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Ratification Clause

- Prior to fulfilment of suspensive conditions relating to the bond and the sale of the purchaser's property, the seller retains the right to continue marketing his property. Should the seller receive an unconditional offer during this time, the purchaser shall be given written notice thereof, giving the purchaser 72 hours (excluding Saturdays, Sundays and public holidays) to waive his suspensive conditions, failing which the seller will be entitled to cancel his agreement with the purchaser.
- **Questions:**
- Should the first purchaser receive a copy of the competing offer?
- Why only the suspensive conditions relating to the bond and sale and not eg. successful registration?
- Why exclude Saturdays, Sundays and public holidays?
- Why not an automatic lapse of the first agreement after 72 hours?
- How is the written notice sent to the purchaser and must he acknowledge receipt before it is acceptable notice?
- Why an unconditional competing offer and not any more acceptable offer in the seller's sole discretion?
- Can the purchaser prove fulfilment of suspensive conditions as opposed to a written waiver?

SPECIAL CLAUSES WHICH MAY BE REQUIRED FOR INSERTION IN A DEED OF SALE:

- **Backup offers** (where there is an accepted offer in existence and you want the seller to accept another offer after the fact):
 - This sale is further subject to the cancellation or lapsing (whichever occurs first) of the sale between the Seller and by not later than
- **Multiple offers** (where more than one acceptable offer is expected on the property at more or less the same time):
 - The Seller will be entitled to accept multiple offers on this property subject to the Purchaser who is first able to **submit written proof of fulfillment of the suspensive conditions together with proof of funds for the balance purchase price (if applicable)** being the Purchaser that the Seller will proceed with and all other offers will be null and void.
 - The words in bold can be substituted with the words "**present guarantees for the full purchase price**" but it poses a few practical problems.

- **Waiver (by a purchaser after having been served with the rat notice eg):** The Purchaser hereby waives the suspensive conditions contained in clauses ... and in the deed of sale dated
- **Undertaking by Seller to repair leaks in a roof:** That it shall make good or cause to be made good at its cost any leakage in the roof of the Unit arising from faulty materials or workmanship occurring within a period of five (5) months after the date of occupation, provided if no heavy rain falls during that period such period shall be extended for a further period of three (3) months. **OR** The purchaser shall carry out a roof inspection at his expense and this offer is subject to the purchaser's written confirmation that he is satisfied to proceed within 7 days hereof.

- **Undertaking by Seller to have an extension to a sectional title unit registered:** The seller undertakes to ensure that the patio area is duly measured and surveyed and in accordance therewith the seller accepts responsibility to have the extension simultaneously registered with the sale of the unit. Should such registration of the extension not be capable of being finalised for whatever reason by date of registration of the sale, the Seller authorises the conveyancer to retain an amount of R20 000 for such purpose after registration.
- **Shortfall on the Seller's outstanding bond:** "The seller accepts this offer subject to the bondholder's consent to cancel the bond with the nett proceeds payable or alternatively, to the Seller making arrangements to pay off the outstanding balance after registration. The Seller undertakes to sign all documents required by the bondholder to give effect hereto".

- **A parking bay could have been assigned to each unit in some schemes; it is not necessarily included in the Rules of the Body Corporate or registered in the Deeds Office. Always check before you insert the parking bay number under the description of the property sold in your OTP.**
- The Purchaser hereby acknowledges that the portion of land adjacent to the property hereby sold, which portion is used for parking by the Seller, is NOT part of the property sold but used on a temporary basis with the approval of the Body Corporate of the block of flats adjacent thereto.

IN CASE OF A SHARED / DUAL MANDATE INCLUDE:

- That the following clause, known as the "72 hour ratification" clause, will be added to any Offer to Purchase relating to the sale of this property which does not have this clause nor will it be permitted to delete the said clause in any Offer to Purchase relating to the sale of this property until such time that written proof, acceptable to the conveyancers, is provided for the fulfillment of ALL suspensive conditions.
- **Where there is a problem with approved municipal plans and you are aware of it beforehand:** "It has been pointed out to the purchaser that the flatlet attached to the main house is indicated as a games room on the approved municipal plan. The purchaser is aware of this and accepts the property as is."

