

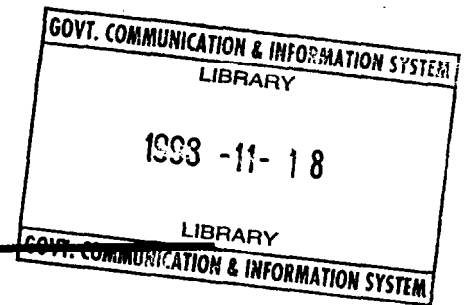
REPUBLIC OF SOUTH AFRICA

ALIENATION OF LAND AMENDMENT BILL

(As amended by the Select Committee on Economic and Foreign Affairs (National Council of Provinces))

(DR R H DAVIES)

[B 129B—98]



REPUBLIEK VAN SUID-AFRIKA

WYSIGINGSWETSONTWERP OP VERVREEMDING VAN GROND

(Soos gewysig deur die Gekose Komitee oor Ekonomiese en Buitelandse Sake (Nasionale Raad van Provinsies))

(DR R H DAVIES)

[W 129B—98]

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GENERAL EXPLANATORY NOTE:

Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Alienation of Land Act, 1981, so as to confer on a purchaser or prospective purchaser of land the right to revoke an offer to purchase or to terminate a deed of alienation in certain circumstances; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 68 of 1981, as amended by section 1 of Act 51 of 1983 and sections 68 and 69 of Act 67 of 1995

1. Section 1 of the Alienation of Land Act, 1981 (hereinafter referred to as the principal Act), is hereby amended—

(a) by the insertion immediately before the definition of “alienate” of the following definition:
“‘agricultural land’ in paragraph (d)(ii) of the definition of ‘land’ means any land used or intended to be used mainly for commercial farming operations;”
and

(b) by the addition to the definition of “land” of the following paragraph:
“(d) in section 29A—

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| (i) includes— | 15 |
| (aa) land, whether or not registrable, used or intended to be used mainly for residential purposes; | |
| (bb) any housing interest as defined in section 1 of the Housing Development Schemes for Retired Persons Act, 1988 (Act No. 65 of 1988), and any proposed housing interest; | 20 |
| (cc) any share in a share block company as defined in section 1 of the Share Blocks Control Act, 1980 (Act No. 59 of 1980), and any proposed share, which confers on the holder of such share the right to occupy land owned or leased by the share block company and which is used or intended to be used mainly for residential purposes; | 25 |
| (dd) any unit as defined in section 1 of the Sectional Titles Act, 1986 (Act No. 95 of 1986), and includes any proposed unit; | |
| (ii) <u>excludes agricultural land;</u> ” | |

Amendment of section 2 of Act 68 of 1981

2. Section 2 of the principal Act is hereby amended by the insertion after subsection (2) of the following subsection:

“(2A) The deed of alienation shall contain the right of a purchaser or prospective purchaser to revoke the offer or terminate the deed of alienation in terms of section 29A.”.

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Insertion of section 29A in Act 68 of 1981

3. The following section is hereby inserted in the principal Act after section 29:

“Purchaser’s right to revoke offer or terminate deed of alienation

29A. (1) Subject to subsection (5), a purchaser or prospective purchaser of land may within five days after signature by him or her, or by his or her agent acting on his or her written authority, of—

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(a) an offer to purchase land; or

(b) a deed of alienation in respect of land,

revoke the offer or terminate the deed of alienation, as the case may be, by written notice delivered to the seller or his or her agent within that period.

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(2) The period of five days contemplated in subsection (1) shall be calculated with the exclusion of the day upon which the offer was made or the deed of alienation was entered into, as the case may be, and of any Saturday, Sunday or public holiday.

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(3) The written notice contemplated in subsection (1) shall be effective only if it—

(a) is signed by the purchaser or his or her agent acting on his or her written authority;

(b) identifies the offer or deed of alienation that is being revoked or terminated, as the case may be; and

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(c) is unconditional.

(4) Where an offer is revoked or deed of alienation is terminated as contemplated in subsection (1), every person who received any amount from the purchaser or prospective purchaser in respect of the offer or deed of alienation, as the case may be, shall refund the full amount of such payment to the purchaser within 10 days of the date on which the notice referred to in subsection (1) was delivered to the seller or his or her agent.

