



Van Deventer & Van Deventer

— Incorporated —

Attorneys • Notaries • Conveyancers

COMMON PITFALLS IN OFFERS TO PURCHASE

INTRODUCTION

This article aims to highlight the remedies available to the common pitfalls as identified from a conveyancing perspective when concluding offers to purchase in respect of immovable property. A greater understanding of these pitfalls and the solutions may assist in avoiding same in future.

CONTRACTUAL CAPACITY

Contractual capacity relates to an individual, company, close corporation or trusts legal ability to enter into an agreement. The following pitfalls appear commonly:

- **Party to the agreement married in community of property**

Where a party to an agreement is married in community of property to another, the signature of both spouses and their full names as parties to the agreement are required for the agreement to be valid.

- **Deceased Estates**

Only the Executor or Representative of a deceased estate from the date he is appointed by the Master of the High Court has contractual capacity to enter into any agreement on behalf of the deceased estate. A copy of the Letters of Executorship or Authority should be obtained and only the persons reflected thereon have capacity to sign an agreement.

- **Trusts**

The Trust Property Control Act requires that a resolution be signed by the Trustees of a Trust prior to the entering into of an agreement, which resolution should authorize the Trust's engagement in the agreement and nominate an authorised signatory to sign the agreement and

transfer documents on behalf of the Trust. Alternatively, all the Trustees can sign the agreement.

- **Foreign Marriages**

Sellers and Purchasers who are foreigners and wish to enter into any agreement for the acquisition or disposal of immovable property must assist one another in the transfer process. This requires that spouse of a foreign seller must be available to sign the conveyancing documents and to that end it is advisable to have that spouse sign the sale agreement.

The spouse of a cash foreign purchaser is not required to sign, however where a mortgage bond is utilised to finance the purchase, the spouse of the foreign purchaser is required to assist in the signing of the bond documents and thus it is advisable that the spouse signs the sale agreement. However whilst it is possible for one spouse to purchase immovable property and finance same, most South African banks as a matter of policy require that both spouses to a foreign marriage be the purchasers and ultimately be registered owners of the property.

- **Companies and Close Corporations – Final Deregistration**

Companies and Close Corporations which have been finally deregistered by CIPC do not have contractual capacity to enter into agreements. In the event of a CC or Company being de-registered, same will have to be re-registered with CIPC prior to signature of any resolutions and/or agreements. CC's and Companies should reflect an "In Business" status.

- **Resolutions by CC's and Companies**

Resolutions should be signed authorizing the sale or purchase of immovable property by a CC or Company preferably prior to the signature of an agreement. The resolution should also nominate a signatory to act on behalf of the CC or Company. In the event of a CC, all members should sign the resolution and with regards to Companies, all directors and in certain instances the shareholders, must sign the resolution.



- **Suspensive Conditions**

Suspensive conditions should generally be utilised and constructed with caution. Suspensive conditions suspend the operation of an agreement until a certain condition is wholly fulfilled, such as an agreement being subject to the obtaining of loan finance for a certain amount by a specified date. If the loan finance is not obtained for the amount specified on or before the date stipulated the agreement shall lapse and be of no further force or effect.

When inserting suspensive conditions into agreements, it is crucial that such conditions are clear, unambiguous and contain a specific date by which or time period in which the condition is to be fulfilled.

- **Guarantees**

Guarantees are ordinary utilised to secure the payment of the purchase price or part thereof upon registration of transfer in the Deeds Office. The date for delivery of guarantees cannot be a date prior to or shortly after the granting of loan finance as various steps have to be undertaken before guarantees can be issued. It is recommended that around 15 - 20 days be given from date of granting of loan finance for the delivery of guarantees.

- **Expiry Of Acceptance Period**

Offers to purchase commonly remain open for acceptance by the Seller for a specified period. Offers which are accepted after the expiry of the stipulated period are void and unenforceable.

- **Plans**

If building plans are not available and the Seller is aware thereof, this must be disclosed to the Purchaser. Inserting conditions that require the Seller to deliver plans can potentially delay a transfer for several weeks/months. If a condition relating to the provision of

building plans is inserted, the condition must be clearly worded and have a date by which same must be fulfilled.

- **Endorsements On Title Deed / Deeds Office Search**

Attention should be given to any endorsements which may appear on title deeds and/or deeds office searches. Certain endorsements prohibit the transfer or mortgage of a property or may cause delays in the transfer process.

- **Pets**

It is important to acquaint oneself and any prospective purchaser with regards to the rules of a sectional title scheme or home owners association with regards to pets. It is suggested that you obtain a copy of the conduct rules and any pet policies that may be in place and hand same to any purchaser prior to the signature of an agreement. Such purchaser should acknowledge receipt.

- **Exclusive Use Areas**

Parts of the common property are often demarcated as exclusive use areas for the sole utilization by the owner of a section in a scheme. EUA's are either allocated in terms of the management or conduct rules or they are held by notarial deeds of exclusive use areas. The latter are registered in the Deeds Office, however same will only be located when a "person search" is done in the deeds office as the EUA is a personal right and attaches to the owner and not the property. Person searches should be attended to together with enquiries with the managing agents regarding the existence of any EUA's prior to the signature of an agreement to ensure that EUA's are identified and included as part of the sale.

