Introduction

Like anywhere else in the world, the Real Estate Industry in Namibia is a vital part of the economy. However, it is a fast changing and dynamic environment, with well-equipped property professionals being essential to the industry.

Many agents enter the industry with no formal training and a long, lonely road ahead. In a competitive industry a large percentage of these agents do not survive the rigours and pressures of real estate and leave disillusioned. This in turn may lower the professional image of the industry in general. If the property industry in Namibia is to upgrade its image, it is imperative that estate agents who intend to enter the profession should receive ongoing training and motivation after beginning their career by passing the Board exam. This guide should assist both new and experienced agents alike in fulfilling this need.

From combined experiences and research we have structured this hands-on, practical guide. It is structured in logical order of activities: Sellers, buyers, the sale (including negotiation aspects and the contractual requirements), utilising your own potential, as well as related legal and financial matters. Questions of practical relevance often arise about aspects of property transfers and related matters in general; in this guide we attempt to discuss these matters. We are therefore confident that this comprehensive and highly informative guide to selling real estate in Namibia will prove to be an indispensable accessory to every estate agent’s successful sale.

Although well researched, the purpose of Immobilien is not to be an all-inclusive source of information regarding the real estate industry in Namibia. As this is a broad field with no set borders, we rather like to think of it as a living work and intend to update, expand and develop it over time. Therefore we will appreciate input from you and the different role players related to the industry.

Combined with your hard work and underscored by integrity, we hope that Immobilien will assist you to achieve the satisfaction of success and reap the rewards of consistent earnings and professional pride.

Good luck to you all — abundant opportunities are out there!

JACO JACOBS

Qualified Realtor
Legal Practitioner & Conveyancer of the High Courts of South Africa and Namibia
Theunissen, Louw & Partners
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About this Guide

Because a property transaction involves a great deal of money, it requires a great deal of responsibility and skill from the estate agent. Although general skills are tested by the examination to qualify as agent, your standing as estate agent in the community will depend on your professional level of skills and knowledge. You must be willing to continuously develop yourself by attending seminars and doing research about the industry, to enable you to satisfy clients from both a moral and professional viewpoint.

It is one of the primary objectives of the Institute of Estate Agents in Namibia to educate estate agents with meaningful literature, seminars and training methods to help you to adapt to this highly competitive, rapidly changing and increasingly demanding business scene.

Well educated and professional estate agents can indeed successfully contribute to the social and economic upliftment of our industry, country and people. An estate agent also becomes a valued member of the Namibian community and is as important to its general well being as the local vet, doctor, banker or accountant.

In the past there has been a great need for a practical, informative and market-effective publication based on local conditions and problems – a publication which would teach all estate agents, both experienced and inexperienced, most of what they need to know about selling property in Namibia.

Immobilien is that publication!

Various chapters cover a wide spectrum of topics, all of them vital to the success of any person involved in the selling of property. With this publication available, no agent will be ill-informed or ill-trained. With the rapidly changing and sophisticated property market we are experiencing higher demands. Therefore an ever increasing level of competence and professionalism would be required from agents. In Immobilien, Mr. Jacobs did not only recognise these demands, but also set out to satisfy them. Therefore, it should certainly become compulsory reading for all estate agents.

Enjoy the privilege of selling Real Estate in Namibia.

RIAAN POTGIETER
President of the Institute of Estate Agents in Namibia

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Deputy Prime Minister of the Republic of Namibia

Dedicated to the Namibian Real Estate Industry.

Although every care is taken to ensure the accuracy of the contents of this guide, please note:

- We make no claims, promises or guarantees about the accuracy, completeness, or adequacy of the information contained in this guide or references made herein.
- This guide is not offered as legal or financial advice. As legal and financial advice must be tailored to the specific circumstances of each case, and laws are constantly changing, nothing provided herein should be used as a substitute for the advice of competent counsel or financial advisor.
- No responsibility can be accepted for any errors, whether caused by negligence or otherwise, or for any loss however caused or sustained, by any person who relies on the information contained herein.

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Chapter 1

Sellers

Plan your work and work your plan

1. 1. Prospecting

1. 2. Mandates and Pricing

1. 3. Marketing and Service to Sellers

1. 4. My Commission

1. 5. Sourcing Sellers
1.1 Prospecting

The World Dictionary describes prospecting as "the exploration of the probability of success or profit". In other words, you are searching for success by increasing your list of potential buyers and sellers. Like prospecting for gold or diamonds, prospecting in the Real Estate Industry also has to do with your outlook and expectation to discover profitability through exploring. Prospecting will enable you to always have a list of potential buyers and sellers to follow up on. The initial "lead" that eventually develops into:

1. Identifying a seller and property (mandate)
2. Identifying a buyer
3. Bringing them together and negotiating a successful deal.

What is Prospecting in the Real Estate Industry?

Real estate clients come in two types: suspects and prospects.

- A suspect is someone who appears to fit your target market or shows some interest in what you have to offer.
- A prospect is someone who has the money, the authority and the desire to become your customer.

The function of prospecting is to identify and attract suspects and then convert these suspects into prospects. Therefore your typical prospecting objective is to get appointments with partially qualified prospects in order to fully qualify them.

Real Estate exploring is a quest to increase your list of potential buyers and sellers. Without it, there would be very little sales activity at all.

Explore the following Avenues:

- Ask existing clients for leads
- Direct canvassing
- Personal observations and networking from day-to-day attentiveness (sport and socials)
- Company leads and past clients of agents who have left
- Referrals from other salespersons
- Coupons, newsletters, circulars and brochures
- Shows and exhibitions
- Spotters, assistants and junior salespersons
- Family, friends, colleagues and their prospects
- Centres of Influences – own clubs, contacts and social groups
- Professional Bodies

You may not be the most experienced Real Estate agent in the business but if you become well known and respected, you could become the best just by “being there”. If someone thinks of Real Estate, they must think of you and your name. You must be their “First Choice Agent”.

Real Estate prospecting is not something you do when you have time or something that you rely on others to do for you. Prospecting should be a lifestyle to you. Unfortunately many agents make simple mistakes that deter them from doing the prospecting (and business) that they should do.
Mistakes to avoid:

1. Not prospecting regularly and systematically;
2. Poor attitude;
3. Not following up leads;
4. Not asking for referrals;
5. Discontinue once there is activity;
6. Prospecting without sense of urgency;
7. Not being persistent;
8. Wasting time with unqualified suspects.

When prospecting, there are a couple of specific things you want sellers to know about you:

As you are dealing with one of the most valuable assets of a person, the seller obviously wants to know that he/she can trust you. A seller who puts his/her property in the market will only prefer to entrust the marketing to you if they know:

- about you;
- that you are ethical and honest;
- that you are professional in your knowledge and conduct;
- that you are successful.

Once you have achieved this, you will undoubtedly be his/her first choice estate agent.

Remember: If you do not promote yourself, something terrible happens – nothing!

Farming your Area:
“Sowing seeds for the future….”

Immovable property is usually one of a person’s most valuable assets. Sellers will obviously prefer entrusting the marketing of their property to an established, well-known, honest, professional and successful estate agent. Real estate farming is the process of making yourself known to a specific target group, area or market segment. The aim is to become a first choice agent for homebuyers, home sellers or other real estate investors. Real estate farming is a long time investment in both time and money, but it is well worth it in the end, as it will help you to develop business on a regular basis.

Although not all agents who took part in the survey agreed to the concept of “farming” a specific area, the majority was under impression that Windhoek is indeed a city and therefore the farming concept is of utmost importance to make yourself known as an estate agent. However, you must go beyond making yourself known; you must develop a thorough knowledge of the area in which you work.
Tell the world who you are and what you do.
Market yourself above all else.

How do you make yourself known?

Start with the Numbers in Namibia:

Conventional Transfers that were registered in the Deeds Registry over the last three years were as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Conventional Transfers</th>
<th>Sectional Title Transfers</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005</td>
<td>7 984</td>
<td>1 463</td>
<td>9 447</td>
</tr>
<tr>
<td>2006</td>
<td>9 356</td>
<td>1 589</td>
<td>10 945</td>
</tr>
<tr>
<td>2007</td>
<td>7 414</td>
<td>1 844</td>
<td>9 258</td>
</tr>
</tbody>
</table>

It is estimated that a total of almost 20 % of properties change ownership each year. That means it can be assumed that there may be around 45 000 available title deeds and possible sales in Namibia. (CC and Company transfers registered with Trade and Industry, as well as Trust transactions not included in calculations)

Like the rest of southern Africa, Namibia is no exception when it comes to urbanisation and the growing need for more land. Across the region, governments are realising this and are dealing with it as a matter of urgency. The idea is to increase the number of free hold titles. Because of the growing population (and potential purchasers), the available title deeds in Namibia are increasing each year. It seems like there are more opportunities for success in today’s market in Namibia than ever before. There is more land available, more people and more available credit for them to buy property.

This means:
There are endless possibilities for agents to be part of a sale each year and opportunities are continuing to increase.

If you target 1000 of these properties, you could potentially sell 200 in that year. Generally, an agent should be in a position to effectively make himself/herself known in an area of 1000 properties. With some assistance and experience it will eventually be possible to make yourself known in a bigger area. However, the size of the area should initially be limited to ensure the best results.

When it comes to farming (marketing yourself in the Real Estate industry), the shotgun approach in marketing will not work for you. The magnitude of the task of making yourself known all over the place can easily leave an agent feeling despondent. This despondency can lead to a decrease in motivation, which in turn can result in failure.

Therefore: Start with a smaller target area, work this area constantly and correctly and then consider enlarging your market. These small steps of constant effort will eventually ensure that you reach your goal.
Introducing yourself to the Market:

Remember: It is not the giant leaps of passion that build one up – but rather the small steps of consistent effort taken one step at a time.

After identifying your target area, start by introducing yourself. In order for you to become known and remembered, your goal should be to reach all property owners in the targeted area at least twice a month. Do not wait for homeowners to decide that they want to sell. You have to promote action in various ways, which includes making suggestions to them at certain phases of their lives about the possible benefits of selling portions of their properties or even selling and buying a more suitable “lock-up-and-go”.

To reach someone means to make contact in general, whether by letter, note, flyer, pamphlet, telephone or personal contact. This task may seem huge, but is easier once the task has been broken down into a manageable system. Once you have started an introductory campaign with flyers, make use of a map to break your area down into manageable zones.

1. Business Cards

A business card is an important tool to help market your services. It is more than just a placeholder for your phone number and company name. It is an easier way for potential clients to find your business, refer you to others, to remember you and to recall what you do. Always have a business card ready and do not be shy to hand them out.

For the design: It must be clear, easy to see and easy to read. Remember to use the same logo on web sites, brochures and flyers, as well as other means of advertising.

Even though it may be more expensive, try to print on the back also, even if it is just to list your company’s mission statement. Combine this with small headings like: “came by with a client”, “have an offer ready”, “please phone”, etc.

2. Flyers

Well designed flyers can be of great assistance when making yourself known. Images such as digital photographs of the land you are marketing will be a good way to convey necessary information to your clients. Try to use an easily recognisable leaflet with a consistent layout, colour, company logo with contacts, catch phrases and messages (without saying too much), by which the recipient will remember your name. This is all that you are aiming to achieve.

Even though your flyer will mostly be thrown away almost immediately, after the third flyer your name will be synonymous with real estate in that area.

Besides introduction, flyers have other functions. Flyers can be used as newsletters and information sheets (statistics of sales, new developments, testimonials from clients, etc). You can also add something like this: “I have recently sold the following houses in your area: …. (See sample add).

Remember: Finding the right flyer printing/design service and leaflet distributor is imperative to the success thereof.
3. Newsletters

Newsletters are a good way of keeping contact with existing clients, as well as being handy prospecting tools. However, not every recipient would necessarily appreciate and read a newsletter. When gathering ‘news’ for a newsletter, an agent must consider if the story is significant to the real estate industry – if the story is controversial, even better! Also include valuable tips for buying property or financing in your newsletter. Should a story be of any significance to the industry, make sure that the story is timely. Is the topic on everyone’s mind these days? Issues such as new legislation, zoning or a recent interest hike may be newsworthy. For a story to be newsworthy it must contain information that is new/recent. Whatever your publishing schedule (weekly, monthly, quarterly), every story you publish should deal with events that occurred since your last newsletter and not before.

Boring newsletters will not only end up in the rubbish bin but they will also annoy recipients.

4. Phone Calls

The telephone is effective when used efficiently, sparingly and within the framework of a plan. Always have a plan and purpose before phoning. At this stage you need a short, respectful and non-threatening call to introduce yourself. You just want to offer assistance for real estate needs in the area and therefore make sure not to initiate major business proposals. At this early/introductory stage it is important to avoid any confrontation.

5. Knocks

Visit your area to meet and get to know your owners. This is especially good if you can combine it with a personal gift or valuable information like a fridge magnet, perhaps containing a calendar, school timetable, and/or emergency contacts for your area. Be sure never to overstay your welcome and always show enthusiasm when you offer your assistance for their real estate needs.

During conversations, try to comment (without sounding effusive) on things you noticed about the property. Comment about things like the pool, braai area, patio, roses, etc.

Whenever you have had contact with a potential client, remember to show appreciation for their time spent with you. One way of doing so is with a simple follow-up note or call.

Obviously you want to be remembered, therefore make sure that not only your name and contact details appear on all flyers and newsletters, but also your picture. If your campaign is consistent, professional and non-threatening to the property owner, you will receive the benefit of increased business.

6. Host a Community Event

Consider hosting events in your territory where you arrange to have experts talk to the people in the community about important issues that they want to know about. If there are any proposed changes in your area that your local government officials are considering, such as zoning changes or construction projects being proposed, these could be very controversial in your territory. A hosted event to discuss these matters could be well attended and add to your credibility in the industry.

Arrange for speakers like government officials, attorneys and tax experts to talk about these issues. People that attend such events, where the most recent real estate news and strategies are discussed, can very likely be people looking to buy or sell real estate in your area in the near future.
When hosting events like these on a regular basis, you have the opportunity to rise above other real estate agents and competitors in your area. Your prospects will feel that you provide them with value on an ongoing basis. Naturally, when you host events like these, there should be a big banner at the front of the room with your name, company and phone number on it as the person responsible for putting it all together. Because it is your event, you also get to stand up and say whatever you want to in front of the prospects. This is a great opportunity for publicity, enhancing your image and also mentioning a few words to them about the current real estate market, which may land you some new business before everybody goes home.

When you focus on doing things for your prospects that provides value to both them and the community, you rise to a whole new level as an agent in their minds. Many of the other agents may just be focused on getting their prospects' business when they're ready to buy and sell. You, on the other hand, through providing your prospects with value on an ongoing basis, have a better chance of becoming the "First Choice Agent" they'll want to work with when it is time to move onto their next transaction.

7. Radio as Media

It comes as no surprise that up to 95% of all consumers listen to the radio. However, this should certainly not be the only advertising method used by an agent. When possible, it should be a portion of your advertising budget. Besides the costs involved, the secret is to get a professional script writer (and voice) to create the perfect advertisement.

8. Yellow Pages

If you think the yellow pages are old fashioned, think again. If you know how to use them, the Yellow Pages can be incredibly valuable. The internet will most probably be the next generation of the yellow pages. For now, you want your name to become synonymous in the real estate industry. Besides daily newspapers, this is the most likely place for newcomers in town to look for an estate agent (as well as those local prospects looking for rentals). If you can understand the mindset of your prospect in their moment of need, you will dominate your heading year after year.

Remember to go for matching logos but, more importantly, focus on the attention grabber in the heading of your add: "Need a house, we have the listings!" Forget about the nice pictures; rather use the space for information you want to convey to prospects.

Most agents fail because
they do not practice what they know.
1. 2. Mandates and Pricing

Your main goal within this farming area should always be to:

- Obtain correctly priced sole mandates
- Market the property professionally
- Source a buyer
- Negotiate a satisfactory Offer to Purchase

A mandate is nothing more other than an authorised instruction from a client to render a particular (agency) service to that client. On acceptance, it is a binding contract between the client and agent.

**Generally mandates need not be in writing except for:**

1. Sole Mandates
2. Mandate which embodies a Power of Attorney

It is, however, better business practice to record all mandates in writing, as this avoids later disputes regarding the terms thereof.

An estate agent is said to have a mandate when he/she accepts an instruction or authority from a client to render a particular estate agency service for a client. On acceptance of the mandate, a legally binding contract is established between the estate agent and his/her client.

A person is entitled to appoint as many estate agents as he/she wishes, unless he/she has given a sole mandate to a specific estate agent.

**Sole or Open Mandates?**

Should more than one agent be instructed by the same client regarding the same property, each agent has received an “open mandate” and no one can claim to have the sole right of marketing it.

In the case of a sole mandate, the client agrees to the following:

1. Appoint only that specific agent to sell or let his/her property.
2. Not to appoint any other agent before expiry of the time mentioned in the contract.
3. Client may still sell his/her own house.

Sellers should limit the period of a mandate to between 45 and 90 days, rather than the three to six months which some estate agents would like. Depending on the wording, a sole mandate can also have the effect that owner is not entitled to market and/or sell the property himself/herself.

**Why a Sole Mandate?**

Sellers sometimes incorrectly assume that their property will sell faster and for a better price when it is “out there on the open market”. The misconception is that if the property is represented by more agents, it is exposed to more buyers. This, however, is not so. There are a number of advantages to having a Sole Mandate:

- Having it in writing means you have a more committed seller, who is more willing to cooperate.
- It allows you to carefully plan your timing and marketing strategies to launch the property onto the market.
• Other agents may quote and advertise different prices and reasons for the sale with or without the seller’s permission. This downgrades both the property and the final selling price.
• You can allocate a bigger budget for marketing from the agency. No estate agent will put in maximum time, effort and money to market a property that could be sold by someone else.
• It reduces commission disputes and is the only way that you can ensure receipt of your commission if you do your job properly and fulfil the terms and conditions of the mandate.
• It provides more time to go for the highest possible price and find a better qualified buyer.
• It controls viewing access through one agency, which also reduces security risks.
• It ensures responsibility and accountability.
• It ensures consistency of price during the marketing period.
• It ensures that there is no “over-exposure” of property. Buyers may easily realise the property is listed with several agents and then make the assumption that it is overpriced and hard to sell.
• A seller can end up not knowing what is happening regarding the marketing of his/her property, because no estate agent has bothered to report back to the seller with meaningful information. Estate agents working on the property may well believe that the seller will divulge the information to their competitors, who will use it to achieve a sale for their own account.
• All in all, it is a more organised and controlled way of marketing.

Note that a seller is under no obligation to sell the property to anyone introduced by you, even if the terms seem to be acceptable according to the mandate. However, if the mandate is worded in such a way that the seller will commit a breach when not selling or refusing to sell, it may well constitute a breach of the mandate agreement.

Open mandate
More than one agency is allowed to sell a person’s property and the first to introduce a buyer and negotiate an agreement gets the commission. This mandate also allows the seller to sell the property himself/herself without having to pay commission to an agency.

Exclusive mandate
With this mandate, the agency is entitled to the commission no matter who sells the property during the period of the mandate or during a specified period afterwards (the seller should be made aware of this period).

Open Mandate after expiry of a Sole Mandate
See Regulation 3 of the Code of Conduct regarding mandates in general and more specifically regarding expired sole mandates and the option to renew.

The Role the Estate Agent plays:

In today’s market, many homeowners are considering selling their homes alone or without the help of an agent. You as an agent have to convince them that selling or buying a home is not a simple procedure. It involves large sums of money, stringent legal requirements and the potential of costly mistakes. To complete the real estate transaction requires an organised, step-by-step approach that many homeowners just do not have the time, skill or experience to carry out.

After trying to “go it alone”, many people eventually reconsider and enlist the services of an agent who can indeed provide a variety of valuable services. This is where you come into the picture.

• The first choice agent services the buyer’s and seller’s requirements, follows up, follows through and keeps everyone informed.
• Like the proverbial oil on troubled waters, he/she keeps buyer and seller emotions at manageable levels. In the sale of homes, sellers can get very emotional, particularly if they
have been in occupation for many years. They may eventually be seeking reasons not to sell. Your job is to be a calm and soothing influence.

- You need to positively encourage buyers and sellers to accept prevailing market conditions by educating them factually. There is nothing worse than raising false hopes, giving distorted valuations, or building castles in the air. Apart from the fact that this may lead to court action against you, it is most unprofessional and a direct contravention of your ethical obligations.
- You need to persuade buyers and sellers that their trust in the estate agent is not misplaced, that the action taken by the estate agent is in their best interest, and that such action speaks louder than words. Be a doer not a talker. Do what you say you will do and do not break your promises.
- In the process of winning the public’s trust, you also need to educate them on various matters regarding the industry. Much of the negative image attributed to the industry (and agents) comes from uninformed members of the public and should be corrected.

**Try to point out the possible hidden hazards and why you/your agency will be the solution to the problems. You should always try to sell solutions or to sell by solving specific problems. Find the problem (need) and then sell the solution.**

**First of all:**

By using the correct methods, you as a property professional will assist in establishing the selling price within the current market value. Many sellers have unrealistic expectations regarding the value of their property. Sometimes there is also the perception that the amount of money they spend on “extras” in and around their homes will enhance the value and therefore enable them to obtain a higher selling price.

After years when property was in such high demand that sellers could almost name their price, we have entered a tougher, more realistic phase where true value is governing market behaviour. It is no longer about perceived value in the face of unstinting demand, but rather about good value for money.

If a property is incorrectly priced in this market, it will not sell and will become tainted after being advertised for months on end. Perceptions that there is something wrong with the property – apart from its inappropriate price – is one of the most dangerous things that can happen in a market like this, where buyers are looking for real value for money.

**In short:**

Should a property be listed with too high a price, there will most likely not be a sale. Should the price be too low, the seller loses out on a valuable investment.
Marketing the property

When it comes to marketing their property, an agent is essential. You should take care of issues such as show days, as well as advertising the property in newspapers and other publications. You should also be a good source of information on matters like zoning, possible subdivisions and other environmental issues not always known to the general public.

Inform the seller that once a buyer is found, your work is not done and that you will play a further important role in completing the deal. These duties include negotiations, offers, counteroffers, contractual matters and many more.

After all, you need to convince the seller that there are indeed distinct advantages to working with an agent like you who is well educated, knowledgeable and experienced in this field.

**Remember:**

*Never Over-Promise:* You want to win the sale so badly and feel an overwhelming temptation to shave a few days off from the promised delivery time.

*However:* Your future is always at stake and it is totally dependent on your trustworthiness.

Even if it costs you a sale now and then; always under-promise instead!

Why should a Seller use you?

A Sole Mandate and an Employment Contract do not greatly differ from each other. No seller will be willing to employ you as agent and trust you with such a valuable asset without good references. Sellers are looking for the following:

- Proven track record of your sales, rewards and recognitions.
- Agents who specialise in a specific area, neighbourhood or property type.
- Your marketing plan and how often you will have an open house.
- Testimonials from other/past clients.
- What market share you are enjoying in your area.
- Average days your Sole Mandates are on the market.
- Average differences between asking prices and selling prices.
- Number of properties sold and the N$ value thereof.

Why should they use your Agency?

It is true that you are known by those you associate with. Therefore, the reputation and standard of service of your agency is more important to the seller than the size of your organisation. Sellers are normally convinced or “impressed” by the following factors regarding an agency:

- Agency’s market share in the region (number of listings with the agency, average sales each month).
- How long an agency has been in the business.
- Training and registration of agents.
- Number of agents and assistants working in the office.
- Ethics and professionalism of agents in general.
- Profile of the principals.
- Credibility (“Good Name”).
- Overall networking in the industry.
Immobilien

- Referrals, well-known people as clients and well-known properties listed and sold by the agency.
- Marketing strategies.
- Appearance of agents, office buildings and vehicles.

If your company has a specific brand, take full advantage of the goodwill. Live that brand story and make sure to sell it. Put in a story about “the way we do business” or about “our vision”, or “the experience our team offers”. In short, make it a striking story about your “brand”. Know your story, make it your own, use it and make sure to tell it.

“None of us are as smart as all of us”

Pricing

According to recent estate agent’s surveys, not all properties are currently sold at the asking price of the sellers, since some of the houses are sold at prices below the asking price. Market value (price a willing buyer will pay) primarily determines the selling price of houses. Estate agents should be well informed and use the correct methods to establish market values and the subsequent selling price of a property. To intentionally value a property incorrectly to secure a mandate contravenes the estate agent’s Code of Conduct.

There are three ways of establishing Market Values:

1. Comparative Market Analysis
2. Comparable Cost
3. Income Generated

You need to ensure that you list properties at market related prices. Remember that sellable properties build confidence and properly satisfy buyer and seller demands. The correct way for an agent to price most properties and the method we will also be focusing on, is Comparative Market Analysis (CMA).

CMA is nothing more other than a detailed comparison between the specific property and another property that is similar in:

- Size;
- improvements;
- area; and
- amenities

Additional information you need to know before making the comparison is:

- The length of time that property is on the market;
- were they sold;
- which were withdrawn and why;
- asking prices; and
- selling prices

There is indeed a constant need to determine the value of all types of properties for the purpose of purchase and sale, as well as financing. As this is a specialised area of the industry, it is wise to contact a qualified valuator to do the analysis. Mistakes in this regard could not only be costly for the client but could also have severe consequences for an agent. By appointing a valuator, you not only cover yourself, but also provide a more professional service to your client. Most valuators specialise in certain
areas and it is important to select and appoint an appropriate valuator with the necessary qualifications and practical experience. The cost of this service can be covered by your commission. However, should the property not sell, the costs will be for your account (another good reason to get a sole mandate).

For an agent to correctly determine the value of property by way of CMA, there is a need to have more information (data) and statistics available in Namibia. This is where the Receiver of Revenue, the Municipality and the Deeds Registry, together with other role players in the industry, can make a huge contribution.

With the information available, be ready to present sellers with a complete analysis prior to suggestions regarding the selling price. It is important that sellers have accurate and detailed information with which to compare their property. Although mostly optimistic about the value of their property, sellers normally do have a good idea of the value of their property. Therefore, to gain respect in this regard, be prepared and do your homework!

**Overpricing**

Current buyers like to look for newly released property. Most buyers will also know about this property within the first two weeks. Unfortunately, sellers often make the mistake of putting their property in the market at a price slightly higher than the current market value.

Should someone be interested in buying at this inflated price, they will most likely not get financed, as banks are reluctant to finance a property for more than it is worth.

The reality is that **buyers purchase by comparison**. Should they compare and find your price too high, they will either:

- not make an offer at all, or
- make an offer far below what the property is worth.

With an offer so far away from the actual price it means that the gap is too big and that negotiations will not work. This eventually becomes a contest which no one wins.

Overpriced property also tends to stay on the market for too long. Buyers see this and begin to wonder what is wrong with the property. As the time passes, buyers assume the seller is getting desperate and as a result, make even lower offers. This eventually means an even lower price for the owner.

Eventually the seller loses faith in the agent and appoints other agents after the mandate has expired. This also reduces agents’ enthusiasm. Buyers then see the property of which the price has most likely been reduced again, and the hunt for a bargain is on.

It is therefore the duty of an agent to explain these dangers to the seller and carefully (together with the seller) establish the correct asking price in the midst of the current market. You and the seller should be working as a team to sell the house for the best possible price in the shortest possible time frame.

**To ask for help (and put pride aside)**

Although not the only scenario, obtaining the correct market evaluation may be one of those instances where you may just need to draw on every possible resource. Resources are sometimes people, and these people may sometimes be your opposition or “enemies”. Do not let your pride prevent you from becoming a first choice agent.
Example: Once upon a time you had a lousy experience with Bulletjie Boysen, an active and well-known Namibian consultant. Today, five years later, you are still angry about it. But now you have a client and Bulletjie, being the perfect consultant and expert on his field, is not only the solution to your problem, but would also add great credibility to your services.

So: get over it! Call Bulletjie, ask him to be part of a great deal and sign him up. Even better, do not allow for this or other small-minded things to come in the way of you becoming a “First Choice Agent”. Always strive to have a good working and professional relationship with those who may cross your path by keeping the end goal in mind. You need to be the first choice agent!

Remember: Inspired selling involves bringing to bear the absolute best resources available to create the best outcome imaginable for a client. It is your job to steer and channel those resources – even if you are less than charmed by some of these “resource/service providers”.

Cancellation/Settlement Figures on an existing Mortgage/Bond.

Always guard against fixing the purchase price at a lower amount than the cancellation (settlement) fee required by the bank to cancel the bond. It is indeed a potential problem that the seller will accept an offer which is lower than what is needed to cancel his/her bond. Therefore, make 100% sure from the client and get the necessary confirmation that the purchase price would in fact be higher than the cancellation amount. If it is not and the seller cannot pay the difference, he/she could be in breach to deliver the object of the contract.

See also “Penalty Clauses” on mortgage agreements in chapter 5.

Do I really need this Listing/Mandate?

Do not waste time with Mandates that will not work out. It is not worth it.

- Be sure you can effectively and successfully market the property before taking it on.
- Is this a mandate you can commit to?
- Be comfortable with the seller. Do you trust him/her? Remember that your time is important and you cannot be kept waiting by people who are not serious. To work with property where you have very little cooperation with the seller means difficult marketing.
- Taking on a mandate which is not priced correctly will demand a lot of time, energy and money to market. Should the terms, conditions and commission also not appeal to you, decline.

Besides a reasonable selling price, other factors can also have an influence on the marketing and probability of your sale. In your negotiations, ask yourself the following questions:

- Are you really dealing with the owners or authorised persons?
- Does the mandate require specialised skills or knowledge that you do not have? If so, rather decline.
- What is the occupation date or occupational interest?
- Why does the seller want to sell?
- Has the seller already given a Sole Mandate to another agent/agency?
- Is your commission safe?
- What are the general terms of your mandate? Also make sure of the Offer to Purchase.
- Have you discussed your marketing strategy with the seller? Make sure you do so.
I want this Mandate; how do I get it?

Sole Mandates do not just “happen”; you have to work for them. The most difficult part is probably sourcing the seller. Once you have done that, it is important to make a good impression. To do that you should be prepared and act with confidence. Confidence comes with experience, but also with preparation. Some sellers are well experienced, while others know very little of the property industry. Remember that you should refrain from using harmful or misleading (marketing) techniques/methods to influence any person in order to obtain the mandate.

Be ready to answer questions and perhaps have a brochure/booklet handy with the following information. This is also part of making a good impression and to gain trust and cooperation from the seller.

1. Why work/list with an agent?
2. Overview of your career and achievements not necessarily related to the real estate industry.
3. Photocopies of achievements, rewards and certificates.
4. Information about your agency.
6. Marketing Plan, including sample advertisements.
7. What cooperation is expected from the seller?

From this it would be clear to any seller that you have personal drive, initiative and good marketing skills. Be on time for an appointment and make sure to have a visible interest in the property and the seller as your client. Where possible, only list the property in the owner’s presence. When meeting with the client, make sure you have your standard “listing kit” handy. This includes pens, a calculator, business cards, listing forms, CMA forms, a diary/appointment book, sole agency agreements, etc. You want to eliminate writing time as much as possible so that you can devote the maximum amount of time to the seller to get to know his/her property.

When receiving the mandate: Send the seller a “thank you” note and a copy of the signed mandate as soon as possible. This will prevent any later complications arising from what he/she has signed and when the sole authority to sell will expire.

1.3. Marketing and Service to Sellers

Marketing plan

All sole mandates must include your marketing plan. A seller cannot be expected to make an informed choice when hiring an estate agent if he/she is unaware of what exactly the agent is offering to do for him/her in order to get the property sold.

- By now you should have already agreed on the fair market and selling price of the property.
- Make sure you know your property by heart. Inspect it thoroughly and with an interest in detail. It helps to do so together with the owners. Ask them what they like about the house and what attracted them to buy it in the first place.
- Book a time for the viewing of the property with your colleagues.
- Should it be necessary, advise the seller on small detail that could speed up the selling process, e.g.: a clean, attractive garden, a tidy house, clean walls, etc.
- Ask the seller to “assist” you in the placing of “For Sale” signs outside the property and in keeping them clean and visible at all times.
Immobilien

- Teamwork: Share listing with office colleagues and a multi listing network and, if necessary, arrange to take those agents to inspect the property.
- Consult your list of pre-qualified buyers and introduce them to the property.
- Arrange for newspaper advertisements and discuss the show days and times with the seller.
- Take pictures for listing brochures, advertisements and office displays, and get the seller to be involved in the writing of the first advertisements.
- Include the new property in the “Property Portfolio” in your office.
- Place an advertisement in your office window display.
- Prepare and distribute a “Just Listed” flyer.
- Develop and print a list of features and benefits of the property for presentation to potential buyers.
- Start sending out invitations to the first show day.
- Pre-qualify buyers before introducing them to the property.
- Keep a list of all potential buyers who are introduced to the property during your mandate period.
- Follow up on all visitors after show days.
- Knock on at least 20 doors in the surrounding area, inform them of the new listing and ask for possible leads.
- Assist in arranging any necessary finance for potential buyers.
- Communicate continuously with the seller on the progress made to date.

Interaction with the Seller

Make sure the seller is prepared and knows what to expect over the next couple of weeks. You want cooperation from the seller, so it is vital to treat him/her as a valued client. The seller needs to have your pledge of service and you need to stick to it.

People appreciate and like to be informed. Keeping sellers informed makes them feel good and promotes trust and cooperation from them. However, they do not necessarily like to be informed in the same way/manner or at the same times.

The most important thing is to constantly communicate with your seller, especially on any progress. Also make sure on what basis they would like to be updated and then make sure you stick to a planned schedule. Keep in mind that not all sellers want the same service. A busy executive would probably require feedback on progress on a weekly basis, while a young and inexperienced first time seller might require daily contact. Some would prefer SMSs, while others would like to have occasional phone calls, a letter in the mail or even personal appointments. The best way to find out from sellers what service they prefer is to ask them.

Remember: It is better to under-promise and over deliver than to over promise and under-deliver.
I have presented the Property to a willing and able Buyer who has made an offer and now the Seller does not want to sell.

According to our Common Law, the seller is under no obligation to sell his/her property to anyone introduced to him/her through the agent who has a sole mandate, even if the prospective buyer makes an offer on the exact terms that the seller and agent agreed to in the mandate.

However, the mandate can be worded in such a way that the client (seller) commits a breach of contract if he/she refuses to sell should the agent perform in terms of the mandate. Therefore the contractual wording of the relevant mandate will determine the outcome or possible outcome of a situation like this.

Claim for commission in terms of the mandate.

An estate agent that wishes to proceed to recover commission in terms of the mandate agreement (as opposed to claiming such commission in terms of a benefit created in favour of the agent in a sales agreement) must allege and prove the following:

- Compliance with S26 of the Estate Agents Act; Commission should only be paid to people in possession of a valid Fidelity Fund Certificate.
- A valid and existing mandate, preferably in writing, stating when commission will be payable and how much, including or excluding VAT.
- During the process of introducing buyers to the property (or seller), make sure that you always inform the seller of the identity of a possible buyer you are working on.
- Performance of the mandate, which in the absence of special terms involves:
  - That he/she has introduced a purchaser to the seller;
that the purchaser was, when the contract was signed, willing and able to purchase the property;
that a valid contract of sale was concluded; and
that the introduction was the effective cause (causa causans) of the contract.

(Refer to case law at back)

**Seller’s Remorse**

A court judgment in Western Cape Division, RSA, ruled that an expiry date on an Offer to Purchase a property is inserted solely for the benefit of the potential buyer, which he/she can choose to waive should the offer be accepted after the expiry.

The ruling came about after a seller accepted an Offer to Purchase after the specified expiry date – a fact which she later attempted to use as way out of the contract. This was indeed a case of seller’s remorse. The decision in this case reinforced the principle that once an Offer to Purchase is signed by the seller, it becomes a legally binding agreement. If one suddenly develops seller’s remorse, it will take the consent of the buyer to make the agreement null and void.

The ruling also highlights how important it is for sellers to thoroughly consider the pros and cons of an Offer to Purchase and ensure that they enlist the services of a reputable agency to represent their property. Agents then need to work out the best deal for both buyer and seller, as well as accurately advise both parties using their in-depth market knowledge.

As an agent working for both parties, it should be an imperative to get offers of purchase signed by both parties prior to the specified expiry date, thereby leaving no room for discrepancy. Sellers must realise, however, that this expiry deadline is there for the benefit of the potential buyer only.

(Refer to Case Law: EP Manna v JM Lotter 2007)

### 1.4. My Commission

Earning a commission will constitute the majority of your income as a real estate agent. Unfortunately nowadays there are commission cutting establishments all over the industry. Internet marketing and other ways of private sales are all seen as competition to an agent who wishes to provide a professional service and earn a living out of commission. The reality is that, while the seller might well make a bit more profit by avoiding commission, the buyer will seldom benefit, as the seller still tries to get the same asking price he/she would have asked if he/she had been paying commission, in order to make that extra profit. Any potential buyer who believes his/her seller will discount some of the cost of the commission is fooling himself/herself and should be correctly informed by estate agents.

To actually earn and be entitled to a decent commission, agents need to:

- Have confidence in their own abilities.
- Provide quality service, which is critical in earning a full commission. Therefore, work smart and deliver excellent service.
- Increased prospecting and other real estate activities.
- Be the effective cause of the sale.
Remember:
Believe in your own abilities and send out a professional but clear message that you are delivering a professional service and are entitled to your commission.

To sell yourself (and justify your commission), you need to have confidence in your own abilities. Without this it would be rather impossible to convince someone else that you are worthy of any commission.

If clients are aware of how precise, professional and thorough you are, it is unlikely that you will be involved in disputes regarding commission.

It is important to openly promote yourself:
- In conversations with others, and
- through a marketing campaign of your services.

Confidence comes with knowledge. If you have knowledge of a certain field, you can talk about that field more easily, whether in public or in one-on-one conversations.

Analyse yourself and your company constantly

If you are not as smart as you would like to be, what is the reason? Focus on what you need to do and be persistent and consistent. What are the strengths of your company as role player in the market place? Once you have established these strengths, make sure your targeted farming area takes note of them.

To offer excellent service is of the utmost importance. Make sure to promote the fact that you and your company provide excellent service to clients.

Cutting my Commission?

Many times when a quick sale is concluded, the seller could easily think that you did not work hard or long enough to earn/justify your commission. Some sellers would then argue that you do not deserve your full commission. Very few people would realise and agree that you must be paid on results (the sale of the property) and not because of your intentions or hard work.

It is also important for sellers to realise that your real estate business has been going on long before you started to work on his/her property. Your successful sale is determined by experience and the amount of work you have put in, not only in his/her property but all together.

Therefore, once your service is delivered in terms of your mandate, never feel obliged to cut your prescribed commission and always stand your ground. Furthermore (within the guidelines of R 8.2 of the Code of Conduct), justify this by being persistent yet professional. After all, you did deliver the service and deserve the commission.

Should you feel that there must be exceptions, keep the following in mind:
No amount of commission is prescribed by the law. However, the Institute of Estate Agents does suggest that the he average for commission asked is around 7% of the purchase price of the property. An agent may freely advertise his/her commission, but it is improper conduct to advertise that you will “under cut” competitors’ rates.
Remember: Anybody can cut commission. It is the exceptional that earns it!

With competition from commission cutting agents and establishments increasing each day, you need to deliver exceptional service to justify your fee. In order to achieve this you must constantly follow these steps:

- **Believe in yourself**: This includes personal self-promotion campaigns to sell yourself, oozing confidence by being capable and knowledgeable, changing your mindset and assuming that clients want to pay for the best agent in the business, increasing farming activities, and keeping in touch with past and present clients.

- **Work smart, not only hard**: Establish what it is that makes you and your company superior and then tell the marketplace about it. It is not good enough to be fantastic at something if nobody is aware of it. Try also to list hard and sell easy by having all relevant information pertaining to a particular property available. Qualify buyers, update listings and always ensure that you portray enthusiasm rather than desperation in all your dealings.

- **Know your market**: A truly professional and sustainably successful agent needs to be knowledgeable about more than just the properties he/she sells. He/she must understand the market and the industry as a whole. This includes answering the following questions:
  - Who is the market?
  - What is your average client profile?
  - Are you designing advertising strategies for the right markets?
  - How big is your market?
  - Who are the main players?
  - Who is the main opposition and why?
  - What new developments are planned?

- **Increase your activities**: Use your time wisely and increase activities that you know bring results.

- **Be persistent**: Two children were watching a clutch of chicks trying to hatch. The first chick struggled hard to get out of its shell, but it persisted until it succeeded. The children could not bear to stand there and just watch so they decided to help the others. Sadly, only the first chick survived. The children were devastated, but the wise old farmer told them: “The persistence and tenacity of the first chick prepared it for life outside.”

- **Deliver exceptional service**: Service consistency, in the long run, is a great differentiator between an estate agent that prospers and an estate agent that just marks time. This means delivering the type of service that your client desires. Ask what service they want and listen to their needs.

### Commission Disputes

Estate agents should take care to avoid disputes regarding their commission. Because your right to commission is mainly based on the specific clauses as they appear in the sole mandate, you always need to ensure that they are clearly stipulated in all sales agreements in which you are acting as an agent.

Fully discuss and explain to clients:

1. Who your mandate is from.
2. When your commission is payable.
3. By whom will it be payable.
4. How much commission will be payable.
5. Whether VAT is included or excluded.
6. Stipulate on the sales agreement that it was you (agent) who introduced the purchaser to the property/seller or, alternatively, that you were the effective cause of the sale.
7. Include the *Stipulatio alteri* clause in the contract, which refers to the legal position of an agent when a contract is made between two other parties. Accept the benefits of the clause by your signature at the foot thereof (see “Offer to Purchase under “contracts”).

Lengthy arguments can be made (or avoided) about which agent “closed the deal” and whether or not it was the “introducing agent”. There is no legal rule that automatically entitles the introducing agent to commission, especially if there were obstacles in the way of the sale. The real question, should the sale actually happen, would be: “Whose efforts were actually the effective cause of the sale?” This situation may result in purchasers often taking advantage of the services of introducing agents.

**The question as to whether or not an estate agent was the effective cause of a sale usually arises in two instances:**
- Where an estate agent introduces a purchaser to the seller and the parties conclude a private sale; and
- where an estate agent introduces a purchaser to a property who eventually purchases it through another estate agent.

The issue in both instances is whether the estate agent who first introduced the purchaser is entitled to the commission. Each case has to be carefully scrutinized before this question can be answered.

**Where the seller privately sells, various factors can indicate whether or not the estate agent was the effective cause:**
- The nature and effect of the estate agent’s efforts (e.g. A simple phone call, leaving a business card, driving the purchaser past the property and/or pointing it out may well in certain circumstances constitute the effective cause of the sale, although it may not be the decisive factor).
- The period which has lapsed between the estate agent’s introduction and the conclusion of the sale.
- Have a mandate in place; the terms of the sale must be viewed against the terms of the mandate (the mere fact that the purchase price of the sale is lower/higher than that of the mandate is not decisive). There must be a causal relationship between your mandated efforts and the property’s sale (or purchase).
- If the seller grants the purchaser financial assistance, this may be a factor, albeit not a decisive one.
- Where the estate agent introduces a purchaser but later breaks off negotiations, it does not necessarily terminate the influence of the introduction, but it does affect the value of the introduction.
- It helps to inform the seller about the identity of the purchaser, but it is certainly not enough.
- Where an estate agent introduces a purchaser to a property and that purchaser eventually purchases it through another estate agent, the first agent will only be entitled to commission if he/she can show that it was his/her efforts which resulted in the conclusion of the agreement, notwithstanding the intervention of the second agent. Although the above-mentioned will also apply here, you must remember that if a property is listed with several competing estate agents there is no rule that the estate agent who first introduced a purchaser is entitled to commission.
In short:

You need to be “there” in all the phases of the transaction; starting at the mandate and the introduction, until the eventual signing of the offer/agreement. Your role does not stop at introducing the purchaser to the seller/property. You need to follow through; the mere introduction of the eventual purchaser to the property by a mandated agent may be seen as the effective cause of the sale only in circumstances where no other obstacle had to be overcome (by someone or something else) to bring the sale about.

- If you are the introducing agent, make sure to put in continuous and professional effort and follow up after introducing the potential purchaser to the property or owner.
- In your efforts to maintain contact with the purchaser, make sure to assist in negotiations by removing any obstacles that may form barriers preventing the transaction to happen. Should these obstacles be removed by someone else, you as introducing agent may not be entitled to your commission any longer.
- By being involved you will also ensure that when an offer is made or when the actual contract is signed, there is a “commission clause” included. This is one of the reasons why most agents always have pre-printed contracts/offers handy.

By introducing the purchaser to the seller or his/her property you only have a “foot in the door”. For you to be the effective cause, you need to actually keep it there and eventually go through to the other side to bring the sale about. Until you get to the “other side”, things can sometimes get difficult and painful. However, you need to keep your foot in the door. You need to work consistently and without interruption to make sure the door stays open.

Two main factors which are of importance when determining whether your actions were the effective cause:

1. The proximity of time between the introduction and the sale (the longer it takes, the weaker your claim).
2. The comparative and relative weight of your efforts against the competing factors and influences that lead to the final decision to buy the property.

You do so by being a major positive influence towards the successful conclusion of the sale. Many times it will include continuous communication or negotiations about the purchase price, the date of occupation, and the amount of occupational rent to be paid if occupation occurs before transfer. Even to obtain much needed documents or certificates could be seen as a major positive influence towards conclusion of the transaction. This however may not be sufficient; you need to make sure that the sale actually came about as a result of your continuous efforts. It may even include assistance to the purchaser to obtain finance for the transaction or to offer suggestions on how the purchaser’s other concerns could be addressed in general.

The successful conclusion of the purchase and time when you will be entitled to commission will in most cases only be upon registration of the property in the name of the purchaser.

Therefore, once you have a foot in the door, keep it there and be there every step of the way. This way you will stay informed and not only know what is going on, but also know how to address the obstacles and concerns to see the sale through. If you snooze, you lose!

More than one agent:
The real issue is whether it was the first or second agent’s efforts which were the effective cause of the sale.
For example: the offer submitted by the first agent is rejected because it was too low. The second agent concludes sale because he/she obtains financing for the purchaser, who then submits a higher offer. The first agent would not be entitled to commission in these circumstances. What about the situation where the sale is concluded because the second agent reduces his/her commission and, as a result, the seller “clears” more of the purchase price?

There are situations where it is impossible to distinguish between the efforts of two agents in order to decide who the effective cause was. In such situations it may well be that the seller is liable to pay commission to both estate agents. In such circumstances the seller has only himself/herself to blame if he/she appoints more than one agent without ensuring that he/she will only be liable for the commission of one estate agent, as there is no obligation on an estate agent to acquaint the seller with all the various people introduced to the property.

The requirement that an estate agent must be the effective cause of a transaction before he/she can claim commission can be excluded by agreement. However, such an agreement is not readily assumed and must be set out in very clear terms in order to be binding.

Remember: always act professional regarding your commission.

- This includes the scenario where a sales agreement contains the following clause: “The seller hereby irrevocably instructs the Conveyancers to pay the commission to the agent out of the proceeds of the sale against registration of transfer.”

Do not convince/manipulate the purchaser to pay the commission directly over to you (or your agency). It is not only unprofessional to “go outside” the contract made by the parties involved, but it is also against the Code of Conduct and would not be allowed or tolerated by the Board of Estate Agents. Unfortunately people often want the rewards before the results. This is a greedy way of doing business and by doing so you do not stay as focused as you should. First do the job and then get the rewards!

- Although most agents prefer that deposits are paid over to the lawyers, it may sometimes happen that you have to keep the deposit in a trust. Estate agents are prohibited from withdrawing their commission amounts from those deposits before the conclusion of the transaction; i.e. before registration of transfer. The best practice is to have the deposit in a trust at the law firm that is dealing with the transfer.

- If a deposit is paid by the purchaser to the conveyancer, agents can ask the conveyancer firm in the Letter of Instruction to “keep us covered” for commission. This means that the agent wants a promise from the conveyancing firm that it will pay the commission to the agent when the transfer is registered. The conveyancing firm is usually willing to do so on the condition that certain requirements are met. This is normal practice that make sense and that strengthens the relationship between agents and conveyancers. The agreement is usually clear on the amount of commission. However, it is good practice to mention in this letter whether or not the amount stated is inclusive of VAT. Another good reason to ask for this confirmation or promise is because sellers tend to easily “forget” about the commission that is payable. You must not allow the transfer to be finalised without receiving your commission (See sample attached).

For further issues regarding commission and trust accounts refer to R 8 and 9 of the Code of Conduct in Chapter 8 of this guide.
1. 5. Sourcing Sellers

Many people believe that marketing is just about advertising or sales. However, marketing is everything you do to turn prospects into clients by maintaining a relationship with them. Even the smallest tasks like writing “thank you” letters, playing golf with a prospective client, returning calls promptly and meeting with a past client for coffee can be thought of as marketing.

The ultimate goal of marketing is to match your products (listings) and services to the people who need and want them, thereby ensuring profitability.

**Good News:** Real estate marketing is a lot simpler than most agents make it out to be. Effective real estate marketing does not have to be expensive, complicated, or sophisticated. Although a long-term activity, sometimes plain, simple and to the point marketing makes lasting impressions that result in increased business opportunities and more income.

**Bad News:** Marketing will cost you money; there is no way around it. However, one of the most effective (and free) real estate marketing ideas often overlooked involves expired listings. If you are newly licensed, new to a community or simply looking for a way to increase your business, you should aggressively pursue them. Expired Listings are plentiful and always easy to find.

Speak with other agents in your office and ask if you can handle some of their excess business when they are busy and in return you can provide referrals when you are too busy to give prospects the full attention they deserve.

**Remember:**

*Your earnings as a real estate agent will be in direct proportion to the value you deliver according to the marketplace.*

The following ideas should be of some assistance to market your services and reach targeted sellers:

1. **T-shirts, Caps and Jackets**

Real estate marketing via T-shirts and jackets is not a new or novel idea, but how many real estate agents do you see advertising via this medium? Have some made with your logo and other business information on them. You, your family and friends can wear them almost anywhere. Market your business all year round for a one-off cost. When it is too cold for t-shirts, wear the jacket.

2. **Umbrellas**

Invest in some sun umbrellas and have the company name and logo (with contacts) embroidered onto them. Make sure to find out about social events in your area and offer to lend them to churches, schools and other outdoor activity clubs. In this way you do not only get your name “out there”, but also have the opportunity of meeting the people (members) at those institutions. Make sure to keep contact with those prospects too.

3. **Envelopes, Stationary and Business Cards**

These are the mainstay of any real estate marketing campaign and a must for your marketing campaigns. Make sure your logo and other business information is printed on all of your stationary, envelopes and business cards. Leave a few wherever you go and do not be shy.
Also, invest in time tables, calendars and rulers to be handed out at the beginning of a school year at different schools in your targeted area. Children normally share such excitement with their parents and in this way would assist you in becoming the house hold name of the real estate industry. Unlike flyers, the lifespan of these gifts are much longer.

4. Plastic Telephone Book covers

Have some book covers made with prominent faces, logos and office contact numbers on them. It could be rather expensive, so perhaps try to get others (related but not competition) involved in keeping costs down. These can then be delivered to homes and businesses (including lawyers) in your area; it has a long lifespan and can be used year after year.

5. Cars: Magnetic Signs, Sign writing and Bumper stickers

Besides the usual “fridge stickers”, it would also be wise to invest in large automobile signs. If you do not already have automobile signs, get some! Place them on your car doors or wherever visible. Take them off and reattach them in different spots from time to time to avoid fading your car’s paint.

Print some clearly visible bumper stickers and ask friends, colleagues and previous clients to put them on their bumpers. These are nothing more than free running billboards all year round.

6. Marketing Material / Presentation Manuals

Include in your marketing material letters from satisfied clients, photos of buyers in their new homes, and remember rewards and certificates. Sellers are always looking for successful agents to market their property. A useful tool in the real estate industry is to insert copies of your most successful advertisements with promotional material. Offering this to potential sellers increases their confidence in your marketing abilities. Remember to get permission to show pictures or to use the quotes/testimonials.

Make sure to drop off your brochures and business cards at insurance companies, large national companies, kennels, paint suppliers, building merchants, friends, hairdressers, etc.

7. Sole Mandates and sales thereof

Make use of any possible opportunity to gain marketing from your sole mandates. When placing newspaper/magazine advertisements, be sure to use quality photography detailing the property’s best features.

After the sale of sole mandates, make sure to put “sold” signs up.

To further assist you in securing new sole mandates in this area, use the “just listed and sold by me” flyer in the neighbourhood to emphasise your successes.

8. Local authorities and Community

Where possible, obtain permission to look after parks and street areas to keep it need and tidy. You can upgrade the entire area in exchange for the right to put up signs with your company’s name or logo on it. In this way you will also ensure that more people at the Municipality are aware of your services.
Make sure to be at the openings of neighbourhood shopping centres and stores. Even offer to assist or speak.

**Do some good! Try to change the world, even if it is just in a small way.** You will be surprised at the difference it makes in your life by helping others and acknowledging their good work. Remember, as a first choice agent you are in the people business. Never forget it! Always think of what you can do to help. To make people actively seek and respect your advice and knowledge, you must bend over backwards to make the community affairs your affairs. I can speak from personal experience; as co-founder of both SWAM and Crime Stoppers Namibia, making a meaningful impact in people’s lives has dramatically changed my perspective. The same goes for my involvement with the Bushman/San communities in the Tsumkwe region and the Windhoek City Police programs. The enjoyment of my day-to-day “work life” also increased as a result.

Probably the best examples of this attitude are Oprah Winfrey, Bill Gates, McDonalds Food Corporation and Richard Branson. They have realised the blessing there is in helping others and these organisations give out millions of dollars each year to charities. And no, they did not start doing this once they were filthy rich; this was their attitude from the start.

Namibia is among the countries in the world with the highest diversity between rich and poor. This means there is more than enough opportunities to do good deeds. You will soon realise that there is truth in the saying: “Blessed to be a blessing.” What a great opportunity for real estate agents to symbolise the sun in our national flag and really become part of the “light”. To really be part of the “light” in this world would mean that not only your good deeds, but also your ethical behaviour as a professional real estate agent will be contagious to the public.

**The vision of the Institute of Estate Agents in Namibia** is also to contribute towards the social and economic upliftment of the industry, country and people.

### 9. Shared Listing Services

By sharing with a Shared Listing Network, you will have immediate access to an array of services which can provide you with instant, thorough and accurate property information. This co-operative marketing system relays information about property to a vast network of agents and gives you access to a much bigger database. As the combined experience and efforts of all the agents involved will attract possible sellers, it could also improve your chances to get hold of the appropriate property for your buyer. The normal commission will be shared between the listing and selling agent.

In Namibia, **Property I** provides the platform for estate agents, financial advisors, conveyancers and home improvement companies to display their data/information on Plasma and LCD Monitors within a high foot count area such as Maerua Mall. Customers can browse for a house in the whole of Namibia, Mozambique & South Africa according criteria such as location and price. Once a property is selected, the customer will be put in touch directly with the specific agent.

The **MLS® or Multi Listing Services®** group, the largest property brand in southern Africa, combines resources and listings of different agents to give bigger exposure through their marketing campaigns. Participating agents do so by entering sole mandates into the MLS database within 72 hours of the mandate being signed by the seller. This broader MLS database allows for many more potential buyers than that of a single agency. Besides the training and administration support that goes along with it, the further advantage for the agent is marketing, networking, sharing and access to properties locally, regionally and internationally. For the seller it means maximum exposure of his/her property and buyers have the confidence and security that participating member agents have to adhere to high ethical and professional standards. The success of an initiative like this in Namibia would depend on the basic teamwork fundamentals; trust, communication, honesty and respect.
Now get them moving!

Encourage your company to make use of a highly visible truck or trailer to assist sellers in local moves. This could even be rented out to provide smaller services like moving some of the garden equipment. Obviously the sign writing should be very clear and visible. Combine that with a “moving checklist” and you have an added incentive for sellers to list with your agency.

“The trouble is; If you don’t risk anything, you risk even more.”
Chapter 2

Buyers

2.1. Advertising

2.2 Presentation Manual

2.3. Show Days

2.4. Qualifying Buyers

2.5. Service to Buyers

2.6. Sourcing Buyers

Remember

Clients will definitely tell their friends and family if the liked or hated you.
For much needed referrals and “word of mouth” advertising, it is in your best interest to always act honestly and professionally towards buyers.

Therefore:

- Refrain from making any misrepresentations.
- Always disclose facts that to your knowledge could be material to the deal.
- Comply with legal and ethical obligations.
- Do not discriminate against potential purchasers.
- Always act with reasonable care and skill as prescribed by the Code of Conduct.
People regularly ask me what the implications are for Namibia’s property (and agricultural land) market. Are we, like South Africa, following what is happening in The USA? Or even worse, are we following the economy of Zimbabwe?

I believe we are following none of the above. Namibia has a unique market with unique influences. Certainly it is a sought after destination for both locals and foreigners. As long as the property market (including the lending of finances) does not become reckless the growth of the last couple of years will continue. In Namibia we have seen dramatic improvements in economic growth since the early 1990s. We have also experienced interest rate stability and good rate levels. Not surprisingly therefore, the local property markets launched into arguably the country’s greatest boom on record. We have seen rapid growth in both mortgage advances as well as overall credit. However, I believe that we are not far enough down the road to have arrived at an end of the booming industry. The “boom” in the North American market has lasted, broadly speaking, for about a decade and a half. The golden era for Namibia has not even reached half that mark yet.

The Namibia Economist of 22 February 2008 stated: “The International Monetary Fund (IMF) said this week that Namibia’s overall economic outlook is positive, adding in its executive board assessment that a sound macroeconomic management, which, together with a favourable external environment, has led to robust economic growth, subdued inflation, large current account surpluses, and a strengthened foreign reserve position.”

Although some may still try to discourage you, the reality is that there are more than enough opportunities in the Namibian market to go around for everyone. Unfortunately the popular saying is: “The pie is just not big enough.” This sounds more like a lie from greedy people that acts like a virus in the mind of estate agents, conveyancers, financial institutions and investors alike. Rather listen to the voice and vision inside you than the negative opinions from the outside. You cannot help the real estate industry or yourself by focusing on negative things and opinions. It is also encouraging to note that the Republican Newspaper issue of 2 January 2008 mentioned under “Market Place” the following article: “Real estate: plenty of opportunities”. This article was written upon the return of a group of real estate agents from the 2007 Realtors Conference and Expo in Las Vegas USA, together with First National Bank (Home Loans) Namibia.

Although the recent hike in interest rates means that properties now stay in the market for a little longer than they would have six months ago, economists are confident that the rate will stabilise for the next three years at least. In the mean time it should be noted that demand for residential property in the country remains. There are many properties that are still selling for record prices and developments that are selling out in record time. The future still looks bright but the market is ultra-competitive and it is ultimately only the best who will survive.

With an abundance of properties that need to be sold and interest rates still relatively low, it is a wonderful time for buyers to get a great deal and for you to do business.

“Success in business requires training and discipline and hard work. But if you’re not frightened by these things, the opportunities are just as great today as they ever were.”

David Rockefeller
Your job as a first choice agent is to use all your prospecting methods to:

1. Find prospects.
2. Educate them on this rare opportunity.
3. Qualify those prospects with the potential to be buyers.
4. Assist them through the process.
5. Conclude the deal.

Your duty is to provide your client with exceptional service; help till it hurts...then help some more!

- Never feel insecure about doing your job well.
- Follow up as many times as it takes to get a yes.
- Make as many appointments as it takes for you to find your buyer the perfect property.

If potential buyers take the time and trouble to make a telephonic enquiry on one of your advertisements, walk into a show house or, better still, visit your real estate office. There is no reason for you to feel insecure or "pushy" by giving the answers or service they came to you for. It is your duty to assist them in finding the right property, as well as an opportunity. When a potential buyer visits your show house or office, he/she is in the mood to talk property! He/she has not, for example, just opened his/her front door after a hard day at the office to find that his/her house has been burgled and that the insurance policy has lapsed, just as you ring with a bright and chirpy: "Hi there, my name is Jacky ..." When a potential buyer calls on your services, give them your services and continue to do so until you are both satisfied.

2.1. Advertising

Make this year the year you finally market effectively with less effort and reach your financial goals. In the years beyond you will reap the benefits of the referral business it will bring.

Your advertisement will probably be displayed alongside many others in the newspaper publications. However, do not be discouraged. You do not want everyone to read it; only your target market should do so.

To determine how you should reach your target market, you first need to understand why people buy. Normally buyers will fall in one or more of the following categories:

- Money savers and profit hunters
- Practical buyers (looking for the usefulness/comfort of the product)
- Safety and security
- Prestigious buyers (ego)
- Pleasure seekers

Obviously the above categories will be motivated by different reasons and emotions. Are these buyers first time buyers, retirees, executives seeking status, or is it perhaps speculators and renovators buying for the purpose of rental or resale?

Different people look for different houses for different reasons. You need to take your listings, look for special features and then determine which buyer categories you should focus your marketing efforts on.
When advertising, your advertisements should be written in such a way as to appeal to the correct target market.

The AIDA principle assists us in ensuring that our advertisements do just that:

- attract Attention
- create Interest
- stimulate Desire
- lead to Action

1. Your advertisement needs to stand out and attract attention.

   Fewer words, an oddly shaped advertisement, white space, a catchy phrase, noticeable boarding or some other distinguishing feature is necessary to allow an advertisement to stand out from its competitors. Make sure it appears on the right hand side of the paper under the property section at either “for sale” or “to rent”.

Immobilien
Try to centre the advertisement so that there is a white space surrounding the printed words.

A **bold heading** in large letters should state exactly those features you want buyer categories (target market) to notice. It should clearly state whether it is a sale, rental or show. The heading is probably more important than the logo, until the point where people want to call you.

**DO NOT USE ALL CAPITAL FONTS AS THIS IS MORE DIFFICULT TO READ.**

Use fewer words as people are normally lazy. They only want to quickly browse or scan for what they are looking for.

Consider oddly shaped or striking colours for letters.

Make use of **bold** frames and box your advertisements to make them more noticeable.

When making use of images, make sure that you use high quality resolution images. You do not want your prospects to use their imagination to picture the property.
2. Create an interest in your target category

Once prospects notice your advertisement, the next step will be to stimulate interest. Think like the buyer. What will motivate and tickle the appropriate emotions?

- Will it be a specific landmark or sought-after area or development for the status conscious person?
- Or perhaps the newly repainted property or low maintenance garden would be of interest to first time buyers?
- Speculators would mostly be interested in good priced houses in a good area with the potential to be renovated and sold for a profit.
- Retired couples may be more interested in low maintenance and a safe environment.

3. Now stimulate the desire

You want to sell the lifestyle, not just a property. Use wording in your advertisement to arouse buyers' desire for the lifestyle you want to sell.

- “Cool spacious rooms.”
- “Listen to the waves.”
- “Enjoy the view from high above.”
- “Have sundowners on the balcony.”
- “Room to work and play!”

4. You want action from buyers

When it reaches this stage, your advertisement has already attracted the attention of the prospective buyer. He/she has an interest in the property and you have planted the necessary seeds for him/her to desire the property. The final and most important thing your advertisement (and you as an estate agent) needs to accomplish, is to lead him/her to action.

Call Jacky now at 081…………….. for viewing
or
Do not delay – phone Sandra today 081……………………..

General Tips for Advertisements

- Advertising is expensive, but it can bring in valuable leads. Therefore, plan carefully.
- **Do not be too wordy.** You will pay for your advertisement per word or per line. You do not need to write a novel to get your point across. Write succinctly and you will spend less money and get a better response to your advertisements.
- **Do not over-abbreviate.** Some people try too hard to abbreviate the words in their advertisement and the reader almost needs a translator to read them. You want people to be able to read your advertisement quickly and understand what they have read.
- **Talk to current owners.** They will be in the best position to point out the unique features that attracted them to the property when they bought it. The best advertisements are those written shortly after receiving the listing/mandate and compiled with the help of the sellers.
- **Point out important information:**
  - location/geographic region
  - price
- number of bedrooms and bathrooms
- condition of property
- convenience

- **Less-important information:** the number of other rooms, the type or style of the residence, the age of the buildings, whether or not there is a garage, and amenities like a fireplace, braai, swimming pool or jacuzzi.
- When making use of the printed media, always request **right hand page positions.**
- **Make use of community association or religious newsletters** that could sometimes be free of charge or relatively cheap if you sponsor part of the printing fee. Keep in mind that paid circulation is usually a better way to advertise. The reason being that people who paid for a newspaper have a commitment to it; they paid for it, so they want to read it.
- Phone the publishers and make sure you know the **deadlines for placing advertisements.**

**Thought:**
Some say that half the money and time spent on advertising was wasted. The question is: which half?

To assist in effective advertising and to identify a possible category of buyers, you can make use of the following lists:

<table>
<thead>
<tr>
<th>Listing Ad Sheet</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Address:</strong></td>
</tr>
<tr>
<td><strong>Unique Features:</strong></td>
</tr>
<tr>
<td>1</td>
</tr>
<tr>
<td>2</td>
</tr>
<tr>
<td><strong>Benefits for Buyers:</strong></td>
</tr>
<tr>
<td>1</td>
</tr>
<tr>
<td>2</td>
</tr>
<tr>
<td><strong>Category of target Buyers:</strong></td>
</tr>
<tr>
<td>1</td>
</tr>
<tr>
<td>2</td>
</tr>
<tr>
<td><strong>Physical Features:</strong></td>
</tr>
<tr>
<td>1. Bedrooms</td>
</tr>
<tr>
<td>2. Bathrooms</td>
</tr>
<tr>
<td>3. Living Rooms</td>
</tr>
<tr>
<td>4. Garages</td>
</tr>
<tr>
<td>5. Pool/Jacuzzi</td>
</tr>
<tr>
<td>6. Braai &amp; Lapa</td>
</tr>
<tr>
<td>7. Garden</td>
</tr>
<tr>
<td>8. Alarm System</td>
</tr>
<tr>
<td>9. Size of erf</td>
</tr>
<tr>
<td>10. Size of house</td>
</tr>
<tr>
<td>11. Other</td>
</tr>
<tr>
<td>12 Marketing Price N$ _________________</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Ad Checklist</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Did I:</strong></td>
</tr>
<tr>
<td>1. Attract attention with my heading, wording, colours, shapes, etc?</td>
</tr>
<tr>
<td>2. Create an interest by appealing to a certain target market?</td>
</tr>
<tr>
<td>3. Stimulate a desire in that target group?</td>
</tr>
<tr>
<td>4. Lead them to action with my advertisement?</td>
</tr>
</tbody>
</table>

You can use the same Advertisement Checklist to create flyers.
Construct a chart detailing the various ways you advertise: Web sites, letters, brochures and flyers, Home magazines, newspapers (by name if you use more than one), flyer boxes, etc. Put your advertisements in a folder and date them so that you can refer to them later, once you know which of the advertisements have worked. When making contact with a client, try to find out how they came to know about you (and what they heard).

**Buyers’ response cards:**

Track your success by completing a “Buyer’s Response” card for each advertisement. This allows you to continually evaluate and improve your advertisements, as well as reuse ideas from past advertisements that proved to be highly successful.

![Buyer’s Response Card](chart.png)

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*Not advertising is like winking in the dark.*

You know what is happening but no one else does.

Start now, so that within a few months you will know exactly where to spend your Real Estate marketing dollars - and where NOT to spend them.*
2.2. Presentation Manual

People tend to believe more in what they see than what they hear. Therefore a visual presentation utilised by an agent can be an effective tool in establishing trust with buyers and sellers alike.

The content of a manual should be geared to assist in persuading sellers and buyers to utilise your services. To achieve this goal, the manual should preferably be computerised to enable a personalised and original presentation manual, suitable for different sellers and buyers. Most clients (especially sellers) may interview a few agents for the job of selling their property. Therefore a highly professional initial presentation is of extreme importance in order to obtain both the mandate and the sale.

Depending on the market in which you work, your manual should include some, if not all, of the following:

- **Utilising a digital camera** to print pictures of the properties involved on the front cover will impress most sellers and buyers.
- **Why deal through an estate agent?** Before clients can make a decision to either list their property or buy through you, they need to make the broader decision; whether or not to deal with an estate agent at all. Often sellers assume that they are just as capable of selling their property as an experienced and qualified estate agent. This selection should point out the possible pitfalls of them doing so.
- **Company CV:** Why should the client use your company at all? Include in this section: newspaper articles, CVs of your principals, branch networking, market share statistics, notable achievements, etc.
- **Personal CV:** In many cases the client will first decide on the agent before deciding on the company. Provide the seller with a history of your successes and an overview of your services. Include in this section: brag letters and testimonials from past clients, as well as all your qualifications. Photographs of properties that you have sold are also encouraging to sellers.
- **Pricing and contract arguments:** You should point out to both sellers and buyers that the price, terms and conditions of contracts and the agent dealing with the property, are all within his/her control. Price alone seldom sells property, but unscrupulous agents might try to manipulate a seller’s decision regarding which agent to employ by inflating the potential selling price of the property. In this section a market analysis with an overview on recent sales in the area, properties currently on the market and properties withdrawn from the market should be included.
- **Benefits of a sole mandate:** Sellers often grant selling rights to several agents in the mistaken belief that the more agents they have working for them, the better their chances are to obtain a quick sale at a good price. In this section: list the benefits of a sole mandate. When working with buyers it could also be beneficial to persuade them to work only with you to find that suitable property.
- **Marketing plan:** Explain in detail everything you and your company will do to market the property or to find the right deal for the buyer. Marketing is the area in which private sellers have the most difficulty when attempting to sell their own property.
- **Activities for the seller:** Under this topic, ensure that the seller understands the benefits of keeping the property clean and in good order. Give him/her some tips on preparing the house for the market. The seller needs to understand that first impressions are extremely important when selling property.
- **Property selling process:** In this section, explain to the seller all the steps in the process; from the CMA to the eventual transfer of the property into the name of the new owner.
- **Questions sellers/buyers often ask:** Do not assume that the client has the same knowledge you do in real estate. Compile a list of questions that are frequently asked, accompanied by model answers. The more you educate clients, the more they will trust you and the more loyalty you can expect from them.
Possible information to provide prospective buyers with:

House hunting in Namibia:

For most people, buying a house is probably the largest investment they will ever make. It requires careful consideration and planning to avoid pitfalls. You may receive this information before you have taken any steps or you may have already progressed along the road to homeownership. Read through it anyway - it will hopefully clarify the process or you will be able to help someone else.

Firstly, involve your Attorney

We recommend that you consult your Attorney before you start visiting show houses. He/she will be able to explain the process of financing and transfer of property, as well as bond registration.

Working with an Agent

Choose an estate agent who appears to have the trust of the community. Such trust is usually achieved through expert and honest dealing. If you are selling, speak to more than one agent especially if you want to find out the value of your property. Keep your eyes and ears open and also consult with friends and family who will certainly share their experiences with agents. It is essential that the agent knows and understands your needs and requirements.

The Process - Submitting an Offer to Purchase

Once you have found the house you like and can comfortably afford, bear in mind that you may require at least a 10% deposit and funds for the transfer and registration costs. You will then be presented with an Offer to Purchase form to sign. This is usually completed with the assistance of the estate agent. At this point, before signature, you need to ensure that the agreement reflects your requirements. This might not necessitate a consultation with your attorney (telephonic or otherwise), because in the long run it may prove to be time and money well spent. You should in ensure that the meaning and importance of each term in the Offer to Purchase is explained to you by the agent.

The estate agent will submit the Offer to Purchase to the seller who will accept it, reject it or make a counteroffer. The counteroffer will usually take the form of alterations to the Offer to Purchase, which you may accept/reject by initialling the seller's alterations. Remember that once you have signed and the seller accepts, a binding agreement comes into existence. Any changes that you wish to make thereafter will require the agreement of the seller and will need to be in writing. The estate agent will send the original agreement to the conveyancers, who should issue you with a copy of the signed agreement.

The Process - Applying for Finance

Once the offer has been accepted, you will require a copy thereof for submission to the Financial Institution in order for your loan application to be processed. This process should not take more than 10 days, especially if you have obtained some sort of pre-approval. If you do not have a pre-approval certificate, your estate agent may also be able to assist you in submitting the required loan application.
The Process - Transfer and Bond Documentation

The Offer to Purchase (which now constitutes a Deed of Sale) will in the interim be submitted to the seller's conveyancer. It is usual for the seller to nominate a conveyancer, but you may be able to negotiate in the contract that your own Attorney or the Attorney attending to the registration of the mortgage bond, be appointed to attend to the registration of transfer. Either way, the transfer fees will be paid by you unless the contrary has been negotiated.

The conveyancer will request copies of your Identity Document, Marriage Certificate and Antenuptial Contract (if applicable). Once the suspensive conditions have been fulfilled (for example approval of the loan application and the sale of your existing property), the conveyancer will prepare the necessary documentation, request payment of the transfer costs and any outstanding balance of the purchase price, and arrange an appointment for the signing of the transfer documentation. Both the seller and the purchaser will be required to sign certain documents which have been prepared by the conveyancer and which will enable the conveyancer to effect the transfer in the deeds office.

The Financial Institution will by now have appointed a conveyancer to attend to the registration of the mortgage bond for the property to secure the loan granted to you. This conveyancer will request similar information from you in order to prepare the bond documentation and will also request payment of the bond registration costs and arrange an appointment for signing of the relevant documentation. Depending on the conditions of the Financial Institution, you may also be required to cede life insurance policies and sign debit/stop order forms. Other persons may be required to sign as sureties. This will be attended to by either the conveyancer or the Financial Institution. It is the Purchaser's obligation to ensure that all these requirements are met timeously.

The Process - Registration at the Deeds Registry

Once the documentation has been signed and the necessary costs paid, the conveyancers will liaise with each other to affect registration at the Deeds Registry. After approximately 10 days the Deeds, having been examined by the Deeds Registry, will be available for registration. Assuming all suspensive conditions and outstanding requirements have been met, the transfer of ownership and the mortgage bond will be registered simultaneously. Your new home actually becomes your property on the day that the transfer is registered at the Deeds Office.

After approximately three months, a copy of the Title Deed reflecting you as owner and a copy of the Mortgage Bond will be sent to you. The original will be retained by the Financial Institution granting the home loan. This will conclude the transaction. The copy of the Title Deed and Mortgage Bond should be kept in a safe place with all your other important documentation. In the event that you want to sell the property, the availability of the documentation will speed up the sale process.

The People you will deal with:

The Estate Agent

Generally, the estate agent is appointed by the seller. Accordingly, you will not have much of a choice as to which agent you will be dealing with. A reputable estate agent will be able to greatly assist you in completing the real estate transaction, which requires an organised, step-by-step approach. Estate agents are specifically trained to do what many homeowners do not have the experience, skill or time for.

The agent is also required to comply with a Code of Conduct and should the agent act illegally or unethically towards you, you may be able to refer the matter to the Estate Agent's Board. This Board regulates the conduct of the estate agents and is established in terms of the Estate Agents Act. Therefore, always ensure that you are dealing with an estate agent registered at the Estate Agent’s Board and a holder of a current Fidelity Fund Certificate.

It is advisable to deal with agents who are members of the Namibian Institute of Estate Agents to ensure that you get quality and ethical service. Should you choose to approach an estate agent to find you a property, it is wise to take advice from your Attorney, as well as trusted friends, family and colleagues as to a reputable estate agent.
The Conveyancer

The legal and administrative process whereby a person becomes the registered and lawful owner of a property is known as conveyancing. Only a conveyancer (a legal practitioner who has acquired the additional qualification of conveyancer) is entitled to register transfers of ownership of property and other transactions in the Deeds Registry in Namibia. As a great deal is at stake in the transfer of immovable property, the law seeks to ensure that the transaction is handled by a specialist; this is the conveyancer's function. This protects the rights and interests of the public and also safeguards the integrity of the Namibian Land Registration system. As a general rule, the seller has the prerogative to nominate the conveyancer who will attend to the registration formalities on his/her behalf. However, you can negotiate the appointment of the conveyancer with the seller. When registering a mortgage bond, the Bank appoints a conveyancer to attend to the registration of the mortgage bond.

The Home Loan Consultant

The Home Loan Consultant is employed by the Bank to arrange your home loan finance.

Amounts to be paid

Besides the purchase price, there are additional costs that you need to pay. Some of these costs need to be paid prior to registration of transfer and the necessary cash flow arrangements need to be made accordingly.

The first payment you are likely to be called upon to make is the deposit. This amount should be paid over to the conveyancer and is mostly invested in an interest bearing account with interest accruing to yourself. A deposit is invariably required as a sign of your good faith, but may be forfeited in the event of a breach of the transaction by yourself.

Sellers are mostly responsible to pay a pro rata share of the annual rates on the property. All amounts due to the local authority must be paid in advance before a clearance certificate will be issued.

Without a clearance certificate, registration of transfer cannot take place. You will be required to pay your share of the rates from the date of possession or date of transfer, depending on the terms of the Deed of Sale. If you are purchasing a Sectional Title unit, you may have to pay a pro rata share of levies. Until the levies are paid up to date, the transfer cannot proceed.

You will also be required to pay the transfer costs; this includes the conveyancer's fees and disbursements, as well as a taxes levied by the Government, called transfer duty and stamp duty. In addition, you may be required to pay the mortgage bond registration costs in advance, although normally these costs can be paid on registration. Please note that although conveyancer's fees are payable in advance, they are not debited by the conveyancer until the registration of the transactions. The conveyancer will only take his/her fee on registration of the transaction. In the event of occupation taking place prior to registration, you will be required to pay occupational interest or rental monthly in advance from the date of occupation, until the date of registration. Provision must also be made for this.

(An estimate of costs is available upon request.)

Some Important Clauses

Voetstoots:

Note that the property you are buying is normally sold voetstoots. The rationale behind this is that it protects the seller from the purchaser’s never ending “come-backs”. This means that you should thoroughly examine the property. If there are hidden or latent defects the seller will only be liable if they are deliberately concealed with the intent to defraud; this is usually very difficult to prove. The seller does not have an obligation to point out any defects in the property. If, however, he/she gives any verbal assurances, we urge you to put them in writing and incorporate them into the Deed of Sale to avoid costly litigation.
Risk and Insurance

Note that unless the agreement provides for a specific date (for example the date of possession), risk passes to the Purchaser after all conditions have been met. Most agreements deal with risk expressly. Although the property may be insured upon registration of the bond by the Financial Institution which has granted you the mortgage loan, this insurance would not assist you in the event that physical damage occurring after the date of possession and before registration. In the event of the Purchaser taking occupation before registration, you will need to ensure that the property is properly insured.

Possession and Occupation

Possession is a complex legal concept. Possession passes when the seller gives the Purchaser access to keys and he/she legally controls the property. From the date of possession the purchaser is responsible for rates and taxes and other expenses concerning the property. It is best that the purchaser insures the property (fire, geyser, etc.) from this date onwards.

More often than not, the purchaser will move into the house some time before the transfer is actually registered, giving rise to a situation where the purchaser resides in the home before the seller has been paid for it. To compensate for this, the purchaser pays an amount of rental to the seller for the right to use and enjoy the property. This rental is called occupational interest. Ordinarily occupational interest/rent would be payable from this date, even though the Purchaser has not physically moved in.

If the Deed of Sale does not provide for occupation, or there is a tenant on the property, the passing of possession would entitle the Purchaser to the rental, but not to occupation. “Whatever the case, a lot of misunderstanding and acrimony can be avoided if the date of occupation and the amount of occupational rent payable are clearly written into the sales agreement. It is also a sound idea to arrange for household insurance (theft, etc.) accordingly and to stipulate that all the seller’s belongings are to be removed from the property by the agreed occupation date. It is also inadvisable for the buyer not to store goods on the premises before this date, because issues such as liability, damages and insurance can really complicate an already stressful time.”

Fixtures and Fittings

Please note that the sale will include, unless specified, all objects which are actually attached to the structure, such as light fittings, pool filters, fitted carpets, burglar bars, etc. In order to ensure that no disputes arise, it is suggested that the Deed of Sale reflect all items which the seller intends to remove. This is sometimes more prudent than trying to list every possible item which has been attached to the structure.

2.3. Show Time

You have worked very hard; you have done your farming and marketing and followed up on prospects, and now you have your first listing and sole mandate.

Now you need to show the Property to Potential Buyers.

Depending on the effort and attitude of the agent, show days can either be a nightmare, or the most lucrative activity of the marketing process. This will depend on you, the agent.

However, two things are certain:

- You need to have show days.
- You need to be well prepared.
Why make use of Show Days?

Primarily you have an obligation towards the seller and want to sell the property. So you put it up for a viewing and invite the public to come inside.

A secondary (and underlying) objective is that you want to meet other potential buyers and sell other properties to them should they not buy the show house. Therefore you take all the time and effort in the world to strike up a conversation with these visiting prospects and arrange for follow-up meetings with them. Therefore, be ready to hand out your listing flyer on show days.

Finally, the neighbourhoods where you are having show days are filled with potential sellers, who take note of your active marketing strategies. Therefore, make sure you have personal and company information handy and visible to those passing by. Make use of things like pointer boards, banners, balloons and other means to attract attention to your show day.

You need to have show days.
You have worked very hard to get there;
make the most out of it.

