

Short notes on:

CONTRACT PRICE AS AN ELEMENT OF A VALID CONTRACT

INTRODUCTION

There are certain essential elements which must be present in a contractual arrangement for an agreement to be deemed valid. As many may be aware, these essential elements may summarised to the following: capacity, offer and acceptance, certainty, possibility of performance and lawfulness.¹

In saying that, what do these elements boil down to in respect of the actual terms of the relevant contract?

In this article, we aim to briefly discuss price as a component of contractual certainty and the possible effects it may have on the validity of a contract.

OVERVIEW

A contractual term which sets out what the price may be for a specific purchase and sale, is required to be express/ certain or objectively obtainable.² Scholars have indicated that this principle coincides with the element of consensus in a contract and have made this assertion on the basis that; if there was no certainty on the part of the relevant contractors, then there cannot necessarily, have been consensus.³

In the case of *Loggenberg N O & others v Maree* in 2018, although the case was centered around the alienation of land where the relevant agreement was not reduced to writing, the Supreme Court of Appeal mentioned the following in respect of contracts of sale and price:⁴

¹ A Van der Ploeg (2017), "A Legal Guide to Contracts in South Africa", Lioness of Africa, www.lionessofafrica.com Accessed on: 24 July 2020.

² M R Laing (1999), "Price Adaptation and the Requirement of Certainty" SUNscholar Research Repository, www.scholar.sun.ac.za Accessed on 24 July 2020.

³ M R Laing (1999), "Price Adaptation and the Requirement of Certainty" SUNscholar Research Repository, www.scholar.sun.ac.za Accessed on 24 July 2020.

⁴ *Loggenberg N O & others v Maree* (286/2017) [2018] ZASCA 24 (23 March 2018), www.saflii.org Accessed on: 24 July 2020.

“A contract of sale is a consensual agreement by which one of the contracting parties (the seller) binds itself to the other (the buyer) to exchange a thing for a definite sum of money (the price) which the buyer promises to pay to the seller. The essentials of the contract are agreement upon the merx, the price and the obligation of the seller to deliver the merx to the buyer.”

It therefore goes to say, that an ambiguous term in respect of price may render more than one point of vulnerability in terms of the validity of a contract.

Accordingly, contractual terms which allow a party to determine a price in the future and contracts which have no price or no mechanism to determine price have rendered a number issues in respect of contractual validity.

Be that as it may, the courts have considered whether a contract which allows a party to the contract to determine performance of another party is invalid. In *NBS Boland Bank Ltd v One Berg River Drive CC; Deeb v ABSA Bank Ltd; Friedman v Standard Bank of SA Ltd* 1999 4 SA 928 the courts indicated that the prevailing legal principle dictated that such contracts are invalid.⁵

However, the court further commented (*obiter*) that the principles of public policy and equity may be employed to interpret the relevant contractual provisions under the circumstances.⁶

CONCLUSION

Upon consideration of the above, it is clear that where price is not expressly provided for in an agreement or where there isn't a clear mechanism to determine such price; that the relevant contract in may in all likelihood be invalid for lack of certainty and furthermore consensus.

The unfortunate reality is that questions in relation to validity usually arise when a party wishes to enforce the terms of a contract previously agreed upon and the other does not or refuses to perform.

⁵ H M Du Plessis (2013), Volume 16, *“The Unilateral Determination of Price- A Question of Certainty or Public Policy?”* P.E.R., www.academia.edu Accessed on 22 July 2020 & *NBS Boland Bank Ltd v One Berg River Drive CC; Deeb v ABSA Bank Ltd; Friedman v Standard Bank of SA Ltd* 1999 4 SA 928.

⁶ H M Du Plessis (2013), Volume 16, *“The Unilateral Determination of Price- A Question of Certainty or Public Policy?”* P.E.R., www.academia.edu Accessed on 22 July 2020 & *NBS Boland Bank Ltd v One Berg River Drive CC; Deeb v ABSA Bank Ltd; Friedman v Standard Bank of SA Ltd* 1999 4 SA 928.

Certainty in respect of price with due regard to the other elements of a relevant contract, is therefore worthy of significant consideration when entering into agreements.

Contact an attorney at SchoemanLaw Inc for your contractual needs.

