



CORPORATE & COMMERCIAL ALERT

IN THIS ISSUE

VENDOR FINANCIERS RISK RIGHT TO CLAIM PURCHASE PRICE IN THE EVENT OF A DEFAULT ON PAYMENT

There are often instances where a person wishes to purchase shares in a company but does not have the capital to fund all or a portion of the purchase price payable to the selling shareholder. As a consequence, the parties often agree on a vendor financing type arrangement, whereby the shares are transferred to the purchaser with payment of the full or part of the purchase price being deferred.

A SLOW START FOR THE COMMUNITY SCHEMES OMBUD SERVICE

It has been two years since the Community Schemes Ombud Service Act, No 9 of 2011 (Act) was brought into force. The Act provides for the establishment of the Community Schemes Ombud Service (CSOS). One of the principle functions of the CSOS is to develop and provide for a dispute resolution service.

VENDOR FINANCIERS RISK RIGHT TO CLAIM PURCHASE PRICE IN THE EVENT OF A DEFAULT ON PAYMENT

The applicability of the NCA to a transaction such as this is not necessarily an obvious consideration in relation to a once-off sale transaction between persons who do not participate in the credit industry.

The Supreme Court of Appeal set aside the order of the High Court, finding that s40 of the NCA was clear and unambiguous in that it makes it obligatory for a person to register as a credit provider if the total debt advanced exceeds the prescribed threshold.

There are often instances where a person wishes to purchase shares in a company but does not have the capital to fund all or a portion of the purchase price payable to the selling shareholder. As a consequence, the parties often agree on a vendor financing type arrangement, whereby the shares are transferred to the purchaser with payment of the full or part of the purchase price being deferred. The outstanding amount would then either be paid in one lump sum or in instalments, and would bear interest until paid in full.

This does raise the question as to whether the agreement concluded between these parties would have to comply with the National Credit Act, No 34 of 2005 (NCA) and whether the seller would be obliged to register as a credit provider in terms of the NCA. If indeed the case, the agreement (including any security held by the seller for payment of the outstanding purchase price, for example a pledge of the shares) would constitute a credit agreement, and should it not comply with the NCA and/or the seller fails to register as a credit provider, the agreement (including the security) will be void and the seller may not be able to rely on the provisions of the agreement to claim the outstanding purchase price and realise the security.

The applicability of the NCA to a transaction such as this is not necessarily an obvious consideration in relation to a once-off sale transaction between persons who do not participate in the credit industry. The question was, however, recently considered in the judgment handed down in the Supreme Court of Appeal by Nicholls AJA on 28 September 2018 in *Du Bruyn NO & others v Karsten* (929/2017) [2018] ZASCA 143.

In this case, Mr and Mrs Du Bruyn, in their capacities as trustees of a trust, purchased shares from Mr Karsten, on the basis of an

instalment sale, whereafter, the Du Bruyns defaulted on paying the outstanding purchase price. Mr Karsten instituted legal action against them in a High Court and was successful in his claim.

The Du Bruyns, however, appealed the decision on the basis that Mr Karsten registered as a credit provider after the conclusion of the sale agreement, rendering such agreement (including the security registered in favour of Mr Karsten for the purchase price) null and void due to non-compliance with the NCA.

Mr Karsten, in defence, submitted that the requirement to register as a credit provider was directed at participants in the credit market and not for single transactions where credit was provided. The Supreme Court of Appeal set aside the order of the High Court, finding that s40 of the NCA was clear and unambiguous in that it makes it obligatory for a person to register as a credit provider if the total debt advanced exceeds the prescribed threshold.

It is therefore critical to appreciate that a sale of shares transaction, between certain persons where the payment of the purchase price is deferred subject to payment of interest on the outstanding amount, is generally considered a "credit agreement" in terms of the NCA. This

VENDOR FINANCIERS RISK RIGHT TO CLAIM PURCHASE PRICE IN THE EVENT OF A DEFAULT ON PAYMENT

CONTINUED

The seller may opt to forego the payment of interest, given that the extension of credit where no interest is charged does not constitute a credit transaction which requires compliance with the NCA.



requires the transaction documentation to be drafted in a NCA compliant manner and the seller to register as a credit provider prior to the conclusion of the transaction documentation.

There are, however, various other factors to consider when determining whether the NCA is indeed applicable to such transaction. For example, the purchaser must constitute a consumer for purposes of the NCA.

Natural persons automatically constitute consumers under the NCA including a trust which has two or less trustees (who are natural persons). Persons who are not natural persons (including, amongst others, companies, partnerships ("juristic persons") and trusts with more than two trustees or where a trustee is itself a juristic person) are also deemed consumers if they fall below certain asset-value or annual-turnover thresholds.

