

# *MCPurchasersGuide*

*Revised October 2022*



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

Your Property Attorneys

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**Legal indemnity – M.C. van der Berg Incorporated compiled this MCPurchasersGuide to provide general legal information regarding the purchase of immovable property. It must not be construed as being advice applicable to your specific transaction. Furthermore, it does not bind us, the banks, or any other party. Changes in legislation, procedures and processes are frequent and readers are advised to contact us to ensure they obtain advice that is correct and up to date.**

## 1. Introduction

M.C. van der Berg Inc. provides this MCPurchasersGuide free of charge with the purpose of introducing our firm and supplying important information to you, the prospective purchaser. This guide will assist estate agencies to comply with their obligations in terms of the Consumer Protection Act (CPA) as well as the Property Practitioners Act (PPA).

There are pitfalls that many purchasers are not aware of, which will not only frustrate them, but can also cost them dearly. This document informs and assists purchasers in complying with their legal obligations.

**The MCPurchasersGuide should be read before you put pen to paper and make an offer to purchase.**

You can also contact us to guide you when facing the labyrinth of laws, rules, regulations, and contractual requirements that accompany a property purchase.

## 2. M.C. van der Berg Incorporated – An Introduction

**M.C. van der Berg Inc. Attorneys, Conveyancers and Notaries is a well-established law firm specialising in property law since 1999.** While our head office is in Centurion, we also have satellite offices in Midstream and Garsfontein (Pretoria East). Our company mainly conducts business in the greater Pretoria, Centurion, Ekurhuleni, Midrand, Johannesburg, and surrounding areas.

**The primary focus of our practice to give legal advice pertaining to property law, drafting agreements, attending to property transfers as well as registration of new bonds and cancellation of existing bonds.**

*We also attend to the registration of trusts, estate planning, drafting of wills, administration of deceased estates, registration of ante-nuptial contracts and other notarial services.*

In our view, feedback is the backbone of good customer relations and service excellence!

**M.C. van der Berg Inc. undertakes to attend to the transfer of your property in a professional and diligent manner and keep you informed with relevant and contextualised feedback on a regular basis.**

*For more information on M.C. van der Berg Inc. please visit us at [www.mcvdberg.co.za](http://www.mcvdberg.co.za).*

## 3. Terminology

### 3.1. Attorney description

**Attorney:** A person who is admitted by the High Court as an attorney and practises law.

**Conveyancer:** An attorney who passed an additional exam and is admitted by the High Court as a conveyancer and who specialises in property law.

### 3.2. Contract terms

**Offer to purchase (OTP):** This is a signed, written offer that the purchaser makes to the seller to buy a property. It specifies all the conditions relating to purchasing the property.

**Purchase agreement:** Once a seller accepts the offer to purchase (OTP) by signing the OTP, it becomes the purchase agreement. This is also known as a 'deed of sale' or contract.

### 3.3. Estate Agency terms

**Estate agent:** The person instructed and authorised to market your property, advising on all aspects of the transaction to facilitate the successful sale of your property.

**Estate agency:** The business the estate agent works for. Also known as a business property practitioner.

**Candidate estate agent:** A person who is authorised to operate as an estate agent, although not fully qualified.

**Property Practitioners Act (PPA):** Act 22 of 2019: Legislation regulating the Property Practitioner industry since 1 February 2022.

**Property Practitioner:** Various role players in the property sector, as defined by the PPA. An estate agent and candidate estate agent fall within this description.

**Property Practitioners Regulatory Authority (PPRA):** Property Practitioners' governing body. This is also the statutory body who will facilitate disputes between Property Practitioners and the public.

**Fidelity Fund Certificate (FFC):** A certificate issued by the PPRA to every estate agent and estate agency which certifies they comply with all legal and training requirements set by the PPRA. Every estate agent and agency must hold a valid FFC to operate as such. It is your right as a purchaser to request the agent's FFC for verification purposes.

**Code of Conduct:** Legislation which requires certain practical and ethical standards from Property Practitioners. An abbreviated version of the [code of conduct](#) can be found on our website.

**Registration:** An administrative act that takes place at the deeds office. The following transactions, if applicable, are registered simultaneously on a specific date at the deeds office: transfer, bond registration and bond cancellation.

#### 4. Choosing an Estate Agent

**Using an estate agent can have major advantages when purchasing your dream property. Do not underestimate the value that a good estate agent can bring to the table.**

An estate agent may not operate without a valid FFC. Estate agents are required to comply with certain educational and training requirements which means that an estate agent holding a valid FFC should be able to deliver professional service, complemented by their marketing, legal and ethical background. Agents should on request show their valid FFC to you. Estate agents must act in accordance with their code of conduct.

If the estate agent assisting you is a candidate estate agent, a fully qualified estate agent with more than 6 month's experience must supervise him/her when documents are completed and signed.

Estate agents have a general duty of care to provide information aimed at consumer confidence and empowerment thus limiting the risk to the purchaser. The PPA and Consumer Protection Act (CPA) also require that estate agents promote consumer awareness by providing information and encouraging responsible and informed consumer choice and behaviour.

#### 5. Understand the offer you are about to make

To create a valid and enforceable contract you will be required to make a written offer to purchase the property, which in turn will have to be accepted by the seller in writing.

Agreements of sale of immovable property will **not be valid** if they are signed electronically and therefore must be signed with a pen (wet ink).

The offer itself will become the contract on acceptance by the seller. Once your offer is accepted by the seller you are bound by the agreement, and you cannot escape the consequences and obligations contained therein, unilaterally amend the terms and conditions thereof or unilaterally cancel the agreement.

The purchase agreement is the parties' instruction to the transferring attorney and the transferring attorney must keep both parties to the terms thereof and cannot deviate from it.

One of the benefits of using a qualified estate agent, is that they will introduce pro-forma documentation that should be compliant and adequate to protect both the seller and purchaser. The problem with some standard pro-forma offers to purchase is that they are outdated and incomplete.

**The concern is often not what the agreement states, but rather what it does not state.**

Numerous estate agencies use documentation drafted by this firm, and which contains our firm's details in the footer. Although our documentation is up to date and drafted correctly, it is merely an attempt to regulate a standard transaction and may need to be tailored to your specific transaction. The estate agent will be able to assist with this, but if you are not making use of an estate agent, contact us for assistance.

