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REVIVAL OF AN OFFER TO PURCHASE PURSUANT TO A SUSPENSIVE CONDITION

WHAT IS A SUSPENSIVE CONDITION?

A condition which suspends the rights and obligations under a contract until the condition is fulfilled. Simply put, if the suspensive condition is not fulfilled, there is no binding contract.

In the case of ***Maria Luisa Palma Codevilla v Paula Jane Kennedy-smith NO and Others (494/2023) [2024] ZASCA 136*** the Supreme Court of Appeal ("SCA") was tasked with answering the question of whether an agreement for the purchase and sale of an immovable property can be *revived* subsequent to the lapse of a suspensive condition contained therein.

At first glance the answer seems obvious. However, this recent SCA decision serves as a stark reminder of the nature of suspensive conditions and their ramifications.

FACTS OF THE CASE

- On 4 February 2020, the purchasers made an offer to purchase a property for R5,15 million subject to a suspensive condition that they had to secure a mortgage bond for R4,95 million by 14 February 2020.
- On 11 February 2020, the seller and purchaser entered into an addendum extending the suspensive condition to 19 February 2020.
- On 20 February 2020 a second addendum was concluded wherein the provisions in respect of bond approval had to be provided by 25 February 2020. Payment of R1950000.00 was made and the suspensive conditions were met. The purchasers failed to meet their financial obligations and desired to cancel the agreement. In this regard, they requested the Bank to retract their bond application.

HELD - HIGH COURT

- The parties intended to revive the OTP and the second Addendum had that effect. The Second addendum amounted to a 'fresh agreement' incorporating the terms of the OTP as amended by the first addendum.
- Leave to appeal was granted to a full bench (3 judges)

HELD - FULL HIGH COURT

- Appeal dismissed on 23 January 2023.
- It was found that a new agreement was not concluded but that the OTP was validly extended in terms of the 30-day period provided in clause 7.2 of the OTP.
- This argument was raised *mero muto* (of its own accord)
- Special leave to appeal was granted.



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HELD - SCA MAJORITY JUDGMENT

- The appellant is thus correct that the respondents laboured under the erroneous impression that they could simply extend the time fixed for the fulfilment of the suspensive condition, and did not appreciate that a new contract had to be concluded. It was found that, on the evidence presented, the second addendum did not constitute a new agreement.
- The purported revival of the OTP and extension of the time fixed for the fulfilment of the suspensive condition, after the expiry date for its fulfilment, is legally incompetent.
- The SCA found in favour of the appellant which resulted in the appeal succeeding with costs. The seller was ordered to repay the funds.

IN SUMMARY

- Whilst the Courts may consider the intention of the parties, it is trite that where a condition exists for something to be done on or before a specific date, that condition must be dealt with before that date. The contract lapses by operation of law and with it, the suspensive condition. This means that there is nothing to revive or extend and the OTP and all its terms become unenforceable.
- On this backdrop Stupel & Berman Inc recommend that where the date to fulfil a suspensive condition has lapsed, the parties should enter into a new OTP and not merely sign an addendum. This will ensure clarity and codify the true intention of the parties.
- The above does not constitute legal advice and is a brief summary on the recent decision handed down by the SCA on 10 October 2024. For more information and exhaustive legal advice, please contact Stupel & Berman Incorporated (ana@stupelberman.co.za / nandi@stupelberman.co.za).