

# The Sellers Handbook

## Introduction

You are reading this because you are either selling or purchasing a property and from experience we know that you may have numerous questions. The purpose of this handbook is to give you, a simple yet thorough explanation of the most common terms, processes, legislation and time frames which will assist in changing a potentially stressful experience into a pleasant one. We encourage you to read this handbook as it will give you the knowledge to handle the necessary procedures which lie ahead.

### Deciding on a mandate

The estate agent's claim for commission is regulated by the common law principles and will usually be contained partly or fully in the mandate form, which the seller signs when they appoint the estate agent to market and sell their property. There are no formal requirements for a contract of mandate, and may therefore be made verbally to an agent. Verbal agreements are obviously not advisable because it may present problems for both the agent and the seller in providing evidence of the existence and details of the mandate.

A sole exclusive mandate (see below) must be in writing and must be signed by the seller.

**In practice, there are three types of mandates.**

**Open mandate:** A number of agencies are instructed by the seller to market the property. The agent who makes the final sale will be entitled to commission. The seller may also sell the property himself.

**Dual mandate:** The seller instructs, a limited number of agencies (two or three) to sell the property. The agency that makes the final sale will be entitled to commission. The seller may also sell the property himself.

**Sole exclusive mandate:** The seller gives the agency the sole right to market the property excluding all other agencies. A sole mandate, it usually is granted for a limited time only, due to the restrictive nature of it. If the property is sold by another agency during this period, the seller will remain liable for paying commission to the agency, who has sole mandate. The seller therefore renounces the right to sell the property himself during this exclusive mandate period.

Finally, you should remember that the Code of Ethics for Estate Agents requires that sole exclusive mandates should be in writing and signed by both contracting parties.

The Consumer Protection Act regulates the relationship between agent and seller and for this reason, any mandates must adhere to the requirements set out in the Act, most notably, the fact that the mandate must be in clear and understandable language and not contain onerous conditions. Our offices are happy to check any mandate agreement you may be thinking of entering into before you sign it.

## **Commission – Liability**

You expect the estate agency to market your property, and to be effective and professional. The commission they receive for selling your property is their livelihood and an incentive to do their best for you. To avoid the issue of commission between agents and sellers becoming a legal dispute, take note of the following:

***IN THE CASE OF A SOLE EXCLUSIVE MANDATE:*** You are still contractually liable for the payment of commission to the agency that holds the sole mandate, if you or another estate agent sells the property during the period of the mandate. Even if you sell the property after the sole mandate has lapsed, to someone who was introduced to the property during the sole mandate period, you will be held liable for the commission.

***DOUBLE COMMISSION:*** It may occur that multiple agents introduce your buyer to your property which gives rise to a double, treble or multiple commission claims. The general rule is that the agent who is the effective cause of the sale is the one who has earned the commission arising from the sale. The term “effective cause” is not always easy to define and doesn’t automatically associate with the agent who took the buyer through the property first or who presented the offer to purchase to the seller. It has been held in a recent court appeal that double commission may be payable by the seller.

In order to reduce the risk of commission being payable to more than one agent, it is advisable that you obtain a list of the names of all the people introduced to your property by each agency to ensure that the buyer has not been introduced by multiple agents before signing an offer.

***PRIVATE SALE – COMMISSION CLAIM:*** A buyer may contact you directly to purchase the property, while you are unaware that they were actually introduced by an agent. The buyer may deliberately not tell you in an attempt to avoid paying commission. When the agency later discovers that the property was sold privately to a buyer which they introduced to your property, (and they most probably will) they can in certain circumstances claim commission from you.

We recommend, therefore, that in order to protect yourself from being opened up to a commission claim by any estate agent, you include a clause in your deed of sale in which the buyer warrants that no estate agent introduced him/her to your property and further indemnifies you against any commission claim that may arise.

## **Before accepting the offer of purchase**

The offer to purchase is a written offer made to the seller, which sets out all the conditions on which the buyer wants to purchase the property. The offer to purchase becomes the deed of sale once you have signed acceptance of it. The deed of sale and legislation then creates the rules applicable to the transferring attorney when your property is transferred.

It is imperative that you read over the offer before you accept it and take note of key aspects before signing it. We would happily look through your offer to purchase before you sign to ensure your rights are protected and assist you with the transfer of your property thereafter.

