

Exchange Control Basics

By **Jayna Hira** (Senior Associate)

15 July 2024

INTRODUCTION

The movement of funds to SA is highly regulated by our Exchange Control Regulations, administered by the South African Reserve Bank (SARB). As a result, there are various and sometimes complex rules that regulate funds moving into and out of South Africa.

This is a common issue facing purchasers of immovable property in SA where purchasers will use funds from abroad (off-shore funds) to pay the purchase price or a portion thereof. The rules and regulations are often confusing and the purpose of this article is to provide some guidance.

In addition, there are various steps that can be taken at the time of introduction of funds to SA which will make it easier, faster, and more cost effective (in terms of professional costs and exchange rates) to remit the funds abroad from SA in future.

BASIC RULES

1. If the purchaser has a local SA bank account, whether this is a resident account or a non-resident account, the funds must be paid first to this account and thereafter paid to the trust account. In such a case, the funds will not be permitted to be paid directly to the Attorney trust account.
2. Should the purchaser not have a local SA bank account, the purchaser can remit the funds directly to the trust account.
3. It is suggested that the purchaser remit foreign currency to SA, not ZAR. To the extent that the purchaser remits ZAR, when the immovable property is sold in the future and the funds are to be expatriated, the purchaser can only expatriate the same ZAR amount. This could result in exchange rate losses.
4. For a standard and straightforward transaction, the remitter of the funds, the recipient, and the purchaser should all be the same person. Any deviation from this will add to the complexity, cost, and duration of the foreign remittance and should be discussed beforehand.

5. Note that when the immovable property is sold in the future, as a general rule, the purchaser may remit the funds (original amount and the gain) back offshore. The purchaser will need to retain sufficient documentation for SARB to permit this. To this end, please retain all documentary evidence of the swift transfer and other confirmatory documents.

KEY DEFINITIONS

“NON-RESIDENT” PURCHASER

- Is a permanent resident of another country which is not SA;
- Does not have a SA ID number;
- Does not pay tax to the South African Revenue Service (SARS);
- Has financially emigrated ;
- Does not have a local SA bank account;
- If an entity, is not registered with the Companies and Intellectual Property Commission (CIPC).

“RESIDENT” PURCHASER

- Permanently resides in SA;
- Has a SA ID number (This includes non-SA Citizen ID numbers);
- Pays tax to SARS;
- Has not financially emigrated;
- Has a local SA bank account;
- If an entity, is registered with the CIPC.

COMMON POSSIBLE SCENARIOS FOR NON-RESIDENT PURCHASERS

SCENARIO 1:

NON-RESIDENT – NON-RESIDENT: HAS A PERSONAL NON-RES BANK ACCOUNT IN SA

- A non-resident purchaser (natural person/ individual) remits funds from their personal bank account abroad for the purpose of a conveyancing transaction.

- The non-resident purchaser does have a personal non-resident bank account with a local SA bank.
- The non-resident purchaser is obliged to remit the funds directly to their SA bank account and thereafter must transfer the funds to the attorney trust account. The Attorneys are not able to accept the funds into their trust account directly.

SCENARIO 2:

NON-RESIDENT – NON-RESIDENT: NO PERSONAL NON-RES SA BANK ACCOUNT

- A non-resident purchaser (natural person/individual) remits funds from their personal bank account abroad to the Attorneys trust account for the purpose of a conveyancing transaction.
- The non-resident purchaser does not have a personal non-resident bank account with a local SA bank.
- This is a straightforward transaction, and the non-resident purchaser is regarded as the Applicant for purposes of reporting to the bank. The Attorneys are able to accept the funds into their trust account and the transaction will be reported to the bank as an investment into property by a non-resident individual.

SCENARIO 3:

MULTIPLE JOINT NON-RESIDENT PURCHASERS ON ONE OFFER TO PURCHASE – NO PERSONAL SA BANK ACCOUNT

- A non-resident purchaser (natural person/individual) on behalf of one or more other non-resident purchasers (natural persons/individuals) remits funds from their personal bank account abroad to the Attorneys trust account for the purpose of a conveyancing transaction.
- The non-resident purchaser as remitter does not have a personal non-resident bank account with a local SA bank.
- This is a straightforward transaction and the non-resident purchaser as remitter is regarded as the Applicant for purposes of reporting to the bank.
- The Attorneys can accept the funds into their trust account and the transaction will be reported to the bank as an investment into property by a non-resident individual. Acceptance is notwithstanding the fact that there is one remitter for credit account of two or more purchasers.

NB: When the immovable property is sold in the future, only the remitter may remit the funds back offshore.

SCENARIO 4:

NON-RESIDENT THIRD PARTY – PAYS ON BEHALF OF A NON-RESIDENT PURCHASER - LOAN

- A non-resident third party (natural person/individual

or foreign entity) on behalf of a non-resident purchaser (natural person/individual) remits funds from their bank account abroad to the Attorneys trust account for the purpose of a conveyancing transaction.

