The Offer to Purchase

Schaëfer S

INCORPORATED

GENERAL NOTES ON COMPLETION AND UNDERSTANDING OF DEED OF SALE (OFFER TO PURCHASE)

1. <u>DESCRIPTION OF PARTIES</u>

1.1 PARTIES MARRIED IN COMMUNITY OF PROPERTY

To buy a property: In terms of the Alienation of Land Act either spouse can sign the Offer to Purchase for the acquisition of immovable property and thereby bind the joint estate, however in order to effect the transfer both parties must sign the transfer documents.

To sell a property: Either spouse may sign the Offer to Purchase with the written consent of the other spouse, but both must sign the transfer documents.

1.2 DIVORCEES WHO WERE MARRIED IN COMMUNITY OF PROPERTY
If the immoveable property was acquired before or after the date of marriage in community of property, the property is automatically an asset in the joint estate whether it is registered in the Deed Office on one or both parties' names and therefore both parties must sign the Offer to Purchase and transfer documents even if they are now divorced. If they are divorced, they are described as:

EXAMPLE:

1. SIPHO KIBI
   Identity Number ....
   Unmarried

2. SALLY KIBI
   Identity Number ......
   Unmarried

Even if one of the divorced spouses got married in the meantime in community of property with another spouse then the immoveable property, which was formally an asset of the joint estate of his/her first marriage, can only be sold if all three parties sign the Offer to Purchase and transfer documents as follows:

EXAMPLE:

1. SIPHO KIBI
   Identity Number ....
   and
   DOROTHY KIBI.... (note-this is the new wife)
   Identity Number ....
   Married in community of property to each other

   and

2. SALLY KIBI....... (note- this is the ex-wife)
   Identity Number ....
   Unmarried

1.3 PARTIES MARRIED IN TERMS OF CUSTOMARY MARRIAGES

In terms of the Recognition of Customary marriages Act of 1998, a customary marriage conducted after 15 November 2000 (date of commencement of the act) is automatically regarded as in community of property.

In terms of the Gumede v Pres. Of Rep of SA case the court found that sections of the aforesaid act that said that the act is not applicable to marriages before 15 November 2000 is unconstitutional and invalid. Thus, all customary marriages are regarded as being in community of property.

1.4 ESTATES

Should the Seller's Estate sell his/her property, then a duly appointed Executor Administrator by the Master of the High Court must sign the Offer to Purchase and all transfer documents.

When the purchase price is less then R250 000.00 a Letter of Authority is sufficient and the Power of Attorney is endorsed in terms of Section 18(3)of the Administration of Estates Act 66 of 1965, alternatively, when the purchase price is higher than R250 000.00 then a Letter of Executorship is required and the Power of Attorney is endorsed in terms of Section 42(1) by the Master of the High Court.

This means that if the heirs have a Letter of Authority and you are selling the property for more than R250 000.00, you need to ensure that the estate is immediately re-reported to change the Letter of Authority to a Letter of Executorship. If not, you can have a lengthy delay in the registration process.

If the property is first transferred to the heirs and then to the Purchaser of the heir, no endorsement is required but the sale of the property will thus result in two transfers resulting in more cost. This can also cause a lengthy delay since the estate of the heir must first be finalized, the L&D account approved and advertised before the transfer of the heir may be done.

1.5 MINORS

When a minor is under 7 years old, they have no sale agreement capacity and therefor both guardians must sign any sale agreement regarding the sale of property.

When a minor is between 7 and 18 years old, they have limited capacity to act, can sign but must be assisted by both guardians for any sale agreement regarding the sale of property.

Be mindful of Section 80 of the Administration of Estates Act 66 of 1965 which stipulates that "no natural guardian shall alienate or mortgage any immovable property belonging to his minor child, unless authorized by the Court (value above R250 000) or by the Master (value under R250 000)".

When a minor is buying cash, only one guardian needs to sign the Offer to Purchase and transfer documents but when a bond is taken up, both guardians must sign the bond documents. Majority status is attained at 18.

1.6 REPRESENTATIVES

In terms of the Alienation of Land Act, the written authority of a representative/ agent is required when a SALE AGREEMENT is signed on behalf of a buyer or Seller. Thus, before someone can sign on behalf of another, they need a Power of Attorney, either General or Special.

A General Power of Attorney is registered in the deeds office which attract additional cost. A Special Power of Attorney only relates to a specific property/property and are not registered in the deeds office.

Persons signing for a Trust, CC or Co must have the authority to bind the entity. This authority is proven with a resolution in terms of which all the trustees, members or directors authorise the signatory to act on behalf of the legal entity.

