

Advisory note 11: Supply of Voetstoots Goods

This advisory note is provided by the office of the Consumer Goods and Services Ombudsman to guide suppliers and consumers of their rights and obligations under the Consumer Protection Act (CPA) about ‘voetstoots’ clauses in contracts.¹

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1. Introduction

1.1 When the CPA first came into effect, the question of whether goods can still be sold as “voetstoots” has been hotly debated.² Prior to the CPA, such clauses were commonplace in property transactions and in the sale of second-hand vehicles. They were permitted in terms of the principles of freedom of contract adopted into our law from English law.

1.2 A voetstoots (“as is”) clause is ordinarily effective in exempting a seller from liability arising from latent (a fault in the goods that could not have been discovered by a reasonably thorough inspection prior to the sale).defects, but not where the purchaser shows “not only that the [defendant] knew of the latent defect and did not disclose it, but also that [it] deliberately concealed it with the intention to defraud”.³

¹ **Warning:** This information is provided for information purposes. It is not intended to constitute legal advice and should not be relied upon in lieu of consultation with appropriate legal advisors.

² Tjakie Naudé “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) *SA Merc LJ* 336 at 342

³ *Van der Merwe v Meades* [1990] ZASCA 150; 1991 (2) SA 1 (A) at 8C-F.

1.3 The thinking behind this approach was that if two competent parties voluntarily enter into an agreement with full understanding, they will be bound by it. The problem is that in practice, in most transactions the parties do not have equal bargaining power and the stronger party, usually a business, is able to exclude itself from certain legal obligations through the use of disclaimers, indemnities and exemption clauses.

1.4 Recently, freedom of contract has been weakened by the courts using public policy as grounds to strike down unfair contracts and by the legislature intervening in private contracts in the interests of fairness, most notably with the National Credit Act and the Consumer Protection Act.⁴ The CPA prohibits certain terms or conditions outright, and subjects others to a requirement of fairness and reasonableness.

1.5 The issue of whether Voetstoets clauses apply to consumer transaction that the CPA applies to, has been put to rest by the National Consumer Tribunal which has ruled not only that a voetstoets sale, whereby the supplier is able to sell goods without any form of liability for any defects, whether patent or latent, whatsoever is not applicable to any transactions falling under the CPA, but also that the use of a voetstoets clause by a supplier in a contract of sale constitutes prohibited conduct under the Act.⁵

1.6 The only exceptions are where the goods are sold by auction, where the goods have been altered after the sale and where the consumer has been expressly informed that particular goods were offered in a specific condition and has either expressly agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting the goods in that condition. In the latter situation, it would generally be necessary for the supplier to have described the defects with some particularity.

2. Consideration of law

2.1 Definitions

Aedilician remedies:

The aedilician remedies, are the legal actions that are available in terms of Roman law, whereby a party may protect themselves against latent defects in the goods sold. The two remedies available in this context are **the actio redhibitoria and the actio quanti minoris**.

- i. **Actio redhibitoria:** the purchaser may claim repayment of the purchase price and interest.
- ii. **Actio quanti minoris,** the purchaser may claim a price reduction, which is determined by the difference between the purchase price and the value of the goods with their defect.⁶

⁴ http://en.wikipedia.org/wiki/South_African_contract_law

⁵ See Reported Decisions below.

⁶ W Jacobs, PN Stoop & R Van Niekerk "Fundamental Consumer Rights Under the Consumer Protection Act 68 Of 2008: A Critical Overview and Analysis" *PER / PELJ* 2010(13)3 302/508.

Implied Warranty of Quality(See advisory note 1)

The warranty against latent defects applies automatically in sale agreements by operation of law. It can be excluded by a *voetstoots* clause, if certain criteria is met.

Latent Defect

A latent defect constitutes an impairment of the usefulness of the thing sold that is not discoverable upon reasonable inspection by an ordinary person (not an expert). The defect renders the item unfit for the purpose for which it is bought or for which it is normally used.⁷

Voetstoots

The word *voetstoots* is derived from the custom in terms of Roman-Dutch law to “stoten” or push the thing sold (for example a barrel of grain) with one’s foot to indicate the delivery and sale of the property without coming with complaints later. Kerr describes a *voetstoots* clause as a clause which stipulates that the seller is not to be held responsible for diseases or defects and goods are sold “as it stands” or “with all its faults”. A *voetstoots* clause excludes the Aedilitian actions/ remedies for latent defects.⁸

3. The Consumer Protection Act and Voetstoots Clauses

3.1 A consumer is provided with various rights in terms of the CPA. One of these rights is contained in section (55)(2) of the CPA: the right to safe, good quality goods, particularly that goods must:⁹

- a) be reasonably suitable for the purpose for which they are generally intended or suitable for any specific purpose which was communicated to the supplier;
- b) be of a good quality, in good working order and free of defects;
- c) be useable and durable for a reasonable period of time; and
- d) comply with any other legislation which regulates their quality.

