

THE NEWSLETTER WITH A DIFFERENCE

# M.C. MONTHLY

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## When is an OTP a good one?

All estate agents who sell properties make use of standard *pro forma* offers to purchase (OTP).

Most of these *pro forma* OTP's are drafted by attorneys and are expected to be legally viable. All estate agents want to use a 'good' OTP. The question is however, exactly what makes an OTP 'a good one'?

We are taught in law school that the main purpose of an agreement is to legally bind the contractual parties and create enforceable reciprocal rights and duties. All that is necessary for an agreement of sale to be valid is that it contains the so-called essential elements i.e. details of the parties, price and property. Obviously, this still leaves many unanswered questions about the material terms and practical aspects of the terms and conditions relating to deposits, guarantees, occupation, defects, building plans, risk, costs etc. Most *pro forma* OTP's attempt to regulate these aspects to some extent.

Although most OTP's contain these standard clauses, they are often sparsely worded and don't contain anything more than just the basics. In many cases, it is a case of formalities over substance. Some estate agents prefer this approach as they believe it avoids complicating the transaction. These agents somehow believe that it is good practice to trust the parties and leave possible contentious issues to chance. In many instances, this approach works and the transfer proceeds without any hassles.

Unfortunately things don't always run so smoothly. I have often found that the minimalistic approach results in catastrophe because certain key aspects of the transaction are not regulated. This minimalistic approach to agreements – namely, using a short contract – often has dire consequences for the seller, purchaser and agent alike. It is in these cases that one often wishes a less simplistic and more comprehensive *pro forma* document was used. In such cases one needs certain aspects to be set out in more detail.

Some agents focus on getting the contract signed and sealed in record time while hoping for the fewest possible legal hassles in the process. The doctrine of unintended consequences often results in exactly the opposite. Instead of spending 15 minutes longer going through a properly drafted OTP, these agents then have to spend many hours sorting out the problems afterwards. They often have to sacrifice their commission to save face.

Written by/Geskryf deur: Tiaan (M.C.) van der Berg - Director

My take has always been that since most agents only sell an average of one or two properties a month, surely it makes more sense to rather use a properly drafted *pro forma* OTP that covers all the bases?

In the majority of cases, the most involved transactions that ordinary people enter into are property transactions. For the most part, our sellers and purchasers are not knowledgeable and don't have the experience to anticipate possible practical problems in the transaction. We have an obligation to inform our clients, foresee possible risks and situations and guide them appropriately. To expect sellers and purchasers to know how property transactions work, and then throw them to the lions when things go wrong is both absurd and unprofessional.

It is not only our purchasers and sellers who rely on us to compile and use comprehensive *pro forma* documentation but also the Consumer Protection Act (CPA) which requires service providers (such as estate agents) to provide this service.

Remember that the constraints of an estate agent's *pro forma* agreement also bind conveyancers. The stipulations of an OTP (or lack thereof) often place restrictions on how we are able to handle a transaction, as we may not operate outside the sphere of an OTP that an agent has passed on to us.

I believe therefore, that a *pro forma* OTP should go far beyond simply presenting a legally binding document that makes a meagre attempt to regulate certain obvious aspects. The OTP should bring value to the table as a document that is not only legally binding but addresses all the key aspects of the transaction, foresees possible critical pitfalls and regulates them in detail. In addition, it needs to inform the respective parties about important aspects they would not otherwise be aware of.

I have often seen how a so-called 'black swan event' (low probability – high impact) not only has disastrous practical and financial effects on the transaction and the contractual parties, but also ruins professional and personal relationships with incalculable consequences.

Don't leave things to chance; remember that fortune favours the prepared.

Our M.C. van der Berg Inc. standard OTP together with its annexures is drafted so comprehensively that it covers most situations that may arise during a property transaction.



## New safety requirements for swimming

There are certain Municipal Pool Safety Regulations in place that the owner of a swimming pool has to comply with.