## **The role of the transferring attorney**

The transferring attorney is the Conveyancer at a law firm who is tasked with transferring your property into the buyer's name. (A Conveyancer is simply an attorney who has passed additional exams qualifying him/her to transfer property and deal with property transactions.) The transferring attorney must also ensure that the buyer complies with the terms of the deed of sale and, if not, that the necessary steps are taken to enforce the terms. The transferring attorney drafts all the legal documents and oversees the signing thereof. Additional responsibilities include the obtaining of the transfer duty receipt, the rates clearance certificate from the relevant municipality and any consent from the Home owners association and sectional title consents that may be required. The transferring attorney controls the financials relating to the transaction and accounts to the seller and buyer on registration of the transfer. The transferring attorney furthermore liaises with the bond attorney and cancellation attorney and sees the transaction through the deed's office.

## **The sale agreement**

The deed of sale provides the transferring attorneys with the instruction and mandate given by the parties and they cannot deviate from it, namely the mandate for the transferring attorney to transfer the property from the seller to the buyer. The transferring attorney plays a pivotal role in the successful completion of the transfer process. It is the seller who has the right to nominate the transferring attorney and Anthony Whatmore & Company Incorporated would be pleased to assist you in this regard.

Before you accept any offer that is presented to you, you, as the seller, must ensure that you have familiarized yourself with the terms of the offer. This is because you will be held to the terms contained in the agreement.

### **Among others, it is important that the offer contains the following clauses:**

1. A clause stating that the offer is the whole offer and that no verbal or oral representations will form part of the agreement unless those have been reduced to writing as an addendum to the agreement. Anthony Whatmore and Company is happy to assist you with the drawing of such an addendum.
2. A clause stating that transfer of the property will only be passed from the seller to the buyer once the purchaser has complied with all his/her obligations including but not limited to paying the full purchase price and costs, supplying all documentation and signing the documents for the bond and transfer. This clause must, furthermore, state that the buyer undertakes to do this on request by the transferring attorneys and bond attorneys.
3. A clause making provision for mora interest, namely a penalty that is payable by either party in the event that they delay the matter, in terms of which the defaulting party is placed in mora and is charged penalty interest at an agreed percentage on the full purchase price from the date of which they are placed in mora until the date that they comply and cease being in mora. Very often the only way to enforce someone's compliance is to penalise their "pocket".

## **Suspensive conditions**

All the suspensive conditions of the deed of sale need to be fulfilled timeously and to the letter for it to be, legal and binding. Should an extension of time be required for any suspensive condition, it is crucial that the deviation of the terms of the agreement be agreed upon in the form of an addendum signed by all the parties before the original date stipulated in the suspensive condition has been met. Failure to do this will result in the agreement becoming null and void and of no further effect and, should the parties wish to continue with the sale, they will need to conclude a new written sale agreement. At Anthony Whatmore and Company we monitor the time periods and

liaise with you, the purchaser and the agent to timeously enter into an addendum to the agreement should this be necessary to effect amendment to the due dates or alternatively to change any conditions.

**The two most common suspensive conditions in a sale agreement are the bond grant and the 'subject to' clauses.**

***SUSPENSIVE CONDITIONS – BOND APPROVAL/GRANT:*** The offer to purchase will in most instances be made subject to the approval of a bond, since most buyers rarely can purchase the property for cash. Usually the bond approval process does not take longer than a month to be finalized, depending on the financial situation of the buyer. Sometimes, based on the buyer's situation and circumstances, a longer period for bond approval may be needed and you must look at each one of these on its merits. The deed of sale can state that bond approval (subject to certain requirements) needs to be acquired for the suspensive condition to be fulfilled, whereas others can state that final bond grant is required (ie. after compliance with all the bank requirements). The period to obtain the approval/grant of a bond by the buyer, as agreed to by you, must be long enough to give the buyer a fair opportunity to obtain the loan, but not too long that it may cause an unnecessary delay. Should there be a clause in the sale agreement allowing the buyer an automatic extension of the loan period for a further period of days, you will need to take this additional period into account when you consider the offer to purchase. It is also important to ascertain from the sale agreement whether it considers "days" to be working days or calendar days.

Either a bond approval in approval, as aforementioned, or a final grant of bond is required for the suspensive condition to be fulfilled, depending on the terms of the agreement signed. This bond approval/final grant has to be obtained before the date stipulated as the date in the sale agreement, failing which the deed of sale will lapse and be of no force whatsoever.

