

# Dealing with defects

By  Adrian Goslett

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The Consumer Protection Act (CPA) was introduced to protect consumers engaged in commercial transactions with businesses to avoid the consumer being treated unfairly. Unless a property buyer is purchasing a home from a developer or speculator whose ordinary course of business is to sell properties, the CPA does not come into play and the buyer will not fall under its protection. An ordinary property sale is seen as a transaction between two consumers, the seller and the buyer.



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The CPA will not have an effect on the voetstoets clause used in agreements of sale in an ordinary property transaction. This is why it is so important for buyers to have property thoroughly inspected before they submit their offer to purchase. There are instances where the buyer is protected if severe defects are found after the transfer has taken place. However, it is difficult to determine whether the seller deliberately concealed the defect or genuinely wasn't aware of it.

## Patent vs. latent defects

There are two kinds of defects. A patent defect is clearly visible on inspection of the property, such as broken window or cracks in the wall. All patent defects should be listed in the offer to purchase, along with who is responsible for fixing them. Because patent defects are visible or obvious without professional inspection, the buyer has no recourse against these types of defects. It is up to the buyer to spot patent defects and then decide whether they would still like to proceed with purchasing the property.

The other type of defect is a latent defect, which is not easily picked up by a superficial inspection. Examples of latent defects include a leaking roof or faulty geyser. Common law states that the seller is responsible for all latent defects in the property for three years from the date of discovery of the defect. Most sellers are aware that they are responsible for latent defects which is why they include the voetstoets clause in the sale agreement. The clause protects the seller against all defects – including latent defects that are unknown to him. However, if the seller was aware of a latent defect and deliberately concealed it from the buyer, the buyer has recourse against the seller. It is important to bear in mind that the onus will be on the buyer to prove that the seller was aware of the defect but deliberately hid it.

## Claiming a portion of the purchase price

It will be dependent on the circumstances, but if a latent defect is found, the buyer will be able to cancel the contract or claim a portion of the purchase price. The law prescribes that the buyer will not be allowed to simply obtain a quote for the repair and then deduct it from the purchase price, paying a lesser amount. The buyer can also not refuse to pay occupational rent or a portion thereof unless the defect seriously impairs the use and occupation of the property.

Any defects that are discovered after the sale of the property but before the property is transferred into the buyer's name will be for the seller's account, unless those defects are caused by the buyer during their occupation of the property.

For buyers to ensure that they are fully protected against any latent defects, they should enlist the services of a professional home inspection company to check the home thoroughly. The price of paying a professional to do the job properly will be far less than the time and hassle caused by dealing with hidden defects.

## ABOUT ADRIAN GOSLETT

Adrian Goslett is CEO and regional director of RE/MAX Southern Africa. He joined RE/MAX Southern Africa in 2005 as a franchise development consultant, supporting various regions and offices. Throughout his career at RE/MAX he has held various positions. In 2010, after successfully leading 160 offices and over 1500 agents in six countries through the worst years real estate has ever seen in South Africa in 30 years, Goslett was appointed as CEO of RE/MAX Southern Africa.

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