

MDA PRESENTS



FIRST AID FOR CONTRACTS



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BEING CONSCIOUS OF CONDITIONS

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Generally speaking, the word “condition” is often used interchangeable with the word “term”. This is particularly prevalent in a construction law context with the FIDIC’s “conditions of contract” and the General Conditions of Contract standard form contracts making reference to conditions. The conditions of contract referred to in these standard form contracts are essentially a combination of the terms, conditions and warranties that make up the contract between the parties.

The distinction between terms and conditions in the colloquial phrase “terms and conditions” is for good reason.

Terms

The “terms” of a contract refer to the contractual obligations placed on the parties, to act, or refrain from acting in a particular manner.

Conditions

This is contrasted with the meaning of conditions when viewed in its true sense, a condition is a qualification which renders the operation and consequences of a contract dependant on the occurrence of an uncertain future event. ¹

An important consequence of this distinction is that an obligation arising from a term of a contract is enforceable whereas a condition is not and the non-fulfilment of a condition cannot be considered a breach of contract. ²

¹ *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd* 1982 1 SA 398 (A).

² *Commissioner for Inland Revenue v Viljoen and Others* 1995 4 SA 476 (E) and *Macduff & Co Ltd (in liquidation) v Johannesburg Consolidated Investment Co Ltd* 1924 AD 573.

Three common types of conditions prevalent in construction contracts are suspensive conditions, condition precedents and resolutive conditions. A suspensive condition is often referred to as a condition precedent however the two are distinct concepts. A suspensive condition suspends the operation of a contract pending the occurrence of an uncertain future event whereas a condition precedent is a condition specified in the contract which must be fulfilled before the contract comes into existence. These are contrasted with a resolutive condition which terminates obligations under the contract on the occurrence of an uncertain future event.

Common examples of these conditions:

General Conditions of Contract – Third Edition, 2015:

Clause 5.9.3 to 5.9.6: These clauses read in conjunction provide for a suspensive condition. The Contractor is to give timeous notice to the Employer's Agent of any requirements additional to that contained in the scope of work or drawings provided, which the contractor requires for the carrying out of the works. This is essentially a request for further instructions or documentation from the employer's agent. The instructions or drawings requested by the contractor must be delivered at the time stipulated in the accepted programme. When the drawings are provided later than the date stipulated in the accepted programme, the contractor is entitled to extension of time and recovery of proven additional cost. If the notification is not given the contractor has no right to rely on these remedies.

It must be noted that the court has held on this point that a contractor must provide notice to the employer (place them in *mora*), should the contract not provide

for a certain date for performance by the employer, to give effect to this suspensive condition.³ A contractor's programme is not sufficient without the notice, to place the employer in *mora*.⁴

Clause 5.3.1 and 5.3.2: These clauses provide that the instruction by the employer's agent to commence the works is subject to submission by the contractor of documentation as required in the contract data and approval of such documentation by the employer's agent. If the documentation is not submitted in the required time period or is found to be unacceptable, then the employer has grounds for termination. The failure to submit or the submission of unacceptable documents creates a resolutive condition in that the employer has an option to terminate the contract. The occurrence of the uncertain future event in this case is both the contractor's failure to submit or the submitting of unacceptable documents and the employer electing to terminate the contract.

FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer – First Edition, 1999 (the Red Book):

Clause 2.1: This clause places an obligation on the employer to grant access to the site to the contractor within the time stated in the appendix to tender. The employer may however withhold performance of this obligation subject to the contractor providing its performance guarantee. The clause constitutes a suspensive condition in that the obligation to grant access only arises after the contractor has provided a performance security to the employer.

³ Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1977 (4) SA 310 (T).

⁴ Ovcon (Pty) Ltd v Administrator, Natal 1991 (4) SA 71 (D).

The NEC3 Engineering and Construction Contract – April 2013:

Clause 50.1, 51.1 and 51.2: These clauses provide for assessment and payment of the contractor. The obligation to make payment by the employer arises following the fulfilment of a number of suspensive conditions. These include assessment by the project manager on the assessment date, certification of payment by the project manager within one week of each assessment and the obligation to make payment then arises after the fulfilment of these conditions.

Effect of fulfilment or non-fulfilment

These suspensive and resolute conditions are found throughout standard form construction contracts and are always dependant on the happening (sometimes referred to as fulfilment) of an uncertain future event. Should a resolute condition be fulfilled then the contract is considered null and void. Should a suspensive condition not be fulfilled within the time period prescribed for fulfilment or, in the absence of a stated time period, within a reasonable time period, then the entire contract or the obligation suspended by the condition does not take effect and is not enforceable.

The doctrine of “*fictional fulfilment*” provides an exception such that where a party to a contract, in breach of his duty, acts in a manner which prevents the fulfilment of a condition which would result in a subsequent obligation arising and does so with the intention of ensuring that the fulfilment of the obligation is not forthcoming, the unfulfilled condition will be deemed to have been fulfilled against him.⁵ The purpose of such doctrine is to provide for fair and

equitable remedy against a party who acts in a manner to frustrate the fulfilment of a suspensive condition.

Notice provisions as conditions

Very often standard form contracts include provisions that require that notice is to be given where the contractor wishes to exercise an entitlement to an extension of time and or to recover his cost, as the case may be. These provisions constitute suspensive conditions. The question is whether these notice requirements are binding suspensive conditions and can this result in a contractor losing an entitlement to claim?

English case authority provides useful insight and states that these suspensive conditions will be binding if the notice requirements contain a specified time period for the delivery of the notice. Furthermore, that should such notice not be delivered in time then the delivering party loses its entitlement to make such claim.⁶ Our courts have similarly held in interpretation of a time-barring provision which constituted a suspensive condition that these notice requiring provisions are to be enforced provided that the conditions are clearly worded, and the time period prescribed for submission of such notice is reasonable.⁷

⁵ *Scott and another v Poupard and another* 1971 (2) SA 373 (A).

⁶ *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem nv* [1978] 2 Lloyd's Rep. 113.

⁷ *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

A closing thought

Accordingly, it is important that all standard form contract users are aware of the suspensive and resolutive conditions contained in the contracts that they use and must beware of the potential consequences of fulfilment or non-fulfilment of these provisions.