

**BUYING
PROPERTY IN SA AS
A NON-RESIDENT**

STBB The
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Firm

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THE FIRM

Established in 1900, STBB is a firm of more than 100 business-minded lawyers practising from 12 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.



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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. These 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 guaranteed security of tenure. 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-RESIDENT

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

There are, however, procedures and requirements which must be complied with in certain circumstances. For example, the local registration of entities registered outside of South Africa who wish to 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, application for residence permit must be made 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 signed by both parties, an Agreement of Sale represents a valid and binding contract from which neither party can withdraw without incurring legal consequences, except 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/a member’s 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. It is recommended to record this agreement in writing to ensure that the material terms agreed to are accurately recorded.

TRANSFER PROCEDURE

The registration of a property transaction (the transfer of ownership) is handled by a specially qualified legal practitioner known as a conveyancer. It is customary for the seller to appoint the conveyancer. However, the costs



attendant on effecting registration 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 clearance certificates required by the relevant laws, is lodged (together with the cancellation of any existing mortgage bonds and new mortgage bonds to be registered) in a regionally located Deeds Registry. The deeds are subject to a stringent examination process whereafter they are made available for registration. On the date of registration of transfer, all existing mortgage bonds registered over the property are cancelled simultaneously with the registration of any new mortgage bonds (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 of the property to the new owner, any municipal 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.

Note:

The aforementioned procedure does not apply where the buyer acquires the shares/a member's interest in a property-owning entity as no change in ownership rights is recorded in the Deeds Registry. The entity remains the registered owner.

If the sale agreement relates to the sale of shares/ a member's interest, the entity will remain liable for settling its liabilities. A purchaser of shares/a 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/members' interest agreement.

COSTS

SELLER

- Brokerage (commission) is payable where an estate agent is responsible for the successful facilitation 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. However, should the parties agree that the purchaser settles the selling agent's commission, there are certain tax implications involved and it is advisable that the parties obtain legal advice.
- The seller is generally also responsible for the cost of procuring certain prescribed compliance certificates.
- 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.
- Usually, the seller also pays 60 days' advance rates and services, and any arrears to the local municipal authority.

PURCHASER

• Transfer Costs

The purchaser is responsible for the payment of transfer costs and the costs of registering any new mortgage bonds over the property purchased. These fees are based on the purchase price of the property and determined in line with the Conveyancing Fee Guidelines issued by the Law Society of South Africa.

Conveyancing fees further include:

- Transfer duty that is payable to the South African Revenue Services, calculated in accordance with the following formula based on the purchase price:

TRANSFER DUTY: Effective 1 March 2024

R0 – R1 100 000 0%
R1 100 001 – R1 512 500 3% of the value above R1 100 000
R1 512 501 – R2 117 500 R12 375 + 6% of the value above R1 512 500
R2 117 501 – R2 722 500 R48 675 + 8% of the value above R2 117 500
R2 722 501 – R12 100 000 R97 075 + 11% of the value above R2 722 500
R12 100 001 and above R1 128 600 + 13% of the value exceeding R12 100 000

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. If the seller is a registered VAT vendor, VAT will be payable either at the standard rate (15%) or at the rate of zero percent (0%) depending on the nature of the transfer.

- Sundry charges are imposed by the Deeds Registry and the bank granting financial assistance, for the expense of obtaining rates and or 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 by hand and in black ink.

In the event of such documents being signed outside of South Africa, there are certain jurisdiction-specific formalities pertaining to the 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 specific advice must be obtained from the conveyancer.

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

If a seller is married according to the laws of another country, their spouse will be required to assist the seller in signing all the transfer-related documents.





THE OFFER TO PURCHASE/ AGREEMENT OF SALE

The following are some of the most important provisions in the Agreement of Sale ('the Agreement'):

DEPOSIT AND PURCHASE PRICE

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

The deposit shall be invested by the estate agent/conveyancer in an interest-bearing trust account, interest generally 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 the Fidelity Fund which guards against the risk of loss and oversees the operation of these trust accounts.

The Agreement may make provision 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 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 the issuance of a back-to-back guarantee. Specific advice on this subject should be sought from the conveyancer attending to the transaction.

OCCUPATION, POSSESSION AND TRANSFER

'Occupation' refers to the physical occupancy of the property whereas 'possession' is generally deemed to be the date upon which the purchaser assumes responsibility for the risk in the property. It is customary for possession to pass on the date of registration of transfer. Transfer refers to date upon which ownership of the property is registered with the Registrar of Deeds, in favour of the purchaser.

