8 MARCH 2021

# REAL ESTATE ALERT


## IN THIS ISSUE

### Purchase price deferments and the potential application of the NCA

The decline of the economy and the attendant downturn in the property market have forced market players to structure and finance their transactions in innovative ways. Although not entirely novel, one such method of financing potential property sales, that is fast gaining traction among sellers, is the deferment of part of the purchase consideration payable. In this regard, the seller effectively finances the deferred portion of the purchase price and charges interest thereon at a rate agreed upon between the parties.

CDH
CLIFFE DEKKER HOFMEYR

**CLICK HERE**

For more insight into our expertise and services

# Purchase price deferments and the potential application of the NCA

Although not entirely novel, one such method of financing potential property sales, that is fast gaining traction among sellers, is the deferment of part of the purchase consideration payable.

**The decline of the economy and the attendant downturn in the property market have forced market players to structure and finance their transactions in innovative ways. Although not entirely novel, one such method of financing potential property sales, that is fast gaining traction among sellers, is the deferment of part of the purchase consideration payable. In this regard, the seller effectively finances the deferred portion of the purchase price and charges interest thereon at a rate agreed upon between the parties.**

To illustrate by way of a simplified example, suppose the trustees for the time being of the Beta Trust (Beta Trust) enter into an agreement (Deed of Sale) with Alpha, a natural person, in terms of which, Alpha purchases from the Beta Trust certain immovable property for a purchase consideration of R10,500,000.00. In terms of the Deed of Sale, an amount of R10,000,000.00 of the purchase price would be paid upfront by Alpha, and the balance being R500,000.00 would be deferred and "financed" by the Beta Trust at an interest rate of 4% compounded per annum.

What the parties may not have considered, as is often the case, are the potential implications of the above transaction falling within the purview of the National Credit Act 34 of 2005 (NCA).

## National Credit Act

For the above transaction to fall within the purview of the NCA, section 4(1) prescribes that the parties must have entered into a credit agreement dealing at arm's length within, or having its effect within, the Republic of South Africa (Republic). Assuming that the Beta Trust and Alpha concluded the agreement at arm's length in the Republic, the obvious point of departure would be ascertaining whether the above transaction fell within the definitional ambit of a credit agreement in terms of the NCA.

In terms of section 8(1)(b) read with section 8(4)(f) an agreement, irrespective of its form, but excluding the agreements contemplated in section 8(2), constitutes a credit agreement if:

(i) in terms of the agreement payment of an amount owed by one person to another is deferred; and

(ii) any charge, fee or interest is payable to the credit provider in respect of the deferred amount or is payable in terms of the agreement.

The terms 'fee', 'charge' and 'interest' are, however, not defined – nevertheless, the courts have provided useful insight with regard to how the terms ought to be interpreted respectively.

In *Evans v Smith and Another* the High Court held that the terms 'fee', 'charge' and 'interest' are intended to be of wide import. The court held that the terms ought to be construed so as to include any consideration payable in respect of any agreement, such as a loan, "*in terms whereof payment of an amount owed by one person to another is deferred, or in terms of which consideration is charged by the grantor for the extension of credit*" to the respective grantee. Therefore, provided that consideration was payable for the deferred amount or the credit extended, the transaction in question was said to have fallen within the purview of a credit agreement as contemplated in section 8(4)(f).



CDH
CLIFFE DEKKER HOFMEYR

# Purchase price deferments and the potential application of the NCA

*...continued*

In *Asmal v Essa*, the Supreme Court of Appeal appeared to add a gloss on the principle laid down in *Evans v Smith* and Another, with respect to the consideration payable for the portion of the purchase price so deferred.

In *Asmal v Essa*, the Supreme Court of Appeal appeared to add a gloss on the principle laid down in *Evans v Smith* and Another, with respect to the consideration payable for the portion of the purchase price so deferred. The court held that for a charge or fee to fall within the ambit of section 8(4)(f), the parties to the credit agreement must both quantify as well as specify the manner in which the charge or fee will be paid. In that instance, E advanced A money to purchase certain medical equipment and, in return, A gave E a number of cheques. The amounts stipulated on the cheques included 'a participating share of the profit' that A would make pursuant to the resale of the said equipment – the amount of this share was, however, to be determined solely by A.

The court held that the 'charge' contemplated in section 8(4)(f) was an amount that was fixed, quantified and payable in a specific manner. Thus, the indeterminate profit share, for which no date of payment had been determined, and the value of which was determined solely at the discretion of one of the parties, fell beyond the purview of section 8(4)(f).

There appears to be a considerable degree of consensus among academics with respect to the types of transactions that fall within the ambit of section 8(4)(f). The prevailing view supports the conclusion that section 8(4)(f) includes, among other transactions, a sale of immovable property where payment of the purchase price is deferred but subject to interest. As a result, given that payment of the R500,000.00 portion of the purchase price would be deferred and that the Beta Trust would charge interest thereon, we submit that the above transaction would fall to be classified as a credit agreement in terms of section 8(4)(f).

The implications of the above transaction falling within the ambit of section 8(4)(f) depend, in large part, on the identity of the parties. If the Beta Trust is not a registered credit provider and Alpha is considered a consumer (which would ordinarily be the case in the present instance), the credit agreement would be rendered unlawful in terms of section 89(2)(d) and would be declared void from the date the agreement was entered into in terms of section 89(5)(a). If the Beta Trust was a registered credit provider the agreement would be lawful, but Alpha would be





CLIFFE DEKKER HOFMEYR

# Purchase price deferments and the potential application of the NCA

*...continued*

Although tough times have befallen the property market, market players must make do with the cards they have been dealt and innovate accordingly.

afforded all of the protections provided by the NCA to consumers which can be very onerous from the vantage point of the credit provider.

