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SCHINDLERS ATTORNEYS AND CONVEYANCERS

INTRODUCTION

Schindlers Attorneys and Conveyancers is a medium size conveyancing law firm situated in Melrose Arch, Johannesburg.

The aim of Schindlers Attorneys and Conveyancers is to partner with sellers, purchasers, estate agents, developers and property practitioners of all kinds in order to assist in the efficient transfer of immovable property.

CONVEYANCING TEAM

Our professional team comprises 6 attorneys and over 20 experienced paralegals. A paralegal is assigned to the day to day running of a matter and works closely in conjunction with a member of the professional team. The Conveyancers are always available to assist in queries relating to any transaction dealt with by our offices and any other legal issues.

Our offices attend to the transfer of immovable property throughout South Africa. Similarly, our offices attend to mortgage bond registrations on behalf of First National Bank, Nedbank, Standard Bank, Absa and Investec.

LOCATION

Our main office is located in Melrose Arch which renders our office convenient and easily accessible to clients from most areas around Johannesburg. The office is close to the M1 and all linked highways, and we offer secure, free parking in our building. We have a branch office in Aspen Business Park, Aspen Hills in the South of Johannesburg just off Kliprivier Drive, as well as an office at the Eagle Canyon Business Park in the West Rand.

EXTERNAL SIGNING OF DOCUMENTS

Should clients not be able to attend our offices, we can arrange for the clients to sign the documents at their home or workplace, whichever is most convenient.

WEEKLY REPORTS

Our paralegals attend to weekly written reports which are sent to all parties. The reports outline, in a systematic fashion, the progress achieved as well as comprehensive notes on each matter.

PROPERTY DUE DILIGENCE

Our firm advocates an approach where sellers and estate agents are encouraged to attend to a property due diligence before marketing and selling immovable property. In doing so, the parties are paving the way to a smooth conveyancing transfer process by preparing for this during the marketing phase of the process.
In assisting with the due diligence exercise, we can:

- Obtain Deeds Office searches;
- Investigate caveats and / or interdicts;
- Obtain information copies of title deeds;
- Obtain copies of sectional title plans, body corporate rules, and financials;
- Obtain copies of building plans from the local authority;
- Draw Special and General Powers of Attorney;
- Advise on resolving rates / billing issues;
- Provide 90 days' notice to the banks pursuant to the National Credit Act on behalf of sellers in respect of the anticipated cancellation of their mortgage bond;
- Draft complex annexures / special conditions clauses for insertion into agreements;
- Advise on VAT / transfer duty issues; and
- Advise on Capital Gains Tax legislation and liability.

RATES ADVANCES

In the event that sellers are unable to pay the funds required by the local authority in order to obtain a rates clearance certificate or funds required to obtain a levy clearance certificate from a body corporate, Schindlers Attorneys and Conveyancers will under certain circumstances and at a reasonable cost assist in the bridging of the required funds. Alternatively, we will assist in obtaining third party bridging finance.

AFTER SALES SERVICE

Once the transfer process is finalised, should any issues arise, our Conveyancers will liaise between the parties in order to attempt to resolve such issues amicably and without the need to incur unnecessary legal fees.

COLLECTION OF RATES REFUNDS

Our associate firm, Schindlers Attorneys and Notaries, has a dedicated Municipal Law Department, where we offer clients the service of assisting in the collection of rates refunds due to the seller after registration of transfer, for a nominal fee.

PROPERTY LAW MANUAL / RESOURCES

Schindlers Attorneys and Conveyancers has produced a Property Law Manual consisting of over 100 articles on different property law and related topics. These are available on request or can be accessed through our website.

Our conveyancers are furthermore available to assist in any queries that may arise.

COMMERCIAL TRANSFERS / DEVELOPMENTS

The Conveyancing Team is able to attend to the transfer of commercial properties and is further able to assist with freehold and sectional title developments. We have the expertise to advise on the aforementioned and on related issues. The attorneys are free to consult on these issues and to assist with drafting the necessary agreements.

FULL SERVICE LAW FIRM

In addition to our conveyancing services, our associate firm, Schindlers Attorneys and Notaries, possesses expertise in a wide range of legal fields, including commercial work, litigation, criminal law, matrimonial law, and labour law, amongst others.

Our attorneys are well known for their expertise in property law related matters and have appeared on television and radio shows, including Carte Blanche.

Schindlers Attorneys and Conveyancers further has access to an accounting team of 6 Accountants, including a Chartered Accountant.

We have a number of support resources to provide a holistic service to our clients including 3 full time drivers who assist with deliveries.

In particular, our associated teams assist with the following property related issues:

- Resolution of municipal rates and billing issues;
- Re-registration of companies or close corporations that have been deregistered by CIPC;
- Formation of trusts and trust advice in general;
- Advice on complex VAT and tax related transactions;
- Advice on South African Reserve Bank issues and the repatriation of funds to foreign countries;
- Drafting co-ownership and co-habitation agreements;
- Litigation around property related disputes.

CONCLUSION

In conclusion, we are well equipped to offer a superior conveyancing service. We have the necessary expertise, experience and resources.

Please feel free to contact any one of our conveyancers on the following details: +27 (0) 11 448 9600; conveyancers@schindlers.co.za

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 no 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 and prepare 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 Legal Practice Council.

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

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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

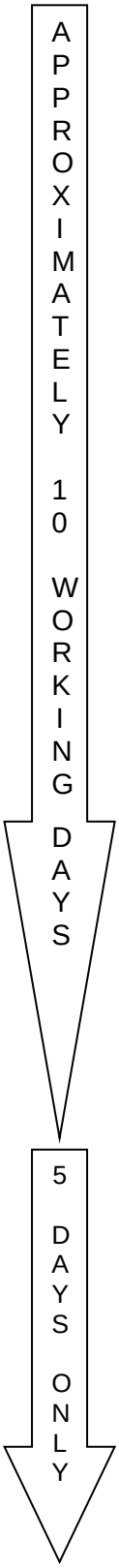
STEP 7
Deeds passed or rejected

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



OFFER TO PURCHASE CHECK LIST

1.	**Has a deed search been done in order to check the following:**	
	• The details of the 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. Confirm if Company / Close Corporation is reflected as "In Business"**	
3.	**If either Seller or Purchaser is a Trust have the Letters of Authority been provided? Does the resolution pre-date the Offer to Purchase?**	
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	
	• Resolution (if applicable)	
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 (purchase price less than R250 000)	
20. Has the Estate Agent's Commission been agreed and inserted / dealt with	
21. Is there a Property Owners Association / Body Corporate / Special Levies?	
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	

COMMON PITFALLS IN OFFERS TO PURCHASE

INTRODUCTION

This article aims to highlight the remedies available to the common pitfalls as identified from a conveyancing perspective when concluding offers to purchase in respect of immovable property. A greater understanding of these pitfalls and the solutions may assist in avoiding same in the future.

CONTRACTUAL CAPACITY

Contractual capacity relates to an individual, company, close corporation or a trusts legal ability to enter into an agreement. The following pitfalls appear commonly:

1) Party to the agreement married in community of property

Where a party to an agreement is married in community of property to another, the signature of both spouses and their full names as parties to the agreement are required for the agreement to the valid.

2) Deceased Estates

Only the Executor or Representative of a deceased estate from the date he is appointed by the Master of the High Court has contractual capacity to enter into any agreement on behalf of the deceased estate. A copy of the Letters of Executorship or Authority should be obtained and only the persons reflected thereon have capacity to sign an agreement.

3) Trusts

The Trust Property Control Act requires that a resolution be signed by the Trustees of a Trust prior to the entering into of an agreement, which resolution should authorize the Trust's engagement in the agreement and nominate an authorised signatory to sign the agreement and transfer documents on behalf of the Trust. Alternatively, all the Trustees can sign the agreement.

4) Foreign Marriages

Sellers and Purchasers who are married according to the laws of a foreign country foreigners and wish to enter into any agreement for the disposal of immovable property must assist one another in the transfer process. This requires that the spouse of a seller who is married according to the laws of a foreign country must be available to sign the conveyancing documents and to that end it is advisable to have that spouse sign the sale agreement.

The spouse of a cash purchaser (who is married according to the laws of a foreign marriage) is not required to sign, however where a mortgage bond is utilised to finance the purchase, the spouse of that purchaser is required to assist in the signing of the bond documents and thus it is advisable that that spouse sign the sale agreement. However whilst it is possible for one spouse to purchase immovable property and finance same, most South African banks as a matter of policy require that both spouses to a foreign marriage be the purchasers and ultimately be registered owners of the property.

5) Companies and Close Corporations – Final Deregistration

Companies and Close Corporations which have been finally deregistered by CIPC do not have contractual capacity to enter into agreements. In the event of a CC or Company being de-registered, same will have to be re-registered with CIPC prior to signature of any resolutions and/or agreements. CC's and Companies should reflect an "In Business" status.

6) Resolutions by CC's and Companies

Resolutions should be signed authorizing the sale or purchase of immovable property by a CC or Company preferably prior to the signature of an agreement. The resolution should also nominate a signatory to act on behalf of the CC or Company. In the event of a CC, all members should sign the resolution and with regards to Companies, all directors and in certain instances the shareholders, must sign the resolution.

SUSPENSIVE CONDITIONS

Suspensive conditions should generally be utilised and constructed with caution. Suspensive conditions suspend the operation of an agreement until a certain condition is wholly fulfilled, such as an agreement being subject to the obtaining of loan finance for a certain amount by a specified date. If the loan finance is not obtained for the amount specified on or before the date stipulated the agreement shall lapse and be of no further force or effect.

When inserting suspensive conditions into agreements, it is crucial that such conditions are clear, unambiguous and contain a specific due date for the performance of that condition.

GUARANTEES

Guarantees are ordinarily utilised to secure the payment of the purchase price or part thereof upon registration of transfer in the Deeds Office. The date for delivery of guarantees cannot be a date prior to or shortly after the granting of loan finance as various steps have to be undertaken before guarantees can be issued. It is recommended that around 15 - 20 days be given from date of granting of loan finance for the delivery of guarantees.

EXPIRY OF ACCEPTANCE PERIOD

Offers to purchase commonly remain open for acceptance by the Seller for a specified period. Offers which are accepted after the expiry of the stipulated period are void and unenforceable.

PLANS

If building plans are not available and the Seller is aware thereof, this must be disclosed to the Purchaser. Inserting conditions that require the Seller to deliver plans can potentially delay a transfer for several weeks/months. If a condition relating to the provision of building plans is inserted, the condition must be clearly worded and have a date by which same must be fulfilled.

ENDORSEMENTS ON TITLE DEED / DEEDS OFFICE SEARCH

Attention should be given to any endorsements which may appear on title deeds and/or deeds office searches. Certain endorsements prohibit the transfer or mortgage of a property or may cause delays in the transfer process.

PETS

It is important to acquaint oneself and any prospective purchaser with regards to the rules of a sectional title scheme or home owners association with regards to pets. It is suggested that you obtain a copy of the conduct rules and any pet policies that may be in place and hand same to any purchaser prior to the signature of an agreement. Such purchaser should acknowledge receipt.

EXCLUSIVE USE AREAS (EUAs)

Parts of the common property are often demarcated as exclusive use areas for the sole utilization by the owner of a section in a scheme. EUA's are either allocated in terms of the management or conduct rules or they are held by notarial deeds of exclusive use areas. The latter are registered in the Deeds Office, however same will only be located when a "person search" is done in the deeds office as the EUA is a personal right and attaches to the owner and not the property. Person searches should be attended to together with enquiries with the managing agents regarding the existence of any EUA's prior to the signature of an agreement to ensure that EUA's are identified and included as part of the sale.

VAT

If the Seller of immovable property is a VAT vendor then enquiries should be made as to whether the property sold forms part of his/her VAT enterprise and if the sale of the property will attract the payment of VAT. It is recommended that written advices from the Seller's accountant/auditor be obtained at mandate stage.

LINKED DEALS

Where a property has been sold subject to the sale of Purchaser's property or the property is being bought as a result of the Purchaser having sold their property, it is imperative that all the dates should correlate, especially occupation dates.

OCCUPATION DATES & RENTAL

Occupation dates and occupational rental payable must always be completed in the Agreement. The rent should be a market related rent and not one contrived to suite one of the parties.

DISCLOSURE OF PROPERTY CONDITION

A disclosure document must be completed by the Seller with regards to the physical condition of the property, setting out any latent or patent defects. It is imperative that the disclosure document be annexed to the sale agreement, alternatively signed simultaneously therewith by all parties. This document cannot be presented to the purchaser for the first time after the sale agreement is concluded.

TENANTS IN OCCUPATION

Where a property is tenanted, whether in terms of a written or oral lease agreement, a copy of the lease or the terms thereof must be obtained and perused.

Should the purchaser intend to occupy the property, the terms of the lease and lease period and in particular any right to renewal must be understood to ensure the tenant will vacate on termination date.

Should the purchaser be taking over the tenant it is suggested that a copy of the lease agreement be handed to the purchaser who must accept same prior to the conclusion of the sale agreement. The purchaser must specifically acknowledge receipt of the lease or its terms. If necessary, a specific addendum must be drawn to cater for the tenancy arrangements.

EXISTING BONDS

If an existing bond is registered over a property the Seller must give the financial institution 90 days' notice of its intention to cancel the mortgage bond over the property to avoid paying early termination penalty interest. Once cancellation figures are requested by the Conveyancing Attorneys, any access facility or available funds will be frozen and the Seller will no longer have access to the funds. Sellers are to withdraw the necessary funds prior to the attorneys calling for cancellation figures. Bond account numbers must be clearly completed on the contact information sheet annexed to the agreement.

DOMICILIUM / NOTICE ADDRESS

It is imperative that the domicilium or notice address of both the Seller and Purchaser be completed clearly and comprehensively (including postal code) to ensure that any notices or letters of demand issued pursuant to the agreement can be validly dispatched. This includes email addresses, postal addresses and physical addresses.

CASH PURCHASES

Where a Purchaser is paying cash for the property and the agreement states that a cash payment will be made to secure the purchase price, no other form of guarantee can be accepted unless provided for in the agreement. Cash received is then invested and the interest will be for the benefit of the Purchaser. If in doubt a "Letter of Comfort" or bank statement must be obtained to indicate that the purchaser does in fact have funds.

Estate agents should as a matter of courtesy advise the purchaser to ensure that he has the necessary home owner's insurance in place in respect of the property from date of registration of transfer.

MOVABLES

Where movables are to be included with the sale of immovable property, this must be dealt with in a separate sale of movables agreement to avoid the Purchaser paying transfer duty on the value of the movables and the bank granting a mortgage bond possibly reducing the loan amount by the value of the movables. There is also a CGT implication in not dealing effectively with movables.

ELECTRICAL COMPLIANCE CERTIFICATES

Most banks require that a valid Electrical Compliance Certificate be submitted to them for approval prior to the transfer/bond being lodged in the Deeds Office. It is imperative that the ECC be handed to the transferring attorneys without delay.

SALE OF CC'S OR SHARES IN PRIVATE COMPANIES

This practice has fallen into ill repute due to the fact the Purchaser by virtue of the acquisition of members interest in a close corporation or shares in a private company automatically assumes various liabilities on behalf of the close corporation or company. These liabilities include capital gains tax, income tax, VAT, annual return fees, etc.

SPECIAL OR GENERAL POWERS OF ATTORNEY

Where it is anticipated that either party to an agreement is or will likely to be travelling or relocating abroad, it is recommended that a Special or General Power of Attorney be signed to enable another person resident in South Africa to sign any of the documents on behalf of the absent party.

GENERAL INFORMATION AND DOCUMENTS

Information such as the seller's bond account details and rates account details are really useful to assist in the conveyancing process and should be provided in the sale agreement where possible. Likewise, the provision of the parties FICA documents also assisting in the process.

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 paralegal secretaries who work in conjunction with conveyancing Attorneys. The paralegal 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 towards obtaining the 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. It is suggested that Sellers give notice to the Banks early to ensure that penalty period expires before registration.

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 R4 500.00 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 email. 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/CC 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, even if the same Attorneys are attending to both bond and transfer. 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 (AS AMENDED) ("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 proceed (thus the importance of the parties providing proper FICA information and documents timeously).

LODGMENT

When 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 endeavour to ensure timeous payment. The funds reflect in the conveyancer's 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 and proof thereof, 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 months to complete, dependent 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 bank's 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 by the Conveyancers 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.

FIXTURES AND FITTINGS

Unless by agreement to the contrary in writing:

a) TV aerials are fixtures along with the mast. 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 the 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, being date of registration of transfer (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.

VOETSTOOTS

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.

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 two year period preceding the 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 unless the conveyancer presents a RCC when lodging the documents in the Deeds Office.

RATES CLEARANCE CERTIFICATES ARE NEEDED FOR FREEHOLD AND SECTIONAL TITLE PROPERTY

From 1 August 2008 Sectional Title (ST) Properties are treated the same as freehold properties and each ST property owner will receive a rates account from the City Council. This means that a RCC must be obtained before ST properties may be lodged and registered in the Deeds Office just as in the case of freehold properties. The one difference regarding the rates clearance figures between these two types of properties is that the figures for a freehold property will include the projected billing for electricity and water consumption whilst on sectional title properties this consumption will normally be administered in the body corporate levies.

PAYMENT OF RATES BEFORE TRANSFER

The conveyancer requests rates clearance figures from the City Council. The figures are worked out by the City Council, not the conveyancer. The figures include arrears for rates and taxes, electricity and water (in respect of freehold property) and sewerage and refuse and 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 will obtain direction from the conveyancer as to how and where this payment should be made. The RCC must be obtained and paid for before the lodging of transfer documents in the Deeds Office. The Conveyancer requires all municipal accounts in order to apply for RCC figures. The seller must supply proof of any payments to the City Council that post date the RCC figures so these can be deducted from the amount due. 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.

WHY MUST THE SELLER PAY IN ADVANCE?

The City Council will claim rates and taxes, electricity, water, sewerage and refuse for a period that is in most cases 120 days in advance in respect of conventional properties and refuse, sewer, rates and taxes in advance for sectional title properties. Once rates clearance figures are issued, payment must be made to the City Council within 60 days of the expiry of the validity period set out on those figures. The last payment date is set out on the rates clearance figures. If payment is not made before this date, new figures will need to be applied for by the conveyancer.

Once the payment of the rates clearance figures is made the City Council will issue the RCC. The deeds office requires that registration of transfer of the property must occur within 60 calendar days of the signing off of the RCC by the City Council (this being 60 days from date of signing off regardless of any validity dates in the rates figures). If registration does not occur within this period, the RCC will lapse and the conveyancer will need to repeat the process and the seller will need to pay for further rates clearance figures to obtain a new RCC.

WHEN DOES THE SELLER GET A REFUND AND HOW?

After registration 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 refund is paid to the Conveyancer's trust account. The City Council does not do a pro rata calculation for refund purposes for the month that registration of transfer occurs, the conveyancer is required to attend to this in the final calculations and will credit and debit the parties accounts accordingly.

WHAT TO EXPECT REGARDING MUNICIPAL ACCOUNTS AFTER TRANSFER

INTRODUCTION

In order for a conveyancer to register a transfer at the deeds office, they are required to lodge a rates clearance certificate (RCC). For both sectional title and freehold property, the rates clearance figures for rates and refuse charges will be incorporated. In the case of freehold property, the rates clearance figures will include the utility or consumption accounts too.

Please note that the obtaining of a refund from the City Council by a seller and the opening of new accounts by a new owner can be a lengthy and frustrating process. There are numerous examples of incorrect and misleading advice being provided at both City Council call centres and walk-in centres.

RESPONSIBILITIES OF THE CONVEYANCER

Pursuant to registration of transfer and as part of the post registration procedure, the deeds office updates its records of ownership – this can take up to six weeks. Once the deeds office has updated its records, the conveyancer will send a letter to the City Council confirming change of ownership. This letter will enclose a copy of the RCC, rates clearance figures, proof of payment of these figures and a printout of the deeds office records showing the change in ownership.

The conveyancer has no further involvement in the calculation of the refund payable by the City Council to the seller save for the fact that the City Council will make payment of the refund to the conveyancer. The conveyancer will pay this to the seller after receipt.

CITY OF JOHANNESBURG

OPENING OF NEW ACCOUNTS BY THE PURCHASER

At the outset, please bear in mind that for both sectional and freehold property, a new owner should budget for the monthly City Council expenses even if no accounts are received in the months after transfer.

The City Council will begin to charge the new owner from the 1st day of the calendar month after registration and the first account that is eventually received will include all charges outstanding and request immediate payment of same.

In respect of sectional title property, the COJ will automatically see to the opening of the rates account. If there seems to be an undue delay, the new owner or an agent on their behalf may attend to the walk-in centres or call the call-centre to follow up with the process. Please bear in mind that the utility accounts will be administered by the body corporate of the scheme.

In respect of freehold property, the COJ expects a new owner to either itself or by way of a proxy, attend to one of the walk-in centres to request the opening of the new utility accounts in respect of the property. It is suggested that the earliest that a new owner should attend to a walk-in centre is six weeks after registration of transfer.

The Deeds Office also independently notifies the City Council of transfers that take place. If a Purchaser attends to a walk-in centre prior to the Deeds Office giving this notification, the COJ will not assist in any way.

When attending to the walk-in centres, the new owner should bring their identification document and confirmation of registration of transfer (i.e.a letter from the conveyancer, a deeds office printout or copy of the new title deed). The reference number provided by the COJ at this time must be kept for future reference.

A new owner may mandate Schindlers or another private rates consultant to assist them in opening the rates and utility accounts in respect of the property. Should a new owner of freehold property choose not to take any active steps to open their utility accounts it will most likely lead to a lengthy delay in, a failure by the COJ to open the utility accounts. This leads to a greater risk of the disconnection of services to the property.

CLOSING OF ACCOUNTS AND THE RATES CLEARANCE REFUND

The payment of refunds by the City Council is a process that can be fraught with tension and delay. In some cases, the refund is paid in good time and in other cases a court application is required to compel payment.

It is generally accepted that a rates refund will be paid by the City Council sooner if active steps are taken to follow up with the COJ on the process.

In order for a new owner to follow up personally they would need to attend to a walk-in centre with a document confirming transfer, identification document, RCC, rates clearance figures and proof of payment of those figures to the COJ. The reference number provided by the COJ at this time must be kept for future reference.

The closing of a seller's accounts and payment of rates refund will not be processed by the COJ unless the new owners accounts have been opened and linked to the property.

For freehold property this includes the rates and consumption/utility accounts. A seller may appoint Schindlers Attorneys to attend to this service at a nominal fee. This work is mandated to a separate department who will attend to the matter.

Please note that even with professional assistance it is an unpredictable process to finalise.The COJ will always pay the refund to the conveyancer who will then refund the seller.

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 COJ varied from person to person.

It is to be understood that in dealing with the COJ 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 the service offered by Schindlers can be taken up or 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 COJ above.

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 seller's application to close the account must be stamped by the bank to verify the banking details that Eskom will make any refund payment to.

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.

LOST TITLE DEEDS

INTRODUCTION

When registering a property into the name of a new owner or cancelling an existing mortgage bond over a property, the Deeds Registry requires the original (or duplicate original) title deed or mortgage bond to be lodged in the Deeds Registry. To the extent that the original documents have been lost or destroyed, Regulation 68 of the Deeds Registries Act, 1937 (Act No. 47 of 1937) prescribes the process of requesting a duplicate original thereof (VA copy).

BONDS

To determine if a property is mortgaged, a conveyancing attorney will do a deeds office search to check if there are any bonds endorsed against the title deed to the property. It often happens that a mortgagor pays the mortgage bond in full but does not cancel it. The mortgage bond will still need to be cancelled prior to transfer of the property to a new owner. In these cases, the original title deed and mortgage bond are still held by the bank. Where there is no mortgage bond registered, the property owner will have the original title deed.

COPIES

There are two types of copies that can be requested from the Deeds Registry. The first type is a copy of the deed requested for "information purposes". These copies are to be used for information purposes only and cannot be used to pass transfer or cancel the existing mortgage bond.

The second copy that can be requested from the Deeds Registry is a certified copy used for legal purposes and can be requested in terms of Regulation 68. These are called VA copies.

VA COPIES

Once the Deeds Registry replaces a lost original of a title deed or mortgage bond, this is called a VA copy. The replacement title deed or mortgage bond within the Deeds Registry will then be endorsed as a VA and the original (if the original is subsequently found) of such document may no longer be used once a VA is obtained. It is then referred to as a "Dead Deed".

The procedure prescribed in Regulation 68 to obtain a VA copy of a title deed (and any other deeds) requires the registered holder of the deed or their legal representative to lodge a written application for the issue of a certified copy along with an affidavit to the Registrar of Deeds.The affidavit needs to contain the description of the deed, a statement that it has not been pledged or detained as security for a debt, a statement that it has actually been lost or destroyed and cannot be found after a diligent search, where possible the circumstances under which it was lost or destroyed. If the property is mortgaged, the consent of the mortgagee is also required.

CHANGES TO REGULATION 68 PROCEDURE

As from the 1st of January 2020, Regulation 68 of the Deeds Registries Act, 1937 has been amended. In terms of the newly amended Regulation 68, the process of applying for the replacement of a lost deed now requires that the applicant publish a notice in a newspaper circulating in the area in which the property is situated advising of the intention to apply for a certified copy at the Registrar of Deeds.

After the applicant has published the above notice, a copy of the deed to be replaced, must lie open for inspection at the office of the Registrar of Deeds for a period of two weeks.

Any interested party may inspect the copy of the deed during the two week period at the Registrar of Deeds. Furthermore, any interested party who has objection to the application for the lost deed may submit such objection in writing to the Registrar of Deeds within the two week period. Should there be no objection to the application the Registrar of Deeds will issue the certified copy if satisfied that the copy is truly lost or destroyed**.**

CONCLUSION

It is important to establish early on in the process whether a title deed or mortgage bond (or other original deed) has been lost or destroyed so as not to cause unnecessary delays in the transfer of the property or cancellation of a mortgage bond

MORTGAGE BOND TYPES AND REGISTRATION PROCEDURE

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.

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. A new bond can also be registered by an owner if the property is unbonded or initially bought cash.

On receipt of a new bond instruction from the Bank (usually electronically), the Bond Attorneys will:

- Contact the client to advise of the receipt of the bond instruction and confirm the basic details of the mortgage bond to be registered;

- Contact the Transferring Attorneys and advise them of the amount available for guarantees and will simultaneously request a copy of the draft title deed and any specific guarantee requirements.

Once the Bond Attorneys are in receipt of the draft deed from the Transferring Attorneys, the documents can then be prepared for signature by the clients. Once the documents have been signed the Bond Attorneys are in a position to issue guarantees as requested by the Transferring Attorneys.

The Bond Attorneys further prepare the bond documents to be sent to the bank and the deeds office, provided that all the standard and special conditions imposed by the Bank have been met.

The Bond Attorneys then await confirmation from the Bank that the documents are in order and that they may proceed to lodge the bond. The Bond Attorneys will wait for advices from the Transferring Attorneys that they are ready to lodge in the deeds office.

Once all parties to the transaction are in a position to lodge, lodgement is arranged in the Deeds Office for registration.

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. The signed documents are submitted to the Bank for their approval. The bank may also impose special conditions which will have to be complied with prior to submission of the documents to the Bank.

Once the Bond Attorneys are in receipt of the original title deed and confirmation from the bank that they may proceed, the matter is lodged in the Deeds Office for registration.

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 and are attended to concurrently by the Conveyancers.

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 and cancellation figures the Bond Attorney will be in a position to prepare your documents for signature.

Clients should be aware that on average an amount of R4 500.00 is charged per bond cancellation but this amount varies according to the amount of the bonds being cancelled.

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. To avoid having to pay this notice interest, the Client should give the Bank 90 days' notice of their intention to cancel their bond. Should this notice not have been given, the client will have to pay or secure payment of the interest for this period to the Bank or delay the bond registration until this period has expired.

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 can 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.

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. It is important to remember that the purchaser must qualify for the full bond amount on his own merit, i.e. must prove affordability to the bank.

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.

Section 45 and 57 Endorsements are usually charged at 75% of the conveyancing tariff.

MORTGAGE BOND CONDITIONS

When the Banks instruct Attorneys to register a mortgage bond, the instruction is accompanied by various bond registration conditions. These conditions are referred to as "special conditions" and are usually conditions imposed by the bank in addition to their standard terms and 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 all standard and special conditions have been completely fulfilled.

Standard conditions typically include:

- Signature of all bank documentation within a specified period;
- Attorneys to comply with the Bank's FICA policy;
- Clients to sign a debit order instruction for the collection of monthly bond installments;
- Clients to provide home owner's insurance for the buildings;
- Submission of NHBRC registration documentation;
- Submission of an electrical compliance certificate and/or gas compliance certificate;
- Payment of initiation or valuation fees;

Special conditions typically include:

- Submission of approved building plans;
- Cancellation of an existing loan / mortgage bond on a Property other than the property purchased;
- Clients to obtain or cede a life cover policy
- Clients need to attend an educational workshop offered by the Bank;
- Submission of structural engineers reports and/or certifications;
- Signature of a suretyship by a third party or entity;

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.

INTERNAL BANK PROCESS

The Banks each have their own internal process whereby they monitor the progress of the bond registration and compliance by the Conveyancers and the Clients of the standard and special conditions. This differs from institution to institution, however most require that original documentation be scanned in to the Bank's system whereafter the matter is allocated to consultants who will check the documents for compliance. If the documents are found to be compliant, the bank will issue the Conveyancers with a "Proceed to Register".

It is imperative that all documents are submitted to the bank simultaneously to avoid delays in obtaining the bank's proceed.

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?

A guarantee is a document issued by a registered South African Financial Institution that guarantees the payment of funds upon the happening of certain events. Guarantees from foreign banks are not acceptable.

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

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 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 conveyancer's trust account and allow the attorney to issue the necessary guarantee. The Purchaser will further receive interest on the funds in the Conveyancer's account. It must be noted that the interest earned on the funds held in the Conveyancer's account could be considerably less than that earned if held with the Purchaser's own bank.

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 higher fee for the issue of this guarantee. The fee varies from bank to bank, however interest rates are usually preferable.

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 if account balance is NIL, no penalties will apply	YES, the interest can be transferred to a new bond or waived in certain circumstances.	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 after 90 days	YES after 6 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	NO
PENALTIES FOR SEQUEST-RATIONS	NO	NO	NO	NO	NO	NO
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	0861111146	0861 334 444 / 45	086 673 7716 admin@sahomeloans .com	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 – March 2020

SCHINDLERS
attorneys and conveyancers

DEMYSTIFYING BONDS AND BOND CANCELLATIONS

INTRODUCTION

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

BOND OPEN FOR ACCEPTANCE / FULFILLMENT OF SUSPENSIVE CONDITION

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

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

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

CAN THE BANK WITHDRAW THE BOND?

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

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

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

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

WHICH ATTORNEY CAN BE INSTRUCTED?

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

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

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

BOND TERMS AND CONDITIONS

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

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

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

BOND GRANTED ON "NORMAL TERMS AND CONDITIONS"

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

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

SIGNING BOND DOCUMENTS

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

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

BOND CANCELLATION DOCUMENTS

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

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

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

ORIGINAL DEEDS

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

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

COSTS

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

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

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

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

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

BANK PROCEEDS

Attorneys need the banks permission to attend to the physical registration in the deeds office. i.e. the attorneys need a bank "proceed". In order to obtain the banks' proceed to register, the attorney is required to upload all the signed bond documents and FICA documents which the bank checks and then grants the proceed. Similarly, on a cancelation instruction the attorney is required to obtain certain signed documents and FICA and provide those to the bank to obtain a proceed.

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

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

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

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

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

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

LIFE COVER

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

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

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

INSURANCE

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

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

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

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

GUARANTEES AND CANCELATION AMOUNTS

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

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

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

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

COMMON LAW WARRANTY AGAINST LATENT DEFECTS BY SELLER

The common law provides that for a period of 3 years from date of sale the Seller remains liable for any latent defects, unless this warranty is expressly excluded. The use of the *'Voetstoots'* is one of the contractual means of excluding this common law latent defect warranty.

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.

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

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, but of which he is aware. If the Seller hides defects in the property on purpose, the Seller will not be protected if he acted fraudulently.

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 or hides 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 *voetstoots* clause will also not protect a Seller who tells a half truth.

It quoted a judgement from *Odendaal v Ferraris* where Cachalia AJ says:
"where a seller recklessly tells a half truth or knows the facts but does not reveal them because he or she has not bothered to consider their significance this may also amount to fraud."

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.

In summary, the Seller is not protected by the *Voetstoots* clause if:

a) he/she was aware of the latent defect; and
b) he/she failed to disclose the defect; and
c) he/she failed to disclose the defect with the intention of defrauding the Purchaser.

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.

VOETSTOOTS AND THE CONSUMER PROTECTION ACT

INTRODUCTION

Since the promulgation of the Consumer Protection Act (CPA) on 1 April 2011 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.

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 (the Seller in the instances of immovable property) 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 homeowner 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.

Under these circumstances the Purchaser must be made to thoroughly inspect the property and the Seller must 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.

VOETSTOOTS (IN THE CONDITION THAT THE PROPERTY STANDS ON DATE OF SALE)

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 in 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 then made application to court for the eviction of the purchaser from the 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 a 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 *voetstoots* 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.

THE DUTY TO DISCLOSE

INTRODUCTION

This article briefly explores the duty of the seller and the property practitioner to disclose defects to prospective purchasers when selling immovable property, and the parameters of this duty.

DISCLOSURE AND PROPERTY PRACTITIONERS

The duty of an estate agent with regards to the issue of disclosures is set out in Regulation 34.3.2 of the Property Practitioners Act, 2019. (Previously Clause 4.1 of the Estate Agency Affairs Board Code of Conduct).

Regulation 34.3.2.1 provides that an estate agent shall convey to a purchaser or lessee all facts as are, or should reasonably in the circumstances be, within his personal knowledge and which are, or could be material to a prospective purchaser (or lessee).

If the obligation in Regulation 34.3.2.1 is broken down, there are four main requirements:

- The estate agent must disclose facts which are within the estate agent's knowledge, i.e. facts in respect of which the agent has actual knowledge;
- The estate agent must disclose facts which should be within their knowledge i.e. if the estate agents hold themselves out to be the area specialist, they need to be aware of issues affecting the area such as new roads planned or new hospitals etc;
- The estate agent must disclose facts which are material to purchasers. This implies that the estate agent should disclose facts which are known to be material to the purchaser;
- The estate agent should disclose facts which could be material to a purchaser. This requires wider disclosure and a broad exercise of this discretion.

The question arises whether an estate agent should disclose a particular fact or not, for example when the previous occupant was either murdered or died in the property.

The above must serve as a guide in every instance.

The answer to the question should be yes, disclosure of this fact is needed. In this example, the facts (i.e., there was a death) is within the knowledge of the estate agent and may be material to the purchaser. The estate agent should find the appropriate timing and method of disclosure of such a fact.

Bear in mind that adverse property conditions and /or incidents involving the property are likely to be known by neighbours etc. who will no doubt advise the purchaser in any event of such property conditions and/or incidents after the sale has taken place.

Regulation 34.3.4.2 of the Act (previously clause 5.2 Code of Conduct) of the Act further provides that an agent shall not wilfully or negligently, in relation to his activities as an estate agent, prepare, make or assist another person to prepare or make a false statement, whether orally or in writing, knowing it to be false or knowingly or recklessly prepare or maintain any false books of account or records.

Regulation 34.3.4.5.1 (previously clause 5.5.1 Code of Conduct) provides that no agent shall wilfully or negligently mislead or misrepresent in regard to any matter pertaining to the immovable property where a mandate is held.

Regulation 34.3.4.5.2 provides that an agent shall not use any harmful or misleading marketing techniques.

DISCLOSURE DOCUMENT

With the advent of the Consumer Protection Act, various forms of the disclosure document were created and used by agents. The Property Practitioners Act has since introduced a mandatory disclosure document.

From 1 February 2022, a Property Practitioner may not accept a mandate unless the seller of the property has provided him/her with a fully completed and signed mandatory disclosure document in the prescribed form. This mandatory disclosure document (which is prescribed in the Regulations), must be signed by the purchaser (or lessee) and annexed to the sale or lease agreement.

The Property Practitioners Act provides that if the mandatory disclosure document is not completed, signed and annexed, the agreement must be interpreted as if there were no defects or deficiencies on the property disclosed to the purchaser.

Failure by a Property Practitioner to comply may result in being held liable by an affected consumer. In addition, the regulations provide for a potential fine of a maximum sum of R15 000.00 for a failure to obtain the mandatory disclosure when taking a mandate.

The purpose of a disclosure document is to, in the first instance serve as a record of the condition of the property for the purchaser. The purchaser will enter into the sale agreement based on the disclosures made by the seller in such document.

The prescribed mandatory disclosure document is a broad based document that does not deal with detailed property issues.

The document deals mainly with broader property disclosures. Where agents require additional and more detailed disclosures and wish to prompt a seller, an additional annexure can be used. It is assumed that the mandatory disclosure document can be added to but portions thereof cannot be deleted or not used.

A clause in a sale agreement to the effect that the disclosure document is to follow or be provided in a certain number of days is incorrect, impractical and contrary to the Property Practitioners Act. The disclosure document MUST precede the sale agreement in every case and must be annexed to the sale agreement.

The second purpose of a disclosure document is to document the seller's instructions with regard to the condition of the property for the agent's protection. The document prevents the seller from alleging after the fact that the agent was advised of a certain defect which was not disclosed to the purchaser or was inaccurately conveyed.

The use of a disclosure document is however a "double edged" sword in that a poorly completed disclosure document can create more trouble than it is worth. The agent needs to impress on the seller the importance of the document and the importance of the need to complete the document properly and honestly. This can be more difficult than otherwise thought and the estate agent should actively assist the sellers in this process.

There is a tendency by sellers to not disclose for fear that disclosure will lead to a lower price or a delay in selling, alternatively to disclose insufficiently. There is also a tendency not to disclose issues in respect of which the sellers either do not apply their minds or in respect of that which they consider to be an acceptable defect. Issues in the property should rather be disclosed and/or properly dealt with or remedied before sale to avoid legal disputes after sale. It is often the agent's reputation which is tarnished by non-disclosure.

As indicated above, the disclosure document is now obligatory and to the extent that same is not possible, for example where the seller is an executor of a deceased estate or has lived overseas for some years, the mandatory disclosure document must still be annexed to the sale agreement. The fact that the seller or the executor cannot complete the document must be noted on the document and the purchasers must be advised to properly inspect the property in the absence of a disclosure by the seller.

It is Schindlers view that until the Property Practitioners Authority provides clarity, the mandatory disclosure document should be annexed to every sale or lease of immovable property, whether this be commercial or residential and or for vacant land.

HOW TO DEAL WITH DEFECTS

Where sellers are aware of defects in the property (for example a leaking roof or the absence of building plans), same must either be remedied before sale by means of a proper repair with a transferrable warranty or disclosed in writing in the mandatory disclosure document or sale agreement.

It must be born in mind that most sale agreements have a clause to the effect that “no representation and/or warranties made by the parties prior to the agreement are binding on the parties unless included in the agreement”. This means that any disclosures must be in writing and included in the agreement if they are to be relied upon.

FIXTURES AND FITTINGS CLAUSES

There are essentially two types of fixtures and fittings clauses. One that makes a representation that “all fixtures and fittings are in good working order” and another that only warrant that these are the Seller’s “exclusive property and fully paid for”.

Estate agents who have the former clause have an additional task of ensuring that all the fixtures and fittings are in working order. This must be specifically brought to the seller’s attention and the necessary disclosures and/or repairs should be made.

HOME INSPECTORS

These may be used, however the clause must be clear as to, by when the inspection must take place, the consequence of this not taking place, whether the sale lapses if unacceptable defects are found and the obligation of the seller to correct any defects found. Sellers must further understand the risk that the inspection report may bring to light defects the seller was not previously aware of and which then need to be disclosed to new purchasers due to the seller’s new found knowledge.

CONCLUSION

The issue of disclosure needs to be carefully considered in every case. In the event that the Mandatory Disclosure document is needed or clauses are required relating to sellers being unable to disclose, home inspectors, etc., same may be requested from our offices by emailing conveyancers@schindlers.co.za.

DEALING WITH DEFECTS, REPAIRS AND MAINTENANCE ISSUES

INTRODUCTION

When a purchaser takes occupation of a property before registration of transfer, the purchaser has the opportunity to live in the property purchased prior to the date of registration. One of the possible consequences of this early occupation is that purchasers from time to time experience issues in the property.

These issues range from defects not previously noted, to the discovery of new defects, to issues around repairs and maintenance. The purpose of this article is to provide some guidance as to how to deal with these issues.

SCENARIO

The guidance provided in this article will be by using a typical example encountered in practice. A seller sells a residential house to a purchaser with the standard *voetstoots* clause. In terms of the sale agreement the purchaser is entitled to occupation of the property on a certain stipulated occupation date, which date is before registration of transfer of the property in the deeds registry.

In the period after occupation date and before date of transfer, the purchaser raises the following issues:

- there is a leaking roof after rain;
- there is a wall with a large crack;
- there is damp in one of the bedroom cupboards;
- the pool pump has stopped working;
- the pool turns green;
- the drain becomes blocked;
- the air conditioners were struck by lightning;
- the geyser has burst.

VOETSTOOTS

The first principle to be understood is that the property is sold *voetstoots* which means the property is sold 'as it stands' or 'as is'. 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.

The seller must disclose to the purchaser all known latent (hidden) defects and the purchaser must inspect the property for all patent (visible) defects. The Seller is not protected by the *voetstoots* clause if he/she was aware of the latent defect; and he/she failed to disclose the defect; and he/she failed to disclose the defect with the intention of defrauding / causing loss to the Purchaser.

PASSING OF RISK

In terms of common law, risk in a property sold moves from the seller to the purchaser on date of sale. Most standard contracts amend this common law position and provide that risk passes from the seller to the purchaser on date of registration of transfer in the deeds registry i.e. if the house burns down before transfer, it is for the sellers account.

The seller further has the obligation to ensure the property is in the same condition (within reason) from date of sale until date of registration of transfer. Due to this obligation and as a result of the date for the passing of risk, where the property is in need of repairs after occupation (and the damage was not caused by the negligence or intentional conduct of the purchaser), the seller bears the obligation to attend to these repairs.

INSURANCE

Due to the date of the passing of risk, sellers must insure the property until date of transfer. Save where the purchase price is financed through a mortgage bond (where insurance is compulsory with the bond holder) or here the property is insured by the body corporate of a sectional title scheme, purchasers should be advised as a courtesy to ensure the property is insured from date of transfer.

DUTY TO MAINTAIN

On occupation of the property, generally speaking, the purchaser has the duty to maintain the property. This duty to maintain is akin to that of a tenant of the property. The risk remains with the landlord and the tenant must "look after" the property.

Examples of the duty to maintain are that the purchaser should ensure that the lawn is mowed, reasonably maintain the condition of the pool for example by using chlorine/ chemicals. The purchaser should tighten screws on door hinges etc.
The duty to maintain includes ensuring that the property is correctly utilised. i.e. don't pour fat into the drains causing a blockage.

SOLUTIONS TO ISSUES RAISED

Utilising the principles provided, the following are potential solutions to the issues raised in the fictitious scenario:

Leaking roof after rain

To the extent that this occurs before transfer, risk is with the seller and the seller would need to attend to the necessary repairs.

To the extent that this happens after transfer, risk would have passed to the purchaser. The question that would arise post transfer is whether the seller was aware of the leak at the time of sale - a latent defect requiring disclosure.

Wall with a large crack

If the wall had a crack as at the date of sale this would be a patent defect and the seller would not have a liability as this should have been noted by the purchaser and dealt with at the time of sale.

Damp in one of the bedroom cupboards

This example is arguable and falls into a potential grey area. The damp needs to be categorized latent or patent. General consensus is that this type of damp is patent and the seller has no liability. If this damp was deliberately hidden by the seller, the seller would be liable if there was a failure to disclose.

The pool pump stopped working

Risk in the property is with the seller before transfer and provided that the pump malfunctions due to normal wear and tear, the seller would have a liability to fix this.

The pool turns green

If this is due to the purchaser not putting chemicals in the pool, the purchaser is liable as part of the duty to maintain.

The drain becomes blocked

The answer is the same as with the pool pump. Provided the pool pump does not malfunction due to misuse, the seller has a liability to repair.

The air conditioners are struck by lightning

Where this happens before transfer, risk is with the seller who will be liable to repair. In this case, the seller would claim against insurance as this is an insurable event.

The geyser bursts

The result is the same as with the air conditioner being struck by lightning – the seller has a liability and should claim through insurance. In sectional schemes, caution must be exercised as not all sectional insurance covers a burst geyser.

CONCLUSION

Advice must be taken before making a decision as to liability for defects, maintenance and repair issues.

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 / Title Deed if un-bonded.**
- **Copies of rates/municipal accounts (with municipal account numbers) & prepaid meter 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 before the agreement is signed. 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. Sellers must continue to maintain their bond installments henceforth.

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.

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 arrear 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 System 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 15% (if applicable);
- **Existing mortgage bond -** this needs to be formally cancelled with transfer of the property;
- **Attorney bond cancellation costs-** paid to the attorney cancelling the mortgage bond ± R4500.00
- **Rates clearance costs -** As set out above;
- **Body corporate levies -** These need to be paid to the end of the month in which registration occurs;
- **Home owner's association levies -** these need to be paid to the end of the month in which registration occurs;
- **Compliance certificates -** where applicable, Electrical Compliance Certificates, Gas Compliance Certificates
- and Electric Fence System Certificates of Compliance; and
- **Lost title deed -** Where this has been lost the cost of replacement is approximately R3000.00

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.

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 / Building Plans	Approved SG Diagrams / Building Plans	Approved SG Diagrams / Building Plans
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. Refer to FICA checklist in this manual.

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 before signature of the agreement. 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, and in some cases the bank may insist on the property being registered in both of their names.

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 15% 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, wendy houses 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 an 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 3-4 months advance payment for rates, taxes, sewerage, refuse, electricity and water charges (as applicable).

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 Gauteng and to be provided by the seller are an Electrical Compliance Certificate, a Gas Compliance Certificate and an Electric Fence System 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, unless the Purchaser is given early occupation of the property in which case the duty rests on the purchaser. 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 usually an amount of R6 037.50, for natural persons. Some banks charge a higher "initiation fee" for juristic entities. 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.

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 a juristic 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 kinds 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: Caveat

Document: I – 35781 /2010 AT
Description: Attachment 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 owner 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 our offices.

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 to 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 homeowner’s 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 (RCC) 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 should be annexed to the sale agreement or handed to the purchasers by way of such disclosure, as prescribed in the Mandatory Discloser Document of the property Practitioners Act.

GETTING THE PAPERWORK RIGHT TO INITIAL OR NOT TO INITIAL

THE LAW

The Alienation of Land Act 68 of 1981 deals with all agreements for the sale of land. In terms of this Act all agreements must be in writing, signed by the parties or by their agents acting on written authority. Section 2(1) states:

"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".

GENERAL CHECK LIST

- Agreement must be in writing.
- Write legibly and neatly in a dark pen.
- Give the parties a chance to read the agreement and ask questions.
- Take the time to explain the agreement.
- Complete the date and place the agreement is signed.
- The parties must have capacity to sign (see article on this topic).
- Counter offers – treat with caution.
- Advise parties immediately on acceptance or rejection (as the case may be) - notwithstanding the OTP provisions.
- Intern agents to comply with relevant rules (see article on this topic)

WHERE TO INITIAL / SIGN IN FULL

- All blank spaces on a pre-printed form must be correctly completed.
  i.e., Seller details, purchaser details, property description, purchase price, deposit, bond amount etc.
- Blank spaces that have been correctly completed need not be initialled.
- Blank spaces that do not require completion should be deleted and initialled.
- Any changes or corrections must be initialled.
- Every page must be initialled. It is customary to initial at the bottom right.
- Both parties to sign in full at the end (at the correct place).
- Do not over initial as this leads to confusion. Follow the above rules.
- Complete the place and date of signing.

WITNESSES

Witnesses are preferable but not essential. Witnesses are not an absolute legal requirement.

ANNEXURES

Attach any relevant annexures and get these initialed and signed. Reference the annexure as follows: "Annexure A hereto forms part of this Agreement".

USEFUL INFORMATION TO GET ON SIGNATURE / INFO SHEET

- FICA documents for each client (refer to the FICA checklist).
- Bond account number from the Seller (if applicable).
- Whereabouts of the original deed if the property is unbonded.
- Copy of the rates account or rates account numbers.
- Copy of the Levy statement with managing agent's details (where applicable).

CONCLUSION

Attention to detail in completing the sale agreement ensures and facilitates a smooth conveyancing process.

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 (unless it is an auction sale, in which case the purchase pays the commission);

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 R4500.00 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 3-4 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.

7. 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.

8. 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. The costs of the application is approximately R4000.00, including disbursements.

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/GPA 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 with 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 general or 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 contents 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 in that registry.

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 and to sign all conveyancing documentation to effect the transfer of the property sold.

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

(i) To market the Property for sale;

(ii) To nominate an Estate Agency and grant an appropriate mandate to sell the Property on my behalf;

(iii) To sign an agreement of sale.

(iv) 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;

(v) To do all such things as deemed necessary to effect the sale and registration of the Property.

(vi) 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 this day of 20__ , in the presence of the undersigned witnesses

AS WITNESSES

1 _____ _____

2 _____

SALE OF PROPERTY OWNING COMPANIES / CC's / TRUSTS

INTRODUCTION

We are often approached for advice around the sale of shares / members interest in companies / close corporations that own immovable property (hereafter referred to as property) and the sale of trusts that own property.

The objective of such transactions is to purchase the company / close corporation or trust that in turn owns property and thereby effectively purchase the property. Pre 2001 this was a popular and cost effective method to purchase property (save for the sale of trusts where the status remains the same).

Reference to the sale of shares in Companies in this article must be taken to include a reference to member's interest in close corporations.

