

## **WHAT IS CONVEYANCING?**

Conveyancing is the legal system of property transfer, as well as the registering of rights in and to property. For sales, it is important to know that a sale agreement sets out the legal terms, conditions and obligations of the parties involved and the process of conveyancing fulfils the agreement by registering the sale against the property and transferring the property into the names of the new owners.

## **WHAT IS A CONVEYANCER?**

In our legal system, a conveyancer is the only person who is authorized to transfer a property that you have bought or sold. Handing over the title deed is not a transfer of the property, and possessing a title deed does not mean ownership. The conveyancer has to register the transfer of the property at the office of the Registrar of Deeds.

A conveyancer is an attorney who has written and passed a further specialist examination and been admitted as a conveyancer of the high court. The conveyancer must have a valid fidelity fund certificate issued by the Law Society and a registered trust account.

As of 2016, fidelity fund certificates are being issued online bearing a digitized signature.

## **THE SALE AGREEMENT**

The Alienation of Land Act 68 of 1981 prescribes the formalities surrounding the sale of immovable property, in particular the sale agreement. Sale agreements have in the past, been filled with unnecessary legal jargon, and there is an intentional movement towards demystifying legal contracts. A simple rule to follow would be not to sign

any document until you understand everything that's contained in that document.

Except for cooling off clauses that may apply in certain circumstances, the Act provides only two legal formalities in order for a sale agreement to be valid:

1. It must be contained in a written document referred to in the Act as a "Deed of Alienation" but also commonly known as a sale agreement, agreement of sale, contract of sale or deed of sale. It should contain the description of the parties, the description of the property being sold, and the price that was agreed upon.
2. It must be signed by all parties or their agents acting on their written authority.

From the above, it can be seen that very little in terms of the law is required in order to establish a valid agreement of sale.

The question that arises is why are sale agreements filled with clauses?

The reason is to establish rights and obligations between the parties. The sale agreement is by its very nature a reflection of the agreement between the seller and purchaser. It should contain what you understand the transaction to be. It must reflect the true status of the intention and obligations that the parties wish to enforce, and is a formal recording of those intentions and obligations. The entire conveyancing transaction revolves around the sale agreement, which in essence, is our mandate and instruction.

By agreement, many different sale agreements may emerge. It is your duty to ensure that you understand every single word and obligation in the agreement. The legal repercussions that may follow for failure to

abide with the sale agreement may see a future legal battle transpire for damages as well as specific enforcement of the sale agreement.

### **MORTGAGE BONDS**

The term mortgage bond is a term that we all hear frequently, but it is also a term that most people do not understand. Most people believe that a home loan is a mortgage bond, but this is not really a true reflection of the purpose of a mortgage bond.

To unravel the mystery relating to mortgage bonds we need to understand what they are, and why they are used.

Any person, who applies for a home loan to subsidize their property purchase, will have to sign a home loan agreement. This loan agreement establishes the personal rights between the parties.

The mortgage bond goes a step further. It is registered at the office of the Registrar of Deeds, and establishes a real right which is enforceable against third parties.

To understand what this means we look at the 3 basic rights which it establishes:

1. The mortgagee (bank or other institution) may sell the land (land meaning vacant or developed) if the mortgagor (you) fails to meet your obligations. If you fail to make your monthly bond repayment for example, then this entitles the bank to sell your property in order to recover the money which they have loaned to you. This is the common sale by sheriff of the court.

2. If you go insolvent (bankrupt), the bank's loan to you is secured. The bank has a secured claim against your estate and is entitled to the proceeds of any sale of the property in order to satisfy its claim for the money it has advanced to you.

3. You may not sell the property freely. You are restricted, in that the property may only be transferred to another person once the bond amount is secured and the bond cancelled.

The bank or other financial institution will retain the original title deed for the property, so you technically do not own your home until you have paid off the loan amount and the mortgage bond cancelled.

Once you have paid off your loan, the mortgage bond will be cancelled and the original title deed will be delivered to you, and then you are the owner in every aspect, of your home.

