

Buying *property* as a non-resident in South Africa

STBB

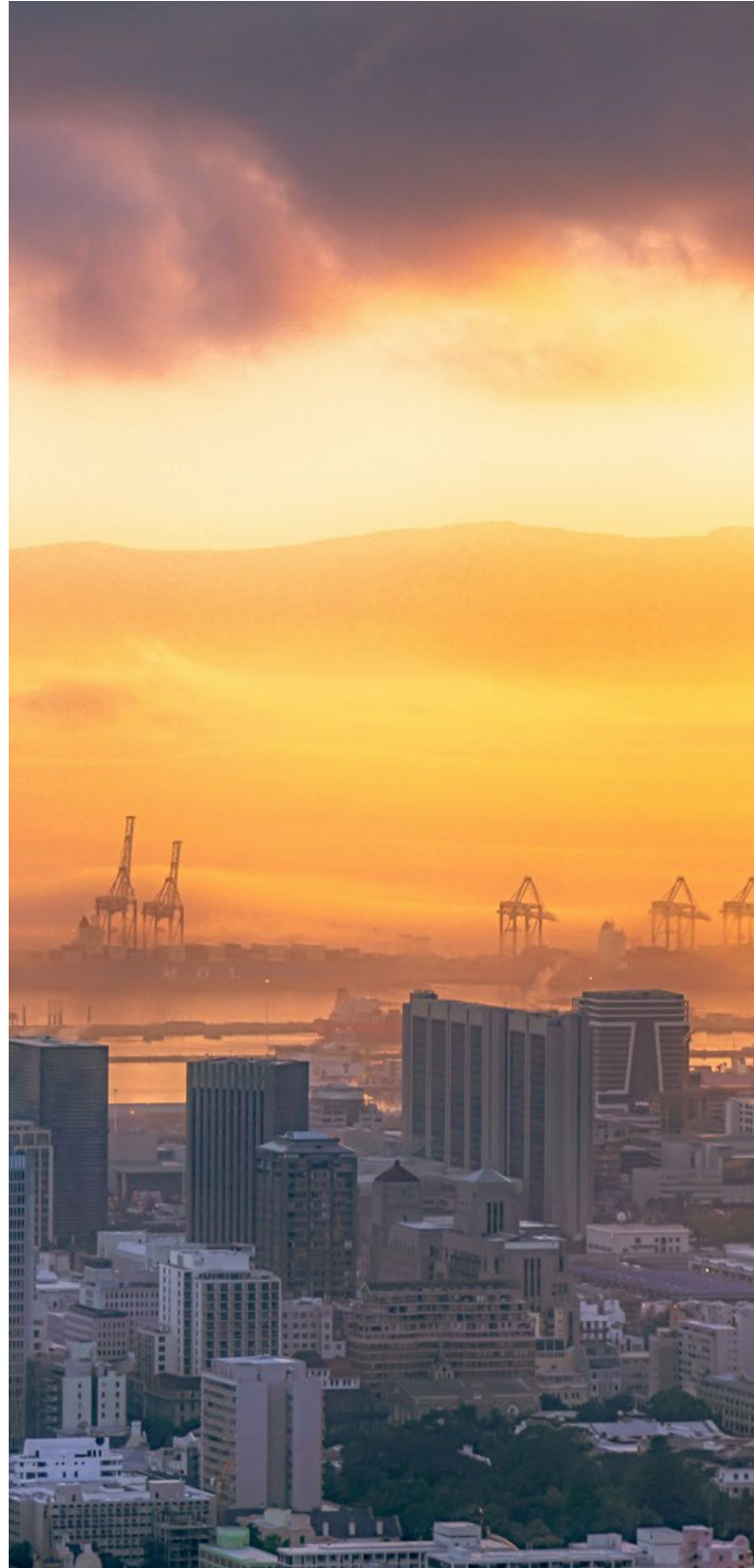


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The firm

Established in 1900, **STBB** is a dynamic law firm of approximately 120 business-minded lawyers practising from 13 offices throughout South Africa. **STBB** is known for our seasoned property law practitioners and personalised client service.



