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## **DIVORCE AND IMMOVABLE PROPERTY**

For the purposes of this article we will be discussing recommendations on how to deal with immovable property before divorce (in uncontested divorces) and factors to bear in mind for sellers, buyers and agents when dealing with a property owned by a divorced person.

### **PRE-DIVORCE – SETTLEMENT AGREEMENT & IMMOVABLE PROPERTY**

Unfortunately, we often encounter divorce orders where the immovable property is dealt with in very little or no detail. This results in potential impasses between the parties and restricts how the property may subsequently be dealt with by the parties. The parties may attempt to renegotiate the terms of their settlement agreement or, in some instances, be compelled to approach a court to obtain relief.

Issues are normally encountered at the time of disposing of the property because the parties failed to deal in detail with important aspects pertaining to the property at the time of divorce. As a result, one of the spouses then feels that the situation has become unfair and becomes uncooperative, resulting in the matter having to be referred back to court. If these important aspects are agreed in detail upfront it will prevent unnecessary stress, disputes and costs down the line.

If you are in the process of getting divorced and will conclude a settlement agreement to deal with the splitting of assets, we recommend that the parties fully consider the costs and manner of retaining or disposing of the immovable property (or any share therein). The following should be considered and certain points may be included in the settlement agreement, which is to be made an order of the court on divorce:

- Agree and note in detail who will be receiving the property (or a spouse's half share in the property) as well as who will be liable for the transfer costs. Although transfer duty is exempt if a property (or half share in the property) is disposed from one spouse to another in terms of a divorce, the transfer costs will still be payable. More importantly however, parties should note that the divorce order does not constitute a disposal of the property/half share and that the transfer will still need to be given effect to at the Deeds Office by a conveyancing attorney.
- In the event that the parties agree that the property will be retained in both their names or transferred so that it is registered in both parties' names in terms of the divorce, the parties will be joint owners. The same rights and obligations of joint owners will apply. Both parties will be liable for the liabilities of the property and be entitled to the benefits of the property in accordance with their share of ownership.
- In the event that the parties agree that the property will be retained in one or both parties' names but the property is to be sold and the proceeds will go to one or both spouses (in accordance with such split as may be agreed), it is important to deal with several related aspects. Such aspects would include: -

- who will be liable for the cost of maintenance of the property, bond repayments, water, electricity, levies, rates and taxes (“ownership costs”) until such time that the property is disposed of. The parties should also agree upfront what events will trigger the disposal of the property, or if either spouse is entitled at their election to sell the property.
- Importantly the agreement should provide for the minimum selling price, and if the minimum selling price can’t be achieved within a determined period of time, one spouse may at his/her election lower the selling price.
- In addition, the agreement should cater for who will pay for costs related to the sale of the property including bond cancellation costs, compliance certificates and rates figures.
- In particular we recommend that one party be empowered to appoint an agent to market the property, to sign the sale agreement on behalf of both parties and to sign the transfer documents on behalf of both parties (if necessary) and that the other spouse will sign all such powers of attorney and documents as may be required to give effect to such disposal. The reason for this is that more often than not one spouse refuses to sign a mandate, or to sign the sale agreement and the sale of the property can be frustrated. In such event the one party will need to approach a court for relief and the more detail the divorce order contains in this regard the easier it will be to compel the other spouse to perform.

#### **AFTER DIVORCE– IMMOVABLE PROPERTY**

The divorce order will determine the parties’ rights and obligations regarding the property. Just because the property is currently registered in one or both parties’ names, it may not give them the right to sell and dispose of the property. The divorce order must first be obtained and checked to determine what the legal position is regarding the property. We have discussed a few scenarios of common issues encountered to assist in clarifying the steps to be followed.