TRUSTS

It is possible and legal to sell a trust and thereby acquire the property registered in the name of the trust. An agreement is entered into whereby the trustees and beneficiaries of the trust are amended to persons nominated by the purchaser, against the payment of a consideration (in effect the purchase price).

These changes are registered at the Masters office and the consideration is paid. This effectively changes ownership of the trust and the property is "acquired". These transactions attract the payment of transfer duty to SARS based on the market value of the property. There is thus no real benefit to these transactions from this perspective.

SALE OF SHARES / MEMBERS INTEREST

An agreement for the sale of the shares in a property owning company is entered into, whereby the property is effectively purchased. A specific agreement is to be entered into whereby warranties are given. A standard property sale agreement cannot be used. There are a number of factors to be considered:

TRANSFER DUTY: The Taxation Laws Amendment Act of 2001 provided that there is transfer duty payable on the sale of shares in residential property owning companies. Transfer duty is payable at the standard rate based on the market value of the property. This excludes commercial / agricultural property owning companies. The test here is the zoning of the property (not the use).

CAPITAL GAINS TAX: Since 2001 a further issue to be considered is CGT. Example: A company purchases a property in 2002 for R100 000.00. The shares in the company are sold in 2015 for R500 000.00. The company (at the direction of the purchaser as shareholder) sells the property in 2020 for R1 000 000.00. The company is liable for CGT (maximum effect tax rate is 22.4% of the gain) based on the base cost of the property in the hands of the company as at 2002 (not on the sale price of the shares in 2015), i.e. the gain for the company is R900 000.00 and not R500 000.00. The purchaser (through the company) has thus effectively purchased the CGT liability of the company.

COMPANY LIABILITY: When the shares are purchased, the purchaser as the new owner of the company effectively assumes any liabilities of the company as at the effective date of sale. Prior to 2001, the above factors (transfer duty and CGT) were not applicable and thus the saving in transfer duty was deemed to be sufficient *quid pro quo* for this assumption of risk. Warranties against the company's liabilities prior to date of sale were provided by the seller to protect the purchaser.

SECURITIES TRANSFER TAX: This is payable by the purchaser at the rate of 0.25 % of the value of the share sold.

CONCLUSION

In most instances the purchase of a trust / company / close corporation that owns property is not going to be the best method to acquire that property. It is more cost effective and less risky to form a new company / trust and allow the new entity to purchase the property directly from the existing entity.

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 of 1971 (now repealed and replaced by the 1986 Act) – "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. 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.

SECTIONAL TITLE SCHEMES MANAGEMENT ACT

The STSMA, introduced on 7 October 2016, brings about significant changes to the laws relating to and the manner in which sectional title schemes are managed and regulated. The STSMA repealed and amended various sections of the Sectional Titles Act No. 95 of 1986, most notably those referring to the management of a scheme.

The STSMA also introduces for the first time in sectional title legislation reference to the "ombud' and "chief ombud". While the new legislation retains the nature of the old act it has introduced some new aspects. The STMA and Community Schemes Ombud Service Act of 2011 are briefly referred to and referenced in this article.

ESTABLISHMENT OF A SECTIONAL SCHEME

Freehold property is converted in the deeds registry to sectional title property by 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 the 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. Note that going forward it is the function of the chief ombud to house and preserve the scheme documents including the rules of the Scheme.

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 and transferred.

Exclusive use areas such as parking bays, garages, 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 owner's 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 on 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 STSMA makes provision for a body corporate, which is deemed to have been established upon the transfer of the first unit from the developer. This was previously provided for in terms of the Sectional Titles Act.

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

The STSMA requires a body corporate to establish two funds: an administrative fund and a reserve fund. Previously a body corporate would only need to establish a single fund with one bank account. The reserve fund contributions must be held in a separate banking account for the purposes of executing the maintenance plan if and when required.

Contributions (levies) collected from owners must be paid into the administrative fund and used only to fund operating expenses in the current financial year. These operating expenses include *inter alia* provisions for the repair, maintenance and administration of the common property, payment of rates and taxes and other municipality charges and the payment of insurance.

A portion of the contributions must also be allocated to the reserve fund and used to pay for future expenditure determined by a maintenance, repair and replacement plan, which the body corporate is required to draw up.

The Regulations to the STSMA prescribe how the reserve fund account is to be managed and further prescribes the minimum amounts that a body corporate needs to have in the reserve fund.

Further in terms of the STSMA, the body corporate will be required to prepare a plan for the maintenance, repair and replacement of major capital items on the common property going forward 10 years. A separate budget must be proposed for this purpose and included in the calculation of the reserve fund contributions to ascertain that sufficient funds exist to give effect thereto.

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. Sellers need to allow for the payment of 3-4 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.

SECTION 25 REAL RIGHTS

In terms of section 25 of the Sectional Titles Act, a developer may reserve the right to extend the scheme on the common 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.

SECTIONAL TITLE RULES

The regulations to the STSMA have introduced both new Management and Conduct rules for sectional title schemes.

If a developer is registering a new sectional title scheme, and wishes to make any amendments to the prescribed management and conduct rules, it will need to submit these to the chief ombud in order for their offices to formally approve the amended rules. The chief ombud now needs to issue a certificate of approval for any new rules submitted to it prior to the deeds office registering any new sectional title scheme.

Furthermore, if a body corporate wishes to amend its management or conduct rules, such amendments will need to be submitted to the chief ombud for approval.

FURTHER INNOVATIONS INTRODUCED BY THE SECTIONAL TITLE SCHEME MANAGEMENT ACT

- The body corporate must register a domicile with the chief ombud, local municipality and local registrar of deeds. This address is to be used for the service of any legal documentation;
- The body corporate may approach the ombud to obtain an order recovering arrear levy contributions from an owner;
- For the first time a limit has been place on the amount of proxies a person may hold at a body corporate meeting. This has now been capped at two;
- The chief ombud may be approached by a member of a body corporate if he is unable to obtain a special or unanimous resolution either by way of a stalemate or inability to achieve a quorum;
- The STSMA introduces service of the notice to the owners by email, fax or hand delivery as opposed to only pre-paid registered post as per the repealed legislation;
- The STSMA further provides that where a unanimous resolution is passed and it would have an adverse effect of any member, such resolution shall not be effective unless that member consents in writing within a period of 7 days from the date such resolution was passed;
- The trustees may on their own now receive and consent to subdivision and consolidation applications for sections, whereas under the old legislation a unanimous resolution would need to be passed by all members;

- The STSMA also establishes a sectional title schemes management Advisory Council which Council will be tasked with making recommendations and advising the Minister on the provisions of the STSMA, as well as keeping the implementation of the STSMA and the regulations under regular review.

THE COMMUNITY SCHEMES OMBUD SERVICE ACT

The Community Schemes Ombud Service Act No. 9 of 2011 ("CSOSA") came into effect on 7 October 2016. From this date, all community schemes are bound by the provisions of this Act and the Regulations.

A "community scheme" is very broadly defined and includes sectional title developments. This act provides for the establishment of the Community Schemes Ombud Service and a dispute resolution mechanism in community schemes. The act creates the office of the Chief Ombud.

The Community Schemes Ombud Service ("the Service"), via its Board will be responsible for, *inter alia*:

- the development of dispute resolution mechanisms;
- provide training for conciliators, adjudicators and other employees of the Service;
- regulate, monitor and control the quality of all sectional title scheme governance documentation and such other scheme governance docs as may be determined by the Minister;
- take custody of, preserve and provide public access electronically or by other means to sectional title scheme governance documentation and such other scheme governance docs as may be determined by the Minister.

This Act and Regulations provides inter alia for:

- a levy to be payable by each unit calculated as the lesser of R40.00 or 2% of the amount by which the monthly levy charged by such scheme exceeds R500.00;
- detailed dispute resolution mechanisms for members of community schemes;
- that every community scheme shall take out insurance against loss or money belonging to the community scheme or for which it is responsible, sustained as a result of any act of fraud or dishonesty committed by any insurable person;
- that all community schemes register their details with the Ombud within 30 days of incorporation or within 30 days of the coming into effect of the regulation i.e. before 7 November 2016. This obligation arises from Regulation 18(3) and form CS 1 must be used;
- that all community schemes submit their governance documentation to the Service within 90 days of establishment or within 90 days of the coming into effect of the regulation i.e. before 7 January 2017;
- that all community schemes submit their annual financial statements to the Ombud within 4 (four) months from the end of the community scheme's financial year end.

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.

With the advent of the Sectional Title Schemes Management Act and the Community Scheme Ombud Service Act, the sectional title landscape is set to change to some degree. Property professionals would be well advised to familiarise themselves with the new rules.

SECTIONAL TITLES SCHEMES MANAGEMENT ACT NO. 8 OF 2011

INTRODUCTION

The Sectional Titles Schemes Management Act ("STSMA") was signed by the President on 11 June 2011 and was held in abeyance until the Minister of Human Settlements signed the Regulations into effect on 7 October 2016. From this date, all sectional title schemes are bound by the provisions of this Act and the Regulations thereto.

The STSMA brings about significant changes to the laws relating to and the manner in which sectional title schemes are managed and regulated. The STSMA repealed and amended various sections of the Sectional Titles Act No. 95 of 1986, most notably those referring to the management of a scheme. The STSMA also introduces for the first time in sectional title legislation reference to the "ombud' and "chief ombud" which is dealt with further below. While the new legislation retains the nature of the old act it has introduced some new aspects.

The purpose of this article is to highlight the changes that the STSMA introduces.

ADMINISTRATIVE AND RESERVE FUNDS

The STSMA requires a body corporate to establish two funds: an administrative fund and a reserve fund. Previously a body corporate would only need to establish a single fund with one bank account.

Contributions (levies) collected from owners must be paid into the administrative fund and used only to fund operating expenses in the current financial year. These operating expenses include *inter alia* provisions for the repair, maintenance and administration of the common property, payment of rates and taxes and other municipality charges and the payment of insurance.

A portion of the contributions must also be allocated to the reserve fund and used to pay for future expenditure determined by a maintenance, repair and replacement plan, which the body corporate is required to draw up.

The Regulations to the STSMA prescribe how the reserve fund account is to be managed:

- If the amount in the reserve fund at the end of the financial year is less than 25% of the total contributions to the administrative fund, the budgeted contribution to the reserve fund must be at least 15% of the total budgeted contribution to the administrative fund;
- If the amount in the reserve fund is between 25% - 100% of the total contributions to the administrative fund, the budgeted contribution to the reserve fund must be at least the amount budgeted to be spent from the administrative fund on repairs and maintenance to the common property in the financial year being budgeted for; and
- If the amount in the reserve fund at the end of the financial year is equal to or greater than 100% of the total contributions to the administrative fund, no minimum contribution to the reserve fund is set;

The rule of thumb it appears is that the act intends for body corporates to keep in their reserve fund a minimum of 25% of the yearly contributions to the administrative fund. So if R 100, 000 is paid to the administrative fund in levies, an extra R 25, 000 is to be allocated to the reserve fund.

A body corporate will be required to prepare a plan for the maintenance, repair and replacement of major capital items on the common property going forward 10 years. A separate budget must be proposed for this purpose and included in the calculation of the reserve fund contributions to ascertain that sufficient funds exist to give effect thereto. This is set out in the newly prescribed Management Rule 22.

OBLIGATION TO HOLD SEPARATE RESERVE FUND BANK ACCOUNT

The reserve fund contributions must be held in a separate banking account for the purposes of executing the maintenance plan if and when required.

LEVIES

A new levy will be payable by the Body Corporate to the offices of the chief ombud, the details of this are set out in the Community Schemes Ombud Service Act No. 9 of 2011 ("CSOSA").

The body corporate may now charge additional levies in regards to exclusive use areas and additionally may charge a developer that has reserved a right to extend the scheme, with a levy.

Any changes to the levy contributions must be certified in writing. In the ordinary course this occurs at the annual general meeting of the scheme.

SPECIAL LEVIES

The STSMA makes provision for the Trustees to impose a "special contribution", commonly referred to as a "special levy" which provides for the levying of an additional amount for the payment of such expenses or liabilities not specifically provided for in the approved estimated income and expenditure at the AGM. This special contribution becomes due on the passing of a resolution by the Trustees and recovered from the owners by the body corporate.

Interestingly, the liability for payment of special levies in the event of a change of ownership was not dealt with explicitly in the repealed legislation. The STSMA provides that upon the change of ownership of a unit, the successor-in-title becomes liable for a pro-rata payment of such contributions from the date of change of ownership. This must be disclosed to all potential purchasers and any deviation hereof must specifically be dealt with in an agreement of sale between the parties.

NOTIFY THE OMBUD OF A DOMICILE

The body corporate must register a domicile with the chief ombud, local municipality and local registrar of deeds. This address is to be used for the service of any legal documentation.

ASSIST SCHEMES TO RECOVER ARREAR LEVIES

The body corporate may approach the ombud to obtain an order recovering arrear levy contributions from an owner. This does not preclude the body corporate from making use of the courts to obtain levies but does provide them with another option. It is anticipated and intended that this will afford the body corporate a cheaper and faster alternative to the courts to obtain an order.

LIMIT PROXIES

For the first time a limit has been place on the amount of proxies a person may hold at a body corporate meeting. This has now been capped at two.

REMEDY FOR AN INABILITY TO OBTAIN EITHER A SPECIAL OR UNANIMOUS RESOLUTION

The chief ombud may be approached by a member of a body corporate if he is unable to obtain a special or unanimous resolution either by way of a stalemate or inability to achieve a quorum.

MANAGEMENT & CONDUCT RULES

The regulations to the STSMA has introduced both new Management and Conduct rules for sectional title schemes.

If a developer is registering a new sectional title scheme, and wishes to make any amendments to the prescribed management and conduct rules, it will need to submit these to the chief ombud in order for their offices to formally approve the amended rules. The chief ombud now needs to issue a certificate of approval for any new rules submitted to it prior to the deeds office registering any new sectional title scheme.

Furthermore, if a body corporate wishes to amend its management or conduct rules, such amendments will need to be submitted to the chief ombud for approval.

The applicable rules must be made available in either digital format or hard copy at every meeting of the body corporate. Owners and tenants should acquaint themselves with the rules and owners should ensure that the rules form part of all their rental agreements in compliance with the Rental Housing Act.

All rules are to be approved by the chief ombud and no conduct or management rules may be irreconcilable with the management rules set out in the STSMA. For the details of the applicability of existing rules, please see section 10, subsections 9 – 12 of the STSMA.

MEETINGS OF THE BODY CORPORATE

The STSMA provides that 30 days' notice must be given to the owners of the intention to hold a body corporate meeting (this does not include an AGM), setting out the date, time, place and proposed agenda. The STSMA introduces service of the notice to the owners by email, fax or hand delivery as opposed to only pre-paid registered post as per the repealed legislation.

The STSMA further provides that where a unanimous resolution is passed and it would have an adverse effect of any member, such resolution shall not be effective unless that member consents in writing within a period of 7 days from the date such resolution was passed.

SUBDIVISION & CONSOLIDATION OF SECTIONS

The trustees may on their own now receive and consent to subdivision and consolidation applications for sections, whereas under the old legislation a unanimous resolution would need to be passed by all members.

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. The STSMA provides that an owner shall be entitled to independently insure his or her section against damage not specifically covered by the policy effected by the body corporate.

DUTIES OF OWNER TO NOTIFY BODY CORPORATE OF CHANGE IN OWNERSHIP/OCCUPANCY

Owners are also obliged to notify the body corporate of any change of occupancy or ownership of a section.

ESTABLISHMENT OF THE SECTIONAL TTLE SCHEMES MANAGEMENT ADVISORY COUNCIL

The STSMA also establishes a sectional title schemes management Advisory Council.

The Advisory Council will be tasked with making recommendations and advising the Minister on the provisions of the STSMA, as well as keeping the implementation of the STSMA and the regulations under regular review. The Council will be made up of persons appointed by the Minister who have skills, knowledge and experience in the management of schemes.

SECTIONAL TITLE SCHEME FINANCIALS

The body corporate is obliged to have the scheme's financials audited each year. In terms of CSOSA the audited financials must be submitted to the chief ombud within 4 months of the end of the financial year.

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. Knowledge of the Sectional Titles Schemes Management Act which aims to provide for the establishment of body corporates to regulate and manage sections and common property in sectional schemes, to ensure application of rules applicable and to establish the Sectional Titles Schemes Advisory Council is essential.

COMMUNITY SCHEMES OMBUD SERVICE ACT NO. 9 OF 2011

INTRODUCTION

The Community Schemes Ombud Service Act No. 9 of 2011 ("CSOSA") was signed by the President on 11 June 2011 and was held in abeyance until the Minister of Human Settlements signed the Regulations into effect on 7 October 2016. From this date, all community schemes are bound by the provisions of this Act and the Regulations thereto, save for where transitional arrangements are catered for.

A "community scheme" is defined in CSOSA as any scheme or arrangement in terms of which there is shared use of and responsibility for parts of land and buildings, including but not restricted to sectional title developments, share block companies, a home or property owner's association, a housing scheme for retired persons and a housing co-operative. The CSOSA aims to provide for the establishment of the Community Schemes Ombud Service and a dispute resolution mechanism in community schemes. The act creates the office of the Chief Ombud.

FUNCTIONS OF THE CSOS

The Community Schemes Ombud Service ("the Service"), via its Board will be responsible for, *inter alia*:

- the development of dispute resolution mechanisms;
- provide training for conciliators, adjudicators and other employees of the Service;
- regulate, monitor and control the quality of all sectional title scheme governance documentation and such other scheme governance documents as may be determined by the Minister;
- take custody of, preserve and provide public access electronically or by other means to sectional title scheme governance documentation and such other scheme governance documents as may be determined by the Minister.

In the exercise of these functions the Service is required to:

- promote good governance of community schemes;
- provide free education, information, documentation and services as may be required to raise awareness to owners, occupiers, executive committees and other persons or entities who have rights and obligations in community schemes;
- monitor community scheme governance;
- deal generally with matters to give effect to the objects of the CSOSA.

FUNDING OF THE CSOS

The Ombud will be mainly funded by taxpayers' money, from levies collected from community schemes, fees for services rendered by the Ombud in the form of an application fee and an adjudication fee.

The levy payable to the Service shall, subject to changes promulgated by the Minister from time to time, be:

The lesser of R40.00 or 2% of the amount by which the monthly levy charged by such scheme exceeds R500.00

The following table sets out examples:

MONTHLY LEVY	AMOUNT CSOS IS CALCULATED ON	MONTHLY CSOS LEVY PAYABLE PER UNIT
R500.00	R0.00	R0.00
R550.00	R50.00	2% of R50.00 = R1.00
R1800.00	R1300.00	2% of R1300.00 = R26.00
R2600.00	R2100.00	2% of R2100 = R42.00 (reduced to R40.00 as maximum)

Payments to the CSOS by the community scheme must be done quarterly. Any amounts that are not paid on or before the due date thereof will accrue interest at a rate prescribed by the National Credit Act.

Any person wishing to refer a matter to the Service for dispute resolution will be liable for an application fee of R50.00 and the fee for adjudication is R100.00. Provision is made throughout the Act for the applicant to a dispute to apply for the reduction or waiver of these fees.

REGULATIONS AND PRACTISE DIRECTIVES

CSOSA provides that the Minister may make regulations regarding various issues related to the Act. These regulations have been published and promulgated. The Chief ombud may further from time to time issue practice directives relating to the service.

OFFENCES AND PENALTIES

The CSOSA provides that any person who fails to comply with the Act (as detailed in section 34) is guilty of an offence and may be liable for a fine and imprisonment not exceeding 5 years or both. In the case of repeat offences, the prison term is up to 10 years.

DISPUTE RESOLUTION

The CSOSA has as one of its main purposes the provision of a dispute resolution mechanism for members of community schemes.

Applications

Any person who is a party to or who is materially affected by a dispute may refer a dispute to the Service by way of submission of an application on the prescribed form. The application form must be lodged with the Ombud either by hand or electronically, together with the prescribed application fee (currently R50.00).

Dispute is defined as a dispute in regard to the administration of a community scheme between persons who have a material interest in that scheme, of which one of the parties is the association, occupier or owner, acting individually or jointly.

The application must be accompanied by a statement setting out the relief sought, which relief must be within the scope of one or more of the prayers/remedies set out in Section 39 of the CSOSA. The application must contain the name and address of the persons affected materially by the application and may contain an application for the discount or waiver of the fees.

Prayers for relief

Prayers for relief include prayers in respect of the following: (see section 39 for detail)

- Financial Issues;
- Behavioral issues;
- Governance Issues;
- Meetings;
- Management Services;
- Works pertaining to private areas and common areas;
- General and other issues.

After receiving the application, the ombud may request further information or documentation, verify the information submitted or request the applicant to provide proof that an internal dispute resolution mechanism was unsuccessful.

Time Limit on certain Applications

An application for an order declaring a decision of an association or executive committee void, must be made no later than 60 days after such decision was taken. In special circumstances, the ombud may condone the late submission of an application.

Rejection of Application

The ombud may reject an application which falls outside of its jurisdiction, is incomplete or fails to meet the requirements of section 40 or the ombud feels that the dispute should be dealt with in a court of law or other tribunal of competent jurisdiction or if the applicant

fails to notify the ombud in writing within 14 days after service of the application on other parties (section 43) that the applicant wishes to proceed.

Notice to affected persons and response to the Application

Unless rejected, the ombud must serve the application on affected persons, provide the details in section 43 and invite written submissions in response to the application. The Applicant must thereafter be given an opportunity to inspect the submissions, provide a written response and must confirm in writing that s/he wishes to proceed.

Conciliation

On acceptance of an application and after receipt of any submissions from affected persons or responses from the applicant, if the ombud considers that there is a reasonable prospect of a negotiated settlement of the disputes, the ombud must refer the matter to conciliation.

Referral to an Adjudicator

If conciliation fails, the ombud must refer the application to an adjudicator. The fee for referral of a matter for adjudication is currently R100.00. Section 48 details this process and details how the adjudicator is chosen.

The adjudicator must investigate an application to decide whether it would be appropriate to make an order, and in this process the adjudicator

- must observe the principles of due process of law; and
- must act quickly, and with as little formality and technicality as is consistent with a proper consideration of the application; and
- must consider the relevance of all evidence, but is not obliged to apply the exclusionary rules of evidence as they apply in civil courts.

The adjudicator has various powers detailed in section 51.

Legal Representation

Legal representation is not permitted unless the adjudicator and parties' consent, alternatively if the adjudicator concludes, on application, that this necessary (having regard to the matter, its complexity and the legal issues raised).

Adjudicators Orders

The adjudicator may make an order dismissing an application, including granting a costs order against the applicant.

If the application is not dismissed, the adjudicator may make an order granting or refusing each part of the relief sought by the applicant or similar. The order must set out the time when the order takes effect or within which the order must be complied with and must contain a statement of reasons for the order. The order must be delivered to all parties.

An applicant, community scheme or any affected person who is dissatisfied by an adjudicator's order may appeal to the High Court, but only on a question or law. Such appeal must be lodged with the High Court within 30 days of delivery of the order of the adjudicator.

If an adjudicator's order is for the payment of an amount of money or any other relief which is within the jurisdiction of either the magistrate's or high court, the order must be enforced as if it were a judgement of such Court and the clerk of such a Court must, on lodgment of a copy of the order, register it as an order in such Court.

PROMOTION OF GOOD GOVERNANCE, TRAINING AND EDUCATION

The regulations to the CSOSA provide that all scheme executives (trustees and directors etc.) must take reasonable steps to inform and educate themselves about the community scheme and take all steps necessary to obtain the relevant information and advice necessary to enable conscientious and informed decisions.

Scheme executives are obliged to exercise their duties with great care and skill and should ensure that an active and independent opinion with respect to all matters to be decided by the scheme executives is held.

In addition to developing and identifying training courses for the staff of the Service, it shall also develop, identify and publicise education and information programs for owners, occupiers, executive committees and other people who have rights and obligations in community schemes.

FIDELITY INSURANCE

The Regulations to the CSOSA provide that every community scheme shall take out insurance against loss or money belonging to the community scheme or for which it is responsible, sustained as a result of any act of fraud or dishonesty committed by any insurable person.

The Regulations define an "insurable person" as:

- any scheme executive;
- employee or agent of a community scheme who has control over the money of a community scheme;
- managing agent; or
- contractor, employee or other person acting on behalf of or under the direction of a managing agent.

The value of the insurance is calculated by adding the community scheme's investments and reserves at the end of its last financial year and 25% of the community scheme's operational budget for its current financial year.

The Regulations further state that the insurance cover must provide for payment of a loss by the insurer within a reasonable amount of time after reasonably satisfactory proof of loss has been furnished, without the scheme having to pursue criminal or civil proceedings to recover the stolen money before payment is made.

REGISTRATION OF A SCHEME

The regulations to the CSOSA require that all community schemes register their details with the Service within 30 days of incorporation or within 30 days of the coming into effect of the regulation i.e. before **7 November 2016**. This obligation arises from Regulation 18(3) and form CS1 must be used.

SCHEME GOVERNANCE DOCUMENTATION

Regulation16 of the regulations requires that all community schemes submit their governance documentation to the Service within 90 days of establishment or within 90 days of the coming into effect of the regulation i.e. before **7 January 2017**.

ANNUAL RETURN AND ANNUAL FINANCIAL STATEMENTS

Regulation18(1) of the regulations read with section 59(b) requires that all community schemes submit the documents listed below to the Service within 4 (four) months from the end of the community scheme's financial year end:

- An annual return on the prescribed form (see *Form CS 2*)
- A copy of its annual financial statements; and
- Any other prescribed document or information.

CONCLUSION

The above is a summary of CSOSA and Regulations. The Act and the regulations should be consulted in detail before proceeding with any actions contemplated therein.

SECTION 25 OF THE SECTIONAL TITLES ACT: REAL RIGHT OF EXTENSION OF A SCHEME

WHAT IS A REAL RIGHT OF EXTENSION?

A real right of extension is the extension of a sectional title scheme by the addition of sections and/or exclusive use areas. Section 25(1) of the Sectional Titles Act (the Act) describes a real right of extension as "the right to erect, complete or include from time to time, but within a period stipulated in such condition or such extended period as may be agreed upon by unanimous resolution of the body corporate and bondholders from time to time, prior to the expiry of the stipulated period…

a) a building or buildings;

b) a horizontal extension of an existing building;

c) a vertical extension of an existing building" or to create and delineate exclusive use areas.

A real right of extension is reserved by a developer when the initial sectional title scheme is opened in the Deeds Office.

WHEN DOES A REAL RIGHT LAPSE AND CAN IT BE EXTENDED?

A real right of extension can lapse in two circumstances, either due to the expiry of the time which was initially reserved to extend the scheme or due to completion of all the extensions envisaged.

If a real right of extension has lapsed and the extensions have not yet taken place, the original real right must be cancelled and a new real right of extension can be reserved. Application can be made by the developer, if no body corporate is established, or if a body corporate is established the body corporate must make the application. A body corporate is deemed to be established upon the transfer of the first unit to a third party.

If the developer wishes to reserve a new real right of extension, the consent of any bondholders must be obtained. If the body corporate wants to reserve a new real right of extension all the members of the body corporate and all the bondholders must consent. The Act provides that such consent cannot be withheld without good cause.

SELLING A REAL RIGHT OF EXTENSION

Transfer of a right of extension takes place in terms of a notarial deed of cession much like a transfer of an ordinary exclusive use area. Any amounts due to the body corporate must be paid and a certificate is lodged by the conveyancer to certify this. A real right of extension can also be bonded.

DISCLOSURE OF A REAL RIGHT IN AN AGREEMENT OF SALE

If a purchaser buys a sectional title unit and a real right of extension was reserved by the developer that real right of extension must be disclosed in the agreement of sale. If it is not disclosed in the agreement of sale, the sale is voidable at the instance of the purchaser. In other words the purchaser can withdraw from the sale if the real right of extension is not disclosed in the agreement.

However if the purchaser wishes to continue with the sale, he will have to sign a specific consent drawn by the conveyancer.

The 15B(3) Conveyancer's certificate, which is lodged in the deeds office with every sectional title transfer, has to accurately state whether there is a real right of extension or not. In addition it must state whether same has lapsed or not. If there is a real right of extension which has not lapsed and it was not disclosed in the agreement of sale the 15B(3) certificate must state that consent was obtained otherwise the transfer cannot be registered. In this way the provisions of the Act must always be complied with as the conveyancer has to check this for each and every sectional title unit that is being transferred.

HOW DO YOU KNOW IF THERE IS A REAL RIGHT OF EXTENSION RESERVED

If a real right of extension is reserved it will appear as an SK endorsement on your deeds office search or the endorsements will refer to a Section 25 real right.

SECTIONAL TITLE PROPERTY –
REGISTERING AN EXTENSION OF A SECTION

INTRODUCTION

The purpose of this article is to provide a brief explanation of the procedure to be followed in order to register the extension of a sectional title property in the deeds office, and the approval by the municipality of the respective building plans.

In the event that the owner of a section decides to increase its square meterage, by an extension of the floor area, an additional story or by way of the extension of an internal loft, the owner is obliged to follow the processes as set out below.

Extension of sections sometimes happen in a sectional scheme as a result of ignorance of the law and a lack of trustees understanding of the legal requirements. It is however important that extensions are properly regulated.

The procedure to be followed to register the extension of sectional title property in the deeds office is set out in the Sectional Titles Act No 95 of 1986 (the Act).

INADVERTANT EXTENSION OF A SECTION

An increase in floor area may happen inadvertently and in ignorance of the legal requirements. An example may be when an owner encloses a patio of a section.

In some instances, the patio is part of the section and thus enclosing the patio does not create additional square meterage and only requires the consent of the body corporate as the external look of the section is altered.

In other cases, the patio is an exclusive use area and the enclosing thereof amounts to the extension of the owners section. This needs to be regulated per this article.

SPECIAL RESOLUTIONS

The first step that an owner must take is obtaining consent from the body corporate for the extension. The Act sets out that this consent must be obtained by passing a special resolution. A special resolution may be passed either by the round robin or general meeting methods, more fully set out below.

This resolution must be obtained before the owner of the section commences with any alterations or extensions of the section.

The round robin procedure requires 75% of the all members of the body corporate, in number and value (according to their participation quota), to sign in confirmation that they approve the extension. An owner may simply email the resolution to other members for them to sign in confirmation, thus depending on the number of members within the scheme this can be a simple procedure to follow.

The alternative method is by way of calling a special general meeting of the members of the body corporate and tabling the resolution for approval. This meeting requires a 30 day notice given to all body corporate members, this notice must inform the member of the purpose of the meeting and where and when same will occur.

The meeting must have 35% of the members of the body corporate present in order for a quorum to be achieved. A quorum is the minimum amount of body corporate members attendance required for the meeting to decide on any special resolution. 75% of the number and value of the members present at the meeting must then vote in favour of the resolution in order for this special resolution to be passed at this meeting.

APPROVAL OF BUILDING PLANS

It is important to remember that the procedure described in this article will often need to be done in conjunction with an application to the Local Authority for the approval of updated building plans.

If required, the owner would need to appoint an architect/draftsman to draft the updated plans and then have them submitted to the office of the Local Authority for approval.

APPROVAL OF THE DRAFT SECTIONAL PLAN

Once the owner has acquired the special resolution to confirm that the body corporate approves of the extension of the section and to the extent necessary, the owner has obtained approved building plans, the owner may then proceed to attend to the alterations and physical extension of the section.

Once the alterations are attended to, the owner must appoint a land-surveyor to draft a sectional plan of extension. It is important to note that the sectional plan of extension can only be drawn and approved once the physical changes are made. The land surveyor measures the actual physical building in order to draft the required diagram.

This plan is then submitted by the land-surveyor to the Surveyor-General's office for approval. A letter from the trustee's of the body corporate that the extension has been passed by way of special resolution must accompany this application.

Pursuant to the Surveyor-General approving the sectional plan of extension, the land-surveyor may then hand this to the conveyancer as it will form part of the documents to be lodged for registration at the Deeds Office.

BONDHOLDERS CONSENTS REQUIRED

If the extension of the section results in the participation quota of any section within the scheme deviating by more than 10% (which is above the threshold set by the Act requiring bondholders consent), the owner will be required to obtain consent from the bondholder (ie. the bank) of each section within the scheme to the registration of extension of the particular section. (To the extent that the other sections are bonded).

This will accompany the lodgment documents sent to the deeds office in the form of a conveyancers certificate.

APPLICATION TO THE DEEDS OFFICE

The following is lodged in the deeds office for registration:

- The approved Surveyor-General plans;
- The title deed of the section to be extended for endorsement;
- The transfer duty receipt;
- Any sectional mortgage bond with the applicable consent enclosed;
- A certificate from the conveyancer concerning bondholder consents if required as per above paragraph.

CONCLUSION

Frequently owners of sectional title property are unaware of the above procedures and obligations and extend their sections without following the above processes. Once an estate agent or seller is aware of the fact that a section has been extended without the correct procedure followed, a full disclosure of this would need to be made to any potential buyer.

It is important to note that the lodgement of the documents for the extension of the section and a transfer of the section to a purchaser can be done simultaneously. Notwithstanding the above, the procedure set out above will in all likelihood delay a transaction so it is best for the owner to begin the process as early as possible, hopefully prior to entering into an agreement to sell.

A purchaser may be willing to purchase a sectional title unit even if the correct procedure has not been followed, however it is unlikely that a bank would agree to register a bond over a property if it was aware of this defect in the property.

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 antenuptial contract before the date of marriage. It does not make a difference for conveyancing purposes if the antenuptial 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 antenuptial 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

Monogamous customary marriages before 15 November 2000 are considered in community of property whilst polygamous customary marriages remain subject to customary law and are considered to marriages out of community of property.

Customary Marriages – Marriage entered into after 15 November 2000

Parties married in terms of customary law after 15 November 2000 are married in community of property unless they have entered into and correctly registered an antenuptial contract.

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

Civil Unions

Civil Unions entered into after commence of the Civil Unions Act shall be treated as marriage in community of property unless they have entered and registered an antenuptial contract.

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.

Where a minor sells immovable property:-

-the Master of the High Court must authorise the sale if the property value is less than R250 000.00 and

-the High Court must authorise the sale if the property is valued at more than R250 000.00

Where a minor buys immovable property:-

-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 R250 000; and
- the High Court must authorise the bond if the bond is valued at more than R250 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 CIPC 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 be 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 the Letters 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 AUTHORITY OF CLOSE CORPORATION MEMBERS TO BIND A CLOSE CORPORATION

INTRODUCTION

The purpose of this article is to discuss the extent to which members of a Close Corporation ("CC") have authority to bind the CC generally and specifically with regard to immovable property transactions.

HISTORY

CC's are regulated and governed by the Close Corporations Act, 69 of 1984 (as amended) ("**the Act**"), together with any association agreement concluded between the CC and its members. Accordingly, CC members must be aware of this legislation when acting and representing the CC on a daily basis.

ASSOCIATION AGREEMENT

To the extent that there is an association agreement, this agreement may regulate the authority of members in contracts and reflects the rights and obligations of each member. An association agreement is not obligatory and if there is no such agreement, then the conduct of the members is regulated by the Act.

LEGISLATION

Members authority to sell or purchase immovable property is dealt with in Section 46(b) of the Act which provides that members shall have equal rights with regard to the management of the CC and with regard to the power to represent the CC in its business, provided that the consent of members holding members interest of at least 75%, shall be required for certain fundamental decisions including "…any acquisition or disposal of immovable property by the CC."

The Act thus stipulates that the written consent of the members holding at least 75% of the members interest in the CC is required. If all parties agree, then all members may sign a resolution. This is known as a round robin resolution.

To the extent that there is disagreement, any member may call a meeting by giving the required notice for such meeting. The quorum required at the meeting is 75% of the aggregate number of members. If a quorum is achieved, 75% of the members present need to vote in favour of the resolution to sell or purchase as the case may be.

OPTIONS WHEN MEMBERS DISAGREE

To the extent that there is a disagreement between the members of the CC, the options are relatively limited. If there is an association agreement, it may be regulated by this agreement. Otherwise, if there are minority members it is possible to bring an application in terms of Section 49 of the Act whereby the court may order the complaint of the minority member be rectified (this is not a simple route). Alternatively, under the appropriate circumstances, a member may bring an application for liquidation of the CC.

PROTECTION TO THE CC

The above provisions are intended to provide protection to the CC and its members against "blanket" individual power, which could bind the CC in dangerous transactions. Additionally, when one considers the implications of the purchase of immovable property, this safeguard is justified.

CONCLUSION

Although CC members are granted a large degree of independence in respect of binding the CC, there are important safeguards in the Act which ultimately protect the CC. Due to the complexity and nature of certain transactions, readers are encouraged to seek advice from one of our professionals.

FOREIGN COMPANIES AND IMMOVABLE PROPERTY IN SOUTH AFRICA

INTRODUCTION

This article considers the purchase of immovable property in South Africa by foreign companies and the requirements for a foreign company to register as an external company with the Companies Intellectual Property Commission (CIPC).

FOREIGN COMPANY VERSUS EXTERNAL COMPANY

A foreign company is an entity which is incorporated outside of the Republic of South Africa. This is irrespective of whether it is a profit or a non-profit entity, and irrespective of whether it carries on its business or non-profit activities within South Africa. If however, the foreign company carries on business or non-profit activities within South Africa, it may then, subject to the provisions of Section 23 of the Companies Act, qualify to register as an "external company" with CIPC.

MUST ALL FOREIGN COMPANIES WHICH ACQUIRE PROPERTY IN SOUTH AFRICA REGISTER AS AN EXTERNAL COMPANY?

The Companies Act does not specifically create an obligation on a foreign company to register as an external company merely because the company acquires an interest (share, ownership etc.) in any property in South Africa.

WHEN IS A FOREIGN COMPANY REQUIRED TO REGISTER AS AN EXTERNAL COMPANY IN SOUTH AFRICA?

According to Section 23 of the Companies Act, a foreign company must register as an external company in South Africa if it is:

(a) conducting business or non-profit activities within South Africa; or

(b) is a party to one or more employment contracts within the Republic; or

(c) is engaging in a course of conduct, or has engaged in a course or pattern of activities within the Republic over a period of at least six months, such as would lead a person to reasonably conclude that the company intended to continually engage in business or non-profit activities within the Republic.

CAN I REGISTER IMMOVABLE PROPERTY DIRECTLY INTO THE NAME OF A FOREIGN COMPANY?

Foreign companies may purchase immovable property in South Africa and attend to the registration of immovable property into the foreign company's name in the Deeds Registry. Where a foreign company wishes to purchase property in South Africa and such foreign company does not fall within the parameters of Section 23 above, such company will not be required to register as an external company before registering immovable property into its name.

In such event, the Deeds Office will require documentary evidence from the Conveyancer in the form of affidavits from the directors, or a certificate from the auditor(s) of such foreign company, to the effect that the company need not register as an external company in South Africa. Where a foreign company does fall within the parameters of Section 23 above and that company, wishes to purchase property in South Africa, such foreign company will be required to register as an external company before registering immovable property into its name.

After registration as an external company with CIPC, the company will be given a registration number – ending in /10.

IMMOVABLE PROPERTY PURCHASED BY FOREIGN COMPANY TO BE LEASED OUT TO TENANTS

In the event that a foreign company purchases immovable property for the sole purpose of leasing same out to individuals or other companies within South Africa, such foreign company will be required to register as an external company with CIPC.

The foreign company has 20 business days to register with CIPC after first beginning to perform its business or activities in the Republic as set out in Section 23 of the Companies Act. The act of leasing out the property and deriving income from same, is regarded as conducting business and therefore such company must be registered as an external company in South Africa.

CONCLUSION

There is no restriction in our law prohibiting the purchase of immovable property in South Africa by a foreign company. A foreign company which conducts or intends conducting business or non-profit activities within South Africa, must adhere with the provisions of the Companies Act and register as an external company in South Africa.

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 OF THE COMPANIES ACT 71 OF 2008

WHAT IS SECTION 112 OF THE COMPANIES ACT

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 majority asset (51%) 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 shareholder's resolution is a special resolution.

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 assets 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 Company's 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 should 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 / Donor: The founder/donor 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 Letters of Authority.

It follows that prior to a trust contracting to sell or purchase immovable property, such trustee must be in possession of letters 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.

<u>In the case of a trust two important principles follow:</u>

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 Agreement of 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 (i.e. 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 by 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 of 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 2020, the transfer duty payable by a trust when acquiring immovable property is the same as that as applies to an individual.

Value of the property (R)	Rate
1 – 1000 000	0%
1 000 001 – 1 375 000	3% of the value above R1 000 000
1 375 001 – 1 925 000	R11 250 + 6% of the value above R 1 375 000
1 925 001 – 2 475 000	R44 250 + 8% of the value above R 1 925 000
2 475 001 – 11 000 000	R88 250 +11% of the value above R2 475 000
11 000 001 and above	R1 026 000 + 13% of the value exceeding R11 000 000

TRUSTS AND CAPITAL GAINS TAX

With effect from 1 March 2016 the inclusion rate applicable to the calculation of CGT for a Trust increased from 66.6% to 80%. On 1 March 2017, the effective tax rate for a Trust has increased to 45%. The maximum effective tax rate in respect of CGT for trusts is thus 36%.

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 guardian's 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 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.

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.

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 terms of section 13(1) of the Administration of Estates Act 66 of 1965 a person may not sign an agreement if he/she has not been issued with letters 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 Estates 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.

WHAT HAPPENS IF ONE OF THE PARTIES TO A TRANSACTION DIES OR BECOMES INSOLVENT PRIOR TO REGISTRATION

INTRODUCTION

Purchasing a house is usually quite stressful owing to the enormity of the implications involved, this can be further compounded by a party to the transaction passing away or going insolvent. In this article we explore the implications of the death/insolvency of one of the parties to an immovable property transaction prior to registration.

CONSEQUENCES OF THE DEATH OF THE SELLER

Agreements concluded prior to the death of either party to a sale agreement, remain valid and enforceable. Should the seller pass away before registration, the Power of Attorney signed by the seller in favour of the transferring attorneys becomes invalid. This applies even if the matter has been lodged in the deeds office. If the seller dies, the matter must be halted and the estate of the deceased must be reported and an executor appointed by the Master of the High Court. The executor appointed must then sign a new Power of Attorney to proceed with the transaction.

Before transfer from the deceased estate can take place, the Power of Attorney must also be endorsed by the Master of the High Court in terms of section 42(2) of the Administration of Estates Act 66 of 1965. In the ordinary course in the event of a sale of immovable property from a deceased estate, all major heirs must consent to the sale of the property. In the case where a seller sells a property and subsequently dies before registration, consent of the major heirs is no longer a requirement.

THE CONSEQUENCES OF THE DEATH OF THE PURCHASER

As with the death of a seller before registration, the agreement remains valid and enforceable. In such circumstances, the executor of the deceased's estate (duly appointed) would have to act on behalf of the estate. This includes the signature of the necessary documents to give effect to the transfer. In the case of a purchaser becoming deceased, there may be further complications such as when the deceased purchaser had obtained a mortgage bond, the bank will withdraw the bond owing to the practicalities of the death of the purchaser (who will be unable to service the bond repayments). If the bond is withdrawn after approval, the agreement does not lapse and it remains to the parties to find a practical solution. In the event that the bond is not granted at the time of death, as the bond approval is a suspensive condition, the agreement will lapse.

THE CONSEQUENCES OF THE INSOLVENCY OF THE SELLER

If the estate of the seller is sequestrated prior to registration, the property vests in the trustee of the seller's insolvent estate. In so far as the purchaser may have fully or partially performed in terms of the agreement of sale concluded prior to the insolvency, by payment of the whole or portion of the purchase price, the purchaser is in a position of a creditor with a concurrent claim against the insolvent estate.

The trustee has an election to proceed with the agreement or not. In the event of the trustee proceeding, the agreement remains in full force and both parties must perform in full per the agreement. The consequences of the trustee choosing not to proceed with the transaction/repudiating are that the purchaser is barred from obtaining an order of specific performance but may pursue other contractual remedies available in law such as damages.

In terms of Section 23 of the Insolvency Act 24 of 1936 if an insolvent wishes to alienate (sell, donate, exchange etc.) a property, this will only be permitted by the registrar of deeds if the consent by the trustee of the insolvent estate is lodged together with the transfer or registration of the mortgage bond.

THE CONSEQUENCES OF THE INSOLVENCY OF THE PURCHASER

If an insolvent, before the sequestration entered into a contract for the purchase of immovable property (which was not registered in his/her name), the trustee of the insolvent estate may enforce or abandon the contact. This means that if a person has signed an agreement to purchase immovable property and is subsequently sequestrated, the trustee can decide to accept or reject the transaction. If the trustee decides to accept the contract, the property falls in the estate of the insolvent, if not the property returns to the seller. The seller may call upon the trustee by notice in writing to elect whether the trustee will enforce or abandon the contract.

AFRICAN CUSTOMARY LAW MARRIAGES

INTRODUCTION

African customary law marriages in South Africa are governed by the Recognition of Customary Marriages Act 120 of 1998 (the "Act") which came into effect on 15 November 2000. According to the Act, a customary marriage is one that has been concluded in terms of customary law and entered into in terms of the customs and practices of the indigenous people of South Africa.

The Act applies to customary marriages both before and after the commencement of the Act.

In terms of section 3(1) of the Act, the requirements for a valid customary marriage are as follows:

(a) the prospective spouses –
  (i) must both be above the age of 18 years; and
  (ii) must both consent to be married to each other under customary law; and
(b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.

CUSTOMARY MARRIAGES PRIOR TO 15 NOVEMBER 2000

Section 7(1) of the Act states that "the proprietary consequences of a customary marriage entered into before the commencement of this Act continue to be governed by customary law". This would have the effect that women who had entered into customary marriages prior to the commencement of the Act would have no marital property rights.

However, in *Gumede* v *President of the Republic of South Africa and Others* 2009 (3) SA 152 (CC) and *Ramuhovi and Others* v *President of the Republic of South Africa and Others* (CCT194/16) [2017] ZACC 41; 2018 (2) BCLR 217 (CC); 2018 (2) SA 1 (CC) (30 November 2017), the courts found this section to be unconstitutional resulting in wives in customary marriages prior to the Act having full status and capacity (subject to their marital property systems).

Monogamous customary marriages entered into prior to the commencement of the Act are considered **in community of property** whilst **Polygamous customary marriages** entered into prior to the commencement of the Act, remain subject to customary law and are marriages **out of community of property**.

CUSTOMARY MARRIAGES AFTER 15 NOVEMBER 2000

Monogamous Customary Marriages

Monogamous customary marriages entered into after the commencement of the Act are marriages **in community of property** and community of profit and loss, provided that neither of the spouses are a partner in an existing customary marriage and/or civil marriage.

Inasmuch as the parties may wish for the property regime to be **out of community of property,** it is possible to enter into an antenuptial agreement prior to the marriage (Section 7). These antenuptial contracts must be registered in the normal manner within 3 months of execution and must be executed before the marriage.

Polygamous Customary Marriages

Polygamous customary marriages entered into after to the commencement of the Act require a court application to be made in which the matrimonial property system of the further customary marriages as well as the existing marriage will be regulated. Each of the spouses will be provided with a certified copy of the court order and the court order will be registered with all the Registrars of Deeds in the various Deeds Registries.

Any further marriages that the man enters into will require a further court application, which order will then supercede the previous order. Should the court application not be made, the further marraiges will be out of community of property. It should also be mentioned that

in order for a Tsonga customary marriage to be valid, any former spouses need to consent to the further marriage (*Mayelane* v *Ngwenya & Another* (CCT 57/12) [2013] ZACC 14 (30 May 2013)).

Conversion to Civil Marriage

The Act also prevents any person in a customary marriage from entering into a subsequent civil marriage (section 10(4)). However, Section 10 of the Act allows for parties who have entered into customary marriages to convert such marriages into a civil marriage. Such a marriage will remain a marriage in community of property. They may not simply enter into an antenuptial contract prior to the conversion. Should the parties wish to change their maritmonial property regime, they would be required to approach the High Court for an order in terms of Section 21 of the Matrimonial Property Act 88 of 1984.

Proof of a valid Customary Marriage

Proof of a valid customary marriage will ordinarily be in the form of a certificate from the Department of Home Affairs that the marriage has been registered or the court order showing the matrimonial property system, in the case of a polygamous customary marriage. In terms of the section 4 of the Act, spouses in customary marriages both prior to and after implementation of the Act have a duty to have such a marriage registered with Home Affairs within 3 months however, in reality this is often overlooked. Section 4(9) of the Act therefore provides that non-registration of such a marriage does not affect it's validity. For the purposes of the Deeds Registry, an affidavit by both spouses will be accepted as proof of a customary marriage.

CONCLUSION

In conclusion, it may be difficult to ascertain the matrimonial property system governing a customary law marriage. It is therefore important to obtain as much information as possible from the parties prior to entering into an agreement of sale to ensure that they have the necessary authority to enter into the transaction and that the transaction is valid. It is further necessary to establish whether or not a customary marriage was entered into prior to the parties entering into an antenuptial contract.

THE SALE OF AN IMMOVABLE PROPERY REGISTERED IN A MINOR CHILD'S NAME

INTRODUCTION

A child is defined in the Children's Act, No. 38 of 2005, as a person under the age of 18 years. Under South African law, a minor child may not enter into contracts without the express or implied consent of their natural or legal guardian i.e. the minor child's parents or appointed guardian by the courts / specified in a will. Whilst there are no legal impediments on transferring immovable property into a minor child's name, a minor child may only sell his / her immovable property if such alienation has been authorised by the Master of the High Court or the High Court as upper guardian of all minor children.

LEGAL CAPACITY

As a minor child has no or limited legal capacity (depending on his / her age) and by extension of this restriction of contractual ability, a minor child is not eligible to purchase / sell immovable property without consent of the natural / legal guardian.
Therefore, the minor child's guardian must sign the deed of transfer and transfer documents on behalf of a minor child younger than 7 years old. If the minor child is between the ages of 7 and 18 years old, the minor child has limited contractual capacity and may be authorised to sign legal documents but only if he / she is assisted by his / her guardian.

Although the minor child is the owner of the immovable property, the natural / legal guardian is responsible for administering the property until the child reaches the age of majority and is considered fit to manage his / her own affairs.

