

Act No 65 of 1988

HOUSING DEVELOPMENT
SCHEMES FOR RETIRED
PERSONS ACT

NOTES

1. Afrikaans text signed on 17 June 1988.
2. Commencement 1989-07-01 by Proc 72/1989.
3. AMENDED by -

Act 20/1989 Housing Development Schemes for Retired Persons Amendment Act comm 1989-03-23:

Section 1 "housing development scheme" (a) substituted, 7 substituted, 10 repealed.

Act 70/1990 Housing Development Schemes for Retired Persons Amendment Act comm 1990-06-29:

Section 1 "right of occupation", 4(1)(dA) & (hA), 4A, 4B, 4C inserted, 6(1)(a) & (b) amended, (c) inserted, (2) amended, (3) & (4) substituted, 10 inserted, 11(1)(d) substituted, (i) inserted, (2) amended.

* Act 66/1991 Housing Development Schemes for Retired Persons Amendment Act comm 1991-05-22.

Section 1 "right of occupation" para. (b) substituted.

ACT to regulate the alienation of certain interests in housing development schemes for retired persons; and to provide for matters connected therewith.

Definitions

* [Section 1 "right of occupation" para. (b) substituted by Act 66/1991 s 1.]

1. In this Act, unless the context indicates otherwise—
 - (i) "alienate", in relation to a housing interest, means—
 - (a) sell, exchange, lease, donate, grant or otherwise dispose of or place at disposal; or
 - (b) the making of an irrevocable offer to acquire the interest for consideration; (xxv)
 - (ii) "architect" means an architect as defined in section 1 of the Architects Act, 1970 (Act No. 35 of 1970); (iii)
 - (iii) "consideration", in relation to the alienation of a housing interest, means the purchase price and interest thereon (but excluding occupational interest), rent or other consideration which is payable or must be rendered in terms of the contract concerned; (xxii)
 - (iv) "contract" means a document in terms of which a housing interest is alienated to a retired person, and includes any agreement or agreements which together have the same import, whatever form the agreement or agreements may take; (xiv)
 - (v) "debilitated person" means a debilitated person as defined in section 1 of the Aged Persons Act, 1967 (Act No. 81 of 1967); (xxiv)

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- (vi) "developer"—
- (a) means a share block developer as defined in section 1 of the Share Blocks Control Act;
 - (b) means a developer as defined in section 1 (1) of the Sectional Titles Act;
 - (c) in relation to a housing interest, includes any person, or his agent or successor-in-title, who alienates the interest for the first time; (xvii)
- (vii) "development scheme" means a development scheme as defined in section 1 (1) of the Sectional Titles Act; (xviii)
- (viii) "estate agent" means an estate agent as defined in section 1 of the Estate Agents Act, 1976 (Act No. 122 of 1976); (viii)
- (ix) "housing development scheme" means any scheme, arrangement or undertaking—
- (a) in terms of which housing interests are alienated for occupation contemplated in section 7, whether the scheme, arrangement or undertaking is operated pursuant to or in connection with a development scheme or a share block scheme or membership of or participation in any club, association, organization or other body, or the issuing of shares, or otherwise, but excluding a property time-sharing scheme;
 - (b) declared a housing development scheme by the Minister by notice in the *Gazette* for the purposes of this Act; (v)
- (x) "housing interest", in relation to a housing development scheme, means any right to claim transfer of the land to which the scheme relates, or to use or occupy that land; (iv)
- (xi) "insolvent" means—
- (a) any person whose estate is under sequestration in terms of the Insolvency Act, 1936 (Act No. 24 of 1936);
 - (b) any insolvent deceased estate which is being dealt with in terms of section 34 (2) of the Administration of Estates Act, 1965 (Act No. 66 of 1965);
 - (c) any juristic person in liquidation which is unable to pay its debts;
 - (d) any person whose estate is being dealt with in terms of section 23 (5) of the Agricultural Credit Act, 1966 (Act No. 28 of 1966); (xiii)
- (xii) "land", in relation to a housing development scheme, means land which is used or intended to be used mainly for residential purposes, including any unit and any undivided share in land; (x)
- (xiii) "levy" means the amount payable as a contribution to the costs of the control, management and administration for a housing development scheme; (xi)
- (xiv) "Minister" means the Minister of Economic Affairs and Technology; (xvi)
- (xv) "practitioner" means a practitioner as defined in section 1 of the Attorneys Act, 1979 (Act No. 53 of 1979); (xix)
- (xvi) "property time-sharing scheme" means a property time-sharing scheme as defined in section 1 of the Property Time-sharing Control Act, 1983 (Act No. 75 of 1983); (ix)
- (xvii) "purchaser" means any person to whom a housing interest is alienated in terms of a contract; (xv)
- (xviii) "quantity surveyor" means a quantity surveyor as defined in section 1 of the Quantity Surveyors Act, 1970 (Act No. 36 of 1970); (vi)
- (xix) "registrable", in relation to land, means capable of being registered as the subject of a separate title deed in a deeds registry as defined in section 102 of the Deeds Registries Act, 1937 (Act No. 47 of 1937), in that the requirements of any law relating of such registration have been complied with; (xx)
- (xx) "regulation" means a regulation made under section 11; (xxi)
- (xxi) "retired person" means a person who is 50 years of age or older; (ii)

