

SADJ

South African Deeds Journal

November 2008 Issue No.16

WAIVERS OF LEGAL EXCEPTIONS
IN BONDS – LAWFUL OR UNLAWFUL

INTERDICTS - DANGERS
RELATING THERETO

ALIENATION OF COMMON PROPERTY

WHY FRACTIONAL OWNERSHIP?

SECTION 228 OF THE COMPANIES ACT,
AND BONDS



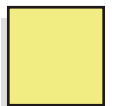
land affairs

Department:
Land Affairs
REPUBLIC OF SOUTH AFRICA

GUIDELINES FOR ARTICLES IN THE SADJ

SADJ welcomes contributions, in any of the official languages, especially from deeds office staff and practitioners. The following guidelines should be complied with:

1. Contributions should as far as possible be original and not published elsewhere.
2. Contributions should be useful or of interest to the conveyancing practice and land issues. The decision of the editorial committee is final.
3. Authors are required to provide their involvement or interest in any matter discussed in their contributions.
4. Footnotes should be avoided. Case references, for instance, should be incorporated into the text.
5. Authors should limit their articles to a maximum of 3 000 words, however, should an article exceed the said amount of words, the editorial committee may split the article and publish it in two successive issues.
6. When referring to publications, the publisher, city and date of publication should be provided. When citing reported or unreported cases and legislation, full reference details should be included.
7. Articles should be in a format compatible with Microsoft Word and should either be submitted by e-mail or, together with a printout, on a stiffy or compact disk. Letters to the editor, however, may be submitted in any format.
8. The editorial committee and the editor reserve the right to edit contributions as to style and language and for clarity and space.
9. Articles should be submitted to Allen West at e-mail: ASWest@dla.gov.za or Private Bag X659, Pretoria 0001.



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DISCLAIMER

The views expressed in the articles published in this journal do not bind the Department of Land Affairs and the Chief Registrar of Deeds. The Chief Registrar of Deeds does not necessarily agree with the views of the contributors.

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Editorial

EDITORIAL

This issue is once again jam-packed with interesting articles and views on many contentious issues, which make for interesting reading for the practitioner and deeds official alike.



Allen West - Editor

In the previous issue a table was provided of the monetary value of the registrations during 2007. This issue contains a table of the number of registrations effected for the same period.

I have also taken the liberty of including the guidelines laid down by the Law Society of the Northern Province for conducting interviews with Deeds Office staff. Although it was issued for conveyancers under the jurisdiction of the Northern Province, the principles are applicable to all the other Provinces as well. Should the principles differ, please inform us accordingly so as to publish them in a follow-up issue of the journal.

No response from our readers was forthcoming on the purpose and contents of the journal. For this reason the Editorial Committee decided to proceed with a journal which will appeal to all readers involved or interested in property law matters, and not only restrict articles to the Deeds Registry Practice and Procedure.

The article judged as the best article for the August 2008-issue, is the article by Wiseman Bhuqa, pertaining to the overview of Communal Property Associations.

Once again, thank you for all the contributions.

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This journal is also published on the Department of Land Affairs' website: www.dla.pwv.gov.za

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This journal is also available in Braille, on request

SECURITY OF TITLE - FACT OR FICTION?

By: Allen West
Deeds Training
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It has always been held that South Africa has one of the best land registration systems in the world, if not the best. Our system of land registration guarantees title and only a court of law can cancel the title to land. This having been said, the case of ***Prophitius and Another v Campbell and Others*** [2008] JOL 21372 (D) has now thrown a cat amongst the pigeons.

It is not endeavoured in this article to regurgitate the facts of the case, but merely to issue a stern warning that the holder of a title to land may no longer have the security of title that was always anticipated.

In this particular case, the same property was registered by different titles in different owners' names. The Registrar of Deeds, one of the respondents on the case, informed both parties that the Deeds Registry cannot make a determination as to who the rightful owner of the property is, and requested the parties to approach the court for a determination of the rightful owner. This in itself is a sad state of affairs.

The Court held that the initial owner had committed fraud by selling the same land to both parties. The

Court further held, based on the principle of ***qui prior est tempore potior est jure***, that the parties who obtained first transfer are the true owners of the property.