- **VAT**

If the Seller of immovable property is a VAT vendor then enquiries should be made as to whether the property sold forms part of his/her VAT enterprise and if the sale of the property will attract the payment of VAT. It is recommended that written advices from the Seller's accountant/auditor be obtained at mandate stage.

- **Linked Deals**

Where a property has been sold subject to the sale of Purchaser's property or the property is being bought as a result of the Purchaser having sold their property, it is imperative that all the dates should correlate, especially occupation dates.



- **Occupation Dates & Rental**

Occupation dates and occupational rental payable must always be completed in the Agreement. The rent should be a market related rent and not one contrived to suit one of the parties.

- **Disclosure Of Property Condition**

If a disclosure document is completed by the Seller with regards to the physical condition of the property, setting out any latent or patent defects. It is imperative that the disclosure document be annexed to the sale agreement, alternatively signed simultaneously therewith by all parties. This document cannot be presented to the purchaser for the first time after the sale agreement is concluded.

- **Tenants In Occupation**

Where a property is tenanted, whether in terms of a written or oral lease agreement, a copy of the lease or the terms thereof must be obtained and perused.

Should the purchaser intend to occupy the property, the terms of the lease and lease period and in particular any right to renewal must be understood to ensure the tenant will vacate on termination date. Should the purchaser be taking over the tenant it is suggested that a copy of the lease agreement be handed to the purchaser who must accept same prior to the conclusion of the sale agreement. The purchaser must specifically acknowledge receipt of the lease or its terms. If necessary, a specific addendum must be drawn to cater for the tenancy arrangements.

- **Existing Bonds**

If an existing bond is registered over a property the Seller must give the financial institution 90 days notice of its intention to cancel the mortgage bond over the property to avoid paying early termination penalty interest. Once cancellation figures are requested by the Conveyancing Attorneys, any access facility or available funds will be frozen and the Seller will no longer have access to the funds. Sellers are to withdraw the necessary funds prior to the attorneys calling for cancellation figures. Bond account numbers must be clearly completed on the contact information sheet annexed to the agreement.

- **Domicilium / Notice Address**

It is imperative that the domicilium or notice address of both the Seller and Purchaser be completed clearly and comprehensively (including postal code) to ensure that any notices or letters of demand issued pursuant to the agreement can be validly dispatched. This includes email addresses, postal addresses and physical addresses.

- **Cash Purchases**

Where a Purchaser is paying cash for the property and the agreement states that a cash payment will be made to secure the purchase price, no other form of guarantee can be accepted unless provided for in the agreement. Cash received is then invested and the interest will be for the benefit of the Purchaser. If in doubt a "Letter of Comfort" or bank statement must be obtained to indicate that the purchaser does in fact have funds.

Estate agents should as a matter of courtesy advise the purchaser to ensure that he has the necessary home owners insurance in place in respect of the property from date of registration of transfer.

- **Movables**

Where movables are to be included with the sale of immovable property, this must be dealt with in a separate sale of movables agreement to avoid the Purchaser paying transfer duty on the value of the movables and the bank granting a mortgage bond possibly reducing the loan amount by the value of the movables. There is also a CGT implication in not dealing effectively with movables.

- **Electrical Compliance Certificates**

Most banks require that a valid Electrical Compliance Certificate be submitted to them for approval prior to the transfer/bond being lodged in the Deeds Office. It is imperative that the ECC be handed to the transferring attorneys without delay.

- **Sale Of Cc's Or Share In Private Companies**

This practice has fallen into ill repute due to the fact the Purchaser by virtue of the acquisition of members interest in a close corporation or shares in a private company automatically assumes various liabilities on behalf of the close corporation or company. These liabilities include capital gains tax, income tax, VAT, annual return fees, etc.

- **Special Or General Powers Of Attorney**

Where it is anticipated that either party to an agreement is or will likely to be travelling or relocating abroad, it is recommended that a Special or General Power of Attorney be signed to enable another person, resident in South Africa, to sign any of the documents on behalf of the absent party.

- **General Information And Documents**

Information such as the sellers bond account details and rates account details are really useful to assist in the conveyancing process and should be provided in the sale agreement where possible. Likewise the provision of the parties FICA documents also assist in the process.



Van Deventer & Van Deventer

— Incorporated —

Attorneys • Notaries • Conveyancers

OUR BUSINESS, *is understanding yours.*

Directors

Arno Van Deventer (LLB)
Cor Van Deventer (LLB)
Priyesh Modi (B.Proc, LLB, LLM)

Johannesburg Office

Telephone: +27 (0) 87 701 5768
Fax: +27 (0) 86 411 7980
Physical Address: 7 Mellis Avenue,
Bradeham Hall, Ground Floor,
North Block, Rivonia

General

Docex number: Docex 38 Rivonia
Postal Address: P.O. Box 71466
Bryanston, 2021

Cape Town Office

Telephone: +27 (0) 21 982 2629
Fax: +27 (0) 86 411 7980
Physical Address: 2 Arauna Street,
Brackenfell, Cape Town

Join us: [f](#) [G+](#) [t](#) [in](#) [@](#)

Learn more at: www.vandeventers.law