



## **Option to contract**

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In today's society, people tend to act more rationally. They make well-considered decisions to ensure a more desirable outcome. With that said, people may take longer to make decisions and bind themselves contractually. Therefore, the *pacta de contrahendo*, also known as an option, is available. It is an additional agreement relating to an offer to conclude a further contract.

In the commercial world an additional contract can be concluded prior to the main agreement. The best way to define and understand an option is by way of the following: take for instance A, who made an offer to sell an object to B, can promise not to withdraw the offer made to B for a few days, in order for B to think about the matter. B can either accept the offer (where after the main agreement of sale will take effect), reject the offer (where the offer will fall away), or let the time on the option run out (with the result that the offer is withdrawn). This additional offer / promise is known as an option. Its purpose is to keep an offer open for a reasonable or determinable period in order for B to make a decision.<sup>1</sup>

It is important to note that an option is a contract on its own and it has the same legal effect as the main agreement but separate from the main agreement because of the effect it gives to the main agreement. It places the holder of the option (offeree) in a strong position. The reason therefore is the binding element the agreement creates, and the effect thereof is that the offer is irrevocable for the period of the option. The commencement of the main agreement is solely in the hands of the offeree the moment

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<sup>1</sup>D Hutchison & C Pretorius *Kontraktereg in Suid-Afrika* 2<sup>nd</sup> 2012 65.

the option is created. The offeree is entitled to exercise his option and therefore, either accept the offer where the main agreement will commence, or to reject the offer where no additional contract will be concluded. The offeree is not compelled to accept the offer.

The option creates the opportunity to enter into a contract in the future and in itself has monetary value. The option may be given free of charge, or at a definite price to the offeree. It may even be transferred to a third party. If it is transferable the option given can be bought, sold or transferred to someone else at great monetary values i.e. derivative contracts.

In certain instances, formalities play a decisive role in the validity of an agreement, be it for the main agreement or the option. Where the law prescribes certain formalities for the main agreement, these formalities also apply to the option agreement.<sup>2</sup> The offeror has strict obligations after the option is given to the offeree. The offeror may not do anything to prevent the commencement of the main agreement, nor revoke the offer during the period agreed to. If no time period is indicated, the offer must be kept open for a reasonable time. An option period ends when the agreed time period lapse, or at the demise of the offeror or offeree (only if the contract indicated that it is not transferable), or when the offeree refuses the offer.

The underlying values of contracts are applicable on options and it must therefore be performed in good faith (*bona fide*). If any terms of an agreement (express or tacit) is not met, the innocent party has remedies to his/her disposal. The two options are to either cancel the agreement and to return all goods or payments, with effect of placing the contacting parties in the same position they were before they entered into the agreement. The second option is to enforce the agreement with the help of a specific performance order. In both instances, damages can be claimed because of any loss caused by the breach of the agreement.

In conclusion, an option always consists of two elements; an offer to conclude a main agreement and an agreement to keep the main agreement open, available for a specified time.

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<sup>2</sup> In the *obiter* remark of *Hirschowitz v Moolman* 1985 3 SA 739.

Article by **Herman Janse van Rensburg (BCom, LLB)**, Candidate Attorney at Malan Lourens Viljoen Inc.

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