STRICT COMPLIANCE WITH THE CANCELLATION CLAUSE IS PEREMPTORY:

The traditional roles of Attorneys have not evolved much over the years, barring the fact that Attorneys in the Republic of South Africa can appear in the High Court, Supreme Court of Appeal and the Constitutional Court in terms of Section 25 of the Legal Practice Act, the general duties of Attorneys as imported from duties of Solicitors in Commonwealth Jurisdictions involve a lot of paper work.

Inevitably an Attorney is expected to be apt at drafting and overseeing their client's day to day documents. In a country like South Africa, where there is an impetus on reviving the entrepreneurial spirit of its citizens to achieve economic growth, the majority of the documents you are mostly likely to encounter as an Attorney are contracts and accordingly an Attorney ought to know his or her way around a contract.

Contacts vary in complexity and content however the general clauses of a contract are largely the same. Any contract you may come across today may have the following six general clauses:

- Commencement Clause;
- Confidentiality Clause;
- Breach Clause;
- Dispute Resolution Clause;
- *Domicilium* Clause
- Cancelation Clause;

This article is will focus on the Cancellation clause. Your client will place significant reliance on your knowledge and skill should they ever be involved in a contractual dispute. A lack of proper application and skill to assist your client manoeuvre out of a contract properly may expose your client to a damages claim and may you, the Attorney with a professional malpractice complaint.

When exercising the cancellation clause, a strict analysis of the interplay between the breach clause and the cancellation clause is a prerequisite, you cannot get to the cancellation clause without first exhausting the Breach clause.

Logically speaking, your notice in terms of a breach clause serves as a "warning shot", as described in the matter of ***Godbold v Tomson 1970 (1) SA 61 (D) at 65A-D*** , "*The purpose of such a notice is to inform the recipient* ***of what he is required to do in order to avoid the consequences of default****…"*

If the contract lays down a procedure for cancellation, that procedure must be followed or a purported cancellation will be ineffective, this was held in Constitutional Court in the matter of ***Bekker v Schmidt Bou Ontwikkelings.*** This underscores the importance of procedural compliance when terminating a contract.

Accordingly, if a defaulting party has more than one option of remedying his breach to avoid the cancellation of a contract, your breach notice has to inform the defaulting party of <u>all</u> the options, if an option that is available to the defaulting party is omitted from the breach notice, the notice and subsequent cancellation as a result of the said breach notice is defective because it has essentially robbed the defaulting party of a right to elect a method available to him to remedy the breach. This has been settled law for the past 50 years as a result of the matter of ***Middleton v Goble 1970 (1) SA 56 (D).***

The breach clause in the ***Middleton*** case stipulated the following:

1. Clause 1. (ii) provided that the balance of the purchase price was to be paid against registration of transfer of the property and to be secured by the issue of suitable guarantees within 90 days of signature of the contract.
2. Clause 11 obliged the purchaser to notify the agent that such loan had or had not been granted within 90 days of signature.
3. Clause 12 is the cancellation clause which is comparable to the present clause 12, because it also refers to a written notice "*calling upon [the purchaser] to remedy such default*".

The breach notice given as per the facts of case, which was held to be deficient, informed the purchaser as follows, "*I therefore give you 7 days' notice* ***in which to make payment****, failing which this agreement will be cancelled"*

The court dealt with the notice as follows, "*It is perfectly clear, however, that nowhere does the agreement between the parties impose any obligation upon the applicant to pay the balance of the purchase price, or to arrange for it to be paid to the respondent, until transfer is passed… The 2nd paragraph of the letter does not require that default to be remedied, but instead requires payment of the purchase price within 7 days".*

The consequences of sending a defective breach notice on behalf of your client, and proceeding to institute legal proceedings on the basis of a defective breach notice can be disastrous. This may expose your client to a counterclaim on a repudiation

basis. Repudiation takes place before performance is due and may take the form of a statement that the party concerned is not going to carry out the agreement.

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