

MCSellersGuide



M.C. VAN DER BERG INC
INC
ATTORNEYS, CONVEYANCERS & NOTARIES

Your Property Attorneys

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Legal indemnity - M.C. van der Berg Inc. has compiled this *MCSellersGuide* in an attempt to provide general legal advice regarding the sale of property. It must not be construed as being specific advice applicable to your transaction. Furthermore, it does not bind us, the banks or any other party. Changes in legislation, procedures and processes are frequent and readers are advised to contact us to ensure they obtain advice that is correct and up-to-date.


1. Introduction

M.C. van der Berg Inc. provides our *MC Sellers Guide* free of charge with the purpose of introducing our firm and supplying important information to you, the prospective seller. This guide will also assist estate agencies to comply with their obligations in terms of the Consumer Protection Act (CPA).


Because we know you are probably busy, we have taken the opportunity to highlight certain aspects that we know require your immediate attention should you receive an offer to purchase (OTP).


 ***You should therefore take note in particular of all the aspects marked with*** 


The *MC Sellers Guide* contains all the information you need before you accept an offer to purchase. The information relating to the process after you have accepted the offer to purchase is contained in another guide known as *MC Quick Guide*. Once you have instructed us to attend to the transfer of your property, we will forward the *MC Quick Guide* to you. Both the *MC Sellers Guide* and *MC Quick Guide* are available on our website at www.mcvdberg.co.za for your convenience.


 ***Please read through our MC Sellers Guide, as this is a compilation of the most important stumbling blocks you may encounter in the legal process that lies ahead.*** We trust that you will find the information contained in this guide useful. Our hope is that sharing our expertise and information will result in a mutually beneficial business relationship. We shall gladly assist you through the labyrinth of laws, rules, regulations and contractual requirements that accompany the sale of a property.

2. M.C. van der Berg Incorporated – An Introduction

 ***M.C. van der Berg Inc. Attorneys, Conveyancers and Notaries is a well-established law firm specialising in property law since 1999.*** While our head office is in Centurion, we also have an office at Midstream, Pretoria East and Pretoria North. Our company conducts business in the greater Pretoria, Centurion, Ekurhuleni, Midrand, Johannesburg and surrounding areas.

 ***The primary focus of our practice is giving legal advice pertaining to property law, drafting agreements, handling property transfers as well as registering new bonds and cancelling existing ones.***

 ***We also attend to the registration of trusts, estate planning, drafting of wills, winding up deceased estates, registration of ante nuptial contracts and other notarial services.***

 ***M.C. van der Berg Inc. undertakes to handle the expedited and hassle-free transfer of your property and keep you informed with relevant and contextualised feedback on a regular basis.*** We believe that our unique and efficient feedback system is one of the aspects that differentiate us from others. You will not be kept in the dark and we shall keep you informed when important milestones in your transaction are reached.

 ***We offer a free consultation to discuss your transaction.***

 ***For more information on M.C. van der Berg Inc. please visit us at www.mcvdberg.co.za.***

3. Terminology


The list of terminology below should be helpful in navigating your way through the legalese:


Attorney descriptions

Attorney – A person who is admitted by the High Court as an attorney and practises law.

Conveyancer – An attorney who passed an additional exam and who is admitted by the High Court as a conveyancer and who specialises in property law.

Transferring attorney – The firm of attorneys and, more specifically, the conveyancer who is responsible for transferring a property from the seller to the purchaser. The transferring attorney plays a pivotal role in the successful completion of the transfer process. The seller is entitled to nominate his/her transferring attorney and M.C. van der Berg Inc. would be honoured to assist you in this regard.

 **Bond attorney** – The firm of attorneys responsible for the registering a purchaser's bond. This firm needs to serve on the registration panel of the particular bank to which the purchaser applied for a bond. *M.C. van der Berg Inc. serves on registration panels of several banks, including Absa, FNB, Nedbank, Standard Bank, SA Home Loans and HIP (Housing Investment Partners).*

 **Cancellation attorney** – The firm of attorneys responsible for the cancellation of the seller's bond. This firm needs to serve on the cancellation panel of the particular bank where the seller's bond is registered. *M.C. van der Berg Inc. serves on the bank cancellation panels of Absa, Nedbank, FNB and Standard Bank.*

Clearance terms

Clearance figures – This term relates to the amount the municipality requires in order to issue a clearance certificate. The amount includes all rates, taxes and charges for utilities in arrears, plus an estimated amount for a few months in advance.

Clearance certificate: Municipality – This is a document the transferring attorney obtains from the municipality after the clearance figures have been paid. It verifies that the seller has paid his/her rates, taxes and charges for utilities in advance. The transferring attorney must lodge this certificate as a supporting document at the deeds office to complete the property transfer.

Clearance certificate: Homeowners' Association (HOA) – The transferring attorney obtains this document, if applicable, from the HOA verifying that all levies due to the HOA have been paid in advance. The transferring attorney lodges this certificate as a supporting document at the deeds office to complete the property transfer.

Clearance certificate: Body Corporate – If the property being transferred is a sectional title unit, the transferring attorney must obtain a certificate from the body corporate verifying that the levies due and payable to the body corporate have been paid in advance. The transferring attorney lodges a certificate confirming payment to the body corporate as a supporting document at the deeds office to conclude the property transfer.

Registration terms

Registration – An administrative act that takes place at the deeds office. Registration refers to the date on which the transaction is finalised, i.e. the property is transferred, the purchaser's bond is registered and the seller's existing bond is cancelled.

