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**WITH COMPLIMENTS**

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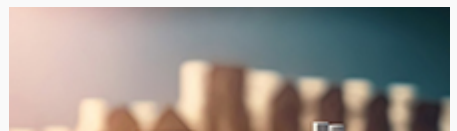
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**April 2023**

**Buying Property as an Investment – Some Strategies for Success**

*"The only bad time to buy property is later." (Steve Bolton)*

Buying property – whether to live/work in



or on a buy-to-let basis – could be one of the most important investments you make.

Here are some strategies to help you on your way.



### ***Twelve strategies for success***

1. **Map out your investment goals:** Do you plan to “buy-to-let” to provide steady income? Or as a wealth-builder to hold for long-term capital growth? Or to “flip” (quickly resell, with or without renovation)? Formulate your strategy accordingly.
2. **Do your homework:** Before making any big property investment decisions, research the property market, the area where you want to invest, and the type of property you want to buy (see below).
3. **Choose what type of property you want to buy:** You have a wide choice here - vacant land (to develop or to hold), residential property (to live in or to let out), commercial/industrial property, agricultural land etc. You might also consider an indirect property investment via for example a REIT (Real Estate Investment Trust).
4. **Location, Location:** Look for properties in areas with a high demand for rental properties (even if you are buying a house to live in, the time may come when you decide to rent it out), good infrastructure, and potential for capital growth.
5. **Consider diversification:** If you plan to go big on this, you could invest in different types of properties and in different locations to spread your risk.
6. **“Buy Low”:** It seems self-evident, but more than a few investors lose sight of the fact that a big part of success when it comes to property investment is “buying low”. Some ways to achieve that –
  - a. **Negotiate:** Don’t be shy to negotiate on price, or to bring in a professional if your negotiating skills aren’t up to it.
  - b. **Consider a “renovation” property:** Properties in need of renovation can be bought at a lower price and renovated to increase their value and rental potential.
  - c. **Look for bargains:** Repossessed properties, properties in insolvent estates, distress auctions, sellers wanting to sell quickly (perhaps for financial or personal reasons) – all could be a source of well-priced property. But tread with care because this type of property can come with more pitfalls than normal.
7. **Take professional advice:** For most of us, property should be just one element in a balanced investment portfolio, structured to meet our particular needs and goals, so ensure that you take competent financial advice upfront. Then go to the property professionals in your target area and market. **Your first port of call in this regard should be your lawyer** who can share valuable insights into the local property market and can in need refer you to other trusted professionals in the area.
8. **Choose wisely when it comes to financing options:** Using mortgage finance to purchase property can provide leverage and enable you to invest in more properties than you would be able to with cash.
9. **Manage your cash flow:** Ask your lawyer to help you draw up a full budget for your purchase costs so you plan properly both for your cash flow and for profitability.
10. **Manage the risks:** If you have a bond, build into your calculations the possibility of interest rate increases in the future – a highly-leveraged property leaves you little room to maneuver if the market turns against you. If you are letting out to tenants, provide for vacancy rates and periods of low demand for rental property. **Budget for worst-case scenarios!**
11. **Property management might pay for itself:** Consider using a property management company to manage your rental properties, as this can take the stress and workload off you and provide a more professional service to your tenants.
12. **Don’t forget the tax implications:** This is vital – there are both potential tax benefits and tax pitfalls awaiting the property investor, and taking upfront

professional advice to structure your investment for tax efficiency could make all the difference between an acceptable return and an exceptional one.

Investing in property can be a great option for you if you are looking for long-term growth and a steady income. However, it's important to do your research, to seek professional advice, and to consider all the available options before making any investment decisions.

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## Why You Need a Shareholders' Agreement, and How to Structure It

Whether you are forming a new company or buying shares in an existing one, a formal shareholders' agreement, tailored to suit your particular situation and needs, is essential.



### **What is a shareholders' agreement?**

It's a contract between shareholders outlining the rights, responsibilities, and obligations of each shareholder, it provides a framework for the governance of the company, and it ensures a clear understanding between the shareholders about its management, operation and control. It's not a legal requirement, but not having one is a recipe for uncertainty and dispute.

Which brings us to...