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Introduction

South African law 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 Offices. 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, trust, or a similar entity registered outside of the country.

Non-residents

There are currently no restrictions in respect of legal property ownership by non-residents.

However, certain procedures and requirements must be followed, such as local registration for foreign entities buying property in South Africa. Non-resident property purchasers intending to stay long-term must apply for a residence permit as the ownership of property does not guarantee permanent residency.



Purchasing property in South Africa

Under South African law, certain requirements to purchase immovable property in South Africa must be met in order for the agreement to be valid and binding:

- The contract must be in writing;
- It must state the prescribed information (the parties' names, property, and price);
- It must be signed by both the purchaser and seller or their representatives;
- 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. It is recommended to record such agreement in writing to ensure that the material terms are accurately recorded.

Once a sale agreement has been signed by both parties, it is a **valid and binding** contract. A party cannot withdraw without incurring legal consequences, except where:

- The sale agreement is subject to certain conditions, which are not fulfilled (such as financing); or
- The purchase price is below R250 000.00 and the purchaser is entitled to a 'cooling-off' period and may cancel the sale.

Transfer procedure

1. The sale agreement is concluded and sent to the conveyancer.
2. The conveyancer acknowledges receipt, contacts the parties, and attends to FICA compliance.
3. The conveyancer requests the seller's original title deed if the property is not bonded.
4. If applicable, payment of the deposit is requested and bond approval pursued.
5. If applicable, bond cancellation figures are requested from the seller's bank.
6. The purchase price is secured by collecting the balance and/or bank guarantee/s.
7. Parties sign the transfer documents; the purchaser signs bond documents, if applicable.
8. The purchaser pays transfer duty and transactional costs.
9. The conveyancer requests rates clearance figures from the municipality and levy clearance figures from the managing agent, HOA, or body corporate, if applicable.
10. The conveyancer requests compliance certificates from the seller.
11. The conveyancer receives the transfer duty receipt/exemption after payment is made to the South African Revenue Service ('SARS').
12. The required documents are lodged in the Deeds Office and transfer of the property is registered.

Transfer procedure applicable to shares

When a purchaser acquires shares or a member's interest in a property-owning entity, the ownership rights are not changed in the Deeds Registry as the entity remains the registered owner. When selling shares or a member's interest, the entity remains responsible for its liabilities.

Purchasers should conduct thorough due diligence with a commercial attorney and include the necessary provisions in the sale agreement.

Costs

Seller's costs

1. Brokerage (commission) is payable where an estate agent is responsible for the successful facilitation of the sale of immovable property.
2. Brokerage is generally payable by the seller who mandates the estate agent to procure a purchaser for the property. However, where the parties agree that the purchaser settles the selling agent's commission, the parties must obtain advice as there are certain tax implications to consider.
3. The seller is also responsible for the cost of procuring the prescribed compliance certificates.
4. If the seller's property is bonded, they are liable for the costs relating to the cancellation of the existing bond over the property.
5. The seller also pays 60–120 days' advance rates, and arrears to the local authority.

Purchaser's costs

The purchaser is responsible for the following costs:

1. Transfer fees payable to the conveyancing attorney to transfer the property, which are determined by the Law Society of South Africa.
2. The costs of registering any new mortgage bonds over the property, if applicable.
3. Sundry charges (Deeds Office fees and expenses for obtaining rates and/or levy clearance certificates).
4. Transfer duty payable to SARS, which is calculated according to a formula and is based on the purchase price.

Calculate your costs



Scan the QR code for the **STBB** Cost Calculator

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 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.

