

AANTEKENINGE

EXPANDING THE SCOPE OF LATENT DEFECTS AND THE PROTECTION AFFORDED BY “VOETSTOOTS” CLAUSES? DEVELOPMENTS IN THE CASE LAW

1 Introduction

Echoing the sentiments expressed in *Weinberg v Aristo Egyptian Cigarette Co* 1905 TS 760, Norman *Purchase and sale in South Africa* (1919) 198 defined latent defects, being physical defects in the *merx*, as

“those defects in the thing sold which either destroy or impair its usefulness in regard to the purpose for which things of that kind are ordinarily intended to be used . . . [and] the defect must be such that had the buyer been aware of it he would not have bought . . . [T]he test to be applied is whether the defect is material or not. Does it seriously interfere with the essential attributes of the thing sold?”

However, already in *Glaston House (Pty) Ltd v Inag (Pty) Ltd* 1977 2 SA 846 (A) Galgut AJA in an *obiter dictum* extended the ambit of what was generally accepted to be a latent defect to include an undisclosed servitude. In *Glaston* a dilapidated building, part of which was a national monument, was the subject matter of the sale and the purchaser intended to demolish and redevelop the building. Therefore the physical condition of the building and the existence of any defect were of no relevance to him. However, with reference to Voet 21 1 1; Mackeurtan *Sale of goods in South Africa* (1972) 246 para 340; De Wet and Yeats *Die Suid-Afrikaanse kontraktereg en handelsreg* (1964) 226; *Cloete v Smithfield Hotel (Pty) Ltd* 1955 2 SA 622 (O) 628; and *Dibley v Furter* 1951 4 SA 73 (C) 81, the judge remarked:

“The . . . fact that [the sculpture] was proclaimed a monument precluded the demolition of the old building, and hence the rebuilding scheme, without the consent of the Council. The . . . obtaining of that consent was by no means a formality, caused a great deal of trouble and expense . . . [T]he proclamation . . . is a statutory prohibition which rendered the property unfit for the purpose for which it was purchased . . . It precluded the redevelopment for which the property had been bought. It thus constituted a defect . . . The plaintiff had no reason to suspect the existence of the encumbrance and no matter how reasonably observant or alert it had been it could not have discovered its existence. Accordingly it was a latent defect” (866).

It should be kept in mind that any flaw in the property’s title, such as the rights of a third party, affects the use, enjoyment and disposal of the *merx*. It therefore affects its title, which is a form of eviction. On the contrary, a latent defect affects the actual use of the *merx*. For this reason it is doubtful whether the court came to the correct conclusion in *Glaston* by classifying a deficiency in the title of a *merx* as a latent defect, especially in the context of the facts.

Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd 1977 3 SA 670 (A) 683 is generally considered as the *locus classicus* regarding the requirements

for a defect to qualify as a latent defect. The court, referring to *Blaine v Moller & Co* (1889) 10 NLR 96 100; *Schwarzer v John Roderick's Motors (Pty) Ltd* 1940 OPD 170 180; *Knight v Trollip* 1948 3 SA 1009 (D) 1012; *Dibley v Furter* 80; *Lakier v Hager* 1958 4 SA 180 (T); *Knight v Hemming* 1959 1 SA 288 (FC); *Curtaincrafts (Pty) Ltd v Wilson* 1969 4 SA 221 (E) 222; De Wet and Yeats *Die Suid-Afrikaanse kontraktereg en handelsreg* (1964) 236; Mackeurtan *Sale of goods in South Africa* (1972) 246 and Wessels *The law of contract in South Africa* (1951) para 4677, defined a latent defect as follows:

“[A]n abnormal quality or attribute which destroys or substantially impairs the utility or effectiveness of the *merx*, for the purpose for which it has been sold or for which it is commonly used . . . Such a defect is latent when it is one which is not visible or discoverable upon an inspection of the *merx*.”