- **Scenario 1 – the property is registered in both parties’ names, or only the husband’s name but in terms of the divorce order the wife is entitled to the property (or vice versa):**

Unless the divorce order provides otherwise, the correct sequence would be for the entire property, or the husband’s half share, to be transferred to the wife and for her to then sell the property. If the wife wants to sell the property without the property or the relevant half share first having been transferred into her name, the agreement of sale must be made subject to the transfer of the property (or half share) to the wife. This is to protect the wife, the seller of the property. This however does risk the agreement lapsing in the event the transfer of the property from the husband cannot be done due to him frustrating the agreement and therefore it is recommended to ensure that the husband understands the obligations of the divorce order and will comply with the same before the agent accepts the mandate from the wife. If the husband refuses to cooperate the wife would need to approach a court to compel him to adhere to the divorce order.

- **Scenario 2 – in terms of the divorce order the property is to be sold and the parties will split the proceeds:**

If the property is registered in both the names of the husband and wife, both the husband and wife will need to sign the mandate to sell, the agreement of sale and the transfer documents. If one party refuses to sign the agreement, the other party would need to approach a court to compel the spouse to sign. The sale can’t proceed without both parties’ consent.

If the property is registered in only one of the spouses' names, then the registered owner will need to sign the mandate to sell (unless the parties are/were married in community of property), the agreement of sale and the transfer documents. However, the divorce order is likely to prescribe the conditions of sale including the payment of the proceeds. These conditions must be examined at the time of taking a mandate in order to ensure the mandate terms and offer will comply with the divorce order.

- **Scenario 3 – The divorce order is lost:**

If a divorced party approaches an agent to sell and can't find their divorce order, a copy of the order should be obtained from the court that granted it. If such party needs to list the property urgently both parties' signatures to the mandate should be obtained to ensure that the agent has the necessary authority to proceed in the meantime.

A copy of the divorce must be obtained in order to determine how the property was dealt with by the courts and in order to determine the parties' rights to the property. It is preferable for the agents to obtain this documentation before the property goes to market and before signing the mandate in order to ensure that they are mandated by the correct spouse or both spouses. It is better to resolve such issues at this stage rather than waiting until after an offer to purchase has been signed and then finding out that only one of the spouses is a party to the agreement and has signed when both were required to sign as this complicates matters and may compromise the sale and lead to claims by the purchaser.

- **Scenario 4 – the parties were married out of community of property and the property was purchased by the spouse before or during the marriage:**

We recommend that the agent obtain a copy of the divorce order to ensure that no order was granted affording the other spouse any rights to the property. If the divorce order is silent on the property in question, then such property remains the property of the owner and this party acting alone may sign the mandate, sale agreement and transfer documents.

- **Scenario 5 – spouses were married in community of property, property acquired before the marriage and the property is noted to only be registered in the name of the spouse who purchased it and now that spouse wants to sell the property:**

Assuming the divorce order is silent on the property, please note that by virtue of marriage in community of property the immovable property purchased before (or during) the marriage became the property of both parties in equal undivided shares by operation of law even if it's not noted in the deeds registry as such. Therefore, both spouses would be required to sign the mandate, sale agreement and transfer documents.

- **Scenario 6 – the husband was married in community of property but is subsequently divorced and remarried in community of property to his new wife. The property owned by the husband was registered in his name before he got married to his first spouse:**

As per scenario 5 above, the property becomes the joint asset of the parties of the first marriage. If the property is not dealt with in the divorce, the parties of the first marriage will jointly own the property. When the one ex-spouse re-marries, his half share is then jointly owned by his new spouse. This means you would need all three parties to sign the mandate and agreement of sale.

## CONCLUSION

Divorce is an emotional and difficult time for all parties concerned. The consequences of dealing with immovable property in particular can be further reaching than the parties initially anticipated. It is best to cater in detail for the disposal and splitting of the parties' assets by agreement at the time of divorce. If the parties are already divorced the parties and agents should ensure that they proceed on the correct basis to prevent wasted efforts, unnecessary disputes and delays.

**This newsflash has been prepared for information purposes only and does not constitute legal advice, or a legal opinion, the practical application of the provisions of this newsflash will vary depending on the facts of each case.**

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