SALE OF IMMOVABLE PROPERTY

To protect the minor child's interests, restrictions are implemented in relation to the actions natural / legal guardians are permitted to take in the administration of the minor child's property.

In terms of Section 80 of the the Administration of Estates Act 66 of 1965 ("the Act"), it states that: "*no natural guardian shall alienate or mortgage any immovable property belonging to his minor child … unless he is authorised thereto by the Court or by the Master…*" Accordingly, the guardian may not sell / dispose / mortgage an immovable property registered in the minor child's name without the consent of the Master of the High Court, alternatively, the High Court. In order to do so, the guardian will have to apply to the Master of the High Court or the High Court who will determine whether or not to approve the sale having regard to the best interests of the minor child.

PROCEDURE TO OBTAIN CONSENT

In terms of Section 80(2) of the Act, the Master may authorise a sale if the value of the immovable property registered in the minor child's name does not exceed the amount of R250 000.00. If the value of the property exceeds R250 000.00, the natural or legal guardian should apply to the High Court for consent to sell the immovable property.

The court application is an *ex parte* court application supported by affidavit. An advocate is needed to appear in court to argue the application and take the court order. Applications for consent can be time consuming and expensive and where not done in advance will delay the transfer process.

The sale of the immovable property will only be authorised if it can be demonstrated that the sale will benefit the minor child. The natural / legal guardian would have to provide reasons as to why the property is being sold, and details of how the proceeds of the sale will be distributed / invested in order to benefit the minor child. If the proceeds are not utilised to acquire another property / investment for the minor child, the proceeds of the sale must be paid to the Guardian's fund and administered on behalf of the minor child.

CONCLUSION

The decision to purchase and register an immovable property in the name of a minor child should not be made lightly and must be well considered, having regard to the onerous legal implications of the subsequent sale / alienation of such an immovable property. It is therefore important to establish early in the process of selling or buying an immovable property whether the property is owned by a minor so as to avoid unnecessary delays in the transfer.

THE LEGAL POSITION OF PERSONS INCAPABLE OF MANAGING THEIR OWN AFFAIRS

INTRODUCTION

Our law requires that parties to legal agreements must have the necessary mental capacity, i.e. be able to understand the nature, purpose and consequences of their actions.

This article will demonstrate what is required when a person with diminished mental capacity, resulting from mental illness, brain injury, a stroke, dementia, incapacity related to aging in general, or where a person, incapable of managing his/her own affairs, wishes to conclude certain transactions such as selling or buying immovable property.

A POWER OF ATTORNEY MAY NOT BE SUFFICIENT

A common misconception is that people assume that granting a power of attorney to a loved one or a professional advisor will enable that person to manage investments and transactions on their behalf, should they lose the ability to manage their own affairs due to diminished mental capacity.

A power of attorney is only competent in cases where a person is temporarily or briefly unable to fulfil certain legal actions (e.g. they are out of the country or in hospital for an operation) and can be helpful if an elderly or frail person, who is able to handle his own affairs and understands the nature and consequences of those actions, simply wishes to slow down and hand over the responsibility to a trusted third party, their agent.

For a power of attorney to be valid and exercisable, the principal has to be legally competent and have the necessary mental capacity in the first place. As soon as the principal becomes incapable of acting on their own behalf, or dies, the power of attorney automatically lapses, the reason being that an agent cannot have more power than the principal.

It is unlawful to exercise a power of attorney that has lapsed. For example, if a person gave someone a power of attorney to sell their property while they were healthy and mentally sound, but the transaction took place after the principal's mental capacity had diminished (in other words they would not have been able to make the decision themselves) the transaction would be unlawful and the agent would be guilty of a fraudulent act. South African law does not recognise an enduring power of attorney.

APPOINTMENT OF A CURATOR OR ADMINISTRATOR

There are two legal procedures available in our law that allow for a person to take over control of the personal affairs of another who is of unsound mind or does not have the necessary mental capacity to handle his/her own affairs:

<u>Option One</u>

The common law, in terms of Rule 57 of the Uniformed Rules of the High Court, allows the High Court, in whose jurisdiction the person concerned lives or in which they own property, to appoint a curator *bonis* to perform or execute a particular act on his/her behalf in respect of his/her property or to manage or look after such person's property (this curator protects the patient's financial and proprietary interests).

The application to the High Court for the appointment of a curator *bonis*, is brought by way of a Notice of Motion and supporting affidavit by an interested person such as a family member,and sets out the facts and circumstances relied on to show that the person is of unsound mind and incapable of managing his/her affairs. The Application will also need to include two medical reports, one of which shall be from a psychiatrist, confirming that the individual is mentally incapacitated and incapable of managing his/her estate.

Upon hearing the application, the court will first appoint a curator *ad litem* (usually an advocate or legal practitioner of that court) to investigate the matter fully and who will need to submit a written report of his/her findings to the court and the Master.

The curator *ad litem* will interview the person, medical practitioners and others with knowledge of the person's circumstances and submit a report, which is supplemented by the Master of the High Court's report. The curator *ad litem* is also responsible for recommending the appointment of a curator *bonis,* who will ultimately take control over the person's property and estate.

The appointed curator *bonis* is often an attorney, accountant or other like professional, rather than a family member, as the duties are onerous and may be too much for someone who is also providing personal care to their loved one. A curator *bonis* must also furnish security to the Master of the High Court, as a guarantee for doing the job properly. Practicing attorneys hold Fidelity Fund certificates that satisfy this requirement, and are thus ideal candidates for the curator *bonis*.

The curator *bonis*, once appointed by the Master, shall administer the estate of the individual in accordance with the powers and functions granted by the court. The curator *bonis* is accountable to the Master of the High Court and is required to submit annual accounts, detailing all income received, expenditure incurred and providing all vouchers and receipts for transactions made for or on behalf of the incapable person.

In regard to immovable property of the mentally incapacitated person, section 80 of the Administration of Estates Act, 66 of 1965 stipulates that the curator *bonis* shall not alienate or mortgage any property that he/she has been appointed to administer unless he/she has been authorised thereto:

- by any will or written instrument by which he/she has been appointed as executor; or
- by the Master of the High Court where the value of the particular property to be alienated does not exceed the amount determined by the Minister from time to time by notice in the Government Gazette (currently R100,000) and if the alienation would be in the interest of the mentally incapacitated person (section 80(2)(a) of Act 66 of 1965); or
- by the High Court where the value of the immovable property concerned exceeds the amount determined by the Minister from time to time by notice in the Government Gazette (currently R100,000).

A curator *bonis* receives a modest remuneration for his services in this regard and is entitled to a maximum annual fee of 6% on gross income generated from the assets, and a once off fee of 2% of the capital on the date the curatorship ends. These fees are deducted from the estate they control and will be monitored and approved by the Master.

Since the appointment of a curator *bonis* involves a High Court application, this procedure is relatively expensive, with the average costs ranging between R60 000 and R80 000, and is rather cumbersome (in that all steps taken by the curator *bonis* must first be approved by the Master of the High Court or the High Court itself). The medical costs are also substantial. These costs are usually paid by the estate of the person in respect of whom the curator *bonis* is appointed.

A curator *bonis* may also be appointed in situations where a person has full mental capacity but that person has, for example, a gambling addiction or a substance dependency and as a result thereof squanders his estate, and is declared a prodigal.

A curator *bonis* is concerned only with the *financial* affairs of the person. Where the person is incapable of managing his/her own *personal* affairs, and day to day living or welfare, the court can be approached to appoint a curator *ad personam* – a curator for the person.

<u>Option Two</u>

The second option is an alternative and simpler procedure governed by The Mental Health Care Act, 17 of 2002, whereby the Master of the High Court may appoint an Administrator to manage the property of someone who is mentally incompetent.

This application is only applicable in the case of mental illness or severe or profound disability. The diagnosis will have to be confirmed by medical certificates or reports by a mental health care practitioner. Since a positive diagnosis of mental illness or severe intellectual disability is a prerequisite for the appointment of an administrator in terms of the Mental Health Care Act, persons who are incapacitated

from managing their own affairs by reason of physical handicap, serious illness, old age (without any form of dementia such as Alzheimer's), etc. are excluded from the provisions of the Act, unless they also suffer from a mental health related illness or disability.

Any person over the age of 18 may apply directly to a Master of a High Court for the appointment of an administrator for a mentally ill person or person with severe or profound intellectual disability.

The application, brought under oath (i.e. by way of affidavit) must be submitted directly to the Master of the High Court in whose area of jurisdiction the mentally ill person, or person who suffers from a severe or profound intellectual disability, resides and must include all available mental health related medical certificates or reports relevant to the mental health status of that person and to his/ her incapability to manage his/ her property.

In terms of the Mental Health Care Act, it is the Master of the High Court who has the authority to appoint an Administrator who has been nominated by the applicant. The High Court may only make recommendations to the Master in this regard.

If the Master is satisfied that the person is mentally ill or is a person with severe or profound intellectual disability and the capital value of such person's assets is below R200 000 or income is below R24 000 per annum, the Master may appoint the nominated administrator without any further investigation.

If the value of the person's capital assets is above R200 000 and the income is above R24 000 per annum, or there are certain allegations in the application that require confirmation or further information is required to support the application, the Master must appoint an interim administrator and must cause an investigation to be conducted before a final administrator is appointed.

The Act says the Master has 30 days from the date of submission to arrange for a suitably qualified person to investigate the application in this instance. The investigation must be finalised within 60 days.

In terms of section 63(4)(a) of the Mental Health Care Act, an administrator may not alienate or mortgage any immovable property of the person for whom he or she is appointed, unless authorised to do so by a court order or with the consent of the relevant Master of the High Court.

In light of the fact that no High Court application is required for the appointment of an administrator, the procedure for the appointment of an administrator is far less costly than the common law appointment of a curator *bonis*. The applicant does not need to work through an attorney, and the application fees charged by the Master in processing the application are minimal, amounting to no more than R2500.

Administrators, like curators, are governed by the Administration of Estates Act and are entitled to their fee of 6% on income from assets and of 2% of the value of the capital when the administration is terminated.

THE GENERAL POWERS OF A CURATOR BONIS AND/OR ADMINISTRATOR

The powers and responsibilities of a curator or administrator are primarily to administer the estate of the person who is incapable of managing their own affairs, and generally include the following:

- To receive, take care of, control and administer all the assets
- To carry on/or discontinue, subject to any law which may be applicable, any trade, business or undertaking
- To acquire, whether by purchase or otherwise, any property, movable or immovable, for the benefit of the estate
- To apply any money for the maintenance, support or towards the benefit of the person; to invest or re-invest any funds etc.

These powers are carried out under the supervision of the Master and the High Court and are subject to the prior consent and approval of the Master.

With specific regard to the sale of immovable property of a mentally incapable person, proof of the authorisation from the Master of the High Court must be submitted by means of an endorsement on the power of attorney to give transfer and the court order must be lodged to prove the authorisation of the High Court.

Naturally, the curatorship or administration of a person's estate automatically terminates upon the death of that person. The curator *bonis* / administrator is then replaced with the Executor of the deceased's estate who will take control of the assets and property of that person.

CONCLUSION

The general rule is that majors are presumed mentally and legally competent to manage their own affairs until the contrary is proved. When a person becomes incapable of managing his or her own affairs, especially the administration of his or her estate, it is imperative that someone be legally appointed to assist the person who has become incapable, as a general or special power of attorney will not be valid. In terms of our current legal system no person may manage the affairs of another person without the required authority to do so.

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

Former 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. Some banks, however, may insist that the bn and property be registered jointly in both of their names.

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.

<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.

Value of the property (R)	Rate
1 – 1000 000	0%
1 000 001 – 1 375 000	3% of the value above R1 000 000
1 375 001 – 1 925 000	R11 250 + 6% of the value above R 1 375 000
1 925 001 – 2 475 000	R44 250 + 8% of the value above R 1 925 000
2 475 001 – 11 000 000	R88 250 +11% of the value above R2 475 000
11 000 001 and above	R1 026 000 + 13% of the value exceeding R11 000 000

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 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:	7.5 %
If the non-resident Seller is a Company:	10 %
If the non-resident Seller is a Trust:	15 %

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.

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 WITHHOLD?

The Purchaser must withhold funds as follows:

If the non-resident Seller is a natural person:	7.5 %
If the non-resident Seller is a Company:	10 %
If the non-resident Seller is a Trust:	15 %

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. ie. 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 WITHHOLD 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.

WHO IS A NON-RESIDENT FOR THE PURPOSES OF SECTION 35A OF THE INCOME TAX ACT

INTRODUCTION

There is often confusion as to whether or not an individual, company or trust is a resident or non-resident for income tax purposes. This is of particular importance when applying the provisions of Section 35A of the Income Tax Act (Withholding Tax). This article looks to give some clarity on the issue.

DEFINITIONS PER THE SARS GUIDE

The external guide issued by SARS dealing with "Amounts to be Withheld when a Non-Resident Sells Immovable Property in SA" provides the definitions below.

Non-resident is defined as a person:

(i) Not normally residing in South Africa; and

(ii) falling outside of the definition of resident.

Resident is defined to include:

(i) Any natural person who is ordinarily resident in South Africa; or

(ii) Any natural person who complies with the physical presence test; and

(iii) Any person (other than a natural person) which is incorporated, established or formed in South Africa or which has its place of effective management in South Africa.

Resident is defined to exclude "any person who is deemed to be exclusively a resident of another country for the purposes of the application of any agreement entered into by the government of South Africa and that other country for the avoidance of double taxation."

APPLICATION OF THE DEFINITION OF NON-RESIDENT

To determine if a taxpayer is a non -resident, we must look at whether the taxpayer is a resident. If the taxpayer does not fall into the definition of "resident" then the taxpayer must be a non-resident. In the latter case, Section 35A will apply.

APPLICATION OF THE DEFINITION OF RESIDENT

Ordinarily Resident

"Ordinarily resident" is defined as the place where a person resides in the ordinary course of their daily life, i.e. the place where a person will naturally return to from his wanderings.

Although a person may not be physically present in a place, he or she may still be deemed a resident if an intention to become ordinarily resident in a country is proven and steps indicative of this intention having been or being carried out.

The following non-exhaustive list of factors is considered (by SARS) in determining whether the above two requirements are satisfied:

- most fixed and settled place of residence;
- habitual abode, i.e. present habits and mode of life;
- place of business and personal interest;
- status of individual in country, i.e. immigrant, work permit periods and conditions, etc.;
- location of personal belongings;
- nationality;
- family and social relations (schools, church, etc.);
- political, cultural or other activities;
- application for permanent residence;
- period abroad;
- purpose and nature of visits;
- frequency of and reasons of visits

Physical Presence

The "Physical Presence Test" is where the taxpayer meets the requirement that the taxpayer is physically present in South Africa for a period or periods exceeding:

- 91 days in total during the year of assessment under consideration; and
- 91 days in total during each of the five years of assessment preceding the year of assessment, and
- 915 days in total during those five preceding years of assessment.

A taxpayer who fails to meet the above, does not satisfy the terms of the test. The Physical presence test only applies to natural persons (and not incorporated entities) who were not at any stage during the relevant tax year ordinarily resident in South Africa.

In addition, any individual who meets the physical presence test, but is outside South Africa for a continuous period of at least 330 full days over two years of tax assessment, will not be regarded as a resident from the day on which that individual ceased to be physically present.

A tax year starts on the first day of March of one year and ends on the last day of February of the subsequent year.

The physical presence test as set out in the definition of the Income Tax Act can be confusing. The test is used in application for individuals who do not ordinarily reside in South Africa. The test is used by these individuals in order to gain residency.

LOSS OF RESIDENCE BY EMMIGRATION

The most common way for an individual to lose their residency and for Withholding Tax to be applicable to their proceeds of sale is for an individual to emigrate from South Africa.

If a natural person has indefinitely emigrated to another country, they are no longer ordinarily resident in South Africa and automatically lose their residency the moment they arrive in their new country of residence. They cease to be resident on the day they emigrate.

The fact that an individual who has emigrated still has a South African income tax number and is still liable to submit a tax return/owes tax to SARS is irrelevant in the determination of whether or not he/she is a resident or non-resident for the purpose of Section 35A.

LEGAL ENTITIES

The definition in the SARS external guide above provides two criteria for an incorporated entity to be a resident in South Africa. The entity must;

(i) Be incorporated, established or formed in South Africa; or
(ii) Have its place of effective management in South Africa

If either of these are present, the Company is a Resident – i.e. the entity won't be deemed a non-resident for Withholding tax.

CONCLUSION

The above is a simplification of complex legal and tax issues and professional advice must always be taken before entering into transactions where certain tax implications are elicited by residency status.

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 that 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.

TRANSFER DUTY: PENALTIES

Transfer Duty must be paid within 6 (six) months of date of sale, failing which penalties are payable at the rate of 10% per annum. The 6 (six) month period is calculated from the date of sale, regardless of any suspensive conditions.

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 1 March 2021. Transfer Duty remained unchanged in 2022:

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

Value of the property (R)	Rate
1 – 1000 000	0%
1 000 001 – 1 375 000	3% of the value above R1 000 000
1 375 001 – 1 925 000	R11 250 + 6% of the value above R 1 375 000
1 925 001 – 2 475 000	R44 250 + 8% of the value above R 1 925 000
2 475 001 – 11 000 000	R88 250 +11% of the value above R2 475 000
11 000 001 and above	R1 026 000 + 13% of the value exceeding R11 000 000

EXAMPLES: MATTERS CONCLUDED FROM 1 MARCH 2021

Purchase Price: R990 000.00 **nil (as below threshold)**

Purchase Price: R1 800 000.00

-R0-R1 000 000.00	nil as exempt	nil
-R1 000 001.00 – R1 375 000.00	x 3 % on R375 000.00	R 11 250.00
-R1 375 001.00 – R1 800 000.00	x 6 % on R425 000.00	R 25 500.00
Total transfer duty:		**R 36 750.00**

Purchase Price: R3 000 000.00

-R0-R1 00 000.00	nil as exempt	nil
-R1 000 001.00 – R1 375 000.00	x 3 % on R375 000.00	R 11 250.00
-R1 375 001.00 – R1 925 000.00	x 6 % on R550 000.00	R 33 000.00
-R1 925 001.00 – R2 475 000.00	x 8 % on R550 000.00	R 44 000.00
-R2 475 001.00 +	x 11 % on R525 000.00	R 57 750.00
Total transfer duty:		**R 146 000.00**

VALUE ADDED TAX (VAT)

When immovable property is sold, transfer duty or VAT is always payable. Either one or the other is applicable and same is not a choice – a determination must be made in every case. The Standard Rate of VAT was increased from 14% to 15% on 1 April 2018.

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.

Assumptions should not be made as to whether a seller is a VAT vendor or not. Individuals may be VAT vendors and not all trusts, companies and close corporations are VAT vendors. Note that not all VAT vendors will sell on a VAT basis and thus the importance of the Seller and or their advisors specifically advising if VAT is applicable.

Whether or not VAT is leviable is a complex issue and the ground rule is to never make assumptions and to always take professional advice. An example of this complexity is the case of the Seller who is a VAT vendor and is selling a “dwelling” used a “residential property”. This example is an exception to General Rule three below.

In the latter case, notwithstanding that the Seller is a VAT vendor, output VAT cannot be levied on the purchase price as the use of the property (purely residential) is not in the course or furtherance of the Sellers business. Such a sale would attract transfer duty notwithstanding that the Seller is a VAT vendor.

Refer in this regard to our article: When does VAT apply to the sale of Residential Property.

VAT legislation has various exceptions. Each case must be studies and determined on its own merits.

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 R869 565.22

-the VAT portion of the purchase price is R130 434.78

-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 R130 434.78

(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 15% to the purchase price as follows:

Purchase Price excluding VAT: R1 000 000.00

To VAT thereon at 15 % R150 000.00

Total Purchase Price including VAT R1 150 000.00

The Seller will receive R1 150 000.00 and will have to account to SARS for the VAT portion of R150 000.00

In addition to the above, reference should made to our article: When does VAT apply to the sale of Residential Property.

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.

THE SUSPECT VAT VENDOR

INTRODUCTION

In each and every matter lodged in the deed's registry for transfer and registration, the deeds registry requires the lodgement of a transfer duty receipt or a transfer duty exemption certificate.

The Registrar of Deeds in effect acts as a "policeman" on behalf of SARS in order to ensure that either transfer duty is paid on the sale or that the transaction is exempt from transfer duty. There are various exemptions for the payment of transfer duty, one of these exemptions is where the immovable property is sold and the sale is subject to the payment of VAT.

HISTORICAL POSITION JOHANNESBURG

Historically the practise in the case of a Vat sale in Johannesburg was for the conveyancer to apply to SARS for the issue of a transfer duty exemption certificate on the basis that the sale was exempt from transfer duty.

The conveyancer would lodge the transfer in the deed's registry, and on registration pay the full amount due to the seller, including the normal net proceeds and the Vat portion on the purchase price. The seller would account to SARS for the Vat portion in the Seller's ordinary Vat cycle when filing Vat returns.

CAPE PRACTISE

The position and practise in Cape Town was that, upon registration, the conveyancer would pay the net proceeds to the seller, less the Vat portion. The Vat portion of the purchase price is paid to SARS within 5 days of registration of the transfer. This remains the practise in Cape Town.

The disadvantage of the Cape Town system is that a seller of a Vat based property does not receive the Vat portion of the purchase price directly from the Conveyancer and must "recover" same from SARS.

THE SUSPECT VAT VENDOR - JOHANNESBURG

Around 2009 SARS wanted to implement the Cape Town Practise in Johannesburg. This was met with resistance. The solution was the effective introduction of a "suspect Vat Vendor". When a submission is made to SARS via e-filing for the issue of a transfer duty exemption certificate, SARS attends to an assessment of the selling Vat vendor.

To the extent that SARS deems the vendors affairs to be in order, SARS issues the transfer duty exemption in the ordinary course – no undertaking being required.

To the extent that SARS deems the vendor "suspect" the conveyancer is called upon the provide a written undertaking that the Vat portion of the purchase price will be paid to SARS within 5 days of registration of transfer. Once the undertaking is provided to SARS (after being authorised by the Seller to do so), SARS issues the transfer duty exemption. The conveyancer is then able to lodge in the deeds registry and after registration of transfer has 5 days within which to pay SARS the Vat portion of the purchase price. Any Vat due to the Seller is recovered from SARS when a Vat return is submitted in the Seller's ordinary Vat cycle.

A Vat vendor may be deemed "suspect" if for example the Vat Vendor is new, has not submitted Vat returns or owes SARS Vat etc.

CONCLUSION

When involved in the sale of immovable property in Johannesburg, where the sale is subject to Vat, the seller must be advised to ensure that their Vat and tax affairs are in order and up to date in order to avoid SARS requiring the conveyancers to issue a Vat undertaking prior to the issue of a transfer duty exemption certificate.

Legal and Tax advice should always be sought and the above is a simplification of complex law.

REMEMBERING VAT IN IMMOVABLE PROPERTY SALES
GERBER V NAIDOO AND ANOTHER (3048/2015) [2016] ZAECPEHC 11

INTRODUCTION

The sale of immovable property may in certain circumstances attract VAT, which must be accounted for by the Seller. This is often overlooked during the negotiation of the sale and omitted when concluding the offer to purchase.

The failure to properly consider the VAT implications can have a grave effect on the sale proceeds received by the Seller.

THE LAW

The Value Added Tax Act provides that any price charged by a vendor in the sale of goods, including the sale of immovable property, is deemed to include VAT at a rate of 15%, unless the contrary is specified. In other words, where the purchase price is subject to VAT but VAT is not dealt with, the purchase price is deemed to include VAT.

Whether a sale is subject to VAT or transfer duty is not a matter of choice and as such when a purchase price is subject to VAT or deemed to be subject to VAT (as in the case below), transfer duty is not payable.

The result is that the Seller must account to SARS for 15 % VAT in the purchase price.

THE FACTS

In the above case the liquidators acting for and on behalf of the close corporation seller, resolved to sell the property for R1.8m, which purchase price excluded VAT.

In amplification hereof, the bank who held a mortgage bond over the property consented to the sale of the property provided that a purchase price of R1.8m plus VAT was realised.

The sale agreement subsequently concluded was silent on the issue of VAT and therefore the purchase price was deemed to include VAT. The purchaser was presented with a proforma invoice for the payment of the purchase price, together with VAT thereon. The purchaser refused to pay the VAT in addition to the purchase price and approached the High Court for an order compelling the Seller to pass transfer at the agreed purchase price.

The Seller defended the action and applied to the court for rectification of the agreement on the basis that the true agreement and common intention of the parties was to exclude VAT from the purchase price, i.e. that VAT was payable on top of the purchase price.

HELD

The Court held that the seller failed to prove the alleged common intention and accordingly the provisions and interpretation of the Value Added Tax Act was upheld. The seller was obliged to transfer the property to the purchaser at the purchase price reflected in the agreement of sale, being R1.8m inclusive of VAT.

Effectively, the seller had received proceeds reduced by R252 000.00 (being VAT on the purchase price of R1 800 000.00) and in addition thereto was liable to pay R221 053.00 (being VAT in the purchase price) to SARS in lieu of VAT from the proceeds. A further issue to be addressed by the liquidators was the effect of the resultant shortfall had on the bondholder's settlement of the mortgage bond liability.

CONCLUSION

Value Added Tax must be carefully considered and the true intention of the parties relating to the liability for the payment of VAT must be expressly dealt with in the agreement. Sellers should be aware that the failure to specify that VAT is specifically excluded from the purchase price would render the value reflected in the agreement to be deemed to be inclusive of VAT.

WHEN DOES VAT APPLY TO THE SALE OF RESIDENTIAL PROPERTY?

INTRODUCTION

In every sale of immovable property, transfer duty or VAT is payable. However, in transactions where the seller is registered for Value Added Tax (VAT) then VAT maybe payable. VAT is an indirect tax that is leviable on the supply of goods and services by a registered VAT vendor (Vendor). Output tax is levied at 15% of the selling price of every taxable supply of goods or services made by the vendor in the course or furtherance of its business. Input tax is incurred by the vendor when paying for goods or services in the course or furtherance of its business.

A supply can be a sale, rental agreement, instalment credit agreement and all other forms of supply (as set out in the Act). If the supply is made in the course or furtherance of the business then VAT is payable on the transaction.

EXEMPT SUPPLIES

A vendor may not charge output tax on exempt supplies nor deduct any input tax if an expense is incurred to make exempt supplies or for any other non-taxable purpose. An exempt supply for instance is the supply of residential accommodation ("dwelling") by way of a lease agreement. Therefore, a vendor who supplies exempt supplies cannot levy output tax and cannot deduct the input tax in the process of making those exempt supplies.

Consequently, as a general rule and subject to exceptions, the vendor who is selling a dwelling, used as a residential property, cannot charge output tax on the sale of the property. The buyer must pay transfer duty. The Sellers accountant must be consulted to determine if any of the exceptions apply.

WHEN DOES VAT APPLY TO THE SALE OF PROPERTY?

The general rule is that a vendor may only levy output tax to the sale of property if the property was used by the vendor in the course or furtherance of its business, for example where the seller supplied commercial accommodation inclusive of goods and services. For example, a vendor running a guesthouse bed and breakfast would be required to levy output tax on the sale of its guesthouse property because the property was used in the course of its business or the sale is in furtherance of its business.

The sale of a dwelling, "used as a residential property" owned by a vendor is subject to transfer duty because output tax cannot be levied on the sale price as the use of the property was not in the course or furtherance of its business. Only a vendor who supplies (leases or sells) commercial accommodation inclusive of goods and services can charge output tax on the sale price. For example, if a vendor owns a student accommodation business the sale of the property is not subject to VAT. Only if the vendor provides the students accommodation inclusive of goods and services, such as cleaning their rooms, air conditioning, television, cooking meals and a laundry service at one inclusive fee, then the sale of the student accommodation property is subject to VAT.

THE SUPPLY OF COMMERCIAL ACCOMMODATION

The VAT Act defines commercial accommodation as, "lodging, or board in a building; house or other structure". Commercial accommodation must include the supply of domestic goods and services, such as cleaning, maintenance, electricity, air conditioning, television, meals and a laundry service. The supply must be regularly and systematically supplied and the yearly receipts must exceed R120,000 in a 12-month period.

CONCLUSION

The way in which the property has been used can have a fundamental impact on whether or not the sale of the property is subject to transfer duty or VAT. The parties to the sale of the property must consider whether the seller is a registered vendor and if the property was used as a commercial accommodation inclusive of goods and services alternatively the sale of the property should be in the furtherance of the vendors business.

This article is a general guide, and specific tax advice should be sought in each situation from a tax consultant.

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 "maximum effective rates of tax" which can be used to calculate Capital Gains Tax. These maximum effective rates of tax state that if you are an individual then Capital Gains Tax will be about 18% of the capital gain. If the Property is registered in a Company/Close Corporation, the Company/Close Corporation will pay about 22.4% of the capital gain and if the Property is registered in a Trust, the Trust will pay about 36% of the capital gain (percentages since 1 March 2017).

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 (R40 000.00 annual exclusion from 1 March 2016). 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.

WHEN DOES CAPITAL GAINS TAX LIABILITY ACCRUE FROM THE SALE OF IMMOVABLE PROPERTY?

INTRODUCTION

Capital Gains Tax (CGT) is payable by individuals, trusts and companies to the South African Revenue Services (SARS), when property is sold. CGT was introduced into our law in October 2001, and it is payable based on the increase in value of property sold.

After a taxpayer enters into an agreement of sale for their property, there is often confusion about the tax year in which the CGT arising from the sale should be declared and paid to SARS. This article clarifies the confusion and provides a general guideline on the determination of the tax year in which a capital gain or loss is payable to SARS, after the sale of property.

THE LAW

CGT forms part of income tax, it is an additional income tax. CGT must be accounted for and declared in the annual income tax assessment (IT34) in each tax year.

Paragraph 13(1)(a) of the Eighth Schedule to the Income Tax Act (the Act): provides a guideline on the time of disposal of an asset and it further determines when a capital gain is payable by a taxpayer:

a. a change of ownership effected or to be effected from one person to another because of an event, act, forbearance or by the operation of law is, in the case of—

   i. an agreement subject to a suspensive condition, the date on which the condition is satisfied; and
   ii. any agreement which is not subject to a suspensive condition, the date on which the agreement is concluded.

CGT IN PRACTISE

From the above it follows that where the agreement is not subject to a suspensive condition, CGT is payable in the tax year that the agreement is entered into. However, in circumstances where the agreement is subject to a suspensive condition, CGT is payable in the tax year that the suspensive condition is fulfilled.

The common mistake is in the assumption that CGT is payable only in the tax year that the registration of the transfer occurs or when the taxpayer receives the proceeds of sale.

For example: Where the agreement is entered into on 1 February 2021 and there is no suspensive condition and the sale registers in the deed's office in March 2022, CGT is payable in the 2021 tax year, which ends 28 February 2022 despite the fact that the sale proceeds are only received by the taxpayer in March 2022. The change in ownership is deemed to be the date on which the agreement is entered into.

Where the agreement is entered into on 1 February 2021 and there is a suspensive condition which is only fulfilled in March 2022 CGT is payable in the 2022 tax year, which ends 28 February 2023. The change in ownership is deemed to be the date on which the suspensive condition is fulfilled.

WHAT HAPPENS IF THE CGT IS PAID AND THE AGREEMENT IS CANCELLED?

Where CGT is paid to SARS in the tax year that the change in ownership occurred and in the subsequent tax year the agreement is cancelled, paragraph 4(*b*)(i) provides that the taxpayer will have a capital loss (equal to the proceeds of sale) in the year of assessment (when the agreement is cancelled). The proceeds of sale must have been accounted for in the previous tax year.
The taxpayer essentially gets to write-off the capital gain as a capital loss in the subsequent tax year (when the agreement is cancelled).

CONCLUSION

The above is a complex topic and this article should not be construed as legal or tax advice. Specific tax advice should be sought in each situation from a tax consultant.

EFFECT OF THE BUDGET ON IMMOVABLE PROPERTY

GENERAL

In February 2021, Minister of Finance Tito Mboweni presented the budget which took effect on 1 March 2021. The intention of this article is to set out the effect of this budget on immovable property.

CORPORATE INCOME TAX

The only change brought about in the budget speech of 2021 is that the corporate income tax was lowered to 27 per cent for companies with years of assessment commencing on or after 1 April 2022.

PERSONAL INCOME TAX

The personal income tax brackets increased by 5 per cent. The highest marginal tax rate for individual taxpayers remained unchanged at 45%.

CAPITAL GAINS TAX

Capital gains tax (CGT) remains unchanged and is 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) remains unchanged at 40%
2. The inclusion rate for companies and trusts remains unchanged at 80%.
3. The annual exemption of CGT for individuals remains unchanged at R40 000.00 per year.
4. The primary residence rebate remained at R2 000 000.00 per primary residence (not individual owner).
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 as before.

The above is demonstrated in the following examples:

INDIVIDUALS (NOT PRIMARY RESIDENCE)

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

AS FROM 1 MARCH 2021

Less annual exclusion		R 40 000.00
CGT after exclusion		R960 000.00
Inclusion rate at 40% of the Capital Gain	R384 000.00	
Tax at 45%*		R172 800.00

*(may vary according to tax rate applicable)

Thus CGT is approximately 18% of the gain

CGT payable	R172 800.00

INDIVIDUALS (PRIMARY RESIDENCE)

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

AS FROM 1 MARCH 2021

Less primary residence rebate	R2 000 000.00	
Less annual exclusion		R 40 000.00
CGT after rebate (deduct rebate & exclusion)		R 960 000.00
Inclusion rate at 40% of the Capital Gain	R 384 000.00	
Tax at 45%*	R 172 800.00	

*(may vary according to tax rate applicable)

Thus CGT is approximately 18% of the gain

COMPANIES AND CLOSE CORPORATIONS

Base cost at October 2001 R1 000 000.00

Selling Price

R2 000 000.00

AFTER 1 APRIL 2022

Inclusion rate at 80% of the Capital Gain	R800 000.00
Tax at 27%	R216 000.00

Thus CGT is approximately 22.4% of the gain

Less annual exclusion	not applicable
CGT payable	R216 000.00

Capital Gain (Selling Price less Base Cost) R1 000 000.00

AS FROM 1 MARCH 2021

Inclusion rate at 80% of the Capital Gain	R800 000.00
Tax at 28%	R224 000.00

Thus CGT is approximately 22.4% of the gain

Less annual exclusion	not applicable
CGT payable	R224 000.00

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

AS FROM 1 MARCH 2021

Inclusion rate at 80% of the Capital Gain R800 000.00

Tax at 45% R360 000.00

Thus CGT is approximately 36% of the gain

Less annual exclusion	not applicable
CGT payable	R360 000.00

DIVIDENDS TAX

Dividends tax was introduced in the budget speech at the rate of 15% in February 2012. The rate was increased from 15% to 20% with effect from 1 March 2017 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 20%.

CONCLUSION

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

CALCULATION OF THE VALUE OF PROPERTY AS AT 1 OCTOBER 2001 FOR CGT PURPOSES

INTRODUCTION

Capital Gains Tax (CGT) 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) on or after October 2001.

Property owners who purchased property on or after October 2001 will use the purchase price as the "initial base cost." Property owners who purchased property prior to October 2001 will need to calculate the value of their property as at October 2001.

This article explains how to calculate the value of property acquired before October 2001.

THREE METHODS TO DETERMINE VALUE AS AT OCTOBER 2001

METHOD ONE: MARKET VALUE

At the time that CGT was introduced, property owners were afforded an opportunity to obtain a market valuation of their property.

The market value method is only available as a method of determining the base cost of a property if the property was valued on or before 30 September 2004. The valuation had to be submitted to and accepted by SARS within the time period provided.

Prescribed valuation form CGT 2L must be completed and submitted with the return reflecting the disposal.

To the extent that the market valuation was not done, this method is not available.

METHOD TWO: TIME APPORTIONMENT BASE COST

This method utilises the formula set out below. You would need to know the date of acquisition, original cost and the sale price.

Formula: Original Cost + [(Proceeds – Original Cost) x Years before Valuation Date* (i.e. 1 October 2001)]
Total Years Property Held

* *"Original Cost" includes the original purchase price, plus any improvements made prior to 1 October 2001 (including the cost of building a top structure where only vacant land was purchased)*

* *"Years Before Valuation Date" is limited to 20 years when an improvement to the property has been made in more than one year before the valuation date (i.e. 1 October 2001). This compensates for the fact that the formula treats all improvements before the valuation date as if they were made at the beginning of the period. Note also that a part of a year is treated as a full year.*

SARS has published a time apportionment calculator (TAB calculator) on its website that can be accessed to assist in making this calculation.

METHOD THREE: 20% OF PROCEEDS

This formula provides that 20% of the proceeds can be deducted from the proceeds to ascertain the gain. See the following example to illustrate this method:

Proceeds (sale price)	=	R4 250 000.00
Less 20% of Proceeds	=	R 850 000.00
Gain	=	*R3 400 000.00*

WHICH METHOD IS BEST?

The taxpayer may adopt any of the three methods illustrated above.

It is suggested that property owners calculate the base cost using all three of the above options and determine which is the most tax effective based on their circumstances.

Please refer to the Schindlers general articles on CGT for an explanation as the calculation of CGT once the base cost is established and for details around the primary residence exclusions.

CONCLUSION

The above is aimed at setting out the various methods of calculating the CGT liability on the disposal of a property. It must be noted that various other exemptions and exclusions apply and therefore it is recommended that tax advice be obtained from an accountant, auditor or tax practitioner prior to concluding any agreement for the disposal of a property

CAPITAL GAINS TAX: CAPITAL GAINS AND CAPITAL LOSSES

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.

CALCULATING CAPITAL GAINS TAX

For a more detailed discussion on the specific formulae and specific rules for calculating Capital Gains Tax and a discussion as to when capital gains tax is payable, please refer to our articles in capital gains tax on our website, www.schindlers.co.za.

WHAT IS A CAPITAL LOSS VS A CAPITAL GAIN?

A capital loss occurs when the base cost of an asset exceeds the proceeds of the sale of that asset. A capital gain is where your proceeds are higher than your initial base cost. It is only in the latter instance that Capital Gains Tax is payable.

For an example of a capital gain if your Property was valued at R500 000.00 on 1 October 2001 and you sell the Property in 2006 for R800 000.00, then your capital gain is R300 000.00. For an example of a capital loss if your Property was valued at R500 000.00 on 1 October 2001 and sell the Property in 2006 for R400 000.00, then your have a capital loss of R100 000.00.

CAN AN ASSESED CAPITAL LOSS BE OFFSET AGAINST FUTURE CAPITAL GAINS?

Taxable income and Capital gains may be a negative figure. An assessed capital loss can be carried forward to a subsequent year of assessment to be set off against a future capital gain.

The assessed capital loss may not be set off against taxable income. As such, an assessed capital loss neither decreases a person's taxable income nor does it increase a person's assessed loss of a revenue nature. The assessed capital loss is thus ring-fenced and can be set off only against capital gains arising during future years of assessment.

HOW MANY YEARS CAN AN ASSESSED CAPITAL LOSS BE CARRIED FORWARD?

Schedule Eight of the Income Tax Act is not specific on time periods. Paragraph 8 (capital gain) and Paragraph 9 (capital loss) provide that an assessed capital loss can be brought forward from the previous year of assessment and taken into account in arriving at the net capital gain or assessed capital loss for the current year of assessment.

As such an assessed capital loss for the current year of assessment is carried forward to the next year of assessment. It assumed that that capital losses can be carried forward into the next financial year in perpetuity until same is offset or reduced by a capital gain in the future year of assessment.It is important however to note that, in the case of individuals, the loss that is carried over every year will be reduced by the annual exemption, currently R40 000.00 per year.

CAN LOSSES IN REGULAR INCOME BE OFSETT AGAINST CAPITAL GAINS LOSSES?

Capital losses may offset capital gains. Regular income losses may offset net capital gains. However, assessed capital losses may not offset regular income.

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.

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 15/115. 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	(as at January 2012)

Prior to 10 January 2012		After 10 January 2012
Input VAT Credit:	R 317 000.00	R5 000 000.00 x 15/115 = R 652 173.91

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.

DONATIONS TAX AND ESTATE PLANNING – IMMOVABLE PROPERTY SALES

In practice, estate agents and property practitioners are often approached by parents to purchase immovable property for their children or are asked for advice around the transfer of immovable property between family members. The purpose of this article is to provide some insight into the law that affects these types of transactions.

ESTATE DUTY

Estate Duty is a death tax. When an individual dies, SARS is entitled to estate duty equal to 20% of any amount over the sum of R3 500 000.00. In other words if the gross value of an estate is R10 000 000.00, the sum of R3 500 0000.00 is exempt and estate duty equal to 20% of the balance is payable. In this example the sum of R1 300 000.00 is payable as Estate Duty. For estates with a value over R30 000 000.00 will attract estate duty equal to 25%.

In the case of spouses, bequests made to a spouse are exempt from estate duty. In addition each spouse is entitled to the exemption of R3 500 000.00. This unused portion of one spouse's exemption may be carried over and used by the surviving spouse on the death of the surviving spouse.

It is for this reason that estate planning vehicles such as trusts are utilised. Wealthy individuals occasionally attempt to reduce their nett asset value by donating assets to their children and family.

DONATIONS TAX

Many sellers and purchasers are surprised to be advised that they cannot simply give their properties to their children or sell their properties at greatly reduced prices without any consequence.

Donations tax is payable on the value of any property disposed of by a South African resident by way of a donation whether directly or indirectly. The definition of property is relatively wide and includes *inter alia* moveable (including cash) and immovable property. Donations tax is levied by SARS at the rate of 20% of the value of property donated. Donations above R30 000 000.00 will attract donations tax of 25%. Donations made by non-residents are not subject to South African donations tax but may be liable in the country of their origin.

Donations between spouses are exempt from donations tax. There is a general exemption for each individual in each tax year in the amount of R100 000.00. In other words an individual may donate R100 000.00 each year to any individual or entity without attracting donations tax.

Donations tax is payable by the end of the month during which the donation takes effect. The donor is liable for donations tax, however should he fail to pay, both the donor and donee become jointly liable.

DISPOSAL FOR INADEQUATE CONSIDERATION

Property disposed of for a consideration that is not an adequate consideration (i.e. below fair market value) in the view of SARS is deemed to be a donation to the extent of the difference between the actual fair market value and the reduced consideration paid.

This situation may arise where a parent sells their own property to their child (or to any other person) for a purchase price that is not a fair market related price. If for example a parent sells a property worth R2 500 000.00 to their child for R1 000 000.00, such sale would be valid, however based on the premise that SARS is entitled to transfer duty and capital gains tax (CGT) on the fair market value, SARS would assess the sale for tax purposes as if the sale had taken place at the fair market value.

SARS would accordingly require transfer duty and CGT to be paid based on the fair value and would regard the difference between the sale price and the fair market value as a deemed donation whereupon donations tax would be due. Donations tax would thus be payable on the difference of R1 500 000.00 at the rate of 20% i.e. R300 000.00.

LOANS AND DONATIONS TAX

Should a parent give money to their child to purchase immovable property and there is no intention that the money be paid back, a donation is deemed to have been made to the amount advanced and donations tax would be payable by the parent to SARS at the rate of 20%. Caution must thus always be exercised when considering such arrangements.

The gratuitous waiver or renunciation of a right is also considered to be a donation. An example of this would be where two parties enter into a loan agreement for the loan of an amount plus interest. The creditor then waives the interest payable.

It has been argued that if no provision or agreement is made for the payment of interest (i.e. an interest free loan) then there can be no gratuitous waiver of such interest. It is currently not SARS practice to treat interest free loans as donations for tax purposes.

A loan that is made for an amount which is repayable at the same value at a date in the future, may lead to a deemed donation due to the effect of the lapse of time on the value of the money loaned. It is argued that a loan should be made repayable "on demand" to avoid this as in such loans it is practically not possible to calculate the value.

Any unpaid loans existing at the date of the death of the lender are considered to be an asset in the estate of the deceased lender. If the lender upon death, bequeaths the loan to the borrower in terms of a will, this would trigger CGT for the borrower. It is suggested that the lender bequeath the cash equivalent of the loan so that a set off can be effected.

Prior to death, the loan can be reduced using the annual donations tax exemption of R100 000.00 per year. i.e. the parent donates R100 000.00 to the child each year to reduce the loan. This should not be a simulated payment but an actual payment. SARS has various rules and deeming provision that apply and proper advice must be taken before proceeding.

LOANS AND INCOME TAX

The general rule is that "all amounts received by or accrued to the taxpayer that are not of a capital nature should be included in the taxpayer's gross income and are therefore subject to income tax".

In the case of *SARS v Brummeria Renaissance (Pty) Ltd* 2007 (6) SA 601 (SCA), the lender provided an interest free loan to the borrower in exchange for life rights. The value of the 'free interest' was deemed to be money paid for services rendered and as such the borrower had to pay income tax on that amount.

Thus where an interest-free loan is considered to be granted in return for services rendered or goods received, that loan is income in nature and is subject to income tax. An interest-free loan between family members is not granted in return for services rendered or goods received, that loan is arguably capital in nature and it is arguable thus that the benefit of the interest-free loan in such case is not subject to income tax. SARS has cautioned that each case turns on its own facts.

LOANS AND CAPITAL GAINS TAX

Where a loan of R1 000,000.00 is made and upon the repayment date, the lender (without just cause) waives the right to collect the full amount and for example only collects R700 000.00. The portion not paid (R300 000.00) may be deemed to be a donation and donations is tax payable by the donor. The borrower would be liable for CGT inasmuch as the borrower had the benefit of the capital gain to the extent of the waiver.

CONCLUSION

The above article should not be considered to be exhaustive. Extreme caution is required when considering the above. Section 7 of the Income Tax Act has various anti-tax avoidance provisions and deeming provisions that may apply and SARS approach will be dependent on each case. This article should not be used without first seeking tax and legal advice in every case.

LOANS TO TRUSTS – TAX IMPLICATIONS

INTRODUCTION

In the budget speech in February 2016, the Minister of Finance proposed new measures to prevent estate duty and donations tax avoidance through the transfer of assets to a trust using interest free or a below market interest rate loans.

SARS subsequently promulgated the Taxation Laws Amendment Act 2016. This Act introduced section 7C of the Income tax Act which section became effective on 1 March 2017. The changes are discussed in this article.

CURRENT OPTIONS TO TRANSFER ASSETS TO A TRUST

When an individual wishes to transfer assets to a trust, there are a number of options. Each has its own tax consequences.

1. The asset can be donated to the trust and donations tax of 20% of the fair market value of the asset is then paid by the individual (25% donations tax for donations over R30 000 000.00);

2. The individual may sell the asset to the trust on loan account and charge "arm's length interest". The seller is then taxed on the interest received and the trust can deduct the interest paid;

3. The individual can sell the asset to the trust on loan account at a below market interest or on an interest free basis.

THE REASON FOR THE CHANGES

The route taken by most individuals is to sell the asset to a trust for a fair market value on an interest free loan account basis. The loan account is then reduced using the individuals R100 000.00 tax free annual donation i.e. the individual donates R100 000.00 per annum to reduce the loan account and deals with the remainder of the loan or balance thereof in a last will and testament on death (in other words any balance remaining is bequeathed to the trust thus extinguishing the debt).

When an individual sells an asset to a trust in the above manner, the effect is that the value of that individuals estate value is reduced which in turn reduces the estate duty liability on death. Estate duty is currently 20% of the value of deceased assets over the sum of R3 500 000.00. With effect from 1 March 2018 the rate is 25% for estates that exceed R30 000 000.00.

If an individual thus has an asset value of R10 000 000.00 and sells assets to a trust to the value of R 6 500 000.00, that individual effectively saves 20% of R6 500 000.00 on death which equals R1 300 000.00.

In addition to the above, selling an asset to a trust on an interest free or below market interest rate basis results in the avoidance of the interest being taxed in the hands of the seller i.e. there is no interest or a reduced interest which can be taxed.

SARS has now limited an individual's ability to avoid estate duty and donations tax.

INTEREST FREE LOANS – SECTION 7C

SARS has in Section 7C introduced rules to regulate interest free or below market interest loans by individuals or companies related to trusts and thereby limit the taxpayer's ability to transfer wealth without being subject to tax.

Section 7C provides that where a "connected person" makes a loan to a trust and the lender does not charge interest or charges interest at a rate less than the SARS official rate (7.75% as at 1 August 2017), the difference between the SARS official rate of interest and the actual interest rate charged on the loan will be calculated as a Rand value. This Rand value is then deemed to be a donation in the hands of the lender and donations tax is payable to SARS.

The donation is regarded has having been made on the last day of assessment and as such donations tax is payable at the end of the month following the donation i.e. 31 March. Donations tax is payable each year for as long as the loan is in place.

In the event that the lender raises interest, the trust may deduct the interest against any income received. The lender must in turn account to SARS for interest received.

By way of an example. If the lender loans a trust R5 000 000.00 and does not charge interest. SARS will deem interest at 7.75% in the sum of R387 500.00. The Lender will be liable for donations tax on the deemed interest at the rate of 20%. Note that the lender may rely on the R100 000.00 donations tax free allowance to exempt the first R100 000.00 of the deemed donation from tax.

The deemed donation is thus R287 500.00 and donations tax of R57 500.00 is thus payable by the lender each year while the loan exists (20% of R287 500.00).

EXEMPTIONS

There are various exemptions to Section 7C, which exemptions include where the trust is a special trust, trusts that fall under the category of public benefit organisations, vesting trusts, where the loan is made by a natural person and is used for the purpose of acquiring a primary residence for that person or their spouse and where the loan was regarded as sharia compliant (section 24JA of the Income Tax Act).

Section 7C(5) should be consulted for the full list of exemptions.

CONCLUSION

The above is a summary of Section 7C and its provisions and should not be regarded as comprehensive tax advice. Taxpayers dealing with trusts and these types of transactions need to be aware of the tax consequences and take appropriate advice.

ELECTRICAL COMPLIANCE CERTIFICATES 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, typically over 2 pages, 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 TRANSFERRING 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 with the Department of Labour, 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 an Approved Inspection Authority to issue a non-compliance notice with regards to the ECC. The seller will then have to re-issue a valid certificate.

