



fninc

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ESTATE AGENTS TO DO LIST

Matters to be considered in regard to your seller:

1. Are the Title Deeds and Mortgage Bonds of the seller to the property readily available?

This is a particularly relevant question where the seller has recently dealt with his property, in that he has registered a further bond or he has only recently taken transfer. It also is relevant if any of these documents are missing, damaged or unusable as same required additional actions from the conveyancer to replace the documents.

2. Is the seller authorised to instruct you to sell the property and to give you mandate in this regard? Always establish the identity of your seller.

- 2.1 Do this by conducting a deeds office search before attending to a seller for the first time to ensure that you have the correct particulars of the property and the person authorised to deal with and sell the property. If there appears any information on the deeds office printout that is not clear refer to your conveyancer for guidance.

- 2.2 If your seller is married, get documentary proof of the marriage regime applicable to his marriage.

Take note that all parties married in community of property needs to be assisted by their spouse in selling property that forms part of the joint estate.

All parties married out of community of property can sell their immovable property registered only in their name exclusively.

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However, sellers married according to the laws of any other country, requires the assistance of their spouses in terms of Section 17(6) of the Deeds Registries Act (Act 47 of 1937).

- 2.3 Be aware when you are dealing with minor sellers, that they cannot sell their immovable property without the consent of the Master of the High Court (as upper guardian of all minors) if the purchase price does not exceed R250 000 or and Order of the High Court authorizing the sale if the purchase price exceeds R250 000
 - 2.4 Do you have all the supporting documents for a Company, Close Corporation or Trust you may be dealing with (see FICA checklist) and a duly signed resolution appointing the party who purports to act on behalf the entity and giving him the power to sell the property on behalf of the Company, Close Corporation or Trust.
 - 2.5 If the seller is a company or close corporation, ensure that the entity is still in business and has not been de-registered with the Companies and Intellectual Property Commission (see our article published in our Knowledge Centre under the heading De-Registered Entities and the Re-registration process)
3. Is the seller receiving invoices from COJ which includes all services and utilities? The invoice must reflect Rates, Taxes, Water, Electricity, Pikitup and Effluent accounts for the seller's property on the Council and/or Eskom invoices?
 4. Will the seller incur any penalty interest in respect of the cancellation of his existing bond? In terms of the National Credit Act (NCA) most financial institutions require their customers to give 90 days' written notice of cancellation of their loan before the completion of the original full 20-year term of loan. The early termination charge is usually calculated by multiplying the monthly interest on the loan with the three months' notice required, less the completed part of the notice period that has run out between the written notice to the bank and the registration in the deeds office.
 5. Does the personal information checklist to the agreement of sale contain the full particulars of the seller, including all contact details, existing bond account number, managing agents in respect of sectional title complexes, details of HOA in applicable, particulars re marital status?
 6. Apply your mind specifically to the Mandatory Disclosure as required by the Property Practitioners Act. Failure by the seller to disclose latent defects or patent but obscured defects often result in conflict and delays and sometimes even refusal by aggrieved buyer to move forward with the transaction. As you are also a signatory of the Mandatory Disclosure, it will benefit you to consider the answers thereon and compare it with your knowledge of the property and raise inaccuracies with the seller, before concluding offers based on the Mandatory Disclosure.

7. Is the seller possibly a VAT vendor?

If the seller is a VAT vendor in respect of the sale, keep track of the 15% VAT liability the seller will incur to SARS upon receipt of the purchase price, which ultimately reduces his net profit. Conversely the purchaser will not be liable for transfer duty and therefore the property purchase presents this benefit to the purchaser.

Make sure your sale agreement adequately covers the possibility of VAT being applicable and where liability will fall.

If there is uncertainty as to whether the transaction attracts VAT or Transfer Duty, resist the temptation to proffering an opinion in this veritable minefield.

Only the shareholders / members of the entity in question are able to answer the following question:

Does the sale of the property constitute the sale of goods sold in the course or furtherance of the VAT enterprise? If the answer is affirmative the sale will be subject to VAT payable by the seller. There are substantial volumes of court cases dealing with the issue of whether a sale triggers VAT or not and it is recommended that the shareholders / members get written assurances from their Auditors/ Financial Advisors as the professions in this space.

If both the seller and purchaser are VAT vendors and certain essential terms are incorporated into the agreement of sale, the rate at which VAT is payable is zero. Please refer to us for these essential terms prior to concluding the agreement.

If the seller is not a VAT vendor the purchaser will have to pay transfer duty, even when the purchaser is a VAT vendor. The purchaser will however be able to claim the transfer duty from the Receiver of Revenue in his capacity as a VAT vendor.

8. If your seller wishes to make a withdrawal against the access facility of his bond account, he must do so before the agreement of sale is passed onto the conveyancing attorney.

Once the conveyancer has received the instruction and called on the seller's bank for the release of the Title Deeds and the cancellation figures, the bank will likely freeze the bond account, thus disabling the seller's ability to withdraw money against his access facility. The seller will nevertheless remain liable for his bond instalments as and when they fall due in terms of the mortgage loan agreement and they will remain due and payable until registration is passed in the deeds office.

9. Never project registration dates for parties to a transaction. Considering the

Numerous steps involved in the transfer process and the various role players involved, the conclusion of a transaction is a team effort.

The team potentially includes not only the transfer, bond and bond cancellation - attorneys but will also include SARS, the Local Authority, Bond registration banks, Bond Cancellation banks and/ or Body Corporates and/ or Homeowners Associations, Sellers and Buyers, the Deeds Offices and linking attorneys in respect of subject to sale properties together with all their transactional teams.

