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BUCHANAN BOYES



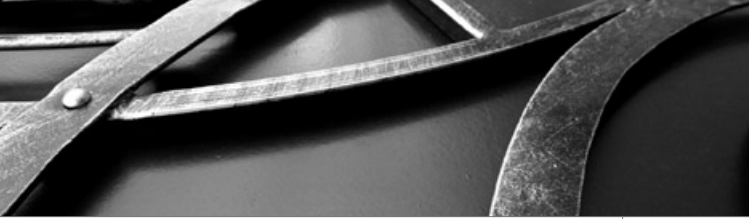
MORTGAGE BONDS  
AND CONVEYANCING

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 50 professionals practising from 7 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.



To inform home owners and prospective home owners about the registration procedures of mortgage bonds.

## INTRODUCTION

A creditor who advances money to a debtor usually requires the debtor to provide some form of security for the repayment of the debt. Two main forms of security can be distinguished, namely:

### ■ Personal Security

A borrower/debtor can request a third party to bind himself/herself personally as surety for the repayment of the debt in the event of non-payment by the debtor himself. Should the debtor not pay, the surety will be called upon to pay on behalf of the debtor.

### ■ Real Security

A borrower (Mortgagor) can offer his immovable property to a lender (Mortgagee) as security for the repayment of a debt. The Mortgagee (usually a bank) will cause a mortgage bond to be registered over the immovable property as security for the fulfillment of the Mortgagor's obligations.

## WHO IS THE MORTGAGOR AND WHO IS THE MORTGAGEE?

### ■ The Mortgagor

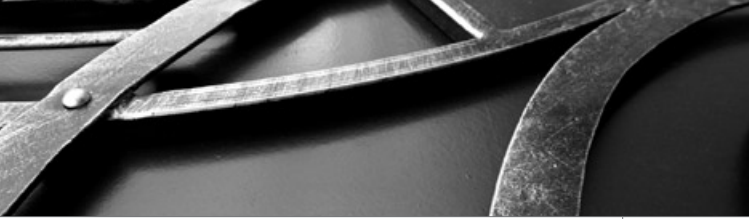
The Mortgagor is the individual, company, close corporation, partnership or trust who has borrowed money for a particular purpose and mortgages immovable property as security for repayment of the loan.

### ■ The Mortgagee

The Mortgagee is the Financial or other Institution or individual who lends the money to the Mortgagor and in whose favour the mortgage bond is registered.

## WHAT IS A MORTGAGE BOND?

A mortgage bond is based on an agreement in terms of which the Mortgagor borrows money from the Mortgagee and agrees to pass a mortgage bond over a specific immovable property in favour of the Mortgagee as security to the Mortgagee for the repayment of money. The document which secures the immovable property as security for the repayment of the loan is called a mortgage bond.



## WHAT PROPERTY IS CAPABLE OF BEING MORTGAGED?

All immovable property, improved or unimproved, that is registrable in a Deeds Office can be mortgaged. This includes property owned under sectional title.

## WHAT ARE THE RIGHTS AND OBLIGATIONS OF THE MORTGAGOR?

### ■ Repayment of the loan

The Mortgagor must repay the capital debt and interest to the Mortgagee on the terms set out in the loan agreement. Repayments are usually scheduled over a 20 year period.

### ■ Use of the property

The Mortgagee does not obtain the rights to use and enjoyment of the mortgaged property as this is retained by the Mortgagor. However, the Mortgagee may place restrictions on the Mortgagor's ownership rights. For example, a mortgage bond usually stipulates that the Mortgagor may not, without the written consent of the Mortgagee, grant a servitude over the property in favour of a third party.

- **Right to sell and transfer**

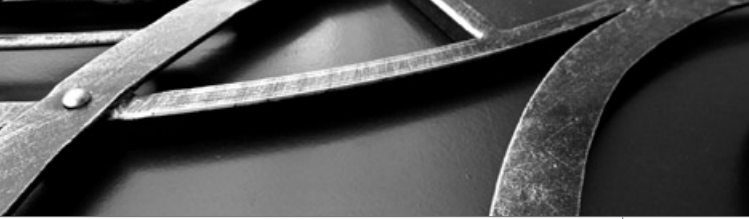
The Mortgagor cannot transfer the property to a third party unless provision has been made for the outstanding debt to be paid in full and the bond cancelled; or for the release of the property from the operation of the bond with the (written) consent of the Mortgagee. The cancellation or release normally takes place simultaneously with the transfer of the property to a third party.

## WHAT DOES THE MORTGAGE BOND COVER?

The mortgage bond covers the land and all improvements thereon, including improvements made after the bond was registered, e.g. a swimming pool built after registration of the bond.

## WHAT HAPPENS IN THE EVENT OF THE MORTGAGOR'S INSOLVENCY?

If the property is sold pursuant to the Mortgagor's insolvency, the mortgagee has a preferential claim to the proceeds of the sale.



