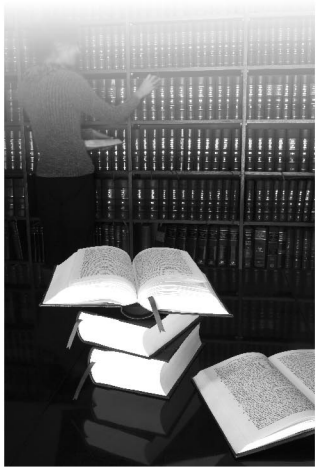
CONVEYANCING

Only study guide for LPL416F



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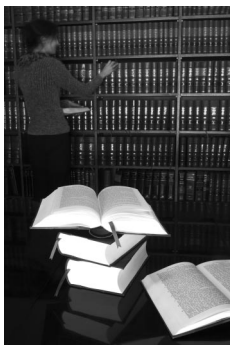


CONTENTS

FOREWORD

Welcome to this module on conventional land registration. We hope you will find it topical, practical and interesting. The deeds registration or conveyancing section is generally one of the most lucrative and specialised departments in an attorney's practice. It is therefore appropriate that you study this specialised elective near the end of the LLB degree as you start preparing for practice.

Nearly all of us, at some point or other, will buy and sell land. In South Africa, there has been much talk about the land boom and increasing costs, particularly during 2003–2004. Thus there has also been a remarkable increase in the number of land developers, estate agents and attorneys who see the property industry as a viable opportunity for creating wealth. In the background, the government seeks to ensure that land is distributed quickly, cost-effectively and equitably, while maintaining a secure and reliable land registration system.

The purpose of this module is to equip you with professional competence and research skills in the law relating to conveyancing: that is, the drafting, evaluation and registration of conventional deeds required for the lawful creation and transfer of ownership and other real rights in land in South Africa.

After having worked through this module, you should be able to:

- identify and discuss the purpose and function of conveyancing and its participants in contemporary South African law and everyday life
- analyse the procedural framework of the South African land registration system
- apply the South African land registration procedural framework specifically in a deeds office context, to effect registration of rights to land
- demonstrate an understanding of the historical and theoretical framework of the law of conveyancing practice, and its most pressing and prevalent issues
- apply the principles of conveyancing practice in practical situations and solve multi-dimensional legal problems associated with conveyancing practice
- conduct research using a variety of legal documents relating to the law of conveyancing practice

In this module we are focusing on real rights in **conventional land** as opposed to real rights in sectional title, share block and timeshare developments.

Conventional land refers to the traditional, typical piece of land, including everything above and below or permanently attached to that piece of land. In legal technical terms one might say the object of the real right is a piece of land including everything, below, above or permanently attached to that piece of land.

The Sectional Title Act 95 of 1986 provides for the division of buildings and the land on which they stand into sections and common property and for the acquisition of separate ownership of sections together with co-ownership of common property, which together make up a unit (the object of the sectional title ownership [real right]). A unit consists of a section (a defined part of a building such as a flat, a garage, an office or shop in a building, office block or business complex), together with an undivided share in the common property (the land and

all permanent structures on the land that do not form part of a section), apportioned according to the participation quota. Ownership and co-ownership form the basis of sectional title ownership, which require certain common law principles to be amended. The Sectional Titles Act further regulates the following: control over certain rights connected with the separate ownership of the section and joint ownership of the common property, transfer of ownership of units, the registration of sectional mortgage bonds over and real rights in units, the granting and registration of rights in and the disposal of the common property, as well as creation of a body corporate to manage each sectional title scheme by way of rules.

Real rights in both conventional land and sectional title schemes are registered in the South African deeds registries. You will learn more about notarially executed deeds and sectional title registration in Notarial Practice (LPL417G) and Sectional Title Registration (LPL418H). However, in this module we focus only on conventional land registration.

There is no prescribed book for this module. Instead, we refer to legislation/ statutes, Registrars' Conference Resolutions, Chief Registrar's Circulars, and case law and examples to build an integrated understanding of the relevant deeds registration principles. You will also receive additional information and support through tutorial letters and a DVD depicting the sale, mortgage and registration of transfer of a conventional piece of land. Please note that for examination purposes you do not need to know all the information in this guide in detail. We will provide you with detailed study guidelines unit by unit, and give demarcations for examination purposes in Tutorial Letter 101. You will need to refer to these study guidelines in order to focus your studies, as you work through the study guide.

There is a glossary at the end of this guide for the subject-specific terminology you will come across as you work through this module. So you can look up any terminology that you do not understand.

Icon of clipboard indicates that you should refer to the original section or regulation in your prescribed Deeds Registries Act 47 of 1937 and regulations.

A clipboard with a hand and pencil indicates an activity.

This icon generally indicates an example.

A clipboard with a tick indicates the answer or ''please note''.

This module covers an elective subject, usually taken in the final year of the LLB degree, after successful completion of Property Law (PVL303Y).

OVERVIEW OF THE COMPOSITE UNITS OF THIS MODULE

INTRODUCTION

Unit 1: Overview of the positive/negative South African registration system, the participants that complement each other and linking of simultaneous deeds

Unit 2: The conveyancer, qualifying requirements, powers, duties and responsibilities

Unit 3: The registrar of deeds, qualifying requirements, powers, duties and the registration process

THE MAIN TYPES OF CONVENTIONAL LAND REGISTRATIONS:

TRANSFER

Unit 4: The deed of transfer, purpose, analysis and variable clauses

Unit 5: The supporting documents of deed of transfer in particular the power of attorney and contractual capacity of PA signatory

Unit 6: Estate, partition, expropriation-/ vesting and court order transfers as well as deeds of grant

Unit 7: Transfers by virtue of endorsements

Unit 8: Substituted title deeds/certificates of registered title

MORTGAGE

Unit 9: The mortgage bond, structure and different types of bonds

Unit 10: Transactions registered in respect of mortgage bonds: cancellations, releases, cessions, substitutions, reduction in cover, waiver of preference and variations

Unit 11: Sequence in which transactions must be registered in the deeds registry and various applications and endorsements that can be made in respect of registered deeds (both deeds of transfer and mortgage bonds)

UNIT 1

Overview of South African land registration system

1 Introduction

Perhaps we should begin by explaining the term ''conventional land registration''. Since land is a valuable and limited resource, in South Africa as in most other countries, **ownership** and **limited** real rights in land are meticulously recorded in a dedicated government (deeds) office by way of a strictly prescribed, specialised legal procedure referred to as conveyancing. You will also remember from preceding studies of the law of property that transfer of ownership requires publicity, either in the form of delivery of movables or by registration in the case of immovables. In the case of ownership of immovable property and **other** real rights in immovable property, registration in the deeds office is required, similar to the delivery requirement for the transfer of ownership in movable property. Registration in the deeds registry fulfils the publicity requirement in respect of real rights in immovable property. Do you remember what real rights are? It is crucial that you do and you may have to refer back to your study material for Property Law to revise before you continue. Note particularly the distinction between real and personal rights and that real rights to immovable property only vest on registration in the deeds office.

In this unit we will consider the following key questions:

- How do negative and positive land registration systems compare?
- How is the South African land registration system structured?
- Who are the different participants in the South African land registration system?
- How and why is linking of deeds done in batches?

Please remember to refer to the study guidelines in Tutorial Letter 101 to focus on the most important parts of this unit for examination purposes.

2 *Types of land registration systems*

Land registration systems are generally classified as positive or as negative.

A positive system implies the following:

- The State guarantees to *bona fide* third parties that the state register in the designated deeds registry is an authoritative record of the rights to clearly defined units of land.
- The State examines/investigates documentation and transactions for legality.
- The State completes and maintains **a register of title**.
- Register of title is linked to a cadastral system of maps and diagrams.
- Transfer takes place when the **register of title is annotated** and any deeds are merely endorsed.
- From this it follows that new deeds are not necessary for each transaction as the main source of information ie the register is merely annotated.
- Linking of transactions occurs.
- The State guarantees the accuracy of the deed register and is liable for shortcomings.
- Such a register is characterised by a high degree of state interference (as for instance in the Torrens system, created by Sir Robert Torrens in the 19th century, which is still being used in New Zealand and in New South Wales, Australia).

A negative system implies the following:

- The State gives no guarantees to *bona fide* third parties regarding the accuracy of the state deeds **register**.
- The State simply records deeds submitted at face value.
- There is no examination of the deeds or investigation by the State prior to recording.
- **Transfer** is effected in the new deed, not in the state deeds register, so a new deed must be executed for each transaction.
- There is usually no link to a cadastral system of maps and diagrams.
- Third parties cannot rely on the accuracy of the state records, which might give an inaccurate or incomplete picture.
- The State incurs no liability for inaccurate or incomplete records.
- Parties often guarantee their rights by taking out private insurance.
- There is minimal state interference (as for instance in the land registration system in the Netherlands).

3 *The South African land registration system*

In South Africa land registration is based on **statute** (Alienation of Land Act 68 of 1981 and Deeds Registries Act 47 of 1937) and is unique because it is nominally negative, having some characteristics of a positive system as well. The South African land registration system has *inter alia* the following components and participants:

- **The deeds registry.** These are government offices under the control of a registrar of deeds, where real rights (including ownership) in land are registered. There are deeds registries in Pretoria, Johannesburg, Pietermaritzburg, Cape Town, King William's Town, Vryburg, Kimberley, Bloemfontein, Nelspruit and Mthatha.

- **Conveyancers.** A conveyancer is an attorney who has written and passed the conveyancing exam set by the Law Society of South Africa, has been admitted to practice by the High Court and works in private practices throughout the Republic of South Africa. We discuss the duties and functions of the conveyancer in detail in unit 2.
- **Land surveyors.** A land surveyor is a person with specialised survey qualifications in private practice throughout the Republic. Before a piece of land may be registered in the deeds registry, it must be precisely identified, measured and depicted on a plan or diagram with reference to its position in relation to the gridline coordinates below, usually by a land surveyor. These diagrams or plans must be lodged with, approved and registered by the Surveyor-General's office, before any transactions can be entered into or registered in respect of that piece of land in a deeds registry.
- **The Surveyor-General offices.** These are government offices where a cadastral (maps and diagrams) system is recorded and maintained for all the land in South Africa based on a grid coordinate system as shown in the diagram below.

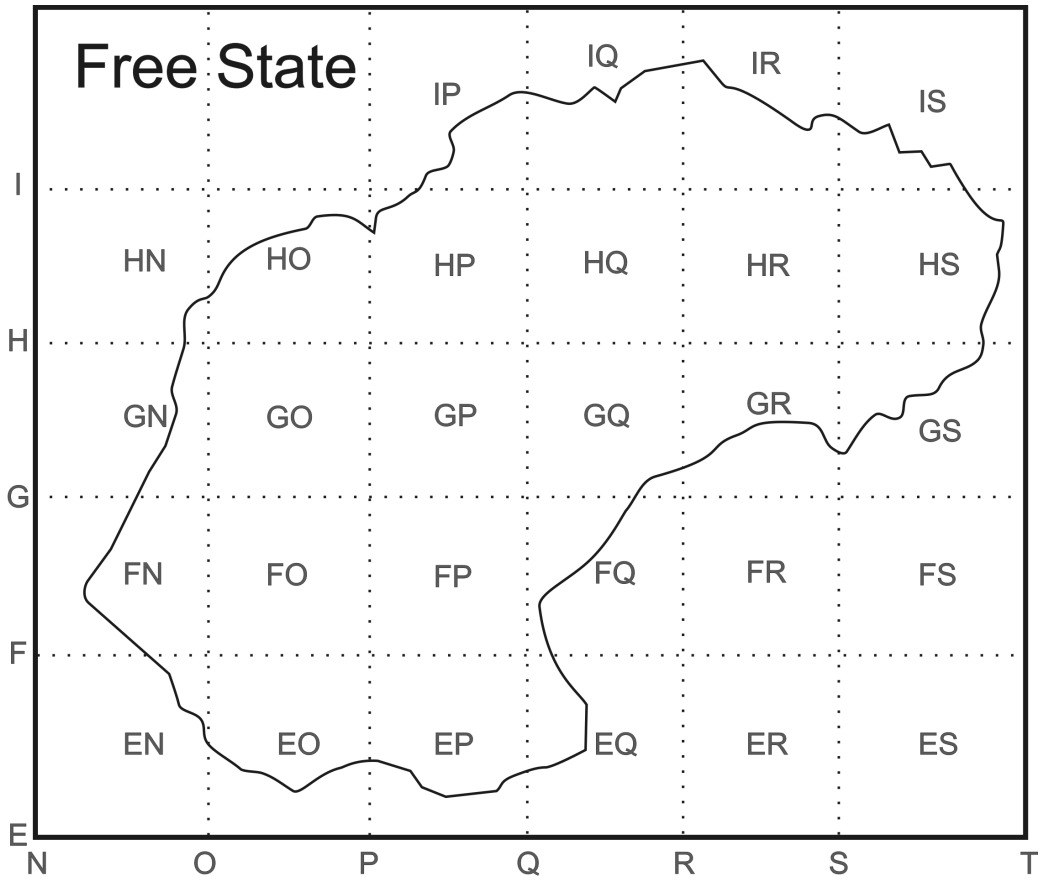


Diagram 1.1: Map of the Free State with gridline co-ordinator

- **Local authorities**, whose consent is required by law for all developments and subdivisions of land. In addition, local authority levies, rates, taxes and services accounts for water and electricity in respect of a specific property must be paid up to date and in advance before transfer of that property may be registered in the deeds office.

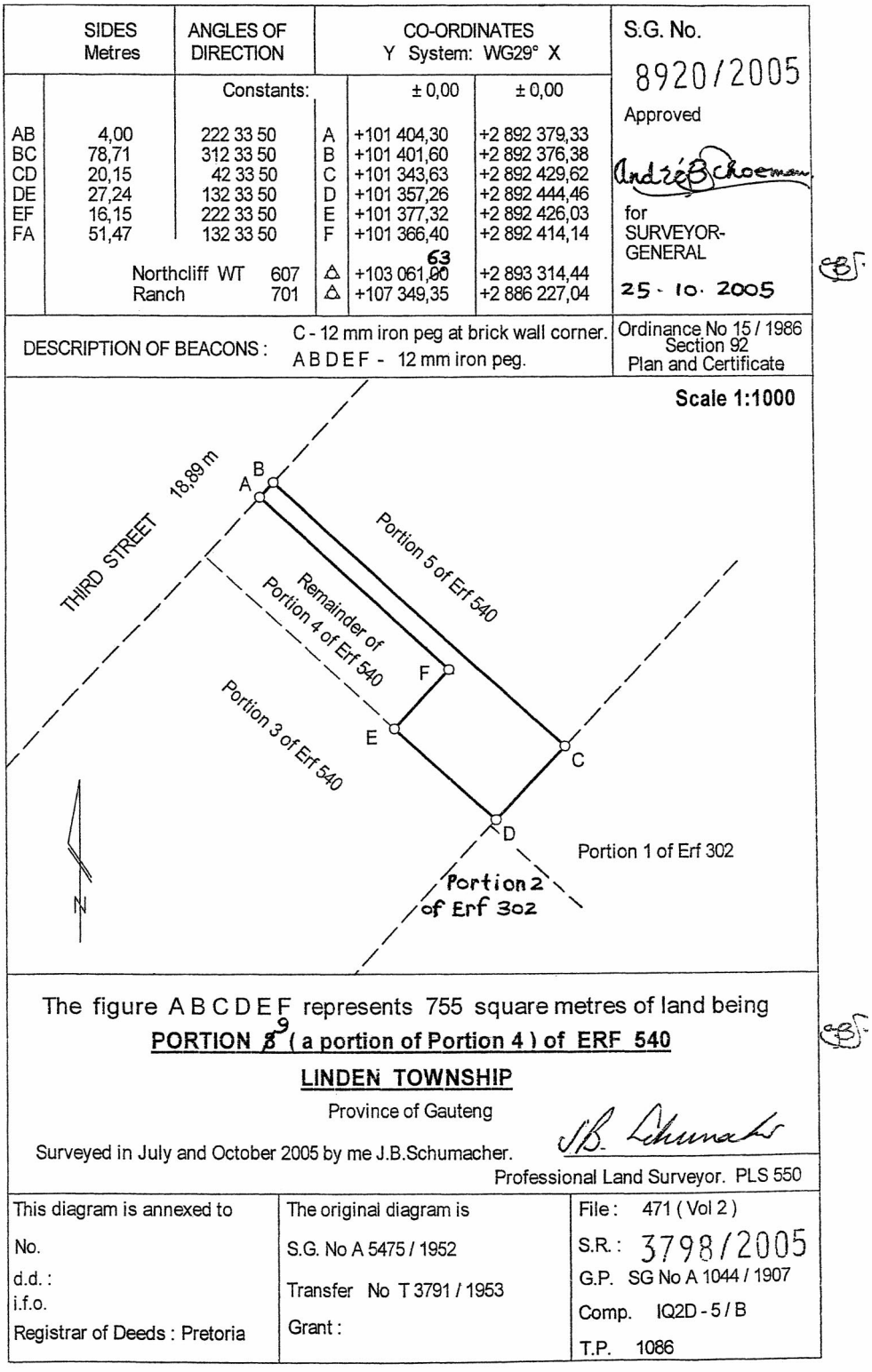
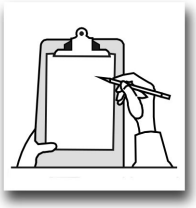


Diagram 1.2: Subdivisional approved by Surveyor-General with annotations relating to registration division, S–G approval, servitudes

- **State departments**, who must consent and cooperate in some instances before registration can be effected, for instance the Minister of the Department of Agriculture in terms of the Subdivision of Agricultural Land Act 70 of 1970, or the ''Controlling Authority'' of the Department of Transport as referred to in the Advertising on Roads and Ribbon Development Act 21 of 1940.

- **South African Revenue Services** (SARS), who, like the local authority above, must provide proof that all taxes, in particular **transfer duty**, have been paid (or that a particular transaction is exempt), before a transfer of a particular property may be registered in the deeds office.
- **Property developers**, who establish townships, subdivide land and erect residential and business complexes.
- **Financial institutions**, who provide finance for purchase or development of land, securing repayment by registering mortgage bonds against the relevant property.

The above summary is a simplification, but we would like you to have an overview of the participants involved and of the components of the South African land registration system, before we get too involved with the detail of specific individual transactions.



Activity

Complete the table below, which you will later find useful as a revision summary for this part of the unit. We have indicated the number of items you must complete by the number of cells in the table below.

Characteristics of a positive system	Characteristics of a negative system
The South African land registration system	
Positive characteristics of SA system	Negative characteristics of SA system

The nominally negative South African land registration system reflects elements of both the positive and the negative registration systems discussed above. While the

State does not guarantee the correctness of the data contained in the South African deeds registries, it does not simply record deeds at face value either – it provides owners/real right holders with security of title. Both titleholders and *bona fide* third parties do rely on the correctness of the information contained in the title and deeds registry records. This is evident from the fact that, despite the hundreds of thousands of transactions registered in the South African deeds offices annually involving billions of rands in value, there are few court cases or disputes involving title to land or mortgage bonds. It is also unnecessary for South African titleholders to insure their rights in case a third party should subsequently prove to have a better title to the property, as is the case with other negative registration systems.

Activity

Can you think of some examples where, in the South African deeds register, registration does not guarantee valid title? In other words, the deeds office records do not reflect the true owner of the property as the registered owner of the property.

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(Note: Where land has been expropriated by the State, the expropriating authority will become owner of the property as from the date mentioned in the notice of expropriation, although the transfer may not yet be registered in the deeds office. Ownership of land may have been acquired by prescription, which will not be reflected in the deeds registry records until it has been recorded in the deeds registry in terms of a court order. Similarly where X, the unmarried registered owner of a property, subsequently marries Y in community of property, the existing title deed will not reflect Y as co-owner.)

The question arises whether third parties who rely in full good faith on the abstract registration system and the correctness of incorrect data, or on incomplete data in a South African deeds registry, are protected — even if this may prejudice the original holders of the real right. Is a defective title validated through registration and does it then become indisputable, even though the rights of the original holder may be negated?

In *Barclays Nasionale Bank Bpk v Registrateur van Aktes, Transvaal* 1975 (4) SA 936 land which was subject to a mortgage bond was transferred to a *bona fide* purchaser without the bond first being cancelled in accordance with section 56 of the Deeds Registries Act 47 of 1937. The court held that the mortgagee's secured real right was not terminated by the transfer, and that the transferee therefore acquired the land subject to the bond. Until the mistake is discovered and rectified, the same principle will apply to all subsequent transfers. This means that the

mortgagee's rights remain intact although a number of subsequent transfers may have been registered. There is nothing in the Deeds Registries Act or at common law that justifies a departure from this decision.

Similarly the judgment in *Standard Bank v Breitenbach* (1977(1) SA 151 (T)) relates to the reliability and completeness of deeds office information. There the court held that a mortgage bond that had erroneously not been endorsed on the title deed of the land was in fact duly registered once the registrar had signed the mortgage bond, and that a *bona fide* purchaser of the land therefore acquired the land subject to the bond.

However there is a contrary view. According to this a South African land title automatically includes a tacit guarantee of indisputable title (Heyl JWS *Grondregistrasie in Suid-Afrika* Perskor (1977) 38–39). If this approach were applied in the above cases, the outcome would probably have been that the transferee landowner's title would have been regarded as indisputable and free from the mortgage bonds that were erroneously omitted.

The South African system of land registration, despite being nominally a negative system, remains a reliable source of information about the legal position of real rights registered in respect of immovable property; in practice third parties do rely on its accuracy. Therefore in this sense it is a positive system. However, defects in the title of a predecessor are not cured by registration.

In addition to other delictual or contractual remedies one may have against the relevant conveyancer, a prejudiced party may in an appropriate case recover damages from the State in terms of section 99 of the Deeds Registries Act 47 of 1937. However, the State is liable only if the claimant can prove that:

- the loss resulted from an act or omission of a registrar or an official employed in a registry
- the act or omission was committed in bad faith or as a result of a failure to exercise reasonable care and diligence

This is in contrast to a positive system. Here general compensation is payable to a prejudiced party from a special fund by the State, should the title noted in the register prove to be faulty.

This security of title (confidence in the validity of registered title deeds) that South African titleholders enjoy is the result not of a state guarantee, but of a unique private-public partnership between the deeds office, on the one hand, and the conveyancing profession, on the other. These two sectors rely implicitly on each other to **maintain** an effective South African land registration system, each keeping to a high professional standard.

A conveyancer may be compared to the conductor of a symphony orchestra controlling the participation of the various players, while taking responsibility for the finances of the transaction and the correctness of various aspects of the deeds lodged in the deeds office. (Refer to sections 15, 15A, and regulations 44 and 44A of the Deeds Registries Act 47 of 1937.) Continuing with this comparison, the registrar of deeds may perhaps be compared to the recording specialist who must ensure that the performance is perfect when it is recorded – ensuring the legal compliance and registrability of the deeds. (Refer to ss 3(1)(b) and 99 of the Deeds Registries Act 47 of 1937.) You will learn more about conveyancers, registrars and their duties in units 2 and 3.

To illustrate the various elements involved in conveyancing let us look at a simple transaction where X, the registered owner of land in Johannesburg, mortgaged to Q bank, sells the property to Y. Like most of us Y does not have enough cash to pay for the land. Fortunately however, Z bank is prepared to lend Y one hundred percent of the purchase price, provided that a mortgage bond is registered in favour of Z bank over the land being acquired to secure the repayment of the loan.

In this transaction the transferring conveyancer must, in addition to preparing and registering the deed of transfer from X in favour of Y, do the following simultaneously:

- ensure that there is a valid deed of sale as required by section 2(1) of the Alienation of Land Act 68 of 1981 (see 3.2.1 in unit 2)
- manage the relationship/**finances** between seller and purchaser
- deal with the cancellation/**guarantee** requirements of Q bank who currently holds a mortgage over the property
- manage the bond registration in favour of Z bank in order to **secure payment** of the advanced funds for the purchase of the property by Y
- deal with the city council/local authority who must furnish a certificate to the effect that **all rates and taxes** in respect of the land **have been paid**
- deal with the South African Revenue Services to whom all **taxes and transfer** duties relating to the transaction **must be paid**

As you can see there are six parties to the transaction (the seller, the purchaser, the city council/local authority, the South African Revenue Services, Q bank's mortgage bond cancellation conveyancer and the new Z bank mortgage bond conveyancer).

At the end of this study guide we will furnish you with a much more complex example for self-evaluation, which will hopefully demonstrate to you how much you have learnt!

But the transaction could be much more complex, cumbersome and divergent. For instance if Y were financing his purchase of the land in Johannesburg with the sale of his existing Durban property the transaction might be subject to two mortgage bonds with different banks. Then we have not even touched on special transfers such as estate, partition, expropriation or endorsement transfers, or on the registration of other real rights in land, like servitudes and reversionary rights.

From the above you should see that financial factors link most of these people and transactions, and make simultaneous registration important. X will not transfer the property to Y until he has received, or is guaranteed of simultaneously receiving, the purchase price. Q bank will not consent to X transferring the property to Y until it has been paid or is assured of simultaneous payment of this outstanding loan to X. In addition the Deeds Registries Act 47 of 1937 prohibits the transfer of land unless all bonds registered over the land have been cancelled or the land has been released from the operation of the bond. Z bank will not lend Y the money unless it has security for repayment of the loan in the form of a mortgage bond over Y's property and all other existing bonds have been cancelled. However, Y cannot get transfer of the property unless he can use the money from Z bank to pay for the purchase. So the registration of the land and the registration of the new bond securing the outstanding purchase price must occur simultaneously. This brings us to the linking of deeds, which you will learn more about in unit 2, and to the role of the registrar of deeds in registering the transaction, covered in unit 3.

Once the deeds have been lodged simultaneously and linked as a batch, these deeds follow a scrupulous process of checking and re-checking through the deeds office until they are either finally registered (and meticulously recorded on the

deeds office database), or rejected and returned to the conveyancers concerned for correction and re-lodgment.

4 Summary

We hope that in this overview we have given you a bird's-eye view of the public-private partnership nature of the conveyancing process. At this stage, before we delve into the detail in the units that follow, it may be helpful to view the deeds registration video/DVD that is included in your study material: it similarly attempts to give you an overview of the process.

We shall start off with a more detailed discussion of the duties, responsibilities and role of the conveyancer and the registrar of deeds in units 2 and 3 respectively, as well as the deeds registration procedure in unit 3. In units 4, 5, 6 and 7 we deal in detail with ordinary and special types of transfers of ownership, the supporting documents that must be lodged with such transfers as well as the contractual capacity of various transferors and transferees. In unit 8 we introduce you to the substitution of title deeds, whereby owners can obtain new or replacement title deeds for land already owned by them where no transfer is involved. We then turn our attention to mortgage bonds in units 9 and 10. Then, finally in unit 11, we discuss the prescribed sequence in which transactions must be registered in the deeds registry, and some diverse applications that may be effected in respect of deeds. We also provide you with a complicated conveyancing scenario that you will be required to unravel as a self-evaluation exercise.

UNIT 2

The conveyancer

1 Introduction

In this unit you will learn about who may practise as a conveyancer, the origin of the conveyancing profession and the conveyancer's duties. Keep in mind that learning requires an integration of knowledge. What we said in the previous unit remains relevant — about the conveyancer's responsibility for managing the financial arrangements of the transactions, the linking and simultaneous execution. Similarly, once you have completed the next unit on the duties of the registrar of deeds, you will be expected to integrate all this information in order to discuss the respective responsibilities of the conveyancer and the registrar of deeds and their liability for damages, by referring to appropriate authority and cases.

Let's look closely at the following key questions:

- What are the origins of the conveyancing profession?
- Who may act as a conveyancer, who may prepare deeds for lodgment and registration in a deeds registry and who may in fact lodge deeds in a deeds office?
- In view of regulations 43 and 44A of the Deeds Registries Act 47 of 1937, what are the duties and responsibilities of the conveyancer?

Please remember to refer to the study guidelines in Tutorial Letter 101 to identify the most important parts of this unit.

2 Origin of the conveyancing profession in South Africa

In the late 17th century in the Cape Colony, prospective transferors of land or their agents appeared before the State Secretary or the Deputy State Secretary in order to effect the registration of the transfer. There was a designated officer in the State Secretary's office who received the applications of persons who wished to transfer their properties. This officer, who had no professional knowledge of the practice or principles of law, presented the prospective transferors and transferees to the State

Secretary or Deputy State Secretary, who supervised the proceedings. Any uncertainty was referred to the president of the court for a ruling.

During the 19th century, deeds registries were opened in various parts of what is now South Africa (in Pietermaritzburg for the Colony of Natal, King William's Town for British Kaffraria, Bloemfontein for the Republic of the Orange Free State, Pretoria for the South African Republic, Kimberley for Griqualand West and Vryburg for the Republic of Stellaland). It would take too long to discuss the development of each of these registries. Suffice to say that in each of these registries there was a history of provisional titles or temporary certificates of title, often without the benefit of proper survey — until the establishment of a formal government for that area, which thereafter legislated land survey, an audit of existing titles and the substitution of these by official deeds of grant registered in the local deeds registry.

By virtue of Cape Ordinance No 14 of 1844, the task of preparing deeds in the South African colonies was entrusted for the most part to legally qualified persons in private practice, namely advocates, and soon most of the deeds were prepared by professional, specialised conveyancers; this practice gradually spread to other deeds registries.

3 The contemporary conveyancer

3.1 What does it take to be a conveyancer in the Republic of South Africa?

Section 102 of the Deeds Registries Act 47 of 1937 provides a deceptively simple definition of a conveyancer as:

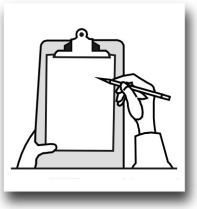
> *a person practising as such in the Republic, and includes a person admitted as an attorney in terms of the relevant Transkeian legislation and physically practising as such within the area of the former Republic of Transkei on or before the date of commencement of Proclamation No R9 of 1997.*

Does this mean anyone can simply go and practise as a conveyancer? No, because in addition section 18 of the Attorney's Act 53 of 1979 provides that **a person cannot be enrolled as a conveyancer until he/she has been admitted to practise as an attorney.**

Such admitted attorney must then pass two written national examinations (one of which may be an oral examination), before being eligible for admission to practice as a conveyancer by the High Court. The prospective conveyancer must in addition have himself/herself placed on record at the local deeds registry and provide a specimen of his/her signature.

To summarise then, a conveyancer is an attorney who has:

- specialised in the preparation of deeds and documents destined for registration in the deeds registry
- passed additional national conveyancing exams
- been admitted to practice by the High Court
- been enrolled on an electronic register of conveyancers maintained by the registrar of deeds in terms of regulation 16 of the Deeds Registries Act 47 of 1937



Activity

May a mere attorney act as a conveyancer?

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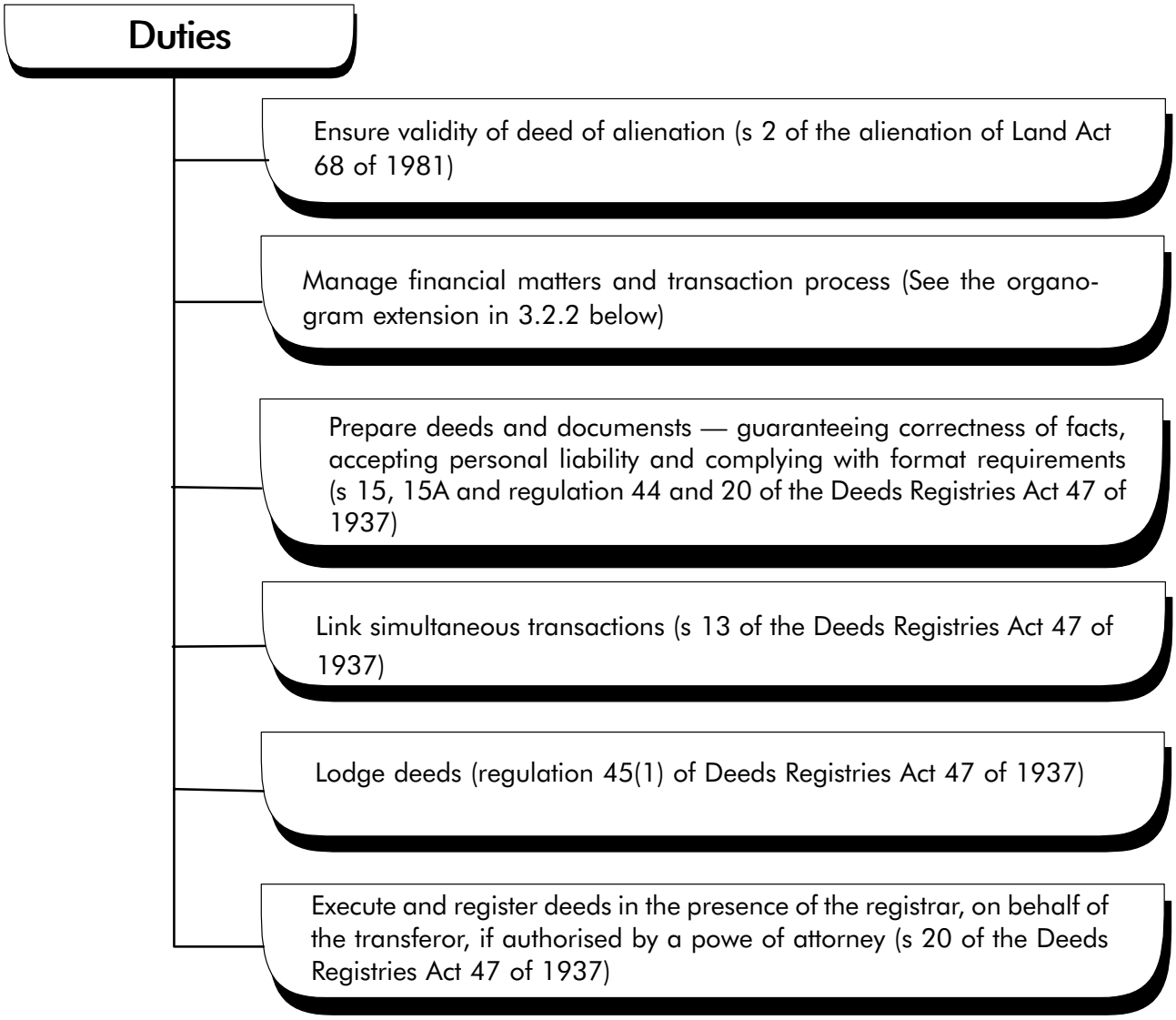
Ahaa! If you said yes, you would be correct: Remember the exception of the Transkei attorneys? And if you said no, you would also be correct, as shown by the four items in the summary above.

3.2 Duties of the conveyancer

The diagram below gives an overall illustration of the conveyancer's duties. We dealt with the first two cursorily in unit 1, and now we'll be dealing with the last four in detail in this unit.



3.2.1 Ensure valid agreement of sale of land (deed of alienation)

Section 2(1) of the Alienation of Land Act 68 of 1981 provides that no alienation of land will be of any force or effect unless it is contained in a **deed of alienation,**

signed by the parties, or their agents acting on their written authority, while ''alienation'' of land refers to the **sale, exchange, or donation of land** (see definitions of ''alienate'' and ''deed of alienation'' in s 1 of the Alienation of Land Act 68 of 1981). However there are exceptions for public auctions and where an agent acts on behalf of a close corporation or company still to be formed. In these instances special procedures have to be followed. Only once the conveyancer is certain that there is indeed a valid sale can he/she proceed with the further transfer of the property. Please refer to the case of *Thorpe NNO and another v Trittenwein and another* (2006 [4] All SA 129 (SCA)) for a comprehensive analysis of the validity requirements of an agreement for the sale of land, as well as the added complications of trustees acting on behalf of one of the parties before being duly authorised to do so.

3.2.2 Manage financial matters and the transaction process

In every registration transaction where there is a transfer of rights in exchange for a payment of money, the conveyancer must manage the financial matters. This implies the following:

- The conveyancer must ensure that he/she has sufficient cash funds and/or guarantees and undertakings to cover the consideration payable, including any occupational rental payable in terms of the agreement of sale. This is one of a conveyancer's primary responsibilities. The conveyancer will accordingly check the amounts and totals of the guarantees and undertakings, interest rates, limits, conditions of payment and authorised signatures.
- The conveyancer must ensure that the purchase price is sufficient to cover the capital and interest required to cancel the existing bond or that the seller has alternative funding available, as no property may be transferred unless the existing bonds have been disposed of (cancelled or the property released from the operation of the bond). You will learn more about this in units 9 and 10. It is quite tricky because the conveyancer cannot predict exactly when the bond will be cancelled and thus know how much interest will be payable to the existing bondholder.
- The conveyancer must ensure that the transfer duty, municipal rates and taxes, deeds office levies and transfer fees have been paid, and collect the money for all this from the party liable for such costs in terms of the deed of sale.
- Should the conveyancer be required by the client/seller to furnish undertakings in writing on behalf of the seller (to pay for instance the estate agent's commission), the conveyancer must ensure that there will in fact be sufficient funds on registration of transfer to honour these undertakings to third parties. In such instances the conveyancer must be particularly careful regarding the interest that may be payable on the existing bond as described above. Should there be an extended and unexpected delay in the registration, this interest may accrue to such an extent that there is little or no proceeds of the sale or alternative funding left to cover these undertakings.
- The conveyancer must remember to present guarantees and undertakings for collection on date of registration of the transaction and to pay out his/her undertakings on behalf of the seller or purchaser, before paying over the proceeds of the sale to the seller.

The conveyancer has a great many duties and activities under this heading and we cannot deal with all of them in detail, but perhaps the organogram below will provide you with more comprehensive insights.

Conveyancer receives instructions and contacts the following:

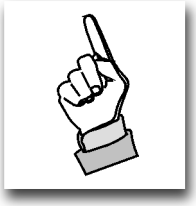
Attorneys registering new bond to finance the purchase	Bondholder requesting cancellation requirements and original title deed	**Seller** for copy of ID, marital status, ANC and electrical compliance certificate	**Purchaser** for details of financing of purchase, copy ID, proof of marital status, ANC and transfer costs	**Local authority** to apply for rates clearance certificate	**Estate agent** to confirm proceeding and undertaking to pay commission
Subsequent processes, and conveyancer's actions:					
Receives confirmation of amount available on bond	Receives bond cancellation figures, title deed and details of cancellation attorneys	Receives requested documents	Receives requested documents and payment of costs	Receives estimated account 120 days in advance	Reports to estate agent
Sends bond attorneys details of guarantee required by existing bondholder and balance in favour of trust and copy of new draft deed, enabling them to draft their bond and supporting documents		Draws up documents and draft deed using seller and purchasers details and existing title deed Checks documents and draft deeds Arranges for signature by transferor(s) and transferee(s)		Pays local authority and SARS for transfer duty	Reports to estate agent
Receives guarantees	Forwards guarantee in favour of existing bondholder and pays cancellation costs on behalf of seller			Receives transfer duty receipt and rates clearance	Reports to estate agent
Arranges lodgment	Arranges lodgment	Checks and prepares deeds and double-checks finance		Checks correctness and reapplies or amends if necessary	Reports to estate agent, purchaser and seller
Finally, conveyancer lodges deeds.					
Process through deeds as described in unit 3 registry:					
New bond comes up on prep	Existing bond cancellation comes up on prep	Transfer comes up on prep — final check, especially finances		Advises estate agent, purchaser and seller	
Registers bond	Cancels bond	Registers transfer	Advises local authority	Advises agent, seller and purchaser	
Uses finances to pay purchase price to seller	Uses finances to pay outstanding amount on existing bond	Accounts to all parties			

From the above it follows that before lodging the deeds at the deeds registry, and

again before proceeding with the execution and registration of the deeds in the deeds registry, the conveyancer must check and double-check all the calculations, guarantees and undertakings — that all fees and disbursements have been paid, that all cheques have been cleared and that there are sufficient funds from both seller and purchaser to meet their obligations (contributions to rates clearances, occupational rental, bond cancellation costs, etc).

3.2.3 Prepare deeds and documents and take responsibility for correctness of facts

When we talk about preparation of deeds in this module the word ''preparation'' does not have the ordinary lay meaning of ''getting something ready or organised''. In conveyancing terminology ''to prepare'' a deed means to check the contents thoroughly and thereafter to sign the preparation clause on the top right-hand corner of the first page in the format shown below, to certify the correctness of certain facts and the signatory's responsibility in this regard in terms of section 15A(1) and (2) and regulation 44(A) of the Deeds Registries Act 47 of 1937. The purpose of the preparation clause is to firmly place the responsibility for the documents and deeds prepared by the conveyancer with that conveyancer — who coordinates and manages the particular transaction — and not with the registrar, who has no knowledge or control of that particular transaction until it is lodged for registration. As the conveyancer is now responsible and liable (to the extent provided for in regulation 44A), it is not necessary to lodge proof of certain facts contained in the deed, such as identity numbers and marital status, at the deeds office. This saves time for the deeds office personnel, who will simply accept the correctness of the allegations of the preparing conveyancer in this regard.



Example

Prepared by me

.....

CONVEYANCER
SURNAME AND INITIALS

According to section 15 of the Deeds Registries Act 47 of 1937, before a registrar of deeds may attest, execute or register a **deed of transfer**, **certificate of registered title** for registration or a **mortgage bond**, it **must** be **prepared** by a conveyancer (unless any other Act provides differently). Similarly regulation 43(1) of the Act provides that all deeds of transfer, certificates conferring title to immovable property, deeds of cession and mortgage bonds **must** be **prepared by a conveyancer**. What if the conveyancer practises in one province, but the deed is to be registered in another province? Refer again to the definition of a conveyancer — any person who practises as such in the Republic of South Africa. Therefore a South African conveyancer can prepare a deed for lodgment anywhere in South Africa. (See s 102 definition of conveyancer in the Deeds Registries Act 47 of 1937.)

Note: Although most deeds are prepared by conveyancers (and we refer to the preparing conveyancer in the study material), there are exceptions. Other Acts do allow for deeds to be prepared by certain officials (who are not conveyancers) as defined in those Acts; see for instance the Agricultural Debt Management Act 45 of 2001 and the Land and Agricultural Development Bank Act 15 of 2002.

A conveyancer must also personally initial **all** alterations or interlineations in any **deed**, **certificate**, **cession** or **bond** he/she prepares, and initial every page of that deed, certificate, cession or bond not requiring the conveyancer's signature (regulation 43(2)). The reason is that the conveyancer is responsible for the correctness of the **contents** and **facts** as stipulated and contained in the deeds, so all pages and all changes need to be initialled by the conveyancer to ensure that no unverified information has been inserted. In exceptional instances in the case of minor errors in a deed or mortgage bond, the registrar may allow the **conveyancer who executes** the deed, as opposed to the **conveyancer who originally prepared** the deed, to initial the amendments or interlineations. This saves time and money because the deed or mortgage bond does not have to be sent back for correction to the conveyancer who prepared it (regulation 43(2)).

Examples of material alterations or interlineations to the documents and deeds referred to in regulation 44(2), which therefore must be initialled by the preparer of the deed/document, are amendments to:

- names, identity numbers or marital status of transferor or mortgagor
- date of sale
- description of property — erf or portion number of property
- purchase price
- amount of mortgage bond

According to regulation 43(2) whether an alteration is minor and may be initialled by the executing conveyancer, or material and **must** be initialled by the preparing conveyancer, depends on the ''opinion of the registrar''.

The following documents, if executed in South Africa and if they are to be used for an act of registration in a deeds registry or submitted for registration or filing of record, must also be **prepared**, but in this instance it may be done by either an **attorney**, a **notary** or a **conveyancer**:

- power of attorney
- an application (refer to unit 11 for diverse applications relating to deeds)
- consent to an act of registration
- any agreement of partition referred to in section 26 of the Deeds Registries Act 47 of 1937

The preparers of the above documents, be it an attorney, notary or conveyancer, likewise accept responsibility under regulation 44A and section 15A(1) and (2) for the correctness of the facts in the documents they have prepared.

Activity

Complete the table below by inserting the following deeds under the correct heading:

- deed of transfer
- partition transfer deed
- partition agreement
- cession of a mortgage bond
- power of attorney
- consent to cancellation of a bond
- mortgage bond
- application for correction of a deed in terms of section 4(1)(b)
- cession of a notarial bond

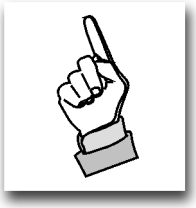
Deeds that must be prepared by a conveyancer	Deeds that may be prepared by an attorney, notary or conveyancer

Do you have too few lines? Maybe you didn't notice that the last bulleted item referred to a **notarial** bond, not a conventional bond. You will learn more about these in LPL417G, but they do not contain preparation clauses and may only be drafted and executed by notary publics, not conveyancers.

In short, all documents usually drafted and lodged by conveyancers must have a signed preparation clause, except affidavits and conveyancer's certificates. (In general a conveyancer cannot vouch for the correctness of someone else's affidavit and in the conveyancer's certificates the conveyancer already signs and certifies the correctness of the within-mentioned facts, so another signature in a preparation clause would be obsolete. The exception is an application in terms of s 4(1)(b), which you will learn about in unit 11.)

Easy! But, now, who may sign the preparation clauses? As a general rule, only conveyancers may sign the preparation clauses — but powers of attorney, applications, consents to acts of registration and agreements of partition may also be prepared by attorneys or notaries.

Where the preparation clause is signed by an attorney or notary, the fact that the signatory is a practising attorney or notary must be confirmed by a practising conveyancer, who must countersign the preparation certificate, as shown below.



Example

Countersigned by me	Prepared by me
.....	.....
CONVEYANCER SURNAME AND INITIAL	ATTORNEY/NOTARY SURNAME AND INITIALS

Activity

If a power of attorney executed in South Africa and destined for registration in the deeds office was prepared by attorney X and countersigned by conveyancer Y, and it now appears that the grantor of the power of attorney's identity number is incorrect in the document, who should initial the correction/ interlineations?

.....

.....

.....

According to regulation 44(2) the preparer who accepted responsibility for the original correctness of the document must initial any amendments.

The question of liability for incorrect facts contained in deeds, especially in a negative/positive registration system such as ours, can be crucial. Accordingly it is important to note what exactly the conveyancer bears responsibility for in terms of law. Please read the following sections and regulations in your copy of the Act and the regulations.

Section 15A essentially provides that, by signing the preparation certificate of a deed, consent, power of attorney, etc, the conveyancer accepts responsibility for the accuracy of the facts as prescribed in regulation 44A. Regulation 44A provides that the preparer of the deeds is responsible to ensure the following:

(a) All copies of the deeds or documents are identical on date of lodgment. (This is only relevant for deeds offices where microfilming is not yet in place and multiple copies of deeds still need to be lodged.)
(b) In the case of a deed of transfer or certificates of title to land, all the applicable **township and other conditions** have been correctly brought forward from the **previous title deed**. This is particularly problematic in the case of consolidated properties, where the component parts are subject to different conditions. However, the registrar of deeds must still examine the title conditions to ensure that they do not, for instance, contain conditions that have lapsed, a prohibition against alienation, or require certain consents to alienation or a pre-emptive right (first right to purchase — refer to the Property Law module PVL303Y if you need to refresh your memory). In the case of a mortgage bond, however, the registrar must not examine any provisions relating to the bond which are not relevant to the registration of the bond (s 50A of the Act).
(c) Where deeds and documents are being signed by an executor, trustee, tutor, curator, liquidator or judicial manager, or by a person in any other representative capacity, the preparer (from perusal of the documents evidencing the appointment which have been exhibited to him/her) must ensure that such person has in fact been so appointed, is acting within his/her powers and has furnished the necessary security to the Master of the High Court.

    (See the similar provision below in (e) relating to companies, close corporations, etc. Consider the implications of this and the conveyancer's potential liability for a moment. As prospective conveyancers you would be well advised to check such appointments and authorisations meticulously and retain proof in the form of copies for your files.)
(d) To the best of the preparing conveyancer's knowledge and belief and after due enquiry has been made, the names, identity number, or date of birth, and the marital status of any natural person who is party to the deed or document is correctly reflected in the deed or document; and the names and registered number, if any, of any other (legal) person or a trust are correctly reflected in that deed or document.
(e) Where deeds and documents are being signed on behalf of a company, close corporation, church, association, society, trust or other body of persons, or an institution, **the signatory** is in fact authorised (that is with proof that the signatory is duly authorised by the management to sign the documentation, by way of a resolution) and (except in the case of a company) **the relevant transaction** is authorised by and according to the constitution, regulations, founding statement or trust instrument.
(f) In the case of a deed of transfer, certificate of title or mortgage bond, the **particulars** in the deed have been correctly brought forward from the **special**

power of attorney or relevant application. This means that, where the deed of transfer, certificate of title or mortgage bond is based on a preceding power of attorney or application, drafted and **prepared** by someone else, the preparer of that power of attorney is responsible for the correctness of the names, identity numbers, registration numbers and marital status of the parties. (See regulation 44(1) read with regulation 44A.) The conveyancer who thereafter prepares the deed of transfer, certificate of title or mortgage bond takes responsibility for the correct carrying forward of this information (see also points (d) and (e) above) from the power of attorney to the new deed — not for the actual content of such information.

When preparing a deed, power of attorney, consent or application for lodgment in the deeds office and in particular before signing the preparation certificate at the top of the deed and accepting personal responsibility for the items set out above, the preparer (conveyancer, attorney or notary) will check the above matters meticulously and will keep proof of any facts for which he/she took responsibility on file. Section 15A(3) of the Act provides that, in the course of examining the deed or document, the registrar of deeds must accept that the facts for which the preparer of the deed accepted responsibility have been conclusively proved, unless the deed or document is *prima facie* incorrect. The registrar is duty-bound to examine the deed or document (s 3(1)(b)) and may in terms of section 4(1)(a) call for proof, by way of affidavit or otherwise, of any other necessary fact.

Now you can already begin to see how the duties and responsibilities of the conveyancer and the registrar of deeds dovetail to constitute the positive characteristics of our nominally negative deeds registration system. When we discuss the registrar of deeds in the following unit it will become even more apparent.

In terms of regulation 20 all deeds lodged in the deeds registry must comply with the following format requirements and formalities:

- good quality A4 paper to be used
- top half of the first page to be left blank for endorsements
- blank spaces to be ruled through (regulation 22)
- a 4 cm binding margin on the left-hand side
- only black ink to be used — no faint writing, typing or printing
- all interlineations and alternations to be initialled
- copies of documents, the originals of which are lodged in government offices, to be certified by a notary, conveyancer or head of that government office (regulation 20(7))

However the registrar has a discretion to waive compliance with any of the above requirements, many of which have now become obsolete in any event; for instance copies of deed are no longer bound and filed, but electronically stored, so no binding margin is required. However, these requirements remain in regulation 20 and for this reason we mention them.

3.2.4 Link deeds

All deeds and documents presented to the deeds registry for purposes of registration must be lodged in separate lodgment covers for each transaction. Deeds that must be registered simultaneously for financial reasons, although prepared and lodged by different conveyancers, can be linked as a batch (by completing their lodgment covers in a specific way) and lodged on the same day in separate lodgment covers. The deeds are then examined/checked by the deeds

office personnel as a batch and are registered simultaneously as a batch. The linked deeds are all deemed to be registered only when the last act of registration in the batch has been signed by the registrar (s 13).

Linking of deeds for simultaneous execution in a batch is usually done because the finances of the various transactions are linked. A number is allocated to each deed for execution or document for registration (sometimes called ''units''). This sounds complicated but it will become clear once you study the practical example below.

The following codes/abbreviations are commonly used on the lodgment cover:

- **T** for deeds of transfer, transfers by endorsements, certificates of title and deeds of grant since 1/1/1974 — in short, all title deeds of land
- **B** for mortgage bonds and charges
- **BC** for mortgage bond cancellations, releases from the operation of the bond (that is, all dealings with bonds or charges as well as amendments of deeds, status and names of parties)
- **PA** for general powers of attorney
- **H** for antenuptial contracts
- **VA** for copies of lost or destroyed deeds in terms of regulation 68

(For a complete list of codes and abbreviations refer to the end of the glossary at the end of this guide.)

Number and order of deed/document in batch

The nature of the different transactions and the linking of the deeds must be indicated by the conveyancers (regulation 63(3)) on the front covers of all the linked deeds. In the example below this is indicated by the following:

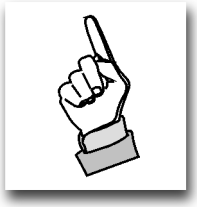
	Code	Names of parties to transactions	Firm no	
1	T	Mr A/Mrs B	116	1
2	BC	X bank/Mr A	203	2
3	B	Mrs B/Y bank	116	3

If the lodgment covers do not indicate a linking, but instead each transaction cover shows only a single transaction, for instance the transfer cover shows only the transfer details, while the mortgage bond cover shows only the bond details and the bond cancellation shows only those details, the transactions will be registered individually. This will result in financial chaos for that transaction (especially if one of the parties were to become insolvent before all the transactions were registered). If the covers of the entire linked batch of deeds do not correspond, the deeds office personnel will be unable to match up the linked deeds and they will be returned forthwith to the respective conveyancers with a note ''simuls not lodged''.

We shall use the example in unit 1 to demonstrate how the linking of the deeds should take place.

X, the registered owner of land in Johannesburg, mortgaged to Q bank, sells the property to Y. Y does not have enough cash to pay for the land. Fortunately however, Z bank is prepared to lend Y one hundred percent of the purchase price, provided that a mortgage bond is registered in favour of Z bank over the land being acquired to secure the repayment of the loan.

The linked lodgment covers for the three registrations would look as follows:



Example

116
XXXXXXX
Attorney
Tel: 011 782 6267

UITVOERING – EXECUTION

A. VIR AKTEKANTOORGEBRUIK/FOR DEEDS OFFICE USE

Datum van indiening Date of lodgment	Gelyktydiges nie ingedien nie Simuls not lodged	Regstellings Rectifications
2006-10-13		

Ondersoekers/ Examiners		Kamer/ Room		Skakeling/ Linking		Verwerp/ Rejected	Gepasseer/ Passed
1							
2							
3							

B. (a) VIR AKTEBESORGER SE GEBRUIK FOR CONVEYANCER'S USE

Verwysingsno/Reference No
Transportlêer/Transfer File X333/2006

Skakeling/Linking

3	1

Erf 2222 Johannesburg Township

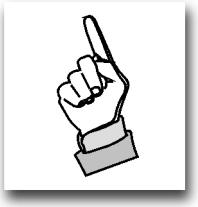
No.	Kode/ Code	Name van partye/ Names of parties GELYKTYDIGES/ SIMULS	firma/ firm no	No in stel/ batch	Titelbewyse/Title deeds
1	T	Mnr X/Mnr Y	116	1	T3245/2004
2	BC	Bank Q/Mnr X	203	2	
3	T	Mnr Y/Bank Z	116	3	

B. (b) GELYKTYDIGES MET ANDER REGISTRASIEKANTORE/DEELTITELS: SIMULS WITH OTHER REGISTRIES/SECTIONAL TITLES:

Kode/ Code		Firma/Firm	Eiendom/Property	Kantoor/ Office

Versoek om registrasie/
Request for registration

010004657035



Example

203
JJJJJJJJJ
Attorneys
Tel: 011 447 4598

UITVOERING – EXECUTION

A. VIR AKTEKANTOORGEBRUIK/FOR DEEDS OFFICE USE

Datum van indiening Date of lodgment	Gelyktydiges nie ingedien nie Simuls not lodged	Regstellings Rectifications
2006-10-13		

	Ondersoekers/ Examiners	Kamer/ Room		Skakeling/ Linking		Verwerp/ Rejected	Gepasseer/ Passed
1							
2							
3							

B. (a) VIR AKTEBESORGER SE GEBRUIK FOR CONVEYANCER'S USE

Verwysingsno/Reference No
Lêer Bank X-rojerings/File X bank cancellations No 543/2006

Skakeling/Linking

3	2

Erf 2222 Johannesburg Township

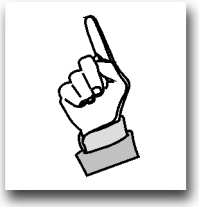
No.	Kode/ Code	Name van partye/ Names of parties	firma/ firm no	No in stel/ batch	Titelbewyse/Title deeds
1	T	Mnr A/Mnr B	116	1	
2	BC	Bank X/Mnr A	203	2	B8753/2004
3	B	Mnr B/Bank Y	116	3	

B. (b) GELYKTYDIGES MET ANDER REGISTRASIEKANTORE/DEELTITELS: SIMULS WITH OTHER REGISTRIES/SECTIONAL TITLES:

Kode/ Code		Firma/Firm	Eiendom/Property	Kantoor/ Office

Versoek om registrasie/
Request for registration

010004657035



Example

116
XXXXX
Attorneys
Tel: 011 782 6267

UITVOERING – EXECUTION

A. VIR AKTEKANTOORGEBRUIK/FOR DEEDS OFFICE USE							
Datum van indiening Date of lodgment		Gelyktydiges nie ingedien nie Simuls not lodged			Regstellings Rectifications		
2006-10-13							
Ondersoekers/ Examiners		Kamer/ Room		Skakeling/ Linking		Verwerp/ Rejected	Gepasseer/ Passed
1							
2							
3							

B. (a) VIR AKTEBESORGER SE GEBRUIK
FOR CONVEYANCER'S USE

Verwysingsno/Reference No
Bank Y-verbande/File Y bank bonds 978/2006

Skakeling/Linking

3	3

Erf 2222 Johannesburg Township

No.	Kode/ Code	Name van partye/ Names of parties GELYKTYDIGES/ SIMULS	firma/ firm no	No in stel/ batch	Titelbewyse/Title deeds
1	T	Mnr A/Mnr B	116	1	
2	BC	Bank X/Mnr A	203	2	
3	B	Mnr B/Bank Y	116	3	

B. (b) GELYKTYDIGES MET ANDER REGISTRASIEKANTORE/DEELTITELS:
SIMULS WITH OTHER REGISTRIES/SECTIONAL TITLES:

Kode/ Code		Firma/Firm	Eiendom/Property	Kantoor/ Office

Versoek om registrasie/
Request for registration

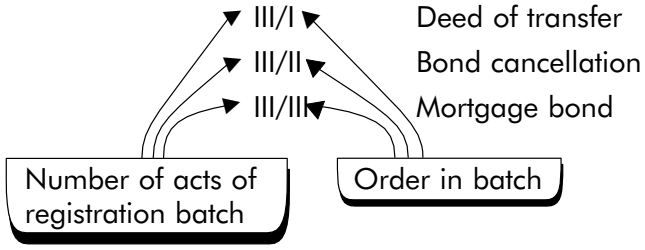
010004657035

In the example of the three transactions above take note of the following distinctions on the different covers:

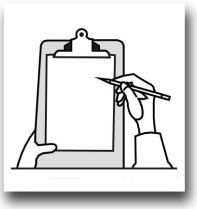
- The details of the different attorneys lodging the different deeds are given in the top left-hand corner of the cover. The first cover is lodged by firm no 116, the second cover by firm 203 and the third cover also by firm 116. (All conveyancing firms are awarded designated numbers for easy identification.)
- The reference block in the middle of the page on the left-hand side indicates the different conveyancer's file references for the different deeds on each cover.
- The linking block in the middle of the page on the right-hand side indicates the linking, if any. The first figure in the double box, with the heading ''Linking'', indicates the number of transactions or units to be registered in the batch. The second figure indicates the position of that transaction or unit, in the batch.
- The original documents (for example a deed of transfer or a bond) included in that specific cover are indicated under **Title deeds** in the linking block. Supporting documents such as powers of attorney to transfer are lodged with the transaction they corroborate and are not lodged or numbered separately for linking purposes.

Also note that the cancellation of the mortgage bond as an act of registration only (as opposed to the deed of transfer and registration of the new mortgage bond, which are actually executed and registered) follows the transfer. This does not mean that the deed of transfer is registered before the cancellation of the existing bond, which is prohibited by the Act (see s 56). Since the transfer, bond and bond cancellation are linked and lodged as a batch, it means that all three transactions are registered simultaneously regardless of their order in the batch.

The covers in a batch may also be linked in pencil in Roman numerals. For example:



In such instances of **Roman linking** the registrar of deeds will pass those deeds that are in order for registration, and will reject only those deeds in the batch that are not in order, unlike the conventionally numbered batches, where the whole batch is rejected if one of the deeds in the batch is not in order for registration.



Activity

Complete the excerpt from a lodgment cover below assuming that you are a conveyancer and you are transferring your land held under deed of transfer T2345/2004 to your best friend. The property is not mortgaged at present but the purchaser has obtained finance from African Bank Ltd, which is to be secured by a mortgage bond.

Skakeling/Linking

No.	Kode/ Code	Name van partye/ Names of parties	GELYKTYDIGES/ SIMULS	firma/ firm no	No in stel/ batch	Titelbewyse/Title deeds

3.2.5 Lodge deeds (with the receiving clerk of the deeds registry)

When a conveyancer has completed the financial arrangements and the transaction process, checked, prepared and linked the deeds (in collaboration with the conveyancers attending to the other simultaneous transactions, where applicable), the conveyancer will arrange for simultaneous lodgment of all the linked deeds at the relevant deeds registry. This involves the transferring conveyancer contacting for instance the bond cancellation conveyancer and the new bond conveyancer (if different conveyancers are involved), checking that they have all satisfied their financial and procedural requirements and are ready to lodge and execute the deeds for which they are responsible — and, if so, arranging to lodge their deeds on a prearranged date at the deeds office. If one of the simultaneous transactions is not yet ready for lodgment, then lodgment cannot take place for any of the linked deeds. If one of the linked transactions is not lodged on that particular day, the remaining transactions will be rejected and relodgment will have to be arranged.

As opposed to **preparation** of the deed, which may be done by any South African conveyancer, regulation 45(1) in terms of the Act provides that deeds, bonds, documents and powers of attorney **must be lodged by a conveyancer practising at the seat of the deeds registry**, or by a person employed by such conveyancer, for execution or registration. See also the final proviso to regulation 45(1), to the effect that documents lodged on behalf of government departments may be lodged by any person in the employ of that government department, even though he/she is not a notary or conveyancer and even where that government department does not have an office at the seat of the relevant deeds registry, in a manner approved by the registrar.

Activity

Explain who may:

- prepare deeds for lodgment

.....

.....

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.....

.....

- lodge deeds at the deeds registry

.....

.....

.....

.....

Most deeds registries now have a tracking system for lodged deeds, referred to as DOTS — short for Deeds Office Tracking System. A sticker with a bar code is affixed to the bottom right-hand corner of the lodgment cover (refer to the examples of lodgment covers above). This bar code is scanned by various sections of the deeds office as the batch of deeds proceeds through the process; this allows the conveyancer and the deeds office management to track or anage the progress of a particular deed or batch of deeds through the process and to predict when it may ready for registration or execution.

3.2.6 Execute and register deeds

After about five to six working days (regulation 45(3)), the deeds should have completed their progress through the deeds registry and ''come up on prep'' (discussed more fully in unit 3). ''Come up on prep'' means the respective conveyancers have a final chance to make such amendments and corrections as are required by the deeds examiner's notes and to check their financial arrangements before the deeds are registered or executed. Once all the corrections and amendments have been completed (within a maximum of three days — see 5.5 in unit 3), the deeds are ready for registration. The deeds are first handed to a final registration clerk, who again scans the deeds to record their progress from ''prep'' to registration and thereafter places them in special execution pigeonholes for the conveyancers to execute. This involves the respective conveyancers of the simultaneous transactions signing their respective deeds in the execution room of the deeds registry in the presence of the registrar of deeds. The deeds thus signed are then handed to the registrar for execution, who attests the signatures of the conveyancers and registers the deeds in the batch. Now execution of the deeds has taken place.

Once the registrar affixes his/her signature to the deed (or the endorsement on a document or power of attorney lodged for registration only) or to the last deed in a batch of simultaneous transactions, then such deed or batch of deeds is deemed to be registered (s 13(1) of the Act).

The above process is closely related to the registration process described in 5 in unit 3, and we suggest that you cross-reference when studying this part of the work.

3.2.7 After registration

After registration the respective conveyancers advise their clients of registration, the guarantees and undertakings relating to the various linked transactions are presented for payment and honoured, the conveyancers account to their clients for the monies received and debit their fees. After approximately a month, the

registered deeds are returned by the deeds office to the respective lodging conveyancers, after having been sealed, a sequential number allocated, recorded on the deeds office database and electronically recorded (microfilmed or scanned). The conveyancers deliver the new deeds to their clients, or in some instances to some other person entitled thereto; for instance the bondholder will hold the title deeds of the land over which he/she/it holds a bond as security for repayment of the debt. Old, defunct deeds will also be handed to the client or simply be retained in the conveyancer's file.

4 Summary

A conveyancer is an admitted attorney who has passed the national conveyancing exams set by the Law Society, has been admitted to conveyancing practice by the High Court and whose name and signature have been entered onto the deeds registry electronic register (database).

Duties of a conveyancer:

- to ensure validity of alienation
- to generally manage the process, in particular finances
- to prepare deeds and guarantee correctness of facts and take responsibility in terms of section 15A and regulation 44A for:
  - all copies being identical
  - deeds of transfer and certificates of registered title conditions being correctly brought forward from preceding deed
  - executors, trustees, curators, liquidators and judicial manager signatories being duly appointed and transaction being authorised will, trust deed or court order
  - parties being correctly and completely described/cited, including marital status
  - signatories being duly authorised in the case of companies, close corporations, churches, associations, societies and trusts and that the transaction (except in the case of companies) is authorised in the founding deed or constitution.
  - particulars being brought forward from power of attorney

(However, the registrar is still duty-bound to examine the deed and may call for proof by affidavit or otherwise of facts not guaranteed by preparing conveyancer, unless those are patently incorrect.)

- to link deeds
- to lodge deeds
- to attend to prep and execution of deeds
- to report, account for and deliver deeds to clients

We have now completed our discussion of the conveyancer, his/her duties, functions and role in the registration process. In the next unit we deal with the other major participant: the registrar of deeds. We realise that at this stage the volume of detail and information may appear overwhelming; but you will feel more comfortable as we proceed and you get a complete picture.

UNIT 3

The registrar of deeds

1 Introduction

As explained in the introduction to this module, initially registrations were effected before commissioners of the Court of Justice. Subsequently the presiding commissioners were replaced by the secretary of the court, then by the master of records and the first clerk. Finally, Cape Ordinance No. 39 of 1828 created the post of registrar of deeds at the Cape Colony and the present Deeds Registries Act 47 of 1937 expanded on this by providing for:

- the appointment of a chief registrar of deeds, registrars of deeds, deputy and assistant registrars (s 2)
- the duties of the registrar of deeds (s 3)
- the powers of the registrar of deeds (s 4)

Regulation 5 provides that an assistant or deputy registrar of deeds may fulfil the registrar's powers and duties as well.

In this unit we look at the following key questions:

- Who is eligible to become a registrar of deeds?
- What are the duties and powers of the registrar of deeds?
- Given the roles of the conveyancer and registrar of deeds in the South African deeds registration system, what different components make up the deeds registration system and how do they complement and support each other?
- How is a deed registered in a deeds registry in terms of the Deeds Registries Act?

Please remember to refer to the study guidelines in Tutorial Letter 101 to focus on the most important parts of this unit for examination purposes.

We can best illustrate the hierarchy and management structure by way of a diagram:

Minister of Land Affairs

Chief Registrar of Deeds
(Chairman and executive officer of deeds registries regulation board)

supervises all deeds registries to bring about uniformity in practice and procedure

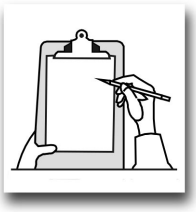
Registrar of Deeds in charge of an individual deeds registry for which he/she has been appointed (There are currently South African deeds registries at Pretoria, Johannesburg, Cape Town, Bloemfontein, Pietermaritzburg, King William's Town, Kimberley, Vryburg, Umtata and Nelspruit.)

Deputy Registrar of Deeds
— one or more per deeds registry

Assistant Registrar of Deeds
— one or more per deeds registry

For a person to be appointed to any of the above positions, s 2 of the Deeds Registries Act 47 of 1937 requires him/her to have the Diploma Juris or an equivalent diploma or degree and to have proven appropriate expertise or the capacity to acquire the ability required to perform the functions of that office within a reasonable time.

(However these requirements do not apply to those persons who are acting, or are temporarily, in the above positions.)



Activity

Who is eligible to be appointed as a registrar of deeds?

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Each registrar is in charge of the deeds registry for which he/she has been appointed, usually comprising the following sections: examination, strongroom, data, microfilm/scanning, information, personnel and administration. Lodged deeds and documents are usually routed through all of these sections as part of the registration process, as shown in the deeds registration video/DVD, in unit 2 and in 3.5 below.

3 Duties of registrar

The duties (and responsibilities) of the registrar of deeds are set out in section 3 of the Act, and will differ depending on the type of transaction. Among other things therefore the registrar has the following duties (and responsibilities).

3.1 Take charge of and preserve all records

The registrar takes charge of and preserves all records of the deeds registry for which he/she is appointed (s 3(1)(a))

3.2 Examine all deeds

The registrar examines all deeds or other documents submitted for execution or registration and rejects any deed or document which cannot be registered under the Act or any other law or to the registration of which any other valid objection exists (s 3(1)(b)).

The examination of a deed entails:

- checking that all the legal provisions relating to the transaction have been complied with
- checking and disposing of interdicts against the relevant persons and property
- endorsing the relevant deeds and documents to give effect to such registration or law (s 3(1)(v)) (''endorsing'' a deed involves placing a stamp and/or a short note on an existing deed or document referring to subsequent transactions, for instance ''mortgaged'' endorsement on a deed of transfer)
- updating the deeds registry records by recording the details of the new registration

Examination by the registrar will not include the examination of the facts referred to in regulation 44A, for which the preparing conveyancer accepts responsibility. However, the registrar must still check title conditions to ensure that they do not contain prohibitions to the proposed transfer and that the necessary consents, where applicable, have been lodged (Chief Registrar's Circular 8 of 1983). The registrar is specifically obliged to check conditions relating to consolidated land consisting of component parts which were originally subject to different conditions (Registrars' Conference Resolution 26 of 1987).