Transfer – An action (registration) that occurs on a specific date at the deeds office and happens simultaneously with bond registration and bond cancellation.

Bond registration – An action that occurs on a specific date at the deeds office when the purchaser's bond is registered. This action happens simultaneously with transfer and bond cancellation.

Bond cancellation – This action occurs on a specific date at the deeds office when the seller's bond is cancelled. It happens simultaneously with transfer and bond registration.

Contract terms

Offer to purchase (OTP) – This is a written offer that the purchaser makes to a seller to buy his/her property. It specifies all the purchaser's conditions relating to purchasing the property.

Purchase agreement – Once a seller accepts the offer to purchase in writing, it becomes the purchase agreement. This is also known as a 'deed of sale'.

Guarantee – In this document, the purchaser's bank promises to pay the purchase amount into either the seller's bond account or the transferring attorney's trust account on an unspecified future date when registration occurs.

Transfer duty receipt – The transferring attorney obtains this document from the South African Revenue Service (SARS). It certifies that the transfer duty, payable by the purchaser, has indeed been paid or been exempted. The transferring attorney submits this receipt as a supporting document to the deeds office to conclude the property transfer.

4. Your risk, your right, your choice

There are many potential pitfalls in the process of selling and eventually transferring your valued property if you do not receive the correct advice timeously. It is therefore advisable to use reputable transferring attorneys who you can trust to guide you and look after your interests.



As a seller, you have the right to nominate the conveyancer dealing with the transfer of your investment. Always be cautious and consider your own best interests when making this important choice! It is best to appoint an established law firm that specialises in property law. Make sure your conveyancing firm has the capability to manage and expedite the transfer process while giving frequent and relevant feedback.



We at M.C. van der Berg Inc. shall gladly assist you with the transfer of your property if you decide to appoint us.



The most important aspect of our mandate is to transfer your property swiftly and effectively. In addition, our undertaking to you is to:

- Act proactively by providing relevant information;
- Ensure that all our requests are clear and unambiguous;
- Answer your emails and telephone calls within 24 hours;
- Provide easy access to our conveyancers;
- Assist you in Afrikaans or English, according to your preference; and
- Settlement and payment will occur within 48 hours after registration at the latest. (Note that while settlements usually occur within 24 hours, bank systems may sometimes delay payments).

We strive to register your transaction promptly and in a hassle-free manner while providing feedback that is continuous, relevant and contextualised. In our view, this type of feedback is the backbone of good customer relations and service excellence!

5. Roles of the different attorneys

Various conveyancing firms can be involved in a typical property transaction, depending on the nature of the transaction and the required actions in the deeds office. Several different attorneys or a single legal firm can handle these actions. It is obviously much faster and convenient for the parties if only one law firm deals with all aspects of the transaction. In order to handle all aspects of a sales transaction, the transferring attorney needs to be on both the bond registration and bond cancellation panels of the relevant bank.

The different legal role players are:

5.1 The Transferring attorney

The transferring attorney is the conveyancer responsible for the transfer of the property into the purchaser's name and is usually appointed by the seller.

The transferring attorney's responsibilities are wide-ranging and include:

- Ensuring that the parties comply with the terms of the sale agreement and, if not, that the necessary steps are taken to enforce the terms;
- Drafting all the legal documents and overseeing the signature thereof;
- Obtaining the transfer duty receipt/exemption from SARS as well as the clearance certificates from the relevant municipality and HOA's (and sectional title body corporate, if applicable);
- Holding the deposit in trust and dealing with the financial aspects of the transaction;
- Coordinating the lodgement of these documents at the deeds office once they are satisfied that all legal and contractual requirements have been met;
- Ensuring that the relevant certificates of compliance (COC's) are in place (e.g. the electrical-, electric fence- and gas-certificates).




The parties must ensure that they appoint a respected and independent conveyancing practice to deal with the transaction. Be wary of conveyancers with a conflict of interest, especially where the conveyancers are also acting as estate agents in the transaction.



M.C. van der Berg Inc. will gladly oversee your property transfer.

5.2 The bond registration attorney


The bond registration attorney is the conveyancer who oversees the registration of the purchaser's bond. Some banks will allow the purchaser to nominate the attorney who should attend to the registration of the purchaser's bond. (Such attorneys must be on the bond registration panel of the bank involved).

 ***If a purchaser prefers that M.C. van der Berg Inc. oversees the bond registration, he/she must give an instruction to their personal banker or bond originator to ensure that they appoint us as the bond registration attorney.***

 ***M.C. van der Berg Inc. serves on the bond registration panels of Absa, FNB, Nedbank, Standard Bank, HIP (Housing Investment Partners) and SA Home Loans.***


5.3 The bond cancellation attorney


The bond cancellation attorney is the conveyancer who oversees the cancellation of the seller's bond (if applicable). The attorney firm attending to the cancellation on behalf of the seller's bank must be on that specific bank's bond cancellation panel.

 ***M.C. van der Berg Inc. serves on the bond cancellation panels of Absa, FNB, Nedbank and Standard Bank.*** If we are appointed to oversee the transfer of the property, we shall apply for the cancellation figures from the seller's bank and subsequently attend to the cancellation of the existing bond.

