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# Phase One: General Research

## Annexure E: Legal Aspects

**For Discussion**

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## **1. Introduction**

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Regulatory Frameworks has been commissioned to provide regulatory input to Shisaka in respect of a research report commissioned by FinMark Trust on the functioning of the Secondary Low Income Housing Market.

### **1.1 General Impressions**

Whilst there are many issues which could have an impact on the functioning of the secondary housing market, there are certainly legal issues involved. But it will be important to distinguish between big issues and small issues. It is suggested that the issues impacting on the functioning of the secondary housing market are a number of big issues rather than a multiplicity of small issues. Before proceeding to identify the role of the law in this, it is perhaps useful to identify the key issues which I would suggest have a big impact. These are:

#### **The Apartheid Landscape**

It is common knowledge that the South African landscape is divided between townships and suburbs. The former were developed under the Black Communities Development Act, Proclamation R293 of 1962 in Trust Areas, National Home Lands and Independent States. Suburbs were mainly established under the relevant Ordinances. In short, the important thing is that there are, in any particular geographic area, one of each and there are spaces in between which generally have not disappeared when the new democratically elected government came into power. When talking about the dysfunctional property market, it is particularly the townships which are affected. Buying power is drawn away from townships to suburbs and inner cities for obvious reasons.

#### **The Availability of Housing Finance**

The unavailability of housing finance in the lower income housing market is a much debated and contentious issue. This is evidenced by the threat over the last decade of Community Reinvestment Legislation and current discussions in respect of the Financial Charter. Very few people would dispute the fact that housing finance is not available in order to acquire affordable housing products. If the Banking Council were to agree to make declined applications for home loans over the last decade available, an interesting picture will emerge. Issues such as redlining obviously come into it but essentially the issue is the unavailability of housing finance. Why is there no finance? High risk, high hassle factor, translating into costs, and presumably no comparable return on funds. One can go into all the possible risks (high exposure to default, negative equity, aids, and high loss severity). Seems like a circle.

### **Title issues**

The ability of the seller to provide title may well be an issue. It could be for one of the following reasons. The township register may not have been opened yet and hence individual erven are not registerable and there is no title. This is mainly the scenario where an RDP project has been completed, where people have taken occupation, the bulk of the subsidy has been paid out and township registers have not yet been opened. Or it is a case that the erven, although a register has been opened, cannot be transferred because of clearance certificate issues. Or it can be case where there is a form of tenure which requires upgrading for transferability in a particular form before it can be transferred. These issues will be addressed in more detail below.

### **Other Considerations**

Apart from structural and regulatory restrictions, there are certain social issues impacting on the problem. The one relates to consumers knowledge of how they can utilize their properties and in particular that they can bond it and secondly consumers willingness to dispose of their property or to expose it to a greedy bank with whom most RDP beneficiaries have not yet been introduced.

## **2. Legislation Impacting on the Secondary Market**

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### **2.1 *The Housing Act 1997, (Act No. 107 of 1997)***

This Act is relevant for two reasons. Firstly, in section 10A it contains a provision prohibiting for a period of 8 years the sale of a property having had the benefit of a government housing subsidy unless the property is first offered to the relevant Province. The Province must record the details, the person becomes entitled to a new subsidy but is not entitled to any compensation or consideration. Section 10B contains equivalent provisions on the involuntary sale of properties having had the benefit of the subsidy. These provisions were introduced to stop people disposing of their government subsidized assets for little or no value. Secondly, the housing subsidy scheme is a programme in terms of this Act. The housing code sets out the terms and amounts of the various subsidies. See Annexure for the applicable amounts. The impact of the subsidy on the lower income housing market is that the real value of properties are discounted by the amount of the subsidy, hence the need for section 10A referred to. The section is flawed in that it is unconstitutional, it cannot apply retrospectively, it effectively takes away a very important component of ownership – the right to alienate and provides no compensation on what is effectively expropriation. The beneficiary merely receives the right not to be precluded from a subsidy in future.