3.3 Record interdicts

The registrar records interdicts, that is court notices, returns, statements or orders lodged with the registry in terms of any law (s 3(1)(w)). Interdicts usually prevent or restrain a person from acting or dealing freely with his/her property and are recorded and numbered (in terms of Chief Registrar's Circular 3/1983) by placing the code I before the consecutive number followed by the year, as follows: I 326/ 2007 — which means that the relevant property is subject to an interdict , and is the 326th interdict recorded at the deeds office during 2007. Several types of interdicts may be recorded against a property. For instance:

- General interdicts and court orders: I
- Attachments: I AT
- Caveats: I C
- Liquidation and judicial management: I CY
- Surveyor-General interdicts: I SG/ I LG
- Rehabilitations: I Reh

Expropriations and sequestrations are numbered using only the code EX or S before the consecutive number, without the I — for instance Ex 628/2006.

3.4 Keep registers

The registrar keeps registers (computerised or otherwise) necessary for compliance with the Act or any other law and maintaining an efficient land registration system that provides security of title and ready reference to any registered deed. All the registration information is thus captured electronically and reproduced on microfilm, or more recently by scanning and capture on the electronic deeds registry database.

3.5 Give access to public registers and records

The registrar must, if any person complies with the prescribed conditions and pays the prescribed fee, permit that person to inspect the public registers and records, to make copies and extracts of the records and registers, and to obtain other information about the registered deeds or documents (s 7(1)).

In compliance with this requirement there is currently a triple supply of information:

- The Deeds Web system (replacing the Aktex system). This is a computerised system permitting registered users to access the deeds registry mainframe computer system by way of a data link, either electronically via the Internet or by physically visiting the deeds registry, where deeds registry employees will access the computerised information on request.
- The scanned, electronic copies of deeds on the deeds office database which can be viewed on computer monitors. This recently replaced the microfilm system by which one could browse celluloid copies of registered deeds and their supporting documents on special viewers set up in the deeds registry.
- The manual card-based recording system. This is still used in some deeds registries and can only be accessed by physically visiting the deeds registry.

Take note of the duties of the registrar as delineated in s 3 of the Deeds Registries Act 47 of 1937 and discussed above.

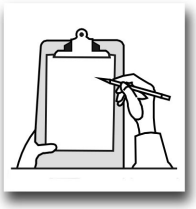
4 Powers of registrar

The powers of the registrar are set out in s 4 and we shall briefly discuss them below:

- The registrar may require the production of proof, by affidavit or otherwise, of any fact necessary to be established in connection with any matter or thing sought to be performed or effected in his/her registry (s 4(1)(a)) in respect of deeds or documents lodged for registration. The registrar may thus refuse registration pending production of further documentary proof or even require parties to obtain a court order authorising registration.
- The registrar may rectify deeds or documents registered or filed in his/her deeds registry relating to an error in the name or the description of any person or property, or the conditions affecting the property (s 4(1)(b)).
- The registrar may issue certified copies of deeds or documents registered or filed in his/her deeds registry (s 4(1)(c)).

- The registrar may order that a certified copy be obtained to replace an illegible or unserviceable deed or document (s 4(1)(d)).
- The registrar may submit reports to court relating to applications for performance of any act in a deeds registry, where it will carry a good deal of weight (s 97(1)).

In addition to the above duties and powers assigned to the registrar by the Deeds Registries Act 47 of 1937, many other enactments do the same. A registrar must also be familiar with the common law, court decisions, legal opinions, instructions issued by the chief registrar and prescribed by the Registrars' Conference Resolutions to ensure correct registration of deeds and documents. Although the office of the registrar of deeds evolved from that of judge, the registrar today is not regarded as a judicial officer, but rather as semi-judicial officer covering the ambit of the civil law.



Activity

Make a brief summary of the powers and duties of the registrar of deeds.

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You may find the above summary to be helpful for exam preparation and as a basis for a discussion of the integrated role of the conveyancer and the registrar in the South African negative/positive deeds registration system.

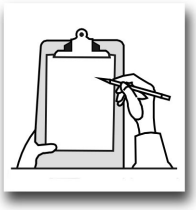
Section 99 of the Act provides that the government, the registrar and officials employed at the deeds office will not be liable for damages sustained by any person due to any act or omission on their part, unless:

- the act or omission was *mala fide* or
- the registrar and/or official did not exercise reasonable care and diligence in carrying out their duties

As a general rule then, there is no liability for the State or the registrar, corresponding with the fact that we have a negative registration system in South Africa.

However, note the two exceptions listed above, where the State can incur liability. In each instance the court will have to decide whether one or both the above exceptions apply, based on the proven facts before the court. However, should

mala fide be an element, the registrar or official concerned may incur personal liability to the State for any loss or damage suffered.



Activity

Apply the above criteria for liability of the State and/or registrar/official to the two cases we read about in unit 1 relating to errors in registration:

- *Barclays Nasionale Bank Bpk v Registrateur van Aktes, Transvaal* 1975 (4) SA 936. Here land which was subject to a mortgage bond was transferred to a *bona fide* purchaser without the bond first being cancelled in accordance with section 56 of the Deeds Registries Act.

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- *Standard Bank v Breitenbach* 1977(1) SA 151 (T). Here a mortgage bond had erroneously not been endorsed on the title deed to the detriment of a *bona fide* purchaser of the land, who then unknowingly acquired the land subject to the bond.

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Remember: Merely because a registration is faulty does not necessarily mean that it was *mala fide* or that there was not reasonable care and diligence by the official concerned.

If you have not already done so, we recommend that you view the deeds registration video/DVD before you attempt this part of the work. Although the process described below is generally followed, please note that this exact process is not followed uniformly in all the deeds registries.

5.1 Day 1

The conveyancer lodges the deeds or documents under cover of a lodgment slip (as shown below) at the **lodgment counter** in the deeds registry. When more than one conveyancer is involved in the simultaneous transactions, all the simultaneous deeds and documents relating to that transaction are reconciled as a batch by means of the linking system (see 3.2.4 in unit 2), dated and scanned into the Deeds Office Tracking System (DOTS) by the officers at the lodgment counter. If only a single transaction/conveyancer is involved, it is similarly dated and scanned into the DOTS.

XYZ ATTORNEYS LODGMENT SLIP DATE:

Names of parties	Rejected/registered	
1.		
2.		
3.		
4.		

When all the single deeds and batches have been dated at the lodgment counter, they are sent to the **data section**, where they are again scanned and computer data printouts are made of the existing deeds office data relating to the persons and property concerned. These printouts are inserted into the lodgment covers.

From the data section the deeds proceed to the **distribution room**, where (after scanning) the sorters allocate a value to the single deeds and batches of deeds corresponding with their degree of difficulty for examination purposes. Then the sorters distribute the single deeds and batches of deeds among the deeds controllers in such a manner that all the deeds controllers receive a similar quota (comparable variety) of deeds to examine.

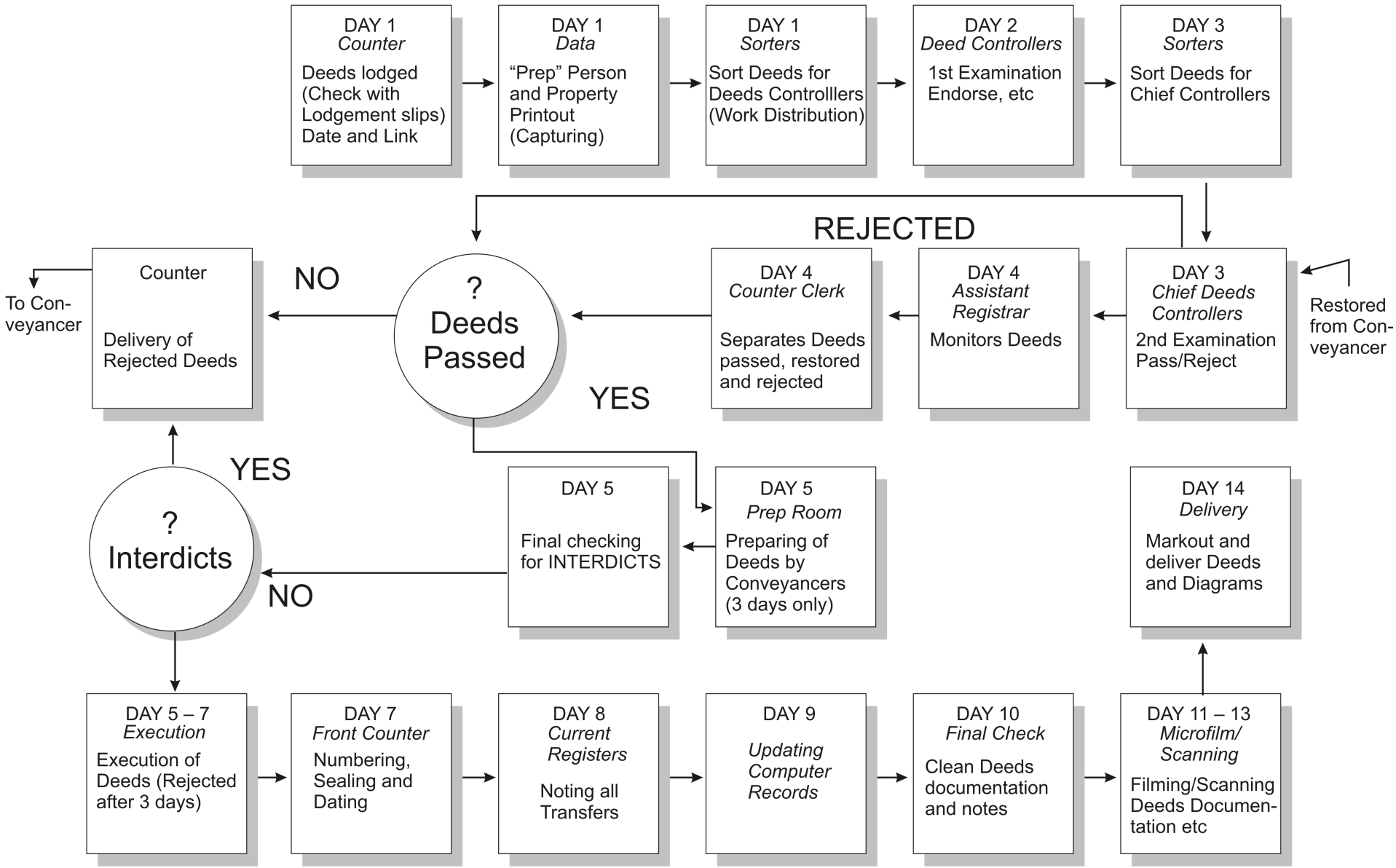
5.2 Day 2

The **deeds controllers examine** the deeds for the first time:

- They **endorse the deeds** to reflect the transaction to be registered.
- They **check interdicts** against the person and property to ascertain whether there are any court orders prohibiting the proposed registration or restraining dealings by the person or with the property.
- They **raise notes** in respect of any errors or oversight in the deeds or documents or request lodgment of further evidentiary proof.

The conveyancers have to comply with these notes in order to have the deeds or documents registered.

WORKFLOW OF DEED THROUGH THE DEEDS REGISTRY



5.3 Day 3

The deeds controllers return their quota of deeds to the **distribution room** from where they are scanned and distributed to the **chief deeds controllers**, who examine them for a second time. In particular they must ensure that all the applicable **provisions of the Act have been complied with**, raise further notes if necessary and decide whether the deeds, documents and batch are registrable. They will indicate on the lodgment cover of each deed or document whether the deed, documents or batch has been **rejected** (by endorsing it with a capital **R**) or **passed** for registration or execution (by **initialling** the cover).

5.4 Day 4

After scanning, the deeds and documents destined for execution or registration proceed to the **assistant registrar** who monitors them to ensure that he/she agrees with the chief deeds controller's decision.

The **rejected** deeds and documents are sent to the **delivery counter** for scanning and returned to the relevant conveyancer, who must correct the errors in the relevant deeds or documents and thereafter **re-lodge** the deeds and documents at the lodgment counter to go through the whole process again. If the conveyancer is satisfied that after correction a deed or batch is in order, he/she may **request** the **chief deeds controller**, in his/her **discretion**, **to restore** same. If the deeds or documents were however incorrectly rejected, the chief deeds controller has no option but to restore the deeds.

The **restored deeds** or documents and those monitored and passed by the assistant registrar of deeds then proceed to the **preparation room**, where they are scanned, sorted and placed in the relevant conveyancing firm's pigeonhole for the attention of the conveyancer.

5.5 Day 5

Unless they have obtained a prior extension from the assistant registrar, conveyancers have **three days** within which to comply with the notes raised by the deeds controllers, failing which the deeds will be rejected and sent to the delivery counter for collection by the relevant conveyancer.

When all the notes in the deeds or batch have been complied with and accordingly deleted by the deeds examiner, the deeds or batch of deeds are finally scanned for execution and checked by the data typists for any new interdicts that have been received in respect of any of the parties or the property subsequent to the initial examination done by the deeds controller (see 5.2 above). This process is called ''black booked''. If new interdicts that are applicable have been received, the batch is rejected (unless the conveyancer certifies that that particular interdict is not applicable) and sent to the delivery counter for collection by the conveyancer. If not, the deeds, batch of deeds or documents are sent to the execution room, sorted and placed in the relevant attending conveyancer's pigeonhole.

5.6 Days 6–9

The conveyancer has a further period of three days within which to appear before the registrar of deeds and register or execute the deeds or documents, failing which the batch will be rejected and returned to the delivery room for collection by the lodging conveyancer.

5.7 Day 7

After execution of the deeds by the conveyancer and registrar and, where applicable, registration of the deeds or documents, the deeds and documents are scanned, **numbered, sealed and dated**. (The registrar has a seal of office that must be affixed to all deeds executed or attested by him/her and to all copies of deeds serving in the place of the original, issued by him/her. This, together with his/her signature, serves to authenticate the deed so that it may serve as an official public document.)

5.8 Days 8–9

The data section captures the information from the registered deeds on the deeds registry computer database and, in those deeds registries not using microfilm or digital scanning, the registered transactions are manually cross-referenced against the office copies of the title deeds, as well as in the relevant registers.

5.9 Day 10

Any specific office instructions from the deeds controllers in respect of the deeds are attended to.

5.10 Days 11–13

In the mechanised offices copies of the deeds and documents are captured on microfilm or scanned into the computer database, after which the deeds or documents proceed to the delivery room for delivery to the lodging conveyancer, who in turn delivers the registered deeds to the client concerned. (In the non-mechanised offices an additional copy of the deed must be lodged, which is then retained and filed by the deeds registry for record purposes in place of the microfilm/scanned copy kept in the mechanised offices.)

Please note that the above day allocation is the ideal — in reality it often takes longer than this.

6 Summary

At this stage you should be able to explain the roles of the conveyancer and registrar of deeds in the process of registration and how these dovetail to constitute our negative/positive registration system, in addition to discussing the key questions set out at the start of this unit. If this is indeed so, you are ready to move on to an in-depth discussion of specific conveyancing deeds and transactions — the first being an analysis of the deed of transfer and its supporting documents.

UNIT 4

The deed of transfer

1 Introduction

We are now progressing to an in-depth discussion of specific conveyancing deeds and transactions — the first being an analysis of a deed of transfer and its supporting documents. A deed of transfer is the most common means by which land is transferred from one person to another. In fact, section 16 of the Act provides that, save for exceptions, this will be the only means by which ownership of land is transferred. There are many exceptions as you will see from the list below, which incidentally is not exhaustive. You will learn more about them in unit 7, but for now let us focus on the deed of transfer with the following key questions in mind:

- What is the purpose of a deed of transfer?
- What is the significance of the various clauses of a standard deed of transfer?
- How should key clauses and the operative parts of a deed of transfer be drafted under different circumstances?
- How are conditions incorporated into a deed of transfer and how may these be qualified?

Please remember to refer to the study guidelines in Tutorial Letter 101 to focus on the most important parts of this unit.

The general rule in terms of section 16: ownership of land is conveyed by deed of transfer.

Exceptions in the Deeds Registries Act:

- deed of grant
- endorsement in terms of section 16
- endorsement in terms of section 6
- endorsement in terms of section 25(3)
- endorsement in terms of section 45(1)
- endorsement in terms of section 45*bis*(1)
- endorsement in terms of section 45*bis*(1A)
- endorsement in terms of section 58(2)

- withdrawal of an expropriation notice section 31(7)
- dissolution of a firm/partnership in terms of section 24*bis*(2)

Exceptions in other Acts and at common law:

- state acquisition by expropriation in terms of section 8 of the Expropriation Act 63 of 1975 (s 31 of the Deeds Registries Act 47 of 1937)
- acquisition of half share by marriage in community of property (common law and Matrimonial Property Act 88 of 1984)
- acquisition by prescription in terms of section 1 of the Prescription Act 68 of 1969

The deed of transfer usually serves a dual purpose — as a deed **transferring ownership** and as a deed **proving ownership**. However, in some of the items listed above, the subsequent deed of transfer does not serve as a **transfer** document but merely as confirmation of an already existing situation to prove ownership.

2 Analysis of the deed of transfer

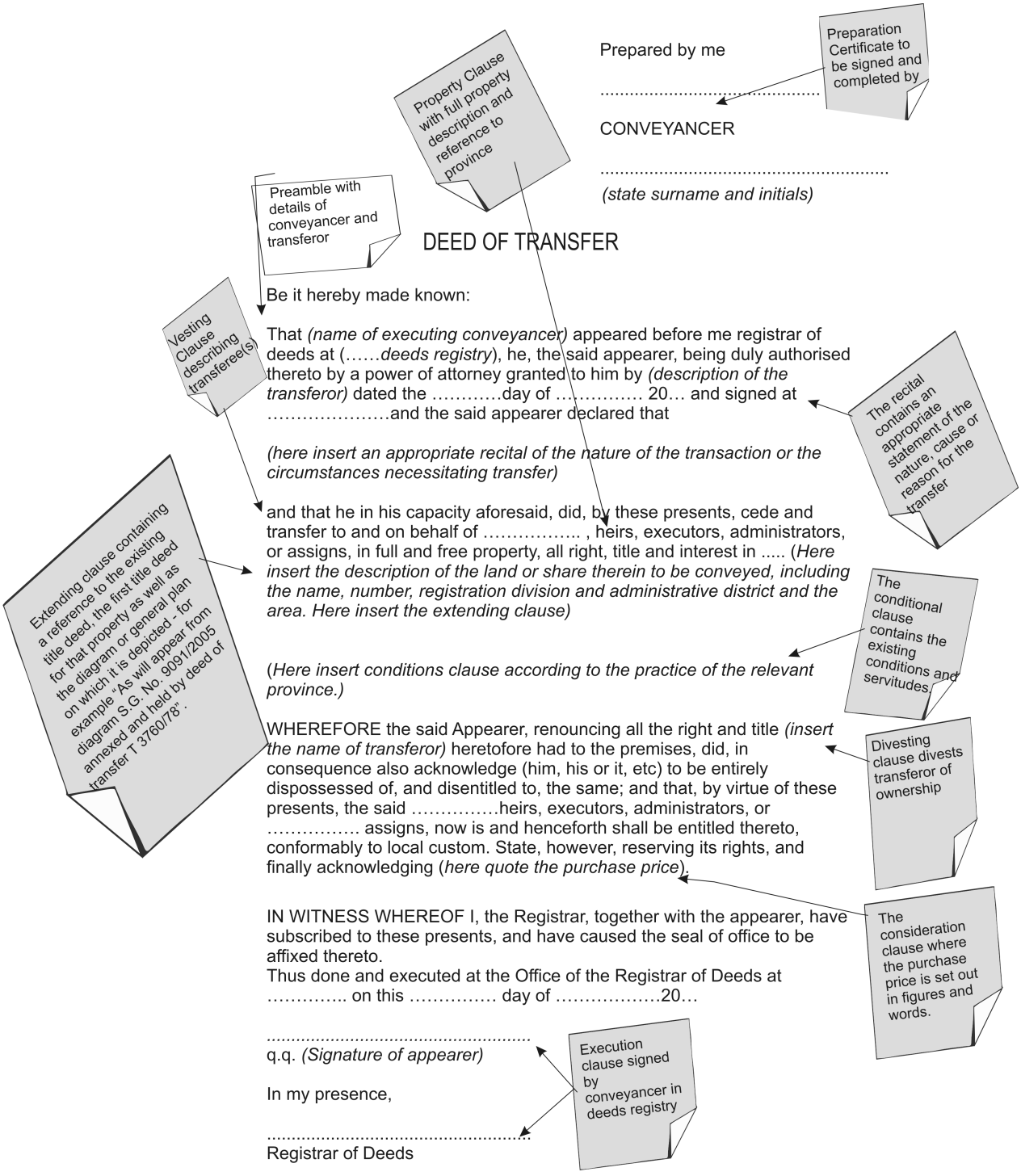
2.1 Introduction

Section 20 of the Act provides that a deed of transfer must be drawn in the forms prescribed by the Act and regulations, although minor deviations are permitted (reg 19(8). There are different forms of deed of transfer prescribed in the regulations to the Act:

- form E, which is used for sales, donations, inheritance, etc (this is the most common form)
- partition transfers — form F
- expropriation transfers — form G
- transfer in compliance with a court order — form H
- transfer of initial ownership in terms of the Development Facilitation Act 67 of 1995 — form CCC
- transfer in terms of certain other Acts — form DDD

We will start with form E (shown in the diagram below). The other deeds of transfer will be dealt with in unit 6.

FORM E



2.3 Discussion of component clauses

By referring to the prescribed form of the deed of transfer set out above and the discussion of the component parts/clauses below, please ensure that you know the name and contents of these different clauses and can identify them in a deed of transfer.

2.3.1 Preparation certificate/clause

This is the certificate at the top right corner of the first page of the deed of transfer, which a conveyancer signs in terms of regulation 43 to indicate that he/she accepts responsibility for the deed as described in unit 2. To refresh your memory please refer back to this unit, and also to section 15 and regulations 43(1) and 44A.

Section 15 of the Act prohibits a registrar from attesting, executing or registering a deed unless it has been prepared by a conveyancer, **or as provided for in any other law**. Two of these exceptions, where someone other than a conveyancer may prepare a deed of transfer, are provided for by the following Acts:

- Land and Agricultural Development Bank Act 15 of 2002
- Agricultural Debt Management Act 45 of 2001

The above is not an exhaustive list.

Remember that the term conveyancer by definition (s 102) also includes a person physically practising as an attorney within the former Republic of Transkei on or before the date of commencement of Proclamation No. R9 of 1997 — so this constitutes another exception to the rule that deeds of transfer must be prepared by a conveyancer, since such a Transkei attorney may also prepare a deed of transfer (as mentioned in unit 2).

2.3.2 The heading

This is the title or heading indicating the nature of the deed, for example ''Deed of transfer'', or ''Partition transfer''.

2.3.3 The preamble

The preamble contains the following:

- details of the conveyancer appearing before the registrar
- the name, identity number and status of the transferor/owner or person who granted the power of attorney authorising the conveyancer
- the date and place of signature of the power of attorney authorising the conveyancer to execute the transaction

Section 20 of the Act provides that ''*deeds of transfer ... shall be executed in the presence of the registrar by the owner of the land described therein, or by a conveyancer authorized by a power of attorney to act on behalf of the owner ...* ''.

Does this mean that an owner can actually transfer his/her own land and does not need the costly services of a conveyancer? Yes and no. Although section 20 does provide for the owner acting personally in the deeds office, the deeds must still be prepared (and lodged) by a conveyancer in terms of section 15. Personal appearances by owners, although possible, therefore very seldom occur in practice.

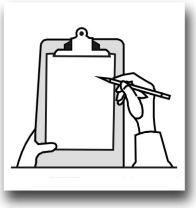
A more pertinent question is: Who qualifies as the ''owner'' to be cited in this clause in order to effect the transfer?

The definition of **owner** in relation to immovable property in section 102 of the Act stipulates in paragraph (a) that it is ''*the registered owner or holder of the property*'', including:

- the trustee of an insolvent estate owner
- liquidator of company or close corporation owner
- executor (or any legally recognised representative) of a deceased owner
- legally recognised representative of a minor, insane or otherwise disabled owner
- if the trustee/liquidator/executor or legal representative is acting within his/her legal authority

However the above definition of ''owner'' is subject to subsection (b), where ''owner'', in relation to immovable property, real rights in immovable property and notarial bonds which are registered as follows:

- in the name of both spouses in a marriage (or civil union) in community of property, means **either spouse or both the spouses**
- in the name of only one spouse and which form part of the joint estate of both spouses in a marriage (or civil union) in community of property means **either spouse or both spouses**
- **under section 17(1)** in the name of both spouses in a marriage in community of property to which the provisions of Chapter III of the Matrimonial Property Act 88 of 1984 do not apply, means **the husband**
- in the name of only one spouse, and which form part of the joint estate of both spouses in a marriage in community of property to which the provisions of Chapter III of the Matrimonial Property Act 88 of 1984 do not apply, means **the husband**



Activity

Miss X, who owns various immovable properties registered in her name, subsequently marries Mr Y in community of property (or enters into a civil union). Could Mr Y actually be cited as the owner/transferor and sign the transfer documents for the above properties?

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(Remember that s 15(2)(a) and (5) of the Matrimonial Property Act 88 of 1984 always requires the witnessed, written consent of the other spouse married in community of property.)

Strictly applied, the above definition of ownership would have the effect of prohibiting simultaneous registration of multiple successive transactions which would cause delays and wasted costs. In other words, you cannot sign documents to transfer a property until you are actually the registered owner. Thus in the case of multiple sales of one property, each transfer would have to be individually lodged in sequence and be registered in the deeds registry one after the other. Fortunately, s 96 remedies this situation: it provides that where a person who has a right to receive transfer executes a deed or document, it ''*shall be deemed to have*

been executed by the owner of such property'' upon such person receiving transfer.

This means that the same piece of land can be sold in sequential transactions by X to Y, then by Y to Z, and then by Z to Q. All three transactions can be linked as one batch of deeds, lodged and registered simultaneously in the deeds registry.

Now that we know who the owner is, how should he/she or they be described or cited in a deed, power of attorney or other document in terms of regulation 24?

Persons other than natural persons, for instance trusts, companies, close corporations, must be identified by their name and registered number, if any (reg 18(b)).

A natural person must be identified (in terms of reg 18(1)(a)) by his/her name and identity number reflected in his/her identity document, or:

- if his/her identity document contains incorrect information, by means of his/her name, identity number and date of birth
- if no identity document has been issued to him/her, by means of his/her name and date of birth
- if no identity document has been issued to him/her and his/her date of birth is unknown, by a method approved by the registrar
- **AND by his/her marital status** (s 17(2) of the Act), except for persons acting in a representative capacity (for example an executor of a deceased estate)

Land held in ownership by two or more persons in undivided shares may be transferred by **one deed of transfer** from those persons to any other person, or to two or more other persons in undivided shares (s 23(2)).

Two or more persons each owning a different piece of land may not transfer those pieces of land to one or more persons by the **same deed of transfer**, unless such transfer is authorised by the provisions of a law or by an order of court (s 22(1)). In such a case each owner must give transfer in a separate deed of transfer in respect of his/her separate piece of land. Each transferor in a deed of transfer must therefore be the sole owner of the land or the owner of a share in **each** of the properties that are transferred (s 22(1)).

Where a piece of land is owned by two or more persons in undivided shares and one of the co-owners acquires the share(s) of the remaining owner(s) in a defined portion of that land, **all the owners jointly**, including the owner(s) acquiring the share(s), may transfer such portion to the person(s) acquiring it (s 24(2)).

X, Y and Z are the joint owners of erf 77. They have the erf surveyed and subdivided into two portions: portion 1 and the remaining extent. X buys the shares of Y and Z in portion 1, but all three will remain joint owners of the remaining extent. Usually X, Y and Z should first take out a certificate of registered title in respect of portion 1, and then Y and Z could transfer their shares to X. However, section 24(2) allows X, Y and Z to pass transfer of portion 1 directly to X, although X is already an owner of a share in portion 1.

For the manner in which parties are to be described in deeds and documents, please also refer to the discussion relating to the citation of the transferee below, where we have included a schedule of the different descriptions of parties under different circumstances. We trust you will find it comprehensive and helpful.

2.3.4 The recital

This part of the deed of transfer is also called the *causa* or story and follows the preamble to a deed of transfer. The aim of the recital is to give the reason for, or cause *(causa)* of the transfer enabling the registrar of deeds to judge whether the transfer is permissible and registrable.

An example of a transfer of land that is not registrable is one which is passed as security for a debt or other obligation (s 91 of the Deeds Registries Act). The precise wording of a recital or *causa* depends on the discretion and draftsmanship of each conveyancer. There is no prescribed form, but sufficient reasons must be given explaining why a particular piece of land must be transferred to a specific transferee. For example:

- sale
- donation
- succession
- exchange
- rectification

These reasons are discussed below, together with some examples.

2.3.4.1 Sale

Here the recital will be brief and to the point:

> *... and the appearer declares that his/her principal truly and lawfully sold on 4 December 2006 ... .*

It is practice to insert the date of sale either here or in the consideration clause, as this indicates when the transferee acquired a right to the land. This is an important factor when the question arises whether or not a sequestration or insolvency order is applicable to that property. In the case of rehabilitation, providing the date of sale can establish whether a right to the property was acquired after the rehabilitation order and, consequently, whether the transferee can deal freely with the property — for example transfer or mortgage it.

If land is sold to someone, and **he/she dies before the land is registered in his/her name**, the fact that he/she died after the date of sale must be mentioned in the recital. For example:

> *... and the appearer declares that the said deceased Ben Claasen did during his lifetime on 6 January 2007 truly and legally purchase the hereinafter mentioned property ... .*

This explains why the land is subsequently transferred to his/her estate. If the deceased was married in community of property at the time of the transaction, the land must be transferred to the joint estate. Therefore the fact that the marriage was in community of property must be mentioned in the recital, together with the name of the surviving spouse.

In the case of **sales in execution** resulting from the judgment of a court of law, the recital must refer to the names of the plaintiff and the defendant in the court case, and state that the particular land is registered in the name of the defendant, that it was attached by the sheriff in execution of an order by a specific court and that the property was sold by public auction on a particular day.

The *causae* in **sales in liquidation** must state that the property was sold **by the liquidator** on a specific day with the consent of the members of the company, or by virtue of a specific court order, as the case may be.

Where land is **sold on behalf of persons who have no legal capacity to act**, or by persons with restricted legal capacity who have the necessary assistance, the recital must state who sold the property, and with whose approval or authority. For instance, the sale may have taken place by virtue of a court order or the approval of the Master of the High Court, or on the written authority of a valid will or other document (see, for example, s 80 of the Administration of Estates Act 66 of 1965).

2.3.4.2 Donation

The date of the donation of the land will determine which procedure must be followed to transfer the land to the donee or receiver.

Since the commencement of the Alienation of Land Act 68 of 1981 on 19 October 1982, in terms of section 2(1) no alienation, including a donation of land, is of any force or effect unless it is contained in a deed of alienation (deed of donation) signed by the donor and donee or by their agents acting on their written authority.

In the case of donations of land **after** this date, it is therefore no longer necessary to refer to the acceptance in the recital of the deed of transfer to prove the donation, notwithstanding the reference to such acceptance in form E to the regulations (Registrars' Conference Resolution 21 of 1987).

2.3.4.3 Succession

Depending on the circumstances of each case, it is important to mention the following facts in the recital of each deed being registered as the result of succession:

- date of testator's death
- mode of inheritance
- short explanation of why the transferee (or each transferee) is entitled to the land
- short explanation of how testamentary conditions are dealt with

2.3.4.4 Exchange

In a deed of transfer which results from an agreement of exchange, the recital must disclose which land is given in exchange for the land which is the subject of the transfer with reference to the title deed under which the other land is held. Normally the two deeds of transfer will be registered simultaneously, but this does not have to be done.

2.3.4.5 Rectification

Whenever a rectification of an error in registration will have the effect of a right being transferred, the simple, s 4(1)(b) application procedure cannot be followed and a rectification transfer must be registered. (S 4(1)(b) provides a simple procedure whereby certain mistakes in deeds can be rectified and is more fully discussed in unit 11.)

In a rectification transfer the recital will vary depending on the nature of the error being rectified. The full facts must be disclosed in the recital, for example how the error occurred and how it is to be rectified.

The following example of a recital will illustrate this point clearly:

> *Whereas the Appearer's Principal did on 1 December 2006 sell certain property to the undermentioned transferee;*
>
> *And whereas by deed of transfer no. T 1234/1983 transfer was passed to the transferree herein of property thought to have comprised all the land sold as aforesaid;*
>
> *And whereas it has since been discovered that the property hereby transferred also comprised part of the property sold as aforesaid which was in error omitted from the aforementioned deed of transfer;*
>
> *Now therefore, in order to rectify the matter, the Appearer in his capacity aforesaid, did ... .*

2.3.5 The vesting clause

Go back to the example of the vesting clause in the example of the deed of transfer above. You will see that the vesting clause contains the name(s) of the transferee(s) to whom the property is transferred.

In the case of a natural person or his/her estate, the transfer is registered in favour of such person or estate and *''his heirs, executors, administrators or assigns''*.

In the case of a local authority, company, close corporation, association, statutory body, etc, the transfer is registered in favour of such body and ''its successors in title or assigns''.

Where vesting is in trustees or office bearers, transfer should be passed to such trustees or office bearers and *''their successors in office or assigns''*.

In the schedule below we have set out most of the possible vestings you will encounter in practice. We do not expect you to know them all, but have indicated the most common ones with an ''NB''. These you must learn.

Deed of transfer: descriptions of natural persons

		A	B
	Nature and status of person to be described	Description of person if disposing of or granting right, ie transferor/mortgagor/grantor	Description of person acquiring or recieving right, ie transferee/mortgagee/ grantee
	Natural persons		
1 NB	Person who is unmarried (never married before)	Kate Smith Identity number ..... Unmarried	As 1A
2 NB	Unmarried person (previously married, now divorced or widowed)	As in 1A or Kate Smith Identity number ..... Divorced/widow	As 2A
3 NB	Person to whom valid identity Document has not been issued	Cameron Campher Born on 7 September 1952 Unmarried	As 3A
4	Person whose date of birth is incorrectly reflected in her identity number or not reflected therein	Simona Partridge Identity number 0619470068002 Born on 19 June 1947 Unmarried	As 4A
5 NB	Person married in community of property (option 1)	Marius Lionhart Identity number ..... And Lina Lionhart Identity number ..... Married to each other in community of property	As 5A (s 17(1) Act 47 of 1937)
	Persons in a civil partnership in community of property (option 1)	John Smith Identity number ..... and Peter Jones Identity number ..... Partners in a civil partnership in community of property registered in terms of the Civil Union Act 17 of 2006	As for transferees in column A (Chief Registrar's Circular 1 of 2007)
6 NB	Person married in community of property (option 2)	Lina Lionhart Identity number ..... Married in community of property to Marius Lionhart (and consent in terms of s 15(2)a of matrimonial Property Act 88 of 1984 must be lodged)	As 5A (s 17(1) Act 47 of 1937)
7	Person married in community of property and transferee is about to acquire the property subject to condition that ownership shall be excluded from community	Andrew Evans Identity number ..... Married in community of property to Kerryn Evans, which community of property is excluded by condition contained in the will of the late William Evans in respect of the land hereinafter described	As 7A

		A	B
8 NB	**Persons married out of community of property, and the immovable property concerned is registered/to be registered in the name of only 1 of them**	Samantha Stephens Identity number ..... Married out of community of property	As 8A
	Persons in a civil union with an antenuptial contract, i.e. out of community of property, and the property concerned is registered/to be registered in the name of only 1 of them	John Smith Identity number ..... Partner in a civil union partnership out of community of property and registered in terms of the Civil Union Act 17 of 2006 (Chief Registrar's Circular 1/2007)	As for transferee in column A
9 NB	**Persons married out of community of property, the immovable property concerned is registered in both their names and they are disposing of the property together or, in the case of transferee, the property is about to be registered in both names**	1. George Michaels Identity number ..... Married out of community of property 2. Beatrix Michaels Identity number ..... Married out of community of property	As 9A
10	**Persons married out of community of property, and the immovable property is registered in both their names. One wishes to transfer his half share in the property, the other is to retain her share**	As in 8A, but remember to qualify property description to read ''a one-half (½) share in erf''	Not applicable
11	**Persons married out of community of property, acquiring property in unequal shares**	Adrian Taljaard Identity number ..... Married out of community of property (as to a ⅓ share) and Patricia Taljaard Identity number ..... Married out of community of property (as to a ⅔ share)	
12 NB	**Property is registered in the name of a woman. Since registration, the woman has changed her surname. She is now about to dispose of her rights in the property**	Denise Jacobs (formerly Isaacs) Identity number ..... Unmarried	
13 NB	**Persons married according to Hindu or Muslim customs (Chief Registrar's Circular 5 of 1994)**	Not recognised in RSA, so may be described either as unmarried or — Nizaam Pillay Identity number ..... Married according to Hindu rites	Same as in 13A but no consent or co-signature of spouse required

		A	B
14 NB	**Persons married according to African customary marriages — before 15/11/2000**	Peter Nkosi Identity number ..... Married, which matrimonial property system is governed by customary law in terms of the Recognition of Customary Marriages Act 120 of 1998	Same as 14–A for transferor
NB	**— after 15/11/2000 in COP**	Peter Kumalo Identity number ..... And Esther Kumalo Identity number ..... Married in community of property to each other	
NB	**— after 15/11/2000 out of COP**	Anna Fatyela Identity number ..... Married out of community of property	
NB	**— after 15/11/2000 second and further customary marriages in terms of court order** **Refer to Chief Registrar's Circular 15 of 2000 for more detail**	Simon Tshabalala Identity number ..... Married, which marriage the proprietary consequences thereof are governed by an order of court issued in terms of the Recognition of Customary Marriages Act 120 of 1998 and filed as I	
15 NB	**Persons married and that marriage governed by the laws of a foreign country. Property registered/will be registered in the name of one of the parties only**	Yo Yang Identity number ..... Married, which marriage is governed by the laws of Japan, duly assisted by his spouse Ding Yang	Yo Yang Identity number ..... Married, which marriage is governed by the laws of Japan
16	**Persons married and that marriage governed by the laws of a foreign country and the property is registered/is about to be registered in the name of both spouses**	1. Jeff Connor Identity number ..... Married, which marriage is governed by the laws of Texas, USA, duly assisted by his spouse Ethel Connor 2. Ethel Connor Identity number ..... Married, which marriage is governed by the laws of Texas, USA, duly assisted by her spouse Jeff Connor	1. Jeff Connor Identity number ..... Married, which marriage is governed by the laws of Texas, USA 2. Ethel Connor Identity number ..... Married, which marriage is governed by the laws of Texas, USA
17	**Example of multiple transferors/transferees**	1 John Brown Identity number ..... Unmarried 2. Mabel Syrup Identity number ..... Widow 3. Merry Maverick Born on ..... Married, which marriage is governed by the laws of Spain, duly assisted by her spouse Moaner Maverick	1. John Brown Identity number ..... Unmarried 2. Mabel Syrup Identity number ..... Widow 3. Merry Maverick Born on ..... Married, which marriage is governed by the laws of Spain

		A	B
18 NB	**Minor (under the age of 7)**	John Major and Sarah Major Father and mother respectively and the natural guardians of Nigel Major. Identity number ..... A minor	Nigel Major Identity number ..... A minor
19 NB	**Minor (7 and older)**	Hans Little Identity number ..... A minor, duly assisted herein by Linus Little and Linda Little, his father and mother, they being his natural guardians	Hans Little Identity number ..... A minor
20	**Description of person where property bequeathed to ''the children born or to be born of my son Claud''**	Not applicable	Claud Clemens, in the trust for his children to be born from Fran Clemens
21	**The bare dominium owner of property and the usufructuary are together passing transfer of property to a purchaser**	Wally Forsman Identity number ..... Unmarried (bare dominium owner) and Landi Rose Identity number ..... Widow(usufructuary)	Not applicable
22	**The fiduciary and fideicommissary heir are together passing transfer to a purchaser**	Milas Maposa Identity number ..... Unmarried As the fiduciary and Raymond Maposa Identity number ..... Married out of community of property as the holder of a fideicommissary right in the undermentioned land	Not applicable

Deed of transfer: descriptions in the case of juristic persons and other entities

		A	B
	Nature and status of person to be described	**Description of person disposing of or granting right, ie transferor/mortgagor/grantor**	**Description of person acquiring or receiving of or granting right, ie transferee/mortgagee/grantee**
1 **NB**	**Partnership (other than Kwa-Zulu-Natal description)**	*In power of attorney*: It will depend on nature of transaction: (a) If membership of partnership is intact (eg, a sale of old premises which have been outgrown, and it is business as usual for the partnership, no change in membership, then one partner can sign PA on behalf of all partners, and description will then be: Carel Combrink, duly authorised by a resolution of ABC Partnership consisting of partners *(quote all partners as set out in (1B)*. (b) If a change in members take place (eg, Anna retires and/or Desire joins the partnership, hence transfer of partnership property to new partners) then **all** the existing partners must sign the PA and the description will read as it appears in the deed (see example above)	Anna Anderson Identity number ..... Married in community of property to Frederick Anderson And Bennie Bookbank Identity number ..... Divorced And Carel Combrink Identity number ..... Unmarried Trading (*or* carrying on business *or* practising) in partnership under the name of ABC Partnership
NB	**Partnership (other than Kwa-Zulu-Natal description)**	*In deed*: Anna Anderson Identity number ..... Married in community of property to Frederick Anderson and Bennie Bookbank Identity number ..... Divorced and Carel Combrink Identity number ..... Unmarried Trading (**or** carrying on business **or** practising) in partnership under the name of ABC Partnership	

		A	B
2	**Partnership description as it will appear in KwaZulu-Natal deeds and documents**	*In power of attorney*: Anna Anderson duly authorised thereto by resolution of ABC Partnership consisting of: Anna Anderson Identity number ..... Married in community of property to Frederick Anderson and Bennie Bookbank Identity number ..... Divorced and Carel Combrink Identity number ..... Unmarried *In deed*: ABC Partnership, the partners whereof are: ... (see power of attorney above)	As in 2A
3 **NB**	**Company**	*In power of attorney*: Gordon Sunderland, duly authorised thereto by a resolution of the directors of Sunrise (Pty) Limited 1997/011234/07 *In deed*: Sunrise (Pty) Limited 1997/011234/07	Sunrise (Pty) Limited 1997/011234/07
4	**Company in liquidation**	*In power of attorney*: James Jones in my capacity as trustee of Down the Drain (Pty) Limited 1997/011234/07 only authorised thereto by letter of appointment No ..... issued on 12 December 2007 by the Master of the High Court, Pretoria. Transvaal Provincial Division. *In deed*: Down the Drain (Pty) Limited 1997/011234/07 (in liquidation) (or in voluntary liquidation, as the case may be)	Down the Drain (Pty) Limited 1997/011234/07 (in liquidation) (**or** in voluntary liquidation, as the case may be)
5 **NB**	**Close corporation**	*In power of attorney*: Dorian Fabian, duly authorised thereto by a resolution of the members of Fabian Fabrics CC 1992/112345/23 *In deed*: Fabian Fabrics CC 1992/112345/23	Fabian Fabrics CC 1992/112345/23

		A	B
6 NB	*Inter vivos* trust or trust *mortis causa* (ie created in will) and to which the testator has assigned a name	*In power of attorney*: Daniel Fourie, duly authorised by the trustees for the time being of the Fantastic Family I T 1234/93 *In deed*: The trustees for the time being of the Fantastic Family I T 1234/93	The trustees for the time being of the Fantastic Family I T 1234/93
7 NB	Trust created in a will (ie *mortis causa* trust) where no name has been assigned to the trust	*In power of attorney*: John Smith duly authorised by the trustees for the time being in the estate of the late Pieter Pankop *In deed*: (See power of attorney)	
8	Statutory body (created by an Act of parliament eg the University of South Africa)	The University of South Africa established by section 4 of Act 23 of 2001	Same as 8A

Deed of transfer: descriptions in the case of persons acting in a representative capacity

		A	B
	Nature and status of person to be described	Description of person disposing of or granting right, ie transferor/mortgagor/grantor	Description of person acquiring or recieving a right, ie transferee/mortgagee/grantee
1	Person acting on behalf of a person by virtue of a general power of attorney	*In power of attorney*: Jane Fondness, duly authorised thereto by general power of attorney PA ..... ./ 19 ..... granted to me by Sarah Matthews, Identity number ..... Unmarried at *(place)* on *(date)* *In deed*: Jane Fondness, duly authorised thereto By general power of attorney PA ..... ./19 ..... granted to her by Sarah Matthews, Identity number ..... Unmarried at *(place)* on *(date)*	Not applicable

		A	B
2	**Person acting on behalf of a person by virtue of a special power of attorney which has been given for this "once of" transaction.**	Manette Cilliers, duly authorised thereto By special power of attorney granted to Me at ***(place)*** on ***(date)*** by Mannie Manester, Identity number ..... married out of community of property	Not applicable
3	**Where *curator bonis*** has been appointed for a person	*In power of attorney:* San Bona, in my capacity as *curator bonis* in the estate of Thandile Ndlovu Identity number ..... Unmarried duly authorised thereto by letters of curatorship no. ..... issued to me by The Master of the High Court at Bloemfontein *In deed*: The *curator bonis* in the estate of Thandile Ndhovu Identity number ..... Unmaried, No	Thandile Ndhovu Identity number ..... Unmarried (a mental patient)
4 NB	**Sheriff of the court**	*In power of attorney*: Neels Jansen in my capacity as Sheriff of the Magistrate's Court of Boksburg **Alternatively**: Neels Jansen in my capacity as Sheriff of the Johannesburg High Court (Local Division) *In deed*: The Sheriff of the Magistrate's Court of Boksburg Or The Sheriff of the High Court, Johannesburg	

Activity

Where a couple is married in community of property, you cannot assure that land will automatically be registered in their names. In six cases the property will be registered only in the name of the husband or wife, depending on the circumstances. List these cases.

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Deed of transfer: descriptions in the case of deceased or insolvent estates

		A	B
	Nature and status of person to be described	**Description of person disposing of or granting right, ie transferor/mortgagor/grantor**	**Description of person acquiring or recieving a right, ie transferee/ mortgagee/grantee**
1 **NB**	Single deceased estate (whether deceased were married in or out of community of property or unmarried)	*In power of attorney*: John Jones, in my capacity as the executor in the estate of the late Danny Done, acting by virtue of letters of executorship no. 6789/1997 issued to me by the Master of the High Court at Pietermaritzburg on 20 June 1997 *In deed*: The executor in the estate of the late Danny Done	The estate of the late Danny Done
2	Husband and wife married in community of property One spouse dies S 21 Act 37 of 1947 **does not** apply (in case of transferor), ie surviving spouse need not be joined as transferor Note s 21 irrelevant when describing transferee	*In deed*: As lA (In *causa* reference will be made to spouse.)	The joint estate of the late Martin Martyr and Sarah-Martyr, Identity number ....., widow, surviving spouse
3	Surviving spouse has been appointed executor in the estate of the deceased relevance if estate is transferee) to whom he was married in community of property (in case of transferor). (S 21 has no relevance if estate is transferee)	*In power of attorney*: Raynier Raphado, Identity number ..... Surviving spouse, and in my capacity as executor in the estate of the late Miriam Raphado, acting by virtue of letters of executorship 1234/1994 issued to me by the Master of the High Court at Pretoria *In deed*: granted to him by the surviving spouse and executor in the estate of the late Miriam Raphado, no. 1234/1994:	As 2B (s 21 Act 37 of 1947 has no has no relevance if estate is transferee)

		A	B
4	Husband and wife married in community of property, one spouse dies, s 21 Act 37 of 1947 **does** apply, ie surviving spouse must be joined as a transferor	*In power of attorney*: Wikus Marais, in my capacity as the executor in the estate of the late Sanusa Naidoo, acting by virtue of letters of executorship no. 10123/1995 issued to me by the Master of the High Court at Pretoria on 30 November 1995 and Jana Naidoo, Identity number ..... Widow, in my capacity as surviving spouse, by virtue of my marriage in community of property to the said Sanusa Naidoo *In deed*: Granted to him by the executor in the estate of the late Sanusa Naidoo, no. 10123/1995 and by Jana Naidoo, Identity number ....., widow, surviving spouse in her personal capacity, by virtue of her marriage in community of property to the said Sanusa Naidoo	
5	Both spouses, who were married in community of property, now deceased	*In power of attorney*: Sarel Smit, in my capacity as the executor in the estate of the late Pieter Heyns, acting by virtue of letters of executorship no. 7854/1996 issued to me by the Master of the High Court at Pretoria on 15 July 1996 and Roda Rademan, in my capacity as the executor in the estate of Katrina Heyns, acting by virtue of letters of executorship no. 7855/1996, issued to me by the Master of the High Court at Pretoria on 20 July 1996 *In deed*: The executor in the estate of the late Pieter Heyns, no. 7854/1996 and by the executor in the estate of the subsequently deceased late Katrina Heyns, no. 7855/1996, they the said deceased, having been married to each other in community of property	The joint estate of the late Pieter Heyns and subsequently deceased spouse, the late Katrina Heyns

		A	B
6	Person owns land, is sequestrated, Trustee sells property on authorisation of creditors	*In power of attorney*: Victor Viscous in my capacity as trustee in the insolvent estate of Down Andout, Identity No ....., unmarried, duly authorised by letters of appointment 11532/1997 issued to me by the Master of the High Court at Cape Town on 23 August 1997 *In deed*: the trustee in the insolvent estate of Down Andout, no. 11532/1997	Not applicable
7	Person is insolvent, property was acquired by person *after* sequestration, trustee for whatever reason lays no claim to property and consents to person disposing (selling or mortgaging the property)	*In power of attorney*: Down Andout Identity number ..... Unmarried Unrehabilitated insolvent acting with written consent of the trustee in my insolvent estate *In deed*: Down Andout Identity number ..... Unmarried Unrehabilitated insolvent acting with written consent of his trustee	Not applicable
8	Insolvent person acquires property	Not applicable	Down Andout Identity number ..... Unmarried (no mention made of insolvency)

The above table illustrates how the transferees must be described; however there is more to the vesting clause than just this. It may happen that land is transferred to more than one person, company, trust or partnership in undivided shares. Section 23(1) of the Deeds Registries Act provides that land held by one person may be transferred by one deed from that person to two or more persons in undivided shares. In terms of section 23(2) of the Act, land held by two or more persons in undivided shares may be transferred by one deed from those persons to any other person, or to two or more persons in undivided shares.

1 ½ share in erf 55 .....

2 ½ share in erf 66 .....

Where land is transferred in one deed to more than one transferee in equal shares it need not be stated in the deed that they acquire it in equal shares. Their equal share acquisition will be presumed in the absence of any statement to the contrary. This is true whether the whole property or only a portion of it is transferred.

Where transferees acquire different shares in the whole property, the share that each transferee acquires must be stated explicitly.

Where the transferees acquire different shares, but the deed conveys the same shares in different properties, the share of each transferee in the **whole** property is set out after his/her name in the vesting, followed by a statement of the aggregate share held by all the transferees, as follows:

X ..... $\frac{1}{4}$ share
Y ..... $\frac{1}{8}$ share
Z ..... $\frac{1}{8}$ share

Together comprising a $\frac{1}{2}$ share in the following properties

1 $\frac{1}{2}$ share in erf 55 .....
2 $\frac{1}{2}$ share in erf 66 .....

Undivided shares in more than one piece of land may not be transferred to more than one transferee in the same deed if the shares appropriated to any one transferee are not the same in respect of each piece of land (s 23*bis* of the Deeds Registries Act). In our example above it would not be possible for X to obtain a $\frac{1}{4}$ share in erf 55 and a $\frac{1}{3}$ share in erf 66. Separate transfers would have to be passed in that case.

With regard to the ownership of land in shares, note that a share must be expressed in one fraction in its lowest terms. Where the denominator of the fraction exceeds two figures, the fraction must be expressed as a six-figure decimal (reg 30 of the Deeds Registries Act). This share must be calculated to a seven-figure decimal and then expressed to the nearest six-figure decimal, for example not $\frac{1}{180}$ but 0,005556.

For the purpose of uniformity, ordinary shares and decimal shares may not be expressed together in the same deed (Registrars' Conference Resolution no. 18/1968). The following examples will illustrate the effect of this resolution:

(a) *''..... did, by these presents, cede and transfer, in full and free property, to and on behalf of*

1 X ..... $\frac{1}{30}$ th share
2 Y ..... $\frac{1}{90}$ th share
3 Z ..... $\frac{1}{180}$ th share **(not 0,005555)**

Together comprising $\frac{1}{20}$ th share in the undermentioned property.

Their heirs, executors, administrators or assigns $\frac{1}{20}$ th share in erf ... .''

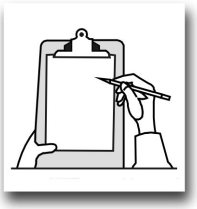
(b) *'' ..... did, by these presents, cede and transfer, in full and free property, to and on behalf of*

1 X ..... 0,011 share ***(not $\frac{1}{90}$ th)***
2 Y ..... 0,005555 share
3 Z ..... 0,002778 share

Together comprising 0,019444 share in the undermentioned property.

Their heirs, executors, administrators or assigns (0,019444 decimal) ..... shares in erf ...''

We know that the above table contains a gigabyte of information, but the question is not whether you can learn it by rote — rather whether you can apply it. So let's try an activity.



Activity

How would the identity of a natural person be established in a deed according to regulation 18 of the Deeds Registries Act?

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Describe the transferee, that is give the correct vesting clause in the deed of transfer, in the following circumstances:

- Suzy Smith, identity number 650419 0031 084, married in community of property to John Brown, bought the property with proceeds of property which was previously excluded from the community of property.

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- Sophia Mtwetwe, identity number 650409 0023 056, unmarried, is a mentally ill patient.

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- A property is transferred to John Peters and Jim Jones who carry on business in partnership as ''Jo-Ji Jewelers''. John Peters is married in community of property to Jane Peters, and Jim Jones is married in community of property to Anne Jones.

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2.3.6 The property clause

The property clause contains information about the land being transferred. In every deed the property description should include the following particulars.

2.3.6.1 A full description of the land

The registered number (if any) of the land (farm land, agricultural holding or township erven) must be given (reg 28(1)(b)). If the land has been subdivided into smaller portions, the property description must include a reference to the relevant portion number or the fact that it is the remaining extent of the land, after all the portions have been excised, that is being dealt with.

In the description of the land the term ''share'' must be used when an undivided share in a piece of land is being dealt with. Note that no transfer of an undivided share in land which is intended, calculated or purports to represent a defined portion of land is registrable, in terms of section 24(1) of the Act. In other words, if a half share in erf 20, Mtata, is registered in your name, it does not represent an independent, demarcated half portion of the property.

In describing land, no reference must be made in a deed conferring title to land, to any building or other property, movable or immovable, which may be on or attached to the land (reg 28(2)).

2.3.6.2 The situation of the land

Regulation 28(1)(a) of the Act prescribes that the name of the registration division, administrative district and province in which the land is situated must be mentioned or, in the case of land situated in a township, the registration division concerned, administrative district, the name of such township and the province must be mentioned. By definition (see reg 4) an administrative district includes a fiscal division in the former Cape Province, a registration division in the former Transvaal, a ''county'' in KwaZulu-Natal and northern districts of Vryheid and Utrecht, and a district as it was recognised on 1 April 1996 in the Free State.

An erf in a township will, for instance, be described as:

> *Erf 38 in the township Delmas, Registration Division KR, Province of Mpumalanga*

And a portion of an erf as:

> *Portion 3 of Erf 38 in the township Delmas, Registration Division KR, Province of Mpumalanga*

A farm will for example be described as:

> *The farm Rooivallei 278, Registration Division JP, Province of Gauteng*

And a portion of a farm as:

> *Portion 83 (a portion of Portion 38) of the farm Rooivallei 278 Registration Division JP, Province of Gauteng*

Any owner of immovable property may in writing request the Minister of Land Affairs to change the name of immovable property which appears in any

registered deed on the ground that the name may be offensive because of its racial connotation (s 93 (3)(a) of the Act).

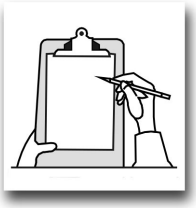
2.3.6.3 The extent or area of the land

In a deed, reference is made to the extent of the land and not the area. Regulation 29 refers to the ''extent'' of land and prescribes that it must be expressed in words and figures. For example:

> *3,5076 (THREE COMMA FIVE ZERO SEVEN SIX) hectares*
> *OR*
> *8565 (EIGHT FIVE SIX FIVE) square metres* ***(and not 0,8565 hectares)***

In terms of section 22(2), two or more pieces of land may be transferred in one deed by one person, or by two or more persons holding such pieces of land in undivided shares to one person or to two or more persons acquiring such pieces of land in undivided shares. However, each piece of land must be described in a separate paragraph.

Similarly, in terms of section 22(3), two or more portions of a piece of land may be transferred in one deed by one person, or by two or more persons holding the whole of such piece of land in undivided shares to one person or to two or more persons acquiring such portions in undivided shares. However, each portion must in terms of regulation 27(1) be described in a separate paragraph, in which reference is made to the diagram of that portion in the extending clause (which you will learn about later in this unit).



Activity

How must property be described in terms of regulation 28 of the Act?

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2.3.7 The extending clause

The extending clause (prescribed by reg 26, and forms TT and UU) follows immediately after the property clause in a deed of transfer.

The purpose of the extending clause is twofold:

- It provides a reference to the diagram or general plan that was approved by the Surveyor-General for the land, so that an interested party can determine the whereabouts of the land, namely the boundaries of the land, its width and length, and its general situation in relation to adjoining land. (Remember that our land registration system is based on a cadastral system as discussed in the introduction to this study guide.)
- It indicates the title under which the land was held at the time of execution of the current deed of transfer.

Extending clauses can take one of two forms.

2.3.7.1 As a diagram or original deed

In respect of land which was not previously registered, this new piece of land will be represented on an approved diagram by the Surveyor-General or on a general plan. In this instance the extending clause might read as follows:

> *As will appear from the general plan/annexed diagram SG No. A 1711/1992 and held by deed of transfer (or grant or certificate of title) No. T 3578/1980.*
>
> (See reg 26 and prescribed form TT.)

The extending clause of the first deed of transfer following the diagram deed will read as follows:

> *First transferred (or registered) and still held by deed of transfer T3729/1993 with diagram SG No. A 1711/92 annexed thereto.*

2.3.7.2 As a subsequent deed of transfer

Here the extending clause might read as follows:

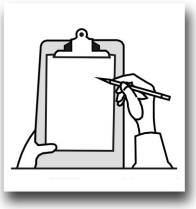
> *First **transferred** by deed of transfer (or grant) No. T 3729/1993 with diagram SG No. A 1711/92 annexed thereto and held by deed of transfer (or grant) or certificate of title No. T 43165/2002.*

Or:

> *First **registered** by certificate of registered title No. T 3729/1993 and general plan No. S G No. AS 1711/92 relating thereto and held by deed of transfer (or deed of grant or certificate of title) No. T 43165/2002.*
>
> (See reg 26 and prescribed form UU.)

Where the number of the diagram does not appear in the extending clause of the preceding deed, it is not necessary to refer to it in the following deed (see the footnote to form UU).

That sounds quite simple, doesn't not? Let's try to apply it!



Activity

In deed of transfer T7629/1986 the extending clause reads as follows:

- *First registered and still held by deed of transfer T 93/1957 with diagram no. SG 652/55 annexed thereto.*

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- *First registered by certificate of registered title T184/1970 and held by deed of transfer T559/1979.*

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- *As will more fully appear from subdivisional diagram no. SG 378/1985 and held by deed of transfer T3986/1985.*

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Describe **in each of the above circumstances** how the extending clause will read in the subsequent deed of transfer.

2.3.8 The conditional clause

This clause contains all the conditions applicable to the land on registration of the transfer. The concept of ''condition'' includes not only registered real rights in favour of others (personal servitudes and praedial servitudes) and other restrictive conditions on the land, but also rights to which the land is entitled as dominant tenement.

The conditions that appear in the conditional clause are not necessarily the only conditions applicable to the land. The conditional clause encompasses only those conditions that have already been registered against the land and that were inserted in the conditional clause when the deed of transfer was first passed. All other conditions imposed after registration of the title deed are endorsed against the title of the land. If someone wishes to ascertain what conditions are applicable to a specific piece of land, he/she must not look at the conditional clause only, but must also satisfy himself/herself that there are no conditions endorsed against the title deed. On transfer of the land the conditions of the endorsement are ''brought forward'' and are embodied in the conditional clause of the new deed, as additional conditions immediately following the existing conditions.

Conditions must as far as practicable be embodied in the title deed and appear immediately after the extending clause. Only in exceptional circumstances may they be contained in an annexure (reg 35(5)).

No conditions may be included in any deed (or bond) imposing a duty or obligation upon a registrar that is not sanctioned by law (reg 35(6)).

If a deed conferring title to land contains conditions which operate pending the establishment of a local authority, once a local authority is established then all such conditions must be omitted from any subsequent deed conferring title to such land — but only if it is clear from the wording that such conditions do lapse on the establishment of a local authority (reg 35(7)).

Conditions must be quoted from preceding deeds and must therefore be inserted in the conditional clause in the language in which they were originally created. Conditions will also follow the order in which they were set out in the preceding deed, and thereafter all the new conditions or servitudes endorsed against the preceding deed will follow in order of registration.

Each deeds registry has its own practice with regard to the conditional clause. For instance, in the Cape Town deeds registry the ''pivot deed'' system is used. The head of each deeds registry also has the authority to prescribe the office procedure.

2.3.9 The divesting clause

As the name implies, this clause declares the previous registered owner divested of his/her ownership. It is not necessary again to indicate the full marital status of the transferor(s), and parties can be merely referred to as *''married as aforesaid''*.

If an estate is the transferor, divest the *''estate late Sipho Sitole''* and, if a joint estate of a deceased and his/her spouse is involved, divest *''the joint estate of the late Sipho Sitole and surviving spouse* (or later deceased spouse)'' (reg 50(2)(c)). This must occur even where the executor in the estate acts alone in terms of the exceptions in section 21 of the Act.

The last part of the divesting clause where the rights of the state are reserved must be omitted in the case where transfer is in favour of the Republic of South Africa (reg 35(1)(f)).

2.3.10 The consideration clause

Form E prescribes that only the purchase price must be embodied in the deed of transfer. Where transfer duty was paid on a higher amount than the purchase price, it is established practice that the amount on which transfer duty was paid is also embodied in the deed of transfer. (We will discuss transfer duty in unit 5.) If transfer duty was paid on another amount than that of the consideration, the sum on which it was paid will also be mentioned in this clause, along with the reason why it differs from the sum of the consideration.

When the amount on which transfer duty was paid included other properties that are not transferred in the deed of transfer, this must be disclosed in the consideration clause.

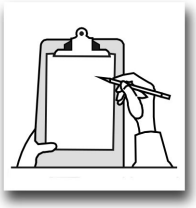
2.3.11 The execution clause

This is the clause in which the act of execution by the appearer (or owner) before the registrar is recorded (s 3(1)(d)).

Execution of the deed of transfer occurs before the relevant registrar of deeds, who attests the deed by signing it as a witness: once the registrar has signed the deed it

is regarded as attested and registered. Ownership passes at that moment, unless the deed is linked with others in a batch, in which case ownership passes only when the last deed in the batch is signed (s 13(1)).

The full date when the deed was executed appears in the execution clause.



Activity

Now that we have studied the whole deed of transfer in form E in detail, can you, without looking at the labelled example at the beginning of this unit, identify the different sections of form E in your prescribed copy of the regulations and explain the purpose/content of each clause briefly?

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3 Summary

In this unit we analysed the deed of transfer. It became clear that the transferor plays a very important role in the transfer of land. The transferor must not only be the owner of the land, but must also have the legal capacity to transfer the land. The next unit contains a more detailed discussion of contractual capacity. It is important to ensure that the person acting as transferor does in fact have the necessary capacity, or assistance or authorisation, to act as he/she does.

UNIT 5

Supporting documents

1 Introduction

Since you are now familiar with the deed of transfer, we shall discuss the documents that must be lodged simultaneously with and in support of an ordinary deed of transfer.

As you work through this unit, keep the following key questions in mind:

- What are the supporting documents required for a standard deed of transfer and what purpose does each of these supporting documents serve?
- Since the power of attorney by the transferee is the key to the whole transaction, who has the capacity to give or sign that power of attorney?

Please remember to refer to the study guidelines in Tutorial Letter 101 to focus on the most important parts of this unit.

The following documents can be described as the basic supporting documents that must be lodged with a new deed transfer, but remember that the *causa* of the deed will determine which **additional** supporting documents may need to be lodged.

These documents are arranged and numbered in the following order:

- deed of transfer under which the land is presently held
- special power of attorney
- transfer duty receipt or exemption certificate
- rates clearance certificate
- any consent required in terms of a title condition (or otherwise) for the registration of the deed, or proof of compliance with a title condition
- solvency affidavits

2 Special power of attorney

2.1 Nature of a special power of attorney

A special power of attorney is the **written authority to represent somebody else** in performing a juristic act. The juristic act which the conveyancer is obliged to undertake, in this case, is to appear before a registrar of deeds and to do all that is necessary to pass transfer of ownership of the land to the transferee. The person granting the authority is the owner (transferor) of the land.

In terms of section 20 of the Deeds Registries Act, all deeds of transfer, unless the Act or any other law or court order provides otherwise, must be executed in the presence of the registrar **by the owner** of the land described in the deed or document, or **by a conveyancer authorised by power of attorney** to act on behalf of the owner. Therefore a deed of transfer may only be executed by the owner in person, or by a conveyancer duly authorised by the owner of the land by virtue of a written power of attorney to transfer the land to the transferee. Because of the practical problems surrounding appearance by the owner himself and because deeds of transfer must be prepared by a conveyancer in any event, almost all deeds of transfer are accompanied by a special power of attorney authorising a conveyancer to appear before the registrar of deeds and to effect the transfer (or other transaction) on behalf of the owner.

2.2 Analysis of a special power of attorney

There is no prescribed form for a power of attorney. Regulation 65(3) of the Act stipulates, however, that a special power of attorney to transfer, hypothecate or otherwise deal with land or immovable property must contain:

(a) a clear and sufficient description of the land or property including the extent;
(b) the registered number, if any, of the land or property;
(c) the number (comprising the serial number and year number) of the deed whereby the land or property is held; and
(d) in the instance of a power of attorney to transfer land, the date of disposal of the land.

In the regulations to the Act, the terms ''power'' and ''power of attorney'' **are used interchangeably**. In all cases, these terms mean a **written** authorisation.

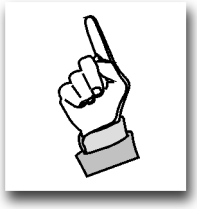
A power of attorney consists of the following:

- preparation clause
- preamble (including date of alienation and consideration)
- name of appearer
- *causa*
- name of transferee
- description of property
- new registrable conditions
- execution clause

2.2.1 The preparation clause

In terms of regulation 44 of the Deeds Registries Act, the power of attorney must contain a preparation clause completed by a practising attorney, notary or conveyancer. If the power of attorney was prepared by an attorney or notary, a practising conveyancer must countersign the certificate. This is done by providing

and signing a further certificate (see reg 44(5)) and attaching it to the power of attorney:



Example

Countersigned by me

.....

CONVEYANCER
(Surname and initials in block letters)

The purpose of this countersignature is to confirm that the signatory is a practising attorney or notary.

You will remember from unit 2 that the person who prepares the power of attorney accepts responsibility for the correctness of the facts mentioned in regulation 44A of the Act.

Study this part of the unit in conjunction with the information in unit 2.

2.2.2 The preamble

The preamble refers to the person or entity who granted the special power of attorney and who is referred to as the transferor. The transferor must be the owner of the land which is being transferred. (Refer to the definition of ''owner'' in s 102 and as discussed in 2.3.3 in unit 4.) In the case of a **natural person**, the preamble must contain the full names, identity number and/or date of birth and marital status of the transferor as illustrated in the schedule of transferors and transferee descriptions in 2.3.5 in unit 4 (regs 18 and 24).

In the case of a **person other than a natural person**, the preamble must contain the full name and registration number, where applicable.

In the case of a power of attorney to pass transfer from a **deceased estate**, the grantor of the power of attorney should be described as follows:

> ***Reginald Weideman****, in my capacity as* ***executor*** in the estate of the late ***Charles Weideman*** (full name) acting herein under letter of executorship ***no. 357/2006*** dated 10 July 2006 issued by the Master of the High Court, Provincial Division

The power of attorney must refer to the letter(s) of appointment as evidence that the preparing conveyancer did in fact peruse the letter(s) of appointment. In the actual deeds relating to the power of attorney, it is not necessary to repeat this reference (Chief Registrar's Circular 8 of 1983). A power of attorney granted by the executor in an estate prior to the date of his appointment is invalid.

In terms of section 15(2) of the Matrimonial Property Act 88 of 1984, a person married in community of property requires the consent of the other spouse for the acts referred to in sections 15(2)(a) to (h) and 15(3)(a), (b) and (c). Where immovable property is involved, either of the spouses may act with the **written consent** of the other spouse; alternatively both parties may sign the power of attorney, in which case both parties must be cited in the preamble to the power of attorney (Chief Registrar's Circular 5 of 1994).

In terms of regulation 44A of the Act, the preparer of the power of attorney accepts responsibility for the correctness of information pertaining to the marital status of any natural person who is party to a power of attorney. An error in the description of the transferor can usually be amended only if the grantor, witnesses and preparer have initialled the error (reg 44(2) and Registrars' Conference Resolution 15 of 1988).

Obviously the grantor of the power of attorney as described in this preamble must have contractual capacity and persons who have limited contractual capacity must be duly assisted. Although it is the responsibility of the **conveyancer** to **correctly cite** the parties and to ensure that persons, whether signing in person or **in a representative** capacity, are in fact authorised so to sign, it is the duty of the **registrar** of deeds **to ensure** that the transferor has the necessary contractual capacity to effect transfer. If the transferor does indeed have this capacity, the registrar must establish whether that capacity is in any way restricted by a registered condition of title or statutory restriction or any other law.