The Court thus instructed the Registrar of Deeds to amend the records of the Deeds Registry, thereby expunging from the records the owners of the land not entitled thereto, and reflect that the first owner is the rightful owner of the land.

This instruction by the Court leads to another confusing situation as to how the Registrar of Deeds, being a creature of statute, will give effect to the instruction of the Court.

It is clear that section 6 of the Deeds Registries Act cannot be applied, as there is no previous title that can be revived. The question thus begging an answer is: How will the Deeds Registry records be amended?

Given the facts and the findings of the judge, can one, as an owner of land, sleep soundly or must the following words by the judge provide nightmares: *"I do have considerable sympathy for the fourth respondent who has only the solace of an action for damages ..."* You be the judge.

SECTION 45(1) ACT 47 OF 1937 ON REDISTRIBUTIONS AND MASSING; TRANSFER DUTY IMPLICATIONS

By: Wiseman Bhuqa
Deeds Training
PRETORIA



In terms of section 9(1)(e)(i) of the Transfer Duty Act 40 of 1949 transfer duty is not payable on land acquired by virtue of ***ab intestatio*** or testate succession. However, as from 21 June 1989 said exemption is only afforded in respect of assets acquired from the deceased.

The effect of the said amendment is that transfer duty is payable in deceased estates on acquisition of land based on a redistribution agreement, and also on acquisition of land after massing.

The purpose of this article is to caution deeds examiners and practitioners against the potential evasion of transfer duty in redistributions involving a surviving spouse in a joint estate, and in massed estates where the mode of massing follows the so-called common law massing.

In common law, massing the surviving spouse who

has adiated to massing ends up acquiring the massed estate, unlike in statutory massing where the massed estate ends up with the heirs.

Where in a joint estate the share of the deceased does not vest in the surviving spouse but vests in the heirs, who together with such surviving spouse enter into a redistribution agreement in terms of which the surviving spouse eventually acquires the said share, such acquisition is not from the deceased, but from the heirs. It therefore goes without saying that:

Transfer of such share attracts transfer duty because it is not acquired from the deceased, but from the heirs.

Transfer of such share may not be effected by a section 45(1) application procedure, but by a formal deed of transfer because it is not acquired from the deceased, but from the heirs.

The title deed will be endorsed with a section 3(1)(v)

endorsement over and above the ordinary "transferred endorsement".

In a joint estate where common law massing has occurred with adiation from the surviving spouse, it can also be argued that section 45(1) does not find application.

With regard to payment of transfer duty on acquisition of the massed estate by the surviving spouse, it may be argued that the said should be levied on the whole massed unit.

A contentious issue and readers' response will be appreciated - Editor

SKETCH PLANS IN TERMS OF SECTION 25(2) OF THE SECTIONAL TITLES ACT 95 OF 1986



In terms of Cape Town Registrar's Circular 4 of 2008 the following procedure will be followed in the Cape Town Deeds Registry, with immediate effect, for the compliance with section 25(2) of Act 95 of 1986 in respect of plans lodged with application to reserve a right of extension:

"Due to the highly technical and expert nature of this requirement of the Act, it will be a requirement that the land surveyor or architect provides a certificate on the section 25(2) plans that confirms the

following:

*That the sketch plans lodged comply with the requirements set out in section 25(2); and
The number of pages constituting the Section 25(2) plan."*

This practice was confirmed by the Registrars at this annual conference (see RCR 61/2008). Thus same is applicable in all Deeds Registries.

1 000 KM CHALLENGE - A FOLLOW-UP

By: A S West
Deeds Training
PRETORIA



In the March-edition reference was made to the achievement by Susan Hurter, an Assistant Registrar of Deeds in the Pretoria Deeds Registry. The following statistics are worth noting:

The duration of a challenge year extends from the end of the one Comrades Marathon to the end of the next Comrades Marathon, during which period a participant must complete 1 000 km in road races in South Africa to enable funds to be contributed to welfare organisations. Susan has participated for the last three years and has won silver and gold medals, respectively.