***SUSPENSIVE CONDITIONS – "SUBJECT TO" – SALE:*** In order for a buyer to afford to purchase a property he/she often needs to sell their existing property to finance the next one. It may even be a condition of the bond grant by the Bank that the buyer's one property be sold in order for the bank to grant the bond (so that the buyer is not over indebted). In either of these cases the buyer's existing property will need to be sold and registered first before the sale from you to him or her can be registered as the proceeds realized from their sale will fund either the whole or a part of the sale price for your property. Should you be presented with an offer to purchase which is subject to the sale of the buyer's property, you will need to take advantage of the

methods available to you legally to protect yourself whereby you do not have to decline the offer but you also do not have to withhold your property from the market for a protracted period of time while the buyer markets and sells their property.

In the event that the offer to purchase makes provision for the buyer to obtain a loan and sell their property (ie. the two most common suspensive conditions) you must insist that the date by which the buyer needs to obtain bond approval is calculated from the date of acceptance by you of the offer to purchase and not from the date on which the buyer sells his property because it is better for you to have confirmation sooner rather than later that your buyer does or does not qualify for the loan. The Bank will protect the buyer as it will grant the loan subject to the sale of the buyer's property.

If the sale is subject to the sale of the buyer's property it is important for you as the seller to negotiate a provision into the agreement commonly known as an "out clause". This will give the seller an opportunity to still market the property while the buyer tries to sell their property and if you secure a more favorable purchase/offer you will, under certain circumstances, be able to accept the said favorable offer. We as the transferring attorney will be able to assist you in drafting of such a clause in the sale agreement.

## **Bond application and approval**

If the deed of sale contains a suspensive condition, namely that the buyer must procure a bond, the timeous procurement thereof by the buyer is pivotal in the transaction, because the deed of sale does not come into existence legally until the suspensive conditions have been met.

It is recommended that one attorney attends to both the transfer and bond registration to avoid unnecessary correspondence between various attorney firms and any delay in the conveyancing process.

## **Signature of the documents at the attorney's office**

We will schedule an appointment with the buyer and seller to sign the necessary transfer documentation as soon as the suspensive conditions have been fulfilled and the documents have been drafted by the conveyancing secretary. Please ensure that you bring the originals of all the required documentation, along to this appointment. As an additional service to our clients, should the buyer or seller not be able to come into our offices to sign documents, we will arrange for a member of our staff to meet you at your home or office to sign the documents.

## **Guarantees**

Guarantees are utilised widely in property transfers to secure the funds that are being exchanged between the buyer and seller for the purchase price. They are issued by the bond attorney (if a bond has been granted), by the buyer's bank or there may be a combination of guarantees being issued by both the bond attorney and the buyer's bank. They are issued once the buyer has complied with all the terms of the Bank (if a bond has been granted) and once the buyer has signed all the relevant documentation. Ideally, the guarantees are issued between 10-14 days after bond approval. Once the guarantees have been delivered you can be assured that the whole or part of purchase price covered by those guarantees has been secured.

## **Fixtures and fittings**

You need to differentiate between the terms 'fixtures' and 'fittings'. Fixtures are defined as parts of the property that are sold with the property as they have become "affixed" or "adhered" to the property. For this reason they cannot be removed by you when you move and they are included in the sale price. Common examples of fixtures are curtain rails, wall and ceiling light fittings and the pool pump. On the other hand, fittings are defined as items that are not part of the property and are easily removed and can be taken with you when move, unless specified as a fixture in the deed of sale. A common examples of fittings is curtains. It is therefore advisable to distinguish between fixtures and fittings in the deed of sale.

It is prudent to ensure that a list of items which you want to remove from the property and take with you is incorporated into the sale agreement so that even if these are fixtures, they are specified as not forming part of the sale. Many sale agreements set out an existing list of fixtures and fittings that form part of the sale. If your sale agreement has one of these lists contained within it, make sure that no items are listed there that you do not want to form part of the sale. Also, be aware of these clauses if they make a warranty on your behalf that the fixtures are "in good working order" or there is another phrase to that effect because then you may be compelled by the buyer at a later stage to repair or replace a fixture that the buyer considers to not be "in good working order".

## **Costs**

Although you, as the seller, can appoint the transferring attorney, the buyer is responsible for payment of their fees, disbursements and the transfer duty. If a buyer has obtained a bond then they will also be liable for payment of the bond attorney's bond registration fee. If you have an existing bond to be cancelled, however, you will be liable for payment of the bond cancellation attorney's fee. This cancellation fee is a nominal fee, as prescribed by the Law Society and there is a charge for the first bond to be cancelled with further incremental charges for each additional bond to be cancelled. Unless you do not have sufficient proceeds realized from the sale of your property to cover this cost, the amount is deducted from the proceeds of the sale and do not need to be paid in advance. Payment will only need to be made in advance by you for this cancellation fee should there be insufficient funds after the expenses for transfer due by you have been deducted. The other expenses for which the seller is also responsible, for example, are the electrical, gas, entomologist and electric fence certificates, as well as any agent's commission that may be payable.

