WITH COMPLIMENTS

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CAN YOU STILL SELL AS IS? CPA V THE VOETSTOOTS CLAUSE

Both sellers and buyers (of anything – houses, cars, you name it) need to understand how the CPA (Consumer Protection Act) has impacted on the very common "*voetstoots*" ("as is") clause.

Firstly, what's the difference between "patent" and "latent" defects?

Before we get into the meat of this question, let's understand two important terms –

Wills and Estates: Cost of Dying Rises with Master's Fees Increase

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- "Patent defects" are those that can be easily identified on inspecting the goods – like a broken door, damaged tiles, cracked mirror or windscreen, and so on.

- "Latent defects" on the other hand are hidden or non-obvious. They "would not have been visible or discoverable upon inspection by the ordinary purchaser". Think for example of seasonal roof leaks, broken underground drains, leaking geysers and the like.

Exactly what is a voetstoots clause?

A general rule in our law is that when you sell something, you give the buyer an "implied warranty" against defects. That can be disastrous for the seller as it allows the buyer, on finding a defect, to claim a price reduction (or sometimes cancellation of the whole sale).

Hence the very common *voetstoots* or "as is" clause. In effect as seller you are telling the buyer "you agree to take the goods as they are, the risk of defects is on your shoulders, and I give no guarantees". Note however that a seller cannot always hide behind such a clause – if he/she is aware of a latent defect and deliberately conceals it with the intention to defraud the buyer, all *voetstoots* protection falls away.

And then along came the CPA

The Consumer Protection Act has been a game changer when it comes to consumer rights. In a nutshell, as a buyer you are entitled to receive goods that are of good quality, "reasonably suitable" for the purposes for which they are generally intended, defect-free, durable and safe.

If anything you buy fails, or turns out to be defective or unsafe –

- You can return the goods to the supplier – without penalty, and at the supplier's risk and expense – within 6 months of delivery, and

- You can require the supplier to give you a full refund, or to replace the goods, or to repair them. The choice is yours; the supplier cannot dictate your options to you.

But does the CPA apply to all sales?

Here's the rub for buyers – the CPA applies only when the seller is selling "in the ordinary course of business", so **generally "private sales" will fall outside its ambit.**

In other words, if you buy a movable like a car from a trader or dealer, the CPA applies and overrides the voetstoots clause. But if you buy from a private seller, the voetstoots clause applies and you have no CPA protection.

What about property sales?

Developers, builders, investors and the like are clearly bound by the CPA. But for private sellers the position is less clear. Although it seems very likely that one-off private sales of residential property don't fall under the CPA, there is some suggestion that we won't be 100% sure on that until either our courts rule definitively on it, or the CPA is amended to provide clarity. On the "better safe than sorry" principle, don't take any chances - cover yourself as below.

Practical advice for sellers

Cover yourself by disclosing any defects you know of to the buyer, and record any such disclosure/s in a written and signed annexure to the deed of sale. A buyer cannot complain if you have informed him/her of the condition of the goods and they have been bought on that basis.

Then if you are selling in the "ordinary course" of your business, be very aware that the CPA applies to you. Understand its very strict requirements (what is said above is of necessity only a brief overview) and the risks of not complying.

If on the other hand you are a "private seller", make sure you are covered by a properly-drawn "*voetstoots*" clause. On the off-chance its validity is challenged, you can avoid later disputes with a "belt-and-braces" approach - have the goods checked out by an independent expert (like a home inspection service when selling a house) and have your lawyer incorporate that into the sale agreement.

Practical advice for buyers

Don't risk having to fight in court over whether or not the CPA applies to your purchase, and over whether or not any *voestoots* clause is valid. Be warned that depriving a private seller of the protection of a *voetstoots* clause is never going to be easy, particularly since you will need to prove that the seller intended to defraud you by concealing a defect.

Rather be sure of the condition of the goods before you buy. If the seller hasn't provided you with an expert report as above, commission one yourself.

MAINTENANCE DEFAULTERS – NO PLACE TO HIDE

Obtaining a maintenance order for the support of yourself and/or your children is all very well, but what if you are dealing with an "Artful Dodger" who is determined not to pay you?

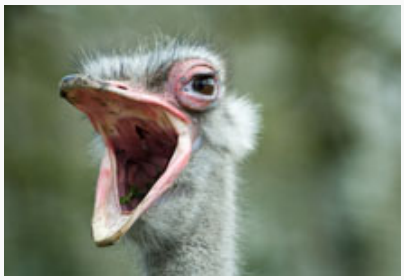
New provisions in the Maintenance Act just handed you two powerful new weapons –

1. **Tracing defaulters:** Serial maintenance dodgers are fond of going to ground to make themselves as hard as possible to trace. They'll find that a lot harder to do now that maintenance courts can order network service providers (all "Electronic Communications Service Providers" are in the net on this one) to provide the court with all the contact information they have on the defaulter.

