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Suspensive conditions and the risk of non-compliance

What is a suspensive condition?

A suspensive condition is a contractual clause that suspends the enforceability of a contract (or part of it) until a future uncertain event occurs. In other words, the sale agreement exists, but it is not legally binding or enforceable. The suspensive condition thus postpones the operation of the agreement until such condition is fulfilled. The agreement only comes into *effect* once this takes place. If the condition is not fulfilled, the agreement never becomes enforceable and is void *ab initio*.

Suspensive conditions protect parties against uncertainty. Purchasers may need time to secure finance, and sellers may wish to ensure that a purchaser can perform before binding themselves to a sale.

This type of condition differs from a resolutive condition. In the second instance, the sale agreement is immediately valid but may fall away if an uncertain event does not occur.

Common suspensive conditions in sale agreements

In property transactions, several types of suspensive conditions frequently arise.

Bond approval:

- The most common suspensive condition.
- The sale is subject to the purchaser securing a loan from a financial institution for a specified amount, usually within a set timeframe.

A typical clause reads:

'This agreement is subject to the purchaser obtaining a home loan of R2 million within 30 days.'

- The purchaser signs an OTP, subject to them obtaining a bond from a bank within an agreed time period (30 days).
- Until the bond is granted, the contract is suspended.
- Once the bond is approved, the condition is fulfilled, and the agreement becomes fully enforceable.
- If declined, the agreement lapses once the time period is up, unless the condition is extended or waived.

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Sale of purchaser's existing property:

- Sometimes, purchasers need to sell their current property to afford the new purchase.
- In this case, the new sale is suspended until the old property is sold within an agreed timeframe.
- This can create chains of transactions and significant delays.
- Agents should manage expectations carefully.

Subject to consents or approvals:

- Certain properties require consent from a body corporate, homeowners' association, or government authority before transfer.
- The sale agreement may be suspended until the necessary consent is obtained.

Other conditions:

In some cases, parties may agree on unique suspensive conditions, such as:

- The approval of building plans;
- Rezoning or subdivision approval; or
- Due diligence investigations.

The consequences of non-compliance

The failure to comply with suspensive conditions has serious consequences for all parties involved.

The agreement lapses

If the suspensive condition is not fulfilled within the specified time, the agreement falls away without the need for cancellation. It becomes void *ab initio* (void from the start).

- This means there is no enforceable contract, as if the parties never concluded the agreement.
- Neither party can insist on transfer, demand payment, or enforce performance.

This amounts to a failed deal and no commission, regardless of how much work has gone into marketing and negotiation.

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The deposit must be returned

Where deposits have been paid into trust, these must be refunded to the purchaser if the suspensive condition is not met. Sellers cannot retain funds because there was never a valid agreement.

Wasted time and resources

Non-compliance often causes significant delays for sellers:

- Losing valuable time in the property market;
- Missing out on alternative purchasers; and
- Being forced to start the marketing process from scratch.

For purchasers, this might mean:

- Losing the property to another purchaser; or
- Wasting money and time on applying for a bond, appointing an expert to inspect the property, etc.

For agents, this means:

- Lost commission;
- Frustrated clients;
- Loss of trust/future business; and
- Potential reputational harm.

Disputes

Non-compliance often leads to arguments about what exactly was required.

Was the purchaser obliged to obtain a bond from any bank or only the bank of their choice?

If a bond was approved for less than the stated amount, does that count as compliance?

If the seller was willing to reduce the price to match the lower bond, can the purchaser still walk away?

Therefore, suspensive conditions must be clearly drafted to avoid ambiguity, disputes, and unwanted costs.

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Linked transactions

In practice, many property deals are linked. For example, a purchaser's ability to buy one property may depend on selling another. Non-compliance with the first agreement's suspensive condition can cause a domino effect, which collapses several deals at once.

For this reason, agents should closely track deadlines, remind clients of their obligations, and, where possible, assist in ensuring conditions are met.

Deemed fulfilment

If a party acts in bad faith by not taking genuine steps to fulfil a suspensive condition, they may face liability. For example:

- A purchaser signs subject to bond approval but never applies for a loan; or
- A purchaser signs subject to selling their property but makes no effort to list or market it.

In such cases, the seller may claim damages for wasted costs because the condition was not pursued honestly.

The doctrine of deemed fulfilment refers to instances where a condition is deemed to have been fulfilled if a party deliberately prevents the fulfilment of the condition to avoid being bound by the terms of the agreement.

The party in whose favour the suspensive condition operates is required to take all reasonable steps to fulfil that condition.

Where a sale agreement is subject to the suspensive condition that the purchaser obtain bond approval by a certain date, they're obliged to take all reasonable steps to obtain approval and fulfil the condition. In practice, the purchaser is required to:

- Actively apply for the bond within a reasonable time and submit all requisite documentation to the financial institution; and
- Provide accurate information so that the financial institution can properly determine whether or not to grant approval.

If the purchaser deliberately fails to apply for the bond within the agreed time or does not submit the relevant documentation, the suspensive condition can be deemed to have been fulfilled and the agreement will come into existence and be binding on the purchaser notwithstanding their attempt to prevent this.

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Waiving suspensive conditions

Generally, a suspensive condition is inserted for the benefit of one or both parties. Where it benefits one party (bond approval benefits the purchaser), that party may waive the condition if they wish.

For example, if the purchaser obtains a bond for a lesser amount than was stipulated in the sale agreement, and wishes to accept that bond, they may unilaterally waive the bond condition, provided they are able to finance the shortfall in cash. In this event:

- The waiver must be reduced to writing;
- It must be signed by both seller and purchaser, should the seller be agreeable;
- It must be signed before the due date for obtaining bond approval; and
- The purchaser has the funds to make up the balance of the purchase price despite the lesser amount of the bond.

Pro tips

- To prevent disputes and lost sales, the parties to an agreement must provide sufficient time for the relevant party to deliver on the suspensive condition.
- The inclusion of automatic extensions in writing in an agreement is advisable.
- Alternatively, an addendum to the agreement must be executed prior to the date on which the condition must be fulfilled.
- Monitor timeframes: Time is of the essence with suspensive conditions. Failure to monitor timeframes is one of the biggest reasons deals collapse unnecessarily.
- Agents should:
 - ✓ Diarise and communicate all important deadlines.
 - ✓ Remind parties of approaching cut-off dates.
 - ✓ Encourage proactive steps (e.g., bond applications submitted early).
- Ensure purchasers and sellers understand what a suspensive condition means in practical terms.
- Manage expectations by advising clients upfront that if conditions fail, the agreement lapses.
- Always obtain written proof of fulfilment, waiver, or extension.