### **Cancellation of your existing bond**

To enable the unencumbered transfer of your property into the name of the buyer, the existing bond on your property has to be cancelled. Even if the bond is paid up, it still has to be cancelled at the Deeds Office. This cancellation will be effected at the same time as the transfer of the property at the Deeds Office. In order to proceed to cancel the existing bond over your property the cancellation attorney calls for the cancellation figures (the outstanding balance) from your bank and then liaises with the transferring attorney and bond attorney to obtain a guarantee/s from the bond attorney or the buyer's bank in favour of your bond account so that when the matter registers in the deeds office, your bond account will receive payment of the outstanding balance and the cancellation will have been effected. At the point at which the guarantee/s are received, your Bank will consent to the cancellation of your bond.

Provision is made in terms of the National Credit Act for your Bank to charge you penalty interest if you have not given 90 days' notice that you will be cancelling your bond. Only once you have provided us with your bond account number will your Bank provide us with cancellation figures. It is therefore important for you as the seller to provide us with your bond account number as soon as possible, to be able to reduce or avoid any possible penalty interest payable by you.



## **Tax related matters**

**VALUE ADDED TAX (VAT):** VAT is payable on the sale of your property if you, as the Seller, are registered for VAT at SARS as a property trading enterprise. This is most commonly applicable to property developers or property speculators. If you are unsure whether you are liable for VAT then you should discuss this with your accountant. We are able to guide you with this too.

It must be noted that if VAT is payable then transfer duty will not be payable and vice versa. We are also able to help you and guide you with this.

**TRANSFER DUTY AND INCOME TAX:** Transfer duty is a tax payable to the South African Revenue Services (SARS) by any person acquiring immovable property (houses, stands, sectional title units, holiday homes, land and etcetera). It is therefore a tax payable by the buyer.

We will pay the transfer duty to SARS on behalf of the buyer before registration of the property takes place. On payment of the transfer duty, we will obtain a transfer duty receipt from SARS, which must be lodged at the Deeds Office as a supporting document to effect transfer. Before we are able to apply to SARS for the transfer duty receipt, both the buyer and the seller must provide the conveyancing secretary with their income tax numbers and sign the transfer documents (which includes the transfer duty declarations). Naturally, the buyer must also pay the transfer duty amount into our trust account to enable us to effect payment to SARS.

Depending on the work load at SARS, it may take two to three days to obtain the transfer duty receipt from SARS. We require the transfer duty receipt to be able to proceed with the lodgment of the relevant documentation at the Deeds Office. Timeous payment of the statement of account (which includes the transfer duty) is therefore imperative to ensure expeditious transfer of the property. All tax-related matters of both the seller and the buyer must be in order before the transfer duty receipt will be issued by SARS.

It is a requirement of SARS that the income tax numbers of both the seller and the buyer appear on the transfer duty declarations. If one of the parties does not have an income tax number, he must apply for one urgently or provide a reasonable explanation why they haven't got an income tax number e.g. Pensioner. This may cause a delay in the transfer process. The applicant can, however, provide us with proof of the application, which we will attach to the transfer duty declaration. This will minimise the delay with regard to the issuing of the transfer duty receipt.

According to the provisions of the Transfer Duty Act, the agent's commission always forms part of the purchase price, irrespective of whether it is payable by the seller or the buyer. The agent's commission must therefore always be taken into account when calculating the transfer duty. The pro forma account will indicate the amount of transfer duty payable by the buyer. The buyer may visit our website at [www.anthonywhatmore.co.za](http://www.anthonywhatmore.co.za) and use the "Cost Calculator" to calculate the transfer duty payable and all the other costs.

***CAPITAL GAINS TAX (CGT):*** The transfer of your property may trigger the payment of CGT. If this is the case then CGT will be due at the end of the year when you pay your income tax. Whilst we are responsible for collecting and facilitating payment of either VAT or transfer duty, we do not deal with the payment of CGT to SARS. You will need to contact your accountant or tax consultant if you need to establish whether you are liable for the payment of CGT.

