

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

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OUR SERVICE

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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 relevant requirements.

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 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 that owns 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.



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. 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 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 or in the case of certain historic municipal rates and taxes debts that attaches to the land. If the sale agreement relates to the sale of shares/ members interest in a company or close corporation, the entity will remain liable for settling the liabilities it incurred.

COSTS

SELLER

- 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, electrical, gas, plumbing and electric fence compliance certificates where necessary.
- If the seller's property is bonded, the seller is liable for the costs relating to the cancellation of the existing bond over the property.

PURCHASER

- Conveyancing Fees

The purchaser is responsible for the payment of transfer costs and the costs of registering any new mortgage bonds over the property purchased. These are often referred to



as the 'conveyancing fees'. The conveyancing fee is determined according to the purchase price of the property and determined by a tariff guideline issued by the Law Society.

Conveyancing fees further include:

- transfer duty that is payable to the Receiver of Revenue, calculated on the following formula, based on the purchase price:

R0 - R900 000: exempt;

R900 001 - R1 250 000:

3% of the value above R900 000;

R1 250 001 - R1 750 000:

R10 500 + 6% of the value above R1 250 000;

R1 750 001 - R2 250 000:

R40 500 + 8% of value above R1 750 000;

R2 250 001 - R10 000 000:

R80 500 + 11% of the value exceeding R2 250 000;

R10 000 000 and above:

R933 000 + 13% of the value exceeding R10 000 000.

Transfer duty is payable on the acquisition of property whether by an individual or entity. Note the exception: no transfer duty is payable if VAT is payable. VAT is payable in a transaction if the seller is a registered VAT vendor and the property sold forms part of the seller's business.

- sundry charges are imposed by the Deeds Registry and the Bank granting financial assistance;
- deeds office levies;
- pro-rata rates and taxes; and
- expenses for obtaining rates/levy clearance certificates.

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, 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, interest accruing for the benefit of the purchaser. Both attorneys and estate agents are covered by Fidelity Funds, which guard against the risk of loss and oversee the operation of these trust accounts.

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 possession to pass on the date of registration of transfer. 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'. The Consumer Protection Act applies to sale agreements where the seller is in the business of selling land, such as a developer. In such instances, the seller is obliged to provide the purchaser with property that is free from defects, as defined in the Act.



■ 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, is neither a legal requirement nor is it included in sales of sectional title units. Beetle-free certificates only apply to properties in the Western Cape and KwaZulu-Natal provinces.

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.

■ GAS, ELECTRIC FENCE AND WATER INSTALLATION CERTIFICATES

If there is a gas appliance installed in the property a Gas Certificate of Compliance must be obtained, confirming that the installation complies with certain statutory safety requirements. A compliance certificate must also be obtained where there is an electric fence installation on the property. Moreover, with regards to all properties situated in the jurisdiction of the City of Cape Town municipality, a Certificate of Compliance of Water Installation must be provided by the Seller to the municipality before transfer.

■ 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, contain many of the clauses discussed above. Such agreements are, however, substantially different from property sale agreements and include numerous warranties and indemnities that the seller gives to the purchaser, as the latter is acquiring 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. The current rates, as at March 2018, are the following:

	2017*	2018**
Individuals and special trusts	16.4%	18%
Companies	22.4%	22.4%
Other trusts	32.8%	36%

*Up to 28 February 2017.

**As from 1 March 2017, up to and including the 2018/2019 tax year.

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.

WITHHOLDING TAX

An obligation relating to the withholding of a percentage of the sale proceeds from non-resident sellers was introduced into our tax laws in 2007. This provision requires that, where a non-resident sells a property for more than R2 million, provisional CGT must be paid to SARS in an amount of :

- 7,5% in the event of a natural non-resident seller,
- 10% in the event of a foreign company; and
- 15% in the event of a foreign trust

unless a specific CGT directive is applied for prior to transfer of the property being registered.



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 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. For further advice, contact us at info@stbb.co.za.

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. It is possible to sign an agreement as nominee for another, but the nomination of the alternative purchaser must then be made before midnight on the date of signature of the agreement.

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 deposit 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. If the money is deposited into an attorney's trust account, the client will be required to sign a specific instruction form, directing the attorney to invest the money and requesting interest to accrue to the client. Failing such an instruction, interest earned will accrue to the Law Society.

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 considers 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.

Non-residents are restricted in their borrowing ratio to an amount equal to the amount brought in from a foreign bank. As such, if a purchaser brings sufficient money into South Africa to cover the costs and transfer duty of the transaction together with 50% of the purchase price, he will be able to borrow an amount that is more than 50% of the purchase price. 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 certified as true copies of the originals. 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 South African 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.

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.

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. In addition, a non-resident is liable for payment of capital gains tax on the disposal of a South African property.

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 for the value up to R30 million and 25% on the value exceeding R30 million. 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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