So we need to digress here and discuss the different categories of transferors, conditions of transfer and contractual capacity as applicable in each case. In each instance please refer back to the transferor/transferee schedule provided in unit 4 for further integration and clarification.

2.2.2.1 A married person or civil union partner as transferor

The contractual capacity of a married person to pass transfer of land will depend on various factors. For practical reasons, we distinguish between the following.

2.2.2.1.1 A person married/party to a civil union out of community of property

Section 11(2) of the Matrimonial Property Act 88 of 1984 (as amended by s 29 of the General Law Fourth Amendment Act 132 of 1993) abolished the marital power that a husband had over the person and property of his wife. Both the spouses in a marriage or civil union out of community of property have **full contractual capacity** to deal with immovable property registered in either of their names, irrespective of the contents of their antenuptial contract.

2.2.2.1.2 A person married/party to a civil union in community of property

Section 11(1) of the Matrimonial Property Act 88 of 1984 abolished the common law rule in terms of which a husband had marital power over the person and property of his wife. The provisions of Chapter III of the Act apply to all marriages in community of property, irrespective of the date on which they were entered into. However, the abolition of the marital power does not affect the legal consequences of any act done or omission or fact existing before the abolition.

A party to a marriage or civil union in community of property, in other words the individual spouses, has **limited contractual capacity**. This means the one spouse may not alienate any immovable property forming part of the joint estate without the written consent of the other spouse (s 15(2)(a) of Act 88 of 1984).

The consent required in terms of section 15(2)(a) of Act 88 of 1984 must be given separately for each act. Each consent must be attested (certified valid) by two competent witnesses and not by a commissioner of oaths only (s 15(5) of Act 88 of 1984).

The consent required under section 15(2)(a) is not necessary in the following circumstances:

- when land is donated or bequeathed to a person married/party to a civil union in community of property subject to the explicit condition (for example in the will) that it be excluded from the community of property
- when the High Court orders a registrar of deeds to register a deed of transfer given by a person married/party to a civil union in community of property
- when the land is excluded from the community of property by law, whether it is common law or statutory law (as was the case in *Ponnisammy and Another v Registrar of Deeds* 1946 TPD 214 at 218), or by statutory enactment
- when the land was purchased by a person married/party to a civil union in community of property with the proceeds from a property that was previously excluded from the community of property (*Ex parte Lelie* 1945 WLD 167)

2.2.2.1.3 A person whose marriage is governed by the laws of a foreign country

The **matrimonial property regime** is determined by the law of the husband's country of domicile at the date of marriage (*Frankel's Estate v The Master* 1950 (1) SA 220 AD). A person is domiciled in that country which the law regards as his/her permanent home (*Mason v Mason* (1885) 4 EDC 330 at 337). This issue becomes more complicated in civil unions where the spouses are of the same sex. It would appear that here South African law would apply, but that remains an open question still to be determined.

A person married in terms of a marriage whose legal consequences are governed by the law of any other country must, in terms of section 17(6) of the Deeds Registries Act 47 of 1937, be assisted by his/her spouse in executing any deed or other document required or permitted to be registered in any deeds registry or required or permitted to be produced in connection with any such deed or document — **unless** the registrar deems the assistance of the spouse to be unnecessary in terms of the Act or on other grounds. This section has the effect that a person (man or woman) whose marriage is governed by the laws of a foreign country must be assisted by his/her spouse when alienating immovable property.

Section 17 gives the registrar of deeds the discretion to dispense with such consent if it can be proved that the assistance is unnecessary.

The description must read for example ''*X, Identity number ..., married, which marriage is governed by the laws of Switzerland and duly assisted by ...*'' (Chief Registrar's Circular 5 of 1994).

It is unacceptable to state that the parties are ''married according to the laws of'' any other foreign country, because the laws governing the actual marriage ceremony might have been different from those governing the actual marriage. The actual marriage is governed by the laws of the husband's domicile and reference must be made to the fact that such foreign country's laws govern the marriage.

2.2.2.1.4 Marriages according to Hindu or Muslim custom

These marriages are not recognised under South African law. Although it is permissible to describe persons in a deed as married according to Hindu or Muslim rites, the legal consequences of a marriage in accordance with South African law do not apply. The husband and wife are considered as unmarried and

each has full contractual capacity without the necessary assistance of the other spouse (Chief Registrar's Circular 5/1994).

2.2.2.1.5 Customary marriages in terms of the Recognition of Customary Marriages Act 120 of 1998

A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose thereof (s 6 of the Recognition of Customary Marriages Act 120 of 1998, which came into operation on 15 November 2000).

2.2.2.1.6 Customary marriages entered into before the commencement of Act 120 of 1998

Customary marriages entered into before the commencement of the Act will continue to be governed by customary law — subject, however, to the provisions of section 6 of the Recognition of Customary Marriages Act, which affords the spouses equal status and full contractual capacity. Such marriages are at best deemed to be marriages out of community of property. So each spouse has full contractual capacity.

2.2.2.1.7 Customary marriage entered into after the commencement of Act 120 of 1998

A customary marriage entered into after the commencement of the Recognition of Customary Marriages Act, where no prior customary marriage was entered into, will be in community of property and profit and loss between the spouses, and Chapter III and sections 18, 19, 20 and 24 of Chapter IV of the Matrimonial Property Act will apply. Both spouses have restricted contractual capacity because the consent of the other spouse must be given with regard to the disposal or alienation of immovable property (see s 15(2)(a) of the Matrimonial Property Act) — unless the community of property in respect of the immovable property has been excluded for some or other reason.

The parties may, however, also elect to have their marriage governed by an antenuptial contract, which will regulate the matrimonial property system of their marriage provided it is notarially executed and registered.

However, customary marriages can only be in, or out, of community of property, where the husband is not a partner in more than one customary marriage (s 7(2) of the Recognition of Customary Marriages Act).

2.2.2.1.8 Further customary marriages after the commencement of Act 120 of 1998

A husband in a customary marriage may enter into a further customary marriage after the commencement of the Act. However, the husband must make application to the court in terms of section 7(4) of the Recognition of Customary Marriages Act to approve a written contract which will regulate the future matrimonial property system of his existing marriage and the prospective one. The order of court must be noted as an interdict against all parties concerned (see Chief Registrar's Circular 1 of 2004). Thereafter no immovable property belonging to the parties which formed an asset in a joint estate may be dealt with, until such time as the provisions of section 45*bis*(1)(b) or section 45*bis*(1A)(b) of the Deeds Registries Act 1937 have been complied with. The contractual capacity of the spouses will then

be governed by customary law, subject to the provisions of section 6 of the Recognition of Customary Marriages Act.

2.2.2.2 A divorced person as transferor

A divorced person as transferor has the same contractual capacity as an unmarried major person, that is full contractual capacity, and will be described as such. However, the court divorce order may include a specific award of the property, which will be noted as a *caveat* against the property. In such a case the divorced person will not be able to deal freely with the property but will have to comply therewith.

2.2.2.3 A minor as transferor

A minor who has not yet reached the end of his/her seventh year has **no contractual capacity**. Such a child may not sign a power of attorney to pass transfer, but his/her parents, guardian or curator may do so on his/her behalf.

Children over the age of seven, but under the age of 18, have **limited contractual capacity**. They may personally sign a power of attorney to pass transfer but, because their contractual capacity is limited, their parents, guardian or curator must assist them. As an alternative the parents, guardian or curator may sign the power of attorney on behalf of the minor.

The assistance of **both parents** or that of the guardian will be necessary for the alienation or encumbrance of immovable property or any right to immovable property belonging to the minor.

Apart from this assistance, section 80(1) of the Administration of Estates Act 66 of 1965 also requires the authorisation of the High Court or the Master of the High Court, depending on the value of the property, to alienate immovable property belonging to a minor. If the value of the property is R100 000,00 or more, the High Court must issue an order to authorise registration. If the value is less than R100 000,00 the Master of the High Court must consent to registration. This amount may be changed by proclamation.

Where the parents (or the curator) transfer property sold by them in terms of a will or other instrument by which they were nominated to sell such immovable property, the approval by the High Court or the Master is not necessary (s 80 of Act 66 of 1965). A copy of the relevant will or other instrument must be lodged as evidence of the nomination. When immovable property of a minor is dealt with in terms of the powers allocated to a curator in a will, the certificate of the Master that there is no objection to the transfer of the property must be obtained (s 42(2) read together with s 85 of Act 66 of 1965).

When the guardian is appointed in terms of section 72 of the Administration of Estates Act 66 of 1965, the power of attorney must refer to the letters of appointment, but it is not necessary to lodge the letters or to refer to them in the deed of transfer.

Unless authorised by the will of the deceased, an executor or his/her spouse, parent, child, partner, employer or agent may not purchase any property of the estate he/she is administering on behalf of a minor without the consent or confirmation of the Master or the court (see ss 49(1) and 85 of the Administration of Estates Act 66 of 1965).

Although the title of the land may indicate that the transferee is a minor, bear in mind that the minority might have been terminated since the registration of the title. This could happen in the following circumstances:

- When the minor turns 18. He/She then has full contractual capacity and can give transfer of land without any assistance, **unless** for some reason this person lacks **legal capacity**, for example on the grounds of insanity.
- When the minor enters into a marriage which is recognised by South African law as a legal marriage.
- When the High Court issues an order in terms of the Age of Minority Act 57 of 1972. A copy of the court order must be lodged as proof of majority.

Note that even where the parents or guardian simply renounces a registered personal right of a minor, for example a right of first refusal (pre-emptive right), a court order may be necessary, depending on the value (*Ex parte Oberholzer and Others* 1951 (1) SA 554(AD)).

2.2.2.4 A deceased estate as transferor

We will discuss a deceased estate as transferor and estate transfers in detail in unit 6.

2.2.2.5 An insane person as transferor

Insane persons or lunatics have no capacity to act at all. They cannot perform legal acts, even if through such acts they acquire rights only and do not incur obligations. So an insane person is incapable of transferring immovable property registered in his/her name in a deeds registry to anyone else, or of mortgaging such land or otherwise dealing with it.

When a person has been declared mentally insane, the Master of the High Court may appoint an administrator to perform or exercise on behalf of the insane person any act or right in respect of his/her property or to take care of or administer his/her property (s 59(1) of the Mental Health Act 17 of 2002).

A curator/administrator has only those powers granted to him/her by the court as contained in the letters of appointment (*Ward NO* v *Lockhat Ltd* 1928 AD 279 at 284). The curator may not exceed these powers, unless he/she has obtained the necessary authority from the court (*Ex parte De Lange* 1939 EDL 186).

As far as immovable property of the insane person is concerned, section 80 of the Administration of Estates Act provides clearly that the curator may not alienate such property which he/she has been appointed to administer, unless he/she is authorised to do so by:

- will or other written instrument by which he/she has been nominated as curator, or
- the High Court or the Master of the High Court, depending on the value of the particular immovable property (s 80(2)(a)). (If the value is R100 000,00 or more, the High Court must order registration; if the value is less than R100 000,00, the Master of the High Court must consent to registration.)

Where it is alleged that a curator is acting in terms of the powers conferred on him/her by a will or other written instrument, a certified copy of the will or instrument must be lodged in the deeds registry to verify his/her powers.

In instances where a curator transfers property which has been sold by him/her in

terms of a will or other written instrument appointing and instructing him/her to do so, an endorsement under section 42(2) of Act 66 of 1965 must be issued by the Master of the High Court to indicate that no objection to the transfer exists (s 42(2) read together with s 85).

2.2.2.6 An association as transferor

You will be able to ascertain from the vesting clause whether an association is a legal person or a voluntary association. In the case of a **legal person**, the land will be registered in the name of the legal person *per se*, whereas in the case of a **voluntary association** it will be registered in the names of the trustees or officials of the voluntary association concerned.

In the case of an association that is a body corporate a specific person or persons will be duly authorised, by way of a special resolution of the governing body, to pass transfer on behalf of the association. In the case of the voluntary association, trustees or officials of the association will be authorised to give transfer, by way of a special resolution usually taken at a general meeting of the members or as the constitution may determine.

The names of the representatives, trustees or officials, as the case may be, together with the date of the special resolution, must be disclosed in the special power of attorney, but need not be disclosed in the deed of transfer.

2.2.2.7 A partnership as transferor

In most deeds offices it is practice first to mention the names and marital status of the individual partners, and then the name of the partnership.

During the existence of a partnership all deeds or documents executed by the partnership must contain the full names (and marital status) of the partners constituting the firm (reg 34(1)).

As long as the partnership consists of the same partners, land of the partnership can be transferred or otherwise dealt with, as the case may be, on a power of attorney bearing the **signature of the firm** and of the partner who affixed the firm's signature (reg 34(2)).

If any partner in a firm wishes to transfer his/her share in any land of the firm to a new partnership which consists of the remaining partners plus a new partner or partners, such transfer may not be passed unless the whole of the property is transferred to the new partnership, and not merely the share of the disposing partner. The same principle applies if an additional partner is admitted to the firm to form a new partnership. In both instances all the partners of the old partnership must sign the power of attorney (reg 34(3)(a)).

If land or a real right registered in the name of the partnership is acquired by any partner in his/her individual capacity, transfer or cession of it must be given by all the partners of the firm. All the partners must sign the power of attorney or cession (s 24*bis*(1)).

Where a partnership has been dissolved, the power of attorney given in pursuance of the dissolution must be signed by all the partners (reg 34(3)(b)).

If, during the continuance of a partnership, any partner wishes to deal with his/her share of the partnership land, he/she cannot do so unless he/she first receives transfer of it. However, an endorsement in terms of section 45(1) of the Deeds

Registries Act is admissible (reg 34(3)(c)). You will learn more about this type of transfer by endorsement in unit 7.

What was said above about the capacity of natural persons to act as transferor is applicable *mutatis mutandis* to the individual partners of a partnership when such partnership deals with immovable property. A consent in terms of section 15(2)(a) of the Matrimonial Property Act 88 of 1984 will be required if a partner who is married in community of property trades with the immovable property belonging to the partnership. (The wording of s 15(2)(a), read together with s 15(6), and Registrars' Conference Resolution 4 of 1987 makes it clear that such a consent is necessary.)

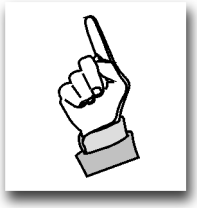
2.2.2.8 A trustee in a deceased estate as transferor

Before a trustee appointed in a deceased estate (*mortis causa* trust) can transfer estate land, the land must vest in the trustee. There must therefore be a deed of transfer in favour of the trustee(s) or the existing title must be endorsed in terms of section 40 of the Administration of Estates Act 66 of 1965. In addition the trustee(s) must be authorised either by the will or the trust deed to sell and transfer immovable property.

2.2.2.9 An owner of land and the holder of a personal servitude as transferors

If the owner of land subject to a personal servitude and the holder of that servitude have disposed of the land together with the rights of servitude, they may together give transfer of the land to the transferee(s) (s 69(1) of the Deeds Registries Act). A personal servitude as referred to above includes not only the common law servitudes of usufruct, *usus* and *habitatio*, but also other personal servitudes. Section 69(1) can however not be used to cede only the rights over the land and not transfer the land itself. Section 66 of the Act prohibits a cession of usufruct, *usus* or *habitatio* to any person other than the owner of the land encumbered thereby. The transfer of the land and personal servitude must therefore be in favour of the same person, which will result in termination of the personal servitude through merger.

The deed of transfer must describe the transferors as the owner of the bare *dominium* and the holder of the servitude respectively (s 69(2) of the Act). For example:



Example

Stephen Stanton
Identity number
unmarried
the owner of the bare dominium
and
Pauline Scott
Identity number
unmarried
the holder of usufruct over the hereinafter-mentioned land

Everything that has been said so far about the capacity of the transferor applies *mutatis mutandis* to transferors in this instance, except in respect of marriages in

community of property. The common law excludes the transfer of such a personal right to the community of property (*Van der Merwe v Van Wyk NO* 1921 EDL 298).

2.2.2.10 An owner of land (fiduciary) and fideicommissary as transferors

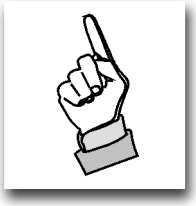
Fideicommissary substitution is when the testator stipulates that the bequest must first vest in one person, the fiduciary, and that when a certain time arrives or a condition has been fulfilled, it must vest in another person, known as the fideicommissary. The testator stipulates, for instance, that the property must go to his son, A, and after the death of A it must go to B.

If the owner of land subject to a *fideicommissum*, and the fideicommissary if competent to do so, have disposed of the land or any portion of it, together with the fideicommissary rights, to any other person, they may together give transfer of the land to that person (s 69*bis*(1) of the Deeds Registries Act).

If the fideicommissary heirs have been determined, but some of them are still minors, the court as upper guardian may consent to the transfer of the fideicommissary rights of the minors, provided that it is to their benefit. The same applies to undetermined fideicommissary heirs (*Ex parte de Winnaar 1959* (1) SA 837 (N); *Rogers NO and Another v Erasmus NO and Others* 1975 (2) SA 59 (T)).

From the wording of section 69*bis*(1) of the Act it is evident that all fideicommissary rights, and not only a portion thereof, must be transferred.

The deed of transfer must describe the transferors as the fiduciary (owner of the land) and the holder of the fideicommissary rights respectively (s 69*bis*(2)). For example:



Example

Johan Wentzel
Identity number
unmarried
as fiduciary
and
Susan Swanepoel
Identity number
unmarried
as the holder of the fideicommissary rights in the hereinafter-mentioned land

If the fiduciary is married in community of property to his/her spouse, transfer to the community of property is excluded, as is the case with the usufructuary.

2.2.2.11 A sheriff of the court as transferor

A sheriff of the court can attach and sell immovable property only in execution of an order of court. Before a transfer or cession of immovable property can take place, a copy of the notice of attachment must first be served on the registrar of deeds.

The sheriff of the court (magistrate's court) or sheriff (High Court) must pass transfer of the immovable property.

An attachment can be made only against the rights that the debtor has in the land. When the land is, for example, subject to a personal servitude and the bare *dominium* is attached and sold in execution, the land can be sold and transferred subject to the personal servitude.

If the owner of the bare *dominium* passes a bond over the land and the holder of the personal servitude waives his/her preference in favour of the bondholder over the land, and the creditor attaches the property, the land can be sold and transferred free from the servitude. It is also unnecessary for the holder of the servitude to pass transfer with the sheriff (Registrars' Conference Resolution 34 of 1964; Registrars' Conference Resolution 16 of 1967; *United Building Society Limited v Du Plessis* 1990 (3) SA 75 (W)).

When an attachment is made on immovable property, the sheriff of the court cannot always freely transfer the property:

- If the estate of the debtor is sequestrated, all the assets of the insolvent vest in the trustee and in principle the sheriff of the court may not deal with it.
- If the land is mortgaged in favour of the Land Bank, the sheriff of the court may transfer the property only with the written consent of the Land Bank (s 55 of the Land Bank Act 13 of 1944).
- If the land is mortgaged in favour of the State with assistance in terms of the Agricultural Credit Act 28 of 1966, the relevant minister's consent is required in terms of section 35(2) of Act 28 of 1966.
- Furthermore, if the property is subject to the recording of a contract in terms of section 20(1) of the Alienation of Land Act 68 of 1981, section 21(2)(b) of the aforesaid Act provides that the sheriff is compelled to notify the purchaser in writing to exercise his/her right to claim transfer of the land (s 21(3)). (In terms of s 20 a contract for the sale of land by instalments may be recorded against the land at the deeds office, thereby providing the purchaser with some protection by instalments.)

If the purchaser does not exercise his/her right the recording of the contract must first be cancelled by the sheriff.

Note: Although the Acts referred to in the second and third bullets above have been repealed, existing conditions in deeds in terms of those Acts are still dealt with in the same way.

2.2.2.12 Trustee in an insolvent estate as transferor

There must be proof that the owner is insolvent (s 17 of the Insolvency Act 24 of 1936). A provisional or final sequestration order must be lodged with the registrar of deeds, if a sequestration interdict has not already been filed.

The trustee in the insolvent estate must transfer the property (s 20 of Act 24 of 1936).

A provisional trustee does not have the power to sell property belonging to the estate he/she is administering. The authority of the court or the Master must first be obtained (s 18(3) Act 24 of 1936).

Sales in insolvency are ranked prior to sales in execution (by the court), unless the court orders differently (s 20(1)(c) of Act 24 of 1936). Therefore, if land is sold in insolvency, an attachment interdict can be ignored.

If the separate estate of one of two spouses is sequestrated, the estate of the solvent spouse will also vest in the trustee, until such time as it has been released by him/her — section 21 of Act 24 of 1936. In the case of a marriage out of community of property, both the names of the husband and wife must be checked in the interdict register or on the computer. With a marriage in community of property, the estates of both spouses are sequestrated.

The **general rule** is that property acquired prior to or during insolvency vests by insolvency (sequestration) in the insolvent estate, and thus vests in the Master of the High Court until a trustee has been appointed. Upon the appointment of a trustee the estate vests in him/her, without the title deed being endorsed to that effect. During insolvency, only the Master of the High Court or trustee of the insolvent may transfer property (s 25 of the Insolvency Act 24 of 1936).

Exceptions to this general rule are as follows:

- Property that was acquired during insolvency adversely to the trustee does not form part of the insolvent's estate, for example a transaction that the trustee could have prevented but failed to prevent, or a transaction that was entered into with the consent of the trustee. If an insolvent wishes to alienate such property, a registrar of deeds will allow it provided a disclaimer is lodged with the deed to the effect that the trustee does not lay claim to such property for purposes of the insolvent estate.
- Property which was acquired during insolvency by the insolvent, which the court on rehabilitation of the insolvent declares to vest in the name of the insolvent, or which vests in the insolvent due to the automatic rehabilitation in terms of section 127A of the Insolvency Act, does not form part of the insolvent estate.

In the following two instances the land must first be re-vested in the rehabilitated insolvent before he/she can deal with it:

(a) If, by virtue of the provisions of the Insolvency Act 24 of 1936, an insolvent has been re-vested with the ownership of any property, such property may not be dealt with by the insolvent until an endorsement has been made by the registrar on the title to the effect that the property has been restored to him/her (s 58(2) of the Deeds Registries Act 47 of 1937). This procedure will be discussed in more detail in unit 6.
(b) In the event of the insolvent's estate being finalised and there being immovable property in the estate which has not been re-vested in the insolvent as set out under (a) above, and such property not being claimed by the creditors or trustee or the Master, the trustee or Master must give formal transfer thereof to the ex-insolvent before the latter can freely deal with it (s 58(1) of the Deeds Registries Act 47 of 1937).

2.2.2.13 A liquidator of a company or close corporation as transferor

A company, including a foreign company and a legal person, and a close corporation can be wound up (liquidated) by an order of the High Court, or a company or close corporation can go into voluntary liquidation. A voluntary winding-up of a company or close corporation can be a voluntary winding-up by the creditors or members of the company or close corporation (s 343 of the Companies Act 61 of 1973 and s 67(1) of the Close Corporations Act 69 of 1984).

The registrar of the court must forward a copy of every winding-up order made by the High Court, irrespective of whether it is a provisional or final order or any order staying, amending or setting aside such order, to every registrar charged with the maintenance of any register under any Act in respect of any property within the Republic which appears to be an asset of the company or close corporation (s 357(1)(b) of the Companies Act). A copy of every special resolution for the voluntary winding-up of a company or close corporation must be forwarded by the relevant company or close corporation to every registrar referred to above (s 357(3) of the Companies Act). Upon receipt of a copy of any such order or resolution, registrars must note an interdict of such winding-up in their registers.

In terms of section 49(5) of the Companies Act, the statement ''In Liquidation'' or ''In Voluntary Liquidation'', as the case may be, must be included in and subjoined to (added at the end of) the name of the company or close corporation concerned. If the winding-up order is discharged the statement must be omitted from the name of the company or close corporation.

If a company or close corporation is being wound up by the court, or voluntarily, or is placed under judicial management, the Registrar of Companies must alter the register. This is done on receipt of a copy of the relevant order of court or on registration of a special resolution for the voluntary winding-up of the company or close corporation in terms of section 349. The alteration must include in and subjoin to the name of the company or close corporation concerned the statement ''In Liquidation'' or ''In Voluntary Liquidation'', as the case may be.

If the winding-up order or judicial management order is discharged, or the winding-up ceases, the Registrar of Companies must, on receipt of a copy of the relevant order of court, alter the register to omit the statement from the name of the company or close corporation concerned (s 49(7) of the Companies Act).

A liquidator must pass transfer of the immovable property of a company or close corporation that is in liquidation. The liquidator is appointed by the Master of the High Court, and the Master issues him/her with a certificate of appointment which is valid throughout the Republic (s 375(1) and (2) of the Companies Act). A liquidator is entitled to act as such only from the date of his/her certificate of appointment (s 375(3) of the Companies Act).

The contractual capacity of the liquidator of a company or close corporation to pass transfer is subject to the following authority:

- authority granted by resolution of the creditors or members or contributories, or by virtue of instructions given by the Master in terms of section 387 — if the company or close corporation was **liquidated by the court**
- authority granted by a meeting of creditors — if the company or close corporation was **voluntarily liquidated by the creditors**
- authority granted by a meeting of **members** — if the company or close corporation was **voluntarily liquidated by the members** (s 386(3) read with s 386(4)(h) of the Companies Act)

The powers of a provisional liquidator can be restricted by the Master in terms of section 386(6), and therefore the consent of the Master will be required when a provisional liquidator deals with assets.

The above authorisations are not, however, required to be lodged in the deeds registries in view of regulation 44A of the Deeds Registries Act.

When the court has made an order for the winding-up of a company or close corporation, or the company or close corporation has passed a special resolution for its voluntary winding-up, any attachment or execution noted against the estate or assets of the company or close corporation after the commencement of the winding-up will be void (see s 359(1)(b) of the Companies Act).

If the attachment and sale in execution occurred prior to the liquidation of the company or close corporation, the liquidator must transfer the land (*Shalala v Bowman NO and Others* 1989 (4) SA 905 WLD and Registrars' Conference Resolution 27 of 1994).

Bonds registered over the property need not be lodged for disposal, unless they are registered in favour of the Republic of South Africa or the Land Bank.

2.2.2.14 Judicial manager of a company or close corporation as transferor

When a company or close corporation is placed under judicial management by an order of court, irrespective of whether it is a provisional or final order, a copy of the judicial management order must be forwarded to the registrar of deeds in whose registry immovable property of the company or close corporation is registered. The copy of the court order is noted as an interdict against the company or close corporation in the deeds registry.

A judicial manager is not allowed to sell or otherwise dispose of any of the company's or close corporation's assets without an order of court, save in the ordinary course of the company's or close corporation's business (s 434 of the Companies Act). A copy of the court order must be lodged in the deeds registry when immovable property is transferred.

2.2.2.15 A juristic person as transferor

The contractual capacity of a company or close corporation will depend on the contents of its memorandum and articles of incorporation or founding statement, which should be checked in each instance by the preparing conveyancer, together with the authorising resolution, to ensure that the envisaged transaction is in fact within the signatories' powers and authority.

2.2.2.16 A municipality as transferor

Contractual capacity varies from one municipality to another depending on the relevant ordinance of each province. In some provinces the local authority must obtain the consent of the premier of the province before it can sell or alienate immovable property.

In the preamble to the deed, the local authority will, for example, be described as follows:

The City Council of Tswane Metropolitan Municipality

2.2.2.17 A statutory body as transferor

The contractual capacity of a statutory body will depend on the powers granted to that body in the authorising statute, which should in each instance be checked by the preparing conveyancer.

Having completed the study of contractual capacity as it relates to the transferor/ signatory of the power of attorney as described in the preamble to the power of attorney, we shall continue with our analysis of the power of attorney and more particularly the appointment of an appearer.

Activity

1 Describe the transferor as you would in the preamble to a power of attorney and in each instance indicate whether any further consents or authorisations would be needed and what these are:

- Sonja Spies, identity number 840306 0032 081, unmarried, transfers land to Bill Cosby.

  .....

  .....

- Sonja Spies, identity number 900318 0032 008, unmarried, transfers land to Bill Cosby.

  .....

  .....

- Sipho Nzo, identity number 58910 5032 008, married out of community of property, is insolvent and has sold his land to Bill Cosby.

  .....

  .....

2 Refer to section 69(1) and 69*bis*(1) of the Deeds Registries Act 47 of 1937 and explain the purpose of each and the difference between them in your own words.

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Now that we have completed our discussion of the preamble to the power of attorney including the contractual capacity of the grantor described in the preamble, we will continue with our analysis of the power of attorney as supporting document.

2.2.3 Appointment of appearer

The power of attorney must contain the name of the appearer, who must be a conveyancer (see s 20 of Act 47 of 1937), appointed to appear before the

registrar of deeds on behalf of the transferor. The identity number and/or date of birth and marital status of the appearer is not required and should not be disclosed in the power of attorney.

If for some reason the actual appearer appointed in the power of attorney cannot execute the deed, the special power of attorney may be amended to include an alternative appearer (usually another conveyancer practising in the same firm of attorneys) without the alternation having to be fully initialled by the grantor of the power of attorney and witnesses (Registrars' Conference Resolution 49 of 1962).

*2.2.4 The **causa***

The power of attorney must contain the cause *(causa)* of the transfer; for example, for a sale, the date of the transaction and the purchase price must be disclosed, corresponding to the transfer duty receipt.

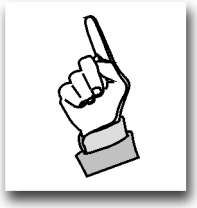
A power of attorney usually contains one of five types of *causae:* a sale, donation, inheritance, exchange or rectification. The *causa* must substantially correspond to the deed of transfer (see 2.3.4 in unit 4).

2.2.5 The transferee

The power of attorney must disclose the full names, identity number and/or date of birth number and marital status of the transferee if he/she is a natural person, alternatively the full name and registration number of a transferee other than a natural person (reg 24 of the Act). Please refer to the schedule of transferee descriptions in 2.3.5 in unit 4.

2.2.6 Description of the property

The power of attorney must contain a complete description of the property, including the extent of the property and the title reference (reg 65(3)). For example:



Example

The farm Dennelton 383,
Registration Division KR, Province of Mpumalanga [description of property]
In extent: 5 000 (Five Thousand) Hectares [extent of property]
Held by Deed of Transfer T 2798/1967 [reference]

2.2.7 Creation of new registrable conditions

The power of attorney must contain a comprehensive disclosure of any **new** conditions (created for example in terms of ss 65, 67 or 76 of the Act). For example:

Personal servitude:

The property to be transferred is subject to a lifelong right of usufruct in favour of Ismael Omar, identity number 340908 5089 080, unmarried.

Praedial servitude:

The property hereby transferred is subject to a right of way 3 metres wide in favour of Erf 45 Bloemhof Township, Registration Division MS, Province of the Free State,

held by Certificate of Registered Title No. T295/1996 as indicated by the figure AB on diagram SG No 69342/2006.

2.2.8 Execution clause

The power of attorney must be **signed** by the grantor and duly **witnessed**, with reference to its date and place of execution of the power of attorney (reg 25 and s 95). The place of execution must be clear, in order that it can be ascertained whether the land is inside or outside the Republic.

If the power of attorney was signed and dated **prior to** the date of transaction, it will have to be re-executed (Registrars' Conference Resolution 26 of 1974).

Any power of attorney which is signed **within** the Republic of South Africa and lodged for registration in a deeds registry must be attested either by **two** witnesses over the age of 14 years, competent to give evidence in any court of law in the Republic, **or** by a magistrate, justice of the peace, commissioner of oaths or notary public, duly described as such. No person is permitted to attest any power of attorney under which he/she is appointed as an agent or from which he/she derives any benefit (s 95(1) of the Act and Registrars' Conference Resolution 49 of 1967). If the power of attorney is attested by a commissioner of oaths, his/her full names, business address and official title must be reflected.

Can X be appointed to appear on behalf of the owner if he/she witnessed the power of attorney? No, since X derives a financial benefit from the transaction. (See paragraph above and s 95(1) of the Deeds Registries Act 47 of 1937.)

However, in *Hersch v Bedelia Gift Centre (Pty) Ltd* 1958 (3) SA 838 (0) and *Barclays National Bank Ltd v Wollach* 1980 (1) SA 615 (C) the court decided that it is directory and not peremptory or imperative that two witnesses be required to attest a power of attorney. The **registrar thus has a discretion** to permit the transaction to proceed even though the power of attorney is only witnessed by one person.

There is a presumption that all witnesses have the legal capacity to act as witnesses, unless the contrary is proved.

If the power of attorney was signed **outside** the Republic, it must be duly authenticated in accordance with the Hague Convention Abolishing the Requirement of Legislation for Foreign Public Documents or Rule 63 of the Supreme Court (dealt with in more detail in Notarial Practice LPL417G). If the formalities of Rule 63 of the Supreme Court have been observed for documents signed outside South Africa, the witnessing requirements of section 95 of the Act may be dispensed with; that is, the document then need not also be attested by two witnesses or a commissioner of oaths. The registrar has a discretion to dispense with these authentication requirements (reg 20(8)).

A principal's signature by way of a mark is sufficient, provided that the mark is made in the presence of and witnessed by a commissioner of oaths and two witnesses.

If a power of attorney has been granted by **one** of the parties to a marriage in community of property, and the other spouse has signed the power of attorney too, thereby giving his/her consent, it must be clearly stated in the power of attorney that the signature contemplates the necessary consent (Chief Registrar's Circular 5 of 1994). In such a case, the signature of the other spouse will be regarded as a consent, in terms of section 15(2)(a) of the Matrimonial Act 88 of 1984, in which

case two witnesses must attest such signature (s 15(5)). However, if both spouses act as grantors in the power of attorney, the power of attorney can be attested in the normal way either by two witnesses or by a commissioner of oaths (Registrars' Conference Resolution 2 of 1986). Please also refer to contractual capacity of persons married in community of property discussed in 2.2.2.1 of this unit.

2.3 General

2.3.1 Initialling

All the pages of the power of attorney (including any annexures) must be initialled by the grantor and the witnesses (Registrars' Conference Resolution 19 of 1989) except the page that is signed in full. Should the first page or any intermediary pages (except the last) be retyped, the power of attorney must be re-executed.

2.3.2 Alterations

Any **material alterations** to or interlineations in a power of attorney **must** also be initialled by the person who signed the document (reg 44(2)) **and** the person who attested to the grantor's signature. If an amendment or interlineation is, however, effected by a person who was not the original witnessing attestor, then that person must attach his/her full signature to it (reg 20(4)). Minor alterations such as typing errors may be initialled by the preparing conveyancer.

Regulation 44(2) of the Act provides that any material alteration to any power of attorney must be initialled by the person who has prepared the document. Clearly, therefore, any alterations in respect of information for which the preparer takes responsibility must be initialled by that preparer.

The above two regulations are complementary and not contradictory; therefore both must be observed (Registrars' Conference Resolution 15 of 1988).

This means that all material alterations to a power of attorney must be initialled by the person who executed the document, by the witnesses and by the preparer of the document. This is referred to as ''full initialling''.

Full initialling is required for the following common errors, although this is not an exhaustive list:

- the amendment of an error in the names, identity number or marital status of the **transferor or mortgagor**
- an error in the **date of sale**
- an error in the **property description** with regard to an **erf number** or the portion number of an erf, agricultural holding or farm
- a material error in the **extent of the land**, as this may affect the purchase price or the security under the mortgage bond
- an error in the **purchase price**
- an error in the **capital amount** or **cost clause** in a mortgage bond

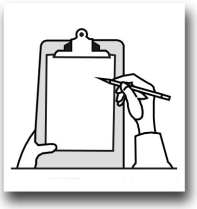
A certificate (setting out the correct information), issued by a conveyancer, may be attached to a faulty power of attorney without full initialling, if the error is:

- An error in the names, identity number, marital status or description of the **transferee or bondholder/mortgagee**. An error of this nature should be rectified by means of a certificate from the preparer or initialling by the preparer. If, however, the error in the names is of a material nature, for example ''Fourie'' instead of ''Van der Merwe'', the rectification must be fully initialled.

- A **spelling error in the name of a township** or farm description, for example if the property is described as ''Erf 108 Fort Hare'' instead of ''Erf 108 Fort Hare Extension 21''.
- An error in the **registration division or province** in which the land is situated.
- An omission or an error in the **title deed reference**.

2.3.3 A power of attorney executed in a foreign language

Powers of attorney executed outside the Republic of South Africa in a foreign language may be accepted, if accompanied by a **translation certified** by a sworn translator or other translator if a sworn translator is not available (reg 24(3) of the Act).



Activity

State whether the following statements are true or false and provide authority for your answers:

- Only the last page of a power of attorney need be initialled by the transferor/grantor and witnesses.

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- One witness is sufficient to attest a power of attorney

  .....

- Powers of attorney written in a foreign language are acceptable for deeds office registrations.

  .....

You may want to refer to section 95, regulation 24 and Registrars' Conference Resolution 19 of 1989.

3 Transfer duty receipt or exemption certificate

Transfer duty is the tax payable in terms of the Transfer Duty Act 40 of 1949 to the Receiver of Revenue on the consideration or value when land or rights in land are acquired. (S 12 of the Act prohibits the transfer of land or rights in land without a transfer duty receipt.) It is paid by the person acquiring the property and for natural persons it is calculated on a sliding scale based on the value or purchase price of the property. The higher the value or price, the higher the transfer duty payable.

For persons other than natural persons, for example companies, close corporations and, note, trusts too (even though strictly speaking they are not legal persons!) the transfer duty is set at a flat rate — currently 8 per cent of the purchase price or value.

In terms of section 92(1) of the Deeds Registries Act 47 of 1937, a deed of grant or transfer of land may be registered **only** if it is accompanied by a receipt or certificate, issued by a competent public revenue officer to prove that all taxes, duties, fees and so forth payable on the property have been paid — alternatively, that the transaction is exempt from transfer duty. It is no longer the duty of the registrar to calculate transfer duty, but deeds controllers may raise notes if they do find errors.

As a general rule, a transfer duty receipt or an exemption certificate must thus accompany every deed of transfer. (See however the discussion of the exception to this rule in respect of estate transfers below.) This transfer duty receipt will either be endorsed by the South African Revenue Services and contain their cash register receipt, or it can be issued to the relevant conveyancer electronically by the South African Revenue Services, in which case it **must**, in terms of Chief Registrar's Circular 6 of 2005, contain a verification by a conveyancer, notary or commissioner of oaths as follows:

> *I ... hereby certify that this is a true copy of transfer duty receipt no .../ exemption certificate no ... that has been extracted from the SARS website. Date:.....Conveyancer/notary/commissioner of oaths signature and particulars*

Where land or real rights in land have been donated to an intended spouse in an antenuptial contract, but not transferred to such spouse, section 92(2) provides that the following transactions may not be executed in respect of that property unless transfer duty (if any) has been paid:

- transfer or cession of land, or of any real right in land to any person other than the donee
- mortgage of such land

Accordingly, should an antenuptial contract which contains a donation of land be lodged for registration in the deeds registry, a *caveat* will be noted against the relevant property — so that it cannot be dealt with unless the transfer duty receipt in respect of the donation has been lodged.

A receipt for the full amount of the transfer duty payable must be lodged. A transfer duty receipt marked ''Deposito'' or ''Deposit'' is not acceptable. The word ''Deposit'' must be deleted, the word ''Finalised'' added and it must be duly signed and dated by the Commissioner for Inland Revenue, after which it can be lodged with the additional transfer duty receipt. The only exception is when the receipt is accompanied by a certificate duly signed by the Receiver in terms of section 11(3) of the Transfer Duty Act 40 of 1949, which provides for possible further transfer duty to be paid.

Transfer duty receipts amendments may be effected only by the Receiver of Revenue under his/her signature and official stamp. Where there are small errors, like the incorrect spelling of names, which do not affect the validity of the receipt, a certificate by the conveyancer may be called for, indicating that the receipt relates to that transaction. Otherwise the receipt must be sent back to the Receiver for amendment.

NOTE: In certain instances value-added tax (VAT) will be payable by the transferor on the sale of the property. Should this be the case, then the transaction will be exempt from transfer duty in line with the principle against double taxation.

This issue was dealt with in Chief Registrar's Circular 14 of 2000 which we have reproduced in a shortened form below only for noting:

> *In terms of section 92 of the Deeds Registries Act 47 of 1937 a deed of grant or deed of transfer of land is registrable only if it is accompanied by a receipt or certificate from a competent public revenue officer to the effect that taxes, duties and fees, on the property concerned, payable to the government or any provincial administration have been paid.*

1 The Commissioner of the South African Revenue Services (SARS), in a Minute dated 18 October 2000, gave a ruling to the effect that, as from 1 November 2000, the transactions below may be registered without the need to lodge a receipt or an exemption certificate from SARS. These transactions are as follows:

- *Special exemptions provided for in other legislation.*
- *Exemptions provided for in subsections (1)(a), (1)(b), (1)(bB) and (1)(e)(i) of s 9 of the Transfer Duty Act 40 of 1949).*

2 The exemption provided for in section 9(1)(e)(i) is, however, not applicable where the transfer is in terms of a joint will where massing has taken place or where the transfer is in terms of a single will and VAT is payable.

3 The Registrar of Deeds is not in a position to determine whether VAT is payable or not. It was accordingly resolved at a joint meeting of SARS, conveyancer representatives and the registrar that, in respect of transfers in terms of a single will, a certificate/affidavit to the effect that VAT is not payable, prepared by the executor and approved by SARS, will have to be lodged as proof that no VAT is payable, alternatively an exemption certificate issued by the Receiver of Revenue must be lodged.

(Please refer to 2.3 in unit 6 for a discussion of the implications of the above.)

Activity

1 X and Y have made a joint will wherein they mass their separate estates and bequeath the family farm to their son Z, subject to a usufruct in favour of the survivor of them. X dies, Y adiates and accepts the provisions of the joint will and accordingly the family farm is now being transferred to Z.

Must a transfer duty receipt or exemption be lodged with this transfer?

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2 X, a successful commercial farmer who is registered as a VAT vendor, has died and bequeathed the farm to his son Z, subject to a usufruct in favour of his surviving spouse Y. Accordingly the family farm is now being transferred to Z, subject to the usufruct in favour of Y. Must a transfer duty receipt or exemption be lodged with this transfer?

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In the first activity above, did you remember that half the property being transferred did not belong to the deceased estate, was therefore not exempt from transfer duty in terms of section 9(1)(e)(i) — and is therefore not included under the exceptional circumstances described in Registrars' Circular 14 of 2000, where no transfer duty receipt or exemption need be lodged?

The second activity was simpler in that only inherited property is being transferred, so it is exempt from transfer duty and Registrars' Circular 14 of 2000 does apply. So no transfer duty receipt or exemption need be lodged. But did you remember about the VAT affidavit or exemption certificate?

4 Rates clearance certificates

In terms of section 118(1) and (1A) of the Local Government Municipal Systems Act 32 of 2000 **a registrar of deeds may not register the transfer of property, unless** the **prescribed certificate** issued by the municipality in which the property is situated has been lodged. This certificate must:

- **be valid for 120 days** from date of issue
- **certify that all amounts due have been paid** — for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties, **during the two years preceding the date of the application** for the certificate

The above requirement, and what is discussed below regarding charges, does not apply to transfers from the national or provincial or local government, or financed by loans from the national, provincial or local government; nor does it apply where vesting of ownership is the result of conversion of land tenure rights into ownership in terms of the Upgrading of Land Tenure Rights Act 112 of 1991.

Clearly, a municipal clearance valid for **more than 120 days** from issue (that is, date of signature — Chief Registrar's Circular 11 of 2005) must be lodged with every transfer of property (including sectional title units and exclusive use areas), except *inter alia* tenure upgrades. Transfer cannot be registered after the expiry of such certificate. The question arises: What about the municipal service fees, property rates, etc, which accrued **prior** to the two-year period referred to above? Section 118(3) of Act 32 of 2000 provides:

> *An amount due for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties is a charge upon the property in connection with which the amount is owing and enjoys preference over a mortgage bond registered against the property.*

Keep this in mind later when we learn about mortgage bonds and charges in units 9 and 10. Section 118(4) includes a proviso to the effect that nothing shall preclude the subsequent collection by a municipality of any amounts owed to it in respect of such property at the time of the transfer.

It often happens that city councils issue clearances in respect of erven that are situated in extensions of townships, without specifying in which extension a particular erf is situated. Such a certificate may be accepted if accompanied by a conveyancer's certificate.

5 Consents

5.1 Consents required in terms of title conditions

The title may contain conditions entirely prohibiting the transaction that is about to be registered or may require the consent of another person for the transaction to be registered. We will look at a few of these conditions.

5.1.1 In terms of pre-emptive rights

This is a title deed condition whereby the holder of the pre-emptive right has the right to buy a property before anyone else. An owner can only transfer a property to anyone else once the pre-emptor declines. The property must be transferred either to the pre-emptor or, if the pre-emptor elects not to purchase the property, to anybody else, free from the condition — provided that the registrar of deeds is satisfied by way of documentary evidence (in the form of an underhand consent) that the pre-emptor elected not to exercise his/her right. In the latter instance the condition lapses and the provisions of section 68(1) of the Act must be complied with.

5.1.2 In terms of reversionary rights

In terms of a reversionary right, the ownership of a property will revert to the previous owner, in the event of the occurrence or non-occurrence of some or other event. Although such a condition contains no restriction on alienation, transfer of the land will not be permitted by the deeds registry unless accompanied by the written consent of the holder of the reversionary right or the cancellation thereof.

5.2 In terms of statutory provisions

Numerous statutory requirements in various Acts impact on conveyancing, and are not apparent from the title deed. Knowledge of the statutory requirements enables one to decide whether a consent is required with a specific transaction. We have listed some of the common requirements below.

5.2.1 In terms of section 3 of the Subdivision of Agricultural Land Act 70 of 1970

Section 3 prohibits certain actions regarding agricultural land without the written consent of the Minister of Agriculture.

5.2.2 In terms of section 11(4) of the Advertising on Roads and Ribbon Development Act 21 of 1940

Section 11(4) states that the consent of the controlling authority is required for the transfer of an undivided share in a piece of land situated outside an urban area, within 95 metres of the midline of a building restriction or main road, if the registrar thinks such registration may lead to the frustration of the objects of the Roads and Ribbon Development Act 21 of 1940, that is impact on traffic on public roads. As the registrar of deeds has no way of knowing when this might be the case, all the deeds registries follow a uniform practice.

If the extent of any land (situated outside an urban area) being transferred in undivided shares is such that, where it is divided by the number of joint owners (or proposed holders of undivided shares), it results in each joint owner having less than 4.2827 hectares in extent, the registrar regards it as a contravention of section 11(4) of Act 21 of 1940. Thus, if it would lead to the transfer of a portion smaller than 4.2827 hectares for each joint owner, then the registrar of deeds assumes that the section is being contravened and requests the conveyancer concerned to either lodge the consent of the controlling authority, or certify that section 11(4) is not being contravened. If application of the formula above results in each joint owner having more than 4.2827 hectares, the registrar assumes that section 11(4) is not being contravened and asks no further questions.

(S 11(1) of the Road and Ribbon Development Act 21 of 1940 similarly prohibits the Surveyor-General from approving a general plan or diagrams for land situated outside or partly outside an urban area, if any or part thereof falls within 95 metres of the centre of a building restriction road, without the express consent of the controlling authority.)

5.2.3 In terms of the Agricultural Holdings (Transvaal) Registration Act 22 of 1919

An established condition of the Minister of Agriculture by virtue of the Agricultural Holdings (Transvaal) Registration Act 22 of 1919 is that an agricultural holding may not be subdivided or any portion of it sold, leased or disposed of without the consent of the town council. Consent to subdivision of a holding in any portion less than 8 565 square metres is prohibited (s 5(1)).

Section 5(2) of Act 22 of 1919 determines that an agricultural holding may not be transferred to more than one person if any owner's portion is going to be smaller than 1 morgen (8 565 square metres) after it has been divided. (In practice the holding is excised and reverts to farm land which is then subdivided with the consent of the Minister of Agriculture in terms of the Subdivision of Agricultural Land Act 70 of 1970.)

5.2.4 In terms of section 15 of the Matrimonial Property Act 88 of 1984

Section 15 provides that a party to a marriage (or civil union) **in** community of property may not perform any juristic act without the consent of the other spouse. The consent of the other spouse must be in writing and, if the document is required for registration in a deeds registry, it cannot be done by ratification (s 15(4)). The consent must be given in respect of each act separately and the signature must be attested by **two** witnesses (s 15(5)). From this it would appear that an agent of a spouse acting under a general power of attorney cannot consent to such an act, unless permission is given in the power of attorney.

Section 15(6) provides that where a spouse performs acts in the ordinary course of his/her business, profession or trade, and if the acts do not have any bearing on the property of the spouses' joint estate, the consent of the other spouse is not required. Since section 15(2)(a) has not been excluded in section 15(6), a partner to a marriage in community of property must nevertheless obtain the consent of the other spouse, irrespective of whether or not an act is performed in the ordinary course of business, profession or trade (Registrars' Conference Resolution 4 of 1987). Section 16 empowers the court, if the consent of the other spouse cannot be obtained or for other reasons, to dispense with such consent.

5.2.5 In terms of the Further Education and Training Colleges Act 16 of 2006

The Further Education and Training Colleges Act provides that public colleges may not without the **concurrence** of the Member of the Executive Council for Education (MEC) dispose of or alienate any immovable property acquired with the assistance of the State or give any person a real right or servitude over such property. Nor may such property be attached as a result of legal action. Registrars will accordingly have to ensure that any future dealings with public college immovable property is done with the concurrence of the MEC.

5.2.6 In terms of section 56 of the Deeds Registries Act 47 of 1937

All open mortgage bonds registered against the property being dealt with must be lodged for disposal, together with the consents by the holder(s) of the bonds, in terms of section 56 of the Deeds Registries Act 47 of 1937. (We deal with mortgage bonds and these consents in unit 9.)

5.2.7 Exceptional instances in cases of insolvency

Where an insolvent acquires property adversely to the trustee, subsequent to sequestration, such property may vest in the insolvent and be retained by him/her. ''Adverse acquisitions'' are for instance transactions entered into which could have been avoided by the trustee but were not, or were entered into with the trustee's consent. Here the registrar will permit an insolvent to deal with the property, provided a disclaimer signed by the trustee is lodged, to the effect that the trustee lays no claim to the property, which was acquired with the trustee's consent and which may be dealt with freely by the insolvent. To sum up, in certain exceptional instances, an insolvent may acquire or deal with property during his/her insolvency and, if the above circumstances apply, the trustee's disclaimer will have to be lodged.

5.3 General guidelines for the above consents

The consent must be clearly and unambiguously drawn up and the date and place of execution of every signature must appear on it (reg 25).

The consent must contain the full names, identity number and/or date of birth and marital status of the person who is consenting if it is a natural person and the full names and registration number if it is a person other than a natural person.

If the consent is to be registered in a deeds registry or tendered for registration or filing on record, it must bear a preparation clause signed by a conveyancer (s 15A read with reg 44).

6 *Insolvency and solvency affidavits*

Once a person has been sequestrated, he/she will remain insolvent until the court issues a rehabilitation order or until he/she is automatically rehabilitated ten years after sequestration. We discuss the effect of sequestration in more detail in unit 7.

Once the registrar of deeds has been informed of the sequestration of a person by the registrar of the court, a sequestration interdict is noted against the name of that person in the deeds registry. The interdict prevents such person from personally dealing with his/her property as the trustee of the insolvent estate is, in terms of section 102 of the Deeds Registries Act; this person is now regarded as the owner of any immovable property.

However, the registrar of deeds often cannot positively link a sequestration order to a specific person, because, although it is a requirement under the Insolvency Act, the court order does not usually contain the insolvent's date of birth or identity number. The registrar then links the insolvency interdict to all persons of that name. If it is a common name like Johan Smit, this interdict could erroneously delay all the transactions whereto a Johan Smit is a party. It is therefore common practice for the owner of a property to be transferred to lodge a solvency affidavit with the transaction: to the effect that he/she is not insolvent, has never been insolvent and that any court order to that effect does not apply to him/her but to someone with a similar name.

Alternatively, on the basis of such an affidavit, the conveyancer may instead lodge a conveyancer's certificate that the interdict is not applicable to the transferor. It will then be deemed by the registrar that the person concerned may freely deal with the property and prevent undue delay. However, the affidavit will not avert sequestration orders issued after the date of the affidavit.

If the deponent declares in the solvency affidavit that he/she was once sequestrated, but has since been rehabilitated, the registrar of deeds must ascertain whether or not ten years have passed since the sequestration. If ten years have passed, the person may deal freely with the property. If the ten-year period has not expired, section 58 of the Act must be complied with (see more detailed discussion in unit 7).

The solvency affidavit must obviously comply with the usual requirements for an affidavit: supply full names, identity number, date and place of affidavit, and full particulars (name, capacity, physical address and area) of the commissioner of oaths before whom it was sworn to.

7 *Supporting documents kept on file*

We have listed and discussed most of the supporting documents that need to be lodged with a deed of transfer above. However, there are further supporting documents which the conveyancer will complete and have signed, **but simply keep on his/her file**. These are mostly documents relating to those matters for which the preparing conveyancer accepted responsibility by signing the preparation certificate. We list and briefly discuss them below.

7.1 Marital status affidavit

This affidavit is completed and signed by both the transferor and the transferee, confirming their current marital status, marital property regime and undertaking to advise the conveyancer should there be any changes in status or regime before registration of transfer. Ideally the conveyancer would also keep a copy of any antenuptial contracts on file as further supporting evidence.

7.2 Personal affidavit

The personal affidavit must be completed and signed by both the transferor and transferee, confirming their correct names and identity numbers according to a South African identity document or dates of birth, should an identity document not have been issued to them or if it contains incorrect information. Ideally the conveyancer will also keep copies of the identity documents on file as further supporting evidence.

7.3 FICA affidavit

In terms of the Financial Intelligence Centre Act 38 of 2001 attorneys are obliged to have financial particulars of their clients on file; accordingly both the transferor and the transferee will be obliged to take an oath and sign an affidavit setting out once again their correct names and identity numbers or dates of birth, residential address, income tax registration number and details of how the purchase of the property is to be financed (usually by way of ''*a mortgage bond in favour of ... Bank*'').

7.4 Transfer duty declarations

Although in the past transfer duty declarations (confirming the financial details of the acquisition) were completed by the transferor and transferee for submission to SARS in support of the transfer duty payment, this has now changed. Conveyancers can elect to complete transfer duty forms on behalf of the parties and pay transfer duty online; in which case hard copies of the transfer duty declarations, completed and signed by the parties, should be kept on the conveyancer's file as supporting evidence of the online payment.

8 Summary

We have now discussed ordinary deeds of transfer and the supporting documents that must accompany them. Next we will look at more complicated and diverse transfers, starting with estate transfer, partition transfers, and more. And just in case you are still wondering, sections 69(1) and 69*bis*(1) both deal with situations where the land is subject to a limited real right of a third party and thus cannot be freely alienated in its entirety, without the cooperation of the right holder. In fact the holder of the limited real right may become a co-transferor in terms of both subsections, but **section 69(1) deals with land subject to a personal servitude**, while **section 69*bis*(1) deals with land subject to a fideicommissum**.

UNIT 6

Special transfers

1 Introduction

Now that you are conversant with the ordinary deed of transfer and its supporting documents, we will look at more difficult types of transfer: estate transfers, partition transfers, expropriation, transfers by virtue of a court order and transfers by endorsement. The purpose of this unit is to make you familiar with these types of transfers, so that you can identify and use them correctly in practice.

Our discussion will focus on the following key questions:

- How should a deceased estate be described and divested as transferor in the preamble to a deed and when need the surviving spouse not be joined as co-transferor?
- What is the distinction between a partition transfer and a subdivision of land?
- How are various problems related to mortgages, real rights or *fideicommissum* solved in respect of partition transfers?
- In what way is a deed transferring ownership different from an expropriation transfer?
- What is the purpose of an expropriation transfer and which requirements should be complied with before it can be registered?
- What restrictions are placed on the registered owner of property expropriated as a whole or in part, once the notice of expropriation has been filed with the registrar of deeds?
- Under what circumstances will court order transfer take place?
- How do the different supporting documents for the various transfers provide evidence to maintain a secure land registration system?

Please remember to refer to the study guidelines in Tutorial Letter 101 to focus on the most important parts of this unit.

In transfers from a deceased estate we still use the usual form E deed of transfer discussed in unit 4, but the operative clauses need to be expanded and adapted as you will see below; and in transactions relating to a deceased estate, the executor acts on behalf of the estate/deceased owner. An executor is someone who is:

- authorised to act by virtue of letters of executorship granted by the Master of the High Court, or
- authorised to act by virtue of an endorsement of the appointment of an assumed executor (s 15 of the Administration of Estates Act 66 of 1965), or
- ''*any* ***representative of a deceased*** *owner recognised by law*'' in terms of section 102 of the Deeds Registries Act including, for example, the representative of an estate administered in terms of section 18(3) of the Administration of Estates Act and regulation 4(11) of the Black Administration Act 38 of 1927 (Proclamation R200 of 1987)

2.1 The preamble

The **preamble to the power of attorney** to transfer immovable property granted by the executor must disclose the **name of the executor** or representative, as well as the **place** and **date of issue of the** letter **of executorship/appointment**.

However the letter of executorship or appointment itself need not be lodged, as the preparer of the power of attorney takes responsibility for this (refer to s 44A of Act 47 of 1937). **The preamble to the deed of transfer,** however, must not contain any reference to the letter of executorship or appointment, or the names of the executor or representative. It merely refers to *''... the executor in the estate of the late John Smith No. xxx/2006''*.

2.1.1 Land that does not form an asset in a joint estate

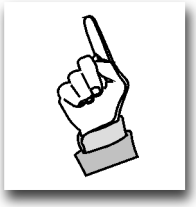
Where the land to be transferred did not form an asset in a joint estate (for example the deceased was not married in community of property), the executor or representative of the estate must pass transfer — that is, sign all the documentation and in particular the special power of attorney authorising the conveyancer to execute the transfer. The transferor will be described in the preamble to the deed as:

> *The executor (or representative) in the estate of the late WILLEM MBATI No. 3967/07*

Note that where property is registered in the name of a surviving spouse who was married to the deceased out of community of property and massing of the estates has taken place, then (in terms of Registrars' Conference Resolution 15 of 1986) the registered owner must pass transfer, and not the executor in the estate of the deceased.

2.1.2 Land that forms an asset in a joint estate

Where the land to be transferred formed an asset in a joint estate, the surviving spouse of the deceased, who is accordingly owner of an undivided half share of the property, must always (in terms of s 21 of the Deeds Registries Act) be joined in his/her personal capacity with the executor of the estate of the deceased spouse — except in the instances mentioned below.



Example

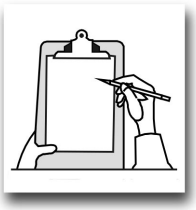
The preamble should be worded as follows:

The executor (or representative) in the estate of the
late WILLEM MBATI No. 3967/07
and surviving spouse, LENA MBATI
Identity number ..... .
widow
(previously married in community of property to each other)

Note the following exceptions, where in a transfer of land from a joint estate the surviving spouse need not participate in the transfer:

- where the executor is only dealing with the share of the deceased spouse, or
- where the land has been sold to pay the debts of the joint estate, or
- where there has been a massing of the joint estate and the surviving spouse has adiated, or
- where such transfer is in favour of the surviving spouse, or
- where the surviving spouse has signed, as executor, the power of attorney to pass such transfer

The preamble to the deed of transfer must indicate that the transaction is being effected **on behalf of the joint estate** and **the joint estate must be divested** in the divesting clause (reg 50(2)(c)).



Activity

1 Who must pass transfer if a deceased estate is the transferor?

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.....

2 When is it not necessary for a surviving spouse to join with an executor in passing transfer of land forming part of a joint estate?

.....

.....

3 Describe the transferor as you would in the preamble to the deed in each of the following circumstances:

- Property in the estate of the late Ben Botes, No. T123/97, is to be transferred to Jan Lowe. Ben Botes was married in community of property to Susan Botes at the time of his death. Koos Calitz is the executor of the estate.

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- Property is registered in the name of Mary, married out of community of property. Mary and Joe entered into a mutual will whereby they mass their estates on the death of the first-dying, and any property registered in their names must be transferred to Arnold, subject to usufruct in favour of the survivor. Joe dies and Mary adiates. The property registered in Mary's name is about to be transferred to Arnold.

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- Property in the estate of the late Ben Botes, No. 123/97, is to be transferred to Susan Botes, to whom Ben Botes was married in community of property. Koos Calitz is the executor of the estate.

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2.2 Supporting documents for transfer from a deceased estate

We now discuss the specific proof, unique to a deed of transfer from a deceased estate, that must be lodged with the registrar of deeds before the transfer from the estate will be registered. These are over and above the general documents that we have already discussed in unit 5. The registrar will check these documents to ensure that the *causa* (cause or reason) for the transfer is correct and that all the necessary consents and authorisations have been obtained for that specific causa. We do not expect you to know all the lists of supporting documents by rote, but rather to understand why each is necessary under the circumstances and thus be able to explain it. Different causae will require different supporting documents. For estate transfers the possible *causae* are the following:

- testate succession
- intestate succession (including the estates of black persons administered in terms of the Intestate Succession Act 81 of 1987)
- sales by the deceased during his/her lifetime
- donations by the deceased during his/her lifetime
- sales by the executor
- transfers in terms of section 18(3) of the Administration of Estates Act 66 of 1965
- take-overs in terms of section 38 of the Administration of Estates Act 66 of 1965
- sales by an executor in a deceased insolvent estate in terms of section 34(2) of the Administration of Estates Act 66 of 1965

- property registered in the name of the survivor of spouses who were married in community of property.
- property registered in the name of a spouse who was married out of community of property, whose spouse died and massing of the estates had taken place
- transfer from an estate of a black person whose estate is being administered in terms of the Black Administration Act 38 of 1927 according to customary law

Note: In terms of Registrars' Conference Resolution 31 of 1988 and 21 of 2005 any document, the original of which is filed with the Master of the High Court, and which is to be lodged in the deeds registry, must be certified a true copy by the Master of the High Court — including, among other documents, death notices, redistribution agreements and affidavits of next-of-kin.

Please also refer back to the schedule of transferee and transferor descriptions in unit 4, specifically where it deals with estate vesting clauses.

Acquisition of land by virtue of biab intestatio or **testate succession,** or as a result of a redistribution of assets in a deceased estate, is usually exempted from transfer duty (s 9(1)(e)(i) of the Transfer Duty Act 40 of 1949). This exemption applied even to assets acquired from someone other than the deceased, for example where massing and adiation took place. However, a 1989 amendment permitted an exemption of transfer duty **only in respect of assets belonging to the deceased.** Accordingly transfer duty is now payable on those acquired immovable assets not belonging to the deceased. Therefore, if X and Y are married in community or property, and they mass their estates and bequeath their immovable property to their children on the death of the first-dying of X and Y, transfer duty will be payable on a half share of the fair value of such property.

As you can see from the above, some of the estate transfers (and other transfers discussed in this unit) are exempt or partly exempt from transfer duty in terms of section 9 of the Transfer Duty Act 40 of 1949. This is where you now have to refer back to heading 4 of unit 5, where we quoted Chief Registrar's Circular 14 of 2000. Thus, although the general rule with transfer duty is that either a transfer duty receipt or exemption issued by SARS must be lodged with all transfers, estate transfers (which are usually exempt under s 9 of the Transfer Duty Act 40 of 1949) are an exception to this rule; that is, no SARS transfer duty exemption need be lodged. However, because some massed estates may be liable for transfer duty and even single estates may be liable for VAT (while being exempt from transfer duty), Registrar's Circular 14 of 2000 was issued. The effect of this circular is that with transfers from deceased estates either a transfer duty exemption or a certificate by the executor to the effect that VAT is not payable by the estate, prepared by the conveyancer and approved by SARS, will have to be lodged. Alternatively, a VAT exemption certificate issued by SARS must be lodged.

2.2.1 Testate succession (excluding s 18(3) estates) — supporting documents to be lodged

(i) **A conveyancer's certificate must always be lodged** in terms of section 42(1) of the Administration of Estates Act 66 of 1965 to the effect that the transfer is in accordance with the liquidation and distribution account.
(ii) There must be proof **of any waiver or repudiation** of an inheritance or legacy if applicable.
(iii) If the heirs entered into a redistribution agreement, a duly certified copy accepted by the Master must be lodged to determine whether the terms of

such agreement have been complied with (Registrars' Conference Resolution 21 of 2005). The complete facts must be mentioned in the recital of the deed.

(iv) A copy of the will certified by the Master together with an endorsement by the Master that it was accepted by him/her must be lodged as proof that the deceased died testate and that the transfer is in accordance with the will (reg 50(1)).

(v) Where a testator nominates his/her children as heirs without identifying them, an affidavit of next-of-kin is required in order to identify the heirs (Registrars' Conference Resolution 11 of 2005).

(vi) Where a personal servitude (for example a usufruct) is bequeathed to the surviving spouse who alleges that they were married in community of property, proof of such marriage is necessary, unless the property is registered in the name of both spouses in terms of section 17(1). A marriage certificate is required in order for the servitude to be created by reservation as a condition in the deed of transfer in terms of section 67 of the Deeds Registries Act. If the marriage in community of property cannot be proved, the personal servitude must be ceded notarially and cannot be created directly in the deed of transfer and power of attorney by way of section 67.

(vii) If it is alleged that one of the heirs is deceased, his/her death must be proved (by death notice or death certificate). If the deceased heir left descendants who can inherit in terms of the will, the identity of such descendants must be proved by way of a next-of-kin affidavit (Registrars' Conference Resolution 11 of 2005).

(viii) If a personal servitude is bequeathed to a person who dies before the servitude can be registered in his/her name, such death must be proved by way of a death notice or death certificate.

(ix) Where a joint estate is massed and the survivor adiated, proof of adiation must be lodged, being either a statement by the surviving spouse, or a conveyancer's or Master's certificate to that effect (reg 50(2)(b)).

(x) Where it is alleged in a deed of transfer that the surviving spouse is entitled to the land, one half by virtue of the marriage in community of property, and the other half in terms of the conditions of the will of the deceased, subject to registrable testamentary conditions, proof of the marriage in community of property is necessary (if it has not yet been proved for another reason). This is necessary in order to determine whether only one half share in the land, or the whole of such property, must be made subject to the testamentary conditions. Such proof will be unnecessary if the property is registered in the names of both spouses.

(xi) Where the bequest of land is subject to a condition (for example the payment of a certain amount of money to a third person — referred to as a bequest price), proof must be lodged that the beneficiary accepted the bequest subject to the condition before a transfer can be registered. **A certified copy of acceptance** by the Master or even a certificate by a conveyancer will suffice.

(xii) As explained in 2.2 above, transfer duty is usually not payable in respect of inherited or bequeathed land, but where there has been massing, transfer duty may be payable on the acquisition of the surviving spouse's share, in which case a transfer duty receipt will have to be lodged.

(xiii) Proof that the deceased is not liable for VAT. This can be in the form of proof from SARS or a certificate from the executor endorsed by SARS (see Chief Registrar's Circular 14 of 2000). Where a transfer duty receipt is lodged or an exemption certificate, no proof from the exemption of VAT is required.

(xiv) In terms of Registrars' Conference Resolution 29 of 2005, the deceased estate or the joint estate must be divested and not the executor in the estate.

2.2.2 Intestate succession (including the estates of black persons) administered in terms the Intestate Succession Act 81 of 1987

The Intestate Succession Act 81 of 1987 is applicable to persons who died intestate after 18 March 1988. Estates of persons who died before this date will either be administered by Act 38 of 1927 or by Act 13 of 1934. For this reason it is important that the date of death of the deceased be mentioned in the causa of the transfer. The estates of black persons who died intestate will be discussed in 2.2.10 below.

The supporting documents listed above in 2.2.1 — (i) to (iii), (vii) and (xii) to (xiv) — also apply to intestate estates and, depending on the circumstances, various other supporting documents may have to be lodged:

- Proof that the deceased did in fact die intestate, in the form of an affidavit from the executor (Registrars' Conference Resolution 20 of 2006).
- Proof that the person or person(s) to whom the land is to be transferred is/are in fact the deceased's intestate heir(s) in the form of an affidavit of next-of-kin (Registrars' Conference Resolution 11 of 2005).
- Proof that the deceased and his/her alleged spouse were in fact married, unless the vesting clause of the existing title deed is clear in this regard. A marriage certificate or an affidavit from the surviving spouse will be sufficient proof. In respect of customary marriages, the registration certificate from the Department of Home Affairs or an order of court is necessary, and no affidavit will be acceptable (see Registrars' Conference Resolution 31 of 2005, as confirmed by Registrars' Conference Resolution 8 of 2006). Pending the Recognition of Islamic Marriages Act, an order of court must be lodged to prove that a monogamous Islamic marriage existed (Registrars' Conference Resolution 46 of 2006).
- Proof of the balance of the estate that is available for distribution. A copy of the liquidation and distribution account certified by the Master will suffice.
- Whether or not the deceased has descendants who are entitled to inherit *ab intestatio* from him/her (see s 1(1)(a), (b), (c), (d), (e) or (f) of Act 81 of 1987). An affidavit of next-of-kin will provide sufficient proof.

2.2.3 Sales by the deceased during his/her lifetime

The recital of the deed of transfer must specifically mention that the deceased sold the property during his/her lifetime. The following documents must be lodged:

- a certificate by the Master in terms of section 42(2) of the Administration of Estate Act of 1965
- a transfer duty receipt or proof of exemption

2.2.4 Donations by the deceased during his/her lifetime

The following documents are required:

- A certificate by a conveyancer must be lodged in terms of section 42(1) of the Administration of Estates Act.
- If the donation of land was made prior to 19 October 1982 and the donor solemnised the donation in his/her will, a copy of the will must be lodged together with an acceptance of the donation by the donee(s). If the donation was made between 22 June 1956 and 19 October 1982, but was not solemnised by the donor in his/her will, then the written donation duly signed by the donor must be lodged (as was required by Act 50 of 1956) together with

proof that the donee accepted the donation from the donor during his/her lifetime. (After 19 October 1982 no alienation of land, as described in the Alienation of Land Act 68 of 1981, shall be of any force or effect unless it is contained in a deed of alienation signed by the donor and donee — s 2 of Act 68 of 1981.)