## WHAT ARE THE CONSEQUENCES OF FAILURE TO PAY INSTALMENTS?

Foreclosure is the term describing the procedure that is followed when the mortgagor defaults on instalments. If the Mortgagor fails to fulfill his/her obligations towards the Mortgagee, the latter can enforce its rights against the Mortgagor by calling up the bond and obtaining a Court Order authorising a sale in execution of the mortgaged property after due notice has been given to the Mortgagor.

## WHAT IS THE “ADDITIONAL SUM” REFERRED TO IN THE MORTGAGE BOND?

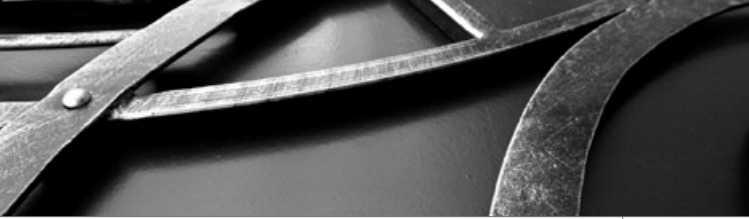
The mortgage bond secures not only the principal obligation of the debtor, but also ancillary expenses which the Mortgagor may incur in respect of the loan in certain circumstances such as the legal costs in respect of foreclosure. Therefore a bond document makes provision for an “additional sum” over and above the amount borrowed, to cover such ancillary expenses. The additional amount is separate from the capital amount and is not included in the repayments. It only becomes relevant when the Mortgagor defaults and the Mortgagee takes steps to sell the property in execution; or where the Mortgagor is declared insolvent.

## WHO CAN GRANT A MORTGAGE BOND?

- A mortgage bond can only be granted by the owner of the property.
- Property held in joint ownership can be mortgaged only if all the co-owners give their consent.
- A person married out of community of property can mortgage his/her own immovable assets without spousal consent. However, if persons are married in community of property, one spouse may not mortgage the joint immovable assets without the other spouse's written consent.

## REGISTRATION IN THE DEEDS OFFICE

The limited real right which is embodied in the mortgage bond is only conferred on the Mortgagee after the bond has been registered in the Deeds Office. To effect registration, a mortgage bond must be prepared by a Conveyancer and lodged in a deeds registry for formal registration. In practice, an endorsement is made on the Title Deed of the property which is mortgaged, which records the details of the bond so registered.



## CANCELLATION OF A MORTGAGE BOND

Cancellation of a mortgage bond must be registered in the Deeds Office and occurs upon complete fulfillment by the debtor of his/her obligations to the Mortgagee. When the owner (mortgagor) sells and transfers the property to a third he/she will pay the outstanding bond amount from the proceeds of the sale and thereby secure the cancellation of the bond.

Paying the debt in full does not automatically result in the cancellation of the bond. A separate act of cancellation in the Deeds Office is required.

## WHAT IS CONVEYANCING?

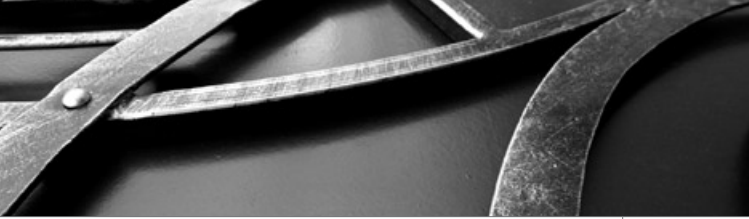
The term "CONVEYANCING" describes the law, practise and procedures concerned with creating, maintaining and transferring real rights in immovable property. It includes (but is not restricted to) the transfer of ownership in a property, registration of mortgage bonds, cancellation of mortgage bonds, registration of services, and the like.

## WHAT IS A CONVEYANCER?

A Conveyancer is an attorney who has, in addition to the attorney admission examination, also passed the national conveyancing examination. By law, a conveyancer is the only person who may register immovable property transactions in a deeds office. This regulation of the registration process is necessary to ensure the protection of the various interests that the parties involved have in the transaction and to maintain the high standard of land title registration in South Africa.

## WHO APPOINTS A CONVEYANCER?

In a sale transaction, the seller usually appoints a Conveyancer to attend to the transfer although this, like other aspects of the sale agreement, can be varied by negotiation between the parties. Although the purchaser normally pays the costs of transfer, it is the seller who appoints the Conveyancer to protect his/her interests in the transaction and to ensure that the purchase price is collected when transfer takes place.



