THE USE OF THE USUFRUCT PHENOMONAN WHEN TRANSFERRING YOUR FIXED PROPERTY TO YOUR TRUST

Contrary to popular belief the Usufruct phenomenon is not only alive and well but provides Tax saving solutions that can benefit all who implement it in the correct manner.

It happens from time to time that a person has a need to transfer his/her property as a long term asset to his or her Trust. The reason for this might be for risk management, estate planning etc.

In order however to give effect to same on the standard method the transaction will draw Transfer Duty at the prescribed rate which will result in this becoming a rather costly exercise. To prove the point one needs only look at the Transfer Duty payable on a transfer of a R2 000 000-00 which will set the Trust back by R77 000-00.

The solution to this problem may be to consider transferring the property to the Trust with the simultaneous reservation of a Usufruct in favour of the seller.

In this context the Usufruct will refer to a “Right of Occupation” or “habitatio” being reserved in favour of the seller.
**Example:**

The seller sells his/her property to his/her Trust for R2 000 000-00 retaining a Usufruct for a period of 36 years. The transfer duty payable on this transaction will not be R77 000-00 but R 0.00 (Nil Rand). Please bear in mind that the applicable Conveyancer’s transfer and bond registration costs will still be payable save for the saving on the Transfer Duty.

**How is this possible?**

SARS formula for the determination the value of the Usufruct is follows: 

\[(\text{Value of property}) \times (\text{factor in terms of Act 45 of 1955}) \times 12\%\]  

\[= \text{Value of the Usufruct}\]

**I.e.**

R2 000 000.00 \( \times \) 8,1924 \( \times \) 12\% = R1 966 176.00 (Value of the Usufruct)

Bare Dominium value = R2 000 000 - R1 966 176.00 = R33 824.00

The value of the Usufruct is deducted off the purchase price to determine the “Bare Dominium” value. As the seller is to retain the value of the Usufruct **we are only required to pay Transfer Duty on the value of the “Bare Dominium” and that is how we obtain the saving.**

At the end of the exercise the property is owned by the Trust subject to a Usufruct in the seller’s favour. As time goes by the sellers Usufruct will diminish with each passing year until such time as the Usufruct lapses and the Trust becomes owner of the whole property.
Once the property has been transferred to the Trust subject to the 36 year Usufruct the property cannot be sold or bonded without the Usufruct holder’s written consent. To this end the Banks will not consent to the registration of any bond over the property without the Usufruct holder signing a waiver of preference in favour of such Bank. Please take note that we cannot effect a Sec 57 Substitution of Debtor with respects to the existing bond as the Deeds Registries Act 47/1937 renders this impossible. The Trust will therefore have to apply for a new bond.

We need however to caution that due care needs to be taken that the Usufruct is correctly implemented with consideration being given to i.e. use of the fixed property, age of the proposed the Usufruct holder, Capital Gains Tax etc.

Should you require assistance in giving consideration to the above application you will be well advised to contact your Attorney or the writer to assist you in this regard.

We trust that the above article will be of value to you

Yours faithfully

*Bert Smith*  
*BLC LLB (PRET)*