

Demystifying Bonds and Bond Cancellations

By **Marius van Rensburg** (Partner)

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INTRODUCTION

The idea behind this article is to briefly offer some explanation of common concepts with regards to bonds and bond cancellations.

BOND OPEN FOR ACCEPTANCE / FULFILMENT OF SUSPENSIVE CONDITION

There is often debate around when a suspensive condition relating to a mortgage bond is fulfilled. The precise date of fulfilment can vary according to the terms of the sale agreement.

Most agreements contain a term that provides that “this condition will be deemed fulfilled on the date that the financial institution issues a written approval in principle or a quotation and/or pre-agreement statement for the amount of the loan”.

This clause is a deeming provision and the suspensive condition is fulfilled on this date – without the purchaser first actually signing the bond grant. In terms of the National Credit Act, the bank offering the loan must hold same open for acceptance for 5 business days. This provision must not be confused to mean that the purchaser must accept the bond in 5 business days. That said, if the purchaser does sign and accept the bond, this is a positive step.

CAN THE BANK WITHDRAW THE BOND?

Once the mortgage bond is granted, the suspensive condition is fulfilled and the agreement is binding. The banks reserve the right to withdraw the bond at any time before registration. This could happen for example if the purchaser loses his /her job or if new facts around the information given to the bank in the approval process comes to light.

Banks do at times re-look at and review the bonds if the bond is not registered within 6 months. In doing so the matter is referred back to the credit department and the finances of the purchaser are reviewed. If the financial position has worsened, the bank can withdraw the bond.

TIP: *advise your purchaser not to incur additional expenditure until after the bond is registered. I.e., don't purchase a new expensive car or buy furniture on credit.*

If the bond is withdrawn the agreement does not lapse or become suspensive again. The agreement remains binding and the guarantees issued are withdrawn and become invalid. The purchaser is then obliged to seek new financing or to pay cash. If the purchaser cannot do so, the seller can place the purchaser in breach and cancel the agreement.

WHICH ATTORNEY CAN BE INSTRUCTED?

Different banks have different rules around who can attend to the registration of mortgage bonds and bond cancellations. The first requirement is that the attorney firm must be on that banks panel.

Some banks allow the attorney attending to the transfer to attend to the bond as well and other banks have an absolute rule prohibiting this. With some banks, client can request a particular attorney and with others, this is not possible.

Most banks have a system of allocating bond registrations known as “auto allocation”. This means the bank allocates the bond based on the various criteria relating to the location of the attorney and the attorneys ranking on the banks system. The ranking is determined based on criteria such as business relationship, investments with the bank, process adherence, turn around times and BEE level.

BOND TERMS AND CONDITIONS

It is important to note that attorneys who are instructed to register bonds on behalf of banks do not represent the purchasers but rather represent the bank. The attorneys function is to register the bond as security for the loan that the bank has granted and to ensure that the bond is registered correctly such that to the extent that purchaser does not pay the bond after registration, the bank can foreclose on the bond, sell the property and recoup the loss.

When a bond is granted it contains conditions which are to be fulfilled before the bond can register. One of the attorneys functions is to ensure that each and every condition is fulfilled before the bond is registered.

The bank will only issue a proceed to lodge/register once they are satisfied that all the conditions are fulfilled to their satisfaction.

BOND GRANTED ON “NORMAL TERMS AND CONDITIONS”

A suspensive condition in a sale agreement is fulfilled once the bond is granted on the banks “normal terms and conditions”. In other words, provided that the bond grant does not have unusual conditions or conditions not contemplated in the sale agreement, the bond will fulfil the suspensive condition.

Where the interest rate is higher than the purchaser anticipated, this will not affect the fact that the suspensive condition is fulfilled unless the purchaser stipulated in the sale agreement that the bond condition is only met where a specific minimum interest rate is granted.

SIGNING BOND DOCUMENTS

Once the bond attorney is instructed, the transfer attorney is advised of this fact. The transfer attorneys are required to provide the bond attorney with the draft deed and guarantee requirements. The bond attorneys cannot start the process until these are received.

On receipt, the bond attorney can prepare the various documents for signature. There are many documents that need to be signed and as such clients should make provision for at least 45 minutes to sign the bond documents and should further ensure that all necessary supporting documents and FICA documents are brought to the meeting.

BOND CANCELLATION DOCUMENTS

Sellers do not generally meet the bond cancellation attorneys. The BC attorneys deal with the transfer attorneys.

The BC attorneys send documents to the transfer attorneys for signature and the transfer attorneys obtain sellers FICA and provide this to the BC attorneys. The documents signed by the sellers with the transfer attorney includes an “instruction to pay bond cancellation refund”.

This document allows the canceling bank to pay any excess amount in the bond account after registration, directly to the seller, as the seller is still obliged to pay the bond instalments until such time as the bond is canceled at the deeds office.