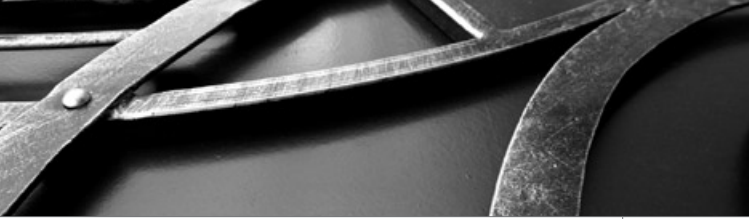
## WHAT IS THE FIRST STEP IN THE SALE OF IMMOVABLE PROPERTY?

The most important requirement is a valid agreement of sale. The Alienation of Land Act provides that no transaction involving the sale of immovable property will be valid, unless it is in writing and signed by both the purchaser and seller, or their agents who have been given written authorisation to sign on their behalf. A written "Offer to Purchase" signed by a purchaser and accepted by a seller constitutes a binding agreement.

## WHAT ARE THE IMPORTANT TERMS OF THE SALE AGREEMENT?

- The name, address, identity number and marital status of both buyer and seller. If a legal entity is buying, name of entity, registration number and the capacity of its signatory;
- A clear description of the property being sold;
- The selling price and manner of payment. If a deposit is payable, the parties must arrange that it be held in a trust account pending registration of transfer by the appointed Conveyancer;

- A provision that the buyer shall be liable for all transfer costs as well as all taxes, levies and other municipal charges on the property from the date of possession;
- The date on which the buyer is to take occupation;
- A provision indicating whether the property is sold “voetstoots” (in other words without any guarantee by the seller regarding visible and/or hidden faults);
- The name of the Conveyancer who will attend to the transfer;
- The amount of commission due to the estate agent as well as confirmation that the specific agent introduced the buyer to the property or was the effective cause of the sale;
- A provision determining that if occupation does not coincide with the date of transfer, the party enjoying occupation will pay occupational interest (rental) from the date of occupation until transfer to the registered owner. The amount and manner of payment must be stated;
- If a beetle-free certificate has to be obtained, who must arrange it, pay for the inspection and any work required;



- A provision determining whether or not an electrical certificate must be obtained and if so, who must arrange it, pay for the inspection and repairs (if required);
- A provision to the effect that no amendment to the agreement of sale will be valid unless it is in writing and signed by both parties;
- Where the sale is subject to the purchaser obtaining a loan, the amount of such loan, the institution to whom he/she may apply and the date by which the loan must be approved;
- Where the sale is subject to the sale of the purchaser's property, a description of the property, the amount for which it is to be sold and the date by which it must be sold.

Any special condition which has been inserted either at the instance of the buyer or the seller must be carefully checked. The seller may, for example, wish to ensure that certain items are not regarded as fixtures or fittings and do not form part of the property sold. In such an instance he must check to ensure that these have been properly listed. It is wise to obtain legal advice on special conditions.

## WHAT HAPPENS NEXT?

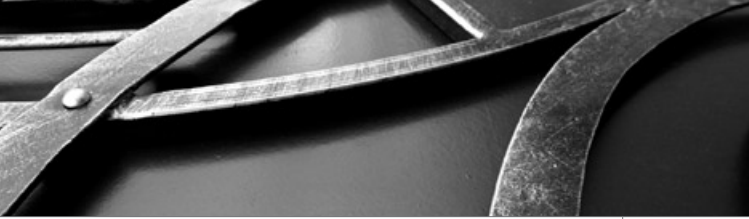
The Deed of Sale is handed to the appointed Conveyancer who will, on receipt request cancellation figures and the Title Deed from the Bank (if applicable) and request figures from the local authority to obtain a Clearance Certificate. The Conveyancer will then process the transaction and ensure compliance with the deed of sale by both parties. This includes the drafting of documents which both the seller and the purchaser will be required to call at the offices of the Conveyancer to sign. The documents to be signed include the following:

- **A Power of Attorney to Pass Transfer**

This document must be signed by the seller as it empowers the Conveyancer to transfer the property on his/her behalf.

- **Declaration in respect of Marital Status, Identity Number, Solvency status and Residential address**

Both the purchaser and seller must depose to an affidavit wherein they state their marital status, identity number and confirm their solvency. In order to comply with the Financial Intelligence Centre Act, they will also be required to provide proof of their identity, residential address and an indication of the source of the funds with which the purchase price is to be paid.



#### ■ **Transfer Duty or Value Added Tax (VAT) Declaration**

Transfer duty is a form of tax payable by the purchaser to the Receiver of Revenue and is based on the value of the property. Both the purchaser and seller have to sign Transfer Duty Declarations which are furnished to SARS and in which they affirm the purchase price to be paid. VAT is not usually payable on transactions between private purchasers and sellers but may be applicable if the seller is a registered vendor under the VAT Act. Where the seller is registered as a vendor, he will sign a VAT declaration. If VAT is payable on the purchase price, no transfer duty will be payable.

