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Buying and Selling Property: Nine Important Questions

"Owning a home is a keystone of wealth… both financial affluence and emotional security" (Personal Finance Expert Suze Orman)

When you buy or sell your "Home Sweet Home", particularly for the first time, the process can seem complicated, the terminology confusing, and the risks of making a costly mistake intimidating. You are after all dealing with quite possibly your most important asset!

To help you navigate the process, as either seller or buyer, here are some common questions, with answers.

1. Where can I get a simple guide to the process?

When you come down to the details it certainly is important to get everything right, but a simple, broad overview to start with will go a long way to de-mystifying the process and to setting you safely onto the right path.

Have a look at the Law Society of South Africa's "Buying or Selling a House: What You Need to Know". Download it in any of four languages **here**.

Simply and clearly written, the guide is full of really important information and advice, both practical and legal – take the time to read it in depth!

Turning now to a few of the other more common questions you will no doubt have…

2. Do I really need legal advice?

Our law reports are full of court disputes that could have been avoided with a simple upfront request for legal advice. The danger of not doing so is that many pitfalls await the unwary and you will be held to anything you agree to. It's only sensible therefore to take advice early - well before you appoint an agent, start looking for a house, or get involved in submitting offers and negotiating sale agreements.

Not having your "offer to purchase" or "agreement of sale" legally checked is a recipe for disaster. Once you sign on the dotted line you are on the hook for everything in the document. With very limited exceptions our law holds you to your signature and it is no good saying later "But I didn't read the document, it all looked like the normal standard stuff" or "I had no idea I was agreeing to term x or condition y" – tough, you are bound.

Bottom line - chat to your attorney before you do anything else!

3. Whose name/s should I put the property in?

Should you buy the house in your name or in your spouse's name? Should you buy jointly? Does it matter what marital regime applies to your marriage? What if you are in a permanent cohabitation arrangement rather than a formal marriage? Or perhaps you are wondering whether you should put the house into the name of a company or family trust.

Your choice now will have far-reaching legal, tax and practical consequences; and with some complex areas of law involved, specialist upfront advice is a no-brainer.

4. What else should I ask my attorney?

Common areas of dispute and litigation include "bond clauses" and "72-hour clauses" in sale agreements, confusion over the need to identify or disclose both visible and invisible defects, disagreements over what is a "fixture" that comes with the house and what isn't, misunderstandings over neighbours' rights to build and encroach on views and the like, not checking for building plans and municipal Certificates of Occupancy (you will have a problem if a previous owner built or extended without proper plans), not checking the zoning and title deed restrictions (which could put a damper on any plans you have to extend, go up a storey, build a home office, or the like), servitudes or other rights of use over the property, limited "home business" options and so on.

(*Tip: Take lots of "before and after" photos of the house and property with your cell phone – a dated picture is hard to argue with!)*

Other "homework" items to ask about – what paperwork you will need (do you know where your title deed is?), how long your particular transfer is likely to take (and a linked question "what date of occupation should we agree on?"), to whom deposits and any occupational rental must be paid (and who gets paid the interest earned on monies held in trust), what compliance certificates you need, how to find the best bond rates, whether you might qualify for a FLISP (Finance Linked Individual Subsidy Program) subsidy, how to cancel and open municipal service accounts, the rights of any occupiers (not just tenants, also "unlawful occupiers"), and so on – you will have your own list.

5. What about planning my finances?

Ask your lawyer for a breakdown of who will pay what and when. Think deposits, bond and transfer costs, transfer duty, agent's commission, bond settlement balances and so on. Cash flow forecasting, and a clear understanding of the timelines involved, are critical here to avoid unpleasant surprises down the line.

As a buyer, factor into your “affordability budget” not only bond repayments and your projected regular monthly costs (rates, services, insurance premiums, security costs etc) but also an emergency fund to cover any unexpected costs that may crop up.

On the subject of finances, cyber-fraud is a growing issue when it comes to electronic communications and payments so agree with your lawyer on measures to ensure that neither of you falls victim. Fraudulent “here are my new bank account details” emails are flavour of the month, but the scams are constantly evolving.

6. Should I buy-to-let in the current market?

Buying-to-let can be an excellent investment channel, and for a whole host of reasons this time of pandemic and disruption has opened up an abundance of opportunities to prospective landlords. Just don’t rush in blind - choose the right property in the right area, go into the process with your eyes fully open, and in particular beware the common pitfall of failing to minimise your risk of having to fight a difficult, destructive or non-paying tenant. Residential property occupiers enjoy strong protections against eviction even in normal times, and these protections are even stronger for the duration of the National State of Disaster.

It is essential also to understand the impact of the Rental Housing Act on the landlord/tenant relationship – do you know for example the specific requirements around rental deposits and joint property inspections? “Ignorance of the law” is no excuse, and non-compliance could cost you dearly.

7. Who appoints the conveyancer and why do I need one?

In a nutshell, you need to appoint a specialist lawyer (a “conveyancer”) to pass transfer of ownership from the seller to the buyer in the Deeds Office. That’s because only on registration of the transfer does the buyer become the legal owner of the property.