Always remember that there are costs involved in registering the bond as well as cancelling the bond. Make sure you budget for those amounts.

### **POWER OF ATTORNEY**

Most people have encountered the term "power of attorney" at least once in their lives. This document albeit sophisticated and complex at times, is a legal document empowering a person to act on behalf of another, and empowers that individual to complete legal transactions on behalf of another.

There are two commonly encountered powers of attorney:

1. A general power of attorney

## 2. A special power of attorney

A special power of attorney enables an individual to perform one act, and lapses on the completion of that act. A general power of attorney is a collection of special powers of attorney but is set out in a single document.

As a seller of land, you will always sign a special power of attorney in which you authorize a conveyancer to register the transfer of your property at the deeds registry.

Section 20 of the Deeds Registries Act 47 of 1937 stipulates that deeds of transfer must be executed in the presence of the registrar by the owner of the land, or by a conveyancer authorized by power of attorney to act on behalf of the owner, and shall be attested by the registrar.

The power of attorney is thus an integral part of the transfer process, and without it there will be no transfer. It is always preferable to have the power of attorney drafted by a conveyancer to ensure that the preparation certificate is not defective.

The power of attorney to effect a transfer will contain the details of the seller and purchaser, the property, the purchase price, date of purchase, new and existing conditions relating to the property and conveyancers details, and must be signed by the seller (transferor) or his agent authorized thereto by a special power of attorney as explained above.

Attention should be paid to alterations made in the power of attorney. Although non material alterations may be done, material alterations must have full initialling. It is advisable to sign a new power of attorney if alterations need to be done, to avoid complications and delays from rejected documents.

For powers of attorney signed outside the Republic of South Africa, the rules of authentication must be followed in terms of Rule 63 of the High Court or alternatively in terms of the Hague Convention to which the Republic of South Africa became a party to in 1995.

## MARRIAGE AND PROPERTY

Marriage is a natural progression of life and for the individual this spells changes in the way we live, and more importantly the way we transact. Depending on the marital regime entered into, a person may face limitations in the way they transact.

The Matrimonial Property Act 88 of 1984 applies.

If married out of community of property, you retain your individual capacity to transact in any manner without spousal consent. To understand what this means we look at the consequences of marriage. Marriages out of community of property are done by the use of an ante-nuptial agreement signed by both parties prior to marriage. This must be done by an attorney who is also a Notary Public. The ante-nuptial agreement has to be registered at the Deeds Registry and given its own unique number.

With marriages out of community of property, you have two basic options of dealing with the accrual system that may apply- with or without accrual, and affects the distribution of property upon divorce.

When the accrual system applies, the assets accumulated during the marriage are divided upon divorce, with the exclusion of starting values or assets as per the agreement.

When the accrual system is excluded the effect is – “what’s mine is mine, what’s yours is yours”- the marriage is a formality on paper but the property of each party remains that persons sole property, and will not form part of the marriage.

You may transact and purchase property as freely as before you were married.

With marriages in community of property, both parties’ individual estates become one joint estate. This has transactional repercussions:

Section 15(1) stipulates the general rule that any spouse in a marriage in community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse. As with every general rule there are exceptions which may apply, and Section 15(2) stipulates that written consent of the other spouse must be obtained when dealing with immovable property. This refers to alienation, mortgages, servitudes or the conferring of real rights in property forming part of the joint estate. Property which is expressly excluded from the joint estate by conditions of title, do not need consent, e.g. inheritances.

Limitations and the need for consent also apply to credit agreements, a sale in instalments, and the binding of oneself as a surety.

Therefore it is of utmost importance to ensure that you are aware of your marital regime and how it affects your transactional behaviour. Planning is essential, and although Section 15(9) gives remedy, this must be avoided as litigation is necessary in most circumstances. When consent is not given or unreasonably withheld Section 16 may be used in a court application to allow the spouse to enter into a transaction without

consent. Section 20 may be used to order a division of the joint estate when the conduct of a spouse is seriously prejudicing the joint estate.

Remember to adequately plan in advance before marriage to avoid complications after marriage.