MAY AN ELELECTRICAL COMPLIANCE CERTIFICATE BE WAIVED?

The Occupational Health 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 often requesting 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 valid for 2 years and is transferable. 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 owners 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 Occupational Health and Safety Act (OHSA).

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. 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 an Approved Inspection Authority (AIA) appointed by the Department of Labour. The AIA will on request and for a fee, of approximately R2000.00, payable by the Purchaser, 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 to indicate the installation as being compliant or non-compliant

The report is forwarded to the electrician who issued the certificate and the electrician is provided an opportunity to remedy the non-compliance and issue a new ECC. The AIA will repeat their inspection and confirm whether the installation is compliant. The re-inspection will also attract a fee of approximately R2000.00. If the matter is not resolved, same can be referred to the Department of Labour who may issue a probation notice to the electrician. If after the non-compliance notice is issued, the Seller fails to deliver a compliant COC to the Purchaser, he remains liable and in breach of his obligations set out in the OHSA, and the Agreement of Sale.

ELECTRICAL COMPLIANCE CERTIFICATES ALTERNATIVE ENERGY SOLUTIONS

INTRODUCTION

Homeowners in South Africa are going off the grid and installing alternative and/or renewable energy systems into their homes, like solar panels. There is some confusion about Electrical Certificates of Compliance (ECC) and whether solar panel systems and alternative energy solutions should be included in the ECC.

ELECTRICAL COMPLIANCE CERTIFICATES IN GENERAL

The purpose of an ECC is to certify that the electrical installation in your home is safe according to minimum standards set in legislation. 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.

In terms of the Electrical Installation Regulations relating to ECC's published pursuant to the Occupational Health and Safety Act (the Act) an owner of a property must, upon change of ownership, have an ECC which is not older than two years.

The legal question is whether an ECC is required in respect of a solar panel control circuit system and/or renewable energy systems.

LEGISLATION

In terms of the Act an electrical installation is defined as, "any machinery, in or on any premises, used for the transmission of electricity from a point of control to a point of consumption anywhere on the premises, including any article forming part of such an electrical installation irrespective of whether or not it is part of the electrical circuit, but excluding:

(a) any machinery of the supplier related to the supply of electricity on the premises;
(b) any machinery which transmits electrical energy in communication;
(c) control circuits, television or radio circuits;
(d) an electrical installation on a vehicle, vessel, train or aircraft; and
(e) control circuits of 50 V or less between different parts of machinery or system components, forming a unit, that are separately installed and derived from an independent source or an isolating transformer."

Solar panels are not excluded from the above definition of an electrical installation. Therefore, it is argued that an ECC is required when a solar panel control circuit is used on the premises.

DEBATE

Solar systems and alternative and/or renewable energy systems are relatively new in South Africa and as such the regulations have not been updated to specifically provide for these. As such there is some debate as to what forms part of the electrical installation and what does not. The further question is whether stand-alone appliances are part of the electrical installation.

It is argued that equipment itself that is connected to the electrical installation and designed to operate as an alternative energy source is regarded as a fixed or stationary appliance. Thus, these do not form part of the ECC. However, wiring and switchgear used to connect the equipment to the electrical installation do form part of the ECC and as such an ECC must be issued in respect of the wiring and switchgear.

CONCLUSION

Consensus appears to be that a Solar Panel and/or Inventor is an appliance and not an electrical installation. An ECC must be issued for the electrical wiring thereof as the wiring falls within the description of a point of consumption.

As a practical comparative example, in the case of a geyser, the geyser itself is an appliance which doesn't require a certificate the physical wiring thereof to the point of consumption in the property requires an ECC.

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

FICA FOR ESTATE AGENTS

WHAT IS AN ACCOUNTABLE INSTITUTION?

In terms of Section 1 of the Financial Intelligence Centre Act (FICA) 38 of 2001 an “accountable institution' means a person referred to in Schedule 1”. Schedule 1 lists an estate agent as defined in the Property Practitioners Act, 2019 as an accountable institution.

Thus all estate agents are obliged to comply with the FICA rules as set out in the Act and the regulations.

ESTABLISHMENT AND VERIFICATION OF IDENTITY

In terms of section 2 of the regulations to the Act “no accountable institution may knowingly establish or maintain a business relationship or conduct a single transaction with a client who is entering into that business relationship or single transaction under a false name.”

Therefore it is imperative that all clients be verified by the estate agent. Verification entails comparing the details of the person with documents provided by such person.

WHAT DOCUMENTS ARE REQUIRED?

There are different documents depending on whether you are dealing with a natural person or a legal entity.

NATURAL PERSONS (CITIZENS AND RESIDENTS)

WHAT NEEDS TO BE VERIFIED	DOCUMENT TO BE USED TO VERIFY
(a) full names	Identity document (or other document bearing a photo, full name or initials and surname, identity number and date of birth of such person if there is an acceptable reason why no ID document can be produced)
(b) date of birth	As above
(c) identity number	As above
(d) income tax registration number, if issued	A document issued by the South African Revenue Service bearing such a number and the name of the natural person
(e) residential address	Any document which can reasonably be expected to achieve such verification and is obtained by reasonably practical means, taking into account any guidance notes concerning the verification of identities which may apply to that institution.

NATURAL PERSONS (FOREIGNERS)

WHAT NEEDS TO BE VERIFIED	DOCUMENT TO BE USED TO VERIFY
(a) full names	Identification document or with any information obtained from any independent source, if it is believed to be reasonably necessary
(b) date of birth	As above
(c) nationality	As above
(d) passport number	As above
(e) South African income tax registration number, if issued	A document issued by the South African Revenue Service bearing such a number and the name of the natural person or with any information obtained from any independent source, if it is believed to be reasonably necessary
(f) residential address	Any document obtained from any independent source

CLOSE CORPORATIONS AND COMPANIES

WHAT NEEDS TO BE VERIFIED	DOCUMENT TO BE USED TO VERIFY
(a) the registered name of the close corporation or company	In the case of a company, the most recent versions of the Certificate of Incorporation (form CM1) and Notice of Registered Office and Postal Address (form CM22), bearing the stamp of the Registrar of Companies and signed by the company secretary In the case of a close corporation, the most recent versions of the Founding Statement and Certificate of Incorporation (form CK1), and Amended Founding Statement (form CK2) if applicable, bearing the stamp of the Registrar of Close Corporations and signed by an authorised member or employee of the close corporation.
(b) the registration number under which the close corporation or company is incorporated	As above
(c) the registered address of the close corporation or company	As above
(d) the name under which the close corporation or company conducts business	To be verified with information which can reasonably be expected to achieve such verification and is obtained by reasonably practical means
(e) the address from which the close corporation or company operates	As above
(f) South African income tax and VAT registration number, if issued	A document issued by the South African Revenue Service bearing such a number
(g) for all managers, members of the close corporation or any person (natural or legal) who holds 25% or more of the voting rights of the company and each natural person who purports to be authorised to establish a business relationship or to enter into a transaction with the accountable institution the documents applicable to such person or entity in terms of the relevant table. .	See relevant table

PARTNERSHIPS

WHAT NEEDS TO BE VERIFIED	DOCUMENT TO BE USED TO VERIFY
(a) the name of the partnership	Partnership Agreement or with any information obtained from any independent source, if it is believed to be reasonably necessary
(b) for every partner, the person who exercises executive control over the partnership and each natural person who purports to be authorised to establish a business relationship or to enter into a transaction with the accountable institution the documents applicable to such person or entity in terms of the relevant table	See relevant table or with any information obtained from any independent source, if it is believed to be reasonably necessary.

TRUSTS

WHAT NEEDS TO BE VERIFIED	DOCUMENT TO BE USED TO VERIFY
(a) the identifying name and number of the trust;	Trust deed or other founding document and letters of authority

(b) the address of the Master of the High Court where the trust is registered, if applicable;	To be verified with the authorisation given by the Master of the High Court to each trustee to act in that capacity or with any information obtained from any independent source, if it is believed to be reasonably necessary.
(c) the income tax registration number if issued	A document issued by the South African Revenue Service bearing such a number
(d) the founder, every trustee and each natural person who purports to be authorised to establish a business relationship or to enter into a transaction with the accountable institution the documents applicable to such person or entity in terms of the relevant table	See relevant table or with any information obtained from any independent source, if it is believed to be reasonably necessary.
(e) details of how the beneficiaries of the trust are to be determined.	Trust deed or other founding document and letters of authority or with any information obtained from any independent source, if it is believed to be reasonably necessary.

WHEN MUST I GET THE DOCUMENTS?

According to the Property Practitioners Act, 2019, these documents must be obtained before accepting a mandate. The regulations also place a duty to take reasonable steps to maintain the correctness of particulars which are susceptible to change. Thus if the details of your seller have changed you will need updated details when accepting the mandate and when concluding an agreement of sale. You will need the FICA of the purchaser before entering into the offer to purchase.

RESIDENTIAL ADDRESS VERIFICATION OF MARRIED PERSONS

In the event where natural persons are married and documents are not available to verify the residential address of one of the spouses, the spouse who has a valid proof of residential address may depose to an affidavit to the effect that his/her spouse resides at the same address. The provision of a marriage certificate is insufficient to prove/confirm that spouses reside together.

WHAT IF I NEVER MEET THE PERSON FACE TO FACE?

If this is the case, you must take reasonable steps to establish the existence or to establish or verify the identity of that natural or legal person, partnership or trust, taking into account any guidance notes concerning the verification of identities which may apply to that accountable institution.

HOW LONG MUST I KEEP THE DOCUMENTS?

The compliance officer must keep the following documents for at least five years:

1. The properly completed FICA forms relating to the establishment and verification of all persons as prepared by the compliance officer
2. The mandate
3. The sale or lease agreement
4. The verification documents listed above.

WHO SHOULD REPORT SUSPICIOUS AND UNUSUAL TRANSACTIONS?

The FIC Act requires a person who carries on a business, or is in charge of or manages a business, or who is employed by a business, and who has a suspicion of money laundering or terror financing activity or unusual transaction, to report this to the Centre.

WHAT CONSTITUTES A SUSPICION?

A suspicious transaction will often be one when the transaction raises questions or gives rise to discomfort, apprehension or mistrust. When considering whether there is reason to be suspicious of a particular situation one should assess all the known circumstances relating to that situation. This includes the normal business practices and systems within the industry where the situation arises.

WHEN DOES ONE NEED TO REPORT A SUSPICIOUS TRANSACTION?

Section 29 of the FIC Act imposes obligations on any person who carries on a business or is in charge of or manages a business or who is employed by a business to report suspicious or unusual transactions to the Centre. It provides that required reporters must report if they suspect that:

- the business in which they are involved has received or is about to receive the proceeds of any unlawful activity or,
- a transaction or series of transactions in which your business is involved has facilitated or is likely to facilitate the transfer of proceeds of unlawful activities from one person to another or from one location to another or,
- a transaction or series of transactions in which your business is involved has no apparent business or lawful purpose or,
- a transaction or series of transactions in which your business is involved is conducted to avoid giving rise to a reporting duty under FIC Act or,
- a transaction or series of transactions in which your business is involved may be of interest to the South African Revenue Service in a possible investigation of tax evasion, or
- the business in which you are involved has been used or is about to be used in any way to hide or disguise the proceeds of unlawful activities

WHAT IS THE TIME PERIOD FOR REPORTING A SUSPICIOUS TRANSACTION?

In terms of Regulation 24 a report made under section 29 of FIC Act must be sent to the Centre as soon as possible but not later than fifteen days, excluding Saturdays, Sundays and public holidays, after a natural person or any of his or her employees, or any of the employees or officers of a legal person or other entity, has become aware of a fact concerning a transaction on the basis of which knowledge or a suspicion concerning the transaction must be reported. In exceptional cases the Centre may approve of the report being sent after the expiry of this period.

CAN AN INSTITUTION CONTINUE TRANSACTING WITH A CLIENT AFTER A SUSPICIOUS TRANSACTION REPORT HAS BEEN MADE?

The general rule is that a person may continue with a transaction from which a report emanates. However, section 34 of the FIC Act empowers the Centre to intervene in certain transactions after consulting with an accountable institution, reporting institution or person required to make a report. In such instances the accountable institution, reporting institution or person in question may not proceed with the carrying out of the transaction. The Centre's intervention is valid for a maximum period of 5 days and is aimed at creating an opportunity for the Centre to make the necessary enquiries and to inform and advise an investigating authority.

IS THE REPORTER'S IDENTITY PROTECTED?

Section 38 of the FIC Act provides for a broad range of measures to protect persons who participate in submitting reports to the Centre. It guarantees that "no action, whether criminal or civil, can be instituted against any natural or legal person who complies in good faith with the reporting obligations of the FIC Act". Consequently, they cannot even be forced to give evidence concerning such a report in criminal proceedings arising from the report. However, such a person may choose to do so voluntarily. If a person who participated in submitting a report to the Centre elects not to testify, no evidence regarding that person's identity is admissible as evidence in criminal proceedings

WHAT IS CASH THRESHOLD REPORTING (CTR)?

Section 28 of the Financial Intelligence Centre Act, Act 38 of 2001 (the FIC Act) makes it obligatory for all accountable institutions and reporting institutions to report cash transactions above the prescribed limit to the Centre in the prescribed format. The prescribed limit will be R25 000.00. Accountable and reporting institutions are obliged to report all cash transactions of R25 000.00 and above to the Centre in the prescribed format within two (2) business days of the transaction.

Adapted from Source: www.fic.gov.za

FICA AMENDMENT ACT 1 OF 2017

INTRODUCTION

The Financial Intelligence Centre Act 38 of 2001 was first introduced into South African law in 2003. FICA legislation was introduced to assist in the identification of the proceeds of unlawful activities and the combating of money laundering activities and the financing of terrorist and related activities.

The FIC Act was previously amended in 2008 (Act 11 of 2007) and again in 2017 (Act 1 of 2017). The Amendment seeks to introduce measures to strengthen the transparency and integrity of the South African financial system in its objectives to combat financial crimes and align itself with the Financial Action Task Force's international standards.

AMENDMENT ACT

The Amendment Act is principle based legislation that seeks to introduce the following high level changes

- Risk based approach
- Ultimate beneficial ownership
- Withdrawal of exemptions
- Prominent Influential persons
- Customer due diligence measures

TIME LINE FOR THE AMENDMENT ACT

27 April 2017:	Amendment Act signed into Law
13 June 2017:	Exemptions withdrawn
2 October 2017:	Remaining requirements come into force
31 March 2019:	Deadline for compliance with the Act

RISK BASED APPROACH (RBA)

Accountable institutions must identify and assess money laundering and terror financing risks that affect their business by a process of risk profiling and risk assessment. Enhanced measures and controls must be in place where money laundering and terror risks are higher. Systems must be in place to determine risk and to allocate resources proportionate to the risk.

SOME DEFINITIONS

Business Relationship: means an arrangement with a client that contemplates a series of transactions over a period of time;

Domestic prominent influential person (DPIP): a person or their immediate family member or a close known associate of such person (as defined in the Act);

Foreign prominent public official (FPPO): a person or their immediate family member or a close known associate of such person who occupies or within the last 12 months occupied any of the positions listed in the Act.

CUSTOMER DUE DILIGENCE (CDD)

Includes:

- Verification of client identity
- Identification and verification of clients beneficial owner
- Understanding the purpose of the intended business relationship
- Conduct an ongoing due diligence on the business relationship
- Scrutinising transactions
- Check source of wealth and source of funds

ULTIMATE BENEFICIAL OWNER (UBO)

Includes determining:

- Who has the controlling interest
- Who exercises controlling rights
- Who exercises control over management
- Check percentage ownership in entities
- Verify above through organograms and confirmation by auditors, company secretaries

RISK MANAGEMENT AND COMPLIANCE PROGRAMME

As from 2 October 2017, accountable institutions are required in terms of Section 42 to replace their current internal rules with a Risk and Management Compliance Programme (RMCP) which must enable the accountable institution to

(i) identify,

(j) (ii) assess,

(k) (iii) monitor,

(l) (iv) mitigate, and

(m) (v) manage, the risk that the provision by the accountable institution of products or services may involve or facilitate money laundering activities or the financing of terrorist and related activities.

In addition to the above, Section 42(2) stipulates that the RMCP must:

a) set out how the institution is to determine if a person is a client or prospective client;

b) indicate the manner in which the institution will comply with section 20A, which prohibits an institution from establishing a business relationship or concluding a single transaction with an anonymous client or a client with an apparent false or fictitious name.

c) provide for the manner and process by which the establishment and verification of the identity of clients will be performed;

d) provide for how the institution will determine whether any future transactions that will be performed in the course of the business relationship are consistent with the institutions knowledge of the client;

e) set out how the institution will undertake additional due diligence measures in respect of legal persons, trusts and partnerships;

f) set out how the institution will conduct ongoing due diligence and account monitoring of its clients;

g) set out how complex and unusually large transactions and unusual patterns of transactions which have no apparent business or lawful purposes will be examined and how written findings relating thereto will be maintained;

h) identify the manner in which the institution will confirm information previously obtained where it's validity is questionable;

i) provide mechanisms for performing the customer due diligence as required by section 21, 21A, 21B and 21C when, during the course of the business relationship, the institution becomes suspicious or identifies unusual transactions as contemplated in section 29.

j) set out the procedure for terminating an existing business relationship as contemplated in section 21E;

k) provide for enhanced due diligence to be conducted for high-risk clients and when simplified customer due diligence might be permissible;

l) provide for the determination of whether a prospective client is a foreign prominent public official or a domestic prominent influential person;

m) provide for the manner in which and place at which records are kept;

n) identify reportable transactions and activities;

o) provide for reporting processes to be followed;

p) provide for the manner in which and the processes for the RMCP implementation.

In addition to the above, the institution is required to indicate in its RMCP if any of the above provisions are not applicable to it and set out the reasons why not.

Furthermore, section 42A provides that the senior management of the institution must approve the RCMP and ensure the enforcement of compliance throughout the institution. The RMCP must be regularly reviewed and must be made readily available for all employees involved in any transaction/s contemplated in the Act.

NEW SECTIONS

The following new sections were introduced into the Act:

1. Section 20A which provides that an institution may not enter into a business relationship with an anonymous client or a client with an apparent false or fictitious name;
2. Section 21 amended to provide that when an accountable institution engages with a prospective client to enter into a single transaction or to establish a business relationship, the institution must, in the course of concluding that single transaction or establishing that business relationship and in accordance with its RMCP identify and verify the identity of the client or any person acting on behalf of such client;
3. Section 21A provides that the institution must obtain information to enable it to determine whether any future transactions that will be performed in the course of the business relationship are consistent with the institutions knowledge of the client;
4. Section 21B sets out additional steps to be taken to in conducting a due diligence when dealing with legal persons or a person acting on behalf of a partnership, trust or similar arrangement between natural persons including determination of the client's business and the ownership and control structures of the client.
5. Section 21C provides for ongoing due diligence being conducted in terms of the RMCP;
6. Section 21D provides that if there are doubts regarding the validity or authenticity of information previously obtained, the information should be confirmed by further verification;
7. Section 21E provides that if the institution is unable to establish and verify a client's identity or conduct an ongoing due diligence, it may not establish or continue any business relationship or conclude a single transaction with the client and must consider reporting same to the FIC;
8. Section 21F, 21G and 21H set out the manner in which accountable institutions must deal with foreign prominent officials, domestic prominent officials and the family members or close associates of such persons and that these processes must be contained in the RMCP.

Sections 22 and 22A provide which records must be kept and the duration of such safe keeping of any customer due diligence investigations undertaken and all documents relating to any transactions.

FURTHER AMENDMENTS

Additional amendments relating to the prohibitions on dealing with persons and entities identified by the Security Council of the United Nations, inspections powers of the FIC, financial sanctions and the dealing with property associated with terror activities, suspicious and unusual transactions and associated reporting procedures, the protection of personal information, appeals procedures and the inclusion of non-compliance provisions.

RISK MANAGEMENT AND COMPLIANCE PROGRAMME (RMCP) REBOSA MODEL

Each accountable institution must develop and implement a written RMCP.

Robosa has published a standard RMCP for its members. This RMCP proposes a distinction between "High Risk Clients" and "Low Risk Client" in compliance with the new FICA rules.

A High risk Client is a client:

1. whose single transaction or business relationship will be financed through a cash payment of R25 000.00 (twenty-five thousand rand) or more, as opposed to through a bond or similar arrangement from a financial institution that is duly registered as such; or
2. who is a natural person, but is not a citizen or permanent resident of South Africa; or
3. that is a partnership, trust, company or close corporation, regardless of whether or not it was formed in South Africa –
    - that has no operations or business premises in South Africa; and

- that cannot produce a letter and documents / records from a Secondary Accountable Institution confirming its FICA compliance; or

4. who is an FPPO; or
5. who is suspect, whether or not they fit into any of the categories listed in the above paragraphs. A Client may, in the Risk Officer's discretion, be regarded as suspect for any reason relating to the Client's conduct in the context of a single Transaction or Business Relationship, which conduct includes (without limitation) –
   - a reluctance or refusal to provide information; or
   - an unusual or inexplicable preference for dealing with the Business via correspondence or via electronic media, as opposed to in person, particularly for the purposes of the CDD;
   - a patent lack of concern or disregard for the costs involved; or
   - deliberate evasiveness or vagueness when providing information; or
   - any other conduct or circumstances that, when viewed objectively, and when considered in light of all of the relevant factors taken as a whole, should be regarded with suspicion; or

A low risk client is any Client who is not mentioned above.

The Rebosa model proposes that a distinction between High and Low risk clients be made and that the customer due diligence process be applied accordingly. Low risk clients are subject to an abbreviated customer due diligence while High Risk clients have an extended procedure and requirements.

Dealing with anonymous or fictitious clients is prohibited in the Rebosa Model.

SECONDARY ACCOUNTABLE INSTITUTIONS

Accountable institutions may rely on a customer due diligence undertaken by a secondary accountable institution where a client is held in common provided that the latter provides a letter and documents to confirm compliance with a customer due diligence.

REPORTING TO THE RISK OFFICER

Agents / employees must provide a written report to the Risk Officer where it is known or reasonably suspected that:

- the Business received, or is about to receive the proceeds of crime, or property associated with the financing of Terrorist Activities; or
- the Business is party to one or more transactions that -
  -facilitated, or will likely facilitate, the transfer of the proceeds of crime, or property associated with the financing of Terrorist Activities; or
  -are complex or involve abnormally large amounts of money, are not business-like, or do not appear to serve any legal purpose; or
  -were effected so as not to trigger a reporting duty on the Business' part; or
  -may pertain to an investigation into actual or attempted tax evasion; or
  -are associated with the financing of Terrorist Activities; or
- the Business has been, or is about to be, used for MLFT in any manner whatsoever.
- there has been a transaction of the business involving the payment of R25 000.00 (twenty-five thousand rand) or more in cash. The R25 000.00 may be by a single payment, or by a series of payments made within a period of 24 (twenty-four) hours that are R25 000.00.

RISK OFFICER

Each accountable institution must have a “Risk Officer” or a “FICA compliance officer” who has the function overseeing compliance with the FICA legislation and the implementation of the RMCP.

The Risk Officer must ensure training of all staff of the accountable institution and attend to any required reporting. The Risk Officer may terminate a business relationship with a client in respect of whom, the customer due diligence cannot be undertaken.

The Risk Officer must ensure that records are kept for 5 years following the conclusion of a transaction with a client. Records must be readily available, properly stored and protected. Backup copies must be kept separately from the originals. The Risk Officer must report to FIC on the FICS website within the prescribed days.

CONCLUSION

The Amendment requires that institutions understand their relationships with their customers, rather than only identifying them and accordingly need to apply the appropriate risk mitigation controls. The Amendment further provides for greater flexibility for institutions in assessing and managing their risks.

Compliance with FICA and the recently promulgated Amendment is of utmost importance to institutions and the consequences of failure to do so are dire.

DEVELOPMENTS: FREEHOLD

INTRODUCTION

The purpose of this article is to provide a framework of the various stages of a development and to set out a non-exhaustive list of documents which are required from the pre-marketing stage and the other various stages leading up to registration in the Deeds Office of freehold developments.

FREEHOLD DEVELOPMENTS

Freehold Developments are generally undertaken on an erf or erven which are appropriately zoned (or rezoned for the purpose of developing) and subdivided into smaller individual erven which are then sold by way of land sale agreement to third parties together with a building agreement which deals with the construction of a dwelling house on such erf by a building contractor.

Developers should carefully peruse the title deed of the underlying erf to ascertain whether there are any restrictive or resolutive conditions imposed in the title deed that would prohibit the proposed development. Restrictive conditions are usually removed by way of an application in terms of the Gauteng Removal of Restrictions Act during the rezoning process.

In order to draft the Land and Building Sale Agreements, we would require *inter alia* the following information/documents:

DOCUMENTS / INFORMATION REQUIRED	**COMMENTS / NOTES / ☑**
Name of the proposed Development	
Name of the Developer (if different from land owner)	
Copy of Title Deed of the underlying "parent" erf	
*Draft SG diagram/s, layout plans and site development plans	
Proposed name of a Home Owners Association (if applicable)	
Estimation of levies and/or charges applicable	
Construction time frames and/or anticipated occupation dates	
Purchase Price of the Land and Building	
Whether Purchase price includes or excludes VAT, if VAT is applicable	
Whether the Purchase Price includes transfer costs to be payable by the Seller / Developer or payable by the Purchaser/s	
Whether the Purchase Price includes bond registration costs to be payable by the Seller / Developer or payable by the Purchaser/s	
Proposed occupational rental payable	
Whether agreement is to be subject to a certain number of pre sales (full details required)	
Whether development will be registered in phases (full details required)	
Details of appointed estate agency and commission structures (if applicable)	
Details and costs of any PC items (per cost items) – if applicable	

Prior to signature of any Sale Agreements, we would require *inter alia* the following information / documents

DOCUMENTS / INFORMATION REQUIRED	**COMMENTS / NOTES / ☑**
FICA documents for the Seller of the Land and the Building Contractor	
*Schedule of Finishes and/or Specifications of building works/finishes	
*Approved building plans	
*Conduct / House Rules	

* *It is suggested that the final version of these documents be annexed to the Agreement of Sale upon signature thereof for the sake of completeness.*

Once the rezoning (if applicable) and subdivision have been approved by the City Council, the Developer will be issued with:

1. Letter confirming approval of the subdivision; together with a
2. Subdivision Certificate which sets out the conditions of subdivision (Regulation 38 requirements) with draft layout plan annexed.
3. Calculation of bulk services contributions payable by the Developer to Council.

The following documents are required by the Conveyancers in order to complete the necessary documents for submission to City Council to obtain the Regulation 38 Certificate:

DOCUMENTS / INFORMATION REQUIRED	**COMMENTS / NOTES / ☑**
Signed Land Sale Agreements for the various portions, together with FICA documents for all parties;	
SG Diagrams (Subdivisional diagrams, a general plan and/or servitude diagrams) approved by the Surveyor-General;	
Details of Directors of the Home Owners Association – Non Profit Company (if applicable)	
Further conditions to be inserted into the Memorandum of Incorporation of the Home Owners Association (if applicable) – these are usually inserted in compliance with the conditions set out in the subdivision certificate;	

Note: City Council will only issue the Regulation 38 Certificate once all bulk services (water, sewer, electricity etc.) have been installed to their satisfaction and every interested department (roads, water, electricity, parks and open spaces, etc.) have provided a clearance certificate confirming its satisfaction to the Legal Administration Department at the City Council and only if all bulk services contributions have been paid.

The following documents are required by the Conveyancers in order to effect lodgement and registration of the development in the relevant Deeds Registry:

DOCUMENTS / INFORMATION REQUIRED	**COMMENTS / NOTES / ☑**
Original Title Deed of the underlying "parent" erf	
Certified copy of Government Gazette Notice if Title Deed Conditions are to be removed	
Certified copy of the Subdivision Certificate and sketch/layout plan annexed	
Original Regulation 38 Certificate together with signed notarial deeds of servitudes (if applicable)	
Original Approved SG Diagrams (in duplicate)	
Original Approved Servitude Diagrams (in duplicate) – if applicable	
Registration number of the Home Owners Association	
Clearance Certificate by the HOA	
Rates Clearance Certificate for underlying "parent" erf/erven	
Cancellation of existing Mortgage Bond, alternatively necessary consent from mortgage bond holder to proposed Development	

In the event that a mortgage bond is being registered simultaneously with the transfer to fund the purchase of the land and/or subsequent building of the dwelling house, the following documents will be required by the Bank PRIOR to lodgement and registration of the mortgage bond:

DOCUMENTS / INFORMATION REQUIRED	COMMENTS / NOTES / ☑
Approved Building Plans	
Approved SG Diagrams	
NHBRC Builders Registration Certificate	
NHBRC Unit Enrollment Certificate (original)	
Regulation 38 Certificate (copy)	
Appointment of Structural Engineer – signed form confirming appointment of professional engineer	
Land Surveyors Identification Certificate (specific to each erf)	
Waiver of Builder's Lien & Minimum Standards and Specifications Forms – issued by the Bank	
Builder's All Risk Policy – noting the financial interest of the Bank in the policy	
Copy of the Rates Clearance Certificate	

The following documents will be required by the Bank during construction to facilitate progress draws (payments) and prior to payment of the final progress draw:

DOCUMENTS / INFORMATION REQUIRED	COMMENTS / NOTES / ☑
Electrical & Electric Fence System Compliance Certificate;	
Gas Compliance Certificate (if applicable);	
Occupation Certificate;	
Happy Letter from Client confirming that he/she is satisfied with the construction works;	
Final Structural Engineers Certificate;	

SPLUMA

The Spatial Planning & Land Use Management Act was promulgated in 2015. This new legislation furthers the role of Local Authorities in municipal planning. Each Local Authority, has or should have issued its own by-laws regarding this legislation setting out which occurrences will require a SPLUMA certificate before they may be registered in a Deeds Office.

A developer should consult with a conveyancer or town planner to investigate whether the applicable Local Authority requires a SPLUMA certificate in this regard.

GENERAL

It is imperative that Developers acquaint themselves with the necessary documents which may be required during the development period in consultation with various professionals appointed to assist with the Development. A number of delays can be avoided by proper planning and pre-emptive action.

DEVELOPMENTS: SECTIONAL TITLE

INTRODUCTION

The purpose of this article is to provide a framework of the various stages of a development and to set out a non-exhaustive list of documents which are required from the pre-marketing stage and the other various stages leading up to registration in the Deeds Office of sectional title developments.

SECTIONAL TITLE DEVELOPMENTS

Sectional Title Developments are usually undertaken on an erf or erven (in the case of more than 1 erf if they are to be consolidated or alternatively notarially tied).

The Developer should ensure that the property is appropriately zoned for such development and that there are no adverse title deed conditions.

Developers should carefully peruse the title deed of the underlying erf to ascertain whether there are any restrictive or resolutive conditions imposed in the title deed that would prohibit the proposed development. Restrictive conditions are usually removed by way of an application in terms of the Gauteng Removal of Restrictions Act during the rezoning process.

Developers should also indicate whether the property is to be transferred from the current registered owner to the name of the developing individual/company prior to opening of the sectional title scheme and subsequent transfers of sections.

It is imperative that Developers acquaint themselves with the necessary documents which may be required during the development period in consultation with various professionals appointed to assist with the Development.

A number of delays can be avoided by proper planning and pre-emptive action.

In order to draft the Sale Agreements, we would require *inter alia* the following information/documents:

DOCUMENTS / INFORMATION REQUIRED	**COMMENTS / NOTES / ☑**
Name of the proposed Sectional Scheme	
Name of the Developer (if different from land owner)	
Name of the Architect (who prepared the draft/approved plans)	
Number of Sections in the Scheme	
Details of any Exclusive Areas and confirmation whether they are to be allocated by the Developer or notarially ceded to owners	
Estimation of levies and/or charges applicable	
Amended Management and Conduct Rules (if those provided for in the regulations to the Sectional Titles Act are to be deviated from)	
Construction timeframes and anticipated occupation dates	
Purchase Price	
Whether Purchase price includes or excludes VAT	
Deposit Requirements	
Whether the Purchase Price includes transfer costs to be payable by the Seller / Developer or payable by the Purchasers	
Whether the Purchase Price includes bond registration costs to be payable by the Seller / Developer or payable by the Purchasers	
Proposed occupational rent	

Whether the agreement is to be subject to a certain number of pre-sales (detail required)	
Whether development will be registered in Phases (details required)	
Details of any optional extras which Purchasers may elect	
Details of appointed estate agency and commission structures (if applicable)	

Prior to signature of any Sale Agreements, we would require *inter alia* the following information/documents:

DOCUMENTS / INFORMATION REQUIRED	COMMENTS / NOTES / ☑
Copy of Title Deed of the underlying "parent" erf	
Draft or approved building plans	
Draft SG diagram/s or layout plans indicating sections, including details of any exclusive use areas	
FICA documents for the Seller/Developer	
Schedule of Finishes and/or Specifications of building works/finishes	
Details of proposed managing agents (if applicable);	

The following documents are required by the Conveyancers in order to effect lodgment and registration of the development in the relevant Deeds Registry:

DOCUMENTS / INFORMATION REQUIRED	COMMENTS / NOTES / ☑
Original Approved SG Diagrams – Sectional Title Plans (in duplicate);	
Original Title Deed of the underlying "parent" erf;	
Rates Clearance Certificate;	
Confirmation that no lease agreements exist at date of registration of transfer in respect of any section to be registered (Section 10 of the Sectional Titles Act)	
Draft Management and Conduct Rules	
Details of existing mortgage bond to be cancelled; alternatively the necessary consent is to be obtained;	
Confirmation in terms of SPLUMA from the Local Authority that the change in land use is approved	

In the event that a mortgage bond is being registered simultaneously with the transfer to fund the purchase of the sectional title unit, the following documents will be required by the Bank PRIOR to lodgement and registration of the mortgage bond:

DOCUMENTS / INFORMATION REQUIRED	COMMENTS / NOTES / ☑
Signed Building Agreement	
Approved Building Plans	
Approved SG Diagrams	
NHBRC Builders Registration Certificate (copy)	
NHBRC Unit Enrollment Certificate (original)	
Appointment of Structural Engineer – signed form confirming appointment of professional engineer	
Waiver of Builder's Lien & Minimum Standards and Specifications Forms – issued by the Bank	
Builder's All Risk Policy – noting the financial interest of the Bank	

Electrical Compliance Certificate	
Gas Compliance Certificate (if applicable)	
Occupation Certificate	
Happy Letter from Client confirming satisfaction	
Final Structural Engineers Certificate	
Details of managing agents to be appointed	

GENERAL

The prescribed Management Rules contained in the Sectional Titles Act requires that an inaugural body corporate meeting must be held within 60 days of the transfer of the first section in the Scheme. The aim of the meeting is to assign roles and responsibilities to the elected Trustees and to initiate the usual body corporate processes.

SUBDIVIDING YOUR PROPERTY – WHAT YOU NEED TO KNOW

WHAT DOES SUB DIVIDING YOUR PROPERTY MEAN

Subdividing 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 subdivide these larger stands 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 SUBDIVIDING

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 SUBDIVISION

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 subdivide, 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. 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” 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 once the compliance certificate is issued. 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.

SPATIAL PLANNING AND LAND USE MANAGEMENT ACT NO 16 OF 2013 WITH FOCUS ON THE CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY: MUNICIPAL PLANNING BY-LAW 2016

INTRODUCTION

The purpose of this article is to provide a brief explanation of the concepts and regulatory framework introduced by the advent of the Spatial Planning and Land Use Management Act (SPLUMA) which came into operation on 1 July 2015 and the Regulations thereto which were subsequently promulgated on 13 November 2015. SPLUMA creates an obligation on each municipality to develop and define their own municipal planning by-laws which we will continue to see promulgated periodically.

BACKGROUND

Historically our living spaces have been defined and influenced by past spatial planning and land use laws and practices which were based on racial inequality, segregation and unsustainable settlement patterns.

Prior to 1994, South Africa had separate planning legislation for the then four provinces and the homelands. After 1994, in spite of reforms in government structures and high level policy, existing land use planning laws and mechanisms remained largely unchanged.

The Development Facilitation Act No 67 of 1995 (DFA) was the only post-1994 piece of legislation that dealt with spatial development principles and a land use management mechanism. The DFA was applied in parallel to existing provincial and "homeland" planning legislation and mechanisms, and municipal Town Planning Schemes.

In 2010, the Constitutional Court in *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* declared Chapters 5 and 6 of the DFA dealing with land use management unconstitutional. The DFA has been repealed with the finalisation of SPLUMA together with other historic parallel planning related legislation including the:

- Removal of Restrictions Act (84 of 1967)
- Physical Planning Act (88 of 1967)
- Less Formal Township Establishment Act (113 of 1991)
- Physical Planning Act (125 of 1991)

In addition to a lack of new planning legislation, various pieces of legislation governing issues with a direct impact on spatial planning remained in force or were formulated post-1994. Examples of these include the Subdivision of Agricultural Land Act (70 of 1970), National Environmental Management Act (107 of 1998), Heritage Resources Act (25 of 1999) and Mineral and Petroleum Resources Act (28 of 2002).

Apart from the constitutional imperatives found throughout the Constitution which need to be upheld, the Con Court decision above further emphasised the provisions of s151(4) of the Constitution which provides that the national or a provincial government may not compromise or impede a municipality's ability or right to exercise its power or perform its functions. Section 156(1) of the Constitution confers on municipalities the right to administer local government matters which includes municipal planning.

The declaration of Chapters 5 and 6 of the DFA as unconstitutional triggered the urgent introduction of legislation providing for a national framework of land use planning. SPLUMA is set to aid effective and efficient planning and land use management. SPLUMA applies to the whole of South Africa (urban and rural areas) and governs informal and traditional land use development processes which were previously excluded from the benefits of these systems.

IMPORTANT DEFINITIONS

To fully understand the various provisions of SPLUMA, it is imperative that certain important terms be defined:

- “Applicant” – means a person who makes a land development application;
- "Land Development" – means the erection of buildings or structures on land, or the change of use of land, including township establishment, the subdivision or consolidation of land or any deviation from the land use or uses permitted in terms of an applicable land use scheme.
- "Land Use" – means the purpose for which land is or may be used lawfully in terms of a land use scheme, existing scheme or in terms of any other authorisation, permit or consent.
- "Land Use Management System" – means the system of regulating and managing land use and conferring land use rights through the use of schemes and land development procedures.
- “Land Use Scheme” means the documents referred to in Chapter 5 for the regulation of land use;
- "Minister" – means the Minister of Rural Development and Land Reform.
- "MPT" – means Municipal Planning Tribunal.
- “Owner” - means the person registered in a deeds registry as the owner of land or who is the beneficial owner in law.
- “Restrictive Condition” - means any condition registered against the title deed of land restricting the use, development or subdivision of the land concerned.
- "SDF" – means Spatial Development Framework.
- "Township" – means an area of land divided into erven, and may include public spaces and roads indicated as such on a general plan
- "Township Register" – means an approved subdivision register of a township in terms of the Deeds Registries Act.
- "Zone" – means a defined category of land use that is shown on the zoning map of a land use scheme.

KEY SECTIONS OF THE ACT

Schematic overview of SPLUMA:

SPLUMA is a framework for a planning system for the country (Chapter 1: Section 1-5)	Legislation and Policies (Chapter 2: Section 6)	Development Principles (Chapter 2: Section 7)	Spatial Development Planning & Frameworks (Chapter 4: Section 12-22)	Land Use Management through Schemes (Chapter 5: Sections 23 to 32)	Land Development Management (Chapter 6: Sections 33 to 52)	Other Provisions (Chapter 7: Sections 53 to 61)
Categories of Planning – Municipal, Provincial and National	*Application of Development Principles – apply to all organs of state and other authorities*					

SECTION 7: SPLUMA’S FOUNDING PRINCIPLES

The following principles will apply to spatial planning, land development and land use management:

- The principle of Spatial Justice
  - redress imbalances of the past
  - inclusion of previously excluded areas
  - flexibility on types of settlements
- The principle of Spatial Sustainability
  - promote land development that is within the fiscal, institutional and administrative means of South Africa, protect prime and unique agricultural land, comply with environmental laws and limit urban sprawl
- The principle of Efficiency
  - land development must optimise the use of existing resources and infrastructure and decision making procedures must be designed to minimise negative financial, social, economic or environmental impact.

- The principle of Spatial Resilience
    - flexibility in spatial plans is accommodated to ensure sustainable livelihoods.
- The principle of Good Governance
    - creating of planning decision-making tools
    - transparency and community involvement
- A Municipal Planning Tribunal cannot be obstructed in its discretion on the ground that the value of the land / property is affected by the outcome of the application;

SECTIONS 12 to 22: SPATIAL DEVELOPMENT FRAMEWORKS

These sections deal with the spatial planning component which requires national, provincial and local government to reach agreement on the direction in which they collectively want to go.

SECTION 24: LAND USE SCHEME

A municipality must adopt and approve a single land use scheme for its entire area within five years from 1 July 2015.

SECTION 25: PURPOSE AND CONTENT OF LAND USE SCHEME

A land use scheme must give effect to and be consistent with the municipal spatial planning development framework and determine the use and development of land within the municipal area to which is relates in order to promote economic growth, social inclusion, efficient land development and minimal impact on public health, the environment and natural resources.

A land use scheme must include:

- Scheme regulations setting out the procedures and conditions relating to the use and development of land in any zone;
- A map indicating the zoning of the municipal area into land use zones; and
- A register of all amendments to such land use scheme.

SECTION 28: AMENDMENT OF LAND USE SCHEME AND REZONING

A municipality may amend its land use scheme by rezoning any land considered necessary by the municipality to achieve the development goals and objectives of the municipal spatial development framework, subject to a public participation process being undertaken to ensure that all affected parties have the opportunity to be heard.

SECTION 33: MUNICIPAL LAND USE PLANNING

All land development applications must be submitted to a municipality as the authority of first instance. Despite submitting same to the municipality, where an application or authorization is required in terms of any other legislation for a related land use, such application must also be made or such authorization must also be requested in terms of that legislation.

SECTION 35: ESTABLISHMENT OF MUNICIPAL PLANNING TRIBUNALS

A municipality must, in order to determine land use and development applications within its municipal area, establish a Municipal Planning Tribunal. A municipality must categorise development applications into those to be considered by an official and those to be considered by the Municipal Planning Tribunal.

SECTION 40: DETERMINATION OF MATTERS BEFORE THE MPT

The MPT may approve (in whole or in part) or refuse any application referred to it in accordance with SPLUMA. In the approval of any application it may impose any reasonable conditions it deems appropriate, such as the payment of engineering service contributions or development charges.

SECTION 41: CHANGE WITH APPROVAL OF MPT

The MPT may, upon application, change the use, form or function of land or remove, amend or suspend a restrictive condition.

SECTION 42: DECIDING AN APPLICATION

The MPT must consider the following aspects when deciding an application:

- Be guided by the development principles;
- Make a decision consistent with the norms and standards, measures designed to protect and promote sustainable use of agricultural land, national and provincial government policies etc.
- Public interest;
- The constitutional transformation imperatives;
- The facts and circumstances relevant to the application
- The respective rights and obligations of all those affected
- The state and impact of engineering services, social infrastructure and open space requirements;
- Any factors that may be prescribed, including timeframes for making decisions
- Environmental legislation.

SECTION 43: CONDITIONAL APPROVAL OF APPLICATION

An application may be approved subject to such conditions as are determined by the MPT or may be prescribed. A conditional approval of an application lapses if the condition/s are not complied with, within 5 years from date of such approval if no specific date is recorded.

SECTION 44: TIMEFRAMES FOR APPLICATIONS

The Minister must, after public consultation, prescribe timeframes for the consideration and determination of an application before the MPT. An MPT shall then be obliged to consider, hear and determine land development applications within such timeframe. Regulations may set out different time frames for MPTs and differential types of land development applications.

SECTION 47: RESTRICTIVE CONDITIONS

A restrictive condition may, with the approval of the MPT and in the prescribed manner, be removed, amended or suspended.

SECTION 49: PROVISION OF ENGINEERING SERVICES

An applicant shall be responsible for the provision and installation of internal engineering services. A municipality shall be responsible for the provision of external engineering services.

SECTION 53: COMMENCEMENT OF REGISTRATION OF OWNERSHIP

The registration of any property resulting from a land development application may not be performed unless the municipality certifies that all the requirements and conditions for the approval have been complied with.

SECTION 54: REGULATIONS

The Minister may make regulations consistent with the Act, prescribing among other things procedures concerning the lodging of applications and the consideration and decision of such applications and any fees that may be payable in connection with applications and appeals.

REGULATIONS TO SPLUMA

The Regulations in terms of SPLUMA came into operation on 13 November 2015 and are made in terms of Section 54 described above. Regulation 1 deals with definitions and Regulations 2 to 10 set out intergovernmental and institutional arrangements. Regulations 11 to 13 stipulate the process of the appointment of external members.

REGULATION 14: SUBMISSION OF LAND DEVELOPMENT AND LAND USE APPLICATIONS

A Municipality must among other things, determine the manner and format in which a land development and land use application must be submitted, the fees payable therefore, the time frames applicable to each component of the phases, the manner and extent of public participation, procedures for site inspections, etc.

REGULATION 15: CATEGORIES OF LAND DEVELOPMENT AND LAND USE APPLICATIONS

If a municipality elects not to delegate authority to an "authorised official" then the MPT must consider all applications submitted. If an authorised official is delegated authority, the municipality must decide the type, scale and nature of applications to be considered by it.

REGULATION 16: TIME FRAMES FOR LAND DEVELOPMENT AND LAND USE APPLICATIONS

If no applicable provincial legislation or municipal by-laws have been promulgated, the timeframes for land development and land use applications or a mechanism for regulating circumstances of apparent undue delay by the MPT or authorised official shall be as set out in this regulation.

This regulation identifies three distinct phases to which each land development or land use application will be subjected to:

Administration Phase – a phase during which the application is submitted, circulated, all public participation notices must be published and responded to, intergovernmental processes finalized and applications referred to an MPT or authorised official for consideration and decision making. It commences after the complete application has been submitted and accepted by the municipality. This period may not be longer than **12 months**. If the applicant fails to act/provide information during this phase, the application is deemed to have been refused. If an organ of state or department fail to give input or comments during this phase, they are deemed to have no objection to the application.

Consideration Phase - the phase where the MPT/authorised official must consider the application and undertake investigations if required. This period may not be longer than **3 months**.

Decision Phase – the phase during which a decision must be made within **30 days** after the last meeting of the MPT or authorised official. If no decision is made within the stipulated period, the applicant may report non-performance to the municipal manager, who must report this to the municipal council / mayor.

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY: MUNICIPAL PLANNING BY-LAW 2016

The COJ By-Law, pursuant to SPLUMA, was promulgated on 3 August 2016 and came into operation on 1 September 2016 and also listed the members appointed by COJ to its MPT.

The By-Law applies to all land and land development applications within the jurisdiction of the City of Johannesburg and all such applications shall be submitted under the provisions of this By-Law. The By-Law specifically prohibits any person from using or developing land unless the use and land development is permitted in terms of the COJ's land use scheme or an approval in terms of this By-Law is obtained.

TYPES OF APPLICATIONS

A land development application that may be submitted in terms of this By-Law include the following

- Consent-use;
- Building line relaxation;
- Amendment of a provision of the COJ land use scheme (rezoning);
- Township establishment;
- Subdivision and/or consolidation or an erf/erven in an approved township or the subdivision of any other land;
- Phasing of an approved township;
- Extension of the boundaries of an approved township;
- Amendment or cancellation either wholly or in part of a general plan;
- Amendment, suspension or removal of a restrictive or obsolete condition, obligation, servitude or reservation registered against the title of land;
- Permanent closure of public place or diversion of a street; and
- Any other application as provided for in this By-Law.

THE COJ MUNICIPAL PLANNING TRIBUNAL

The COJ shall establish its MPT to determine land development applications within its area of jurisdiction (note that this was already done upon promulgation of the By-Law) and the MPT will comprise the members as set out in the By-Law. The powers of the MPT include approving (wholly or in part) any application referred to it, impose reasonable conditions including the provision of engineering services or the payment of engineering services contributions, conduct investigations and decide any question concerning its own jurisdiction.

The MPT shall be obliged to keep record of all its proceedings and decisions and must provide reasons for any of it's decisions made upon any written request submitted by any of the parties which appeared before it within 28 (twenty eight) days of date of receipt of the notice of the decision and such reasons shall be provided by the MPT chairperson in writing within 14 days from date of such request.

COJ AUTHORISED OFFICIAL

As provided for in Section 35(2) of SPLUMA, the municipality may authorise an official in terms of proper delegated authority to decide on certain land development applications. The By-Law stipulates that the authorised official may only decide any unopposed land development applications without referring the matter to the MPT. The authorised official may however, at this sole discretion, refer any application he deems necessary to the MPT for a decision.

GENERAL REQUIREMENTS AND APPLICATION PROCEDURES FOR LAND DEVELOPMENT APPLICATIONS

Chapter 5 of the By-Laws sets out the various requirements and application procedures for each of the different types of applications referred to above, including the supporting documentation required, the timeframes for public notices and advertising, the procedure for dealing with objections (referred to as the administrative phase) and the steps leading up to the decision phase.

ENGINEERING SERVICES & CONTRIBUTIONS

Every township approved in terms of the provisions of the By-Law shall be provided with such engineering services as the City deems necessary for the proper development of the township.

The owner of the land shall be responsible for the provision, installation and costs of internal engineering services required for a development when an application is approved. The City will be responsible for the provision and installation of external engineering services.

The City may levy an external engineering services contribution in respect of the provision of external engineering services to the land and when it does so, the City will inform the owner of the land in writing of the contribution payable. Should the owner of the land install any engineering services on behalf of the City, the fair and reasonable cost of such installation may be set off against the external engineering services contributions payable.

External engineering contributions shall be payable within 12 (twelve) months from date of proclamation of an approved township or in the event of subdivision, prior to the registration of a transfer of any portion in the Deeds Registry.In the event of an application for the amendment of the scheme (rezoning) and where it will be necessary to enhance or improve such services as a result of the amendment, engineering services contributions may be levied.