The evolution of what may constitute a latent defect did not cease with *Holmdene Brickworks*. Recently the Supreme Court of Appeal in *Odendaal v Ferraris* 2009 4 SA 313 (SCA) 121, with reference to Voet 21 1 1; John “*Voetstoots* clause and the meaning of defect” 1954 *SALJ* 8; Bamford “Aspects of a *voetstoots* clause” 1956 *SALJ* 62; Lubbe “Law of purchase and sale – Remedies” 1977 *Annual Survey* 123; *Uhlmann v Grindley-Ferris* 1947 2 SA 459 (C); *Glaston House (Pty) Ltd v Inag (Pty) Ltd*; *Ornelas v Andrew's Café* 1980 1 SA 378 (W); Du Bois *Wille's Principles of South African law* (2007) 892; and De Wet and Yeats *Kontraktereg en handelsreg* (1978) 292 fn 97, held that a latent defect is not limited to a physical defect and confirmed that:

“In a broad sense, any imperfection may be described as a defect. Whether the notion of a ‘defect’ is to be restricted only to physical attributes of the *merx* or to apply more broadly to extraneous factors affecting its use or value has generated discordant judicial and academic opinion. In relation to a *voetstoots* sale of land, for example, that is, a sale of land ‘as it stands’, it has been held that the language is wide enough to cover not only any hidden defects in the property itself, but also any defect in the title to, or area of the property.”

This note analyses some recent developments concerning the question of what can be included under the broad umbrella of the concept “latent defect”, beginning with *Odendaal*.

2 Recent developments

As mentioned above, latent defects are no longer confined to physical defects.

2.1 *Odendaal v Ferraris* 2009 4 SA 313 (SCA)

In *Odendaal* the dispute hinged, *inter alia*, on defects consisting of a collapsed staircase railing, water-damaged ceilings, a covered sewer manhole in the middle of the laundry, a faulty jacuzzi, leaking roofs, wood panelling infested with bore beetle and build-on constructions that did not comply with building regulations.

On appeal the question was whether the failure to obtain statutory approval for build-on constructions constituted a latent defect and, if so, whether a *voetstoots* clause would protect a seller against liability in the circumstances.

In *Van Nieuwkerk v McCrae* 2007 5 SA 21 (W) it was held that in a sale of residential property, a purchaser is entitled to assume that the improvements were erected in compliance with all statutory requirements and it could, as such, be used to its full extent. As this assumption is implied as a matter of law, it will be regarded as tacitly incorporated in the agreement as a contractual term. However, relying on *Ornelas* above, Goldblatt J held that a seller could not in

these circumstances rely on a *voetstoots* clause since it excludes liability only for latent defects of a physical nature. Hence, a *voetstoots* clause does not apply to the lack of certain qualities or characteristics (such as statutory compliance), which the parties have agreed that the *merx* should have.

In *Ornelas* property was sold as a going concern for purposes of a café and restaurant. After conclusion of the sale, the purchasers became aware that the business was operated without a licence and that they were unable to obtain one. In an action to cancel the agreement, the seller sought refuge in a *voetstoots* clause. Nestadt J construed a *voetstoots* clause to be confined to physical or visible qualities of the *merx*. As the absence of a licence (ie a statutory compliance) does not qualify as a physical or visible quality it will also fail to qualify as a (latent) defect in the *merx*. The solution to this licence problem, so it was held, fell within the scope of an implied contractual term and not a *voetstoots* clause.

Cachalia JA distinguished *Ornelas* from *Van Nieuwkerk* and *Odendaal*. In *Ornelas* the *merx* was unfit for the purpose for which it was purchased owing to the absence of a trading licence. This was contrasted with the *merces* in *Van Nieuwkerk* and *Odendaal*, which were, notwithstanding the lack of statutory compliance regarding the building plans, still fit for the purpose for which they were bought (paras 21–22). In other words, in *Ornelas* the purchaser received something different from what he bought, while in *Van Nieuwkerk* and *Odendaal* the purchasers received exactly what they purchased.