If the signatory does not appear to have the necessary authority to act and did not warrant in the sale agreement that he does have the necessary authority, the sale agreement can be declared invalid. If he did warrant, even if he did not had authority, the sale agreement can be upheld as being valid.

Therefor it is best of the person signing writes after his signature" who warrants that he is authorised to bind the Trust/ Co/ CC".

The members or directors of Co/CC can ratify an agreement where property is bought or sold- meaning that they can afterwards authorise the transaction with a resolution. However, in the case of the trust that cannot be done, and all the trustees must either sign the SALE AGREEMENT or a resolution must be provided not older than the date of the SALE AGREEMENT authorising the sale. The reason- trustees can only act through powers conveyed to them in terms of the trust deed, whereas members of a CC or directors of a Co can act in terms of powers granted by legislation.

A property cannot be bought in the name of a trust to be formed. If the trust is formed later than the date of the SALE AGREEMENT then SARS can regard the transaction as a double transaction- the first transaction being to the person acting on behalf of the "trust" and the second from that person to the trust with the result that transfer duty can be payable twice.

You can, however, buy a property in the name of the CO or CC to be formed. In such circumstances it is custom to include a clause that should the Co or CC not be formed in for instance 30 days, that the person signing the sale agreement will then be held personally liable in terms of the sale agreement.

2. DESCRIPTION OF PROPERTY:

In terms of the Alienation of Land Act, it is imperative that the property to be sold be described properly. If there is any uncertainty as to the property description, the sale agreement can be declared invalid.

In the case of an erf- the erf number and the area as it is registered in the deed's office must be inserted. It is always safer to also insert the street address to avoid any uncertainty although the omittance of either the erf description or the street address in itself will not have the result that the sale agreement is invalid as long as there is certainty between the parties.

In the case of a sectional title unit always ensure that you insert the correct unit number as well as the section number which can differ from the unit number and also insert the description of any exclusive use areas being sold, i.e.. Garage areas, parking bays, garden areas, etc.

In the case of a new development, case law has stipulated that a 3D image of the property must be described, therefor always attach a draft/approved municipal plan, a copy of the draft/approved site plan and a list of the specifications/fixtures of the property.

3. PAYMENT OF THE PURCHASE PRICE:

Should the Purchaser be paying a deposit, it is important that the funds be available at the date inserted in the deed of sale. If the funds are in a money market scheme or fixed deposit, or is payable from a policy or shares or pension fund or similar sources, the parties should understand that no guarantee will be able to be given against the funds and also, if the release date of the funds are contrary than the date stipulated in the sale agreement, the Purchaser can be held in breach of sale agreement.

No bridging finance can be arranged for the Estate agent nor the Seller unless all funds are secured by way of guarantees or paid in the trust account of the Conveyancer.

If the deposit is being paid from the sale of the Purchasers' property, this fact must be stated as such either in the deposit clause or in the special conditions at the end of the sale agreement. Normally this clause is worded as a suspensive condition but does not necessarily have to be. Make sure that the date when the deposit is payable, is later than the date of sale of the Purchaser's property and also allow enough time for the buyer of the Purchaser's property to provide guarantee for that deal.

The balance of the purchase price can be a further deposit or the amount payable by the mortgage bond taken up by the Purchaser.

Even if the Purchaser is taking up a bond, a guarantee for provision of the balance of the purchase price still must be provided. This is issued by the Conveyancer attending to the registration of the mortgage bond on signature by the Purchaser of the bond documents. It is therefore important to insert that the guarantee be issued within for instance 10 days after bond approval, allowing for the bond instructions to be received, documents drafted, and consultation scheduled with the Purchaser. This will provide sufficient time for the bond attorneys to receive the bond instructions after the bond has been approved, to prepare the bond documents and to attend on the Purchaser for signature thereof. Should the bond therefore be approved, and the Purchaser fail or refuse to sign the bond documents, he will be held in breach of sale agreement.

4. WHEN IS A SALE AGREEMENT INVALID?

In terms of the Alienation of land act, all material terms applicable to a sale of immovable property must be in writing, namely a full description of the land sold, the identity of the parties to the sale agreement and the purchase price. If any of these material terms are not specifically provided for in the written document which is signed by the parties or the persons authorised by such parties in writing, the sale agreement is void and unenforceable.

5. BOND APPROVALS:

A bond clause is 99% of the cases formulated as a suspensive condition. This means that there is no binding sale agreement until such time when the bond is approved- and if not approved the sale agreement lapses automatically. The Purchaser is not in breach, the Seller cannot claim damages and the Estate Agent cannot claim commission.

