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NON-REFUNDABLE DEPOSITS ARE NOT AS NON-REFUNDABLE AS YOU THINK

One quite often comes across non-refundable deposits in Offers to Purchase properties. In addition most Deeds of Sale contain breach clauses that stipulate that in the event of a contractual breach by the Purchaser that is not rectified within a certain number of days, the Seller can cancel that agreement and retain all amounts paid on account of the Purchase Price as “rouwkoop” or liquidated damages.

In South African law, matters are unfortunately not as simple as that. In terms of the Conventional Penalties Act (Act 15 of 1962) (The “Act”) any penalty or liquidated damages contained in a contractual obligation shall be subject to the provisions of the Act. It specifically states in section 3 that:

“If upon the hearing of a claim for a penalty, it appears to a court that such penalty is out of proportion to the prejudice suffered by the creditor by reason of the act or omission in respect of which the penalty was stipulated, the court may reduce the penalty to such extent as it may consider equitable under the circumstances: Provided that in determining the extent of such prejudice the court shall take into consideration not only the creditor’s proprietary interest, but any other rightful interest that may be effected by the act or omission in question.”

A forfeiture stipulation resulting from the withdrawal from an agreement is also covered by the stipulations of the Act quoted above. In other words it applies to non-refundable deposits as well as the retention of certain amounts already paid by a Purchaser as liquidated damages or “rouwkoop”. The intangible aspect is that the Act refers to “any other rightful interest that may be effected by the act or omission in question” which does allow a portion of the penalty to compensate for the Seller’s pain and suffering as a result of the stress and anxiety caused by such cancellation. The Court in applying the Conventional Penalties Act does not necessarily work out what the actual damages will be and need only reduce the penalty “to such extent as it may consider equitable under the circumstances”. This means that the penalty can be far higher than the actual loss suffered.

Estate Agents should be very careful not to create an expectation with a Seller that he/she will be entitled to all of non-refundable deposit or monies already paid to the Conveyancers on account of the purchase price if a purchaser breaches a Deed of Sale of Immovable Property and such breach results in a cancellation thereof. Conveyancers are expected not to act as judge and jury when dealing with monies in their trust accounts when a dispute arises about who should be the rightful recipient of such monies once the Deed of Sale is cancelled. The Conveyancers cannot be expected to pay the monies to either party in the absence of an agreement being reached between the parties or a competent court making an order.

It is however important to note that paying Estate Agent’s commission may be less problematical in the sense that the contract will provide when the Agent’s commission is payable and the same is a liquidated amount (provided the Deed of Sale is worded correctly). The Agent will be entitled to such commission even if the Estate Agent again resells the property from the same Seller to another buyer subsequent to the cancellation taking place. However once again a Conveyancer is not entitled to assume that the agreement has been validly cancelled and that the Purchaser is at fault. Accordingly the Conveyancer will very often have to hold the monies in trust until such stage as the parties have reached an agreement or a court order is obtained.

At this juncture it needs to be mentioned that the Seller’s damages will often only be liquidated once the property is resold. The Seller will only have a claim in the event that the property is resold or valued for an amount that is not high enough to nullify the damages. The Purchaser therefore runs the risk (failing a subsequent agreement being reached or a court ordering otherwise) of the Conveyancer holding the monies back until the property is resold. This is so, as one of the components in calculating the Seller’s damages is the eventual net selling price or market value of the property. This however does not entitle a Seller to deliberately resell the property at a lower price as one has a common law obligation to mitigate one’s damages.

If one wishes to include a provision in terms of which certain monies will be non-refundable, a better way would perhaps be to grant the Purchaser an option to purchase the property on the basis that the Purchaser pays an amount for such option. The option agreement will provide that if the option is exercised, the option amount will then be deducted from the Purchase Price if the transfer takes place. If the option is not exercised and the transfer does not take place (in other words if the Purchaser does not proceed with the transfer) then the option monies will remain the property of the Seller and this will not be considered a penalty or forfeiture stipulation. Of course the difficulty with this approach is that the Seller does not necessarily know whether the sale has taken place until such stage as the Purchaser exercises the option. In other words the Purchaser may forfeit the option but this may not compensate the Seller for the uncertainty created. .

The question of what amounts will be forfeited is therefore one which can be fraught with danger.

COMPANIES WITHIN THE DYKES VAN HEERDEN GROUP

DYKES VAN HEERDEN INC
Tel : (011) 279-5000
E-mail info@dvh.net.za
19 Ontdekkers Road
Roodepoort 1724, South Africa
Web-site: <http://www.dvh.law.za>

DYKES VAN HEERDEN (CAPE) INC
Tel : 0861 110 210
E-mail admin@dvh.law.za
Unit E4/2, Edward IV
120 – 122 Edward Street
Bellville 7530, South Africa
Web-site: <http://www.dvh.law.za>

DYKES VAN HEERDEN (KZN) INC

Tel : (031) 903- 1851

E-mail thomas@kzndvh.za.net

Nr. 18 Ridge Road

Amanzimtoti, Durban 4120, South Africa

Web-site: <http://www.dvh.law.za>

DYKES VAN HEERDEN SLABBERT HOPKINS INC

Tel : 0861 110 210

E-mail capetown@dvhs.law.za

Unit E4/2, Edward IV

120 – 122 Edward Street

Bellville 7530, South Africa

Web-site: <http://www.dvh.law.za>