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# SCHEDULE OF CONTACTS

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Whilst every effort has been made to ensure the correctness of the contents of this document, Schindlers Attorneys cannot be held liable for any errors or omissions.

# WHO ARE CONVEYANCING ATTORNEYS AND WHY DO YOU NEED ONE TO TRANSFER YOUR PROPERTY

**WHAT IS A CONVEYANCER**

A conveyancer is an Attorney who has written and passed exams to specialise in property law. When we speak about property in this article we are speaking about immovable property, being the property in which you live and not other forms of movable property such as your car. To qualify as a conveyancer one must first become an attorney.

**WHAT DOES A CONVEYANCER DO**

A conveyancer deals with all matters related to property law and Deeds Office transactions. The Deeds Office is a government institution that records ownership of property and other rights related to property. The practice of conveyancing is not limited to the transfer of residential property however this article will only deal with the conveyancer's role in the transfer of residential property.

Most people will deal with a conveyancer when they buy or sell property or when they register a mortgage bond over their property. Once property has been sold a conveyancer will be required to transfer the property from the Seller to the Purchaser and if necessary register a mortgage bond so that the Purchaser can pay for the property.

The conveyancer will draw the documents that are needed to transfer a property or property right from one person to another and will make sure that the laws related to property transfers are complied with. The conveyancer will ensure that the agreement of sale is followed by both parties.

**WHY ARE CONVEYANCERS NECESSARY**

For most people, owning property will be their largest and most important investment. Property is also the most expensive asset most people will ever own. Our property registration system is one of the safest and best in the world. Conveyancers are an important part of this registration system.

In terms of the Deeds Registries Act only conveyancers may sign the documents needed to transfer property or register a mortgage bond. The Deeds Office does not have the capacity to check every single fact related to the property, the Purchaser and the Seller so when the conveyancer signs the Deeds Office documents, the conveyancer accepts responsibility that the documents are correct, that the Seller owns the property, that the Seller and Purchaser have the contractual capacity to sell and buy the property and that the transaction is correct in all respects.

**WHO CHOOSES THE CONVEYANCER and WHO PAYS THE CONVEYANCER**

The Seller chooses the conveyancer who will transfer the property. The conveyancer works towards the positive goal of transferring the property. The conveyancer will represent both parties to reach this goal. If the parties become involved in a dispute however the transferring conveyancer will represent the Seller.

The Purchaser may choose the conveyancer who will register the mortgage bond. The bond conveyancer does not represent the Purchaser but will rather represent the bank that has granted the mortgage bond.

In our system of property transfers the Purchaser pays the conveyancer's costs, these being the transferring conveyancer's costs and the bond conveyancer's costs. The costs are based on a tariff recommended by the Law Society.

# THE CONVEYANCING PROCESS

## AGREEMENT FINALISED BY AGENT

### BOND REGISTRATION PROCESS

Bond approved by Bank

**BOND REGISTRATION CONVEYANCER**

**Initial Steps:**

1. Request copy of draft titled deed and guarantee requirements from Transferring Conveyancer

Receive guarantee requirements and copy of draft deed

Prepare guarantees and bond registration documents

Purchaser signs and pay bond registration costs

Forward guarantees to Transferring Conveyancer

Ready to lodge

### TRANSFER PROCESS

**TRANSFERRING CONVEYANCER**

**Initial Steps:**

1. Request cancellation figures and release of title deed from bond holder
2. Obtain levy / rates clearance figures
3. Obtain supporting documentation from Seller and Purchaser

Rates / Levy clearance figures received – obtain cover from parties

Receive copy of title deed and cancellation figures from Bond Cancellation Conveyancers – draw transfer documents

Provide Bond Registration Conveyancers with guarantee requirements and copy of draft title deed

**SUBSEQUENT STEPS**

1. Purchaser and Seller to sign transfer documents
2. Purchaser to pay transfer costs
3. Obtain transfer duty clearance
4. Obtain rates / levy clearance certificate

Receipt of guarantees – forward to Bond Cancellation Conveyancers

Ready to lodge

### BOND CANCELLATION PROCESS

**Bond Holder** – receives request:

1. Calculates amount outstanding on Seller's bond
   Issues cancellation figures and title deed to bond cancellation conveyancer

**BOND CANCELLATION CONVEYANCER**

**Initial Steps:**

1. Forward copy of title deed and cancellation figures to Transferring Conveyancer – will need guarantee for amount required to cancel bond

Receive cancellation guarantee

Ready to lodge

## ARRANGE SIMULTANEOUS LODGMENT IN DEEDS OFFICE

### DEEDS OFFICE

1. Examination of Deeds
2. Transactions on "prep"
3. Registration of transactions

# DEEDS OFFICE PROCEDURE

**STEP 1**
Documents lodged in Deeds Office and linked

**STEP 2**
Personal/Property printouts are done-Interdict check

**STEP 3**
Batches are sorted for distribution to the examiners

**STEP 4**
First examination by Junior Examiner

**STEP 5**
Second examination by Senior Examiner

**STEP 6**
Third examination by Monitor Examiner

**STEP 7**
Deeds passed or rejected

**STEP 8**
Rejected Deeds sent to delivery

**STEP 9**
Passed Deeds on Prep

**STEP 10**
All in order: Deeds put forward for registration

**STEP 11**
Execution/registration

APPROXIMATELY 10 WORKING DA

5 DAYS ONLY

# FINANCIAL INTELLIGENCE CENTRE ACT NO. 38 OF 2001 ("FICA")

The Financial Intelligence Centre Act ("FICA") is anti-money laundering legislation that was introduced in South Africa in 2003. In practical terms this law aims to stop money laundering and to identify and prosecute all those involved in such activities.

In terms of FICA, a firm of Attorneys is an accountable institution which is required to verify the identity of every Seller on whose behalf a property transfer is registered, as well as every Purchaser on whose behalf funds are invested. Attorneys are also required to identify and obtain documentation in respect of every mortgagor for whom they register a mortgage bond.

In order to comply with the above Attorneys require certified copies of the following documentation:

**From Individuals**

- [ ] Certified copy of Identity Document
- [ ] Proof of income tax number (dated within the last twelve months)
- [ ] Proof of banking details (dated within the last three months)
- [ ] Proof of residence (dated within the last two months)
- [ ] Marriage Certificate and Ante Nuptial contract if applicable
- [ ] Divorce Order and Settlement Agreement if applicable

**From Companies**

- [ ] Certified copy of Memorandum and Articles of Association / Memorandum of Incorporation
- [ ] Certified copy of Certificate of Incorporation (with Registrar of Companies Stamp)
- [ ] Any document reflecting the trade name of the Company
- [ ] Proof of Registered Address and Physical business address (dated within the last two months)
- [ ] Proof of Income Tax number and VAT number
- [ ] Individual FICA (as above) for all Directors and any Sureties

**From Close Corporations**

- [ ] Certified copy of CK documents / Certificate of Incorporation / Founding Statement
- [ ] Any document reflecting the trade name of the Close Corporation
- [ ] Proof of Registered Address and Physical business address (dated within the last two months)
- [ ] Proof of Income Tax number and VAT number
- [ ] Individual FICA (as above) for all Members and any Sureties

**From Trusts**

- [ ] Certified copy of Trust Deed
- [ ] Certified copy of Letters of Authority issued by the Master of the High Court
- [ ] Certified copy of Trustees resolution
- [ ] Proof of Income Tax number and VAT number
- [ ] Individual FICA (as above) for all trustees, beneficiaries and any Sureties

# OFFER TO PURCHASE CHECK LIST

| | |
|---|---|
| **1. Has a deed search been done in order to check the following:** | |
| • The details of the correct registered owner | |
| • The correct property description (including extent of property) | |
| • If sectional title whether there are any registered exclusive use areas | |
| • Whether there are any adverse interdicts/attachments | |
| • Whether there is a Section 25 Real Right to extend registered that needs to be mentioned in the Agreement. (only applicable to Sectional Title) | |
| | |
| **2. If either the Seller or Purchaser is a Company or Close Corporation, has a CIPC / Company office search been done and are the relevant resolutions in place.** | |
| | |
| **3. If either Seller or Purchaser is a Trust have the Letters of Authority been provided** | |
| | |
| **4. Has the Seller been correctly described** | |
| | |
| **5. Does the Seller have the necessary contractual capacity** | |
| • Age of majority | |
| • Unmarried | |
| • Married in community / out of community / foreign marriage / Customary marriage / Hindu marriage / Muslim marriage | |
| | |
| **6. Has the Purchaser been correctly described** | |
| | |
| **7. Does the Purchaser have the necessary contractual capacity** | |
| • Age of majority | |
| • Unmarried | |
| • Married in community / out of community / foreign marriage / Customary marriage / Hindu marriage / Muslim marriage | |
| | |
| **8. Has the Property been correctly described** | |
| | |
| **9. Does the wording of the Purchase Price correspond to the numbered amount (check all such insertions).** | |
| | |
| **10. Is the purchase price inclusive or exclusive of VAT or is VAT not applicable** | |
| | |
| **11. Is there a deposit payable** | |
| | |
| **12. Does the deposit amount and the guarantee amount add up to the Purchase Price** | |
| **13. Has the occupation date been completed** | |
| • If the occupation date is extended, have the parties given the conveyancer a clear instruction to register as soon as possible or as close to the occupation date as possible | |
| • Will the requirements of the deposit, guarantees and transfer costs (and any other relevant conditions) be complied with before the occupation date | |
| | |

| | |
|---|---|
| 14. Has the occupational rent been agreed and inserted | |
| | |
| 15. Has the bond finance amount been inserted | |
| | |
| 16. Has the Purchaser been pre-qualified to determine if the loan is affordable | |
| | |
| 17. Does the Purchaser have sufficient time to get a bond having regard to the availability of documents etc. | |
| | |
| 18. Are there any fixtures or fittings which need to be included or excluded or that need a special mention | |
| | |
| 19. Is the Alienation of Land Act applicable | |
| | |
| 20. Has the Estate Agents Commission been agreed and inserted / dealt with | |
| | |
| 21. Is there a Property Owners Association | |
| | |
| 22. Have the Seller and Purchaser inserted their domicilium addresses as being a physical address in South Africa | |
| | |
| 23. Are there any special conditions that need to be inserted | |
| | |
| 24. Is there a reasonable expiry date inserted | |
| | |
| 25. Has the date and place of the signing by Seller and Purchaser been inserted. | |
| | |
| 26. Have both Seller and Purchaser initialled all pages of the agreement where necessary, including any deletions, alterations or additions | |
| | |
| 27. Have both the witnesses initialled all pages of the agreement where necessary, including any deletions, alterations or additions | |
| | |
| 28. Have the Seller and Purchaser signed the Agreement in full where required | |
| | |
| 29. Have both witnesses signed the Agreement in full where required | |
| | |
| 30. Have both the Seller and Purchaser completed the information page | |
| | |
| 31. Has the Seller inserted his bond account number or indicated where the original title deeds are | |
| | |
| 32. Is there a need for a surety to sign on behalf of the Purchaser? | |
| | |
| 33. If a surety is a requirement has the surety initialled where necessary and signed in full. | |
| | |
| 34. Are there any blank spaces | |
| | |
| 35. Has the agreement been completed in black ink | |
| | |
| 36. Is the agreement legible | |
| | |
| 37. Are there any relevant annexures | |
| | |

# GENERAL CONVEYANCING CONCEPTS

**INTRODUCTION**

Prior to the registration of immovable property, there are a number of procedures which must be followed. The conveyancing system utilises para-legal secretaries who work in conjunction with conveyancing Attorneys. The para-legal secretaries attend to the day to day running of a matter. Clients are however always welcome and in fact are encouraged to contact one of the conveyancing Attorneys to discuss any aspect of the conveyancing process relevant to a matter. The steps taken after receipt of the Deed of Sale and prior to registration of transfer vary from transaction to transaction, there are however certain steps which are uniform throughout.

**SUSPENSIVE CONDITIONS**

A suspensive condition is a condition that suspends the operation of the contract until such condition has been met. Although there are various possible suspensive conditions the most common suspensive condition in a deed of sale is that of the obtaining of loan finance, i.e. a mortgage bond. A deed of sale is not enforceable until the suspensive conditions are fulfilled. In the case of a suspensive condition relating to a mortgage bond, the Purchaser is obliged to take active steps toward the obtaining of that bond.

**CANCELLATION OF EXISTING BOND**

In order to transfer the immovable property to the Purchaser, the Seller's existing bond (if any) must be cancelled. At this juncture it is important to realise that the cancellation of the existing bond, transfer of property and registration of the new bond, where applicable, all take place on the same day in the Deeds Office.

The most time consuming procedure is the obtaining of the title deeds and cancellation figures in respect of the Seller's existing bond. Sellers are encouraged to provide their bond account details speedily in order to facilitate this. In terms of the National Credit Act Banks are entitled to 90 days interest in lieu of notice.

Sellers must be aware of the fact that the Attorneys appointed by the Bank to cancel the existing bond (the bond cancellation Attorneys) charge on average R1 900-00 for such cancellation. This fee is paid by the transferring Attorneys and is recovered from the Seller on registration of transfer.

In the event of there being no existing bond, the Seller is required to provide copies of the title deeds by facsimile. The original title deed must be lodged by the conveyancer in the Deeds Office and this document must thus be delivered to the conveyancers by the Seller when signing the transfer documents.

In the event of a title deed being lost, the conveyancers will obtain Deeds Office certified copies which may take some time. Sellers are thus requested to ensure that the original documents are available and advise the conveyancer as early as possible if this is not the case.

**DOCUMENT DRAFTING**

On receipt of the title deeds from the Sellers bank, the transfer documents are drafted and the Seller and Purchaser will be required to sign same.

The Bond Attorneys will draft the bond documents for signature once they receive the draft deed and guarantee requirements from the transferring Attorneys.

The Deeds office is extremely particular. One incorrect letter or number will result in the documents being rejected from the Deeds office with resultant delays. In order to avoid this the Seller and Purchaser are requested to provide identity documents/trust documentation/company documentation as soon as possible. (See FICA compliance in this regard).

**GUARANTEES**

If a mortgage bond is involved, the required information is sent to the Attorneys attending to the registration thereof (the bond Attorneys) to enable them to prepare their documents and to issue guarantees.

It must be borne in mind that the bond and transfer fees are charged for separately and the Purchaser must make provision for both these costs. These are generally payable once the documents are signed.

Unless the Bond Attorney has a Power of Attorney to sign guarantees on behalf of the Bank, the issuing of the guarantees for the payment of the purchase price from the bond can be a time consuming process. The Purchaser is requested to attend to the signature of the bond documents as early as possible to facilitate this process and avoid delays.

**FINANCIAL INTELLIGENCE CENTRE ACT NO. 38 OF 2001 ("FICA")**

Before a transaction can be registered, the conveyancing Attorney must obtain FICA documents from the Seller and Purchaser. These documents provide proof of the client's identity, as well as proof of the client's residential address, tax registration and physical address. Please see the document headed Financial Intelligence Centre Act in this bundle for a comprehensive list of the documents required under the Act.

In the case of a bond registration, the various banks have different requirements in regard to FICA. On average however the Banks consider this a very important requirement and in some instances the bond Attorneys may not lodge in the Deeds Office until such time as the Bank has given a FICA proceed (thus the importance of the parties providing proper FICA information and documents timeously).

**LODGMENT**

Provided that the transfer, bond and bond cancellation Attorneys are ready to lodge, the documents are lodged in the Deeds Registry for examination.

Provided that there are no additional complications, transfer should be registered between ten and fifteen working days after the deeds have been lodged in the Deeds Registry.

**PAYMENT OF GUARANTEES ON REGISTRATION**

The bank registering the bond is required to make payment of the purchase price in terms of the guarantees on the date of registration. However due to the fact that conveyancers are reliant on outside factors, in practice this does not always occur, although conveyancers endeavor to ensure timeous payment. The funds reflect in the conveyancers trust account on the day after payment and payment to the Seller is made on this day.

Sellers and Purchasers are requested to provide banking details, prior to registration, in order to facilitate payment of funds due.

**RETURN OF TITLE DEEDS**

After registration the title deeds move through a post registration process in the Deeds Office. This process takes up to 4/6 months to complete, dependant upon the capacity of the Deeds Office. The title deeds are returned to the conveyancing Attorneys after this process is complete and not before.

Where the sale is subject to a mortgage bond the title deeds to the property will be sent to the bank as part of the banks security for the loan. Where no bond is applicable the title deeds will be given to the new registered owner for safe keeping.

**ESTATE AGENTS COMMISSION**

Commission due to the Estate Agent is paid from our office out of the proceeds of the sale on the date of registration.

**OCCUPATIONAL RENTAL**

In the event of occupation before transfer, the Purchaser must make payment of occupational rent monthly in advance subject to pro rata adjustments for registration mid-month. Occupational rental is to be paid either to the conveyancers or the Seller or as directed by the agreement of sale.

**TELKOM TELEPHONE**

The Purchaser may contact the Seller requesting the Seller to transfer its telephone into the Purchaser's name. If the Seller does not transfer the telephone account into the name of the Purchaser or to the Seller's new address, the Seller must remember to cancel the connection with Telkom. Purchasers and Sellers can contact Telkom on 10219 in order to arrange a new telephone line.

**FIXTURES AND FITTINGS**

Unless by agreement to the contrary in writing:

a) TV aerials are fixtures along with the mast. M-Net aerials and satellite dishes remain the property of the Seller;

b) a Seller is obliged to hand over all keys and remote controls which are required to make any of the locks on the premises work;

c) pot plants (indoor and outdoor) may be removed by the Seller but all plants planted in the garden must remain;

d) all pool equipment must remain including automatic pool cleaner. These are considered fixtures;

e) garden decorations like lamps, fountains and gnomes are considered fixtures; and

f) mirrors hanging or fixed in bathrooms are considered fixtures while hanging mirrors in the rest of the Property are considered ornaments and may be removed.

**CARPET CLEANING**

It is not prescribed that the Seller must clean the carpets before occupation, but it shows goodwill especially if they have been blemished during the vacating process.

**RISK AND INSURANCE**

In most standard agreements of sale of immovable property the risk in the property remains with the Seller until registration of transfer. Therefore, should anything go wrong with the property (other than damage caused by the Purchaser's negligence), the Seller would be liable for repair costs. The Seller's Property owner's insurance (normally linked to your bond) keeps the property (structural) covered until registration. In the event that the Seller does not have a bond, he/she should ensure that the insurance remains valid until registration.

In the event of Purchasers purchasing property without a bond, they are advised to arrange sufficient insurance to be effective at the date of the passing of risk. (Not applicable in the case of sectional title)

**ALTERATIONS**

Neither party may make alterations to the property prior to registration without the prior written consent of the other party.

**VOETSTOETS**

The property is sold 'Voetstoots' or 'as it now lies'. It is the Seller's responsibility to maintain the property in its current condition until occupation or registration, whichever occurs first.

# BOND REGISTRATIONS

**INTRODUCTION**

The steps taken after receipt of an instruction from the bank and prior to registration of a mortgage bond vary from transaction to transaction, there are however certain steps which are uniform depending on the type of bond instruction and we set these out below, together with a brief explanation. This is not intended to be an exhaustive resume of all procedures in every transaction but is intended simply as a guideline.

**BOND CONDITIONS**

When the Banks instruct Attorneys to register a mortgage bond, the instruction is accompanied by various bond registration conditions. The Attorneys should provide a copy of these conditions to the client. It is of great importance that clients peruse and assist the Attorneys with the fulfillment of these conditions to avoid unnecessary delays as the Attorneys are not permitted to register any mortgage bond until such time as <u>all</u> conditions have been completely fulfilled.

**FICA REQUIREMENTS**

In terms of the Financial Intelligence Centre Act, the Banks are required to FICA all clients. Attorneys are also accountable institutions in terms of this legislation and also have the obligation to FICA all clients. Attorneys are mandated and obliged by the Banks to collect the FICA information on behalf of the Banks.

It is a registration policy of most banks that a matter may not be registered in the Deeds Registry (and in some cases may not be lodged in the Deeds Registry) before the Attorneys have sent to the Bank the certified copies of the clients FICA documents and received the Banks consent to proceed further. The Banks are very particular on this issue and regard the obligation as most serious. Clients are encouraged to provide the necessary information in order to avoid delays.

**SWITCHING BONDS**

A switching bond is where a client has a bond with another bank and wishes to cancel that bond and change to a new bank.

The procedure here is that the first registered bond needs to be cancelled and the new bond registered. These two registrations take place simultaneously in the Deeds office.

The Bond Attorneys will require the current bond account number to obtain cancellation figures from the existing bank. The existing bank will instruct an attorney on their panel to attend to the cancellation of the registered bond on their behalf and will send them the relevant title deeds and bond/s together with cancellation figures.

Should the bank not be in possession of the title deed and/or mortgage bond/s registration copies will have to be obtained from the relevant deeds office which may take some time. On receipt of copies of the title deed the Bond Attorney will be in a position to prepare your documents for signature.

Clients should be aware that on average an amount of R1 900.00 is charged per bond cancellation but this amount varies according to the amount of the bonds being cancelled. This fee will have to be paid by the client unless the bank taking over the existing bond agrees to cover such fees.

If the registered bond contains an access facility and the client wishes to draw funds from the account, the client should advise the Bond Attorney of same as early as possible as from the moment the cancellation figures are issued the registered bond account will be frozen and there will be no access to the relevant funds.

In terms of the National Credit Act Banks are entitled to 90 days interest in lieu of notice. Should this notice not have been given, the client will have to wait a period of 90 days for the time period to expire, whereafter the Bond Attorney shall proceed to cancel and register the new bond.

During the above process the client will be required to continue to pay the monthly bond installments. This money is however not lost and the bank will refund post registration any monies received in excess of the cancellation amount.

On receipt of the cancellation figures and copies of the bonds the Bond Attorney will prepare the documents for signature. Once these bond documents have been signed guarantees will be issued. Guarantees will then be sent to the cancellation attorneys and the bond documents will be prepared for lodgment and for submission to the bank in question.

**NEW BONDS**

A new bond registration takes place where a Purchaser purchases property and a mortgage bond is to be registered as a first bond to finance the purchase price.

On receipt of a new bond instruction the Bond Attorneys will advise the Transferring Attorneys of the amount available for guarantees and will simultaneously request a copy of the title deed and their guarantee requirements.

Once the Bond Attorneys are in receipt of the draft deed the documents are prepared for signature. Once the documents have been signed the Bond Attorneys issue guarantees and send them to the Transferring Attorneys. The Bond Attorneys further prepare the bond documents to be sent to the bank and the deeds office.

The Bond Attorneys then await an instruction from the Transferring Attorneys that they are ready to lodge in the deeds office.

**FURTHER LOANS**

A further loan is one where the owner of property already has a bond registered over the property and is now loaning further funds from the bank who is the bond holder in respect of the first bond. The further mortgage bond is registered as a second (or third or fourth etc) bond to secure the further loan by the bank to the owner of the property.

On receipt of a further loan instruction the Bond Attorney will request the title deed from the bank as the original deed needs to be lodged in the deeds office for endorsement. In the interim documents are prepared for signature. Once the documents are signed and the Bond Attorneys are in receipt of the title deed from the bank the matter is lodged in the Deeds Office and the balance of the documents are sent to the bank.

**SUBSTITUTION OF DEBTOR**

Section 45 and section 57 of the Deeds Registries Act create certain situations whereby one debtor can substitute another under a registered mortgage bond. The substitution is effected by way of an endorsement against the existing bond.

Section 57 applies where the whole of the mortgaged property has been transferred to the new mortgagor and the mortgagor has not reserved any real right in the land. An example of this is where one joint owner of property sells his share to his co-owner and the purchaser substitutes the seller under the existing bond and takes full responsibility under the bond.

Section 45 of the Deeds Registries Act allows for transfers by endorsement in certain circumstances. The first is a Section 45(1) transfer whereby property which formed part of a joint deceased estate and the surviving spouse has acquired the deceased spouse's share in the property. Section 45 *bis*(1)(a) applies to the situation where spouses who were married in community of property get divorced and one spouse is entitled to the other spouses share in the property in terms of the divorce order. In these scenarios the bond will also be endorsed to reflect the substitution of debtor under the bond.

# WHAT YOU NEED TO KNOW ABOUT RATES CLEARANCE CERTIFICATES

**WHY IS A RATES CLEARANCE CERTIFICATE NECESSARY**

A rates clearance certificate (RCC) is a document obtained from the City Council that certifies that the Seller does not owe any money to the City Council for the 2 year period preceding date of application for the RCC. The Registrar of Deeds acts as a policeman on behalf of the City Council and will not transfer a property from the Seller to the Purchaser unless the conveyancer presents a RCC when lodging the documents in the Deeds Office.

**RATES CLEARANCE CERTIFICATES ARE NEEDED FOR FREEHOLD PROPERTY AND SECTIONAL TITLE PROPERTY**

From 1 August 2008 Sectional Title Properties are treated the same as freehold properties and each sectional title property owner will receive a rates account from the City Council. This means that a RCC must be obtained before Sectional Title properties may be lodged and registered in the Deeds Office just as in the case of freehold properties.

**PAYMENT OF RATES BEFORE TRANSFER**

The conveyancer calls upon the City Council for rates clearance figures. The figures are worked out by the City Council and not the conveyancer. The RCC will include arrears for rates and taxes, electricity and water and sewerage and refuse and will also include an advance portion which is discussed below. It is important to note that the Seller will be responsible for all accounts opened in respect of the property sold, even if accounts were opened by tenants. Once the rates clearance figures are received, the conveyancer will present them to the Seller to ensure the correctness thereof and ask for payment.

**WHOSE RESPONSIBILITY IS IT TO OBTAIN A RATES CLEARANCE CERTIFICATE**

It is the Seller's responsibility to pay all amounts needed to obtain the RCC. The Seller must pay the conveyancer (and not the City Council directly) who will pay the City Council as the City Council requires rates figures to be paid with a trust cheque. The RCC must be obtained and paid for before the lodging of transfer documents in the Deeds Office.

Sellers should let the conveyancer have copies of all municipal accounts to expedite the application process.

Once the conveyancer has obtained funds from the Seller and paid for and obtained the RCC, the Seller's account at the City Council will be in credit and the Seller can discontinue paying monthly rates as a result of the credit.

**WHY MUST THE SELLER PAY IN ADVANCE**

The City Council will claim rates and taxes, electricity, water, sewerage and refuse for a period of 90 -120 days in advance. The law related to the RCC says that a RCC must be valid for a period of 60 days from the date of issue of the RCC by the City Council. The City Council gives the Seller 1-2 months to pay and thereafter the RCC is valid for the 60 day period. Should the amount not be paid in time and the figures expire, new figures will need to be obtained.

**WILL THE SELLER BE REFUNDED BY THE CONVEYANCER ON REGISTRATION**

The conveyancers will not refund any funds to the Seller on registration. The conveyancers have been instructed by the City Council of Johannesburg not to refund the Seller for any amounts paid past the registration date.

**WHEN DOES THE SELLER GET A REFUND FROM THE CITY COUNCIL AND HOW**

After registration and once the municipal charges are transferred to the Purchaser's accounts there is usually a credit left on the Seller's municipal accounts. This means that the Seller is owed a refund by the Council. The Council takes approximately 6 to 9 months to reconcile the Seller's and Purchaser's accounts and pay the refund. The Seller has to expressly request a refund from the municipality, it does not happen automatically.

The Seller should complete a Refund Application wherein the Seller’s banking or postal details are specified. The Council will thereafter provide the Seller with payment of the refund directly in due course.

## CITY OF JOHANNESBURG

**OPENING OF NEW ACCOUNTS BY THE PURCHASER**

Should the property transferred be a sectional title unit, no action needs to be taken and the city council will transfer the rates account in the ordinary course.

There are different types of accounts at the city council, these being the rates account and the service accounts.

Purchasers will not receive rates or services accounts for some time after registration of the transfer and as such need to make provision for these anticipated costs.

On registration of transfer the conveyancers send a letter to the City Council notifying them that the transfer has taken place. The conveyancers will advise the city council of all relevant information relating to the transfer and the date of registration.

The Deeds Registry also independently notifies the city council of the transfers that have taken place.

Rates Accounts

After transfer the city council will transfer the rates account from the Seller to the Purchaser. The transfer of this account should be done by the city council without the need for any intervention from the parties. This process should take approximately 30 days from registration of transfer but could take several months.

Prior to the transfer of the rates account from the Seller to the Purchaser, the Purchaser will not be permitted to open any services account.

To check when the rates account has been transferred Purchasers can call 011 375 5555 and log a service request to have the rates account transferred.

As an alternative Purchasers can visit the city council's premises at Thuso Property, 61Jorrisson Street or any Regional Service Centre.

Details of the nearest regional service centre are available online at www.joburg.org.za . There are over 20 options available for the greater Johannesburg area. Purchasers can visit the centre most convenient regardless of where the property is situated. Note that service levels and advice given by the city council will vary.

