

## **Advisory note 11: Voetstoots**

**This 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) with regard to ‘voetstoots’ clauses in contracts.**

### **SUMMARY**

Since the CPA came into effect, the question whether goods can still be sold as ‘voetstoots’ has been hotly debated.<sup>1</sup> The issue is whether a supplier can, in a transaction that falls under the CPA, escape liability for defects in a product by relying on a voetstoots or other exclusionary clause in the agreement. The arguments for the view that a voetstoots clause may no longer be relied upon are compelling and should be accepted as being the correct position. 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.

### **INTRODUCTION**

Since the CPA came into effect, the question whether goods can still be sold as ‘voetstoots’ (as is) has been hotly debated. The issue is whether a supplier can, in a transaction that falls under the CPA, escape liability for defects in a product by relying on a voetstoots or other exclusionary clause in the agreement. 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.

The thinking behind this approach is 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. 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.<sup>2</sup> The CPA prohibits certain terms or conditions outright, and subjects others to a requirement of fairness and reasonableness.

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<sup>1</sup> Tjakkie 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

<sup>2</sup> [http://en.wikipedia.org/wiki/South\\_African\\_contract\\_law](http://en.wikipedia.org/wiki/South_African_contract_law)

## CONSIDERATION OF LAW

### DEFINITIONS

#### Aedilician remedies:

The Roman-Law legal actions applicable to claims in respect of latent defects:

***Actio redhibitoria***: the purchaser may claim repayment of the purchase price and interest.

***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.<sup>3</sup>

#### Implied Warranty

The warranty against latent defects applies automatically in sale agreements by operation of law. It can be excluded by a *voetstoots* clause.

#### 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.<sup>4</sup>

#### 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 Aedilician actions/ remedies for latent defects.<sup>5</sup>

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<sup>3</sup> 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.

<sup>4</sup> 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.

<sup>5</sup> Barnard (op cit) at 460

## Consumer Protection Act

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:<sup>6</sup>

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

In addition, under section 55(3), the consumer has a right to expect that the goods are reasonably suitable for the specific purpose that the consumer has informed the supplier of.<sup>7</sup>

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.<sup>8</sup> In other words, every such transaction automatically contains a clause giving a consumer the mentioned rights.

The question is, can this implied right be excluded by agreement between the parties, by use of a voetstoets clause? It is an important issue because, if the goods are defective, the consumer's remedy is somewhat harsh. If the defect manifests within 6 months of the delivery of the goods, the complainant 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).

The argument in favour of the voetstoets clause being retained is that section 55(6) 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.<sup>9</sup>

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<sup>6</sup> S 55(2) CPA

<sup>7</sup> S 55(3) CPA

<sup>8</sup> S 56(1) CPA

<sup>9</sup> Barnard (op cit) 471.

The prevailing academic view, however, is that the voetstoets clause has not survived the CPA.<sup>10</sup> They 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; ...

According to Barnard<sup>11</sup>,

Selling goods in terms of a general “umbrella” voetstoets clause is a clear waiver and deprivation of a consumer's right. Whether a voetstoets 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 voetstoets clause even more difficult.

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.

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.

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<sup>10</sup> Barnard (op cit) 372; Naudé (op cit) and Jacobs et al(op cit).

<sup>11</sup> Op cit at 472.

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.

A supplier can therefore in terms of section (55)(6) sell goods in a particular condition. This would however mean 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.<sup>12</sup>

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.

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.

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 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.<sup>13</sup>

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."

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<sup>12</sup> Preamble to CPA.

<sup>13</sup> Consumer Law Review (2013), Juta.

## **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.

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**Ombudsman**