### **2.2 *The Municipal Systems Act 2000, (Act No. 32 of 2000)***

Section 118 of this Act imposes a restraint on the transfer of a property without a clearance certificate. This is now also the case since its amendment by Act 51 of 2002 in respect of first generation transfers. The effect is that an account needs to be opened for each beneficiary in a project before a certificate can be issued and before a property can be transferred for the first time to a beneficiary. The effect is that in many cases property transfers are substantially delayed (municipalities were not aware of the implications when this was introduced) with the result that people have been living on properties for a substantial period before they receive transfer of the property in their names. Only then can they transfer or bond their properties. Whilst the principle is sound it has created a huge administrative hassle in the first generation transfer process.

### **2.3 *Deed Registries Act 1937 (Act No. 47 of 1937)***

This Act is relevant for a number of reasons. Firstly, it prescribes the fees payable to the deeds office for certain transactions, including registrations of transfers and bonds. Secondly, it prescribes recommended fees to be charged by conveyancers in attending to these functions, and which impacts on the cost to the consumer for the acquisition and bonding of a property. See Annexure. Secondly, the Deeds Registries Act is the Act determining the whole deeds system in South Africa. Hence, the way in which transfers and bonding of properties are to be effected are set out in the Act or the regulations thereunder. The current registration system has its advantages and disadvantages and this is not the place to consider its benefits or

drawbacks compared to other systems. Suffice to say that to replace it is no simple matter and will seriously impact on security of tenure. There are, however, flaws in the system impacting on efficiency. The opening of township registers (creating individual erven in law capable of being transferred – cancelling all underlying conditions, servitudes etc that prevents the coming into being of individual erven) is a serious delaying factor in getting first generation transfers done, thereby impacting on the time that elapses before a second generation transfer can happen. In many RDP projects people have taken occupation of their homes more than 3 years ago but they still do not have title. The reasons for the delays are varied but complementary: deeds office staff requiring bribes, rejecting applications on the first fault and not reflecting all so as to facilitate the process, incompetent conveyancers, major problems in getting mineral and mining title consents to cancellation.

## **2.4 Upgrading of Tenure Rights Act 1991 (Act No. 112 of 1991)**

This Act upgrades various forms of old apartheid related forms of title to ownership. In certain instances and in respect of certain forms of tenure, the upgrading was automatic; particularly where there was a surveyor general approved plan and a township register. In certain instances there were neither and the form of tenure is a right of occupation which is not bondable and which will only become that once certain measures have been taken by the state i.e. when a general plan is approved by the surveyor general (at least) and a township register has been opened. Originally the state was tasked with the obligation to get this done, but this was watered down by the Upgrading of Land Tenure Rights Amendment Act, 1996 (Act No. 34 of 1969) which changed the upgrading process into a demand driven process, in the hands of the community involved, and subject to state funds and resources. It needs to be determined what progress has been made in this regard and the annual reports of the Department of Land Affairs may shed light on this. The second issue here is that certain forms of tenure were never subject to the provisions of this Act. These include the permits granted in locations under regulations the Black Urban Areas Consolidation Act (R1036 of 1968) and it would seem regulations under section 6A of the Prevention of Illegal Squatting Act. The first is the subject matter of the Conversion of Certain Rights to Leasehold or Ownership Act, 1988 (Act No. 81 of 1988) in terms of which an investigation will be done as to who are the people currently entitled to certain properties comprising municipal housing stock, whereafter leasehold rights or ownership rights will be allocated depending upon the township register has been made or not. The areas in which these investigations had to be undertaken are contained in a schedule in the Act and it is not clear how far this has gone. Again, depending under which regulation a particular permit has been issued, the person may be entitled to ownership or leasehold rights on the one hand or statutory rental on the other. As far as the second category of rights are concerned, i.e. the regulations under section 6A, these are also statutory rental forms of tenure with no bondability. The Upgrading Act didn't, and to some extent couldn't, deal with these because there was no basis (such as a general plan of sorts) for upgrading.

## **2.5 Stamp Duties Act 1968 (Act No. 77 of 1968)**

This Act provides that stamp duty is payable on certain items including mortgage bonds (item 7 read with section 3) and there are no applicable exemption under section 4.