The following will assist you to prepare for the Big Day:

- It is best to book show days at the same time you make the listing and receive the mandate. This way, both you and the seller can make sure of the date and you also make a good impression regarding your marketing strategies. When consulting your calendar, make sure these days do not coincide with other big events in town (or on TV) that will prevent your prospects from attending.
- When you drop off a copy of the sole mandate, attach to it the dates set aside for show days. This way you have re-confirmed the dates and you have a well-informed and prepared seller to assist.
- Make use of quiet times during show days to write future advertisements. There is enough quiet time between prospective buyer visits. During this time, you will be in a position to look for features that will attract buyers.
- Think of the type of buyer profile that will fit this property and consider the correct approach to use in your advertisements.
- Drop flyers in the neighbourhood to advertise the show day and also invite people. This should be done on the Wednesday before the show weekend. They may well know of friends or family who want to live in the area. Remember to hand out the “Just Listed” and “Sold” flyers afterwards.
- Ensure all pointer boards are clean, worthy of your logo and pointing in the right direction. (Remember to also check this on show day.)
Preparing the House

Studies show that homes that have been thoroughly prepared, sell up to three times faster. The following tips, implemented in a few relatively inexpensive and effective ways, can mean more positive interest from home buyers, resulting in a faster, higher-priced sale.

However, you will need to invest time and effort to get the house prepared for the day. As the sole mandated agent, you have to work as hard as possible to present the seller’s house in the best possible light.

First of all, get the seller involved for a quicker sale which will benefit both you and your seller. Have a pre-designed brochure handy for sellers, containing the following general tips:

**Outside:**

First impressions of the house are most likely to happen here. Some buyers will even decide if they want the house or not, just by the impression they get from outside.

- Pay attention to the municipal areas outside. Is it clean and is there sufficient parking space available?
- Pick up all garbage/litter outside the house and yard and replace or clean faded house numbers on the outside.
- Tend to the lawn, pavements, paths, driveways and other flower beds. Plant new colourful flowers and keep the garden well watered. Remove dead limbs and debris. Advise owners on simple and relatively cheap preparations, such as interlocks.
- Have some flowerpots at the entrance.
- Touch up necessary paintwork and varnishing.
- Tidy the garage, attic and other storage areas.
- Arrange and tidy up items like firewood and outdoor/garden furniture.

**Inside:**

- Make sure the entry bell and doorbell work. Clean the porch and foyer and make sure the entrance hall is neat.
- Remove things like paintings and pictures that the owners may love, but which others may find offensive. Buyers will easily visualise themselves in a new place if they feel comfortable with the interior. People often buy a home based on their feelings about it. Regardless of your location and price, if something about your home “feels” wrong, buyers will look elsewhere.
- Tighten loose doorknobs, pulls, towel racks, drawers and cabinets, and oil squeaky doors. Fix loose stair banisters, window openers and broken windows.
- Fix leaky taps and toilets, remove water stains, and repair caulking and seals around tubs and basins. Make sure bathrooms and toilets are clean and fresh.
- Arrange the furniture and discard (surplus) unused furniture and items. Each room must appear as spacious as possible.
- If a room is painted with dark colours, it could work to lighten up an area with lighter colours.
- Make sure that the (high wattage) light bulbs and switches are all working.
- Clean all your windows and mirrors.
- Check closets for neatly arranged clothes and make sure there are as few items as possible stored overhead and on floors.
- Make sure all valuables are safely stored away.
- Leave kitchen countertops clear. Clean the oven and all other kitchen appliances. Polish all the chrome and sinks.
Shampoo carpets and wax floors. Launder draperies and curtains.
Make sure the laundry areas are clean.
Repair cracked walls and touch up chipped paint.
Make sure garages, spare rooms and packaging areas are neat.

Finally:

- Drive around the block. Is it clearly visible that there is a show house in the area?
- Will it be possible, convenient and safe for a potential purchaser to stop and enter the property? If possible, open the security gate to make it easier for them to enter. Remember that should a prospect be unable to enter, you might have lost the sale for no particular reason.

<table>
<thead>
<tr>
<th>In Short:</th>
</tr>
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<tbody>
<tr>
<td>The entire area around the house should be neat and interesting to any passerby.</td>
</tr>
<tr>
<td>It should be easy for a car to stop and once they have stopped, nothing should hinder them from coming inside.</td>
</tr>
<tr>
<td>The more inviting and accessible the house looks, the more likely they are to enter.</td>
</tr>
</tbody>
</table>
| Ensure a friendly entrance and neutral atmosphere where strangers/show house visitors would get the feeling of “I want to live here”.

(see www.haverhillstaging.com/haverhill/)

Remember:

You will waste valuable time if you do all the preparations for the day and do not ensure that you have enough visitors.
Market the day appropriately, even if it means distributing flyers to your farming area or the neighbourhood of the show house. People in the area often know about others who would like to live nearby.

On the Show Day:

- Make sure that there are no pets around (or at least not inside the house) and deal with any possible bad odours beforehand.
- Have balloons handy for visibility and for any children that are passing by.
- Open every window covering. All drapes, curtains and blinds should be positioned to let in the maximum amount of light. Buyers like a house to be "light and bright", so accommodate them! Also, turn on as many lights as possible. Suggest to owners who are having difficulties selling their houses to repaint dark colours with lighter colours to give a brighter, cleaner and more spacious effect.
It can do no harm to have soft (not too obvious) music or a radio playing in the background.

Decorate the property with your own trademark umbrellas and banners (and those sponsored by financial institutions). Where possible, make use of the seller's garden furniture.

Greet buyers enthusiastically and encourage them to walk around and to be comfortable.

Make sure you have more than enough additional presentation manuals and business cards handy (the dining room table is ideal for displaying these). Include handy buyer's information and tips on buying (mortgage, finance, conveyancing, etc) and Offers to Purchase in your packages. Remember your calculator and promotional pens.

Should prospects want to talk price, make sure you have the CMA or other valuations (see Chapter 1) and an Offer to Purchase handy.

You may ask visitors to sign the “Show House Visitors' Book” and even show some identification. If they do not want to, make sure to make a notation in the book yourself, after they have left.

Make sure no visitor leaves without a business card.

Never apologise for any of the house's shortcomings.

Put out some fresh flowers and have (pleasant smelling) snacks available. These can be left afterwards for the sellers. In the meantime, place a visible note near your other displayed items which conveys your appreciation for the day, to all involved. Buyers will also see this and be impressed by your creativity and professionalism.

Dress your best and wear a visible name tag.

See example for “Show House Visitors’ Book”

Safety Issues

Unfortunately, estate agents are also a target for criminal minds. This is not only on show days, but also when you take out clients and show property in general. With the glut of properties for sale now there is plenty opportunity for criminals to make use of the situation. The following are basic guidelines for agents on how to protect themselves, the seller's property and potential buyers.

On Show days:
- Upon entering a show house for the first time, the agent should familiarise himself/herself with the house and should check all rooms. Work out the most convenient escape routes and unlock all deadbolt locks which might slow down an exit. Back doors, although often handy for an escape, can lead into high walled yards.
- When visitors arrive, agents are advised to note their car license plate numbers. While showing them the house the agent should walk behind, not lead.
- Watch what prospects are doing at all times. Do not become preoccupied with viewing the home – always expect the unexpected.
- Notify your office, a friend or your spouse that you will call every hour – if you do not, they should contact the police at once.
- Meet the neighbours, make sure that they are aware that you will be there and ask if they could help you to keep an eye on the property throughout the day.

Above all, do not be in the house on your own – have a colleague or friend with you. If you become suspicious of a prospect, leave at once.

Safety in general:
When meeting prospective buyers for the first time, make sure that it is in a public place or at the company offices. Insist on identification, giving the reason that “it is company policy”, to ensure Namibian citizenship or valid permits. Always try to find out as much as you can about the prospects; where they work, what they do, and how much they earn (also general pre-qualifying questions). Ask
many questions and make sure to be a good listener. When driving to view properties, you should always use your own car and be sure to familiarise yourself with the area in which the property is located.

It is regrettable that we have to be aware of these matters, but it is also true that crime can be prevented by adopting simple precautions. The industry has an unusual number of women, whom criminals and psychopaths see as soft targets because they work away from the security of their offices.

**After show time:**

Along with the flowers, leave your sellers some of your promotional materials, including the flyers and advertisements you created to promote their home. Never forget to be empathetic with the sellers as it is not always easy and convenient to prepare the house for show days and then leave for the day.

Also, inform sellers of how many visitors attended the show day. Combine this with any other feedback you may have and, where applicable, supply them with a copy of the Offer to Purchase.

**Note:** Make sure to do a complete follow-up on all your visitors.

### 2.4. Qualifying Buyers

**Without making judgmental mistakes, do not waste time with unqualified buyers that will not purchase your property. Your time is too valuable.**

When you do reach them (or they reach you), identify the "active market": in other words, those qualified buyer leads that will actually end up in a sale for you. The uninformed estate agent can spend a substantial amount of time taking a prospective purchaser to view a number of properties, deal with all the queries, complete the Offer to Purchase and much more, only to find out the buyer is not in the position to continue. This may be due to many reasons, including the sale of their own home or difficulties to obtain a mortgage.

Within your professional guidelines, you now need to qualify the potential buyers and spend your time (quality and quantity) talking only to those that are willing and able to push forward with the deal.

If you are not dealing with qualified buyers, you are wasting both your time and theirs. The last thing you want is a surprise after the offer is made.

You should be trained to find and quickly qualify the potential buyer. It is up to you to find those who are “ready to buy” and qualified to buy. So, when qualifying buyers try to get down to the following issues:

1. How long have they been looking for a home?
2. Do they need to sell their current home before they can buy? Most sellers cannot buy anything because they have to sell first.
3. Have they met with a mortgage consultant and are they pre-qualified or pre-approved?

Many times you will spend time on mortgage bond applications, only to find out that the bank does not approve of the finance. The goal is to get them to meet with the consultant. This way you will quickly find out if they can buy a home or not.
However, you also need to be well informed about financial matters to assist in facilitating the deal. To be well informed about the financing process will better equip you as a professional agent when you assist buyers to obtain finance. To have a better understanding of how banks qualify clients and the finance process in general, please see Chapter 5 on Bonds and Finance.

### 2.5. Service to Buyers

**Remember:** If you do not show buyers what they want, your opposition will!

**“Different Buyers, different needs”**

Not all clients have the same needs. When you come into contact with prospects they may have a variety of different reasons for enquiring about property. Be sure to establish those needs for property and show them only what they are interested in.

Your relationship with a prospective buyer can easily turn sour as a result of poor communication. These problems may be avoided if properly disclosed up front (see Chapter 3.1 on communication). Make sure to have accurate criteria of what the buyer is looking for. While experienced buyers tend to be more specific on their needs for a house, an agent in general has to spend more time with younger buyers to get to know them and to assess and provide what they really need.

**How then do you establish what each buyer wants and needs from you?**

- Get to know them.
- Always show a keen interest in them and their situation; family needs, etc.
- Ask “why”, “what”, “where” and “how”.
- Do it professionally and without self-importance.
- Listen!
- Test responses with questions like: Do you agree on this? Is this important to you? Does this suite you? Would this be an advantage?
- Once they are comfortable, they will open up more and share personal information with you. This will make it difficult for them to approach next door opposition agents.

**Once you have established that the client is indeed a potential buyer, you need to confirm the following:**

- How well are they acquainted with the home buying process and do you need to explain it in detail to them?
- Do they still need to sell their property? Have they signed an existing sole mandate and can you assist with a referral?
- If they have already sold their property, ask them for a copy of the Offer to Purchase and determine if it is duly signed, all suspensive conditions fulfilled, when occupation will occur, who the conveyancer is and if a simultaneous transfer is possible.
- Are their finances in place? Do they know the costs involved?
- Have they decided on an area yet and how long have they been looking for?
- Have they seen properties with another agent that they like?
- What specific features do they like or dislike?
- What is their price range?
Now go ahead and make the viewing appointments

Bear the following buyer profiles in mind:

- Buyers buy for different reasons and make their decisions by making comparisons.
- It may take a couple of viewings to enable them to obtain enough information so that they can make good comparisons.
- Buyers may at times be scared of not seeing all the available options.
- Eventually they discover their true needs by realising what it is that they do not want.
- Buyers often do not really know what they want and you may have to assist them.

What do you want your Prospective Buyers to know?

1. About your work:

   Social Recognition:
   
   - The type of houses or listings you have available.
   - Houses you have sold and your clients.

   Quality of your Service and Agency:
   
   - You are a well known and established agent.
   - You deliver good quality, professional work.
   - You are part of a national/international franchise.
   - Your agents are all well qualified and equipped.
   - You will assist in the registration and finance process.
   - You will do anything possible to speed up the process.
   - You will only work on appointments.
   - You will assist in getting valuations for the property if needed.

2. In General:

You want to sell the area. Make use of a possible introduction time and point out features and benefits of the area such as a quiet and safe environment, traffic matters and access roads, sport and other nearby facilities (such as shopping areas). If the buyer is new to the area, show him/her around with pride. Explain to them the benefits of living in the area. Share information about houses, prices, sales and builders of homes in your area. This freely given information is also a key to a good agent/client relationship. Your prospects get the information they desire and you have not only impressed them with your knowledge but, in the process, have also lowered their resistance. The threat of dealing with you will further diminish.

3. When viewing with Buyers:

Use possible travelling time spent with the buyer in your car to sell your area. Make use of this time and trouble to show the buyer around your suburb and point out features and benefits of the area.

Should it happen that you have both the seller and buyer present at the property at the same time, always caution the buyer that making personal comments about a property while in earshot of the seller
can knock them out of the running, even if they have the financial wherewithal to afford it.

This is a common and serious mistake. Therefore agents should always caution prospective buyers to tone down comments regarding knocking down walls, removing trees or turning the formal lounge into a children's games room while in the presence of sellers. Sellers are often sentimental about their homes and may become stubborn and difficult to negotiate with if you do not show them the necessary respect.

Not only is it important to reign in one's emotions to reduce the risk of offending the seller, but also in order to remain focused since runaway emotions can cloud judgment and create unreasonable expectations. Buyers sometimes become fixated on taking possession of an immaculate property. Realistically, however, they need to accept that there are always going to be repairs or alterations that they will need to take care of if they want to avoid upsetting the seller.

When you accompany and introduce a possible buyer to a property, make sure to bring out exactly those unique features which you obtained from discussions with the seller when you visited the house to do your initial inspections.

Furthermore, try to establish what is important to your client about the product (the type of house he/she is looking for) and point out how this house fulfils those needs.

**Be sure to know exactly what features your client buyer is looking for in a home.** When viewing the property with the buyer, be observant and make sure to point out those features they would be interested in. What are the advantages of thereof, what will it mean to the client and will it fulfil his/her needs in a house? This could include a variety of things like: price, location, accessibility, convenient garden, age of the house, finishing and paint work, pool, view, kitchen cupboards, entertainment area, size of the erf, the patio, etc.

**Discuss the following advantages of the property that may assist the buyer to make a decision:**

**What kind of social recognition will he/she get from friends and family when buying here?**

Is it perhaps because of the area or well-known neighbours?
Is it because of the view or the status of the complex?
Is it perhaps the fact that the rooms and entertainment area are so well-planned and built?

**What quality is he/she buying?**

Value for money
Good finishing and painting
Solid structures and area
Expensive tiling and carpets in a good condition
Expensive chandeliers and other light fittings
Well equipped security and alarm system
Well maintained garden, etc.

**Convenient qualities of the house:**

Short distance to work, schools and shopping areas
Finishing of the house and patio
Outlay of the garden
Accessibility to main roads
Design of the roof
Age of the house

Entertainment and comfort of the house:

Lapa and other entertainment areas
Pool and Jacuzzi
Heating or air-conditioning system
Prestige or status
Specific comfortable design and lifestyle

The fear of making the wrong Financial Decision:

To assist the buyer in overcoming the fear that he/she is actually paying too much for the house, you would have to discuss the following with him/her:

- Actual valuation of the property and the possibility that he/she will be able to resell for the same price or an even better price.
- The safety of his/her investment.
- Buying at this price will actually be cheaper than building the same house again in this area.
- The value will increase more than the interest rate.

Remember:

- Do not make a decision for the client.
- Listen rather than talk; more transactions are lost by talking too much and by not listening enough.
- Never make the mistake of judging a potential buyer on his/her appearance and assume that he/she will not be able to afford a house.

Dealing with Buyer’s Remorse:

Like many big decisions in life, buying a house needs careful consideration and then, after considering many options, you make the decision based on what is available at that stage.

Many times we make well-informed decisions based on several guidelines. However, the magnitude of these big decisions can sometimes be overwhelming and afterwards create concern as to whether it was the right decision and worry takes over.

Buying a house is no exception. This phenomenon is probably one of the reasons for the “cooling off period” that was introduced by legislation in countries like South Africa. According to Section 29 of the Alienation of Land Act, a buyer (who buys up to a certain price range) is allowed to reconsider and in writing then cancel/revoke an offer within five working days of the purchaser signing the Offer to Purchase. The National Credit Act in South Africa create further opportunities for buyers to withdraw from contracts. The reason behind this legislation is to protect the inexperienced buyer from the potential financial pitfalls of the industry.

The above legislation is not applicable in Namibia and the best thing you can do as an agent is to remind the buyer (in these difficult times) of the very reasons and advantages he/she (while fairly rational) sought and bought the house in the first place. To prevent buyer’s remorse, buyers (or you as agent) can make a list before the purchase about the advantages of the house. This list is made during
quiet, rational moments, when emotions are not affected by the aftershocks of the immediate financial responsibilities.

**Remember that buyers in general want reinforcement that they have made the correct decision.** They want validation that they bought the right product, that they paid a good price, got the best deal, are in style, made a good investment and will not be disappointed. Mostly, when they have some sort of remorse, it will be because they do not get these confirmations from friends and family. This is why you need to constantly reaffirm their beliefs on what they have bought. This will also increase the possibility that they will make those much needed referrals!

**Your assistance to Buyers**

Once again you will ensure that buyers take note of the possible dangers and pitfalls of a real estate transaction; then offer yourself or your agency as the natural solution.

**1. Defects:**

A major cause of post-sale disputes and lawsuits centre on defects and the (non) disclosures thereof. You as an experienced agent will assist by looking for and pointing out possible downsides and defects of the property. An agent is not expected to be a construction specialist and therefore it could be handy to appoint someone like an experienced property inspector to assist in the inspection. They will be able to alert the buyer to possible defects and will also be in a position to point out things like leaking roofs, cracking walls or other problems not so easily visible to the average eye.

**Remember that intentionally and fraudulently withholding material information about a property (by a seller or agent) can have serious legal consequences.**

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**Agent’s Liability for Fraudulent Misrepresentation:**

When an estate agent makes a false statement to a prospective purchaser knowing that it is false, he/she can be held liable by the purchaser for the losses sustained by him/her.

E.g. the estate agent falsely states to a prospective purchaser that the foundations of a particular house have been adequately strengthened.

E.g. the estate agent knows that the roof leaks but fails to disclose it to the purchaser.

E.g. the estate agent knows of problems on a site adjacent to the property and fails to disclose this fact to a prospective purchaser.

E.g. the estate agent confirms that the “books of the CC” is up to date, when in fact he/she does not even have any idea who the accounting officer is or what is reflected in the financial statements.

**Davidson v Bonafede 1981 (2) SA 501 (C)**

The plaintiff purchased a house but cancelled the sale on the grounds that the agent had made misrepresentations which were material and had been made fraudulently or recklessly, careless as to whether they were true or false. In an action for an order confirming the cancellation, the plaintiff had claimed:

- Return of the purchase price.
- Payment of certain wasted costs associated with the transaction.
- Reimbursement for additions made and work done to the property.
- Reimbursement of interest which he had paid on a bond which was raised partly to finance the transaction and interest he had lost upon the portion of the purchase price, which had come from his own funds.
The defendant (the seller) was held liable for the full claim. In my view the agent in turn would have been liable to the seller for that full claim if the seller had sued.

**Agents' Liability for negligent Misrepresentations:**

An estate agent’s liability to the 3rd party negligent misrepresentations made by him/her is not entirely clear. E.g. an estate agent tells a prospective buyer that there are no leaks in the roof of a house without knowing whether that is actually true.

**Principal (Seller) suing Agent:**

A fiduciary relationship exists between an estate agent and his/her principal. This means that the agent owes the principal a duty of utmost good faith and must act in the interests of his/her client.

If a conflict of interest exists, there is a duty on the agent to make full disclosure and get the principal’s consent.

i.e. the agent is never allowed to make a secret profit from the performance of his/her mandate.

E.g. if the agent is entrusted with the property to sell it, he/she cannot buy it himself/herself without full disclosure and the principal’s consent.

There is a further duty on the agents not to misuse for his/her own benefit, or unlawfully disclose, confidential information entrusted to him/her which he/she has obtained during the performance of his/her mandate.

He/she must also disclose to his/her principal if he/she obtains another mandate in respect of the property which may conflict with the existing mandate.

**If an agent breaches the duty of good faith, the Principal has two alternatives:**

- Set the contract aside; or
- Affirm the contract. The agent forfeits any right to commission and is liable for any other damages the principal may suffer. The principal can claim back all profit made by the agent

**Employer liable for Employee’s Defects:** Is the Estate Agency Company liable for the misrepresentation of its Agents/Employees?

The answer depends upon the nature of the contract of employment between the employer and the employee. If it is a loose, unstructured arrangement whereby the agent has a lot of freedom of movement then there is a strong possibility that such an agent will be viewed as an independent contractor and the company would not be liable for the misrepresentation of such an agent. However, where the relationship is well defined and structured with such matters as “hours of attendance at the office” spelt out, then that agent is an employee and the employer company is liable for that agent’s defects.

2. To make the Offer:

Estate agents normally make use of pre-printed standard documents to assist the buyers in making an Offer to Purchase. If you do so, please make sure to update the document and perhaps replace it with newer versions approved by the Board.

*See chapter 3.2 for further discussions on contracts and clauses.*

3. Assisting to obtain Finance:

A successful transaction requires cooperation from everyone associated with the sale. Without pressuring or unduly influencing a buyer with a view to further their own personal interest, agents may
also be of great assistance when it comes to financial and legal aspects. With their knowledge and experience of the industry, agents form an important link in the chain.

Always keep in mind the clauses of R 7.2 and 7.3 of the Code of Conduct, which stipulates that an agent should never unduly influence a purchaser to make use of a specific financial institution. Also remember that the financial matters/status of a person is a sensitive issue and should be approached as such.

*(See more on financial matters in Chapter 5.)*

**4. Assist Buyers to work out the Costs involved:**

Remember it is always about the money. No client can make a decision without being aware of all the costs involved. You, as a well-trained property professional, will be in the perfect position to supply exactly that information which is needed for the client to make a well-informed decision.

To assist in financial aspects of purchasing you should:
1. Work out the costs, as described in Chapter 5
2. Provide the buyer with a professional “Buyer’s Cost Sheet” *(see example)*; you can create one manually or invest in a computerised version.

Make sure you have pointed out, calculated and included the correct costs involved. This way you will not only make a good and professional impression, but you will also help the buyer to share this information with his/her family when they need to make the decision.

**You have done everything needed, now remember to follow up:**

- First of all, a copy of the contract of sale should be given to the buyer. Should the buyer want to make any changes afterwards, you as a property specialist will assist him/her.
- Even if your buyer is not interested in a specific listing, or the price is too high, or you are still waiting for a suspensive condition to be fulfilled, or the sale did not go through for whatever reason; **remember**: he/she is still a willing and able buyer. Should the buyer not hear from you again, he/she may easily conclude that you are not interested in dealing with him/her anymore and turn to another agent. If you maintain effective communication, you may sell him/her another property.

Should the deal continue, you should do everything in your power (ethically correct) to actually assist and expedite the transfer process *(see Chapter 5, Process of Registration)*. An effective process asks participation and communication from everyone involved and this is also an important opportunity to prove that you are indeed a professional.

**Confidentiality:**

When working with buyers and other parties involved in the transaction, always keep in mind the Code of Conduct, specifically clauses 2.1 and 10.

Remember that property transactions are difficult and most people are unfamiliar with the complicated legal and financial issues. To be able to successfully purchase a property, the buyer will most likely share and trust you with very confidential information regarding his/her needs, business, financial situation, etc. This information is given to you, the professional, to enable you to assist in putting the deal together. It is therefore expected of you not to divulge to any third party any of the confidential information given to you for this purpose. Be it financial, business or personal, the best thing is to keep it confidential; always act honestly and in good faith.
2.6. Sourcing Buyers

The basic things like setting up an office, having a telephone connected, putting up a display window and putting advertisements in the newspaper will not be enough for you to gain access to enough potential clients.

“If you are willing to do only what is easy, life will be hard.
If you are willing to do what is hard, life will be easy!
It is funny how the harder I try, the luckier I get!”
Gary Player

The following will assist you in the process of reaching much needed buyers.

1. Renters:

Never make the mistake of thinking that renters will stay renters forever. Research shows that renters comprise of up to 30% of all sales in a specific area. Work out a strategy to be in contact with renters in your area and make sure to inform them about the benefits of homeownership. Have a pre-prepared handout ready to present the cost difference between renting and buying.

2. Mortgagees:

Build up a good relationship with bankers, mortgagees and loan financing consultants. They are normally the first to know of a pre-qualified client who is able to buy and looking for a suitable house.

3. Signs:

Contact the homeowners in your area that have “Sold” or “For Sale” signs displayed outside their properties. Many of them might be looking to upgrade or downgrade and may not be aware of your mandates/listings. Be careful not to infringe on the rights of other agents who may have a sole mandate with that owner.

*(See also Chapter 6 on The use of Boards/Signs)*
4. Networking:

Make contact with and befriend secretaries of schools (including pre-schools), social clubs and institutions in your area. They are normally the first to know of new families moving into the area. The same applies for your hairstylist.

Almost everyone has a barber or hairstylist they use on a regular basis and, as you know, conversation covers a variety of topics. Keep your ears and eyes open at all times.

Take part in neighbourhood activities and get involved in community charity events. This is a perfect opportunity to become more familiar with your prospects and to gain exposure among the media representatives who usually attend these events.

Contact the Human Resources department of large organisations and make sure to be updated on any new appointees or transferees who may be looking for homes.

Befriend management and receptionists at hunters’ and safari companies, as well as local hotels and lodges. Give them an incentive to pass on the names of any tourists and visitors who show an interest in obtaining property in our beautiful country. Have handy brochures available that can inform foreign visitors about house/property buying initiatives such as applicable taxes and duties, as well as the transfer system and whether or not foreigners can own property in Namibia. These brochures can also be put in places where visitors to Namibia will most often stop by, such as stopovers or restaurants on the main route to South Africa and other neighbouring countries, as well as popular routes in Namibia. The same goes for the International Airport or other places where tourists are likely pass by.

5. Build up and manage an effective Database:

Source for possible investors (for rental or speculative reasons) in your area and make sure to introduce yourself and keep regular contact with them. Whether or not you can use the database to help market your company has a lot to do with how you set up and manage the prospects in your database. Make sure to update your listings, client contacts and database and referrals regularly. It is vital to categorise the people in your database according to several important criteria.

These are:

1. **Source**: Where did you get this lead from?
2. **Reminder**: Any detail that enables you to remember him/her more easily and continue your conversation where you left off.
3. **Status**: How far to go before this prospect will be a customer?
4. **Type**: Buyer, seller or renter?

**Remember to follow up on buyers.**

Once they have bought from you, keep in close contact with them. **Make it a priority to contact buyers after a 16-18 month time interval.** Follow up on how they are and let them know you are looking for buyers in the area and neighbourhood. The most obvious and direct question would be: “Do you know of anyone interested in buying or selling a property?” This is probably one of the most underestimated ways of sourcing for buyers and you have to make use of it. Remember to always specifically ask for referrals, as many actually want to be asked. This is almost like some sort of psychology that is stimulated by referring others to you, as most satisfied clients are happy to help the agent to also make other clients happy.
6. Your Office:

Your office and window display are important sources for prospects and buyers. Make sure that this display is not only updated regularly, but that it is also a friendly environment where buyers can easily stop and look at the display. A busy shopping mall or street is probably best situated, but unfortunately not always possible.

Make sure that when you approach people at your display to make them feel welcome and not threatened in any way. Make sure to mention to them that some of the properties may be sold but that you have an updated list in your office. Invite them in so that they can look through the listings at their own time. If they are not interested in buying, ask for a referral.

7. Seminars:

Advertise and put together courses with attorneys and bank consultants for prospective buyers or investors. These seminars are great for sales lead generation. You will establish yourself as market leader and professional in the industry. People who attend your seminar have an interest in the information you are presenting and a need for your product or service.

8. Follow up on Show Houses and Buyers!

Only 2 to 5% of agents call prospective buyers back after they have visited show houses. Remember that follow-up and continuous involvement and communication with potential buyers is vital to ensure that your efforts are actually the “effective cause” of a sale. You do not want to miss the opportunity of having “your contract with your commission clause” signed.

“Courage is the ability to fail without losing enthusiasm.”

Winston Churchill

Spotters and Runners:

When considering the possibilities of giving a person a reward (financial incentives) for providing you as an agent with valuable information that leads to concluding a deal, one always has to make sure you are not doing anything illegal.

Remember that commission can only be paid to registered agents in the possession of a valid Fidelity Fund Certificate. One of the things you need to determine is that you are not dealing with a person who renders himself/herself as an agent to the public, when in fact he/she is not licensed or registered. This would contradict the Act and will make you an accomplice; something that you as a professional agent should avoid.

The occasional providing of information alone can hardly be regarded as performing the functions of a real estate agent as described in the Real Estate Act and, therefore, one can assume that payment or remuneration for passing on the information cannot contravene the Act. However, the onus will still be on you to make sure that you do not contravene any Act.
Chapter 3

Closing the Deal

3.1. Communication Skills

3.2. Body Language

3.3. Negotiation Skills

3.4. Closing the Deal

3.5. Sales Agreement of Immovable Property
3.1. Communication Skills

Your communication skills will be essential to your success as a sales person. Throughout your communications, remember that your attitude and approach will make the difference.

Effective communication is required with respect to all the parties involved. As a first choice agent, you should not only be able to communicate well with prospects and clients, but equally well with other financial or legal professionals involved in the transaction. The ability to calmly communicate one’s way through glitches in closings and financial negotiations benefits all of the parties involved.

Train yourself to become a great listener. It is an exceptional listener that identifies customers’ needs and wants and then talks passionately about his/her products and services in relation to those needs. Listening should be your number one differentiator. Listening is a quality that will enable you to discover the needs of your clients much more easily and will separate you from the rest.

Telephone Calls:

Remember: Speak not so that you are understood, but so that you are not misunderstood.

Objectives:

Set primary, secondary and even tertiary objectives for each telephone call you make or receive. Never opt for the 2nd or 3rd objective unless the primary objective is impossible.

Dealing with a potential seller:

Primary: Sole Mandate  
Secondary: Show house  
Tertiary: Further appointment

Dealing with a buyer:

Primary: Take an offer  
Secondary: View a property  
Tertiary: Further appointment

Preparation before speaking

Take a deep breath and avoid making calls when you are upset about something. Lift your chin in order to emit a better resonance in your tone of voice. Relax your face and smile. Speak slowly and clearly showing interest and using good articulation and expression. Callers need to know, without the benefit of eye contact, that you are listening and concentrating solely on their needs.

When dealing with a potential seller, for example, your objectives might be: a sole mandate, show house, and/or a further appointment.

- Have your notebook/dairy handy.
- Know the purpose of your call, write down or practice beforehand so you know exactly what you are going to say.
- Know your audience (who you are calling).
• Identify yourself in a clear and even tone of voice.
• Listen to the client's first words when he/she answers the telephone; is he/she too busy to focus on what you have to say?
• Ask for a few minutes of the person’s time and make sure you have his/her full attention (he/she must not be driving).
• Ask for identification and make sure you are not revealing important information to the wrong person.
• Sound interested in what you are about to share.
• If the battery in your handset is running low, remember to inform the other party.
• Avoid initiating major business and in the case where agreements are made, confirm these agreements in writing as soon as possible.
• Learn to handle different people with ease, avoid confrontation, arrogance and unnecessary technicalities.
• Be assertive - not aggressive!
• Remain seated and imagine the other person can see you (smile).
• Try to evaluate your telephone voice (on voicemail).
• Never try to eat, drink or chew silently while on the telephone.
• Have a good vocabulary, make use of plain understandable language and refrain from using bad language and exaggeration.
• Return calls as soon as possible.

Remember: A sense of urgency is possibly the most important attribute required of an estate agent in today’s competitive environment.

When receiving calls:

• Make sure you are aware of current advertisements, listings and prices so callers/potential buyers will not catch you off guard.
• Make sure you have materials such as note books and pens handy to right down particulars like names, phone numbers, etc.
• Answer promptly and identify yourself and your company immediately.
• Speak clearly and do not lift the receiver to answer and then talk to someone else in the office.
• Listen clearly to establish the reason for calling.
• If a caller is responding to an advertisement, ask: “When would you like to look at the house?”
• Avoid saying: “Who’s calling?” or “Who’s talking now?”. This gives the caller the impression that he/she is not sufficiently important for you. Rather say: “May I ask who I am speaking to?”

Cellular Phones:

In today’s professional environment a cellular phone is no longer an extravagance, but a necessity. Being in contact with your office and clients at all times will increase your chances of closing more sales. A person responding to an advertisement and wanting to speak to an agent immediately is a potential client in the mood to talk about real estate. Clients do not want to wait for answers; they need information regarding real estate now! They do not want to leave a message never knowing when it will be returned. Cellular phones allow agents to fulfil the needs of their clients.

Make it your mission to have your cellular phone on at all possible times. Take a message yourself if you are busy with a client at the time of a call and return that call immediately after your current appointment. Have your diary and pen handy and never interrupt an appointment with a lengthy and unnecessary conversation. Explain to the caller that you are currently with a client, thank him/her for his/her inquiry and arrange a mutually convenient time for you to return the call. Make sure that he/she
is satisfied that you can give him/her the information that he/she requires. If this is not achieved, he/she will most probably immediately contact another agent. Ensure that you know where he/she will be at the agreed time and that you have his/her correct number.

The Telephonist:

In many cases a telephonic inquiry initiates contact with a new client. Making a good and professional first impression is vital to the ongoing success of any company. Office receptionists and telephonists should therefore be encouraged to view their position within the company as an extremely important and integral part of the entire sales process. The telephonist should be professional, friendly and efficient. Knowing the whereabouts of all the agents and the estimated time of their return if the agent is out of the office, is a prerequisite of good service.

3.2. Body Language

We communicate in many different ways and often ignore the important non-verbal messages (signals) we send out or receive. The signals that we transmit through our body language can sometimes result in many misunderstandings.

The aspects of Body Language include:

- Physical space (comfort)
- Appearance and first impression
- Body movements

Physical Space:

This refers to the physical space between parties. Everyone has a bubble around them known as their personal space. Depending on your family background and cultural influences, this sense of space can be large or small. The best way to create a strong impression on others is to observe and respect their personal space differences. This is especially significant in the case of interactions amongst strangers or new acquaintances. If someone steps away from you, it may simply be a space issue and not an issue of attraction.

Another important element of personal space is that of levelling. In order to have a comfortable mutual conversation, you need to balance the field. This is accomplished by meeting your client eye to eye. If you start a dialogue with someone sitting down whilst you are standing, sit down with them to meet at the same level. This shows interest and is less aggressive and controlling.

Normally, as you build trust with prospects, the space between you will reduce. Initially, however, you need to be aware of the following 4 spaces and adjust your sales techniques accordingly:

1. Intimate:

This is about 50 to 60 cm from the body (an arm’s length away). The physically closer two people become during a conversation, the more intimacy is being shared. However, should your client show signs of unease within this distance, move slightly back and give some time to adjust.
Typically, the first initial contact (and an indicator of a strong first impression) is a handshake. Psychologists who have studied handshakes, give the following advice:

- The shake should last three to five seconds.
- Your hand should grab firmly, but not uncomfortably.
- Maintain eye contact while shaking the hand.
- Smile and nod at the other person.
- Address the client by their preferred name.
- Start the shake with the hand extended; thumb up, open palm showing sideways and not up or down.
- Only shake with one hand.
- When a man and woman shake hands, normally a woman will extend her hand first.

The client’s response will also alert you with some insights to his/her character. A firm response will indicate warmth and friendliness (although this does not necessarily lead to a sale, it would help to enter the comfort level). While a limp and reticent handshake could indicate a lack of trust or unwillingness for involvement or commitment.

It is most unlikely that a prospect will do business with someone they do not trust or respect. Should you be alerted by uneasiness, try to get behind the reason and build that trust. Be careful not to make a judgment on a handshake alone, also look for other indicators and cultural differences.

2. Personal:

Around 60 to 120 cm away. Some people who are sensitive to their physical space may still feel threatened within this distance. A desk could be a helpful comforting barrier to create distance between you and a client, however it is better to sit next to someone and not opposite. An estate agent sitting behind a desk can easily create a “power struggle” with a client who is used to being “in control”. Should you make use of a table, rather make use of a round table.

3. Social:

This is 120 to 360 cm away. This is the usual and more comfortable distance to be away during a sales presentation. It is close enough to maintain the necessary eye contact, yet far enough not to pose a threat. This will encourage relaxation and build much needed trust.

4. Public:

More than 360 cm away. This distance poses no threat, but in order for you to have control and also retain interest, make sure to have good eye contact and other appropriate body language gestures.

Appearance and First Impressions:

Our appearance normally determines the first impression we make upon our clients. Making a good first impression is something all agents should take seriously. The (unfortunate) reason is that many customers may already be questioning your integrity. By making a bad impression you are not correcting this wrong impression.
Unfortunately too often an unprofessional image is portrayed by agents who think it is unnecessary to
dress in a professional, businesslike manner. It is most unlikely that someone will trust you to assist
them in making one of the most important investment decisions of their life if your appearance is not up
to standard. Most prospects will simply not have faith in what you are saying. Although possible to
justify a bad impression by a good presentation, it just takes too much (unnecessary) time and effort.

To make your appearance and first impression more positive, make sure to dress appropriately and
ensure that your hairstyle and makeup will help you to appear more positively. The self-confidence that
accompanies an appropriate impression will help you to be relaxed and assist in making a better
presentation when combined with your knowledge of the industry.

To ensure a good initial Impression:

- Always act professionally.
- Be well prepared.
- Be well mannered and patient.
- Be enthusiastic about what you do.
- Watch your language.

First Choice agents will always be willing to promote themselves, their company and industry, their values and their properties while the average agent will think negatively about selling themselves and their products.

Names:

“Nothing is sweeter to our ears than the sound of our own names!”

Make a habit of remembering names. Few other things make as good an impression as remembering
and also addressing someone by his/her name. When meeting someone for a second time, avoid
excuses like “I am bad with names but I can remember faces” or “have we met before?”. It often helps is to repeat the person’s name when meeting them for the first time and perhaps asking
them to repeat it with the proper pronunciation. When you receive a business card, store it in your card holder’s directory where you will see it over and over again. You can also try to relate the name to
someone else with the same name.

Body Movements:

Sometimes there may be uncontrollable (involuntary) itches and twitches when meeting with a
prospective client. However, an experienced salesman must know the disadvantages thereof and learn
how to overcome these during presentations. When it comes to the voluntary movements you need to
know how to make use of them to put clients at ease and to create interest in their presentations. In the
process of evaluating body language, always try to make an assumption by combining the verbal with
the non-verbal. However, should they contradict each other, give more consideration to the non-verbal
(body language). To correctly evaluate body language, do not assign meaning because of one gesture
only, but identify at least 2 to 3 gestures that indicate a certain behaviour.
Openness:

- Legs parallel and not crossed
- Hands, palms and arms open and moving in synchronisation with what is being said
- Eye contact is likely to be relaxed
- Loosened clothing like unbuttoned jacket or open collar

Interest:

- Quick eyebrow flash/raise
- Sitting or leaning forward
- Smiling and good eye contact
- Nodding of head

Defensive or Disagreement:

- Arms folded
- Legs crossed
- Bending away or backwards
- Moving of head, facing away
- Sudden cut of gestures
- Index finger on chin

Evaluative:

- Hand to cheek gesture in the style of Rodin's "The Thinker" statue
- Slight blinking or squinting
- Chin stroking
- Hands touching face especially upper lip
- Head tilted
- Peering over top of glasses
- Sucking on tip of pencil or earpiece of glasses indicates a wish for nourishment in the form of more information
- Arched eyebrows
- Pinching bridge of nose with closed eyes
- Scratching head, ruffling hair

Suspicious Concealment:

- Left hand over mouth (when right-handed)
- Head tilted forward
- Lack of eye contact and looking at floor
- Scratching in front of ear
- Scrunching in with head down
- Stolen look, sideways glance and positioning
- Frequent swallowing and wetting lips
- Throat clearing, frowning

Needing Comfort or Reassurance:

- Biting nails or pinching fleshy part of hands
- Clenched hands or stroking arms
- Sucking on a pen, glasses, etc.
• Touching chair before sitting
• Hand to throat (women), often displaced to seemingly check if the necklace is still there

Nervousness:
• Clearing of throat
• Nail biting and finger movement
• Cigarette smoking and chewing on things
• Hand covering mouth when speaking
• Rapid, twitchy movements
• Voice strained and higher pitch
• Rapid eye movement
• Crossed fingers
• Playing with jewellery
• Jingling change in pockets

Boredom:
• Blank stare, head in hand
• Leg over arm of chair
• Rhythmic drumming, tapping of feet or pen, shaking one foot (women)
• Straightening up then slouching
• Glancing at exit
• Rigid, unmoving posture with fixed stare
• Yawning
• Hand holding up face, drooping eyelids
• Fidgeting or rocking

Acceptance:
• Touching, patting, holding hands to give reassurance
• A person moves closer to another
• Welcoming handshake
• Open arms or hands (palms out)
• Smile and good eye contact
• Rubbing palms together indicating expectation of something pleasant
• Hand to chest in a man indicates loyalty (but in a woman it is defensiveness)

Confidence or Superiority:
• Chest inflated
• Standing with hands on hips, feet apart, head held high
• Rocking back and forth
• Physical evaluation of other people
• Hands behind head
• Taking on different postures than others, especially arms behind the head

Face:
The most important body part involved in body language is our face. Our expression is a clear indication of our feelings; something that is difficult for most people to hide. Watch other people’s faces while communicating. Listen to your inner reaction, as your brain can detect emotions that may not be immediately obvious. Note genuine smiles and nodding, and remember that the eyes do not lie. As the
window to one’s soul, the eyes are the key to it all. Keep an eye on others’ eyes and their messages will become more authentic.

**Assertive vs. Aggressive Behaviour:**

It is important for salespeople to show assertiveness in their dealings with the public. It gives the client a sense of comfort and of “being in the right hands” if their agent is self-confident, knowledgeable and assertive. So often, however, misguided assertiveness comes across to the client as aggression. In face-to-face dealings with a client it is the combination of a salesperson’s body language and tone of voice as well as the spoken words, which determine what the client “hears”.

If during the sales presentation you are coming across as aggressive instead of assertive, your client will baulk or become argumentative. No matter how much you try to put things back on the right track, once this has happened, the more you talk, the worse it becomes! Clients become suspicious and disbelieving or worse still, silent and uncommunicative. This aggressive type of salesperson is the pushy, bulldozer type who may get the sale but seldom receives a referral and often leaves clients with a “bad taste” with respect to estate agents in general.

“He who masters himself will soon be master of others.”

The difference between assertive and aggressive behaviour can be marginal. Consider the following:

<table>
<thead>
<tr>
<th>Aggressive people</th>
<th>VS</th>
<th>Assertive people</th>
</tr>
</thead>
<tbody>
<tr>
<td>Demand respect</td>
<td></td>
<td>Earn respect</td>
</tr>
<tr>
<td>Want popularity</td>
<td></td>
<td>Want effectiveness</td>
</tr>
<tr>
<td>Seek admiration</td>
<td></td>
<td>Seek believability</td>
</tr>
<tr>
<td>Highlight faults</td>
<td></td>
<td>Highlight strengths</td>
</tr>
<tr>
<td>Monopolise talking</td>
<td></td>
<td>Monopolise listening</td>
</tr>
<tr>
<td>Know</td>
<td></td>
<td>Learn</td>
</tr>
<tr>
<td>Talk to impress</td>
<td></td>
<td>Talk to express</td>
</tr>
<tr>
<td>Talk at people</td>
<td></td>
<td>Talk with people</td>
</tr>
<tr>
<td>Display authority</td>
<td></td>
<td>Lead by example</td>
</tr>
<tr>
<td>Destroy confidence &amp; morale</td>
<td></td>
<td>Build a desire for success</td>
</tr>
<tr>
<td>Too often say “what I want”</td>
<td></td>
<td>Are clear and concise on what they want</td>
</tr>
<tr>
<td>Make decisions for others</td>
<td></td>
<td>Set limits and keep the structure in place</td>
</tr>
<tr>
<td>Treat others with less respect</td>
<td></td>
<td>Treat others and themselves with respect</td>
</tr>
<tr>
<td>I am sorry, but….</td>
<td></td>
<td>Apologize with genuine regret</td>
</tr>
<tr>
<td>Interrupt others</td>
<td></td>
<td>Listen</td>
</tr>
<tr>
<td>Blame and attack</td>
<td></td>
<td>Calm, relaxed and confident and don’t get put down to easily</td>
</tr>
</tbody>
</table>
### 3.3. Negotiation Skills

You as an agent are often between two parties; the seller and the buyer. Too often agents think they have to negotiate only with the buyers and forget that they are actually mediators and not necessarily negotiators.

Real estate clients have also become much more sophisticated in recent years. Firstly, with regard to the seller obtaining the mandate and the correct pricing, and secondly with regard to the buyer that closes the deal. How these negotiation strategies are handled determines the success of the process and, eventually, the deal. Finally, the aim of your negotiations should be to resolve the terms and conditions of the sale.

The ideal way in which to do so is a three-way win solution, where the buyer, seller and agent are happy. This means you as an agent need to be well equipped when it comes to negotiation strategies.

Like all other negotiations, many things may happen in between real estate negotiations which can have an influence on the outcome. Unfortunately disputes may also arise as a result of representations or statements made by the estate agents to the parties involved!

**Keep the following Ground Rules in mind:**

- Start with the end in mind. Stay focused on the theme and what you ultimately want to achieve.
- Stay calm and never make any personal comments. By keeping these structures in place, you will remain in control and confident, which will keep you focused.
- Learn to become a good listener. Do not interrupt someone and pause before answering a question.
- Do not arrive late or cancel at the last minute or, even worse, not show up for scheduled meetings at all. This is not only unprofessional, but it will also jeopardise future negotiations with that person.

**During negotiations you need to sell yourself! Therefore:**

- Be confident, well trained and knowledgeable. This will build up trust and rapport.
- Act professional.
- Make use of emotions and body language to show interest and other feelings.

**Make sure to have a clear goal, be well prepared and always anticipate counter arguments.**

- Prepare for the person and situation you will be negotiating in; keep in mind the culture and context of the situation.
- What characteristics do you need to portray to stay ahead with the negotiations? Depending on your client, you need to determine which characteristics you need to portray to enable you to effectively negotiate. Do you need to be: knowledgeable, enthusiastic, calm and controlled, empathetic or energetic? Remember to dress and act appropriately; this will help you to portray a specific image. Build a picture in your mind of this person you need to become to effectively negotiate with the other party.
The Process of Negotiations

1. Opening negotiations

The first 5 minutes is vital in “closing the deal” (first impressions). In this short time span you need to build the necessary trust and rapport. A warm smile, a firm handshake and good eye contact is imperative. Listen with interest and get the information you need. Don’t interrupt others and control your tone of voice.

2. Look for common ground

Make sure to agree on common ground. Do this with a positive attitude and positive statements. This will not only put the other person at ease, but will also give you a good starting point.

3. Sticky matters

Always have empathy. Do not make personal threats or be sarcastic. Do not question the motives of the other party and do not rush into making counteroffers at this stage.

How to deal with:

1. Conflict: Keep calm and keep the structure in place. Recognize the needs of others and respond to mutual needs and concerns.
2. Anger and aggression: Distance yourself; do not become emotionally involved. Listen when feelings are expressed and do not argue when expressing yours.
3. Manipulation: Make neutral statements (do not agree or disagree) and steer conversation into another direction. Distance yourself.
4. Criticism: Listen and evaluate criticism before responding; this will help to build self esteem.
5. Objections: Objections are not always put downs, but merely delays which you need to get around. Pause, listen and acknowledge others’ viewpoint. Understand buyers’ needs and state sellers’ needs. Confirm and isolate the real objection; be hard on the problem, but soft on people. Test alternatives, invite suggestions and emphasise benefits. Confirm all acceptability to eliminate misunderstandings.

When you are not achieving your objective, focus on the positive. Change the strategy and not your objective.

If you find the client may be slipping away, try bringing him/her back by asking open ended questions to put them at ease. People like talking and dealing with their own kind of personalities. It would therefore be reassuring if you can give confirmation by agreeing with them in your actions (verbally and non-verbally). If your body language is too superior or too different from theirs, it could act as a barrier.

Adjournments

Calling an adjournment will allow you to stop the negotiations and have some time to recuperate and think. Focus on managing the situation and keep negotiation structures in place. Be better prepared for the next time around and perhaps discuss your ideas with colleagues and other trusted partners.

Alternatives

Ask “why not?” and make suggestions to look for other possibilities. Show that you understand and empathise with their position. Remain open and generate alternative options. Remember, there are many possible solutions and as you need to be part of the solution, look for it. Push a little, pull a little and use your observation skills to assess when the other person is ready to shift their position. Focus
on those objectives that are achieved and help the other party to create a vision of what it would be like if they were to change.

**Proposals**

Make the proposal and give reasons for your proposal or suggestions. Be careful not to dilute your argument by giving too many reasons. You do not want to “win” an argument; you merely want to achieve your objective, which is closing the deal. By saying too much it can create more areas for dispute. Rather stick with a single strong reason than a dozen weak ones. Summarize the benefits of the proposal.

**Thought**

Our attitude could determine the outcome of negotiations. Many times we say to ourselves: “I am going to have a pleasant meeting and discussions.” By doing so we are literally preparing and arranging things to fall into place even before the negotiations have started. If we are in a bad mood before the meeting, already angry at the person or fearful and apprehensive of an unpleasant outcome, we are actually preparing for the unpleasantness to happen. Our thoughts, or in other words our state of mind, are ever working to set the table for things good or bad, in advance!

### 3.4. Closing the Deal

You will have the same buyer and the same seller negotiating on the property only once. They will never again be in the exact same position, nor will their circumstances ever be the same again. You need to make use of the negotiation process as much as possible. As a skilled real estate professional, you now have to make several proposals for objections and then carefully observe the reactions of the buyer through both his/her verbal and non-verbal gestures. You must be confident that the sale will continue, but you need a specific method (way) to close the deal.

The method you use will depend on the situation. Your experience will guide you through the process.

- **Assumptive Close:**

  This happens when you assume that they are buying and, while taking out the Offer to Purchase, ask: “So, in whose name will the property be registered?” This type of closure is only recommended when you are absolutely sure about the situation, for it could easily create the impression that you are actually making decisions on behalf of the buyer.

- **Objection Close:**

  The buyer objects to the colour of the house. React and ask: “If it was painted another colour, would you have bought it?” If he/she reacts positively, continue with the negotiations. However, should the reaction be negative, there may be more reasons why buyer is not interested.

  Should there be objections that you will not be able to change or negotiate around, do not even try to deal with it, as you would be wasting valuable time.
• Fatal Alternative Close:

The Law of Murphy abounds; sometimes a property is on the market for a very long time without any success and then suddenly two or more buyers want to purchase that property at the same time. The estate agent is in a tenuous position, but has to remain honest and professional. Inform the buyers about the situation and the need for them to seriously consider making an offer as soon as possible. This way of closing negotiations should only be considered within the guidelines and regulations of the Code of Conduct.

• Warning Close:

Example of the warning close:
- “A property like this does not stay on the market for very long.”
- “You do not often find a property with a view like this.”
- “The quests for these properties are very high.”
- “This is very rare.”

• Alternative Close:

Propose options to the client such as: “Would you like to have occupation before or after the holidays?” This way the client has two (positive) alternatives, which will reinforce commitment and lead to the purchase of the property.

• Reminder Close:

When clients give off positive emotional signs during viewing, remind them of that specific fact which they saw or experienced. For example: “Can’t you just imagine the kids playing around the pool or on the big lawn?” “How does the occupation date fit in with your children’s school term?” (or when do you have to begin working?) “Did I mention that the blinds/carpets/light fittings stay?” Reminding them of these positive features of the house can help you to close the deal.

• Direct Close:

This is usually a rhetorical statement such as: “You really liked it, didn’t you?” Then you simply ask for the deal/sale to continue. “Can we proceed with the paperwork? “Shall we get the process started for you?” “Sounds like a great fit! Are you ready to move forward?” “Let’s get the ball rolling, OK?”

• Question Close:

This is a chance you only take when the buying signals are really strong. It is a risk, but you are also able to get to any objections, should there be any: “Would you like to make an offer?”

• Pro – Con Close:

Walk the prospect through the thinking process. On a piece of paper, draw a line down the middle of the page and write down factors that help your prospects compare and contrast how many more pros your product has than cons. This closing strategy is excellent for analytical personalities.

• The Relevant Story Close:

People think in terms of stories. Relate to your prospects the experience of another client in a similar situation who moved forward and was very happy with his/her decision. This closing strategy also works when reversed: someone who did not go forward and later regretted it.
• The Real Reason Close

After you have tried everything, thank your prospects for their time. They will then sense that the exchange is ending, so their resistance will subside. Ask your prospect something like this: “Mr. Smith, I tried to present the information to the best of my ability. What is the real reason influencing your decision to not buy/sell today?” After receiving an answer, see if you can address the concern and re-close.

Remember:
If you can change the objection, do so.
If not, move away.

Should purchasers ask the “favourite buyer’s response question”, e.g. “Will they take a lower offer?” respond in the following manner:

As an experienced negotiator you should first pause for a moment and the respond: “What offer were you thinking of?” Then keep quiet! Should they now respond with a decent amount, you know that they are still interested and that there is some sort of commitment to the property. However, should it be a ridiculous amount, you know that there will most likely not be a sale.

Should you experience a negative gesture or attitude with a client after attempting to close:

• Do not be over-persistent and mind your voice control.
• Change the pace, slow down a little and rebuild trust and rapport.
• Do not ask too much or talk too much.
• Avoid making excuses for any shortfalls; this will only emphasise negativity surrounding the home.
• Avoid any personal comments or distractions that may irritate the purchaser at this point. This includes things like your car, hair or anything else around you.
• Emphasise and remind the client of the benefits and features they were initially intrigued by: “Do you agree?” or “Would that be good?”
• Tell stories about your previous experience in similar circumstances and what happened.
• Look for body language indicators and attempt to close again.
• Remind yourself (and the client) of the motives of the purchaser: what will trigger him/her and what is he/she actually looking for?
• Control your emotions and do not be overly enthusiastic.

Summarise the outcome:

1. Agreed upon:
   Stop talking and do not create possible misunderstandings.

2. Negative Reactions:
   Change the pace, slow down, rebuild trust and rapport.
   Look for strong positive signs and build on common ground.
After closing the deal:

- Carry out what you have agreed upon.
- Inform all relevant parties.
- Send a copy of the agreement to the parties involved.
- Give thanks and recognition where other parties were involved.

(See also Chapter 5 on the process of registration and the positive assistance from the agent to speed up the process.)

Client Follow-up:

Client follow-up should be a major part of your real estate marketing program. Whether it is an official mailing program through direct mail, or just a series of well-timed “thank you” notes after the transaction, you need some form of follow-up.

After closing a deal, make a point of calling or sending a note to thank mortgage consultants, office assistants, lawyers, clients, valuers and others involved. (To show gratitude towards others, positively shifts your energy in amazing ways.) Good work should be recognised and the goodwill you create will be helpful to you in future transactions.

Proper follow-up:

- Generates repeat business by keeping you in touch with past clients.
- Generates referrals by showing you still care after the transaction.
- Will assist you to be the effective cause of the sale.

Remember:

You are in business to, above all, help people buy ideal homes and make good investments.

An understanding of the people you deal with will bring you, not only success, but great long-term personal job satisfaction.
3.5. Sales Agreement of Immovable Property

“A Verbal Agreement is as good as the paper it is written on.”

You have closed the deal and are ready to hand over the contract to be signed. Parties to a contract normally entrust the agent to assist with these duties and therefore you should be well aware of the requirements relating to contracts and clauses. As a professional, you should always encourage your clients to read through the contract before signing and never put pressure on a buyer to sign offers if he/she does not fully understand or perhaps has uncertainties about the contract in general. You should then be able to answer the client’s questions. If you cannot do so, refer the client to someone who can.

All in all it is essential for you to be fully aware of formalities, as well as the general clauses of an agreement of sale. In the absence of these formalities a party to a contract could afterwards claim that there were misrepresentations and thus the contract is invalid and should be set aside.

Purpose of an Agreement of Sale:

A pitfall awaiting overly-trusting buyers and sellers is that of verbal agreements. Some agreements are so serious in their nature and consequences that the law forces people to write them down and sign them. Where immovable property is sold, there are two rules that apply:

Rule 1

According to section 2 of the Alienation of Land Act 68 of 1981, no alienation of land shall be of any force or effect unless it is:

- Contained in a deed of alienation (sales agreement, donation, will, etc.).
- Signed by the purchaser and seller.

Thus: Agreement of sale must be in writing and signed by the parties.

Rule 2

The above-mentioned “agreement of sale” is not sufficient to effect transfer of ownership. According to section 16 of the Deeds Act, right of ownership of land can only be transferred from one person to another by means of a deed of transfer signed by the Registrar of Deeds (or endorsements being made on the Title Deed). See also Chapter 5.8 concerning the registration process.

The transfer of property therefore:

Begins with a preceding legal act – the signing of the agreement of sale by both parties – and ends with a registration act, when the deed of transfer is registered at the Deeds Registry.
Formalities of an Agreement of Sale:

According to the Alienation of Land Act 68 of 1981 there are only two legal formalities for a valid agreement of sale:

1. It must be in writing and it must contain, at the very least, a description of the parties involved, the property sold, the price agreed upon and the date.
2. It must be signed by the parties thereto or by agents acting on written authority by the owners (see power of attorney).

The only exception hereto, is property sold by public auction where there need not be a written agreement or signatures of both parties. The sale is regarded as *perfecta* when the hammer announces the sale to the highest bid. However, in practice, an agreement of sale is mostly signed after the auction. Note that in the case of sale in execution, “The conditions of sale in Execution of Immovable Property” as filed at the court, would partly fulfil the role of a sales agreement as far as the various conditions are concerned.

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**Real Estate Auctions in a Nutshell:**

It is important to remember that auctions are another way to dispose of real estate. There are, however, some misconceptions that exist about auctions, a major one being that only people in financial difficulty will put their property up for auction. This perception is wrong. More and more, private sellers are approaching auctioneers directly to dispose of their property.

**So how does selling through a public auction work?**

A property is marketed through traditional media, which generates the required levels of interest from prospective purchasers. Most auctioneers will advertise properties in the dedicated auctions section of newspapers and will also advertise in the various property guides that are produced by newspapers, or will simply just put up signs. Purchasers will mostly have the opportunity to view the property before the auction. An auctions agent will be assigned to the marketing of the property, fulfilling a role similar to that of an estate agent.

A property catalogue containing relevant information on the property is normally produced and made available to interested purchasers at viewing days and at the actual auction. The “conditions of sale” document will usually be included in this catalogue. This document explains the auction process and is there to protect the interests of the seller and the buyer, and thus conditions should be studied carefully. These conditions should be read out at the beginning of the sale or brought under the notice of buyers in some way.

The seller of the property and the auctioneer will have an agreement on an expected price. The highest offer obtained at auction will be submitted to the seller for acceptance. The perception that sellers have to accept the price fetched at auction is not totally right. It all depends on auction conditions and the arrangement made between the seller and the auctioneer, and whether the sale is with or without reserve. Should it be without reserve, the auctioneer is bound (has to) to sell at the highest bidder. Auction sales are, however, deemed to be with reserve unless the conditions of sale clearly indicate that it is without reserve.

Conditions of sale may also stipulate that the sale is subject to confirmation by the seller within a certain period. In such cases it is usually also stipulated that the seller may accept a higher offer during that period. Where the property is mortgaged, similar conditions are imposed which gives the bondholder an option to make a better offer than the best one obtained at the auction, should that offer be less than settlement amount under the bond.

**To pay:**

One of the most frequently asked questions regarding the sale of property via an auction is whether you need cash to be able to buy a property on auction. The simple answer to this question is: No.

When property is purchased on auction, suspensive conditions can include “subject to” clauses built into an Offer to Purchase. In other words, one could put in an offer to purchase a property subject to the sale of another property.
It is also possible to buy a property on auction and bond it. This means that the potential purchaser must arrange for finance through the bank or consultant prior to the auction. **Note, however, that this will mostly depend on the “Auctioning Conditions” which must be studied carefully.**

It is important to remember that the purchaser is responsible for all costs in the transaction. This is a very clear difference between purchasing a property on auction and purchasing a property through an agent. The purchaser, unlike the seller who would pay the commission to an estate agent, must pay the commission and transfer costs of the transaction to the auctioneers. **The purchaser would also be responsible to pay the rates and taxes up to date.** This would normally show from the conditions of the auction.

If the seller was a registered VAT vendor, VAT may still be levied on commercial properties on top of the “bid” amount.

**Moving in:**

Should a written agreement or the conditions of sale not make provisions for it, the common law has it that the purchaser can basically move in once the sale is perfecta. In other words, once all the conditions have been met. **Is property Free or Subject to possible Usufruct or other Real right?**

This would depend on the construction of the agreement concluded at the sale in execution. Should the agreement include a standard non-variation clause stating that the property was sold "as represented by the title deed and diagram and subject to the conditions specified in the deed of transfer”, the sale will take place subject to the usufruct.

In Chapter 2 of the above-mentioned Act, provision is also made for contracts of sale of land in instalments. This is the case where the parties agree that the purchase price of land is payable in (more than two) instalments over a period exceeding one year and that transfer will only pass to the purchaser after the balance of the purchase price has been paid in full. Chapter 2 of this act further makes provisions for those limited cases where these instalment sale contracts may be recorded at the Deeds Registry against the applicable Deed of Transfer.

Agents should only take note of the above-mentioned; it is most unlikely for an agent (or conveyancer) to encounter this in practice.

**Offer and Acceptance of Agreement of Sale**

An offer to purchase immovable property is made by a purchaser, put in writing and signed by the purchaser (or his/her authorised agent).

**In general the seller usually has three options:**

- to accept the offer, unchanged, including the occupation and transfer dates included.
- to reject it outright as being too low or having too many unattractive conditions.
- The third possibility is that they ‘counter’ the offer, with an amended one. This is usually on price, with the seller asking for a price higher than the offer, but often lower than the original asking price. They may also change some of the conditions. When the agent re-presents the changed offer to the prospective purchaser he/she then also have an opportunity to accept or otherwise. All of this process can take place in just a couple of days and involve some negotiation between yourself and the seller and purchaser.

The purchaser normally stipulates that acceptance of this offer must take place on or before a specified date. If the offer has not been accepted upon expiry of this period, it lapses and it cannot be accepted afterwards. Can a purchaser who has committed himself/herself to “keep his/her offer open for a certain period” withdraw that offer prior to the date specified in the offer?
If an offer contains no date by which it must be accepted by the seller, then the purchaser can revoke it at any time. However, if the offer sets out that it shall remain open for acceptance until a certain date in the future, as is usually the case, then that offer must remain open for acceptance until that date, provided that the seller is aware of that date and has accepted that he/she has a right to consider the offer up to that date.

**Example:** An agent receives an offer which is open for acceptance to a date three days hence. On the way to see the seller, the purchaser phones the agent on his/her cellular phone and asks whether or not the agent has had any contact with the seller. If the agent has had no contact with the seller whatsoever, then the purchaser can withdraw the offer as there has been no acceptance by the seller up to that point of this so-called *pactum de contrahendo*, in terms of which both parties have agreed that the offeror undertakes to keep the offer open for a period of time. However, if the agent has contacted the seller telephonically and advised him/her briefly of the terms of the offer and the fact that it is open for acceptance for a period of time, then that offer can in no way be revoked or withdrawn by the offeror.

**To sum up,** in simple terms, the only dated offer that can be withdrawn is one that has not yet come to the mind of the seller.

**An acceptance** of an offer to purchase immovable property must also be put in writing and signed by the seller (or his/her authorised agent). Upon the written acceptance of the offer by the seller, the agreement of purchase and sale comes into operation. An agreement of purchase and sale in respect of immovable property therefore comes into operation/existence when:

1. The purchaser makes an offer; and
2. the seller accepts that offer.

**Acceptance of an offer must be:**

- Unconditional.
- In response to an offer.
- By the person to whom the offer was made.
- Communicated to the one who made the offer in the manner prescribed, within the stipulated time and prescribed place.

**Is the contract concluded as soon as the seller signs the agreement OR only once the seller (or the agent) has communicated the seller’s acceptance of the offer to the Purchaser?**

**The legal position is as follows:**

As a general rule, a contract is concluded only when the seller (the offeree) has communicated his/her acceptance of the offer to the Purchaser (offeror). This means that if a seller signs an Offer to Purchase (thereby purporting to accept the offer), the contract is not concluded unless the seller has notified the Purchaser that the offer has not been accepted prior to the expiry of the offer.

**Offers to purchase immovable property often state that the offer will be deemed to be accepted “on signature by the seller”.** The effect of this is that the offer is accepted once the seller has signed his/her acceptance. It is not necessary for further notification of acceptance to be conveyed to the Purchaser in a specific way or within a specific time.

However, in order to prevent any later disputes between the parties if your agreement does not contain the above-mentioned, I suggest that agents should still take all reasonable steps necessary to find out whether the seller has accepted the Purchaser's offer and, if so, communicate such acceptance.
Immediately to the Purchaser. This must all happen before the expiry of the offer. Do so even if you think it might not be necessary in terms of the wording of the contract.

**Signing, witnessing and initialling**

Although the contract must be in writing and signed by the parties, unlike in the case of a Will, there is nothing in law that requires a deed of sale to be witnessed. Even if no witness signs the agreement, it is valid. The purpose of witnesses to a contract is to prove that the signature of the seller and purchaser was indeed brought about by that person. This will naturally assist the conveyancer who needs to make sure that the instruction is not fraud and that the parties involved seriously did intend to create legal rights and duties.

The same goes for initialling each page at the bottom (not referring to changes and alterations) of each page. An agreement of sale of land will not be invalid if this is not done and there is no legal obligation to do so. Agents usually insist that parties initial at the bottom of each page, purely as a matter of precaution to eliminate the risk that a party can act in bad faith, for example adding a page at a later stage. As an agent, you should avoid making any unauthorised amendments on contracts at all costs.

**Rules:**

1. Pay attention to unsigned amendments or alterations and bring them to the attention of the clients.
2. Refrain from initialling every handwritten insertion, for this may only open the door to unauthorised amendments, because it would get difficult later on to prove the real purpose of a particular set of initials. Only initial alterations and do so at the bottom of each page too.
3. Use Black ink. This is purely for practical reasons, as it shows better on copies and faxes.

**An offer can “fall away” in any one of the following scenarios:**

- Before being accepted by the offeree, the offer is revoked (withdrawn) by the offeror.
- An offer expires when the expressed time limit stipulated (e.g. number of days), expires.
- When the offer is expressly rejected by means of a “counteroffer”.
- Death or legal incapacity of either party before the offer has been accepted.

**Rejection of an offer** must be explicit with an indication that the offeree is not interested in the offer and that it is not acceptable to him/her. Once it is rejected, the offer cannot be accepted afterwards and a new offer must be made. A counteroffer results in the rejection of the original offer. However, a mere enquiry from the offeree as to whether the offeror would be interested to adjust or modify his/her offer or not, is not a rejection and therefore could still be accepted and form a valid contract. A counteroffer only arises when an offeree rejects the original offer as a whole, or in part.

**Faxed or mailed contracts:**

Sellers and buyers are not always present at the same time and place. Buyers can draft and sign an Offer to Purchase and then fax it to the seller for his/her perusal and signature. Sometimes there can even be two separate documents; the offer on the one side and the acceptance on the other. However, the first document should clearly indicate that it is an offer and the other one should clearly refer and state that the offer is accepted. For a valid (faxed) contract, the wording should be clearly visible and legible without making use of outside sources.
Pre-printed contracts and documents:

Agents normally make use of standard, pre-printed documents when concluding real estate agreements. Unfortunately these documents, although relatively comprehensive, can sometimes be rather lengthy and do not necessarily reflect the true intention of the parties involved. Although most estate agencies have their own standard contracts which their agents understand and are experienced in completing, great care should still be taken when completing these documents. For instance, do not initial when filling in blank spaces (names, dates, property descriptions, etc). Blank spaces on these documents should also never be left blank. If it is not applicable, state: "Not Applicable."

When making changes or amendments, it should be clearly worded (in easily understandable terms) and initialled by the parties involved. If this is not done correctly, the document that you rely upon for your commission earnings is no longer valid and enforceable. Any amendments (and addendums) after a contract has been signed, must be stipulated in writing and signed by the parties (or their authorised agents) involved. Amendments can be made on the original contract or on a separate document.

There is no clear "right" or "wrong" when it comes to the format and length of an agreement of sale. If all the relevant provisions are dealt with and if the stipulations are clear and easy to understand, it does not matter whether the agreement is one or ten pages long.

Although there is no such thing as a "standard agreement of sale", the following "Offer to Purchase" for houses has been chosen for analysis, as it covers the most important areas of concluding a valid real estate transaction. Note that specific contracts for the purchase of vacant land, sectional title, close corporations, trust and companies and agricultural land (farms) should be used when dealing with these properties and entities.

Furthermore, note that an agreement of sale is a legal matter that requires knowledge and skill and is best left to an attorney who understands the theory and practice of property law and conveyancing. Experienced property investors also prefer to instruct their attorneys to draft an agreement, tailor-made for the specific transaction.

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**Offer to Purchaser**

……………………………………

……………………………………

Date of Birth

……………………………………

Contact Numbers

(Hereinafter called "the seller" whose address is)

………………………………………………………

And

……………………………………

……………………………………

Date of Birth
Contact Numbers
(Hereinafter called “the purchaser” whose address is)

At which address both the seller and purchaser chooses domicilium citandi et executandi (Note 2) and which any notice required to be given to the parties of this agreement shall be deemed to be received by the parties after delivery thereof on the date of such delivery, or if sent by pre-paid registered post to such address, 7 (seven) days after the date of such posting.

The SELLER hereby sells and the PURCHASER hereby purchases the under mentioned property, with improvements thereon, upon the terms and conditions set forth.

Certain Erf Number………………………Situated in the
Township……………………………………………………

Municipality of…………………………………………..Registration
Division………………………………………………

Measuring……………………Square Metres and held by Deed of Transfer no T

(Hereinafter referred to as the property) (Note 3)

Subject to all the existing terms and conditions as stipulated in the said Title Deed (Note 4) and the following terms and conditions.

1. PURCHASE PRICE: (Note 5)
The purchase price is the amount of _________________Namibian Dollars and is payable as follows –

2. DEPOSIT (Note 6)
A deposit of N$_______________(_______________Namibian Dollar) must be shall be paid within 7 (seven) days after signature of this agreement by both parties, by the purchaser in trust to the conveyancing attorney, who shall upon special request by the purchaser invest same in an interest bearing account.
All interest thereon shall accrue to the purchaser; and

3. BALANCE
The balance of the purchase price, N$_______________(_______________Namibian Dollar) without any deduction or setoff shall be secured by a banker’s or other approved guarantee(s) to the conveyancer within 14 (fourteen) days after fulfilment of all suspensive conditions contained in this agreement.

The full purchase price, consisting of the deposit and the balance of the purchase price, must be paid to the seller against registration of the transfer of the property into the name of the purchaser.

4. Benefits and Risks (Note 7)
On registration of transfer of the property the risk of ownership shall pass to the purchaser from which date the purchaser shall receive all benefits from and be responsible for all rates and taxes on the property.
5. Voetstoots (Note 8)
The property is sold voetstoots and subject to all conditions and servitudes attached hereto or mentioned or referred to in the said Title or prior Deeds. The seller shall not be liable for any deficiency if extent or error in description which may be revealed upon any resurvey nor shall the seller benefit by any possible surplus.

The seller warrants that any known defects have been disclosed to the agent and the purchaser acknowledges that he/she has fully acquainted himself/herself with the property as well as the beacons thereof.
(Note 8.1)

6. Transfer (Note 9)
Transfer of the property shall be passed by (name of law firm) - (reference) and shall be given and taken upon as soon as possible after payments of the amounts referred to in clause 2 hereof and the fulfilment of the suspensive conditions mentioned in clause (mention if there are any).
The seller and purchaser undertake immediately, upon being requested to do so by the conveyancer, sign all documents required to be signed in connection with the transfer.
(Note 10)
All costs of transfer, including Transfer Duty and Stamp Duty in order to transfer the property into the name of the purchaser, shall be paid by the purchaser immediately upon request by the Conveyancer.

7. Possession and Occupation (Note 11)
Occupation of the property shall be given to the purchaser on ____ (this could be a specific date or "on day of registration" depending on what the parties agree to)
OR
The purchaser acknowledges having been informed that the property is let to tenants and that this purchase is subject to the tenant’s rights under the tenancy and/or the Rental Act as amended.
The seller gives no warranty that the purchaser will obtain physical occupation of the property by any particular date.
OR
It is recorded and understood that there are no existing contracts with current and/or future tenants which are binding to the purchaser.

The purchaser shall take occupation of the property on ____ (complete whether it would be on a specific date or perhaps "on day of registration", whichever is agreed upon by the parties)
OR
If the date of possession does not coincide with the date of transfer of the property, the party enjoying the occupation of the property while it is registered in the name of the other party, shall be liable to pay pro-rata monthly in advance, at the office of the conveyancers, occupational rent of _______.

The occupational rent shall increase to _______ after _______. (Note 12)

8. Fixtures
The property is sold together with all fixtures and fittings of a permanent nature which the SELLER warrants are fully paid for and owned solely by the SELLER, including the following
(Note 13)

9. Bond
This offer is made subject to the purchaser being able to obtain a loan to the sum of N$ _______ from a bank or other financial institution arranged for by the purchaser at his/her expense by the agent or the purchaser himself/herself.
The PURCHASER undertakes to apply for such loan forthwith and confirmation of the bond application from the financial institution is to be obtained within 14 (fourteen) days. In the event of such a loan not being obtained and approved in writing within 21 (twenty one) days from date hereof, this Agreement shall lapse and be of no further force and effect. (Note 14)

10. Commission (Note 15)
The sellers shall pay the Agent's Commission of N$ ______ (________) Namibian Dollar inclusive of VAT, which commission shall be deemed to have been earned upon the signature of this Deed of Sale by both parties, as well as the subsequent fulfilment of suspensive conditions herewith.

The purchaser hereby warrants that the only Agent who introduced him/her to the said property is ___________ Real Estate and hereby indemnifies and holds the sellers free and harmless from and against any claim which may be made by any other Agent in respect of commission arising out of the sale of the property where such other Agent claims to have actually introduced the purchaser to the property and/or to the sellers in connection with the transaction therein set forth.

The seller hereby irrevocably instructs the Conveyancers to pay the commission to the Agent out of the proceeds of the sale against registration of transfer.

The parties hereto furthermore agree that in the event of the sale being cancelled or transfer not being implemented as a result of any failure by the purchaser to carry out the purchaser's obligations hereunder, that the purchaser shall be liable to the sellers and/or the Agent for the agent's above-mentioned commission.

Should the sale be cancelled or transfer not be implemented as a result of any failure by the sellers to carry out the sellers' obligations hereunder, then the sellers shall be liable to the Agent for the agent's above mentioned commission.

The provisions of this clause are intended by the sellers and the purchaser to be a contract for the benefit of the Agent (stipulatio alteri) which may be enforced by the Agent, it being recorded and agreed that the Agent has accepted the benefits hereof by the Agent's signature at the foot hereof. (Note 16)

11. Boards
If not prohibited by the local authority or Body Corporate, the agent is authorised to display a SOLD Board/Sign on the property for 30 (Thirty) days after the sale. (Note 17)

12. Forfeiture
Should either the purchaser or the seller commit a breach or fail to comply with any of their obligations in terms of this Agreement, then the other party shall be entitled to:

- give the defaulting party 5 (five) days notice in writing to remedy such breach and/or failure, and
- if the party in breach fails to comply with such notice, then the other party shall forthwith be entitled, but not obliged, without prejudice to any other rights or remedies which he/she may have in law, including the right to claim damages:
  1. to hold him/her to the contract and to claim immediate performance and/or payment of all obligations in terms hereof;
  2. or to cancel this Agreement. (Note 18)

In the event of the sale being cancelled as a result of any breach on the part of the purchaser, the agent shall be entitled, but not obliged, to claim the commission payable to him/her in terms of clause 10 from the purchaser without prejudice to the Agent's rights against the seller.

In the event of the Agent being notified of cancellation of this agreement, the agent shall be entitled to claim from any deposit amount held in a trust account in terms of the provisions of clause 2, the commission payable in terms of this agreement.

13. Warranties and Acknowledgements
The parties agree that this offer constitutes the entire contract between them and that no warranties, stipulations or representations other than those as contained herein have been made by any party
or agent and no variation or amendment hereof shall be binding unless recorded in writing and signed by all the parties.

(Note 19)
The parties acknowledge that the full meaning and consequences of this agreement are explained to them by the agent and are fully understood by them.

14. Validity of Offer
This offer is irrevocable and expires at on . Provided both parties sign this offer prior to its expiry, a binding Contract of Sale shall exist between seller and purchaser. The offer shall be deemed accepted on signature of seller. (Note 20)

15. Special Conditions (Note 21)

(Signed)

(Note 22)

SIGNED at on this day of

AS WITNESSES:
1. 
2. 

SELLER/S

SIGNED at this day of

AS WITNESSES:
1. 
2. 

PURCHASERS/S

SIGNED at this day of

AS WITNESS:
1. 

ESTATE AGENT

Note 1

The agreement/offer will only be valid if the identity of the seller and purchaser is clear without resources to outside evidence. This fact should be clear from the description in this clause as well as from the signature clauses.

Note that there is different persona that could be a party to a contract. Essentially you may be dealing with minors or perhaps companies, closed corporations or trusts yet to be formed. In the case of a purchaser buying on behalf of a company, close corporations or trusts, it needs to be clear in this clause that he/she is not buying in his/her personal capacity. Normally, special clauses are included that would make the representatives liable in their personal capacities should the legal persona not be
registered in a certain time. It is best is to gain information from your lawyer to fulfil the necessary requirements.

It is good practice to always check the particulars of the parties, to see whether they correspond to the names and identity numbers as reflected in their ID documents.

*(See also Chapter 4 on ownership.)*

**Nomination Agreements**

If a person wishes to purchase property and at the time of entering into the agreement, he/she is not certain whether to purchase in his/her name or in the name of another person or legal entity, he/she then enters the agreement as:

“John Jones or nominee”

**Requirements for a nomination agreement:**

1. The time period within which the nominated other person should be appointed must be in writing.
2. The timing period within which the nominated party should accept and ratify the agreement.

Should the nominee accept and ratify the contract after the given time period, Transfer Duty could be payable on two transactions; in most cases nomination agreements should be approached with caution to avoid possible financial losses.

1st transaction – seller to Johan Bantjies
2nd transaction – Johan Bantjies to nominee

Since 2003, the nominee must be appointed on the same day in South Africa to avoid transfer duties being paid twice on the transaction. There is currently no fixed number of days within which the nominee should be appointed in Namibia. This tricky and controversial situation currently opens the way for possible disputes and therefore transfer duties matters should always be very carefully considered and correct wording should be used in the sales agreement.

**Note 2**

*Domicilium citandi et executandi* is the “legal” address for the parties that they choose for any delivery of legal notices and/or the process thereto. It can also be translated as the “place they consider to be their permanent address”. When a notice has been sent to the person’s *domicilium* address by registered mail, such action constitutes valid service of such notice, whether the party receives it or not. Obviously there should be some sort of evidence that the notice was actually sent to the address. The *domicilium* should further be a physical address and not postal address. *This should be an address within the borders of Namibia.*

**Note 3**

Check and make sure you have the correct (and full) property description. Too often an agreement of sale of immovable property reaches the conveyancer with totally faulty property descriptions. The conveyancer needs to know for certain which property the agreement relates to. It would be problematic if the wrong property were transferred because of a misunderstanding or incorrect information.

In case of a conventional transfer (erf) make sure about the erf number. *This should not be the street/gate number allocated to the property but the erf number which is normally stated on municipal accounts and statements. In case of sectional title and agricultural land also make*
sure you have the correct description of properties. The best way to obtain the correct property description is from the existing title deed.

A) Recommended Property Description in case of Sectional Title Unit:

The Sectional title unit known as:

a) **Section No. 2** as shown and more fully described on **Sectional Plan No. 80/2002** in the building or buildings known as **Desert Streams**, situated in **Klein Windhoek, (Extension No.5), Municipality of Windhoek**, of which section the floor area, according to the said sectional plan, is **218 (TWO ONE EIGHT)** square metres in extent; and
b) an undivided share in the common property in the land and building or buildings as shown and more fully described on the said sectional plan, apportioned to the said section in accordance with the participation quota of the said section specified in a schedule endorsed on the said sectional plan and held under **Certificate of Registered Sectional Title No. 80/2002 (2) dated 18 OCTOBER 2002**.

