

Suspensive conditions in contracts of sale of immovable property

Introduction

When a contract is subject to a suspensive condition, the contract comes into effect only if the condition is met. On a practical level, this can entail a future event such as a deposit payment, securing a loan or even conditions such as graduating from university to receive a bonus payment.

Suspensive conditions are commonly encountered in contracts for the sale of immovable property (e.g. deposit requests). They are often misunderstood, which can result in little recourse.

According to *Mia v Verimark Holdings (Pty) Ltd* (522/08) [2009] ZASCA 99 (18 September 2009):

“The conclusion of a contract subject to a suspensive condition creates ‘a very real and definite contractual relationship’ between the parties. Pending fulfilment of the suspensive condition the exigible content of the contract is suspended. On fulfilment of the condition the contract becomes of full force and effect and enforceable by the parties in accordance with its terms. No action lies to compel a party to fulfil a suspensive condition.

If it is not fulfilled the contract falls away and no claim for damages flows from its failure. In the absence of a stipulation to the contrary in the contract itself, the only exception to that is where the one party has designedly prevented the fulfilment of the condition. In that event, unless the circumstances show an absence of dolus (intent) on the part of that party, the condition will be deemed to be fulfilled as against that party and a claim for damages for breach of the contract is possible.”

In other words, the fulfilment of a suspensive condition is a pre-requisite for a contract to come into force and effect. Similar to the fulfilment of a suspensive condition, in addition to any condition for the creation of a contract, there are a number of requirements that must be fulfilled.

This article focuses on the challenges posed by the misconceptions of the nature and effect of suspensive conditions. We also discuss non-compliance with those conditions, legal defences, ad hoc examples thereof and the general requirements for valid contracts specifically in respect of contracts of sale of immovable property.

Requirements for valid contracts

- (i) **Consensus.** The parties must reach conscious agreement, with a genuine concurrent intention.
- (ii) **Contractual capacity.** The parties must be legally capable of concluding a binding contract. They must be over the age of 18 years and of sound mind or not insolvent.
- (iii) **Legality.** The contract must be legal and may not contradict any statutory or common law rule.

- (iv) Possibility of performance. The performance must be determinable and possible at the time of conclusion.
- (v) Formalities. The contract must abide by any formalities set by law or by the parties themselves. For example, in terms of Section 2 of the Alienation of Land Act 68 of 1981, all contracts of sale of immovable property must be in writing and signed by both parties.

All the above requirements must be fulfilled in addition to any suspensive condition for a legally enforceable contract to come into existence.

Doctrine of fictional fulfilment and waiver of the suspensive condition

As previously stated, in addition to the requirements for legally enforceable contracts in terms of common law, any suspensive conditions contained in the contract must first be fulfilled. Simply put, if a contract is breached, it cannot be enforced if the requirements being were not met and suspensive conditions were not fulfilled. As a result, damages often cannot be claimed.

In terms of this common law principle, where a party wilfully prevents a suspensive condition from being fulfilled, the aggrieved party may rely on the doctrine of fictional fulfilment to remedy the situation. This means that the defaulting party will have to perform his obligations just as if the contract had never been subject to a suspensive condition at all. If he does not perform his obligations, he may be liable for damages resulting from his breach of contract. A number of cases have relied on this theory, including the case of *Du Plessis & Smith NNO v Goldco Motor & Cycle Supplies*.¹

In some instances the purchaser can waive the suspensive condition, eliminating the need to fulfil it and the contract is legally valid and enforceable.

The above was illustrated in *Abraham Willem Adriaan Coetzee v Anna Catharina Van Der Walt*, Free State High Court - case number: 2589/2004.

Facts:

In this case, on 27 June 2003, the parties to the contract entered into a Deed of Sale of a fixed property. A dispute developed between the parties, with the respondent alleging that the contract has lapsed. The applicant disputed the allegation and launched an instant application in which he sought ancillary relief and an order declaring the contract to be valid and.

The contract was also made subject to suspensive conditions, which was the payment of a deposit.

It is common cause that no deposit, let alone the full purchase price, was paid into the trust account of the transferring attorney.

Judgement:

In the judgement the court made reference to *MIA v d J L Properties (Waltloo) (Pty) Ltd and another*,² in which it was held that the suspensive condition protected the purchaser and that he could waive it. It was further held that by raising a bond for less than the stipulated

¹ 2008 SCA 372.

² 2000 (4) SA 220 TPD.

amount, and opting to provide guarantees for the full purchase price, the purchaser had waived the protection of the suspensive condition.

The issue of waiver of a suspensive condition was also considered in *Westmore v Crestanello and others*.³

The court held that the real difference between these two cases lies in the question of when a purchaser should waive the protection; and who is meant to be protected by the suspensive condition in question.

In the *Westmore* case the court held that the purchaser must waive the protection of the suspensive condition the cut-off date of the condition. In the *MIA* case it was held that, where a suspensive condition is not waived, the contract lapsed when the condition expired. , The court also held that “*whatever happened thereafter was, to use a phrase borrowed from Shakespeare, “much ado about nothing” and could not “breathe new life into the corpse”*”.

This means that no contract comes into existence where the suspensive condition is not waived and not fulfilled. No remedy can be invoked for a breach of contract that never existed.

The trustee acting for a trust to be formed (legality)

Under sections 4 and 6 of the Trust Property Control Act 57 of 1988, a trustee can only conclude agreements on behalf of the trust after the trust has been registered; and only after the trustees have been authorised to conclude those agreements in writing by the Master of the High Court by the issuance of letters of authority.

This means that and agreement will be null and void and cannot be ratified as it lacks legality⁴ if it is entered into by a person who is trustee of a trust yet to be formed; or by a trustee of a trust which is formed but who does not hold letters of authority. However, the agreement may falsely pose as a suspensive condition similar to pre-incorporation contracts found in company law.

Conclusion

Contracts of sale of immovable property are not as simple as using an offer to purchase drafted by an agent. They should ideally be undertaken by your attorney or at least reviewed before signature.

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³ 1995 (2) SA 733 WLD.

⁴ Simplex (Pty) Ltd v vd Merwe and Others NNO 1996 (1) SA 111 (W).