



Property: all you need to know – Module 1

“DON'T WAIT TO BUY REAL ESTATE, BUY
REAL ESTATE AND WAIT”

*THE BEST WAY TO PREDICT THE
FUTURE IS TO CREATE IT*

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Property: How you obtain it and what you do with it

In South Africa private property is acquired in terms of the Alienation of Land Act of 1981. In terms of Section 2 of this Act property (farmland, an erf in a municipal area and a sectional title unit are all property) can only be acquired by an individual, company, trust or close corporation if the agreement to purchase it, is in writing and signed by both the purchaser and seller. If the parties are represented, then the authority of the representative to act, must be in writing before he/she enters into the agreement. Public auctions are excluded from this provision but are still dealt with under the Act.

In addition the agreement need to clearly identify the property by its legal description, or less preferably street address and the price must be certain. It is common practice to add suspensive conditions, costs clauses, electrical and other legally required certificate clauses, breach clauses etc. but the absence of these clauses will not render a sale agreement for property void or invalid. All agreements for property where the price is less than R250 000 and where the purchaser is a natural person, can be terminated by delivering written notice to the seller within 5 business days after signing a sale agreement.

At this point it is necessary to clearly define the Land Sale Agreement also known as a Deed of Sale. The most common method used in most property transactions is for the purchaser to make an offer to the seller in a format known as “An Offer To Purchase”. These are almost exclusively used by Estate Agents. This offer is presented to the seller, pre-signed by the purchaser, with an understanding that once accepted by the seller a Land Sale Agreement or Deed of Sale has been concluded. Note that before the signature of the seller is affixed no agreement exists even if the seller indicates his willingness to accept the offer verbally, by sms, email or another format. The offer needs to be signed by the seller to be valid.

The other less used method is for the parties to sign an agreement jointly at the office of an attorney or another convenient meeting place. These agreements are pre-drafted on the instructions of the parties, or drafted by one or both of them together and becomes a valid Land Sale Agreement or Deed of Sale once signed by both. If the parties don't sign at once they usually do shortly after one another.

If any offer or agreement are altered by one party and the deletion/alteration or new clause is not signed by the other party then no consensus was reached and no valid agreement is in place. A valid agreement does not have to be one document and the parties can both sign separate papers but still have a valid agreement. An example will be where A offers to buy B's land for a certain price and he puts this in writing and sign it. B on receipt of the offer then drafts a letter and affix it to the offer of A in which he agrees to accept the offer. He signs the letter. This will also constitute a valid agreement.

Can an offer to purchase property or any sale agreement for land be signed electronically? No – The Electronic Communications and Transactions Act (ECTA in short) deals with electronic signatures and specifically excludes any agreement under the Alienation of Land Act, thereby excluding any agreement where immovable property is the subject of the sale.

Please note that certain transfer documents flowing from the sale of a property may be signed electronically and in 2018 a property was even registered in the Bloemfontein Deeds Office using an Advanced Electronic Signature (AES). FNB is also using electronic signatures for some of its bond documents.

We are all expecting this field to expand and change rapidly and in 2019 the Electronic Deeds Registration Systems Act was promulgated, although it has not yet been implemented. Covid-19 may just be the accelerator that fast track this.

Is a scanned offer to purchase or land sale agreement valid if signed by both the seller and the purchaser? This seems straight forward, but keeping the above in mind remember that the sale of land can only take place by signature with a “wet” or pen signature.

A signature’s purpose is to provide a) evidence of the identity of the signatory b) that the signatory intended his/her signature to be on the document and c) that he/she agrees to the content of the document.

In common law it is also required that a person must have applied the signature him/her-self. With a scanned copy fraud is easy. Sometimes a person's signature may not be his/hers but may be produced by a spouse or partner or any external party.

Make sure that the scanned copy you receive has a "wet" signature on it and not an electronic signature. As far as possible try and make sure the correct party signed the offer/agreement. You can do this by phone confirmation (if you know the person's voice), by asking some investigative questions that only the party involved should know or any other way you can come up with.

Remember the rule of "Best Evidence". You want the best possible evidence that the agreement you facilitated/signed is legitimate and correct. Nothing beats an original agreement when it comes to this. Never underestimate the value of diligence and doing your homework. It may one day make the difference between having or losing a deal.

Your client/counterparty is married under the laws of a foreign country. He/she says he/she is married out of community of property or he says nothing about the way that country's laws work but he/she insists that he/she wants to buy the property in his/her name only. Can you proceed? Yes a person married in a foreign country can buy property in his/her own name in South Africa even if married "in community of property" in that country BUT when the buyer in the above example wants to sell the property it can only be done with his/her spouse's consent. So if this same person one day becomes your seller make sure his/her spouse gives you written consent to the sale or you may wrongly believe you are party to "a sure deal" just to find out the spouse is not going to consent.

Also remember that if the person needs a bond to acquire the property then his/her spouse needs to consent to the bond being registered. This consent is dealt with at the bond attorneys office but best you advise the buyer that his/her spouse will have to co-sign the Power of Attorney (PA) to register a mortgage bond. **REMEMBER** the spouse don't have to be a co-applicant on the bond he/she must merely sign the PA to register the bond.

Why is this: The fact is that the Deeds Office can not be expected to know all the various marital dispensations world wide. For this reason all foreign marriages are viewed as requiring spousal consent to sell or bond immovable property and therefore the need for consent when a property is sold or bonded.