## Avoiding the application of the NCA

Avoiding the application of the NCA can at times prove a tall order, nonetheless, the Beta Trust is not without options should circumstances necessitate selling the property in question. In order for the transaction between the Beta Trust and Alpha to fall beyond the purview of a section 8(4)(f) credit agreement, they would have to either alter the manner in which Alpha paid the interest to the Beta Trust or dispense with the obligation to pay interest altogether.

To this end, on the strength of the principle laid down in Asmal v Essa, one might advise the Beta Trust to make the interest payable an indeterminate and unfixed amount, in which the date of payment thereof is determined at the discretion of either party. As the court noted for the transaction to fall within the ambit of section 8(4)(f) "*the parties must quantify the charge, fee or interest and specify the manner in which it is to be paid when they determine their contractual terms*". That said, it must, however, be borne in mind that despite the above remarks the ratio pertained to whether the indeterminate profit shares qualified as a 'charge'. Therefore, it is by no means a foregone conclusion that by making the interest payable indeterminate and unspecified, that the Beta Trust would necessarily avoid the application of the NCA.

The parties could dispense with the obligation to pay interest and agree that only the purchase price would be payable. This approach finds support in the case of *Voltex (Pty) Ltd v Chenleza and Others* where an agreement made provision for the purchase price to be paid 30 days after the delivery date of the goods but did not require the buyer to pay anything other than the purchase price. In that instance the court held that the agreement in question did not fall within the ambit of section 8(4)(f) as there was no 'fee', 'charge' or 'interest' payable for the deferred amount.

Alternatively, should the Beta Trust be unwilling to forego charging interest, it could conclude the Deed of Sale with a juristic person (as defined). In terms of section 4(1)(a)(i) the NCA will not find application if the consumer is a juristic person whose asset value or annual turnover, together with the combined asset value or turnover of all related juristic persons, at the time the agreement is made, exceeds R1,000,000.00. Moreover, in terms of section 4(1)(b), should the deferral amount exceed R250,000.00 the NCA will not find application if the consumer is a juristic person, even if its asset value or annual turnover is below R1,000,000.00.

## Conclusion

Although tough times have befallen the property market, market players must make do with the cards they have been dealt and innovate accordingly. That said, as we intimated in a previous alert, regard must be had to the manner in which the transaction is structured so as to avoid the application of the NCA and other cumbersome legislation.

*Andrew Heiberg and Khoro Makhesha*



CDH
CLIFFE DEKKER HOFMEYR

## OUR TEAM

For more information about our Real Estate practice and services, please contact:


**Muhammad Gattoo**
National Practice Head
Director
T +27 (0)11 562 1174
E muhammad.gattoo@cdhlegal.com

**Bronwyn Brown**
Director
T +27 (0)11 562 1235
E bronwyn.brown@cdhlegal.com

**Nayna Cara**
Director
T +27 (0)11 562 1701
E nayna.cara@cdhlegal.com

**Mike Collins**
Director
T +27 (0)21 481 6401
E mike.collins@cdhlegal.com

**Werner de Waal**
Director
T +27 (0)21 481 6435
E werner.dewaal@cdhlegal.com

**Lucia Erasmus**
Director
T +27 (0)11 562 1082
E lucia.erasmus@cdhlegal.com

**Simone Franks**
Director
T +27 (0)21 670 7462
E simone.franks@cdhlegal.com

**Daniel Fÿfer**
Director
T +27 (0)21 405 6084
E daniel.fyfer@cdhlegal.com

**Fatima Gattoo**
Director
T +27 (0)11 562 1236
E fatima.gattoo@cdhlegal.com

**Andrew Heiberg**
Director
T +27 (0)21 481 6317
E andrew.heiberg@cdhlegal.com

**Simone Immelman**
Director
T +27 (0)21 405 6078
E simone.immelman@cdhlegal.com

**William Midgley**
Director
T +27 (0)11 562 1390
E william.midgley@cdhlegal.com

**Muriel Serfontein**
Director
T +27 (0)11 562 1237
E muriel.serfontein@cdhlegal.com

**John Webber**
Director
T +27 (0)11 562 1444
E john.webber@cdhlegal.com

**Kelsey Biddulph**
Senior Associate
T +27 (0)11 562 1417
E kelsey.biddulph@cdhlegal.com

**Natasha Fletcher**
Senior Associate
T +27 (0)11 562 1263
E natasha.fletcher@cdhlegal.com

**Robyn Geswindt**
Senior Associate
T +27 (0)21 481 6382
E robyn.geswindt@cdhlegal.com

**Marlene Heppes**
Senior Associate
T +27 (0)11 562 1580
E marlene.heppes@cdhlegal.com

**Samantha Kelly**
Senior Associate
T +27 (0)11 562 1160
E samantha.kelly@cdhlegal.com

**Janke Strydom**
Senior Associate
T +27 (0)11 562 1613
E janke.strydom@cdhlegal.com

**Joloudi Badenhorst**
Associate
T +27 (0)11 562 1272
E joloudi.badenhorst@cdhlegal.com

**Nabeela Edris**
Associate
T +27 (0)11 562 1740
E nabeela.edris@cdhlegal.com

**Shanita Goven**
Associate
T +27 (0)11 562 1586
E shanita.goven@cdhlegal.com

**Lutfiyya Kara**
Associate
T +27 (0)11 562 1859
E lutfiyya.kara@cdhlegal.com

**Sune Kruger**
Associate
T +27 (0)11 562 1540
E sune.kruger@cdhlegal.com


**BBBEE STATUS:** LEVEL TWO CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

**PLEASE NOTE**
This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.


**JOHANNESBURG**
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

**CAPE TOWN**
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

**STELLENBOSCH**
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com






CLIFFE DEKKER HOFMEYR