The *Ornelas* scenario is similar to that in *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 4 SA 276 (SCA) where the appellant, a manufacturer of spices, sold spices which were contaminated with the banned artificial colorant Sudan Red 1 to the respondent (trading as Nando's), a fast-food retailer. (Sudan 1 is a red dye that is used in colouring solvents, oils, waxes and shoe and floor polishes. It is a genotoxic carcinogen rendering it unfit for human consumption. It has been banned by the World Health Organisation, and its presence is not permitted in foodstuff for any purpose in this country and most others internationally – para 8.) The appellant sued the respondent for payment of the purchase price of the spices. Although the respondent admitted the claim, it raised a defence by way of four counterclaims based on delictual damages suffered by the defendant as a result of the defect (the presence of Sudan Red 1) in the *merx*. The appellant's defence against the counterclaims was based on a comprehensive contractual indemnity signed by the defendant. (see Neethling and Potgieter 2014 *THRHR* 502ff for a recent discussion of the case from the point of view of product liability *ex delicto*.)

On *appeal*, it was reaffirmed that here one is not dealing with a defect in the *merx*, but rather with the delivery to the purchaser of a *merx* that is different to that which had been contracted for (para 20). *Chickenland* was entitled to delivery of spices free of Sudan Red 1. Since the delivered *merx* was contaminated with Sudan Red 1 and thus different in substance to that purchased, *Freddy Hirsch's* failure to deliver spices free of this toxin was effectively a failure to perform in terms of the contract (*ibid*). One should therefore be careful not to confuse the obligation to deliver a *merx* without defects with the delivery of the wrong performance. The distinction is a fine one. (See the remarks by Otto "Koop van 'n saak vir sy normale of vir 'n bepaalde doel. En die een en ander oor *winkeldochters*" 2013 *TSAR* 1 3.)

To motivate his conclusion, Ponnar JA referred to *Marais v Commercial General Agency Ltd* 1922 TPD 440 443–440 where it was held that it seemed to be

an exploitation of terms to say that to supply one article in lieu of another article which was ordered, can be brought under the concept of “latent defect” (para 21). In the latter case a seed merchant inadvertently supplied a farmer with seeds of a character different to that purchased.

Ponnan JA consequently held that because one is dealing with non-performance, as opposed to defective performance, the *voetstoots* clause does not offer a defence to Freddy Hirsch (para 22). Furthermore, if such a restriction against liability, as envisaged by the *voetstoots* clause in this case, were to be enforced, it would unavoidably result in an infringement of a statutory provision which not only prohibits the delivery of foodstuffs that contain Sudan Red 1, but also makes it an offence to do so (*ibid*; see GN R1008 in GG 17258 of 21 June 1996 promulgated in terms of the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972). To allow the protection of a *voetstoots* clause in these circumstances would be so unreasonably harsh and oppressive that public policy could not tolerate it (*ibid*).

As indicated above, the Supreme Court of Appeal in *Odendaal* held that in the broad sense any imperfection in a *merx* may be described as a defect, but the exclusionary scope of a *voetstoots* clause in any particular case must be decided on its own facts. Hence, the operational sphere of a *voetstoots* sale is wide enough to cover both physical defects and defects in the title or area of the property (para 24). Any material imperfection preventing or hindering the ordinary or common use of the *merx* is an aedilician defect (para 25).

In conclusion, the court confirmed that the absence of statutory approval for build-on constructions constitutes a latent defect which interferes with the ordinary use of the *merx*, thus satisfying the *Holmdene Brickworks* test (para 26). Taking into account the supervention of public policy considerations and the illegalities on constitutional prescripts, the court held that a *voetstoots* clause would cover the absence of statutory authorisations (para 26). In reaching this conclusion Cachalia JA effectively overruled *Van Nieuwkerk*, confirming the whole purpose of a *voetstoots* clause, namely, to exempt a seller from liability for defects of which he is unaware, including defects constituting statutory non-compliance, as in this case (para 27).

A plea was made by Du Plessis “Pre-contractual misrepresentation, contractual terms, and the measure of damages when the contract is upheld” 2008 *SALJ* 413 that the legislator should intervene, especially with regard to the sale of land, to clarify, *inter alia*, a seller’s duty to disclose latent and patent defects and put the measurement of liability in these circumstances on a sure footing, provided that the courts retain their discretionary powers to award damages.