**You must understand the terms of the agreement before you make an offer to purchase. Once your offer is accepted you will be bound to the offer you made.**

**Take note of the legal principle – *Caveat Subscriptor*: Be aware the signatory! You will be kept to what you sign! You cannot plead ignorance.**

## 6. The rules of the contract

Be mindful of the following important aspects which are usually contained in the OTP:

### 6.1. **Pro forma agreements usually contain a “memorial” or “entire agreement”- clause stipulating that the purchase agreement constitutes the complete and only agreement between the seller and the purchaser.**

Ensure that all the terms and conditions important to you are set out in the offer. Keep in mind that an estate agent's pro-forma OTP is a recordal of the typical clauses in the average property transaction. Any other terms should be entered as a special condition in the offer.

Do not make or accept any verbal undertakings, warranties, or terms as these will be unenforceable. Ensure that the purchase agreement contains this clause to indemnify yourself against possible claims resulting from verbal undertakings or guarantees.

### 6.2. **Pro forma agreements usually also contain a “non-variation” clause stipulating any amendments, deletions and variations to the purchase agreement must be in writing and signed by both parties in an addendum before they are valid and enforceable.**

Do not rely on verbal amendments, deletions, and variations to the purchase agreement, as they are not enforceable!

## 7. Pre-qualification

If you are funding the purchase of the property via a bank loan, it is sensible to establish the loan amount for which you qualify. This can be done by contacting your personal banker or a bond originator. The estate agent can also refer you to a bond originator. The advantage of a bond originator is that your application can be submitted to various banks simultaneously, giving you the option to choose the best offer.

A bond originator acts as an intermediary between the purchaser and the bank by applying for a loan on your behalf and can assist you with a pre-qualification to establish for what loan amount you will qualify. Bond originators are remunerated by the banks and this application will therefore be free of charge.

## 8. The Purchaser entity

It is important to consider the nature of the purchaser entity. The property can be bought by a natural person (human being) or multiple natural persons (regardless of whether they are married or not) as well as any number of juristic persons (company, close corporation, or trust).

Although the initial cost of transfer of the property into either a natural- or juristic person's name will be the same, there may be tax and other consequences during the subsistence of the ownership as well as at the disposal thereof. In most instances it is advisable for purchasers to register a primary residence in their personal names as it is beneficial for capital gains tax (CGT) purposes when they dispose of the property. This may, however, be detrimental if the purchaser has a high-risk profile such as a businessperson. It is advisable to obtain proper legal, financial and estate planning advice when considering the purchaser-entity.

**Estate planning is essential, especially when you are purchasing property other than your primary residence.**

## 9. Purchase Price

The purchase price in the OTP must reflect the true and full amount offered, inclusive of commission payable to the estate agent (payable by the seller). The purchase price forms the basis on which various forms of tax e.g., transfer duty is calculated when you purchase the property and capital gains tax on disposal of the property.

Adjusting the true price by paying a portion of the purchase price in cash directly to the seller to save transfer duty is tantamount to tax fraud. It could also cost you dearly when you dispose of the property in future as the base cost for the calculation of capital gains tax is lower than the true purchase price paid for the property.

It is also not advisable to include the transfer costs (see para 17 below) in the purchase price. If this is the case, it must be declared to the bank, as future bondholder, on application for the loan. Banks generally prefer not to fund the transfer costs. It is referred to as a “loaded deal” and may result in the bank withdrawing the loan when they become aware of the situation, unless approved on application.

In exceptional cases the banks may approve a higher loan amount to include a percentage of the transfer and bond fees in the loan (some banks have a cost inclusive offering for first time purchasers). In these cases, the true purchase price must still be reflected in the agreement of sale, but the loan application amount must indicate that you will apply for a higher amount to include a portion of the costs (note that the bank will not include all bond and transfer costs and provision must still be made for the balance).

## 10. Transfer duty

Transfer duty is a tax levied by the government when a person obtains (e.g. purchase) immovable property (houses, stands or sectional title units). Transfer duty is calculated on the value of the property but only above a threshold set by the Minister of Finance. Transfer duty increases incrementally with the value of the property above this threshold.

The Minister of Finance may amend transfer duty from time to time. You will find updated transfer duty rates on our ‘MCostCalculator’ on our website at [www.mcvdberg.co.za](http://www.mcvdberg.co.za).

The transfer duty must be paid to the transferring attorney before the documents can be handed to the deeds office to be registered. Even if the transaction falls below the abovementioned threshold or is otherwise exempt, documentation must be submitted to SARS and a receipt must be obtained to be submitted to the deeds office. Purchasers must ensure that they are aware of the amount of transfer duty they will be liable for before they enter into an agreement.

In some instances, a Purchaser will be exempted from paying transfer duty. The most common example is a transaction where a seller is registered for

Value Added Tax (VAT). The price will then include VAT and the seller will then be liable to pay VAT. Another instance where transfer duty is not payable is if the property is inherited or if the property is obtained through divorce order.

**Please note that SARS charges 10% penalty interest per year on the transfer duty amount if the transfer duty is not paid to SARS within six months of date of signature of the purchase agreement.**

Our pro forma account will indicate the transfer duty amount that a purchaser needs to pay.

## 11. Provision of the purchase price

The agreement should clearly specify the source of the funds used to pay the purchase price and the timeframes within which the funds or guarantees must be paid or delivered.

### Source of Funds:

#### 11.1. Cash

You can settle the purchase price by paying the full purchase price or a portion thereof in cash. “Cash” is used in reference to an electronic fund transfer (EFT) to the transferring attorney. Never pay any money directly to the seller.

Ensure that the agreement allows for sufficient time to transfer the funds. The OTP should also authorise and instruct the transferring attorney to invest the funds for the benefit of the purchaser.

#### 11.2. Mortgage loan (Bond)

You can fund the full purchase price or a portion thereof with a loan from a bank.

You can either apply for a bond through your personal banker or a bond originator. Protect yourself by making the agreement subject to the successful approval of the loan.

#### 11.3. Investment

If you prefer not to pay invested funds over to the transferring attorney's trust account, indicate in the agreement of sale that you will deliver a guarantee against such investment.

