

ANNEMARIE SWANEPOEL ATTORNEYS COVID-19 NEWSLETTER

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Message from Annemarie Swanepoel

Dear Client

The president has announced an extension of the nationwide lockdown by a further period of two weeks, as we enter the third stretch of the nationwide lockdown period, it is heartening to see how united and resolute our country has remained in limiting the impact of the Covid-19 virus. The stringent lockdown laws applied in our country are showing positive results although the path ahead remains undoubtedly difficult.

As part of the nationwide lockdown, our offices are currently closed. Our team is focused on the period beyond these 5 weeks and has continued to work remotely on all bonds and transfers in order to ensure that they are ready for lodgment and registration as soon as possible as well as to answer your calls, respond to your emails and to see to your concerns.

Our offices will, subject to the lockdown being lifted, be open on Friday the 1st of May as well as Saturday the 2nd of May to accommodate all clients who are yet to sign their bond and transfer documents. We wish you well during this period.

Covid-19 Relief measures

Financial relief for businesses

In light of the lockdown there has been a significant number of businesses under pressure in terms of cash flow and the ability to pay their employees. The government has announced measures that are in place and still in the process of being implemented to provide some relief for Small and Medium-sized Entities.

We have compiled a list of all the measures presently known to us of what the government is providing to small business to help them through this difficult time. We can only bring to your attention what has been announced by the government.



Assistance from the Debt Relief Finance

This initiative is from the Department of Small Business Development, the fund will provide assistance to mitigate the impact of the expected economic slowdown on small and medium enterprises (SME) in the country.

The fund value amounts to R500 million

To apply, the business applying must comply with the following criteria:

- Registered with CIPC at 28 February 2020
- 100% owned by SA Citizens
- Should employ at least 70% South African Nationals
- The business applying should be fully tax compliant

Priority will be given to businesses owned by women, youth and people employed with disabilities.

Applicants must demonstrate direct link of impact or potential link of impact of Covid-19.

[Click here to apply](#)



Financial assistance offered to businesses

Oppenheimer Fund (SA Future Trust)

This fund was established by a R1 billion donation from the Oppenheimer family that is to provide assistance to companies that are affected by the Covid-19 epidemic and lockdown. The fund will be administered through a trust to provide interest free loans to businesses for a period of 5 years.

To apply, the business applying must comply with the following criteria:

- Have an annual turnover of less than R25 million.
- Have been trading for two or more years.
- Must be in good standing with the banks.
- Must be a sustainable business on 29 February 2020.
- The company must be banking with one of the following banks: ABSA, FNB, Nedbank or Standard Bank.
- The business must be able to provide proof of how the lockdown and pandemic has affected the business.



Rupert Fund (Covid-19 SME Fund)

The Rupert fund is established through a R1 billion donation from Anton Rupert to aid small businesses affected by the Covid-19 epidemic and the lockdown. The fund will be administered through Business Partners Limited.

The funding can be utilised to fund working capital. (Salaries, rent, loan instalments, etc). Please note that this is short-term financing, with the following terms:

- Month 1 - 12: 0% interest, with a payment holiday of 12 months
- Month 12 - 60 : Prime interest to be levied on the loan.
- The funding will be provided via monthly disbursements.

Qualifying criteria:

- The business must be tax compliant.
- February 2019 signed annual financial statements must be submitted.
- Ownership does not have to be SA citizens.

More clarity on the above fund is yet to be made public on how to apply.



Business Funding

Unemployment Insurance Fund (Covid-19 TERS)

The Covid-19 TERS is a separate fund from the Unemployment Insurance Fund and is applicable to caring and responsible employers that are unable to pay salaries of workers they send home due to the lockdown and are encouraged to apply for Covid-19 TERS. Only businesses that are closed due to the lockdown, may apply. If shorter hours are worked, UIF must be claimed.

To apply simply send an email to covid19ters@labour.gov.za and an automated response will reply with the requirements and documentation to be completed by the employers.

SARS

When the lockdown was announced by the President, he informed the country that there will be relief received from SARS. The following relief is available:

For companies with a turnover less than R50 million, they have the option to delay 20% of the company's PAYE liability for a period up to four months starting 1 April 2020 (please note this is not applicable for the March 2020 PAYE that has to be paid by today, 7 April 2020). The PAYE liability that is delayed must be paid to SARS in equal instalments over six months starting 01 August 2020.

For provisional taxes there is also a delay that will be communicated when the time comes for provisional tax returns. (The LSSA has previously circulated the guideline from SARS)

Quick links

- <https://sasmefund.co.za/> - Independent Fund

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Government relief fund for small business

- Help line number : 0860 663 7867
- <https://smmesa.gov.za/>
- [SMME Business Growth Resilience Facility Form](#)
- [SMME Debt Relief Scheme Form](#)
- [COVID Finance Relief Application Form](#)



Industry news

The Voetstoets clause and what it means for property buyers and sellers

A well-known term that every buyer and seller of immovable property may have encountered is that of the voetstoets clause. The term originates from Dutch and translates directly to 'with the shove of a foot'. What the term in effect means is that the product, in this context the immovable property, is sold "as is" or "as it stands".