6. Before accepting the offer to purchase


When a purchaser makes an offer to purchase and you accept it in writing, it becomes the purchase agreement. It is important to understand that the purchase agreement together with legal principles and legislation create the rules that govern a transferring attorney's actions when your property is transferred.

 ***It is essential to be mindful of specific key aspects listed here before accepting an offer to purchase. It is also crucially important to scrutinise the offer before accepting it. Rather be safe than sorry!***


 ***Should you decide to appoint us to handle your property transfer, we offer a free consultation to discuss the offer to purchase.***


7. Rules of the game – the purchase agreement

The purchase agreement is the instruction and mandate that the parties give to the transferring attorney and we cannot deviate from it. Besides scrutinising an OTP before you accept it, be mindful of the following important aspects:

 ***In most cases, pro forma offers to purchase that various estate agents present to you will contain a clause stipulating that the purchase agreement will constitute the complete and only agreement between the seller and purchaser.***

Remember therefore, not to accept or give any verbal undertakings as these will be unenforceable. Make sure the purchase agreement contains this clause to indemnify yourself against possible claims resulting from professed verbal undertakings or guarantees.

 ***Pro forma offers to purchase that various estate agents present to you usually also contain a clause stipulating that amendments and variations to the purchase agreement must be in writing and signed by both parties before it is valid.***

 ***Remember that verbal amendments and variations to the purchase agreement are not enforceable! Our conveyancing experts can assist you with legally correct addendums should you wish to amend certain clauses in the purchase agreement.***

8. Suspensive conditions

Sale agreements usually contain one or more suspensive condition. The sale agreement will not be legally enforceable and binding if these suspensive conditions are not fulfilled completely and timeously.


Any deviation from the terms of a suspensive condition has to be addressed in an addendum before its due date. Together with the estate agent, we monitor these dates carefully. Rest assured that we shall contact you should we require an instruction to amend the due dates or alternatively, to amend the conditions.

A sale agreement typically contains two types of suspensive conditions, namely the mortgage loan and clauses that deal with the sale of another property.

8.1 Suspensive condition: Mortgage Loan

Purchasers seldom have the resources to pay cash when purchasing a property. Therefore, in most instances, a sale agreement will be made subject to the approval of a mortgage loan to protect the purchaser.

Depending on the purchaser's financial position, approving a mortgage loan should not take longer than a month. Circumstances sometimes require a longer period and it's important to assess each case on its merits.

 ***The period allowed for the approval of a mortgage loan must serve both parties. On the one hand, it needs to be sufficient to give the purchaser a fair opportunity to obtain a loan, yet on the other hand it should not disadvantage the seller by removing the property from the market for a prolonged time.***

If your offer to purchase includes an additional automatic extension clause, be sure to take it into consideration. Also, be mindful of whether the time allowed for bond approval involves working days or calendar days.

Pro forma offers to purchase may stipulate that the suspensive condition is deemed to be fulfilled once the bank approves the bond 'in principle' or when it issues a 'quotation' to the purchaser.

It's important to note that this condition is not in line with the provisions of the National Credit Act (NCA). The Act specifies that a loan is only formally granted when the borrower has accepted the quotation as far as it applies to the bond amount, expenses, interest and repayment period. A final

grant is therefore necessary before it can be stated that the suspensive condition has indeed been fulfilled. This final grant must be obtained on or before the date set out in the purchase agreement.

8.2 Suspensive condition: 'Subject to the sale of another property'

For various reasons (e.g. affordability or availability of funds) a purchaser or his/her bank often stipulates a prerequisite that his/her current property must first be sold and registered before the transfer of another property or a new bond that funds the transaction can be registered.

The proceeds from this preceding transaction are often also required to fund the subsequent transaction.



If an offer to purchase is made subject to the sale of a purchaser's property, the parties must ensure that it is effectively dealt with in the purchase agreement to protect both the purchaser and seller. This matter is often handled haphazardly to the detriment of both parties. For example, a seller may not wish to decline an offer to purchase but may also be reluctant to withdraw the property from the market for a prolonged period while awaiting the sale and registration of a purchaser's property.

If an offer is subject to both the approval of a bond and the sale of a purchaser's property, the bond approval date must commence from date of acceptance of the offer and not from date of sale of the purchaser's property. This means establishing whether the purchaser qualifies for the loan as soon as possible. The purchaser will be protected as the bank will grant the loan subject to the sale of his/her current property.

Due to its wording this condition can cause great discord between a seller and a purchaser. Sometimes, despite the best intentions, words used in good faith may have ambiguous meanings, which can have legal implications. Do not hesitate to contact us or your estate agent to assist you in wording such a clause.

9. Guarantees

Delivering guarantees is very important as it indicates that all the purchaser's finances relating to the purchase price are in order.

A bond attorney or a purchaser's bank issues guarantees once he/she has signed all the bond documentation and complied with all the bank's requirements.



Note! It usually takes between 10 to 14 calendar days after bond approval for the guarantees to be issued.

10. Your next property

Do not to commit yourself contractually to buying a new property before confirming that the purchaser has indeed secured an approved loan. If you intend buying a new property it is sensible to ensure that your offer to purchase is subject to the successful sale and registration of your present property, regardless of whether the purchaser has already successfully obtained a bond or not.



Remember! When making an offer to purchase a new property before your own property transfer has been finalised, ensure that the conditions and timeframes in both transactions are aligned. You are welcome to contact us to assist you in this regard.