Her goal for 2008 was to win the competition outright, which has never been achieved by a woman during the past 18 years. She achieved this by completing a total of 4 415 kilometres, which comprised three one hundred-milers.

Congratulations Susan.



TRANSFER DUTY OR VAT?

By: Hesma Strydom
Legal Advisor
PRETORIA

It is important during negotiations pertaining to, and in connection with, the drafting of an agreement of sale that practitioners consider the **VAT status of the seller** to determine if VAT or transfer duty is payable on a transaction.

The VAT status of the purchaser is not important, but only indicates if the purchaser will be able to claim the transfer duty that he/she has paid on a transaction back from SARS.

Very often practitioners neglect to take into account the VAT status of the seller where the purchaser is not a registered VAT-vendor. They do not make provision for payment of 14% VAT and the seller (who is a VAT vendor) has to pay the VAT from the proceeds of the purchase price.

Always utilise the VAT-status of the seller as a starting point to determine if VAT or transfer duty is payable on a transaction.

SALE OF A GOING CONCERN

The sale of a going concern is governed by the provisions of section 11(1)(e) of the Value Added Tax Act, 89 of 1991.

The following must be included in the Offer to Purchase in order to qualify for the exemption:

- The property is sold as a *going concern*, being the *rental of the premises for business purposes* (give here a short description of the type of activity that is conducted on the property);
- The business will be an income earning activity on date of registration of transfer;
- The seller is a registered VAT-vendor with VAT registration number (*state the VAT number*);
- The purchaser is a registered VAT-vendor with VAT registration number (*state the VAT number*).

The following should be added as a separate paragraph:

In the event that SARS finds that the transaction is not the sale of a going concern and is not a zero rated transaction, the purchaser will be liable for the payment of VAT levied on the purchase price.

EASY REFERENCE TABLE

SELLER	LIABILITY FOR VAT/ TRANSFER DUTY	PURCHASER	LIABILITY FOR VAT/ TRANSFER DUTY
1. Seller is a registered VAT-vendor	Seller is liable	1. Purchaser is a registered VAT-vendor	Purchaser is not liable for payment of any tax. VAT can be claimed from SARS
2. Seller is a registered VAT-vendor	Seller is not liable for payment of VAT	2. Purchaser is not a registered VAT-vendor	Purchaser is liable for payment of 14% VAT
3. Seller is not a registered VAT-vendor	Seller is not liable for payment of any tax	3. Purchaser is a registered VAT-vendor	Purchaser is liable for payment of transfer duty and can claim it from SARS as input tax
4. Seller is not a registered VAT-vendor	Seller is not liable for payment of any tax	4. Purchaser is not a registered VAT-vendor	Purchaser is liable for payment of transfer duty

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SHARE BLOCKS, OLD HAT OR RESURGENT FASHION?

By: Tertius Maree
Conveyancer
CAPE TOWN



When sectional titles were introduced in 1971, the intention was to address the shortcomings of the share blocks' property-holding format and it was predicted that sectional titles would replace share blocks at a fast rate.

Sectional titles certainly gave property development an astounding injection of energy and it quickly overshadowed share blocks as the preferred development format. Many existing share block buildings were converted and the vast majority of new apartment developments were sectional title schemes. The attraction of sectional titles vis-à-vis share blocks mainly consisted in the possibility of raising mortgage finance, which opened the market to buyers unable to pay cash. The fact that sectional titles conferred real ownership, compared to mere shareblocking in a company, was also seen as a compelling argument in the thinking of potential purchasers.

Also, it soon became apparent that the sectional title model was a very flexible development vehicle for purposes other than housing.

In Natal (as it then was) conversion of existing share block schemes to sectional titles was slowed down by three factors, namely (i) the longer history of share blocks in the province, (ii) the high percentage of temporary holiday (share block) accommodation existing there, and (iii) the fact that many share block schemes were based on leasehold, which made such schemes unsuitable for conversion.

