

The effect of the Consumer Protection Act  
on the “voetstoots” clause in the South African  
Law and comparison to the Belgian Law

by

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THE EFFECT OF THE CONSUMER PROTECTION ACT ON THE  
“VOETSTOOTS” CLAUSE IN THE SOUTH AFRICAN LAW AND  
COMPARISON TO THE BELGIAN LAW

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## INTRODUCTION

The contract of sale, also known as *Emptio Venditio*, is one of the most commonly performed legal acts in ancient and modern times. The contract of sale forms part of the so called *contractus consensus*, as classified by Roman law.<sup>1</sup> Various rights and obligations arise from a contract of sale, including the seller's duty to warrant the buyer against latent defects.<sup>2</sup>

A latent defect can be defined as an imperceptible defect, hidden from the naked eye of a reasonably attentive buyer.<sup>3</sup> In contrast, a patent defect is a clearly visible defect, detectable without any proper inspection.<sup>4</sup> Patent defects fall outside the ambit of this research and will not deserve any further attention.

This research will focus on the origin and development of the warranty against latent defects as well as the *voetstoots* clause with specific reference to the buyer's remedies against the seller for non-compliance. The writer will start with a historical approach to investigate the origin and application of the warranty against latent defects and the *voetstoots* clause since 735 B.C. The focus will mainly be on Roman law.

The development of the warranty is forthwith discussed in chapter 2 of this research. Courts readily noted and applied the warranty since 1900 and developed it to afford broader protection to consumers. The warranty against latent defects and the *voetstoots* clause in their original forms were preserved although the remedies available to the buyer changed significantly.

The Consumer Protection Act (Hereafter the CPA) came into force 24 October 2010 and the warranty against latent defects was therein codified to afford better protection to consumers. Chapter 2 part H of the CPA deals with a consumer's right to fair value, good quality and safety and will therefore be discussed and analyzed to outline the current legal position. The main

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<sup>1</sup> Thomas van der Merwe Stoop *Historiese Grondslag van die Suid-Afrikaanse Privaatreg* 2000 285. Zimmermann *The Law of Obligations. Roman Foundations of the Civilian Tradition* (1990) 825-826.

<sup>2</sup> Supra 385.

<sup>3</sup> Nagel CJ *Kommersiële Reg* (2011) 4de Uitgawe 222. Kerr AJ *The Law of Sale and Lease* (3<sup>rd</sup> Edition) 2004 314.

<sup>4</sup> Supra.

objectives of the CPA are therefore to level the playing field and protect vulnerable consumers against exploitation by suppliers.

The term “Voetstoots” entails that goods are sold or leased “as it stands” or “as is”, exempting the seller/lessor from liability for any latent defects.<sup>5</sup> Before the CPA came into effect, the “voetstoots” clause was permitted if, at the time of conclusion of the contract: The seller/lessor was unaware of any defects in the goods concerned; The seller/lessor disclosed any defects he/she had knowledge of to the buyer/lessee.<sup>6</sup> Forthwith the use of the “voetstoots” clause is curbed in transactions subject to the CPA. Despite its good intentions, interpretation and enforcement remains problematic, this raises the ominous question whether the act fulfils its purpose.

Dilemmas such as manufacturer’s liability; whether the consumer has recourse against the manufacturer, once the manufacturer sold the goods “voetstoots” to the supplier, is not covered in the Act. Furthermore, the CPA’s effect on the second hand market and the sale of property is much greater than is catered for by the Act and has been the source of many controversies between consumers and manufactures alike. This paper will investigate the position regarding these transactions.

The CPA applies to marketing and supply of goods and services. It is therefore important to dedicate a chapter of this research to discuss the warrantee against latent defects pertaining to lease agreements since lease is seen as a service in terms of the CPA and many South Africans are dependent upon the mechanism of lease to afford adequate housing.

Section 2 of the CPA deals with the interpretation of the act. It states that courts may consider foreign law, international law, conventions and other applicable protocols.<sup>7</sup> The Belgium Law provides a useful comparison. *De Wet van 14 Juli betreffende de handelspraktijken en de*

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<sup>5</sup> Nagel *Kommersiële reg* (2011) 228.

<sup>6</sup> Supra.

<sup>7</sup> Consumer Protection Act s 2(1)(a) and (b).

*voorlichting en bescherming van de consument* has similar provisions to the CPA<sup>8</sup> and will forthwith be discussed.

The purpose of this research is thus to critically discuss and analyze the current position regarding the warrantee against latent defects and the *voetstoots* clause as contained in the Consumer Protection Act and to understand the logic and thought process behind this Act.

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<sup>8</sup> Otto 531.

## CHAPTER 1

### THE ORIGIN AND DEVELOPMENT OF THE WARRANTIES AGAINST LATENT DEFECTS WITH SPECIFIC REFERENCE TO THE AWARD OF DAMAGES.

#### 1. INTRODUCTION

This chapter provides an overview of the origin and development of the warranty against latent defects with specific reference to the award of damages. The study commences with the period 735 before the birth of Christ until its vesting in the South-African Law. Uncertainty exists regarding ancient Roman law, since very little was codified during that period.

#### 2. ORIGIN AND DEVELOPMENT: DEFECTS IN THE THING SOLD

##### 2.1 THE MONARCHY (735-509 BC)

During early Roman times a buyer was only awarded damages for latent defects.<sup>9</sup> No remedy was available to the buyer for patent defects or defects he was aware of at the time of conclusion of the contract.<sup>10</sup> The purpose of this was to protect buyers against misrepresentations of the *merx*.<sup>11</sup> The ancient Romans used various methods to determine damages where merchandise was defective.<sup>12</sup>

The monarchy was a time where legal uncertainty prevailed.<sup>13</sup> During this period, the purpose of awarding damages for latent defects was vengeance rather than compensation.<sup>14</sup> Payment

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<sup>9</sup> Van den Heever *Aquilian Damages in South African Law* Vol I (1944) 2.

<sup>10</sup> *Supra*.

<sup>11</sup> Zimmermann *The Law of Obligations. Roman Foundations of the Civilian Tradition* (1990) 825-826.

<sup>12</sup> Two methods based on the *formula*, namely: Categorical damages and damages based on the objective market value of the *merx*.

<sup>13</sup> Thomas, van der Merwe en Stoop *Historiese Grondslag van die Suid-Afrikaanse Privaatreg 2000* 18.

<sup>14</sup> Van den Heever Vol I (1944) 2. The wrongdoer was punished by being compelled to render to the aggrieved party a gift (*damnum*) to ransom this person. This prevented vengeful acts and promoted reconciliation." Also see Van den Heever 10 ev.

of damages replaced physical retaliation and other harmful forms of revenge. Instead of aiming to compensate the aggrieved party, it aimed to protect the guilty party from brutality.<sup>15</sup>

Restitution, cancellation and specific performance were unknown remedies. There was therefore no precedent for compensating buyers for latent defects in the *merx*.<sup>16</sup> Until the *Lex Aquila* was promulgated, damages for latent defects were calculated in one of two ways based on the *formula*.<sup>17</sup>

Firstly, defects were divided into categories. Damages for defective *merx* were awarded according to the category of the defect in question.<sup>18</sup> Thus, if a defect fell into a pre-determined category, the mediator appointed to adjudicate the matter had no discretion regarding the calculation of damages.<sup>19</sup> The buyer was awarded the pre-determined compensation for that specific category.<sup>20</sup> Where a defect did not form part of any category, the mediator had discretion to award damages depending on the circumstances.

Secondly, damages were calculated in accordance with the objective market value<sup>21</sup> of the *merx*.<sup>22</sup> This method soon became untenable due to inflation.<sup>23</sup>

Towards the end of the monarchy, damages were limited to monetary compensation. Mediators could no longer impose or award any other type of penalty or compensation.<sup>24</sup>

The ancient Romans often used *arrha* to secure the valid conclusion of a contract of sale.<sup>25</sup> *Arrha* is a valuable item given to the seller, by the buyer, as security for payment of the

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<sup>15</sup> Lötz 'n *Kursoriese historiese terugblik op skadevergoeding met spesifieke verwysing na suiwer vermoënskade in die Suid-Afrikaanse reg* Fundamina (2007) 75.

<sup>16</sup> Zimmermann 578, 770, 801 and 825.

<sup>17</sup> Lötz (2007) 76 vn 4 as referred to G 4 39-44; Wenger *Institutes of the Roman Law of Civil Procedure* (1955) 371; Van Zyl *Geskiedenis van die Romeinse privaatreë 374*; Van Warmelo 'n *Inleiding tot die Studie van die Romeinse Reg* (1971) 262.

<sup>18</sup> Van Zyl DH *Geskiedenis van die Romeinse privaatreë* (1977) 273

<sup>19</sup> Supra.

<sup>20</sup> Supra.

<sup>21</sup> As on *litis contestatio*.

<sup>22</sup> Van Zyl 274.

<sup>23</sup> Supra as referred to Daube "On the third chapter of the *Lex Aquilia*" 1936 *LQR* 256 and Van den Heever 16.

<sup>24</sup> Van Zyl 273 en 375; Wenger 143 ev: Even where performance was still possible, the mediator had no discretion to order specific performance.

<sup>25</sup> Lötz DJ *Die Koopkontrak: 'n Historiese terugblik* Deel 2 (1992) 157.



purchase price.<sup>26</sup> The seller had the right to retain the item if payment was not made in full.<sup>27</sup> The seller returned the item to the buyer once he was satisfied with the performance.<sup>28</sup> If the buyer found any latent defects in the *merx*, the seller was obligated to return double the value of the *arrha*.<sup>29</sup> The use of *arrha* is similar to the doctrine of valuable consideration in the English law and applied in the South African law until the case of *Conradie v Rossouw*.<sup>30</sup>

Initially damages were only awarded where the seller deliberately concealed defects in the *merx* or where he fraudulently represented the *merx* to possess certain characteristics.<sup>31</sup> In this case the impaired party could make use of the *actio empti*.<sup>32</sup> This remedy only protected the buyer's interest in *merx* and was not sufficient to compensate the buyer for his loss.<sup>33</sup>

*Stipulationes* became popular practice around 220 BC.<sup>34</sup> Sellers used *stipulationes* to guarantee that their *merx* possess certain characteristics and are free of any latent defects.<sup>35</sup> If it comes to the attention of the buyer that the seller broke the guarantee, he could use the *actio ex stipulatu* or, alternatively, the *stipulation duplae* or *stipulation habere licere*.<sup>36</sup> These remedies differ from the *actio empti* and are based on the guarantee rather than a belief that the seller will act *bona fide*.<sup>37</sup>

## 2.2 THE REPUBLIC AND THE PRINSIPATE (509 BC – 284 AC)

A need arose to regulate good order in markets. All traders, selling slaves and draft animals, had to disclose any character flaws, disabilities and ailments the animals and slaves have, to the buyer.<sup>38</sup> This rule is contained in the edict of *aedilis curule* and aimed to prevent fraud at public markets.<sup>39</sup> The Seller had to disclose all defects, *morbi*<sup>40</sup> and *vitia*,<sup>41</sup> to the buyer.<sup>42</sup> The

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<sup>26</sup> Supra.

<sup>27</sup> Van Zyl 287 vn 148.

<sup>28</sup> Supra.

<sup>29</sup> Supra.

<sup>30</sup> 1919 AD 279. van Zyl 287 vn 148.

<sup>31</sup> van Zyl 294.

<sup>32</sup> Supra.

<sup>33</sup> Supra.

<sup>34</sup> van Zyl 295.

<sup>35</sup> Supra.

<sup>36</sup> Supra.

<sup>37</sup> van Zyl 295 vn 177 with reference to Kaser I 556.

<sup>38</sup> van Zyl 295.

<sup>39</sup> Supra.