2.2 *Banda v Van der Spuy* 2013 4 SA 77 (SCA)

A leaking thatch roof was the bone of contention in *Banda*. It was common cause that although the respondents had made repairs to the roof before the sale, the roof continued to leak afterwards. In order to encourage the appellants to proceed with the transaction, an addendum was added to the deed of sale specifying that the “[s]eller [would] transfer guarantee on the thatch roof to the purchaser from the contractor”. However, the problem with the leaking roof persisted.

The crux of the matter on appeal was whether the appellants had proved the respondents’ essential knowledge of the latent defects in the roof, which they had then fraudulently concealed from the appellants. In determining this, the fact that

it was common cause that the respondents had effected repairs to the roof, also had to be taken into account to establish whether they had had sufficient knowledge that the repairs had not properly or adequately rectified the defects so as to prevent the roof from leaking (para 6).

The Supreme Court of Appeal held that an objective evaluation of the facts is essential in ascertaining whether the respondents knew of the latent defects and had, with intent to defraud the appellants, concealed these defects from them (para 11). Any conclusion must be drawn exclusively from the facts revealed by the evidence (*ibid*).

Central to this enquiry was first, the evidence of two expert witnesses who testified that the reasons for the leaks in the roof were an ineffective roof support structure of which the respondents were properly aware and an inadequate roof pitch of 30 degrees instead of 45 degrees of which the respondents were unaware. Secondly, the evidence substantiated that the addendum to the deed of sale concerning the contractor's guarantee, which had already expired when it was furnished, was misleading and fraudulent, and finally confirmed that the respondents knew that the repairs to the roof were incomplete (paras 8–10 13–19).

Referring to *R v Myers* 1948 1 SA 375 (A) 382 and *Hamman v Moolman* 1968 4 SA 340 (A) 347, Swain AJA held that the first respondent had avoided obtaining a clear picture of the extent of the latent defect and the sustainability of the repairs, and that his conduct clearly construed a "wilful abstention" from the truth (paras 12 20–22). Taking all the above into consideration together with the fraud relating to the invalid contractor's guarantee, Swain AJA further concluded that the first respondent did not honestly believe in the adequacy of the repairs to the roof and consequently had a duty to disclose the latent defect to the appellants (para 22). The fact that the respondents were unaware that the roof leaks were caused by an inadequate roof pitch of 30 degrees instead of 45 degrees, did not influence the fact that their conduct was fraudulent. This resulted in the forfeiture of the protection of the *voetstoots* clause (paras 23–24).

In these circumstances, and as it is trite that the seller is liable for all latent defects which render the *merx* unfit for the purpose for which it was intended to be used, the appellants were entitled to the difference between the purchase price of the house and its value with the defective roof (paras 24–25). As no evidence was led as to the market price of the house with the defective roof at the time of the sale, the court was (as was decided in *Labuschagne Broers v Spring Farm (Pty) Ltd* 1976 2 SA 824 (T)) entitled to take the costs of repair as a gauge to determine the amount to be awarded (para 25). The Supreme Court of Appeal also held that the alternative delictual claim based on a fraudulent or negligent misrepresentation had to succeed (paras 26–32).

It should be kept in mind that the courts were long divided on what should be proved before a *voetstoots* clause can be impugned. On the one hand, there is authority that the mere non-disclosure of the latent defect of which the seller was aware at the time of the making of the contract, will nullify his or her protection in terms of the *voetstoots* clause. On the other hand, authority exists for the proposition that a purchaser can only divest a seller of the protection afforded by a *voetstoots* clause if he or she is able to prove that the seller was, in fact, aware of the existence of the latent defect at the time of the making of the contract and that he or she, with the intention to defraud (*dolo malo*), concealed its existence from the purchaser. It was only in 1991 that the then Appellate Division approved the latter view in *Van der Merwe v Meades* 1991 2 SA 1 (A).

