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# REAL ESTATE ALERT

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### What constitutes the granting of a mortgage bond in transactions which are subject to the National Credit Act?

In transactions which are subject to the National Credit Act, there is often a discrepancy between the wording of the suspensive condition dealing with mortgage bond approval in a sale agreement and what actually constitutes the granting of a bond in terms of the National Credit Act (NCA).

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CLIFFE DEKKER HOFMEYR

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## What constitutes the granting of a mortgage bond in transactions which are subject to the National Credit Act ?

Although the bond may be deemed to be approved or granted in terms of the bond clause in the sale agreement, there could be a dispute as to whether the bond is actually granted in terms of the provisions of the NCA.

**In transactions which are subject to the National Credit Act, there is often a discrepancy between the wording of the suspensive condition dealing with mortgage bond approval in a sale agreement and what actually constitutes the granting of a bond in terms of the National Credit Act (NCA).**

For example, the mortgage bond clause in the sale agreement relating to such a transaction may provide as follows:

*"the sale is subject to the Purchaser being granted a loan in writing of an amount not less than R.....from a registered bank....."*

Or

*This sale is conditional upon any Financial Institution approving on its normal terms and conditions a bond of R.....on security of the property. Such bond shall be approved in principal no later than ....."*

Where there are no disputes between the parties, the above clauses may suffice, but there is an inherent risk that such clauses, which are not correctly and clearly worded, may be the cause of much unnecessary legal wrangling. Although the bond may be deemed to be approved or granted in terms of the bond clause in the sale agreement, there could be a dispute as to whether the bond is actually granted in terms of the provisions of the NCA and consequently for the avoidance of doubt, the bond approval clause should rather be absolutely clear as well as conform to the prescripts of the NCA.

**So what constitutes the granting of a bond in terms of the NCA ?**

After a successful bond application has been processed, a Financial Institution will issue an Offer of Finance for acceptance by the Purchaser. This Offer of Finance

does not constitute the granting of a bond. Once the Purchaser has accepted the Offer of Finance, the Financial Institution must, in terms of sections 92(2) and 93(1) of the NCA, issue the Purchaser with a Quotation and Loan Agreement (sometimes referred to as a pre-agreement statement and quotation). Consequently, it is upon the delivery of the Quotation and Loan Agreement to the Purchaser and the acceptance thereof by the Purchaser that the bond approval conforms with the NCA and is deemed to be granted in terms of the NCA. This follows the court's decision in *Basson v Remini and Another* 1992(2) SA 322(N). It is not clear whether acceptance by the Purchaser can be by email or other media, or whether the Purchaser is required to actually sign the Quotation and Loan Agreement to signify acceptance. It seems in practice that the Purchaser's signature on the Quotation and Loan Agreement is not a pre-requisite for acceptance, and that an emailed or in some cases a WhatsApp acceptance suffices. Whether these methods of acceptance are sufficient have not yet been tested by the courts.

In conclusion, to ensure certainty and to avoid disputes, it is recommended that the suspensive condition dealing with a bond approval in a sale agreement conform to the prescripts provided by the NCA that a bond is granted when the Purchaser accepts a Quotation and Loan Agreement (pre-agreement and quotation) issued by the Financial Institution. To minimize the risk of a dispute completely, the mortgage bond clause could go further and state that the Purchaser must provide a signed Quotation and Loan Agreement within the time-period set for approval of the mortgage bond in order to fulfill the suspensive condition.

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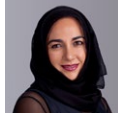
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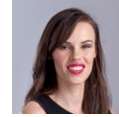
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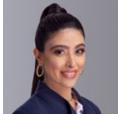
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### BBBEE STATUS: LEVEL ONE CONTRIBUTOR

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.

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