Foreign Buyers

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1. Introduction

If you are considering buying real estate in South Africa it is important to understand the regulatory, legal, financial and tax implications of owning property in South Africa.

South African property law is based on Roman Dutch law, which follows a land registration process whereby every piece of land (referred to as an "Erf") or sectional title unit (a unit or flat in an apartment complex) is transferred in terms of a Title Deed. The Title Deed is registered at the regional Deeds Office in the area where the land is situated. It is a public document and any person can approach a Deeds Office to view a copy thereof. The Title Deed reflects the conditions of ownership and refers to a diagram which essentially illustrates the boundaries of the property. It is therefore, important as a first step, to obtain a copy of the Title Deed to determine the conditions and to identify if there are any onerous or unfavourable conditions. One of our specialist attorneys can assist you with interpreting the Title Deed.

There are no prohibitions on foreign nationals (also referred to as non-residents) purchasing and owning land in South Africa. However, there is currently a controversial bill tabled in Parliament called the Agricultural Land Holdings Bill, which if passed into law, will prohibit foreigners from owning agricultural land in South Africa (for more information, please contact us). This Bill, if passed into law, will not apply retrospectively.

2. Purchasing and financing property

Before submitting an offer, you need to establish whether you are going to purchase the property in your personal capacity (with or without your spouse / partner), through a local or foreign company, or through a local or foreign trust. There are consequences for each and we suggest that you seek appropriate legal and tax advice before making the decision.

In order to purchase property in South Africa, the contract must be in writing. The contract, normally referred to as an Offer to Purchase, is usually drawn up by an estate agent (professional practitioner in real estate). The Offer to Purchase, signed by the Purchaser, must contain certain information and will usually be open for acceptance by the Seller for a certain period of time. The offer is irrevocable for the stipulated open period and if it is accepted, i.e. signed by the Seller, it becomes a valid and binding contract i.e. Agreement of Sale.

Once the Agreement of Sale is signed by both parties, neither party can withdraw without incurring legal consequences, except in certain particular circumstances.

Once your offer has been accepted you will be required, amongst other things, to:

- **Pay a deposit:** The deposit is usually 10% of the purchase price, and payable into theattorneys trust account (or sometimes into the estate agents trust accountdepending on the agency you are dealing with). A trust account is similar to an escrow account. The deposit will be invested on your behalf and interest will accrue to you; and
- Balance of purchase price: Make arrangements for payment of the balance of the purchase price. If it is a cash purchase, the Seller's Conveyancer will require a guarantee from a recognised bankor financial institution acceptable to the Seller. A guarantee is a formal document from a bank or financial institution securing the payment of a specific sum of money at a future date (i.e. date of registration). Please note that Sellers do not usually accept guarantees from foreign banks. It is therefore practice that the funds are paid to the Sellers' Conveyancer who will place the funds in their trust account, pending registration of the transfer, with interest accruing to the Purchaser until date of transfer. There are other options available to you regarding securing the purchase price, so please contact one of our experienced attorneys who will be able to guide you in this regard.
- **Some further points to note re financing the property:**
  - There are no restrictions on funds coming into South Africa from a foreign source, but the amounts and purpose of the funds need to be reported to the Financial Surveillance Department (administers exchange control on behalf of SA Reserve Bank), which will be done automatically by the local South African bank to which the amount has been paid. You will need to advise the bank of the purpose for which the funds are being transferred (i.e. purchase of immovable property). To make payment the foreign bank will require the local bank account details including the Swift Code (a code required for foreign inward transfers).
  - As a foreigner you may be able to obtain a loan from a local South African Bank, subject to certain restrictions. Such a loan will be secured by the registrationof a mortgage loan against the property. The current exchange control regulations state that

a foreigner may only borrow as much as they bring into the country. For example, if the purchase price is R 20 000 000, you may beable to borrow up to R 10 000 000 and the balance will need to paid into South Africa from a foreign source. In basic terms, as a foreigner you can obtain aloan of up to 50% of the purchase price.