An example of voetstoets in action

For instance, person X sells a cellphone to person Y. Person X stipulates in the contract of sale that the cellphone is sold voetstoets (or 'as is'). Person Y, once having purchased the cellphone, cannot subsequently return the cellphone and ask for a refund if it transpires that the phone was defective due to the voetstoets clause which allowed the person to contract out of the implied warranty that the cellphone was free from defects.

Latent and patent defects

There are two types of defects:

- A latent defect is a fault that would not readily be revealed by a reasonable inspection of the property being sold; and
- A patent defect is a flaw that is not hidden and ought to be easily identified upon reasonable inspection.

A patent defect is therefore clearly identifiable on ordinary inspection of the property as opposed to a latent defect that cannot be seen upon ordinary inspection of the property. The voetstoets clause shields the seller from incurring liability in respect of both latent defects and patent defects. There are however certain qualifications to this in respect of latent defects.

The property seller is in fact liable for a latent defect regardless of the voetstoets clause if the seller knew about the defect in the property being sold and omitted to inform the prospective buyer of such defects. This omission is almost tantamount to fraud.

Case law and the voetstoets clause

This was confirmed in the case of *Odendaal v Ferraris* (422/07) [2008] ZACA 85; [2008] 4 All SA 529 (SCA) where the court stated that if a seller conceals a latent defect in the property intentionally, the seller cannot rely on the voetstoets clause. Contrastingly, if the defects are brought to the attention of the purchaser, the purchaser cannot go back and claim from the seller.

Summarily stated, the instances when a seller can in fact return the item/property or ask for a reduction in the price irrespective of the voetstoets clause exists when:

- The defect was deliberately concealed and if the buyer had seen the defects, they would have stopped the sale or negotiated a lower price.
- The seller made a fraudulent misrepresentation that was material.
- The property or product had the defect at the time of sale, and the seller knew of the defect and did not disclose it.

The onus is consequently placed on the buyer to prove the deliberate concealment with the intention to defraud and that the seller knew of the defect and did not disclose it.



Effect of the Consumer Protection Act on the sale of immovable property

The Consumer Protection Act (CPA) applies to all transactions that occur within the Republic of South Africa as well as to the supplier of any goods or services in the Republic. Importantly, it states that the purchasing of goods or property comes with an implied warranty that the thing being purchased is sold free from defects and of good quality. Similarly, this position is expressed in our common law as well.

As such, the general rule is that the voetstoets clause cannot apply to transactions that fall within the ambit of the CPA. For purposes of the CPA, a 'transaction' that will be excluded from the operation of the voetstoets clause is an agreement that occurs in the ordinary course of business between a supplier and consumer.

A consumer, in terms of the CPA, is defined as a person to whom those particular goods or services are marketed in the ordinary course of the supplier's business as well as but not limited to a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business.

In the context of the purchase of immovable property, the immovable property is a good that is being marketed to the public. A company that has its core function in the buying and selling of immovable property would, for purposes of the CPA, be considered a 'supplier' of goods and services as the transaction of buying and selling immovable property occurs in the ordinary course of its business.

Consequently, the CPA would find applicability to those companies that primarily buy and sell immovable property and as such the voetstoets clause cannot be inserted in its sale agreements.

The Voetstoets rule exception to the CPA

An exception to this general rule found in the CPA is that the voetstoets clause can be used in relation to the private sale of immovable property. This is owing to the fact that a private sale generally does not fall under the CPA's qualification of the transaction having to occur in the supplier (seller's) "ordinary course of business". Therefore, when a party who is not a supplier in the ordinary course wants to embark on the private sale of his/her immovable property, he/she can insert the voetstoets clause into his/her sale agreement. In effect the voetstoets clause therefore allows the seller to contract out of the implied warranty as found in the CPA.

Seller and buyer obligations when selling property

In conclusion, it is suggested that when a seller wants to sell immovable property privately with the inclusion of the voetstoets clause, he/she has the duty to disclose all defects of the immovable property that he/she is aware of. A seller can further mitigate potential liability by attaching a condition report to the contract of sale. The condition report would essentially be the seller setting out the quality of the property as well as listing all the defects thereof.

The purchaser similarly has the duty of properly inspecting the property as the condition report is not a warranty to the purchaser. The seller may dispute that he/she truthfully did not know of a defect and consequently, did not list the defect.

The purchaser is not barred from outsourcing independent professionals to properly inspect and ensure the safety of the property or from requesting an electrical certificate of compliance, water installation certificate, gas certificate of conformity or the like.