11. Fixtures and fittings

It is important to distinguish between the terms 'fixtures' and 'fittings'. **Fixtures** form part of the property and may not be removed when you move. They are therefore sold with the property. **Fittings**, however, are regarded as items that do not form part of the property, which means you can take them with you when you move. Purchasers and sellers often disagree on this issue because it is not always clear in which category a certain item fall.

There are a few broad legal principles that determine whether a particular item is a fixture or a fitting. Note that these legal principles cannot cater for each and every unique situation, so it's always advisable to distinguish between the two in the purchase agreement.



We recommend inserting an extensive list in the purchase agreement or adding an annexure to the purchase agreement. This should specify the list of fittings that you want to remove and that are not part of the sale, as well as items that you regard as fixtures.

Some estate agents use *pro forma* purchase agreements that already contain a comprehensive list of both fixtures and fittings.



Make sure to study this list carefully so you can delete items that are not applicable and add items that should be included. Remember that these lists are generic in nature and are therefore not specific to your particular transaction.

12. Costs



Although the purchaser is responsible for payment of the transfer and bond registration fees, the seller must take notice of the expenses he/she may incur.

12.1 Bond cancellation costs

The seller will be responsible for the bond cancellation attorney's costs (if applicable). We deduct the cancellation costs from the proceeds and the seller usually does not need to pay us in advance.

12.2 Other costs

The seller may also be liable for other expenses. Examples of these include electrical- and gas compliance certificates and the costs involved in obtaining clearance certificates from the Metropolitan Municipality and possibly HOA and body corporate (if applicable).

12.3 Agent's Commission

If an estate agent brokered the transaction, the seller will be liable to pay commission as per the commission agreement. The transferring attorney will deduct the commission from the proceeds and



pay it to the estate agency. The seller cannot unilaterally instruct the transferring attorney to withhold the commission or any part thereof after registration.

13. Cancelling your existing bond

The existing bond over a seller's property must be cancelled at the deeds office to enable the simultaneous, unencumbered transfer of the property into the purchaser's name. The misconception

exists that a bond does not have to be cancelled if there is no outstanding balance on the loan account. There always has to be a formal bond cancellation in the deeds office.

The transferring attorney obtains the outstanding balance (cancellation figures) from the seller's bank and ensure that guarantees are issued in its favour to credit the seller's account. The seller's bank will only consent to the cancellation of the existing bond once it has received these guarantees.



In terms of the National Credit Act, the bank may charge penalty interest (equal to three month's interest payable on the seller's bond) if it is not given 90 days' notice of the intention to cancel the bond.

If the bond is cancelled during the 90-day period, *pro rata* penalty interest will be charged for the remainder of the penalty period. For example, if 90 days' notice was given and the bond is cancelled within 30 days from date of such notice, penalty interest will be charged on the remaining 60 days. The seller will be obliged to pay the full penalty amount but will be refunded by the bank after registration.

The seller can give written notice to the bank of his/her intention to cancel the bond. However, our standard practice is to also notify the bank once we have received an instruction to transfer the property and the seller has confirmed the bond account number.



Any prospective seller who is concerned that he/she will be liable for penalty interest is welcome to send a request to bc@mcvdberg.co.za together with the bond account number. We then use the proper channels to notify the bank of the seller's intention to cancel the bond. The 90 days' notice period will commence once we have issued this notification.



Note that the seller will not be able to access any additional funds from his/her bond account once cancellation figures have been requested or this notice has been given.

14. Tax related matters

14.1 Value Added Tax (VAT)

VAT is only payable on the purchase price if the seller is a property trading enterprise registered for VAT and the property sold is a supply in terms of the VAT Act. Usually, only developers and speculators are liable to pay VAT. Sellers should contact their auditors if they are uncertain about whether they are liable to pay VAT. If it is a VAT transaction, it must be clear whether the purchase price includes VAT or not.

14.2 Transfer duty

If you are not registered for VAT, the purchaser will be liable to pay the transfer duty. The transferring attorney collects the transfer duty from the purchaser and pays it to SARS.

In exceptional circumstances, it is possible to add the transfer duty (together with other legal costs) to the purchase price to assist the purchaser. While such costs are usually for the purchaser's account, we would advise against this since the bank then effectively finances the purchaser's transfer duty and legal costs. The bank will consider such applications in unusual circumstances.

If transfer duty and costs are added to the purchase price, it needs to be disclosed to the bank and also mentioned in the purchase agreement.

 ***Banks are generally not keen to finance the purchaser's costs for various reasons.***

Remember that accepting an offer of this nature will most probably result in the bank declining the bond or only granting a loan for an amount that excludes the transfer duty and legal costs (the true purchase price). Should you receive an offer where the transfer duty and legal costs are included, it is advisable to add a condition in terms of which you can require that the purchaser expedite the bond approval.

14.3 Capital Gains Tax (CGT)


CGT may be payable by the seller as a result of the transfer of a property if the proceeds are deemed to be capital in nature. The calculation of CGT is rather complex as the inclusionary rates, income tax rates and subsequently the effective rates, differ from entity to entity. There is a rebate applicable when a natural person disposes of his/her primary residence. The calculation of CGT furthermore becomes complicated as there are costs that can be added to the base cost and others that can be deducted from the proceeds.


 ***Kindly contact us for a discussion regarding the possible CGT on your transaction.***

14.4 Income Tax

Income tax will only be payable by the seller if the seller ventured into a scheme of profit making. In other words, a developer or speculator may become liable for income tax (and not for capital gains tax). A seller who has recently sold other properties, must consult his/her auditor to establish whether the proceeds forthcoming from such further sales will be deemed income (in which case income tax is payable) or capital (in which case capital gains tax is possibly payable).

