

STBB

SMITH TABATA
BUCHANAN BOYES



BUYING PROPERTY
IN SOUTH AFRICA
AS A RESIDENT OR
NON-RESIDENT

2010

OUR SERVICE

STBB | SMITH TABATA BUCHANAN BOYES is a firm of business-minded lawyers which was established in 1900. At present the firm consists of approximately 60 professionals practising from 10 offices throughout South Africa.

By understanding our clients' needs and objectives, we strive to deliver cost-effective legal solutions to their business and personal matters. A vital aspect of the professional service we provide, is a commitment to developing close working relationships with our clients. This commitment enables us to consistently succeed on their behalf.

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South Africa follows a system of land registration where every piece of land is reflected on a diagram and ownership recorded in one of the regionally located Deeds Registries where documents are available for public viewing. South Africa is reputed to have one of the best deeds registration systems worldwide with an exceptional degree of accuracy and security of tenure being guaranteed. Property can be owned individually, jointly in undivided shares or by an entity such as a company, close corporation or trust or a similar entity registered outside South Africa.

NON-RESIDENTS

There are no restrictions in respect of property ownership by non residents, save for a prohibition on illegal aliens owning immovable property within South Africa.

There are however, procedures and requirements which must be complied with in certain circumstances, such as the local registration of entities registered outside of South Africa where they purchase property in South Africa, and the appointment of a South African resident public officer for a local company whose shares are owned by a non-resident. In the event of a non-resident purchasing property in the country with the intention of residing for longer periods, a residence permit will have to be applied for in accordance with the given requirements and procedures of South African law.

BUYING A PROPERTY

All contracts to acquire land must be in writing, contain certain prescribed information and be signed by both buyer and seller to be valid and legally binding. Contracts most commonly take the form of an Agreement of Sale or Offer to Purchase which, once accepted, constitutes an Agreement of Sale.

Once an Agreement of Sale has been signed by both parties it represents a valid and binding contract from which neither party can withdraw without incurring legal consequences, save in certain instances where:

- the agreement is subject to certain conditions which are not fulfilled;
- the purchase price is less than R250 000.00 and certain additional criteria in terms of the Alienation of Land Amendment Act are present entitling the Purchaser to “cool off” and cancel the sale.


The de facto ownership of property can also be obtained by means of acquiring the shares/members interest and loan claims in a company/close corporation respectively which company/close corporation is the registered owner of a property. These contracts, strictly speaking, need not be in writing and can be concluded verbally. Although legally binding, this is not advisable and it is recommended to record the agreement in writing to ensure that the material terms agreed to are accurately recorded. The

decision to enter into and sign an Offer to Purchase/ Agreement of Sale is not a decision to be taken lightly and it is recommended that an inexperienced purchaser obtain independent legal advice if uncertain in any respect.

TRANSFER PROCEDURE

The registration of a property transaction is handled by a specially qualified legal practitioner known as a conveyancer. It is customary for the seller to appoint the conveyancer to attend to the registration of transfer of a property sold, whilst the costs attendant thereon are for the account of the purchaser, unless contractually agreed to otherwise.

The conveyancer prepares the requisite transfer documentation which, after signature by the purchaser and the seller and receipt of various clearances required by government departments, is lodged together with the cancellation of any existing mortgage bonds and new mortgage bonds to be registered in a regionally located Deeds Registry. The deeds are subject to a stringent examination process whereafter they are made available for registration. On the date of registration of transfer all existing mortgage bonds registered over the property are cancelled simultaneously with the registration of any new mortgage bonds by the purchaser in favour of the bank granting financial assistance. The purchaser is recorded as the new owner of the property and the purchase price is paid to the seller. The above procedure does not apply in the situation




where the shares/member's interest and loans are acquired in a property-owning company/close corporation as no change in ownership is recorded in the Deeds Registry. It is important to note that upon transfer to the new owner, any liabilities in respect of the property incurred by the previous owner remain with the previous owner and do not pass to the new owner, unless otherwise agreed to.