B) Recommended Property description in case of Agricultural Land

**CERTAIN :** Portion 1 of Farm Elna No. 115  
**SITUATE :** Registration Division “K”  
**MEASURING :** 2424 (Two Four Two Four), 8006 (Eight Zero Zero Six) hectares  
**HELD BY :** Deed of Transfer No. T 9901/1991

Note that there are not many differences between an ordinary sales agreement and the sales agreement for agricultural property. The major difference is the fact that a suspensive condition regarding the “waiver” must be inserted.

**Other possible clauses in sales agreements for agricultural property.**

Following the property description is a clause referring to improvements, fixtures or other moveable assets and whether they make part of the sales agreement or not (engines, pumps, generators, cattle scales, cattle, game, etc.)

*(See also Chapter 5.4 on costs involved especially regarding the split in the price for transfer duty purposes in the case where moveable assets form part of the sale.)*

**A clause dealing with Land Tax Certificate** and the seller’s responsibility to pay until transfer of the property is made into the purchaser’s name, should normally also be included as well as separate clauses handling the issue surrounding possible labourers and tenants on the farm.

For more info on Agricultural Land in Namibia also see Chapter 4.

**Note 4**

See chapter 4 on **Land Use Control as well as conveyancing** regarding the conditions of the Title Deed.

**Note 5**

The purchase price is another important conveyancing fact as he/she needs to collect the full amount of the purchase price and may not transfer the property until the full amount has been received or at least secured.
The purchase price and method of payment should be established, i.e. whether it is a once-off payment or whether loans and deposits are involved.

It is better practice not to stipulate that “the purchase price includes all costs involved to transfer the property.” The simple reason for that is the fact that you save the client money by rather working on the purchase price PLUS the “additional transferring” costs. Therefore we have added the Buyer’s Cost Sheet to this guide and also ample guidance as to how costs should be calculated.

5.1 With this example a part of the purchase price is to be paid as deposit and the rest is payable by loan. If a deposit is payable, it is normally payable shortly after the signature of the contract and must be before registration. In such cases the balance of the purchase price has to be secured by means of a bank guarantee. Very important information for conveyancers is the date (number of days) by which the guarantee or undertakings for the balance has to be tendered. Conveyancers “secure” the purchase price by way of guarantees or undertakings. It is a very important date, as the risk of the purchaser failing to produce the money to pay for the property is then eliminated.

Also note that when the contract stipulates that “the deposit should be paid into an interest bearing account, where interest will be for the benefit of the purchaser”; this deposit cannot simply be used by the conveyancers for paying stamps and transfer duties in order to speed up the process. This should only be done when there are written instructions to do so.

5.2 When the full purchase price is payable in cash, the purchase price must be secured by a bank guarantee or paid into the conveyancer’s trust account at least fourteen days before registration. This means that the purchaser will be financing the purchase price himself/herself and not obliged to borrow money.

Example of clause in contract:
“The purchase price is the amount of N$ 900 000.00 (nine hundred thousand Namibian Dollar) which must be paid within 7 (seven) days from date hereof into the trust account of the conveyancing attorney.”
or

5.3 The full purchase price can also be payable by loan. In such a case the full purchase price should be secured by means of a bank guarantee and the applicable clause should read as follows:
“The purchase price is the amount of N$ 800 000.00 (eight hundred thousand Namibian Dollar), which amount shall be secured by a banker’s or other approved guarantee(s) within 14 (fourteen) days after fulfilment of all suspensive conditions contained in this agreement.”

Note 6

Although it is not always required, the purchaser and seller often agree that a cash deposit will be paid as soon as the agreement is signed. A deposit usually indicates that the purchaser is serious about the purchase of the property and mainly serves as a goodwill gesture. It must be clearly established from the agreement whether a deposit is payable by the purchaser, to whom and when is it payable.

Holding and investing clients’ money is a huge responsibility. By law, estate agents and attorneys must have “trust accounts”. A trust account is a separate banking account in which clients’ monies are kept and is guided by strict rules as prescribed in the Legal Practitioners Act. Agents and attorneys are not allowed to “mix” money that belongs to clients or other third parties with their own money. Such practice could lead to abuse and clients losing their money.

All funds received from a purchaser will be paid into a firm’s trust account. The Attorneys Fidelity Fund is a special insurance fund that exists to reimburse clients of law firms who lost money due to the misuse of trust funds by attorneys and/or their employees. This fund only covers trust money, and not money that was handed to the attorney with the instruction to “invest in an interest bearing account”.

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Should the attorney be instructed to invest the funds, the instruction should stipulate who the interest will accrue to. In this agreement it will go to the purchaser on instruction to do so. If the purchaser had not consented to this, and the money was only paid into the trust account, the interest accumulated in the trust account will be paid over by the law firm to the law society. The attorneys will therefore have no "right" to the interest accumulated.

Similarly, if the deposit is paid into the estate agent's trust account and it was not stipulated to whom the interest should accrue, the interest will be paid over to the Estate Agent's Board. (Refer also to Chapter 7 and Section 32 of the Estate Agents Act.)

Note 7

Risk and benefits of ownership are usually transferred simultaneously on the date of registration. However, be alert that some parties may stipulate that risk is transferred on the date of occupation. This clause will determine who will be entitled (and from what date) to the rent money and liable for rates and taxes levied upon the property.

Who is liable for the costs of repairs to damage, caused by a leaking geyser for example? It depends on wording of the contract.

Unless the agreement provides for a specific date, for example the Date of Possession, risk passes to the Purchaser when the sale is perfecta. This means as soon as all conditions have been fulfilled and there is no other legal provision that can cause the deal to lapse.

This arrangement, however, is impractical and a prudent seller will maintain his/her insurance cover until registration of transfer. It is also a practical idea to allow the risk in the property to pass from the seller to the buyer on transfer of the property (and not necessarily on occupation) - and for agents to double check that this is stated in the agreement of sale. In practice this is the best option, because this is the date on which the purchaser becomes the owner of the property and the logical date from which he/she will want to insure the property against risk. Such an arrangement means that careful sellers will stay fully insured until transfer and that there will be no need for buyers to take out special insurance before they take ownership.

As a professional agent you have to ensure that the parties understand at what point the risk will be passed from seller to purchaser and advise them to insure accordingly. (Refer also to Chapter 5 regarding home insurance.)

Note 8

More problems have arisen from a misunderstanding of the "voetstoots" clause than from any other in the property transaction. Voetstoots or “as it stands” generally means that the property is sold as it is, with all its defects (faults). It is in essence an exemption clause and protects the seller by excluding liability on the seller's part for defects in the property sold. It strengthens the seller's position in that he/she cannot be held liable for defects in the property whether patent or latent, subject however to an exception which applies in certain circumstances, to be dealt with below.

The purchaser is obviously at risk and should therefore exercise extreme caution when inspecting the property. However, the voetstoots clause can also be a dangerous trap for purchasers. It happens all too often that a purchaser is unhappy with a defect discovered in the property, mostly a latent defect, only to be referred to the voetstoots clause by agents and sellers.

There are certain circumstances however where the seller will not be protected by the voetstoots clause and where the purchaser will be able to obtain some relief in the form of either a reduction in the
purchase price or, where the defect is very bad, a setting aside of the contract. An estate agent should insist that the seller try to recall all the defects in his/her property before selling. A buyer with any doubts on these matters should also be advised to call in a professional valuator and assessor. Although this bill is obviously for the buyer's account, the assessor's report can be extremely useful in drawing up an honest "deed of sale."

**Latent defect** (hidden/invisible) refers to a defect which is not reasonably (clearly) visible upon inspection of the property. It may be covered up or concealed and will actually impair the property's usefulness and effectiveness. Very often latent defects only become evident sometime after the date of sale or transfer, for example a leaking pool or a leaking roof after heavy rain. Common examples of a latent defects include faulty plumbing or a leaking pool, roof or gutters, a structural defect in a newly built property, electrical problems, rising damp or a carport or additional room for which no plans were approved.

**Patent defect** (visible) is a defect which is plainly visible or that is discovered during the course of a reasonable inspection. Common examples of patent defects include water stains, broken windows, cracked gutters and tiles or dripping taps.

The exception to the voetstoots clause involves latent defects only. The test that the courts apply to disputed transactions contains the following three points:

1. **Did the latent defect exist at the time the sale was concluded?**
   If it did exist at the time the sale was concluded, the purchaser bears the onus.

2. **Is the defect material?**
   To satisfy this part of the test, the courts will consider whether:
   a) The defect affects the purpose for which the property was to be used.
      For example, a property is purchased and on the property is a "granny flat". The purchaser's intention was to rent the granny flat out or operate it as a bed and breakfast. The purchaser discovers a latent defect; plans for the granny flat were never approved. There is a Title Deed restriction prohibiting a second dwelling and the neighbours are against the proposal. Clearly the defect poses a serious threat to the purchaser's intentions for the property and the purpose for which part thereof would be used.
   b) The defect affects the value of the property.
      Generally speaking, a defect will almost always affect the value of a property. The extent to which it does will indicate whether it was a material or minor defect. If the court finds the defect to be only a minor one then all the purchaser may claim, if the other 2 parts of the test are satisfied, is a reduction in the purchase price. The test that would be applied is the following: "What would the purchaser have paid for the property if the purchaser had known about the defect?" An expert such as a valuator can determine this. If the purchaser is able to prove that the defect is material, then the purchaser will be able to have the contract set aside by the Court.

3. **Did the seller know about the defect and deliberately and fraudulently refrain to mention anything about it at the time of the sale.**
   This is the most difficult part of the test to meet and it is because of this that purchasers often leave courts with nothing more than frustration and wasted time and money. The courts require clear and convincing evidence that the seller's non-disclosure was fraudulent. If the court finds that the seller
merely forgot to mention the defect (a negligent non-disclosure), then the seller will not be held liable.

However: the seller may, for example, claim that he/she was not aware subsidence was taking place on a wall. But if it can be proved that cracks were visible prior to a recent paint-over or re-plastering, he/she can still be held responsible.

Similarly, if a geyser has required two or three visits from plumbers or electricians shortly before the sale and this is not mentioned, the seller can be guilty of non-disclosure.

The saying "prevention is better than cure" is very apt for this unpleasant situation. At the end of the day, it is best to encourage the seller to make a full disclosure of all known defects in the property. Purchasers should ask more questions about the property sold and examine the property carefully beforehand. The seller's answers or representations should be included in the deed of sale. Where the seller discloses any defects to the estate agent, the agent is obliged to in turn disclose these to the purchaser, whether questioned about them or not. The seller and agent are in essence one and the same and the seller will be held liable for any non-disclosure by the agent.

**Note 8.1**

*Soobramoney v R Acutt & Sons (PTY) LTD*

In the above-mentioned case, the estate agent erected a “for sale” notice board on a certain property. The purchaser made an offer for the property but, unbeknownst to him, the property described in the offer was not the plot on which the notice board stood. It was on another plot he did not want. When the purchaser discovered the mistake, he rejected the contract and sought to recover the purchase price from the seller. However, the seller was insolvent. The purchaser then sought to recover the purchase price from the estate agent on the basis that it was the estate agent’s negligence which had caused the purchaser to buy the wrong property.

The court held that the estate agent did in fact make a misrepresentation by representing the ground upon which the notice board stood as included in the property for sale.

The estate agent escaped liability because the contract in question contained a clause whereby the purchaser declared that he had acquainted himself with the beacons of the property and that the seller and/or his agent were entirely free from all liability in respect thereof.

However, it appears to be clear that if the contract did not contain this clause, the court would have held the estate agent liable. The court accepted in principle the purchaser’s allegation that: “a duty rested on the estate agent to exercise professional skill and care in giving information and in pointing out the land entrusted to it for sale.”

**Note 9**

The law states that, unless the agreement stipulates differently, the seller has the right to appoint the transferring attorney. It is also customary in Namibia for the seller to appoint the conveyancer, unless the seller and purchaser have agreed otherwise in the contract.

The following reasons show why the seller should nominate the conveyancer in most instances:

- The party more likely to delay the transfer or breach in terms of the agreement is the purchaser.
- It is easier for the seller's conveyancer to ensure that the purchase price of the property be properly secured.
• Until transfer, the property is the seller’s. Therefore, it is logical that his/her own conveyancer protect his/her interests.
• The argument might hold that since the purchaser pays the transfer duty, he/she should nominate the conveyancer, but this is not so when the seller pays VAT.
• In transfers from developments such as townships or sectional title schemes, the seller’s conveyancer is in the best position to coordinate the sequence of transactions.
• In auction cases the conveyancer is also nominated by the seller.

It is however true that sometimes it is preferable for the purchaser’s conveyancer to act. The seller and purchaser could therefore agree in the deed of sale that the purchaser has the right to appoint the transferring attorney. However, the conveyancer has a duty of care towards the seller and the purchaser at all times and will not neglect the one in favour of the other.

Some law firms have more than one conveyancer and it is good practice to include the name of the conveyancer together with the relevant firm name. This would make it easier to allocate instructions to the appropriate conveyancer and his/her secretary.

Refer also to Chapter 5.1 on conveyancers, as well as Chapter 9 on the Institute and Real Estate ethics and the article on “The estate agent / conveyancer (attorney) relationship”.

Note 10

As far as cost and duties are concerned, it should be remembered that the contract normally stipulates that the purchaser is responsible for paying costs and duties. Keep in mind that should the contract not clearly state that the purchaser should pay the Stamp Duties, by law it should then be paid by the seller.

(For further guidelines on cost see also the Buyers Cost Sheet and refer to Chapter 5.3.)

Note 11

Possession
Possession refers to the moment that the Purchaser takes legal control of the property, including the responsibility for any tenant and the rights to any rental. The person who is in possession of the property has all the rights and responsibilities of an owner, even though transfer has not yet been passed.

This date could be agreed to fall on the date of transfer (when ownership passes) or on the date of occupation (when the purchaser takes physical control of the property).

Occupational Interest

Although sometimes misleading to clients, the term occupational interest is preferred above occupational rent. More often than not, the purchaser will move into the house some time before transfer is actually registered, giving rise to a situation where the purchaser is living in the home before the seller has been paid for it. To compensate for this, the purchaser pays an amount of rental to the seller for the right to use, enjoy and control the property. This rental is called occupational interest. This is paid monthly in advance and the conveyancers will refund the purchaser in the final accounts such unexpired portion of the month in which the registration takes place. The parties may also arrange between themselves to collect the monthly payments or instruct the estate agent to attend to collection. The “going rate” for occupational interest is an estimate 1% of the purchase price per month. Most contracts also make provision for the automatic increase of the interest after a certain period since occupation.
If a seller has entered into a lease agreement with a tenant, this must be disclosed to the potential purchaser and the **best practice for estate agents is to disclose this in the sales agreement**. Tenants will be protected by the “*huur gaat voor koop*” principle for the duration of their lease agreement and, therefore, it should also be addressed by the seller as a matter of urgency.

*(See example on calculation of occupational Interest and levies.)*

**Distinction between occupation and possession.**

There are three distinct events in a transfer (not just two), each with important legal implications:

* **Occupation** (physically moving in).
* **Possession** (together with the legal control the risk of accidental damage or loss, as well as responsibility to maintain and upkeep the property, passes to the possessor. The possessor is also the one entitled to the benefits of the property, such as rental income, etc.).
* **Transfer** (transfer or “shift” of ownership in the particular property is registered in the deeds office).

The following example will illustrate the relevance of the concept "possession":

S sells a house to P on 1 January, for N$ 2 million. The contract stipulates that occupation and possession will pass to the purchaser on 1 March and the transfer date is agreed to be 1 April (the custom would be to simply register the transfer as soon as possible).

The house burns down on 10 March (through no fault of the purchaser), shortly after the purchaser moved in - this is after occupation and possession passed to the purchaser, but before transfer. Who will bear the risk of the loss? Because the purchaser is in possession, it is his/her loss. He/she will now have to take transfer of the razed erf and still pay the N$2 million.

The end result would be very different if possession was treated differently in the contract. If the contract stipulated that possession only passed on transfer, then in the above example (since the house was destroyed before possession passed to the purchaser) the seller would have to bear the loss. The parties will be released from their respective obligations under the contract, because performance became impossible (one exception, where the purchaser is *in mora*).

If the parties specify a date for possession in the contract, that date prevails. If the contract says nothing about possession, then the common law takes over and sets the date. Possession then passes to the purchaser when "the sale becomes *perfecta*". In practice, this more or less means the moment that all suspensive conditions have been met.

The safest and most logical way, given practical considerations, is to stipulate that possession will pass on transfer and that risk will pass on date of registration of transfer. Link possession to transfer and not to a stipulated calendar date, unless there is a good reason for it. Or, if possession is to be passed to the purchaser sooner, make him/her aware of the implications and advise him/her to insure against the risk.

While attempting to equate possession with transfer, however, some pre-printed contracts often use wording that could have unintended possession related consequences. **Example: The contract says:** Occupation on 1 March. Transfer to take place on 1 April or as soon as possible thereafter; possession to take place on 1 April. The intention is to link possession with transfer, which is sound practice, but in reality it is linked to the date of 1 April.

What will happen, given this wording, if the transfer is delayed and will only be ready to be registered on the 7th of April, but the house burns down on the 2nd April? It will be the purchaser's loss - a result not foreseen by the parties and possibly unfair. **The moral of the story?** Use the correct wording: Link
possession (and the transfer of risk) to the event of transfer, not to the calendar date which has been stipulated as the transfer date.

**Note 12**

It should be clearly stated in contracts who will receive the occupational interest, what the amount is and when it is payable. Normally the parties arrange between themselves to collect the monthly payments, or the seller instructs either the estate agent or conveyancer to attend to the collection on his/her behalf. Most agents prefer the conveyancer to do so, as this is less admin on their side and also because they can be held liable to make payments to the seller when they “forget” to collect the money from the purchaser and there are difficulties in recovering the due amount from him/her.

These rental amounts are simply deposited into and paid out of the lawyer’s trust accounts almost immediately, where no interest is accumulated. The interests that may accumulate are normally paid over to the respective fidelity funds.

The two concepts of “**Occupational rent**” or “**Occupational interest**” mean the same thing. However, it is recommended to use the term “interest”. The sellers often think that they should also receive interest on the amounts of occupational rent. This, however, is not the case as these rent amounts are mostly not deposited into an “interest bearing” account (call account or “beleggers rekening”).

**Note 13**

Our common law states that, unless otherwise stipulated in the contract, all permanent improvements (including fixtures and fittings) – for example swimming pools, lapas and outside TV aerials screwed into a wall – become part of the property and therefore part of the sale.

To make sure there are no misunderstandings, the agreement needs to specify which fixtures are included in the sale. Parties to a contract are normally confused by this clause and you need to spend time with those involved to prepare a list of the items which should be incorporated into the agreement. Indoor and outdoor plants, TV aerials, ovens, bar counters, alarm systems, blinds and light fittings, as well as pool cleaning equipment are the most commonly disputed items.

Because all fixtures are suppose to stay it is probably better to list those items that will not stay, or those that the seller may remove, which will therefore not be part of the sale.

**Note 14**

A purchaser does not want to be held liable to the seller under an agreement if the bank is not prepared to grant him/her a loan. In the case of the example, the bond clause takes the form of a suspensive condition which makes the agreement conditional upon the granting of the loan. This condition makes the contract subject to the obtainment of a loan for a specific amount before or on a particular cut-off date, as the seller cannot wait indefinitely for the purchaser to obtain a loan (with the possibility of course that the period can be extended by the parties involved by mutual agreement).

**If the purchaser does succeed in obtaining a loan** within the prescribed period and all the other suspensive conditions (if any) have been met, the contract comes into operation and the purchaser must provide guarantees that his/her obligations will be met in terms of the contract.

**If the purchaser does not succeed** in obtaining a loan within the prescribed period, the contract automatically lapses without any obligations. However, in the event that there is sufficient proof that the purchaser deliberately prevented the fulfilment of this clause in an effort not to be bound by the contract, the condition is deemed to be timeously fulfilled.

*(Refer to Case Law)*
Suspensive condition clauses in a contract should be very carefully worded and thoroughly scrutinised.

a) By making the sale of a purchaser’s property a suspensive condition to the contract, it means that the contract of sale would be subject to the prior sale of the purchaser’s property on or before a specific date. Problems often arise when a purchaser is dependent on the proceeds of the sale of his/her property, but he/she has not inserted a “subject to” condition into the contract of the property he/she is buying. This would mean that the agreement is not conditional on the sale of the purchaser’s property and the purchaser cannot get out of the transaction if his/her house is not sold or if there is a delay in that transfer.

Example:
This agreement is subject to the fulfilment of the following suspensive condition:
That the purchaser is successful in selling and transferring of another property of his/hers within 90 days after signature of this agreement, situated at Zenobiastreet 8, Ludwigsdorf, Windhoek, by acceptance of a bona fide written Offer to Purchase.

If no time limit is placed on the condition to be fulfilled, the seller may be prejudiced, as he/she will have to wait for a rather long time before he/she can declare that the transaction has lapsed due to non-fulfilment of the condition.

b) If the sale of a purchaser’s property is made a suspensive condition, the “outside offer” could also take the form of a suspensive condition in an agreement of sale and will normally follow directly after the above-mentioned condition (a).

The outside offer enables the seller, pending the fulfilment of the suspensive condition, to market the property and receive written offers from other prospective purchasers. Should the seller receive a better offer from another prospective buyer (the outside offer), the purchaser shall be entitled to:
- declare the agreement unconditional; or
- make an offer that is equivalent to, or better than, the other offer.

If the purchaser does not do one of the above, the seller is entitled to accept the other (outside) offer.

Example:
Until such time as there has been full compliance with all suspensive conditions contained in this agreement, the seller shall be entitled to continue marketing his/her property, subject thereto that should he/she receive another or more favourable offer which is not subject to a similar condition (of selling another property first), a copy of the said offer shall be delivered to the purchaser, who shall be given the opportunity –
i) to waive in writing all suspensive conditions contained herein in case of an equal offer; or
ii) to make a similar or better offer to the seller within a period of 48 hours from receipt thereof. In such an event, the seller shall be obliged to accept a new offer from the purchaser. Should the purchaser not make any such offer, the seller may accept the said offer, whereupon the original offer to purchase will lapse and be of no further force or effect.
**Resolutive Conditions**

In the case of suspensive conditions the contract depends on a specific condition to actually form a binding contract. In the case of a resolutive condition, the contract is already binding but will resolve/terminate when specific events occur.

**Note 15**

An estate agent who is in possession of a valid Fidelity Fund Certificate and insurance, and who was the effective cause of the sale, is entitled to remuneration for his/her services. Where a valid agreement has been concluded he/she would be entitled to commission.

Although it is common practise for the seller to pay the estate agent’s commission, costly and unnecessary mistakes sometimes mean that the contract does not stipulate who is actually responsible for paying the agent’s commission. It is best to simply stipulate the amount, inclusive or exclusive of VAT, and by whom (seller or purchaser) and when it is payable.

An agent, like any other business in Namibia, is obliged to register for VAT if his/her turnover exceeds (or is expect to exceed) N$200 000 per annum. VAT must then be paid to the Receiver of Revenue by the person registered for VAT. Once registered for VAT, the person (entity) is called a VAT vendor. Should the agent be registered for VAT, 15% must be charged on the commission amount. If the amount of the agreement is stated to be exclusive of VAT, then it means VAT should still be calculated at 15% and added to the amount of commission to be paid. Also ensure that this amount on the agreement corresponds with the amount in your instruction letter to the conveyancer to avoid any confusion.

Any changes to this clause should be in writing and signed by the seller and purchaser.

*(See also Chapter 1 on “Commission”)*

**Note 16**

*Stipulatio alteri* refers to the legal position of an agent when a contract is made between two other parties:

A *stipulation alteri* is in effect a complex/combination of two contracts:

1st. Between the promisee and the promisor, where the promisor agrees to keep an offer open to a third party.
2nd. The promisor and third party. This comes into existence when the third party accepts the offer the promisor has made to him/her.

Under the Roman Dutch Law, a third party to a contract (the agent) can acquire a benefit from a contract only if he/she has accepted it. The provisions of this clause are intended, by the sellers and the purchaser, to be a contract for the benefit of the agent (*stipulatio alteri*) which may be enforced by the agent, having been recorded and agreed that the agent has accepted the benefits thereof by his/her signature at the foot hereof.”
Note 17

The parties can only authorise the agent to display his/her boards if this is permitted by the relevant authorities. Authorities, like the City of Windhoek, promulgate outdoor advertising regulations applicable to agents and the display regulations regarding boards/signs (see “Outdoor Advertising Regulations in Chapter 6”)

Note 18

The law of contract and the law relating to breach of contract is a fairly specialised area of law. The following is a brief summary thereof:

No party who suffers from a breach of the contract by the other party is entitled to cancel the agreement and claim damages or claim specific performance without notifying that party of the breach and giving them the prescribed time, in terms of the contract, to remedy their own breach.

- **Cancellation:**
  Cancellation will only be granted when the breach is of a term of the contract that is sufficiently important to reach to its root. If the breach is of a minor clause, only specific performance or damages may be claimed. A delay in the performance of a party’s obligations is not usually something that goes to the root of a contract unless it is specifically agreed to do so.

- **Damages:**
  The aggrieved party can claim either restitutionary damages (from the word “restore”) to put him/her in the same position as before the breach or can claim for compensatory damages for the losses he/she may have suffered. A person claiming damages has to prove that he/she has indeed suffered loss as a direct result of the breach of the contract. Naturally damages are difficult to prove.

- **Performance:**
  In terms of performance, the aggrieved party may seek:
  1. An order to compel the defaulter to fulfil his/her side of the contract.
  2. To refuse to perform his/her side of the contract.
  3. A diminution of his/her own performance.

**Other possible Cancellation / Breach Clauses:**

a) In the event of cancellation of this agreement, the seller shall have *inter alia*, the following rights:
   i) To retain all amounts which the purchaser has already paid in terms of this agreement, including the deposit as “rouwkoop” and/or liquidated damages sustained by the seller; and
   ii) in addition to forfeiture of the deposit by the purchaser, to claim from the purchaser such damages as the seller may have sustained, should the amount of the deposit proof to be inadequate for this purpose; and
   iii) the purchaser shall vacate the property without delay, enabling the seller to obtain immediate repossession of the property.

b) Should the seller have to take steps against the purchaser pursuant to a breach by the purchaser, the seller shall be entitled to receive from the purchaser, payment of all the seller’s legal costs incurred on the scale between attorney and client, including tracing fees and collection commission paid by the seller to his/her attorneys.

c) If the purchaser disputes the seller’s right to cancel and/or remains in occupation of the property after cancellation or purported cancellation, the purchaser shall continue to pay interest and levies as herein provided in consideration of his/her continued occupation of the property.
d) In the event of cancellation of this agreement due to the seller’s breach of contract, the purchaser is entitled to be refunded with the amount of the deposit, as well as interest thereon.

**Note 19**

As explained in Rule 1 above, the sale of immovable property must be recorded in writing and signed by both parties. This also means that the amendment of any clauses should therefore also be in writing and signed by the parties to the contract. If this is not the case, these (oral) amendments will be of no force and effect.

They also agree that nothing else, other than what is specifically stated in the written document, has been agreed upon. In this way, neither of the parties can claim later on that there were “silent agreements to amend the agreement”; it is all in writing.

**Note 20**

A purchaser whose offer is not irrevocable can revoke that offer at any time prior to acceptance. If the seller rejects the purchaser’s offer, it immediately ceases to exist and cannot be accepted later. If a seller presents a counteroffer to the purchaser and the purchaser declines, the seller may not subsequently accept the original offer. However, a mere inquiry from the seller’s side to determine if the purchaser would consider making a better offer does not necessarily mean the original offer is rejected, and the seller can still accept the original offer if he/she does so before the time stipulated.

**Note 21**

Sometimes there are special conditions agreed upon. Space is often provided in written agreements for these special conditions to be concluded by the parties. Make sure to follow the guidelines which stipulate when these conditions and blank spaces should be initialled, and when not.

**Note 22**

The date of sale (agreement date) is the date on which the last signature was made on the agreement.

This date is important for it serves as the “base date” for suspensive conditions like obtaining a loan, guaranteeing due dates, and transferring duty payments (which must be paid within six months from date of sale).

Note that the general function of a witness to a document is to give evidence as to whether the signature is really that of the alleged person. Should a document or signature be disputed, the witness should be capable of giving evidence in a court. Therefore a witness must be older than 16 years, of sound mind and able to describe the circumstances of the signing to a court.
Other possible Contractual Clauses:

What are “options” and “pre-emptive rights”?

An option gives the optionee (one who may want to purchase) the right to purchase a certain property within a certain time, at a possible fixed price. An option obliges a seller to sell the property to the specific purchaser (optionee) if and when the option is exercised.

The Right of First Refusal gives the holder of that right (mostly municipalities, lessees or perhaps previous owners) a preference to purchase a particular property if the owner should decide to sell it. If the seller receives an acceptable offer from a prospective purchaser, he/she is obliged to first offer the property to the holder of the right of first refusal at the same price and conditions. The right of first refusal imposes no obligation on a seller, except the obligation to give the holder of the right the first opportunity to purchase.

Both an option and a right of first refusal must be in writing and signed by both parties.

Essential Difference:
In the case of an option, the owner/seller is compelled to sell if the option is exercised. In the case of right of first refusal, there are no obligations to sell; the only obligation is to give the holder the first opportunity to purchase should the owner/seller decide to sell.

Example of option:
The seller, Frankie Mouton, hereby gives Solomon Nangolo an option to purchase erf 2399 Eros Park, Windhoek, for N$ 900 000.00 (Nine Hundred Thousand Namibian Dollar). This option expires at midnight on 31 December 2008.

Typical wording for a right of first refusal:
The lessee has a right of first refusal to purchase the leased property upon expiry of the lease. If the lessor intends to sell his/her property at that stage, he/she must first inform the lessee and invite him/her to make a written Offer to Purchase the property.

What are “Jurisdiction Clauses”?

For the purpose of resolving disputes (in a cheaper and less complicated way) that may arise between the parties, a clause is often added to an agreement stating that the party instituting legal action may do so in a Magistrate’s Court (as opposed to the High Court under which the jurisdiction will normally fall) if he/she wishes. This is mostly done because it could be less expensive for the parties involved and also to speed up the procedures to resolve the dispute. Express agreement is required to do so, because the law in Namibia states that when someone wants to institute legal action in a dispute that involves a claim of more than N$ 20 000.00, the claim must be brought to the High Court, unless the parties agree otherwise.
**Typical wording of a Jurisdiction Clause:**

The parties hereby consent to the jurisdiction of the Magistrate’s Court otherwise having jurisdiction under Section 28 of the Magistrate’s Court Act, 32 of 1944, notwithstanding that such proceedings are otherwise beyond its jurisdiction.

This clause shall be deemed to constitute the required written consent conferring jurisdiction upon the said court pursuant to Section 45 of the Magistrate’s Court Act, 32 of 1944 or any amendment thereof. Provided that the seller shall have the right at the seller's sole option and discretion to institute proceedings in any other competent court in respect of any claim which, but for the foregoing, would exceed the jurisdiction of the Magistrate’s Court.

**Note:**
People are increasingly resorting to alternative dispute-resolution methods, such as arbitration or mediation. It is therefore possible for an agreement to state that the parties must resolve issues in such a matter and that the outcome of the arbitration or mediation would be final.

**Note on Lease Agreements:**

This guide does not deal specifically with lease agreements. Should you wish to obtain specific information regarding lease agreements, necessary stamps, tenant deposits, defects and maintenance, termination of leases it is probably best to consult a legal practitioner.

**Keep the following in mind:**
- For a lease agreement, the basic contractual formalities are applicable.
- Rental matters in Namibia are governed by the Rent Ordinance of 1977.
- The common law a duty to mitigate losses upon the landlord where the tenant is in breach can be excluded in the lease agreement.
- In case of lease of a business premise, the rent ordinance has specifications that must be followed strictly regarding the notice period which can only be amended by separate addendum to the lease agreement. This differs substantially from notice periods of ordinary residential properties.

**Automatic Rent Interdict**
In terms of our law, the Landlord has a special protection assisting in the collection of arrear rental from tenants, which is called the "Landlord’s Hypothec". The hypothec allows the Landlord to sell the movable goods of the tenant (and in certain instances movables of a third party) which are on the leased premises, if the tenant fails to pay the rent.

The hypothec exists from the date of the tenant's occupation of the leased premises, but becomes legally enforceable once a Court Order (rent interdict summons) is obtained. Therefore, prior to a Court Order being obtained, the tenant is free to remove the movable goods from the premises at any time.

The Landlord may also bring the hypothec into effect by interdicting the tenant from removing goods from the premises. Ones the summons is obtained attachment of the moveable goods can be made even if those items are stored at another location.
Chapter 4

Succeeding with Sales

To become a well informed property professional you need to continuously develop your skills. This is what this chapter is all about; to give you the sharp edge you need to become the first choice agent in the industry.

4.1. Land Use Control

4.2. Ownership and Contractual Capacity
   (Including Natural and Legal Entities)

4.3. Sectional Titles

4.4. Conventional Deed of Transfer / Title Deed

4.5. Agricultural Land
4.1. Land Use Control

Introduction

Land is used for a variety of purposes. A professional and responsible agent needs to have a basic understanding of Land Use Control to be in a position to respond correctly to those queries. While flats and houses are examples of residential use, office blocks and shopping centres indicate commercial use. Factories and plants are zoned (declared/marked) for industrial use, while churches are zoned for religious purposes and schools for educational purposes.

The authorities in the various regions of Namibia have very specific rules about land use and development in their areas.

Municipalities/Local Authority

In Namibia we have 37 local authorities, 16 municipalities, 10 towns and 11 villages.

Regional councils:

The functions, duties and responsibilities of regional councils in the land and housing delivery process are defined in the National Housing Development Act. These include:

- Reporting of problems to the Ministry of Regional & Local Government & Housing (MRLGH) concerning housing.
- Preparation of regional housing policies.
- Increasing and sustaining regional land and housing development, especially in neglected rural areas.
- Acting as the supervisor of village councils and settlement areas with regard to housing as contemplated in the National Housing and Development Act.

Municipalities:

A municipality is a legal body with its own assets and consists of proclaimed town and extensions. All municipalities have an organised and formal administrative structure, performing the functions of a local authority. Administratively they are divided into departments of general administration, finance, health and engineering.

Taxes are being levied to ensure the following services: water supply; provision of systems of sewerage and drainage; collection of garbage; construction and maintenance of streets and public places like gardens and parks; supply of electricity; facilitating housing developments; and last but not least, to subsidise the City Police, emergency services and traffic departments where applicable.

They are, in principle, independent from higher authorities, both administratively and financially. The main sources of income for municipalities come from local rates, charges and fees from provision of urban services (water, electricity and sewerage), as well as the sales and taxation of land. The government contributes to their finances in the form of loans for development purposes and subsidies on streets, traffic control and fire brigades.

With ever increasing numbers, the city of Windhoek consist of an estimate population of around 233,600 000 people. With a steady influx of people to Windhoek, especially to the informal parts of Katutura, the costs for development of urban services are likely to be considerable in the future.
Municipal Property Information System is accessible via the Internet.

www.windhoekcc.org.na

The above website contains useful information such as erf size, municipal valuation of land and improvements, erf dimensions, contours compiled from aerial photography, orthophotos generated from the same photography, updates surrounding erf descriptions and much more. Note however that legal sizes and dimensions should always be verified at the Deeds Registry or at the Surveyor General's office.

Towns and Villages:

Towns and villages are proclaimed and surveyed in accordance with the procedures laid down in the Townships and Division of Land Ordinance (1963). Some towns in communal areas have been proclaimed as municipalities since independence, which allows them to generate additional income through charges for water, electricity, sewerage and rent on the use of land. Most towns are not self-supporting and rely on central government to cover salaries and some maintenance costs.

Settlement Areas:

Settlement Areas are created by Regional Authorities when they are of the opinion that provision should be made for management, control and regulation of matters pertaining to the health and welfare of the inhabitants of the designated area. The boundaries are determined by the Regional Authority and proclaimed in the Government Gazette. Settlement areas are managed by the Regional Council as such areas are local authority areas.

By proclamation of land as a Settlement Area, it is withdrawn from Agricultural Land and no legislation pertaining to Agricultural Land is applicable any more.

Land Use Control

Sometimes we have to look further than we see to realise the true value and potential of property. A prospective purchaser will often ask an agent for information regarding the usage or potential usage of a property he/she is interested in or perhaps neighbouring to the property he/she wants to purchase. Because our population expands, more and more land is developed. Land Use Control is the way that Authorities control the use of land and new developments in different areas. Town planning regulations and laws as well as environmental laws exist to ensure the orderly change and responsible development of land. To control the use of land the authorities make use of four basic guidelines:

1. Title Deed Restrictions
2. Guide Plans
3. Structure / Development Plan
4. Town Planning Schemes
5. Policy Areas

Agents should take note of the different land use control elements. For example, if the Title Deed does not have any restrictions, it does not mean one can go ahead and develop on the property. As can be seen from the above, the variables in land use control are vast. Even with a broad knowledge on these aspects no agent can categorically give assurances to a client in respect of land use. It is best to
consult with the applicable professional - either the town planners/land surveyor, attorney or municipality – to check for relevant town planning schemes and other information. It is sometimes regarded that a town planning scheme even overrides a title deed.

**Title Deed Restrictions**

Restrictive conditions of title are by far the most important conditions on a piece of land. These are conditions that are registered against the title deeds of erven within a proclaimed township which restrict the use in a particular manner. Such restrictive conditions could include:

- Conditions relating to the use to which the stands may be put.
- Prohibiting the subdivision of property or the erection of a building unless it complies with certain requirements (e.g. that it must have a specific type of roof).
- The sale of property may also be restricted in terms of the provision of a will, for example when a parent bequeaths a property to his/her child on the basis that the property may not be sold before the child has reached a certain age. It could also be because of a pre-emptive right granted to the previous owner. Therefore it is always good to consult the Title Deed for those possible restrictive conditions.
- Conditions in favour of the local authority to gain access to provide services or restrictions against growing certain trees on the property. It may also include conditions regarding the design of all structures and buildings to be erected as well as a time frame for doing so.

Applications for the removal of Title Deed restrictions are normally dealt with, on behalf of the property owner, by an attorney and/or town planner. This could involve a variety of options including court orders or notorial agreements to be registered against the title deed.

**Guide Plans**

Local Authority plans that indicate future developments and land use patterns in general for a specific region. These guide plans specify areas within that region that will cater for industrial development, township establishment, farmland, recreation, etc.

A property may not be utilized by the owner/potential owner for any purposes contrary to the guide plan.

**Structure / Development Plan**

Bigger Local Authorities in Namibia usually have their own master plans that lay out specific development and/or land use patterns, e.g. business (shops) or residential purposes.

**Town Planning Schemes**

Every local authority should have a town planning scheme. For instance, the Windhoek Town Planning Scheme has been constituted and promulgated in order to promote harmonious and orderly development for the urban area and regulates how a particular portion of land within the urban area of the scheme may be used. It further enhances the quality of life of residents as a town planning scheme is also used to regulate services such as the protection of public health, safety and welfare. Town Planning Schemes will contain the following basic information:
1. Scheme Map
A scheme map restricts the erven within an area to use specific zones. Thus it specifies the purposes for which buildings may be erected and used, for example, residential, commercial, special, municipal, agricultural, open spaces, etc.

2. Scheme Clauses
By utilizing the following methods of control in scheme maps, the usage of a property by its owner is limited:

- **Density Zones**: All residential zones have a density zoning and there are no “bulk factor” applicable. The density zones informs a property owner of the number of dwellings that may be erected on a property (or a neighbouring property), or a minimum erf size that is required for a house. No building shall be so erected that the number of dwelling houses and units on an erf exceeds the number specified in the density zoning for that erf.
- **Floor Area Rations**: The total floor space that may be built on a property.
- **Height**: The number of storeys that are permitted on a property.
- **Coverage**: The amount of land that may be covered by the buildings.
- **Building Restriction Areas**: The distance from the street boundary, or the distance from the side and rear boundaries that may not be built upon. Commonly referred to as building lines.
- **Parking**: The number of parking bays required in developments.
- **Bulk Zones**: The intensity of development on non-residential zoned property is guided by the bulk factor. The bulk factor for any development is the ratio of the built floor area to the erf area. The bulk factor indicated on the Scheme Map is the maximum to which any building may be erected.

Consent uses:
The City Council may consent to minor and ancillary activities additional to the primary rights. These are called “consent uses”. For instance, permission may be given for a noxious industry to be located in an “industry” zone or a small industry in a “business” zone provided certain safety conditions are met. Conditions to protect the local environment are usually included when granting a consent use and special Council policies may apply.

Rezoning
Changes in zoning are usually caused by changes and needs in the external environment. Many of the changes are anticipated and Council has prepared policies to meet the anticipated new circumstances. Council is further required to submit proposed amendments to the Ministry of Regional and Local Government and Housing for approval. In case of rezoning, the necessary application by the owner must be submitted through a Town and Regional Planning consultant to the Council.

The success of an application depends on the following:

- Town Planning Scheme
- Structure/Development plan
- The need for rezoning: Can the proposal be motivated on grounds of change in the environment?
- The desirability of rezoning: Will the new zoning community? The comments of neighbours and other likely affected parties will be obtained.
- The environmental impact of rezoning
- The precedent set by rezoning it
- The opportunities/restrictions relating to the property
- Acceptability of proposal to adjacent residents and civic associations
- The impact of the Environmental Management Act
**Betterment Fees:**

In terms of Section 34 of the Town Planning Ordinance a local authority is entitled to recover “betterment” where by the coming into operation of any provision contained in a scheme, or by the execution by a responsible authority of any work under a scheme, any property is increased in value. Betterment may be recovered from the person whose property is so increased in value by an amount not exceeding seventy five percent, of the amount of that increase.

**Sub-divisions & Consolidations:**

Our law states that every piece of surveyed land must be depicted on a diagram. How do we define a piece of land and what is a diagram?

Picture a cake. To help yourself to a piece of cake you need to take a knife and cut off a slice. The slice on your plate is a piece and the rest of the cake is the remains. In conveyancing terms the slice is called a ‘portion’ and the rest (what remains after the portion is removed) is called the “remainder”.

Land, being immovable, cannot be separated into pieces or afterwards be “put back” with the remains. Physical separation is not possible, but a symbolic separation can be made by drawing a map of the piece of land in question.

Our law makes provisions for two types of “maps” in conveyancing and land surveyor terms:

1. **Diagram:** An A4 size document which is drawn up by a surveyor and is then submitted to the Surveyor General for approval, and which shows the boundaries and beacons of a property. A diagram depicts a small portion/s of land. It could, for example, be a subdivision diagram on which a single farm, plot or erf is shown. It could be a consolidation diagram on which a single consolidation property is shown or perhaps a servitude diagram showing the specific servitude dimensions.

2. **General Plan:** A combination of diagrams on a single large sheet of paper on which more than one property is shown. A general plan indicates a large number of properties which are the product of a large scale subdivision of land for instance a township development scheme where an entire new township is laid out.

Our “mapping” is called the Cadaster system and forms the foundation of our registration system. It basically means that all dealings with land require either a diagram or a general plan. All properties can be “plotted” precisely through a system that indicates the name, location and extent of the property. The system relating to the survey of land and the system of deeds registration are inter-dependent on one another for their existence, maintenance and effectiveness.

For both subdivisions and consolidations, a land surveyor is required to draw up a diagram under the Land Survey Act 33 of 1993, submit it to the Surveyor General’s office and supply the client with an approved diagram once approved. The application would also include application to the local authority service division and town planning. Approval is dependent on approval granted by the Townships Board. The original approval and approved diagrams (2 copies) are required for registration purposes. From then on, registration in the Deeds Registry is handled by a conveyancer. It is advisable to consult with a town planner and/or land surveyor when dealing with either subdivisions or consolidations.

**Sub-division:**

It is not possible for an owner to sell parts or a portion of land to different people unless it has been subdivided. The process of “chopping off” a piece of land from other land is called sub-division. This generally involves subdividing a property into two or more parts to obtain separate titles. In the case of the subdivision of a portion of land into a number of portions, the land surveyor prepares a general plan.
instead of individual diagrams. The owner will then be entitled to mortgage, lease or register other rights separately over the new portions.

As in the case of consolidations, application to the appropriate local town planning authority can be done by the owner or any appointed person and needs to be accompanied by supporting documentation. Once this application is approved, an application to the Townships Board with all required supportive documentation must be done.

Upon approval, a Subdivision Certificate will be issued by the Ministry of Local Government and Housing. Once approval is granted a land surveyor is instructed to draw a diagram to be submitted to the office of the Surveyor General. The Surveyor General approves the diagram and gives it a registered SG number. The owner can now instruct a conveyancer to draw up the transfer documents and deal with applicable bonds over the property. Each time a first title is being registered in respect of a piece of land, the diagram must be lodged together with the title.

**Sub-division Options:**

Having considered the basic environment and neighbourhood and the likelihood of being able to subdivide, clients have several options:

1. Subdivide the land, keep their house and sell off the plot or plots.
2. Subdivide the land, keep their house and build on one of the plots.
3. Subdivide the land, keep their house and build another house or flats on the property to yield a regular rental income.
4. Demolish the house and sell off the plots.
5. Demolish the house and develop the land into a cluster, townhouses or a block of flats.

**Consolidation:**

Consolidation takes place when two or more bordering properties are joined together to form one larger piece of property.

These properties must have the same zoning and be:

1. contiguous to each other;
2. owned by the same person, or by two or more persons holding the same undivided shares in each piece of land;
3. registered in the same property register; (erf, farm or sectional title)
4. situated in the same administrative and registration division.

Conveyancers and land surveyors need to follow strict guidelines regarding the necessary consent and approvals from authorities in respect of conditions and servitudes to be registered on a newly consolidated property.

**All surveyed land belongs to what is commonly referred to as a “Register”. There are three main property registers at the Deeds Registry:**

- Erf Register (municipalities, towns or villages)
- Sectional Title Register
- Farm Register

**Erf Register:**

Erven in this register are grouped according to townships, e.g. Windhoek, Klein Windhoek, Olympia, etc. One cannot move an erf from one township to another, which implies that one cannot consolidate
two adjacent erven in different townships, nor can one consolidate a part or portion of land situated in one township with a full/portion of erf in another township (or register). It is however possible within different extensions within the same township.

**Sectional Title Register:**

Erven are moved from the erf register to this register once the sectional title scheme is created and approved. One can subdivide land from a sectional title and have it as an erf again, provided that the number of sections are still in line with the zoning and, furthermore, that factors such as the bulk factor, etc. (building conditions) are met. Further note that it is possible to subdivide units but not to consolidate them.

**Farm Register:**

A register of farms in Namibia exists at the Deeds Registry. Registered information regarding the size and ownership of farms can be obtained from the Farm Register.

The subdivision of Agricultural Land Act, 70 of 1970 controls farm surveys and prevents agricultural land from being subdivided to smaller than a minimum economical size. With the necessary consent and providing it is possible, farm surveys can involve subdividing of a farm into two or more parts. Generally the original owner will retain the portion known as the “remainder”. The Surveyor General’s Office will allocate a portion number to the new part.

For farm subdivisions smaller than 25 ha, applications must be made to the Namibian Planning Advisory Board (NAMPAB).

**Land situated inside a proclaimed township or settlement area** is referred to on diagrams and applications as “farms” or portions thereof, but it differs from agricultural land in the sense that it has other rights. NAMPAB deals with applications relating to the subdivision of such land. Should a portion of such land be consolidated with an erf in an existing township, such a portion of land is surveyed as a portion of the relevant farm, then incorporated into the township as an erf and then consolidated. Land in settlement areas is not subject to agricultural acts.

**Township Establishment:**

Where a developer/investor wishes to allocate land for the purpose of establishing a Township, the following procedure needs to follow:

- Obtain approval from the relevant local authority. Application for the need and desirability of the proposed township must be made to NAMPAB.
- After approval by NAMPAB, applications must also be submitted to the Townships Board.
- A surveyor does the survey and subdivides the erven. This is then indicated on the draft of a general plan.
- This draft plan must be submitted and approved by the surveyor general who allocates a number thereto.
- Finally, application to the Registrar of Deeds for registration of the general plan and opening of a Township register.

A clear distinction should be drawn between a township laid out on the whole of a piece of land (that is land forming a unit under one title deed and on one diagram), and on a township laid out on only a portion of a piece of land. Different procedures are applicable to each of them.
On Real Rights, Personal Rights and Servitudes

**Personal Right**
A right between two persons, which is only binding and enforceable between those two persons.

(Not all personal rights are capable of being registered in the Deeds Registry.)

**Real Right**
- A Real Right now refers to a person’s right to do something or to prevent something from being done with that land.
- It can therefore also limit your ownership by giving rights to other regarding your property.

Upon Registration in the Deeds Registry a Personal Right becomes a Real Right, which is a strong right in relation to things and can be enforced against the whole world as opposed to just one or two individuals.

Practically: Servitude is a real right belonging to “A” in the property of “B”, entitling “A” to:
- exercise some right or benefit in the property of “B” (a burden upon the property of “B”); or
- to prohibit “B” from exercising any of his/her normal rights of ownership.

**The Two Types of Real Rights (Servitudes):**

1. **Praedial Real Right (servitudes):** A registered servitude which one property has over another. It is thus not a servitude in favour of another “person” but in favour of another piece of land.
   Praedial Servitudes are divided into rural and urban servitudes and as there is no legal significance in this distinction; certain servitudes may be both rural as well as urban.

   **Examples**
   **Rural servitudes:** “right of way”, “water pipe line”, to “conduct electricity”, and “way of necessity”.
   **Urban servitudes are:** “right to encroach”, “light or view”, “support or projection” and “urban servitude of water flow”.

2. **Personal Real Right (Servitudes):** Personal servitudes are established in favour of particular persons over specific land and may confer a variety of benefits on their holders. They may be constituted for a fixed term of years or be granted until the happening of a future event or for the lifetime of the beneficiary, but not beyond his/her death.

   **Examples are:**
   **Usufruct (Vruggebruik):** A usufruct may be defined as a real right in terms of which the owner of a thing (often referred to as the grantor) confers on the “usufructuary” the right to use and enjoy the land to which the usufruct relates. A usufruct may be constituted over a collection of things such as a herd of cattle or flock of sheep and even over the entire estate of the grantor. It furthermore extends to the accessories of the thing that is subject thereto. A usufruct over a farm, for example, will normally extend not only to all buildings but presumably also to the livestock, farming equipment and the furniture in the homestead, provided of course a contrary intention does not appear from the will or agreement, as the case may be.
   As the usufructuary is only entitled to the use and enjoyment of the property, he/she does not acquire the ownership over it, though he/she is of course entitled to its possession. The usufructuary has no entitlement to consume and destroy the thing and is obliged to preserve its substance. But he/she has the right to take, consume or alienate its fruits, whether they are natural, industrial or civil. The obligation to preserve the substance of the property means that the usufructuary is bound to maintain it and to defray the costs of all current repairs necessary to keep it in good order and condition, fair wear and tear only excepted, and all rates and taxes.
As the usufructuary is not the owner of the property that is the subject matter of his/her right, he/she cannot alienate or encumber it. Nor may he/she alienate the real right of usufruct as a personal servitude is inseparably linked to its holder.

**Use:** A servitude of use resembles a usufruct, but the holder’s rights are far more restricted. He/she may possess and use the thing to which the right relates if it is an immovable and occupy it together with his/her family and visitors if it relates to land. The holder may take the fruits of the thing for his/her daily needs as well as for the daily needs of his/her household, but nothing in excess of that. The holder cannot sell any fruits. Nor may he/she grant a lease in respect of a building, though this rule is subject to a number of exceptions. His/her use must be without detriment to the substance of the property and he/she may be required to give security for the due fulfilment of his/her obligations.

**Habitatio:** the servitude of *habitatio* confers on its holder the right to dwell in the house of another together with his/her family without detriment to the substance of the property. Unlike a servitude of use, it carries with it the right to grant a lease or sublease to others.

**Creation of servitudes:**
Until a right is registered it remains only a contractual right where the one party to the contract may claim performance by the other. Before registration it would therefore not be maintainable against *bona fide* third parties. Only once the right is registered will it be maintainable against the world at large. Registration either takes place by means of a reservation in a deed of transfer, in the circumstances envisaged in section 67 of the Deeds Registries Act 47 of 1937, or by the registration of a notarial deed accompanied by an appropriate endorsement against the title deed of the property, in respect of which the servitude is granted.

**Cancellation of servitudes:**
Both praedial and personal servitudes can be cancelled by notarial agreement between the owner of land encumbered by the servitude and the holder of the servitude by Bilateral Notarial Deed of Cancellation or Unilateral Notarial Deed of Cancellation, if no obligation is imposed. A personal servitude also lapses where it is granted for a specific period only or on the death of the holder of the servitude.

**Cession of servitudes:**
While ownership of immovable property “changes hands” by means of registration; the word “cession” refers to the “transfer of rights” (intangibles) which is held under a Title Deed from one person to another. Cession (such as the cession of a mortgage bond or servitude) is therefore the transfer (verb) of these rights and not the contract or document.

Cession may be preceded by an obligatory agreement which is sometimes embodied in the same document. However, (1) agreement and (2) transfer document, and their consequences should be clearly distinguished. The first is the obligatory agreement between the cedent and the cessionary in terms of which the cedent undertakes to cede the right to the cessionary. This obliges the cedent to transfer the right, but does not affect the transfer. The second document, which is lodged at the Deeds Registry, actually affects transfer of the right from one estate (entity or person) to another.

Although statutory provisions seem to be against the cession of the common law servitudes of usufruct, *usus* and *habitatio*, as provided for in section 66 of the Deeds Registries act 47 of 1937, it seems to be an inherent right of an owner of a servient tenement to agree to the cession of that servitude to someone other than the holder. Depending on the nature of the rights under a particular servitude and the terms upon which it was created, these rights could in fact be transferred/ceded to a third person, provided the servitudes are clearly worded or it can be derived from their contents that this is the intention of the parties involved.
Agents should take note of servitudes for several reasons.

Value of properties can be affected (increased or decreased) because of servitudes and purchasers will have to respect servitudes registered over their new property. That is also the reason why some contracts state that “the property is sold subject to all conditions and servitudes recorded in the title deed of the property”. It is clear that servitudes and restrictive conditions of title can have certain economic implications. Always advise purchasers about the possibilities of servitudes being registered against or in favour of the property.

*(See Chapter 4.4 on Title Deed investigation.)*

Always advise prospective clients if the title deed was not examined and do not assure them that there are no servitudes registered if that is not the case. The best will be to consult a conveyancer for a Title Deed investigation in the Deeds Registry. A sale can also be made subject to the condition that there are no servitudes registered over the property.

Also take note that servitudes can be cancelled by consent from the holder of the servitude and agreement with the property owner.

In Namibia, minerals and rights thereto belong to the State and not to the owner of the property.

**Note on Beacon Replacements or Boundary verifications:**

Boundaries are defined by physical beacons demarcated on the ground. Sometimes beacons are destroyed, moved or covered by construction or other reasons. Beacon relocation and verifying their position is a common job for land survey firms. A boundary wall or fence is thus not necessarily the “legal boundary”. Estate agents should always be careful not to point out existing walls and fences as the boundaries. It is possible to obtain a beacon certificate which states that the boundary beacons are correct.

### 4.2. Ownership and Contractual Capacity

As a professional estate agent, the public would expect you to advise a purchaser on the basis of the most suitable form of ownership for a particular property. In Namibia we do not have a graded system of ownership. True ownership is ownership and it is fair to say that there is only one “strength” of ownership in our country and that property owners all have the same bundle of rights regarding their properties.

**Freehold versus Leasehold**

When it is said that a property is freehold, it means that it is capable of being privately owned, that the owner owns the land and is free to deal with it as the law of ownership allows.

Leasehold property implies a lesser right; something like qualified, limited ownership. One “owns” the land, but only for a limited duration, for example 99 years. After that period of time expires, the land reverts to the owner, usually the authorities such as the municipality or the state.

Today most leasehold rights are being converted into freehold rights at a steady pace. This is not a fast-moving process, as in most of these areas where these leasehold rights were granted, lands were not initially surveyed and no diagrams or proper general plans exist for the stands.
Ownership and contractual capacity in general

**Article 16 (1)** of the Namibian Constitution guarantees all persons the right to acquire, own and dispose of all forms of property in any part of Namibia.

**Art. 10 (1):** “All persons shall be equal before the law.”

**Art. 14** provides for equal rights to men and women on dissolution of marriage

The content of ownership is usually described as the capacity to possess, use, enjoy, dispose and destroy the land. Because ownership is regarded as such a strong right it is sometimes called an “absolute” right, meaning other people are not permitted to interfere with that right.

Although Article 16 (1) guarantees the right of ownership, one must not lose sight of the fact that the guarantee of ownership is based on the application of the law by Government, courts and conveyancers, as well as the offices of the Surveyor General and the Registrar of Deeds. We also have to realise that the right to own is not absolute and limited. We will now look at the different forms ownership and what may inhibit one’s right to freely own and dispose of property in Namibia and in what way our law is being reconciled with the Constitution.

To protect the public interest our law places limitations on the absolute nature of ownership of immovable property. The ability of a person to enter into agreements that will be recognized as valid and enforceable in the law is called a person’s “contractual capacity”. Certain legal factors/circumstances exist which have the effect of limiting a person’s contractual capacity. With natural persons it could be the fact that they are still minors, or perhaps because of marital status, mental capacity or solvency. While with juristic persons and entities (companies, CCs, trusts) it could be founding statements, representatives or transactions not duly authorised or perhaps limitations on management.

The purpose of the following is to help you to identify and understand the following:

- The distinction between natural persons and entities.
- The factors that may influence a natural person’s ability to conclude a valid contract.
- The practical relevance of the legal nature of a client.

**Marriages in Namibia:**

The marriage status of a person has a direct influence on his/her capacity to conclude a contract and his/her ability to acquire and dispose of immovable property. Marriage law is a legal field with direct property and conveyancing implications. Therefore the Deeds Registries Act in section 17 (2) requires that a person must be described as married or unmarried, and if married whether the marriage is in or out of community of property, a marriage governed by the Recognition of certain marriages act, or a marriage governed by the laws of any country other than Namibia.

- **Unmarried Clients**

  An unmarried person may generally make decisions that have legal implications and may conclude contracts without having to consult a spouse or anyone else.

  However, it is helpful to distinguish between clients (sellers) that have never been married before and those who were married previously and are now divorced. The latter one is obviously complicated.

  If a person acquired property while he/she was still unmarried and then got married in community of property, the spouse automatically became owner of a half share in the joint
estate. Suppose they got divorced and the court awards the property to the spouse. The original owner is upset with the outcome of the disputes and subsequent developments and decided to sell the property. The sale will not be valid if the consent of the spouse is not obtained.

- **Marriages In Community of Property:**

  In Namibia, the Married Persons Equality Act was passed so that women married in community of property can now register property in their own names. The Matrimonial Property Act abolished the marital power husbands had over their spouses. According to Section 14 of the act, couples who are in a civil community of property marriage now have equal rights over their joint property. If persons who are married in community of property purchase immovable property, the property will be registered in both their names.

  According to Section 15, written consent is required from both spouses when dealing with the immovable property of the joint estate. Therefore, with husbands and wives having identical powers and restraints, they are required to consult each other on all major transactions like sales, mortgage bonds, servitudes or real rights regarding the property. An agreement of sale would therefore not be binding until the other spouse has signed.

  If either spouse withholds a transaction unreasonably, there are avenues of redress. Where either husband or wife ignore the requirement of consent, the wronged spouse can, in theory, seek recourse during the existence of the marriage as well as upon its dissolution.

  An exception to the requirement of consent is when a transaction is concluded in the ordinary course of a spouse’s business, trade or profession. Although the spouse dealing with his/her business activities may sign the sales agreement on his/her own, the transfer documents would still need the consent of the other spouse.

  One spouse does not need the consent of the other to award a mandate to an estate agent, even if the property forms part of a joint estate. The other spouse cannot award a similar mandate to another agent, or contest the sales commission agreed to in the original mandate.

  **The concept of “Joint Estate”:**

  The concept of a joint estate should not be confused with joint ownership which is discussed later on. A joint estate refers to the estate of two people who got married in community of property and, by law, their assets are pooled together and they become owners (each of an undivided half share) of the joint estate.

- **Married with Antenuptial Contract (Out of Community of Property):**

  Marriages governed by the “common law” are all automatically regarded to be “In community of Property”. Parties who wish to be married “Out of Community of Property” must enter into a contract known as an Antenuptial Contract, **before** the marriage ceremony. This contract is signed before a notary and subsequently registered in the Deeds Registry. Records of Antenuptial Contracts are kept at the Deeds Registry. Persons married Out of Community of Property should also retain their original Antenuptial Contract for future use and reference.

  Marriages Out of Community of Property keep each party’s debts and assets separate and on dissolution; each takes their portion. If the marriage is Out of Community of Property, the abolition of marital power means that husband and wife each control their own separate estate (property) independently from the other, and may generally conclude contracts that relate to assets in his/her own estate without having to consult the other spouse. In such a case the
property will only be registered in his/her name. Persons married Out of Community of Property may also decide to acquire property jointly (in half undivided shares).

**Thus:**
No Antenuptial Contract: In community of property; joint Estate; limited Capacity to act.
Married with an Antenuptial Contract: Out of Community of Property, two separate estates, each has full capacity to act with his/her estate and property.

**Married Out of Community of property in South Africa:** Recognition in Namibia to marriages entered into in South Africa can only be recognized as such if indeed registered as such in our Deeds Registry within six months after the marriage was entered into.

- **Walvis Bay Marriages:**
  All marriages contracted before 1 March 1994 where the husband was domiciled in Walvis Bay, are regarded as foreign marriages.

  **Therefore,** couples who were married in Walvis Bay before 1st March 1994 should be duly assisted by their spouses to enter into property transactions.

- **Civil/Customary Marriages:**
  If parties are spouses in a customary marriage, the law prescribes the legal position with reference to the facts of that particular marriage.

  The default position on civil marital property is different for some Namibians. The Native Administration Proclamation 15 of 1928, part of which is still in force, makes a rule for civil marriages between black persons north of the old Police Zone that took place on or after 1 August 1950. These (red-line) marriages are automatically out of community of property, unless a declaration establishing another property regime was made to the marriage officer one month before the marriage took place. In Title Deeds it is described as: "a marriage that does not have the legal consequences of a marriage in community of property by virtue of the provisions of Proclamation 15 of 1928."

  Customary marriages are regulated primarily by unwritten customary laws that differ from community to community. For example, in Herero communities, civil marriages are usually technically in community of property, while a husband and wife have separate movable property in terms of customary law.

  **It seems not to be uncommon, in regions other than the Caprivi, for a couple to marry in terms of both civil and customary law and to rely upon different legal and social norms, depending on the situation at hand.**

  The property arrangements applying to customary marriage are determined solely by customary law. In matrilineal communities, such as the Ovamboland and Okavango communities, the custom is that spouses have some control over their own individual property regarding marriage, divorce and inheritance issues. Matriliniality and matrilocality determine the laws of inheritance and succession, as well as post-marital residence.

  In customary practices, in matrilineal as well as patrilineal systems, wives need the consent of their husbands for some property transactions, but husbands do not need the consent of their wives. In addition, under the matrilineal system, immovable property such as houses tend to be
treated under such customary law as “male property”, regardless of which spouse actually acquired them.

- **Swapo Family Act Marriages:**

  According to “The Recognition of Certain Marriages Act, Act 18 of 1991”, marriages according to the Swapo Family Act has the legal right of a marriage in community of property.

- **Divorce matters:**

  Divorce proceedings can cause some of the most difficult problems confronting estate agents and conveyancers. Those couples who were married in community of property are often the most at risk. A difficult situation that arises regularly for agents comes about when one of the divorcing pair decides to buy a new home before the divorce is finalised. In these circumstances, the new house is in fact jointly owned by the husband and wife and forms part of the joint estate and has to be registered as such. It is, therefore, absolutely essential not to buy before the legalities of the divorce are completed. The alternative to avoid this is to make the new purchase part of the settlement agreement. However, it is much easier to simply wait until proceedings are completed.

  The pain of a divorce is often exacerbated by the couple refusing to cooperate on the selling of their existing home, e.g. by holding back on signing documents (the signatures of both parties married in community of property are required until the divorce goes through) or by quarrelling about the price. Buyers then sometimes exploit the disagreement and play one partner off against the other. This in turn results in delays which may well cause genuine buyers to go elsewhere and a lower price to be achieved for the house.

  When dealing with a divorced couple as sellers, depending on whose name the property is registered in (both, equal shares, married in community of property or out of community of property, etc.), will determine who needs to sign the sales agreement and subsequent transferring agreements.

- **Religious Marriages**

  People who are partners in a religious marriage (example hindus or Moslems) not concluded in terms of Namibian law are considered to have a valid marriage but some contractual capabilities of spouses as well as other proprietary consequences are governed by the religious laws concerned and not by our civil law. Thus for those parties who have chosen to have a different system of law governing their union, it is also acknowledged by our land registration system as such. The consent of a spouse married in terms of religious rites is not required for entering into a property transaction and a person’s capacity to deal with property registered in his or her name is not limited.

- **Foreign Marriages:**

  As Namibia is such a popular destination for international investors and house hunters, it is impossible for the Deeds Registry, conveyancers and agents to know whether the laws of the particular foreign country require assistance from the other spouse when dealing with immovable property. To be on the safe side, our law states this: The laws of that country will dictate the rights of the respective spouses in relation to any immovable property they own, even if that property is situated in Namibia.
The general rule to stick with: A person, who has entered into a marriage (the legal consequences of which are governed according to the laws of foreign countries, including Germany, Angola and South Africa) should be assisted by their spouses to enter into property transactions. There are some exceptions to this rule and should it not be possible for both spouses to sign, it is best to discuss this with the appointed conveyancer.

Most often the sales agreement is signed only by one spouse. However, both spouses should sign the agreement as well as transfer documents like the Power of Attorney to pass transfer (sellers) or register a bond (purchasers), which is lodged at the Deeds Registry. This assistance by the spouse will also be necessary in other bond documentation as required by the banks.

Other limitations:

Namibian citizens, residents, non-residents and foreign nationals:

All countries have finite resources when it comes to food, water, basic services and job opportunities. The Namibian Constitution recognises the right for all persons to acquire, own and dispose of all forms of immovable and movable property in any part of Namibia. However, to protect the right of our citizens, Namibia, like other countries, has complex laws regulating people’s access to enter and stay in our country. Only a brief outline is given here:

The Immigration Control Act further prohibits the selling or letting of immovable property to illegal immigrants. One needs permission to reside in Namibia and it is illegal to enter or stay here without proper permission. “Foreign national” is, in general, the term we use to describe a person who is neither a Namibian citizen, nor a holder of a resident status. Temporary or permanent resident permits may be issued to foreign nationals and agents need to examine these classes of permits before entering into any transaction regarding immovable property.

The Namibian ID card is probably the safest and best way to prove that someone is a Namibian citizen. Without proof you really have no way to know whether such a person is really permitted by the authorities to reside here.

From a conveyancing perspective, once official permits provide resident status, citizens and residents of Namibia are generally regarded as having equal status with the important exception of agricultural land. The Agricultural Land Reformed Act prohibits foreign nationals to enter into any agreement regarding the right to occupy or possess agricultural land or a portion thereof in Namibia, without the written permission and consent of the Minister.

To date no further restrictions are being placed on the acquisition of landownership by foreigners. Unless the permit of a foreigner who resides in Namibia expressly prohibits the acquisition of immovable property, that person is not restricted from acquiring property. Should you have the opportunity to get engaged in property dealings with a foreign national on holiday in Namibia, you would need to establish his/her identity (and entry permits) from his/her passport to ensure he/she is not an illegal immigrant.

Joint Ownership:

The term “joint ownership” or “co-ownership” denotes that two or more persons own a thing at the same time. A single property may therefore also be bought and held by several (joint/co) owners. Each owner has the right to a share in the entire property, but the various shares need not to be equal. A property held as such can only be sold, mortgaged or let when the consent of all the owners are given. This is also applicable to units of a sectional title scheme. However, co-ownership of agricultural land is limited to those cases where the minister grants permission according to Act 70 of 1970.
You may be instructed to sell a property belonging to joint owners. Be aware that there may be agreements in place between the different owners that prohibits one of them to deal with his/her property without consent from the other. The property can only be sold or mortgaged with the consent of all the joint owners, therefore always ensure that all the owners sign the contract.

When a property is held by one person, it is also possible for a second person to obtain shares in that property. This should be done, like all other property transactions, by way of a valid deed of sale.

Persons with no Contractual Capacity

The General Rule is that intoxicated persons have no contractual capacity whatsoever.

Can you sell property if you do not own it?

In most cases the seller is the existing owner of the property, but it is also possible for someone to sell the property if he/she is not the owner. This, however, should always be disclosed to prospective buyers. The most common of these cases is where you have an executor of an estate, insolvency, trustee of a minor or perhaps someone acting on a Power of Attorney on behalf of the legal owner.

A. Minors (Youth):

A person remains a minor if he/she is;
- Not yet 21 years of age
- Unmarried
- Not declared a major by the High Court
- Not emancipated (allowed by his/her guardian to lead an economically separate life)

The general rule is that minors cannot enter into contracts. However, where a contract is concluded by such a person without the necessary assistance (from a guardian), the contract will be valid and enforceable from the side of the pupillus, but not from the side of the other contracting party.

B. Mental Capacity of persons

In the unlikely event that you should encounter the above-mentioned scenario, it is only necessary to take note that when the mental capacity of someone is under dispute, his/her family would most likely approach the courts so that a “curator” could be appointed to deal with property of the person. The High Court will also issue “letters of curatorship” that will define the curator’s powers. From then onwards, the only person who may then onwards conclude contracts or perform juristic acts on behalf of this person, is the curator.

C. Insolvency:

“Insolvent” is the legal term used to describe the status of someone whose liabilities exceeds his assets. In such a case it is not likely that the person will be able to repay creditors what is owed to them.

The application is brought in the High Court. If the court is satisfied that the debtor has committed an act of insolvency or is insolvent, or there is reason to believe that it will be to the advantage of creditors if the debtor’s estate is sequestrated, it will grant a provisional Order, placing the debtor under
Sequestration which will ultimately be made final at a further hearing.

Sometimes it may happen that a person, who has signed a Deed of Sale for acquisition of immovable property into his/her name, is sequestrated. In that case the trustee of the insolvent estate can decide to accept or reject the deal. If the trustee decides to enforce the contract, the property falls in the estate of the insolvent. If not, the property reverts back to the seller.

**The effect of a Sequestration Order:**

- **On the Insolvent’s Property:**
  When a court declares a person insolvent, he/she is by law no longer allowed to deal with his/her assets. Only the trustee in his/her estate may dispose of assets. Any attempt by the insolvent to dispose of his/her assets will be void. The register of the court also sends a copy of each court order declaring a person insolvent to the Deeds Registry. The Deeds Registry will examine the order and if the person owns property registered in the registry, an interdict will be noted against the property.

  - **When selling:** Always make sure that the trustee has the necessary authority to sign transfer documents. His/her appointment can be proved by producing “Letters of Appointment” issued by the Master of the High Court.
  - **When acquiring:** If an insolvent, before the sequestration of his/her estate, entered into a contract for the acquisition of immovable property which was not transferred to him/her, the trustee of his/her insolvent estate has two choices: he/she can enforce or abandon the contract. If the trustee decided to enforce the contract, the property falls into the estate of the insolvent. If not, the property reverts back to the seller.

- **On Property of the Spouse of the Insolvent:**
  In terms of section 21, the property of the spouse whose estate is not being sequestrated shall vest in the Master until a trustee has been appointed. The trustee shall then release certain property within the categories and provisions provided for by Section 21.

  In terms of Section 23, nothing prevents an insolvent, with the consent of his/her trustee, to own immovable property during the period of his/her sequestration. However, it is highly unlikely that a financial institution will grant credit to an insolvent who has not been rehabilitated. It must be mentioned that this is a somewhat academic question in that any assets of the insolvent during the period of his/her insolvency may be attached and sold in order that creditors be paid a dividend. It must be emphasised in this regard, that the estate of an insolvent will remain vested in a trustee until he/she is rehabilitated.

  The effect of rehabilitation is to end a person’s status as an insolvent which means putting an end to the sequestration. An insolvent is automatically rehabilitated after the expiry of a period of 10 years from the date of his/her sequestration. It is possible to be rehabilitated earlier, but this is at the discretion of a court to which an application must be made.

  Theoretically, a person is entitled to apply for a home loan immediately upon his/her rehabilitation. The credit provider, however, has the right to refuse to enter into a Credit Agreement with any prospective consumer on reasonable commercial grounds that are consistent with its customer risk measurement and underwriting practices.

  There is no hard and fast rule as to when a credit provider will, in the circumstances, assess an individual to be a reasonable risk. Assuming that there are sufficient funds equal to the property and the potential borrower is earning an income sufficient to service the bond, a financial institution may grant a mortgage bond as the risk associated with granting the loan will be low.
D. Deceased persons

When a person dies an executor is appointed to take charge of his/her estate, to wind up the estate and to distribute the assets of the deceased person to the heirs (those who inherit) or take responsibility for selling the assets from the estate. On instruction to deal with property from a deceased estate, it must first be assured that the representative person has indeed been appointed in that capacity and, secondly, that the transaction is authorised in terms of our law; the will of the deceased (if any) and the powers granted to the executor or representative person.

Namibia’s inheritance laws apply to everyone who owns property in Namibia. All property located in Namibia is subject to these laws and there are no separate laws for foreigners. Exceptions exist however in case of a will being signed in overseas countries which falls under certain international conventions and agreement.

Immoveable property is not treated any differently to other types of moveable asset for inheritance purposes. Inheritance issues of foreigners and Namibian citizens are primarily dealt with by the Master of the High Court. However, if a dispute arises, then the case can be heard in any High Court of Namibia.

If the seller is a deceased estate, the conveyancer needs to ensure that the “seller/executor” has in fact been appointed in that capacity and is acting therein in accordance with the powers granted to him/her. The Deeds examiner will also call for the Power of Attorney (endorsed by the Master) to ensure the sale falls within the law.

Importance when dealing with deceased persons assets:
Take the scenario where a purchase of a house was accepted by the widow of the owner, who had been married in community of property. On reaching the conveyancers, it is discovered that the house is part of the deceased's estate and in the absence of a valid Will, the estate (house) belongs in equal parts to the widow and the four minor children. In such a case a ruling by the Master of the Supreme Court will probably order to release the children's share of the house for sale. By the time it gets this far, the buyer had probably sold his house and taken occupation of the new property. The Master will probably refuse the motion, and the house will not be sold until after finalisation of the estate.

E. Someone else

It does happen from time to time for perfectly acceptable reasons that the seller of the property is not the owner of that property. The Alienation of Land Act provides that, if someone (agent) signs a deed of sale on behalf of a seller or a purchaser, that person must be in possession of a written power of attorney (Afrikaans: Volmag/prokurasie) to that effect.

Power of Attorney

This document allows someone to act on behalf of the owner and must be signed by the grantor/principal and dated before the date of the signature of the agreement. If such a written power of attorney does not exist at the time of the owner signing the agreement, the agreement is invalid.

Although there is no prescribed form for a Power of Attorney, the format most widely used at present has evolved as a result of convention within the following guidelines:

- A Power of Attorney must be prepared by a practicing legal practitioner, notary or a conveyancer.
- Powers of Attorney must specify the date, as well as place of execution
- Powers of Attorney must contain:
1. Full names and description of the person authorising the power/act.
2. Full names and description of the agent/appointed person.
3. Clear and sufficient description of the land/property
4. The registered number of such land/property
5. The number of the Title Deed whereby such land/property is held.

- Power of Attorney must be duly stamped.
- All material alterations and interlineations must be authenticated by:
  1. The initials of the person who signed the power of attorney, as well as the original witnesses. If new witnesses, it must be their full signature; and
  2. the conveyancer, notary or legal practitioner who prepared the power of attorney.
- Non Material alterations and interlineation may be effected and certified by any conveyancer.

**Authentication**

The dramatic increase of documents signed outside Namibia testifies to the trend of globalization and people unafraid of leaving their homeland for greener pastures. From a conveyancing (and estate agent) point of view, documents signed abroad to be used for registration purposes in Namibia quite often cause confusion and frustration. Legislation prescribes the formalities to be followed for the legal and valid execution of these documents.

Authentication is the act of establishing or confirming something (or someone) as authentic; to confirm that claims made by someone or about something is in fact true. Authenticating a person consists of verifying their identity. It is merely to ensure that the individual is who he/she claims to be. To validate Power of attorneys that are executed in any place outside Namibia, it should be authenticated according to Rule 63 of the High Court Rules by any of the following persons:

1. The head of a Namibian diplomatic or consular mission in that country, or an official delegated by such head of mission.
2. When in the United Kingdom by the consul-general, consul, vice-consul or consular agent of the UK or any other person acting in any of these capacities.
3. Any Government official who is responsible for authentication of documents of that country.
4. If it is a notary public of that foreign place (including powers signed in South Africa), the notaries’ seal shall also be further acknowledged or authenticated (shown/proofed). This second act is mostly done by The Registrar of the High Court in that division where the notary practices, however it could also be done by those persons referred to in 1-3 above.
5. A seal of authentication of notaries practicing in the United Kingdom, Northern Ireland, Zimbabwe, Lesotho, Botswana, or Swaziland.
6. It could also be authenticated by a commissioned officer of the Namibian Defence Force as defined in section 1 of the Defence Act, 1957 in the case of a document executed by any person on active service.

Drafting and signing of documents (including witnesses) should always be in **BLACK INK**!

**In conveyancing practice two types of “special powers of attorney” are found.**

1. **Power of Attorney to transfer land:**

This is where the seller/principal authorises a conveyancer to register the transfer of land or a mortgage bond on land at the Deeds Registry. This is by far the most common, since almost every transaction that is registered in the Deeds Registry needs a power of attorney as one of the supporting documents to the deeds.
2. Power of Attorney to sell or otherwise deal with land:

This is a power of attorney where the principal authorises/grants power to a third party to carry out a specific legal act regarding his/her land/immoveable property.

This would be the case where an owner/principal, by virtue of the power of attorney, authorises the agent to sell on his/her behalf. Therefore, the agent would have to also sign all the transfer documents concerning the specific transfer/s on his/her behalf which will be necessary to register the transfer of the land. A power of this kind is usually given to an agent when the principal is going on a long journey, is living abroad or will not be available for a long period for some or other reason to sign the transfer documents in person. The appointed agent would then sign the contract of purchase (sales agreement), as well as other documents necessary to register the transfer.

When examining a Power Of Attorney:
- Verify the identity and address of the agent; and
- Ensure that the original power is signed by the principal, dated (before transaction) and duly authenticated.

Private/Individual Owners in general:

Advantages:
1. When taking transfer, lower transfer duty is payable.
2. Decision making is simple and (normally) no resolutions or additional documentation and consents are required.
3. No auditors or additional income tax returns are required.

Disadvantages:
1. The property is part of the individual’s estate and is available to his/her creditors should he/she encounter financial problems.

Depending on the transaction, when dealing with natural persons as parties to a property transaction, conveyancers will most likely need to obtain proof of their status regarding:
- Identity and correct description of name and date of birth (ID or foreign passport);
- marital status (antenuptial contract, divorce order and settlement agreement, affidavit);
- majority or minority age/status (from ID);
- solvency (affidavit);
- foreigner’s lawful presence in Namibia (stamp in passport), marriage status and compliance with exchange control regulations.

(Note that FIA legislation may acquire more detail on tax status and other requirements in future.)

Affidavits and their role in conveyancing:

As property transactions involve large amounts of money it requires a great deal of responsibility and skills from the conveyancer. The law holds the conveyancer personally accountable for the correctness of his/her work relating to specifics of the particular transaction. Part of that responsibility is the conveyancer’s duty to establish and verify facts. This includes the identity of the client, marital status, capacity of the client to act, capacity of the signing person, details of transaction and information relating to the property. To verify means to confirm that the information is actually true.
Verification is usually done by a number of actions, including comparing and studying of information gathered from documents.

It is not always possible for the conveyancer to completely verify facts such as the solvency and marital status of clients. As these are very important issues from a conveyancing point of view, the onus of proving these facts are shared with the client. In addition to obtaining documentary proof, conveyancers need to take the additional precaution of requesting clients to confirm relevant facts on an affidavit. An affidavit is a sworn statement where, in addition to signing, the client will also be asked by a person* specially appointed for this purpose in terms of the local law, to swear an oath before God that he/she has read it, understands the content of the affidavit, and that it is true and correct.

The rationale for this is the belief that, because of their fear of and respect for God, people are not likely to make untrue statements if they have to swear that it is true.

* The law appoints certain persons as “commissioners of oath” for the purpose of procuring these sworn statements. People who practice as attorneys, land surveyors, certain police officers and bank managers are by virtue of their official capacity automatically commissioners of oath.

**Partnerships:**

A partnership is a basic relationship, based on an agreement, between two or more persons (but not more than 20) who intend to make and share profits through joint business endeavours, where each of them agrees to contribute something (either money or skills) to the business.

