

SECURE TRUST BEFORE BUYING

Buying Property in South Africa
as a Non-Resident

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THE FIRM

Established in 1900, STBB is a firm of approximately 90 business-minded lawyers practising from 11 offices throughout South Africa.

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



INTRODUCTION

South Africa follows a system of land registration where every piece of land is reflected on a diagram and ownership recorded in one of the regionally located Deeds Registries where documents are available for public viewing. South Africa is reputed to have one of the best deeds registration systems worldwide with an exceptional degree of accuracy and security of tenure being guaranteed. Property can be owned individually, jointly in undivided shares or by an entity such as a company, close corporation or trust or a similar entity registered outside South Africa.



NON-RESIDENTS

There are no restrictions in respect of property ownership by non-residents, save for a prohibition on illegal aliens owning immovable property within South Africa.

There are, however, procedures and requirements which must be complied with in certain circumstances, such as the local registration of entities registered outside of South Africa where they purchase property in South Africa, and the appointment of a South African resident public officer for a local company whose shares are owned by a non-resident. In the event of a non-resident purchasing property in the country with the intention of residing for longer periods, a residence permit will have to be applied for in accordance with the relevant requirements. Please note that ownership of fixed property provides no automatic entitlement to any type of residence permit.

BUYING A PROPERTY

All contracts to acquire land must be in writing, contain certain prescribed information and be signed by both buyer and seller to be valid and legally binding. Contracts most commonly take the form of an Agreement of Sale or Offer to Purchase which, once accepted, constitutes an Agreement of Sale.

Once an Agreement of Sale has been signed by both parties it represents a valid and binding contract from which neither party can withdraw without incurring legal consequences, save in certain instances where:

- The agreement is subject to certain conditions which are not fulfilled;
- The purchase price is less than R250 000.00 and certain additional criteria in terms of the Alienation of Land Act are present entitling the Purchaser to “cool off” and cancel the sale.

The de facto ownership of property can also be obtained by means of acquiring the shares/members interest and loan claims in a company/close corporation that owns a property. These contracts, strictly speaking, need not be in writing and can be concluded verbally. Although legally binding, this is not advisable and it is recommended to record the agreement in writing to ensure that the material terms agreed to are accurately recorded. Please contact our Non-Resident department for assistance prior to embarking in such transaction at nonres@stbb.co.za.

TRANSFER PROCEDURE

The registration of a property transaction is handled by a specially qualified legal practitioner known as a conveyancer. It is customary for the seller to appoint the conveyancer. The costs attendant thereon are for the account of the purchaser, unless contractually agreed to otherwise.

The conveyancer prepares the requisite transfer documentation which, after signature by the purchaser and the seller and receipt of various clearances required by government departments, is lodged (together with the cancellation of any existing mortgage bonds and new mortgage bonds to be registered) in a regionally located Deeds Registry. The deeds are subject to a stringent examination process where after they are made available for registration. On the date of registration of transfer all existing mortgage bonds registered over the property are cancelled, simultaneously with the registration of any new mortgage bonds (if applicable) by the purchaser in favour of the bank granting financial assistance. The purchaser is recorded as the new owner of the property and the purchase price is paid to the seller.

It is important to note that upon transfer to the new owner, any liabilities in respect of the property incurred by the previous owner remain with the previous owner and do not pass to the new owner, unless otherwise agreed to or in the case of certain historic municipal rates and taxes debts that attaches to the land.

The above procedure does not apply where the shares/member's interest and loans are acquired in a property-owning entity as no change in ownership is recorded in the Deeds Registry.

If the sale agreement relates to the sale of shares/members interest, the entity will remain liable for settling its liabilities. A purchaser of shares/member's interest must understand what they are acquiring. It is therefore advisable that an in-depth due diligence be performed on the target entity by a commercial attorney to ensure that the necessary provisions are included in the sale of shares/member's interest agreement.

COSTS

SELLER

- Brokerage is payable where an estate agent is responsible for the successful conclusion of a sale of immovable property. Brokerage is customarily payable by the seller who mandates the estate agent to procure a purchaser for the property. Should the parties however agree that the purchaser settles the selling agents commission, there are certain tax implications pertaining to transfer duty and capital gains tax.
- The seller is usually also responsible for the cost of procuring beetle free, electrical, gas, plumbing and electric fence compliance certificates where necessary.
- If the seller's property is bonded, the seller is liable for the costs relating to the cancellation of the existing bond over the property.