Services Accounts

Once the rates account has been transferred from the Seller to the Purchaser, the Purchaser can open up the applicable service accounts.

Service accounts include Water, Pikitup, Electricity supplied by City Power. Should electricity be supplied by Eskom please refer to the Eskom procedure to open and close an account. In some instances water will be supplied directly by the properties home owners association or body corporate in which case the home owners association or body corporate must be referred to.

In order to open the service accounts Purchasers can visit the city council's premises at Thuso Property, 61Jorrisson Street or any Regional Service Centre. (as above)

Note that the city council no longer allows for tenant accounts to be opened and accounts can only be opened in the registered owner’s name. (Thus the city council’s reason for insisting the rates account be first transferred to the Purchaser before new service accounts be opened).

The Purchaser will need the following in order to open an account:

**Individual Applicant**

| |
|---|
| An application form for the service (available at the municipal offices) |
| Copy of the Identity Document of the applicant |
| Next of kin details |
| Meter readings and numbers (please remember to take these on registration of transfer and on occupation if different) |
| Copy of spouse's Identity Document and spouses details |
| Applicant's bank account details, spouses employer details and monthly income |
| A letter from the Conveyancer stipulating the registration date |
| Sufficient funds to pay a deposit which will be equal to the average of the Seller's service charges for the 2 (two) months immediately preceding the opening of the account (cash or cheque only). Obtain this estimate from the information given to you by the conveyancer or ask your conveyancer for this amount. |

**Company, Close Corporation and Trusts**

| |
|---|
| The information above for individuals as may be applicable: |
| Company, close corporation or trust documents |
| Identity Documents of all directors/trustees/members |
| A letter/resolution authorizing the signatory to open the account and sign all the necessary documents |

**CLOSING ACCOUNTS**

For rates accounts, the Seller is not required to do anything. For service accounts the Seller should complete a 'Cancellation of Consumer Agreement Form' at the regional service centre or Jorrisson Street.

Provided that the rates have been transferred and the Purchaser has paid a deposit and opened the services account, the city council will bill the Purchaser for rates and services from the date of registration of transfer and debit the Purchasers new account accordingly.

Until this point in the process the Seller would still be receiving accounts from the City Council and would have noted that the credit on the account is being used up by the Purchasers rates and consumption charges. In other words until the Purchaser has opened new accounts all charges on the account, for example, for rates, water, electricity, sewerage and refuse will be billed to the Seller's municipal accounts and the Seller will continue to receive monthly statements.

When the city council debits the Purchasers new accounts, the Seller's accounts will be credited. It is at this stage that the Sellers refund is processed and paid out.

**OCCUPATION BEFORE REGISTRATION OF TRANSFER**

Should the Purchaser occupy the property prior to registration of transfer, the Purchaser is liable for electricity and water consumed. These individual arrangements are not accounted for by the city council and as such the parties should make provision for the Purchaser to reimburse the Seller directly for any consumption charges incurred prior to registration of transfer.

**OCCUPATION AFTER REGISTRATION OF TRANSFER**

Should the Seller likewise remain in occupation of the property after registration of transfer the Purchaser will be liable directly to the city council for these charges. As such the Seller should pay to the Purchaser the consumption costs even though the Seller may have paid his own account in advance.

**GENERAL**

In order to draft this article the City of Johannesburg was approached for information as were various city council consultants and other sources. The information offered by the City of Johannesburg varied from person to person.
It is to be understood that in dealing with the City of Johannesburg sellers and purchasers are not going to always find consistency. The various time periods and procedures are going to vary to some degree.
Should a satisfactory result not be achieved it is recommended that the services of a city council consultant be utilised. Please contact us for recommendations in this regard where necessary.

## EKURHULENI METROPOLITAN MUNCIPALITY

The requirements of the Ekurhuleni Metropolitan Municipality are the same as that of the City of Johannesburg above, save that:

1. It is not a requirement that the rates account be transferred from the Seller to the Purchaser before the Purchaser can open the services account;
2. The contact details for Ekurhuleni are as follows:
   Call centre no: 0860 543 000
   Web site address: www.ekurhuleni.gov.za

Each customer care centre has its own email address, direct number and physical address listed on the above website.

## ESKOM

In instances where electricity is supplied to the property directly by ESKOM, the onus rests on the seller/s and buyer/s respectively to finalise and open their accounts.

Sellers are to contact the ESKOM Customer Call Centre on 08600 ESKOM (37566). Sellers are to provide the call centre with final meter readings, the date of vacation of the property, all relevant account details and future contact details.

The call centre will issue a reference number which the Sellers are to provide to the Purchasers. This is referred to as Eskom's "Move Out" process.

The Purchasers are required to contact the call centre and provide the aforesaid reference number. The Purchasers will then be required to provide the call centre with all their relevant information to enable the call centre to open the new account.

The Purchaser will complete a "voice contract" with ESKOM in respect of the new account and will be advised of the deposit/s payable. This is referred to as Eskom's "Move In" process.

Please note that ESKOM will not allow the finalisation of the Seller's account unless all arrears and current charges are paid up to date.

# GUARANTEES

**GENERAL**

When a Conveyancer is appointed to attend to the transfer of property, one of the most important functions of a conveyancer is to secure the purchase price of that property.

To secure the purchase price the conveyancer must either have received payment of the purchase price in cash and have the actual funds in his trust account, alternatively the conveyancer must have received a guarantee for the payment of the purchase price issued by a registered South African Bank.

All standard offers to purchase property contain a clause that obliges the purchaser to either pay the purchase price in full in cash, alternatively to secure the purchase price by means of a guarantee issued by a registered South African bank. The guarantee must set out the value of the guarantee and must be payable upon the registration of the property from the Seller to the Purchaser in the Deeds Registry.

The guarantee is usually to be delivered within a specified period of time.

**WHAT IS A GUARANTEE ?**

In other words the guarantee is a document issued by a registered South African Bank that guarantees the payment of funds upon the happening of certain events.

Guarantees are signed by a representative of the issuing bank or an authorised agent who signs the guarantee by virtue of a power of attorney.

On registration of transfer of the Property from the Seller to the Purchaser in the Deeds Registry, the conveyancer will notify the issuer of that guarantee of the registration. The guarantee is then payable and funds are paid in terms of that guarantee into the nominated trust account.

**THE SOURCE OF THE GUARANTEE ?**

The source of the guarantee depends on the terms of the individual agreement entered into. If the purchase price is to be secured by a mortgage bond, the guarantee will be issued by the bank who granted the mortgage bond. This is done with the assistance of the attorneys appointed to register the mortgage bond.

If the purchase price is to be secured in cash, there are two ways to issue the guarantee. The first method would be for the purchaser to pay the funds into the conveyancers trust account and allow the attorney to issue the necessary guarantee. Most attorney's do not charge for the issue of this guarantee. The Purchaser will further receive interest on the funds in the conveyancers account.

The second method would be for the Purchaser to leave the funds in his banking account and request his bankers to issue the required guarantee. The conveyancers would provide the guarantee requirements. The disadvantage in this method is that the banks do charge a fee for the issue of this guarantee. The fee varies from bank to bank.

**A MATTER OF TRUST?**

Purchasers often enquire whether they can effect payment of the purchase price on registration without the issue of a guarantee. The answer to this question is no. The reason being that the conveyancer has a duty to the Seller to secure the purchase price such that on registration the payment of that purchase price is guaranteed. This is not possible without a valid guarantee.

This is not a matter of trust but rather one of practicality and contractual compliance.

# RULES FOR 90 DAY NOTICE PERIOD FOR BOND CANCELLATIONS

| | ABSA | NEDBANK | Standard Bank | FNB | SA Home Loans | Investec |
|---|---|---|---|---|---|---|
| **90 DAYS NOTICE REQUIRED?** | **YES** | **YES** | **YES** | **YES** | **60 DAYS** | **YES** |
| **CAN PENALTY INTEREST BE WAIVED/ REFUNDED?** | **If a new bond is registered with ABSA simultaneously or within 6 months with cancellation – penalties can be refunded upon request** | **If a new bond is registered with Nedbank simultaneously or within 12 months - penalties will be waived/refunded, or**<br><br>**if account balance is NIL, no penalties will apply** | **NO** | **If a new bond is registered with FNB within 6 months of cancellation of your bond, penalty interest will be waived/ refunded on registration** | **YES, in the event that the bond is more than 2 years old, no penalty will apply** | **Determined on a case by case basis** |
| **PRO- RATA *** | **YES** | **YES** | **YES** | **YES** | **YES** | **YES** |
| **DOES NOTICE PERIOD EXPIRE? **** | **YES Must apply for extension** | **YES after 12 months** | **YES One month grace period applies providing guarantees have been received** | **YES after 12 months** | **YES Application must be made for extension of notice period** | **YES Application must be made for extension of notice period** |
| **PENALTIES FOR DECEASED ESTATES** | **NO** | **NO** | **NO** | **NO** | **NO** | **YES** |
| **PENALTIES FOR SEQUESTRATIONS** | **NO** | **NO** | **NO** | **NO** | **NO** | **YES** |
| **NUMBER TO CALL** | **0860 023 646 011 971 3756** | **0860 555 111** | **0860 123 001** | **0860 334 455** | **0861 888 777** | **Contact Investec Private Banker** |
| **NUMBER TO FAX** | **0860 109 303** | **MUST CALL Email: requestcanwg@nedbank.co.za** | **JHB: 0861 111 146 DBN: 0861 111 800 CPT: 0861 111 803** | **0861 334 444 / 45** | **031 571 3150** | **Contact Investec Private Banker** |

*** In cases where loans are cancelled within the 90 day notice period, such interest is charged on the remaining days of the notice period**
**** The notice period does not expire if cancellation instructions have been issued to the conveyancers**
**E & OE – November 2012**

# THE *VOETSTOOTS* CLAUSE: WHAT ALL SELLERS AND PURCHASERS SHOULD KNOW

**WHAT DOES *VOETSTOOTS* MEAN**

This term means that property is sold 'as it stands' or 'as is'. The '*voetstoots*' clause as it is commonly known is found in most agreements of sale of immovable property. An example of the wording of a *voetstoots* clause is as follows:

> *The Property is sold voetstoots in the condition in which it stands and the Seller gives no warranty with regard thereto, whether express or implied.*

**WHO DOES THE *VOETSTOOTS* CLAUSE PROTECT**

The *voetstoots* clause is written into the agreement of sale for the protection of the Seller. The protection this clause gives to the Seller is that the Seller is not responsible for any defects which are in the property whether these be latent or patent. The Purchaser buys the property in the condition in which it is found at the date of sale regardless of the condition of the Property.

**WHAT IS A PATENT AND LATENT DEFECT**

A patent defect is one which is obvious and easily seen such as a large and noticeable crack in the wall. A latent defect is one which is hidden and not easily seen. Examples of latent defects are hidden damp, leaking pools and structural problems which can't be seen with the naked eye.

**WHAT ARE THE SELLER'S RESPONSIBILITIES: THE DUTY TO DISCLOSE**

The Seller has certain responsibilities. Whilst this clause will protect a Seller, the protection only goes so far. The Seller has the "duty to disclose" any defects which are latent, in other words any defects which are not obvious. If the Seller hides defects in the property on purpose, the Seller will not be protected. In other words the *voetstoots* clause will not protect a Seller who knows of a defect in the property but does not tell the Purchaser about the defect. Sellers should also be aware that the law goes even further than a simple failure to tell the Purchaser about a defect in that the *voetsoots* clause will also not protect a Seller who tells a half truth.

It is good advice to fix as many of the defects as possible before selling the property. An added advantage of this is that the property becomes more marketable as a result of these efforts.

**WHAT ARE THE PURCHASER'S RESPONSIBILITIES: THE DUTY TO INSPECT**

The Purchaser also has certain responsibilities when buying property. This responsibility is the "duty to inspect". The Purchaser must inspect the property and must be aware of the condition of the property as the Purchaser will have to "live" with any defects. If the Purchaser sees defects that are not acceptable, the Purchaser must write into the offer to purchase that the problem be fixed by the Seller prior to registration of transfer. If the Seller accepts the offer to purchase with this condition, that Seller has then agreed to fix the problem.

**CONCLUSION**

In conclusion Sellers should remember that while the property is sold voetstoots it remains the Seller's responsibility to maintain the property in the same condition from the date of sale until the date of transfer in the Deeds Office.

# VOETSTOOTS AND THE CONSUMER PROTECTION ACT

**INTRODUCTION**

Since the promulgation of the Consumer Protection Act on 1 April 2011 (CPA) there has been debate as to whether the *voetstoots* clause is permitted by the CPA.

This article serves as an argument in the first instance that the CPA does not apply to the vast majority of residential immovable property sales and in the second instance that if the CPA is applicable, the inclusion of a *voetstoots* clause is not prohibited.

**WHAT DOES VOETSTOOTS MEAN**

This term means that property is sold 'as it stands' or 'as is'. The '*voetstoots*' clause as it is commonly known, is found in most agreements of sale of immovable property. An example of the wording of a *voetstoots* clause is as follows: *The Property is sold voetstoots in the condition in which it stands and the Seller gives no warranty with regard thereto, whether express or implied.*

**EXCLUSIONS FROM THE CONSUMER PROTECTION ACT**

The CPA contains various limitations and not all sales of immovable property are covered by this legislation. One of the central exclusions is to be found in the definition of a "transaction". A transaction only falls within the CPA if that transaction is within the "ordinary course of business" of the supplier of the goods sold.

In other words a sale of immovable property is a "transaction" for the purposes of the CPA if that sale is made in the "ordinary course of business" of the seller of that property.

The effect of this exclusion is that where immovable property is sold by a person whose usual or ordinary business is not the sale of immovable property, that sale will not be protected by the CPA at all as the CPA would not be applicable. The clearest example of this is where a residential home owner sells his property.

**WHAT IF THE CPA DOES APPLY**

Chapter 2 of the CPA contains a series of fundamental consumer rights. One of those rights is the consumers right to safe and quality goods. This right includes the right to receive goods which are suitable for the purpose generally intended, of good quality, in good working order and free of any defects.

In making a determination as to this right, regard must be had to all circumstances including the manner in which the goods were marketed. The provisions of this clause do not apply where the consumer:

(a) has been expressly informed that the particular goods were offered in a specific condition; and

(b) has expressly agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting the goods in that condition.

In other words, if the consumer is aware that the property is sold in the condition in which it stands at the date of sale and where the consumer has an opportunity to inspect the property, it is argued that this exception permits the continuation of the *voetstoots* clause.

It is suggested that under these circumstances the Purchaser must be made to thoroughly inspect the property and the Seller is to provide the Purchaser with a comprehensive defect list which should be annexed to the sale agreement. It is further suggested that the following clause, which should be highlighted, be included in the agreement for the sale of immovable property.

<u>*VOETSTOOTS (IN THE CONDITION THAT THE PROPERTY STANDS ON DATE OF SALE)*</u>

1. *The Purchaser records that s/he understands that the Property sold in terms of this offer to purchase has been offered for sale by the Seller in the condition in which it stands on the date this agreement is signed.*
2. *The Purchaser records that s/he has had an opportunity to inspect the Property. The Purchaser specifically agrees to accept the Property in the condition in which it stands as at the date this agreement is signed.*

# THE VOETSTOOTS CLAUSE AND STATUTORY APPROVAL FOR BUILDING ALTERATIONS
# *ODENDAAL V FERRARIS* (422/2007) [2008] ZASCA 85

**THE FACTS**

The defendant in this matter purchased immovable property from the plaintiff. The defendant alleged that there were certain latent defects in the property and that the carport and an outbuilding did not have the necessary approved statutory plans.

The matter was lodged in the deeds office and came up on prep. The purchaser instructed his bond attorneys not to register the matter due to the alleged latent defects and absence of statutory plans. The seller alleged that the purchaser had breached the contract by instructing his bond attorneys not to register the matter and thereby repudiating the contract. The seller cancelled the contract on the basis of this breach.

The seller of immovable property then made application to court for the eviction of the purchaser from property sold. The purchaser opposed the application on the basis that he was not in breach of the agreement and the seller was thus not entitled to cancel the agreement.

The seller alleged that the *voetstoots* clause protected him against the allegation of latent defects and the absence of approved statutory plans.

**THE PREVIOUS LAW**

The law prior to this case was examined. The case of Van Nieuwkerk v McCrae 2007(5) SA 21 W was discussed. In this case the court held that in the sale of residential property a buyer is entitled to assume that the building on a property was erected in compliance with all statutory requirements. This assumption was held to be implied in any agreement relating to the sale of property. It was further held that it was an implied (or at least tacit term) of such an agreement that alterations to the building also complied with the statutory requirements.

**WHAT THE COURT HELD**

In this case, the absence of the statutory approvals did not render the property unfit for the purpose for which it was purchased.

The absence of a statutory approval for building alterations on the property constitutes a latent defect.

If a purchaser wishes to avoid the consequences of a *voetstoots* clause he has to show not only that the seller knew of the defect and did not disclose it, but also that he deliberately concealed it with the intention to defraud.

In this case the purchaser had failed to show that the seller had acted fraudulently and thus could not avoid the consequences of the *voetsoots* clause.

The court further found that the purchaser had no basis to instruct his bond attorneys not to register the matter, that this was a breach and the seller was entitled to cancel the agreement. The Seller was granted the eviction order.

**SUMMARY**

The importance of this case is that it revisits the issue of approved building plans and ruled that these are to be treated as ordinary latent defects. If the seller is aware of the absence of these plans, he must disclose this as a latent defect. If the seller is not aware of the absence of these approved building plans, he is not able to disclose this and the *voetstoots* clause will protect him.

# PURCHASER'S GUIDE TO PURCHASING IMMOVABLE PROPERTY

**INTRODUCTION**

Prior to signing a sale agreement for the purchase of immovable property there are a number of issues that should be considered by any prudent purchaser.

**INSPECTING THE PROPERTY**

When purchasing immovable property, the seller's duty is to disclose all latent (hidden) defects in the property of which the seller is aware. The purchaser has a corresponding duty to inspect the property. The seller has no duty to disclose patent defects. Patent defects are those defects which can be seen by virtue of a reasonable inspection of the property. Purchasers should not underestimate this duty and should always conduct a thorough inspection of the property. This includes checking water pressure, looking in cupboards and behind curtains for damp and testing the various fixtures and fittings. A disclosure document can be used by the seller, however this should not replace the duty to inspect and a purchaser should in any event conduct a thorough inspection of the property. Should any defects be found, these should be recorded in the sale agreement and agreement reached as to how these are to be dealt with.

**DOCUMENTS**

The following is a list of documents that may be perused before entering into an agreement of sale:

| SECTIONAL TITLE PROPERTY | FREEHOLD PROPERTY | CLUSTER PROPERTY |
|---|---|---|
| Title Deeds | Title Deeds | Title Deeds |
| Body Corporate Rules & Financials (indicate restrictions imposed by the body corporate, e.g. pet ownership) | | Home Owner's Association Documentation, Financials and Rules (indicate restrictions imposed by the HOA, e.g. pet ownership) |
| Sectional Title Plans | Approved SG Diagrams | Approved SG Diagrams |
| Details of reserved real rights or caveats registered over the scheme | Details of applicable servitudes | Details of applicable servitudes |
| Details of Exclusive Use areas (parking bays, garden areas, store rooms) | | Home Owner's Association Levy Statement (may include water charges) |
| Rates and Utility Accounts | Rates and Utility Accounts | Rates and Utility Accounts |
| Levy Statements | Eskom Accounts (if supplied by Eskom) | Eskom Accounts (if supplied by Eskom) |
| Disclosure as to any pending/anticipated special levies | | Disclosure as to any pending/anticipated special levies |

**GENERAL DOCUMENTS**

**FICA Documents**

It is imperative to provide these documents to the estate agent and conveyancer upon request. These differ depending on the purchasing entity. For individuals these include proof of identity, proof of residence, confirmation of SARS tax number and banking account details.

**Mortgage Bond**

Where a purchaser takes mortgage finance from a bank to finance the property acquisition, the purchaser should ensure that all necessary documents required to apply for loan finance are available.

Purchasers should ask their estate agents/bond originator for guidance as to which documents are required and for guidance as to whether they qualify for loan finance.

Where loan finance is a condition of the sale agreement, purchasers should note that they are contractually obliged to take all necessary steps to apply for loan finance and to fulfil the suspensive condition.

**ISSUES TO CONSIDER**

**Contractual Capacity**

If the purchaser is a company, close corporation or trust, the purchaser should ensure that the correct resolutions are in place to authorise the purchase of the property. Note that a trust not yet in existence cannot purchase property and it is no longer possible to purchase property on behalf of a close corporation to be formed.

If the purchaser is an individual, ensure the necessary matrimonial and other consents are obtained as may be applicable. If the purchaser is married according to the laws of a foreign country, the consent of the spouse is not required where the property acquisition is not financed through the use of a mortgage bond. Where a mortgage bond is used, the consent of the spouse is required to register the mortgage bond.

**VAT Registration**

Whether transfer duty or VAT is payable is determined by the status of the seller. Where the seller is not VAT registered, and the purchaser is a VAT vendor, the purchaser can, under certain circumstances, claim a notional VAT input credit from SARS, up to a maximum of 14% of the purchase price.

If the seller is VAT registered, VAT must be clearly dealt with in the sale agreement such that it is clear as to whether the purchase price includes or excludes VAT. Obtain proper advice from an accountant or auditor before proceeding to enter into the sale agreement.

**Building Plans Approved**

The building plans should be inspected to determine whether the property sold has approved building plans and/or to determine whether all of the improvements on the property are incorporated on the approved plans.

**Sectional Title: Levies**

Sellers are liable for all levies due to the body corporate until date of registration of transfer. Special levies may be applicable and should be addressed in the sale agreement.

**Fixtures and Fittings**

These are sold with the property and should these not be in working order, same should be disclosed in writing in the sale agreement. Caution must be exercised with regard to items which do not strictly fall within the definition of "fixtures and fittings".

When in doubt, create certainty by clarifying in writing in the sale agreement whether the particular item is to remain or will be removed. Examples are hanging bathroom mirrors, blinds, wendyhouses etc.

**Special Power of Attorney**

The legal requirements of signing conveyancing documents outside of South Africa are onerous. Consideration should be given as to whether it is appropriate to make use of a special power of attorney (SPA) when a purchaser is not going to be in SA to sign the necessary documents.

In this regard it is critical to consult a conveyancing attorney to ensure that the deeds registry requirements are met when drafting and signing the SPA to ensure same is usable. Note that some banks do not accept documents signed in terms of a SPA.

**Rates Clearance Certificates**

The seller will be obliged to provide a rates clearance certificate (RCC), valid for 60 days from date of issue. Rates figures are issued by the municipality and represent the current balance due, and two years arrears together with 4 months advance payment for rates, taxes, sewerage, refuse, electricity and water charges (as applicable).

In accordance with a recent judgment of the Supreme Court of Appeal, purchasers should contractually insist that sellers pay their full debt due to the local authority and not only the debt existing two years prior to the application for the RCC, as is permitted.

**Eskom**

Where electricity is supplied directly by Eskom, sellers need to finalise their accounts and purchasers need to attend on Eskom's offices or contact their call centre to open a new account. Eskom will not allow the new account to be opened until the seller has finalised their existing account.

**Compliance Certificates**

The certificates of compliance relevant to the sale of immovable property in Johannesburg and to be provided by the seller are an Electrical Compliance Certificate, a Gas Compliance Certificate and an Electric Fence Certificate of Compliance. Provision must be made in the sale agreement for the seller to provide these certificates, where applicable.

**Risk and Insurance**

The Seller should insure the property until the date of registration of transfer in the deeds registry. In regard to freehold property acquisitions where the property is paid for without mortgage finance, the Purchaser should ensure that they have insurance from date of transfer. Insurance for sectional properties is included in the levies and paid for by the Body Corporate.

**Alterations / Maintenance**

The seller has a general duty to maintain the property in the condition as at date of sale until registration. Should occupation be taken before registration, purchasers may not make any alterations before transfer without the written consent of the seller. Purchasers are advised to, where possible, wait until registration of transfer before making any alterations or additions to the property.

**PURCHASER'S COSTS**

The purchaser should make provision for the payment of the transferring attorney costs and disbursements (including transfer duty (as applicable)) and should further make provision for the payment of the bond registration attorney costs where mortgage finance is taken.

Purchasers should note that the bank charges an initiation and valuation fee which is the maximum sum of R5 700.00. Depending on the bank and the conditions of loan, this cost may have to be paid before registration or may be capitalised in the bond. Purchasers should obtain a costing from the conveyancing attorney such that they understand these costs before purchasing.

**CASH ACQUISITIONS**

Where purchasers do not utilise a mortgage bond for the acquisition, it should be noted that banks charge a fee to issue cash guarantees. This can normally be avoided by placing the cash portion of the purchase price in trust with the transfer attorney. Purchasers should check with attorneys if any fees are payable and confirm the interest rate earned on invested funds. Purchasers are reminded that a property purchased cash will have to be insured by the Purchasers personally.

**CONVEYANCER**

The seller nominates the conveyancer who will attend to the transfer of the property to the purchaser. The appointed conveyancer, whilst appointed by and acting for the seller owes a duty of good faith to the purchaser and can be approached so as to address any concerns or queries.

# SELLER'S GUIDE TO SELLING IMMOVABLE PROPERTY

**INTRODUCTION**

In order to facilitate a smooth sale and the subsequent transfer of immovable property there are a number of issues that should be considered by a seller prior to the marketing and sale of such property.

**DISCLOSURE**

When selling immovable property your duty as the seller is to disclose all latent (hidden) defects in the property to your agent and prospective purchaser. This is an obligation which must be given serious consideration. Latent defects must be disclosed in writing in the sale agreement. Your purchaser has a corresponding obligation to inspect the property for all patent (visible) defects. A disclosure document can be used, however sellers must be careful to complete this comprehensively.

**DOCUMENTS**

The following is an indicative list of documents that should be made available to your mandated estate agent and prospective purchaser.

| SECTIONAL TITLE PROPERTY | FREEHOLD PROPERTY | CLUSTER PROPERTY |
|---|---|---|
| Title Deeds | Title Deeds | Title Deeds |
| Body Corporate Rules & Financials (indicate restrictions imposed by the body corporate, e.g. pet ownership) | | Home Owner's Association Documentation, Financials and Rules (indicate restrictions imposed by the HOA, e.g. pet ownership) |
| Sectional Title Plans | Approved SG Diagrams | Approved SG Diagrams |
| Details of reserved real rights or caveats registered over the scheme | Details of applicable servitudes | Details of applicable servitudes |
| Details of Exclusive Use areas (parking bays, garden areas, store rooms) | | Home Owner's Association Levy Statement (may include water charges) |
| Rates and Utility Accounts | Rates and Utility Accounts | Rates and Utility Accounts |
| Levy Statements | Eskom Accounts (if supplied by Eskom) | Eskom Accounts (if supplied by Eskom) |
| Disclosure as to any pending/anticipated special levies | | Disclosure as to any pending/anticipated special levies |

**GENERAL DOCUMENTS**

Additional documents to be made available:

- **FICA Documents** These differ depending on the selling entity. For individuals these include proof of identity, proof of residence, confirmation of SARS tax number and banking account details.
- **Existing mortgage bond account number**
- **Copies of rates/municipal accounts (with municipal account numbers)**

## ISSUES TO CONSIDER

### Contractual Capacity

If the registered owner of the property is a company, close corporation or trust, ensure that the correct resolutions are in place to authorise the transfer. Sellers should consult their conveyancer in this regard as the implications are important.

If you are an individual, ensure the necessary matrimonial and other consents are obtained as may be applicable. If you are married according to the laws of a foreign country, the consent of your spouse is required to transfer the property.

### VAT Registration

If you are VAT registered, VAT must be clearly dealt with in the sale agreement such that it is clear as to whether the purchase price includes or excludes VAT. Obtain proper advice from an accountant or auditor before proceeding to enter into the sale agreement.

### Approved Building Plans

Disclosure must be made as to whether you are aware if the property sold has approved building plans or as to whether any part of the improvements on the property do not have approved plans.

### Sectional Title / Home Owners Association Special Levies

Sellers are liable for all levies due to the body corporate / homeowners association until date of registration of the transfer. Sellers should disclose if they are aware of any pending special levies or special levies which are in force at date of sale. Who is responsible for the payment of the special levies must be clearly indicated.

### Fixtures and Fittings

These are sold with the property and should these not be in working order, same should be disclosed in writing in your sale agreement. Caution must be exercised with regard to items which do not strictly fall within the definition of “fixtures and fittings”). When in doubt, create certainty by clarifying in writing in the sale agreement whether the particular item is to remain or will be removed. Examples are hanging bathroom mirrors, blinds, wendyhouses etc.

### Special Power of Attorney

The legal requirements of signing conveyancing documents outside of South Africa are onerous. Consideration should be given to as to whether it is appropriate to make use of a special power of attorney (SPA) when a seller is not going to be in SA to sign the necessary documents. In this regard it is critical to consult a conveyancing attorney to ensure that the deeds registry requirements are met when drafting and signing the SPA to ensure same is usable.

