Deeds Training Newsletter

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Office of the Chief Registrar of Deeds

A NEW PROCEDURE ESTABLISHED BY THE AMENDMENT OF THE REGISTRATION OF DEEDS REGULATIONS, ACT 47 OF 1937.

VALIDITY OF A NOTARIAL BOND REGISTERED IN THE WRONG DEEDS REGISTRY.

ACCEPTANCE OF AN ELECTRONIC APOSTILLE IN THE DEEDS REGISTRY.

agriculture, land reform & rural development
Department:
Agriculture, Land Reform and Rural Development
REPUBLIC OF SOUTH AFRICA

2030 NDP

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Office of the Chief Registrar of Deeds

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The views expressed in the articles published in the newsletter do not bind the Department of Agriculture, Land Reform and Rural Development and the Chief Registrar of Deeds.

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FROM THE FRONT DESK

In this second issue, we provide further aspects surrounding the Electronic Deeds Registration Systems Act, 2019 (Act No. 19 of 2019) (EDRSA) and the registrar's duty to record informal rights referred to in our previous issue.

Valuable examination aspects are further dealt with on authentication of foreign documents and the use of an apostille, massing of estates, rights flowing from leases, the new VA application procedure and how to deal with a notarial deed if it was registered in the wrong office.

We are moving towards the end of year and, fortunately as Deeds Training, we managed to exercise our mandate and continued with our courses as scheduled in our annual training programme by providing lectures electronically.

The Advanced Module 1 & 2 Deeds Registration Course, The Refresher Module 1 Course and Vryburg Topic Course, have been successfully presented from Level 3 Lockdown with the King Williams Town Topic course and Refresher Module 2 course to be presented in November.

All that still remains from Deeds Training is to wish all our colleagues in our Branch and department a safe and blessed holiday season and a prosperous new year.

Tania Shawe
Deputy Registrar
Deeds Training

THE RECORDAL OF INFORMAL TENURE RIGHTS IN THE DEEDS REGISTRY

BY TANIA SHAWE
DEPUTY REGISTRAR
DEEDS TRAINING

The Branch: Deeds Registration has been institutionally mandated to commence with the process of recordal of tenure rights, as ordered in the Ministerial Review dated January 2020 as well as in the 2020 – 2025 Strategic Plan of the Department of Agriculture, Land Reform and Rural Development (DALRRD), dated 24 March 2020.

Currently, only the recordal of a sale of immovable property in instalments in terms of Section 20 of the Alienation of Land Act, 1981 (Act No. 68 of 1981) (ALA) is effected in the deeds registries.

Section 20(1)(a) directly instructs the seller to record the sale agreement in the deeds registry, the reason being that such a purchaser's legal position is *sui generous* the position of a preferential creditor's right, e.g. a bondholder in the instance the property is sold in execution.

If the seller is sequestrated, the Section 20 buyer obtains a statutory right to offer the remaining purchase price and claim transfer of the property. Apart from the above and, perhaps Section 3(1)(v) & (w) of the Deeds Registries Act, 1937 (Act No. 47 of 1937) (DRA) there is no other legislation mandating the registrar of deeds to record informal land rights.

Full ownership in land is placed at the top of the hierarchy of the property rights pyramid, with informal tenure rights at the lowest, therefore the least secure with hardly any collateral benefits.

A real right or limited real right in land; however, is adequately protected by registration in the deeds office as S16 of the DRA provides a two-fold purpose of a public record of land as well as publication, so that it is maintained against the whole world.

This purpose is not afforded to most lesser rights referred to as "off-register rights", apart from slightly better secured rights which are registered in the deeds registry such as leaseholds, initial ownership and communal rights and those that fall under proclamations.

As the registrar of deeds is a creature of statute, the initial recordal of all institutional informal rights and, thereafter, the upgrading thereof, can therefore not yet be accommodated until the necessary legislation is available authorising the registrar to

make these recordals as provided for in the ALA.

Alternatively, legislation is needed that will specifically exonerate the registrar from fulfilment of this mandatory requirement.

This legislative requirement has become the biggest challenge to date.

The questions raised by those not familiar with the registration requirements in the deeds registries in South Africa is why initial recordal of the right and not registration thereof, and what is the difference?

The answer in the simplest terms is by reason of the intricate, structured processes involved before the deed is lodged in the deeds office for registration.

To start with is the requirement in Reg 32 DRA that no portion of any piece of land shall, save as provided by the DRA, be transferred except upon a diagram thereof. Registration of informal rights will therefore initially involve the surveying of each land parcel over which an informal right exists by the Surveyor General.

