

Elements of a contract of sale – Part 2

Last week we started our discussion of various elements of a contract of sale. I sketched a scenario of a property practitioner (PP) who 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 pool 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 silent and the PP is now panicking.

What does the law say about such a situation?

Both our common law and our case law have very defined principles relating to this. The person who owns the land, owns the following:

1. The land;
2. The permanent improvements such as any structures built on the land and will also include things like plants and trees;
3. The fixtures, being anything attached to the permanent improvements. Examples may include burglar bars on the windows and items permanently affixed to a wall; and
4. Movable accessories. These would be movable items but they are inextricably part of the immovable property, such as the keys used to control the property.

The obvious solution to prevent any disputes after the sale has been concluded, is for the parties to agree what the seller may wish to remove from the property. These items would then be identified in the agreement of sale, usually as a special condition. My strong advice to property practitioners (PPs) is that they need to discuss this upfront with the seller and indicate what these items are to any potential buyers. I often suggest to PPs to also get a box of luminous round stickers and place a sticker on the items that the seller will be removing, in addition to making a list of what will be removed.

Should the PP not include any items that will be removed by the seller as a special condition in the agreement of sale, then we have to resort to the law to assist us to resolve the dispute of the wall unit, bar stools and automatic pool cleaner removed by the seller. When determining whether something stays with the property or can be removed, the Courts have highlighted the following tests:

1. What is the nature, function and purpose of the item? In other words, is the item so integral to the functioning of the property, that you cannot use the property without that item?
2. How is the item attached? The investigation here revolves around the damage that would be caused by the removal of the item.
3. What was the intention of the seller?

Tests 1 and 2 are usually not helpful. The buyer (in the scenario above), could still use the property without the wall unit, bar stools and pool cleaner. Removal of those items by the seller is not going to cause any damage to the property at all. How do we interpret the seller's intention? What we are trying to determine is what the seller's intended to do with those items, i.e: do they remain with the immovable property or not? Not always such an easy thing to determine!

In the very well known case of *Senekal v Roodt*, the Court held that where something was designed as a set, the intention is to keep it as a set. In our example, this would mean that the bar stools are to remain with the bar. The bar is affixed to the floor and is hence not movable. It has become a fixture. The bar stools are part of the set and must be left behind by the seller.

If the wall unit is attached to the wall, it should remain because it is now a fixture. If it is free standing, then it can be removed, like any other piece of furniture. One could potentially make the case that the pool cleaner is part of a “set” being the pool, filter and cleaner. However, in my view, it can be removed, as the pool is usable without the pool cleaner and the pool can be cleaned using other methods.

Hence:

1. Bar stools remain;
2. Wall unit can be removed if free standing; and
3. Automatic pool cleaner can be removed.

Once again, let us ensure that these disputes do not arise. Ask the seller what will be removed, make a list of these items and include the list of items as a special condition in the agreement of sale, agreed upon by both the seller and buyer. You will save yourself a lot of aggravation and anxiety as the transaction progresses!

Next week we will continue discussing various elements of the agreement of sale. Don't forget to read my Monday Contemplation each week. Previous blogs are available on various websites.