### National Credit Act (NCA): Banks 90 Day Interest Provisions

Banks are entitled to charge 90 days interest in lieu of notice to cancel any mortgage bond. To avoid or to limit payment in this regard, sellers can give notice during the marketing phase. Sellers should make use of their chosen conveyancer for this purpose.

### Consequences of Calling for Cancellation Figures on a Mortgage Bond

Where the bond cancellation figures are called for from the seller’s bank, this results in the bond account being “frozen” and funds cannot be accessed from the account (this is different from the notice discussed above).

### No Existing Mortgage Bond

Where there is no existing bond, the sellers are required to have the original title deed available. Should this document be lost the conveyancer must be notified, such that application can be made for a replacement deed.

### Rates Clearance Certificates

A rates clearance certificate (RCC) must be valid for 60 days from date of issue. Rates figures are issued by the local authority and represent the current balance due, and any arrears amounts together with 4 months advance payment for rates, taxes, sewerage, refuse, electricity and water charges (as applicable).

There are potential delays where billing errors exist. Sellers should provide their rates accounts to their chosen conveyancer during the marketing phase for early detection and correction of these billing issues so as to prevent delays occurring in the transfer process.

**Eskom**

Where electricity is supplied directly by Eskom, sellers need to finalise their accounts and purchasers need to attend at Eskom's offices to open a new account upon registration of transfer. Any amounts payable are not included in the rates clearance figures aforesaid.

**Compliance Certificates**

The certificates of compliance which may be applicable to the sale of immovable property in Gauteng, are an Electrical Compliance Certificate, a Gas Compliance Certificate and an Electric Fence Certificate of Compliance.

**Risk and Insurance**

The sellers should insure the property until the date of registration of transfer in the deeds registry.

**Alterations / Maintenance**

The seller has a general duty to maintain the property in the condition as at date of sale until registration and should not make any alterations to the property.

**COSTS**

The following are costs / disbursements for which the seller may be liable or should make provision for depending on the sale and the type of property sold:

- **Agent's commission -** As agreed and accepted by the seller as set out in the sale agreement plus VAT at 14%.
- **Existing mortgage bond - t**his needs to be formally cancelled with transfer of the property;
- **Attorney bond cancellation costs- p**aid to the attorney cancelling the mortgage bond ± R2500.00
- **Rates clearance costs -** As set out above;
- **Body corporate levies -** These need to be paid to the end of the month of registration;
- **Home owner's association levies -** these need to be paid to the end of the month of registration;
- **Compliance certificates -** where applicable, Electrical Compliance Certificates, Gas Compliance Certificates
- and Electric Fence Certificates of Compliance; and
- **Lost title deed -** Where this has been lost the cost of replacement is approximately R1000.00

**CONVEYANCER**

The seller may nominate the conveyancer who will attend to the transfer of the property to the purchaser. Sellers should involve the conveyancer upon making a decision to sell, such that they can contribute to the effectiveness of the sale and marketing process together with the estate agent. Sellers should be sure to utilise the services of an attorney who is a conveyancer and who understands the conveyancing process.

**CAPITAL GAINS TAX**

The sale of immovable property may attract Capital Gains Tax (CGT). Should the property being sold be the seller's primary residence and registered in his/her name and the purchase price exceed R2 000 000.00, then the first R2 000 000.00 of the gain is exempt from CGT. There are various factors which influence the calculation the CGT payable to SARS and this should be discussed by the seller with his/her accountant/auditor for an accurate calculation.

# THE IMPORTANCE OF DEEDS OFFICE SEARCHES

**INTRODUCTION**

This article will serve to demonstrate the absolute importance of conducting a deeds office search prior to dealing with any issues relating to immovable property. The purpose of conducting deeds searches is to enable the accurate recording of information relating to the property searched.

When conducting a deeds search it is crucial to conduct a "property" search AND a "person" search.

**PROPERTY SEARCHES**

A property search will provide information regarding the property in question.

This search will indicate the details of the property such as the property description and the extent of the property. In regard to freehold property the extent of the property is a reference to the land size only and not an indication of the size of the improvements on the land. Information on the size of the improvements should be obtained from the city council.

This search will indicate the identity of the registered property owner and whether there are multiple registered owners or whether the registered owner is an incorporated entity. This information requires further analysis as to the owners contractual capacity and any particular requirements such as in the case of trusts.

The incorrect recordal of the property details and registered owner may have the effect of a sale agreement being unenforceable.

**PERSON SEARCHES**

A deeds search on a particular property will provide information as to that property alone whereas a person search will list all the properties owned by the person or entity (company, close corporation or trust) searched. The importance of a person search can be demonstrated best when considering sectional title searches.

A sectional owner may own various sections and exclusive use areas in a particular sectional scheme. A property search on the primary section owned will not necessarily reveal the additional sections and exclusive use areas.

A person search will for example show that the registered owner has a section registered for the unit in which s/he lives, a section for the garage and a parking bay registered as exclusive use (by notarial deed). A search on each individual property can then be conducted.

**SECTIONAL TITLE EXCLUSIVE USE AREAS**

Caution must be exercised when dealing with exclusive use areas as only exclusive use areas registered by way of notarial deed will be revealed on a deeds search. Should the exclusive use areas be allocated by the body corporate or indicated in the body corporate rules, this will not appear on the deeds searches and further investigation will be required.

In the event of an exclusive use area being registered by way of a notarial deed, a full search can be conducted to establish the full details of such exclusive use area including the extent and the notarial deed number, eg SK4367/2011

**ENDORSEMENTS**

A deeds search will have a section with heading "Endorsements". It is important to understand each of the endorsements relevant to the property searched. There are various kind of endorsements such as mortgage bonds (B 163646/2010), interdicts (caveat or attachment), section 25 real rights to extend etc.

Every endorsement listed on the deeds search needs to be considered and understood.

An example of a caveat and attachment interdict is as follows:

ENDORSEMENTS 1 of 2
Document: I – 10318 /2010C
Description: Interdict

Document: I – 35781 /2010 AT
Description: Interdict

Each deeds registry has an interdict room where all interdicts registered against the property are recorded. The numbers 1685/2011 indicate the page number and the year of the interdict respectively. When this form of endorsement is present, the essential action required is that the details of the Interdict be obtained from the deeds office as it could impact the decision to sell the property and/or delay the transfer of the property once sold.

A caveat interdict is a note from the deeds registry or a conveyancer regarding the property such as the necessity to correct a registration error or the need to register a right of way servitude on a subsequent transfer.

An Attachment interdict is where the property has been judicially attached by a creditor of the property such as where the property owners owes and must pay a bank or a creditor funds before the property can be transferred. The property owner may or may not still be indebted to the creditor who has attached the property and thus this may or may not be material information.

In either case the deeds registry will not permit the transfer of the property until the attachment interdict has been uplifted or caveat interdict has been dealt with.

**MICROFILM REFERENCES**

Every deed registered in the deeds registry (save for deeds registered prior to the introduction of microfilming) are microfilmed and stored in the deeds office. This enables the viewing of such document in the deeds registry by the general public.

A deeds search may indicate the following: Microfilm Reference: Awaiting Mfilm

This means that the deed in question has as at the date of the search not been microfilmed and a copy of the deed is thus not available. This is furthermore an indication of a recent transfer or bond registration which further means that the deed is not immediately available for use and thus may result in a delayed transfer.

This is worthy of investigation due to the fact that in order to transfer property or cancel a mortgage bond, the original deed is required for re-lodgment in the deeds office.

**HISTORY**

The History portion of the deeds search is the last portion of any search. This section indicates the previous history of the property and can contain useful information.

**CONCLUSION**

The material importance of a deeds search and understanding the content of that search cannot be overstated. In the event that assistance is required to conduct the search or interpret the content or to look up any interdicts in the deeds registry, contact ourselves or e-mail vanrensburg@schindlers.co.za

# STEPS TO TAKE PRIOR TO MARKETING IMMOVABLE PROPERTY

**INTRODUCTION**

This article describes steps that must be taken prior to the marketing or sale of immovable property. The emphasis is on, in the first instance, preparing to market by understanding the parameters of the property being sold and in the second instance looking at various issues that could delay the transfer process.

By focusing on the details set out below, property practitioners and estate agents will be empowered with knowledge and information which will not only ensure a smooth sale and transfer process but will enable the image of a property professional which will meet the expectations of the general public.

**DEEDS OFFICE SEARCHES**

A “property” and “person” deeds office search is the essential first step. Any relevant endorsements such as caveats or attachments should be looked up and understood

The property and registered owner must be fully understood and acted upon where necessary. In the event that the registered owner is an incorporated entity, a company office search should be done on that entity so that the resolutions are signed correctly. Trusts must be acted on in accordance with the trust deed and letters of authority.

**TITLE DEEDS**

Copies of title deeds can be obtained from the deeds office with the assistance of the conveyancer.

The title deed will indicate whether there are any title deed conditions which could affect the sale or transfer process, such as a restrictive right of way or municipal servitudes. Should these be present, details of these could be obtained by ordering copies of the relevant notarial deeds and SG diagrams.

In the case of panhandle erven or freehold property which have been sub divided a copy of the SG diagram could be obtained to shed light on the exact extent of the property and any relevant servitudes.

In the case of sectional title property and freehold property there may also be additional title deed conditions such where the scheme falls within a greater home owners association. This fact can be brought to the attention of potential purchasers and where necessary a copy of the homeowners association rules and documents obtained.

**SECTIONAL TITLE PROPERTY**

Copies of Body Corporate rules and financials can be obtained as these could be material to the sale and transfer process. Restrictions imposed by the body corporate such as relating to pet ownership could be revealed. The body corporate financials may indicate a positive or negative financial position that requires disclosure.

Where there is doubt as to the position and extent of the section and any relevant exclusive use areas, the sectional title plans would provide clarity. The managing agents could be consulted on any of the above and on any relevant pending special levies.

**THE COST OF OWNING THE PROPERTY SOLD**

Purchasers wish to be advised of the cost of owning any property and as such this information should be gathered early in the process.

In the case of freehold property this entails determining the extent of the monthly expenses due to the city council. Bear in mind that some properties pay electricity directly to Eskom and not the city council. In the case of sectional title property, expenses include city council accounts and the body corporate levy payments. In the case of a home owners association, the applicable levy should be determined.

In respect of each of the above, actual statements and accounts should be obtained, particularly with regards to body corporate levies where the levies are sometimes split into the actual levy, a garden levy, a security levy and a DSTV levy or exclusive use area levy etc.

**NATIONAL CREDIT ACT - 90 DAY NOTICE PERIOD**

In terms of the NCA banks are entitled to charge 90 days interest in lieu of notice to cancel any mortgage bond registered over the property. In other words when cancellation figures are called for the banks may add 90 days worth of interest to the cancellation amount, this being in addition to the actual amount outstanding on the mortgage bond.

Should transfer be effected prior to expiry of the banks 90 days, the banks will be entitled to the unexpired portion of the 90 days in addition to the actual amount due on the mortgage bond resulting either in a delay in the transfer process so as to register after this period or a loss to the seller where registration takes place earlier.

Sellers can be advised to provide the banks with the required notice alternatively the intended conveyancer could assist in giving this notice during the marketing phase. It may be more appropriate to give notice rather than to call for cancellation figures as the latter will result in the mortgage account being “frozen”.

**RATES CLEARANCE CERTIFICATES**

In order to transfer any property in the deeds registry, a rates clearance certificate (RCA) is required. The unfortunate reality is that if there are any issues or errors on the municipal accounts, these could and do result in delays in the transfer process.

Examples of such issues are disputes with the city council that need to be resolved, the absence of a land value, the omission of a required billing entry such as refuse removal or electricity or water.

These issues can take some time to resolve with the city council and early action is essential to avoid a delay in the transfer process. Sellers can thus refer copies of their account to the conveyancers in order that the account can be assessed prior to sale. If corrective action is required the process can be started and a delay in the transfer process avoided.

**SPECIAL POWER OF ATTORNEY**

The seller’s circumstances should be assessed to determine whether a special power of attorney is required. An example would be where the parties intend on emigrating and one spouse will depart from South Africa prior to sale or registration or where one of the sellers is generally unavailable.

In such cases sellers can be advised to have a special power of attorney drafted which would enable a trusted party in South Africa or the remaining co-owners to sign the necessary sale and transfer documents.

The reason for this requirement is that when transfer documents are to be signed outside of South Africa the deeds registry has various requirements such as that the documents need to be signed at an SA embassy or a foreign notary in which case an authentication process may be required using apostille certificates. The aforementioned are often impractical, time consuming and expensive, thus the alternative of a special power of attorney.

Should this route be followed, the special power of attorney must be drafted by a conveyancer. The deeds office requirements in regard to special powers of attorney are stringent and thus the documents must be correctly drafted to comply with these requirements to be usable. If a seller already has such a document or a general power of attorney, this should be referred to a conveyancer for checking.

**CONCLUSION**

Being armed with information relating to the property being marketed lends itself not only to professionalism but also lends itself to the ability to make disclosures regarding the property to the purchaser thereof. Much of the information referred to above can be annexed to the sale agreement or handed to the purchasers by way of such disclosure.

# SECTIONAL TITLE PROPERTY

**INTRODUCTION**

The purpose of this article is to provide a brief explanation of the concepts related to sectional title property.

**THE CONCEPT OF SHARED OWNERSHIP**

The Sectional Titles Act No 95 of 1986 (the Act) introduced the concept of shared ownership. The Act introduced the concept of ownership of a Unit comprising a section and an undivided share in the common property.
Prior to the Act there was no provision in our law for the shared ownership of immovable property in undivided shares.

Prior to the Act legislation such as the Share Block Control Act was used where the property is owned by a company and shares owned in the company entitle the holder of the shares to the use of a specific portion of the building.

**ESTABLISHMENT OF A SECTIONAL SCHEME**

Freehold property is converted in the deeds registry to sectional title property my means of an application to the deeds registry to establish a sectional title scheme on that property.

Amongst the various documents filed together with such application will be the sectional title plans. The sectional title plans are drawn by a land surveyor and approved by the Surveyor General. The sectional plans will indicate the section, common property and any exclusive use areas.

In the event of doubt as to the position of any of the aforementioned, the sectional plans must be consulted.

Bear in mind that the door numbers on the unit may differ from the deeds registry section number. Both should be recorded in any sale agreement.

**DEEDS REGISTRY SECTIONAL TITLE OFFICE**

Each deeds registry will contain a sectional title office. When a sectional scheme is established a file for each scheme is opened and will contain all documents related to that scheme including the sectional plans, rules and documents relevant to the establishment of the scheme.

The deeds registry is a public office and any of these documents can be viewed by any person.

**DEEDS OFFICE SEARCH: PERSON AND PROPERTY SEARCH**

Prior to dealing with sectional title property a person and property deeds search must be conducted.

The property search will contain the details of the property searched whilst the person search will describe what properties are registered in the name of the person searched.

The property search will indicate if there is a Section 25 Real Right of extension registered. In this regard please see below.

The person search is useful when dealing with sectional title property as different schemes are registered in different ways and the details of ownership need to be established. The property owner may own more than one section. An example would be where the actual home and the garage are registered as different sections in which case both sections must be referred to in the sale agreement.

Exclusive use areas such as parking bays, garage's, storerooms etc registered by means of notarial deeds will also be shown as separate properties on the search. See below for details of exclusive use areas (EUA)

**DESCRIPTION OF A UNIT**

The deeds registry documentation refers to a sectional tile property being owned as a "Unit" comprising of:

(a) A section

(b) An undivided share in the common property

This is significant and important to understand from a conceptual point of view. A sectional title property owner is the owner of the actual section which will be indicated as a certain square meterage and an undivided share of the common property.

The size of an owners section will determine the owner's participation quota, expressed as a percentage of the total area. The participation quota is used to determine that owner's share of the common expenses as provided for in the monthly levy and also determines the owner's voting rights.

The common property comprises the common access roads, common amenities', shared walls, roofs etc.

**EXCUSIVE USE AREAS**

Exclusive use areas represent a portion of the common property over which a particular owner has exclusive use. The EUA is thus not owned by the section owner but rather the section owner has the right of exclusive use of that portion of the common property.

There are various types of exclusive use areas: parking bays, garages, storerooms, balconies, stairwells, gardens etc.

In order to own an EUA, the owner must first be the owner of a unit in the scheme. Likewise when an owner sells a section, any EUA's must be sold at the same time.

EUA's are one of the most vexed and potentially problematic sectional title issues. Each scheme is different in regard to the registration and recording of EUA's.

Should an EUA be included as part of the property sold, the purchaser is entitled to insist of the transfer/cession of that right, in the absence of which the purchaser is entitled to a reduction in the purchase price, thus the importance of properly and accurately identifying the relevant EUA.

EUA's can be registered in various ways (or a combination of these):

1. By means of registration by virtue of a notarial deed of cession. Should this be the case a deeds search will reveal the existence of this form of EUA;
2. By means of allocation by the body corporate. Should this be the case the body corporate, trustees or managing agents should have a schedule which can be consulted;
3. By means of registration in the rules of the scheme. Should this be the case the rules in the sectional file in the deeds registry should be consulted.

Levy statements can also be looked at to determine if there is a levy in respect of the EUA.

**BODY CORPORATE**

The Sectional Titles Act make provision for a body corporate which is deemed to have been established upon the transfer of the first unit from the developer.

Every owner of a unit in the scheme is deemed to be a member of the body corporate and is thus bound by the body corporates rules. A member cannot resign from the body corporate. The body corporate has certain statutory duties in terms of the Act.

The body corporate is obliged to hold a yearly AGM (annual general meeting)

The body corporate is obliged to nominate and elect trustees from the members to be responsible for the functioning of the body corporate.

The trustees may (and usually do) appoint professional managing agents to assist in the affairs of the body corporate and the compliance with the various statutory duties.

**LEVIES**

One of the body corporate responsibilities is to determine the monthly levy payable by each unit. The levy will include *inter alia* provision for insurance, common property electricity and water, security, maintenance etc.

The levy statement should be consulted to determine the precise levy.

In order to transfer sectional title property a section 15(B)(3) certificate is lodged in the deeds registry. This certificate certifies that the levies due to the body corporate are paid in full until the end of the month of registration.

The existence or otherwise of special levies should be determined and dealt with in any sale agreement.

**RATES AND TAXES**

With effect from July 2008 all sectional title units are separately rated and liable to the local authority for monthly rates and taxes.

On transfer a rates clearance certificate is obtained from the local authority and presented to the registrar of deeds on transfer. The rates clearance certificate certifies that the rates are fully paid for a period of 60 days from the date of issue of the certificate. Seller need to allow for the payment of 5/6 months rates in advance.

**INSURANCE**

Sectional schemes are insured as a whole. The extent of the insurance cover is to some degree standard but differences are found in regard to for example the insurance cover of burst geysers.

When a mortgage bond is passed over the unit, a sectional title insurance certificate is provided to the bank granting the finance, which certificate provides confirmation of insurance cover.

**SECTIONAL TITLE SCHEME FINANCIALS**

The body corporate is obliged to have the scheme's financials audited each year. The audited financials are then approved at the AGM.

When purchasing sectional title property, the financials should be obtained and scrutinized. Banks granting bonds often call for copies of the latest financials.

In the absence of the latest audited financials, the body corporate can be requested to provide a letter to confirm all is in order and that the body corporate is solvent.

**SECTIONAL TITLE RULES**

When the sectional scheme is registered in the deeds registry, the developer has the option to use the statutory rules or to introduce new rules. The conduct rules may be substituted, however the amendment and substitution of the management rules are limited.

The sectional title file in the deeds registry with thus either contain a document in which the developer declares that the statutory rules apply (this will not include a copy of the statutory rules) or the substituted rules will be in the file.

Should the body corporate amend the rules thereafter by means of an appropriate meeting and resolution, the new rules must be filed in the deeds registry before they are deemed to be enforceable.

**SECTION 25 REAL RIGHTS**

In terms of section 25 of the Sectional Titles Act, a developer may reserve the right to extend the scheme onto an adjoining property and in order to do so will upon the establishment of the scheme in the deeds registry reserve such a right in terms of section 25 of the Act.

In terms of the Act, should such a right have been reserved by the developer, the seller is obliged to disclose such reservation to the purchaser in the sale agreement failing which the purchaser has the right to withdraw from the sale.

**CONCLUSION**

Whilst sellers and purchasers are in general familiar with the concept of sectional title property, the sale and purchase of a sectional title unit can still present various issues. Proper preparation and a good understanding of sectional title is necessary.

# COSTS IN RESPECT OF THE SALE OF A PROPERTY FOR WHICH A SELLER IS LIABLE

**INTRODUCTION**

Various costs are borne by the Seller's during the sale of immovable property. We have set out various costs which the Seller should be aware of.

**COSTS FOR WHICH THE SELLER IS LIABLE:**

| | | |
|---|---|---|
| 1. | Agent Commission - | the commission amount as agreed and accepted by the Seller as set out in the Offer to Purchase; |
| 2. | Mortgage Bond - | the property cannot be transferred unless all mortgage bonds registered over the property are formally cancelled. In terms of the National Credit Act, the Seller is obliged to give the bank 90 (ninety) days notice of his/her intention to cancel the mortgage bond. Should the bond be cancelled before the 90 days notice period has expired, the Seller will be liable for penalty interest for the remaining days of such period. |
| 3. | Bond Cancellation Costs - | the relevant financial institution/bank will instruct an attorney on their panel to attend to the cancellation thereof. The costs are approximately R2000.00 and will escalate based on the number of bonds registered over the property which are to be cancelled. The transferring attorneys will liaise directly with the bond cancellation attorneys and pay the applicable fees from the proceeds of the transaction. |
| 4. | Rates Clearance Costs - | a rates clearance certificate is required in all instances where a property has been sold. The certificate confirms that all monies due, owing and payable to the local authority have been paid. In most instances, the local authority insists on the payment of an estimation of 4-6 months advance projection in respect of rates, electricity, water and refuse. Upon registration of transfer, the local authority is advised and will adjust the account accordingly. Any refund due in respect of the advance payments made will be refunded to the Seller by the local authority after registration of transfer. |
| 5. | Levy Clearance Costs - | where a sectional title unit is sold, a levy clearance certificate is required which confirms that all levies and other imposts have been paid up to the end of a certain month in which registration is to take place. The managing agent or body corporate may insist on an advance payment of levies or utility charges. The transferring attorneys or body corporate will attend to the pro-rata adjustments of payments made upon registration of transfer. |
| 6. | Home Owner's Association - | where a property forms part of a home owner's association, a home owner's association clearance certificate is required. This certificate confirms that all monies due to the home owner's association have been paid in full to the end of a certain month in which registration is to take place. The home owner's association may insist on an advance payment of contributions. The transferring attorneys/HOA will attend to the pro-rata adjustments of payments made upon registration of transfer. |
| 6. | Compliance Certificates - | where applicable, an electrical compliance certificate, gas installation certificate of conformity and electric fence system certificate of compliance will be required. Costs will depend on the contractor. |
| 7. | Lost Title Deed - | in the unlikely event that the Title Deed for the property has been lost, an application will need to be made to the Deeds Registry for the issue of a certified copy thereof.<br>The costs of the application is approximately R1000.00. |

# POWERS OF ATTORNEY

**INTRODUCTION**

The purpose of this article is to provide some insight into the use and purpose of Powers of Attorney (PA). With regards to immovable property, there are two types of Powers of Attorney commonly used. The first is a General Power of Attorney (GPA) and the second is a Special Power of Attorney (SPA).

**THE USE OF THE POWER OF ATTORNEY IN IMMOVABLE PROPERTY TRANSACTIONS**

The seller's circumstances should be assessed to determine whether a GPA or an SPA is required. An example where the use of an SPA would be appropriate would be where the parties intend on emigrating and one spouse will depart from South Africa prior to sale or registration of the immovable property or where one of the sellers is generally unavailable.

In such cases sellers can be advised to have a SPA drafted which would enable a trusted party in South Africa or one of the remaining co-owner/s to sign the necessary sale and transfer documents.

The reason for this requirement is that when transfer documents are to be signed outside of South Africa the deeds registry has various requirements such as that the documents need to be signed at an SA embassy or a foreign notary in which case an authentication process may be required using an Apostille certificate. The aforementioned are often impractical, time consuming and expensive, thus the alternative of a special power of attorney proves advantageous.

**GENERAL**

In order to be valid, a PA must clearly describe the grantor and the grantee and must further clearly describe the extent of the powers granted. The PA must further be signed by the grantor and two witnesses.

For the purposes of use of a PA in the deeds registry however, the PA must also comply with the requirements of the Deeds Registries Act. In this regard the PA must properly and comprehensively describe the grantor, the grantee and the immovable property in question. There are also requirements specific to a GPA or SPA which must be complied with.

The PA must further contain a "preparation certificate" where a qualified conveyancer signs the PA and accepts responsibility for the correctness of the content thereof. It is for this reason when drafting a GPA or SPA that a conveyancer be consulted in order to ensure the PA is correctly drafted so as to avoid same being rejected by the deeds registry and being unusable.

**VALIDITY OF POWERS OF ATTORNEY**

A PA is only valid for so long as the grantor has the power to revoke same. In other words if the grantor is incapable of revoking the PA due to being, for example, unconscious or mentally incapable, that PA may no longer be used.

Under such circumstances the grantee would be obliged to wait until the grantor is rendered capable or the grantee would have to approach a court for the appointment of a *curator bonis* to look after the affairs of the grantor.

Grantees should further bear in mind that a PA is not a tool to be used to achieve something that the grantor does not wish to be done. The grantee must act in accordance with the grantor's instructions and according to his wishes.

**GENERAL POWER OF ATTORNEY**

A GPA as the name implies is general in nature and when used in the standard format confers various general powers by the grantor on the grantee whereby the grantee is authorized to perform a variety of acts on behalf of the grantor.

A GPA does not need to be registered in the deeds registry when used for general purposes. When the GPA is used for the transfer of immovable property however, the Registrar of Deeds will require the GPA to be lodged and registered in the deeds registry before or simultaneously with the transfer of the property sold.

Once registered, the GPA will be allocated a GPA number which can be used for future reference- i.e. when using the same GPA for future property transactions in the same deeds registry. If the GPA is to be used in another deeds registry a Regulation 65 copy must be obtained and registered.

Caution must be exercised when using a GPA due to the wide powers conferred by the grantor to the grantee.

**SPECIAL POWER OF ATTORNEY**

This is the most common and prudent PA used for conveyancing purposes. An SPA grants limited powers to the grantee for a specific purpose. An example would be an SPA which authorizes the grantee to market for sale a particular property, to accept a purchase price (a minimum purchase price must be stipulated) and to sign all conveyancing documentation to effect the transfer of the property sold.

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**AN EXAMPLE:**

**SPECIAL POWER OF ATTORNEY**

I, the undersigned,

**NAME**
**Identity number**
**Marital Status**

do hereby nominate constitute and appoint

**NAME**
**Identity number**

In respect of the following property:

**ERF 23 MELROSE TOWNSHIP, REGISTRATION DIVISION IR, PROVINCE OF GAUTENG**
**MEASURING 1000 (ONE THOUSAND SQUARE METRES)**
**HELD BY DEED OF TRANSFER T12345/2010**

1. To market the Property for sale;
2. To nominate an Estate Agency and grant an appropriate mandate (including a sole mandate) to sell the Property on our behalf;
3. To effect payment of a reasonable commission to the nominated Estate Agents from the proceeds of the purchase price.
4. To sign an agreement of sale and accept a purchase price for the Property of not less than R 700 000.00 (Seven Hundred Thousand Rand).
5. To nominate an account into which the proceeds of sale shall be paid;
6. To sign all conveyancing and additional documents necessary to effect the registration of transfer of the Property in the relevant Deeds Registry into the name of a prospective purchaser;
7. To do all such things as deemed necessary to effect the sale and registration of the Property;
8. And generally to actualise the aforementioned purpose and to do whatever is necessary for that purpose as what I would do if I were personally present and if handled personally by me - and I ratify, permit and confirm hereby and promise to ratify, allow and to confirm everything which my Attorney and Agent is lawfully entitled to do by virtue of this my Power of Attorney.

Signed at JOHANNESBURG this 23RD day of JULY 2014, in the presence of the undersigned witnesses

**AS WITNESSES**

1 ________________________ ________________________

NAME

2 ________________________

# CONTRACTUAL CAPACITY OF NATURAL PERSONS

A natural person over the age of 18 years has full legal capacity and as a general rule has full contractual capacity and may enter into contracts unassisted. Various categories of individuals and their respective capacities are set out below.

**Unmarried adults**

This term describes any person who is single, divorced and/or widowed. An unmarried adult (i.e. 18 years or over) does not need any assistance when contracting.

**Persons married out of community of property**

A person is married out of community of property when s/he signs and registers an ante nuptial contract at the time of the marriage. It does not make a difference for conveyancing purposes if the ante nuptial contract was with or without the accrual system.

