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FOREIGNERS BUYING HOMES IN SOUTH AFRICA

The purchase and sale of property in South Africa is governed in terms of common law. In terms of our common law any person with full legal capacity may enter into contracts unhindered.

There are no restrictions for foreigners purchasing property in South Africa, save for illegal foreigners purchasing property. A foreigner can purchase property over the internet but should they wish to reside in the property, they will have to comply with the Immigration Act and apply for the requisite visa.

The Immigration Act 13 of 2002 repealed the Alien Control Act *in toto*.

1. **ILLEGAL FOREIGNER** (entered the Republic of South Africa without a passport and/or without a valid visa)

1.1 In terms of the Immigration Act an 'illegal foreigner' means a foreigner who is ***in the Republic*** in contravention of the Immigration Act 13 of 2002 and includes a prohibited person.

A 'prohibited person' means any person referred to in section 29 of the Immigration Act.

Section 29 states:

- (29) The following foreigners are prohibited persons and do not qualify for a port of entry visa, admission into the Republic, a visa or a permanent residence permit:
- (a) Those infected with or carrying infectious, communicable or other diseases or viruses as prescribed;
 - (b) Anyone against whom a warrant is outstanding or a conviction has been secured in respect of genocide, terrorism, human smuggling, trafficking in persons, murder, torture, drug-related charges, money laundering or kidnapping;
 - (c) Anyone previously deported and not rehabilitated by the Director-General in the prescribed manner;
 - (d) A member of or adherent to an association or organization advocating the practice of racial hatred or social violence;
 - (e) Anyone who is or has been a member of or adherent to an organization or association utilizing crime or terrorism to pursue its ends;
 - (f) Anyone found in possession of a fraudulent visa, passport, permanent residence permit or identification document.

1.2 Illegal foreigners, specifically with regards to Conveyancing matters, are now dealt with by section 42 of the Immigration Act.

This Section states:

- “(1) Subject to this Act, and save for necessary humanitarian assistance, no person, shall aid, abet, assist, enable or in any manner help –

- (a) an illegal foreigner; or
- (b) **a foreigner** in respect of any matter, **conduct or transact** which **violates such foreigner's status**, when applicable,

including but not limited to –

- (ix) letting or selling or in any manner making available any immovable property in the Republic to him or her”

Section 49(6) makes any transgression of this prohibition a criminal offence.

Section 49(6) states:

“(6) Anyone failing to comply with one of the duties or obligations set out under sections 38 to 46 of this Act shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding 5 years.”

Section 42(2) states that it will not be a defence if one did not now know the person was an illegal foreigner, if one ought to reasonable have known that the person was an illegal foreigner.

Section 42(2) states:

“(2) In any criminal proceedings arising out of this section, it is no defence to aver that the status of the foreigner concerned, or whether he or she was an illegal foreigner, **was unknown to the accused if it is proved that the accused ought reasonable to have known the status of the foreigner**, or whether he or she was an illegal foreigner.”

It is therefore, clear that one should have some working knowledge of the different ways a foreigner may enter South Africa.

2. CRIMINAL SANCTIONS

In terms of section 49(6) anyone failing to comply with one of the duties or obligations set out under sections 38 to 46 of the Immigration Act shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding 5 years.

3. ENTRY INTO THE REPUBLIC OF SOUTH AFRICA

Section 9 of the Act states:

“(1) Subject to this Act, no person shall enter or depart from the Republic at a place other than a port of entry.

(4) A foreigner who is not the holder of a permanent residence permit (contemplated in section 25) may only enter the Republic as contemplated in this section if –

- (a) his or her passport is valid for a prescribed period; and
- (b) issued with a valid visa as set out in this Act.”

4. TYPES OF VISAS A FOREIGNER CAN HOLD

A valid visa could be one of the following:

4.1 Visas to temporarily sojourn in Republic – upon admission, a foreigner, who is not a holder of a permanent residence permit, may enter and sojourn in the Republic only if in possession of a visa issued by the Director-General for a prescribed period

4.2 Visitor’s Permit – a visitor’s permit may be issued for any purpose other than those provided for in sections 13 to 24, and subject to subsection (2), by the Director-General in respect of a foreigner who -

- (a) complies with section 10A;
- (b) and provides the financial or other guarantees prescribed in respect of his or her departure: Provided that such permit –
 - (a) may not exceed three months and upon application may be renewed by the Director-General for a further period which shall not exceed three months; or
 - (b) may be issued by the Director-General upon application for any period which may not exceed three years to a foreigner who has satisfied the Director-General that he or she controls sufficient available financial resources, which may be prescribed and is engaged in the Republic in –
 - (i) an academic sabbatical
 - (ii) voluntary or charitable activities;
 - (iii) research; or
 - (iv) any other prescribed activity.

