

ACQUISITION OF IMMOVABLE PROPERTY AS A NON-RESIDENT IN SOUTH AFRICA

Introduction

- 1.1 Purchasing and taking transfer of ownership of immovable property (land) in South Africa is a fairly easy and uncomplicated process.
- 1.2 South Africa's system of land registration is considered one of the best in the world. Precise records of ownership, bonds, servitudes, etc. are kept in the Deeds Registries.
- 1.3 Transfer of ownership of land passes upon execution by the Registrar of Deeds of a formal transfer deed prepared by a Conveyancing attorney (solicitor).

Restrictions

- 2.1 There are no restrictions upon a non-resident who is legally in the country to acquire immovable property in South Africa.
- 2.2 Ownership can be personal, or through a company, close corporation or a trust.
- 2.3 Which ownership vehicle to use will depend on the particular circumstances and an attorney specialising in this field should be consulted.
- 2.4 In general, however, personal ownership would be the better option for non-business purposes (i.e. residential). Companies are subject to higher tax rates, set up and annual administration cost.

Sale agreement

- 3.1 Once a property has been found, a written Agreement of Sale must be entered into and signed by both the seller and the buyer or their written authorised representatives. An oral agreement in respect of land is unenforceable.

- 3.2 Should the services of an estate agent be used, the agent will normally draft the sale agreement. It is, however, advisable to have the same checked by an attorney. As the Sale Agreement is the most important document creating the rights and obligations between the parties, the parties may prefer to be represented by their own attorneys in the matter, especially in commercial matters.
- 3.3 If it is a private sale, i.e. over the internet or otherwise without the intervention of an estate agent, the sale agreement would normally be drafted by an attorney.
- 3.4 The purchaser will, normally, be requested to deposit up to 10% of the purchase price with the agent or attorney. This is not a requirement of law, but serves as security for the seller should the purchaser repudiate the agreement. In such event, the deposit would normally be forfeited to the seller.
- 3.5 The deposit is normally invested in Trust by the Attorney, interest for the purchaser.

Transfer

- 4.1 Once the written Agreement of Sale has been concluded, the same will be handed to a Conveyancing Attorney, who will draft the transfer documents and then forward these to the seller and buyer for signature. Only one attorney is used for this purpose, usually the Seller's attorney.
- 4.2 The Conveyancing Attorney will request the buyer to pay the costs of transfer as set out below, as well as to furnish a bank guarantee for the balance purchase price, (if a deposit was paid), alternatively to deposit the balance purchase price to the attorney's trust account.
- 4.3 The sale is then cleared with the Local Municipality (all outstanding rates have to be paid) and with the South African Revenue Services ("SARS") for payment of the prescribed Transfer Duty, or exemption if VAT is involved. The documents are subsequently lodged in the Deeds Office for transfer of ownership, thus concluding the process.

4.4 The Deeds office will examine the documents carefully, ensuring that the same are correct. Hence the accuracy of the system.

4.5 The whole process should take between 6 to 8 weeks.

Finance

5. Depending upon the buyer's cash flow, South African banks will lend up to 50% of the purchase price to non-residents upon a mortgage of the property.

Costs

6.1 The estate agent's commission equals approximately 6% plus Value Added Tax ("VAT"), of the total purchase consideration.

6.2 If the transaction is subject to VAT, no transfer duty is payable. Residential property purchased from a developer will be subject to VAT.

6.3 If the transaction is not subject to VAT (as is the case with all residential property purchased from non-developers), Transfer Duty on the purchase price is payable to SARS, calculated on the following scale:

- R0 – R600,000.00 of purchase price: NIL
- R601,000.00 – R1, 000,000.00: 3% of the purchase price
- R1,000 000.00 - R1,500,000.00 5% of the purchase price
- Over R1,500,000.00 - 8% of the purchase price

6.4 In addition, the attorneys' transfer fee for the transfer will amount to approximately 1% of the purchase price plus VAT.

- 6.5 Where a mortgage loan is taken, the bank will charge a raising fee of approximately R5 700.00 on the loan amount and the attorneys who register the mortgage bond will charge approximately 1% of the capital amount towards registering the mortgage.
- 6.6 A pro rata share of the Municipal rates and taxes (calculated from date of transfer) and HOA levies will be due by the buyer to the Local Authority and HOA concerned, and will be collected by the Transferring attorney.
- 6.7 There are no other costs of acquisition.

Taxation: Income Tax

- 7.1 Residents (as defined in the Income Tax Act) are subject to Income Tax in South Africa on their world wide income. Non-residents are liable for Income Tax in respect of income which accrue from a source in South Africa.
- 7.2 Thus, income (such as rent) from an asset situate in South Africa will be subject to South African income tax.
- 7.3 There is presently no withholding tax on rent.
- 7.4 The property acquired will also, upon its subsequent alienation or death be subject to Capital Gains Tax ("CGT") in South Africa, provided it was acquired as a capital asset.
- 7.5 CGT is calculated at a sliding scale with a maximum of 18% of the capital gain for natural persons. For companies it is 22.4% of the gain and for trusts 36%.
- 7.6 For proceeds of R2 million and more, there is, however, a withholding tax on Capital Gains, which must be deducted from the purchase price and payed to SARS, pending the assessment. - for individuals : 5% of the sale price, for companies: 7½ %, for the Trusts: 10%. One can, however, apply for an upfront determination.
- 7.7 Accurate records must be kept of all capital improvements to the property.