10. Ensure that the seller warrants and confirms in the agreement of sale that he has at all times complied with the conditions of title, the provisions of any servitudes and town planning schemes and with all laws and by-laws, ordinances and regulations in respect of any improvement made to the property.

It happens from time to time that sellers attends to extensions and alterations of structures on the property without getting the requisite prior approvals therefore and one needs to be mindful of the potential existence of such problems which could result in the failure of a transaction at worst or the delay of the transaction at best.

11. Ensure that your seller is in possession of a valid electrical certificate of compliance prior to commencing the marketing of the property.
12. If there is a gas installation in the property of the seller, ensure that the seller is in possession of a gas conformity certificate issued a person registered and accredited to issue a Certificate of Conformity
13. Caution your selling client to maintain all payments in respect of home loans, homeowners' association, rates and taxes and levies up until the date of transfer.

(pro rata refunds will be attended to by the COJ after transfer is passed)

Matters to be considered in regard to your purchaser:

1. Establish the identity of your purchaser and the matrimonial regime that may be applicable so that you can determine who needs to sign the sale agreement and who needs to apply for mortgage finance, if applicable.

Minor buyers can purchase and take transfer of immovable property in their own name, but if they must mortgage the immovable property they buy, they will require the consent of the Master of the High Court (as upper guardian of all minors) if the mortgage does not exceed R250 000 or an Order of the High Court authorising the mortgage if the mortgage exceeds R250 000. Note that in terms of the Children's Act No 38 of 2007, children become majors on reaching the age of eighteen years.

Insofar as the conclusion of the agreement of sale is concerned, note that a minor needs to be assisted by his/her guardian in the conclusion of any agreement. Note further that a minor under the age of seven cannot enter into any agreement, even with the assistance of his guardian but only by the legal guardian can.

Do you have all the supporting documents for a Company, Close Corporation or Trust buyer (see FICA checklist) and a duly signed resolution appointing the party who purports to act on behalf the entity and giving him the power to buy the property on behalf of the Company, Close Corporation or Trust?

If the purchaser is a company or close corporation, ensure that the entity is still in business and has not been de-registered with the Companies and Intellectual Property Commission (see our article published in our Knowledge Centre under the heading De-Registered Entities and the Re-registration process)

2. Check that the terms or conditions of the bond grant do not contradict the terms of the agreement.

It happens sometimes that the bank who grants the bond imposes a condition that the purchaser must cancel his existing bond before being allowed to register his new bond on a transaction that was specifically not made subject to the sale of the purchaser property.

Sometime when the bond instruction is received by the bond attorney the terms of the loan does not agree with the terms the purchaser negotiated and this necessitates an amended instruction which delays the bond registration and issuing of guarantees process.

3. Sometimes purchasers wish to change the financial structure or the parties in respect of the deal after it has been concluded. This can only be achieved by way of an additional written consensual agreement between the seller and the buyer.

Coach the purchasers to ensure that they are aware of the time sensitive obligations imposed upon them by the stipulated time frames in the agreement of sale.

- 3.1 Payment of the Deposit within the time prescribed time limit, regardless thereof that the sale may be subject to suspensive conditions.
- 3.2 The latest date for the Bond grant condition to be met. Advise the purchaser of the consequences if he fails to obtain a bond and the possible consequences of the Doctrine of Fictional Fulfillment.
- 3.3 The guarantee due date
- 3.4 Payment of transfer and bond costs. What is the amount payable (calculate with reference to our website or APP costs calculators) and by when does it need to be paid?

4. Delays in funding the purchase price or costs invariably result in delays that prejudice the parties to the transaction and could lead to conflict and potential cancellation of the deal.

Where a portion of the purchase price comes from offshore sources note that the Foreign Exchange Control regulations of South Africa regulate the flow of money into and from South Africa and as all incoming monies needs to be channeled to South African bank account via the reserve bank (all of whom have responsibilities as accountable institutions in terms of the Financial Intelligence Center Act)

It is therefore not possible to guarantee time frames for receipt of offshore payments and it is good practice to get the foreign bankers and as well as the local banks to give an estimation of the expected time frame.

Where the transaction is funded by Investment sources, get clarity on the time frames necessary to realize those investments.

5. Should the purchaser require an additional loan to finance a portion of the purchase price for which he was not able to raise a mortgage loan, this additional loan will further burden the purchaser insofar as his balance sheet is concerned and will likely result in the bank who granted him a partial mortgage loan, withdrawing therefrom on the basis of over indebtedness in terms of the National Credit Act.

General matters to be considered:

1. Absent seller/s and/or purchasers.

If any of the parties to the agreement are either not in South Africa at the time of conclusion of the agreement or plan to leave South Africa while the transfer is under way, ensure that this party executes a General or Special Power of Attorney before they depart, in favour of a person present in South Africa who will be able to sign and attend to matters pertaining to the transfer process.

Ensure that the General or Special Power of Attorneys are drawn up by the Conveyancer attending the transfer, as the Conveyancer will be aware of the specific practice requirements of the relevant Deeds Registry.

If it is unavoidable that the General or Special Power of Attorney needs to be signed outside of South Africa, note that very strict rules apply to the execution of the document and the authentication of the signatures thereon and it is recommended that a Conveyancer well versed in the provisions of Rule 63 of the High Court Act sends the documents for signature together with clear instructions regarding the execution thereof to the party who has to sign the document/s.

2. SARS may cross reference transacting parties general tax status when assessing the transfer duty declarations. Caution all parties to the transaction that unresolved tax affairs may adversely impact on the speed with which the transfer duty receipt required by the deeds office, is issued