An interesting approach in this regard was followed in *Truman v Leonard* 1994 4 SA 371 (SE) where the court held that a contractual undertaking resulting from fraud would, on grounds of public policy, not be enforceable in law. Therefore, where the seller deliberately (fraudulently) conceals the latent defect, one cannot simply think away the *voetstoots* clause. The clause remains, but the seller is entitled to rely on it only to the extent that he acted honestly. With reference to Voet 21 1 10, the court further held that a seller, who has knowledge of the latent defect but fails to disclose it to the purchaser, would still be liable under the aedilician actions, despite the presence of a *voetstoots* clause. Further, if the purchaser has suffered because of the seller's deliberate (fraudulent) concealment of a latent defect, the cause of action, despite the *voetstoots* clause, can be based either on the aedilician actions or in delict, on the ground of fraudulent misrepresentation.

2 3 *Haviside v Heydricks* 2014 1 SA 235 (KZP)

The appellant in *Haviside* sold a house to the respondents. After transfer of the property in their name, the respondents discovered that a garage on the property was an illegal structure since no proper building plans were approved for it. The respondents instituted action in the magistrate's court for payment of a sum equal to the cost of demolishing the garage and replacing it with a legal structure, alternatively, a claim for the reduced value of the property.

The appellant relied on a *voetstoots* clause, explaining that when she bought the property there was already a carport on it. Furthermore, the property had at all times thereafter been occupied by the appellant's mother and her mother and brother had, without her knowledge or consent, filled in the walls of the carport to change it into an illegal garage. Consequently, by the time she visited the house, the illegal structure was a *fait accompli*. The appellant's mother took the initiative to sell the house and the appellant did not communicate with the respondents until they took transfer of the property.

The magistrate held that the appellant's failure to inform the respondents that the garage was an illegal structure constituted a non-disclosure, equal to a misrepresentation, inducing the sale. The magistrate also found that it was an implied term of the contract that the garage was a legal structure in compliance with the applicable building regulations. Thus, the appellant was prohibited from relying on the *voetstoots* clause.

It should be noted that the evidence presented at the trial was not that the garage was not fit for the purpose for which it was intended, that is, to park a vehicle in it, but that the foundation of the garage was inadequate for purposes of converting it into a double-storey structure, as the respondents anticipated to do.

Stretch AJ, following the methodology in *Odendaal*, held that the present matter should be distinguished from *Ornelas*, since the *merx* in *Ornelas* was unfit for the purpose for which it was bought and that the absence of a licence (ie a statutory compliance) did not qualify as a physical or visible quality. Thus this "defect" could not qualify as a (latent) defect in the *merx*. Stretch AJ concurred that the absence of a licence to operate a premise as a restaurant, implies that a purchaser could not use the *merx* for the purpose it had been bought (para 24). Nevertheless, by contrast, the non-existence of statutory approved building plans, as was the position in *Van Nieuwkerk*, *Odendaal* and *Haviside*, does not necessarily render the property unfit for residential purposes, being the exact purposes for which it was bought (*ibid*).

Stretch AJ followed *Odendaal*, differentiated between *Freddy Hirsch, Ornelas* and *Van Nieuwkerk* and held that any imperfection in a *merx* may be described as a defect, but that the exclusionary scope of a *voetstoots* clause in any particular case must be decided on its own facts. Hence, the operational sphere of a *voetstoots* sale is wide enough to cover both physical defects and defects in the title or area of the property. Any material imperfection preventing or hindering the ordinary or common use of the *merx* is an aedilician defect as defined above in *Holmdene Brickworks* and confirmed in *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 2 SA 447 (SCA).

Stretch AJ rejected *Van Nieuwkerk* and in accordance with the ruling in *Odendaal* held, with reference to *Uhlmann v Grindley-Ferris* 1947 2 SA 459 (C) and *Glaston House*, that the nature of a defect which could fall within the sphere of a *voetstoots* clause is wide enough to cover not only any hidden defects, but also any defect in the title or area of the property, including the absence of statutory approved building plans, as was the dispute in the present matter (paras 26–31).