Many such rights, as substantially identified in the definition of “informal right to land” in the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA) exist over vast hectares of such mostly rural unsurveyed areas.

A Further option is for townships to be developed in these areas; however the legislative requirements and bylaws make it a cumbersome process and finances required may take years before development can commence and registration can take place.

Time is not on the DALRRD’s side and the above mentioned only deals with the underlying land over which the informal right exist and not yet with the demarcation of the informal right in order for it to be adequately identified and described and to prevent overlapping of rights when recorded.

A further requirement for deeds lodged for registration is that the transaction takes place between the registered owner of the land, as per definition in the DRA, and the other party or parties (apart from sub-leases).

These requirements have excluded most of the socially regulated tenures in urban and rural areas as the right they received is not from the registered owner of the land but provided by a third party such as the traditional leader.

Recordal is therefore distinguished from registration as no registration can take place between the owner of the particular still unidentified and unregistered portion and the holder of the right over a still un-demarcated portion superimposing the unregistered land.

By making use of recording in the meantime, the right of the holder can still become a public record over land so that it is maintained against the whole world and may be converted into full ownership in time.

Above this, the registrar must still be authorised to record these rights.

A first attempt to amending the Deeds Registry Act was made when the Communal Land Rights Act 11 of 2004 mandated the registrar of deeds to register “new order rights” and “old order rights” by inserting Section 16C, D and E into the Deeds Registry Act and provided for these rights to be transferred by means of a Deed of Communal Land Right as contemplated in the Communal Land Rights Act, 2004. Section 3 of the DRA and the definition of “person” was also suitably to be amended in this regard. These provisions were however not yet put into operation by proclamation.

Further attempts to amend the DRA and a new Land Tenure Act is still in the beginning phases.

In conclusion:

Recordal of rights over urban and rural land are currently the most suitable interim vehicle to commence with eventual registration of all socially regulated, off-register rights, and to confer the legal recognition of ownership that is cognisant with socially recognised practices in families and communities and which are managed at local levels.

A record of rights will be held in local databases that are managed locally but coordinated by the Deeds Registry, to ensure an integrative system which adheres to the norms and principles that are enshrined in the Bill of Rights.

Sources used: Silberberg and Schoeman’s The Law of Property Fifth Ed: Badenhorst et al.

ACCEPTANCE OF AN ELECTRONIC APOSTILLE IN THE DEEDS REGISTRY (*pronounced A – pos - tee*)

BY THEO BESTER
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Due to the modern age that we live in, it has become more and more the trend for various institutions and businesses to issue documents electronically with an electronic signature, instead of the traditional hard copy with a "wet" signature.

Recently, the Hague Convention also made amendments to their Articles, to provide for an Apostille to be issued electronically, and the lodgement of such electronically issued Apostilles (usually in PDF format), also known as an e-Apostille, and this result in uncertainty in Deeds Registries within the Republic of South Africa, who traditionally only accepts documents containing a "wet" signature or, where applicable, which have been certified in terms of the provisions of Regulation 20(7) of the Deeds Registries Act 47 of 1937.

Registrars of Deeds and their examination staff are confronted with the decision whether they have the authority to accept such an e-Apostille or not, and to answer this question, one needs to take a step back and understand the purpose of an Apostille.

The Hague Convention, which was concluded on 5 October 1961, abolished the requirement of legalisation for foreign public documents. It is important to note that it only applies to public and not to private documents.

According to Article 1 of the Convention, a public document is that which is executed by an authority or a person acting in an official capacity.

The said Article 1(2) of the Convention lists the following four categories of documents that are deemed to be "public documents",

(2) For the purposes of the present Convention, the following are deemed to be public documents:

a) Documents emanating from an authority or an official connected with the courts or tribunals of the State, including those emanating from a public prosecutor, a clerk of a court or a process-server ("huissier de justice");

b) Administrative documents;

c) Notarial acts; and

d) *Official certificates which are placed on documents signed by persons in their private capacity, such as official certificates recording the registration of a document or the fact that it was in existence on a certain date and official and notarial authentications of signatures.*

It is, however, important to understand that the determination of what constitutes a public document is entirely determined by the law of the State from which the document originates and an Apostille does not have any legal effect beyond certifying the origin of the underlying public document, and does not certify the content of the underlying public document itself.

An Apostille also does not certify that all requirements of domestic law of the State from which it originated for proper execution of the underlying public document are met, and the Convention also does not impose any obligation upon a Competent Authority to do so.

