



## Seminar content

# Gawie le Roux on Agreements of Sale *Voetstoets* still very much alive!

### 1. Introduction

- 1.1 A practical approach
- 1.2 Discussion restricted to immovable property
- 1.3 Territory of the litigation attorney
- 1.4 Simplification of Latin terminology
- 1.5 Use of the male pronoun

### 2. A glossary of technical terms

- 2.1 *Merx* – (property/ immovable property)
- 2.2 Patent defect
- 2.3 Latent defect – (simplified definition)
- 2.4 *Caveat emptor* – “Let the buyer beware”
- 2.5 *Caveat venditor* – “Let the seller beware”
- 2.6 *Respondeat venditor* – “The seller is liable”
- 2.7 *Naturalia* – “Natural provisions implied by law”

### 3. *Voetstoets* in a nutshell

### 4. *Voetstoets* and the Consumer Protection Act

### 5. *Voetstoets* and the National Credit Act

### 6. South African common law on warranties

### 7. Duties of the parties – (seller and purchaser)

### 8. Duties of the seller

### 9. Warranty against latent defects

- 9.1 Introduction
- 9.2 Meaning of latent defect - (definition)
- 9.3 Requirements for a defect to be latent
- 9.4 Warranties against latent defects
- 9.5 Contractual warranties
- 9.6 Warranties distinguished from misrepresentation and sales talk
- 9.7 The purchaser’s remedies
- 9.8 *Actio empty*
- 9.9 Aedilician actions - (aedilition remedies)
- 9.10 Prescription



**10. Voetstoots sales**

- 10.1 Background
- 10.2 Meaning of *voetstoots*
- 10.3 Effect of *voetstoots*
- 10.4 Purpose of *voetstoots*
- 10.5 *Voetstoots* does not protect dishonesty

**11. Wording of the *voetstoots* clause**

- 11.1 Name of the *voetstoots* clause
- 11.2 Wording of the *voetstoots* clause
- 11.3 Examples of the *voetstoots* clause
- 11.4 Applicability of the *voetstoots* clause

**12. *Voetstoots* and non-compliance with statutory provisions**

- 12.1 Examples where the seller's reliance on the *voetstoots* clause did not succeed
- 12.2 Examples where the seller's reliance on the *voetstoots* clause did succeed

**13. Identifying a latent defect**

- 13.1 Our courts have taken a "liberal approach"
- 13.2 What is a "material imperfection?"

**14. What the purchaser must prove**

**15. The seller's duty to disclose**

- 15.1 Two approaches to the seller's duty to disclose
- 15.2 The liberal approach
- 15.3 The alternative approach – the "parallel duty to disclose"

**16. Examples of latent defects and misrepresentation by the seller**

- 16.1 A sculpture and cornice proclaimed a national monument
- 16.2 An unregistered road reserve
- 16.3 Lack of adequate water supply to a property
- 16.4 A leaking thatch roof
- 16.5 "Fraudulent" misrepresentation

**17. No general duty on the seller to disclose**

- 17.1 Introduction
- 17.2 Balance between the seller's duty to disclose and the purchaser's inspection of the property
- 17.3 Extent of the seller's duty to disclose
- 17.4 *Caveat emptor* and nature of the purchaser's investigation
- 17.5 Nature of a latent defect
- 17.6 Guidelines on the disclosure of information



**18. Where an estate agent is involved**

- 18.1 Estate agent as an intermediary
- 18.2 CPA applies to the mandate agreement
- 18.3 Origin of the so-called "Property Condition Report"
- 18.4 A better solution
- 18.5 A warning to estate agents

**19. Commercial sales and the *voetstoots* clause**

- 19.1 An absolute prohibition on *voetstoots* or not?
- 19.2 May the seller exclude or limit liability for defects?
- 19.3 Duty on purchaser to accept property in specific condition

**20. Contradictory clauses**

- 20.1 Special difficulty
- 20.2 Answer lies in the intention of the parties

### List of court cases

***Banda and Another v Vand Der Spy and Another*** (781/2011)[2013] ZACCA 23 (22 March 2013)

***Cape Agulhas Hotel CC v Liesbeek Motors (Pty) Ltd*** (1479/09) [2015] ZAWCHC 27 (6 March 2015)

***Dibley v Furter*** 1951 (4) SA 71 (C)

***Ellis and Another v Cilliers N.O. and Others*** (16936/11) [2015] ZAWCHC 145 (9 October 2015)

***Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd*** 2011 (4) SA 276 (SCA); (20/10) [2011] ZASCA 22 (17 March 2011)