<sup>40</sup> Temporary defect.

defects should not be nugatory; it should affect the usability of the *merx*.<sup>43</sup> It made no difference whether the defect was permanent or only temporary.<sup>44</sup>

The buyer could demand that the seller, by way of stipulation, provide a guarantee that the *merx* is free of defects.<sup>45</sup> The buyer had the *actio redhibitoria* and the *actio quanti emptoris intersit* to his disposal if the seller refused to give a stipulation. The buyer could claim restitution with the *actio redhibitoria*; the *actio quanti emptoris intersit* on the other hand enables him to claim a reduced purchase price.<sup>46</sup>

*Stipulationes* was so commonly used in contracts of sale that it became redundant. The warranty against latent defects therefor forms part of the *naturalia* of a modern-day contract of sale.<sup>47</sup> The *actio redhibitoria* and *actio quanti minoris* became the only remedies, which restricted the buyer's claim to restitution or reduction of the purchase price respectively.<sup>48</sup>

*Stipulationes* must be distinguished from *dicta* and *promissa*.<sup>49</sup> The *Digesta* does not clearly state the difference between *dicta* and *promissa*, however both amounts to oral declarations by the seller, promising that the *merx* possesses certain characteristics or is suitable for a specific purpose.<sup>50</sup> The *ius civile* did not protect the buyer where a *dicta* or *promissa* was made by the seller, the *aedilition actions* thus served as remedy.<sup>51</sup>

### 2.3 THE DOMINATE (284- 527 AC)

The *formula*-procedure was abolished and replaced with the *cognitio*-procedure during the fourth century.<sup>52</sup> The first signs of court proceedings arose. All disputes were heard by a state official.<sup>53</sup> Each party had to prepare pleadings on which the official decided the dispute.<sup>54</sup> The

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<sup>41</sup> Permanent defect.

<sup>42</sup> Mostert D, Joubert DJ and Viljoen G *Die koopkontrak* (1972) 188.

<sup>43</sup> *Supra*.

<sup>44</sup> *Supra*.

<sup>45</sup> van Zyl 295 vn 179.

<sup>46</sup> *Supra*.

<sup>47</sup> van Zyl 296.

<sup>48</sup> *Supra*.

<sup>49</sup> Mostert Joubert Viljoen 188.

<sup>50</sup> Mostert Joubert Viljoen 188.

<sup>51</sup> *Supra* 189.

<sup>52</sup> Lötzt (2007) 78.

<sup>53</sup> van Zyl 385-386.

<sup>54</sup> Lötzt (2007) 78 with reference to van Zyl 385-386; Buckland *A Text-Book of Roman Law from Augustus*

official was also entitled to command specific performance, thus obligating seller to deliver the same type of *merx* free of defects, alternatively a monetary amount to the value of the *merx*.<sup>55</sup>

## 2.4 JUSTINIAN (527-565 AC)

The *Corpus Juris Civilis* extended the applicability of the *aedilition* actions to include *merx* sold outside markets.<sup>56</sup> The *actio empti* was now also used for the same purpose.<sup>57</sup> Even though the use of the *actio empti* and *aedilition* actions became redundant, it still forms part of South African law.

The focus of Roman law was not on the extent of damages but rather on accountability of the seller, therefore no limit was imposed on a claim for damages.<sup>58</sup> During the reign of Justinian it became possible to claim consequential damages. This enabled the plaintiff to claim any damages resulting from a latent defect.<sup>59</sup> Justinian attempted to restrict these claims to prevent claimants from taking it too far.<sup>60</sup> The buyer could also claim damages for future loss he may suffer from the defective *merx*.<sup>61</sup> The claim was limited to damages common to the specific type of defect.<sup>62</sup>

Initially the non-disclosure of guilty misrepresentations was not calculated by using positive or negative interest.<sup>63</sup> The primary and secondary distinction of damages developed later when the Glossators and Pandectists started categorising damages based on interest.<sup>64</sup> During the

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*to Justinian* (1966) 662 ev; Jolowicz *Historical Introduction to the Study of Roman Law* (1967) 457 ev; Zimmermann 828.

<sup>55</sup> Erasmus *Aspects of the history of the South African law of damages* (1975) *THRHR* 109; Van Zyl 387; Dannenbring *Roman Private Law* (1980) 183.

<sup>56</sup> van Zyl 296.

<sup>57</sup> van Zyl 297.

<sup>58</sup> Lötze (2007) 96.

<sup>59</sup> *Supra*.

<sup>60</sup> Damages can at the most be double the value of the Res. Erasmus 'n *Regshistoriese beskouing* (1968) *THRHR* 214 en 225 ev; Erasmus "Aspects" 117-118; Also see Lötze 97 vn 46 with reference to Conradie 12, Domat *Les Lois Civiles Dans Leur Ordre Naturel* (1745) 35 ev en Pothier *Traité des Obligations* (1813) 159 .

<sup>61</sup> *Supra*

<sup>62</sup> Zimmermann 830-831.

<sup>63</sup> Lötze (2007) 82.

<sup>64</sup> *Supra* 96.

post-classical period, the Romans deviated from instituting proceedings to determine liability and moved towards awarding damages based on reasonableness and fairness.<sup>65</sup>

## 2.5 INFLUENCE OF ENGLISH AND GERMAN LAW

The sum-formula, as it is known in the South-African law, finds its roots in the German *Differenz-theory*.<sup>66</sup> This theory aims to determine damages without considering its cause or any surrounding circumstances.<sup>67</sup> A method was developed based the buyer's position before and after the damages occurred.<sup>68</sup> The damages awarded for latent defects are thus calculated by determining the buyer's position if the *merx* was without any defects and his position given the defective *merx*.<sup>69</sup> The two positions are compared and the difference constitutes the damage. The same calculation is used in English law.<sup>70</sup>

The Diffirentz-theory has been influencing the calculation of contractual and delictual damages in the South-African law since 1910.<sup>71</sup>

## 2.6 THE "VOETSTOOTS" CLAUSE

The exact origin of the voetstoots clause is unknown.<sup>72</sup> Dutch-writers of the 15<sup>th</sup> century only defined the term "voetstoots" in their work.<sup>73</sup> The *Fockema Andreae's juridisch dictionary*<sup>74</sup> defines it as: "met uitsluiting van elke garantie van de kant van de verkoper bij verkoop betreffende de hoeveelheid, verborgen gebreken enz".<sup>75</sup> The *Groot woordenboek van de*

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<sup>65</sup> Supra 96.

<sup>66</sup> Supra 87. Visser & Potgieter *Skadevergoedingsreg* 2012 11.

<sup>67</sup> Lötz (2007) 81; Van der Walt (n 2) 9 ev.

<sup>68</sup> Lötz (2007) 81 vn 66; Zimmermann 824; Van der Walt *Die Sommeskadeleer en die "Once and for All"-Rule* (Unpublished LLD-thesis, University of South African, 1977) 10 ev; Conradie *The "Convention" and "Contemplation"-principles of damages after breach of contract*. (Unpublished LLM-thesis, University of the Orange-Freestate, 1987) 12 en 25; Mommsen *Beiträge zum Obligationenrecht; 2 Abt Zur Lehre vom Interesse* (1855) 3. *Damnum emergens* and *lucrum cessans* can according to Mommsen (as broad introduction to different types of damages) form part of the calculation: Van der Walt 19 ev.

<sup>69</sup> Lötz (2007) 81.

<sup>70</sup> Sedert 1880. Lötz (2007) 81.

<sup>71</sup> Lötz (2007) 87 vn 105. For a complete discussion on the *Differenztheorie* see Van der Walt 3 ev.

<sup>72</sup> Van Warmelo *Vrywaring teen gebreke by koop in Suid-Afrika* 33 90 155.

<sup>73</sup> Otto JM *Verborge gebreke, voetstootsverkope, die Consumer Protection act en die National Credit act* (2011) 74 THRHR 530.

<sup>74</sup> (2008) by Van Caspel and others.

<sup>75</sup> Otto 530.

*Nederlandse taal*<sup>76</sup> states that it is of Middle-Dutch origin.<sup>77</sup> Ter Laan described “voetstoots verkopen” as: “letterlijk: zoals men er met de voet tegen stoot; zonder uitzoeken; zonder dat men later met klachten kan komen”.<sup>78</sup> The use of the “voetstoots” clause in the South-African law will be discussed in the following chapters.

### 3. CONCLUSION

Most principles originating from Roman law are still applicable in the South-African law. Even though many new requirements and conditions came into force to regulate the warranty against latent defects in contracts of sale, the basic principles can still be traced to ancient Roman law.

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<sup>76</sup> Van Dale.

<sup>77</sup> See also De Vries *Nederlands etymologisch woordenboek* (1971) 797 provides the same information and also mentions the word - *veurvoets* – as origin.

<sup>78</sup> *Nederlandse spreekwoorden, spreuken en zegswijzen* (2009) 362.

## CHAPTER 2

### THE APPLICATION OF THE WARRANTIES AGAINST LATENT DEFECTS BEFORE THE COMMENCEMENT OF THE CONSUMER PROTECTION ACT IN THE SOUTH AFRICAN LAW

#### 1. INTRODUCTION

It is apparent from the previous chapter that the foundation of the South African private law is the Roman law. This chapter will focus on the application of these Roman principles pertaining to the warranty against latent defects in the South African law prior to the promulgation of the Consumer Protection act. The *actio empti* and the *aedilician* remedies will also be discussed with reference to important case law.

#### 2. GENERAL PRINCIPLES

The warranty against latent defects became so commonly used in contracts of sale that it was included as an *ex lege*<sup>79</sup> warranty in every contract of sale. The warranty may be given explicitly in the contract. The importance of the difference between the two types is to determine the recourse of the buyer if the seller breaches the warranty.<sup>80</sup> Where the warranty was given in the contract as *incidentalia*, the buyer may base his claim on the breach of the warranty. On the other hand, when the warranty is *ex lege* the buyer may use<sup>81</sup> both the *actio empti* as well as the *aedilician* actions but since damages cannot be claimed with the *aedilician* actions it will be unwise to use these remedies.<sup>82</sup> The warranty could only be excluded by way of a *voetstoots* clause<sup>83</sup> or explicitly through a mutual agreement between the contracting parties.<sup>84</sup>

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<sup>79</sup> Through the application of law as *naturalia* in a contract of sale.

<sup>80</sup> *Supra*.

<sup>81</sup> *Supra* 225.

<sup>82</sup> *Supra*. Mostert Joubert Viljoen 197.

<sup>83</sup> *Minister van Landbou-Tegniese Dienste v Scholtz* 1971 3 SA 188 (A); *Consol Ltd T/A Consol Glass v Tweek Jonge Gezellen (Pty) Ltd* 2002 6 SA 256 (K).

<sup>84</sup> Nagel *Kommersiële Reg* (2011) 222. Kerr AJ *The Law of Sale and Lease* (3<sup>rd</sup> Edition) 2004 314.

A Latent defect can be described as a defect that materially affects the use of the *merx*.<sup>85</sup> The buyer should not have been aware of the defect at the time of conclusion of the contract and should not have been able to detect the defect through inspection.<sup>86</sup> Only defects objectively and materially affecting the use of the *merx* will qualify as latent defects.<sup>87</sup>

*Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd*<sup>88</sup> sets out the definition of a latent defects and illustrates the applicability of the warranty against latent defects in the South African law. Holmdene Brickworks is a manufacturer and merchant seller of bricks. Roberts Construction bought bricks from Holmdene to build a factory. After completion of the building it came to the attention of the buyer that some of the bricks were defective. Some of the walls of the factory had to be taken down to be rebuilt. Roberts Construction thus instituted a claim against Holmdene for consequential damages. The court a quo ruled in favour of Roberts Construction. Holmdene appealed this decision.

The Supreme Court of Appeal concluded that a latent defect is an unusual defect which materially affects or destroys the quality or use of the *merx* (or materially impede the intended purpose of the goods or the purpose it is normally intended for). The court held that the test for latent defects is the following: Whether the defect is reasonably<sup>89</sup> discernible<sup>90</sup> or detectable for an ordinary buyer.<sup>91</sup>

The court had to decide whether the buyer could claim consequential damages. As discussed in chapter one of this research, consequential damages was not claimable under Roman law

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<sup>85</sup> Supra 223. Mostert Joubert Viljoen 197.

<sup>86</sup> Reasonable inspection. *Dibley v Furter* 1951 4 SA 73 (K).

<sup>87</sup> Nagel 223. Mostert Joubert Viljoen *Die Koopkontrak* (1972) 198.

<sup>88</sup> 1977 4 All SA 94 (A).

<sup>89</sup> *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 4 All SA 94 (A): "Such a defect is latent when it is one which is not visible or discoverable upon an inspection of the *res vendita*. I refrain, however, from entering into the question as to whether to be latent the defect must be not "easily visible" (see *Blaine v. Moller & Co.*, (1889) 10 N.L.R. 96 at p. 100) or whether the test is rather that it should not be reasonably discoverable or discernible by the ordinary purchaser.; *Schwarzer v John Roderick's Motors (Pty.) Ltd.*, 1940 O.P.D. 170 at p. 180; *Lakier v. Hager*, 1958 (4) S.A. 180 (T)). Nor is it necessary to consider what effect, if any, is produced by the fact that the purchaser is himself an expert in regard to the *res vendita* or employs an expert to examine the goods" (see in this connection *Knight v. Hemming*, 1959 (1)S.A. 288 (F.C.))".

