



DYKES VAN HEERDEN GROUP OF COMPANIES
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CLOSING THE LOOPHOLE ON BANK FINANCE APPROVALS WHICH PRECEDE PRE-AGREEMENT STATEMENTS AND QUOTATIONS IN TERMS OF THE NATIONAL CREDIT ACT, 2005

It has come to our attention that a number of the major South African Banks are now issuing documents called “a grant quotation”, “an offer issued in respect of a mortgage loan” and certain other documents in terms of which the Banks preliminarily approve a loan to be secured by the registration of a mortgage bond over a property subject to a number of conditions. We are of the view that Banks are likely adding this step, in order to mitigate incurring finance charges when funds are allocated and set aside in respect of approved loan finance. These approvals specifically record that such approval is not a pre-agreement statement or quotation (in terms of the National Credit Act) and therefore such approvals are not catered for in terms of those standard sale agreements which ordinarily deem a pre-agreement statement or quotation to fulfil the suspensive condition relating to a bond grant.

The risk of not contractually addressing this step/approval is that the suspensive condition will not be deemed to be fulfilled. As such, should the purchaser after receiving such in principle approval not proceed with progressing the financing from the Bank or frustrate the obtaining of such finance for example by not providing the Bank with the necessary documents as requested, the suspensive condition will not be fulfilled and the deal will lapse. We suggest the inclusion of the following clause in your agreement of sale in order to provide the parties with certainty, and to close out this loophole:

“1.1 Approval of bond

This Agreement is subject to the Purchaser obtaining approval by not later than _____ for the granting of a loan by a registered South African Bank, or a reputable registered financial institution approved by the Conveyancer (the “Bank”), of not less than R _____ (_____ Rand) upon the security of a mortgage bond to be registered over the Property at such rates of interest and on such conditions as are stipulated by the Bank/s to which application/s for the loan is/are made provided that if the loan is granted subject to the Purchaser selling any immovable property or cancelling any existing mortgage bond or repaying any existing loan, the suspensive condition will not be fulfilled. This suspensive condition shall be deemed to have been fulfilled:

1.1.1 on the date that the Purchaser obtains a quotation and/or pre-agreement statement from any Bank in terms of which such Bank offers a loan to the Purchaser in an amount of not less than the amount referred to above and even if such loan is approved subject to the Purchaser's spouse (or any of the directors and/or shareholders and/or members and/or trustees of the Purchaser, as the case may be) interposing himself as surety for and co-principal debtor in solidum with the Purchaser for the fulfilment of all the Purchaser's obligations under the loan; and/or

1.1.2 even if such loan is offered as a conditional approval by a Bank whether in the form of a grant quotation or as an offer issued in respect of a mortgage loan or as a conditional offer preceding a quotation or otherwise. It is recorded that some Banks issue offers which are not official quotations in terms of the provisions of the National Credit Act 34 of 2005 as amended and/or replaced from time to time (the “NCA”) in order to indicate to a purchaser that they would be willing to provide an official quotation in terms of the NCA to such purchaser and in respect of such specific property. In light of the same it is specifically agreed that this suspensive condition will be deemed to be fulfilled in the event that a Bank issues a document which reflects the name of the Purchaser, the Property, a mortgage loan amount which is equal to or greater than the amount set out above and the rate of interest and such other information which would usually reflect on a quotation issued under provisions of the NCA.

This suspensive condition shall further be deemed to be fulfilled upon the Purchaser accepting a quotation and/or pre-agreement statement from a Bank for the granting of a loan for a lesser amount than the amount stipulated above, in which event the Purchaser shall deliver to the Conveyancer a guarantee for the difference between the amount stipulated above on the one hand and the amount of the loan accepted on the other hand, within 7 (seven) days of the loan or offer being accepted by the Purchaser. The Agent may in his discretion and without notice to any of the Parties extend the period in which the Purchaser has for obtaining approval for the granting of the loan referred to above by a period of 15 (fifteen) days. The Purchaser warrants that he/she/it is solvent and no existing judgements are recorded against his/her/its name, and that no factors exist which might prevent the granting of the loan.

1.2 Failure on the part of

- 1.2.1 the Purchaser to sign any application for a bond or any other document/s necessary to procure the granting of such loan or registration of such bond, or to furnish relevant information or documentation or to pay the costs of or incidental to registration of any bond or to properly and timeously take all steps reasonably necessary to procure the loan and to comply with the requirements of the Bank; or
- 1.2.2 any person nominated to sign a Deed or Deeds of Suretyship as contemplated above to sign such deed of suretyship or to furnish relevant information upon demand by the Seller or any prospective Bondholder,

shall constitute a breach hereof by the Purchaser within the meaning of clause [X – insert number of breach clause] hereof or alternatively shall, at the option of the Seller, entitle the Seller to regard clause [Y – insert the number of this clause i.e the bond clause] hereof as having been duly fulfilled.”

Please note that this clause will require tailoring in order to be aligned to your offer to purchase, in respect of terms used as well as in respect to clause references.

This newsflash has been prepared for information purposes only and does not constitute legal advice, or a legal opinion, the practical application of the provisions of this newsflash will vary depending on the facts of each case.

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