"right of occupation" means the right of a purchaser of a housing interest -

(a) which is subject to the payment of a fixed or determinable sum of money by way of a loan or otherwise, payable in one amount or in instalments, in addition to or in lieu of a levy, and whether or not such a sum of money is in whole or in part refundable to the purchaser or any other person or to the estate of the purchaser or of such other person; and

* (b) which confers the power to occupy a portion in a housing development scheme for the duration of the lifetime of the purchaser or, subject to section 7, any other person mentioned in the contract in terms of which the housing interest is acquired, but without conferring the power to claim transfer of the ownership of the portion to which the housing interest relates; (xixA)

(xxii) "Sectional Titles Act" means the Sectional Titles Act, 1986 (Act No. 95 of 1986); (xxvi)

(xxiii) "seller" means any person who alienates a housing interest in terms of a contract; (xxiii)

(xxiv) "share block scheme" means a share block scheme as defined in section 1 of the Share Blocks Control Act; (i)

(xxv) "Share Blocks Control Act" means the Share Blocks Control Act, 1980 (Act No. 59 of 1980); (xxvii)

(xxvi) "this Act" includes the regulations; (xii)

(xxvii) "unit" means a unit as defined in section 1 (1) of the Sectional Titles Act; (vii)

Formalities in respect of contracts

2. (1) No alienation of a housing interest to a retired person shall, subject to section 8 (2), be of any force or effect, unless it is contained in a contract signed by the parties thereto or by their agents acting on their written authority.

(2) The provisions of subsection (1) relating to the signature by the agent of a party acting on the written authority of the party, shall not derogate from any law relating to the conclusion of a contract in writing by a person professing to act as agent or trustee for a company or close corporation not yet formed.

Language in which contract shall be drawn up

3. The purchaser in relation to a contract is entitled to choose the official language in which the contract shall be drawn up.

4. Contents of contract.

(1) Without derogating from the requirements of any other law, a contract, if the seller concerned is a developer, shall contain the following:

(a) The names of the purchaser and the seller and their residential or business addresses in the Republic;

(b) a concise description of the legal basis upon which the housing interest concerned is to be alienated;

(c) the duration of the housing interest and any other limitations thereon;

(d) a statement as to whether the housing interest is registrable;

(e) a description of the land concerned, including the erf and unit number (if any), the extent thereof and the magisterial district in which it is situated;

(f) a statement as to whether the land is held by the seller by virtue of ownership or otherwise;

(g) if the seller is not the owner of the land -

(i) the name and address of the owner;

