

Short notes on:

MULTIPLE OFFERS - CAN THE SELLER CANCEL AN OFFER TO PURCHASE UPON RECEIVING A BETTER OFFER?

Introduction

In South Africa, the transfer of Immoveable Property is governed and regulated by legislation to ensure that all Parties to a transaction are protected. In terms of Section 2 of the Alienation of Land Act No. 68 of 1981, as amended, no alienation of land shall be of any force and effect unless it is contained in a written deed of Alienation signed by both the Seller and the Purchaser. In other words, one cannot acquire and/or take ownership of land/property unless it is reduced to writing in a form of an Offer to Purchase (hereinafter “OTP”).

Although the above legislation protects all parties to an OTP, a common concern for Purchasers is whether or not the Seller can cancel an OTP after receiving a better offer. Can he/she or they simply just cancel the OTP?

Clauses in an OTP often protect the Seller in instances when multiple offers are being received. This article will briefly look at a few important clauses to address this concern.

The 72-hour clause

The 72-hour clause, also called a release clause, kick-out clause, escape clause, or first refusal clause, is commonly inserted into an OTP.

The function of a 72-hour clause in an OTP is intended to protect the Seller from losing valuable marketing time for his/her Immoveable Property, due to a suspensive condition, which may delay the sale for too long.

The 72-hour clause enables the Seller to continue offering his/her Immoveable Property for sale, while guaranteeing the Purchaser a right of preference (or right of first refusal). The 72-hour clause is meant to allow the Seller to avoid losing the First Purchaser, without knowing if a Second Purchaser has the capacity to purchase.

The 72-hour clause also allows the First Purchaser time to make sure of his/her capacity to purchase, in case he/she decides to make use of the right of first refusal.

Contingency Protection

If Home Owners wish to purchase Immoveable Property but have a home of their own to sell first, the Seller may want to keep the door open, to be able to accept another OTP, which is not contingent upon the sale of another property. The 72-hour clause is not limited to contingencies involving the sale of another property.

It can be used to protect the Seller in any Contract involving a suspensive condition. The 72-hour clause functions as a resolutive condition in the OTP. In other words, if something specific happens, the contract cancels.

The Seller can accept the Purchaser's OTP, just as any other OTP, but a 72-hour clause is annexed (added) to the document and signed by both Parties. The 72-hour clause allows the Seller to reserve the right to accept a better offer, if one should happen to come along.

Accepting a Second OTP

The Seller can accept a new OTP, just as he/she accepted the first offer. To protect the Seller against liability, and to inform the new Purchaser about the situation, an addendum to the new OTP document is often prepared. This Addendum will state that the new OTP is subject to the suspensive condition that the first OTP be cancelled.

72-hours to Perform

The Seller cannot simply cancel the OTP, one-sidedly, upon receiving a better offer. If the Seller receives a new OTP, which he/she wants to accept, the Purchaser must immediately be notified in writing. The Purchaser then usually has 72 hours to fulfil the suspensive conditions of the OTP, or to declare them fulfilled (even if they are not) and move ahead with the purchase of the property.

The Notice must be sent in writing by the Seller to the Purchaser, where receipt by the Purchaser can be confirmed. It is advisable to require the Purchaser to acknowledge receipt of the 72-hour

notice on a copy of this notice. The Purchaser should also indicate the day and time of receipt. The Seller should then retain this copy as proof of notice.

It is important to note that the Purchaser must make himself/herself reasonably available to receive the 72-hour notice. So, if the Purchaser is leaving town for a while, he/she must leave an address or telephone number where he/she can be reached in case the notice is sent.

The Purchaser will therefore have 72 hours, to give a written notice of his/her intention to waive all the suspensive conditions in the OTP to the Seller or his/her Estate Agent. The time period does not necessarily have to be 72 hours, any time frame can be negotiated between the Parties.

Conclusion

The Seller can accept a second OTP when receiving multiple offers and can subsequently cancel an OTP after receiving a better offer.

The 72-hour clause is solely for the benefit of the Seller. Purchasers should always try and avoid the inclusion of a 72-hour clause or ensure that it worded carefully by the Seller. It is always advisable for the Purchasers to conduct a proper due diligence prior to entering into an OTP.

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