Buying for Non-Residents

There are no restrictions on property ownership in South Africa 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 it purchases 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 here for longer periods, permanent residency will have to be applied for in accordance with the given requirements and procedures of South African law.

Purchasing Property In South Africa As A Foreigner

Property of any kind in South Africa is normally purchased through a broker or real estate agent who should be registered as a member of the Estate Agents Board.

The South African Reserve Bank refers to foreigners as NON-RESIDENTS whether they are natural persons or legal entities, whose normal place of residence, domicile or registration is outside the common monetary area of South Africa.

Should the non-resident be paying cash for the property, the transaction can be processed without intervention from the South African Reserve Bank.

Non-residents purchasing a property in South Africa may borrow up to a maximum of 50% of the purchase price in South Africa; the other 50% of the funds must be brought into the country by the purchaser and transferred from a recognised foreign bank to a bank in South Africa. The total amount that may be borrowed is at the discretion of the commercial bank offering the loan and any estate agent can assist in this regard.

Non-residents who are in possession of a valid South African work permit are considered to be residents for the duration of their work permit and are therefore not subject to borrowing restrictions placed on non-residents without work permits.

Legal Documentation
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.

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

- the agreement is subject to certain conditions which are either fulfilled/not fulfilled;
- the purchase price is less than R250 000 and certain additional criteria in terms of the Alienation of Land Amendment Act are present entitling the Purchaser to "cool off".

A non-resident must open a ‘non-resident’ account at a South African commercial bank, to facilitate loan repayments. This account would normally be funded from abroad or from rentals received on the property purchased, subject to the bank holding the account being provided with a copy of any rental agreement.

However, the Exchange Control Authority allows a non-resident desirous of obtaining permanent residence status in South Africa, to be dealt with as a South African ‘resident’ for exchange control purposes. This takes place upon completion of a so-called Immigrant’s Declaration & Undertaking issued by South African banks.

Once such Declaration has been completed, such applicant will be eligible to borrow 100% of the purchase price of the property. However, it will then be incumbent upon such person to actually apply for and obtain permanent residence within a reasonable period.

Exchange Control is currently going through a process of deregulation in South Africa, to make it progressively easier for foreigners to invest in this country, and for South Africans to do business abroad. However, it remains a complex subject and non-residents investing in South Africa are strongly advised to consult a reputable lawyer or accountant for advice. The Reserve Bank retains considerable control, and while notes and guidelines have been set, allowances will be made for exceptional circumstances.

Land Registration

South Africa is reputed to have one of the best deeds registration systems worldwide, with an exceptional degree of accuracy and of tenure being guaranteed. South Africa offers an unusual degree of certainty with regard to property ownership and 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.

Frequently Asked Questions

1. Is my investment secure?

   The banking system in South Africa is dependable, established and highly advanced. Transfer of funds through any registered South African Bank is secure and guaranteed. Once the money transfer has taken place, it is usually held in trust by an attorney or real estate company, either on behalf of the purchaser or the seller until registration of transfer. The holding of the funds in trust by an attorney is a cornerstone of the attorneys' practice and is regulated by the relevant Law Societies and secured by the Attorney¹s Fidelity Insurance.

2. Will I be able to get my money out of South Africa?

   The Exchange Control Rulings stipulate that funds brought into the country by a non-resident may be repatriated at any time, as well as any capital gain thereon after deduction of any Capital Gains Tax payable.

   A new immigrant (that is, someone who has completed the Immigrant’s Declaration & Undertaking) may only repatriate funds introduced from abroad, and capital gains accruing thereon, within the first five years of the date of signature of such Declaration. Thereafter, such person will be bound by Exchange Control restrictions imposed on residents with respect to the repatriation of funds.

3. Can property be owned by a non-resident?

   Non-residents can own property partially or wholly, in their own names or through ownership of an interest in one or other forms of legal entity, as discussed below.

4. What forms of ownership are available?

   Freehold is the most common form of property ownership. Other forms of ownership include Leasehold, Sectional Title and Share Block.