## WHAT ARE THE COSTS INVOLVED?

The costs relating to the transfer of fixed property fall into three categories:

#### ■ **Transfer Duty or VAT**

Where transfer duty is payable, the rate is determined on a sliding scale based on the value of the property. Transfer duty usually constitutes the major portion of the costs, often 90% or more of the costs of transfer. The purchaser is liable for transfer duty.

- **Rates and Levies**

The payment of rates and levies must be up to date to the satisfaction of the Local Authority (and in the case of a sectional title, also to the satisfaction of the Body Corporate) before the required clearance certificate is issued. This is usually paid by the seller, the purchaser being responsible for the expense only from date of transfer/possession.

- **Fees**

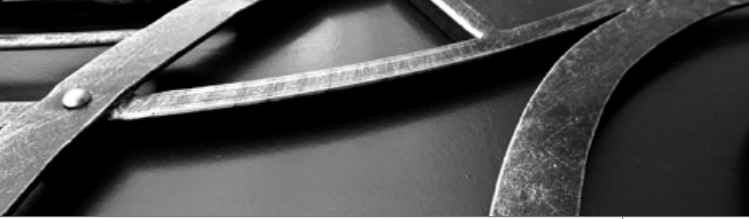
The Conveyancer's fees for attending to the registration of transfer are calculated on a sliding scale based on the purchase price. The purchaser is liable for payment thereof (together with VAT, if applicable).

- **Bond Registration Costs**

If the purchaser obtains a loan from a financial institution, the lender (financial institution) will require the purchaser to register a bond over the property to secure the loan. The Conveyancer's fee for attending to the registration of the mortgage bond is calculated on a sliding scale based on the amount of the bond and is payable by the purchaser to the Conveyancer who registers the bond (together with VAT, if applicable).

- **Bond Cancellation Costs**

If the seller has a bond registered over his/her property, it must be cancelled before transfer to the purchaser



may be effected. The seller is responsible for payment of the Conveyancer's fee for cancellation of the existing bond (together with VAT thereon).

Once the documents have been signed by the purchaser and the seller and the transfer costs, transfer duty and rates and levies have been paid, the Conveyancer will apply for and receive the Transfer Duty Receipt and municipal rates clearance certificate. The Conveyancer may then proceed to lodge the transaction in the deeds office and thereafter to register the transfer of ownership.

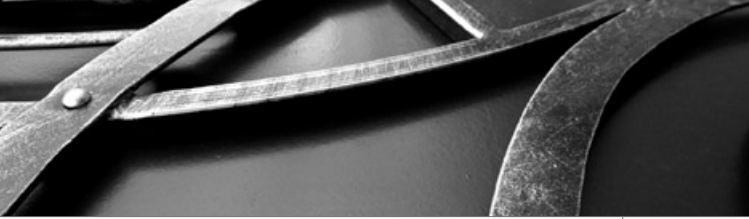
## ELECTRICAL CERTIFICATE OF COMPLIANCE

In terms of The Occupational Health and Safety Act, an electrical compliance certificate not older than 24 months must be available before the property (together with the electrical installation thereon) may be transferred. The Act does not stipulate whether the seller or purchaser is responsible for obtaining the certificate and the parties must negotiate this aspect. Failure to comply is an offence.

## WHAT HAPPENS AT THE DEEDS OFFICE?

The Conveyancer will lodge the prepared documents in the Deeds Office for registration. If a mortgage bond is to be registered or cancelled the Conveyancer attending to the registration thereof will lodge the documents in the Deeds Office for registration or cancellation simultaneously with the transfer documents.

Two examiners in the Deeds Office will then examine the documents to ensure they comply with all the relevant legislation and regulations. Depending on the circumstances, this examination process takes 8-10 days. If the documents are found ready for registration, they are executed by the Conveyancer in the presence of the Registrar of Deeds and the purchaser becomes the lawful owner of the property. The new title deed reflecting the purchaser's ownership will be released by the Deeds Office some 3 months after registration, and will then be handed or posted to him/her by the Conveyancer concerned – unless a mortgage bond has been registered, in which case the title deed will be retained by the mortgagee as part of its security.



## HOW LONG DOES THE PROCESS TAKE?

From receipt of a new transfer instruction (when the estate agent sends the agreement of sale to the Conveyancer), it takes approximately 6-8 weeks before registration of transfer is effected in the deeds office. The estimation of time can, and often does, require an extension as a result of complexities occasioned by subdivision and consolidation of properties, the registration of servitudes of use and rights of way, or time constraints resulting from a sale that is subject to the purchaser first selling and transferring his current property.

The period of time it takes to register a transfer of property is moreover dependant on the cooperation of each party and the extent to which they have complied with their contractual arrangements.

There are also numerous unforeseen difficulties, such as the death of one of the parties, the attachment of the property concerned by a creditor of the seller or delays at the Receiver of Revenue or the local authority, that may cause delays.



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