An owner wishing to avoid the payment of the contributions may apply for the amendment scheme to be repealed or may apply for a further amendment of the land use scheme within 90 days from the date of receipt of initial notification of the contributions payable. The contribution payable shall become due within 30 days of the expiry of the aforesaid 90-day period.

SOURCES:

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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 MOI 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 purchaser's 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.

HUUR GAAT VOOR KOOP

INTRODUCTION

The purpose of this article is to examine the maxim "*huur gaat voor koop"* that applies in South African Law.

MEANING OF THE MAXIM

Loosely translated it means that an existing lease trumps a later sale. This means that in the case of a lease of immovable property, a tenant is protected against the rights of third parties which vested later in time than those rights of the tenant under the lease.

This maxim is especially relevant in the context when the property in question is sold to a new party. The purchaser (new owner) will take over the lease agreement by 'stepping into the shoes' of the seller and have the same rights and obligations against the tenant as the seller of the property before the sale took effect. The seller is substituted by operation of law, meaning no formal ceding of right is required, and the purchaser will automatically acquire all the rights and duties of the landlord under the lease.

In other words, both the tenant and the purchaser will be bound to the lease agreement and neither party can resile from it without following the provisions contained in the agreement itself.

THE PURPOSE OF THE MAXIM

The maxim aims to protect the most vital part of the lease agreement namely the tenant paying rent to the landlord, in return for undisturbed quiet occupation of the property for the duration of the lease period.

EXCEPTIONS TO THE MAXIM

As will be discussed below, the maxim is however limited in its application, as all of the rights and obligations in terms of the lease are not necessarily protected. Generally, the maxim will only transfer rights which are related to the immediate relationship between landlord and tenant.

MORTGAGE EXECUTION

In cases where a mortgage bond preceded the lease agreement, the rights of the bank will take precedence over those of the tenant.

Inasmuch as the real right (mortgage bond) was registered before the lease was concluded such right will trump the *huur gaat voor koop* maxim. Generally, in situations such as these the bank or sheriff must try and sell the property subject to the leases as they are aware of their existence. But if the offers received are not reasonably sufficient to cover the claims of the bank the obligation to honor the lease will fall away and the choice to auction the property free of the lease is in the bank's discretion.

SURETIES

Sureties continue to be bound to the purchaser in terms of the suretyship agreement in the event that the tenant omits to pay rental in terms of the lease agreement. As was confirmed by the courts, the seller is substituted by the purchaser by operation of law and therefore it is a natural result of such substitution that the purchaser also acquires the rights which the seller had against the surety for the tenant's obligations under the lease agreement. Thus the purchaser is entitled to sue any sureties in terms of the agreement if necessary.

MANAGING AGENT / COMMISSION CLAUSES

As highlighted above, where *huur gaat voor koop* applies, the purchaser and tenant will only be bound by the *essentialia* of the lease agreement and need not comply with any additional, incidental obligations contained in the agreement. In other words, the parties will be bound by those terms of the agreement which gives the lease its relevant identity such as the terms which ensures undisturbed occupation of the property in return for compensation.

Often the lease agreement will include a clause providing for the services of a managing agent in return for commission payable monthly, or as a once-off payment, and the question arises whether this provision is covered by the maxim.

It has been argued that such a provision is incidental to the agreement and to the landlord-tenant relationship as ancillary rights, thus not being protected by the maxim. Therefore it is advisable for the Purchaser and agent to conclude a new agreement upon transfer of the property to avoid unnecessary disputes.

The same thinking applies to commission clauses relating to the sale of the property to the tenant by the landlord. Where the rental agent has a clause entitling the agent to commission in the event of the sale of the property to the tenant, in the event that the property is sold and the purchaser of the property subsequently sells the property to the tenant, it is argued that the leasing agent would not have a claim for commission against the purchaser.

DEPOSITS PAID IN TERMS OF THE LEASE AGREEMENT

The purchaser will be held liable upon the end of the lease for any deposits the tenant may have paid, regardless of who may hold the original deposit amount. Therefore, it is advisable that should the purchaser who buys property that has an existing tenant, makes it a condition of the offer to purchase that any deposits and pro rata rental held by the existing landlord (seller) are to be transferred by the conveyancer to the purchaser upon transfer.

OPTION TO PURCHASE CONTAINED IN THE LEASE AGREEMENT

The case of *Spearhead Property Holdings v E & D Motors (2010)* dealt with a situation where a property was sold with the lease. In terms of the lease, the lessee had a right to purchase the property from the lessor. The court held that the lessee's option to purchase the leased property in terms of the lease agreement is not a primary part of the landlord-tenant relationship in which the maxim would apply.

Thus the Supreme Court of Appeal held in its majority judgement that the tenant could only exercise his option against the seller who granted the option and not against the purchaser.

However, the court underlined that its ruling went hand in hand with the doctrine of notice, which prescribes that if the purchaser was aware of the tenant's prior right to purchase, the claim of the tenant may still be asserted and compel the purchaser to transfer the property against payment of the purchase price stipulated in the option. In this context 'notice' means prior knowledge and therefore it is essential to ensure that the content of any existing lease agreement be made known to any prospective purchaser.

In the context of property sales, this is important. Agents should be careful to ensure a purchaser is provided with a copy of the lease and acknowledges receipt of same and awareness as to the content.

Agents should further ensure that the lease agreement is read and understood. Any issues around options to purchase the property must be dealt with in writing.

LONG TERM LEASES

The maxim only applies to leases shorter than ten years. Should a tenant wish to enjoy protection against third parties in respect of a lease which exceeds ten years, such lease agreement needs to be registered at the relevant deeds office for the full period of such lease. In the event that the lease is not registered, the tenant will be protected for the first ten years of the lease, as long as he is in occupation of the relevant property.

CONCLUSION

The maxim of *huur gaat voor koop* protects the rights of tenants in the case where the property, where they reside is sold to a new purchaser and therefore it is important to take care when buying or selling property in terms of which a lease agreement pre exists.

The best practical guideline in these cases is to ensure that the estate agent obtain the relevant lease agreement and provides this to a serious purchaser before the offer to purchase is entered into. It is furthermore good practice to ask that the purchaser sign an acknowledgement that he/she indeed received such a copy, as this will prevent future disputes as to the content and terms of the lease agreement after transfer.

EFFECT OF THE CONSUMER PROTECTION ACT ON RESIDENTIAL LEASES

INTRODUCTION

There are a number of different laws that impact residential leases. This article explores certain of those laws relevant to a residential lease and explains the proper procedure to be followed when terminating a residential lease.

WHEN DOES THE CONSUMER PROTECTION ACT APPLY?

The Consumer Protection Act (CPA) applies to the supply of goods and services within South Africa, and this Act expressly defines residential accommodation as a service, meaning that residential leases are affected by this Act.

The CPA will apply to all leases, except:

1) where the lease is concluded between a landlord and a tenant which is a juristic entity (such as a company, trust, partnership or association) and where such tenant (at date of transaction) has an annual turnover or asset value which equals or exceeds R 2 million; or
2) where the landlord is not leasing the property in the ordinary course of business.

LIMITATION ON DURATION OF LEASES

The CPA provides in Regulation 5 that fixed term contracts (of which leases are an example), are limited to a maximum duration of 24 months, unless such longer period is expressly agreed with the consumer (tenant) and the supplier (landlord) can show a demonstrable financial benefit to the consumer.

CANCELLATION OF A LEASE BY TENANT BY NOTICE PRIOR TO EXPIRY IN A FIXED TERM LEASE

The cancellation of a lease before the agreed fixed term of the contract has run its course, is commonly referred to as 'early termination'. If the fixed term lease does not provide for early termination, then the lease cannot (save for where the CPA or Rental Housing Act apply) be cancelled early, unless both parties agree to this.

Should the parties agree to an early termination, this termination and the terms thereof should be reduced to writing and signed by the parties.

Where the CPA is applicable, a consumer (i.e. a tenant) can cancel a fixed term agreement (i.e. a lease) for any reason whatsoever by giving the supplier (landlord) 20 business days written notice of the cancellation.

Such cancellation is subject to a "reasonable cancellation penalty" in favour of the landlord, the calculation whereof is set out more fully in Regulation 5 of the Consumer Protection Act.

The calculation of this penalty requires the following to be taken into account:

- the amount which the consumer is still liable for to the supplier up to the date of cancellation;
- the value of the transaction up to cancellation;
- the value of the goods which will remain in the possession of the consumer after cancellation;
- the value of the goods that are returned to the supplier;
- the duration of the consumer agreement as initially agreed;
- losses suffered or benefits accrued by the consumer as a result of the consumer entering into the consumer agreement;
- the nature of the goods or services that were reserved or booked;
- the length of notice of cancellation provided by the consumer;
- the reasonable potential for the service provider, acting diligently, to find an alternative consumer between the time of receiving the cancellation notice and the time of the cancelled reservation; and
- the general practice of the relevant industry.

It must be noted that the landlord has a duty to mitigate his damages and to try find a new tenant. When the landlord thus received the written CPA notice to cancel, the landlord has a duty to take reasonable steps to find a new tenant.

Lease agreements need to be perused and understood prior to signing and or cancellation inasmuch as there are some lease agreements that provide for an agreed amount as the reasonable cancellation penalty, which amount, being pre agreed, is applicable in the event of early termination in terms of the CPA.

Where agent's commission has been paid in respect of the full duration of the lease, the landlord would suffer damages to the extent that commission has been paid in respect of the period following cancellation of the lease. This pro-rata portion of the commission already paid commonly forms part of the reasonable cancellation penalty.

CANCELLATION OF THE LEASE DUE TO BREACH

Leases commonly contain breach clauses that stipulate where a landlord or tenant has breached the lease, the aggrieved party may give written notice to the defaulting party for such breach to be remedied. Failure to remedy the breach in the stipulated time period, will entitle the aggrieved party to either enforce the lease or cancel the lease and (where relevant) claim damages suffered from the defaulting party.

Where the CPA is not applicable to a lease agreement, the provisions of the breach clause in the agreement must be followed.

In instances where the CPA is applicable, the CPA provides that the landlord may not cancel the lease upon the tenant's breach, unless the landlord (despite a shorter period provided for in the lease) first gives the tenant 20 business days written notice to remedy the breach. Provided that the tenant does not remedy the breach in this period, the landlord can cancel the lease after this period has expired.

This is critical because it applies despite what the lease says – it thus overrides the provisions of the lease or the common law. The Rental Housing Act does not stipulate how many days the breach notice period must be.

EXPIRY OF LEASES / FIXED TERM CONTRACTS WHERE THE CPA IS APPLICABLE

The landlord must notify the tenant in writing of the impending expiry date of the fixed term agreement, not more than 80 (eighty), nor less than 40 (forty) business days before the expiry date; and

(i) any material changes that would apply if the agreement is to be renewed or may otherwise continue beyond the expiry dates; and
(ii) the options available to the consumer.

MONTH-TO-MONTH LEASES

In terms of the CPA, upon expiry of the fixed term of the agreement, it will be automatically continued on a month-to-month basis, subject to any material changes of which the landlord has given notice, as contemplated above, unless the tenant expressly:

(i) directs the landlord to terminate the agreement on the expiry date; or
(ii) agrees to a renewal of the agreement for a further fixed term.

The Rental Housing Act also provides that if a tenant remains in occupation of the property after the fixed period defined in a written lease expires, that the lease will continue to run on the same terms and conditions as contained in the written document, save that the duration of the lease will be only one month (i.e. a month to month lease situation will arise).

In both cases above, in the absence of an agreement to the contrary, either party can terminate the lease by giving the other party one calendar months' notice.

CONCLUSION

Landlords and tenants should seek legal advice when entering into or terminating lease agreements.

INCOMING AND OUTGOING RENTAL INSPECTIONS

INTRODUCTION

The purpose of this article is to look at the importance of incoming and outgoing rental inspections as required by the Rental Housing Act, 50 of 1999 (the "Act").

In terms of section 4(5) of the Act it is the landlords right, at the end of the lease, to receive the property in a good state of repair, apart from fair wear and tear and that he may claim compensation for damage to the property caused by the tenant, a member of the tenant's household or a visitor of the tenant.

DEPOSIT

In terms of section 5(3)(c) of the Act, the landlord may require the tenant to pay a deposit prior to taking occupation of the property.

The deposit may not exceed the amount as specified in the lease agreement, and must be invested in an interest bearing account as per section 5(3)(d).

If the deposit is held by the landlord, it must be invested in an interest-bearing account with a financial institution. The interest earned on such an account may not be less than that earned on a savings account. The interest thereon accrues to the tenant. The tenant may also request at any time during the period of the lease, that the landlord provide written proof in respect of the interest accrued on the deposit, which the landlord is obliged to provide.

If the deposit is held by a registered estate agent, it must be dealt with in terms of the Property Practitioners Act, 2019.

At the end of the lease, the deposit may be applied towards the reasonable payment of amounts for which the tenant is liable for under the lease including the costs of repairing damages caused by the tenant and the cost of replacing lost keys. The receipts from any repair work need to be available to the tenant for inspection as proof of the costs of such repairs.

INCOMING INSPECTIONS

In terms of section 5(3)(e) of the Act, the tenant and the landlord must jointly inspect the property before the tenant moves in. The purpose being to determine whether there are any defects or damages to the property.

It is therefore mandatory in terms of the Act that an incoming inspection is performed in the presence of both the tenant and the landlord (or the agent as his authorised representative) before the tenant takes occupation.It is not sufficient to drop off an inspection list at the leased premises and require the tenant to complete and return same a few days later.

It is important that the inspection is as detailed as possible recording all existing damage to the property in every room. It should also be noted that in terms of section 5(7) of the Act, a copy of the defects registered in terms of the above must also be attached as an annexure to the lease. A copy of any House Rules applicable to the property should also be attached to the lease (section 5(8)).

Should the landlord fail to perform either the incoming or outgoing inspection, he acknowledges that the property is in a good and proper state of repair and has no claim against the tenant for damages and must refund the full deposit plus interest within **7 days** (section 5(3)(j)&(i)).

OUTGOING INSPECTIONS

In terms of section 5(3)(f) of the Act, the landlord and tenant must arrange an outgoing inspection, at a mutually convenient time, within **3** days prior to the end of the lease. The purpose of this outgoing inspection is to determine whether any damage was caused to the property whilst the tenant was in occupation.

This is again a clear requirement of the Act that the inspection must be performed within the time period specified and that it must be done in the presence of both the tenant and the landlord (or the agent as his authorised representative).

Should the tenant fail or refuse to attend the outgoing inspection (after being requested to attend such inspection) the landlord is still required to do inspection within **7 days** of the end of the lease. He may then deduct the reasonable cost of repairing damage and replacing lost keys from deposit and the balance must be refunded to tenant within **21 days** of the end of the lease (section 5(3)(k)-(m)).

REPAYMENT OF DEPOSITS

Clause 5(3) of the act provides for four potential time periods within which the deposit and interest earned thereon must be refunded to the tenant:

1) If all the inspections have been performed and no amounts are found to be owing by the tenant, the tenant must be refunded within **7 days** from end of lease (section 5(3)(i)).

2) If the landlord fails to perform either the incoming or outgoing inspection, he acknowledges that the property is in a good and proper state of repair and has no claim against the tenant for damages and must refund the full deposit plus interest within **7 days** (section 5(3)(j)&(i)).

3) If the inspections have been performed and damage has been found to the Property, the balance of the deposit must be refunded to the tenant within **14** days from end of lease (section 5(3)(g).

4) If the tenant fails to attend either inspection, the landlord is still required to do the inspection within 7 days of the end of the lease. He may then deduct the reasonable cost of repairing damage and replacing lost keys from the deposit and the balance must be refunded to tenant within **21 days** of the end of the lease (section 5(3)(k)-(m)).

Note again that the landlord must retain receipts from any repair work and that these need to be available to the tenant for inspection as proof of the costs of such repairs.

VACATION OF THE PROPERTY BEFORE EXPIRATION OF THE LEASE

Section 5(3)(o) of the Act provides for the situation where a tenant vacates the property prior to the expiration of the lease without giving notice. The section says that the lease is then “deemed’ to have expired on the date that the landlord became aware that the tenant had vacated the property. The landlord still retains his rights in terms of the tenant’s breach of contract but this establishes a date on which the contract is considered to have come to an end.

WAIVER OF RIGHTS

Section 5(4) of the Act specifically provides that the rights detailed above may not be waived. In other words, the Act sets out the minimum rights of the parties and these cannot be waived or amended even by means of the parties reaching agreement to the contrary.

CONCLUSION

It is clear from the above that non-compliance with the Act with regard to the obligations around ingoing and outgoing inspections may have serious and costly consequences.

It is therefore essential the provisions of the act be strictly complied with and that a detailed and thorough inspection of the property is done before the tenant takes occupation of the property and again within 3 days prior to the end of the lease.

It is recommended that the results of both inspections be signed off by both parties as proof that the inspection took place.

THE PROPERTY PRACTITIONERS' REGULATORY AUTHORITY CODE OF CONDUCT

INTRODUCTION

The Code of Conduct for Estate Agents published pursuant to the Estate Agency Affairs Act (now repealed) has been replaced by the Code of Conduct published in the Regulations (Regulation 34) to the Property Practitioners Act.

Whilst the previous Code of Conduct and the new Code of Conduct are very similar, there are some differences. In addition, the order of the code has been rearranged. The differences will be pointed out in the article below.

This article is aimed at examining and breaking down the provisions of the Code of Conduct into easily understandable guidelines.

DUTIES APPLICABLE TO ALL PROPERTY PRACTITIONERS

34.2.2 In terms of property practitioners' general duty to members of the public and other persons, a property practitioner has the following duties:-

DUTY TO MAINTAIN THE INTEGRITY OF ESTATE AGENTS IN GENERAL

34.2.1.1 A property practitioner shall not in, or pursuant to, the conduct of his business do, or omit to do, any act which is, or may be, contrary to the integrity of property practitioners in general.

This regulation is a "blanket provision" which intends to regulate conduct that is not dealt with anywhere else in the code of conduct. This regulation provides the general standard of conduct expected of a property practitioner.

Only the conduct of the property practitioner in his professional capacity as an property practitioner can be measured in terms of this provision. The property practitioner' s actions and/or omissions in his/her personal life or in any other capacity are not considered.

If a property practitioner's conduct is regarded as dishonest, corrupt or reckless, he/she could be found guilty in terms of this regulation. A guilty finding in this regulation could easily be linked to a guilty finding elsewhere in the code due to this regulation's general nature.

THE DUTY TO PROTECT THE INTEREST OF THE CLIENT

34.2.1.2 A property practitioner shall protect the interest of his client at all times to the best of his ability with due regard to the interest of all other parties concerned.

When considering this regulation, it is important to note the definition of "client" in the Regulations.

Client means: "a person who has given a property practitioner a mandate, provided that should a property practitioner have conflicting mandates in respect of a particular immovable property, the person whose mandate has first been accepted by the property practitioner is regarded as the client".

This regulation requires a property practitioner to protect the interests of his client (as defined) to the best of his/her ability.

This does not mean that the property practitioner may run "roughshod" over the interests of the other party. The property practitioner is required to have due regard to the interests of the other party.
This clause ties in with certain of the obligations created in terms of the Consumer Protection Act.

THE REQUIREMENT OF SPECIALISED SKILL

34.2.1.3 A property practitioner shall not accept a mandate if the performance of the mandate requires specialised skill or knowledge falling outside his field of competence, or he has not completed the required qualifications, unless he will in the performance of the mandate be assisted by a person who has the required skill or knowledge and this fact is disclosed in writing to the client;

Whether specialist skill or knowledge is required will be considered on the merits of each individual case.

Agents who specialise in residential sales should, for example, not try selling industrial or commercial property, without appropriate assistance from a specialist industrial or commercial agent and any assistance should be disclosed.

The portion underlined above is an addition in the PPRA Code.

THE DUTY TO PERFORM WITH REASONABLE CARE AND SKILL

34.2.1.4 A property practitioner shall not in his capacity as a property practitioner wilfully or negligently fail to perform any work or duties with such degree of care and skill as might reasonably be expected of a property practitioner.

The scope of improper conduct under this regulation is wide, as the act can be willful (i.e., intentional) or negligent.

This regulation requires a property practitioner to properly apply his/her mind in the conduct of his/her duties. The standard applied is that of a reasonable property practitioner acting with the care and skill that can be expected of a reasonable property practitioner.

This regulation applies to all aspects of a property practitioner's duties such as valuating a property for rent or sale, expressing a view on the likely rental or value of a property, completing a mandate, sales or rental agreements etc. If the property practitioner does not act with the care and skill expected from a reasonable property practitioner (acting diligently), he/she could be found guilty of a contravention of this regulation.

COMPLIANCE WITH THE ACT AND REGULATIONS

34.2.1.5 A property practitioner shall comply with both the Act and the regulations and all applicable by laws

A property practitioner can be found guilty of unethical conduct if any of the provisions of the Property Practitioners Act,22 of 2019 and or the Regulations are not complied with.

THE USE OF A JURISTIC ENTITY/NOMINEE AS A FRONT

34.2.1.6 A property practitioner shall not through the medium of a company, close corporation or third party, or by using such company, close corporation or third party as a front or nominee do anything which would not be permissible for him to do if he were operating as a property practitioner.

A property practitioner cannot use a form of juristic entity or nominee to escape liability for improper conduct. In other words, a property practitioner cannot do anything under the guise of a company which he/she could not have done when acting in a personal capacity.

An example would be purchasing a property using a company as the purchaser where the property practitioner has a mandate to sell such property (this would be permissible where this was disclosed in writing to the seller).

INTEREST IN TRUST MONEY

A Property Practitioner –

34.2.1.8 shall not solicit or influence any person entitled to trust funds under his control to make over or pay to the property practitioner directly or indirectly any interest on moneys deposited or invested in terms of section 54(1) or 54(2) of the Act.

34.2.1.9 shall, before he receives any money in trust in respect of a contract of sale or lease, disclose to the parties concerned that unless they agree in writing to whom interest earned on such money must be paid, the interest may accrue to the Property Practitioners Fidelity Fund.

34.2.1.10 shall, if any money is invested by him pursuant to section 54(2) of the Act or pursuant to an instruction by the party entitled to the interest on money held in trust by the property practitioner –

34.2.1.10.1 invest such money at the best interest rate available in the circumstances at the bank or building society where he normally keeps his trust account or accounts; and

34.2.1.10.2 pay the full amount of the interest which accrued on the investment to the party entitled to such interest.

Interest earned on moneys held in trust by property practitioners is payable to the Authority for the benefit of the Property Practitioners Fidelity Fund, unless the parties agree otherwise in writing.

Clients generally wish to earn interest on their funds and as such, the option should be given to the client. It is best to include a clause in the sale or lease agreement identifying to whom the interest will accrue to comply with this regulation.

Banks generally require that before trust moneys can be invested with interest to accrue to a client, the provisions of FICA need to be complied with. For further information on FICA requirements refer to our article “FICA for Estate Agents”.

Ensure that the client understands the circumstances under which he/she will earn interest on moneys deposited into a trust account.

CONFIDENTIALITY

34.2.2. No property practitioner shall without just cause, divulge to any third party any confidential information obtained by him concerning the business affairs, trade secrets or technical methods or processes of a client or any party to a transaction in respect of which he acted as a property practitioner.

Information acquired by the property practitioner while acting as such must be kept confidential. The regulation does, however, provide that confidential information may be divulged with just cause. An example of just cause would be where the property practitioner is obliged to disclose information in terms of legislation. No property practitioner may use such confidential information to further his personal interests.

MANDATES

A MANDATE IS OBLIGATORY

34.3.1 No estate agent shall -

34.3.1.1 offer, purport or attempt to offer any immovable property for sale or to let or negotiate in connection therewith or canvass or undertake or offer to canvass a purchaser or lessee therefor, unless he has been given a mandate to do so by the seller or lessor of the property, or his duly authorised agent;

34.3.1.2 on behalf of a prospective purchaser or lessee, offer, purport or attempt to offer to purchase or lease any immovable property or negotiate in connection therewith or canvass, or undertake or offer to canvass a seller or lessor therefor, unless he has been given a mandate to do so by such prospective purchaser or lessee, as the case may be, or his

The effect of regulations 34.3.1.1 and 34.3.1.2 is that an estate agent must obtain a mandate in order to sell or lease any immovable property.

As can be seen below, sole mandates must be in writing. It is not a requirement for an open mandate to be in writing and such a mandate may be verbal. It is advisable however that insofar as is possible, an open mandate be obtained in writing. If this is not possible, ensure that all the essential elements are agreed upon and follow up by sending an e-mail to the client confirming the mandate and setting out the agreed terms to avoid a dispute in the future.

The elements that need to be agreed upon include the duration of the mandate, the purchase price or rental amount required and the commission amount or percentage that will be paid to the agent. Bear in mind that in any subsequent claim for commission, the onus will rest on the agent to prove the existence of the mandate and the terms thereof. To the extent that these were not specifically agreed upon, no commission claim can be successful.

Agents are cautioned against introducing purchasers or lessees unless there is a mandate in place, even if for only a short duration.

SOLE MANDATES

No estate agent shall –

34.3.1.3 accept a sole mandate, or the extension of the period of an existing sole mandate, unless –

34.3.1.3.1 all the terms of such mandate (or extension, as the case may be) are in writing and signed by the client <u>in a manner acceptable in law, including by way of an electronic signature as permitted under the Electronic Transactions and Communications Act,2002;</u> and

34.3.1.3.2 the expiry date of the mandate (or extension, as the case may be) which shall be expressed as a calendar date, is specifically recorded in the written sole mandate (or extension, as the case may be);

The underlined portion above is a new addition in the PPRA code of conduct.

The wording “in a manner acceptable in law, including by way of an electronic signature as permitted under the Electronic Transactions and Communications Act,2002” is a new inclusion and was previously not mentioned in the code of conduct of the Estate Agency Affairs Act.

In terms of the above a sole mandate must be in writing and signed by the client. Although it is not an express requirement of the Code that the agent sign the mandate, it is advisable that the agent does so.

The expiry date of the sole mandate must be expressed as a calendar date, for example 31 March 2022. It is not sufficient to refer to a time period, such as “3 months”.

The length of a mandate is not limited by the Code, but must be reasonable. The particular circumstances of the mandate will determine what a reasonable time period is. For example, it might be reasonable to have a one year mandate in the case of a high end commercial property, but not so for a flat valued at R1 000 000.00.
A mandate “until the property is sold” will not be regarded as reasonable.

EXTENSION OF A SOLE MANDATE

No estate agent shall –

34.3.1.4 accept a sole mandate which contains a provision conferring upon him –

34.3.1.4.1 an option to extend the sole mandate for a certain period after expiry of the sole mandate; or

34.3.1.4.2 a mandate to continue to render the same service referred to in the sole mandate, after expiry of the sole mandate

The requirement as contained in the previous code of conduct, that the client must sign a separate document prior to signing the mandate, which

1. contains express consent by the client to include the said provision in the mandate;
2. contains an explanation of the reason why the provision is included;
3. contains an explanation of the implications of the inclusion of the provision;
4. must be signed by both the client and the agent.

has been omitted from the PPRA code of conduct.

This regulation does not prevent an agent from renewing the sole mandate upon expiry thereof or from continuing to sell the property on an open mandate basis after expiry – provided that such open mandate is provided, verbally or in writing, upon the expiry of the sole mandate.

A SOLE MANDATE WHICH INCLUDES A POWER OF ATTORNEY

No estate agent shall –

34.3.1.5 accept a sole mandate which also confers upon him a power of attorney to act on behalf of the person conferring the mandate, unless the intention and effect of such power of attorney is fully explained in the document embodying the sole mandate;

In terms of the above regulation a sole mandate which also confers power of attorney to the agent, may only be accepted by the agent if the intention and effect of the power of attorney is explained in full, in the combined document. It is thus possible for the agent to be granted power of attorney, but this is not advisable.

A better suggestion would be to instruct a Conveyancer to draft a power of attorney in favour of a relative or other person appointed by the client.

FUTURE SOLE MANDATE INCLUDED IN CURRENT CONTRACT

No estate agent shall –

34.3.1.6 include, or cause to be included, or accept the benefit of, any clause in a contract of sale or lease of immovable property negotiated by him, whereby a sole mandate is directly or indirectly conferred upon him to sell or let the said immovable property at any time after the conclusion of the said contract;

The purchaser's freedom of choice regarding future transactions relating to the property being purchased cannot be curtailed by a clause in the current sale or lease agreement.

A typical example of a contravention of this clause is the inclusion of a clause in a lease to the effect that the agent is granted a sole mandate to sell the property upon the expiry of the lease. In this case, the preferable clause is to grant the agent a (open) mandate to sell the property upon conclusion of the lease and restricting the lessor from granting any other agent a sole mandate (which would conflict with the open mandate). The value of this clause is however moot and in practice these clauses tend to cause offence and are very rarely implemented.

A further example of a contravention is a sole mandate granted to an agent to sell the purchasers property in a subject to sale scenario combined with a continued marketing clause in a sale agreement. This applies equally to the sole mandate granted in such agreement to continue marketing the seller's property pending the sale of the purchaser's property. The above does not however prevent a separate sole mandate in these circumstances – separately executed.

CONFLICT OF INTEREST

No estate agent shall –

34.3.1.7 accept any mandate or instructions for work in respect of immovable property if his interest therein would compete with his obligations towards an existing client in respect of the same immovable property without first disclosing such interest in writing to such client;

It is important in this regard to note the definition of "client" in regulation 1. Client means: "a person who has given a property practitioner a mandate, provided that should a property practitioner have conflicting mandates in respect of a particular immovable property, the person whose mandate has first been accepted by the property practitioner is regarded as the client".

If, for example, a purchaser provides an agent a mandate to locate a property and the agent locates such a property, the agent must be mindful that the purchaser and not the seller is the "client". This issue needs to be practically resolved when proceeding.

MISREPRESENTATION

No estate agent shall –

34.3.1.8 knowingly or negligently make a material misrepresentation concerning the likely market value or rental income of immovable property to a seller or lessor thereof, in order to obtain a mandate in respect of such property;

An agent may not knowingly or negligently misrepresent the likely market value or rental income of the property in order to get a mandate from the client in terms of this regulation.

This clause does not prevent an agent from marketing a property at a higher value, either at the request of the seller or to test the market. This clause does however prohibit an agent from inflating their valuation of property beyond its correct value or advising the seller that the property is worth more than it actually is, in order to obtain the mandate (the intention being to obtain the mandate based on the incorrectly increased value and thereafter "price council" the seller in time).

Should the agent have applied his mind and based his opinion on the likely market value on adequate research, he cannot be found guilty of contravening this clause even if the market value differs from the selling price. Agents are advised to retain objective evidence of their market related valuations.

Whilst this regulation is not directly related to this, it does discourage agents from providing lower than market valuations where requested to do so for the purposes of deceased estate or "family" transfers etc. It should be borne in mind that such "lower than" market valuations are a fraud on SARS due to the consequence of reducing transfer duty based on such value.

With regard to a query re a rental to be achieved for a particular property, agents should be cautious to obtain accurate rental estimates from experts before providing a view.

THE REQUIREMENT OF SPECIALISED SKILL

No estate agent shall –

34.3.1.9 accept a mandate in respect of any immovable property if the performance of the mandate requires specialised skill or knowledge falling outside his field of competence, unless he will in the performance of the mandate be assisted by a person who has the required skill or knowledge and this fact is disclosed in writing to the client;

Whether specialist skill or knowledge is required will be considered on the merits of each individual case.

Agents who specialise in residential sales should, for example, not try selling industrial or commercial property, without appropriate assistance from a specialist industrial or commercial agent and any assistance should be disclosed.

DUTY WITH REGARDS TO SOLE MANDATES

No estate agent shall –

33.3.1.10 accept a sole mandate to sell or let immovable property, unless he has explained in writing to the client –

34.3.10.1 the legal implications should the client during the currency of the sole mandate or thereafter sell or let the property without the assistance of the estate agent, or through the intervention of another estate agent; and

34.3.10.2 what specific obligations in respect of the marketing of the property will be assumed by the estate agent in his endeavour to perform the mandate:

Provided that such explanations, if contained in a standard pre-printed or typed sole mandate document shall be in lettering not smaller than that generally used in the remainder of the document.

Often the client is unaware of the commission implications that may arise from a sole mandate, such as if the property is sold by the client himself or another agent during the course of the sole mandate. These implications need to be explained to the client.

These implications can further extend to the sale of the property after the expiry of the mandate to a purchaser who was introduced to the seller by the agent during the course of the mandate.

It is also important that the client be made aware of the specific obligations that the agent assumes in respect of marketing the property. These cannot be “hidden” in the “small print”. The principles adopted here are echoed by the Consumer Protection Act, being that the sole mandate document needs to be clearly worded in simple understandable English – no technical jargon.

THE DUTY TO DISCLOSE

An estate agent shall –

34.3.2.1 convey to a purchaser or lessee or a prospective purchaser or lessee of immovable property in respect of which a mandate has been given to him to sell, let, buy or hire, all facts concerning such property as are, or should reasonably in the circumstances be, within his personal knowledge and which are or could be material to a prospective purchaser or lessee thereof;

34.3.2.2 if he conducts his business under a trade name or style other than his own name, clearly disclose his full name in all correspondence, circulars and other written documentation; and

34.3.2.3 not perform or attempt to perform any mandate in respect of a particular property if a current prior mandate, which conflicts with the aforesaid mandate, has been accepted by him, unless he has disclosed to the person who has given the later mandate the existence of such prior mandate, and the fact that he will not be the estate agent's client in respect of that property;

The estate agent's duty to disclose is codified in regulation 34.3.2.1 of the *Authority's Code of Conduct* in that the agent must disclose facts regarding the property that:

1. are within the personal knowledge of the estate agent; or
2. should reasonably, within the circumstances, be within his personal knowledge (i.e. the agent is the area expert); and
3. which are material to the prospective purchaser or lessee; or
4. which could reasonably be material to the prospective purchaser or lessee.

The above test is wide and calls upon agents to carefully examine potential disclosure issues. An example would be whether to disclose a death in the property being sold. The death is or should be in the knowledge of the agent and is or arguably would be material to a purchaser. It must be borne in mind that to the extent that agents fail in this duty, the neighbours will no doubt inform the purchaser after transfer in any event.

A further example is the agent being an area specialist and being aware of development plans in the area as may relate to new roads being built or sub-economic housing projects in the immediate vicinity of the property etc. Reference can be made on the comprehensive article by Schindlers on "The Duty to Disclose".

Regulation 34.3.3 deals with conflicts of interest in respect of mandates. Should the agent hold a mandate in respect of a particular property, he may not accept a conflicting mandate from another person without disclosing the existence of the first mandate.

CONFLICT OF INTEREST

No estate agent shall –

34.3.3 purchase directly or indirectly for himself, or acquire any interest in, or conclude a lease in respect of, any immovable property in respect of which he has a mandate, without the full knowledge and consent of the person who conferred the mandate, or sell or let his own immovable property or any immovable property in which he has any direct or indirect interest, to any prospective purchaser or lessee who has retained his services, without that purchaser or lessee having full knowledge of his ownership of, or interest in, such immovable property.

This provision does not prohibit an agent from selling or leasing their own property or from purchasing a property in respect of which they have a mandate to sell. This provision rather ensures that there is no conflict of interest when entering into such transactions.

In other words, agents must guard against any potential conflict of interest and make the appropriate disclosures. Such disclosures should be made in writing to prevent future disputes.

DUTY NOT TO MAKE MISREPRESENTATIONS OR FALSE STATEMENTS OR TO USE HARMFUL MARKETING TECHNIQUES

MISREPRESENTATION

No estate agent shall –

34.3.4.1 in his capacity as an estate agent publish or cause to be published any advertisement which could create the impression that it was published by the owner, seller or lessor of immovable property, or by a prospective purchaser or lessee of immovable property.

The prospective purchaser must know whether he is dealing with an agent or owner and consequently whether the asking price includes or excludes estate agents commission.

An estate agent should at all times maintain the highest standards of honesty when making statements, preparing accounts and records. The test here is willfully (i.e. intentionally) or negligently. Agents should be cautious not to allow others to make such inaccurate statements where the agents is aware that such statement is inaccurate.

No estate agent shall –

34.3.4.2 wilfully or negligently, in relation to his activities as an estate agent, prepare, make or assist any other person to prepare or make any false statement, whether orally or in writing or sign any false statement in relation thereto knowing it to be false, or knowingly or recklessly prepare or maintain any false books of account or other records.

34.3.4.3 claim to be an expert or to have specialised knowledge in respect of any estate agency service if, in fact, he is not such an expert or does not have such special knowledge.

34.3.4.4 advertise or otherwise market immovable property in respect of which has been given a mandate to sell or let, at a price or rental other than that agreed upon with the seller or lessor of the property.

The above Regulation 34.3.4.2 relates to regulation 34.3.1.9. Agents must seek expert advice if required.

Regulation 34.3.4.4 calls on agents to only market a property at the mandated price. If there is agreement that such price be reduced, it is advisable that the reduction be agreed in writing. At a minimum, an e mail must be sent confirming the reduction.

No estate agent shall –

34.3.4.5 without derogating from the generality of the aforegoing –

34.3.4.5.1 wilfully or negligently mislead or misrepresent in regard to any matter pertaining to the immovable property in respect of which he has a mandate;

34.3.4.5.2 use any harmful or misleading marketing technique or method to influence any person to confer upon him a mandate to render any estate agency service or to sell, purchase, let or hire immovable property, having regard to the general experience which such person has concerning property transactions and the circumstances surrounding the transaction or proposed transaction.

The test here is again that of negligently or intentionally misleading or misrepresenting.

If posed with a question such as whether the property has certain defects or has certain features, the estate agent may not confirm that there is or is not such defect or feature without first verifying such fact. An example would be whether a property has underfloor heating in all the rooms in the house. The agent should not assume or guess but rather get the precise information from the seller. This is where disclosure documents are useful and protect agents.

The Code of Conduct does not define what constitutes harmful or misleading marketing. The determination thereof will lie in the facts of the individual case. An example of harmful or misleading marketing could be presenting an offer to purchase to a seller shortly before the expiry thereof whereas the agent has had the offer in his possession for some time prior to presenting same – the intention being to place undue pressure on the seller to accept same. In addition, inexperienced clients should receive a greater amount of care than more experienced ones.

No estate agent shall –

34.3.4.6 use any firm or trading name in respect of his business if such name may give rise to confusion on the part of the public in respect of the nature of the business carried on by him.

The content of this regulation is self-explanatory. This regulation is also a new addition to the Code of Conduct

OFFER TO PURCHASE TO BE *BONA FIDE*, IN WRITING AND SIGNED BY THE OFFEROR

No estate agent shall –

34.3.4.7 inform a seller or purchaser, or prospective seller or purchaser, of immovable property in respect of which he has been given a mandate to sell or purchase that he has obtained an offer in respect of the property from a purchaser or the seller (as the case may be), unless such offer –

34.3.4.7.1 is in writing; and

34.3.4.7.2 has been signed by the offeror in manuscript, albeit that the offer was subsequently electronically transmitted to the estate agent; and

34.3.4.7.3 is to the knowledge of the estate agent concerned a *bona fide* offer.

Note that the Estate Agency's Affairs Act 112 and the previous code of conduct do not refer to "in manuscript, albeit that the offer was subsequently electronically transmitted to the estate agent; and ", this is an inclusion in the new regulations ie the underlined portion above.

This does not mean that an agent cannot verbally inform any party that an offer has been received. This is permitted provided that an actual, written *bona fide* offer has been received.

"FOR SALE" OR "SOLD" BOARDS

No estate agent shall –

34.3.4.8 affix any board or notice to the immovable property indicating that such property is for sale or hire or has been sold or let unless –

34.3.4.8.1 the seller or lessor (as the case may be) has given his written consent to do so; and

34.3.4.8.2 the estate agent concerned in fact has a mandate to sell or let the property, or in fact has sold or let the property as the case may be; or

34.3.4.9 affix or erect any advertising board or notice to solicit business-

34.3.4.9.1 on local authority property, without express written approval by the local authority; or

34.3.4.9.2 which is in contravention of the regulations of the advertising by-laws of the applicable local authority.

Regulations 34.3.4.9 to 34.3.4.9.2 are new inclusions in the new regulations, and were previously not mentioned in the code of conduct prescribed by the Estate Agency Affairs Act. i.e. the underlined portion above.

It is not in the public interest for the effectiveness of an estate agent to be falsely presented. Some agents misuse “For sale” or “Sold” boards to gain exposure.

This provision thus regulates the use of “For sale” or “Sold” boards. These may only be affixed to properties where:

1. the estate agent has permission in writing from the seller or lessor; and
2. the agent has a mandate to sell/let the property or has in fact sold/let the property; and
3. it is not in contravention of the local authority’s rules and regulations.

It must be borne in mind that in the case of verbal mandates, written permission must still be obtained to display a “For sale Board”. Furthermore, it is these provisions that make the inclusion of permission to display a “Sold” board important in sale agreements.

The above applies equally to “To Let” or “Let / Rented” boards.

DUTY IN RESPECT OF OFFERS AND CONTRACTS

THE DUTY TO PRESENT OFFERS

No estate agent –

34.4.1 who has a mandate to sell or purchase immovable property shall wilfully fail to present or cause to be presented to the seller or purchaser concerned, any offer to purchase or sell such property, received prior to the conclusion of a legally valid contract of sale in respect of such property, unless the seller or purchaser (as the case may be) has instructed him expressly not to present such offer;

34.4.2 who has a mandate to sell immovable property, may present competing offers to purchase the property in such a manner as to induce the seller to accept any particular offer without regard to the advantages and/or disadvantages of each offer for the seller;

34.4.3 shall amend any provision of a signed offer, prior to rejection thereof, or a written mandate or any contract of sale or lease, without the knowledge and express consent of the offeror or the parties to the contract, as the case may be.

A mandated estate agent must present all offers received. This is so even if the agent is of the view that the purchase price or terms of the offer are not reasonable.

The client may, however, on the granting of the mandate expressly instruct the agent not to submit offers that do not meet certain criteria. An example could be offers below a certain purchase price.

When presenting competing offers, agents may further not manipulate a client into accepting a particular offer. The advantages and disadvantages need to be objectively explained such that the client can make an informed decision.

Regulation 34.4.3 deals with the principle that there may be no variations to contractual documents unless the offeror or the parties to the contract (as they case may be) have provided consent. Such consent must be in writing by way of a variation initialed by the parties or by way of an addendum signed by the parties.

DUTY TO EXPLAIN PROVISIONS AND PROVIDE COPIES OF THE AGREEMENT

An estate agent shall –

34.5.1 explain to every prospective party to any written offer or contract negotiated or procured by him in his capacity as an estate agent, prior to signature thereof by such party, the meaning and consequences of the material provisions of such offer or contract, or, if he is unable to do so, refer such party to a person who can do so;

34.5.2 if he knows that an offer submitted by him as an estate agent to any party has been accepted, or has not been accepted by the expiry date thereof, forthwith notify the offeror of such fact; and

34.5.3 without undue delay furnish every contracting party with a copy of an agreement of sale, lease, option or mandate with which he is concerned as an estate agent, provided that the aforegoing shall also apply in respect of an offer to purchase or lease if the offeror specifically requests a copy thereof.

The estate agent must, prior to signature, explain the meaning and consequences of all material provisions of the agreement to the parties.

The material provisions of the agreement would be, amongst others:

1. the property description (and movable property, if applicable);
2. the purchase price and payment thereof;
3. the occupation date and occupational interest;
4. suspensive and/or resolutive conditions;
5. commission amount and when it is payable.

If the estate agent is unable to explain the material provisions, he must refer to the party to someone who is able to do so. It is advisable that this regulation be applied in a wider sense in that an agent should explain every clause of the contract such that the parties understand the implications and consequences of the contract fully.

The estate agent must forthwith advise the offeror of a sale or lease as to whether such offer has been accepted. Failure to do so can have adverse consequences such as the offeror making a new offer in respect of a different property.

The estate agent must provide the parties with copies of the contract concluded, whether these be a mandate, sale agreement or lease. The agent cannot refuse to provide copies. Note that this extends to an offer to lease or buy – where such offer was not accepted.

REMUNERATION

OFFERS SUBJECT TO SUSPENSIVE OR RESOLUTIVE CONDTIONS

No estate agent shall –

34.6.1 stipulate for, demand or receive directly or indirectly any remuneration, commission, benefit or gain arising from or connected with any completed, pending or proposed contract of sale or lease which is subject to –

34.6.1.1 a suspensive condition, until such time as that condition has been fulfilled; or

34.6.1.2 a resolutive condition, during the time that the transaction may fall away as a result of the operation of the said resolutive condition

Note that the prior code of conduct at paragraph 8.1.2 qualified the above to include: “unless

(aa) good cause exists; and

(bb) the party liable for the payment of the remuneration, commission, benefit or gain has expressly consented in a written document executed independently of the contract in question, to such payment at any time, notwithstanding the fact that the said contract is subject to a suspensive or resolutive condition, as the case may be; and

(cc) such document contains an explanation of the implications and financial risks for such party of such payment; and

(dd) such document is signed by such party and the estate agent in question”;

As such the new regulations, have deleted the abovementioned. This is thus clearly no longer permitted.

A sale agreement that has a suspensive condition only becomes binding on the parties once the suspensive condition has been met. The result of the failure to meet a suspensive condition does not result in the cancellation of the agreement, but in that the agreement did not come into existence in the first place.

A resolutive condition is a future uncertain event, upon the happening of which, the sale agreement will fail and become void. An example would be a sectional title off plan sale agreement that is resolutive upon the opening of the sectional title register within one year from date of sale. If the register is not opened after one year, the agreement becomes void.

The estate agent is only entitled to commission once a binding agreement has been entered into and thus only once any suspensive conditions have been met or until after the resolutive condition period.

The inclusion of a clause into the sale agreement providing that the agent shall be entitled to commission prior to any suspensive conditions being met, or time period of a resolutive condition is contrary to this regulation, as the party that is liable for the commission bears substantial risk in these circumstances.

PROHIBITION AGAINST MISREPRESENTATION: MINIMUM PRESCRIBED COMMISSION / FEE

No estate agent shall –

34.6.2 convey to his client or any other party to a completed or proposed transaction in which he acted or acts as an estate agent, that he is precluded by law from charging less than a particular commission or fee, or that such commission or fee is prescribed by law, the board or any institute or association of estate agents or any other body.

An agent may not advise a client that a certain commission amount is prescribed or that the agent may not in law charge under a certain commission amount. I.e. the agent may not make misrepresentations with regard to commission in order to achieve a higher commission amount.

The Competition Commission views recommended commission tariffs as price fixing and thus no prescribed minimum commission tariff for estate agents exists. Conveying that the Authority or any other institution or association of estate agents prescribes a minimum commission constitutes misrepresentation.

The commission amount must be negotiated and agreed upon by the estate agent and the client.

This regulation does not preclude estate agents from advertising that they charge a fixed percentage of the purchase or lease amount, for example, 5%, but they may not advertise undercutting or comparative commission percentages such as “I charge 5%, 2% lower than the other agents in the area”.

THE DUTY TO INFORM OF THE POSSIBILITY OF DOUBLE COMMISSION

No estate agent shall –

34.6.3 introduce a prospective purchaser or lessee to any immovable property or to the seller or lessor thereof, if he knows, or has reason to believe, that

34.6.3.1 such person has already been introduced to such property or the seller or lessor thereof by another estate agent and

34.6.3.2 that there is a likelihood that his client may have to pay commission to such other, or to more than one estate agent, should the sale or lease be concluded through his intervention.

It is important to note that the following sentence contained in the prior code of conduct has been omitted from the current code:

"Provided that the aforegoing shall not apply if the estate agent has informed his client of such likelihood and obtained his written consent to introduce such party to the property or the seller or lessor thereof."

In other words, informing your client, getting consent and proceeding despite the prior introduction is no longer permitted.

This regulation protects the seller or lessor from being liable to pay double commission. The estate agent's responsibility in terms of this regulation is quite wide as he/she has a duty to inform the seller not only if he/she knows that another estate agent has introduced a prospective purchaser to the property or seller, but even if there is reason to believe so, or there is a likelihood that double commission might be payable.

COMMISSION

No estate agent shall –

34.6.4 include, or cause to be included, or accept the benefit of, any clause in a mandate or in a contract of sale or lease of immovable property, providing for payment to him by the seller or lessor of immovable property, of any remuneration, commission, benefit or gain arising from or connected with a contract of sale or lease, regardless of whether the purchaser or lessee is financially able to fulfil his obligations in terms of the said contract:

The agent must introduce a willing and able purchaser to the seller, lessor or property in order to earn commission.

A clause in any mandate or sale or lease agreement whereby the seller or lessor is liable for estate agents commission even if the purchaser is financially unable to give effect to the agreement is prohibited save in the event that the above is complied with.

COMMISSION MAY NOT BE DEDUCTED FROM THE DEPOSIT

No estate agent shall –

34.6.5 include, or cause to be included, or accept the benefit of, any clause in a contract of sale or lease of immovable property negotiated by him, entitling him to deduct from any money entrusted to him in terms of the contract, any remuneration, commission, benefit or gain arising from or connected with such contract: Provided that the aforegoing shall not be so construed so as to prohibit an estate agent from making such deduction when such money is actually paid over by him to the party entitled thereto and such party is in terms of the said contract liable for the payment of such remuneration, commission, benefit or gain.

COMMISSION MAY NOT BE DEDUCTED FROM MONEYS HELD IN TRUST

An estate agent –

34.6.6 shall not include, or cause to be included, or accept the benefit of, any clause in a contract of sale of immovable property negotiated by him, providing for payment to the seller, prior to registration of transfer of the property in the purchaser's name, of any portion of the purchase price entrusted to the estate agent by the purchaser: Provided that the aforegoing shall not apply if –

34.6.6.1 good cause exists; and

34.6.6.2 the purchaser has prior to his signature of the contract in question, consented in writing in a document executed independently of the said contract to such payment; and

34.6.6..3 such document contains an explanation of the implications and financial risks of such payment for the purchaser; and

34.6.6.4 such document is signed by both the seller and the purchaser and the estate agent in question.