15. South African Revenue Service (SARS)

 Take note that ***all systems at SARS are integrated and accordingly no transfer duty receipt will be issued if you do not have an income tax number or if your income tax matters are not in order.*** This can delay the transfer of the property indefinitely. If you resolve these issues timeously you can save yourself a lot of frustration at a later stage.

 ***A property transaction cannot be processed unless both parties have income tax numbers. If either party does not have one, he/she must take immediate steps to obtain it from SARS.***

SARS carries out a risk analysis on both the purchaser and the seller before issuing the transfer duty receipt/exemption. All tax-related matters (whether private or otherwise), including but not limited to tax returns and payments, should therefore be up to date as failure will delay the transaction. If this is not the case, you should do so immediately.

16. Compliance Certificates (COC's)

16.1 Electrical Compliance Certificate

The Occupational Health and Safety Act requires a seller to provide a purchaser (or transferring attorney) with an electrical certificate of compliance on the date of occupation or registration, whichever is earlier. This certificate certifies that the electrical installation is safe and complies with SABS standards. Although the certificate makes no reference to the working order of the installation or to any appliances such as stoves and geysers, the specific clause relating to an electrical compliance certificate in your purchase agreement may require that these installations and appliances are in working order. In this case you would be obliged to ensure they are indeed functional. If you already have an electrical compliance certificate, it may not be older than two years on date of registration of the property. If any alterations or additions were made to the electrical installation after the certificate was issued, it becomes void and you will need to obtain a new certificate.



Repairs may be necessary (especially with older houses) before the electrical compliance certificate can be issued. We recommend obtaining the certificate immediately from a qualified electrician to avoid any delays in your transaction. Take note that a purchaser's bank will also require a copy of the electrical certificate before it gives permission to lodge the documents at the deeds office.

The cost of this certificate and any expenses relating to the repair of the electrical installation will be for your account.

16.2 Electric Fence Compliance Certificate

When transferring a property with an electric fence, the Occupational Health and Safety Act requires a certificate verifying that the installation is in accordance with the relevant SABS standards. The seller needs to deliver this certificate, known as the electric fence compliance certificate, to either the purchaser or transferring attorney. Note that it is not the same as an electrical certificate. While an electric fence compliance certificate is transferable, it becomes void if any alterations or additions are made to the installation. This means a new certificate will have to be issued.



Repairs (especially for older houses) may be necessary before an electric fence compliance certificate can be issued. Make sure to obtain this certificate immediately to avoid any unnecessary delays in your transaction!

Any electric fence installer or other certified installer can assist you in obtaining this certificate. Remember that the cost of this certificate and any expenses relating to the repair of an electric fence will be for your account.

16.3 Gas Certificate

If your property has a gas installation, the Occupational Health and Safety Act requires that you must provide the purchaser or transferring attorney with a gas certificate before date of occupation or registration, whichever is earlier. This certificate must certify that the gas installation is safe and complies with the relevant SABS standards.

The Regulations do not prescribe the validity period of the gas certificate. Any modification or alteration to the installation will however require a new gas certificate. The regulations require that

the 'coupling hoses' must be replaced every 5 years. As this is a modification it indirectly limits the validity of the certificate to 5 years.

Apart from the aforementioned a new gas certificate is required every time the owner or user of the installation changes. *In other words when a property is sold, a new gas certificate is required.*



Repairs (especially for older houses) may be necessary before the gas certificate can be issued. We recommend obtaining this certificate immediately to avoid any unnecessary delays in your transaction.



The company that handled the gas installation can issue the gas certificate. Alternatively, any institution specialising in the installation of gas equipment should be able to issue these certificates.

The cost of this certificate and any expenses relating to the repair of the gas installation will be for your account.

16.4 Plumbing- or water certificate (only applicable to properties in the Cape Town area)

The issuing of a plumbing- or water certificate in the municipal jurisdiction of Cape Town is a prerequisite when transferring any properties in this area. According to the Cape Town Water By-Laws of 2010 (Section 14), sellers are obliged to obtain a plumbing certificate from a certified plumber.

16.5 Beetle Certificate (only applicable to properties situated in coastal areas)

Purchase agreements for coastal properties usually contain a clause requiring a beetle certificate, which guarantees the absence of beetles in or on the property. If this applies to your property, make sure that the certificate includes a guarantee with regard to all beetles and not only to a specific species.

If the purchase agreement states that a beetle certificate must be handed to the purchaser and the transfer attorneys fail to obtain it, the attorneys can be held liable for negligence. The purchaser's bank may also require such a certificate prior to registering the transaction at the deeds office. In this situation, it makes sense to ensure that the certificate is issued as soon as possible and handed over to the transferring attorneys to avoid any delays in the transfer process.

The cost of the certificate and/or other expenses relating to the extermination of beetles will be for the seller's account.

16.6 Declaration regarding Invasive Species

In terms of Section 29(3) of the Alien and Invasive Species regulations of 2014, a seller has to notify a purchaser in writing, prior to concluding a sale agreement, of the presence of any listed invasive species on the property. This list is available on the website of the Invasive Species of South Africa (ISSA) at www.invasives.org.za.