Even though purchasers often earn more interest in their own investment account than in the investment account of the transferring attorney, the cost involved in issuing the guarantee from the investment account often surpasses the additional interest earned.

#### 11.4. Sale of your current property (Subject-to sale)

You can also fund the purchase price (or a portion thereof) from the proceeds of the sale of another property you own.

If this is the case, protect yourself by making the offer subject to a suspensive condition that the property must be successfully sold.

### 12. **Suspensive conditions**

Sale agreements usually contain one or more suspensive conditions. The sale agreement will not be enforceable and binding if these suspensive conditions are not fulfilled completely and timeously.

Any deviation from the terms of a suspensive condition must be addressed in an addendum **before its due date**. Together with the estate agent, we monitor these dates carefully and negotiate and formalise any amendment to the existing conditions.

A sale agreement typically contains two types of suspensive conditions, namely the mortgage loan and clauses pertaining to the sale of another property.

#### 12.1. Suspensive condition: Mortgage Loan

Purchasers seldom have the resources to pay cash when purchasing a property. Therefore, a sale agreement will often be made subject to the approval of a mortgage loan.

Approval of a mortgage loan will usually not take longer than a month, but circumstances may dictate a longer period. Each case should be assessed on its merits.

The period allowed for the approval of a mortgage loan must serve both parties. On the one hand, it needs to be sufficient to give you fair opportunity to obtain a loan, yet on the other hand it should not disadvantage the seller by removing the property from the market for a prolonged period.

Be mindful of whether the time allowed for bond approval in the agreement is calculated as 'business days' or 'calendar days' (if not a fixed date).

**The purchaser must immediately after the offer is accepted start with the loan application process.**

The National Credit Act (NCA) requires that the borrower must accept the quotation made by the bank as far as it applies to the bond amount, expenses, interest, and repayment period. The purchaser must ensure that he/she accepts the quotation from the bank on or before the due date as set out in the purchase agreement.

## 12.2. Suspensive condition: 'Subject to the sale of another property'

A purchaser or the bank granting the loan often, for various reasons (e.g., affordability or availability of funds), requires that a currently owned property or a property owned by a linked person (spouse) or entity (e.g., trust or company) must first be sold and/or registered.

**If an OTP is made subject to the sale of a removed property, ensure that it is effectively dealt with in the purchase agreement to protect both the purchaser and seller.**

If an offer is subject to both the approval of a bond and the sale of a property, do not delay bond application and approval until the sale of that property. It is important to establish whether you qualify for a loan as soon as possible.

Ask us or your estate agent to assist you in wording the condition as it is technical in nature and often causes discord between a seller and a purchaser if not worded correctly.

## 13. Types of property

We broadly distinguish between two types of property:

**Full title property**, also called 'freehold' or 'conventional property', refers to sole ownership of a stand or erf e.g., Erf 1 Brooklyn. The boundaries of the erf are indicated on a general plan or diagram approved by the Surveyor General. No reference is required to what is attached to the erf. Everything that is planted or built onto the erf forms part of the erf.

**Sectional property** refers to sole ownership of a 'section' in a sectional title scheme together with joint ownership in common property. The 'section' refers to the house you are going to occupy. Unlike as in the case of full title property, the owner of a section does not become the sole owner of the land adjacent to the section but co-owns it in undivided shares together with all the other owners. This is referred to as 'common property'. 'Exclusive use areas' can be allocated to the section which will give the owner of a section the sole use of that portion of the common property.

Our [MCSectionalTitleGuide](#) provides more useful information on sectional title scheme.

## 14. Community Schemes – Sectional Title Body Corporate and Homeowners' Association (HOA)

The property you are purchasing may be situated in a community scheme. A Community scheme is any scheme or arrangement in terms of which there is shared use of and responsibility for parts of land and buildings, including but not limited to a sectional title scheme, a homeowners' association (HOA), or a housing scheme for retired persons. It may even be that a specific property is part of multiple community schemes for instance a sectional title scheme within an estate controlled by an HOA.

Community schemes have rules to facilitate the safety, use and enjoyment of the property by all owners and occupants. This may however infringe on your envisaged use of the property, for instance, if you planned to operate a business from the property and the rules do not allow this, or you would like to have a pet, but it is not permitted. Establish if the property is subject to management and/or conduct rules of a body corporate in a sectional title scheme and/or homeowners' association and familiarise yourself with the rules before making an offer.

The estate agent should be able to provide you with a copy of or a web link to the rules of the community scheme.

If the property is situated in a community scheme the owner will become liable for a monthly levy from date of registration. Ask the estate agent what this levy amount is. Also establish if any special levies are imposed and if buy-in levies are charged. Ascertain the financial position of the body corporate by requesting the latest financial statements from the body corporate. It is not advisable to buy into a sectional title scheme which is not financially sound.

## 15. Occupation and occupational rent

The term '**occupation**' refers to the date on which a seller is obliged to give vacant possession of the property to a purchaser.

The occupation date can be on date of registration or another pre-determined date before or after registration. The parties must agree to the occupation date in the agreement. Once agreed the parties are contractually and legally bound to this date. The occupation date can only be amended by agreement in an addendum.

**The parties should contractually agree on the requirements that must be in place before occupation can take place. Examples of such requirements are obtaining loan approval and paying the deposit. M.C. van der Berg Inc. will monitor the process and ensure that the requirements are met before the purchaser takes occupation.**

**Neither the transferring attorney nor the estate agent can agree to the amendment of the occupation date or the occupational rent amount or to the waiver of any of the conditions for occupation.**

'*Occupational rent*' refers to the amount payable by either party occupying the property while it is registered in the name of the other party. It will usually be the purchaser who will pay occupational rent to the seller if the property is occupied before date of registration, but if the seller remains in the property after registration the inverse will be true.

There is no established rule or fixed percentage occupational rent payable, thus the parties can negotiate and agree on any amount. We suggest that you negotiate the amount of occupational rent in the purchase agreement, even if the occupation date is set for registration.

A purchaser cannot open a utility account at the local authority in his/her name before registration, therefore the seller will remain liable for payment of the utility account until registration. The parties must therefore come to an agreement for the purchaser to reimburse the seller for consumption.