- A transfer duty receipt or proof that the transaction is exempt for some or other reason must be lodged.

2.2.5 Sales by the executor

The following documents are required:

- An endorsement in terms of section 42(2) of Act 66 of 1965 that the Master has no objection to the transfer must be lodged.
- If it can be ascertained that the immovable property was purchased during the administration of the estate by the executor or his/her spouse, parent, child, partner, employer, employee or agent, proof is necessary that the Master or the court consented thereto and ratified such sale, unless such a sale was authorised by the deceased in his/her will (s 49 of the Administration of Estates Act of 1965).
- Where the estate is administered in terms of section 34(2), and the executor in the estate of the deceased conveys land in terms of exception (b) of section 21 of the Act, a certificate by the Master or executor or by a conveyancer must be lodged to the effect that the land has been sold to pay the debts of the joint estate (reg 50(2)(a) read with s 21(b) of the Act). The *causa* of the deed must also state that the estate is administered in terms of section 34(2) of the Administration of Estates Act 66 of 1965.
- A transfer duty receipt or proof that the transaction is exempt from such payment must be lodged.

At this stage we would just like to remind you that we are still busy with the different types of estate transfers and the supporting documents that must be lodged in support of the different *causa*. Also note that although we have included the information contained in 2.2.6 to 2.2.10 of this unit for the sake of completeness, you do not need to have this information for the examinations.

2.2.6 Transfers in terms of section 18(3) of the Administration of Estates Act 66 of 1965

Where the value of the deceased estate is relatively low, section 18(3) of Act 66 of 1965 authorises the Master to give directions on the **manner** in which an estate must be liquidated and distributed. The Master may also give directions regarding the **appointment of the representative**. Such directions need not be lodged with the registrar of deeds in view of the responsibilities of the signatory of the preparation certificate in terms of regulation 44A(c) of the Deeds Registries Act.

The deed must contain a **suitable** *causa* which must be proved by way of the necessary documentation, wills, etc (see the discussion above).

Note the following:

- If the *causa* is one of sale, no consent or authorisation from the Master is required, as same is covered by section 15A read in conjunction with regulation 44A of the Act (see Registrars' Conference Resolution 3 of 2003 and 53 of 2006).

- If the deceased died testate no section 42(1) or 18(3) certificate is required and if the deceased died intestate, the liquidation and distribution account cannot be lodged as no account is drawn, the value of the estate being under R125 000,00 (see Registrars' Conference Resolution 2 of 2003).
- A transfer duty exemption certificate or proof that the deceased was not registered for VAT must be lodged (Chief Registrar's Circular 14 of 2000).
- In terms of Registrars' Conference Resolution 38 of 2005 the representative appointed in terms of section 18(3) has no authority to donate immovable property.

2.2.7 Take-over in terms of section 38 of the Administration of Estates Act 66 of 1965

A section 38 take-over occurs where the Master, in his/her discretion in order to preserve the assets of the estate as a whole for the benefit of the surviving spouse and deceased's children, allows the surviving spouse to take over all or part of the estate assets at valuation, even though the children or other heirs may be entitled to some of these estate assets. In such a take-over, the surviving spouse will usually be required to furnish the Master with a bond over the property to secure the rights of the minor heirs. The following supporting documents will be required:

- authorisation by the Master of the High Court for the taking over of the land by the surviving spouse in terms of section 38 of the Administration of Estates Act of 1965 must be produced. Where a bond is to be registered simultaneously with the transfer of the land in favour of the Master (''kinderbewysverband''), the Master's written authorisation is required. In all other cases the power of attorney is endorsed in terms of section 38.
- The conveyancer must provide a certificate in terms of section 42(1) of the Administration of Estates Act 66 of 1965.
- Proof of exemption from transfer duty or that the deceased was not registered for VAT must be lodged.
- Proof that the surviving spouse was in actual fact a spouse as defined in section 38, and was legally married to the deceased must be lodged.

Please note:

In the recital of the deed it must be stated that the immovable property is taken over by the surviving spouse in terms of section 38 of the Administration of Estates Act. In the event of the land forming an asset in a joint estate, the transfer by endorsement procedure prescribed by section 45(1) of the Act may be used (discussed later in this study guide).

2.2.8 Sale by the executor in a deceased insolvent estate in terms of section 34(2) of the Administration of Estates Act 66 of 1965

This type of sale occurs when a natural person dies and the executor or representative establishes that the liabilities in the estate exceed the assets. No sequestration order will be recorded against the name of the deceased in the deeds registry because the deceased is not formally declared insolvent in terms of the Insolvency Act and no reference to insolvency must be made in the preamble of the deed or power of attorney. The *causa* of the deed must reflect that the executor is selling the property in terms of the provisions of section 34(2) of Act 66 of 1965. If there is an attachment recorded against the property, it need not be withdrawn before registration of transfer. The relevant deeds controller will simply

make an office note against such attachment that the property was sold in terms of section 34(2) Act 66 of 1965.

Bonds against the property need not be lodged for disposal (s 56(1) of the Act).

The following documents must be lodged:

- An endorsement by the Master on the power of attorney that the Master has no objection to the sale in terms of section 34(2) or 42(2) of the Administration of Estates Act 66 of 1965 (see Registrars' Conference Resolution 31 of 2003).
- A transfer duty receipt/exemption certificate.
- The title deeds of the land. However, this may be dispensed with if the executor provides the registrar of deeds with a certificate that he/she, after thorough search, could not procure the title (see reg 51(2)).

Section 21 of the Act is not applicable; accordingly the surviving spouse need not act and sign as co-transferor. However, regulation 50(2)(c) must be complied with if the property forms an asset in a joint estate, meaning that the joint estate must pass transfer and the joint estate must be divested.

2.2.9 Property registered in the name of the survivor of spouses who were married in community of property

Once one has ascertained that the survivor is in fact entitled to the whole property, a section 45 transfer by endorsement is effected. (You will learn more about transfers by endorsement in the next unit.)

If the surviving spouse is not entitled to the half share of the deceased spouse, then he/she only has the capacity to deal with a half share of the property.

At this stage we would just like to remind you that we are still busy with the different types of estate transfers and the supporting documents that must be lodged in support of the different *causa*.

2.2.10 Transfer from an estate of a black person distributed according to customary law in terms of the Black Administration Act 38 of 1927

From the earliest of times, customary law governed the succession in the intestate estates of black persons. Therefore the Black Administration Act 38 of 1927 contained specific provisions to give effect to this customary law. These were declared unconstitutional by the Constitutional Court in the case of *Moseneke and Others v The Master and Another* 2001 (2) DS 18 (CC) and the State was ordered by the court to enact unified, non-discriminatory legislation before 5 December 2002. Unfortunately this legislation is still forthcoming.

However the Constitutional Court's decision in *Bhe v Magistrate Khayelitsha* 2005 (1) SA 580 CC handed down on 15 October 2004 came to the rescue and declared unconstitutional section 23 of the Black Administration Act 38 of 1927, as well as regulation R 200 of the regulations published in Government Notice 10601 of 6 February 1987 — and went further by instructing how black estates should in future be dealt with in the absence of new legislation. This impacted on the future administration of black estates and the practice pertaining to the conveyance of immovable property emanating from a deceased black estate.

We shall not discuss the administration of intestate estates of black persons in

detail. We will merely provide a guide regarding the procedure that must be followed, depending on the date of death of the deceased, in so far as this may be necessary to understand the subsequent transfer procedure that must follow.

2.2.10.1 Summary of the *Bhe* decision

Briefly the following was held:

- Section 23 of the Black Administration Act 38 of 1927 was repealed with retrospective effect to 27 April 1994.
- Magistrates will no longer have the authority to administer black intestate estates.
- All estates, irrespective of race, colour or creed, will be administered by the Master of the High Court in terms of the Administration of Estates Act 66 of 1965.
- The order of the court in respect of the administration of estates was not made retrospective; thus estates currently being administered by the magistrate in terms of section 23 of the Black Administration Act 38 of 1927 will continue to be administered by those magistrates. However, the customary rules of intestate succession should not be adhered to and the magistrate must apply the provisions of the Intestate Succession Act 81 of 1987.
- Although the provisions of section 23 have been repealed with retrospective effect, it will not apply to completed transfers of ownership, except where an heir had notice of a challenge to the legal validity of the statutory provisions and the customary law rule of male primogeniture. How the challenge will be put into effect is for the courts to decide and only the future will tell.
- In polygamous marriages, each spouse will be entitled to R125 000,00 or a child's share, as more fully explained below.

2.2.10.2 The current position

2.2.10.2.1 Where the deceased died prior to 27 April 1994

The Master of the High Court has decided that, for practical reasons, these estates must be referred to the Master and must be administered according to the Black Administration Act 38 of 1927, and the regulations promulgated thereunder.

2.2.10.2.2 Where the deceased died after 27 April 1994

The Master of the High Court must administer all deceased estates where the deceased died after 27 April 1994. The estates will be administered in terms of the Administration of Estates Act 66 of 1965 and the Intestate Succession Act 81 of 1987 or 13 of 1934, depending on the date of death unless the estate was already wound up in terms of the Black Administration of Estates Act 38 of 1927.

2.2.10.2.3 Where the deceased died after 27 April 1994 but before 15 October 2004

Where a black person died after 27 April 1994, but before 15 October 2004 and such estate was reported to the magistrate, the magistrate must finalise the estate, but the estate must be administered in terms of the Intestate Succession Act, read in conjunction with the Bhe decision.

However, where the estate has already been wound up, in terms of the Black Administration Act and the regulations promulgated thereunder, the delivery of all assets will devolve in terms thereof, unless a dispute by an heir is made.

2.2.10.2.4 Where the deceased died after October 2004

Such estate must be administered in terms of the Administration of Estates Act 66 of 1965 and the Intestate Succession Act 81 of 1987 by the Master of the High Court.

2.2.10.2.5 Intestate succession of polygamous customary marriages

When the deceased was a husband in a polygamous customary union, his estate devolves as follows:

- When the deceased is survived by wives but not survived by any descendants, the estate is divided equally between the wives.
- When the deceased is survived by wives and descendants, each surviving wife is entitled to a child share or R125 000,00, whichever is the greater. Where the estate is not large enough to pay each surviving wife at least R125 000,00, the estate is distributed between the wives equally.
- A child share is calculated by adding the number of children surviving the husband (and predeceased children surviving by descendants) to the number of surviving wives.

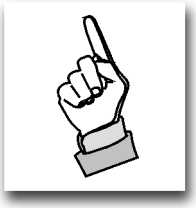
2.2.10.3 Effect of the *Bhe* decision on the deeds office practice and procedure

The *Bhe* case had a profound effect on all transfers from the estates of black persons; these transfers are now dealt with as described below.

2.2.10.3.1 Where the deceased died prior to 27 April 1994

Where the deceased died prior to 27 April 1994, his/her estate will have been wound up in terms of the Black Administration Act 38 of 1927 and the regulations promulgated thereunder. Herewith some guidance relating to the deed of transfer and the supporting documents to be lodged at the deeds office in such instances.

The drafting of the *causa* of the deed must reflect who is entitled to receive transfer of the land in question as referred to in the regulation 4(2) of the Black Administration Act 38 of 1927 and include a certificate issued by the magistrate concerned. Where the estate was administered in terms of Act 38 of 1927, the causa should read as follows:



Example

And the appearer declared that the said deceased died intestate on
And whereas the estate is being administered in terms of the regulations promulgated in terms of Act 38 of 1927, in terms of which the hereinmentioned transferee is entitled to the hereinmentioned property in terms of the approval of the magistrate issued in terms of regulation 4(2) of Act 38 of 1927.

Now therefore .....

If the provisions of the Intestate Succession Act 81 of 1987 were used, the conventional *causa,* as discussed earlier in this unit, should be used.

Where the property is an asset in a joint estate, the *causa* will obviously have to reflect that if the surviving spouse is receiving the whole of the property: he/she is

entitled to a half share by virtue of his/her marriage in community of property to the deceased.

The following are deeds office requirements for estates administered in terms of Act 38 of 1927:

- The regulation 4(2) of the Black Administration Act 38 of 1927 certificate by the magistrate must be lodged, or endorsed on the power of attorney.
- Any existing bonds must be lodged for disposal.

  If the property forms an asset in a joint estate, and the surviving spouse is entitled to the land as a whole, the transfer by endorsement provisions of section 45 of Act 47 of 1937 as more fully discussed in unit 7 could possibly be used.

- The appointment of the representative need not be lodged, as the preparer accepts responsibility for such appointment (see the definition of executor read with reg 44A(c) in Act 47 of 1937).
- Proof that the deceased was not registered for VAT must also be lodged. However, if it is a leasehold being transferred no proof need be lodged.

No proof of intestacy or intestate heirs need be lodged.
The balance of the estate available for distribution need not be proved.

2.2.10.3.2 Where the deceased died after 27 April 1994 but before 15 October 2004

Where the estate was wound up in terms of the Black Administration Act 38 of 1927, the procedure as referred to in 2.2.10.3.1 above will be followed.

Where the estate was reported to the magistrate, but the magistrate applied the provisions of the Intestate Succession Act 81 of 1987, read with the Administration of Estates Act 66 of 1965, the procedure referred to in 2.1 and 2.2 above will be followed.

2.2.10.3.3 Where the deceased died after 15 October 2004

— In these estates the Administration of Estates Act 66 of 1965 as well as the Intestate Succession Act 81 of 1987 as adapted by the court in the Bhe case will have been applied.

The following supporting documents are to be lodged:

- A conveyancer's certificate in terms of section 42(1) of the Administration of Estates Act of 1965 to the effect that the transfer is in accordance with the liquidation and distribution account, unless the estate is administered in terms of section 18(3).
- A certified copy by the Master of any waiver or repudiation of an inheritance or legacy as proof of such waiver or repudiation.
- If the heirs entered into a redistribution agreement, a copy thereof must be lodged to determine whether the terms of such agreement have been complied with. The complete facts must be mentioned in the recital of the deed.
- If it is alleged that one of the heirs is deceased, his/her death must be proved (death notice or death certificate). If the deceased left descendants who can inherit in terms of the will, such descendants must be proved by way of an affidavit of next-of-kin and not a death notice (Registrars' Conference Resolution 11 of 2005).

- Proof that the deceased did in fact die intestate. This fact must be proved by the lodging of the affidavit from the executor/representative that no will exists (Registrars' Conference Resolution 28 of 2006).
- Proof must also be lodged that the person or persons to whom the land is to be transferred are in fact the deceased's intestate heirs. An affidavit of next-of-kin is necessary to prove the intestate heirs of a deceased (see Registrars' Conference Resolution 7 of 1997 as confirmed by Registrars' Conference Resolution 11 of 2005).
- Proof that the deceased and his/her alleged spouse were in fact married. A marriage certificate or affidavit from the surviving spouse must be lodged. In respect of customary marriages, the registration certificate is necessary. An affidavit proving the marriage will not be acceptable (see Registrars' Conference Resolution 31 of 2005 as confirmed by Registrars' Conference Resolution 8 of 2006).
- Proof of the balance of the estate that is available for distribution. A certified copy by the Master of the liquidation and distribution account certified a true copy of the original will provide sufficient evidence in this regard.
- Proof whether or not the deceased has descendants that are entitled to inherit *ab intestatio* from him/her. A certificate of next-of-kin will provide proof of this fact.
- Proof that the deceased was not registered for VAT (see discussion *supra*). Transfer duty is not payable on land which is acquired by intestate succession, or as a result of a redistribution of assets in a deceased estate (s 9(i)(e)(i) of Act 40 of 1949).

2.2.10.3.4 Where the estate is administered in terms of section 18(3) of the Administration of Estates Act 66 of 1965

The documents referred to in 2.2.10.3.3 above must be lodged, except for the conveyancer's certificate in terms of section 42(1) or 42(2) of the Administration of Estates Act 66 of 1965, and the liquidation and distribution account.

In such an instance the preamble to the deed will refer to the representative and not the executor.

2.3 Drafting of the causa of an estate transfer

You will recall that we referred to the format of the recital in unit 4. You may want to revise this before you study the following information. The circumstances of each estate transfer will determine how the causa of the deed of transfer should be drafted. The following information, if applicable, should be mentioned.

2.3.1 The date of death of the testator

The date of death of the testator is important as this represents the date on which the rights to the inheritance devolve on the heir. It is also an important date for ascertaining whether the old or new Intestate Succession Act will apply and whether, in certain instances, transfer duty is payable.

2.3.2 The way in which the land devolves

It should be mentioned whether the land devolves testate or intestate. If it devolves intestate, it should be mentioned whether it occurs in accordance with the common law or in terms of a statute and, in the latter instance, whether the 1934 or the

1987 Succession Act applies. The particular section of the Act involved should then also be mentioned.

2.3.3 A short explanation why the inheritance devolves on the transferee

If the inheritance is transferred to any other person(s) than those on whom the right initially devolved, or in another proportion than that in which the right initially devolved on them, an explanation is required: for example, about redistribution agreements, renunciations of an inheritance, heirs who died before the testator, massing of estates, and adiation.

2.3.4 A short explanation how testamentary conditions are complied with

A distinction should be drawn between testamentary conditions to be registered against the land and conditions preceding the bequest. In the latter instance it should be mentioned in the *causa* that the inheritance has been accepted subject to such conditions, for example the payment of a bequest price.

Should the bequest be subject to a condition which must be registered against the title deed (see s 63 of the Deeds Act in this regard), the causa should only briefly refer thereto without quoting it in detail. A comprehensive quote should, however, appear in the conditional clause.

2.3.5 Transfer from a massed estate

Should any of the exceptions to section 21 of the Deeds Registries Act apply, the *causa* should indicate that the transfer is on behalf of the joint estate (see the provisions of reg 50(2)(c).

Activity

Indicate what information must be recital/causa of the following estate transfers:

- Property in the estate of the late Ben Botes, No. T123/97, is to be transferred to Jan Lowe. Ben Botes was married in community of property to Susan Botes at the time of his death. Koos Calitz is the executor of the estate.

  .....

  .....

  .....

- Property is registered in the name of Mary, married out of community of property. Mary and Joe entered into a mutual will whereby they mass their estates on the death of the first-dying, and any property registered in their names must be transferred to Arnold, subject to usufruct in favour of the survivor. Joe dies and Mary adiates. The property registered in Mary's name is about to be transferred to Arnold.

  .....

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- Property in the estate of the late Ben Botes, No. 123/97, is to be transferred to Susan Botes, to whom Ben Botes was married in community of property. Koos Calitz is the executor of the estate.

  .....

  .....

  .....

2.4 Conditional clause

If there are any registrable testamentary conditions, these must be disclosed, and stipulated in the power of attorney and in the conditional clause of the deed of transfer. These conditions must be disclosed after all the existing conditions. Where there is a discrepancy as to the nature of a condition, it is practice to quote the condition in the will *verbatim* (word for word) in the deed.

2.5 Divesting clause

Where transfer is passed on behalf of an estate, the estate must be divested instead of the ''transferor''. If a joint estate is involved, the ''joint estate'' must be divested (reg 50(2)(c)).

We have now completed our discussion on estate transfers. As you will have experienced, it is a diverse and complicated section of conveyancing. Before you tackle the next part of this unit dealing with other specialised deeds of transfer, we think you'll agree that you owe yourself a good break or, at the very least, a deep breath!

3 The partition transfer

3.1 Introduction

The purpose of a partition transfer is to divide co-owned land between the co-owners in such a way that each of them receives a demarcated piece of land in lieu of their respective shares in the land (or a new undivided share in land where the co-ownership of some continues). For example:

- X,Y, Z and Q share ownership of a property. On partition, X and Y together receive Portion 1 and Z and Q receive the remainder.

  OR

- Erven 1 and 2 are owned by X and Y. On partition, X receives Erf 1, while Y receives Erf 2.

3.1.1 What is meant by co-ownership?

When land is owned as a whole by more than one person, it is held in co-ownership by those persons. For example, the farm Mputhi is owned as a whole by X and Y; X and Y will each own an undivided half share in the farm (or maybe X owns a one-third undivided share and Y a two-thirds undivided shares).

3.1.2 What is an undivided share?

The ownership in this instance is an undivided share in respect of the whole of the land and not ownership of a demarcated piece of the land. A person cannot be forced to stay on as a co-owner if he/she would prefer to have full ownership of a piece of the land, equivalent to the share held in co-ownership (*Badenhorst v Marks* 1911 TPD 144). X and Y in the example above can therefore agree to partition the land into demarcated portions of land, equivalent to the undivided share each respectively held in the original piece of land.

3.1.3 How will X and Y agree on the terms of the partition?

Agreements of this nature are usually in writing, in accordance with section 2(1) of the Alienation of Land Act 68 of 1981. In terms of section 26(1) of the Deeds Registries Act 47 of 1937 the agreement must be embodied in the power of attorney and attached thereto. If X and Y, however, disagree on the terms of the partition, the court can order the partition or arbitrators can award the partition (s 26(6) of the Deeds Registries Act).

3.1.4 What will be the effect of partitioning the farm?

If the farm Mputhi is 9 000 hectares in extent, then the situation will be as follows after registration of the partition:

- If they each own a half share in the farm, X will own Portion 1 of the farm, in extent 4 500 hectares, and Y the remainder of the farm, also in extent 4 500 hectares (if equal in value).
- If X owns a one-third share and Y two thirds, X will now own Portion 1, in extent 3 000 hectares, and Y the remainder of the farm, in extent 6 000 hectares (if equal in value). Of course, the farm will have to be prepared by a surveyor and approved for registration by the Surveyor-General in respect of Portion 1 of the farm. No diagram is needed in respect of the remainder of the farm (s 26(3) of the Deeds Registries Act 47 of 1937).

3.1.5 Is there any difference between a partition of land and a subdivision of land?

Yes, there is a big difference!

When an owner of land 2 000 hectares in extent **subdivides** that land, the piece of land is ''split'' into two or more separate pieces (with the assistance of a land surveyor and approval of new diagram of the two or more pieces of land by the Surveyor-General). The original owner is still the owner of the land, but now of demarcated portions of the original piece of land, still with a combined extent of 2 000 hectares. He/She may now apply to the registrar of deeds for a separate title deed (see unit 7) for one of the portions or may transfer it directly to a new owner. The remainder of the land remains registered in the name of the original owner. Even joint owners of a piece of land can have it subdivided, whereafter those same joint owners will still be joint owners of the new portions of land in the same proportions.

However, with a partition transfer, the whole of the jointly owned property must be divided between the co-owners. It is important that each party to the partition acquires a defined portion of the partitioned land in place of the undivided share he/she previously held. Jointly owned property cannot be partly partitioned and

partly still held in undivided shares — the whole property must be partitioned if it is to be partitioned (s 26(1)) of the Deeds Registries Act 47 of 1937. Statutory restrictions or title conditions may prohibit the subdivision of the land, for example the Subdivision of Agricultural Land Act 70 of 1970 or the Advertising on Roads and Ribbon Development Act 21 of 1940. In such cases, the restriction must either be cancelled or the consent of the relevant authority must be obtained.

A point to ponder: If joint owners can subdivide or partition property, can a single owner partition his/her property? No — that would simply amount to a subdivision.

Activity

In your own words differentiate between a subdivision and a partition.

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3.2 Analysing a partition transfer (form F)

At first glance, there does not appear to be much difference between the form used for a partition transfer (form F) and that used for a normal deed of transfer (form E). A partition transfer contains the usual clauses. See if you can identify them. We have indicated the differences for you in bold below.

Form F *Prepared by me*

.....

CONVEYANCER

(Surname and initials in block letters)

DEED OF PARTITION TRANSFER

(In terms of section twenty-six of the Deeds Registries Act 47 of 1937.)

Be it hereby made known:

That ..... appeared before me ..... at ....he/she, the said appearer, being duly authorized thereto by a power of attorney granted to him/her by biinsert names of parties to partition) ..... *dated the..... day of*

..... *''and signed at ..... '' and the said appearer declared that whereas his/her said* ***principals heretofore held and possessed in joint ownership the (describe the land to be partitioned, giving the share held by the transferee and the number and date of his/her title) ..... and whereas the said joint owners have agreed to partition the said land by subdividing the same according to their respective interests therein and receiving trans fer in severalty of such subdivided portions.***

Now, therefore, the said appearer, in his/her capacity aforesaid ***and in pursuance of the above in part recited agreement, declared that he/she did*** *by these presents, cede and transfer in full and free property unto and on behalf of the said ....., his/her heirs, executors, administrators, or assigns.*

(Describe the land, giving the name, number, registration division and administrative district and area, and conform with the regulations pertaining to the extension clause and inserted conditions. All the titles under which the land is held must be quoted, along with the relevant dates.)

Wherefore the appearer, renouncing all the rights and titles that his/her principals heretofore ***jointly had*** *to the premises, on behalf of aforesaid, did, in consequence, acknowledge that his/her said principals,* ***with the exception of the above transferee, are entirely dispossessed of and disentitled to the land hereby transferred, and that, by virtue of these presents, the said heirs, executors, administrators, or assigns, are now and shall henceforth be entitled thereto, in accordance with local custom, the state, however, reserving its rights, and finally, acknowledging that the remaining principals have, as a consideration, on this day received transfer of their respective portions of or shares in, as the case may be, the landed property partitioned as aforementioned.***

In witness whereof I, the said Registrar, together with the appearer, have subscribed to these presents, and have caused the seal of Registry to be affixed thereto.

Thus done and executed at the Registry of the ..... at ..... on this ..... day of ..... in the year of Our Lord, two thousand .....

.....
Signature of appearer

In my presence

.....
Registrar of Deeds

(Add a registration clause approved by the Registrar.)

The partition transfers must adhere strictly to the partition agreement (s 26(1) of the Deeds Registries Act 47 of 1937). Note that with partition transfers all the existing title deed(s) to the land held in co-ownership are replaced by the deeds of partition transfer. New deeds of partition transfer will be issued individually to each of the co-owners. So there will be the same number of deeds of partition transfer as there are co-owners.

3.2.1 Preamble

The preamble to prescribed form F describes all the co-owners. Since the co-owners have agreed to divide the joint property among themselves, all the co-owners act as transferors, in order to transfer the relevant portion(s) of the land to one (or more) of the co-owners (transferees) in accordance with the partition agreement or court order.

3.2.2 Recital

The recital describes the original joint property, with reference to the share(s) owned by the transferee(s), as well as the number(s) and date(s) of the relevant title(s). In addition, reference is made to the agreement or court order to partition.

3.2.3 Vesting clause

The vesting clause contains the name(s) of the co-owner(s) to whom the new share or new portion is awarded.

3.2.4 Property clause

The description of the property includes a full description of the awarded new share or new portion and the extent of the awarded new portion.

3.2.5 Extension clause

The extension clause, which refers to all the title deeds, follows the description of the original land. (See unit 4.)

3.2.6 Conditional clause

The new portion or the new share in the land is subject to the existing title conditions as well as new conditions (if any) created in the power of attorney.

3.2.7 Divesting clause

The divesting clause divests all the former co-owners and vests the new portion or new share in the land in the transferee.

3.2.8 Consideration clause

The divesting clause is followed by a consideration clause, which is unique to the partition transfer.

Where no consideration exists among the co-owners, it means that they have agreed that each of them will receive their awarded portions as acceptable consideration for the undivided share in the land which they previously held in joint ownership. The clause will then read, for example:

> *And, finally, acknowledging his or her remaining principals to have received as a consideration, transfer on this day of their respective portions as aforementioned:*

If the parties pay a consideration to assure equal partitioning, this must be disclosed in the consideration clause. For example:

> *And that the sum R20 000,00 has been duly paid by the said transferee to said ..... to equalise this partition.*

3.2.9 Execution clause

All the deeds of partition transfer must be executed simultaneously (reg 52(2)). The land being partitioned may, where applicable, be registered in different deeds registries (s 26(7)), in which case the conveyancers concerned must make the necessary arrangements to assure the simultaneous execution of the deeds.

3.3 Supporting documents

3.3.1 Partition agreement or court order

There must be a partition agreement or court order and a power of attorney.

3.3.1.1 Forms of agreement

The basis of the partition transfer may be an agreement to partition or it may be in the form of a court order or an arbitration award (s 26(6)).

If it is in the form of an agreement it must be signed by all the co-owners of the land or shares in the land being partitioned. The power of attorney, discussed in unit 5, must strictly adhere to the partition agreement. The agreement can be separate or embodied in the power of attorney.

3.3.1.2 Contracting parties

Each of the parties to a partition must own a share in the property (s 26(1) and (2)). The shares held by each owner need not be equal.

The joint owners must naturally be competent to conclude an agreement of this nature. For example, if a minor is involved, the Master will have to consent to the partition, in accordance with section 94 of the Estates Act of 1965. (**Note:** Section 80 of the Estates Act still applies — see unit 5 where we discussed contractual capacity in detail.)

3.3.1.3 Requisites for the partition agreement (s 26 of the Act)

The partition agreement or power of attorney must contain details on the following:

- the land being partitioned (reg 52(2))
- the shares registered in the name of each owner, with reference to all the titles
- the land (portions or shares) which has been allocated to each owner (reg 52(2))
- any conditions which may have been created in respect of each allocated portion or share
- any consideration that may have been given to equalise the partition

Concerning this last point above, a party may however not receive money alone in the place of his/her share in the partitioned land (s 26(2)(c)), whereas it is perfectly acceptable for one or more of the parties to the partition to receive money or something else of equal value in order to equalise the partition.

3.3.1.3.1 Mineral rights

Since the coming into operation of the Mineral and Petroleum Resources Development Act 28 of 2002 on 1 May 2004, the registrar of deeds has no authority to register any transactions relating to mineral rights, except for the deregistration thereof in the deeds office as provided for in Schedule II of the Act. However, where a title deed to immovable property contains a condition with regard to the reservation of mineral rights, this condition must remain in the title deed to that immovable property.

3.3.1.3.2 Conditions

In terms of section 26(5) of the Deeds Registries Act 47 of 1937, no partition transfer may vary or affect the conditions of tenure of land under partition or any other conditions pertaining to the land generally, unless it has been stipulated that these conditions may be varied, defined or limited by the partition agreement and

by the consent of interested parties. Parties to a partition may not, therefore, create a praedial servitude in the power of attorney in respect of the partitioned land or any portion of the partitioned land, in favour of any other land belonging to the parties, but not forming part of the partition. The granting of such a servitude can be a condition of the partition, but it will have to be created notarially and not in the power of attorney to partition.

The amendment of a praedial servitude over partitioned land cannot be effected by means of an underhand consent. A notarial deed is required for this purpose. The parties to a partition may, however, agree that rights in respect of partitioned land be awarded to one or more specified portions of the partitioned land, as in the case of subdivision. Therefore, the parties may for example agree that only one of the portions of a partition will carry the water rights to which the whole of the partitioned land was originally entitled.

Personal servitudes can be created in the power of attorney, provided that the provisions of sections 65 to 67 of the Act are complied with.

3.3.1.3.3 Consideration

Section 26(2)(e) provides that any consideration given to equalise the partition must be disclosed in the power of attorney or partition agreement to allow the registrar of deeds to determine the position in regard to transfer duty. The consideration need not necessarily consist of money. If it is in the form of money, the amount must be disclosed in the consideration clause of the partition transfer of the party who paid the consideration, with reference to whom the consideration was paid.

It will not be necessary to disclose this information in the other partition transfers. If the consideration takes the form of immovable property which does not form part of the partition and which is to be transferred or ceded by one or more of the parties to the partition to another party or parties, this fact must be fully disclosed in the recital of the partition transfers and acknowledged in the consideration clause of the partition transfer of the party who has undertaken to transfer it. A consideration of this nature is then transferred by means of a separate deed of transfer.

3.3.2 Bondholder's consent

If the share or shares of one of the parties to a partition is encumbered by a bond, the partition transfer cannot be attested unless the bond is lodged at the registrar of deeds for disposal (cancellation, release or substitution).

In terms of section 27(1) of the Deeds Registries Act 47 of 1937, the lawful holder of the bond may consent in writing both to the partition and to the substitution of the mortgaged shares for the land awarded to the mortgagor on partition. The underlying principle is that, with the written consent of the mortgagee, such a bond can be substituted for the portion or share awarded to the relevant co-owner.

It is important to note that if a defined portion is awarded jointly to two owners, where one owner's share was encumbered by an existing bond, the bond can be registered against his/her share in the defined portion without him/her first having to take out a certificate of registered title in terms of section 34. (See unit 8 on substituted titles and when as a general rule the co-owner of a property **must** take

out a certificate of registered title before dealing with his/her undivided share. This is an exception to that general rule.)

3.3.3 Partition diagrams

Diagrams must be lodged in duplicate with the partition transfers in those instances where each party to the agreement receives a demarcated portion of the land. No diagram is required for the remainder of the property.

3.3.4 Clearance certificate

If the land to be partitioned is rated, a clearance certificate issued by the local authority must be lodged on registration of the partition transfers.

3.3.5 Consents to subdivision

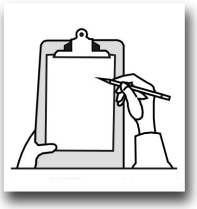
If there are statutory restrictions or restrictions in the conditions of title against subdivision of the land, the necessary consents must be lodged for registration of the partition transfers.

3.3.6 Consent by spouse married in community of property to transferor

If any party to the partition agreement is married in community of property, and the spouse of that person did not also sign the partition agreement, that spouse must consent in writing to the partition (s 15(2)(a) of the Matrimonial Property Act 88 of 1984). This consent must be witnessed by two competent witnesses.

3.3.7 Effect of partition transfer

After registration of the partition transfers, each party to the agreement will be in possession of a new title deed to the property he/she acquired on registration of the partition transfers. All the former title deeds are therefore replaced by the deeds of partition transfer.



Activity

1 Can a co-owner receive only money as a consideration for his/her share in a property on registration of a partition? Give reasons for your answer.

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2 Discuss the partition agreement in detail.

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3 Sam and Jonas are the co-owners of Erf 10, Tembisa. Sam's share is held by T 23/1978 in respect of a quarter share and another quarter share is held by T 76/1995. The share held by T 23/1978 is hypothecated by Mortgage Bond B 55/1980. Jonas's share in the property held by T 764/1996 is subject to a *fideicommissum*. The mineral rights over Erf 10, Tembisa have not as yet been separated from the land. Sam and Jonas agree to partition the property, giving Sam Portion 1 of Erf 10 in place of his share, and Jonas will receive the remainder.

Answer the following questions:

- Whose consents must be lodged on registration of the partition transfers?

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- How will the partition affect the mineral rights?

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- Which share of Portion 1 of Erf 10 will be subject to the mortgage bond?

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  .....

- Which share of the remainder of Erf 10 will be subject to the *fideicommissum*?

  .....

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4 Expropriation transfers

Up to now we have been studying transfers where the transferors have agreed to transfer their property. Now we shall deal with the situation where the State acquires property without the consent or cooperation of the owner. When land is expropriated, a notice of expropriation is served by the expropriating authority on the registered owner of the land or the executor of his/her deceased estate, trustee of his/her insolvent estate or the deputy sheriff who attached the property in execution) to the effect that on a certain date the expropriation authority will

become the owner of the property, and that the registered owner will then receive a consideration in return. No transfer duty is payable in this instance.

4.1 Requirements for the registration of an expropriation transfer

Before an expropriation transfer can be registered, the following requirements must be met:

- land must be authorised by law.
- Only the State, a public or local authority, corporate body or an association of persons may expropriate land (s 31 (1) of Act 47 of 1937).
- The owner must have been notified in writing of the expropriation.
- The date of effect of the expropriation must already have passed.
- The registrar of deeds must be furnished with a certified copy of the notice of expropriation and the expropriation plans (if any) by the expropriating authority.

The registrar will examine the notice to determine whether it has been served on the right person. This notice is then filed as an interdict under an EX code and a distinguishing number allocated to it. Once the client's copy of the title deed has been endorsed, the EX interdict remains on the computer, in other words noted against the property, until formal transfer or cession has been effected (Registrars' Conference Resolution 30 of 1996). This is because the expropriation notice must still be examined when the expropriation transfer or cession is dealt with, and can only then be purged.

4.2 Analysis of an expropriation

It is important to note that in expropriation transfers, ownership vests in the State before registration of the deed of transfer. Transfer of the land takes place on the date stipulated in the expropriation notice served on the owner. The registration of the deed of transfer (form G) or transfer by endorsement (see unit 7) therefore constitutes nothing more than confirmation of an already existing fact. The expropriation is merely an updating of records and not a registration of transfer of ownership by the registrar.

4.2.1 Prescribed form G

This is again very similar to the standard deed of transfer form E and contains most of the standard clauses, albeit with slightly different wording.

Form G *Prepared by me*

.....
CONVEYANCER

(State surname and initials in block letters)

DEED OF TRANSFER

[By virtue of section thirty-one of the Deeds Registries Act 47 of 1937.]

Be it hereby known:

That whereas the undermentioned land has been ..... (here state whether expropriated or vested in, and quote the authority in either instance) which land is at present registered in the Deeds Registry at ..... in the name of ..... under Deed of ..... No ..... dated .....

And whereas a certificate has been furnished to me in terms of section thirty-one (4)(a) of Act 47 of 1937, by the transferee, to the effect that the provisions of expropriation (or vesting) have been complied with.

Now, therefore, by virtue of the authority vested in me by the said Act, I, the at ..... do, by these presents, cede and transfer in full and free property to and in favour of ..... (here insert the name of the transferee entitled to claim transfer), its successors in title or assigns ..... (here insert the description of the property giving the relevant name, number, registration division, administrative district, in compliance with the regulations in respect of the extension clause and conditions).

Wherefore the said ..... (registered owner referred to in first paragraph) is entirely dispossessed of and disentitled to the said land and that by virtue of the said expropriation (if transfer is by reason of an expropriation by the state) or by virtue of these presents (in other cases) the said ..... , its successors in title, or assigns, is now and hereafter shall be entitled thereto in accordance with local custom. (Add: ''the State, however, reserving its rights'', where the State is not the transferee.)

In witness whereof I, the said Registrar, have subscribed to these presents, and have caused the seal of office to be affixed thereto.

Thus done and executed at the Office of the ..... at ..... on this ..... day of ..... in the year of Our Lord, Two thousand and .....

.....
Registrar of Deeds

(Add a registration clause approved by the Registrar.)

4.2.2 Preamble

The manner in which the property was acquired by the transferee, as well as the relevant authority, is mentioned in the preamble to form G. The preamble must describe the registered owner, in the same way as he/she was described in the title.

4.2.3 Recital

The recital of the vesting or expropriation transfer must state that the transferee furnished the registrar with the certificate in terms of section 31(4)(a) of the Deeds Registries Act 47 of 1937 and that all the legal provisions were complied with as to the change in ownership.

4.2.4 Vesting clause

The vesting clause describes the expropriating authority in the normal way, according to regulation 18 and section 17 of the Deeds Registries Act 47 of 1937.

4.2.5 Property clause

The property concerned and its extent are described in detail in the property clause. In the case of a subdivision, the description and extent reflect the subdivisional diagrams.

4.2.6 Extending clause

The applicable extending clause, as discussed in unit 4, is inserted.

4.2.7 Conditional clause includes existing conditions of title

The expropriation transfer is registered subject to all existing conditions that apply to the said land. If, for instance, a servitude alone is expropriated, it is ceded to the expropriating authority in terms of section 32 of the Act.

Conditions in favour of the State and conditions imposed under section 11 of Act 21 of 1940 must be omitted by the South African Rail Commuter Corporation Limited, if the expropriation is in terms of section 11 of Act 37 of 1955. When a portion of land is expropriated together with a new servitude right over adjoining land, the expropriated land must be transferred by virtue of an expropriation transfer in terms of section 31, or by means of an endorsement in terms of section 16, and the expropriated servitude right ceded in terms of section 32.

4.2.8 Divesting clause

The registered owner is once again divested in this clause. Note, however, the alternatives and the reservation of the State's rights in this clause.

4.2.9 Execution

A deed of this nature is executed only by a registrar of deeds.

4.3 Supporting documents

The following supporting documents **must** be lodged.

4.3.1 Title deed

The expropriation authority must submit the title deed of the relevant land to the relevant registrar of deeds, together with the expropriation transfer.

If the expropriating authority have been unable to obtain the relevant deed, they may instead submit a sworn affidavit to the registrar to that effect (s 31(2)(b)).

In such a case, the registrar registers the expropriation transfer by endorsing the deeds office copy of the title deed and notes a caveat that if the client's copy of the title deed is ever lodged in a deeds registry for any reason, a similar transfer endorsement must be made on it (s 31(2)(b)).

4.3.2 Certificate in respect of legal provisions

The registrar will not register the expropriation transfer unless he/she has been furnished with a certificate issued by the expropriating authority, to the effect that the provisions of any law in connection with the change in ownership of the land, as a result of the expropriation, have been complied with (s 31(4)(a)).

4.3.3 Mortgage bonds

If the expropriated land is mortgaged by a bond it need not be lodged for disposal. The transfer will be endorsed on the registry duplicate of the relevant bond and a caveat will be noted to the effect that if the original bond is ever lodged at a deeds registry for any reason other than its cancellation, a similar endorsement must be made on it (s 31(1)).

4.3.4 Attachments and interdicts

Where property has already been vested in the transferee (by virtue of expropriation or vesting), it is not necessary that attachments or interdicts against the property be withdrawn.

Sequestration interdicts against the registered owner of the property will also not influence the expropriation transfer.

4.3.5 Subdivisional diagrams

Sometimes only a portion of the parent property is expropriated, in which case subdivisional diagrams must be lodged in duplicate, together with the expropriation transfer.

4.3.6 Expropriation notice

The expropriation notice should already have been lodged. If not, it must now be lodged simultaneously with the expropriation transfer.

4.3.7 Municipal rates clearance (Registrars' Conference Resolution 8 of 1969)

The above clearance must be lodged.

The following **need not** be lodged:

- power of attorney (the owner is not authorising the transfer)
- transfer duty receipt (usually exempt either in terms of legislation authorising the expropriation or of the Transfer Duty Act 1949)

4.4 Restraint on the expropriating authority to prevent such authority from dealing with the expropriated land

The expropriating authority may not transfer the expropriated land, or create a real right in the expropriated land or deal with any right of that nature, until transfer of the expropriated land has been registered in the name of the expropriating authority by virtue of an expropriation transfer (s 31(5)).

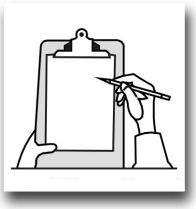
4.5 Restraint on the registered owner to prevent the registered owner from dealing with expropriated land

Where a piece of land is recognised in its entirety as a separate entity in a deeds registry and that piece of land is expropriated, the registered owner is prohibited from transferring the land or otherwise dealing with it, except to allow the registration of a deed of transfer in favour of the expropriator (s 31(6)(b)).

Where only a portion of the land or a servitude has been expropriated, the registered owner is not prohibited from transferring his/her land or otherwise dealing with it.

The transfer of that land must be made subject to the expropriation by bringing it in as a condition in the new deed of transfer or by making any other act of registration subject to it.

If a portion of land is only provisionally expropriated, the registered owner may not deal with that land unless the expropriation is made final or withdrawn.



Activity

1 According to the Expropriation Act 663 of 1975, who is the registered owner of property?

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2 X is the registered owner of Erf 37, Laudium township, in extent 3 500 square metres. She receives a notice of expropriation that Transnet is to become the owner of a portion, in extent approximately 500 square metres, as from 1 December of the current year. A consideration of R10 000,00 will be paid to X.

Answer the following questions based on the above facts:

- X thinks R10 000,00 is not a fair consideration considering the value of the property. What can she do about this?

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- On what date will Transnet become the owner of the property?

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- Will Transnet be able to grant a right of way over the property before it has been registered in their name?

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- X sold the whole of Erf 37 to Y before she received the notice of expropriation. Will X now be able to transfer the property to Y? Discuss in detail.

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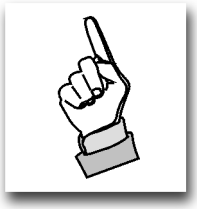
5.1 Introduction

Section 14 of the Deeds Registries Act 47 of 1937 provides that transfers of land and cessions of real rights in that land must follow the sequence of the successive transactions by which the right to ownership of the property concerned devolved from one owner to another. Section 33, however, provides an alternative way of registering a title. In terms of section 33(1), if a person acquires the right to ownership in immovable property in a manner other than by expropriation and is unable to register it in his/her name in the usual manner, he/she may petition the court for an order authorising the registration of the property in his/her name. This will be a motion court application, which applies, for example, to acquisition by prescription (*Ex parte Glendle Sugar Mills (Pty) Ltd* 1973(2) SA 653 N); or it applies when a person buys and pays for a property, but the seller is unwilling to transfer it to the buyer or cannot be traced.



Example

X sells land to Y and Y in turn sells the land to Z. Y disappears. Ownership may now, with the authorisation of the court, be transferred directly from X to Z, in terms of section 33. Prescribed form E (analysed in unit 4) is used, since X acts as the transferor.

Alternatively, if a person acquires ownership of land by operation of law (except by expropriation), he/she acquires a form H title deed in terms of section 33. For example, under the Prescription Act 68 of 1969, if the court finds that ownership has passed to a person by reason of prescription and orders that it be so registered in the deeds registry, the registered owner is usually unwilling to sign the transfer documents or cannot be found. In this case, registration of the deed of transfer is effected by means of form H, as the registrar of deeds will have to provide the ''owner'' with a title deed of the land.

It is important to note that in the latter example, as with expropriation transfers, ownership vests before registration of the deed of transfer. The registration of this deed therefore constitutes nothing more than the updating of records and does not constitute the registration of a transfer of ownership by the registrar or the former owner.

5.2 The owner's capacity to deal with the property

The ''new'' owner will not be entitled to deal with the property acquired by prescription until he/she obtains a title for the property. The property concerned cannot be sold or mortgaged without a title registered in the name of the new owner.

Neither will the former owner be entitled to deal with the property until the court has made a ruling. The former owner will receive notice of the application to the court and will not be able to transfer or mortgage the property while the court is considering the application.

5.3 Notice to the registrar of the application to court

According to the provisions of section 97 of the Deeds Registries Act 47 of 1937, the application must notify the registrar of deeds at least seven days before the application is heard. The registrar notes a caveat against the property regarding the court proceedings and may submit to the court any report he/she wishes to make. The registrar notifies the court who the registered owner of the property is, furnishes a description of the property, states whether there are bonds or servitudes registered over the property and informs the court of any legislation that may apply.

A title issued by the registrar of deeds in terms of section 33 has the normal validity and status of any other title registered by him/her, which means that it can be annulled, limited or altered by a further court order (s 33(9)).

5.4 Supporting documents

5.4.1 Order of court

A copy of the court order, certified a true copy, must be lodged. The court order must contain the following:

- a reference to the registered owner and the relevant title deed
- a description of the property concerned
- a declaration stating who the owner of the property is
- an order to the effect that, notwithstanding the provisions of section 14, a certain person is entitled to transfer the property to the transferee by means of form E (failing which the registrar of deeds must be ordered to transfer the property by means of form H)

Usually, the court will order registration of the deed, free from any registered mortgage bond over the property. The court may order the registration, alteration or cancellation of any condition or servitude in respect of the property concerned and may specify a particular period of time in which the registration of the deed must take place.

5.4.2 Transfer duty receipt and rates clearance certificate

The transfer duty receipt and rates clearance certificate (if the property is in a ratable area) must always be lodged. Section 33(10) does, however, exempt the transferee from the payment of taxes, duties and fees which would have been payable by the previous registered owner or intermediate holder of the right to the property — unless the transferee undertakes by agreement to make these payments or the delay in effecting transfer is due to his/her own neglect or default.

5.4.3 Mortgage bonds

The court order usually indicates that the transfer is free from any existing bonds. If, however, the court order is silent in this regard and there are bonds registered against the title, then the office copy of the bond (unless the client's copy is lodged) must be updated by the registrar of deeds by means of a factual endorsement in respect of the transfer. A *caveat* will be noted against the client's copy of the bond, in order that it can be updated on lodgment for an act of registration.

5.4.4 Title deed

The title must be lodged, unless the *proviso* to section 33(1) applies, and must be endorsed in the normal manner. If the title is not lodged, the office copy must be used and endorsed. A *caveat* will be noted against the client's copy, to the effect that it was not lodged and endorsed in respect of the transfer. A sworn affidavit pertaining to the non-availability of the client's copy of the title is required.

The following **need not** be lodged:

- power of attorney (the owner is not authorising the transfer and the registrar provides the new owner with a title)

6 Deeds of Grant

6.1 General

Section 3(1)(c) of the Deeds Registries Act 47 of 1937 provides for the registration of deeds of grant issued by the State or any other competent authority (Republic of South Africa represented by the Minister of Public Works, or an officer of the State authorised by him/her, or the State President). A deed of grant is a formal deed or document by means of which ownership of unalienated or acquired state land is transferred from the State to another person.

Unalienated state land may in fact only be transferred by a deed of grant (s 18(1) of the Act) and since the land would never previously have been registered, a diagram of the land must be annexed.

Acquired state land, on the other hand, is land that has previously been registered in the deeds office and which has subsequently been transferred to the State. Acquired state land may be transferred by the State either by way of a deed of grant or a deed of transfer (s 18(2) of the Act).

6.2 Form

6.2.1 Format

There is no prescribed form for a deed of grant, but it usually follows the format of the standard form E deed of transfer.

6.2.2 Requirements

The deed of grant does not require a regulation 43 preparation clause and therefore the duties and responsibilities of the preparer in terms of section 15A and regulation 44A do not apply.

6.2.3 Vesting clause

As with the standard deed of transfer the vesting clause must contain the full names, identity numbers/dates of birth and marital status of the grantees/ transferees. However, as the deed of grant contains no preparation certificate, the registrar will insist on proof of status and vesting being lodged, and will check the authority of the signatory, unless the deed of grant contains a preparation clause and the relevant facts (Registrars' Conference Resolution 5 of 1986).

6.2.4 Right of the State

The right of the State must be reserved, usually just before the description of the property.

6.2.5 Description of property

A deed of grant must contain a complete and correct description of the property and an extension clause (reg 26).

6.2.6 Title conditions

The applicable title conditions must be comprehensively carried forward.

6.2.7 Personal rights

Personal rights may be created in a deed of grant (s 63(2) of the Act).

6.2.8 Special conditions

If the land is subject to special conditions, these conditions must be included in the deed of grant or a separate schedule annexed to the deed of grant.

6.2.9 Who may issue

A deed of grant may be issued to a person who is the holder of a land settlement lease in respect of the property being granted, in which case the settlement lease is not carried forward as a title condition in the deed of grant.

6.2.10 Divesting clause

A deed of grant does not require a divesting clause.

6.2.11 Signature

A deed of grant must be signed by an authorised official and the inside pages of the deed of grant and any amendments must be initialled by the person who executed the deed of grant (Registrars' Conference Resolution 51 of 1987).

6.2.12 Registration clause

Deeds of grant are documents that have already been executed and registered by the time they are lodged in the deeds registry — ownership has passed. Nevertheless, the deed of grant must contain a registration clause for completion by the deeds registry and signature by the registrar of deeds.

6.3 Supporting documents

Note the following:

- No power of attorney is required since no one would have been appointed to execute the deed of grant.

- Before a deed of grant can be registered, all rates and transfer duties must have been paid (s 92(1) of the Act). Rates clearance and transfer duty receipts or exemptions must therefore be lodged. Why do you think this is so? If you are not sure perhaps you should revisit the discussion on transfer duty in unit 5.
- If 6.2.7 and 6.2.8 above apply, the document of authority in which the conditions have been created must be lodged with the deed of grant.
- Copies of deeds of grant, that do not contain preparation clauses, must be certified as per regulation 20(7) of the Act, except those copies issued by the Master of the High Court.

Activity

1 Is it correct that acquired state land can be transferred to another person only by means of a deed of grant?

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2 Are there titles for immovable property registered in deeds registries in respect of **all** unalienated state land? Discuss briefly

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3 Can conditions of a personal nature be embodied in a deed of grant?

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7 Summary

In this unit we first focused on estate transfers where we studied in detail how the standard form E deed of transfer must be completed in order to effect an estate transfer, particularly in respect of the recital, and the conditional and divesting clauses. We also discussed some of the supporting documents that are lodged with estate transfers.

Thereafter we dealt with other specialised transfers, the first of which were partition transfers and the different types of transfers that can be effected by an owner of land in this regard, and the impact on existing registered real rights. This was followed by transfers where the registrar of deeds is usually the transferor, and not the owner as in the previous instances. This occurs in expropriation transfers and court order transfers, although in the case of expropriation transfers, we are not **transferring** in the technical sense.

Finally we dealt with the deed of grant. Where the State transfers land to a private person, it may either be unalienated state land or acquired state land. If it is

unalienated state land such transfer must be effected by a deed of grant. If it is acquired state land the transfer may take the form of an ordinary deed of transfer or a deed of grant. A deed of grant has no prescribed form but usually follows that of the standard form E transfer, except that it does not contain a preparation certificate — with the result that proof of the veracity of every fact, authority and copy will have to be lodged with the registrar of deeds.

We have now dealt with all the types of transfer in which property is transferred by virtue of deeds of transfer. Transfer can, however, take place by means of endorsement in certain cases. These kinds of transfers will be discussed next.

UNIT 7

Transfers of ownership by virtue of endorsement in terms of Act 47 of 1937

1 Introduction

Section 16 of the Deeds Registries Act provides among other things that, unless the Act or any other law provides otherwise, ''*the ownership of land may be conveyed from one person to another only by means of a deed of transfer*''. In terms of the *provisos* in section 16 and provisions in other sections of the Deeds Registries Act, as well as those contained in other Acts, transfer of land may, in certain circumstances, be effected by means of an endorsement. Transferring property by endorsement rather than a new deed of transfer is much less costly and therefore preferable for the client. Transfers by endorsement can be effected in terms of the Deeds Registries Act 47 of 1937 in sections 16, 24*bis*(2), 25(3), 58(2), 45, 45*bis*(1)(a), 45*bis* (1)(b) and 45*bis*(1A)(a).

The key questions guiding this discussion are the following:

- Why are there exceptions to the general rule that transfer of land can be effected by virtue of a deed of transfer?
- What requirements must be met/circumstances must prevail before such exceptional transfers by endorsement apply?
- What is the difference in scope of sections 45, 45*bis* and 45*bis*(1A) of the Deeds Registries Act 47 of 1937?
- Which procedure for endorsement should be followed, given a particular set of facts?

Please remember to refer to the study guidelines in Tutorial Letter 101 to focus on the most important parts of this unit.

We will now deal with the exceptions to the general rule laid down in section 16 of the Deeds Registeries Act 47 of 1937.

2 Section 16 of Act 47 of 1937: acquisition of land by the state or a local authority

When a local authority (or transitional local authority) acquires all the land held under one title deed from another local authority by virtue of the provisions of any law (therefore not for example in terms of an ordinary sale) or when the State (by expropriation or otherwise) acquires all the land held under one title deed, the registrar of deeds will effect such transfer by means of an endorsement in the relevant registers (s 16 of the Deeds Registries Act). The transferee, local authority or the State must, however, apply to the registrar to make the necessary endorsement. In terms of section 16, no registration fee is payable in this instance.

2.1 Requirements to be met prior to the application

- According to the second *proviso* of section 16 of Act 47 of 1937, the State or a local authority must acquire **all the land under any title deed**. Consequently, should two or more properties be held under a single title deed and the State or local authority acquires only one of these properties, the *proviso* does not apply and transfer will have to take place by means of a normal deed of transfer. In the instance where a local authority acquires the property, there is an additional requirement in that the acquisition must be by virtue of a law.
- Transfer to the State due to expropriation can be effected by an expropriation deed of transfer or by endorsement. Transfer by endorsement in such an instance can only occur on condition that the title deed of the land is available and lodged together with the application, and that section 31(4)(a) of Act 47 of 1937 is complied with. Section 31(4)(a) provides that a certificate must be submitted to the registrar of deeds by the expropriating authority ''*to the effect that the provisions of any law in connection with the change of ownership in the land in consequence of expropriation or vesting, have been complied with*'' (consult unit 6 with regard to the expropriation transfer).

2.2 The application

2.2.1 The applicant

The applicant is the relevant government department or local authority acquiring the property. The acquisition by the State can be any legal acquisition, for instance a sale, donation, transfer under the provisions of an Act or proclamation, or an expropriation. However, acquisition by a local authority must be in terms of a law.

2.2.2 Contents of the application

The application must describe the property, state the name of the registered owner, with reference to the title deed concerned and announce that the State or local authority has acquired all the land held by the title deed. The *causa* for the transfer must also be stated, for example a sale to the State or vesting in terms of the provisions of Act 37 of 1955.

2.2.3 Supporting documents

As with transfers by deed of transfer, supporting documents must be lodged.

2.2.3.1 Expropriation transfers

Note the following:

- The title deed of the land must be lodged if the transfer is to be effected by endorsement. If the title deed cannot be lodged, transfer will have to be effected by way of a deed of transfer.
- Should the property be hypothecated, section 31(1) applies in respect of the bonds. If they are not lodged for endorsement, the registry copies will be endorsed and the necessary *caveats* noted.
- No transfer duty receipt is necessary.
- A municipal rates clearance must be lodged.

2.2.3.2 All other transfers by endorsement in terms of section 16

Note the following:

- The title deed of the land must be lodged.
- A sworn affidavit by the registered owner authorising the endorsement of his/her title deed must be lodged. The authorisation must bear a regulation 44 preparation clause.
- Should the property be hypothecated, the consent for the disposal of the mortgage bonds over the property must be lodged (Registrars' Conference Resolution 6 of 1966).
- Also to be lodged are clearance certificates and certificates by the Master and conveyancer, where an estate is involved: in other words, any other documentation which would have been necessary had the property been transferred to the State or local authority by means of a deed of transfer.

2.3 Effect of registration

Once a title deed has been endorsed in terms of section 16, the State may, by means of either a grant or a deed of transfer, dispose of and transfer the land, or a share therein, as held under such title (Registrars' Conference Resolution 6 of 1966). A local authority, however, will be able to do the same only by means of a deed of transfer.

Activity

Under what circumstances can an application in terms of section 16 of the Deeds Registries Act be launched?

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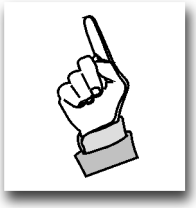
3 Section 24bis(2) of act 47 of 1937 dissolution of a firm or partnership

Section 24*bis*(2) fineprovides that where land or a real right belonging to a firm or partnership is, on dissolution of such firm or partnership, allotted to all the members or partners, the title deed may be endorsed (after compliance with s 24*bis*(2)) to the effect that such land or real right vests in the individuals mentioned therein.



Example

If property for example vests in:

(a) *JOHN JUNIOR*
Identity number .....
Married in community of property to SALLY JUNIOR, and

(b) *PAUL PETERSON*
Identity number .....
Unmarried,
together carrying on a partnership as JOHN PAUL

Should John and Paul decide to dissolve the partnership and vest it in both of them individually, the title deed of the land or other real right will be endorsed to the effect that the property will vest in:

(a) *JOHN JUNIOR*
Identity number .....
and
SALLY JUNIOR
Identity number .....
married in community of property to each other, and

(b) *PAUL PETERSON*
Identity number .....
Unmarried

If, for example, the above partnership is dissolved because of the death of one of the partners, say Paul Peterson, the share of the deceased in the property will vest in the estate of the late Paul Peterson; or, if in terms of section 17(1) the property forms part of a joint estate, the property will vest in the joint estate.

There may be various reasons for the dissolution of a partnership. For instance:

- an agreement between the partners
- the death of one of the partners
- the expiry of an agreed period of duration of the partnership
- the insolvency of a partner
- the provisions of a court order

Where, as a result of the dissolution, the property of the partnership is **not** allotted to **all** the partners, a deed of transfer must be used to register the property in the names of the individuals. An endorsement under section 24*bis*(2) cannot be used.

3.1 The application

A written application signed by all the members or partners of the firm or partnership concerned must be lodged. The application must bear a regulation 44 preparation clause.

The application must disclose:

- the names, identity numbers and/or dates of birth, as well as the marital status of all the former partners of the firm or partnership
- the shareholding of the former partners in the partnership or firm
- the reason for the dissolution of the partnership or firm
- a full description of the property involved

Representatives of the partners may bring the application.

3.2 Supporting documents

The following must be lodged:

- All title deeds of the land or other real right to be endorsed must be lodged (Registrars' Conference Resolution 7 of 1996).
- Proof of dissolution of the firm or partnership must be lodged — in other words, a certified copy of the dissolution agreement or, in the case of the death of one of the partners, a death notice.
- A transfer duty receipt or exemption certificate must be lodged.

3.3 Disposal of the bond

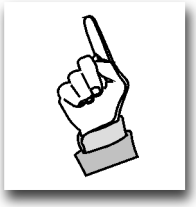
The bond must be disposed of, as more fully discussed in unit 10.

3.4 Effect of registration of transfer by endorsement in terms of section 24bis(2)

The persons named in the application as those acquiring the property are entitled to dispose of the property as if they had taken formal transfer of their shares in such land or real right in their own names, or as if the shares had been ceded to them in their own names.

4 Section 25(3) of Act 47 of 1937: establishing the identity of children

If land or a real right or a mortgage bond is registered in the name of a person who is the parent or guardian of children during their minority, to be held in trust for those children referred to in terms of section 25(1) and the identity of all the children concerned has been established, an endorsement under section 25(3) can be affixed to the effect that the land or real right in question is being transferred to the guardian or parent in trust for the child or children. This does not depend on them attaining the age of majority.



Example

Erf 103, Mamelodi can be registered as follows in the name of:

Dorothy Brown, in trust for her children born or to be born from her

If she proves that for example she is unable to have any more children than she already has, the title deed of the erf can be endorsed to identify the children born from her, setting out their names in the endorsement.

The full facts must be stated in the application, for example that land or a real right therein or a bond is registered in the name of a particular person, to be held in trust for children born or to be born of that person or of a particular marriage, and that the identity of the children has been established because that person has died or because she, or a party to the marriage, can no longer bear children, or because the marriage has been dissolved due to the death of one of the parties, and so forth. The names of the children must be stated.

4.1 The application

A written application by or on behalf of the children (for example by the guardian) must be lodged. If some of them are minors or otherwise incompetent, they must be assisted where necessary, or the application must be made by their legal representatives.

4.2 Supporting documents

Note the following:

- All deeds to be endorsed, in other words deeds of transfer and title deeds of other real rights passed in favour of the person involved, in trust for the children, must be lodged.
- Proof must be provided that the identity of all the children has been established. The proof required will depend on the circumstances:
  - — If, for example, the land or a real right is registered in the name of a particular person, to be held in trust for children born or to be born of that person and he/she dies, then his/her death certificate will be required.
  - — If, however, it is registered in the name of a particular person, to be held in trust for children born or to be born of a particular marriage, and the marriage is dissolved by divorce or the death of the husband, then not only will the death notice have to be lodged, but also a sworn affidavit by the wife in respect of the children born of that marriage (even after the death of the husband).
  - — If an application contends that no further children can be born of a particular person or marriage, for whatever reason, a copy of an order by the High Court to that effect must be lodged as proof, as a registrar of deeds is not qualified to make such a finding (see Registrars' Conference Resolution 6 of 1980 and *Ex parte Harmse* 1917 TPD 585). A certificate by a doctor or specialist will not suffice.
- If the land or real right is mortgaged, it is not necessary to endorse the bond in terms of section 25(3) (Registrars' Conference Resolution 31 of 1972).

4.3 Effect of registration

The children will now be able to deal with the property as if they had obtained transfer of the property in their names by means of a deed of transfer or cession.

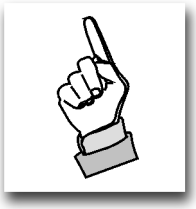
4.4 General

If any of the ''children'' is a person married in community of property, vesting must be effected in accordance with section 17(1), in the name of both spouses, and not in the name of the ''child'' only. If such a child should die before the endorsement is affixed, vesting will be effected in his/her estate or joint estate.

5 Section 58(2) of Act 47 of 1937: reversion of property to an insolvent

5.1 Introduction

If immovable property vested in a curator/trustee in terms of the Insolvency Act 24 of 1936 was later re-vested in the insolvent in terms of that Act, the insolvent may not (subject to the provisions of s 25(3) of the Insolvency Act 24 of 1936) transfer, mortgage or otherwise dispose of that property until the registrar of deeds has made an entry on the title deed of the property indicating that the property has been returned to him/her (the insolvent) (s 58(2) of Act 47 of 1937).



Example

For example, if X is declared insolvent by an order of court a copy of which is sent by the registrar of the court to the registrar of deeds, any property registered in X's name will immediately vest in his/her trustee. Thereafter, as a general rule, X will no longer be able to deal with that property. Should X subsequently be rehabilitated by an order of court (for instance after reaching a compromise with his/her creditors), **he/she can still not deal** with that property until such time as an endorsement in terms of section 58 of the Deeds Registries Act 47 of 1937 has been made against the title deeds of the property, re-vesting the property in the rehabilitated X.

In *Ex parte Alberts* and *Ex parte Hosken* (1943 CPD 359) it was decided that the court has the authority to declare that property acquired by the insolvent during his insolvency belongs to him, and that the court may authorise the registrar **to affix the relevant endorsement to that property in terms of section 58(2).**

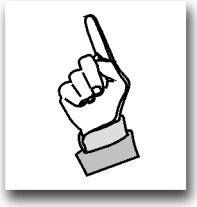
When a registrar of deeds is notified by the registrar of the High Court of any (provisional) sequestration order or amendment to such order (s 17(1)(b)(ii) of Act 24 of 1936), or if he/she later receives a certificate with a copy of a sequestration order from the (provisional) curator as referred to in section 18A of Act 24 of 1936, the date and time of receipt must be noted on the sequestration order by the Interdict Section of the deeds registry and a sequestration number (S /20.) allocated to it. Such a sequestration interdict lapses 10 years after the date of the relevant sequestration order (s 17(3)(b) of the Insolvency Act 24 of 1936).

After the operative period of the sequestration order **or** the extension period of the sequestration order or the section 18B *caveat* has lapsed, every act of registration

brought about by the insolvent in respect of the property concerned will be valid: **even though the property formed part of and vested the insolvent estate and a section 58(2) transfer by endorsement back to the rehabilitated insolvent** has not been registered (s 25(3) of Act 24 of 1936, read with s 4(6) of Act 122 of 1993).

If the insolvent is rehabilitated by the court **within the period of 10 years after sequestration**, the rehabilitation order must be numbered and filed, and noted against the name of the insolvent (and where applicable, also against the name of the spouse) by the Data Section of the deeds registry.

The sequestration interdict may, however, not be removed from the deeds registry's records, because all the property of the insolvent which was under the control of the trustee before rehabilitation remains under the control of the trustee after rehabilitation **for the remainder of the 10 years after sequestration,** to be realised and disposed of by the trustee (s 25(1) read with section 17(3)(b) of the Insolvency Act 24 of 1936). Section 58 of the Deeds Registries Act 47 of 1937 applies here, too.



Example

If, for instance, Marie was sequestrated on 3/1/1998 and was rehabilitated on 13/11/2004, she will not be entitled to deal with the immovable property registered in her name, until the title deed has been endorsed to the effect that the property has reverted to her from her former trustee. If she was sequestrated on 1/2/1990 and automatically rehabilitated on 1/2/2000 however, in terms of section 127A of the Insolvency Act 24 of 1936 she will after the date of rehabilitation be able to deal with the property freely — without an endorsement on the title deed in terms of section 58(2) being made (s 25(3) of the Insolvency Act 24 of 1936).

5.2 The application

Although section 58(2) does not stipulate that an application be lodged, but merely stipulates that the registrar must endorse, in practice the endorsement does not happen automatically and an application by the trustee is required.

5.2.1 The applicant

An application must be lodged by the insolvent or by the trustee of the insolvent estate.

5.2.2 Contents of the application

The application must identify the property concerned and refer to the agreement that the insolvent entered into with his/her creditors, with the Master's approval.

5.3 Supporting documents

Note the following:

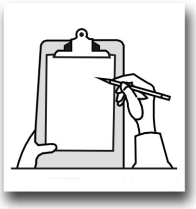
- A copy of the rehabilitation agreement (discussed in 5.1 above) must be lodged, as certified by the Master and accepted by the creditors. It must be

indicated, either in the actual copy or on the certificate issued by the Master, that the agreement has been accepted by the creditors. Failing this, a certified copy of the creditors' resolution, in which the agreement is accepted, will suffice.

- A certificate issued by the Master, stating that the offer of agreement has been accepted by him/her, must be lodged (s 119(7) of Act 24 of 1936). This is, however, not a requirement in all deeds registries (Registrars' Conference Resolution 13 of 1961).
- The title deeds to be endorsed in terms of section 58(2) of Act 47 of 1937 must be lodged. If the property in the title(s) is encumbered by a bond, the bond is not endorsed and consequently need not be lodged.

5.4 Effect of registration of the section 58(2) endorsement

The rehabilitated insolvent will be able to deal with the property freely and without the consent of his/her former trustee.



Activity

B was sequestrated on 3 May 2000. On the 2nd of June 2005 he was rehabilitated by the court. Is B entitled to deal freely with a property which was registered in his name in 2007? Discuss in detail.

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Up to now we have dealt with fairly diverse instances of transfer by endorsement. Now we take a look at transfers by endorsement that have something in common:

- On dissolution of a marriage in community of property by the death of one spouse, the surviving spouse acquires the deceased spouse's share of the immovable property (s 45 of Act 47 of 1937).
- On dissolution of a marriage in community of property by divorce, one of the spouses acquires the other spouse's share of the immovable property by virtue of an order of court (s 45*bis*1(a)).
- During subsistence of the marriage in community of property the court orders that one of the spouses becomes the sole owner of the immovable property, for instance where there is a court order to change the marital property regime of the parties from in community of property to out of community of property (s 45*bis*(1)(b)).

- Spouses married in community of property are by virtue of a court order (for divorce or change of the marital property regime) **both entitled** to the immovable property in equal shares (s 45*bis*(1A)(a)).

The above transfers by endorsement all relate to the transfer of ownership of land between spouses or parties to a civil union who are or were married in community of property.

