



REAL ESTATE LAW

Mark McIntosh

2015 / 2016

WEBBER WENTZEL
in alliance with > Linklaters

REAL ESTATE LAW

Mark McIntosh

Introduction

The South African real estate market offers many favourable investments despite being marred by the effects of the global economic crisis. Although the prices of real estate have declined somewhat from the prices achieved at the peak of the last growth phase (from 2002 to 2006), the past decade has seen significant increases in its capital value.

South Africa has one of the finest land registration systems in the world. Generally, land available for private development is surveyed and recorded on either a diagram or a general plan, and given a unique number. The precise location, status and identity of any given surveyed land parcel are unquestionable, contributing considerably to the creation of secure land ownership.

Registration

The usual procedure for effecting transfer of ownership in or limited real rights over land is the registration of a deed of transfer in the Deeds Registry. The registrar of deeds has great responsibility and legal powers to keep and systematise the information in the registers in a manner which best ensures security of title.

Land parcels may therefore appear in a:

- farm register;
- contract register (which records any limited real rights, eg long-term leases or servitudes registered against the property);
- township register; or
- sectional title register.

The land registration system is a negative registration system in the sense that registration of land in a party's name is not necessarily proof of ownership as ownership could change by virtue of, for example, expropriation.

In practice, however, registration generally equals ownership and any change in that status will be indicated in the records of the relevant Deeds Registry by way of a caveat noted against the title. Third parties can rely on the records held at the Deeds Registry, and although they are not indemnified against errors occurring in the register, such errors are relatively rare.

The registration process is driven by attorneys who have specialised qualifications as conveyancers. An attorney is only permitted to practice as a conveyancer after he or she has completed an additional practical examination and has been admitted as a conveyancer by the High Court of South Africa. Authorised by a power of attorney to act on behalf of the landowners or prospective purchasers, conveyancers prepare the documentation necessary for the transfer of immovable property and present it to the registrar for execution.

The registrar of deeds, who derives his or her functions from the Deeds Registries Act, No. 47 of 1937 (the Deeds Registries Act), must examine any document lodged for execution or registration. The Deeds Registry's system of checks and cross-checks eliminates most of the errors that can be made in the documentation leading up to a land transfer. The responsibility for the correctness of the documentation, however, lies with the conveyancers, since they facilitate the transfers and prepare all the documentation for it. In addition, conveyancers are responsible for ensuring that the necessary financial arrangements regarding the transfer have been made.

It takes between two and four weeks to execute the documents from the time that they are lodged at the Deeds Registry, depending on the workloads and turnover capacity at the 10 different registries across South Africa.

The preliminary preparation of documentation by the conveyancer may take longer, depending on the intricacies of any given deal, any difficulties in obtaining clearance certificates, and confirming that property rates and taxes and utility bills have been paid up to date. A clearance certificate confirming that transfer tax (transfer duty) or value-added tax (VAT) has been paid, is also required from the revenue authorities.

Types of Land Title

South African property law provides for various types of registered land titles.

Freehold title

The conventional notion of land ownership is that the owner holds title in respect of a particular portion of land and is registered as such in the Deeds Registry with jurisdiction over the area in which the land is situated. Land ownership is generally still regarded as quite an extensive form of title, although the usual restrictions in the public interest apply.

Sectional title

Sectional title refers to the notion of ownership of a part of a building. This type of title was imported to South Africa in the 1970s by extensive legislative provisions. It was gradually refined into the sophisticated construct that it is today.

The Sectional Titles Act, No. 95 of 1986 (the Sectional Titles Act), allows for the registration of a unit, that consists of individual ownership of a part of a building (an apartment, shop or office) referred to as the “Section” and an undivided share in the common parts of the building(s) and land comprising the sectional title scheme.

The common parts are administered and controlled by an association of all the owners in the scheme called the “body corporate”. Each owner of a unit automatically becomes a member of the body corporate upon receiving transfer of the unit.

The three elements of sectional title ownership, namely individual ownership of a section, joint ownership of the common property, and membership of the body corporate, are inextricably linked and cannot, as a rule, be alienated separately.

The Sectional Titles Act creates ancillary rights and responsibilities for unit owners to ensure effective exercise of the entitlements pertaining to sectional ownership.

Special registration procedures facilitate this type of ownership. Sectional title construction is employed with tremendous success in property developments that are residential or commercial in nature and in schemes with mixed use comprising residential, commercial and retail components.