34.6.7 shall not operate a trust account, other than in compliance with the Act and these regulations.

An estate agent may not deduct his/her commission from a deposit held in trust by the agent. The deposit remains the funds of the purchaser until the property is registered into his/her name and only on registration of the transfer is the seller entitled to the purchase price. As such the commission may only be deducted from the deposit when the deposit becomes payable to the seller

The purchaser may consent to the deposit being paid to the seller prior to registration, in which case the estate agent may, by written agreement, be entitled to his/her commission on payment to the seller. The seller's receipt of a portion of the purchase price before registration from the purchaser may only be agreed to if good cause exists, and the consent by the purchaser is contained in a separate document setting out the implications and financial risks and signed by the seller, purchaser and estate agent.

34.6.7 No estate agent shall operate a trust account, other that in compliance with the Act and these regulations.

This regulation is self explanatory.

EFFECTIVE CAUSE

INTRODUCTION

This article is intended to shed some light on the concept of effective cause and estate agents entitlement to commission.

GENERAL REQUIREMENTS FOR ENTITLEMENT TO COMMISSION

The following are the general requirements for an entitlement to commission

The Existence of a Mandate

The estate agent must have an actual mandate from the owner of the property entitling the agent to market the property. This is not only a legal requirement but also as ethical requirement found in Regulation 3 of the Estate Agents Code of Conduct.

Save in the case of a sole mandate, the mandate may be verbal. A written mandate is however preferable. To the extent not possible, the agent should confirm the verbally agreed terms of the mandate with the property owner via e mail.
To claim commission, an agent will have to prove the terms of the mandate, i.e. purchase price required and commission amount agreed upon.

The Performance of the Mandate

The agent must have performed in terms of the mandate (one of the reasons why the elements of the mandate must be clearly agreed).

Effective Cause

The agent must have been the effective cause. A distinction must be made between written sole mandates and open mandates. The former must be determined in accordance with the specific provisions thereof.

LEGISLATIVE REQUIREMENTS

The Property Practitioners Act, 2019, provides that no person may act as an estate agent unless in possession of a valid fidelity fund certificate. The Act further provides that any agent not in possession of a fidelity fund certificate is not entitled to any remuneration arising from their activities as an estate agent, and also that an agent who has not complied with the prescribed standard of training may not draft or complete any document or clause conferring a mandate on an agent to perform or relating to the sale or lease of immovable property. It further says that an agent who contravenes this section shall not be entitled to any payment, remuneration or damages in respect of such a document.

The Property Practitioners Act provides than an intern estate agent may not complete / draft documentation otherwise than in the presence of a Principal Agent who must certify as such.

THE ESTATE AGENTS CODE OF CONDUCT

Where an agent wishes to introduce a person to a property or the owner thereof and such agent knows or has reason to believe that there is a likelihood that by virtue of such introduction, the property owner will be subject to a double commission claim, the agent must first inform the client and obtain written consent to make the introduction

PERFORMANCE OF THE MANDATE

In the absence of special terms, the performance of the mandate involves:

- Introduction by the agent of a purchaser to a seller;
- Establishing the purchaser was willing and able to buy the property;
- Establishing that a valid contract of sale was concluded;
- Establishing that the introduction was the effective cause of the contract;
- The commission payable (as per mandate or as may be proven).

COMMISSION PAYABLE

There have been various cases around this issue. What arises from these cases is that an agent claiming commission must allege and prove what commission amount was agreed upon. Courts have held that a court will not make an agreement for an agent that should have been made when entering into the mandate but that which was not made. i.e. agents needs to ensure there is agreement up front.

Whilst it is possible for an Agent to prove an "implied' commission, the Agent bears the onus to prove this "implied" commission amount. It must be noted that the onus in such cases is not easily discharged.

DETERMINING EFFECTIVE CAUSE

The typical scenario here is where an agent has introduced a purchaser to the seller of a property and thereafter a different agent concludes a sale with the same purchaser, alternatively an agent makes an introduction of a purchaser to a seller and a property and the seller and purchaser thereafter do a private sale, excluding the agent.

The difficulty with the concept of effective cause is that there is no clean and objective formula that can be applied to every case. Each case, as can be seen from the principles below, must be judged on its own facts and merits.

The issue of effective cause has come before our courts on numerous occasions. What follows are the principles that arise from these court decisions.

The court examines the efforts of Agent One and thereafter examines the efforts of Agent Two. The court determines what new factors were introduced by Agent Two. These are known as the "intervening factors". The court makes a determination as to whether the efforts of Agent Two (i.e. the new intervening factor) was sufficient to outweigh the efforts of Agent One, thereby rendering Agent Two as the effective cause of the sale.

This does not mean that merely because Agent Two overcame obstacles that previously prevented a sale or that a higher price is achieved, that Agent Two will automatically be the effective cause. Our courts have further not prescribed a time period that can elapse before Agent Two can safely be considered the effective cause.

The courts have held that the activities of the Agent claiming commission must have predominated the purchaser's decision to buy the property. Courts have further held that it is not sufficient for the Agent to be the cause of the sale but that the Agent must be the "Effective Cause" of the sale.

The test is an objective test – evidence of the seller or purchaser as to what induced the sale will be considered by the courts but is not decisive. The courts have further said that the claim to commission is not dependent on how much work was put into the sale. The mere furnishing of an address may be sufficient provided that a line of cause and effect can be reasonably traced from the introduction to the conclusion of the sale.

The courts have further said that the question as to which agent was the effective cause is often difficult to answer but that save in exceptional cases the first introduction would necessarily be an important factor. A further question is whether but for the introduction of the first agent, would the purchaser have been aware of the existence of the property?

CONCLUSION

What is clear from the various cases is that courts have interpreted "effective cause" largely based on the facts of each case. There is no formula and no assumptions can be made.

Agents should ensure the mandate is complete, accurate and complies with all formalities. Where marketing a property on an open mandate the Agent should provide the Sellers with a weekly list of prospective purchasers introduced to the property. Where marketing a property on a sole mandate Agents should likewise provide the Seller with a list of prospective purchasers introduced to the property at termination of the mandate.

EFFECTIVE CAUSE OF A SALE: W*AKEFIELDS 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.

SPOTTER'S FEES: IS IT LEGAL FOR PROPERTY PRACTITIONER TO PAY A SPOTTER'S FEE TO A THIRD PARTY

INTRODUCTION

A spotter's or finder's fee is a fee that is paid by a property practitioner to a third party for introducing the property practitioner to a seller or property listing. The question has arisen as to whether the payment of such spotter's fees to third parties is permissible, and if so:

(a) under what circumstances; and;

(b) may the estate agent advertise that he will pay a spotter's fee.

LEGISLATIVE PROVISIONS

The Property Practitioners Act, 2019 defines a property practitioner, *inter alia*, as a person who, for his own account, holds himself out to be, or directly or indirectly advertises that he, on instruction of another person, sells, purchases, publicly exhibits or negotiates the sale of immovable property.

Section 48 of the same Act prohibits any person from acting as a property practitioner unless the person has a valid Fidelity Fund Certificate. Section 56 further sets out that a property practitioner shall not be entitled to any remuneration for acting as an agent if he is not in possession of a valid Fidelity Fund Certificate. In terms of Regulation 34.2.1 of the Property Practitioners Code of Conduct a property practitioner shall not act in a manner that is contrary to the integrity of property practitioners in general.

This then raises the question of whether an estate agent may remunerate a third party that does not hold a valid Fidelity Fund Certificate for introducing the agent to a seller or property listing.

HAIG FARMING (PTY) LTD / EG ELLIOT REAL ESTATE CC (14175/2013) [2015] ZAKZPHC 47

This question was well answered in the above case. The plaintiff was a specialist in agricultural property and was often called upon to consult on matters pertaining to agricultural property. The plaintiff and EG Real Estate CC had an agreement in terms of which EG Real Estate CC would pay the plaintiff a spotter's fee for introducing them to sellers.

After paying the plaintiff a spotter's fee on numerous transactions, EG Real Estate CC refused to pay the agreed fee on a specific transaction based on the argument that the plaintiff was not in possession of a Fidelity Fund Certificate.

The court concluded that the first question that needs to be addressed is whether the third party acted as an estate agent or not. On interpretation of the *Estate Agency Affairs Act*, which was in force at that time, the court found that the supplying of a listing is not defined as an act performed by an estate agent.

As such the third party or "spotter" would not be barred from receiving any remuneration in supplying the identity of the immovable property which was up for sale to the estate agent or referring the seller to the agent. The court further concluded that to rely on the absence of a Fidelity Fund Certificate in order to avoid paying the agreed spotter's fee would be opportunistic.

WHAT THEN ABOUT CANVASSING AND ADVERTISING?

Canvassing can be considered an act performed by a property practitioner. As such if a spotter were to canvass for property listings he would be seen to be acting as a property practitioner and would require a Fidelity Fund Certificate in order to do so.
In respect of advertising on business cards or flyers, for example that spotter's fees are payable, this practice is viewed as contrary to the duty of the property practitioner to maintain the integrity of property practitioners in terms of the Code of Conduct.

CONCLUSION

In conclusion, a third party that introduces an agent to a seller or listing is not barred from being remunerated by the agent. This is, however, subject to limitations. The third party may not purport to be an estate agent or property practitioner or perform any acts which would define him as a property practitioner in terms of the Property Practitioners Act. Furthermore, it is inadvisable for estate agents to advertise that spotter's fees will be paid. Agents should remember to obtain an invoice from the spotter for tax and record purposes.

PROFESSIONAL DESIGNATION EXAMS AND PROFESSIONAL DEVELOPMENT

PROFESSIONAL DESIGNATION EXAMINATIONS

The issue of Professional Designation Exams is dealt with in Regulation 33.2 of the Property Practitioners Act Regulations.

The Authority is required to consult in good faith with the representative bodies in the various industries and establish in accordance with the principles set out:

- the qualification standards for property practitioners;
- the course materials;
- professional designation examinations to be written; and
- standards for the practical training of non-principal property practitioners.

The above may vary according to the industry in which such property practitioner operates.

The standards, course materials and professional designation examinations above shall be different in respect of non-principal and principal property practitioners.

The regulations provide that no person shall be entitled to sit for the exam, or qualify as a principal property practitioner, unless such person has first qualified as a non-principal property practitioner and completed the practical training.

Subject to certain exceptions, no person shall be entitled to practice as a property practitioner unless such person has first completed a practical training course in respect of non-principal property practitioners relevant to the industry in which such person operates.

The practical training course will constitute a minimum of six modules to be completed over a maximum period of six months. The Authority shall make arrangements so that the professional designation examinations will be capable of being written at least four times per annum at such intervals as are determined by the Authority.

The Authority may permit a person to write the relevant professional designation examination in any official language other than English or be examined orally in respect of the relevant professional designation examination.

It shall not be a prerequisite that a person be registered with the Authority as a candidate property practitioner prior to such person being entitled to study for, sit the exams for, and achieve the qualification. In other words there are two ways to become a Candidate Estate Agent. The first is to register as a Candidate Estate Agent and act in such capacity for a period of 180 days and before the end of that period complete the required training. The second way is to complete the required training exams and register as a non-principal Property Practitioner (without having first been a Candidate Estate Agent). In such a case, the qualified Property Practitioner will be subject to Regulation 33.3 (below) for the first 6 months of their tenure as a qualified Property Practitioner.

Any person who ceases to practice as a property practitioner, either a non-principal property practitioner or a principal property practitioner for more than five years calculated from the date upon which his or her professional designation examination was passed, shall not be entitled to practice as a property practitioner unless such person has again first achieved the qualification in question *de novo*.

The Authority may establish a less onerous standard for the purposes of such requalification than the standards and professional designation examinations otherwise contemplated in respect of persons who have not previously achieved the relevant qualifications.

The Authority shall keep and maintain, for a period of 5 years, in electronic format, copies of all examination scripts written by persons in respect of the professional designation examinations and in respect of oral examinations, electronic recordings of such oral examinations.

The modules and content of the exam is still to be determined and published by the Authority

CONTINUING PROFESSIONAL DEVELOPMENT

The issue of Professional Development is dealt with in Regulation 33.5 of the Property Practitioners Act Regulations.

The Authority may prescribe any reasonable continuing professional development requirements for property practitioners, having regard to the various industries within which such property practitioners operate.

All property practitioners are required to undergo continuing professional development as prescribed by the Authority other than candidate estate agents.

All continuing professional development requirements prescribed by the Authority must be completed over a rolling three-year cycle on the basis that during such rolling three-year cycle, every property practitioner must complete at least 12 modules of continuing professional development.

A minimum of four modules must be completed during each year of such cycle and that no module may be duplicated during such rolling three-year cycle.

The Authority shall be entitled to approve any business property practitioner or independent training organisation providing continuing professional development to develop modules for the purposes of continuing professional development.

The module prepared by the business property practitioner or independent training organisation must be submitted to the Authority for review and approval, which approval the Authority may not unreasonably withhold or delay.

Continuing professional development will be charged for by the Authority at a rate of R1 500.00 per annum in respect of each property practitioner. Where a business property practitioner or independent training organisation provides continuing professional development, the Authority will charge at the rate of R500.00 per annum (increased annually on 01 April each year in line with CPI).

As in the case of the Professional Designation Exams, the modules and content are still to be determined and published by the Authority.

CANDIDATE ESTATE AGENTS

INTRODUCTION

Candidate Estate Agents are dealt with in the Property Practitioners Act and the Regulations

Entry into the Industry for Candidate Estate Agents

What appears from the Act and the Regulations are that there are two ways to become a Candidate Estate Agent. The first is to register as a Candidate Estate Agent and act in such capacity for a period of 180 days and before the end of that period complete the required training. (as indicated below).

The second way is to complete the required training exams and register as a non-principal Property Practitioner (without having first been a Candidate Estate Agent). In such a case, the qualified Property Practitioner will be subject to Regulation 33.3 (below) for the first 6 months of their tenure as a qualified Property Practitioner.

Supervision of Candidate Practitioners – Per the Act

Section 64 in Chapter 9 deals with Supervision of Candidate Property Practitioners and provides that a candidate practitioner may not draft or complete any document or clause in a document conferring a mandate or relating to the sale or lease of property.

A contravention here results in the candidate not being entitled to any remuneration or payment or damages arising from the transaction. It is not a defence that the principal was not aware of the actions or omissions of the candidate. A principal must ensure proper supervision and control. This is also the case where the Property Practitioner conducts business from more than one premises.

Candidate Estate Agents – Per the Regulations

Regulation 33.4 of the Property Practitioners Act deals in detail with the rules around candidate estate agents. The restrictions imposed by the Act seem to be clarified and expanded in the Regulations.

A Property Practitioner who registers in the estate agent industry prior to becoming entitled to practice as such shall be known as a candidate estate agent.

A candidate estate agent cannot act as such unless, they have disclosed as far as practically possible, that he or she is a candidate estate agent and is acting under the active supervision and control of a qualified Property Practitioner (or a practicing attorney, with at least 3 years' experience where applicable), which supervision and control may be exercised either in person or by means of any electronic medium (excluding authorized advertisements in the press).

A candidate estate agent may not hold himself or herself out or advertise, as someone who has complied with the educational requirements contemplated in the Regulations or as someone who is no longer subject to any restriction in terms of Reg 33.3.

A candidate estate agent may not complete or draft any documentation relating to any transaction negotiated by him or her in his or her capacity as a candidate estate agent, otherwise than under the supervision of a Property Practitioner qualified in terms of regulation 33.1 and who is no longer subject to any restriction in terms of regulation 33.3, and who certifies on the documentation in question that the said documentation has been completed under his or her supervision.

The Property Practitioner supervising the candidate shall be responsible for all acts of a candidate estate agent done in his or her capacity as such, of which the principal Property Practitioner is aware.

Where a candidate estate agent is making use of letterheads or is referenced in marketing material, the fact that such individual is a candidate estate agent must be clearly stated.

No person may act as a candidate estate agent for a period exceeding 180 days in aggregate. After the 180-day period they must sit for their PDE, provided that if such person fails to pass then on application and good cause shown, the Authority may permit the candidate to register as a candidate for another 180 days.

Further Restrictions.

Regulation 33.3 of the Regulations provides that once a Property Practitioner qualifies as a non-principal Property Practitioner, for a period of 6 months thereafter they may not enter into any mandate for sale or purchase of property or letting or hiring of any property or conclude any agreement for the sale or purchase or letting or hiring unless such agreement has been reviewed and co-signed by another qualified Property Practitioner.

The fellow Property Practitioner co-signing is obligated to ensure the documents are compliant with the norms and standards and duties and obligations of the industry, however the co-signor will not assume any liability in relation to any matter other than the contents of the document in question.

UNDESIRABLE BUSINESS PRACTICES IN TERMS OF THE PROPERTY PRACTITIONERS ACT, 2019

INTRODUCTION

Section 63 of the Property Practitioners Act provides that the Minister with the Board, may by notice in the Gazette declare a particular business practice in the property market to be undesirable and thus prohibited.

The Authority may issue a compliance notice to any offending property practitioner found to be in contravention of a prohibited business practice.

UNDESIRABLE BUSINESS PRACTISES – PER THE REGULATIONS

In terms of Regulation 35 of the Regulations, the following have been declared as undesirable business practices and are thus prohibited:

35.1.1.1	any arrangement in terms of which any party or person that directly or indirectly controls or manages any franchised business, requires that any franchise operation or outlet of such franchised business may only be marketed, promoted or disposed of through the agency of the franchisor or a property practitioner designated by the franchisor or which imposes any form of penalty in respect of a failure to do so; and
35.1.1.2	any arrangement in terms of which any party or person that directly or indirectly controls or manages any residential property development, including any body corporate or homeowners' association (the "managing organisation") –
35.1.1.2.1	receives money or any other reward in exchange for a benefit, advantage or other form of preferential treatment in respect of the marketing of properties in such property development;
35.1.1.2.2	requires that any property in such property development may only be disposed of through the agency of the managing organisation or a property practitioner designated by the managing organisation or which imposes any form of penalty in respect of a failure to do so;
35.1.1.2.3	requires that any property in such property development may only be disposed of to the managing organisation or a person or entity designated by the managing organisation;
35.1.1.2.4	effectively provides an advantage to any one property practitioner or group of property practitioners over and above any other property practitioners, in providing services in relation to properties in such property development; or
35.1.1.2.5	effectively excludes or disadvantages any property practitioner or group of property practitioners from being able to provide services in relation to properties in such property development

Insofar as body corporates and homeowners' associations are concerned, the above regulations appear to abolish the practice of charging agents "accreditation fees" in return for exclusive rights and privileges (such as exclusive rights of access and show days) when marketing immovable property within a particular security estate or development.

It remains to be seen whether the body corporates and homeowners' associations may still regulate agents with accreditation courses and or tests and whether a fee for these may be levied.

CONCLUSION

Whilst the regulations are clear, it is not known how body corporates and homeowners' associations will react to the regulations.

Affected property practitioners can lodge a complaint with the Authority and a compliance notice should be issued.

It is assumed that going forward, the Authority will publish further undesirable business practises.

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 purchaser's 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 R480 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 (i.e., 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.

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.

S118 REVISITED: MUNICIPAL DEBT OF PREVIOUS OWNERS

INTRODUCTION

This article relates to the various interpretations of Section 118(1) and 118(3) of the Municipal Systems Act by the courts to-date.

Section 118(1) provides that the municipality must issue a rates clearance certificate which certifies that all amounts due in connection with that property for municipal service fees as well as property rates and taxes during the two years preceding the date of application for such certificate have been fully paid. Section 118(3) provides that any amount due for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties is a charge upon the property in connection with which the amount is owing and enjoys preference over any mortgage bond registered against the property.

***CITY OF TSHWANE METROPOLITAN MUNICIPALITY V MATHABATHE & ANOTHER* (502/12) [2013] ZASCA 60**

In this controversial judgement of the court held 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.

NEW VENTURES CONSULTING AND SERVICES/LIVANOS AND OTHERS VS THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY AND OTHERS

The constitutionality of the interpretation of S118(3) in the *Mathabathe* case was questionable from the outset and was finally challenged in the matters before the court in this case.

The above case consisted of a number of individual actions brought by various property owners who had purchased properties and effected registration of transfer by the lodgement of a certificate in terms of S118(1) as aforesaid.

It was common cause that historical municipal debt existed in respect of the properties acquired and the applicants approached the court for an order declaring *inter alia* that the precedent set in the *Mathabathe* judgement where new owners were said to be liable for the historic debt of sellers and tenants of a property was unconstitutional.

NEW LEGAL POSITION

The Court held in the *New* Ventures case that the practice of municipalities of holding new owners of properties liable for municipal debts older than two years under the provisions of Section 118(3) is unconstitutional and amounts to an improper and arbitrary deprivation of a property right.

The Municipality still has the right to pursue the previous owner for the indebtedness due to the municipality in respect of historic debts.

CONCLUSION

New owners of property are now protected from being pursued for the payment of the historic debt of sellers and tenants of a property where the appropriate rates clearance certificate was issued by the municipality and transfer was accordingly effected.

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.

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.

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.

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.

TRIPARTITE AGREEMENTS AND NOMINATION CLAUSES

WHAT IS A TRIPARTITE AGREEMENT?

A tripartite agreement is an agreement between three parties. The most common example of a tripartite agreement occurs in the following scenario: A sells his property to B for R1 million rand and before registration of transfer can take place, B sells the property to C for R1,2 million rand. In order to fast track the transfers and in order to avoid paying double transfer duty, the three parties agree that the sale between A and B will be cancelled and A will sell directly to C for R1,2 million and B will take his share of the profit of R200 000.00 without having to pay transfer duty.

SARS AND TRIPARTITE AGREEMENTS

Tripartite agreements are dealt with in terms of section 5(2) of the Transfer Duty Act which was amended to prevent the scenario as set out above. Section 5(2)(a) can be summarised as follows:

If a property sale is cancelled before it registers in the deeds office, transfer duty will only be paid on the amount which the seller retains and on any amounts payable by the buyer in respect of the cancellation provided the property reverts back completely to the Seller and the buyer has not and will not receive and consideration arising from the cancellation.

The effect of this is that you cannot avoid the payment of transfer duty by entering into a tripartite agreement and in fact SARS will insist on the full transfer duty being paid for both transactions i.e. from A to B and from B to C in the above example.

In addition section 14 Deeds Registry Act states that deeds are to follow the sequence of their relative causes, which simply put means that you cannot skip a step in a transaction and registrations must take place in the right order.
In light of these two sections tripartite agreements are a thing of the past.

NOMINATION AGREEMENTS

WHAT IS A NOMINATION?

Sometimes an agreement of sale will be signed by a Purchaser or nominee. The idea behind this is that the ultimate Purchaser will not be the person who signed the agreement but rather his nominee.

HOW MUST A NOMINATION BE EXERCISED?

In terms of section 16 of the Transfer Duty Act a person who signs on behalf of a nominee must disclose the name and address of his principal on the same day on which the agreement is accepted (in the case of auction sales) or on the same day of conclusion (in respect of all other sales). The effect of this is that if an agreement is accepted/ concluded at 4pm the name and address of the nominee must be provided to the Seller before midnight on the same day.

WHAT IF A NOMINATION DOESN'T TAKE PLACE IN TIME

In this instance the person who acted on behalf of the nominee will in terms of section 16(2) will be deemed, unless the contrary is proven, to have acquired the property for himself.

There is also the problem that when the nomination is not made in time, double transfer duty will be payable as there will be seen to be two transactions- one from the seller to the agent who signed the agreement and one from the agent to the nominee.

The situation with regards to purchasing on behalf of companies to be formed is different from the above and only one transaction is deemed to take place provided:

1. The company to be formed is intended to be the ultimate transferee
2. The contract has or will be ratified
3. The provisions of section 16 have been complied with.

NATIONAL ENVIRONMENTAL MANAGEMENT

INTRODUCTION

The National Environmental Management: Biodiversity Act (No. 10 of 2004) (NEMBA) was promulgated in 2004. This act aims to provide the framework, norms, and standards for the conservation, sustainable use, and equitable benefit-sharing of South Africa's biological resources.

RECENTLY PROMULGATED REGULATIONS

The Alien and Invasive Species Regulations for this Act were published on 1 August 2014 in the Government Gazette and came into effect on 1 October 2014. NEMBA together with the Regulations aim to prevent the introduction and spread of alien and invasive species across South Africa.

DIFFERENT CATEGORIES OF LISTED INVASIVE SPECIES

The various alien invasive and prohibited species (both fauna and flora) have been listed in four different categorisations. There are a total of 559 alien species which are listed as invasive and 560 species listed which are prohibited from being introduced into South Africa. A detailed list can be found at http://www.invasives.org.za/legislation.html.

The four different categories are:

Category 1a: invasive species that may not be owned, imported into South Africa, grown, moved, sold, given as a gift or dumped in a waterway. These species need to be controlled on your property, and officials from the Department of Environmental Affairs must be allowed access to monitor or assist with control.

Category 1b: invasive species that may not be owned, imported into South Africa, grown, moved, sold, given as a gift or dumped in a waterway. Category 1b species are major invaders that may need government assistance to remove. All category 1b species must be contained, and in many cases they already fall under a government sponsored management programme.

Category 2: These are invasive species that can remain in your garden, but only with a permit, which is granted under very few circumstances.

Category 3: These are invasive species that can remain in your garden. However, you cannot propagate or sell these species and must control them in your garden. In riparian zones or wetlands all category 3 plants become category 1b plants.

FAILURE TO COMPLY

Any contravention of the provisions of the Act or Regulations, or failure to co-operate with the Department, may render a person liable for a fine and in some instances imprisonment.

IMPACT OF THE ACT AND REGULATIONS ON IMMOVABLE PROPERTY SALES

Regulation 29(3) provides that as from 1 October 2014, any agreements of sale must contain a declaration by the purchaser that they have acquainted themselves with and accept the fauna and flora on the property. Further the seller should disclose any knowledge of the presence of any invasive species on the property and provide any permits that may exist.

IDEAL CLAUSE

It is suggested that the Voetstoots/Seller's Disclosure clause/s be amended to include the following:

The Purchaser warrants that he/she has fully acquainted himself with and accepts the nature and extent of all fauna and flora, including any alien or invasive species situated on the property and understands the legal implications thereof.

DEMYSTIFYING THE BREACH CLAUSE

INTRODUCTION

All agreements contain a standard clause which relates to the breach of the agreement by either the Seller or Purchaser. The purpose of this article is to give some clarity as to how a breach clause functions within an agreement for the sale of immovable property.

CONTRACTUAL OBLIGATIONS AND SUSPENSIVE CONDITIONS

A distinction can we drawn between ordinary obligations of the parties to a contract, such as the obligation of the purchaser to make payment of the deposit and suspensive conditions which have the effect of suspending the operation of the contract until that suspensive condition is fulfilled, such as the agreement being suspensive upon the purchaser being granted a mortgage bond to finance the purchase of the property.

Where either of the parties to the contract cannot fulfil a suspensive condition within the required time period (through no fault of their own), the contract lapses and becomes null and void. For example, where a purchaser cannot obtain the necessary loan finance, the contract lapses. Note that in such cases, the contract is not cancelled but lapses as it in effect never comes into existence.

Where however the purchaser fails to comply with a contractual obligation, such as the payment of a deposit within a specified time period, the contract does not lapse and the purchaser is in breach of the contract.

In the latter event, the seller has two options, namely:

1. Allow the purchaser more time to effect payment of the deposit, (i.e. grant the purchaser an indulgence) or
2. Place the purchaser in breach using the breach clause in the contract.

In the latter option, the seller is obliged to act in accordance with the breach clause and to allow the purchaser a specified period of time within which to remedy (correct) the breach. In this case, the purchaser would thus be given a number of days to pay the deposit.

The failure by either party to act properly in order to fulfil a suspensive condition can constitute a breach of contract. This issue is dealt with in the article titled “The Doctrine of Fictional Fulfilment”. Where however, the party in whose favour the suspensive condition is drawn, takes all reasonable steps to fulfil that suspensive condition (e.g. the purchaser applies for the mortgage bond and takes all necessary steps in this regard) and the suspensive condition is still not fulfilled, such a purchaser cannot be placed in breach of the agreement.

THE STANDARD BREACH CLAUSE

A typical example of a breach clause reads as follows:

1. In the event of a breach of this Agreement, the aggrieved party may give the defaulting party 10 days written notice to remedy the default, failing which the parties will have the right, without prejudice to his rights in law, to act as set out below.

2. If the aggrieved party is the Seller, the Seller may after the Purchaser’s failure to remedy the default after receipt of notice, at his option without prejudice to his rights in law:-

   (i) cancel this Agreement and retain the Deposit (less the Agent's commission plus VAT which the parties irrevocably instruct the Conveyancer to pay the Agent forthwith) in the Conveyancer’s trust account and set it off against any damages proved by the Seller to have been suffered; or

   (ii) enforce the terms hereof including payment of the full balance of the purchase price owing at the date of the Purchaser’s breach aforementioned.

3. If the aggrieved party is the Purchaser, the Purchaser may after the Seller’s failure to remedy the default after receipt of notice, at his option without prejudice to his rights in law:

   (i) cancel this Agreement and claim damages proved by the Purchaser to have been suffered; or

   (ii) enforce the terms of this Agreement.

4. If this Agreement is terminated for any reason, such termination will not release a Party from any liability which at the time of termination has already accrued to another Party or which thereafter may accrue in respect of any act or omission prior to such termination.

The actual content of breach clauses do vary. All breach clauses however will specify:

- how a defaulting party is to be advised that they are in breach of the agreement (eg by delivery of written notice);
- the specific time period within which the defaulting party is to comply or remedy the breach;
- how the notice of breach is to be delivered to the defaulting party i.e. via e-mail, facsimile, registered post or by-hand delivery (refer to the domicilium / notices clause);
- the rights of the aggrieved party should the defaulting party not remedy the breach.

FAILURE TO REMEDY THE BREACH

After the aggrieved party has sent out the breach notice, the defaulting party is entitled to the time specified to remedy the breach complained of. Should the defaulting party not remedy the breach within the time period, it should be noted that the agreement does not automatically become cancelled but rather the aggrieved party has a number of options:

- the aggrieved party can give the defaulting party more time (i.e. grant the defaulting party an indulgence); or
- the aggrieved party can cancel the agreement and claim damages
- the aggrieved party can enforce the contract through our courts.

ENFORCEMENT OF THE AGREEMENT

In the event that the aggrieved party elects not to cancel the agreement but rather to enforce the agreement, the aggrieved party will have to consult an attorney to launch an application to court to obtain a court order to this effect. The aggrieved party will have to weigh various factors such as the cost of such court action and whether the defaulting party is able to comply with the agreement.

EFFECT OF CANCELLATION OF AN AGREEMENT

In the event that the aggrieved party elects to cancel the agreement and claim damages, the aggrieved party is obliged to send a further written notice to the defaulting party advising that the agreement is cancelled. This written notice must be served by the same method as that of the delivery of the breach notice. Only upon proper service of the cancellation notice can the agreement be deemed to be formally cancelled.

DAMAGES

Various breach clause deal with the issue of damages differently. Some breach clauses will provide that in the event of the purchaser being in default, any deposit held in trust is to be utilised toward the seller's damages on the basis of *rouwkoop* or pre estimated or liquidated damages. Other clauses will provide that the deposit is to be held in trust pending the determination of the sellers damages by a court.

It should be noted that despite the provisions of the breach clause, a deposit held in trust cannot summarily be deemed to equate to the damages which may be suffered by an aggrieved party. In all instances, including where a *rouwkoop* clause is present, a court order has to be obtained which must confirm the damages suffered by the aggrieved party and instruct the party holding the deposit to make payment of the damages accordingly.

An estate agency or conveyancing attorney is not entitled to withhold or make payment of any funds held in their trust account without the necessary express authority.

Note further that in terms of section 12(5) of the Alienation of Land Act 68 of 1981, *rouwkoop* clauses are subject the provisions of the Conventional Penalties Act 15 of 1962. This act essentially provides that the damages claimed by the aggrieved party should not be more than the actual damages suffered.

AGENTS COMMISSION

In terms of most standard breach clause's and commission clause's, the agent's commission is deemed to be earned and payable to the agent upon cancellation of the agreement, either by the defaulting party or jointly by the parties in the event of mutual agreement to cancellation.

If the Purchaser has paid a deposit which is either held by the estate agency or the conveyancers and it is the Purchaser's breach which resulted in the cancellation of the agreement, the commission may be deducted from the deposit so held, subject to the terms of the agreement.

As the Purchaser's deposit is held in trust, it is imperative that specific authority is contained in the agreement which expressly authorises the payment of the commission to the agents (see clause 2(i) above).

The Seller may be liable for agent's commission in the event that the cancellation is due to the sellers breach of the agreement.

CONCLUSION

When a breach occurs it is suggested that an attorney be consulted to assist in the drafting of the breach notices. The provisions of a breach clause must be strictly adhered to in order to validly place a party in breach and if needs be, legally cancel the agreement. Any funds held in trust may only be dealt with strictly in accordance with the provisions of the agreement, failing which by the direction of a court order.

PROPERTY RIGHTS / SERVITUDES

The purpose of this article is to give a brief explanation of servitudes. In order to understand servitudes it is necessary to first understand the nature of real and personal rights.

REAL RIGHTS VS PERSONAL RIGHTS

The best way to understand these rights is to look at an example. Assuming the owner of Property A needs to drive over Property B in order to gain access to his property, and the owners of properties A and B reach an agreement that the owner of Property A may drive over Property B for the purposes of this access. This agreement is reduced to writing by the parties.

The right that owner of Property A has is a personal right which is enforceable only against the owner of Property B. This right is personal and may not be enforced against any third parties.
Should this right however be registered against the title deeds to the properties in the Deeds Registry, such right becomes a real right in that the right now attaches to the properties and is now enforceable against the owner of Property B and any subsequent owners. It becomes part of the title deed conditions.

A real right is thus enforceable against everyone while a personal right may be enforced only against the person contracted with.

LIMITED REAL RIGHTS

The full rights of ownership that a property owner has may be limited by the existence of limited real rights.

A limited real right grants to the holder of that right a limited right over the property. An example of a limited real right is the example above, being a right of way servitude. Property A has a limited real right registered over Property B and thus the property ownership rights in Property B have been limited.

A further example of a limited real right is a mortgage bond which is registered over a property in the Deeds Registry.

SERVITUDES

Two types of servitudes are discussed here, Personal servitudes and Praedial servitudes.

Personal servitudes are servitudes registered over immovable property in favour of an individual. An example of a personal servitude is a usufruct. The best example of this is where A dies and bequeaths his property to his children but grants his wife a usufruct over the property until her death. The property is registered in the name of the children but subject to the usufruct. The wife may thus use the property until her death whereafter the children will have full rights of ownership. The usufruct automatically terminates on her death.

Praedial servitudes are servitudes registered over one immovable property (the servient tenement) in favour of another immovable property (the dominant tenement). The servitude is registered as a condition against the title deeds to the property in the Deeds Registry and is binding on all current and subsequent owners of those properties.

An example is the right of way servitude described above.

ENCROACHMENT SERVITUDES

It often happens that walls between properties are built in the wrong place or skew, either deliberately in order to avoid cutting down a tree for example or simply in error.

When this happens, this is known as an encroachment. Should the seller of a property be aware that his property encroaches on his neighbour's property or the neighbour's property encroaches on his property, that seller will be obliged to either disclose the encroachment in writing to any purchaser or to regulate the encroachment.

The encroachment can be regulated either by moving the incorrectly positioned wall to the correct position, or by registering an encroachment servitude.

An encroachment servitude is an agreement entered into between the two property owners that the boundary of one property may encroach on the other. The agreement is embodied in a notarial deed of servitude which is signed by both parties and registered in the Deeds Registry. The consequences of this are the same as the right of way servitude example above in that on registration, the right becomes binding on current and all future owners of the property.

In order to register the encroachment servitude, the Deeds Registry will require that the exact position of the encroachment be accurately described. If the encroachment a straight line for example capable of being described on an existing SG diagram, this will be accepted by the Deeds Registry. Should the line of the servitude however be irregular, a new SG diagram depicting the line will be required.

Where necessary a land surveyor is instructed to measure the encroachment, draft a diagram and have this approved by the Surveyor General's Office. This diagram is lodged in the Deeds Registry.

The encroachment servitude can be registered simultaneously with transfer of the property on sale and should not delay the transfer to a great extent if properly dealt with. If the property is not being sold and the encroachment servitude is being registered on its own in the deeds office, any existing bondholders will have to consent to the registration of the servitude.

BARE DOMINIUM / USUS

Property rights can be divided in *bare dominium* rights and *usus* rights. The former are the bare rights of ownership and the latter is the right to use the property. Together they constitute the full basket of ownership rights.

In the example above dealing with a Usufruct, the children are the *bare dominium* owners and the wife of the deceased owns the *usus.*

It is possible to calculate the value of the *bare dominium* rights and *usus* by utilising tables for this purpose available at SARS. The value is calculated by looking at the age of the usufructuary holder and the extent to which the rights of *usus* detracts from the full rights of ownership.

Subject to the terms of the Usufructuary rights, the two rights may be sold together. An agreement of sale will describe the Sellers as the *bare dominium* sellers and the Usufructuary sellers. They must be separately described.
The respective sellers will be entitled to the proceeds of sale (subject to the terms of the will or agreement creating the usufruct), in proportion to the value of the respective rights. The respective sellers will further be liable for capital gains tax on the same basis.

SUBDIVISIONS AND SERVITUDES

When the city council consents to the subdivision of a property they will more often than not require certain servitudes to be registered as part of providing the Regulation 38 certificate which is required to lodge and register a subdivision in the deeds office.

These servitudes may be in favour of the city council itself or between the new portions that are being created. These will be set out in the conditions of subdivision which are attached to the consent to subdivide.

Examples of the most common servitudes required by the city council include: right of way servitudes in favour of other portions and the city council, municipal services servitudes and what it colloquially called the 2m omnibus servitude.

PROVINCIAL HERITAGE RESOURCES AUTHORITY GAUTENG (PHRA-G)

WHAT IS PHRA-G

The Provincial Heritage Resources Authority Gauteng is a governmental organization that is responsible for the protection of heritage sites in Gauteng. PHRA-G is established and governed in terms of the National Heritage Resources Act 25 of 1999 ('the Act').

WHAT DOES PHRA-G GOVERN?

In terms of this Act, any building or site which is identified as a heritage site by PHRA-G or any building 60 years or older, can only be altered or demolished once you have made application for and been granted a permit from PHRAG.

HOW IS PERMISSION OBTAINED FROM PHRA-G?

There are various requirements and procedures that need be followed in order to apply for these permits, and failure to follow these requirements could lead to unnecessary delays in (or even a complete cessation of) the proposed construction, alteration, or demolition. Application is made on prescribed forms and by submitting supporting documents as prescribed on the application form, which is available on PHRA-G's website. More is said about this below.

WHO AT PHRA-G MAKES THE DECISIONS ABOUT APPROVALS?

The Heritage Council of PHRA-G decides all applications based on merit. Depending on its case load, applicants can wait two months or more, although usually applications are dealt with within the two month time frame. The Heritage Council sits approximately once a month and hears from twelve to twenty applications at a time, depending on their complexity. The Heritage Council has the power to approve, approve with conditions, or deny, any application made.

CAN DECISIONS OF PHRA-G BE CHALLENGED?

Decisions of the Heritage Council can be challenged firstly in terms of the Act, which provides for a right to appeal a decision to the Heritage Council itself; and secondly in terms of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), in which case the appeal lies to a judge of the High Court. The first type of appeal, namely one conducted in terms of the Act, can be managed by the applicant without an attorney, but unfortunately the second kind must be brought before a High Court, and thus, needs to be handled by a legal professional. Ultimately, if the challenger is not satisfied after making use of the 'internal appeal' – the appeal to the Heritage Council in terms of the Act – or it is denied this opportunity for some reason, it can approach the High Court for an order that the decision be set aside, varied, substituted, or remitted for re-consideration to PHRA-G.

CONSEQUENCES OF FAILURE TO SEEK APPROVAL BEFORE BEGINNING WORK

A failure to obtain the necessary approvals before commencing construction, demolition or alteration on a heritage site could lead to the Heritage Council refusing to grant you the relevant permission at all, or imposing conditions on the approval. In some cases, a failure to comply with the provisions of the Act amounts to a criminal offence, that you could receive a fine or even imprisonment for. In addition, PHRA-G is given powers to conduct investigations, require documents or information to be furnished, and even to apply to court to stop works the have not been approved. This could cause a lengthy delay of several months, and may even result in a refusal to grant approval at all – which would result in the permanent suspension of the works, unless the decision to refuse to grant approval is overturned on appeal. This could cause severe financial harm to the property owner or developer in the situation where the holding costs of the undeveloped property are significant. This could also lead to damages claims against property professionals where they should have known to apply for approval, but failed to, in cases where the client has suffered financial harm.

GETTING APPROVAL AFTER WORK HAS BEGUN

Although PHRA-G is empowered to grant retrospective approval, the Heritage Council does not deal lightly with those who have commenced works without approval. It is incredibly difficult to get retrospective approval in certain instances, and in others, it is refused entirely.

It is thus critical to seek and obtain your permit before commencing works, as failure could cost thousands in the resulting delay when PHRA-G orders work to stop.

SIGNING OF CONVEYANCING DOCUMENTS OVERSEAS

INTRODUCTION

Where transfer documents are to be signed by Sellers or Purchasers outside of the Republic of South Africa, there are very strict requirements governing such signing which must be adhered to. These requirements have been imposed to ensure that the identity of the signatories are confirmed by a responsible person so as to guarantee the legitimacy and reliability thereof.

SIGNING OF CONVEYANCING DOCUMENTATION OUTSIDE SOUTH AFRICA

There are 2 options for the signing of transfer and bond documents abroad. Documents can be signed with either a Notary Public or at the South African Embassy / Consulate. In both instances, an appointment will need to be scheduled.

Documents signed at the South African Embassy / Consulate do not require any further certification or verification as it is deemed to have been signed on South African soil. The originals can simply be returned to the Conveyancers.

If the documents are signed before a Notary Public, an "Apostille Certificate" must be affixed to the documents, provided the country where the documents are being signed is a Hague country.

Should you however be signing with a Notary Public in either Northern Ireland, Swaziland, Botswana, United Kingdom of Great Britain, Lesotho or Zimbabwe an Apostille Certificate is not required.

In all instance, before the original documents are sent to South Africa, we recommend that a scanned copy of the signed documents be sent to the Conveyancers via e-mail to confirm that same have been correctly signed and will be acceptable to the Deeds Office.

THE APOSTILLE CERTIFICATE

The function of the Notary is to properly identify the signatory of the documents. The function of the Apostille Certificate is to authenticate the legal standing of the Notary in his/her country. The Apostille Certificate is authenticated by the governing body of the Notary, usually the high court who will complete, stamp and sign the certificate. The Notary will direct you to such offices. An example of an Apostille Certificate and explanation of the content is annexed hereto.

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.

Example of an Apostille:

APOSTILLE

(Convention de La Haye du 5 octobre 1961)

1. Country: .....

This public document

2. has been signed by .....

3. acting in the capacity of .....

4. bears the seal/stamp of .....

.....

Certified

5. at ..... 6. the .....

7. by .....

.....

8. N° .....

9. Seal/stamp: 10. Signature:

....

OCCUPATION CLAUSES

INTRODUCTION

The purpose of this article is to examine the details around occupation clauses in residential sale agreements.

REGISTRATION OF TRANSFER OR A PARTICULAR DATE

The question often arises whether the date of occupation should be a particular date or on registration of transfer. The issue often gives rise to a heated debate.

Occupation on transfer avoids the purchaser taking occupation and delaying the transfer on the basis of complaints regarding the condition of the Property. Occupation on transfer is not always possible and each case needs to be dealt with in accordance with the parties' specific requirements.

AMENDING THE DATE OF OCCUPATION

When occupation is on registration of transfer and an amended date is agreed to by the parties, it should be noted that it is essential that a written addendum be entered into and signed by the parties.

This avoids the situation where the parties verbally agree a date of occupation and thereafter one of the parties reneges on the date or there is a misunderstanding as to the precise date.

It must be borne in mind that for any amendment to the contract to be binding, such must be reduced to writing and signed by the parties – this is due to the "no variation" clause found in most sale agreements.

OCCUPATIONAL RENT – HOW MUCH?

Firstly is should be noted that the occupational rent amount must be inserted into the clause on signature of the agreement, regardless of whether occupation is on transfer or on a particular date. It often happens that a specific occupation date is agreed to by the parties later in the transfer process and having an amount inserted avoids further discussion and negotiation on the issue when this is done.

There is often a temptation to determine occupational rent based on the cost of owning the property to the seller, alternatively based on some other miscellaneous factors. This should be resisted.

The occupational rent should be based on a market related rental for that property. This avoids the allegation later in the process that one of the parties was favoured or prejudiced in the determination of the occupational rent.

WATER, ELECTRICITY, LEVIES AND RATES AND TAXES

The parties should ensure that the above costs are clearly dealt with in the occupation clause. No assumption should be made as to whether a certain party would in the ordinary course be liable for these costs.

The respective party's liability to pay each of these costs should be clearly set out. Most clauses provide that the seller will be liable for levies and rates and taxes (including sewer costs) and the purchaser will be liable for water and electricity consumed. Water and electricity meter readings must be taken to ensure the cost of these can be calculated.

DELAYED DATE OF OCCUPATION

Where a delayed date of occupation is agreed to, the parties must include in the agreement an instruction to the conveyancer as to whether the registration must be delayed to coincide with this delated date of occupation or whether the matter must proceed in the ordinary course. i.e. "the parties hereby instruct the conveyancing attorney to effect registration of transfer as close as possible to the date of occupation / to effect transfer in the ordinary course despite the delayed date of occupation".

In the latter case the seller must be reminded that when the transfer is registered and seller remains in occupation after this date, occupational rent is payable by the seller to the purchaser for this period.

In the event of a delayed date of occupation coinciding with a delayed registration where the purchaser price is paid in cash, the parties must be careful to structure the timing of the securing of the purchase price to avoid prejudice to the purchaser.

It is suggested that the purchaser be made to pay a substantial deposit and thereafter be permitted to secure the balance of the purchase closer to the date of transfer. This avoids the purchaser losing substantial interest on the funds held in trust or a cheque account (where the funds are required for the issue of guarantees).

OCCUPATION BEFORE TRANSFER

When providing for occupation before transfer, caution must be exercised to ensure that occupation is never given to a purchaser before the suspensive conditions in the agreement (mortgage bond or other) are properly fulfilled.

Best practise dictates that before occupation is given to a purchaser, the bond must be granted (without unusual conditions), all FICA must be provided, the transfer and bond costs must be paid and the transfer and bond documents should be signed. In the case of a cash sale, the purchase price must be paid into the conveyancers trust account – not secured via guarantees.

PROPERTY OCCUPIED BY A TENANT – PURCHASER TO TAKE OVER TENANT

Where the property is occupied by a tenant and the purchaser will take over the tenant, the principle of *huur gaat voor koop* applies. This means that the purchaser steps into the shoes of the seller upon registration of transfer and the purchaser will have the same rights and obligations against the tenant after transfer as the seller had before transfer.

As such it is important that the estate agent obtain a copy of the lease and hand same to the purchaser before the purchaser enters into the offer to purchase. It is good practice to make the purchaser sign acknowledgment of receipt or has a “read receipt” if the lease is emailed.

This avoids the dispute as to the terms and conditions of the lease after transfer.

It is also good practice to include a clause in the sale agreement providing for the conveyancer to pay the deposit and pro rata rental to the purchaser from the sellers proceeds upon registration. This also avoids disputes going forward.
When in doubt have a conveyancer peruse the lease agreement and advise the parties

PROPERTY OCCUPIED BY A TENANT – PURCHASER TO OCCUPY PERSONALLY

The comments in the paragraph above apply equally here. The exception is that the parties must definitively determine when the lease expires and whether the tenant has a right to renew the lease for a further period. In such event an addendum to the lease must be signed by the seller (as lessor) and the tenant wherein the right to renew is deleted – the end of the lease must coincide with occupation unless otherwise agreed.

In the event of the purchaser being nervous as to whether the tenant will vacate the property, the parties can use a clause which we refer to as the “Comfort Clause”.
This clause requires the conveyancer (as a term of the sale agreement) not to register the transfer of the property until the conveyancer has been notified by the parties that the tenant has vacated the property.

This avoids the transfer being registered and the tenant remaining in occupation after transfer. (Please contact Schindlers if this clause is required)

SUBJECT TO SALES

In the case of subject to sales, the parties must be careful to ensure that the dates of occupation in the various subject agreements coincide. Extreme unhappiness results from these dates not coinciding as one of the parties may be left without accommodation for a period of time.

To achieve this goal, the parties need sight of both agreements.

CONSENT TO CHANGES TO THE PROPERTY BEFORE REGISTRATION OF TRANSFER

This is generally not desired and should be avoided. In the event it is not avoidable, the parties must consent in writing in the form an addendum signed by both parties.

The extent of the changes should be determined and will further determine the content of the addendum. Cosmetic changes are more easily dealt with than structural changes. The latter require more security and protection for the seller in the event that the sale does not proceed for any reason.

CONCLUSION

Occupation clauses can be tricky and do often give rise to disputes if not formulated correctly. The parties are advised to seek advice when in doubt.

AGRICULTURAL LAND AND AGRICULTURAL HOLDINGS

INTRODUCTION

There often exists some confusion as to the differences between agricultural land and agricultural holdings. Although both contain the word “agricultural”, they are quite different and different rules apply to each.

AGRICULTURAL LAND

The legislation applicable to agricultural land is the Subdivision of Agricultural Land Act 70 of 1970. This covers all agricultural land throughout the Republic. In Act 70 of 1970 “agricultural land means any land, except (a) land situated in the area of jurisdiction of a municipal council, city council, town council, … (b) land which forms part of any area subdivided in terms of the Agricultural Holdings (Transvaal) Registration Act…”

This definition poses a problem inasmuch as all land nowadays falls within the jurisdiction of a municipality. However to assume that as a result of this that agricultural land no longer exists is nonsensical and defeats the purpose of the Act which is to ensure that farm land is not fragmented into uneconomical portions. The rule of thumb is that if the property description contains the word “farm” Act 70 of 70 applies.

