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MEUMANN WHITE  

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ATTORNEYS

## **BUYING THROUGH TRUSTS, COMPANIES AND CLOSE CORPORATIONS**

Presented by Meumann White Attorneys

## **OUTLINE**

### **TRUSTS**

- A: BUYING PROPERTY IN THE NAME OF A TRUST - ALREADY IN EXISTENCE
- B: BUYING PROPERTY IN THE NAME OF A TRUST - NOT YET IN EXISTENCE
- C: SALE OF THE TRUST

### **COMPANIES**

- A: BUYING PROPERTY IN THE NAME OF A COMPANY - ALREADY IN EXISTENCE
- B: BUYING PROPERTY IN THE NAME OF A COMPANY - NOT YET IN EXISTENCE
- C: SALE OF THE COMPANY

### **CLOSE CORPORATION**

- A: BUYING PROPERTY IN THE NAME OF A CLOSE CORPORATION - ALREADY IN EXISTENCE
- B: BUYING PROPERTY IN THE NAME OF A CLOSE CORPORATION - NOT YET IN EXISTENCE
- C: SALE OF THE CLOSE CORPORATION

## **TRUSTS**

### **A: BUYING PROPERTY IN THE NAME OF A TRUST - ALREADY IN EXISTENCE**

When a trust is purchasing property, the estate agent should check whether the trustees have authority to purchase.

It is advisable to obtain:-

- 1) a copy of the deed of trust;
- 2) copies of the letters of authority in favour of the trustees; and
- 3) where not all the trustees are signing the agreement, a resolution of trustees.

Likewise, if a trust is selling or bonding immovable property, the estate agent must ensure that the trust has authority to sell or bond.

When immovable property is acquired by a trust, the property is registered in the name of the trustees for the time being, acting in their capacities as trustees of the trust.

The estate agent usually has little if any knowledge of the trust's financial stability, and it is thus advisable to include a clause in the sale agreement in terms of which the signatory, by his signature to the contract, binds himself personally liable to carry out the obligations of the trust if the trust fails to carry them out.

**ADVANTAGES** of buying property in the name of a trust:-

1. **Limited Liability**

Like a Company or Close Corporation, a trust has a legal personality separate from its trustees and beneficiaries.

2. **Continuity**

The trustees and the beneficiaries enjoy the benefit of continuity as the trust's continued existence is not effected by changes in membership.

3. **Estate Planning**

Estate duty is charged on the "dutable amount" of the estate of a deceased person. The trust is not a person for the sake of the Estate Duty Act and therefore, whatever happens to the trust fund (or to the trustees) has no estate duty implications.

In certain circumstances, the beneficiary's right in the trust fund will not be "property" in the estate of the beneficiary - and will also thus not form part of his estate for estate duty purposes.

However, if anti-generation skipping provisions are introduced by legislation (which seems likely in the near future according to recommendations), the trust will be considered to have died and estate duty will have to be paid at a pre-determined rate, then a major attraction and benefit of the trust will fall away.

**DISADVANTAGES** of buying property in the name of a trust:-

1. **Transfer Duty**

Prior to 1996 the rate at which a trust paid transfer duty was determined by the identity of the beneficiaries. If they were all natural persons, then transfer duty was determined on the scale applicable to natural persons.

The trust is now deemed to be a person other than a natural person (ie. a legal/juristic person) with regards to the imposition of transfer duty and thus transfer duty is payable at a flat rate of 10 % of the value of the property where a trust acquires immovable property.

2. **CAPITAL GAINS TAX**

Capital Gains Tax is payable where a trust is the Seller of the property.

**B: BUYING PROPERTY IN THE NAME OF A TRUST -  
NOT YET IN EXISTENCE**

1. **The Prohibition**

According to our common law, an agent or representative cannot bind or represent a non-existing principal - except in the case of a Company or Close Corporation where the legislature has provided, in the Company's Act and Close

Corporation's Act respectively, for persons to enter transactions for and on behalf of Company's and

Close Corporations to be formed. There is however no similar legislation in existence for trusts.

In terms of the Trust Property Control Act the trustee can only conclude agreements on behalf of the trust after the trust has been registered AND the trustees have been authorised thereto in writing by the Master of the High Court by the issue to them of letters of authority.

Thus, any agreement entered into by a person as trustee of a trust yet to be formed, or by a trustee of a trust which is formed but in respect of which the trustee does not hold letters of authority, will be null and void; and cannot be ratified.

**2. What assistance is there in overcoming this prohibition.**

We used to advise clients of two solutions to this prohibition. However the Receiver of Revenue has taken the strong view that both solutions attract double transfer duty. We therefore recommend that no Sale Agreement for a Trust be signed before Letters of Authority relating to that Trust have been issued.

## **COMPANIES**

**A: BUYING PROPERTY IN THE NAME OF A COMPANY -  
ALREADY IN EXISTENCE**

**1. Does the Company have Authority?**

In terms of the Company's Act (Section 34) every Company has the power to sell, purchase or mortgage immovable property unless specifically excluded in the Company's memorandum. It is thus advisable to call for a copy of the company's memorandum.

However, in the unlikely event of the memorandum specifically excluding the purchase of immovable property by the Company, it still does not mean that the contract is void. In terms of Section 36 of the Company's Act, no act of the Company will be void by reason only of the fact that the Company was without capacity or that the directors had no authority to perform that act on behalf of the Company; and nor may the Company or any other person in legal proceedings rely on such lack of authority or contractual capacity.

So, a purchase of immovable property by the company, even if specifically prohibited in terms of the memorandum would not be void, provided the directors were prima facie duly authorised to bind the Company to the transaction.

This means that estate agents dealing with a Company can accept that the Company has the capacity to enter into a contract of sale of immovable property.

It is however an entirely different question whether the person representing the Company has the necessary authority to conclude the contract.

2. **Is the person signing authorised to represent the Company?**

a) WHO can be authorised to represent the Company?

The person representing the Company can either be an authorised person within the Company or an authorised outsider, such as an estate agent.

b) HOW is such person authorised?

The Company's articles must be examined as they might provide, for example, that only the board of directors may enter into a contract of sale of immovable property on behalf of the Company. In such a case, a single director would not be authorised to represent the Company unless he was authorised by the board of directors to do so.

If the articles and memorandum of the Company are silent and do not deal with exactly who shall be authorised, then it can be assumed that the board of directors or the Company's managing director has the necessary authority to conclude a contract of sale for the Company. A single director or the Company's secretary normally cannot conclude such contracts on behalf of the Company, unless authorised to do so by the Company's constitution (memo and articles) or by the board of directors.

c) **The Resolution**

It is always advisable to obtain a copy of a resolution authorising a person to enter into a transaction on behalf of the Company, and to annex this to the agreement.

d) **How is the signatory cited?**

The person authorised to enter the contract on behalf of the Company must sign the contract in a representative capacity ie) it must be clear that he signed the contract on behalf of the Company; eg. "for and on behalf of ABC (Pty) Ltd", otherwise he may be held personally liable on the contract.

However, the courts have held that where it is clear that the Seller or Purchaser is a Company and the contract is signed on its behalf by one of its officers without an indication that he signs on behalf of the Company, it will be assumed that he did sign on behalf of the Company;

e) **Section 228 of the Company's Act**

In terms of this section, the directors of a Company do not have the power to dispose of the whole or substantially the whole of the undertaking of the Company or the whole or the greater part of its assets except with the approval of 51 % of the shareholders at a general meeting of the Company.

This means that where the Company's only asset is the immovable property, the estate agent must ensure that he/she obtains a resolution of a general meeting of shareholders, which authorises or ratifies the specific transaction.

3. **Suretyship Clause**

It is advisable, especially where the estate agent has little knowledge of the financial stability of the Company, to include a clause in the sale agreement in terms of which the signatory, by his signature to the contract, binds himself personally to carry out the obligations of the Company if the Company fails to carry them out.

**B: BUYING PROPERTY IN THE NAME OF A COMPANY - NOT YET IN EXISTENCE**

It is possible to enter into a contract on behalf of a Company yet to be formed. This would arise, for example, where a person is interested in purchasing immovable property but wants to do so in the name of a Company not yet in existence.

Section 35 of the Company's Act is an exception to the rule that a person cannot bind a non-existent principal, and provides that a person may act as an agent for a Company to be formed.

A pre-incorporation contract (ie. a contract concluded before the Company is incorporated) only becomes binding on the Company if all the following requirements stipulated in Section 35 are adhered to:-

- 1) the contract must be in writing;
- 2) the contract must have been entered into by a person acting as agent or trustee for a Company to be formed;
- 3) the memorandum of the Company must contain as one of its objectives the ratification or adoption of the contract;
- 4) 2 copies of the contract, one of which must be certified by a notary public, must be lodged with the Registrar of Companies;
- 5) The Company must actually ratify or adopt the contract after its incorporation.

If these requirements are not complied with, then the pre-incorporation contract is not binding on the Company after it has been formed.

It is commonplace in a property sales agreement for a person signing a contract as trustee for a Company to be formed that the said trustee is allowed a period of time within which to form the Company and thereafter, should the Company fail to be formed or should the contract fail to be ratified then the signatory will be personally bound by the obligations set out in the contract. The estate agent should thus be familiar with how long the process takes to form a Company.

**See clause to be inserted in the contract.**

If the clause is not included then the agent or trustee acting for the Company yet to be formed incurs no liability if the Company does not ratify the agreement after its incorporated.

### **CLAUSE TO BE INSERTED IN AGREEMENT**

#### **COMPANY / CLOSE CORPORATION**

1. If the signatory hereto is entering into this Deed of Sale as a Trustee or Agent for a Company or Close Corporation to be formed, it shall be deemed that:-

1.1 Where the Company/Close Corporation is not formed within one month of date of signature hereof or does not adopt the Deed of Sale within 7 days of its formation, the signatory shall be deemed to have entered into this Deed of Sale in his personal capacity.

1.2 Where the Company/Close Corporation is formed within one month from the date hereof and adopts this Deed of Sale the signatory hereto by his signature hereon binds himself as surety and co-principal debtor for the due and punctual performance by the Company of all its obligations hereunder.

**C: SALE OF THE COMPANY**

ie. The acquisition of shares in a Company which owns a specific immovable property for the purposes of acquiring the property.

This procedure generally presents no problems and the purchaser becomes the shareholder of the Company on registration of the transfer of shares in his name in the share registry in the Company's Registry in Pretoria.

The only difficulty that may arise is where the Purchaser needs to raise a bond on the property in order to pay the purchase price. In terms of Section 38 of the Company's Act, no Company is allowed to give financial assistance for the purpose of acquiring any shares of the Company. This in real terms means that where the Company is a property-owning Company, the purchaser cannot raise a bond on that property in order to pay the purchase price. The bond would be void and every director would be guilty of an offence. Such a purchaser can only bond the property to the extent of the Seller's loan account in the Company. To get around this prohibition, the Company may be converted to a Close Corporation if the shareholders do not exceed 10

in number and qualify for membership in terms of the Close Corporations Act, as there is no similar prohibition in the Close Corporation's Act.

In a situation where a buyer is purchasing shares in a property owning company from a seller and:-

- a) the buyer requires bond finance;
- b) they buyer requires to mortgage the property in order to raise the purchase price for the shares;
- c) there are no difficulties with Section No. 38 of the Companies Act;

a difficulty which often arises is that the seller will not transfer the shares in the company to the purchaser before the full purchase price is paid and consequently the purchaser is therefore unable to sign mortgage bond documents on behalf of the company. A way around this difficulty is to structure the Sale Agreement such that the Seller agrees to sign the bond documents on behalf of the company in order to raise the finance but ensures that any suretyships which are to be signed will be signed by the purchaser. In this way the mortgage bond is subsequently registered and thereafter the transfer of the shares takes place as against payment of the purchase price.

#### Advantages

1. The Asset is kept separate from the Estate of the purchaser.

#### Disadvantages

1. The purchaser cannot see the "skeletons in the cupboard". There is no way of knowing exactly what debts the Company has.

2. Capital Gains Tax is payable on the sale of shares.
3. Transfer duty is payable.

## **CLOSE CORPORATIONS**

### **A: BUYING PROPERTY IN THE NAME OF A CLOSE CORPORATION - ALREADY IN EXISTENCE**

#### **1. Authority**

In terms of the Close Corporations Act, the consent in writing of a member holding a member's interest of at least 75 % or of members holding together at least that percentage of the members interests, in the Corporation, shall be required for any acquisition or disposal of immovable property by the Corporation - unless an association agreement provides otherwise. (Sec46(b)(iv)).

Once the required consent has been obtained, the contract can be entered into by any member of the Corporation acting on its behalf provided the transaction falls within the scope of the business of the Corporation stated in its Founding Statement or actually carried on by it. If the transaction falls outside the scope of the Corporation's business, a particular member must be specifically authorised by the CC to conclude the transaction.

It is always advisable to obtain a copy of the resolution authorising a member to conclude the transaction and to annex it to the contract.

#### **2. Suretyship Clause**

As in the case of Company's, this is advisable if the estate agent is not familiar with the financial standing of the Corporation.

**B: BUYING PROPERTY IN THE NAME OF A CLOSE CORPORATION - NOT YET IN EXISTENCE**

Similar to the situation of companies in terms of the Close Corporations Act a pre-incorporation contract is allowed to be signed by an Agent or Trustee for Close Corporation to be formed. After its incorporation the contract must be ratified in the form of a written consent given by all the members of the Close Corporation within the time specified in the contract, or, if no time is specified, consent must be given within a reasonable time after the incorporation of the Close Corporation.

Similarly as is the case with Trustees who sign on behalf of a company to be formed most property sale agreements will contain a clause where a purchaser is a Trustee of a Close Corporation to be formed, that where the Close Corporation is not formed or where if it is formed it fails to ratify the contract, that the signatory will be bound personally to carry out the obligations of the contract. If this clause is not included in the agreement, the person who enters into the contract for the Close Corporation yet to be formed is not personally liable if the Corporation, on its incorporation, does not ratify or adopt the contract.

**C: SALE OF A CLOSE CORPORATION**

ie. Acquisition of the member's interest in a Close Corporation in order to acquire the property owned by the Close Corporation.

1. There is no provision in the Close Corporation Act similar to Section No. 38 of the Companies Act. Consequently where a company faces difficulties with structuring a deal because of the terms of Section No. 38 of the Companies Act, the one way around this difficulty for the company is to convert to a Close Corporation.

A Close Corporation may give financial assistance for the purpose of any acquisition of the member's interest in that CC by any person if:-

1. the previously obtained written consent of every member is obtained;
  2. after such assistance, the Close Corporation's assets (fairly valued) exceed its liabilities;
  3. the Close Corporation is able to pay its debts as they become due in the ordinary course of business; and
  4. such assistance will not render the Close Corporation unable to pay its debts as they become due in the ordinary course of business.
- 
2. Generally in all other respects a Close Corporation is very similar to a Company in terms of the legal implications of dealing with it.
  3. Disposal of a member's interest must take place in accordance with the Association Agreement if one exists. In the absence of an Association Agreement a member can dispose of his interest only with the consent of every other member of the Corporation. Similarly, no person can become a member of the Corporation unless the existing members agree to his introduction into the Corporation.
  4. The Purchaser of a member's interest becomes a member of the Close Corporation only after the rejection of the amended Founding Statement (CK2) in the Close Corporation's Registry in Pretoria.
  5. The advantages and disadvantages of buying shares in a Company as reflected on page 21 applies equally to a Close Corporation.

