

20 JANUARY 2020

REAL ESTATE ALERT

IN THIS ISSUE >

Commercial Property Finance Mortgage Transactions: The early bird catches the worm

By the time a commercial bond instruction is received by the bond registration attorney, time may be of the essence in order to avoid negative financial implications such as penalty interest or purchase price escalations.

FOR MORE INSIGHT INTO OUR
EXPERTISE AND SERVICES

[CLICK HERE](#) 



CLIFFE DEKKER HOFMEYR

Commercial Property Finance Mortgage Transactions: The early bird catches the worm

Sections 112 and 115 of the Companies Act, 2008 stipulate regulatory requirements for the disposal by a company of all or the greater part of its assets or undertaking including the requirement of prior approval by way of a special shareholders' resolution passed in accordance with the provisions of sections 112 and 115.

By the time a commercial bond instruction is received by the bond registration attorney, time may be of the essence in order to avoid negative financial implications such as penalty interest or purchase price escalations.

Below are some potential pitfalls which, if considered at the outset of a transaction, may serve to minimise complications and delays with a commercial bond registration process:

1. The financial institution may impose conditions relating to a linked transfer and related sale agreement, in which case the following should be considered:
 - 1.1 Consider compliance with or determine the non-applicability of the following legislative provisions -
 - 1.1.1 Sections 112 and 115 of the Companies Act, 2008 stipulate regulatory requirements for the disposal by a company of all or the greater part of its assets or undertaking including
 - the requirement of prior approval by way of a special shareholders' resolution passed in accordance with the provisions of sections 112 and 115;
 - 1.1.2 Section 46 of the Close Corporations Act, 1984 requires the consent in writing of a member/s holding at least 75% interest in the corporation in respect of *inter alia* a disposal of the whole, or substantially the whole undertaking of the corporation, a disposal of all, or the greater portion of the assets of the corporation and any acquisition or disposal of immovable property by the corporation;
 - 1.1.3 Takeover Regulations in terms of sections 117 to 120 of the Companies Act, 2008;
 - 1.1.4 Section 34 of the Insolvency Act, 1936 relating to a voidable sale of business which entails advertisement requirements (if applicable);

Commercial Property Finance Mortgage Transactions: The early bird catches the worm...*continued*

Prospective mortgagors are recommended to take cognisance of any restrictive conditions in the company's MOI which may have a bearing on the loan and bond registration transactions or the granting of related securities.

- 1.1.5 Competition Commission Approval in terms of the Competition Act, 1998;
- 1.2 It is thus prudent to ensure timeous compliance with or waiver of suspensive conditions in a sale agreement in order to avoid the financial institution possibly calling for the conclusion of a reinstatement agreement.
2. Compliance with sections 44 and 45 of the Companies Act, 2008 and sections 40 and 52 of the Close Corporations Act, 1984 (if applicable to a transaction and/or the related security requirements)
 - 2.1 In considering the timing of a commercial bond transaction, one should bear in mind that a financial institution would normally require that special shareholders' resolutions be passed to authorise financial assistance by a company for subscription of securities as required in terms of section 44 or to authorise the granting of loans or other financial assistance by a company as required in terms of section 45 (which financial assistance would include guaranteeing a loan or other obligation and securing any debt or obligation).
 - 2.2 Similarly, the previously obtained written consent of every member of a close corporation would be required in respect of financial assistance by a corporation in respect of the acquisition of members' interests in that corporation and the granting of loans and furnishing of security by a corporation to members and others as more fully set out in sections 40 and 52.
3. Compliance with requirements imposed in terms of the Memorandum of Incorporation of a company
 - 3.1 Prospective mortgagors are recommended to take cognisance of any restrictive conditions in the company's MOI which may have a bearing on the loan and bond registration transactions or the granting of related securities.

Commercial Property Finance Mortgage Transactions: The early bird catches the worm...continued

Should the transaction in question fall within the ambit of Section 34 of the Insolvency Act, 1936, a financial institution would ordinarily require compliance with the provisions of Section 34 irrespective of whether the parties have contracted to the contrary.

4. Compliance with section 34 of the Insolvency Act, 1936 (Voidable Sale of Business)
 - 4.1 Should the transaction in question fall within the ambit of section 34 of the Insolvency Act, 1936, a financial institution would ordinarily require compliance with the provisions of section 34 irrespective of whether the parties have contracted to the contrary.
 - 4.2 In the case of *Gainsford And Others NNO V Tiffski Property Investments (Pty) Ltd And Others 2012 (3) SA 35 (SCA)*, the Supreme Court of Appeal found *inter alia* that where immovable property of a trader company is sold and transferred to the purchaser otherwise than in the ordinary course of the business of the

trader and without a notice of the intended transfer being published as required by section 34(1) of the Insolvency Act 24 of 1936, and the company is placed in liquidation within six months of such transfer, the transfer of that property is void as against the creditors for a period of six months after such transfer; and also void against the liquidator of the trader company. No legal consequences would flow from that void jural act. Therefore the purchaser of that property does not acquire ownership of it, on account of the voidness of the transfer, and cannot grant any rights, let alone real rights such as a mortgage bond, over the property to anyone and the person in whose favour such mortgage bond is registered acquires no rights in respect thereof.



Commercial Property Finance Mortgage Transactions: The early bird catches the worm...*continued*

Prospective purchasers are recommended to traverse the title conditions for a property as part of the preliminary due diligence process to facilitate the early detection of any such restrictive or onerous conditions.

5. Consideration of provisions in Trust Deeds

5.1 Consider *inter alia* the following -

- 5.1.1 whether the trust deed includes the requisite powers of the trustees to enter into the transaction or to grant the required security;
- 5.1.2 whether the trust deed contains any restrictive provisions or requirements relating to the proposed transaction;
- 5.1.3 whether the requisite minimum trustees have been appointed by the relevant Master of the High Court in order for the trust to transact business;
- 5.1.4 the provisions contained in the trust deed in respect of how resolutions by the trustees are required to be passed in order to authorise the conclusion of the particular transaction and signature of related documents;

6. Title Conditions

- 6.1 The bond registration attorney is normally required to investigate the title conditions in respect of the property being bonded in order to determine whether there may be any title conditions, servitudes or other endorsements which may prejudice the financial institution's security having regard to the intended development or commercial use of the property. Prospective purchasers are therefore recommended to traverse the title conditions for a property as part of the preliminary due diligence process to facilitate the early detection of any such restrictive or onerous conditions.

Simone Immelman

CDH is a Level 1 BEE contributor – our clients will benefit by virtue of the recognition of 135% of their legal services spend with our firm for purposes of their own BEE scorecards.

OUR TEAM

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



John Webber
National Practice Head
Director
T +27 (0)11 562 1444
E john.webber@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



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 Fyfer
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



Muhammad Gattoo
Director
T +27 (0)11 562 1174
E muhammad.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



Attie Pretorius
Director
T +27 (0)11 562 1101
E attie.pretorius@cdhlegal.com



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



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

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

Aaron Mupeti
Associate
T +27 (0)11 562 1016
E aaron.mupeti@cdhlegal.com

Melissa Peneda
Associate
T +27 (0)11 562 1385
E melissa.peneda@cdhlegal.com

JD van der Merwe
Associate
T +27 (0)11 562 1736
E jd.vandermerwe@cdhlegal.com

BBBEE STATUS: LEVEL ONE CONTRIBUTOR

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 cdh Stellenbosch@cdhlegal.com

©2020 8582/JAN



CLIFFE DEKKER HOFMEYR