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NEWSLETTER- MORTGAGE BOND CLAUSES

One never realizes how crucially important the drafting and wording of a bond clause is until factual disputes arise with regards to the fulfilment of these clauses. In the case of *Murphy and another v Durie 2006 JOL 18301 (C)*: The main question was whether or not the suspensive condition relating to the bond had been fulfilled. The wording of this particular clause was dissected by the Judge as the interpretation between the parties differed.

In terms of this case, the sale was subject to the purchaser obtaining in principle a mortgage bond from a Building Society or Financial Institution by no later than 09 December 2003. On 09 December 2003, the purchasers received a pre-quotation / indication from Standard Bank that they would qualify for the bond and that a valuator has been sent to the property. On the same day, Standard Bank contacted the Purchaser telephonically to confirm that the bond has been formally approved. The Purchaser telephonically relayed this information to the estate agent, who requested written confirmation of same. When the purchaser contacted Standard Bank, they were busy with a Christmas party and unable to send the confirmation on 09 December 2003. The written confirmation of the approval of the bond was only received on 10 December 2003. The Purchaser failed to corroborate his version as he and the agent did not testify that the bond was approved and that all communication was done orally on the 09 December.

The Judge found that the suspensive condition was not fulfilled and that there is no binding contract between the parties. The wording of the clause becomes extremely important as the judge states that the deed of sale was subject to the *obtaining* of a bond from a bank, but not to its *approval* in principle. When one looks at the correspondence received from Standard Bank it is evident that the loan is approved subject to specific formalities. The letters received from the bank do not amount to the fulfilment of the suspensive condition. The obtaining of the loan had to be communicated to the Seller's Agent by no later than 09 December 2003. The only communication that was relayed to the Seller's Agent was a notification that the bond was approved on 10 December 2003, and this did not constitute



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fulfilment of this condition. In this specific case, the suspensive condition required a loan to be “obtained in principle” as opposed to “approved” in principle.

This case highlights the extreme importance of ensuring that the wording of the bond clause is clear and unambiguous. These factual disputes can be easily avoided by using well-worded bond clauses that relay exactly what the parties intend and will leave no room for alternative interpretation.

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