<sup>90</sup> *Dibley v Furter* supra en die gesag daar aangehaal; ook *Knight v Trollip* 1948 3 SA 1009 (D); *Curtaincrafts(Pty.) Ltd. v. Wilson*, 1969 4 SA 221 (E); De Wet en Yeats, *Kontraktereg*, 3de uitgawe 236; Mackeurtan *Sale of Goods* 4de uitgawe 246; Wessels *Contract* 2de uitgawe para. 4677.

<sup>91</sup> It is irrelevant whether the If the buyer possesses specialist knowledge regarding the type of *merx*.

and was only introduced with very limited scope during the reign of Justinian.<sup>92</sup> In *casu* the court ruled that buyer has the right in terms of the contract of sale to claim consequential damages. The buyer should be put in the position he should have been in if the defect was not present. This case restricts a buyer to claim consequential damages only from manufactures and merchant sellers. Manufacturers and merchant seller may not use ignorance as a defense.<sup>93</sup> The legal position regarding merchant sellers and manufacturers will be discussed later in this research.

The previous Appellant division divided damages into two categories, namely: general damages and special damages. General damages are determined by using the objective foreseeability test. Special damages on the other hand are determined based on what was foreseeable at the time of conclusion of the contract, taking into account all surrounding circumstances.<sup>94</sup> In the *Holmdene* case, it was indeed a latent defect and only general damages were claimable, therefore the appeal was dismissed.

### 3. PATENT DEFECTS VERSUS LATENT DEFECTS

The reasonable person inspecting the *merx* is used as measure to determine whether a defect is latent or patent.<sup>95</sup> This objective test is forthwith discussed. The buyer must prove that the defect was present at the time of conclusion of the contract and that he was unaware of the defect.<sup>96</sup>

### 4. MISREPRESENTATIONS AND SALES PITCHES

Warrantees in a contract of sale must be distinguished from misrepresentations and sales pitches. A misrepresentation can be made with fraudulent intent, negligently or without fault and can be made both inside and outside a contract.<sup>97</sup> If a misrepresentation is made in a clause in a contract of sale, the buyer may use normal contractual remedies.<sup>98</sup> However,

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<sup>92</sup> Lötzt 96.

<sup>93</sup> Voet 21.1.10; Pothier *Contract de Vente* para. 214; *Kroonstad Westelike Boere Ko-opersie. Vereniging v. Botha*, 1964 (3) SA 561 (AD); ook *Bower v Sparks*, *Odendaal v Bethlehem Romery Bpk.* 1954 3 SA 370 (O).

<sup>94</sup> Visser & Potgieter *Skadevergoedingsreg* 2012 78.

<sup>95</sup> Nagel 223.

<sup>96</sup> *Truman v Leonard* 1994 4 All SA 445 (SE).

<sup>97</sup> Nagel 224. Mostert Joubet Viljoen 198.

<sup>98</sup> Supra.



where a misrepresentation is made with fraudulent intent or negligently outside the contract, the buyer may use delictual remedies<sup>99</sup> The *aedilician* actions are to the exposal of the buyer where the misrepresentation was made without fault.<sup>100</sup>

A sales pitch is when the seller praises the *merx* to convince the potential buyer to buy the *merx*. The buyer has no remedy where he bought *merx* based on a false sales pitch.<sup>101</sup> The buyer's recourse in this case falls outside the ambit of this dissertation.

## 5. THE ACTIO EMPTI

This remedy was available to the buyer when the seller acted *contra bonos mores* or where the *merx* does not comply with the warrantee given by the seller.<sup>102</sup> The *actio empti* enables the buyer to cancel the contract and claim damages. This remedy is also available where an implied warrantee is apparent from the contract. *Minister van Landbou-Tegniese Dienste v Scholtz* illustrates the operation of the *actio empti*.<sup>103</sup> The minister bought a bull from Scholtz for breeding purposes. The purpose of the bull was clear from the contract (This constitutes an implied warrantee, implied warrantees are often confused with *ex lege* warrantees). However, the bull was unable to reproduce. The minister made use of the *actio empti* to place himself in the position he should have been in if the bull was indeed able to reproduce.

The grounds on which the *actio empti* can be instituted are the following: Where the seller warrants the buyer that the *merx* are free of any latent defects; where the buyer fraudulently concealed defects in the *merx*; where the seller is the merchant seller or manufacturer of the goods and where the seller promised the buyer that the *merx* possess certain characteristics.<sup>104</sup>

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<sup>99</sup> *Bayer South-Africa (Pty) Ltd v Frost* 1991 4 SA 559 (A) en *McCann v Goodall Group Operations (Pty) Ltd* 1995 2 SA 718 (K).

<sup>100</sup> *Phame (Pty) Ltd v Paizes* 1973 3 SA 397 (A) en ook *Waller v Pienaar* 2004 6 SA 303 (C).

<sup>101</sup> Nagel 224.

<sup>102</sup> Mostert Joubert Viljoen 194.

<sup>103</sup> *Truman v Leonard* supra.

<sup>104</sup> Nagel 224; *Minister van Landbou-Tegniese Dienste v Scholtz* 1971 3 SA 188 (A).

## 5.1 WARRANTEE AGAINST LATENT DEFECTS

As mentioned in the above paragraphs, the seller may warrant the buyer explicitly or by implication that the *merx* are free of defects. If it appears that there are defects in the *merx* after the conclusion of the contract, the buyer may institute the *actio empti*.<sup>105</sup>

## 5.2 CONCEALMENT OF LATENT DEFECTS

The seller has an obligation to reveal to the buyer all defects he is aware of at the time of conclusion of the contract.<sup>106</sup> The buyer may cancel the contract and institute an action for damages if the seller fails to comply with this duty.<sup>107</sup> It is however a requirement that the seller intended to mislead the buyer to conclude the contract by concealing the defects.<sup>108</sup> The seller's duty to disclose is unavoidable if the defect falls within his personal knowledge.<sup>109</sup> The seller may not exempt himself from liability by way of a *voetstoots* clause if he was aware of the defect when concluding the contract.<sup>110</sup> In this case, instituting proceedings based on delictual liability is more popular than the *actio empti*.<sup>111</sup> Precedent regarding the above principles will be discussed.

*Glaston House (Pty) Ltd v Inag (Pty) Ltd*<sup>112</sup> is a good example. Glaston House bought a dilapidated building from Inag for the sole purpose of demolition. Inag failed to register a statue and cornice, which was declared as national monuments, on the title deed and further failed to inform Glaston House accordingly. Glaston House was therefore unable to proceed with the demolition. Glaston House could only proceed if the monuments formed part of the new building. There would have been additional costs involved to preserve the monuments; therefore Glaston House instituted a claim for damages against Inag.<sup>113</sup>

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<sup>105</sup> Supra.

<sup>106</sup> *Glaston House (Pty) Ltd v Inag (Pty) Ltd* 1977 2 SA 846 (A).

<sup>107</sup> Nagel 225; Mostert Joubert Viljoen 200.

<sup>108</sup> *Van der Merwe v Meades* 1991 2 SA 1 (A).

<sup>109</sup> Nagel 225. Mostert Joubert Viljoen 201.

<sup>110</sup> Supra.

<sup>111</sup> *Ranger v Wykerd* 1977 2 SA 976 (A); *Truman v Leonard* supra; *Waller v Pienaar* supra.

<sup>112</sup> 1977 3 All SA 88 (A).

<sup>113</sup> Various provincial divisions of the court have decided that a buyer has a claim for damages where the seller fraudulently disguised defects: *Dibley v Furter* supra; *Cloete v Smithfield Hotel (Pty.) Ltd*. 1955 2 SA 622 (O); Mackeurtan. *Sale of Goods in South Africa*, 4de uitgawe 325.

The majority and minority<sup>114</sup> decisions of the Supreme Court of Appeal differ. The majority decided that an unregistered servitude does not constitute a form of eviction but does however constitute a latent defect. A delictual claim for damages was awarded due to Inag's fraudulent concealment of the defect. The minority agrees that the claim is of a delictual nature but adds that it will constitute a patent defect if it is registered against the title deed. This case received some criticism<sup>115</sup> regarding the classification of registered and unregistered servitudes as latent defects; this will however fall outside the ambit of this research.

It appears that the concealment of a servitude affects the buyer's right to peaceful use and enjoyment of the *merx*, rather than its physical intended use. The purpose of this case is thus only to show that a buyer may have a claim for damages based on the *actio empti* where the seller fraudulently concealed defects.

It is further important to note that the main purpose of the fraudulent misrepresentation must be to mislead a buyer to conclude a contract. This is confirmed in the case of *van der Merwe v Meads*.<sup>116</sup>

### 5.3 MERCHANT SELLERS AND MANUFACTURERS

Where the seller concludes a contract in its capacity as merchant seller of the *merx*, he will be liable for any damages caused by latent defects in the goods sold.<sup>117</sup> In order for a seller to be held liable accordingly, he has to publically present himself as an expert on the *merx* and it must appear that he concluded the contract in his capacity as merchant seller.<sup>118</sup>

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<sup>114</sup> *Glaston House v Inag* supra: "In view of the conclusion to which I have come on the facts of the case it is not necessary to discuss these cases and the old authorities to which they refer. It would be a work of supererogation so to do. It is sufficient to say that the earlier Natal cases such as *Knight v Trollip* 1948 3 SA 1009 (D), and *Forsdick v Youngelson* 1949 2 PH A 57 (N), are to the effect that mere non-disclosure by the seller, without more, is not sufficient to constitute fraudulent conduct such as to nullify the effects of a *voetstoots* clause. The Transvaal Courts in *Hadley v. Savory* 1916 TPD. 385, and *Van der Merwe v Culhane* 1952 3 SA 42 (T)."

<sup>115</sup> Barnard J *The influence of the Consumer Protection act 68 of 2008 on the common law of sale* (Unpublished LLD Thesis, University of Pretoria) 2013 52.

<sup>116</sup> 1991 4 All SA 42 (AD): This case will be discussed under the Aedilician actions.

<sup>117</sup> *Kroonstad Westelike Boere Ko-operasie Vereniging Bpk v Botha* 1964 3 SA 561 (A); *Sentrachem Bpk v Prinsloo* 1997 2 SA 1 (A); *Langenberg Voedsel Bpk v Sarculum Boerdery* 1996 2 SA 565 (A) and *Sentrachem Bpk v Wenhold* 1995 4 SA 312 (A).

<sup>118</sup> Nagel 225.

If the seller is the manufacturer of the *merx*, he will be liable for all damages incurred due to latent defects in the products<sup>119</sup> regardless of whether he publically presented himself as an expert on the *merx*.<sup>120</sup> Negligence or ignorance is no defence.<sup>121</sup>

The decision by the Supreme Court of appeal in *Ciba-Geigy (Edms) Bpk v Lushof Plase (Edms) Bpk and another*<sup>122</sup> illustrates the position of merchant sellers and manufacturers. Ciba-Geigy is a manufacturer of toxins. Lushof bought a toxin from the merchant seller to spray his pear trees to protect them against insects. The toxin had a negative impact on the growth of the trees and caused some of the young trees to die. Lushof claimed damages from both the merchant seller and manufacturer. The court *a quo* ruled in Lushof's favour. Ciba-Geigy took the case on appeal.

The Supreme Court of appeal ruled that a merchant seller is liable for consequential damages caused by latent defects if he presented himself as an expert on the *merx*.<sup>123</sup> The merchant seller is liable based on the contractual warrantee and Lushof is entitled to use the *actio ampti* to cancel the contract and claim damages.

The court further decided that a contractual warrantee exists between the merchant seller and manufacturer. The manufacturer warrants the merchant seller that the *merx* comply with the required specifications and it therefore renders the manufacturer liable if the product fails to comply with these specifications. Ciba-Geigy also encounters delictual liability because of the negligence of the factory regarding the testing and distribution of the toxins.<sup>124</sup>

#### 5.4 SELLER WARRANTS THE MERX TO POSSESS CERTAIN CHARACTERISTICS

A seller may explicitly or by implication warrant a buyer that the *merx* possess certain good characteristics or warrant the absence of certain bad characteristics.<sup>125</sup> An implied warrantee is

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<sup>119</sup> *Holmdene Brickworks (pty) Ltd v Roberts Construction (pty) Ltd* 1977 4 All SA 94 (A).