The advantages of sectional titles over share blocks as a development model became somewhat cliché and went largely unchallenged until recently. The fact that share blocks do offer certain advantages has again been put under the spotlight by the upsurge in so-called 'fractional ownership' of late. It has brought an awareness of the fact that, particularly for leisure accommodation, share blocks present some real advantages. These may be summarised as follows:

- The establishment of the legal sub-structure of a share block scheme is less costly and quicker than for a sectional title scheme.
- A developer may use the proceeds of sales of shares to develop the scheme, and even to purchase the land or building, which diminishes or sometimes eliminates the need for borrowed development capital, allowing a less costly end product due to the interest factor.

- Registered ownership of the land on which a scheme is established, is not required a share block scheme may be based on leasehold.
- A single share block scheme may be established on several pieces of land which need not be contiguous.
- Real ownership, such as sectional title ownership, burdens owners with more obligations and commitments than shareholding in a share block company. In respect of leisure accommodation this is often seen as an advantage of share blocks.
- The flexibility of share blocks makes them more suitable for time-share schemes.
- The fact that bond finance is not obtainable for share blocks is perceived by some as a 'selectivity benefit' for existing owners.
- Transfer procedures may be cheaper, particularly when a substantial loan obligation exists.
- By utilising share blocks within a sectional title scheme, complex structures may be achieved which could accommodate divergent interest groups on one piece of land.

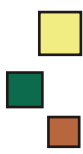
Despite certain warnings, the so-called 'fractional ownership' industry appears to be expanding at a rate of knots. In the majority of 'fractional ownership'-schemes, a combination of share blocks and time-sharing is utilised. Whilst the use of the term 'ownership' is misleading and the legal integrity of some schemes may be doubtful, share blocks do offer the developer and purchasers real advantages in this type of leisure accommodation, and it may be successfully linked to time-sharing arrangements, provided that it is done correctly.

Share blocks have recently emerged as a useful device to facilitate certain developments in compliance with emerging policies and legislation, in terms of which provision must be made for benefits to previously disadvantaged individuals. This is particularly true in respect of rural/agricultural developments, which combine upmarket leisure accommodation with education, training, employment, profit-sharing, and housing benefits for members of local communities. Such schemes present interesting challenges and exciting possibilities for both investment and social development.

It would seem that we have not yet seen the end of the potential role of share blocks as a property-holding format.

See also the article on Fractional Ownership on page 14 of this issue - Editor





PIETERMARITZBURG GETS A NEW REGISTRAR OF DEEDS

By: A S West
Deeds Training
PRETORIA

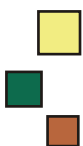


Ms. Audrey Gwangwa

Born in Limpopo, Audrey Gwangwa (36) is the new Registrar of Deeds in KwaZulu-Natal and she is determined to make the Deeds Office in Pietermaritzburg more accessible to more people.

Audrey, a single mother of a 10-year old girl, has a B.Proc degree from the University of North West and an LLB from the University of Pretoria. In 1996 she was appointed to Unisa's research department, where she lectured prospective conveyancers in preparation for their board exams.

She was an Assistant Registrar in Pretoria and was promoted to Deputy Deeds Registrar in Johannesburg in 2002. She was appointed as the Registrar of Deeds in the Pietermaritzburg office in February 2008.



A CONVEYANCING CONUNDRUM

By: Donald Moore
Conveyancer
Guthrie & Rushton
Attorneys

A and B were married in California where the default matrimonial proprietary regime is in community of property and A, the husband, was domiciled in California at the time of the marriage.

A and B are now permanently resident in South Africa and A owns a property in South Africa, which was purchased after the marriage. The property is registered in his name with his marital status disclosed as "married which marriage is governed by the laws of California, United States of America".

A and B get divorced in South Africa and in terms of the settlement agreement, that is made an Order of Court, it is recorded that in terms of the laws of California the marriage is in community of property and that the property registered in A's name is awarded to A.

Is it open now for a section 45bis-application to be registered, considering that the marital property regime is not in community of property in terms of South African Law?

If a section 45bis-application is not the correct procedure to follow, then how is the property to be transferred by A to a purchaser several years after the divorce? Would it be sufficient to lodge the divorce order in terms of which the property is

awarded to A, or would it be necessary for B to be joined effectively to give the assistance that would have been required had the parties still been married?