Either party to the marriage may contract without the assistance of the other party. In practical terms if one spouse owns property (i.e. the full share owner) s/he may sell that property or bond the property without the help of the spouse.

**Persons married in community of property**

A person is automatically married in community of property if s/he does not sign and register an ante nuptial contract at the time of marriage.

One spouse requires the assistance of the other spouse when contracting to buy or sell property. In practical terms both spouses must sign the agreement of sale and the property will be registered in both names.

**Persons married according to Muslim/Hindu customary law**

For conveyancing purposes, the parties are described as being married according to Muslim / Hindu rites, or as being unmarried.

Either party to the marriage may contract without the assistance of the other party. i.e. they have full contractual capacity.

**Persons married under the law of any other country**

The Deeds Registry treats all foreign marriages as potential "in community of property" marriages. This means that where there is a potential effect on the potential joint estate, one spouse must assist the other spouse. In practical terms, when dealing with immovable property the following rules apply:

<u>Selling:</u>

If the property is registered in only one spouse's name, the other spouse will have to assist the selling spouse. i.e. the spouse who does not own the property will also have to sign the transfer documents required to sell the property. It is preferable that they also sign the agreement of sale.

Note that this does not mean that the assisting spouse is entitled to any of the proceeds of sale but rather that the assisting spouse is made aware of the sale.

<u>Buying:</u>

No assistance is required where the property is purchased for cash (i.e. no bond is taken up).

Where the purchasing spouse purchases property and wishes to take a bond to pay the purchase price, the non purchasing spouse will have to assist the purchasing spouse in taking the bond. Note that this does not mean that the non purchasing spouse becomes a co-owner or becomes liable under the bond but rather means that the non purchasing spouse signs documents to show s/he is aware the bond is being taken out.

**Non Residents**

A person who is a non resident has full capacity and can purchase property in South Africa and have the Property registered in their name in the Deeds Registry.

There are certain restrictions in regard to the obtaining of mortgage bonds for finance.

**Customary Marriages – Marriage entered into before 15 November 2000**

Black persons married <u>before</u> 15 November 2000 have full contractual capacity and are deemed to have the same status as persons married <u>out of community</u> of property. i.e. they can contract without the consent of their spouse.

**Customary Marriages – Marriage entered into after 15 November 2000**

Black persons married <u>after</u> 15 November 2000 are married <u>in community</u> of property <u>unless</u> they have entered into and registered an ante nuptial contract.

This is subject to the proviso where the Seller or Purchaser has more that one wife, the relationship and contractual capacity will be governed by an order of court specifically related to that person and his wives.

**Minors**

A minor is a person younger than 18 years of age. A minor must always be assisted by his parents or guardian to enter into a contract related to property.

<u>Where a minor sells immovable property:-</u>

-the Master of the High Court must authorise the sale if the property value is less than R100 000;00 and

-the High Court must authorise the sale if the property is valued at more than R100 000.

<u>Where a minor buys immovable property:-</u>

-No consent of the Master of the High Court is necessary, provided that the purchase price is paid in cash (without a bond).

-Where the minor needs a bond to finance the purchase of the property:

- the Master of the High Court must authorise the bond if the bond value is less than R100 000; and
- the High Court must authorise the bond if the bond is valued at more than R100 000.

**Insolvents**

According to the Insolvency Act, an insolvent's estate is vested in the name of his trustee. However any immovable property acquired by an unrehabilitated insolvent must be transferred to him personally and not to his trustee.

As a general rule, an insolvent is not deprived of his contractual capacity. However, an insolvent may not without his appointed trustee enter into a contract in which he disposes or acquires any property. This includes immovable property.

In practical terms this means that an unrehabilitated insolvent needs his appointed trustee to assist in the sale or purchase of immovable property.

# DOMICILE – THE EFFECT ON IMMOVABLE PROPERTY SALES

**INTRODUCTION**

When dealing with the sale and transfer of immovable property it is important to establish how the parties are married and which country's laws apply to the marriage as this has a direct impact on their contractual capacity.

Their marital regime determines whether they are able to contract alone (if married in accordance with South African law out of community of property having entered into an antenuptial contract) alternatively whether they can only contract together with their spouse (if married in accordance with South African law in community of property) or alternatively whether they need to be assisted by their spouse (if married in accordance with the laws of a foreign country).

**DOMICILE**

In order to answer the above question it is important to establish the "domicile" of the husband inasmuch as it is the domicile of the husband at the time that the marriage was concluded that determines which country's laws apply to the marriage between the parties.

In other words, the laws of the country in which the husband was domiciled at the time the marriage was concluded will apply to that marriage. The domicile of the wife is not taken into account as in our law the wife follows the domicile of the husband.

Whilst it is possible for a husband to acquire a new domicile, the domicile of the husband at the date of marriage will still be applicable.

Domicile may be defined as the country that the husband treats as his permanent home, or lives in and has a substantial connection with. The husband's permanent home is one to which he returns or intends to return. The determination of a domicile requires an examination of the facts and the husband's intention.

**THE DOMICILE ACT NO 3 OF 1992**

This act provides that every person over the age of 18 years and who has the ability to make a rational choice may acquire a domicile of choice (there are exceptions in the Act.)

The act further provides that a domicile of choice is acquired when two elements are present, the first being when he is lawfully present at a particular place and the second when he has the intention to settle there for an indefinite period. Domicile is determined by looking at the fact and intention on a "balance of probabilities."'

**EXAMPLE**

Mr. H is a citizen of South Africa. He meets Mrs. W, an American citizen. Mr. H takes up a 6 month contract in London to gain experience in his chosen profession. Whilst in London they marry and receive a British marriage certificate. Inasmuch as Mr. H never intended London to be his permanent home, the law of South Africa will govern the marriage. In other words Mr. H's domicile remained South Africa. In this instance, as an antenuptial contract was not entered into prior to the marriage, they will be deemed to be married in community of property.

If however Mr. H's intention was never to return to South Africa, he would then have chosen London as his domicile and the laws of the United Kingdom would apply to the marriage.

**CONCLUSION**

Determining domicile can be a complex decision of law and fact. Legal advice should be sought when in doubt.

# CONTRACTING BY AND WITH
# COMPANIES / CLOSE CORPORATIONS / TRUSTS

**COMPANIES**

The management of a Company vests in the appointed directors of that company. In order to effect transfer of any property acquired or alienated by a Company, a company resolution authorising a company representative to act on behalf of the Company in the transaction will be required. A companies office search should always be done to determine the identity of directors of the company.

In terms of section 112 of the Companies Act 71 of 2008 (section 228 of the previous Act), the directors of a Company may not dispose of the whole or substantially the whole of the undertaking or the greater part of the Company's assets, without a special resolution authorised by the shareholders of the Company and thus under these circumstances a Section 112 Resolution may be required. (refer to notes on Section 112).

If the intention is to register the property into the name of a Company which is still to be formed, this is acceptable. One possible description of such an entity in an agreement is as follows:

*Joe Black for and on behalf of a Company to be formed*

**CLOSE CORPORATIONS**

The business of a Close Corporation is generally attended to and authorised by the members of the Close Corporation. A close corporation search should be conducted to determine who the members of the close corporation are.

Unless the Association Agreement of a Close Corporation stipulates otherwise, a Close Corporation will require the consent in writing of members holding 75% of the members' interest before the Close Corporation can dispose of the whole or substantially the whole of the undertaking, or the greater part of the Close Corporation's assets.

It is therefore important to obtain a copy of the Association Agreement, as well as a resolution authorising the nominated person to enter into the transaction.

With the introduction of the new Companies Act 71 of 2008 the registration of new close corporations is no longer possible and as such a purchaser cannot contract in the name of a Close Corporation which is still to formed.

**TRUSTS**

The business of a Trust is controlled by the Trustees appointed in terms of the Trust's Letter of Authority. Trustees are only authorised to act on behalf of a Trust once they have been issued with Letters of Authority by the Master of the High Court and not before.

A contract entered into by the Trust before the Trustees are issued with a Letter of Authority is null and void. The Trustee must further be authorised to enter into the contract (in this case the sale or purchase of immovable property) by the Trust Deed. The trustees must be authorised to sign the sale agreement by way of a resolution prior to the agreement being entered into failing which the agreement is not a valid agreement. The trust deed may specify who is authorised to sign various agreements.

It is thus important to have sight of the Letters of Authority and Trust Deed before contracting.

See the article on the case of Thorpe and Others vs Trittenwein and Another 2007(2) SA 172 SCA

The Trustees may depending on the terms of the trust deed authorise one of their number by way of a resolution to sign the various documents on behalf of the Trust. It is <u>not</u> possible to contract "for and on behalf of a trust to be formed". The Trust must be in existence when contracting.

# THE TRUSTEES AUTHORITY TO ACT ON BEHALF OF A TRUST
# *THORPE AND OTHERS V TRITTENWEIN AND ANOTHER* 2007 (2) SA 172 SCA

**THE FACTS**

In this case a purchaser of immovable property applied to the court to have an agreement of sale declared valid and enforceable. The purchaser was a trust. The sale agreement was signed by one trustee whereas the trust had three trustees appointed to act on behalf of the trust in terms of the letters of Authority issued by the Master of the High Court.

The trustee who signed the agreement was not at the time of signing authorized to do so in writing. The trustee alleged he had oral authority from his fellow trustees at the time of signing and further that this oral authority was ratified in writing after the fact. The purchaser's trust deed provided for three trustees and required all decisions to be taken by majority vote.

The seller argued that oral authority was not sufficient and that the agreement was void due to the non-compliance with Section 2(1) of the Alienation of Land Act.

**THE ISSUE**

The issue to be decided was whether the sale agreement was valid and enforceable despite the fact that the sale agreement was only signed by one trustee under circumstances where there were three trustee's appointed to act for the trust.

A further issue was whether the trustee who signed the sale agreement had to be authorized in writing and whether this authorisation had to exist at the time of the signing of the agreement or whether this written authorisation could be given after the signing.

**THE LAW**

Section 2(1) of the Alienation of Land Act reads as follows:

"No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or **by their agents acting on their written authority**."

The legislation thus requires an agreement of sale of immovable property to be signed by the parties or their agents, acting upon written authority.

**WHAT THE COURT HELD**

The court held that:

1. In the absence of a contrary provision in the trust deed, the trustees in this case had to act jointly.
2. The trustees could authorise one of them to sign the sale agreement on behalf of the trust.
3. The trustee who signed the sale agreement had to be authorised in writing by his fellow trustees before the signing of the agreement.
4. The sale agreement was thus not valid and enforceable.
5. Inasmuch as the sale agreement was void, it could not be ratified after the fact.

**SUMMARY**

The main point to be taken from this case is the importance of ensuring that in the case of a trust, the trustee who is signing the sale agreement must be authorised to sign the sale agreement either in terms of the provisions of the trust deed or by means of a trustee's resolution. The authority must exist at the time of the signing of the sale agreement. If there is no authority as contemplated above, the sale agreement is void and not enforceable.

# WHAT YOU NEED TO KNOW ABOUT S112 SPECIAL RESOLUTIONS IN TERMS OF THE COMPANIES ACT 71 OF 2008

**WHAT IS SECTION 112 OF THE COMPANIES ACTS**

This is the successor to and has the same effect as Section 228 of the Companies Act 61 of 1973. If the Company sells the whole or greater part of the undertaking of the Company or the whole or greater part of the assets of the Company a special resolution is required to be authorised, passed and ratified by the shareholders of the Company. In other words, if a Company decides to sell immovable property which is the only or the largest asset of the Company compliance with Section 112 is a necessity.

Directors are not authorised without the approval of a General Meeting to dispose of the whole or substantially the whole of the undertaking of a company. This shareholders resolution is a special resolution and should be filed at the Companies Office.

**WHAT IS A SPECIAL RESOLUTION**

A special resolution is a resolution passed by 75% of the shareholders of the Company at a general meeting of which the prescribed notice has been given to all shareholders specifying the intention to propose the resolution as a special resolution, the terms and effect of the resolution and the reason for it.

**WHY IS A SPECIAL RESOLUTION REQUIRED**

If Directors wish to dispose of an asset of the Company where the transaction involves disposing of the whole or substantially the whole of the Company's business Section 112 requires the shareholders of the Company to approve the disposal of the asset. A special resolution is required due to the importance attached to the disposal of the whole or a greater part of the Companies Assets.

**QUORUM**

The special resolution must be passed at a General Meeting at which members holding in the aggregate at least one quarter of the total votes of all members entitled to vote at the meeting are present in person or by proxy.

**RELAXATION OF NOTICE PERIODS FOR THE GENERAL MEETING**

A shorter notice period than as prescribed is permitted if all the members having a right to attend and vote at the meeting are present at the meeting and agree to waive the required minimum notice for such meeting.

Alternatively, if all members consent in writing to waive the notice period in totality a document with the signatures of all members must be lodged with the Registrar of Companies.

**MUST THE SPECIAL RESOLUTION BE REGISTERED IN THE COMPANIES OFFICE ?**

In terms of section 228 of the previous Companies Act the special resolution was only effective from the date it was registered by the Registrar in the Companies office. The current view in terms of the new Companies Act 71 of 2008 the special resolution does not need to be registered in the Companies office and but a copy thereof should be filed with the Companies Office.

**CONCLUSION**

The explanation given in this article has been simplified and is intended as general information. Section 112 of the Companies Act has intricacies and one should consult an Attorney for further information before the specific application of this provision.

# TRUSTS AND IMMOVABLE PROPERTY

**WHAT IS A TRUST**

A trust is in essence an arrangement whereby control and ownership of property is provided to other persons (the trustees) for the benefit of beneficiaries.

The following are essential in the establishment of a trust:

- A written document known as a trust deed;
- At least one trustee (it is desirable to have more than one trustee though);
- At least one beneficiary;
- The trustees must hold the trust assets for the benefit of the beneficiaries. The trustees may not have an interest in the trust property or use the trust property for their own benefit;
- There must be a clear separation from the control and enjoyment of the trust assets.

**THE PARTIES INVOLVED IN A TRUST**

**The Planner:** The planner is the person who initiates the formation of the trust for a specific purpose. The planner is often a trustee and a beneficiary as well.

**The Founder:** The founder establishes the trust. In most instances this is either through a last will and testament or through a formation of an *inter vivos* trust.

**The Trustees:** Bare ownership of the trust assets vest in the trustees whose function it is to administer the trust assets for the benefit of the beneficiaries. Trustees are appointed by the Master of the High Court. Trustees hold an onerous position and need to act not only in the best interests of the beneficiaries but they need to comply strictly with the provisions of the trust deed and the Trust Property Control Act.

**The Beneficiaries:** The beneficiary is the person or entity for whose benefit the trust exists. A trust without a beneficiary is a nullity. The identity and rights of beneficiaries are identified in the trust deed.

**The Master of the High Court:** The Master of the High Court has various responsibilities and duties in relation to trusts in terms of the Trust Property Control Act.

**ESTABLISHMENT OF TRUSTS**

Trusts are generally created by means of a last will and testament or by agreement, as in the case of an *inter vivos* trust.

A testator may create a trust in their last will and testament. On the death of the testator the will containing the details of the trust to be created is lodged with the Master of the High Court who then registers the trust.

An *inter vivos* trust is created and registered in the lifetime of the founder by means of the drafting of a trust deed and the lodgment of this document with various supporting documents with the Master of the High Court.

**THE TRUST PROPERTY CONTROL ACT 57 of 1988**

The Trust Property Control Act (the Act) was promulgated on 31 March 1989. The Act provides that all trusts must be lodged and registered with the Master of the High Court.

In terms of the Act a trustee of a trust may only act in such capacity if authorized in writing by the Master. Such authorization is in the form of “Letters of Authority”. In other words a trustee may only deal with trust property or act on behalf of the trust if s/he in possession of valid letter of authority.

It follows that prior to a trust contracting to sell or purchase immovable property, such trustee must be in possession of a letter of authority. Any contract entered into by a trustee acting without such authorization is null and void and cannot be resuscitated or ratified.

The Act does not regulate the content of the trust deed but rather deals with registration and various administrative issues.

**THE ALIENATION OF LAND ACT**

Section 2(1) of the Alienation of Land Act reads as follows:

"No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority."

It is clear from this legislation that a contract for the sale of immovable property must be entered into in writing by the seller and purchaser or by their agents and in the case of the use of agents, such agents must be authorized in writing.

In the case of a trust two important principles follow:

1. In the case of a trust not yet in existence, there is nobody to authorize the agent to act on behalf of the trust and according to our common law an agent or representative cannot represent a non-existent principle. An agent cannot thus enter into a contract for a trust to be formed or not yet in existence.

   Any such contract entered into is a nullity and cannot be ratified when the non-existent trust is formed.

2. The agent acting on behalf of the trust must be authorized in writing prior to entering into the sale of immovable property, failing which the agreement is a nullity and cannot be revived.

   This means that the trustees must either be authorized directly by the trust deed and act jointly if more than one trustee (ie all trustees sign the agreement) or the trustee acting for the trust and signing the agreement must be authorized to enter into the agreement in writing (generally be a resolution), prior to signing the agreement.

When dealing with trusts it is thus important to have a copy of the Letters of Authority to determine the identity of the trustees. The trustees or one of their number must be authorized in writing prior to contracting, either by means of a resolution or by virtue of the content of the trust deed.

**VESTING OF IMMOVABLE PROPERTY IN THE BENEFICIARIES**

In the event the trustees electing to vest immovable property into the name of a beneficiary by transferring the property into the name of that beneficiary in the deeds registry, the transfer is exempt from transfer duty provided that the beneficiary is related to the founder of the trust.

There are various rules that apply here and advice must be taken before proceeding.

**ACCESS TO TRUST INFORMATION**

One of the dangers of dealing with trusts is that there is no easy mechanism or immediate access to the information relevant to a trust as there is in the case of companies and close corporations. There is no prescribed or legislated content for trusts and as such assumptions cannot be made as to the internal working and mechanisms in a trust.

In order to confirm information relating to a trust, a trip must be made to the Masters Office where the trust is registered and the information supplied can then be confirmed.

**TRANSFER DUTY PAYABLE BY TRUSTS AS PURCHASERS**

With effect from 1 March 2011 the transfer duty payable by a trust when acquiring immovable property is the same as that as applies to an individual.

| | | | |
|---|---|---|---|
| *All Purchasers: (sliding scale)* | R0-R600 000.00 | nil % | |
| | R600 001.00-R1 000 000.00 | 3% | (max of R12 000.00) |
| | R1 000 001.00-R1 500 000.00 | 5% | (max of R37 000.00) |
| | R1 500 001 upwards | 8% | (Plus R37 000.00) |

**TRUSTS AND CAPITAL GAINS TAX**

With effect from 1 March 2012 the inclusion rate applicable to the calculation of CGT for a Trust increased from 50% to 66.6%. The rule of thumb for the calculation of CGT for trusts is thus 26.6%.

**THE DECISION AS TO WHETHER TO USE A TRUST AS A VEHICLE FOR IMMOVABLE PROPERTY OWNERSHIP**

There are various advantages and disadvantages to the use of trusts and when seeking advice various and varying views will be found. The reality is that the decision whether to utilize a Trust or not in not a simple one.

**ADVANTAGES OF THE USE OF TRUSTS**

**Protection of trust assets:** Trust assets are protected from creditors of the beneficiaries who can receive support even though indebted etc. Beneficiary creditors generally cannot attach the trust assets that have not been vested. Trusts have limited liability.

**Protection of beneficiaries:** Delinquent or incapacitated beneficiaries can be protected and looked after. Assets are further protected from claims on insolvency or divorce of the beneficiary. Beneficiaries have the further advantage that they can enjoy the benefit of the trust assets without the administrative burdens.

Testamentary trusts can be used where the heirs are minors in order to avoid the inheritance being transferred to the guardians fund.

**Trusts are relatively easy to form:** Trusts are relatively easy and cost effective to establish and register.

**Lack of trust regulation:** Lack of regulation can be an advantage as it creates flexibility and the ability to effectively hide assets and the wealth of the planner.

**Perpetual succession:** A trust has perpetual succession and does not die as in the case of an individual. Termination of a trust can be regulated in the trust deed. Trustees are often afforded a discretion to terminate the trust when appropriate. The life of a trust can also be extended if authorized by the trust deed and where necessary for example to look after incapable or insolvent beneficiaries.

**Estate planning and avoidance of estate duty:** When an individual dies estate duty is levied at the rate of 20% of the value of the estate over R3 500 000.00. When assets are acquired in a trust, this is avoided (subject to the proviso that the trust is properly administered and legal). Enormous tax savings can be achieved through the proper use of trusts.

**Growth of assets takes place in the trust:** Once assets are in the trust, the growth of those assets takes place in the trust and not in the individual's name. The wealth of the trust is increased and not of the individual.

**Capital gains tax advantage:** When an individual dies, this is regarded as a CGT event where CGT is calculated and paid on all the deceased's assets. As a result of a trusts perpetual succession, this is avoided.

**Accounting and disclosure:** As a result of the lack of regulation, there are no onerous accounting and disclosure requirements. The extent of the accounting and reporting can be regulated in the trust deed.

**DISADVANTAGES OF THE USE OF TRUSTS**

**Onerous duties of trustees:** Trustees hold a responsible position and have various onerous duties. In the event of losses or negligence they may be held liable. Trustees face court action from beneficiaries who believe their rights have been infringed. Trustee's decisions are further often called into question.

**Liability for actions of co trustees:** Trustees must take their responsibilities seriously and need to remain involved in the trust and its activities. Trustees can under certain circumstances be held liable for the actions of their fellow trustees.

**Ignorance as to how trusts work:** Many people consider it fashionable to have a trust and purchase immovable property into the trust but do not have the knowledge to administer the trust properly which in turn results in financial loss or in the worst case, the declaration of the trust as being a sham and the attachment of personal assets.

**Planners unwillingness to relinquish control**: For the trust to be valid the trustees must be independent and not have the power of disposal of the trust assets for their own benefit. If the trustees are not independent and are one and the same as the beneficiaries, alternatively treat the trust property as their own, there is in law no trust. Ownership of trust assets must be given up the trust.

**Cost of accounting and administration :** Although there is no legal requirement to audit a trust, unless required by the trust deed, the accounts of the trust must be maintained. There are also various admin costs and potentially fees due to the trustees.

**Cost of expert advice:** Where trustees do not have the knowledge to administer the trust, the advice of costly experts may be required.

**Tax rates:** The tax rates for a trust is a flat 40% for income purposes and the effective rate of CGT is higher than that for individuals and companies. Trusts are further not entitled to certain rebates to which individuals are entitled. The tax of a trust can be extremely complicated and can depend on various factors such as how the assets are held and the type of trust.

**Concern for the future of the trust assets:** Many role players in trusts are concerned that once they have passed on, the control of trust assets may pass to persons that they do not know or trust and this is cause for anxiety.

**Appetite for a trust:** Those contemplating the registration of a trust and purchasing immovable property or other assets into a trust need to have the appetite for the trust and for taking responsibility to conduct the trust properly and in accordance with the Trust Property Control Act, the trust deed and various decided case law etc. Meetings must be held, minutes kept and resolutions passed properly.

**CONCLUSION**

The law relating to trusts and the decision as to whether to use a trust as a vehicle to hold assets or immovable property is a complex one. Expert advice must always be sought before proceeding.

# IMMOVABLE PROPERTY SALES INVOLVING A DECEASED ESTATE

**INTRODUCTION**

Estate Agents are often approached to sell immovable property which forms part of a deceased estate.

The purpose of this note is to explain the different types of deceased estate transfers and the common pitfalls associated with these sales.

**TRANSFER OF PROPERTY TO AN HEIR IN A DECEASED ESTATE**

The transfer of property contemplated here is where the property is transferred from the deceased estate to the person that inherited that property from the deceased.

When a person dies the Master of the High Court appoints an executor to administer the deceased estate. The executor's function is to collect the assets of the deceased, pay any debts and thereafter distribute the inheritance to those entitled to such inheritance.

The executor drafts a liquidation and distribution (L&D) account which represents the final affairs of the deceased and includes a distribution account which sets out who is entitled to inherit what assets. This account is generally drafted towards the end of the winding up process.

Where a person is entitled to property, this property will only be transferred in the deeds registry after the Master has approved the L&D account, the account has lain for inspection free from objection and after the Master has given the go ahead to transfer.

This transfer is thus a delayed transfer as the transfer to the heirs takes place at the end of the winding of the deceased estate. A simple deceased estate can take 12 plus months to finalise.

**SALE BY AN HEIR BEFORE THAT HEIR HAS TAKEN TRANSFER FROM THE DECEASED ESTATE**

This is an extension of the above process and contemplates the scenario where the person entitled to inherit a property from a deceased estate wishes to sell that property on to a third party purchaser before taking transfer from the deceased estate.

The transfer of the property from the deceased estate to the heir and on to the third party purchaser can take place simultaneously in the deeds registry.

Caution must be exercised in this type of sale as the heir is only entitled to sell the property once the Master of the High Court has approved the L&D account referred to above. Prior to this date the heir has inherited the property but the right to the property has not in law vested in him.

The sale agreement can be proceeded with before the approval of the L&D account but the sale must be made subject to the approval of such L&D account within a specified time.

Further caution is required as the property transfer process will be delayed and lengthy due to the need to finalise the estate before transfer can take place. The purchaser's attention should be drawn to this fact in the agreement of sale.

Due to the issues with the above sale, it is where possible preferable and quicker for the executor to sell the property from the deceased estate to the third party purchaser. As will be seen below this transfer process is quicker.

**SALE OF PROPERTY FROM THE DECEASED ESTATE DIRECTLY TO A PURCHASER**

In this case the property is sold by the executor of the deceased estate from the deceased estate directly to a third party purchaser.

The executor signs the agreement of sale on behalf of the deceased estate. The seller can be described as:

The Executor in the estate of the Late Joe Bloggs.

The only person authorised to sign the sale agreement is the executor. The executor must be appointed by the Master of the High Court in terms of a document called a “Letter of Executorship”.

In order to satisfy the requirements of Section 2(1) of the Alienation of Land Act, the Executor must be appointed in writing before he signs the sale agreement.

Where there is more than one executor, all executors must sign the sale agreement or where one executor signs on behalf of both in terms of a resolution, the resolution must be signed prior to the executor signing the sale agreement.

The transfer process in this kind of deceased estate sale is quicker that the transfer described above but can still be delayed to an extent due to the requirement that the Master of the High Court must prior to transfer issue a certificate in terms of Section 42(2) of the Administration of Deceased Estate Act.

In practice the Master does not issue an actual certificate, rather the Conveyancer submits to the Master the Power of Attorney to pass transfer (to be used in the Deeds Registry) and the Master stamps the Power of Attorney with a stamp that reads:

CERTIFICATE
I hereby certify that in terms of
Section 42 (2), Act No. 66 of
1965, that there is no objection
to transfer as stated herein"

…………………………………
Master of the High Court

When application is made to the Master of the High Court for the Section 42(2) certificate, the executor completes and signs an application in terms of Section 42(2). This document contains various questions which when answered enable the Master of the High Court to effect the endorsement.

It is important to note that all major heirs must consent to the sale of the property and this consent is submitted to the Master of the High Court with the Section 42(2) application.

Prior to selling the property it is thus prudent to ensure there are no objections to the sale from these heirs.

From an administration of estates perspective, this transfer process may depending on the circumstances be preferable to the first process above inasmuch as it reduces the ongoing holding costs related to ownership of the property, such as rates, electricity, maintenance and the bond repayments where applicable.

After registration of transfer to the purchaser in the deed office, the proceeds of sale are paid into the deceased estates banking account to be dealt with by the executor.

**CONCLUSION**

In order to determine the best way to deal with immovable property in a deceased estate regard must be had to the particular circumstances of the deceased and the heirs. Consultation with the executor is essential.

# FOREIGNERS AND IMMOVABLE PROPERTY IN SOUTH AFRICA

**INTRODUCTION**

This article is a guide to the purchase of immovable property in South Africa by foreigners (i.e. non-residents).

**NO RESTRICTION TO PURCHASE**

Persons who are not South African citizens (or residents) may purchase immovable property in South Africa. Our law permits the registration of immovable property into a foreigners name in the Deeds Registry.

Instead of buying property in their personal names, foreigners may choose to register a South African trust or company to take transfer of the property. The shares in a South African company can be held by a foreigner or an off shore entity.

**ACQUISITION OF IMMOVABLE PROPERTY BY PERSONS MARRIED ACCORDING TO THE LAWS OF A FOREIGN COUNTRY**

The Deeds Registry treats all foreign marriages as potential "in community of property" marriages as they cannot take cognizance of or apply foreign laws. This means that when parties are married by foreign law the one spouse must assist the other spouse. In practical terms, when dealing with immovable property the following rules apply:

<u>Selling:</u>

If the property is registered in only one spouse's name, the other spouse will have to assist the selling spouse. i.e. the spouse who does not own the property will have to sign the transfer documents required to sell the property. It is preferable that they also sign the agreement of sale. Note that this does not mean that the assisting spouse is entitled to any of the proceeds of sale but rather that the assisting spouse is made aware of the sale.