Of all these public documents, the one that are most commonly encountered in deeds registries are "notarial acts". According to the Apostille handbook, a "notarial act" *"is an instrument or certificate drawn up by a notary that sets out or perfects a legal obligation or formally records or verifies a fact or something that has been said, done or agreed"*.

The Apostille handbook further explains that when such an underlying document is authenticated by the signature and official seal of the notary, the notarial act is the public document under Article 1(2)(c) of the Convention.

Now to answer the question on whether a Registrar of Deeds may accept an e-Apostile, one must take note of the fact that Article 3(1) of the Convention makes provision that each Contracting State is obliged to give effect to Apostilles which have been issued in accordance with the Convention by other Contracting States, and since South Africa, in terms of the provisions of the Accession to the Convention Abolishing the Requirement of Legislation for Foreign Public Documents published in Notice 773 of 1995 published in Government Gazette No. 16609 dated 18 August 1995 is a contracting State to the Convention, are therefore bound by the Articles of the Convention.

The convention does however provide that the Destination State may reject the underlying document if it does not meet the requirements pertaining to the laws of the Destination State.

A Registrar of Deeds may therefore not reject an Apostille on the basis that it has been issued electronically, but a Registrar of Deeds may e.g. reject the power of attorney attached to the Apostille if it has not been signed as original "Wet" signature or if he/she is not satisfied that the document has been properly authenticated.

Where a Registrar of Deeds rejects the underlying document, the note to the conveyancer should point out that the underlying document to the Apostille are unacceptable and state the reason

for not accepting the said underlying document.

The note should not read that “the electronic Apostille is unacceptable” or something similar, as that will be unlawful.

As with a paper Apostille, the Apostille must remain attached to the underlying public document. Detaching the underlying document from the Apostille, invalidates the Apostille and that will be a valid reason for rejection.

Considering the facts that an Apostille only certifies the origin of the State from which it originated and not the contents of the underlying document, a Registrar of Deeds therefore still has the responsibility to consider whether the underlying document has been properly authenticated.

Source:

Apostille Handbook - A Handbook on the Practical Operation of the Apostille Convention
ISBN 978-94-90265-08-3
Published by:
The Hague Conference on Private International Law
Permanent Bureau
Churchillplein 6b,
2517 JW The Hague
The Netherlands

A NEW PROCEDURE ESTABLISHED BY THE AMENDMENT OF THE REGISTRATION OF DEEDS REGULATIONS, ACT 47 OF 1937

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In the South African land registration system, title deeds serve as proof of legal ownership of a property. The deeds office requires that the original title deed or mortgage bond be lodged for the purpose of the registration of various property transactions, as mentioned in Regulation 51(1) and Regulation 63(2) of the Deeds Registries Act, 1937 (Act No. 47 of 1937) (DRA).

Regulation 68 of the DRA is still relied on for issuing of a lost copy (also referred to as a VA application) and used as an original where the original title deed has become lost, destroyed or defaced. This copy must be distinguished from an information copy which is issued over the counter. The procedure for application for a VA copy prior to amendment of the regulation was simple to follow, quick and cost-effective and a relative cheap solution.

It only required the lodgement of a written application for the issue of a certified copy in lieu of the original, accompanied by an affidavit by the registered owner of the property stating under oath that “a diligent search has been made, that he/she failed to locate the title deed and confirms that it is not pledged or held as a security by anyone.”

This regulation has been amended by the Department of Agriculture, Land Reform and Rural Development, due to the increase in fraudulent transactions registered in the deeds offices emanating from fraudulently obtained titles. It therefore became necessary to implement changes in the procedure of applying for a copy of a title in order to mitigate fraudulent applications from taking place.

The new amendments require that in respect of a Regulation 68 (1) application:

(1E) (a) before issuing a certified copy, the applicant shall publish in the prescribed form a notice of intention to apply for such certified copy in an issue of a newspaper circulating in the area in which the land is situated, and in the case of a notarial bond, in an issue of one or more

newspapers circulating in the area of every deeds registry in which such notarial bond is registered; and

(b) *copies of the deeds referred to in (a) shall be open for inspection in the deeds registry free of charge by any interested person for a period of two weeks from the date of publication of the notice, during which period any interested person may object to the issue of a copy.*

Stricter measures and procedure have therefore been implemented for the applicant(s) who lost their original title deeds.

Though this measure has unwanted additional cost implications such as newspaper publication charges and the copy to lie for inspection for two weeks with the purpose to allow objections from the public, can causes delays in property transactions.

