

**PURCHASER GRANTED LOAN FOR LESS THAN AMOUNT  
REQUIRED IN TERMS OF THE SALE AGREEMENT. NOW WHAT?**

In Kovacs Investments 724 (Pty) Ltd versus Marais the Supreme Court of Appeal was asked to pronounce inter alia, on the effect of the non fulfillment of a condition to obtain a loan for a certain amount by a certain date by a buyer in terms of an agreement of sale of land. The loan required was R10 149 722.00, and the amount granted was R9 650 000.00, R499 722.00 short of what was required.

After having taken occupation of the property, and some twenty months later, the seller's attorneys were advised that the actual amount of the loan obtained by the purchaser "is slightly less than the amount specified in the agreement of sale, (but) the condition was substantially fulfilled." In the communication the purchaser's attorney went on further to state "in any event – and only to the extent that your client may now seek to contend that there was not substantial fulfillment of the condition – his conduct evidences the mutual acceptance (and hence agreement) with Kovacs that all suspensive conditions had been fulfilled and that the agreement came into operation. He has thus waived any such non fulfillment, alternatively and in any event is estopped from asserting .... That the suspensive conditions were not fulfilled and / or that the agreement did not come into operation."

In June 2007, the seller commenced motion proceedings in the High Court for an order declaring the agreement to be of no force and effect on the basis of the non fulfillment of the conditions.

The court found that there was no suggestion of any waiver of the condition before the date the bond was to be granted. The court held that on that day, the agreement of sale automatically lapsed and it granted the seller the order sought.

The purchaser then appealed against this decision. Simply put, the purchaser's argument was that as both parties had, prior to the date on which the loan was to be granted been aware that a loan for a lesser amount had been granted, but continued to

perform in terms of the agreement, that both parties had in fact agreed to waive the benefit of any further compliance with the condition.

The sale agreement had the usual "non variation clause," meaning that any variation or alteration of the terms and conditions of the agreement or consensual cancellation thereof would have to be reduced to writing and signed by the parties.

The Supreme Court of Appeal held that the parties mutual agreement to vary the amount required for the loan was in fact an amendment or alteration of that clause. The amendment or alteration being verbal, fell foul of the provisions of section 2 (1) of the Alienation of Land Act. The Court therefore held that it followed that the agreement lapsed at the end of the day on which the loan had to be granted.

The Supreme Court of Appeal judgment initially caused some confusion with a belief that if there had been substantial compliance with a condition that an agreement could continue in validity. This is clearly not the case.

What the Supreme Court of Appeal's judgment has reinforced is that

- a. if the loan is not granted for the sum required in terms of the sale agreement, an amendment to the agreement is required changing the amount of the loan and setting out how the balance of the purchase price is to be paid; alternatively
- b. the purchaser has to waive compliance with the conditions timeously and tender payment of the purchase price.