Stretch AJ also reaffirmed the trite principle laid down in *Van der Merwe* that a purchaser who wants to avoid the consequences of a *voetstoots* sale must prove that the seller not only knew of the latent defect and did not disclose it, but also that he or she deliberately (*dolo malo*) concealed it with the intention to defraud (paras 35–39). On the facts the court found that the respondent did not comply with the requisite onus of proof and that the magistrate erred in not tackling this issue and making a finding in this regard (paras 40–41).

2 4 *Transnet Ltd t/a Transnet Freight Rail v SA Metal & Machinery Co (Pty) Ltd* unreported case no. A 439/2013, 7 August 2014 (WCD)

In *Transnet*, the respondent bought two lots of marine fenders by way of an online auction from the appellant. The purchase price for lot one, consisting of twenty fenders, was R200 000 and that for the other lot, consisting of fourteen fenders, was R140 000. The appellant did not dispute the contractual specifications that these fenders had to be inflated, reasonably usable and equipped with nets and transmitters. Nevertheless, it was common cause that the appellant was unable to deliver all thirty four fenders. The respondent accepted delivery of fourteen fenders and sued appellant for the delivery of the balance of twenty fenders.

The appellant pleaded, *inter alia*, that the respondent had refused to collect and remove nine of the fenders, which were still available for collection, and tendered to repay the respondent R101 000, together with the delivery of fourteen fenders, and reimburse them for the remaining 6 fenders. The respondent rejected this offer and maintained that they were entitled to the delivery of all 26 fenders.

The crux of the appellant's argument before the trial court was that clause 11 of the Auctioneers Terms and Conditions, which echoes a *voetstoots* clause, indemnified the appellant, the auction company and their employees from liability for errors of description or for the genuineness or authenticity of either of the two lots which had been sold to respondent. Clause 11 provided as follows:

"All goods are sold 'AS IS, WHERE IS, WITH ALL FAULTS AND WITHOUT RECOURSE' . . . The Auctioneer . . . has used its reasonable endeavours to ensure that the description of each lot(s) appearing on the Site are accurate, but, the buyer relies upon such description as [*sic*] its own risk. Buyers should satisfy themselves prior to the sale as to the condition of the lot and should exercise and rely on their judgment as to whether the lot accords with its description at their own risk.

... [T]he Auctioneer nor any of their respective employees or agents are responsible for errors of description or the genuineness for authenticity of any lot and no warranty whatever is given . . . to the buyer in respect of any lot and any express or implied conditions or warranties are hereby excluded to the greatest extent [*sic*] permitted by law.”

The trial court drew a distinction between the description of the *merx* and the presence or absence of defects and held that clause 11 did not protect the appellant against non-delivery of the *merx* as advertised and ordered it to deliver the outstanding 20 fenders.

On appeal, the appellant argued that clause 11 went beyond a traditional *voetstoots* clause insofar as it necessitated the respondent to investigate, prior to the sale, the condition of the *merx* in order to ascertain whether it matched the description contained in the advertisement. Thus neither the seller, the auctioneer nor their employees could be held legally liable for any errors of description or authenticity of the *merx* which had been advertised. Accordingly it was submitted that the respondent had an opportunity to inspect the *merx* before buying it but failed to do so.

It was held in *Odendaal* that where a purchaser has an opportunity to inspect the *merx* before buying it, and nevertheless buys it with its patent defects, he or she has him- or herself to blame for failing to examine it and would consequently have no recourse against the seller. The appellant, in analogy with *Odendaal*, contended that the respondent, for this reason, had no claim against the appellant for any patent defects.

Davis J, on appeal, held that the legal classification of clause 11 and its precise legal scope lay at the heart of the solution of the present appeal. In order to contextualise the matter, Davis J referred to *Cockraft v Baxter* 1955 4 SA 93 (C) 98B–C where it was held:

“There however appears to me to be no sufficient warrant for expanding the ambit of the mere agreement to buy *voetstoots* (without more) beyond its recognized sphere of relieving the vendor from liability for latent defects to the extent of precluding the buyer from relying upon any misrepresentation whatever as to the condition of the article sold. If the vendor wishes to guard himself against all liabilities for all representations as well as for all defects he should, in my opinion, incorporate into the sale an appropriate condition on their behalf.”

