Elements of a contract of sale – Part 4

Over the last few weeks we have been discussing elements of a contract of sale. This week, we continue our discussion of the various elements of a contract of sale.

I often find that property practitioners (PP) take the view that you can make whatever changes to an offer to purchase that you need to without any concerns. The case of Maria Luisa Palma Codevilla v Paula Jane Kennedy-Smith NO and Others is very instructive in this regard. Judgement in this case was handed down in October 2024 and dealt with extensions to time to fulfil suspensive conditions.

You will be aware, that one of the most common suspensive conditions is making an offer to purchase subject to the raising of finance. This means that the contract will not proceed unless the buyer is able to obtain the requisite finance by the time indicated in the agreement of sale.

1. On the 4th of February 2020, the purchasers signed an offer to purchase to purchase a house from the sellers.
2. The offer to purchase was subject to approval in writing from a bank for a mortgage bond by the 14th of February 2020.
3. The purchasers paid the deposit required in terms of the agreement on the 10th of February 2020.
4. On the 11th of February 2020, the seller and the purchasers signed an addendum to the offer to purchase, giving the purchasers an extension from 14 February until 19 February to obtain approval for the mortgage bond. All the other terms and conditions remained the same.
5. The purchasers were unable to obtain mortgage approval by the 19th of February 2020 and hence the agreement of sale had lapsed.
6. On the 20th of February 2020, the purchasers approached the seller and requested a further extension to obtain the mortgage finance. The seller agreed and the seller and purchasers then signed a second addendum effectively giving the purchasers until 25 February to obtain the finance required.
7. The purchasers were unable to obtain the finance that they needed from the bank and they then cancelled the agreement of sale.
8. The purchasers then requested repayment of their deposit in the amount of R1 950 000 on the basis that the offer to purchase lapsed on 19 February and that the second addendum entered into and signed on 20 February did not revive the lapsed agreement.
9. The seller disagreed with the purchasers and demanded that payment in full be made by the purchasers.
10. The High Court agreed with the seller and indicated that the second addendum that was signed revived the agreement of sale and that the agreement of sale remained in force.
11. On appeal, the Supreme Court of Appeal (SCA) disagreed.

The SCA confirmed that a suspensive condition suspends the operation of the contract until the suspensive condition is fulfilled. If the suspensive condition is not fulfilled by the date required, then the contract lapses. In this case, the parties signed the first addendum prior to the suspensive condition needing to be fulfilled and so the first extension was valid. However, by the time the second addendum was signed, the contract had now lapsed and the second addendum did not revive the agreement.

The SCA also said that the various formalities required by the Alienation of Land Act 68 of 1981 (which I have discussed on this platform previously) had also not been met. Section 2(1) of the Alienation of Land Act requires that a contract of sale of immovable property must be in writing and signed. The second addendum did not comply with the requirements of Section 2(1) as it did not contain details of the parties, property and price, but merely referred to the extension of time to obtain the finance required.
Hence, the agreement of sale and the second addendum were of no force and effect.

The important lesson here for PPs, is that you cannot just make changes to an agreement of sale and expect that all will be in order. You may very well be making changes to an agreement that has already lapsed. If you are not sure, then consult with a legal professional that can assist you.

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.