### **Why you need one**

Here are some of the reasons why it's a "must-have" and not a "nice-to-have" -

- **The Memorandum of Incorporation (MOI) is not enough:** Every company must have a memorandum of incorporation (MOI) setting out amongst other things the "rights, duties and responsibilities of shareholders, directors and others within and in relation to a company" but you should always complement its provisions to suit your particular needs and circumstances. Be careful here, the MOI will override any conflicting provisions in your shareholder's agreement.
- **Dispute avoidance and management:** By setting out the agreed shareholder relationships and responsibilities, a shareholders' agreement will greatly reduce the risk of bitter, disruptive and expensive disputes arising. Where disagreements do arise, reference to the agreement should help diffuse them before they become a major issue. Agree processes for dispute resolution.
- **Avoidance of deadlock:** Deadlocks can occur when shareholders are unable to reach a decision on important matters such as the direction of the company or the appointment of new directors. Deadlocks will inevitably hurt the company and could even result in failure and liquidation. A formal shareholders' agreement reduces the risk of deadlocks by providing a clear set of rules for decision-making and resolving disputes.
- **Clarity of roles and responsibilities:** Your agreement should define the roles and responsibilities of each shareholder, which can be especially important in companies where the shareholders are also involved in the day-to-day management of the company. This will help to ensure that each shareholder is clear about their obligations and the consequences of not complying with them, and it will help to prevent misunderstandings that may arise from overlapping responsibilities.

- **Flexibility:** Make sure that your agreement is tailored to the specific needs of the company and shareholders. This allows it to be flexible enough to accommodate changes in the company's structure and operations, while still providing the necessary protection and clarity to shareholders.
- **Protection of minority shareholders:** Sometimes, majority shareholders have different goals and objectives than the minority shareholders. A formal shareholders' agreement can provide protection to the minority shareholders by ensuring that the company operates in a fair and equitable manner. In doing so it reduces the risk of dispute by setting out the voting rights and decision-making powers of each shareholder.

### ***What should be in it?***

As we said above, your agreement should be tailored to your particular needs, so professional advice is essential to ensure that your agreement is legally binding and protects the interests of all parties involved. You will likely to be advised to address at the very least the following aspects –

- How loan accounts, profit sharing, payment of dividends, salary and fringe benefit structures and the like will work
- Who will manage the company and its business activities, and how
- Decision-making processes, with reference to meeting requirements and voting
- Roles and responsibilities, powers to make executive decisions and to bind the company
- Confidentiality requirements, conflict of interest rules, restraints of trade and the like
- Conflict resolution procedures
- Valuation and sale of shares, rights of first refusal etc
- The list goes on – every company and every set of circumstances will be different, so brainstorm other issues to be included with your fellow shareholders, other stakeholders, and your legal advisors.

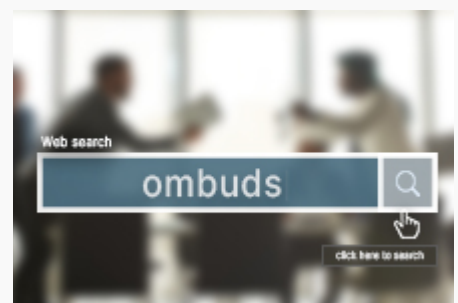
**Keep everything as short, simple and practical as possible!**

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## **Ombuds - Why and How to Use Them**

***“Who you gonna call?”  
(Ghostbusters)***

An “ombud” (often called ombudsperson, ombudsman or ombudswoman, and sometimes not referred to as an “ombud” at all) is an independent and impartial person or office who will investigate any complaint you may have against a business, government agency, or public or private institution falling under their authority.



Ombuds seek to resolve disputes (to the benefit of all parties) fairly, efficiently, and

cost-effectively by acting as mediators between complainants and the entity being complained about. Many have the power to make binding “determinations”. Most are free to complainants.

### ***Fighting your bank, body corporate, or panel beater: Who you gonna call?***

When you have a beef with your bank or body corporate, a grievance against SARS, or a fight with the panel beaters, and whether you are an individual or a business, think of calling in the appropriate ombud.

There are many ombuds in South Africa, some limited to a specific sector and some to a specific entity - often institutions like universities, municipalities etc have their own internal ombud.

There are too many to list all the ombuds here but in particular bear in mind those ombuds with a wider remit than just one institution or industry player. We've compiled for you a list of some of the most important ones and their contact details (Name; Website; Tel. No.; Email; What areas they cover) –