5. Which is the best form of ownership?

   The most common form of ownership is that of individual title. However, property may also be held through share ownership in companies, through holding membership in Close Corporations or as a beneficiary in a Trust. This choice will be dependent on decisions in relation to tax or transfer duty issues, or relating to the protection of assets.

   Companies and Trusts in South Africa are based on English Law and are very similar in nature to those in England. A Close Corporation is a type of company, which is flexible and cheaper to form and administer than a normal incorporated company. A Close Corporation or a Trust can usually be formed in less than a month. A Proprietary Limited Company may take a few weeks longer. Your estate agent will refer you to specialists who provide advice in each case as to the method of holding property best suited to particular needs.

6. Can property be leased to others?

   Non-resident owners of South African property have all the normal rights of ownership including the right to recover rental income from lessees. Rental income is normally taxable in South Africa.

7. What is the procedure for transfer of ownership?

   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 to attend to the registration of transfer of a property sold, whilst the costs attendant on same are for the account of the purchaser, unless contractually agreed to otherwise.

   The conveyancer prepares the requisite transfer documentation that, after signature by the purchaser and the seller, is lodged in a regionally located Deeds Registry, together with the cancellation of any existing mortgage bonds and new mortgage bonds to be registered. The deeds are subject to an intense examination process whereafter they are made available for registration.

   On date of registration of transfer all existing mortgage bonds registered over the property are cancelled simultaneously with the registration of any new mortgage bonds 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.

   The above procedure does not apply in an instance where the shares/members interest and loans are acquired in a property-owning company/Close Corporation where no change in ownership is recorded.

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 necessarily pass to the new owner, unless otherwise agreed to.

8. Are there costs in addition to the purchase price?

There are various costs involved in the transfer of property in South Africa. The following are costs borne by the purchaser:

A. Transfer Duty
Transfer duty is a tax levied by the government on transfer of ownership of fixed property.
Where the purchaser is a natural person, the duty is calculated on the following scale:

No duty up to R190 000 of the purchase price
R190 001 - R330 000 5% above R190 000
R330 001 and above R7 000, plus 8% on the value above R330 000.
Where the purchaser is a legal entity, transfer duty is levied at a flatrate of 10% of the purchase price.

B. Transfer Costs - Conveyancing and Attorney's Fees
These costs relate to the transferring attorney. They are calculated on a sliding scale regulated by a tariff and amount to between 1-2% of the purchase price.

C. Mortgage Costs

Mortgage costs are the costs incurred for raising mortgage finance. These fees include inspection fees of 0.2% of the bank valuation. Mortgage registration fees according to a prescribed tariff are payable to the registering attorney.

Therefore: a home costing R500 000 with a 50% mortgage bond registered in your own name would attract additional costs of R2 996.

These costs are subject to change from time to time and a complete and updated table of costs is available from your Estate Agent.

D. Estate Agents Commission

This fee, normally paid by the seller, is 7.5% plus VAT (VAT is currently 14%).

9. Does a property purchase affect applications for permanent residence?

For any foreign person seeking to reside permanently in South Africa, applying for a permanent residence permit, or at least a temporary residence permit, is obligatory. Permanent residence applications are assessed completely independently of the issue of property in South Africa. However, the current immigration law and regulations do allow for immovable property owned in South Africa to be taken into account when assessing the applicant's net worth.

Before embarking on the process of applying for permanent or temporary residence in South Africa, it is best to consult with an immigration lawyer since South Africa's immigration laws have recently changed and are complex.

10. To what taxation am I liable?

For income tax purposes, South Africa is no longer a source-based taxation system. In February 2000 proposed changes to the South African tax legislation were announced and, although the actual legislation has not been promulgated, the government has indicated its intention to change from a source-based to a residence-based taxation system.

In addition, a Capital Gains Tax was introduced in October 2001 and clients are advised that it is prudent in all cases to seek professional legal and tax advice.