A bond clause can also be worded as an ordinary condition. It will then merely be a term of the sale agreement, the same as any other guarantee or deposit clause. This mean that even if the Purchaser does not obtain a bond, the sale agreement will still be enforceable, and should the Purchaser not qualify for the bond he will be held in breach of sale agreement. This is quite dangerous for any Purchaser and is normally only done if the Purchaser in any event wanted to buy cash but wants to register a bond over the property for his own further use.

A deposit or guarantee clause is normally not a suspensive condition and therefore, if there is no other suspensive conditions, the sale agreement is enforceable from acceptance and should the Purchaser not pay the deposit or guarantee, he will be held in breach of sale agreement.

If the Purchaser by his actions, and on condition that the Seller can proof it, frustrates the obtaining of a bond, then the Seller can sue the Purchaser for performance as if the bond was approved, on the ground of the doctrine of fictional fulfilment.

It is important to note that should the bond not be approved by the date stated in the sale agreement or for the amount stated in the sale agreement, then an addendum for extension of the time or for reduction of the bond amount must be signed by both parties prior to the date mentioned in the sale agreement otherwise the sale agreement is null and void and cannot be revived. The exception is when the wording of the sale agreement says that the Seller can automatically grant a further extension or where the Purchaser can decide whether he will accept a lower bond and pay a higher deposit. Once the sale agreement has lapsed you must either sign a new sale agreement by both parties and do an addendum as follows:

"The parties sale agreement with one another on exactly the same terms and conditions contained in the Deed of Sale annexed hereto/ or dated …relating to the property described as…………… save for Clause X dealing with the bond approval which shall read as follows:
The agreement is subject to the Purchaser obtaining a mortgage loan in the amount of Rx which has already been granted by y bank and accepted by the Purchaser or the Purchaser shall have until…. to obtain a bond in the sum of Ry."

6. SUBJECT TO SALE OF PURCHASER'S PROPERTY

If the sale agreement contains a suspensive condition that the Purchaser must first sell his property before a certain date mentioned in the deed of sale at a certain price, then the sale agreement is only enforceable and binding once that condition is met. Should the property not be sold by the mentioned date, or sold at a lower price as stated, you can either obtain an addendum for extension/ lower price, signed by both parties prior to the said date, or alternatively you have to either have a new sale agreement signed or an addendum signed as set out in the above example.

7. OCCUPATIONAL RENT AND OCCUPATION DATE

Should the Purchaser take occupation prior to registration he must pay occupation rent from the occupation date. It is important to agree on an amount even if the Purchaser does not intent on taking occupation prior to registration for the parties can always later agree on an earlier date and then at least the amount has been agreed upon. Parties often have a dispute as to the amount if it must be agreed at a later stage.

Should the Seller not vacate the property on date of registration, the Seller will be liable to pay the occupational rent to the Purchaser.

If for any reason the occupation date or occupation amount is not agreed upon, the party being in occupation whilst the property is registered in the other party's name, can be held liable for the occupation rent not on contractual grounds, but on the ground of unjustified enrichment.

The occupational rent is normally payable into the Conveyancer's trust account, who will pay the Seller pending the transaction, and who will refund either party on registration should rent have been paid for a longer period than what was anticipated.

Should the agreement not contain any details on occupation date or rental payable and not be aware of subsequent addendums or that the parties have taken occupation, the Conveyancer will not be held accountable for unpaid rent.

Always ensure that the addendum is signed, and rent paid in advance before the Purchaser obtain the keys.

8. BREACH OF SALE AGREEMENT OR VOID SALE AGREEMENT

Should a sale agreement contain suspensive conditions, for instance, the approval of a bond or the selling of the Purchasers property, and the conditions are worded as such, that is, that the sale agreement will only come into existence once the conditions have been met, then the non-fulfilment will result in the sale agreement being void ab initio. This means that none of the parties can claim any damages for "cancellation" and the agent are not entitled to any commission.

Should however, the suspensive conditions be met and thereafter one of the parties fail or refuse to adhere to any other term in the sale agreement, for instance, failure to sign documents, failure to pay cost, failure to provide guarantees, then the defaulting party can be held in breach of sale by written notice sent in terms of the breach clause of the sale agreement and the innocent party will be entitled to the relief as set out in the remedy clause of the sale agreement, which can be either cancellation with a damages clause or the enforcement of the sale agreement with a damages clause.

9. VAT OR TRANSFER DUTY

The main question is whether the Seller is registered for VAT or not.

If the Seller is registered for VAT, then VAT is always payable unless the transaction is zero rated.