<sup>120</sup> *Sentrachem Bpk v Wenhold* supra; *Langeberg Voedsel Bpk v Sarculum Boerdery* supra and *Sentrachem Bpk v Prinsloo* supra.

<sup>121</sup> Nagel 226.

<sup>122</sup> 2001 JOL 9228 (A).

<sup>123</sup> Hereafter also referred to as the porthiër-rule.

<sup>124</sup> Compare *Cooper and Nephews v Visser* 1920 AD 111 te 114; *Tsimatakopoulos v Hemingway, Isaacs and Coetzee CC and another* 1993 (4) SA 428 (C) te 433A – E; 435H – I; Neethling, Potgieter & Visser *The Law of Delict* 3de uitgawe 321. It is an obvious deduction that this behaviour is *contra bonos mores*.

<sup>125</sup> Mostert Joubert Viljoen 198.

also given when the seller sells the *merx* for a specific use.<sup>126</sup> If the buyer inform the seller that he intends to use the *merx* for a specific purpose or it is general knowledge that the *merx* can only be used for one purpose, the seller warrants the buyer accordingly by implication.<sup>127</sup> The *actio empti* serves as remedy to put the buyer in the position he would have been in if the contract was performed properly

## 6. VOETSTOOTS CLAUSE

Where *merx* is sold *voetstoots* it excludes the seller's liability for latent defects. This is not the case where the seller fraudulently conceals defects when concluding the contract.<sup>128</sup> *Van der Merwe v Meads*<sup>129</sup> explains the position; to successfully set aside the application of a *voetstoots* clause, the buyer needs to prove that the seller was aware of the defect at the time of conclusion of the contract and concealed it *dolo malo*.

*Waller & another v Pienaar & another*<sup>130</sup> confirms the above position and adds that the seller should have a legal obligation to reveal defects to the buyer before it will lead to liability and the fraudulent representation should have convinced the buyer to enter into the contract. The seller will be protected if the defect is clearly visible.<sup>131</sup>

The buyer may, regardless of a contract containing a *voetstoots* clause, where fraudulent misrepresentation took place, base the cause of action on the *aedilician* actions or delictual grounds.<sup>132</sup>

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<sup>126</sup> Nagel 225.

<sup>127</sup> See discussion regarding *Minister van Landbou-tegniese dienste v Scholtz* 1971 3 All SA 81 (A) in 5 above.

<sup>128</sup> *Odendaal v Ferraris* 2008 4 All SA 529 (SCA).

<sup>129</sup> 1991 4 All SA 42 (AD).

<sup>130</sup> 2004 JOL 13046 (C).

<sup>131</sup> *Waller and another v Pienaar and another* supra: "The position of the seller who sells "voetstoots" is captured by the well-known dictum of Silke J in *Knight v Trollip* 1948 3 SA 1009: "I think it resolves itself to this, viz that here the seller could be held liable only in respect of defects of which he knew at the time of the making of the contract, being defects of which the purchaser did not then know. In respect of those defects, the seller may be held liable where he has designedly concealed their existence from the purchaser, or where he has craftily refrained from informing the purchaser of their existence. In such circumstances, his liability is contingent on his having behaved in a way which amounts to a fraud on the purchaser, and it would thus seem to follow that, in order that the purchaser may make him liable for such defects, the purchaser must show directly or by inference, that the seller actually knew. In general, ignorance due to mere negligence or ineptitude is not, in such a case equivalent to fraud."

<sup>132</sup> *Truman v Leonard* 1994 4 All SA 445 (SE).

## 7. AEDILITAIN ACTIONS

The *aedilitian* actions are mostly used where the warrantee against latent defects is *ex lege* included in the contract.<sup>133</sup> It may also be applicable where the seller gave the buyer an explicit or implied warrantee.<sup>134</sup> *Van der Merwe v Meades*<sup>135</sup> illustrates the application of the *aedilitian* actions.<sup>136</sup>

The *actio redhibitoria* and *actio quanti minoris* can therefore be instituted where there are latent defects in the *merx*; where the buyer concealed defects in the *merx* with the sole purpose of misleading the buyer; where the seller explicitly or by implication warrants the buyer that the *merx* are suitable for a specific purpose or that the *merx* are free of certain defects or where the seller made a false *dictum et promissum*<sup>137</sup> during the negotiations (not merely a sales pitch).<sup>138</sup> The *aedilitian* actions may also be instituted where there is an invalid *voetstoots* clause in a contract of sale.<sup>139</sup> The court in *Janse van Rensburg v Greive Trust CC*<sup>140</sup> decided that institution of the *aedilitian* actions should be extended to barter transactions.

### 7.1 ACTIO REDHIBITORIA

The main purpose of the *actio redhibitoria* is to achieve restitution. The buyer may claim the purchase price, while the seller may claim back the *merx*.<sup>141</sup> This is a once-off remedy and may only be instituted if the defect is of such nature that it renders the *merx* useless for its intended purpose.<sup>142</sup> *De Vries v Wholesale Cars en 'n ander*<sup>143</sup> illustrates the application of the afore-mentioned test.

The facts of the *De Vries* case is as follow: De Vries bought a vehicle from Wholesale cars. However, the steering mechanism of the vehicle was defective. De Vries took the vehicle back

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<sup>133</sup> Nagel 223.

<sup>134</sup> Mostert Joubert Viljoen 198.

<sup>135</sup> 1991 4 All SA 42 AD. Sien ook *Waller and another v Pienaar and another* 2004 JOL 13046 (C).

<sup>136</sup> Sien 'n volledige bespreking hiervan in hoofstuk 1.

<sup>137</sup> *Phame (Pty) Ltd v Paizes* supra.

<sup>138</sup> Nagel 226. Mostert Joubert Viljoen 198.

<sup>139</sup> *Truman v Leonard* 1994 4 All SA 445 (SE). Sien ook die bepreking hierbo onder die *voetstootsklousule*.  
<sup>140</sup> 2000 1 SA 315 (K).

<sup>141</sup> Nagel 227. Mostert Joubert Viljoen 210.

<sup>142</sup> *Janse van Rensburg v Grieve Trust CC* 2000 1 SA 315 (K).

<sup>143</sup> 1986 1 All SA 158 (O).

to the merchant seller for reparation. The repair was unsuccessful and the faulty steering mechanism caused the vehicle to be involved in an accident. De Vries insisted that his contract of sale with Wholesale cars be cancelled and that restitution should take place. The court a quo found that the defect was not significant enough to warrant restitution and ordered a reduction of the purchase price. De Vries appeals.

The question before the Supreme Court of appeal was whether the defect was serious enough to warrant a successful claim in terms of the *actio redhibitoria*. The court found this to be an objective test. The question is whether the buyer would have bought the goods if he was aware of the defect at the time of conclusion of the contract.<sup>144</sup> The court takes the following circumstances into account to determine if the defect is a material defect: how speedily the defect can be repaired; the cost of reparation; the effect of the inconvenience on the psyche of the buyer and whether the defects might have been caused by normal wear and tear, in which case it will not be a material defect. The court considered these factors and the appeal therefor succeeded.

## 7.2 ACTIO QUANTI MINORIS

Pro-rata reduction of the purchase price can be claimed with the *actio quanti minoris* and it can be instituted multiple times<sup>145</sup> if more defects arise.<sup>146</sup> The reduction is determined by the difference between the purchase price and the value of the defective *merx*.<sup>147</sup> The buyer has no claim if the defect increased the value of the *merx*.<sup>148</sup>

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<sup>144</sup> De Wet en Yeats *Kontraktereg en Handelsreg*, 4de uitgawe bl 304. In *Weinberg v Aristo Egyptian Cigarette Co.* 1905 TS 760 Innes HR makes the following comments on p 764 about the *actio redhibitoria*: "Even after the goods have been delivered, if there is a latent defect in them so serious that if the buyer had known of it he would not have bought them, the buyer can claim rescission of the contract and the return of the purchase-money." Also see *Reed Bros, v Bosch* 1914 TPD 578 on p 582.

<sup>145</sup> *Truman v Leonard* supra.

<sup>146</sup> *Truman v Leonard* supra: "It may also be observed in this regard that in *Crawley v Frank Pepper (Pty) Ltd* 1970 (1) SA 29 (N) at 36F-H and 37E-G it was held that the action for a reduction of a purchase price was not based on delict despite the averment of non-disclosure in the plaintiff's particulars of claim. Reliance was placed on the fact that *Voet* 21.1.10, quoting *Ulpian*, says that fraud comes into play by way of replication. It is true that in *Crawley's* case the first reference to a *voetstoots* clause was in the plea and that in the present matter the plaintiff mentions that the sale was *voetstoots* in the particulars of claim. But this distinction in the form of pleading is hardly sufficient to convert an *aedilitian* claim into a delictual action."

<sup>147</sup> *Phame (Pty) Ltd v Paizes* supra.

<sup>148</sup> Nagel 227. Mostert Joubert Viljoen 218.

### 7.3 CASES WHERE THE AEDILITION ACTIONS MAY NOT BE INSTITUTED:

If the defect arises after the conclusion of the contract or if it is not a hidden defect, these remedies may not be instituted.<sup>149</sup> The buyer also has no recourse in case of a valid *voetstoots* sale.<sup>150</sup> The buyer may also not use the *aedilition actions* to claim damages where the seller repaired the defect with the understanding that it occurred before conclusion of the contract (but it actually occurred after conclusion of the contract) and where the seller is not the merchant seller or manufacturer of the *merx*.<sup>151</sup> Where the seller is the manufacturer of the goods, the buyer has to afford the seller a chance to repair the defect after conclusion of the contract. If the seller can prove on a balance of probabilities that the buyer intentionally abandoned his right to claim damages, no claim can be instituted.<sup>152</sup> All actions must be instituted subject to the rules of the Prescription Act 68 Of 1969. The Buyer will thus forfeit his claim if he did not institute it accordingly.<sup>153</sup>

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<sup>149</sup> Nagel 228.

<sup>150</sup> *Van der Merwe v Meads* supra. See discussion regarding invalid *voetstoots* clause in this chapter.

<sup>151</sup> Mostert Joubert Viljoen 201.

<sup>152</sup> Must prove on a balance of probabilities that the buyer acted intentionally and with proper knowledge: *De Vries v Wholesale Cars* supra; *Miller v Dannecker* 2001 (1) SA 928 (K).

<sup>153</sup> Nagel 228.



## CHAPTER 3

### THE SCOPE AND PURPOSE OF THE CONSUMER PROTECTION ACT PERTAINING TO LATENT DEFECTS IN SALE AGREEMENTS

#### 1. INTRODUCTION

The requirements for a valid contract are based on freedom of contract, sanctity of contract, privity of contract and good faith. These cornerstones originate from Roman law and were elaborated on by English and Dutch writers.<sup>154</sup> The South African Law of contract is therefore mainly an application of the common law modernized and expanded by legislation.<sup>155</sup>

The Consumer Protection Act 68 of 2008 (here after the CPA) came into force in 2010. This controversial legislation drastically affects freedom of contract. Freedom of contract functions under the assumption that the involved parties have equal bargaining power, which is not always true.<sup>156</sup> The main objectives of the CPA are therefore to level the playing field and protect vulnerable consumers against exploitation by suppliers.

The term “Voetstoots” entails that goods are sold or leased “as it stands” or “as is”, exempting the seller/lessor from liability for any patent or latent defects.<sup>157</sup> Before the Consumer Protection Act came into effect, the *voetstoots* clause was permitted if, at the time of conclusion of the contract: The seller/lessor was unaware of any defects in the goods concerned; The seller/lessor disclosed any defects he/she had knowledge of to the buyer/lessee.<sup>158</sup> Forthwith the use of the *voetstoots* clause is curbed in transactions subject to the CPA. Despite its good intentions, interpretation and enforcement remains problematic, this raises the ominous question whether the act fulfills its purpose.

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<sup>154</sup> Hutchison D et al *The Law of Contract in South-Africa* (2009) 21.

<sup>155</sup> Supra 11.

<sup>156</sup> Supra 23.

<sup>157</sup> Nagel *Commercial Law* (2011) 228.

<sup>158</sup> Supra.

The act includes provisions dealing with the warrantee against latent defects and the *voetstoots* clause. The content and applicability of these sections will be discussed in this chapter with specific reference to sections 53, 54, 55, 56 en 61.