## **TRANSFER DUTY**

Transfer Duty is a tax levied on the value of any property acquired by any person by way of a transaction or in any other way. For the purpose of Transfer Duty, property means land and fixtures and includes real rights in land, rights to minerals, a share or interest in a “residential property company” or a share in a share-block company.

Transfer Duty is paid by the purchaser or by the person in whose favour or for whose benefit any interest in, or restriction upon the use or disposal of property has been renounced. This amount must be paid within 6 months of acquisition, after which interest shall become payable at the rate of 10% per annum on the amount of duty that remains unpaid.

The value of the property on which Transfer Duty shall be payable, will either be the purchase price or where no purchase price is payable, the declared value of the property (the current municipal valuation or estate agent’s valuation).

As from the 01 March 2015, following the Budget speech, no Transfer Duty shall be payable on properties up to the value of R750 000-00 which was increased from the previous amount of R600 000-00.

We have all seen conveyancing calculators, and you can easily calculate Transfer Duty using the following guide:

VALUE OF PROPERTY (Rand)	RATE
0 - 750 000	0%
750 001 - 1 250 000	3% on the value above 750 000
1 250 001 - 1 750 000	15 000 + 6% of the value above 1 250 000
1 750 001 - 2 250 000	45 000 + 8% of the amount above 1 750 000
2 250 001 and above	85 000 + 11% of the amount above 2 250 000

Take note that additional amounts paid by the purchaser must be added to the purchase price when calculating Transfer Duty. Such additional amounts may be agreement costs, rates and taxes, or commissions. Transfer Duty is thus payable on the total consideration paid in acquiring the property.

Note further that payments of Transfer Duty or any other tax payable in acquiring the property and costs in connection with the registration of the transfer are excluded from the consideration paid when calculating Transfer Duty.

Exemptions from Transfer Duty are dealt with in Section 9 of the Act, and include the following:

- Government institutions
- Public benefit organisations

- Public hospitals
- Heirs or legatees
- A surviving spouse or divorced spouse who acquires the sole ownership in the whole or any portion of a property registered in the name of his/her spouse
- An acquisition of property by a spouse by virtue of marriage in COP
- A joint owner upon partition
- A joint owner who acquires sole ownership
- Correction of errors
- Partners
- Trustees
- Sureties who pay consideration and seek transfer
- Void transactions
- Foreign companies
- Re-acquisition of expropriated property
- VAT
- Conversion of share block schemes to a sectional title schemes

Where Transfer has been paid, but the transaction is cancelled before the registration of the transfer, a refund of the amount paid is possible and is done through the conveyancer.

## VAT

With any property sales transaction Transfer Duty or VAT will always be payable. In this article we will explore VAT and how it relates to your sale transaction.

VAT or value added tax stems from the Value Added Tax Act 89 of 1991.

In establishing whether VAT is payable we have to look at the status of the seller:

1. Is the seller a VAT vendor?
2. Is the seller a vendor for the purposes of this transaction?

VAT registration for turnovers exceeding R1 000 000-00 per annum is compulsory, whilst turnovers over R300 000-00 per annum is voluntary. To establish whether a person is a VAT vendor, simply ask for his/her registration number and verify the information with SARS.

The seller's property that is being sold must be linked to his business from which he earns income. To understand this concept we look at the example of a person who conducts his business (enterprise) from a building and sells that enterprise together with the building. The enterprise and business are linked and the sale will attract VAT. Should the same seller sell his private residence, VAT will not be payable as his enterprise and property are not linked. Transfer duty will then be payable.

Note that VAT payments are the responsibility of the seller and this should be indicated on the sale agreement and noted. Should VAT not be separately noted, it will be deemed to be included in the purchase price.

VAT exemptions do exist regarding property sales. A property that has previously been leased for residential purposes, and which is now being sold, will be exempt from VAT, however the purchaser will pay transfer duty. Rentals received from the letting of property for residential purposes, is VAT exempt, as well as the proceeds of the sale of that property.

VAT is payable at the rate of 14%, however there may be an option of zero rating, which will see VAT payable at the rate of 0%.