If VAT is payable, then no transfer duty is payable. You never pay transfer duty and VAT.

The law prescribes that the purchase price is deemed to be VAT included. Thus, it is very important to establish whether the Seller is registered for VAT and whether he is aware that from his asking price he will have to pay VAT. If he does not wish to pay, you must reflect the purchase price as Rx Plus VAT or insert the clause that the Purchaser is liable to pay the VAT. The Conveyancer then obtains the VAT and pay it over to SARS.

A transaction is zero rated when the Purchaser and the Seller is registered for VAT at the time of the tax supply and the property that is being sold is sold as a going concern or income bearing activity. From the sale agreement all these facts must be evident- the sale agreement must therefore reflect both parties' VAT numbers and state that the property is sold as a going concern. If the Purchaser will require certain moveable assets to continue with the income bearing activity, then the moveable assets must also be sold in the sale agreement. For instance, if a farm is sold, the farm equipment must be sold. If a house/ building is sold which was rented out, then the lease agreement will have to be ceded.

You have to make provision for which party will pay the VAT in the case where SARS (who have the final ruling) does not regard the transaction as zero rated- otherwise the Seller will be automatically liable.

When both parties are registered for VAT, but the property sold is not sold as a going concern, then the VAT can also be set off. This means that the parties sign an addendum in terms of which the VAT input of the one is set off against the VAT output of the other.

When a Purchaser is registered for VAT and the Seller not, the Purchaser still must pay transfer duty and VAT is still not applicable. In such an instance the Purchaser, as a VAT vendor, can claim the transfer duty back from SARS as notional input VAT.

When both parties are registered for VAT, and the transaction is not zero rated or set-off is not applied, then the Purchaser can still claim the VAT back.

The Purchaser can however only claim the VAT or transfer duty back if he can proof that the use of the property is directly linked to the income earning activity of the Purchaser and if he can proof that his VAT registration was effective from the date of sale. In other words, even if the Purchaser is not registered at the date of the sale agreement, he must register for VAT before the invoice for payment of the selling price is issued or before the date stipulated in the sale agreement for payment of the VAT.

In exceptional cases, where the Seller is registered for VAT, but never claimed the VAT back as Purchaser when he acquired the property and used the property for residential purposes, the Seller can do an affidavit to that effect and in such circumstances, SARS may waive the VAT payable and regard the transaction as a transfer duty transaction. Always stipulate this is the sale agreement so that the Purchaser is aware that he will pay transfer duty

10. POWER OF ATTORNEYS

If either the Seller or Purchaser is not be available to accept an offer to purchase or to sign transfer documents, then the that party must provide you with an original power of attorney, whether special (referring to the specific transaction) or general indicating who will accept the offer or sign transfer documents on his behalf.

If the party who signed the power of attorney has passed away by the time the property is sold, then the power of attorney is no longer valid and the executor of his estate must sign the sale agreement and transfer documents. If the Seller already signed the sale agreement before his passing, the executor still to sign the transfer documents.

If the Seller was of sound mind when he signed the Power of attorney but when the sale agreement is concluded has become mentally incapacitated, then an application must be made by the High Court to appoint a Curator who must sign the sale agreement and transfer documents on his behalf.

If the Seller is sequestrated, the power of attorney is also no longer valid and only the Administrator of the Seller's Insolvent estate can sign any sale agreements and transfer documents.

11. WHO BEARS THE RISK

It is important to note that "occupation" means only the right to enjoy the property. "Possession" is associated with the legal risk in the property and the right to enjoy the benefits of the property.

The sale agreement normally indicates that the Purchaser will take possession and occupation either from a date mentioned prior to registration or from date of registration. If the Purchaser intends to take possession prior to registration the Purchaser will from that date bear the risk in the property and must insure the property from that date. This can be difficult especially if the Purchaser is taking up a bond because the insurance normally only covers from date of registration. It is therefore advisable to insert a clause that the Seller will maintain his insurance on the property pending registration and that any excess payable for damages resulted from date of possession by the Purchaser, will be covered by the Purchaser.

There is a high obligation on a Purchaser to properly inspect the property before making an offer and to list all defects to be repaired by the Seller. If not, the property is sold voetstoots and the Seller is only liable to repair defects that he gave warranties for, or defects which arose after the date of sale or latent defects, if the Purchaser can proof that the Seller was aware of the defect and on purpose fraudulently withheld the defect from the Purchaser (for instance a mirror hanging over a whole in the wall, or a carpet over a whole in the floor, etc)

12. ELECTRICAL WIRING CERTIFICATE

If a sale agreement does not mention the electrical certificate, the sale agreement is still valid and enforceable. In terms of the Occupational Health and Safety Act, it is law that every consumer of electricity shall have a valid certificate of compliance. The Purchaser will then be liable to pay for the certificate.
An electrical certificate is valid and can be transferred from one user to another unless new electrical work has been done on the property since the issue of the same. To proof that no electrical work has been done to the property an electrical inspection must be done in which case the electrician in any event will issue a new electrical certificate.