- **Money laundering regulations:** The estate agent and conveyancing attorney will need to satisfy the requirements of the money laundering regulations. This generally takes the form of verifying the Purchaser's identity and source of monies required to undertake the purchase.

3. The Transfer Process

Once the offer is accepted by the Seller, the Conveyancer is instructed to attend to the registration of the transfer. The Conveyancer is usually appointed by the Seller, who co-ordinates and manages the entire transfer process on behalf of both parties. Although the Conveyancer is usually appointed by and acts for the Seller, he/she has a fiduciary duty of care towards the Purchaser. There is generally no need for the Purchaser to have legal representation during the process; however, you are at liberty to appoint a legal representative to supervise the transfer on your behalf. All costs of transfer (including payment of the Transfer Duty, which will be discussed under Tax Implications) are usually payable by you, as the Purchaser. *Click on the following link to determine the transfer costs relating to your specific price range.*

A Purchaser (and Seller) can sign an Agreement of Sale whilst physically absent from SA although there are more stringent requirements when signing the property registration documents for lodgement at the Deeds Office. This will involve signing at the SA Embassy or in the presence of a Notary Public which involves additional expense. The Transfer process (i.e. the procedure from purchasing the property to the registration thereof into the name of the Purchaser at the Deeds Office) takes approximately 6-8 weeks. *For a detailed explanation as to the process please click on the following document.*

4. Transferring proceeds of a sale out of South Africa

All funds which are transferred by a foreigner into South Africa, together with the growth thereon (i.e. capital growth/interest), can be repatriated in full on sale of the property (i.e. the full proceeds from the sale can be transferred back to a foreign jurisdiction), on condition that:

- Proof is provided that the funds were introduced from a foreign source. It istherefore important to keep all documents/receipts from your bank relating to theinward transfer of funds into South Africa;
- You can prove that you are a foreigner (a copy of your passport);
- You can prove that you are the owner the property and that you have sold the property(you will be required to provide a copy of the Title Deed and Agreement of Sale);
- You have paid/made provision for the payment of Capital Gains Tax (discussed underTax implications.

Please take note that if you have formed a South African company or trust into which to take transfer, it is recommended that any funds paid from an offshore source be in the form of a loan from the foreigner to the company or trust. This type of loan must be approved by the South African Reserve Bank before being transferred to South Africa. Once the loan is approved, the full loan amount and interest thereon can be repatriated out of South Africa on sale of the property. We strongly urge you to seek the appropriate legal and exchange control advice in respect of foreign loans.

5. Tax implications

There are various tax implications to owning property in South Africa. Please note that the summary below is for information purposes only, does not cover all South African taxes and is not to be viewed as tax advice. We strongly recommend that you seek the relevant advice if you have any queries relating to tax and owning property in South Africa.

If property is purchased for speculative purposes i.e. the buying and selling of property as stock in trade, the profits thereon may be subject to income tax and therefore taxable at a higher rate than the Capital Gains Tax rate. This depends on the buyer's personal circumstances and should be discussed with a tax expert.

- **Transfer Duty:** Once you have purchased property you are liable to pay Transfer Dutyto the South African Revenue Service ("SARS"). Transfer duty is a tax on the transferof property (referred to as Stamp Duty in many other jurisdictions). Transfer Duty isbased on the value of the property and is calculated according to a sliding scale. *Please click on the following link for the current sliding scale.*

