

# THE SALE OF AN IMMOVABLE PROPERTY: WHAT YOU NEED TO KNOW.

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**P**roperty can generally be categorised as one of the most prized possessions that any person or entity can hold. By legal definition, there are two distinct categories of property: immovable and movable. These two terms encompass a broad array of assets, ranging from homes to computers. Each classification also carries with it many different legal implications and applications. Broadly speaking, the primary factor that distinguishes immovable property from movable property is whether or not the asset in question can be relocated or transported without having to alter it, or, in more serious circumstances, destroy it. The names of the categories themselves are quite telling on what kind of property these are. Generally, movable property refers to all the properties that can easily be displaced from one point to another with ease, for example; a motor vehicle, Television set etc. It can further refer to any property which is not affixed to any part of an immovable property. When dealing with the sale of your property or purchase of a house, movable property can be described as the seller's personal property which is not affixed to the property, for example curtains are not immovable property and cannot form part of the sale agreement automatically.

Immovable property on the other hand generally refers to property which is affixed to the ground and cannot be moved around at all. This includes houses, flats, bolted bridges, land, etc. Looking at from a sale point of view, an immovable property can be described as the land and all buildings on the land as well as all permanent fixtures which are included in the sale of the property. These are items which are glued, cemented or bolted to the property.

'The simplest way to determine if an item is a permanent fixture would be to imagine turning the house upside down. The items that would fall down can be seen as movable and those that would remain attached can be seen as part of the immovable property; better known as fixtures in the offer to purchase.'

In this piece, we shall briefly examine the sale of an immovable property and the important things to look out for. For the sake of convenience, the immovable property up for sale shall be referred to interchangeably as Real Estate. According to investopedia, Real Estate is the land along with any permanent improvements attached to the land, whether natural or man-made—including water, trees, minerals, buildings, homes, fences, and bridges.

## **The laws regulating real estate in South Africa:**

The right to possess and enjoy possession of property is preserved under section 25 of the **Constitution of the Republic of South Africa, 1996**. The *Deeds Registries Act 47 of 1937* regulates the registration of rights to and over immovable property or real estate. This Act sets out the registration requirements and processes necessary for the transfer of ownership or creation of real rights in respect of land. The sale thereof of land is regulated by the *Alienation of Land Act 68 of 1981*. The aforesaid Act provides for the requirements to be met when entering into a sale agreement in respect of land. All regions' and cities' planning legislation (otherwise known as provincial ordinances/laws and bylaws) are subject to the legislation enacted in terms of the *Spatial Planning Land Use Management Act 16 of 2013 (SPLUMA)*. There are many other statutes that regulate the real estate law.

### **Offer and acceptance:**

Most of the real estate sales commence with an offer (from the seller) and acceptance (by the purchaser). Although this exercise is not a requirement in order to successfully conclude an eventual sale of land/real estate agreement, it is quite a normal process that parties who intend to conclude a real estate agreement undertake. It should however be noted that an offer and acceptance can be made orally with optional terms and it is not a strict requirement to a valid sale of land agreement. In as much as the offer and acceptance are not the strict requirements for a successful sale, once the parties decide to conclude same it becomes a legally binding document.

In *Kretzmann v Kretzmann and Another (2644/2018) [2019] ZAECPEHC 54 (27 August 2019)*, the Constitutional Court declared that a pre-emptive right to purchase property need not be reduced to writing in order to be valid. This was because a right of pre-emption gives the holder thereof no right to claim transfer of land; it merely gives him a right to enter into an agreement of sale with the grantor, should the latter wish to sell. When such an agreement is completed then - and not before - will he have a right to claim transfer of land, and that it is the agreement which must be in writing.

A seller who wishes to sell land/real estate may make an offer to a prospective purchaser. This offer must be a valid offer and to achieve that, it must at the very least comply with the following:

- Blank spaces must be completed correctly and where they are not applicable they must be deleted;
- If some material terms are left, to be discussed later, the proposal is not a complete offer, and acceptance does not create a contract, unless it is clear that the matters still to be discussed are in fact immaterial to the contract.