PURCHASER

- Conveyancing Fees

The purchaser is responsible for the payment of transfer costs and the costs of registering any new mortgage bonds over the property purchased. These are often referred to as the 'conveyancing fees'. The conveyancing fee is determined according to the purchase price of the property and determined by a tariff guideline issued by the Law Society.

Conveyancing fees further include:

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

R0 - R900 000: exempt;
R900 001 - R1 250 000: 3% of the value above R900 000;
R1 250 001 - R1 750 000: R10 500 + 6% of the value above R1 250 000;
R1 750 001 - R2 250 000: R40 500 + 8% of value above R1 750 000;
R2 250 001 - R10 000 000: R80 500 + 11% of the value exceeding R2 250 000;
R10 000 000 and above: R933 000 + 13% of the value exceeding R10 000 000

Transfer duty is payable on the acquisition of property whether by an individual or entity. Note the exception: no transfer duty is payable if VAT is payable. VAT is payable in a transaction if the seller is a registered VAT vendor and the property sold forms part of the seller's business. The rate of VAT is currently 15%.

- Sundry charges are imposed by the Deeds Registry and the Bank granting financial assistance;
- Deeds office levies;
- Pro-rata rates and taxes; and
- Expenses for obtaining rates/levy clearance certificates.

SIGNATURE OF DOCUMENTS

Documentation prepared by the conveyancer pertaining to the registration of transfer of the property and any mortgage bond to be registered over the property is required to be signed in black ink.

In the event of such documents being signed outside of South Africa there are certain jurisdiction specific formalities pertaining to authentication of the signatories that must be complied with to ensure the validity of the document. This authentication can be time consuming and costly and we would advise specific advice being obtained from the conveyancer.

It is possible, and often advisable, to leave a General Power of Attorney (GPA) in favour of a trusted person in South Africa to assist in this regard. This having been said, it is important to note that no person is allowed to sign an affidavit on someone else's behalf, even if a GPA has been granted.

Where the purchaser is married according to the laws of a foreign country the spouse of the purchaser will be required to assist the purchaser in signing all transfer related documents .

PROCEDURE RELATING TO THE SIGNATURE OF BOND TRANSFER AND BOND DOCUMENTS OUTSIDE OF SA

Whilst these documents may be completed and signed abroad, there are certain jurisdiction specific formalities that must be complied with which may include the Notarisation and authentication by way of an Apostille. Authentication can be time consuming and costly and we would advise specific advice being obtained from the conveyancer.

THE OFFER TO PURCHASE/ AGREEMENT OF SALE

PURCHASE PRICE

A deposit is not mandatory but serves as a gesture of good faith on the part of the purchaser and an indication of financial ability.

This amount will be invested by the estate agent/ conveyancer in an interest-bearing trust account, interest accruing for the benefit of the purchaser provided that the purchaser has specifically mandated the attorney to do so. Both attorneys and estate agents are covered by Fidelity Funds, which guard against the risk of loss and oversee the operation of these trust accounts.

Provision will be made in the Agreement for a guarantee to be called for in respect of the balance of the purchase price. In general, a guarantee will only be acceptable if issued by a local financial institution which means that the funds will actually have to be remitted to South Africa in order for a local bank to issue such a guarantee or, alternatively, arrangements

must be made between a foreign and local bank for a back to back guarantee to be issued. Specific advice on this subject must be sought from the conveyancer attending to the transaction.

OCCUPATION, POSSESSION, TRANSFER AND OCCUPATIONAL INTEREST

Occupation is the physical occupation of the property whereas possession is generally deemed to be the date upon which the purchaser assumes responsibility for the property and it is customary for possession to pass on the date of registration of transfer. Transfer refers to the actual date of registration of ownership in the Deeds Registry in favour of the purchaser.

Occupational interest is the rental payable by the party occupying the property belonging to another where the date of occupation and date of transfer differs and is normally expressed in Rand terms or as a percentage of the outstanding balance of the purchase price.

VOETSTOOTS

This is a standard inclusion in all deeds of sale and implies that the property is bought 'as is', which means 'in the exact condition in which the property is found.' The Consumer Protection Act applies to sale agreements where the seller

is in the business of selling land, such as a developer. In such instances, the seller is obliged to provide the purchaser with property that is free from defects, as defined in the Act.

