



Bulletin No 8  
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# PIP - vacant possession

**Distribution:**

Members of Banking Association of South Africa  
Representative Bodies  
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Press

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During 2001 and 2002 the Office received a number of complaints based on “Properties in possession” (PIP) that had been sold to complainants by the bank.

The complaints were based on one or more of the following issues:

- The purchaser is unable to move into the property due to the previous owner or occupier’s refusal to vacate the property.
- The previous owner or occupier removes certain fixtures from the property before the purchaser takes possession.

In some cases the purchaser was unable to move into the property for a period of 18 months while eviction proceedings were underway.

The bank’s standard contracts contain a standard clause referring to the fact that the bank would not be held responsible for evicting any present occupiers of the property and that the purchaser is aware of the risk of buying these properties. This clause however was inserted amongst all the other clauses but was not specifically referred to and was not specifically brought to the purchasers notice. It formed a standard clause amongst all the other standard clauses.

The property is generally sold “voetstoots”, in spite of the fact that the bank is well aware of the likelihood that the present occupiers of the property will remove certain items i.e. carports and walls etc. from the home before they are evicted.

This Office assumed jurisdiction in these matters by virtue of the fact that the bank selling the property is the same bank financing the purchase. The relationship is therefore one of banker and client and not only purchaser and seller. Further the Code is applicable on any application made to the bank for finance.

## **Legal considerations**

There is clear indication of a departure from a strict interpretation of the *caveat subscriptor* rule by the courts, which have not held parties bound to a standard form contract. Examples<sup>1</sup> of these cases are as follows:

*Meskin NO v Anglo-American Corporation of SA Ltd*<sup>2</sup>

“Where a contract is concluded the law expressly invokes the dictates of good faith, and conduct inconsistent with those dictates may in appropriate circumstances be considered fraud.”

*Dlovo v Brian Porter Motors Ltd t/a Port Motors Newlands*<sup>3</sup> In this matter the appellant’s vehicle that was in for repairs, had been damaged when it was stolen from the respondent’s premises. The respondent claimed for services rendered, and the appellant lodged a counterclaim for damage caused to her vehicle.

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<sup>1</sup> Examples obtained from article by Steve Cornelius “The Writing is on the Wall for Small Print.”(Unpublished)

<sup>2</sup> 1968 (4) SA 793 (W)

<sup>3</sup> 1994 (2) SA 518 (C)

The job card, signed by the complainant, contained an exemption clause. No steps were however taken by the respondent's employees to bring the exemption clause to the appellant's attention.

The appellant signed the job card for the express purpose of authorising repair work on her vehicle, and it was found that there was no basis to argue that the complainant was aware of the exemption clause.

Despite the appellant's admission that she was negligent in not reading the job card, the court held that the appellant's error was *iustus* and not binding on her.

*Fourie v Hansen and another*<sup>4</sup> The plaintiff in this matter claimed for damages suffered due to injuries he sustained as a passenger in a vehicle hired from the second defendant. The claim against the second defendant was based on vicarious liability. The second defendant relied on a clause excluding liability for damages for breach of the agreement. These clauses were contained in faint and small print on the reverse side of the document.

The first defendant understood the signing of this document merely to be necessary to obtain delivery of the vehicle. The clause was not specifically brought to the first defendant's attention. The court concluded that the clause went against what the reasonable person would have expected in a contract of this nature and indicated that the second defendant could not rely on the exemption clause.

Christie may also be quoted in this regard

“Does the reasonable man present for signature without reading (as opposed to signature after clause by clause discussion) a document containing terms which no reasonable man would expect to find therein? Or put in another way, because it is a known fact of life that people habitually sign contracts without reading them only because they assume that they do not contain unexpected terms, can it be said that the unwitting signatory of a contract which does contain unexpected terms has so conducted himself that a reasonable man would believe he was assenting to those unexpected terms. The answer to both questions must surely be no and the *caveat subscripto* rule should therefore not apply in these circumstances.”

The position is summarised as follows by Cornelius:

“Where one party proffers a standard form contract which the other party must sign or forfeit the advantages offered in terms thereof, our law clearly places an obligation on the party proffering the standard form contract, to ensure that the other party is familiar with the contents of the standard form contract and appreciates the consequences thereof.

## **Assessment**

Any clause indicating that the bank does not guarantee vacant occupation is an unexpected term in a contract. The purpose of the contract is clearly not just to have the property transferred into one's name, but to have a home to live in. The reasonable man would not expect to find a clause basically stating that the seller is not responsible should there be violent illegal occupiers on the property, and that the seller cannot guarantee you occupation of the property.

The clause in question basically negates that purpose of the contract, and is therefore unexpected.

There is often no evidence that the complainant's attention was drawn to the specific clause, or that he was familiar with the contents of that particular clause in the contract.

### **Suggested approach**

We believe the following provides for a fair and reasonable resolution to these types of complaints.

- The banks should endeavour to ensure that the illegal occupiers of premises are evicted before transfers into the purchasers' names take place.
- The banks should, by way of an addendum to the standard purchase and sale contract, specifically alert the potential purchaser to the dangers and the risks inherent in buying a property sold in execution and the fact that occupation of the property may be a potential problem. The purchaser should also be alerted to the possibility of the occupiers of the property removing certain items before they are evicted.
- If a purchaser of a property is unable to take possession of it owing to its occupation by unauthorized persons, an investigation will be conducted to establish whether the purchaser was specifically informed of this risk.
- If a bank is deemed to be liable, it will be given the option of either having the present occupiers of the property evicted within a reasonable period of time and placing the complainants in possession of the property or placing the complainant in the same position he would have been in had he never bought the property. This would mean a cancellation of the bond and any amounts owing on the bond.
- If the bank elects to evict the occupants, it should, as soon as the date for eviction has been set, inform the purchaser of the date for eviction so that he can immediately move in once the present occupier has been evicted. The bank should provide us with proof, either of delivery by courier or a recording of the telephonic conversation with the purchaser, showing that it did inform the purchaser of the date.

The Addendum will therefore also alert the potential purchaser to the fact that the bank will not be liable if certain items are removed from the property.

The abovementioned resolutions provide for a cost effective manner in which this type of complaint can be prevented in the future. Any complaint received, relating to the abovementioned issues, will be evaluated with due regard to these resolutions and any other relevant aspects.

**Adv NJ Melville  
Ombudsman**