In terms of Section 11(6) a visitor’s permit may issued to a foreigner who is the spouse of a citizen or permanent resident and who does not qualify for any of the permits contemplated in sections 13 to 22: Provided that –

- (a) such permit shall only be valid while the good faith spousal relationship exists;
- (b) on application, the holder of such permit may be authorized to perform any of the activities provided for in the permits contemplated in sections 13 to 22; and
- (c) the holder of such permit shall apply for permanent residence contemplated in section 26(b) within three months from the date upon which he or she qualifies to be issued with that permit

- 4.3 Study Permit** – A Study permit may be issued, in the prescribed manner, to a *foreigner* intending to study in the *Republic* for a period of not less than the period of study, by the Director- General; Provided that such foreigner complies with the prescribed requirements.
- 4.4 Treaty Permit** – A treaty permit may be issued to a foreigner conducting activities in the Republic in terms of an international agreement to which the Republic is a party.
- 4.5 Business Permit** – Subject to subsection (1A) a business visa may be issued by the Director-General to a foreigner intending to establish or invest in, or who has established or invested in, a business in the Republic in which he or she may be employed and an appropriate visa for the duration of the business visa to the members of such foreigner’s immediate family: Provided that –
- (a) such foreigner invests the prescribed financial or capital contribution in such business;
 - (b) the contribution referred to in paragraph (a) forms part of the intended book value of such business; and
 - (c) such foreigner has undertaken to –
 - (i) comply with any relevant registration requirement set out in any law administered by the South African Revenue Services; and
 - (ii) employ the prescribed percentage or number of citizens or permanent residents within a period of 12 months from the date of issue of the visa; and
- (1A) No business visa may be issued or renewed in respect of any business undertaking which is listed as undesirable by the Minister from time to time in the Gazette, after consultation with the Minister responsible for trade and industry.
- 4.6 Crew Permit** – The Director-General may, as prescribed, issue a crew permit to a foreigner who is a member of the crew of a conveyance.
- 4.7 Medical Treatment Permit** – A medical treatment permit may be issued to a foreigner intending to receive medical treatment in the Republic for longer than three months by-
- (a) the Department, as prescribed, or
 - (b) the Department through the registrar’s office or a designated official of an institution where the foreigner intends to receive treatment, provided that such institution –
 - (i) has been approved by and is in good standing with the Department;
 - (ii) certifies that it has received guarantees to its satisfaction that such foreigner’s treatment costs will be paid;
 - (iii) in the case of a minor, provides the name of a person in South Africa who is, or has accepted to act, as such minor’s guardian while in the Republic or certifies that such minor will be accompanied by a parent or guardian to the Republic;
 - (iv) undertakes to provide a prescribed periodic certification that such foreigner is under treatment; and
 - (v) undertakes to notify the Department when such foreigner has completed his or her treatment.
- 4.8 Relative’s Permit** – A relative’s permit may be issued for a prescribed period by the Director-General to a foreigner who is a member of the immediate family of a citizen or a permanent resident, provided that such citizen or permanent resident provides the prescribed financial assurance.

4.9 Work Permit – A general work visa may be issued by the Director-General to a foreigner not falling within a category contemplated in subsection (4) and who complies with the prescribed requirements.

Subsection (4) – subject to any prescribed requirements, a critical skills work visa may be issued by the Director-General to an individual possessing such skills or qualifications determined to be critical for the Republic from time to time by the Minister by notice in the Gazette and to those members of his or her immediate family determined by the Director-General under the circumstances or as may be prescribed.

4.10 Retired Person Permit – A retired person permit may be issued for a period exceeding three months to a foreigner who intends to retire in the Republic, provided that the foreigner provides proof that such foreigner has –

- (a) the right to a pension or an irrevocable annuity or retirement account which will give such foreigner a prescribed minimum payment for the rest of his or her life from the country of his or her origin; or
- (b) a minimum prescribed net worth.