## **COMPANIES, TRUSTS AND CLOSE CORPORATIONS – PAYMENT OF TRANSFER DUTY**

On 13 December, 2002, the Government promulgated the Revenue Laws Amendment Act 74 of 2002. This Act had been anticipated to be promulgated in approximately March or April, 2003, and therefore it took the entire business community by surprise in that it was promulgated on 13 December, 2002, and came into effect on the same day. Often legislation is promulgated in a Gazette with the date of its coming into effect being some month to a month and half thereafter. However the Government in its wisdom decided that this Act would come into effect immediately on the day that it was first promulgated. The danger was that there must have been many people who did transactions on that day who were unaware of the fact that the Act was in force.

The reason the Government wished to bring in the Act was to fill a loophole in the payment of transfer duty in property transactions. For some time there had been concern from the Receiver of Revenue that where a Company, Trust or Close Corporation sold its shares/members interest/interest in the Trust, no transfer duty was payable. The only duty that was payable for the share transfer was stamp duty of .25%. The effect of the new legislation therefore is to do away with this stamp duty and make transfer duty payable in these situations.

The new legislation states that as of 13 December 2002, all sales of :-

1. shares in a residential property owning Company (including shareblock);
2. sales of a members interest in a residential property owning Close Corporation and;
3. sales of the interest in a residential property owning Trust;

shall be liable for payment of transfer duty. This will apply in respect of all sales entered into on or after 13 December, 2002.

The amount of transfer duty payable will be dependent on the identity of the Transferee (the person taking transfer). If the Transferee is a natural person

then the graduated rate of transfer duty will be payable. If the Transferee is a legal person then transfer duty at 10% will be payable.

The Act is only applicable to Companies, Close Corporations and Trusts that own residential property. It is not applicable where Companies, Close Corporations and Trusts own commercial or industrial property.

This new legislation is not applicable where a Company, Trust or Close Corporation sells its property because this is a basic conveyancing transaction where transfer duty has always been payable, the amount thereof being dependent on who the purchaser is.

In regard to how the transfer duty is to be paid generally it will be attended to by the Managing Agents/Company Secretary/ Accountants who will have to add the transfer duty to the account and effect payment thereof to the Receiver of Revenue in order to obtain a transfer duty receipt. The cost therefore of such a transfer will be the amount of the transfer duty, the amount of the usual secretarial fee and an additional fee for the extra work required in obtaining the transfer duty receipt. We understand that this fee has been set at between R250.00 and R300.00 excluding VAT.

In terms of the legislation the persons who are liable for payment of the transfer duty are:-

- i) in the case of a Company, the purchaser is liable in terms of the agreement for payment of the transfer costs, including the transfer duty. If the purchaser fails to pay such amount within a period of six months from date of the sale then the public officer of the Company is jointly and severally responsible for payment of that amount, together with the seller. As a consequence of this you can imagine that the public officer who will generally be the company secretary, is going to be careful to ensure that transfer duty is paid on all such transactions;
- ii) in the case of a Close Corporation, again the purchaser will be responsible in terms of the agreement and if he/she fails to pay within a period of six months the public officer of the Close Corporation together with the seller will be jointly responsible for such payment;

- iii) in the case of a Trust, if the purchaser fails to pay the Trust and Trustees will be jointly and severally liable for such payment.

In view of the fact that in terms of the agreement the purchaser is held responsible and the seller has a residual responsibility in the event of the purchaser not paying, our advice to buyers and sellers involved in such transactions is to ensure that they obtain from the managing agents/company secretaries who are attending to the transfer, a copy of the transfer duty receipt for their records. In this way they can ensure that the duty in terms of the law to pay the tax has been carried out properly.

Some interesting questions have emerged in regard to this law :-

- i) What is the situation where there is a sale of shares in a Company who owns a farm on which obviously the farmer and his family live? The answer we have received from the Receiver of Revenue is that a farm property is not zoned residential and therefore it will not fall within the ambit of the Act.
- ii) What of a situation where a double story building is owned by either a Company, Close Corporation or Shareblock Company and the ground floor unit is a shop and the upper level unit is a residential flat? Our queries to the Receiver of Revenue have been met with the response that this transaction will not fall within the ambit of the Act because the property must be a fully residential property. In view of the fact that this property is partially residential and partially commercial this will take it outside the ambit of the Act. This view might change in time but that is what pertains at present.

Our advice to Estate Agents in regard to the new Act is to amend their clauses in their sale agreements which refer to the payment of costs so as to include reference to transfer duty. The reason for this is that the transfer duty amount is a significant amount and the Agent wants to forestall any complaint from a Purchaser who states that he/she was not advised of the fact that transfer duty was payable. Furthermore we advise Agents to obtain a copy of the transfer duty receipt from the person attending to the transfer and retain it on their file so that the Agent can ensure that the Act has been complied with in the interests of both buyer and seller.

In our view it is not advisable for people to buy a residential property through a trust, company or close corporation for the following reasons :-

1. There is no longer any cost saving – the costs of a conventional transfer are now the same as a share transfer;
2. C.G.T. - Capital Gains Tax on the higher rate applicable to legal persons is payable and if the property is the primary residence of the owner the one million rand exemption is not allowed.
3. "Skeletons in the cupboard" - there are always risks in buying a trust, company or close corporation as you buy it with both its assets and **liabilities**.

In regard to Shareblock Conversion transfers the Receiver of Revenue has subsequent to this December 2002 promulgation, legislated for allowing the Sectional Title part of the transaction to be free of Transfer Duty, provided that Transfer Duty has been paid on the Share Transfer.



## COOLING-OFF CLAUSE

**The cooling-off clause came into effect from 27 November 1998.**

The cooling off clause is entrenched in the Alienation of Land Act and not in the Estate Agents Act as originally proposed.

**The cooling-off clause applies to all purchasers EXCEPT:-**

Persons who buy land which is NOT used or intended to be used mainly for residential purposes (ie. Commercial, industrial or agricultural properties);

Persons who buy land at a price exceeding R250 000,00;

Persons who buy land in the name of a Company, Close Corporation or trust;

Persons who buy land at a publicly advertised auction;

Where the Seller and Purchaser have previously entered into an agreement of sale of the same land on substantially the same terms (this is to prevent purchasers enjoying multiple opportunities to cool off in respect of the same property);

Where the Purchaser has the right in the agreement to nominate or appoint another person as purchaser (this is to prevent a situation where a Company, Close Corporation or trust uses a natural person as a front to buy land);

Where the Purchaser purchases the land by the exercise of an option, which was open for exercise for a period of at least 5 days (this is to prevent an additional cooling-off);

The written notice which the Purchaser must deliver to the Seller or his agent will only be effective if:-

It is signed by the purchaser or his agent acting on his written authority;

It identifies the offer/agreement that is being revoked/terminated;

It is unconditional.

All monies received by the Seller, an estate agent, an attorney or any other person in respect of the offer/sale must be refunded to the Purchaser within 10 days of the delivery of the written notice.

No person is entitled to claim damages or remuneration in respect of the offer/sale, which has been revoked/terminated.

Any agreement by the Purchaser to pay a fee or penalty for exercising the cooling-off right or any waiver of the cooling-off right will be VOID.

A Purchaser who signs an offer/agreement (hereinafter referred to as "the later transaction") within 5 days after having signed an offer/agreement in respect of other land (hereinafter referred to as "the earlier transaction" and before he has exercised his right to cool off in respect of the earlier transaction shall:-

On signature of the later transaction be deemed to have exercised his right to revoke/terminate the earlier transaction; and

Forthwith after signature of the later transaction in writing notify the Seller in the earlier transaction of the revocation/termination of that transaction. Any person who willfully or negligently fails to comply with this shall be guilty of an offence.

This clause does however not apply to a Purchaser who bona fide intends to purchase both properties.

The purpose of this provision is to ensure that Purchasers are not able to monopolize the market by buying all the properties that are for sale in a particular area, and in effect obtain options on all those properties, making it impossible for other purchasers to enter into enforceable sale agreements in respect of those properties before the cooling off period has expired.

This period of five days excludes the day he signed and any Saturday, Sunday or Public Holiday.

Where a Seller has counter signed an offer from a purchaser, his counter signature now constitutes a counter offer and the original offer is effectively killed off. Consequently when the purchaser accepts the counter offer the five day cooling off period will commence from the day after the purchaser's acceptance of the counter offer excluding a Saturday, Sunday or Public Holiday.

### **DRAFT CLAUSE**

The clause which we suggest be incorporated in your standard sale agreement/offer to purchase is as follows:-

"If the purchase price for the property does not exceed R250 000,00 then the Purchaser is, in terms of Section 29A of the Alienation of Land Act, 1981 , as amended , entitled , within 5 (FIVE) days after signature hereof by the Purchaser , to revoke this offer or , in the event of the offer having been accepted by the Seller , terminate this deed of alienation , by delivering to

the Seller or his/her agent written notice to that effect in the manner prescribed in the said Act. The period of 5 days shall be calculated with the exclusion of the day upon which the offer or deed of alienation was signed by the Purchaser, and of any Saturday, Sunday or public holiday."



## **CAN A PURCHASER WITHDRAW HIS OFFER AT ANY TIME ?**

Presented by Meumann White Attorneys

We have had a few queries from Estate Agents lately asking whether a purchaser who has committed himself to keep his offer open for a certain period, can withdraw that offer prior to the date specified in the offer.

If an offer contains no date by which the offer must be accepted by the Seller, then the purchaser can revoke it at any time.

However, if as is usually the case the offer sets out that it shall remain open for acceptance until a certain date in the future, then that offer must remain open for acceptance until that date provided that the seller is aware of that date and has accepted that he has a right to consider the offer up to that date. Let us give an example. An agent receives an offer which is open for acceptance to a date three days hence and on the way to see the seller the purchaser telephones on the agent's cell telephone and asks whether the agent has had any contact with the Seller. If the agent has had no contact with the seller whatsoever then the purchaser can withdraw the offer as there has up to that point been no acceptance by the seller of this so called pactum de contrahendo in terms of which both parties have agreed that the offeror undertakes to keep the offer open for a period of time. However, if the agent has contacted the seller telephonically and advised briefly of the terms of the offer and the fact that it is open for acceptance for a period of time then that offer can in no way be revoked or withdrawn by a offeror.

To sum up, in simple terms, the only dated offer that can be withdrawn is one that has not yet come to the mind of the seller.



**HOW CRUCIAL IS THE COMMUNICATION  
OF AN ACCEPTANCE OF AN OFFER TO  
THE OFFEROR?**

An agent had the following experience: -

A potential Purchaser signed an offer to purchase. The offer was forwarded to the Seller, who had until 5.00 pm on 20 July, 1998, to accept the offer. Before 5.00pm on 20 July 1998 (i.e. before expiry) the Seller accepted the offer by signing the agreement and left a message on the agent's cellular phone to advise her of his acceptance. The agent retrieved the message on the morning of 21 July 1998 and immediately contacted the Purchaser to advise him that his offer had been accepted. To the agent's surprise, the Purchaser advised that the acceptance had not been communicated to him prior to 5.00pm on 20 July 1998 and therefore the offer had lapsed, and he was no longer interested in purchasing the property at that price.

The question that arises is: Is the contract concluded as soon as the Seller signs the agreement OR only once the Seller (or the agent) has communicated the Seller's acceptance of the offer to the Purchaser?

The legal position is as follows :-

As a general rule a contract is concluded only when the Seller (the offeree) has communicated his acceptance of the offer to the Purchaser (offeror). This means that if a Seller signs an offer to purchase (thereby purporting to accept the offer), the contract is not concluded unless the Seller has notified the Purchaser that the offer has not been accepted prior to the expiry of the offer.

This leads to the question: What type of notification is required?

The notification need not be in writing unless this is stipulated in the offer. Thus a simple telephone call, prior to the expiry of the offer to the Purchaser advising him that this offer has been accepted would be sufficient. It is not necessary for the Purchaser to actually be furnished with a copy of the signed agreement at that stage.

Generally, the Seller (the offeree) must take all reasonable steps to inform the Purchaser (the offeror) of his acceptance. If the Purchaser changes his address stated in the contract or otherwise makes it impossible for the Seller to give notice of acceptance before the expiration of the offer, the contract will be deemed to be binding provided the Seller did his best to communicate the acceptance of the offer. Thus, in the example given above, if the Purchaser only had the agent's cellular phone number as a contact with the Seller, the message left on the agent's voice mail may well be deemed to be sufficient communication of acceptance.

It has not yet been decided by the Courts whether it is sufficient for the Seller (offeree) simply to inform the estate agent that the offer has been accepted. It is thus imperative that when acceptance of an offer is communicated to an estate agent, he should immediately inform the Purchaser (offeror) of this.

A Purchaser (offeror) may dispense with the requirement that he must be notified of acceptance. Offers to purchase immovable property often state that the offer will be deemed to be accepted "on signature by the Seller". The effect of this is that the offer is accepted once the Seller has signed his acceptance: and it is not necessary for notification of acceptance to be conveyed to the Purchaser.

We suggest that if your sale agreement does not reflect the above that steps be taken to amend your agreement to cater for the above.

To the extent that at present your agreement does not contain the above, in order to prevent any later disputes between the parties, we suggest that agents take all reasonable steps necessary to find out whether the Seller has accepted the Purchaser's offer and if so, to communicate such acceptance to the Purchaser, all before the expiry of the offer.



## **TRANSFER DUTY**

.....We have been advised by the South African Revenue Service Transfer Duty Section that a new directive has been received from the Commissioner for South African Revenue Service (Policy and Law Application) with regard to contributions by the seller towards the purchasers costs in a deal , and the usually intended reduction in the dutiable amount of the purchase price from a transfer duty perspective.

Section 7 of the Transfer Duty Act determines that for the purpose of the payment for Transfer Duty, there shall be excluded from the consideration payable in respect of the acquisition of any property:-

Transfer duty or any other duty or tax payable in respect of the acquisition of the property; and

The cost of fees payable in connection with the registration of the acquisition of the property.

The ruling by the South African Revenue Services is to the effect that Section 7 only applies, and therefore transfer duty will only be payable on the lower amount, where the purchase price INCLUDES transfer and bond costs ("the costs") and the deduction will now be limited to the actual costs of transfer and not the contribution amounts if the said contribution amounts exceed the said costs. The drafting of the contribution towards costs clause has also become critical in that it would seem that the Receiver requires that it be stated in the agreement that the contribution towards costs is made from the actual purchase price of the property, requiring a clause along broadly similar lines to the following:-

"The seller hereby undertakes, from the proceeds of the sale, to contribute the sum of R\_\_\_\_\_ towards the costs of registration of the transfer and bond herein."

The important fact which the clause must convey is that the purchase price of the property must include the cost, and this,

it would seem, must be very clearly stated. Furthermore, it is now required that the financial institution granting the loan in respect of any transfer for which we make application for transfer duty must confirm, in writing, that the addendum forming part of the sale agreement was submitted to them and that they are aware of there being a contribution towards costs . This written confirmation must be submitted with the transfer duty documents before any addendum will be taken into account in reduction of transfer duty.



## **CLAIM FOR COMMISSION**

Presented by Meumann White Attorneys

An estate agent that wishes to proceed to recover commission in terms of the mandate agreement (as opposed to claiming such commission in terms of a benefit created in favour of the agent in a sale agreement) must allege and prove:-

Compliance with S26 of the Estate Agents Act;

A mandate;

Performance of the mandate which in the absence of special terms involves

That he has introduced a purchaser to the seller;

That the purchaser was, when the contract was signed, willing and able to purchase the property;

That a valid contract of sale was concluded;

That the introduction was the effective cause (*causa causans*) of the contract.