2. **Blacklisting defaulters:** Living the high life on credit is no longer an option for defaulters, who face blacklisting when courts send their personal particulars to credit bureaus.

These new provisions are in addition to the existing sanctions of criminal prosecution (up to 3 years' imprisonment), imprisonment for contempt of court, attachment of assets and earnings etc.

DOGS (AND OTHER ANIMALS) BEHAVING BADLY: AN ANGRY OSTRICH AND A R6.75M CLAIM



Your dog bites the neighbour or a visitor is hurt running away from an angry ostrich on your property – can you be sued?

A recent SCA (Supreme Court of Appeal) decision illustrates.

R6.75m claimed for a snapped Achilles tendon

- A visitor was invited to a farm (roamed by a variety of game including ostrich, giraffe and buck) to assist in capturing wildebeest.
- When he ran from an ostrich that he thought was chasing him, he fell and snapped his Achilles tendon.
- He sued for damages of R6.75m and the High Court held the farm owner liable for whatever losses he could prove.
- The SCA overturned this decision, finding that the visitor had, despite his denials, previously teased the ostrich on several occasions and made it angry. On the day in question he had also, found the Court, thrown a stone at the bird whilst it was peaceably minding its own business, and this had provoked the chase.
- That provocation, held the Court, provided the farmer with a good defence to the visitor's claim.

But be careful - you face liability without fault!

The Court in reaching its decision analysed how our modern courts have applied and interpreted several ancient Roman laws dealing with the question of liability for damage/injury caused by animals (domesticated and wild).

Lawyers of an academic bent will doubtless spend many happy hours analysing the SCA's judgment, but unless you are interested in learning about the theory and ins-and-outs of arcane concepts like *actio de pauperie, edictum de feris, qua vulgo iter fit* and the like, best confine yourself to understanding these practical issues –

- Let's start with the really risky part for animal owners. You are "strictly liable" (i.e. **you are liable without any fault or negligence on your part**) for the consequences of your animal's behaviour. In the case of a domestic animal (like a dog) you have a bit of protection – you are liable only if the animal acted from "inward excitement or vice" and against its natural behaviour. If it's a wild animal there is no such restriction.
- You do also have several defences you can raise, those relevant in this case being that the victim

contributed to his/her own loss either through a deliberate action (like provoking a chase or an attack), or through contributory negligence. Take advice in need on the other defences you may be able to shelter behind.

- You also risk being sued under the normal principles of liability for negligence.

How to protect yourself

Bottom line - protect yourself by reducing the risks your animals pose to others, and check that your insurance will cover you if you are sued. Disclaimers of liability are also a no-brainer for commercial operations like game farms and reserves, but they need careful wording to afford any hope of protection.

WILLS AND ESTATES: COST OF DYING RISES WITH MASTER'S FEES INCREASE

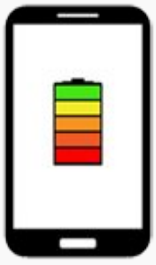
If you are inheriting from someone who passed away on or after 1 January 2018, don't blame the estate's executor for one substantially-increased cost you may notice – Master's Office fees.

They are calculated on the value of the deceased estate and were long overdue for an increase, going up sharply from the old maximum of R600 to a new maximum of R7,000 (which will apply to any estate of R3.6m or more).

See the table below for details –

Value of Deceased Estate	Master's Fees	
	Before 1.1.18	From 1.1.18
R15,000 or more but less than R17,000	R42	-
R17,000 or more - R6 for each additional R6,000	+ R6 / R6,000	-
Subject to a maximum of	**R600**	-
R250,000 or more but less than R400,000	-	R600
R400,000 or more - R200 for each additional R100,000	-	+ R200 / R100,000
Subject to a maximum of	-	**R7,000**

YOUR WEBSITE OF THE MONTH: THE ART OF SMARTPHONE BATTERY CHARGING



As our dependency on our always-connected cell phones grows, so does the importance of maximising battery life.

That's particularly relevant with the death knell now sounded for removable-battery phones. When your battery dies, you can no longer replace it yourself with a low-priced third party one, nor with a spare you carry around for sudden failures. You are in for the cost and delay of paying a technician to do the job for you.

So keep your battery alive and well for as long as possible. Cut through all the grey areas and myths surrounding the topic with "Smartphone charging myths – Are you killing your battery?" on the MyBroadband website.
