

THE NEWSLETTER WITH A DIFFERENCE

M.C. MONTHLY

Jan/Feb 2019 • Issue/Weergawe: 46 • Tel: 012 660 6000 • E-mail: info@mcvdberg.co.za • www.mcvdberg.co.za

Obtain your non-verifiable CPD Points today!

Visit our MCAcademy e-learning platform at www.mcademy.co.za

WITHHOLDING TAX!

**ETHICAL CODE
– EAAB**

**BONDS/VERBANDE:
FREQUENTLY ASKED QUESTIONS**

**EXPROPRIATION WITHOUT
COMPENSATION
- WHAT YOU NEED TO KNOW**

EXPROPRIATION WITHOUT COMPENSATION

- What you need to know

The draft Expropriation Bill was released on 21 December 2018.

This bill runs parallel with the process to amend the Constitution.

In terms of the bill it may be just and equitable for no compensation to be paid where land is expropriated in public interest. Public interest is defined as including the nation's commitment to land reform.

The bill states that the following categories of land may be considered (although it is not a closed group):

- 1) Land occupied or used by a labour tenant;
- 2) Land for speculative purposes;
- 3) Land belonging to a state-owned enterprise;
- 4) Abandoned land and
- 5) Land into which the state has already invested more than its value.

Below are the highlights of the bill:

- **Only the minister of public works can expropriate property, with or without compensation.**
- **Part of a farm could be expropriated, but the owner can then ask for everything to be taken instead.**
- **The state must make an offer to compensate – and a fair one.**

Expropriation can only come after unsuccessful negotiations. The draft law specifies that the power to expropriate may not be used before the state has "attempted to reach an agreement with the owner". The court may be approached if the owner does not agree with the offer.

- **Property must always be valued, whether or not compensation is paid.**

The draft law sets out in some detail how property valuation can and must be done. For instance, if an owner denies access to land for the purposes of valuation, the government can obtain a court order to access it, but must then enter only at reasonable times. Once on the property, valuers can drill holes, demarcate boundaries, and otherwise do pretty much anything necessary to pin down a price.

- **The state must give a detailed notice of intent to expropriate.**

The Expropriation Bill requires a notice of expropriation that includes the reason for expropriation, full detail of the property the state wants to take, and details of how to object.

- **Banks are first in line for compensation.**

The bond holder and the owner has to come to an agreement. If there is a dispute the state transfers the funds into trust with the Master of the High court, and any interested party can apply to court for an order.

- **The owner must maintain property until it is handed over – but can claim money spent back from the state.**

The bill requires an owner who remains in possession of property that has been expropriated but not yet transferred to maintain it – and failure to do so could see money subtracted from compensation. But at the same time the state is liable for "costs which were necessarily incurred" in maintenance.

- **Profits remain for the account of the private owner – but so do taxes.**

A former owner of expropriated property "who is in possession of the property" gets to use it as before, and gets to keep any income generated until formal transfer. But that former owner is also liable for municipal rates and taxes, and any other charge that would be normally due until date of transfer.

The public has 60 days to submit written comments on the bill to the Department of Public Works. There will most probably be quite a few amendments to this bill after comments are received and the process of getting the bill approved will take time. There is no need to panic and the fear of residential property owners within municipal areas that their houses will be expropriated are unfounded.



Written by/Geskryf deur: Sonja du Toit - Director

WITHHOLDING TAX

We often deal with clients that are either foreigners or non-residents. There should be a clear distinction between these two, as foreigners are individuals who do not reside in the Republic of South Africa. Non-residents on the other hand might be South African citizens, however due to their circumstances, they might be regarded as non-residents for income tax purposes.

Section 35A of the Income Tax Act 58 of 1962 was introduced to prevent non-resident sellers from selling immovable property without paying capital gains tax accruing to SARS. There is an obligation on a purchaser who pays consideration to a seller in excess of two million rand, to withhold a percentage of the purchase price and to pay this withholding tax to SARS directly.

In order to determine if withholding tax is applicable to your transaction, you need to determine if your client is a non-resident. There are two tests to determine residency: 1. the ordinarily resident test (ordinarily returns to the RSA) and; 2. the physical presence test based on the number of days a natural person is physically present in the Republic. With regards to the aforementioned, the individual should be physically present in the RSA for a period exceeding:

- 1) 91 days in total during the year of assessment;
- 2) 91 days in total during each of the 5 years preceding the year of assessment and
- 3) 915 days in total during the 5 years preceding the year of assessment.

It should be noted that even if the individual complies with the above but is outside the RSA for a continuous period of 330 days he will be regarded as a non-resident.

The following amounts should be withheld from the purchase price:

- 1) 7.5 % from the amount due in respect of natural persons
- 2) 10 % from the amount due in respect of a company and
- 3) 15 % from the amount due in respect of a trust.

This amount must be paid to SARS within 14 days after registration of the transaction. The obligation of the payment rests on the purchaser but there is a duty on the conveyancer as well as estate agent to inform the purchaser that section 35A is applicable. In practice the withholding tax will be paid to SARS by the conveyancer.