## 16. Fixtures and fittings

Distinguish between the terms 'fixtures' and 'fittings'.

**Fixtures** are items that form part of the property and may not be removed by the seller, e.g., curtain rails and swimming pool equipment. Fixtures are sold with the property.

**Fittings** are regarded as items that do not form part of the property, and the seller can take them with when they relocate.

Purchasers and sellers often disagree on this issue because it is not always clear in which category a certain item falls.

Although there are broad legal principles that assist in determining whether a particular item is deemed a fixture or a fitting, these legal principles are often not clear and also cannot cater for each and every unique situation. It is always advisable to clarify this matter in the purchase agreement.

This list of fixtures and fittings contained in estate agent's pro-forma agreement are usually generic and not specific to your transaction. Read through the list carefully and ensure those items you deem to be fittings are in fact regarded as such.

## 17. Cooling-off

**Contrary to popular belief there is no general "cooling-off" period when you purchase a property.**

The Alienation of Land Act makes provision for a five-day cooling-off period where a natural person purchases a property for R 250 000 or less.

The Consumer Protection Act also contains a “cooling-off period” where someone enters into an agreement as a result of direct marketing. Purchasers of immovable property generally do not enter into agreements as a result direct marketing and therefore this cooling-off right is seldom applicable.

Nothing prevents the purchaser from inserting a cooling-off clause in the OTP. It is up to the seller to accept this.

## 18. Costs

**The purchaser of a property is liable for certain costs and should budget for it. The costs can be divided into two categories namely, transfer costs and bond registration costs (if applicable).**

**Your transaction cannot register if the costs are not paid in full. To give you an indication of the transfer and bond costs, we have developed the [MCostcalculator](#), which is available on our website.**

### 18.1. Transfer costs

*Transfer costs* are the costs payable to transfer the ownership of a property from the seller to the purchaser. This cost component includes transfer duty payable to SARS, and the transferring attorney’s professional fees. There are also several administrative charges and fees payable, for example document generation costs, deeds office levies, postage and petties, FICA fees, etc.

### 18.2. Bond registration costs

Bond registration costs refer to the costs payable for registration of the purchaser’s bond if applicable. The bond registration costs include the professional fee of the bond registration attorney as well as administrative charges and fees, e.g. document generation costs, deeds office levies, postage and petties, etc.

The initiation fee charged by the banks should also be kept in mind. This amount can be included in the capital amount of the loan. The purchaser should request that it be included on application for the loan. If it is not included in the capital amount, it will be added to the bond registration costs.

The professional fee charged by the transferring attorney is based on the value of a property and that of the bond registration attorney on the value of the bond that will be registered. We adhere to the guidelines of the Legal Practice Council of South Africa relating to fair and reasonable fees.

**You can also peruse our [MCBondGuide](#) if you want to know more about mortgage loans and bonds.**

## 19. Defects

Defects to the property often create animosity between the parties because sellers and purchasers are unaware of the legal principles, misunderstand and differ in opinion about their respective legal and contractual obligations, and are often under the wrong impression that the estate agent, the conveyancer, bank valuator or authorities carry certain responsibilities in this regard.

**It is crucial that a prospective purchaser not only understands the complex legal principles involved, but also acts promptly and prudently to protect his/her rights as explained in this guide.**

### 19.1. Understanding defects

The legal principles relating to defects are influenced by an array of legislation and legal principles depending on various factors.

In this guide we only discuss the legal position for a run of the mill property transaction. i.e. where the property is sold by the person in the street through an estate agent. The legal position differs if the property is sold directly by the seller, as the purchaser then loses some statutory protection. The legal position also differs vastly if the property is sold by a developer or a speculator.

The term “defects” includes both physical defects e.g. cracks and leaks as well as regulatory measures e.g. building plans.

There are two categories of defects and the legal position pertaining to each category differs:

1. **Patent defects** are defects that are visible or detectable with a reasonable inspection. A typical example is a visible crack in a wall. Patent defects can also be a non-visible but detectable defect like a dysfunctional patio door. It may also be the absence of regulatory measures e.g. building plans that are not approved.
2. **Latent defects** are defects that are neither visible nor detectable with a reasonable inspection. A typical example is a leaking roof or even a visible crack in a wall concealed by furniture.

#### 19.2. The seller's obligation to disclose certain defects

The seller must disclose certain defects he/she is aware of to the purchaser before the purchaser makes the offer, namely:

- All latent defects and
  - Patent defects of a significant nature.
- } Of which the seller is aware

The disclosure of these defects must be done in the Immovable Property Condition Report (IPCR).

The seller cannot disclose what he/she is not aware of. It often happens that the seller or the signatory of the IPCR has not lived in the property for many years or has never lived in the property. Do, therefore, not blindly rely on the content of the IPCR.

Apart from the fact that the legal principle is somewhat murky, the real issue is often factual and evidentiary in nature namely "which defects were the seller indeed aware of and which not". There is often also a dispute whether a specific defect is latent or patent and if patent whether it is significant and needs to be disclosed. The onus is on the purchaser to prove that the seller was aware of the defect and should have disclosed it.

#### 19.3. Immovable Property Condition Report (IPCR)

If an estate agent is mandated to market and sell a property, the seller must, in terms of section 67 of the PPA, disclose the 'defects' as required in the prescribed IPCR.

**The estate agent must deliver the completed and signed IPCR to the purchaser before the purchaser makes the offer. The purchaser must acknowledge receipt of the IPCR. The IPCR must be incorporated into the agreement and form an integral part thereof.**

The IPCR requires the seller to disclose defects of a significant nature he/she is aware of. These defects imply any defect, whether patent or latent that would or could significantly:

- have a deleterious or adverse impact on, or affect, the value of the property;
- impair or impact upon the health or safety of any future occupants of the property; or
- shorten or adversely affect the expected normal lifespan of the property, if it cannot be repaired, removed, or replaced.

In addition to the defects disclosed as set out in the IPCR, the seller must, in terms of the common law, also disclose all other latent defects he/she is aware of, regardless of whether they are of a significant nature or not.