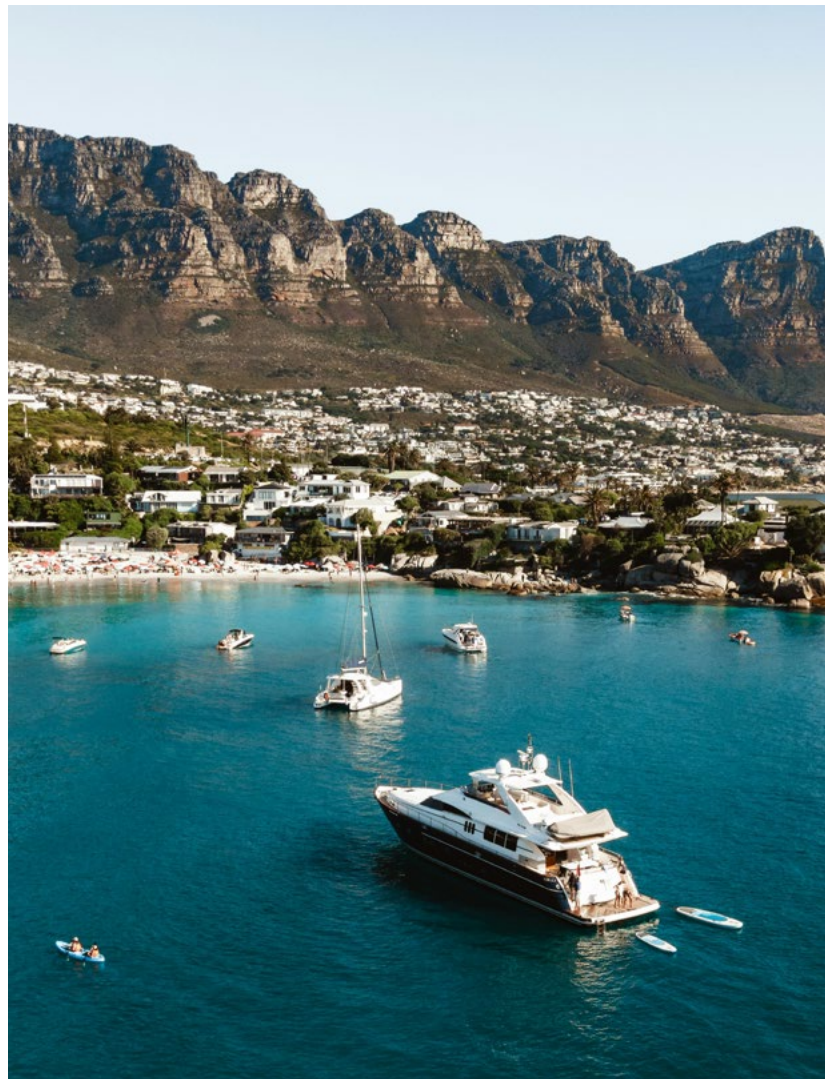
Signature of documents

All conveyancing documents must be signed in black ink. When signing documents outside of South Africa, there are specific formalities for authentication 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 leave a General Power of Attorney ('GPA') in favour of a trusted person in South Africa to assist with documentation. No person may sign an affidavit on someone else's behalf, even if a GPA has been granted.

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

When signing documents outside of South Africa, there are specific formalities for authentication that must be complied with to ensure the validity of the document.



The offer to purchase/sale agreement

The following are some of the most important provisions in the sale agreement.

Deposit

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

It will be invested by the 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. The Legal Practitioners' Fidelity Fund guards against the risk of loss due to theft or misappropriation and oversees the operation of these trust accounts.

Guarantee

Provision is made in the sale 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. This means that the funds will have to be remitted to South Africa in order for a local bank to issue such a guarantee. 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

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 the date upon which ownership of the property is registered in the name of the purchaser with the Registrar of Deeds.

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 Rands or as a percentage of the outstanding balance of the purchase price.

Voetstoots

This is a standard inclusion in all sale agreements and implies that the property is bought 'as is', which means 'in the exact condition in which the property is found'.

Compliance certificates

The existing 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. A compliance certificate must also be obtained if there is an electric fence installed on the property.

The beetle-free certificate certifies that all accessible parts of the property are free from certain beetle infestations. However, whilst it is a standard inclusion in sale agreements in coastal areas, it is neither a legal requirement nor is it usually included in sales of sectional title units.

If there is a gas appliance installed in the property, a gas compliance certificate must be obtained, which confirms that the installation complies with statutory safety requirements.

