

PERSONALISED LEGAL ASSISTANCE

Professional legal and property consulting

SONNENBERG & ASSOCIATES PROPERTY AND LEGAL ADVICE NEWSLETTER #26

1. Legal Quotes

"The old law about 'an eye for an eye' leaves everybody blind. The time is always right to do the right thing." [Martin Luther King Jnr]

"Whenever men take the law into their own hands, the loser is the law. And when the law loses, freedom languishes." [Robert Kennedy]

"The law does not pretend to punish everything that is dishonest. That would seriously interfere with business." [Clarence Darrow]

2. Legal short

A lawyer, an engineer and a mathematician were called in for a test. The engineer went in first and was asked, "What is $2 + 2$?" The engineer thought for a while and finally answered, "4." Then the mathematician was called in and asked the same question. With little thought he replied, "4.0." Then the lawyer was called in and asked the same question. The lawyer answered even quicker than the mathematician, "What do you want it to be?"

3. Food for thought

"The greatest pleasure in life is doing what people say you cannot do." [Walter Bagehof]

"Never take life too seriously. Nobody gets out alive anyway." [unknown]

"The difference between stupidity and genius is that genius has its limits." [Albert Einstein]

4. Inspiring quotes

"In order to succeed, your desire for success should be greater than your fear of failure." [Bill Cosby]

"Success is not final, failure is not fatal. It is the courage to continue that counts." [Winston Churchill]

"A hero is an ordinary individual who finds the strength to persevere and endure in spite of overwhelming obstacles." [Christopher Reeve]

4. Key terms and phrases that appear in Offers to Purchase of Immovable Property

1. BEETLE

The requirement of the issue of a beetle certificate by the Seller to the Purchaser is generally included in Offers to Purchase in the Cape and KwaZulu Natal where infestation does occur, to protect the Purchaser. The Conveyancer is obliged to see that this requirement is fulfilled, *unless the requirement has been specifically excluded from the Agreement* (i.e. the Purchaser has waived his right to insist that he be provided with a beetle certificate prior to registration of transfer). **Beetle certificates are usually not required where the property is a Sectional Title unit.** A beetle certificate guarantees the absence of most beetle (e.g. oxypleuris beetle). **NOTE HOWEVER: The presence/absence of other common infestations such as furniture beetle are not warranted or covered by the beetle certificate. As a result, it is wise for the Purchaser to insist on a certificate guaranteeing the absence of all beetles.**

2. BOND ATTORNEYS

The conveyancers who will be attending to the registration of the Purchaser's new mortgage bond (instructed by the bank or other financial institution).

3. CANCELLATION / RELEASE ATTORNEYS

Conveyancers attending to cancellation of the Seller's existing bond or the release of the property from the existing bond.

4. CONVEYANCER

An attorney specifically qualified to attend to the registration and transfer of immovable property (houses, apartments, land etc...) and related matters.

5. DOMICILIUM CITANDI ET EXECUTANDI

Often referred to simply as domicilium. **This is the address for service and delivery of documents.** The choice of domicilium should not be taken lightly as, once it has been selected, letters and notices can be served on this address and you will be deemed to have received them, even if you did not in fact do so. Similarly, therefore, once you have chosen a domicilium address, be sure to notify any other party to a contract in writing of any change to your domicilium. Remember a judgment could even be taken against you by service on a domicilium address, without you knowing about it. The domicilium must be a physical address, not a P O Box number.

6. ELECTRICAL CERTIFICATE OF COMPLIANCE

When a property is sold the new owner will require an Electrical Certificate of Compliance before the Local Authority will connect the electricity supply. It is common practice for the Seller to be required to furnish such a compliance certificate to the Purchaser. When the property is sold again it is customary for the Seller to provide the Purchaser with a new electrical certificate of compliance (the old certificate will only be valid if there has been any addition or alteration to any electrical installation subsequent to issue of the existing certificate. The problem with merely giving the new Purchaser the electrical certificate which had been issued at the initial sale of the property is the lack of proof that the electrical supply complies with the stringent new requirements introduced by the legislature). The **New Code of Practice SABS 0142 of 2001** pertaining to electrical compliance certificates came into being on 1 April 2002. **This new legislation does not permit unregistered / unqualified electricians to undertake inspections, maintenance or construction work. The user or owner is now responsible for the safety of the electrical installation. It follows that if the Seller appoints an unqualified electrician, the Purchaser can hold the Seller liable and not the electrician who issued the certificate.**

7. FIXTURES AND FITTINGS

Properties are usually sold with "all fixtures and fittings in permanent nature". This sounds simple, but very often problems arise as to what is meant to be included, e.g. are the automatic pool cleaning equipment, curtains and/or chandeliers meant to stay with the property or go with the Seller? If you are the Seller, where any doubt exists, make sure you record in the agreement of sale anything you specifically wish to exclude and, if you are the Purchaser, anything you want to specifically ensure is included in the sale. A little extra time spent at the time of taking the Offer will avoid disappointment later on.

