



## Suspensive conditions vs ordinary terms / obligations of an agreement

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It is important to note that in the case of conditions, being they suspensive conditions and/or resolutive conditions, the parties by specific agreement introduce contingency as to the existence and/or continued existence of the contract, whereas provisions which are not true conditions i.e obligations bind the parties as to their fulfilment and on breach give rise to contractual remedies of a compensatory nature i.e. specific performance, cancellation etc. See in this regard *R v Cats* 1959(3) SA 408 (C) 417.

Legally a suspensive condition can be described as a condition which suspends the operation or effect of one, or some, or all, of the obligations under a contract until the condition is fulfilled. If the condition is not fulfilled, then no contract comes into existence.

The consequences of non-fulfillment of a true suspensive condition vs an ordinary term / obligation will be considered below.

Drawing the distinction between the ordinary terms regulating an agreement and a suspensive condition is not always easy. In *Lomon Marè and Others v Trudie Marè* (343/2019) [2020] ZASCA 43 (21 April 2020) the Supreme Court of Appeal (SCA) was tasked to determine whether a provision set out in a settlement agreement constituted a suspensive condition which, on fulfilment, would give effect to an obligation by the appellants to make payment to the respondent, or whether the provision was simply a description of the method of payment agreed upon by the parties i.e. an “ordinary” term of the agreement.

The agreement stipulated that payment of a settlement amount would be made upon the sale, by the appellants, of various game to a third party purchaser, which third party purchaser would then make payment of the settlement amount to the respondent on behalf of the appellants. A breakdown in price negotiations between the appellants and the third party purchaser resulted in the cancellation of the proposed sale and the appellants alleged that such cancellation rendered performance in terms of the settlement agreement impossible. On the back of this alleged impossibility the appellants argued before the SCA, that their obligation to make payment in terms of the settlement agreement had become notional i.e. the suspensive condition had not been fulfilled and accordingly the settlement agreement had not come into existence.

In reaching its decision, the SCA embarked on the interpretation of the settlement agreement, guided predominantly by the context under which the agreement was concluded, as well as its purpose.

The SCA held that the obligation to pay, at all material times, existed independently of the method of payment. It therefore follows that when the prescribed method of payment became “impossible”, the obligation to pay would inevitably survive it.

The SCA ultimately found in favour of the respondent and the appellants remained obliged to make payment of the settlement amount in terms of the agreement. The agreement accordingly survived given the specific terms were found to be an obligation / ordinary term, and not a true suspensive condition.

In the matter *Africast (Pty) Limited v Pangbourne Properties Limited* [2014] 3 All SA 653 (SCA) the SCA had to decide on the effect of non-fulfilment of what was found to be a true suspensive condition.

In this matter the parties concluded a contract for the development of commercial property in an area in Gauteng. One of the suspensive conditions in the contract was that Pangbourne’s board of directors had to approve the contract and written approval had to be presented to Africast within seven working days from the date of conclusion of the contract. The contract was signed on 11 April 2007 and Pangbourne’s board of directors approved the contract on 20 April 2007, however the written approval was only provided on 25 April 2007 to Africast being after the required seven day period.

Pangbourne decided after 18 months that since the suspensive condition had not been met within the stipulated period, it was not bound by the contract and refused to deliver the required guarantees. At that stage buildings had already been constructed by Africast in terms of the agreement.

The SCA confirmed Pangbourne’s view that since the suspensive condition in the contract had not been fulfilled timeously no contract had come into existence and that the contract had lapsed due to non-fulfilment of the suspensive condition. The Court came to this conclusion notwithstanding the fact that both parties had performed in terms of the agreement for some 18 months.

Suspensive conditions appear most commonly in contracts involving the sale of immovable property such as a houses, flats or farms. The conditions that are generally encountered in the contract of sale are that the sale is subject to the purchaser obtaining a bond and/or that the sale is subject to the purchaser selling his existing property within a certain time frame.

It is evident from the above that it is always prudent to be careful when entering into agreements, especially when they contain suspensive conditions. Be aware of the stipulated time frames for compliance, and for whose benefit the conditions are inserted, and the requirements to prove compliance.

It is recommended to seek legal advice before you sign a contract.

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