The commission payable

The question as to whether an estate agent was the effective cause of a sale usually arises in two instances:-

Where an estate agent introduces a purchaser to the seller and the parties conclude a private sale; and

Where an estate agent introduces a purchaser to a property who eventually purchases it through another estate agent.

The issue in both instances is whether the estate agent who first introduced the purchaser is entitled to the commission, and in

deciding this factor each case has to be carefully scrutinized before this can be answered. However the following general points can be made:-

Where the seller sells privately various factors can indicate whether or not the estate agent was the effective cause;

The nature and effect of the estate agents efforts (eg. A simple phone call leaving a business card, driving purchaser past the property and pointing it out may well in certain circumstances constitute the effective cause of the sale);

The period which has lapsed between the estate agents introduction and the conclusion of the sale;

The terms of the sale must be viewed against the terms of the mandate (the mere fact that the purchase price of the sale is lower/higher than that of the mandate is not decisive);

If the seller grants the purchaser financial assistance may be a factor, but this too is not decisive;

Where the estate agent introduces a purchaser but later breaks off negotiations does not necessarily terminate the influence of the introduction but it does effect the value of the introduction.

Where an estate agent introduces a purchaser to a property who eventually purchases it through another estate agent, the first agent will only be entitled to commission if he can show that it was his efforts which resulted in the conclusion of the agreement notwithstanding the intervention of the second agent. Although what has been covered in (1) above will also apply here it must be remembered that if a property is listed with several competing estate agents there is no rule that the estate agent who first introduced a purchaser is entitled to commission. The real issue is whether it was the first or second agents efforts which were the effective cause of the sale (eg. Offer submitted by first agent rejected because it

was too low, second agent concludes sale because he obtains financing for purchaser who then submits higher offer: first agent would not be entitled to commission in these circumstances. What about the situation where the sale is concluded because the second agent reduces his commission and as a result the seller "clears" more of the purchase price?)

There are situations where it is impossible to distinguish between the efforts of one agent and another in deciding who was the effective cause. In such situations it may well be that the seller is liable to pay commission to both estate agents. In such circumstances the seller has only himself to blame if he appoints more than one agent without ensuring that he will be liable for the commission of only one estate agent, as there is not obligation on an estate agent to acquaint the seller with all the various people introduced to the property .

The requirement that an estate agent must be the effective cause of a transaction before he can claim commission can be excluded by agreement, however such agreement is not readily assumed and must be set out in very clear terms in order to be binding.



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## **HOUSING CONSUMERS PROTECTION MEASURES ACT 95 OF 1998 (NHBRC)**

Presented by Meumann White Attorneys

The above Act came into effect on 1<sup>st</sup> June 1999, and brought into being the National Home Builders Registration Council ("NHBRC"). This council is put in place to protect consumers. In terms of the Act home builders will agree to be bound by the rules and regulations laid down by NHBRC. This means that the home builder has agreed to build the house to a minimum quality standard that has been set out in the NHBRC standards and guidelines. The NHBRC will investigate a valid complaint sent to the home builder if he refuses or is unable to assist the owner.

A valid complaint is one that relates to a defect caused or likely to cause significant damage to the roof structure, superstructure, foundations and private drainage of the new house and which is made within a five year warranty period.

The process for claiming against the homebuilder is laid down in the standard home builders warranty. As there are cases when the NHBRC cannot assist the home owner, the home owner is advised to read the standard home builders warranty carefully and take note of the conditions stipulated in the warranty.

The standard homebuilders warranty is not an insurance scheme and the home buyer cannot submit a claim against the NHBRC. Rather it is a method whereby if the home builder refuses or is unable to honor his contractual or warranty obligations the NHBRC may step in to provide support to the home owner, in the form of putting pressure on the builder to rectify otherwise he will be de-registered. If he is de-registered then he cannot validly continue to be a builder. When the Act commenced it governed only dwellings up to a value of R250 000.00. As of 1<sup>st</sup> November, 1999, this was amended so that the Act covers all new dwellings regardless of their value.

**The local office at the NHBRC is at telephone number 277-8400.**



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**PROPERTY OWNING COMPANIES OR  
CLOSE CORPORATIONS WHICH ARE  
REGISTERED VAT VENDORS**

Of late we have come across various property owning close corporations and companies which have been registered as a Vat Vendor.

In our view such a property owning close corporation or company generally will not be required to register for Vat in terms of the Vat Act as it will not be doing a turnover of in excess of R150 000,00. The reason why most persons register their property owning close corporation or company for Vat is that by those means they are available to obtain a refund of their transfer costs. Thereafter should the close corporation or company sell the property, then the Receiver will demand 14% Vat from the company or close corporation as it is a Vat Vendor.

Accordingly, where a purchaser purchases the shares in a Vat registered company or the interest in a Vat registered close corporation, that purchaser will be taking over the liability for Vat. If that purchaser in years to come were to sell the property to another purchaser then he would be required to pay Vat (through the company or close corporation) to the Receiver. If the purchaser, when he sells the property in years to come, is able to sell the interest in the close corporation or the shares in the company then the Vat will not become payable. However a purchaser can never be sure whether any subsequent purchaser will be prepared to buy the shares in the company or the interest in the close corporation.

In our view therefore it is an added risk that a purchaser is taking when he purchases such a Vat registered close corporation or company and estate agents should be careful to first of all ascertain whether the property owning close corporation or company is a Vat Vendor and, if so, to warn any potential purchaser of the implications.



## **CAPITAL GAINS TAX (CGT)**

1. Capital Gains Tax ("CGT") was implemented on 1 October, 2001. This date will be referred to as the effective date of the Act. It was intended to be implemented on 1 March 2001 but owing to the fact that business was not perceived to be ready for it, it was postponed for a period of six months. Property is one of the many type of assets that, when disposed of, will be subject to Capital Gains Tax.
2. When is property deemed to be disposed of?  
"Disposal" will occur when an asset is sold, donated, scrapped, exchanged, cancelled, lost, destroyed or redeemed.
3. Some interesting deemed disposals are :-
  - i) emigration from South Africa;
  - ii) death
4. One of the major advantages of the implementation of CGT is that the SARS is through the disclosures made by the tax payer able to ascertain more readily whether a receipt of monies is in nature revenue or capital. This will result in a far more full disclosure from taxpayers about their true asset position. If a tax payer has over a number of years prior to his CGT disclosure rendered returns showing a very small income he/she could have difficulty in explaining to SARS how he/she managed to acquire the assets now being disclosed.
5. What amount of tax is payable:-

<b>Type of Tax Payer</b>	<b>CGT Rate</b>	<b>Taxation Rate</b>
Individuals	25%	10.5%
Special Trusts	25%	10.5%
Others Trusts	50%	15%
Companies or CCs	50%	15%

The taxation rate here is assumed at the top of the marginal rate. For example:- If an individual sells his second home and makes a R50 000 capital gain. 25% of R50 000 is R12 500. This R12 500 is then added to the individuals taxable income for that year.

6. Exclusions from CGT
  - i) An individuals primary owner - occupied residence was R1 million but is now R1,5 million.
  - ii) Private motor vehicles
  - iii) Personal belongings and effects
  - iv) Lump sum benefits in respect of most superannuation and life assurance policies
  - v) Compensation for personal injury or illness or defamation actions
  - vi) Betting, lotteries, competitions or the disposition of a chance to win a prize or a right to receive a prize
  - vii) The foreign legal tender (notes or coins) for personal use
  - viii) Gains or losses made by foreign Government agencies
  - ix) Small business assets disposed of where the proceeds are used for retirement
  - x) Institutions exempt from normal taxation.
7. In regard to the primary owner - occupied residence the following is to be noted:-

- i) Exclusion is limited to the first one million five hundred thousand rand of the capital gain from the sale of a primary residence.
- ii) A tax payer may only own one primary residence and he/she must reside in the residence.
- iii) The primary residence exclusion will be apportioned up for a periods where it is not used as a primary residence or used by the tax payer for purposes of trade. Consequently where a tax payer renders a return setting out that one bedroom is used as an office, although this has benefits from an income tax point of view it will have a negative effect from a CGT point of view.
- iv) The exclusion will not apply where the land upon which the building is situated exceeds two hectares in extent.

8. How is the Capital Gains Tax calculated?

This is divided into two categories, the one being in respect of an asset acquired after 1 October 2001 and the other being in respect of an asset acquired before 1 October 2001.

To deal with both categories :-

**Asset acquired after 1 October 2001**

- i) The base cost of the asset is calculated in the following way :-  
It is the sum total of the following amounts :-
  - a) the actual cost of the asset;
  - b) expenses actually incurred that are directly related to its acquisition, ie. Transfer costs;
  - c) the cost of expenditure actually incurred in effecting improvements to the asset but excluding :-
    - costs that are deductible for income tax ;
    - mortgage bond costs;
    - expenditure on repairs, maintenance, insurance or similar expenditure.

The capital gain will therefore be calculated by deducting from the consideration realised for the sale of the asset, the amount of the base cost.

Where the Asset is acquired before 1 October 2001

The base cost here is the sum of the value of the asset at the effective date and the amounts of any qualifying expenditure incurred on the asset after the effective date. In order to determine how to value the asset at the effective date, the Act allows the valuation as at 1 October 2001 to be done by :-

- a) a valuation – this can either be a sworn valuation , an estate agent's valuation or, in the case of a commercial property, the rental received can serve as a basis for calculating the value of the property. The Act prescribes that the valuation must be done within two years of the effective date, i.e. by 30 September 2003. A word of warning to Estate Agents who are doing valuations on behalf of clients: Estate Agents cannot charge for a valuation, but may be liable for damages for negligence if their valuation is proven to be incorrect.
- b) pro-rating of the Capital Gain.

This is based on the number of years the asset has been held using the following formula:-

$$\text{Taxable portion of capital gain} = \frac{(\text{period held after implementation}) \times \text{Capital Gain}}{\text{Total period held}}$$

9. The Primary exclusion is not allowed to a property that is owned by a Trust, Company or a Close Corporation. The Act has therefore allowed a concession being given to persons who wish to transfer their primary residences out of the trust to the donor or out of a Close Corporation to the members thereof, or out of a Company to its shareholders, so as to avoid capital gains being paid on the sale of those properties. Such transactions are exempt from the payment of transfer duty and stamp duty on the bond, provided that the transfer is registered by 31 March 2003. Our firm is prepared to attend to registration of such transfers and bonds at the following set rate :-

Transfer fees, excluding VAT and Deeds Office Registration fee	R3
500,00	
Bond registration fee, excluding VAT and Deeds Office Registration fee	R2
000,00	
Bond cancellation fee, excluding VAT and Deeds Office Registration fee	
	R500
,00	

This concession is not an option that will suit everyone as certain persons from a planning point of view will still prefer to have their different assets in different entities. There is a further requirement to obtain this relief from Transfer Duty: the natural person alone, or together with his spouse, must have from 5 April, 2001 :-

- lived in the property as a primary residence, and
- held all the share capital in the Company, or
- held all the members interest in the C.C., or
- was the donor in the Trust.

10. What is the situation regarding CGT where a property was sold in this month of September and transfer is not through by the 1<sup>st</sup> October?

The Act will apply but SARS will make the selling price the base cost and therefore there will be no capital gain made and therefore no tax payable.



## **RENTAL HOUSING ACT**

Presented by Meumann White Attorneys

## The Rental Housing Act 50 of 1999

The above Act came into effect on the 1<sup>st</sup> of August 2000. It applies to all written or verbal lease Agreements entered into on or after 1<sup>st</sup> August 2000. The below mentioned provisions are deemed to be included in all Lease Agreements entered into on or after this date irrespective of the parties intentions. It provides for the total repeal of the Rent Control Act 80 of 1967 subject to a three-year transitional period during which existing tenants of controlled premises will continue to enjoy protection in terms of Section 18. In essence, the Act serves to dilute the power of the lessor and level the playing fields between the aforementioned and the lessee.

It does so by:

- a) Defining the Rights and duties of Tenants and Landlords and the contents of contracts between them.

In terms of Section 5(3) a lease will be deemed to include certain terms spelt out in the Act, which will be enforceable in a competent Court. Some of the responsibilities imposed on the Landlord include:

- Section 5(2) which provides the Landlord must reduce the lease to writing, if requested to do so by the Tenant
- The deposit is to be invested in an interest bearing account, which the interest is to be paid to the tenant
- The Landlord must provide a detailed, written receipt for all payments made by the Tenant
- In terms of Section 4(1) the Landlord may not unfairly discriminate in advertising a dwelling for the purpose of leasing it
- The Landlord has a period of 14 / 21 days in which to return the deposit to the Tenant
- Both parties must, at a mutually convenient time, before the occupation and **3 days prior to the** expiry of the lease, conduct a joint inspection of the dwelling and a list of defects must be annexed to the lease

Section 4(2) provides that a Tenant has the right to privacy during the lease period and that the Landlord may only exercise the right of inspection in a reasonable manner and after reasonable notice.

The Tenant furthermore has the right not to have:

- his person or home searched;
- his property searched;
- his possessions seized, except in terms of law of general application and having first obtained an order of court; or
- the privacy of his communication infringed.

These rights apply equally to household members and bona fide visitors of the Tenant.

- b) Allowing for the Creation of Provincial Housing Tribunal to handle dispute resolution between Landlord and Tenant, including the determination of a fair rental

### Review of tribunal proceedings

A ruling by the tribunal is deemed to be an order of a Magistrate's Court and the proceedings of the tribunal can only be brought under review before the High Court within its area of jurisdiction.

### Offences and Penalties

A maximum penalty of a fine and/or imprisonment for two years is laid down for offences under this Act.

### Government promotion of Rental Housing

Act allows the Minister to introduce a Rental Subsidy Housing Programme.



## **SALE OF REAL RIGHTS BY A DEVELOPER**

Presented by Meumann White Attorneys

## Sale of Real Rights by a Developer

The present Sectional Titles Act No. 95 of 1986 was assented to on the 8 September 1986 and commenced approximately a year and half later on the 1 June 1988.

And with it came the innovative section 25, the section that deals with the developers right to extend the scheme and to do phase developments, without (as some will remember) having to retain the so called "Golden Unit"; the necessity for the developer to retain at all times ownership for himself of a unit in the scheme, otherwise he lost his right to exercise his right of extension.

Briefly section 25 entitled the developer to reserve for himself, simultaneously with the opening of the register, the right to extend the scheme by the additions of sections for his own benefit in one or more phases.

In terms of the said section the right to extend can be mortgaged

Under section 25 a developer even having disposed of all units in the scheme, could sell his right to extend as the old "golden unit" adage under the former Act, no longer applied under the new Act . The disposal of the right to extend was by way of a notarial deed of cession pursuant to a sale agreement of the right to extend.

However the sale of the right to extend had to be of the whole right to extend or the whole of the balance. No portions thereof could be disposed off. This was a limiting factor.

Then in 1997 Section 25 (4) was significantly amended by Act No. 44 of 1997, and it is worth setting out the relevant section in full –

" 25 (4) A right reserved in terms of subsection (1) or vested in terms of subsection (6), and in respect of which a certificate of real right has been issued –

- (a) shall for all purposes be deemed to be a right to urban immovable property which admits of being mortgaged; and
- (b) may be transferred by the registration of a notarial deed of cession in respect of the whole, **a portion** or a share in such right: provided that in the case of a cession affecting only a portion of the land comprising the scheme only such portion shall be identified to the satisfaction of the Surveyor-General. "  
(our highlighting)

This amendment now allowed the developer to sell not only the whole right to extend but also a portion or portions of his right, provided such portions are identified on a diagram which is lodged with and approved by the Surveyor General.

