

# VOID SALE AGREEMENTS – CAN THEY BE REVIVED?

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A sale agreement in respect of immovable property is not valid unless certain formalities are complied with in. In particular, Section 2 (1) of the Alienation of Land Act 68 of 1981 provides that:

*“No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.”*

The above formality is of particular importance when, for example, a sale is subject to a suspensive condition. A suspensive condition is one which makes rights and obligations of the sale agreement subject to an uncertain future event occurring timeously. This was discussed in the matters of *Fairoaks Investment v S Oliver (268/07) [2008] ZASCA 41 (28 March 2008)* and *Pangbourne v Basinview (381/10) [2011] ZASCA 20 (17 March 2011)*.

In the *Fairoaks* decision an agreement of sale was concluded but was subject to the fulfilment of three suspensive conditions. One of these conditions was not fulfilled within the requisite 12 month period and the agreement consequently lapsed. The parties then signed an addendum purporting to revive the agreement and amend the unfulfilled suspensive condition. The Court held that the addendum was not sufficient to revive the sale agreement - a new sale agreement had to be entered into.

In the *Pangbourne* decision again an agreement of sale was concluded subject to the fulfilment of certain suspensive conditions, which remained unfulfilled. The parties concluded an addendum, and were under the impression that this “revived” the agreement. The Court held that a contract ceases to exist if a suspensive condition is not fulfilled. The agreement cannot be revived and as such the addendum was of no force or effect in either reviving the sale agreement or constituting a new sale agreement.

The above two decisions can be differentiated from the matter of *Neethling v Klopper and Others 1967 (4) SA 459 (A)* where the Court held that a valid contract which had been cancelled (as opposed to the agreement lapsing as in the cases above) could be revived when both parties waived their rights created by the cancellation of the agreement, and that an agreement to do so does not constitute a fresh agreement of sale.

To summarize, the position in our law is that, if a suspensive condition is not fulfilled timeously, the sale agreement lapses and is regarded as void *ab initio* or “void from the beginning”. The effect is that the sale agreement is not capable of being revived.

After the sale agreement has lapsed, no addendum signed between the parties or any agreement to waive the suspensive condition would be of any force or effect. The parties would have to conclude a fresh sale agreement that complies with the Alienation of Land Act.

Below are three different scenarios which could occur:

### **Scenario A:**

The parties sign the agreement of sale but it subsequently emerges that the agreement was signed by the second party after the offer made by the first party had expired.

In this scenario the agreement is void and is incapable of being revived through an addendum. The parties should conclude a new sale agreement in compliance with the Alienation of Land Act. This new agreement can be a short and simple document incorporating the terms of the lapsed agreement by using the lapsed agreement as an annexure.

### **Scenario B:**

The parties sign an agreement of sale which contains a suspensive condition. The suspensive condition lapses.

In this scenario the agreement is void, and incapable of being revived as per Scenario A. The solution would be the same as Scenario A.

### **Scenario C:**

The parties sign an agreement of sale which contains a suspensive condition. Prior to the agreement lapsing, the parties either waive the suspensive condition or extend the time for its fulfilment by signing an addendum.

In this scenario the addendum signed by both parties would keep the agreement alive.

To prevent sale agreements from becoming unenforceable and potential litigation between the parties, it is crucial that all parties be aware of applicable timeframes, the effect of non-fulfilment of these, and the options available should there be a danger of not meeting a particular timeframe.

***For professional but personal advice on, and assistance with the drafting and conclusion of, sale agreements or any litigation matters associated with sale agreements, please contact Stuart Fourie (stuart@fouriestott.co.za), Vicky Stott (vicky@fouriestott.co.za) or Chris Salmon (chris@fouriestott.co.za) or visit our website for further information about our firm and areas of expertise.***