In order to assist our clients, we advise that the non-resident seller applies to SARS for a directive that no amount should be withheld.

Written by/Geskryf deur: Nicole Alberts - Director



The Consumer Protection Act and the Voetstoots

There is a popular belief that the **Consumer Protection Act 68 of 2008 (CPA)** has done away with the **voetstoots** clause that is contained in most agreements of sale of immovable property. This is however not the case and a distinction should be drawn between when the CPA is applicable and when it is not applicable to a particular transaction.

In terms of our common law the seller gives the purchaser an "implied warranty" against any defects. This allows the purchaser upon discovering a defect, to either claim a reduction in the purchase price or even cancellation of the transaction. This can have devastating consequences for the seller. The **voetstoots** clause is incorporated in a sale agreement to avoid a situation like this. The effect of this is that the purchaser purchases the property as is, in the current condition, nature and extent as inspected and accepted by the purchaser, from the date of signing of the sale agreement to date of the transfer. The effect of the **voetstoots** clause is that all patent defects and latent defects that the Seller was not aware of are the purchaser's liability.

The seller can however not always be protected with such a clause. If the seller is aware of a latent defect and deliberately concealed it with the intention to mislead the purchaser, the seller will not be protected by the **voetstoots** clause.

The CPA makes provision that a purchaser is entitled to receive property that is of good quality, reasonably suitable for the purposes for which it is generally intended, defect-free and safe. The CPA further provides for a 6 month period in which goods that does not meet above standards can be returned.

The CPA only applies when the seller is selling in the "ordinary course of business". A normal private sale between two parties will thus be excluded from the ambit of the CPA, and the **voetstoots** clause will be applicable in private sales.

Sale agreements between developers, builders and property investors and purchasers fall within the ambit of the CPA as these sales are in the normal course of the seller's business. These sellers will not have the protection of the **voetstoots** clause as the stipulations of the CPA will be applicable.

Written by/Geskryf deur: Ramona Michael - Director



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

Your Property Attorneys

We can assist you with: Transfer of properties • Registration and cancellation of bonds • Estate planning • Administration of deceased estates • Registration of companies
Purchase agreements • Rental agreements • Trusts • Wills • Antenuptial contracts • Notarial services

Ethical Code- EAAB

DUTY NOT TO MAKE MISREPRESENTATIONS OR FALSE STATEMENTS OR TO USE HARMFUL MARKETING TECHNIQUES

No estate agent shall:-

- 5.1 in his 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 wilfully or negligently, in relation to his 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 is not such an expert or does not have such special knowledge;
- 5.4 advertise or otherwise market immovable property in respect of which he has been given a mandate to sell or let, at a price or rental other than that agreed upon with the seller or lessor of the property.



Written by/Geskryf deur: Lorraine Beukes - Professional Assistant

FREQUENTLY ASKED BOND QUESTIONS/ GEREELDE VERBAND VRAE

WHAT IS A MORTGAGE BOND?

A mortgage bond is a form of security that is registered over immovable property (the property that you currently own or are in the process of purchasing). The purpose of a mortgage bond is to secure an obligation of a mortgagor (the debtor, i.e. the person registering the bond) in favour of a mortgagee (the creditor, i.e. the bank in this instance) to repay money that the bank has lent to you.

The mortgage bond creates a two-way relationship between yourself and the bank as it firstly establishes a contractual relationship by means of the loan agreement and secondly creates a real right that is enforceable against third parties when the bond is registered at the deeds office against the property.

WAT IS 'N VERBAND?

'n Verband is 'n vorm van sekuriteit wat oor onroerende eiendom (die eiendom wat u reeds besit of in die proses is om te koop) geregistreer word. Die doel van 'n verband is om 'n verpligting van 'n verbandgewer (u, met ander woorde die skuldenaar) ten gunste van 'n verbandhouer (skuldeiser, in hierdie geval die bank) te verseker om geld wat die bank aan u geleen het, terug te betaal.

'n Verband skep 'n tweeledige verhouding tussen u en die bank aangesien dit eerstens 'n kontraktuele verhouding deur die leningsooreenkoms vestig en tweedens 'n saaklike reg skep wat afdwingbaar is teen derdepartye wanneer die verband by die aktekantoor geregistreer word teen die eiendom.



Written by/Geskryf deur: Chanél Ferguson - Professional Assistant

WHAT OUR CLIENTS HAVE TO SAY / WAT ONS KLIËNTE SÊ

- ◆ Thanking you for all your diligence and frequent correspondence in getting us to this point of the process. Your professionalism and understanding have been greatly appreciated by us both.
- ◆ I just wanted to thank you for your great service. My clients were also very impressed when they visited your office in Centurion to sign. They were grateful that you made the effort to meet them face to face. This made them feel appreciated and not just another number.
- ◆ Ek is beïndruk met die professionele diens wat jy gelewer het en wil my waardering daarvoor uitspreek, veral gesien in die lig dat dit oor landsgrense plaasgevind het.
- ◆ Ek wil jou graag bedank vir al die harde werk en moeite om ons koop te vergemaklik. Ons het dit so geniet om met julle te kan werk. Dankie vir al die eposse en verslae en "updates". Dit het dinge vir ons baie makliker gemaak en ons gerus gestel. Dankie vir die spoedige registrasie ook. Dit was baie aangenaam om saam julle te werk en julle sal verseker ons eerste opsie wees met ons volgende kopie.

