

Should I purchase the Shares or the Property?

The purchaser has found a house that is in the market for R2m. The seller informs him that the house is registered in the name of a company. He suggests to the purchaser that the shares in the company are sold and transferred instead of the property. Would this be a good idea for the purchaser?

The answer in my opinion is “no” for the following reasons:

1. If SARS or other creditors have a claim or claims against the company, they will go after the company. The purchaser will therefore sit with the problem. Although he will have a right of recourse against the seller, he will not be able to use it as a defence against SARS or another creditor.

If the seller therefore does not settle the claim immediately, the purchaser will have to do so and then sue the seller to recover his loss. If the purchaser, on the other hand, buys and takes transfer of the property, he will not have such risks. He will obtain a “clean asset”.

1. The purchaser will also not save anything in terms of transfer duty. The Transfer Duty Act, 1949 was amended a couple of years ago. In terms of the relevant amended provisions transfer duty is payable on the transfer of shares where the company owns a residential property like in our example.
2. If the property will be the primary residence of the purchaser, there is another reason for him not to take over the company. When selling your primary residence, a Capital Gains Tax exemption of up to R2m is available for the seller. This exemption, however, does not apply where the property is registered in the name of a company, a close corporation or a trust.

I would therefore advise the purchaser to rather buy the fixed property from the company and register it in his personal name.

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