

Consumer Note 12

# Settlement Agreements, Divorce Orders and your Liability to your bank





## Introduction

Please note that the information provided does not constitute expert legal or financial advice. You should consult a legal professional or financial adviser for expert advice.

We have only mentioned sections of the various Acts where they are applicable to the complaints we receive. These Acts however contain many other sections and details that may not have been mentioned. There may also be other legislation that is applicable. For more information and detail on the Acts and other applicable legislation you should consult a legal professional.

The purpose of the document is to provide you with practical information based on our experience. Each case we investigate is however assessed on its merits.

## Background

We often receive applications for assistance and enquiries relating to settlement agreements, divorce orders and the liability of the parties to the bank that granted the mortgage loan. This Customer Information Note seeks to clarify certain aspects of settlement agreements, divorce orders and the liability to the bank, based on the most common complaints we receive.

Joint ownership in immovable property is usually awarded to one of the owners in instances of:

- death of a joint owner
- divorce
- an agreement between the parties to sell / donate shares.

This information note deals only with the transfer of immovable property in the case of a divorce and where an endorsement is registered against the title deed in terms of Section 45.<sup>1</sup>

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<sup>1</sup> Section 45 of the Deeds Registries Act 47 of 1937, as amended by Proclamation no. R9 of 1997



## Summary

Generally, parties to a divorce regulate the division of their assets by means of a settlement agreement.<sup>2</sup> The parties in fact have full contractual freedom and may draw up a settlement agreement that they find better suited to their specific circumstances, irrespective of the matrimonial property regime applicable to their marriage.<sup>3</sup>

Any such settlement agreement is not binding on the bank<sup>4</sup> and payment of the full bond instalment must be made until, for example, the property is either sold or a Section 45<sup>5</sup> endorsement is registered against the title deeds.

If one party retains the immovable property in terms of the settlement agreement, an application must be made to the Registrar of Deeds to endorse the title deeds of the property so that, that party becomes the sole owner.

An application to the Registrar of Deeds to register the transfer and substitute the party who is now the sole owner, as the sole debtor in respect of the mortgage bond, must be made.<sup>6</sup>

The application to be substituted as the sole debtor in respect of the mortgage bond will be treated by the bank as a new credit application.

Once a party becomes the sole owner of the property and the sole debtor in respect of the mortgage bond, the bank is obliged to take reasonable steps to assess the affordability of that person for the full indebtedness.<sup>7</sup>

If the new sole owner succeeds in obtaining a fresh mortgage bond in his/her name only, it is then the responsibility of that person to ensure that there is credit life insurance in respect of the immovable property not exceeding the full asset value of the property.<sup>8</sup>

It is advisable to approach your bank, before you finalise your settlement agreement, to ascertain whether you would qualify for a mortgage bond in your own name based on your salary only.

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<sup>2</sup> Section 7(1) of the Divorce Act 70 of 1979

<sup>3</sup> Section 2 of the Matrimonial Property Act 88 of 1984

<sup>4</sup> *Nedbank Ltd vs Finin & others* (70232/2013) ZAGPPHC 673 (1 September 2014) par [8] at page 3

<sup>5</sup> Section 45 bis (1) of the Deeds Registries Act 47 of 1937, as amended by Proclamation no. R9 of 1997

<sup>6</sup> Section 57 of the Deeds Registries Act 47 of 1937, as amended by Proclamation no. R9 of 1997

<sup>7</sup> Section 81(2) of the National Credit Act 34 of 2005

<sup>8</sup> Section 106(1)(i) of the National Credit Act 34 of 2005



## Discussion

In South Africa, it is accepted practice to regulate the consequences of a divorce by means of a settlement agreement<sup>9</sup> between the parties. In such settlement agreement, the parties agree on matters such as the division of the assets and the payment of maintenance.