- 7.8 The buyer will be required to register as a taxpayer in South Africa. The registration as taxpayer is a simple process and can be done by an accountant or the attorney attending to the transfer.
- 7.9 Upon the death of the owner the property will also be subject to CGT and Estate Duty ("ED").

If the property is transferred to a spouse, a roll over of CGT is applicable.

Estate Duty

- 8.1 R3.5 million of a person's nett estate is exempt from ED, which is charged at 20% upon the nett estate situate in South Africa. If the property is transferred to a spouse, no ED will be payable upon the demise of the first dying of 2 spouses.
- 8.2 By example, if the property is less than R7 million no ED.

Exchange Control

- 9.1 Although very much relaxed lately and expected to be done away with entirely sometime in future, Exchange Control continue to apply in South Africa.
- 9.2 Thus, Reserve Bank consent will be required to repatriate income earned in South Africa and to repatriate the capital and gain on sale.
- 9.3 Any amount of money may be transferred into the country to account for the purchase price and costs on a property acquired. A buyer should instruct the receiving commercial bank in South Africa to report the transfer of such monies to the South African Reserve Bank. That will ensure trouble-free repatriation of the amount brought into South Africa as well as any gain made on the property (excluding CGT referred to above) upon resale. The buyer must keep record of the inward transfer, which will be needed to repatriate the money on sale.

Permanent Residence

10. Property ownership in South Africa on the one side, and permanent residence on the other, are two completely separate issues, dealt with in terms of distinctly different criteria. However, the value of a property purchased in the country will be relevant as part of the requisite amount to be brought into the country before an application for permanent residence in the applicable category may be made. One should seek the advice of a specialist (attorney or immigration agent) for the necessary guidance and assistance.

Security

- 11.1 South Africa has a sophisticated banking system and likewise, the larger firms of estate agents and attorneys are efficient and well-positioned to assist with property related enquiries.
- 11.2 Presently approximately 1% of all property in South Africa is owned by non-residents.
- 11.3 Over the past 20 years, virtually all new upmarket residential developments have been in security estates with access control, which happen to be popular buys for non-residents, as it normally provides for a lockup-and-go situation.

The Future

- 12.1 By virtue of the weakness of the Rand, acquisitions by non-residents have indeed inflated property prices. It has had the effect of putting some properties beyond the reach of even more affluent South Africans.
- 12.2 Certain African and other countries do have restrictions on the ownership of land by non-residents and there have, thus, from time to time also been calls made for restrictions in this regard in South Africa.
- 12.3 The distribution of land amongst the people of South Africa has now become a highly emotive political issue, with some political parties holding out to voters that if they

acquire land, they would prosper. This is however, as far as Agricultural Land is concerned, not always the situation.

12.4 For many years now, Agri SA has been trying to assist the government in carrying out its programs of land reform, advising them on how to meet their targets within the ambit of the South African Constitution. Lately Agri SA has been finding government more and more difficult to deal with though. The reason being that the land issue will surely be used as electoral bait for the 2019 general election, and as such government seems to be reluctant to engage with the formal Agricultural Sector

12.5 It came, therefore, as no surprise, when in March 2015 the Minister of Agriculture published the Draft Policy and Bill on the Preservation and Development of Agricultural Land. The Draft Bill was suspended within the cabinet for nearly 3 years prior to its publication.

12.6 The Bill is applicable to Agricultural Land only.

12.7 The Bill, *inter alia*, provides for the following:

12.7.1 No "foreign person" may acquire ownership of Agricultural Land;

12.7.2 This provision will not be applicable where a black person has a controlling interest in the entity that owns the land.

12.7.3 A foreign person means a natural person:

- i) Who is not a citizen;
- ii) Who is allowed in the country for a limited period only;
- iii) Not ordinarily resident in South Africa.

12.7.4 It is interesting that "citizen" includes a person with permanent residence status, in other words such person is not foreign person.

12.7.5 A foreign person may also not enter into a long lease, i.e. a lease for 30 years or longer.

12.7.6 A foreign person who disposes of ownership of Agricultural Land, must offer it to the Minister of Agriculture first, in terms of right of first refusal. The Minister must within 90 days indicate whether the right of first refusal is exercised or not. If the Minister does not exercise the right of first refusal the land may be sold to a citizen only.

12.7.7 The Minister may determine categories of ceilings for Agricultural Land. In other words, the maximum extent a land owner may hold.

12.7.8 Black people have right of first refusal to acquire any land above the determined ceilings, if no black person wants it, the Minister may acquire it through expropriation.

12.8 The general opinion seems to be that the Bill is unconstitutional and will be challenged should it ever become law. In the meantime, it should take a minimum of 2 years to go through the parliamentary process. This, together with a minimum of a further 3 years which a constitutional challenge will take to reach completion, means that it will probably not become law within the next 5 years. By this time, the current hype will have, hopefully, faded into history.

12.9 It is clear that for the foreseeable future, the current position will remain and foreigners will be able to continue to buy and sell Agriculture Land in South Africa.

12.10 Nevertheless, foreign buyers is advised to take two simple precautionary measures to protect their interests:

12.10.1 The first is to acquire the land in the name of a company, which is formed in South Africa.

12.10.2 The second is to create individual companies to purchase each individual title of land separately, should the farm consist of more than one piece of land.

12.11 As the Act applies to the disposition of land only and not shares in the company, the first measure above will ensure the disposal of the company holding Agricultural Land.

12.12 The second measure will take care of the ceiling provision.

12.13 Foreign buyers should, therefore, consult with reputable attorneys, so as to ensure that the acquisition is structured correctly and thus ensure the necessary flexibility in the future.

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