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 and must be authenticated if signed outside South Africa. This is sometimes inconvenient and it is possible, and often advisable, to leave a General Power of Attorney in favour of an entrusted person within South Africa to assist in this regard. Where the purchaser is married, which marriage is governed by the laws of a foreign country and a mortgage bond has been applied for; please note that the spouse of the purchaser will be required to assist the purchaser in signing the mortgage bond documentation. Marriages according to the laws of the England and Scotland are exceptions to the aforegoing rule.

Buying A Property
Offer To Purchase/Agreement Of Sale
The Offer to Purchase/Deed of Sale will contain certain of the following standard provisions:

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 for the benefit of the purchaser.

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. It is, however, possible to negotiate the issue of a Standby Letter of Credit from an overseas institution in certain circumstances.

OCCUPATION, POSSESSION, TRANSFER AND OCCUPATIONAL RENTAL

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 the risk of ownership to pass on the date of possession. Transfer refers to the actual date of registration of ownership in the Deeds Registry in favour of the purchaser. Occupational consideration is the rental payable by the party occupying the property belonging to another where the date of occupation and date of transfer differs, which is better expressed in Rand terms or as a percentage of the outstanding balance of the purchase price.

VOETSTOETS

This is a standard inclusion in all deeds of sale and implies that the property is bought as is. As is means 'in the exact condition in which the property is found'. However, all patent and latent defects present in the property within the sellers' knowledge must be brought to the attention of the purchaser. It is not standard in South Africa to conduct property surveys but these can be arranged with the assistance of the estate agent or an attorney and should be included as a condition of the purchase.

ELECTRICAL AND BEETLE-FREE CERTIFICATE

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 certificate, whilst a standard inclusion in the Agreement of Sale, is neither a legal requirement nor included in sales of sectional title units. 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.

FIXTURES AND FITTINGS

A property is sold together with all fixtures and fittings of a permanent nature situated thereat. Generally fixtures and fittings include anything which is attached to the property or which by virtue of its considerable mass accedes to the property. In the event of any 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.

The format of agreements concluded for the acquisition of shares/members interest and loan accounts in property-owning companies/close corporations contains many of the aspects discussed above, although it is substantially different and includes numerous warranties and indemnities granted by the seller to the purchaser who acquires the property-owning entity together with its financial history.

Exchange Control/Repatriation Of Funds
All funds introduced from outside South Africa to acquire fixed property within South Africa may be repatriated together with any profit on resale of the property, provided, the title deed of the property has been endorsed "non-resident". Similarly, funds introduced to acquire shares in a company/members interest in a close corporation may be repatriated together with any profit on resale, provided, the relevant securities have been endorsed "non-resident". Funds, introduced into South Africa in the form of a foreign loan to fund acquisitions of corporate entities which own property in South Africa, may be repatriated in terms of the original loan approval by the Reserve Bank. The profit on resale may also be repatriated, provided, the relevant securities have been endorsed "non-resident".

Income Tax
South Africa follows a revenue-based income tax system meaning that income earned from a South African source will be subject to ordinary income tax. Accordingly, any rental earned by non-residents in respect of South African properties will be subject to income tax and it is the responsibility of the non- resident to register as a South African taxpayer.
Income earned by natural persons below R 32 222.00 per annum (for persons under the age of 65) and R50 000.00 (for persons above the age of 65) is exempt from income tax, whilst all income earned over and above the aforesaid amounts, will be taxed at a marginal rate

applicable to that non-resident in accordance with published tax tables. The marginal tax rate is calculated on a sliding scale with a maximum rate of 40%.
Corporate entities are subject to a tax rate of 30% of each Rand of taxable income whilst the equivalent rate for trusts is 40%. Non-resident companies are taxed at a rate of 35% but are exempt from secondary tax on companies ("STC") in respect of dividends paid.
On death a person is deemed to have disposed of all property at market value hence triggering a CGT liability. For non-residents this deemed disposal applies to immovable property situated in South Africa. In addition on death a person is liable for estate duty at 20% (after deducting an R1.5million abatement from net assets and after deducting any CGT payable by virtue of the deemed disposal of the property). In the case of a non-resident estate duty would be levied on immovable property situated in South Africa (subject however to the terms of any applicable Double Death Duties Act entered into by South Africa with any other State).
The only exception to the foregoing is where a person bequeaths his or her estate to his or her spouse the bequest is exempt form both CGT and estate duty.