The most important aspect hereof is, should objections be raised, the registrar may not issue such VA Copy. The main purpose is to mitigate the risk of fraudulent applications and subsequent need to put stricter measures in place to counter fraud.

The deeds offices have been registering a high volume of VA Copies. This has created the impression that the significance of the title deed has decreased because it is simple to obtain a copy.

The further purpose of this new process is to place more emphasise and importance on the care of the original deed, and encourage a higher standard of care, with the option still available to obtain a new one, however in a much more complex manner.

Look after your title deed!

SOURCE OF REFERENCE

1. Registration of Deeds Regulations
2. Have you lost or destroyed your title deed? Here's what all property owners should know-CAF: Trust and Estate Law.

RIGHTS, OBLIGATIONS AND IMPLICATIONS FLOWING FROM A LEASE OF LAND

SYDNEY MEKWE
LAW LECTURER
DEEDS TRAINING

Introduction

A lease of land is an agreement between a party having the right to occupy a piece of land and another who wishes to enjoy the same or lesser rights to the whole or part of such piece of land for a determinable period against payment of consideration for the enjoyment of such right. It is the intention to give a brief exposition of the implications that flow from conclusion of this agreement.

Essential Requirements

In terms of the common law there are certain essential requirements which are critical to the existence of a contract of lease.

The first requirement relates to the ability in law of the parties. This implies their position in law to enter into such an agreement.

The party who seeks to lease the rights to the property must himself/herself be entitled to them. This is in accordance with the legal principle that no one can pass on more rights to another than he himself had.

This implies that the party leasing the rights must lease such rights or less thereof that he himself had in the property.

This scenario finds application where the party leasing the property is not the registered owner thereof, such as where the present lessee of the property in turn leases the property to another. This type of lease is referred to as a sublease, as it stems from a valid principal lease.

The lessee of the first lease obtains the ability in law to conclude the second lease (sublease) by virtue of his/her position as the holder of the rights leased in the first lease concluded say with the owner of the property. These rights must, themselves, not prohibit their subleasing in terms of the first contract.

The party seeking to enjoy the rights (sublessee) must in turn not be suffering from any disqualification from the owner of the land. Where such lease is silent and the owner of the property would not have leased the rights in the property to the sublessee

due to reasonable concern about the personality of such sublessee or his/her intended use of the property, the sublease could be found to be invalid. However, it is up to the sublessee to prove that the refusal of the owner is unreasonable, but the court will not force the owner to give his /her consent to the sublease.

The other requirement for validity is the agreement of the parties on the duration of the lease. The period need not necessarily be fixed. It is enough if it is determinable from the terms of the lease. What is important is that the use and enjoyment of the leased rights must not be perpetual.

The period must be capable of coming to an end upon the happening of some event. Mere death or insolvency of either party does not automatically terminate the lease, unless such was its term. In circumstances where the lease expires, and such lease was subject to a sublease, the sublease will also come to an end as it was dependent on the continued existence of the principal lease.

Another important term of the lease is the provision for consideration for the use and enjoyment of the property leased. This can take the form of specified monthly or annual rental payable to the lessor or an obligation by the lessee to bring about certain improvements on the property at his own expense in lieu of rental.

Another way that this finds application is when, in terms of the agreement for the lease of agricultural land, the parties have agreed that the lessee must give to the lessor a certain percentage of the total harvest of the land in lieu of rental money.

Undisturbed possession is another important requirement for the lease, i.e. the lessee must be granted an undisputed right of use and enjoyment of the property. In other words, there must not be another party with competing rights to those that the lessee acquired from the lessor, who can disturb the lessee in his exercise of the lease.

Where the leased property does not involve the whole of the owner's property, the portion subject to the lease must be clearly defined. This is secured by way of a lease area diagram approved by the surveyor-general of the province in which the property is situated.

This does not amount to subdivision of the underlying land on which the lease is to be exercised. The underlying land parcel remains intact in terms of the land register.

Legal implications of the lease

A lease concluded for a period of less than 10 years is deemed to be movable property in law and can only be mortgaged by a notarial bond. On the other hand, a registered lease concluded for a period which, together with the right of renewal thereof, exceeds 10 years, or if it is concluded for the lifetime of a party mentioned therein, is deemed immovable property as per definition and can be bonded by a mortgage bond.

An owner who has leased the whole or portion of his/her property to a lessee has, by implication, surrendered his/her rights and interest in the property as regards the purpose of the lease relating to the lease area to such lessee.

The lease area is for all intends and purposes '*owned*' by the lessee for the duration of the lease. The erstwhile owner cannot cede the rights, duties and interest that he/she has in the lease to another party because such party would lack the legal capacity to be a lessor, unless he/she obtained co-ownership of the leased land.

