General principles of contract – Part 1
After a bit of a break, we return with our Monday Contemplation posts.

This week, we start a series of posts that will deal with general principles of contract, before we delve into the legalities and requirements relating to contracts of sale and lease.

Any contract entered into in South Africa, must comply with the following five requirements:

1. Consensus – the contracting parties must be in agreement with each other;
2. Legal capacity – the parties must have the legal capacity to enter into the contract;
3. Physical possibility of performance – the contract must be possible to perform. The classic example from our law is that if a property that has been sold burns down prior to transfer, then it becomes impossible for the seller to perform;
4. Formalities – any formalities required must be complied with; and
5. Legal possibility of performance – the contract must be legally possible to perform.

This week we will discuss the requirement of consensus and legal capacity.

Consensus means that the parties must be in agreement. A simple example is that if one party thinks they are selling the property and the other party thinks they are entering into a lease agreement, then the parties have not achieved consensus.

In terms of our common law, we say that the parties must be achieve "consensus ad idem". This means that the there must be a meeting of the minds, in other words, the parties must agree with each other. This of course is where you as the property practitioner (PP) plays a crucial role. As the PP, you would take a mandate from a seller and negotiate with potential buyers. It is therefore your responsibility to understand exactly and accurately what the requirements of both the seller and the buyer are. Verbal discussion and any other communications such as emails would then be captured in the offer to purchase (OTP). It is not difficult to understand that the OTP must be clear and contain the wishes of both the buyer and seller. If not, consensus has not been achieved.

The second aspect is that the parties entering into the contract must have legal capacity. In general, the following rules apply:

1. Individuals must be at least 18 years of age. This is the age of majority in South Africa.
2. If any of the parties are married, you need to check how they are married. If married in community of property (MICOP), then both spouses need to sign, unless one spouse has given the other spouse a written authority to act on the other's behalf. If married out of community of property (MOCOP), then each spouse has the authority to contract on their own behalf.
3. If any of the parties is divorced, it is a good idea to have a copy of the decree of divorce to satisfy yourself that this is in fact the case.
4. If a party is entering into a contract on behalf of a legal entity, like a company or a trust, then that party must be authorised to do so by the company or trust. If you are dealing with a company, ask for a resolution from the company authorising the person acting on behalf of the company. If you are dealing with a trust, then you would likewise ask for a resolution from the trust. Ideally, this resolution would be drawn up and issued by the auditor of the trust. In order to satisfy yourself fully that the company or trust has followed all requirements correctly, obtain a copy of the company's Memorandum of Incorporation and if dealing with a trust, then the trust deed. Each of these documents may contain very specific requirements relating to authority and these requirements need to be followed in order to avoid a situation where a contract is invalidated due to any of these requirements not having been met.

I will discuss the remaining three requirements next week.

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