Welkom by die eerste uitgawe van MCMonthly in 2019.

Ek is vol vertroue dat 2019 vir ons almal 'n uitstekende jaar gaan wees wat net positiewe beloftes inhou.

Op 'n nasionale vlak is die een ding, wat ek glo soos 'n paal bo die water uitstaan, dat Suid-Afrika aan die begin van 2019 op 'n baie beter ekonomiese en politieke plek is as 'n jaar gelede. Ons was aan die begin van verlede jaar nog onder die diktatuur van die groot korrupte kleptokraat. Sedertdien het ons 'n nuwe president wat lyk asof hy die korrupsie wat ons mooi land lamlê, met hand en tand wil beveg.

Ons het natuurlik die naderende verkiesing wat waarskynlik 'n bietjie opwinding en onstuimigheid sal veroorsaak, maar ek is seker alles sal mooi en vreedsaam verloop.

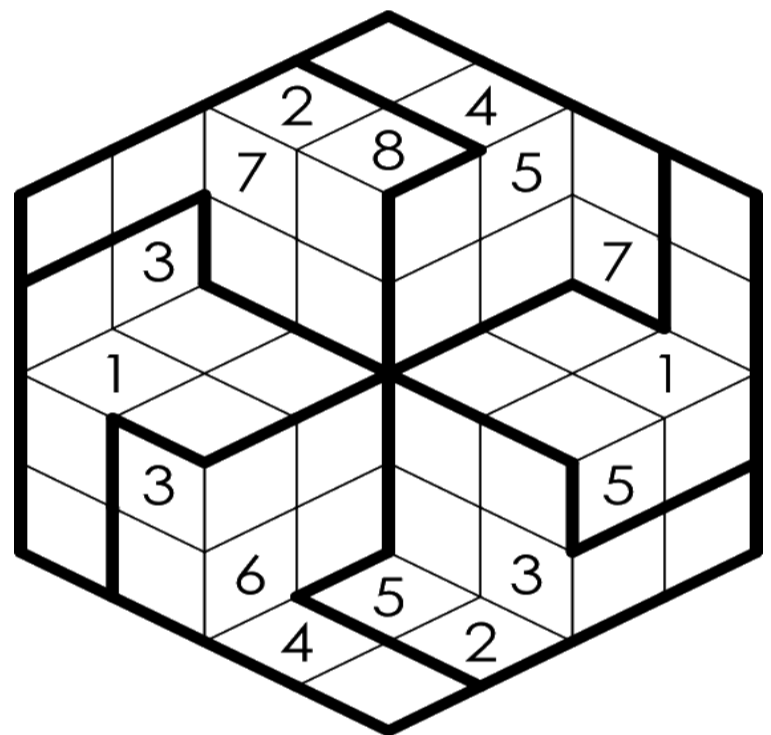
Ons staan ook op die vooraand van die inwerkingtreding van nuwe wetgewing wat die eiendomsindustrie gaan reguleer. Dit gaan verskeie nuwe aspekte en vereistes daarstel wat opsigself 'n uitdaging gaan wees.

En dan het ons natuurlik die krieket- en rugby wêreldbekers om na uit sien. Ons hoop die Proteas en die Bokke maak ons trots.

Ek hoop elkeen van julle sal 'n wonderlike jaar van sukses, goeie gesondheid en vrede hê.



SUDOKU



Boereraat verbruikers-wenke: Ketels

- * Aanpaksels aan 'n ketel se element kan verwyder word deur te kook met asyn.
- * Plaas ketel in vrieskas totdat kante gevries is, sodra dit ontdooi kom die aanpaksel af.
- * Vir die aanpaksel in jou ketel, gooi een pakkie of 3 eetlepels wynsteensuur by, kook en spoel ketel uit. Dis onmiddellik skoon.
- * Voorkom aanpaksel deur 'n glas albaster permanent in die ketel te gooi.
- * Vul nuwe ketel met helfte wit asyn en helfte water. Kook en laat oornag staan. Spoel die volgende dag uit met skoon water.



Werknemer van die maand

Anriëtte van Biljon het in Januarie 2017 by die firma begin as Kandidaatprokureur.

Sy het intussen haar prokureursexamen met lof geslaag en is in Maart 2018 toegelaat as prokureur en in September 2018 as aktevervaardiger.

Tans werk sy as junior prokureur by ons firma en is daar 'n blink toekoms wat vir Anriëtte voorlê.



Anriëtte van Biljon - Professional Assistant

We can assist you with:

*Transfer of properties • Registration and cancellation of bonds • Estate planning • Administration of deceased estates • Registration of companies
Purchase agreements • Rental agreements • Trusts • Wills • Antenuptial contracts • Notarial services*