Further in terms of subsection (1A) the spouse and dependent children accompanying the holder of a retired person permit may be issued with an appropriate permit issued in terms of this Act.

4.11 Corporate Permit – Subject to subsection (1A), a corporate visa may be issued by the Director-General to a corporate applicant, to employ foreigners who may conduct work for such corporate applicant in the Republic.

Subsection (1A) states that no corporate visa may be issued or renewed in respect of any business undertaking which is listed as undesirable by the Minister from time to time in the Gazette, after consultation with the Minister responsible for trade and industry.

4.12 Exchange Permit – An exchange permit may be issued by the Department to a foreigner

- (a) participating in a programme of cultural, economic or social exchange, organized or administered by an organ of state or learning institution, in conjunction with a learning institution or an organ of a foreign state, provided that –
 - (i) such organ of state or learning institution reports to the Director-General on the stages and the completion of the relevant programme together with other prescribed information; and
 - (ii) it may be prescribed that, in respect of certain programmes, upon expiration of such permit such foreigner may not qualify for a status until he or she has complied with the requirement of a prescribed period of physical presence in his or her foreign country or of domicile outside the Republic; or; and
- (b) who is under 25 years of age and has received an offer to conduct work for no longer than one year: Provided that –
 - (i) the prospective employer certifies that the position exists and has committed himself or herself to –
 - (aa) pay such foreigner remuneration which complies with applicable legal requirements
 - (bb) provide for the welfare and the needs of such foreigner while in the Republic under the aforesaid permit; and
 - (cc) report to the Department the failure of the foreigner to comply with the terms of his or her permit or to depart when so required

4.13 Asylum – The Director-General may, subject to the prescribed procedure under which an asylum transit visa may be granted, issue an asylum transit visa to a person who at a port of entry claims to be an asylum seeker, valid for a period of five days only, to travel to the nearest Refugee Reception Office in order to apply for asylum.

If the holder of an Asylum Transit Visa expires prior to the holder reporting to a Refugee Reception Office, the holder shall become an illegal foreigner.

4.14 Permanent Residence – The holder of a permanent residence permit has all the rights, privileges, duties and obligations which a law or the Constitution explicitly ascribes to citizenship.

5. DOCUMENTS TO BE REQUESTED FROM A FOREIGNER TO DETERMINE STATUS

The Conveyancer must make sure that when he or she deals with

1. A non South African citizen, or
2. A person that does not hold a permanent resident permit
- 3.

To obtain the following from the foreigner who is residing in South Africa

1. A valid passport as proof of Identity
2. Proof of legal entry into South Africa:
 - 2.1 Customs and Excise will check the foreigner's passport upon entry to ensure it is valid
 - 2.2 Customs and Excise will check the visa endorsed in the foreigner's passport to ensure that it permits the foreigner temporary residence in the Republic of South Africa, whereupon Customs and Excise will endorse the passport signifying valid entry in the Republic of South Africa
3. Verify that the foreigner is not a prohibited person in terms of section 29 of the Immigration Act
4. Proof of South African Income Tax Number (if registered)

To obtain the following from the foreigner who is not residing in South Africa

1. Valid passport as proof of Identity
2. Proof of residence in the country where he is residing.
3. Proof of South African Income Tax Number (if registered)

The above documents are required for FICA purposes.

WITHHOLDING TAX FOR NON-RESIDENTS ON THE SALE OF IMMOVABLE PROPERTY IN THE REPUBLIC OF SOUTH AFRICA

In terms of Section 35A of the Income Tax Act of 1962 any immovable property which is sold by a non-resident and the amounts payable to the non-resident as the seller (or the seller's agent, i.e. for or on behalf of the seller) exceed R2 million, the purchaser will have to withhold a part of the payment of the purchase price to the non-resident

The purchaser unfortunately is drawn into the web and has the duty to withhold the tax (at the appropriate percentage). The withholding tax is based on amounts actually paid.

In essence, where immovable property in South Africa is purchased by any person from a non-resident, that purchaser must withhold and pay over to the South African Revenue Service (SARS) from any amount to be paid to the seller or the seller's agent:

- 5% of the amount payable where the seller is a natural person;
- 7.5% of the amount payable where the seller is a company; or
- 10% of the amount payable where the seller is a trust.

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