In a recent matter involving the above facts the following occurred:

- The registered owner of the property (A) sold the property subsequent to the divorce, the property having been awarded to him in terms of the settlement agreement;
- Before preparing any transfer documents an Assistant Registrar was approached to ascertain his view as to whether a section 45bis-Application was necessary. He expressed the view that no section 45bis-application was necessary as the property was awarded to A in terms of a court order and was registered in the name of A already;
- The transfer was prepared as a normal sale and transfer by A and in support of A being entitled to Deal with the property a certified copy of the Court Order and Settlement Agreement was lodged;
- The matter was rejected by the Deeds Office with a note calling for a section 45bis-application to be lodged;

In discussion with an Assistant Registrar of Deeds

the note was changed so that a section 45bis-application was no longer required, but that A required in effect to be assisted by his ex-wife. The Assistant Registrar of Deeds was not prepared to accept the award of the property in the Settlement Agreement (Court Order).

Republished with permission from Ghost Digest. However, it must be mentioned that according to the scenario, the provisions of section 45bis can be applied should the property form an asset in a joint estate (see RCR 20(ii) of 1962 and RCR 1 of 2003 read with RCR 5 of 2004) - Editor

WHEN IS AN ENCLOSURE OR IMPROVEMENT AN EXTENSION OF A SECTION?

By: G Moore-Barnes
Conveyancer
CAPE TOWN



There appears to be wide-spread uncertainty on this issue, and many schemes, unfortunately, allow unauthorised enclosures/improvements (often incorrectly terming them "exclusive use") which result in precedents that create a controversial situation that can, and very likely will, be the cause of costly dispute and much unhappiness in the future.

"But it was always an enclosed courtyard", we often hear; "all I did was put a roof over it." Pop inside the roofed enclosed courtyard and one might find all sorts of surprises, from a full scale laundry to a cozy additional bedroom or some other form of living "add-on" and guess what, ask to see the municipal plans "What are they?" "Was I supposed to have plans?"

The Act/Management Rules are very clear a section/exclusive use area may only be used for the purpose for which it is intended to be used. A section consists of living space, exclusive use is generally used for outdoor areas which are specifically identified; a courtyard is a courtyard, a patio is a patio, a garden is a garden, a carport is a carport the list stretches into infinity; and they must remain as intended and cannot be "transformed" to suit the needs or whims of an owner, unless they

have followed and fulfilled the procedures as prescribed.

Another prime example, that I know has been covered before, is the addition of loft rooms; here reference to Section 24 explains this very clearly "If an owner of a section proposes to extend the boundaries or floor area of his or her section, he or she shall with the approval of the body corporate, authorised by a special resolution of its members, cause the land surveyor or architect concerned to submit a draft section plan of the extension to the Surveyor General for approval." A new floor where before there was only air constitutes an extension of floor area without any doubt!

The Trustees have an important duty to ensure that the owners comply with all requirements of the Act/Regulations; and in the case of extensions/improvements specifically with Section 44 and PMR.68. They need to disregard the whispers, the glares, the threats and other profanities and keep focused on the responsibility they undertook (sadly often without full knowledge of the implications) when they accepted nomination as a Trustee.

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THE LAND RESTITUTION PROCESS

By: Blessing Mphela
Acting Chief Land
Claims Commissioner



The restitution process is one of the three legs of the Department of Land Affairs' land reform programme. The Restitution of Land Rights Act (Act 22 of 1994) was one of the first laws passed by the democratic government in 1994. Following the

promulgation of the Land Rights Act, the Commission on Restitution of Land Rights was established with the mandate to investigate and settle land claims lodged against the state by victims of racially motivated land dispossessions that took place under



the previous government.

A perception exists that land reform in South Africa is failing because projects that have been handed over to beneficiaries are dying, according to claims by those who claim to be “experts” on land reform matters. The Commission contests the notion that projects are failing.