17. Municipal accounts

Your property cannot be transferred at the deeds office unless you have proof (i.e. a clearance certificate) that the municipality's account is paid up in advance.

The transferring attorney applies for the clearance figure, which includes all rates and taxes and charges for utilities in arrears, as well as an advance payment for four months. The municipality issues a clearance certificate once the transferring attorney has paid the clearance figure on behalf of the seller. **Note that if your account is in arrears, we recommend providing you with a figure that includes all arrears and required advance figures instead of paying the arrears to the municipality yourself.**



When it comes to arrears payments, the municipality often experiences delays in updating the necessary journals to reflect the correct figures. Waiting for the updated figures from the municipality may delay your transaction, so it's better to be pro-active in this regard.



If you appoint us to handle your property transfer we shall explain in detail how to close municipal accounts in the most effective way.

18. Homeowners' Association (HOA) / Sectional Title Body Corporate

As with your municipal account, your property cannot be transferred without proof from the HOA and/or body corporate that any applicable levies have been paid in advance.

The transferring attorney applies to the HOA/body corporate to issue the clearance figure, which includes the levies in arrears as well as an advance payment. After the transferring attorney has paid the clearance figure to the HOA/body corporate on behalf of the seller, a clearance certificate will be issued.



If you are in arrears with your levies at the body corporate or HOA, wait for us to provide a figure that includes all the arrears and advance payments required instead of paying the arrears yourself.

Since we are able to settle the full amount required in one payment, this will avoid any unnecessary delays in the process.

19. Occupation and occupational rent

The term '**occupation**' refers to the date on which a seller is obliged to give vacant possession of the property to a purchaser.


Once the parties agree in the purchase agreement to give occupation on a specific date, they are contractually and legally bound to this date. The transferring attorney cannot relax conditions or enforce conditions not agreed upon unilaterally at the will of either party.




It is therefore essential that the parties apply their minds and contractually agree on which requirements must be in place before occupation can occur. (Examples of such requirements are obtaining loan approval and paying the deposit). M.C. van der Berg Inc. will monitor the process and ensure that the requirements are met before the purchaser can take occupation. Evicting unwanted occupants in the event of a transaction not proceeding, is a costly and time-consuming exercise!

Although most sellers agree to give occupation only on date of registration, this date is often altered by agreement at a later stage. For purposes of clarity, we therefore suggest that you agree on the amount of occupational rent in the purchase agreement. This is regardless of whether or not it is envisaged at acceptance of the offer that the occupation date will only be on the date of registration.

The term '**occupational interest**' refers to the rent payable by either of the parties occupying the property while it is still registered in the name of the other party. Usually, the purchaser will pay occupational rent to the seller if the property is occupied before date of registration.

 ***Since there is no established rule stipulating what the occupational rent amount should be, parties can therefore negotiate an amount. Note that once you have agreed on the amount of occupational rent payable, you are legally bound to that amount. It is therefore vital to consider this carefully before accepting an offer to purchase!***

 ***Remember that a purchaser cannot open a utilities account at the local authority in his/her name before registration. Therefore, the seller will still be liable for any costs on the utility account until registration. This is why aside from agreeing on the occupational rent; both parties need to agree on an estimated advance amount for these utilities.***

20. Insurance


As an owner, you are responsible for the short term insurance of your property, so make sure not to cancel your short term insurance before registration. Should you cancel your short term insurance before registration, it will mean that the property is not insured against any damages that may arise in the period between cancelling the insurance and registering the property. If a purchaser occupies the property before registration it can increase your exposure to risk, so insurance is therefore essential.

21. Mandates

Sellers often incorrectly believe that an estate agent's claims for commission arise from the purchase agreement. Legally, it actually emanates from the common law principles of a contract of mandate (in other words, the seller's instruction to sell the property).

Although the clause with regard to the agent's commission in the purchase agreement, together with a possible agent's commission addendum, regulates agent's commission, the agent will still have a claim for commission even if the purchase agreement does not contain a stipulation to this effect.

This will be the case as the estate agent's claim for commission is regulated by the common law principles of a contract of mandate.

 ***This contract of mandate will usually be contained partly or fully in the mandate agreement, which the seller signs when he/she appoints the estate agent to market and sell the property.***

According to common law principles, there are no formal requirements for a contract of mandate, and therefore a seller may verbally grant a mandate to an estate agent. It is obviously bad business practice to enter into verbal agreements as this may present evidentiary problems for both the agent and the seller in proving the existence and ambit of the mandate.

The common law principles discussed above have been amended in the Code of Conduct of Estate Agents by stipulating that a sole mandate and an exclusive mandate (see below) must be in writing and must be signed by the seller.

In practice, there are four types of mandates. For the purposes of this document we shall not discuss the advantages and disadvantages of the various types of mandates since they are not relevant.

21.1 Open mandate

In the case of an open mandate, the seller authorises several agencies to market the property. The agent that is the effective cause of the sale will be entitled to commission. The seller may also sell the property himself.

21.2 Dual mandate

In this case, the seller authorises a limited number of agencies (two or three) to sell the property. The agency that is the effective cause of the transaction will be entitled to commission. The seller may, in this case, also sell the property himself.

21.3 Sole mandate

In the case of a sole mandate, the relevant agency and the seller agree that the agency has the right to market the property to the exclusion of all other agencies. Due to the restrictive nature of a sole mandate, it is usually only granted for a limited period. If another agency sells the property during this period, the seller will still remain liable for paying commission to the sole mandatory.