Although a partnership has no separate persona from the partners, for property transactions and registrations it is treated as a separate entity or persona. Any partner can conclude an agreement that binds the partnership. From a conveyancing perspective one must be careful to ensure that a person who says he/she is acting on behalf of the partnership in selling, purchasing or mortgaging property is indeed a partner of the partnership, and has the authority to deal with assets on behalf of the partnership.

Where persons enter into a contract in their capacity as partners, it must clearly be stated to such effect.

For Partner’s Authority to conclude business or sign contracts on behalf of the partnership, it is necessary to distinguish between:

A. **Business within the scope** of the partnerships ordinary business: Every partner has authority to enter into agreements and bind the partnership

B) **Business that falls outside the scope** of partnership’s normal activities: The acting partner must be authorised to enter into the agreement on behalf of the partners. The best practice is to require written confirmation of that.

For a person married in community of property, who obtained real rights or immovable property in the name of a partnership, the joint estate (of his/her marriage) shall not be affected thereby. The husband or wife is only involved therein in the capacity as a partner.

Depending on the transaction, while dealing with partnerships conveyancers will most likely need to obtain the following documents relating to property transactions:

- If necessary, a partnership agreement (if in writing) to prove the identity, existence, description and scope of the business and the partners' powers.
Immobilien

- A statement confirming the names and identity of partners and stating the name, particulars and main business of the partnership.
- Identity documents and documents proving marriage status of the partners.
- Resolution by partners authorising the transaction (when in doubt as to whether they agreed on the transaction).
- Solvency affidavit for partnership and all parties.

(Note that FIA legislation may acquire more detail in future)

On Trust, Companies and Close Corporations:

Two types of “persons” function in society; natural persons (human beings) and entities (which include juristic persons and de facto entities). Some of these entities are acknowledged by our law as existing in every day commercial life, but the law may not fully recognize them as having a total separate legal status. They also differ from one another and each has a unique relationship between the entity and the individuals (jockeys) that own/manage/represent them. Each of them has different risks and advantages involved.

Some of the main advantages of entities from a property point of view are multiple ownership, perpetual existence and limited liability, while the biggest disadvantages are “red tape” and expenses to register and maintain, as well as the lack of privacy.

It is rather common in Namibia to see advertisements for the “sale” of immovable property as “being in a CC”. A not so common occurrence is the “sale” of immovable property as being held in a company or trust. In these cases the property is not sold “out” of the entity, but sellers make use of the legal entity as a marketing tool to legally and effectively evade duties and costs relating to the sale.

In the case of trust transactions, as well as share transactions of a company or membership changes of a property owning close corporation, the Title Deed at the Deeds Registry is not re-recorded since the property is not sold, but it is merely a “change of hands” in regards to the beneficiaries of the trust, directors of the company or members of a closed corporation together with the various other requirements.

An important matter to be addressed by the parties in their agreement is the responsibility of the “seller” to, at his costs; see to it that all financial records and statutory annual financial statements are up to date. These requirements are often not up to date and it should therefore be stipulated in the contract that any costs thereof could be recovered from the seller. The auditors/accounting officers should also be informed of the change in ownership. In practice we often find that it is not done and when we eventually start to follow up on the annual financial statements, it is often the first time buyers find out about the statutory requirements. The buyer often has no other option than to pay the bill so as not to jeopardise the legal entity. This of course causes a lot of frustration for the buyer that could have been avoided had he been informed beforehand. The buyer should also be informed about statutory responsibilities as well as personal liabilities of directors/members. It should thus be duly noted that members of a closed corporation for instance are responsible for ensuring that the financial statements fairly present the state of affairs of the corporation at the end of the financial year concerned, and the results of its operations for that year.

It is further important to keep in mind that the Title Deed (owner’s copy as well as at the Deeds Registry) details the original amounts of mortgage bonds registered against the title. These bonds would in most cases either be cancelled or amended and therefore it is important that those transactions should also be done by a conveyancer.
A. Trusts:
1. Advantages and disadvantages of Trusts.
2. Buying property in the name of a Trust already in existence.
3. Buying property in the name of a Trust not registered.
4. “Sale” of a Trust.

B. Companies:
1. Advantages and disadvantages of Companies.
2. Buying property in the name of a Company already in existence.
3. Buying property in the name of a Company not yet in existence.

C. Close Corporation (CC):
1. Advantages and disadvantages of Closed Corporations:
2. Buying property in the name of a CC already in existence.
3. Buying property in the name of a CC not yet in existence.
5. Sale of a CC.

A. Trusts

Many definitions attempt to explain the nature of a trust. It appears to be a vague concept not as easily understood as the relatively straightforward structure of a close corporation or company.

The first important thing to realise is that a trust is not a juristic person, which means the law basically looks through the entity to what is behind it. However, in some instances the law does regard the trust as a separate entity.

A trust is not owned by any person. It has neither shareholders nor members. A trust exists when the creator (the founder; who wants to create benefits for another) hands over, or is bound to hand over the ownership of an asset which, or the proceeds of which, is to be administered by another (trustee) in his/her capacity as such, on behalf and for the benefit of a third person (beneficiary) or for the purpose of a charitable cause. A specific characteristic of this “arrangement” between the trustee and the founder whereby the trust is created is the fact that the trustee acts not in his/her private capacity but rather in his/her official capacity; however ownership of trust assets vests in the trustees and not in the beneficiaries. The benefits are therefore for a “third” person (beneficiary), without the beneficiary really having a say or control of the assets.

Trusts are created for a variety of reasons, one of them being to provide for dependents. The two basic types of trusts are:

**Inter vivos trust:** *inter vivos* means “amongst the living” and this phrase is used to refer to a trust that is created and that becomes effective while the founder is still alive.

**Mortis causa** or “testamentary” trust: This trust is created in a testament and only comes into operation at the founder’s death.

Trusts can then further be classified as discretionary, vesting, family, business or charitable trusts. Creation of a trust is a specialised part of our law better left for legal practitioners who specialised in that field.

As the trustees of a trust can enter into contracts and the trust has the right to own and deal with assets, a trust can also enter into property transactions. Depending on the transaction, when dealing
with trusts, conveyancers will most likely need to obtain the following documents relating to property transactions:

- Trust deed (scope of trustees powers and validity and correct name and description of trust).
- Resolution by the trustees authorising the transaction.
- Resolution authorising signature of trustee that will sign, as well as the identity of the trustee.
- A statement (preferably from auditor) setting out who the current trustees are.
- Identity documents of trustees.

(Note that FIA legislation may acquire more detail in future.)

1. Advantages and Disadvantages of buying property into the name of a trust:

Advantages:

- **Continuity (perpetual existence):** The beneficiaries enjoy the benefit of continuity as the trust's continued existence is not affected by changes in trusteeship or amendment of beneficiaries.
- **Depending on the specific trust, the benefits** of the trust would not fall within or make part of the assets of the estate of the beneficiary.

Disadvantages:

- **Transfer Duty:** The trust is deemed not to be a natural person. Transfer duty is calculated and payable at a flat rate of 8% of the value of the property where a trust acquires immovable property.
- **Cost of formation of the trust.**
- **Possible tax scrutiny by The Receiver of Revenue.**

2. Buying property in the name of a trust already in existence:

When a trust is purchasing property, the estate agent should check whether the trustees have authority to purchase.

Likewise, if a trust is selling or mortgaging immovable property, always ensure that the trust has authority to sell or mortgage. When immovable property is acquired by a trust, the property is registered in the name of the trustees for the time being, acting in their capacities as trustees of the trust.

The estate agent usually has little if any knowledge of the trust's financial stability and it is thus advisable to include a clause in the sales agreement in terms of which the signatory, by his/her signature to the contract, binds himself/herself personally liable to carry out the obligations of the trust if the trust fails to carry these out.

3. Buying property in the name of a trust not yet registered:

This is one situation where the position regarding trusts in Namibia differs extensively to the position in South Africa. In South Africa a transaction like this will be void if the letters of authority of the trustees has not yet been issued by the Master of the High Court.

In Namibia it is possible for trustees of a trust to acquire property before the trust is reported to the Master of the High Court of Namibia. The reporting of the trust to the Master is purely an administrative recording enabling the Master to require the trustees to provide security or not.

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4. Sale of a trust:

Recently techniques have been used whereby the existing beneficiaries and trustees of a particular trust, holding a specific fixed property, are replaced by new beneficiaries and new trustees in exchange for an agreed sum of money. When the “owner” wishes to sell the property, instead of transferring it to the purchaser in the normal manner, “transfer” of the property will be affected by the beneficiaries of the trust and his/her trustees resigning and new trustees being appointed. The new trustees will usually include the new “purchaser” and a person or persons sympathetic to that person. The new “purchaser” would usually pay the previous “owner” an amount equivalent to what the property would normally fetch on the open market, together with some consideration for the saving in transfer costs.

These techniques, known as “the sale of a Trust”, are primarily used to evade the payment of duties and costs. The question often arises whether or not these techniques are valid in view of the prevailing trust and corporate law and, secondly, whether or not these techniques in fact dodge the payment of transfer duty.

Where a specific trust owns immovable property as its only asset, a person wishing to acquire such property may thus do so by way of a cession by the beneficiaries of the beneficial interest in the trust and by the appointment of new trustees. If the trust deed is amended to substitute new trustees and beneficiaries (discretionary trusts) and the distribution is undertaken thereafter, persons who are no longer beneficiaries will receive the purchase price.

Trustees have a fiduciary duty for the proper administration of the trust property for the benefit of the beneficiaries. It is thus conceivable that where there are minor beneficiaries, these beneficiaries may later have a claim against the trustees should the “sale” of the trust later prove to be the beneficiary’s detriment.

**Take note:** In South Africa, The Receiver of Revenue was apparently silent - save for a 2002 amendment to the Transfer Duty Act, which effectively plugged the loophole. Then on 26 October 2007, the Johannesburg Special Tax Court delivered judgment holding that a 1998 “sale of a trust” did result in a transfer duty liability, and upheld an assessment on the trust concerned for transfer duty and, in addition, a penalty of some 42% of the transfer duty.

The most important issues for estate agents to bear in mind are thus to warn parties insistent on using these techniques, that each Trust is specifically designed for the intended purpose and there are many uncertainties and several risks involved. A Trust may not necessarily be the suitable property owning vehicle for residential property. The ideal property to own through a trust is a holiday home, intended to be used by several generations over many years, not a primary residence. The best would be to consult with a legal practitioner who specialises in this field.

B. Companies

A company is a juristic person formed according to the procedures laid down by the Companies Act. There are many facets to companies and the laws relating to them are complicated. However, companies are useful and flexible vehicles and play an important part in the local Namibian economy. It owns its own assets and is responsible for its own debts and offers limited liability to its owner(s), the shareholder(s). To form a company, a number of documents need to be drafted and signed. The most important are the memorandum of association and the articles of association. Once these documents are registered at The Ministry of Trade and Industry, the company comes into existence. Companies are managed by directors and owned by shareholders. Decisions in a company are not made by individual directors, but by resolutions.
Property transactions involving companies are generally more complex than those concluded by Close Corporations or individuals. Depending on the transaction, when dealing with companies conveyancers will most likely need to obtain the following documents relating to property transactions:

- Articles of association (scope of powers and possible limitations).
- Certificate of incorporation (proving that it was actually registered, and supplying the name and registered number)
- Certificate to commence business (right to function).
- A statement from the auditor confirming who the directors and shareholders are.
- Resolution by the directors authorising the company to enter into the agreement and authorising a specific director to act on behalf of the company.
- A copy of the ID document of that director.
- Resolution in terms of S228 of the Act (where the company disposes of property and the property constitutes the whole or substantial part of the company’s undertakings; resolution by directors must be ratified by shareholders).
- Affidavit by director confirming various facts.

(Note that FIA legislation may acquire more detail in future.)

1. Advantages and Disadvantages of buying property in the name of a company:

Advantages:

- Limited liability: Just as in a Close Corporation, the legal entity has a legal personality separate from its members or directors. This also means continuity, as the legal entity will not necessarily be affected by changes in membership.

- Possible Tax benefits.
- Multiple Ownership: A private company may have up to 50 shareholders, while a public company may have an unlimited number of shareholders.

Disadvantages:

- It remains an asset in the purchaser’s estate.
- In the sale of the shares the purchaser will be concerned that the company has undisclosed liabilities. The purchaser cannot see the "skeletons in the closet". There is no way of knowing exactly what debts the company has.
- Transfer duty is payable at 8%.
- Annual audited financial statements are required.
- Income Tax returns are required.

2. Buying a Property in the Name of a Company already in existence:

Many properties are company-owned and they often constitute the main or sole asset of the company concerned.

Does the company have authority?

In terms of the Company's Act (Section 34), every company has the power to sell, purchase or mortgage immovable property unless specifically excluded in the company's memorandum. It is thus always advisable for estate agents and conveyancers to call for a copy of the company's memorandum for possible limitations and exclusions. However, in the unlikely event of the memorandum specifically excluding the purchase of immovable property by the company, it still does not mean that the contract is void.
In terms of Section 36 of the Company’s Act, no act of the company will be void by reason only of the fact that the Company was without capacity or that the directors had no authority to perform that act on behalf of the company; nor may the Company or any other person in legal proceedings rely on such lack of authority or contractual capacity.

So, a purchase of immovable property by the company, even if specifically prohibited in terms of the memorandum would not be void, provided the directors were *prima facie* duly authorised to bind the company to the transaction. This means that outsiders (estate agents) dealing with a company can accept that the company has the capacity to enter into a contract of sale of immovable property.

**Who can be authorised to represent the company?**

The person representing the company can either be an authorised person within the company or an authorised outsider, such as an estate agent or legal practitioner.

**How is such a person authorised?**

The company’s articles must be examined as they might provide, for example, that only the board of directors may enter into a contract of sale of immovable property on behalf of the company. In such a case, a single director will not be authorised to represent the company unless he/she is authorised by the board of directors to do so.

If the articles and memorandum of the company are silent and do not deal with exactly who shall be authorised, then it can be assumed that the board of directors or the company's managing director has the necessary authority to conclude a contract of sale for the company. A single director or the company's secretary normally cannot conclude such contracts on behalf of the company, unless authorised to do so by the company’s constitution (memo and articles) or by the board of directors.

**The Resolution:**

It is always advisable to obtain a copy of a resolution authorising a person to enter into a transaction on behalf of the Company, and to annex this to the agreement.

*(See sample resolutions with CCs.)*

**How is the signatory cited?**

The person authorised to enter the contract on behalf of the company must sign the contract in a representative capacity, i.e. it must be clear that he/she has signed the contract on behalf of the company: e.g. "for and on behalf of ABC (Pty) Ltd". If not, he/she may be held personally liable to the contract. However, the courts have held that where it is clear that the seller or purchaser is a company and the contract is signed on its behalf by one of its officers without an indication that he/she signs on behalf of the company, it will be assumed that he/she did sign on behalf of the company.

**Section 228 of the Company’s Act:**

In terms of this section, the directors of a company do **not** have the power to dispose of the whole or a substantial part of the whole of the undertaking of the company, or the whole or the greater part of its assets, except with the approval of 51% of the shareholders at a general meeting of the company. This means that where the company's only asset is the immovable property, the estate agent must ensure that he/she obtains a resolution of a general meeting of shareholders, which authorises or ratifies the specific transaction. It is desirable that the shareholders’ resolution be obtained before entering into the agreement of sale in question. If the sales agreement is signed without the required resolution of the shareholders, the shareholders may subsequently ratify the transaction. This will meet the requirements of s. 228, but until such ratification occurs, the agreement has no legal effect and you are not entitled to commission!
Suretyship Clauses:

It is advisable, especially where the estate agent has little knowledge of the financial stability of the company, to include a clause in the sales agreement in terms of which the signatory, by his/her signature to the contract, binds himself/herself personally to carry out the obligations of the company if the company fails to carry them out.

3. Buying Property in the name of a company not yet in existence:

It is possible to enter into a contract on behalf of a company yet to be formed. This will arise, for example, where a person is interested in purchasing immovable property but wants to do so in the name of a company not yet in existence.

Section 35 of the Company's Act is an exception to the rule that a person cannot bind a non-existent principal and provides that a person may act as an agent for a company to be formed. A pre-incorporation contract (i.e. a contract concluded before the company is incorporated) only becomes binding on the company if all the following requirements stipulated in Section 35 are adhered to:

- The contract must be in writing.
- The contract must have been entered into by a person acting as agent or trustee for a company to be formed.
- The memorandum of the company must contain as one of its objectives the ratification or adoption of the contract.
- 2 copies of the contract, one of which must be certified by a notary public, must be lodged with Trade and Industry.
- The company must actually ratify or adopt the contract after its incorporation.

If these requirements are not complied with, then the pre-incorporation contract is not binding on the company after it has been formed.

It is common in a property sales agreement, when a person signs a contract as trustee for a company to be formed, that the said trustee is allowed a period of time within which to form the company and thereafter, should the company fail to be formed or should the contract fail to be ratified, the signatory will be personally bound by the obligations set out in the contract. The estate agent should thus be familiar with how long it takes to form a company.

Clause to be inserted in the contract:

If the clause is not included, then the agent or trustee acting for the company yet to be formed incurs no liability if the company does not ratify the agreement after it is incorporated.
4. Sale of a Company:

i.e. the acquisition of shares in a company, which owns a specific immovable property for the purposes of acquiring the property.

It is always advisable to study the financial statements (balance sheets) of the company in conjunction with auditors. However, the procedure of acquiring shares generally presents no problems (providing it is not restricted in terms of the memorandum, articles, or any shareholders agreement) and the purchaser becomes the shareholder of the company on registration of the transfer of shares in his/her name in the registrar of members. Sometimes all the shares in a company are sold (the whole company changes hands), but it is also possible that only some of the shares are sold.

A difficulty that may arise is where the purchaser needs to obtain a mortgage bond on the property in order to pay the purchase price. In terms of Section 38 of the Company's Act, no company is allowed to give financial assistance for the purpose of acquiring any shares of the company. This in real terms means that where the company is a property-owning company, the purchaser cannot raise a bond on that property in order to pay the purchase price. The bond will be void and every director will be guilty of an offence. Such a purchaser can only bond the property to the extent of the seller's loan account in the company. To get around this prohibition, the company may be converted to a close corporation if the shareholders do not exceed 10 in number and qualify for membership in terms of the Close Corporations Act, as there is no similar prohibition in the Close Corporation's Act.

C. Close Corporations (CCs)

A close corporation is a newer legal entity which is much simpler and quicker to form than companies and could be regarded as the "little brother" of the company. It is easier and less costly to set up than a company, simpler to administer and is subject to fewer restrictions than companies. It is created by first reserving a name with The Ministry of Trade and Industry. It has no memorandum or articles of association and the only constitutional document required, is a founding statement (CC1). The close corporation comes into existence on registration of the CC1 with The Ministry of Trade and Industry. On registration, a juristic person comes into existence and continues to exists as such notwithstanding changes in its membership until it is deregistered or dissolved.

A private company that meets the requirements of a close corporation may convert to a close corporation and a close corporation may convert to a private company.

A close corporation exists separate from its members (maximum of 10), who enjoy limited liability. Members’ interest is expressed as percentage and not as a number of shares. If a member of a close corporation decides to cede (transfer) his/her member’s interest in the close corporation to another person, for example when he/she sells the business, it is not done by means of a "share transfer” as it is in the case of a company, but it is simply done by filling in and registering a CC2 form with Trade and Industry. There is no separate Board other than the members. Decision-making by a close corporation takes the form of resolutions by the members and are made more or less in the same way as company resolutions. Ratification however is not done by shareholders, but the members. Members’ interest is also expressed as a percentage not as a number of shares.

Close corporations are popular "property-owning vehicles" because of the easy setup procedures, as well as the procedure to sell a close corporation when the intention is really to sell the property belonging to the close corporation. Close corporations are no longer as popular as they used to be in South Africa due to changes in Transfer Duty and tax legislation. As a result these legislations lead to a decline in the use of close corporations for the purpose of holding property.

This does not mean to say that there are currently no longer reasons why property could and should not be bought by close corporations in Namibia. Up to date the sale of members’ interest (with the intention
to actually sell the property) does not attract transfer duty in Namibia. This could mean either substantial savings to the purchaser who prefers to buy the close corporation (with the property in it), rather than buying the property outright. (It could also develop into a situation where sellers ask more for the property because of this advantage) However, should these limitations arrive in Namibia, close corporations may become a less attractive vehicle for holding property.

Depending on the transaction, when dealing with close corporations conveyancers will most likely need to obtain the following documents relating to property transactions:

- CC1 document (unless superseded by CC2), the founding statement to prove legal existence, name and registered number, right to function, who members are and identity of members, and the nature of the entity.
- CC2 document (amended founding statement), to ensure the changes that have been made to members, name of the close corporation, main business, etc. has been made since registration of the close corporation.
- Consent from accounting officers.
- Statement from accounting officers reflecting the identity of members, as well as the solvency status of corporation.
- The identification documents of members.
- Resolution by members authorising the transaction.
- Resolution of members authorising the signatory and his/her identification document.

(Note that FIA legislation may acquire more detail in future.)

1. Advantages and Disadvantages of buying property in the name of a closed corporation:

Advantages:

- Possible Tax benefits.
- No audited Financial Statements required.
- Own legal persona, separate from its members, irrespective of change of members.
- Multiple owners: A close corporation may have a maximum of ten owners (members).

Disadvantages:

- Transfer duty of 8%.
- Limited to 10 members.
- Only natural persons can be members of close corporations.
- The purchaser could be concerned that the close corporation has undisclosed liabilities.
- Remains an asset in the purchaser’s estate.
- Income Tax Returns to be completed annually.

2. Buying Property in the name of a close corporation already in existence:

In terms of Section 46 of the Close Corporations Act, the consent (in writing) of a member holding a member's interest of at least 75% or of members holding together at least that percentage of the members interests in the Corporation, shall be required for any acquisition or disposal of immovable property by the corporation - unless an association agreement provides otherwise. Once the required consent has been obtained, the contract can be entered into by any member of the corporation acting on its behalf, provided the transaction falls within the scope of the business of the corporation stated in its Founding Statement or actually carried out by it.
If the transaction falls outside the scope of the corporation’s business, a particular member must be specifically authorised by the close corporation to conclude the transaction.

Section 54 of Close Corporation Act deals with the powers of the members of the close corporation to bind the CC. If the specific member appears to have the authority to represent the close corporation and the third party (bank, conveyancer or estate agent) has no reason to believe otherwise, the member’s action would indeed bind the close corporation in so far as the third party is concerned. If of course the third party knew better, it is another scenario. It is always advisable to obtain a copy of the resolution authorising a member to conclude the transaction and to annex it to the contract.

For example, an attorney might know the management, officials or members of a company or close corporation so that he/she could dispense with all evidence of the signatories having the necessary binding authority. In other circumstances, for instance, where the attorney has doubts about the true capacity of the signatories, he/she could only be proved to have acted with the reasonable amount of care expected, if he/she had taken the fullest steps in getting the necessary physical evidence about the relevant company or close corporation.

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**EXTRACTS FROM THE MINUTES OF A MEETING OF THE MEMBERS OF KUNENE PIONEERS CC.**

CC NO: 64/103 HELD AT OUTJO THE 5TH DAY OF JULY 2007

__________________________________________________________________________________________

**BE IT RESOLVED THAT:**

1. The CLOSE CORPORATION buys the hereinafter mentioned property from:

KITTE MULLER

for a purchase price of N$900 000.00 (nine hundred thousand Namibian Dollars)

The Sectional title unit known as:

a) **Section No. 2** as shown and more fully described on **Sectional Plan No. 80/2002** in the building or buildings known as **Desert Streams**, situated in **Klein Windhoek, (Extension No.5), Municipality of Windhoek**, of which section the floor area, according to the said sectional plan, is **218 (TWO ONE EIGHT) square metres in extent**; and

b) an undivided share in the common property in the land and building or buildings as shown and more fully described on the said sectional plan, apportioned to the said section in accordance with the participation quota of the said section specified in a schedule endorsed on the said sectional plan and held under **Certificate of Registered Sectional Title No. 80/2002 (2) dated 18 OCTOBER 2002**.

2. PIET BOTES a director of the said CLOSE CORPORATION be and is hereby authorised to sign all documents on behalf of the CLOSE CORPORATION which may be necessary to give effect to the abovementioned resolution.

__________________________
Member

__________________________
Member

__________________________
Member

Certify a true extract

*(It is advisable that all the members sign the resolution)*
Suretyship Clauses:

As in the case of companies, this is advisable if the estate agent is not familiar with the financial standing of the corporation.

3. Buying Property in the Name of a close corporation not yet in existence:

Similar to the situation with companies, in terms of Section 53 of the Close Corporations Act, a pre-incorporation contract is allowed to be signed by an agent or trustee for close corporation to be formed. This is applicable where a person may sign an Offer to Purchase and the words “or nominee” is included. The close corporation is not established yet (in existence) and the idea is for the close corporation to be the owner and not the natural person, even though it is not yet in existence.

After its incorporation, the contract must be ratified in the form of a written consent given by all the members of the close corporation within the time specified in the contract or, if no time is specified, consent must be given within a reasonable time after the incorporation of the close corporation. Similarly, as is the case with directors/representatives who sign on behalf of a company to be formed, most property sales agreements will contain a clause where a purchaser is a trustee of a close corporation to be formed, when the close corporation is not formed or where if it is formed it fails to ratify the contract, that the signatory will be bound personally to carry out the obligations of the contract. If this clause is not included in the agreement, the person who enters into the contract for the close corporation yet to be formed is not personally liable if the corporation and on its incorporation does not ratify or adopt the contract.

The following is an example as there are several simpler formulations that could be used to achieve the same purpose:

The representative (agent or trustee) hereby undertakes that he will as a matter of urgency make the necessary arrangement to register the purchasing close corporation, with one of its main objects the adoption and ratification of this agreement, with or without modification and that, in the event of –

1) the close corporation not being registered within 21 days from the date of signature of this deed of sale, or within such further extended period as shall be mutually agreed upon in writing, the seller and the purchaser; or
2) the close corporation having being registered, but failing to adopt and ratify this agreement within seven days thereafter,

then, and in such event, the trustee shall be regarded as personally bound and liable in terms of this agreement, in the same way as if his/her name and not the name of the close corporation had been given as the purchaser herein, and in such event he/she shall be entitled to benefits and subject to all obligations existing or creating in this agreement, as if he/she had entered into it in person.

4. Sale of a close corporation:

I.e. acquisition of the member’s interest in a close corporation in order to acquire the members’ interest and thereby also the property owned by the close corporation.

There is no provision in the Close Corporation Act similar to Section No. 38 of the Companies Act. Consequently, where a company faces difficulties with structuring a deal because of the terms of Section No. 38 of the Companies Act, the one way around this difficulty for the company is to convert to a close corporation.
A close corporation may give financial assistance for the purpose of acquisition of the member's interest in that close corporation by any person, if:

- The previously obtained written consent of every member is obtained;
- after such assistance, the close corporation’s assets (fairly valued) exceed its liabilities;
- the close corporation is able to pay its debts as they become due in the ordinary course of business; and
- such assistance will not render the close corporation unable to pay its debts as they become due in the ordinary course of business.

Generally, in all other respects, a close corporation is very similar to a company in terms of the legal implications of dealing with it. Disposal of a member’s interest must take place in accordance with the Association Agreement if one exists. In the absence of an Association Agreement, a member can dispose of his/her interest only with the consent of every other member of the Corporation. Similarly, no person can become a member of the corporation unless the existing members agree to his/her introduction into the corporation. In terms of Section 46 of the Close Corporations Act, the consent in writing of a member holding a member's interest of at least 75% or of members holding together at least that percentage of the members’ interests in the Corporation, shall be required for any disposal of immovable property by the Corporation - unless an association agreement provides otherwise.

Note:
The Purchaser of a member's interest becomes a member of the close corporation only after the registration of the amended Founding Statement (CC2) with Trade and Industry. Normally, when one purchases a property owning close corporation, one buys the membership as well as the claims. Therefore, it would be imprudent to buy a close corporation without having had sight of the latest financial statements. From those the “new members” would be able to see precisely what the claims or loan account/s is/are that they are buying. You would also be able to determine from these financials the affairs of the close corporation and establish whether there are any signs of “skeletons in the closet”. If there are no financials available for at least the last two years, it should set off the alarm bells.

Taking over a close corporation would mean that the onus would fall upon the new members to ensure the completion of all the financial statements up to date. Before putting in an offer, potential new members should insist upon seeing the latest financials. Although there would mostly be certain warranties which relates to the affairs of the close corporation, it is cold comfort to have purchased the close corporation and afterwards find that the warranty regarding the books and records have failed. By that stage the new members will have parted with their money and may simply be left with a claim against a “seller”. It would also be wise to ask for a copy of the latest assessment from the Taxation Authorities to confirm that there are no nasty tax surprises.

WHEREAS:
A. The seller holds a hundred percent (100%) members interest in the Close Corporation registered under the name V D B Properties CC, (Registration Number CC/2002/1920) (hereinafter referred to as “the Corporation”).

B. The Corporation is the registered owner of:
(FULL PROPERTY DESCRIPTION)

IS AGREED AS FOLLOWS:

1. SALE AND PURCHASE
The SELLER hereby sells to the PURCHASER and the PURCHASER hereby purchases free of all liens, charges and encumbrances the hundred percent (100%) member’s interest in the Corporation as well as the SELLER’S loan account in the Corporation (if any).

2. PURCHASE PRICE

The purchase price of the member’s interest shall be the sum of N$
…………(………………………..NAMIBIAN DOLLAR) without any deduction or setoff
AND shall be secured by a banker’s or other approved guarantee(s) to the conveyancer within 14 (fourteen) days after fulfilment of suspensive conditions contained in this agreement.

The full purchase price must be paid to the seller against registration of the transfer of the property into the name of the purchaser.

The following matters should also be dealt with in the above-mentioned “Sale of a Closed Corporation” contracts:

- **Effective Date**: The date on which amended founding statements in respect of the close corporation constituting the purchaser the sole member of the close corporation is lodged with and subsequently registered by the Registrar of Companies and the bonds (if any) are registered in the Deeds Registry (whichever occurs later).
- **All claims** which members may have against the close corporation on loan account or otherwise.
- Signing of the amended founding statement by the seller recording the resignation of the members of the close corporation and further recording the purchaser as the sole member thereof.
- **Delivery** by the seller against payment of the purchase price to the purchaser, in addition to the proof of registration of the amended Founding Statement, all books, records and other documents of the close corporation; the resignation of the accounting officer at the CC if required by the purchaser, the Title Deed of the property free of encumbrances (including bonds).
- **Warranties by the seller** may include the following:
  - The seller is the sole registered and/or beneficial owner of the members’ interest.
  - The seller will have the right, power and authority to sell the subject matter, free from any option, rights of first refusal or charges whatsoever.
  - No steps will have been taken for the de-registration of the close corporation in terms of The Close Corporation Act.
  - The only assets of the close corporation will be the specific property.
  - The close corporation will be the registered owner of the property free from all encumbrances.
  - The close corporation will not be bound to any party under any agreement of whatsoever nature not disclosed in this agreement.
  - The close corporation will have no liabilities, actual or contingent, other than member’s claims included in the subject matter.
  - The close corporation will not be engaged in litigation, nor will any law suit or arbitration proceedings or criminal proceedings be pending or threatened against the close corporation.
  - The seller shall do nothing or permit nothing to be done on behalf of or in respect of the close corporation during the period from the signature of this agreement to the effective date which may vitiate any of these warranties.
  - All transactions of the close corporation will have been properly recorded as required by law and all due income tax returns of the close corporation will have been submitted to the revenue authorities.
4.3. Sectional Titles

As potential homebuyers adjust their aspirations to take account of rising interest rates and higher inflation, sectional title units are selling relatively well compared to freehold homes. Generally, sectional title units are cheaper than freehold homes, and they are now attracting many potential buyers who are a little cash-strapped. Security considerations are also coming into play as most sectional title units are located in gated complexes. However, when introducing a potential buyer into purchasing a unit in a Sectional Title Complex, agents need to prepare and inform them on exactly what it is they will become an owner of. This “lock-up-and-go” lifestyle they have always wanted may not be what they thought it would be.

For instance, they will have to abide by certain rules and regulations which never applied to the full title house they have lived in for 20 years and now sold. Therefore, make sure they know what is expected from them and what they can expect from their neighbours, the complex and the Body Corporate, levies and managing agents.

In Namibia we are currently in the process of adopting a new Sectional Titles Act. This Act, which is very much similar to the South African Sectional Titles Act, Act 95 of 1986 in South Africa, was recently finalised by a legal drafter. This “new” Act/draft Bill is now being forwarded by the Ministry of Land and Resettlement for further debate in Parliament. The biggest pitfall of this new Act on arrival in Namibia would be the Exclusive Use Areas (EUA’s).

Like the old Act, this Act also provides for the division of buildings into sections and common property, as well as the acquisition of separate ownership in the sections, coupled with joint ownership in the common property. The major difference is that the transfer is not done by endorsements on the original certificate of registered sectional title but, instead, it will be similar to transfer of properties in terms of the Deeds Registry Act (conventional transfer). Another difference is the allocation of exclusive use areas and the transfer thereof by means of Notarial Deed of Cession to the transferee.

For the purpose of this guide we focus on the current Namibian Sectional Title Act, Act no 66 of 1971

According to Section 1 of the above Act a new concept of landownership was introduced to Namibia.

According to the Oxford Dictionary, the definition of title is: “the right of ownership of property.” These rights of ownership of a part(s) of a building are now possible and the Act provides for separate ownership of a property. Although we are a “land-loving” nation, many people are attracted to sectional title living because of the convenience and low maintenance, security and community spirit offered by them. People increasingly felt the need to own a part of a building (such as a flat) or one building situated with other buildings on the same piece of land (such as a “townhouse”).

Almost any building can be divided into self-containing units such as a block of flats, offices or townhouses, and by August 2007 there were around 1 380 Registered Plans and 10 920 Units in Namibia and many more are being developed.

(Note that “duets” also reside under the Sectional Title Act, as registration of the plan and opening of the register take place for only two units.)

How does a scheme come into existence?

A property developer bought a large stand in town. He/she decided to develop it by building two or more housing units on the stand and selling the individual units or sections. The stand is too small to be
subdivided into separate stands, so he/she is not able to sell the individual houses as freehold properties. The alternative is to develop a sectional title scheme.

After planning, preparation and discussions with town planners, the first and probably most important step is the approval from the local authority regarding the use and density zones in relation to the proposed development of property. If there are possible consolidations of (adjacent) property (belonging to the same owner), the consolidation diagrams also need to be drawn up and approved by both the surveyor general and the local authority.

Once this is dealt with and the owner (developer) wishes to divide a building into sections, he/she should consult with an architect to prepare the necessary site layout plan which shows the ten three-bedroom houses with their garages.

Once the site plan is finalised and the building plans approved, the building of the sections can begin. The developer now instructs a land surveyor to draft a sectional plan. Sectional plans show the area of each section. Note that the mid-wall measurements are +/− 6% smaller than the outer area. The sheet of the plan showing the positioning (bird's eye view) of the buildings in relation to the land, is known as the block plan. The next step in the process of sectional title development is for the land surveyor to sign the sectional plan and to submit it to the Deeds Registry for approval. Once satisfied that the plan complies with all relevant legal requirements, the SG approves the sectional plan.

Once these plans are approved, the documents for the opening of the sectional title register and the registering of the plan are lodged in the Deeds Registry by a conveyancer who has, while waiting for the approval of the sectional plan, already prepared the application to be submitted to the Deeds Registry. Once the deeds office has opened the sectional title register and registered the sectional plan, a unit in the scheme comes in existence and may be transferred to the new owners.

It is possible for a developer to develop a sectional title scheme in stages or phases. This is done by “reserving the real right to extend the scheme” on the sectional plan and on the application for the opening of the scheme when it is first lodged at the Deeds Registry. If such a right exists, it must be disclosed to any new potential purchaser in the scheme and should also be disclosed in an agreement between the seller and the purchaser. It is the conveyancer’s job to check this and to confirm, in a certificate to the Registrar of deeds at the time of transfer, that the real right to extend the scheme has been disclosed to the purchaser.

The requirements pertaining to lodgement and registration are prescribed by the Deeds Registry Act as well as the Sectional Titles Act.

**The share of a developer in the buildings or land:**

The developer (as original owner) shall be the owner of sections not held by any other person. His/her share in the common property would therefore also depend on the total of the participation quotas of such sections held by him/her.

The developer shall cease to have a share in the common property when the ownership of all sections is held by another and not by him/her anymore.

**What do you actually own in a scheme?**

You own a unit, which means:

1. You own a specific section of the building; **plus**
2. a share in the common property proportioned to the quota of that unit.
Practically, you own the inside of the property, i.e. the space contained by the inner walls, ceilings & floors of the unit. You are entitled to paint or decorate or undertake alterations as desired, providing such alterations do not infringe on municipal by-laws.

The common boundary between your section of the building and another section, or the common property area/property is the very middle line of the floor, ceiling, wall or whatever the case may be.

Sometimes an apartment can be in one building while the garage belonging to that apartment is situated in another building. Estate agents should always make sure exactly what compromises a section. The first place to consult will most likely be the registered sectional plan for that scheme.

**What is a section?**

A section means a specific portion of a building (a flat in a multi-storey apartment block) as shown as such on a sectional plan.

Section + Share of common property = Unit

**What is “Common Property”?**

The Common Property is that part of a scheme which does not form part of any section. It basically comprises of the land on which the scheme is situated. Driveways, gardens, swimming pools, corridors, roofs, lifts and entrance foyers in general are good examples of common property. Naturally all the owners of the various sections are the “owners” and therefore entitled to use the common property.

Our current Sectional Title Act in Namibia does not make provisions for Exclusive Use Areas like the new Act in South Africa. If owners of a unit in an existing scheme want to reserve certain areas for exclusive use (parking or garden), the best way to do so is by ways of the management rules (see discussion on rules).

**What is your “undivided share” in the common property?**

In relation to an owner of a unit, undivided share in the common property means the undivided share of that owner in the common property as determined in accordance with the quota of the section of which he/she is the owner and in relation to a section means the undivided share in the common property apportioned to that section in accordance with the quota of that section. In short, one can say that the owners of the sections are co-owners of the common property. Your share in ownership thereof will depend on your participation quota.

**What is your Quota / Participation Quota (PQ)?**

\[
PQ = \frac{\text{Floor Area of your section to the nearest square meter}}{\text{Total Floor Area of all the sections in the building to the nearest square meter}}
\]

The PQ is a percentage expressed to three decimal places.

This calculation is done by the land surveyor/architect who prepared the sectional plan and shows on the last sheet of the plans. Although a Body Corporate can make rules, shareholding is fixed and cannot be altered unless the building is altered.
Why is PQ important?

i. It determines the size of the owner's undivided share in the common property.
ii. It determines the value of the vote of an owner of a section (in the case where the vote is reckoned by value).
iii. It determines the amount of the owner's levy towards the Body Corporate.
iv. It determines the amount a particular owner can be held liable for in the payment of a judgment debt of the Body Corporate.

Who controls the Common Property?

Once a sectional title register is opened, the scheme functions in an orderly fashion and owners and occupiers must comply with rules that govern the day-to-day aspects of living in a sectional title scheme. The common property is controlled by the Body Corporate. There are no exceptions to this rule. This means that even though parts of the common property are designated exclusive use areas, these areas are still controlled by the Body Corporate and are therefore subject to the rules of the scheme. These rules might prohibit a "braai" in an exclusive use garden or balcony, control the type of fence or wall erected around a garden, or prevent the installation of a plunge pool or spa bath without first obtaining the consent of the trustees.

Who is “The Body Corporate”?

The Body Corporate is not some mysterious group of outside rulers that acquire power over sectional title schemes. It is rather a collective name given to all the owners of units in a scheme. It comes automatically into existence as soon as the sectional title register is opened and the first unit is transferred to a new owner. All registered owners of units in a scheme are members of the Body Corporate.

The Body Corporate has perpetual succession and shall be capable of suing and of being sued in its corporate name in respect of:

a) Any contract made by it;
b) any damage to the common property;
c) any matter in connection with the land or building for which the Body Corporate is liable or for which the owners are jointly liable; and
d) any matter arising out of the exercise of any of it is powers or the performance of any of duties under this Act or any rule.

The Body Corporate controls and runs the scheme. Major decisions regarding the scheme are made by the Body Corporate, usually at the Annual General Meeting (AGM), or at a Special General Meeting (SGM). At these meetings, matters which affect the scheme are discussed, budgets are approved, rules can be changed and trustees are appointed – these are often accompanied by lively discussions!

Each member of a Body Corporate is entitled to vote at these meetings, providing that the member is not in arrears with levy payments or in serious breach of the rules. Members (who are basically the owners of units) in default can only vote in certain circumstances.

As described earlier, an individual member's voting power is governed by the member's percentage ownership (PQ) of the common property.
Duties and powers of the Body Corporate:

The Body Corporate shall carry out the duties and exercise powers as assigned and conferred in the Act.

Main Duties:

- Insurance and maintenance of the building, plants and common property

Main Powers:

- To establish a fund for the above duties, determine the amounts needed and require the owners to make contributions to this fund by ways of levies and open accounts for that fund.
- To appoint such managing agents and employees as it may deem fit.

What is the “levy”?

The costs incurred in running a scheme that has to be paid by the Body Corporate. These costs could include:

- Rates and taxes
- Water and electricity used on the Common Property
- Sewerage
- Insurance premiums for the Common Property
- Repairs and maintenance of the Common Property
- Wages and salaries of the cleaners and other staff
- Security

These costs are paid by individual owners in the form of a monthly levy, calculated in accordance with the participation quota for their unit. Some costs incurred in the upkeep of Exclusive Use areas can be recovered from the user of that area.

In addition to the above, the Body Corporate is obliged to establish a fund for future maintenance and unexpected expenses. The size of this fund is not specified in the Act, but a wise Body Corporate will make sure that the fund is adequate for the size of the complex and present condition of the property. If the fund becomes excessively large, the Act does not allow any part of the excess to be refunded. However, the excess can be used to subsidise future levies or to improve the common property.

Before transfer of a unit to a new owner can happen, a clearance certificate must be obtained from the Body Corporate stating that all levies for the seller to the Body Corporate is fully paid-up.

How is the levy calculated?

At the inception of a scheme and again before every AGM, the trustees have to prepare a budget for the following year. This budget is then presented to all members of the Body Corporate at the AGM. The Body Corporate can either accept the budget or can ask for changes to be made. Once the budget has been accepted, the total annual cost is divided into a monthly amount. Each owner is then "levied" a monthly amount, which is his/her share of the common budget.

The amount is calculated in accordance with the Participation Quota (PQ) of the owner unit. Larger units have a higher PQ than smaller units and the amount paid by each owner will vary accordingly. The members of the Body Corporate may by unanimous resolution make rules whereby a different value is attached to make contributions.
Can the levy be changed at times?
Yes. In an emergency, the trustees can impose a special levy to cover expenses of an unforeseen nature.

Can an owner be summoned by the Body Corporate for levies in arrears?
Yes, the Body Corporate has the power to approach the court of law to issue summons against an owner for not paying the levies.

The personal liability of various owners:
Like the South African Act, the current Namibian act also provides that a judgment creditor can recover from the owners of sections on a pro-rata basis, in proportion to their prospective quotas, in respect of an unsatisfied judgment against the Body Corporate. Therefore, a local authority is empowered to recover any rates and taxes levied by it from the Body Corporate and in default thereof, from the owners on a pro-rata basis. Owners who made payments directly to the judgment creditor can be refunded by the Body Corporate.

Rules of the Complex:
Who makes the rules?
An original schedule (as provided in the Act as Schedule 1 and Schedule 2) setting out the rules shall accompany the application for the opening of the sectional title register at the Deeds Registry.

Can rules be changed?
Although a developer is free to design new rules from scratch, the Sectional Title Act contains as an annexure a standard set of rules which developers may adopt with or without amendments.

Section 27 of the Act also authorises members to put proposed changes to the Body Corporate at a General Meeting, at which members will be able to discuss the proposed changes before being asked to vote for or against them. To change schedule 1 rules, a unanimous resolution is needed and for schedule 2 rules a special resolution is required.

Unanimous Resolution: A resolution passed unanimously at a general meeting of which at least fourteen days’ notice specifying the proposed unanimous resolution has been given and at which all owners of sections are personally present or represented by proxy.

Special Resolution: A resolution passed by a majority of not less than three-fourths of the votes (reckoned in value) and not less than three-fourths of the votes reckoned in number of all the owners of sections, at a general meeting, of which at least fourteen days’ notice specifying the proposed special resolution has been given.

According to Section 27 (3) of the Act, no addition or amendments to, or repeal of any rules shall be of any force or effect until the Body Corporate has lodged with the Registrar a notification in the prescribed form and the Registrar has made reference thereto on the schedule to the relevant sectional plan.
Rules of a sectional title scheme are divided into two broad categories;

- Management rules
- Conduct rules

The Schedule 1 (Management) rules deal with the following important aspects of management:

- **Trustees of the Body Corporate**: How many there may be, how they shall be elected, how voting shall take place, how vacancies shall be filled, choosing a chairman, calling of meetings, how to determine a quorum, how to keep minutes and proper books and accounts relating to levies, money and expenses, if and when to make these books and accounts available to owners and new owners, signing authorities, etc.
- **Regarding general meetings of owners**: Frequency, notice, proceedings, quorum, votes and proxy thereof, as well as electing of a chairman for the meetings.

The Schedule 2 (Conduct) rules determine what is permissible in terms of conduct of owners, occupants and their guests:

- **The rules will specify for example**: the specific use or purpose of a section, rules regarding common property, whether pets are allowed, the appearance of units, etc.

**Note on trustees (of the Body Corporate) and the Sectional Title Management:**

A Sectional Title life-style brings together people from diverse backgrounds, age-groups, interests and philosophies. Often, the only common factor is ownership of a unit in the scheme in which they live. Inevitably, integrating such diverse backgrounds into a stable, happy and successful scheme presents problems.

The success or failure of most schemes rests almost entirely with the trustees, who are normally owners in a scheme, who have been entrusted by the Body Corporate to “look after the scheme”. The role of a trustee is not an easy one. It is time-consuming, often frustrating and requires sensitivity, patience, wisdom and occasionally, the hide of a rhinoceros! A trustee is a manager, negotiator, mediator and peace-maker. A trustee needs to understand the Act and must be able to interpret the rules and guide the Body Corporate. A trustee must be able to understand and control budgets and accounts. Most trustees are laymen without a legal or accounting background, so their task is tremendous.

The minimum number of trustees for a scheme is two. The Act does not specify the maximum number. Ideally, a trustee should possess skills or qualities which will be of benefit to the scheme. Accounting or legal knowledge, organisational abilities, knowledge of electrical or mechanical matters, the ability to type or bookkeeping skills are much in demand and can save the Body Corporate a lot of time and trouble! It is permissible to appoint as trustee someone who does not own a unit in the scheme, although this not common practice. At all times, the majority of trustees must be owners in the scheme. At the first meeting, after being appointed, the trustees elect a chairman who usually holds office until the next AGM. The trustees do not have the same powers as the directors of a company or members of a closed corporation. Trustees work on a voluntary, unpaid basis, although a trustee who is not an owner in a scheme may receive payment derive any financial or economic benefit for acting as a trustee.

**Who are the Managing Agents?**
Most Body Corporates appoint or “outsource” certain functions to a managing agent who specialises in sectional title administration. These managing/administrative agents must be registered with the Estate Agent’s Board and hold a valid Fidelity Fund Certificate. The agents normally send out monthly statements to collect levies and other monies due to the Body Corporate. They have to keep books, recover debts, prepare budgets and arrange for repairs and maintenance, as well as other administrative duties on behalf of the Body Corporate. Good managing agents should normally have a good understanding of the Act and also act in good faith towards the Body Corporate and owners.

Changes to Units or Grounds:

In the interest of keeping uniformity, minor changes may be approved (in writing) by the trustees. Consent is thus needed for all external changes, i.e. aerials, satellite dishes, awnings, enclosures, changing of exterior colour schemes, air conditioners, paint work, window fittings, etc.

An owner, who wishes to extend his/her section, either by the addition of an extra room or the extension of an existing room, must get a unanimous resolution from the Body Corporate (as any alterations may change the look of the property, or increase the insurance) approving the extension before approaching the local authority for planning approval. In addition to the cost of effecting the extension, the owner whose section is to be extended will be responsible for the costs occurred by surveyor to get the sectional plan amended by re-calculating participation quotas and have the amended sectional plan registered. This applies to any extension which infringes onto common property and can include balconies, patios and terraces, including vertical extensions. According to section 18 (1) of our current Act, should any participation quota of a section which is mortgaged be effected by the amendment on the sectional plan, consent from mortgagees will be required.

Sale and transfer of a Sectional Title Unit:

In a new development, the developer may even start to sell the proposed sections long before the sectional plans have been drafted and even before the sections have been built. It could be time well spent to ensure from the sectional plans what the correct number is of the unit a client is buying. These numbers can often change from the developer to the architect and differ from the legal number that is being registered on the sectional plan. Therefore most contracts make provision for the fact that numbers could change.

Any deposits paid by the purchaser in regard to the buying of units must be held in trust by the conveyancer and the earliest that the developer may use these funds is when the sectional title register has been opened in the Deeds Registry.

When dealing with a prospective buyer on a sectional title unit, make sure to get a copy of the rules governing the scheme. This can easily be obtained from the trustees who must provide it to prospective purchasers. At the same time it is good to get the names of the trustees and, if possible, the contact information of the managing agents appointed by the Body Corporate to manage the complex. You also need to supply the prospective purchaser with the amount of levy payable each month. Also make sure to correctly advise prospective purchasers on “house rules” like pets and other arrangements. This information can be obtained from the trustees or the managing agent.

Make sure to use the correct contract for sectional title purchases. Besides the requirements for a regular Deed of Sale/Offer to purchase, it should have the correct property description. It is also wise to put the amount of levy payable with an explanation on the contract what the terms Body Corporate, rules and levy means.
Besides the guidelines of Chapter 5 on the Process of Registration, an agent can also contribute positively to the process by assisting to obtain a Body Corporate Clearance Certificate which is required from the conveyancers to do the transfer of ownership. Once all the requirements are in place (necessary declarations are signed, transfer duty and stamp duty are paid) and after fulfilling of the suspensive conditions, a conveyancer will sign a certificate in terms of section 11 (4) in terms of which all the facts of the transaction is stated and, on the basis of that certificate the Deeds Office will endorse the transfer of ownership on the Certificate of Registered Sectional Title.
Example of Certificate of Registered Sectional Title

PREPARED BY ME:

_____________________
CONVEYANCER
JACOBS JJ

CERTIFICATE OF REGISTERED SECTIONAL TITLE NO

CERTIFICATE OF REGISTERED SECTIONAL TITLE ISSUED IN TERMS OF SECTION 8(2)(d) OF THE SECTIONAL TITLES ACT, 1971

I, the Registrar of Deeds at WINDHOEK do hereby certify that

DEsert STREAMS CLOSE CORPORATION NO 2
Registration number CC/2000/2000

is the registered owner(s) of a unit, consisting of

(a) SECTION NO 2, as shown and more fully described on SECTIONAL PLAN NO 3 /2001 in the building or buildings known as DEsERT STREAMS of which Section the floor area, according to the Sectional Plan, is 210 (TWO HUNDRED AND TEN) Square metres in extent; and
-2-

(b) an undivided share in the common property in the land and building or buildings as shown and more fully described on the said Sectional Plan, apportioned to the said Section in accordance with the participation quota of the said Section specified in a Schedule endorsed on the said Sectional Plan,

and that the said owner’s title to the said Section and undivided share in the said common property is subject to or shall benefit by

(i) the servitudes, other real rights and conditions, if any, endorsed on the said Sectional plan and the servitudes referred to in Section 19 of the Sectional Titles Act, 1971, and

(ii) any alteration to the building or buildings or to a Section or to the common property shown on the said Sectional Plan.

SIGNED at WINDHOEK on the

__________________________________

REGISTRAR OF DEEDS
Possible Sectional Title Endorsements

**Endorsement:** Refers to the Registrar’s mark or endorsement (stamp) being made on a Title Deed. Some endorsements merely serve to note a fact on a deed while other endorsements effect transfer of ownership of immovable property.

1. **On transfer of ownership on the Certificate of Registered Sectional Title:**

   **ENTRY NO:** .................................................................

   Ownership in the unit held under this Certificate of Registered Sectional Title is hereby transferred to and registered in the name of .................................................................
   ...........................................................................................................................................
   ...........................................................................................................................................
   Vide Conveyancer’s Certificate No: ....................................................................................
   Filed herewith / with duplicate original hereof.

   **Deeds Registry**
   **Windhoek**

   **Date** .................................................................
   ........................................................................................................

   ........................................................................................................
   **REGISTRAR OF DEEDS**

2. In case the unit was transferred, the following endorsement will be made on the previous ownership endorsement and a new entry will follow.

   **Transfer to:**

   See entry NO: .................................................
3. In case of the unit being held by a Sectional Mortgage Bond the following endorsement will follow after the ownership endorsement on the Certificate of Registered Sectional Title.

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<th>………………………………………………..</th>
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Hypothecated by Sectional Mortgage Bond No …………………………………………………….. (unit)
dated ................................ for an amount of N$ …………………………………………………..

Done on.........................................this......................................................day

of....................................................../20.............................................

........................................ REGISTRAR OF DEEDS

4. In case of the above Sectional Mortgage Bond being cancelled, the following endorsement will be made to the right side over the above Mortgage endorsement to indicate that it has been cancelled.

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</table>
4. 4. Conventional Deed of Transfer / Title Deeds

A Deed of Transfer serves a twofold purpose:

1. **Instrument:** It is a document by means of which the right of ownership of land is transferred from one person to another.
2. **Publicity:** It serves as proof of the owner’s right of ownership over the land – proof after registration.

Some general Rules applicable to Deeds and Registerable Documents:

- All deeds will be on A4 size paper of good quality and utilize good quality printing.
- The upper half of the first page will be left blank for endorsements and there will also be a left margin of 4 cm for binding (staples).
- Signatures must be in black ink, pages must be numbered and all blank spaces would be ruled through and only one side of the page will be used.
- Place and date of execution must be disclosed.
- In case of more than one transferor/transferee – parties must be numbered (except marriage in community of property and partnerships).
- In case of more than one property: property must be numbered.

All relevant information relating to a specific piece of land and its owner can be determined from a Deed:

- Who the previous owner was and who the current registered owner is.
- Is the property bonded?
- When was the date of transfer?
- A description of the property (including size).
- Reference to diagram or general plan of the property.
- Conditions of Title and applicable servitudes.
- The right of use, the date of sale and the purchase price.
Analysis of a Deed of Transfer

DEED OF TRANSFER

Be it hereby made known:

That JOHANNES JACOBUS JACOBS

appeared before me, Registrar of Deeds at WINDHOEK

he, the said Appearer, being duly authorised thereto by a Power of Attorney granted to him by

ADRIAAN JANTJIES
Born on 10 February 1968
and
MARIA ELIZABETH JANTJIES
Born on 15 November 1970
Married in community of property to each other

dated the 9th day of April 2007, and signed at Windhoek
And the said Appearer declared that His Principal had truly and legally sold on the 9 February 2007 (Note 8) and that he in his capacity aforesaid did, by these presents, cede and transfer, in full and free property, to and on behalf of (Note 9)

JOHN MULENI
Born on 18 November 1969
UNMARRIED

His Heirs, Executors, Administrators or Assigns

(Note 10)
CERTAIN: Erf no. 91 (a Portion of Erf 505) KEETMANSHOOP
SITUATED: In the Municipality of Keetmanshoop

REGISTRATION DIVISION "T"

KARAS REGION

MEASURING: 1170 (ONE ONE EIGHT ONE) Square metres

(Note 11)

FIRST transferred by Deed of Transfer no. T 222/1972 with Diagram no. A.731/72 relating thereto and held by Deed of Transfer no. T5166/2004

(Note 12)
SUBJECT to the following conditions imposed in terms of Ordinance no. 11 of 1963 and created in Deed of Transfer no. T272/1974, namely:

IN FAVOUR OF THE LOCAL AUTHORITY

1. It shall not be permitted to drill or excavate for water on the erf.

2. No dairy, livery stable, cowshed, slaughter pole, piggery, workshop, bakery, sausage factory or any offensive trade may be established or conducted on the erf. “Offensive trade” means any of the trades mentioned in regulation 1(a) of Government Notice 141 of 1926 dated the 10th November 1926, as amended.
3-

3. Except with the permission of the local authority, no person shall have the right to make or cause to be made any bricks, tiles, earthenware pipes or any articles of a like nature on the erf or any part thereof for any purpose whatsoever except for the purpose of erecting a building on the erf.

4. No cattle, pigs, sheep, goats, baboons, apes, beasts of prey or draught animals may be kept on the erf.

5. There shall be no obstruction or deviation of the natural courses of storm water over the erf, without consultation with and approval by the local authority.

6. No building or structures or any portion thereof except the boundary walls, fences, fire walls or railway lines as the case may be, shall, without the approval of the local authority be erected nearer than 5 metres to any street boundary or within 3 metres to any lateral or rear boundary of the erf.

For the purpose of this condition a "street boundary" means any boundary common to a street, a "lateral boundary" is a boundary with at least one end on the street boundary and "rear boundary" is any boundary other than a lateral or street boundary.

(Note 13)
Wherefore the Appearer, renouncing all the Right and Title which the said TRANSFEROR heretofore had to the premises, did, in consequence also acknowledge the said TRANSFEROR to be entirely dispossessed of, and disentitled to, the same, and that, by virtue of these presents, the said TRANSFEREE, His Heirs, Executors, Administrators, or Assigns, now is and henceforth shall be entitled thereto, conformably to local custom. The State, however, reserves its rights.

(Note 14)
And finally acknowledging the purchase price to the sum of N$220 000,00

(Note 15)
Signed at WINDHOEK, on ______________________________, together with the Appearer, and confirmed with my seal of office.

_________________
Signature of Appearer

In my presence,

________________________
Registrar of Deeds.
1. Transfer Duty Receipt No. 105130
   Issued at Windhoek
   on 02.05.2007 for
   N$ 2 000.00  
   (Note 16)

Checked 1. ______________________ 2. ___________________

2. I, the undersigned, JOHANNES JACOBUS JACOBS
   Conveyancer hereby certify in terms of Section 78 of Act 23/1992 that all rates, fees, charges and other
   monies due to the local authority council in respect of any service, amenity or facility supplied to such
   property in terms of this Act, inclusive of any availability charge and minimum charge provided for in
   Section 30(1)(u) has been paid up to and including the date of registration hereof.

   J J JACOBS (CONVEYANCER)

*Delete which is not applicable.

If necessary, insert a Registrator Clause etc. approved by the Registrar.

Explanations:

Note 1

The amount of Stamp duty in terms of Act 15 of 1993 will appear here. This will appear on the client
copy of the deed by ways of:

1. Stamps to the exact amount being stamped on to the page; or
2. An endorsement and confirmation of payment made by the Receiver of Revenue.

Note 2

Every Deed of Transfer must be prepared by a practicing conveyancer and his/her surname and initials
must be shown in BLOCK LETTERS. The conveyancer, who prepared and signed here, takes
responsibility for the accuracy of those facts mentioned in the particular document.

Note 3

The top half of the first page must always be kept open for endorsements. Endorsements can either
indicate a mere fact or transfer of the property from the specific deed depending on the type of
endorsement. The most common endorsements to be found here will be transfer and mortgage
endorsements and, in some cases, newly imposed conditions or servitudes. (Although the title deed
may mention that the property is bonded, it does not mention who the mortgagee is; this information
must be obtained from the Bond Deed.) Once this space is taken, subsequent endorsements will follow
at the back of the first page and from there onwards.

Note 4

The name and particulars of the attorneys who have lodged the deed.
**Note 5**

The number of the registered deed will appear here. In this case in will be a Title Deed number of 2007.

**Note 6**

Every deed must be supplied by a heading that indicates what it is; bond, transfer, etc.

**Note 7**

This introduction part refers to three things:

1. The conveyancer who will appear before the Registrar to register the deed.
2. The transferor (seller) with reference to his/her date of birth and marriage status.
3. Reference to the power of attorney signed by the seller where he/she authorised the conveyancer to register transfer of the property.

**Note 8**

The purpose of this clause is to tell the “story”. This is to indicate the nature of the transaction and the circumstances necessitating the transfer. It will therefore indicate how the purchaser obtained the property; was it sold to him/her, donated, inherited, or whatever the case may be.

**Note 9**

A description of the parties to whom the property is transferred.

**Note 10**

This part of the deed contains the full description of the land/property. It will tell you the registered number, where it is situated, registration division (see attached map of registration divisions) as well as the extent/size of the land.

**Note 11**

This clause tells a little more about the “history” of the land; including how it was first registered and where you can find the diagram/general plan on which the property is plotted. This clause basically reflects the very foundation of our land registration system and how it is based on a land surveying system. Any piece of land to be transferred must be reflected on either a diagram or a general plan (map) approved and signed by the Surveyor General. Together with the Title Deed, this complete miniature picture of the land proclaims ownership in each piece of land *(Kaart-en-transport)*.

**Note 12**

This clause contains all the conditions applicable to the registration of such Deed of Transfer. Note that a condition (for example a new servitude registered by means of Notarial Deed) that was imposed after registration of transfer can also be made by means of an endorsement and will therefore not show here.
Note 13

This clause declares that the previous registered owner (identified by his/her full names) is now divested of his/her land. The State however is reserving its rights and this should be included.

Note 14

Legislation requires that the purchase price should be stated in the Deed of Transfer. Where transfer duties was paid on a higher amount than the purchase price, the actual amount on which duties was paid must be stated instead.

Note 15

The deed is executed by the signature of the conveyancer and the Registrar. Deeds executed or attested by a registrar shall be deemed to be registered upon the affixing of the Registrar's signature thereto.

Note 16

No transfer of property may be registered unless accompanied by a valid transfer duty receipt. If transfer duty is payable, reference to the Transfer duty and the receipt on the transaction will be made and should also be checked and signed by two deeds examiners.

Also included is a certificate signed by the conveyancer in respect of rates and taxes payable to the applicable local authority in terms of the Local Authorities Act.

Endorsements:

Commonly the term "endorsement" means to "write on the back of document" or "an explanation that is written on back of document".

The Deeds Registries Act and certain other laws, makes provision for the transfer of ownership from one person to another by virtue of an endorsement made by the Registrar of deeds on the existing Title Deed of the land concerned. These endorsements can include amongst others, the following:

- To rectify an error
- Transfer to the State or local authority
- Registration of change in marital status (and other marriage issues)
- Transfer from partnership to individual members
- Rectification of title deed
- Endorsements in connection with insolvency, servitudes, change of names, etc.

However, for the purpose of this guide we will focus on the transfer and bond endorsements:
In the case where a mortgaged bond is registered over a property, the following endorsement will appear on the Title Deed:

**MORTGAGED**

(No. ____B_______________/ ______)

for ________________________________ (with preference for an additional amount not exceeding ______________________)

____________________________________________________

DEEDS OFFICE
WINDHOEK REGISTRAR OF DEEDS

**CANCELLED**

___________________

Deeds Office
Windhoek Registrar of Deeds

BC /

In the case where the above bond is cancelled the “CANCELLED” endorsement will be made over the Bond endorsement indicating the Bond is cancelled. It will also make a reference to the Cancellation (BC) number where more information can be found regarding the cancellation.

Where the property was alienated and subsequently transferred to a new owner:

**TRANSFERRED TO: ______________________________**

No. _______________Remainder_____________________

__________________________

Registrar
4.5. Agricultural Land

“Contrasting beautiful Namibia
Namibia our country
Beloved land of savannas.”

Taken from Namibian national anthem

This beautiful country of ours has a landmass of approximately 824 000 km²,

- 114 500 km² (13.9% of total area) are national parks;
- 21 600 km² (2.5%) are restricted “Diamond Areas”;
- 469 100 km² (57.0%) are Title Deeds in freehold land; and
- 218 300 km² (26.5 %) are Non-Title deeds in communal land.

There are approximately 10 900 Title Deed portions outside municipal areas (2006).

- Of this 6 010 are Title Deed farms.
- The 4 890 remaining Title Deeds are plots and small farms.

In total, title deed farms (of more than 3 000 ha each) constitute 61.8% of the agricultural land in Namibia. Smaller title deed plots make up 6.4% of the agricultural land. This last portion consists mainly of smallholdings around towns, in many cases just in residential areas. There are purportedly about 47 state-owned farms that have not been subdivided.

Agricultural land basically consists of land that is:

- Not situated in Municipal/local authority area.
- Not in a settlement area.
- Not owned by the State.
- Not excluded by a notice from the Minister in the Government Gazette.

Extensive livestock farming makes out the bigger part of agricultural activities, as more than 90% of the 687 000 km² of agricultural land (83% of the total surface) are utilized for extensive livestock farming. Veterinary Livestock census and reports in 2006 indicated more than 2 300 000 cattle in Namibia. In 2007 Namibia had four export abattoirs for cattle in operation at Windhoek, Okahandja, Oshakati and Katima Mulilo. The sale distribution of Namibian beef reached 72% in the United Kingdom in 2006 and 13% in the Netherlands. Agriculture in Namibia indeed shapes the backbone of the economy with regard to job creation and the production of primary products. Nearly 50% of our countries job-opportunities are provided by agricultural activities, 20% plus in the formal sector, hereby thus being the single most important employment factor within the domestic economy.

Guest farms/lodges are also a widespread Namibian development. On guest farms you will still find farming activities/business, but in addition farmers/owners also offer accommodation with full- and half board services. Game viewing and sustainable trophy hunting is also of major importance not only for giving value to the game but also for the economy of our country.
Needless to say, these beautiful lands are not only sought after but general observations are that prices of commercial farmland are expensive, as ownership of farmland is very much linked to wealth in people’s minds.

Agricultural land is not only of importance to the economy but also a vital part of the real estate industry. By including agricultural land in this guide, the aim is not to make all agents experts on agricultural land sales. Agents should at all times be adherent to clause 2.3 of the Code of Conduct which requires that work and duties must be performed with such degree of care and skill as might reasonably be expected. It is further also important to keep clause 5.3 of the Code of Conduct in mind. The purpose of this clause is to avoid misrepresentation by estate agents concerning the level of expertise which they possess, in respect of certain estate agency services. I believe that this is indeed a “specialised field” and like commercial real estate, it should be left for those agents specialising in it. An agent may therefore not advertise that he/she is an expert in the field of commercial or agricultural property transactions if he/she in fact has very little experience in that regard.

Important Legislation regarding Agricultural Land:

1. Sub-Division of Agricultural Land Act 70 of 1970:

This Act prohibits certain actions regarding Agricultural Land and the main purpose is to control sub-division and thereby avoid the sub-division of agricultural land in uneconomical units.

The more important aspects for agents to take note of are:

**Subject to the provisions of section 2 –**

d) No lease in respect of a portion of agricultural land of which

1. the period is 10 years or longer, or
2. is the natural life of the lessee or any other person mentioned in the lease, or
3. which is renewable from time to time at the will of the lessee, either by the continuation of the original lease or by entering into a new lease, indefinitely or for periods which together with the first period of the lease amount in all to not less than 10 years, shall be entered into;


g) No public notice to the effect that a scheme relating to agricultural land or any portion thereof has been prepared or submitted under the ordinance in question, shall be given, unless the Minister has consented to this in writing.

**Section 3 of the Act requires the consent from the Minister of Agriculture for sub-division of agricultural land:**

When farm land is being sub-divided, transferred in undivided shares, or certain real rights are being registered over such land (with the exception of those referred to in section 6A of the Act), the following must be lodged with the Registrar of Deeds concerned:

- A consent by the Minister of Agriculture; or
- A letter from the Department of Agriculture to the effect that the farm land in question is not agricultural land as defined in section 1 of the Act.

When drafting contracts for the sale of an unregistered portion of agricultural land, it should be remembered at all times that **no portion of agricultural land may be sold or even advertised for sale without the Minister's consent** (section 3(e)(i) of the Act).
The effect hereof is that a contract for such a sale is void *ab initio* if the consent of the Minister is not obtained prior to the conclusion of the contract. It even applies to the sale of a portion of agricultural land where the sale is subject to a suspensive condition that the Minister will grant his/her consent to the subdivision of the land. The Registrar of Deeds will compare the date of the consent with the date of sale and reject the deed if the consent was obtained subsequent to the sale of the land.

2. Introduction to the Agricultural (Commercial) Land Reform Act, 1995 as amended:

The Agricultural industry in Namibia underwent a number of changes since we gained independence in 1990. Besides some changes in subsidy support farming, the government also needed to address land reform and for that purpose, adopted the Agricultural (Commercial) Land Reform Act which was passed in 1995.

According to the government’s policy document last year, the objective was to place 15 million hectares out of a total of 36 million hectares of commercial farming land in the hands of previously disadvantaged citizens by 2020. As mentioned in local newspapers on 30 November 2007, the aim is to relocate 240 000 families to these farms. The government says 204 out of the approximately 6,000 commercial farms in Namibia have been bought since independence in accordance with the land reform programme. Another 800 farms have been bought by emerging farmers by means of Agribank loans and formerly disadvantaged farmers have purchased about 300 farms with their own capital.

This Act contained a number of provisions which include:

- A requirement that any commercial farm offered for sale is offered to the Government first, for the purposes of resettlement.
- Ownership of commercial farmland by non-Namibians is regulated by the statute.
- Creation of a Land Reform Advisory Commission (LRAC) to advise the Government on the suitability of farms it wants to purchase and to resolve disputes arising from other parts of the Act.

Practical Implications of Act: Preferment Right of State to Purchase:

A key component of the 1995 Act is the requirement that all commercial farmland sold must first be offered to the Government for redistribution through its resettlement programme. This includes the sale/exchange of the land or otherwise disposal of the land for valuable consideration.

Practical steps of getting waivers:

In effect it means that no sales agreement/Offer to Purchase is valid until the land:

1. Is first offered to the State; and
2. If the State does not intend to purchase the farm, they have issued a “Certificate of Waiver” in respect of the particular land.

1. Offer to the State
   - Must be in writing.
   - Made to the Minister through the permanent secretary.
   - Stipulate the intended price that the owner wants.
   - Comply with the particulars needed/prescribed.
   - Be accompanied by a certified copy of the existing Title Deed.
Once an offer is made it cannot be withdrawn unless by consent of the Minister.

2. Certificate of Waiver:
   - A written certificate/document.
   - Made in writing by the Minister.
   - Certifies that the State waived its preferment right to purchase the particular land.
   - Certifies that the State does not acquire the specific agricultural land at the time of the offer.

What to do in the case of lapsed waivers:

A Certificate of Waiver is only valid for one year. If the sale does not go through and the certificate has lapsed, the procedure needs to be repeated and can only in certain circumstances and specific conditions be renewed.

Are there any land/transactions exempted from waivers?

Yes. Land is exempt from waivers when agricultural land is alienated:

   - By the State
   - By regional council or local authority councils
   - As a result of administration of a deceased estate
   - By the trustee of an insolvent estate, liquidation or winding up procedures as described in the Act
   - By a deputy sheriff in execution of judgment from a competent court
   - By co-owner to another co-owner, except in the case where such land is owned by company or closed corporation.

In the above scenarios an exemption certificate, and not a waiver, will be issued in terms of Section 17 on the grounds applied for.

Other transactions excluded from obtaining a waiver:

   - Where the minister directs otherwise, and
   - the time for the issuing of the waiver expired without the Minister accepting or rejecting the offer.

What about companies and close corporations?

Until 2002 when the Act was amended by the Agricultural Commercial Land Reform Amendment Act 13 of 2002, land transfers as donations to a close corporation were exempted from the provisions of the Act. Land transfers without sale have mostly been done through close corporations. For example, there was a dramatic increase in the number of corporate registrations between 1994 and 1995 – the year when reporting of sales of commercial farms became mandatory. It has been suggested that the majority of post-1995 transfers categorised as donations could have been structured so as to avoid provisions of the 1995 Act.

As a result there was no sale of land between parties and no need to first offer the land to the Government by seeking a waiver from the Minister of Lands and Resettlement. The short-term effect is that commercial land is removed from the process of redistribution at the point when ownership is transferred. A long-term effect is that once land is owned by a corporation, it is possible to gain control
over it by selling or purchasing shares of the corporation. This means that no sale of land as such occurs and any subsequent change of ownership is not liable to provisions of the Act, including provisions against ownership of multiple holdings and ownership of land by non-Namibians.

The Amendment Act of 2002, Section 17 (1 A) was introduced to eliminate some of the loopholes in the 1995 Act. Currently the Amendment Act specifically provides that the passing of commercial agricultural land to another person in terms of the controlling interest in a company or close corporation owning agricultural land be deemed as void, unless a certificate of waiver is first obtained from the Minister of Lands and Resettlement.

**What does Controlling Interest mean?**

- More than 50% of the issued share capital of a company (51% and more).
- More than 50% of the interest in the close corporation.
- More than half of the voting rights in respect of the issued shares of the company.
- To obtain the power, either directly or indirectly to appoint or remove the majority of the directors/members of the company/close corporation without the concurrence of any other person.

**Procedure where the Minister does not issue a waiver in respect of the sale:**

- The Permanent Secretary refers the offer to the Commission (LRAC) within 60 days after receiving the offer.
- LARC will consider the offer and make recommendations to the Minister within 30 days after receiving it.
- The Minister will within 14 days:
  1. Decline the offer and issue a waiver; or
  2. if he/she wants to acquire the land
     A. Accept the offer OR
     B. Make a counteroffer according to the provisions of the Act.

Should there be disagreement regarding the value/purchase price, the owner will approach the Lands Tribunal for the determination of the purchase price. Should the owner not approach the Tribunal, it shall be deemed that the owner has accepted the counteroffer. Where a mortgage bond is registered over the land in question, the Minister shall pay the amount concerned or furnish guarantees for the payment thereof. A Certificate of Waiver is valid for one year from the date of which it was issued. At any time before the expiry of the one year period, the Minister may, upon receiving a written request from the owner, extend such period should a good cause exist.

**_(Agricultural) Land Tax:_**

As in South Africa, farming in Namibia was a direct subsidy by the Government for commercial agriculture. Needless to say, taxation of farmlands never really existed. As part of the current effort to achieve land reform, the government introduced land tax through the Agricultural (Commercial) Land Reform Second Amendment Act 2 of 2001.

Section 2 states that every owner of commercial agricultural land has to pay a land tax based on the value (known as the Unimproved Site Value) of the land. The value of the land is indicated on the main valuation role and calculated at a rate or progressive rate as may be determined by a notice under section 76 of the Act.
The first collection of a land tax on commercial farmland was extended from 22 March to 31 July 2005 and again to 31 August 2005, to give the people affected more time to resolve with the MLR issues regarding their land tax assessments. The idea behind taxation is to obtain revenue for Land Acquisition and Development Funds to buy more commercial agricultural land for the resettlement program. When Land Tax was introduced in the 2005/2006 financial year it resulted in an estimated N$ 28 million.

Section 2(1) sets the rate of the land tax on commercial farmland at:

- A single farm owned by a Namibian – 0.75% of Unimproved Site Value (as per Land Tax valuation role) per hectare.
- A single farm owned by a foreigner – 1.75% of Unimproved Site Value (as per Land Tax valuation role) per hectare.

\[ \text{Size} \times \text{Value (Unimproved Site Value)} \times \text{Percentage} = \text{Land Tax Payable} \]

For additional farms owned by the same owner, even if it is held by one Title Deed, the rate shall be increased by 0.25% of the Unimproved Site Value per hectare for each farm progressively, according to the number of farms owned. For example, if he/she owns two farms, the second (and most likely smaller) farm will be taxed the following way:

\[ \text{Size} \times \text{Value} \times (0.75\% + 0.25\%) = \text{Land Tax Payable} \]

or

\[ \text{Size} \times \text{Value} \times (1\%) = \text{Land Tax Payable} \]

If a farm of 6 000 ha is situated in the valuation zone of N$250/ha of unimproved land, the following formula applies: 6 000 ha \times N$250/ha = N$1 500 000

Now the N$1 500 000 represents the Value of the farm. If this unit is the owner’s first or only unit, the tax payable per annum will be: N$1 500 000 \times 0.75\% = N$11 250

Tax rates can create the following anomalies, for example:

If a person owns one farm of 10 000 ha but another owns four farms of under 10 000 ha in total, the first owner will be levied a lower tax than the second. In other words, the system may be fairer if the tax rate is based on the combined size of an owner’s multiple agricultural lands rather than on the number of farms per Title Deed held by a particular owner.

A Possible Solution is Consolidation of Farm Units:

Consolidating farm units means that two or more units are valued as one unit. This can be advantageous under the new tax law. Over the years, most Namibian farmers have treated two or more adjacent farms as a single entity, but adjacent farms are usually registered in the Deeds Office as separate entities. Currently there is no legislation prohibiting a farmer to consolidate adjacent farms to form a single entity so that the farmer can register as a single farming unit. If not consolidated, the adjacent properties will be regarded as two separate entities, with every additional farm unit taxed progressively.

Note: Non-Namibian citizens who own land in Namibia are taxed at a rate of 1% more than Namibian citizens are taxed on land.
How is Land valuated?

The Minister of Lands and Resettlement appoints a valuator who is responsible for the valuation of agricultural land. The Valuer-General decided to follow the mass appraisal approach and a valuation method recognised internationally was adopted for the valuation process. This approach entails that the value of a specific piece of land is determined on the basis of market evidence in its specific agricultural-ecological zone. Land valuation involves valuating a piece of land in its natural form and does not take into consideration any infrastructural improvements.

This Ministry is responsible for preparing a provisional valuation roll containing:

- A description of the agricultural land in question;
- the name and address of the owner of the land;
- the size of the land in hectares and its carrying capacity; and
- the Unimproved Site Value of the land.

The valuator must sign and date the completed provisional valuation roll and submit it to the Minister. The roll can then be inspected by any interested person at a place and time made known by the Minister in the Government Gazette. A valuator has to value any commercial agricultural land at a rate equal to the best price at which, in the valuator's opinion, that land might reasonably be expected to be sold by a willing buyer to a willing seller at the date of the valuation.

(Compare to valuations done by Municipalities to determine Tax payable on residential properties.)

What happens in the case of objections to the Provisional Valuation Roll?

The Act allows for objections to the provisional valuation roll. But first the Minister has to publish a notice in the Government Gazette and at least two circulating newspapers no later than 60 days before the date determined by the Minister for the commencement of the Valuation Court. The notice should inform every owner who has lodged an objection of the date, time and place at which the valuation court will sit. Regulation 6 of the Regulations as amended by section 4(b) provides that every owner of agricultural land who wishes to object to a valuation can lodge their objection with the Minister within 21 days of the date of the notice.

Are there exemptions from paying Tax?

Certain persons and organisations are exempted from land tax, but they have to apply to the Minister of Lands and Resettlement for exemption. The Minister may exempt “persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices.”

Section 76B of the Agricultural (Commercial) Land Reform Second Amendment Act 2 of 2001 provides for an exemption to be granted to formerly disadvantaged citizens. An exemption will be granted only on application by the landowner himself/herself. It has been reported that a tax exemption will be granted to new entrants into the agricultural sector, such as those who have purchased a farm through Agribank's Affirmative Action Loan Scheme (AALS) or with a private loan. A benefit in this case is an exemption of up to 85% of the tax payable, with the remaining 15% payable by an emerging farmer on application.

An exemption will also be considered if the land is used primarily for the activities of a church, mission, hospital, school or hostel, provided that such activities are not for profit.

Applications for exemption can be made only at the offices of the MLR, Inland Revenue or a magistrate. An exemption will not necessarily be granted in cases of natural disaster such as drought. The MLR or the National Assembly will have the discretion to grant exemptions in such cases.
Can Land be expropriated?

Property in Namibia has always been protected by the common law. However, as mentioned in Chapter 4.2, ownership of property is not absolute; it is limited by Article 16(2) of the Constitution which provides for expropriation of private property "in the public interest" upon payment of "just compensation".

The Minister may decide to expropriate property in terms of section 20 of the Agricultural (Commercial) Land Reform Act 6 of 1995, but there is no provision in the Act to protect a landowner from a *mala fide* decision. The only recourse is to challenge the decision to expropriate under administrative law and in the High Court. It will thus be appropriate to give the Lands Tribunal administrative powers to review the Minister's decision where a landowner has grounds to request a review.

Recently five farms have indeed been expropriated for which compensation has been paid. There have been no farm seizures. This is different from the current situation in neighbouring countries, as the amendments to the Expropriation Act in South Africa seem to be rather controversial for landowners.

In a statement issued recently by the Agricultural Unions it says that the amendments will enable the minister to expropriate land without paying farmers market value prices. But it assures them that the amendments may be in contravention of Sections 1, 2 and 3 of the Constitution. According to the statements the amendments to the Expropriation Act will not only apply to farmers, but to every citizen with movable and unmovable property.

This is another good reason why the real estate industry (which forms the backbone of the economy) in Namibia will be doing better than those in neighbouring countries.

What about foreign ownership of commercial agricultural land?

Part VI of the Agricultural (Commercial) Land Reform Act regulates the *acquisition* of agricultural land by foreign nationals as contemplated in Art 16(1) of the Constitution.

What does a Foreign National mean?

1. **In the case of a natural person**, it refers to someone who is not a Namibian citizen.
2. **In relation to a company**, it refers to a company incorporated in any other country but not in Namibia or if it is incorporated in Namibia, the controlling interest thereof is not held by Namibian citizens.
3. **In relation to a closed corporation** it refers to the controlling interest is not held by Namibian citizens.