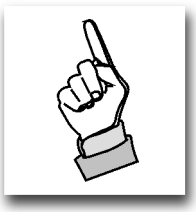
As we have seen, there are special circumstances surrounding each transfer by virtue of endorsement. So, too, special circumstances arise when one of the parties to a marriage in community of property acquires the other spouse's share, after the dissolution of the marriage or a change of the matrimonial property regime (s 45 and 45*bis*). This is more cost-effective than using the normal deed of transfer. It is, however, not obligatory to act in terms of section 45 and 45*bis*. In other words, there is nothing to prevent the transferor from transferring the share by means of a normal deed of transfer (Registrars' Conference Resolution 13(a) of 1996).

Section 45*bis*(1A) is also discussed in this unit, although the section 45*bis*(1A) procedure does not as such effect transfer: it merely reflects an existing situation. According to *Ex parte Menzies et Uxor* 1993 (3) SA 799 C, vesting occurs at the time of the High Court order (for dissolution of the marriage or change of their marital property regime) being issued and the registrar must register such vesting without calling for any other consents that might be required.

6 Section 45: transfer by endorsement if one of the spouses dies

6.1 Requirements to be met before application can be made

Section 45(1) of the Deeds Registries Act is applied where immovable property, a registered lease or a bond, which forms an asset in a joint estate or civil union, is registered in a deeds registry and the surviving spouse or civil union partner has lawfully acquired the share of the deceased spouse. Here the title deed, lease or bond can be endorsed in terms of section 45(1) to indicate that the surviving spouse or civil union partner is entitled to deal with it as if he/she had taken formal transfer or cession.



Example

X and Y are married in community of property and own a farm. X dies and according to X's will, all his assets are bequeathed to Y. Y is therefore entitled to the farm, half of which she acquired by virtue of their marriage in community of property, and the other half share she acquires by virtue of the bequest in X's will. Now instead of transferring X's half share of the farm to Y by way of a deed of transfer to her, it may be done by simply endorsing the current (joint) title deed to the effect that Y is the owner of the whole farm in terms of section 45(1).

6.2 Other circumstances under which application can be made

6.2.1 A later marriage in community of property

Even if the surviving spouse, before registration of the section 45(1) endorsement, again enters into a marriage in community of property, the procedure set down in section 45 can be followed to register an undivided half share into the name of the new spouse. The provisions of section 17(1) of the Deeds Registries Act 47 of 1937 make it possible that the procedure in section 45 can be applied both to the surviving spouse or to a joint estate of a later marriage in community of property (Registrars' Conference Resolution 6 of 1994).

6.2.2 A partnership

Furthermore, section 45(1) can be applied in respect of property registered in the name of one of the spouses only, as for instance in the case of a partnership. If one of the partners is married in community of property and his/her spouse dies, that partner's share need not be transferred to the survivor before section 45(1) can be applied (reg 34(3)(c)). An application can be made in terms of section 45(1) and the title of the partnership endorsed to the effect that the share of the deceased spouse devolves on the survivor.

6.2.3 A marriage governed by foreign law

If a marriage is governed by the laws of a foreign country and under those laws the patrimonial rights of the spouses are such that a joint estate is created, section 45(1) may be applied on proof that the immovable property concerned forms part of the joint estate. In terms of Registrars' Conference Resolution 1 of 2003 read with Registrars' Conference Resolution 5 of 2004, the proof required will emanate either from the foreign mission or from expert opinion in that country.

6.3 The application

In order to effect the transfer of the deceased spouse's share into the name of the surviving spouse, a written application must be made in terms of section 45 to endorse the relevant title. The application must be signed by the surviving spouse and the executor in the estate of the deceased (except where the surviving spouse is also the executor), and must be lodged in a white lodgment cover. Should the surviving spouse also have died in the meantime, the executors in the deceased estates of both spouses must apply.

6.3.1 The content of the application

The application must contain the following:

- The reason or *causa* for the transfer of the deceased's share. For example:
  - — that it is a bequest in terms of a will, or
  - — that the property has been taken over by the surviving spouse in terms of section 38 of the Administration of Estates Act 66 of 1965, or
  - — that the property devolves in terms of section 1(1)(c) of the Intestate Succession Act, Act 81 of 1987, or
  - — that the surviving spouse purchased the property from the estate (note that a validation order by the Court or consent by the Master would in this instance be necessary if the surviving spouse is also the executor of the estate of the deceased (s 49 of Act 66 of 1965))
- A rates clearance certificate must be lodged.

- All existing mortgage bonds registered against the land must be lodged for disposal. The provisions of section 45(2)(a), (a)*bis* or (c) must be complied with: that is, to release the property or share of the deceased from the operation of the bond, cancel the bond, or substitute the survivor as sole debtor under the bond.
- If it is not evident from the title deed that the property is an asset in a joint estate, this fact must be proved by lodging a marriage certificate indicating this or an affidavit from the surviving spouse proving same (see Registrars' Conference Resolution 4 of 2006). In the case of a customary marriage, only the registration certificate or order of court will be accepted as proof (see Registrars' Conference Resolution 31 of 2005 as confirmed by Registrars' Conference Resolution 8 of 2006).
- Proof that the deceased was not registered for VAT purposes. This can either be proved by means of an exemption certificate from SARS or a certificate from the executor in the deceased's estate which is duly endorsed by SARS (see Chief Registrars' Circular 14 of 2000).
- If the bequest is made by means of a will, then a copy of the will, as certified and accepted by the Master, must be lodged (reg 49(1)(c)).
- With inheritance, a certificate must be lodged by the conveyancer, in terms of section 42(1) of the Administration of Estates Act 66 of 1965, to the effect that the intended section 45 endorsement is, for the reason set out in the application, in accordance with the relevant liquidation and distribution account.
- If the property has been taken over by the surviving spouse in terms of section 38 of Act 66 of 1965, the Master must, in accordance with this section, endorse this approval on the application, after which the application must be lodged along with the certificate (reg 49(1)(e)).
- If the property is inherited in terms of the Intestate Succession Act 81 of 1987, the following proof must be furnished:
  - — **firstly,** that the deceased died intestate (affidavit by executor — Registrars' Conference Resolution 28 of 2006)
  - — **secondly,** proof of the balance of the estate for distribution (reg 49(1)(g)) and whether, in applying Act 81 of 1987, it is more than R125 000,00
  - — **thirdly,** whether the deceased was survived by a child, brother or sister who could inherit intestate from him/her (affidavit of next-of-kin — Registrars' Conference Resolution 11 of 2005)

- If a share in the property is purchased, the Master's endorsement in terms of section 42(2) of Act 66 of 1965 must appear on the application. Note that a validation order by the court or consent by the Master would in this instance be necessary if the surviving spouse is also the executor of the deceased's estate (s 49 of Act 66 of 1965).
- The relevant title deeds requiring endorsement in terms of section 45 must be lodged. These could be the title deeds of immovable property, such as the title to land, a long-term lease as contemplated in section 102 of Act 47 of 1937 and a mortgage bond of which the surviving spouse is the mortgagee.
- If the title deeds of the immovable property are encumbered by a mortgage bond, the bond(s) must be lodged for disposal. This means that the bond must be cancelled, or the deceased's share in the property released from the operation of the bond (s 45(a)*bis*), or the surviving spouse substituted as the sole debtor in place of the joint estate (s 45(2)(c)). In the latter case the consents of the surviving spouse and mortgagee are needed to the release of the estate of the deceased spouse from responsibility in terms of the bond, in order that the surviving spouse can be substituted as the sole debtor under the bond.

- Where the bequest is subject to testamentary conditions, proof of a marriage in community of property is sometimes required to determine whether the whole of the property or only the half share being inherited must be made subject to the relevant conditions (Registrars' Conference Resolution 8 of 1989). The title deed of the land can also serve as proof if the marital status of the parties is evident from it. Such proof will not be necessary if the property is registered in the names of both spouses married in community of property.
- If the transfer in terms of section 45 depends on adiation by the surviving spouse under the will, then the adiation must also be proved.

6.4 Documents that need not be lodged

- A conveyancer's certificate in terms of section 42(1) of Act 66 of 1965 is not necessary if section 18(3) of Act 66 of 1965 applies. This is because the Master appoints a representative and instructs him/her on the manner in which the estate must be liquidated and distributed. So there is no liquidation and distribution account to follow or object to.
- Community of property need not be proved if the property is registered in both spouses' names — but only if it is evident from the title deed that the property forms part of a joint estate. If it is registered in only one of the former spouses' names, community of property will have to be proved.
- No transfer duty is payable because acquisition by virtue of an inheritance is exempted from transfer duty according to section 9 of the Transfer Duty Act 40 of 1940 (see Chief Registrar's Circular 14/2000, discussed fully in unit 5).

Activity

X and Y married in community of property in 1975. In 2007 X died and Y took X's share in the property over in terms of section 38 of Act 66 of 1965. How will registration be effected in Y's name in the most cost-effective manner? Discuss in detail.

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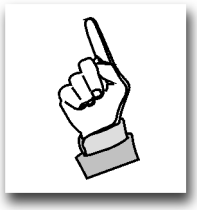
7 Section 45bis(1)(a) of act 47 of 1937: transfer by endorsement where the parties are divorced

7.1 Requirements before application can be made

An application in terms of section 45*bis*(1)(a) only applies if the immovable property or a lease under any law relating to land settlement or a mortgage bond

formed an asset in a joint estate of spouses to a marriage in community of property, or partners to a civil union in community of property, and one of them has legally acquired the share of his/her former spouse in the said property, lease or mortgage bond **on divorce**. Section 45*bis*(1)(a) applies only where marriages (or civil unions) in community of property were dissolved by divorce.



Example

X and Y are married in community of property and own a farm. They divorce and according to the settlement agreement X will become the sole owner of the farm. X is therefore entitled to the farm, the first half share by virtue of their marriage in community of property, and the other half share by virtue of the divorce order and settlement agreement.

7.2 The application

Application must be made for this endorsement by the person who is entitled to the property according to the divorce order and settlement agreement, not necessarily the registered owner. For instance in the example above, the farm may be registered in the name of Y only, although X is half owner by virtue of the marriage in community of property and then becomes owner of the other half by virtue of the order of court. The applicant is therefore not necessarily the registered owner of the property, but the person entitled to the property. The application need not be witnessed.

7.2.1 Contents of the application

The application must contain the following information:

- reason for the transfer, which may be as a result of:
  - — a divorce agreement between the parties which was made an order of court, or
  - — a redistribution agreement following the divorce, or
  - — a purchase agreement
- applicant's full names, identity number or date of birth and marital status (reg 18 and s 17)
- a preparation clause in compliance with regulation 44
- place and date of signing (reg 25)
- full description of property and title deed involved

7.3 Supporting documents

Documents that must be lodged:

- The divorce agreement, which has been made an order of court.
- A redistribution agreement, if any, of the assets of the parties at the time of the divorce, to prove that the applicant is entitled to the relevant immovable property or bond.
- The title deeds to be endorsed in terms of section 45*bis*.
- A further court order authorising unilateral action by the applicant plaintiff.
- In the event that the court, on divorce, ordered a forfeiture of benefits, and the plaintiff alone applies for the endorsement whereby the whole property is to be passed to the plaintiff, while the defendant cannot be traced to sign any

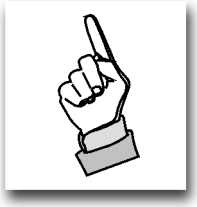
documents, a further court order authorising this unilateral action will be required (Registrars' Conference Resolution 7(b) of 1988).

- A transfer duty receipt, since the spouse acquiring the property as his/her sole property acquires the undivided half share of the other spouse in terms of the settlement agreement by means of a transaction. Transfer duty is therefore payable and a transfer duty receipt must be lodged. The partial exemption contained in section 9(1)(h) of the Transfer Duty Act 40 of 1949 is only applicable to the spouse's own undivided share.
- Proof of the marriage in community of property if it is not apparent from the title deed or court documents. This is usually a certified copy of the marriage certificate.
- A municipal clearance certificate.

8 *Section 45bis(1)(b) of act 47 of 1937: transfer by endorsement due to a court order during the subsistance of the marriage or union*

8.1 Circumstances surrounding the application

Unlike the applications for endorsement in terms of section 45 and section 45*bis*(1)(a) discussed in 6 and 7 of this unit, which applied on **dissolution** of the marriage or civil union in community of property either by **death or divorce**, an application in terms of section 45*bis*(1)(b) only applies where the marriage in community of property **subsists**. So where **during the subsistence** of the marriage or civil union in community of property, the court issues an order or issues an order **and grants an authority** in terms of section 20 or 21(1) of the Matrimonial Property Act 88 of 1984 for the change of the matrimonial property regime, and has ordered that the immovable property, a lease or mortgage bond be granted to one of the civil union partners or spouses married in community of property, then an transfer by endorsement in terms of section 45*bis*(1)(b) can be effected.



Example

X and Y are married in community of property and own a farm. The court orders a change in their marital regime to the effect that they will in future be married out of community of property and that the farm will become the sole property of X. X is now entitled to the whole farm, the first half share by virtue of their marriage in community of property, and the other half share by virtue of the order of the court.

8.2 The application

Application will be made to the registrar of deeds by the party entitled to the property for an endorsement of the relevant title deed to the effect that the applicant is entitled to deal with such property since he/she has acquired the share of his/her spouse in such property.

8.2.1 The applicant

The application must be made by the spouse to whom the property has been granted.

8.2.2 Contents of the application

The application must mention the reason for the endorsement. Refer back to 7.2.1 of this unit for the other information that must be mentioned in such application.

8.3 Supporting documents

Documents that **must** be lodged:

- the original court order or a certified copy, to determine the contents of the order, or the order and authorisation
- the deeds to be endorsed
- a transfer duty receipt
- a certified copy of the marriage certificate to prove the former marriage in community of property, if the property is registered in only one of the spouses' names
- a municipal clearance certificate

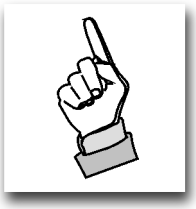
9 Section 45bis(1a)(a) or (b) of Act 47 of 1937: vesting in both of the former spouses

This application is used when the former spouses, who were married in community of property, are **both** entitled to the property involved after such marriage was dissolved or their marital property regime changed. In the previous discussions only one of the parties became entitled to deal with the property as the sole owner thereof.

9.1 Requirements before application can be made

An application in terms of section 45*bis*(1A)(a) or (b) only pertains to immovable property or a lease in terms of a land settlement Act or a bond registered in a deeds registry which formed an asset in a joint estate of spouses, in either of the following circumstances:

- The spouses have been divorced, and such property, lease or bond accrues to both the former spouses in undivided shares in terms of the division of the joint estate.
- A court has made an order, or has made an order and given an authorisation in terms of section 20 or 21(1) of the Matrimonial Property Act 88 of 1984 as the case may be, in terms whereof the property, lease or bond was allocated to both spouses in undivided shares.



Example

X and Y are married in community of property and own a farm. They divorce (or their marital regime changes to out of community of property) and according to the settlement agreement (or order of the court) they both are entitled to the property in equal shares.

9.2 The application

Application will be made by both spouses who were married in community of property to the registrar of deeds to endorse the relevant title that they are both co-owners or co-lessees or co-mortgagees in terms of the order of the court.

9.2.1 The applicant

A written application by both spouses must be lodged (s 45*bis*(1A)).

9.2.2 Contents of the application

The application must include the following information:

- the reason for the endorsement, which could be:
- a divorce agreement between the parties which was made an order of court, or
- a redistribution agreement following the divorce, or
- a change in the matrimonial property regime
- the applicant's full names, identity number or date of birth and marital status (reg 18 and s 17)
- proof of compliance with regulation 44, in other words a preparation clause
- the place and date of signing (reg 25)

The property and title deed involved must be fully described.

9.3 Supporting documents

Documents that **must** be lodged:

- the court order and settlement agreement/authorisation
- the title deeds to be endorsed
- a municipal rates clearance certificate
- consents required in terms of other legislation, for example Subdivision of Agricultural Land Act 70 of 1970

Activity

X and Y entered into a marriage in community of property in 1975 and divorced in 2007. During 1980 a property was registered in X's name, without any reference to his marital status. Answer the following questions:

1 According to the divorce order the property has been awarded to Y. Discuss the cheapest registration procedure that can be used to register the property in Y's name.

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2 The court declared a forfeiture of rights. What will be the effect regarding the transfer of the property by endorsement?

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3 According to the court order X and Y are both entitled to the property. Y sells her share in the property to Z. How will transfer to Z be effected and who will transfer the property? Discuss in detail.

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10 Summary

This unit concludes our discussion on the transfer of land. In the previous units we saw how a person becomes the owner of land by way of a deed of transfer. In this unit we have looked at how transfers may in certain specific circumstances be effected more cost-effectively, not by deed of transfer, but by endorsement, particularly where spouses were married in community of property.

In the following unit we discuss substituting title deeds, or certificates of registered title as they are more commonly known.

UNIT 8

Substituted titles/Certificates of registered title

1 Introduction

The previous units dealt with the transfer of ownership of land. The next two units contain a discussion of when and why a property owner can apply for a substituting title deed in place of the title to the land where no transfer takes place. This unit specifically looks at the different substituting titles.

We will look at the following key questions:

- In which circumstances should a certificate of registered title be applied for?
- How are certificates of registered title issued?
- What circumstances must prevail before certificates of registered title may be issued in terms of sections 37, 38 and 43?
- What information can be elicited from certificates of registered title?
- How is the applicant identified in the vesting clause?
- Which certificate of registered title applies to a specific set of facts?

Please remember to refer to the study guidelines in Tutorial Letter 101 to focus on the most important parts of this unit for examination purposes.

2 Procedure for issuing certificates of registered title

There are various substituting titles, for example certificates of consolidated title, certificates of uniform title and certificates of registered title. A certificate of registered title is a deed, prepared by a conveyancer in the prescribed form, wherein the registrar of deeds certifies who the owner of the property or share in the property is. Such a certificate or registered title is issued on application by the owner. A certificate of registered title is therefore no more than a substituting title containing information derived from existing titles, thereby replacing or partly replacing the existing title deed. No transfer of ownership takes place.

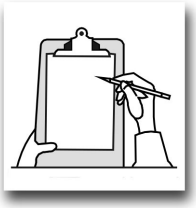
Certificates of registered title have various prescribed forms, depending on the circumstances under which they were issued and the type of certificate of title that is required, although the general procedure set out in section 37 of the Act must be followed. This procedure is briefly as follows:

- A written application, accompanied by the title deed of the land, must be lodged by the owner for the certificates of title in terms of sections 34 to 36 of the Act (except for the s 34(2) application for a lost deed, where the deed obviously cannot be lodged).
- All registered bonds over the property must be lodged, although no consent from the mortgagee is required.
- The registrar will state on the title deed(s) and the mortgage bond(s) that a certificate of registered title has been substituted for the title deed(s) or bond(s).
- A certificate of registered title replaces the title deed(s) concerned.

We shall now list the various types of certificates of title that may be issued depending on the surrounding circumstances, and thereafter we shall discuss each of them in more detail:

- If a **co-owner's share** in land is held jointly with other co-owners **under one title deed,** he/she may obtain a certificate of registered title for his/her undivided share in such land in terms of section 34(1) of the Deeds Registries Act 47 of 1937. In fact such a co-owner **must** obtain a certificate of registered title before he/she can **transfer a fraction** only of his/her undivided share or before he/she can hypothecate or lease the whole or any fraction of his/her undivided share in the land. A certificate of registered title is not necessary where a joint owner disposes of **the whole of his/her share**. This procedure is discussed under heading 3 below.
- If **a co-owner's joint title deed is lost**, the procedure set out in section 34(2) read with regulation 68(12) may be followed to issue a certificate of registered title in respect of that co-owner's undivided share in the property in terms of section 34. This procedure is discussed in detail under heading 4 below.
- If an **owner holds various shares** to one or more properties **under a number of title deeds,** in terms of section 35 he/she may obtain a certificate of registered title reflecting his/her total shareholding in the property or properties.
- If an **owner holds two or more pieces of land** (or undivided shares in land) under **one** title deed, he/she may obtain a certificate of registered title for one or more of those pieces of land in terms of section 36.
- If both the **client's copy and the deeds registry's copy** of the title deed **is lost**, the procedure set out in section 38 of the Act is followed to issue a certificate of registered title to take the place of the lost deed. This procedure is discussed in under heading 7 of this unit.
- Where it is necessary to **correct an error in registration**, a certificate of registered title may be issued in terms of section 39(1).
- Where a title deed contains **obsolete conditions**, a certificate of registered title may be issued in terms of section 39(2) to omit these obsolete conditions.
- Section 43 has a specific procedure for issuing a certificate of registered title in respect of a **portion of land** or an erf held by **virtue of a township title**. This procedure is discussed in detail under heading 10 of this unit.

Before we start discussing specific individual certificates of registered title in detail, let's make sure that you do in fact understand what a certificate of title is.



Activity

Describe in your own words what a certificate of registered title is.

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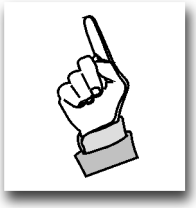
3 Section 34(1): certificate of registered title of an undivided share

3.1 Circumstances in which the certificate is issued

If a person is a joint owner of an entire piece of land or a portion of that land and the land is held under a single title deed by all the joint owners, he/she can apply, under section 34(1) of the Act, for a certificate of registered title for his/her undivided share. In fact such a co-owner **must** obtain a certificate of registered title before he/she can **transfer a fraction** only of his/her undivided share or before he/she can hypothecate or lease the whole or any fraction of his/her undivided share in the land. A certificate of registered title is not necessary where a joint owner disposes of **the whole of his/her share**.



Example

If X, Y and Z are the joint registered owners of the farm Fransfontein by virtue of Deed of Transfer T 100/1976, X may apply for a certificate of registered title in respect of **X's one-third share.**

Even where X, Y and Z **jointly hold a one-third share** in the farm Strandfontein by virtue of Deed of Transfer T 403/1979, X may apply for a certificate of registered title in respect of his one-ninth share in the farm.

Generally the **owner has a choice** whether or not he/she wishes to apply for a certificate of registered title. However an owner of land or a share in land, who holds it together with other owners under one title deed, **must**, in respect of his/her share, (simultaneously with or prior to the registration of the deed) take out a certificate of registered title in terms of section 34(1) in the following circumstances:

- If he/she wishes to **transfer a fraction of his/her undivided share** to someone. For example X, Y and Z are the joint registered owners of the farm Fransfontein by virtue of Deed of Transfer T 100/1976, and X is therefore the owner of a one-third share in the property. If X sells only a one-sixth share of his share in the property to Q, he must apply for a certificate of

registered title for his entire one-third share to be registered in his name, before the one-sixth share can be transferred to Q.

- If he wishes to **mortgage or lease his entire share**. For example X, Y and Z are the joint registered owners of the farm Fransfontein by virtue of Deed of Transfer T 100/1976, and X is therefore the owner of a one-third share in the property. If X wants to hypothecate or register a lease over his one-third share, he must first apply for a certificate of registered title in respect of that share.

3.2 Prescribed form

Form **I,** as set out in the Deeds Regulations, is prescribed for the abovementioned certificate of registered title. We analyse this form now.

3.2.1 Preparation clause

As with deeds of transfer, certificates of title must be prepared by a conveyancer and must include the required preparation clause (reg 43 read with s 15 of the Act — see unit 2 in this regard.)

3.2.2 Heading

The heading must indicate that the certificate has been issued under section 37 of the Act.

3.2.3 Preamble

The preamble states that the owner has applied for the certificate of registered title and refers to the section of the Act in terms of which the certificate is being issued.

3.2.4 Vesting clause

In the vesting clause the registrar of deeds states who **the owner of the property is according to existing deeds registry records**. For example:

> *Joe Jackson*
>
> *Identity number 4409195096002 unmarried*

(i) Where a certificate of title is issued in respect of land that is registered in the name of a natural person who has since died, the certificate is issued in the name of the registered owner, described as ''*the now deceased*'', and not in favour of his/her estate (reg 54(2)). For example:

> *Joe Jackson*
>
> *Identity number 4409195096002 unmarried (the now deceased)*

Even if the deceased was married in community of property, there is no vesting in the joint estate. If the property was registered in the names of both spouses, as stipulated in section 17(1) of the Act, regulation 54(2) will apply. For example:

> *Joe Jackson*
>
> *Identity number 440919 5096 00 2 (the now deceased)*

and

Linda Jackson

Identity number 501001 0057 00 4

unmarried (formerly married in community of property to each other)

(ii) If the property was registered in the name of an unmarried person who subsequently entered into a marriage out of community of property, the certificate will be issued to that person as an unmarried person and his/her present status will be disclosed in brackets (Registrars' Conference Resolution 7 of 1954). For example:

Joan Jillson

Identity number 4209163043 002 formerly unmarried

(now married out of community of property)

Why do you think the vesting clauses in (i) and (ii) above differ from the vesting clauses in deeds of transfer? If you are not sure, remember that in a certificate of registered title the registrar certifies who the owner of the land is **according to existing deeds registry records**.

(iii) In the event of a marriage in community of property, section 17 stipulates that the certificate must however be issued in the names of both spouses (Registrars' Conference Resolution 21 of 1988), even if the current title is registered in the name of only one spouse. Both spouses will have to apply for the certificate (see s 17(2) of the Act).

(iv) If a woman owns property under her maiden name and another property under her married name and she is married out of community of property, it is common practice to proceed according to her married name and status. If she is married in community of property, section 17 referred to in (iii) above applies.

(v) If the title deed is endorsed in terms of section 40 of the Administration of Estates Act, the vesting clause will for example read as follows:

The trustees in the trust created in the Will of the Late Piet Louw, dated 18 November 1992 No. T 440/93.

(vi) If the registered title refers only to the date of birth of a natural person, or is silent regarding the company number of a juristic person, the certificate of title must reflect the date of birth and/or identity number of the natural person or the company number of the juristic person, as the case may be (reg 18 of the Act and Registrars' Conference Resolution 18 of 1991).

3.2.5 Property clause

The property description must correspond with the title, except that the applicant's **share** must be disclosed, too. (See unit 4 for the provisions of reg 30 in this regard.)

If the property description has changed in the meantime, the certificate of registered title must reflect the new description.

3.2.6 Extending clause

As in the case of a deed of transfer, an extending clause is required here, too (see unit 4).

3.2.7 Conditional clause

Existing conditions must be brought forward *verbatim* from the title under which the certificate is being issued, with the necessary qualifications.

No new conditions can be created in certificates of title, except where conditions are imposed under a statute, for example conditions imposed by the Premier when consenting to subdivision, or by the controlling authority in terms of Advertising on Roads and Ribbon Development Act 21 of 1940 or any other statute.

3.2.8 Execution clause

Certificates of title can be executed only by a registrar of deeds, that is no one appears before the registrar.

3.3 Supporting documents

3.3.1 Bond over the property

Section 37(2) requires that the bond over the property concerned be produced, but does not require the mortgagee's consent. Furthermore, this subsection refers to bonds only, and not to other encumbrances like leases and servitudes.

3.3.2 Owner's application and title deeds

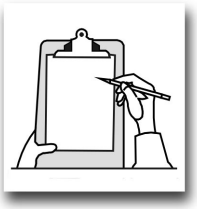
The owner's application for the issue of the certificate of title and the title deeds must be lodged.

3.3.3 Clearance certificates

No clearance certificates are called for (Registrars' Conference Resolution 53 of 1949).

3.3.4 Transfer duty receipt

No transfer duty is payable. There is no transfer of rights.



Activity

Why do you think a clearance certificate is not required?

.....

.....

.....

.....

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.....

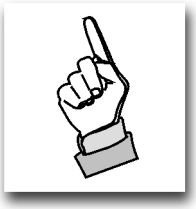
If you are not sure, refer to 3.3.4 above.

4 *Section 34(2): certificate of registered title of an undivided share in the case of a lost or destroyed title deed*

Make sure that you understand the difference between the provisions of this section and regulation 68(1) of the Act. A certificate of registered title in terms of section 34(2) is issued **to a co-owner** of property who holds the property together with other co-owner(s) by virtue of a title that has been lost or destroyed. **The lost title deed nevertheless remains valid in respect of the share(s) of the other co-owner(s)**. In terms of regulation 68(1) of the Act a certified copy of a lost or destroyed title deed may be issued to a single owner or joint owners of a piece of land who apply for the issue of a copy of the property title deed to **replace** the original which has been lost or destroyed. The owners or all the owners of that piece of land must apply for the regulation 68 copy; once the copy been issued, the original deed **becomes null and void**.

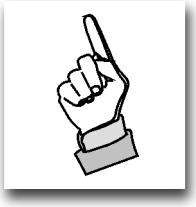
4.1 Circumstances in which the certificate is issued

Section 34(2) of the Act provides for the issue of a certificate of registered title of an undivided share in land where the client's copy of the title has been lost or destroyed, without first having to apply for a certified copy (in terms of reg 68) of the lost or destroyed title deed. You will learn more about applications for certified copies of deeds to serve in the place of the original (in terms of reg 68, in unit 11.)



Example

X, Y and Z are the joint registered owners of the farm Fransfontein by virtue of Deed of Transfer T 100/1976, which has been lost or destroyed. X may apply for a certificate of registered title in respect of his one-third share, without all the owners having to obtain a certified copy of the lost title deed for properties under the title (Registrars' Conference Resolution 9 of 1996).



Example

X and Y jointly own and hold Erven 1 and 4, Hammanskraal, by virtue of Deed of Transfer 3/1996. Y sells and transfers his share in Erf 1 to Q, after which deed of transfer T 3/1996 is lost or destroyed. X is entitled to apply for a certificate of registered title in respect of his share in Erven 1 and 4, Hammanskraal, even though strictly speaking he is no longer a **joint** owner under deed of transfer T 3/1996 in respect of Erf 1.

4.2 Prescribed form

The prescribed form as I discussed in 3.2 above applies *mutatis mutandis*.

4.3 Supporting documents

Note the following:

- An affidavit in terms of regulation 68(1) must be obtained from all the co-owners. If they (or some of them) cannot be traced, the applicant must declare in his/her application that he/she has been unable to obtain their consents (Registrars' Conference Resolution 44 of 1966 and Registrars' Conference Resolution 3 of 1979).
- Statement by mortgagee that he/she is not in possession of the missing title must be lodged, if the property is mortgaged. The registrar of deeds must endorse the certificate to the effect that the share is subject to a bond. No **consent** to the endorsement is required by the mortgagee.
- 3.3.2 and 3.3.4 above apply here too, except that the title deed is not lodged in this case. The effect of issuing a copy in terms of regulation 68(1) is that the lost or destroyed original becomes void. It remains void even if it is found at a later stage and submitted to the relevant registrar. This does, however, not apply to cases mentioned in section 34(2).

Regulation 68(13) states that where a person has obtained a certificate of registered title under section 34(2) of the Act, the registrar must endorse the registry duplicate of the lost or destroyed deed to the effect that a certificate has been issued in respect of the applicant's share. If the lost deed is found and submitted to the registrar, a similar endorsement must be made on it.

Activity

What is the difference between a certificate of registered title in terms of section 34(2) of the Act and a certified copy of a deed in terms of regulation 68(1)?

.....

.....

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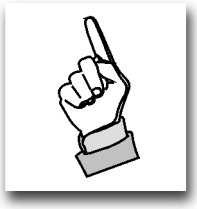
.....

Note: The owner of the last remaining share under a lost or destroyed title must apply for a certified copy of that title in terms of regulation 68, not for a certificate of registered title of his/her share in terms of section 34(2). The title deed must not be exhausted by the issue of certificates of registered title (ss 36 and 34(2)).

5 Section 35: certificate of registered title of aggregate shares

5.1 Circumstances in which the certificate is issued

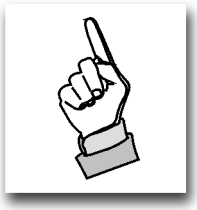
In terms of section 35, the owner obtains a single title in respect of his/her total share in a property or properties, instead of separate titles in respect of the individual fractions owned by him/her.



Example

X owns the whole of Erf 10, Lambertsbaai, in half shares under two titles, or a three-quarter share of the property under three titles. X can substitute the existing titles for a certificate of registered title in respect of the whole shareholding.

Joint owners may also follow this procedure. If different properties are involved, however, the joint owners can use this procedure only if their shareholdings are equal. If their shareholdings differ, each must obtain his/her own certificate of registered title (Registrars' Conference Resolution 23 of 1971).



Example

X and Y own Erven 1, 2 and 3 in the township of Paarl. Each of them owns a half share in Erven 1 and 2 by virtue of different title deeds. X owns a one-third share in Erf 3 and Y a two-thirds share in Erf 3 by virtue of different title deeds.

X and Y can apply for one certificate of title in respect of both Erven 1 and 2, as their shareholdings in both properties are equal. They cannot apply for one certificate in respect of all three properties, because their shareholdings in Erf 3 differ from their shareholdings in the other erven.

X and Y can, however, apply for a separate certificate in respect of Erf 3, since it is held by them under different title deeds.

The issue of this certificate of title is not obligatory. It is up to the owner to decide whether he/she wishes to follow this procedure.

5.2 Prescribed form

Prescribed form I, as discussed in 3.2 above, is used for this type of certificate of registered title, too — with the difference that in the preamble, reference must be made to section 35 and not to section 34(1).

5.2.1 Extending clause

Form UU must be used for the extending clause, listing all the titles under which the shares are held.

5.2.2 Conditional clause

Where only one of the shares in a property is subject to a special condition, this must be reflected in the new deed with the necessary qualification. For example:

a quarter-share in the property held hereunder, is subject to ... .

5.3 Supporting documents

Note the following:

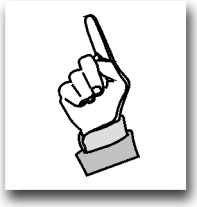
- The owner's application for the issue of the certificate of title and the title deeds must be lodged.

- No mortgagee's consent is needed, but the bond must indicate that a certificate of title has been issued and the certificate of title must refer back to the bond.

  Do you know why consent is not required? (S 37 specifies that it is not necessary — see 2.4 above.)
- No transfer duty is payable since there is no acquisition of rights to land.

6 *Section 36: certificate of registered title of one or more properties held under one title deed*

Section 36 of the Act stipulates that if a person holds two or more pieces of land or undivided shares in land under one title deed, he/she may obtain a certificate of registered title in respect of one or more of those pieces of land or his/her undivided shares. At least one of the pieces of land or one of the shares must, however, continue to be held under the original title deed. This section is often used when an owner of more than one property held under the same title wants to mortgage one of the properties, without handing over the title of all the properties to the mortgagee to secure the debt.



Example

X is the owner of Erven 3 to 9 in the township of Scottborough by virtue of Deed of Transfer T 273/1975. He may apply for a certificate of registered title in respect of Erven 4 and 6 or even Erven 3, 4, 5, 7, 8 and 9, as long as one of the erven continues to be held under deed of transfer T 273/1996.

If X and Y own Erven 3 to 9 in the township Scottborough by virtue of Deed of Transfer T 273/1975 in half shares each, X and Y may apply for a certificate of registered title in respect of their half shares in any of the erven. One half share in any erf must however continue to be held by either X or Y under deed of transfer T 273/1996.

6.1 Prescribed form

Prescribed form I is once again used and altered where necessary.

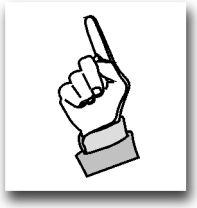
6.2 Supporting documents

3.3 above applies *mutatis mutandis*.

7 *Section 38: certificate of registered title taking the place of a lost or destroyed deed*

7.1 Circumstances in which the certificate is issued

Provision is made in section 38 of the Act for the issue of a certificate of registered title in the event of the client's (transferee's) title deed as well as the deeds registry's copy being lost or destroyed.



Example

X loses his title deed T 2/1990. He applies for a certified copy of the lost title deed in terms of regulation 68, but the deeds registry's copy has been lost, too. X must therefore apply for a certificate of registered title in respect of the lost title in terms of section 38.

To do this, he will first have to notify all interested parties of the intention to apply for a certificate of registered title; only if there are no objections to the issue of such a title can he apply for the title to be issued by the registrar of deeds.

Where immovable property is to be transferred in execution of the judgment of any competent court and the duplicate original (deeds registry copy) of the title deed concerned has been lost or destroyed by the deeds registry, the officer appointed to execute the judgment must obtain a certificate of registered title under the provisions of section 38 of the Act, for which purpose the officer will be regarded as the owner of the land (reg 51(2)).

7.2 Prescribed form

The prescribed form for this certificate of registered title is form L.

7.2.1 Preamble

The preamble to form L differs from other forms, in that it only appears from the preamble that the applicant is the owner of the property. In other certificates, there is no doubt that the applicant is the owner. In almost all other respects the form is identical to that used for ordinary certificates of registered title.

7.2.2 Extending clause

If the old diagrams have been destroyed and the certificate is accompanied by a new diagram, the extending clause must follow prescribed form UU. The new diagram cannot be attached to the certificate. It must either be attached to the diagram deed of the property or filed in a diagram book.

7.2.3 Conditional clause

All conditions, servitudes, leases and other encumbrances must be embodied in the certificate (s 38(5)).

7.3 Supporting documents

7.3.1 Owner's application

The owner's application, along with an affidavit in terms of regulation 68, should be lodged, together with:

- a draft deed, prepared by a conveyancer according to prescribed form L
- a diagram of the property, in duplicate, approved by the Surveyor-General if there is no diagram filed in the deeds registry or in the registry of the Surveyor-General

- a notice, signed by the registrar and returned to the applicant, for publication in accordance with section 38(2)

The draft deed and diagram (if there is one) are open for inspection in the deeds registry for a period of six weeks after the date of the first publication of the notice in the Gazette. During this time, any interested person can lodge an objection with the registrar; if his/her objection is valid, he/she may, within a month after the last day of the six-week period, apply to the court for an order prohibiting the registrar from issuing the certificate.

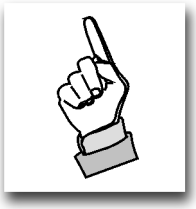
7.3.2 Certificate of registered title

Once the above formalities have been complied with, and provided no valid objection has been lodged with the registrar, the certificate of registered title can be issued. In terms of section 38(1), written application must be made by the registered owner for the certificate of registered title to be issued. An affidavit in terms of regulation 68(1) must be submitted by the owner. If the property is mortgaged, the mortgagee must state in writing that he/she is not in possession of the title (reg 68(2)). If the lost title is a diagram deed and the diagram has also been lost, the necessary copies must be lodged, certified by the Surveyor-General. Proof of publication (in the form of newspaper cuttings showing the date of publication and referring to the relevant Gazette) must be lodged. All conditions, servitudes, leases, bonds and other encumbrances must be embodied in the certificate (s 38(5)). Bonds will be endorsed against the certificate.

8 Section 39(1): certificate of registered title to correct an error in registration

8.1 Circumstances in which the certificate is issued

Section 39(1) applies in instances where, by reason of an error, the same land has been registered in the names of different persons. The registrar can only issue a certificate of registered title to the latter party, who now holds the property under two titles, after one of the two parties has transferred the land to the other party by means of a rectification transfer.



Example

Erf 9, Dullstroom, is registered in X's name and held under title deed T 32/1987. The same property is also registered in Y's name, under title deed T 454/1993. As the property was incorrectly registered in Y's name, Y must transfer the erf to X by means of a rectification transfer in terms of section 16. X will now be in possession of two title deeds for the same property and must therefore apply for a certificate of registered title to replace both titles. (See unit 4 with regard to rectification transfers.)

In this case, the certificate of registered title naturally supersedes both existing titles (s 39(3)). Due to the problematic situation that arises when there are two titles for the same land, one would expect the legislator to have made it compulsory for such a certificate to be issued; in fact, in practice the registrar concerned always insists that such a certificate is issued.

8.2 Prescribed form

The prescribed form is form M.

8.2.1 Extending clause

The extending clause must refer to both titles and must comply with form UU.

8.2.2 Conditional clause

Where contradictory conditions are reflected in the two titles, the registrar of deeds will ascertain which conditions are valid. The issue of the certificate of registered title is not precluded by these differences (Registrars' Conference Resolution 55 of 1970).

8.3 Supporting documents

Note the following:

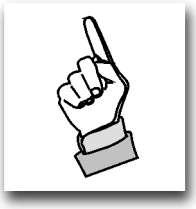
- The certificate of registered title must be lodged together with the title deeds and bonds registered against the land.
- No mortgagee's consents are required.
- 3.3.2 to 3.3.4 above apply *mutatis mutandis*.

9 Section 39(2): certificate of registered title to omit conditions that are no longer applicable

9.1 Circumstances in which the certificate is issued

Even if conditions in a title deed have been cancelled or have lapsed as the result of a noted merger (for example a servitude), they are not removed from the title deed. How can one obtain a title deed that is clear of these conditions?

The only way is to obtain a certificate of registered title in terms of section 39(2) of the Act. The aim of such a certificate is therefore not to have the conditions cancelled, but to remove from the title those conditions that have already lapsed or been cancelled by means of a new title in the form of a certificate of registered title issued under section 39(2).



Example

X is the owner of a property held by virtue of title deed T 3/1960. The property was subject to a condition restricting the use of the property in favour of a certain population group, as well as a servitude in favour of Eskom. The first condition was abolished by law and the servitude, too, has been cancelled. X would like a clean title for the property: that is, one that does not reflect these abolished conditions and therefore she decides to apply for a certificate of registered title in terms of section 39(2) of the Act.

It must be stressed that this certificate can only be issued to the owner of one or more **defined pieces** of land. Therefore, the owner of **a share in land cannot** substitute his/her title in respect of that share for a certificate in terms of section 39(2). Furthermore, the applicant must be the registered owner of the whole property.

9.2 Prescribed form

According to section 39(3), the certificate of registered title must be in the prescribed form N.

9.3 Supporting documents

Note the following:

- The certificate of registered title, title deeds and bonds registered against the property must be lodged.
- No mortgagee's consent is required.
- 3.3.2 to 3.3.4 above apply *mutatis mutandis*.

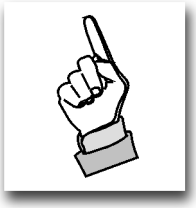
10 Section 43: certificate of registered title of a portion of a piece of land

10.1 Circumstances in which the certificate is issued

Certificates of registered title in terms of section 43 **must** be taken out in the following instances.

10.1.1 A specific portion of land

When the owner of a piece of land wants to mortgage a specific portion of that land he/she must first obtain a certificate of registered title in respect of that portion (s 43(4)).

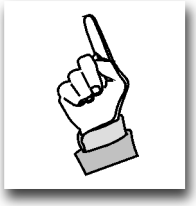


Example

X is the owner of Erf 2, Bronkhorstspruit, and wishes to mortgage Portion 1 of that erf. In order to do so, he must apply for a certificate of registered title in respect of Portion 1.

10.1.2 An individual erf or portion of it

When an owner of a township or settlement wishes to deal with an individual erf or a portion of that erf, he/she must first obtain a certificate of registered title in respect of that erf.



Example

A is the owner of the township Pietersburg. In his title deed the erven for the township are not separately described. If he wishes to mortgage Erf 4, Pietersburg, he must first apply for a certificate of registered title in respect of that erf.

This provision will not apply where the owner of a township holds the erven separately in his/her title deed. That is where the erven are set out separately in separate paragraphs. Neither will it apply if an owner wishes to transfer the entire piece of land, consisting of a number of erven.

Note: In the case of township title deeds, the streets and public places will make up the remainder, which must remain under the existing title.

Why is it important to know this? The reason is that the title may not be exhausted by the issue of certificates of title. If the owner of a township obtains a certificate of registered title for each erf in the township for instance, it will not be considered that the title has been exhausted, because the streets in the township will ensure that the township title still applies in respect of the remainder of the township.

10.1.3 Division of property into two

An owner of a property who divides it into two and wants to transfer the remainder must first obtain a certificate of registered title for that part of the property that he/she is retaining, before the transfer of the remainder can be registered. In this case, the certificate is also issued under section 43(1) of the Act.

10.2 Prescribed form

The certificate must be issued in the prescribed form R.

10.2.1 Conditional clause

10.2.1.1 Notarial deed

If a diagram is required when applying for a certificate of title in terms of section 43 and that **diagram refers** to a **new servitude**, the registrar of deeds may not register the certificate, **unless a notarial deed in respect of that servitude is registered simultaneously** (reg 60(2)). In other words, certificates of registered title in terms of section 43 usually involve a subdivision of an existing piece of land and subdivisions of land often require servitudes of right of way, water and electricity pipe or power lines. Should such a new servitude be necessary, the registrar of deeds may not issue the certificate of registered title until the new servitude has been notarially created or is simultaneously created with issue of the certificate of registered title.

However there is a further problem. For instance, if the new servitude relates to a thoroughfare, which affects the remainder, **the servitude cannot be registered as long as the owner of both the new portion and the remainder is the same person**. (One cannot have a servitude over one's own property.) Consequently the certificate of registered title cannot be issued. Yet, because section 43 forbids it, the owner cannot transfer a portion of the land until a certificate of registered title has been issued. Here the exception mentioned in regulation 60(2) applies and the deeds controller must **have a *caveat*** noted against the properties, to the effect that if either of the properties is transferred to a third person, the servitude must be registered.

10.2.1.2 Servitude

If the property in respect of which a certificate in terms of section 43 of the Act is issued is **not affected by a particular servitude** or condition, the servitude or condition **may be omitted** from the conditional clause of the certificate of title.

10.2.1.3 New conditions

New conditions imposed as a result of the consent to subdivide must be **incorporated in the deed**, for instance conditions in terms of Act 21 of 1940, Act 54 of 1971, Act 10 of 1944, Ordinance 33 of 1934, Ordinance 15 of 1985 or Ordinance 15 of 1986.

The authority under which a condition is being imposed must be disclosed in the heading to the condition. For example:

> *Subject to the following condition imposed by the Premier in his consent to subdivision in terms of Act 10 of 1944 ... .*

If the Premier consents to the subdivision of an erf into two portions (in other words, Portion 1 and the remainder) subject to conditions, and the owner takes out a certificate of registered title in respect of Portion 1, **the condition or servitude** must be reflected **in the certificate of registered title**. If the condition or servitude applies to the remainder as well, the **title of the remainder must be endorsed accordingly** by the deeds controller.

10.2.1.4 Title conditions

All title conditions must be accounted for, with qualifications where necessary. If the local authority is the developer of the township, all the relevant proclaimed conditions must be embodied in the title, including those created in favour of the local authority, and no merger of conditions need be noted since a township condition cannot lapse by merger (*Ronnies Motors (Pty) Limited v Van der Walt* 1962 (4) SA 660 (A) and Registrars' Conference Resolution 5 of 1994).

10.3 Supporting documents

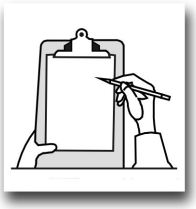
Note the following:

- Written application must be made for this certificate of registered title. No condition may be created in the application.
- The title deed must be lodged.
- Mortgage bonds over the property must be lodged for disposal. Alternatively the mortgagee may also consent to the issue of the certificate of registered title. This consent must follow prescribed form MM.
- It is not necessary to obtain the consent of other interested parties, such as lessees or holders of servitudes (excluding mortgage bonds), or to lodge their title deeds.
- In the event of the situation in 10.1.1 above, where a certificate of registered title is registered in respect of a specific portion of land, the following requirements must also be met:
  - The subdivisional diagrams approved by the Surveyor-General must be lodged in duplicate.
  - The parent diagram must be lodged in duplicate.
  - If conditions or servitudes are being created in terms of sections 65(1), 75(1) or 76(1) of the Deeds Registries Act, for instance where the subdivision is governed by ordinances, and if these conditions or servitudes are being imposed against the remainder, which is subject to mortgage bonds, the consents of the mortgagees are required and the bonds must be endorsed in respect of these conditions or servitudes (ss 65(3), 75(3) and 76(2) of the Act). If, however, the conditions or servitudes are being imposed by statute, for instance under Act 70 of 1970, the

consents of the mortgagees are not required and the bonds are not endorsed (Registrars' Conference Resolution 8 of 1991).

- In the case of the situation in 10.1.2 above, where the certificate of registered title is in respect of an erf in a township title, the following requirements must also be met:
  - — A diagram need not to be lodged, unless a general plan was registered prior to 6 August 1965 (s 46(7) of Act 47 of 1937).
  - — Proof must be lodged that endowments have been paid and endowment properties have been transferred.
  - — The mortgage bonds over the property must be lodged together with the mortgagee's consents, either to release from or cancellation of the bond, or the issue of the certificate. If a portion of the erf is not being released from the mortgage bond(s), the certificate of registered title must be endorsed in respect of the mortgage bond(s).
- The township title must be lodged for endorsement (Registrars' Conference Resolution 13 of 1987).
- If the property is subject to an attachment, a certificate of registered title under section 43 cannot be taken out unless the attachment is withdrawn, or the consent of the sheriff is obtained (Registrars' Conference Resolution 52 of 1990).

We have now dealt with ten different certificates of registered title, and we will soon discuss other certificates of title, such as certificates of consolidated title, uniform title, township title and state title. However, before we proceed, let's consolidate what you have learnt so far with some self-evaluation questions. We need to prevent confusion — since these substituting titles are all very similar, but with crucial differences. Do not proceed unless you are fully conversant with all the certificates of title discussed so far.



Activity

1 Fanie Coetzee, identity number 6303131 5009 086, has, since the registration in his name of Erf 6, La Montagne, married Aletta in community of property — and then divorced her. The divorce court order provides for a division of the joint estate. Fanie is now anxious to register a mortgage bond over his undivided half share in Erf 6, La Montagne. Two applications will be required before Fanie can register a mortgage bond over his half share in the erf.

(a) Name the applications. (Hint: Refer to s 45*bis*(1A) in unit 7 and s 34(1) as discussed in this unit.)

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(b) Briefly discuss the procedure of issuing the certificate of registered title to Fanie, with reference to supporting documents.

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2 X is the owner of the township Ermelo. He wants to mortgage Erf 10, Ermelo. What procedure must he follow to do so? Discuss in detail.

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3 Y is the owner of Erf 4, Merrivale. He applies for a certificate of registered title in respect of Portion 1 of Erf 4, Merrivale. What supporting documents must accompany the application?

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4 Z is the owner of Erf 10, Dennelton. He owns one half of the erf by virtue of deed of transfer T 3/1998 and the other by virtue of deed of transfer T 2/ 1997. He would like to hold the property under a single title deed. Advise Z what he should do.

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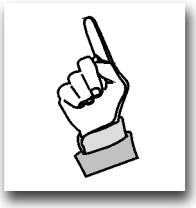
We will now proceed by discussing the remaining certificates of title or substituted deeds, namely certificates of consolidated title, uniform title, township title and state title. Each certificate has its own prescribed form. In analysing the respective clauses, only those that differ from the clauses already discussed will be highlighted.

11 Section 40: Certificate of consolidated title

11.1 Circumstances in which a certificate of consolidated title is issued

As the name indicates, a certificate of consolidated title consolidates two or more adjacent pieces of land belonging to the same owner, into a single unit of land.

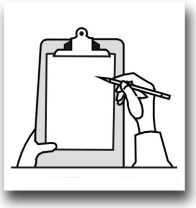
Why would one want to consolidate two or more pieces of land? It is usually to facilitate development, as you will see from the example below.



Example

X owns Erven 3 and 5, Kimberley. X consolidates the two properties into a single property, which will in future be known as Erf 9, Kimberley on which a sectional title scheme is to be developed.

In terms of section 40(8) of the Deeds Registries Act 47 of 1937, a diagram representing a combination of portions of two or more pieces of land will not be accepted in a deeds registry for purposes of transfer. A certificate of consolidated title of the land represented on the diagram must first be issued.



Activity

Consider for a moment: What is the difference between a certificate of consolidated title and a certificate of title of aggregate shares in terms of section 35?

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The crux lies therein that with a consolidation the separate properties are not only held under one title deed, but are actually merged into one property.

Before we continue with the prescribed form and supporting documents, as we did with the preceding substituting titles, we need to look at the special requirements or prerequisites for a certificate of consolidated title. Unless these requirements are present, there can be no consolidation.

11.2 Prerequisites

Section 40(1) of the Act stipulates a number of prerequisites for the issuing of a certificate of consolidated title, as follows.

11.2.1 Common boundary

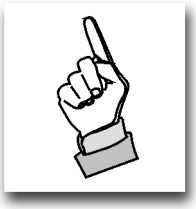
The pieces of land to be consolidated must be contiguous or adjacent to each other (s 40(1)(a)). This means that they must have a common boundary. When, however, land has been subdivided by the deduction of one or more intervening portions, the parts forming the remainder of the land are not regarded as separate pieces (reg 32*bis*).

11.2.2 Owners

The pieces of land that are to be consolidated **must be owned by the same person** or by **two or more persons, each holding undivided shares of the same size** in each of the components. If the separate pieces of land are owned by two or more persons, the consolidation can be effected only if the co-owners hold undivided shares of the same size in each of the separate pieces of land.

11.2.3 Consolidation diagram

A diagram must be prepared, in accordance with the Land Survey Act 9 of 1997, of the pieces of land that are to be consolidated into a single unit of land. The diagram must be **approved by the Surveyor-General**. As in the case of any other ''diagram deed'', the consolidation diagram must serve as a basis for the certificate of consolidated title. The components being consolidated must be described in the consolidation diagram. Should the Surveyor-General fail to give a description of the components in the consolidation diagram, a certificate by the Surveyor-General as envisaged in regulation 59 must be lodged with the application for a certificate of consolidated title. This certificate must contain a description of the components.



Example

X, Y and Z own two pieces of land, which are contiguous. X owns a one-third share, Y a half share and Z a one-sixth share in each of the two pieces of land.

A certificate of consolidated title may be registered in their names, whereby X will own a one-third share, Y a half share and Z a one-sixth share in the consolidated land.

Suppose, however, X owns a one-third share in one piece of land and a one-eighth share in the other piece of land, and Y and Z also own shares of different sizes in each of the two pieces of land. It is obviously impossible to issue a certificate of consolidated title in respect of the properties, even if X, Y and Z's total shareholding constitutes a total unit of the land. The reason for this is that X, Y and Z's shareholdings differ in respect of each piece of land.

11.2.4 Requirements for certificate

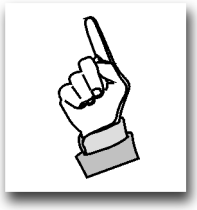
In the case of a **registered deed of lease or other registered deed** (except a mortgage bond), whereby another person holds a real right in the land, for instance a servitude right over a portion of the land to be consolidated, a certificate of **consolidated title cannot be registered, unless**:

- a diagram indicating the portion to which the lease or real right applies has been attached to the relevant deed

- diagrams reflecting the portion concerned are produced
- the diagram of the consolidated property clearly indicates, by means of dotted lines or some other means, that portion of the consolidated property that is affected by the lease or real right

11.2.5 Recording

The pieces of land that are about to be consolidated **must be recorded in the** same property register (s 40(1)(d)). This means that the separate pieces of land cannot for example be listed in registers of separate townships. An erf in one proclaimed township cannot be consolidated with an erf in another proclaimed township even through they are contiguous (Registrars' Conference Resolution 22 of 1972).



Example

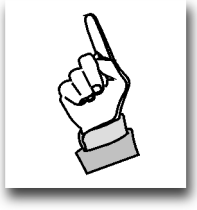
Two contiguous properties in the same township, for example Standerton, may be consolidated; but two contiguous properties in different townships, for example one in Standerton and the other in Heidelberg, cannot be consolidated.

By the same token, properties in different extensions of townships cannot be consolidated, since each extension is treated as a separate township. For example, an erf in Glenmore Extension 3 cannot be consolidated with an erf in Glenmore Extension 4.

In Eastern and Western Cape, where erven in townships are numbered in allotment areas, each allotment area falls under a single register, which means that an erf situated in one allotment area cannot be consolidated with an erf in another allotment area.

11.2.6 Administrative district

The pieces of land that are to be **consolidated must be situated in the same administrative district** (s 40(1)(e)) and province (s 40(1)(f)). One cannot obtain a certificate of consolidated title where properties are in different provinces, even if they are listed in the same Deeds register (Registrars' Conference Resolution 12 of 1996).

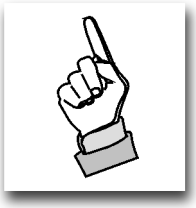


Example

A farm or a portion of a farm situated in the administrative district of Clanwilliam (Western Cape) cannot be consolidated with a farm or portion of a farm situated in the administrative district of Van Rhynsdorp (Western Cape). Furthermore, land situated in registration division JQ cannot be consolidated with land situated in registration division JR, even if the two pieces of land are contiguous.

11.2.7 Process of consolidation

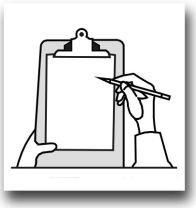
Two or more **erven cannot be consolidated directly from a township title** even if they comply with the above requirements. A certificate of registered title in terms of section 43 of the Deeds Registries Act 47 of 1937 must first be registered in respect of all the erven concerned (Registrars' Conference Resolution 10 of 1994).



Example

X owns the remainder of township Tableview, Cape Town, and wishes to consolidate two erven still held by virtue of the township title. Only after she has applied for a certificate of registered title in respect of the properties can she apply for the consolidation of the properties.

The **above conditions are cumulative and must all be met**. Once these conditions have been complied with, the title deed(s) of the components can be replaced by a certificate of consolidated title, provided that it complies with section 40 of the Act.



Activity

To facilitate future study, we suggest that you summarise the requirements to be complied with before one can apply for a certificate of consolidated title, as this is an important certificate of title that frequently comes up in conveyancing practice. (There should be at least eight points.)

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11.3 Prescribed form

The certificate of consolidated title must be issued in the prescribed form (s 40(1)). Although regulation 82 stipulates that a certificate of title to be issued by a registrar of deeds must be prepared substantially in the form provided in the Schedule of Forms annexed to the regulations, keep in mind that the provisions of the Act prevail above the provisions of the regulations. The certificate of consolidated title must therefore follow prescribed form O.

11.3.1 Preamble

The preamble to the deed must contain a description of the owner(s) who applied for the certificate. This description will be the same as discussed in unit 4.

11.3.2 Recital

The recital refers to the components and the title deed(s) under which they are held. The component areas concerned are not disclosed. The area of the new property, as it is indicated on the new diagram, may differ from the sum of the areas of all the components. The reason is that when a property is surveyed, there may be a few metres' difference, in comparison to what is shown in the title deed. If the difference is substantial, however, the property will have to be resurveyed.

11.3.3 Vesting clause

This clause will be identical to the vesting clause of a certificate of registered title discussed above.

11.3.4 Description of the property

The description of the property must mirror the diagram in all respects.

11.3.5 Extending clause

The extending clause must follow form **TT,** but with the omission of the title reference. In other words as follows:

> *Erf ... Linden Township*
>
> *Registration Division I. Q. Gauteng Province*
>
> *Measuring ... square metres*
>
> *as will appear from the annexed diagram SG* ..... (give the number of the consolidation diagram annexed).

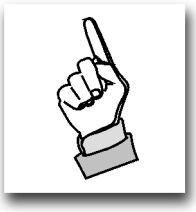
11.3.6 Conditional clause

All title conditions must be accounted for in the certificate of consolidated title, and must be fully qualified. Double qualifications and references to previous diagrams should be eliminated. Qualifications must be formulated anew, to refer to figures and lines on the consolidation diagram. With each consolidation, it must be established whether qualifications are required and to what extent. For instance:

11.3.6.1 Component parts subject to same general conditions

If the components that are to be consolidated are all subject to the same general conditions or the same servitude, no qualification is necessary. The entire consolidated property is simply made subject to those conditions or servitude.

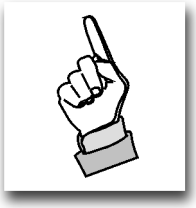
If reference to a servitude line is required, the servitude is described once only, referring to the full servitude line on the consolidated diagram.



Example

The property held hereunder is subject to a powerline servitude in favour of Eskom, as indicated by line XYZ on diagram SG ..... annexed hereto, as will more fully appear from Notarial Deed of Servitude No. .....

If the conditions or servitudes were created against different components by virtue of different (notarial) deeds, the conditions must be qualified in respect of each component, with reference to the respective deeds.



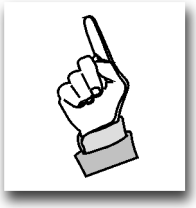
Example

The former Portion ..... of Farm ..... indicated by the figure ..... on diagram SG ..... annexed hereto, is subject to the following condition: ..... (State condition.)

11.3.6.2 Some component parts subject to same general conditions

If some, but not all, of the components are subject to certain conditions or a servitude, it stands to reason that qualifications must be provided, since the consolidated property as a whole cannot be made subject to the conditions or servitude.

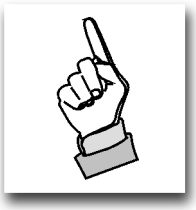
If the components that are subject to the conditions or servitude **are contiguous** to each other, the qualification should refer to the figure incorporating all the components.



Example

The former Portions ..... and ..... of the former Farm, expressed by the figure on the annexed diagram, are subject to/have the benefit of ...

If the components are **not contiguous,** it stands to reason that any qualification must refer to the separate figures on the consolidation diagram, but the condition(s) need be stated once only.

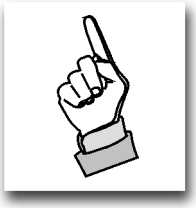


Example

''The former Portions ..... and ..... of the aforementioned farm indicated by the figures ..... and ..... respectively on the annexed diagram, are subject to/entitled to .....''

11.3.6.3 Different components subject to different conditions

If different components are subject to different conditions, the conditions in respect of each component must be qualified, even if they are of a general nature. Continual reference must be made to the previous descriptions of the components concerned.

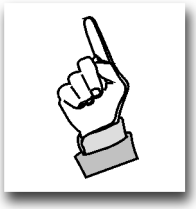


Example

The former Portion 10 of Farm ....., indicated by figure ....., on the annexed diagram, is subject to/has the benefit of the following conditions/ rights: ..... (State conditions/rights.)

11.3.6.4 General conditions and individual different conditions

If the components are all subject to the same general conditions, but certain of the conditions apply only to particular components, for example a condition prohibiting the erection of more than one dwelling on one of the components, the consolidated property in its entirety cannot be made subject to that condition. A detailed qualification is provided, clearly indicating that the condition concerned is restricted to a particular component. This is done by adding a qualification (in brackets after the restrictive condition).



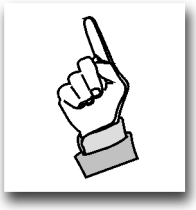
Example

(This condition applies to each of the former lots ..... and ..... represented by the figures ..... and ..... respectively, on the annexed diagram.)

11.3.6.5 Method of qualification

Note the following method of qualification of a condition or servitude:

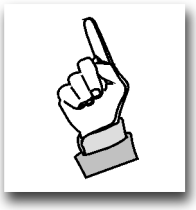
- If a servitude or condition that applies to a particular component has already been qualified in the title of that component, reference must be made to the original unit of land against which it was created.



Example

The Farm A (of which that portion indicated by the figure ..... on the annexed diagram forms a portion) is subject to/entitled to ..... as will appear from Notarial Deed of Servitude No. ..... (creative deed).

- If a servitude or condition is not qualified in the title of the component, the qualification contained in the certificate of consolidated title must refer to the component to which the condition/servitude previously applied.



Example

The former Portion 5 of the farm H ....., as indicated by the figure ..... on the annexed diagram, is subject to ..... as will more fully appear from ..... (creative deed).

It is important to note that references to figures on diagrams of previous consolidations and subdivisions of consolidations should be avoided at all costs. Furthermore, if a servitude or condition was created by virtue of a notarial deed, the condition should refer to the creative deed.

- No new conditions may be incorporated in the deed. For example, if the Premier imposes conditions in his/her consent to subdivision, they must be created by virtue of a notarial deed, unless they are being imposed in terms of an Act or proclamation, in which case they can be incorporated directly into the certificate of consolidation (Registrars' Conference Resolution 11 of 1986).

11.3.7 Execution clause

This clause will be identical to the execution clause in a certificate of registered title, as discussed earlier in this unit. (Remember that a certificate of title is not executed, only registered.)

11.4 Supporting documents

11.4.1 Application with details of owner

The application for a certificate of consolidated title by the owner or his/her representative in writing must be lodged (s 40(3)), providing comprehensive details of the owner, the components to be consolidated and the consolidated property. A registrar of deeds may not issue such a certificate on his/her own initiative.

11.4.2 Consolidation diagram

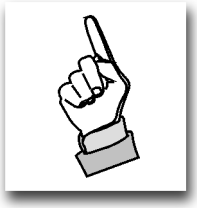
The consolidation diagram, as approved by the Surveyor-General, must be lodged in duplicate.

11.4.3 Title deeds

The title deed(s) of the components and any bonds involved must be submitted when one applies for a certificate of consolidated title (s 40(3)).

11.4.4 Bondholder's consent

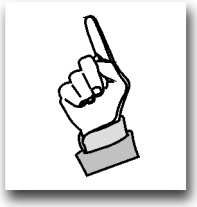
The bondholder's consent must be lodged, but if all the properties to be consolidated are held under one bond, that bondholder's consent to the consolidation is sufficient.



Example

Erven 3 and 4 of the township Durban are both hypothecated by mortgage bond B 33/1991. If these two properties are to be consolidated, the bondholder's consent will suffice.

If only a portion of the land represented on the new diagram has been mortgaged, no certificate may be issued, unless the bond is cancelled. On written application from the owner, however, and with the mortgagee's consent, all the land shown on the new diagram may be substituted for the land that was originally mortgaged under the bond (s 40(5)(a)).

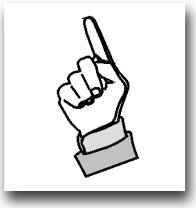


Example

Erf 3, Kimberley, is hypothecated by mortgage bond B 21/1976. It is to be consolidated with Erf 5, Kimberley, which is not hypothecated. The bondholder may consent to the consolidation and the substitution of the new consolidated property for the land held under the bond. In this instance, security of the bond actually increases.

Both the application and the consent must be prepared in accordance with form WW of the Act and must be furnished separately.

If different portions of the land represented on the new diagram have been mortgaged under different bonds, no certificate may be issued unless the bonds are cancelled (s 40(5)(b)).



Example

Erf 5, Meyerton, is hypothecated by mortgage bond B 3/1998 and Erf 6, Meyerton, by mortgage bond B 72/1994. The properties are to be consolidated. In terms of section 40(5)(b), one of the bonds will have to be cancelled. This means that one of the bondholders will have to consent to the cancellation of his bond, and the other bondholder to the substitution of the new consolidated property for the mortgaged erf, under section 40(5)(a).

11.4.5 Special consent

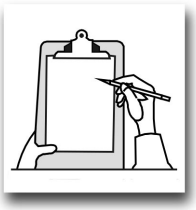
Usually, no special consent to consolidation is required from the authorities. In those provinces where the Premier's consent is required in terms of the ordinances, any conditions imposed by the Premier must be created notarially, with due regard to section 65(3) of the Deeds Registries Act 47 of 1937 (Registrars' Conference Resolution 16 of 1989 and 11 of 1986).

11.4.6 Attachment

If the property is subject to an attachment, it cannot be consolidated unless the attachment is withdrawn, or the consent of the sheriff is obtained (Registrars' Conference Resolution 52 of 1990).

11.4.7 Diagrams of components

Diagrams of components, if available, must be lodged for cancellation by the Surveyor-General. (For diagrams, lessees' and real right holders' consents see 11.2.3 above.)



Activity

1 X owns Erven 3 and 8, Malmesbury, and wishes to consolidate the properties. Erf 3 has been hypothecated. How should the bond be dealt with on consolidation? Discuss fully.

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2 X owns Erven 4 and 6, Hoopstad, and wishes to consolidate the properties. Erf 4 has been hypothecated under one mortgage bond and Erf 6 under a different mortgage bond. How should the bonds be dealt with on consolidation? Discuss fully.

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3 X owns Erven 2 and 3, Gezina, and wishes to consolidate the properties. Both properties have been hypothecated under the same mortgage bond. How should the bond be disposed of on consolidation? Discuss fully.

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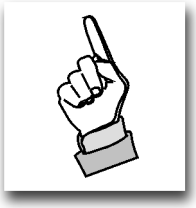
12 Section 46(4): Certificate of township title

12.1 Circumstances in which a certificate of township title is issued

If a township is being laid out on a portion of registered land held under a title deed, the registrar of deeds may not open the township register, unless a certificate of township title has been issued in respect of that portion of land (s 46(4)). Alternatively, a certificate of registered title in terms of section 43(1) can be issued (Registrars' Conference Resolution 16 of 2006). However, where a township is being laid out on the full property held under a title deed, it is not necessary to first obtain a certificate of registered title. The registrar of deeds may open the township register directly from that holding title deed.

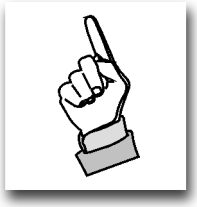


Example

X owns Portion 3 of the farm Rooihuiskraal 353 under deed of transfer T 2345/1985. X intends establishing a township (Magaliespark) on only a portion of Portion 3 of the farm Rooihuiskraal 353. X applies for a certificate of township title in respect of that portion. The property description will be as follows:

> *Portion 1 (a portion of Portion 3), now known as the township of Magaliespark, of the farm Rooihuiskraal 353, Registration Division JS, Province of Gauteng, in extent ....., as indicated on diagram SG.A ..... and held by .....*

Instead of the owner commencing with the establishment of a township on a portion of registered land and then being compelled to take out a certificate of township title in terms of section 46(4), he can first obtain a certificate of registered title under section 43 in respect of that portion and then proceed with the establishment of the township.



Example

X owns Portion 3 of the farm Rooihuiskraal 353. A township known as Magaliespark is to be established on a portion of the farm. X applies for a certificate of registered title in respect of that portion. The description of the property will be as follows:

> *''Portion 1 (a portion of Portion 3) of the farm Rooihuiskraal 353, Registration Division JS, Province of Gauteng, in extent ....., as indicated on diagram SG.A ' ..... and held by .....''.*

Once the certificate of title has been issued, X can apply for the opening of the township register and registration of the general plan, and the registrar of deeds will endorse the certificate with regard to the opening.

