

# TO ALL AGENTS AND AGENCIES

## THE CONCEPTS OF CONTRACT LAW

### DEFINING CONTRACT

1. A contract is an agreement reached between at least 2 or more parties, with the intention of creating a legal obligation with resulting rights and duties. In short, a contract is an agreement which gives rise to a legal obligation. A mere social appointment between parties does not constitute a contract between them.

### FORMAL CONTRACTS

2. Formal contracts are particular types of contracts which must be completed in a particular way to be valid, e.g. they may require to be formed in writing.

### SIMPLE CONTRACTS

3. Simple contracts are very common types of contracts which can be completed in a variety of ways, e.g. can be formed verbally or in writing.

- a. Simple Contract.

The first three elements of a simple contract must be present at all times for the contract to be valid.

- a. Intention - There are two presumptions: firstly that business agreements have an intention to create legal relations and secondly that social, domestic or family agreements do not. Both these presumptions can be rebutted (argued against).
- b. Agreement - Offer & acceptance
- c. Consideration - Something of value (legal) promised / exchanged by both parties.

- b. Elements of Simple Contract which may affect validity

The last three elements of a simple contract may be relevant when they become an issue which could invalidate the agreement.

- i. Capacity - Capacity relates to restrictions which may be placed on people's ability to enter into contracts, e.g. young people, mentally disabled etc.
- ii. Certainty - Relates to the terms of a contract which must be clear.
- iii. Legality - Legality relates to the objects of the contract which must be legal.

### SIMPLE CONTRACT - FORMS

4. 'Some' simple contracts are required to be in writing, e.g. land contracts. It is important to check whether there are any 'form' requirements to your particular simple contract before you enter into it.

### THE CONCEPT OF "LEGAL OBLIGATION"

5. When the contractual rights and duties are recognised and enforced by law, the legal obligation is known as a civil obligation (the law would, for example, allow an order of court for specific performance or for the payment of damages if the duty is not fulfilled towards the holder of the right. A contract of sale, for example, creates a civil obligation).
6. Where rights and duties are recognised but not enforced by law, the obligation is known as a natural obligation (the law will, for example, acknowledge set-off between the parties, but an order of court to force the one party to the contract to fulfil his contractual

duty towards the other will not be allowed. A bet, for example, creates a natural obligation between the parties to the contract). Critical Note:

A legal obligation is a legal tie between legal subjects, recognised by law, which is created because of certain legal facts, (such as a contract or a delict) and which creates rights (personal rights or claims) and duties which are recognised by law.

#### CONTRACTUAL TERMS AND CONDITIONS

7. A contract is made up of different types of terms and conditions. There are essential and material terms. In order for a sale of immovable property to be enforceable, the contract (in writing) must contain the essential terms. These are:

- A description of the property (both physical and legal description),
- the names and ID numbers of the parties and,
- the amount payable.

8. It is, however, true that many other terms are considered in modern day life as important, such as the date of transfer and the date of occupation. These terms are called material terms. Though they are not essential, the commercial world dictates that the parties to a contract have certainty regarding a number of issues. Therefore the following terms are most often found in a contract of sale of immovable property:

- a. The transfer date. That is the date on which the property will be transferred into the name of the buyer.
- b. The occupation date: That is the date on which the buyer gets the right to physically occupy the property. If this date is before the transfer date, there will be a:
- c. Clause relating to occupational interest, that is the amount that the buyer will pay the seller to live there until the property is transferred into his or her name.
- d. Finance: How will the buyer pay for the property? Terms regarding deposit, guarantees for the remainder and the granting of a bank loan (mortgage) are included.
- e. Risk: In the case of damage or destruction, who will pay for it? Normally risk is linked to the transfer date, so that the buyer becomes liable only once he/she is the registered owner.

#### CONTRACTUAL CONDITIONS

9. A condition in a contract is a clause which makes the operation and consequences of the contract as a whole, dependent on an uncertain or possible future event. Conditions are either 'suspensive' or 'resolutive'. Let us discuss these two types of conditions and their consequences.

- a. Suspensive conditions. With suspensive conditions, the agreement is not yet binding until the suspensive condition has been met and fulfilled, in other words the suspensive condition has the effect of suspending the working of the contract. If the condition is fulfilled, there is a binding contract from the date of both parties having signed the contract. Critical Note: Should the suspensive condition not be fulfilled timeously, i.e. the mortgage loan is not approved by the specified date, then there is no contract. All performance in terms of the agreement must be returned so that the parties are in the same position that they were in before the contract came about. (Deposit must be returned). An example is the common clause found in agreements of sale where the agreement is made subject to the purchaser obtaining bond finance from a registered financial institution for a specific amount and within a specific time period. As a general rule, the use of the words "subject to" is the normal way of expressing a suspensive condition. It must be kept in mind that the bond clause benefits the purchaser and if the

purchaser does not get the required loan (the exact amount and on the day as stated in the agreement), the agreement lapses on that date.

- b. Resolutive conditions. With resolutive conditions, it is stipulated that the agreement will terminate or fall away if some or other event occurs within a specified time period. An example is where a purchaser stipulates in the agreement of sale that the agreement will terminate if a national road is proclaimed next to the property or through the property within a certain time period. Where this is to happen, the contract would terminate/lapse/fall away/be null and void. All these terms are indicative of a resolutive condition.

