

Preference of security in terms of a mortgage bond potential impact of COVID-19 protocols:...continued

This essentially means that in the scenario described above the lender will not have a preferent claim. In terms of section 2 of the Insolvency Act, a preferent claim means the right to payment of a claim out of the assets of the insolvent estate in preference to other claims.

pay. If the former was the case, then the debt would have been incurred more than two months prior to the lodgement of the mortgage bonds registered by the contingent debtor as security for its "contingent liability", however, if the latter was the case then the debt would have been incurred after lodgement of the said bonds which would accordingly confer a preference. The court acknowledged that:

"A mortgage bond... passed for the purpose of securing the payment of a debt not previously secured, which was incurred more than two months prior to the lodging of the bond... shall not confer any preference if the estate of the mortgage debtor is sequestrated within a period of six months after such lodging..."

The court therefore reiterated the principle of section 88 but held that the debt secured by the bonds had not been incurred more than two months prior to the lodging of the bonds and that the bonds registered in favour of the respondent did confer preferent status.

Conclusion

The provisions and implications of section 88 should be noted by all lenders in respect of delays and especially during any COVID-19 lockdown period. Should a lender have unsecured debt or should a lender be in the process of securing debt by way of a mortgage bond, such lender should note the date on which it furnish the unsecured debt to the borrower. The lender should then consider that, should such mortgage bond not be lodged within the prescribed two-month period, the bond in question shall not confer any preference if the borrower is sequestrated or liquidated within a period of six months after such lodgement.

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Registrations during lockdown – the practical implications

This alert seeks to address the practical implications of registrations of immovable property which one can anticipate, following the re-opening and operation of the 11 Deeds Offices across the country.

The government has implemented a phased risk-adjusted strategy aimed at easing the current lockdown restrictions in the form of Alert Levels, a term defined in the regulations (the Regulations) issued in terms of section 27(2) of the Disaster Management Act 57 of 2002. Chapter 3 of the Regulations states that as of 1 May 2020, *Alert Level 4 is applicable in South Africa and will remain in force up to the declaration of different Alert Levels for the duration of the National State of Disaster. At Alert Level 4, the operation of the office of the Registrar of Deeds (the Deeds Office) is classified as a "permitted service", which is defined as a service listed in Table 1 of the Regulations.*

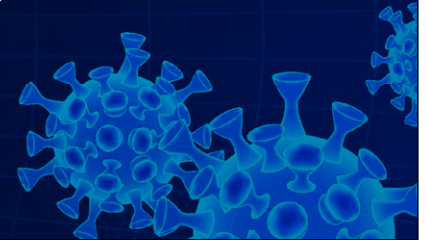
This alert seeks to address the practical implications of registrations of immovable property which one can anticipate, following the re-opening and operation of the 11 Deeds Offices across the country.

A property has just been registered. Is it time to move into a new house?

In the ordinary course, occupation of the property is given to and taken by the Purchaser on registration of the transfer in the Deeds Office. The obvious issue that presents itself here is that the Purchaser would be unable to take occupation on the date of registration due to the restriction on movement imposed by the Regulations. Similarly, the Seller would be unable to move out of the property and give occupation to the Purchaser on the date of registration. Chapter 3 of the Regulations unequivocally states that "a person may only leave their place of residence to perform an essential or permitted service as allowed in Alert Level 4". Table 1 does not include persons moving in and out of residences as a "permitted activity" under Alert Level 4. As it stands, the aforesaid parties will have no choice but to remain in the residence which they were in at the start of the lockdown.

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Registrations during lockdown – the practical implications...continued

To contribute to the plight of the parties, moving companies are not listed under the transport services which are permitted to operate at Alert Level 4. Only transport companies carrying persons and or goods that fall into the “permitted services” space are able to operate.

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Even though a Purchaser’s property may just have been registered it is not time to move into a new house.

The seller is now residing in the purchaser’s new house. What should the parties do?

The sale agreement is to regulate the position between the parties. There are two common scenarios that will be discussed herein.