Thus became possible a new type of development scheme – the sale of a portion of the developer's right to extend to a purchaser (on which portion the purchaser could build) instead of the developer selling a unit built by him in a scheme.

Note the portion of the right to extend can be bonded in terms of the above section 25(4)(a)

Briefly the mechanics is that a developer still opens the sectional title register but with a minimum of two sections, takes out a certificate of right to extend in terms of section 25 (1) and at the same time lodges a plan approved by the SG depicting the real right areas which are to be sold (each area being a portion of the developer's right to extend) or which at that stage have usually been pre-sold. The plan must comply with section 25 (2) requirements.

Simultaneously with the opening of the register the developer cedes to any purchasers by way of a notarial deed the portion of their respective rights to extend which they have purchased as depicted on the above plan. If not bought for cash (including building costs) the purchaser's building bond is at the same time registered over his real right.

Note in a sale of the portion of the right to extend it is the purchaser who bears the cost of erecting the building and not the developer.

On registration of the notarial deed the developer is paid out for the land either from the deposit, if sufficient, or later from the first progress payment.

The developer through another vehicle may or may not be involved in the building contracts but doing the building construction or having an interest therein is usually where his real profits can lie.

The purchaser on transfer of the real right to him by way of the notarial deed becomes a developer (in place of the seller/developer) by virtue of the fact that he holds a portion of the right to extend under such notarial deed. The said Act No. 44 of 1997 suitably amended the definition of "Developer" of the principal act to permit this. So there can be as many developers as there are acquired portions of rights to extend.

Once the purchaser (now a developer) has built his house he is invariably obliged by his sale agreement to have a sectional plan of extension prepared by a land surveyor and to register the plan in the Deeds Office. Usually a number of purchasers get together and register the plan simultaneously to spread the costs. A certificate of registered sectional title is issued to him in respect of his unit, his building bond is endorsed over his sectional title deed, and the development right held under the notarial deed lapses.

### **Developer's Advantages**

1. The developer finances the first two sections (usually a show house and say a gate house), the usual infrastructure of the roads and other civils, but does not have to construct any sections except the first two.
2. He gets paid out for the land on registration of the notarial deed in favour of the purchaser or on the first progress payment draw.
3. The developer does not have to get a development bond to finance the buildings. The purchasers obtain their own building bonds or build for cash.

### **Developer's Disadvantages**

1. A relatively new concept and some banks are still cautious about getting involved or will only get involved if the risk is spread among other banks - usually a 25% stake in each phase only

2. The developer must be able to have lined up financial institutions conversant with the real right concept and willing to grant end user building bonds, otherwise the scheme is not likely to get off the ground.
3. Because of the nature of the whole transaction the sale agreement can be bulky and a somewhat formidable document which can be daunting to a prospective purchaser especially as he is being asked to grasp the ramifications and implications of a relatively new and involved concept
4. Costs for the purchaser may be higher than for a conventional sectional transfer

Example: developer registered vat vendor -

Conventional sectional transfer

R600000,00 (for land and buildings)

R7069

Real Right

1. Notarial cession of real right (land-R200000)

R4960

2. Conversion costs: application for amending sectional plan of extension

R2880

3. Land surveyor's costs (depends on number of conversions)- could be between R1000 to

R3000 or more per person – min

R1000

R8840



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ATTORNEYS

**FICA AND THE ESTATE AGENCY  
BUSINESS  
AN INTRODUCTORY GUIDE**

**30 JULY 2003**

## **Financial Intelligence Centre Act Estate Agents and the Act**

### **What is it?**

The Financial Intelligence Centre Act (FICA) is part of a worldwide legislative network that seeks to combat money laundering. "Money Laundering" is the process of manipulating the proceeds of crime (usually cash) in order to conceal the nature of its true source. Money that started out "dirty" will end up "clean". More often than not the funds will be moved through a series of financial transactions that leave a paper trail so long it becomes impossible to trace its source. The crime cartels take advantage of loopholes in the commercial world, such as juristic personality, to achieve this. In essence money laundering is a series of legal transactions that when viewed together form part of and achieve an illegal objective. Money Laundering as such only became a crime in this country about 10 years ago. South Africa gained a rather unpleasant reputation as a haven for illegal money as our banking controls were not as strict as those in Europe or the Americas.

FICA closes many of the loopholes by laying down procedures and obligations on those citizens who work in professions and organisations that have been identified as susceptible to abuse.

### **Why Estate Agencies?**

One of the methods used to "clean" dirty money is to change its nature e.g. by purchasing immovable property and then selling it.

### **What needs to be done?**

The requirements of FICA can be roughly divided into four general areas:

- (1) **Establishment and verification of clients' identities (pgs 2 – 6);**
- (2) **Recording all transactions made with clients (pg 6);**
- (3) **Record Keeping (pgs 6 – 7);**
- (4) **Reporting of transactions (pgs 7 – 11).**

The above four requirements will be analysed in the context of the business of conducting an estate agency.

### **1. *Verification of clients' identities (S21).***

The regulations appended to FICA set out exactly what information is required to ensure compliance. We have comprehensive information sheets that can be handed to agents, office administrators and clients which set out exactly what information is required from the client.

Please note that a great deal of information has to be gathered which will naturally take time. It is thus essential that the estate agency implement

**effective** and **efficient** procedures to ensure that there are no undue delays in the process.

### **When does all of this have to be done?**

S21 (1) FICA, which provides:

S21 ***Identification of clients and other persons.*** — (1) *An accountable institution may not establish a business relationship or conclude a single transaction with a client unless the accountable institution has taken the prescribed steps—*

- (a) *to establish and verify the identity of the client;*
- (b) *if the client is acting on behalf of another person, to establish and verify—*
  - (i) *the identity of that other person; and*
  - (ii) *the client's authority to establish the business relationship or to conclude the single transaction on behalf of that other person; and*
- (c) *if another person is acting on behalf of the client, to establish and verify—*
  - (i) *the identity of that other person; and*
  - (ii) *that other person's authority to act on behalf of the client.*

It is important to define the key terms "business relationship", "single transaction" and "client" within the context of FICA.

In the definitions section of FICA they are defined as:

Business relationship - an arrangement between a client and an accountable institution for the purpose of concluding transactions on a regular basis.

Single Transaction - a transaction other than a transaction concluded in the course of a business relationship.

### **Who is the Client?**

Reference is made throughout FICA to "clients". It stands to reason that a person who could be described as a "client" would differ in each accountable institution.

The Estate Agents Code of Conduct<sup>1</sup> defines a "client" as:

"a person who has given an estate agent a mandate"

The ordinary use of the word "mandate" is in the context of a mandate to sell. For the purposes of this note a client, in the Estate Agency context, will be defined as:

*The party liable to pay commission to the Estate Agent for services rendered.*

This is a rough definition, which takes into account only the ordinary course of business.

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<sup>1</sup> CODE OF CONDUCT – GN R3415/1992

At this juncture a distinction should be drawn between the two different types of work carried out by Estate Agencies namely sales and letting.

### **A. Sales**

The acceptance of and work related to the fulfilment of a mandate is a single transaction within the meaning of FICA.

According to the Best Practice Guidelines for Estate Agents<sup>2</sup>, the mandate is fulfilled on conclusion of the sale agreement. This is when the commission accrues to the agent not when it is actually paid over. At the present time the verification has to be completed on or before the signing of an agreement of sale<sup>3</sup>.

In essence the procedure is as follows:

- (1) **Granting of Mandate** – Establish Identity of client.
- (2) **Conclusion of Sale Agreement** - ie when Agreement signed and suspensive conditions fulfilled – the particulars in (1) have to be verified ie. checked against available documentation to ensure that they are correct.

#### **What if the Property is sold before the Particulars have been verified?**

On a strict construction of FICA the agreement cannot be concluded. This would make the whole system unworkable and it is our opinion that it was not the intention of the legislature to sink deals that would have otherwise proceeded without delay.

#### **Practical Hints**

- ❖ **Get as much information as possible at the mandate stage and inform the client as to what documentation is required. It should be made clear to the client that failure to provide the requested information could lead to delays.**

The agent concerned should be able to establish the identity of the client without too much trouble. It is the verification documents that may take some time.

- ❖ **If the client cannot provide you with the required documentation make a note on the FICA form that it was requested but not supplied.**

The information could then be verified at a later stage by the Conveyancers who will then relay the information back to the agents for their records.

Example:

Sale of Trust Property. Much of the information required is contained in the Trust Deed. The Agent must **establish** the basic details of the Trust, name, address,

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<sup>2</sup> Prepared by the Estate Agency Affairs Board, 30<sup>th</sup> June 2003

<sup>3</sup> The EAAB is at present negotiating with FICA to have it extended to seven days after conclusion of the agreement.

trustees, beneficiaries. The **verification** could be attended to by the Conveyancers should the client not be able to supply the Trust Documents at the time of the conclusion of the sale. Copies of the relevant documents would be then sent to the agents for their files.

Unfortunately the establishment and verification of client identity cannot be delegated wholly to the Conveyancers. However, they will have access to information resources that can assist the agent in complying with his obligations under FICA.

### **Whose information must be recorded?**

S21 requires verification of the identity of "the Client", using the earlier definition it is the agent concerned or his compliance officer that have to ascertain who would be responsible for paying the commission should the mandate be fulfilled. It is that party's details that will have to be recorded. Please note that the details of a person acting on behalf of a client also have to be recorded. A common example of this would be a property owning CC duly represented by a member. If a client is acting on behalf of another party then that other party's details have to be recorded and verified. An example of this could be, using our earlier definition of "client", where a person agrees to pay the commission on a sale of a property owned by another person. The details of that owner would have to be recorded and verified.

### ***B. Letting***

Letting can either be a "business relationship" or a "single transaction" as defined by FICA. It best illustrated by example.

Example 1:

A landlord instructs an agent to find a tenant for his property. All that is required of the agent is that they find the tenant and conclude a lease agreement. The landlord himself will then administer the property, collect rentals etc.

This is a **single transaction** for the purposes of FICA and the same requirements apply as for sales.

Example 2:

The landlord instructs an agent to not only find a tenant for his property but also to administer the lease on his behalf. This is a "business relationship" for the purposes of FICA and requires that existing clients ie clients who were with the agency before 30 June 2003 have to have their identity established and verified. The requirements of s21 will have to be complied with *prior* to signing the mandate which will establishes a "business relationship" between the parties. Please see above for what information is required.

### **Existing Clients**

S21 (2) lays down the same requirements for compliance in respect of existing clients. In the sales context what was said in respect of S21 (1) still applies. NB it will only apply to deals concluded after 30 June 2003. In the letting context there are further conditions. S21 (2)(d) requires that the accountable institution

take the "prescribed steps" to "trace all accounts at the accountable institution that are involved in transactions concluded in the course of that business relationship". "Transaction" means, in terms of the FICA definitions, "a transaction concluded between a client and an accountable institution in accordance with the type of business carried on by that institution".

## **S21 COMPLIANCE IS MANDATORY FROM 30 JUNE 2003.**

### *2. Records of all business relationships and transactions made with clients – S22 FICA*

S22 provides that records must be kept of all business relationships and transactions concluded with clients. Aside from the verification of identity requirements of s21 the Estate Agency must also keep a record of:

- (1) The manner in which the identity was established;
- (2) The name of the person who gathered the information;
- (3) The nature of the business relationship or transaction;
- (4) The parties to the transaction;
- (5) Details of accounts involved in the conclusion of the single transaction or used in the course of the business relationship;
- (6) Copies of all documents used to verify the identity of a client in compliance with S21.

### *3. Record keeping*

Records may be kept in electronic format. FICA imposes a positive duty on the Estate Agency to ensure that internal measures are implemented to facilitate the gathering and storage of the required information. The Financial Intelligence Centre will only be allowed access to the records by means of a court order. There does not appear to be anything in the Act, which precludes an Estate Agency from storing the information required by FICA separately from its ordinary client files. These records could be stored in a different cabinet or in a different folder on a computer database. What is of paramount importance is that they can be easily retrieved.

#### **How long do the records have to be retained?**

Business relationship – **5 years** from the date on which the business relationship terminates.

Transaction – **5 years** from the date on which the transaction is concluded.

S24 provides for third parties to keep the records on behalf of the Estate Agency. However, should the third party not comply with the requirements of s22 liability (and by this is meant criminal liability) will attach to the Estate Agency who handed over the records for storage. In the event that files are sent "for storage" at an information storage facility great care must be taken to ensure that they are not destroyed prematurely. If a third party is put in charge of the documents

then the Estate Agency must furnish the Centre with the prescribed particulars of that party.

#### 4. *Reporting of transactions.*

There are two types of reporting duties:

- (1) Automatic Reporting Duties;
- (2) Reporting of suspicious or unusual transactions.

##### **Automatic Reporting**

Transactions that require automatic reporting are:

- S28 Cash Transactions over the prescribed limit (this report is made to the Centre)
- S30 Conveyance of Cash to or from Republic in excess of the prescribed amount. The person intending to convey the cash must report the prescribed particulars concerning the conveyance to the person authorised by the Minister of Finance for this purpose. They will in turn send a copy to the Centre.
- S31 Electronic transfers of money to or from Republic in excess of the prescribed amount. This must be reported within the prescribed period to the Centre.

**The Minister of Finance has not yet published Regulations to give effect to ss28, 30 and 31. Though they are inoperative at this stage Estate Agencies should be aware of them.**

##### **Suspicious and unusual transactions.**

The relevant section of FICA is S29 deals with the reporting of suspicious and unusual transactions.

*29. **Suspicious and unusual transactions.**—(1) A person who carries on a business or is in charge of or manages a business or who is employed by a business and who knows or suspects that—*

- (a) the business has received or is about to receive the proceeds of unlawful activities;*
- (b) a transaction or series of transactions to which the business is a party—*
  - (i) facilitated or is likely to facilitate the transfer of the proceeds of unlawful activities;*
  - (ii) has no apparent business or lawful purpose;*
  - (iii) is conducted for the purpose of avoiding giving rise to a reporting duty under this Act; or*

- (iv) may be relevant to the investigation of an evasion or attempted evasion of a duty to pay any tax, duty or levy imposed by legislation administered by the Commissioner for the South African Revenue Service; or*
- (c) the business has been used or is about to be used in any way for money laundering purposes,*

*must, within the prescribed period after the knowledge was acquired or the suspicion arose, report to the Centre the grounds for the knowledge or suspicion and the prescribed particulars concerning the transaction or series of transactions.*

*(2) A person who carries on a business or is in charge of or manages a business or who is employed by a business and who knows or suspects that a transaction or a series of transactions about which enquiries are made, may, if that transaction or those transactions had been concluded, have caused any of the consequences referred to in subsection (1) (a), (b) or (c), must, within the prescribed period after the knowledge was acquired or the suspicion arose, report to the Centre the grounds for the knowledge or suspicion and the prescribed particulars concerning the transaction or series of transactions.*

*(3) No person who made or must make a report in terms of this section may disclose that fact or any information regarding the contents of any such report to any other person, including the person in respect of whom the report is or must be made, otherwise than—*

- (a) within the scope of the powers and duties of that person in terms of any legislation;*
- (b) for the purpose of carrying out the provisions of this Act;*
- (c) for the purpose of legal proceedings, including any proceedings before a judge in chambers; or*
- (d) in terms of an order of court.*

*(4) No person who knows or suspects that a report has been or is to be made in terms of this section may disclose that knowledge or suspicion or any information regarding the contents or suspected contents of any such report to any other person, including the person in respect of whom the report is or is to be made, otherwise than—*

- (a) within the scope of that person's powers and duties in terms of any legislation;*
- (b) for the purpose of carrying out the provisions of this Act;*
- (c) for the purpose of legal proceedings, including any proceedings before a judge in chambers; or*
- (d) in terms of an order of court.*

#### **Meaning of "Suspicious and Unusual"**

The mere fact that a transaction is unusual does not automatically make it "suspicious" and thus impose a duty on the person concerned to make a report to the Centre. When trying to establish if a transaction is "suspicious" within the meaning of FICA the individual facts of the situation must be objectively assessed. There must be sufficient reasonable grounds/facts for the suspicion.

