Joint and Several Liability

Where there are multiple purchasers purchasing a property, they might agree to purchase the property in undivided shares, for example: John acquires one third (share) in the property, and Susan acquires two thirds (shares) in the property. This will usually have the effect that John will be entitled to one third of the proceeds, and Susan to two thirds of the proceeds, when selling the property in the future.

It is very important to take note that if John and Susan decide to finance the property by way of a mortgage bond, the fact that they own the property in unequal shares will have no effect whatsoever on their liability towards the bank.

They will be indebted to the bank jointly and severally. In terms of the "joint and several liability clause", contained in the loan agreement, the bank may claim from John and Susan jointly, or against any one of them and it is their responsibility to sort out their respective proportions of liability and payment between themselves. This means that if the bank recovers the full outstanding amount from John (for example) and receives payment, that John must then recover Susan's contribution in proportion to her share in the property from her. The bank may recover all outstanding amounts from any of the mortgagees regardless of their individual share of the debt. Usually, the bank will pursue the most affluent party.

Where the purchasers were introduced to the property by way of an estate agent, it is very important for the agent to ensure that the sale agreement, and more specifically the clause regarding the commission / the commission agreement, makes provision for joint and several liabilities with regards to the commission in case of breach of contract.

In the light of the above, it is important to be very careful when purchasing a property jointly.

- Annele Odendaal

MCademy

Practical training by practitioners

During the month of October MCademy will present the following:

- **The relevant legal principles and legislation regarding property transactions as contained in the Company Law, Trust Law & Partnership.**
- **What are the pitfalls for agents?**
- **What is my obligation as an agent?**
- **What clauses should be in my pro forma agreement?**
- **What are all the legal requirements the agent must adhere to in this regard?**

Thursday 17 October:
09:00 – 10:00 Afrikaans
11:00 – 12:00 English

Wednesday 23 October:
09:00 – 10:00 English
11:00 – 12:00 Afrikaans

Wednesday 30 October:
09:00 – 10:00 Afrikaans
11:00 – 12:00 English

Please book your seat at mcademy @mcvdberg.co.za or phone Sarie at 012 660 6000

Certificates for acknowledgment of attendance are supplied for your portfolio of evidence or logbook.

Verskeie agente het ons gevra om al die artikels in die MCMonthly in Afrikaans en Engels te plaas aangesien hulle dit ook aan van hulle kliënte gee.

U sal derhalwe sien dat die formaat van die MCMonthly vanaf hierdie maand verander daarin dat hy nou ten volle tweetalig is – behalwe vir die Sudoku – dit is steeds Grieks!

Various agents asked us to duplicate the articles in English and Afrikaans because they hand them out to their clients.

You will therefore note that the format of the MCMonthly as from this month has changed in that it is now fully bilingual – except the Sudoku – That remains in Greek!

- Tiaan (M.C) van der Berg

10 Minute Sudoku

MCSudoku

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5					6		4	
	3		9	4		2		
			3	7			8	2
						6		
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		5				7		3
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			2		1			4

M.C. Monthly

Issue 16 M.C. van der Berg Incorporated - Your Property Attorneys September 2013

The Newsletter with a difference

Weerhoudingsbelasting: Verpligting van die koper, agent en prokureur

Mnr Verkoper (wat huidiglik in London woon) verkoop sy eiendom in Centurion aan mnr Koper.

Jy mag dalk dink dit is 'n normale eiendomsoordrag, maar artikel 35A van die Inkomstebelastingwet plaas 'n belastingplig op die koper wanneer hy eiendom van 'n verkoper koop wat nie woonagtig is in Suid Afrika nie.

Die bedoeling van die wetgewing is om die belasting ontduikery deur mnr Verkoper te voorkom.

Eiendomsagente sal nie baie sulke transaksies teëkom nie, maar as agent moet jy bewus wees van die bepalings van artikel 35A.

<u>Die vereistes vir artikel 35A om van toepassing te wees is:</u>

1. Die verkoper moet nie gewoonlik in Suid Afrika woonagtig wees nie
2. Die koopprys moet R2 000 000 of meer wees
3. Die koper moet die volgende persentasie van die koopprys terughou: 5% waar die verkoper 'n natuurlike persoon is 7.5% waar die verkoper 'n maatskappy is 10% waar die verkoper 'n trust is.