- **Public Protector South Africa:** [www.pprotect.org](http://www.pprotect.org); 0800 11 20 40; [info@pprotect.org](mailto:info@pprotect.org). Investigates complaints against government entities, with “the power to investigate, report on and remedy improper conduct in all state affairs. The Public Protector must be accessible to all persons and communities. Anyone can complain to the Public Protector.”
- **Community Schemes Ombud Service (CSOS):** [www.csos.org.za](http://www.csos.org.za); 010 593 0533; [info@csos.org.za](mailto:info@csos.org.za). Alternate Dispute Resolution services for all participants in residential, commercial and industrial “community schemes” (sectional title bodies corporate, Homeowners Association complexes etc.).
- **FAIS Ombud (Ombud for Financial Services Providers):** [www.faisombud.co.za](http://www.faisombud.co.za); 0860 66 327; [info@faisombud.co.za](mailto:info@faisombud.co.za). Complaints against financial service providers, including insurers, banks, insurance brokers (long- and short-term insurance), investment managers, and financial advisors and intermediaries. The **FSCA (Financial Sector Conduct Authority [www.fsca.co.za](http://www.fsca.co.za))** also has a complaints procedure.
- **Ombudsman for Long-Term Insurance:** [www.ombud.co.za](http://www.ombud.co.za); 0860 103 236; [info@ombud.co.za](mailto:info@ombud.co.za). Complaints against subscribing insurance companies that offer long-term insurance products, such as life insurance and disability cover.
- **Ombudsman for Short-Term Insurance (OSTI):** [www.osti.co.za](http://www.osti.co.za) 0860 726 890 [info@osti.co.za](mailto:info@osti.co.za). Complaints by the insuring public against short-term insurers offering motor, homeowners, household, travel, disability, credit protection, commercial etc cover.
- **Pension Funds Adjudicator:** [www.pfa.org.za](http://www.pfa.org.za); 086 066 2837; [enquiries@pfa.org.za](mailto:enquiries@pfa.org.za). Investigates complaints against pension funds and their administrators, including issues related to benefits and investments.
- **Ombudsman for Banking Services (OBS):** [www.obssa.co.za](http://www.obssa.co.za); 0860 800 900; [info@obssa.co.za](mailto:info@obssa.co.za). Complaints against banks that are members of the Banking Association of South Africa.
- **National Credit Regulator (NCR):** [www.ncr.org.za](http://www.ncr.org.za); 0860 627 627; [complaints@ncr.org.za](mailto:complaints@ncr.org.za). Complaints against credit industry participants (including debt counsellors), working with and cross-referring complaints with the Credit Ombud (below).
- **Credit Ombudsman of South Africa:** [www.creditombud.org.za](http://www.creditombud.org.za); 0861 662 837; [ombud@creditombud.org.za](mailto:ombud@creditombud.org.za). Complaints against member credit bureaus and credit providers, working with and cross-referring complaints with the NCR (above).

- **Consumer Goods and Services Ombud:** [www.cgso.org.za](http://www.cgso.org.za); 0860 000 272; [info@cgso.org.za](mailto:info@cgso.org.za). Complaints by consumers against members of the Consumer Goods and Services Industry (retailers, suppliers, importers, distributors etc.). Complaints relating to credit agreements need to go to the Credit Ombud (see above). If mediation fails or if a non-member entity is involved, complaints will be referred to the **NCC (National Consumer Commission)**, [www.thencc.gov.za](http://www.thencc.gov.za).
- **Motor Industry Ombudsman of South Africa:** [www.miosa.co.za](http://www.miosa.co.za); 010 590 8378; [info@miosa.co.za](mailto:info@miosa.co.za). Investigates complaints against the automotive industry, including car dealerships and repair shops. If mediation fails, complaints will be referred to the **NCC (National Consumer Commission)**, [www.thencc.gov.za](http://www.thencc.gov.za).
- **NHBRC (National Home Builders Registration Council):** [www.nhbrc.org.za](http://www.nhbrc.org.za) (Complaints process [here](#)); 0800 200 824; [thenhbrc@nhbrc.org.za](mailto:thenhbrc@nhbrc.org.za); Not called an "Ombud Service", but all home builders must be registered with the NHBRC and it will address and attempt to resolve all complaints.
- **Health Ombudsman of South Africa:** [www.ohsc.org.za](http://www.ohsc.org.za); 0860 104 146; [info@ohsc.org.za](mailto:info@ohsc.org.za); Complaints against healthcare providers, including hospitals, clinics, and doctors. Lodge complaints [here](#). Complaints can also be lodged against specific industry players to these industry bodies –
  - **Health Professionals (doctors)** – [www.hpcs.co.za](http://www.hpcs.co.za)
  - **Private Hospitals** – [www.hasa.co.za](http://www.hasa.co.za)
  - **Nurses** – [www.sanc.co.za](http://www.sanc.co.za)
  - **Medical Schemes** – [www.medicalschemes.co.za](http://www.medicalschemes.co.za) (Complaints Procedure [here](#)).
- **Office of the Legal Services Ombud (OLSO):** <https://justice.gov.za/olso/index.html>; 010 023 5501 or 076 235 9887; [TRamuada@justice.gov.za](mailto:TRamuada@justice.gov.za) or [TLegora@justice.gov.za](mailto:TLegora@justice.gov.za). Complaints against legal practitioners and the Legal Practice Council (LPC). Complaints must first be lodged with the LPC (complaints procedure [here](#) and provincial complaint forms [here](#)).
- **Office of the Tax Ombud:** [www.taxombud.gov.za/](http://www.taxombud.gov.za/); 0800 662 837; [complaints@taxombud.gov.za](mailto:complaints@taxombud.gov.za). Taxpayer complaints against SARS (South African Revenue Services).

