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THE NATIONAL CREDIT ACT AND BOND CLAUSES

The question of amendments to the bond clause as a result of the passing of the National Credit Act has been the subject of much discussion. Most contracts contain a clause which provides that the agreement is subject to the suspensive condition that the purchaser is able to raise a loan upon the security of a mortgage bond to be passed over the relevant property by a bank or other financial institution for the sum of not less than a certain amount within a certain period of time.

The contract therefore is subject to the purchaser being able to raise a loan. Once the purchaser is in a position where the purchaser can in fact raise a loan then the suspensive condition is fulfilled. Thus strictly speaking, it is not necessary to amend the bond clause.

Many contracts in the past provided that that the bond clause was deemed to be fulfilled if the loan was granted in principal. Such a clause would now not be applicable as loans are not granted in principal. Instead a quotation is presented to the client who can either accept or reject the quotation. In respect of contracts which contain such clauses, some commentators have suggested that one should replace that portion of the contract with words to the effect that the suspensive condition is deemed to be fulfilled once the quotation and pre-agreement statement have been issued by a financial institution. Some doubt has been expressed by others on the basis that such a clause would be struck out as it has the effect of negating the contract by virtue of the fact that it effectively negates the purchaser's right in terms of the National Credit Act to consider the quotation for a period of 5 (five) days and either accept or reject the same. Thus, if one were to include such a clause, we believe it would be prudent to also include a clause in the contract to the effect that in the event that any paragraph, clause, line, sentence or word is found to be illegal or unenforceable that such paragraph, clause, line, sentence or word be deleted from the contract and the balance of the contract will remain in full force and effect. This would hopefully negate the danger involved in including a clause of the nature referred to above.

Of course one must take into account the fact that in law there is the principle of fictional fulfilment in terms of which a suspensive condition is deemed to have been fulfilled if the person who is capable of fulfilling the same frustrates such fulfilment. Thus, in all probability, if the purchaser obtains the relevant quotation and pre-agreement statement from a financial institution and does not accept the same, the seller will probably be able to argue that the purchaser frustrated the fulfilment of the suspensive condition and that therefore the contract is valid and binding. This of course is a further reason why one need not necessarily amend one's bond clause if one does not have the deeming provision.

If however those parties which have a contract which has a clause which provided that the bond clause would be deemed to be fulfilled if the loan was granted in principle, wish to amend their bond clause to retain a redeeming provision, there are various options which can be considered namely:-

1. One could insert a deeming provision along the lines suggested above. In such event the following words would be added in the appropriate part of the bond clause:-

"The parties specifically agree that this suspensive condition shall be deemed to be fulfilled on the date that the purchaser obtains a quotation and/or pre-agreement statement from any financial institution in terms of which such financial institution offers a loan to the purchaser in an amount of not less than the amount referred to above."

In such event we would suggest that the severability clause referred to above also be inserted in the contract;
or

2. One could insert at the appropriate place in the bond finance clause the following:-

"The purchaser's attention is drawn to the fact that in terms of the doctrine of fictional fulfilment, this clause will be deemed to be fulfilled if the purchaser frustrates the fulfilment of this clause in any way whatsoever."

or;

3. One could phrase the clause in terms of a resolutive condition instead of a suspensive condition. In such event the first part of the clause will read:-

"In the event that the purchaser (or the seller or the agent on the purchaser's behalf) is not able to obtain a quotation and/or a pre-agreement statement from any financial institution in terms of which such financial institution offers to loan to the purchaser the sum of not less than R_____ plus costs (delete if not applicable) within ___ days of acceptance of this offer (which time may be extended by the agent at the agent's sole discretion for a further period not exceeding ___ days) then this agreement will automatically terminate and be of no further force or effect. The parties specifically agree that if the agent exercises its discretion to extend the time period by which the quotation and/or pre-agreement statement from the financial institution is received, it will not be necessary for the agent to notify either the purchaser or the seller of such extension"

It could then be argued that because the agreement is not suspensive upon the purchaser obtaining the relevant finance, the fact that the clause is linked to a quotation or pre-agreed statement is no longer forcing the purchaser to give up his rights in terms of the National Credit Act in regard to the 5 day period of acceptance or his rights to accept or reject the quotation. It is a fine distinction and this distinction may not be upheld by a court of law.

Please obtain legal advice before altering any contract as one must assess the wording of the contract before making any amendments.

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