COSTS

Brokerage is payable where an estate agent is responsible for the successful conclusion of a sale of immovable property. Brokerage is customarily payable by the seller who mandates the estate agent to procure a purchaser for the property. The seller is usually also responsible for the cost of procuring 'beetle free and electrical compliance' certificates. The purchaser is responsible for the payment of transfer costs and the costs of registering any new mortgage bonds over the property purchased. Transfer costs include transfer duty payable to the Receiver of Revenue, calculated on the following formula, based on the purchase price:

- R0 - R500 000 exempt;
- 5% between R500 000 – R1 000 000;
- 8% on the balance above R1 000 000;

where a natural person purchases the property, shares or member's interest in a residential property owning entity; or



- **8% of the purchase price**

where the purchaser of the property, shares or member's interest in a residential property owning entity, is not a natural person. Attorneys' fees for attending to the transfer and registration of mortgage bonds are calculated according to a tariff. Further sundry charges are imposed by the Deeds Registry and the Bank granting financial assistance.

SIGNATURE OF DOCUMENTS

Documentation prepared by the conveyancer pertaining to the registration of transfer of the property and any mortgage bond to be registered over the property is required to be signed in black ink and must be authenticated if signed outside South Africa. This is sometimes inconvenient and it is possible, and often advisable, to leave a General Power of Attorney (GPA) in favour of a trusted person in South Africa to assist in this regard. This having been said, it is important to note that no person is allowed to sign an affidavit on someone else's behalf, even if a GPA has been granted.

Where the purchaser is married, according to the laws of a foreign country and a mortgage bond has been applied for, or on the re-sale of the property, note that the spouse of the purchaser will be required to assist the purchaser in signing the mortgage bond documentation or transfer documents.

THE OFFER TO PURCHASE/ AGREEMENT OF SALE

The Offer to Purchase/Agreement of Sale will typically contain the following standard provisions:

■ PURCHASE PRICE

A deposit is not mandatory but serves as a gesture of good faith on the part of the purchaser and an indication of financial ability.

This amount will be invested by the estate agent/conveyancer in an interest-bearing trust account for the benefit of the purchaser.

Provision will be made in the Agreement for a guarantee to be called for in respect of the balance of the purchase price. In general, a guarantee will only be acceptable if issued by a local financial institution which means that the funds will actually have to be remitted to South Africa in order for a local bank to issue such a guarantee or, alternatively, arrangements must be made between a foreign and local bank for a back to back guarantee to be issued. It is, however, possible to negotiate the issue of a Standby Letter of Credit from an overseas institution in certain circumstances.

■ OCCUPATION, POSSESSION, TRANSFER AND OCCUPATIONAL INTEREST

Occupation is the physical occupation of the property

whereas possession is generally deemed to be the date upon which the purchaser assumes responsibility for the property and it is customary for the risk of ownership to pass on the date of possession. Transfer refers to the actual date of registration of ownership in the Deeds Registry in favour of the purchaser.


Occupational interest is the rental payable by the party occupying the property belonging to another where the date of occupation and date of transfer differs and is normally expressed in Rand terms or as a percentage of the outstanding balance of the purchase price.

■ **VOETSTOOTS**

This is a standard inclusion in all deeds of sale and implies that the property is bought 'as is'. Which means 'in the exact condition in which the property is found'. However, all latent defects present in the property within the seller's knowledge must be brought to the attention of the purchaser. It is not standard in South Africa to conduct property surveys but these can be arranged with the assistance of the estate agent or an attorney and should be included as a condition of the purchase.

■ **ELECTRICAL AND BEETLE-FREE CERTIFICATES**

The property owner is required by law to be in possession of a valid electrical compliance certificate certifying that the electrical installation at the property meets certain statutory safety requirements. The beetle-free certificate certifies that all accessible parts of the property are free




of infestation by certain defined beetle and this, whilst it is a standard inclusion in the Agreement of Sale, it is neither a legal requirement nor is it included in sales of sectional title units.

The cost of attending to the necessary repairs in order for the aforesaid certificates to be provided is generally accepted as being for the account of the seller, although the parties can contractually agree otherwise.

■ **FIXTURES AND FITTINGS**

A property is sold together with all fixtures and fittings of a permanent nature. Generally fixtures and fittings include anything which is attached to the property or which by virtue of its considerable mass accedes to the property. To avoid uncertainty, the purchaser is cautioned to ensure that all items intended to be included in the purchase price are specified in writing in the Agreement of Sale. Agreements for the acquisition of shares/member's interest and loan accounts in property-owning companies/close corporations contains many of the aspects discussed above, although it is substantially different and includes numerous warranties and indemnities given by the seller to the purchaser who acquires the property-owning entity together with its financial history.