Sale of a property from an estate: MASTER'S CONSENT

- This sale is subject to the written consent of the Master of the High Court and the heirs in the estate of the Seller.

1st REFUSAL IFO TENANT IN PLACE TO BE INCORPORATED IN OTP:

- The Purchaser is aware there is an “Offer of 1st Refusal” in place in favour of the existing tenant, _____, which “Offer of 1st Refusal” has to be exercised by the aforementioned tenant within 36 hours after serving notice of such Offer to Purchaser telephonically upon receipt of such offer and confirming such telephonic conversation by email to the tenant within the aforementioned 36 hours.

Dampness or other problem that has been reported to B/C but they are dragging their feet/reluctant to do repairs

- The purchaser has been made aware of the body corporate's responsibility to repair the dampness on the outer walls of the 2 bedrooms. The seller gives no undertaking in this regard, save for her undertaking to fully co-operate with the body corporate should the problem be addressed by them prior to registration.

Offer to Purchase: When a sale is subject to the Purchaser obtaining finance through security of a Mortgage Bond

- Conditions of sale are terms inserted into the Offer to Purchase by both the Buyer and Seller. Commonly, these conditions of sale include: subject to finance and bond approval, subject to a sale of another property, and subject to the specialist inspection approvals.
- An Offer to Purchase must include a condition that the sale is subject to a bond approval being obtained within a realistic amount of time. Once a home loan has been approved by the Bank, the Estate Agent is notified to ensure that the offer becomes valid and this will enable the buying process to continue.

- What happens if your purchaser's bond is approved a day after the expiry period for bond approval? Can the seller and purchaser sign an addendum accepting the purchaser's bond, albeit out of time?
- If a bond is not approved within the time period agreed to, in the agreement of sale, then the agreement lapses and becomes null and void. Signing an addendum after the agreement has lapsed, will be ineffectual because as our courts have noted "you cannot breathe life into something that is already dead".
- The way to revive the Agreement of Sale, is for the parties to sign a Memorandum of Agreement in which the parties include a provision such as:
 - "The parties contract with one another on exactly the same terms and conditions as contained in the Deed of Sale annexed hereto save for Clause "x" dealing with bond approval which shall read as follows:
 - The Agreement is subject to the purchaser obtaining a mortgage loan in the amount of R.....which has already been granted to the purchaser by x Bank and accepted by her."
- The initial Deed of Sale must then be attached as an addendum to the Memorandum of Agreement and each page must be initialled by both seller and purchaser.

- Where an Agreement of Sale is subject to the purchaser obtaining a bond in the amount of R1mil and the purchaser is granted a bond of R1,1 mil, is an addendum necessary?
- No, unless the clause is worded to the effect that a higher bond is not acceptable, which would be quite unusual.
- However, if the purchaser obtains a bond of only R900 000, then an addendum is necessary and the parties must sign before the expiry date for bond approval. However if the wording of the bond clause is “...or such lesser amount as may be acceptable to the purchaser”, then no addendum is required.

- Banks often make the bond approval subject to certain conditions. Such as, the sale of the purchaser's property and cancellation of his existing bond, foreign exchange approval, unlimited suretyship by a third party, building repairs etc. Is the purchaser is obliged to accept these conditions? Can it be argued that the purchaser's bond has been approved and that the condition in the sale agreement has been met and that therefore a valid and binding agreement of sale came into existence?
- Most deeds of sale specify that the agreement is subject to a bond being granted "on the bank's normal terms and conditions." Normal conditions are not defined but would include:
 - Where the Bank requires a suretyship by the member or director of a CC or Company that has applied for a bond; or
 - Where a foreigner is registering a bond and foreign exchange approval is made a bond condition; or
 - If a 62 year old man is applying for a bond and the financial institution grants the bond but the term of the bond taking into account his age is to be 10 or 15 years;
- However, if a bond is granted but is made subject to a condition that the roof of the property must be replaced by the purchaser before registration, (and assuming the roof problems were patent defects accepted by the purchaser) then the purchaser is not obliged to accept that bond from the particular bank. This in turn means that the seller cannot claim that the condition has been met thereby keeping the purchaser bound to the agreement.
- Similarly, a condition requiring that the purchaser's existing bond over another property be cancelled is not a standard bond grant condition. Cancelling the existing bond would in almost all cases necessitate the sale and transfer of the purchaser's property and where the agreement of sale is not subject to this special condition, it may be unacceptable to the seller.

