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Lockdown Legalities

Offers made and accepted with the parties only being able to sign electronically:

The Alienation of Land Act and The Electronic Communications and Transmissions Act are relevant.

The sale of immovable property is governed by the Alienation of Land Act. Section 2 (1) of this Act provides that no sale of land will be of force and effect unless it is contained in a written deed of alienation signed by the parties or their agents (under the parties' written authority). An Offer to Purchase is a deed of alienation.

The Electronic Communications Act was enacted in 2002. In terms of section 12 of the ECT Act, the lawful requirement that documents or information must be in writing is met if these documents or information are:

- In the form of a data message; and
- Accessible in a manner usable for subsequent reference.

- Section 13 of the ECT Act provides for the legal use of an electronic signature. Subsection (1) specifically states that where the signature of a person is required by law, and such law does not specify the type of signature, this requirement in relation to a data message is met only if an advanced electronic signature is used.
- This essentially means that contracts concluded electronically will have legal force. This includes agreements concluded online, via email communication, and where a contract is executed through the use of an electronic signature.
- The ECT Act has a couple of exceptions, more specifically transactions governed by the Alienation of Land Act 68 of 1981. Section 4 explicitly states that provisions of the ECT Act do not give validity to the following transactions –
 - An agreement for alienation of immovable property as provided for in the Alienation of Land Act; and
 - An agreement for the long-term lease of immovable property in excess of 20 years as provided for in the Alienation of Land Act.

- The agreement of sale is not valid and binding so there is no need for a clause highlighting that in the agreement. The attorneys will attend to signature of the agreement when the clients visit to sign transfer documents, but the parties will be free to resile from the “agreement” until it has been signed. The banks are however processing bond applications with email confirmation.
- How does this affect the date for acceptance of the offer if we assume that the purchaser has had access to a printer and scanner, but not the seller?

Taking a mandate during lockdown:

1. Seller's declaration – Please be reminded that this document protects you as the agent against claims resulting from non-disclosure of latent defects disclosed to the agent by the seller. You are to explain to the seller the importance of the documents to be completed by the seller without you being present.
2. Sole and exclusive mandate – Sellers may feel that, because of lockdown and the agent's forced absence, they have sold their properties themselves.
3. Discussing occupation date with your seller – It is recommended that you suggest occupation on registration for now. Nobody knows for sure when lockdown will be over and removal services will be in high demand once it is over. To give a specific amount of days after lockdown is not recommended as it causes more confusion and uncertainty in our view.
4. Mandate period – You have to manage expectations. A lot of work is going to have to be done and the curtain will not magically lift the day after lockdown comes to an end.
5. Effective cause – If the purchaser views the property on the web through marketing efforts of one agent and personally views it after lockdown with another agent. This is expected to cause a stir.

Offers made without purchaser being able to view the property:

- This offer is made by the purchaser subject to him being able to view the property in person within 3 days of it being allowed according to the applicable alert level during the the nationwide lockdown and him giving written confirmation to his agent within 24 hours of viewing that he is to proceed with the purchase.
- Remember that not all purchasers will require viewing the property in person. This DOES NOT mean that the voetstoots clause is not applicable. Also check the time frames (eg. 3 days) with your client.

General Questions

- What is happening with concluded deals at the moment?
- Can a seller argue that a purchaser is in breach as a result of lockdown?
- Can suspensive conditions lapse during lockdown?
- Ratification notices served during this time – how do I calculate the 72 hours?
- How will the banks treat mortgage loans approved prior to lockdown but not yet lodged? Some banks are issuing proceeds to lodge. It has always been banking practice to run a credit check on a purchaser before the bank issues the bond attorney with the proceed to lodge.
- I am unmarried and own a property that is bonded. Due to expected affordability issues as a result of lockdown, my boyfriend offered to be added to the bond. How does this work and what does this cost?

SALE OF PURCHASER'S PROPERTY

This sale is subject to the sale of the PURCHASER'S property, situated at _____ free of suspensive conditions, or if suspensive conditions apply, such conditions must be fulfilled by _____. The SELLER acknowledges that the PURCHASER will be deriving funds for the furnishing of guarantees from the proceeds of the sale of his property and that the provisions of Clause 1.2 shall be subject to this paragraph. In the event of the guarantees not being available by _____ the SELLER shall be entitled to give notice to the PURCHASER in terms of clause 15.

The SELLER'S conveyancer will be entitled to a copy of the sale agreement of the PURCHASER'S property.

- Default: If after acceptance hereof either party fails to fulfil any of the conditions hereof, and remains in default for a period of 7 (seven) days after written notice has been given by the other party or his agents, then the aggrieved party shall be entitled without prejudice to any other right of law, to claim performance or cancellation of this contract and damages
- No indulgence which either party may grant to the other shall constitute a waiver of any rights of the grantor

72 Hour Ratification

Prior to the fulfilment of the suspensive conditions contained herein, the SELLER retains the right to continue marketing the PROPERTY which is the subject of this agreement and in the event of the SELLER receiving a more satisfactory written offer (to be decided in the sole unfettered discretion of the SELLER) from a third party, he shall notify the PURCHASER in writing, by any electronic communication of the Sellers choosing, furnishing the PURCHASER with a copy of such written offer and giving the PURCHASER 72 hours notice to waive the suspensive conditions herein, and if the PURCHASER fails to give written notice of such waiver within such 72 hour period, the SELLER shall be entitled to cancel this agreement forthwith, such offer being presented by ABC Properties.