There are many more – Google for any specifics.

### ***Present your complaint effectively!***

A final thought – how well you present your complaint and your side of the story to an ombud will directly impact your chances of a successful outcome, so specific legal advice is a no-brainer here, particularly in larger disputes.

## **Agreements Not to Sue – Tread Carefully!**

***“Agreements not to litigate are not necessarily unreasonable.” (Extract from judgment below)***

An "Agreement Not to Sue" undertakes that one party won't take legal action against another. In other words, it's a way





of ensuring that disputes don't end up in court. You might come across this type of agreement in many different situations, such as in a business setting, a family dispute, a neighbour dispute, or even between friends.



In particular, any compromise agreement settling a dispute is very likely to contain such a clause. Incidentally, if you see mention of a "*pactum de non petendo anticipando*" that's just Latin for the same thing.

### ***The benefits***

The benefits of an agreement not to sue are that it can save you time, money, and stress. Going to court can be a long and complicated process, and an agreement not to sue means that you can avoid that. It can also allow you to come to a solution that is mutually agreeable, rather than having a court make a decision for you.

### ***The downsides and risks***

However, there are also downsides and risks to consider.

You may think that you can never lose a constitutionally guaranteed right such as that which gives us all right of access to the law, and indeed our courts will approach any "agreement not to sue" with a great deal of caution. But, as a recent SCA (Supreme Court of Appeal) decision has made crystal clear, such agreements may well be held valid and enforceable in an appropriate case. **In that event, you have no legal recourse if the other party doesn't follow through on their end of the agreement.**

### ***A R1,225 billion claim sunk by a "limited and reasonable" clause***

- A complicated series of contracts went wrong, and one of the parties sued a bank for R1,225 billion.
- The bank relied on a "agreement not to sue" clause in the applicable contract, and the High Court agreed, ordering the claimants to withdraw their action. The SCA confirmed that order on appeal, and in doing so highlighted some of the important considerations a court will consider in such a case –
  - An agreement not to sue "is an agreement like any other ...It is a contract that gives rise to rights and correlative duties. The nature of the right in question varies from case to case and is dependent on the text and the facts."
  - It can be for a limited time or "operate in perpetuity".
  - "Courts should use the power to invalidate a contract or not to enforce it sparingly and only in the clearest of cases ... balanced against the backdrop of our constitutional rights and values."
  - The claimants were fully informed of their rights and had consented to the clause freely and voluntarily. Their agreement not to sue was not a waiver of their constitutional rights, just an agreement not to enforce them.
  - The clause was not against public policy – the claimants had been legally represented (they spent over R16 million on legal advice), they were all experienced businesspeople capable of evaluating the merits, risks and suitability of the clause, and there was no indication of unequal bargaining power between the parties. Perhaps most importantly, the Court found that the agreement "went no further than was necessary to prevent very specific litigation. **As such it is a limited and reasonable restriction on the appellants' ability to litigate.**"

(Emphasis supplied).

### ***The bottom line***

An agreement not to sue is a serious document with both benefits and risks. If you're asked to sign one, take the time to carefully consider all the pros and cons and remember that it's always a good idea to ask a professional to help you understand the terms of the agreement and ensure that your rights are protected.

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## **Legal Speak Made Easy**

### ***"Bare Dominium"***

"Bare dominium" is ownership of a property without the right to use it. To put that into perspective, almost all of us have "full ownership" in our properties, so we can both sell them and "use and enjoy" them as we please. But if someone else has a right of usufruct (usually provided for in a will, but sometimes by agreement) over your property they have the usage rights, and you just have the "bare dominium" i.e. ownership and nothing more. The terminology can be complex (you may also come across terms such as *usus* and *habitatio*) but the important thing from a practical point of view when buying any property is to check that you will have "full ownership" and not just "bare dominium".



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