Over and above its mandate to investigate and settle land claims by victims of racially motivated land dispossessions in line with the Restitution Act, the Commission on Restitution of Land Rights has had to assume the role of providing development support to restitution beneficiaries, due to the vacuum that exists in this regard. As part of the process of carrying out the development support role, partnership agreements have been entered into regarding the provision of support to the beneficiaries. In some instances, the wrong partners have unfortunately been attracted to come on board for the wrong reasons, seeking to pursue their own interests. This has been the reason why some of the projects are going under, even when partners are in place who have been brought on board specifically to assist in ensuring that projects remain sustainable.

The Commission took over post-settlement support in order to fill the gap that was supposed to have been filled by institutions such as the Land Bank, which has the infrastructure to support emerging farmers, as opposed to the Commission whose business is to resolve land claims. Given this scenario, the Commission has been forced to spread its resources thinly across a terrain for which it was little prepared, and not ready to undertake.

The result is that there was a Commission which had to perform a dual function, and this has led to the Commission not being able to carry out its mandate and meet the deadline in line with the policy on land. Contrary to the popular notion that the Commission is under-capacitated and not capable of carrying out its mandate to resolve claims, the truth is that the Commission has been bogged down by the dual role that it has been forced to play, i.e. resolving claims and acting as a development agent.

In line with its business which is Right based, the Commission will not in the main be accountable for the attainment of the 30% target for land ownership by black people in 2014. This responsibility lies with the Department of Land Affairs. The Commission is essentially about restitution of land rights to victims of land dispossessions. To date, a total amount of about R10,6 billion has gone into the pockets of land owners as compensation for their land for the purpose of restoring the land to the claimants, as well as for financial compensation for those

claimants who have opted for such. Approximately R5 billion was allocated as development grants for beneficiaries where land has been restored.

The Commission is currently setting in place a mechanism to address post-settlement support in a comprehensive fashion in line with the Settlement Support Implementation (SIS) strategy, which will be implemented as part of the Land and Agrarian Reform Programme (LARP). We are working hard to ensure that there is a complete support package for those whose needs should be accommodated in terms of the improvement of livelihoods, as well as to ensure the sustainability of projects by emerging commercial farmers.

Unreasonable criticism has been levelled against the restitution process. It is a fact that there are institutions, including the provincial agriculture departments, that must play a leading role in ensuring that land is utilised in line with the overall sector plans. Issues that need to be addressed include the provision of training, research and development, land use management, assistance with access to markets, etc. LARP is aimed at addressing such issues and to assist with the alignment of the government grant systems and procedures in order to offer comprehensive support to the emerging farmers. This is important, particularly now, given the current situation where we are faced with increasing food prices and so forth.

Whereas Europe is faced with the pressures of global competitiveness in respect of its products, we find ourselves in the unfortunate position of having to deal with the issue of global competitiveness as well as problems related to under-development, lack of skills, and many other historical legacies which have placed our people in the disadvantaged position in which they find themselves today. Simultaneously, it is expected to compete with those who have been previously advantaged, and being cruelly judged against Western standards.

It is a fact that the white commercial farmers have in certain instances not performed so well, despite having been immensely assisted and subsidised by the previous government. New entrants into the sector are being unfairly judged, if one takes all these issues into consideration. We are committed to address the issues of global competitiveness, which we see as a massive opportunity for emerging black farmers.

The factors affecting farmers are the same. The only difference is that those who are well established are better equipped to hedge against risk as compared to the emerging farmers. The challenges that are faced by the Zimbabwean government present an opportunity for emerging

farmers in the Southern African countries. It is therefore imperative that as Southern African countries we must marshal our forces in dealing with the issues of agriculture. There is no way in which we can survive if we operate in silos and ignore continental realities.

There is a need to recognise the fact that inasmuch as agriculture is now an international issue, in the same manner, the issues of land reform are national and international matters. This is why we need the Policy on Land Ownership by Foreigners (PLOF).

The Commission is expected to finalise claims as expeditiously as possible in order to address the legacy of skewed land ownership, improve the quality of life of our people, generate employment opportunities, and address the issue of poverty. This shows that 14 years ago the government was correct, because today we are faced with the threat of starvation, not only nationally, but also internationally. This is proof of how critical land is, and its relation to the issue of cultural identity.

The issue of land is more relevant today than ever before, therefore more emphasis should be placed on the provision of land for all.