8. GUARANTEE

A formal letter issued by a bank or other financial institution undertaking to pay the purchase price (or part thereof) on registration of transfer.

9. LODGMENT

This is the act of handing in the documents at the Deeds office for examination and registration.

10. OCCUPATION

Occupation is the right to physically occupy the property. This usually occurs when the keys are handed over and the Purchaser is actually entitled to move in. Occupation can be "vacant" or "subject to existing tenancies". Vacant occupation means that from that date the Purchaser can move into the property or put a tenant in, whereas occupation subject to tenancies means that the current tenant will carry on

renting from the new owner.

11. OCCUPATION CONSIDERATION

Often referred to as "occupational rental" or "occupational interest", **this is a monthly amount payable by the Purchaser to the Seller for the right to occupy the property prior to the date of registration of transfer of the property into the name of the Purchaser.** Alternatively, this amount could be payable by the Seller to the Purchaser if he/she is allowed to continue occupying the property for a period after registration of transfer. The amount of the occupational consideration should be negotiated by the parties to the agreement. If an estate agent is involved in the transaction, he/she is usually in a good position to assist the parties in reaching agreement in this regard.

12. OFFER TO PURCHASE (OFTEN REFERRED TO AS A DEED OF SALE)

This is a document which becomes a binding agreement of sale once signed by both the Purchaser and the Seller.

13. POSSESSION

Possession is when the Purchaser takes over legal control of the premises. There is a distinction from occupation, as only an owner or potential owner can possess, whereas a tenant can occupy without any intention of owning the property. The terms "possession" and "occupation" tend to be used interchangeably. *The distinction between "possession", "occupation" and "transfer" is very important, as the contract will usually state that risk in and to the property will pass on one or other of these dates (see definition of risk in 16 below).*

14. RATES OR LEVY CLEARANCE CERTIFICATE

A certificate issued by the relevant authority (municipality, town council or sectional title body corporate) stating that the rates or levies have been paid up to a future date in respect of the property.

15. REGISTRATION OF TRANSFER

Registration of transfer is the South African method of recording and ensuring that you own your home. It works as follows :-

The completed and signed offer to purchase together with the Seller's title deed, is handed to a conveyancer. He/she will prepare all the necessary documents that have to be signed by the various parties, will arrange for the Seller's rates to be paid up to date, will guarantee payment of the balance of the Seller's bond to the relevant bank, and will obtain a similar guarantee from the bank that will be providing the Purchaser's new bond.

Once all the documentation has been drafted and signed and all guarantees are in place, the deeds are all lodged with the deeds registry, where the documents are carefully scrutinised and examined. If everything is in order, the documents come up on prep within seven to ten days i.e. they are now available for registration. By agreement between the transferring attorney ("conveyancer"), the bond attorney and, if applicable, the cancellation/release attorney, the documents will be handed for registration.

Registration is effected by the new deed of transfer and mortgage bond being signed at the Deeds Office by the conveyancer and the Registrar of Deeds. The conveyancer also attends to finalisation of the financial arrangements including settlement of the balance of the Seller's bond, recovering payment from the Purchaser, paying the Estate Agents and the Beetle and Electrical inspectors and finally accounting to the parties.

From the moment that the Registrar signs the title deed, the Buyer is now the owner of the property and his/her title deed is documentary proof of this.

16. RISK

Risk is all the good and bad things that can happen to the property. From the date on which risk passes, the Purchaser benefits/loses. For example, if gold was found on the property after risk has passed, the Purchaser benefits. Much more important, if the house burns down after risk has passed, it would be the Purchaser's loss **N.B. therefore, Sellers must keep the property insured until the day risk passes, and Purchasers must make sure that the property is properly insured from that date onwards.**

17. SECTIONAL TITLE

Traditionally in South Africa, one purchased land and then whatever was build on the land became your property as well (the principle of "accessio"). This changed, however, with the introduction of the Sectional Titles Act. This Act made it possible to have ownership rights in a unit although one did not necessarily exclusively own the land on which it was situated e.g. you could own a flat on the third floor of a building. A sectional title development will include sections (which are available for sale by way of sectional title), common property, such as stairways and lifts (which will be owned by all the section owners jointly) and exclusive use areas which are portions of the common property which have been demarcated and may only be used by the owner of a particular section e.g. gardens or parking bays. All section owners become members of a Body Corporate which is the governing body of the sectional title scheme. Save for extraordinary business, the Body Corporate will meet once a year to elect trustees. The trustees will then form the executive of the sectional title scheme and will attend to the day-to-day running of the affairs of the scheme, such as employment of maintenance staff, upkeep and collection of levies.

