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REAL ESTATE ALERT

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Due to the current volatile economic climate, borrowers are inclined to enter into lending agreements in order to manage their business requirements. When concluding such agreements, lenders should be cognisant of the provisions relating to the security granted by a mortgage bond in terms of the Insolvency Act 24 of 1936 (Insolvency Act) and specific time implications which could have detrimental consequences for the lender if not considered carefully.

Registrations during lockdown – the practical implications

The government has implemented a phased risk-adjusted strategy aimed at easing the current lockdown restrictions in the form of Alert Levels, a term defined in the regulations (the Regulations) issued in terms of section 27(2) of the Disaster Management Act 57 of 2002. Chapter 3 of the Regulations states that as of 1 May 2020, *Alert Level 4 is applicable in South Africa and will remain in force up to the declaration of different Alert Levels for the duration of the National State of Disaster.*

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Introduction

Many lenders are going to disburse funds, and some may be requested to do so on an urgent basis pending registration of a mortgage bond as a form of security of debt. The lender, also referred to as the mortgagee, should note section 88 of the Insolvency Act, which section provides as follows:

"A mortgage bond, other than a kustingbrief, whether special or general passed for the purpose of securing the payment of a debt not previously secured, which was incurred more than two months prior to the lodging of the bond with the registrar of deeds concerned for registration or for the purpose of securing the payment of a debt incurred in novation of or substitution for any such first-mentioned debt, shall not confer any preference if the estate of the mortgage debtor is sequestrated

within a period of six months after such lodging: Provided that a mortgage bond shall be deemed not to have been lodged as aforesaid, if it was withdrawn from registration."

Implications of section 88 of the Insolvency Act for lenders

In terms of section 88, should a mortgage bond be registered for the purposes of securing the payment of a debt which was previously not secured and should such unsecured debt have been incurred more than two months prior to the lodgement of the mortgage bond in the applicable deeds registry, such mortgage bond shall not confer any preference in favour of the lender should the borrower be sequestrated (or the borrowing entity be liquidated in the case where the mortgagor is an entity) within a period of six months after lodgement of the mortgage bond.

This essentially means that in the scenario described above the lender will not have a preferent claim. In terms of section 2 of the Insolvency Act, a preferent claim means the right to payment of a claim out of the assets of the insolvent estate in preference to other claims.

In the case of *Joint Liquidators of Glen Anil Development Corporation Ltd (in liquidation) v Hill Samuel (SA) Ltd (SA) Ltd* 1982 (1) SA 103 (A), the court considered whether a debt was incurred in terms of section 88 of the Insolvency Act when an indemnity was furnished or whether such debt was only incurred when the contingent debtor was called upon to

Preference of security in terms of a mortgage bond potential impact of COVID-19 protocols:...continued

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pay. If the former was the case, then the debt would have been incurred more than two months prior to the lodgement of the mortgage bonds registered by the contingent debtor as security for its "contingent liability", however, if the latter was the case then the debt would have been incurred after lodgement of the said bonds which would accordingly confer a preference. The court acknowledged that:

"A mortgage bond... passed for the purpose of securing the payment of a debt not previously secured, which was incurred more than two months prior to the lodging of the bond... shall not confer any preference if the estate of the mortgage debtor is sequestrated within a period of six months after such lodging..."

The court therefore reiterated the principle of section 88 but held that the debt secured by the bonds had not been incurred more than two months prior to the lodging of the bonds and that the bonds registered in favour of the respondent did confer preferent status.

Conclusion

The provisions and implications of section 88 should be noted by all lenders in respect of delays and especially during any COVID-19 lockdown period. Should a lender have unsecured debt or should a lender be in the process of securing debt by way of a mortgage bond, such lender should note the date on which it furnish the unsecured debt to the borrower. The lender should then consider that, should such mortgage bond not be lodged within the prescribed two-month period, the bond in question shall not confer any preference if the borrower is sequestrated or liquidated within a period of six months after such lodgement.

Daniel Fyfer and Sikelelwa Stemele

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Registrations during lockdown – the practical implications

This alert seeks to address the practical implications of registrations of immovable property which one can anticipate, following the re-opening and operation of the 11 Deeds Offices across the country.

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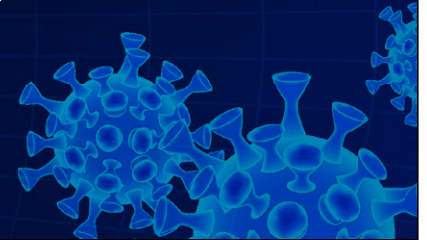
This alert seeks to address the practical implications of registrations of immovable property which one can anticipate, following the re-opening and operation of the 11 Deeds Offices across the country.

A property has just been registered. Is it time to move into a new house?

In the ordinary course, occupation of the property is given to and taken by the Purchaser on registration of the transfer in the Deeds Office. The obvious issue that presents itself here is that the Purchaser would be unable to take occupation on the date of registration due to the restriction on movement imposed by the Regulations. Similarly, the Seller would be unable to move out of the property and give occupation to the Purchaser on the date of registration. Chapter 3 of the Regulations unequivocally states that "a person may only leave their place of residence to perform an essential or permitted service as allowed in Alert Level 4". Table 1 does not include persons moving in and out of residences as a "permitted activity" under Alert Level 4. As it stands, the aforesaid parties will have no choice but to remain in the residence which they were in at the start of the lockdown.

