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SELLING A HOUSE WITHOUT APPROVED PLANS & UNDERTAKING UNAPPROVED BUILDING WORKS

It is common knowledge that when a house or a structure is built on immovable property that the law requires the plans to be drawn up in a particular manner and approved by the relevant Local Authority with jurisdiction. Therefore, it stands to reason that every dwelling or house will have a set of plans. However, this is not always the case and sometimes people only discover that there are no plans for their house years later when they want to make alterations to their house or when they want to sell their property. Having approved plans for your property has therefore become a major concern and in many instances an issue for many South Africans buying and selling property.

The National Building Regulations and Building Standards Act 103 of 1977 obliges owners to obtain Municipal approved plans before the commencement of any building works on a property. The compliance herewith is generally enforced by the relevant Municipality involved. Every owner should obtain the Municipalities' approval to build or alter their property as municipal approval along with complying with building regulations, obtaining building plan approval and the inspection of building sites by municipal inspectors are essential in ensuring that the minimum standards of health and safety are adhered to as well as to ensure that such alterations and structures comply with all necessary laws.

In certain instances building plans may not be required if the work that is done is of a minor nature and does not pose a danger to or interfere with the amenities of the neighbourhood. If there is any doubt as to whether or not the work would be considered minor in nature, the relevant Municipality should be contacted for advice. It is highly recommended that the services of a duly qualified architect or draughtsmen be procured in order to prepare the plans for Municipal approval as such professionals will have a working knowledge of the standards and regulations applied by the Municipalities within their area of practice.

If an owner has chosen to build without approved plans, a building inspector is entitled to enter the property and order construction to stop immediately. The building inspector may also obtain a court order for the structure to be demolished at the owner's expense and the owner shall be liable for the legal costs involved.

When a property is being sold a purchaser may only insist on proof of approved plans if there is a clause to that effect in the agreement of sale. If no such clause exists in the agreement, the purchaser has no legal right to demand such plans and the absence of approved plans, if applicable, would then constitute a latent defect and would be governed by the voetstoots principle (depending on the terms of the agreement in question as well as whether the Consumer Protection Act 68 of 2008 finds application). A purchaser seeking to hold a seller liable for unapproved alterations or structures, or in the absence of approved plans will therefore be required to institute legal action against the seller and will bear the onus of proof that (i) at the time of contracting, the seller was aware that there were no approved plans in respect of the property; (ii) the seller deliberately failed to disclose this information to the purchaser; and (iii) that the seller's failure to disclose such information, or withholding of such information was undertaken with the intention to defraud the purchaser which may prove difficult. Accordingly, this action would not likely succeed against a seller who in good faith purchased an unapproved property from a third party and was not aware of such non-approval.

If an offer to purchase agreement is subject to a purchaser obtaining a loan from a bank or other financial institution, financial institutions will in some instances grant their loan subject to the receipt of approved plans in respect of the property being purchased. If the plans supplied to the financial institution do not correspond to the property, the financial institution will not provide the necessary consent to proceed with the registration of the bond and the sale could potentially fall through (if the loan is a suspensive condition). In addition to this the seller will be left with the cost and hassle to rectify the problem if they still wish to sell the property and may be liable for a fine for the illegal building works undertaken on the property without approval.

Given the limited recourse a purchaser may have due to the voetstoets principles, a prudent purchaser may wish to insist that such clause be inserted into the agreement of sale. The clause would provide that the seller warrants that all plans are in order and have been approved by the relevant municipality concerned, failing which the seller will be in breach of the agreement affording the purchaser a number of remedies such as specific performance or cancellation (depending on the breach terms of the agreement).

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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