The Approach of Part VI of the Act is twofold:

1. It restricts commercial agricultural land acquisition by foreign nationals; and
2. It makes recommendations for those cases where agricultural land was obtained by foreign nationals.

In short, Part VI of the Act prohibits any Foreign National, without the prior consent of the Minister, to:

- **Acquire such land** through the registration of the transfer of ownership in the Deeds Registry; or
- **enter into an agreement** with any other person whereby any right to occupy or possess such land or a portion thereof is conferred upon a foreign national for, in effect, a period which exceeds 10 years.
In addition, Part VI provides that:

- where the controlling interest (51%) in any company or close corporation which is the owner of such land passes to a foreign national, that company or close corporation shall be deemed to have acquired that land on the date when the controlling interest so passed;
- no person shall acquire or hold such land as a nominee owner on behalf of or in the interest of any foreign national if the Minister’s written consent has not been obtained;
- only in circumstances where a close corporation or a company is not the owner of agricultural land may a foreigner acquire 50% of the member’s interest or shareholding without contravening the Act should the close corporation then acquire agricultural land; and
- in all other instances a foreigner may only acquire 49% of a member’s interest or shareholding in a close corporation which is already the owner of agricultural land.

If agricultural land has been acquired in contravention of Part VI of the Act, the Minister may issue an order for such land to be sold unless he/she decides that acquiring that land is compulsory for the purposes of the Act.

While the Minister of Lands and Resettlement holds ultimate power to expropriate farms under the Act, he/she is advised by a Land Reform Advisory Commission (LRAC) consisting of stakeholders able to advise the Minister on all matters under the Act. The LRAC, however, operates only in an advisory capacity and the Minister is in no way bound by any of its recommendations.

What (documents) is needed to affect transfer of agricultural land?

Besides the normal requirements (see chapter 5), to affect transfer of agricultural land the following is also needed:

1. Statement/affidavit made by the transferee declaring his/her nationality and whether or not he/she will be holding the land to be transferred on behalf of any other person.
2. Certificate of waiver.
3. Land Tax Clearance certificate; a statement in writing by the Minister certifying that all land taxes imposed under this Act on the Agricultural land in question have been paid. (See chapter 4 Note 16; the conveyancer also has to certify accordingly.)
4. Data verification form that needs to be completed by the (new) owner.
Chapter 5

Registration, Finance and Costs

After sales services, and more specifically, the estate agent’s responsibility in the totality of the marketing, sale and transfer process of a client’s property, is often neglected. Besides giving the buyer a copy of the signed sales agreement, the estate agent should follow up and be involved with the conveyancers, as well as the financial institutions. Most commission clauses provide that commission is only payable to the agent once the transaction is registered. It will certainly be in your interest to assist and contribute in such a way that the transfer is to be registered as soon as possible.

Therefore, a professional estate agent needs to understand the basic conveyancing procedures performed by the conveyancer, as well as the basic financial matters like financing for property transactions and the cost included. The experienced agent should not only give feedback, but should also assist to expedite the transfer process by removing obstacles if any problems arise.

5.1. Introduction

5.2. Conveyancing

5.3. Bonds and Finance

5.4. Process of Registration

5.5. Costs involved

5.6. Summary of Deeds Office work flow

5.7. Financial Intelligence Centre Act (FIA) requirements

5.8 Exchange Control Regulations
5.1. Introduction

The Deeds Registry falls under the Ministry of Land and Resettlement and currently has two offices; the Windhoek Deeds Registry and the one in Rehoboth. The functions of the Deeds Registries are currently outlined in the Deeds Registries Act, No. 47 of 1937 and the Registration of Deeds in Rehoboth Act, No. 93 of 1976. The registration of the Rehoboth Deeds Act is very similar to both the Sectional Titles Act and the Registration of Deeds Act, and makes provision for the transfer of land by way of an endorsement and not by means of a separate Deed of Transfer.

We have an official system of recording and keeping track of information regarding immovable property and changes in the ownership thereof. Any person has the right to information about any property. Our Registries therefore are Government offices where information relating to land and other related judicial information are readily available to the public. The functions of the Registry include amongst others:

- Preserving Deeds Registry records;
- examining all submitted deeds for registration and rejecting those that do not comply with the law;
- registering transfers and certificates of registered or consolidated titles;
- registering bonds, cancellations and cessions thereof;
- registering general plans and opening township registers;
- registering sectional plans and opening sectional title registers;
- registering various other documents such as notarial bonds, servitudes, antenuptial contracts, certain leases of land, waivers, cessions, etc; and
- issuing copies of deeds when originals have been lost, amending errors in deeds, etc.

The Registrar of the deeds office must see to it that the operations of the Deeds Registry are carried out correctly and effectively. The Registrar sets the policy and determines the overall strategy to be followed by the deeds offices in Namibia in the fulfilment of their duties.

When questions of law arise about specific transactions or general principles, the Registrar will interpret the law and make a ruling. Important rulings are noted in “circulars” issued to the deeds registries, examiners and conveyancers. These circulars are, to some extent, regarded as binding law.

The values to the economy of a reliable land register in Namibia:

In Namibia our system is based on the best and most secure systems for property registration and ownership in the developed world. On receipt of a signed and accepted Offer to Purchase the property can be transferred, and once transferred and registered the owner has an unassailable right to the property that cannot be overturned by anyone.

This compares well with other countries, where a property can be lost to a better offer before registration and buyers need to take out title insurance to protect their rights of ownership. Indeed our land registration system and all that it is built upon forms a fundamental part of the total judicial infrastructure on which our country’s economy is based. If anarchy escalates here to such an extent that a judgment creditor can no longer retrieve its outstanding debt on a property by way of public auction, then the whole judicial and economical system becomes meaningless.

Information kept in our registers enables potential land purchasers or credit providers to decide whether they wish to proceed with such transactions or not. Great care is taken to ensure the accuracy of our registers. In its present form, the Deeds Registries Act 47 of 1937 places a great deal of responsibility on conveyancers to upkeep and maintain the land registration system. On the other hand, our system
also relies a great deal on the professionalism of deeds examiners employed by the State to ensure the integrity of the registers.

In reality, the office of the registrar of deeds forms a vital piece of economic infrastructure. Without it our modern free market system would hardly function or function with great difficulty, as has been shown in many Third World Countries; the lack of a proper land register stifles economic development. As an everlasting asset, land is the most obvious security one has to offer for the repayment of a loan. However, this presupposes that the particular piece of land may be clearly identifiable. Only then will individual or institutionalised money lenders be prepared to provide credit on the strength of a real right (mortgage) against the debtor's land. This is the basis upon which the whole modern banking system is built. If all land in a country belongs to the State, then banks are largely restricted to providing loans to the different organs of State or merely providing short-term loans, even if individual property rights on land are acknowledged without a credible system which proves X or Y's legal right. So for example, in Indonesia, or in other parts of the developing world, no bank will provide significant credit to a subsistence farmer.

Indeed, one should not underestimate the value to the economy of a reliable land register in Namibia. Therefore, it is necessary for the Registrar to speak out against unbecoming conduct relating to the Deeds Registry and the public. Besides conveyancers, land surveyors and government employees, a great deal of responsibility is also placed on the Namibian estate agents to prevent anarchy and maintain a reliable land register system to the benefit of the industry and economy.

Recently the Registrar sent out a request to the Board of Estate Agents, The Institute, as well as culprit estate agents. Agents, or any other members of the public, are not allowed to go behind the counters and enter either the records room (strong room) or other restricted areas of the Deeds Registry to investigate the status of documents (transfers) on prep or to be registered. It would, therefore, also be highly unethical (and possibly corrupt) to lure deeds office personnel into obtaining favours on your behalf. Rather make use of the counter personnel to obtain information, or work through the applicable conveyancing office.

5.2. Conveyancing

The word “conveyancing” is used to describe the administrative and legal procedures necessary to transfer ownership (and other rights) in immovable property from one person to another. It therefore also describes the process whereby a person, partnership, close corporation, company or trust becomes the registered and lawful owner of fixed/immovable property, and ensures that such ownership cannot be challenged. The first step in the process of property transfer is to ensure the existence of a valid agreement of sale between seller and purchaser. As described in Chapter 3, a written Offer to Purchase signed by a purchaser and accepted by a seller, after all suspensive conditions have been fulfilled, constitutes a binding Deed of Sale. To set the process in motion, a conveyancer is appointed by the seller.

The simplest definition of conveyancing is probably “the drawing of deeds for the conveyance of immovable property from one person to another.” The Oxford Illustrated Dictionary mentions the following: “To convey in a legal sense means to carry over, make over, transfer property by deed or other legal process.”

The following are examples of possible conveyancing processes:
- transfer of ownership in land
- cancellation and registration of mortgage bonds
- creating townships and sectional title schemes
The Conveyancer:

The actual processing of transfer (shift of ownership) includes registration in the Deeds Registry which is performed by a conveyancer. A conveyancer is a practicing legal practitioner (admitted by the High Court of Namibia), who has passed a specialised conveyancing examination to practice as conveyancer in Namibia. To lodge a deed for execution before the Registrar, the conveyancer must be in possession of the required certificate issued by the Board for Legal Education. A newly qualified conveyancer must exhibit this certificate to the Registrar before appearing before such registrar or before lodging any documents prepared by him/her at the Registry. The Registrar is required to keep a register of practicing conveyancers at his/her office.

The Deeds Registries Act stipulates that the Registrar of Deeds shall not attest, execute or register any deed or document unless it has been prepared by a conveyancer or a notary public. According to section 20 of the Act, only a conveyancer may be given the Power of Attorney by the owner of land to execute deeds before the Registrar on the owner's behalf. The responsibility of all conveyancing matters, including the supervision of the registration of all transactions, lies with the conveyancer. It is also the conveyancer’s duty to establish and to verify facts in documents drafted by him/her. Verify means to check and confirm that the information is really true and the law holds the conveyancer personally accountable for the correctness of certain facts and particulars relating to the specifics of the particular conveyancing transaction. Conveyancing requires not only attention to detail and great accuracy, but also knowledge of the law and good drafting skills.

Role and function of Conveyancer in the transfer/sale of immovable property:

The most important role of the conveyancer in general is to uphold the land registration system in Namibia together with the various role players. The conveyancer also takes ultimate responsibility for the handling of conveyancing matters. This would include the following important responsibilities for a general transfer file:

- Secure the purchase price; cash deposits or guarantees;
- organise payment/settlement of the seller’s bond from the available funds from the purchase price;
- handle occupational interest;
- ensure payments regarding duties and taxes to the Government are made;
- pay the seller’s outstanding rates and taxes to the local authority;
- ensure that all parties keep their promises in terms of the sales agreement;
- draft the new deed of transfer and supplementary documents;
- keep all parties informed;
- ensure that the property is transferred from the seller to the purchaser for the right price at the correct time; and
- pay the purchase price to the seller and pay the agents commission.

Appointing a Conveyancer:

The right to nominate a conveyancer is vested in the party to whom the right is granted in terms of the contract. Where the contract is silent on this point, the right to nominate a conveyancer is governed by common law. The position at common law appears to be that the right is vested with the seller. Most contracts of sale also stipulate that the transfer of land to the purchaser will be attended by the seller’s conveyancer.
When you are asked to recommend a firm of attorneys, always keep in mind clause 7.1 of The Code of Conduct which stipulates that agents may not pressure a seller into using a particular firm or conveyancer.

If a seller does not have a conveyancer and asks for assistance from agents to nominate a conveyancer, they would naturally expect a recommendation in their best interest, using the following criteria:

- Capability of handling the specific instruction;
- up-to-date knowledge of Namibian conveyancing law and practice;
- good communication with clients and other stakeholders;
- organisation and admin skills; and
- the capability of balancing accuracy and speed.

However, always ensure that the seller knows and understand that he/she has the right to make the selection himself/herself without being pressured or unduly influenced.

(Also refer to Chapter 8 and more specifically Chapter 9: “The estate agent / conveyancer [attorney] relationship.”)

Conveyancing Secretary:

Most conveyancers operate with experienced staff to assist them in the general day-to-day running of the conveyancing department of the firm. The conveyancing secretary will be largely responsible for the communication between different firms of attorneys, as well as liaising with clients, local authorities, Revenue Services and estate agents. These secretaries are not only very specialised and professional, but also precise, systematic and neatly organised so that anybody in the office is immediately able to establish what progress has been made on the specific file/transfer.

### 5.3. Bonds and Finance

**Introduction**

**Mortgage bonds continue to confound some homeowners and purchasers, who often do not understand how and why a mortgage bond is registered in favour of a bank over the property that they purchase.**

The successful conclusion of a transaction often depends on whether or not a purchaser will be able to afford it. The price of a home is usually so high that a person rarely has sufficient cash handy for the purchase. One of the options available is to borrow money from the bank or other financial institutions. A home loan is also referred to as a bond or mortgage. This mortgage bond will allow a potential homeowner to spread his/her repayments over a longer term. (Since 2005, an average of 10 000 bonds and 1 800 sectional mortgage bonds were registered each year in the Deeds Registry in Windhoek.)

Most sales agreements contain a suspensive condition to the effect that the offer is subject to the purchaser being able to borrow the purchase price or a portion thereof from a financial institute. As explained in Chapter 3, if the bank refuses to lend the money to the purchaser, then the deal will fall through.

Armed with a signed sales agreement, the purchaser then approaches a home loans consultant and completes an application form to apply for the loan. Affordability is normally calculated at a maximum of 30% of joint gross monthly income. The client must also have a clear credit record at the Credit Bureau
and not be listed on ITC – a system used for the sharing of positive data. In the case of joint applicants, companies, trusts or where personal suretyships are provided for the loan, credit checks are normally done on all parties involved. The bank will then further process the application to satisfy itself that the client's income is sufficient to cover the repayments.

A valuator will in most cases be instructed to inspect the property. Once the bank satisfies itself that the property provides sufficient security for the loan requested, it will approve the application and instruct conveyancers to register their security over the property against the Title Deed. This security is called a mortgage bond. The conveyancers prepare the bond documents for signature by the borrower.

On registration of the bond in the Deeds Registry the bank releases the amount of the loan, usually to the transferring attorneys for the credit of the seller. It is important to remind clients that the registration of a mortgage bond involves additional costs over and above the transfer costs and buyers who plan on purchasing a property with the help of a home loan have to keep the cost of registering a mortgage bond in mind. Mortgage bond registration costs consist mostly of the attorney fees for the conveyancer attending to the registration of the mortgage bond. The amount of the fee depends on the size of the loan. The more a buyer borrows, the higher the mortgage bond registration costs. You can use the attached cost guidelines to determine these costs.

Most Banks have an administration and valuation fee that is normally part of the client's bond fees. The Credit Act that came into force in South Africa regulates the fees that banks may charge. This includes property valuation fees which no longer apply and were replaced by a once-off "Initiation Fee" with a prescribed maximum fee. It also includes the monthly Administration Fee that has been increased.

In general, all banks provide a home loan for anywhere from 10 to 30 years, repayable monthly at an interest rate margin lower than prime rate. In a attempt to soften the blow of higher interest rates and in a market where future interest rate trends are difficult to predict, many home purchasers are applying for the longest possible repayment periods on their home loans and paying bigger deposits.

Debit orders are the preferred way of repayment but clients can negotiate with their bank if this is not the most convenient way for them to pay.

Clients should also bear in mind that early settlement penalties come into action if they cancel their bond prior to the completion of the term of the bond without giving the required notice. (see “Penalty clauses in Home Loan Agreements”)

What does Pre-Approval mean?

The pre-approval of a bond application is a mere indication to the interested parties, for example sellers/estate agents, etc. that the financial institution concerned will probably grant the applicant a loan against the security of a property to be mortgaged for the amount of the pre-approval. Pre-approval hardly legally binds the financial institution or the buyer in any manner towards anybody. It should rather be seen as a way of assisting the purchaser to "shop around" for correctly priced properties.

The granting of a bond in principle is done by a financial institution on information furnished by the purchaser and contained in the Deed of Sale. It is normal that a Deed of Sale contains a term that the purchaser (or another party on his/her behalf) has to furnish a guarantee or an undertaking acceptable to the seller, or his/her transferring attorney, for the purchase price (or part thereof) within a stipulated time period. The intended guarantee is usually issued by the financial institution granting the loan and the undertaking is usually issued by the conveyancer acting on behalf of the financial institution. (Refer to process of registration.)
Purpose of registering a Bond with the Credit Provider (bank):

A debtor will only be able to grant security in the form of a mortgage bond if the property that is to serve as security under the bond is registered in the debtor’s name. A mortgage bond must be registered in the Deeds Registry for it to be valid and effective against all persons. On registration of a bond, the mortgagee/bond holder (credit supplier) obtains the following claims against the immovable property of the mortgager (owner):

- If the borrower defaults on his/her repayments, then the bank has the right to follow a legal procedure (foreclosure) to “attach” the property after obtaining a court order. It will then be “sold in execution” to obtain the outstanding amount of the loan (and the cost of the lawsuit).
- In the case of insolvency of the mortgager, the mortgagee has a preference right over other creditors in claiming against the mortgager. This means that the bank receives payment before any other creditors.

Practical Implication of a registered bond: A real right is registered over the property in favour of the bank. The owner of the mortgaged property will not be able to sell or transfer his/her property without the consent of the Mortgagee (bank) to the cancellation of the bond. This consent will only be given if the owner pays the outstanding amount.

Therefore, a Mortgage Bond is a legally binding contract with a clear set of obligations:

A mortgage bond is a (real) right over the property of another, which serves to secure an obligation (by the owner/debtor/mortgager). The borrower will have a contractual obligation to repay the bank the money that is advanced to purchase the home. When entering into a mortgage agreement, it is like making a promise to the mortgagee (bank) that you will repay your loan in (mostly) monthly instalments.

A mortgage bond actually constitutes two separate rights:

1. **Personal Right**: The so-called principal debt or “loan”.
2. **Real Right**: The bond which is being registered over the property to secure the loan and is enforceable against the whole world at large.

Mortgagor: The person who owns the property is called the “property owner”. If the property owner gives his/her property as security for a loan under a bond, he/she is called the mortgagor and becomes the debtor.

Mortgagee: The bank (or other person) that grants the loan (or other benefit), for which the property is going to serve as security, is called the mortgagee.

Who can be mortgagee or mortgagor under a mortgage bond?

The mortgagor will only be the house (property) owner. In most cases some or other bank will be the mortgagee under the bond. But a mortgagee is not necessarily always a bank. If a grandmother lends money to her granddaughter and decides she needs security for repayment in the form of a bond over her granddaughter’s property, the grandmother will be the mortgagee and the granddaughter will be the mortgagor under the bond. This could also be the case in an employee/employer relationship. The granddaughter may at a later stage allow a second bond to be registered over her property, in favour of the company that she works for.
Ranking of Bonds:

It is possible for the property owner to agree to more than one mortgage bond over his/her property and there are no limits to the number of mortgage bonds that can be registered over a property. However, in practice, the value of the property and the amounts secured by bonds already registered over it will determine whether it can "carry" further bonds.

Normally, the ranking is determined by the order of registration; the first bond will rank first and the next one second. In the above (grandmother/company) scenario, both the bonds are secured against creditors and the company's bond will rank second. However, depending on waivers and agreements between the parties involved, it may also be possible for the bonds to have equal ranking or that the second bond may actually have a "first ranking".

Ranking is important for it determines how the proceeds will be distributed after a sale of the property. The first ranking bond will stand first in line to receive its money, followed by the rest in line with their rankings. Normally banks will not consent to further bonds over the property of a client, unless these further bondholders comply.

Note:
According to Deeds Act, it is also possible for two or more mortgagors to bind themselves to one mortgagee (creditor), provided that immovable property of each mortgager is bound by the bond.

What is agreed upon in this “Mortgage Contract” that is being registered?

- The names of both the mortgagee and mortgager will always be mentioned.
- Besides the normal formalities, the first important thing to realise is that a bond agreement is an acknowledgement of debt. The mortgager admits and acknowledges that he/she is lawfully indebted to the mortgagee for a specific amount. The so-called “binding clause” will normally stipulate that: “the mortgagor is truly and lawfully indebted to and/or held and firmly bound to and in favour of…”
- The mortgage agreement will also stipulate the amount of the debt. This normally includes the actual (capital) amount borrowed, as well as an additional amount which is added to the bond in order to serve as additional security for the mortgagee should the mortgagor not fulfil his/her obligations in terms of the contract (bond). This amount provides security for possible legal costs when steps are being taken against the mortgagor for not paying the instalments on the capital amount owed to the bank.
- Bond agreements will also “explain the story” of the indebtedness. In other words; why is a mortgagor in debt? The most common ones are for existing debt, future debts or balance of a purchase price. This will indicate what obligation the bond is to serve as security for banks.
- Most bond agreements also have “miscellaneous” clauses to give more detail and description to the operation and conditions of the bond, which would include applicable interest rates as well as a time period to repay the loan. There are no statutory requirements that the interest rate be mentioned in the bond. Nevertheless, it is common practice to mention the interest rate in mortgage bonds.
- Our law provides for certain exceptions which can be taken by mortgagors. Mortgagees will in most cases require from the mortgagor to renounce benefits of exceptions (possible excuses for not paying). This would include, amongst others, the excuse of the amount of money that was never paid over, or perhaps the excuse that there is no reason for the obligation of the debt or if there was an error in calculation or bookkeeping. Specific exceptions are also applicable in surety bonds or where two or more mortgagors are liable for the payment.
- Ranking clauses are also included. In the absence of explicit ranking clauses, the bond registered earlier in time will give a preferment right to that specific creditor.
- Bond agreements will also contain the description of the property bonded.
• Sometimes it is also necessary to deal with servitudes and other restrictive conditions, such as a “right of sale” or “prohibition of alienation” and even usufructs (vrugebruik) in bonds.
• In case of bonds over sectional title properties, bonds may also refer to meetings and voting privileges of the sectional title scheme.

In terms of the Deeds Registries Act, it is possible to alter terms and conditions contained in a registered bond. However, the cause (reason) of debt, mortgaged security (property) and the amount cannot be varied. Some exceptions do apply and it is possible to register a “reduction or part payment” of the mortgaged amount.

**Penalty clauses in home loan agreements:**

Many homeowners (mortgagers) are not aware of the fact that the average home loan agreement of most major banks contains a “penalty clause” for the early cancellation of the mortgage bond. This penalty for early cancellation, although rightfully there, can do more harm to the mortgager than anticipated if it is ignored. In terms of this clause, the mortgager is typically required to give the relevant bank at least three months’ notice prior to canceling the bond.

In reality this means that anyone canceling his/her bond will be liable for the penalty (depending on the amount of the loan) if the condition is not respected. In many cases this clause may give rise to difficult positions involving the practical reality of giving full notice. If prior notice is not given, the bank will take the notice period from the date they receive the request for cancellation figures from the conveyancer handling the transfer. Normally, if clients go back to the same bank they used initially within a prescribed time to re-apply for a new bond over a new property, these interest rate charges may be waived.

A seller will obviously not give a notice of cancellation until such time as he/she has concluded a deed of sale and, moreover, until all suspensive conditions of the sale have been met. From the date of sale, it typically takes four to six weeks before a transfer is registered and the bond simultaneously cancelled. The purchaser obviously cannot be expected to wait an additional six to eight weeks so that the seller can give sufficient notice to the bank.

Sellers are often not aware of this provision until they want to sell their property and then are faced with the penalty. Clients are in general very annoyed by this unexpected “extra” cost of the transfer. This situation can, in most cases, be prevented when an agent warns the sellers so that the necessary communication can occur in time. Banks would in general be open to prevent and discuss this with clients, as this is precisely the sort of thing that makes a bank unpopular.

**Can one Mortgagee under a Registered Bond be replaced by another?**

It is possible and referred to as “cession of a mortgage bond”. When the word “cession” is used, it refers to the “transfer of rights” of the mortgagee held under a bond. A mortgagee can therefore cede his/her rights to another mortgagee and it is commonly referred to as “substitution of mortgagee”. With the necessary signed consents, this transfer of rights is then registered in the Deeds Registry and endorsed on the bond.

**What about the obligation of the Mortgager? If the Owner (seller) has an existing bond, can this be taken over by the Purchaser/new Owner?**

The general rule is that the existing bond over a property first need to be paid in full and be cancelled before the property can be sold and transferred to the new owner. The Deeds Registries Act, however, does make provision for the substitution of the debtor and, in exceptional cases within the prescribed guidelines, the sellers bond can be taken over by the purchaser who will then become the debtor under the bond.
Although this is not common practice and in a new bond is normally registered on transfer of the property to the purchaser, banks may also allow the takeover of the mortgager in the case of a mortgage being given by a close corporation. In this case the new members will basically “step into the shoes” of the previous members and also take over the obligations of the existing bond.

**What is Bridge Finance?**

Although not well known in Namibia, bridging finance or so-called “discounting” is an established concept in South Africa. It is basically a short-term advance that allows the seller to have faster access to his/her “money”, which would not have been possible under the normal transfer process that can sometimes take as long as three to four months.

In this way the seller can enter into another sales agreement or perhaps pay moving costs, because he/she has a certain percentage of his/her money immediately available through some or other financial institution that is willing to give a cash advantage before the transaction is officially registered at the Deeds Registry.

In effect it means that a bridging financer purchases up the proceeds (difference between selling price and settlement) of the sale from the attorneys and makes these funds available to the seller before registration.

**Credit applications and Rating (Bad, Average, Good):**

Bankers, who are generally conservative by nature, prefer their prospective clients to rate as average or good in all the criteria. They only allow their clients to rate bad in one category if there is a corresponding “good” in another. A Banker will seldom sanction a loan to a client who rates badly in integrity. How then does a bank view a home loan application in terms of credit? Estate agents can save valuable time and provide a better service to their clients if they understand the basics of a credit decision. A credit application is generally viewed by a bank in a very simplistic manner, which is best explained as the “EASI-BAG” matrix.

**Affordability:**

Affordability is measured as a ratio of the purchaser’s bond instalment to the household gross income. The bond instalment is calculated by taking the bond amount, dividing this by one thousand and then multiplying it by the bond factor. The bond factor is determined by the interest rate and period of repayment that the purchaser qualifies in obtaining from the bank. Banks have various interpretations of what culminates in the term “gross monthly income”. The generally accepted view is the monthly amount on the pay slip plus all “hidden” income, such as an employer’s contribution to medical aid, etc. Gross income also includes a partner’s salary/income, but would normally exclude bonuses. Income has to be consistent and the client’s ability to service the debt on a monthly basis has to be proved to the bank. Where the client is a commission earner, the bank will generally require the previous six months’ commission statements.

Example of calculation of affordability ratio:

<table>
<thead>
<tr>
<th>Purchaser’s gross income:</th>
<th>N$ 12 500</th>
</tr>
</thead>
<tbody>
<tr>
<td>Purchaser’s spouse/partner’s income:</td>
<td>N$ 6 800</td>
</tr>
<tr>
<td><strong>Total Income</strong></td>
<td><strong>N$ 19 350</strong></td>
</tr>
</tbody>
</table>

Bond Amount: N$ 220 000
**Immobilien**

| Interest Rate: | 16% |
| Period of Loan: | 20 years |

**Calculation:** Bond amount divided by 1 000, multiplied by the bond factor equals bond repayment:
N$ 220 000 divided by 1000 multiplied by 13.91 equals N$ 3 060

Bond repayment divided by gross income as a percentage equals affordability ratio:
N$ 3 060 divided by N$ 19 350 as a percentage equals 15.8%

15.8% in the EASI-BAG matrix is rated as good.

(>30% is rated bad, 20% - 30% is rated average, <20% is rated good)

**What is Equity?**

This is the cash (or security), as a percentage of the purchase price, that the purchaser invests in the property transaction. Banks feel more comfortable with the knowledge that if the purchaser decides not to pay his/her monthly bond instalment and the bank repossesses the property, that the purchaser has some sort of cash involvement in the transaction which will ultimately be lost. The idea behind equity is to "prevent" a person from "walking away" from his/her financial obligations because he/she has a cash involvement in that transaction.

Similar "EASI-BAG" matrix is used for calculating equity ratings by banks.

**What does Collateral mean?**

Collateral means security pledged in addition to the principal security (property in most cases) as guarantee for the repayment of monies owed by the mortgager. It is something that goes together with/parallel to the security offered.

**Example:** If the selling price of the property the client wants to buy is more/higher than the amount of the loan they qualify for, the bank may ask them to obtain additional (collateral) security for the loan. This can also involve an increase of the deposit amount.

**Always remind the client:** To pay a bigger deposit can only benefit the purchaser/mortgager. One only pays interest on the amount you borrow; if you borrow less, you pay less interest.

**Security:**

This is the physical property or collateral provided by the purchaser to the bank, to secure the loan. The bank’s valuator will view and inspect the property and provide a report to the bank in respect of the property’s condition, resale potential and the area surrounding the property. Obviously a house in a well established suburb is better security for a mortgage bond than a ramshackle holiday house on the outskirts of the countryside.

**Integrity:**

This is the integrity of the client. Generally, the credit manager who approves or declines the loan application does not meet the purchaser. It is the bond consultant’s responsibility to ensure that all relevant information in respect of the purchaser’s integrity is submitted with the bond application. A professional estate agent will assist the bond consultant in this regard.
The information required by the credit manager of the bank encompasses the following:

- credit record
- job stability
- status in the community

"If you would like to know the value of money; go and try to borrow some.”

Benjamin Franklin

“Types” of Bonds:

Banks cater for the general banking needs of the public and design “packages” with different “banking products” for marketing purposes. There are generally three broad categories of mortgage lending business (each bank will have different names):

1. General home loan bonds
2. Covering bonds or continuing covering bonds
3. Commercial bonds

1. General home loans:

General home loan bonds are mortgage bonds registered over residential properties as security for loans granted to the homeowners. There are a variety of options available in the commercial world when it comes to home loan options and the client’s reason for requesting a loan forms the basis for classifying bonds into certain categories. These are the typical bond transactions one comes across every day in conveyancing firms;

- **Bond-to-buy**: Traditional type of bond to secure a loan made for the purpose of enabling a purchaser to buy the particular immovable property.
- **Switch bond** or take-over bond: The borrower changes his/her bank.
- **Further bond**: The bank advances further money to client where it already holds one or more bonds over the client’s property.
- **First bond**: The client already owns the property, but it has not been mortgaged until now. The client now requires funding/credit facility and offers the property as security.
- **Building bond**: Bond to secure a loan granted to the client for purposes of building a new home or for doing substantial renovations to an old one.

How does a Building Loan work?

Three possible scenarios exist in the case where a bank grants a loan (to be secured by a bond) for the borrower to build a house on:
- The borrower buys a vacant stand and simultaneously enters into a building agreement with a builder (plot and plan option);
- The borrower is already the owner of the vacant land (mortgaged or unmortgaged) and has now decided to build on it. For this purpose he/she applies to the bank for a loan; or
- The borrower is the owner of the property and wants to renovate.

The client then enters into a written agreement with a builder to build a home or to make alterations/expansions for them, according to a plan and specifications that they have signed (building contract). As stipulated in the contract, the builder must build and the owner must pay. The contract will also specify which extras and finishes are chosen for the home. One of the risks involved is the fact that the builder is not going to perform as agreed or that the building work will be below standard. In order to apply for a building loan, most banks will require at the very least: proof of ownership, approved building plans, a reputable contractor and not “owner-builders”, compliance with legislation and local authorities, and a signed waiver of builders’ Lien.

A Building Loan is basically a mortgage loan which is paid out in specific proportions on the progressive construction of a dwelling (house), over a specific period of time and is secured by the completed development of an existing building. The builder can complete the home and then ask for payment. In this case a completion certificate (from town council or municipality) would be needed, as well as signed letter (occupation certificate) from the owner that states his/her satisfaction.

One of the differences between a building loan and an ordinary loan is the fact that the full proceeds are not paid out on registration of the bond but based on progress reports. Progress payments can also be made against sections of the work completed and the project will normally be monitored carefully to ensure satisfactory completion. A valuator (assessor), who specialises in building projects, is mostly entrusted with this duty. It also means that the assessor will go to the property several times during the building process as well as at completion thereof.

### Renting, building, renovating or buying?

Homebuyers are often faced with the question of whether it makes more economic sense to rent or buy a home. And whether it is better to renovate or simply pay more for something that is in mint condition. How can you as agent assist in giving proper advice?

**When renting accommodation**, it may be true that you don’t need much of a capital outlay and that you can relocate rather easily, but it also means that you do not own a place of your own. Every dollar paid for rent simply goes into someone else’s pocket, and the dream of owning your own place keeps slipping further and further away. Any escalation in property prices is to the benefit of the property owner, while the tenant simply has to pay a higher rent.

On the other hand, whether you buy an existing house or build a house from scratch, some initial capital of your own will be required, but all price escalations in the housing market will be for your own benefit.

**You will not always be fortunate enough to find your dream house, with all requirements in the area in which you want to live. The only way to do so is by building it.** When it comes to building one’s own dream house it can be one of the most exciting times of someone’s life, but more often than not it turns out to be the biggest nightmare:

- Developers find it increasingly difficult to find cost-effective opportunities. The costs of developable land are on the increase as less becomes available. It is a matter of time before the land and building costs start to outstrip achievable unit prices in new developments. When looking for the right land for the right price, one should also keep in mind things like land use control, title deed restrictions, town planning schemes (zoning, density, height restrictions, building lines, etc.).
- Many other factors would also play a role, such as location, slope, view, etc. The next cost is that of building plans and their approval. It would be wise to also obtain cost estimates for foundations, foundational walls, backfill and damp proofing, floor slabs, brick walls, the roof, ceiling and plasterwork.
- Before building can commence, the stand must also be provided with services connection points. This includes points for water, sewerage and electricity, and the costs can be substantial and may vary amongst local authorities.
- Apart from the stand’s purchase price, the property must be registered in the buyer’s name. This would include normal transfer and bond fees with the necessary taxes and other costs involved.
- Costs like site cleaning and stripping as well as bulk earthworks and excavations are often overlooked or underestimated.
- The actual building costs are by far the main component of the total costs. These usually consist of material costs and labour costs and may vary from city to town. They will also vary depending on the degree and quality of the finishing required. Final costs could include extras like fencing, landscaping, security, etc. Both material and labour cost can escalate more than can be anticipated.
- During the building process you may also be required to make use of other professional disciplines that may involve professional fees. For instance, an owner may have to use the services of a professional engineer to design and supervise a reinforced concrete slab, or a land surveyor to point out the exact stand boundaries, as well as plumbing and electrical work.

If an owner wishes to use the services of a building contractor, a profit margin will most likely be added to all material and labour cost. Although this is a safe way to go for a layman, it will also be more expensive. The safest way is to appoint someone like an architect or building consultant to oversee the building process, but then the owner must be prepared to pay markup on all costs. If the owner has the necessary knowledge and skills, he/she can become an owner builder and appoint subcontractors to do the job. By going this route, the owner cuts out all profit taken by somebody else and only has to pay the material and labour costs of the sub-contractors.

**It also makes sense to renovate** if you can do so for a substantial discount in comparison to buying a new property. This is especially true for first time homebuyers and it is often the more affordable option. They can upgrade their home when they have the finances. When you plan to renovate, depending on the situation, it can cost you anything between N$ 2 000 – N$ 4 000 per m². However, people have a propensity to underestimate the true costs of upgrading and should get several quotes for the work beforehand so that they can make a truly informed decision.

Older properties that are in good condition are becoming like hen’s teeth nowadays, as buyers realise the value to be found in these properties. In addition, renovating can give you more personal choice in the layout and living space than developments, where you can really only alter the finishes.

Before advising someone to renovate older buildings or properties; keep in mind the new National Heritage Act which makes provision for a National Heritage Council to oversee the screening of sites and objects for possible inscription onto National Heritage Register. It may be possible for buildings not to appear in the register that could be affected by the act. Anyone wishing to find out more about protected heritage sites could contact either the City of Windhoek or the Heritage Council (opposite the Deeds Office) at Tel: 061 - 244 375.

**Buying:** There are currently good deals to be found in housing market. In spite of current uncertainty surrounding the stability of the residential property market, experts believe it remains a sound investment for the future. However, buyers need to weigh up all the available options in both the second hand and new market and work out exactly which market offers them the best value in their chosen area.

From an investor’s point of view it is important to remember that property is a medium to long-term investment (ideally 5 years and longer). The important aspects to keep in mind would be:
- the broader business cycle (inflation, interest rates, economic growth, etc), as this can have an influence on capital appreciation and rental yields.
- the purpose of an investment in property (for instance primary use, buy-to-let/rental, speculation and/or asset diversification).
- Specific regional, neighbourhood, sectoral and economic infrastructure (roads, railways, etc) trends, developments and factors which are having or could have an impact on future values and returns.
- Diversification of a property portfolio (the type of property, such as vacant land, residential, commercial or industrial; area, such as inland, coastal, rural or urban);
- Location is probably still one of the most important considerations when buying property.
- Tax implications (personal income tax and transfer duty).
- Costs (transaction costs, such as conveyancing fees, commissions, rates and taxes, maintenance and letting costs).
2. Covering bonds or continuing covering bonds

The terms "covering bond" and "continuing covering bond" have no distinct legal meaning and are, to our knowledge, nowhere defined in any law. For some banks the two phrases mean the same thing, while others distinguish between them.

Continuing covering bonds is the term used when the bond secures existing and future debt, which means the outstanding balance of the loan may fluctuate. It could also mean that, at the time of registration of the bond, the debt may perhaps not yet exist and is anticipated to arise in the future or at a future date. The essential element is the fact that it serves as security for a debt to arise in the future on a running account.

The disadvantages of this type of bond is that it requires special measures, as the wrong wording or structuring of a bond can lead to the lapsing of the bond if the debt is temporarily extinguished.

The advantage, however, is the flexibility thereof. In the public mind the term "access bond" is the generic description of this type of bond. Literally, it means clients have instant access to finance without the need to formally apply for a new loan. Clients have the flexibility of paying off their home loans and then, once a portion has been repaid, to withdraw the money again from the loan account.

3. Commercial Loans (Business and Development)

Business Loans are commercial loans granted on properties generating rental income in suitable and economically active areas. Development loans are considered to be loans granted for the development of multiple sectional title units or residential properties. In general, commercial bonds are complex in nature and need to be very carefully structured to minimize the risk of loss to banks.

Other Bond descriptions:

- **Collateral bond:** A collateral mortgage bond, as the name describes, is a bond giving additional security for a debt or obligation for which security has already been given by the debtor to the creditor. It is usually registered to compliment a principal bond currently registered over a property. An additional (collateral) bond is then registered over another property of the same debtor. This would happen, for instance, when the creditor and the debtor previously agreed to a loan or other obligation and the debtor registered a mortgaged bond over his/her property in favour of the creditor. Some time after the principal bond had been registered, the creditor requires further security for the already existing debt in the form of another bond over other property belonging to the debtor.

- **Surety bond:** This bond is registered by a third party (for example a father over his/her property) to provide security in favour of the creditor (bank) for the debt or obligation of another (for example the son who will be the principal debtor).

- **An Indemnity bond** is very much the same as a surety bond and is passed by a principal debtor in favour of a surety who carries suretyship for the payment of overdraft or an indemnity.

- **Participation bond:** This is an ordinary mortgage bond. However, the bondholder is not a bank but a company acting as the investment front of individual investors who want to pool their funds against the security of mortgaged bonds.

What are Guarantees and Undertakings?

Banks and conveyancing firms work with guarantees and undertakings to eliminate the risk of monetary loss in property transactions. It is also a way of providing a “bridge” of trust between the different parties involved in a property transaction.
Guarantees, in the transfer process, are usually issued by banks and financial institutes which have agreed to lend money for the purchase price (or partly) under security of the registration of a bond. The guarantee is an undertaking to pay the conveyancing attorney a specified amount of money on the happening of registration of the bond, simultaneously with registration of transfer of the property subject to certain terms and conditions (like transfer of the property, registration of bond in their favour, cancellation of other bonds). The guarantee may be revoked under certain circumstances provided that the beneficiary is advised of withdrawal before registration.

An Undertaking (to pay the proceeds of a bond to the seller of a property) is issued by the attorneys attending to the registration of mortgaged bond on being assured that they will be placed in funds, and this takes the form of an original written document handed to the seller's conveying attorneys. The document is substantially similar to the guarantee but, instead of being issued by a bank, it is a promise by a firm of attorneys, on the firm’s letterhead, to pay a certain amount to a specified person on a certain event taking place. Upon receipt of this written undertaking, the transferring attorneys will be in a position to proceed with the registration of a transfer and the bond attorneys will simultaneously register a bond against the property.
(See transfer process)

On Interest Rates:

In South Africa and Namibia, banks borrow money from the Reserve Bank/Central Bank and are charged interest on those loans. The interest they are charged is determined by government and is known as the Repo Rate. The bank then lends this money to clients to enable them to purchase property, cars and other consumer goods on prime rate and subsequently charges the interest rate from them. Although economics indicated that we should not be overly concerned about further interest rate hikes, the latest repo rate hikes indicate prime rates rising to 16% shortly. The weaker Rand (and Namibian $) and an increase in consumer spending are but a few factors that influence the interest rates. For residential property, the negative impact of interest rates is quite significant and will probably keep the market on its deteriorating trend for the time being.

However, what the above graph is telling us is that rates are not excessive and, secondly, after a possible further 0,5% or even 1% rise later this year, the rates are almost certain to go into a decline, which will be very beneficial to the housing market. Some economists are predicting as much as a 2% to 2,5% decline by the middle of 2010. Interest rates go through periods of “natural” cycling, as can be
seen on the graph from 1994 to the present, with three clearly visible cycles. If a straight line is superimposed on these cycles, it clearly reveals a downward trend in the overall interest rate. This is something to keep in mind.

Referring to certain bank figures, a 9% to 11% price growth had been the average in the South African / Namibian housing market over the last 30 years. Demand and price increases also continue to be above average, as land remains in short supply, so many people see these suburbs as the ideal stepping stone to take them into the middle and upper-middle categories.

Regarding Interest Rates and loans:

- **Variable Rate Loan:**
  This is probably the most common form of loan available. With a variable rate loan, interest rate is linked to the base home loan rate which moves up and down depending on market conditions. If the base rate decreases by 1%, so will your interest rate and of course if the base rate increases so does your home loan rate.

- **Fixed Rate Loan:**
  Here your interest rate is fixed for a specified period, generally between one and two years. Generally the fixed interest rate will be slightly higher than the base home loan rate when the loan is taken out. A fixed rate loan protects you from rising interest rates and gives you the certainty of knowing exactly what your payments will be. However, it does not allow you to benefit from any decreases in the interest rate over the fixed period.

- **Capped Rate Loan:**
  This type of loan allows you to benefit from any decrease in interest rates, but has a maximum rate built-in so you never pay more than the capped rate. These loans are not always available from banks and generally the qualifying criteria are stricter.

**More on Fixed rates:**

Fixed rates should be seen as a service provided by banks which enable the client to, for a certain time frame, shift the cash flow risks involved with fluctuating rates onto the bank. Most financial institutions offer fixed rates for short periods of 12, 18 or 24 months. Fixing your interest rate is about getting greater certainty regarding one's cash flow and limiting the risk of further interest rate hikes. The advantage of a fixed rate is that your monthly repayment will not increase beyond the rate at which you fixed your repayments. This option is also beneficial to the homeowner that has a set income and is unable to meet his/her instalments in the event of a possible rate hike.

The bank assumes and manages the interest rate hike/risk while the client obtains certainty over his/her cash flows. In return for this benefit, the customer can expect to pay some price. Should average floating rates over the period in question never rise to the level of the fixed interest rate for the period, then the client would have been better off leaving his/her interest rate to float.

The other option of the variable interest is one that varies in accordance with the prime lending rate. This option is generally suited to homeowners that have more flexibility in their monthly income and will be easily able to enjoy the benefit of a lower interest rate should the prime rate drop below the fixed rate.

The formula to decide whether to fix your rate or not, is simple. For every N$100k mortgage bond an increase of 0,5% rate increase will increase your payments by N$35. In other words, if you have a mortgage bond of N$500 000 at a rate of 11% and the rate increases by 0, 5 %, your monthly repayment will increase by N$171, 21.

Even though economists have expressed their opinion that the Southern African economy is strong, the possibility of an increase in rates is still dependant on various unpredictable factors. The cumulative increase and its effect on monthly repayments over the past year have been considerable. However, economists expect another 1 to 1,5% rate hike until the cycle peaks. It is expected that the economy
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will slam on the brakes soon after that - and that rates would remain stable for some time afterwards. Switching from a fixed rate home loan to a variable one before the end of the predetermined fixed rate period can be costly. Usually you will end up paying a significant finance charge - up to 1% of the total outstanding balance for the contractual period of the fixed rate. You could also be stuck for another year at the fixed rate, while those on a floating rate could start enjoying the respite of lower interest rates.

Homeowners should therefore weigh up these two options and make an informed decision as to whether or not to fix their interest rate on their home loan.

Credit checks in Namibia?

The National Credit Act was activated in South Africa and so far it is not on its way to Namibia. This act is making it increasingly difficult to obtain credit and home loans in South Africa. In South Africa it has a far-reaching effect on the credit industry and by default the property industry, since buying a house is generally one of the larger purchases that a buyer can make on credit. (This is yet another reason why the industry in Namibia should not be doing badly when compared to South Africa.)

However, most financial institutions in Namibia already do the necessary checks to ensure that credit is not being extended to persons who would be unable to repay such credit. The process also takes longer than it did in the past and, as a result, banks might be hesitant to give bonds as freely as in the past and more frequent declines may also be a reality in Namibia. As a direct result it will be necessary for banks (and conveyancers) to spend more time guiding the borrowers through the mortgage loan and bond documentation and to ensure that the borrower is aware of the meaning and implications of the documents that are being signed. In particular, documents like suretyships and the waiver of rights, such as usufructs and habitatio, must be fair and need to be clearly explained.

With the current situation regarding interest rate hikes and credit checks, one would assume that the market will soon slow down. However, this need not be the case. On your journey to become “the first choice agent” this obstacle should rather be seen as a challenge for you to come up to scratch. The way in which you can assist (or hinder) potential home buyers and mortgage consultants can play a “make” or break’ role in the future.

Together with the Mortgage Consultant, the Agent can deliver the following valuable Services:

- Evaluate the client’s financial situation and give professional advice on the best way to finance the new home.
- Pre-qualify clients for a home loan so they know exactly how much they can spend before they even start looking.
- Outline the costs of buying a home and let the client know when these costs must be paid to speed up the process.
- Explain the different home loan options.
- Advise on the necessary paperwork and procedures between the bank and attorneys.
- Explain the stages of home buying, pointing out the responsibilities of everyone involved, when monies are due and potential pitfalls to avoid.
- Remain on hand to assist buyers through the home buying process until the day they move in.

When assisting a buyer in the above process, the estate agent should always keep in mind those provisions of the Code of Conduct which prohibits an agent from unduly influencing a client/purchaser to make use or to not make use of a specific financial institute. Ascertaining someone’s financial status
is also a sensitive issue and should be approached accordingly. A professional estate agent should not pressure clients to make use of a specific bank/financial institute for personal reasons.

**What is a “Bond Originator” and what do they do?**

Although not known in Namibia, bond originators in South Africa are rather common in the international real estate industry. In short, they operate as a liaison between buyers, agents and financial institutions. Many of the above-mentioned functions like evaluating clients’ financial situations, filling applications with banks and other financial institutions, paperwork, other possible related assistance, etc. are done by them. More reputable originators have the necessary software, infrastructure and experience to assist clients through the process of purchasing a home and obtaining the finance/credit to do so.

Most bond originators have some sort of previous financial experience, mostly with banks and home loans departments, and pride themselves on the fact that they will get the best possible financing for their clients. For their services, originators get paid a fee (commission) from the financial institutions granting the loan which is based on a percentage of the loan amount. Because originators depend on banks and financial institutions to “do their business”, they mostly make sure to have good relationships with banks and do not get involved with “takeovers” or “switching” of mortgage bonds from one bank to another. Two of the more established originators in South Africa are Bond Choice ® and Better Bond®.

Some may say that a system of mortgage originators may increase the “response time” of banks in Namibia, while others may argue that originators will merely represent an additional middleman that takes a slice out of the proverbial commercial cake. Whichever way one may look at it, the reality is that bond originators across the world have a lot of negotiation power in the industry. Should they enter the Namibian market there will undoubtedly be a shift in the balance of negotiation power between the various role players in the industry.

**To enable mortgage consultants and the bank to process and approve your client's home loan finance without delay, the following minimum bank requirements, information and documentation are needed to prepare and process the client’s applications.**

**a) Natural Persons – Salary earners**

Most financial institutions will be reluctant to finance insolvents that have not been rehabilitated, mentally disabled persons, persons not yet 21 (unless emancipated), persons under curatorship, administration or those who have a garnishee order against them.

- Copy of the Offer to Purchase.
- Completed application form (including assets and liabilities and income and expenditure statements as well as proof of possible investments).
- Copy of ID Document.
- Latest salary advice/slip as proof of earnings.
- Last three months’ authentic bank statements reflecting salary deposits (printed internet statements are usually not acceptable).

In case of a non-resident, also make sure to obtain information about working permits.

**a.1 ) For Sectional Title Purchases:** (in addition to the above)

- Registered complex name.
- Section and unit number.
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- Size of the unit.
- Managing agent name and Body Corporate address and contact numbers.
- In all first transfers from a sectional scheme the bank will also need a copy of the sectional title plans to verify participation quotas and other necessary detail. This could also sometimes be requested even in subsequent transfers.

b) Self employed Persons:

- Auditor’s letter confirming monthly drawings.
- Financial statements.
- 3 to 6 months’ business bank statements.

c) Commission / Overtime Earners:

- Commission based on average earnings over the previous 6 months may be taken into consideration, provided it is expected to continue. The best is to obtain salary slips and 6 months’ personal bank statements.
- Overtime is normally not considered as income, however if it seems to be of permanent nature it can improve the chances of the client to obtain a loan.

d) Maintenance:

- In cases where maintenance is paid as a result of divorce and court order to the effect, it is advised to have a copy of the court order handy when applying for a loan. However, it is rather exceptional and advisable that clients should also have an additional stable income.

e) Subsidies for Employees:

- Sometimes subsidies, calculated according to salary scales are available to employees. This means that the employer will pay a (bigger) part of the monthly instalment and the employee needs to pay the balance only. This monthly allowance will in most cases also be treated as part of the monthly income when calculating the affordability of the home loan. One should however keep in mind that the gross subsidy amount is taxable.
- Government subsidies are available to employees and are calculated according to their salary scale at the interest rate they qualify for. The Government will pay the bigger part of the monthly instalment and the employee will have to pay the balance.

f) Rental Income or Payment:

- In the case where clients receive rental income from additional properties it may also be an added benefit when applying for a home loan.
- One of the most common mistakes that can occur on an application form that can jeopardise the approval of the bond is something like rental payments by clients that are also being added up to monthly expenses. These monthly rental payments will end when the bond begins and should not be added to the total of expenses on applications or buyers’ cost sheets.

g) Car Allowance:

- Depending on the actual benefit, limited or unlimited use, the benefit received from a car allowance may also be added to the income.
h) Close Corporations / Trust / PTY LTD Companies:

- Documentation as per natural persons for ALL members.
- 3 to 6 months’ business bank statements.
- Latest financial statements for Trust or CC.
- CC1 and CC2 documentation, Trust and when necessary, the Memorandum of Articles and Certificate to commence business of the Co.
- Letter of Authority / Resolution.

When dealing with close corporations and companies the provisions regarding Section 40 of the Close Corporations Act and Section 38 of the Companies Act (Chapter 4) regarding finance to purchase members interest or shares should always be kept in mind.

The application process is one of the most important parts of a successful transaction.

Mistakes can often be avoided by an agent being involved and taking care of follow-up duties. The actual process involves several staff members at a bank. It mostly starts with the business/sales consultants who liaisons with estate agents. The application is then received and the process of approval begins with credit checks and other requirements to ensure that applications are completed as required and conditions of approval are adhere to.

Several (including pre-registration) administration procedures are then followed which includes:
- Instruction to attorneys to register bond,
- Pay bond registration costs,
- Confirmation that all conditions of approval are in place prior to registration of bond.
- Payment of Letter of Undertaking
- Progress payments
- Advise client on new home loan installments
- Capture subsidies on Government loans etc.

Advising Clients on Bond and other Insurance:

Immediately after approval it is normally time for life insurance, property assurance and possible suretyships to be taken care of. Since homeowner’s insurance is a long-term expense, getting the best deal here brings savings that continue and will add to your efforts of delivering professional service to clients.

1. Homeowner’s insurance (covers the structure) will be required by the financing institution and should normally be effective from dates of transfer and possession according to the sales agreement.
2. In most cases, life insurance covers the owner and partner's life for the outstanding amount still owned. Although it is not legally compulsory, a life insurance policy should always be taken out when a bond is granted for a home – and it should be large enough to cover the full outstanding sum owed on the home.
3. The third type of insurance for homeowners will be household insurance that covers the contents of homes against things like theft and other losses and damages. It is good to have this coverage from the date of occupation onwards.
Note on homeowners insurance (structure) and life insurance:

1. In the case of mortgaged properties and homeowner’s insurance, the mortgagee will mostly establish the sum insured and take care of the insurance to protect his/her interest in the property and the premium will simply be added to the bond repayments. If however, the borrower can obtain a better rate elsewhere, he/she is free to insure the property with any insurer of his/her choice, provided that the mortgagee has: proof of the identity of the insurance carrier, is in agreement with the amount the property is insured for, proof that the policy is current, and ongoing proof of premium payments. This may sound cumbersome but it is not an insurmountable problem and there will, after all, be savings on the premiums.

The sum insured under a buildings policy must be the full replacement cost of not only the building, but all other fixed improvements on the property, for the property to be comprehensively insured. The market value of homes or the local authority’s rates valuation has no relationship to the rebuilding cost.

In the event of a claim, the risks and consequences can be categorised as follows:

**Over-insurance** (Valuation too high): The insurer will honour the claim minus the excess amount, as may be stipulated in the contract. Over-insurance means that one is paying too high a premium for the same benefit as when being insured to value.

**Insurance to value** (Correct valuation): The claim is honoured, again minus the excess amount. In this instance the correct premium is levied as the property was insured for its true replacement value.

**Under-insurance** (Valuation too low): The insurer will apply “the average” and only partly honour the claim. The remainder of the claim will be for the insured’s own account. The insured will be financially deprived - sometimes to such an extent that he/she might not be able to restore the property to its former condition.

The only proven method to obtain an accurate assessment of the replacement cost of a building is to employ the services of a registered valuer whose work is backed by professional indemnity insurance. Thereafter, make sure you keep the assessment up to date by telling your insurance company if you improve your home/building – perhaps by installing under floor heating or building an extension. Also, ensure that the building is well-maintained at all times.

Owners of fully owned homes or buildings are not compelled by legislation to insure their homes, with the result that a large number of buildings are not insured at all or are under-insured. Some argue that a building is hardly ever destroyed in totality and it is therefore not necessary to insure for the full replacement value, believing that they will have adequate cover for partial damage. Nothing could be further from the truth, as the settlement of the small claim will be directly proportionate to the percentage by which the building is underinsured. The minute saving on the premium is not worth the risk.

Legislation, however, does exist in respect of insuring Sectional Title buildings. It was introduced to protect the members of Body Corporates, among other things, against unilateral decisions regarding sums insured. The sections dealing with the duties of Body Corporates, state that they are “to insure the building or buildings and to keep it insured to the replacement value thereof against fire and such other risks as may be prescribed”.

Also take note that there may be exclusions and exceptions, as in properties situated downstream of the Hardap Dam and the lower Fish River and its tributaries within the area downstream of the Hardap Dam.
2. When it comes to life insurance; it is possible and has also happened before that a wife or husband with children have to move out soon after the spouse has died because large sums were still owed on the home which they could not pay. Life insurance is compulsory on the bonds under N$ 200 000 and mostly clients do not need to purchase life insurance from the bank, but simply have to prove that they are covered.

There will mostly be three possible conditions from banks when it comes to life insurance and granting a loan:

- **The bank requires the borrower to take out life insurance** (or additional): This makes provision for the unfortunate eventuality of the borrower dying and there being no one to pay the monthly bond instalments. Applications for life insurance as well as dealings with brokers may be requested.

- **The bank requires cession of the existing life policy**: Some borrowers refuse to take out more life insurance as they feel they have sufficient cover already. In such a case, the bank may instruct the client to obtain a signed cession form wherein the borrower cedes to the bank the rights under the existing life insurance policy. Proceeds under the policy will go to the bank first to pay the outstanding amount and the remaining thereof will go to the actual beneficiaries.

- **The bank waives the requirement to take out life insurance**: In this scenario the bank has decided that no life insurance is needed. It is then said that the bank has waived (dropped) the requirement for life insurance. This is most unlikely and the banks will furthermore insist on the borrower to sign a document confirming that the client understands the consequences of not taking out insurance.

**Note:**

1. When examining the policies in general, it pays to shop around. However, before signing it is essential to examine the small print carefully because apparently excellent policies can contain tricky exclusion clauses which greatly reduce their value. A case of this kind involved a homeowner who was killed while climbing a safe part on Table Mountain. According to the insurers, although no ropes or pitons were in use, the activity was classed as “mountain climbing” not “mountain walking”, and therefore the insurance company refused to pay out as mountain climbing was in their policy listed as a dangerous activity.

2. Similarly, certain pre-existing health conditions of which the insured may be completely unaware and which may not be picked up at his/her original health inspection can also nullify the payment if it is found later that these diseases were the cause of death.

3. Life insurance is mostly ceded to the mortgagee and, in some cases, the insurance policy is linked to the bond and falls away, without the insured realising it, after the bond is cancelled. This can also happen with fire and storm insurance. In these cases it is possible to keep the policy going even though the bond is paid up.

**Types of Dwellings/Properties qualifying for Bonds:**

Depending on the different banks and financing possibilities, it is preferred and easier to obtain finance for vacant residential stands (erven), normal houses, and semi-detached and sectional title (townhouse or flats) units.

Generally units in a sectional title complex consisting of mixed/combined tenancy of shops, offices and residential units are not that popular when it comes to the marketability thereof. Other properties not easily accepted as security for a mortgage might be blocks of flats, boarding houses, crèches or nursing homes, churches and hotels. Other high risk properties may be timeshare or unpopular development schemes and complexes.
When it comes to agricultural smallholdings (plots), the financial institutions will normally look for factors like water and power supply and if there is a main tar road leading to the property and whether it is inside or outside of municipal areas. In most cases a “full loan” is not granted, which means the purchaser has to give at least 15% to 30% deposit, depending on the circumstances.

Depending on the client; farms, vacant land, and commercial or industrial properties, as well as shares in properties will also take serious motivation from clients and consideration from the financial institution involved.

When financial institutions consider properties to be bonded, they would normally take into account the following criteria:

- Condition which the property offers as security for the money borrowed.
- Age and design, as well as the type of construction, outlook and level of maintenance.
- Location and environment, the potential demand for houses in that area, as well as crime trends.
- The resale potential and general risks involved.
- Conditions of title deeds (servitudes) or perhaps town planning considerations.

### Home Loan Repayment Factors

The table below gives the monthly repayment per N\$ 1 000 of a loan with an interest rate between 10% and 20% per annum, over a period of 5, 10, 15, 20, 25 or 30 years.

For example: Purchase Price of N\$ 950 000.00 minus deposit of N\$ 100 000.00 = N\$ 850 000.00

With a loan amount of N\$ 850 000.00; Monthly instalment over 30 years at interest rate of 16.00% will be:

\[(850 000.00 \div 1000) \times 13.45 \text{ (factor)} = \text{Repayment}\]

\[850 \times 13.45 = \text{N\$ 11 432.50}\]

<table>
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<th>Interest %</th>
<th>5</th>
<th>10</th>
<th>15</th>
<th>20</th>
<th>25</th>
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<td>10.00%</td>
<td>21.25</td>
<td>13.22</td>
<td>10.75</td>
<td>9.65</td>
<td>9.09</td>
<td>8.78</td>
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<tr>
<td>10.50%</td>
<td>21.49</td>
<td>13.49</td>
<td>11.05</td>
<td>9.98</td>
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<tr>
<td>11.00%</td>
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<td>11.37</td>
<td>10.32</td>
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<td>11.25%</td>
<td>21.87</td>
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<td>11.68</td>
<td>10.66</td>
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<tr>
<td>11.75%</td>
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<td>11.84</td>
<td>10.84</td>
<td>10.35</td>
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</tr>
<tr>
<td>12.00%</td>
<td>22.24</td>
<td>14.35</td>
<td>12.00</td>
<td>11.01</td>
<td>10.53</td>
<td>10.29</td>
</tr>
<tr>
<td>Zinssatz</td>
<td>12.25%</td>
<td>12.50%</td>
<td>12.75%</td>
<td>13.00%</td>
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<td>14.78</td>
<td>14.93</td>
<td>15.08</td>
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</tr>
</tbody>
</table>
5.4. Process of Registration

During the late Roman times the transfer of land took place by physically handing over a document in which the transferor (i.e. the seller of a house) confirmed that he transferred the land to the transferee (the buyer). This event was not accompanied by public notification. This, in essence, is still the situation in England today with their "conveyance by deed" and complicated matters to outsiders who wish to know who the owner of a specific piece of land is.

Fortunately, in other parts of North-West Europe things developed differently during the middle ages. The roots of our registration system go far back in history and have been used as early as the thirteenth century in some provinces of the Netherlands. The transfer of land had to take place in public, usually in the presence of family or neighbours. The principle is that a person becomes owner of immovable property upon registration.

This developed into a practice where this function was performed in the presence of the local judicial official who had to keep a copy of the transfer deed in his/her office. This finally gave rise to legislation enacted between 1529 and 1580 by the Austrian-Spanish rulers who also ruled the Lower Lands of Holland. Accordingly, all transfers of land and rights thereto (such as a mortgage or servitude) had to be registered in the local court.

This is precisely what happened in the Cape and then in Namibia. Simultaneously with the establishment of a separate Council of Justice (Raad van Justisie) in 1680, all land transfers were registered there until the early 19th century when the British administration in the Cape established a separate registration office for land titles. The Roman-Dutch principles upon which this office then functioned remained, and indeed still do so to this day.

Fundamental to a credible cadastre (property register) is the survey performed by many generations of surveyors, which enables almost each piece of land to be identified (kaart en transport). This combination of the surveyor general's office with the Deeds Registry provides the creation of a register of who owns a piece of land or has rights thereto. This means that the registration was intended to record and protect these rights. In our system, the State gives an implied guarantee that the person who is registered as the owner of a right to land in the Deeds Registry is indeed the owner thereof.

Today the process of registration affords utmost certainty to guarantee an undisputable title. On receipt of a signed and accepted Offer to Purchase the property can be transferred, and once transferred and registered the owner has an unassailable right to the property that cannot be overturned by anyone. This compares well with other countries, where a property can be lost to a better offer before registration and buyers need to take out title insurance to protect their rights of ownership!

Sales and Transfer Process

1. The first step when purchasing property will normally be the agent who receives a mandate from the seller to sell the property and start marketing it.
2. The sales agreement is signed.
3. The agent supplies the seller, transferring attorney and Bond Bank (BB) with copies of the agreement.
4. 1. The Transfer attorney (TA) will open a file and examine the sales agreement. The agreement must be read in its entirety and thoroughly examined for suspensive and other conditions like loan periods. It must also be examined to see if it is properly signed, and when and how the
purchase price, deposit or balance and estate agent’s commission is payable. Make sure the property is clearly described, any alterations to or deletions of clauses have been signed, blank spaces ruled out and that the agreement is dated. If all is in order, the conveyancer will acknowledge instruction and where necessary confirm the agent’s commission.

4.2 The TA will then **Conduct a Deeds Registry search**; This search will mainly verify the details of the property, the applicable local authority, the current registered owner, his/her full names and birthday (or registration number of the legal entity), his/her marriage and insolvency status, any bonds held over the property, possible conditions or servitudes applicable, as well as detail on possible interdicts, attachments or caveats over the property.

4.3 **Rates Clearance / Body Corporate Certificates**: No transfer of property may be registered without a rates clearance certificate from the local authority in whose jurisdiction the property lies. Local authorities usually estimate an amount for rates (clearance figure) which is required to be paid two to three months in advance, giving one enough time to register the transfer.

4.4 A pro-forma account is mostly prepared and given to the purchasers at this stage.

5. **Existing Mortgage Bonds**: In the event where finds from the search that a mortgage bond is registered over the property, a letter is immediately addressed to the bondholder (Bond Cancellation Bank) *(bank/financial institute)* asking for:
   - The Title Deed of the property.
   - The amount still owed (cancellation figures) so that arrangements can be made for the repayment thereof. This is also called “guarantee requirements”.
   - The name of the attorney’s firm which will be instructed by the bondholder to attend to cancellation of the bond. At this stage confirmation of the bond approval is also obtained.

6. The existing **Bond Cancellation Bank (BCB)** will send the guarantee requirements to the transferring attorney.

7. **Bond Approval**: The Bond Bank (BB) approves the bond and advises the Bond Attorney (BA) to register the bond. The Bond Attorney will conduct a deeds search and draw up the necessary documents in order for the purchaser to sign. *(Note: The Bond Attorney will not issue any guarantees before the purchaser has signed the necessary documents at his/her office.)* The Bond Attorney advises the Transferring Attorney of the amount available for guarantees and requests the draft Deed of Transfer and guarantee requirements.

8. The transferring attorney will:
   8.1 Ask purchaser for Deposits to be paid
   8.2 Ask Bond Bank for costs
   8.3 Send a copy of the new deed of transfer to the Bond Attorney and ask for guarantees; for settlement in favour of cancellation Bank and, balance of the purchase price in favour of his/her own firm (to go to the seller).

As soon as the purchaser’s loan has been approved and all other suspensive conditions have been complied with, the following preliminary documentation can be prepared for signing by the parties:

9.1 Bond Bank needs to pay over costs to Transferring Attorney.
9.2 Bond Attorney needs to issue guarantees to the Transferring Attorney.
9.3 Deposits to be paid to Transferring Attorney.

10. The transferring attorney can now issue the Bond Cancellation Attorney with a guarantee ifo. Bond Cancellation Bank. The other guarantee he/she keeps with him/her.

11. The existing BCB will send the current Title Deed to their cancellation attorney, together with the cancellation instruction of the seller’s bond.

12. The Bond Cancellation Attorney will conduct a deeds office search, draft the necessary consents for the BCB to sign and have it signed. He/she will also send off the Title Deed to the Transferring Attorney. After receiving the guarantees, the Bond Cancellation Attorney can send off the Title Deed to the transferring attorney who must lodge it at the deeds office.
13. **Payments of Transfer Duty, (VAT) and Stamps**: the conveyancer needs to consider whether the transaction is subject to VAT and/or Transfer Duty. The prescribed declarations by the seller and purchaser need to be completed and signed by the parties. If not paid already, payments must also be made to the applicable local authority or Managing Agent of the Body Corporate.

14. **Lodgment**: Once all documentation has been drafted and signed and all guarantees are in place, the attorneys (transferring, bond cancellation and bond) will liaise and lodge together at the Deeds Registry. **Registration** is affected when the new Deed of Transfer and bonds are being signed and executed by both the conveyancer and the Registrar of Deeds.

15. **Guarantees are mostly payable** only in the afternoon of registration and, in practice, payments in accordance with the guarantees are usually made only the following (working) day.

16. **Disbursement of Funds**: The conveyancer will then draw a final account and pay the seller the proceeds from the sale. Where applicable, the necessary payments regarding interest, occupational rent, rates and taxes and the agent’s commission will also be made.

The Bond Cancellation Attorney will only proceed to cancel the seller’s bond on receipt of a guarantee from the transferring attorney for the amount owing. The Bond Attorney will not send off any guarantees to the transfer attorney from his/her side before the instruction has been received from the bank and the clients have signed the necessary documents at his/her office that payment of costs and stamps were received.

**Short summary of the process after the sales agreement is signed:**

1. Transferring Attorney conducts search at Deeds Registry.
2. Transferring Attorney asks for cancellation figures from Bond Cancellation Bank.
3. Either the Cancellation Attorney, who acts for Bond Cancellation Bank, or the Cancellation Bank will provide cancellation figures or “guarantee requirements” and an existing Title Deed to the Transferring Attorney;
4. Transferring Attorney enquires from Bond Bank regarding new loan for purchaser;
5. Obtain clearance figures for rates and taxes.
6. Bond approval; clients to sign documents.
7. The Bond Attorney informs the Transfer Attorney that he/she has been instructed to register a bond on behalf of the Bond Bank and the purchaser and he/she also indicates what the total amount of the loan will be. The transfer attorney needs to look at amounts available (guarantees plus deposit) against purchase price and costs.
8. Drafting and signing of documents.

**Management of payments done by deposits and guarantees:**

Costs and deposits need to be paid.

9. The Transfer Attorney requests guarantees from the Bond Attorney;
   - for the cancellation amount to be paid to Cancellation Bond Bank; and
   - for the balance to be paid to Transferring Attorney.
10. The Bond Attorney sends the guarantees to the Transferring Attorney;
    - Ifo the Cancellation Bond Bank (plus interest)
    - Ifo the Transferring Attorney (minus interest)
    (If there was no existing bond, only one guarantee would have been requested and issued in favour of the Transferring Attorney for the payment of the purchase price to the seller.)
11. Transfer Attorney sends the guarantee in favour of the Bond Cancellation Bank to the Cancellation Attorney and keeps the guarantee in favour of his/her own firm on file.
12. Pay the necessary Rates, Taxes, Duties and Stamps.
13. Final Check on finances
14. Arrange for linking, lodgments and registration
15. Payments and communication to all parties involved.
List of typical documents to be drafted and signed:

The specific documents to be drafted and signed on transfers will depend on the nature of each transaction, the parties involved and the procedures at conveyancing firms. Normally these documents will entail the following:

- Power of Attorney authorising the conveyancer to pass transfer.
- New (draft) deed of transfer.
- Transfer duty declarations.
- Personal affidavits.
- Pro-forma accounts (before the actual transaction happens an account and breakdown of costs involved) regarding fees, duties, costs, VAT and expenses.
- Optional could be specific instruction sheets from either the seller and/or purchaser.
- When dealing with entities; the necessary authorising resolutions and affidavits.

Timing:

Many unforeseen happenings can cause delays in the process of registration. Many of these delays are not in the hands of the conveyancer and can include difficulties to obtain finance, insolvency or the unforeseen death of one of the parties involved. These aside, the average registration of transfer since signing of the agreement of sale by both parties can take anything from six to eight weeks. Once lodged at the Deeds Registry, it can take an average of seven to ten working days, depending on the current work load at the office.

It is the estate agent’s responsibility to ensure a superior performance not only in the process of marketing and sale, but also through the transfer of a client’s property. In most cases your commission will only be available once the registration (transfer) has happened. Although the actual process of transfer in the Deeds Registry is performed by a conveyancer, a successful transaction requires cooperation from everyone associated with the sale.

Possible Factors that might delay the registration of a Bond or Transfer:

- Failure by the seller and/or buyer to provide personal information.
- Transferring attorney delaying to request Title Deed and cancellation/settlement figures from the bondholder.
- The existing bondholder delaying/not providing cancellation figures and the Title Deeds to the transferring attorney.
- Delay in receiving rates figures (local authority) and/or clearance certificate (transferring attorney), including the unnecessary delay and difficulties to obtain Land Tax Clearance Certificates in the case of Agricultural Land Transfers (farm sales).
- Failure by the buyer to pay a deposit (if required).
• Delay in the provision of guarantees.
• Failure by the buyer to pay transfer and/or bond costs on time.
• The seller delaying to sign transfer documents.
• Delay by the buyer in obtaining subsidy approval/employee income subsidy and supplying those documents to the new bondholders, or failure to comply with other bank requirements and, in the process, delaying the financing process.
• Delay by the buyer to sign transfer and/or bond documents.

*If you are not part of the solution, you are part of the problem!* 

Although an agent who concludes the sale cannot directly assist with any of the procedures, he/she delivers a valuable service to both his/her client and the conveyancer, by providing clear and detailed instructions. An experienced (and valued) agent can speed up the process of property transfer by making a “check list” and by attending to the following:

• Ensure the existence of a valid agreement of sale between seller and purchaser.
• Make sure of the correctness of property detail (erf number or unit number and scheme in case of sectional title), as well as information on persons, closed corporations or companies involved.
• Make sure that the conveyancing attorneys are instructed as soon as the contract has been signed and do not wait for suspensive conditions to be fulfilled. By following this procedure, the attorneys can immediately start working on cancellation figures, apply for rates clearances and get things moving in general.
• Arrange for good quality (preferably original) copies of the sales agreement to go to the conveyancer’s office.
• Attached to these copies when possible:
  • In case of Natural Persons: ID, Marriage Certificate, ANC or divorce order if applicable, place and time of marriage, etc.
  • In case of Companies: Copies of Memorandum and Articles of Association, Certificate of Incorporation, Certificate to commence business and copy of authorised person’s ID.
  • In case of Closed Corporations: A copy of CC1 (Founding Statement) or latest CC2 if changes were made, as well as a copy of authorised person’s ID and resolution.
  • In case of Trust: A copy of Trust Deed, copy of letters of Authority issued to Trustee/s (if applicable), as well as a copy of authorised person’s ID.
• On instructing the attorney; specify who will be responsible for collecting the occupational interest. In most cases, it is preferable for the attorneys to handle this and to assist when any changes are being made by the parties involved, regarding the rental income.
• Estate agents should also advise attorneys when suspensive conditions have been fulfilled and constantly follow up on those conditions. This includes the granting of mortgage bonds, but also information regarding other special/suspensive conditions of the sale. Depending on the particular transaction, there may or may not be other general aspects the agent needs to bring to the conveyancer’s attention and which the conveyancer also needs to bring under the agent’s attention. This is a critical aspect that must be monitored and followed up as most transactions are dependent on conditions like loans and guarantees. If those conditions are not met, the transaction will lapse and both agent and lawyer will lose out on the deal. Always have open lines of communication and communicate subtle delays, as well as possible breaches of obligations to the conveyancer.
• Follow up on bond application at financial institutes.
• Where possible, estate agents should clearly state whether the bonds have been formally granted or whether they have merely been granted in principle. If bonds have been granted in principle, it may be some time before they are formally granted and the expectations of parties involved may be needlessly raised.
• Arrange for deposit cheques and/or the punctual receipting thereof. Agents can also remind buyers (and conveyancers) to check that contractually specified repairs have been affected, even if it means a visit to the property to make sure that the seller has done the repairs agreed upon. This is not only recommended, but also essential prior to the deed changing hands.

Although you have to ensure that your continuous efforts and involvement are seen as the “effective cause” of the transaction, please be patient with all involved when registering the transaction. Always mind your attitude and ensure good (positive) communication to all parties involved.

It is useful to make use of the following document as an attachment to contracts when giving instructions to a conveyancer.

Information for Transfer purposes:

**Purchaser / Seller:**

1. Full names: ________________________________________________________________
2. Date of Birth: ______________________________________________________________
3. Postal Address: _____________________________________________________________
4. Telephone numbers: ________________________________________________________

5.1 Are you married?
   a) Yes / No
   b) In community of property
   c) Out of community of property (Delete whichever is not applicable)
   d) Other ________________________________________________________________

5.2 If married:
   a) Full names of spouse: ______________________________________________________
   b) Date of Birth: _____________________________________________________________

5.3 Place of marriage: _________________________________________________________

6. Bond/Financing_____________________________________________________________
5.5. Costs involved

Although not all agents agree on this, I believe it is important for buyers to keep the home buying costs in mind when hunting for their dream home. These expenses, and other costs associated with property buying which may seem to be less apparent, can quickly become a problem for any buyer who did not budget for those expenses well in advance. Needless to say, this can cause unnecessary delays and even jeopardise the transaction, as well as your commission.

The cost involved in transferring a property from the seller to the buyer’s name is largely made up of taxes (transfer duty and stamp duty) and attorney fees. The transfer costs vary according to the size of the purchase price agreed upon in the contract (sometimes the Receiver of Revenue may question the value and valuation certificates may be required). The higher the purchase price (value), the higher the costs involved in transferring the property. The following costs in transfer of property normally appear on the account from the conveyancer and are payable as indicated, unless agreed otherwise by the parties:

- Stamp Duty
- Transfer Duty
- Deeds Office Fee
- Transfer Fee
- Postage and Petties
- VAT on Transfer Fee and Postage and Petties

Stamp Duty:

Stamp Duty is payable to the Receiver of Revenue. Should the contract not stipulate otherwise, the following persons are liable:

- Mortgage Bond: The Mortgagor
- Cession of Bond: The Cedent
- Rental Agreement: The Landlord
- Deed of Transfer: Transferor(seller)

A. Calculation of Stamp Duty on Transfers:

When calculating, always round off the amount to the nearest thousand.

- Purchase Price at N\$ 20 000 and less:
  \[ \text{Purchase Price} \div 1000 \times 5 = \text{Stamp Duties Payable} \]

- Purchase Price above N\$ 20 000
  \[ \text{Purchase Price} – 20 000 \div 1000 \times 10 + 1000 = \text{Stamp Duties Payable} \]

B. Calculation of Stamp Duty on Bond Registrations:

Bond amount x 0.005 = Stamp Duties payable
Transfer Duty:

According to the Transfer Duty Act, a transfer duty shall be levied on the value of any property acquired by any person, by way of a transaction or in any other manner, or on the amount by which the value of any property is enhanced by the renunciation, on or after the said date, of an interest in or restriction upon the use or disposal of that property.

It is necessary to view these arguments in the light of the interpretation of the word “acquired” in s. 2(1) in the context in which it is used in the Act. The word is not defined in the Act, but it has been construed to mean the acquisition of a right to acquire the ownership of property.

By Whom:

From the above it is clear that Transfer Duty is payable by the one who “acquires” the property.

Property:

This would include “land” and any fixtures thereon as well as any real right in land, but not mortgage bonds. In terms of definition of property in the Transfer Duty Act, transfer duty is not only due on the acquisition of ownership in property, but also on the acquisition of other real rights, such as servitudes. Transfer duties are thus also payable in case of personal servitudes such as usufruct, usus, and habitation, as well as on praedial servitudes such as servitude roads, grazing, pipeline or water servitudes.

The value on which duty shall be payable shall,

a) where consideration is payable by the person who is acquiring the property, be the amount of that consideration,

b) where no consideration is payable (donation, exchange or otherwise grant), be the declared value of the property.

If the Receiver is of opinion that the consideration payable or the declared value of the property is less than the “fair market value”, he/she may then determine the fair market value. Transfer duty shall be paid on the larger value.

For properties sold at public auctions, the auction price (including commission price) will determine the value and not the “fair market value”. Relevant to farm transactions is that the Deed of Sale must be worded correctly. Specify “movable items” separate from the purchase price to prevent that unnecessary transfer duties are being levied.

Total Value:

For purposes of the payment of transfer duty certain payments shall be included to the consideration payable in respect of the acquisition of the property. Examples of such additional amounts are estate agent’s commission, municipal rates and taxes, and agreement costs.

For example:

1) Should a property be bought on an auction and the conditions of sale provide that the purchaser shall pay all outstanding commissions and fees to a further N$50 000.00, transfer duties shall be paid on the bid amount PLUS N$ 50 000.00.

2) If an undeveloped property is sold for N$200 000.00 and in the conditions of sale it is contained that a company is to build a house valued at N$ 400 000.00 on such property, transfer duties shall be payable not only on the land, but on the total consideration in terms of the contract i.e. on N$ 600 000.00.
Movable Items / Equipment included in the sale:

Transfer duty is normally calculated on the purchase price of the property as stipulated in the agreement of sale. In other words, if the purchase price is in respect of immovable property and movable property and there is no split of the purchase price between the immovable and movable property, the transfer duty will be calculated on the full purchase price.

Example: As in the case with farm transactions where the purchaser buys the land together with equipment, or the purchase of a house with its furniture, the Agreement of Sale should indicate and clearly split that moveable items are included in the sales agreement. It should further stipulate and differentiate specifically;

1. The consideration (amount) to be paid for the immovable property (land)
2. The costs (amount) of the movable items/equipment

The above is to ensure that transfer duty will only be paid on the consideration paid for the land. If the split was not done in the sales agreement, transfer duty will be payable on the single (total) amount.

Note: Transfer duty is payable on the value of a property, i.e. the purchase price in the case of a sale. It constitutes fraud and a contravention of the Code of Conduct to enter into a disguised contract of sale at a price lower than the actual price for which the property is sold in order to avoid transfer duty. An estate agent must therefore keep this in mind should an agreement of sale be concluded on the basis that the purchaser is to pay commission.

When payable: In terms of the Act, transfer duty must be paid, at the latest, within six months after the date of acquisition of the property. Even if the transfer has not been registered within six months after the date of the sale of the property, transfer duty should be paid to avoid penalties.

Exemptions from paying Transfer Duties:

The Act does provide for some exemptions and for the purpose of this guide the following is mentioned: No Duty is payable in respect of acquisition of property by the State, regional council or local authority, religious, public hospitals and animal welfares, educational or charitable institution provided that such property is indeed used for that purpose.