***SECTION 35A OF THE INCOME TAX ACT:*** This section of this Act states that where a buyer pays an amount to a seller who is a non-resident in respect of the disposal of the seller's immovable property (namely payment of the purchase price) a percentage of this purchase price must be retained. This only applies where the purchase price exceeds R2 000 000.00. Should you be a seller who is a non-resident, please contact us for further clarification on this aspect.

***DONATIONS TAX:*** In the event that you donate your property to anyone else you need to be aware that donations tax may be payable to SARS. Donations tax is currently charged at a flat rate of 20%. Some exemptions do apply. We would be happy to discuss your liability to pay donations tax on your transaction (if this applies).

## **Certificates**

***ELECTRICAL COMPLIANCE CERTIFICATE:*** The seller is required to provide the buyer (or transferring attorney) with an electrical certificate of compliance on date of occupation or registration, whichever is earlier. This certificate does not certify that all appliances or electrical installations in the property are operational and functioning, it simply certifies that the house is earthed and that the electrical installation is safe, in accordance with the SABS requirements. Having said this, should the relevant electrical compliance clause in your sale agreement stipulate that the appliances and installations will be in working order then you will need to instruct the electrical contractor to rectify all the defects so that you can comply with the terms of the clause. In order for you to use an existing electrical compliance certificate, the certificate may not be older than 1 year on the date that the property registers in the deeds office. It

follows that the electrical compliance certificate will also only remain valid if no alternations or changes have been made to the electrical installation in the property. If changes have been made, a new certificate will need to be obtained.

The electrical contractor will undertake an inspection and advise you whether any repairs need to be attended to before the electrical compliance certificate can be issued. You, as the seller, will be responsible for the costs of the inspection fee, the certificate and any repairs that need to be undertaken. As the transferring attorney we are able to assist you with this and appoint an electrician on your behalf and obtain a clearance certificate.

***ENTOMOLOGISTS REPORT:*** The seller is required to provide the buyer (or transferring attorney) with an entomologists report. This report certifies that the house and buildings have been checked for wood borer and other destructive pests, and complies with the required standards. The cost of this certificate and any costs pertaining to the eradication of pest will be for the sellers account. This report is required for the house to be transferred. As the transferring attorney we are able to assist you with this and appoint an entomologist on your behalf and obtain a certificate.

***ELECTRICAL FENCE COMPLIANCE CERTIFICATE:*** Any property that is situated within an electric fence requires an electrical compliance certificate for that fence, as well as obtaining the electrical compliance certificate for the interior electrical installation of the property, as mentioned above. This electrical fence compliance certificate certifies that the installation is in accordance with SABS standards. It is the seller's responsibility to attend to this and to pay the cost associated therewith. As mentioned with the electrical compliance certificate, an existing certificate is only valid if there have been no alterations to the installation since the time that the certificate was issued and repairs may be necessary before the compliance certificate will be issued.

***GAS CERTIFICATE:*** If your property is equipped with gas, a gas certificate must be provided to the buyer before registration of transfer or the date on which the buyer takes occupation, whichever occurs first. This certificate, too, certifies compliance with the SABS standards and the cost of this certificate and any remedial work will be for your account.

## **City council accounts**

A clearance certificate, that the city council account has been paid up in advance, is needed for your property to be transferred at the Deeds office. The clearance certificate is a document the transferring attorney obtains from the city council after the clearance figures have been paid, which verifies that the seller's rates, and charges for utilities have been paid in advance. The transferring attorney must lodge

this certificate as a supporting document at the Deeds Office in order to “effect” transfer of the property.

Clearance figures, which includes all rates and taxes and charges for utilities in arrears, as well as an advance payment for three months, are applied for by the transferring attorney. These figures are the amounts required by the city council to enable them to issue a clearance certificate. Once the clearance figures have been paid on your behalf, the city council will issue a clearance certificate.

In order to avoid any delay with the city council we recommend that if you are in arrears with your rates account, that you pay us the arrear amount as well as the clearance figures so that the entire amount can be paid at one time.

## **Home Owners Association (HOA) / Body corporate**

In sectional title transfers, your property cannot be transferred without proof from the HOA and/or body corporate that the levies (where applicable) have been paid in advance. The HOA/body corporate is approached by the transferring attorney who ascertains what the levy figures are that need to be paid (inclusive of any arrear or advance amounts) and the transferring attorney pays this amount on your behalf whereafter a clearance certificate is issued. As mentioned above with the rates clearance certificate, in order to avoid delays in the matter, if you are in arrears with your levies , it is advisable that you pay us these arrears so that when we make payment to the HOA or body corporate we can pay the levy figures and the arrears at the same time. The conveyancer is not permitted (in terms of the sectional title act) to transfer the property into the buyer’s name until the conveyancer is in possession of a levy clearance certificate certifying that all levies are up to date.