<u>Wie word geag nie in Suid Afrika woonagtig te wees nie?</u>

Dit is 'n baie belangrike vraag aangesien dit bepalend is in die vraag of artikel 35A van toepassing is of nie.

'n Verkoper word geag nie in Suid Afrika woonagtig te wees nie indien die persoon permanent elders woon as in Suid Afrika.

Indien die verkoper nie saamstem dat hy 'n nie-inwoner is nie of die bedrag betaalbaar in dispuut plaas, moet die verkoper SAID nader vir 'n direktief. Indien daar geen direktief is nie, moet die belasting betaal word binne die tydperk hieronder uiteengesit.

Betalings moet aan SAID gemaak word binne 14 dae na registrasie van die eiendom in die naam van die koper (waar die koper in Suid Afrika woonagtig is) en binne 28 dae (indien die koper ook nie in Suid Afrika woonagtig is nie) Die langer tydperk is om voorsiening te maak vir die oorplasing van fondse vanuit 'n oorsese rekening.

Die vraag ontstaan nou wat die gevolge vir die agent en die transportprokureur is. Die wet bepaal dat die agent of prokureur wat vergoeding ontvang vir hul dienste verplig is om die koper skriftelik in te lig dat die verkoper nie in Suid Afrika woonagtig is nie.

Indien hul weet of redelikerswys moes bewus wees dat die verkoper nie in Suid Afrika woonagtig is nie, is die agent en transportprokureur gesamentlik en afsonderlik aanspreeklik vir die betaling aan SAID (maar beperk tot die omvang van hul vergoeding).

Uit die voorafgaande is dit duidelik dat alhoewel sulke transaksies nie gereeld oor jou tafel sal kom nie, beide die transportprokureur en agent moet optree in ooreenstemming met die bepalings van artikel 35A.

Kopers en agente hoef nie bekommerd te wees nie aangesien MC van der Berg Ing as transportprokureur sal vasstel waar die verkoper woonagtig is, die nodige bedrag van die koopprys terughou en die betaling aan SAID sal maak.

Skakel ons gerus om u behulpsaam te wees.

- Sonja du Toit

Verbande: Gereelde vrae en antwoorde

1. Wat is die aanvangsfooi?
Die Nasionale Kredietwet, 34 van 2005, laat banke huidiglik toe om 'n bedrag tot 'n maksimum van R5 700 vanaf die kliënt te verhaal om die bank se administrasiekoste te dek. Die verbandgewer mag kies om die aanvangsfooi by sy leningsbedrag te voeg of om dit dadelik te betaal as deel van sy koste, voor registrasie van die verband.

2. Wat is die verband registrasie fooi?
Hierdie fooi, wat 'n riglyn is wat verskaf word deur die prokureursorde, is betaalbaar aan die prokureurs wat toesien tot die registrasie van u verband. Dit is betaalbaar aan u verbandprokureur voor registrasie van die verband in die Aktekantoor.

Looney Law-

An Irish attorney was making the best of a shaky case when the judge interrupted him on a point of law.

"Surely your clients are aware of the doctrine de minimis non curat lex?"

"I assure you, my lord," came the suave reply,

"that in the remote hamlet where my clients have their humble abode, it forms the sole topic of conversation."

Misleiding van ‘n koper

In die onlangse Appèlhof saak van Banda v Van der Spuy (ZASCA 23) het Van der Spuy (hierna die verkoper genoem) sy huis verkoop aan Mnr Banda en Me Fynn (hierna die kopers genoem).

Toe hulle die eiendom okkupeer na registrasie het die kopers gesien dat die grasdak verskeie lekke het.

Hulle eis vermindering van die koopprys in die bedrag van R449 499. Die hof van eerste instansie het hul eis verwerp aangesien die verkoper gesteun het op die voetstootsklousule. Die kopers het die saak op appèl gewen.

Die ooreenkoms het wel ‘n voetstootsklousulebevat. Die Appèlhof het bevind dat dit ‘n addisionele bewyslas op die koper plaas om nie net te bewys dat daar latente gebreke in die eiendom was nie (die lekkende dak), maar dat die verkopers bewus was van die lek en bedrieglik nagelaat het om die kopers daarvan in te lig.