OCCUPATIONAL INTEREST

'Occupational interest' is the rental payable by the party occupying the property belonging to the other where the date of occupation and date of transfer differ, and is normally expressed in Rands or as a percentage of the outstanding balance of the purchase price.

VOETSTOOTS

The voetstoots clause is a standard inclusion in all Agreements and implies that the property is bought 'as is', namely 'in the exact condition in which the property is found.'



ELECTRICAL AND BEETLE-FREE CERTIFICATES

The existing owner is required by law to be in possession of a valid electrical compliance certificate certifying that the electrical installation on 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. However, whilst it is a standard inclusion in the Agreement, it is neither a legal requirement nor is it included in sales of sectional title units.

GAS, ELECTRIC FENCE AND WATER INSTALLATION CERTIFICATES

If there is a gas appliance installed at the property, a Gas Certificate of Compliance must be obtained confirming that the installation complies with statutory safety requirements. A compliance certificate must also be obtained where there is an electric fence installation on the property.

Moreover, a Certificate of Compliance of Water Installation must be provided by the seller to the Municipality before transfer if the property is situated within the City of Cape Town. The cost of attending to the necessary repairs in order for the various certificates to be provided is generally accepted as being for the account of the seller, although the parties can contractually agree otherwise.



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 must ensure that all items intended to be included in the purchase price are specified in the Agreement.

MOVABLE ITEMS

Including the cost of the sale of movable items in the purchase price of the land, may influence the capital gains tax calculation. Specific advice should be sought from your conveyancer prior to signature of the Agreement.

It is important to note that an Agreement whereby the shares/members' interest in a property holding entity are 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.

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 includes a profit realised from letting fixed or other property, as well as the capital profit realised from the disposal of a capital asset (capital profit).


Note that 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 and would, for example, include salary or rental income which is taxable. The sale of a capital asset can either result in a capital gain or loss. In the event that it is a capital gain, it will be taxed in accordance with the withholding tax scale of the South African Revenue Services ('SARS').

CAPITAL GAINS TAX

The phrase 'Capital Gains Tax' is actually a misnomer as this is not a 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 ('CGT'). The inclusion rate depends on the type of owner.

The effective rate of tax applicable to a capital gain made by a company is 21.6% and 36% in respect of a trust.



The position for individuals is more complex due to a progressive sliding tax scale applied to the income of natural persons.

The effective tax rate in respect of a capital gain in the hands of a natural person is directly related to the total taxable income for the year of assessment. 40% of the capital gain must be added to the taxpayer's total income for the year.

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%).

The disposal of the following will be treated as a capital disposal:

- Immovable property situate 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 belonging to 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 for the relevant tax period declaring the income to SARS and to make payment in accordance with the assessment raised by SARS.



WITHHOLDING TAX

The country's Income Tax Act places an obligation on conveyancers 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. The withholding amount applies to the full purchase price without regard to the R2 million limit.

Practically, the withholding tax is collected from the purchase price received from the buyer.


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% for a non-resident individual;
- 10% for a company; and
- 15% for a trust.

In instances where this obligation is applicable, the conveyancer shall withhold a percentage of the net sales price and make payment directly to SARS on behalf of the non-resident seller, which payment is then captured as provisional payment in respect of the seller's 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.



Our in-house Non-Resident department can assist by applying for a Tax Directive from SARS which may reduce the withholding tax down to the actual liability. This eliminates 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 then able to remit a greater portion as they will not have to wait for a refund from SARS.

For more information, please contact tax@stbb.co.za.




BUYING PROPERTY WITH FOREIGN FUNDS

Foreign funds may 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 are invested for the non-resident's benefit provided that the attorney is mandated to do so. The non-resident buyer can rest assured that the funds 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 funds.

BORROWING MONEY IN SA

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 a local bank account. These accounts are strictly regulated and local currency payments may, in limited circumstances be deposited into such accounts, namely local rental income approved by the bank in terms of its specific requirements.



WHO CHOOSES THE PROPERTY TRANSFER ATTORNEYS?

It is customary in South Africa for the seller to nominate the attorney who will attend to the transfer. That being said, a purchaser may nominate the conveyancer in an Offer to Purchase to be accepted by the seller. The nominated conveyancer acts on behalf of both parties throughout the conveyancing process.

REMITTANCE ABROAD OF SALE PROCEEDS

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

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



ESTATE DUTY IN THE EVENT OF DEATH

Estate duty is presently calculated at 20% of the dutiable amount of an estate with a value of 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.

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Big enough to take
on any challenge.

Small enough to
make it personal.

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

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