### **Who is under a duty to report?**

In a nutshell, everyone who is employed by, manages or owns a business is under a duty to make a report if he or she feels that a report to the Centre is warranted.

### **What types of transactions are they talking about?**

FICA does not make a distinction between clients and non-clients in terms of the s29 duty to report. If there are grounds for suspecting the purchaser's motives then the agency will be bound to make a report on them.

S29 (1)(a) – (c) set out the types of transactions and situations that would cause a reasonable person to become suspicious and could give rise to the duty to make a report on that transaction. Obviously, if it is clear to the person concerned that the transaction is overtly unlawful i.e. for the purpose of evading tax the duty to report will arise. One must always bear in mind this crucial distinction in regards to tax:

tax **evasion** – not paying tax when you are legally obliged to do so. This is a crime and a transaction of this nature would have to be reported.

tax **avoidance** – efficient legal planning to minimise the amount of tax to be paid on a transaction. That is not a crime.

If a person is not sure whether a transaction is illegal, for whatever reason, then legal advice must be sought.

Some examples of transactions that should be reported:

- The purchase price is to paid into a foreign bank account (exchange control violation – tax evasion);
- The purchase price is being paid in cash and there doesn't seem to be any legitimate explanation as to where the money originated;
- Over valuation of a property as at 1 October 2001 for the purposes of evading Capital Gains Tax;
- Unrealistically splitting a purchase price between moveable and immovable property;
- Sale of a business where one set of books is presented to the Receiver and another, which reflects what the business is actually worth;
- A purchaser's job does not match the type of property purchased;

- A large amount of money is deposited in the Agency Trust account on the pretext of future investment in property and is withdrawn shortly thereafter due to a “change of heart”;
- Purchase price is paid by an unidentified third party;
- The name of the purchaser is changed just before the transaction is concluded;
- Purchaser concludes deal without inspecting premises physically or on the internet;
- Purchaser insists that property be registered in the name of a third party unrelated to him or her.

The above list is not exhaustive. In essence it requires that every deal done by the agency must be assessed, bearing in mind that not every unusual deal is a suspicious one.

### **When does the report have to be made?**

Within 15 days of the suspicion arising. This does not include weekends or public holidays. The transaction may continue after the report has been made (s33 FICA) unless the Centre directs otherwise.

The report may be made after the transaction has been concluded S29 (2). This covers the situation where new facts arise and cast suspicion over what was originally perceived to be a legitimate deal.

### **Secrecy**

Because FICA is directly related to criminal investigations the person making the report is not allowed to inform the person whom he or she has reported about the report or any other person (s29 (3) FICA). This extends to those persons who know that a report has been made but were not responsible for making the report (s29 (4)). To do so is an offence under FICA and the penalties are stiff. Owners and Managers of agencies must ensure that adequate training is given to their agents and admin staff members to maintain this secrecy.

### **Making the Report**

The report is to be made in on a standard form electronically via the website ([www.fic.gov.za](http://www.fic.gov.za)). Should the person wishing to make the report not have the technical expertise or resources to use the online system then the report can be made in hard copy and faxed or hand delivered to the Centre.

### **The status of the deal**

The making of a report does not affect the deal. The agency can continue with the transaction as normal. The purpose of this information gathering is to build up a profile of the suspected money laundering. It could be a substantial amount of time (years even) before any action is taken if at all. Principals must not fall into the trap of thinking that because a report is made on the Monday their client will be arrested on the Friday!

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## *Compliance with FICA*

S42 FICA requires that the business draw up Internal Rules covering all aspects of compliance with FICA.

The Internal Rules must comply with the prescribed requirements (see below) and a copy has to be made available to all employees.

S43 provides that the Estate Agency must:

1. **Provide training to all employees on the Internal Rules and FICA;**
2. **Appoint a Compliance Officer to ensure compliance with the internal rules and FICA by both the institution and the employees.**

Regulations 25, 26 and 27 set out FICA's requirements in respect of Internal Rules to be implemented regarding:

1. **Establishment and verification of Identities;**
2. **Keeping of Records;**
3. **Reporting of Information.**

In essence what is required is:

- Clear processes and working methods to ensure compliance;
- Responsibility of management to ensure that there is compliance;
- Appointment of employees to carry out FICA's requirements;
- Provide for disciplinary steps to be taken should employees fail to comply with the internal rules, the regulations and FICA. What is envisaged here is that the Employees Code of Conduct be amended to make provision for FICA Compliance;
- Provide training to its employees in order for them to be familiar with FICA and its requirements.

### **Exemptions**

Estate Agents are specifically exempted from compliance with s21 (identification of Clients), s22 (keeping of records) in relation to:

Collecting or receiving—

- (a) money payable by any person to or on behalf of a developer or a body corporate in terms of the Sectional Titles Act, in respect of a unit or proposed unit;

- (b) money on behalf of a share block company payable by the holder of a share in such company or his nominee;
- (c) money in consideration of a promise or an undertaking by the person receiving such money or his agent or nominee to the person paying such money his agent or nominee to make available to such person, his agent or nominee, information or details of immovable property, any interest in immovable property or any business undertaking with a view to bringing potential buyers, sellers, lessors, lessees or occupiers thereof into contact with one another.

**NB. This does not relieve the estate agent of its reporting duties under s29 and only applies to this specific function.**

## General Exemptions

### Regulation 5

The accountable institution will be exempt from compliance with s21 in respect of verification only if:

- The client is situated in a country that has similar anti-money laundering legislation. Attached is a list of all countries that meet the requirements of the Financial Action Task Force, the international organisation that oversees *inter alia* anti-money laundering measures.
- A person or institution in that country has identified the client and verifies the particulars of the client in question in writing.
- The aforesaid person undertakes to forward all documents obtained in the course of that verification.

**NB. This does not relieve the accountable institution of its obligations to establish the identity of the client. It merely lessens the burden of having to verify the particulars of a client that is overseas.**

The regulations do not state who could perform this function. It is suggested that only an attorney, banking institution or a similar corporate entity would be able to meet the requirements of FICA.

### Regulation 6(1)

In the case of a company which is listed either on the JSE or an approved stock exchange. The establishment and verification requirements **do not** have to be complied with.

### Regulation 6(2)

There is a general exemption regarding the income tax and VAT details required under FICA. These are not required at this stage.

### **Conclusion**

Though the requirements of FICA may be onerous it is here to stay. Effective risk management depends on the efficient and effective gathering of information in the shortest time possible.

Meumann White has committed itself to keeping up to date with the latest developments regarding FICA. These notes have been compiled on the strength of information available at the present time. Further guidelines will be issued by the Financial Intelligence Centre in the future and there may be a possibility that FICA itself may be amended. **Please check back regularly with us to make sure that you have the most current edition of these notes.**

Sarah Linscott  
Meumann White

### Financial Action Task Force Members<sup>4</sup>

Argentina  
Australia  
Austria  
Belgium  
Brazil  
Canada  
Denmark  
Finland  
France  
Germany  
Greece  
Hong Kong, China  
Iceland  
Ireland  
Italy  
Japan  
Luxembourg  
Mexico  
Kingdom of the Netherlands  
New Zealand  
Norway  
Portugal  
Russia  
Singapore  
South Africa  
Spain  
Sweden  
Switzerland  
Turkey  
United Kingdom  
United States

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<sup>4</sup> Source – FATF website - <http://www1.oecd.org/fatf/index.htm>. This list comprises all the countries that have sufficient money-laundering controls that satisfy the requirements of FATF. This relates not only to the controls but also to effective implementation of those controls. South Africa was recently admitted to FATF.

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Financial Intelligence Centre website

[www.eaab.org.za](http://www.eaab.org.za)

Estate Agency Affairs Board Website

## LIST OF ACCOUNTABLE INSTITUTIONS

1. An attorney as defined in the Attorneys Act, 1979 (Act No. 53 of 1979).
2. A board of executors or a trust company or any other person that invests, keeps in safe custody, controls or administers trust property within the meaning of the Trust Property Control Act, 1988 (Act No. 57 of 1988).
3. An estate agent as defined in the Estate Agents Act, 1976 (Act No. 112 of 1976).
4. A financial instrument trader as defined in the Financial Markets Control Act, 1989 (Act No. 55 of 1989).
5. A management company registered in terms of the Unit Trusts Control Act, 1981 (Act No. 54 of 1981).
6. A person who carries on the "business of a bank" as defined in the Banks Act, 1990 (Act No. 94 of 1990).
7. A mutual bank as defined in the Mutual Banks Act, 1993 (Act No. 124 of 1993).
8. A person who carries on a "long-term insurance business" as defined in the Long-Term Insurance Act, 1998 (Act No. 52 of 1998), including an insurance broker and an agent of an insurer.
9. A person who carries on a business in respect of which a gambling licence is required to be issued by a provincial licensing authority.
10. A person who carries on the business of dealing in foreign exchange.
11. A person who carries on the business of lending money against the security of securities.
12. A person who carries on the business of rendering investment advice or investment broking services, including a public accountant as defined in the Public Accountants and Auditors Act, 1991 (Act No. 80 of 1991), who carries on such a business.
13. A person who issues, sells or redeems travellers' cheques, money orders or similar instruments.
14. The Postbank referred to in section 51 of the Postal Services Act, 1998 (Act No. 124 of 1998).
15. A member of a stock exchange licensed under the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985).
16. The Ithala Development Finance Corporation Limited.
17. A person who has been approved or who falls within a category of persons approved by the Registrar of Stock Exchanges in terms of section 4 (1) (a) of the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985).

18. A person who has been approved or who falls within a category of persons approved by the Registrar of Financial Markets in terms of the Financial Markets Control Act.19.
19. A person who carries on the business of a money remitter.



**AMENDMENTS TO THE TRANSFER DUTY  
ACT IN RESPECT OF NOMINATIONS AND  
TRIPARTITE AGREEMENTS**

## **NOMINATIONS**

- 1.1 Section 16 of the Transfer Duty Act, 1949 has been amended to the effect that nominations must be done-
  - (i) on the day of acceptance by the auctioneer of the offer, if the sale is by auction; or
  - (ii) on the day of conclusion of the agreement of sale, if the sale is otherwise than by auction.
- 1.2 It is clear that with auctions, the nomination must be accepted and signed on the day of the auction when the auctioneer accepts the offer.
- 1.3 The Receiver of Revenue has already issued a ruling that with private agreements of sale the "day of conclusion of the agreement" will be the day on which the agreement was signed.
- 1.4 Section 16 goes on to say that if a person or (agent) fails to timeously nominate in accordance with the above, it will be presumed that such person (or agent) acquired the property for himself and accordingly, double transfer duty will be payable.
- 1.5 In effect, the Receiver of Revenue will regard all agreements with nominees as constituting two separate transactions and transfer duty will therefore be payable on the transaction between the seller and the purchaser and on the 'subsequent' transaction between the purchaser and the nominee.
- 1.6 To prove the contrary to the Receiver will be a difficult feat as the Receiver has already made it quite clear that affidavits by the respective parties will **not** suffice.
- 1.7 Documentary proof will have to be submitted for the Receiver to decide whether the property was in fact purchased by an agent only and in the interim, double transfer duty will remain payable.
- 1.8 It is consequently our advice not to utilise nominee agreements any longer.

## **2. TRIPARTITE AGREEMENTS**

- 2.1 The Transfer Duty Act, 1949 has been recently amended to the effect that on cancellation or dissolution of a transaction, the property must completely revert to the seller and the original purchaser must relinquish all rights and may not receive any consideration arising from such cancellation or dissolution.
- 2.2 In the event of the original purchaser retaining any amount whatsoever, transfer duty will be payable on the full purchase price of the first transaction between the seller and original purchaser. In addition, transfer duty will be paid on any consideration received by the seller as a result of the cancellation.
- 2.3 In effect, all tripartite agreements will now attract double transfer duty and it is clearly the intention of the Receiver's Office to do away with tripartite agreements in their entirety.



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**SHARE BLOCK CONVERSIONS :  
TRANSFER DUTY REFUND**

Presented by Meumann White Attorneys

A client who paid transfer duty in terms of a share block conversion transfer, is now entitled to a refund from the Receiver.

An Act published in the Government Gazette on 22 December, 2003, amends the Transfer Duty Act in terms of which liability to pay transfer duty on Share Block conversions has been changed. No duty is payable by a natural person on the conversion from Share Block to Sectional Title ownership, if Transfer Duty was paid on the acquisition of that share.

The effect of this is that the problem of double transfer duty has been eliminated, and where a purchaser buys a share block and immediately converts to Sectional Title, transfer duty will only be payable in respect of the sale of shares.

The date on which this amendment comes into operation is 13 December 2002, which was the date on which transfer duty on residential share sales was introduced. This would entitle anyone who has paid the duplicate transfer duty on the share block conversion to apply for a refund from the Revenue Office. The Receiver office has confirmed that it will in fact refund the duty in respect of the conversion, even if the party who paid for the duty on the conversion is not the same party who paid the duty on the purchase of the shares.

The Receiver's requirements are :-

1. Rev 16
2. Receipt
3. Copy of Receipt for share transfer
4. Sale Agreement
5. Letter confirming it is a claim for a refund in terms of the Revenue Land Amendment Act 45/2003.
6. That the application for the refund be done by the conveyancer who attended to the transfer.

All agreements relating to a shareblock conversion transfer should insofar as the costs are concerned, be structured as follows :-

- 1) Shareblock Transfer  
The seller shall pay the fee of the person/entity attending to the transfer of the shares. The transfer duty payable shall be paid by the Purchaser.
- 2) Sectional Title Transfer  
The usual clause setting out that the Purchaser will pay these costs. Leave out any reference to transfer duty as the Purchaser has paid it in 1) above and consequently there is no duty payable on the Sectional Title transfers.



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# LIABILITY FOR LEVIES ON TRANSFER OF A SECTIONAL TITLE UNIT

## **1) THE AMENDMENT TO THE SECTIONAL TITLES ACT**

Section 37(2) of the Sectional Titles Act has been amended to the effect that any contributions levied by the trustees of the Body Corporate may now be recovered from the person who was owner of the unit **at the time that the resolution determining the contributions to be levied, is passed**. Previously, section 37(2) stated that the contributions levied may be recovered from the person who was owner of the unit **at the time when the contributions became due**. From our investigations, it appears that the reason for the amendment was to deal with the issue of special levies. However, the amendment was not properly worded and accordingly the intention behind the amendment has been lost.