Transfer Duty Rates:

In order to calculate how much transfer duty is due, the two most important questions are:

1. Is the person a natural person or an entity?
2. What is the value of the property (usually purchase price)?

a) In the case where a natural Person/Partnership is purchasing/acquiring the Property/Interest:

a.1) Purchase Price between 0 – N$ 100 000
Exempted from paying Transfer Duty

a.2) Purchase Price exceeds N$ 100 000 but does not exceed N$ 200 000
Purchase Price - 100 000 x 1%

a.3) Purchase Price exceeds N$ 200 000 but does not exceed N$ 400 000
Purchase Price - 200 000 x 5% + 1000.00
a.4) Purchase Price exceeds N$ 400 000
Purchase Price - 400 000 x 8% + 11 000.00

When the purchaser is a juristic person, the first N100 000 is not exempted and transfer duty is calculated on 8% of the value of the property. For the purpose of levying Transfer Duty, a Trust is deemed to be a person other than a natural person and will therefore, like companies and close corporations, also attract Transfer Duty at 8% of the value of the property or the said amount.

(Note that rates may change periodically.)

For calculation on transfer duty where a purchaser is buying a share in the property, consult the conveyancer.

Value Added Tax (VAT) on Property Transactions:

The VAT Amendment Act regulates the position regarding the VAT position on property transactions. Various guidelines are mentioned in the Act regarding erections or extensions which are zero rated. For the purpose of this guide however, it should be noted that VAT can, over and above Transfer Duty, also be levied.

A distinction should further be made between commercial buildings and buildings for residential purposes (which is excluded). It is further important to note that VAT should be raised on commercial properties (including farms). The registered person making the supply will levy output VAT and the person who received the supply can claim the input VAT back from Revenue if he/she is a registered person for VAT purposes and has a TAX invoice as prescribed in the Act. Therefore, the seller and the purchaser’s VAT status will determine how VAT shall be levied. The VAT status of the purchaser indicates whether he/she will be able to claim the VAT back afterwards. However, should the seller be registered and the purchaser is not a registered VAT vendor, keep in mind that the seller could end up paying the VAT out of the proceeds of the purchase price. Therefore, always enquire about the VAT status of the seller.

What happens if the seller incorrectly assumes that he/she is not liable for VAT?

In the event of the sale of a property by a registered vendor in terms of the Value Added Tax Act, a seller might incorrectly assume that a transaction is not subject to VAT, in which event the seller will be liable for payment of value added tax to the Receiver of Revenue out of the proceeds of the sale, effectively resulting in the purchaser taking transfer of the property at a 15% discount.

Note that the supply by a registered person to another registered person of a taxable activity as a going concern will be zero-rated in terms of the Act. It should be noted that:

- The property is sold as a going concern;
- the business will be an income earning activity on date of registration of transfer; and
- both parties, the transferee and the transferor, should be registered VAT vendors in terms of the Act on date of the transaction.

The following clause could be added for protection of the seller:

“In the event that the Receiver of Revenue finds that the transaction is not the sale of a going concern and is not a zero rated transaction, the purchaser will be liable for the payment of VAT levied on the purchase price.”

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What happens if VAT is not applicable?

Once you have ascertained that value-added tax is not applicable, then in all other property transactions transfer duty will still be applicable. It is common practice in Namibia that all deeds of sale include the purchaser's liability for transfer duty. When dealing with transaction that might attract VAT, it is best to consult a specialist in this area.

Deeds Office Fees:

All pro-forma accounts prepared by a conveyancer for payment by any party to a transaction must make provision for the Deeds Office levies, which are payable on registration of the transaction. The Deeds office levies (N$ 300 per transaction) is prescribed by regulations to the Act and the conveyancer will bill the party to the transaction accordingly. All Deeds office levies are paid on a monthly basis to the office of the Deeds Registry, by the conveyancer.

Postage and Petties:

A conveyancer is entitled to recover the reasonable costs of postages, petties, telephone calls and faxes, as well as other disbursements incurred in registering a transaction. It is up to the conveyancer to assess what is a reasonable amount for each individual transaction, which will naturally depend on the nature of the transaction. An average of N$ 150 for transfers and N$ 100 (plus VAT) for bonds are mostly in order, in comparison to the average of R400 being asked in South Africa.

Transfer Fees:

A great deal is at stake in the transfer of fixed property. It is generally the largest single asset that a person owns and the transaction for the purchase or sale of a fixed property is probably the most important contract undertaken by individuals. There is thus a great deal of risk involved and a responsibility to ensure rightful transfer of the property as well as to secure the purchase price. The law, therefore, provides that only qualified conveyancers may attend to the transfer of fixed property and related transactions. This is not only to give proper protection to the rights and interest of the public, but also to safeguard the integrity of the Namibian land registration system and economy in general.

Conveyancing Fees charged by conveyancers to register transfers or bonds have historically been based on recommended tariffs published by the Law Society in accordance with the Regulations to the Deeds Registries Act. These fees are related to the cost of the transaction (slightly more than 1%) and bear a relationship with the risk and responsibility involved for conveyancers to deal with such important matters.

The origin of a fee structure is found in our common law and relates to the complexity of the matter as well as the seniority of the legal practitioner. Although some people in the industry may want these rules to be relaxed, the rationale behind the fee structure is sound. It exists to maintain the independence of the attorneys’ (and conveyancers’) profession which flows into unbiased, honest and reliable service to their clients. This then lays the foundation of our land registration system and the basis of economical development. An efficient land registration system is critical for the economic development and political stability of any country. And in Namibia as in many other countries, it is the conveyancer, in co-operation with the Deeds Registry, who is at the centre of this system.

There are probably various manuals available which can set out such recommended fees, however, by using the attached recommended tariff table as well as other guidelines (Transfer Duty, Stamps etc) in this guide, you would be able to work out the estimate fees involved for each transaction.
Keep in mind that there may also be other legal costs and expenses which can be claimed over and above these recommended fees which may include fees for preparing an agreement of sale, providing legal advice on various issues and settling disputes, travelling costs and other additional attendance.

**Rates and Taxes:**

Owners or immovable property, whether in city or town, are liable to make certain payments to the applicable local authority in which jurisdiction the property is situated. This is according to the Local Authorities Act and these funds are used to provide basic municipal services by these authorities (water, sewerage removal, refuse removal etc.). Rates and taxes due in respect of properties are based on the value of each property and owners are billed monthly. This includes two parts; a form of tax as well as for “services rendered”. Some authorities combine the rates and taxes with the “utility bill” water and lights, while others may have it separate. If a freehold property is sold, the conveyancer will apply to the relevant local authority for the issue of “rates clearance figures” and after payment of the due amount, for a rates clearance certificate. In sectional title transfers, a clearance certificate is obtained from the managing agents of the sectional title complex. Usually the agreement of sale will provide that rates and taxes be the responsibility of the person who enjoys possession of the property. However, in most cases the firm will require most of the funds from the seller and then do a pro rata contribution depending on the date of transfer (and possession).

**Table of Costs** *(also refer to “Buyers Cost Sheet”)*

**A. Transfer Fees** *(normal transfers as well as sectional titles)*

Deeds office fee of N$ 300.00 should be added. Transfer Duty amount on this table is for purchase by a Natural Person. For a purchaser other than a natural person (trust, cc or company) the Transfer Duty will be 8% of the purchase price. 15% VAT is added to Attorney Fee and Postage and Petties.

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**B. Cost for Registering a Mortgage Bond** *(normal transfers as well as sectional titles)*

Deeds Office fee of N$ 300.00 should be added to each transaction. 15% VAT is added to the Attorney Fee and Postage and Petties.

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5.6. Summary of Deeds Registry work flow

Transfer of ownership occurs after the conveyancer has signed the Deed of Transfer and it is thereafter signed by either the Registrar or Deputy Registrar. Until that moment, there are a variety of things that need to happen since lodging of the deeds until the registration thereof.

Although the conveyancer, by virtue of his/her signature, accepts responsibility for the accuracy of facts mentioned in deeds prepared by him/her, according to section 3 (1) (b) of the Deeds Registry Act the Registrar of Deeds has a duty to examine all deeds and other documents lodged for execution and registration and to reject them if they do not conform with the laws, practice and procedures.

Deeds Lodged at Counter:

The lodging clerk will mainly look for dates and linking on the deeds. In most cases deeds will have to be linked because the different transactions are interdependent. Normally there are at least three transactions in a set which need to be registered simultaneously:

1. Transfer from the previous owner to the new owner.
2. Bond cancellation of the existing bond currently registered over the property.
3. Bond registration of the new bond on behalf of the mortgager.

These three transactions can all be dealt with by one conveyancer, or with three different conveyancers. To make sure that the above three transactions are registered simultaneously, the conveyancers link and lodge simultaneously. This way the set can be registered at the same time.

Sorters and Examiners

On the first day, deeds are checked to see if all deeds indicated on the linking were indeed lodged. Deeds are then date stamped and sorted according to type, linking, complexity and nature. Different deeds go to different examiners to ensure that the workload is evenly divided amongst them.

Examination

Examinations are done by junior deeds examiners, and senior and chief examiners. The examiners have different tasks to perform while they study the deeds to ensure that the contents comply with all legal requirements.

- **Junior examiners**: They must check the registers in the Deeds Registry to make sure that they comply with the information contained in the lodged deeds. The first register to be checked is the land register, in order to ascertain the number of the current Title Deed, the property involved (including size), as well as the current owner of the land. The personal registers (index cards) are also checked for antenuptial contracts or other personal information that may affect transfer. The examiner will also check for caveats or court orders, such as sequestration orders against the property or the parties involved. The junior examiner will also ensure that linking of the deeds is in the correct order.

- **Senior examiners**: If the required number, stamp duty, transfer, bond or other endorsements are not yet made by the junior, it will be done here. The Deeds Registry copy of the Title Deed is also compared with the lodged owner’s copy to ensure that they are the same. The senior examiner deals with required legal issues and may reject deeds or pass them on for registration.

- **Chief examiners**: The final examination of deeds is done here. The chief examiner will compare notes made by the previous two examiners to ensure that deeds are only rejected for valid reasons.
The final prerogative remains with the Registrar, who will decide if a deed will be registered or rejected.

“On Prep”

Each law firm with a practicing conveyancer has a pigeonhole in the Deeds Registry bearing the firm number which was allocated to them. These pigeonholes are situated in the preparation room/area of the registry. After the chief examiner has inspected the deeds, they are placed in the pigeonholes of the firm that lodged them. The conveyancer then has three days to correct minor notes on deeds and to apply the required stamps. If the examiners are satisfied that the notes may be removed, the deeds will continue on their path to the execution room to be registered the next day. If notes are not removed within the given three days, deeds will be rejected and delivered at the delivery counter.

While deeds are on prep, the final checks are also being made in the office of the conveyancer to ensure that all funds are in place before registration of the deeds.

Counter Delivery of Rejected Deeds

If not linked correctly or any other serious mistakes are found in the documents, the faulty deeds and documents are rejected and delivered (rejected) at the lodgment counter. This could either be on day 1 or during the examination process. Deeds could be rejected because of incorrect names and birthdays, attachments noted against the property, incorrect description of marital status, mortgage bonds not lodged for cancellation, incorrect property description, conditions left out, etc. The faulty deed must then be redrafted, relodged and re-examined.

Restoring Deeds

If, however, a conveyancer can convince the Registrar or the deeds examiner concerned that the rejection note was in error, the examiner may consider restoring the deeds. If the notes were serious but relatively easy to fix the examiner or registrar may be willing to restore the matter. This however must be done on the same day it was rejected. This means that the deed will be “put back” in the system and does not have to be relodged or the whole process repeated from the beginning.

Expediting Deeds

If a transaction is urgent and cannot, for a good reason, wait seven to ten working days to be registered, the conveyancer may approach the Registrar and ask for the transaction to be expedited. This means that the documents must still be examined and travel the full journey through the Deeds Registry, but the documents will be “fast tracked” so that the duration from date of lodgment to date of registration is shorter. To avoid abuse of the system, the Registrar will consider expediting a matter only in exceptional circumstances and the reasons for requesting expedition must be set out in writing when the request is made. Expediting deeds is a privilege conveyancers will not abuse.

Black book

The term “black book” originated from a request for urgent registration and a reference to a practice followed where the register had to go through the lists of sequestrations and interdicts that were written up in the Black Book to ensure that no interdicts were received by the deeds office regarding that specific property. Today it still refer to the final check to ensure that there are no “fresh” interdicts that
may have arrived at the Deeds Registry against the property or the parties to the transaction that may prevent registration.

**Execution of Deeds**

When all notes have been removed and the deeds have been black booked, they are taken to the execution room for registration on the next working day. In the execution room they are once again placed in numbered pigeon holes. On the day intended for registration, the various firms’ conveyancers collect the deeds from their respective execution boxes and proceed with the execution thereof. During execution, the conveyancers sign the deeds and hands them over to the Registrar who does the final check and then signs the deeds. A deed (transfer, bond, real rights, etc.) shall be deemed registered at the moment the Registrar affixes his/her signature thereon.

**Numbering and Cross Writing:**

After registration the numbering take place. For example transfers are numbered from 1/2008 to 10500/2008. It is then also bound in volumes for example Volume 1 will consist of transfers 1-45 and Volume 2 will be 46-100.

The relevant registers are now updated with the new information. This includes the personal (index) and land registers. The entry of the particulars of the new owner in the land register (under the particular erf number) can be seen as the symbolism of transfer that occurs. The deeds registry is also in a process of computerising data.

**Storage / Delivery:**

The “office copy” of the deed stays behind at the registry and is bound numerically in volumes. There are separate volumes for Title Deeds, bonds, consents, servitudes and antenuptial contracts. These volumes are kept on shelves in the “strong room” of the Deeds Registry, where they are easily accessible and form a permanent record of all transactions relating to property and real rights in Namibia.

While the office copy of the deed stays behind, registered deeds or documents are released by the Deeds Registry and must be returned to the persons entitled thereto. Great care is taken to ensure that registered deeds end up with the rightful owner. In some cases it may go directly to the client entitled, however it will mostly be through the conveyancer who is responsible for delivering of deeds to the rightful owner/mortgagee. This delivery is normally made within three months after registration thereof.
5.7. Financial Intelligence Act

Introduction

Money laundering is basically the activity and process of transactions to disguise or conceal the true source and nature of funding; to further eliminate audit and to make it appear as if it is legitimate.

Money laundering as such only became a crime in this region recently. South Africa and Namibia gained a rather unpleasant reputation as a haven for illegal money, as our banking controls were not as strict as those in Europe or the Americas. In an effort to combat organized crime and money laundering activities, governments world-wide are busy passing necessary rules and legislation. In South Africa legislation like this came in effect on 1 February 2002 and in Namibia it is scheduled for July 2008.

The banking industry is deeply aware of the problems of money laundering, and came under pressure from international donors and customers to ensure that banks operate in terms of internationally accepted norms. In particular, the industry became worried about the prospects of losing international business if it allows itself to be used for money laundering in any manner. Money laundering in Namibia includes the laundering of the proceeds of illicit deals in diamonds, foreign exchange, stolen cheques, car theft, drugs, weapons and protected resources, as well as evading taxes. Subsequently, Namibia is not immune to the rising pressure to adopt and implement measures to effectively prevent and stop the flow of proceeds of unlawful activities.

Namibia is a member country of the Financial Action Task Force (FATF) established in 1989 by the G-7 Summit. This Force leads the international fight against money laundering and terrorist financing. FATF has thirty-three members and consists of eight regional bodies world-wide that assist the FATF in fighting economic crime such as money laundering and terrorist financing. Namibia belongs to the regional body, called the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) whose goal is to evaluate whether regional countries comply with their international rules and regulations that is aimed at combating money laundering. Namibia is not only committed to these international best practices as a matter of policy and as a result of its membership, but we are legally committed to anti-money laundering by virtue of being party to the Palermo Convention.

Significant legislative developments have taken place and the Financial Intelligence Act, Act 3 of 2007 (FIA), was gazetted on 20 July 2007 and calls for the establishment of a Financial Intelligence Centre. Although the Financial Intelligence Act has been gazetted, the regulations to the Act still needs to be finalised before the Act can become fully operational in Namibia. Other legislative initiatives are in the in the pipeline. It would include money laundering law, an anti-corruption law, and provisions for extradition, international cooperation, the prevention of organised crime, and the sharing of financial intelligence. However, the Regulations to accompany the FI Act is yet to be finalised and the Prevention of Organised Crime Bill is not effective yet. This Act seeks to introduce measures to combat organised crime, money laundering, the activities of criminal gangs, and racketeering; to criminalise money laundering and gang-related activities; and to provide for the recovery of the proceeds of criminal activities and the civil forfeiture of criminal assets, be they proceeds of crime or instrumentalities used to commit crimes. The Act also seeks to establish a Criminal Assets Recovery Account.

The FI Act also regulates the establishment of a Money Laundering Advisory Council, and imposing certain duties on institutions and other persons who may be used for money laundering. These other persons would include role-players like banks, lawyers, estate agents, insurance companies, auctioneers, dealers, etc. to shed a spotlight on illegal transactions from which proceeds are used to fund organised crime. If illegal funds can be detected (and cut off) when the offenders try to introduce it back into the legitimate financial system, criminal activities can be curtailed. The measures to be adopted in the Act complement and give effect to the measures to be adopted in terms of the Prevention of Organised Crime Act.
Money laundering does not only erode the integrity of a nation’s financial system by reducing tax revenues, but it also restricts fair competition with legitimate businesses and disrupts economical development. Ultimately, it can also undermine national economies, currencies and finance crime and terrorism activities and poses both a national and international threat. FIA closes many of the loopholes by laying down procedures and obligations on those citizens who work in professions and organisations that have been identified as susceptible to abuse.

**An overview of the Namibian Financial Intelligence Act:**

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<td>Others</td>
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**Financial Intelligence Centre:**

The main purpose of FIC is to collect data received from Accountable Institutions and share relevant information with the different Law Enforcement bodies. The FIC is based out of the Bank of Namibia Centre at 71 Robert Mugabe Avenue.

**Anti-money laundering Advisory Council**

Section 10 of the FI Act prescribes that the Minister of Finance appoints members of the Anti-money laundering Advisory Council. According to the Act, the Council should consist of: the Governor of the Bank of Namibia, the Permanent Secretary of the Ministry of Finance, the Inspector General of the Namibian Police Force, the Permanent Secretary of the Ministry of Trade and Industry, the Permanent Secretary of the Ministry of Justice, the Director of the Namibian Central Intelligence Service, the Director of the Anti-Corruption Commission and the President of the Bankers Association.

The main role of the council is to advise the Minister of Finance on policies and measures to combat money laundering activities and about other powers entrusted to the Minister in terms of this Act. The council should hold a forum at least twice a year where accountable institutions, government ministries, offices and agencies and supervisory bodies can consult one another.

**Accountable Institutions:**

The minimum safety measures which accountable institutions should adopt to detect and combat money laundering are:

- The development of a “know your customer” policy, incorporating procedures for identifying customers at the time of the establishment of a relationship;
- the keeping of records;
“due diligence” in the conduct of business with a specific customer in terms of acquiring sufficient knowledge of the customer’s activities in order to recognise unusual business patterns which may raise suspicion;

- the reporting of suspicious transactions;
- internal control procedures; and
- staff awareness and training.

**Duties upon Accountable Institutions**

Accountable Institutions will now have a duty upon them to establish the identity of a client by collecting information regarding the client and they must verify the information by obtaining and studying the documents presented to them as proof of identity.

- **Natural persons:**
  - Full names, date of birth, residential address, income tax registration number.
  - Copies: ID documents, Utility bills and tax registration documents.

- **Company:**
  - Registered name, registration number, registered address, trading name, physical address.
  - Copies: Certificate of Incorporation (CM1), Notice of registered address and postal Address (CM22), Utility bill reflecting address, Income tax return or VAT registration and certificate.
  - Personal Particulars of: the manager of the company, natural persons authorised to act on behalf of the company, natural or legal persons holding 25% or more of the vote (see above at Natural persons).

- **Close Corporation:**
  - Registered name, registration number, registered address, trading name, physical address.
  - Copies: Founding statement (CC1), Amended Founding statement (CC2), Utility bill reflecting address, Income tax return or VAT registration and certificate.
  - Personal Particulars of: each member of the CC, natural persons authorised to act on behalf of the CC.

- **Trust:**
  - Name, number and tax or VAT number (where applicable).
  - Copies: Master’s letter of authority (where applicable) and certified copy of trust deed, Income tax return and registration certificate, Utility bill reflecting address,
  - Personal Particulars of: each trustee and beneficiary of the trust, as well as natural persons authorised to act on behalf of the trust.

**Certain offences and penalties are stipulated for failure to comply with duties. Including the fact that attorneys and estate agents may not establish a business relationship or conclude a single transaction with a client unless the following information has been obtained:**

1) The client’s identity has been established and verified
2) If the client is acting on behalf of another person (or entity), the;
   a) identity of that person; and
   b) the client’s authority to establish the business relationship or to conclude the single transaction on behalf of that other person, must be established and verified.
3) If another person is acting as an agent on behalf of the client;
   a) the identity of that other person; and
   b) the other person’s authority to act on behalf of the client, must be established and verified.
Exemptions to FIA:

Accountable institutions may take initial steps to commence with a transaction or a business relationship before verifying the identity of the client, but may not conclude the transaction or perform any act to give effect to a single resultant transaction, unless FIA verification has taken place.

Exemptions also provides that estate agents who perform certain services, for example managing agent services (collecting money for Body Corporates) need not comply with the money laundering control measures of the FIA. This effectively means that they need not obtain and verify the identity details of clients. This exemption would only apply to these certain services, not to the selling of real estate in general.

Additional obligations in high-risk transactions:

Additional responsibilities are placed on accountable institutions where a business relationship or transaction poses a particularly high risk of money laundering activity. This would include certain high-risk profile clients or suspicious transactions like sales of high-priced properties where the buyer intends to pay a large part of the purchase price in cash. Cases like this would need to be brought under the attention of the institution. It would be recommended that the purchaser be requested to state the source of his/her income and the source of the funds used to pay for the property.

Accountable institutions will have a duty upon them to keep FIA records in respect of their clients for at least five years from the date of transactions. They would also need to formulate and implement internal rules dealing with matters like the establishment and verification of identity of relevant persons, information on which records must be kept, manner and place where records must be kept, steps to be taken to determine when a transaction is reportable, etc.

There has not been enough preparation in terms of raising public awareness, training law-enforcement officers, prosecutors, magistrates, banking staff and employees of non-bank financial institutions. Furthermore, once the new legislation is in place and operational, banks, financial institutions and other accountable institutions should similarly implement training schemes for their employees through their respective supervisory authorities.

Why Estate Agencies?

One of the methods used to "clean" dirty money is to change its nature, e.g. by purchasing immovable property and then selling it.
5.8. Exchange control regulations

It is advisable to note that Exchange Control is complex, yet important to make it easier for foreigners to invest in Namibia. It is highly recommended that non-residents investing in Namibia consult a reputable lawyer, accountant or authorised dealer (bank) for advice. The rules governing exchange control in Namibia stipulates that all funds brought into the country by a non-resident to acquire fixed property within the country may be repatriated at any time.

Exchange Control in Namibia falls under the control of the Minister of Finance and the Treasury who have delegated the administration thereof to the Bank of Namibia who, in turn, have appointed the commercial banks as Authorised Dealers in foreign exchange.

Purpose of control is to ensure the repatriation into the Namibian banking system of all foreign currency acquired by residents of Namibia, whether through transactions of a current or a capital nature and further to ensure that foreign currency outflows are for legitimate purposes only and in the best interest of Namibia as a whole.

The control regulations are also applicable to non-residents [person (or legal entity) whose normal place of residence, domicile or registration is outside the Common Monetary Area (Namibia, the Republic of South Africa, Lesotho and Swaziland)].

The regulations particularly deal with local financial assistance to non-residents. This assistance refers to the lending of currency or granting credit to foreign investors. It also refers to any local borrowing, leasing, and loans extended to a company of which more than 75% is owned by foreigners.

This ratio has now been doubled. In the past, a foreign investor could only borrow 50% of his/her capital funds locally. The rational for this requirement is to ensure that a foreign investor introduced a reasonable amount in respect of capital funds, without too much dependency on local borrowing.

Non-residents purchasing a property in Namibia are nowadays not restricted as much and the best would be to consult the applicable bank to enquire about the maximum % of the purchase price that may be borrowed and which % of the funds must be brought into the country by the purchaser. These funds must also be transferred from a recognised foreign bank to a bank in Namibia. The total amount that may be borrowed is at the discretion of the commercial bank offering the loan.

A non-resident must open a “non-resident” account at a Namibian commercial bank to facilitate loan repayments. This account would normally be funded from abroad or from rentals received on the property purchased, subject to the bank holding the account being provided with a copy of any rental. Non-residents who are in possession of a valid Namibian work permit/permanent residency are considered be residents for the duration of their work permit and are therefore not subject to borrowing restrictions placed on non-residents without the necessary permits.
Chapter 6

Utilising my Potential

6.1 My Attitude and Potential
6.2 Be Knowledgeable
6.3 Now get some WOO
6.4 My Goals
6.5 My Time
6.6 Teamwork
6.7 Friends and Family
6.8 The use of Boards/Signs

“If a man can write a better book, preach a better sermon, or make a better mouse trap than his neighbour, though he build his house in the woods, the world will make a beaten path to his door.”

Emerson
6.1. My Attitude and Potential

Is this the right job for you?

First of all, you probably need to determine whether the real estate industry and, more specifically, being an agent is the right option for you. Too many times people get stuck in positions and careers that do not suit them. Even when the going gets tough it is probably a good thing to make use of an easy diagnostic tool that helps you “take stock” of your current position:

1. Are you having fun; do you wake up in the morning actually excited about the day ahead?
2. Are you being challenged intellectually? Even if you do attend training and development courses, does your job still provide an intellectual challenge?
3. Do you like your colleagues? Although you don’t have to be best friends, it makes life much easier if you have a positive relationship with co-workers.
4. Are you reaching your goals or are you going around in circles?
5. Is your job allowing you to have your desired “life balance”?
6. Is your compensation somewhat close to your “worth”?

If you didn’t do well in the above checklist, don’t feel too bad – and don’t quit your job. The above is to identify red flags more than anything else. Once you know where there is a deficiency, you can take steps to fill in the gaps. Hopefully the rest of this chapter will show you how.

First of all, you need to believe:

The first choice agent believes:
“You can have your cake and eat it too.”
The average agent believes:
“The cake is too rich; I will only have a little piece.”
The struggling agent believes they do not deserve cake.
They order a doughnut, focus on the hole and wonder why they have “nothing”.

Sometimes we need to do a little paradigm search and perhaps shift. The Greek word “paradigm” means a model, theory, perception, assumption, or frame of reference we have in our minds. In a more general sense, this is the way we see things. It is important, as it is the “lens” through which we see the world. Our paradigm, whether we like it or not, is the source of our attitudes and behaviours. It also influences our relationship with others and ultimately, our abilities to achieve more. Always observe your attitude, thoughts and environment, and make sure to entertain and cherish only those that positively empower you.

Thoughts and Direction:

Do not focus on the wrongs or the negativities of the industry or your surroundings and agency. You cannot help the industry by focusing on the negative things, as you will only add to them this way. Instead, have a positive outlook on life, enjoy the people you come into contact with through your job and just get on with it. Also make sure that you do not put yourself in the proximity of complainers. This negative energy is infectious and should be avoided if possible. Some people like to stick around complainers and the reason for that is just to get “their chance at complaining”.

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Remember: Thoughts become things and what you focus on, expands (will actually happen).

Avoid the Blaming Game:

A lot of people feel like they are victims in life and they often point at past events, incidents, people or circumstances. Victims of the blaming game like to blame the economy, the government, banks and interest rates, lawyers, principals or employees, their head office, partners or a spouse, their parents, their school and even God. It is always someone or something else that is to blame for their failure. The problem is everything or anyone but them. The reality is: you are responsible for your own success and happiness.

The solution is simple: You can either keep on focusing on the negative, or you can start focusing on what you really want. The moment you start focusing on what you really want, the rest starts to fall away.

Maintaining a Good Attitude:

We may not be able to directly choose our circumstances, but we can choose our thoughts and so indirectly, shape our circumstances. To have a good attitude, we have to make a habit to have one!

Try the following ideas:

- Greet and smile the first people you see every day.
- Before you tell someone (colleagues, friends or family) about a problem, find the solution yourself and you will have a greater sense of achievement.
- Be careful to share your problems with everyone. Remember that half do not really care and the other half may even secretly be glad you are finally getting what is coming to you!
- Live in an attitude of positive expectancy, knowing that everything that happens in your life benefits you in some way.

If you say you’re worthy, you are,
If you say you’re not worthy, you’re not.
Either way, you will live into your story!

Or

In the words of Henry Ford:
“Whether you think you can or think you can’t, either way you are right.”

This serves to tell us that our attitude and thoughts will manage our potential and eventually, determine our abilities. Limiting and negative thoughts about ourselves, our abilities and possibilities, are best described as defeating beliefs. They are often very simple, yet they can have a profound effect on our lives. To liberate yourself from ideas that defeat, you must first identify them.

Pay attention to your words and thoughts.

What do you constantly tell others and yourself you cannot do? Listen to your excuses you give yourself for not doing things or being a good agent. Unfortunately, it is hard to let go of old beliefs, but this way of thinking and talking about yourself can prevent you from becoming a first choice agent.
Never resent more successful Agents:

Biblical teachings encourage us to pray even for our enemies. It is interesting to see that even modern day scholars regard this as accurate. Rather be polite and respect and encourage not only teammates, but even opposition and more successful agents. Try to establish what they are doing (better) that you are not doing and learn from their success.

If it is difficult to talk well about other agents, rather refrain from talking about them with clients at all. It is also advisable not to downplay or “knock” competing agents in discussions with clients, especially if they have previously done business with those “competing agents”, as this could also be taken as an insult by the client. Knocking the other agent is tantamount to telling your clients that they were stupid for considering someone else. Knocking competitors in this way will certainly diminish you in the eyes of your clients and the public. Rather focus on your clients, stay close to them and educate them instead of trying to downplay other agents. Eventually you will believe that you do not have any competitors. This is in your control!

In her book, *A return to Love*, author Marianne Williamson puts it in this way:

“*You are a child of God. Your playing small does not serve the world.*

*We are all meant to shine, as children do. We were born to manifest the glory of God that is within us. It is not just in some of us; it is in everyone. And as we let our own light shine, we unconsciously give other people permission to do the same.*

*We are liberated from our own fear, our presence automatically liberates other.*”

Life is a game and the world (and certainly the Namibian real estate industry) does not need more people playing small. It is time to start playing the game of life (and real estate) in a “big way”. In the end, small thinking and small actions lead to unfulfilled transactions. The choice is yours.

Remember that top salespeople are confident, but not over confident (and without putting too much enthusiasm into presentations), and use loads of empathy to “feel” their client’s needs, to relate to the buyer’s requirements and financial situations, as well as to develop the ability to assess the true selling motive of the seller.

Those first jobs:

Be proud of earlier qualifications and experiences. If you were a teacher before or perhaps have some experience in the financial or insurance industry, make use of hosting events and seminars. Whatever your previous experiences, make sure to utilize them positively.

To further improve your own abilities, make sure to use your personal strengths. Drive yourself to do things you do naturally well and sharpen those specific skills you have. We each came to this earth with natural talents, things we are just naturally good at. These gifts were given to you for a good reason and research shows that the happiest people are those who use their natural talents to the utmost. Our Creator gave us the talents, how we make use of it is our gift to Him.

Therefore, be yourself and never try to be what you are not. If your natural character is one of a quiet, methodological person, use these traits and harness them to develop yourself into a good, stable salesperson. It is not necessary to have a forceful and gregarious nature in order to succeed in sales.

*Remember:*

*To believe in yourself actually involves acting, speaking and thinking as though you have already achieved that.*
6.2. Be Knowledgeable

“Good agents will constantly learn and grow. Average agents think they already know.”

To be knowledgeable about your field makes it easier to speak about it and also makes you a more interesting person to speak to and deal with. In short: knowledge is power in real estate. Few things will develop you to your full potential like knowledge. Change your attitude from “I know it all” to “I have to learn it all”. If properties were free, everybody would buy. Be well-informed on property, legal and financial matters; this will not only make a good impression but the reality is that people like to do business and to be associated with well-informed professionals. You must focus on your knowledge of the neighbourhood and the market factors that affect the sales of homes in the local area. Know your stuff! If you can convince a home seller or potential buyer of this, then you will win their trust and get their business. If you cannot give good sound advice, make sure you know where to get it and report back to the client.

Make a habit out of attending training and other sessions. These are mostly sponsored anyway and provide a great opportunity to connect with others. This will help you to become as knowledgeable as possible about the industry and your target area. This includes matters on all different aspects relating to the industry and area you work in. Your ability to quickly and accurately answer prospective buyers’ questions will establish trust and confidence with clients and certainly benefit you. Set up a fact file with a record of concluded sales in your area, whether you were responsible for them or not. Make sure to be well acquainted with all new legislation and procedures involved. Read market research studies about your profession, real estate industry and target market groups, and attend seminars, etc.

You need the ability to answer questions from prospects. Be sure to combine your knowledge with zeal* and you will certainly reap the rewards.

How:

Teach yourself the habit and desire of constantly wanting to know more, not only about your industry and facts of your area, but things in general. Even global conflicts or history should broaden your knowledge. This desire will also stimulate not only your thirst for general knowledge, but also the desire to know more about your industry and it also makes you more pleasant to interact and communicate with.

Eventually you will find yourself devoting more time than others to exploring certain problems, issues, situations, topics, prospects or techniques of the industry. Chances are that you will then direct your attention towards new ideas and possibilities to create opportunities.

Note to Principals: When people have the opportunity to learn and grow, they are more productive and loyal.

* Webster’s Dictionary defines “zeal” as:
“An eager desire to accomplish or to get something done, or to see something succeed.” Always show your enthusiasm and interest in people as well as the industry and remember to be professional, excited and enthusiastic in your duties and personal contact with prospective clients.

As a real estate agent working in a very competitive industry, it is of utmost importance for you to have confidence in your own abilities. Without this confidence and vision of success this will be a very difficult and impossible road.
6.3. Get some WOO

WOO stands for “Winning Others Over”. You need to enjoy the challenge of meeting new people and getting them to like you. As a salesman/person, you should never allow strangers to intimidate you; rather you should learn to be energised by them.

You need to learn to be easily drawn to others. As a real estate agent, you should be totally comfortable with getting to know people well in a short period of time. Besides wanting to learn their names and find out about their real estate needs, also ask and find out about some area of common interest so that you can strike up a conversation and build rapport.

Some people may shy away from starting these important ice breaking conversations, but you need to be totally comfortable with it. You should never be at a loss for words; in fact, you should actually enjoy initiating conversation with strangers because you derive satisfaction from breaking the ice and making a connection. This strength and advantage will allow you to engage with people in a way that allows you to present information so that they can accept and hear you better. Once this connection is made and the relationship of trust is built, you will be quite comfortable to get the listing and that sale you are after.

Even after the initial meeting you should still strive to win them over. This is where “word of mouth” comes from. Clients will certainly tell their friends if they loved or hated their real estate agent.

Combine this with a Sense of Urgency:

The barriers of entry into the real estate profession at present are relatively low, which may easily result in an oversupply of estate agents in Namibia. Besides hard work, the difference between a good and an excellent agent is normally the person’s sense of urgency. Having a keen sense of urgency in all areas regarding real estate will make the difference to the sustained success of a real estate agent. To always have energy and enthusiasm is vital for prosperity and survival in the real estate industry. It is, amongst other things, what gets an agent the first appointment with a prospective client before the competition does.

If you are not totally and truly committed to make a success out of your real estate career, chances are that you will not. You cannot expect to be successful if you are not putting in enough effort. Have discipline and manage yourself to increase prospecting and other real estate activities needed to succeed.

Live in the here and now; make the present perfect. Believe it or not, happiness is a choice and although you may not be able to change your situation, you can change your thoughts. Do not expend your energy dwelling on what you should have, could have, and might have done in the past. The present is a gift; enjoy it! By combining your positive mind and vision with your knowledge, experience and professional conduct, you will eventually become the first choice agent in your farming area.

The darkest hour in any man’s life is when he sits down to plan how to get money without earning it!

Horace Greeloy
6.4. My Goals

The number one reason why most people do not get what they want is because they do not know what it is they want. Besides not knowing what we want, we simply do not believe we will ever get it. The reality is that you always get what your (subconscious) mind wants. A motivated estate agent is one who sets goals, pictures a certain amount of success and is creative and energetic in order to achieve that success.

To achieve a well-rounded, joyous life we need to work towards our goals. Always remember that the mind will more readily accept a positive goal and will not automatically try to find ways to sabotage us, as it does with a negative goal.

You need goals in all areas of your life. It is not good enough to set your sights on your sales or transaction sides. You need goals in family, spiritual, physical, financial and mental areas of your life. This is the only way to achieve balance.

The ability to plan, set goals and create action plans to accomplish your goals is the mark of someone who is truly successful. The skill to set goals is a life-long endeavour. It is a habit that must be cultivated daily for a lifetime. This single activity will have the greatest impact on your life, over any other achievement skill.

Earl Nightingale said: “The problem with people is not achieving the goals we set, it is actually the process of setting them in the first place.”

To be disciplined in setting goals is to sit down with paper and a pen and make a list of things you want to acquire, attract or accomplish in the next several years. Your subconscious mind will take over and work on the goals you have set until they are accomplished. You must only set this vast powerful computer in motion by setting the goal.

When it comes to goals, the journey is almost better than the destination. Success was defined by Nightingale as the progressive pursuit of a worthy goal. You become successful once you set the goal and work towards it. Success is not found only at the attainment level, but also in the striving towards attainment. This will stretch you and mould you into a new person. Jim Rohn wisely said: “It's not the money that makes the millionaire successful; it’s what he had to become (as a person) to earn a million dollars.” If you took the money away from that millionaire, that millionaire would make it back twice as fast as before, because he/she learned the skill to make it in the first place.

Our overall goal for life should be to challenge ourselves and be continuous goal setters. We need to become so focused and clear on what we desire that every hour of every day we are doing the things that are moving us in our direction of choice and towards our goals.

The Keys of Goal Setting:

- **Accountability:** “The market is down” or “Jane is a better agent than me” or “XYZ Properties has got a better system”, etc. Within the context of goal setting, remember that there is a very definite parallel between motivation and accountability. However, whereas you may be motivated by other people, you can never share the accountability for your own goal setting. “If it is to be, it is up to me” should become one of your maxims.

- **Your goals must be specific, detailed and clear.** Well-written goals are like magnets; they will attract you to your desired result. Highly defined goals are attained, fuzzy goals are forgotten.

- **Although you should try not to put a ceiling on your sales/income, the goals you set must be measurable.** You have to be able to analyse and evaluate your progress and your results in a
tangible way. You need to know specifically how many sales you want to have. Your need to know the specific time period you want to achieve it by. Now that is a goal.

- **The best goals have deadlines.** They have a time by which you need to accomplish them. They also have interim steps along the way that can be monitored. These sub-deadlines or schedules are critical to success. There are no unrealistic goals; there are merely unrealistic time frames.

- **Your goals must have balance.** Just as a wheel needs balance to rotate properly, you need balance to get anywhere in life. Make sure you have a balance between your personal life, family, financial, spiritual, physical, mental and business goals.

- **Although challenging, your goals must be practical and realistic.** It is never a bad thing to have a dream, but do not daydream about things that are impossible. Set goals and work out how to achieve them.

After determining your goals, you must make an action plan. Exactly what steps are you going to take to reach them? For instance, if one of your goals is to get more focused, where are you going to start? With your files, with your piles of other stuff, or somewhere else? Whichever you choose, take the necessary steps to prioritise and make your goals happen!

**Play the P’s to get there!**

I find that adhering (or not adhering) to the following principles made a dramatic difference in my life.

1. **Paper**

There is a direct link between your writing the goal, seeing it being written, reading it over and over and etching it into your subconscious mind.

2. **Prayer**

Several studies done in Canada, the US, Netherlands and South Africa has proven the importance and necessity of prayer. It seems like the act of putting yourself in the presence of the Almighty and the subsequent divine relationship has got much more power than what we can imagine. This is also the reason why it has been practiced all over the ages.

Prayer also leads us to wisdom and self-knowledge. It is the laboratory where we closely examine ourselves. One of the often unheralded benefits of prayer is that it also prevents certain things from growing. It is a place where bad growth is curtailed. Growth happens imperceptibly, especially bad growth – the negative attitudes we cultivate, the prejudices we develop, the priorities we misplace, and the misinterpretations of God's will that can cause us to gradually wander from the truth. Without prayer these harmful growths go unchecked. Prayer is the place of pruning where such things are nipped in the bud. It prevents them from ever taking root in us.

In prayer we ask God to examine all aspects of our lives in order to avoid such errors. Prayer is the place where we get to re-examine and adjust the assumptions we are operating under. It is where we come to have our lives redirected as needed; holding all things up to God to see if there is anything that needs to be adjusted. To ask God daily for verification is the simple ounce of prevention that will make unnecessary the pound of cure that any wrong tangent will eventually require.

3. **Politeness + Persistence + Patience = Performance**

Everybody knows a salesperson should be polite and considerate. However, if you are only polite and forget about the business, you may end up a polite, disappointed agent.
Everybody knows a salesperson is supposed to be persistent: keep on calling, keep on knocking and never give up. Fair enough, but if you are only persistent, some potential clients may see you as an annoying irritant.

However, by combining politeness with persistence, you can be on the doorstep for as long as it takes to get the appointment or introduction. To stay persistent and polite is not always easy, especially if clients do not show up for a meeting or try to sidestep your commission. Remember that clients appreciate patient agents.

4. Personalise your Service

Remember, people buy from people. Whether you are on your own or in an agency, everything you do, or how you look or talk is part of your persona and service. To reinforce this and to be memorable to you clients, make sure to personalise what you do as much as possible. Use your picture as much as possible, put your own handwriting in letters or notes, have your name out there, etc.

5. Physically Fit

Look after yourself; your body will not only look after your mind, but will also ensure a more positive appearance and first impression. The reality is that clients like to do business with good-looking, impressive and confident salespersons. If you work out regularly, chances are that you will not only feel and look better, but studies also show that you will improve your chances of making the right decisions by up to 70%.

6. Play

All work and no play makes Jack a dull boy.
All play and no work makes Jack a mere toy.

The meaning of the above proverb is that without time off from work, a person becomes bored and boring. However, finding a balance between work, play and other activities is not easy. Different people will give you very different advice. Some people say you should be spending 80 or 90% of your working hours prospecting. Others think that this is unrealistic and unhealthy and that it is important for your mental and physical health to have other active interests.

One of the keys to balancing your life is to develop a schedule that is more or less consistent. You may decide that you will only work during the days and that evenings are for your hobbies.

7. Polished Professional

Pay attention to your manners and be professional in your selling area. This means you have to be punctual and prepared. Always be early, never late and do not even think about not showing up for a meeting. Put effort into becoming a problem solver. Remember: if you are not part of the solution, you are part of the problem. To perform you have to produce. Therefore you have to work hard.

8. Proud

Finally, be a proud patriot; not only of your agency or products, but also of yourself and your country. Send out a clear and proud message that you deliver professional service and are entitled to commission.
Setting your Financial Goals in terms of Real Estate:

So many times agents say: “I’d like to double my income in the next year.” But then you look at their actions and they are not doing the things that are going to make that happen. Decide on your ideal lifestyle, equate this lifestyle to a monthly remuneration and then decide whether you are prepared to work at the required level of output to achieve this lifestyle.

Do the following exercise:

My Ideal lifestyle (monthly remuneration) N$ ............
The average selling price of properties in my area N$.............
The average commission per sale N$.............
My portion of the total commission N$.............

Therefore, I have to sell ________ properties per month to achieve my ideal lifestyle. To do this I need to:

__________________________________________________________________________________

__________________________________________________________________________________

__________________________________________________________________________________

Remember: There is no reward for long service in real estate. It is what you do this year that counts!

6.5. My time

“Things which matter most must never be at the mercy of things which matter least.”
- Johann Wolfgang von Goethe

Successful estate agents have good “time systems”. They make sure that they are always “on top” of things by doing the business of the day on that day. No doubt there are many daily activities necessary, for example updating listing files and databases. Staying in contact with buyers, sellers, lawyers and banks, as well as centres of influence also take up time. Then there is also the much needed canvassing for mandates, preparing advertisements, planning show houses and many more. Unless estate agents have a good time management system in place, they will fall prey to the temptations of procrastination and avoidance.

Once you have set your goals, you have to allocate time to achieve these goals. In real estate practice there are a significant number of actions that generate virtually no return. The secret of success in the
industry is to identify these activities, do fewer of them and do more of the activities that generate a greater return.

**Inventory of Activities:**

For a period of a week, list all the work-related activities you do each day and the time you spend doing these activities. This list should include, but not be limited, to the following:

- Telephone activities: buyers, sellers, canvassing,(work related or personal?)
- Canvassing: door-to-door, pamphlet distribution, centres of influence and following up on past leads.
- Correspondence / administration: personal notes, letters, advertisements, update files, preparing pamphlets and taking photographs.
- Face to face activities: show houses, listing presentations, take out buyers, obtaining offers, hosting events, etc.
- Revenue producing: offers accepted, taking mandates.
- Other: placing and taking down signs, procrastinating, chatting to colleagues.

All your activities can be allocated to one of the following categories:

<table>
<thead>
<tr>
<th>Urgent</th>
<th>Not Urgent</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Important</strong></td>
<td><strong>Not Important</strong></td>
</tr>
<tr>
<td><strong>Red Time:</strong> Red is for Revenue Producing – offers and mandates.</td>
<td><strong>Orange Time:</strong> Work that needs to be done before getting to Red Time – canvassing, taking buyers out, etc.</td>
</tr>
<tr>
<td><strong>Yellow Time:</strong> Other real estate work. Work that if left uncompleted for a time will not affect your sales and performance.</td>
<td><strong>Blue Time:</strong> Time wasters, no real affect on your sales or goals. Things you can either leave out or delegate to others.</td>
</tr>
</tbody>
</table>

Average estate agents spend less than 5% of their time on red time and more than 70% of their time on yellow and blue. Your success as a first choice agent will be determined by how effectively you change these ratios to your benefit.

Allocate yourself points for the various activities you complete, as follows:

Red Time: 10 points
Orange Time: 5 points
Yellow Time: 1 point
Blue Time: 0 points

Your target should be to achieve 25 points per day. When you achieve your target, do not feel shy to reward yourself accordingly and take time off to relax.
The Time Wasters:

Time wasters are generally placed under blue time, but sometimes they are camouflaged and hidden by other categories. The following are some examples of common time wasters with ideas of solutions for dealing with each example.

- **Disorganised records and files:**
  
  Disorganisation in any form is a great time waster. This can range from not being able to find a document, to not being prepared for a visit to/with a client.

  Solution: Organisation does not really mean neatness – but neatness will help. As long as you can find what you need immediately. Use a system that works with you and use it constantly, to avoid time wasters.

- **Procrastination:**

  We are often tempted to put things off until later. One of the reasons for this is that some tasks seem so big that we do not really want to start them.

  Solution: Start with the most important tasks and then break them down into smaller and more manageable chunks and do it now! When you are actually doing something about it, you are too busy to fear it.

- **Chatting to colleagues:**

  You will be surprised if you add up all the hours spent on this category!

  Solution: Turn this blue time into quality time. Set time aside to chat and socialise with your colleagues in a “quality” atmosphere, for example jogging, braais, etc. When you are at work, spend your time productively – work!

When it comes to time and how you manage it, you need to ask yourself if your attitude conveys professional expertise – or neediness?

While your physical appearance goes a long way towards conveying a professional demeanour, what you say and how you behave are even more important. Many of your potential customers and clients will first meet you on the telephone or via email. This means you need to let them know that you have time to give them personal service, but that you are also a busy person who does not “need” their business.
Do not take that the wrong way. No business should tell customers “I do not need you.” What I mean is, you do not want them to think that unless you list their home or find them a home to buy you are going to miss your next house payment. There is a big difference here.

So how can you strike this balance?

For one thing, you can offer them appointment times and keep with it. If they say they will be in town next Tuesday, you can say, “I’ll be available after 1 p.m. Is that a good time for you?” If they insist that they absolutely must meet first thing in the morning, you can offer to try to re-arrange your schedule.

It is never a good idea to lie, but you did have an appointment with yourself, did you not? You must have blocks of time written in your day planner for prospecting and working on your marketing materials and databases.

What you do not want to do, is tell them that you do not have any other appointments all week (or all afternoon) so whenever they show up is fine. If you do that, they will wonder why you do not have any other customers, and they will assume the worst. They will assume that you are not very good at what you do.

On the other hand, if you sound rushed and barely able to squeeze in 20 minutes to meet with them, they will assume that you will not have time to do a good job for them. They want to know that you will be available to meet with them at reasonable times and that you will return their calls within a few hours.

Your job is to convey an impression of professionalism, through business life and personal service. Most customers and clients want to hear from you, not from an assistant. If you do have an assistant to handle some of the paperwork, mention it – but be sure to add the fact that the reason he/she is there is to free up your time to be with your customers and clients. Do not let them find out about your assistant in a manner that makes them believe they are not getting your personal attention.

If your assistant communicates on your behalf, make sure the customers know it is because you felt something was too important to wait until you were back in the office.

I mentioned making appointments with yourself. If you have things going on in your personal life that need to be scheduled, write them down in your planner. This can be anything from a haircut, to lunch with your best friend, to a school event for your children.

Having the time and money to live your life well is the reason you work, so these are important appointments and need to be treated as such. But you do not need to tell your customers what they are all the time!

It is like the agent who told a customer that she could not show him houses on Thursday because it was her golfing day. They start at 11 a.m. and then they hang around the club all day. The man fairly roared! Needless to say, he did not buy a house through her either.

Thus: your customers do not need to know what your appointments are. They only need to know that you will be available enough of the time to give them attention and do the job they have chosen you to do.

Thought:

*Winning Salespeople are routinely ahead of Schedule*
6.6. Teamwork

Your choice with regard to teamwork is whether you wish to work in an environment that represents Heaven, or in an environment that represents Hell.

There is an ancient tale of two men talking; one from Heaven, one from Hell. The man from Hell lamented, “It is indeed a wretched place, we are hungry all the time.”
“Do you mean there is no food in Hell?” the man from Heaven asked.
“Oh, there’s food – we sit at banqueting tables with the most sumptuous food your eyes could behold spread out before us. But we are made to eat with knives and forks a meter long. No matter how hard we try, it is impossible to put food in our mouths.”
“In Heaven,” the older man began, “we too sit at banqueting tables and we are made to eat with knives and forks. But ours are two meters long.”
“It cannot be,” said the man from Hell in disbelief. “If we cannot feed ourselves with knives and forks that are a meter long how in Heaven’s name do you feed yourselves with knives and forks that are twice that length?”
“Ah, but that is the point,” the man from Heaven replied, “we do not feed ourselves, we feed each other.”

Estate agents need to seek out the strength of their team and then make sure to always utilise and reward great efforts from fellow team members. Make the parties you are working with feel that you will do your best for them. You cannot do this if you do not behave sincerely; your own body language will give you away!

Why do you need a Team?

T – Together
E – Everyone
A – Achieves
M – More

Working together in a Team gives you:

- More listings
- A greater brand awareness
- Camaraderie and a feeling of “belonging”
- The opportunity to learn from each other
- The opportunity to use each other’s strength
- Greater market exposure; you will see more of our companies “sold”, “for sale” and “on show” signs out there.

For example, lions and wolves hunt better in a pack, geese fly in a “V” formation, perhaps we can learn from them:

- As each goose flaps its wings, it creates “uplift” for the bird following. By flying in a “V” formation, the whole flock adds 70% more flying range than if each bird flew alone.

Lesson: People who share common direction and a sense of community can get where they are going quicker and more easily because they are travelling on the “lift” of one another.
• When a goose falls out of formation, it suddenly feels the drag and the resistance of trying to fly alone and quickly gets back into formation to take advantage of the lifting power of the birds immediately in front.

**Lesson:** If we have as much sense as a goose, we will join in formation with those who are headed where we want to go.

• When the lead goose gets tired, it rotates back into the formation and another goose starts flying at the point position.

**Lesson:** It pays to take turns doing the hard tasks and sharing leadership with others; be interdependent on one another.

• The geese in formation honk from behind to encourage those up front to keep up their speed.

**Lesson:** We need to make sure our “honking” from behind is encouraging, not something less helpful.

• When a goose gets sick, wounded or shot down, two geese drop out of the formation and follow their fellow member down to provide protection. They stay with this member until he/she dies or is able to fly again. Then they launch out again with another formation to catch up with their own flock.

**Lesson:** if we have as much sense as the geese, we will stand by each other instead of against each other.

**Improving Team Dynamics:**

• Always encourage and acknowledge good (team) performance and give the credit for success to the team.

• Rather focus on good qualities and things you and other team members appreciate about someone else in the team, than on their weaknesses or shortfalls. When you focus and acknowledge those strengths, you will not only get more out of them, but the chances are that weaknesses may also improve.

• To achieve a "spirit of approval", the following ingredients are required: trust, honesty, good communication, friendship and respect.

• Never allow yourself to be perceived as a money hungry snake in the grass.

• Learn to celebrate the success and share the sorrow of fellow team members. Jealousy does not benefit a first choice agent and is a total waste of time.

• Set an example to others concerning the manner in which you would like to be treated.

• Stop complaining about team dynamics. You are only adding to the problem.

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*The best way to improve your team is to improve yourself.*
Some Real Estate Team Characters:

Every real estate office (like any office) has its “characters” who are not really the “role models” of the industry. See if you can spot any of your colleagues amongst the following descriptions and decide together how to promote teamwork.

- **Ben the Bully**: Ben likes to sell by pushing his clients too hard and too soon. He has a huge ego and sales drive, but lacks empathy. The sad thing is that he is often highly successful with “hit and run sales”, but seldom receives a referral from past clients, who leave feeling slightly irritated and discontented.

- **Delaying Doris**: Although she seriously wants to “make it” in the real estate industry, Doris avoids meeting the buyer or seller. This may be because of many reasons, including time management or a fear for failure or people. Her favourite words are “not yet”.

- **Defiant Dan**: Dan likes to have a bad influence on new agents and arrivals at the office. He likes to skip training and meetings. Dan is never in a hurry and always late. In general, he is a bad example of a real estate agent. Although he never canvasses, he has some contacts and sells reasonably well. Unfortunately, this profession is not for Dan and the sooner he finds alternative employment the better for him, the office and the industry.

- **Friendly Felicity**: Felicity is probably the friendliest girl in town; she likes people and really likes to be liked. She is continuously out of the office, either for lunches, coffees, teas and other social gatherings. However, she is seldom with buyers and sellers.

- **Labouring Larry**: Although 50% of all his sales fall apart, Larry still does reasonably well. Unfortunately he is a manager’s nightmare. He has lots of energy, but his administration is very poor. Sadly enough, Larry is always short of money.

- **Negative Neville**: It is never Neville’s fault if he is performing badly at sales. The market is down, the banks are not granting loans, the interest rates are too high or the sellers want too much. Naturally the lawyers are usually not performing well enough.

- **Nice Nora**: Nora has a huge amount of empathy, but a low ego drive. She is always “about to make a sale”. Her clients love her and will “only deal with her”. The problem is she cannot ask for the sale and close. She never puts her clients under any pressure to make a decision because of her lack of urgency and the fear of “worrying” her clients. Clients are being driven around daily viewing everything on the market with this charming agent.

- **Smart Smitty**: does not participate in team building efforts. Smitty is rather smart so he likes to openly and loudly disagree with everyone. A living proof that the average “sales person” knows everything.

- **Terrible Tracy**: Tracy always steals buyers and listings. She always takes the last and more than what she needs from stationary and “give-aways”. She likes to destroy team spirit and fights with everybody.

- **Top Tommy**: Tommy is the star of the office (and the profession). He is knowledgeable, confident and uses loads of empathy to “feel the needs of his clients”. He has an extreme sense of urgency and is driven by a large “need to succeed” ego. He revels in the thrill of a “three way win” sale. The buyer, the seller and the agent must all be happy with the outcome for the sale to be deemed “successful”. His business grows by referrals from past clients, and his personal portfolio is bulging with letters of thanks and commendations.
• **Vince the Veteran**: Vince continuously sets up the biggest sale of the year. Although he gets most his business from the local Beer House, he has contacts from everywhere. Vince has been advised several times to take it easy for health reasons.

_Remember Teamwork Fundamentals:_
_Trust, Communication, Honesty and Respect_

### 6.7. Friends and Family

If your definition of success is more than the numbers of your businesses, or if you yearn to not only have a productive business but also enjoy the life and lifestyle it provides you, you have probably found it has required some conscious decisions and some consistent practices. Agents who are effective, yet who realise their business is only the vehicle to a great life, have some traits in common.

Brian Dyson, the CEO of Coca Cola Enterprises, has captured the essence of this when he said: "Imagine life as a game in which you are juggling some five balls in the air. You name them – work, family, health, friends and religion, and you’re keeping all of these in the air. You will soon understand that work is a rubber ball. If you drop it, it will bounce back. But the other four balls – family, health, friends and religion are made of glass. If you drop one of these, they will be irrevocably scuffed, marked, nicked, damaged, or even shattered. They will never be the same. You must understand that and strive for balance in your life.”

Richard Branson from the “Virgin Group” shares in much of this when it comes to the value of family in his business success. He is not ashamed to acknowledge that if it was not for the encouragement and support of his family, he would not have made it in life. This, according to Branson, did not only shape him, but the trust, encouragement and support he received from them can be substituted by nothing else. Unfortunately, very few of us can take our whole family for a vacation to our private island annually like Branson does. However, we all can encourage, support and appreciate our families.

Family is there to assist each other in life and it forms a very important network and reliable support structure. This is something that should never be underestimated or misused.

When it comes to friends and associates, successful people like to associate with other positive and successful people. They see successful people as models to learn from, rather than resent.

To help you and your family cope with challenges, try to share your mission and have combined goals. This will help you to understand each other better and to be more supportive towards the needs and challenges of family members.

**Today more than half of mothers with young children work.** Working mothers are now the rule rather than the exception. Women have been moving into the workforce, not only for career satisfaction, but also because they and their families need the additional income. Some people still think that a “good mother” is one who gives up work to stay home with her children. However, no scientific evidence says children are harmed when their mothers work. A child’s development is influenced more by the emotional health of the family, how the family feels about the mother’s work life and the quality of child care.

In most families with working mothers, each person plays a more active role in the household. The children tend to look after one another and help in other ways. The father is more likely to help with
household chores and child rearing, as well as breadwinning. These positive outcomes are most likely achieved when the working mother feels valued and supported by family, friends and co-workers.

Studies show that the most stress found in children is not because of money, but rather because of bad relationships between parents or between the child and a parent. Children rather wish for more time with the parents than for more money. However, should you be working because you need the money, it is important to find a job you like and to make the most out of it. If not, the message children may receive in this situation is that work is unpleasant and damages instead of building self-esteem.

We often forget that the most important things to our children are the following:

- Hearing things like "I trust you", "I believe in you", "I know you can handle this" and "you are very important to me".
- Being listened to.
- Being cared for and having a sense of belonging.

Make the best out of time spent together, whether it is just eating dinner, being around each other in a non-rushed way, or doing a special activity. Remember that children normally also wish that their parents would be less stressed and less tired from work, rather than wishing for more time with their parents. So leave the stress at work.

When things get demanding; learn to say no!

Saying no is often a much needed and under-utilised skill. However, without this word, no balance is possible. Sometimes "let me think about it" is better on the ears of the recipients than a straight no.

Naturally, the better and more effective worker you are, the easier it is for you to say no (without feeling guilty) in those situations where you have to attend to family matters. Feelings of guilt are strong emotions that can eliminate much needed positive thoughts and bind your mind to negativity.

When families work together on short and long-term goals, they are more likely to accomplish the things that are really important to them. Strong families work on their common goals together and support each other’s individual goals. Make sure that your family and spouse knows and understands what you want to achieve and that you also know about their challenges and goals. The family will also share joy in the success of achieving these goals.

“My father gave me the greatest gift anyone could give another person; he believed in me.”

Jim Valvano, USA Basketball coach.
6.8. The use of Boards/Signs

Real estate signs are considered one of the oldest and best forms of advertising for homes available for sale. Also, the use of professionally designed and executed signage and boards is one of the most effective (and underestimated) ways of promoting your image as a (efficient) first choice agent. Those “For Sale” and “Sold” boards, pointers and show house signs are highly visible “silent salesmen” and, besides your business cards, they constantly project your public image in your absence. It is important to remember that they also reflect your attitude towards business, so to speak.

To be effective, your Signs must be:

- Visible from a considerable distance
- Correctly positioned
- Eye catching and evident of good taste
- Easy to read and identify
- Of good quality

The most important elements regarding visibility are the colours and wording. A brightly coloured sign will far more readily attract the eye of the passer-by than one of a more sombre background. So go for a bright colour, but make sure that the lettering is of a contrasting colour to enhance legibility. A good example of legibility through controlled contrast is used by Shell, with its white background, distinctive yellow emblem and striking red lettering. Your choice of colours and words can indeed make a huge difference and contribute to the fact that it is easily remembered. Another good example is the blue and yellow of Pep Stores which is easy to identify and remember.

The wording on your boards and signs is just as important. The less words used, the better since comprehension and impact must be immediate. The lettering must also be easy to read at a distance. There is certainly no space on a 600 mm X 440 mm board for needless words and your boards must really only impart the following information to be effective (starting with the most important and therefore prominent):

1. Is the property for sale, has it been sold or is it a show house?
2. Your company’s name.
3. A telephone number where you can be contacted.
4. Your name

Although your company’s logo/design may enhance the overall look, any other data is simply superfluous.

Cutting corners for short-term savings when it comes to boards is just not worth it. Although boards and signs are costly, they are almost infinitely re-usable (make sure to clean used ones before putting them up again). It is always advisable to use material of the best possible quality to withstand the elements of nature. The base material must be able to withstand the effects of wind, sun and rain for a considerable period of time. Unfortunately, not much can be done about those individuals who get pleasure out of destroying signs and boards. The ability to survive our climate in Namibia also applies to the paint/sticker quality you may use. Since fading is a particular problem when paint is exposed to our sun, care should be taken when choosing the type of board-covering emulsion. Professional advice from sign makers can be very valuable.

The correct positioning of boards also has an important influence on legibility. Impact and visibility can both be seriously retarded by positioning them either too high or too low. Experience shows that the bottom of most boards should be about 500 mm from the ground. Even if you have permission to do so, refrain from plastering any property with your boards and signs. Besides looking unsightly and
conveying evidence of bad taste, it may also give the impression that the property is being overadvertised because it is difficult to sell.

If you want to have good standing and reputation in your farming area, remember the following:

- Never erect your boards without the property owner’s permission.
- Always remove boards when requested to do so by the owner.
- Do not tamper with boards erected by other agents.
- Record where you have erected boards to reclaim them. Also limit exposure of your boards to a maximum of 60 days. Although excellent, this form of advertising can also be too much of a good thing.

Estate agents are not only confronted by material, positioning, quality and wording challenges, but also by regulations from local authorities. Local authorities and municipalities lay down regulations to prevent the placing of boards, for instance to contribute to the neatness of the towns and also to prevent the obstruction of driver visibility at intersections. Regulations vary from council to council and it is best to check out the regulations in your area. The following is applicable in Windhoek:

**Outdoor Advertising Regulations: Displaying of Estate Agents’ Boards**

The City of Windhoek has under the Local Authority Act, 1992 (Act 23 of 1992) promulgated Outdoor Advertising Regulations display signs for Estate Agents’ Boards.

S 2 (1) states: It is a condition of the above Regulation that no person shall erect or display an advertisement on Council property, streets and public places situated in the Council area, unless he/she has been given written authority to do so by Council.

Therefore:

- Each estate agency should submit an (prescribed) application to the City of Windhoek to get permission to make use of much needed display signs/boards.
- Should the City grant permission, they will either by letter or phone call inform you (it is best to follow up after submitting the application).
- Specific provisions also deal with the maintenance and display of the signs.
- In their feedback, the City will also require that the agency should pay N$ 1 000.00 per year before proceeding with display of advertising boards/signs.
- More information regarding these regulations can be obtained from inquiries at the City of Windhoek or by phoning 061 -290 2568.

The following conditions must be adhered to by estate agents:

1) An estate agent may not display an estate agent’s notice, subject to payment of the tariff contained in Schedule 1 hereto and to the provisions of these regulations, on sidewalks belonging to the Council without the prior approval of the Council.
2) An estate agent’s notice may not contain information other than the words “for sale”, “to let” or “on show” or “show house” and to the name, logo and contact details of the estate agent displaying the notice.
3) No estate agent shall display more than four estate agents’ notices in respect of a single residential property, of which notices shall not be further than a radius of 1 kilometre or more than 3 kilometres from the property advertised.
4) An “on show” or “show house” notice may not be displayed more than 48 hours prior to commencement of the showing and all estate agents’ notices must be removed no later than 48 hours after letting, sale or end time of the showing of the residential property, as the case may be.
5.) No estate agent’s notice may:

a) either be more than 1 meter in height measured from the mean ground level immediately below the length of the notice or obscure motorists’ sight lines;
b) be displayed less than 10 meters from the midpoint of the outside curve of a corner measured from the midpoint of such corner;
c) be made with a material which is not strong and durable;
d) have one notice above the other;
e) be displayed against the transformer casing, illuminated advertising signs, traffic lights or signs, structure walls, pillars or fences, excluding a fence of the residential property advertised, shelters, trees, refuse bins, bus shelters or lamp posts;
f) have supports which are driven through a tarred or paved surface;
g) be displayed in such a way as to damage any service whether belonging to the Council or not;
h) be within 1,5 meters from the driving surface of an adjoining street;
i) in the opinion of a Traffic Officer endanger or obstruct vehicular or pedestrian traffic; or
j) be displayed adjacent to any street mentioned in Schedule 2 hereto.

6) a) Any estate agent’s notice displayed in conflict with the provisions of these regulations may be removed by any person instructed thereto by the Council.
b) The cost of removal of any notice in terms of paragraph (a) shall be the actual cost of removal plus an administrative levy of 15 % (fifteen percent) and may be recovered from the estate agents’ displaying, or causing to be displayed, any such notice.

7) In this regulation the meaning of the words “display”, “displayed” and “displaying” in relation to an estate agent’s notice shall include:

a) the driving of the supports of such notice into the ground
b) the affixing of such notice to any structure in any way; and
c) the supporting of such notice by the round, any artificial surface or any structure.

Section 2 B deals with Auctioneer’s notices including the tariffs and size.

Section 5 deals with Prohibited Advertisements.

5. No person, shall in the Council area, erect or display an advertisement-

a) which obscures a road traffic sign;
b) which contravenes any law which is applicable to Namibia;
c) which obstructs the flow of light or air into or out of a building or obstructs the movement of people into, within or out of a building unless the person concerned has obtained the consent of the owner or occupant of that building;
d) which obscures an advertisement which was lawfully erected or displayed by another person, unless that other person consents to the erection or display of that advertisement;
e) which is dangerous to any person or property;
f) which interferes with the enjoyment of the environment or obscures viewing of a place or thing which Council may determine;
g) which obscures the viewing of a thing or place which has been declared a national monument in terms of section 10 of the National Monuments Act, unless permission to erect or display that advertisement has been obtained from the National Monuments Council established under that Act.
h) by affixing it to, or by placing it onto, a vehicle unless the owner of that vehicle consents to the erection or display of that advertisement onto the vehicle.

Sections 6 and 7 deals with further conditions as well as the Powers of Council regarding repairs, complaints, time limits and the authority to remove or destroy advertisements that do not meet the requirements.
Schedule 1 deals with the type of advertisements, the period allowed and the tariff payable.

Schedule 2 stipulates the following prohibited streets/roads:

- Monte Christo Road
- Independence Avenue
- Mahatma Gandi Street
- Auswarts Street
- Sam Nujoma Drive
- Hendrik Witbooi Drive – Harvey Street
- Nelson Mandela Drive
- Hochland Road
- Krupp Street
- Frankie Fredericks Drive
- Michelle McLean Drive
- Robert Mugabe Avenue
- Otjomuise Road
- Bulow Street – Florence Nightingale Street – Abraham Mashego Street
- Dortmund Street
- Hosea Kutako Drive – Auas Road
- Mandume Ndemufao Avenue

Swakopmund Policy on Advertisement.

The policy from the Municipality of Swakopmund does not specifically address boards placed by estate agents on properties that are for sale per se, but the practice that is maintained at present is as follows:

- Such notices may only be placed on the property being advertised.
- The number of notices that may be placed is not limited to a single agent.
- Notices may not be placed on any other property than the one being advertised.
- Notices may not be placed in any public area or street.
- Notices must conform to the standard dimensions as per industry norm.
- In the case of a show house, a written application must be submitted to the Municipality (Department: Engineering Services) well in advance of such event.

The following conditions are applicable:

- A maximum number of three (3) notices are allowed.
- The positions these are to be placed must be indicated in the letter of application.
- The notices may only be erected one week before the event.
- The applicant is responsible for the removal of the notices immediately after the event.
- The applicant will be held responsible for any damage caused to Municipal property such as pavements or road surface.
- Notices may not be attached to any road or traffic sign or street light pole.
- Notices may not hinder pedestrian or vehicular movement.
- Notices may not obstruct the view of motorists or cause any unsafe situation and may only be placed in conjunction with the office of the Manager: Traffic Services.
- Notices must conform to the standard dimensions as per industry norm
Chapter 7

Estate Agents Act 112 of 1976

The purpose of this chapter is to serve as an introduction to Chapter 8 on the Namibia Estate Agency Board (The Board) and Code of Conduct, as well as Chapter 9 on The Institute of Estate Agents in Namibia (IEAN). The content is merely a summary of the Act and Regulations, for more detail please refer to Chapters 8 and 9 and to Act 112 of 1976.

The Act can be divided into the following parts:

• **Introduction** which mainly deals with definitions used in the Act. (Section 1)

• **Chapter I**:
  Deals with the establishment and administrative function of the Board (Section 2-11).
  
  S 3 (1) (2) (b) - Constitution of the Board
  S 7 & 8 - Powers of the Board
  S 9 (1) - Funds of the Board

• **Chapter II**:  
  Deals with the establishment and control of the Estate Agents Fidelity Fund for Namibia (Section 12-28).

  S 12 (1) (2) & (3) - Establishment and control of Estate Agents Fidelity Fund
  S 18 (1) (a) & (b) - Application for monies in Fund
  S 18 (3) (a) & (b) - Claims against Board
  S 19 (1) to (4) - Claims against Board in respect of Fund
  S 26 (a) & (b) - Prohibition of rendering services as estate agent with reference to Fidelity Fund Certificate and Fidelity Fund Insurance
  S 27 (a) to (c) - Disqualification relating to Fidelity Fund Certificates
  S 28 (1) to (4) - Withdrawal of Fidelity Fund Certificates

• **Chapter III**:  
  Deals with general provisions (Section 29-37).

  S 29 (a) to (b) - Duty of estate agents to keep accounting records
  S 30 (1) – (5) - Improper conduct by estate agents
  S 32 (1) to (6) - Trust account and investment
  S 32 (7) & (8) - Trust account winding up
The following Regulations refer to the Act and should be consulted for more information relating to it:

A. Code of Conduct for estate agents.
B. Manner in which a charge of improper conduct against any estate agent shall be brought and investigated.
C. Issues on Fidelity Fund and Registration Certificates.
D. Trust account of an estate agent and investment of trust monies.
E. Investment of monies in the estate agents Fidelity Fund not immediately required for the purpose of the Fund.
F. Standard of training of estate agents.
G. Specification of services.

Note:
Copies of the Act and Regulations to it can be obtained from the Board.

Definitions:

Besides general definitions referring to the Act like annual financial statements, auditor, bank, board, building society and court, references are also made amongst others, to the following definitions and meanings thereof:

- **“Estate agent”**
  a) Any person who for the acquisition of gain on his/her own account, or in partnership, in any manner holds himself/herself out as a person who, directly or indirectly, advertises that he/she on the instructions of or on behalf of any other person –
    1) sells or purchases immovable property or any interest in immovable property or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvass a seller or purchaser therefore; or
    2) lets or hires immovable property or any interest in immovable property or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvass a lessee or lessee therefore; or
    3) collects or receives any monies payable on account of a lease of immovable property or any business undertaking; or
    4) renders any such service as the Cabinet on the recommendation of the Board may specify from time to time by notice in the Government Gazette of the Republic of Namibia.

(References are also being made to the directors and members of close corporations acting as estate agents. However, attorneys are excluded from this definition.)

- Further references are made to the Fidelity Fund and Fidelity Fund Certificates as they appear in the Act.

- **“Immovable property” includes:**
  a) any unit as defined in Section 1 of the Sectional Titles Act of 1971
  b) any right to claim transfer of immovable property
  c) any undivided share in immovable property
  d) any interest in immovable property
  e) any share in a private company as further defined in the Act.
Chapter I

Chapter I deals with the establishment of the Namibian Estate Agent’s Board. This includes the number of members, how they should be appointed, who cannot be appointed, remuneration of members, etc.

Section 6 refers to the “designation of inspectors”. The Board therefore has the authority to appoint inspectors, whom they deem fit, to perform specific investigative functions on their behalf.

Section 7 stipulates that the object of the Board is to “maintain and promote the integrity of the estate agents.”

The Powers of the Board according to Section 8 is:

1. To appoint advising committees
2. To maintain and enforce a “code of conduct” among estate agents.
3. To encourage and promote a standard of training and service by agents.
4. To review applications for exemptions from the provisions of the Act.
5. To take general steps to achieve its object under the Act.

Section 8 further refers to an executive committee who will have the power to actually exercise the powers of the Board, as well as the appointment of disciplinary committees. The disciplinary committees may exercise or perform any power or function which is granted or entrusted to the Board, under the Act.

Section 9 refers to the funding of the Board which shall consist out of:

1. Levies (paid by agents)
2. Investments
3. Accrual of funds from other sources

The rest of Chapter I is devoted to guidelines regarding financial book keeping and reporting.

Chapter II

Chapter II deals with the establishment and control of the Estate Agents Fidelity Fund for Namibia:

Section 12 deals with how the Fidelity Fund shall be funded (annual contributions, investments, insurance monies, interest etc.), as well as the management thereof.

Section 13 stipulates the provisions for payments there from with a reference to claims, expenses, premiums, etc.

Section 14 refers to the auditing requirements of the Fund.

Section 15 refers to the contributions by estate agents to the Fund:
“Every estate agent shall, in making application in any year for a Fidelity Fund Certificate in accordance with the provisions of Section 16, in addition to the levies referred to in Section 9 (1) (a), pay as annual contribution to the Fund, such amount as may be prescribed.”

Section 16 deals with applications for the issue of Fidelity Fund Certificates and Registration Certificates:
1. Every estate agent or prospective estate agent, excluding an estate agent referred to in paragraph (d) of the definition of “estate agent” in section 1, shall, within the prescribed period and in the prescribed manner, apply to the board for a Fidelity Fund Certificate and such an application shall be accompanied by the levies referred to in section 9 (1) (a) and the contribution referred to in section 15.

2. An estate agent or prospective agent referred to in paragraph (d) of the definition of “estate agent” in section 1, shall, within the prescribed period and in the prescribed manner, apply to the board for a Registration Certificate and such application shall be accompanied by the levy referred to in section 9 (1) (a).

3. If the Board upon receipt of any application referred to in subsection (1) and (2) and the levy and contribution referred to in those two subsections, is satisfied that the applicant concerned complies with the requirements of this Act, the Board shall in the prescribed form, issue to the applicant concerned, a Fidelity Fund Certificate or a Registration Certificate, as the case may be, which shall be valid until 31 December of the year to which such application relates.

4. No Fidelity Fund Certificate or Registration Certificate shall be issued unless and until the provisions of this Act are complied with, and any Fidelity Fund Certificate and Registration Certificate issued in contravention of the provisions of this Act shall be invalid and shall be returned to the Board at its request.

Section 17 gives authorisation that any monies in the Fund which is not immediately required for the purpose of the Fund shall be invested in the prescribed manner.

Section 18 stipulates the circumstances for which monies in the Fund must be applied for, which is to reimburse persons who suffer pecuniary loss by reason of:

a) the theft, committed after the commencement of the Estate Agents Amendment Act, 1987, by an estate agent –
   1. of any money or other property entrusted by or on behalf of such persons to him/her in his/her capacity as an estate agent;
   2. of any monies collected or received by him/her and payable in respect or on account of a contract of purchase and sale in respect of immovable property, including any agreement or intermediate transaction as defined in section 1 (1) of the Sale of Land on Installments Act, 1971 (Act 72 of 1971);
   3. of any other monies, including insurance premiums, collected or received by him/her and payable in respect of immovable property, any interest in immovable property or any business undertaking.

b) the failure of an estate agent to comply with the provisions of section 32 (1).

Section 18 (3) further gives the time schedules and procedures for claims against the Board in respect of theft or failure referred to in subsection (1) which must be –

1. In writing within three months after the claimant became aware of such theft or failure, or by the exercise of reasonable care should have become aware of such theft or failure;
2. should the board send a written demand to the claimant to furnish it with such proof as reasonably required, the claimant has six months to furnish it.

The Board may however use its discretion to extend any of the above periods.

Section 19 provisions regarding settlement of claims submitted to the Board. Guidelines are given to the calculation of these amounts as well as specific people excluded from taking action against the Board in respect of losses suffered. Amongst others, this will include spouses and partners of the estate agent who committed the alleged theft.

Section 20 refers to defences the Board may raise against claims against it.
Section 26 refers to the prohibition of rendering of services as estate agent in certain circumstances:
“No person shall perform any act as estate agent unless –

a) A valid Fidelity Fund Certificate has been issued to him/her and to any person employed as an estate agent by him/her and, if such person is a company, to every director of such company; and if such person is a close corporation, to every member of such close corporation;
b) She/he has, in respect of every person who is in his/her employment, taken out fidelity insurance to an amount which in the opinion of the Board is sufficient.”

Section 27 deals with disqualifications relating to Fidelity Fund Certificates
No Fidelity Fund Certificate shall be issued to –

a) Any estate agent (including if such an agent is a director of a company or member of a closed corporation) who
1. has at any time by reason of improper conduct been dismissed from a position of trust;
2. has at any time been convicted of an offence involving an element of dishonesty;
3. an insolvent who has not been rehabilitated;
4. is of unsound mind;
5. has been dealt with in accordance with section 30 (3) (a); or
6. does not prescribe with the standard of training

b) Any estate agent who –
1. has failed in respect of his/her financial year which has expired before the date on which application for a Fidelity Fund Certificate is made, to comply with any provision of section 29 (b) or section 32 (3)(b); or
2. has at any time, whether before or after the commencement of the Estate Agents Amendment Act of 1987 been guilty of any act or omission in respect of which any person had to be compensated pursuant to the provisions of section 18 from the fund or the Estate Agents Fidelity Trust Fund, established by the said section 12 before its amendment by section 9 of the last-mentioned Amendment Act, unless the estate agent has repaid the relevant amount in full to the Board concerned or the Board is of the opinion that satisfactory arrangements for the settlement of such amount have been made and the Board concerned has confirmed such arrangements.

c) Any estate agent who is a director of a company or a member of a close corporation –
1. of which the Fidelity Fund Certificate was withdrawn by the Board in terms of section 28 or 30; or
2. which was prohibited in terms of section 32(6) from operating in any way on its trust, savings or other interest-bearing account referred to in section 32(2)(a).

Or any agent, who within a period of six months before or on the date on which such Fidelity Fund Certificate was so withdrawn or such company or closed corporation was so prohibited, was a director of such company, or a member of such close corporation.

Section 28 refers to the procedures in case where the Board may withdraw a Fidelity Fund Certificate referred to in section 27.
Chapter III

According to Section 29 there is a duty for estate agents to keep accounting records which shall reflect and explain the state of affairs regarding -

1. all monies received or expended by him/her, including monies deposited to a trust account referred to in section 32 (1) or invested in a savings or other interest-bearing account referred to in section 32 (2) (a);
2. of all its assets and liabilities; and
3. of all his/her financial transactions and financial position of his/her business;

Section 29 (b) stipulates that the accounting records referred to in paragraph (a) to be audited by an auditor within four months after the final date of the financial year of the estate agent, which final date shall after the commencement of section 15 of the Estate Agents Amendment Act, 1987 not be altered by him/her without the prior written approval of the Board.

Section 30 refers to improper conduct by estate agents;

Any estate agent shall be guilty of improper conduct if he/she –

1. receives any remuneration for any act performed by him/her as an estate agent from two or more than two persons whose interests are not in all respects identical in respect of the performance of such act, unless such persons agreed thereto in writing;
2. fails in respect of any act performed by him/her as an estate agent to give proper account, within 30 days of being called upon in writing to do so, to any person having a material interest in the performance of such act;
3. fails to pay any monies due by him/her to the Board or in respect of the Fund within one month after such monies become due;
4. fails to furnish within such period as the Board may determine such information as the Board may request and reasonably require in order to exercise its powers properly under the Act.
5. contravenes any provision of the Code of Conduct;
6. commits any deed of insolvency;
7. fails to comply with any provision of section 16 (1) (2) (4) 29 or 32 or contravenes any provision of section 26 or 32 A (2) (a) or (b) or in his/her capacity as a director of a company or member of close corporation which is an estate agent and which failed to comply with the requirements of sections 29 or 32, did not take all reasonable steps to prevent such failure;
8. commits an offence involving an element of dishonesty.