(ii) the nature of the seller's right to the land;

(iii) the period for which the right is being held;

(iv) the obligations (if any) of the seller, arising from the right; and

(v) a statement of the place where and the hours during which a document which confirms the existence of the right, or a certified copy thereof, may be inspected;

(h) if the land is encumbered by a mortgage bond -

(i) the name and address of the person in favour of whom, or, in the case of a participation bond, the name and address of the relevant nominee company contemplated in the Participation Bonds Act, 1981 (Act No. 55 of 1981), in favour of which, the mortgage bond is registered at the time the contract is concluded; and

(ii) the outstanding balance owing by the mortgagor in terms of the mortgage bond;

(h.A) in the case of a housing interest consisting of a right of occupation, the amount, if any, of the consideration payable by the purchaser which will be applied by the seller in reduction of the outstanding balance owing by the mortgagor in terms of the mortgage bond;

(i) the amount or nature of the consideration concerned;

(j) the annual rate at which interest (if any) is to be paid on any balance in respect of the consideration;

(k) the amount, or the method of determining the amount, of each instalment payable in terms of the contract in reduction or settlement of the consideration concerned (if any);

(l) the due date, or the method of determining the due date, of each such instalment;

(m) if a certificate contemplated in section 6(1) has not been issued at the time the contract is concluded, the latest date by which such certificate, subject to subsection (2), will be issued and furnished to the purchaser;

(n) a statement of the place where and the hours during which rules (if any), in accordance with which the housing interest concerned is to be utilized, may be inspected;

(o) a statement -

(i) of the location, nature and extent of any facilities or services which are to be provided or rendered in connection with the housing interest concerned;

(ii) of the rights and obligations of the purchaser in connection with the utilization of those facilities or services;

(iii) without derogating from the above, as to whether any such facility or service provides for the care of debilitated persons; and

(iv) of the date by which the facilities or services contemplated in subparagraphs (i) and (iii) will be provided or rendered;

(p) a statement of the official language chosen by the purchaser under section 3;

(q) the date on which the purchaser will become entitled to utilize the housing interest;

(r) if applicable, the date upon which the risk of the housing interest will pass to the purchaser;

(s) a statement of the obligation (if any) of either the seller or the purchaser to insure the subject matter of the contract;

(t) a statement -

(i) of any amount which in terms of any law is payable in respect of the land as endowment, betterment or enhancement levy, a development contribution or any similar imposition, and an indication of the person to whom and the person by whom it is payable; or

(ii) that no amount contemplated in subparagraph (i) is payable in respect of the land, if such is the case;

- (u) an indication of the party who is liable for the payment of the costs of the drafting of the contract and (if applicable) the transfer of the land;
- (v) if the seller is the owner of the land, an undertaking by him that the land will not be encumbered or further encumbered by a mortgage bond, as the case may be;
- (w) if applicable, the period within which the purchaser is obliged or may be compelled to take transfer of the land against simultaneous payment of all amounts owed by him in terms of the contract;
- (x) an estimate, for a period of three years in advance, of all expenditure for the control, management and administration of the housing development scheme and all services and facilities concerned, and an indication of the person or persons who will be liable for the payment thereof, and a statement that over and above any levy contemplated in paragraph (y), the purchaser will not be liable for the payment of any such expenditure;
- (y) a statement of the basis upon which any levy payable by the purchaser is to be calculated, and an estimate, for a period of two years in advance, of the amount of the levy;
- (z) a reference to the rights and remedies of the purchaser in terms of subsection (3) and sections 8 and 9;
- (aa) a statement as to the percentage of the total number of housing interests in the housing development scheme concerned which is reserved for alienation to retired persons only;
- (bb) a concise outline of the management structure or proposed management structure of the housing development scheme concerned;
- (cc) such further particulars as may be prescribed by regulation.

(2) The date stated in a contract in terms of subsection (1) (m), shall not be later than two years from the date of conclusion of the contract.