In its present form, the amendment to the Act basically states that Body Corporates may now recover levies from the person who was the owner of the unit at the time that the resolution determining the levies was passed. This means that if the Body Corporate fails to recover the entire balance of levies owing before registration of transfer, it will not be able to recover levies from the new owner for the remainder of that financial year. The Body Corporate will then have to look to the previous owner to recover the outstanding levies, which could at this stage prove both costly and futile.

Accordingly, to safeguard themselves, Body Corporates/ Managing Agents are now asking for all levies for the current financial year to be paid prior to them issuing Levy Clearance Certificates. Although the Act says that the Body Corporate may recover the outstanding annual levies from the seller, most Sale Agreements state that levies must be apportioned between the Seller and Purchaser depending on when date of occupation is likely to take place. This has obvious additional financial implications for purchasers of Sectional Title Units as a purchaser could, if occupation is to take place shortly after the commencement of the financial year of the Body Corporate, be called upon to pay nearly the full annual levy upfront.

## **(2) OUR VIEW ON THE AMENDMENT**

We are of the view that the following options are available to deal with the amendment:-

1. A clause may be inserted in the agreement to the effect that the seller shall not be liable for the levies due and payable to the Body Corporate as from date of registration of the transfer into the purchaser's name and accordingly, the purchaser shall be liable and shall pay all the levies due to the body Corporate from such date. The clause may further state that the purchaser indemnifies the seller against any claims in terms of Section 37 of the sectional Titles Act.

The problem with this approach is that it is unlikely that the Managing Agents will be happy with such a clause as they will now assume the risk in the event of the purchaser failing to effect payment of the outstanding levies. Further, from our discussions with a number of Managing Agents, it appears that the idea of collecting the annual levies upfront certainly appeals to them as it is quicker and easier.

2. A Tripartite Agreement may be entered into between the body corporate, the seller and the purchaser, in terms of which the purchaser will assume liability for

any outstanding levies due by the seller for the remainder of the financial year and the Seller will stand surety for the purchaser's due fulfilment of the obligation.

The problem with this approach is that it is extremely unlikely that the Seller will agree to bind himself as surety for the due fulfilment of the purchaser's obligation i.e. to pay the outstanding annual levies. Furthermore, from our discussions with Managing Agents, it appears that some of them consider the possibility of entering into a tripartite agreement with both the seller and purchaser as contrary to the law.

**IN CONCLUSION:**

**On further investigation, we were advised by a leading Managing Agent that the National Association of Managing Agents have been legally advised to accept undertakings and tripartite agreements, where the purchaser assumes liability for the outstanding annual levies. However, on taking this up with the KwaZulu-Natal Association of Managing Agents (KAMA), we were advised that they do not agree with the legal opinion received and that they are continuing to adhere strictly to the amendment. Accordingly, KAMA will continue to request payment of the outstanding annual levies prior to issuing a Levy Clearance Certificate.**

**Not all Managing agents agree with the approach by KAMA and certain Managing Agents have made it quite clear that they will accept undertakings from the purchaser and they will continue to issue Levy Clearance Certificates if they receive payment of levies a month in advance. It is anticipated by these Managing Agents that there will be a further amendment to Section 37(2) shortly, which will clarify the intention for the amendment.**

As stated above there are options available, but it will depend on the particular Managing Agent we are dealing with whether or not the options will be acceptable to them. We will endeavour to reveal the benefits of accepting letters of undertakings or entering into tripartite agreements to the various Managing Agents, as and when we deal with them and we hope that we will succeed in the main.

**Accordingly, there appears to be no finality on the matter and the position is such as at the date hereof. We will nevertheless continue to keep updated on the new developments and we shall, in turn, keep you advised thereof.**



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ATTORNEYS

## **LEVIES – PROBLEMS AND CONTINUOUS ISSUES**

## LEVIES

### PROBLEMS & CONTENTIOUS ISSUES

#### **1. COLLECTION & CALCULATION OF LEVIES**

- 1.1 It is the task of the Trustees from date Body Corporate comes into being.
- 1.2 If the manner of calculation is not specifically set out in the Management Rules then it is assessed by reference to the Participation Quota.
- 1.3 Levies are approved at each AGM where an itemized schedule of anticipated income and expenditure must be tabled and then approved. Once this is approved then the Trustees must by resolution determine the monthly instalments payable and advise each owner.
- 1.4 It is often after this point that things start going wrong with the collection of levies. Either because Trustees are too soft hearted, or not well organized, arrear levies start mounting up and are not collected straight away. This is where things start snowballing because if the levies are not collected then payments for such items as electricity, rates and insurance cannot be paid let alone payments for maintenance and upkeep. We often find that suddenly when some owners are in arrears for six months then legal action is taken. Its too late as the legal process can take some time and each month the arrears grow.
- 1.5 If insurance premiums are not paid then owners run the risk that if the buildings are damaged or burn down then there is no insurance.
- 1.6 If rates are not paid then still at this point in time the Municipality has the right to proceed against the entire complex because as yet the separate rating of Sectional Title buildings has not been finalized. My investigations reveal that the eThekweni Municipality are confident that the separate rating of Sectional

Title units will be in place by 1<sup>st</sup> July, 2008. Once in place this will lessen the amount of levy required but there still will be a levy required for insurance, maintenance, communal electricity and communal water.

In the meantime we all know that what we are faced with now is a situation that many Sectional Title complexes owe thousands and in some cases hundreds of thousands of rands to the Municipality for rates and the effect of this is that it renders the units in those complexes as being incapable of being sold. What we as Conveyancers have found is that this can cause hardship especially where there is a chain of sales. Here is an example. An agent sells a unit in a complex that has arrear rates. The only suspensive condition is the obtaining of a bond. The bond is granted and so the deal is solid. Then the chain starts developing and people start buying and selling. Then about two to three weeks later the Bond Attorney is instructed and in the bond instruction is a clause stating that the Bond Attorneys must establish that rates are up to date. When after another two weeks of enquiries it is established that rates are in arrears then the Bank withdraws from the bond causing the chain to collapse with much "snot and trane". How is this prevented? Well first by good credit control and collection so that levies are kept up to date. Secondly the Trustees can take a loan from a company like Propell Finance and pay off the arrears. Its also about estate agents getting to know the situation of complexes in their area. I am not talking about red lining buildings but about simply knowing that a sale in such a building is not final until it is almost at registration. These are tough circumstances in which to function but agents have to acknowledge the reality of it.

## 2. **THE LAW COURTS TO THE RESCUE**

Historically and legally a levy payment has always ranked in preference second to a mortgage bond registered over a Sectional Title unit by a Bank. This meant that if a Body Corporate wanted to attach the unit because of arrear levies then it needed the consent of the Bank who had the mortgage bond registered over the property. If the mortgage bond was not in arrears then this would mean that the Bank would not consent. This usually took place where the unit owner was a Provincial or Government employee and where the bond payment came automatically off his/her salary. Such a Body Corporate felt frustrated by the inability to attach and sell the property. So a Body Corporate in the Eastern Cape took one of the Banks to Court and won.

In terms of this judgment it was held that a levy payment ranked in preference to a mortgage bond. This was a real concern for the Banks as out of control arrear levies could really hurt their security. So they proceeded to the Supreme Court of Appeal and won. So today its back to where it was before. The relief was short lived.

As an aside, it is this type of issue which makes the conversion to Sectional Title unattractive to certain Shareblock Companies. In the Shareblock Memorandum and Articles of Association it is usually stated that if an owner is in arrears then the Company can attach the owners shares in the Company and take cession of his Use and Occupation Agreement.

3. **SPECIAL LEVIES**

Trustees can call upon owners to pay special levies. This can only be in respect of an expense that was not on the schedule of anticipated income and expenditure that was tabled at the AGM. The Trustees cannot call for a special levy if they have simply overrun the budget. They can determine how this special levy is to be paid. As to who pays it when the property is sold is determined by the appropriate clause in the Agreement.

4. **S37(2) AMENDMENT AND TRI-PARTITE AGREEMENTS**

The 2003 amendment to the Sectional Title Act which introduced S37(2) in its current form was intended to deal with the issue of special levies. It however, by dint of how it was drafted, effected levies in general and brought about the well known tri-partite agreement which is now signed by Seller, Purchaser and Body Corporate at the date of transfer.

5. **EXCLUSIVE USE AREAS**

Levies should be paid in respect of Exclusive Use Areas. We have noted that particularly in self managed buildings this is overlooked. It cannot be just any arbitrary amount but must take into account the costs of rates, insurance and maintenance of the Exclusive Use Areas.

**CONCLUSION**

Body Corporate should act quickly on arrear levies in order to save their bacon. It is really a case of the "early bird catches the worm". Estate Agents should make sure that they know the financial status of Body Corporates in their area.



MEUMANN WHITE  

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ATTORNEYS

# **SERVITUDES OVER IMMOVABLE PROPERTY AND THEIR IMPLICATIONS**

## **SERVITUDES OVER IMMOVABLE PROPERTY AND THEIR IMPLICATIONS**

A Servitude is a limited real right in terms of which a burden is imposed on an immovable property restricting the rights, powers or liberties of its owner to a greater or lesser extent in favour of either another person or the owner of another property.

Servitudes are classified as either personal or praedial. A personal servitude entitles the holder of the real right to exercise some right in the property of another or to prohibit another from exercising a normal ownership right, whereas a praedial servitude is a real right entitling one piece of land from receiving the benefit of the right and the other piece of land being subject to the right.

### **PRAEDIAL SERVITUDES:**

Praedial Servitudes are divided into rural and urban servitudes and as there is no legal significance in this distinction, certain servitudes may be both rural as well as urban.

The most important rural servitudes are: -

#### **1. Rights of way: -**

These may take the form of the right to walk across another person's land or to drive cattle or vehicles across it. The route of such right of way may be specified or granted in general terms, depending on the intention of the parties involved in the creation of the servitude.

#### **2. Way of necessity:-**

The consent of the owner whose property is subject to such servitude is not necessary and this servitude may be claimed as a right by an owner of land which is hemmed in by other land to such an extent that he or she has no direct or reasonably sufficient access to a public road and is therefore compelled to cross adjoining privately owned land.

#### **3. Water Servitudes:-**

This servitude generally grants the person holding the real right the right to draw water from the property over which the servitude is granted. It may also grant the person the right to lead the water across the land in furrows and pipes and also to discharge surplus water or to store water on it.

The principal urban servitudes are servitudes of light, of view, of projection, of affording support and of discharging water onto another's urban tenement. Restrictive conditions imposed on plots sold in a new township development are also classified as urban servitudes. With the modernisation of building methods and styles and the advent of planning law regulating the construction of buildings and general health matters, these servitudes became of minor importance.

The important urban servitudes are: -

#### **1. Light, view:**

A servitude of light is a right of access of light from another's land unimpeded by buildings or trees or both. A servitude of view is the right to an open view; this restricts the rights of the owner of the servient tenement to impede the view by buildings or trees or both. As in the case of a servitude of light, a servitude of prospect (view) may take the form of a right to prevent the owner of the other property from raising the height of buildings on his land.

2. **Support:** The servitude of support takes the form of either the right to require one's neighbour to support the weight of one's house or wall or the right to drive a beam into one's neighbour's building.

3. **Projection:** A servitude of projection is the right to have a balcony or another projection over a neighbour's land.

4. **Water:** An urban servitude of water may take the following forms:

- (a) The right to receipt or non-receipt of dripping rainwater
- (b) the right to receipt or non-receipt of water coming down in a stream and
- (c) the right to have an artificial pipe or canal crossing or issuing on a neighbour's land

5. **Restrictive conditions:** Restrictive conditions are by far the most important category of urban praedial servitudes.

Restrictive conditions create non-statutory limitations on the use of land inserted by the original township owner, in favour of each and every purchaser of land in the township, as part of a general township scheme and registered in the title deeds of the erven for the purpose of preserving the specific characteristics of the area.

The earliest and most common examples of restrictive conditions are the following:

- (a) Conditions prohibiting ownership or occupation by persons of specific race groups;
- (b) Conditions restricting the alienation and transfer of land to persons of certain race groups;
- (c) Restriction on the subdivision of land;
- (d) Conditions relating to the use to which the stands may be put; and
- (e) Conditions relating to the imposition of further conditions of title.

Restrictive covenants prohibiting ownership or occupation by persons of specific race groups have statutorily been deleted from title deeds, and are in any event in conflict with the Bill of Rights incorporated in the Constitution.

Conditions of title are statutory restrictions imposed on the owner of land in pursuance of specific township establishment legislation and registered against the title deeds of the erven for the reciprocal benefit of owners and for the purposes of retaining the specific character of the neighbourhood.

Conditions of title originating from township legislation usually include the following types of conditions:

- (a) The erf is subject to a servitude for sewerage or other purposes along one or two boundaries;
- (b) No building or other structure may be erected within the servitude area;
- (c) No large-rooted trees may be planted within the servitude area;

- (d) The local authority shall be entitled to deposit temporarily on the land adjoining the servitude such material as may be excavated during the construction, maintenance or removal of sewerage works;
- (e) Proposals to overcome detrimental soil conditions shall be contained in the building plans submitted for approval;
- (f) Screen walls or fences shall be erected and maintained to the satisfaction of the local authority;
- (g) The design of all structures and buildings to be erected shall be approved by a professional structural engineer;
- (h) Except with the written approval of the local authority the roofs of the buildings shall be of tiles, shingles, slate or thatch;
- (i) Neither the owner nor any other person shall have the right, save and except to prepare the erf for building purposes, to excavate therefrom any material without the written consent of the local authority;
- (j) The erf shall be used for the erection of a dwelling house only;
- (k) Not more than one dwelling house together with such outbuildings as are ordinarily required to be used in connection therewith shall be erected on the erf;
- (l) The erf is subject to a servitude for transformer purposes;
- (m) The erf is subject to a servitude for municipal purposes;
- (n) The making of bricks, tiles or earthenware pipes is prohibited; and
- (o) No shop, factory or industry may be erected on the erf.

From these examples it is clear that restrictive conditions can play a definite role in determining the character of a specific township, and that they have certain economic implications.

Praedial servitudes may be changed or modified in one of the following ways:

- (a) By agreement;
- (b) By application to court, either ex parte or on notice;
- (c) In terms of the Immovable Property (Removal or Modification of Restrictions) Act 78 a beneficiary, interested in immovable property subject to any restriction imposed by means of a will or other instrument, may apply to the High Court for its removal or modification;
- (d) the Administrator has the power to alter, remove or suspend certain restrictions or obligations binding an owner of land situated in his or her province;
- (e) the Minister of Public Works may, in terms of the State Land Disposal Act, 81 consent to the amendment or cancellation of any condition embodied or registered in a title deed;
- (f) in terms of the Subdivision of Agricultural Land Act 82 the Minister of Agriculture may impose, cancel or vary conditions imposed by him or her;
- (g) in terms of the Development Facilitation Act, 83 servitudes and restrictive conditions may be suspended and removed by a tribunal, if necessary for land development and where suspension of these servitudes and restrictive conditions would unnecessarily delay the development of the land;
- (h) Where a less formal township is envisaged or established, the Premier may suspend servitudes and conditions of title where these servitudes or conditions are inconsistent  
With the development of the land or cancellation of the servitude or condition in accordance with formal procedure will delay the opening of the township;
- (i) In terms of the Advertising on Roads and Ribbon Development Act, 85 upon written application by the registered owner of land the Registrar of Deeds is under certain circumstances empowered to cancel a condition inserted in the title deed;

- (j) Provision is made in the Transfer of Certain Rural Areas Act 86 for the removal of restrictive conditions which relate to the period for which a land right was granted or the alienation or transfer of land; and
- (k) Provincial legislation contains (or will contain) procedures to remove restrictions on the subdivision of land or the purposes for which the land may be used.