CAPITAL GAINS TAX

South African residents are liable for the payment of Capital Gains Tax ("CGT") on the disposal of any capital asset, subject to certain limited exceptions. Non-residents, however, are only liable to pay CGT on the disposal of the following:

- Immovable property situated in South Africa, including any right or interest in immovable property (this also includes an interest of at least 20% in a company where 80% or more of the value of the net assets of the company is attributable, directly or indirectly, to immovable property in South Africa);
- Assets of a permanent establishment of a non-resident through which trade is carried on in South Africa.

CGT is payable in the year in which the asset is disposed of and is calculated by adding 25% of the capital gain or profit to the individual's income for that year, then deducting the annual exclusion of R17 500 for the financial year 2009/2010 and taxing that income at the individual's marginal rate of income tax. The maximum marginal income tax rate for individuals in South Africa is presently 40%. The capital gain is calculated and disclosed in the individual's income tax return for the year in which it is sold. Thus, if a non-resident disposes of immovable property in any year of assessment and is not already registered as a South African taxpayer, he or she will have to register as such and submit an income tax return reflecting the calculation of the capital gain and will be liable




for the payment of CGT on that gain. A provision relating to the withholding of a percentage of the sale proceeds from non-resident sellers was introduced in 2007. This provision provides that 5% in the event of a natural non-resident seller, 7.5% in the event of a foreign CC / PTY(Ltd) and 10% in the event of a foreign trust is to be paid over to SARS if the sales price exceeds R2 million, as a provisional CGT unless a specific CGT directive is applied for prior to transfer of the property being registered. Please refer to our brochure on CAPITAL GAINS TAX for further information.

If the asset is held by a Trust, the Trust pays CGT on 50% of the gain at 40%, whereas a company or close corporation pays CGT on 50% of the gain at a tax rate of 28%.

CGT became effective on 1 October 2001 and is thus payable only from that date. The amount of a capital gain is calculated either by deducting the value of the property as at 1 October 2001 (together with the costs of acquiring and improving the property) from the proceeds on disposal of the property or by apportioning the amount of time the property was owned between the period before 1 October 2001 and the period after that date.

You may alternatively use the 20% calculation if you do not have records of the acquisition of the costs of the property and you do not have a valuation as at 1 October 2001. SARS will deem 20% of your proceeds to be the base cost of the asset.




South African residents do not pay CGT on the first R2 million of profit made on the disposal of their primary residence. However, non-residents will not qualify for this exemption if their primary residence is not in South Africa.

ARE THERE ANY RESTRICTIONS ON NON-RESIDENTS BUYING PROPERTY IN SOUTH AFRICA?

The answer to this is a resounding NO, save for a prohibition on illegal aliens owning immovable property in South Africa. Non-residents will of course be subject to the same laws and regulations as South Africans and it is compliance with these stringent requirements that ensures the efficiency of the South African land registration system and security of tenure.

Should the non resident not wish to purchase the property in his or her own name but rather in the name of an entity, such entity must be locally registered and meet the requirements inherent in registration of the chosen entity, such as the requirements of the Companies Act.

For example, a non-resident may decide to own the property through share ownership in a company, membership in a close corporation (unique to South Africa) or as a beneficiary in a trust. In the event of a non-resident acquiring property in the name of an entity, funds brought into the country will represent a loan to the local entity and will require Exchange Control approval.




For the most part however, property is registered in the name of the purchaser as an individual. There may be specific reasons for taking transfer in the name of an entity and for a brief overview of these, kindly consult our [Purchaser's Guide to Alternate Entities for Acquiring Ownership Of Immovable Property](#).

Note that purchasers will have to finalise their choice of entity in which to purchase the property prior to signing any Offer to Purchase or Agreement of Sale, as no changes can be made at a later date without the possibility of penalties being imposed and resultant delays in the transaction.