As at 30 June 2008, the Commission has settled a total of 74 808 claims out of the more than 79 000 claims that had been lodged by the cut-off date of 31 December 1998. A total of over 2 million hectares of land has been restored to 289 937 households, benefiting about 1,4 million individuals at a total cost of approximately R16 billion to the state.

A total of about 4 949 claims are still outstanding. These are mostly rural claims that involve vast tracts of land in the rural areas, affecting large numbers of community members. The outstanding claims are difficult to settle due to a number of challenges, which include exorbitant land prices; disputes regarding the validity of some of the claims; family and community disputes; boundary disputes involving traditional leaders; as well as cases that have been referred to the Land Claims Court.

In the Limpopo and Mpumalanga provinces about 671 and 829 claims are still outstanding, respectively. The high incidence of community disputes in the Limpopo regional office, particularly in the Sekhukhune District Municipality area, is negatively affecting the finalisation of claims in the province. The process is underway to fill the vacant positions for Regional Land Claims Commissioners for the Limpopo and Mpumalanga offices.

A meeting was held between the Commission and members of the Matsafeni community in the

Mpumalanga Province, regarding the issue of the construction of a stadium on land belonging to the community. The outcome of the meeting was that there is a general understanding that the construction of the stadium in preparation for the 2010 Soccer World Cup event, is in the public interest.

Out of a total of about 5 700 hectares of land restored to the Matsafeni community, only 118 hectares will be alienated for the purpose of the development of the stadium, as well as a residential area by the Mbombela Municipality. It would have been difficult for the Municipality to invest such vast amounts of money to develop land that is privately owned. The investment only became possible once the community had ceded the land to the Municipality. About 70 ha of the 118 ha alienated to the Municipality for development purposes is for the construction of the stadium. About 48 ha of the alienated land will be used for housing development.

The land restored to the Matsafeni community was purchased for R62 million. The land on which the stadium is being constructed is now valued at R43 million, taking into account the potential of the land. The current value of the development of the stadium is about R900 million. The community will enter into a 50/50 partnership as a joint venture regarding the control and management of the stadium. This means that the community will receive a portion of the proceeds from the business operations taking place in the stadium precinct.

Regarding the issue of commonages, it is a known fact that restitution claims have been lodged against land that is currently privately owned, as well as land owned by organs of the State, including municipal commonages. Municipal commonage in this instance refers to land that is owned by a municipality, and that was usually acquired through state grants.

In November 2007, the Minister of Finance published the Draft Municipal Asset Transfer Regulations for public comment. These regulations seek to improve transparency and accountability, set out key principles and procedures, and deal with the process to be followed by a municipality when disposing of assets. Once the Minister of Finance has reviewed comments by the public, it is envisaged that the Regulations will be promulgated and guidance will be provided for municipalities who wish to dispose of land that is currently under claim for restitution purposes.

There are many pending claims for restitution on commonages; examples of the claims that have been settled include the Bizana commonage in the Eastern Cape and the Loeriesfontein commonage in the Northern Cape. Claims that are still

outstanding in this regard include the Umtata commonage which is claimed, inter alia, by the KwaLindile and Zimbane communities.

The view in certain quarters regarding the settlement of claims such as Loeriesfontein, is that there is no need to restore the land rights to the claimants due to the fact that the land belongs to the Municipality, and the claimants have access to the land. Our position in dealing with such cases is that the restitution process is not about the Upgrading of Tenure, but is about the restoration of land rights to the claimant(s). This position is supported by the Land Claims Court ruling in the case of Hlaneki v the Regional Land Claims Commissioner; Limpopo, where judge Moloto ruled that it is wrong to assume that just because a claimant is residing on the land that is claimed or has access to the use of that land, a claim for restitution will not be valid, including the notion that a remedy for such a claimant is to be found in the Communal Land Rights Act.

We must point out that in many instances where municipal land, which in most instances is prime land with development potential, is made available to property developers for development, a potential exists for the land reform beneficiaries not to get a fair deal. To protect the beneficiaries' rights, the Minister has determined that the State be given the right to first refusal over these properties. In this way, should the beneficiaries wish to dispose of their land, the land gets sold back to the State and can therefore be allocated to other beneficiaries of the land reform programme, or for the purposes of other government programmes.