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(5) Subsection (1) shall not apply if—

(a) the purchase price of the land, or the price offered for the land by the prospective purchaser contemplated in that subsection, exceeds R250 000 or such higher amount as the Minister may prescribe in order to counter the effect of inflation;

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(b) the purchaser or prospective purchaser contemplated in that subsection is a trust or a person other than a natural person;

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(c) the purchaser or agent contemplated in that subsection has purchased the land at a publicly advertised auction;

(d) the seller and purchaser contemplated in that subsection have previously entered into a deed of alienation of the same land on substantially the same terms;

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(e) the purchaser or prospective purchaser contemplated in that subsection has reserved the right in terms of the deed of alienation or offer, as the case may be, to nominate or appoint another person to take over the rights and obligations of the purchaser as stipulated in the offer or deed of alienation in question;

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(f) the purchaser contemplated in that subsection purchases the land by the exercise of an option which was open for exercise for a period of at least five days calculated *mutatis mutandis* in the manner prescribed in subsection (2).

(6) No person shall be entitled to any remuneration payable in respect of an offer or deed of alienation which the purchaser or prospective purchaser

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has revoked or terminated, as the case may be, pursuant to the provisions of subsection (1) and no such person or agent shall be entitled to claim damages from any person following such revocation of the offer or termination of the deed of alienation by the purchaser or prospective purchaser.

(7) (a) **Any provision in any document or** in any agreement or undertaking entered into by the purchaser or prospective purchaser, in writing or verbally, whereby a penalty or fee is directly or indirectly imposed or levied on the purchaser or prospective purchaser should he or she exercise the rights contained in this section, shall be void.

(b) Any waiver by a purchaser or prospective purchaser of the rights conferred upon him or her in terms of this section shall be void.

(8) A purchaser or prospective purchaser who signs an offer to purchase land or a deed of alienation in respect of land (hereinafter referred to as the later transaction) within five days (calculated in accordance with subsection (2)) after having signed an offer or a deed of alienation in respect of other land (hereinafter referred to as the earlier transaction) and before he or she has exercised his or her right as contemplated in subsection (1) in respect of the earlier transaction, shall—

(a) on signature of the later transaction be deemed to have exercised his or her right in terms of subsection (1) to revoke or terminate the earlier transaction; and

(b) forthwith after signature of the later transaction in writing notify the seller of the earlier transaction of the revocation or termination, as the case may be, of that transaction.

(9) (a) Any person who wilfully or negligently fails to comply with the provisions of subsection (8)(b), shall be guilty of an offence and upon conviction liable to a fine, or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

(b) The provisions of paragraph (a) shall not in any way detract from any civil remedy which a seller may have against a purchaser who failed to comply with the provisions of subsection (8)(b).

(10) Subsections (8) and (9) shall not apply to a purchaser or prospective purchaser who *bona fide* intends to purchase both the land to which the earlier transaction and the land to which the later transaction referred to in subsection (8) relate.”.

Short title

4. This Act shall be called the Alienation of Land Amendment Act, 1998.

MEMORANDUM ON THE OBJECTS OF THE ALIENATION OF LAND ,4 MENDMENT BILL, 1998

The purchase of land for residential purposes is one of the basic needs of South Africans and it is necessary that the acquisition of such basic need does not result in great hardships. South Africa is currently experiencing an unprecedented demand in land ownership, especially for residential purposes. Many people in South Africa, especially those from the previously disadvantaged background, are not experienced in property transactions. For instance many purchasers are not aware that a signed offer to purchase is legally binding once the seller accepts it.

The purpose of this Amendment Bill is to confer on certain purchasers (or prospective purchasers) of land the right to revoke an offer to purchase the land or to terminate a deed of alienation in respect of the land. This is commonly referred to as a "cooling-off" right. Such a right is not entirely a novelty in our law. In terms of section 13 of the Credit Agreements Act, 1980 (Act No. 75 of 1980), a buyer who signs a credit agreement at a place other than the seller's ordinary place of business may terminate the agreement within five days after signature thereof provided the transaction was initiated by the seller or his manager, agent or employee. The Consumer Codes Of Conduct by the Business Practices Committee for Property Time-Sharing, Direct selling, Home Construction also make provision for a cooling of period. The cooling off right is also part of the Australian and American Laws.

The fundamental idea behind a cooling-off clause is to protect persons who buy goods having been influenced to do so by high-pressure selling techniques. There is indication that questionable marketing techniques do exist with regard to property transactions and it is therefore desirable to give purchasers of property the right to cancel a contract where a decision was influenced by questionable marketing techniques.

In addition to the high pressure marketing techniques, it is an inescapable fact that many people make a decision to purchase property on emotional rather than rational grounds. Because the purchase of land is a major decision involving a huge long-term financial commitment, a cooling-off right is under the circumstances desirable to give purchasers of land the further opportunity to carefully and rationally reconsider the transaction and, if necessary, to obtain independent advice as to whether or not they should proceed therewith. A decision made under pressure or irrationally and which turns out to be wrong cannot be rectified easily and may cause great economic, financial and social hardship.