In addition to the above, if the property is registered in the name of both spouses they will need to “assist” each other.

<u>Buying:</u>

No assistance is required where the property is purchased for cash (i.e. no bond is registered).

Where the purchasing spouse purchases property and wishes to take a bond to pay the purchase price, the non-purchasing spouse will have to assist the purchasing spouse in taking the bond. Note that this does not mean that the non-purchasing spouse becomes a co-owner nor do they become liable under the bond. It means that the non-purchasing spouse signs documents to show s/he is aware the bond is being taken out.

**REGISTRATION OF IMMOVABLE PROPERTY INTO A FOREIGN COMPANY**

Property can be registered in the name of a foreign company. Dependent upon the classification of that foreign company in terms of the Companies Act 71 of 2008, such foreign company may have to register itself with the Company’s Office in South Africa.

External companies are a sub category of foreign companies and it is only external companies which must be registered in South Africa. Whether a foreign company is classified as an external company depends on whether the company is conducting business or non-profit activities in South Africa. Section 23 of the Act deals with determining whether a foreign company is also an external company.

The Act does state that a company is not deemed to be an external company merely because the company acquires an interest in any property in South Africa. The position of the various banks is however unclear as they may in terms of their credit policies insist on registration of a company in South Africa regardless of whether it qualifies as an external company or not.

**FINANCE**

Mortgage bond finance is available. South African exchange control regulations determine the extent to which non-residents can borrow money from South African Banks to fund the property purchased.

In general, foreigners are eligible for a bond for 50% of the purchase price of the immovable property. The granting of finance is subject to various conditions and restrictions and further dependent upon various types of foreigner, such as non residents, residents, foreign embassy employees, diplomats, contract workers, refugees etc.

**UNDERSTANDING THE PURCHASE AND REGISTRATION PROCESS**

In South Africa, unlike many other countries any due diligence required by the purchaser must be undertaken before an agreement of sale is signed.

The purchaser cannot in the ordinary course, after the sale agreement is concluded cancel the agreement on the basis of any patent or latent defects in the immovable property. Immovable property is sold *voetstoots* (as is and in the condition existing as at at the date of sale) inclusive of title deed conditions etc.

Once the agreement of sale is signed, the parties are bound by the exact terms of the sale agreement and unless agreed to in writing, no deviations or changes to the sale agreement are permitted. There is very little scope for not proceeding with the transfer process once the sale agreement is signed.

In South Africa there is one conveyancing attorney who is appointed by the seller of the property to transfer the property. Whilst the conveyancer owes a duty of good faith to the purchaser, the conveyancer does act on the instruction of the seller. The purchaser may by agreement appoint their own attorney to oversee the sale and transfer process but this is not the norm. Should a bond be registered the bank will appoint a conveyancing attorney to attend to this. This attorney represents the bank and owes a duty of good faith to the purchaser.

The purchaser is liable for the fees and disbursements payable to the conveyancers and a costing should be obtained before proceeding.

**WHAT TAXES ARE PAYABLE**

There are a number of taxes that may apply to immovable property ownership in South Africa. Herewith a brief overview and detailed tax advice should be obtained.

<u>Transfer duty</u>

This is the tax payable to the South African Revenue Service (SARS) on the acquisition of the immovable property. These rates are applicable to individuals, Companies, Close Corporations and Trusts. These funds are payable before registration of transfer.

| | | | |
|---|---|---|---|
| *All Purchasers: (sliding scale)* | R0-R600 000.00 | nil % | |
| | R600 001.00-R1 000 000.00 | 3% | (max of R12 000.00) |
| | R1 000 001.00-R1 500 000.00 | 5% | (max of R37 000.00) |
| | R1 500 001 upwards | 8% | (Plus R37 000.00) |

<u>Capital Gains Tax (CGT)</u>

This is the tax payable on any capital gain made. CGT is payable only upon the sale of the immovable property.

<u>Income tax</u>

Should there be any profit derived from the immovable property from rentals (after payment of permitted expenses), income tax will be payable to SARS.

Should the foreigner or foreign entity owning the immovable property commence trading in immovable properties, income tax (as opposed to CGT) could be payable on the proceeds of the sale of any immovable property

**SECTION 35A OF THE INCOME TAX ACT: TAX WITHOLDING LAW**

When a non-resident sells property for a sum of R2 000 000.00 or more, this law makes it obligatory for the purchaser of the property to withhold a portion of the selling price by the purchaser pending the determination by SARS of the CGT liability of the seller. The purpose of the law is to prevent foreigners from disposing of immovable property and avoiding the payment of CGT by the immediate repatriation of the proceeds of sale.

The Purchaser must withhold funds as follows:

| | |
|---|---|
| If the non-resident Seller is a natural person: | 5 % |
| If the non-resident Seller is a Company: | 7.5 % |
| If the non-resident Seller is a Trust: | 10 % |

In order to avoid this withholding law a directive from SARS can be obtained as to the exact amount of CGT to be paid. This amount is then withheld and paid to SARS on registration of transfer.

**INTRODUCTION AND REPATRIATION OF FUNDS**

Once a foreigner has introduced cash into South Africa with which to purchase property, they can on the sale of the property repatriate these funds together with any profit made on the purchase provided the funds were brought into South Africa through the proper channels.

All relevant documentation relating to the purchase of the property should be retained including the sale agreement, proof of the origin of the funds and proof of receipt of the initial funds in South Africa.

Advice should be sought before introducing foreign funds as the relevant Exchange Control regulations need to be followed.

**SIGNING OF CONVEYANCING DOCUMENTATION OUTSIDE SOUTH AFRICA**

Conveyancing documents signed outside South Africa need to be signed at a South African Embassy.

The documents can also be signed before a foreign notary where that country is a member of the Hague Convention. In such instances the Notary would need to be authenticated by means of an apostille certificate.

The above can be a time consuming process and in the case of the notary an expensive process. Where possible the conveyancing documents should be signed in South Africa or the use of special power of attorney should be employed.

It should be noted that the above applies only to the signing of conveyancing documents. Sale agreements signed in foreign countries are valid and binding without the need to sign at an embassy or Notary.

**CONCLUSION**

This article is intended as an overview of some of the factors applicable to foreigners acquiring immovable property in South Africa.

Detailed advice and assistance is recommended before proceeding with the acquisition of immovable property.

For more details on acquisition of property by foreigners, Voetstoots, Capital Gains Tax, Income tax (property speculators vs property investors) and Section 35A Income Tax, please see specific articles in the Schindlers Property Law Manual.

# WITHHOLDING OF FUNDS PAYABLE TO NON-RESIDENT SELLERS
# SECTION 35A OF THE INCOME TAX ACT

**WHAT IS SECTION 35A OF THE INCOME TAX ACT**

Section 35A is a new section added to the Income Tax Act (effective from 1 September 2008) the purpose of which is to prevent non-resident Sellers of immovable property from disposing of immovable property without paying capital gains tax due to SARS.

Section 35A states that a Purchaser of property from a non-resident Seller must withhold funds from the amount due to the non-resident Seller and pay the funds to SARS. These funds are used by SARS to pay the Sellers tax due to SARS.

**WHAT AMOUNT OF FUNDS MUST THE PURCHASER WITHOLD**

The Purchaser must withhold funds as follows:

| | |
|---|---|
| If the non-resident Seller is a natural person: | 5 % |
| If the non-resident Seller is a Company: | 7.5 % |
| If the non-resident Seller is a Trust: | 10 % |

The amount withheld must be paid over to SARS within a prescribed time or the Purchaser will be liable to SARS for interest and penalties.

**CAN THE SELLER AVOID THIS WITHOLDING OF FUNDS**

Yes. The Seller can apply to SARS for a directive to reduce the amount or a directive that no amount be paid.

**WHAT ARE THE LIMITATIONS OF SECTION 35A**

Section 35A does not apply if the amount payable by the Purchaser to the Seller in respect of the acquisition does not exceed an aggregate of R2 million. i.e. the Section does not apply if the purchase price is less than R2 million.

**JOINT OWNERS**

The reference in S35A(14) to a seller means the individual joint owner of a property and not a partnership or aggregate of the joint owners. The threshold exemption of R2 million must therefore be applied to each joint owner and not to the total amount payable to all joint owners.

**WHAT HAPPENS IF THE PURCHASER DOES NOT WITHOLD FUNDS**

If a Purchaser knows or reasonably should have known that the Seller is not a resident and fails to withhold any amount as required in terms of the Act, that Purchaser will be personally liable for the payment of the amount which he failed to withhold.

Any estate agent and any conveyancer who is entitled to any remuneration in respect of services rendered in connection with the disposal of the immovable property or the registration of transfer, as the case may be, must each inform the Purchaser in writing of the fact that the Seller is not a resident.

If an estate agent or conveyancer knows or should reasonably have known that the Seller is not a resident and fails to comply with the above, that estate agent or conveyancer will be jointly and severally liable for the payment of the amount which the Purchaser is required to withhold to pay to SARS in terms of this section, but the amount is limited to the amount of remuneration payable to such person.

**CONCLUSION**

The explanation given in this article has been simplified. Section 35A of the Income Tax Act has intricacies and one should consult an Attorney for further information.

# EMIGRATION

**INTRODUCTION**

When the decision is made to emigrate from South Africa one of the issues that must be dealt with is the sale of immovable property. There are a few important considerations that should be looked at when undertaking this task.

**POWER OF ATTORNEY**

Careful consideration should be given to whether or not to have a Power of Attorney drawn and signed for the purpose of facilitating the marketing and subsequent transfer of your immovable property in the Deeds Registry.

A Power of Attorney is a useful tool that can be used to enable a trusted individual to sign documents on your behalf in South Africa while you are away or generally to contract on your behalf. There are two types of Power of Attorney, the first being a General Power of Attorney (GPA) and the second being a Special Power of Attorney (SPA). The first gives general power to act and the second limits the acts which can be undertaken, such as those related to a property transaction.

The Deeds Registry has a set of particular rules that apply to Powers of Attorneys and it is advisable to consult a Conveyancing Attorney to have this document drawn correctly so as to avoid the Deeds Registry rejecting the document as incorrect and unusable.

Should you as a Seller leave South Africa and have to sign Deeds Office documents in a foreign country there are again particular rules that apply to the signing of such documents in a foreign country. Depending on the country in which you need to sign the documents you may need to either sign the documents at a South African Embassy or before a Notary Public.

**RATES REFUNDS**

In order to transfer your immovable property a Rates Clearance Certificate (RCC) is required. The City Council will claim rates and taxes, electricity and water 5 – 6 months in advance. The law related to the RCC says that a RCC must be valid for a period of 120 days from the date of issue of the RCC by the City Council.

The conveyancers will not refund the Seller any funds on registration. The conveyancers have been instructed by the City Council of Johannesburg not to refund the Seller for any amounts paid past the registration date. After transfer the Purchaser of the property opens new accounts at the City Council and any refund due to the Seller in respect of any overpayment is generated by the City Council. The City Council normally takes approximately 6 to 9 months to reconcile the Seller's and Purchaser's accounts and issue a refund cheque.

The refund cheque is made out to the Seller if so requested by the Seller in the Application for a Refund. The conveyancing Attorneys do not calculate the refund and are not advised as to how this is determined. There are a variety of City Council Consultants who for a fee will expedite this refund process.

**EMIGRATING AND CAPITAL GAINS TAX**

South African Citizens who emigrate to live permanently overseas stop being local tax residents on the day they leave (even if they continue to hold a South African passport). It is not possible to give an exhaustive explanation of the various implications of this, save to state that it is important to consider all the tax implications before leaving and to obtain professional advice.

The implications for normal income tax are simple as you will be taxed in South Africa until you leave and then taxed in your new country when you arrive.

In regard to Capital Gains Tax (CGT) however the matter is more complex. Paragraph 12(2)(a) of the Eighth Schedule to the Income Tax Act states that a person who ceases to be a resident of South Africa is deemed to have disposed of all of their assets as of the date of departure, irrespective of whether or not such assets were actually disposed of. This applies to and includes all assets held worldwide as a result of our residence based system of taxation.

In other words when you leave, SARS considers you to have sold all your assets (even if you have not) and thus you become liable for (CGT) on the sale of those assets (whether or not you have actually sold them). The assets are deemed to have been disposed of at market value. The usual CGT rules will be applicable to this disposal of assets and will give rise to CGT on the difference between the market value and the base cost.

There are various exceptions to this deemed disposal, one of which is in regard to immovable property situated in South Africa. The reason why immovable property is excluded from this deemed disposal is that this type of asset is subject to CGT irrespective of the residency status of the owner.

**TAX CLEARANCE CERTIFICATE**

In order to emigrate a Tax Clearance Certificate is needed from SARS. In order to obtain a Tax Clearance Certificate a Form MP 336(b) declaring all assets, liabilities and personal details must be completed and handed to SARS.

**ALLOWANCES**

There are various exchange control rules and regulations that apply to the taking of funds out of South Africa. These exchange control rules and regulations are complex and the assistance of an Attorney or Tax Consultant is advisable. It is possible to apply to the Reserve Bank to have the limits below increased and amended, however in general the following will apply:

**Cash Allowance:**

- R1 000 000.00 per adult over the age of 18 years and R200 000.00 per child.

**Foreign Capital allowance:**

- R4 000 000.00 per single unit or R8 000 000.00 per family unit.

**Household goods:**

- A Form N.E.P is required to be completed and attested by an Authorised Dealer for house hold, personal effects, motor vehicles, caravans, trailers, motorcycles, stamps and coins (excluding coins that are legal tender in the Republic), within the overall insured value of R2 million.

These limitations are the values which may be transferred per year and as such, if you exceed these limits in the year of emigration, the balance may be taken over successive years.

**CONCLUSION**

The above article is not intended to be an exhaustive text on the issues that have been mentioned and discussed in this document. When considering emigration it is advisable to assemble a professional team to advise and guide you through the process. When dealing with immovable property this would include an Estate Agent, a Tax/Accounting Advisor and an Attorney.

# TRANSFER DUTY

**WHAT IS TRANSFER DUTY**

Transfer Duty is a form of tax which is paid in terms of the Transfer Duty Act when a Purchaser buys immovable property. This is subject to various exceptions in which case a Transfer Duty Exemption Certificate must be obtained and lodged.

There are various examples of transactions which are exempt from Transfer Duty (Section 9 of the Transfer Duty Act). The most common example is where the Seller is registered for VAT. (in such instance the Purchaser does not pay Transfer Duty)

**WHO ISSUES THE TRANSFER DUTY RECEIPT**

SARS issues the Transfer Duty Receipt or Transfer Duty Exemption Certificate after receiving the necessary documents and payment of funds from the Conveyancing Attorneys.

**TRANSFER DUTY: FURTHER ISSUES**

The Seller and Purchaser are required to sign declarations (at the conveyancers) to the effect that the purchase price for which the property was sold is a market related price.

In terms of the Transfer Duty Act SARS is entitled to be paid Transfer Duty on the "Fair Value" of the property. In most instances the purchase price is the "Fair Value", SARS however may call for valuations to confirm this.

The SARS declarations call for a disclosure of the parties income tax numbers and for various tax information related to the sale and Capital Gains Tax. One of the functions of SARS in issuing transfer duty receipts / exemption certificates is to monitor the tax status of all the parties involved in the transaction.

Any outstanding tax issues a party to a transaction may have with SARS will have to be resolved before Transfer Duty Receipts are issued, and this could create delays in the transfer process.

Both Sellers and Purchasers should be encouraged to resolve any outstanding tax issues with SARS at an early stage, to avoid delays.

**WHY IS A TRANSFER DUTY RECEIPT NECESSARY**

When documents for the transfer of property are lodged in the Deeds Office, it is a requirement that a Transfer Duty Receipt or Transfer Duty Exemption Certificate be lodged. The Deeds Office will not register the transfer unless this document is lodged. In other words, the Deeds Office acts as a policeman on behalf of SARS to ensure that the Transfer Duty Act is complied with.

**HOW MUCH TRANSFER DUTY IS PAYABLE**

The rate at which Transfer Duty is paid is determined by the Minister of Finance in the budget speech each year and is as follows from 23 February 2011:

These rates are applicable to individuals, Companies, Close Corporations and Trusts.

| | | |
|---|---|---|
| *All Purchasers: (sliding scale)* | R0-R600 000.00 | nil % |
| | R600 001.00-R1 000 000.00 | 3% (max of R12 000.00) |
| | R1 000 001.00-R1 500 000.00 | 5% (max of R37 000.00) |
| | R1 500 001 upwards | 8% (Plus R37 000.00) |

**EXAMPLES: MATTERS CONCULDED FROM 23 FEBRUARY 2011**

| | | |
|---|---|---|
| <u>Purchase Price</u>: R590 000.00 | | =nil as below threshold |

| | | |
|---|---|---|
| <u>Purchase Price</u>: R720 000.00 | | |
| -R0-R600 000.00 | nil as exempt | nil |
| -R600 001.00 - R720 000.00 | x 3 % of R120 000.00 | R3 600.00 |
| Total transfer duty: | | <u>R3 600.00</u> |

| | | |
|---|---|---|
| <u>Purchase Price:</u> R1 400 000.00 | | |
| -R0-R600 000.00 | nil as exempt | nil |
| -R600 001.00 – R1 000 000.00 | x 3 % on R400 000.00 | R12 000.00 |
| -R1 000 001.00 – R1 400 000.00 | x 5 % on R400 000.00 | R20 000.00 |
| Total transfer duty: | | <u>R32 000.00</u> |

| | | |
|---|---|---|
| <u>Purchase Price:</u> R1 800 000.00 | | |
| -R0-R600 000.00 | nil as exempt | nil |
| -R600 001.00 – R1 000 000.00 | x 3 % on R400 000.00 | R12 000.00 |
| -R1 000 001.00 – R1 500 000.00 | x 5 % on R500 000.00 | R25 000.00 |
| -R1 500 001.00 – R1 800 000.00 | x 8 % on R300 000.00 | R24 000.00 |
| Total transfer duty: | | <u>R61 000.00</u> |

# VALUE ADDED TAX (VAT)

When immovable property is sold, transfer duty or VAT is always payable. Either one or the other is applicable.

**The Overriding Rule:**

The question of whether VAT or Transfer Duty is payable is a complex one and is one in respect of which there is not always a simple answer. The determination of this issue must be left to the Seller and their legal, tax or financial advisors. The answer must never be guessed at and certainty is critical.

**General Rule No 1: Seller not registered for VAT (Purchaser not registered)**

Where the Seller is not registered for VAT the Purchaser must pay transfer duty. (this is the usual case in most residential re-sales).

**General Rule No 2: Seller not registered for VAT (Purchaser registered for VAT)**

Where the Seller is not registered for VAT the Purchaser must pay transfer duty as above in Rule No 1.

The Purchaser can under certain circumstances claim the Transfer Duty back from SARS as a "Notional VAT Input Credit".

Whether this is possible or not is a fact to be determined by the Purchasers' advisors.

The Conveyancer will give the Purchaser a copy of the Transfer Duty Receipt for this purpose.

**General Rule No 3: Seller registered for VAT (Purchaser not registered)**

Where the Seller is registered for VAT the Purchaser does not pay transfer duty and the Seller must deal with VAT in the purchase price (normally included as in most developer sales).

NB NOTE: Where the Seller is registered for VAT but does not deal with VAT in the purchase price, i.e. the Purchase Price does not refer to whether it includes or excludes VAT, the Purchase Price is deemed to include VAT.

(a) The Purchase Price is the sum of R1 000 000.00 including VAT

| | |
|---|---|
| -in this example the Purchaser price due to the Seller is | R877 192.98 |
| -the VAT portion of the purchase price is | R122 807.02 |
| -total purchase price | R1 000 000.00 |

The Seller will receive R1 000 000.00 and will have to account to SARS for the VAT portion of R122 807.02

(b) The Purchase Price is the sum of R1 000 000.00 excluding VAT

-in this example the Purchase price due to the Seller is excluding VAT and we thus add VAT at 14% to the purchase price as follows:

| | |
|---|---|
| Purchase Price excluding VAT: | R1 000 000.00 |
| To VAT thereon at 14 % | R114 000.00 |
| Total Purchase Price including VAT | R1 114 000.00 |

The Seller will receive R1 114 000.00 and will have to account to SARS for the VAT portion of R114 000.00

**General Rule No 4:** **Seller and Purchaser registered for VAT**

In this case the Seller must deal with VAT in his purchase price as above. The Purchaser has the option under certain circumstances to claim back the VAT from SARS. The Conveyancer will give the Purchaser a copy of the Transfer Duty Exemption Certificate and the Seller must provide a VAT Invoice.

**General Rule No 5** **Zero Rated Transactions**

The legislative basis for these transactions is found in Section 11(1)(e) of the VAT Act. A zero rated transaction is one where VAT is applicable but is charged at the rate of 0 %. For Zero Rating to apply a clause which complies with Section 11(1)(e) of the VAT Act must be inserted into the agreement of sale. A typical such clause is set out below.

In order for a transaction to be zero rated the criteria set out in the precedent clause below must apply: (this is an example and must not be used without further advice)

***ZERO RATING OF TRANSACTION FOR VAT PURPOSES***

*The parties record that:*

(a) *Both the Seller and Purchaser are registered as vendors in terms of the Value Added Tax Act on the date of Registration of transfer.*

(b) *The Property, being let on a commercial basis, is and will, on the date of registration date, be a going concern and the Seller's Property is disposed of on that basis;*

(c) *The Property is now, and will on the date of Registration of transfer, still be an income earning activity;*

(d) *The sale of the Sellers interest in the Property is accordingly Zero Rated for VAT purposes.*

(e) *The parties record that in the event of the Receiver of Revenue not permitting the zero rating of the transaction for any reason whatsoever, the Purchaser shall pay to the Seller VAT upon the Purchase Price within 7 (Seven) days of demand for such payment and upon presentation of a valid VAT invoice.*

# WHAT YOU NEED TO KNOW ABOUT CAPITAL GAINS TAX

**WHAT IS CAPITAL GAINS TAX**

Capital Gains Tax is a tax that was introduced into our law in October 2001. This is a tax which is paid on the increased value of your Property (or other capital asset) when you sell. If you bought your Property before October 2001, and informed SARS of the value of your Property by 1 October 2001, the capital gain is worked out on the increased value since 1 October 2001. If you bought your Property after 1 October 2001, capital gains tax is paid on the increased value from the date of buying. Capital Gains Tax applies to any capital profit, but this article will only deal with Capital Gains Tax when a Property is sold.

**HOW MUCH IS CAPITAL GAINS TAX**

To calculate the capital gain the property owner must work out how much the value of the Property has increased since 1 October 2001, or if after this date since the Property was bought. For example if your Property was valued at R500 000.00 on 1 October 2001 or if you bought the Property after 1 October 2001 for R500 000.00 and sell the Property in 2006 for R800 000.00, then your capital gain is R300 000.00.

There are specific formulae and specific rules for calculating Capital Gains Tax. These are complicated. There are however certain “rules of thumb” which can be used to calculate Capital Gains Tax. The basic rules of thumb are that if you are an individual then Capital Gains Tax will be about 13.3 % of the capital gain. If the Property is registered in a Company/Close Corporation, the Company/Close Corporation will pay about 18.6% of the capital gain and if the Property is registered in a Trust, the Trust will pay about 26.7% of the capital gain. (percentages as at 1 March 2012)

There are certain deductions that are allowed, such as the cost of buying and selling the Property and the cost of any improvements made to the Property. The cost of general maintenance and repairs do not count as deductions. There are also certain exemptions that apply (R30 000.00 annual exclusion from 1 March 2012). A tax practitioner should be consulted.

**THE PRIMARY RESIDENCE EXEMPTION**

The first exemption to be aware of is that when you sell your primary residence, sales of up to R2 million are disregarded for CGT purposes. If you sell your home for more than R2 million and the following factors are present, the next exemption will apply:

1. The Property must be registered in your own name. In other words the Property cannot be registered in the name of a Company, Close Corporation or a Trust.
2. The Property must be what is known as your “primary residence”. In other words the Property must be the Property you live in permanently and cannot be a second investment Property or a holiday Property.

If these two factors both apply, the first R2 000 000.00 (Two Million Rand) capital gain is exempt from Capital Gains Tax. (from 1 March 2012) In other words you must make more than a R2 000 000.00 gain before you will have to pay any Capital Gains Tax. If the Property is not registered in your name or is a second Property that you own, then these exemptions will not apply and you will pay Capital Gains Tax on the full capital gain.

**WHEN MUST YOU PAY THE CAPITAL GAINS TAX**

Many Property owners think that Capital Gains Tax is paid as soon as the Property has been sold. This is not correct. When the Property owner fills out their income tax return for the financial year, the fact that a Property was sold must be disclosed. The Property owner must then tell the Receiver of Revenue in the tax form that a Property was sold and whether or not Capital Gains Tax is payable in respect of that sale or not. The income tax return is then sent to the Receiver of Revenue as usual. The Receiver of Revenue will assess the income tax payable and the Property owner will pay the Capital Gains Tax along with the ordinary tax payable as per the income tax return.

**CONCLUSION**

The explanation given in this article has been simplified. Capital Gains Tax is in fact a very complicated tax and all Property owners should consult a tax expert when looking at the issue of Capital Gains Tax.

# EFFECT OF THE 2012 BUDGET ON IMMOVABLE PROPERTY

**GENERAL**

In February 2012 Minister of Finance Pravin Gordhan presented the budget which took effect on 1 March 2012. The intention of this article is to set out the effect of the 2012 budget on immovable property.

**CAPITAL GAINS TAX**

Capital gains tax (CGT) was increased and amended in the budget speech.

In short the changes are as follows:

1. The inclusion rate (i.e. the portion of the gain that is included as income to be taxed) for individuals (and special trusts) increased from 25% to 33.3%

2. The inclusion rate for companies and trusts increased from 50% to 66.6%.

3. The annual exemption of CGT increased from R20 000.00 per year to R30 000.00 per year

4. The primary residence rebate increased from R1500 000.00 to R2 000 000.00

5. In the year of your death (when all assets are deemed to have been disposed of) the first R300 000.00 of any capital gain will be excluded. This has been increased from R200 000.00.

The above changes are demonstrated in the following examples:

**<u>INDIVIDUALS (NOT PRIMARY RESIDENCE)</u>**

| | |
|---|---|
| Base cost at October 2001 | R1 000 000.00 |
| Selling Price | R2 000 000.00 |
| Capital Gain (Selling Price less Base Cost) | R1 000 000.00 |

| **PRIOR TO 1 MARCH 2012** | | **AFTER 1 MARCH 2012** | |
|---|---|---|---|
| Less annual exclusion | R 20 000.00 | Less annual exclusion | R 30 000.00 |
| CGT after exclusion | R980 000.00 | CGT after exclusion | R970 000.00 |
| Inclusion rate of 25% of the Capital Gain | R245 000.00 | Inclusion rate at 33.3% of the Capital Gain | R323 010.00 |
| Tax at 40%* | R 98 000.00 | Tax at 40%* | R129 204.00 |
| *(may vary according to tax rate applicable) | | | |
| Thus CGT is approximately 10% of gain | | Thus CGT is approximately 13.3% of the gain | |
| CGT payable | R98 000.00 | CGT payable | R129 204.00 |

**<u>INDIVIDUALS (PRIMARY RESIDENCE)</u>**

| | |
|---|---|
| Base cost at October 2001 | R1 000 000.00 |
| Selling Price | R4 000 000.00 |
| Capital Gain (Selling Price less Base Cost) | R3 000 000.00 |

| **PRIOR TO 1 MARCH 2012** | | **AFTER 1 MARCH 2012** | |
|---|---|---|---|
| Less primary residence rebate | R1 500 000.00 | Less primary residence rebate | R2 000 000.00 |
| Less annual exclusion | R 20 000.00 | Less annual exclusion | R 30 000.00 |
| CGT after rebate (deduct rebate & exclusion) | R1 480 000.00 | CGT after rebate (deduct rebate & exclusion) | R 970 000.00 |
| Inclusion rate of 25% of the Capital Gain | R 370 000.00 | Inclusion rate at 33.3% of the Capital Gain | R 323 010.00 |
| Tax at 40%* | R 148 000.00 | Tax at 40%* | R 129 204.00 |

*(may vary according to tax rate applicable)

| | | | |
|---|---|---|---|
| Thus CGT is approximately 10% of the gain | | Thus CGT is approximately 13.3% of the gain | |
| CGT payable | R148 000.00 | CGT payable | R129 204.00 |

**COMPANIES AND CLOSE CORPORATIONS**

| | |
|---|---|
| Base cost at October 2001 | R1 000 000.00 |
| Selling Price | R2 000 000.00 |
| Capital Gain (Selling Price less Base Cost) | R1 000 000.00 |

| **PRIOR TO 1 MARCH 2012** | | **AFTER 1 MARCH 2012** | |
|---|---|---|---|
| Inclusion rate of 50% of the Capital Gain | R500 000.00 | Inclusion rate at 66.6% of the Capital Gain | R666 000.00 |
| Tax at 28% | R140 000.00 | Tax at 28% | R186 480.00 |
| Thus CGT is approximately 14% of the gain | | Thus CGT is approximately 18.6% of the gain | |
| Less annual exclusion | not applicable | Less annual exclusion | not applicable |
| CGT payable | R140 000.00 | CGT payable | R186 480.00 |

**TRUSTS**

| | |
|---|---|
| Base cost at October 2001 | R1 000 000.00 |
| Selling Price | R2 000 000.00 |
| Capital Gain (Selling Price less Base Cost) | R1 000 000.00 |

| **PRIOR TO 1 MARCH 2012** | | **AFTER 1 MARCH 2012** | |
|---|---|---|---|
| Inclusion rate of 50% of the Capital Gain | R500 000.00 | Inclusion rate at 66.6% of the Capital Gain | R666 000.00 |
| Tax at 40%* | R200 000.00 | Tax at 40%* | R266 400.00 |
| Thus CGT is approximately 20% of gain | | Thus CGT is approximately 26.7% of the gain | |
| Less annual exclusion | not applicable | Less annual exclusion | not applicable |
| CGT payable | R200 000.00 | CGT payable | R266 400.00 |

**DIVIDENDS TAX**

Dividends tax was introduced in the budget speech at the rate of 15%. Dividends tax effectively replaces secondary tax on companies (STC).