- A link must be established between the non-resident purchaser and the non-resident third-party.
- It will be assumed that a loan agreement is concluded between the two parties offshore.
- The non-resident purchaser is regarded as the Applicant for purposes of reporting to the bank.
- The transaction will be reported to the bank as an investment into property by a non-resident individual.

SCENARIO 5:

NON-RESIDENT THIRD PARTY – PAYS ON BEHALF OF A NON-RESIDENT PURCHASER – GIFT OR DONATION

- A non-resident third party (natural person/individual or foreign entity) on behalf of a non-resident purchaser (natural person/individual) remits funds from their bank account abroad to the Attorneys trust account for the purpose of a conveyancing transaction and discloses that it is considered to be a gift/donation to the non-resident purchaser.
- The non-resident purchaser is regarded as the Applicant for purposes of reporting to the bank.
- The transaction will be reported to the bank as a gift/donation.
- The Attorneys cannot advise on the offshore tax implications of the gift/donation as the transaction will be governed by offshore tax regulations.

COMMON POSSIBLE SCENARIOS FOR RESIDENT PURCHASERS

SCENARIO 1:

RESIDENT – HAS A PERSONAL BANK ACCOUNT IN SA

- A resident purchaser (natural person/individual) remits funds from their personal bank account abroad to the Attorneys trust account for purposes of a conveyancing transaction where that resident has a personal SA Bank account.
- The funds are required to first flow into the resident purchaser's local SA bank account and thereafter paid to the Attorneys trust account.
- The resident purchaser's local SA bank will process the transaction as a repatriation of a resident's own funds or a disinvestment of capital by a resident individual.
- The funds cannot flow directly to the Attorneys trust account where the resident has a local SA bank account.

SCENARIO 2:

NON-RESIDENT THIRD PARTY – PAYS ON BEHALF OF A RESIDENT PURCHASER - LOAN

- A non-resident third party (natural person/individual or foreign entity) on behalf of a resident purchaser (natural person/individual or local entity) remits funds from their bank account abroad for the purpose of a conveyancing transaction.
- Assuming the resident has a local SA bank account, the Attorneys are prohibited from accepting the funds into their trust account for this reason. The funds are required to first flow into the resident purchaser's local SA bank account and thereafter paid to the Attorneys trust account.
- A link must be established between the resident purchaser and the non-resident third-party.
- Inward foreign loan approval is required to be obtained from the SARB before the funds may flow into the resident purchaser's local SA bank account.**
- The SARB prescribes a minimum of 6 weeks to process an application for loan approval. The resident purchaser's local SA bank will process the transaction as an inward foreign loan and categorise the loan as either a shareholder's loan or a third-party loan.

**HBGSchindlers Exchange Control Department can assist you to compile an inward foreign loan application and submit same to your local SA bank for approval. The fees charged will be discussed on application and assessment of the matter.

SCENARIO 3:

NON-RESIDENT THIRD PARTY – PAYS TO RESIDENT PURCHASER AS GIFT OR DONATION

- A non-resident third party (natural person/individual or foreign entity) on behalf of a resident purchaser (natural person/individual or local entity) remits funds from their bank account abroad for the purpose of a conveyancing transaction and discloses that it is considered to be a gift/donation to the resident purchaser.
- Assuming the resident has a local SA bank account, the Attorneys are prohibited from accepting the funds into their trust account for this reason. The funds are required to first flow into the resident purchaser's local SA bank account and thereafter paid to the Attorneys trust account.
- The resident purchaser's local SA bank will process the transaction as a gift/donation and declare and place same on record with the SARB.
- The non-resident third party will not be subject to donations tax in SA.

INFORMATION / SUPPORTING DOCUMENTATION REQUIRED BY LOCAL SA BANKS

FOR NON-RESIDENTS (NATURAL PERSON/INDIVIDUAL):

- Clear copy of foreign passport or non-SA citizen ID document;
- Clear copy of foreign address (not older than 3 months);
- Source of funds;
- Email address and contact number.

FOR NON-RESIDENTS (FOREIGN ENTITY):

- Clear copy of foreign entity incorporation/registration documents;
- Clear copy of foreign passports of all directors of the entity;
- Clear copy of foreign passports and/or foreign entity incorporation/registration documents of all shareholders of the entity;
- Clear copy of foreign address (not older than 3 months);
- Source of funds;
- Email address and contact number for the foreign entity.

PLEASE NOTE: To the extent that the remitter of the funds is a third party, our Exchange Control Department will require the applicable supporting documentation for the third party as well.

DISCLAIMER

The possible scenarios unpacked above are the most common types of scenarios experienced by our Exchange Control Department and are not limited to the vast and extensive types of scenarios available in respect of foreign inward remittances from abroad. Therefore, if you are unsure and require further clarity, we encourage you to please reach out to our Exchange Control Department urgently and before processing any remittances from abroad so that they may advise you accordingly.

CONCLUSION

The SA Exchange Control Rules are not commonly understood and are often confusing and do create some frustration. Best practise is to contact us prior to making payment such that advice can be given as to the most effective method to pay offshore funds into SA.



Jayna Hira
(Senior Associate)