29 July 2022

REFUND OF THE DEPOSIT TO A PURCHASER

There is a general rule in terms of the common law that places an obligation on parties to an agreement to restore each other's positions as was before the agreement was entered into if the agreement fails to proceed. This rule was reiterated in the recent case of Royal Energy Management Services (Pty) Ltd v Carse (23 November 2021), where the purchaser paid a deposit for a farm he was purchasing.

On failure of the agreement, the seller refused to refund the purchaser's deposit, arguing that due to the purchaser's breach, he was entitled to retain the deposit. The court held that the general rule in terms of the common law as well as the principles relating to deposits, which provides that deposits are funds held by the depository on behalf of and for the benefit of the person making the deposit, must be taken into consideration. The court held further that if there is no provision in the agreement stipulating that a deposit may be retained, a party has no legal basis for retaining a deposit or for refusing to refund the deposit.

It is therefore important to use a pro forma agreement which stipulates that the deposit may be retained if that is the intention of the parties. The provisions of the Conventional Penalties Act should also be kept in mind. The MC van der Berg pro forma agreement includes all the required provisions.