The right to sell a property is an inherent right of a seller, which means that South African courts have not interpreted a sole mandate as a limitation of this right. Therefore, a seller who has granted a sole mandate may sell the property himself.

21.4 Exclusive mandate

This type of mandate dictates that the relevant agency will exclusively sell the property within the period allowed. In this case, the seller renounces the right to sell the property himself during the exclusive mandate period.

Finally, it should be kept in mind that the EAAB Code of Conduct for Estate Agents contains additional requirements. Aside from the requirement that sole (and exclusive) mandates should be in writing and signed, the mandate should also include a marketing plan.

The Consumer Protection Act also affects the relationship between agent and seller; the various mandates need to comply with the Act. For example, the Act requires that the mandate should be drafted in plain language and draws the parties' attention to any specific high-risk condition.

It is always advisable for the seller to have the mandate scrutinised as it regulates the legal relationship between the seller and the agent.

22. Commission – liability

It's a given that a seller expects an estate agency to market his/her property in an effective and professional way. Remember that estate agents earn their living from commissions, which motivates them to put in their best efforts when marketing properties.



If not managed correctly, commission can cause problems between agents and sellers and result in a legal dispute. It's therefore helpful to know more about how different types of mandates affect commission.

22.1 Commission in sole and exclusive mandates

Giving a sole or exclusive mandate to a specific agency to market your property means you should refrain from marketing and/or selling the property through another estate agent.

An estate agent who is given a sole or exclusive mandate dedicates his/her attention, time and resources to marketing and selling your property. Aside from the agency incurring substantial expenses in this process, the agent also loses other opportunities as a result of his/her intensified efforts and commitment to market and sell your property. Remember that if you have given an agent a sole mandate, you will remain contractually liable to pay commission to the relevant agency if an estate agent from another agency sells the property during the mandate period.

Even if you sell the property to someone who was introduced to the property during the sole or exclusive mandate period after the sole mandate has lapsed, you can still be held liable for the commission.

22.2 Double commission

It sometimes happens that more than one estate agent introduces the same purchaser to your property. As a general rule, the agent who originally introduced the purchaser to your property is regarded as the effective cause of the sale and will usually be entitled to commission.

However, this is not always the case, since an agent that ultimately presents an offer to purchase to you may be regarded as the effective cause of sale.

It is not always possible to establish which agent was indeed the effective cause, because both could have played a substantial role in convincing the purchaser to make an offer. For this reason, the Court of Appeal recently confirmed the legal principle that a seller may be held liable for double commission, namely having to pay commission to both agents.

Where a second or subsequent agent introduces a purchaser, who has already been introduced to your property, you should reveal this information to the second agent. However, you will not necessarily know about all the potential purchasers that agents introduce to your property. It is therefore advisable to request the agent to provide a list of names specifying everyone that was introduced to your property. This enables you to verify if another agency previously introduced a purchaser before you accept an OTP. Remember that small slip-ups could result in expensive double commission costs!

22.3 Private sale – commission claim

It sometimes happens that a purchaser contacts you directly to purchase the property while you are unaware that an agent initially introduced this purchaser. A purchaser may deliberately withhold this information in an attempt to avoid paying commission. When an agency later discovers that a purchaser it initially introduced to the property has bought it privately, it is highly likely that it can and will claim commission from you in certain circumstances.

In the case of a private sales transaction, it is therefore advisable to include a clause in the purchase agreement in which the purchaser verifies that he/she was not introduced to your property by any estate agent and furthermore, that he/she indemnifies you against any possible commission claim.

22.4 Deceitful behaviour of some purchasers

Some dishonest individuals who are interested in a property advertised by an agent might send family members or business associates to view it. In this scenario, the actual purchaser will make a sudden appearance and make an offer directly to the seller without collaborating with the estate agent. Their intention is to evade paying commission.

Beware of this practice, as it is not only unethical, but can result in you being held liable for the estate agent's commission in certain circumstances.

23. Building plans

Although the law does not currently require building plans to be in order before the property is transferred, it is better to exercise caution. A purchaser who ultimately makes an offer on your property may make it conditional upon the delivery of the approved plans. Banks are increasingly requiring approved building plans before they give consent to register the bond and the property thereafter.



Approval of building plans at a late stage will delay your transaction!

Note that it can take up to four months to get an approval finalised.

For example, if you have made structural alterations to the property such as building garden walls, erecting a Wendy house or lapa and even building a swimming pool, you will need to obtain amended plans.

In some provinces, provincial legislation has already been promulgated requiring confirmation from the municipality that the plans are indeed in order before transfer can take place. It is likely that this legislation will also be incorporated into Gauteng's provincial laws. Furthermore, banks may soon make it a requirement that building plans need to be in order before they will give permission for registration.

In the case of sectional title units, the consequences can be even more severe as both building plans and sectional title plans need to be approved.

24. Town planning and legal compliance

Should you be required to update your property's building plans it is important to note that there might be other town planning and legal challenges during the approval process. Including, but not limited to:

- Building line relaxation
- Permission for servitude encroachment
- Servitude cancelation application
- Removal of Restrictive Conditions contained in the title deed

- Rezoning to increase allowable building controls (coverage/FAR/height)
- Permission for an additional dwelling unit (especially relevant on section titles with 2 units on a property)
- Engineer certificate for swimming pool (dolomitic areas)



Compliance is a specialized field and we suggest that you contact iCompli2sell to assist you timeously to ensure that your property is compliant to avoid any delays later in the process. iCompli2sell will do an assessment on the property and supply you with a Property Compliance Vetting Report to identify any legal challenges that can potentially be faced before building plans are submitted for approval. For further information regarding the services that iCompli2sell offers, visit www.icompli.biz or contact iCompli2sell directly at helpme@icompli.biz or 086 006 1062.