ELECTRICAL AND BEETLE-FREE CERTIFICATES

The property owner is required by law to be in possession of a valid electrical compliance certificate certifying that the electrical installation at the property meets certain statutory safety requirements. The beetle-free certificate certifies that all accessible parts of the property are free of infestation by certain defined beetle and this, whilst it is a standard inclusion in the Agreement of Sale, is neither a legal requirement nor is it included in sales of sectional title units. Beetle-free certificates only apply to properties in the Western Cape and KwaZulu-Natal provinces.

The cost of attending to the necessary repairs in order for the aforesaid certificates to be provided is generally accepted as being for the account of the seller, although the parties can contractually agree otherwise.

GAS, ELECTRIC FENCE AND WATER INSTALLATION CERTIFICATES

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

FIXTURES AND FITTINGS

A property is sold together with all fixtures and fittings of a permanent nature. Generally, fixtures and fittings include anything which is attached to the property or which by virtue of its considerable mass accedes to the property. To avoid uncertainty, the purchaser is cautioned to ensure that all items intended to be included in the purchase price are specified in writing in the Agreement of Sale.

MOVABLE ITEMS

The sale of movable items may influence the applicable capital gains tax as well as the ability to remit that portion of the proceeds abroad. Specific advice should be sought from our Non-Resident department at nonres@stbb.co.za prior to the finalisation of the Offer to Purchase.

Please note that an agreement whereby the shares/member's interest in a property holding entity is acquired differs substantially from that of a property being acquired. Specific advice must be sought not only in terms of the agreement but also in respect of the current and future tax obligations. Please contact our Non-Resident department for assistance at nonres@stbb.co.za.



NON-RESIDENTS AND TAX

INCOME TAX

Non-residents are only liable to pay income tax in South Africa on income accruing from a South African source. This would include profit realised from letting fixed or other property as well as the capital profit realised from the disposal of a capital asset (capital profit).

Please note foreign pensions are specifically exempt from tax in South Africa.

A distinction must however be made between normal income and income of a capital nature. Income generated through a scheme of profit-making is classified as normal income would for example include salary or rental income of which 100% taxable. In contrast, the sale of a capital asset gives rise to a capital gain which is taxed slightly differently.

CAPITAL GAINS TAX

The phrase “Capital Gains Tax” is actually a misnomer as there is no such separate tax. In reality, only a portion of a capital gain is included as normal

income and the tax on this gain is referred to as Capital Gains Tax. The inclusion rate depends on the type of owner.

The effective rate of tax applicable to a capital gain made by an entity is 22.4% (which is the 80% inclusion rate multiplied by the fixed income tax rate of an entity being 28%) and 36% in respect of a trust (80% x 45% tax rate).

The position for individuals is more complex due to the employment of a progressive sliding tax scale. The effective tax rate is accordingly directly related to total taxable income for the year of assessment which includes 40% of the capital gain. The sliding scale ranges from 0% to 45%. The highest effective tax rate applicable to a capital gain realised by an individual is 18% (40% x 45%).

- To provide clarity, the disposal of the following will be treated as a capital disposal:
- Immovable property situated in South Africa, including any right or interest in immovable property. (This also includes an interest of at least 20% in a company where 80% or more of the value of the net assets of the company is attributable, directly or indirectly, to immovable property in South Africa.);

- Assets of a permanent establishment of a non-resident through which trade is carried on in South Africa;

A non-resident realising a profit from the sale of fixed property or any other income from a South African source is obliged to register as a non-resident taxpayer in South Africa and to submit a tax return during the appropriate tax filing season declaring the income to the South African Revenue Services ('SARS') and to make payment in accordance with the assessment raised by SARS.



WITHHOLDING TAX

Since 2007 a withholding obligation is placed on the conveyancers and professional estate agents to withhold a percentage of the proceeds in transactions where the seller is a non-resident disposing of fixed property for consideration in excess of R2 million. Technically the withholding tax is applied to the purchase price received from the buyer.

The effect is that the conveyancer in such transaction must withhold a percentage of the net sales price and make payment directly to SARS on behalf of the non-resident seller of this amount which is captured as provisional payment of the future tax liability.

This provisional tax does not take into account the actual profit realised on a transaction, and more often than not, results in an excessive payment of tax to SARS. Non-residents can claim a refund of the excessive tax payment by submitting a tax return during the appropriate tax filing season indicating the actual liability as less than the provisional tax payment made. It should be noted that the filing season may in certain instances only open 18 months after the payment of the provisional tax and that no interest accrues to the non-resident on this provisional payment of tax.