## 2. THE SCOPE OF THE ACT

The Act applies to all transactions<sup>159</sup> relating to the supply or promotion of goods and services, during the normal course of business, within the Republic of South-Africa<sup>160</sup> as well as the goods and services forming the object of the transaction<sup>161</sup> (unless specifically excluded by the act).<sup>162</sup>

The following transactions are excluded from the application of the act: transactions regulated by the National Credit Act;<sup>163</sup> transactions exempted by the minister; transactions concerning the supply of goods and services to the state<sup>164</sup> and any transaction in terms of an employment contract<sup>165</sup> or collective bargaining agreement.<sup>166</sup>

It is important to note that the CPA is not applicable to genuine auctions or private sales and the sale must take place during the seller's normal course of business.<sup>167</sup> If the consumer is a business, it must have an asset value of less than the threshold value determined by the minister<sup>168</sup> before the act will apply<sup>169</sup>. It must be noted that some sections of the act may, in certain instances, still be applicable to the goods pertaining to these excluded transactions

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<sup>159</sup> S1; A transaction in terms of this act entails a transaction concluded during the normal course of business of one of the parties. Once-off transactions are thus excluded.

<sup>160</sup> S 1; Means to sell, rent or exchange goods.

<sup>161</sup> S 5(1); *Otto Verborge gebreke, voetstootsverkope, die Consumer Protection Act en die National Credit Act* THRHR 2011 528.

<sup>162</sup> S 5(1)(a)–(d).

*Otto The National Credit Act explained* (2010) par 60; Melville en Palmer "The applicability of the Consumer Protection Act 2008 to credit agreements" 2010 *SA Merc LJ* 272. The act applies to the goods and services pertaining to the credit agreement.

<sup>164</sup> S 5(2)(a). The act does not contain a definition for the word "state" It is not clear whether the act applies to transactions where the state is a shareholder in a company. The definition of the word state appears to be the same as the definition in s239 of the 1996 Constitution of the Republic of South Africa.

<sup>165</sup> S 5(2)(e). It is unclear whether temporary employment contracts are also excluded from the ambit of the act.

<sup>166</sup> Labour Relations Act 66 of 1995 A 213. Includes a collective bargaining agreement in terms of the Labour Relations Act and the 1996 Constitution s23.

<sup>167</sup> *Otto Verborge gebreke, voetstootsverkope, die Consumer Protection Act en die National Credit Act* THRHR 2011 536.

<sup>168</sup> Currently R2 million.

<sup>169</sup> S 5(2).

even though it is not applicable to the transaction itself.<sup>170</sup> This chapter will attempt to interpret and analyse the field of application to determine whether the act affords sufficient protection to consumers.

### 3. LATENT DEFECTS

There are a series of provisions pertaining to the warrantee against latent defects. The warrantee is contained in the same sections as strict product liability and purpose of the *merx* as it cannot function alone.<sup>171</sup>

The “Right to fair value, good quality and safety” are discussed in part H of chapter 2 of the act. Section 53(1)(a) defines a “defect” as –

- “(i) any material imperfection in the manufacture of the goods or components, or in performance of the services, that renders the goods or results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or
- (ii) 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.

The test in both instances is whether a reasonable consumer can expect more from the *merx*.<sup>172</sup> Section 55 deals with the consumer’s right to safe and good quality goods.<sup>173</sup> Section 55(2) states that all goods, subject to this section, needs to be reasonably suitable for their intended purpose,<sup>174</sup> be of good quality and free of any defects.<sup>175</sup> The consumer can expect the *merx* to be suitable for a specific purpose<sup>176</sup> if he notified the supplier of his intended purpose for the goods<sup>177</sup> and the supplier acts as an expert<sup>178</sup> regarding the goods.

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<sup>170</sup> Goods forming the object of a credit agreement. S 5(2)(d).

<sup>171</sup> Otto 536. See also Van Eeden *Consumer protection law in South Africa* (2013) 350.

<sup>172</sup> There are a debate regarding this test. Jacobs, Stoop & Van Niekerk “Fundamental consumer rights under the Consumer Protection Act 68 of 2008: A critical overview and analysis” 2010 PER 302 363 These writers warn however that the exact extent of the test for defective goods or services will have to be determined based on the facts of each case when interpreted by our courts, taking all the relevant circumstances into account.

<sup>173</sup> S 55(1). This section is not applicable on goods sold at an auction. The common law rules will apply.

<sup>174</sup> S 55(2)(a).Van Eeden 351.

<sup>175</sup> S 55(2)(b).Van Eeden 351.

<sup>176</sup> S 55(3).

<sup>177</sup> S 55(3)(a).

The consumer's right to safe and good quality goods includes the right to receive goods that are durable and useable for a reasonable time.<sup>179</sup> Goods must comply with any applicable standards<sup>180</sup> and public regulations.<sup>181</sup> All circumstances surrounding the supply of the goods have to be taken into account to determine whether sections 55 (2) and (3) are complied with.<sup>182</sup>

In terms of the act, it is irrelevant whether defects are latent or patent.<sup>183</sup> The common law rule, the buyer should not have been able detect the defect with reasonable care, are no longer applicable. Where a seller sells a dated product because a newer version of the product became available cannot be classified as latent defects.<sup>184</sup>

Section 55(6) determines that a consumer may not rely on section 55(2)(a) and (b) if he was informed about the condition of the *merx* and expressly accepted the *merx* in that condition or knowingly acted in a way compatible with accepting the *merx* in that condition. This section influences the common law use of the *voetstoots* clause.<sup>185</sup> It is a requirement under the CPA that the supplier must inform the consumer of any defects or flaws in the *merx*.<sup>186</sup>

#### 4. EX LEGE WARRANTEE

Section 56 is one of the most controversial sections in the act, it amends the common law. This section states that the seller provides the buyer with an *ex lege* warrantee that a transaction complies with the requirements set out in section 55.<sup>187</sup> The warrantee is present in

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<sup>178</sup> S 55(3)b.

<sup>179</sup> S 55(2)c.

<sup>180</sup> Standards Act 29 of 1993.

<sup>181</sup> S 55(2)d.

<sup>182</sup> S 55(4).

<sup>183</sup> S 55(5)b.

<sup>184</sup> S 55(5)a.

<sup>185</sup> See the discussion in chapter 2 under number 6.

<sup>186</sup> Otto 537.

<sup>187</sup> Supra.

every transaction. Section 56 (4) describes it as an “implied warranty”.<sup>188</sup> However, sections 55 and 55 must be read together.<sup>189</sup>

The buyer has the right, in terms of section 56(2), to return the goods to the supplier, within six months after delivery took place, if the transaction did not comply with the standards set out in section 55. The buyer may ask the supplier for a refund, replacement or repair of the *merx*. The supplier must refund the buyer if the supplier repaired the defect and the same defect surfaces or a new defect occurs within 3 months after the repair took place.<sup>190</sup>

The *ex lege* warrantee in section 56(1) is curbed by the restriction in section 55(6). *Merx* may be sold *voetstoots*, however, it seems that the clause will only be valid six months after delivery took place.<sup>191</sup> The buyer may rely on the common law to enforce the *ex lege* warrantee six months after delivery took place if the *merx* was not sold *voetstoots*.<sup>192</sup> The normal rules of prescription will apply.<sup>193</sup>

Section 56(3) gives a consumer the right to use the remedies in section 56(2) according with his own discretion. Section 56(4) states that an *ex lege* warrantee exists with any other warrantee the buyer may have in terms of common law, legislation and public regulation<sup>194</sup> as well as any explicit warrantee given by the supplier.<sup>195</sup> The act does not account for any other implied warrantees. These other implied warrantees are sometimes confused with *ex lege* warrantees.<sup>196</sup>

Section 56 is problematic for sales of immovable property. Immovable property may no longer be sold *voetstoots* after the commencement of the act. The buyer may choose between the remedies provided by section 56, if the property has any latent defects. It is problematic for the

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<sup>188</sup> Supra.

<sup>189</sup> Jacobs, Stoop en van Niekerk *Fundamental consumer rights under the Consumer Protection Act 68 of 2008: A critical overview and analysis* PER (2010 )13 3 373.

<sup>190</sup> Otto 537. See also Van Eeden 352.

<sup>191</sup> Jacobs, Stoop en van Niekerk 373.

<sup>192</sup> Jacobs, stoop and van Niekerk is of the opinion is that the implied warrantee will exist indefinitely and that the normal rules of prescription will apply.

<sup>193</sup> Supra.

<sup>194</sup> S 56(4)a.

<sup>195</sup> S 56(4)b.

<sup>196</sup> Jacobs, Stoop en van Niekerk 374.

seller if he already bought new property and the buyer prefers to be refunded since transfer of ownership is on the date of registration in the deeds office and not upon physical delivery.<sup>197</sup> There are major cost implications and inconvenience arising from this section. The interpretation of the word “goods” will determine whether these types of transactions are subject to the act.

## 5. LIABILITY FOR DAMAGES CAUSED BY DEFECTIVE MERX:

### MANUFACTURER’S LIABILITY

Prior to commencement of the act, manufacturer’s liability formed part of the law of contract or the law of torts.<sup>198</sup> Contractual liability vests when a *nexus* exists between the defective *merx* and the manufacturer of the goods. The buyer seldom succeeded to prove contractual liability.<sup>199</sup> Alternatively the buyer could use delictual remedies.<sup>200</sup> The buyer had to prove the five elements of a delict before the manufacturer could be held liable. It was difficult to prove guilt,<sup>201</sup> since strict product liability was not recognised before the commencement of the act.<sup>202</sup>

Section 61(1) and (2) states the following:

- (1) Except to the extent contemplated in subsection (4), the producer or importer, distributor or retailer of any goods is liable for any harm, as described in subsection (5), caused wholly or partly as a consequence of—
  - (a) supplying any unsafe goods;
  - (b) a product failure, defect or hazard in any goods; or
  - (c) inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods, irrespective of whether the harm resulted from any negligence on the part of the producer, importer, v distributor or retailer, as the case may be.

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<sup>197</sup> Barnard J *The influence of the Consumer Protection act 68 of 2008 on the common law of sale* (Unpublished LLD Thesis, University of Pretoria) 2013 52.

<sup>198</sup> Jacobs *Stoop van Niekerk* 382.

<sup>199</sup> *Supra*.

<sup>200</sup> Neethling, Potgieter and Visser *Law of Delict* (2006) 292.

<sup>201</sup> *Supra* 294.

<sup>202</sup> *Supra*.

(2) A supplier of services who, in conjunction with the performance of those services, applies, supplies, installs or provides access to any goods, must be regarded as a supplier of those goods to the consumer, for the purposes of this section

In terms of section 61, the supplier, distributor, importer or trader is strictly liable for any damage caused by defects in their products.<sup>203</sup> Section 61(2) includes goods supplied as part of rendering a service. The service provider is liable for the installation of defective goods. Other persons who suffered loss as a result of the defective goods may also claim in terms of section 61.<sup>204</sup>

Most defects fall within the ambit of section 61, including defects in buildings and land, false information in books, defective computer software, infected blood from the South-African blood bank and pharmaceuticals.<sup>205</sup> The onus is on the claimant to prove a direct link between the damage and the defect.<sup>206</sup>

The term damage, for purposes of section 61, includes<sup>207</sup>: Death, injury<sup>208</sup> or illness<sup>209</sup> of a natural person; Loss or damage of movable or immovable property<sup>210</sup> as well as economic loss.<sup>211</sup>

Section 61(4) includes a list of defenses that may be raised by the supplier against strict liability. The supplier may argue that the defect arose as a result of compliance with a public regulation<sup>212</sup> or that the defect was absent at delivery.<sup>213</sup> The supplier may also argue that the consumer failed to comply with the directions for use of the *merx*.<sup>214</sup> It is unreasonable to expect the distributor or seller to be liable for defects that are untraceable when selling and

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<sup>203</sup> S 61(1)(b).

<sup>204</sup> Jacobs, Stoop en van Niekerk 382.

<sup>205</sup> Supra 385 vn 572-575.

<sup>206</sup> Supra 385.

<sup>207</sup> S 61(5).

<sup>208</sup> S 61(5)(a).

<sup>209</sup> S 61(5)(b).

<sup>210</sup> S 61(5)(c).

<sup>211</sup> S 61(5)(d). Loss of income, profit or earning ability.

<sup>212</sup> S 61(4)(a).

<sup>213</sup> S 61(4)(b)(i).