As a seller, insist on choosing the conveyancer - pick a firm you can trust to act with professionalism, integrity and speed.

8. What about buying into a complex?

Owing a house and living in a community scheme come with substantial benefits, just understand exactly what you are letting yourself in for both on a practical level and in regard to the various rules and regulations you will be agreeing to.

Our courts regularly have to sort out bitter (and unnecessary) disputes around owners desperately – and almost always unsuccessfully - trying to get out of complying with body corporate and Home Owners Association rules. Common areas of complaint are home businesses, pet ownership and control, vehicle parking, noise, nuisance objections and the like.

9. What records and paperwork should I keep?

One thing is certain – the document you don’t keep on file is the one you will be desperately searching for in 10 or 20 years’ time! So when in doubt about a particular item keep it, but at the very least have a file (backed up electronically) with –

- Your title deed (also called a “deed of transfer”) from the conveyancer. If your property is bonded the bank will keep the original in which event keep a copy plus a note as to which bank has the original. If you lose your title deed you can get a copy but there are delays and costs attached which you really want to avoid when you come to sell again down the line.
- The full signed agreement of sale and annexures,
- The conveyancer’s final statement of account and associated invoices,
- All bank loan and bond documents,
- Your municipal Certificate of Occupancy if you undertook any building work (construction, renovations, extensions etc),
- A running list with supporting documents of all tax-relevant expenses.

For example, keep a running Capital Gains Tax schedule with –

- A list of expenses relevant to the house's "base cost" (purchase price, transfer costs and legal fees, bond costs, agent's commission, costs related to the sale or purchase like advertising, architect's fees etc) and
- Ongoing capital expenses i.e. improvements and renovations (but not repairs or maintenance).

- "Before and after" photos of the house and property,
- Ask your lawyer if there is anything else you should keep relevant to your particular property and transfer.

Can Employees Resign to Dodge Disciplinary Hearings?

"…an employee who gives short notice in violation of the contract … may be obliged to serve out the notice period" (Quoted in the judgment below)

It's an age-old workplace dodge - threatened with a disciplinary hearing and fearing a guilty verdict, an employee resigns with immediate effect and walks out the door with a defiant "Well that's it, you just lost your right to discipline me. See you around, loser".

No longer! Our courts have dealt with this issue often in the past in various guises and with conflicting outcomes. Fortunately, a new Labour Appeal Court (LAC) decision has finally settled the matter.

The bank employee and the fraudulent cheque charge

- A bank employee was given notice to attend a disciplinary hearing on a charge of misconduct after a R30,000 cheque was cashed without proper procedures being followed (the cheque was later found to have been fraudulent, and the bank lost R30k).
- She resigned "with immediate effect", presumably fearing a guilty verdict and the risk of her name being put onto the Banking Association of South Africa's REDS (Register for Employees Dishonesty System) database.
- The bank however insisted that she serve the four-week notice period in her employment contract and convened a disciplinary enquiry within the notice period.
- The employee and her attorney arrived at the enquiry to argue that her immediate resignation had ended the employment relationship and that the enquiry could not therefore continue. When the chairman rejected this argument, she left the enquiry to proceed in her absence.
- Found guilty of misconduct and summarily dismissed, the employee approached the Labour Court which agreed that the resignation had terminated the employment. It accordingly ruled the dismissal null and void.
- On appeal however the LAC found that the employer had been entitled to

enforce the contractual four-week notice provision, that the employment relationship therefore still existed at the time of the hearing, and that the dismissal was accordingly valid.

Employers: Be clear and be quick!

- You can choose to enforce the notice period provision, or you can choose to waive it. If you are found to have waived it, the employment relationship will have ended immediately. To avoid any risk of that, **make it crystal clear to the employee that you are enforcing the notice period.**

- Secondly, don't drag your feet on holding the disciplinary enquiry – you must act **before the notice period expires and the employment relationship ends.**

What if there is no notice period in your employment contract?

In that case, said the Court, the notice periods in the Basic Conditions of Employment Act (BCEA) would apply –

> "(a) one week, if the employee has been employed for six months or less;
> (b) two weeks, if the employee has been employed for more than six months but not more than one year;
> (c) four weeks, if the employee
> (i) has been employed for one year or more; or
> (ii) is a farm worker or domestic worker who has been employed for more than six months."

Landlords: Can You Cut Electricity to Collect Arrears or Evict?

"It is a fundamental principle that no man is allowed to take the law into his own hands" (Transvaal Supreme Court, 1906)

Landlords can be sorely tempted to force defaulting tenants to settle their arrears (or to vacate the premises altogether) with a bit of instant "self-help" by cutting electricity or water supplies, or perhaps by changing locks or disabling access codes.

From the High Court comes another timely warning that you cannot resort to self-help without risking an immediate and costly "spoliation order".

What exactly is a spoliation order?

In a nutshell, it is an order rapping you over the knuckles for taking the law into your own hands and forcing you to return to the previous *status quo* whilst you fight your weary way through proper legal channels.