25. FICA (Financial Intelligence Centres Act) and POPI (Protection of Personal Information Act)

24.1 FICA

‘FICA’ is an acronym for the ‘Financial Intelligence Centres Act’. The FICA Act requires that certain nominated individuals and institutions like attorneys, banks and estate agents need to verify certain information and keep records thereof. Accordingly, an individual seller or purchaser will also need to provide certain documentation such as an identity document and proof of residential address (e.g. Vodacom or municipal account).

Furthermore, we have a statutory obligation to disclose and report certain suspicious transactions. The primary objective of FICA legislation is to prevent money laundering and the flow of income earned from illegal activities.



Don’t ever become involved in a transaction where a purchaser offers to pay an amount in cash directly to you, unless it has been disclosed in the offer to purchase. Purchasers that do not disclose such transactions are probably doing it to avoid paying transfer duty costs. If you are involved in such a transaction you would unwittingly be assisting the purchase to evade tax and take part in money laundering yourself (albeit out of ignorance!).

FICA legislation obliges transferring attorneys to report transactions involving cash payments of R25 000 or more to the Financial Intelligence Centre (FIC). Not all cash deposits are necessarily obtained from illegal activities, however. Provided they are disclosed in the offer to purchase, declared



to the FIC and paid into our trust account, you will be protected. Our first letter to you contains a list of original FICA documents which you need to bring along when you sign the transfer and bond documents (if applicable) at our office.

24.2 POPI


‘POPI’ is an acronym for the ‘Protection of Personal Information Act’. In terms of this Act, we need your consent to process your personal information (i.e. your identity number, contact details, email address etc.). We shall request this consent when you sign the transfer, bond cancellation and/or bond documentation (if applicable) at our offices. Rest assured that we comply fully with the POPI Act. This means we shall only process your information for the purpose of property transfers, bond cancellation and other bond-related issues.

26. Consumer Protection Act (CPA)

One of the primary objectives of the CPA is to protect consumers. The CPA however, does not regulate all transactions and business relationships. Only transactions where a person is selling a property in the normal course of business fall within the ambit of the CPA. Generally, therefore, the CPA will not be applicable to the seller/purchaser relationship unless you, as the seller, are a property developer or speculator.


Note that estate agents provide a service to both the seller and the purchaser in the normal course of their business. Therefore, the CPA regulates the relationship between the seller and the agent on the one hand, and the purchaser and the agent on the other hand. We have compiled this *MC Sellers Guide* to assist estate agents to comply with this requirement.

As a result, most estate agencies will require you to complete a so-called property report. Unfortunately, many of these reports contain incorrect wording, which introduces the concept of unintended consequences. This means that the common law protection afforded to the seller regarding latent (hidden) defects is nullified. This exposes you unnecessarily regarding the liability of claims.

 ***Make sure to obtain this report when an agent lists your property. Study it carefully to check that you are not required to give any guarantees. If you are unsure, you can gladly discuss this document with us.***

27. Flow chart of the transfer process

A flow chart of the transfer process can be found on the last page hereof.


 ***The normal turnaround time for a transfer is approximately six to eight weeks from receipt of the bond instruction by the bond attorney.***

This means that week 1 begins when the bond attorney receives the bond instruction.

As the bond approval period are negotiated between the parties, it might differ from contract to contract and therefore the flowchart will indicate it as 'unknown'.

Find out more about the transfer process by viewing our *MC Quick Guide* on our website at www.mcvdberg.co.za.

28. How you can facilitate a smooth transaction

 ***There are several things you can do to assist us in ensuring that your transaction runs smoothly, such as:***

- 1) Providing your FICA and any other documentation on request;
- 2) Supplying your bond account number;
- 3) Immediately supplying your latest rates and taxes account and if applicable, a photo or screenshot of your pre-paid electricity meter;
- 4) Provide us with photos of water and/or electricity meter readings;
- 5) Signing any relevant documents as soon as possible when requested to do so;
- 6) Notifying us when you will be unavailable or out of town for document signing purposes;

- 7) Transferring the clearance figure amount when requested;
- 8) Obtaining and forwarding the electrical compliance-, gas-, and electric fence certificates timeously;
- 9) Ensuring that you have an income tax number and providing it to us immediately;
- 10) Making sure that your tax affairs at SARS are in order;
- 11) Making certain that your building plans are updated.

29. Message from the directors

The directors of M.C. van der Berg Inc. trust that this *MC Sellers Guide* has provided you, our valued client, with essential and useful information.

We furthermore trust that this informative guide, together with our professionalism, effectiveness and expertise will result in a hassle-free, pleasant and exceptional business experience.



We invite you to put your trust in M.C. van der Berg Inc. You are welcome to contact us if you have any queries. Visit our website at www.mcvdberg.co.za, contact us on 012 660 6000 or send an email to info@mcvdberg.co.za.

The MC-team look forward to meeting you over the best cup of coffee in town!

M.C. VAN DER BERG^{INC}
ATTORNEYS, CONVEYANCERS & NOTARIES

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