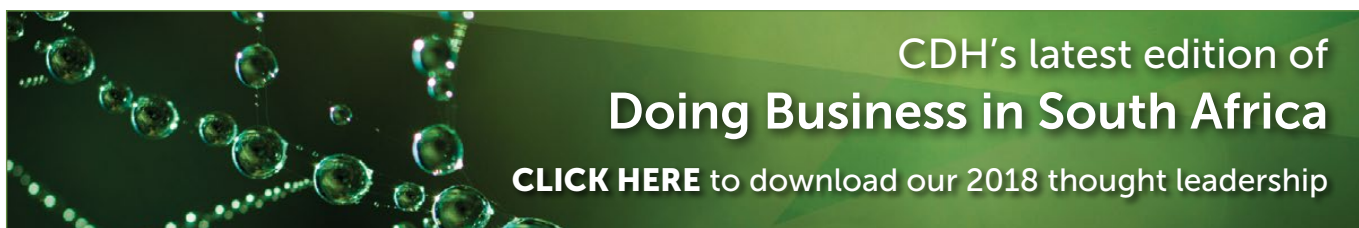
Furthermore, the requirement for a person extending credit (ie the seller in this case) to register as a credit provider depends on the quantum of the amount deferred, in that the NCA prescribes a minimum threshold that must be exceeded before a person is required to register as such. This threshold is, however, rendered redundant on the basis that it is currently R0.00, as prescribed by the Minister in terms of the NCA.

Registration as a credit provider involves an application by the seller to the National Credit Regulator, which application must be accompanied by various documents as well as certain administrative payments and may take up to eight weeks to be approved. Once the seller registers as a credit provider, it will be required to renew such registration on an annual basis for as long as the credit agreement is in force and effect if it intends to continue charging interest on the outstanding purchase price.

The administrative burden of registering as a credit provider, and the additional cost that may need to be incurred to ensure that the transaction documentation complies with the NCA, may very well discourage parties from concluding transactions on this basis.

Since commercial practicalities often demand this type of arrangement (which does not only apply to the sale of shares but to goods and services in general), "out of the box" alternatives may be worth exploring, for example the seller may opt to forego the payment of interest, given that the extension of credit where no interest is charged does not constitute a credit transaction which requires compliance with the NCA.

Antonia Pereira and Quintin Honey



CDH's latest edition of
Doing Business in South Africa
CLICK HERE to download our 2018 thought leadership

A SLOW START FOR THE COMMUNITY SCHEMES OMBUD SERVICE

The CSOS's 2016/2017 annual report provides some insight into how it is functioning.

Since its inception, the CSOS has published three adjudication orders, which are the findings of disputed cases heard by it and the orders granted in each matter.



It has been two years since the Community Schemes Ombud Service Act, No 9 of 2011 (Act) was brought into force. The Act provides for the establishment of the Community Schemes Ombud Service (CSOS). One of the principle functions of the CSOS is to develop and provide for a dispute resolution service – ie to offer a means to resolve disputes arising in relation to community schemes, which are broadly defined to include sectional title schemes, share block companies, homeowners' associations, retirement housing schemes and housing co-operatives.

Annual Report

The CSOS's 2016/2017 annual report provides some insight into how it is functioning. As noted, one of the CSOS's core objectives is to provide a dispute resolution service. The annual report indicates that, in respect of the 2016/2017 financial year, 285 disputes were resolved through conciliation – ie the matters became settled through a conciliation process without the CSOS having to adjudicate a dispute and render an award – which is within the CSOS's agreed service levels.

However, the report also indicates that, in respect of the 2016/2017 financial year, 315 disputes were not resolved within the specified service levels as per the approved dispute resolution model. This is reportedly due to the current dispute resolution workforce being unable to manage the drastic increase in new applications for dispute resolution. As regards the timelines in respect of the resolution of disputes, the report indicates that only 36% of conciliations were finalised within 40 days, with 64% taking longer than the 40-day target period (against a target of 80% being resolved within 40 days). This is reportedly due to the latter being complex conciliation matters that could not be finalised within the stipulated timelines for resolution.

A further core objective of the CSOS is to promote good governance in community schemes. In this regard, the CSOS has an obligation to ensure that there is a process in place for the registration of community schemes so that they can be sent information about good governance to ensure that the proper governance structures are in place. As at March 2017, approximately 25,000 registration applications were received. However, only 7,434 community schemes were actually registered out of an annual target of 50,000 registrations.

Adjudication Orders

Since its inception, the CSOS has published three adjudication orders, which are the findings of disputed cases heard by it and the orders granted in each matter. The orders all relate to applications brought against body corporates by residents. In two of the three cases, the body corporates in question were ordered to pay for the costs of repairs to the residents' premises and common property.