To quote from a 2012 Supreme Court of Appeal decision (emphasis supplied): "Spoliation is the wrongful deprivation of another's right of possession. The aim of spoliation is to prevent self-help. **It seeks to prevent people from taking the law into their own hands** ... The cause for possession is irrelevant - that is why a thief is protected ... The fact that possession is wrongful or illegal is irrelevant, as that would go to the merits of the dispute".

The two things the tenant must prove

At this stage, the court is not interested in how strong or weak the landlord's claim may be. Your full-on fight over the "merits of the dispute" comes later, and all the tenant need show now is –

1. That it was in "peaceful and undisturbed" possession, and

2. That it was "unlawfully deprived" of that possession.

The filling station, the laundromat and the "personal rights" argument

- A landlord was in a protracted clash with two of its long-standing tenants – a filling station and a laundromat – over disputed electricity arrears totalling some R240k. As often happens, the landlord was on the hook for the arrears, and was, it said, "facing financial ruin". The leases had been cancelled and High Court litigation over the disputes was pending.

- Eventually, by agreement, pre-paid meters were installed. The tenants loaded their first credit tokens but suddenly found themselves unable to top up the meters. It turned out that the landlord had instructed the electricity supplier to load the arrears onto the pre-paid meters, meaning that the tenants would have to pay the disputed arrears before they could buy more electricity.

- When the tenants launched an urgent spoliation application, the landlord argued that the tenants' rights to a supply of electricity were purely "personal rights" in terms of their respective leases. Thus, argued the landlord, spoliation could not apply.

- The tenants countered that "the right to access to electricity supply is an incident to the possession of the property from which they conduct their businesses" which would come to a standstill without electricity.

- The Court's analysis of the various legal arguments around the "personal rights v incident of occupation" fight, and over whether our law recognises "quasi-possession" of an "incorporeal" (like electricity) - as opposed to "actual possession" of the property itself - will be of great interest to lawyers. But for landlords and tenants it is the practical outcome that really matters.

- Finding that there was an "irresistible inference that the [landlord] effectively cut the electricity (by uploading the arrears on the pre-paid meter) to force the [tenants] to vacate and to avoid having to follow due process to recover the alleged arrears" and that "this is a matter where the interference on the supply of electricity … constituted material interference of the possession of the property itself", the Court ordered the landlord to immediately (a) restore the tenants' access to their electricity supply and (b) cancel the negative and arrear balances on their pre-paid meters. An adverse costs order rubs salts into the landlord's wounds.

The lesson for landlords

No matter how strong your main case may be, taking the law into your own hands is likely to be a costly mistake. **Seek legal advice before you take any form of self-help action!**

New National Minimum Wage and Earnings Thresholds From 1 March 2021

(N.B. The increases highlighted below are extracted from the Employment and Labour Minister's announcement of 9 February 2021, and emphasis has been supplied where helpful in enabling quick identification of your employment sector. Comment is in square brackets)

- "The **National Minimum Wage (NMW)** for each ordinary hour worked has been increased from R20,76 to **R21,69 per hour** [a 4.5% increase] for the year 2021 **with effect from 1 March 2021.**

  It is illegal and an unfair labour practice for an employer to unilaterally alter hours of work or other conditions of employment in implementing the NMW. The NMW is the amount payable for the ordinary hours of work and does not include payment of allowances (such as transport, tools, food or accommodation) payments in kind (board or lodging), tips, bonuses and gifts.

- Following a transitional phase, **the farm worker sector** has been aligned with the NMW rate of **R21,69 per hour** [a 16% increase].

- **The domestic workers sector** will be entitled to **R19,09 per hour** [a 23% increase] and could be expected to be aligned with the NMW when the next review is considered [i.e. 2022]. [Use the **Living Wage** calculator to check that you are paying your domestic worker enough to cover a household's "minimal need"].

- In line with the **Basic Conditions of Employment Act (BCEA)**, the increase in the NMW will mean that wages prescribed in the sectoral determinations that were higher than the NMW at its promulgation, must be increased proportionally to the adjustment of the national minimum wage. Therefore, the **Contract Cleaning; and Wholesale and Retail Sector** will also have their wages upwardly adjusted by **4,5 percent.**

- In another development, the Minister has also, in terms of the **BCEA earnings threshold**, revised the rate from R205 433.30 to **R211 596.30**. Chapter 2 of the Act deals with the regulation of working time, limit on the duration of an employee's working week and to prescribe a rate at which an employee should be paid to work outside normal working hours among others.

- Employees that earn in excess of this rate per annum are excluded from sections 9, 10, 11, 12, 13, 14, 15, 16, and 17(2) and 18(3) of this Act from 01 March 2021. These sections protect vulnerable employees and regulate amongst others, hours of work, overtime, compressed working time, average hours of work, meals interval, daily and weekly rest period, pay for work on Sundays, night work, and work on public holidays."

Your Website of the Month: From Scenarios to Strategy – Use Business "Wind Tunneling"

Now more than ever before, scenario planning is essential for the success of your business. But of course the next step in the process is just as critical – **you need to create an actual business strategy based on your scenario planning.**

It's a process that can be both quick and simple. As the author of "From Scenarios to Strategy: Top 3 Methods" on the Medium **website** points out, even smaller businesses with limited resources will find the "wind tunneling" method both powerful and flexible.