Getuienis met die saak het bewys dat die verkopers ‘n kontrakteur in diens geneem het om die dak te herstel en bewus was dat die herstelwerk nie die daklek ten volle herstel het nie. Die verkopers het gesteun op die voetstootsklousule, maar die Appèlhof het beslis dat wanneer ‘n verkoper ‘n latente gebrek bedrieglik verswyg hy nie kan steun op die voetstootsklousule nie.

Die Appèlhof bevind dat die kopers geregtig is op die koste van herstel van die dak in die bedrag van R449 499.

Verkopers moet gewaarsku word om wel alle defekte in ‘n eiendom te openbaar. Die voetstootsklousule is steeds relevant maar die werking daarvan sal verbeur word deur verkopers wat dit bedrieglik verswyg.

In Odendaal v Ferraris saak is dit bevestig dat die koper sal moet bewys dat:

1. Die verkoper bewus was van die latente defek.
2. Hy dit doelbewus verswyg het.
3. Dat hy bedoeling gehad het om die koper te bedrieg.

Ons advies is dat agente verkopers baie duidelik moet inlig om alle defekte te openbaar en agente moet seker maak dat dit alles aangeteken word in die eiendomsverslag.

Ons sal u graag hierin bystaan.

- Rich Redinger

Gesamentlike en Afsonderlike Aanspreeklikheid

In sommige gevalle is daar twee of meer persone wat besluit om ‘n eiendom saam, in onverdeelde aandele, te koop. ‘n Voorbeeld hiervan sal wees waar Johan en Susan besluit om ‘n eiendom saam te koop: Hul besluit dat Johan twee derdes in en tot die eiendom verkry, waar Susan slegs ‘n derde aandeel in en tot die eiendom verkry. Dit sal normaalweg beteken dat indien die eiendom in die toekoms verkoop word, Johan op twee derdes van die opbrengs geregtig sal wees, waar Susan slegs op ‘n derde van die opbrengs geregtig sal wees.

Dit is uiters belangrik om daarop te let dat indien Johan en Susan sou besluit om die koopprys deur middel van ‘n verband te finansier, die feit dat hul die eiendom in onverdeelde aandele besit geen effek sal hê op hul verpligtinge teenoor die betrokke bank nie.

Johan en Susan sal gesamentlik en afsonderlik teenoor die bank aanspreeklik wees. In terme van die “gesamentlike en afsonderlike aanspreeklikheid klousule” soos vervat in die leningsooreenkoms, is die bank by magte om enige uitstaande bedrae vanaf Johan en Susan gesamentlik te verhaal, of van slegs een van die twee. Dit is dan Johan en Susan se verantwoordelikheid om hul afsonderlike verpligtinge en proporsionele betalings met mekaar uit te sorteer. Dit beteken dat indien die bank die volle uitstaande bedrag bv van Johan verhaal en betaling daarvan ontvang, Johan self ‘n eis teen Susan sal moet instel vir haar bydrae. Die bank kan enige uitstaande bedrae van enige van die partye verhaal, ongeag watter aandeel hy / sy in die eiendom besit. Die bank sal normaalweg die eis teen die persoon wat in die beste finansiële posisie is, instel.

In die geval waar daar ‘n eiendomsagent by die kooptransaksie betrokke is, is dit baie belangrik dat die agent daarvoor voorsiening maak dat die kommissie-klousule in die koopkontrak / die kommissie-ooreenkoms bepaal dat die partye gesamentlik en afsonderlik aanspreeklik sal wees vir die kommissie in die geval van kontrakbreuk.

In die lig van die bovermelde, is dit belangrik om baie versigtig te wees indien partye sou besluit om ‘n eiendom saam met ‘n ander persoon te koop.

- Annele Odendaal

Bonds: Frequently asked Questions

1. What is the Initiation Fee?
The National Credit Act 34 of 2005, currently allows banks to charge an amount up to R5 700 for initiation fees to cover their administration costs. You may elect to have the Initiation Fee added to the principal debt or to pay it as part of your costs, before registration of the bond.

2. What is the bond registration fee?
These fees are the attorney costs, as per the prescribed tariffs of the Law Society, for their service of registering your bond at the Deeds office. It is paid to the bond attorney before registration.