The lease agreement can also provide for the lessee there under to be replaced by another. In the case where the lease is silent on the matter, it is presumed that the right of the lessee to cede the rights and obligations under the lease to another is recognised, subject to the consent of the lessor. In the case of a cession, the previous lessee gets out of the picture completely and is replaced by the cessionary, who will thenceforth enjoy the same rights that the lessee had and carry out his obligations under the lease.

Where it is only the rights that the lessee cedes, the lessor's consent thereto is not necessary, unless the lease provides otherwise, because the lessee remains responsible for his obligations towards the lessor.

When the leased property is transferred to a new owner, such owner acquires the property, subject to the existing lease for the remainder of the lease period. He/she succeeds the seller in respect of the bare dominium of the property.

Where the lease contains an option to buy the leased land in favour of the lessee, upon transfer of the land, such option cannot be enforced against the new owner of the bare dominium, as it is a personal right enforceable only against the previous owner. The option can only be enforced against the owner if transfer has not taken place. (see *Spearhead Property Holdings Ltd v E & D Motors (Pty)Ltd* (214/2008) [2009] ZASCA 70)

Conclusion

It is hoped that this exposition of the rights and implications arising out of a lease and dealings therewith has provided a better understanding of the subject matter.

Sources of Reference:

- Bradford & Lehmann: Principles of the law of Sale & Lease, 3rd Ed. 2013
- Du Bois et al: Wille's Principles of South African Law, 9th Ed. 2007
- Spearhead Property Holdings Ltd v E & D Motors (Pty) Ltd (214/2008) [2009] ZASCA 70)

HISTORY AND ASCERTAINMENT OF CUSTOMARY LAW: PART II

BY ANDRIES BADENHORST,
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With this article, I want to focus on the complex ways in which African customary law is ascertained to get the applicable version and prove it. Ascertainment and proof of a legal rule refer to the manner in which that rule is identified as applicable to an issue in a judicial proceeding. In South Africa, we have the common law of South Africa, which is a written tradition in which specialised legal professionals ascertain legal rules from written sources, and also the living customary legal system of South Africa, which is an oral tradition that survives in unwritten narratives. African customary law is therefore different from other legal systems, such as Roman-Dutch law and English law, which are produced by institutions of civil authority, because it is a product of social discourse generated by indigenous communities in South Africa.

To understand the ascertainment of African customary law, one should differentiate between ascertainment in the pre-colonial era and colonial era and onwards.

Pre-colonial era

Customary law is found in sources such as the language, rituals, history, folktales and storytelling. People applied customary law in their environment as part of their cultural upbringing and ascertained legal rules with reference to their own oral sources. Customary law was theorised about, practised and administered by the indigenous people.

The community's participation in social interactions resulted in its qualities of flexibility and adaptability. Participating communities gave customary law its local uniqueness by bearing the features of those communities. People therefore obtained their expertise in ascertaining the rules of customary law, as a result of their upbringing in its cultural and social habitat.

The community's participation meant that a litigant's trial was conducted by his or her peers, therefore, no cultural gap between the parties to the dispute and the court.

Colonial era and onwards

Legislation had to be enacted to facilitate the ascertainment of the applicable customary law when

disputes arose before the courts. One of the earliest provisions to help the courts to facilitate the ascertainment of customary law was Proclamation 140 of 1885. Considering the non-recognition of customary law at the time, Section 22 of the Proclamation contained the repugnancy clause, which allowed the courts to restrict the application of customary law to those rules that they deemed were not opposed to the principles of public policy and natural justice.

In terms of the repugnancy clause, the version of customary law put forward by a party to litigation had to be in line with the common law standards of justice and morality, otherwise this party had failed to ascertain the applicable custom.

Thereafter, the repugnancy clause was retained when Proclamation 140 of 1885 was later superseded by Section 104(10) of Proclamation 145 of 1923. Further thereto, various versions of the repugnancy clause appeared in different areas.

In 1927, the Black Administration Act, 1927 (Act No. 38 of 1927) (BAA) superseded all the laws regulating the ascertainment of customary law. Section 11(1) of the BAA gave discretion to the Commissioners' Courts to apply customary law in all proceedings between black people, subjected such application to the repugnancy clause, however the custom of ***lobolo*** or ***bogadi*** were exempted from the repugnancy clause. This meant that courts were not allowed to return a verdict that this custom was repugnant to public policy and natural justice. In 1983, the Hoexter Commission of Inquiry into the Structure and Functioning of the Courts investigated the condition of customary law in South Africa and found that the blacks-only Commissioners' Courts discriminated between litigants on the ground of race and dispensed inferior justice to blacks which led to the enactment of the Law of Evidence Amendment Act 45 of 1988 (LEAA).