Levies are payable monthly by each section owner to the Body Corporate and are used by the Body Corporate to meet the costs of running the scheme e.g. upkeep of the common areas. Levies are usually set annually. The levy amount payable by each section owner will vary according to his participation quota. **The participation quota is a calculation of the section owner's property vis-à-vis of the entire sectional title scheme.**

In terms of Section 25 of the Local Government Municipal Property Rates Act 6 of 2004, Municipalities may rate units in sectional schemes separately. After 1 July 2007 a rates clearance certificate must be lodged with all sectional title transactions that fall within the jurisdiction of the City of Cape Town.

In respect of other Municipalities, until notification is received from the relevant municipality that the units are separately rated, the transfer must be accompanied by an exemption or a "non-rated" certificate for all transactions entered into on or after 1 September 2007, issued by the Municipality. This certificate must contain full details of the unit and the parties.

The section owner will be responsible for the costs of maintenance and upkeep of his section and any exclusive use arrears he may have, whilst the Body Corporate will be liable for the costs of upkeep and maintenance of the common property.

18. SUSPENSIVE CONDITIONS

A suspensive condition is a condition in an agreement which has the effect of suspending either the whole agreement, so that it does not take place yet, or a portion of the agreement, so that the agreement (or portion thereof) does not come into being until the condition is fulfilled. Where the suspensive condition suspends the whole agreement, none of the terms agreed upon have any legally binding meaning and create no rights and obligations on either party until that condition, e.g. the granting of a bond or the sale of the Buyer's existing property, has actually taken place. However, once that event has taken place, the rest of the contract immediately comes into effect.

19. TITLE DEED

This is the document prepared by the conveyancer reflecting the ownership of the property. When a transfer takes place, the existing Title Deed is superseded by the new Title Deed which is executed in the Deeds Office by signature by the conveyancer and the Registrar of Deeds. This then becomes the new owner's proof of ownership.

20. TRANSFER DUTY

Transfer duty is simply a tax levied on the transfer on the land. It is based either on the actual price paid for the property, or the fair market value thereof, whichever is the higher. Transfer duty is calculated on the purchase price of the property as follows: Exempt from R1.00 to R600 000.00, 3% of the purchase price from R600 000.00 up to R1 000 000.00, 5% of the purchase price from R1 000 000.00 up to R1 500 000.00, and thereafter R37 000.00 plus 8% of any balance.

N.B. If the purchase price includes VAT, no transfer duty is payable. (i.e. transfer duty and VAT are mutually exclusive).

21. TRUST ACCOUNT

Attorneys and estate agents are both obliged by their governing bodies to run separate Trust Accounts into which they deposit monies which are being held in Trust for clients. Both associations have created a guarantee system to protect members of the public against the misappropriation of their funds by the relevant attorney or estate agent.

22. VALUE ADDED TAX

Value Added Tax (VAT) is of particular importance to property transactions as, if the Seller is or should be a "VAT vendor", VAT may be payable and not Transfer Duty, or, if the Purchaser is a Vendor, Transfer Duty may be payable but the Purchaser may then be entitled to claim back "a deemed input credit" from the Receiver of Revenue. These are only two of the possible ramifications.

Should there be any doubt as to whether the sale is a VAT-able transaction or whether any party is a Vendor, it is recommended that you seek professional advice, as a mistake could result in a Seller having to pay 14% of the purchase price to the Receiver of Revenue, or a Purchaser could be unexpectedly liable for Transfer Duty where no transfer duty was anticipated.

23. VOETSTOOTS

If the property is sold voetstoots, it means it is sold as it stands, without any guarantees being given by the Seller as to the condition of the property and he/she therefore cannot be held responsible for such defects at a later stage. It is important to note, however, that a voetstoots clause does not protect the Seller in respect of defects in the property of which he/she is aware but intentionally hides in order to mislead the Purchaser. Purchasers should carefully inspect the property and not rely on any oral assurance which is not actually guaranteed. The Consumer Protection Act has given the Purchaser even more protection against possible defects in the property.

24. COMMISSION

Also commonly referred to as "brokerage". This is the amount of money due to the Estate Agent(s) for facilitating the property transaction or introducing a willing and able purchaser to the Seller and/or property. The agent is then said to be the "effective cause" of the transaction. Commission is due and payable by the Seller (unless otherwise stipulated in the Deed of Sale) to the Agent on registration of transfer. The standard commission recommended by the Institute of Realtors was until very recently 7,5% (VAT exclusive) of the purchase price (which is now merely used as a guide – commission rates can be negotiated between Sellers and Agents.

All newsletters can be obtained on our website: www.sonnenberg.co.za. You can also sign up to receive future newsletters on the site. **Please let us know of property or legal issues you wish us to cover in future newsletters.**



FRITZ SONNENBERG | Legal Consultant

Mobile: 083 251 5451 | Email: Fritz@sonnenberg.co.za | Skype: fritzsonnenberg



SONNENBERG
PROPERTY & LEGAL ADVICE

[in Visit my page](#)

[Download Vcard](#)

[View Disclaimer](#)