

FORECLOSURE MEDIATION OFFERS BANKS AND HOMEOWNERS THE HIGH WAY.

The biggest pick up in distressed property sales in the world was reported for South Africa during the 3rd quarter of 2009, according to the RICS's Global Distressed Property Monitor. Not surprising that the home loan division of one of the big four banks in SA posted a loss of R1.167 billion for 2009, compared to R393 million for 2008. There is no reason to believe that the home loan divisions of the other big four banks fared much better during 2009.

Banks have responded to this crisis by participating in quick sales and rapid auctions, where commentators say properties are often sold for 40% less than market value. In South African law banks have no duty or incentive to help homeowners sell their homes for more than the outstanding mortgage. (*Nedcor Bank Ltd v SDR Investment Holdings Co (Pty) Ltd (274/07) (2008) ZASCA 11*). Homeowners who believe they have been pressurized into selling well below market value may however soon have a claim for damages under the new Consumer Protection Act.

Internationally banks and homeowners have responded to the mortgage crisis by engaging each other at foreclosure mediations. In South Africa the mediation high way, prepared by **King III**, the **new Companies Act**, the **National Credit Act**, the **new Consumer Protection Act** and the **ACDS's Accreditation Initiative**, will soon be open for traffic.

King III

The King III report on corporate governance sees mediation as a vital tool in the management of stakeholder relationships. Stakeholders are employees, customers, communities and organisations affected by a company's business. King III does not make stakeholder mediation compulsory but banks and other companies will now have to explain to their stakeholders why they decided to litigate without first mediating. Banks and other listed companies will be in breach of the JSE's Listing Requirements if they fail to explain in their annual financial statements why mediation before litigation is not in the best interest of the company. The sting in the tail of King III. As seen below the new Companies Act will provide a further incentive for banks and other companies to apply the King III adr principle in favour of mediation.

New Companies Act

The new Companies Act is likely to come into operation on 1 September 2010. It will change the role of companies in society by stating that the promotion of high standards of corporate governance is one of the key purposes of the Act. While still obliged to make a profit for shareholders, directors will no longer be able to use the maxim of "best interest of shareholders" to justify decisions harming the company's other stakeholders. Class actions by homeowner-stakeholders, bolstered by the new Consumer Protection Act, may soon threaten the bottom line and reputation of banks. This seismic shift in company law will

probably to some extent be tempered by our conservative judiciary. The King III adr principle in favour of mediation aims to defuse the potential of stakeholder class actions against companies and directors after 1 September 2010.

National Credit Act

The National Credit Act has made it possible for debt counselors to raise the “defense” of over-indebtedness on behalf of homeowners facing foreclosures. Debt review applications, intended to enable the restructuring of a homeowner’s financial obligations, have caused much confusion in the banking industry. Early indications are that different magistrate courts have differing views on the nature and scope of the “defense” of over-indebtedness. According to the Act a bank may only foreclose on a home loan after inviting the homeowner to make use of a debt counselor or an alternative dispute resolution (adr) agent. The legislator sees mediation as an alternative to a debt review application. Homeowners are likely to be ignorant of mediation. Banks should jump at this opportunity to educate and inform homeowners about mediation. At foreclosure mediations banks and homeowners will be able to engage each other more meaningfully than on the steps of the court of a debt review application. Engaging homeowners in mediation will lower the risk of the abuse of the “defense” of over-indebtedness.

New Consumer Protection Act

The new Consumer Protection Act will come into operation on 24 October 2010. It will bring about a sea change in our law by codifying a number of fundamental consumer rights. Roman Dutch law purists will be aghast that the sanctity of contract has been relegated to the dustbin of history in consumer agreements. Consumers will soon have a right to fair and honest dealing and unconscionable terms will no longer be immune from judicial scrutiny. It is likely that quick sales and rapid auctions will fall under the spotlight of the Act. While the Act creates an extensive machinery for the enforcement of consumer rights, it also allows a homeowner to refer a dispute to an independent mediation service provider. By encouraging homeowners to refer their disputes, banks will be lowering the risk of the abuse of the enforcement machinery of the new Act.

Africa Centre for Dispute Settlement’s (ACDS) Accreditation Initiative

The Africa Centre for Dispute Settlement at the University of Stellenbosch Business School recently launched an initiative for industry regulation of accredited mediators in South Africa. A National Accreditation Conference was held on 5 March 2010 in Johannesburg and attended by independent mediation service providers, including the industry leaders Equillore and Tokiso. At the conference the Dispute Settlement Practitioners Council (DSPC) under the auspices of the ACDS was established. The DSPC has been tasked to develop Uniform National Accreditation Standards for the mediation profession. This is a

significant step towards professionalising and mainstreaming mediation services in South Africa.

Benefits of Early Foreclosure Mediation.

Foreclosure mediation has the following potential benefits:

- **Innovation:** Parties are able to explore innovative mutually beneficial and viable solutions that are not possible in the heat of litigation;
- **Independence:** The independence of the mediator moderates the power imbalance between the bank and the homeowner, allowing both parties to explore solutions in an atmosphere of mutual trust and respect;
- **Reality Checking:** In a private session reality checking by a skilled mediator may be more effective than threats or warnings by the bank to bring a homeowner to take stock of his financial situation;
- **Confidentiality:** The process is confidential and without prejudice so the parties are free to openly discuss their interests and concerns;
- **Limiting Legal Costs:** The civil justice system has priced itself out of reach of homeowners. For banks the escalating costs of litigation is also not sustainable;
- **Avoiding Indirect Costs:** It is widely acknowledged that indirect costs of litigation, for instance damage to brand and loss of opportunity far exceed legal costs;
- **Lowering Risk of Fraud:** Mediation by independent mediators will significantly lower the risk of fraud/collusion between bank employees and property speculators.

The benefit of exploring innovative solutions deserves more attention. In the US a solution in which the bank takes ownership of the property and the owner becomes a tenant until he or she is in a position to repurchase the property, is an example of such innovation. Nearer at home, property lawyer Meyer De Waal is quietly developing a similar solution. Interest based mediation may help banks preserve their assets and, where possible prevent homeowners losing the roof over their heads.

Indispensable Tool

The mortgage bond is an indispensable tool for spreading homeownership. The value of a mortgage bond lies in the confidence that the law will give effect to its terms. (*Standard Bank of South Africa Ltd v Saunderson and Others 2006 (2) SA 264 (SCA)*) “While South Africa waits for our courts to interpret the new consumer protection and company legislation the banking industry may wish to begin to meaningfully engage homeowners in mediation before a quick or sheriff sale becomes inevitable”, says Khanya Motshabi, CEO of Equillore. “Time is money and the value of the mediation high way is that less time and money will be spent

to arrive at *mutually beneficial, sustainable destinations.*”

Comments on this article may be sent to MediationSolutions@mweb.co.za

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