Capital Gains Tax
South African residents are liable for the payment of Capital Gains Tax (CGT) on the disposal of any asset, subject to certain limited exceptions.

Non-residents, however, are only liable to pay CGT on the disposal of the following:

- 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.

CGT is payable in the year in which the asset is disposed of and is calculated by adding 25% of the capital gain, or profit, to the individual's income for that year and taxing that income at the individual's marginal rate of income tax. The maximum marginal income tax rate for individuals in South Africa is presently 40% (reached at taxable income levels above R270 000). The capital gain is calculated and disclosed in the individual's income tax return for the year in which it is sold.

Thus, if a non-resident disposes of an immovable property in any year of assessment and is not already registered as a South African taxpayer, he or she will have to register as such and submit an income tax return reflecting the calculation of the capital gain, and will be liable for the payment of CGT on that gain.

CGT became effective on 1 October 2001 and is thus payable only from that date.

The amount of a capital gain is calculated either by deducting the value of the property as at 1 October 2001 (together with the costs of acquiring and improving the property) from the proceeds on disposal of the property or by apportioning the amount of time the property was owned between the period before 1 October 2001 and the period after that date.

South African residents do not pay CGT on the first R1 million of profit made on the disposal of their primary residence. However, non-residents will not qualify for this exemption if their primary residence is not in South Africa.

SA Immigration Act
The Immigration Act number 13 of 2002 came into operation on the 7th April 2003 and

heralded a degree of certainty in terms of the various categories of temporary and permanent residence in South Africa for the first time. It also represented an Act of Parliament upon which all interested parties and stakeholders had been give an opportunity to give input. Much of this input has been included in the the current Act and Regulations.

The Immigration Act Amendment Bill was signed into law by the President of South Africa on the 22nd October 2004 but will not come into operation until the draft new regulations in terms of the Immigration Act and its Amendment have been gazetted into operation. There is still at an administrative and public participation process which will have to be followed before this can happen and in addition the draft regulations still have to be forwarded to the Immigration Advisory Board "the IAB" for that body to advise the Minister on the final drafts.

The draft regulations will then be published in the final format and hopefully approved by the Minister and gazetted into operation. This would have to take place simultaneously with the coming into operation of the Immigration Amendment Act.

One of the main purposes of the draft Immigration Amendment Act and Regulations is to bring about a degree of certainty in the immigration law and regulatory sphere. It is certainly hoped that this goal can be achieved.

Full particularity will be carried in updates of this article as and when the information comes to hand.

The most important categories of permits under the current Immigration Act and Regulation are set out hereunder together with comment, wherever possible, of what can be expected in terms of the Immigration Amendment Act and the new Regulations:

Temporary Residence Permits

Visitors Permit (Section 11 of the Act) :

- Cannot exceed a period of three months;
- Section 11(1) ((b) (ii) however provides for issue of a permit for a period not to exceed three years to a foreigner who can prove available resources in South Africa to sustain themselves (to the satisfaction of the Department of Home Affairs) and who is in South Africa and engaged in activities such as academic sabbaticals, voluntary or charitable activities, research or “other prescribed activities and cases”. This last category opens up the door for long term visitors permits to be granted in appropriate cases for up to three years, he so called ”long term visitors permit”.
- All applications to extend a permit must be made timeously and at least thirty days prior to expiry of the current permit;

Work Permits (Section 19 of the Act)

- Various categories of temporary work permit are provided for in the Immigration Act. All of these are linked to the applicant having an offer of employment and the required skills, qualifications and experience for the position. An overriding factor in all of this type of application is that the prospective employer must show what efforts have first been made to secure the services of a South African Resident before a foreign national can be employed. This is generally achieved by proving an advertisement in the national printed media in respect of the position being offered him by way of a report from the regional Department of Labour. In the quota permit, intercompany transfer and the category where the applicant is in a spousal relationship with a South African citizen, the advertisement requirements are dispensed of. Applications in this category must be lodged at the South African High Commission or Embassy closest to where the applicant normally resides all should be processed at the Department of Home Affairs regional office closest to where the applicant will reside and work, if the applicant is already in South Africa It is advisable to consult with and have an assessment of viability done by a specialist immigration attorney before embarking on an application.