Long lease

Long leases are regulated by the Leases of Land Act, No. 18 of 1969. A long lease is, typically, a lease for a period no less than 10 years. It is binding on the parties like any other lease. It is also binding against creditors and successors in title who have acquired the leased property for the period of the lease, if it was registered, or for a maximum period of 10 years if it was not registered.

In terms of the Deeds Registries Act, a duly registered long lease is regarded as fixed property that can be mortgaged. Thus, the rights under a registered long lease can be used as collateral security for obtaining funding to acquire the property by registering a mortgage bond against the relevant lease.

Who May Own Land

Ownership in a land title may be held by a natural person, partnership, company, close corporation, trust, association, or any other recognised entity.

Land may be owned by foreign natural persons or foreign legal entities. Ownership by foreign legal entities is subject to certain restrictions contained in the Companies Act, No. 71 of 2008, and the interpretation that the Chief Registrar of Deeds has attached to the relevant provisions. Generally, a foreign company wishing to acquire land in South Africa may be required to register as an external company with the Companies and Intellectual Property Commission.

In principal, any foreign legal person recognised as such in the country of its origin and/or registration may own property in South Africa subject to the above limitations. The registrar of deeds may, however, require proof that the relevant legal entity has, in its jurisdiction of origin, legal personality (ie that it is capable of having its own rights and obligations). This is particularly relevant in the context of foreign (registered) limited partnerships, which in some foreign jurisdictions enjoy legal personality.

It should be noted that the South African Government published a green paper on land reform during September 2011 for public comment. The green paper states that foreign ownership of land will be permitted in a new land system, but that ownership will be conditional with certain obligations attached to such ownership. In this sense foreign ownership would have precarious tenure. Little detail is contained in the green paper to explain these concepts and it remains to be seen how these ideological statements will be implemented.

Co-ownership

Property can be co-owned by two or more persons in undivided shares, with certain exceptions applicable to agricultural land and agricultural small holdings. The undivided share structure is sometimes used to establish what is informally referred to as “fractional ownership”. In terms of such a construction, a number of owners share the benefit of a certain property, mostly a holiday home.

Each fractional owner owns an undivided share of the property as a whole, and becomes party to a use agreement which regulates, contractually, the affairs among all fractional owners as to their respective rights of use, as well as the management of the relevant property.

This option may also be useful in property developments which offer “own title” stands within a secure development, or one with special amenities which comprise vast common areas, such as golf course developments or “gentlemen’s estates” surrounded by vineyards or other amenities that are part of a development’s common areas.

Undivided shares in a property can be registered in separate title deeds. They are therefore capable of being mortgaged separately, although banks are normally not prepared to accept the mortgage of an undivided share as sufficient security as an undivided share may be difficult to dispose of in a forced sale scenario.

Acquisition of Land

Acquisition by agreement

Land is normally acquired by the conclusion of an agreement of sale between the relevant parties and the subsequent transfer of the land through registration of a deed of transfer. The agreement of sale must comply with the following formalities:

- it must be in writing (except where land is sold on public auction) and signed by the parties to the agreement or their agents acting on written authority; and
- it must contain the essentials of the agreement, which are the:
 - identities of the parties;
 - description of the subject matter; and
 - purchase price.

Land may also be acquired by donation or through exchange. The formalities above will nevertheless still apply.

Agreement of sale: usual terms

Save for the formalities referred to previously, South African law does not prescribe the form or content of an agreement of sale of land. In other words, the content of every agreement will be the result of individual negotiations between the parties. The following commercial terms may also be found in sale agreements even though none of them are prescribed:

- the purchase price will be paid by way of (i) a deposit (eg 10% of the purchase price) payable on, or shortly after, signature or the fulfilment of certain suspensive conditions; and (ii) the balance payable upon registration of the property in the name of the purchaser;
- pending registration of the property, the deposit will be held in the attorney's trust account of the conveyancer, with interest accruing to the purchaser;
- the seller will be entitled to appoint the conveyancer who will tend to the registration of transfer;
- the purchaser will have to pay the costs of registration, including the conveyancer's fees;
- the seller will pay any agent's commission; and
- the purchaser may occupy the property from the transfer date, or prior to the transfer date, in which case it will pay occupational rental.