If the property is situated in the jurisdiction of the City of Cape Town, a water installation certificate must be provided by the seller to the Municipality before transfer.

The cost of attending to the necessary repairs to obtain the various certificates is generally 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 that 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 sale agreement.

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 a conveyancer prior to signature of the sale agreement.

An agreement whereby the shares or a member's interest in a property-holding entity are acquired differs substantially from that of a property being acquired. As such, specific advice must be sought regarding the purchaser's current and future tax obligations.



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Non-residents and tax

Income tax

Non-residents are only liable to pay income tax 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). 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. If it is a capital gain, it will be taxed in accordance with SARS' withholding tax scale.

Capital gains tax

The phrase 'capital gains tax' is 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. The inclusion rate depends on the type of owner.

The effective rate of tax applicable to a capital gain made by an entity is 21.6% for a company 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% and the highest effective tax rate applicable to a capital gain realised by an individual is 18% (40% x 45%).

The following disposals will be treated as a capital disposal:

- Immovable property situated in South Africa, including any right or interest in immovable property. (This also includes 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); and
- 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, submit a tax return for the relevant tax period declaring the income to SARS, and make payment in accordance with the assessment raised by SARS.

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Withholding tax

Under the Income Tax Act, a purchaser (via the conveyancer) is required 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.

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

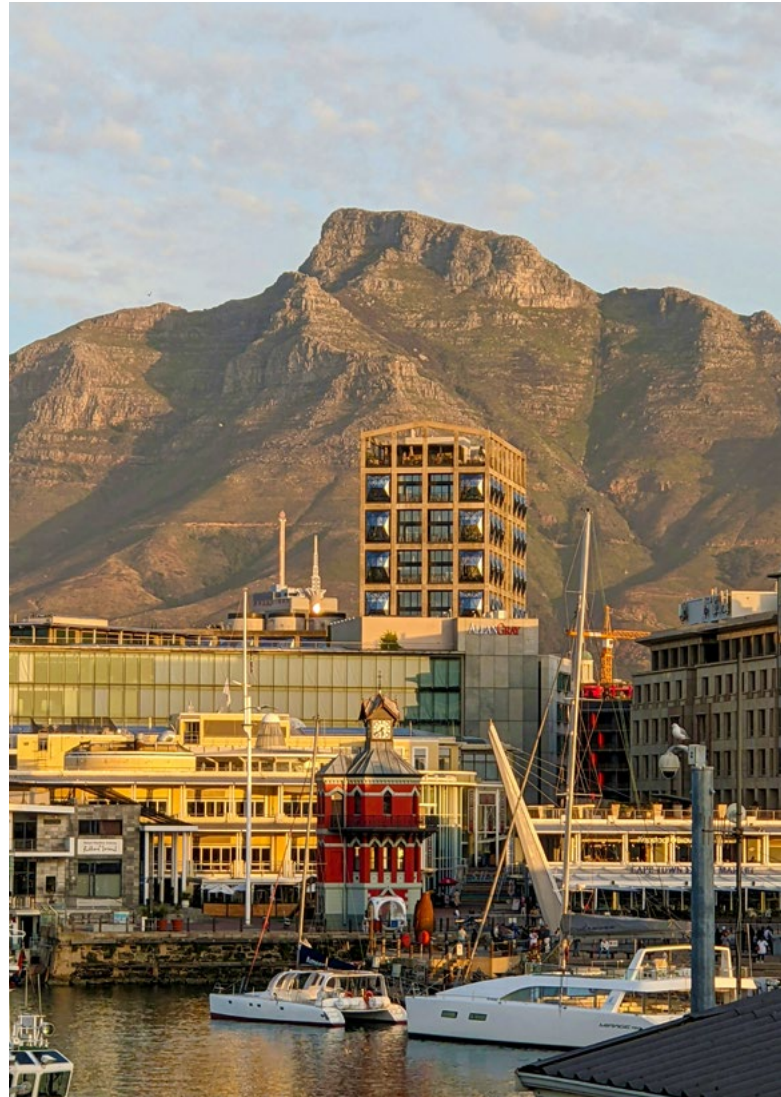
Where the value of the property exceeds R2 million, the withholding amount applies to the full purchase price without regard for the R2 million limit.