Deceiving the purchaser

In the recent Appelate case of Banda v Van der Spuy (ZASCA 23) the Van der Spuy’s (hereinafter Sellers) sold their house to Mr Banda and Ms Fynn (hereinafter Purchasers). The property was fitted with a thatch roof. Upon occupation after registration the Purchasers noticed that there were severe roof leaks in the thatch roof. They sued the Sellers for a reduction in the purchase price, totalling an amount of R449,499. The court of first instance rejected their claim as the Sellers relied on the voetstoots clause. The Purchasers took the matter on appeal.

The Agreement of Sale contained a voetstoots clause. The Court of Appeal held that this places an added burden on the Purchasers of not only proving the existence of the latent defects in the property (leaking roof), but also that the Sellers were aware of these defect which caused the roof to leak, and fraudulently neglected to inform the Purchasers of its existence.

Testimony in the first court case proved that the Sellers had employed a contractor to repair theroof and were aware that the repairs had notproperly rectified the latent defect. They relied on the voetstoots clause but the Appeal Court found that if a Seller fraudulently conceals a latent defect (in this case by not telling the Purchaser of the existing problem), the seller cannot rely on the voetstoots clause.

The Appeal Court found that the Purchasers were entitled to the reasonable cost of repairing the roof for the value of R449,499.

Sellers should be cautioned about the risks of not disclosing defects to the property to be sold. The voetstoots clause is very much alive but will be forfeited if challenged by a Purchaser who can show that the Seller fraudulently neglected to inform them of a latent defect of which they had adequate knowledge of.

The Odendaal vs Ferraris case confirmed onus rest on the purchaser to prove that:

1. The seller knew about the latent defect.
2. That he deliberately concealed it.
3. The seller had the intention to defraud the purchaser.

Our advice is that agents should inform sellers to disclose all defects they are aware of and for agents to record all such defects in the property report.

We will gladly assist you in this regard

- Rich Redinger

Withholding tax: Obligation of the purchaser, agent and attorney

Mr Seller (currently residing in London), sells his property in Centurion to Mrs Purchaser. You may think it’s a no-brainer, normal property transfer, but section 35A of the Income Tax Act imposes a withholding tax obligation on the purchaser when buying a property from a non- resident.

The intention of the legislation is to curb tax evasion by Mr Seller (the non-resident).

Estate agents will not often be faced with a non-resident seller, but should be aware of the implications of section 35A if it occurs.

<u>The requirements for withholding tax are:</u>

1. Non-resident seller.
2. Purchase price of R2 000 000 or more.
3. The following percentage of the purchase price must be withheld by the purchaser: 5% where the seller is a natural person 7.5 % where the seller is a company 10% where the seller is a trust.

<u>Who qualifies as a non-resident?</u>

This is a very important question as it is the deciding factor to determine if withholding tax is payable or not.

A non-resident is: a person who has his or her permanent home elsewhere. It’s where his “centre of vital interest” is situated or where he or she is ordinarily resident.

Should the seller dispute the fact that section 35A is applicable or dispute the amount payable, the seller must apply to SARS for a directive. Without such directive the purchaser is obliged to pay the amount within the period set out below.

Payments must be made to SARS within 14 days after transfer (where the purchaser is resident in South Africa) and within 28 days (where the purchaser is also a non-resident). The longer period is to provide for the transfer of funds from a foreign country.

The question however arises what the implication is for the agent and conveyancer.

The act stipulates that any conveyancer or agent who is entitled to remuneration for their services is obliged to notify the purchaser in writing that the seller is a non-resident.

If they knew or should reasonably have known, the estate agent and conveyancer are jointly and severally liable for payment of the amount for SARS (but limited to the amount of remuneration of the services rendered).

From the aforesaid it is clear that although an estate agent or conveyancer may not often come across transactions where withholding tax is applicable, it is vital to act according to the requirements of section 35A where a non-resident is the seller.

Purchasers and agents shouldn’t be alarmed, MC van der Berg Inc as conveyancing attorney, will confirm the non-resident status of the seller, retain the tax and make payment thereof to SARS.

We will gladly assist you in this regard.

- Sonja du Toit

Looney Law-
If there were no bad people there would be no good lawyers.