## **2.6 Transfer Duty Act 1949 (Act No. 40 of 1949)**

This Act in section 2 imposes a duty on the transfer of properties but the rate applicable to properties the value of which does not exceed R140000 is 0%, hence it is effectively exempting properties in the low income housing market. VAT is payable at 14% in respect of first generation transfers of property from a developer to a buyer buying a new property.

## **2.7 Alienation of Land Act**

Chapter 2 of this Act deals with the sale of a property on instalments (sometimes incorrectly referred to as rent to buy). The mechanism is used in the social housing context and in middle and higher income markets where for some or other reason a bond cannot be accessed. It allows the parties to a sale to negotiate their own agreement and terms of repayment. It is a mechanism that could assist the secondary low income market in the absence of bond finance. Thought must be given to developing its potential in this context. The agreement require substantial compliance with the disclosure and other provisions of the Act, requires professional assistance in its drafting and recordal (at much less cost) in the deeds office.

### **3. Annexure A : Section 10A and 10B of the Housing Act 1997 (Act No.107 of 1997)**

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#### 10A Restriction on voluntary sale of state-subsidised housing

(1) Notwithstanding any provisions to the contrary in any other law, it shall be a condition of every housing subsidy, as defined in the Code, granted to a natural person in terms of any national housing programme for the construction or purchase of a dwelling or serviced site, that such person shall not sell or otherwise alienate his or her dwelling or site within a period of eight years from the date on which the property was acquired by that person unless the dwelling or site has first been offered to the relevant provincial housing department.

(2) The provincial housing department to which the dwelling or site has been offered as contemplated in subsection (1) shall endorse in its records that the person wishes to vacate his or her property and relocate to another property and is entitled to remain on a waiting list of beneficiaries requiring subsidised housing.

(3) When the person vacates his or her property the relevant provincial housing department shall be deemed to be the owner of the property and application must then be made to the Registrar of Deeds by the provincial housing department for the title deeds of the property to be endorsed to reflect the department's ownership of that property.

(4) No purchase price or other remuneration shall be paid to the person vacating the property but such person will be eligible for obtaining another state-subsidised house, should he or she qualify therefor.

[S. 10A inserted by s. 7 of Act 4 of 2001.]

10B Restriction on involuntary sale of state-subsidised housing

(1) Notwithstanding any provisions to the contrary in any other law, it shall be a condition of every housing subsidy, as defined in the Code, granted to a natural person in terms of any national housing programme for the construction or purchase of a dwelling or serviced site, that such person's successors in title or creditors in law, other than creditors in respect of credit-linked subsidies, shall not sell or otherwise alienate his or her dwelling or site unless the dwelling or site has first been offered to the relevant provincial housing department at a price not greater than the subsidy which the person received for the property.

(2) Any such offer to the provincial housing department shall be made in writing and shall be accepted or rejected by the MEC within a period of 60 days from receipt thereof.

(3) If such offer is accepted, the purchase price shall be determined, subject to the provisions of subsection (1), by agreement between the MEC and the person or creditor concerned or, in the event of no agreement being reached, by a valuer acceptable to both parties and registered in terms of the Valuers' Act, 1982 (Act 23 of 1982).

(4) The purchase price as determined in terms of subsection (3) shall be financed by the MEC out of the provincial housing development fund.

(5) An MEC may grant exemption from the provisions of subsection (1), either conditionally or unconditionally, in respect of any dwelling or site to which the provisions of that subsection apply.

(6) The Registrar of Deeds concerned shall-

(a) make such endorsements on the title deeds of any dwelling or site and such entries in his or her registers as may be necessary to indicate that the provisions of subsection (1) apply in respect of such dwelling or site;

(b) cancel any such endorsements or entries where an exemption has been granted unconditionally under subsection (5) or where satisfactory proof has been submitted that conditions imposed under subsection (5) have been complied with; or

(c) make such endorsements or entries as may be necessary to indicate any conditions subject to which an exemption has been granted under subsection (5).

(7) No transfer of any dwelling or site in respect of which subsection (1) applies, shall be passed to a person other than the provincial government unless the Registrar of Deeds is provided with a certificate, signed by the head of department, to the effect that such dwelling or site has been offered for sale to the provincial department of housing in terms of subsection (1) and that-

(a) the offer has been rejected; or

(b) an exemption has been granted under subsection (5), either unconditionally or subject to the conditions set out in the certificate.