Section 1(1) of this Act reads:

"Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy and natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles …"

This meant that **all** the courts of South Africa were to apply customary law, but the application remained subject to the courts' discretion. All the courts applying customary law were given the discretion to take judicial notice thereof, therefore not necessary for the litigants to prove each and every custom that they alleged on the assumption that official customary law was extensively recorded in legislation and other precedents.

This meant that only the customary law that was recorded in written form such as statutes, cases and textbooks was

exempted from the necessity to be proved. For the purposes of ascertainment, Section 1(1) of the LEAA further associated customary law with foreign law in South Africa. The repugnancy clause was again retained; therefore, customary law still had to comply with the common law standards of public policy and natural justice to be valid with the exception of *lobolo* or *bogadi*.

Finally, Section 211(3) of the Constitution plays three roles, namely recognition, application and the alignment of customary law with the Constitution and any legislation specifically dealing with customary law. Section 211(3) reads:

"*The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."*

Section 211(3) ends a long period of the non-recognition of customary law during which the common law was the general law of the land. The recognition of customary law relates to the sanction that courts 'must' apply customary law as a matter of law and not a discretion to apply it in the interests of justice.

Section 211(3) also align customary law with the Constitution and legislation that deals with it. Customary law is subject to the Constitution as the supreme law of the land and is not exempted from the application of the Bill of Rights.

Finally, the phrase '*subject to the Constitution and any legislation that specifically deals with customary law'* relates to ascertaining the particular version of customary law to be applied. Ascertainment of customary law is questioned by both the instruction that courts '*must apply customary law'* and by the proviso, '*when that law is applicable'*.

Therefore, courts must first ascertain the relevant rule, principle, concept or doctrine of customary law before they can comply with the recognition imperative *'must apply'*. Thereafter, they must measure the ascertainment against *'subject to the Constitution and any legislation that specifically deals with customary law'*.

From the abovementioned section, it is therefore clear that customary law is finally recognised as a distinct legal system which now has its own independent values and norms. Considering the history of ascertainment of customary law, it is understandable that even in the 21st century we will still have court cases like - *A S and another V G S and another* D12515/2018 [2020] ZA KZDHC 1 (24 Jan 2020) where the constitutionality of legislation that was enacted to facilitate the ascertainment of the applicable customary law being questioned, just as Section 22(6) of the Black Administrative Act is questioned.

SOURCES:

Books

Himonga C and Nhlapo T (eds). (2014). *African Customary Law in South Africa: Post-apartheid and living law perspectives* (Oxford University Press) Ndima DD. (2018) *Advanced Indigenous Law* (University of South Africa)

VALIDITY OF A NOTARIAL BOND REGISTERED IN THE WRONG DEEDS REGISTRY

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When it comes to notarial bonds, one of the most important provisions in the Deeds Registries Act, 1937 (Act No. 47 of 1937) (DRA), the registration of a notarial bond may be overlooked, and that is the requirement in Section 62(1) pertaining to the address of the debtor. From the quoted wording of the said Section 62(1), is clear in essence that, *"every notarial bond shall be registered in the deeds registry for the area in which the debtor resides and carries on business, or if he resides and carries on business in areas served by different deeds registries, in the deeds registry for the area in which he resides and in every deeds registry serving an area in which he carries on business"* (my underlining) One should however bear in mind the last provision of Section 62(1) which provides that if a notarial bond is passed in Natal in pursuance of the Notarial Bonds (Natal) Act 1932 (Act 18 of 1932), that, irrespective of whether the debtor resides or carries on with business in Natal, the bond shall be sufficiently registered for the purposes of this Act if registered in the deeds registry at Pietermaritzburg.

It should also further be considered that Section 62(2) of the DRA also provides for that the registration will be effective for the whole Republic if such notarial bond was registered in accordance with Section 62(1) of the DRA, and, at the same time, Section 62(3) of the DRA is clear in that a notarial bond registered in the deeds registry for the area, in which the debtor resides or carries on business will only be effective for such area.

Further, Section 62(4) of the DRA provides that where a notarial bond is executed by a company incorporated with limited liability, or a close corporation, and if the bond is registered in the deeds registry for the area in which the registered registry of such company or close corporation is situated, at the date of registration of such bond it will be effective as registration for the whole of the Republic.