Dividends tax is payable where a company or close corporation declares a dividend to its shareholders (or members). In other words if a Company sells a property and after payment of all expenses, there is a profit, this profit is paid to the shareholders or members is by the declaration of a dividend.

Dividends tax is the tax that is paid on the dividend declared at the rate of 15%.

**CONCLUSION**

The content of this article is a simplification of complex legislation. Detailed advice must be taken in all instances.

# NOTIONAL INPUT TAX CREDIT:
# FIXED PROPERTY ACQUIRED BY A VAT VENDOR FROM A NON-VAT VENDOR

**INTRODUCTION**

Where a VAT Vendor acquires fixed property from a Non-VAT Vendor, such transaction is subject to Transfer Duty at the prescribed rates. Prior to 10 January 2012, the purchasing VAT-Vendor was (under certain circumstances) able to claim the transfer duty paid in respect of the acquisition from SARS as a notional input tax credit.

This deduction remained limited to the amount actually paid, provided that the property was acquired for the purpose of consumption, use or supply in the ordinary course of generating taxable supplies (i.e. a vatable income).

**CHANGES IN THE VAT ACT**

The VAT Act was amended and with effect from 10 January 2012, the aforesaid ceiling of the notional input tax deduction, which was arguably unfair, was eliminated.

When purchasing a property for the generation of taxable supplies, such as the supply of commercial accommodation, the vendor is entitled to a notional input tax credit on the basis that the fixed property is now viewed in the same light as the supply of second-hand goods.

Although still subject to transfer duty, the notional input tax credit is now calculated and equal to the tax fraction of 14/114. The calculation is based on the purchase consideration paid or the market value of the property, whichever is the lowest. In the event that a vendor purchases fixed property for any purpose other than that of making taxable supplies, no input tax credit is allowed under the Act.

**CALCULATION OF NOTIONAL INPUT TAX CREDIT**

| | | |
|---|---|---|
| Purchase Price | R5 000 000.00 | |
| Transfer Duty | R 317 000.00 | |
| | | |
| <u>Prior to 10 January 2012</u> | | <u>After 10 January 2012</u> |
| Input VAT Credit: | R 317 000.00 | R5 000 000.00 x 14/114 = R614 035.00 |

**CLAIMING THE NOTIONAL INPUT TAX CREDIT**

The credit can only be claimed by a VAT vendor who is a South African resident as defined in the VAT Act. The full purchase price must have been paid and the transfer property must have been registered in the Deeds Office.

The deduction is claimed in the VAT vendor's return in the ordinary course. Section 16 of the VAT Act allows for the input tax credit to be claimed within a period of 5 years from acquisition of the property. It must be noted that should the input tax credit be claimed and subsequently the property no longer be used for the generation of a taxable supply (i.e. change of use of property), SARS will require the input credit so claimed to be repaid.

It is imperative that vendors claiming such credit must provide the necessary documentary proof, as set out in Section 20(8) that it is entitled to such input tax or deduction in terms of Section 16(2) of the VAT Act. Documentary proof include *inter alia,* the offer to purchase, proof of payment and the transfer duty receipt.

The SARS Interpretation No. 49 must be consulted for further details on the requirements in this regard, as the above is only a simple summary of complex legislation.

# ELECTRICAL COMPLIANCE CERTIFICATE AND SELLING YOUR HOME

**WHAT IS AN ELECTRICAL COMPLIANCE CERTIFICATE?**

An Electrical Compliance Certificate, ECC, is a certificate issued by a qualified electrician which certifies that the electrical installation in your home is safe according to minimum standards set in legislation. In terms of the relevant law every electrical installation must have a certificate of compliance. This means that every homeowner must have a valid ECC in respect of his/her home.

**ELECTRICAL COMPLIANCE CERTIFICATES AND THE SALE OF YOUR HOME**

Most agreements for the sale of your home will have a clause that says the seller must get an ECC when the house is sold. The reason for this clause is to ensure that when the house is transferred from the seller to the buyer, there is a valid ECC and that the electrical installation is safe when the buyer takes transfer of the home.

The Seller is normally responsible for getting and paying for the ECC and will have to pay for any alterations or repairs that may be necessary before the certificate can be issued. When the buyer uses a bond to finance the purchase of the home, the bank sometimes makes it a condition of the bond that the seller must get an ECC.

**MUST THE SELLER GET A NEW ECC OR WILL THE OLD CERTIFICATE BE ENOUGH?**

In terms of newly published regulations dealing with Electrical Compliance Certificates which regulations came into effect on 1 May 2009, an owner of a property may not allow a change of ownership if the ECC is older than two years. The Gauteng Electrical Inspection Authority is of the view that the ECC should not be older than two years at the time of registration of the Property into the name of the Purchaser. The new regulations also provide that the ECC must be in the new regulation format and must be accompanied by a test report. However regardless of whether the ECC is less than two years old, if renovations or alterations have been done after the ECC was initially issued, a new certificate must be issued, alternatively a new certificate must be issued for that part of the property where the work was done.

**WHEN IS THE ELECTRICAL COMPLIANCE CERTIFICATE VALID IN LAW?**

The two year rule set out above applies only to the validity of the ECC for the purposes of a change in ownership. The ECC will otherwise be valid until the seller makes an alteration to the electrical installation in his/her home. This means that subject to the above rule, an ECC does not become invalid after a certain period of time but rather that a certificate becomes invalid if changes are made.

**MUST THE CONVEYANCER HAVE AN ECC BEFORE TRANSFERING THE PROPERTY?**

It is not a Deeds Office requirement that there be an ECC before registration can take place and the Conveyancer can therefore register a transfer without an ECC. The answer to this question is therefore no, unless the contract between the seller and the buyer says that the conveyancing attorney may not transfer the home until a new ECC has been issued. As mentioned above it is also sometimes a condition of a mortgage bond that the bank is given a copy of the ECC before transfer of the home takes place. It must be stressed however that there is a legal obligation on the Seller to have an ECC that is valid in law.

**WHO MAY ISSUE AN ECC AND WHAT CAN YOU DO IF YOU THINK THE ECC IS INVALID?**

Only an accredited person i.e. a person who has suitable qualifications and is registered, can issue an ECC. The electrician has to refuse to issue the certificate if the installation is not safe. If the buyer thinks the ECC should not have been issued, the buyer can ask the Electrical Contracting Authority to invalidate the ECC. The seller will then have to re-issue a valid certificate.

**MAY AN ELELECTRICAL COMPLIANCE CERTIFICATE BE WAIVED?**

The Occupational Heath and Safety Act read with the electrical regulations provides that every electrical installation must have a valid ECC. This requirement cannot be waived but the responsibility to get the certificate can be shifted from the seller to the purchaser by way of an appropriate clause in the agreement.

# CERTIFICATES OF CONFORMITY FOR GAS APPLIANCES

**WHAT IS A CERTIFICATE OF CONFORMITY FOR GAS APPLIANCES**

A Certificate of Conformity for Gas Appliances, also known as a gas compliance certificate, is a certificate issued by an authorised person registered to issue such certificate in terms of the regulations. The certificate warrants that any gas appliances present on the property are safe according to the applicable standards. Such a certificate must be obtained whenever a gas appliance is installed, altered or modified and, most importantly, upon any change of ownership of the property.

**CERTIFICATE OF CONFORMITY FOR GAS APPLIANCES AND THE SALE OF YOUR HOME**

Regulation 17(3) of the Pressure Equipment Regulations promulgated in terms of the Occupational Health and Safety Act 85 of 1993 became effective on 1 October 2009 and makes it compulsory for a gas compliance certificate to be obtained in the event that a property is sold.

It should be noted that it matters not that the installation of the gas appliance predates 1 October 2009 and the certificate is required despite this fact.

Unlike in the case of the Electrical Compliance Certificate, there is no similar regulation regarding the length of the period of validity of a gas compliance certificate. It is, therefore, recommended that such a certificate is acquired on the sale of the property regardless of how old the existing one may be.

The seller will generally be responsible for the obtaining of such a certificate and the banks are beginning to demand such certificates as a condition of any bond that may be registered to finance the property where gas is applicable.

**WHAT IS A GAS APPLIANCE?**

The terms 'gas' and 'gas system' are broadly defined and will include anything that uses any amount of gas. Hot water systems, gas fires and built in gas braai equipment must be construed as gas appliances. If you unsure as to whether a particular system constitutes a gas appliance, err on the side of caution and obtain a gas compliance certificate regardless.

**MAY A CERTIFICATE OF CONFORMITY BE WAIVED?**

The Occupational Health and Safety Act read with the pressure equipment regulations provides that every gas installation must have a valid Certificate of Conformity for Gas appliances. This requirement cannot be waived but the responsibility to obtain the certificate can be shifted from the seller to the purchaser by way of an appropriate clause in the agreement.

**RECOMMENDED CLAUSE FOR SALE AGREEMENT**

The Seller undertakes to, at the Seller's expense obtain, from an accredited person, a Certificate of Conformity confirming that any gas installations on the Property comply with section 17(3) of Government Notice R734 of 15 July 2009, Government Gazette 32395. The Certificate shall be delivered to the Purchaser prior to the date of occupation or within five (5) days of demand for delivery.

The parties agree that the Certificate of Conformity certifies that any gas installation on the Property complies with the safety standards as determined by the relevant legislation and is not to be regarded as a general guarantee covering all aspects of any gas installation present on the Property. The Purchaser shall have no further claims against the seller with regard to any gas installation on the Property.

**IN SUMMARY**

A Certificate of Conformity should be treated in the same fashion as an Electrical Compliance Certificate. The only difference between the two is the period of validity. Given that the situation is unclear on the period of validity of a gas compliance certificate, the recommended option is to obtain a new certificate whenever a property is sold.

# ELECTRIC FENCE SYSTEM CERTIFICATES OF COMPLIANCE

**INTRODUCTION**

An Electric Fence System Certificate of Compliance (EFSCOC) is a certificate issued by an electric fence system installer, duly registered as such in terms of the Occupational Health and Safety Act of 1993 and more specifically the Electrical Machinery Regulations of 2011. An EFSCOC certifies that the Electric Fence System (as defined below) is safe and in accordance with the standards prescribed in the regulations.

These regulations were published in the Government Gazette on 25 March 2011 and came into effect on 1 July 2011. The law relating to the EFSCOC's are explained below.

**DEFINITION OF ELECTRIC FENCE AND ELECTRIC FENCE ENERGISER**

While the regulations deal with a wide range of electrical related issues, this article will have a narrower focus. "Electric fence" is defined as "an electric barrier consisting of one or more bare conductors erected against the trespass of persons or animals."

"Electric fence energizer" is defined as "electrical machinery arranged so as to deliver a periodic non-lethal amount of electrical energy to an electric fence connected to it". "Electric fence system" is defined as "the electric fence and an electric fence energizer".

Only a person registered in terms of Regulation 14 as an electric fence system installer may issue the certificate.

**ELECTRIC FENCE SYSTEMS INSTALED AFTER 1 JULY 2011**

Any electric fences sold or installed after the coming into effect of the regulations (1 July 2011) will be obliged to comply with the safety standards incorporated in the regulations.

This means that such Electric Fence System will require an EFSCOC. This certificate is transferable and if the property is sold the certificate may simply be handed over to the purchaser. If at any stage, there are any additions or alterations to the system after the issue of the certificate, a new EFSCOC will be required to be issued.

**ELECTRIC FENCE SYSTEM THAT EXISTED PRIOR TO 1 JULY 2011**

Any Electric Fence System that existed prior to 1 July 2011 shall not require an EFSCOC except where there is a change in ownership of the premises on which such system exists, and if such change in ownership takes place after 1 December 2012.

The date of 1 December 2012 was originally 1 October 2012 but this date was extended by the Department of Labour.

In the event of such change of ownership, the user or lessor must obtain an EFSCOC for the system. The change of ownership in this context does not mean the date of sale of the property but rather the date of registration of transfer of the property in the Deeds Registry.

Once the EFSCOC has been obtained, this certificate is transferable should the premises be sold in the future, provided again that no additions or alternations are made to the system. Likewise with the new systems as referred to above, should there be any additions or alterations to an Electric Fence System that existed prior to 1 July 2011, the user or lessor will be obliged to have an EFSCOC issued.

**SECTIONAL TITLE SCHEMES / HOME OWNERS ASSOCIATIONS / CLUSTER DEVELOPMENTS**

Where an electric fence system is installed on common property in a sectional title scheme or forms part of common property in a cluster development or land owned by a home owners association, the owner of an individual section or property within such scheme/association will not be required to produce an EFSCOC. In the event that the electric fence system is installed and operated independently by the section/cluster owner, the above provisions will apply. Strict interpretation of the regulations suggests that where there is a sale of a sectional title unit, the body corporate will be required to produce an EFSCOC in respect of any electric fence system on the common property, due to the fact that there is a change in ownership in the common property. It is suggested that body corporates / home owner's associations should as a matter of good practice obtain an EFSCOC, which may be requested by interested parties or in the event that the Department of Labour conducts a routine inspection.

# DISPUTES REGARDING: ELECTRICAL COMPLIANCE CERTIFICATES

**WHAT IS AN ELECTRICAL COMPLIANCE CERTIFICATE?**

An Electrical Compliance Certificate (ECC) is a certificate which certifies that the electrical installation in your home is safe and complies with the minimum standards set in legislation. Every homeowner must have a valid ECC in respect of the electrical installation.

**THE OBLIGATION TO DELIVER AN ELECTRICAL COMPLIANCE CERTIFICATE**

The seller's obligation to deliver an electrical compliance certificate arises from two sources. The first is the sale agreement and the second is the Electrical Installation Regulations which regulations were published in May 2009 pursuant to the provisions of the Occupations Health and Safety Act.

**THE SALE AGREEMENT**

Most standard property sale agreements will have a clause that states the seller must obtain an ECC when the property is sold. When the Seller delivers an ECC issued by a suitably qualified electrician, this ECC is *prima facie* valid. In other words, the ECC is assumed valid until invalidated by a competent authority.

**THE REGULATIONS**

In terms of the regulations the owner of a property may not allow a change of ownership if the ECC is older than two years. The ECC must be in the format as set out in the new regulation and must be accompanied by a test report. If any renovations or alterations have been done after the ECC was initially issued, a new certificate must be issued, alternatively a new certificate must be issued for that part of the property where the work was done (even during the two year validity period).

**DISPUTE RESOLUTION**

If a purchaser experiences any problems with regards to the electrical installation on a property after registration of transfer, there are a number of remedies that can be followed.

What is suggested below is in addition to the purchaser's right to approach an independent attorney / advisor for advice. In all instances it is suggested that the purchaser act as quickly as possible after discovering / experiencing the faults in the electrical system. A delay in acting to enforce the purchaser's rights could prejudice the purchaser's prospects of success. Purchasers should not make any alterations to the electrical system or renovate until the dispute is resolved.

The purchaser can contact the electrician who issued the original certificate in order to look over any issues that have arisen. It is suggested that this be done in conjunction with the seller and the transferring attorney inasmuch as the electrician was originally instructed by the seller.

The purchaser can contact an independent electrician to issue a report on the faults being experienced. This report can be passed on to the seller directly or through the transferring attorney with a view to an amicable resolution. The costs of such independent assessment will be for the account of the purchaser.

The purchaser's ultimate remedy is to refer the matter to the Gauteng Electrical Inspection Authority (GEIA). This body is a statutory body authorized to inspect electrical installations and where necessary invalidate an ECC issued by an electrician.

The GEIA will on request and for a reasonable fee visit the premises and inspect the electrical installation and determine the extent to which there is non-compliance with the regulations. A report is issued after inspection.

Where an ECC is invalidated (whether before or after registration) the sellers obligation to deliver the ECC must be complied with and the seller is obliged to arrange for the issue of a new certificate. The GEIA may take disciplinary action again the electrician who issued the invalid ECC and require that electrician to take remedial steps. The obligation to issue a new and valid ECC however remains that of the seller.

THE GEIA can be contacted at 082 8777 223 / info@geia.co.za / www.geia.co.za

# SUSPENSIVE CLAUSES IN SALE AGREEMENTS

## *ELOFF & ANOTHER v DEKKER [2008] JOL 21331(C)*

**THE FACTS**

The Plaintiffs (mother and daughter) purchased immovable property in Gordon's Bay. The sale agreement was suspensive upon the Plaintiffs obtaining a bond approval on a specific date.

The Plaintiffs bond was approved but for a lessor amount than was required. The Plaintiffs were thus of the view that the sale agreement had lapsed and requested repayment of their deposit paid.

The Seller admitted that the bond had not been approved in the correct amount but alleged that the Plaintiffs had accepted the lessor bond that was granted and that the Plaintiffs had thus waived the suspensive condition relating to the bond.

The Seller was thus of the view that the sale agreement was valid and binding.

The Seller thus rejected the Purchasers request for the repayment of the deposit and the matter proceeded to court.

**WHAT THE COURT HELD**

The Court confirmed the principle that a mortgage bond clause in a sale agreement is for the exclusive benefit of the purchaser.

The Court further confirmed the principle that a purchaser may unilaterally waive the benefit of the suspensive condition relating to the obtaining of the bond, provided the waiver takes place before the date for the fulfillment of the suspensive condition.

The Court held that there was a presumption against waiver and that a waiver must be clear and unequivocal.

The Court held in this case that the Defendant had not established that the Plaintiffs had waived the suspensive condition, thus the sale agreement had lapsed and the Plaintiffs were entitled to the return of the deposit with interest.

**SUMMARY**

Where an agreement for the sale of immovable property contains a suspensive condition to the effect that the Purchaser must obtain a mortgage bond:

- the agreement is suspended until the bond is approved;

- if the bond is not approved by the due date and in the correct amount, the sale agreement will lapse;

- if the purchaser obtains a lessor bond and wishes to accept that bond, the purchaser can unilaterally waive the bond condition, provided that such waiver takes place before the end of the time period for the obtaining of the bond;

- the purchasers waiver must be clear and unequivocal. (the waiver should be done in writing);

- the waiver may be contained in an addendum and signed by both seller and purchaser, should the seller be agreeable. The addendum must be signed before the end of the time period for the obtaining of the bond.

- any extensions to the bond suspensive condition period must be contained in an addendum sign by seller and purchaser.

## BOND GRANTED ON USUAL TERMS AND CONDITIONS

## *LATEGAN AND ANOTHER v LELSIE MILDENHALL TROLLIP t/a PROPERTY SOLUTIONS (A297/10 (2011) ZAFSHC 47 (10 March 2011)*

**THE FACTS**

This case concerns an estate agents claim for the commission upon the fulfillment of a suspensive condition related to loan finance.

The seller and purchaser entered into an agreement of sale of immovable property which was subject to the purchaser obtaining a mortgage bond. The bond clause provided that the mortgage bond was to be granted by *'23 November by a registered bank upon its normal terms and conditions".*

The clause further provided that the condition was "*deemed to have been fulfilled upon notification by the bank to the purchaser or his agent that the loan in question has been approved regardless of any conditions attaching to such approval…".*

On 13 November the purchaser was granted a mortgage bond subject to two conditions being firstly the settlement of an existing bond of the purchaser (implying the sale of the purchasers second property) and secondly that the building of the home on the property commence within 6 months of the bond registration.

The estate agents re-submitted the bond application to the bank and the bank removed the first condition on 4 December. No addendum was entered into to extend the suspensive condition.

The purchaser thereafter cancelled the agreement on the basis that he was not granted a mortgage bond as contemplated in the agreement.

The estate agents took the view that the suspensive condition relating to loan finance had been approved and they were thus entitled to commission from the purchaser as per the agreement.

**WHAT THE COURT HELD**

The Court held that the agreement had lapsed by 23 November, alternatively that the purchaser was entitled to cancel the agreement due to the fact that:

-the mortgage bond was not granted as envisaged in the agreement of sale, and

-it was not possible for the purchaser to give effect to the special condition imposed by the bank.

The suspensive condition was further not extended.

In regard to the contradictory terms of the mortgage bond clause, the Court held the special conditions imposed by the bank were not the banks *"normal terms and conditions"* and as such the suspensive condition was not fulfilled.

**SUMMARY**

The lesson to be learnt from this case is that a suspensive condition relating to loan finance may not be fulfilled in circumstances where the bank imposes additional conditions which are not considered to be within the banks normal terms and conditions.

The bond grant provided by the bank granting a loan must accordingly be carefully studied and any unusual or onerous conditions must be identified and acted upon.

# VALIDITY OF ORAL VARIATIONS

## *DREYER V LUBBE AND OTHERS (8620/07 [2010] ZAWCHC (18 February 2010)*

**THE FACTS**

The parties entered into an agreement for the sale of the sellers members interest and loan account in a close corporation.

The purchase price was the sum of R1 595 000.00 and a deposit of 480 000.00 was payable. The agreement was subject to the suspensive condition that a mortgage bond in the sum of R1 115 000.00 be granted within 60 days which period could "*be extended with the consent of both parties"*.

The deposit was to be refunded in the event of the mortgage bond not being granted on due date.

The agreement contained the following non variation clause:

*"This agreement constitutes the sole record of the terms and conditions governing the sale of the subject matter to the purchaser, and governing the related matters referred to herein, and no prior agreement in the same regard shall be binding on any party hereto. Furthermore, no addition to or variation of this agreement shall be binding on any party hereto, unless reduced to writing and signed by all the parties or their duly authorized representatives."*

Prior to the expiry of the 60 day period the parties orally agreed to extend the period to 9 March.

After the expiry of the 60 days but before 9 March the purchaser cancelled the agreement on the basis that he could no obtain the mortgage bond during the 60 day period. As a result he claimed the repayment of his deposit which he had part paid in the sum of R120 000.00.

The seller claimed that the purchaser's cancellation was not valid as the period for the bond was extended.

The purchaser in turn alleged that the extension was not valid as it was an oral agreement and constituted a variation to the agreement and thus had to be reduced to writing and signed to be valid and binding.

**WHAT THE COURT HELD**

The Court held that the oral agreement changed a material provision of the agreement and that this was the type of variation which the parties intended to be reduced to writing and signed.

The Court held further that is it trite that a non-variation clause is binding and a Court must enforce this.

The oral agreement was thus not binding and the agreement was not valid. The purchaser was entitled to the repayment of the deposit.

**SUMMARY**

Any changes, variations or amendments to an agreement must be reduced to writing and signed by all the parties to the agreement.

As a matter of good practice this should be done whether the agreement includes a non variation clause or not.

# VALIDITY OF A DEED OF SALE ACCEPTED AFTER THE OFFER HAD LAPSED

## *MANNA v LOTTER AND ANOTHER 2007 (4) SA 315 (C)*

**THE FACTS**

The Seller, Mrs. Lotter placed her property on the market for sale. The Estate Agent found a willing buyer who made an offer to purchase. The offer contained a clause which stated that the offer was:

*"irrevocable and expires at noon on the 8th day of November 2003 and on acceptance shall become a binding agreement of sale irrespective of whether the purchaser has been notified of such acceptance or not………."*

The offer to purchase was accepted on 12 November 2003 which was after the date that the offer was open to be accepted. The seller subsequently refused to sign the transfer documents. The purchaser approached the High Court to compel the seller to sign the transfer documents to allow for transfer to be registered.

**THE LAW**

The Court had to decide whether there was a binding agreement even though the seller accepted the offer late (ie, after the date provided for in the offer). The question was whether the seller's acceptance of the offer was binding even though the offer had expired.

The Court found that there were no precedents in South African case law and thus looked to various local and foreign authors for the answer.

The Court considered but rejected the argument that the late acceptance constituted a counter offer by the seller. The Court however found that in our law (Section 2(1) of the Alienation of Land Act) such counter offer would have to be accepted in writing and thus acceptance by conduct was not enough.

The Court decided that the expiry date in the offer to purchase was a stipulation that was inserted for the exclusive benefit of the purchaser, who was entitled to waive that benefit. In other words the purchaser could choose to waive the expiry date and proceed with the sale even though the seller had accepted the offer after the expiry date.

The Court further decided that the waiver could be communicated to the seller by doing whatever needed to be done from the purchaser in terms of the agreement of sale. ie signing documents, presenting guarantees or paying costs etc.

**WHAT THE COURT HELD**

The Court held that the purchaser had waived the expiry date in the agreement by proceeding with the transfer, and as such the agreement of sale was binding on the parties.

**CONCLUSION**

The cautionary note raised by this case is that one must ensure that agreements are accepted within the correct time periods.

If the seller accepts an offer to purchase after the offer to purchase expiry date has lapsed, the purchaser should thereafter either reject the "irregular offer", or, if he chooses to accept it, should sign the seller's late acceptance.

In this case the court also held that the bond clause was for the benefit of the purchaser and was therefore capable of unilateral waiver provided that the bond clause was waived before the date for the fulfilment of the bond condition.

# EFFECTIVE CAUSE OF A SALE:
# *WAKEFIELDS REAL ESTATE (PTY) LTD v ATTREE AND OTHERS*
# (666/10) [2011] ZASCA 160 (28 September 2011)

**WHY IS EFFECTIVE CAUSE IMPORTANT?**

An estate agent is entitled to commission if he/she is the effective cause of that sale i.e. he/she introduced a willing seller to a willing buyer and an agreement of sale resulted from the introduction. The issue in this case is which estate agent is the effective cause under circumstances where there are several agents involved.

**THE FACTS**

In this matter the first estate agency introduced the purchaser to the property, but at that stage the purchaser could not afford the house. Shortly afterward the purchaser bumped into a second agent and mentioned that she had liked that specific house. The sellers subsequently granted a sole mandate to a third estate agency. After discussions with this third agent the purchase price was reduced. Despite having given a sole mandate the seller then advised additional agencies, including the second agent mentioned above, of the decision to reduce the purchase price. The second agent who remembered meeting the purchaser contacted the purchaser and arranged a viewing. The second agent negotiated a further reduced purchase price and a sale agreement was signed and accepted

The sale was processed and registered and the second agent was paid commission as a result. The second agent shared the commission with the third agent who has a mandate. The first agent instituted action against the sellers on the basis that they were the effective cause of the sale and thus entitled to commission.

**WHAT THE COURT CONSIDERED AND WHAT THE COURT HELD**

The court stated that all cases of this nature must be decided on their own merits and it is not possible to make a blanket ruling in this regard.

The court noted that the fact that there were intervening factors between the initial introduction and the eventual sale did not detract from the first agent being the effective cause of the sale, had the first agent not introduced the buyer to the house in the first instance, the second agent's fortuitous meeting of the purchaser and subsequent negotiations, would not have yielded any results.

The court also stated that the effective cause of the sale is not determined by which agent did the most work but on the actual final results. The court was also of the view that the sellers could have protected themselves in the situation and therefore they could only blame themselves for having to pay double commission.

The court ordered the sellers to pay the first agent's commission plus costs over and above the second and third agents commission which had already been paid.

**HOW TO AVOID THIS**

When granting a sole mandate sellers need to abide by the terms thereof and not allow other agents to market the property. On expiry of the sole mandate sellers should insist on receiving a written list of persons introduced to the property. This purchasers can be excluded from future mandates. Sellers need to be cautious when granting open mandates to multiple estate agents and should likewise insist on receiving a written list of purchasers introduced to the property by that agent.

Estate agents should likewise provide sellers with a written list of purchasers introduced to the property.

# HOW TO DEAL WITH MOVABLE PROPERTY IN IMMOVABLE PROPERTY SALES

**INTRODUCTION**

When concluding the sale of immovable property, sellers and purchasers often wish to simultaneously sell various movable property associated with the immovable property.