The sale agreement can state that the Seller is already in possession of a certificate with a specific date which will be handed to the Purchaser.

It is always saver to obtain a new electrical certificate to prevent unnecessary disputes.

13. RETENTION AND REPAIRS

The Seller is only liable for the repairs which he specifically undertook to attend to in the sale agreement or if he warrants that there are no repairs and there appears to be defects. If the Purchaser can proof that defects or breakages exists which was not there at the time of the sale, those defects must also be repaired. The Purchaser in entitled to receive the property in the same state as it was at the time of the sale.

The Seller is not liable for latent defects unless the Purchaser can proof that the Seller knew about the defects and fraudulently withheld the knowledge about the defects.

If the Purchaser's bond is approved but subject to certain repairs to be effected on instructions of the bank, which have the result that a part of the bond is under retention, then the Purchaser is obliged to effect these repairs at his own cost prior to registration of the transfer unless the sale agreement contains a clause in terms of which the Seller undertook to pay for the same.

A bond can normally be registered with a retention and the repairs effected after registration. However, the risk in that is that the Purchaser can instruct the bank to release the funds to him and not to the transferring attorney resulting in a short in the purchase price.

Should a Conveyancer therefore register with a retention it is advisable to obtain in writing the consent thereto by both parties, the undertaking by the Purchaser that the retention funds be paid to the transferring attorney and an indemnity by the Seller that should the bank not release the funds to the transferring attorney, that the Conveyancer will not be held liable.

It has happened that the banks deduct arrear instalments on the bond from the retention funds which result in a short on the purchase price.

14. FICA REQUIREMENTS

The Financial institutions has placed a high duty on Estate agents and Conveyancers to comply with the Financial Intelligence Act.

If a transaction is not cleared for FICA, the Conveyancer may not lodge the bond registration and the transfer in the deed's office.

FICA REQUIREMENTS FOR EACH LEGAL ENTITY ARE AS FOLLOWS:

1.1 NATURAL PERSONS

- Identity documents, marriage certificates, ANC's.
- Statement of account not older than three months which is sent to you every month to your physical address, e.g. municipal account, cellphone account, medical aid account, Telkom account, clothing account, traffic fines, etc.
- Foreign citizens-a certified copy of their permanent / temporary residential permit as well as the above documents including the passport.
- In certain instances, the bank will also require new salary slips or bank statements from the Purchaser prior to registration.

1.2 TRUSTS

- A certified copy of the Letters of Appointment and the Trust deed.
- All trustees must provide the documentation set out under the heading Natural persons.
- Copies of the identity document or birth certificate of the beneficiaries.
- Statement of account reflecting the address of the trust- this can be provided by the auditor or on a letterhead of the trust signed by all trustees.
- Before registration of any bond an updated auditor's report which is provided by the bond attorneys needs to be stamped and completed by the Auditors.
- a Resolution by the Selling trust or Buying trust authorising the sale or purchase and the registration of the bond- this is prepared by the Conveyancer if not provided by the Estate agent.

1.3 CLOSE COPRORATIONS

- a Certified copy of the CK1 or any amended founding statement reflecting the names of all the members.
- All members must provide the documentation set out under the heading Natural persons.
- Statement of account reflecting the address of the close corporation- this is can be provided by the auditor or on a letterhead of the cc signed by all the members.
- Before registration of any bond an updated auditor's report which is provided by the bond attorneys need to be stamped and completed by the Auditors.
- a Resolution by the Selling CC or Buying CC authorising the sale or purchase and the registration of the bond- this is prepared by the Conveyancer if not provided by the Estate agent.

1.4 COMPANIES

- a Certified copy of CM29, the Certificate to Commence business and the Certificate of Incorporation.
- All directors must provide the documentation set out under the heading Natural persons.
- Statement of account reflecting the address of the Co.- this can be provided by the auditor or on a letterhead of the Co. signed by all directors.
- Before registration of any bond an updated auditor's report which is provided by the bond attorneys need to be stamped and completed by the Auditors.
- a Resolution by the Selling Co. or Buying Co. authorising the sale or purchase and the registration of the bond- this is prepared by the Conveyancer if not provided by the Estate agent.