What constitutes bond approval?

- The bank will initially provide Approval in Principle. This means that the bond value has been approved but is still subject to the bank finding value in the property and the loan amount requested.
- Since the inception of the National Credit Act however, the suspensive condition is only deemed to have been met once a full quotation has been received from the bank which lays out all the terms and conditions that relate to the loan. Thus, where an application for a loan is financially not viable for an individual, he or she has a statutory right not to accept the quotation.

- In theory, it seems simple to identify when a suspensive condition relating to bond approval has been fulfilled, but in practice there are a few additional complications that can arise such as a bond being granted but with an unfavourable interest rate, or not for the full amount requested or required by the buyer.

Insufficient loan amount

- In some cases, a bond may be approved but for a lower amount than a buyer needs to proceed with the sale.
- The buyer may then be given a timeframe within which to raise the remaining funds. However, if this is not achieved, the suspensive condition is considered not to have been met despite the bond approval and thus, the contract of sale is null and void.

Unfavourable interest rate

- This scenario can cause issues for the buyer as, in principle, the suspensive condition has been fulfilled with the bond required to purchase the property being approved.
- Protection against this unfavourable situation can be included in the offer to purchase. For example, an added clause in the contract can stipulate that a particular interest rate needs to be obtained. If this is not the case, the buyer may in any event reject the bank's loan offer (based on the National Credit Act, this needs to be done within 5 days of the quotation being received) and cancel the offer to purchase.

- Of course one must take into account the fact that in law there is the principle of fictional fulfilment in terms of which a suspensive condition is deemed to have been fulfilled if the person who is capable of fulfilling the same frustrates such fulfilment.
- Thus, in all probability, if the purchaser obtains the relevant quotation and pre-agreement statement from a financial institution and does not accept the same, the seller will probably be able to argue that the purchaser frustrated the fulfilment of the suspensive condition and that therefore the contract is valid and binding.
- This of course is a further reason why one need not necessarily amend one's bond clause if one does not have the deeming provision.

- If however those parties which have a contract which has a clause which provided that the bond clause would be deemed to be fulfilled if the loan was granted in principle, wish to amend their bond clause to retain a redeeming provision, there are various options which can be considered namely:-
 1. One could insert a deeming provision along the lines suggested above. In such event the following words would be added in the appropriate part of the bond clause:-
 - “The parties specifically agree that this suspensive condition shall be deemed to be fulfilled on the date that the purchaser obtains a quotation and/or pre-agreement statement from any financial institution in terms of which such financial institution offers a loan to the purchaser in an amount of not less than the amount referred to above.”
 - In such event we would suggest that the severability clause referred to above also be inserted in the contract; or
 2. One could insert at the appropriate place in the bond finance clause the following:-
 - The purchaser’s attention is drawn to the fact that in terms of the doctrine of fictional fulfilment, this clause will be deemed to be fulfilled if the purchaser frustrates the fulfilment of this clause in any way whatsoever.” or;

3. One could phrase the clause in terms of a resolutive condition instead of a suspensive condition. In such event the first part of the clause will read:-

- “In the event that the purchaser (or the seller or the agent on the purchaser’s behalf) is not able to obtain a quotation and/or a pre-agreement statement from any financial institution in terms of which such financial institution offers to loan to the purchaser the sum of not less than R_____ plus costs (delete if not applicable) within ____ days of acceptance of this offer (which time may be extended by the agent at the agent’s sole discretion for a further period not exceeding ____ days) then this agreement will automatically terminate and be of no further force or effect. The parties specifically agree that if the agent exercises its discretion to extend the time period by which the quotation and/or pre-agreement statement from the financial institution is received, it will not be necessary for the agent to notify either the purchaser or the seller of such extension.”