<sup>214</sup> S 61(4)(b)(ii).

distributing the goods.<sup>215</sup> The claim is also subject to the normal three year prescription period.<sup>216</sup>

## 6. ENFORCEMENT

Enforcement of consumer rights is dealt with in section 76. It gives a court discretion to make the following orders, in addition to any order in terms of this act or any other right, concerning a dispute regarding the violation of consumer's rights arising from the act: <sup>217</sup> order a supplier to stop or change any behavior contrary to the act<sup>218</sup>; an order specifically intended by the act; a reasonable amount payable to the consumer or a group of consumers for damages or injury suffered.<sup>219</sup> The act does not prevent the consumer from claiming special damages and interest.<sup>220</sup> The consumer or supplier is also entitled to claim an amount from the opposing party where counter performance was not received.<sup>221</sup>

## 7. COMMON LAW REMEDIES AND THE CPA

The question is raised whether the common law remedies<sup>222</sup> are still available to the buyer even though the CPA provides its own remedies. Section 2(10) of the CPA provides that no section in the act may be interpreted as to preclude the consumer from any remedies provided for by common law.<sup>223</sup> Section 56(4) also states that the implied warranty and the consumer's right to be refunded and to repair or replace defective *merx*, are in addition to any implied warranty or condition imposed by common law.<sup>224</sup> For practical reasons<sup>225</sup> it is less

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<sup>215</sup> S 61(4)(c).

<sup>216</sup> S 61(4)(d)(i) read with A 61(5)(a). Normal prescription applies.

<sup>217</sup> S 76 (1).

<sup>218</sup> S 76 (1)(a).

<sup>219</sup> S 76 (1)(b). The order made by the court should be fair and reasonable taking into account all the surrounding circumstances and should stroke with the purpose of the act.

<sup>220</sup> S 76 (2)(a).

<sup>221</sup> S 76 (2)(b).

<sup>222</sup> Actio qaunti minoris, actio redhibitoria and action empti.

<sup>223</sup> Barnard 469.

<sup>224</sup> Barnard 469. Also in addition any implied warranty or condition imposed by the CPA, any public regulation or additional warranty or condition given by the retailer, producer, importer, distributor or any other party in the supply chain.

<sup>225</sup> For eg: To institute the actio redhibitoria the defect needs to be of material nature, it is thus easier to rely implied warranty in the act.



cumbersome to rely on the act than the common law remedies but these remedies are still to the disposal of the consumer if he wants to make use of them.<sup>226</sup>

## 8. CONCLUSION

The application of the act is problematic and creates controversy. Some sections prove to be vague and ambiguous. Even though the shortcomings are legion, they fall outside the ambit of this research. Courts may provide some clarity in the near future; however, the legislator should take the sections discussed in this chapter under advisement.

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<sup>226</sup> For further discussion regarding the preference of actions see Barnard 470.

## CHAPTER 4

### WARRENTEE AGAINST LATENT DEFECTS AND THE VOETSTOOTS CLAUSE IN SALES OF IMMOVABLE PROPERTY, SECOND HAND SALES AND TRADE-IN TRANSACTIONS

#### 1. INTRODUCTION

The CPA had significant impact on contracts of sale. The act creates controversy and confusion regarding certain types of sales agreements. These agreements deserve some attention in this research. This chapter will therefore focus on the effect of the CPA on the common law warranty against latent defects as well as the exclusion of the seller's liability in terms of a *voetstoots* clause in sales of immovable property, the sale of second-hand goods as well as trade-in transactions.

#### 2. SALES OF IMMOVABLE PROPERTY

In the past a *voetstoots* clause was an automatic defense against any defects that came to light after the conclusion of a sale of property. The only exception was where the seller failed to disclose a latent defect that he was aware of at the time of conclusion of the contract.<sup>227</sup> The courts referred to this as a fraudulent no-disclosure and consistently ruled that these types of non-disclosures cancel the protection of the *voetstoots* clause.<sup>228</sup> Where the buyer proved a fraudulent no-disclosure, the seller had to take back the defective goods and refund the buyer. As mentioned earlier,<sup>229</sup> the CPA is not applicable where the seller or intermediary is not regarded as a trader or dealer in the *merx*<sup>230</sup> and where the buyer is a juristic person having

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<sup>227</sup> Hands M *The 'voetstoots' clause in property sale agreements* Property (December 2012) 11. Van Eeden E *Consumer Protection Law in South-Africa* 2013 354.

<sup>228</sup> Supra.

<sup>229</sup> Chapter 3 No 2 of this research.

<sup>230</sup> S 5(2) of act 68 of 2008.

assets or an annual turnover of R2 million or more.<sup>231</sup> Thus, a natural person or body corporate with moderate means enjoys the protection of the act. People selling their homes are not dealers or traders and therefore have to disclose any defects they are aware of to the estate agent to avoid a disappointed buyer to hold the estate agent, directly liable for any latent defects.

Many believe that the *voetstoots* clause has become redundant, however where the act does not apply it is still very much acceptable practice to include these clauses. Buyers must therefore pay careful attention when buying property in once-off transactions since a *voetstoots* clause will be valid and enforceable.

As discussed in chapter 3 of this dissertation, section 56 of the CPA provides and implied warranty of quality. This section gives the buyer the right to return defective goods within six months of delivery. Unwinding property transfers will give rise to interesting disputes since the property is only delivered when the deed is transferred to the buyer's name in the deeds office and not when the buyer physically or symbolically takes delivery of the property.<sup>232</sup>

### 3. SECOND HAND GOODS

The application of the CPA is problematic for the sale of second hand goods. Especially when dealing with merchant sellers also selling goods second hand. Car dealerships are a good example. The insertion of a *voetstoots* clause in these circumstances comes down to the exclusion of the merchant seller's liability and therefore seems problematic to sell second hand goods *voetstoots* since the clause will not be enforceable.<sup>233</sup> Barnard argues that a possible exception may exist where the dealer sells the vehicle on behalf of the owner and thus only acts as an agent, in which case section 55 will not be enforceable against the dealership.<sup>234</sup> The transaction will in this case qualify as a once-off transaction to which the Act is not applicable. This may however be an easy way for suppliers to circumvent the application of the

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<sup>231</sup> S 1 of act 68 of 2008.

<sup>232</sup> Bracher P *Voetstoots clause still carries weight* Business Day (June 2011) 10.

<sup>233</sup> Barnard J *The influence of the Consumer Protection act 68 of 2008 on the common law of sale* (Unpublished LLD Thesis, University of Pretoria) 2013 401.

<sup>234</sup> Supra.

Act. Sellers will often sell second hand goods by way of auctions to avoid application of the Act.

It seems that the courts and the Consumer Tribunal will follow the approach that second hand goods cannot be compared to new goods.<sup>235</sup> Ordinary wear and tear will have to be taken into account when inspecting the condition of second hand goods. This approach still does not warrant the insertion of a *voetstoots* clause. Dealers might use ordinary wear and tear as an excuse to get away with the vehicle being in a worse condition than what it was presented to the buyer.<sup>236</sup> According to Barnard the fact that the goods are second hand will be taken into account as circumstances surrounding the supply of the goods for purposes of section 55. The Minister of Trade and Industry is given authority to publish industry codes that will hopefully clarify the situation regarding sales of second hand goods.<sup>237</sup>

#### 4. TRADE-IN TRANSACTIONS

The CPA is applicable to all trade-in transactions concluded in a seller's normal course of business.<sup>238</sup> The buyer has all rights in terms of chapter 2 of the Act as well as the implied warranty of quality and remedies available in terms of section 56 for a breach of that warranty.<sup>239</sup> The seller also has to comply with the duties regarding marketing when concluding a trade-in transaction.<sup>240</sup> However all claims seller's might have resulting from the trade-in part of the transactions falls outside the ambit of the act and will be governed by common law.<sup>241</sup>

#### 5. CONCLUSION

Common law will still apply where buyer is body corporate. Buyers should think twice before buying assets in a company name and if you do so make sure the company has very little or

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<sup>235</sup> Supra. Addison v Harris 1945 NPD 444.

<sup>236</sup> Barnard 402.

<sup>237</sup> Supra.

<sup>238</sup> Supra.

<sup>239</sup> Supra.

<sup>240</sup> Supra.

<sup>241</sup> *Janse van Rensburg v Grieve Trust* CC 2000 1 SA 315 (C).

no other assets to avoid not being protected by the act. Barnard advises buyers of property and second hand goods to consult an independent expert to inspect the *merx* before they buy.<sup>242</sup>

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<sup>242</sup> Barnard 400.

## CHAPTER 5

### WARRENT EE AGAINST LATENT DEFECTS AND THE VOETSTOOTS CLAUSE IN LEASE AGREEMENTS

#### 1. INTRODUCTION

Many South Africans are dependent upon the mechanism of lease to afford adequate housing. It is therefore of grave importance to regulate lease agreements. It creates legal certainty concerning the rights and obligations of both the lessee and lessor. It is also essential to maintain a balance between the rights and responsibilities of both parties.

In recent years, the common law lease was supplemented by the Rental Housing Act<sup>243</sup> and the prevention of Illegal Eviction from Unlawful Occupation of Land Act (PIE).<sup>244</sup> The Consumer protection Act<sup>245</sup> was introduced in 2008 in an attempt to meet international consumer protection standards, to promote the social and economic welfare of South African consumers and to protect them against unfair business practices. If any inconsistency arises between the CPA and any other act, the provisions of both acts apply concurrently (to the extent that it is possible to comply with one of the provisions without contravening the second).<sup>246</sup> If it is not possible, the provision affording the greater protection to the consumer will prevail.<sup>247</sup>

As explained in chapter two of this research, the CPA applies to the marketing and supply of goods and services. Rental of immovable property classifies as a service in terms of the act. The act is also applicable to the goods involved in rendering the service, in this case the

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<sup>243</sup> Act 50 of 1999.

<sup>244</sup> Act 19 of 1998.

<sup>245</sup> Act 68 of 2008.

<sup>246</sup> S 2(9)(a).

<sup>247</sup> S 2(9)(b) With the provision pertaining to hazardous chemical products only the CPA will apply.

leased property. The act will, as with contracts of sale, only apply when the lease agreement is conducted in the ordinary course of the supplier's business.<sup>248</sup>

The CPA protects eight categories of consumer rights, namely<sup>249</sup>:

- a) The right of equality in the consumer market.
- b) The right to privacy.
- c) The consumer's right to choose.
- d) The right to disclosure of information.
- e) The right to fair and responsible marketing.
- f) The right to fair and honest dealing.
- g) The right to fair, just and reasonable terms and conditions.
- h) The right to fair value, good quality and safety.

This chapter will consider the impact of the CPA on lease agreements and how the aforementioned consumer rights are protected. The discussion will commence with an overview of the common law of lease of property in South Africa and how it was impacted by legislation. It will conclude with the perceived impact of the CPA.

## 2. COMMON LAW LEASE

### 2.1 ROMAN LAW

The ancient Romans recognised three types of lease agreements, namely: Letting and hiring of a *res*; letting and hiring of services and the letting and hiring of work. This dissertation will focus on the hiring and letting of a *res*<sup>250</sup> (*Locatio conduction re*) with specific reference to the letting and hiring of immovable property.

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<sup>248</sup> See chapter 2 of this dissertation.

<sup>249</sup> Van Heerden in Nagel et al *Kommersiëleereg* (4<sup>th</sup> ed) at 707. Kerr AJ *The Law of Sale and Lease* (3<sup>rd</sup> Edition) 2004 314.

<sup>250</sup> The thing rented or hired. Thomas van der Merwe Stoop *Historiese Grondslag van die Suid-Afrikaanse Privaatreg* 2000 p306.

In Roman law, the lessee and lessor had certain rights and responsibilities regarding the *res*.<sup>251</sup> The lessor's duty of care (*culpa levis in abstarcto*) is relevant for the purpose of this research. He had to perform this duty with the care and skill of a reasonable man. If the lessee discovered any latent defects in the *res* and the lessor should have been aware of the defect,<sup>252</sup> the lessor was liable for any damages caused by the defect.

The first signs of strict liability can be found in the Roman law, where the romans held the manufacturer as the lessor of wine barrels strictly liable for any defects in their barrels. If a wine barrel leaked the manufacturer was seen as negligent and therefore liable for any loss the lessee suffered due to the defect, regardless of the fact that he was unaware of the defect.<sup>253</sup> The lessor was only liable for other defects in the *res* if he should have been aware of the defect or was aware of it but failed to inform the lessee.<sup>254</sup>

The lessee had the *actio conducti* to force the lessor to fulfill his responsibilities. There is no mention in the Roman law of cancellation of the agreement where the lessee would never have entered into it if he was aware of the defect. The *actio conducti* only provided a remedy to claim damages.

