

1. THE TRANSFER DUTY ACT

1.1 Section 16 of the Transfer Duty Act (40 of 1949) deals with the situation where a signatory of a sale agreement is acquiring property on behalf of another person or entity (such as a company).

Section 16 reads as follows:

"16. Persons who acquire property on behalf of others shall disclose names of their principals

1. Where property is sold to a person who is acting as an agent for some other person, the person so acting as agent shall disclose to the seller or his or her agent the name and address of the principal for whom he or she acts, and furnish the seller or his or her agent with a copy of the documents appointing him or her as agent-
 - i. if the sale is by auction, on the day of acceptance by the auctioneer of his or her offer; or
 - ii. if the sale is otherwise than by auction, on the day of conclusion of the agreement of sale.
2. Any person who has been appointed as an agent, but fails to furnish the documents contemplated in subsection (1) and the name of the person on whose behalf he or she is acting to the seller or his or her agent on the date specified in subsection (1) shall, for the purpose of the payment of the duty payable in respect of the acquisition of the property in question, be presumed, unless the contrary is proved, to have acquired the property for himself or herself."

1.2 The Receiver of Revenue treats the effect of section 16 as follows:

If an agreement which attracts transfer duty provides that the ultimate purchaser is still to be nominated by the signatory, such nomination must be made on the same day of acceptance in the case of an auction; or, in any other case, on the same day that the sale agreement was concluded, i.e. no later than midnight of the date of agreement.

Failure to do this attracts double transfer duty (section 16(2)). SARS will levy transfer duty on (i) the 'sale' to the signatory and on (ii) the sale to the ultimate purchaser.

2. BUYING ON BEHALF OF A COMPANY/ CLOSE CORPORATION* AND THE NEW COMPANIES ACT

If a signatory to a sale agreement wishes to nominate a company or close corporation, then the following must be noted:

2.1 The company/close corporation *is in existence* at the time of signing

- The agent acting on behalf of the company must be authorised to enter into transactions on behalf of the company.
- If the agent acts outside his mandate (authority), the company will not be bound, unless it retrospectively ratifies the transaction and provided it is not prohibited by the company's Memorandum of Incorporation or the Companies Act. The third party with whom the agent entered into an agreement, must therefore make sure that the agent is authorised before contracting.
- Note further that section 16 of the Transfer Duty Act (as discussed in paragraph 1 hereof) applies in this instance. If an agreement is signed by 'A or nominee' and A nominates a company as purchaser, such nomination must occur on the same day that the agreement was signed in order to prevent double transfer duty.

2.2 The company *is not in existence* at the time of signing:

- If the company is not yet in existence when the agreement is signed, the signatory may use the provisions of section 21 of the (new) Companies Act (71 of 2008).

- The signatory (referred to as the 'promoter' in the Companies Act) will sign the deed of sale as "Joe Soap in my capacity as a trustee for a Company to be formed" or similar wording.
- Section 21 determines that, within 3 months after the company was formed, the Board must completely, partially or conditionally ratify or reject the agreement. This will be done by passing a resolution.
- If the Board does not ratify or reject the agreement within the 3 month period, then the company is deemed to have ratified the agreement.
- This procedure does not involve section 16 of the Transfer Duty Act relating to nominations, as discussed in paragraph 1 of this note. The reason is that our common law does not allow someone to act as an agent for a principal that is non-existent. Therefore, an agreement purportedly entered into by an agent on behalf of a company to be formed is a nullity. The provisions of section 21, allowing for a promoter to do this, must therefore be followed.
- There are other possibilities, outside of the Companies Act, that can be considered when there is a need to transact on behalf of a company that is still to be formed (such as a *stipulatio alteri* - a contract made for the benefit of a third). This is discussed below.

(* No new close corporations can be incorporated after 01 May 2011. A shelf CC that was incorporated before this date can still be used as vehicle in which to buy a property. It is however no longer possible to sign on behalf of a "close corporation to be formed".)

2.3 Position of the promoter signing on behalf of a company to be formed

- If the agreement has been ratified, it is enforceable against the company as if itself had entered into it.
- However, if the company is not incorporated or if it rejects the agreement or part thereof after incorporation, the promoter becomes jointly liable with the company for liabilities in terms of the agreement.
- Note that at common law a promoter was not automatically personally liable in such instances. Agreements therefore usually specifically provided for a promoter's liability. The Companies Act, 2008, changed the common law position and now specifically provides for the automatic liability of the promoter if the agreement is not ratified in full.
- Therefore it is no longer necessary to expressly agree that the promoter will become liable if the agreement is not ratified. Our below suggested nomination clause confirms the new position and, in addition, provides that the promoter will step in the shoes of the company as purchaser in the event of the company not fully adopting the agreement after it has been incorporated or if it is not incorporated.

