<u>Elements of a contract of sale – Part 1</u>

Last week we completed our discussion of the general requirements of any contract entered into in South Africa.

In addition to the general requirements for any contract that needs to be complied with, we also need to be aware of the essentiala, naturalia and incidentiala of the contracts that we deal with in the real estate profession.

If we refer to a contract of sale of immovable property, then the essentiala, naturalia and incidentiala of this contract would be as follows:

1. Essentiala – these are the terms in the contract that distinguish this contract from another contract. We know the differences between a motor car and a motorcycle and hence the same with a contract of sale if immovable property and a lease of immovable property. In the case of a sale of immovable property, the essentials are that the parties (seller and buyer), property (address), price (amount) must be clearly identified, and the prescribed formalities must be complied with for this contract, being that it must be in writing and signed. Refer to one of earlier articles for more detail;
2. Naturalia – these are terms of the contract that are not essential for the contract's existence but are automatically assumed to be part of such a contract or implied by law. As examples, in a contract of sale of immovable property, the buyer must pay the purchase price, and the seller must effect transfer of the property. These duties flow naturally from such a contract and do not need to be specifically stipulated; and
3. Incidentialia – these are terms that are neither essential nor flow naturally from the contract, but rather are important to the parties. These terms are often referred to as material terms because they are material to the parties. An example would be something like the date of occupation. This date is not essential for the contract, but it is important for the parties.

It is important for you as the property practitioner (PP) to ensure that you fully describe the seller and buyer, the address of the property and the price. Likewise, it is important to understand what is important to the parties (incidentialia), like:

1. The date of occupation; and
2. Any items that the seller may wish to remove.

Both the seller and the buyer often assume what the seller may or may not be removing from the property. As the PP, DO NOT MAKE ANY ASSUMPTIONS!

In the very famous 1915 court case of McDonald Ltd v Radin NO and the Potchefstroom Dairies and Industries Co Ltd 1915 AD 454, the Appeal Court said that in terms of our common law the owner of the land also owns any permanent improvements (like buildings built on the land), fixtures (items attached to the building) and any movable accessories. A movable accessory is something that is movable but a part of the property. One of the best examples of a movable accessory would be the keys that you use to control the property. In other words, the keys belong to the property.

Let us assume that a PP shows a house to a potential buyer. At the date of viewing, the buyer saw a wall unit against a wall in a TV room, six bar stools matching a bar affixed to the floor in the lounge and an automatic pol cleaner in the swimming pool. The buyer purchases the property, takes transfer and moves into the house. Upon taking occupation, the buyer sees that the seller has removed the wall unit, the six bar stools (left the bar behind as it is attached to the floor) and the automatic pool cleaner.

The buyer asks the seller for return of these items and the seller responds that they were not attached to the property and so they can be removed. The agreement was sale was silent and the PP is now panicking.

Next week we will give the PP advice and solve the problem for the seller and buyer. Don't forget to read my Monday Contemplation each week. Previous blogs are available on various websites.