Finally, a non-resident can purchase South African property over the internet without entering the country! However, should the prospective purchaser intend residing in the property for any length of time, he or she will need to comply with the requirements of the Immigration Act and either have a valid permit to temporarily remain in the country or be in possession of a permanent residency permit.

HOW CAN FOREIGN FUNDS BE BROUGHT INTO SA FOR A PROPERTY ACQUISITION?

Foreign funds can be paid into any nominated bank account in South Africa. This account will usually be the trust account of the estate agent or transferring attorneys




into which the deposit for the property and the balance of the purchase price is paid. These funds will be invested for the non-resident's benefit and the non-resident can rest assured that such a transfer is secure and guaranteed, as the operation of these trust accounts is regulated by the professional boards overseeing the operations of both attorneys and estate agents.

When a non-resident transfers funds from a foreign source into a South African bank account, a record known as a "deal receipt" is kept of the foreign funds received by the South African bank. This is an important document which must be retained for purposes of repatriation of the funds.

CAN MONEY BE BORROWED IN SA TO PURCHASE PROPERTY?

The South African Reserve Bank will adjudge all foreigners not having their domicile in South Africa as non-residents. This however does not include foreigners with South African work permits who will be considered to be residents for the duration of their work permit.

What this means is that non-residents are restricted in their borrowing ratio to 50% of the purchase price, while the remaining 50% must be brought into the country in cash from a foreign bank. In order to qualify for a South African mortgage bond, the non-resident will need to provide proof of earnings and comply with the Financial Intelligence Centre Act. This Act, in simple terms, requires identification of the




non-resident for money laundering purposes, and involves the production of certain documents such as a passport and proof of residential address.

CAN A NON-RESIDENT OPEN A BANK ACCOUNT AT A SOUTH AFRICAN BANKING INSTITUTION?

In order for a non-resident to service repayments on a mortgage bond, he or she will need to open a non-resident banking account which can only be done from within the country. Again, certain documentation relating to the applicant's identity will be required, ie. application form detailing name, passport number and address, certified copies of the relevant pages of the passport, and proof of source of income, such as a salary slip or pension statement. All copies will have to be originally certified. Once the bank account has been opened, foreign funds will have to be deposited immediately.


In certain circumstances, local currency can be deposited into the account, for example, rental income acquired from property belonging to the non-resident. This is dependent on the bank being in possession of a certified copy of the rental agreement. This type of deposit, together with any other ZAR deposit into the non-resident account, will require the Reserve Bank's approval, as non-residents are not entitled to generate income in South Africa, other



than interest/rental generated from the foreign funded capital asset. Obviously the rand value received on the sale of immovable property in South Africa can also be receipted into the non-resident account provided the necessary documentation is lodged prior to the deposit being made.

WHO CHOOSES WHICH ATTORNEYS WILL ATTEND TO THE TRANSFER AND WHOSE INTERESTS ARE THE ATTORNEYS PROTECTING?

It is customary in South Africa for the seller of immovable property to nominate the attorneys who will attend to the transfer. Such attorneys then act for the seller and on his or her instructions. Consequently, in the event of a dispute between the seller and purchaser, the purchaser would have to seek independent legal advice. Note that whilst the seller selects the attorneys, the purchaser pays the transfer costs.



CAN TRANSFER AND BOND DOCUMENTS BE SIGNED OVERSEAS AND IF SO, WHAT IS THE PROCEDURE?

Yes, but there are certain formalities that must be complied with. Documents can either be signed before a Notary Public in certain countries or alternatively at the South African Embassy in that country. This can unfortunately turn out to be costly and time consuming.

If a seller or purchaser is in South Africa at the time of the transaction but returning overseas shortly thereafter, it is advisable to sign a special or general power of attorney in favour of a local friend or family member who will then be able to act on his or her behalf. It is important to remember that affidavits cannot be signed by an authorised representative on your behalf.

OTHER THAN THE PURCHASE PRICE, ARE THERE ANY OTHER COSTS FOR WHICH THE PURCHASER WILL BE LIABLE?

