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CANCELLATION OF SALE AGREEMENTS AND RETENTION OF DEPOSITS AS A PENALTY

More often than not one is confronted with non-refundable deposits in offers to purchase of immovable property.

In the same vein, most deeds of sale contain breach clauses worded that, in the event of a contractual breach on the part of the purchaser, which breach is not rectified within a specific period of time, the Seller can cancel such agreement and retain all amounts paid by the Purchaser in respect of the purchase price as a penalty. This provision is not accurate

In terms of our case law (see Mathews v Pretorius(1984) (3) SA547W) and the Conventional Penalties Act (Act 15 of 1962) ("The "Act") any penalty or liquidated damages contained in a contractual obligation shall be subject to the provisions of the Act. It specifically provides in section 3 as follows:

"If upon the hearing of a claim for a penalty, it appears to a court that such penalty is out of proportion to the prejudice suffered by the creditor by reason of the act or omission in respect of which the penalty was stipulated, the court may reduce the penalty to such extent as it may consider equitable under the circumstances: Provided that in determining the extent of such prejudice the court shall take into consideration not only the creditor's proprietary interest, but any other rightful interest that may be effected by the act or omission in question."

A forfeiture stipulation resulting from the withdrawal from an agreement is also covered by the stipulations of the Act quoted above. In other words it applies to non-refundable deposits as well as the retention of certain amounts already paid by a Purchaser as liquidated damages. The intangible aspect is that the Act refers to *"any other rightful interest that may be effected by the act or omission in question"* which does allow a portion of the penalty to compensate for the Seller's pain and suffering as a result of the stress and anxiety caused by such cancellation. The Court in applying the Conventional Penalties Act does not necessarily work out what the actual damages will be and need only reduce the penalty *"to such extent as it may consider equitable under the circumstances"*. "This means that the penalty can be far higher than the actual loss suffered

Estate Agents should be very careful not to create an expectation with a Seller that he/she will be entitled to all of non-refundable deposit or monies already paid to the Conveyancers on account of the purchase price if a purchaser breaches a deed of sale of immovable property and such breach results in a cancellation thereof. Conveyancers are expected not to act as judge and jury when dealing with monies in their trust account when a dispute arises about who should be the rightful recipient of such monies once the deed of sale is cancelled. The Conveyancers cannot be expected to pay the monies to either party in the absence of an agreement being reached between the parties or a competent court making an order.

It is however important to note that paying Estate Agent's commission may be less problematic in the sense that the contract will provide when the Agent's commission is payable and the same is a liquidated amount (provided the deed of sale is worded correctly). The Agent will be entitled to such commission even if the Estate Agent again resells the property from the same Seller to another buyer subsequent to the cancellation taking place. However, once again a Conveyancer is not entitled to assume that the agreement has been validly cancelled and that the Purchaser is at fault. Accordingly the Conveyancer will very often have to hold the monies in trust until such stage as the parties have reached an agreement or a court order is obtained.

It should be noted that the Seller's damages will often only be liquidated once the property is resold. The Seller will only have a claim in the event that the property is resold or valued for an amount that is not high enough to nullify the damages. The Purchaser therefore runs the risk (failing a subsequent agreement being reached or a court ordering otherwise) of the Conveyancer holding the monies back until the property is resold. This is so, as one of the components in calculating the Seller's damages is the eventual net selling price or market value of the property. This, however, does not entitle a Seller to deliberately resell the property at a lower price as one has a common law obligation to mitigate one's damages.

Conclusion

From the said case law and the provisions of section 3 of the referred to Act, sellers or their agents (conveyancers) *"cannot take the law into their own hands"*. The penalty must be agreed upon between the parties, preferably in writing, or the Court must be sought to quantify the amount payable as a penalty.

A "rouwkoop" clause in a deed of sale must clearly be distinguished from the penalty clause alluded to as the "rouwkoop" clause is not subject to the provisions of the aforesaid Act.

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Updated Aug 2017