A cooling-off right erodes the common law rule that all contracts validly entered into are enforceable and should be adhered to (*pacta sunt servanda*). Accordingly it is not in the public interest to introduce a cooling-off right for every person who enters into a deed of alienation. The right should be confined only to persons who are truly in need of statutory protection. For this reason the Amendment Bill does not confer a cooling-off right on *sellers* of land. A seller, as a general rule, is not acquiring a basic need by entering into a long-term financial obligation. A seller is also not subjected to questionable marketing techniques.

The cooling-off right introduced by the Amendment Bill is furthermore confined to persons who are buying land intended for residential purpose. Persons who buy commercial and industrial properties can reasonably be expected to know what they are doing or to obtain independent advice *before* entering into a property transaction. There is therefore no need to make the cooling-off right available to such persons.

The following comments apply in respect of the specific clauses of the Bill:

Clause 1: Definition of land for purposes of cooling-off clause

As stated earlier, the cooling-off right is confined to purchasers **who buy land which is used or intended to be used** mainly for residential purposes. Persons who buy dwelling houses will therefore enjoy a cooling-off right, as opposed to those who buy commercial, industrial or commercial agricultural properties who will not. Persons who buy housing interests in retirement schemes, or shares in a share block company which owns or leases residential property, will also enjoy the cooling-off right.

Clause 2: Formalities in respect of alienation of land

It is necessary to entrench the right to cool off in all contracts involving purchase of land for residential purpose so as to make both parties aware of its existence. This is necessary to avoid possible misunderstanding on the part of the seller who might believe that an offer or a deed of alienation is valid and enforceable and that the seller can on the strength of it enter into another deed of alienation to buy a property elsewhere. A seller who has signed such other deed of alienation may land in serious difficulties if the purchaser under the first deed of alienation exercise his or her cooling off right.

Clause 3: The cooling-off clause

Subclause (1): The cooling-off clause applies to all purchasers, except those listed in subsection (5).

Subclause (2): This subclause is self-explanatory.

Subclause (3): The purpose of this subclause is to avoid confusion and eliminate any dispute as to whether a particular notice qualifies as a notice of revocation or termination for the purposes of subclause (1). The provisions are self-explanatory.

Subclause (4): The effect of this subclause is that all monies received by the seller, an estate agent or an attorney (or any other person) in respect of the offer or sale must be refunded to the purchaser, within the period stated in the clause, if the cooling-off right is exercised.

Subclause (5): This subclause provides for exclusions, *ie* cases where the cooling-off right would not apply:

- (a) The purpose of this paragraph is to confine the cooling-off right to properties within a certain price bracket. It therefore excludes persons who buy land at a price exceeding R250 000.
- (b) Persons who buy land in the name of a company, close corporation or trust.
- (c) Arranging a public auction can be an expensive undertaking and the whole object of the auction could be frustrated if the purchaser at an auction later decides to make use of the 'cooling-off' period.
- (d) There is no reason why a purchaser should enjoy multiple opportunities to exercise the cooling-off right in respect of the same property; hence the inclusion of this paragraph.
- (e) The purpose of this paragraph is to prevent a situation where a third party (legal persona) uses a natural person as a front to buy land. A deed of alienation can be entered into on the basis that the purchaser has the right to nominate a third party as the purchaser. It is not the intention to confer a cooling-off right on a nominee who is not a natural person, but which may for example be a company or close corporation. The paragraph is also intended to prevent a circumvention of subclause (8) in that it is not the purpose to confer a cooling-off right on a purchaser who uses other persons as fronts to enter into a number of transactions in terms of which they reserve the right to appoint the first purchaser as the true purchaser.
- (f) The provisions of this paragraph are of a technical nature. A person who has a five day option to purchase immovable property has, in effect, a five day cooling-off right; hence such person should not enjoy an additional cooling-off period.

Subclause (6): This clause is self-explanatory.

Subclause (7): This clause is self-explanatory

Subclause (8): It is not the intention that the cooling-off right be misused by purchasers to stifle competition or to monopolise the market. Unless the cooling-off right is restricted in the manner set out in this subclause, it would be possible for a person to buy *all* the properties that are for sale in a particular town, knowing that he or she has the right to terminate each of those agreements within five days. By doing so such person can in effect obtain options on all available properties in an area, making it impossible for other purchasers to enter into enforceable sale agreements in respect of such properties before the cooling-off period has expired. This is clearly undesirable.

Subclause (9): This clause is self explanatory.

Subclause (10): This clause is intended to ensure that the legitimate/ bona fide/genuine intentions of a prospective purchaser or purchaser to purchase more than one land or residential property within five working days of each other are realised.

Clause 4: Short title and commencement

This clause is self explanatory

Parliamentary procedure

The relevant Department and the Member in charge of the Bill are of the opinion that Parliament should deal with the Bill in accordance with the procedure set out in section 76 of the Constitution.