ORIGINAL DEEDS

The deeds office requires the BC attorneys to lodge the original title deed and mortgage bond. If these have been lost, an application must be made for duplicate originals. This is done simul with the transfer and is based on an application signed by the seller.

This application must however be preceded by a notice published in a local newspaper and thereafter lay open for inspection for 14 days. Early detection of lost deeds is thus important to avoid delays.

COSTS

The costs payable to register a new bond or to cancel a bond are set out in the recommended tariff issued by the Legal Practice Council. The bond costs are determined by the actual amount to be registered and is on a sliding scale and on a cancellation is determined by the number of bonds to be cancelled and is not based on the registered amount or the amount payable to the bank.

In recent years, bond registration costs were made the same as the transfer costs. Costs are payable by the purchaser before registration. Some bonds do have a “costs included” provision but this is not the norm.

TIP: Purchasers must be advised to expect an account for transfer costs and a separate account for bond costs. Obtain a costing before signing the sale agreement for both to get certainty.

Bond cancellation costs for a single bond are the sum of approximately R 4 500.00. (this does vary to some extent from firm to firm). This is not doubled for an additional bond to be cancelled.

Additional bonds are charged as a set additional fee. The bond cancellation attorneys send their account to the transfer attorney for payment. The transfer attorney either pays the account and deducts the amount from sellers proceeds or asks the seller to pay the account directly before registration.

BANK PROCEEDS

Attorneys need the banks permission to attend to the physical registration in the deeds office. i.e. the attorneys need a bank “proceed”.

In order to obtain the banks’ proceed to register, the attorney is required to upload all the signed bond documents and FICA documents which the bank checks and then grants the proceed. Similarly, on a cancellation instruction the attorney is required to obtain certain signed documents and FICA and provide those to the bank to obtain a proceed.

On bond registrations this proceed has to be obtained before lodgement can take place and on cancellations the proceed is given to register.

As a general proposition and subject to various factors, a bond proceed can take 5-7 working days and up to two days for a cancellation proceed.

Due to the nature of bond and the need for bank security, banks are very strict and require 100% compliance with their conditions and proceed rules.

BOND SUBJECT TO THE CANCELLATION OF AN EXISTING BOND WITH ANOTHER BANK

Banks at times impose a bond condition which says an existing bond must be canceled before the bond can be registered.

If the agreement of sale is also subject to the sale of a property this is not a problem, but if the agreement is silent in this regard, this bond grant does not fulfil the suspensive condition relating to loan finance. To regulate this position an appropriate addendum must be drawn to cater for the unusual condition. The parties need to assess the factual position and determine whether the additional property is on the market, has been sold or whether the purchaser even intends to sell same (or has funds to cancel the existing bond).

LIFE COVER

Another example of a bond condition which requires early fulfilment is life cover. In the past many banks had insisted clients take out life cover so that the bond is paid when the person dies or becomes disabled. The bank not only requires a policy be taken out which meets their requirements but that the life policy also be ceded to the bank

Once the policy is approved and issued it must then also be ceded to the bank. This whole process can take from 1 to several weeks to complete thus it is important that it be attended to early on.

Life cover as a condition is no longer the norm and more recently banks only insist on life cover on certain bonds.

INSURANCE

When you take up and register a bond the bank will insist on the property being adequately insured. The insured value is determined by the bank and is not linked to the market value or the purchase price. The bank calculates the value on what it would cost to rebuild/restore the house should an insured event take place. Many banks will offer up their own insurance but clients are always free to choose their own insurer, provided the policy meets with the banks requirements.

For sectional title properties the bond attorneys will obtain an insurance certificate from the body corporate to confirm the insured amount and to make sure the bank's interest has been noted against the policy.

When bonds are cancelled the insurance offered by the bank will be simultaneously cancelled. If you are cancelling the bond and have not sold the property, you will have to insure the property yourself if you had bank insurance.

TIP: in cash sales of freehold properties, remind purchasers to take up insurance cover.

GUARANTEES AND CANCELATION AMOUNTS

Guarantees are issued by bond attorneys who have been instructed to register the new bond. Guarantees are signed by the attorney and sometimes by the bank directly in accordance with your signed Authority To Pay (ATP), which is drafted by the bond attorneys in accordance with the guarantee requirements issued by the transferring attorney.

The amount that is required to cancel an existing bond is determined by the bank issuing the cancellation figures. This is based on your actual outstanding balance and a forward projection. Some banks will also issue prep figures which are requested by the cancellation attorneys when the matter comes up on prep in the deeds office. This enables the cancellation attorneys to ensure that the guaranteed amount is sufficient to cover the banks requirements.

Any amounts paid to cancel the bond in excess of the amount actually required are refunded directly by the bank after registration.



Marius van Rensburg
(Partner)