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Registration of Mortgage Bonds and the
Conveyancing Process



THE FIRM

Established in 1900, STBB is a firm of approximately 100 business-minded lawyers practising from 11 offices throughout South Africa.

By understanding our clients' needs and objectives, we strive to deliver cost-effective legal solutions for all business and personal matters. We are committed to developing close working relationships with our clients, enabling us to succeed consistently 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.

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 the loan. The document which secures the immovable property as security for the repayment of the loan is called a mortgage bond. If the Mortgagor defaults, the Mortgagee may, in principle and after following certain legal procedures, sell the property to recoup the money owing to it.

WHO IS THE MORTGAGOR AND WHO IS THE MORTGAGEE?

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:

- The Mortgagor

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 financial or other institution or individual who lends the money to the Mortgagor and in whose favour the mortgage bond is registered.

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 sectional title property.

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 or 30 year period.

- Use of the property

The Mortgagee does not obtain the rights of 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.

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.

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. alterations to the existing building structures on the property.

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.

WHO CAN MORTGAGE A PROPERTY?

- A mortgage bond can only be registered with the permission of the legal 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.

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.

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.

WHAT IS CONVEYANCING?

The term “conveyancing” describes the law, practice 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 servitudes, and the like.

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 party 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 to the Mortgagee does not automatically result in the cancellation of the bond’s registration in the Deeds Office. A separate act of cancellation in the Deeds Office is required.

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 ARE THE COSTS INVOLVED?

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

- Conveyancer's Fees

These are the fees that are payable to the attorney charged with registering your mortgage bond (the bond attorney). The amount varies according to the capital of your home loan amount. The fee is based on tariffs recommended by the Law Society and will be subject to VAT. The fees are payable once off before registration of your bond to the bond attorney.

- Deeds Office Registration Fee

This fee is charged by the deeds office for the registration of your mortgage bond. It is a set fee, determined by the amount of your home loan. The fees are included in the account you

receive from the bond attorney and payable before registration of your bond. The bond attorney will pass the fee on to the deeds office.

- Postage & Petties

The bond attorneys charge a levy to cover small expenses such as the posting and delivering of secured documents to the various role players, faxes and telephone calls sent and received and the like. Each law firm has its own rates but it averages R1 100 (VAT included).

- Home Loan Initiation Fee

This fee is charged by the bank for the processing of the home loan application. You can expect to pay a fee of approximately R5 985 depending on the value of the loan. It is payable on registration of your bond, and could be debited from your home loan account (added to your outstanding balance) depending on the bank's internal rules.

- Administration and Service Fee

This is the fee that is charged by the bank to administer the home loan account. You can expect to pay between R17 and R57 per month, depending on whether you have taken out the bank's in-house homeowners' insurance. Generally the service fee is less if you make use of the bank's insurance. It is payable monthly and will be debited from your home loan account.

- Homeowner's Insurance

The bank will insist that you take out a homeowner's insurance policy to cover the risk of damage to the property that may result from natural disasters, such as fire or storm damage. The amount payable will vary depending on the value of your property. It is payable monthly and will most likely be debited from your home loan account. The bank will then pass the amount on to the insurance company.

- Home Loan Protection Insurance

If you do not already have a life assurance policy to cede as additional security for the loan, you may be required to take out some form of home loan protection insurance. The value of the policy will depend on the balance owing under your home loan. It is payable monthly and will most likely be debited from your home loan account.

Note: Depending on the home loan package, some of the costs mentioned above can be absorbed into the mortgage bond. Speak to your banker or financial adviser for more information and to double check these costs.

- 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).

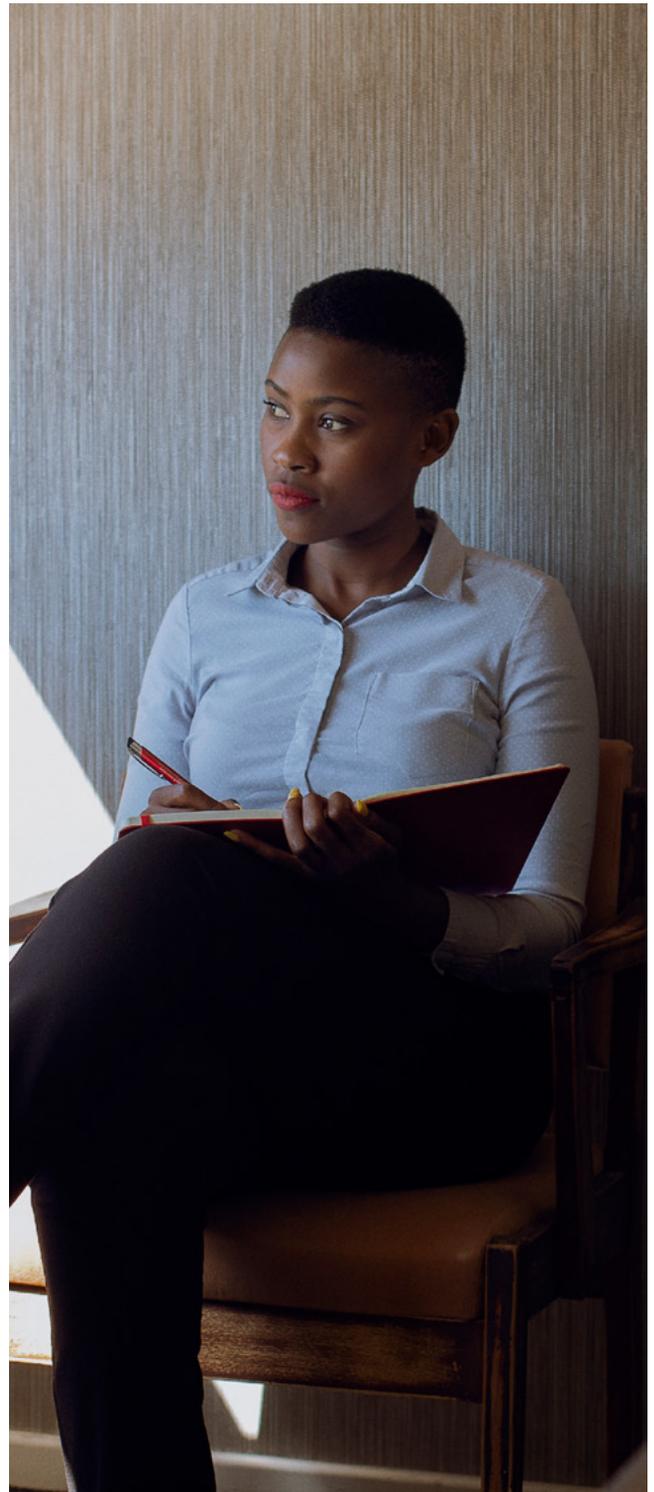
Once the documents have been signed by the purchaser and the seller and the transfer costs, transfer duty and rates and levies have been paid, the Conveyancer will apply for and receive the Transfer Duty Receipt and municipal rates and/or levy clearance certificate. The Conveyancer may then proceed to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

WHO APPOINTS A CONVEYANCER?

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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 12 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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