

# What to know about a property condition before signing the agreement

*Concluding an agreement for the sale or lease of immovable property can be an overwhelming experience, and one can easily overlook some of the most important clauses in the agreement.*

The condition of the property often becomes a contentious issue after registration of the property or conclusion of a lease, when the purchaser or lessee finally takes occupation of the property and realises that there are defects that were never identified or disclosed.

The law has over the years developed a mechanism to prevent the occurrence of such incidents and to provide guidelines on how such incidents should be dealt with.

## **THIS ARTICLE WILL FOCUS ON THE FOLLOWING ASPECTS:**

- The common law principle of voetstoets and its legal implications;
- The Mandatory Disclosure Form and its legal implications, as introduced by the Property Practitioners Act No. 22 of 2019 ("the Act") which came into operation on 1 February 2022; and
- The core differences between the common law principle of voetstoets and the Mandatory Disclosure Form.

The voetstoets principle is usually contained as a standard clause in property sale agreements. The voetstoets clause will stipulate that the purchaser buys the property from the seller as it stands, thereby indemnifying the seller against claims for damages in respect of any defects on the property, whether patent or latent.

Patent defects are defects that are, or should reasonably be, easily identifiable upon inspection of the property (for example cracked walls, broken windows or damaged ceilings). The purchaser is

expected to acquaint himself with the general condition of the property to identify patent defects before entering into a property sale agreement.

Latent defects are hidden and not discoverable through a reasonable inspection. An expert is required to identify them (for example rising damp, a faulty pool pump or geyser, rusted internal pipes or leaking roofs). Although the seller is indemnified against claims in respect of defects, he cannot rely on the voetstoets clause if he was aware of a latent defect and deliberately concealed or failed to disclose it with the intention to defraud the purchaser.

## **THE PURCHASER WHO WANTS TO CHALLENGE THE SELLER'S RIGHT TO RELY ON THE VOETSTOETS CLAUSE SHOULD ALLEGE AND PROVE THAT THE SELLER:**

- was aware of the latent defects (or its extent) when the contract was concluded;
- deliberately concealed the defect;
- bore a duty to disclose the defect; and
- failed to disclose the defect with the intention to defraud.

Section 67 of the Act brought several changes which, amongst others, seek to transform and professionalise the property sector and to further ensure that members of the public are protected when they participate in property sale or lease transactions. This section aims to minimise disputes due to the condition of the property.



## **A PROPERTY PRACTITIONER (SUCH AS AN ESTATE AGENT) MUST FACILITATE THE COMPLETION OF THE MANDATORY DISCLOSURE FORM. THE ACT STIPULATES THAT A PROPERTY PRACTITIONER IS REQUIRED TO:**

- not accept a mandate, unless the seller or lessor of the property has provided him or her with a fully completed and signed Mandatory Disclosure Form in the prescribed form; and
- provide a copy of the completed Mandatory Disclosure Form to a prospective purchaser or lessee who intends to make an offer for the purchase or enter into a lease agreement for the property.

The Act further stipulates that a completed Mandatory Disclosure Form, signed by all parties must be attached to any agreement for the sale or lease of a property and forms an integral part of such an agreement. However, if such a Mandatory Disclosure Form was not completed, signed, or attached, the agreement will not be null and void. It will only be interpreted as if no defects or deficiencies of the property were disclosed to the purchaser. The Act emphasises that nothing prevents the purchaser from undertaking a property inspection to confirm the state of the property before finalising the transaction. Regulation 36 to the Act provides a format that the Mandatory Disclosure Form must follow to ensure a uniform practice of detailed disclosure of information relating to the property.

The Act emphasises the compliance aspect of Section 67 by using the compelling word "must" and therefore highlighting the obligatory compliance requirements that the property practitioner is compelled to adhere to. The main purpose of this provision is to ensure consumer protection for all parties to the transaction and further avoiding unnecessary legal disputes due to non-disclosure of defects.

Further, the provisions of Section 67 are only applicable to property practitioners and does not extend to private sales. Although private sellers or lessors do not need to adhere to this requirement, as they are not regulated by the provisions of the Act based on the definition of a property practitioner in the Act, they are strongly advised to follow a similar approach, by disclosing all known defects to potential purchasers or lessees.

Certain consequences will flow from non-completion of Section 67 by a property practitioner who may be held liable by an affected consumer. In addition, the Property Practitioners Regulatory Authority may act against a property practitioner or impose an appropriate sanction, should a property practitioner fail to comply with the provisions of Section 67. If a property practitioner is found guilty of contravening the Act, a committee of inquiry may impose a fine of R15 000.

Section 67 does not repeal the common law principle of voetstoets. A purchaser still has a duty to inspect a property and identify the patent defects. This provision was implemented to enhance the principle of voetstoets by compelling the property practitioner to assist a seller and a purchaser in meeting their obligations imposed by the voetstoets principle and to minimise the legal disputes that may arise therefrom. 