The sale of movables are often incorrectly included in and form part of the agreement of sale of the immovable property and the purchase price.

**THE CORRECT METHOD OF DEALING WITH MOVABLE PROPERTY**

Where the seller and purchaser agree to the sale of movables associated with the sale of the immovable property, these should be clearly identified in a separate annexure and then dealt with in a separate agreement for the sale of movable property.

The movable property agreement should:

- be linked to the immovable property agreement and the two agreements should refer to each other;
- indicate the purchase price of the movables;
- clearly identify the movable property in an annexure;
- provide for the securing of the purchase price of the movables by means of a bank guarantee payable on registration of transfer of the immovable property or by means of a cash payment to the conveyancing attorneys trust account, payable to the seller on registration of transfer;
- provide that the movables are sold *voetstoots*;
- indicate that risk and ownership only passes from the seller to the purchaser on the date of the registration of the immovable property from the seller to the purchaser in the deeds registry;
- include a clause to the effect of which is that should the sale of the immovable property be terminated for any reason the movable property agreement will likewise automatically terminate;
- be signed by both parties.

**THE DISADVANANTAGES OF ONE AGREEMENT**

The first disadvantage from the purchaser point of view is that the inclusion of the movables and their value in the same agreement is that the purchase price of the immovable property is inflated to the extent of the value of the movable property. The practical consequence of this is that the transfer duty payable to SARS increases resulting in higher costs for the purchaser.

The potential disadvantage for the seller is that save where the property is exempt from capital gains tax (CGT), the seller's CGT exposure is increased by means of the inflated purchase price. Movable property under these circumstances is seldom sold resulting in a capital gain.

**MOVABLES SOLD MUST NOT BE FIXTURES AND FITTINGS OR PART OF THE IMMOVABLE PROPERTY**

Sars is entitled to the payment of transfer duty based on the fair value of the immovable property. The seller and purchaser should not classify as movables any portion of the property that are in fact part of the immovable property such as fixtures and fittings, this in an attempt to reduce the purchase price of the immovable property and thus reduce the transfer duty payable.

**LOW VALUE MOVABLES**

This note and the need for a separate sale of movable property agreement should only be used where the value of the movables sold is material. The inclusion of minor movables or movables of low value will not be material and can at the parties discretion be dealt with in the immovable property agreement.

**CONCLUSION**

A sale of movable property precedent may be obtained by e-mailing a request for such document to vanrensburg@schindlers.co.za

# THE DOCTRINE OF FICTIONAL FULFILLMENT

**WHAT IS THE DOCTRINE?**

If a party to a contract which is subject to a suspensive condition deliberately prevents fulfilment of the condition to avoid being bound by the contract, the condition may be deemed to have been fulfilled.

The doctrine stems from the Roman law principle that a party to a conditional contract has a hope that his contractual rights will become enforceable. This doctrine protects that hope by inserting the concept of fairness into the law of contract by disallowing a party to take advantage of his own default while causing loss to another.

The doctrine reinforces the proposition that where an agreement is subject to a suspensive condition, the party in whose favour the suspensive condition is framed is obliged to take all reasonable steps to fulfil that suspensive condition.

**HOW DOES THE DOCTRINE APPLY TO PROPERTY SALES**

A classic example of the application of the doctrine in property law is where a contract for the sale of immovable property is subject to a suspensive condition that the purchaser must obtain a mortgage bond by a certain date.

In such a contract the purchaser is obliged to take all reasonable steps to obtain such a bond. The purchaser is thus obliged to take active steps to apply for the bond within a reasonable time and submit all relevant and required documents to the financial institution. The purchaser is also obliged to provide accurate information such that the financial institution can make a proper determination as to whether or not to grant the bond.

If the purchaser deliberately fails to apply to a financial institution for the bond within the specified time, does not submit the relevant documentation or supplies false information, then according to the doctrine of fictional fulfilment the suspensive condition can be deemed to have been fulfilled and the contract will in this way come into existence and be binding on the purchaser despite the purchaser's efforts to prevent it from doing so.

The doctrine would also apply to any suspensive condition in an agreement of sale and not only to a mortgage bond.

**INTENTION AND NEGLIGENCE**

The doctrine does not only take effect when the other party to the contract acts fraudulently or without good faith, but rather it includes any deliberate or calculated action to prevent the fulfilment of the condition.

Where a contracting party acts negligently and in so doing fails to apply for a mortgage bond or negligently fails to take steps to fulfil a suspensive condition, the doctrine of fictional fulfilment can also be used.

The question here is whether a reasonable person in the position of the defaulting party would have taken the necessary steps in order to fulfil the suspensive condition. If the reasonable person in the same position as the defaulting party would have taken such steps, then the doctrine will be applicable.

**DEFENCES TO THE DOCTRINE**

It is accepted by the leading authors that the Plaintiff must prove (a) non fulfilment of the condition, and (b) that the defendant breached his duty with the intention to frustrate the fulfilment. The Defendant must then show that the condition would not in any event have been fulfilled.

**CONCLUSION**

The doctrine thus applies where a party prevents the coming into existence of a contract by intentionally taking steps to frustrate the fulfilment of a suspensive condition or where he negligently fails to take the steps necessary to fulfil same.

The doctrine ensures that where two or more persons enter into a contract with the intention to create legal obligations, the innocent party's hope that the contract will become legally enforceable will not be frustrated due to the defaulting party either intentionally or even negligently not performing his side of the bargain.

# SUB DIVIDING YOUR PROPERTY – WHAT YOU NEED TO KNOW

**WHAT DOES SUB DIVIDING YOUR PROPERTY MEAN**

Sub dividing property is when a property owner decides to divide his property into two or more smaller pieces of property. The new pieces of property are called sub divided portions or stands. The property owner can then sell one or more of the sub divided portions to a Purchaser.

Sub dividing your property is possible in any area but is most popular in older areas where the size of land is larger. The trend is to sub divide these larger stand into smaller and more manageable stands. Not only developers sub divide property, ordinary residential owners of property also often sub divide their property to either sell or make a profit or contain costs by living on a smaller stand and to feel more secure.

**WHAT ROLE DOES THE TOWN PLANNER PLAY**

When you decide to sub divide your property, the first professional you need to consult is a town planner. The town planner will advise you on the process and help you apply to your local authority or municipality to get the permission needed to sub divide.

The municipality will look at different factors in deciding whether to give permission to sub divide. These factors include the size of your property, the availability of electricity and other municipal services. The municipality will also look at the impact of smaller stands on an area such as the impact of increased traffic etc. The role of a town planner is *inter alia* to motivate your application taking into account the various factors.

**WHAT MUST YOU CONSIDER BEFORE SUB DIVIDING**

Whilst sub dividing property can be very profitable it is important to be aware of the pitfalls so that these can be avoided. The most important of these is the “time” and “cost” involved in sub dividing your property. The town planner must be asked to help you estimate the realistic time period to complete the sub division and must be asked to help estimate the costs of sub division, taking into account not only the town planning fees but also all the other costs such as the land surveyor costs, contributions to council and the potential costs of having to install sewer lines or move electrical boxes. Each sub division will have to be looked at on an individual basis to see what potential time and cost factors are applicable so that the “surprise” element can be avoided. The “cost” and ‘time” factors must be looked at in light of the different phases to a sub division as set out below.

**WHAT ARE THE PHASES OF A SUB DIVISION**

The sub division process can be broken down into three separate phases. The first phase is getting the permission of the municipality to sub divide. A common mistake made by property owners is that they think this is the end of the process, but it is not, it is only the first phase.

When the municipality gives permission to sub divide, they include various conditions that must be complied with before the new stands can be transferred in the Deeds Office. These are called the “Legal Admin” requirements or the “Regulation 38” requirements. This is the second phase of the process. What property owners do not realize, is that the town planner’s job does not extend to helping the property owner fulfill these requirements unless this is specifically arranged. To avoid unnecessary delays and expenses the property owner is advised to discuss this phase of the process with the town planner or a conveyancing Attorney very specifically in order to establish what is required. There are companies who specialise in the fulfillment of “Legal Admin” or “Regulation 38” requirements who can be used to help.

The final phase of the process is the transferring of the newly sub divided stands to the new owners in the Deeds Office. This is done by the conveyancing Attorney. The conveyancing Attorney will draw and have signed any documents or servitudes that may need to be registered. These could include servitudes of right of way, sewer servitudes and a variety of council servitudes.

# PROPERTY INVESTORS vs. PROPERTY SPECULATORS

**INTRODUCTION**

The past few years have seen enormous growth in the property market. We have also seen a large number of people entering into the property market and purchasing second and third properties as investment properties. These new entrants largely see themselves as property investors. The danger for some of these property investors is that SARS may view them as property speculators.

**INVESTOR vs. SPECULATOR**

The difference between an Investor and a Speculator is one of intention. The difference could also have far reaching and expensive tax implications.

An Investor is an individual who acquires the property with the intention of holding the property as an asset in order to rent it out and produce a future flow of income. The property is purchased as a capital asset. When the Investor sells his capital asset he will be taxed with Capital Gains Tax which is effectively in the region of 10% of the capital gain, depending on whether the taxpayer is an individual or legal entity

A Speculator on the other hand purchases the property with the intention of making a profit by selling the property. The property is not regarded by the Purchaser as a capital asset but is rather regarded as trading stock which will be sold at a profit. The profit achieved here is of a revenue nature. When the Speculator sells the property he is selling trading stock and will be taxed at his marginal income tax rate and a maximum of 40% of the gain.

It is clear that the tax implications can severely affect the profit generated from the property investment.

**THE TEST**

In determining the outcome of various disputes as to whether a property purchase was of an investment or speculative nature, our courts have advanced various tests. The dominant test is to determine the "intention" of the taxpayer. A major factor the courts will look at is the intention of the taxpayer at the date the property was acquired. In other words was the intention to purchase the property and hold it as a capital asset or was the intention to purchase the property and sell it in order to make a speculative profit.

The dominant intention test is aptly named. The activities of the taxpayer are looked at holistically and the dominant intention determined. Additional factors the courts may look at are factors such as how long the property was held for, the explanation for and method of selling, how the taxpayer has treated other properties, the main business or profession of the taxpayer and how the property was purchased.

The courts do recognise that the taxpayer may have a change of intention. Such a change of intention would have to be properly motivated. Individuals should not take it for granted that where they purchase a property for investment and then sell that same property shortly after purchase for a large profit, the courts will easily infer a change of intention.

**CONCLUSION**

The onus of proving the intention of the taxpayer will always rest on the taxpayer. Caution must be exercised as SARS will levy penalties against those taxpayers who attempt to mislead SARS in their tax returns. A word of advice would be to treat your property investments as a business in the sense that prior to embarking on various acquisitions, a business plan be drawn up in order to record your intentions. The business plan should be updated on a regular basis to record new developments and any change of intention.

The above comments are merely a guide to what is a complex tax issue and one where individuals are advised to seek expert advice.

# NHBRC CERTIFICATES

**WHAT IS AN NHBRC CERTIFICATE AND WHO MUST HAVE ONE?**

The Housing Consumers Protection Measures Act 95 of 1998 was introduced into our law to protect housing consumers and establish the National Homebuilders Registration Council (NHBRC) as the regulatory body of the home building industry. The NHBRC also sets out to promote ethical and technical standards and holds home builders accountable for the homes they build and provides sanctions for non-compliance.

In terms of section 10(1) of the Act no person can carry on business as a home builder or receive payment in terms of an agreement for the sale or construction of a home unless he is a registered home builder. The NHBRC will issue him with an NHBRC registration certificate if he is registered. In addition no person may build a home unless he is registered with the NHBRC. The home builder is required to enroll every home he intends to build before construction starts and an enrolment certificate is issued to him by the NHBRC.

A home builder is a person who carries on the business of a home builder. The business of a home builder means to: (a) construct or undertake to construct a home or cause same to be constructed; (b) to construct a home to be sold or otherwise disposed of; (c) to sell or dispose of a home in terms of (a) or (b) as a principal; (d) to conduct any other activity prescribed by the Minister for the purpose of this definition.

**WHY IS AN NHBRC CERTIFICATE IMPORTANT?**

Only houses built by registered home builders and enrolled with the council are entitled to the remedies under the Act. An NHBRC certificate is important as the NHBRC will pay out funds to a housing consumer where:

1. There is a major structural defect in the home as a result of the home builder not complying with the NHBRC technical requirements within 5 years of the date of occupation and the housing consumer has notified the home builder of the defect within those 5 years;
2. The home builder is in breach in that he has failed to rectify the defect;
3. The home was constructed by a registered home builder, the house was enrolled with the NHBRC and was still enrolled at the date of occupation;
4. The home builder no longer exists or cannot meet his obligations;
5. Where a home was enrolled on a project basis and application has been made by the MEC pursuant to an agreement in terms of section 5(4)(c).

When a home builder is registered with the NHBRC and the home is enrolled the NHBRC will inspect the home and ensure it meets with the NHBRC technical requirements which in turn ensures homes that are built are of a higher standard and better quality. If the council is of the opinion that the home builder is not complying with the Act, they can impose a penalty and may apply to court to direct the home builder to comply, stop construction or grant assistance appropriate in the circumstances.

**NHBRC CERTIFICATES AND CONVEYANCING**

Section 18(1) of the Act states that a financial institution cannot lend money to a person to purchase a new home from a home builder if:

1. The home builder is not registered with the council;
2. The home has not been enrolled with the council; and
3. The relevant fees have not been paid to the council.

In light of the aforesaid the banks will often instruct Conveyancers to obtain the necessary NHBRC certificates before registering the bond where the building on the property is less than 5 years old. In addition section 18(2) imposes an obligation on Conveyancers to obtain NHBRC certificates. NHBRC certificates are valid for five years from the date of occupation. The date of occupation is the date on which the housing consumer first acquiring the home accepts the home as reflected in a document confirming such acceptance. The banks refer to this as a “Happy Letter”. If this document is not available or if the NHBRC cannot for any reason determine the date, the date reflected on the certificate of occupancy issued by the city council will be the date of occupation.

# HOME OWNERS ASSOCIATIONS

**WHAT IS A HOME OWNERS ASSOCIATION**

Home Owners Associations are more commonly associated and understood in the context of a cluster development or a gated community. In a cluster complex or a gated community the owners of the property generally own freehold land within the development.

A Home Owners Association is a body which is responsible for running the communal affairs of owners of the properties in the development. The home owners association would be responsible for the collection of levies, the maintenance of the common areas, the insurance of common property structures, maintaining the accounts of the association, ensuring the rules of the association are obeyed and are generally responsible for maintaining harmony between the owners.

**TYPES OF HOME OWNERS ASSOCIATIONS**

There are two types of home owners associations, the first being a company incorporated not for gain, previously known as a Section 21 Company. This is now known as a Non Profit company in terms of the new Companies Act No 71 of 2008.

This association is registered as a company in terms of the Companies Act and is governed by a Memorandum of Incorporation MOI (previously known as the Memorandum and Articles of Association. Provision is made for various rights and obligation for the association and its members (the members being the owners of property in the development).

The association in the form of the company is controlled by directors who are usually also owners of property in the development. The association in this instance must comply with the provisions of the Companies Act. Copies of the MOI can be obtained from the Companies Office as they are public record documents.

The second type of home owners association is a common law home owners association. This type of association is established in terms of the common law and is not registered in the Companies Office. This association is governed by a Constitution which is drawn up and adopted by the members of the association.

The common law home owner association is less formal in nature but must still abide by its own constitution. The constitution generally makes provision for trustees who form a committee to run the affairs of the association.

Both types of association are generally entitled to make conduct rules for the members.

**MANAGING AGENTS OF HOME OWNERS ASSOCIATIONS**

A Home Owners Association can appoint professional managing agents to run the affairs of the association and this appointment would generally depend on the size and complexity of the association.

**MEMBERSHIP IN THE HOME OWNERS ASSOCIATION**

Membership in the association is regulated by the MIO or the Constitution of the association. Every owner of a property in the development is obliged to be a member of the association and remain a member until they transfer their property in the deeds registry.

The mechanism that ensures membership is a condition in the title deed to the property in terms of which the property may not be transferred to a purchaser unless that seller has complied with the rules of the association, paid all amounts due to the association and further that the purchaser has undertaken to become a member of the association.

The registrar of deeds acts as a policeman and does not allow the registration of the transfer to take place until the association has presented a clearance certificate confirming the above facts.

**SALE OF A PROPERTY IN A DEVELOPMENT SUBJECT TO A HOME OWNERS ASSOCIATION**

The sale of land agreement from the developer of the cluster development or gated community to the first purchaser generally contains a condition that that purchaser must become and remain a member of the association and be bound by the various rules and regulations until the property is transferred from that purchasers name.

It further generally contains a provision that the purchaser is obliged to make subsequent purchasers aware of the membership requirement and likewise bind the subsequent purchaser's to the association. This, in addition to the title deed condition binds all subsequent owners of the property.

Sellers of property falling into such an association should ensure the appropriate clauses are inserted in the sale agreement.

**HOME OWNERS ASSOCIATIONS COMPARED TO A BODY CORPORATE**

A body corporate in the context of a sectional title scheme is different to a home owners association in the context of a freehold property development.

A body corporate is established and governed by the provisions of the Sectional Titles Act No 95 of 1986. Membership of the members of a sectional title scheme is regulated and governed by the provisions of the Sectional Titles Act.

In mixed use developments it is possible to find sectional schemes whose body corporate is a member of a controlling home owners association. When such section is transferred a clearance from the body corporate and the home owners association is required.

**COMMON PROPERTY / DRIVEWAYS**

When reference is made to common property in a home owners association, this refers to areas used by all the owners in the development as common property. Common property in this context should not be confused with common property in the Sectional Titles Act which has a separate legal definition in that Act.

In certain larger developments such as golf estates the issue can be complex, however in a normal residential cluster complex or gated community the common property areas are generally areas such as the driveway.

The driveway or access road is registered in one of two ways. The first is by way of reciprocal right of way servitudes which are recorded as conditions in the title deeds to the properties.

The second method is where the access drive is registered as a separate property. This property is registered in the name of the association and each of the owners is granted a right of way servitude over such land by the association. These right of way servitudes are registered as title deed conditions on the relevant property's title deeds.

**NOTE TO DEVELOPERS**

When developers embark on a cluster or gated community development it is important to ensure that the correct documentation relating to the home owners association is in place prior to marketing the development. Developers should further ensure their sale agreements contain the appropriate provisions to ensure membership of the association.

# WHAT CONSTITUTES A FIXTURE

## *SENEKA V ROODT 1983(2) SA 602 T*

**THE FACTS**

In this case the seller and purchaser entered into a sale of immovable property. The agreement included the sale of specified furniture.

When the seller vacated the property he removed certain steel cabinets and bar stools. These cabinets and bar stools where not part of the furniture specified in the sale agreement.

The steel cabinets fitted into a built in wooden unit in the study. They were of standard size, were light and could be removed without removing any nails, screws or wire.

There were six loose bar stools in front of a bar unit. It was common cause that the bar unit was a fixture and thus formed part of the house. It was apparent from the materials used and their construction that the bar stools matched the bar unit.

The purchaser was of the view that these items constituted fixtures and as such formed part of the property purchased and thus contended that the seller was not entitled to remove them.

The purchaser launched an application to compel the seller to return these items and was successful. The seller took the decision on appeal to the high court.

**THE ISSUE**

The issue to be decided was whether the steel cabinets and the bar stools where fixtures and thus formed part of the property sold.

**THE LAW**

The court held that:

1. an accessory for the purpose of a contract for the sale of immovable property must be regarded as part of the property sold if it was destined to be of permanent service to the property sold and if it was necessary for the effective use of the property sold;

2. when a fixture comprising more than one part is designed as a unit and the principal part thereof is incorporated in immovable property, then the loose parts of the unit, as part thereof, also become part of the immovable property;

3. the steel cabinets were not part of the immovable property and the seller could remove these;

4. the bar stools were part of the immovable property and the seller could not remove these.

**IMPORTANCE**

The importance of this case is that it demonstrates the principle of what comprises a fixture when selling immovable property.

When in doubt, the parties need to set out in their special conditions clause, exactly what items can be removed and which items are to remain as part of the sale of the immovable property.

# DRAINAGE OF WATER:

# *PAPPALARDO v HAU* (63/08) [2009] ZASCA 160 (30 November 2009)

**THE COMMON LAW RULE AND WHY THIS CASE IS IMPORTANT**

The general rule in our law is that lower lying properties are obliged to accept water from higher lying properties. This may seem very simple but as this case explains there is more to this issue.

**THE FACTS**

In this matter the two parties purchased vacant land in an estate next door to one another. The properties slope in such a way that one property is higher than the other. The owner of the higher lying property, owner A, built on his stand some time before the owner of the lower lying property, owner B.

Owner B built his house in 2003 together with a swimming pool leaving only about 30% of his stand to garden and lawns. Towards the end of 2003 owner A noticed water was damming up against the common boundary wall and he approached his neighbour to see if it was possible to breach the wall to allow the water to flow out of his property over owner B's property. The parties could not agree on the matter and lawyers were approached.

Owner A argued that owner B was obliged to accept water from his property based upon the fact that his property was higher than owners B's property. Owner B however responded by saying that owner A had to show that the water he was insisting he accept would have flowed on to his property naturally.

**WHAT THE COURT CONSIDERED AND WHAT THE COURT HELD**

In the court which first heard the matter the court held that owner B was obliged to accept the water from owner A's property. The matter was then taken on appeal and a decision was made taking into account various factors.

On appeal the court stated that there is a common law principle that lower lying properties are obliged to accept water that would have flowed there naturally from higher lying properties. However the obligation to accept the water is limited. Due to development of properties it is not possible to determine what water would have flowed naturally (in respect of quantity and locality) over the lower lying property. In addition a lower lying property is only obliged to accept water from a higher lying property (other than what would flow there naturally) if there is a registered servitude to that effect.

The owner of a property is obliged to take steps to minimize any damage that may be caused to his and his neighbour's property due to increased water flow as a result of building on an erf. In this case the city council in its consent to subdivision had inserted a condition that should lower lying properties be obliged to accept water (where it is not practical to drain the water directly to a public street) from higher lying properties the owners of each erven will jointly share the cost of a pipeline to discharge the water.

The court therefore granted the appeal on the basis that there was no proof that the water owner A wanted to discharge over owner B's property would have flowed there naturally and the fact that the erven had been developed meant that not all of the water would have flowed naturally over the property. There was also no servitude to oblige owner B to accept the water and the city council had specifically stated that lower lying erven are only obliged to accept water where it is not practical to drain it elsewhere and in this case both properties had direct access to a street to discharge the water. All of these arguments were in favour of owner B and the appeal was granted.

**CONCLUSION**

Lower lying erven are not obliged to accept water that would not have flowed onto the land naturally unless there is a servitude registered in favour of the higher lying property.

# THE HOUSING CONSUMER PROTECTION MEASURES ACT

# HUBBARD v COOL IDEAS 1186 CC (580/12)

**INTRODUCTION**

The purpose of the Housing Consumer Protection Measures Act 95 of 1998 (the Act) is to afford protection to housing consumers. It does this by establishing the National Home Builders Registration Council (the NHBRC) and the requirement that home builders be registered as such.

**THE LAW**

Section 10 of the Act provides that no person shall carry on the business of a home builder or receive any consideration in terms of any agreement with a housing consumer in respect of the sale or construction of a home unless that person is a registered home builder with the NHBRC. The section further provides that no home builder shall construct a home unless they are registered as a home builder with the council.

Before a homebuilder can register as such, the NHBRC must be satisfied that certain minimum criteria are met, the purpose of these being to protect housing consumers.

**THE FACTS**

In 2006 the housing consumer and developer entered into a written building agreement in terms of which the developer was to construct a residential dwelling on land purchased by the housing consumer. The actual construction of the dwelling was sub contracted to a builder who was registered with the NHBRC. The developer was not registered with the NHBRC.

A dispute arose and the matter was referred to arbitration. The housing consumer complained about various structural aspects of the construction and claimed damages for remedial work required to be performed to her house. The developer opposed the claim and instead claimed payment of the outstanding balance for the work already performed as well as interest on that balance.

The arbitrator made an order in favour of the developer and the developer thereafter applied to the High Court to have the arbitrator's award made an order of the court. The housing consumer opposed the application in the High Court on the basis that she had discovered that the developer had not been registered in terms of the Act.

The housing consumer argued that in terms of section 10 of the Act, the developer was not allowed to carry on the business of a home builder or to receive any consideration in terms of any agreement with a person defined as a housing consumer. She further argued that making the arbitration award an order of the court would amount to an order of the performance of an act prohibited by the legislature.

The High Court found in favour of the developer. The housing consumer then approached the Supreme Court of Appeal (SCA) in order to appeal the decision of the High Court.

**HELD**

The SCA held that section 10 of the Act is aimed at protecting the housing consumer from unscrupulous and/or unskilled home builders. The court also held that the fact that the developer had appointed a registered sub-contractor to complete the work would not assist them as, section 10 (7) of the Act requires both contractors to be registered home builders. The SCA thus held in favour of the housing consumer. This was confirmed by the Constitutional Court in 2014.

Non-compliance with section 10 of the Act does not invalidate/ nullify the agreement entered into by the housing consumer and the home builder. Its effect is to disentitle the home builder from receiving any consideration for work done as a home builder.

**CONCLUSION**

Developers or contractors who intend to construct homes for housing consumers must register with the NHBRC in order to be entitled to claim any remuneration or payment. This is the case even where they have sub contracted the construction to contractors who are themselves registered with the NHBRC.

# SECTION 118 OF THE MUNICIPAL SYSTEMS ACT 32 OF 2000
# *CITY OF TSHWANE METROPOLITAN MUNICIPALITY v MATHABATHE & ANOTHER (502/12) [2013] ZASCA 60 (22 May 2013)*

**INTRODUCTION**

In order to transfer ownership of any immovable property in the deeds registry it is necessary to obtain a rates clearance certificate (RCC) from the local authority.

The RCC needs to be valid for a period of 60 days from date of issue. The local authority thus issues clearance figures which include the current arrears on the property plus an advance calculation of rates, sewer, electricity and water charges. The advance calculation is generally for a period of 4 months in advance which allows the seller 60 days to pay the figures and the clearance certificate to be valid for a further 60 days from issue.

The above procedure and requirements are in terms of Section 118 of the Municipal Systems Act 32 of 2000.

From a conveyancing point of view the importance of RCC's are that they serve the purpose of ensuring that all rates and charges due on the property transferred are paid by the seller and the purchaser receives transfer of the property free of municipal debt.

**SECTION 118(1) vs SECTION 118(3)**

Section 118(1) provides that the seller may obtain a RCC in respect of municipal debt on the property limited to a historical period of 2 years preceding the application for the clearance figures. This means that the RCC may not necessarily include the "full" debt due to the local authority as the RCC is limited to the 2 year period.

Section 118(3) provides that municipal debt is a charge upon the property and that this charge enjoys preference over any mortgage bond registered against the property. This legislation has now been the subject of a case before the Supreme Court of Appeal.

***CITY OF TSHWANE METROPOLITAN MUNICIPALITY v THOMAS AND NEDBANK LIMITED***

The SCA confirmed that the local authority is obliged to issue a RCC where municipal debts for a period of two years preceding the application are paid and the local authority may not withhold the RCC on the basis that there remains, after the issue of a clearance certificate outstanding debts beyond the two year period.

The SCA held that Section 118(3) is not an embargo provision, it is a security provision and that the security provided by Section 118(3) amounts to a lien having the effect of a statutory hypothec over property. In other words the section does not allow the local authority to withhold the RCC where payment is made in terms of Section 118(1) but gives the local authority security for the payment of the amount due beyond the two year period.

The court held further that upon registration of transfer, the local authority does not lose it rights under section 118(3).

The importance of this case is the common interpretation is that the local authority has a lien over the property for the seller's historical debt that may be exercised over the property even though the purchaser has taken transfer, in effect making the purchaser liable for the debt.

The constitutionality of this provision is questionable and in our opinion it is unlikely that a local authority would succeed in such an action. The case has been referred to the constitutional court and the outcome is awaited.

**CONCLUSION**

Inasmuch as the local authority is of the view that they can pursue a purchaser after transfer for historical charges on the above basis, it has been suggested in order to protect the purchaser, agreements for the sale of immovable property include a clause that the seller be obliged to pay the full historical debt to the local authority. As indicated above, whether the local authority will be successful is questionable, however the purchaser does require protection from the threat of such action and the resultant legal costs of defending the legal action.

# SECTION 34 OF THE INSOLVENCY ACT

**INTRODUCTION**

Section 34 of the Insolvency Act provides that when a Trader (as defined in the Act) sells (or transfers) its business, the goodwill thereof, or goods or property forming part of such business, except in the ordinary course of business or for securing the payment of a debt, that Trader is required to publish a notice to that effect.

The purpose of the publication of the notice is to provide creditors of the business with notice of the sale (transfer) of the business, thus enabling them to claim any debts due to them from the seller before the transfer takes place. The notice must be published in the Government Gazette and two issues of an English and Afrikaans newspaper which are circulated in the district in which the business is carried on and must be published not less than 30 days and not more than 60 days before the date of transfer.