What should be noted from all of the said subsections is that they all point to the same important fact, namely that the notarial bond shall be registered in the deeds registry for the area in which the debtor resides and carries on business.

The question that begs to be answered is, if a notarial bond, other than

provided for in the last provision of Section 62(1), was never registered in the deeds registry for the area in which the debtor resides or carries on business, but was registered in any other deeds registry, whether such a notarial bond will still be valid or is it null and void?

Before trying to answer the question whether such notarial bond will be null and void, a further point that needs to be considered is the provisions of Section 1 of the Security by Means of Movable Property Act, 1993 (Act No. 57 of 1993), which specifically provides that any notarial bond, registered from the commencement of the said Act (7 May 1993), in accordance with the provisions of Section 62 of the DRA shall in essence have the consequence that the creditor enjoys a secured claim as if he/she was in physical possession of the pledged security.

It will therefore be fair to reason that the rights of a creditor will be negatively affected, if such bond was not registered in accordance with Section 62 of the DRA.

Unfortunately, both the DRA and Security by Means of Movable Property Act, 1993 (Act No. 57 of 1993) are silent on what will be the validity or consequence of such a notarial bond, but considering the above, it will be fair to come to the conclusion that such a notarial bond which has not been registered in a deeds registry in accordance with Section 62 of the DRA, that the registration thereof may not be a valid registration.

It is, however, the opinion of this author that it will be for the Courts to decide if such a notarial bond will be null and void.

AN ANALYSIS OF THE NEW ELECTRONIC DEEDS REGISTRATION SYSTEM ACT 19 OF 2019

BY BRENDA NDALA
ASSISTANT LAW LECTRURER
DEEDS TRAINING

With the advent of internet, e-commerce and computerisation, there has been an increased need for the electronic service delivery. The 4th Industrial Revolution has become a reality and will become part of our daily lives. To meet such needs, the Office of the Chief Registrar of Deeds has embarked on a project for the implementation of e-commerce principles in the deeds registration process, to facilitate an Electronic Deeds Registration system (e-DRS).

The long-awaited Act that regulates the electronic Registration of properties in the South African Deeds Registries has finally been enacted. On 02 October 2019, President Cyril Ramaphosa signed a Bill (B 35-2017) into law, after having been tabled in Parliament in 2017 and published for comments in 2018, namely the Electronic Deeds Registration System Act, 2019 (Act No. 19 of 2019) (e-DRSA). It intended to provide for electronic deeds registration and finds application to registration, execution and filling of deeds and documents as prescribed by the Deeds Registries Act, 1937 (Act No. 47 of 1937) (DRA) as well as the Sectional Titles Act, 1986 (Act No. 95 of 1986) (STA).

This new system will enable the electronic processing, preparation and lodgment of deeds and documents by conveyancers and the Registrar of Deeds.

It will also enable the registration of large volumes of deeds effectively; improved turn-around times for providing registered deed and documents to clients; countrywide access to deeds registration services; enhanced accuracy of examination and registration; availability of information to the public and security features including confidentiality; non repudiation; integrity and availability.

Only Section 2 of the e-DRSA is currently in effect and operational at present. Subsection (1) imposes the obligation on the Chief Registrar of Deeds to implement the system for electronic registration of deeds that is to develop, establish and maintain the e-DRS, subject to the Electronic Communication Transaction Act, 2002 (Act No. 25 of 2002) (ECTA). Subsection (2) provides that:

"The Chief Registrar of Deeds may after the consultation with the Regulation Board (referred to in Section 9 of the Deeds Registries Act), issue directives for:

(a) functional requirements for the electronic deeds registration system;

(b) technical specification;

(c) specification for interfaces between the electronic deeds registration system and any party interfacing the system

(d) standard for information security

(e) maintenance of the system

(f) the processing of deeds and documents using the system

(g) securing the retention and subsequent production of deeds and documents for electronic registration system."

In terms of Section 3 of the Act, a deed or document generated, registered and executed electronically, scanned or otherwise incorporated into the e-DRS by electronic means will, for all purposes, be deemed to be the original and valid record, subject to Section 14 of ECTA.

This implies that the first document imported into the system will be recognised as the only valid and original record. The ECTA clearly provides the necessary requirement that needs to be met before electronic document will be admitted as original document. For now, all original deeds and documents at the deeds registries that are already in existence are deemed to be originals and valid until incorporated into the e-DRS.

Section 4 of the eDRSA provides that any user of the electronic deeds registration system authorised by the regulations must be registered in the manner and under the conditions as may be directed by the Chief Registrar of Deeds.