3.2 In addition, under section 55(3), the consumer has the right to expect that the goods are reasonably suitable for the specific purpose that the consumer has informed the supplier of.¹⁰

3.3 These rights are created as an implied term in any transaction or agreement regarding the supply of goods to a consumer that the producer or importer, the distributor and the retailer each warrant that the goods comply with all the requirements mentioned above.¹¹ In other

⁷ J Barnard “The influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defects, voetstoots clauses and liability for damages” 2012 De Jure 455 at 456.

⁸ Barnard (op cit) at 460

⁹ S 55(2) CPA

¹⁰ S 55(3) CPA

¹¹ S 56(1) CPA

words, every such transaction automatically contains a clause giving the consumer the mentioned rights.

3.4 If the defect manifests within 6 months of the delivery of the goods, the consumer is entitled to return them, at the supplier's risk and expense, and to demand without penalty, a refund, replacement, or repair (the choice is the consumer's).

3.5 The argument in favour of the voetstoots clause being retained was that section 55(6) of the CPA allows a supplier to escape liability for defects that have been brought to the attention of the consumer, providing that that such a clause may not be on terms that are unfair, unreasonable, or unjust and must be interpreted against the seller taking into account what a reasonable person would expect.¹²

3.6 The prevailing academic view, however, is that the voetstoots clause has not survived the CPA.¹³ The academics rely on the following section of the CPA:

51. (1) A supplier must not make a transaction or agreement subject to any term or condition if—

(a) its general purpose or effect is to—

- (i) defeat the purposes and policy of this Act;
- (ii) mislead or deceive the consumer; or
- (iii) subject the consumer to fraudulent conduct;

(b) it directly or indirectly purports to—

- (i) waive or deprive a consumer of a right in terms of this Act;
- (ii) avoid a supplier's obligation or duty in terms of this Act;
- (iii) set aside or override the effect of any provision of this Act; ...

3.7 According to Barnard¹⁴,

Selling goods in terms of a general "umbrella" voetstoots clause is a clear waiver and deprivation of a consumer's right. Whether a voetstoots clause is worded as a condition or term or if it boils down to a waiver or deprivation, it will still be invalid. The fact that goods should not only be free of any defects but also useable and durable and comply with any publically regulated standard makes the reliance on a voetstoots clause even more difficult.

¹² Barnard (op cit) 471.

¹³ Barnard (op cit) 372; Naudé (op cit) and Jacobs et al(op cit).

¹⁴ Op cit at 472.

3.8 Section 2(10) further provides that no provision of the CPA may be interpreted so as to preclude a right that a consumer would have in terms of the common law. Section 56(4) also provides that the implied warranty of quality is in addition to any other warranty in terms of the common law.

3.9 What then is the effect of section 55(6), relied upon by those who support the continued existence of the voetstoets clause? It provides that a supplier will not be liable in terms of Section 55(2)(a) and (b) if the consumer has been expressly informed that particular goods were offered in a *specific* condition and has expressly agreed to accept the goods in *that* condition, or knowingly acted in a manner consistent with accepting the goods in that condition.

3.10 The meaning of this section is however not very clear and could be interpreted in more than one way. If a section, such as 55(6), has more than one meaning the CPA provides that in such an instance, the Tribunal or Court must prefer the meaning that best promotes the spirit and purposes of the CPA, and will best improve the realisation and enjoyment of consumer rights. The CPA also provides that any ambiguity that allows for more than one reasonable interpretation of a part of a document is resolved to the benefit of the consumer.

3.11 A supplier can therefore in terms of section (55)(6) sell goods in a particular condition. This would however require that the quality and defects of the goods must be described in detail to the consumer. If a defect is pointed out by a seller before the sale and the consumer buys the goods, the consumer cannot hold the seller liable for that defect. This is in line with one of the philosophies that underlie the CPA: A consumer is bound by an agreement that was entered into after sufficient truthful and accurate information has been disclosed to the consumer to enable the consumer to make an informed choice.¹⁵

3.12 Should a contract however contain exclusions, restrictions, limitations or deprivations such clauses should also comply with certain provisions of the CPA. Section (4)(4)(b) of the CPA provides that if a contract, standard form or document contain a restriction, limitation, exclusion or deprivation of a consumer's rights such a contract, standard form or document must be interpreted to the benefit of the consumer so that any restriction, limitation, exclusion or deprivation of a consumer's legal rights should be limited to the extent that a reasonable person would ordinarily contemplate or expect.