AGRICULTURAL HOLDINGS

Agricultural holdings are covered by the Agricultural Holdings (Transvaal) Registration Act 22 of 1919 and relates to agricultural holdings in the former Transvaal. In terms of act 22 of 1919 “agricultural holding shall mean a portion of land not less than one morgen in extent used solely or mainly for the purpose of agriculture or horticulture or for breeding or keeping domestic animals, poultry or bees”. It is clear from the above that agricultural holdings are expressly excluded from the definition of agricultural land although it is clear from its own definition that agriculture is a key element of any agricultural holding. This however makes it clear that there are different rules applicable to each type of land.

DIFFERENCES AND SIMILARITIES

Below is a simple table setting out the biggest differences/similarities between land falling under each act:

ACT 70 OF 70- AGRICULTURAL LAND	**AGRICULTURAL HOLDINGS**
Applies to all agricultural land throughout South Africa.	Only applies to agricultural holdings in the former Transvaal. Specifically excluded from the application of Act 70 of 70 in the definition of agricultural land so Ministerial consent is not required however the Act has its own limitations.
Section 3 states: Subject to the provisions of section 2- (a) agricultural land shall not be subdivided; (b) no undivided share in agricultural land not already held by any person, shall vest in any person; (c) no part in any undivided share in agricultural land shall vest in any person, if such part is not already held by any person, unless the Minister has consented in writing to the subdivision or vesting concerned. See further comments on the *Wary* case below.	Section 5 (2) states: The Registrar of deeds shall not register the transfer or lease of any lot or portion of such land or any part thereof which is less in extent than one morgen nor shall any lot or portion be capable of being held by two or more persons in joint ownership where if the lot or portion were divided according to the shares of the joint owners any of such divisions would be less in extent than one morgen…
Effect of section 3- More than one person cannot own agricultural land (unless they are married in community of property) and agricultural land cannot be subdivided, without Ministerial consent. In addition, a portion of agricultural land cannot be sold, or sold subject to a condition that consent be obtained or advertised for sale, without the Ministers, consent being first had and obtained.	Effect of section 5: more than one person can own an agricultural holding provided the undivided half share is not less than 8565 square metres (one morgen) in extent. No consent is required as long as the size of the portion does not fall below 8565 square metres.

The Department of Agriculture can issue a letter stating whether the property is considered agricultural or not and then the Act may/may not apply. Note: if agricultural land, was erroneously registered into the names of persons married in community of property and it turns out they are married out of community of property, you will need consent prior to lodging an application in terms of section 4(1)(b) to correct the error.	
The title deeds of agricultural land do not usually contain any conditions relating to the Act and its restrictions.	Most title deeds of agricultural holdings will contain the restrictions applicable as set out in the Act.
Non-compliance with the act means the sale is void *ab initio* i.e. from the start	
Ministerial consent must be dated before the date of sale and must be obtained before a subdivisional diagram can be approved.	

AGRICULTURAL LAND CASE LAW: *WARY HOLDINGS (PTY) LTD v STALWO (PTY) LTD AND ANOTHER* (CCT 78/07) [2008] ZACC (1) SA 337

The brief facts are that an agreement of sale was entered into for farmland subject to the condition that the farm was to be subdivided. No ministerial consent was obtained prior to entering into the agreement. The seller tried to get the sale declared invalid as he wanted a higher purchase price and the purchaser opposed the application.

The above constitutional court case is important regarding agricultural land for two reasons. Firstly it clarified the issue that just because farm land/agricultural land falls within the jurisdiction of a municipality does not mean that it is no longer agricultural land within the definition of Act 70 of 70. Secondly, the sale was declared void ab initio inasmuch as Ministerial consent was not obtained prior to entering into the agreement.

<u>This case and section 3 of Act 70 of 70 are clear in that:</u>

1. You cannot advertise for sale or sell a portion of agricultural land without Ministerial consent;
2. You cannot enter into an agreement subject to obtaining consent after the fact (the deeds office will check the date the consent was issued as per the letter lodged and the date of sale reflected in the documents. If the date of sale is before the date of the consent, the matter will be rejected, as the sale is void).

AGRICULTURAL LAND & TESTAMENTARY DISPOSITIONS

If a couple married in community of property owns a farm and one of them passes away and leaves their share, to be administered by a trust for their children- ministerial consent is required. The same applies if a co-owner of a farm passes away and leaves the property to anyone other than the other co- owner/s. (Similarly a co-owner is permitted to sell his share in agricultural land without consent as long as it is to be transferred to his fellow co-owner/s)

There is one “exception” to the above rule relating to agricultural land regarding the prohibition against transferring agricultural land into the name of more than one person without consent, and that lies with testamentary dispositions. If someone leaves a farm, for example, to his three children in his will, the deeds office will allow the transfer to the three children to take place, provided that there is a simultaneous transfer to one child or a company/CC/trust.

CONCLUSION

Although the use of both types of lands are agricultural the differences in the law applicable to each cannot be more different. It is worth obtaining advice from your conveyancer before proceeding on a transaction involving these land types.

HALF SHARE TRANSFERS

INTRODUCTION

Two or more persons may own the same immovable property either in equal or unequal shares. This ownership arrangement may arise from a variety of situations such as married persons, heirs in deceased estates, investors etc.

It happens from time to time that joint owners of immovable property need to dissolve or amend their ownership structure. To do this, they may sell the property to a third party or one party can take transfer of the other party's share in the property. The purpose of this article is to provide information around these half share transfers. It must be noted that the same process explained below would apply regardless of the shareholding in the property, i.e. 25%, 33,3%, 75% etc. being transferred.

CAUSA

The first consideration in these transfers is determining the *causa* or the "reason" for the transfer. There are limited *causa* in our law. These include: divorce, court order, inheritance, donation, expropriation and sale.

Where spouses own immovable property jointly and they get divorced and one spouse is entitled to the share of the other, such a transfer is pursuant to the divorce court order and this is the *causa* for such transfer. In cases where one spouse bequeaths a half share in a property to the remaining spouse, inheritance is the *causa*. The transfer in both these examples are exempt from transfer duty.

In other cases, sale is the only viable *causa*. Donation may be an option however the obligation to pay 20% donations tax on the value of the share in the property donated must be considered. (Note however that donations between spouses are exempt from donations tax, regardless of the value of the donation). Thus, save in the exceptions above, a sale agreement must be drafted between the parties where the half (or any) share in the property is sold from one share owner to another.

THE PURCHASE PRICE IN THE CASE OF A SALE

The purchase price must market related and the sale agreement needs to stipulate this market related value. It must be borne in mind that SARS is entitled, per the Transfer Duty Act to transfer duty on the "fair market" value of the property. SARS is further entitled to Capital Gains Tax (CGT) based on the same fair market value. Transfer duty is calculated by determining transfer duty on the full value of the property and dividing this by the share transferred and not only on the lower value of the half share being sold.

Fair market value is determined using two estate agent valuations. These valuations must not be stipulated as a "parameter" value but rather a definite value inasmuch as SARS may assess the property for transfer duty on the highest of the two values.

The sale agreement must provide for payment of the purchase price of the share being sold, after cancellation of any mortgage bond (if applicable). The agreement should be standard in the sense that it should contain all the usual clauses as a normal sale would contain, including clauses relating to electrical compliances etc. (this may be a condition of a new mortgage bond).

EXISTING MORTGAGE BOND

In the event of the property being subject to a mortgage bond, this bond must be dealt with. There are three options.

The first is to pay up the bond and cancel same. The second that the purchaser registers a new mortgage bond in order to cancel the existing bond. The third is for the purchaser to make application to the existing bondholder to take over the mortgage bond solely. This is known as a Section 57 Substitution of Debtor. In this latter case, the one advantage is that the conveyancing tariff allows for a 25% reduction in registration fees.

In the event of the bond not being cancelled, the purchase will need to make application to the banks as per usual and will have to qualify for the bond in their own name and on their own merit. This requirement must not be underestimated as a factor to the success of the transaction.

CONCLUSION

It is important to consult a conveyancer to assist in the above transfers.

SHORTFALL SALES

INTRODUCTION

The purpose of this article is to provide guidance and insight into what constitutes a shortfall sale and how such sales can be best approached. A shortfall will exist when the expenses pursuant to the sale of a property exceed the proceeds of the sale. In other words, if the amount due to the Seller is insufficient to cover the expenses necessary to transfer the property to the Purchaser.

THE IMPACT OF SHORTFALLS ON THE TRANSFER PROCESS

The conveyancing process followed in order to finalize and ultimately register a shortfall transaction differs to the conventional transfer process. This difference in process has the potential to delay registration of the transfer and it is thus recommended that the sale agreement be made subject to acceptance of the shortfall by the bank.

THE LEGAL PROCESS

Before the conveyancing process of a shortfall transaction can commence, a draft final account must be submitted to the bank which holds the mortgage bond over the property. It is therefore necessary to ascertain all of the expenses pertaining to the sale which are payable by the Seller before the matter can proceed. These expenses include, but are not limited to:

- Bond Cancellation Figures;
- Bond Cancellation Costs (Attorney's Fees for Cancellation of the Mortgage Bond);
- Rates Figures;
- Levy Figures (if applicable);
- Agent's Commission;
- Any ancillary costs, such as Compliance Certificates.

Each bank has different processes relating to the obtaining of bond cancellation figures, instructing bond cancellation attorneys and consenting to bond cancellations. The process will be further affected by whether the arrear bond account has been handed over to the bank's Legal department or not. In some cases one channel will be used in order to obtain bond cancellation figures and another once it is ascertained that the matter will have a shortfall. For this reason, the banks internal processes will inevitably result in a delay.

On receipt of the above figures the draft final account is submitted to the bank for their consideration. The bank holds security over the property in the form of a Mortgage Bond and needs to consent to the cancellation of the bond. As such, the transaction can only proceed at the bank's discretion.

WHAT HAPPENS IF THE BANK CONCEDES TO THE SHORTFALL?

Should the bank agree to make a concession in respect of the shortfall, it would be common practice for the bank to require that the Seller sign a formal Acknowledgement of Debt. The Acknowledgement of Debt would usually be for a period of 5 years and be interest free. The transfer would then continue on its normal course.

UNDER WHICH CIRCUMSTANCES WILL A BANK NOT ACCEPT AN ACKNOWLEDGMENT OF DEBT?

When considering whether to accept a lessor amount to cancel a bond, the bank will take into account various factors, including, for example whether the property was sold for fair market value, with the aim of mitigating its risk. If the bond instalments are up to date, it is less likely that the bank will accept a lesser amount, as they are still receiving payment. This could prove problematic for a Seller who is maintaining payment, but is struggling to do so.

HOW CAN THE ESTATE AGENT ASSIST THE SELLER PRIOR TO MARKETING THE PROPERTY?

It is recommended that the Seller investigate whether the bank has a "quick sell" or similar programme. By making application to such a programme the Seller would grant the bank Power of Attorney to sell the property at a pre-agreed purchase price, but could benefit from a reduction in interest and delay in the legal action.

DISTRESSED PROPERTIES, FORCED SALES AND PROPERTIES IN REPOSESSION

INTRODUCTION

Current economic conditions will likely lead to more property owners being in financial distress. This article will identify and explain the phases related to financially distressed sales.

DISTRESSED SALES

A distressed sale occurs where the seller must sell due to circumstances, such as impending repossession by the bank, a divorce, relocation, financial distress or any other such pressure. A distressed property is usually sold by the owner to prevent repossession of the property by the bank as a result of having fallen into arrears on the home loan.

Private Distressed Sales

Property owners may try sell the property on their own and thereby avoid bank action and in such cases control the process and appoint their own estate agents and conveyancers, alternatively they may apply to be part of a bank assisted sale program. It must be understood that while property owners are free to sell their properties, banks (as bond holders) can refuse to consent to the cancellation of the mortgage bond unless the bank has a guarantee for the full amount due on the mortgage bond.

Bank Assisted Sales

Most banks have bank assisted or distressed sale programs where the bank will assist the owner to put the house on the market to recover the debt owed. The various bank programs have different benefits such as *inter alia* a discount on the capital owed and or the right to pay any shortfall interest free after transfer. It is important that property owners investigate the benefits.

If the bank assisted program route is taken, depending on the bank, the property is objectively valued, and an agreement is reached with the bank whereby the property is to be marketed for sale. The property owner is obliged to accept any offers at or above the valuation, failing which the banks can in some cases (depending on the program) use a Power of Attorney given to the bank by the owner as part of the program, to accept the offer to purchase. Banks have designated panels of estate agents for the purpose of obtaining valuations and marketing the property for sale.

After sale, conveyancers are appointed by the bank to transfer the property. If the property owner does not co-operate, the bank can sign the transfer documents using the Power of Attorney referred to above.

Shortfall / Acknowledgment of Debt

As part of this process, the shortfall (if applicable) between the purchase price less the bond amount due and other expenses such as estate agents commission, rates and taxes, cost of compliance certificates, is calculated. The property owner signs an acknowledgement of debt in favour of the bank to pay the shortfall after transfer (usually interest free).

It must be noted that the bank makes a concession in these cases and allows the cancellation of the bond on strength of the acknowledgment of debt. The bank assumes a risk in having a debt unsecured by the bond over property. On the other hand, banks recognize that if the property owner cannot pay the bond or the costs of owning the property, the property owner goes more into arrears and the banks' situation worsens.

Shortfall Distressed Sales – Bond not in Arrears

There are cases where a property owner is in financial distress and sells a property resulting in a shortfall between the sales price less expenses, where however the property owner is not in arrears with the mortgage bond. It should be noted that in such cases the bank may refuse to allow the cancellation of the bond based on an acknowledgment of debt inasmuch as there is no arrears on the bond.

SALE IN EXECUTION

Should the owner be unable to sell the property to satisfy the outstanding loan, the bank may then elect to institute legal action against the owner. Legal action commences with a letter of demand sent in compliance with the loan agreement and the National Credit Act. If the default is not rectified or an arrangement with the bank not made (which may include selling through a bank assisted program), the bank will terminate the loan agreement and begin the legal process.

The bank will institute legal action by issuing a summons or a court application. If this is not defended, the bank will take default judgment. The bank will thereafter proceed to execute on the judgment. Execution of the judgment can be done by instructing the Sheriff of the Court to attach and sell movable assets of the owner and if permitted by the default judgment or by a court order, the immovable property can be sold on auction by the sheriff.

The court rules relating to the sale of residential immovable property have been amended since the decision of Absa Bank Ltd v Mokebe 2018 (6) SA 492 (GJ) which held that where execution is sought against a primary residence, the claim for the monetary judgment and a claim to have the property sold in execution must be brought at the same time. Residential property cannot be sold in execution without a specific court order authorising this.

In making application for judgment in the case of residential property, the banks must advise the court of all relevant facts typically required for a sale in execution order including, the market value of the property, rates, levies and bond outstanding, equity in the property, whether occupied and by whom, whether a primary residence or not. The court then makes a decision and can direct a reserve price for the property. The court may also postpone the matter to arrange a payment plan with the owner and reinstate the bond, if it is not satisfied that an order of foreclosure is appropriate.

This prevents the sale of a primary residence where the owner thereof is to be severely prejudiced by the sale. The above does not apply in the case of commercial properties sold in execution. If the property is sold in execution, the owner remains liable for the payment of any shortfall, as well as the legal costs incurred by the bank in enforcing its rights including the costs to sell the property. This will only be done by the bank when there is no other alternative.

If during the above process, the property owner sells the property privately, the legal process can be halted by agreement with the bank. In the alternative the property owner may negotiate with the bank to enter into a bank assisted sale program and thereby halt the legal process.

BANK REPOSSESSION

Should the reserve price not be met by a third party at the sale in execution, the bank has the option to bid for the property and buy back the property itself at the reserve price. i.e. the property is repossessed and the bank becomes the registered legal owner.
The bank will then put the repossessed property on the open market and purchasers interested in the property will have to make an offer directly to the bank or its appointed Estate Agent. The bank can then accept or decline any of the offers made, but since this is the very end of the sales process, the bank would want its money back and consider any reasonable offers.

With repossessed sales the bank will settle all arrears rates and taxes on the property, in addition to paying all rates and taxes due until the date of registration. To make the process even easier on the pocket, there is no transfer duty payable by the purchaser when buying a repossessed bank property as the bank is a registered VAT vendor.

CONCLUSION

The banks' voluntary sales programmes for defaulting homeowners are growing throughout the country and remain the most beneficial alternative to alleviate financial stress, expensive recovery costs and adverse credit records. Ultimately, it's critical for a home owner to consult with experts and to seek help immediately.
Banks are loathe to take legal action and property owners who are in financial distress should communicate with their bank as early and as clearly as possible in order to get assistance from the banks. This is particularly true in the current economic climate where various concessions are being made re payment holidays etc.

PERSONAL SERVITUDES – USUFRUCT, USUS AND HABITATIO

INTRODUCTION

The purpose of this article is to provide some insight into the three most common types of personal servitudes, namely *Usus*, *Usufruct* and *Habitatio.* All of these are legal rights given by an owner of a property to another, to use and enjoy that person's property.

USUFRUCT

Derived from the Latin *usus* and *fructus*, this servitude refers to the right to possess and use the property as well as enjoy the fruits/ benefits from the property.

As an example the holder of the right can live in the property or rent it out, provided the term for the lease does not exceed that of the usufruct. You are however expected to utilize it for the purposes for which it was intended (unless a different use would be considered sensible under the specific circumstances) e.g. if it a residential home it can't be rented out for business purposes, and the person who holds the right is expected to maintain the property and ensure it is not damaged in any way. A common example of a usufruct is where a husband leaves his home to his children in his will, subject to his wife having the right to use the house and furniture in it for her lifetime. In such a case the property will be transferred into the names of the children and the usufruct will be registered against the new title deed over the property. In this example, the wife is allowed to let out the property but also has the obligation to maintain it and pay all the municipal rates and taxes on it. However, the children will be expected to insure the property should they feel it necessary and will also be responsible to carry the costs of any major repairs.

Many utilize a usufruct in a will for the purposes of reducing the estate duty payable as the usufruct will pass to the holder free of estate duty, and the bare ownership is no longer transferred at its full value, but instead the difference between the full value of the property and the value of the usufruct. It is noteworthy that if a usufruct is canceled or lapses transfer duty is paid on the "value" returned to the bare dominium owner. It is possible to mortgage a property subject to a usufruct if the holder of the right is a co-mortgagor or if the usufructuary waives their rights in favour of the bank. A usufruct can also be granted to a legal entity but the limitation is that of 99 years.

USUS

Usus, similar to usufruct, is a servitude providing the holder of the servitude the right to use a thing belonging to another. Usus differs from usufruct in that the holder may only use the property for his daily needs, the holder may not lease the property to obtain a profit from it (though this rule is subject to a few exceptions, e.g. should the house be too large for the holder's use, he may let a portion of it).

HABITATIO

This servitude only extends to a dwelling, and the holder will have the right to dwell in the house with his/her family for a determined period of time or until the occurrence of a specific event. Leasing the property is however allowed, but does not extend to further fruits. Further requirements include that a diagram needs to be submitted to the Deeds Office when a right of *habitatio* is registered, except in the case of a sectional title unit in which case the registered sectional plan will suffice.

Servitudes such as these are mostly created in terms of a will, but may also be created in terms of an agreement.

TERMINATION OF PERSONAL SERVITUDES

Personal servitudes may be for a fixed term or granted until the occurrence of a future event e.g. until the death of the holder. It remains enforceable by the servitude holder against any subsequent owner of the property over which the servitude is registered. However, the holder may not transfer his/her right to the servitude to any third party. The holder is expected to return the property at the end of the period to the owner, not altered or damaged in any way. They can also be cancelled prior to lapsing by agreement between the owner of the land and the holder of the servitude by what is known as a bilateral notarial deed of cancellation.

CONCLUSION

When considering whether a usufruct is suitable for your particular circumstances, make sure that it validates the cost and risk associated with such a structure in the long-term.

MANDATES

INTRODUCTION

The purpose of this article is to give a brief explanation of the legal and practical aspects of Mandates as they apply to estate agents and the sale of immovable property.

CODE OF CONDUCT PROVISIONS

There are various provisions in the Property Practitioner's Code of Conduct dealing with sole mandates. For a more detailed discussion on the code of conduct provisions, please refer to the Schindlers Article on this topic.

EXISTENCE OF A MANDATE

As a general principle and as a requirement of the Code of Conduct, an agent must have a mandate before a property can be marketed. Agents sometimes assume that they are mandated to market a property, without actually confirming that a mandate has been given and without confirming the terms of the mandate.

Permission to bring a buyer or a tenant to view a property may not always in law amount to an actual mandate. The terms of the mandate must, to the extent possible be contained in a written and signed mandate or confirmed via an email.

THE ONUS TO PROVE THE MANDATE TERMS

In the case of a dispute around the existence of a mandate or the terms of a mandate, it must be borne in mind that the agents will bear the onus to prove that there was a mandate and furthermore to prove the terms of the mandate. If the matter goes to court, the agent will need to prove this "on a balance of probabilities", this being the civil court standard.

The agent will need to establish not only the terms and conditions of the mandate but equally importantly, the agent will need to prove the amount of the commission to which the agent is entitled. If there is no agreed commission, the agent's case will fail. This is the case, even where the agent was the "effective cause".

There have been decided cases where agents have established that they had a mandate and were the effective cause but lost the case as they could not prove the commission amount or percentage. Where there is no agreed commission, our courts will hear evidence as to a reasonable rate / standard rate, however this will be extremely difficult to prove.

SOLE MANDATE

A sole mandate is the ideal type of mandate to be given by the seller of immovable property inasmuch as a sole mandate allows the agent to market the property without interference from other agents. The agent can spend the necessary time and resources in order to achieve a sale.

Sole mandates are regulated by the Estate Agents Code of Conduct. A sole mandate must be in writing, signed by the seller and must contain a calendar date as its expiry date. The sole mandate cannot be for "three months". It must end on a definitive calendar date, i.e. "terminating on 28 February 2019".

As a mandate is a contract, it should be signed and accepted by the agent.

The code does not prescribe how long a mandate must be for, however it must be reasonable in the circumstances. A low value sectional title unit in Johannesburg can have a mandate for 6 months, depending on market conditions while it may be reasonable to have a two year mandate on a high value property in Clifton beach in Cape Town. It is not considered reasonable to have a mandate until sold.

Sole mandates have specific contractual terms to which the parties are bound. These must be carefully explained to seller and must be understood by both parties.

Some mandates provide that the agent is entitled to commission where any person who was introduced to the property purchases the property after the expiry of the sole mandate. This period may be open or may be limited to a fixed duration.

CONSUMER PROTECTION ACT AND SOLE MANDATES

It has been argued (but not tested in our courts) that a sole mandate is a fixed term contract and is subject to the provisions of the Consumer Protection Act. As such section 14 of the Act is applicable and the consumer (the seller) may provide the agent with 20 business days' notice in writing to terminate the mandate. No reason need be given.

During this notice period the agent may continue to market the property. The cancellation in this case is subject to a "reasonable cancellation penalty" as determined using the factors set out in the Regulations to the Consumer Protection Act. Some agencies have elected to have their sole mandates stipulate that the agreed cancellation penalty in the event of notice being given is 10% of the commission that would have been earned.

TERMINATION OF SOLE MANDATES

In addition to the Consumer Protection Act, a mandate will terminate when the mandate period ends.

Mandates can further be terminated by agreement between the seller and the agent. This should be done in writing.

MANDATE PRICE REDUCTION / PRICE COUNSELLING

Where a seller agrees to reduce the price of the property being sold, agents should be careful to record the agreed reduction. This can be done in writing on the mandate, initialed by both parties alternatively by way of an addendum.

This is so, in particular, where there is a no variation clause in the mandate (i.e. no variation, alternation or cancellation of this mandate is valid unless reduced to writing and signed by the parties)

By doing this, the agents are entitled to enforce the mandate at the reduced price where this reduced price is achieved.

INTERN AGENTS

The Property Practitioners Act provides that an agent who has not complied with the prescribed standard of training may not draft or complete any document or clause conferring a mandate on an agent to perform or relating to the sale or lease of immovable property. It further says that an agent who contravenes this section shall not be entitled to any payment, remuneration or damages in respect of such a document.

The Act provides than an intern estate agent may not complete / draft documentation otherwise than in the presence of a Principal Agent who must certify as such.

OPEN MANDATES

Open mandates are mandates where the seller has not provided a sole mandate but has elected to provide more than one agent a mandate to sell the property i.e. the mandate is open to one or more agents on an open mandate basis. The agent who brings the seller an acceptable offer first earns the commission.

VERBAL MANDATES

Verbal mandates are legal. There is no legal obligation for a mandate to be in writing, save where the mandate is a sole mandate as described above.

It is suggested that a good practice is to email the seller confirmation of the meeting or discussion where the verbal mandate was given. The email should confirm that a mandate to sell has in fact been given and should further set out the terms of the mandate as discussed and agreed.

This does not create a legal document but serves as confirmation of the mandate being conferred and the agreed terms.

JOINT MANDATES

Joint mandates are where two or more agents are jointly appointed to sell property for a seller. The terms of these mandates should be reduced to writing to have certainty as to the agent's respective rights and obligations.

The joint mandate may provide for the sharing of commission regardless who sells the property or could be on a winner takes all basis.

AGREEMENTS TO AGREE

There are cases where a seller will refuse to agree a commission amount or percentage in a mandate and rather prefer to stipulate that the commission to be earned will be "agreed" or "negotiated "at the time an offer is presented.

The stipulation that the commission be "agreed" or "negotiated "at the time an offer is presented constitutes an "agreement to agree" in law. It must be noted that "agreements to agree" are not enforceable in law and as such, the mandate will not be enforceable.

This does not mean the mandate must be refused as the mandate, even on this basis still presents an opportunity to market and sell the property. The commission can be agreed and recorded in a sale agreement. It is however important for agents to understand the limits of such agreements.

A LEGAL COMPROMISE

It must be noted that mandates commonly used in the market are what can be termed a "legal compromise". A mandate in essence is a contract that allows an agent to market a seller's property and to earn a commission once that mandate has been fulfilled.

To the extent that the mandate is fulfilled in terms of the provisions of the mandate, i.e. such as relating to purchase price etc, the agent is entitled to be paid commission (even if the seller elects not to accept an offer that is presented that complies with the terms of the mandate).

Mandates need to be "palatable" and accepted by Sellers. To the extent that every necessary legal protection and provision was included in a mandate, it is likely that sellers would not agree to all terms and as such the document is "watered down" to be acceptable. At the same time however the watered down version is a legal compromise in that it does not contain every desired provision.

MANDATE MANAGEMENT

It must be accepted that sellers and the general public are not familiar with mandates or the danger of not managing mandates.

It is up to estate agents to educate and assist sellers. Where marketing a property on an open mandate the agent should provide the sellers with a weekly list of prospective purchasers introduced to the property. Where marketing a property on a sole mandate agents should likewise provide the seller with a list of prospective purchasers introduced to the property at termination of the mandate.

The above lists should be hand delivered or emailed with read / delivery receipts activated. The sellers should be advised as to why they are being provided with such lists and advised of the dangers of double commission claims.

Where a mandate expires without a sale and a new agent is granted a mandate, the first agent should request that buyers introduced during the first mandate be excluded from the subsequent mandate.

CONCLUSION

Mandates are an essential tool for agents and need to be used correctly and understood.

SUBJECT TO SALES & CONTINUED MARKETING

INTRODUCTION

The purpose of this article is to give a brief explanation of the legal and practical aspects of Subject to Sale and Continued Marketing clauses.

SUBJECT TO SALES

"Subject to sale" clauses are required where a seller sells property to a purchaser who can only purchase the property subject to the suspensive condition that the purchaser in turn sells his/her property.

This may be due to the fact that the purchaser needs the proceeds of sale to finance the property purchase alternatively due to the fact that a bank will not grant a bond for the new property purchase unless the bond over the purchaser's existing property is cancelled i.e. due to affordability.

SUBJECT TO SALE CLAUSES

There are three types of clauses that relate to "Subject to Sales": (note that the examples below may vary from contract to contract).

Type One

Type one is where the purchaser wishes to purchase property from the seller subject to the sale of their property but has not as yet sold such property.

"This agreement is subject to the suspensive condition that 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 and that all suspensive conditions therein are fulfilled by no later than _____."

Type Two

Type Two is where the purchaser has sold his/her property however, the purchaser therein must still obtain loan finance:

"The Purchaser warrants that his property, being, _____ has been sold. 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 _____."

Type Three

Type Three is where the purchaser has sold his/her property and the purchaser therein has fulfilled all suspensive conditions.

"The Purchaser warrants that his property, being _____ has been sold and that any suspensive conditions contained therein have been fulfilled. The Purchaser 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"

General

The following clauses are added to the above (as applicable):

In the event of the above suspensive conditions not being fulfilled, 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.

In the event of the fulfilment 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.

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.

This condition is inserted for the benefit of the Purchaser who may waive the condition at any time in writing.

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.

SUBJECT TO SALE BOND GRANTS

When banks grant mortgage bonds, they assess the purchaser's ability to repay the bond. Where the purchaser has an existing property, banks may grant a mortgage bond for a new property purchase subject to the condition that the bond over the purchaser's existing property is cancelled.

In such cases, the bond attorneys cannot register the new mortgage bond until the existing bond over the current property is cancelled prior to or simultaneously with transfer of the new property.

It may be that the sale agreement is already subject to the sale of the purchasers existing property i.e. provision is made contractually for this. It may however be that the sale agreement is not subject to the sale of the purchaser existing property. In this latter event, the conditional bond grant does not automatically have the effect of fulfilling the suspensive condition relating to loan finance and an appropriate addendum must be signed should the parties agree to proceed notwithstanding.

A cautionary note is thus that the contracting parties, estate agents and conveyancers must always study the bond grants carefully to ascertain if there are any bond conditions not contemplated in the sale agreement. In such a case and in the event the purchaser is willing to sell the existing property (or has the means to settle and cancel the existing mortgage bond) and the seller is willing to proceed on a "subject to " basis, the parties must sign an addendum to this affect.

CONTINUED MARKETING

A "Continued Marketing" clause allows the seller to continue to market the property until such time as the purchaser has fulfilled a suspensive condition in the sale agreement. The suspensive condition that needs to be fulfilled is commonly that their property be sold but can be other suspensive conditions such as the granting of loan finance.

Some sale agreements have a "Continued Marketing" clause as a standard clause i.e. the seller is permitted to continue to market the property until all suspensive conditions in the agreement are fulfilled. In other cases, the continued marketing clause is contained in a separate addendum. In any event, it is important to read each continued marketing clause very carefully as there are a variety of variations found in sales agreements.

Where the seller obtains a competing offer (which is unconditional), the competing offer is presented to the first buyer, who, depending on the specific terms of the agreement must, within a specified time limit (usually 48 hours but can be several days), take certain prescribed steps to avoid losing the property. Note that the competing offer must be a *bona fide* offer.

There are various possible obligations imposed on purchasers in order to meet the competing offer. Some agreements provide that the purchaser must waive or fulfill all existing suspensive conditions whilst other agreements will provide that the purchaser must not only waive or fulfill all existing suspensive conditions but must also match the competing offer by way of purchase price and conditions. In the latter case, the purchaser is required to present a new offer to the seller within the prescribed time limit.

Some continued marketing clauses furthermore provide that the full purchase price must be secured within the specified time frame in order to avoid the competing offer. This is done in order to ensure that where the first purchaser waives the suspensive condition, that purchaser has the means and ability to secure the purchase price without the need to sell their existing property i.e. the contract terms ensure the purchaser can perform after waiver.

CONTINUED MARKETING CLAUSE

"Note that the example below may vary from contract to contract. Note further that the clause below may be drafted as permitting continued marketing pending the fulfillment of any suspensive conditions alternatively pending the fulfillment of the suspensive relating only to the sale of the purchaser's property.

Pending fulfilment or waiver of the suspensive condition relating to the sale of the purchaser property (as more fully set out above), the Seller shall be entitled to continue to market the Property and to accept any other bona fide offer for the Property provided that he shall first have given the Purchaser 48 (forty-eight) hours within which to waive or fulfil all suspensive conditions in this agreement, 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.

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. In the event that the Purchaser fails to waive or fulfil the suspensive conditions, on the lapsing of the 48 (forty-eight) hour period the Seller shall be entitled to accept the alternate offer in which event this agreement will immediately lapse.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.

COMPETING OFFER MUST BE UNCONDITIONAL

It can be noted from the above clause that the competing offer cannot contain any suspensive conditions i.e. the competing offer must be an unconditional cash sale alternatively must be an agreement where loan finance has been granted.

The competing offer must be unconditional for the protection of the seller and the agent. If a conditional offer was permitted as a competing offer resulting in the first offer being cancelled, to the extent that the second offer does not become unconditional (for example the mortgage bond is declined), both offers would be lost. In ensuring that the competing offer is unconditional, the seller and agent are protected.

The above requirement poses some issues as banks will generally not grant mortgage finance until the sale agreement is signed by seller and purchaser. As such the seller may only accept the competing offer together with an annexure wherein it is recorded that the competing offer is a second offer, that there is an existing "subject to" sale from a first purchaser and furthermore that when the mortgage bond is granted to the second purchaser, the second offer will be presented as a competing offer to the first sale agreement.

Only to the extent that the first offer does not become unconditional before the competing offer also becomes unconditional, alternatively the purchaser of the first offer does not waive or fulfill all suspensive alternatively does not match the competing offer (depending on the terms of the continued marketing clause), will the second offer become the "winning offer" and proceed.

In other words, the competing offer can only be accepted subject to the suspensive condition that the first sale agreement is terminated. This is of great importance and agents need to be careful to have the appropriate annexure and thus sell not the seller's property twice.

CASH COMPETING OFFER

Where the competing offer is a cash offer, a similar principle to above applies in that it must be made certain that the purchaser in the cash offer does indeed have the cash to purchase. The agreement can be accepted subject to the cash being made available or the purchaser can be made to provide proof of funds before proceeding.

DELIVERY OF THE COMPETING OFFER

It is preferable that the competing offer be delivered by hand. The reason for this is in the first instance certainty and in the second instance, the ability to communicate clearly. See below in this regard.

Delivery by registered post cannot be accepted or workable. It is possible for the competing offer to be delivered via email, provided that the continued marketing clause makes provision for this. In this case, the email must be sent with "delivery' and "read receipt" notices activated by the sender.

The notice letter delivered to the purchaser must be carefully drafted and checked. A copy of the competing offer together with confirmation of the fulfillment of suspensive conditions must accompany the notice per the continued marketing clause.

MANDATES TO CONTINUE TO MARKET / MARKETING OF PURCHASERS PROPERTY

Where subject to sales are concluded, agents should assess the status of their mandate with the seller and attempt to secure the right to continue to market the property.

Likewise, agents should review the status of mandates on the purchaser's property in an attempt to secure the right to market this property as well. It should be noted that in terms of clause 3.6 the Code of Conduct, agents may not reserve a sole mandate arising from the agreement. Separate mandates must be concluded for this purpose.

THE THREAT OF LITIGATION

When dealing with subject to sales and continued marketing clauses, it is advisable to take legal advice and to get assistance. To the extent that the clause terms are not adhered to alternatively, delivery of the notice is not correct alternatively, the actual notice is incorrect or misleading, the party that feels aggrieved will take legal advice on the matter.

The nature of these transactions is such that errors result in the property being sold twice. In addition, consider the example of where the competing offer is higher in value than the first offer, however errors are made in the delivery of notices resulting in the second offer not proceeding and the first offer being the offer that the seller is obliged to proceed with. An agent could be held liable for the difference in purchase of the competing offers if the errors are the agent's errors. Extreme caution must be exercised.

COMMUNICATION IS KEY

Agents and property practitioner's need to consider the fact that subject to sales and continued marketing clauses can be very confusing. As such communication at every stage is key. It is important that the parties, at every stage are kept advised as to the existence and status of the first offer and any competing offers.

Consider the position of the first purchaser who loses a property that the first purchaser and his family truly wanted to purchase. The first purchaser may even have sold his existing home in order to acquire the new property (and are awaiting their purchasers' bond to be granted). To the extent that this first purchaser is not kept up to date and is not advised of the existence of a competing offer until same was presented as a competing offer – the disappointment cannot be under estimated.

It should also be borne in mind that if the first purchaser does not get the property due to a competing offer, ideally the first purchaser should remain a client and be shown other properties.

NON AVAILABLITY OF CLAUSE WORDING

Subject to sale and continued marketing clauses either form part of the body the sale agreement alternatively form part of an annexure. In the latter event, it must be noted that the wording of these clauses are very specific and an attempt should not be made to draft these "on the spur of the moment". It is more advisable to obtain and use the correct wording before concluding the sale.

CONCLUSION

Subject to sale and continued marketing clauses are essential tools for sellers and agents. They however need to be understood and used correctly to avoid liability. Note lastly that when completing a subject to sale the initial sale must be at hand to ensure the dates in the two agreement tie up. Guarantees, occupation dates etc.

REGISTRATION AS A CREDIT PROVIDER IN TERMS OF THE NATIONAL CREDIT ACT 34 OF 2005

INTRODUCTION

In terms of s 40(1) of the National Credit Act 34 of 2005 (the "NCA") as amended by the National Credit Amendment Act 19 of 2014, a person must apply to be registered as a credit provider if the total principal debt owed to that credit provider under all outstanding credit agreements exceeds the threshold prescribed by the Minister in the Gazette.

The credit provider must register as such, prior to making any offer, making available or extending any credit. The effect of failure to register as a credit provider is that the agreement entered into would be unlawful and void.

The prescribed threshold was previously R500 000.00 however, as of 11 November 2016, it was amended in Government Gazette 39981 to R0.00.

CASE LAW

***DU BRUYN NO AND OTHERS* V *KARSTEN* (929/2017) [2018] ZASCA 143; 2019 (1) SA 403 (SCA) (28/09/2018)**

The previous deciding case in this matter was *Friend* v *Sendal* 2015 (1) SA 395 GP ("Friend"), where the court found that the NCA was only directed at those in the credit industry and did not apply to single credit transactions. However, the Supreme Court of Appeal reassessed the situation in *Du Bruyn No And Others* v *Karsten* (929/2017) [2018] ZASCA 143; 2019 (1) Sa 403 (SCA) (28 September 2018) ("Du Bruyn").

The facts of this case were as follows: Mr Karsten ("Karsten") held shares in two of Mr and Mrs Du Bruyn's (the "Du Bruyn's") companies and member's interest in their close corporation. The Du Bruyn's offered to purchase Karsten's interests in all three entities for a total amount of R2 000 000.00.

A deposit of R500 000.00 was to be paid and the balance was to be paid in monthly installments of R30 000.00 over a period of 5 years. Interest was to be levied on the deferred amount. The Du Bruyn's bound themselves as sureties and co-principal debtors and registered a covering bond over their immovable property.

Karsten was not a registered credit provider in terms of section 40 of the National Credit Act No 34 of 2005 (the "NCA") at the time the agreements were concluded however, he subsequently accepted that he was required to be registered in order for the covering bond to be registered and duly registered himself as such.

The Du Bruyn's thereafter defaulted on their installments and Karsten instituted proceedings against them for the balance of the purchase price based on breach of the Agreements. The Du Bruyn's attorneys claimed that the agreements of sale constituted agreements in terms of Section 8 of the NCA and that inasmuch as Karsten was not registered as a credit provider at the time the agreements were concluded, the agreements were null and void.

There were two aspects to this case that the court was required to decide. Firstly, whether or not the transactions were at arms-length and secondly, whether or not the NCA was directed only at those in the credit industry as found in Friend.

Arms-length Transactions

The NCA applies were the parties are contracting at "arm's length". The NCA further sets out the circumstances in which an arrangement will not be considered as arm's length, such as (*inter alia)* an arrangement in which each party is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction.

In Du Bruyn, the court found that the relationship was at arms-length. Although the parties had previously had an almost familial relationship, Mr Du Bruyn had obtained a valuation of his interest in the businesses, both parties had attorneys represent them in negotiations and their relationship had seriously deteriorated.

Does the NCA apply to single credit transactions?

The more important issue at hand was whether or not the findings in the Friend case, being that the NCA was not applicable to single credit transactions, irrespective of the amount, was correct.

In Friend, the court found that even though an agreement may be a credit agreement in terms of the NCA, this did not necessarily require the credit provider to register as such. It was said that the NCA was directed at the credit industry and did not apply to single transactions, irrespective of the amount.

However, this decision was re-evaluated in Du Bruyn. The Court found that on the plain reading of section 40(1)(b) it is clear that a person must register as a credit provider if the total principal debts exceeds the prescribed threshold in terms of s 42(1) which is set by the Minister by notice in the Gazette, irrespective of whether or not the credit provider is involved in the credit industry and whether or not it is a once-off credit agreement.

The court further mentioned that although it may be sensible and reasonable for the NCA not to apply to once-off transactions by someone who does not participate in the credit industry, they could not reconcile it with the language of the provision. Although the court accepts that this is not a perfect solution to the problem, it has insisted that the deficit needs to be remedied by the legislation and not by the courts.

CONSEQUENCES

This decision has far-reaching consequences within the property sector inasmuch as the prescribed threshold as per the government gazette notice of 13 May 2016 is currently R0.00.

This means that private loans and instalment agreements for the purchase of immovable property could (depending on facts and circumstances) also be considered credit agreements and the credit provider will need to register as a credit provider prior to entering into such an agreement.

SOME RELIEF

As previously mentioned, a failure on behalf of the credit provider to register as such will result in the agreement being found unlawful and void.

Some relief is however to be found in section 89(5) of the NCA (dealing with unlawful credit agreements) in that this section provides that “if a credit agreement is unlawful in terms of this section, despite, any other legislation or any provision of an agreement to the contrary, a court must make a just and equitable order including but not limited to an order that that the credit agreement is void as from the date the agreement was entered into”.

CONCLUSION

The NCA is complex and lengthy legislation and this article is not to be construed as legal advice.

Comprehensive legal and accounting advice should be sought before taking, acting or entering into, agreements related to the NCA.

THE CONSUMER PROTECTION ACT

INTRODUCTION

The CPA was signed into Law on 24 April 2009. The effective date of the Act was 1 April 2011. The Act deals with the rights of consumers generally and affords them very wide protection. Prior to the Act, contracts and supplier and consumer behaviour were not codified and were regulated in terms of various legislation, the common law and decided case law.

SCOPE OF THE ACT

The scope of the Act has been very widely defined and includes every transaction between a supplier and consumer involving the supply of goods and/or services in the ordinary course of business within the RSA. The Act applies to every transaction unless exempted in terms of the Act.

The application is limited by the term "in the ordinary course of the supplier's business". The Act further does not apply to companies and juristic persons and whose turnover or net value exceeds a certain threshold to be determined by the Minister (currently an asset value or annual turnover which equals or exceeds R2 million). (See the exception in Section 14 below.)

APPLICABILITY OF THE CONSUMER PROTECTION ACT TO PROPERTY SALES

The aim of the Act is to protect ordinary citizens from larger suppliers. As such only property sales effected in the ordinary course of the supplier's business would be covered by the Act. There are four main areas of applicability:

1. Developer Sales: when a developer / builder sells a property within a development, such sale is in the ordinary course of business and the purchasers of such property would be entitled to the protection of the Act.
2. Private Sales: where a residential property owner sells a property, such sale is not in the ordinary course of the seller's business and does not as such fall under the Act.
3. Investor Sales: The effect of the CPA on property investors is still to be determined. The current popular view is that investors do not fall within the CPA. Investors purchase property for capital and not revenue purposes. When an investor sells an investment property, SARS levies capital gains tax and not income tax.
4. Speculators: Speculators needs to be cautious. Where an investor is classified as a speculator or trader of property for SARS purposes due to the frequent purchase and on sale of property, the CPA may arguably apply to such sales. An example is the home renovator who continuously purchasers a home, renovates and sells and repeats the process multiple times.

APPLICABILITY OF THE CONSUMER PROTECTION ACT TO RENTALS

The CPA will generally apply where a landlord leases property in the course of its business and where the tenant is a natural person or a juristic person with an asset value or annual turnover of less than R2million.

The application of Section 14 of the CPA is however limited in that this section does not apply to lease agreements between juristic persons regardless of their annual turnover or asset value. Section 14 of the CPA provides, inter alia, for a maximum lease period of 2 years and allows a tenant to terminate the lease early by giving 20 business days' notice.

An investor who rents residential property as part of a rental enterprise is considered to be covered by the Act. A rental enterprise may arguably comprise one property and/or a garden flat. Whilst this issue is still to be determined, the general approach is to include the former rentals into the protection of the Act.

APPLICABILITY OF THE CONSUMER PROTECTION ACT TO ESTATE AGENTS

Estate Agents are regarded as suppliers of a "service" and are thus subject to the Act. The definitions within the CPA are sufficiently wide so as to include estate agents as suppliers and the relationship as constituting a transaction.

Whilst the underlying sale between two private individuals may not be subject to the Act, the service supplied by the Estate Agent is in the ordinary course of that agent's business. Such a sale will ordinarily be recorded on the estate agent's standard documentation. Best practise dictates that the Estate Agents conduct and their documentation should comply with the requirements of the Act.Estate Agent mandates are largely regarded as being subject to the Act. These agreements need to comply with the Act and the provisions in the CPA around fixed term contracts.

CONCLUSION

The CPA is detailed legislation. Advice should be sought when dealing with the Act and its application.

THE IMPACT OF UNFORESEEN EVENTS ON CONTRACTUAL IMPLICATIONS FORCE MAJEURE / IMPOSSIBILITY OF PERFORMANCE

INTRODUCTION

The purpose of this article is to explore the impact of COVID-19 and the resultant lockdown on contractual implications in South Africa. There are two primary issues to be considered in this regard:

1. Does the contract have a Force Majeure (FM) clause?
2. If there is no FM clause or if there is but it does not apply – does the Common Law concept of "supervening impossibility of performance" apply?

FORCE MAJEURE

What is Force Majeure

Force majeure (known in Roman law as *vis maior* or *casus fortuitus*) is the term used to describe an event or occurrence which is unexpected and beyond a party's reasonable control that makes contractual performance impossible.

As a general rule and to the extent there is an FM clause that is applicable, FM will relieve any party from liability arising from non-performance of a contractual obligation.

The requirements for FM are as follows:

1. The performance must be objectively impossible;
2. The impossibility must be unavoidable by a reasonable person.

The obligation to comply with a contractual obligation due to FM will however not be terminated (or suspended if applicable) where:

1. The party was in mora (breach) at the time performance became impossible
2. Where impossibility of performance was the fault (whether intentionally or negligently) of the defaulting party;

As a general rule, where a contractual obligation cannot be performed due to FM, counter obligations of the other party are also not due. As can be seen there are various factors at play and each contract and case must be examined on its own merits.

Force Majeure Clauses

It must be noted that there are various forms of FM clauses and to be enforceable, the clause needs to be sufficiently specific. General standard FM clauses for the most part lack specificity and will afford the affected parties with limited manoeuvrability.

Is Force Majeure Permanent?

In general and depending on the wording of the FM clause, the effect of an FM clause is to suspend contractual obligations for an unknown period. Essentially an FM clause results in the effects of breach of contract being suspended for the length of the force majeure event. Therefore, once the force majeure event terminates and performance is possible once more, the contract will continue. It is vital to analyse an FM clause on a case-by-case basis, having consideration of the contract and the particular surrounding circumstances.

COMMON LAW POSITION – SUPERVENING IMPOSSIBILTY OF PERFORMANCE

To the extent that FM is not applicable, parties need to look to the common law for assistance. In South African law, any event beyond the control of contractual parties (such as COVID-19 and the resultant lockdown) that makes performance objectively impossible after the conclusion of the contract is addressed under the common law principle of "supervening impossibility of performance".

The common law position is that both parties are excused from performing:

1. if performance of an obligation becomes objectively impossible after conclusion of the contract;
2. the events must be unforeseen or unavoidable;
3. the inability to perform is not due to the fault of any of the contractual parties.

Relying on the common law of "impossibility of performance" is difficult as the South African Courts stringently apply these requirements.

Unibank Savings & Loans Ltd (formerly Community Bank) v Absa Bank Ltd 2000 (4) SA 191 (W) 198 B-E, described the common law position: if performance of a contract is impossible due to unforeseen events (not caused by the parties), parties are excused from performing in terms of the contract. The impossibility must be absolute or objective as opposed to relative or subjective.

It is important that the parties must not have had reasonable foresight of the event causing impossibility at the time the contract was concluded.

THE EFFECT OF FORCE MAJEURE ON PROPERTY RELATED CONTRACTS

FM clauses are generally not included in most sale / lease of residential property agreements and will thus not be applicable to the extent that these clauses are not in the agreement.

If there is an FM clause, it must be examined to see if it is enforceable having regard to the specific wording of the clause and the circumstances of the parties (i.e. is performance objectively impossible).

If there is no FM clause, the question is whether the common law applies. Each matter needs to be assessed on a case by case basis.

CONCLUSION

Parties need to carefully consider whether their current contracts make provision for FM and if so where the FM clause is applicable and to what extent. If there is no FM clause it must be determined whether the common law applies and to what extent. Legal advice must be sought before taking action.

Please e mail us conveyancers@schindlers.co.za with any queries you may have.

ELECTRONIC CONTRACTS AND THE SALE OF IMMOVABLE PROPERTY

INTRODUCTION

With the expansion of e-commerce and the growing use of digital technology in the business world, the Electronic Communications and Transactions Act 25 of 2002 (ECTA) enacted in 2002, has made it easier than ever to facilitate electronic communications and transactions online, via e-mail, SMS, and even Facebook and WhatsApp.

This article will highlight the important considerations to keep in mind before an agreement reached electronically or by any means other than being written down and signed will be legally binding on the parties to it.

Note: Agreements for the sale immovable property are specifically excluded in the ECTA from being concluded electronically and accordingly must be signed by hand by the parties. The legal basis for this is more fully set out below.