In order to be issued with a clearance certificate from the HOA it is a further requirement that along with payment of the required fee, the buyer will have to agree to be bound by the rules of the HOA and the HOA will need to state that it has no objection to the buyer taking transfer of your property.

## **Occupation and occupational rent**

In sale agreements the buyer will either be entitled to move into the property on registration of transfer when he/she is the new owner or at an earlier point in time when the buyer takes occupation. If an occupation date is set out in your sale agreement, this will be the date when you will need to give occupation of your property

to the buyer. Once the agreement has been signed by you and the buyer you will be bound by this date and you will only be able to change it if you and the buyer both agree to change it and record it in a signed addendum. Should you give occupation and the sale agreement fall through thereafter, you will be in a difficult position if the occupant refuses to vacate your property. In this event you will have to follow the costly and drawn out eviction procedure to have the occupants removed from your property. We therefore recommend that you do not give a buyer occupation before the full purchase price has been secured and the buyer has signed the transfer documents, paid the costs and preferably has a deposit paid into the transferring attorneys trust account.

If an occupation date before registration of transfer has been agreed upon in the sale agreement or by subsequent addendum, 'occupational interest' or 'occupational rental' will be payable to you by the buyer. If you remain in occupation of the property after transfer has passed to the buyer, you will, in turn, need to pay occupational rental to the buyer. No set formula exists as to what the occupational rental should be and we are happy to assist you negotiate the amount of occupational rental that you wish to receive should your buyer take occupation before registration. The amount is specified in the offer to purchase and once you have agreed on the amount payable as occupational rent, you are legally bound to that amount. It is therefore important that you make sure you are happy with the agreed amount before accepting the offer.

## **The deeds office**

The Deeds Office is tasked with processing the transferring attorneys documentation and the formal registration of property in to the buyer's name and all related acts thereto, for example the registration and cancellation of mortgage bonds. Due to the fact that three registration actions take place simultaneously in the Deeds Office (transfer, bond registration and bond cancellation), it is far better if only one attorney firm deals with all three registration actions. Sometimes this may not be possible as some of the banks insist on a different bond attorney attending to the bond registration.

We will usually arrange for lodgment of the documents in the Deeds Office after:

- transfer and bond documentation have been signed
- we have obtained the transfer duty receipt
- clearances certificates and
- guarantees have been received and the purchase price has been secured
- all transfer and related costs have been paid
- confirmation has been received from the bond and bond cancellation attorney that they have obtained permission to lodge from their respective banks.

all terms and conditions of the sale agreement have been complied with.

## **Insurance**

While you still have a bond over your property, you will be required by the bank to have the property properly insured. Only once the transfer of your property to the buyer takes place with the simultaneous cancellation of your bond will the bank cancel the insurance over the property. Whether you have a bond over your property or not, do not cancel the short term insurance over your property until transfer is passed to the buyer. In the event that your buyer takes occupation before registration, you will need assurance, even more, that your property remains insured, especially as this will increase the risk of damage to your property.

## **Building plans**

At this point in time it is not a requirement by law that some sort of verification be obtained that all building plans are approved and in order for transfer of a property to take place. Having said this, it is recommended that you ensure that all alterations to your property and buildings are to plan and are approved. The buyer may make it a condition of sale that the seller provides approved plans. Getting building plans approved can lead to a delay in your transaction. It can take up to four months to get the approval finalised. It is a requirement that amended plans be obtained for various alterations to the structure of your property, some of which are the following: garden walls built on the property, swimming pools and verandas/awnings.

It is likely that in the near future it will be made a formal requirement that the plans be in order in KwaZulu-Natal before transfer takes place. The same may apply to bonds and be a pre-requisite before a bond may be registered. In a sectional title scheme, not only are building plans probably going to be required but sectional title plans too may be required.