The withholding tax obligation is made on the gross selling price and the applicable withholding rate depends on the nature of the non-resident as follows:

- 7,5% non-resident seller;
- 10% foreign entity; and
- 15% foreign trust.

Our in-house Non-Resident department can assist by applying for a Tax Directive which will reduce the withholding tax down to the actual liability thereby eliminating the excessive tax payment as the Tax Directive settles the tax obligation immediately after registration of transfer. Non-residents wishing to remit their proceeds abroad are able to remit greater portion due to the fact that they do not have to wait for a refund from SARS. For more information please contact nonres@stbb.co.za.

HOW CAN FOREIGN FUNDS BE BROUGHT INTO SA FOR A PROPERTY ACQUISITION?

Foreign funds can be paid into any nominated bank account in South Africa. This account will usually be the trust account of the transferring attorneys into which the deposit for the property and the balance of the purchase price is paid. These funds will be invested for the non-resident's benefit provided that the attorney is mandated to do so and the non-resident can rest assured that such are secure and guaranteed.

When a non-resident transfers funds from a foreign source into a South African bank account, a record known as a "deal receipt" is kept of the foreign funds received by the South African bank. This is an important document which must be retained for purposes of repatriation of the funds.

CAN MONEY BE BORROWED IN SA TO PURCHASE PROPERTY?

Subject to the internal lending requirements of local financial institutions, non-residents are allowed to borrow up to 50% of the outstanding purchase price of the property locally on the proviso that the initial 50% of the purchase price as well as the transfer fees and transfer duties have been introduced into South Africa from a foreign source.

CAN A NON-RESIDENT OPEN A BANK ACCOUNT AT A SOUTH AFRICAN BANKING INSTITUTION?

Subject to the internal requirements of the various financial institutions non-residents can operate an account. These accounts are strictly regulated and local currency payments may in limited circumstances be deposited into such accounts for example local rental income having been approved by the bank in terms of their specific requirements.

WHO CHOOSES WHICH ATTORNEYS WILL ATTEND TO THE TRANSFER ?

It is customary in South Africa for the seller to nominate the attorneys who will attend to the transfer, but this being said a purchaser can in an Offer to Purchase nominate the conveyancer to be accepted by the seller. Such attorneys act on behalf of both parties throughout the conveyancing process.

REMITTANCE OF PROCEEDS FOLLOWING THE DISPOSAL

Whilst the South African Reserve Bank ('SARB') strictly enforces the exchange control regulations which limit the foreign transfer of funds, non-residents will be allowed to remit their available proceeds provided that the applicable regulations are adhered to.

Crucially non-residents must be able to prove the introduction of foreign funds introduced into South Africa to the satisfaction of the SARB. Non-residents are advised to keep meticulous records of the introduction of funds and final statement of account received from the transferring attorney.

Please contact our Non-Resident department for assistance in transferring funds into or out of South Africa at nonres@stbb.co.za.

WHAT ABOUT ESTATE DUTY IN THE EVENT OF DEATH?

Estate duty is presently calculated at 20% of the dutiable amount of an estate for the value between R3.5 million and R30 million and 25% on the value exceeding R30 million. However, any inheritance bequeathed to a surviving spouse is not subject to estate duty.

CONTACT US

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Centurion Office

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IN AN ENDEAVOUR
TO PROVIDE
THE OPTIMUM
PROFESSIONAL
SERVICE TO OUR
CLIENTS, WE
HAVE VARIOUS
DEPARTMENTS
SPECIALISING IN
SELECT ASPECTS
OF LAW.

A PROFESSIONAL
AT ANY OF OUR
BRANCHES
WILL BE ABLE TO
RECOMMEND AN
APPROPRIATE
ATTORNEY/
STAFF MEMBER
TO MEET YOUR
NEEDS, GIVEN
THEIR AREA
OF EXPERTISE
AND THE
LOCATION MOST
CONVENIENT
FOR YOU.

- All Conveyancing
- Commercial Law
- Commercial Property Law
- Constitutional Law
- Construction Law
- Correspondent Services
- Divorce, Child and Family Law
- Insolvency Law
- Insurance Law
- Labour Law
- Litigation and Dispute Resolution
- Mergers and Acquisitions
- Motor Vehicle Accident and Personal Injury Claims
- Municipal Planning Law
- Non-Resident Services
- Property Development and Environmental Law
- Residential Property Law
- Tax
- Wills, Trusts and Deceased Estates