The report reflects that, in respect of the 2016/2017 financial year, the CSOS received 912 dispute resolution applications. Of these, 91 were withdrawn (ie not pursued by the applicants); 12 were settled by the parties; 242 were rejected by the CSOS (without a hearing); 45 were

A SLOW START FOR THE COMMUNITY SCHEMES OMBUD SERVICE

CONTINUED

It is hoped that the CSOS's 2017/2018 annual report will reflect improved service delivery against the annual targets.



referred to other dispute resolution bodies; 95 had no further particulars; 285 were resolved through conciliation; 141 were referred for adjudication; and 1 was finally adjudicated by the CSOS (with the remaining two adjudication orders being in respect of the 2017/2018 financial year).

The fact that the CSOS has only rendered adjudication orders in three matters since its inception two years ago suggests that its resources are severely constrained, and that it is unable to expeditiously resolve disputes at the level required for it to fulfil its statutory mandate. This is borne out by the statistics referred to above pertaining, in particular, to the number of disputes that were not resolved within the specified service levels as per the approved dispute resolution model.

Conclusion

If the CSOS is to be an effective institution and fulfil its mandate it is going to have to improve on the number of new registration applications that it processes (to establish a database of community schemes), and it is going to have to significantly increase its capacity to deal with dispute resolution applications. If it does not do so, it runs the risk of failure. Members of the public will not make use of the service if it cannot be rendered effectively, however laudable its objectives. It is hoped that the CSOS's 2017/2018 annual report will reflect improved service delivery against the annual targets.

Justine Krige

2017 1ST BY M&A DEAL FLOW FOR THE 9TH YEAR IN A ROW.

| | | | |
|--|---|--|--|
| <p>2017 2nd by M&A Deal Value. 1st by General Corporate Finance Deal Flow for the 6th time in 7 years. 1st by General Corporate Finance Deal Value. 2nd by M&A Deal Flow and Deal Value (Africa, excluding South Africa). 2nd by BEE Deal Flow and Deal Value.</p> | <p>2016 1st by M&A Deal Flow. 1st by General Corporate Finance Deal Flow. 2nd by M&A Deal Value. 3rd by General Corporate Finance Deal Value.</p> <p>2015 1st by M&A Deal Flow. 1st by General Corporate Finance Deal Flow.</p> | <p>2014 1st by M&A Deal Flow. 1st by M&A Deal Value. 1st by General Corporate Finance Deal Flow.</p> <p>2013 1st by M&A Deal Flow. 1st by M&A Deal Value. 1st by Unlisted Deals - Deal Flow.</p> | <p>2012 1st by M&A Deal Flow. 1st by General Corporate Finance Deal Flow. 1st by General Corporate Finance Deal Value. 1st by Unlisted Deals - Deal Flow.</p> |
|--|---|--|--|



OUR TEAM

For more information about our Corporate & Commercial practice and services, please contact:



Willem Jacobs
National Practice Head
Director
Corporate & Commercial
T +27 (0)11 562 1555
M +27 (0)83 326 8971
E willem.jacobs@cdhlegal.com



David Thompson
Regional Practice Head
Director
Corporate & Commercial
T +27 (0)21 481 6335
M +27 (0)82 882 5655
E david.thompson@cdhlegal.com

Mmatiki Aphiri
Director
T +27 (0)11 562 1087
M +27 (0)83 497 3718
E mmatiki.aphiri@cdhlegal.com

Roelof Bonnet
Director
T +27 (0)11 562 1226
M +27 (0)83 325 2185
E roelof.bonnet@cdhlegal.com

Tessa Brewis
Director
T +27 (0)21 481 6324
M +27 (0)83 717 9360
E tessa.brewis@cdhlegal.com

Etta Chang
Director
T +27 (0)11 562 1432
M +27 (0)72 879 1281
E etta.chang@cdhlegal.com

Clem Daniel
Director
T +27 (0)11 562 1073
M +27 (0)82 418 5924
E clem.daniel@cdhlegal.com

Jenni Darling
Director
T +27 (0)11 562 1878
M +27 (0)82 826 9055
E jenni.darling@cdhlegal.com

André de Lange
Director
T +27 (0)21 405 6165
M +27 (0)82 781 5858
E andre.delange@cdhlegal.com

Werner de Waal
Director
T +27 (0)21 481 6435
M +27 (0)82 466 4443
E werner.dewaal@cdhlegal.com

Lilia Franca
Director
T +27 (0)11 562 1148
M +27 (0)82 564 1407
E lilia.franca@cdhlegal.com