**The legal application of IPCR is often misunderstood by purchasers.**

**The IPCR is not:**

- a complete record of all the defects on the property.
- an inspection report compiled by the estate agent.
- a list of cosmetic or aesthetic issues or a snag list.
- a warranty
- a list of defects the seller is required to repair, replace or remove.

**The IPCR is only a record of the seller's disclosure of the defects that are required to be disclosed as set out above and which the seller is aware of. The estate agent relies on the integrity and honesty of the seller and cannot be held liable if the information is incorrect.**

**The seller will only be required to attend to the defects agreed to in the agreement. The seller cannot be held liable for any defects disclosed as such.**

**It is therefore crucial that the purchaser receives and studies the IPCR before the offer is made and address any issues he/she wants to address in the offer.**

If the IPCR is not completed and signed by the seller, it is deemed that the seller did not disclose any defects and the seller may be held liable for the defects he/she was aware of but did not disclose.

Even though it is only a requirement to complete the IPCR if an estate agent is involved in the transaction, it is advisable to complete this document even when no estate agent is involved as it offers protection to both the purchaser and seller in a transaction.

#### 19.4. The purchaser's obligation to inspect

The seller's responsibility to disclose certain defects in the IPCR, does not negate the purchaser's legal obligation to perform a proper inspection before the offer is made. ***This inspection includes both physical and regulatory measures.***

You are also entitled to obtain a specialised report from a qualified professional at your own costs before making an offer. The seller also does not have an obligation to attend to any of the defects contained in the specialised report unless agreed thereto in the agreement.

It often happens that the seller cannot make a full disclosure as he/she did not reside in the property recently or at all. A third party (nominee) may then sign IPCR. For instance, a tenant, proxy, representative of a company/cc/trust or even a fiduciary as an executor of a deceased estate. The nominee is not obliged and merely assists if he/she is comfortable making the disclosure. This 3<sup>rd</sup> party's knowledge may be limited, and he/she may thus not be in a position to make a reliable disclosure.

**If any person other than the seller him/herself that resided in the property makes the disclosure in the IPCR, the purchaser must be cautious to rely on the information and conduct an even more thorough inspection.**

#### 19.5. Contractual Warranties

The purchaser can require contractual warranties from the seller when the offer is made. A contractual warranty is contractual confirmation by the seller that a certain set of facts are present or are not present on date of conclusion of the agreement e.g. 'The roof does not leak' or 'The building plans are updated and approved'. This warranty merely confirms a factual position on date of conclusion of the contract and does not mean that any future defect will be attended to.

If the purchaser requires a warranty against a specific defect, it must be requested in the OTP. The seller can then elect to give such warranty or reject the request.

#### 19.6. Addressing the defects in the OTP

If, after perusing the IPCR and conducting a proper inspection of the property yourself or through a specialist, you are satisfied with the state of the property and its regulatory measures, you can proceed to make the offer.

***If you are not satisfied with the state of the property and still wish to continue with the purchase, you can address the defects as follow in the offer;***

- Make a lower offer than the initial asking price, or
- Insist contractually that the seller attends to specified defects.
  - E.g. The seller shall fix the crack in the wall; or

- Require contractual warranties regarding the state of certain aspects.
  - E.g. The seller warrants that the roof does not leak.

The purchaser should ask the estate agent to assist in wording these conditions and warranties. **Note that these options remain part of the negotiation process and the seller may refuse a lower offer or any conditions to attend to any defects or to give any warranties.**

**Once the offer is accepted by the seller, the purchaser will not have the option to:**

- |   |               |  |
|---|---------------|--|
| <ul style="list-style-type: none"> <li>• cancel the agreement,</li> <li>• claim a reduction in purchase price,</li> <li>• institute a claim against the seller or agent,</li> <li>• insist that registration is withheld,</li> <li>• require that a retention be kept.</li> </ul> | } For defects | <ul style="list-style-type: none"> <li>• disclosed in the IPCR;</li> <li>• detected after signature of this agreement.</li> <li>• the seller did not agree to repair.</li> <li>• the seller was not aware of.</li> </ul> |
|---|---------------|--|

### 19.7. Voetstoots

Voetstoots is a legal term for “as is”. If the property is sold voetstoots, the seller is protected against any claims for defects, save for those the seller legally or contractually had to disclose. The seller does not guarantee the absence of any defects with the voetstoots clause but indemnifies him/herself against such claims.

If the purchaser can prove the seller had prior knowledge of a defect, and he/she had to disclose it, as set out above, and fraudulently omitted to disclose it before concluding the agreement, the seller can be held liable for such defects and will not be protected by the voetstoots clause.

## 20. Building plans and regulatory measures

**Purchasers often assume that the estate agent, seller, bank property valuator, municipality, transferring attorney or deeds office must ensure that all regulatory measures e.g., approved as-built plans, sectional plans, zoning, or even an occupation certificate are in place before registration can take place. This is not the case. The purchaser must, before making an offer, either ascertain that there are approved as-built plans, or contractually require that the seller provide the as-built plans.**

Should you establish, after the contract is concluded, that the building plans are not updated and approved, you cannot demand that it must be attended to, cancel the transaction, require that the transferring attorney delay the transaction until the plans are rectified, or insist that a portion of the sellers’ proceeds be retained.

Scrutinise the conditions in the OTP pertaining to as-built plans and if required, incorporate a condition by either including a warranty that the plans are in place or requiring the seller to get the plans updated before or after registration.

Although the prescribed IPCR makes provision for the disclosure of non-compliance issues, sellers are often not aware of the factual and legal requirements relating to building plans. As stated above the IPCR merely reflects what the seller is aware of and is not a warranty. In other words, if the plans were not in order when the seller bought the property, he/she may not be aware that it is not in order and will subsequently not disclose it. The fact that the bank, if you require a loan, requires approved building plans does not automatically place an obligation on the seller to provide plans. The seller is not part of your agreement with the bank and this condition will have to be incorporated into the agreement before the seller is bound by it. If the bank imposes this condition, the parties may negotiate a solution, but the seller is in no way obliged to provide the plans.

iCompli2sell Pty Ltd is an affiliate of M.C. van der Berg Inc who assists with specialist property vetting on regulatory matters and issues a comprehensive property report. If you wish to make use of their services, you can email [helpme@icompli.biz](mailto:helpme@icompli.biz) or visit [www.icompli.biz](http://www.icompli.biz).