(3) If, for any reason whatsoever, the seller is unable, by the date referred to in subsection (1) (m), to furnish the certificate referred to in that subsection, the purchaser may cancel the contract, in which event the parties shall be entitled to the relief provided for in section 8, or the purchaser may abide by the contract, in which event no interest shall be payable by him in terms of the contract as from the date in question until such time as the certificate is furnished to him.

(4) The date stated in a contract in terms of subsection (1) (r), shall not be earlier than the date stated in terms of subsection (1) (q).

(5) A provision in a contract whereby—

- (a) any person who acted on behalf of the seller in connection with the conclusion of the contract or the negotiations which preceded the conclusion of the contract, is appointed or is deemed to have been appointed as the agent of the purchaser;
- (b) the seller is exempted from liability for any act, omission or representation by any person acting on his behalf;
- (c) the liability of the seller to indemnify the purchaser against eviction is restricted or excluded;
- (d) the purchaser binds himself in advance to agree to an assignment by the seller of his obligations in terms of a contract,

shall be null and void.

(6) A *rouwkoop* stipulation in a contract in terms of which the purchaser is deemed to have terminated the contract on account of any act or omission on his part and he, in consequence thereof, is liable for any forfeiture or for the payment of a penalty or damages or for the delivery or performance of anything, or any other stipulation of like import, shall be subject to the Conventional Penalties Act, 1962 (Act No. 15 of 1962), as if that stipulation were a penalty stipulation contemplated in that Act.

- * 4A. Right of occupation shall confer same right as registered lease.

The holder of a right of occupation shall for the purposes of any law have the same rights as those conferred on a lessee in terms of a lease as contemplated in section 1(2) of the Formalities in respect of Leases of Land Act, 1969 (Act No. 18 of 1969), registered against the title deed of the leased land, and such rights shall rank in priority over any other right whether or not such other right has been registered or endorsed against the title deed and irrespective of the time when such other right was registered or endorsed.

- * 4B. Alienation of land subject to right of occupation.

(1) Unless at least 75 per cent of the holders of rights of occupation in a housing development scheme consent thereto the land concerned may not be alienated free from such rights: Provided that the holders of the rights of occupation shall in the case of such an alienation have preferent claims in respect of the proceeds of the sale of the land, which claims shall, notwithstanding the provisions of any other law

(a) rank in priority over the claim of any mortgagee; and
(b) be equal to the amount paid in terms of paragraph (a) of the definition of right of occupation.

(2) Any alienation taking place without the consent of the holders as contemplated in subsection (1) shall be null and void.

- * 4C. Alienation of right of occupation shall be subject to endorsement against title deed.

(1)(a) No developer shall alienate a right of occupation in relation to a housing interest which originated as from the commencement of the Housing Development Schemes for Retired Persons Amendment Act, 1990, or enter into an agreement having such effect or purporting to have such effect, unless the title deed of the land concerned to which such right relates, has, with the consent of the owner of that land and, if the land is encumbered by a mortgage bond, the consent of the mortgagee, or, in the case of a participation bond, the consent of the nominee company concerned as contemplated in the Participation Bonds Act, 1981 (Act No. 55 of 1981), in whose favour the bond is registered, been endorsed by a registrar as defined in section 102 of the Deeds Registration Act, 1937 (Act No. 47 of 1937), to the effect that such land is subject to a housing development scheme.

(b) For the purposes of paragraph (a) it shall be deemed that a right of occupation in relation to a housing interest originates as soon as a developer alienates the first right of occupation in a housing development scheme.

(2) The provisions of subsection (1) do not preclude any developer who is not compelled to comply with the provisions of that subsection, to apply to the registrar concerned that the title deed of land in respect of which he has alienated a right of occupation in relation to a housing interest, be endorsed to the effect that such land is subject to a housing development scheme.