12.2 Prerequisites

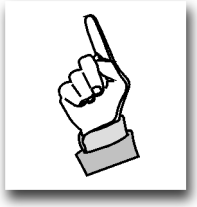
Section 43 applies *mutatis mutandis* to a certificate of township title. (See paragraph 10 of this unit in this regard.)

12.3 Prescribed form

The certificate must follow prescribed form V as closely as practicable.

12.3.1 Description of the property

The description must mirror the diagrams. The name of the township must appear after reference to the portion of the farm, but before the name and number of the farm and the registration division.



Example

''Portion 1 (a portion of Portion 3), now known as the township of Magaliespark, of the farm Rooihuiskraal 353, Registration Division JS, Province of Gauteng''

12.3.2 Extending clause

The extending clause must follow form **TT.**

12.3.3 Conditional clause

When the title conditions are transferred to the certificate of township title, no conditions should be omitted — even if the conditions pertaining to the

establishment of the township state that certain conditions do not affect the township or will not apply to erven in the township.

Furthermore, conditions that lapse on the Premier's declaration in the Official Gazette of an approved township should not be omitted from the certificate of township title. The establishment of a township is deemed to be complete only on publication of the Premier's declaration in the Gazette and any conditions remain binding up to that point, whereafter the certificate of township title will be endorsed to reflect the lapsing of the conditions.

12.4 Supporting documents

Note the following:

- A written application by the owner for the issue of a certificate of township title must be lodged (Registrars' Conference Resolution 47 of 1955). If any conditions have been imposed as a result of subdivision, the application must list these conditions in detail. A *caveat* will be noted against all the subdivisional erven that the conditions must be created on transfer.
- A copy of the general plan as recorded by the Surveyor-General, reflecting the portions and subdivision must be lodged (s 46(1)).
- A written application by the owner for the opening of a township register in respect of a new township must be lodged (Registrars' Conference Resolution 47 of 1955).
- The title deed of the land must be lodged.
- Any mortgage bonds encumbering the land must be lodged together with the mortgagee's consent to the endorsement of the bond to the effect that it attaches to the land described in the plan (s 46(2)). (It may happen that the new township is situated within the area of jurisdiction of the Johannesburg Registrar of Deeds, whereas the erstwhile farm property and the bonds fell under the Pretoria Registrar of Deeds. In such a case the bond[s] must either be cancelled or the township or the remainder of the property still held under the existing title must be released from the operation of the bond.)
- A certificate, issued by the municipality concerned must be lodged, to the effect that all conditions pertaining to any subdivisions have been complied with. This requirement only applies in the Western and Eastern Cape (s 3(1) of Ordinance 15 of 1985).
- The general plan of the township must be lodged in duplicate, within one year of being approved by the Surveyor-General, failing which the Premier of the province may consent to an extension of this period.
- Proof must be lodged that the applicant has complied with any conditions imposed by the Premier.

Activity

How are the property conditions dealt with when a certificate of township title is issued?

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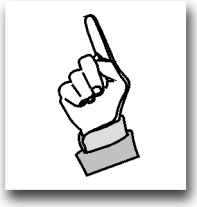
13.1 Circumstances in which a certificate of registered state title is issued

Often land owned by the State, which has not been alienated, has never been surveyed and is therefore not registered in any deeds registry. Before such land can be registered, it must be identified on a general plan or diagram approved by a Surveyor-General. A certificate of registered state title must, however, be obtained if the state intends creating or dealing with or disposing of any real right in any piece of unalienated state land (s 18(5)).



Example

The Republic of South Africa owns the farm Frankfort, No. 10, which has never been surveyed or registered. The State wishes to register a servitude in favour of Eskom over the property. To do this, the farm must first be surveyed and depicted on an approved diagram, after which the State must apply for a certificate of state title.

A certificate of registered state title is therefore a certificate of land ownership, prepared by a conveyancer and issued by a registrar of deeds, on the written application of the Minister of Public Works or an officer of the State authorised by the Minister. This enables a title to be created for a specific, surveyed, unalienated piece of state land (s 18(3)).

13.2 Prerequisites

Since there will be no record of the land in a deeds registry (as it has never been registered), the land must first be surveyed and depicted on a diagram approved by the Surveyor-General.

13.3 Prescribed form

Form D is the prescribed form for this certificate.

13.3.1 Preparation clause

In contrast to a deed of grant, this certificate must contain a preparation clause.

13.3.2 Description of the property

The description of the property must mirror the diagram exactly.

13.3.3 Extending clause

This clause will follow form **TT** and will not contain any reference to a title deed.

13.3.4 Conditional clause

This certificate does not contain any conditions.

13.4 Supporting documents

Note the following:

- A written application by the Minister of Public Works or an officer of the State authorised by him/her must be lodged.
- A diagram must be lodged in duplicate together with the certificate of registered state title.

As no registered title exists, there will be no title to examine or endorse.

14 Summary

We have now discussed all the different forms of substituted title:

- certificate of title of undivided share (s 34(1))
- certificate of title of an undivided share in the case of a lost or destroyed title deed (s 34(2))
- certificate of title of aggregate shares (s 35)
- certificate of title of one or more properties held under one title deed (s 36)
- certificate of title taking the place of a lost or destroyed deed (deeds office copy of) (s 38)
- certificate of title to correct an error in registration (s 39(1))
- certificate of title to omit obsolete conditions (s 39(2))
- certificate of title of a portion of a piece of land (s 43)
- certificate of consolidated title (s 40)
- certificate of uniform title (s 42)
- certificate of township title (s 46)
- certificate of registered state title (s 18(5))

UNIT 9

Types of mortgage bonds

1 Introduction

Having identified and analysed the different certificates of registered title, we will now look closely at different types of bonds.

Let us consider the following key questions:

- What is a mortgage bond and how does it differ from a notarial bond?
- What are the purposes and requirements of the different kinds of bond?
- Which legal exceptions should be waived and under what circumstances?
- How are title conditions dealt with on registration of a mortgage bond?

Please remember to refer to the study guidelines in Tutorial Letter 101 to focus on the most important parts of this unit for examination purposes.

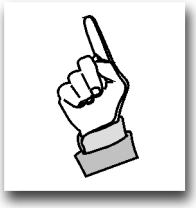
2 Mortgage bond

What is a mortgage bond? The definition in section 102 of the Deeds Registries Act 47 of 1937 is not very helpful. It defines a ''bond'' or ''mortgage bond'' as a bond, attested by the registrar, which specially hypothecates immovable property.

In Law of Property (heading 4 in unit 11) you learnt that ''*a mortgage can be defined as a limited real right over a thing belonging to the mortgagor in order to secure repayment of a debt owed by the mortgagor or a third person to the mortgagee*''.

In brief, a mortgage bond is a method whereby a creditor secures repayment of a debt by the debtor/mortgagor. By registering a mortgage bond in his/her favour over the immovable property of the debtor, the creditor, on registration of the mortgage bond, converts his/her personal right for payment to a real right enforceable against third parties (*Estate Chin v National Bank* 1925 AD 353).

A registered owner of land benefits in that he/she can access credit from a financial institution by providing his/her land as security for the payment or repayment of any monies owing. A mortgage bond is then registered over the land in favour of the creditor (mortgagee, usually a financial institution), whereafter the title deed of the land will bear an endorsement indicating that the land held under that title is subject to the mortgage bond, preventing the registered owner from dealing freely with that land because the mortgagee's consent to such dealings will be required in most instances. The limited real security vests the moment registration takes place in a deeds registry; in other words, the moment the registrar of deeds affixes his/her signature to the bond (s 13 of the Act) the mortgagee acquires a limited real security right over the land of the mortgagor designated in the bond.



Example

X is the registered owner of Erf 3, Khyalitsha. He borrows R100 000,00 from S Bank Limited. X offers Erf 3, Khyalitsha, as security for the debt. S Bank demands that a bond be registered in their favour over this property (otherwise they will have a personal right only against X for repayment of the debt over the property, which is not enforceable against a third party). X will have to pay interest on the outstanding debt and both X and S Bank will agree on the period within which X will repay the debt.

What do we mean when we say the mortgagee acquires a real security right enforceable against third parties? After all, the debtor is the owner of the property, so what third parties can there be? Other creditors! Should the mortgagor/debtor be declared insolvent or even have the property attached and sold in execution by another creditor, the bondholder/mortgagee will be a secured creditor and his/her claim will be paid **first** from the proceeds of the sale of that land, that is the mortgagor has a preferential claim which he/she can enforce against third parties who acquired rights to/over the land after the vesting of his/her real right.

A mortgage bond therefore:

- **vests a limited real security right,** which affords the bondholder/mortgagee a preferential claim to the proceeds of the burdened immovable property
- **prevents** the debtor/mortgagor **from alienating the immovable property** without the knowledge and consent of the bondholder

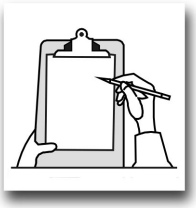
A notarial bond likewise serves as security and is registered in the deeds registry. However, the security under a notarial bond is **movable** property and it is executed before and attested by a notary public. In addition only a notarial bond in terms of the Security by Means of Movable Property Act 57 of 1993 provides real security on registration (see LPL417G).

2.1 Requirements for a mortgage bond

The following items must be present for a mortgage bond to come into existence:

- There must be **an agreement to create a debt** or obligation, which may not be *contra bones mores*. (For instance, in the above example X owes S Bank R100 000,00.)
- There must be **immovable property** that is capable of being mortgaged (in the example given in the introduction above, Erf 3, Khyalitsha).

- There must be **a deed (bond) calling** the mortgage right into existence (the mortgage bond that is to be **registered in the deeds registry**).



Activity

Explain the purpose of a conventional mortgage bond in your own words.

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2.2 Structure of a bond

The Deeds Registries Act 47 of 1937 does not prescribe a form for conventional bonds (only for **collateral** bonds (form KK) and **surety** bonds (form LL)). The standard structure and form for a conventional mortgage bond has thus emerged over the years from common practice and deeds office requirements. To be acceptable for registration a mortgage bond must be prepared by a conveyancer, and must at least clearly identify the mortgagor, mortgagee, cause of debt/ obligation and the immovable property serving as security under the mortgage bond. The standard structure of what we refer to as ''conventional'' mortgage bonds can be analysed as follows.

2.2.1 Heading

The heading will usually be ''Mortgage Bond'' or ''Bond''. Depending on the nature and purpose of the bond the heading may also indicate that it is a collateral, surety, participation, covering, debenture, *kinderbewys* or substituted bond. We shall briefly discuss these different types of bond below.

2.2.2 Preparation clause

What we said about the preparation clause in unit 4 applies to bonds too.

2.2.3 Preamble

The preamble will contain the following:

- the name of the conveyancer appearing before the registrar of deeds on behalf of the mortgagor who must also be the property owner, as well as the date and place of the signing of the power of attorney in terms of which that person is acting
- a description of the mortgagor, just as the transferor is described in the preamble to a deed of transfer (see unit 4)

If, in the above example, an agent appears before the registrar of deeds on behalf of X, the preamble will read as follows:

Be it hereby made known that LEON LOUW

appeared before me, the Registrar of Deeds, at Pretoria, the said Appearer being duly authorised hereto by virtue of a power of attorney signed on 15 May 2007 at Tswane and granted to him by

X (full names)

Identity number

Marital status ...

The **mortgagor** is the person who borrows the money or is liable for the obligations reflected in the bond, or the person who stands surety for the obligations of the actual debtor. Either the mortgagor or his agent (conveyancer) signs the bond (a unilateral document) before the registrar of deeds in terms of which the real security rights over the property are given to the mortgagee/recipient creditor.

Section 50 of the Deeds Registries Act 47 of 1937 states that mortgage bonds must be executed before a registrar by the owner of the immovable property described in the bond, or by a conveyancer duly authorised to do so by a power of attorney given by the owner.

2.2.4 Acknowledgment clause

In the acknowledgment clause, X (in our example) acknowledges that he owes the money to S Bank and gives the reason for the debt.

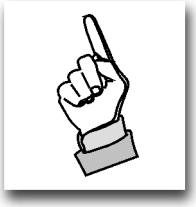
In an ordinary bond, the acknowledgment will read as follows:

> *... and the appearer acknowledged his principal, the said X, to be lawfully indebted to S Bank Limited (registration number ...), the said debt being for monies lent and advanced.*

2.2.5 Mortgagee (bondholder)

The **mortgagee** is the person in whose favour the bond is passed, in other words the creditor. In our example, the mortgagee is **S Bank Limited**. The mortgagee is described in the same manner as the transferee in the deed of transfer. (Consult unit 4.)

As a general rule there may be more than one mortgagee/bondholder in a single mortgage bond; however, debts or obligations to more than one bondholder (creditor) **arising from different causes** may not be secured by a single mortgage bond (s 50(5) of the Act), save as provided by a law other than the Deeds Registries Act 47 of 1937 or a court order.



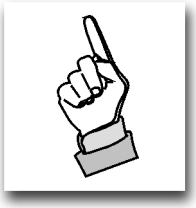
Example

X owes Y money as a result of money lent to X by Y.

X owes Z money, too, since X stood surety for money which Z lent to Q. In this case, two different bonds will have to be registered: one drawn up between X and Y and another between X and Z, because of the different reasons for the debts.

If both Y and Z lent X money, a single mortgage bond can be drawn up between X (as mortgagor) and Y and Z (as mortgagees).

A mortgage **bond may not be passed** in favour of two or more persons where the mortgage **bond provides that the share of one mortgagee ranks prior** in order of preference to the share of another mortgagee. By the same token, no transaction may be registered which would **have the effect of giving preference** to the share of one bondholder over another bondholder (s 55(2) of the Act).



Example

In a situation where X owes both Y and Z money, it cannot, for instance, be stated in the bond that Y has a preferential claim to the money.

Activity

A mortgage bond in favour of two mortgagees is lodged for registration at a deeds registry. From the conditions contained in the bond, you ascertain that the debt in favour of the respective mortgagees arose from different causes, and that the share of the first mortgagee ranks prior in order of preference to the share of the other mortgagee. Is such a bond registrable in a deeds registry?

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2.2.6 Amount

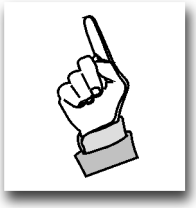
The Act does not state that the amount of the debt must be disclosed in the bond. In practice, however, this is always done. A deeds office registration fee/levy is payable for bonds, among other things, which is calculated on the amount of the debt secured. In a bond which is intended to secure future debts (as opposed to existing debt), the fixed sum must be disclosed as an amount beyond which future debts will not be secured by the mortgage bond (s 51(1) of the Act). In the example given in the introduction, the bond will for instance state that X owes S Bank R100 000,00 (the capital sum) and a further sum which will not exceed R10 000,00 for future debts.

Note that although not required by legislation, it is established practice to stipulate the bond amount. The reason for this can be found in the purpose of registering the mortgage bond: that is, to provide the creditor with a secured claim and registration in the deeds office, which serves as publication to other third parties of the bondholder's rights in this regard; it is also in the interest of the secured creditor, the debtor and third parties that the extent of the secured claim be determined.

Since the amount of the bond is not required by legislation, it is possible for a bond amount to be expressed in foreign currency. In such a case a certificate from a commercial bank reflecting the exchange rate on the date of registration must be

produced. If, for example, the bond states that X owes S Bank $25 000,00, the certificate will state that according to the exchange rate, this amount is equivalent to R200 000,00 (or whatever amount is applicable at the time of registration).

If there are co-mortgagees, the full amount of the bond must be mentioned first and thereafter the separate amounts due to each mortgagee (Registrars' Conference Resolution 21 of 1954).

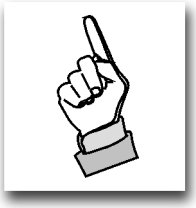


Example

If X owes S Bank Limited and ABSA Bank Limited R20 000,00 and R80 000,00 respectively and a single bond is registered for the total debt of R100 000,00, the bond will state that X owes S Bank R20 000,00 and ABSA Bank R80 000,00.

2.2.7 Cause of debt or causa of the bond

The reason for the existence of a mortgage (evidenced by the mortgage bond) is to provide security for a debt for which a creditor has a claim for payment against a debtor. If there is no claim in respect of a debt, there can be no bond (*Kirburn v Estate Kilburn* 1931 AD 501 on 505–506).



Example

In the example given in the introduction, S Bank is entitled to claim the full R100 000,00 which X owes S Bank. The *causa* of the bond will, for example, read as follows:

> *R100 000,00 (ONE HUNDRED THOUSAND RAND), being money lent and advanced, being the capital amount of the actual loan*

An agreement to create an obligation between a creditor and a debtor is generally referred to as the reason for or *causa* of the bond. The most common examples of such a reason or cause are money lent and advanced or to be advanced, goods sold and delivered or to be delivered, the balance of the purchase price of immovable property, professional services rendered and so forth. Section 50(2) of the Act even makes it possible to secure future debts by way of a covering bond.

Furthermore, the registration of a bond can also arise from more than one cause of debt. A bond may for example be registered for an amount of R40 000,00 of which R30 000,00 is for money lent and advanced and R10 000,00 for goods sold and delivered. However, as stated before, section 50(5) of the Deeds Registries Act 47 of 1937 provides that debts or obligations to more than one creditor arising from different causes may not be secured by a single mortgage bond, unless this is authorised by another law or by a court order.

The cause of debt must not be illegal, for example the securing of debt to cover blackmail debts.

2.2.8 Waiver of legal exceptions

A debtor is entitled to introduce certain exceptions with regard to his/her liability for payment, as defences in the event of a mortgagee applying for a foreclosure of the bond, thereby placing the burden of proof on the plaintiff/mortgagee to disprove the allegations. These defences, dating from Roman times, are often not compatible with contemporary financial transactions; accordingly financial institutions generally insist that mortgagors/debtors waive the benefit of these exceptions as a condition for providing the finance. By waiving these exceptions in the mortgage bond, the mortgagor will not be able to raise them against the mortgagee when the latter demands payment.

2.2.8.1 *Non causa debiti*

This means that the debt has no cause or *causa* (*Conradie v Rossouw* 1919 AD 279). This exception is renounced in any bond not securing a monetary loan but for instance securing payment of goods sold and delivered.

2.2.8.2 *Non numeratae pecuniae*

This exception avers that although the mortgagor/debtor signed the acknowledgment of debt, the money mentioned in the acknowledgment of debt was not actually paid to him/her. Of course with the electronic payments used today, such a defence could be costly, cause delays and be difficult to refute. This exception is waived in bonds where the *causa* is ''*money lent and advanced*''. A renunciation of this exception places the burden of proof on the defendant/mortgagor, who is required to prove for his/her successful defence that he/she did not receive the money (*Cohen v Louis Blumberg* 1949(2) SA 849).

2.2.8.3 *"Revision of accounts", errore calculi* and "no value received"

These three exceptions usually appear together. Waiver of these exceptions will mean that where the financial institution forecloses on the mortgage bond and claims a certain sum which they aver is outstanding, it will be up to the mortgagor/defendant to prove that this claimed sum is incorrect, and not for the financial institution to meticulously prove, item by item, that their calculation is in fact correct. These three exceptions thus apply where money changed hands and written records exist of the transaction(s) concerned. They are then usually waived in bonds where the cause of debt is goods sold and delivered and to bonds in favour of financial institutions, when the capital is paid back in instalments.

2.2.8.4 *De duobus vel pluribus reis debendi*

In general, where two or more persons bind themselves as **co-principal debtors**, they are each only liable for their specific proportions of the debt. If a creditor should claim the full amount from one of the creditors, that creditor can successfully raise this exception as a defence. However, if the benefit of this exception is renounced, each debtor (mortgagor) is jointly and severally liable for the debt and cannot, in a foreclosure case, raise as a defence the fact that the plaintiff can claim proportionately only from the individual co-debtors. The waiver of this exception is thus necessary in mortgage bonds where there is more than one mortgagor or debtor.

2.2.8.5 *Beneficium ordinis seu excussiones*

As a general rule, where a debt is due by a debtor, which debt is also secured by a suretyship of a third party, the creditor is obliged to first fully excuse or ''shake out'' the debtor before the creditor may claim from the surety. Should the creditor not to do this, but claim directly from the surety, this exception is thus available to a **surety** to compel a creditor to proceed against the principal debtor first and obtain all he/she can from that debtor's estate before proceeding against the surety. The renunciation of this exception allows the creditor to proceed against the surety before proceeding against the principal debtor, should he/she wish to do so. The renunciation of this exception is found, *inter alia,* in surety bonds.

2.2.8.6 *Beneficium divisionis*

Where there is more than one surety for a debt, the creditor is as a general rule obliged to claim only proportionally from each surety, failing which the defendant surety can successfully raise this exception. This exception (similar to 2.2.8.4 above) thus prevents the creditor from holding a **surety liable** and being sued for more than his/her *pro rata* share.

Where the sureties renounce the benefit of this exception, it permits the creditor to sue any one of the sureties separately for the full amount outstanding, without reference to the other sureties. This renunciation, too, is found *inter alia* in surety bonds.

Activity

1 What exceptions will be waived in the example used in the introduction?

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2 What particular legal exception(s) should be renounced in the following mortgage bonds?

- A passes a bond in favour of X for R50 000,00, being the purchase price of goods sold and delivered, with interest payable biannually and the capital to be repaid in full within five years from the date of registration of the bond.

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- A passes a continuing covering security bond in favour of X for R100 000,00 in respect of money lent and advanced and in terms of which A is to pay to X monthly instalments of R1 699,00 in redemption of capital and interest.

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2.2.9 Interest and repayment clauses

There is no statutory requirement that interest rates be disclosed in bonds. The National Credit Act 34 of 2005 limits the interest rates, but the registrar of deeds is not obliged to ensure that there has been compliance in this regard. Notwithstanding this and the fact that most mortgage bonds also provide for variable interest rates, it is common practice to disclose the current interest rates in mortgage bonds.

As regards the repayment of the capital amount and the interest thereon, this depends on the agreement between the parties. It is usually repayable in instalments, together with the interest, within a certain period.

In the example given in the introduction above, this clause will probably read something like this:

> *... which aforesaid sum of R100 000,00 and the interest thereon calculated at the rate of 15% per annum from the date of registration of the bond, X is hereby bound to pay or cause to be paid to S Bank ...*

2.2.10 Cost clause

The cost clause secures the payment of any costs and expenses the creditor may have incurred, for which the debtor/mortgagor is liable, over and above the original amount of the debt already secured by the mortgage bond. In other words, in the example provided in the introduction, X may borrow R100 000,00 from **S Bank**, who will register a mortgage bond securing the repayment of that R100 000,00. However, should X fail to make the repayments S Bank may find that in addition to the capital sum of R100 000,00, X owes S Bank interest on the capital sum owed, legal costs, insurance premiums, municipal taxes and even maintenance and security costs for the property, which exceeds and is not secured by the bond sum of R100 000,00. For this reason mortgage bonds usually include additional security for the creditor in respect of costs and expenses in the form of the costs clause. In the event of the mortgagor failing to fulfil his/her obligations in terms of the mortgage bond, this clause secures the mortgagor's contributions on behalf of the mortgagee in regard to insurance premiums, taxes, etc, as well as legal expenses incurred in suing for the recovery of the amount due under the bond. The repayment of these costs incurred by the mortgagee then enjoy

preference above the unsecured claims of third parties. The additional amount mentioned in the bond to secure the abovementioned costs usually constitutes 20 per cent of the capital sum of the mortgage bond. If these expenses are not incurred, they are of course not recoverable and therefore also not secured by the mortgage bond.

Not all bonds contain cost clauses, since the amount which is available to secure future advances may, in the case of a covering bond, include the amount allocated for costs.

2.2.11 Ranking

The Deeds Registries Act 47 of 1937 or the regulations do not require that a mortgage bond must disclose the order in which it ranks over the bonded property. If the mortgagee has not waived preference in respect of his/her mortgage bond, the mortgage bond's rank against earlier or subsequent mortgage bonds is in order of preference according to their date of registration/execution by the registrar: *qui prior est tempore potior est iure* — freely translated, ''that which is earlier in time ranks higher in law''.

The practice of disclosing the ranking of a specific bond is, however, an old and established one. It indicates the ranking that a specific bond enjoys at the time of registration: that is, whether it is a first, second or third bond over a specific property. A bond cannot, however, be denied registration if it is described only as a mortgage bond and not as a first, second or third mortgage bond, etc. The ranking simply indicates the preference to which the creditor is entitled in respect of a secured debt against a particular property. Where two or more mortgage bonds enjoy the **same ranking** or preference, the preference or ranking is said to be *pari passu* (literally translated, ''on an equal footing'').

If two or more mortgage bonds are passed on the same day by the same mortgagor over the same property, the registrar must, if each bond does not disclose the order in which it is to rank, note on each bond the exact time at which he/she affixed his/her signature to the bond (reg 45(4) of the Act). If two bonds are to be registered simultaneously and are deemed to rank *pari passu*, no waiver is required if the ranking clauses in both powers of attorney are clear as to the intention (legal advisor's opinion 1/65/42 dated 24-04-1962 at the office of the Chief Registrar of Deeds). In this instance the ranking clause in the bond will read as follows:

> *A bond that ranks* pari passu *with Mortgage Bond No. B ...../20 ..... in favour of ..... registered this day*

A mortgagee's consent is not required in respect of the waiver of preference, since the statements contained in the power of attorney are sufficient authorisation for the registration of the *pari passu* ranking.

In the example given in the introduction, if X owes ABSA Bank Limited R100 000,00, S Bank and ABSA can agree that the bonds being registered in their favour should rank equally as first bonds over the property. The ranking clause of each bond will then read as follows:

> *... and for the security of the above obligations the appearer declares that this bond ranks* pari passu *with a bond registered on this day in favour of ..... for the sum of R .....*

It is important to note the following:

- Any charge against land must be mentioned in the ranking clause of a bond because previously registered charges enjoy preference over the new bond, for example as follows:

  A first bond subject to Charge No. 359/1982 registered on 25 November 1982 for an amount of R1 000,00

  (You will learn more about charges later in this unit, point 12, (p203) but in essence it involves a hold that the State, provincial or local authority has over a property in terms of legislation, in respect of obligations/debt owed to the state, provincial or local authority.)
- A contract for the sale of land in instalments in terms of section 20 of the Alienation of Land Act 68 of 1981, which is recorded in the deeds office, must be mentioned in the ranking clause, for example as follows:

  A first bond subject to mortgage bond B 792/2006AL

  This is because the purchaser's rights enjoy preference over those of the new mortgagee. The purchaser cannot waive preference of his/her rights in favour of a new bond (s 29 of Act 68 of 1981).

2.2.12 Property and security clauses

Only immovable property as defined in section 102 of the Deeds Registries Act 47 of 1937 may serve as security for a debt under a mortgage bond. The immovable property may be registered land or a registered real right (for example a usufruct — see glossary if you are not sure what that is). In the example given in the introduction, if X is the holder of a registered usufruct he would be able to offer that as security for the debt, although it would not be very good security. Can you explain why? (Hint: usufructs are always for a limited time period.)

Every mortgage bond must contain a full and clear description of the property to be hypothecated, including the extent of the property. If two or more properties are to be hypothecated, each property must be described in a separate numbered paragraph. The number (comprising the serial number and year) of the relevant title deed must be quoted in each paragraph. If more than one property is held by one and the same deed, the number of the deed can be quoted after the description of the last property (reg 41(2)). (Refer to unit 4 for the manner in which property is described.)

2.2.13 Special conditions of title

If a person wishes to mortgage land held under existing special conditions limiting the rights of the owner, the registrar of deeds may require those conditions to be set out in the bond or a suitable reference to be made to the conditions (reg 41(1) of the Act).

For the sake of uniformity, it has been decided that when land is subject to a pre-emptive right, a right of reversion, etc, the bond should be made specially subject to that right (Registrars' Conference Resolution 5 of 1987 and 22 of 2005).

It is important to note the following conditions of title and how they are dealt with in practice.

2.2.13.1 General conditions: township conditions, praedial servitudes, etc

Here the land is described as being ''*subject to the conditions of title*''.

2.2.13.2 Restriction in respect of mortgaging, alienating or disposing of land

Where a title deed contains a condition that the land described in the title deed may not be alienated and/or mortgaged without the written consent of a specific person, an underhand consent must be obtained from the person concerned, in which the bond is properly identified, and this consent must be filed with the mortgage bond.

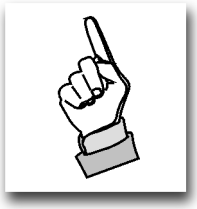
Note that a restraint on ''alienation'' automatically includes a restraint on the mortgage of the property concerned; where such a property is to be mortgaged, the consent of the holder of the right must be obtained and lodged (Registrars' Conference Resolution 2 of 2006).

If a condition states that the property may not be ''disposed'' of, this term does not include mortgaging and it is thus not necessary to obtain consent for the registration of the bond. If the holder of a pre-emptive right, right of reversion or other restraint on the ownership does not waive preference of the right or restraint in favour of the bond, the bond **should** be made subject to the right or restraint (reg 411 of the Act; Registrars' Conference Resolution 52 of 1958, 35 of 1962, 5 of 1987 and 22 of 2005).

2.2.13.3 A lease

If the land which is to be mortgaged is subject to a lease, the lessee's consent is not required in order to hypothecate the leased land, but the fact that the land is subject to a lease must be disclosed in the bond *(Huur gaat voor koop)*.

The lessee of a registered long lease can waive preference in favour of the mortgage, either by **notarial** deed or in the **mortgage bond** itself (reg 41(7) and Registrars' Conference Resolution 20 of 1966). In each case, the condition must be quoted in full in the bond. If the preference is waived in the bond itself, the lessee must give a conveyancer a power of attorney to appear on his/her behalf before the registrar of deeds to waive his/her right of preference in favour of the bond. The waiver clause appears at the end of the mortgage bond, just before the execution clause.



Example

Also appeared the said ... duly authorised by a power of attorney executed at ... on ... and granted to him by X, Identify number xxxxxxx, unmarried. And the Appearer, on behalf of the said X, waived and postponed in favour of this mortgage bond, the lease over the said property held by his principal by virtue of ...

2.2.13.4 Reversionary right

If land is subject to a condition that in the event of a certain occurrence the property reverts to a person mentioned in the condition, there are various ways in which it can be dealt with:

- Firstly, the land can simply be made subject to the condition, in which case the condition must be quoted in full in the bond. Since a reversionary right enjoys preference over the bond and therefore diminishes the security, a bondholder will not easily accept it and as a rule it is not done. For example a general condition in such an instance may read as follows:

  Subject to the conditions of title and a reversionary right in favour of the City Council of Pretoria.

- Secondly, the holder of the reversionary right can consent to the registration of the bond (s 53(2) of the Act). Such underhand consent is prepared by a conveyancer, must be in writing and is filed with the bond. Here the holder of the reversionary right has merely consented to the registration of the mortgage bond, but has not waived any of his/her reversionary rights. Should the mortgagor fail to meet his/her obligations under the mortgage bond and the mortgagee forecloses, the reversionary rights will still prevail and will have to be complied with before the property may be transferred in terms of a sale in execution.
- Thirdly, the holder of the right can waive his/her right of preference in favour of the bond (s 3(1)(i) of the Act), in which case the condition must be quoted in full in the bond. Where there has been a waiver, and the property is subsequently sold in execution at the instance of the mortgagee, the transfer to the execution sale purchaser may proceed without reference to or compliance with the reversionary right, which was waived. The waiver is effected either by means of a separate notarial deed which means that the new bond must be endorsed in regard to the waiver, or the waiver can be incorporated in the new bond (reg 41(7) of the Act and Registrars' Conference Resolution 17 of 2006). In the latter case the holder of the right gives a conveyancer, usually the conveyancer who is executing the bond on behalf of the mortgagor, power of attorney to appear on his/her behalf before the registrar of deeds and to waive his/her right of preference in favour of the bond. The waiver clause appears at the end of the bond, just before the execution clause. Here, the general condition may, for example, read as follows:

  Subject to the conditions of title and a reversionary right in favour of the City Council of Pretoria, which right is being waived in favour of this bond, as will appear later on in the bond.

- Fourthly, the owner of the land, which is subject to the reversionary right and the holder of the right (if he/she has the capacity to do so) can jointly and severally hypothecate the land (s 53(2)). This can only happen if the holder of the reversionary right is a co-debtor. In this case, the condition will not be set out in the bond and the mortgagors will be described as follows:

  ..... *the owner of the land; and*
  ..... *the holder of the reversionary right*

2.2.13.5 Personal servitudes (usufruct, *usus* and *habitatio*) and other real rights

If the land being hypothecated is subject to a personal servitude or usufruct, *usus* or *habitatio,* there are various methods of dealing with this in the bond.

- Firstly, the land described in the bond can simply be made subject to such personal servitudes and the servitude concerned must be quoted in full in the bond. Since the personal servitude or other real right then enjoys preference over the bond and therefore diminishes security, the bondholder will not easily

accept it and as a rule it is not done. However if it is, the general condition may for example read as follows:

Subject to the conditions of title and a lifelong usufruct in favour of Emma Geel, Identity number 520110 0032 002, unmarried.

- Secondly, the holder of the personal servitude can waive his/her right of preference in favour of the bond (s 3(1)(i) of the Act), in which case the condition must be set out in full in the bond. Where there has been such a waiver, and the property is subsequently sold in execution at the instance of the mortgagee, the transfer to the execution sale purchaser may proceed without reference to or compliance with the personal servitude or other real right, which was waived. The waiver can be effected either by way of a separate notarial deed, which means that the new bond must be endorsed in regard to the waiver, or the waiver can be incorporated in the new bond (reg 41(7) of the Act). In the latter case the holder of the right gives a conveyancer, usually the conveyancer who is executing the bond on behalf of the mortgagor, power of attorney to appear on his/her behalf before the registrar of deeds and to waive his/her right of preference in favour of the bond. The waiver clause appears at the end of the bond, just before the execution clause. If the personal servitude is held under a separate title, the waiver must be noted on it (reg 41(7) of the Act). An example of a general condition in such an instance will read as follows:

  Subject to the conditions of the title and a lifelong usufruct in favour of Emma Geel, identity number 5201 100032 002, unmarried, which right is being waived in favour of this bond, as will appear later on in the bond.

- Thirdly, the owner of the bare *dominium* and the holder of the personal servitude may jointly and severally mortgage the land to the full extent of their respective rights in the land (s 69(3) of the Act). This can only happen if the holder of the personal servitude is a co-debtor. In this case, the condition will not be set out in the bond and the mortgagors will, depending on the details, be described as follows:

  .....

  ..... *Identity number*

  ..... *unmarried*

  The bare dominium owner of the undermentioned land and

  .....

  ..... *Identity number*

  ..... *unmarried*

  The holder of the usufruct/usus/habitatio

- Fourthly, the owner or the bare dominium may pass a principal bond over the property, and the holder of the personal servitude can bind the personal servitude as surety in the same bond (s 69(4) of the Act). In such an instance full details of the servitude must be set out in the bond.

2.2.13.6 A *fideicommissum*

If land is subject to a *fideicommissum*, the security under the mortgage bond is of limited value and duration. Nevertheless, the bond may be registered subject to the *fideicommissum* and the mortgagor will be described as follows:

X

Identity number

Unmarried

the fiduciarius of the undermentioned land

(The plural of ***fiduciarius*** or **fiduciary** is *fiduciarii* or fiduciaries.)

2.2.13.7 Expropriation of a portion which has not yet been transferred to the expropriating authority

In this case, the bond must be made subject to the expropriation to indicate that the expropriated land is not encumbered by the bond.

2.2.13.8 Restriction against separate alienation of properties

If the land being bonded is notarially linked to and subject to a restriction against separate alienation of the land, the bond must specifically be made subject to that restriction.

2.2.13.9 Attachment against the property

If an attachment is noted against the land, it may not be mortgaged until the attachment has been uplifted.

2.2.14 Conditions

As a general rule any condition may be inserted in the bond or an annexure to the bond. However, manifestly illegal conditions or dishonest conditions that seek to disguise the nature of the bond may not be inserted in the bond or even in an annexure to the bond.

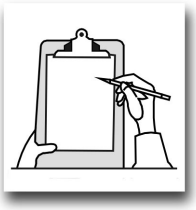
Certain conditions are prohibited in the Deeds Registries Act 47 of 1937 or are unlawful and may not be contained in a bond:

- No mortgage bond may be passed in favour of two or more persons, where the share of one holder ranks prior in order of preference to the share of another; nor may any transaction be registered which would have the effect of giving preference to one share in the bond over another share (s 55(2)).
- No condition may be included in a bond which purports to impose upon a registrar any duty or obligation not sanctioned by law (reg 35(6)).
- The insertion of what is commonly known as a ''general clause'' attempting to simultaneously bind immovable and movable property of the mortgagor is prohibited (s 53(1)).
- A condition in terms of which the repayment of the debt or a portion of the debt by a licence holder in favour of the holder of a wholesale liquor licence, beer-brewing licence or sorghum brewing-licence within a specified time is void (s 149 of the Liquor Act 27 of 1989).
- An agreement stating that, if the debt is not paid by a certain date or the mortgagor is otherwise in default, the mortgagee may hold or keep the security as his/her own property, is known as a *pactum commissorium*. Such an agreement is unlawful and unenforceable (*Mapenduka v Ashington* 1910 AD 343; *McCullough and Whitehead v Whiteaway & Co* 1914 AD 599 on 626).
- A condition in a bond stating that the mortgagor may not repay the debt before a certain date, if it is coupled with a *pactum antichresis,* is void

(*McCullough and Whitehead v Whiteaway and Co* 1914 AD 599). A *pactum antichresis* is an agreement which gives the creditor (mortgagee) the use of the mortgaged property in lieu of interest.

- A condition in a mortgage bond based on an agreement between the mortgagor and mortgagee that the hypothecated property can be sold in settlement of the debt, without recourse of law, is known as a *parate execute*. Such an agreement is invalid (*Iscor Housing Utility Co and Another v Chief Registrar of Deeds and Another* 1971 (1) SA 613(T)).

Notwithstanding section 3(1)(b) of the Act, a registrar need not examine any provisions relating to a bond which are not relevant to the registration of the bond (s 50A).



Activity

Regulation 41 of Act 47 of 1937 requires a brief reference in mortgage bonds to certain conditions or servitudes burdening land to be mortgaged. Give two examples of such conditions or servitudes

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2.2.15 ***Domicilium citandi et executandi***

This is in fact also a condition. The mortgagor chooses a place where notices and processes can be served on him/her, and this is known as his/her *domicilium citandi et executandi*. The mortgagee is permitted to make use of this address to serve notices on the mortgagor (*Gerber v Stolze and Others* 1951 (2) SA 166 TPD). In the example given in the introduction to this unit, X could for example choose his *domicilium citandi et executandia* as Erf 3, Khyalitsha.

2.2.16 Executions clause

Section 50(1) of the Act provides that a mortgage bond must be executed in the presence of a registrar of deeds by the owner of the immovable property or by a conveyancer duly authorised by the owner, and the mortgage bond must be attested by the registrar. This is a dual process of execution, consisting of the signing of the deed by both the debtor or his/her representative (the conveyancer) and the registrar. The registration function of the registrar's signature attests (certifies) that the owner or his/her representative in fact signed the bond before him/her.

In the example given in 2.2.3 above, Leon Louw will sign the bond on behalf of X before the registrar of deeds, and the registrar will affix his/her signature to the bond.

A mortgage bond attested by a registrar is deemed to be registered once the registrar has affixed his/her signature to it (s 13(2)), even though the recording of the new data has not yet taken place. Where, however, a mortgage bond is one of a batch of interdependent deeds intended for registration together, it will not be deemed to be registered until all the deeds in the batch have been signed by the registrar.

If the registrar inadvertently omits to affix his/her signature to a mortgage bond attested by him/her, at the time when the signature should have been affixed in the ordinary course of events, this signature may be affixed when the omission is discovered and the mortgage bond will then be deemed to have been registered at the time the registrar was supposed to sign (s 13(2).

If two or more mortgage bonds are passed together on the **same day** by one and the same mortgagor over the same property, the registrar must, if each bond does not disclose the order in which it is to rank, note on each the exact time at which he/she affixed his/her signature to each (reg 45(4)).

Provision must be made on the last page of the bond for the signatures of the appearer and the registrar of deeds. Both signatures must appear on the same page.

2.2.17 Special power of attorney

There must be a properly executed, witnessed and dated power of attorney that authorises the appearer to execute the bond (reg 25). This power of attorney generally includes a draft bond as an annexure which must be fully initialled by both the mortgagor and the preparer of the bond.

Bear in mind that the power of attorney must be properly authenticated if it was executed outside South Africa (consult unit 5 in this regard).

No material alteration or addition to the power of attorney or draft bond is acceptable without the initialling of the mortgagor and witnesses (reg 20(4)). Non-material amendments may be initialled by the preparer. The signatures of new witnesses are required only if no witnesses originally attested the power of attorney..

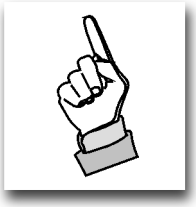
It is important to note that **in the power of attorney** granted by the mortgagor, a holder of real rights can waive his/her rights in favour of the bond (Chief Registrar's Circular 17 of 2006 and see 2.2.13 in this unit).

Now that we have looked at and analysed the structure of a conventional mortgage bond, we will discuss the different types of mortgage bonds that are frequently registered in the deeds registry. There are many types of mortgage bonds. In some cases the cause of debt will determine the structure of the bond but sometimes legislation will prescribe the structure and registration of certain mortgage bonds. However, the bond clauses discussed above still appear in most of these bonds.

3 Collateral bond

As the name indicates, a collateral mortgage bond is an additional mortgage bond for a debt or obligation for which security has already been provided to the

debtor by the creditor. Such a bond must be granted by the same mortgagor (debtor) in favour of the same mortgagee (creditor) for the same debt or obligation or part of a debt or obligation that has already been secured by the principal security. The principal security could have been given by way of a mortgage bond or notarial bond (known as the principal bond) or any other form of security.



Example

- X owes Y R10 000,00. As security for this debt, X cedes one of his insurance policies to Y. If for some reason this policy does not afford Y sufficient security for the outstanding debt, he can demand further security from X. If X owns immovable property, a collateral bond can be registered over the property to provide the additional security. The bond may be registered over the immovable property already mortgaged (value permitting) or over other immovable property registered in the name of the mortgagor.

  OR

- X owes Y R10 000,00. As security, X hypothecates/mortgages one of his houses (land), with a mortgage bond in favour of Y. If for some reason this first mortgage bond (called the principal bond) does not afford Y sufficient security for the outstanding debt, he can demand further security from X. If X owns another house or land, a collateral bond can be registered over that property or over the immovable property already mortgaged (value permitting) or over other immovable property registered in the name of the mortgagor, to provide the additional security.

The *causa* of such a bond will, for example, be as follows:

Whereas X is truly and lawfully indebted to Y in the sum of ..... arising from and being money lent and advanced, as security for which indebtedness Mortgage Bond

(hereinafter called the principal bond) was registered in the Deeds Registry at ..... on the ..... over the property specially hypothecated;

And whereas the said Y requires the indebtedness of X under the principal bond to be further secured by the hypothecation of the undermentioned property as collateral security therefor.

Now therefore ...

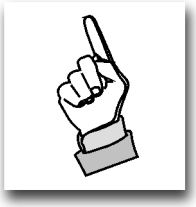
The principal and collateral bonds can be registered simultaneously in the same deed registry or in different deeds registries (reg 48).

The form prescribed by the Deeds Registries Act 47 of 1937 for a collateral bond is form KK.

4 Surety bond

Two types of surety mortgage bonds (or notarial surety bonds) are registered in deeds registries. One is the general surety bond passed by a third party (mortgagor) as further security for a **debt or obligation of a debtor already secured**

by a registered bond or notarial bond (principal bond). The other is a surety bond passed by a third party (mortgagor) as further security for **an unsecured debt or obligation** of a debtor.



Example

- Q agrees to lend money to X, provided Y binds herself as surety for the payment of X's debt and, in addition, X also hypothecates her immovable property as security in favour of Q. X's mortgage bond in favour of Q will be called the principal bond. Y then also passes a surety bond over her property in favour of Q as security for the debt of X, which she, Y, might have to pay Q.

  OR

- Q agrees to lend money to X, provided that Y binds herself as surety for the payment of the debt of X. As security for the debt that Y might have to pay Q, Y can pass a surety bond over her property in favour of Q, if the debt between X and Q is unsecured.

The *causa* of such a bond will, for example, be as follows:

> *Whereas X is truly and lawfully indebted to Q in the sum of ..... arising from and being moneys lent and advanced, as security for which indebtedness X has registered Mortgage Bond (hereinafter called the principal bond) ..... in the Deeds Registry at ..... on the ..... over the property especially hypothecated.*
>
> *And whereas the said Y has agreed to bind herself as surety and co-principal debtor for the due payment of the aforesaid sum and interest thereon and for the compliance with all terms and conditions of the aforesaid principal bond, mortgaging as security for the fulfilment of the said obligations the undermentioned property,*
>
> *Now therefore ...*

If the surety bond is registered together/simultaneously with the principal bond, the surety bond can be incorporated in the principal bond, provided both the principal and surety bond hypothecate immovable property (or both hypothecate movable property in a notarial bond). In such a case, the surety bond must appear immediately after the conditions of the principal bond.

The form to be used is prescribed by the Deeds Registries Act 47 of 1937, namely form LL.

The surety and principal bonds can be registered simultaneously in the same deeds registry or in different deeds registries (reg 48).

If the surety bond is registered to secure an unsecured debt, for example a promissory note, then this must be disclosed in the bond.

In order to make the surety fully liable for the principal debt, she must be bound as surety and co-principal debtor (*Union Government v Van der Merwe* 1921 TPD 318 on 322).

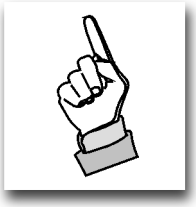
In the surety bond the surety may be required to renounce the exception *beneficium ordinis seu excussionis* by which the bondholder is granted the right to immediately institute legal action against the surety in the event of default payment by the principal debtor.

If there is more than one surety, they can likewise be expected to renounce the exception *beneficium divisionis,* allowing the creditor to hold anyone of the sureties liable for the full amount of the debt (*Klopper v Van Straaten* (1894) 11 SA 94).

5 Covering bond

A covering bond can be defined as a **special mortgage** securing a **future debt**. It must be expressly declared to secure a **future debt**, and a **maximum amount** must be stipulated. The preference conferred by this bond is determined by the **date of its registration**, and not by the date on which the **debt** is incurred.

A covering bond is thus a bond that is granted to secure a debt which did not exist, or part of which did not exist, at the time of registration of the bond. The security covers the liability that the parties agreed would arise at a future date, such as security for future bank overdraft facilities or to secure a debt that the mortgagor has under a fluctuating account with a supplier (a factory, a butcher or baker, etc).



Example

X borrows money from ABSA Bank Limited and registers a mortgage bond over his property in favour of ABSA as security for the debt. The nature of the bond is such that if X later applies for a further loan, the bond will afford enough security for the additional debt.

In terms of section 51(1) of the Deeds Registries Act 47 of 1937, no mortgage bond (or notarial bond) will be of any force or effect for the purpose of giving preference or priority to any debt **incurred after the registration of the bond, unless:**

- it is expressly stipulated in the bond that the bond is intended to secure future debts generally or some particular future debt
- a sum is fixed in the bond as an amount beyond which future debts will not be secured by the bond

Section 51(2) makes a further provision that, if a mortgage bond purports to secure payment by the mortgagor of the costs of preserving and realising the security of fire insurance premiums, costs of notice or bank exchange (that is, the costs clause — (see paragraph 2.2.10 above), such costs and charges shall not be deemed to be future debts within the meaning of section 51(1).

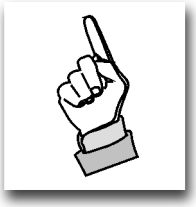
A bond that has been registered as security for a fixed amount of money lent, which money is only to be advanced after registration of the bond, is not a covering bond in the true sense of the word. Similarly a bond in favour of a financial institution, with a covering clause, which to some extent covers the money that will be advanced and re-advanced after registration, is not a covering bond in the true sense of the word.

There is no form prescribed by the Deeds Registries Act 47 of 1937 for a covering bond.

6 *Debenture bond*

A company may, if authorised by its articles of association and memorandum, create and issue secured debentures (s 116 of the Companies Act 61 of 1973). Debentures include debenture stock, debenture bonds and any other securities of a company, whether constituting a charge on the assets of a company or not.

Debentures are *inter alia* secured either by a notarial bond or a mortgage bond in favour of one or more debenture holders or a trustee for the debenture holders (s 117 of Act 61 of 1973).



Example

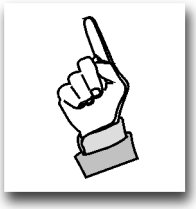
X lends money to YZ (Pty) Limited. In terms of the Companies Act and the memorandum and articles of the company, YZ (Pty) Limited issues X with an obligation letter. A mortgage bond is registered by YZ (Pty) Limited over immovable property as security in favour of X, and the obligation letter is annexed to the debenture bond.

If the mortgage bond or notarial bond is registered in favour of one or more debenture holders, a certified copy of the relevant debenture or debentures must be attached to the bond (s 118(2) of Act 61 of 1973). If it is registered in favour of a trustee of the debenture holders, certified copies of the debentures and the trust deed, by which the trustee is appointed and in which his/her rights and duties are described, must be attached to the mortgage bond or notarial bond (s 118(3) of Act 61 of 1973).

There is no form prescribed by the Deeds Registries Act 47 of 1937 for a debenture bond.

7 *Kinderbewys mortgage bond*

The survivor of two spouses is, as the natural guardian of his/her minor child, entitled to receive any sum of money due to that child from the estate of the predeceased spouse, provided that the sum has been secured *inter alia* by a mortgage bond in favour of the Master of the High Court (s 42 of Act 66 of 1965). If there is no or insufficient immovable property to serve as security, the surviving spouse can pass a notarial bond over his/her movable property; in the same notarial deed, two sureties approved by the Master bind themselves as sureties and co-principal debtors, and also bind their persons and movable property generally.



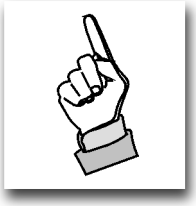
Example

X and Y, both minors, inherit R100 000,00 from their deceased father. Their mother asks to receive the money and is willing to hypothecate her immovable property to the Master as security to guarantee that the money will go to the

minors at the agreed time. The Master approves registration of the bond. This bond, registered in favour of the Master, is called a kinderbewys mortgage bond.

The Master of the High Court must approve a mortgage bond of this nature. Printed forms, containing an approval clause, may be obtained from the Master. If the power of attorney of the bond is approved by the Master, it will be accepted (Registrars' Conference Resolution 29 of 1971).

Where the surviving spouse takes over immovable property with the approval of the Master, in terms of section 38 of the Administration of Estates Act 66 of 1965, the Master may require the inheritance of the minor beneficiary or beneficiaries to be secured by way of a mortgage bond in favour of the Master of the High Court. This normally happens when the survivor wishes to avoid the estate being declared insolvent. This bond, too, must be approved by the Master.



Example

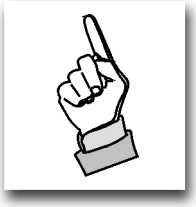
X and Y are married. X dies, and his assets devolve on Y and their children in shares. Y applies to the Master for approval to take the estate of X over in order to maintain it as a unit. The Master gives approval; but, as Y is not able to pay the children's shares/inheritance immediately, a kinderbewys bond is registered by Y in favour of the Master to secure the interests of the children.

To ensure that such a bond is in fact registered in a deeds registry, the Master will not endorse his/her approval on the power of attorney in terms of section 38, in order for transfer of the deceased's land to be passed to the surviving spouse. Instead, the Master will furnish a separate certificate on a separate piece of paper, clearly indicating that his/her approval has been given subject to the condition that a mortgage bond for a specific amount be registered in favour of the Master, simultaneously with the transfer of the deceased's land to the surviving spouse.

There is no form prescribed by the Deeds Registries Act 47 of 1937 for a kinderbewys bond, although the Master's office insists on their format being used.

8 Substituted bond

As the name indicates, a substituted bond takes the place of an existing bond. It can therefore relate to the same property as has been hypothecated in the existing bond, or to another property owned by the debtor and tendered as security. It follows that the creditor (mortgagee) and the debtor (mortgagor) must be the same as in the existing bond. The cause of the debt of the original mortgage bond must be quoted in the substituted bond and there must therefore be an acknowledgment of debt. The existing mortgage bond is cancelled on registration of the substituted bond.



Example

X registers a mortgage bond in favour of Y over one of his properties, whilst it should have been registered over two of his properties. A substituted bond can then be registered over both the properties.

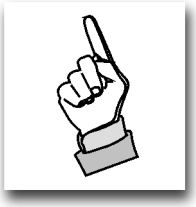
The *causa* of such bond will, for instance, read as follows:

> Whereas X passed a Mortgage Bond No..... over Erf 390, Westdene, in favour of Y, whilst he should have registered such bond over Erf 805, Melville, too;
>
> *Now therefore the existing bond is substituted by registration of this bond as a mortgage bond over ..... and simultaneously B ..... is being cancelled.*

There is no form prescribed by the Deeds Registries Act 47 of 1937 for a substituted bond.

9 Judicial mortgage

A judicial mortgage is not a bond in the usual sense, but is an attachment (court) order. If a debtor does not meet a debt, the creditor can take court action against the debtor. The court may then issue a warrant of attachment against the debtor's property. A copy of the warrant of attachment is served on the registrar of deeds within whose area of jurisdiction the attached property falls. The registrar records the attachment by noting it as an interdict against the immovable property of the execution debtor in the deeds registry records.



Example

X owes Y money. Y institutes legal action against X because of X's failure to meet the debt. After judgment in court, a writ is issued for the attachment of the property belonging to X. Once the registrar of deeds has been notified of this by the deputy sheriff, he/she notes the attachment against the title deed of the land after allocating an interdict number to it.

The computer printout in respect of the property will, for example, read:

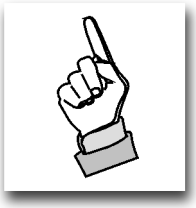
> I 2917/2006 AT

An attachment interdict is as effective as a special mortgage bond, because it prohibits transfer of the immovable property concerned. In some respects it is even more effective, because it prohibits the registration of a further mortgage bond over the property, too. Furthermore, an attachment affords some preference in the case of insolvency.

There is no form prescribed by the Deeds Registries Act 47 of 1937 for a judicial mortgage, although both the Magistrate's Court Act and Rules and the High Court Act and Rules prescribe the form of a writ of attachment.

10 Indemnity bond (vrywaringsverband)

An indemnity bond is registered where a person (X) undertakes to comply with an obligation (or pay a debt) on behalf of another person (Y), on the condition that the principal debtor (Y) indemnifies X should X be compelled to comply with such obligations on behalf of Y. To secure this indemnity by Y, X may insist that Y register a mortgage bond in favour of X and such a mortgage bond would be an indemnity bond.

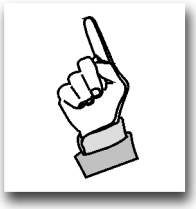


Example

If a surety complies with the obligations of the debtor, the surety can claim repayment from the principal debtor.

There are mainly two kinds of indemnity bonds:

- an indemnity in favour of surety by the principal debtor in respect of a suretyship for overdraft facilities where no existing mortgage bond secures the debt
- an indemnity in favour of a surety by a principal debtor-mortgagor, meaning that the debt is already secured by a mortgage bond passed by the principal debtor.



Example

By a principal debtor to a surety:

X borrows money from Y and Z stands surety for the debt. X then agrees to pass an indemnity bond in favour of Z, in which bond X agrees to indemnify Z and hold Z harmless against any claims which may be made against Z by Y, by virtue of Z's suretyship.

By a mortgagor to a surety:

X borrows money from Y. X registers a mortgage bond in favour of Y to secure the debt **and** Z stands surety for the debt. Z then requires X to indemnify Z against any loss that he might suffer or any claims that might be made against him because of the suretyship. X then passes an indemnity bond in favour of Z, in which bond X renounces the legal exceptions: *non causa debiti*, revision of accounts, no value received and *error calculi*. The indemnity bond is thus a further mortgage bond hypothecating X's immovable property, but this time in favour of Z.

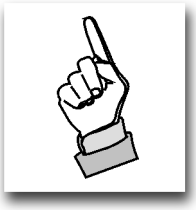
11 Kustingsbrief

A kustingsbrief can be defined as a special mortgage over an immovable thing, to secure a principal debt incurred in respect of the purchase of that thing, where the deed of hypothecation is registered simultaneously with the deed of transfer of the particular thing.

There is no English term for this bond. It is registered when a seller of land requires

a bond to be registered in his/her favour to secure the balance of the unpaid purchase price simultaneously with the transfer of the land.

A mortgage bond, other than a kustingsbrief, passed for the purpose of securing the payment of a debt not previously secured and which was incurred more than two months prior to the lodging of the bond for registration, or for the purpose of securing the payment of a debt incurred in novation of or substitution for any such debt, does not confer any preference if the estate of the mortgage debtor is sequestrated within a period of six months after it has been lodged. A mortgage bond will not be deemed ''*not to have been lodged*'' if it was withdrawn from registration (s 88 of the Insolvency Act 24 of 1936).



Example

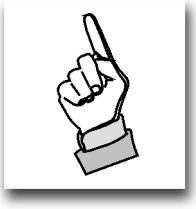
X sells Erf 10, Sebokeng, to Y for R300 000,00. Y pays X R200 000,00 and for the outstanding R100 000,00 a bond is registered by Y over the erf in favour of X. The *causa* of the kustingsbrief is therefore to secure the balance of the unpaid purchase price.

The requisites for the kustingsbrief are as follows:

- The kustingsbrief must be registered simultaneously *(simul et semel)* with the deed of transfer.
- The bond must secure the balance of the purchase price of the immovable property sold.
- Since it is a first bond, the holder enjoys preference over other bondholders. It is not necessary to register the kustingsbrief in favour of the seller only. It can be registered in favour of anyone who advanced the purchase price.
- The kustingsbrief bond must be registered over the property sold.

12 Charges

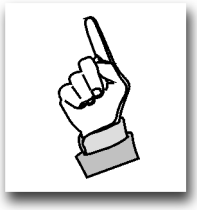
Various statutes require a registrar of deeds to ''*note a charge*'' against land in respect of moneys owed by the owner of the land. A charge is not a mortgage bond, but is comparable to a servitude, for it attaches to the land. A charge is not subject to section 56 of the Deeds Registries Act (that is, all mortgage bonds must be cancelled before transfer of the encumbered property can take place). The debt it secures becomes the responsibility of the successors in title to the owner who incurred it. The statute in terms of which a charge has been noted, however, usually provides for consents to be furnished by the holder in respect of the transfer of the burdened land or a portion of it or share in it.



Example

In terms of section 28 of the Land Bank Act 13 of 1963, the Land Bank could make advances in accordance with the Fencing Act 31 of 1963 for the purposes of, among other things, erecting or meeting the costs of fencing or alteration of fences. If the Land Bank advanced R4 000 000,00 to X for this purpose, this amount could be registered as a charge against immovable property owned by X. It will be treated as a mortgage bond, but ranks prior to any other bonds registered against the property.

Note: The Land Bank Act 13 of 1944 has been repealed and replaced by the Land and Agricultural Development Bank Act of 2002. However, the *status quo* continues with regard to existing charges under the Act. The new Act has a similar ''*charge loan*'' provision in section 31, although the types of expenses for which advances may be made have changed.



Example

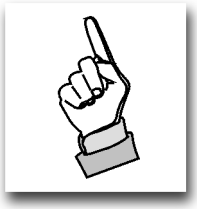
Section 118(3) of the Municipal Systems Act 32 of 2000 affords a municipality a charge against immovable property for claims older then two years, which it could not include in the municipal rates clearance account. (Section 118(1) of this Act limits the municipal claim in the rates clearance account only to debt that became due during the period of two years before the date of the application for a rates clearance certificate.) This amount is a charge against the property concerned although it may have changed owners in the meantime and enjoys preference in the event of insolvency and as against existing bondholders (*BOE Bank Limited v City of Tshwane Metropolitan Municipality* 2005 (4) 336 (A)).

A charge against a property enjoys preference in ranking above all existing bonds, even if no waiver of preference by mortgagees of existing mortgage bonds has been given in favour of the charge. The registrar cannot insist upon a waiver from existing bonds.

A charge is never drawn up by a conveyancer, but by the Land Bank, by the Department of Agriculture or by a municipal officer.

13 Annuity bond

A will or an agreement between parties may provide for the payment of an annuity by a specific person. An annuity is a certain sum of money payable either once off or at regular intervals for a specified or unspecified time. If the party liable to pay the annuity is not able to pay the annuity in a lump sum then an annuity bond can be registered to secure the regular payment of the annuity.



Example

X dies and in his will bequeaths his immovable property to his son Z, subject to the condition that Z pay Y (the surviving spouse) R10 000,00 per month for the rest of Y's life. When Z takes transfer of the property, he is unable to pay Y the money in a lump sum, but instead registers a mortgage bond over the immovable property in favour of Y as security for the payment of the annuity.

The *causa* of the bond will state the reason for the payment of the annuity and the amount of the annuity. For example:

> *Whereas X died on 4 April 2007, and in terms of his will dated 3 May 1990, he bequeathed his immovable property to Z subject to the condition that Z pay Y R10 000,00 per month until her death;*
>
> *And to secure payment of the annuity to Y, Z hereby acknowledges that he owes Y the above sum arising from the considerations set forth;*
>
> *Now therefore, he binds as security ...*

We have dealt with a great many different types of bonds and this is possibly a suitable opportunity to ensure that you can distinguish between them before we proceed.

Activity

1 Distinguish between the two kinds of indemnity bonds.

.....

.....

.....

2 In your own words, explain what is meant by a kustingsbrief.

.....

.....

.....

3 What are the prerequisites for a collateral bond or substituted bond?

.....

.....

.....

4 What will the *causa* of an annuity bond be?

.....

.....

.....

5 What is the effect of a judicial mortgage bond?

.....

.....

.....

6 What kinds of mortgage bonds will be registered, given the following sets of facts:

- X bought a property for R100 000,00 from Y. X is only able to pay Y R20 000,00. Y wants security for payment of the outstanding debt.

  .....

  .....

  .....

- X is willing to lend Y a sum of money if Z will stand surety for the debt. Z is willing to stand surety if he can claim from Y the moneys he may at some stage have to pay to X.

  .....

  .....

  .....

  .....

14 Sectional mortgage bond

A sectional mortgage bond hypothecates units, leases registered over units, exclusive use areas, common property and real rights registered in sectional title schemes. These sectional mortgage bonds have a prescribed format in terms of the Sectional Titles Act, which differs from the bonds we have studied so far in that the bond conditions are contained in an annexure to the prescribed form. In addition the sectional bond is signed and executed by the mortgagor in the presence of a conveyancer, who similarly attests it, whereafter it is simply **registered** in the deeds registry — it is not executed by the conveyancer on behalf of the mortgagor in the presence of the registrar, as is the case with other conventional bonds. Sectional mortgage bonds are dealt with in detail in Sectional Title Registration (LPL418H).

15 Notarial bond

Movable property is hypothecated by notarial bonds executed and attested before a notary public, whereafter it is simply registered (as opposed to executed) in the deeds registry. This type of bond is dealt with in Notarial Practice (LPL417G).

16 Participation mortgage bond

Participation mortgage bonds are regulated by the Collective Investment Schemes Control Act 45 of 2002. Essentially a participation mortgage bond forms part of an investment scheme whereby members of the public are invited to invest in a scheme (for a minimum period of five years) which lends money to members of the public and businesses against security of mortgage bonds over the debtor's/borrower's immovable property — much like a financial institution or bank would do and, like the bank, the investors' return on their investment is the interest paid on the loan by the debtor/borrower.

Clearly, where a number of investors/creditors invest for variable time periods, the mortgage bonds cannot be registered in favour of all these investors; so usually the mortgage bond is registered in favour of a nominee company.

The Collective Investment Schemes Control Act 45 of 2002, besides providing for transitional arrangements between the old Participation Bonds Act 55 of 1981 and this new one, requires the following:

- In order to operate schemes of this nature, the nominee company **must** be registered as such with the registrar of companies and must have as its main object to act as nominee for or representative of any person. It may not incur liabilities except on behalf of those persons for whom it holds property and it is limited concerning the management fees it can charge. It must in addition hold certain minimum capital reserves.
- Participation mortgage bonds must be mortgage bonds over immovable property, registered in favour **of a nominee company as mortgagee (not the individual investors)** and included in a collective investment scheme in participation bonds. This means that the participation mortgage bonds must not merely be called this, but must in fact form part of an investment scheme whereby various participants invest money which is pooled and lent out, against security of participation mortgage bonds. Participation mortgage

bonds must rank as first bonds or equally with another first bond by the same mortgagor.

- The debt secured by the participation mortgage bond is regarded as being owing to the participants in the scheme and not the nominee company. Similarly, the rights created by the registration of the participation mortgage bond are regarded as being held by the participants, not the nominee company.
- All the above participatory interests shall rank in preference concurrently with one another.
- A nominee company may not transfer, cede or encumber any of the rights under a participation mortgage bond without the written consent of the registrar of companies.
- Any collateral security obtained to secure the debt (surety, collateral, notarial bond, etc) must also be registered in the name of the nominee company on behalf of the participants in the scheme.

From a conveyancing perspective the important points here are that the nominee company must be registered as such, and can only register first (or equivalent) mortgage bonds over immovable property in the name of the nominee company. When the need arises, collateral security must likewise be registered in favour of the nominee company. After registration the participation mortgage bonds may not be ceded or dealt with freely by the nominee company, but require the consent of the registrar of companies for such alienations.

17 Summary

We have now acquainted ourselves with all the different types of mortgage bonds. In the following units we will look at the different dealings that can be registered with mortgage bonds.

UNIT 10

Bond cancellations, releases, cessions, substitions and variations

1 Introduction

Now that you are familiar with the purpose and structure of the various types of mortgage bonds, we will discuss various acts of registration relating to mortgage bonds:

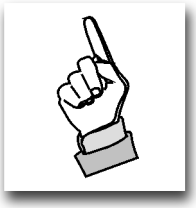
- the cancellation of mortgage bonds
- the release of immovable property from the operation of mortgage bonds and, under certain circumstances, the release of persons from the operation of mortgage bonds
- the cessions of mortgage bonds
- substitution of debtors under mortgage bonds in terms of section 24*bis*(3) in the event of the dissolution of a partnership, in terms of section 45 in the event of matrimonial property changes to marriages in community of property and in terms of section 57 where a purchaser acquires all the land encumbered by a mortgage bond and the purchaser is then substituted as mortgagor under the existing mortgage bond
- part payments or reduction in cover relating to mortgage bonds
- waivers of preference
- agreements varying the terms of a mortgage bond

Let us take a closer look at the following key questions:

- When must a bond be cancelled and in what instances need bonds not be lodged for disposal?
- Which principles apply when releasing a property or a person from a mortgage bond?
- What distinction exists between the different kinds of cessions of bonds and the effects of such cessions?
- Under what circumstances can a debtor be substituted under a mortgage bond and what are the effects of such substitution?
- How are part payments, reduction in cover and waiver of preference differentiated and under what circumstances could each be registered?
- Which terms of a bond cannot be varied by agreement?

Throughout this unit, keep in mind that the authority (or consent) for any of the acts of registration relating to bonds will have to be granted by the **bondholder** (mortgagee) or his/her duly authorised agent on a **separate sheet of paper**, which

should be signed and duly witnessed (reg 39(1)). The expression *''duly witnessed''* means attested as provided for in section 95 of the Act (reg 3). There must be a separate witnessed consent for each bond and each act of registration referred to in regulation 39(1) (reg 39(3)).



Example

If X is the holder of bonds B 17/2006 and B 369/2005, X cannot cancel both bonds by means of a single consent. Separate **consents** must be prepared for the cancellation of each bond.

Any authority of this nature must identify the bond and disclose the full names of the legal holder of the bond or any other consenting party and must be retained by the registrar of deeds (reg 39(1) and (2)).

Prescribed form **MM** to the regulations has been specially prepared below to comply with the requirements of regulation 39 and can, with adaptation, be used as a consent/authority for either a cancellation of the mortgage bond, registration of a part payment against the mortgage bond, release, cession, cancellation of cession, substitution and more.

Prepared by me

.....

ATTORNEY/ NOTARY/CONVEYANCER
(State surname and initials in block letters)

Preparation clause

CONSENT

(to cancellation, part-payment, release, cession, cancellation of cession, substitution, etc., of, from or under the following bonds.)

This is the heading

……..... the undersigned,…….....
the legal holder of the undermentioned bond,
namely:
B……/20.....
Dated.....
Passed by.....
in favour of.....
for the sum of.....
* and ceded to.....
* by cession registered on.....

This is the clause containing all the information concerning the bond

below is the preamble, where the mortgagee is described in accordance with section 17 and regulations 18 and

do hereby .....

This is the operational clause, where the mortgagee consents to an act of registration

This is the execution clause

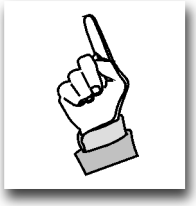
Dated at.....this.....day of.....
Signature of mortgagee
As witness:
1.....
2.....

.....
Signature of mortgagee

If the bond was not ceded, delete. Omit all irrelevant information.

2.1 General

Section 56(1) of the Deeds Registries Act provides, *inter alia*, that mortgaged land cannot be transferred until the mortgage bond has been cancelled or the land has been released from the operation of the bond; this is what we mean when we say ''the bond must be disposed of'' — the mortgage bond must be dealt with either by cancellation or by releasing that particular property and if necessary, the person from its operation. This is the general rule.



Example

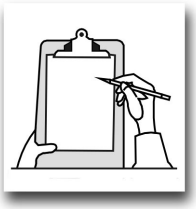
X owns a farm which is hypothecated. If X sells the farm to Y, the bond must be cancelled, because Y cannot take transfer of the farm while X continues using the farm as security for a debt under a mortgage bond. Only the owner of the farm can hypothecate it. (Y will, however, be able to be substituted for X as the debtor under the bond, as you will see under heading 9 of this unit.)