3.13 Section 48(1)(c) further provides that a supplier must not request a consumer to waive any of his rights, or waive the liability of a supplier, or assume any obligations on terms that are unfair, unreasonable or unjust. A clause limiting a consumer's rights may therefore not be unreasonable, unfair or unjust.

3.14 Suppliers should also note that, section 55(6) does not safeguard the supplier against all claims relating to post-purchase quality issues. It only qualifies the first two of the four

¹⁵ Preamble to CPA.

standards listed in section (55)(2). It will always be open to a consumer to claim that the goods were not useable or durable for a reasonable period of time or that they did not meet other statutory requirements. This right cannot be excluded.¹⁶

3.15 In terms of (55)(6) it should be clear to a consumer that what they are buying is of a particular standard. If the goods suffer from a particular defect suppliers should clearly and unambiguously point this out to consumers. In Naudé's view, "[i]t is likely that the courts will prefer a via media interpretation of section 55(6), namely that the supplier may only escape liability if it described the particular less-than-ideal condition of the goods in specific, though generalized detail, without having had to list each and every defect for which it seeks to escape liability."

4. Reported decisions

4.1 *National Consumer Tribunal*

National Consumer Commission v Western Car Sales CC t/a Western Car Sales (NCT/81554/2017/73(2)(b)) [2017] ZANCT 102 (14 September 2017)

35. The concept of a "voetstoots" sale, whereby the supplier is able to sell goods without any form of liability for any defects, whether patent or latent, whatsoever is therefore not applicable to any transactions falling under the CPA.

Vonk v Willow Crest Motors CC (NCT/115078/2018/75(1) (b)) [2019] ZANCT 63 (6 April 2019)

The Applicant purchased a motor vehicle from the Respondent in terms of an offer to purchase. The original sale agreement under special conditions of offer included a term that is commonly referred to as a voetstoots clause or a clause in terms of which the vehicle is sold "as is". The Applicant removed this clause from the sale agreement by adding the words "CPA shall prevail".

40.2 The Respondent's inclusion of "voetstoots" clause on its sales agreements was a clear breach of Section 51 of the Act, which clearly lists different types of prohibited transactions, agreements, terms and conditions, which are deemed to have the general purpose or effect of defeating the purposes and policy of this Act;

44.1 Trying to illegally use the "voetstoots" clause when selling cars to consumers, as a way of circumventing the provisions of the Act. The use of a voetstoots clause by a supplier in a contract of sale constitutes prohibited conduct under the Act even though the clause was removed by the Applicant before the contract was signed;

¹⁶ Consumer Law Review (2013), Juta.

6. Courts

Kondile v Nothnagel NO (49891/2016) [2018] ZAGPPHC 858 (19 August 2018)

The plaintiff was the successful bidder at an auction in respect of a residential property owned by the estate of the late father of the defendant, of which the defendant was the executor.

12 The plaintiff rightly did not seek to suggest that the provisions of the Consumer Protection Act would apply to the transaction. The property was not “supplied” by the defendant within the meaning of that term as defined in section 1, which requires that the supplier in an affected transaction must be acting “in the ordinary course of business”. “Business” is defined to mean “the continual marketing of any goods”.

5. Exceptions

5.1 The Consumer Protection Act (CPA) has put a limitation on the application of the “voetstoots” clause ...However, this only applies in instances where transactions find application under the CPA. There are two important stipulations.

- i. The first being that the CPA only applies to transactions which are decided in the ordinary course of the suppliers’ business.
- ii. Secondly, where the purchaser or “consumer” is an entity with a yearly turnover exceeding R2 million, the CPA shall have no application.¹⁷

6. Conclusion

The CPA has granted consumers new rights regarding the quality and usability of goods purchased and has ensured that suppliers do not deprive consumers of these rights by, for instance, relying on a voetstoots clause. This does not, however, prevent a supplier from escaping liability for defects that were brought to the attention of the consumer and that the consumer accepted. There is a lack of clarity as to how detailed this disclosure ought to be, but it is suggested that suppliers err on the side of caution and provide a comprehensive list of known defects.

Please direct any requests for clarification to info@cgso.org.za

Consumer Goods and Services Ombudsman

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¹⁷ Salomé van Wyk “How does the Consumer Protection Act affect voetstoots clauses?”
<https://www.millers.co.za/NewsResources/NewsArticle.aspx?ArticleID=3144>