I had many clients who are married out of community of property ask me if they can purchase the property in only the one spouses name but take a bond in both spouses name – the simple answer is that this is not possible as Section 50 of the Deeds Registries Act states that a bond can only be executed by the registered owner/s of land. This means that the same party/ies that are listed as the owner/s in the Deed must take the bond. Remember that depending on a banks lending criteria a spouse that is not the owner may sign surety for the debt of a spouse who is the registered owner but this is not the same as having a joint bond.

Similarly many people married in community of property asked if they can buy a property on their own. Here again the answer is no. Section 15 (2) (a) (b) and (g) of the Matrimonial Property Act prohibit the purchase, sale or taking of a bond by just one spouse.

Note that Section 15 (4) states that a spouse can consent to the actions of the other spouse within a reasonable time meaning that if only one party signed an offer it is possible to obtain a written consent from his/her spouse later and still have a valid deal. Remember that the Act specifically states that such a consent must be signed by two witnesses. Also take note that Section 15 (9) (a) states that a seller who deals with a buyer who does not disclose his/her marital status as married in community of property will be able to enforce the agreement if the spouse later refuse to consent to the purchase.

Please remember that a person married in community of property can own property in his/her own name only an example will be where that person inherited the property with a provision in the will of the deceased that the inheritance will fall out of the marriage provisions of the heir.

Many clients incorrectly believe that our law recognises relationships where people have lived together for many years or have been in a relationship but choose not to marry. They then refer to themselves as “common law married” or describe the partner as my “common law husband/wife”. This erroneous believe exist because many countries do recognise a long standing relationship as a common law marriage. NOTE South Africa does not.

If you are in a long relationship and you do not want to get married the best advise is to draft an agreement formalising your financial relationship. In exceptional cases and at a big expense a court my declare your relationship a “universal partnership” but this is not guaranteed and why take the chance? If you have children remember that they will always be entitled to maintenance and can claim for this from both parents.

If you die without a will the Intestate Succession Act comes into the equation. In short your belongings will be left to husband and children or if you don't have one or either to your closest living relatives. If you die with a will then your will dictates the person nominated as executor/trix and nominate the heirs.

Even if you don't have a will your family can appoint an attorney to assist them to get an executor appointed. Your immovable property can be sold once the executor is appointed just as with a person that died with a will. This will be the case where the heirs would prefer the property to be sold rather than inheriting it. In practice the executor will ask the heirs for guidance whether to sell or keep a deceased person's property.

In conveyancing the transfer of any estate property is always delayed due to the fact that the Deeds Office will only allow the transfer of the property once the Master of the High Court agreed to the sale. Always make it a condition of this type of sale that "this agreement is subject to approval by the Master of the High Court" and remember your seller is the executor. If the heir/s sign as seller/s a double transfer will be required wasting money and time.

Can a foreigner buy property in South Africa? Yes any person can purchase property in South Africa. A foreigner that is illegally in the country can however not purchase property. Foreign companies and trusts are also permitted to own property in South Africa although they may have to register with our company office as an "external company".

It is important when selling to a foreigner to explain to him/her/them that he/she/they will have to comply with the Immigration Act in other words they must have a valid visa or permit. Please make sure that these visas or permits are valid way in advance as you will get stuck if the documents lapse after the sale but before transfer.

Once property is bought the foreign buyer must register in South Africa as a tax payer due to capital gains tax and he/she/they will be subject to withholding tax if they sell.

Conditions for taking a bond as a foreigner is prescribed by exchange control regulations issued by the Reserve Bank as well as the commercial banks own lending criteria. In general this means that foreign purchasers can only borrow a certain percentage of the price of the property and that all permits for example work, temporary resident etc. must be valid and up to date.

What is the legal consequences of marriages in terms of Islamic or Hindu rites? These marriages are not recognised as legal marriages yet, although there is severe pressure on the Government to do so soon. A draft bill is in place but has not yet been signed into law. A recent court case have put the Government under pressure to promulgate the Act dealing with these marriages within 24 months.

For property this means that the parties should still be seen as unmarried and the husband or wife can purchase property without the consent or assistance of the other spouse. Remember that certain Imam's were accredited to also officiate marriages in terms of the Marriage Act and a marriage so concluded will be a normal marriage in or out of community of property depending on whether the parties entered into a Ante-nuptial agreement. The parties should be able to produce a valid civil marriage certificate if they want to claim the legal status of a valid recognised marriage.

Interesting to note is that as far back as 2003 did the then Supreme Court ruled that the Intestate Succession Act and the Maintenance of Surviving Spouses Act will be applicable to Islamic rite marriages even though the marriage itself is not yet recognised under South African law.

What is the legal status of a customary marriage? A marriage is only recognised if it is concluded in terms of the Marriages Act or the Civil Union Act and a customary marriage is governed by the provisions of the Recognition of Customary Marriages Act.

A customary marriage must be registered with the Department of Home Affairs to be legally recognised.

Customary marriages like Civil marriages are always in community of property unless the parties entered into a valid Antenuptial agreement.

Customary couples can also enter into a Civil marriage but only if it is the husband's first marriage. Any future marriages will only be recognised under the Recognition of Customary Marriages Act and only if the husband has filed an agreement with the Magistrates Court wherein he sets out the financial framework for all his spouses. Each spouse must be party to this agreement for it to be valid.