When a bond is cancelled, there is no longer any security for the debt under the bond.

There are, however, certain exceptional circumstances in which a mortgage bond need not be cancelled or property need not be released. These exceptions are contained in section 56(1), for example when the transfer of immovable property or cession of a bond is effected:

- in accordance with a court order
- by the trustee of an insolvent estate
- by a liquidator of a company or a close corporation which is unable to pay its debts and which is being wound up by or under the supervision of the court
- by an executor administering and distributing an insolvent deceased estate under section 34 of the Administration of Estates Act 66 of 1965
- in any other circumstances under the Act or any other law or in terms of a court order

When a bond registered in favour of a minor is cancelled by the parents or guardian, only the parents' or guardians' consent will be required and it will not be necessary to obtain further consents from either the Master of the High Court or from the High Court itself in terms of section 80 of the Administration of Estates Act 66 of 1965, since no immovable property is being alienated as a result of the cancellation of the bond. Even if a bond is regarded as immovable property, which is not necessarily the case, section 80(1) of the Administration of Estates Act 66 of 1965 will not apply to the cancellation of a bond even when a guardian acts on behalf of a minor. In *Ex parte MacRobert NO* TPD 336, the court ruled that it was unnecessary for a guardian to obtain the court's approval for the cancellation of a mortgage bond that was registered in favour of a minor as mortgagee (Registrars' Conference Resolution 25 of 1980).



Activity

List the circumstances in which, according to section 56(1) of the Act, a bond need not be cancelled. Briefly in your own words explain why you think this is so.

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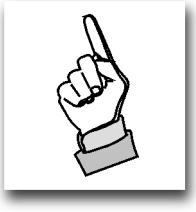
3 Releases from mortgage bonds

3.1 General

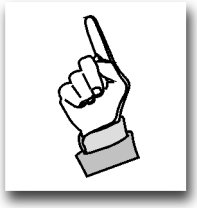
A release of a property from the operation of a mortgage bond will take place where more than one piece of land is hypothecated under one or more mortgage bonds. The owner/mortgagor might want to alienate one of the mortgaged pieces of land or might simply want to have one of the pieces of land unencumbered. If the mortgagee is satisfied that the land remaining encumbered by the mortgage bond offers sufficient security for the debt, the mortgagee may consent to the release of one or more of the encumbered pieces of land from the operation of the bond. Consult 2.1 above for the circumstances in which a release from a bond need not be registered. A distinction is drawn between the release of property only and the release of both persons and property from a mortgage bond. When land is released from a mortgage bond, that land no longer serves as security for the debt concerned and is free from the burden of the bond.



Example

X owns Erf 2, Sandton, and Erf 5, Evaton. X mortgages both properties in favour of Y. If Y consents to the release of Erf 5, Evaton, from the operation of the mortgage bond so that X can sell it, the bond will in future only hypothecate Erf 2, Sandton.

If both a person and immovable property are released, it means that the person is no longer bound to the mortgagee and the property cannot serve as security for the debt. There must, however, still be another property under the bond to serve as security, or a person obliged to pay the debt, otherwise the bond will in effect be cancelled.



Example

X owns Erf 2, Sandton. Y owns Erf 5, Evaton. Together they borrow money from Z to start a business and as security for the repayment of the debt both X and Y mortgage their properties in favour of Z under the same mortgage bond. If Z consents to the release of Y's Erf 5, Evaton, from the security of the bond, Y's person must be released, too. Z cannot consent to the release of Erf 5 from the operation of the mortgage bond without also releasing Y and *vice versa*.

The examples above are just two of the circumstances in which a release from the operation of a mortgage bond may be required. Under this heading in this unit we shall be dealing with the following instances where a release is required:

- Where there is one mortgagor and two or more immovable properties encumbered by one mortgage bond, one or more of the properties may be released — but not all the immovable properties, as this will amount to a cancellation of the mortgage bond.
- Where there are two or more mortgagors and several immovable properties encumbered under one mortgage bond, one or more of the properties, or one or more of the mortgagors, may be released from the operation of the mortgage bond with the consent of the co-mortgagors. However:
  - Not all the mortgagors or all the immovable properties may be released, as this will amount to a cancellation of the mortgage bond (as noted above).
  - The release of all the property of a co-mortgagor is only possible if the person of the co-mortgagor is also released from the operation of the mortgage bond.

- Where there are two or more mortgagors and one or more immovable properties encumbered by a mortgage bond **and** the debt is further secured by an additional collateral mortgage bond, there can be no release of a co-mortgagor or his/her immovable property as this will impact on the collateral bond security.
- Where there is one mortgagor with one property encumbered by one or more mortgage bonds, there can be no release of the person or the property of the mortgagor because it will amount to a cancellation of the mortgage bond.

With this summary in mind, we shall now discuss releases in more detail.

3.2 The consent

3.2.1 The consent to release form

Prescribed form MM, as set out in the introduction to this unit, is also used for the consent to release.

3.2.1.1 Preamble

What we discussed under heading 2 above applies *mutatis mutandis*.

3.2.1.2 Operational clause

If property only is released from the bond, the operational clause will read as follows:

''... do hereby consent to the release of:

Erf 5, Evaton township, Registration Division JR, Province of Gauteng,

in extent ..... from the operation of the bond.

If both property and a person are released from a bond, the operational clause will read as follows:

''... do hereby consent to the release of Erf 5, Evaton township, Registration Division JR, Province of Gauteng, in extent

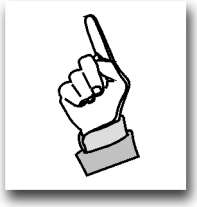
and Y Identity number ..... Unmarried

from the operation of the bond.

3.3 Consent by co-mortgagors

3.3.1 Release of part of co-mortgagor's immovable property

If part of the co-mortgagor's immovable property (whether a portion of the land or one or more of several individual pieces of land, but not all) is released, the consent of the other mortgagor(s) are required, even though the former is not released in person (s 55(1)(a)).

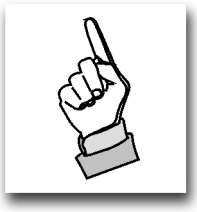


Example

X owns Erf 2, Sandton. Y owns Erf 5, Evaton. Together they borrow money from Z to start a business and as security for the repayment of the debt both X and Y mortgage their properties in favour of Z. Y subdivides Erf 5 and sells Portion 1. If Z consents to the release of Portion 1 of Erf 5, Evaton, from the operation of the bond, X must consent to the release, but Y remains a debtor and the remainder of Erf 5 is still hypothecated.

3.3.2 Release of all immovable property of one of the mortgagors

If a bond is passed by two or more mortgagors and the release of all the immovable property of one of the mortgagors is sought, the release is permissible only if both the property and the co-mortgagor concerned are released from the operation of the bond (s 55(1)(b)) and the other mortgagor gives his consent.



Example

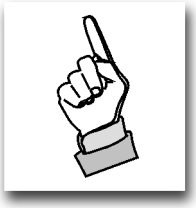
X owns Erf 2, Sandton. Y owns Erf 5, Evaton. Together X and Y mortgage their properties in favour of Z. If Z consents to the release of Erf 5, Evaton, from the security of the bond, Y must be released, too, and X must consent to the releases as this may impact on X's liability.

3.3.3 Consent — co-mortgagors and a Collateral Bond

Where, however, the debt under a mortgage bond with co-mortgagors is further secured by a collateral mortgage bond, the co-mortgagor cannot be released even if all his property under the principal mortgage bond is being released. In

such a case, there is no onus on the registrar to determine whether in fact there is a collateral bond registered (Registrars' Conference Resolution 12 of 1989). If a conveyancer certifies that no collateral bonds exist, the consent to release will be deemed to be a consent to cancellation. If there is a collateral bond, the release of the co-mortgagor under the principal bond will be noted against the principal mortgage bond, but the principal mortgage bond will not be cancelled until the collateral bond has been cancelled. The acknowledgment of debt in the principal bond forms an integral part of the collateral bond. The effect of Registrars' Conference Resolution 12 of 1989 is that it confirms that section 56 cannot be applied to the principal mortgage bond with co-mortgagors if the debt secured by the principal bond is further secured by a collateral bond. The reasons are obvious: the collateral mortgagor relies on the full operation of the principal bond and it is not the duty of the registrar to ascertain whether a collateral mortgage bond has been registered.

The consent of the principal debtor to the release of the surety's property is not necessary if the surety's property, hypothecated under a separate bond, is released (Registrars' Conference Resolution 15 of 1954) because here we are dealing with separate bonds and not co-mortgagors in the same bond (s 55(1)).

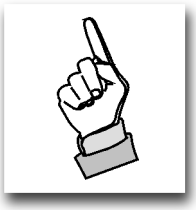


Example

X owes Z R10 000,00 and owns Erf 1, Sandton. Y owns Erf 5, Evaton. X mortgages his property in favour of Z. X is the principal debtor. Y, as surety for X's debt, passes a separate mortgage bond in favour of Z. If Z consents to the release of both Erf 5, Evaton, and of Y, X need not consent to the releases.

3.4 General

As a general rule, where land is subdivided, the release of a portion of the land will only be allowed by the registrar if the release takes place at the same time as the transfer of that portion or the issue of a certificate of registered title in respect of that portion (Registrars' Conference Resolution 20 of 1954 and 8 of 1967). Erven in an established township or depicted on a general plan can be released from a bond before the erven are transferred.



Example

Deed of transfer T 38/1995 is the title deed for the remainder of the township Sabie and hypothecated by means of B 36/1995. Erf 6, Sabie, has not yet been transferred from the township title to any person. The holder of B 36/1995 can consent to the release of Erf 6, Sabie, from the operation of the bond, even though the erf is not being transferred to any person.

If Erf 6 has been subdivided and even though the diagrams of the subdivision have been approved, release of the subdivided portion from the operation of the mortgage bond will only be allowed on the registration of transfer of the portion.

Activity

1 When is the co-mortgagor's consent required for release from a bond?

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2 When is a bond deemed to have been cancelled on consent to release?

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3 X is the owner of Erf 38, Eston, and Y owns Erf 7, Belville. They hypothecate their properties by means of a single mortgage bond in favour of Z. Erf 7, Belville, is to be released from the operation of the bond. What procedure will be followed? Discuss fully.

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4 Property vests in X and Y, together acting as XY Partnership, and the property is hypothecated. X is declared insolvent, causing the partnership to dissolve. How will the bond be disposed of?

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4 Cession of registered mortgage bonds and cancellation of cessions

4.1 General

A cession is an agreement whereby rights are transferred from the holder thereof (the cedent) to another person (the cessionary). Here, we are referring to the transfer of the right of the mortgagee (cedent) to claim payment of the debt from the mortgagor/debtor. This right is transferred to another person, known as the cessionary.

A distinction must be drawn between an out-and-out cession and a cession as security:

- Where the bondholder/mortgagee cedes a bond out and out to a cessionary, the bondholder (cedent) falls out of the picture and the cessionary becomes the effective holder of the bond and may cede the bond to another, either out and out or as security.
- If the bondholder cedes the bond only as security, that is to secure the repayment of the cedent's debt to the cessionary by temporarily ceding his/her rights to and in the mortgage bond, the cedent does not fall out of the picture and the cessionary cannot further cede that bond, either out and out or as security (Registrars' Conference Resolution 21 of 1949 and 32 of 1972).

It is necessary to register a cession of a mortgage bond, not only to comply with the Deeds Registries Act, but to ensure that the cessionary's rights are enforceable against third parties.

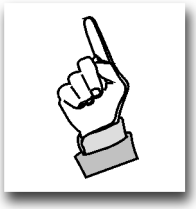
Before dealing with a mortgage bond, all previous cessions must be registered (Registrars' Conference Resolution 21 of 1966).

4.2 Out-and-out cession

A bond may be ceded *''out and out for value received'',* as it is generally expressed, that is in such a way that the existing bondholder or mortgagee has received consideration (payment) and has no further interest in the bond whatsoever.

Where a bond is ceded to another person for value received (without recourse against the cedent), the cedent falls out of the picture; the cessionary of the bond becomes the new bondholder and can effectively act as a creditor against the mortgagor. On completion of such a cession, the new bondholder cannot demand payment from the previous holder (the cedent) if the mortgagor refuses to pay or cannot pay.

However use of the words *''with recourse against''* the cedent in a cession of a mortgage bond, where the cession is for value received, constitutes an act of suretyship. This means that the new holder of the bond (the cessionary) may demand payment from the cedent if payment cannot be obtained from the mortgagor.

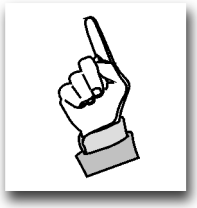


Example

X passes a bond in favour of Y for an amount of R19 000,00. If Z pays Y R19 000,00 and Y then cedes the bond to Z, X will in future be indebted to Z and not to Y — which means that Z can claim payment from X. Y has no claim in terms of the mortgage bond against X.

4.3 Cession as security

A bond may also be ceded as security for repayment of debt incurred by the mortgagee.



Example

X passes a bond in favour of Y for the sum of R5 000,00. If Y owes Z R5 000,00 or less, Y can cede his rights under the bond to Z as security for payment of the debt between himself and Z. If Y fails to pay the debt, Z, as cessionary, can claim payment from X in terms of the mortgage bond. Should Y repay the outstanding debt in full, Z must consent to the cancellation of the cession for security. After cancellation of the cession, Y can claim payment of the R5 000,00 from X.

In this case, the existing bondholder or mortgagee retains an interest in the mortgage bond. If in future his indebtedness is discharged and the *causa* in respect of the cession falls away, the cession as security and the registration thereof can be cancelled. Once the cession as security has been cancelled, the original bondholder/mortgagee reverts to being the sole obligee, as far as the debtor or mortgagor is concerned.

4.4 Form of cession

Form MM to the regulations is used for a cession (see the introduction to this unit).

4.4.1 Heading

The heading of form MM will have to be altered for this purpose, replacing ''Consent to Cession'' with ''Cession'', as it is not a consent but an act.

4.4.2 Cedent

The cedent's full names, status and identity number and/or date of birth must be quoted. If the cedent is represented by someone, that person's name must be disclosed, as well as the authority under which he/she is acting. If, however, the cedent is being represented by a company or close corporation, it is unnecessary to refer to the authority (Registrars' Conference Resolution 1 of 1988).

4.4.3 Sum of the mortgage bond

No cession of the balance due under a mortgage bond can be registered until all amounts paid to reduce the balance have been noted against the bond (reg 47).

4.4.4 Operational clause

A cession cannot be a *''consent to cession'',* like a consent to cancellation, release, and so forth, but must be an actual cession (transfer) of the rights under a mortgage bond. After the words *''do hereby''* (form MM), the wording *''cede, transfer and assign my rights and title to and interest in the aforementioned bond to (cessionary) for (causa)''* is used.

When a bond is ceded from an estate to a fiduciary, the cession must be made subject to the terms of the will without quoting these terms in detail (Registrars' Conference Resolution 27 of 1970). After the death of the fiduciary (or usufructuary), the executor must cede the bond, although the *fideicommissum* or usufruct does not form part of the estate, because the fiduciary or usufructuary controls the goods (Registrars' Conference Resolution 7 of 1972).

4.4.5 Causa for cession

The cession of a bond must disclose the *causa* in respect of the cession, since a cession which contains no *causa* cannot be registered (reg 41(4)). Except in the case of a cession by way of inheritance, the *causa* need not be proved. The *causa* follows directly after the description of the cessionary in the operative part of the cession.

The deceased bondholder's last will and testament may, for example, provide as follows: *''I bequeath the residue of my estate to X, subject to a usufruct in favour of Y.''* In this case, the bond will be ceded only to X (the usufructuary) (*Furnival v Cornwall's Executors* 12 SC 6), unless the will provides otherwise (Registrars' Conference Resolution 13 of 1980).

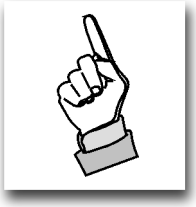
If the mortgagee or cessionary is a usufructuary, the mortgagee or cessionary may be described as follows: *''usufructuary in the estate of the late ... ''* (Registrars' Conference Resolution 18 of 1955). If the cessionary is a usufructuary, this fact must be stated in brackets after the name of the cessionary in the endorsement, for example *''Johanna Steenkamp (usufructuary)''*.

4.4.6 The cessionary

The cessionary's full details must be provided, in accordance with section 17 and regulations 18 and 24 of the Act. In other words, the cessionary's full names, status and identity number and/or date of birth must be given in the usual manner in case of natural persons.

In the case of any other person, the full name and registration number (if any) must be disclosed. Consult unit 3 in this regard.

Where there are several bonds and more than one heir, each bond must be ceded to each of the heirs in shares and not divided among them according to value. For example: if there are two bonds of R2 000,00 each and two heirs who inherit in equal shares, each bond must be ceded to both heirs jointly (Registrars' Conference Resolution 2 of 1940).



Example

X and Y inherit mortgage bond B 1/2006 (securing R3 000,00) and mortgage bond B 2/2006 (securing R3 000,00) in equal shares. Mortgage bond B 1/2006 cannot be ceded to X and mortgage bond B 2/2006 to Y. Each of the bonds must be ceded to X and Y jointly.

This ruling will, of course, be nullified if the heirs decide otherwise by means of a redistribution agreement.

4.5 Supporting documents

Where the registration of the cession of a bond is in favour of an heir, the same documents referred to in unit 5 must be lodged.

When a mortgage bond is ceded the mortgagor's consent is not required (*Jacobson's Trustee v Standard Bank* 16 SC 201 on 203).

As a general rule, a bond can only be ceded as a whole *(in toto)* because the cession must not aggravate the debtor's (mortgagor's) position. It follows that splitting the onus in respect of payment (as in the case of the cession of part[s] of a bond or the cession of a bond to two or more cessionaries) is possible with the consent of the mortgagor (*Lief v Dettman* 1964 (2) SA 252 (A) on 275 and Registrars' Conference Resolution 1(a) of 1956).

On registration of a cession of a bond, the mortgagor's consent is required:

- where the bondholder (either as sole or joint bondholder) cedes only a part of the bond held by him to one or more cessionaries, or
- where a bondholder cedes the whole bond to two or more cessionaries

In *Trust Bank of South Africa Ltd v Standard Bank of South Africa* 1968 (3) SA 166 (A), the majority decision declared that there is no difference, as far as the consequences are concerned, between a cession and a cession as security and it can be argued that the consent of the mortgagor is also necessary for the cession of part of a bond as security, or of the cession of a bond to two or more cessionaries as security.

If, however, the bond contains a clause that makes it unnecessary for the mortgagor to consent, then naturally his/her consent is not required.

The acceptability of a condition in a cession depends on the nature of the condition (Registrars' Conference Resolution 26 of 1961). For example, one of several mortgagees under a registered mortgage bond may cede his/her interest in the bond to two cessionaries, neither of whom is an existing mortgagee. If the mortgagor then submits a consent to the cession, subject to the condition that no further cession of any part of the bond may be effected unless and until the mortgagor approves of the proposed cessionary, such conditional consent cannot be accepted (Registrars' Conference Resolution 28 of 1964).

4.6 General

It may sometimes be necessary to cancel a bond ceded as security. The mortgagee and cessionary may jointly consent to the cancellation of the bond, or the cessionary may consent to the cancellation of the cession, after which the mortgagee may consent to the cancellation of the bond. Both transactions can be done simultaneously.

Cession of a bond can be registered on a cession signed prior to the registration of the bond. Of course, the cession can be registered only after registration of the bond itself (Registrars' Conference Resolution 12 of 1951). Since there will be no bond number to be filled in on the cession document, full details of the new bond will have to be disclosed in the cession for identification purposes (form MM), with the addition of the following wording:

> *''... which bond is to be simultaneously registered herewith''.*

Cession of a surety bond can be registered, provided that the principal bond is ceded to the cessionary at the same time as the surety bond, or that it has already been ceded to him/her. If no principal bond has been registered, there is no prohibition against the registration of the cession of a surety bond (*Inter-Union Finance Ltd v B Dunsterville* 1956 (4) SA 280 (D); Chief Registrar's Circular; CRD 11 of 12 November 1965; Registrars' Conference Resolution 2 of 1966). According to Registrars' Conference Resolution 9 of 1991, however, the *causa* in

respect of the cession must expressly indicate that the principal debt is to be ceded to the new holder of the surety bond.

Although there is no provision in the Deeds Registries Act or regulations prohibiting the cession of a collateral bond, it was decided in Registrars' Conference Resolution 31 of 1964 that such a cession would be a nullity.

A cessionary to whom a mortgage bond has been properly ceded by a company, before that company was placed under judicial management, can properly register the bond in his/her name after the company has been wound up by the court (*Lief NO v Western Credit Africa (Pty) Ltd* 1966 (3) SA 334 (W)).

If a bond is erroneously ceded *''out and out''* instead of *''as security'',* the only way to rectify the cession, other than by a court order, is to cede the bond back to the former mortgagee, who may then cede the bond as security (Registrars' Conference Resolution 8 of 1956).

An indemnity bond may be ceded only if the surety bond and principal bond (if any) are ceded simultaneously (Registrars' Conference Resolution 25 of 1988).

If a mortgagor and cessionary agree to vary the terms of a bond before registration of the cession, such agreement may be registered at the same time as the registration of the cession (Registrars' Conference Resolution 28 of 1971).

Where the rights of a mortgagee have been sold in execution and the sheriff is not in a position to obtain the bond, the sheriff must comply with regulation 68(1) in order to obtain a copy of the bond (Registrars' Conference Resolution 20 of 1989 and reg 68(14)).

A registered cession as security of a bond can be cancelled by a registrar of deeds on the strength of an underhand consent (as opposed to a notarial consent) by the cessionary as security.

An out-and-out cession of a bond can be cancelled in a deeds registry only on the strength of a court order (s 6(1) of the Act). The same result can be achieved, however, by the cessionary ceding the bond back to the cedent.

In this unit so far we have studied the cancellations, releases and cessions of mortgage bonds.

We will now discuss the circumstances in which the debtor under a registered mortgage bond can be substituted for another debtor and the effect of such a substitution.

When a debtor under a registered mortgage bond is substituted for another, the original debtor is replaced with another debtor to repay the same debt to the original creditor. The new debtor will have the same obligations as the original one and the creditor has the same rights, which can be enforced in respect of the new debtor. In some ways this is similar to the cessions we have just studied — with one important difference. In the cessions it was the holder of the bond who ceded his/her rights to the bond to another. With the substitutions it is the debtor/mortgagor whose duties and obligations under the bond are transferred to someone else.

Activity

1 When is the co-mortgagor's consent required for cession of a bond?

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2 What is the difference between an out-and-out cession and a cession as security?

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3 What is the effect of the cancellation of a cession as security?

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4 X is the holder of a bond and dies. In his will he bequeaths the bond to Z, subject to a usufruct in favour of Y. How will the bond be transferred and in favour of whom? Discuss fully, with reference to authority.

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5 What is meant by a cession ''with recourse'' and what is the effect of this?

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5 Substitution of Debtor/Mortgagor by endorsement

We are now going to discuss various ways in which a mortgagor may be substituted by another person as mortgagor under an existing mortgage bond, without cancelling that mortgage bond.

The effect of such a substitution of debtor is that once one person is substituted for another as the debtor/mortgagor in a registered mortgage bond, the new mortgagor will be fully liable for the debt against the mortgagee, as if the mortgagor passed the mortgage bond from the start. The obligations, responsibilities and security under the bond will be exactly the same as it was to begin with. It will be deemed that the new mortgagor had passed the bond himself/herself and had renounced the benefit of all relevant exceptions (s 57(3)).

The original mortgagor (the transferor) will be absolved from any obligation secured by the bond.

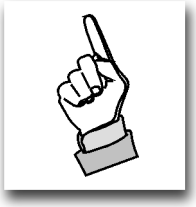
Payment of the outstanding debt will from this point onwards be enforceable by the mortgagee against a new person only.

If the bond is a bond to secure future debts, the immovable property mortgaged will secure any further or future advances made by the mortgagee of the bond to the new mortgagor (transferee) (s 57(3)).

5.1 Section 24bis(3) substitution of a mortgagor by endorsement

In unit 6 we discussed transfer of ownership by way of endorsement on the dissolution of a partnership in terms of section 24*bis*(2) of the Deeds Registries Act. If the land or real right is mortgaged, section 24*bis*(3) stipulates that the endorsement in terms of section 24*bis*(2) should not to be affixed unless:

- the mortgage bond is cancelled, or
- the mortgagee consents in writing to the substitution of the individual members or partners as mortgagors in terms of the bond



Example

Adam and Peet in a partnership own a farm which is mortgaged in favour of Z bank and Adam retires, with the result that the partnership dissolves. The mortgage bond must either be cancelled or Z bank must consent in writing to Adam and Peet being substituted for the partnership as mortgagors in the bond. The effect of the substitution by endorsement is that Adam Smal and Peet Venter, not the partnership, will jointly and severally be the mortgagors in favour of Z.

The substitution, however, cannot be registered unless:

- the individual members or partners apply in writing, which application must be in duplicate and signed by a witness, to be substituted jointly and severally as debtors in terms of the bond
- the individual members or partners are competent to mortgage the land;
- where applicable, the individual members or partners in the application waive the exception *de duobus vel pluribus reis debendi*. Waiver of the exception *de duobus vel pluribus reis debendi* means that each debtor (mortgagor) is jointly and severally liable for the debt, where otherwise they each would have been liable for their proportionate share of the debt

No prescribed form exists for this consent and substitution, but form T of the Act can be used.

5.2 Section 45(2)(c): substitution of mortgagor by endorsement

In unit 6 we discussed the transfer by endorsement in terms of section 45 of the Act, which provides that transfer of property that vests in a joint estate to the surviving spouse who is entitled thereto can be done by virtue of an endorsement rather than the usual deed of transfer. If the title deed of that immovable property is encumbered by a mortgage bond, the bond must be lodged for disposal in one of the following ways:

- for cancellation
- for the release of the property, or the deceased's share in the property, from the operation of the bond (s 45(2)(a)*bis*), or
- for the substitution of the surviving spouse as the sole debtor in the place of the joint estate (s 45(2)(c))

Surviving spouse X was married to the deceased Y in community of property and the erstwhile joint estate of X and Y owned a mortgaged property. If X is entitled to the property and assumes full liability for the deceased's debt, she may be substituted for the joint estate as the sole debtor under the bond if:

- the mortgagee and the surviving spouse (X) consent to the substitution of X and the release of the deceased Y, and
- the title deed of the mortgaged property is endorsed in terms of section 45(1) of the Act

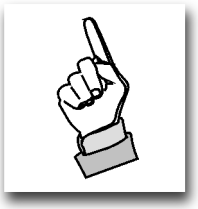
The form prescribed for this consent is form T of Act 47 of 1937.

Where substitution takes place in respect of only a portion of the capital amount, the provisions of regulation 47 apply, in that a part-payment or reduction in cover must first be registered in respect of the bond. This will be discussed in more detail later in this unit.

A bond includes a charge in favour of the Land Bank or a state department (s 45(5)); accordingly this type of substitution of debtor may be done in respect of a charge as well.

5.3 Section 45bis(2)(a): substitution of debtor/mortgagor by endorsement

In unit 6 the endorsement of a deed in terms of section 45*bis* of the Act was discussed, where property registered in a joint estate is transferred to one of the former spouses, who is entitled to the property as his/her sole property on death, divorce or with the change of their marital regime.



Example

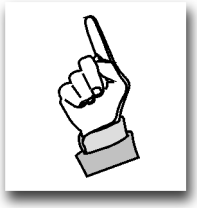
X and Y are married in community of property and own a farm. They divorce and according to the settlement agreement X becomes the sole owner of the farm. X is therefore entitled to half of the farm by virtue of their marriage in community of property, and the other half share by virtue of the divorce order and settlement agreement.

OR

X and Y are married in community of property and own a farm. The court orders a change in their marital regime to the effect that they will in future be married out of community property and that the farm will become the sole property of X. X is now entitled to half of the farm by virtue of their marriage in community of property, and the other half share by virtue of the court order.

X can therefore apply for the title deed of the farm to be endorsed in terms of section 45*bis*(1), to indicate that he/she is the sole owner of the farm. If the farm is encumbered by a mortgage bond or charge, the provisions of section 45(2) of the Act apply *mutatis mutandis*, as do the provisions of section 45*bis*(2)(a) of the Act.

Form T of Act 47 of 1937 is used in this case, too, leaving out reference to a survivor or late spouse.



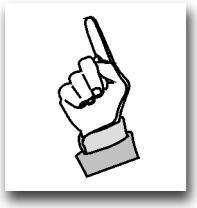
Example

If a bond was passed by X and Y, married in community of property, in favour of Z, Y can be substituted for X as the sole debtor of the bond if:

- Y is entitled to be the sole owner of the property
- Z and Y consent to the substitution of Y and the release of X
- the title deed of the mortgaged property is endorsed in terms of section 45*bis*(1) of the Act

5.4 Section 45bis(1A): Substitution of debtor by endorsement

Unit 6 discusses instances in which property registered in a joint estate can be registered in the names of both the former spouses on the dissolution of their marriage or the change in their marital regime, in terms of section 45*bis*(1A) of the Act.



Example

X and Y are married in community of property and own a farm. They divorce (or their marital regime changes to out of community of property) and, according to the settlement agreement (or court order), they are both entitled to the property in equal shares. Should the farm be encumbered with a registered bond, the title deed of the farm is not endorsed, unless either:

- the bond is cancelled; or
- the said property is released from the bond; or
- the former spouses (X and Y) jointly and severally accept responsibility in writing for the whole debt and renounce the exception *de duobus vel pluribus reis debendi* (s 45*bis*(2)(b) of the Act)

If a bond was passed by X and Y in favour of Z, then X and Y can be substituted for the joint estate as sole debtors of the bond if:

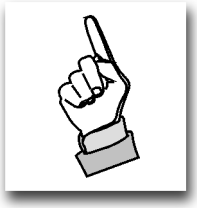
- X and Y are both entitled to undivided shares of the property as joint owners
- Z consents to the substitution
- the title deed of the mortgaged property is endorsed in terms of section 45*bis*(1A) of the Act

This application and consent is prepared in accordance with prescribed form BBB.

5.5 Section 57: Substitution of debtor under a bond

5.5.1 General

A debtor may be substituted as mortgagor under a mortgage bond when a seller/ mortgagor of land has a mortgage bond over that land and the purchaser takes over the bond when purchasing all the land under the bond (s 57(1) of the Act).



Example

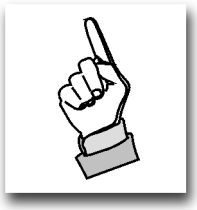
X is the owner of Erf 1, Pretoria, and registers a bond over the erf in favour of Z. If X sells the property to Y, Y can be substituted for X as the debtor in the bond, if Z agrees to the substitution.

OR

If X and Y in their individual capacities transfer mortgaged land to X, Y and Z (trading in partnership), the X, Y and Z partnership may be substituted for X and Y as the debtor (see Justice Minute no. 1/83/43 dated 20th September 1968, filed as Annexure ''P'' to the 1968 Conference Resolutions).

If two or more transferees are substituted for a former owner, the new debtors/ mortgagors under the bond must renounce the exception *de duobus vel pluribus reis debendi* (s 57(4)(b)). Waiver of the exception *de duobus vel pluribus reis debendi* means that each transferee (debtor) is jointly and severally liable for the debt, where otherwise they each would have been liable for their proportionate shares of the debt (see unit 9 in this regard).

A surviving spouse may be substituted as the mortgagor/debtor under section 57, when acquiring immovable property which is subject to an existing mortgage bond from the estate of the deceased spouse, whether the spouses are married in or out of community of property. This substitution is possible irrespective of the method of devolution, but only if such immovable property is transferred by means of a formal deed of transfer (Registrars' Conference Resolution 2/2005). This procedure will not be possible where the transfer of the property to the surviving spouse has been effected by endorsement in terms of section 45.



Example

X and Y are married out of community of property. X owns Erf 1, and hypothecates it. X dies and Y inherits the property. Y can be substituted for X as the debtor/mortgagor under the bond.

OR

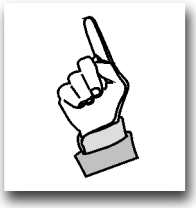
X and Y are married in community of property. They own Erf 1, Denver, and hypothecate it. X dies and Y inherits X's half share of the property. Y can be substituted for the joint estate as the sole debtor under the bond, only if the property is transferred to Y by means of a formal deed of transfer, and not if section 45 of the Act is applied.

5.5.2 When a debtor/mortgagor may not be substituted under a bond

5.5.2.1 Depending on status of transferor

The debtor/mortgagor of a registered mortgage bond may not be substituted by the transferee who acquires the land, if the transferor of the land (that is the existing mortgagor) is:

(a) a trustee in an insolvent estate
(b) an executor administering an estate under section 34 of the Estates Act 66 of 1965
(c) the liquidator of a company or close corporation which is unable to pay its debts and which is being wound up by, or under the supervision of, the court (s 57(1) read with s 56(1)(b) of the Act)

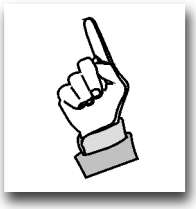


Example

Z owns a farm and hypothecates it. If Z's estate is declared insolvent, all parties that have claims for unpaid debts must lodge their claims with the trustee in the insolvent estate. Creditors will receive dividends for their debts according to the preference of their claims and the agreement made. So there will be no unsettled debt as far as the bond is concerned, since it will be deemed to have been paid. This applies to each of the situations listed in (a) to (c) above.

5.5.2.2 If property is not transferred in its entirety

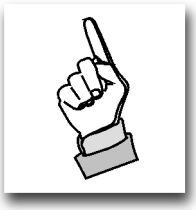
If the property mortgaged under the bond is not transferred to the proposed new debtor/mortgagor in its entirety, the transferee cannot be substituted for the existing debtor/mortgagor, since this affects the security of the bond (s 57(1)).



Example

X owns Erf 1, Vryburg. The property is hypothecated by means of a mortgage bond. If X sells and transfers portion 1 of the property to Y, Y cannot be substituted for X as the debtor under the bond in respect of that portion, as this will change and diminish the security under the mortgage bond, increase the number of debtors and falls outside the express requirements of section 57.

The substitution could well be registered if one of the co-owners transfers his/her whole share to the other co-owner or to any other person as illustrated in the example below.

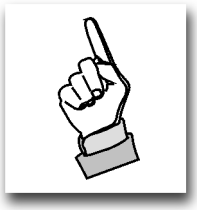


Example

X owns a half share in Erf 1, Vryburg, and Y owns the other half share. The property is hypothecated by means of a mortgage bond. If X sells and transfers his share in the property to Y, Y can be substituted for X as the debtor of the bond in respect of that share, because this does not increase the number of debtors, X's whole share in the property has been transferred and the identity of the mortgaged land remains the same.

5.5.2.3 If transferor reserves a real right

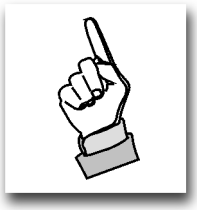
Neither may the transferee be substituted for the existing debtor/mortgagor if the transferor/mortgagor reserves a real right for himself/herself, for example a usufruct, because this affects the security of the bond (s 57(1)).



Example

X owns Erf 1, Vryburg. The property is hypothecated by means of a mortgage bond. X wants to sell and transfer the property to Y, subject to a reservation of usufruct in favour of X. However Y cannot be substituted for X as the debtor/ mortgagor under the bond, because the property is not hypothecated in its entirely, as in the past, but is hypothecated minus the usufruct. The security value under the bond is therefore substantially reduced.

If a mortgage bond, however, contains a waiver of preference, as in the case of a usufruct, and the usufructuary joins with the bare *dominium* owner in passing transfer, the bond may be substituted (Registrars' Conference Resolution 29 of 1962), provided the usufructuary waives the preference in respect of the usufruct.



Example

X owns Erf 1, Vryburg. The property is subject to a usufruct in favour of Y and is hypothecated by means of a mortgage bond. Y waives preference of the right to usufruct in favour of the bond. If X sells the property to Z, and X and Y together transfer the property to Z, Z will be owner of the entire property (free of the burden of the usufruct). X may, however, sell the property to Z, but Y may nevertheless waive preference in respect of the usufruct in favour of the bond.

Z can now be substituted for X as the debtor under the bond, as the waiver ensures that the value of the security under the mortgage bond is not reduced.

Where the bond is passed by the owner and fideicommissary (s 69*bis*(3)), or by the bare *dominium* owner and usufructuary (s 69(3)) jointly, the full ownership of the property is hypothecated and if the property and the real right in the property is in each case sold by both of them, the bond can be substituted under section 57.

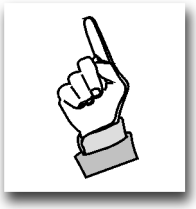
5.5.2.4 If new owner is not competent to mortgage

If the new owner is a person who is not competent to mortgage the land, for example a minor, that person can also not be substituted for the debtor, because he/she is incapable of passing the bond without assistance (see s 57(4)(a)).

Where in a will a conditional bequest provides that a minor (legatee) is to take over an existing bond, the guardian can only accept responsibility on behalf of the minor with the consent of the Master of the High Court, provided the amount of the bond is less than R100 000,00. If the amount of the mortgage bond exceeds R100 000,00 the guardian will require the consent or the authority of the High Court (*Ex parte Ross* 1940 CPO 6 and *Ex parte Ansermino* 1949 (1) SA 357WLO).

5.5.2.5 If bond secures the obligations of a surety

When the bond to be substituted secures the obligations of a surety, the transferee cannot be substituted for the existing debtor (s 57(1) of the Act).



Example

X owns Erf 1, Vryburg. The property is hypothecated in favour of Z by means of a mortgage bond to secure Y's indebtedness to Z. X therefore stands surety for Y's indebtedness to Z by passing the bond. If X sells and transfers the property to Q, Q cannot be substituted for X as the debtor under the bond, because this will result in Q binding himself as surety for Y's debt. This might be to the detriment of Q and not in accordance with the original agreement between X, Y and Z. Neither does it fall within the ambit of section 57. To proceed with the transfer the mortgage bond will have to be cancelled with the consent of Z.

5.5.2.6 Two or more mortgagors may not be substituted for a single mortgagor

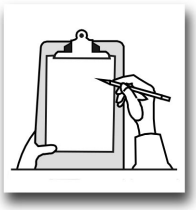
Two or more mortgagors may not be substituted for a single mortgagor in respect of properties mortgaged under a mortgage bond. A mortgagor may not, for example, transfer his 12 properties (four each) to three different trusts and then substitute the trusts as mortgagors (Registrars' Conference Resolution 18(a) of 1996).

5.5.3 Substitution of debtor of covering bonds in terms of section 57

The substitutions of a debtor in a covering mortgage bond under section 57 is permissible if a consent by the mortgagor/transferor and mortgagor/transferee is provided in the form of form W to the regulations.

If the substitution (whether in terms of section 57 or section 45) is not for the full amount of the bond, a part payment or reduction of cover must first be registered (reg 47). (Regulation 47 will be discussed in more detail later in this unit.)

We have now completed the section on substitution of mortgagors. Now may be a suitable time to consolidate what you have learnt in the following activity.



Activity

1 In what circumstances can a debtor not be substituted in terms of section 57 of the Act?

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2 What conditions must be met before a person can be substituted for the debtor in terms of:

- section 24*bis*(3) of the Act

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- section45(2)(c) of the Act

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- section 45*bis*(2)(a) of the Act

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3 Name the two instances in which section 45*bis*(2)(a) of the Act can be applied for substitution of a debtor.

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4 X passes a mortgage bond in favour of Y over Erf 10, Delmas. X sells and transfers the property to Z, subject to a reservation of usufruct in favour of herself. Can Z be substituted for X as the debtor of the bond? Give reasons for your answer.

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5 What is the effect of the substitution of a debtor in a registered bond?

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6 Property vests in X and Y, who are married to each other in community of property, and the property is hypothecated. The marital regime of X and Y changes to out of community of property and according to the court order they both remain owners of the property. How will the bond be disposed of?

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7 Briefly differentiate between the application of section 45(2)(c) and section 45*bis*(2)(a) of the Act.

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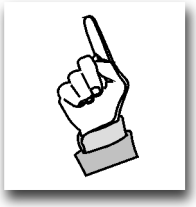
Now that we are familiar with cancellations, releases, cessions and substitutions of debtors under mortgage bonds, we shall end with the acts of registration related to mortgage bonds in terms of regulation 39(1) of the Act, namely the registration of part payments and reduction in cover, waivers of preference and agreements to vary the terms of a bond.

6 Part payments

6.1 General

If a mortgagor has paid part of the moneys due on a fixed debt or obligation secured under a mortgage bond, this payment can be endorsed on the bond, thereby reducing the amount secured by the bond. The endorsement can only be made on application by the holder of the bond. The purpose of the endorsement is to indicate that the sum of the debt has been reduced.



Example

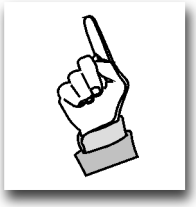
X owes Y R300 000,00, which debt is secured by a mortgage bond. X has already paid Y R100 000,00. If Y consents to the part payment being noted against the bond, the debt secured by the bond will be R200 000,00.

A part payment can be registered only if the bond does not secure future debts, that is the part payment cannot be endorsed in respect of a bond which provides a continuing covering security. (Consult unit 9 to see what is meant by ''continuing covering security''.) The reason is that, in the case of a covering bond, the amount owing under the bond may fluctuate. If, for example, the continuing covering is for an amount of R20 000,00, the debtor can request a re-advance of moneys paid, up to an amount not exceeding R20 000,00. The debtor may therefore owe the creditor only R1 000,00 and a month later owe R20 000,00. This means that the registration of a part payment does not serve any purpose while the cover afforded by the bond remains unaltered, because the amount owed by the debtor can fluctuate at any stage.

6.2 Consent to part payment

Only the mortgagee can consent to the registration of a part payment (reg 39). The consent is drawn up in accordance with prescribed form MM, as set out in the introduction to this unit.

When there is more than one bondholder and all the bondholders consent to the noting of a part payment in respect of the whole of the amount due to one bondholder, it sometimes happens that this bondholder simultaneously consents to the ultimate cancellation of the bond relating to his/her share.



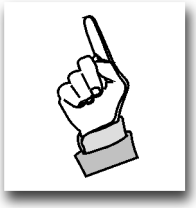
Example

X owes Y and Z R300 000,00, which debt is secured by a mortgage bond. Y is owed R100 000,00 and Z is owed R200 000,00. X pays R100 000,00 and Y and Z consent to a part payment being registered in respect of the R100 000,00 in full settlement of the amount due to Y. Y can now consent in writing to the ultimate cancellation of the bond, but this does not mean that Y obtained preference in respect of security.

When the bond is eventually cancelled, the consent of that one bondholder is never required again. The bondholder who consents to the ultimate cancellation does not obtain preference in respect of the security (Registrars' Conference Resolution 18 of 1951, 2 of 1964 and 62 of 1970). The mortgagor's consent is not required (Registrars' Conference Resolution 40 of 1967).

6.3 General

It is not possible to reduce the amount of a surety bond by way of a part payment without affecting the principal bond. The correct procedure is to cancel the surety bond and to pass a new surety bond for the lower amount in substitution for part of the old bond (Registrars' Conference Resolution 24 of 1968).



Example

If the debt under the principal bond is R20 000,00 and a surety bond is passed for payment of the R20 000,00, a part payment of R10 000,00 cannot be registered against the surety bond if the debt under the principal bond is still R20 000,00. The surety bond will have to be cancelled and a substitution surety bond registered for the lower surety. This procedure must also be followed with collateral bonds (Registrars' Conference Resolution 31 of 1994).

7 Reduction in cover

7.1 General

It may happen that a bond registered to secure existing debts also becomes a covering bond for future debts up to the capital amount of the existing debt. This will happen when the terms and conditions of the mortgage bond are such that moneys lent may be repaid and re-advanced repeatedly. In such a case,

registration of a part payment of the mortgage bond will not affect the cover afforded by the mortgage bond, because the outstanding amount is continually fluctuating. Therefore a reduction in cover will be registered against the bond. A reduction in cover is registered against a covering bond to reduce the extent of the security afforded by the covering bond. (See heading 5 in unit 9 on covering bonds.)

A reduction in cover can only be registered in respect of a bond which secures future debts (Registrars' Conference Resolution 8 of 1978).

(Make sure you know when a part-payment may be registered and when a reduction in cover may be registered!)

Where reductions in cover are registered to enable one of several co-mortgagees to withdraw from a covering bond, it is not necessary to obtain the consent of the mortgagor (Registrars' Conference Resolution 13 of 1967).

In order to register a reduction in cover in respect of a covering bond a consent, prepared on form MM in the Deeds Registries Regulations must be used. (Consult the introduction to this unit for an example of this form.)

Activity

1 Is the mortgagor's consent required when a part-payment is agreed to in respect of the whole amount due to one or a number of bondholders? Discuss.

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2 Why can a reduction in cover not be noted against a bond that does not secure future debt? Discuss.

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8.1 General

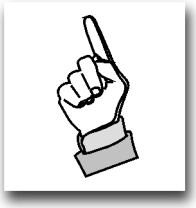
Section 3(1)(i) of the Act provides that waivers of preference in respect of registered real rights in land in favour of mortgage bonds may be registered. Such waivers may be registered against bonds already registered and bonds about to be registered. But note that where a minor is concerned, waiver of such a real right is regarded as an alienation which is subject to section 80 of the Administration of Estates Act 66 of 65; that is, consent of the Master of High Court might have to be lodged (Registrars' Conference Resolution 51 of 2006).

Although section 3(1)(i) restricts the registering of waivers of preference to registered real rights such as usufruct, *habitatio* and *usus*, it has long been common practice to register waivers in respect of other personal rights, such as rights of pre-emption or reversion or fideicommissary rights.

Where preference is to be waived in respect of a bond about to be registered, it is waived on the authority of a power of attorney from the holder of the real right. If the real right is held under a separate title deed from the land being mortgaged, the title deed must be lodged for endorsement regarding the waiver of preference.

A waiver of preference in respect of a real right is essentially an act of suretyship (*Estate Carstens v Van der Westhuizen* 1934 CPD 191).

A registered mortgage bond is also a registered real right and therefore preference can be waived by the holder of a registered bond so as to give another bond equal or prior ranking. Mortgage bonds generally rank in preference in order of their dates of execution. This preference may be waived in favour of an existing and subsequent bond and such a waiver must be registered against any existing bonds.



Example

X is the holder of registered bond B 2/98, which ranks first over the hypothecated property. Another bond is to be passed over the property in favour of X. X can consent to mortgage bond B 2/98 ranking *pari passu* (equal) with the new bond.

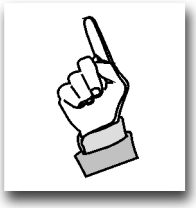
OR

If the bond to be passed is in favour of the Land Bank for example, X may consent to the waiver of preference, allowing the new bond to rank prior to mortgage bond B 2/98. Mortgage bond B 2/98 will now rank as a second bond.

Whenever preference of a mortgage bond is waived in favour of another mortgage bond, that bond will be in a stronger (preferent) position than the waived real right in a situation where the mortgagee is unable to meet his/her debts (s 3(1)(h) of the Deeds Registries Act).

8.2 Notarial waivers

Any waiver of preference in respect of a registered real right in land (including registered mortgage bonds) in favour of a registered mortgage bond must be contained in a notarial deed (reg 41(7)). In such a case, the waiver will be endorsed on the bond and noted against the title deed of the real right. If the waiver is in respect of a bond about to be registered, it may be contained in a notarial deed or in the bond itself. Be sure to differentiate between waivers of preference and consents. The former may be prepared by a conveyancer, notary public or attorney, while the latter must be prepared by a conveyancer only (reg 44(1)).



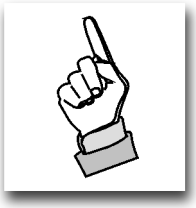
Example

X property is hypothecated by mortgage bond B 1/2006 and mortgage bond B 2/2006. B 1/2006 ranks first and B 2/2006 second. The holder of B 1/2006 can consent to waive preference, in order that B 2/2006 will rank prior to B 1/2006. This consent must be contained in a notarial deed.

The waiver of preference must be drawn up on form MM, as set out in the introduction to this unit.

The waiver must be in favour of the bond and not the mortgagee.

If more than one property is mortgaged under an existing bond and a number of the properties are being mortgaged under the new bond, the consent should be duly indicated by stating the properties after the word ''*registered*'' (Registrars' Conference Resolution 30 of 1990).

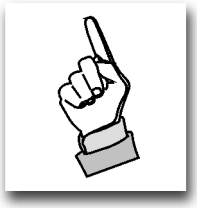


Example

If preference of a usufruct is waived, the actual wording of the waiver may read as follows:

> ''*... hereby waives and postpones, in favour of the mortgage bond to be registered, the usufruct over the said property held by his or her principal by (title of usufruct) to the intent that his said principal shall not at any time be in a position by virtue of such usufruct to compete with the said mortgagee, but in the event of the said property being sold in execution or in insolvency, the mortgagee shall have the right to have the property transferred to the purchaser thereof free from such usufruct and to have the whole of the proceeds of such sale used for the payment of such moneys as shall then be due and owing to the mortgagee under the bond, plus all costs and interest due.*

If a mortgage bond or notarial bond is passed by two or more mortgagors, no waiver of preference by the mortgagee in favour of a further mortgage bond or notarial bond over the property of one of the mortgagors may be registered without the written consent of the other mortgagor or mortgagors (s 55(1)*bis*).



Example

B 3/2006 was passed by X, Y and Z, hypothecating Erf 1, Ellisras (belonging to X), Erf 2, Ellisras (belonging to Y) and Erf 3, Ellisras (belonging to Z). The bond ranks as a second bond over all the properties. If another bond is to be registered over Erf 2, Y can consent to the waiver of preference in order that the new bond ranks prior to mortgage B 3/2006, but X and Z must consent, too, as this may affect them adversely.

Where two bonds, to be executed simultaneously, purport to rank *pari passu*, no waiver is called for if the ranking clauses in both powers of attorney are clear as to the intention.

8.3 General

8.3.1 In a bond already registered over the bare dominium

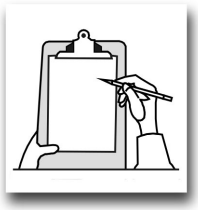
If a bond has already been registered over the bare *dominium* and the usufructuary waives preference in favour of a bond:

- the bare *dominium* owner and the usufructuary may bind themselves jointly and mortgage the whole property in a subsequent mortgage bond, or
- pass a second bond over the bare *dominium*, subject to the usufruct, and bind the usufruct in a separate paragraph stating that this ranks ''*as a mortgage*'', or
- pass a bond by the owner of the bare *dominium* and the usufructuary as a bond over the whole property, which property must be described in a single paragraph in the deed

Reference to the usufructuary's waiver of the preference should be made in the ranking clause (Registrars' Conference Resolution 27 of 1961).

8.3.2 If ranking clause indicates a waiver of preference or pari passu *ranking*

If a bond is lodged wherein the ranking clause indicates a waiver of preference or *pari passu* ranking, the existing bondholder must waive preference, even if he/she is the holder of both bonds, on account of section 3(1)(h) of the Deeds Registries Act 47 of 1937 (Registrars' Conference Resolution 1 of 1994).



Activity

1 Mention the different kinds of waiver of preference and the effects of each.

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2 A bond registered in favour of Y is ceded as security to Z. Who must consent to a waiver of preference?

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3 Two bonds are registered simultaneously. The ranking clause of each bond indicates that it will rank *pari passu* with the other bond. Must a waiver of preference be lodged in each case?

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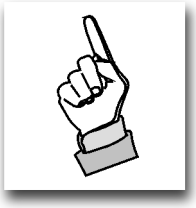
9 *Section 3(1)(s): agreements varying the terms of a bond*

9.1 General

In terms of section 3(1)(s) of the Act it is the duty of the registrar of deeds to:

> ''*register against any registered mortgage or notarial bond any agreement entered into by the mortgagor and the holder of that bond, whereby any terms of that bond ... have been* varied.



Example

A bond is passed by X in favour of Z. The following clause appears in the bond:

> *Interests on all amounts owing by X to Z and secured under this bond shall be calculated at a rate of 10%.*

If X and Z agree to change the interest rate to 15 per cent, the condition has been varied and the variation agreement must be set out in the prescribed form for registration.

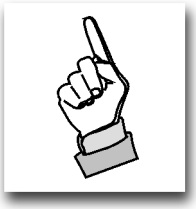
However, in terms of section 3(1)(s) the following terms may **not** be varied:

- conditions relating to the cause of debt
- conditions relating to the mortgaged security
- conditions relating to the amount of the debt secured by the bond (this amounts to a registration of a part payment or reduction of cover and not a variation of the terms of the mortgage bond)
- conditions relating to any additional amounts (costs clause)

Since a mortgage bond constitutes a real right in land (*Lief v Dettman* 1964 (2) SA

252 (A)), the registrar of deeds will refuse to register a variation agreement in terms of section 3(1)(s) changing the character of the bond. A new mortgage bond will have to be registered.

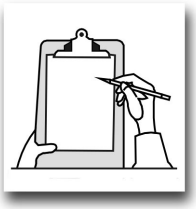
If a mortgage bond contains a condition making it a covering bond (that is, where the debt or future debt will fluctuate), such condition may not be deleted by a variation agreement in terms of section 3(1)(s) (Registrars' Conference Resolution 11 of 1956 and 6 of 1967).



Example

Using the above example and given that the condition was registered incorrectly because the interest rate was incorrect, do you think the condition can nevertheless be amended in terms of an agreement under section 3(1)(s)?

NO! Conditions can only be varied by such an agreement, not rectified or amended. If it was registered incorrectly, it must be rectified in terms of section 4(1)(b) of the Act. The usual conditions pertaining to acknowledgment of debt contained in the bond, such as those providing for the rate and payment of interest, the method and time of repayment of the capital, the *domicilium* clause, and so forth, can be amended or substituted or new conditions of this nature can be inserted.



Activity

What terms in a bond cannot be varied by means of an agreement under section 3(1)(s)?

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The prescribed form for a variation agreement is form VV. The wording of the operational clause may read as follows:

> *... do hereby agree that the terms of the said bond shall be varied as follows: The rate of interest shall be calculated, at twenty-five per cent (25%) per annum instead of eighteen per cent from 1 July 1998*

If a bond has been ceded as security, the mortgagor (cedent), mortgagee and cessionary must each sign the variation agreement.

Each signature must be attested to. Although regulation 39 is silent on this point, there should be two witnesses to each signature.

9.2 General

Say a debenture bond is registered and a copy of the debenture trust deed annexed to it, the bond stating that the trust deed should be deemed to be incorporated in and form part of the bond. The trust deeds are subsequently amended, which amendments were not registered against the bond. At this stage they can be registered, by means of an agreement entered into in terms of section 3(1)(s) of the Act. The various amending deeds should be annexed to the agreement (Registrars' Conference Resolution 29 of 1964).

An agreement in terms of section 3(1)(s) between the mortgagor and cessionary can be registered at the same time as the cession of the bond (Registrars' Conference Resolution 28 of 1971).

10 Summary

We have dealt with some acts of registration commonly lodged at a deeds registry, specifically the circumstances in which a registered mortgage bond can be cancelled or ceded, or the property, and sometimes even the mortgagor, be released from the bond. In certain specific prescribed circumstances the debtor may be substituted under a bond by way of endorsement rather than cancelling the bond and registering a new bond simultaneously with the transfer of the property. These endorsed substitutions usually correspond with transfers by endorsement in terms of sections 24*bis*(3), 45(2)(c) and 45*bis*(2)(a). In addition we studied substitution of debtors in terms of section 57 where the bonded property is transferred by deed of transfer and not by endorsement. Finally, we discussed the variation of the terms of mortgage bonds by virtue of section 3(1)(s) and what matters may not be varied.

UNIT 11

Sequence of deeds and miscellaneous applications

1 Introduction

In the previous units we have studied transfers, substituted titles and mortgage bonds. It is important to note, however, that all transfers of land and cessions of real rights must be registered in a sequence as prescribed by section 14 of the Deeds Registries Act 47 of 1937, unless other legislation or an order of court provides differently. In this unit we will study the principles of section 14 as well as some diverse applications and endorsements commonly used in conveyancing both in terms of the Deeds Registries Act 47 of 1937 and other legislation.

This unit looks at the following key questions:

- What are the general rules contained in section 14 of the Deeds Registries Act 47 of 1937 and what exceptions apply to these rules?
- What are the requirements for a valid redistribution agreement?
- Under what circumstances would the amendment in terms of section 4(1)(b) have the effect of transferring a right?
- How do we distinguish between the change of name of a person and of immovable property in section 93?
- How do applications differ in terms of section 44 and section 4(1)(b)?
- What is meant by the lapsing of a personal servitude and in what circumstances is such a servitude deemed to have lapsed?
- What are the circumstances in which section 39(2) applies and when do we apply section 39(3) of the Administration of Estates Act 66 of 1965?
- What are the prerequisites for an endorsement in terms of section 40 of the Administration of Estates Act?

Please refer to the study guideliner in tutorial letter 101 in order that you may concentrate on the most important aspects of this unit.

2 Significance of section 14

Section 14 of the Deeds Registries Act 47 of 1937, read with section 16, forms the cornerstone of the South African system of land registration — without it the records would be incomplete. Ownership of immovable property and real rights in that property can, with some exceptions such as expropriation in which instances ownership vests by operation of law, be conveyed only by means of registration in the deeds registry (s 16). Furthermore, the transfer of ownership of the property and other real rights must time and time again be registered by means of a deed or an endorsement, in the name of each person who successively becomes entitled to the property or rights (s 14).

The main purpose of section 14 is to ensure that there are comprehensive deeds registry records of transfers of land and cessions of real rights, thereby protecting the unassailability of the titles of all interested parties and to secure the payment of the prescribed taxes payable on the acquisition of land and other real rights in the form of transfer duty.

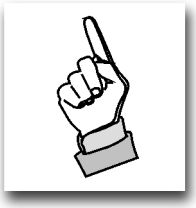
Section 14(2) of the Act provides that even where transfer or cession is effected in terms of an exemption to a general rule, transfer duty is nevertheless payable, as would have been the case had the immovable property or right been transferred or ceded to the person(s) who would successively have become entitled to it.

3 The general rules

Section 14 stipulates that unless the **Deeds Registries Act, another law, or the court** states otherwise, the general rules are as follows:

- Transfers of land and cessions of real rights in the land must follow the sequence of the successive transactions in pursuance of which they are made.
- If those successive transactions are made in pursuance of testamentary dispositions or intestate succession, they must follow the sequence in which the right to ownership or other real right in the land accrued to the persons successively becoming vested with the right.
- It is unlawful to depart from any such sequence when recording any change in the ownership of the land or real right concerned in a deeds registry.

Note that in terms of the Insolvency Act, the immovable property of an insolvent automatically vests in a curator in terms of legislation and is not conveyed by virtue of a juristic act. Likewise, a rehabilitated insolvent has the right to claim the immovable property that has remained in his estate and have it re-registered in his name. In neither instance does section 14 of the Deeds Registries Act apply (*Ex parte Allright* 1946 T 663).

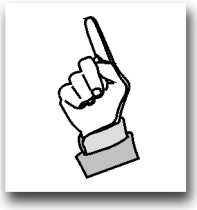


Example

If X sells to Y and Y in turn sells to Q without having taken transfer or cession from X, and Q then sells to Z, X is not permitted to pass transfer or cede direct to Z. X must pass transfer to Y, Y to Q and Q to Z.

Section 14 does not limit the existing method of taking transfer, but simply states that transfers must follow the sequence in which the right to claim transfer

occurred, irrespective of whether the acquisition was in respect of a transaction (juristic act) or in respect of a testamentary disposition or intestate succession.



Example

If land is bequeathed to X, who dies before taking transfer, transfer must first be passed to X's estate, or to the joint estate of X and the surviving spouse if they were married in community of property, and secondly from X's estate (or joint estate) to the heirs or to the person to whom it was sold by X before his death or the executor in X's estate.

For the purposes of section 14 it is imperative to acknowledge that two separate transactions take place when X sells land to Y and Y in turn sells and transfers/ cedes all his rights and obligations under the contract to Z.

It is immaterial whether the transaction is a sale, donation or exchange of land or a real right, or whether the sale, donation or exchange is a right to claim transfer, or whether it is an actual cession of a right to claim transfer. Section 14 simply states that if at the time of registration of transfer or cession there is more than one sequential transaction or testamentary disposition, leading to the final registration to be effected, registration of transfers or cessions must follow the sequence in which each of the transactions or testamentary dispositions took place.

3.1 Exceptions to the rules contained in section 14

There are exceptions to the general rule that the deeds and cessions must follow the sequence of the successive transactions in pursuance of which they were made. The exceptions can be divided into the following three categories:

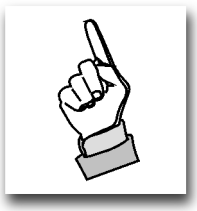
3.1.1 Exceptions contained in section 14 of the Deeds Registries Act itself

First, we will discuss the exceptions contained in the proviso to section 14(1)(b) and then we shall proceed to other exceptions contained in the Deeds Registries Act 47 of 1937.

3.1.1.1 Section 14(1)(b)(i)

Transfer of land or cession of a real right which devolved upon a descendant may be transferred by the executor of the deceased estate direct to that descendants' heir *ab intestato,* provided that:

- the land or real right devolved upon the descendent in terms of a will or through intestate succession
- the descendant died a minor and intestate before the deceased
- no executor was appointed in the intestate estate of such minor descendant



Example

X bequeaths his property to Y in terms of a will. Y dies intestate (without leaving a valid will) whilst still a minor. No executor was appointed in Y's estate. The intestate heirs of Y are Q and Z, who are his mother and father.

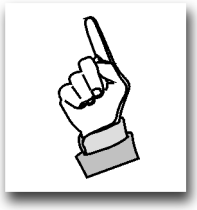
According to the exception to the general rule, the property can be transferred direct from X to Q and Z.

Note that the above three requirements are cumulative, that is the exception applies only if all three requirements have been met.

3.1.1.2 Section 14(1)(b)(ii)

The executor in a deceased estate may transfer immovable property or cede a real right direct to a purchaser of such property, if:

- the immovable property has devolved upon an heir or legatee in terms of a will or through intestate succession
- the registrar is satisfied that the costs of transferring or ceding the property to the heir or legatee would equal or exceed the value of the property
- the property was sold to the purchaser by the heir or legatee
- the heir or legatee has consented to the procedure in writing
- proof of the value of the property must be furnished by means of a written valuation by a sworn appraiser (reg 55)

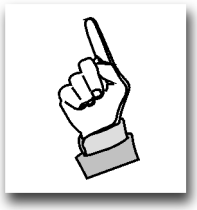


Example

X dies and in terms of his will, he bequeaths his property to Y. The value of the property is R2 000,00 according to a valuation by a sworn appraiser. The cost of transferring the property to Y will amount to R4 000,00. Y sells the property to Z for R2 500,00 and consents in writing to the transfer of the property to Z direct from X's estate.

3.1.1.3 Section 14(1)(b)(iii)

If in the administration of a deceased estate any redistribution of the assets or a portion of the assets (including a *fideicommissum*) takes place among the heirs, legatees, ascertained fideicommissary heirs and/or surviving spouse of the deceased, the executor or trustee of the estate may transfer the land or cede the real rights in the land direct to the persons entitled thereto, in accordance with such redistribution (which must have been reflected in the liquidation and distribution account.)



Example

X bequeaths his property to Y, Q and Z in terms of his will. Y, Q and Z enter into a redistribution agreement in terms of which the property will devolve to Y, while Q and Z will receive a cash amount. Transfer will now take place direct from X's estate to Y.

The whole or any portion of the assets of an estate can be redistributed. Section 14(1)(b)(iv) provides further that you can even introduce movable property that does not form part of the estate, for the purposes of equalising the division.

Since redistribution presupposes a variation of the liquidation and distribution

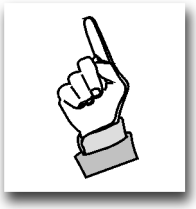
account, any transfer by virtue of the redistribution must be reflected in the liquidation and distribution account. Therefore a redistribution after the liquidation account has been accepted is not possible.

3.1.1.4 Section 14(1)(b)(v)

According to this section, the proviso contained in section 14(b)(iii) shall apply *mutatis mutandis* in the following instances.

3.1.1.4.1 In the case of the redistribution of the assets of the joint estate of spouses who were married in community of property and have since been divorced or judicially separated

The following example describes the **only instance** where an intermediary transfer/ cession can be avoided.



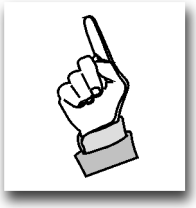
Example

X sells or donates immovable property to Y, who is married in community of property to Q. But, before the property can be registered in Y's name, the marriage between Y and Q is dissolved. In terms of their divorce agreement, which was made an order of court, Q is entitled to the immovable property concerned. Instead of the immovable property being transferred into the names of Y and Q according to the general rule in section 14(1) and thereafter into Q's name, it can be transferred direct from X to Q by deed of transfer.

In all other instances, the transfer can take place by way of a single deed of transfer or cession or an endorsement in terms of section 45*bis*.

3.1.1.4.2 When the assets of a partnership are redistributed on dissolution of the partnership

Since a partnership is not a separate *persona*, immovable property must be registered in the names of the individual partners, with reference to the fact that they are carrying on business as a partnership. Hence when the partnership dissolves and the partners in their individual capacity take ownership of the property by endorsement, it does not actually involve a transfer of ownership.



Example

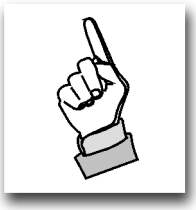
Immovable property is registered in the names of X, Y and Q, carrying on business as XYQ Partnership. If the partners agree to dissolve the partnership and that X and Y should receive the immovable and Q the movable property, it will be unnecessary to first transfer the assets from the partnership to the individual partners X, Y and Q, and thereafter for Q to transfer his one-third share to X and Y.

However, in terms of section 9(3) of the Transfer Duty Act of 1949, transfer duty is

payable on a one-third share of the immovable property, that is Q's one-third share being acquired by X and Y.

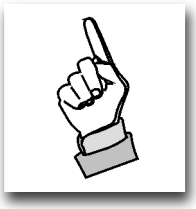
3.1.1.5 Section 14(1)(b)(vi)

This section states that if a fiduciary interest in land or a real right expires before transfer of the land or cession of the real right has been registered in favour of the fiduciary, the land can be transferred or the real right ceded direct to the fideicommissary.



Example

X bequeaths her property to Y (the *fiduciarius)* subject to the condition that on Y's death, the property must be transferred to Q (the *fideicommissarius)*. Before registration of the property in Y's name, Y dies. The property can now be transferred direct from X's estate to Q.



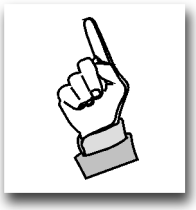
Example

The benefit of this exception is that when a fiduciary interest terminates (by death or otherwise) before the transfer of the immovable property into the fiduciary's name, the property can be transferred direct to the fideicommissary without having first to be transferred to the fiduciary's estate. This situation often arises in deceased estates.

In practice the exception contained in this section also applies when a nominated fiduciary repudiates his/her inheritance or legacy. In such a case, the immovable property is transferred direct to the existing fideicommissary.

This exception applies to both testamentary *fideicommissa* and those that are created *inter vivos,* as well as *fideicommissa* that create successory fiduciaries.

When intermediary fideicommissary heirs fail, transfer must take place from the estate of the fiduciary heir (Registrars' Conference Resolution 12 of 1968; *Union Government v Olivier* 1916 A 74 on pp 85 and 91).

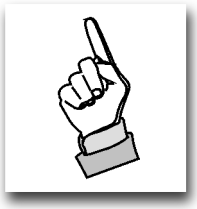


Example

X bequeaths his property to Y (the *fiduciarius*) subject to the condition that on Y's death, the property must be transferred to Q (the first *fideicommissarius)* and on Q's death to Z (the second *fideicommissarius*). Before registration of the property in Y's name, both Y and Q die. The property must now be transferred direct from X's estate to Y's estate and thereafter from Y's estate direct to Z.

3.1.1.6 Section 14(1)(b)(vii)

This section stipulates that if the right of a person to claim transfer of land or cession of a real right has been vested in a third person in terms of a judgment or court order (including a magistrate's court order), or a sale in execution held pursuant to such a judgment or order, then transfer of the land or cession of the real right may be passed direct to that third person by the person against whom the right was exercisable.



Example

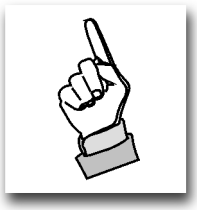
X sells immovable property to Y. Before the property is transferred to Y, Q institutes legal action against Y. In terms of the court order:

- Q acquires Y's rights under the deed of sale to claim transfer of the immovable property from X; or
- Y's rights under the deed of sale are attached and sold in execution in terms of the court order to Z.
- Instead of the immovable property being transferred first from X to Y and then from Y to Q (or Z), it can be transferred direct from X to Q (or Z) in terms of this exception.

3.1.2 Other exceptions contained in the Deeds Registries Act 47 of 1937

3.1.2.1 Section 33(1)

If a person acquires the right to ownership of immovable property registered in the name of another person and is unable to procure registration of the property in his/her name in the usual manner, and according to the sequence of the successive transactions or successions in pursuance of which the right to the ownership of the property has devolved upon him/her, then this person may apply to the court for an order authorising the registration of the property in his/her name.

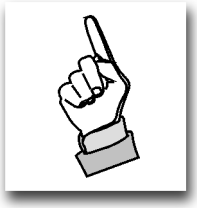


Example

X sells land to Y and Y in turn sells the land to Q. Y disappears. In terms of section 33, ownership can now, with the authorisation of the court, be transferred direct from X to Q, constituting an exception to the general rule contained in section 14 (see discussion on transfer by virtue of an order of court in unit 5).

