

# 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 CURRENT 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 offshore entity.

## LAND HOLDING BILL, 2014

President Jacob Zuma announced the Land Holdings Bill, a new proposed law that will prohibit foreign ownership of land in the country, in the State of the Nation Address on Thursday, 12 February 2015.

This Bill has not yet been passed by Parliament which means that it is not yet in effect.

## 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:

### Selling:

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 is not an owner of the property will have to sign the transfer documents to enable the transfer of the property to be achieved. It is preferable that they also sign the agreement of sale so that there is no uncertainty. 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.

### Buying:

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 as an external company with the Companies and Intellectual Property Commission 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 required to register as an external company depends on whether the foreign company is conducting business or non-profit activities in South Africa. Section 23 of the Act regulates whether a foreign company is deemed to be conducting business or non-profit activities in South Africa.

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 (or is required to register) 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 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.

### Transfer duty

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.

<i>All Purchasers: (sliding scale)</i>	R0-R750 000.00	nil %
	R750 001.00-R1 250 000.00	3% (max of R15 000.00)
	R1 250 001.00-R1 750 000.00	6% (max of R30 000.00)
	R1 750 001.00-R2 250 000.00	8% (max of R40 000.00)
	R2 250 001 -R10 000 000.00	11% (plus R85 000.00)
	R10 000 001 upwards	13% (plus R937 500.00)

### Capital Gains Tax (CGT)

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

### Income tax

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 WITHHOLDING 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.