- It could then be argued that because the agreement is not suspensive upon the purchaser obtaining the relevant finance, the fact that the clause is linked to a quotation or pre-agreed statement is no longer forcing the purchaser to give up his rights in terms of the National Credit Act in regard to the 5 day period of acceptance or his rights to accept or reject the quotation. It is a fine distinction and this distinction may not be upheld by a court of law.

BOND GRANTED ON USUAL TERMS AND CONDITIONS

LATEGAN AND ANOTHER v LELSIE MILDENHALL TROLLIP t/a PROPERTY SOLUTIONS (A297/10 (2011) ZAFSHC 47 (10 March 2011)

THE FACTS

This case concerns an estate agent's claim for the commission upon the fulfilment of a suspensive condition related to loan finance.

The seller and purchaser entered into an agreement of sale of immovable property which was subject to the purchaser obtaining a mortgage bond. The bond clause provided that the mortgage bond was to be granted by *"23 November by a registered bank upon its normal terms and conditions"*.

The clause further provided that the condition was *"deemed to have been fulfilled upon notification by the bank to the purchaser or his agent that the loan in question has been approved regardless of any conditions attaching to such approval..."*.

On 13 November the purchaser was granted a mortgage bond subject to two conditions being met, firstly the settlement of an existing bond of the purchaser (implying the sale of the purchasers second property) and secondly that the building of the home on the property commence within 6 months of the bond registration.

- The estate agents re-submitted the bond application to the bank and the bank removed the first condition on 4 December. No addendum was entered into to extend the suspensive condition.
- The purchaser thereafter cancelled the agreement on the basis that he was not granted a mortgage bond as contemplated in the agreement.
- The estate agents took the view that the suspensive condition relating to loan finance had been approved and they were thus entitled to commission from the purchaser as per the agreement.

WHAT THE COURT HELD

- The Court held that the agreement had lapsed by 23 November, alternatively that the purchaser was entitled to cancel the agreement due to the fact that:
 - the mortgage bond was not granted as envisaged in the agreement of sale, and
 - it was not possible for the purchaser to give effect to the special condition imposed by the bank.
- The suspensive condition was further not extended.
- In regard to the contradictory terms of the mortgage bond clause, the Court held the special conditions imposed by the bank were not the banks “*normal terms and conditions*” and as such the suspensive condition was not fulfilled.

Companies

- The Companies and Intellectual Property Commission (CIPC), previously known as CIPRO, have recently confirmed that more than one million companies and close corporations have lately been either deregistered or are in the process of deregistration due to their failure to submit their annual returns.
- The legal consequences of deregistration are severe: companies and close corporations lose their status as legal entities, their assets pass to the State and agreements concluded with them may be negatively affected. For example, should such an entity be the owner of immovable property, it would not be possible for it to sell or pass transfer of this property.
- The good news is that the new Companies Act (section 82(4) read with Schedule 3, Part 8) provides that application can be made to reinstate the registration of both a company and close corporation if it was deregistered as a result of non-filing of annual returns. Such a reinstatement will have the effect of reviving the company or close corporation's rights and obligations.
- However, when such an entity is the owner of immovable property, additional requirements are laid down: the written consent of both the Departments of Treasury and Public Works are to be obtained prior to lodging the application.
- Since the process of transfer of any property owned or purchased by such entities are effectively stayed until such entity is reregistered, significant delays are to be expected when a deregistered entity is involved.
- You would therefore be well advised to verify the status of your Company or Close Corporation with CIPC, as well as that of any entity you intend to transact with prior to entering into a contract for the sale of immovable property.

NON-REFUNDABLE DEPOSITS

- One quite often comes across non-refundable deposits in Offers to Purchase properties. In addition most Deeds of Sale contain breach clauses that stipulate that in the event of a contractual breach by the Purchaser that is not rectified within a certain number of days, the Seller can cancel that agreement and retain all amounts paid on account of the Purchase Price as “rouwkoop” or liquidated damages.
- In terms of the Conventional Penalties Act (Act 15 of 1962) (The “Act”) any penalty or liquidated damages contained in a contractual obligation shall be subject to the provisions of the Act. It specifically states in section 3 that:
- *“If upon the hearing of a claim for a penalty, it appears to a court that such penalty is out of proportion to the prejudice suffered by the creditor by reason of the act or omission in respect of which the penalty was stipulated, the court may reduce the penalty to such extent as it may consider equitable under the circumstances: Provided that in determining the extent of such prejudice the court shall take into consideration not only the creditor’s proprietary interest, but any other rightful interest that may be effected by the act or omission in question.”*
- A forfeiture stipulation resulting from the withdrawal from an agreement is also covered by the stipulations of the Act quoted above. In other words it applies to non-refundable deposits as well as the retention of certain amounts already paid by a Purchaser as liquidated damages or “rouwkoop”