3.1.2.2 Section 92(2)

According to this section, land or a real right in land that has been settled upon or donated to an intended spouse in terms of an antenuptial contract cannot be transferred or ceded by a donor to any person other than the donee. Furthermore, the donor cannot mortgage the land, unless the transfer duty (if any) payable on the settlement or donation has been paid.

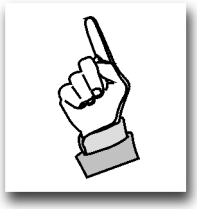


Example

X and Y sign an antenuptial agreement in terms of which X donates a property to Y. After their marriage, X sells the property to Q. On transfer of the property from X to Q, a transfer duty receipt must be lodged in respect of the donation from X to Y — in addition to the transfer duty receipt that has to be lodged in respect of the acquisition of the property by Q in terms of the sale. X is therefore not obliged to transfer the property to Y, despite the general rule contained in section 14.

3.1.2.3 Section 24 *bis*

This section is also regarded as an exception to the general rule as reflected in section 14 (Registrars' Conference Resolution 3(i) of 1961). A change in the shareholding of partners does not need to be followed by registration in a deeds registry where immovable property of the partnership is concerned. Where necessary, transfer duty will however be payable.



Example

Property vests in:

(a) JOHN JUNIOR
Identity number .....
Married in community of property to SALLY JUNIOR, and

(b) PAUL PETERSON
Identity number .....
Unmarried
together carrying on a partnership as JOHN PAUL.

John has a third shareholding in the partnership and Paul a two-thirds shareholding. John and Paul decide to change their shareholdings, giving Paul a one-third share in the partnership and John a two-thirds share. This change need not be registered against the property.

3.1.3 Instances where the court directs otherwise

The court can make a ruling that the transfer of a property or the cession of rights must be registered without following the sequence of transactions (see 3.1.2.1 above).

3.1.4 Exceptions contained in other Acts

Certain other Acts also provide for deviation from the general rule contained in section 14, for instance the Prescription Act 68 of 1969 and the Restitution of Land Rights Act 22 of 1994.

4 Transfer duty on intermediary transfers

In terms of section 14(2), any transfer or cession in terms of a *proviso* to section 14(1)(b) is subject to the transfer duty that would have been payable had the

property concerned been transferred or ceded to each person successively becoming entitled to it.

Section 12 of the Transfer Duty Act of 1949 and section 92 of the Deeds Registries Act of 1937 provide that a transfer duty receipt in respect of each acquisition as referred to in the former Act must be lodged with the registrar of deeds on registration of transfer. Both of these sections are therefore safety precautions to ensure that registration does not occur without the necessary transfer duty (if any) being paid. Section 14(2) of the Deeds Registries Act 47 of 1937 is an additional safety precaution, ensuring that the avoidance of an intermediary transfer or cession at the time of registration does not mean that transfer duty can be avoided too.

Even if the court states that in terms of section 33 an intermediary transfer need not be registered, transfer duty must nevertheless be paid on that intermediary transaction.

We have now completed our discussion of the sequence of deeds and will move on to the final topic in this module, namely some diverse applications and endorsements in terms of the Deeds Registries Act and other Acts commonly used in conveyancing.

Before we leave section 14 and the sequence of deeds, let's consolidate the knowledge you have gained in an activity.

Activity

1 In terms of an *inter vivos* donation contained in an antenuptial contract, X donates his property to his wife Y. Although no transfer of the property has been effected, X wishes to register a bond over the property. Discuss the transfer duty implications.

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2 X dies and in terms of his will Y and Q inherit his property. Y and Q sign an agreement stating that the property will be registered in Y's name, while Q will receive cash before the liquidation and distribution account has been finalised.

(a) In what sequence must the transfer be registered? Give reasons for your answer.

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(b) Who will be party to this agreement?

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(c) Would your answer in (a) be different if the agreement was signed after the liquidation and distribution account was finalised? Discuss.

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3 List the categories of exceptions to the rules contained in section 14.

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4 X dies and in terms of his will, his property must pass to Y, his minor grandson, who shortly thereafter dies intestate. No executor was appointed in Y's estate. Y's heirs are his mother and father. In what sequence must the transfer(s) be registered? Give reasons for your answer.

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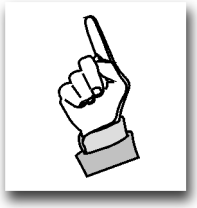
5 Diverse applications and endorsements

We will first discuss various applications for endorsements that can be made against title deeds and mortgage bonds, as provided for in the Deeds Registries Act 47 of 1937.

5.1 Application for the amendment of an error in terms of section 4(1)(b) of the Act

5.1.1 General

An error in a registered deed or document, for example in the spelling of the transferee's name, can only be amended in terms of section 4(1)(b) of the Act. The error must have been an error at the date of registration of the deed or document, and should not have become an error **subsequent to registration**.



Example

A deed was registered on 1/6/1990 in the name of SANET CRONJE. On 3/8/2004 she changed her name to SIRI CRONJE. Sanet cannot rectify her name in the deed by making an application in terms of section 4(1)(b), as the deed was registered correctly on 1/6/1990. (Name changes after registration are dealt with in terms of s 93(1), and in 5.5 below.)

Had Sanet's name changed before 1/6/1990, and the deed at the time was incorrectly drafted to reflect her former name, the deed would have been registered incorrectly and the name can be rectified by means of an application under section 4(1)(b).

What errors can be amended in terms of section 4(1)(b)?

By virtue of paragraph (b) of section 4(1) of the Act, a registrar is empowered to amend an error in a deed or other document with regard to one or more of the following:

- a person's name (for example Siri instead of Sanet as described above)
- the description of a person (for example identity or registration number, date of birth or marital status and details of spouse)
- the name of a property (for example incorrect spelling of township name)
- the description of a property (for example described as Portion 2 instead of Portion 2 of Portion 6)
- the conditions affecting such a property (for example a servitude incorrectly included in title conditions)

However, the amendment must not result in a contravention of another Act, for example the Subdivision of Agricultural Land Act 70 of 1975 and the Advertising on Roads and Ribbon Development Act 21 of 1940; also, if the deed that is to be amended is mortgaged, the amendment must not be allowed to render the bond invalid.

No amendment can be made to a ''dead'' deed. A deed is deemed to be ''dead'' when, for example, no registration dealings can be registered against it in future. If a title deed no longer serves as proof of ownership because all the property held under it has been transferred to another person, it is generally referred to as a ''dead title deed''. By the same token, a mortgage bond is known as a ''dead bond'' once it has been cancelled.

Neither does one amend the name of a person who has no right under or interest in a deed or document once it has been registered, for example a transferor in a deed of transfer or cedent in a notarial cession. These persons no longer have an interest in the property once the transfer or cession has been registered.

Mortgage bonds may also be amended in terms of this section; but bonds that are being cancelled are not amended either, except if the error has a bearing on the description of the mortgagee, since there should be no doubt that the person who is cancelling the bond is also the bondholder.

Although there is no provision in the Act for the amendment of an erroneous purchase price in a deed, a registrar may affix a suitable endorsement to the deed if sufficient proof has been submitted to him/her (Registrars' Conference Resolution 4 of 1956). In such a case, extra transfer duty may be payable.

5.1.2 Application

Although Act 47 of 1937 does not require an application, it is common practice for an amendment in terms of section 4(1)(b) to be recorded only on written application by the registered owner of the land or the holder of the registered real right in land, substantiated by a sworn affidavit.

The provisions of section 4(1)(b) cannot be applied if it would have the effect of transferring any right (s 4(1)(b)(iv)). The sworn affidavit usually makes clear that this is not the case, failing which a conveyancer can certify that no rights have been transferred as a result of the amendment.

In addition, the applicant is required to state in the application and/or sworn affidavit that there are no further deeds that need to be amended, failing which the conveyancer will certify to that effect.

If an error is common to two or more deeds, the registrar has the right to insist that all the deeds be amended (s 4(1)(b)(iii) and Registrars' Conference Resolution 67 of 1964).

When do you think an amendment will cause a right to be transferred?

A property may, for example, be registered as follows:

> A property registered in the names of:
>
> BEN BACK
>
> *Identity number* .....
>
> *Unmarried*
>
> *And*
>
> *BESSIE BACK*
>
> *Identity number* .....
>
> *Married out of community of property*

The property should, however, have been registered in Ben's name only, not in Bessie's name, too. This error cannot be amended by means of an application in terms of section 4(1)(b), as Bessie's share in the property must first be transferred to Ben. A rectification transfer will have to be registered for this purpose. (See 2.3.4.5 on rectification transfers in unit 4.) If the registered owner is insolvent and his/her trustee applies in terms of section 4(1)(b) to amend the insolvent's personal particulars, the insolvent must be joined as an applicant or submit an affidavit regarding the amendment, or else the trustee must provide proof of the error (for example a certified copy of the insolvent owner's identity document). Hearsay evidence is not acceptable.

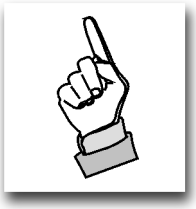
5.1.3 Operational clause

Both the erroneous and the correct information must be set out in the application. The applicant must apply for the deed to be amended.

The consents of all parties having an interest in the amendment, for example the mortgagees and usufructuaries, must be lodged (s 4(1)(b)(i)). If anyone refuses to consent to the amendment, the rectification may be made on the authority of a court order (s 4(1)(b)(ii)).

If the error relates to a party to an antenuptial contract and the contract has been lost, the deeds office copy of the contract must be amended and a *caveat* noted to allow for amendment of the client's copy on lodgment. A certified copy of the lost contract is therefore unnecessary (Registrars' Conference Resolution 52 of 1952).

If the title conditions are being amended and the corrected conditions are too lengthy to be reflected in the deed, the conveyancer must lodge a schedule of conditions in a separate lodgment cover. Such a schedule must mention the relevant title deed, include a description of the property and reflect the correct conditions. The conveyancer must certify the schedule a true extract of the original document, with the addition of the correct conditions (reg 62).



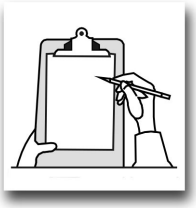
Example

Richard Thomas is the owner of Erf 1857, Danville Extension 2. Anna Thomas has a registered right of *habitatio* over the property. A bond was registered over the property in favour of ABSA Bank Limited.

Richard's name is, however, spelt as Ricard in the title deed. If Richard applies for an amendment of his name in terms of section 4(1)(b), ABSA Bank Limited and Anna Thomas will have to consent to the amendment.

The consent of the co-transferee, co-mortgagor or co-mortgagee need not be lodged when amending the name of a transferee, mortgagor or mortgagee, respectively (Registrars' Conference Resolution 3 of 1940). If, however, a mortgagor's name is amended, all the mortgagees must naturally consent to the amendment of the title deed and bond.

If the particulars of a party to an antenuptial contract need to be amended, the other party to the contract must consent to the amendment.



Activity

1 Identify the circumstances in which an error can be rectified in a deed in terms of section 4(1)(b) of the Act.

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2 Property is registered in the name of Jan Engelbrecht, unmarried. At the date of registration he was actually married out of community of property. Can his marital status be rectified by means of section 4(1)(b)?

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3 One half share in the property should have been registered in the name of Usa Matthee instead of the whole property. Can this vesting clause be rectified by means of section 4(1)(b)? Give reasons for your answers.

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5.2 Application in terms of section 17(4) of the Act

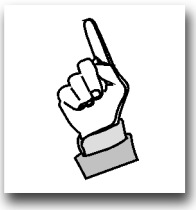
5.2.1 General

If a registered owner's marital status has changed or is not reflected in the title deed of immovable property, a real right in immovable property, a mortgage bond or notarial bond then the registrar must (on written application by the person concerned and submission of the deed in question and proof of the real facts) endorse the change in status or make a note to the effect that the person is party to a marriage in community of property, out of community of property, or party to a civil union, as the case may be. This procedure may also be used where parties to a customary union, prior to the coming into operation of the Recognition of Customary Marriages Act 120 of 1998, were described as unmarried in deeds. You will remember that prior to this Act, customary marriages were not recognised in South African law and that such spouses were described as unmarried in deeds. These deeds may now be amended to reflect their status in terms of section 17(4).

A section 17(4) endorsement may, however, only be made in the following circumstances:

- if the person has married since registration took place
- if on the date of registration the person was married out of community of property or if the marriage was at that stage governed by the law of another country and has subsequently been dissolved by death or divorce
- if the land forms an asset in a joint estate and was registered prior to 1 November 1984 in the name of the husband only

The marital status of the person in whose name immovable property, a real right in immovable property, a bond or notarial bond was registered, must therefore either have changed since registration of the land in his/her name, or not have been mentioned in the deed, because of the provisions of the Act at that point in time.



Example

- Land was registered in the name of JAN MINNY, identity number ....., on 3 October 1962. At that stage, Jan was already married in community of property to Jessica Minny. Jan can apply in terms of section 17(4) to have the title deed endorsed to reflect his marital status.

- Land was registered in the name of JESSICA MINNY, Identity number ....., married out of community of property on 4 May 1993. Jessica's husband died on 27 June 2005. Jessica can apply in terms of section 17(4) to have the title deed endorsed to reflect her new marital status.

This procedure cannot be used:

- to rectify an error in a person's marital status at registration (s 4(1)(b) must be used in such a case)
- to indicate a change in a person's marital status if the person was married in community of property at registration, since the joint estate must either be divested by means of a transfer by both the former spouses, or section 45 and 45*bis* of the Act will have to be complied with.

5.2.2 Application

An application must be lodged by the person in whose name the immovable property, a real right in immovable property, a bond or a notarial bond is registered. The application must contain full particulars of the person's marital status.

No consents of interested parties are required, but note the following requirements:

- Mutually dependent deeds must be simultaneously lodged for endorsement (s 17(4)), for example the deed of transfer and the related mortgage bonds over that property.
- Proof of marital status must be lodged. If the property forms part of a joint estate, or if a person was unmarried at registration and was thereafter married under a matrimonial system governed by the laws of a foreign country or was married out of community of property, only a certified copy of the certificate of marriage will be accepted as proof by the registrar of deeds. Similarly, where parties who were described as unmarried in a deed because their customary marriage was not recognised, a certified copy of the marriage certificate or a court order will have to be lodged. If the certificate does not indicate under what matrimonial system the parties were married, a sworn affidavit will have to be lodged by the applicant.
- If the applicant's spouse has died, a duly certified copy of the death notice must be lodged.
- If the applicant divorced his/her former spouse, a certified copy of the divorce order must be lodged.
- The relevant deeds must be lodged.

Activity

Jan Spies recently married Annie Spies in community of property. His marital status is not reflected in the title deed of their property which he acquired prior to his marriage. Annie qualifies for a housing subsidy and needs the title to reflect her as the owner of the property. Advise Annie on what procedure must be followed to update the title deed, as well as what supporting documents will have to be lodged.

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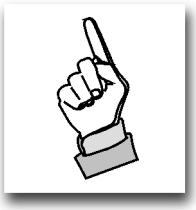
5.3 Application for the endorsement of a title deed in terms of section 44 of the Act

5.3.1 General

It sometimes happens that when a piece of land is re-surveyed, the extent (surface area) is found to differ considerably from the surface area reflected in the deed and on the existing diagram. In this case, the owner's title can be endorsed in terms of section 44 of the Deeds Registries Act and the new diagram substituted for the old.



Example

According to Deed of Transfer T 398/1991 the extent of Remaining Portion No. 456 of the farm Griekwa is 45.2765 hectares. The land is re-surveyed and the diagram shows that the correct extent of the remainder is 56.0034 hectares.

5.3.2 Application

In terms of section 44 of the Act, an owner of land must submit an application to the registrar of deeds to have the title deed endorsed and the old diagram replaced with the new diagram. The application must contain the relevant facts, such as the property description, the extent of the property according to the title, the title number and the extent of the property according to the new diagram.

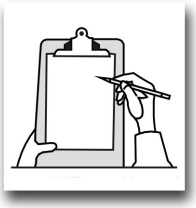
5.3.3 Supporting documents

The title deed(s) of the relevant land must be lodged (s 44(1) and (3)).

Any bond over the land must be lodged, together with the mortgagee's consent to the endorsement of the title deed(s) and the substitution of the diagram, as well as the endorsements (under s 44) themselves.

Any registered lease or deed, by virtue of which another person holds a real right in the land, must be lodged, together with the written consent of the lessee or holder of the rights to the endorsement of the title(s) and the substitution of the diagram, as well as the endorsement of the title(s) in terms of section 44 (Registrars' Conference Resolution 19 of 1962). If the lease or right is mortgaged, the mortgagee(s) must also consent to the endorsement of the title of the lease or right and the relevant bond must be lodged in terms of section 44.

The substitute diagrams, approved by the Surveyor-General, must be lodged, along with the original diagram (floating copy) or a certificate by a conveyancer that it cannot be found.



Activity

According to the title deed of the farm Zeelie, the extent of the farm is 9.0 hectares. According to a recent resurvey diagram, however, the correct extent is 9.4371 hectares. Discuss how this title deed can be rectified.

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5.4 Application to note the lapse of a personal servitude in terms of section 68(1)

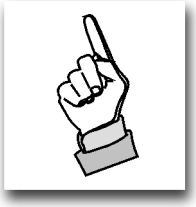
5.4.1 General

Section 68(1) of the Act makes provision for the noting of the lapse of a personal servitude against the title deed of the land encumbered by the servitude, as well as against the title deed of the servitude, if any. Lapsing means that the personal servitude is no longer of force and effect; it has lapsed because of a particular occurrence or a waiver by the holder.

What is the difference between lapsing and cancellation?

In the case of cancellation, there must be consensus between the holder of the servitude and the owner of the property. According to section 68(2) of Act 47 of 1937, the cancellation of a personal servitude by agreement must be effected by means of a bilateral notarial deed.

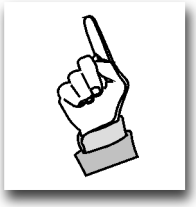
No agreement need be reached in the case of lapsing. A servitude lapses for a particular reason, for example the expiry of a period of time, and no consent is required to cancel the servitude in such a case. A servitude also lapses in the case of an underhand waiver of the servitude (Registrars' Conference Resolution 39 of 1972).



Example

Erf 39, La Hoff, is subject to a right of way in favour of the local authority. The local authority consents to the lapsing of the right of way. The owner of Erf 39 must now apply for an endorsement in terms of section 68(1) to reflect the lapsing of the personal servitude in the title deed.

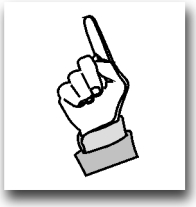
A fideicommissary condition has the status of a personal servitude. The provisions of section 68(1) of the Act can also be applied if the *fideicommissum* lapses (Registrars' Conference Resolution 17 of 1974).



Example

A property is subject to a *fideicommissum*. The fideicommissary heirs waive their rights in favour of the owner of the property. The owner can now apply in terms of section 68(1) for the endorsement of the title deed to the effect that the *fideicommissum* has lapsed.

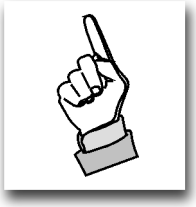
With regard to building conditions in the existing title deed, it is no longer necessary to apply for the deletion of such conditions from the existing title deed on transfer of the property, if the period of time concerned has lapsed or the building conditions are deemed to have been complied with.



Example

A property is subject to a condition that it may not be sold in the three-year period from 4 March 2002 to 4 March 2005 without the consent of the City Council. The property was sold on 5 May 2007. Since the condition lapsed because of the expiry of a period of time, there was no need to bring this condition forward in the deed of transfer when the property was transferred. Neither would it have been necessary to submit an application in terms of section 68(1) of the Act or a consent by the city council to have the title deed endorsed.

If, however, a building condition in a title states that all the building conditions contained in the title lapse on registration of a building loan, the conditions may only be omitted on lodgment of a certificate by the mortgagee that the bond is being registered to secure a building loan, or if the bond clearly states that it is being registered to secure a building loan.



Example

The following condition appears in a title deed:

> *A house must be built on the property within six months from the date of registration of this deed. Failing this, the property will revert back to the local authority.*
>
> *This condition will lapse on registration of a building loan.*

The building condition lapses if a bond is then registered against the property in order to secure a building loan, in which case the owner of the property can apply (lodging the certificate by the mortgagee) for the title deed to be endorsed in terms of section 68(1).

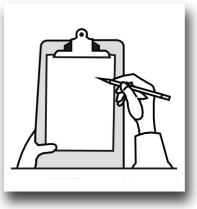
5.4.2 Application (to be used in all instances where a personal servitude lapses)

A written application prepared by a conveyancer (reg 44) must be lodged by or on behalf of the owner of the land encumbered by the personal servitude.

5.4.3 Supporting documents

The following documents must be lodged:

- Proof of the lapsing of the personal servitude. If the servitude has lapsed because of the death of the holder, a certified copy of the relevant death notice or certificate must be lodged.
- The relevant title deed(s).
- A separate title deed, if the personal servitude is held under a separate title deed.
- If the area of land in respect of which the personal servitude was granted or reserved is represented on a diagram, the Surveyor-General must be informed by the registrar of deeds of the lapse, in order to amend the diagram.
- A transfer duty receipt if the personal servitude has been waived (Registrars' Conference Resolution 29 of 1990). If, however, the owner has inherited the land burdened by the personal servitude, no transfer duty is payable as a result of the waiver, because of the provisions of section 9(1)(e)(ii) of the Transfer Duty Act 40 of 1949.



Activity

A right of usufruct was granted to X and is held by Notarial Deed of Cession K 3/1990S. The holder of the right waives the usufruct. What procedure should be followed to note the lapsing of the right against the title of the property, and what supporting documents must be lodged?

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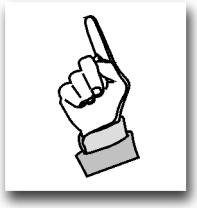
5.5 Application for a change of name of a person or immovable property in terms of section 93(1)

5.5.1 General

Section 93(1) of the Act applies where a person or partnership changes his/her/its name. As regards natural persons, it applies to the change of both their first names and surnames. This section only applies to a change of name and not a change of *persona*. In other words this application cannot bring about a change in the person who is holding or granting a right.



Example

John and Jona Smit, born on 3 May 1987, are twins. If property is registered in the name of John Smit, he cannot apply section 93(1) to register the property in the name of Jona Smit, as this will mean that there has been a change of owner.

The change of name of a company, a mutual bank, close corporation, bank, co-operative or insurer is not done in terms of section 93(1) of the Act, but respectively in terms of the provisions of one of the following: section 44 of the Companies Act 61 of 1973, section 35 of the Mutual Banks Act 124 of 1993, section 21 of the Close Corporations Act 69 of 1984, section 56 of the Banks Act 94 of 1990 or sections 38 and 38A of the Co-Operatives Act 14 of 2005.

A person who wishes to change his/her surname or accept another surname must comply with the provisions of section 93 of the Deeds Registries Act and section 26(1) of Births and Deaths Registration Act 51 of 1992, unless the exceptions mentioned in the said section apply. According to section 26(1) of Act 51 of 1992, the assumption of another surname must be authorised by the Director-General of Home Affairs, except where a woman:

- assumes her husband's surname
- resumes a surname which she bore at any prior time
- adds to the surname which she assumed after marriage, a surname which she bore at any prior time

If a wife wishes to use her maiden name as another forename or first name, the provisions of section 24 of Act 51 of 1992 must be complied with.

If a **woman** is **divorced or widowed**, she can apply to change her name on the registered deeds should she so wish; however, she is not obliged to furnish her previous surname in subsequent deeds, if she has resumed her maiden name. If she resumes a surname which she used at any stage prior to her marriage, the amendment does not take place in terms of the Births and Deaths Registration Act 51 of 1992 or any other Act, and she is not obliged to note the change of name against a deed or other document in order for her to be able to deal with land or a real right in land held by her by virtue of that deed or document (s 93(1)(c) of Act 47 of 1937 and s 26(1)(b) of Act 51 of 1992).

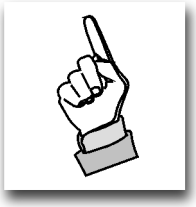
In the case of **Hindu and Muslim marriages** that are not universally recognised by our law, although there have been exceptions in case law relating to intestate succession, the wife automatically assumes her husband's surname. The wife therefore need not comply with section 93 before she can use her new surname in deeds, because of exemption (c) in section 93(1). The conveyancer will, however, have to certify the reason for her new surname.

If the name of a church or partnership is changed after the date of registration of a deed, section 93 of Act 47 of 1937 applies.

5.5.2 Change of name of immovable property

Notwithstanding the provisions of section 93(2), which states that no change in the name of immovable property need be recorded in a deeds registry, unless required by the registrar and the Surveyor-General, an owner of immovable property may submit a written request to the Minister to change the name of the

immovable property, on the grounds that the name may be offensive because of its racial connotations.



Example

The owner of the farm **KAFFERSKRAAL** applies for the name of the farm to be changed and the Minister approves the change to REDDERSFONTEIN.

If the Minister is satisfied that the name may be offensive because of the racial connotations, he/she may order the Surveyor-General to change the name in the relevant registers, documents and diagrams. The Surveyor-General notifies the registrar concerned of the change of name, whereupon the registrar amends the relative deeds and registers without an application by the registered owner of the land. An interdict from the Surveyor-General will appear against the property and, once the deeds controller has affixed the endorsement to the title deed, bond, etc, the interdict can be withdrawn.

5.5.3 Application

A written application by the owner in respect of the change of name must be lodged. Both the old and the new names must be fully set out in the application, along with the reasons for the change of name. Where the name of a partnership is involved, all the partners must sign the application. The application must mention all the deeds and documents that must be amended.

The registrar must be satisfied that no change of person is tacitly implied by such a change of name. Usually the application is prepared in the form of an affidavit, wherein the applicant declares under oath that no change of person is involved.

5.5.4 Supporting documents

The following documents must be lodged:

- Consent by interested parties. Any person who has an interest in the registered deed or other document or in the rights created, transferred or amended thereby, must consent to the change of name: for example if a property is mortgaged, application must be made for the endorsement of both the deed of transfer and the bond, and the mortgagee must consent to the amendment of both the transfer deed and the bond.
- If a church or partnership has changed its name, the resolution in terms of which the name was changed is required.
- If the application is not prepared in the form of a sworn oath, wherein the applicant declares that no change of person is involved, a separate sworn declaration to that effect is required.
- All the deeds in a deeds registry that are affected by the change of name must be lodged and endorsed simultaneously. If a great many deeds are involved in the change of name, the registrar may consent to piecemeal endorsement of the deeds as and when they are lodged for any other act of registration.
- If there is evidence indicating that the name of the applicant appears in any deed, document or power of attorney registered in another registry, the registrar in whose office the application is lodged must notify the other registrar of such registration (reg 77).

We have now completed our discussion of diverse applications and endorsements in terms of the **Deeds Registries Act 47 of 1937**. We shall now discuss sundry applications for endorsements that can be made against deeds as provided for in the Administration of Estates Act 66 of 1965, the Companies Act 61 of 1973 and other statutes.

6 Applications in terms of administration of Estates Act, Companies Act and other statutes

6.1 Applications in terms of section 39(2) of the Administration of Estates Act 66 of 1965

6.1.1 General

Usually the executor is obliged to register inherited immovable property in the name of an heir, subject to any rights or conditions affecting the property (s 39(1) of Act 66 of 1965). There are, however, two exceptions to this general rule. These exceptions are dealt with in section 39(2) of the Administration of Estates Act 66 of 1965:

> *If a usufructuary or other like limited interest in any immovable property has been bequeathed to any person with a direction that after the expiry of such interest the* ***property*** *shall devolve upon some person* ***uncertain*** *or that the* ***proceeds*** *of the property shall devolve upon any person, whether* ***certain or uncertain****, the executor shall, subject to the provisions of section 25 of the said Act, cause the terms of the will or a reference thereto to be endorsed against the title deeds of the property, and lodge with the Master a certificate by the registration officer concerned or a conveyancer that the title deeds have been so endorsed.*

This endorsement can only be made in the following circumstances:

- When a right of usufruct or other limited right in the property concerned has been bequeathed, subject to the condition that the property passes over to an uncertain person or persons, once the right has lapsed. For example, in X's will, property is bequeathed to Y, subject to a right of *habitatio* in favour of Q. However X's will states that when Q dies, the property must be transferred to Q's children who are alive at the time of Q's death. These children may not necessarily have been born yet at the time of X's death.
- If the will stipulates that the proceeds of the property should pass to another person once the right has lapsed, in other words that the property must be sold after the lapse of the bequeathed limited right and the proceeds of the sale must devolve on an identified person, then an endorsement in terms of section 39 of Act 66 of 1965 can be made. For example, in X's will, property is bequeathed to Y, subject to a right of *habitatio* in favour of Q. However X's will states that when Q dies, the property must be sold and that the proceeds of the sale should go to Z.

The endorsement may not be affixed in the following circumstances:

(a) Where section 25(1) of the Registration of Deeds Act 47 of 1947 applies (transfer by endorsement to the person to hold in trust for unknown children or children to be born). In this case, a formal transfer, for example *''to X in trust for Y... ''* must be effected and the deed of transfer must be subject to the bequeathed limited right.

(b) Where there is a fiduciary who can immediately take transfer, which transfer must be effected by a formal transfer (*De Villiers v Estate de Villiers* 1929 CPD 106); then the deed of transfer must be made subject to the bequeathed limited right as in (a) above.

6.1.2 Application

An application prepared by a conveyancer in terms of regulation 44 and signed by the executor (with reference to the number of the executor's authorisation in terms of which he/she is acting) must be lodged. The application must contain a reference to the will and the reason why the endorsement is requested. In addition, the property concerned must be described, with reference to the title deed under which it is held.

6.1.3 Supporting documents

The following documents must be lodged:

(a) A copy of the will of the deceased, certified a true copy by the Master (reg 49(1)(c)).
(b) A certificate in terms of section 42(1) of Act 66 of 1965 by the conveyancer, as well as a section 39(2) of Act 66 of 1965 endorsement by the Master (Registrars' Conference Resolution 7 of 1980).
(c) Proof of marriage in community of property if the deceased was not the registered owner of the property. For example if the husband is the registered owner of the property and his wife, to whom he was married in community of property, dies and is the testator.
(d) Proof of adiation in the circumstances set out in (c) above or when massing of separate estates occurs.
(e) The title deeds to be endorsed.
(f) An application, if required, requesting that the registrar of deeds issue a certificate to the effect that the title deeds have been endorsed in terms of section 39(2).

The consent of the mortgagee is not necessary since property is not being transferred.

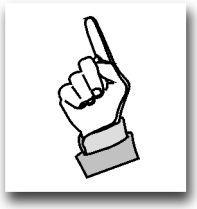
6.1.4 Effect of the endorsement

Affixing such an endorsement does not vest the ownership or any other right in respect of the property in the person to whom the property has been bequeathed. An endorsement in terms of section 39(2) is simply a *caveat* and not a transfer.

6.2 Applications in terms of section 39(3) of the Administration of Estates Act 66 of 1965

6.2.1 General

If there is a possibility that the costs involved in transferring the property will result in hardship for the person entitled to the property, the Master may authorise the executor to have the existing title deed endorsed to indicate that the land held thereunder has been bequeathed or inherited. An endorsement of this nature does not cause a vesting of the property in the name of the person so entitled; it merely creates a *caveat*, as in the case of an endorsement in terms of section 39(2).



Example

X inherits property from Y, but there is not enough money in the estate to effect the transfer. In this instance, application can be made to have the title of the property endorsed in terms of section 39(3) of the Administration of Estates Act 66 of 1965.

6.2.2 Application

An application by the executor (with reference in the application to the number of the executor's authorisation in terms of which he/she is acting), prepared by a conveyancer in terms of regulation 44, must be lodged.

The application must bear a regulation 44 certificate and contain references to the deceased, the property, the title and the will.

6.2.3 Supporting documents

The following documents must be lodged:

(a) A certificate from the conveyancer in terms of section 42(1) of Act 66 of 1965, as well as an endorsement by the Master in terms of section 39(3) (Registrars' Conference Resolution 20 of 1968).
(b) Proof that the deceased was married in community of property if he/she was not the registered owner of the property, for example when the husband is the registered owner of the property and his wife, to whom he was married in community of property, dies.
(c) Adiation of the will must be proved in the circumstances set out in (b) above or when massing of separate estates occurred.
(d) The title deeds to be endorsed.
(e) An application, if required, requesting the registrar of deeds to issue a certificate to the effect that the title deeds have been endorsed in terms of section 39(3) of the Administration of Estates Act 66 of 1965.

The consent of the mortgagee is not necessary, since property is not being transferred.

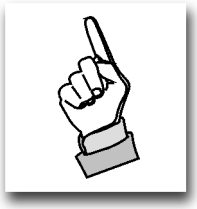
6.2.4 Effect of the endorsement

Affixing such an endorsement to a title deed does not vest the ownership or any other right in respect of the property in the person to whom the property has been bequeathed. The endorsement under section 39(3) is simply a *caveat* and not a transfer.

6.3 Application in terms of section 40(1)(b) of the Administration of Estates Act 66 of 1965

6.3.1 General

Where a will states that any assets in a deceased estate must be administered by a trustee, the executor must hand the assets over to the trustee as *per* the liquidation and distribution account and cause the terms of the will, or a reference thereto, to be endorsed against the title deeds of such of the property as is immovable, and against any mortgage or notarial bond forming part of the property of the estate.



Example

X dies and his **will** states that all the assets of the estate should be administered by the trustee of a trust for the benefit of certain persons. The title deed of X's property must now be endorsed in terms of section 40(1)(b) of the Administration of Estates Act to indicate this fact.

Why is only an endorsement made and the property not transferred?

The Administration of Estates Act **stipulates** that in such testamentary bequests, the property must be administered by the trustee of the trust — not that he/she is entitled to own the property. In other words, the property is not transferred to the trustee. He/She **only administers** the trust or estate of the deceased.

An endorsement in terms of this subsection means:

- that the title deeds of the land concerned must refer to the provisions of the will
- that the **authority** to deal with the assets passes from the executor to the trustee; that is, the trustee must comply with the provisions of the will when dealing with the assets, unless the court permits him/her to do otherwise

The following prerequisites must be complied with before section 40 can be applied:

- A trust must be created in the will and the beneficiaries of the trust named.
- The will must make provision for the termination of the trust.

6.3.2 Application

An application (bearing a reg 44 preparation clause) by the executor for the endorsement of the relevant deeds in terms of section 40(1) must be lodged.

6.3.3 Supporting documents

The following documents must be lodged:

- A copy of the will of the deceased, accepted by the Master of the High Court and certified by him/her to be a true copy of the original (reg 49(1)(c)).
- A conveyancer's certificate in terms of section 42(1) of Act 66 of 1965 to prove that the liquidation and distribution account has lain for inspection and is free from any objection.
- Proof of adiation by the surviving spouse, if it appears from the application and supporting documents that a joint estate is involved and that massing was intended by the testators. If no massing was intended, the relevant deeds can only be endorsed in respect of the share of the first-dying.
- Transfer duty receipt where applicable, although **transfer duty is not payable** when **property is acquired by intestate or testate succession** or as a result of the redistribution of the assets of a deceased estate (s 9(1)(e)(i) of Act 40 of 1949). Where estates have been massed and the survivor has adiated, transfer duty **will be payable** on the value of the survivor's share in the property that has been handed over to the trust. When the trustee transfers the property at a later stage to a person entitled to it, transfer duty becomes payable by the person acquiring the property.
- If application has been made for the endorsement of a deed or deeds in respect of the whole of the property described in the deed(s), and it is uncertain

whether the testator is married and, if married, whether he/she is married in or out of community of property, a conveyancer must certify whether a joint estate is involved or not.
- A certificate indicating that the deeds have been endorsed, issued by the registrar at the request of the conveyancer concerned.
- The client's copy or copies of all titles and bonds to be endorsed, should the mortgagee require this.
- A conveyancer's certificate regarding other bequests that have been made in the will, the bequest to the trustee is in respect of the remainder of the estate and the pre-legacies that have been paid or ensured, if any.

If the property is encumbered by a bond, the mortgagee's consent is not necessary and neither is the bond endorsed (Registrars' Conference Resolution 1 of 1974, 5 of 1978, 55 of 1987 and 51 of 1994).

6.3.4 Effect of the endorsement

Once the endorsement has been made, the trustee may administer the property and is then entitled to deal with it in accordance with the powers granted by the will (see the definition of ''owner'' in section 102 of the Deeds Registries Act 47 of 1937, as discussed in 2.3.3 of unit 4).

What is the difference between the provisions of the Administration of Estates Act and the Deeds Registries Act in this regard?

The former states that the trustee does no more than administer the estate of the deceased, while in the latter, the definition of ''owner'' ''*includes the trustee in an insolvent estate*'', who is entitled to deal with property registered in the name of the trust in accordance with the powers granted to him/her.

Activity

1 X dies and in his will bequeaths his property to Z, subject to a *fideicommissum* in favour of D and E. On E's death, the property is supposed to be transferred to Y. Y would like to have the provisions of the will noted against the title of the property. What procedure must be followed and what supporting documents must be lodged with the registrar of deeds?

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2 X dies and in his will bequeaths his property to Z. There is not enough money in the estate to effect transfer of the property into Z's name. Advise Z in detail on an alternative procedure in terms of the Administration of Estates Act.

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3 X dies. His will states that his property is to be administered by trustees of a trust. He did not indicate who the beneficiaries of the trust are and when it will terminate. Can section 40 of the Administration of Estates Act be applied?

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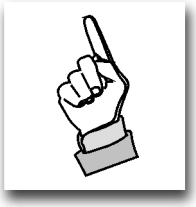
6.4 Application in terms of sections 44 and 49 of the Companies Act 61 of 1973

6.4.1 General

If a company's name changes in terms of section 44 of the Companies Act, the registrar of deeds will make the necessary amendments to his/her registers and endorse all the relevant deeds registered in the company's name, once he/she has been presented with an amended certificate of incorporation or a certificate of change of name.



Example

The name UNITED BANK LIMITED was changed to ABSA BANK LIMITED. This change of name must be reflected in all the deeds registered in the name of UNITED BANK LIMITED.

Section 49(7) of Act 61 of 1973 states that if a company is liquidated by a court order or placed under voluntary judicial management, the registrar, on receipt of a copy of the relevant court order, or on registration of the special resolution for the voluntary liquidation of the company, will amend the register to include or add the declaration ''*In liquidation*'', ''*In voluntary liquidation*'' or ''*Under judicial management*'', as the case may be, to the name of company. By the same token, if the liquidation or judicial management order is uplifted or the voluntary liquidation ends, the registrar will, on receipt of a copy of the relevant court order, amend the register to omit the declaration.

6.4.2 Application

No application for the endorsement of deeds need be lodged.

6.4.3 Supporting documents

The following documents must be lodged:

- The certificate of change of name or amended certificate of incorporation, certified by the registrar of companies or by a notary or conveyancer.
- The client's copy (or copies) of all deeds registered in the company's name. If the conveyancer cannot lodge all the titles simultaneously, he/she will have to come to an arrangement with the registrar of deeds.
- Bonds (and notarial servitude deeds which are registered against the title deeds of properties in which the company's name appears) must also be lodged for endorsement, but the mortgagee's consent is not required.
- If, however, a bond is being cancelled, it need not be endorsed with regard to the change of name of the mortgagee, provided that the consent to cancellation gives the change of name.

6.5 Conversion of a company to a close corporation and vice versa

6.5.1 General

6.5.1.1 Conversion by virtue of section 27(1) of the Close Corporations Act 69 of 1984

A company can be converted to a close corporation by virtue of section 27(1) of the Close Corporations Act 69 of 1984. Section 27(7) authorises the registrar of deeds to make the necessary amendments to his/her registers.

6.5.1.2 Conversion by virtue of section 29C of the Companies Act 61 of 1973

A close corporation can be converted to a company by virtue of section 29C of the Companies Act 61 of 1973. Section 29D(2) authorises the registrar of deeds likewise to make the necessary amendments in his/her register.

6.5.2 Application

No application for the endorsement of deeds need be lodged.

6.5.3 Supporting documents

The following documents must be lodged:

- In the case of 6.6.1.1 above, a certified copy of the founding statement.
- In case of 6.6.1.2 above, a certified copy of the certificate of incorporation.
- All title deeds and bonds by virtue of which the company or close corporation owns property or rights, as well as bonds registered against the titles. If this is not possible, an arrangement must be made with the registrar of deeds.

No mortgagees' consents are required, however; as both close corporations and companies have limited liability their rights are not affected.

6.6 Application for endorsement with regard to the change of name of a close corporation, bank, co-operative, insurer or statutory body

6.6.1 General

If the name of a close corporation, bank, co-operative or insurer changes, a certificate of change of name is issued by the Registrar of Close Corporations, Registrar of Banks, Registrar of Co-operative Associations or Registrar of Insurance Companies, respectively.

The statutory provisions which prescribe the procedures for name changes are as follows:

- for close corporations, section 21 of Act 69 of 1984
- for banks, section 56 of Act 94 of 1990 and section 44 of Act 61 of 1973
- for mutual banks, section 35 of Act 124 of 1993
- for co-operatives, section 38 and 38A of Act 14 of 2005

The name of a statutory body is changed by virtue of a particular statute, which usually imposes a duty on the registrar of deeds to make the necessary entries in his/her registers and changes to endorsements on deeds in this regard.

6.6.2 Application

No application for the endorsement of deeds need be lodged.

6.6.3 Supporting documents

The following documents must be lodged:

- The certificate of change of name or amended certificate of incorporation, certified by the relevant registrar or a notary or conveyancer.
- The client copy (or copies) of all deeds registered in the name of the close corporation, bank, co-operative, insurer or statutory body. If it is not possible for the conveyancer to lodge all the titles simultaneously, he/she will have to come to an arrangement with the registrar of deeds.
- Bonds (and notarial servitude deeds that are registered against the title deeds of properties in which the name of the close corporation, bank, co-operative, insurer or statutory body appears) must also be lodged for endorsement, but the mortgagee involved need not grant consent.

If, however, a bond is being cancelled, the bond need not be endorsed with regard to the change of name of the mortgagee, provided the consent to cancellation sets out the change of name.

7 Summary

In this unit we first discussed the sequence in which deeds must be registered and the exceptions to the general rule contained in section 14 of the Act. Then we dealt with certain applications for the endorsement of deeds in terms of the Deeds Registries Act 47 of 1937, the Administration of Estates Act 66 of 1965, the Companies Act 61 of 1973, the Close Corporations Act 69 of 1984 and other statutes.

We have reached the end of our module on conveyancing. We have studied the land registration system, the main participants, transfers, bonds, certificates of title, applications and endorsements, and still that is not all there is to know about this field of law. So finally, as promised, we give you the mother of all self-assessment activities as a research project. Here it is.

Case study

Ms Benn, an unmarried woman, is the registered owner of a small farm, the Remainder of Tweefontein, which she inherited from her father in 2000, subject to a usufruct in favour of her mother. This property is adjacent to Portion 1 of Tweefontein, a property Ms Benn purchased a year earlier and which is registered in her name. The purchase price of this property was financed by means of a loan she obtained from a financial institution, Bank X. As security for repayment of the loan, a mortgage bond was registered over Portion 1, Tweefontein, in favour of Bank X. Both properties are situated within the municipal boundaries of Barberton, Mpumalanga. For reasons of her own, but in particular having the development of the property at a later stage in mind, Ms Benn decides to consolidate the two farms into one property.

In the meantime, Mr Khumalo approaches Ms Benn and requests that she sell him a portion of the farm which is particularly suited to agriculture. Ms Benn instructs a land surveyor to survey the land and prepare the necessary diagrams which will enable her to consolidate the two farms and sell the relevant subdivision to Mr Khumalo.

In 2006 Ms Benn and Mr Khumalo conclude a deed of sale in terms of which Ms Benn sells the portion which has been subdivided, namely Portion 5 of the farm Tweefontein, to Mr Khumalo. The purchase price is payable in cash on registration of transfer. The deed of sale also provides that Ms Benn reserves the right to use a farm road over Portion 5 in order to gain access to a nearby irrigation dam.

Before registration of Portion 5 is effected in Mr Khumalo's name, he receives a very good offer for the land and he sells it to Messrs A and F Naidoo. This deed of sale is however made subject to the condition that Mr F Naidoo first sells his luxury holiday home in Durban, over which a mortgage bond is still registered, because part of the proceeds of the purchase price of the holiday house is required for payment of the purchase price of Portion 5, Tweefontein. The balance of the purchase price of Portion 5 is financed by means of a loan to be granted by Bank Y. Payment of the loan is to be secured by a mortgage bond in favour of Bank Y over Portion 5, simultaneously with registration of transfer into the names of A and F Naidoo. The two brothers are anxious that registration of transfer be expedited so that they can start farming.

Mr Khumalo informs Ms Benn that he has sold the property and requests her, in order to save time and costs, to transfer the property directly to the brothers Naidoo.

Can Messrs A and F Naidoo indeed become owners of the relevant portion in this way? If so, what must be done to enable them to become owners of portion 5?

Factual overview

In South Africa transfer of ownership is generally effected by registration of a deed of transfer in a deeds registry. This implies the involvement of all the parties to the

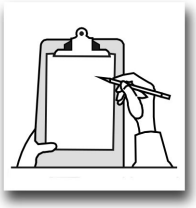
transaction(s): in this instance, the seller, the individual purchasers, the mother of the seller, and the present and future mortgagees, their conveyancers and notaries, the registrar of deeds, a land surveyor, the Surveyor-General, the Receiver of Revenue and the local authority within whose jurisdiction the land is situated.

When Ms Benn's father died, the executor of his estate had to transfer the Remainder of the farm Tweefontein into the name of Ms Benn. This had to be done in terms of the provisions of the will and in accordance with the liquidation and distribution account lodged and approved by the Master of the High Court. The executor acted on behalf of the deceased estate to effect this transfer.

On transfer of the property to Ms Benn her ownership of the farm had to be made subject to a personal servitude of usufruct in favour of her mother. If the parents of Ms Benn had been married in community of property, the usufruct would probably have been created by reservation in the power of attorney to pass transfer. The reservation would then have been incorporated as a condition in the deed of transfer. On registration of the deed of transfer Ms Benn became owner of the Remainder of Tweefontein and her mother acquired a limited real right in the form of a usufruct over the land. As we know from our prior property law studies, a usufruct is a very comprehensive limited real right which leaves the owner of the land with what is called bare *dominium* or bare ownership.

When Ms Benn also acquired Portion 1 of Tweefontein she had to borrow money from Bank X to pay the purchase price of this property. However, the bank had to be sure that if Ms Benn, for some reason or other, were not able to repay the loan, the bank would have a foolproof method of recovery of the outstanding balance. Such a method would be the registration of a first mortgage bond granting the bank a real security right over the property (Portion 1 of Tweefontein). This gave the bank a preferential claim above all of Ms Benn's creditors, even if she were to be declared insolvent or if the property were to be attached for sale in execution.

Without the consent of the bank as mortgagee, the mortgaged land cannot be sold or encumbered by another mortgage bond or any other limited real right. Should Ms Benn withhold punctual payment of instalments in terms of the bond, even after demand, the bank may go to court and obtain an execution order. Such an order will enable the bank to have Portion 1 of Tweefontein attached by the sheriff of the court and to have it sold to the highest bidder at a public auction. The amount in arrears and due under the bond, together with costs incurred with regard to the litigation and the auction, will be recovered by the bank from the proceeds of the sale. The balance of the proceeds of the sale, if any, must be paid to the mortgagor, Ms Benn.



Self-assessment activity

Examine the facts contained in the case study and then do the following:

1 Identify the main acts of registration which are required in the process of effecting registration of transfer of the land into the names of Messrs A and F Naidoo (over and above the financially linked Durban property, there are at least five).

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2 Discuss each of the transactions briefly, with reference to:

- whether it can be done; whether it is registrable
- the deed and supporting documents that will have to be lodged in each instance

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If we examine the facts in the case study we can identify the following main acts that are required in the process of effecting registration of transfer of the land into the names of Messrs A and F Naidoo.

First, the Barberton property transactions:

1 Consolidation of Portion 1 and the Remainder of Tweefontein into Portion 4 of Tweefontein
2 Subdivision of the consolidated property (the new Portion 5, a portion of Portion 4) of Tweefontein
3 Sale and transfer of the subdivision (the new Portion 5, a portion of Portion 4) of Tweefontein:

   (a) Benn to Khumalo
   (b) Khumalo to F and A Naidoo

4 Servitude of right of way
5 Preparation of the deeds for the transfer of the subdivision (Portion 5, a portion of Portion 4 Tweefontein) and the transactions linked to them
6 Financial arrangements
7 Registration of the Barberton property transactions

Finally:

8 Registration of the **Durban property** transactions

We now discuss each of these actions briefly.

1 Consolidation of Portion 1 and the Remainder of Tweefontein (refer to heading 13 in unit 8)

Sketch

Farm Tweefontein

Portion 3	Portion 2	Former Portion 1 NOW PORTION 4	Former Remainder NOW PORTION 4

DAM

In order to bring about a consolidation Ms Benn must first instruct a land surveyor to prepare a new diagram from the existing diagrams, indicating the two properties as one piece of land (and the usufruct of Ms Benn's mother). The land surveyor then prepares such a diagram with a new description of the property, in this case **Portion 4** of the farm Tweefontein. (The farm number, registration division, name of the province within which the land is situated will once again form part of the full description of the property.) The diagram will be submitted to the Surveyor-General who, after approval, allocates an SG number to the diagram.

Note that approval of the consolidation diagram does not automatically result in the consolidation of the two properties. Consolidation is only effected on registration of the certificate of consolidated title in the deeds registry, which then replaces the deeds of transfer of the former Portion 1 and Remainder of the farm Tweefontein.

After receipt of the SG diagram, Ms Benn will consult her attorney, who must also be a conveyancer. The conveyancer will prepare an application (signed by Ms Benn) for consolidation, together with a draft certificate of consolidated title in terms of section 40(1) of the Deeds Registries Act 47 of 1937, for lodgment in the deeds registry. The draft certificate of consolidated title will include the title conditions of both properties, including the usufruct. (Refer to 13.3.6 in unit 8.)

The conveyancer will also obtain Bank X's consent to the substitution of the Remainder of Tweefontein (its existing security) by the new consolidated Portion 4 as security under Bank X's mortgage bond. (Refer to 13.4 in unit 8.) This should not pose a problem as the larger property should provide better security to Bank X and the Certificate of Consolidated title for Portion 4 will on registration be endorsed by the registrar of deeds to the effect that it is subject to the mortgage bond. (Why a certificate of title and not a deed of transfer? There is no transfer: Ms Benn is already the owner of both properties. See unit 8.)

2 Subdivision of the consolidated property

Sketch

Farm Tweefontein

Portion 3	Portion 2	Portion 4 Right of way Portion 5

DAM

Mr Khumalo is only interested in a specific piece of land which Ms Benn intends to consolidate, but this piece of land can be transferred to him only once it has been properly surveyed and an SG diagram has been issued for it. Ms Benn's surveyor will conduct the necessary survey of the property, prepare the diagram of the specific portion to be known as Portion 5 (a portion of Portion 4) of Tweefontein. After approval of the diagram by the Surveyor-General, Ms Benn will be in a position to instruct her conveyancer to proceed with the transfer of this portion of land to Mr Khumalo. Unlike the consolidation above, Ms Benn does not need to first register the subdivision of the property by way of a certificate of registered title before transferring it — the direct transfer of a portion will give effect to the subdivision.

As in the consolidation above, the consent of Bank X will have to be obtained — in this case for the release (discharge) of Portion 5 (a portion of Portion 4) from the operation of the mortgage bond. (See heading 3 in unit 10.) This means that Portion 5 can be transferred to Mr Khumalo free of the mortgage bond. However, this severance will result in a diminution (shrinking) of the security under the mortgage bond. Bank X will therefore have to be satisfied that the Remainder of Portion 4 will provide them with sufficient security for repayment of the balance outstanding under the mortgage bond.

But wait! Mrs Benn's mother still holds a usufruct over that portion of the consolidated property which originally existed as the Remainder of Tweefontein. The subdivision will affect her right in the land and she too will have to consent to the subdivision. Mr Khumalo will certainly require that she waives her usufruct in so far as it applies to his portion under the subdivision (Portion 5 of Portion 4 of the farm Tweefontein).

3 Sale and transfer of Portion 5 (a portion of Portion 4) of the farm Tweefontein

(a) Benn to Khumalo (refer to unit 4)

After the initial personal negotiations, Ms Benn and Mr Khumalo will consult an attorney who is also a conveyancer (usually the seller's attorney, thus Ms Benn's attorney) to draw up a written deed of sale and to attend to the transfer of the property. The deed of sale contains details of the seller and the purchaser, a description of the property, the purchase price and how it is to be paid (when and how bank guarantees payable on registration of transfer must be furnished), the fact that the parties agree to buy and sell the property respectively and the ''cooling-off'' clause. (Remember the requirements of the Alienation of Land Act?) Such a deed of sale usually also includes clauses relating to liability for transfer costs, date of possession and occupation of the property and the fact that the property is sold as is/voetstoots, provision for addresses where notices and processes can be served and a cancellation clause.

In this particular deed of sale, special provisions relating to the right of way and the usufruct in favour of Ms Benn's mother will also have to be included.

(b) Khumalo to A and F Naidoo

If the deed of sale complies with all formal requirements, the agreement between Mr Khumalo and Messrs A and F Naidoo is enforceable, even though Mr Khumalo was not the registered owner of the land at the time of their agreement. However he is contractually bound to transfer ownership of the land to Messrs A and F Naidoo, once he becomes owner of the property, or if the parties enter into a tripartite agreement: that is, the contract between Ms Benn and Mr Khumalo and the contract between Mr Khumalo and Messrs A and F Naidoo is cancelled, and

then Ms Benn sells the property directly to Messrs A and F Naidoo. Let us assume that in this instance Ms Benn is not interested in entering into a tripartite agreement.

Section 14 of the Deeds Registries Act 47 of 1937 forbids (in the absence of a tripartite agreement) the direct transfer of the land from Ms Benn to Messrs A and F Naidoo, as registration of ownership and real rights must follow the sequence of their individual relative causes, for example contracts of sale, donation, etc. (Refer to unit 11.)

Transfer of ownership of Portion 5 (a portion of Portion 4) of Tweefontein must therefore be effected from Ms Benn to Mr Khumalo, and from Mr Khumalo to the brothers Naidoo. Each transfer will require payment of transfer duty.

4 Servitude of right of way

A servitude of right of way is a limited real right (servitude) to use a road over the land of another. In this instance where the road provides access to an irrigation dam, we can assume that the servitude over Portion 5 (a portion of Portion 4) will be for the benefit of the Remainder of Portion 4 (for Ms Benn as owner and not personally). It can therefore be classified as a praedial servitude. (Although you have learnt about praedial servitudes in Property Law, you will find a more detailed discussion of the creation and registration of this in the notarial practice module — LPL417G).

A servitude originates from an agreement, which must be notarially executed in order to be registrable in the deeds registry. It is only on registration that the servitude comes into existence as a limited real right. Ms Benn and Mr Khumalo can request a notary to draw up and attest a notarial agreement of servitude, have it registered in the deeds registry and have the registration of the servitude endorsed against Mr Khumalo's deed of transfer. A conscientious notary (and conveyancer) will however point out to the parties that, in a case where a praedial servitude is reserved over land that is being transferred in favour of other land still registered in the name of the transferor (which is the case in the present circumstances), such a servitude may be reserved in the power of attorney to pass transfer and thus be incorporated as a condition of title into the deed of transfer (s 76(1) of the Deeds Registries Act 47 of 1937). This will be the most appropriate procedure to follow in this case. The drawing up of a notarial servitude agreement and the costs incurred in connection therewith can thus be avoided in this instance.

5 Transfer of Portion 5 (a portion of Portion 4) of Tweefontein

For the purposes of this discussion we will accept that all the parties make use of the conveyancer appointed by Ms Benn.

The conveyancer will require Ms Benn to furnish him/her with the original deeds of transfer of the Remainder and of Portion 1 of Tweefontein, together with the SG diagrams of Portion 4 and Portion 5. The conveyancer will prepare the certificate of consolidated title and the relevant application as discussed above and attach the diagram to the certificate of consolidated title. The conveyancer will arrange with the conveyancer acting on behalf of Bank X for the bank's consent to consolidation and substitution as well as the subdivision and release to be obtained and to be lodged in the deeds registry simultaneously with the land transactions. (Refer to units 2 and 3.)

For the purpose of the transfer from Ms Benn to Mr Khumalo the conveyancer will also require that Ms Benn grant him/her a written power of attorney authorising

him/her to attend to the registration on her behalf. Ms Benn and Mr Khumalo will in addition be required to sign the necessary transfer duty declarations as well as declarations confirming the information for which the conveyancer takes responsibility in terms of section 15A and regulation 44A of the Deeds Registries Act 47 of 1937. (Refer to unit 5.)

The conveyancer will pay the amount due in respect of transfer duty at the local receiver of revenue (SARS) office who will issue the conveyancer with a transfer duty receipt. All local authority taxes and levies due on the property must be paid 120 days in advance to the town council/local municipality of Barberton, and the receipt/municipal clearance certificate obtained for lodgment in the deeds registry.

In the meantime the conveyancer will prepare the deed of transfer in terms of which Portion 5 (a portion of Portion 4) will be transferred from Ms Benn (the transferor) to Mr Khumalo (the transferee). This deed of transfer is called a diagram deed because it contains the first transfer of Portion 5 and the SG diagram of Portion 5 is attached to this deed. (Refer to 2.3.7 in unit 4.)

In the same manner the conveyancer will prepare the deed of transfer for the transfer form of Mr Khumalo to the Naidoo brothers. Transfer duty will be payable, but the municipal clearance certificate already obtained will suffice for both transfers.

In addition the conveyancer will prepare a consent to subdivision and partial waiver of the usufruct (in respect of Portion 5 (4/4)) by Ms Benn's mother and arrange for its signature.

6 Financial arrangements (refer to unit 2)

A conveyancer has the important duty and responsibility of seeing to it that all the financial arrangements are in order, so that each party to whom money is due is paid on date of registration. The conveyancer will arrange with the conveyancer of Bank Y (Messrs A and F Naidoo's bank) that the mortgage bond in favour of Bank Y is registered simultaneously with the transfers of the land and that Bank Y issues guarantees in terms of which the full amount of the loan is payable on registration to all persons and institutions as requested by the parties. A similar arrangement will be made with the conveyancer acting on behalf of Mr F Naidoo in Durban.

7 Registration of the Barberton property transactions

Barberton is situated within the jurisdiction of the Nelspruit deeds registry. All the transactions except those directly connected with the Durban property will therefore be registered in Nelspruit.

All the transactions must be lodged in the deeds registries simultaneously and must be linked, so that they may be registered as a batch in a specific order. (Refer to units 1 and 2.) The order of the linking is as follows:

1 Certificate of consolidated title (Portion 4 of Tweefontein)
2 Consent by Bank X to consolidation and substitution
3 Transfer from Ms Benn to Mr Khumalo (Portion 5)
4 Consent by Bank X to release of Portion 5 from the operation of the existing bond
5 Waiver of usufruct by Ms Benn's mother in respect of the relevant Portion 5
6 Transfer from Mr Khumalo to Messrs A and F Naidoo of Portion 5
7 Bond by Messrs A and F Naidoo in favour of Bank Y over Portion 5

The examiners/deed controllers in the deeds registry will examine the deeds and documents. (Refer to unit 3.) Should they find material errors in a draft deed or document in the batch, the whole batch of deeds will be rejected and returned to the conveyancer. After rectification the deeds will then be re-lodged by the conveyancer. Once the examination process is completed by the deeds registry, the deeds will ''*come up for preparation*'' and the conveyancer will have an opportunity to correct minor errors and again check that the finances are in order. Thereafter the deeds are forwarded to the execution section for signature/ execution by the relevant conveyancer(s) and the registrar of deeds.

The time of registration is the moment at which the registrar of deeds signs the last deed in the batch on execution. Thereafter the deeds are forwarded for numbering and other administrative acts, until finally they are again returned to the conveyancer.

8 Registration of the Durban property

Durban is situated within the jurisdiction of the Pietermaritzburg deeds registry. The transfer of Mr F Naidoo's house in Durban and the mortgage bond passed by the purchaser over the erf in Durban will therefore be registered in Pietermaritzburg. As explained earlier, a part of the purchase price due to Mr Khumalo must be paid from the proceeds of the sale of the Durban erf due to Mr F Naidoo. This money is obtained from the loan made by Mr F Naidoo's purchaser. Repayment of this loan by the purchaser is secured by the registration of a mortgage bond over the Durban erf in favour of a bank. Payment of part of the proceeds of this loan, as mentioned earlier, was secured by way of the guarantee requested by Ms Benn's conveyancer with regard to the Barberton transactions.

Simultaneous registration of the transactions in the two different registries is made possible by an arrangement between the conveyancers that each lodge their batches of deeds in such a manner that they are all ready for registration at the same time. Telephone communications between the registrars in the two registries at the time of execution ensure that the deeds of each batch are executed and thus registered at exactly the same time.

In conclusion, we hope the discussion of this case study has helped you to integrate the knowledge you have gained and to understand how it must be adapted and applied practically.

GLOSSARY

attachment:	A formal act by the sheriff or deputy sheriff in terms of a court order (writ of execution) whereby the judgment creditor acquires a judicial real security right on the attached object in fulfillment of the judgement debt
acceptance of a composition:	Agreement between the creditors and the insolvent's trustee
adiation:	Acceptance of benefits
agent:	Person acting on behalf of another, usually in terms of a power of attorney
authentication/ attest:	The verification of any signature on a document
bequest price:	A testator, in making a bequest to a particular legatee, may stipulate that, in consideration of such bequest, the legatee is to pay a fixed sum of money or transfer a property either to the estate or to another named beneficiary. Such payment is known as a bequest price.
bond (mortgage):	Provides a limited real security right on the thing of another as security for the payment of a debt. A distinction is made between a mortgage over immovables and a notarial bond over movables
caveat:	A notice or warning entered by the Registrar of deeds in the deeds registry database. It indicates a possible prohibition on dealings with the property or a possible restriction on the capacity of the registered holder of the right to act e.g. a provisional sequestration order
cession:	the transfer of a right (a claim or a real right) by the holder of the right (the cedent) to the person who takes transfer of the right (the cessionary).
clearance (municipal):	a receipt issued by a local authority as proof of payment of taxes and levies
contractual capacity:	the capacity to act, that is, the ability to perform legal acts, for example, the conclusion of a contract (compare with ''legal capacity'' below)
corpus:	body
curator bonis:	person appointed by the Master of the High Court to act on behalf of a person
death notice:	A document which must be completed by a person required to do so by law. Among other things, it contains the names of the deceased and his/her surviving spouse, the date of death, whether or not a will was left, the names of the deceased's parents, and the names of the deceased's children.
deed of servitude:	a document containing a servitude agreement, drafted and attested by a notary public and registered in the deeds registry

deed of transfer: a document prepared by a conveyancer and registered in the deeds registry, evidencing the transfer of land from the owner (the transferor) to the acquirer (the transferee) and which serves thereafter serves as proof of ownership.

divest: Take out of the possession of

domicile: Place of permanent residence

dominant tenement: Property entitled to a praedial servitude

endorsement: an official entry by hand or a stamp, on a deed or document regarding a transaction or to give effect to the registration

encumbrance: mortgage or other burden on property

execution: the formal act of signing a document or deed thereby giving it complete and full effect

fideicommissum: There are various kinds of *fideicommissums*, but basically it is a request by the testator to the heir or legatee (fiduciary) to carry over the whole or a portion of the bequest to the fideicommissary (further heir).

forfeiture of rights: This means that when it comes to the dissolving of the joint estate, the plaintiff is entitled to claim, over and above his or her half-share in the joint estate, anything which he or she may have contributed to that joint estate (*Ogle v Ogle* (1910) 31 NLR 87). The guilty spouse is not called upon to surrender his or her half-share in the joint estate (*Celliers v Celliers* 1904 TS 926) but only any financial benefit he or she may have derived from the fact that the innocent spouse contributed more than he or she did to the joint stock (*Smith v Smith* 1937 WLD 126). Thus, if an order for forfeiture is granted and the innocent spouse is found to have contributed less than the guilty spouse, the spouse would be entitled to his or her half-share (*Van der Westhuizen v Seide* 1957(4) SWA 360.

general plan: a plan which represents the relative positions and dimensions of two or more pieces of land and has been signed by a land surveyor and which has been approved, provisionally approved or certified as a general plan by the Surveyor-General or another authorized official.

heir: A person who inherits the estate or a part thereof (the estate consists of that which remains after all debts and legatees have been paid, in other words, the residue).

habitatio: a personal servitude (limited real right) to live in another person's house

intestate estate: This is an estate:

- where the deceased died without leaving a will, or
- where he/she did leave a will but this will was not accepted by the Master, or
- where it was accepted by the Master but it failed for some or other reason.

joint will: This is a document containing the wills of two or more persons, and is most frequently made by spouses married in community of property to each other.

legal capacity:	the power or ability to be the bearer of rights and duties
legatee:	A person to whom the testator has bequeathed a specific thing or general things or a sum of money, that is, a specific bequest.
linking:	the linking of deed or documents lodged in the deeds registry by means of a number or letter code to ensure that the relevant deed or documents are registered simultaneously as a batch. Deeds are linked primarily for financial reasons.
liquidation:	the process of winding up the affairs of a company or close corporation by establishing liabilities and apportioning assets
liquidation and distribution account:	This is an account drawn up by the executor which discloses the assets of the estate, as well as the manner in which the executor is going to distribute these assets among the creditors, legatees and heirs.
lodgment:	the formal handing in of deeds or documents at the deeds registry for purposes of registration
massing:	If any two or more persons have by their mutual will massed the whole or any specific portion of their joint estate and disposed of the massed estate or of any portion thereof after the death of the survivor or survivors or the happening of any other event after the death of the first-dying, conferring upon the survivor or survivors any limited interest in respect of any property in the massed state, then upon the death after of the first-dying, adiation by the survivor or survivors shall have the effect of conferring upon the persons in whose favour such disposition was made, such rights in respect of any property forming part of the share of the survivor or survivors of the massed estate as they would by law have possessed under the will if that property had belonged to the first-dying; and the executor (must) frame (the) liquidation and distribution account accordingly. An example of massing is when testators (married in community of property) mass their estates in their joint will and provide that on the death of the first dying the whole of their massed estate devolves upon their children, subject to a usufruct in favour of the survivor. If the survivor accepts (adiates) the terms of the will after the death of the first-dying, massing occurs. The effect of this is that the survivor waives his/her right to the half-share of the joint estate in exchange for the usufruct over the whole joint estate.
matrimonial property regime:	system regulating the matrimonial property
mortgage:	see bond
mortgagee:	the person or institution who, as the mortgage creditor, on registration of a mortgage bond, acquires a mortgage over the property of the mortgagor.
mortgagor:	the person or institution who, as mortgage debtor, presents his/her/its immovable property in terms of a mortgage bond as security for payment of the mortgage debt to the mortgagee

mortgage bond disposed of:	This means that the existing bond over the property must either be cancelled or the property released from the operation of the mortgage bond
mutatis mutandis:	with the necessary changes
notarial bond:	a mortgage over movable property embodied in a notarial mortgage bond
personal servitude:	a limited real right over the movable or immovable thing of another person granting specific entitlements of use and enjoyment to the holder in his/her personal capacity with regard to that thing for a specified period or as long as he/she lives
pivot deed:	Is a deed used in the Cape Province and intended to guarantee that no change of conditions has occurred between it and the present title deed and so to avoid the need for long, laborious searches
power of attorney:	a written or oral authorization given by one person, called the principal, to another person called the representative or agent, to perform the acts authorized in the power of attorney on behalf of the principal
(special) power of attorney to transfer:	a written power of attorney granted by the owner of the land in his personal capacity as transferor, to a conveyancer to perform on behalf of the transferor all acts necessary to effect transfer of the land described in the power of attorney to the acquirer, the transferee. The conveyancer is also specifically authorized to execute the deed of transfer on behalf of the transferor, before the registrar of deeds.
praedial servitude:	A servitude (limited real right) which one property has over another property, which belongs to someone else
proclamation:	notice in the *Gazette* regarding provincial legislation
redistribution agreement:	This is an agreement concluded by the heirs, legatees and, sometimes, the surviving spouse, during the administration of the estate, whereby they agree to vary the bequest(s) as they see fit. The executor of the estate must also be a party to the agreement.
representative:	see *agent*
repudiation:	Rejection (a surviving spouse can repudiate a joint will, but only in its entirety). If the survivor does not accept the terms of the will (thus repudiates it), the effect would be that the survivor would receive no benefit from the will, but would retain his/her half-share in the joint estate.
renounces:	surrenders or gives up
repealed:	cancelled or annulled
servient tenement:	immovable property subject to a praedial servitude
servitude:	a limited real right over the immovable (or movable) thing of another, granting the holder certain entitlements, usually the use and enjoyment of the thing concerned. (Distinguish between praedial and personal servitudes.)
sequestrated:	temporary possession is taken of an insolvent person's estate

sequestration:	Court declaration of a natural person's estate as being insolvent
statutory enactment/ restriction:	provision or limitation in an Act, ordinance or proclamation
testate:	Where the deceased has left a will which has been accepted by the Master.
title deed:	proof of ownership or a limited real right
transferee:	a person or body who accepts transfer of ownership in land in by way of a deed of transfer
transferor:	the person or body who transfers ownership in land to the transferee in a deed of transfer
substituting title deed:	a title deed issued to the registered holder or holders of an existing title deed in respect of the whole or a part of the object of the right which he/she holds under the original title deed. No transfer of ownership takes place.
unrehabilitated insolvent:	a person who still has limited contractual capacity after having been declared insolvent by a competent court
usus:	the limited real right (personal servitude) to use someone else's movable or immovable property and the fruits of the property only for the needs of the holder and his/her family for a limited time, provided the *servient* property itself is not substantially changed (more limited than usufruct)
usufruct:	a personal servitude to use and enjoy someone else's movable or immovable property and the fruits of the property for a limited time, provided the *servient* property itself is not substantially changed
waiver:	This is a document signed by a beneficiary in which he/she renounces a benefit which devolves (passes) to him/her from the estate of the deceased. If it is a bequest in terms of a will, it can be said that he/she has repudiated the bequest.

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