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REAL ESTATE AND FINANCE & BANKING ALERT

IN THIS ISSUE

How Instalment Sale Agreements could provide a creative finance solution for deals banks turn away

The present economy is challenging due to a multitude of macro and micro economic factors at an international and local level. In an article published by Business Tech on 3 July 2019, John Loos, a property sector strategist reported that *"the June 2019 South African Reserve Bank quarterly bulletin reflected a decline at a year-on-year rate of 7,82% in the first quarter of 2019 in the value of new mortgage loans granted by the banks. This followed a 2,07% decline in the final quarter of 2018."* This climate necessitates the exploration of alternatives and the Instalment Sale Agreement is one of these options. Instead of obtaining finance from a traditional bank or financial institution, the Seller itself will provide finance through the Instalment Sale Agreement.

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Potential Sellers and/or Purchasers may, in certain circumstances, use the Instalment Sale Agreement methodology to buy or sell certain properties in the property market. This process is regulated by the Alienation of Land Act 68 of 1981 (Alienation of Land Act), the Conventional Penalties Act 15 of 1962 and the National Credit Act 34 of 2005 (NCA), making it an alternative with a strong legislative framework. In the event that there is any conflict between the Alienation of Land Act and the NCA, the NCA shall prevail.

What is an Instalment Sale Agreement in terms of the Alienation of Land Act?

The Alienation of Land Act defines the Instalment Sale Agreement as *"an agreement between a Seller and Purchaser, where the parties agree for the purchase price of a property to be paid to the Seller in more than two instalments over a period exceeding 1 (one) year but limited to 5 (five) years"*.

The provisions of the Alienation of Land Act are applicable to land that is intended mainly for residential purposes. Certain categories of land are excluded namely; agricultural land as defined in the Subdivision of Agricultural Land Act 70 of 1970; and land which is held in trust by the State or a Minister for any person. Section 6 of the Alienation of Land Act sets out the rights and obligations of the parties and the details that must be encompassed in the body of the contract.

Section 7 of the Alienation of Land Act dictates that where the property is mortgaged, the Seller has the duty, within 30 days after conclusion of the contract to send the Purchaser a certificate drawn up by the relevant mortgagee (bank) recording the outstanding amount required to discharge the Seller's mortgage bond together with the applicable interest rate. A failure to furnish the Purchaser with this certificate can invoke the Purchaser's right to cancel the Instalment Sale Agreement.

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The Alienation of Land Act sets out guidelines for the calculation of interest and deals with invalid provisions, statements of account and penalties among other subject matter.

The Alienation of Land Act sets out guidelines for the calculation of interest and deals with invalid provisions, statements of account and penalties among other subject matter. In the case of breach, the Alienation of Land Act requires that the Purchaser be given a minimum period of 30 days to rectify the said breach of contract.

The Alienation of Land Act places an onus of the Seller to record the Instalment Sale Agreement against the title deed of the property with the appropriate registrar of deeds within 90 days of concluding the Instalment Sale Agreement. If the Seller fails to attend to the recordal within the 90-day period, the Purchaser has an option to cancel the Instalment Sale Agreement or to have the recordal registered. The relevant title deed is then endorsed either by the Seller or the Purchaser. This insulates the Purchaser as the Seller is precluded from alienating the property to a third person. Transfer is not permissible to anyone aside from the Purchaser. In the case of *Amardian and Others v Registrar of Deeds and Others* (Women's Legal Trust Amicas Curiae) 2019 (2) BLCR 193 (CC), the court held that the Purchaser's duty to pay instalments will not be due and payable prior to the agreement being recorded in the Deeds Registry. It can then be derived that the instalments are due and payable from the date of registration of the Instalment Sale Agreement.

How the NCA applies to the Instalment Sale Agreement

The NCA contains specific provisions, which relate to "instalment agreements", but only in the context of movable property. Immovable property usually falls within the scope of the NCA through the application of the provisions relating to mortgages.

Outside of these provisions, should a Seller undertake to provide goods or services to a Purchaser in terms of an agreement in which the Purchaser's obligation to pay any cost of the goods is deferred and any charge, fee or interest is payable to the Seller in respect of the deferred cost, then the Purchaser and Seller will have entered into a "credit agreement".

The terms "goods" and "services" are not defined in the NCA. However, the Consumer Protection Act, 2008 (CPA) definition of "goods" includes "a legal interest in land or any other immovable property", and a "service" in terms of the CPA includes "a right of occupancy of or power or privilege over or in connection with, any land or other immovable property, other than in terms of a rental".

Sellers who enter into Instalment Sale Agreements with Purchasers, and which Instalment Sale Agreements provide for a charge, fee or interest payable to the Seller, are essentially extending credit to the Purchaser. An Instalment Sale Agreement will not fall within the ambit of the NCA if there are no charges, fees or interest payable to the Seller by the Purchaser.

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Speak to us about whether it is a suitable option for your unique circumstances as this is not a one size fits all application.

Section 100(2) of the NCA states that "a credit provider must not charge a consumer a higher price for any goods or services than the price charged by that credit provider for the same or substantially similar goods or services in the ordinary course of business on the basis of a cash transaction." Accordingly, Sellers cannot "load" the price of goods and services which are sold on credit in an attempt to circumvent the provisions of the NCA.

The definition of a "credit provider" under the NCA is, however, limited to persons who grant credit to retail consumers, more specifically:

- i) borrowers who are natural persons; and
- ii) borrowers who are small juristic persons with an annual turnover or asset value of less than R1 million: provided that the small juristic person is not borrowing an amount of money exceeding R250,000.

Where the Purchaser is a small juristic person borrowing more than R250,000, then the provisions of the NCA will not apply to the credit provider (the Seller) or the credit agreement (the Instalment Sale Agreement). Similarly, where the Purchaser is a large juristic person (annual turnover or asset value exceeding R1 million), the provisions of the NCA will not apply, irrespective of the amount of money borrowed.

Sellers should therefore avoid using Instalment Sale Agreements with natural persons or small companies, whereby a charge, fee or interest is payable to the Seller, otherwise the provisions of the NCA will apply to the Seller and to the Instalment Sale Agreement itself. These provisions can be onerous requiring, *inter alia*, registration as a credit provider with the National Credit Regulator, conducting robust affordability assessments on borrowers, using only NCA compliant documentation and agreements, enforcing debt collection procedures in accordance with the NCA and so on.

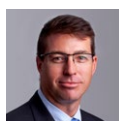
Conclusion

Players in the property market may find themselves in a situation where they are just unable to obtain bank finance for a deal for one reason or another. It is then that one may turn to the instalment sale agreement method. On the other hand, in a factual scenario whereby the Seller wants to prevent his property from being foreclosed on, it may be innovative to use an instalment sale agreement, structuring the deal such that the Purchaser covers the distressed Seller's bond instalments. This structure is available. Speak to us about whether it is a suitable option for your unique circumstances as this is not a one size fits all application.

**Muhammad Ziyaad Gattoo,
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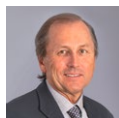
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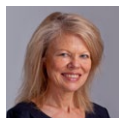
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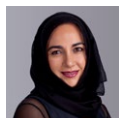
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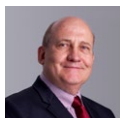
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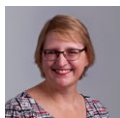
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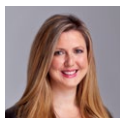
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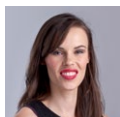
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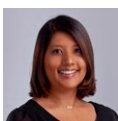
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