Should both the seller and purchaser be VAT vendors and the enterprise (business) sold as a going concern, zero rating may be applicable. For zero rating to be applicable, both the seller and purchaser must be registered VAT vendors, the property must be consist of an enterprise (or part of an enterprise which is capable of separate operation), the assets necessary for the carrying on of the income earning activity must be sold to the purchaser and the parties must agree in writing that:

- The enterprise is sold as a going concern
- The enterprise will be an income earning activity on the date of transfer
- The consideration for the supply includes VAT at the zero rate

With regard to the registering as a VAT vendor in the cases of sales of enterprises to purchasers who are not registered VAT vendors for the purpose of zero rating the transaction, there is an avenue that may be explored albeit practical application may become problematic.

Section 23(4) gives the Commissioner authority to implement a VAT vendor registration date at the date on which that person first became liable to be registered for VAT (back dating of VAT registration), but also allows the Commissioner to effect a later date. With this section it is possible to have the purchasers VAT registration back dated and to enforce the zero rating with regards to the sale.

It is important to note that the back dating of registration is only applicable where the receiver is satisfied that the purchaser due to

ignorance or an oversight, was not registered but that he/she qualified for registration and that the parties have agreed in writing that the enterprise is disposed of as a going concern at the zero rate, subject to the registration of the purchaser with effect from the time of the supply of the enterprise.

Should the purchaser not be registered as a vendor at the time of conclusion of the sale agreement, it is advisable that the agreement provide for the application of the zero rate being subject to the purchaser being a registered vendor on the date the supply takes place and to furnish the seller with a copy of the VAT103 as soon as it is available. Supply is determined by Section 9(1) and is the earlier of the time an invoice is issued in respect of the supply or payment of consideration received by the supplier.

Practical implementation may give rise to difficulties, as there is no set timeline given for the registration as a VAT vendor. Practically SARS may ask for a site inspection and a formal hearing before the registration of a vendor. The registration is not guaranteed and may be set at a date after the supply or even rejected. This may in effect delay the transfer process and well as indefinitely put the sale on hold. It would be advisable to make provisions for these outcomes in the sale agreement.

A practical solution would be to have alternate arrangements made in the sale agreement to have VAT added on to the purchase price should the zero rating fail, and to give a set time frame in order to pursue VAT registration.

## **CAPITAL GAINS TAX**

The property market has become a safe haven for investors. Unlike shares or other investments, a good property investment can yield a much higher return on investment with a drastically reduced risk.

Returns on investment can be as high as 25% of the total investment. Depending on the property, and with a little luck that figure could easily double.

What you should bear in mind is capital gains tax payable as per the Taxation Laws Amendment Act 5 of 2001. This tax is levied over and above your taxable income in respect of an asset which is disposed of, during a particular year of assessment, which is assessed by calculating the difference between the proceeds of the sale and the base costs that apply.

For natural persons or special trusts, the rate of taxation is 33.33% of the net capital gain during a particular year of assessment, and 66.67% in all other cases.

Annual tax exclusions of R30 000-00 per year apply, giving the investor a yearly minimum return on investment of R30 000-00 before tax becomes payable. This applies to secondary properties and not to primary residences. A further amount that is excluded is the base cost of the property, which includes the amount paid in acquiring the property, the costs of improving it as well as the direct costs in respect of the acquisition and disposal of that property. If there is no capital gain during a year of assessment then no taxation will follow, and in the event of a capital loss, that loss will be carried over until it can be set off against a



capital gain. For further information relating to base costs, refer to Part V of the Eight Schedule of the Income Tax Act 58 of 1962. This is an extensive section and should be studied thoroughly to ensure that you have a correct base cost which will drastically improve your profit margin. Remember to keep your receipts all expenses as these amounts need to be proved in order to qualify as a base cost exemption.

With primary residences, there is a R2 000 000-00 exemption on the net capital gain on the sale of that property provided that it does not exceed 2 hectares in size and is mainly used as your primary domestic residence. Every cent above R2 000 000-00 is taxable as above.