Generally, it is “a firmly established practice to incorporate settlement agreements into an order of the court.”<sup>10</sup> However, a court is not compelled or obliged to incorporate a settlement agreement as part of the court order.<sup>11</sup>

Whilst the matrimonial property regime<sup>12</sup> of the parties determines how the assets will be divided upon dissolution of the marriage, the parties have full contractual freedom to either apply the matrimonial property regime applicable to their marriage or to draw up a settlement agreement that they find better suited to their specific circumstances.

So, the parties may include any provision in their Deed of Settlement which is not impossible, illegal or contrary to good morals.

For example, if the parties are married out of community of property with the application of the accrual system,<sup>13</sup> they may nevertheless agree that neither will have a claim for accrual<sup>14</sup> against the other.

## Immovable Assets

A typical example of an agreement between spouses would be, “The parties agree that the plaintiff (wife) shall become the sole owner of the common home. The defendant (husband) shall be liable for the payment of the mortgage loan, rates, taxes and all municipal charges”

In such an instance, the wife is not absolved from paying the mortgage loan as she is not discharged from the debt. Both parties remain liable to pay the mortgage loan.

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<sup>9</sup> Section 7(1) of the Divorce Act 70 of 1979

<sup>10</sup> *PL vs YL 2012(6) SA 29 (ECP)* paragraph [18] at page 18

<sup>11</sup> *Thutha vs Thutha 2008(3) SA 494 (TKH)* paragraph [43] at page 506

<sup>12</sup> Section 2 of the Matrimonial Property Act 88 of 1984

<sup>13</sup> Section 4(1)(a) of the Matrimonial Property Act 88 of 1984

<sup>14</sup> For a discussion on accrual see: *MGB v DEB 2013(6) 86 KZD* See also De Rebus January/February 2014 at pages 44 & 45.

Note: Accrual is the extent to which the husband and wife have become richer by the end of the marriage, in other words, the amount by which the spouse’s joint wealth has increased over the period of the marriage.



It is not a defence against the bank's claim for payment for the wife to state that it is her husband's responsibility in terms of the settlement agreement to pay the mortgage loan.

Even if the settlement agreement is made an order of court, it is not binding on the bank. The bank is not a party to the divorce action.

A settlement agreement can only be binding on the bank if the bank consents to the delegation of the liability to pay, to one or the other party.

The bank advances mortgage finance on the strength of the security registered against the property and if the bank is no longer able to enjoy the assurance of bond security, this would deter banks from granting mortgage loans.

## **Conclusion**

It is advisable to ensure that any Deed of Settlement you enter into be incorporated into the divorce Order of the Court.

Even if the Deed of Settlement is incorporated into the Order of the Court, remember that the terms and conditions of the agreement are binding only on you and your spouse and not on the bank.

You must apply<sup>15</sup> to the Registrar of Deeds, to endorse the Title Deeds of the property so that you become the sole owner of the property as if you had taken transfer into your name and you become entitled to deal with the property.

Whilst the Section 45 application is pending and your affordability assessment is being carried out, both you and your spouse, in the case of a joint bond, are liable to continue to make payment of the full bond instalment.

If your Section 45 endorsement application is successful and you become the sole owner of the property, then a new credit agreement will have to be entered into with your bank.

Your bank will not simply enter into a fresh credit agreement without first taking reasonable steps to assess your affordability under the new agreement.<sup>16</sup>

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<sup>15</sup> Section 45 bis (1) of the Deeds Registries Act 47 of 1937, as amended by Proclamation no. R.9 of 1997

<sup>16</sup> Section 81(2) of the National Credit Act 34 of 2005



If you succeed in obtaining a fresh bond in your name only, it is your responsibility to ensure that there is credit life insurance in respect of the immovable property not exceeding the full asset value of the property.<sup>17</sup>

It is advisable to contact your bank, before you finalise your settlement agreement, to ascertain whether you would qualify for a bond in your own name based on your salary only.

### **The Ombudsman for Banking Services**

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<sup>17</sup> Section 106(1)(i) of The National Credit Act 34 of 2005