ESSENTIAL REQUIREMENTS OF ALL CONTRACTS

Electronic contracts entered into online, or agreements concluded through data messages such as SMS or WhatsApp are only valid if they meet the common law requirements (*essentialia*) of contracts, which are: -

- a valid offer and acceptance;
- there must be consensus between the parties that they have the intention to enter into and conclude the agreement;
- both parties must have contractual capacity (i.e. must be over the age of 18 and be of sound mind);
- The content of the agreement must be specific and have clear, definitive terms;
- The agreement must be legal and lawful;
- The obligations imposed on the parties must be capable of performance.

In terms of section 12 of ECTA, the lawful requirement that documents or Information must be" in writing" is met if these documents or Information are in the form of a data message; and accessible in a manner usable for subsequent reference.

Where all of these requirements are present whether it is communicated as a data message online, through an exchange of e-mails, SMS texts, WhatsApp or Facebook messages, a valid agreement is deemed to have been concluded and will be legally binding and enforceable.
It is thus possible, in terms of ECTA for a contract to be concluded, varied and cancelled by means of an e-mail, SMS or WhatsApp.

ELECTRONIC/DIGITAL SIGNATURES

There may be formal requirements imposed by statute or by the parties to a transaction themselves that the terms be recorded in writing and duly signed.
Where this is the case, and for example where it may be practically impossible to obtain multiple original handwritten signatures on the same document, this requirement can generally be satisfied through electronic signatures.
Section 13 of ECTA provides for 2 categories of electronic signatures to be used:
Standard Electronic Signatures, which include any digital or scanned signatures and suffice for most purposes; and
Advanced Electronic Signatures, which are digital signatures created with a digital certificate from an accredited Authentication Service Provider.

The Supreme Court of Appeal in a recent case *(Spring Forest v Willberry (Pty) Ltd before the Supreme Court of Appeal (SCA) in 2015)* noted that "The courts in South Africa have always adopted a pragmatic approach to signatures rather than a formalistic approach and the primary consideration is not whether the signature is literally pen on paper, but rather if the method of signature has fulfilled the function of authenticating the identity of the signatory".

It also held that the names of the parties at the foot of their respective emails were intended to serve as signatures, constituted "data" which was logically associated with the data in the body of the emails, and identified the parties, thus concluding a valid agreement.

EXCEPTIONS

There are, however, exceptions where agreements may NOT be concluded electronically. These exceptions, contained in Section 4(4) of ECTA are:

- agreements for the sale of immovable property;
- long-term leases of land exceeding 20 years;
- signing of a will; and
- bills of exchange (such as a cheque).

In other words, agreements for the sale of immovable property as provided for in the Alienation of Land Act are excluded from the scope of ECTA and as such the electronic signature provisions (including the advanced signature provisions) will not apply to the signature provisions contained in the Alienation of Land Act.

Section 2(1) of the Alienation of Land Act provides that no sale of land will be of any force and effect unless it is contained in a written ***deed of alienation*** signed by the parties or their agents (under the parties' written authority).
An offer to purchase or agreement for the sale for immovable property are examples of such a deed of alienation. A verbal contract for the sale of immovable property is similarly unenforceable.

Consequently, one can validly conclude a contract of sale for a car electronically, but when it comes to the selling and purchasing of immovable property, the agreement must be reduced to writing and physically signed by hand and in pen by the parties.

Parties may still communicate terms of their agreements via email, WhatsApp or SMS. Execution of the Offer to Purchase shall, however, only be enforceable and valid once the agreement is signed by hand by both of the parties or their authorised agents. Therefore, a signature, for purposes of this transaction must be the act of physically signing by hand and does not include by way of data message.

VARIATIONS AND AMENDMENTS TO EXISTING CONTRACTS CAN BE CONCLUDED ELECTRONICALLY

The Alienation of Land Act does not regulate the amendments, variations or cancellations of agreements for the sale of immovable property and it may be argued that ECTA and more specifically Section 13 thereof may be deemed to be applicable to variations, amendments or cancellations associated with such agreements (as the exclusions relates to the validity of such agreements only).

Typical agreements of sale of immovable property will contain a non-variation clause, providing that "*no amendment to, variation or consensual cancellation of the agreement will be effective unless it is in writing and signed by the parties concerned*".
Variations and amendments to the Agreement of Sale is usually dealt with by way of an Addendum which is signed by the Parties.

However, as a result of the interpretation and application of Section 13 of ECTA (in that the provisions of ECTA remain applicable to such variations and amendments) the proposals and counter-proposals exchanged between the parties by email correspondence, WhatsApp's or SMS may become binding on the parties once a proposal or counter proposal has been accepted, even if the parties have a non-variation clause in place in their contract.
It is therefore recommended that offers to purchase avoid standard non-variation clauses and specifically exclude electronic forms of acceptance or variation as defined in the ECTA to avoid a situation where the parties have unknowingly concluded an agreement by innocent correspondence over WhatsApp. i.e. the variation clause will specifically require an addendum in paper-based form actually signed by the parties.

CONCLUSION

Contracts for the sale of immovable property must be physically signed by the parties whereas other contracts not specifically excluded from ECTA can be concluded via WhatsApp and email etc, as can variations to immovable property sale agreements.

BASICS OF BUSINESS RESCUE & ITS IMPACT ON PROPERTY TRANSACTIONS

INTRODUCTION

Business rescue was introduced into South African law with the commencement of the new Companies Act No 71 of 2008 ("the Act"), being effective on 1 May 2011. Business rescue enables a company, with minimal or no cash-flow, to restructure, while obtaining some "breathing room".

Business rescue is a rehabilitation mechanism, through which a business can restructure its business, contracts, debt affairs, other liabilities and assets. The end goal of course being that the business will recover which will be to the benefit of both its creditors and its employees and directors.

FINANCIAL DISTRESS

The test as to whether a company should be placed in business rescue is whether the company is *financially distressed*.

The Act defines "financially distressed" (section 128(1)(f)) to mean that – *"it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months (commercial insolvency); or it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months (factual insolvency)."*

BUSINESS RESCUE PRACTITIONER & PLAN

A business rescue practitioner ("BRP") will be appointed and tasked with compiling a plan with the directors of the company.
The business rescue plan should*, inter alia*:

- demonstrate why business rescue is the preferable course of action, as opposed to liquidation; and
- balance the rights and interests of all relevant stakeholders.

The business rescue plan must be presented to a meeting of the creditors of the business for approval. If the creditors do not accept the plan then the BRP may apply to the courts for it to be approved, or he may compile another plan for consideration by the creditors, or the business may be placed into liquidation. The vote in favour of the plan needs to be at least 75% of the creditors in value and at least 50% of the vote must consist of independent creditors (not shareholders).

Essentially, the BRP must show to the creditors that they would stand to gain more through business recue proceedings than by liquidation proceedings.

WHAT ARE THE BENEFITS OF BUSINESS RESCUE?

Whilst appointing a BRP may be daunting for many business owners, fearing that the director(s) will lose total control over the company and the day-to-day management of their business, this is not the case.

Business rescue allows a director of a company to continue exercising his duties, whilst under the temporary supervision/guidance of the BRP. The director and BRP are expected to work together in order to revive the company's unfavourable economic conditions, by implementing a well-developed and sustainable business rescue plan.

Other advantages of business rescue include:

- protection of the company's assets against creditors, by placing a temporary moratorium (suspension) on all creditor's claims against the company;
- a temporary moratorium (suspension) on all legal proceedings against the company;
- protection of employees by allowing them to remain employed while the company is restructured;
- enabling the BRP to (entirely, partially or conditionally) suspend contracts entered into by the company for the duration of the business rescue proceedings (with the exception of employment contracts).

EFFECT OF BUSINESS RESCUE PROCEEDINGS ON EXISTING AGREEMENTS OF SALE

In terms of section 136(2) of the Companies Act, the BRP is entitled to entirely, partially or conditionally suspend, for the duration of the business rescue period, any obligations upon the company in terms of an agreement entered into before being placed in business rescue.

Thus, a BRP may suspend the payment of any purchase price or rental amount in terms of an agreement of sale or lease agreement.

The other party to the agreement may then elect to allow the business the indulgence in time regarding its obligations or it may choose to place the other party in breach, cancel the agreement and then record with the BRP its claim against the party along with the other creditors.

A moratorium is placed on parties being able to bring legal proceedings against the company while under business rescue.

SALE OF PROPERTY BY A BUSINESS UNDER BUSINESS RESCUE

A business rescue plan may entail the sale of the business' immovable property in order to access funds to pay creditors.

Only the BRP may enter into any agreement whereby the entity sells a property. Any agreement signed by any other representative of the company whilst it is under business rescue will not be a valid and binding agreement. The conveyancer will need to be provided proof of the appointment of the BRP and a copy of the business rescue plan to show the sale is in accordance with it.

MUNICIPAL DEBT / BODY CORPORATE LEVIES / HOME OWNERS' ASSOCAITON LEVIES

The abovementioned bodies are relatively safeguarded in the debts owed to them as they may withhold the certificates that would be required in order for the owner to realise any cash flow from the sale of immovable properties.

MORTGAGE BONDS

In all likelihood, if a purchaser is placed into business rescue after a bond has been approved, but before registration of transfer, the lender would withdraw any loan finance approval

The BRP may attempt to re-apply for loan finance if it deems it suitable to do so and same is approved by the creditors in terms of the business rescue plan.

UNDERSTANDING LIQUIDATION IN RELATION TO IMMOVABLE PROPERTY

INTRODUCTION

Liquidation is a procedure set out in the Companies Act of 1973, it is applicable to companies/close corporations only and not private individuals. Liquidation is a last resort and ultimately results in the demise of the business. The purpose of liquidation proceedings is to dispose of an insolvent company's assets and utilise the proceeds of the assets to settle creditors' claims.

WHAT CIRCUMSTANCES LEAD TO AN ENTITY BEING PLACED IN LIQUIDATION

An entity should be placed in liquidation if it does not satisfy the solvency and liquidity test, such that the company is:

Factually insolvent: the entity's liabilities exceed its assets; and

Commercially insolvent: the entity is unlikely to be able to pay its debts as they become due in the ordinary course of business, in the ensuing twelve months.

PLACING OF AN ENTITY INTO LIQUIDATION

An entity may be placed in liquidation either by the Court or voluntarily.

A voluntary liquidation may be done by a resolution taken by directors of a company and/or a special resolution by shareholders of the company, or members of a close corporation – or by creditors.

Alternatively, an application can be made to Court to liquidate an entity, by the entity itself (in which case, directors of a company must have resolved to make such application), by one or more of its creditors, by one or more of its members, or a combination of such parties. There are various grounds for the liquidation of an entity, the most general of these being that it appears to the Court that it would be just and equitable in the circumstances.

APPOINTMENT OF A LIQUIDATOR

Once a company has been placed into liquidation, a liquidator will be appointed by the Master to administer the liquidation, which includes the power to sell the assets owned by the business. The liquidator has a duty to, without delay, recover and take possession of all the company's assets and apply them in satisfying the costs of liquidation and creditors' claims. This would include the sale of any immovable property owned by the company.

RANKING OF CREDITORS

Creditor's claims are ranked and are paid out in accordance with an order of preference determined by South African legislation. Once all the costs of winding up have been paid, creditors will be entitled to their proportionate share of the residue of the company's estate.

Preferent creditors are entitled to be paid before concurrent creditors. The secured creditors are those who hold security for their claims and they are paid from the proceeds of a sale of the security that they hold. The most common and relevant example of this is a mortgage bond holder over a property sold.

Concurrent creditors (which would include preferent and secured creditors whose claims are not satisfied in full from the security they hold) are paid out of the residue of the estate and are the last of the creditors to be paid.

SIGNING OF AGREEMENTS OF SALE

Once a business has been placed in liquidation, only the appointed liquidator may represent the business in signing any agreement of sale in respect of immovable property owned by the business. A liquidator may sell the immovable property by public auction, public tender or private contract. An agreement of sale signed by a director or member of the business after it has been placed in liquidation is not valid and binding. In fact, any disposition of a company's property after it has been placed in liquidation, not made by the liquidator, is void unless the Court orders otherwise.

VOIDABLE TRANSACTIONS

The liquidator must be mindful of dispositions of property made by the company before liquidation proceedings, as such transactions may be voidable and set aside by the Court - these include, but are not limited to, dispositions not made for value, or dispositions which have the effect of preferring one creditor of the company (and are therefore to the detriment of the other creditors) and made not more than six months before the company went into liquidation.

IF A SELLER / PURCHASER IS LIQUIDATED BETWEEN SALE AND TRANSFER

As a general rule, the liquidation of a company does not suspend or terminate a contract. A liquidator of a company has a discretion to enforce or abandon the contract concluded by the company before liquidation. In making such election, the liquidator must do so within a reasonable period of time. Should the liquidator elect to abandon the contract, the other party to the contract cannot compel the liquidator to perform and the other party is left only with a concurrent claim against the insolvent estate for the resultant damages from the termination.

DAMAGES

Any party that suffers damages as a result of the liquidation of the other contracting party may lay a claim as a creditor against the entity in liquidation, this would include an estate agency's claim for commission.

MUNICIPAL DEBT / BODY CORPORATE LEVIES / HOME OWNERS' ASSOCIATION LEVIES

With regards to municipal debts owed by that debtor in liquidation, there is a preference in favour of the municipality that allows it to prevent transfer of immovable property by refusing a clearance certificate until all municipal debt owed for a period of two years immediately preceding the date of application for the clearance certificate has been paid. A municipality may not hold back the issuing of a rates clearance certificate if the past 2 years municipal debts have been paid. The municipality is still able to claim from the owner any balance that is outstanding and is in fact a secured creditor in the legislation.

Body corporates and home owners associations also enjoy an effective preference in respect of unpaid pre-liquidation levies and may refuse to issue a levy clearance certificate until the debt is secured, which means that a body corporate effectively ranks in priority before secured creditors.

DURATION OF LIQUIDATION:

Once a company is in liquidation, the liquidator is appointed to administer the estate and wind-it up. Liquidation proceedings, from start to finish, can take anything from 6 months to 2 years depending on the nature and complexity of the transactions in which the company or corporation was involved.

CONCLUSION

Owing to the complexity and implications of liquidation, readers are encouraged to seek the advice of one of our professionals, who will gladly assist you.

RENT TO BUY

INTRODUCTION

Rent-to-buy is a leasing arrangement that provides for the rental of a property for a fixed or undetermined period, during which the Tenant (Purchaser) has the opportunity to purchase the property from the Landlord (Seller).

This opportunity comes either in the form of an "Option" or in the form of a "Right of Pre-Emption". A Right of Pre-Emption is also known as a "First Right of Refusal".

The essential difference between an Option and a First Right of Refusal is that the grantor of an Option is obliged to sell if the option is exercised whereas the Grantor of the First Right of Refusal does not have to sell.

In the case of a First Right of Refusal, in the event of the Grantor wanting to sell, the Grantor must give the Grantee the first opportunity to purchase the property.

RIGHT OF PRE-EMPTION / FIRST RIGHT OF REFUSAL

A First Right of Refusal is a right giving the Grantee (Tenant) a preference to buy the property in the event that the Grantor (the owner of the property or landlord) wishes to sell the property.

The clause creating the First Right of Refusal is normally included in the lease agreement.

The Landlord is under no obligation to sell, but should the Landlord decide to do so, the Tenant must be given the first opportunity to purchase the property.

Whilst there are many variations of a First Right of Refusal clause, such a clause in its simplest form may read as follows:

"The Landlord may not sell, alienate or transfer the property unless the Landlord has first offered the property for sale to the Tenant"

The clause may go on to provide that the property must be offered for sale at an amount provided by a sworn appraiser nominated by the parties jointly. There may be further clauses regulating the appointment of the appraiser or to determine the purchase price and or clauses to regulate the form of contract etc.

The parties should always seek advice in regard to First Right of Refusal clauses, whether this be in the drafting of the clause or the implementation of the clause.

Note that where the Landlord offers the property for sale in terms of a First Right of Refusal clause, which offer is declined and the Landlord thereafter procures an offer to purchase at a lower purchase price than was first offered to the tenant, the tenant must be given a further opportunity to purchase at the lower price.

There are various scenarios that arise and professional advice must be sought.

<u>BENEFITS</u>

Some benefits of a First Right of Refusal clause are as follows:

- The purchaser can occupy the property while accumulating finances to purchase the property at a later stage;
- It can buy the purchaser or tenant time to save for the deposit;
- A purchaser can improve their credit history until such time that a bond is affordable;
- A purchaser has the freedom to back out of the deal;

- The purchaser can experience the property before buying;
- A purchaser renting a home with an intention to own in the future would be more inclined to keep it in a good condition;
- The benefit to the Seller is that they can request the desired purchase while collecting rental.

DRAWBACKS

Some drawbacks of a First Right of Refusal clause are as follows:

- the purchaser does not own the property until such time as transfer takes place;
- The seller must first offer the property to the tenant in the case of a right of first refusal;
- The seller may elect not to sell the property;

OPTIONS

An option is a written offer to sell or buy a property which may be linked to a lease agreement. (Although options need not only be used in relation to lease agreements).

Whilst there are various forms of options, an option agreement generally includes the following:

- A written option document, signed by both parties;
- A time limit for the duration of the option;
- A mechanism for the exercise of the option;
- An undertaking by the Grantor not to withdraw the option for a specific period (such as for the duration of the lease);
- An undertaking by the Grantor not to sell the property to any other purchaser for the duration of the option;
- All the essential terms of the sale including the parties, the property, the purchase price;
- A declaration that if the option is exercised a valid agreement comes into being.

Best practise is to draft a separate Option Agreement setting out clearly the rights and obligations of the parties.

A full sale agreement is then annexed to the Option agreement wherein the terms of the sale are agreed, including the purchase price and other terms. The Grantor signs the agreement. The Grantee is required to exercise the option by signing the Sale Agreement and delivering same to the Grantor within a specified time period.

The option agreement could further include an option consideration – although this would generally not be done in a lease scenario.

If there is an option consideration, the consideration is paid into trust and held pending the exercise of the option. If exercised, the option consideration forms part of the purchase price. If not, the option consideration is paid to the Grantor.

A sample Option may read as follows:

"The Landlord hereby grants to the Tenant an option to purchase the Property according to the conditions as set out below.

The Tenant shall be entitled to exercise the option granted in terms of this agreement and conclude the Agreement of Sale annexed hereto as Annexure A, by delivering to the Landlords chosen address a signed copy of the Sale Agreement to Purchase the Property.

This option must be exercised by the Tenant by no later than _____ at _____h_____, failing which this option shall lapse in its entirety.

It is recorded that Annexure A annexed hereto has already been signed by the Landlord.

The Landlord undertakes to not sell the Property to any other third party while this option agreement is of force and effect.

Should the Tenant fail to exercise the option contained herein, the rights of the Tenant shall lapse.

CONCLUSION

There are various forms of First Right of Refusal and Option agreements. Legal advice should be sought before proceeding with either

ENGINEERING NOTES

INTRODUCTION

In certain transfers when applying for the seller's rates clearance figures from the Municipality, a note relating to "engineering contributions" is raised by the Municipality which needs to be resolved before a rates clearance certificate will be issued by it. This article examines what these "engineering notes" are and how they arise.

"Engineering notes" essentially relate to amounts payable by a person (the owner or the developer) who has applied to change the land use rights of the property (i.e. a rezoning application), or applied for additional rights to the land, or when a property is subdivided.

In order to facilitate the upgrading of roads, sewers, pavements, parks and other infrastructure pursuant to the proposed rezoning or subdivision of the property in question, engineering services are required and as such engineering fees or contributions become due and payable by the applicant to the Municipality. The Municipality confirms with the owner of the property the amount of the contribution payable, particulars of how the contribution was determined and the purpose for which the contribution is required. This process is implemented in accordance with the relevant Municipality's Municipal Planning By-Laws, as governed by the Spatial Planning and Land Use Management Act, 2013 (Act 16 of 2013) ("SPLUMA").

It happens fairly often that an application for additional rights or to subdivide or re-zone the property was made to the Municipality by the owner or the developer is granted and then for whatever reason is postponed, never concluded or abandoned completely. However, the engineering contributions calculated by the Municipality to attend to the amendment of the land use of the property remain reflecting on the Municipality's systems as being due to the Municipality and a "note" to this effect is recorded against the rates account of that property.

HOW CAN ENGINEERING NOTES AFFECT TRANSFERS OF PROPERTY?

In terms of the City of Johannesburg By-Laws, the Registrar of Deeds shall not register a deed of transfer unless the Municipality certifies that all outstanding engineering contributions have been paid in full. Therefore, payment of the sub-division/ rezoning engineering fees is required before the Municipality will issue the necessary rates clearance figures required to be paid for purposes of a transfer. Furthermore, no building plans may be approved by the Municipality until such time as the engineering services contribution has been settled. These fees can run into hundreds of thousands of Rands, and even millions of Rands in certain developments.

HOW ARE ENGINEERING CONTRIBUTIONS DEALT WITH?

Where an owner of property wishes to avoid the payment of a contribution envisaged above, he/she may request the Municipality to repeal the amendment that was applied for, or if the owner wishes to reduce the amount of the contribution, he/she can apply for the further amendment of the land use of the property, which must be done within 90 days of receiving notice from the Municipality of the contribution payable. On receipt of the request, the Municipality may grant or refuse the owner's request. The Municipality may also consider an owner's request that:-

- the contribution be paid in instalments over a certain period of time, not exceeding 3 years;
- a prospective new purchaser be liable for the contribution in terms of an agreement/ undertaking after transfer made with the agreement of that purchaser; or
- payment of the contribution be postponed for a period not exceeding 3 years where security or a guarantee for the contributions is provided to the Municipality.

While the law is not settled in regard to whether engineering contributions prescribe, it is our view that they should prescribe after 3 years of becoming due, as these are technically "fees" charged by the Municipality for the supply of services (or upgrade of services) to a property.

CONCLUSION

Most of the time sellers are unaware of any outstanding engineering contributions noted against the property and this is only brought to light when the conveyancers apply for the rates clearance figures. This can cause a significant delay in the transfer of the property as the note needs to either be removed, if possible, or the contribution paid, before the rates clearance certificate that is needed to facilitate transfer can be issued by the Municipality.

INTERPRETATION OF THE CLAUSE: "SUBJECT TO THE SUCCESSFUL SALE"

INTRODUCTION

Depending on their circumstances, purchasers may need to purchase property – "subject to the sale of their existing property'.

As such a clause is inserted into the sale agreement such that Purchaser's offer is "subject to the Purchaser selling his property". The precise wording of these clauses varies greatly.

This article looks at the court case of *Koen v Punyer* 1984(1) 344 (SECLD) where the court had the opportunity to interpret the phrase: "*subject to the successful sale of the Purchaser's Property*". The case is relatively old, but it demonstrates a point.

The article is further intended to caution parties against using the clause "subject to the successful sale of the Purchaser's property" without properly clarifying what is meant by this phrase.

THE FACTS

The Seller sold his property to the Purchaser "subject to the successful sale of the Purchasers property". The funds from the sale of the Purchaser's property would be used to finance the purchase of the Seller's property. The Purchaser sold his property to a Mrs. Witter and the sale agreement was subject to Mrs. Witter obtaining a bond and raising the balance in cash.

A dispute arose as to when the suspensive condition relating to the "sale of the purchaser's property" was fulfilled. The Seller contended that the condition was fulfilled immediately on the sale of Purchaser's property while the Purchaser argued that the condition was fulfilled only once he was in receipt of the purchase price from his sale.

The consequence of the dispute is that on the first interpretation guarantees were due as the suspensive condition was fulfilled and in the latter guarantees were not due as the suspensive condition was not fulfilled. Guarantees in the latter case were only due and or possible once the suspensive conditions in the sale with Mrs. Witters were fulfilled and when the purchase price in the second (subject to) agreement was secured.

WHAT THE COURT HELD

The Court held that a "successful sale" means a successful signing of an agreement of sale and it did not mean the fulfillment of the suspensive conditions in the Purchaser's sale. Accordingly, the agreement between the Seller and Purchaser was unsuspensive once the Purchaser had signed the sale agreement for his property with or without the suspensive conditions in the Purchaser's sale being fulfilled.

The Purchaser had to perform the Seller even though he had not secured the purchase price from the sale of his property.

CONCLUSION

We respectfully disagree with the reasoning of the court. Our view is that the correct interpretation of the phrase "subject to the successful sale of the Purchaser property" is that the suspensive condition is fulfilled once the purchaser's property has been sold and after all suspensive conditions therein have been fulfilled.

A purchaser in a subject to sale can only proceed and secure guarantees once the Purchasers own sale is unsuspensive and the delivery of guarantees is possible. In addition, the sales and the registration thereof must be linked. The cautionary note is that a "subject to sale" clause must be defined such that it is clear when the suspensive condition relation to the sale of the purchaser property has been fulfilled. A clause as follows can be used:

"This agreement is subject to the suspensive condition that 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 and that all suspensive conditions therein are fulfilled by no later than _____

BUILDING PLANS

INTRODUCTION

This article serves to give some insight into the issue of building plans related to the sale of residential immovable property.

COMMON MYTHS

- Myth: it is unlawful/illegal for a property to be transferred without approved building plans in place for the property;
- Reality: there is no legal requirement that requires estate agents, conveyancers, the deeds office, the municipalities or the banks to ensure that up-to-date approved building plans are in place for a property at any stage before, during or after the registration process.
- Myth: the municipalities are obliged to keep copies of the approved building plans on file for every property that falls within its limits.
- Reality: the municipalities are under no legal obligation to keep building plans on file.

LEGAL POSITION RE BUILDING PLANS

PREVIOUS LAW

The prior law is found in the case of ***Van Nieuwkerk v McCrae 2007(5) SA 21 W***. 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 a tacit term) of such an agreement that alterations to the building also complied with the statutory requirements.

CURRENT LAW

The current law is set out in the case of ***Odendaal v Ferraris (422/2007) [2008] ZASCA 85*** where the court held that a lack of approved building plans for a property constitutes a latent defect. If the seller is unaware of the lack of approved plans, he will not be able to disclose this and the *voetstoots* clause will protect him.

Please refer to our separate article in regard to latent and patent defects for the full facts.

BUILDING PLAN CONSIDERATIONS

- There are various approaches taken by different estate agencies.
- Some estate agents require sellers to warrant that the approved plans are in place.
- Others set out a yes/no/unsure approach in the disclosure document.
- Others avoid the issue.
- To ask or not to ask – that is the question.
- In our opinion, it is better to determine the issue with certainty.
- If Sellers are aware that there are no approved plans, written disclosure is necessary.
- If the Seller did the alterations, the seller must be aware of the existence of the approved plans.

SOME HUMAN FACTS TO CONSIDER

- Sellers do not take the warranty or the disclosure document seriously enough.
- Sellers do not understand the implications of giving a warranty regarding building plans without properly checking first.
- Sellers often assume they have approved plans without actually checking they have these / that they are approved.
- Sellers often operate on assumptions that the “plans must be approved” / “the architect has them” / “the city council has a copy – it’s their job” / “there is an approved set in the drawer” / “the seller gave us approved plans when we bought the house which we assume are correct”.
- Sellers take the view: “the plans are approved even though they don’t reflect all the improvements: but are still correct as they are approved”.

- Estate agents need to protect sellers from the above assumptions.
- Best practice: Purchasers must be given a copy of the building plans before the agreement of sale is signed and a recordal in regard to these plans is made in the agreement:
  "The Purchaser records having been given a copy of the approved building plans for the improvements on the Property and is satisfied with such plans"

BUILDING PLANS AND BANKS

- Not all bonds have a condition that the plans be approved.
- Banks impose this condition if they are of the view there are alterations without approved plans.
- Failing a condition set out in the bond grant, the approved plans are not part of the bond process.
- If plans are a condition of the bond, properly approved copies must be given to the bank to fulfill the condition before registration of transfer can take place.

SALE AGREEMENT CLAUSES

Plans before registration

The seller undertakes to at the Sellers cost, prior to registration of transfer in the Deeds Registry, provide the purchaser with building plans to the property, which plans must correctly reflect all improvements on the property and must further be approved by the City Council. Registration of transfer will be delayed until the Seller has complied with the above obligation.

Plans after registration

The seller undertakes to at the Sellers cost to provide the purchaser with building plans to the property, which plans must correctly reflect all improvements on the property and must further be approved by the City Council.

In the event that the plans are not approved prior to registration of transfer at the Deeds Registry, the parties agree that registration of transfer shall be effected by the conveyancers in the deeds registry notwithstanding that the plans are not approved subject, however, to the following conditions:

- *The seller shall provide written confirmation that the appointed architect has been paid in full.*
- *The appointed architect shall provide written confirmation that in the architect's professional opinion, there are no impediments to the successful registration if the plans post registration.*
- *The conveyancers shall retain the sum of R_____ after the registration of transfer in trust until the successful registration of the plans with the local authority, at which time the funds will be released to the seller with interest accrued.*

CONSIDERATIONS ARISING FROM THE ABOVE

- Plans after registration, is only possible where the bank has not imposed a bond condition regarding such plans;
- Plans to be provided after registration has various implied risks;
- To mitigate the risk, an architect must look at the matter fully and provide confirmation in writing that there will be no issues;
- Be cautious in regard to building line restrictions where the neighbours refuse to co-operate;
- Best Practice: have the building line issues resolved before registration;
- Be cautious of the "bulk" issue. Town planning allows for a certain "bulk" and "coverage". Plans can't be approved where there is not enough bul;.
- Be cautious of "town planning" issues such as zoning: Certain alterations such as additional dwellings / garage conversions require special consents / zoning

CONCLUSION

It is best to take advice from an architect or attorney if unsure around this issue of building plans. Mistakes can be costly and create unnecessary delays.

DEALING WITH USUFRUCTS / BARE DOMINIUM RIGHTS IN PROPERTY TRANSACTIONS

INTRODUCTION

This article explores the nature of a usufruct and how it affects the sale of the property to which it relates.

WHAT ARE BARE DOMINIUM AND USUFRUCTUARY RIGHTS?

It is a little-known fact that Ownership in property can be divided into two rights:

1. Bare dominium rights; and
2. Usufructuary rights.

The division of these rights are used in various ways. They can be used as an estate planning tool or as a tax planning tool.

WHAT IS A USUFRUCT?

A usufruct over immovable property is a personal real right registered in favour of a third party (known as the usufructuary) so that the usufructuary may benefit from the occupation, use or fruits of that property. Ownership is however retained by the registered owner of the property (who is known as the bare dominium owner).

An example of a usufruct is where a husband bequeaths a residential property to his children upon his death in his Will, but stipulates that his wife enjoys a usufruct until her death. In this way he ensures that his wife has the occupation, use and enjoyment of the property for her lifetime. It is therefore a personal right granted in favour of the usufructuary for a limited time. Upon the death of the usufructuary, the usufruct will lapse and the entire property will revert to the registered owner/s or heirs.

WHAT ARE THE RIGHTS AND OBLIGATIONS OF THE USUFRUCTUARY?

As a general proposition, the rights in respect of a usufruct are akin to that of a tenant under a lease agreement, to enjoy the property and all benefits that come with it. The holder of the usufruct is responsible to maintain the property in its current state, fair wear and tear excepted. The usufructuary may also be obliged to make payment of the rates levied by the Council in respect of the property as well as all services (water, electricity and other municipal levies) rendered to the property, unless agreed to the contrary with the owner.

The holder of a usufruct is entitled to enter into certain agreements with third parties, such as lease agreements, and receive the rental income, provided that the period of the agreement does not extend beyond the lifetime of the usufructuary or the period for which the usufruct has been granted.
The bare dominium owner remains responsible for insuring the property.

HOW DOES THE USUFRUCT IMPACT TRANSFER?

The owner's rights to deal with the property are limited by the usufruct. If, as an example, the usufruct is created in terms of a Will, transfer of the property concerned is then registered in the names of the heirs to whom ownership has been bequeathed, and the rights of the usufructuary are included as a condition in the title deed.
It is possible for the bare dominium owner/s and the usufructuary holder to sell the property. In such a case, the usufructuary must pass transfer together with the bare dominium owner and must be included with the seller on the agreement of sale, power of attorney to pass transfer and deed of transfer. Upon registration of transfer, the trust and the individual are both entitled to their respective share of the proceeds of sale based on the SARS valuation of the respective rights and must each account to SARS for CGT on this basis.

Whilst unusual, the property can be sold subject to the usufruct remaining after transfer, or, with the consent of the usufructuary, free of the usufruct. The property therefore can remain encumbered by the usufruct after transfer of the property which means that the usufructuary has rights of use and enjoyment to the property, even to the exclusion of the new owner.

If the property has been transferred to the new owner subject to the usufruct, the property cannot be bonded without the usufruct holder's written consent. Banks will not consent to the registration of any bond over the property without the usufruct holder signing a waiver of preference in favour of such Bank.

The right in and to the usufruct cannot be ceded or transferred to anyone else other than the bare dominium owner. The bare dominium owner cannot transfer the property free of the usufruct without the usufruct's consent and participation in the process.

USUFRUCTS AND TAX PLANNING

The division of property rights into bare dominium and usufructuary rights is sometimes used in order to effectively transfer a property to a trust and as part of a tax planning exercise. The bare dominium rights are valued using the tax tables from SARS and are sold via an agreement of sale to an established Trust. The usufructuary rights are retained by the individual owner.

Depending on the age of the individual owner, the bare dominium rights are usually much lower in value than the usufructuary rights. As an example, the total property value could be R1 000 000.00. The bare dominium rights valued at R200 000.00 and the usufructuary rights valued at R800 000.00. The bare dominium rights are sold and transfer duty is paid on the value of R200 000.00. The nett result after transfer is a title deed where the trust owns the bare dominium and the individual has a title deed condition where the usufructuary rights are retained by the individual.

The usufructuary rights are bequeathed to the trust and on the death of the individual, the trust receives the usufructuary rights and thus has full ownership rights.

If the trust and the individual elect to sell the property before the death of the individual, the sale agreement must refer to the trust as the seller of the bare dominium rights and the individual must be referred to as the seller of the usufructuary rights. Both must sign the sale agreement and both must sigh the transfer documents (in their respective capacities).

The comment above with regards to CGT applies in this instance as well. Note that there are tax consequences to the above and legal and tax advice must be taken.

HOW IS A USUFRUCT VALUED?

While a usufruct cannot be sold or ceded, the renunciation (or abandonment) of it by the usufructuary will increase the value of the property as a whole, as it is no longer encumbered by the usufruct.

The value of a usufruct over a property is essentially calculated with reference to the life expectancy of the usufructuary or the term of the usufruct (whichever is shorter), the fair value of the Property and the annual value of the right of enjoyment of the Property (the annual yield).

If the Usufruct has been granted for the remainder of the usufructuary's life, a table known as "the life expectancy table" is used to determine the value of the usufruct. The present value is R1 per annum for life capitalised at 12% over the expectation of life of males and females of various ages. The value of the usufruct will depreciate with each passing year until such time as the usufruct lapses and the bare dominium holder becomes owner of the whole property.

Transfer duty may be payable as a result of the renunciation of the usufruct in favour of the owner/s of the property. The duty is payable due to the fact that the value of the property has been increased due to the full ownership of the property having been restored.

CONCLUSION

The tax consequences of a usufruct in a property transaction can be quite complex, and advice should be sought before a usufruct is created and when dealing with it in any potential transfer of property.

COHABITATING AS PERMANENT LIFE PARTNERS AND JOINTLY CONDUCTING BUSINESSES TOGETHER: WAS A COMMERCIAL PARTNERSHIP CREATED?

INTRODUCTION

The question arises as to whether there are any proprietary consequences to living together without actually getting married. There is talk of the concept of a "common law" wife or husband. The case of *Allner v Werner* (2584/2018[2020] shows that this is not a simple issue.

THE FACTS

In the above case, Allner and Werner, both unmarried, lived together as if they were married spouses for about 22 years. During that period, they participated in various businesses together, taking joint decisions in some of the businesses. They did not enter into a written partnership agreement.

When their relationship broke down, Allner approached the Court contending that besides having been life partners they were also partners (in a commercial sense). As a result of their actions as a couple throughout their relationship a tacit partnership agreement had come into existence. She claimed that they were each entitled at the termination of the partnership to an equal half share of the partnership assets.

Allner had to prove more than cohabitation and also needed to prove the existence of a universal partnership, which as many cases in the past have illustrated, is not easily achieved, because the onus was on her to prove her case. She had to prove that:

i. Each party brought something into the partnership, whether it be money or labour skills;
ii. The business had been carried on for the joint benefit of both parties;
iii. The object was to make a profit;
iv. The partnership contract was legitimate.

To prove the existence of a tacit universal partnership Allner needed to further provide evidence that:

i. Werner was fully aware of the circumstances connected to the transaction;
ii. That these circumstances were unequivocal;
iii. That the tacit contract does not extend beyond what the parties contemplated.

The facts were bitterly disputed with Werner who was adamant that the relationship had been nothing more than cohabitation as lovers. The Court eventually found that "the parties intended to pool their resources for the benefit of a joint estate" and that Allner had accordingly proved the existence of a "universal partnership".

In our law on dissolution of a partnership each party gets a proportionate share of the partnership assets according to his or her contribution. The Court found that Allner was entitled to a 30% share of the partnership assets. This is all she acquired at the age of 47 after a relationship of 22 years.

CONCLUSION

To avoid the difficult position for permanent life partners to convince a court by searching back through their personal and joint histories of many years later, they should have created a partnership and agreed on a shareholding. It is advisable that such persons conclude a written agreement in writing as soon as they commit to a long- term relationship.

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 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 and that all suspensive conditions therein are fulfilled by no later than _____.

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 fulfilment 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 fulfilment or waiver of the suspensive condition herein, the Seller shall be entitled to continue to market the Property and to accept any other *bona fide* offers (which may be subject to the cancellation or lapsing of this agreement) 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 72 (seventy two) hours within which to waive or fulfil all suspensive conditions in this agreement, such notice period to be calculated from midnight on the day that written notice (together with a copy of the alternative offer) to that effect have been delivered to the Purchaser in person by hand or via e-mail at which time it will be deemed to have been received by him, and which time period shall exclude Saturdays, Sundays and Public Holidays.

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. In the event that the Purchaser fails to waive or fulfil the suspensive conditions, on the lapsing of the above time period 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.

3.3. This condition is inserted for the benefit of the Purchaser who may waive the condition at any time in writing.

3.4. 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.

3.5. In the event of the fulfilment 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. **CONTINUED MARKETING OF PROPERTY**

4.1. Pending fulfilment or waiver of any suspensive condition herein, the Seller shall be entitled to continue to market the Property and to accept any other *bona fide* offers (which may be subject to the cancellation or lapsing of this agreement) 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 72 (seventy two) hours within which to waive or fulfil all suspensive conditions in this agreement, such notice period to be calculated from midnight on the day that written notice (together with a copy of the alternative offer) to that effect have been delivered to the Purchaser in person by hand or via e-mail at which time it will be deemed to have been received by him, and which time period shall exclude Saturdays, Sundays and Public Holidays.

4.2. 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.

4.3. In the event that the Purchaser fails to waive or fulfil the suspensive conditions, on the lapsing of the above time period the Seller shall be entitled to accept the alternate offer in which event this agreement will immediately lapse.

4.4. 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.

5. **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.

6. **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.

7. ANNEXURE TO COMPETING 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 and on _____ (date) 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 and all suspensive conditions such sale are fulfilled within _____ days from date of the First Agreement.

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 (and any other suspensive conditions in this Agreement), he/she shall invoke the provisions of clause _____ (subject-to-sale/continued marketing clause) of the First Agreement and provide the First Purchaser with the required time period to waive or fulfill the stipulated suspensive conditions in the First Agreement.

7.4. This agreement is accordingly subject to the suspensive condition that the First Agreement is cancelled or lapses due to non-fulfillment of the suspensive conditions contained therein or in the event of the Seller invoking clause _____ (subject-to-sale/continued marketing clause) of the First Agreement, that the First Purchaser fails to waive or fulfill the suspensive conditions per clause _____ aforesaid.

8. COMPETING OFFER SUBJECT TO CANCELLATION OF FIRST OFFER – DEPOSIT TO BE PAID

8.1. 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").

8.2. Upon payment of the Deposit referred to in clause _____, the Seller shall instruct the Conveyancers to place the First Purchaser in breach of the First Agreement.

8.3. To the extent that the First Purchaser does not rectify his breach, the First Agreement will be cancelled.

8.4. This agreement is accordingly suspensive upon the cancellation of the First Agreement by no later _____ days from the date of receipt of the Deposit payable in terms of clause _____.

8.5. Should the First Purchaser comply with his obligations in terms of the First Agreement by the above date or the First Agreement not be cancelled, this Agreement shall lapse.

9. **OPTIONS TO PURCHASE EQUITY**

9.1. 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.

9.2. 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.

9.3. The Conveyancing Attorneys are hereby authorised to draw such agreement at the expense of the Purchaser.

10. **PROPERTY LET TO TENANTS**

10.1. The Seller and Purchaser record that the Property sold has been leased to a third party tenant in terms of a lease agreement.

10.2. The Purchaser warrants that s/he/it is aware of the lease agreement and is satisfied as to the terms thereof.

10.3. 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.

10.4. 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:

10.4.1. All rentals that have been or are paid to the Seller for the Property in respect of the period after the date of registration of transfer.

10.4.2. All deposits as may be held by the Seller on behalf of the tenant/s in the Property.

10.5 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.

10.6 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.

11. **PURCHASE PRICE INCLUSIVE OF VAT**

11.1. The Seller warrants that it is registered as a Vat vendor in terms of the Value Added Tax Act.

11.2. 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_____

11.3. 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.

12. AGREEMENT SUBJECT TO CANCELATION / LAPSING OF SELLER EXISTING AGREEMENT OF SALE

12.1 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).

12.2 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 CANCELLATION / LAPSING OF SELLERS EXISTING AGREEMENT OF SALE- SUBJECT TO SALE OF PURCHASERS PROPERTY

13.1 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").

13.2 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.

14. AGREEMENT SUBJECT TO SELLER BANK CONSENTING TO SALE

14.1 The Seller records that there is a mortgage bond/s registered over the Property in favour of _____ Bank (the "Seller's Bank").

14.2 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.

14.3 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.

14.4 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.

15. AGREEMENT SUBJECT TO PURCHASER HAVING PROPERTY INSPECTED

15.1 The Purchaser's may at their own election and cost arrange for the Property to be inspected.

15.2 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.

15.3 The abovementioned inspection must be attended to within a period of 7 days from the date of acceptance of the agreement of sale.

15.4 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.

15.5 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.

16. VACANT OCCUPATION ON TRANSFER

16.1 The parties record that the Property is occupied by Tenants.

16.2 The Purchaser is entitled to vacant occupation on transfer.

16.3 The seller warrants that the tenants in the Property shall have vacated the Property prior to registration of transfer.

16.4 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.

17. SELLER UNABLE TO DISCLOSE DEFECTS

17.1 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).

17.2 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.

17.3 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.

18. ALIENATION OF LAND ACT

18.1 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.

18.2 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.

19 **SARS TRANSFER DUTY**

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

20. **OCCUPATION OF THE PROPERTY**

20.1 Notwithstanding the Purchaser's right to occupation of the Property in accordance with clause ___ of the Agreement, the parties record that the Purchaser shall only be entitled to occupy the Property after the Purchaser has attended to the following:

20.1.1 Secured the full Purchase price by means of the payment in cash of the Purchase Price into the Sellers Conveyancers Trust account (it being the parties intention that the Purchase Price be secured by a cash payment and not via guarantees issued by the Purchaser); and

20.1.2 Made payment of the costs of transfer, inclusive of transfer duty to the Sellers Conveyancers; and

20.1.3 Signed the conveyancing documentation reasonable required by the Sellers Conveyancers; and

20.1.4 Provided the Sellers Conveyancers with FICA documentation as may be reasonably requested from the Purchaser.

20.2 In the event of the Purchasers failure to attend to the above, the Seller shall be entitled to refuse the Purchaser occupation of the Property until the Purchaser has complied with 1 above. In such event the Purchaser shall not be relieved of the obligation to pay the occupational rental.

21. **EARLY OCCUPATION**

21.1 The parties agree to that the Purchase shall be entitled to occupation on the Property on _____, subject to the conditions set out below.

21.2 Clause _____ of the Principle Agreement shall apply to the Purchasers occupation of the Property (occupation clause).

21.3 The Purchaser occupation of the Property is subject to the proviso that the Purchaser has attended to the following:

21.3.1 The Purchaser has paid the deposit amount per the principle agreement;

21.3.2 The mortgage bond has been granted per the principle agreement

21.3.3 All other suspensive conditions have been fulfilled per the principle agreement;

21.3.4 The Purchaser has paid the cost of transfer (including transfer duty) and bond costs;

21.3.5 The Purchaser has signed bond and transfer documents;

21.3.6 The Purchaser has provided the bond and transfer attorneys with the required FICA documents;

21.3.7 The Purchaser has paid the occupational rent to the Seller in cleared funds.

21.4 In the event of the Purchasers failure to attend to the above, the Seller shall be entitled to refuse the Purchaser occupation of the Property until the Purchaser has complied with the above. In such event the Purchaser shall not be relieved of the obligation to pay the occupational rental.

22. **PLANS BEFORE REGISTRATION**

22.1 The Seller undertakes to, prior to registration of transfer in the Deeds Registry, provide the Purchaser building plans to the Property, which plans must correctly reflect all improvements on the Property and must further be approved by the City Council.

22.2 To the extent that the Seller cannot provide such plans, the seller shall be obliged to attend to procure such plans at her own cost prior to registration of transfer.

22.3 In the event of 2 above, registration of transfer will be delayed until the plans are approved as required above.

23. **PLANS AFTER REGISTRATION**

23.1 The Seller undertakes to, prior to registration of transfer in the Deeds Registry, provide the Purchaser building plans to the Property, which plans must correctly reflect all improvements on the Property and must further be approved by the City Council.

23.2 To the extent that the Seller cannot provide such plans, the seller shall be obliged to attend to procure such plans at her own cost.

23.2.1 In the event that the plans are not approved prior to registration of transfer in the Deeds Registry, the parties agree that registration of transfer shall be effected by the conveyancers in the deeds registry notwithstanding that the plans are not approved subject however to the following conditions:

23.2.1.1 The Seller shall provide written confirmation that the appointed architect has been paid in full;

23.2.1.2 The appointed architect shall provide written confirmation that in the architects professional opinion there are no impediments to the successful registration if the plans post registration;

23.2.1.3 The Conveyancers shall retain the sum of R_____ after registration of transfer in trust until the successful registration of the plans with the local authority, at which time the funds will be released to the Seller with interest accrued.

24. <u>ESTATE AGENTS COMMISSION</u>

24.1 Agent's Commission in the amount of R_____ (_____) shall be paid by the Purchaser and is deemed to be earned on signature of this Agreement and fulfilment of any suspensive conditions (if applicable) and payable on registration of transfer of the Property.

24.2 The Commission amount is payable to the Conveyancers within 7 days of signature of the Agreement and this annexure, and shall be invested by the Conveyancers, interest to accrue to the Purchaser. The Purchaser's attention is drawn to the fact that the Conveyancers are not able to invest the funds until such time as the Purchaser has provided FICA documentation and a resolution (if applicable) to the Conveyancer.

24.3 Commission is payable directly to the Agent on registration of transfer by the Conveyancers who are irrevocably instructed not to pass transfer until there are sufficient funds to secure the commission.

24.4 If the Agreement of Sale is cancelled by: (i) default of the Purchaser or the Seller, the Agent will be entitled to commission from the party at fault, alternatively (ii) by mutual agreement between the Seller and Purchaser, the Agent will be entitled to commission from the Seller and the Purchaser, jointly and severally.

24.5 This clause is subject to the proviso that if this Agreement is cancelled prior to registration, commission shall be deemed to be earned upon such cancellation and the Agent shall become entitled to payment of the commission immediately upon such cancellation and the Conveyancers are instructed to effect payment accordingly.

24.6 The Purchaser was not introduced to the Property or the Seller by any other person other than the Agent.

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 _____

<u>As witnesses :</u>

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 :

1. _____ _____
SELLER

2. _____ _____
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 Principal Agreement to the extent only of the provisions as set out hereunder:

1. AMENDMENT OF PROPERTY DESCRIPTION

1.1 The parties hereby record that the property description as recorded in the Principal Agreement is incorrect.

1.2 The Parties record that the correct property description is as follows:

_____
_____
_____
_____

1.3 The parties agree to amend the Principal Agreement accordingly.

2. EXTEND DEPOSIT DUE DATE

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. EXTEND GUARANTEE DUE DATE

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 _____.

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 HIGHER BOND AND ALLOCATION OF DEPOSIT TOWARDS COSTS

8.1 The parties record that the purchaser has obtained a bond grant higher than that required in terms of Clause _____ of the Principal Agreement OR has obtained a bong grant for the full purchase price.

8.2 the purchaser records his acceptance of the higher bond amount and the parties agree that the deposit (or any portion thereof) paid by the purchaser in terms of the Principal Agreement shall be allocated towards the transfer fees and costs payable to the conveyancing attorneys by the purchaser.

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, except in the event that the agreement is cancelled as a result of a breach by the Seller.

12.6 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:

12.6.1 The seller may require the purchaser to complete any unfinished alterations and/or additions, or

12.6.2 The seller may require the purchaser to restore the property to its condition as it was prior to any alterations and/or additions; or

12.6.3 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 Furthermore, in the event of a dispute between the parties arising from the above, the parties irrevocably and jointly (by their signatures hereto) instruct the conveyancing attorneys to withhold the deposit less the agents commission in trust pending receipt of a court order, alternatively a settlement agreement between the parties.

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. ELECTRIC FENCE SYSTEM CERTIFICATE OF COMPLIANCE

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. CONSENT OF PURCHASER TO ADVANCE OF FUNDS TO PAY RATES CLEARANCE FIGURES

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. CONSENT OF PURCHASER TO ADVANCE OF FUNDS DIRECT TO SELLER

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 Witness:

_____ _____

PURCHASER

SIGNED at _____ on this the _____day of_____20 _____

As Witness:

_____ _____

SELLER