***Glaston House (Pty) Ltd v Inag (Pty) Ltd*** [1977] 3 All SA 88 (A), 1977 2 846 (AD)

***Haviside v Heydricks and Another*** (AR27/13) [2013] ZAKZPHC 53 (17 October 2013)

***Holmdene Brickworks (Pty) Ltd v Robetrs Construction Co Ltd*** [1977] 4 All SA 94 (A), 1977 3 SA 670 (AD).

***Ismail NO and Another v Erf 87 Dullstroom CC*** (A357/2015) [2015] ZAGPPHC 835 (11 December 2015)

***Minister van Landbou-Tegniese Dienste v Scholtz*** 1971 (3) SA 188 (A)

***Odendaal v Ferraris*** (422/07) [2008] ZASCA 85 (1 September 2008)

***Ornelas v Andrew's Café and Another*** 1980 (1) SA 378 (W)

***Phame (Pty) Ltd v Paizes*** 1973(3) SA 397 (A)

***Truman v Leonard*** [1994] 4 All SA 445 (SE), 1994 4 SA 371 (SE).

***Van der Merwe v Meades*** [1991] 4 All SA 42 (A), 1991 2 SA 1 (AD)

***Waller and Another v Pienaar and Another*** 2004 (6) SA 303 (C)



## Books

- Christie & Bradfield - Christie RH and Bradfield GB ***Christie's the Law of contract in South Africa*** 6 ed (LexisNexis 2011)
- Du Plessis P ***Borkowski's Textbook on Roman Law*** 4 ed (Oxford University Press: New York 2010) as cited in Bauling
- Hackwill GRJ ***Mackeurtan's Sale of Goods in South Africa*** 5 ed (Juta)
- Kerr AJ ***The Law of Sale and Lease*** 3 ed (LexisNexis 2004)
- Lötz in Nagel - Lötz DJ "Purchase and sale: Duties of the Seller" in Nagel CJ (Editor) ***Commercial Law*** 4 ed (LexisNexis 2011) 209-232
- Lötz in Zimmermann & Visser - Lötz J "Purchase and Sale" in Zimmermann R and Visser D (Editors) ***Southern Cross: Civil Law and Common Law in South Africa*** (Juta & Co 1996) 361-387
- Lötz *et al* - Lötz DJ, Nagel CJ and Joubert EP ***Specific contracts in court*** 3 ed (LexisNexis 2010)

## Journals

- Barnard J ***The influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defects, voetstoets clauses and liability for damages*** (De Jure 2012) 455-484
- Botha M ***Caveat Vendor: The Consumer Protection Act and typical property transactions*** (LexisNexis Property Law Digest December 2009) 3-7
- Cornelius SJ ***Banda v Van der Spuy*** 2013 De Jure 868-875
- Lötz DJ and Nagel CJ ***Waller v Pienaar 2004 6 SA 303 (K), Openbaringsplig van die Verkoper*** 2005 De Jure 188-194
- Lötz DJ & Van der Nest D ***Verborge gebreke, gevolgskaide, handelaar, fabrikant en Siener van Rensburg*** (De Jure 34 2001) 219-247
- Naudé T ***The Consumer's Right to Safe, Good Quality Goods and the Implied Warranty of Quality under Sections 55 and 56 of the Consumer Protection Act 68 of 2008*** (2011 - 23 SA Merc LJ) 336-351
- Otto JM ***Verborge gebreke, voetstoetsverkope, die Consumer Protection Act en die National Credit Act: ius antiquum, ius vetus et ius futurum; aut ius civile, ius commune et ius futurum*** (Tydskrif vir Hedendaagse Romeins Hollandse Reg 2011) 525-545

## Dissertations

- Bauling A ***An Analysis of the Evolution of the South African Law on the Warranty Against Latent Defects*** LLM Private Law dissertation (University of Pretoria Nov 2014)
- Van Warmelo P ***Vrywaring teen gebreke by koop in Suid-Afrika*** LLD dissertation (Leiden 1941) as cited in Bauling



## Seminar notes

Le Roux GJ ***Gawie le Roux on Agreements of Sale: Underlying legal principles - Part 1A***, seminar presented by the Centre for Conveyancing Practice March 2014

Botha M ***Property transactions and the Consumer Protection Act***, seminar presented by the Centre for Conveyancing Practice June 2011

Botha M ***Drafting property agreements in line with the Consumer Protection Act***, a seminar presented by the Centre for Conveyancing Practice November 2011

West AS seminar presented by the Law Society of South Africa, Legal Education and

Development: **Conveyancing update and new developments** January 2016

## Electronic newsletters

Davey M ***Section 4.1.1 of the Code of Conduct + CPA = Questions about the appropriateness of the "Voetstoots" clause = the "birth" of the "Property Condition Report" = CONFUSION***

Meumann White Attorneys <http://www.meumannwhite.co.za/articles/> "Voetstoots" vs "The Property Condition Report" 08/02/2012

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