

# ROUWKOOP AND PENALTY CLAUSES IN SALE AGREEMENTS

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A rouwkoop clause comes from our common law. The word is derived from the Dutch words meaning “regret” and “purchase”. In essence, it is a clause in an agreement that entitles a party to that agreement to pay an agreed sum of money in order to be allowed to withdraw (or purchase his/her freedom) from the agreement. If a purchaser in an agreement containing a rouwkoop clause withdraws from the agreement and pays the agreed rouwkoop amount, the purchaser will be acting in accordance with the terms of the agreement and his/her withdrawal will not amount to a breach of the agreement.

A rouwkoop clause is distinguishable from a penalty clause which would come into operation where there was a breach of the agreement.

Regrettably many agreements have confused the law and merged these two clauses. It is common to see a clause in a sale agreement providing that, if the purchaser breaches the agreement and the seller cancels the agreement as a result, the purchaser will forfeit his/her deposit as rouwkoop. This is an incorrect use of the concept of rouwkoop.

There is nothing wrong with having a penalty clause in an agreement stating that the purchaser will be required to pay the seller’s damages if the purchaser breaches the agreement and the seller cancels it as a result. The penalty must, however, not be out of proportion to the harm suffered or it will fall foul of the Conventional Penalties Act of 1962. Providing in an agreement for forfeiture of a deposit may therefore be unlawful.

We provide in our sale agreements that, if a buyer breaches the agreement and the seller cancels the agreement as a result, the attorneys are authorised to hold the deposit in trust pending determination of the seller’s damages. In this way, once his/her damages are quantified, the seller will have access to the deposit without having to chase the purchaser, and the purchaser will receive the difference, if the damages are less than the deposit.

Very few modern agreements contain a proper rouwkoop clause. It seems to be unpopular nowadays because South Africans appear to desire certainty that the other party is locked into the agreement for the duration of the agreement.

***For professional but personal advice on, and assistance with sale agreements, please contact Stuart Fourie ([stuart@fouriestott.co.za](mailto:stuart@fouriestott.co.za)) or Vicky Stott ([vicky@fouriestott.co.za](mailto:vicky@fouriestott.co.za)) or visit our website for further information about our firm and areas of expertise.***