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DISCOVERING DEFECTS BEFORE TAKING TRANSFER OF A PROPERTY

It often happens that the purchaser takes occupation of the property prior to lodgement and registration in the deeds office and then discover certain defects in the property. This then gives rise to a dispute between the seller and purchaser, and the purchaser then often gives an instruction that registration of the transaction must be held back.

The agreement is key in such a dispute. Unless the agreement provides for certain repairs to be done prior to registration, which has not been done, or determines the condition of the property, the purchaser cannot withhold or delay the transfer of the property. The withdrawal of the bond does not have the effect of lapsing of the agreement as the bond condition had already been met if the purchaser obtained a bond within the stipulated time. A suspensive condition once fulfilled, cannot retrospectively not be fulfilled.

The options available to the buyer if the seller does not want to negotiate is the following:

• Proceed with the transfer and sue the seller for damages for the defects or a reduction in the purchase price, if it can be proved that there are latent defects that the seller fraudulently and purposefully withheld.
• Claim that there was a material misrepresentation by the seller which led to the purchase of the property, and if successful the sale can be cancelled, and damages can be claimed.
If the purchasers however instruct the bank to withdraw the bond with the intention that it would persuade the seller to meet the demands, the risk is taken that the action will indicate the intention of the purchaser to repudiate the agreement, which will amount to breach of contract. The seller can then enforce the remedies for breach of contract.

Risk however only passes to the purchaser on date of registration. Damages to the property that occurs after occupation by the purchaser, but before registration, will be the liability of the seller to repair, provided that the purchaser did not cause such damages. The risk clause can be amended by way of an addendum to stipulate that risk will pass to the purchaser on date of occupation.