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Repudiating contract could lead to damages claim

The buyer of our reader's property obtained a loan for R300 000 less than the full purchase price and undertook in writing that he would pay in the balance.

Our reader says the buyer paid R100 000 towards the outstanding amount, but now, suddenly, wants to cancel the deal. She would like to know from our panel of experts if there is any way in which she can claim damages.

Grant Howard from Kaplan Blumberg attorneys in Port Elizabeth says when a suspensive condition is included in a contract, it means that the working of the contract is suspended until the condition has been fulfilled.

"Most often suspensive conditions in contracts for the sale of immovable property will relate to the fact that the buyer must succeed in obtaining a bond for a certain amount by a certain date," says Howard.

He says if the condition is met by the due date, then there will be a binding contract.

"If the condition is not met by the due date, or any extension thereof agreed to by the parties prior to the due date, the contract will lapse and neither party will be bound by it. In this instance, if a buyer has paid a deposit, it must be returned."

Howard says contracts for the sale of immovable property should specify the exact amount of the bond that the buyer must obtain. "If the bond is obtained timeously, but not for the specified amount, it will be regarded that the suspensive condition has not been met and the contract will lapse accordingly."

He further says it has been confirmed by our courts that a bond clause is usually inserted in a contract for the exclusive benefit of the buyer.

"The clause can be waived, which means that the buyer may unilaterally dispense with its protection. The waiver must take place before the due date for fulfilment of the condition."

Warren Jack from the Warren Jack Property Group in PE says it is advisable that the contract should stipulate that the seller will have the right to call for a guarantee for the purchase price immediately after the suspensive condition has been met or waived, so that the transaction can proceed.

He says the reader must request the conveyancing attorney to advise her on her rights as contained in the contract. "If the buyer is not cooperating with the conveyancer, or if he is acting in such a manner that it may be assumed that he is unilaterally repudiating the contract – as appears to be the case – then the buyer must be placed on terms for breach of contract.

"If the buyer fails to rectify his breach by paying in the balance of the purchase price or by giving a guarantee for payment thereof, then the reader may either cancel the contract and claim damages from the buyer or she may choose to enforce the contract by way of an application to court," says Jack.

He says if the reader's contract stipulates that the buyer will forfeit all monies already paid should the contract be cancelled due to the buyer's breach, then the reader will be entitled to that money. This is known as a "rouwkoop" clause, which allows a contracting party to withdraw from a contract by paying a sum of money to the other party.

"If a contract does not contain a 'rouwkoop' clause, it does not mean that the seller does not have a right to claim damages. Our common law entitles the reader to institute a claim for damages by way of legal action against the buyer," says Jack.

Send your property related questions to coetzee@fullstopcom.com.

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