## **FICA -Financial Intelligence Centres**

This Act requires conveyancing attorneys (comprising transfer attorneys, bond attorneys and bond cancellation attorneys) to establish and verify the identity of the seller and buyer to a transaction and to keep records of these parties. There are different documents required depending on the status of the person, but they mostly relate to the verification of the person's identity and address. The Act requires further

that records of these particulars are kept and that transactions that are suspicious be reported, especially in transactions where large sums of cash are paid. If it is not disclosed a suspicion may be raised that you are assisting with tax evasion and the transaction may be construed by the relevant authorities as a money laundering transaction. Any amount that equals or exceeds R25 000.00 in cash needs to be reported by the transferring attorneys to the relevant authorities. This is to ensure your protection as the Seller as well as a requirement for all parties to be behaving legally.

## **CPA – Consumer Protection Act**

In order for the CPA to apply one has to establish whether the seller is a “supplier” (as defined in the Act) in the ordinary course of his business. This means that suppliers are normally property developers or speculators. “Once-off” transactions are excluded from the application of the Act so in the event that you are selling your sole property as a once off transaction to your buyer, the provisions of the CPA will not apply.

As estate agents sell properties in the ordinary course of their business, they are considered suppliers and for that reason, the relationship that an estate agent has with you and the relationship that the estate agent has with a buyer are both governed by the CPA. This means that the sale agreement drawn by the estate agency needs to be in clear and understandable language and the estate agent needs, among other things, to ensure that they do not act in a way that is misleading or misrepresent you or the buyer or oversell the property. In order for estate agencies to act in accordance with their obligations under the CPA they often request that you have to sign a declaration as to the state of your property and warrant whether fixtures are operational or not. Be aware of what you state in these documents as they will expose you and remove the protection afforded to you by the “voetstoots” clause which will remain in the agreement in the event that your sale is a once-off transaction. If you would like us to check one of these documents normally headed “Seller’s declaration” or something to that effect, please feel free to send it to us and we will happily do so.

## **After registration**

After registration, certain processes will take place in the Deeds Office. The registered documents will be numbered, scanned onto microfilm and the information will be captured onto the Deeds Office’s database. On completion of these processes, which takes about two to six months, the Deeds Office will deliver the documents to the attorney firm responsible for registration of the particular deeds.

If the buyer has registered a bond over the property, the new bond and title deed must be delivered to the bank for safekeeping by the relevant attorneys. We will, however, provide the client with a copy of the title deed. If the buyer has not registered a bond on the property, we will deliver the new original title deed to the buyer for safekeeping.

***THE CLOSURE OF THE CITY COUNCIL ACCOUNTS AND REFUND DUE TO THE SELLER:*** After registration of the property, two actions must take place to close the seller's utility account and his rates and taxes account, namely:

The seller must visit the city council personally and close the utility account. If the seller does not close the utility account, the processing and refund due to the seller of overpaid funds cannot be initiated. We as the transferring attorney will provide you with a letter to take to the city council.

The city council will then check your account and see if there is any refund due on this account. If there is a refund owing, they will send through forms for the transferring attorney to complete to initiate the refund. Arrangements will be made with the city council to either pay the monies back to you or transfer this refund into your new account.

The seller should also not be surprised if he still receives a "rates and taxes account" for a number of months after registration as it can take the city council up to six months to close this account. The seller must obviously not pay this account.

## **Your next property**

Before you decide to purchase your next property, you need to be sure that the Deed of Sale wherein you have sold your property to your buyer is conclusive. It is important that any suspensive conditions have been fulfilled (namely that your buyer's buyer has obtained a bond within the required time frame and/or that your buyer has sold their property within the required time frame). If you are relying on the proceeds of the sale of your property to finance the purchase of your next property you will need to insert a condition into the new sale agreement stating that the offer to purchase is subject to the successful sale and transfer of your existing property (regardless of whether that sale is conclusive or not).

If it is your intention that you make an offer to purchase before the property you have sold is transferred, you will need to ensure that the time frames tie up and that transferring attorneys (if they are different for the two sales) are communicating as to when the transfers go through the deed's office.



We can assist you with this and add additional clauses. Most of the other information you need is outlined earlier in this handbook but, we would like to make special mention of the city council accounts.

## **Opening of a new city council account for your new home**

You should distinguish between the terms “utility account” and “rates and taxes account” with regard to opening an account at the city council.

The “utility account” must be opened in the buyer’s name at the city council immediately after transfer of the property has taken place. The buyer must deliver the following to the city council in order to open the “utility account” in his name:

A copy of the seller’s identity document.

A letter from our offices to confirm that the property has been registered in the name of the buyer (We will email this confirmation to you on date of registration).

A deposit payable when opening the account.

After the buyer has opened the “utility account” at the city council, they will provide him with a monthly account.