On appeal a clear distinction was made between *Odendaal* and the present case insofar as *Odendaal* dealt with latent and patent defects in the delivered *merx*, whereas the present matter was confined to the question whether clause 11 protected the seller from delivering the agreed *merx* as opposed to defects in respect of it (paras 15–16). Hence, the crucial issue according to Davis J was whether the reasonable meaning of clause 11 stretched beyond a conventional *voetstoots* clause.

Davis J found that clause 11 indeed covered defects in the *merx*, but did not create a defence to the non-delivery of thirty four fenders as advertised nor that the fenders would not match the description as set out in the advertisements (paras 19–20). With reference to *Fitt v Louw* 1970 3 SA 73 (T); *Schmidt v Dwyer* 1959 3 SA 896 (C) and *Marais v Commercial General Agency Limited* 1922 TPD 440 the court concluded that the appellant did not fulfil its contractual obligations by failing in proper delivery of the *merx* as regards both the quantity and quality thereof.

3 Future expansion of the ambit of latent defects?

It is clear from *Odendaal*, *Haviside* and *Transnet* that in the broad sense any imperfection in a *merx* may be described as a defect and that the operational sphere of a latent defect is wide enough to cover both physical defects and defects in the title or area of the property, provided it is a material imperfection foiling the ordinary or common use of the *merx*.

However, to expand latent defects to include defects in the title of the *merx* is inappropriate. It should be kept in mind that any flaw in the title of the *merx* affects the use, enjoyment and disposal of the *merx* and will constantly comprise the rights of a third party. It therefore predominantly affects its title, which is a form of eviction. This assessment is in agreement with *De Groot 3 15 5*. *Voet 21 1 1*, which was followed in *Southern Life Association v Segall* 1925 OPD 11, held a different view and labelled a defect in the title of the *merx* as a latent defect. We disagree, since a latent defect affects the actual use of the *merx* and it is for this reason doubtful whether the court came to the correct conclusion in *Glaston* to classify a deficiency in the title of a *merx* as a latent defect, especially in the context of the facts. To link the use of the building to the possibility to destroy it is artificial.

We support the restraint placed on latent defects in the circumstances of *Ornelas* and *Freddy Hirsch* as this is a matter of non-performance, as opposed to defective performance. To allow a seller the protection of a *voetstoots* clause in these circumstances would be unreasonable and against public policy. The same applies to the restriction employed on latent defects in *Transnet*. Again, as was correctly held, this was a matter were the seller did not comply with contractual obligations by disregarding proper delivery of the *merx* as regards the quality and quantity thereof and no nexus with latent defects or a *voetstoots* clause was conceivable, notwithstanding the all-embracing provisions of clause 11.

It is significant that as far as we could establish, the case law dealt with latent defects, physical and non-physical, in *merces* consisting of corporeal things. Ultimately the question is whether the above principles relating to latent defects are also applicable to *merces* of an incorporeal nature, for example, where a computer programme has a latent defect and cannot be used for the purpose for which it was bought. (See Alheit “Contractual liability arising from the use of computer software: Notes on the different positions of parties in Anglo-American law and South African law” 2000 *CILSA* 25 35–36.) Because the classification of latent defects were extended to physical and non-physical defects and even includes a defect in the title and extent of the *merx*, we are of the opinion that there is no sound legal reason to exclude incorporeal things from the principles concerning latent defects. In this respect, regard can be had to the very broad definition of “defect” in section 53 of the Consumer Protection Act 68 of 2008 as:

“any material imperfection in the manufacture of the goods or components . . . that renders the goods . . . less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or any characteristic of the goods or components that renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances”.

DJ LÖTZ

CJ NAGEL

University of Pretoria