- The intangible aspect is that the Act refers to “*any other rightful interest that may be effected by the act or omission in question*” which does allow a portion of the penalty to compensate for the Seller’s pain and suffering as a result of the stress and anxiety caused by such cancellation.
- The Court in applying the Conventional Penalties Act does not necessarily work out what the actual damages will be and need only reduce the penalty “to such extent as it may consider equitable under the circumstances”. This means that the penalty can be far higher than the actual loss suffered.
- Conveyancers are expected not to act as judge and jury when dealing with monies in their trust accounts when a dispute arises about who should be the rightful recipient of such monies once the Deed of Sale is cancelled
- Conveyancers cannot be expected to pay the monies to either party in the absence of an agreement being reached between the parties or a competent court making an order.
- It is however important to note that paying Estate Agent’s commission may be less problematical in the sense that the contract will provide when the Agent’s commission is payable and the same is a liquidated amount (provided the Deed of Sale is worded correctly)

- The Agent will be entitled to such commission even if the Estate Agent again resells the property from the same Seller to another buyer subsequent to the cancellation taking place.
- However once again a Conveyancer is not entitled to assume that the agreement has been validly cancelled and that the Purchaser is at fault. Accordingly the Conveyancer will very often have to hold the monies in trust until such stage as the parties have reached an agreement or a court order is obtained.
- Seller's damages will often only be liquidated once the property is resold. The Seller will only have a claim in the event that the property is resold or valued for an amount that is not high enough to nullify the damages.
- This however does not entitle a Seller to deliberately resell the property at a lower price as one has a common law obligation to mitigate one's damages.

- If one wishes to include a provision in terms of which certain monies will be non-refundable, a better way would perhaps be to grant the Purchaser an option to purchase the property on the basis that the Purchaser pays an amount for such option.
- The option agreement will provide that if the option is exercised, the option amount will then be deducted from the Purchase Price if the transfer takes place
- If the option is not exercised and the transfer does not take place (in other words if the Purchaser does not proceed with the transfer) then the option monies will remain the property of the Seller and this will not be considered a penalty or forfeiture stipulation.
- Of course the difficulty with this approach is that the Seller does not necessarily know whether the sale has taken place until such stage as the Purchaser exercises the option. In other words the Purchaser may forfeit the option but this may not compensate the Seller for the uncertainty created.

CAUTION – AMENDMENTS TO EXISTING CONTRACTS BY MEANS OF ELECTRONIC COMMUNICATION AND WRITTEN CORRESPONDENCE

- *Spring Forest Trading 599 CC v Wilberry (Pty) Ltd t/a Ecowash and another* [2015] JOL 32555 (SCA)

AN OBJECTION TO THE REZONING OF A PROPERTY MAY IN CERTAIN CIRCUMSTANCES CONSTITUTE AN ABUSE OF THE RIGHT TO OBJECT

- *Koukoudis and Another v Abrina 1772 (Pty) Ltd and Another* 2016

FOREWARNED IS FOREARMED – ESTATE RULES SHOULD BE READ BEFORE BEING AGREED TO

- *Singh and another v Mount Edgecombe Country Club Estate Management Association 2 (RF) NPC and others* [2016] JOL 35169 (KZD)

NEIGHBOUR LAW –NUISANCE, FALLING LEAVES, OVERHANGING BRANCHES, WATER FLOW AND DISPUTE RESOLUTION

- *Vogel v Crewe and another* [2004] 1 All SA 587 (T)
- *Pappalardo v Hau* [2009] JOL 24655 (SCA)
- *Williams v Harris* [1998] JOL 2667 (A)