In terms of Section 5, the minister is empowered to make regulations on consultation with the Board. The importance of this provision is that the minister consults the same body referred to in Section 9 of the current DRA, which is the Deeds Regulation Board. Therefore, there will be fewer alterations between the e-DRS and the DRA.

The proposed regulations to be made as mandated in Section 5(1) will categorise the users of the System, one of them being Public Users who will be entitled to use the e-DRS only for information purposes, and also Primary Users which are conveyancers enabling them to also lodge and sign the transfer documents remotely making use of the "advanced electronic signature", as defined in Section 1 of the EDRSA, subject to ECTA. It is important to note that the EDRSA still refers to and includes the obligations of a Conveyancer and Notary Public as mentioned in the DRA, their roles and responsibilities will be retained.

Section 6 of the Act deals with the transitional provision, which will not be discussed. The Registrar will continue with the current manual registration

system, until the e-DRS and related provisions or regulations are fully in place. Subsequently, the manual registration system procedure in terms of the DRA and STA may be discontinued and the e-DRS will ultimately be a replacement for manual preparation, lodgement and execution.

In terms of section 7 the date of coming into operation of the remaining sections of the EDRSA is to be fixed by the president by a proclamation in the Government Gazette. Though there is still a lot of work to be done before the electronic registration system is fully in operation, the time for its full implementation is now.

The Covid-19 lockdown has emphasised an urgent need for a fully operative e-DRS. This was especially following the official announcement by the president that from midnight of 26 March 2020 all non-essential business and government services in South Africa had to close their doors to public to curb the spread of the Covid-19 pandemic.

The deeds office was counted amongst the non-essential services. Its closure, together with that of municipal offices, where rates clearances are obtained and the Office of the Master of the High Court for reporting deceased estates had a negative impact on the property industry. Their closure negatively affected the functioning of the property registrations and other needs for service deliveries.

The implementation of the EDRSA should be expedited for electronic service delivery, which will effectively protect the interest of the clients, both legal practitioners and members of the public.

E-DRS should not be viewed as a complete replacement of a current registration system but rather as an enhancement and technological upgrade, as the current traditional approach is becoming increasingly less viable.

MASSING OF ESTATES

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A term we often hear about is “massing of estates” but not everyone is sure what exactly it means. Massing occurs when two or more persons, with testamentary capacity, combine or consolidate (mass) their separate estates, or where married in community of property, their undivided half shares of their joint estate are massed into a single estate when a specific event occurs, for example, death or divorce.

The first step towards massing is a valid joint estate, which was executed by two or more persons with testamentary capacity in which it is clearly indicated that their intension is to combine their separate estates into a consolidated estate. Further thereto, it must be their wish that this joint estate be administered and distributed as one estate on the occurrence of a specific event, for example, at the death of the first-dying. The manner in which the massed estate will be distributed, identification of the beneficiaries and the nature of the benefit that must fall to the survivor(s) on adiation must be stated. Adiation means the heir accepts (an inheritance), taking the liabilities and benefits of the estate, while repudiation, on the other hand, means the refusal or rejection of the benefits. Usufruct, fiduciary right or a right as income beneficiary is common examples of benefits that must fall to the survivor(s). Massing only takes effect when the survivor adiates and not when the stipulated event occurs.

Therefore, if the survivor repudiates, the massing fails and only the first-dying’s estate will devolve as stipulated in the will. The survivor will forfeit the benefits which would have accrued to him if he had chosen to adiate but will retain his own estate with the full right of disposal over it.

When the survivor adiates, his/her estate is then consolidated/massed with the estate of the first-dying and s/he/she will receive the benefits under the will as stipulated. This will result in the permanent loss of his/her capacity to revoke the joint will since s/he has accepted that his/her own assets will devolve to the nominated beneficiaries.

Why do marital partners utilise Massing? By making use of massing, the surviving spouse can be put in control of the massed estate as long as s/he lives and therefore would be able

to maintain the standard of living to which s/he was used to during the marriage. The same principle applies to the upbringing and education of minors and, therefore, the interests of the minors (normally the eventual heirs) are protected since the survivor cannot tamper with the provisions of the mutual will.

Further thereto, the massed property cannot be alienated in conflict with the provisions of the will by the survivor.

Finally, massing as an instrument can be utilised to minimise or even avoid estate duty, but also be warned that serious tax implications can accrue from undiscriminating use of massing.

SOURCES:

NJ Wiechers, I Vorster, EE Blignaut "*Administration of Estates"* (Lexis Nexis 1996)