(3) The registrar concerned shall, on receipt of an application in the form prescribed by regulation after consultation with the chief registrar of deeds, make such endorsements as he may deem necessary so as to give effect to the provisions of subsections (1) and (2), and no office fee or other charge shall be payable to the registrar in respect of such endorsement.

(4) Any person contravening the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding R20 000 or to imprisonment for a period not exceeding five years or to both that fine and that imprisonment.

5. Facilities for care of debilitated persons deemed to be homes for the aged.

If any facility contemplated in section 4(1)(o) is to be maintained mainly for the care of debilitated persons, the facility shall be deemed to be a home for the aged as defined in section 1 of the Aged Persons Act, 1967 (Act No. 81 of 1967), and sections 3 and 4 of that Act shall apply *mutatis mutandis* in respect of that facility.

6. Restriction on receipt of consideration.

(1) Subject to subsection (3) and notwithstanding any other law, no developer may by virtue of a contract receive any consideration or any part thereof, unless -

(a) an architect or a quantity surveyor has issued a certificate that the housing development scheme concerned has been erected substantially in accordance with any applicable officially approved building plans and town-planning scheme and applicable local authority by-laws, and is sufficiently completed for the purposes of utilization of the housing interest concerned;

(b) a copy of that certificate and a copy of the contract have been furnished to the purchaser concerned; and

(c) in the case where a housing interest includes a right of occupation, a practitioner has issued a certificate that the title deed of the land to which the right of occupation relates, has been endorsed as contemplated in section 4C, in so far as endorsement is required by that section, and a copy of that certificate has been furnished to the purchaser concerned.

(2) Any person who contravenes any provision of subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding R20 000 or to imprisonment for a period not exceeding five years or to both that fine and that imprisonment.

(3) Subsection (1) shall not apply to the receipt of any amount -

(a) which the purchaser by virtue of a contract entrusts to a practitioner or an estate agent in his capacity as such, to be kept for the benefit of the developer, in the trust account of the practitioner or estate agent until the provisions of subsection (1) have been complied with; or

(b) which by virtue of a contract is paid to the developer if, before such payment, the purchaser was furnished with an irrevocable and unconditional guarantee by a banking institution registered otherwise than provisionally under the Banks Act, 1965 (Act No. 23 of 1965), a mutual building society registered otherwise than provisionally under the Mutual Building Societies Act, 1965 (Act No. 24 of 1965), a building society registered otherwise than provisionally under the Building Societies Act, 1986 (Act No. 82 of 1986), or a registered insurer as defined in section 1 of the Insurance Act, 1943 (Act No. 27 of 1943), in terms of which the banking institution, mutual building society, building society or insurer undertakes to repay the said amount to the purchaser, if the provisions of subsection (1) are not being complied with.

(4) If, in the circumstances contemplated in subsection (3), the developer becomes an insolvent before the provisions of subsection (1) have been complied with, any amount kept in a trust account in terms of paragraph (a) of subsection (3) or the repayment of which was guaranteed in terms of paragraph (b) of that subsection, shall immediately become payable to the purchaser concerned by the practitioner, estate agent, banking institution, mutual building society, building society or insurer concerned.

Limitation of occupation of land to which housing interest relates

[Section 7 substituted by Act 20/1989 s 2]

7.(1) After a housing interest has been transferred to or has otherwise been vested in a person by virtue of a contract, no person other than a retired person or the spouse of a retired person may occupy the land to which that housing interest relates, except with the written consent of all the holders of housing interests in the housing development scheme concerned.

(2) Any person who contravenes subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding R1 000 or to imprisonment for a period not exceeding six months or to both that fine and that imprisonment.

