

DEMISTIFYING THE BREACH CLAUSE

INTRODUCTION

All agreements contain a standard clause which relates to the breach of the agreement by either the Seller or Purchaser. The purpose of this article is to give some clarity as to how a breach clause functions within an agreement for the sale of immovable property.

CONTRACTUAL OBLIGATIONS AND SUSPENSIVE CONDITIONS

A distinction can we drawn between ordinary obligations of the parties to a contract, such as the obligation of the purchaser to make payment of the deposit and suspensive conditions which have the effect of suspending the operation of the contract until that suspensive condition is fulfilled, such as the agreement being suspensive upon the purchaser being granted a mortgage bond to finance the purchase of the property.

Where the either of the parties to the contract cannot fulfil a suspensive condition within the required time period (through no fault of their own), the contract lapses becomes null and void. For example, where a purchaser cannot obtain the necessary loan finance, the contract lapses. Note that in such cases, the contract is not cancelled but lapses as it in effect never comes into existence.

Where however the purchaser fails to comply with a contractual obligation, such as the payment of a deposit within a specified time period, the contract does not lapse and the purchaser is in breach of the contract.

In the latter event, the seller has two options, namely:

1. Allow the purchaser more time to effect payment of the deposit, (i.e. grant the purchaser an indulgence) or
2. Place the purchaser in breach using the breach clause in the contract.

In the latter option, the seller is obliged to act in accordance with the breach clause and to allow the purchaser a specified period of time within which to remedy (correct) the breach. In this case, the purchaser would thus be given a number of days to pay the deposit.

The failure by either party to act properly in order to fulfil a suspensive condition can constitute a breach of contract. This issue is dealt with in the article titled "The Doctrine of Fictional Fulfilment". Where however, the party in whose favour the suspensive condition is drawn, takes all reasonable steps to fulfil that suspensive condition (e.g. the purchaser applies for the mortgage bond and takes all necessary steps in this regard) and the suspensive condition is still not fulfilled, such a purchaser cannot be placed in breach of the agreement.

THE STANDARD BREACH CLAUSE

A typical example of a breach clause reads as follows:

1. In the event of a breach of this Agreement, the aggrieved party may give the defaulting party 10 days written notice to remedy the default, failing which the parties will have the right, without prejudice to his rights in law, to act as set out below.
2. If the aggrieved party is the Seller, the Seller may after the Purchaser's failure to remedy the default after receipt of notice, at his option without prejudice to his rights in law:-
 - (i) cancel this Agreement and retain the Deposit (less the Agent's commission plus VAT which the parties irrevocably instruct the Conveyancer to pay the Agent forthwith) in the Conveyancer's trust account and set it off against any damages proved by the Seller to have been suffered; or
 - (ii) enforce the terms hereof including payment of the full balance of the purchase price owing at the date of the Purchaser's breach aforementioned.
3. If the aggrieved party is the Purchaser, the Purchaser may after the Seller's failure to remedy the default after receipt of notice, at his option without prejudice to his rights in law:
 - (i) cancel this Agreement and claim damages proved by the Purchaser to have been suffered; or
 - (ii) enforce the terms of this Agreement.
4. If this Agreement is terminated for any reason, such termination will not release a Party from any liability which at the time of termination has already accrued to another Party or which thereafter may accrue in respect of any act or omission prior to such termination.

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The actual content of breach clauses do vary. All breach clauses however will specify:

- how a defaulting party is to be advised that they are in breach of the agreement (eg be delivery of written notice);
- the specific time period within which the defaulting party is to comply or remedy the breach;
- how the notice of breach is to be delivered to the defaulting party i.e. via e-mail, facsimile, registered post or by-hand delivery (refer to the domicilium / notices clause);
- the rights of the aggrieved party should the defaulting party not remedy the breach.

FAILURE TO REMEDY THE BREACH

After the aggrieved party has sent out the breach notice, the defaulting party is entitled to the time specified to remedy the breach complained of. Should the defaulting party not remedy the breach within the time period, it should be noted that the agreement does not automatically become cancelled but rather the aggrieved party has a number of options:

- the aggrieved party can give the defaulting party more time (i.e. grant the defaulting party an indulgence); or
- the aggrieved party can cancel the agreement and claim damages
- the aggrieved party can enforce the contract through our courts.

ENFORCEMENT OF THE AGREEMENT

In the event that the aggrieved party elects not to cancel the agreement but rather to enforce the agreement, the aggrieved will have to consult an attorney to launch an application to court to obtain a court order to this effect. The aggrieved party will have weigh various factors such as the cost of such court action and whether the defaulting party is able to comply with the agreement.

EFFECT OF CANCELLATION OF AN AGREEMENT

In the event that the aggrieved party elects to cancel the agreement and claim damages, the aggrieved party is obliged to send a further written notice to the defaulting party advising that the agreement is cancelled. This written notice must be served by the same method as that of the delivery of the breach notice. Only upon proper service of the cancellation notice can the agreement be deemed to be formally cancelled.

DAMAGES

Various breach clause deal with the issue of damages differently. Some breach clauses will provide that in the event of the purchaser being in default, any deposit held in trust is to be utilised toward the seller's damages on the basis of *rouwkoop* or pre estimated or liquidated damages. Other clauses will provide that the deposit is to be held in trust pending the determination of the seller's damages by a court.

It should be noted that despite the provisions of the breach clause, a deposit held in trust cannot summarily be deemed to equate to the damages which may be suffered by an aggrieved party. In all instances, including where a *rouwkoop* clause is present, a court order has to be obtained which must confirm the damages suffered by the aggrieved party and instruct the party holding the deposit to make payment of the damages accordingly.

An estate agency or conveyancing attorney is not entitled to withhold or make payment of any funds held in their trust account without the necessary express authority.

Note further that in terms of section 12(5) of the Alienation of Land Act 68 of 1981, *rouwkoop* clauses are subject the provisions of the Conventional Penalties Act 15 of 1962. This act essentially provides that the damages claimed by the aggrieved party should not be more than the actual damages suffered.

AGENTS COMMISSION

In terms of most standard breach clause's and commission clause's, the agent's commission is deemed to be earned and payable to the agent upon cancellation of the agreement, either by the defaulting party or jointly by the parties in the event of mutual agreement to cancellation.

If the Purchaser has paid a deposit which is either held by the estate agency or the conveyancers and it is the Purchaser's breach which resulted in the cancellation of the agreement, the commission may be deducted from the deposit so held, subject to the terms of the agreement.

As the Purchaser's deposit is held in trust, it is imperative that specific authority is contained in the agreement which expressly authorises the payment of the commission to the agents (see clause 2(i) above).

The Seller may be liable for agent's commission in the event that the cancellation is due to the seller's breach of the agreement.

CONCLUSION

When a breach occurs it is suggested that an attorney be consulted to assist in the drafting of the breach notices. The provisions of a breach clause must be strictly adhered to in order to validly place a party in breach and if needs be, legally cancel the agreement. Any funds held in trust may only be dealt with strictly in accordance with the provisions of the agreement, failing which by the direction of a court order.