(8) The Minister may, by notice in the Gazette, make rules on the granting of exemption in terms of subsection (5) as well as the amount that must be paid by the person or creditor concerned for the granting of such exemption.

[S. 10B inserted by s. 7 of Act 4 of 2001.]

## 4. Annexure B : Section 118 of Local Municipal Systems Act of 2000 (Act No.32 of 2000)

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118 Restraint on transfer of property

(1) A registrar of deeds may not register the transfer of property except on production to that registrar of deeds of a prescribed certificate-

(a) issued by the municipality or municipalities in which that property is situated; and

(b) which certifies that all amounts that became due in connection with that property for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties during the two years preceding the date of application for the certificate have been fully paid.

(1A) A prescribed certificate issued by a municipality in terms of subsection (1) is valid for a period of 120 days from the date it has been issued.

(2) In the case of the transfer of property by a trustee of an insolvent estate, the provisions of this section are subject to section 89 of the Insolvency Act, 1936 (Act 24 of 1936).

(3) An amount due for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties is a charge upon the property in connection with which the amount is owing and enjoys preference over any mortgage bond registered against the property.

(4) Subsection (1) does not apply to-

(a) a transfer from the national government, a provincial government or a municipality of a residential property which was financed with funds or loans made available by the national government, a provincial government or a municipality; and

(b) the vesting of ownership as a result of a conversion of land tenure rights into ownership in terms of Chapter 1 of the Upgrading of Land Tenure Rights Act, 1991 (Act 112 of 1991):

Provided that nothing in this subsection precludes the subsequent collection by a municipality of any amounts owed to it in respect of such a property at the time of such transfer or conversion.

(5) Subsection (3) does not apply to any amount referred to in that subsection that became due before a transfer of a residential property or a conversion of land tenure rights into ownership contemplated in subsection (4) took place. S. 118 substituted by s. 44 of Act 51 of 2002.]

## **5. Annexure C : Schedule 1 and 2 of the Upgrading of Tenure Rights Act (Act No.112 of 1991)**

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### Schedule 1

#### **LEASEHOLDS, DEEDS OF GRANT AND QUITRENTS**

1. Any deed of grant or any right of leasehold as defined in regulation 1 of Chapter 1 of the Regulations for the Administration and Control of Townships in Black Areas, 1962 (Proclamation R293 of 1962).

2. Any quitrent title as defined in regulation 1 of the Black Areas Land Regulations, 1969 (Proclamation R188 of 1969).

3. Any right of leasehold as defined in section 1 (1) of the Black Communities Development Act, 1984 (Act 4 of 1984).

4. Any right of leasehold within the meaning of the Conversion of Certain Rights to Leasehold Act, 1988 (Act 81 of 1988).

5. Deed of grant rights or rights of leasehold as defined in regulation 1 (1) of the Regulations concerning Land Tenure in Towns, 1988 (Proclamation R29 of 1988).

6. Deed of grant rights or rights of leasehold within the meaning of the Regulations for the Disposal of Trust Land in Towns, 1988 (Government Notice R402 of 1988).

[Schedule 2 amended by s. 10 of Act 94 of 1998.]

Schedule 2

#### RIGHTS TO THE OCCUPATION OF LAND

[NB: Schedule 2 has been amended by s. 10 of the Transformation of Certain Rural Areas Act 94 of 1998, a provision which will be put into operation by proclamation.]

1. Any permission granted in terms of regulation 5 (1) of the Irrigation Schemes Control Regulations, 1963 (Proclamation R5 of 1963), to occupy any irrigation and residential allotment.

2. Any permission to occupy any allotment within the meaning of the Black Areas Land Regulations, 1969 (Proclamation R188 of 1969).

3. Any right of occupation granted to any registered occupier as defined in section 1 of the Rural Areas Act (House of Representatives), 1987 (Act 9 of 1987).

[NB: Para. 3 has been repealed by s. 10 of the Transformation of Certain Rural Areas Act 94 of 1998, a provision which will be put into operation by proclamation.]

4. Any right to the occupation of tribal land granted under the indigenous law or customs of the tribe in question.

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