**Bear in mind that, if you are reading this, you are probably not purchasing a brand new property from a developer. The property you are purchasing has probably been lived in and has certain defects, whether significant, minor or purely cosmetic. A proper inspection backed with a properly completed IPCR, should enable you to weigh up the information at your disposal to make a sound offer on the property.**

## 21. The role of the estate Agent regarding defects

**The estate agent/agency has the following obligations:**

- Inform the purchaser of the legal position regarding defects – as set out in this guide;
- Obtain the completed and signed IPCR from the seller when he/she receives the mandate to market the property;
- Provide the IPCR to the purchaser before the offer is made;
- Incorporate the IPCR into the agreement;
- Assist the parties with the correct wording of conditions and warranties in the contract;
- Disclose any defects he/she becomes aware of if not disclosed in the IPCR; or
- Use a properly drafted pro-forma agreement to protect both parties.

**The agent/agency has no obligation to**

- inspect the property for any physical defects;
- inspect the property for any regulatory measures;
- obtain building plans or any other compliance documentation; or
- obtain any compliance certificates.

The agent is not a supplier of property, but a supplier of a service aimed at facilitating the conclusion of an agreement of sale between the seller and purchaser. Estate agents are not trained or qualified to do a professional inspection pertaining to the property's physical condition or regulatory measures.

Pro-forma OTP's therefore often indemnify the agent/agency by stating that the agent/agency will not be liable for any latent or patent defects to the property, including any regulatory measures.

If the agent assists the purchaser to obtain any documentation regarding regulatory measures, i.e., building plans, sectional plans, specialist reports, compliance certificates, HOA/body corporate rules, title deeds etc., you cannot expect the agent to inspect and verify the correctness thereof. The agent merely acts as an intermediary, as part of their value proposition to the parties and the agent cannot establish whether the property is fit for the intended purpose. To a large degree the estate agent relies on the honesty and the integrity of the seller as well as the correctness of the information as supplied by the seller.

## 22. The role of the transferring attorney regarding defects.

The transferring attorney's instruction is to transfer the property and to protect the rights of both the seller and the purchaser as set out in the agreement.

The transferring attorney is bound by the terms and conditions of the agreement as supplemented by the law. We cannot operate outside the parameters of the contract and law. This is why it is critically important to ensure that the required inspections are done and that the agreement contains all the required terms and conditions.

There is no legal or professional obligation on a conveyancer to obtain, verify or supply compliance documents such as building plans etc. We are not qualified to verify the correctness of these documents but will gladly refer clients to professionals who can assist.

The professional fee conveyancers charge, as guided by the Legal Practice Council is to facilitate and execute the transfer of the property to the purchaser.

This fee does not include the negotiation, discussion, drafting of addendums, collection of building plans and to resolve matters relating to defects. We will attempt to assist as far as possible and to deliver excellent service, but it is not part of our professional obligation to resolve issues where parties enter into a dispute relating to defects and other regulatory measures.

### **23. Consumer Protection Act (CPA)**

The Consumer Protection Act protects a limited category of consumers by granting certain rights and protective measures. These include cooling-off rights and warranties against defects. The CPA is however only applicable to transactions where the client is regarded as a “consumer” in terms of the CPA. In this regard distinguish between two relationships:

#### **The purchaser-seller relationship**

Purchasers often assume that they fall within the definition of “consumers” and are therefore protected by the CPA.

A purchaser will only be regarded as a consumer and enjoy the protection of the CPA if the seller sells property in the normal course of business, for example, the seller is a property speculator or a developer. If a purchaser makes an offer to Joe Soap (a person not selling property in the normal course of business) the CPA will not regulate the seller-purchaser relationship. Most property transactions fall into this category.

In this instance the purchaser cannot rely on the protective measures contained in the CPA, for example the implied warranty against defects.

#### **The purchaser-estate agent relationship**

A purchaser is a “consumer” in the legal relationship between the purchaser and the estate agent because the estate agent provides a service in the normal course of business.

The agent does not step into the shoes of the seller and therefore the purchaser does not become entitled to the protective measures granted to purchasers in the seller-purchaser relationship. The purchaser is however entitled to proper and professional service from the estate agent which includes correctly drafted documentation as well as information to create consumer awareness and responsibility.

### **24. Risk, maintenance, and insurance**

Pro-forma OTP’s should stipulate that all risk to the property which results from “so called” acts of God (floods, lightning etc.), will only pass to the purchaser on date of transfer. You should therefore ensure that the property is sufficiently insured from date of registration. If the property is a sectional title unit, the structural insurance is normally managed by the body corporate, and the cost is included in the levy. Duet properties are also sectional title units, but in all likelihood insured separately by the owners. Remember to insure your household belongings separately.

If you occupy the property before registration, the pro-forma OTP may stipulate that maintenance of the property and risk of normal wear and tear will pass to you on the occupation date.

Damage to the property resulting from any negligent action (which includes an omission to act with reasonable care) of the purchaser, tenants, family, or visitors will become the liability of the purchaser from date of occupation, even though the property is not yet covered by the purchaser’s insurance.

### **25. Restrictions on the use of the property**

Although ownership of property is protected by the South African Constitution, it does not mean that an owner has unlimited rights to do and build whatever they want on the property. The use of a property is subject to possible restrictions.

**Establish whether there are any restrictions which will limit the intended use of the property before making an offer. If you make an offer, it will be deemed that you are satisfied with the applicable restrictions.**

These restrictions may derive from:

#### 25.1. The title deed

The title deed is the official document in terms of which property ownership is held. This title deed may contain conditions which restrict the use of the property e.g. “Only one dwelling per erf is permitted” or “the property is subject to a 3 meter municipal servitude on the northern boundary”

The property is usually sold subject to all the terms, conditions, and servitudes in the current or previous title deeds of the property.

The relevant title deeds or schedule of conditions (in the case of sectional title property) are available for public inspection at the relevant deed’s office or the Community Scheme Ombud’s office (in the case of a sectional title property).

At a minimal cost we can obtain a copy of the title deed for your convenience. If you make use of the services of iCompli2sell a copy of the title deed will be included in the report.