Yes. The purchaser is usually liable for the following costs:

- transfer duty, which is a tax levied on the acquisition value (purchase price) of the property. This amount is payable prior to transfer and must be paid on demand from the attorneys. The percentages applicable are:

NATURAL PURCHASERS

- R0-500 000: exempt
- R500 001-1 000 000: 5%
- R1000 000 > : 8%

ENTITIES

- 8% flat rate without any exemptions
- Transfer fees based on the purchase price, (this is not payable if the seller is VAT registered);
- Deeds Office levies, pro-rata rates and taxes/sectional title levies;
- Expenses for obtaining a rates/levy clearance certificate.

Most of these costs are determined according to the purchase price of the property. Please consult our tariff guide, Buchanan's Book, for a full list of costs.

Further costs, including attorney's fees and bank charges, will be incurred if the purchaser registers a mortgage bond.


Once the purchaser takes transfer of the property or assumes the risk therein, he or she will be liable for all costs and associated risks. If the property is not bonded, it is in the purchaser's best interests to obtain insurance. If the property is bonded, insurance cover is obligatory and is normally arranged by the bank concerned.



ON SALE OF THE PROPERTY, CAN THE MONEY BE TAKEN OUT OF THE COUNTRY?

Understandably, this is without doubt the number one concern of non-residents considering investing in South Africa. The answer to this question is simply, yes. Money from a foreign source together with any profit, proportionate to that non-resident's shareholding in the property, may be repatriated in due course in terms of SA Exchange Control Regulations. If the non-resident owns property together with a SA resident, only his portion may be repatriated, and is limited to the amount which can be proven to have emanated from a foreign source plus the profit on that portion.

On transfer of the property to the non-resident purchaser, all deal receipts, a copy of the agreement of sale together with the conveyancer's final statement of all costs must be retained by the non-resident purchaser for the duration of his ownership and will have to be presented to the Reserve Bank on sale when the proceeds are to be repatriated back abroad. This facilitates the repatriation of the funds and profit on sale of the property, provided the bankers are satisfied that such profit is reasonable and market related. Please note that title deeds are no longer endorsed by the banks which originally received the funds since the Deeds Office refuses to accept original deeds bearing third party endorsements.




Obviously if the purchase was partially financed by funds borrowed in South Africa, that portion of the purchase price cannot be repatriated unless the bond has been settled in full. It is important to note that during the course of the bond repayment history, the monthly/other installments towards the bond must again have emanated from a foreign source or from rental/interest income generated from a capital asset purchased partly/wholly with foreign funds.

Furthermore, if a foreigner takes up permanent residency in South Africa and signs a Declaration and Undertaking at a South African bank (namely declaring whether he/she is in possession of foreign funds and undertaking not to place such funds at the disposal of anyone resident in the Republic), they will be considered a resident for Exchange Control purposes and will accordingly only be able to repatriate funds within five years of immigration. Thereafter he/she will be considered to be a South African citizen and subject to the same regulations and limitations.

Finally, the repatriation of funds will be subject to capital gains tax.

IS A NON-RESIDENT, LIABLE FOR PAYMENT OF ANY SOUTH AFRICAN INCOME TAX?

While South Africans are taxed on their worldwide income, non-residents are liable for income tax only on income



accruing from a South African source. For example, if the property is rented, the rental income will be subject to South African income tax.

On disposal of the property, the non-resident will be liable for payment of capital gains tax. For property registered in the name of an individual, 25% of the profit will be taxed at the individual's marginal income tax rate. The maximum marginal rate is currently 40%, which translates to a maximum flat rate payable of 10% of the capital gain.

Until recently, non-resident sellers were obliged to register as taxpayers in the year of disposal of their immovable property in South Africa. However, this was not being done and the SARS were not able to collect tax that was due and payable. Accordingly, measures have been introduced which will tighten the tax collection net considerably.

Finally, it is important to note that a non-resident who has not permanently immigrated to South Africa will be considered a resident for income tax purposes if he or she spends more than a certain length of time within the country. This is known as the "physical presence test" and is calculated in terms of days spent in the country over a three year period.

No tax is levied on foreign pensions.



WHAT ABOUT ESTATE DUTY IN THE EVENT OF DEATH?

Estate duty is presently calculated at 20% of the dutiable amount of an estate. However, any inheritance bequeathed to a surviving spouse is not subject to estate duty. Non-residents, like South Africans, are entitled to a rebate of R3.5 million on their dutiable assets; however, unlike South Africans, this rebate is limited to assets situated in South Africa.

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