In order to open the “rates and taxes account”, the city council requires a written confirmation from us together with proof from the Deeds Office (deed search) that transfer of the property in the name of the buyer has indeed taken place.

Although the city council will hereafter be in a position to open the “rates and taxes account” in the name of the buyer, it can take up to six months before this is actually done. We therefore advise the buyer to visit the city council on receipt of this notification from us and to ensure that the “rates and taxes account” is indeed opened in his name to prevent the city council surprising him after a few months with a “rates and taxes” account for six months.

## **Trusts**

Trusts are an excellent mechanism for ring-fencing and protecting assets, most notably immovable property. By putting immovable property into a Trust you are ensuring that the asset does not fall into your personal estate when you die which minimizes the amount of executors's fees and estate duty that is payable.

In order to place a property in a Trust when a property is being purchased it is imperative that the Trust has already been formed before the Deed of Sale is entered into as it is not valid to state in the Deed of Sale that the purchaser is "a trust to be formed" as one could do with a company by stating that the purchaser is "a company to be formed".

Our offices specialize in forming and registering trusts as well as transferring properties from people's personal names into trusts and attending to the registration of bonds on behalf of trusts.

Please contact us should you wish to receive more information relating to trusts.

## **Signing of documents overseas and authentication**

Any document signed outside South Africa's borders for use within South Africa's borders needs to be authenticated in terms of international regulations. This means that a party signing a document outside of South Africa needs to go through the procedure required to sign the document in the presence of the authorized person (usually a Notary Public) and have the document further authenticated thereafter. South Africa is a party to the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents which allows party states to enjoy a much shorter process to follow when documents are being signed overseas for use within the particular country.

If you are going to be out of the country for part of the transfer or bond process, you may wish to sign a Power of Attorney authorising someone else whom you trust to sign the transfer/bond documents on your behalf, in your absence. Our offices can assist you with the drawing of such a Power of Attorney. In the event that you do not wish to give another person Power of Attorney to act on your behalf, you will need to follow the authentication process to have your documents considered valid for use in South Africa while signing outside of South Africa's borders.

We are able to assist you with the authentication process that will need to be followed if you are overseas and are needing to sign documents for use in South Africa or if you need to have documents signed in South Africa authenticated for use in a foreign country.

## **Your expectations are our goals**

Anthony Whatmore & Company Incorporated is a well-established, client centered law firm offering a personal approach to legal services. Founded by Anthony Whatmore, a specialist conveyancer and property lawyer with over 20 years legal experience, the firm prides itself on a client focused approach where every client is treated as the only client.

The company opened for business in 1997 with just two people and has under the guidance of its founder grown steadily over the last 10 years, necessitating relocation to more spacious offices at the company's current location on Adelaide Tambo (formerly Kensington) Drive. This move allowed the firm to provide a more convenient service to clients in the Durban North Community where Anthony is well known, having lived in the area for many years.

More recently we have acquired a property in the Upper Highway, located at the Brook office Park in Gillitts and are opening a branch office there to better service our clientele that reside in this area and the surrounding areas. Kerry Forbes, a Conveyancer and Notary Public, will head up this branch.

As a forward thinking, progressive firm, we are able to provide our client with a broad base of legal services including but not limited deceased estates, the drafting of Wills, Trusts, Magistrate's and High Court litigation, debt collection, Notarial services (including antenuptial contracts), asset protection services and corporate and commercial legal services.

In terms of Conveyancing we offer our clients the full complement of property related services including transfers, bond registrations, bond cancellations, removal of restrictive conditions from title deeds, registration and removal of servitudes and the opening of township registers and sectional title registers. We are on the panels for ABSA, First National Bank, Nedbank, Standard Bank and Investec and can assist you with your bond registration at any of these banks whether it be a first bond or a further loan.

We understand that the purchase or sale of a property is an emotional and stressful situation at times and our staff are well trained to keep all clients up to date on the progress of the transfer with weekly updates and assist with queries or additional assistance required related to the property matter.

We are committed to providing our clients with the best experience possible and are willing to travel to clients to arrange signature of documents at their convenience and accommodate their requirements, should they be unable to come in to our offices.

## **Message from Anthony Whatmore**

Our hope is that by reading this booklet you will feel enlightened as to the transfer, bond registration and bond cancellation process and empowered as to your rights and responsibilities as the seller and, in future, as the purchaser. We look forward to meeting you and helping you through this exciting process of selling and buying immovable property!