The Board may then in the prescribed manner bring and investigate any charge of improper conduct against any estate agent. When an agent is found guilty of such a charge, the Board may withdraw the Fidelity Fund Certificate of such an agent and impose a fine to reprimand such an estate agent.

The Act further states that the acquittal or conviction of an estate agent by any court of law upon any criminal charge shall not be a bar to proceedings against him/her under this Act on a charge of improper conduct. It further states that if the improper conduct with which the estate agent is charged amounts to an offence of which he/she has been convicted by a court of law, a certified copy of the record of his/her trial and conviction by such court of law shall be sufficient proof of the commission by him/her of such offence, unless the conviction has been set aside by a superior court; provided that the estate agent charged shall be entitled to adduce evidence to show that he/she was in fact, wrongly convicted.

Section 31 sets out the procedures for appeal for a person who feels aggrieved by decisions taken by the Board. The main point to take notice of is the time frame of one month after the aggrieved person became aware of such a decision.
In Section 32, the Act further requires the following duties on agents and auditors regarding trust accounts and investments of trust monies:

1) Every estate agent shall open and keep one or more separate trust accounts, which shall contain a reference to this section, with a bank and such estate agent or his/her employee, as the case may be, shall forthwith deposit therein all trust money held or received by or on behalf of such estate agent and the number of each such trust account shall forthwith be notified to the Board.

2) a) Notwithstanding the provisions of subsection 1, any estate agent may invest in a separate savings account or other interest-bearing account opened by him/her with any bank, building society or any institution or class of institution designated by notice in the Gazette by the Minister in consultation with the Minister of Finance, any monies deposited in his/her trust account which are not immediately required for any particular purpose.

b) Any savings or other interest-bearing account referred to in paragraph (a) shall contain a reference to this subsection.

c) Interest on monies deposited in a trust account referred to in subsection (1) and on monies invested in terms of paragraph (a), shall, subject to the express of the mandate in question, which shall be in writing, be paid to the Fund by the estate agent concerned.

d) The board may in the prescribed circumstances refund to an estate agent a prescribed portion of the interest paid by such estate agent to the Fund, in terms of paragraph (c).

e) Trust money in an account invested in terms of paragraph (a) or deposited in terms of subsection (1) shall be retained by the estate agent in question in that account until the estate agent is lawfully entitled to it or instructed to make payment there from or to any person.

3) Every estate agent shall –

a) keep separate accounting records of all monies deposited by him/her in his/her trust account and of all monies invested by him/her in any savings or other interest-bearing account referred to in subsection (2) (a);

b) balance his/her books and records relating to any account referred to in paragraph (a) at intervals of not more than one month and cause them to be audited by the auditor referred to in section 29 (b), within four months after the final date of the financial year of the estate agent concerned;

c) administer the accounts referred to in subsections (1) and (2) (a) in the prescribed manner.

4) Any auditor who does an audit contemplated in subsection (3) (b) shall forthwith, after completing such audit, transmit to the Board, a report in the form from time to time determined by the Board, in regard to his/her findings, and a copy thereof to the relevant estate agent.

5) Notwithstanding the provisions of subsection (3), the Board may, on good cause, at any time order any estate agent by notice in writing to submit to the Board within a period stated in such notice but not less than thirty days, an audited statement fully setting out the state of affairs in respect of the matters referred to in section 29 (a).

6) The court may, on good cause, upon application by the Board or any other competent person, prohibit any estate agent to operate in any way on his/her trust savings or other interest-bearing account referred to in subsection (2) (a) and may appoint a curator bonis to control and administer such trust, savings or other interest-bearing account, with such rights, duties and powers as the court may deem fit.

7) If –

a) the board under the provisions of this Act –

1) refuses to issue a Fidelity Fund Certificate to any estate agent who applied therefore; or

2) has withdrawn a Fidelity Fund Certificate issued to any estate agent; or

b) any estate agent ceases to act as such; or

c) any estate agent becomes subject to any disqualification referred to in section 27, the estate agent concerned shall wind up his/her trust, savings or other interest – bearing account in the prescribed manner and pay out in the prescribed manner the amount standing to the credit of any such account to the persons entitled to it.

8) The amount standing to the credit of the trust, savings or other interest – bearing account, referred to in subsection (2) (a), of any estate agent, shall not form part of the assets of such estate
agent or, if he/she was a natural person and has died or has become insolvent, of his/her deceased or insolvent estate.

Section 32 A Powers of Inspectors:

Any inspector furnished with inspection authority in writing by the Board, may conduct an investigation to determine whether the provisions of this Act are being or have been complied with and may, subject to subsection (5), for that purpose, without giving prior notice, at all reasonable times enter any place in respect of which he/she has reason to believe that –

1. any person there is performing an act as estate agent
2. it is connected with an act performed by an estate agent
3. there are books, records or documents to which the provisions of this Act are applicable order any estate agent or the manager, employee or agent of any estate agent –
   a. to produce to him/her the Fidelity Fund Certificate of that estate agent
   b. to produce to him/her any book, record or other document in the possession or under the control of that estate agent, manager, employee or agent,
   c. to furnish him/her, at such place and in such manner as he/she may reasonably specify, with such information in that respect of that Fidelity Fund Certificate, book, record, or other document as he/she may desire;

examine or make extracts from or copies of such Fidelity Fund Certificate, book, record, or other document;

(Refer to Act for more detail on powers of inspectors)
Chapter 8

The Namibia Estate Agency Board (The Board) and Code of Conduct

The Board, as Governmental body, has the mandate to regulate and control certain activities within the estate agency industry. The Law under which The Board operates is The Estate Agents Act 112 Of 1976 (The Act) as amended.

The Namibia Estate Agent’s Board (NEAB) consists of at least 7 members: 4 of which are practicing estate agents and 3 shall be any person that the Ministry of Trade and Industry regards as suitable to participate as board member.

The primary function of The Board is to protect the public interest while maintaining and promoting the integrity of estate agents. The Board must, therefore, use its best efforts to achieve fair and impartial enforcement of the law.

While keeping the interest of the industry in mind, the aim of the Board is to:

- Protect consumers in estate agency transactions.
- Maintain and promote the standard of conduct.
- Regulate activities of agents in general.

The Board achieves Regulation mainly through:

1. Requiring that agents meet certain standards in order to become (and stay) licensed. To further encourage training and services rendered by the industry.
2. Prohibits unethical conduct in the practice of estate agency.

The Board falls under the jurisdiction of the Ministry of Trade and Industry and also has the power to advise the Minister accordingly.

How does one become a registered Estate Agent in Namibia?

As regulated by Government Notice R 1409; persons who wish to write The Boards’ qualifying examination to become estate agents in Namibia need to apply to The Board in the prescribed manner. Since incomplete or incorrectly completed applications will be returned by the Board, candidates should ensure that all necessary particulars are provided. Applications must reach The Board at least 4 weeks prior to the scheduled examination date. These dates and venues are normally announced well in advance by ways of advertising in local newspapers.

The prescribed examination fee of N$250.00 as well as a copy of the candidate’s Identification Document should also accompany the application. Once registered, candidates will receive an examination number by return mail. This letter should also be taken to the examinations the day of writing so that examiners can verify on their records.
To prepare for the examinations, candidates need to obtain a comprehensive study guide priced at N$350.00 from The Board as well as a copy of the Estate Agency Affairs Act, 112/1976 ("the Act") for N$50.00. *(Total cost of N$680.00)*

To pass the examination, candidates need to obtain at least 50%.

**The Examination is a combination of:**

1. Multiple choice questions; and

2. A case/scenario from which candidates have to draft and execute a valid contract (complete with signatures and initials where required).

Normally examination results will be available 4 to 6 weeks after the date thereof. For any more information regarding the process and exams you need to contact The Board offices at 061 249 885.

It is not hard to become a real estate agent in Namibia and one may raise the question about the low requirements placed on real estate agents, who will be responsible for transactions that inevitably involve a great deal of money, with very little training to guide them. Although the Board together with principal estate agents and conveyancers can ensure smooth transactions, it might benefit the public and industry to introduce candidate estate agents. While working in the office environment, candidate real estate agents should have restricted capacity in relation to the completion and execution of property transaction documentation. So, while still a candidate real estate agent, property transaction documentation as well as working with the public must be done under supervision of a "full status" real estate agent/principal. The candidate can gain a lot of experience about the ins and outs of the real estate agency business by working under supervision of a good principal estate agent. Unfortunately, the candidate may also pick up a number of bad habits and misconceptions about the duties of a real estate agent from his/her mentor.

**Standards set by The Board in order to become (and stay) a licensed Estate Agent:**

- Preventing unsuitable persons from entering the industry.
- Administering a qualifying Board examination for new applicants.
- Registration of aspiring estate agents candidates to sit for this examination.
- Licensing of estate agents.
- Promotion of further training of agents.
- Denying the right to practice as an estate agent to those persons who had been disqualified in terms of the Act.

**Starting a career as an Estate Agent:**

After passing the examinations, prospective estate agents need to decide whether they want to join existing agencies or perhaps start on their own. In most cases, agents join the ranks of others to first learn more about the industry. This is highly recommended and in fact some regard it as a requirement for new agents. The Golden Rule is to start your business in the manner in which you wish to continue. As a prospective estate agent rather seeks to join a company which enjoys a reputation of solid respectability, coupled with a progressive marketing policy. This is important because you will be judged by the quality of your fellow workers and the reputation of the company that employs you.

Whichever way you decide to follow, you have to apply to The Board for the issuing of a Fidelity Fund Certificate. The Board will supply you with two forms you need to complete; a "pink" and "green" form.
Both these forms need to be completed and handed back to The Board. The pink form is in the format of an affidavit and needs to be completed in front of a Commissioner of Oaths.

- If the firm is a **company or a close corporation** every director and alternate director and every member must individually apply for a Fidelity Fund certificate and each such person must pay the prescribed fees.
- If the firm is a **partnership**, the partnership itself must apply for a Fidelity Fund Certificate giving full particulars of the business and each partner [whether the partner is active or not], must individually apply for a Fidelity Fund Certificate to be issued to such person individually, and each partner must pay the prescribed fees to the Board.
- If the firm is a **sole proprietorship**, the proprietor must complete the necessary application forms, giving particulars of the business, and pay the prescribed fees. Only one certificate is issued in respect of sole traders.

The cost as well as time to complete registration of your business would depend on the nature of the entity you choose. It can take anything from 10 to 35 days and cost can range from N$ 1 000.00 to around N$ 6 000.00. Most dealings will happen with the Registrar of Companies and Close Corporations which is located at the Ministry of Trade and Industry. The first step will be the approval of the name of the entity.

**When following the company route:** Section 63 of the Companies Act stipulates that the memorandum and articles of association must be filed and uplifted by a subscriber or by a local accountant or company attorney. The following documents must be filed for the registration and incorporation of a company with share capital:
- The original and two notarially certified copies of the memorandum and articles of incorporation referred to in regulations 17 and 18, bound as prescribed in regulation 4 (1).
- Form CM5, containing particulars of the name reserved for a company, as approved by the Registrar, together with other forms, if any, containing particulars of the shortened form of the name of the company, as approved by the Registrar.
- Form CM22, containing a notice of the company’s registered office and postal address within the geographical boundaries of Namibia.
- A power of attorney, signed by the subscribers to the memorandum, in favor of the person filing the documents.
- Form CM27, appointment as director of the company and general information about director.
- Form CM29, contents of register of directors, auditors, and officers.
- Form CM31, containing the acceptance of appointment of an auditor.
- Form CM46, application and certificate to commence business, along with the company’s annual fee for the first year.
- Proof of payment of the registration fee under Section 63 (2) of the Companies Act must be affixed to the original Form CM2.
- CM47, a statement, as prescribed by Section 172(3)(a) of the Companies Act, of the opinion of each director to the effect that the capital of the company is adequate for the company’s purpose and its business, or, if the director believes that it is inadequate, the reasons and the manner in which and the sources from which the company is to be financed and the extent thereof. This must be filed before the Registrar who will issue a Certificate to Commence Business. The memorandum and articles of association must be notarized; the fee is included in the registration fees. The certificate to commence business is normally filed with the registration of the company and obtained when the company is registered. The Registrar of Companies automatically forwards a copy of the memorandum and articles of association to the Receiver of Revenue, which in turns registers the company as a taxpayer and issues a tax identification number. Taxation of 35% of all profit is payable to the Receiver of Revenue.

**It might also be necessary to apply for VAT and PAYE registration with the Receiver of Revenue, as well as to obtain health certificates from the municipality.**
Remember
Directors, members, partners and sole proprietors must submit their application forms and payment together with the firm’s application form in one batch. No individual Fidelity Fund Certificate can be issued unless the entity’s application form has been received with the principals’ application forms. The entity itself makes no payment although it must complete an application form.

The application form must be accompanied by:
- A letter from the firm’s bankers confirming that a properly designated trust account has been opened for example, NFCA [Pty] Ltd, Trust account opened in terms of section 32[1] of Act No 112 of 1976 and recording the trust account number;
- A letter from the firm’s auditors confirming acceptance of such appointment.

Name of your Agency:
Estate agents may not use a name/trade name which is identical or confusingly similar to the name/trade name of an estate agent who has already been issued with a fidelity fund certificate or whose fidelity fund certificate has been suspended, has lapsed or has been withdrawn. Estate agents are warned, before incurring any expenditure, to ascertain from the Board whether a proposed name/trade name is acceptable on initial or subsequent registrations.

To choose the legal entity:
When starting your agency it could be difficult to choose the suitable legal entity, especially if you don’t have experience in legal and accounting matters. The most common business entities are Sole Trader/Proprietorship, Partnership, Close Corporation, Private Company or Public Company. The major differences between the entities relate to ownership, capital requirements, liability issues, profit sharing and statutory reporting requirements.

The Estate Agency Affairs Board will issue the Fidelity Fund Certificate to the estate agent concerned and only on the issue of these Fidelity Fund Certificates, may such estate agent commence operations. You should also seek membership of the Institute of Estate Agents in Namibia as this will provide you with several benefits when starting up.

Getting settled into a real estate agent position in the Namibian real estate business can take six months or longer. During this “settling in” period, a real estate agent’s income will fluctuate (probably wildly), or even be totally non-existent! Real estate agents usually work only on a commission basis. So, to get paid you have to sell a property first. And getting to the stage of selling a property takes time.

A year of financial instability and struggling really does sound like an extremely long time. But that is how long it can take to get a foothold in the occupation of real estate agent. You have to remember that a real estate agent only gets money once the property is finally transferred from the seller to the buyer's name. Consideration of all the steps that are involved in the property transfer process and the fact that the average property transfer takes between two and three months to complete, a time frame of one year is fairly reasonable.

Remember:
Do not go into the field without an in-depth knowledge of your products, your company and the financial, as well as legal requirements associated with property transactions.
Immobilien

For Statutory requirements on trust accounts and auditors see Chapter 7 on the Act and refer to the Estate Agents Act.

Frequently asked Questions regarding Trust Accounts:

Q. Who must open and maintain a trust banking account and when must it be opened?

A. Every estate agency business must open a cheque trust account with a bank. At the time of opening the account, ensure that it has the following designation in the records of the bank: “Trust account opened in terms of Section 32(1) of the Estate Agency Affairs Act, 112/1976” (“the Act”). The new estate agency is also required to present a letter of consent from an auditor where he/she agrees to the appointment as auditor. The appointed auditor should comply and be registered in terms of the Public Accountants and Auditors Act.

Without such a designation, the account does not enjoy the special protection envisaged by the Act and in the event of death or sequestration of a sole proprietor or the liquidation of the estate agency firm, trust creditors (members of the public who have entrusted monies to the estate agent) run the risk of losing their monies paid in good faith as trust monies.

Q. If trust monies are not immediately required for the purpose entrusted to an estate agent, can such monies be invested for the benefit of the depositor?

A. Yes, provided that such investment is done by way of a savings or a similar interest bearing account with a registered bank and that the account is also designated, but this time the reference must be to Section 32(2) of the Act.

Q. How must I deal with interest earned on trust monies?

A. Estate agents are required to advise trust creditors (purchasers) that they are entitled to receive the full amount of interest earned on their trust deposits. In the unlikely event of a trust creditor renouncing the right to receipt of interest, the full amount of interest must be paid over to the Board. In terms of a longstanding arrangement, the Board is obliged to refund 50% of such interest received to the estate agent concerned. In order, however, to avoid duplication of action, estate agents are entitled simply to pay over to the Board, the Board’s half share of interest earned and actually received by the estate agency business.

Q. When must an estate agency business submit the prescribed auditor’s report?

A. Section 29(b) of the Act provides that all estate agency firms must submit an auditor’s report, in the prescribed form, to the Board four months after the financial year end of the estate agency concerned. The financial year end shall not be altered by the estate agent without the prior written approval of the Board. The Board must be notified if there is a change of auditor and the new auditor must provide the Board with a letter confirming his/her appointment as auditor for the estate agent concerned.

Q. Can the accounting officer of a close corporation submit the required report?

A. No. The auditor must be a person registered in terms of the Public Accountants’ and Auditors’ Act No, notwithstanding the provisions of section 60 of the Close Corporation’s Act. Neither financial statements nor letters from financial institutions and bookkeepers can be accepted as constituting the required auditor’s report in terms of section 32(4) of the Act.
Q. What about audits on business accounts?

A. Something often overlooked is the statutory requirement that a business account of estate agents should also be audited when Trust accounts are audited.

Q. I am not currently practicing as an estate agent but I am still registered with the Board. What are my obligations regarding the submission of an auditor’s report?

A. If you are not a practicing estate agent it would be wise for you to apply to the Board to be removed from the register of practicing estate agents, in which event you will not be required to submit an auditor’s report. If you later decide to re-apply for registration as an estate agent, such registration will entail no onerous procedures or conditions.

Q. What happens when my bank unilaterally closes my trust banking account?

A. It is not unusual for a bank to close a trust banking account which has not been utilised for a long period of time. In such a situation it is advisable to open a savings account since, in the experience of the Board, such accounts are not closed even if they remain dormant. It is advisable to make an arrangement with your bank that expenses such as banking costs will not be taken from the funds in your trust account, but rather from your business account.

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Estate agencies “abuse trust funds”
Article by Linda Ensor as published in Business Day September 2007

CAPE TOWN SOUTH AFRICA — Estate agencies in Johannesburg, Pretoria and Cape Town have been found to be abusing their trust accounts and contravening the Estate Agency Affairs Act in other fundamental ways:

Joint inspections conducted by the Estate Agencies Affairs Board and the Financial Intelligence Centre over the past year also found that the contract forms of some agents contained “blatantly unacceptable and discriminatory provisions”, such as a clause in the standard lease agreement of one firm prohibiting a property being let to black people.

The board was adopting a tough approach to legal compliance and had instituted disciplinary or legal action against the offending firms, CEO Nomonde Mapetla said in the board’s 2006-07 annual report, which was tabled in Parliament on Friday.

The inspection programme — the first in the board’s history — is to be continued this year and extended to cover all provinces and all estate agencies. There are 73000 registered estate agents and 17000 registered estate agencies.

The inspection of 11 estate agencies revealed that none of them was fully compliant with the act. “Such non-compliance is not only intrinsically unprofessional but also illegal and entirely unacceptable,” Mapetla said.

Major areas of non-compliance included the failure to properly designate trust account funds, which Mapetla said could have extremely negative consequences for the board’s Fidelity Fund in the event of the death or sequestration of an estate agent, as it would be difficult to distinguish between trust monies and the personal estate of the agent.

In addition, auditor reports were found not to accurately reflect the businesses of some firms and in some cases bordered on the fraudulent. Some firms were also operating without the obligatory Fidelity Fund certificates, while others were blatantly contravening the industry code of ethics.

“Trust accounts were also found to have been illegally used for payment of non-trust expenditures such as rental, telephone costs, stationery and so forth,” the report said. In some cases, the accounts had
been overdrawn which should never be the case, as there should always be sufficient funds in a trust account to settle the claims of all creditors.

During 2006-07, the board conducted 381 disciplinary hearings, finding 284 estate agents guilty of misconduct and acquitting 97.

Claims are lodged against the Estate Agents Fidelity Fund when a theft or misappropriation of trust monies has taken place. The board paid out R8m in claims to disgruntled consumers, who had suffered financial loss as a result of their dealings with estate agents. In total, 499 individual claims for compensation and 3350 written complaints were received during the year.

Recently in Namibia the manager of the Namibia Estate Agent’s Board, Mr. Phelem Like was quoted after investigations into Namibian estate agent’s trust accounts.

Mr. Like emphasized the need for estate agents to; “keep their fingers off property owner’s money, which they keep in Trust Accounts’. He was quoted saying: “Trust money is not the estate agent’s money and should not be used for running the agent’s operating costs or other expenses. We operate under strict regulations similar to those that guide lawyers on trust accounts”.

Mr. Like also said that the Board was busy amending the Estate Agents Act with a view to raising the penalty imposed on errant estate agents from N$ 1 000.00 to N$ 25 000.00

Note:

According to the Criminal Procedures Act; any shortage in a trust account is a criminal offence and leads to prosecution.

The Code of Conduct in the practice of estate agency and disciplinarily action by The Board against estate agents:

The Board has a fiduciary duty to protect members of the public who make use of the services of a registered estate agent. Only a registered estate agent holds a valid Fidelity Fund Certificate. Therefore, it is understandable that the Board is also constantly in the process of promoting the fact that the public should deal only with registered estate agents.

By the power granted through The Act, the Board now dictates the minimum standards of service required of an agent. This Code of Conduct is enforceable by law and an agent can be severely punished when contravening the code.
The Code of Conduct for Estate Agents:

1. Definitions incorporated in the Code of Conduct

In the Code of Conduct, unless the context otherwise indicates-

“board” means the Namibia Estate Agent’s Board
“client” means a person who has given an estate agent a mandate, provided that should an estate agent have conflicting mandates in respect of a particular immovable property, the person whose mandate has first been accepted by the estate agent, is regarded as the client.
“estate agency service” means any service referred to in subparagraph (i) of paragraph (a) of the definition of “estate agent” in Section 1 of the Act.
“estate agent” means a person defined in section 1 of the Act.
“franchise” means an agreement, arrangement or understanding between a franchiser and a franchisee estate agent in terms of which the latter is entitled or required to operate under a trade name which is owned by, or which is associated with the business of the franchisor or any other person.
“immovable property” means immovable property as defined in section 1 of the Act.
“mandate” means an instruction or an authority given to, and accepted by, estate agents to render an estate agency service;
“sole mandate” means a mandate incorporating an undertaking on the part of the person giving the mandate, not to confer a similar mandate on another estate agent before the expiry of a determined or determinable period.

2. General duty to protect the public’s interest.

In terms of estate agent’s general duty to members of the public and other persons or bodies, an estate agent –

1. shall not in pursuant to the conduct of his/her business do or omit to do any act which is or may be contrary to the integrity of estate agents in general;
2. shall protect the interest of his/her client at all times to the best of his/her ability, with due regard to the interests of all other parties concerned;
3. shall not in his/her capacity as an estate agent wilfully or negligently fail to perform any work or duties with such degree of care and skill as might reasonably be expected of an agent;
4. shall comply with both the Act and the regulations promulgated there under;
5. shall not through the medium of a company, close corporation or third party, or by using such a company, close corporation or third party as a front or nominee do anything which would not be permissible for him/her to do if he/she were operating as an estate agent;
6. shall not deny equal services to any person for reasons of race, creed, sex, or country of national origin;
7. shall not discriminate against a prospective purchaser of immovable property on the grounds that such purchaser will not, or is unlikely to, make use of financial assistance made available by any specific person or financial institution and which the estate agent offers to arrange on his/her behalf.

3. Mandates
No estate agent shall -

3.1 offer, purport or attempt to offer immovable property for sale or to let or negotiate in connection therewith or canvass or undertake to offer or canvass a purchaser or lessee thereof, unless he/she has been given a mandate to do so by the seller or lessor of the property, or his/her duly authorised agent;

3.2 on behalf of a prospective purchaser or lessee, offer, purport or attempt to offer to purchase or lease any immovable property or negotiate in connection therewith or canvass, or undertake or offer to canvass a seller or lesser thereof, unless he/she has been given a mandate to do so by such prospective purchaser or lessee, as the case may be, or his/her duly authorised agent;

3.3 accept a sole mandate, or the extension of a period of an existing sole mandate, unless –

3.3.1 all the terms of such mandate (or extension as the case may be) are in writing and signed by the client;

3.3.2 the expiry date of the mandate (or extension, as the case may be), which shall be expressed as a calendar date, is specially recorded in the written sole mandate (or extension as the case may be);

3.4 accept a sole mandate which contains a provision conferring upon him/her –

3.4.1 an option to extend the sole mandate for a certain period after the expiry of the sole mandate; or

3.4.2 a mandate to continue to render the same estate agency service referred to in the sole mandate, after expiry of the sole mandate, unless –

aa) the client has prior to his/her signature of the sole mandate expressly consented in a written document executed independently of the said sole mandate, to the conclusion of such provision or provisions (as the case may be); and

bb) such document contains an explanation of the reasons for and implications of the inclusion of such provision; and

cc) such document is signed by both the client and the estate agent in question;

3.5 accept a sole mandate which also confers upon him/her a power of attorney to act on behalf of the person conferring the mandate, unless the intention and effect of such power of attorney is fully explained in the document embodying the sole mandate;

3.6 include, or cause to be included, or accept the benefit of, any clause in a contract of sale or lease of immovable property negotiated by him/her, whereby a sole mandate is directly or indirectly conferred upon him/her to sell or let the said immovable property at any time after the conclusion of the said contract;

3.7 accept any mandate or instruction for work in respect of immovable property if his/her interest therein would compete with his/her obligations towards an existing client in respect of the same immovable property without first disclosing such interest in writing to such client;

3.8 knowingly or negligently make a material misrepresentation concerning the likely market value or rental income of immovable property to a seller or lessor thereof, in order to obtain a mandate in respect of such property;

3.9 accept a mandate in respect of any immovable property if the performance of the mandate requires specialised skills or knowledge falling outside his/her field of competence, unless he/she will in the performance of the mandate be assisted by a person who has the required skill or knowledge and this fact is disclosed in writing to the client;

3.10 accept a sole mandate to sell or let immovable property, unless he/she has explained in writing to the client –

3.10.1 the legal implications should the client during the currency of the sole mandate or thereafter sell or let the property without the assistance of the estate agent, or through the intervention of another estate agent, and –

3.10.2 what specific obligations in respect of the marketing of the property will be assumed by the estate agent in his/her endeavour to perform the mandate: Provided that such explanations, if contained in a standard pre-printed or typed sole mandate document, shall be in lettering not smaller than that generally used in the remainder of the document.
4. Duty to Disclose.

4.1 An estate agent shall –

4.1.1 convey to a purchaser or lessee, or a prospective purchaser or lessee of immovable property in respect of which a mandate has been given to him/her to sell, let, buy, or hire, all facts concerning such property as are, or should be reasonably in the circumstances be, within his/her personal knowledge and which are or could be material to a prospective purchaser or lessee thereof;

4.1.2 if he/she conducts his/her business in terms of a franchise, disclose clearly and unambiguously in all his/her correspondence, circulars, advertisements and other written documentation that he/she operates in terms of a franchise and state thereon his/her name and the name of the franchiser;

4.1.3 if he/she conducts his/her business under the trade name or style other than his/her own name, clearly disclose his/her full name in all correspondence, circulars and other written documentation;

4.1.4 not perform or attempt to perform any mandate in respect of a particular property if a current prior mandate, which conflicts with the aforesaid mandate, has been accepted by him/her, unless he/she has disclosed to the person who has given the later mandate the existence of such prior mandate, and the fact that he/she will not be the estate agent's client in respect of that property.

4.2 No estate agent shall purchase directly or indirectly for himself/herself, or acquire any interest in, or conclude a lease in respect of, any immovable property in respect of which he/she has a mandate, without the full knowledge and consent of the person who conferred the mandate, or sell or let his/her own immovable property or any immovable property in which he/she has any direct or indirect interest, to any prospective purchaser or lessee who has retained his/her services, without that purchaser or lessee having full knowledge of his/her ownership of, interest in, such immovable property.

5. Duty not to make misrepresentations or false statements or to use harmful marketing techniques

No estate agent shall –

5.1 in his/her capacity as an estate agent publish or cause to be published any advertisement which could create the impression that it was published by the owner, seller or lessor of immovable property, or by a prospective purchaser or lessee of immovable property;

5.2 willfully or negligently, in relation to his/her activities as an estate agent, prepare, make or assist any other person to prepare or make any false statement, whether orally or in writing or sign any false statement in relation thereto knowing it to be false, or knowingly or recklessly prepare or maintain any false books of account or other records;

5.3 claim to be an expert or to have specialised knowledge in respect of any estate agency service if, in fact, he/she is not such and expert or does not have such special knowledge;

5.4 advertise or otherwise market immovable property in respect of which he/she has been given a mandate to sell or let, at a price or rental other than agreed upon with the seller or lesser of the property;

5.5 without derogating from the generality of the afoforegoing –

5.5.1 willfully or negligently mislead or misrepresent in regard to any matter pertaining to the immovable property in respect of which he/she has a mandate;
5.5.2 use any harmful or misleading marketing technique or method to influence any person to confer upon him/her a mandate to render any estate agency service or to sell, purchase, let or hire immovable property, having regard to the general experience which such person has concerning property transactions and the circumstances surrounding the transaction or proposed transaction;
5.6 use any firm or trading name in respect of his/her business if such name may give rise to confusion on the part of the public in respect of the nature of the business carried on by him/her;
5.7 inform a seller or purchaser, or prospective seller or purchaser of immovable property in respect of which he/she has been given a mandate to sell or purchase, that he/she has obtained an offer in respect of the property from a purchaser or the seller (as the case may be), unless such offer –
  5.7.1 is in writing; and
  5.7.2 has been signed by the offer or; and
  5.7.3 is to the knowledge of the estate agent concerned, a bona fide offer;
5.8 affix any board or notice to immovable property indicating that such property is for sale or hire or has been sold or let, unless –
  5.8.1 the seller or lessor (as the case may be) has given his/her written consent to do so; and –
  5.8.2 the estate agent concerned in fact has a mandate to sell or let the property, or in fact has sold or let the property, as the case may be.

6. Duties in respect of offers and contracts

6.1 No estate agent –

  6.1.1 who has a mandate to sell or purchase immovable property shall wilfully fail to present or cause to be presented to the seller or purchasers concerned, any offer to purchase or sell property, received prior to the conclusion of the contract of sale in respect of such property, unless the seller or purchaser (as the case may be) has instructed him/her expressly not to present such offer;
  6.1.2 who has a mandate to sell immovable property, may present computing offers to purchase the property in such a manner as to induce the seller to accept any particular one without regard to the advantages and/or disadvantages of each offer to the seller;
  6.1.3 shall amend any provision of a signed offer, prior to rejection thereof or a written mandate or any other of sale or lease, without the knowledge and express consent of the offeror or the parties to the contract, as the case may be;

6.2 An estate agent shall –

  6.2.1 explain to every prospective party to any written offer or contract negotiated or produced by him/her in his/her capacity as an estate agent, prior to signature thereof by such party, the meaning and consequences of the material provisions of such offer or contract, or, if he/she is unable to do so refer such party to a person who can do so;
  6.2.2 if he/she knows that an offer submitted by him/her as an estate agent to any party has been accepted, or has not been accepted, by the expiry date thereof, forthwith notify the offeror of such fact;
  6.2.3 without undue delay furnish every contracting party with a copy of an agreement of sale, lease option or mandate with which he/she is concerned as an estate agent provided that the afore going shall also apply in respect of any offer to purchase or lease if the offeror specifically requests a copy thereof.

7. Prohibition against undue influence

No estate agent shall without good and sufficient cause, directly or indirectly, in any manner whatsoever, solicit, encourage, persuade or influence any party or potential party to a pending or a completed transaction to utilize or refrain from utilizing –
7.1 the services of any particular attorney, conveyancer or firm of attorneys;
7.2 the services or financial assistance offered by any financial institution to members of the public in general; or
7.3 the financial assistance offered to such party by any person.

8. Remuneration

No estate agent shall

8.1 stipulate for, demand or receive directly or indirectly any remuneration, commission, benefit or gain arising from or connected with any completed, pending or proposed contract of sale or lease which is subject to –
8.1.1 a suspensive condition, until such time as the condition has been fulfilled; or
8.1.2 a resolutive condition, during the time that the transaction may fall away as a result of the operation of the said resolutive condition:

Provided that the aforegoing shall not apply if:

aa) good cause exists; and
bb) the party liable for the payment of the remuneration, commission, benefit or gain has expressly consented in a written document executed independently of the contract in question, to such payment at any time, notwithstanding the fact the said contract is subject to a suspensive or resolutive condition, as the case may be; and
cc) such document contains an explanation of the implications and financial risks for such party of such payment; and
dd) such document is signed by such party and the estate agent in question.

8.2 convey to his/her client or any other party to a completed or proposed transaction in which he/she acted or acts as an estate agent, that he/she is precluded by law from charging less than a particular commission or fee, or that such commission or fee is prescribed by law, the board or any institute or association of estate agents or any other body.

8.3 introduce a prospective purchaser or lessee to any immovable property or to the seller or lessor thereof, if he/she knows, has reason to believe, that such person has already been introduced to such property or the seller or lessor thereof by another estate agent and that there is a likelihood that his/her client may have to pay commission to such, or to more than one estate agent, should the sale or lease be concluded through his/her intervention: Provided that the aforegoing shall not apply if the estate agent has informed his/her client of such likelihood and obtain his/her written consent to introduce such party to the property or the seller or lessor thereof;

8.4 include, or cause to be included, or accept the benefit of, any clause in a mandate or in a contract of sale or lease of immovable property, providing for payment to him/her by the seller or lessor of immovable property, of any remuneration, commission, benefit or gain arising from or connected with the contract of sale or lease, regardless of the fact whether the purchaser or lessee is financially able to fulfil his/her obligations in terms of the said contract:

Provided that the aforegoing shall not apply if:

aa) good cause exists; and
bb) the seller or lessor has, prior to his/her signature of the contract or mandate (as the case may be) consented to in writing in a document executed independently of the said mandate and contract, to such payment; and
cc) such document contains an explanation of the implications and financial risks for the seller or lessor of such payment; and
dd) such document is signed by both the estate agent and the seller or lessor.
8.5 Include, or cause to be included, or accept the benefit of, any clause in a contract of sale or lease of immovable property negotiated by him/her, entitling him/her to deduct from any money entrusted to him/her in terms of the contract, any remuneration, commission, benefit or gain arising from or connected with such contract:
Provided that the aforegoing shall not be construed so as to prohibit an estate agent from making such deduction when such monies actually paid over by him/her to the party entitled thereto and such party is in terms of the said contract liable for the payment of such remuneration, commission, benefit or gain.

9. Trust money and interest

An estate agent

9.1 Shall not solicit or influence any person entitled to trust funds in the agent's possession or under his/her control to make over to pay to the estate agent directly or indirectly any interest on monies deposited or invested in terms of section 32 (1) or 32 (2) of the Act;
9.2 Shall, before he/she receives any money in trust in respect of a contract of sale or lease, disclose to the parties concerned that unless they agree in writing to whom interest earned on such money must be paid, the interest shall, in terms of section 32 (2) (c) of the Act, accrue to the Estate Agents Fidelity Fund;
9.3 Shall, if any money is invested by him/her pursuant to section 32 (2) (a) of the Act or pursuant to an instruction by the party entitled to the interest on money held in trust by the estate agent –
9.3.1 Invest such money at the best interest rate available in the circumstances at the bank or building society where he/she normally keeps his/her trust account or accounts; and
9.3.2 Pay the full amount of the interest which accrued on the investment to the party entitled to such interest, or the board, as the case may be, subject to any written agreement in this regard between him/her and such party;
9.4 Shall not include, or cause to be included, or accept the benefit of, any clause in a contract of sale of immovable property negotiated by him/her, providing for payment to the seller, prior to registration of transfer of the property in the purchaser’s name, of any portion of the purchase price entrusted to the estate agent by the purchaser: Provided that the aforegoing shall not apply if –

aa) Good cause exists; and
bb) The purchaser has prior to his/her signature of the contract in question, consented in writing in a document executed independently of the said contract, to such payment; and
cc) Such document contains an explanation of the implications and financial risks of such payment to the purchase; and
dd) Such document is signed by both the seller and the purchaser and the estate agent in question.

10. Confidentiality

No estate agent shall, without just cause, divulge to any third party any confidential information obtained by him/her concerning the business affairs, trade secrets or technical methods or processes of a client or any party to a transaction in respect of which he/she acted as an estate agent.
11. Vicarious responsibility

Every estate agent who is the sole proprietor of an estate agency or business or a partner in a partnership or a director of a company or a member of a close corporation contemplated in paragraph (b) of the definition of “estate agent” in section 1 of the Act carving on the business of an estate agent, shall be held responsible for any contravention of or failure to comply with this Code of Conduct by any other partner, director, or member or by any estate agent in the service of such sole proprietorship, partnership, company or close corporation, unless he/she has prior to such contravention or failure to comply taken all reasonable steps to prevent the same and could not in the circumstances have prevented such contravention or failure to comply.

The Code of Conduct explains an estate agent’s general duty to the public. In terms of the Code, an estate agent should protect the public and his/her client’s interest at all times. An agent is also not allowed to act in such a way that the integrity of the industry is compromised. He/she must act with the level of expertise and care that can reasonably be expected of him/her.

Thought:
You can’t act like a skunk without someone getting wind of it.

The Estate Agency Board, as a statutory body, regulates the behaviour of estate agents. The principles embodied in the Board’s Code of Conduct aim to protect the public and estate agents alike. One of the ways the Board regulates the industry is, by issuing Fidelity Fund Certificates (FFC):

Under the Act, no person is allowed to practice as an agent unless in the possession of a valid FFC. The power to issue and withdraw certificates vests in the Board.

The Estate Agency Act further provides for the establishment of a Fidelity Fund from which a member of the public who has suffered a financial loss as result of theft in dealings with an agent.

Display of Fidelity Fund Certificates:

The matter is governed by Regulation C, promulgated under the Estate Agency Affairs Act 112 of 1976 and the position is as follows:
A Fidelity Fund Certificate issued to a company or close corporation must be displayed in a prominent position on the premises of the company or close corporation concerned.

An estate agency partnership or a sole proprietorship is under no duty to display its Fidelity Fund Certificate on its premises.

It is not a requirement that the Fidelity Fund Certificate issued to employees of a firm be displayed. This used to be a requirement, but was abolished some years ago. (Some firms complained that they ran out of wall space to display the certificates. Moreover, in practice very few consumers took the trouble to examine all the Fidelity Fund Certificates on display.)

An estate agency firm (be it a company, close corporation, sole proprietorship or partnership) which carries on business in more than one branch or outlet, must apply for a separate Fidelity Fund Certificate in respect of each such branch or outlet, irrespective of the trading name or style under which the business is carried on in such branch or outlet.

It must furthermore display each such Fidelity Fund Certificate in a prominent position in each such branch or outlet.

In those cases where a Fidelity Fund Certificate must be displayed, this must be done “to the satisfaction of the Board in a prominent position.”

The regulations do not define what is meant by a “prominent position”, but the underlying idea is clearly that the Certificate must be visible to persons visiting the premises. Displaying it on a wall in a firm’s reception area will generally suffice.

In Complaints and Charges lodged against Agents and brought in front of the Board, distinguish between:

1. Those lodged as a result of “Theft” - Fidelity Fund
2. Those lodged as a result of “Improper Conduct” by the agent – Disciplinarily action

1. Theft:

Should an estate agent commit theft of any money or property entrusted to him/her while acting as an agent, claims can be admitted to the Board.

The Board requires for these claims to be lodged by way of a typed affidavit. The affidavit must detail the circumstances under which the claim has arisen. The claimant must clearly stipulate the amount claimed and how the amount had been calculated.

In addition, the Board must be furnished with the relevant evidence regarding:

- Proof that the monies claimed were indeed paid to the agent.
- Copies of the agreements in terms of which the monies claimed were paid.
- Any other relevant documents.
Affidavits must also contain the full name of the estate agent/s as well as the agency and the address of such estate agency.

2. Improper Conduct:

Any person (including other agents or Board members) aggrieved by the acts of an estate agent may lay charges of improper conduct against that agent before the Board. These charges must be made in the form of a sworn affidavit and can include one of the following conducts:

- Receiving commission from both seller and buyer without a written agreement from both of them whereby they permit it.
- Failure to report in writing within 30 days after being asked for an explanation regarding an specific real estate act performed by the agent.
- Failure to pay monies due to the Board.
- Failure to give written explanations within a specific period regarding a request from the Board.
- Failure to comply with provisions of the Act.
- Certain failures regarding trust accounts and monies omitted by director or member of a close corporation operating as an estate agency.
- Offences of dishonesty and other contraventions of provisions of the Code of Conduct.

Should an agent be found guilty of these charges the Board may, through a disciplinary committee, withdraw the agent’s Fidelity Fund Certificate, impose a fine up to N$ 1000.00 or reprimand him/her (to formally rebuke or warn of the fault).

When ceasing to trade as an Estate Agent (Agency):

To avoid the possibility of disciplinary action being taken against you when you decide to cease trading as an estate agent, it is essential to:

- Immediately advise the Namibia Estate Agent’s Board and return to it within 14 days all Fidelity Fund Certificates issued to the firm, its directors or partners and its employees.
- Advise the bank at which the trust account is kept that you have ceased trading as an estate agent and that no monies may be paid out of the trust account without the written consent of the Namibia Estate Agent’s Board.
- Send a list to the Namibia Estate Agent’s Board of all people entitled to monies in the trust account and the amounts due to them.
- Pay out those entitled to monies from the trust account with the written consent of the Estate Agent’s Board, advise the Board that they have been paid and then close the trust account and notify the Board that the account has been closed.
- When there is any change in employment, the employer must return an employee’s Fidelity Fund Certificate to the Board within 14 days of an employee changing his/her employment or ceasing to be an estate agent.
- Advise the Board of the name of a new employer so that a new Fidelity Fund Certificate can be issued bearing the names of the individual and the new employer; and return the Fidelity Fund Certificate with an explanatory letter to the Board if there is a change of name or if a holder is disqualified in terms of Section 27 of the Act.
The above is merely a summary of the main aspects of establishing, running and winding up an estate agency. It is therefore essential to study the Act and the regulations promulgated there under. You should also carefully study the Code of Conduct as issued by the Board and Institute.

Working within the guidelines of these codes will not only help you to avoid legal and other complications and will also improve your abilities as an agent.
Chapter 9

The Institute of Estate Agents

The following notice to all practicing estate agents and estate agencies appeared in local Namibian newspapers on Friday 30th November 2007:

“In terms of the Estate Agency Act 112 of 1976, all registered and practicing estate agents, as well as Estate Agencies, are required to register with a recognised Institute. **Institute means any single body having as its aim the promotion and maintenance of the interest of estate agents in the territory (Republic of Namibia) on a representative basis and which is recognised by the Cabinet for the purpose of this Act.**

The Institute further claimed that: “In co-operation and with the support of the Namibia Estate Agent’s Board and the Ministry of Trade and Industry, you are hereby advised that all registered estate agents and agencies must show proof of membership of a recognised Institute, i.e. the Institute of Estate Agents Namibia, by **no later than 28 February 2008.** Should this requirement not be met, the Namibia Estate Agent’s Board may revoke your Fidelity Certificate and Registration with the Namibia Estate Agent’s Board. Furthermore, the Namibia Estate Agent’s Board may refuse application for membership and issuing of the Fidelity Certificate by new applicants and renewals, if proof of membership of the Institute of Estate Agents Namibia cannot be presented to them on application."

**Indeed a serious matter and one will almost immediately ask, what does membership of the Institute consist of and what is the need thereof:**

Once a member, the high standards of practice and ethics are of utmost importance and it is a priority for the Institute of Estate Agents Namibia to ensure that its members are professional when delivering real estate services to their clients.

**The vision of IEAN:**

"An Institute representing all registered agents in Namibia as a professional body of knowledge, advice and support, thereby contributing towards the social and economic upliftment of our industry, country and people."

**The policy further states that The Institute shall –**

- Be bound to our Code of Ethics to offer the public in general and to all levels of Government, the benefits of our knowledge, our experience and our technical facilities, in order that we may aid in the preservation and promotion of the free enterprise system and the right of all people, irrespective of race, colour or creed, to own and be interested in property.
- Believe that homeownership deserves a preferred place in our system of values as it contributes to community responsibility, civic stability and family well-being.
• Believe in the rights of all people to own property and to enjoy the benefits of property. The Institute further believes in the free enterprise system.
• Believe that every member of our society having the opportunity to live and work in safe, sanitary and decent accommodation and that these objectives can best be served by means of a healthy property market.
• To be active in giving the aforementioned paragraphs meaningful definition.

We are pledged:

1. To continually work towards the situation whereby the vast majority of estate agents perceive it to be in their own self interest to be members in good standing of the Institute and whereby the Institute is seen by Government, the public at large, all responsible bodies involved in the activities allied to real estate and furthermore, by all estate agents themselves, to be in the Body representative of estate agents in Namibia.
2. To speak and behave in such manner that it can and will be shown that our members are responsible and motivated members of our community and that in pursuing our own aims, there is no conflicts in the national interest.
3. To protect, enhance and further the interests of our members and speak out on matters that affect the interests of our members and the property market where and when necessary.
4. To inform and educate our members by providing them with access to meaningful seminars, conventions, literature and business training methods to assist them to beneficially adapt to the highly competitive, rapidly changing and increasingly demanding business scene so as to enable them to conduct their business in a professional manner.
5. To provide a continuous and on-going platform and forum for our members to enable them to air their views and to take note thereof and to act on them whenever and wherever possible.
6. To keep our members fully informed on all pertinent legislation and in particular, to help them conform to all the requirements of the Estate Agents Act.

Website for The Institute of Estate Agents in Namibia

www.iean.cc/index.php

“It is no use saying, ‘We are doing our best.’ You have got to succeed in doing what is necessary.”

Winston Churchill
Real Estate Ethics:

The importance of Ethics:

Many agents read, hear and talk a great deal about being professional in what they do. These include the virtues of professionalism and the hope that the real estate industry in general will also be recognised as a profession. Sadly the word “ethics” has become antiquated and no longer seems to have any place in a competitive business environment.

I put it to you that professionalism goes hand in hand with ethics and ethical behaviour.

To define ethical professionalism: “The achievement of excellence in the pursuit of one’s career by applying a standard of behaviour which differentiates between right and wrong, good or bad.” The problem, of course, is: what is right and what is wrong, what is good and what is bad?

Throughout history, different civilisations have set different standards for their perceptions of right and wrong, good and bad. Interestingly, when we look at Scriptures, those kings and civilisations which had ethical standards that were designed to achieve more than mere self-gratification, were more productive, contributed more to mankind and (the kingdoms) lasted much longer as civilisations.

However; how do we define good or bad, right or wrong today in a competitive environment such as the real estate industry?

First of all, as estate agents you have to be registered with the Namibian Estate Agent’s Board and conform to the Code of Conduct. In addition, you have to be a member of the Institute and it is expected of you to conform to those standards and obligations lay down by the Institute. In fact, you may find that these may be far more stringent than those set by the Board. However, written rules (like policies and mission statements) are only as good as those who adhere to them and unfortunately according to some, rules are meant to be broken. Far more important than rules is how do we, as people or estate agents and lawyers, regard and practice ethical behaviour.

Like the philosophers may say: “Integrity needs no rules.” Ethical behaviour, in other words, is not something you learn in parrot-fashion by reading over a couple of rules. It is, rather, a pattern of behaviour, a way of life, a standard we live by or a set of principles our conscience adheres to.

Foundations of ethics can be found in the world’s great religions:

Judaism says: “Do not do unto others that which you would not have others do unto you.”

Christianity says: “Do unto others as you would have them do unto you.”

It boils down to simple common sense. To bring it into practice in the real estate industry, we should often ask ourselves the question: “What would my reaction be if someone did the same thing to me?” When it comes to your own religious conscience, it is something you would have to work out for yourself. Keep in mind that you may fool others, but when it comes to this obligation, it is difficult to get away with fool’s play.

One’s immediate reaction in an environment where you constantly work with those who will pursue any trick in the book either not to pay or rob you of your commission, will probably be: “They do it to me, why should I not do it to them?” My reply would be: “Since when do you debase yourself by lowering your standards of behaviour” or “Since when does two wrongs make a right?” By thinking before we act, one will mostly establish right from wrong and adhere to a pattern of acceptable behaviour, irrespective of what the rules may say.

As far as I am concerned, the most valuable assets an estate agent can possess apart from knowledge, technique and expertise is self-respect and dignity.
As mentioned earlier, certain civilisations and kingdoms faded while others endured. Clearly the difference between them was ethical standards. You can, in the same way, set yourself apart from others by adhering to your own high principles of ethical behaviour so that you are seen to be honest, ethical and a person of integrity. Although it may take you longer to build your foundations on rock and not sand, your roots will be much deeper and so will your unshakeable standing in the marketplace.

The doctrine in which man has always believed for proven reason is that good is rewarded and bad is punished. However, this issue is also addressed in Scriptures and one may even today ask the question why so many so-called “bad people” appear to go from the cradle to the grave unpunished, while so many good people seem to suffer misfortune throughout their lives. One has to remember that goodness is not something we do for a reward; it is something we do for its own sake. This is another thing I have learned through my involvement with SWAM: “If you propose to do good, do not expect that stones will simply be rolled out of your way; rather accept your lot calmly, even if more stones are rolled upon you.” In fact, it is more a matter of morally feeling good after you have done the deed.

In essence, there are four Categories of Ethical Obligations:

1. Ethical obligations to yourself.
2. Ethical obligations to fellow estate agents.
3. Ethical obligations to members of the public; both buyers and sellers.
4. Ethical obligation towards your religious conscience.

We have already covered in part ethical obligations to yourself and fellow estate agents. When it comes to members of the public – your buyers and sellers – I believe that they have a right to expect from you more than just knowledge, smiles and expertise. They have a right to expect an honest approach and an ethical standard of behaviour that will never involve them in unnecessary disputes.

Thus, the public would like agents to refrain from the following basics:

1. Telling potential buyers that the house is worth more than it really is to get him/her to make an offer on the house you are selling. When you do get sole mandates, remember your responsibility towards both sellers and buyers.
2. Telling a seller that you have an offer from interested party when you do not have such an offer and subsequently manipulate the seller into signing a (open) sales agreement to be left wondering in the dark for some time.
3. Telling a buyer that you have another offer from another interested buyer to trick him/her into making hasty offers when that is not the case.
4. Giving sellers inflated figures of the value of their property so that they extend sole mandates to you.
5. Letting a buyer or seller sign any documentation without reading it or clearly explaining to them what it is all about, particularly the implications of the relevant clauses.

There are many estate agents in the field who are well-educated and well-trained in marketing and real estate matters and who are also highly motivated to do well in real estate. But education and training without ethics is as bad as high ethical standard with minimal education and a lack of training. In other words, is it better to be clever and dishonest, or honest and uneducated?

I do not these are the only two choices available. Although knowledge, education and marketing techniques are all essential for your survival and prosperity in the industry, your long-term survival depends on maintaining a high standard of ethical behaviour. This includes conforming to Code of Conduct of the Namibia Estate Agent’s Board and the high standards of ethical obligations of the Institute of Estate Agents in Namibia. Combine this with your personal standards and you have ethical professionalism in its finest sense.
Adopt this approach and I believe that you will be a better person to work with and that your sales will increase. You will stand apart and you will be spoken about. Maybe you will lose some deals in the process but, in the long run, you are going to gain far more than you lost and, in the final analysis, the best reward of all is that you have maintained your standards – you have not only retained your dignity and self respect, but you can look others in the face as well as yourself!

**Man in the Glass – Rudyard Kipling**

When you get what you want in this struggle for self,  
And the world makes you King for a day,  
Then go to the mirror and look at yourself,  
And see what the man has to say.  
For it isn’t your father, your mother, or wife,  
Whose judgment of you you must pass,  
The fellow whose verdict counts most in your life,  
Is the guy staring back at the glass.  
He is the man you must please – never mind all the rest,  
For he’s with you clear up to the end…  
And you have passed your most difficult and dangerous test,  
When the man in the glass is your friend.  
You can be like another and chisel a plum,  
And think you’re a wonderful guy,  
But the man in the glass says you’re only a bum,  
If you can’t look him straight in the eye.  
You can fool the whole world, down the pathway of years,  
And get pats on the back as you pass,  
But your final reward will be heartache and tears,  
If you’ve cheated the man in the glass.

Why bother with Ethics for Real Estate Agents?

Why impose ethical obligations on estate agents and consequently burden them with a duty that goes even beyond statutory requirements? This question has been posed by many people who argue that binding ethical obligations merely serve to further complicate an already complex calling.

Why, you may ask, impose restrictions on an estate agent that will, in certain circumstances, hamper and hinder him/her in their efforts to earn those much sought-after sales and commission? Why compel members of the Institute of Estate Agents of Namibia to comply with and conform to a set of rules in the face of competition from fellow estate agents? Why should an estate agent have to think of his/her client in a way that exceeds normal commercial practice when those clients many times do not treat them the same way?

The idea of imposing obligations is as old as civilisation itself. There are ethical codes which, common to all known societies, impose some elementary duties designed for the general good of the community. For the purpose of this guide it is not my intention to go into emotional or spiritual benefits; this is probably a job better left for your own psychologists and pastors. Although these would certainly not be bad reasons to mention, it is rather my intention to focus on the practical issues involved in conforming to the standards laid down by bodies like the Institute of Estate Agents in Namibia.
It appears that the founders of these institutions realised that there was a crucial area not really catered for in law; that there was actually a difference between legality and morality. They then drew up a set of rules/guidelines for the benefit of individual estate agents as well as the industry as a whole. Ethical guidelines, which basically include and also embrace the Code of Conduct, directly influence the individual estate agent as well as his/her relationship with colleagues, The Institute, The Board and members of the public. Careful examination will show that these guidelines will, if followed, protect estate agents and assist them to become more successful by carrying out their duties in a meaningful way.

For whom does the Estate Agent Act and Relationship to Third Parties to the Deal?

An estate agent’s client may well be the person who actually instructed him/her to render a specific estate agency service. I guess one can say the real estate industry is like any other industry; “he who pays the piper, calls the tune.” Although this mandate mostly comes from sellers, it is my opinion that nowadays we will find more prospective purchasers who approach agents to find a suitable property to buy or rent. It also happens more often that a “buying mandate” is issued nowadays. This is nothing but fair if you take in consideration the amount of time agents spend with prospective purchasers to show them around and to get them qualified for financing. (Refer to the two “realtors” situation in countries like The USA and Canada. One realtor act for the seller and one acts for the purchaser (also called a “buyers agent”); commission is shared)

It is sometimes argued that since the purchaser provides the funds to secure the gross purchase price, it is he/she who effectively pays the agent’s commission. But, while accepting that the purchaser is the source of finance, the sales agreement will mostly also record that the seller is responsible for payment of commission.

No matter who gave the mandate, estate agents should always appreciate and be sensitive to the expectations of third parties. These parties actually place considerable trust in you to deal in an honest and fair way. Also bear in mind the provisions of clause 2 of the Code of Conduct:

“2. shall protect the interest of his/her client at all times to the best of his/her ability, with due regard to the interests of all other parties concerned;
3. shall not in his/her capacity as an estate agent wilfully or negligently fail to perform any work or duties with such degree of care and skill as might reasonably be expected of an agent.”

The above will include the following Acts taken from the Code of Conduct;

- The obligation to disclose material facts regarding the relevant property to third parties (clause 4.1.1).
- The duty not to prejudice the interest of third parties to refrain from using harmful or misleading marketing techniques (clause 5.5.2).
- The duty not to discriminate against the purchaser (clauses 2.6 and 2.7).

Usually when a seller grants a mandate to an estate agent, he/she will also request a market assessment relative to the sale price. Because the estate agent may have a prospective purchaser waiting at a known figure, he/she may be tempted to relate the assessment to the requirements of the purchaser in mind. Such action would, however, be contrary to accepted ethical standard.

Another inevitable temptation often arises when an estate agent is entrusted with a selling mandate and then wishes to negotiate on his/her own behalf to purchase the property in question for himself/herself. Nothing is wrong that, except that you are obliged to make a full disclosure of your interest. Although you as an agent may negotiate to purchase a property on your own behalf, you must adhere to the provisions of clause 4.2 of the Code of Conduct:
“No estate agent shall purchase directly or indirectly for himself, or acquire any interest in, or conclude a lease in respect of, any immovable property in respect of which he has a mandate, without the full knowledge and consent of the person who conferred the mandate, or sell or let his own immovable property or any immovable property in which he has any direct or indirect interest, to any prospective purchaser or lessee who has retained his services, without that purchaser or lessee having full knowledge of his ownership of, interest in, such immovable property.”

Since the behaviour and integrity of an estate agent is always under scrutiny by the public, it is vital that he/she avoid any malpractice. He/she is further under a moral obligation to protect both parties to a transaction which, in any event, is recommended as one of the finest forms of public relations. Always strive to have a happy buyer-seller-agent relationship at all times. All parties (including the conveyancer) should regard the sale to be successful. At the end of the sale (when you receive your commission) ask yourself if your business will grow from referrals from those people.

**Remember:**
The first choice agent will build up a reputation through referrals and testimonials from satisfied buyers and sellers, a sphere of influence created from friends, family and previous jobs, as well as by personal reputation when people speak well of him/her.

**The Estate Agent / Conveyancer (Attorney) Relationship**

With increasingly complex legislation that impinges on almost every facet of every property transaction, the relationship between an attorney and an estate agent has become an important contributory factor in the success or failure of the real estate industry.

Conveyancing is an extremely broad subject with no clear boundaries. Almost every transaction will be influenced by at least four of the following:

- Administration of Estates Act
- Advertising on Roads and Ribbon Ordinance
- Agricultural Bank Act
- Agricultural Credit Act
- Agricultural Land Reformed Act
- Anti Corruption Act
- Close Corporations Act
- Companies Act
- Communal Land Reform Act
- Constitution of Namibia
- Deeds Registries Act and Regulations
- Deeds Registrar’s Circulars
- Estate Agents Act
- Exchange Control Regulations
- Financial Intelligence Act
- Formalities in Respect of Lease of Land Act
- Flexible Land Tenure Bill
- High Court Rules
- Immigration Control Act
• Insolvency Act
• Intestate Succession Ordinance
• Local Authorities Act
• Magistrates Court Act
• Married Persons Equity Act
• Matrimonial Affairs Ordinance
• Matrimonial Property Act
• National Housing Development Act
• National Housing Enterprise Act
• Prescription Act
• Recognition of Certain Marriages Act
• Regional Council Act
• Registration of Deeds Rehoboth Act
• Removal of Restrictions Act
• Removal of Restrictions Ordinance
• Respect of Leases of Land Act of 1969
• Sectional Titles Act
• Stamp Duties Act
• Subdivision of Agricultural Land Act
• Succession Act
• Survey Act
• Town Planning Ordinances
• Townships and Division of Land Ordinance
• Traditional Authorities Act
• Transfer Duty Act
• Usury Act
• Water Act

These Acts and regulations are, in many instances, intricate and it is obviously impossible for an estate agent to focus on estate agent’s services and have superficial knowledge of the main points embraced by each of the above acts. Another complicating matter is that it is usually vital to close a sale as soon as possible and one cannot take every document to an attorney. It would neither be practical or feasible for an estate agent or attorney.

Fortunately some transactions are relatively straightforward and if the estate agent has, through consultation with attorneys, developed a set of standard forms and practice guidelines that comply with the above statutes, he/she should be able to complete most transactions without further recourse to attorney’s office. However, there is little more frustrating for an attorney than a document that does not comply with the law. An estate agent can therefore, in consultation with his/her attorney, draft several specimen clauses which can be used to cater for specific circumstances and which may not necessarily be covered in the standard documentation. This can include suspensive conditions pertaining to subdivision, mortgage bonds being obtained or the sale of the buyers’ property.

However, sometimes a legal technicality may tend to deprive you of your commission and it might just be necessary to consult with your attorney. Therefore a good working relationship can prove to be of high importance and essential to an estate agent. A good relationship pays handsome dividends in times of crisis, since the attorney will usually be prepared to make himself/herself available either during or after office hours to deal with an urgent matter if time is of the essence to close the deal.

It is also vital that an estate agent is able to satisfactorily communicate with the attorney who acts for their mutual client (usually the seller). Many a transaction has been unnecessarily delayed because of personality clashes or conceptual differences between an estate agent and an attorney, although both were on the same side and should of course have been working for the best interests of their mutual
clients. A well-established, on-going relationship will ultimately result in fewer transactions being set aside for minor reasons that could have been avoided.

Finally;

Whenever an estate agent works with an attorney, he/she should make a conscious effort to treat the attorney as a catalyst (needed person in the process to bring forth the wanted change) rather than a stumbling block in the way of successfully concluding a sale. One must never lose sight of the fact that an attorney has a specific duty to fulfil and that his/her professional concern is solely directed to protecting the interest of his/her client. Many of these duties are not even known to either the estate agent or the other party to the contract. Practically and legally he/she has no duty whatsoever to any of the other parties who may be involved in the transaction. If an estate agent initially adopts an antagonistic attitude or a non-cooperative approach towards the attorney for fulfilling his/her duties, it would later be difficult to restore a good working relationship.

May Conveyancers share their fees with estate agents?

The dilemma is not a new one. First of all it is important to realise that an agent who may be charged with breaching regulation 7 of the Code of Conduct may incur fines of up to N$ 1 000 per transaction, or perhaps more importantly, have their licenses withdrawn if found guilty.

In *Vassen v Law Society of The Cape of Good Hope* it was the court made the statement that it must be borne in mind that the profession of an attorney, as any other officer of the Court, is an honourable profession which demands complete honesty, reliability and integrity from its members; and it is the duty of the Law Society to ensure, as far as it is able, that its members measure up to the high standards demanded of them. It was made clear that a client who entrusts his/her affairs to an attorney must be able to rest assured that that attorney is an honourable man who can be trusted to manage his/her affairs meticulously and honestly.

Conveyancers are bound to remain independent (that is they must not be “owned” by any one) which help them to render unbiased, honest and reliable service to their clients. A seller of property needs to be able to trust his/her legal advisor as impartial and loyal only to him/her, the client. The client is indeed not the estate agent and it will undermine confidence and ethical standards if the conveyancer has a secret arrangement with someone else, for example estate agents or staff members that may interfere with the client attorney relationship.

The Law Society of Namibia also has rules that prohibit fee-sharing with agents (*scenario: give me the transfer and you can keep 10% of the fee*) and kickbacks to agents (*I give you N$500 for every transfer instruction you pass my way*) or any other people (including staff members) who are not attorneys.

One should always keep in mind that this type of behaviour seriously adds to the decrease in trust by the public in the real estate industry. Undoubtedly people loose their faith in agents, lawyers and the industry. Besides it being good and ethical business practice, a conveyancer (and estate agent) that adheres to the rules promotes the integrity not only of the conveyancing profession and him/herself but also to the real estate industry and the public at large. And this integrity, in turn, underpins our country's deeds registration system.

It should also be kept in mind that attempts like this from agents might contravene the Anti-Corruption Act which describes a vast array of corrupt acts, attempts and conspiracies. This statute augments a program called the National Integrity Promotion Programmed, launched with the purpose of cultivating an upright society free of corruption and its attendant evils. Attempts by an agent to direct the business of his/her principal in a specific direction to obtain personal benefits, might be seen as such an act.
The following article is an example of the above temptations that lowers the status of the industry. However sad, fortunately we also learn from the mistakes made by others.

Estate agents - CONDUCT UNBECOMING By Sibonelo Radebe – Financial Mail South Africa
A landmark judgment puts pressure on conveyancers and estate agents to reform;

Estate agents are again in the spotlight after a damning ruling in the Cape high court. It implicates Seeff and Pam Golding Properties (PGP) franchises in the referral of conveyancing work to law firm Buchanan Boyes and of taking kickbacks in return. After a complaint by the Cape Law Society, the director of the law firm, Andre Berrange, was found guilty of unprofessional conduct and suspended for two years. With the principle that if there is corrupter there must a corrupted party still fresh in the public mind since the Schabir Shaik trial, the question is: what of the part played by estate agents in this seemingly widespread conduct?

Seeff and PGP were the only estate agents implicated in the proceedings. But they were not on trial. Says Estate Agency Affairs Board legal manager Clive Ashpol: "Even though the agents were not on trial, we have taken a view that it takes two to tango."

Estate agents and their accomplices in the law fraternity have fiercely defended this practice as an innocent commercial engagement. But others say it undermines the freedom of buyers and sellers to appoint the attorney of their choice. And it goes against every principle of a free market.

The estate agent’s Code of Conduct clearly stipulates in regulation 7 that: "No estate agent shall without good and sufficient cause, directly or indirectly in any manner whatsoever, solicit, encourage, persuade or influence any party or potential party to a pending or a complete transaction . . ."

Records provided by the Cape Law Society as evidence show that Seeff and PGP were paid R237 000 and R271 000 respectively in a period of just over a year. The payments were made by Berrange's firm under the guise of a marketing agreement. This agreement purports to be using the agents for promoting Buchanan Boyes' services through forms of advertising and in their general line of duty. The Cape Law Society successfully argued that the amount paid was out of kilter with the so-called marketing agreement. Instead, it matched the amount of conveyancing work referred by the agents to the law firm during a particular period.

"It seems unlikely that a prudent business person, let alone a law firm, would easily part with R250 000 upon receipt of an invoice (relating to a marketing fee) with such limited detail," reads the judgment. "The most plausible explanation . . . is that the conveyancing work referred to the respondent's firm from Seeff and Pam Golding was generated as a result of the agencies inviting their clients to refer their work to respondent's firm."

The judgment adds that the money paid must have been a strong inducement for agents to recommend their clients to Buchanan Boyes.

Seeff chairman Ian Slot says the judgment relates to a single franchise and not the entire Seeff operation, which has more than 80 licenses across SA.

"We will investigate this matter based on the principle that one is innocent until proven otherwise," he says. "The rules governing this matter are not particularly clear." He adds that no-one knows whether the money involved was actually used for marketing. "All I know is that Buchanan Boyes is a professional law firm which has been providing good service to our clients." Says PGP MD Andrew Golding: "We operate within strict guidelines and we do not believe that we have acted unethically. We have many marketing and sponsorship arrangements in place which are standard across the market."
The ruling comes at a stage when the industry is seeking to shake off an image inherited from a history of unscrupulous behaviour: of estate agents disappearing with buyers' funds; of colluding with sellers to hide structural defects in properties; and of referring work to banks and mortgage originators in return for kickbacks.

The agents may be charged with bringing the industry into disrepute and breaching regulation 7 of its Code of Conduct, says Ashpol. If found guilty, they may incur fines of up to R20 000 per transgression, or have their licenses withdrawn. "We will, if necessary, amend the Code of Conduct. We have noted that this practice is widespread."

Ashpol adds that the board is investigating "a situation where attorneys are taking estate agents on overseas trips on their account".

**In conclusion:**

The more knowledge an estate agent has of the law and its application in terms of property transactions and the more he/she keeps up to date with current legislation and practice, the easier it will be for the agent to establish a good working relationship with attorneys that will lead to mutual respect, trust and co-operation.

“Always do right: this will gratify some people and astonish the rest.”

Mark Twain
Part Two

Real Estate Case Law

Introduction:

Namibia has a “hybrid” or mixed legal system, made of the interweaving of a number of distinct legal traditions. Many aspects of Namibian law are similar to the law of South Africa.

The sources of our law today are:

- **Constitution**: The Constitution of Namibia is the supreme law which governs and applies to all law and conduct within the territory of Namibia. Any law or conduct which contravenes the provisions of the Constitution is invalid and therefore illegal.

- **Statutory law** is the codified part of the Namibian Law made by Parliament. These laws are contained in Acts (Estate Agents Act, etc) and (Municipal) by-laws as well as various pieces of subordinate legislation, which is passed by Parliament.

- Not all law is contained in Acts passed by Parliament. Much of Namibian law is based on **Common Law**, and there has been a great reliance on Common Law in South Africa over the past years. In short, Common Law is that part of our law that has been passed down through history and which does not exist as an Act of Parliament.

**Sources of our Common Law**:

1. The development of the Common Law is made possible by the fact that the courts follow the system of legal precedent or *stare decisis*. This enables a higher court to develop the law in such a way that it becomes a precedent (“pecking order”) for lower (junior) courts (and the public) to follow. As it cannot be expected of Parliament or any other legislative body to be able to pre-suppose all possible scenarios of life and enact relevant laws to cater for them, our law places a great emphasis on the Higher courts to develop the law through their decisions, which become precedents and as such become law which is also known as **Case Law**.

2. **Roman Dutch law** is broadly Roman law as interpreted and developed by the Dutch lawyers of the seventeenth and eighteenth centuries. If the Roman-Dutch jurists express different views on a particular point of law, our courts is not bound to follow the majority view or the view of a particular writer, but may follow the view which appears to it to be the most in keeping with justice, commercial convenience and modern conditions generally and therefore many of these principles have been superseded by case law.

- To a lesser effect **Customs**. This would include habits and business practices. If for instance if people follow customs for a long time and if the contents of the custom are accepted by the community, and if the rule is certain and reasonable, the particular custom becomes part of the law. For example, certain banking and business practices, as well as fishing habits and operations that may become so entrenched in society that they get to be regarded as law.
The following are interesting Case Law relating to Real Estate Matters. Although these cases give a good indication to related matters, the purpose thereof is for information only and should not be relied upon as legal advice. One has to realise that each case will have its own merits that could have an influence on the matter at hand.

**EP Manna v JM Lotter 2007**

The validity of a deed of sale which was accepted AFTER the offer had lapsed was decided upon for possibly the first time in South African law.

Mrs Lotter, a Welsh citizen, placed her property in Sedgefield on the market via a local estate agent in October 2003. The estate agent found a willing buyer who signed an Offer to Purchase on 6 November 2003. Clause 10 of the offer stated that the offer was "irrevocable and expires at noon on the 8th November 2003 and on acceptance shall become a binding Agreement of Sale irrespective of whether the Purchaser has been notified of such acceptance or not…"

The estate agent faxed the offer to the seller on 9 November 2003. The seller then signed the offer and faxed it back to the agent on 12 November 2003.

The conveyancer dealing with the transfer then tried to reach the seller to sign the necessary documentation, but to no avail. The seller simply refused to sign the documents and wouldn't answer any calls or respond to any messages.

The buyer then launched an application in the Cape High Court to compel the seller (which was served in Wales after an application for edictal citation) to sign the necessary documents, so that transfer could be registered.

The seller opposed the application on several alternative grounds, two of them being:

**That the buyer had failed to obtain the necessary bond approval timeously:**

In terms of the Agreement, the sale was made "subject to the suspensive condition that the purchaser obtains approval to the granting of a loan against security of the property for an amount of not less than R485 000.00 from a bank, building society or financial institution within 21 days of acceptance of this offer" and if this loan was not approved within that time, "the period of approval shall automatically be extended for a period of 14 (fourteen) days."

The buyer’s bank only approved a 75% loan. However, it is trite law that a bond clause is to the benefit of the buyer and capable of unilateral waiver, provided such waiver takes place before the date for fulfilment of the condition – in this case it would be within 35 days of acceptance, i.e. by no later than 17 December 2003. On 27 November 2003 the bank notified the buyer, who on the same day advised the conveyancer that he would make alternative arrangements for the balance and wished to proceed with the transaction, after which he signed all the necessary transfer documents and paid the required conveyancer’s costs.

As such, the buyer undoubtedly indicated his waiver of the benefit.

**Because she accepted the offer after it had already lapsed, there was in fact no binding agreement - i.e. you cannot accept an offer that no longer exists:**
The Court immediately drew the following distinction in his judgement: If an offer is accepted by a seller before the time to accept it has lapsed, then the buyer, who made the offer, is undoubtedly bound to the agreement. But what is the situation where the seller accepts the offer, after it has lapsed, and the buyer then still wants to proceed? Can the seller then escape the agreement by relying on the fact that the offer lapsed before she accepted it?

In most instances the favourite argument was that late acceptance amounts to a "counteroffer". However, in this instance the immediate problem was that, due to the strict requirements laid down by section 2(1) of the Alienation of Land Act 68 of 1981, such a "counteroffer" would require a written acceptance – mere acceptance by conduct was insufficient.

In the present matter the buyer never formally accepted the "counteroffer" in writing. The reason for this was that the buyer only became aware of the seller's alleged "counteroffer" in her Answering Affidavit (having remained silent after signing the offer two years earlier) and as such he was never aware that he "should" have formally accepted it in writing. Nevertheless, the Court rejected this theory in any event, because in its view this scenario specifically illustrated the artificiality of such a construction.

Another view expressed by the learned authors and which was accepted by the Court, was that the best way to approach this type of scenario would be to regard the expiry date as a stipulation that was inserted solely for the benefit of the buyer, which benefit he could elect to waive. As such, the buyer would then be entitled to accept (or reject) the "irregular" acceptance of his initial offer. Naturally, this election of the buyer would have to be communicated to the seller within a reasonable time, depending on the circumstances. In this case the buyer, upon receipt of the signed Offer to Purchase, immediately proceeded with doing whatever he needed to from his side, to give effect to the agreement.

On this basis then, the court held that, notwithstanding a late acceptance of the offer, the fact that the buyer had elected to proceed indicated his willingness to accept the "irregular" acceptance anyway, and as such the agreement remained valid and binding. The seller was ordered to pay the applicant's costs and to sign all necessary documents within a specified time, failing which the Sheriff was authorised to sign in her stead.

Van Rensburg and Another v Nelson Mandela Metropolitan Municipality and Others 2007

Title deeds rule

A very important decision was taken by the South Eastern Cape Local Division Courts when they enforced their ability to have an owner demolish their buildings because they do not have the correct provisions in their title deed.

In summary: "The parties herein were, apart from the relevant local authorities, residential neighbours embroiled in a dispute about buildings on urban property. The applicants sought an order for the demolition of the offending buildings on the property and an interdict to prevent nuisance emanating from the property."

In essence, the defending party had constructed a guest house on the adjacent property to a complaining neighbour. Although they had received some building permission from the local authorities (after some of the property had been constructed), they had, in effect, built without getting the correct zoning or planning permission. It was obvious from the reported case that the defendant party was not
acting in an altogether neighbourly way towards their neighbours.

The main point of the case was that, despite having received local authority approval for some of the building work, the title deeds of the property did not allow for more than property to be erected or for the property to be used for business purposes.

The real effect of this decision is to show landowners that their neighbours cannot just do what they like with their property. For example, it seems to be prevalent that businesses of all types are being erected on residentially zoned properties where businesses are not allowed in terms of the title deeds and that additional homes/flats are being erected on sites that only allow for one residential property.

The reason for the court’s decision was that the conditions in the title deed of a property takes precedence over any approval (or rezoning) given by a local authority and that any building or business that takes place in contravention of the title deeds condition is unlawful. While this is only binding on the South Eastern Cape Local Division, it is likely that it will be used as precedence by many disgruntled landowners who have to suffer illegal construction and usage of neighbouring property.

Although the law allows for the disgruntled neighbour to be awarded substantial damages for nuisance and for reduction in the value of their property as a residential home, the law also allows for the court to demand that the property be demolished back to what is actually allowed in terms of the title deeds.

**Mostert v Van der Weshuizen and Another (CPD) 2007**

**The validity of an alleged agreement that had been concluded to purchase immovable property, in terms of an option that had been granted to the alleged buyer in a lease agreement.**

Simply put, an option is an unconditional and irreversible right that is given to a person to buy a certain property within a certain time, at a predetermined price. The option is then exercised in writing by the purchaser, by simply advising the seller that he is now exercising the option, and in doing so, the sale is concluded. The seller may not refuse to then conclude the agreement.

**Background:**

In the present matter, Mr Mostert had leased certain land to a company, in terms of which lease the company was granted an option to buy the property during the duration of the lease, at an agreed sum, subject to an annual escalation. On a certain day, during the existence of the lease, the company's attorney then sent a letter to Mr Mostert indicating that his client had decided to exercise the option, and attached a draft Deed of Sale. The covering letter invited Mr Mostert to make such changes to the Deed of Sale as he thought might be necessary and, if he were happy with it in its present form, to please sign it and return it to the attorney for his client's signature. Several months went by and the company heard nothing. After the lease expired, Mr Mostert wanted his property back. The company, however, refused to vacate the property on the grounds that it had exercised its option in terms of the lease. Mr Mostert then sued the company for eviction. The company defended the claim on the basis that it was entitled to the property on the basis of having exercised the option.

Mr Mostert then raised a point in law which he referred to the Court to be determined as a separate issue, namely that the option had in fact not been properly exercised, in that the proposed Deed of Sale that was sent to him contained a clause stating that the agreement would be subject to the company being able to obtain a bond from a financial institution first, within a certain time. In other words, the option was not properly exercised because the proposed Deed of Sale contained a suspensive condition.
The company argued that the condition that was attached was merely one of several terms and conditions that needed to be negotiated, and that this condition did not affect the question of price but only the manner of payment. The company also argued that Mr Mostert should have simply replied and stated that he was not prepared to make it subject to bond approval, and this clause could have been removed, as Mr Mostert had been invited to do in the attorney's letter.

Mr Mostert argued, and the Court agreed, that firstly there was no duty on him to supplement any shortcomings in the draft Deed of Sale, and secondly, that when one exercises an option, it must be completely in line with the option that was granted - above all, it must not introduce terms or conditions that were not part of the original option. In this case the option was simply worded in the lease, namely that the company would be entitled to buy the property at a certain price, within a certain period of time. No other terms or conditions were attached.

As such, irrespective of the company's best intentions, by law, the option was not exercised. As such the company's defence was ruled out.

Butler v Du Preez 2006

This case relates to the all important question of when the transfer attorney may call for guarantees from the purchaser, in the instance where the agreement does not specify the due date.

The Appellate division case of Hammer v Klein 1951 (2) SA 101 laid down the (highly unsatisfactory, from the transferring attorney's point of view) rule that the purchaser's obligation to furnish the guarantee for the purchase price (in cases where no due date for guarantee is stipulated) only arises on the date on which the seller will be able to lodge the transfer documents at the deeds office. The decision in the Hammer case has since been applied and discussed in a number of cases, amongst which the most recent is the Ronlou Property Development case, heard in the Cape High Court last year.

Background:
Butler bought a property from Du Preez for R950 000. In terms of the agreement, the purchase price was payable by means of a deposit of R30 000 and for the balance Butler had to deliver "such bank or other guarantee as shall be approved by the seller or his conveyancers and which shall be paid in cash on registration of transfer." No due date for guarantees was stipulated.

The transfer attorneys requested a guarantee for the outstanding balance of the purchase price at a time when the seller had not yet signed transfer documents, and neither a transfer duty receipt nor a rates clearance certificate had yet been obtained. In other words, the request for guarantees was made before the documents were finalised and before the transaction was technically ready to be lodged.

When the purchaser failed to get the guarantees issued on the date stipulated in the demand (there was a scramble to secure the funds, so it seems), the seller issued a notice of cancellation of the agreement. The next day, the bank issued a guarantee for a large portion of the purchase price (R760 000) and a few days later an attorney's undertaking for the balance (R160 000) was also received. (The purchaser paid transfer duty and costs before the transferring attorney requested the guarantee.

When the seller refused to proceed with the transfer, Butler took the matter to court, asking for
an order to declare the cancellation invalid and the agreement to be in force.

This is the court's conclusion as reported in the judgement:
"... the facts show that at the time the demand for the guarantee for R160 000 was made, the defendant (the seller) had every intention to effect transfer to the plaintiff. They further show that preparations towards lodging of transfer documents with the Registrar of Deeds reached an advanced stage and that the outstanding matters were of a formal nature, would not have required any significant time period or effort to complete and would not have prevented the timeous lodging of the transfer documents. In view of the communications between the defendant's attorneys and the plaintiff it must have been clear to the plaintiff that the defendant was as anxious and ready to do what was necessary to lodge the transfer documents. I am, therefore, of the view that the defendant's demand for the guarantee was valid." As a result, the agreement was held to have been effectively cancelled, and Butler's case was dismissed.

The judge was really saying that to determine if a matter is ready to be lodged (so that the transfer attorney can call for a guarantee), one must not only look to see whether the documents are ready to be lodged but rather at the intention of the parties at the time; they were anxious to proceed and ready to do what was necessary to lodge the documents.

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**Chestnut Hill Investments v 169 Stamford Hill Road – 2006**

Guarantees: Due date not stipulated in contract - When must it be furnished?

If an agreement of sale of immovable property makes no provision for a guarantee date, and the purchaser stalls in furnishing it, what must be done before the seller can cancel the agreement?

In terms of the law the seller/conveyancer needs to place the purchaser in mora, give him/her reasonable time to rectify the breach and if he/she then does not rectify the breach, he/she can cancel. No surprises here - this has been the law all along. But see how this turned out in practice, in the Durban case of Chestnut Hill Investments v 169 Stamford Hill Road [2006] JOL 18330(D).