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Registrations during lockdown – the practical implications...continued

To contribute to the plight of the parties, moving companies are not listed under the transport services which are permitted to operate at Alert Level 4. Only transport companies carrying persons and or goods that fall into the “permitted services” space are able to operate.

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Even though a Purchaser’s property may just have been registered it is not time to move into a new house.

The seller is now residing in the purchaser’s new house. What should the parties do?

The sale agreement is to regulate the position between the parties. There are two common scenarios that will be discussed herein.

Scenario 1- A sale agreement that already provides for the payment of occupational rent and expressly deals with the passing of risk and ownership:

Certain sale agreements contain a clause dealing with occupation and occupational rental. It would usually be worded as follows:

“Should the date of occupation be prior to the date of registration of transfer, the Purchaser will pay to the Seller, in consideration of such prior

occupation, occupational rental calculated at R [agreed sum] per month, payable monthly in advance, from the date of occupation to the date of transfer of the Property into the name of the Purchaser”

“Should the date of occupation be subsequent to the date of registration of transfer, the Seller will pay to the Purchaser in consideration of such period of occupation, occupational rental calculated and payable mutatis mutandis in accordance with the provisions of the above clause”.

The occupation clause may also provide:

- that all the improvements on the property are to be kept in good order, repair and condition;
- that any alterations or additions to any buildings or improvements on the Property will not be made without the registered owner’s prior written consent; and
- who will be liable for the rates, taxes and other charges in respect of the Property, including where applicable the levies and/or other charges payable to any property owners’ or similar association.

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Registrations during lockdown – the practical implications...continued

Parties considering drafting an addendum should take note of the signature requirements that must be complied with in order for the addendum to be valid.

In this scenario, occupational rent would be due and payable by the Seller who is forced to remain in occupation of the property, to the Purchaser who is now the new registered owner.

Scenario 2- A sale agreement that does not provide for the payment of occupational rent:

Typically, most sale agreements contain what is known as a non-variation clause. This clause states:

no addition to or variation, deletion, or agreed cancellation of all or any clauses or provisions of this Agreement will be of any force or effect unless in writing and signed by the Parties.

Now, if occupational rent is not provided for in the sale agreement the parties may nevertheless negotiate and agree on similar terms, ensuring that they reduce their arrangement to writing and have it annexed to the existing sale agreement as an addendum for it to have force and effect.

Important signature requirements:

Parties considering drafting an addendum should take note of the signature requirements that must be complied with in order for the addendum to be valid. As our movements are restricted by the Regulations, the addendum will have to be negotiated and transmitted between the parties electronically. It is often more convenient to sign a document electronically, instead of having to print a document, sign it and initial each page, and scan it back in before sending it off. Particularly during these times, persons may not have access to printers and scanners and may often find themselves signing documents electronically whilst working from home. Persons must as a result take heed of the Electronic Communications and Transactions Act 25 of 2002 (the ECTA), particularly in relation to electronic signatures in relation to sale agreements (and by extension to addenda to sale agreements).

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Registrations during lockdown – the practical implications...continued

After considering a few of the practical implications of registration under Alert Level 4 it is advisable that Sellers and Purchaser's give due regard to the eventualities and practical implications in proceeding to register their transfer.

The ECTA facilitates electronic communications and transactions and allows for the use of electronic signatures. Section 4 (3) of the ECTA states that section 12, dealing with writing and 13 dealing with signature does not apply to the Alienation of Land Act 68 of 1981. This means that any agreement concluded in terms of the Alienation of Land Act 68 of 1981 may not be validly signed by means of an electronic signature as these agreements fall outside the ambit of the ECTA. This includes agreements for the alienation of immovable property otherwise known as sale agreements.

Under the Alienation of Land Act, no sale of immovable property will be of any force or effect unless it is contained in a deed of alienation or an Offer to Purchase signed by the parties thereto or by their agents acting on their written authority.

As a result, parties to an agreement for the sale of immovable property must print the addendum, sign it and initial each page in wet ink, and scan it back in before sending it off in order to comply with the Alienation of Land Act 68 of 1981 and the non-variation clauses in their sale agreement.

Comment

After considering a few of the practical implications of registration under Alert Level 4 it is advisable that Sellers and Purchaser's give due regard to the eventualities and practical implications in proceeding to register their transfer. Notwithstanding the re-opening of the Deeds Offices around the country, sellers and purchasers of property should be prudent in determining whether registration of the property into the Purchaser's name would suit their particular circumstances.

*John Webber, Nabeela Edris and
Mthokozisi Alpha Zungu*

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A better place to work

The module will empower your organisation with a greater appreciation and understanding of what constitutes sexual harassment, how to identify it and what to do if it occurs.

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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



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 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



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



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



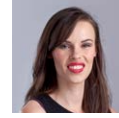
Natasha Fletcher
Senior Associate
T +27 (0)11 562 1263
E natasha.fletcher@cdhlegal.com



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



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

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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

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