- **VAT:** There are certain exemptions to the payment of Transfer Duty, the most notableone being that if you purchase from a developer (e.g. in a new development) who is aVAT vendor, then VAT will be added to the price, in which case no Transfer Duty ispayable. VAT stands for Value Added Tax and the rate is 15% (effective 1 April 2018).
- **Capital Gains Tax:** Capital Gains Tax (CGT) is payable by any South African resident whohas made a capital gain from the sale of a capital asset. Foreigners are generally notsubject to CGT in South Africa subject to one exception, the sale of immovableproperty. Foreigners making a capital gain on the sale of immovable property aresubject to CGT.
  - There is a CGT withholding tax obligation on a Purchaser who buys immovableproperty from a foreigner in excess of R2,000,000.00. The withholding tax ratesare 7.5% for non-resident individuals, 10% for foreign companies and 15% forforeign trusts, which is calculated on the full purchase price. The non-residentSeller can apply for a directive from SARS to pay an amount less than thewithholding tax amount should the actual CGT be less than the withholdingamount. Although the responsibility to withhold the tax lies with the Purchaser,this whole process (including the retention of the withholding tax and / orapplication for a tax directive from SA Revenue Service) is usually handled bythe Conveyancer who is attending to the transfer.
  - **:** The gain is calculated as the difference between the saleproceeds and the base cost. In simple terms, the base cost is the originalpurchase price plus any improvements to the property (neither repairs normaintenance) and costs of sale (e.g. estate agent's commission). A portion ofthe capital gain is included in the taxable income of the taxpayer, at theinclusion rate applicable to the relevant tax payer. For individuals, the inclusionrate is 40%, for companies, close corporations and trusts the inclusion rate is80%. The portion included is then added to the other income of the tax payerand then taxed at the respective tax rate. For an estimate of total tax payableon a capital gain, you can use the effective tax rate on the total gain. The current effective rate for capital gains for individuals is a maximum of 18%, for companies and close corporations it is 21.6% and for Trusts it is 36%. The table below shows the current CGT inclusion rates and the corresponding effective tax rates:

Type of Tax Payer	Inclusion Rate	Statutory Tax Rate	Effective Tax Rate
Individuals	40%	0-45%	0-18%
Trusts (Normal)	80%	45%	36%
Companies and Close Corporations	80%	28%	21.6%

6. Income Tax

If you have purchased the property as a rental investment, then your rental profit will be subject to income tax in South Africa. Your profit will be your rental income less relevant expenses relating to the property. The profit will be taxed as follows:

- The tax rate for individuals is based on an individual's marginal rate which iscalculated according to certain bands of income. *Click here* The corporate tax rate for companies is 28%. If the company wishes todistribute the net profit after tax to its shareholders (which is referred to as a dividend), then a dividend withholding tax of 20% is payable where ashareholder is a natural person. No dividend tax is payable when adistribution is made to a shareholder that is a company.
  - Trusts are taxed at a flat rate of 45%. There are ways to structure a Trust more tax efficiently. Please consult a tax advisor in this regard.o
- **Estate duty:** This is a tax on the estate of deceased persons and is currently 20% on the first R30,000,000 and at a rate of 25% above R30,000,000. For non-residents (foreigners) this applies to the South African portion of their estate only, after deducting an abatement of R3,500,000 and certain other allowable deductions.

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7. Annual costs of owning a property

The local council charges a monthly amount to each homeowner for property rates, provision of water services, refuse collection etc. The amount is dependent upon the value of the property, usage of services etc. and the more expensive the property, the higher the rates.

Levies/Homeowners Association:
Should you decide to purchase a flat / apartment in an apartment complex or a house in a community scheme, there will be monthly levies payable to the governing body for maintenance / security of the common areas. These levies are in addition to property rates.

8. FAQ's

Can foreigners purchase property in South Africa?

- Yes. See comments under "Introduction".

Is property ownership secure?

- Yes, ownership of property is a real right, which is entrenched in our Constitution.South Africa has a strong Deeds Registry that acts as the custodian of all registered Title Deeds. For more information, see comments under "Introduction".

Can I transfer my profit out of the country? If so how do I go about it?

- Yes, you can transfer your full proceeds out of the country. You will need to prove that:
  - The funds were introduced from offshore
  - You are indeed a foreigner;
  - You are the registered owner of the property;
  - You have sold the property.
- To process the payment, we suggest you contact a foreign exchange company / bankto assist with this process. Please contact us if you would like a recommendation.

Can I transfer my rental profit out of the country?

- Yes, you can. You must show that the rental was earned from property purchased withforeign funds.

Are there any tax implications on the sale of property?

- Yes, you are liable for the payment of withholding Capital Gains Tax. See commentsunder paragraph 5.

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