- A letter to a seller from a prospective purchaser, stating that he would like to purchase the seller's property at a particular price is not a valid offer. (Neither is an invite with certain basic terms from a seller to a prospective purchaser, on which the purchaser comments or 'favourably considers' the proposal.)
- An offer to purchase document must be signed by the purchaser.
- The offer must be brought to the offeree's (purchaser's) attention, either personally, telephonically, by fax or by post.

Likewise, a purchaser who wishes to buy land/real estate may accept an offer from the prospective seller. The acceptance of offer must be a valid acceptance and again, to achieve that, it must at the very least comply with the following:

- The acceptance of an offer to purchase must be in writing and signed by the seller or his estate agent acting on his written authority.
- Acceptance must be clear and unambiguous (not have two possible meanings).
- The offeree's (purchaser's) acceptance must be communicated to the offeror (seller) to conclude a valid contract.
- Once the seller has signed the offer to purchase document, it is a legal and binding contract and the purchaser need not be informed of the seller's acceptance, for the document to be valid.
- The offer can only be accepted by the person to whom the offer is addressed, or his duly authorised estate agent.

### **The requirements of a sale of land/real estate:**

Just as mentioned above, the sale of land/real estate is mainly regulated by the *Alienation of Land Act 68 of 1981* (the Act). In terms of Section 2 of the Act, in order for an agreement relating to the sale of immovable property to be valid, it must be in writing and signed and dated by both parties (i.e. the seller and the purchaser). At the very least, the agreement must contain a description of the seller and the purchaser, a description of the property being sold, and the purchase price. These are the essential terms of the sale of land agreement, however, they exist with other material terms which are to be included in the sale agreement.

The above material terms are not easy to define but one must bear in mind that if a material term has not been finally agreed upon and is left open for further negotiations, there is no valid agreement. When dealing with the sale of immovable property, examples of material terms include the manner of payment of the purchase price, the time within which the purchase price must be paid, the suspensive conditions and any other special conditions, as well as the occupation date and any occupational rental which may be payable.

The method or manner of payment of the purchase price must be clearly set out. This include specifying whether the sale would be in a once-off payment or instalment payments. Usually in a pre-printed agreement there would be options provided wherein a party has to choose application, any options not exercised must be deleted as any defect may render the agreement void.

The parties must set out if a deposit is payable and when it is payable. If the purchaser requires mortgage finance to buy the property, then the amount required as well as the date by when the finance must be approved must also be clearly set out. The sale of immovable property usually includes the fixtures and fittings. These are items that are permanently attached to the structures or buildings on the land. There are some ambiguous areas, namely structures such as tool storages and tree houses, items used in conjunction with a fixture such as garage door remotes and batteries for solar power systems. In this case, should the purchaser wish to include these types of items in the sale, the clause setting this out needs to be as specific as possible. It is difficult to enforce verbal agreements in this regard.

A suspensive condition is a material term and therefore must be in writing and clearly set out in order to avoid uncertainty. The sale being subject to the purchaser obtaining mortgage finance is a standard suspensive condition. If the event does not occur, i.e. the purchaser does not obtain bond approval, no agreement comes into existence.

It is important to make sure that all blank spaces in the agreement are filled in or crossed out. If there is no consensus between the parties in respect of something that has not been filled in, there is no agreement.

### **Conclusion:**

In summation, anyone wishing to sell or purchase an immovable property (land/house/flat) must bear in mind that such a sale is better achieved by entering a written agreement which complies with the provisions of the Alienation of Land Act. A sale of land/real estate that offends the provisions of the Act may well result in that agreement being void or voidable. It is also clear that the normal contractual requirements and obligations apply and should be adhered to.

We advise that one should seek the advice of a lawyer when intending to enter to any kind of agreement relating to the sale of land/immovable property.