In addition, there are certain provisions of other laws relating to health and safety which are normally included. Examples of this include that the seller must furnish, at its cost, a valid electrical compliance certificate which confirms that any electrical installation on the land is safe and complies with the minimum prescribed standards. Sometimes provision is also made for a gas installation certificate if the land has a gas stove, heater or other gas-operated devices installed. In cases where there are electrical fences on the land, a certificate confirming the safety and compliance with minimum standards should be issued.

Duties and Fees

Transfer duty and VAT

All disposals of immovable property are subject to transfer duty or VAT.

If the seller is a VAT vendor and the property sold forms part of its enterprise for the purposes of VAT, the transaction will be subject to VAT (currently 14%). Naturally, if the purchaser is also a VAT vendor, he or she will be able to reclaim the VAT paid to the seller as an input credit.

VAT is always the liability of the seller, who is responsible for paying tax to the receiver of revenue from the proceeds of the sale. Therefore, the agreement of sale will have to include a clause in terms of which the purchaser will be liable to pay the VAT in addition to the selling price, or stipulating that the purchase price is inclusive of VAT.

If the property sale is an income-earning activity in terms of the Value Added Tax Act, No. 89 of 1991, it may be subject to VAT at 0%, provided that both the seller and the purchaser are registered as VAT vendors. The parties should also agree that the subject matter is disposed as a going concern, and that the rest of the requirements set out in the VAT Act, read with the practice notes issued by the revenue authorities, are met.

Where the seller is not a VAT vendor or where the property falls outside of the seller's VAT enterprise, the transaction will be subject to transfer duty. Transfer duty is always payable by the purchaser. The amount is determined on a sliding scale between 3% and 8%, depending on the purchase price amount. No transfer duty is payable on the first ZAR 600 000.

A purchaser who is also a VAT vendor is entitled to a VAT input credit in respect of any transfer duty paid. This input credit may not normally be claimed in the case of a property zoned for residential use.

Conveyancing fees

Conveyancing fees are governed by a recommended tariff and vary roughly between 0.25% and 3% of the purchase price, depending on the purchase price paid. The transfer costs will be paid by the purchaser unless otherwise agreed in the agreement of sale.

Real Security

Land may be encumbered with a mortgage bond(s) (mortgage) to secure payment of debts or other types of performances in respect of contractual obligations.

The right to register a mortgage is conferred on a creditor by way of contract. The real right of security conferred by mortgage on the creditor does not come into existence until it is registered.

The date of registration determines the ranking of two or more mortgage bonds passed over the same property. There are instances where the ranking of a mortgage bond may be affected by statutory preferences (eg the claims of a municipality for the payment of outstanding municipal services charges and property taxes in respect of the relevant land will rank higher than the rights of the holder of a mortgage).

New Developments in Real Estate Law

Electronic registration system

The system of electronic deeds registration is aimed at creating greater efficiency in the current deeds registration system. The idea of electronic registration has been on the cards in South Africa for a great many years, but it now appears to be gaining significant momentum and the expectation is that it will be implemented within the next year or two.

Real Estate Investment Trusts

The new Real Estate Investment Trusts (REIT) tax dispensation, Section 25BB of the Income Tax Act, No. 58 of 1962, read with the Johannesburg Stock Exchange's listing requirements for REITS, aims to align the country's listed property sector with international standards. The REIT structure is well known internationally and foreign investor familiarity with REITS will make this form of investment more attractive to foreign investors. The new legislation became law on 1 April 2013.

Expropriation Bill

The Expropriation Bill outlining proposed changes to the laws governing expropriation in South Africa was published during April 2013. The Bill seeks to achieve the consolidation of all laws governing expropriation in South Africa and, according to a statement made by Jeremy Cronin in his capacity as Deputy Minister of Public Works, it seeks to align expropriation with the Constitution and "to ensure consistency with the spirit and provisions of the Constitution especially with equality, property rights, access to information, and lawful, reasonable and procedurally fair administrative decision-making".

The Bill is also intended to assist with expediting land reform in South Africa. The Green Paper on Land Reform 2011 previously identified that a system of land reform premised on the principle of "willing seller, willing buyer" was hindering the achievement of land reform targets.

Property Valuation Bill

The Property Valuation Bill provides for the appointment of a valuer-general and the valuation of land identified for land reform, for expropriation, or for acquisition by the State.

Restitution of Land Rights Amendment Bill

An amendment to the Restitution of Land Rights Amendment Bill proposes to extend the time frame within which claims for restitution can be made.

Conclusion

The current economic climate in South Africa along with the excellent legal infrastructure renders investment in South African real estate promising.