## 2.2 SOUTH AFRICAN LAW BEFORE COMMENCEMENT OF THE CPA

Most of the Roman principles vested in the South African law. The lessor's duty of care is still one of a lessor's primary responsibilities. The *res* must be delivered<sup>255</sup> to the lessee in the agreed condition. If there was no mention of the condition of the *res*, it should be delivered in the condition it was in at the time of the conclusion of the contract. If the *res* is leased for a specific purpose, the lessee may except that it will be suitable for that purpose<sup>256</sup>.

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<sup>251</sup> Supra p307.

<sup>252</sup> The test is the reasonable man test.

<sup>253</sup> Thomas van der Merwe Stoop p307.

<sup>254</sup> Supra.

<sup>255</sup> See Nagel et al *kommersiële reg* p257 par 17.04 for the meaning of delivery.

<sup>256</sup> Harlin Properties (Pty) Ltd v Los Angeles Hotel (Pty) Ltd 1962 3 SA 143 (A).



If the leased premises is not delivered in the agreed condition or cannot be used for its intended purpose, the lessee may make use of normal contractual remedies. If the property is unfit for the purpose it was leased the lessee has the right to cancel the contract since this constitute a major breach of contract.<sup>257</sup> On the other hand, if the property can only partially be used for the purpose it was leased, the lessee may claim damages or a proportionate reduction of the rent.<sup>258</sup> Alternatively the lessee may demand that the lessor put the *res* in the appropriate condition (claim for specific performance).<sup>259</sup>

It was also possible under the common law for a lessee to claim consequential damages. The court ruled in *Stewart & Co v Executors of Staines*<sup>260</sup> that the lessor will be held liable for any harm or loss caused due to the fact that leased property is not delivered in the appropriate condition.

In the case of *Salmon v Dedlow*<sup>261</sup> the court confirmed that the lessor be held liable for any defects in the *res* that he was aware of or should reasonably have been aware of. In this particular case the lessee in informed the lessor that the roof of the building he leased leaked. The lessor failed to repair the defect and was therefore held liable for rain damage to the lessee's property.<sup>262</sup>

It was common practice for a lessor to include *voetstoots* clauses in lease agreements. These clauses were valid unless the lessor knew about defects in the *res* and tried to fraudulently exclude his liability. A lessee may also, as is the case with sale agreements, not rely on his warranty against latent defects if he was aware of the defects or should reasonably have been aware, taking into account the surrounding circumstances and the nature of the lessee's profession, at the time of conclusion of the contract and nevertheless rented the *res* in that condition.

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<sup>257</sup> Kerr AJ *The Law of Sale and Lease* (3<sup>rd</sup> Edition) 2004 314.

<sup>258</sup> *Supra*. See examples as referred to by Kerr.

<sup>259</sup> Kerr 314

<sup>260</sup> (1863) 4 Searle 152.

<sup>261</sup> 1912 TPD 971.

<sup>262</sup> Thomas van der Merwe *Stoop* p310.

## 2.3 IMPACT OF LEGISLATION

Until 1 August 2000 lease agreements was regulated by the common law<sup>263</sup>. The Rental and Housing act 80 of 1976 regulated certain aspects of lease agreements for residential purposes until the promulgation of the Rental and Housing Act 50 of 1999. No further attention will be paid to the 1976 act since it was repealed entirely by the Rental and Housing act<sup>264</sup>.

The provisions of the Rental and Housing act are regulated by the Rental and Housing tribunal. Any lessee, lessor, interest group or a group of lessees or lessors may refer any dispute concerning unfair practice<sup>265</sup> to the tribunal.<sup>266</sup>

The CPA came into force in 2010 and appears to be applicable to sale and service agreements. Lease agreements regardless of its purpose falls under the ambit of the act since a lease agreement is seem as a service in terms of the act. The act thus includes lease agreements for commercial purposes.

## 3. IMPACT OF THE CPA ON COMMON LAW LEASE AGREEMENTS

The section most severely impacting lease agreements is section 14 which deals with fixed term agreements. This section falls outside the ambit of this research, however it is worth mentioning that this section only applies where both parties to the agreement are not juristic persons, regardless of their asset value or annual turnover<sup>267</sup>. This means that there are three types of lease agreements for purposes of the act. Firstly, lease agreements falling outside the application of the act. Secondly, lease agreements that fall inside the ambit of the act but to which section 14 does not apply because both parties are juristic persons and lastly lease agreements that entirely falls inside the application of the act.

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<sup>263</sup> Nagel et al *kommersiële reg* p241.

<sup>264</sup> 50 of 1999.

<sup>265</sup> Meaning explained in S1 of act 50 of 1999. The powers of the tribunal are discussed in S 13(2)(a)-(d).

<sup>266</sup> S 13(4) of the Rental and Housing act 50 of 1999.

<sup>267</sup> S 14(1).

The second and third type of lease agreements must comply with the following provisions of the CPA: sections 16, 22, 48, 49, 51, 54, 55 and regulation 44. This research will mainly focus on sections 54 and 55.

Section 54 deals with the consumer's right to demand quality service. S 54(1)(b) and (c) confirms the common law position that the consumer is entitled to the performance of services as well as the use, delivery or installation of goods required for the performance of the service, in a manner and quality that persons are generally entitled to expect, free of any defects.

Section 54(2) sets out the remedies available to the consumer if the supplier fails to comply with the above requirements. The consumer may require the supplier to remedy the defect in the service performed or the goods supplied as part of rendering the service or refund the consumer a reasonable portion of the price paid, having regard to the extent of the failure.

Section 55 is discussed in detail in Chapter three of this research. This section will apply to the goods installed, delivered or used as part of the service performed. It will thus apply to the leased property. Refer to chapter 3 for further discussion regarding the contents of this section. The same principles will apply under lease agreements.

It is important to also mention that in terms of the CPA, a lessee now has the right to cancel a lease with 20 business days' notice to the lessor, regardless of the agreed term of the lessee.<sup>268</sup> This may be done without giving the lessor any legitimate reason. The lessor may in turn levy a reasonable penalty<sup>269</sup> for cancellation to cover any loss he may suffer. The Lessor must however try everything reasonably possible to minimise his loss. If a lessee refers the matter to the Rental Housing Tribunal for dispute, the lessor will forfeit his right to claim

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<sup>268</sup> S 14(3)(a)

<sup>269</sup> Regulation 5 of the CPA: A reasonable credit of charge may not exceed a reasonable amount taking into account the following: The amount the consumer is still liable for to the supplier on the date of cancellation; The value of the transaction up to the date of cancellation; the duration of the agreement as initially agreed; loss suffered or benefits accrued by the consumer as a result of the consumer entering into the consumer agreement; the nature of the goods or services that were reserved or booked; the length of notice of cancellation provided by the consumer; a reasonable potential for the service provider, acting diligently, to find an alternative consumer between the time of receiving the cancellation notice and the time of the cancelled reservation and the general practice of the relevant industry.

penalties if he did not re-rent the property at the same or at more favourable terms and conditions.

#### 4. THE VOETSTOOTS CLAUSE IN LEASE AGREEMENTS

Section 54 of the CPA, as mentioned earlier, gives the lessee the right to receive good quality service from the lessor. Before commencement of the CPA it was practice for lessors to include *voetstoots* clauses or clauses excluding the liability of the lessor for any latent defects.<sup>270</sup> These types of clauses will now be subject to section 49 of the act.

Section 49 of the CPA states the following:

- (1) Any notice to consumers or provision of a consumer agreement that purports to—
- (a) limit in any way the risk or liability of the supplier or any other person;
  - (b) constitute an assumption of risk or liability by the consumer;
  - (c) impose an obligation on the consumer to indemnify the supplier or any other person for any cause; or
  - (d) be an acknowledgement of any fact by the consumer,
- must be drawn to the attention of the consumer in a manner and form that satisfies the formal requirements of subsections (3) to (5).

In accordance with this section it is submitted that a *voetstoots* clause may only be included in a lease agreement if it is in plain language<sup>271</sup> and the nature and effect of the clause was drawn to the notice of the lessee in a manner or form that will usually draw the attention of a reasonably watchful tenant having regard to all circumstances surrounding the conclusion of the agreement.<sup>272</sup> The clause should be drawn to the notice of the lessee before the conclusion of the lease agreement or before the lessee is expected to pay any amount in terms of the agreement, which ever event occurs first.<sup>273</sup>

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<sup>270</sup> Nagel et al *Kommersiëleereg* p257. Van Eeden E *Consumer Protection Law in South-Africa* 2013 354.

<sup>271</sup> S 22 and 49 (4) of act 68 of 2008.

<sup>272</sup> S 49(4) of act 68 of 2008.

<sup>273</sup> Nagel et al *Kommersiëleereg* p252.

## 5. CONCLUSION

The CPA did not alter the common law rights of the lessee significantly. A lessee may still use the remedies given by common law to be compensated for defective leased property since the CPA did not repeal the common law remedies. A lessee is entitled to receive leased property that is of good quality and fit for the purpose it is leased. The lessor may no longer escape liability by inserting a *voetstoots* clause into the lease agreement, since the clause will only be valid if the lessee was aware of condition of the *res* and expressly excepted it in that condition.

## CHAPTER 6

### CONSUMER PROTECTION LAW PERTAINING TO LATENT DEFECTS IN THE BELGIAN LAW

#### 1. INTRODUCTION

The Belgium law of sale is regulated by the Belgian Civil Code, general principles of contract law, common law of sale as well as the quality of goods and guarantees in the case of consumer sales.<sup>274</sup> It is also influenced by European and international trends.<sup>275</sup> The various sources regulating the law of sale have different wording, interpretation and application and leads to confusion and uncertainty.<sup>276</sup> The following legislation deserves attention when discussing the Belgian Law of sale: the Act of February 25, 1991 on the liability of defective products and the Act of September 1, 2004 on the protection of consumers in respect of consumer sales.

#### 2. DEFINITION OF A LATENT DEFECT

In terms of the legislation mentioned in the above paragraph, the definition of a latent defect varies. A latent defect is defined in article 1641 of the Civil Code as a hidden defect in the *merx* which renders it unsuitable for its intended purpose or diminishes the intended use to the extent that the buyer would not have bought it if he was aware of its condition. Articles 1949bis and 1649octies of the Civil Code replaced the common law warranty against latent defects. It adds to the definition in article 1641 that the *merx* must also comply with the agreement between the seller and purchaser as well as the conformity criteria set out in article 1649ter<sup>277</sup>.

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<sup>274</sup> Barnard J *The influence of the Consumer Protection act 68 of 2008 on the common law of sale* (Unpublished LLD Thesis, University of Pretoria) 2013 52.

<sup>275</sup> Supra.

<sup>276</sup> Supra.

<sup>277</sup> Supra 432.

The term 'defect' initially referred to an intrinsic defect. Recent case law<sup>278</sup> suggested that *merx* will be regarded as defective if it cannot be used for the purpose for which it was bought.<sup>279</sup> This approach assumes that the seller is aware of the buyer's intended purpose for the *merx*. Further requirements are that the defect must be a material defect which existed at the time of conclusion of the contract.<sup>280</sup>

### 3. COMMON LAW

#### 3.1 WARRANTY AGAINST LATENT DEFECTS

The common law warranty against latent defects is regulated by articles 1641-1948 of the Civil Code. In terms of these articles, a buyer is entitled to expect that the *merx* complies with the sale agreement. This entails that the *merx* possesses the characteristics that a reasonable buyer is entitled to expect,<sup>281</sup> considering its normal or specific use (as indicated by the buyer).<sup>282</sup>

#### 3.2 EXCLUSION OF THE WARRANTY

Article 1643 gives the contracting parties the right to exclude the warranty against latent defects by way of agreement. This exclusion is referred to as a "beding van niet-vrywaring".<sup>283</sup> The exclusion is however only applicable if the seller did not act *mala fide*.<sup>284</sup>

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<sup>278</sup> Dekkers R and Verbeke A *Handboek Burgerlijk Recht Deel III Verbintenissen, Bewijsleer, Gebruiklike contracten* (2007) 3<sup>rd</sup> Edition Intersentia 489.

<sup>279</sup> *Supra*.

<sup>280</sup> Barnard 434.

<sup>281</sup> The expectations will differ where the purpose and quality differs. Otto 2011 532.

<sup>282</sup> Dekkers 490.

<sup>283</sup> Barnard 435.

<sup>284</sup> The seller should be unaware of any defects in the goods sold or should inform buyer of the defects he has knowledge of and the buyer has to expressly accept the goods in that condition.

