

Notes

A buyer's choice: The pros and cons of purchasing property in an entity

Property in South Africa may be acquired by natural persons (individuals) or by entities, such as trusts, companies, and close corporations. Each form of ownership carries distinct legal, tax, administrative, and risk implications.

While individuals generally face fewer formal requirements, entities are subject to additional statutory, compliance, and governance obligations. The appropriate structure depends largely on the intended use of the property, risk exposure, tax considerations, financing requirements, and estate planning objectives.

Natural persons (individuals)

When purchasing property in an individual capacity, the purchaser is liable for transfer duty on properties valued at R1 210 000 and above, unless the transaction is subject to VAT, in which case no transfer duty is payable.

On disposal, individuals benefit from the most favourable capital gains tax (CGT) treatment, including:

- A primary residence exclusion of up to R2 million on capital gains, provided the property qualifies as the individual's primary residence; and
- A lower CGT inclusion rate than companies and trusts.

Marital regime

An individual's marital property regime (in community of property, out of community with or without accrual) determines whether spousal consent is required to purchase or mortgage the property, in terms of the Matrimonial Property Act.

Ownership

The property is registered directly in the individual's name, giving the owner full control over the asset.

Personal liability

The owner is personally liable for debts, claims, and obligations relating to the property, which may expose personal assets to risk.

Taxation

Rental income is taxed at the individual's marginal income tax rate. Allowable deductions include interest on bonds, rates, levies, maintenance, and other expenses incurred in the production of income. CGT is payable on disposal, subject to exclusions and the rebate.

Flexibility

Individuals retain complete autonomy over management, leasing, improvements, and sale.

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Simplicity

Purchasing as an individual is generally the least complex option, with fewer compliance and administrative requirements.

Financing

Individuals typically find it easier to obtain mortgage finance, as banks assess personal income and creditworthiness directly. Juristic entities often face stricter lending criteria.

Estate planning considerations

Property owned personally forms part of the individual's deceased estate, potentially attracting estate duty and requiring transfer upon death, which may result in delays and additional costs.

Trusts

When property is acquired by a trust, it is owned by the trust and administered by its trustees for the benefit of the beneficiaries, in accordance with the trust deed.

Trustees may only act once they have received Letters of Authority from the Master of the High Court, as required by the Trust Property Control Act.

In terms of the Alienation of Land Act, read together with trust law principles, trustees must:

- Be properly authorised; and
- Sign a valid trust resolution approving the transaction prior to the conclusion of the sale agreement.

Legal ownership

The trust, not the trustees or beneficiaries, owns the property. This separation supports asset protection and succession planning.

Taxation

Trusts are subject to a distinct tax regime. Undistributed income and capital gains are taxed in the trust at higher effective rates than individuals. Trusts are subject to the highest CGT inclusion rate (currently 80%). Income or gains distributed to beneficiaries in the same tax year may be taxed in the beneficiaries' hands, depending on the circumstances.

Administration and compliance

Trusts require ongoing administration, including trustee meetings and resolutions, accurate record-keeping, annual tax filings, and compliance with Master's Office requirements.

Asset protection

Trust assets are generally insulated from the personal creditors of trustees and beneficiaries, provided the trust is properly constituted and administered.

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Estate planning

Trusts are frequently used to avoid repeated transfer costs upon death, provide continuity of ownership, and protect assets for future generations.

Costs and complexity

The establishment and maintenance of a trust involves legal, accounting, and administrative costs and requires careful governance.

Regulatory and judicial scrutiny

Courts increasingly scrutinise trusts to ensure they are not abused as alter egos of individuals, particularly in divorce and insolvency matters.

Companies

A company is a separate juristic person, capable of owning property independently of its shareholders.

Legal ownership

The property is registered in the company's name, not in the names of shareholders or directors.

Limited liability

Shareholders enjoy limited liability, meaning they are generally not personally liable for the company's debts, unless personal sureties are given.

Taxation

Companies are taxed at the corporate income tax rate. Companies are subject to a higher CGT inclusion rate than individuals. Rental income and capital gains are taxed within the company, with further tax consequences if profits are distributed to shareholders.

Deductions

Companies may deduct expenses incurred in producing income, including maintenance, interest, and operating costs.

Administration and compliance

Companies must comply with Companies and Intellectual Property Commission ('CIPC') requirements, annual returns, accounting records, tax compliance, and corporate governance obligations.

Financing considerations

Banks frequently require personal sureties from directors or shareholders, which can reduce the practical benefit of limited liability.

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Dissolution

Winding up a company can be procedurally complex and costly.

Close corporations ('CCs')

The Companies Act abolished the registration of new close corporations as of 2011. However, existing CCs may continue to operate and acquire property.

In terms of the Close Corporations Act, certain transactions, such as the acquisition of immovable property, require the written consent of members holding at least 75% of the members' interest.

Legal ownership

The CC is a separate legal entity and owns the property in its own name.

Limited liability

Members enjoy limited liability, subject to exceptions such as reckless trading or personal sureties.

Taxation

CCs are taxed in the same manner as companies. They do not have the option to be taxed as partnerships.

Administration

CCs generally have lighter administrative requirements than companies and are not legally required to have audited financial statements, unless otherwise required by lenders or stakeholders.

Regulatory compliance

CCs must still comply with CIPC filing and tax obligations.

Dissolution

As with companies, deregistration or liquidation can be complex and may involve legal costs.

Conclusion

There is no universally 'best' ownership structure for property. Each option involves trade-offs between tax efficiency, risk exposure, financing, administration, and long-term planning. Poor structuring at acquisition stage often results in avoidable tax costs and legal complications later.