## CONSEQUENCES OF CONDITIONS

10. It is absolutely vital that you as the agent manage the fulfillment of suspensive conditions. It is common for banks to fax Letters of Grant or quotations, confirming the bond finance for the purchaser, to the estate agent.
11. This often causes problems if the agent neglects to advise the seller that the Letter of Grant had been received and that the suspensive condition had been discharged. A seller could for instance, rightly or wrongly, immediately enter into another agreement of sale in respect of the property, without checking with the first agent, if the suspensive condition has been met or not. Critical Note: The professional estate agent pays close attention to any suspensive or resolutive conditions which may exist in the agreement and ensures that all documentation pertaining to the fulfillment of those conditions are provided to all the relevant parties immediately upon receipt thereof. These Letters of Grant for instance, very often play a major role in litigation if a dispute should arise between the purchaser and seller as to whether a suspensive condition had been fulfilled or not.

## EXPRESS AND IMPLIED TERMS

12. All the terms of a contract of sale of immovable property are in writing. These are 'express' terms. It may however happen that an express term implies something more. For example, a term in the contract may state that the automatic garage door system is included in the sale. The implication of this is that the seller must hand all remote control devices related to the automated garage door system to the buyer, for without it, the system is incomplete. This obligation on the seller may be regarded as an implied term.

## VOID AND VOIDABLE CONTRACTS

13. If the legal requirements for a contract are not met, such a contract may be void from the outset, or voidable, in which case one of the parties, or both, may apply to a court of law to have the contract set aside, or declared invalid.
14. The termination of contracts.

The offer to purchase will terminate before acceptance under the following circumstances:

- If the offer was made for a certain time period only, i.e. until 17h00 on a certain date.
- If the seller rejects the offer, it terminates automatically on the seller indicating that it is unacceptable.
- If the buyer or seller dies before the offer has been accepted.

- If the offer is not made to be irrevocable until acceptance, the buyer can revoke it before the seller signs his/her acceptance thereof. Revocation need not be in writing, but must be brought to the attention of the seller.
15. There are certain instances where a buyer of residential property has the right to revoke the offer to purchase or cancel the agreement within five days after signing the offer in terms Section 29A of the Alienation of Land Act 68/1981. This right is called the cooling-off right. A contract (accepted offer) can either terminate in the event of breach by one of the parties or in terms of fulfillment of the agreement.

#### “BOILERPLATE PROVISIONS”

16. Although not legally required, each contract should contain several provisions known as "boilerplate" provisions. These include:

- Arbitration Clause -- makes allowances so that disputes are handled by an independent arbitrator.
- Entire Agreement Clause -- states that what is written in the contract is what the agreements and conditions of the contract are, and no previous agreements or conditions are applicable.
- Force Majeure Clause -- states that should something happens beyond the control of either party (such as a tornado destroying a house while it is still in escrow), then the contract is no longer valid. Critical Note: The Essentialia: These are the key characteristics that must be contained in a contract to identify it as a specific type of contract. E.g. sale, lease. The Naturalia: These are the terms that are naturally contained in contracts, by for example the operation of the law.
- The Incidentalia: These are additional terms and conditions that are agreed between the parties.

#### BREACH OF CONTRACT

17. Although most contracts that are concluded, are fulfilled without any problem – this is not always the case and lawyers often have to deal with contracts which have been breached. This occurs where one of the parties to the contract fails to fulfil their contractual obligations.

#### Types/Forms of Breach

- Positive Malperformance. This occurs where there has been performance but the content or quality of the performance is not in accordance with the contract terms.
- Impossibility of Performance. This type of breach may occur before or after the date on which performance is set to take place. There is normally culpability on the part of the creditor or debtor.
- Repudiation. This takes place where a party to the contract communicates his/her intention to the other party that they no longer wish to be bound by the contract. This can take place verbally or by way of conduct.
- Delay by the Debtor (Mora Debitoris). This occurs where the debtor does not perform timeously in terms of the contract. Performance must still be possible, and the delay must be due to the fault of the debtor.

- Delay by the Creditor (Mora Creditoris). This is where the creditor fails to accept performance by the debtor. As with mora debitoris, the performance must still be possible and the delay must be as a consequence of the creditors fault.

#### REMEDIES FOR THE BREACH

18. There are 3 natural remedies available to the aggrieved party:

- a. Specific performance. The innocent party has the right to notify the other party that he insists on specific performance or compliance with the terms of the contract. Normally a date is set and if the party has not complied by then, the contract may be terminated and damages claimed.
- b. Cancellation If the breach of contract is considered to be serious, the innocent party has the right to cancel the agreement and claim damages. It is customary to give the other party notice of intention to cancel and to afford him/her the opportunity to rectify the breach.
- c. Damages (which can be claimed in the cases of (a) and (b)) Furthermore, the parties could agree to their own remedies in terms of the contract.

NOTE EXTRACT FROM SSETA MANAGEMENT GUIDE: NQF 5 NATIONAL CERTIFICATE  
PAGE 110.