The current regulations that an owner of a swimming pool must comply with is: Regulation D4 of SANS 10400-D which stipulates that "The owner of any site which contains a swimming pool shall ensure that public access to such swimming pool is controlled" and that any owner who fails to comply with this requirement shall be guilty of an offence. In terms of Part D of the regulations: Public Safety, a wall or fence must be erected around a property with a swimming pool to ensure that no person can have access to such a pool other than by means of a self-closing / latching gate.

These requirements form part of the SANS 10134, an SABS standard that was last updated in 2008.

New safety regulations are now being drafted that stipulates that a fence or wall will no longer be sufficient and that a safety net or pool cover will now be a requirement in order to prevent drowning incidents.

These requirements include:

- 1) Private swimming pools that contains more than 30 cm of water should contain a safety net or pool cover that is installed by an accredited pool company and not a mere DIY project.
- 2) Should rainwater enter through a pool cover for longer than 5 minutes, the pool cover will be disqualified.

- 3) A pool cover or safety net will be disqualified if a child can unfasten such cover.
- 4) The pool cover or safety net should contain a safety lock that is not easily accessible.
- 5) Larger pools requires a pool cover or safety net that can hold a weight of up to at least 220 kg. This is to allow for a rescue operation of at least 2 adults and a child.
- 6) For smaller pools, which is less than 2 - 4m at its widest point, the weight requirement is 125 kg in order to hold one adult and a child.
- 7) Regular inspection of a pool by an accredited pool company to determine its safety.
- 8) Swimming pool equipment such as a leaf pole should also be close to the pool in order to aid a distressed person in the water.
- 9) Fences or walls around the pool should be at least 1.2 m tall with a 50cm foundation in order to ensure that a child cannot easily climb over.

These requirements will not only be applicable to property owners but will include tenants or occupiers, who will have an additional obligation not to allow water in an unsafe pool.

Written by/Geskryf deur: Nicole Alberts - Director



## We can assist you with:

**Transfer of properties • Registration and cancellation of bonds • Estate planning • Administration of deceased estates • Registration of companies  
Purchase agreements • Rental agreements • Trusts • Wills • Antenuptial contracts • Notarial services**

**M.C. VAN DER BERG** <sup>INC</sup>  
<sup>ING</sup>  
**ATTORNEYS, CONVEYANCERS & NOTARIES**

Your Property Attorneys

## VALIDITY OF A LEASE AGREEMENT IN THE ABSENCE OF APPROVED PLANS AND AN OCCUPANCY CERTIFICATE

In terms of the National Building Regulations and Building Standards Act ("the act") approved building plans and an occupancy certificate is required before a property is leased to a tenant. In the recent case law of *Wierda Road West Properties (Pty) Ltd v SizweNtsalubaGobodo Inc. 2018 (3) SA 95 (SCA)*, the validity and enforceability of a lease agreement in the absence of approved building plans and an occupancy certificate was decided on.

The tenant in the abovementioned case argued that the lease agreement was void and unenforceable due to the non-compliance with the stipulations of the act. The court had to decide whether section 4(1) and section 14(1) of the act applied and whether the agreement was *ab initio* void as a result of the contravention. Section 4(1) stipulates that no person shall without the prior approval in writing of the local authority, erect any building in respect of which plans and specifications are to be drawn and submitted. In terms of section 14(1) of the act an occupancy certificate may be issued if the local authority is of the opinion that such building has been erected in accordance with the provisions of the act.

The court found that non-compliance with the above mentioned sections does not render the lease agreement void and unenforceable. It is not justifiable to read an implied meaning into section 4(1) that the use or occupancy of a building which has no approved plans, is prohibited. Further, that it is clear that the legislature did not intend for private contracts, which contravene these sanctions, to be invalidated. The tenant could thus be held liable for arrear municipal charges as well as arrear rental.

The conclusion is thus that tenants can't avoid their liabilities in terms of a lease agreement based on the fact that no approved plans or occupancy certificated is in place for the property. The court includes in its decision the words "private contracts" and not just lease agreements, and it can therefore be argued that this decision will apply to all private contracts including sale agreements.