Consequences of contracts which are void or are cancelled

8. (1) Notwithstanding any other law, but subject to any power that a court may have and subject to subsection (2), any person who has performed partially or in full in terms of a contract which is of no force or effect in terms of section 2 (1) or which has been declared void or has been cancelled under this Act, is entitled to recover from the other party what he has performed in terms of the contract, and, if the seller concerned is a developer—

- (a) the purchaser may in addition recover from the developer—
 - (i) interest at the rate prescribed by regulation on any payment that he made in terms of the contract, from the date of the payment to the date of recovery;
 - (ii) a reasonable compensation for—
 - (aa) necessary expenditure he had incurred, with or without the authority of the owner of the land concerned or of the developer, in relation to the preservation of the land; or
 - (bb) any improvement which enhances the market value of the land and was effected by him with the express or implied consent of the said owner or developer; and
- (b) the developer may in addition recover from the purchaser—
 - (i) a reasonable compensation for the occupation or utilization the purchaser may have had of the land;
 - (ii) compensation for any damage caused intentionally or negligently to the land by the purchaser or any person for whose actions the purchaser may be liable.

(2) Any alienation which does not comply with section 2 (1), shall in all respects be valid *ab initio* if the purchaser has in terms of the alienation rendered the full compensation and the land concerned has been transferred to the purchaser or the housing interest concerned has otherwise been vested in him.

Relief that court may grant in respect of contracts

9. (1) Notwithstanding any other law, but subject to any other power that a court may have, if a contract does not substantially comply with sections 3 and 4 (1), or if a seller has failed to meet any obligation under a contract or has contravened or has failed to comply with any provision of a regulation, and a purchaser proves that he has in consequence thereof suffered any prejudice, a court in whose area of jurisdiction the land to which the contract relates is situated, provided appropriate proceedings are instituted by the purchaser within a period of three years from the date upon which the contract was concluded, is competent—

- (a) to reduce the rate of interest payable to the seller in terms of the contract to such rate as it may deem just and equitable in the circumstances;
- (b) to grant an order for rectification of the contract;
- (c) to declare the contract to be void *ab initio*; or
- (d) to grant such alternative relief as it may deem fit.

(2) A magistrate's court shall, notwithstanding the value of the housing interest concerned, have jurisdiction to grant any relief contemplated in subsection (1).

* 10. Exemption from operation of provisions of Act.

The Minister may, by notice in the Gazette or by written notice sent by post or handed over, and subject to such conditions as he may determine, exempt any person, including any company or other juristic person or class of such persons, either generally or under such circumstances as may be specified in the notice and either indefinitely or for such period as may be so specified, from the operation of any or all of the provisions of this Act.

11. Regulations.

(1) The Minister may make regulations -

(a) prescribing the information to be contained in any advertisement in connection with the alienation of a housing interest;

(b) prescribing the information which should be disclosed in writing by a developer to a purchaser before the signature of a contract by the purchaser;

(c) regarding the alienation of housing interests and the control over and the operation of housing development schemes, including the payment of levies and the establishment of levy funds;

* (d) regulating advertising in connection with any housing development scheme on such conditions as the Minister may determine, or prohibit such advertising;

(e) regarding the establishment and utilization of facilities or services contemplated in section 4(1)(o);

(f) prescribing the rate of interest for the purposes of section 3(1)(a)(i);

(g) prescribing that the whole or any part of the Alienation of Land Act, 1981 (Act No. 68 of 1981), shall or shall not apply to the alienation of housing interests or to specified categories of housing interests;

(h) regarding any matter which is required or permitted to be prescribed by regulation, or is considered necessary or expedient to be so prescribed in order to achieve the objects of this Act.

* (i) prescribing the formalities for an application for an endorsement in terms of section 4C, the persons by whom such application may be prepared and the fees payable in respect of such application.

(2) A regulation may prescribe penalties for a contravention thereof or failure to comply therewith, not exceeding a fine of R12 000 or imprisonment for a period of three years.

(3) A regulation under paragraph (c) or (e) of subsection (1) may provide for the application thereof also in respect of housing development schemes erected at any time before the commencement of this Act.

Short title and commencement

12. This Act shall be called the Housing Development Schemes for Retired Persons Act, 1988, and shall come into operation on a date fixed by the State President by proclamation in the *Gazette*.