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

- ▾ 7.5% for a non-resident individual;
- ▾ 10% for a foreign entity; and
- ▾ 15% for a foreign trust.

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

For assistance with the remittance of your tax, contact our team at info@stbb.co.za.

Buying property with foreign funds

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. The non-resident purchaser 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 bank. This is an important document, which must be retained for purpose of repatriating the funds.

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Borrowing money in South Africa

Subject to 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 duty, have been introduced into South Africa from a foreign source.

Can a non-resident open a bank account with a South African banking institution?

Subject to the various banks' differing requirements, non-residents can operate a South African bank account. These accounts are strictly regulated and local currency payments may, in limited circumstances, be deposited into such accounts. For example, local rental income approved by the bank in terms of their specific requirements.



Who chooses the transferring attorneys?

It is customary in South Africa for the seller to nominate the attorneys who will attend to the transfer of the property. A purchaser may nominate the conveyancer in the sale agreement to be accepted by the seller. The nominated legal practitioner acts on behalf of both parties throughout the conveyancing process.

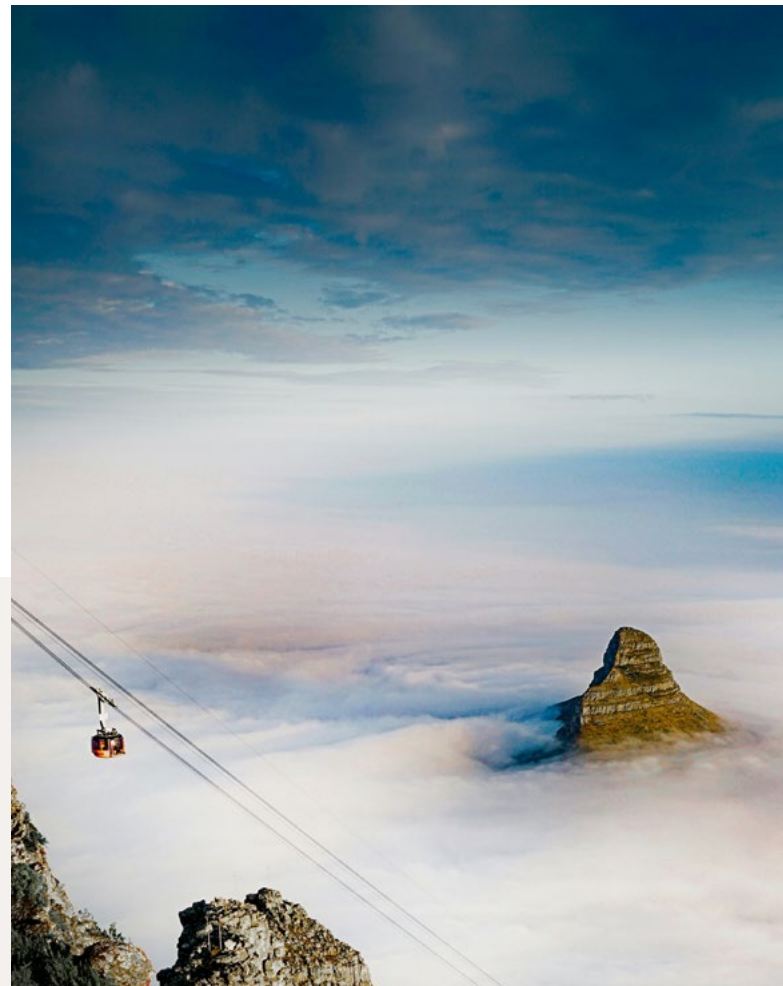
Remittance abroad of sale proceeds

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

Contact us at info@stbb.co.za for assistance with transferring funds into or out of South Africa.

Estate duty in the event of death

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



...any inheritance
bequeathed to a
surviving spouse is not
subject to estate duty.

Let us connect you.

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Big enough to take
on any challenge.

Small enough to
make it personal.

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