### **PERSONAL SERVITUDES:**

As has already been pointed out, personal servitudes are established in favour of particular persons over things and may confer a variety of benefits on their holders. They are real rights; however they cannot be transferred. They may be constituted for a fixed term of years or be granted until the happening of a future event or for the lifetime of the beneficiary, but not beyond his or her death.

The main three personal servitudes are: usufruct, use and habitation

A usufruct may be defined as a real right in terms of which the owner of a thing (often referred to as the grantor) confers on the "usufructuary" the right to use and enjoy the thing to which the usufruct relates. A usufruct may be constituted over a collection of things such as a herd of cattle or flock of sheep and even over the entire estate of the grantor. It furthermore extends to the accessories of the thing that is subject thereto. A usufruct over a farm, for example, will normally extend not only to all buildings but presumably also to the livestock, farming equipment and the furniture in the homestead, provided of course a contrary intention does not appear from the will or agreement, as the case may be.

As the usufructuary is only entitled to the use and enjoyment of the property he or she does not acquire the ownership over it, though he or she is of course entitled to its possession. The usufructuary has no entitlement to consume and destroy the thing and is obliged to preserve its substance. But he or she has the right to take, consume or alienate its fruits, whether they are natural, industrial or civil. The obligation to preserve the substance of the property means that the usufructuary is bound to maintain it and to defray the costs of all current repairs necessary to keep it in good order and condition, fair wear and tear only excepted, and all rates and taxes.

As the usufructuary is not the owner of the property that is the subject matter of his or her right, he or she cannot alienate or encumber it. Nor may he or she alienate the real right of usufruct as a personal servitude is inseparably linked to its holder.

A servitude of use resembles a usufruct, but the holder's rights are far more restricted. He or she may possess and use the thing to which the right relates if it is a movable and occupy it together with his or her family and visitors if it relates to land. The holder may take the fruits of the thing for his or her daily needs as well as for the daily needs of his or her household, but nothing in excess of that. The holder cannot sell any fruits. Nor may he or she grant a lease in respect of a building, though this rule is subject to a number of exceptions. His or her use must be without detriment to the substance of the property and he or she may be required to give security for the due fulfillment of his or her obligations.

Finally, the servitude of habitation confers on its holder the right to dwell in the house of another together with his or her family without detriment to the

substance of the property. Unlike a servitude of use, it carries with it the right to grant a lease or sublease to others.

As in the case of praedial servitudes, personal servitudes are normally created by agreement between the owners of the respective properties, followed by registration. Registration either takes place by means of a reservation in a deed of transfer, in the circumstances envisaged in section 67 of the Deeds Registries Act 47 of 1937, or by the registration of a notarial deed accompanied by an appropriate endorsement against the title deed of the property in respect of which the servitude is granted.

As with the praedial servitude, a personal servitude can be cancelled by notarial agreement between the owner of land encumbered by the servitude and the holder of the servitude by Bilateral Notarial Deed of Cancellation or Unilateral Notarial Deed of Cancellation, if no obligation is imposed. A personal servitude also lapses where it is granted for a specific period only or on the death of the holder of the servitude.



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ATTORNEYS

## **AMENDMENT TO SECTION 14 OF THE TRANSFER DUTY ACT NO. 40 OF 1949**

Presented by Meumann White Attorneys

Section 14 of the Transfer Duty Act 40 of 1949 (hereinafter referred to as "the Act") has been amended to the effect that as of 24 January 2005, an Estate Agent who is entitled to any remuneration or other payment in respect of services rendered in connection with a transaction in terms of which a person acquired residential property by the sale and transfer of-

- (a) shares in a Company;
- (b) members' interests in a Close Corporation; or
- (c) a contingent right to any residential property held by a trust,

shall be obliged to submit details to the Receiver of Revenue of such transaction.

- 1.2 An Estate Agent involved in the type of transaction referred to in 1.1 above must furnish the required details to the Receiver of Revenue on a standard form "TD7" within six (6) months of the date of the transaction.
- 1.3 A copy of the aforesaid form "TD7" is attached hereto for your information.
- 1.4 Of further interest is that the Receiver's office has confirmed that the amendment to Section 14 will apply to the transfer of shares in a Shareblock Company.
- 1.5 We point out that the amendment to Section 14, specifically refers to "an estate agent as contemplated in Section 1 of the Estate Agency Affairs Act, 1976." Accordingly, we are of the opinion that a transfer secretary involved in the transfer of shares in a Shareblock Company who is also an estate agent, will have a similar obligation to complete the aforesaid "TD 7" and have same timeously submitted to the Receiver.
- 1.6 This obligation is effective as of 24<sup>th</sup> January 2005 and accordingly the necessary measures will have to be taken to look through past records and ensure that the Receiver is in receipt of the relevant declarations as required by the amendment to Section 14 of the Transfer Duty Act, 1949.
- 1.7 We point out that any Estate Agent who fails to submit the required details to the Receiver of Revenue within the prescribed six (6) month period shall be guilty of an offence and liable to a fine or imprisonment.

## **2. NON-RESIDENT SELLERS**

- 2.1 The Receiver of Revenue has suggested a tax proposal which aims at getting the Purchasers of property from non-resident Sellers to

collect the Capital Gains Tax on behalf of the non-resident Seller and in this regard, the following information is of importance:-

- 2.2 The actual amount required to be withheld by the purchaser will depend on the nature of the seller. Where the seller is a natural person, 5% of the amount payable to the Receiver must be withheld, whereas if the seller is a Company, 7.5% is to be withheld and where the seller is a trust, 10% must be withheld by the purchaser.
- 2.3 The amount withheld must be paid over to the Receiver within 14 days or 28 days, depending on whether the purchaser is a resident or non-resident.
- 2.4 In order to give some respite to low-income purchasers, the withholding requirement does not apply to sales of property where the selling price is less than R2 million.
- 2.5 The proposed amendment also does not apply to deposits given by purchasers to secure the sale of the property until and unless such deposit is allocated to the purchase price on disposal of the property.
- 2.6 Furthermore, the non-resident seller may apply to the Receiver for a directive that no amount or only a reduced amount be withheld and in considering whether to issue such a directive, the Receiver will consider the following:-
  - 2.6.1 whether the seller can furnish adequate security that the tax will ultimately be paid;
  - 2.6.2 whether the seller has many other assets in South Africa that the Receiver could expropriate should the ultimate tax not be paid;
  - 2.6.3 whether the seller is not subject to tax because of another factor such as a double tax agreement; or
  - 2.6.4 if the actual tax liability of the seller is likely to be less than the withheld amount, for e.g. if the seller is likely to suffer an overall tax loss.

- 2.7 In addition, the Receiver of Revenue proposes that the Estate Agent, as well as the Conveyancer involved in the transaction, will also have an obligation to notify Purchasers if the Seller is a non-resident and to further advise the Purchaser of the corresponding obligations placed on him regarding the withholding of Capital Gains Tax from the purchase price.
- 2.8 The Receiver of Revenue further proposes that if the Estate Agent/Conveyancer is aware or should reasonably have been aware that the Seller was not a South African resident and fails to notify the Purchaser accordingly, such Estate Agent/Conveyancer will be jointly and severally liable together with the Purchaser. In these circumstances, the Agent's liability will be limited to the amount of such Agent's commission in respect of the disposal of the property.
- 2.9 Of further interest is that where an estate agent or a conveyancer did not assist in the disposal of the proceeds of the sale and the purchaser knew or should reasonably have known that the seller was non-resident, the purchaser would be personally liable for the amount not withheld, together with interest and penalties thereon.
- 2.10 The draft proposal empowers the Receiver to impose a 10% penalty on late payments although this can be remitted at the Receiver's discretion.
- 2.11 The aforesaid draft proposal has been released in the press and we have had a number of agents inquiring as to whether or not it is law. The answer is that it is yet to be promulgated and as such, is not yet law.
- 2.12 The aforementioned draft proposal will only come into operation on a date to be proclaimed by the President in the Government Gazette.



## **Exclusive Use Areas**

Prepared by Renelle Moodley  
Meumann White Attorneys

**A] Exclusive Use Areas under the 1971 Act**

1. The 1971 Act made no provision for exclusive use areas and as a result, various methods were employed to ensure that a defined portion of the common property could be reserved for the use of a particular owner.
2. In some schemes under the 1971 Act, exclusive use rights were created by the registration of servitudes whereas in other schemes, they were created by conditions of title. However the most common method was to confer exclusive use rights in terms of the Rules.
3. A developer who wanted to confer exclusive use areas in terms of the Rules would ensure that this was disclosed in the agreement of sale and in each agreement, the Purchaser would give the developer a Power of Attorney to vote at meetings of the Body Corporate for the adoption of the Rules which made provision for exclusive use areas. By using these Powers of Attorney, the developer was then able to obtain the required unanimous resolution of the Body Corporate and perform his obligation to confer exclusive use rights on the various owners.

**B] Exclusive Use Areas under the 1986 Act**

1. In terms of this Act, exclusive use areas may be established in terms of Section 27 of the Act either by the developer when applying for the opening of the Sectional title register or by the body corporate at a later stage.
2. If the developer proposes to establish exclusive use areas when opening the sectional title register, he must require the land surveyor or the architect to indicate the proposed exclusive use areas on the draft sectional plan and the right to the exclusive use of such part or parts of the common property must be reserved in favour of one or more of the sectional owners by the inclusion of a condition in the 11 (3) (b) Schedule filed with the sectional plan. The developer will be issued with a Certificate of Real Right in respect of the Exclusive Use Areas, as shown on the Sectional Plan and the developer will then cede these rights to the owners of the various sections by way of a Notarial Deed of Cession.
3. In order for a Body Corporate to establish exclusive use areas, it must be authorised to do so by a unanimous resolution of the members. As in the case of the developer, the body corporate must request an architect or land-surveyor to apply to the Surveyor –General for the delineation of the exclusive use areas on the registered sectional plan. The Body Corporate can then transfer the exclusive use rights to the various owners, by way of a Notarial Deed of Cession.
4. By the insertion of a new section 27A, the Sectional Titles Amendment Act of 1997 revived the cheaper and less cumbersome method of establishing exclusive use areas in terms of the Rules of a Scheme. In terms of this amendment, a developer or the body corporate is empowered to make Rules that confer exclusive use rights to members of the Body Corporate. These exclusive use areas are shown on a scale layout plan, which is included in the Rules. The layout plan must clearly indicate the locality of the exclusive use areas and allocate a distinctive number to each. The Rules must also specify the purpose of each exclusive use area and include a schedule showing the allocations to the owners.

5. Exclusive use rights in terms of Section 27 of the Act are urban immovable property and they can be bonded and dealt with like any other real property whereas exclusive use rights created in terms of Section 27(A) are not urban immovable property and although like any other Rules, they are binding on all owners and occupiers of sections in the scheme, they are not binding on third parties.
6. Exclusive Use rights allocated in terms of the Rules are far more cost effective and apart from the fact that they cannot be bonded and are not enforceable against third parties, the areas designated as exclusive use areas in terms of the Rules will still be subject to all the other provisions of the Act dealing with exclusive use areas.

**[C] Informal Exclusive Use Areas**

1. Quite frequently a Body Corporate of a sectional title scheme would allocate certain areas of the common property, for example a parking bay, to an owner without such specified area of the common property being registered as an Exclusive Use Area either by way of a notarial deed or in terms of the Rules.
2. Accordingly, this type of informal exclusive use area allocated by the Body Corporate is not a registered exclusive use area and agents must be aware that such an informal exclusive use area cannot be sold with the section.
3. Agents are therefore encouraged to make the necessary enquiries to ascertain whether or not there are registered exclusive use areas attaching to the section being sold. In this regard, enquiries can be made with the Managing Agent of the sectional title scheme concerned.



## **QUESTIONS ON SECTIONAL TITLE**

Prepared by Renelle Moodley  
Meumann White Attorneys

## **1. What are the problems related to Exclusive Use areas?**

- 1.1 The main problem would be explaining to a purchaser that an owner does not acquire ownership of an exclusive use area. Instead they acquire the EXCLUSIVE USE of the exclusive use area for as long as they are owners in the scheme.
- 1.2 Another problem would be explaining to the purchaser the difference between the exclusive use area being registered in terms of a notarial deed as opposed to being allocated in terms of the Rules of the Body corporate.
- 1.3 Even though parts of the common property are designated as exclusive use areas, these areas are still controlled by the Body Corporate and are therefore subject to the Rules of the scheme. Accordingly, there may be Rules that prohibit braaing in an exclusive sue balcony, control the type of fence or wall erected around a garden or prevent the installation of a pool without first obtaining the consent of the trustees of the Body Corporate.

## **2. How can I guard against the buyer not getting what he thought he was buying when talking about a Sectional Title Unit?**

- 2.1 It should be explained to the Purchaser that in a sectional title scheme, the common property is jointly owned by all those who own sections in the scheme and that there are Management and Conduct rules which the purchaser will be obliged to comply with.
- 2.2 Accordingly, a purchaser ought to familiarise himself with the Rules to be sure he knows what he is buying into. The Rules would generally impose restrictions on the owners in a scheme so as to ensure uniformity and harmony.

- 2.3 Furthermore, apart from examining the unit, the purchaser should inspect as much of the common property as possible to ensure that the scheme is in an acceptable physical condition.
- 2.4 A purchaser should ask to see a copy of the latest audited financial statements, as this is the only way of establishing the financial state of the scheme. In this regard, of particular importance is the reserve fund, as a healthy reserve fund indicates that the scheme is well run.
- 2.5 A purchaser should be made aware that although it is the responsibility of the Body Corporate to ensure that the entire scheme is adequately insured against all risks, the onus is on the owner to ensure that his or her unit is adequately insured at all times. Body Corporate insurance is generally based on units in average condition and many owners after renovating their section may find that the insured amount for their unit is inadequate.
- 2.6 Also of importance to the purchaser, is that Body Corporate insurance does not cover the contents of the unit and this is solely the responsibility of the owner of the unit.
- 2.7 Another important issue for the purchaser would be the monthly levy, with particular reference to the extras such as security service and special levies.

### **3. What is the Body Corporate's responsibility?**

3.1 The Body Corporate is required to carry out the functions assigned to it in terms of the Sectional Titles Act and these include the following:-

- 3.1.1 The Body Corporate must establish a fund for administrative expenses, other debt or expense of the scheme.
- 3.1.2 On the basis of its annual estimates of future administrative expenses, the Body Corporate must calculate and collect the levies. In its calculations the Body Corporate must apportion to owners entitled to exclusive use

areas, the share of common expenses attributable to those exclusive use areas. The levies are usually calculated annually and collected in equal monthly installments on the passing of a resolution to that effect by the trustees of the Body Corporate.

- 3.2 The Body Corporate is obliged to insure the buildings in the scheme to their full replacement value and they must keep the buildings insured against fire and other prescribed risks.
- 3.3. The Body Corporate must properly maintain the common property and keep it in a state of good and serviceable repair.
- 3.4 The Body Corporate is obliged to provide information to members of the Body corporate and in general to control, manage and administer the common property in accordance with the Act, Rules and any direction given by the owners at a general meeting.

