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# REAL ESTATE ALERT

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**A judicial reminder to take heed of the provisions in your co-ownership agreement | Part 2 – Be sure to take a “Step-In” the right direction**

As alluded to in [Part 1](#), a co-ownership comprises two or more persons who each own an undivided share in and to a property. In terms of section 34(1) of the Deeds Registries Act 47 of 1937, any person who owns an undivided share in and to a property may obtain a separate title deed for its undivided share. This provision allows a co-owner to secure a loan from a funder and to register a mortgage bond over its undivided share as security for the repayment of the said loan.

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## A judicial reminder to take heed of the provisions in your co-ownership agreement | Part 2 – Be sure to take a “Step-In” the right direction

A co-ownership agreement should contain a provision prohibiting any co-owner from registering a mortgage bond over its undivided share without the consent from the remaining co-owners.

As alluded to in [Part 1](#), a co-ownership comprises two or more persons who each own an undivided share in and to a property. In terms of section 34(1) of the Deeds Registries Act 47 of 1937, any person who owns an undivided share in and to a property may obtain a separate title deed for its undivided share. This provision allows a co-owner to secure a loan from a funder and to register a mortgage bond over its undivided share as security for the repayment of the said loan.

When a mortgage bond is registered over a co-owner’s undivided share, the funder obtains a real right in and to the said undivided share and may exercise certain rights relating to the undivided share upon the happening of events of default. It is for this reason that co-ownership agreements must include specific funding provisions to i) protect the interests of all co-owners, and ii) govern the relationship between the co-owners and the funder.

A co-ownership agreement should contain a provision prohibiting any co-owner from registering a mortgage bond over its undivided share without the consent from the remaining co-owners. If the purpose of the loan to be secured by the mortgage bond is to fund the purchase price of the undivided share, or to fund the proportionate share of the development cost of the building to be constructed on the property, consent to the registration of the mortgage bond should be granted. A co-owner should, however, not be permitted to register a further mortgage bond over its undivided share for any purpose which does not relate to the business of the co-ownership.

Interestingly, the co-ownership agreement concluded between the MEPF and Adamax (discussed in [Part 1](#)) explicitly entitles each co-owner to procure and register a mortgage bond over its undivided share without the consent of the other co-owner.

If such consent to the registration of a mortgage bond is granted, the co-owner encumbering its undivided share should procure an undertaking from the funder that in the event of the co-owner’s default, the funder:

- (i) will first advise the remaining co-owners in writing of its intention to foreclose on the mortgage bond registered;
- (ii) will afford the remaining co-owners the opportunity to exercise their right of pre-emption (governed by the co-ownership agreement); and
- (iii) will use reasonable endeavours to include a condition in the sale conditions of any sale in execution of the undivided share that the purchaser agrees in writing in favour of the remaining co-owners to be bound by the provisions of the co-ownership agreement in the place of the defaulting co-owner as from the date of registration of transfer of the undivided share in the purchaser’s name.

When providing funding to a co-owner in respect of a letting enterprise, the funder will generally require a mortgage bond to be registered over such co-owner’s undivided share as well as the cession of the rental stream as

## A judicial reminder to take heed of the provisions in your co-ownership agreement | Part 2 – Be sure to take a “Step-In” the right direction...continued

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Co-ownership agreements should provide for reciprocal undertakings by the co-owners to negotiate the terms of a step-in rights agreement with a funder in good faith and should further set parameters for such an agreement which are acceptable to all co-owners and more importantly which will safeguard the continuity of the letting enterprise conducted by the co-owners.

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security for the loan. Where the rental stream is ceded as security, provisions in the co-ownership agreement aimed at securing the continuity of the letting enterprise conducted by the co-owners will be scrutinized by the funder. An explicit provision that the co-ownership will endure for an indefinite period unless terminated in accordance with the specific provisions contained in the co-ownership agreement is therefore important.

Nowadays it is a standard term of funders of co-owners of undivided shares in property to require that a tripartite or a step-in rights agreement be entered into between the (i) co-owner mortgaging its undivided share in the property (borrowing co-owner); (ii) the remaining co-owners; and (iii) the funder.

A typical step-in rights agreement will provide for (i) the consent by the remaining co-owners to the registration of a mortgage bond over the borrowing co-owner's undivided share in the letting enterprise; (ii) an undertaking by the remaining co-owners that the co-owners will provide the funder with written notice of any breach of the borrowing co-owner under the co-ownership agreement; and (iii) a period for the funder to step-in and remedy the breach of the borrowing co-owner. Such an agreement should also oblige the funder, once it

exercises its step-in rights, to comply with all the terms and conditions of the co-ownership agreement as if it were the borrowing co-owner.

The extent of the step-in rights is quite often a contentious issue. Most co-owners accept the funder's right to step-in and remedy the breach of the borrowing co-owner, however they are opposed to the funder becoming the defaulting borrowing co-owner's representative and exercising the rights of the co-owners in respect of all dealings flowing from the co-ownership. These matters may also be regulated in both the co-ownership agreement and the step-in rights agreement and should accordingly be negotiated before concluding the agreements.

As different funders have diverse views and requirements for, *inter alia*, step-in rights agreements, co-ownership agreements should provide for reciprocal undertakings by the co-owners to negotiate the terms of a step-in rights agreement with a funder in good faith and should further set parameters for such an agreement which are acceptable to all co-owners and more importantly which will safeguard the continuity of the letting enterprise conducted by the co-owners.

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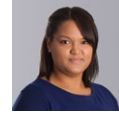
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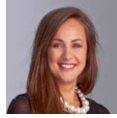
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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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