3. SUITABLE CLAUSE WHICH MAY BE INCLUDED IN A DEED OF SALE WHERE A PROMOTER SIGNS FOR A COMPANY TO BE FORMED

FORMATION OF A COMPANY

1. It is recorded that the purchaser is acting herein as trustee for a company to be formed. The purchaser:-
 - 1.1 undertakes to effect registration of the company as soon as possible after signature of this agreement and as provided for in section 21 of the Companies Act 71 of 2008;
 - 1.2 undertakes to obtain ratification of this agreement by the company within seven (7) days after CIPC has issued it with a registration certificate;
 - 1.3 is jointly and severally liable with the company and/or its directors in the event of the company not being incorporated as provided for herein, or in the event of the company rejecting any part of the agreement after its incorporation.

1.4 undertakes to procure the necessary bank or financial institution guarantee for payment of the balance of the purchase price in compliance with the terms of clause ____* within seven (7) days of the company ratifying this agreement, should the institution which issued the guarantee in terms of clause ____* require a new guarantee to be issued as a result of the ratification of this agreement by the company;

1.5 in the event of the ratification referred to above, binds himself as surety and co-principal debtor with the company for the due and faithful observance by the company of all the terms, conditions and stipulations of this agreement;

1.6 undertakes that, should the company not be incorporated and issued with a Registration Certificate within forty five (45) days of the date of signature of this agreement by the purchaser or within such extended period as may be allowed in writing by the seller, or should the company, when registered and entitled to commence business, fail to adopt and ratify the terms of this agreement within the period provided for herein, he in his personal capacity will accept transfer of the property and take over the purchase of the said property and pay the purchase price as if this agreement had been made in his personal capacity.

* The clause reference here will be to the guarantee clause in the Deed of Sale.

4. AGREEMENT FOR THE BENEFIT OF A THIRD PARTY

- The common law is not excluded by section 21. Therefore, it is still possible to enter into an agreement for the benefit of a third party (*stipulatio alteri*) in terms of which A and B enter into an agreement for the benefit of a third party, C.
- A pre-incorporation contract can be concluded in this way, the company to be formed being the third party.
- It is strongly recommended that the agreement expressly indicates whether a *stipulatio alteri* or section 21 construction is used, so that the parties are aware of the consequences of their agreement. This is especially relevant since section 21 creates a deemed ratification in the absence of any action taken by the company and a shared liability in the case of a non-incorporation or part ratification/non ratification. On the other hand, the common law *stipulatio alteri* does not provide for automatic liability and if this is required, the parties must specifically include such a provision in their agreement. (The below suggested clause do provide for such liability.)
- Note that it is no longer a requirement that the ratified agreement be filed at the CIPC.

5. SUITABLE CLAUSE TO INSERT IN AGREEMENT CONCLUDED FOR THE BENEFIT OF A COMPANY TO BE FORMED (*STIPULATIO ALTERI*)

1. The purchaser is acting herein as principal on behalf of and for the benefit of a company to be formed (*stipulatio alteri*).

1.1 The company for which the Principal acts in this agreement shall:

1.1.1 be registered within _____ days from date of signature hereof;

1.1.2 within seven days thereafter adopt and ratify this agreement without modification and furnish written confirmation thereof, together with a certified copy of the resolution, the company name and registration number, to the Seller and the Conveyancer;

1.1.3 produce the necessary bank or financial institution guarantee for payment of the balance of the purchase price complying with the terms of clause _____ of the agreement of sale within seven (7) days of the company adopting or ratifying this agreement, should the institution which issued the guarantee in terms of clause _____ of the agreement of sale, require a new guarantee to be issued as a result of the adoption or ratification of this agreement by the company;

1.1.4 in the event of the adoption or ratification referred to above in 1.1.2, the Principal binds himself as surety and co-principal debtor with the company for the due and faithful observance by the company of all the terms and conditions of the agreement;

1.1.5 in the event of registration of the company and the obtaining of its Certificate of Incorporation not being effected within _____ days of the date of this agreement or within such extended period as may be allowed in writing by the Seller at his sole discretion; or should the company, when registered and entitled to commence business, fail to adopt and ratify the terms of this agreement within the period provided for herein, the Principal will accept transfer for the property in his/her personal capacity and shall take over all the rights and obligations as Purchaser under this agreement, as if this agreement had been entered into in his/her personal capacity.

1.2 The Principal warrants that all obligations required to be performed by the company prior to the fulfillment of the provisions of clause 1.1 will be timeously and properly performed and upon compliance with the provisions of clause 1.1 the company shall be deemed to be the Purchaser.

FOR FURTHER QUERIES OR ASSISTANCE WITH THE FORMATION OF A COMPANY PLEASE CONTACT:

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SIDE STEP COMPLICATIONS WITH THE PAPERWORK

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