#### **4. What are some of the delays in the opening of a Sectional Title Register?**

- 4.1 Sectional Title Register can only be opened after the following have been attended to:
  - 4.1.1 The draft sectional plan must be prepared by an architect or land surveyor;
  - 4.1.2 The architect or land surveyor must certify that the development
  - 4.1.3 If there is any non-compliance, a certificate must be obtained from the local authority, condoning the non-compliance;
  - 4.1.4 The draft sectional plan is then submitted to the appropriate Surveyor
  - 4.1.5 If there is a bond over the property being developed, then the bondholder must consent to the opening of the sectional title register;

4.1.6 If there is a restrictive condition of title( i.e a condition prohibiting more than one dwelling on the property) in the Title Deed, such condition will have to be removed either by High Court application or by application to the Department of Traditional and Local Affairs.

4.2 Accordingly, if there is a delay with any of the above, the opening of the register will be delayed as well.

## **5. Can we do anything to protect our buyers against these delays?**

You can include a clause in the agreement to the effect that the sectional title register is to be opened by a specified date, failing which the purchaser will be entitled to resile from the agreement by written notice to the Seller, in which event the status quo ante will be restored between the parties and neither party shall have a claim for loss or damages against the other.

## **6. What if I am selling a unit in a small scheme which is self-managed and they have no financial statements. How can I ensure that the rates are paid up to protect the buyer?**

6.1 In terms of Management Rule 35 of the Sectional Titles Act, trustees must ensure that proper books of account and records are kept so as fairly to explain the transactions and financial position of the Body Corporate. Furthermore the trustees must make available for inspection any of the books of account or records of the Body Corporate and the trustees are obliged to retain all books of account and records for six years after completion of the transactions.

6.2 Should the financial statements not be available and the trustees are not prepared to furnish information regarding the rates, then you will need to make enquiries directly with the Rates Department, who would easily pick up whether or not the rates are in arrears.

**7. Who should pay for the documents required for the purchaser's information i.e. Body Corporate Rules; Minutes of latest AGM or Special Meeting; Financial Statement and Sectional Plan?**

As it is in the best interests of the Purchaser to study the above documents and ensure that all is in order, the Purchaser will have to bear the costs of obtaining same. Please note that as Conveyancers, we will only obtain these documents if there is a special condition to this effect in the agreement of sale.

**8. What action can a Body Corporate take against an owner of a sectional title unit who is not paying his levies?**

In terms of Section 37 of the Sectional Titles Act, levies may be recovered by the Body Corporate by court action against owners of units who are not paying their levies.

**9. Can the trustees prevent an owner from having a dog or cat if the rules do not have such a restriction?**

In terms of the Conduct Rules prescribed in terms of the Act, an owner may not keep any animal, reptile or bird in a section unless he first obtains the written consent of the Trustees. Accordingly, if the Scheme's Rules are silent regarding the issue of pets then this prescribed Rule would apply. If however, the Rules of the Scheme clearly prohibit pets in the sectional scheme then that rule would take precedence over the prescribed rule in the Act.

**10. If a special levy is needed, who decides how each owner will pay off the required amount? For example: – would the payment be over a period of time or would it be a lump sum payment?**

- 10.1 A Body Corporate is entitled to determine a "special levy" over and above the normal monthly levy in appropriate circumstances. A special levy may be raised for any common expense that was not included in the estimate of expenses approved at the last annual general meeting.
- 10.2 The trustees do not have the power to raise a special levy when a budgeted expense exceeds the estimate approved at the last annual general meeting. They can only raise a special levy for unexpected expenses that were not included in the budget.
- 10.3 If the Trustees resolve that a special levy is payable by the owners, they may determine whether it is payable in one lump sum or in instalments. This is in terms of the prescribed Management Rule 31(4) of the Act.
- 10.4 While the Trustees can allow owners to pay a special levy in a number of instalments, they cannot provide for an ongoing special levy that runs concurrently with ordinary levies over an extended period of time.



## VAT AND PROPERTY

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## **VAT AND PROPERTY**

The tax authorities levy a tax on transfers of immovable property either in the form of VAT or transfer duty.

It is not always clear in which cases VAT and in which transfer duty will be payable. The question arises as to which is payable : VAT or transfer duty? The answer will depend on the nature of the particular transaction and the status of the parties.

If a person is registered for VAT, such a person is called a VAT VENDOR. He, she or it is then obliged to levy a premium of 14% on every sale / service rendered in his business and to pay this premium (called "VAT OUTPUT TAX") over to the Receiver at the end of the relevant VAT cycle. For most taxpayers, every two consecutive months constitute a VAT cycle.

To determine whether VAT is payable in a property transaction, we need to ask 2 questions, namely:

1. Is the seller registered (or obliged to be registered) for VAT, and
2. Is this transaction in the course and furtherance of the seller's business?

If the answer to both questions is yes, VAT related questions should be asked (VAT will likely be payable). If the answer is no, transfer duty will be payable on the transaction.

For example: If A, who sells a house for R600 000,00 to B and A is a property developer whose business it is to build and sell houses, and the house he is selling to B is sold in the scope and furtherance of his business, then, provided he is also a VAT vendor, VAT will be payable by him in the transaction and not transfer duty.

However, if A sold his private residence (not a house he built with the intention of selling it), it is not part of his business. Even if he is a registered VAT vendor, in this case he is not a vendor for purposes of this transaction. Transfer duty will therefore be payable, not VAT.

It is important to note that, in transactions where VAT is payable, the Receiver demands the amount due from the SELLER, not from the purchaser. The seller must therefore ensure that the sale price he negotiates includes the 14% VAT, alternatively he must expressly arrange with the purchaser that the purchaser will, in addition to the purchase price, also be liable to pay to the seller an additional 14%. The ultimate responsibility to pay the Receiver vests with the seller, and he cannot pass this responsibility on to the purchaser.

In the case of transfer duty being payable, the purchaser (unless the parties agree otherwise) is liable, in addition to the purchase price, to pay the amount of transfer duty due. This amount is usually paid over to the conveyancer, who then ensures that the transfer duty is paid to the Receiver and a transfer duty receipt (which must be lodged in the deeds office) is obtained.

If it has been established that the seller is:

- a VAT VENDOR
  - for purposes of the transaction (in other words, he is selling the property as part of his business)
- then VAT is usually payable.

From a property point of view, there is only one type of transaction which has VAT exempt status: property that has previously been leased for residential purposes, and which property is now being sold.

For example:

C is a property developer and a registered VAT vendor. His business is to buy and sell property and also to lease property. Amongst other assets, he owns a flat which he rents out for residential purposes.

Although C, the lessor, is a VAT vendor, VAT is not levied on the rental income derived from the flat. The reason for this is that rental derived from residential tenants such as in this example, is an exempt supply in terms of the Act.

Not only is the rental of a property let out for residential purposes exempt from VAT, but the purchase price derived from a subsequent sale of the rental property itself is also exempt from VAT. So, notwithstanding the fact that he is a VAT vendor, if C sells the property which he previously let out for residential purposes, no VAT will be payable by the seller. The purchaser of the flat will however be liable for transfer duty on the acquisition.

If a transaction is not VAT exempt, the next question to ask is whether the transaction is perhaps zero rated. "Zero rated" means that VAT is payable on the transaction, but at the rate of 0%, not at the standard rate (currently 14%).

What is the difference between zero rating and VAT exempt? IF a transaction is VAT exempt, it falls outside of the "VAT net" altogether. Accordingly transfer duty is payable and the position with regard to the particular transaction is the same as if the seller were never registered for VAT.

If a transaction is zero rated, it still falls within the "VAT net" and all the provisions relating to VAT applies to the transaction, including the provision that the purchaser can still claim input tax credits in respect of the property concerned.

In order for a transaction to be zero rated, the following requirements have to be met :

- The seller must be a VAT vendor;
- The purchaser must be a VAT vendor;

- The thing that is sold must be a going concern (in other words, an existing, operating business);
- The agreement of sale must expressly state that a going concern (as opposed to merely an asset) is being sold.

Examples of transactions relating to property that will qualify for a zero rating are:

- Mr X sells his grocery store - he sells both the business and the building in which the shop is situated as part of the same transaction to the same purchaser.
- Mrs Y sells an office block owned by her. The offices are let out to various tenants and she effectively "sells" (cedes) the leases together with the building. The new purchaser will thus continue to derive rental income from the building.

It must be highlighted that unless there is a written agreement between the parties specifically stating that the enterprise is disposed of as a going concern, the zero rating cannot apply even if the transfer meets the requirements of a going concern. Should this be the case however, the VAT Act does make provision for the parties to enter into a separate agreement with the original agreement with the separate agreement referring to the disposal of an enterprise as a going concern.

The contracting parties have to agree in writing that the enterprise will be supplied as an income-earning activity. Notwithstanding the latter, the mere mention of the words "Income Earning Activity" will prove to be insufficient in certain instances. In the event of an Agreement of Sale that specifically states that a vacant building is disposed of as a going concern, the zero rate will not apply as the supply of a vacant building cannot constitute an income earning activity. It will therefore prove to be insufficient to merely make mention of the words "Income Earning Activity" and "Going Concern" in the Agreement of Sale if the object of sale is not capable of being an income earning activity.

Should it then subsequently be found that an enterprise was not disposed of as a going concern, the purchase price has to be adjusted accordingly and the amount of VAT paid will be claimed as input tax by the purchaser and accounted for as output tax on the part of the Seller.

Where a purchaser proposes to be a registered vendor and it was subsequently found on date of supply that he was not registered as such, the Receiver will then require the Seller to pay over VAT on the proceeds of this transaction as for purposes of the Receiver the purchase price includes VAT.

It is therefore vital that the Agreement of Sale make provision for the protection of the Seller and it is suggested that a clause along the following lines can form part of the Agreement of Sale as a precautionary measure:

"The Purchaser will deliver to the Seller a copy of the Purchaser's VAT 103 Notice of Registration form (within a specified amount of time). In the

event of the Purchaser not being a registered vendor at the time of conclusion of this Agreement, the application of the zero rate will be subject to the Purchaser being a registered vendor on date of supply. It is further recorded by the parties that if VAT is payable on the transaction the amount of VAT so claimed will be refunded to the Seller by the Purchaser".

If the PURCHASER is a VAT vendor and transfer duty is payable in a transaction, then the purchaser could qualify for a notional input tax credit (i.e. a deemed input tax credit). In other words, the purchaser could claim the transfer duty that it paid on the transaction back from the Receiver, as if the amount were VAT paid by the purchaser on the acquisition. The VAT status of the purchaser is not relevant in determining whether VAT or transfer duty is payable in any transaction. It is only relevant to determine whether the purchaser will be so fortunate as to be able to claim his transfer duty back from the Receiver.

With regards to the calculation of VAT payable, if a transaction is zero rated, 0% on the sale price will be payable - effectively no money will change hands. If not zero rated, 14% on the sale price will be levied on the transaction.

If property developer Z sold one of the flats in his development for R200 000,00, then the VAT payable by him on the transaction will be calculated as follows :

$$14/114 \times R 200\ 000 = R 24\ 561,40.$$



MEUMANN WHITE  

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ATTORNEYS

## **EXEMPTION FROM TRANSFER DUTY FOR DIVORCED & SURVIVING SPOUSES**

**AMENDMENT TO THE TRANSFER DUTY ACT PERTAINING TO  
DIVORCED AND SURVIVING SPOUSES**

1. The Transfer Duty Act has been amended to the effect that divorced or surviving spouses now no longer pay transfer duty on the acquisition of the property registered in the name of his or her deceased or divorced spouse.
2. The exemption reads as follows:  
" a surviving or divorced spouse who acquires the sole ownership in the whole or any portion of property registered in the name of his or her deceased or divorced spouse where that property or portion is transferred to that surviving or divorced spouse as a result of the death of his or her spouse or dissolution of their marriage or union."
3. Accordingly, to qualify for the exemption, the sole ownership in the whole or a portion of the property registered in the name of the deceased or divorced spouse must be acquired by the surviving spouse or the other divorced spouse and the transfer must be the result of the death or dissolution of the marriage, as the case may be.
4. The aforesaid amendment to the Transfer Duty Act came into effect on 25 July 2006.
5. Previously, there was an exemption for spouses acquiring property in any manner from a deceased estate, but there was no exemption for divorce transfers.
6. A further point of significance is that in the amended Act the word "spouse" appears to include persons who have entered into religious marriages, as well as persons involved in same sex and heterosexual relationships, which the Receiver is satisfied are intended to be permanent.



## **NON RESIDENT SELLERS CAUGHT IN SARS TAX NET**

### **NON RESIDENT SELLERS CAUGHT IN SARS TAX NET**

Section 35A of the Income Tax Act, inserted into the Act by section 30 of the Revenue Laws Amendment Act, 2004 deals with the withholding of tax in respect of non-residents who dispose of property in South Africa.

This section was inserted into the Income Tax Act during 2005 and was originally to come into operation on a day to be proclaimed by the President. The Taxation Laws Amendment Bill, 2007 has now been introduced in the National Assembly, and provision is made therein to amend the 2004 Revenue Laws Amendment Act so that s35A of the Income Tax Act will come into operation on 1<sup>st</sup> September 2007 and will apply to any disposal of immovable property on or after that date.

So what is Section 35A all about? Briefly it imposes an obligation to on a purchaser, who purchases immovable property for a price that exceeds R2million from a seller who is a non-resident, to withhold part of the purchase price from the seller on registration of transfer, and pay this withheld portion to SARS. Such amounts withheld, and paid to SARS are treated as an advance in respect of the seller's liability for tax for the year of assessment.

The amount of the purchase price to be withheld is, where the seller is a natural person, 5% of the purchase price, a company or close corporation 7.5% and a Trust 10%. The withheld amount is to be paid to SARS within 14 days of transfer, or if the purchaser is also a non-resident, within 28 days.

If the purchaser knows, or reasonably ought to have known, that the seller is not a resident, and he fails to withhold the amount required, the purchaser becomes personally liable to pay the amount to SARS on due date.

The conveyancer and estate agent have an obligation to notify the purchaser, if they know or ought to have known, that the seller is a non-resident, and if the estate agent and conveyancer fail to do so, they are jointly and severally liable for the tax payable, to the extent of their remuneration.

FICA already imposes an obligation on the conveyancer and estate agent to "know their client" but it is not always easy to determine whether a seller is, for tax purposes, a resident of South Africa or not.

A natural person is regarded as a resident for income tax purposes by being ordinarily resident in the republic of South Africa, or complying with all the requirements of the physical presence test set out in the Income Tax Act.

A legal entity is considered a resident in South Africa if the entity was incorporated, established or formed in South Africa, or if the effective place of management thereof is in South Africa.

To complicate matters SARS may deem a legal entity to be exclusively a resident of another country in terms of an agreement concluded with that other country to avoid double taxation.

So what should the estate agent be doing to protect the purchaser and to avoid personal liability? We recommend that:

1. the seller warrant his residency status in the sale agreement, and
2. that the conveyancers be irrevocably authorized and instructed to withhold the required percentage of tax from the proceeds of the sale and to pay these to SARS within fourteen days of registration of transfer if:
  - the seller is indeed a non-resident, or
  - if the seller has warranted that he is a resident, but the estate agent or conveyancers have cause to believe or suspect that the seller is a non-resident.

Although section 35A imposes further responsibilities upon the estate agent and the conveyancer, it also creates another reason for the use of an estate agent by a purchaser, as the involvement of an estate agent in the transaction, immediately and significantly reduces the purchaser's level of responsibility for compliance with Section 35A.

So, if you as a purchaser want to limit your liability to the SARS for your non-resident seller's tax obligations – engage the services of an estate agent!