#### 25.2. Body Corporate/HOA rules

Establish if the property forms part of a community scheme (body corporate in a sectional title scheme and/or homeowners’ association) and is subject to management and/or conduct rules e.g., whether pets are allowed or whether you are permitted to run a home-office.

Familiarise yourself with these rules before making an offer. The estate agent can on request, or the current owner will be able to, obtain a copy of the rules from the body corporate or homeowners’ association. These rules are often available online and the estate agent may be able provide you with a link.

#### 25.3. Town planning scheme

The town-planning scheme may contain restrictions relating to the zoning, which includes how the property may be used e.g. residential, business and building restrictions, as well as building lines and servitudes. The relevant town planning scheme can be obtained online from the particular municipality’s website.

If you make use of the services of *icompli2sell* the zoning certificate and an explanation thereof will form part of the report.

### 26. Compliance Certificates (COC’s)

The Occupational Health and Safety Act (OHS) requires that certain compliance certificates must be in place when an immovable property is transferred. If any of these certificates are required, the transfer attorneys will not proceed with transfer until they have been obtained. Your bank will also require some of these certificates prior to lodgement of the transaction at the deeds office. The seller must ensure that qualified, registered, and trustworthy contractors are appointed. We recommend that the agreement of sale regulate delivery of these certificates well before lodgement of the transaction in the deeds office to enable the parties to address any issues timeously.

#### 26.1. Electrical Compliance Certificate

The OHS requires a seller to provide a purchaser (or transferring attorney) with an electrical certificate of compliance on the date of occupation or registration, whichever is earlier. This certificate certifies that the electrical installation is safe and complies with SABS standards.

**The certificate makes no reference to the working order of the installation or to any appliances such as stoves and geysers. The purchaser must therefore either inspect all**

**electrical appliances or require a warranty in the OTP that all electrical appliances are in a good working order.**

An electrical compliance certificate may not be older than two years on date of registration of the property. This certificate becomes void when any alterations or additions are made to the installation.

#### 26.2. Electric Fence Compliance Certificate

When transferring a property with an electric fence, the OHS requires a certificate verifying that the installation is in accordance with the relevant SABS standards. The seller needs to deliver this certificate, to either the purchaser or transferring attorney. Note that it is not the same certificate as the electrical compliance certificate. While an electric fence compliance certificate is transferable, it becomes void if any alterations or additions are made to the installation. This means a new certificate will have to be issued.

Where property is situated within a sectional title complex, such a certificate can be obtained from the body corporate.

#### 26.3. Gas Certificate

If a permanent gas installation is installed on the property, the OHS requires the seller to provide the purchaser or transferring attorney with a gas certificate before date of occupation or registration, whichever is earlier. This certificate must certify that the gas installation is safe and complies with the relevant SABS standards.

A new gas certificate is required every time the owner or user of the installation changes. In other words when a property is sold, a new gas certificate is required.

The company who installed the gas appliance or reticulation can issue the gas certificate. Alternatively, any institution specialising in the installation of gas equipment will be able to issue these certificates.

#### 26.4. Plumbing or water certificate (only applicable to properties in the Cape Town area)

The issuing of a plumbing or water certificate in the municipal jurisdiction of Cape Town is a prerequisite when transferring any properties in this area. According to the Cape Town Water By-Laws of 2010 (Section 14), sellers are obliged to obtain a plumbing certificate from a certified plumber.

#### 26.5. Beetle Certificate (only applicable to properties situated in coastal areas)

Purchase agreements for coastal properties usually contain a clause requiring a beetle certificate, which guarantees the absence of beetles in or on the property. If this applies to your property, make sure that the certificate includes a guarantee with regard to all beetles and not only to a specific species.

The cost of the certificate and/or other expenses relating to the extermination of beetles will be for the seller's account.

#### 26.6. Declaration regarding Invasive Species

Most agreements of sale contain a condition pertaining to invasive plant species as required in terms of Section 29(3) of the Alien and Invasive Species regulations of 2014. This is not an aspect which requires particular attention by the seller or purchaser. It is suggested that the purchaser waives this requirement.

### 27. Rates, Taxes, Utilities, and Levies

**There are various monthly expenses payable when owning a property. Enquire which expenses are applicable and what the amounts are before making an offer.**

The transfer process safeguards the purchaser in the sense that on date of transfer all rates, taxes, utilities and levies will be paid in full by the seller.

#### 27.1. Rates and taxes

Rates and taxes are due to the local authority. The purchaser is liable for payment of rates and taxes from date of registration. If you are going to take occupation before registration, be mindful not to contractually commit yourself to payment of the rates and taxes from date of occupation.

#### 27.2. Utilities

Utilities refer to services rendered by the local authority and include water, electricity, refuse, sanitation, and sewerage. The purchaser is liable for payment of the utilities from date of registration, unless occupation is taken before registration, in which case the purchaser will pay for utilities from date of occupation. Utilities are usually not included in the occupational rent unless the contract stipulates otherwise.

#### 27.3. Levies

If the property forms part of a community scheme (sectional title and/or HOA) a levy will be payable by the owner of the property. Multiple levies may be due if the property is regulated by more than one community scheme (for example, if the property is a sectional title unit within an estate regulated by an HOA). If you take occupation before registration, be mindful not to contractually commit yourself to payment of any levies before registration.

### 28. The Estate Agent's role

The estate agent's role is to source property and introduce it to a prospective purchaser and to facilitate the sales transaction.

**The purchaser must take note of the obligations of the estate agent as set out in paragraph 20.**

Estate agents are qualified professionals, who are expected to be knowledgeable, competent, and effective. They work behind the scenes to find a property which meets your requirements and earn commission for their services. The commission is the remuneration for their services.

Commission is payable by the seller, and you should ensure that the pro-forma OTP confirms this. As the commission is an agreement between the seller and the estate agent, it is not necessary that you are a part of that agreement or are informed of the commission amount.

The purchaser must however take note of the following relating to commission:

#### 28.1. Non-compliance with a suspensive condition

If the offer is subject to a suspensive condition (e.g., a loan from a bank and/or a subject-to sale) and the condition is not met, you cannot be held liable for the commission unless you are deliberately and in bad faith causing the non-fulfilment of the condition.