Scenario 1- A sale agreement that already provides for the payment of occupational rent and expressly deals with the passing of risk and ownership:

Certain sale agreements contain a clause dealing with occupation and occupational rental. It would usually be worded as follows:

“Should the date of occupation be prior to the date of registration of transfer, the Purchaser will pay to the Seller, in consideration of such prior

occupation, occupational rental calculated at R [agreed sum] per month, payable monthly in advance, from the date of occupation to the date of transfer of the Property into the name of the Purchaser”

“Should the date of occupation be subsequent to the date of registration of transfer, the Seller will pay to the Purchaser in consideration of such period of occupation, occupational rental calculated and payable mutatis mutandis in accordance with the provisions of the above clause”.

The occupation clause may also provide:

- that all the improvements on the property are to be kept in good order, repair and condition;
- that any alterations or additions to any buildings or improvements on the Property will not be made without the registered owner’s prior written consent; and
- who will be liable for the rates, taxes and other charges in respect of the Property, including where applicable the levies and/or other charges payable to any property owners’ or similar association.

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Parties considering drafting an addendum should take note of the signature requirements that must be complied with in order for the addendum to be valid.

In this scenario, occupational rent would be due and payable by the Seller who is forced to remain in occupation of the property, to the Purchaser who is now the new registered owner.

Scenario 2- A sale agreement that does not provide for the payment of occupational rent:

Typically, most sale agreements contain what is known as a non-variation clause. This clause states:

no addition to or variation, deletion, or agreed cancellation of all or any clauses or provisions of this Agreement will be of any force or effect unless in writing and signed by the Parties.

Now, if occupational rent is not provided for in the sale agreement the parties may nevertheless negotiate and agree on similar terms, ensuring that they reduce their arrangement to writing and have it annexed to the existing sale agreement as an addendum for it to have force and effect.

Important signature requirements:

Parties considering drafting an addendum should take note of the signature requirements that must be complied with in order for the addendum to be valid. As our movements are restricted by the Regulations, the addendum will have to be negotiated and transmitted between the parties electronically. It is often more convenient to sign a document electronically, instead of having to print a document, sign it and initial each page, and scan it back in before sending it off. Particularly during these times, persons may not have access to printers and scanners and may often find themselves signing documents electronically whilst working from home. Persons must as a result take heed of the Electronic Communications and Transactions Act 25 of 2002 (the ECTA), particularly in relation to electronic signatures in relation to sale agreements (and by extension to addenda to sale agreements).

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Registrations during lockdown – the practical implications...continued

After considering a few of the practical implications of registration under Alert Level 4 it is advisable that Sellers and Purchaser's give due regard to the eventualities and practical implications in proceeding to register their transfer.

The ECTA facilitates electronic communications and transactions and allows for the use of electronic signatures. Section 4 (3) of the ECTA states that section 12, dealing with writing and 13 dealing with signature does not apply to the Alienation of Land Act 68 of 1981. This means that any agreement concluded in terms of the Alienation of Land Act 68 of 1981 may not be validly signed by means of an electronic signature as these agreements fall outside the ambit of the ECTA. This includes agreements for the alienation of immovable property otherwise known as sale agreements.

Under the Alienation of Land Act, no sale of immovable property will be of any force or effect unless it is contained in a deed of alienation or an Offer to Purchase signed by the parties thereto or by their agents acting on their written authority.

As a result, parties to an agreement for the sale of immovable property must print the addendum, sign it and initial each page in wet ink, and scan it back in before sending it off in order to comply with the Alienation of Land Act 68 of 1981 and the non-variation clauses in their sale agreement.

Comment

After considering a few of the practical implications of registration under Alert Level 4 it is advisable that Sellers and Purchaser's give due regard to the eventualities and practical implications in proceeding to register their transfer. Notwithstanding the re-opening of the Deeds Offices around the country, sellers and purchasers of property should be prudent in determining whether registration of the property into the Purchaser's name would suit their particular circumstances.

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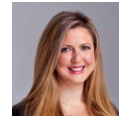
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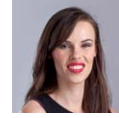
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