- A permanent residence permit in the “worker” category is also possible but can only be made contingent upon a job offer that is permanent, in line with the applicant’s skills, experience and qualifications, which must also be inherent requirements of the job being offered to that applicant. Applications in this category should be lodged at the South African High Commission or Embassy closest to where the applicant resides or works.

Retired Persons Permit: (Section 20 of the Act)

- A temporary residence permit in this category may be granted for periods exceeding three months and up to four years providing that an applicant can show that they have the required financial resources to sustain and support themselves during their stay in South Africa and in specific either a pension or lifelong retirement annuity or a “retirement account” providing the required income for this purpose.
- A qualified dispensation to” work” to a limited degree in respect of retirees exists in the current regulations. The new regulations which will come into force shortly will in all likelihood make provision for a further relaxation of this requirement and may even lift the restrictions on “work” .Off necessity this may require the retiree to obtain a work permit to be endorsed onto their retired persons permit.
- Retirees must be able to show that their pensions or annuities will deliver to them an income of not less than ZAR 20,000-00 per month readily transferable to South Africa, alternatively a “retirement account” of not less than ZAR12 Million delivering an income of not less than ZAR 15,000-00 per month (The new regulations about to come into operation will in all likelihood provide for a relaxation of the qualifying monthly income amount and will in all likelihood also allow for the equivalent rental value of property owned by the retiree to be factored into the income amount. The condition being that the retiree must be living on the property, however it must be remembered that this comment must not be acted upon and till the Immigration Amendment Act has been promulgated in law and there is certainty on this aspect).
  • In the permanent residence permit category it is an additional requirement that the applicant show that the rights they have to the pension/annuity or “retirement account” are lifelong in terms of duration.
- Note: Under the current Immigration Act there is a requirement to have a South African Chartered Accountant certify the financial aspects. The Immigration Amendment Act will do away with this requirement in most categories of residence and replace it with the requirement that an applicant must prove “to the satisfaction of the Director General” that they have adequate resources.

Business permit category: (Section 15 of the Act)

- A temporary residence permit (known as the "own business/self-employment" category under the old immigration laws) may be obtained for a period of up to two years from the date of the issuance of the permit and which is renewable for further to your periods.
- In order to succeed in this category a potential immigrant must meet the capitalisation requirements of at least ZAR 2.5 million to be invested as part of the book value of the business. This amount must be sourced from abroad. Upon application to the Department of Home Affairs May, acting upon recommendation from the Department of Trade and Industry may reduce or even the waive the capitalisation requirement.

- In addition to the capitalisation requirement a potential immigrant intending to apply in this category, must also prove one of the following:
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  o A business track record to prove entrepreneurial skill.
  o Prove that the business contributes to the geographical spread of economic activity.
  o Proof that at least five South African citizens or residents will be employed.

o This prove that the business in question is either in the information technology, clothing and textiles, chemicals and biotechnology or agro-processing, tourism, crafts or automotive and transport industries.
o The export potential of the business; or
o Calls for or involves a transfer of technology not previously generally available in South Africa.
o A sustainable and viable business plan, certified by a South African Chartered Accountant must be filed with the Department of Trade and Industry, requesting a recommendation and must also be included with documentation lodged with the application automatically. This business plan must show short to medium term sustainability and viability.

Applications in the business permit category should be lodged at the nearest South African consular office to where the applicant resides or works.
o A permanent residence application in the business permit category must comply with all of the above criteria and obviously must also show continued long-term sustainability and viability of the business.

Information courtesy of Julian Pokroy, Immigration Specialist Attorney.

The contents of this brochure are presented for information purposes only and they are not to be depended on in any particular transaction. Professional legal and accounting advice should be sought on individual transactions. The contents contained herein are subject to change.

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