### 3.3 REMEDIES

The common law remedies in terms of Belgian law are the same as mentioned in chapter 2 of this dissertation. In terms of article 1648 a buyer can choose between the *actio redhibitoria*<sup>285</sup> and *action qaunti minoris*.<sup>286</sup> The buyer may only claim for the repair or replacement of the goods if the sale qualifies as a consumer sale.<sup>287</sup> In terms of article 1646 a claim for damages<sup>288</sup> can only be instituted where the seller was aware of the latent defect.<sup>289</sup> Where the seller was unaware of the defect he needs to refund the buyer and compensate for any related expenses.<sup>290</sup>

A buyer has to institute actions within in a short period of time.<sup>291</sup> What constitutes a short period of time is a factual debate and falls outside the ambit of this research.

### 3.4 LIABILITY OF MANUFACTURERS AND MERCHANT SELLERS

Manufacturers are experts on the products they produce and are better equipped to detect defects than ordinary sellers.<sup>292</sup> Manufacturers are therefore obligated to inspect their *merx* thoroughly before concluding a contract of sale.<sup>293</sup> If they fail to do so, they will be liable for all damages incurred by the buyer unless they can prove<sup>294</sup> that the buyer was aware of the defect when the contract was concluded.<sup>295</sup> A manufacturer or merchant seller may only limit the time period in which a buyer is allowed to institute a claim but may not limit or exclude liability for latent defects.<sup>296</sup>

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<sup>285</sup> Restitution.

<sup>286</sup> Reduction of the purchase price.

<sup>287</sup> Dekkers 491.

<sup>288</sup> Dekkers 493. Damages include damages incurred because of the defect as well as damages suffered by the buyer.

<sup>289</sup> Read with Article 1645 of the Civil Code.

<sup>290</sup> Agreement related expenses, for example the drafting or collection of the agreement.

<sup>291</sup> Article 1648 of the Civil Code.

<sup>292</sup> Barnard 438.

<sup>293</sup> Dekkers 494 fn 127.

<sup>294</sup> The onus of proof is on the manufacturer to prove he acted *bona fide*. Dekkers 494.

<sup>295</sup> Supra.

<sup>296</sup> Barnard 438.



## 4. CONSUMER SALES

The seller's common law duties to deliver the goods and warrant the buyer against latent defects are combined into a single duty to deliver the goods in conformity with the sales agreement.<sup>297</sup> The criteria for compliance with this duty are set out in article 1649ter § 1 of the Civil Code. There is a rebuttable presumption that the *merx* will conform to the agreement.<sup>298</sup>

The conformity criteria are the following:

- a) The *merx* corresponds with the description and quality presented by the seller in a sample or model of the *merx* given to the buyer.
- b) The buyer informed the seller (at the time of conclusion of the contract) of his intended use for the *merx* and the seller accepted.
- c) The *merx* are fit to be used for the same purpose for which the same type of *merx* will normally be used.
- d) The goods are of a quality which the buyer may reasonably expect.<sup>299</sup>

According to Dekker<sup>300</sup> the following five requirements need to be met before the seller will be held liable: the *merx* do not conform to the agreement; the defect existed when delivery took place;<sup>301</sup> the defect occurred within 2 years from the date of delivery; the consumer informed the seller of the defect within the prescribed period<sup>302</sup> and a claim must be brought within the prescribed period.

A distinction is drawn between legislative and commercial guarantees. Article 1649septies deals with legislative guarantees. This guarantee is present without any additional contractual provisions to that effect and is thus an implied warranty. In this case the buyer may take

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<sup>297</sup> Barnard 439.

<sup>298</sup> Supra 440.

<sup>299</sup> In comparison to the same type of goods, taking into account all relevant circumstances *inter alia* the nature of the goods.

<sup>300</sup> 547-548.

<sup>301</sup> There is a rebuttable presumption that a defect was present at the conclusion of the agreement if it occurs within six months after delivery.

<sup>302</sup> Normal consumer goods have a two year period while second hand goods only have one year.

recourse against the end-seller.<sup>303</sup> The end-seller may in turn take recourse against any other liable party in higher up in the supply chain.<sup>304</sup> In contrast, a commercial guarantee is an additional voluntary guarantee given by the seller. This type of guarantee is enforceable against all sellers in the supply chain.<sup>305</sup>

#### 4.1. EXCLUSION OF WARRANTY

Consumer rights in terms of the above mentioned legislation may not be limited or excluded by any provision in a consumer sales agreement.<sup>306</sup> Manufacturer's liability may also not be excluded.<sup>307</sup> It seems that the only exception to this rule is where a consumer was aware of a defect or should reasonably have been aware of a defect at the time of conclusion of the contract because article 1649ter § 3 states that the conformity criteria will not apply in this case. There is however a debate regarding the interpretation of this clause which will not be discussed in this research.<sup>308</sup>

#### 4.2 REMEDIES IN CONSUMER SALES

A hierarchy of the following remedies is available to the consumer: repair or replacement of the goods at no cost to the buyer and a claim for damages<sup>309</sup>. The buyer has to institute these remedies within a reasonable time to avoid losing his right to cost free repair or replacement.<sup>310</sup> The seller has the onus to prove that these remedies are unreasonably harsh to avoid compliance.<sup>311</sup> The buyer can only claim a reduced purchase price or restitution where the defect is of such a serious nature that it is no longer possible to repair or replace the goods.

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<sup>303</sup> Dekkers 553.

<sup>304</sup> Supra.

<sup>305</sup> Dekkers 553-554.

<sup>306</sup> Article 1649octies of the Civil Code and article 74<sup>o</sup> 14 of the WMPC 2010.

<sup>307</sup> Article 10 § 1 of Act 1991.

<sup>308</sup> For further discussion regarding this issue, see Barnard 444-446.

<sup>309</sup> Article 1649quinquies of the Civil Code.

<sup>310</sup> Barnard 447.

<sup>311</sup> Supra.

### 4.3 LIABILITY OF MANUFACTURERS AND MERCHANT SELLERS

The Belgian provisions brought about the following changes to the liability of professional sellers:

- a) The agreement must fall within the definition of a consumer sale in terms of the Civil Code.
- b) The warrantee against latent defects is forthwith regarded as a defect in relation to the conformity of the agreement and manifests within the prescribed period of time.<sup>312</sup>
- c) The remedies to the disposal of the purchaser changed. The purchaser can now claim repair of the goods, reduction of the purchase price or restitution and may also claim damages in certain instances.<sup>313</sup>
- d) Provisions in the agreement with the effect that a buyer waives his right to claim damages are void.

It became irrelevant whether the professional seller acted *bona of male fide*.<sup>314</sup> The professional seller will be liable in terms of consumer legislation two years from the date of delivery and thereafter in terms of common law.<sup>315</sup>

Some writers even interpret article 1649sexies to result that merchant sellers and manufacturers are jointly and severally liable for defects in conformity to the agreement.<sup>316</sup>

### 4.4 PRODUCT LIABILITY

For the purpose of completeness it should be mentioned that Act 1991 introduced a new product liability regime in Belgium. The law no longer draws a distinction between the legal position of a buyer and a third party who suffered damages from a latent defect.<sup>317</sup> The

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<sup>312</sup> Two years for new goods and one year for second hand goods.

<sup>313</sup> Refer to 3.2 of this chapter.

<sup>314</sup> Claey's I and Van Strydonck K *Contractuele aansprakelijkheidsbeperkingen voor de professionele verkoper bij verborgen gebreken in het algemeen kooprecht: elf argumentent pro in Bijzondere Overeenkomsten 2007-2008* (2008) Kluwer 309-334.

<sup>315</sup> Barnard 446.

<sup>316</sup> Claey's & van strydonck.

<sup>317</sup> Dekkers 554.

aggrieved party has three years to institute a claim for damages.<sup>318</sup> A manufacturer will be liable for product defects ten years from the date the product was put into circulation.<sup>319</sup>

The amount of damages claimed for product liability may be limited where it was partially caused by claimant but may never be excluded by way of agreement. A product liability claim may be instituted in addition to any other claim in terms of Belgian law.<sup>320</sup>

Subject to an array of investigations,<sup>321</sup> provided that all parties are bound in a chain of contracts of sale, the buyer may hold the immediate seller as well as previous seller, importer or manufacturer liable for damages caused by defective *merx*.

#### 4.5 DEFENCES

It is worth briefly mentioning that there are six defences to the disposal of the seller listed in article 8 of act 1991.<sup>322</sup> Further details are not discussed here; refer to The LLD thesis of J Barnard as referenced in this chapter.

#### 5. CONCLUSION

The Belgian consumer provisions significantly amended the common law as the CPA has done in South Africa, especially concerning the liability of professional sellers.

Even though the terms used in the various pieces of legislation differ, the requirements for a defect to qualify as a latent defect and the common law regimes are almost identical in the two legal systems. The Belgian consumer law creates even more confusion than the CPA since it is not bound in a single piece of legislation. It seems like both legal systems strive to comply with international consumer protection standards but are not always successful.

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<sup>318</sup> Starting from the date on which he became aware of the damages or should have become aware of the damages, the defect and the identity of the producer. A 12 § 2 of Act 1991.

<sup>319</sup> A 12 § 2 of Act 1991.

<sup>320</sup> Supra. A consumer may therefor also claim in terms of consumer legislation for defects that did not conform with the agreement.

<sup>321</sup> See discussion in Barnard 452-453

<sup>322</sup> Also see Barnard 454.

## CONCLUSION

The warranty against latent defects has its roots in the origin of trade, both sale and barter transactions. Initially sellers gave the warranty on an informal basis. Buyers held sellers liable if they delivered defective goods. During later years it was incorporated as an *ex lege* warranty in all contracts of sale. The need arose, as the trade industry developed, to create rules and regulations to protect buyers against mala-fide sellers and *vice versa*.

The ancient Romans had no fixed method to determine an amount for damages where goods were defective. This position changed when the *formula* procedure was introduced. In terms of this procedure, damages were calculated in accordance with different categories of defects common to the trade industry. However, the *formula* became obsolete and damages were calculated based on the objective market value of the defective *merx*. Damages were only claimable where the seller fraudulently hid the defect from the buyer and the buyer was unable to detect the defect with reasonable care and attentiveness.

The buyer's protection was eventually extended to claims for consequential damages and to cover instances where the seller falsely promised that the *merx* possess certain characteristics. The application of these rules led to a mediation system to resolve these kinds of disputes. This system formed the foundation of modern-day courts.

The big revolution for the warranty against latent defects commenced when the Edicts of *Aedilis Curules* and the *Copus Juris Civilis* were instituted. These statutes formed the basis of the common law as it is incorporated into modern-day law.

The most commonly known common law remedy is the *actio empty*. This remedy is to the disposal of the buyer where the seller acted *mala fide* and made false representations to the buyer. Furthermore, the *actio redhibitoria* can be used to claim restitution in cases where the thing sold cannot be used for its intended purpose. Lastly, the *actio qaunti minoris* may be used to claim reduction in the purchase price. Developments in the law led to stricter liability of merchant sellers and manufacturers.

The CPA came into force in October 2010. This act codifies a consumer's right to good quality and safe goods. *Merx* should be suitable for the purpose it was bought and should be durable and usable for a reasonable period of time. Importers and distributors are strictly liable for defects in their merchandise. Buyers therefore enjoy broader protection under the CPA. However, the act does not repeal any common law remedies the buyer may have; it only serves as additional protection. The act provides for the recovery of compounded interest and consequential damages. The CPA also includes services into this category. A Lease agreement is regarded as a service in terms of the act, which means that lessees will enjoy similar protection against lessors for latent defects in the property leased.

The CPA does not always fulfil its purpose since many agreements of sale and lease fall outside the ambit of act. Even though the common law position will remain intact there are many possible oversights, interpretational and practical problems. The legislator should provide clarity on these issues.

Suppliers and Consumers should familiarize themselves with the practical application of Part H of the CPA, which includes the implied warranty of quality (S55), the remedies to the disposal of the consumer as well as the implications of the act on supplier's liability (S56). It should be noted that a *voetstoots* clause will no longer hold where the CPA is applicable, unless the buyer was aware for the defects in the *merx* and expressly accepted it in that condition. Many interpretational problems arise from S61 and clarity is not yet provided on this section.

Where dealt with second-hand goods, it is of grave importance to follow industry codes and buyers should carefully inspect the *merx* before buying. Courts must still shed light on these matters but it can be certain that the outcome they follow will be the one more beneficial to the consumer.

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