In cases where Section 34 is applicable, the publishing of the notice is important for the protection of the purchaser and also any financial institution that finances the purchase of the business.

The consequence of the failure to publish the notice (when applicable) is that the failure renders the sale void as against the seller's creditors for a period of 6 months after transfer and is void against the trustee of the seller's estate if sequestrated within the 6 month time period aforesaid. In other words the seller's creditors could claim the seller's debts against the assets of the business notwithstanding that these have been sold to the purchaser.

**IMMOVABLE PROPERTY SALES**

It is clear that when an "owner occupier" sells immovable property, Section 34 is not applicable, i.e. when an owner of commercial immovable property sells that property (occupied by that seller) to a purchaser and no lease agreement in respect of the property exists.

The question that arises for property practitioners is whether publication of a Section 34 notice is required where the seller of immovable property sells that property to a purchaser and such property is used as a letting enterprise.

In other words the seller owns immovable property which property is let to a tenant and that property is sold to a purchaser with the tenant in place, i.e. sale of a letting enterprise. Financial institutions granting finance often call for proof of publication to ensure compliance with the Act prior to releasing any funds. This query thus needs to be effectively and accurately dealt with.

**CASE: KEVIN & LASIA PROPERTY INVESTMENT CC vs ROOS NO**

The issue was dealt with and decided in the Supreme Court of Appeal in the case of *Kevin & Lasia Property Investment CC and another v Roos NO and Others* 2004 (4) SA 103 (SCA) where it was confirmed that the sale of a letting enterprise (such as immovable commercial property which is let to tenants) by a company will not need to be advertised as is required with other businesses.

The rationale is that such company does not fall within the definition of a 'trader' as set out above as the asset being sold is not deemed to be trading stock, nor is the owner of the company engaged in a scheme of profit-making by selling buildings, but rather the immovable property being sold is a capital investment from which an income is generated and the sale thereof is the sale of a capital asset.

**CONCLUSION**

The above is a simplification of complex law and situation specific advice must always be taken before proceeding.

# ANNEXURE TO AGREEMENT OF SALE
# (PRE-SALE ANNEXURE)

**SELLER(s):** ________________________________________

**PURCHASER:** ________________________________________

**PROPERTY:** ________________________________________

**SITUATE AT:** ________________________________________

---

Notwithstanding anything to the contrary contained in this agreement of sale:

*Delete as inapplicable:*

1. **SALE OF PURCHASER'S PROPERTY**

1.1. This agreement is subject to the suspensive condition that:

1.1.1 the Purchaser accepts an offer to purchase for the sale of his Property situated at ______________________________________________________________ for an amount of R____________________________ or such lesser amount as may be accepted by the Purchaser.

1.1.2 that any suspensive conditions contained in the sale of the Purchasers property be fulfilled within ___________________ days of acceptance of this offer failing which this sale shall lapse, in which event, any deposit plus interest accrued will, subject to the provisions of this agreement, be refunded to the Purchaser.

1.2. This condition is inserted for the benefit of the Purchaser who may waive the condition at any time in writing.

1.3. In the event of the fulfillment of this suspensive condition, the parties agree and instruct the appointed Conveyancing Attorney to effect a simultaneous transfer of the properties, insofar as this is possible.

1.4. Pending fulfillment or waiver of this condition, the Seller shall be entitled to continue to market the Property and to accept any other *bona fide* offer made through the Agent (who is hereby given a mandate for the duration of this suspensive condition) for the Property provided that he shall first have given the Purchaser 48 (forty-eight) hours within which to submit an unconditional offer for consideration, such notice period to be calculated from the time that written notice (together with a copy of the alternative offer) to that effect have been delivered to the Purchaser in person by hand at which time it will be deemed to have been received by him.

1.5. The Seller may not give notice as contemplated in the preceding clause until all suspensive conditions in the alternative offer have been fulfilled or waived.

1.6. Once that 48 (forty-eight) hour period aforesaid has lapsed, the Seller shall be entitled to accept the alternate offer in which event this agreement will immediately lapse.

1.7. In the event of the lapsing of this agreement as contemplated above, any deposit plus interest accrued will, subject to the provisions of this agreement, be refunded to the Purchaser.

## 2. PURCHASER PROPERTY SOLD

2.1. The Purchaser warrants that his property, being ________________________________________
__________________________________________________________________________________
has been sold and that any suspensive conditions contained therein have been fulfilled.

2.2. The Purchaser further warrants that the purchase price and the terms of the sale of his property are sufficient and such that they enable the fulfilment of the terms and conditions contained in this Agreement, including but not limited to guarantees, occupation dates and costs of transfer.

2.3. The parties record that the proceeds of the Purchaser's property sold will be used to finance the purchase of the property purchased in terms of this agreement

2.4. The parties agree and instruct the appointed Conveyancing Attorneys to effect a simultaneous transfer of the properties, insofar as this is possible.

## 3. PURCHASERS PROPERTY SOLD SUSPENSIVE

3.1. The Purchaser warrants that his property, being, ________________________________________
__________________________________________________________________________________
has been sold.

3.2. This agreement is subject to the suspensive condition that the suspensive conditions contained in the agreement of sale pertaining to the sale of the Purchaser's property are fulfilled by ___________________________________________ failing which, this sale shall lapse in which event, any deposit plus interest accrued will, subject to the provisions of this agreement, be refunded to the Purchaser. This condition is inserted for the benefit of the Purchaser who may waive the condition at any time in writing.

3.3. The parties record that the proceeds of the Purchaser's property sold will be used to finance the purchase of the Property purchased in terms of this agreement.

3.4. In the event of the fulfillment of this suspensive condition, the parties agree and instruct the appointed Conveyancing Attorneys to effect a simultaneous transfer of the properties, insofar as this is possible.

## 4. UTILISATION OF DEPOSIT PAID - 100% MORTGAGE BOND

The Conveyancing Attorneys are authorised to utilise any deposit paid in terms of this Agreement towards costs in the event of the Purchaser obtaining a 100% mortgage bond.

## 5. ACCEPTANCE OF LESSER MORTGAGE BOND - 100% MORTGAGE BOND APPLIED FOR

The purchaser records that whilst application will be / has been made to a bank for loan finance equal to 100% of the purchase price, in the event of any bank granting a __________ % loan finance (or any higher percentage bond), the Purchaser undertakes to accept such loan finance. The suspensive condition relating to loan finance will be deemed to have been fulfilled and the Purchaser undertakes to effect payment in cash of the balance of the Purchase Price to the Conveyancing Attorneys within 15 days of the approval of the aforesaid loan finance.

6. **CONTINUED MARKETING OF PROPERTY**

6.1. Pending fulfillment or waiver of any suspensive conditions contained in this agreement of sale, the Seller shall be entitled to continue to market the Property and to accept any other *bona fide* offer made through the Agent (who is hereby given an mandate for the duration this suspensive condition) for the Property provided that he shall first have given the Purchaser 48 (forty-eight) hours within which to submit an unconditional offer for consideration, such notice period to be calculated from the time that written notice (together with a copy of the alternative offer) to that effect have been delivered to the Purchaser in person by hand at which time it will be deemed to have been received by him.

6.2. The Seller may not give notice as contemplated in the preceding clause until all suspensive conditions in the alternative offer have been fulfilled or waived.

6.3. Once the 48 (forty-eight) hour period aforesaid has lapsed, and the Purchaser has not provided an unconditional offer or the Seller does not accept it, the Seller shall be entitled to accept the alternate offer in which event this agreement will immediately lapse.

6.4. In the event of the lapsing of this agreement as contemplated above, any deposit plus interest accrued will, subject to the provisions of this agreement, be refunded to the Purchaser.

**7. ANNEXURE TO COMPETIING OFFER AND SUBJECT TO CANCELATION OF SELLER'S EXISTING AGREEMENT OF SALE**

*(this annexure is to be annexed to a competing offer where there is an existing sale in place which is subject to the sale of that purchaser's property)*

7.1. The parties record that the Seller has prior to the date of this agreement entered into an agreement for the sale of the Property ("the First Agreement) with the purchaser thereof ("the First Purchaser").

7.2. The First Agreement is subject to a suspensive condition that the First Purchaser's property is sold on or before ___________________________ and that all suspensive conditions therein are fulfilled on or before ___________________________ (the "Existing Sale").

7.3. The Seller undertakes in favour of the Purchaser that upon fulfillment of the suspensive condition contained in clause ________ (bond clause) of this Agreement, relating to the obtaining of bond finance by the Purchaser, he/she shall invoke the provisions of clause ______ (subject-to-sale/continued marketing clause) of the First Agreement.

7.4. For the sake of clarity, should the First Purchaser fulfill the suspensive conditions contained in the First Agreement prior to the Purchaser obtaining bond finance as per clause ______ (bond clause) of this Agreement and the Seller invoking the provisions of Clause ______ (subject-to-sale/continued marketing clause) of the First Agreement, this Agreement shall become null and void.

7.5. This agreement is subject to the suspensive condition that the Existing Sale is cancelled or lapses due to non-fulfillment of the suspensive conditions contained therein on or before __________________ or the Seller invoking clause ______ (subject-to-sale/continued marketing clause) of the First Agreement, failing which this agreement will be null and void.

8. **OPTIONS TO PURCHASE EQUITY**

8.1. If the Property is owned by a Company, Close Corporation or Trust and if agreed to by the persons holding the shares or beneficial interest in the Seller, the Purchaser may elect to take transfer of their shares or beneficial interest in the Seller provided that it is legally competent for him to do so.

8.2. In such event the Seller undertakes to make all its records available to the Purchaser within 7 (seven) days of written request to do so. A binding agreement, for the transfer of shares/interest shall be entered into between the holders and the Purchaser within 30 (thirty) days of the date of acceptance hereof and this agreement shall fall away and be of no effect save that the Agent shall retain its rights to the payment of commission as outlined in this agreement.

8.3. The Conveyancing Attorneys are hereby authorised to draw such agreement at the expense of the Purchaser.

9. **PROPERTY LET TO TENANTS**

9.1 The Seller and Purchaser record that the Property sold has been leased to a third party tenant in terms of a lease agreement.

9.2 The Purchaser warrants that s/he/it is aware of the lease agreement and is satisfied as to the terms thereof.

9.3 With effect from date of registration the Purchaser shall assume the rights and obligations of the Seller under the lease agreement. The Seller warrants it has the necessary consents/ approvals to transfer the lease.

9.4 The Seller warrants that as at the signing of this agreement of sale, there are no deductions due from the tenants deposit and the all sums due in terms of the lease agreement are up to date.

9.5 The Conveyancing Attorneys attending to the transfer of the Property are irrevocably instructed by the parties on date of registration of transfer of the Property in the Deeds registry to deduct from the Sellers proceeds of sale the following amounts and pay these directly to the Purchaser:

9.5.1 pro rata rental calculated on a daily rate from date of registration of transfer to the last day of the month of registration, irrespective of whether the tenant has effected payment of rental or not, and

9.5.2 the full deposit paid by the tenant to the Seller in terms of the lease agreement, irrespective of whether any deductions are permissible from the tenant.

9.6 Should the tenant be indebted to the Seller as at date of registration of transfer in the Deeds Registry, the Seller shall be obliged to collect any funds due directly from the tenant.

10. **PURCHASE PRICE INCLUSIVE OF VAT**

10.1 The Seller warrants that it is registered as a Vat vendor in terms of the Value Added Tax Act.

10.2 The Parties record that the Purchase Price is inclusive of Vat and is made up as follows:

Nett Purchase Price: R_______________________________________________

Vat: R_______________________________________________

Total Purchase Price: R_______________________________________________

10.3 The Purchaser shall be relieved of the obligation to effect payment of transfer duty but shall continue to be liable for the costs of transfer.

11. **AGREEMENT SUBJECT TO CANCELATION / LAPSING OF SELLER EXISTING AGREEMENT OF SALE**

11.1 The parties record that the Seller has prior to the date of this agreement entered into an agreement for the sale of the Sellers Property (the Existing Sale).

11.2 This agreement is subject to the suspensive condition that the Existing Sale is cancelled / lapses as provided for therein within a period of __________________ days from the date of this agreement, failing which this agreement will be null and void.

**12. AGREEMENT SUBJECT TO CANCELLATION / LAPSING OF SELLERS EXISTING AGREEMENT OF SALE- SUBJECT TO SALE OF PURCHASERS PROPERTY**

11.1 The parties record that the Seller has prior to the date of this agreement entered into an agreement for the sale of the Sellers Property, which agreement is subject to the sale of that purchaser's property (the "Existing Sale").

11.2 This agreement is subject to the suspensive condition that the Existing Sale is cancelled / lapses as provided for therein within a period of __________________ days from the date of this agreement, failing which this agreement will be null and void.

13. **AGREEMENT SUBJECT TO SELLER BANK CONSENTING TO SALE**

13.1. The Seller records that there is a mortgage bond/s registered over the Property in favour of ____________________________________ Bank (the "Seller's Bank").

13.2. The Seller anticipates that the purchase price will be insufficient to cover the amount due to the Seller's Bank and additional costs associated with the sale of the Property.

13.3. This agreement is subject to the suspensive condition that the Seller's Bank consents to the Seller entering into an acknowledgement of debt with the Seller for the payment of the shortfall referred to above by the Seller to the Seller's Bank after registration of transfer.

13.4. Should this suspensive condition not be fulfilled within a period of __________________ days from the date of the acceptance of this agreement, the agreement will be null and void.

14. **AGREEMENT SUBJECT TO PURCHASER HAVING PROPERTY INSPECTED**

14.1. The Purchaser's may at their own election and cost arrange for the Property to be inspected.

14.2. In the event of the Purchasers inspectors identifying any material defects, the Purchasers shall have the option to terminate the agreement of sale by providing written notice to that effect to the Seller's Conveyancers.

14.3. The abovementioned inspection must be attended to within a period of 7 days from the date of acceptance of the agreement of sale.

14.4. The written notice contemplated above must be provided by the Purchasers within a period of 10 days from the date of acceptance of the agreement of sale.

14.5. In the event of the Purchaser failing to attend to the inspection, alternatively failing to provide written notice as contemplated in the two preceding clauses, the Purchasers rights in terms of these clauses shall terminate and no longer be available to the Purchaser and the Purchaser will be deemed to be satisfied.

15. **VACANT OCCUPATION ON TRANSFER**

15.1. The parties record that the Property is occupied by Tenants.

15.2. The Purchaser is entitled to vacant occupation on transfer.

15.3. The seller warrants that the tenants in the Property shall have vacated the Property prior to registration of transfer.

15.4. The Conveyancing attorneys are instructed by the parties not to register the transfer of the Property at the deeds registry until the Purchaser and/or the Estate Agent have confirmed in writing to the conveyancing attorneys that the tenants have vacated the Property.

16. **SELLER UNABLE TO DISCLOSE DEFECTS**

16.1 The parties record that prior to date of sale the Seller has not been in occupation of the Property and as a result the Seller is unable to disclose any defects in the Property to the Purchaser, whether latent (unknown) or patent (known).

16.2 The Purchaser records that s/he understands that the Property sold in terms of this offer to purchase, has been offered for sale by the Seller in the condition in which it stands on the date this agreement is signed.

16.3 The Purchaser records that s/he has had an opportunity to inspect the Property. The Purchaser specifically agrees to accept the Property in the condition in which it stands as at the date this agreement is signed.

17. **ALIENATION OF LAND ACT**

17.1. Section 29A of the Alienation of Land Act shall apply in the event that; (a) the purchase price does not exceed R250 000,00; (b) the Purchaser is a natural person; and (c) the Purchaser has no right to nominate a third party as purchaser.

17.2. Should section 29A of the Alienation of Land Act 68 of 1981 be applicable the Purchaser may revoke this offer within 5 working days of the signing of this offer (not including the day of signature) by written notice delivered to the Seller. Such notice will have no effect unless it: (a) is signed by the Purchaser or his/her agent acting on his/her written authority: (b) refers to this agreement as the agreement that is being revoked or terminated as the case may be; and (c) is unconditional.

18. **SARS TRANSFER DUTY**

18.1. The purchaser records having been made aware that transfer duty is payable by the Purchaser to SARS within 6 months of the date of the principle agreement failing which SARS penalties apply.

This addendum shall be binding on the parties notwithstanding that it may be signed in counterpart. No additions or alterations made by either party shall be of any force or effect.

SIGNED at ______________________________ on this the ________day of _____________________20 _____

As witnesses :

1. __________________________________ __________________________________
**PURCHASER**

2. __________________________________ __________________________________
**PURCHASER**

Assisted insofar as needs be by me, the Purchaser's spouse being bound as surety and co-principal debtor of my spouse's obligations herein; I also bind myself in respect of my spouse's application for a mortgage bond as contemplated in this agreement.

______________________________________
**SURETY**

SIGNED at ______________________________ on this the ________day of _____________________20 _____

As witnesses :

3. __________________________________ __________________________________
**SELLER**

4. __________________________________ __________________________________
**SELLER**

# POST SALE ADDENDUM TO AGREEMENT OF SALE

**SELLER(s):** ________________________________________

**PURCHASER:** ________________________________________

**PROPERTY:** ________________________________________

**SITUATE AT:** ________________________________________

---

Notwithstanding anything to the contrary contained in this agreement of sale:

*Delete as inapplicable:*

This addendum is intended to amplify and vary the Principle Agreement to the extent only of the provisions as set out hereunder:

**1. <u>AMENDMENT OF PROPERTY DESCRIPTION</u>**

1.1 The parties hereby record that the property description as recorded in the Principle Agreement is incorrect.

1.2 The Parties record that the correct property description is as follows:
_______________________________________________________
_______________________________________________________
_______________________________________________________
_______________________________________________________

1.3 The parties agree to amend the Principle Agreement accordingly.

**2. <u>EXTEND DEPOSIT DUE DATE</u>**

2.1 The parties record that in terms of clause ______ of the Principle Agreement the Purchaser was required to pay a deposit in the sum of R__________________________________________ on or before __________ or acceptance of the offer, being _________________ 20___.

2.2 The parties agree to extend the aforementioned date until _______________________ 20____.

**3. <u>EXTEND GUARANTEE DUE DATE</u>**

3.1 The parties record that in terms of clause ______ of the Principle Agreement the Purchaser was required to deliver guarantees in the sum of R___________________________________ by no later than _________________________________ 20____.

3.2 The parties agree to extend the aforementioned date until _______________________ 20____.

**4. EXTEND DATE TO SECURE BALANCE OF PURCHASE PRICE IN CASH**

4.1 The parties record that in terms of clause ______ of the Principle Agreement the Purchaser was required to secure the balance of the purchaser price in cash in the sum of R________________________________________ by no later than _______________________ 20_____.

4.2 The parties agree to extend the aforementioned date until _______________________ 20____.

**5. EXTENSION OF MORTGAGE BOND DATE (BEFORE EXPIRY OF INITIAL PERIOD)**

5.1 The parties hereby agree that the date for the granting of loan finance / mortgage bond as contemplated in clause ____ of the Principle Agreement is hereby extended to __________________________________.

**6. EXTENSION OF MORTGAGE BOND DATE AND REINSTATEMENT (AFTER EXPIRY OF INITIAL PERIOD)**

6.1 The parties hereby agree that the date for the granting of loan finance / mortgage bond as contemplated in clause ____ of the Principle Agreement is hereby extended to __________________________________.

6.2 Insofar as may be necessary, the Principle Agreement referred to above is hereby reinstated upon the same terms and conditions notwithstanding that the suspensive condition relating to loan finance was not fulfilled as envisaged therein.

**7. ACCEPTANCE OF LESSER MORTGAGE BOND / SECURING OF DIFFERENCE (BEFORE EXPIRY)**

7.1 The parties record that in terms of clause _________ of the Principle Agreement the purchaser was required to obtain loan finance in the sum of R________________________________________ on or before ____________________________.

7.2 The parties record that the purchaser has obtained loan finance in the sum of R __________________________.

7.3 The purchaser records his acceptance of this lesser loan finance amount and records that the granting of the aforesaid loan finance is deemed to be a fulfilment of the suspensive condition relating to loan finance in the Principle Agreement.

7.4 The purchaser shall effect payment in cash directly into the conveyancing attorneys trust account the difference between the loan finance required in the Principle Agreement and the loan finance granted as aforesaid, such difference being the sum of R______________________________________________ by no later than ________________________20___.

**8. ACCEPTANCE OF LESSER MORTGAGE BOND / SECURING OF DIFFERENCE / REINSTATEMENT (AFTER EXPIRY OF INITIAL PERIOD)**

8.1 The parties record that in terms of clause _________ of the Principle Agreement the purchaser was to obtain loan finance in the sum of R___________________________________________________________.

8.2 The parties record that the purchaser has obtained loan finance in the sum of R______________________.

8.3 The purchaser records his acceptance of this lesser loan finance amount and records that the granting of the aforesaid loan finance is deemed to be a fulfilment the suspensive condition relating to loan finance in the Principle Agreement.

8.4 The purchaser shall effect payment in cash directly into the conveyancing attorneys trust account being the difference between the loan finance required in the Principle Agreement and the loan finance granted as aforesaid, such difference being the sum of R __________________________________________ by no later than _______________________________________ 20____.

8.5 Insofar as may be necessary, the Principle Agreement referred to above is hereby reinstated upon the same terms and conditions notwithstanding that the suspensive condition relating to loan finance was not fulfilled as envisaged therein.

**9. AMEND OCCUPATION DATE**

The parties hereby agree that the date of occupation of the property as contemplated in clause ____________ of the Principle Agreement shall be amended from the date set out therein to _______________________________________ 20_____.

**10. AMEND OCCUPATIONAL RENTAL**

The parties hereby agree that the sum of occupational rental payable by the purchaser of the property as contemplated in clause ____________ of the Principle Agreement shall be amended from the amount set out therein to R_______________________________________.

**11. CHANGE DATE OF REGISTRATION**

The parties instruct the conveyancing attorneys to register the transfer of the property in the deeds registry as close as possible to the following date: ____________________________________ 20_____.

**12. PERMISSION TO ATTEND TO ALTERATIONS**

12.1 The parties agree that the seller shall allow the purchaser to attend to alterations and/or additions to the property prior to registration of transfer.

12.2 The alterations and/or additions permitted by the seller to the property prior to registration of transfer are limited to those as set out herein.

12.3 The aforementioned are limited to internal changes and will not include changes that require building approvals.

12.4 The parties record that the alterations to be done to the property is are follows:

12.4.1 _______________________________________________________________

12.4.2 ____________________________________________________________

12.4.3 ____________________________________________________________

12.5 The Purchaser records that the alterations and additions undertaken on the property are done at his/her sole risk and should the transfer not proceed, the purchaser shall not be entitled to reimbursement of any costs expenses incurred and shall not be entitled to remove the additions / alterations.

12.6 The parties agree that should registration of transfer of the property not take place as a result of the purchaser's breach, the parties irrevocably and jointly (by their signatures hereto) instruct the conveyancing attorneys to withhold the deposit less the agents commission in trust for the purpose set out hereunder.

12.7 Should registration of transfer of the property not take place as a result of the purchaser's breach, the parties agree that the seller may by notice in writing to the purchaser and at his sole discretion exercise one of following options:

12.7.1 The seller may require the purchaser to complete any unfinished alterations and/or additions, or

12.7.2 The seller may require the purchaser to restore the property to its condition as it was prior to any alterations and/or additions; or

12.7.3 The seller himself may complete any unfinished alterations and/or additions, alternatively restore the property to its condition prior to any alterations and/or additions;

12.7.4 The conveyancing attorneys are hereby irrevocably instructed by both parties to effect payment to the seller in a sum equal to the expenditure incurred, upon request for such payment by the seller.

12.7.5 The conveyancing attorneys shall not be required to scrutinize or determine the reasonableness of the sum requested by the seller and are hereby indemnified by all parties in regard to such payments.

**13. RELEASE OF DEPOSIT**

The agent is hereby authorised to release the deposit held by such agent, to the conveyancing attorneys in order for the Purchaser to comply with his/her obligations in terms of the Principle Agreement.

**14. WAIVER OF BOND**

14.1 The parties record that in terms of clause__________ of the Principle Agreement the Purchaser was obliged to obtain loan finance in the sum of R____________________________.

14.2 The Purchaser hereby waives the aforesaid suspensive condition and the parties agree that the purchase price shall be secured in cash or acceptable guarantees on or before ________________.

**15. SELLER TO REMAIN IN OCCUPATION AFTER TRANSFER**

15.1 The parties agree that the Seller shall remain in occupation of the Property after registration of transfer in the deeds registry until _________________________________, on which date the Purchaser shall be entitled to take occupation of the Property.

15.2 The Seller shall pay to the Purchaser an occupational rental in the sum of R____________________________________________, per month excluding water and electricity and including rates and taxes / body corporate levies / homeowners levies (as may be applicable).

15.3 The above occupational rental shall be paid on a pro rata basis as may be applicable.

15.4 The Seller hereby instructs the Conveyancer to deduct the occupational rental due to the Purchaser as set out above and pay this amount directly to the Purchaser on registration of transfer.

15.5 The parties instruct the conveyancers to proceed with transfer in the ordinary course notwithstanding occupation date above.

**16. <u>ELECTRIC FENCE SYSTEM CERTIFICATE OF COMPLIANCE</u>**

16.1 The Seller undertakes (at the Seller's expense) to obtain from an accredited person, Electric Fence System Certificate of Compliance (EFSCOC) (if applicable). The EFSCOC shall comply with all the applicable current legislation and shall be delivered to the Purchaser or the Conveyancing Attorneys prior to the date of occupation, alternatively registration of transfer whichever is the sooner.

16.2 The Seller warrants that no additions or alterations to the electric fence system have or will be effected after the date of issue of the EFSCOC.

16.3 After delivery of the EFSCOC, the Purchaser shall have no further claims against the Seller in relation to the electric fence system.

**17. <u>CONSENT OF PURCHASER TO ADVANCE OF FUNDS TO PAY RATES CLEARANCE FIGURES</u>**

17.1 The Purchaser has agreed to advance an amount of R________________________________________ to the Sellers from the Purchasers deposit held in trust for the purpose obtaining the rates clearance certificate from the local authority.

17.2 The Purchaser hereby authorises and instructs the Conveyancers to pay such amount the relevant local authority for the aforementioned purpose.

17.3 Should the sale and transfer not proceed for any reason whatsoever, the Seller shall repay the amount advanced by the Purchaser within 7 (seven) days of demand by the Purchaser.

17.4 The parties record having taken independent advice regarding the content of this addendum and understand the risk inherent in same.

**18. <u>CONSENT OF PURCHASER TO ADVANCE OF FUNDS DIRECT TO SELLER</u>**

18.1 The Purchaser has agreed to advance an amount of R________________________________________ to the Sellers from the Purchasers deposit held in trust.

18.2 The Purchaser hereby authorises and instructs the Conveyancers / Estate Agents to pay such amount directly to the Seller upon signature of this addendum by all parties.

18.3 Should the sale and transfer not proceed for any reason whatsoever, the Seller shall repay the amount advanced by the Purchaser within 7 (seven) days of demand by the Purchaser.

18.4 The Seller confirms that the advance referred to in 1 above is to be paid into the following account:

Bank: ______________________________
Branch : ______________________________
Branch Code: ______________________________
Account Type: ______________________________
Account Number: ______________________________
Account Name: ______________________________

18.5 The parties record having taken independent advice regarding the content of this addendum and understand the risk inherent in same.

**19. ADDITION OF PURCHASER TO AGREEMENT OF SALE**

19.1 The parties hereby agree to the addition of (new purchaser/s) ______________________________ to the Agreement as further purchasers.

19.2 By virtue of their signatures hereto, (new purchasers) ______________________________ accept all of the rights and obligations pursuant to the Agreement and records being fully acquainted with the terms of the Agreement and annexures thereto.

19.3 The parties agree that by virtue of their signatures hereto, (new purchasers) ______________________________ will be parties to the agreement as further purchasers as if they had signed the Agreement.

19.4 All funds paid to date to the Conveyancing Attorney/ Estate Agent shall be deemed to have been paid by all purchasers and shall be held in trust on this basis.

This addendum shall be binding on the parties notwithstanding that it may be signed in counterpart. No additions or alterations made by either party shall be of any force or effect.

SIGNED at ______________________________ on this the _______day of____________________20 _____

As Witnesses :

5. ______________________________ ______________________________
**PURCHASER**

6. ______________________________ ______________________________
**PURCHASER**

Assisted insofar as needs be by me, the Purchaser's spouse being bound as surety and co-principal debtor of my spouse's obligations herein; I also bind myself in respect of my spouse's application for a mortgage bond as contemplated in this agreement.

______________________________
**SURETY**

SIGNED at ______________________________ on this the _______day of____________________20 _____

As Witnesses :

7. ______________________________ ______________________________
**SELLER**

8. ______________________________ ______________________________
**SELLER**