## **UNDERSTANDING THE COSTS INVOLVED IN BUYING OR SELLING A PROPERTY**

With all property come costs. This is the natural outcome of ownership or sale. In this article we will explore the costs associated to all parties.

We will start with the Sellers costs. All sellers will incur costs in the sale of their property. A seller will see himself or herself face the following:

-Bond cancellation fees (if applicable)

This is a fee payable to your banks attorney for cancelling an existing bond on your property.

-Compliance reports

This is mandatory and will include electrical compliance, entomology, and gas. There is a legal debate surrounding the issue of electrical fencing but that will be covered in a separate article.

-Rates clearance figures

This is the amount that the municipality requires in order to render the property cleared of rates, electricity and water. Amounts are paid in advance and all amounts from date of transfer will fall to the purchaser who will refund the seller his pro rata portion.

-Levy clearance figures (if sectional title)

As with rates clearances, the same principles apply to all sectional title properties. The managing agent or body corporate will provide us with amounts that the seller has to pay in order to render the levies cleared. This is mandatory. Amounts are paid in advance and all amounts from date of transfer will fall to the purchaser who will refund the seller his pro rata portion.

-Estate agents commission

Should the property be sold using the services of an estate agent, the Seller will be liable for the payment of the agreed commission.

This liability can be changed by agreement, but remember that transfer duty will be calculated differently if the purchaser pays any amounts over and above the sale price. Transfer duty is paid on the total value of the consideration paid in acquiring the property but excludes the legal fees paid.

The Purchasers liability will include the following:

- Transfer Duty (payable to SARS):

All transactions attract transfer duty besides a few exceptions.

Application must be made for a transfer duty receipt (above R750 000) or



exemption (if below R750 000), regardless of whether transfer duty is payable or not.

- Transfer fee:

This is the tariffed conveyancing fee. This is the fee payable for the registration of the transfer.

- Lodging agent's fee/vat/postages and petties:

The lodging agents are our correspondent attorneys based at different deeds registries. Their fee is for attendance to the registration at the deeds office and returning of the original title deed to us, and is paid to them.

- Deeds office fee:

The Deeds office is regulated and all conventional and sectional title lodgements attract a prescribed tariffed fee for registration of the transfer.

- Deeds office search:

This fee is the fee that our service providers charge us for a compulsory deeds office search. This is inclusive of obtaining a copy of the deed in order to begin immediate drafting. The search enables conveyancers to note caveats, endorsements, restrictions, servitudes, bonds etc. registered against the property.

-Postages and petties:

This is our fee inclusive of all costs incurred in travelling, telephone calls, postages, bank charges etc. in handling the matter.

- Electronic document generation fee:

This is charged by our service provider for the transfer and use of the system.

- Rates clearance application / certificate:

This is paid over to our electronic service providers for use of the electronic rates service. All municipalities are moving towards electronic requests for rates. This not only speeds up the process but alleviates municipalities handling and misplacing physical documents. Preference is given to all electronic requests.

- Transfer duty application:

This is paid over to our electronic service providers. The application entails all the details of the transaction in order for SARS to verify the transaction and establish the amount of duty payable. Once paid, a transfer duty receipt or exception certificate is issued which must accompany the registration as proof of fulfilment of obligations in terms of tax.

- FICA:

This is a fee for compliance with the financial intelligence centre regarding all property transactions.

- Levy clearance certificates:

For all sectional title transfers, a levy clearance certificate must be issued by the managing agent or body corporate reflecting that the levies due have been paid in full. The fee for the certificate is payable directly to the

managing agents and varies. This cost will be added onto the bill once we are notified of the fee. This is paid over to the agency concerned.

-Bond registration fee:

If the purchaser is being financed by a bank then a bond will be registered over the property in favour of the bank. The bank will appoint a conveyancer to register the bond and the purchaser will be liable for the bond registration fee, and in certain circumstances, an initiation fee.

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### Disclaimer:

Whilst every effort is taken to ensure the correctness of the contents hereof, these notes should be used for informational purposes only, and further study is highly recommended to fully understand the subject material.