#### 28.2. Introduction to the property by multiple agents

More than one agent can introduce you to a specific property. If a second or further agent introduces you to the same property, immediately disclose this to this agent and to all other involved agencies, preferably in an e-mail for record purposes.

#### 28.3. Private sale - commission claim

You should never approach a seller directly with an offer after an agent has introduced you to a property. It is also not advisable to ask friends, family, or business partners to make an offer on your behalf. If the agency later learns (and it is highly likely they will) that you made an offer directly to the seller, they may be able to claim the commission from you.

## 29. FICA (Financial Intelligence Centre Act) and POPI (Protection of Personal Information Act)

There are two acronyms that you will frequently hear during the process of purchasing a property, namely:

### 29.1. FICA

'FICA' is an acronym for the 'Financial Intelligence Centre Act'. FICA requires that certain individuals and institutions like attorneys, banks and estate agents verify certain information and keep record thereof. Our first letter to you contains a list of original FICA documents which you need to bring along when you sign the transfer and bond documents (if applicable) at our office.

Furthermore, we have a statutory obligation to disclose and report suspicious transactions. The primary objective of FICA legislation is to prevent money laundering and the flow of income earned from illegal activities.

**Do not become involved in a transaction where you pay an amount in cash directly to the seller. This is a form of money laundering. If you are involved in such a transaction, you could be found guilty of tax evasion or money laundering.**

FICA legislation obliges transferring attorneys to report transactions involving cash payments of R25 000 or more to the Financial Intelligence Centre (FIC). This is standard procedure and, if the source of funds is legitimate, will not have any further consequences.

### 29.2. POPI

'POPI' is an acronym for the 'Protection of Personal Information Act'. In terms of this Act, we need your consent to process your personal information (i.e., your identity number, contact details, email address etc.). We will request this consent when you sign the transfer, bond cancellation and/or bond documentation (if applicable) at our offices. We will only process your information for the purpose of property transfer, bond cancellation and other related matters.

## 30. South African Revenue Service (SARS)

**A property transaction cannot be processed unless both parties have income tax numbers. If you do not have an income tax number, take immediate steps to obtain one.**

SARS will carry out a risk analysis on both the purchaser and the seller. All your tax-related matters (whether private or business), including but not limited to tax returns and payments, should be up to date. If this is not the case, you should attend to it immediately. Failure to do so will delay the transaction.

## 31. Summary

**We advise that you attend to the following before making an offer:**

- Select an estate agent who is in possession of a valid FFC.
- Obtain the agency's pro-forma OTP and study it carefully before making an offer.
- Get a pre-qualification done.
- Peruse the rules of any community scheme.
- Investigate the cost involved and make provision for it. Make use of the MCostcalculator for planning purposes.
- Comply with your responsibilities relating to inspection of the property.
- Ensure that you are aware of any possible restrictions.

- Establish approximate amounts for rates, taxes and levies.
- Ensure that you have a tax number and that your tax affairs are in order.
- Make sure that you are satisfied with the condition of the property and address concerns during the negotiation phase of the transaction.
- Remember to put everything in writing.
- Request your bank or the bond originator to appoint M.C. van der Berg Inc. as your bond registration attorney.

**M.C. van der Berg Incorporated serves on the bond registration panels of the major banks. You can request the bond originator or the banker to appoint us as the bond registration attorney. Although it is ultimately the bank's prerogative which attorney will be appointed to attend to the bond registration, most banks send the instruction to the nominated attorney.**

### 32. Message from the directors

The directors of M.C. van der Berg Inc. trust that this MCPurchasersGuide has provided you, our valued client, with essential and useful information.

We furthermore trust that this informative guide, together with our professionalism, effectiveness and expertise will result in a hassle-free, pleasant, and exceptional business experience.

**We invite you to put your trust in M.C. van der Berg Inc. You are welcome to contact us if you have any queries. Visit our website at [www.mcvdberg.co.za](http://www.mcvdberg.co.za), contact us on 012 660 6000 or send an email to [info@mcvdberg.co.za](mailto:info@mcvdberg.co.za).**

## COMPLIANCE RESPONSIBILITY

The owner of a property has the responsibility to ensure that the property complies with all legal requirements, for example, building plan and town planning compliance matters. Non-compliance can lead to the rejection of insurance claims in the case of damage. It can furthermore cause a sale transaction to fail, be delayed, or even lead to expensive, prolonged litigation.

## YOUR COMPLIANCE SPECIALIST

Consider appointing iCompli2sell, a compliance specialist company, to ensure that your valued asset is legally compliant. We can assist purchasers and sellers to ensure that legal measures like zoning, servitudes, building lines, building plans, site development plans, sectional plans etc. are in order. Our professional team consists of town planners, architects, draughts-persons, engineers, conveyancers, and land surveyors who will investigate and assess each case, based on its merits.

### LEVEL 1

#### PROPERTY COMPLIANCE VETTING

To establish the compliance status of your property:

- ✓ The owner appoints and authorise iCompli2sell to obtain copies of the required building plans, zoning certificate, SG Diagram, Sectional Plans and Title Deed.
- ✓ iCompli2sell will conduct a site inspection to determine if the structures on site correspond materially with the approved building plans.
- ✓ Thereafter our professional team will vet the compliance of the property.
- ✓ You will receive a comprehensive vetting report pertaining to your property which will include non-compliance matters, recommendations, cost estimates and timeframes to ensure property compliance.

### LEVEL 2

#### PROPERTY CONSULTING SERVICES

To resolve property compliance issues:

- ✓ iCompli2sell can be appointed if the cost estimate provided is approved by the owner.
- ✓ iCompli2sell will co-ordinate the project, appoint the necessary service providers and communicate project status progress continuously.
- ✓ Compliance documentation will be provided to the property owner as the non-compliance matters are resolved, to ensure successful marketing or registration of the property.

### LEVEL 3

#### BRIDGING FINANCE

We can assist in providing funding for the costs involved in the vetting as well as possible subsequent appointment of professional service providers to rectify the non-compliance concerns.

**M.C. VAN DER BERG<sup>INC</sup>**  
**ATTORNEYS, CONVEYANCERS & NOTARIES**  

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