Written by/Geskryf deur: Ramona Michael - Director



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## FREQUENTLY ASKED BOND QUESTIONS/ GEREELDE VERBAND VRAE

### BOND REGISTRATION COSTS

The purchaser is responsible for the payment of bond registration costs, in respect of the registration of a bond over the property in favour of the respective financial institution. These costs include the bond registration attorney's professional fee together with VAT thereon as well as certain disbursements (e.g. vendor software package fee, deeds office registration fee, postage & petties, FICA etc.). The professional fee is calculated in accordance with the bond amount to be registered and should be consistent with the guidelines for fees as determined by the Law Society of South Africa.

### VERBANDREGISTRASIEKOSTE

Die koper is verantwoordelik vir die betaling van verbandregistrasiekoste ten opsigte van die registrasie van 'n verband oor die eiendom ten gunste van die spesifieke finansiële instansie. Die koste sluit in die professionele fooie van die verbandregistrasieprokureur tesame met BTW daarop, asook sekere ander uitgawes (bv. sagtewarefooie, aktekantoor registrasiefooie, posgelde en diverse, FICA, ens.). Die professionele fooie word bereken ooreenkomstig die verbandbedrag wat geregistreer word en moet in ooreenstemming wees met die riglyne vir fooie, soos deur die Prokureursorde van Suid-Afrika voorgeskryf.

Written by/Geskryf deur: Chanèl Ferguson



## Werknemer van die maand

**Joey Fopma** is werksaam by die firma sedert 1 Augustus 2017 as Senior Aktetikster by ons ontwikkelingsafdeling. Sy het al amper 20 jaar ondervinding as Aktetikster.

Joey se sprankelende en borrelende geaardheid maak haar gewild onder kliënte en kollegas. Ons is trots om haar as deel van ons span te hê.



## Ethical Code- EAAB

### No estate agent shall –

3.10 accept a sole mandate to sell or let immovable property, unless he has explained in writing to the client-

3.10.1 the legal implications should the client during the currency of the sole mandate or thereafter sell or let the property without the assistance of the estate agent, or through the intervention of another estate agent; and

3.10.2 what specific obligations in respect of the marketing of the property will be assumed by the estate agent in his endeavour to perform the mandate: Provided that such explanations, if contained in a standard pre-printed or typed sole mandate document, shall be in lettering not smaller than that generally used in the remainder of the document

On 9 August each year we celebrate Woman's Day. This is done in commemoration of the 20 000 women who marched to the Union Buildings in 1956 to petition against the pass laws of the apartheid government.

They marched together, they supported each other and the cause. It seems that in this day and age the opposite is happening. Society is rife with women bringing each other down. We are not applauding the victories, we are the biggest critics of our fellow Evas whether it is her choice of dress, her success in business or in life.

In remembrance of a united womanhood I urge women to unite in their support for each other.

In fact, once you start coming together with other women, and you start supporting each other, you will find that it will be much easier to gain a sense of inner confidence that will propel you through life. By all means, competition is healthy; however, constantly insulting others and trying to bring others down is incredibly unhealthy. It's time to start focusing on bettering yourself, instead of bringing others down, on applauding and supporting the successes of others rather than criticizing their achievements or life choices.

## What our clients have to say / Wat ons kliënte sê

- ◆ We appreciate the assistance received from all your staff in the past. The whole transaction was handled in a very efficient and business-like manner and the booklet we received has been a great help with the purchasing and transfer of our new home.
- ◆ I would like to take this opportunity to thank you and your team for the impeccable way you handled our transaction. We were always kept up to date on all stages of the registration process. Your professionalism was phenomenal I would personally recommend M.C. van der Berg to all my friends, family and acquaintances just for the level of professionalism you and your team has shown to me.
- ◆ Baie dankie vir uitmuntende diens. Dit was 'n voorreg om met sulke professionalisme behandel te word.
- ◆ Thank you very much for the exciting news and progress made by your office. It was not easy but through your dedication and exerted effort that you showed then you can pride yourself. Your office ensured that it gives me feedback on weekly basis and if there were emergency situations you did not hesitate to call me and get everything on track once more. I must confess that it was an excellent thing to do business with you.

Sonja sê