John Gillmer
Director
T +27 (0)21 405 6004
M +27 (0)82 330 4902
E john.gillmer@cdhlegal.com

Sandra Gore
Director
T +27 (0)11 562 1433
M +27 (0)71 678 9990
E sandra.gore@cdhlegal.com

Johan Green
Director
T +27 (0)21 405 6200
M +27 (0)73 304 6663
E johan.green@cdhlegal.com

Allan Hannie
Director
T +27 (0)21 405 6010
M +27 (0)82 373 2895
E allan.hannie@cdhlegal.com

Peter Hesselting
Director
T +27 (0)21 405 6009
M +27 (0)82 883 3131
E peter.hesselting@cdhlegal.com

Quintin Honey
Director
T +27 (0)11 562 1166
M +27 (0)83 652 0151
E quintin.honey@cdhlegal.com

Roelf Horn
Director
T +27 (0)21 405 6036
M +27 (0)82 458 3293
E roelf.horn@cdhlegal.com

Yaniv Kleitman
Director
T +27 (0)11 562 1219
M +27 (0)72 279 1260
E yaniv.kleitman@cdhlegal.com

Justine Krige
Director
T +27 (0)21 481 6379
M +27 (0)82 479 8552
E justine.krige@cdhlegal.com

Johan Latsky
Executive Consultant
T +27 (0)11 562 1149
M +27 (0)82 554 1003
E johan.latsky@cdhlegal.com

Giada Masina
Director
T +27 (0)11 562 1221
M +27 (0)72 573 1909
E giada.masina@cdhlegal.com

Nkcubeko Mbambisa
Director
Corporate & Commercial
T +27 (0)21 481 6352
M +27 (0)82 058 4268
E nkcubeko.mbambisa@cdhlegal.com

Nonhla Mchunu
Director
T +27 (0)11 562 1228
M +27 (0)82 314 4297
E nonhla.mchunu@cdhlegal.com

Ayanda Mhlongo
Director
Corporate & Commercial
T +27 (0)21 481 6436
M +27 (0)82 787 9543
E ayanda.mhlongo@cdhlegal.com

William Midgley
Director
T +27 (0)11 562 1390
M +27 (0)82 904 1772
E william.midgley@cdhlegal.com

Tessmerica Moodley
Director
Corporate & Commercial
T +27 (0)21 481 6397
M +27 (0)73 401 2488
E tessmerica.moodley@cdhlegal.com

Anita Moolman
Director
T +27 (0)11 562 1376
M +27 (0)72 252 1079
E anita.moolman@cdhlegal.com

Jo Neser
Director
T +27 (0)21 481 6329
M +27 (0)82 577 3199
E jo.neser@cdhlegal.com

Francis Newham
Director
T +27 (0)21 481 6326
M +27 (0)82 458 7728
E francis.newham@cdhlegal.com

Gasant Orrie
Cape Managing Partner
Director
T +27 (0)21 405 6044
M +27 (0)83 282 4550
E gasant.orrie@cdhlegal.com

Verushca Pillay
Director
T +27 (0)11 562 1800
M +27 (0)82 579 5678
E verushca.pillay@cdhlegal.com

David Pinnock
Director
T +27 (0)11 562 1400
M +27 (0)83 675 2110
E david.pinnock@cdhlegal.com

Allan Reid
Director
T +27 (0)11 562 1222
M +27 (0)82 854 9687
E allan.reid@cdhlegal.com

Ludwig Smith
Director
T +27 (0)11 562 1500
M +27 (0)79 877 2891
E ludwig.smith@cdhlegal.com

Ben Strauss
Director
T +27 (0)21 405 6063
M +27 (0)72 190 9071
E ben.strauss@cdhlegal.com

Tamarin Tosen
Director
Corporate & Commercial
T +27 (0)11 562 1310
M +27 (0)72 026 3806
E tamarin.tosen@cdhlegal.com

Roxanna Valayathum
Director
Corporate & Commercial
T +27 (0)11 562 1122
M +27 (0)72 464 0515
E roxanna.valayathum@cdhlegal.com

Deepa Vallabh
Head: Cross-border M&A,
Africa and Asia
Director
Corporate & Commercial
T +27 (0)11 562 1188
M +27 (0)82 571 0707
E deepa.vallabh@cdhlegal.com

Roux van der Merwe
Director
T +27 (0)11 562 1199
M +27 (0)82 559 6406
E roux.vandermerwe@cdhlegal.com

Charl Williams
Director
T +27 (0)21 405 6037
M +27 (0)82 829 4175
E charl.williams@cdhlegal.com

BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 2 BBBEE verification under the new BBBEE Codes of Good Practice. 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.

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.

©2018 7282/OCT