The seller in this case cancelled - or rather purported to cancel - the agreement due to the purchaser's failure to provide an acceptable guarantee for the purchase price after being placed on terms to do so. But the purchaser argued that the purported cancellation was not effective and applied to court for a declaratory order that the agreement was still valid and binding and that it was entitled to transfer of the property.

The court found that the seller did succeed "albeit in a confused and inept way" in putting the purchaser in mora, and did effectively cancel the agreement.

**Summary of the lessons from the case:**

- Those who draft agreements of sale for immovable property **must remember to insert a due date** for furnishing of guarantees. If such a date is not furnished it causes tremendous difficulties and could, like in the case under discussion, result in costly and lengthy litigation.
- An attorney dealing with an agreement which makes no provision for a guarantee and where the purchaser fails to provide the required guarantee will first need to clearly **place the purchaser in mora**. If a purchaser is not duly placed in mora, any subsequent cancellation letter is void.
- Guarantee should not be asked too soon: This may be premature and jeopardise all further attempts to enforce or cancel the agreement. In the unfortunate event of an agreement not
making provision for a due date for guarantee, the prevailing law is as set out in *Hammer vs Klein* 1951 (2) SA 101 (A), as discussed, interpreted and applied by various subsequent cases.

- Be sure to study the breach clause in the relevant agreement and make sure of full compliance when sending "place you in breach" letters or cancellation letters to a party to the contract.

### Maharaj & another v Govindsamy & another - 2007

**Agreement of sale with a suspensive condition of obtaining a loan within 21 days of the date of signature**

**Non-fulfilment of - Waiver of compliance - Written notification of breach - Non-compliance with - Contract valid Order to effect transfer granted**


**Summary:**

The applicants purchased immovable property from the two respondents. Their agreement of sale was subject to the applicant obtaining a loan within 21 days of the date of signature. Furthermore, this suspensive condition was for the benefit of the purchaser who could unilaterally waive compliance with it. After the applicant failed to fulfill this suspensive condition, the respondents wrote a letter to the applicant to inform him that the contract had lapsed. In response the applicants lodged this application to claim transfer. In his founding affidavit the first applicant asserted that the respondents were aware that they had, *inter alia*, already obtained a "pre-approved bond" at the time when they signed the agreement. The obligation had been fulfilled; alternatively, they had elected to waive compliance with the condition. In addition, the respondents had not notified them in writing before purporting to cancel the agreement as was required by a clause in the agreement.

It is held that, in terms of section 19(1) of the Alienation of Land Act 68 of 1981, a seller of immovable property who decides to take action as a result of a breach is required to give the buyer written notice to rectify the breach before the seller can terminate the contract. Cancellation constitutes a drastic step that cannot be taken willy-nilly without following the necessary procedure. The agreement was declared to be valid and the respondent was directed to take steps to effect transfer of the property into the name of the applicants.

*Murphy and another v Durie* 2006 JOL 18301 (C): The main question was whether or not the suspensive condition relating to the bond had been fulfilled. Judgement was granted by Acting Judge Zonda on 7 September 2006 in the Cape High Court.

**The facts**

S sold to P a property in Somerset West in terms of an agreement dated 5 December 2003, for R999,000. Clause 13 of the agreement reads as follows:

"*This sale is subject to the purchaser obtaining in principle a mortgage bond from a Building Society or Financial Institution to finance this transaction. The Purchaser undertakes to sign all papers to permit passage of the said mortgage bond for an amount of not less that R700 000. 00. Confirmation of such mortgage bond having been granted is to be given to (the seller’s agent) by no later than 9 December 2003."

On the purchaser's version, the suspensive condition was fulfilled. On the seller's version, the suspensive condition was not fulfilled, and as a result the transaction lapsed. The purchaser obtained an interim interdict preventing the seller from transferring the property to someone else until the question of whether or not the agreement is binding has been resolved. The purchaser then launched
this action, an action for transfer of the property to him.

This is what P says happened:
- Prior to the transaction the purchasers had already obtained an indication from The Bank that they would qualify for a bond of R1.2 million;
- After concluding the agreement, on Monday 8 December, he faxed a copy of the deed of sale to one Esther at the Bank;
- On 9 December he phoned Esther and was told a valuator had gone out to value the property;
- Subsequently, Esther phoned him and told him that a bond for R700,000 was approved;
- He then telephoned his own estate agent Tamara-Lee from Cluttons (she introduced him to the property) to tell her the news;
- Tamara-Lee then phoned him again, requesting him to send her written confirmation of the bond grant, as the seller's agent required it;
- P phoned The Bank again, but was told that the bank's staff was at a Christmas party and that no one was available to give written confirmation;
- P phoned Tamara-Lee to let her know;
- The next morning, that is, on 10 December 2003 (the suspensive condition stipulated due date as 9 December), Tamara-Lee phoned P confirming that she had received a letter (dated 10 December) confirming approval of the bond in principle.

Although P stated this version in his pleadings and a corroborating affidavit by Tamara-Lee was attached to the pleadings, neither Tamara-Lee nor Esther from The Bank testified at the hearing. This despite the plaintiff giving notice that they would be called, and despite the matter being postponed twice for Esther to be called.

This is what S says:
Counsel for S did not waste time debating the merits of the events concerning the fulfilment of the bond clause. S's view was simply that P's legal action is a claim for specific performance; as a result the onus to prove compliance with the bond clause was on the plaintiff, P. As P did not call Tamara-Lee or Esther to testify, there was no evidence that the suspensive condition was fulfilled. P's evidence about the alleged conversations were hearsay, and therefore inadmissible.

As a result, S applied for absolution from the instance.

This is what the court said:
"In my view the suspensive condition was not fulfilled in this case and therefore there is no binding contract ... The deed of sale was subject to the obtaining of a bond from a bank, but not to its approval in principle. Something more than approval of a loan in principle was required in the context of clause 13. The parties must be taken by the use of their language in clause 13 to have intended that the plaintiffs were to conclude a binding agreement of loan with a bank. When one looks at letters from The Bank, it is clear that the loan was approved subject to compliance with certain formalities. The letters from The Bank do not constitute fulfilment of the suspensive condition. The obtaining of the loan in principle had to be communicated to the defendant's agent by no later than 9 December 2003. This did not take place in the matter. What was communicated was the notification that the bond was approved on 10 December 2003. This did not constitute compliance with a suspensive condition. The suspensive condition in the present case required a loan to be "obtained in principle" as opposed to "approved" in principle. I think this distinction should be borne in mind in an assessment of the language used in clause 13."

Herewith some observations and comments on the judgement and how this case affects banks, conveyancing and real estate practice.

If the Court's ruling is that the purchaser (being the plaintiff and bearing the onus of proof) failed to
discharge, the onus of proving fulfilment of the suspensive condition by due date. However, if the Court is saying that the condition was not approved because there is a **general distinction between obtaining a mortgage loan and approval of a loan in this context**, and the purchaser only received approval, he did not obtain the bond. In making these comments the Court relied on *De Wet v Zeeman* 1989 (2) SA 433 (NC) where, on those facts, the court distinguished between mere approval of a bond and the actual acquisition thereof.

Other conveyancers should voice their opinion, but to me the words "obtain" a loan/bond or "to get approval of a loan/bond" or to "secure" a loan from/by a bank mean one and the same thing (in the context of the wording of a typical bond clause). We all know the procedure: the purchaser or someone on his behalf applies to a bank and furnishes certain information, and the bank approves or turns down the application. The approval can be conditional, or it can be final. Once approved, the purchaser can say he obtained the loan, or he can say he “secured the loan” or he can say the bank “approved” his loan. In every day conveyancing practice there is no distinction between these words, in contrast to what the Court stated in this case. It is possible that in exceptional circumstances there would be merit in making such a distinction, but in general commercial and conveyancing practice no such artificial distinction exists.

I do agree, though, that the words "in principle” are significant. *Obtaining approval of a mortgage loan in principle* is something less certain than obtaining approval of a mortgage loan. "In principle” seems to suggest that the bank gave the application a hasty overview, and made a preliminary decision to approve, subject to later review.

If a bond condition in an agreement requires approval of a mortgage loan “on the usual terms and conditions of the institution”, would the clause be fulfilled if the bank indicates approval “in principle”? I am not sure: it seems to me that the phrases "in principle” and “usual terms and conditions” will need to be examined in more depth. Perhaps colleagues will give their views?

**Recommendations:**

1. **Improved wording required**
   Many of the difficulties revealed in this matter can be avoided in similar situations by using well-worded bond clauses in agreements of sale. For example, by making “notice of approval by the bank in writing” a prerequisite, there can be no debate afterwards as to whether oral discussions constituted compliance or not. There are many pitfalls to be avoided in the drafting of a bond clause and special effort should be made by conveyancers and commercial attorneys when drafting them.

2. **Realistic time for compliance**
   The agreement was signed on a Friday 5 December and the bond (or rather, the loan to be secured by a bond) was supposed to be approved by Tuesday 9 December. Granted, we do not know the full facts, but four days (two of them weekend days) seem to be an unrealistic period for obtaining a mortgage loan. Is it any wonder the purchaser was found not to have complied in time? Unless there is a good reason to do otherwise, one would expect the agent to recommend and the parties to agree to a reasonable period for bond grant.

3. **File notes and evidence about fulfilment of suspensive conditions**
   It is uncertain why in this case no direct evidence about the crucial conversation between the bank and the purchaser/purchaser’s agent was offered.

In addition, no mention is made of any file notes made by the conveyancing secretary or the transfer attorney on the file. It would be interesting to see what, if anything, had been recorded on the file concerning due date for the bond and the alleged events. Ideally there should be evidence on the file (file notes or correspondence) proving efforts on the part of the conveyancer or paralegal to establish whether or not and when the bond had been approved. The seller should then be notified of the status and evidence of this notification provided; especially if the loan was not approved/secured/obtained by due date.
Ideally then, there should have been a letter in this file by the conveyancer/paralegal addressed to the purchaser (and the agent and seller should have been copied) dated 9 December 2003 stating "I confirm your advising me that the required loan/bond for R700,000 has been/has not been granted."

What if oral approval was obtained?
Let us assume for purposes of argument that someone at The Bank telephonically communicated the approval/obtaining of a loan of R700,000 to the purchaser or the purchaser's agent on 9 December. No one else was informed. Would the suspensive condition be fulfilled?

I think not, but the reason for non-compliance would not be the lack of written confirmation - this particular bond clause does not require written confirmation - the reason would be that the confirmation was not given to the seller's agent. Would it have been sufficient if the purchaser had phoned the seller's agent on 9 December and communicated The Bank's approval of the loan? On the wording of the clause, I think it would.

On the discrepancy between the alleged oral approval and The Bank's letter:
It is in theory possible that The Bank did approve the loan orally on 9 December, but that the date of 10 December was reflected on the paper work due to the bank only processing it on that day (remember the Christmas party). If the significance of the date was not realised, I think it is possible that such a thing could happen. The mere fact that the paper work reflected the date of 10 December instead of 9 December would then, to my mind, not necessarily render the suspensive clause unfulfilled.

Of course all of the above is, in the absence of evidence, mere speculation. In this case, as in many other conveyancing matters, the precise facts are crucial.

Conclusion
The bond clause in an agreement of sale of land can cause misery if poorly drafted or if factual disputes arise regarding its fulfilment. To eliminate problems a reasonable due date for compliance must be stipulated in the agreement, and the transfer attorney ought to monitor fulfilment in cooperation with the estate agent. It is better to act before the due date; take timeous steps to try and avoid lapsing of the contract, for example by getting the parties to agree to an extension in writing. **On fulfilment or non-fulfilment of the condition, the seller and other interested stakeholders should be notified.** If there is any doubt as to how the clause should be interpreted or if the approval by the bank is conditional, the conveyancer should apply his/her mind to the legal consequences and should take steps to minimise risks for all involved.

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**Heathfield v Maqelepo 2004**

In the case where a purchaser (representative/agent or trustee) buys land on behalf of a company a special clause was inserted in the agreement of sale that held the purchaser liable.

Summary
On 5 August 2001 the respondent signed a written Offer to Purchase from the appellant stand no 716, Bedfordview Extension 115, for a purchase price of R1 300 000. The offer, which was accepted on 6 August 2001, was subject to a bond or bonds of R1 180 000 being obtained by the purchaser within 30 days of acceptance of the offer.
The "Offer to Purchase" consists of a standard estate agent's printed form. It also has an additional page (clause 21), which reads as follows:

"Should the PTY LTD NEW HEIGHTS not be able to take transfer and or ratify this agreement I LIJANE MAQELEPO HEREBY holds (sic) myself surety and co-principal debtor for all the obligations of this offer towards the seller and irrevocably hereby undertake to take transfer in my own name."

The respondent signed the Offer to Purchase as purchaser without qualifying his signature.

The document was thus completed in two stages with Lijane Maqelepo as the initial purchaser. Then they attempted to make NEW HEIGHTS (PTY) LTD the purchaser with the insertion of the words "on behalf of the above co" after the respondent's name as purchaser and by inserting clause 21.

The respondent launched an application in the Witwatersrand Local Division (WLD) when he called upon appellant to pass transfer, and appellant repudiated it, contending that as "New Heights" did not exist, the agreement was null and void and that respondent was no more than a surety. Relief was granted as Goldstein J found that the clear intention of the parties was that the respondent would be the purchaser.

Appellant appealed, arguing that an agreement signed on behalf of a non-existent principal is invalid. In Southwood AJA's view, this argument ignores the context in which clause 21 is used in the agreement as a whole. Further, a court should not lightly hold that an agreement is invalid.

Despite been inelegantly worded and obviously not the work of a "lawyer or linguistic precisian" the entire document shows that the parties clearly contemplated that in the event of the company failing to ratify the agreement, the respondent would be bound to perform all the obligations of the purchaser and would take transfer of the property in his own name.

This agreement, however, is inconsistent with the obligations of a surety in two crucial aspects:

* A surety cannot be liable unless there is a principal debtor who becomes liable; and
* A surety is liable for the debt or obligations of another.

Furthermore, the agreement that the respondent would take transfer of the property into his own name is also inconsistent with the position of the surety because, if called upon to perform, the agreement between the purchaser will remain in force and the seller will be obliged to transfer the property into the name of the purchaser, not that of the surety.

Based on the construction of clause 21 therefore, the word "surety" was used inappropriately and was inconsistent with the parties' true intention, which was that both the appellant and the respondent regarded the respondent, and not the company, as the purchaser of the property.

The appeal was therefore dismissed with costs.

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**Waller and Another v Pienaar & Another 2005**

**Latent defects not disclosed**

**Summary**

Plaintiffs sued defendants in two alternative claims after buying a house from defendants which they claim had certain latent defects which were not disclosed by the defendants at the time of sale.

The alleged defects include:

* Poorly compacted filling;
* A cracked gable wall;
* The failure of internal walls;
* Inadequate foundations.

Plaintiffs averred that despite the "voetstoots" clause the defendants "had a duty to disclose … the existence of the latent defects in the property of which they were aware at the time of the sale …." The matter therefore concerned the common law application of the aedilitian remedies in respect of the latent defects affecting the purpose for which a thing is sold. As Silke J set out in Knight v Trollip 1948(3) SA 1009 at 1013: "The seller's undertaking thus imported covers all such defects as exist at the time of sale, regardless of whether or not the seller knows of them then."

In "voetstoots" sales when a thing is sold "as it is" or "as it stands", a seller's liability is excluded in respect of all defects in the thing of which he/she was genuinely ignorant up to and at the time of the sale. A seller will also not be liable for "defects" which were clearly visible or patent. The exception to this is set out in Van der Merwe v Meads 1991(2) SA 1 (A) at 8E-F where it was concluded that the seller will not be able to rely on the protection of a "voetstoots" clause where, having sold "voetstoots", he/she is aware of the defects at the time of making the contract and dolo malo conceals the existence of the defects with the intention of defrauding the purchaser. The seller in these circumstances is clearly under a duty to disclose to the purchaser defects of which he/she is aware, and the purchaser has a remedy if the seller has acted fraudulently.

The principles around the duty to disclose, giving rise to delictual liability and a claim for damages in relation to, inter alia, a negligent non-disclosure by way of negligent misrepresentation as set out by Van Zyl J in McCann v Goodall Group Operations (Pty) Ltd 1995(2) SA 718 (C) were then looked at. As was the more recent case of ABSA Bank Ltd v Fouche 2003(1) SA 176 (SCA).

For the Plaintiffs to succeed in their claim then, they had to prove that:

i. Defendants were aware of the defects as pleaded, if indeed the defects were latent, at the time of sale.
ii. Defendants had a duty to disclose the existence of the defects (as pleaded) to Plaintiffs at the time of sale.
iii. Defendants fraudulently concealed the existence of the defects, thereby inducing the contract, alternatively that Defendants fraudulently misrepresented that there were no defects.

What constitutes a latent defect is expressed in Dibley v Furter 1951(4) SA 73 (C) as being "those (defects) which either destroy or impair the usefulness of the thing sold for the purpose for which it has been sold or for which it is commonly used; (and) that the defect must be material. The test as to whether the defect has destroyed or impaired the usefulness of the thing is an objective one, in that the defect must have destroyed or impaired it for everyone, not just for the purchaser." To be "latent" such a defect must also not be reasonably capable of perception.

Without going into the technical details the court found that the house had been built on an uncontrolled fill site and because inadequate steps had been taken to provide for suitable footings and foundations, the house's usefulness or purpose for which it was bought was compromised. Given that the only time the dwelling was inspected externally was at night, it was reasonable to assume that the crack was not seen and therefore no questions arose as to the foundations. Since the defects were not apparent, particularly to the untrained eye, the defects as pleaded were latent defects.

The next question to be answered was whether the Defendants were aware of the alleged defects at the time of sale, and if so, whether they were under a duty to disclose these to the Plaintiffs.

Here the dictum of Silke J in Knight v Trollip regarding "voetstoots" sales is worth repeating, to wit: "I think it resolves itself to this, viz that here the seller could be held liable only in respect of defects of which he knew at the time of the making of the contract, being defects of which the purchaser did not
then know. In respect of those defects, the seller may be held liable where he has designedly concealed their existence from the purchaser, or where he has craftily refrained from informing the purchaser of their existence.

In such circumstances, his liability is contingent on his having behaved in a way which amounts to a fraud on the purchaser, and it would thus seem to follow that, in order that the purchaser may make him liable for such defects, the purchaser must show directly or by inference, that the seller actually knew. In general, ignorance due to mere negligence or ineptitude is not, in such a case equivalent to fraud."

The fact that the first Defendant concluded that the Plaintiffs had not seen the crack, because he conceded that had he been the one purchasing the house he would have asked about it implies that there must have been some element in the transaction beyond mere knowledge and non-disclosure - "designedly concealed" and "craftily refrained". The Defendants clearly held out then that the dwelling was free of defects, especially after telling the Plaintiffs that the only problem that they had had with the house was a leaking sliding door.

Lastly, was such concealment of the defects fraudulent or a false misrepresentation done with the intention of inducing the Plaintiffs to buy the property under circumstances where they had a duty to disclose the alleged defects? Taking the above into account it was concluded that on a balance of probabilities this indeed was the case. Silence (hiding the default) was therefore fraudulent.

Consequently the court found that the contract of sale had to be cancelled, and the Plaintiffs accordingly be placed in the position that they would have been in had the contract not been concluded.

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**Beyers No v Ackerman**

_A judgment dealing with the law relating to latent defects and the voetstoots clause. The theory confirmed in this judgment is a useful refresher of the underlying principles._

_A patent defect_ is a defect that is clearly visible to the naked eye, for example, cracked gutters and tiles or dripping taps. If a purchaser buys a house and afterwards notices that there are certain obvious defects which would have been revealed by a reasonably careful inspection of the property by the purchaser, then the purchaser has no claim against the seller in respect of these defects.

_Latent defects_, on the other hand, are defects that are not clearly visibly to the ordinary person - even if it would be apparent to an expert. These defects may be covered up or concealed. Very often they only become evident sometime after the date of sale or transfer, for example, a leaking pool or a leaking roof after heavy rain.

In terms of our law, there is an implied term in a contract of sale (in other words, this position prevails even where the agreement is silent about the topic) that the seller warrants to the purchaser that there are no latent defects in the property. As a result, if it appears after the conclusion of the agreement that a latent defect in a house exists, the seller is liable for those defects whether he/she knew about it or not.

Because this implied term (known as the seller's warranty against latent defects) places such a heavy burden on a seller, most sellers include a clause in the contract to counter this common law provision. This clause typically states that the seller shall NOT be liable for latent defects in the property, and that the purchaser buys the property as is. This clause is commonly known as the voetstoots clause. Voetstoots means, roughly translated, "pushed with the foot". It is almost as if the seller put the thing to
be sold on the floor and pushed it with his toes in the direction of the purchaser, saying: “there it is, but remember, you buy it warts and all, whether you can see the warts at first glance or not.”

So, if an agreement contains a voetstoots clause, and if the seller did not know about latent defects in the property, and if latent defects manifested themselves after the sale, the seller will rightfully be able to say to the purchaser: “Sorry, this is your problem, fix it at your cost; I am protected by the voetstoots clause.”

But what about latent defects which the seller knew about and did not bring to the purchaser's attention before the sale? And worse, what if the seller knew about them and deliberately concealed the defects (Polyfilla can do wonders) with the purpose of inducing the purchaser to buy the property? Will such a seller be able to hide behind the voetstoots clause when the purchaser tries to hold him liable?

The law concerning this issue has been fine-tuned over the years and it is now clear in law that, if a seller knew about a latent defect and deliberately concealed the defect so as to induce the purchaser to buy, the seller cannot hide behind the voetstoots clause; a voetstoots clause only protects a seller against latent defects he/she did not know about or, if he/she knew about them, did not deliberately conceal them from the purchaser.

This is a consolation for the purchaser, but the burden of proof (proving that the seller did know about the defects and that he deliberately concealed them) is on the purchaser, which sometimes makes it difficult for purchasers to enforce their rights in practice.

**The facts in Beyers NO v Ackerman**

Beyers (as trustee in a trust and hereinafter referred to as “Beyers”) bought immovable property from Ackerman. The contract contained, amongst other things, the usual stipulation that the property is sold voetstoots and provided specifically that there shall lie no claim against the seller, Ackerman, for any defects that may be found to have existed on the property at the time of entering into the agreement.

The day after signing the sales agreement, Ackerman indicated to Beyers, via the estate agent, that she recently noticed one or two leaks in the thatch roof of the house and that she (Ackerman) offered to have these leaks repaired. These repairs were then attended to. On two further occasions, prior to transfer, Beyers noticed further leaks in the roof and advised Ackerman accordingly. Ackerman denied that these were latent defects, but still arranged for a thatching company to go out and fix the leaks since the leaks were in the same area in the roof as the previous leaks.

When, at a later stage, after registration of transfer, further substantial leaks were found in the roof (and which would be costly to repair), Beyers again requested Ackerman to attend to the repairs. Ackerman replied that she had disclosed (to Beyers) those leaks of which she was aware at the time of contracting. As regards the “new” leaks that Beyers now pointed out, she maintained she had no knowledge of these and can therefore not be held liable since she is protected by the voetstoots clause in the sales agreement. Beyers was of the opinion that Ackerman was aware of the leaks at the time of contracting and had deliberately concealed these defects. Beyers therefore instituted action against Ackerman for damages he suffered in the amount of the costs of the repair work required to fix the thatch roof.

**Question before the court**

On an investigation of the evidence offered and relying on reports by professional roof thatchers and building inspectors, the court found that the defects did exist in the property at the time of entering into the contract. The question the court then had to consider was whether Ackerman was aware of these defects at the time of contracting with Beyers.

**Held**

On an examination of the facts, taking into account the instruction initially given to the thatchers to fix the leakages that she conceded to initially, and the fact that Ackerman had lived in the house for
thirteen years, the court found that Ackerman had known of the defects and that she had deliberately refrained from disclosing the defects to Beyers.

Judgment was accordingly awarded in Beyer’s favour.

_Pretoria East Builders 2004_

**Power of Attorney to act on behalf of owner**

**Summary**

On 29 March 2004 judgment was given in the Supreme Court of Appeal in an appeal from a decision given on 23 August 2002 by Webster J in the Pretoria High Court interdicting two Pretoria companies, Pretoria East Builders CC and Infogold Investments CC, from selling a Pretoria property, Erf No 6733, Woodlands Estate, Moreleta Park, Pretoria to anybody other than the respondent, and ordering them to give effect to a written agreement between the parties (1) by permitting the respondent to occupy the property immediately, and (2) by registering the property in his name.

The issue involved the enforceability of a contract for the sale of property belonging to somebody else. The respondent purchased the property from Pretoria East Builders CC for R890 000. However, the land was owned by Infogold Investments CC whose case is simply stated: it was the owner of the property; it was not a party to the sale; it is not bound by the sale; and it did not authorise Ms Badenhorst (the project manager of Pretoria Builders CC) to act for it as its agent, whether in the sale or for any other purpose. The counter-argument was that Infogold is bound to the sale as the undisclosed principal of its agent, Pretoria East Builders. The court found this counter-argument unsound.

It held that Infogold's knowledge, if it had such knowledge, that somebody else had sold its property would not be sufficient in the circumstances of this case for an inference that Infogold must have authorised the sale. The result is that whether or not it is permissible to hold an undisclosed principal to an agreement for the sale of land there is no evidence to show that the seller acted or was authorised to act on behalf of the alleged undisclosed principal. **There is therefore no basis on which to hold that Infogold is liable to the respondent in terms of the agreement of sale.**

Regarding the submissions made about the liability of Pretoria East builders, the court held that they were not liable to the respondent because no written agreement existed between them as required by section 2(1) of the Alienation of Land Act No 68 of 1981. It was not a contract of sale but a rejected counteroffer made by Pretoria Builders CC to sell the land to the respondent and to build a house on it.

Finally, the court found that Pretoria Builders CC could not be ordered to perform on the contract of sale, even if there was one, because Infogold refused to perform on Pretoria Builders CC's contract and sell the property. Thus an order for specific performance is futile and should not have been granted. An action for damages for breach of contract would have been a more appropriate remedy.

In the result, the appeal of both appellants was allowed with costs.
Immobilen

Clark v Faraday & Another 8 April 2004

Impairment and obstructing view

Summary
The applicant sought an urgent interdict to prevent his neighbour from building a home on his vacant erf on the grounds that it would "substantially impair and obstruct the view from [his] property and cause irreparable harm." He also contended that the building would be so objectionable that it would substantially derogate from the value of his property to such a degree that in terms of s 7 of the National Building Regulations and Building Standards Act, No 103 of 1977 ("the Act"), the local authority should have refused approval of the building plans.

It was common cause that the views from the applicant's property contributed to its value and that after completion the first respondent's new dwelling would impair these views and "derogate from the value". The first respondent stated that his new house would more than comply with the building regulations applicable to the area. And that, "were applicant to succeed in this matter, it would mean as a matter of logic that since his house was built earlier in time than the dwelling on the property in front of him, he could enforce more stringent requirements than those pertaining to the area in question, thereby obtaining for himself greater rights than he in fact has."

He submitted further that "... the approach of Applicant and the estate agents whose opinions have been presented to this Honourable Court are fallacious since they fail to take account of the obvious - namely, that Applicant's view was only temporarily unimpeded and the potential always existed that it would be impaired by the dwelling that would one day be built on First Respondent's property."

In his analysis of Paola v Jeeva, Van Der Westhuizen AJ pointed out that it was the failure to appoint a building officer in terms of the Act which was the necessary prerequisite to the exercise of the statutory power to approve building plans. This was not the case here. Applicant failed to show that the building was not constructed in accordance with the Building Regulations and Building Standards Act and other applicable law - Sections 4, 6(1) and 7(1) of the Act - and respondents' arguments were upheld.

The court lastly reiterated the principle that, "an owner (or occupier) of land who uses his property in an ordinary and natural manner is not guilty of committing an injuria (or nuisance), even if by doing so he causes damage to the property of others." So, no injuria = no prima facie right for an interdict.

Cohen & Another v Lench & Another 2007

Deals with the given “domicile address” and the requirements for a notice to cancel a contract to be properly delivered.

The seller and purchaser entered into an agreement of sale of immovable property. The agreement entitled the sellers to cancel should the purchasers breach any of the terms of the agreement. In order for the seller to cancel the agreement, the purchaser had to fail to remedy the breach within ten days of delivery either by pre-paid post or by hand of a written notice to the purchasers' "chosen domicilium" to do so. The purchasers' chosen domicilium was a unit in a gated townhouse complex.
The purchasers had committed a breach of contract because the failed to obtain the necessary guarantees from a bank to pay the purchase price of the property. The sellers cancelled the agreement and delivered a written notice to the purchasers' address to inform them of their decision to cancel. The sellers alleged that because access could not be gained to the unit they had attached the requisite notice to the perimeter gate of the complex and that this constituted delivery for the purposes of the agreement. At stake here was whether the notice of cancellation had been delivered in the prescribed fashion.

The Judge held that the chosen domicilium was not the townhouse complex, but a specific unit in the complex and that the notice to remedy the breach had not been delivered to such domicilium. The fact that the domicilium could not be reached because the perimeter gate was locked did not entitle the sellers to choose and alternative place for delivery, whether or not delivery at that place would ordinarily bring it to the attention of the addressee.

### Taljaard v Botha Properties 2008

**Summary:** Estate Agency Affairs Act 112 of 1976 - section 34A - estate agent not entitled to remuneration if functions performed in absence of fidelity fund certificate - client who pays remuneration in such circumstances not entitled to claim its return.

Justice RW Nugent said that section 34A of the Estate Agency Affairs Act which relates to fidelity fund certification and remuneration "was not enacted for the benefit of clients", because they "have incurred a contractual obligation to pay remuneration to an estate agent who has performed his or her mandate."

The Act, instead, is designed to "penalise estate agents who have breached the section" which "prohibits any person from performing any act as an estate agent unless a fidelity fund certificate has been issued to him/her."

In *Noragent (Edms) Bpk v De Wet*, it was held that this section does not have the effect of "invalidating the contract of mandate of an estate agent who acts in contravention of its terms." An estate agent who claims remuneration and does not have a valid fidelity fund certificate, however, is opening himself/herself up to criminal charges and if the commission hasn't yet been received, he/she may have a battle extracting it from a seller who refuses to hand it over.

Said Nugent (at Paragraph [7]), "An estate agent who claims remuneration in conflict with s 34A might expose himself or herself to criminal sanction and will be prevented from enforcing his or her claim, but I do not think it follows by necessary implication that a client who has settled his or her contractual obligation is accorded a right of action for its return."

He continued at [8], "It is well-established that legislation is to be construed so as to interfere as little as possible with established rights. While it might indeed seem anomalous that an estate agent is prohibited from enforcing a claim for remuneration that has become due, but may retain that remuneration if it has been paid, that apparent anomaly arises as no more than an incident of the purpose of the section. Had it been intended to confer a right of action upon a client for recovery of monies that became contractually due, it would have been a simple matter to do so in express terms. Absent the express conferral of a right of action I do not think it is conferred by necessary implication."

The Appeal was accordingly dismissed with costs.
Written agreement of an immovable property, whether the sales agreement complied with the requirements set out in section 2(1) of the Alienation of Land Act 68 of 1981, in circumstances where offer signed and delivered by offeree in incomplete form.

Involved business relations between the owners of supermarkets gave rise to this case. Simply put, the question to be solved was whether a signature on a blank page in a contract for the sale of land gave rise to the invalidity of the agreement.

Jajbhay J held that s 2 of the Act required that all material terms of an agreement must be reduced to writing for it to be valid. A term was material if the parties intended a particular aspect of their relationship to be governed by a special provision agreed upon by themselves rather than by the naturalia or the general principles of contract. As to the question whether the agreement had to be reduced to writing prior to signature, the court held that s 2 did not prescribe a particular procedure for the execution of a deed of alienation.

However, where the terms of the contract were required by statute to be embodied in a document and signed by a particular party as a manifestation of his assent to such terms, the later insertion of these terms, after signature on a blank piece of paper, could not constitute compliance. This is because “[21] On a proper construction of the Act, the offer had to be complete when the Fouries accepted and signed it or at least had to be signed by them in its completed form before they released it for delivery to the other party (cf Standard Bank of SA v Jaap de Villiers Beleggings). The fact that they signed two blank pieces of paper is fatal to the whole agreement. As Van Winsen J explained in Van Rooyen v Hume Melville Motors (Edms) Bpk: What defendant signed was not an agreement but a piece of paper. It is true that the placing on such piece of paper of a number of terms not embodied therein in writing at the time that the defendant signed the paper might in form turn the piece of paper into an agreement but it was certainly not an agreement when the defendant signed it and accordingly it cannot be regarded as an agreement having force and effect.”

[22] The invalidity of the agreement cannot be cured by the fact that the amended clause reflected the intention of the parties. The Fouries' signature did not perform the function which the provisions of the Act required them to perform, namely, to signify that the written offer to which the signatures pertained met with their agreement.

Shaik & others v Pillay & others [2007]

A valuable alert to pitfalls real estate practitioners may encounter when dealing with contracts for the sale of member’s interest relating to immovable property.

The facts, briefly summarised, are: P approached a well-known estate agency, X, with the view to purchasing a beachfront property in Durban. X subsequently received a mandate from Y (the developers) to market a new sectional development on the beachfront and advised P of the details. The units would be owned in close corporations and purchasers would buy the membership interest in a corporation.
P was eager to invest in the scheme and signed the standard agreement that X had furnished to him (in casu, the document headed agreement constituted an “Offer to Purchase”, since it was only signed by the purchaser). P then duly paid a deposit to Y’s conveyancers and complied with their requests for documents and guarantees.

Some two months later, P received a letter from the conveyancers advising that Y did not accept his offer. (Q, a purchaser of member’s interest relating to another unit in the same development, had a similar experience so the matters of P and Q were joined when the trial commenced.)

At the trial it appeared that Y mandated X to market the properties, to locate buyers and, once the agreements were signed, to present these to Y for consideration. At one of Y and X’s subsequent meetings, it transpired that Y had received some paperwork from X relating to the agreements that P had signed, but nothing concerning Q’s agreement. Y had no knowledge of the current correspondence between his conveyancers and P and Q. X suggested that Y sign the agreements but Y refused because the agreement with P “was in a mess” and (it seems) because they were unhappy with the purchase price offered.

It appears that initially the units had been sold for a relatively low price since the developers, Y, needed to raise R14 million for which Absa Bank undertook to finance the project. At the time the developers were presented with the agreements signed by P and Q, more money than was needed had been raised and Y’s threshold had been met. So, Y was in a position to increase the purchase price on the remaining unsold units.

The conveyancers confirmed a statement by the developers that their mandate included the opening of a sectional title register and the transfer of members’ interests in the close corporation to the purchasers. It did not include contracting on behalf of the developers, but they confirmed that their duty involved dealing with purchasers and advising them as to the status of the transaction. (The judgment does not mention who had sent the agreements to the conveyancers, but it appears that it was the agents, X, that sent them together with the instruction to attend to the transfer. The judgment is silent on the question whether the conveyancers noticed that the seller had not signed the agreements, or assuming that they had noticed: why they did not take steps to address this issue? However, it is clear that the two agreements were not signed by Y, the developers).

The court had to determine whether the documents signed by P and Q respectively (but not Y) constituted a valid and binding agreement. The court noted that the Close Corporation Act, 69 of 1984, does not require the sale of a member’s interest to be in writing, even if it does relate to immovable property. Yet, there never was any direct discussion between the seller and the purchasers and it can therefore not be said that the parties came to any oral agreement.

It could also not be said that it was the intention of the parties that the “standard agreement” would constitute a valid and binding contract between the parties, when signed by the purchasers only. An investigation of the evidence and the terms of the agreement showed that P and Q understood the respective agreements had to be signed by both parties in order to be valid. The court concluded therefore that it was clear that the intention was that both parties were to sign as a prerequisite for validity of the agreement. Since Y had not signed, no valid agreement came into existence.

Comments:
Where an individual instructs an agent with the view to purchasing a property, receives an agreement, signs it, pays a deposit timeously, furnishes guarantees to the seller’s conveyancers on the due dates as well as relevant documentation on request, he/she should have been reasonably able to assume that everything was in order and that the transaction would result in transfer.

There are lessons in this case for attorneys, conveyancers, estate agents and purchasers, among others:

• Estate agents should not instruct attorneys to transfer property (or cede shares in property owning entities) until they are certain that a valid and binding agreement has been reached between seller and purchaser.
• Conveyancers/attorneys should always check signature clauses in agreements, and should follow up if any uncertainty exists.
• Potential purchasers should, after making an offer, never assume acceptance. There should always be insistence on obtaining a copy of the signed agreement, or if a verbal agreement, on written confirmation of acceptance (or at least on verbal confirmation in the presence of reliable witnesses) of acceptance by the seller.

• Real estate practitioners sometimes tend to treat cession of shares/members’ interest agreements as if they are mere variations of ordinary property transfers. This is undesirable. Instead, one should remember that section 2 of the Alienation of Land Act (obliging a written agreement) does not apply to sales of shares/members’ interest, and that there are subtle, but vital, differences between the legal structuring of the two types of transactions. Although the legal objective is similar, the process to be followed in a cession of shares/members’ interest, differs markedly from the process of a transfer of immovable property.

Estate Agency Affairs Board v Neil McLaggan and Another (161/2004)

The lapsing of a Fidelity Fund Certificate upon conviction of an offence involving element of dishonesty: The court gave a wide interpretation to dishonesty as stipulated in the Estate Agency Affairs Act 112 of 1976, s 28(5)

The question is whether offences in respect of which an estate agent was convicted, involved an element of dishonesty such that his fidelity fund certificate lapsed or should be withdrawn. Dishonesty was indeed found to be an element of both these offences and the agent’s fidelity fund certificate having lapsed ipso facto as intended in s 28(5) of EAA Act.

The charges and the convictions of the agent:

In April 2002 the agent and the company were charged on 37 counts of theft in respect of employees’ tax deducted by the second respondent and not paid to the South African Revenue Service (SARS). In the alternative, they were charged on 37 counts in terms of paras 1 and 2(1), read with para 30(1)(b) of the Fourth Schedule to the Income Tax Act in that they had wrongfully and unlawfully used or applied the amounts deducted, or withheld employees’ tax (the amounts being set out in a schedule to the charge), for purposes other than the payment of these amounts to SARS.

The provisions of the Estate Agency Act that regulate fidelity fund certificates:

“26 Prohibition of rendering of services as estate agent in certain circumstances
No person shall perform any act as an estate agent unless a valid fidelity fund certificate has been issued to him/her and to every person employed by him/her as an estate agent and, if such person is-
(a) a company, to every director of that company; or
(b) a close corporation, to every member referred to in paragraph (b) of the definition of ‘estate agent’ of that corporation.

27 Disqualifications relating to fidelity fund certificates
No fidelity fund certificate shall be issued to-
(a) any estate agent who or, if such estate agent is a company, any company of which any director, or if such estate agent is a close corporation, any corporation of which any member referred to in paragraph (b) of the definition of ‘estate agent’-
(i) has at any time by reason of improper conduct been dismissed from a position of trust;
(ii) has at any time been convicted of an offence involving an element of dishonesty;
Provided that if in respect of any person who is subject to any disqualification referred to in this section, the board is satisfied that, with due regard to all the relevant considerations, the issue of a fidelity fund certificate to such person will be in the interest of justice, the board may issue, on such conditions as the board may determine, a fidelity fund certificate to such person when he or she applies therefor.

Section 28 deals with the withdrawal and lapse of fidelity fund certificates. It provides that the Board may withdraw a certificate in a number of specified circumstances. The subsection in issue in this case relates to the automatic lapsing of a certificate: s 28(5)(a) reads:

A fidelity fund certificate issued to any person shall lapse immediately and be of no force and effect if that person-

(a) becomes subject to any disqualification referred to in section 27 (a) (i) to (v); . . . .

Section 27(7) and (8) read:

(7) "No person whose fidelity fund certificate has been withdrawn in terms of subsection (1) or has lapsed in terms of subsection (5), may directly or indirectly participate in the management of any business carried on by an estate agent in his/her capacity as such, or participate in the carrying on of such business, or be employed, directly or indirectly, in any capacity in such business, except with the written consent of the board and subject to such conditions as the board may determine.

(8) No estate agent shall directly or indirectly in any capacity whatsoever employ a person referred to in subsection (7), or allow or permit such person directly or indirectly to participate in any capacity in the management or the carrying on of his/her business as an estate agent, except with the written consent of the board, and subject to such conditions as the board may impose."

The effect of these provisions, in summary, is that an estate agent cannot operate as such without a fidelity fund certificate (S 26). The certificate is issued by the Board, and may not be issued in certain circumstances, one of which is that the applicant has been convicted of an offence involving an element of dishonesty.

Section 28(5) of the Estate Agency Affairs Act 112 of 1976 (the Act) provides that an estate agent's fidelity fund certificate shall lapse if he or she "became subject to any disqualification referred to in s 27 (a) (i) to (v)' while s 27 (a) (ii) provides that an estate agent who "has at any time been convicted of an offence involving an element of dishonesty" is disqualified from holding a fidelity fund certificate.

In this case:

Dishonesty:

Cases dealing with dishonesty as an element of the offence in South Africa have tended to suggest that the element of dishonesty must be an ingredient of the offence.

In Ex parte Bennett, in dealing with offences committed under the Companies Act La Grange J said:

“What is an ‘offence involving dishonesty’? In its ordinary meaning dishonesty in this context denotes:

"Lack of probity: disposition to deceive, defraud or steal. Also, a dishonest act." (See Shorter Oxford English Dictionary, sv "dishonesty" 4.) In Brown v R 1908 TS 211 Solomon J said at 212 that in its ordinary sense "dishonest" involves an element of fraud. (Cf R v White 1968 (3) SA 556 (RAD).) In Words and Phrases Legally Defined (2nd ed by J B Saunders; 1976 Supplement at 57) there is a quotation from a judgment of the Canadian Supreme Court:

"... 'Dishonest' is a word of such common use that I should not have thought that it could give rise to any serious difficulty, but in construing even plain words regard must be had to the context and circumstances in which they are used: Canadian Indemnity Co v Andrews & George Co Ltd (1953) 1 SCR 19 at 24. However, to try to put a gloss on an old and familiar English word which is in everyday use is often likely to complicate rather than to clarify.
'Dishonest' is normally used to describe an act where there has been some intent to deceive or cheat. To use it to describe acts which are merely reckless, disobedient or foolish is not in accordance with popular usage or the dictionary meaning. It is such a familiar word that there should be no difficulty in understanding it. *Lynch & Co v United States Fidelity & Guaranty Co* (1971) 1 OR 28 per Fraser J at 37, 38."

In this context the word "involve" means to contain or include as a part, so that the expression "offence involving dishonesty" means an offence of which dishonesty is an element or ingredient - in the case of a common law offence in terms of its definition, and in the case of a statutory offence in terms of the statute which created it.

This approach was followed in *La Grange v Boksburg Stadsraad* and in *Nusca v Da Ponte* where the court held that illicit diamond dealing was inherently dishonest. Dishonesty is an ingredient of the offence if not a requirement. In *La Grange* Flemming J added that while dishonesty need not be a requirement of the offence itself, one must have regard at least to the actual conduct complained of in the charge sheet.

The court further found the offences committed as intrinsically dishonest. It is a deliberate misuse of funds. It is conduct that would be regarded by the public in general as lacking in probity.

The failure to pay over income tax collected from employees constituted a deliberate misuse of funds entailing a deception of the employees from whose salaries the tax had been deducted. It was also dishonest as far as the fiscus was concerned. Equally, the levying and receipt of VAT for any purpose other than paying it to the fiscus in accordance with the statute is inherently dishonest. If one of these offences is committed by an estate agent, his/her fidelity fund certificate would ipso facto result in the lapse as intended in s 28(5) of the Estate Agency Affairs Act 112 of 1976 (the Act). It was indeed conceivable that the context in which the offence was committed could render the conduct dishonest even where dishonesty was not an element of the offence itself.

The court found that there was no statutory discrimination against McLaggan, or anyone in his position, and that the disparity between s 27 and s 28(5), complained of by McLaggan, is justified. **The offences of which he was convicted involve an element of dishonesty, and his fidelity fund certificate lapsed automatically on conviction.**

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**NO 1 ESTATES CC v BAARD 2002 NR 378**

Plaintiff showed G property but thereafter no further communication between it and G. G ultimately bought the property after reintroduction by defendant. The first “introducing” agent claimed commission based on the principle of effective cause on the sale of an immovable property.

The court confirmed there must prove of both a contractual and a causal relationship to succeed: a contractual relationship mandating the agent to find a willing and able purchaser for or seller of an immovable property and a causal relationship between the agent’s mandated efforts and the property’s sale or purchase, as the case may be. The court finding that no sufficient causal connection existing between the plaintiff’s introduction and the ultimate sale. The plaintiff not discharging onus resting on it to prove effective cause; Claim was dismissed.
In October 1997 the defendant had mandated the plaintiff, an estate agent, to sell his property. On 7 October 1997 the property was shown to G but he had certain reservations and had not seen the property in detail. In the meantime G made an offer on another property, but this transaction fell through. On 24 November 1997 the defendant and G entered into a contract, subject to the condition that G would be able to obtain the necessary finance. G was unsuccessful, but in January 1998 he entered into a lease agreement with the defendant and occupied the property. A second agreement, similar to the first agreement, was entered into, but yet again G was unsuccessful in obtaining finance. Ultimately, in October 1998 and with the defendant’s assistance, G was able to raise the necessary finance and in February 1999 the property was registered in his name.

The plaintiff sued the defendant for commission, contending that it was by its introduction that G ultimately purchased the property.

It was well established in law that the plaintiff bore the burden to prove on a balance of probabilities that the introduction “operated up to the execution of the deed of sale and was, despite the intervention of (another cause)... its effective cause” (per Schreiner JA in Barnard & Parry, Ltd v Strydom 1946 AD 931 at 938). B Held, further, that the mere introduction of the eventual purchaser to the property, by a mandated agent may give rise to a prima facie inference that it was the effective cause the sale in circumstances where no other obstacle had to be overcome to bring the sale about.

Where nothing intervened to prevent the introduction from leading straight on to the sale, the introduction was not only a causa sine qua non for, but in all likelihood also the causa causans of the sale.

Whether such a prima facie inference of cause and effect may still be drawn once it was clear that in addition to the introduction there were a number of other competing causes for the eventual sale, must depend on the circumstances of each case and considerations such as the proximity in time between the introduction and the sale, Comparative and relative weight to be accorded to all the competing factors and influences that led to the final decision to buy the property on terms acceptable to the seller: the Court had to adopt a common sense approach and could not use a mathematical formula in order to determine whether the agent’s introduction was the effective cause.

One had to have regard to G’s conduct after plaintiff had introduced him to the property: when the transaction on the other property fell through, he did not approach the plaintiff to enquire about the property he had been shown: at that stage he was therefore not a willing buyer; he started making enquiries from friends and other agents about the availability of other properties.

G’s reintroduction to the property was the effect of a completely new unrelated chain of events: it would have happened even if he had never been introduced the property before; in that context, the plaintiff could not even claim that the initial introduction was a causa sine qua non to the sale; the reservations he had when he saw the property for the first time worked against a possible sale when the defendant reintroduced the property to him: it was only when he saw the parts of the property that he had not seen before and when his objections and concerns were addressed by the salesmanship of the defendant that he began to show interest.

Accordingly, in these circumstances it could hardly be said that the plaintiff’s instrumentality has been “in all the phases from the introduction to the sale consistent, uninterrupted and a major positive force working towards the successful conclusion of the transaction” as Marais J required in Aida Real Estate v Lipschitz 1971 G (3) SA 871 (T) at 874F.

Claim dismissed.
Part Three

Real Estate Terms and Terminology

This glossary of Real Estate Terminology is an easy to use, practical interpretation of a number of terms commonly used in the Real Estate industry.

A

**Abstract of Title:** A summary of the information obtained from a title search of property. Information sought from the records of the Deeds Registry include ownership and transfers, conditions, registered mortgages, leases and any other relevant encumbrances to title.

**Access Bond:** This facility allows you to deposit and draw Home Loan funds up to a predetermined amount.

**Acquisition Cost:** The total cost of acquiring an investment property, consisting of the purchase price plus other costs of acquisition such as closing costs, legal fees, title insurance, acquisition fees and due diligence costs.

**Administration Fee:** This is a monthly fee charged to cover the cost of maintaining your home loan account on the bank’s system.

**Affidavit:** A sworn statement and signing in front of a Commissioner of Oaths. It can for example be used as evidence in court or required to register transfer of ownership of immovable property and should be lodged at the Deeds Registry.

**Agreement of Sale:** A written agreement between seller and purchaser in which the purchaser agrees to buy certain real property and the seller agrees to sell upon terms of the agreement. Also called offer and acceptance, Offer to Purchase or sale contract.

**Alienate:** In terms of the Alienation of Land Act this means to sell, exchange or donate immovable property.

**Amount limit:** This is the limit up to which you may transfer funds from your home loan account to another linked account via electronic facilities.

**Annual Premium:** This is the premium payable once a year in respect of a life assurance or a homeowner’s insurance policy.

**Antenuptial Contract:** If a couple is married out of community of property, a copy of their antenuptial contract should be obtained in most property deals by the lawyers. This is a contract that is entered into before marriage and sets out the agreement made between them as well as what will happen to the couple’s property and money if they ever get divorced.

**Arbitration:** When parties in a dispute appoint an arbitrator to settle the dispute and that decision bounds the parties.

**Assessment:** This is the bank's assessed value of the property.

**Assessment Fee:** This fee pays for the administration work that accompanies a property assessment.

**Attachment:** A formal legal act whereby either the sheriff or the messenger of the court in terms of a “Writ of Execution” issued by a competent court, attach an object (moveable or immovable) in order to secure a judgment debt.

**Attestation:** Means to sign a document as a witness. The witness attests the signature of the signatory, thereby confirming that the signature that appears on a document is in fact the signature of the signatory.

**Auction:** A method of selling property (including immovable property) to the highest bidder.

**Audit:** An inspection that checks the accuracy and completeness of records.

**Auditor:** A financial professional registered in terms of the Auditors Act whose main function relating to estate agent’s business is to ascertain the proper management of estate agent’s trust accounts.

**Authority to Pay:** This is a document whereby authorisation is given to make payments for instance out of a home loan account. It forms the basis from which guarantees are issued.

B

**Balance:** This is the Home Loan balance reflected on the statement when the enquiry is taken and excludes accrued interest.

**BA Linked Rate:** Rate linked to 3 month BA SAFEX rate which can be monitored on an ongoing basis.
This option guarantees a fixed rate for three months. The rate will change every three months in line with the cost of short-term funding rates. This type of product normally has a minimum loan size and a maximum loan to value qualification criteria.

**Banks’ Criteria and Required Documentation:** The banks look at a ratio of interest being paid on a bond to your gross income. The maximum bond is typically limited to the amount which would result in this ratio being 30%. Banks require: 1) proof of income in the form of the most recent pay slip, certificate from their accounting officer or accountant, 2) 3 months’ bank statements or an income tax assessment, 3) Statement of assets and liabilities 4) Proof of identity of the borrower.

**Blanket Mortgage:** One mortgage on a number of parcels of real property.

**Board:** The Namibia Estate Agent’s Board

**Body Corporate:** The controlling body of a sectional title scheme

**Bona Fide:** In good faith.

**Bond:** See Mortgage Bond.

**Bond Cancellation Costs:** The bank advises the attorney of these figures. They comprise the outstanding capital amount and interest, plus any other costs required to settle the account in the bank’s books (Attorneys’ Fees, Deeds Office levy, Post and Petties). Note: in some cases bond cancellation costs may be paid by the bank taking on the refinancing business.

**Bond Registration Fees:** The fee charged for the registration of the home loan in the buyer’s name. These are the conveyancer’s fees, stamp duty and VAT. They are payable by the buyer to the attorney attending to the registration of the bond on behalf of the bank. Conveyancing fees and stamp duty are calculated on a sliding scale based on the bond registered.

**Bond Term:** This is the original term and conditions of the loan.

**Breach / Cancellation of contract:** A good contract should contain a breach of contract or cancellation procedure to make provision for cases where one of the two parties has failed to comply with his/her obligations under the contract and as a result the other party requires specific performance of the contract or else wishes to withdraw from the contract.

**Building Loan:** This is a loan applied for to build a house or to do structural improvements/additions to existing dwellings. Basically a mortgage loan which is paid out in specific proportions, on the progressive construction of a dwelling (house), over a specific period of time, and is secured by the completed development of an existing building. Progress payments are normally made against work completed and the project would normally be monitored carefully to ensure satisfactory completion. A valuator who specialises in building projects is usually entrusted with this duty.

**By-laws:** Laws enacted by local government or authorities like the City of Windhoek regarding advertising policies for estate agents.

**C**

**Caveat:** A Latin word which means warning; this warning is made by the Registrar of Deeds against a property and indicates a possible prohibition to deal with the property at hand. See also “interdict”.

**Canvassing:** The procedure whereby estate agents contact either the potential seller for a mandate to sell their property or the potential buyers to enquire whether he/she wishes to purchase property.

**Cede/Cession:** When the word “cession” is used it means the “transfer of rights” which is held under a Title Deed from one to another. Cession (such as the cession of a mortgage bond or servitude) is therefore the transfer of these rights, held under a title deed, from one person to another. This does not refer to the contract but rather the actual transfer. A Cession can also take place when a customer’s (mortgager’s) life insurance policy is ceded to the bank. The bank would hold the cession, while the insurance company would retain the policy document.

**Certified Copy:** A duplicate copy of a document stating that it is a true version of the original one.

**Certificate of Registered Real Right:** In case where a real right is registered (reserved) at the Deeds Registry in favour of a person, such person can apply in the prescribed form to the registrar for a certificate indicating the particulars of that real right.

**Certificate of Consolidated Title:** A substituting title deed in terms of which two or more bordering pieces of land owned by the same person have been consolidated into one property.

**Certificate of Registered Title:** Are in effect substitutive title deeds which are registered at the Deeds Registry in the place of deeds of transfer. To some extent they serve the same purpose, namely; they prove ownership but the difference being they do not effect transfer of ownership of the land.
Clearance Certificate: This certificate is required by law to proceed with transfer and states that rates and taxes to the applicable authority were paid in full. Proof of payment in the form of a clearance certificate must be obtained from the applicable authority where the property is situated.

Clearance Figures: The applicable authority in which the property is situated will usually provide a (clearance) figure (amount) which have to be paid before a clearance certificate can be issued. Clearance figures are usually requested for a period in advance, giving one enough time to register the transfer.

Close Corporation: A type of business which is an independent legal entity suited to small enterprises. The regulations as regulated by the Close Corporations Act for administration procedures are simple and more flexible comparing to companies.

Code of Conduct for Estate Agents: A set of rules drawn up by the Board to regulate estate agents ethical conduct. It is enforceable by law through committees appointed by the Board.

Collateral: This is the amount of security provided to secure the home loan.

Commercial Property: Property zoned and used for business, office or other commercial activities and not residential purpose.

Commission: Remuneration paid to an estate agent by his/her client for Estate Agency services rendered and normally a percentage of the purchase price paid by the seller to the agent.

Commissioner of Oaths: A person who can certify that a statement was made by the person who was supposed to have made it made by (affidavit) or a person who can certify that copies have been made from valid originals. For example; practicing lawyers, police officers, postmasters and bank managers.

Common Law: The law which applies automatically in the absence of legislation or contractual relationships. In Namibia our common law is based on the Roman Dutch Law.

Common Property: In relation to sectional titles, it means the land on which the building is situated, as well as parts of the building not included in the section/s

Company: Type of legal entity and registered business in terms of the Companies Act which is often referred to as a Pty (ltd). Shares in the company are privately owned.

Consolidation: This occurs where one owns two properties next to each other and would like them joined into one property. A new property description will be given and will be depicted on a Surveyor General Diagram.

Contract: A legally binding agreement between different parties. In the case of an agreement to sale immovable property, the contract must be in writing and signed by the parties.

Contract Price: This is a fixed amount of what a contractor quotes to complete a house according to the plans supplied to him, with possible escalation built in.

Conveyancing: Begins when the “Offer to Purchase” becomes a “Deed of Sale” (i.e. is accepted) and ends when the registration of the new bond and associated transfer of ownership into the new owner's name each take place simultaneously at the Deeds Registry.

Conveyancing Attorney: A specially qualified attorney who is permitted to handle the legal process associated with transfer of ownership of fixed property in Namibia and the registration of any bonds. The seller normally appoints the transferring attorney and the lending bank appoints the bond registration attorney.

Court order: A formal demand by a judge ordering someone to do something or to stop doing something.

Credit Bureau: A credit bureau is a clearinghouse for credit history information.

Credit Report / Profile: A report detailing the credit history of a prospective borrower. There are specific credit companies used by lenders in Namibia to assist in determine the borrower’s creditworthiness. These companies collate credit history on individuals and companies, which they obtain from various sources in the retail market pace and legal system. Your bank account history is another important source of credit information used by lenders in assessing your credit profile.

Credit Score: A statistical method of assessing creditworthiness. Credit card history; amount of outstanding debt; the type of credit used; negative information such as bankruptcies or late payments; collection accounts and judgments; too little credit history and too many credit lines with the maximum amount borrowed are all included in credit-scoring models to determine a credit score.

Deed of Grant: A Title deed whereby state/government land is transferred by the state to a new owner.
**Deed of Partition Transfer:** Deed giving effect to partition transfer of land where joint owners of a piece of land agreed to subdivide such land, so that each receives a defined portion of land, or an undivided share in such land OR where joint owners agree to redistribute such land, so that each receives a defined portion of land, or an undivided share in such land.

**Deed of Partition Transfer:** Where two or more persons own in undivided share a portion of land and in terms of a redistribution agreement, agreed that the land shall be portioned between them. This partition is then done by means of a Deed of Partition Transfer, registered at the Deeds Registry whereby each respective owner will then become owner of the land or shares therein as provided under the agreement.

**Deed of Sale:** Legal document containing a contract of sale whereby the seller sells to the purchaser. The deed also contains a description of the property and price and is duly signed and witnessed.

**Deed of Servitude:** A document drafted by a notary, containing a servitude agreement and is registered in the Deeds Registry.

**Deed of Transfer:** A document by means of which the right of ownership of land is transferred from one person to another. It also serves as proof of the owner's right of ownership over the land.

**Deeds Office/Registry:** This is a government department whose task it is to attend to the registration of transfers of immovable property and other real rights to immovable property. Particulars of all transactions registered in the Deeds Registry are stored in the Deeds Registry for safekeeping.

**Deed Office Registration Fees:** These fees are charged by the Deeds Office for registering the mortgage bond and title deed.

**Default:** Failure to meet legal obligations in a contract, including failure to make payments on a loan.

**Deposit:** This is the amount the customer has available to put towards the purchase of the property as a guarantee.

**Diagram:** An A4 size document which is drawn up by a surveyor, which is then submitted to the Surveyor General for approval, and which shows the boundaries and beacons of a property. A diagram depicts a small piece or small pieces of land and could include subdivisions or consolidations.

**Domicile Branch:** This is the branch where the customer's home loan account is held.

**Domicilium Citandi et Executandi:** This is a physical address where the delivery of legal notice will be accepted by a party to a written agreement.

**Dominant Tenement:** Property that carries a right to use a portion of a neighbouring property. For example, property that benefits from a beach access trail or pipeline servitude across another property is the dominant tenement while the latter property will be the servient tenement.

**E**

**Encumber:** To encumber means to place a financial or other burden on an asset. For example: When you permit a bond to be registered over your property, the property is “encumbered” by the bond.

**Endorsement:** Refers to the Registrar of Deed’s mark or endorsement (stamp) on a deed. Some may merely indicate a certain fact while other can effect transfer of ownership of the property.

**Equity:** This is the amount by which the value of a bonded property exceeds the amount owing on the loan.

**Estate Agent Introductory Commission:** This commission is paid by the bank to estate agencies for introducing home loan business to the bank.

**Estimated Cost:** This is what the bank's assessors feel the house would cost to build, based on prevailing building costs.

**Execute:** The term execute and “register” are synonymous. Two persons are concerned with the execution of a deed of transfer and a mortgage bond, namely; the conveyancer and the registrar of Deeds.

**Exposure of a Complex:** This indicates the number of units bonded to a bank as a percentage of the total number of units in the complex.

**Expropriation:** This is where the local authority (State) needs a portion or the entire property for its use. The Expropriation Act allows for expropriation where it is deemed necessary for public interest and stipulates that market related compensation must be paid.

**F**

**Finance:** Money loaned or advanced to enable the purchaser to pay for the property.
Finance Charge: This is the interest charged on the loan.
Fixed Interest Rate: This is when your home loan interest rate is fixed for a specified period.
Fixtures: An agreement of sale can also provide for special conditions, e.g. the wendy house, pool cleaner, TV-antenna, or anything else, may form part of the sale, or may be excluded from the sale. It is better to specifically mention what is excluded from the sale.
Franchise: Like in many other industries, it is also possible to carry on business in the name of an already established name (franchise). There will normally be an agreement with the holder company to enable the estate agent to operate under that name in a specific area in exchange for paying a “license fee”.
Freehold: This is when you own the property as well as the land it is built on in full ownership without any time limitations.
Further Advance: This is when you register a further bond over the property in order to obtain additional funds.

G
General Plan: A combination of diagrams on a single large sheet of paper on which more than one property is shown.
Grace Period: Period of time during which a loan payment may be made after its due date without incurring a late penalty. The grace period is normally specified as part of the terms of the loan.
Gross Income: Total income before taxes or expenses are deducted.

H
Habitatio: The servitude of habitatio confers on its holders the right to dwell (inhabit) in the house or land of another together with his family without detriment to the substance of the property.
Home Loan Application: An initial statement of personal and financial information required to apply for a loan. It can be made submitted in a variety of ways.
Home Loan Pledge: This is a certificate you receive from the bank before you start house hunting that details how much the bank is prepared to lend you. It is subject to normal credit criteria and a satisfactory assessment of the property.
Home Loan Protection Policy: This policy is used to cover the outstanding balance on your home loan account, where capital is repaid via normal instalments in the event of death, disability, retrenchment or dread disease.
Homeowner's Comprehensive Insurance: This policy provides cover for certain loss or damages to the property. These are specified in the policy document. This is normally compulsory.
Householders Insurance: This covers the risk of loss or damage to the contents of the house such as clothing, furniture, and appliances.
“Huur gaat voor koop”: “Lease goes before sale” The moment a tenant takes possession of a property in case of a short lease agreement (need not to be registered at the Deeds Registry), for the duration of the lease he/she will be protected by the Common Law rule “huur gaat voor koop”. This means that every subsequent of the lessor is bound by the lease as soon as the transfer of the leased property to him/her has been registered, irrespective of whether or not he/she is aware of the existence. The new landlord will basically step into the shoes of his predecessor, who in turn, is relieved of his/her obligations towards the tenant.
Hypothec: A way of establishing security over the land belonging to the debtor to secure payment of a debt.

I
Immovable Property: This term refers to property, fixed property, land (and everything attached to it) surveyed and plotted on a diagram, registered or to be registered in the Deeds Registry and can also refer to long-term lease (10 years +) or a registered leasehold.
Improved and unimproved land: A piece of land can be “unimproved” (meaning it is vacant – there are no buildings on it) or “improved” (there are buildings on it, such as houses, a block of flats, offices, and so on).
Improper Conduct: The grounds for improper conduct by estate agents are set out in the Estate Agents Act and Code of Conduct. Any person (including other agents or Board members) aggrieved by
the acts of an estate agent may lay charges of improper conduct against that agent before the Namibian Estate Agent’s Board.

**Income and Joint Income:** When applying for a home loan the monthly income should be consistent, regular and stable to sustain regular monthly repayments on the home loan. Joint income is the combined monthly income of those individuals who are purchasing a home jointly.

**Industrial Property:** Non-residential property zoned and used for industrial purposes like a manufacturing plant.

**Initiation Fee:** This is a once-off fee allowed in terms of the Usury Act to offset the cost of opening the account (to every new home loan granted).

**Insolvent:** A debtor who owes money to a creditor and is unable or refuses to pay the debt (by committing an act of insolvency in terms of the Insolvency Act) and whose estate is thereafter declared insolvent.

**Instalment Amount:** This is the basic monthly instalment amount payable on the home loan, excluding insurance or assurance premiums, where applicable.

**Instalment Status:** This is the status of the account, which is the difference between the balance and the balance limit.

**Interdict:** Court order that prohibits, restrains or forbids action regarding the immovable property. See also “caveat”.

**Interest Accrued:** This is the interest accrued on the daily balance outstanding – from the first day of the current month, up to the day before the enquiry was taken.

**Interest Rates:** Interest rates for home loans vary from Prime to 2,5% below Prime according to the bank’s assessment of the risk. The value of shopping around is demonstrated in the variation between the different banks when it comes to risk assessment. Important factors are the ability and the willingness of the borrower to repay the loan, the size of the bond, and that size in relation to the value of the property. For example, an 80% bond will attract a lower rate than a 100% loan. Investment properties are not as attractive to the banks as a property the borrower lives in. It is reasonable to assume “the bigger the bond, the lower the rate”, and “the smaller the bond, the higher the rate”.

**J**

**Joint Owners:** Refers to two or more people owning the same property in equal or different shares.

**Joint Estate:** Refers to the estate of a husband and wife married in community of property.

**K**

**Kustingsbrief:** A special type of mortgage bond which secures the purchase price or balance of the purchase price due to the seller. In other words; the seller of the land requires a bond to be registered in his/her favour over the land to secure the purchase price or balance, which ever the case may be, simultaneously with the transfer of the property to the new owner.

**L**

**Latent Defect:** This is a fault or flaw that is not immediately detectable, or is hidden from view on inspection of the property.

**Lease:** The right and duties of landlord and tenant are regulated by their contract of lease. The essential terms will be the undertaking by the landlord that the tenant shall have the use and enjoyment of the property thereby leased for a limited period of time in consideration for an undertaking by the tenant to pay a certain rent and to restore the property to the landlord on the expiration of the lease in the same condition in which he/she has received it, fair wear and tear only excepted.

**Leasehold:** Leasehold property implies qualified or limited ownership for a certain time after which the property reverts back to the owner.

**Levy:** This is the owner’s proportionate share of the costs incurred by the complex for the month.

**Lien:** A right of retention which is conferred on a person who has done work on another’s property or rendered a service in pursuance of a contract or who incurred certain expenses in respect of the other person’s property. He/she may then retain possession of such property until the debt is paid.

**Linking of Deeds:** Normally there would be at least three transactions in a set which need to be registered simultaneously. These three transactions can all be done with one conveyancer, or with three different conveyancers. To make sure that the above three transactions are registered
simultaneously, the conveyancers link and lodge simultaneously. Linking is done by means of numbering. This way the set can be registered at the same time.

**Life Cover**: Banks sometimes insist that home loan borrowers insure their lives and cede the policy to the lending bank. The amount of cover should be at least the amount borrowed. It is often referred to as a Mortgage Bond Protection policy. Premiums need to be added to the bond account monthly or annually.

**Liquidation**: The process whereby a company or close corporation is dissolved (winding-up) either on grounds of insolvency or other possible grounds.

**Lodgement**: This is when transfer and bond deeds are presented and formally handed in at the Deeds Registry for checking by officials for the purpose of registration of the transfer, bond or real right regarding immovable property.

**Loan to Value (LTV)**: This is the percentage the bank is willing to lend you, expressed as a percentage of the bank’s estimated value of the property and the loan amount required.

**M**

**Mandate**: This is an agreement between the seller and the estate agent to market the property.

**Marital status**: Refers to whether a person is married or unmarried, which provides an indication of the person’s legal capacity like ownership or signing capacity to immovable property.

**Market value**: The price a willing buyer is able to pay a willing seller on an open market on a specific date.

**Mortgage (or Bond)**: This is an agreement between mortgagor and the bank (financial institute), stating that the bank will lend a certain amount of money in the form of a home loan, and that the mortgagor will pay the bank back over a certain period, on a monthly basis, and at a certain interest rate. A mortgage signifies a special security over moveable property.

**Mortgagee**: The person or institution lending the money and who will subsequently hold the mortgage bond over the property.

**Mortgager**: The borrower of the money who needs to allow the registration of a mortgage bond over his property.

**Mortgage Broker or Originator**: An individual or company that arranges real estate financing for borrowers.

**N**

**Nominee**: A person or entity nominated or appointed by another to perform a specific duty. In the real estate context it happens that where sales agreements are sometimes drawn up and signed on the understanding that the property is not sold to the person but to the one who will be appointed by him/her.

**Non-resident**: This is a person whose normal place of domicile is outside the common monetary area (outside Namibia).

**Notary**: An attorney duly admitted and authorised to practice as such who draws up and attests contracts or deeds or other documents whereby real rights are created or conveyed. There is a high tradition of honesty, reliability and skills attached to the office of a notary. When a document is executed before a notary there is a presumption that every statement contained in the document is true and that all possible solemnities have been observed by the notary.

**Notarial Mortgage Bond**: Attested before a notary and registered over moveable property in the Deeds Registry in order to attempt to secure the position of the creditor for the satisfaction of a debt. The general exception governing all mortgage bonds also governs notarial bonds.

**Notarial Tie Agreement**: This is very similar to a consolidation of properties. Although the property descriptions does not change the two properties cannot be alienated separately.

**Notice of Default**: Written notice to a borrower that a default has occurred and that legal action may be taken.

**Null and Void**: A document (sales or mandate agreement) without any legal effect which cannot be enforced by any of the parties involved.

**O**

**Occupation**: More often than not the purchaser will move into the house some time before transfer is actually registered, giving rise to a situation where the purchaser is living in the home before the seller
has been paid. Occupation date is the date the buyer moves into the property and is normally agreed upon in the sales contract. To compensate for this occupation of the property before he/she is the owner, the purchaser pays occupational interest/rent, which is a form of rental that is payable for the right to use, enjoy and control the property. This is paid monthly in advance and the conveyances will refund to the purchaser in the final accounts, such unexpired portion of the month in which registration takes place.

**Occupational Interest (Rent):** This is paid by the buyer to the seller at an agreed amount, if the buyer decides to move into the property before transfer of ownership takes place. It is usually calculated at 1% of Sale Price or at an average rental amount for a similar property and is mostly negotiable.

**Offer to Purchase:** (also known as Agreement of Sale) An offer in writing from the buyer to the seller, which is usually prepared (or assisted) by the estate agent. It states the terms and conditions under which the property will be sold. Once signed by all parties it becomes a legal and binding contract between the seller and the buyer.

**Offeror and Offeree:** The offeror in sale transactions is the one making the offer to purchase and the offeree is the one to whom the offer is made or addressed to.

**Option to purchase:** An option is a written Offer to Purchase or sell property linked to an undertaking not to retract the offer for a specific period. An option therefore consist of two separate parts 1) an ordinary written Offer to Purchase *(containing all the essential conditions of a proper contract to purchase or sale land)* and 2) an undertaking by the optioner to keep the offer open for a particular period for acceptance by the optionee.

**Ordinary Loan:** This is a loan over property on which there is a dwelling and freehold rights apply.

**Outside Offer:** The outside offer normally forms part of the wording of the suspensive condition pertaining to the sale of the purchaser’s property and enables the seller, pending on the fulfilment of the suspensive condition, to market the property and receive written offers from other prospective purchasers (outside offers)

**P**

**Participation quota:** In relation to a section or the owner of a section in a sectional title scheme, means the decimal fraction determined in accordance with the provisions of the Act.

**Partnership:** An agreement between two or more persons (to a maximum of 20) whereby they agree to carry on in business in common. Partnerships are not governed by legislation but by common law and a partnership do not form a separate legal entity as such. Therefore partners are also personally liable for debts of the partnership.

**Possession:** This is the date when the risk in the property passes to the buyer.

**Power of Attorney:** In the context of buying a property; this refers to the seller giving the conveyancing attorney the power to act on his behalf at the Deeds Registry where only such specially qualified people may go to see to the registration of the change of ownership in accordance with the Deed of Sale. In the context of selling or otherwise “dealing” with property it is applicable where a principle authorises a third party to sell his/her land or otherwise deal with it.

**Pre-approval:** A lender’s informal commitment on a loan which enables the client to enter into negotiations with confidence. A pre-approval includes a preliminary screening of a borrower’s credit history. Information submitted during pre-approval is subject to verification at application.

**Pre-emptive Right/ Right of First Refusal:** This is the right to buy before anyone else. The current owner is because of such right bound to offer his/her property to the pre-emptor before he/she can sell to anyone else.

**Pre-qualification:** Pre-qualifying gives you a general idea of the client’s borrowing power. It is the process of determining how much money he/she may be eligible to borrow.

**Progress Payment Form:** This is a form signed and completed by the customer as building work progresses. The assessor does an inspection and releases the retention accordingly.

**Property Guarantee:** This is a written document issued by a bank that promises to pay to the person or financial institution named, the sum referred to on registration in a Deeds Office of the transactions mentioned in the guarantee.

**Purchase Price:** The purchase price is the amount of money the seller wants in exchange for his property. This is also the amount on which transfer duties and costs will be calculated on.
Rates: These are taxes levied on all property owners by the local government authority of the area that is your municipality for instance. Rates are included in the levy if you buy Sectional Title. Most authorities have an annual assessment which, by arrangement, you can pay monthly. As part of the change of ownership process, a "Rates Clearance" certificate must be obtained from the municipality/local authority. This is arranged by the conveyancing attorney. In order to obtain a clearance certificate rates need to be paid advance.

Re-advance: When you have repaid a portion of your home loan, you may borrow all or part of the loan amount.

Real right: A person’s right with regard to land with regard to immovable property. It refers to a person’s right to do something or to prevent something from being done with that land. In some cases it can also limits the right of the owner for example a mortgage bond or servitude registered over the property.

Registration: This is the process whereby ownership of the property is transferred from the seller to the buyer via a deed of transfer. A home loan will be secured at the Deeds Office as a mortgage bond.

Repayment Term: The length of your home loan repayment period with the financial institution. The longer your repayment period, the lower your instalments. The repayment period is normally 20 years.

Repo Rate: This is one of the credit management tools used by the Reserve Bank to regulate liquidity in Namibia (customer spending). The bank borrows money from the Bank of Namibia to cover its shortfall. The Bank of Namibia only makes a certain amount of money available and this determines the repo rate. If the bank requires more money than is available, this will increase the repo rate - and vice versa.

Repossession (or Foreclosure): Legal process by which a mortgaged property may be sold to pay off a mortgage loan that is in default.

Representative: A person acting on behalf of another either by virtue of an agreement or a power of attorney.

Resolution: If one of the parties to an agreement (property deal) is a company or close corporation, a copy of the resolution authorising the transaction should be obtained. It is an extract from the minutes of a meeting of directors or members in which either the decision was made to deal with the property or the authorisation was given to a specific person to attend to the matter.

Resolutive Conditions: Unlike in the case of suspensive conditions where the contract depends on the specific condition to actually form a binding contract; In the case of a resolutive condition, the contract is already binding but will resolve/terminate/end in the event when the specific mentioned events occur. In other words: there is already an existing and binding contract but it could be ended/terminated should a specific event occur.

Retention: This is the money retained by the bank in case of building loans and paid out once the bond is registered. Payments are made in the form of progress payments as work on your house progresses.

Reversionary right: This is a provision which provides that, on happening of a prescribed event, ownership of the property will revert to a previous owner, or if so expressed, to the heirs of the previous owner.

Safe Custody: This is placing the bond documents in a safe place once an instruction has been issued and the bond has been paid up.

Section: Can be either a specific portion of a building (a flat in a multi storey apartment block) or a building in itself (a townhouse). A section must be shown on the sectional plan and each section is given a unique number. The section number does not need to correspond to the flat/townhouse number.

Sectional Title: This is an entire complex (flats and townhouses) divided into individual units which are then sold separately. This is the opposite of Freehold.

Sectional Title Deed: A certificate of registered sectional title which is endorsed in terms of the act and proof of ownership of a sectional title unit.

Sectional Title Register: Means the register as filed in the Deeds Registry and includes any sectional plan registered under the act at the registry.
**Servitude:** A right belonging to one person over the property of another, giving the former some right or benefit in the property or prohibiting/limiting the owner from exercising his/her right in a normal way. Servitudes are registered against the title deed.

Example of a preadial servitude is a right to access which allows a local authority access to a property for inspection or installation of pipes, sewerage lines, electricity cables and so on.

Example of personal servitudes are Use, Usufruct and *Habitatio*.

**SG Diagram:** This is a Surveyor General’s diagram and shows sub-divisions, servitudes, expropriations and so on. It becomes a loan condition when the assessor cannot identify the property to be bonded, with the latest municipal map.

**Shortfall:** A shortfall arises when the bank’s estimate of what it will cost to complete the building work is higher than the contract price quoted by the builder.

**Sole Mandate:** This is an agreement between the seller and the estate agent to exclusively market the property. Once the agent is allowed to market the property, he/she has sole rights.

**Stamp Duty:** Stamp duty is a form of tax imposed by the government according to the Stamp Duties Act.

**Subdivision:** A legal and technical procedure whereby land is divided into two or more portions.

**Suspensive Condition:** This is a clause in the agreement of sale whereby the validity of the contract is made subject to the occurrence or non-occurrence of a future event. The two most common suspensive conditions that may occur in a contract of sale of land are 1) the approval of a loan for the purchaser and 2) the sale of the purchaser’s property. In comparison with the resolutive condition; in this case the contract is “hanging in the air” and will only become legally binding some time in the future when the specific mentioned condition is met or not met.

**Title:** Means any right in respect of land, whether it is the right of ownership or any real right.

**Title Deed:** This legal document (deed) is registered at the Deeds Office as proof of ownership of property. It is held by the owner of the property should no bond be over the property. It also indicates the rights of ownership with a full property description. The term Title Deed is therefore an umbrella term that refers to any registered deed whether it is a deed of transfer, a mortgage bond or a servitude.

**Timeshare:** This is a property development where occupancy time is sold. The bank does not grant loans for timeshare properties.

**Transfer Fees:** The conveyancer’s fees and VAT to attend to the transfer of the property in the Deeds Registry and related financial matters.

**Transfer Duty** are taxes levied by the government on the purchase/acquisition of immovable property and real rights in land and is calculated on the purchase/agreement price or in some cases the value of the property or real right acquired.

**Transferee:** Buyer of land

**Transferor:** Seller of land

**Trust Account:** A Bank account in which (trust) money is held by the account holder on behalf of another until the occurrence of a specific future event. Both lawyers and estate agents are by law obliged to keep a trust account and have several legal requirements to meet in terms of trust accounts which include the annual audits of these accounts. Trust accounts of estate agents must further have the following designation in the records of the bank (Name of Estate Agency business) “Trust account opened in terms of Section 32(1) of the Estate Agency Affairs Act, 112/1976” (“the Act”).

**Unit:** In relation to sectional title it means the section together with its undivided share in the common property.

**Unrehabilitated Insolvent:** An insolvent not yet being rehabilitated yet in terms of the Insolvency Act. Insolvents can be rehabilitated either by court order or automatically after ten years of being declared insolvent.

**Usufruct:** May be defined as a real right in terms of which the owner of land confers on the “usufructuary” the right to use and enjoy the land. A usufruct over a farm for example, will normally extend not only to all buildings but presumably also to the livestock, farming equipment and the furniture in the homestead, provided of course that a contrary intention does not appear from the will or agreement.
**Usus:** A servitude of *usus* resembles a usufruct, but the holder’s rights are far more restricted and not as broad as the case may be with Usufruct.

**V**

**Vacant Land:** This is a piece of land without buildings with a possible view to build in the future.

**Valuation:** A written estimate of a property’s current market value, completed by a knowledgeable person (valuator).

**Variable Interest Rate:** The official interest rate charged by the bank fluctuates according to the repo rate.

**Variation Agreement:** This states that the bank may change the interest rate.

**Voetstoots:** This clause is always found in a sale document and means “let the buyer beware”. All known defects must be mentioned to the buyer upfront. Always advise buyers to ask if they are not 100% sure of anything whatsoever. If there are any defects in the property of which the seller was unaware (or did not fraudulently conceal), the buyer will acquire the property with such defects.

**W**

**Waiver of Lien:** This is a legal document where a contractor waives his common law right to hold control over a property if he is not paid in full.

**Waiver of Usufruct or other Real Right:** A person in whose benefit a real right or a right to a real right is, is sometimes required by a potential creditor to “waive” that right as a pre-requisite for lending funds and the bond to be registered over the property. The real right will then be waived in favour of the mortgagee and subsequently endorsed as such on the title deed.

**Waiver in terms of Agricultural land:** A key component of the 1995 Agricultural Land Reform Act is the requirement that all commercial farmland sold must first be offered to the government for redistribution through its resettlement programme. This includes the sale of the land/exchange or otherwise disposal of the land for valuable consideration. In effect it means that no sales agreement/Offer to Purchase is valid until the land; is first offered to the state and if the state does not intend to purchase the farm, they issue a “Certificate of Waiver” in respect of the particular land. Only after a waiver is issued to the owner he may proceed to sell the farm to the prospective purchaser.

**Z**

**Zoning:** The local authority determines the purpose for which property may be used, for example, residential or business.
Part Four

Examples

1. Just listed and sold add/flyer

2. Buyer’s show house visitor’s book

3. Calculation of occupation interest and Body Corporate levies

4. Namibian Registration divisions

5. Deeds Registry flowchart

6. Buyer’s Cost Sheet

7. Sample instruction letters to conveyancers.

8. Diagram

9. General Plan

10. Sectional Title Plans