The Commission continues to engage all the stakeholders in order to fast-track the resolution of the remaining claims. We have entered into agreements with some of our stakeholders regarding the settlement of the outstanding claims, including the provision of settlement support for the land reform beneficiaries. The agreement signed with the Department of Environmental Affairs and Tourism (DEAT) focuses on guidelines for the settlement of claims on conservational land. As government our position is that Protected Areas are a national asset that must be preserved and managed as conservation areas in perpetuity. We have therefore come up with a model that ensures that in instances where there is a restitution claim on conservational land, the transfer of ownership of the affected land occurs in title only, without physical occupation by the beneficiaries.

In line with the agreement, the settlement of restitution claims on conservational land must uphold the principles of economic viability and should result in tangible and realistic beneficiation for the affected communities. We strive to make sure that the settlement of claims on conservational

land is in line with the applicable legislation, and further that access rights for the beneficiaries are clearly defined in the settlement agreement for such claims. Provision is also made for co-management of the land in accordance with the relevant legislation.

The Commission has also concluded agreements with Mondi and Sappi regarding the settlement of claims on land that is under forestry. The agreement focuses on the available options for the restitution beneficiaries when settling such claims. It also deals with issues regarding how the affected community will benefit from the continued use of the land by the forestry companies, with specific focus on equity shareholding, the transfer of skills and capacity building to ensure that the community's benefits arising from the settlement of the claim are indeed sustainable.

In line with our focus on the provision of improved settlement to the beneficiaries of the land reform programme, we have entered into an agreement with the Development Bank of South Africa (DBSA) which focuses on offering support to the new land owners.

A Memorandum of Agreement has been signed with one of the large mining companies operating in the country, Anglo American South Africa Limited, regarding the settlement of restitution claims on land owned by the Anglo Group. This follows a series of extensive consultations with Anglo focusing, among others, on issues relating to the Mining Charter, which must be taken into consideration when settling claims on land where there are mining activities taking place. These include issues about the effect of the mining activity on the immediate environment, as well as focus on the mining company's social development and environmental rehabilitation plans.

In line with the agreement entered into between the Commission and the Agricultural Sector Training Authority (AgricSETA), land reform beneficiaries will receive training on the sustainable management of the restored land, which will help to increase food production and thereby make a significant contribution to the economy of the country. This is of importance, particularly now, at a time where we are faced with escalating costs of food and oil.

The Commission has committed itself to settle a total of about 2 585 claims by the end of the 2008 financial year, which will bring the total number of claims settled by the Commission to 98%. We have estimated that about 2% of the outstanding claims will be difficult to settle due to the complex nature of the claims.

A memorandum has been sent to Cabinet explaining the current situation, including the

challenges faced by the Commission in finalising the outstanding claims. Cabinet has taken note of the memorandum. The Commission remains committed to settle all the outstanding claims by 2011, depending on the availability of funds. About R18 billion is needed for this purpose. It is a recognised fact that it is not possible for the Treasury to allocate all the funding that is needed in one fiscal year. Given the current recession, the state has lesser resources at its disposal to deliver services to the people.

The issue of development requires a medium to long term approach. In our case the easiest form of development for the beneficiaries is housing development. However, a longer period of time is needed for people to gain benefit from other forms of land use such as agricultural development. In particular, the issue of skills development needs a long term perspective.

Beneficiaries need time to be able to gain the necessary skills to manage the factors of production. Development is linked to the issue of sustainability. It was a mistake to impose a deadline that is not informed by any concrete understanding

of the reality concerning issues around land reform, such as legislation issues, capacity within government, etc.

The deadline was put in place with the assumption that certain things were in place, such as the institutional arrangement including policies, etc. The first five years were spent on developing policies that were not in place. The reality is that these were in fact developed as we went along. This has created certain problems for us in meeting the deadline, as indicated earlier. The deadline was fixed without a clear understanding of what it would take to settle all the outstanding claims, as well as an understanding of the complex nature of some of the claims.

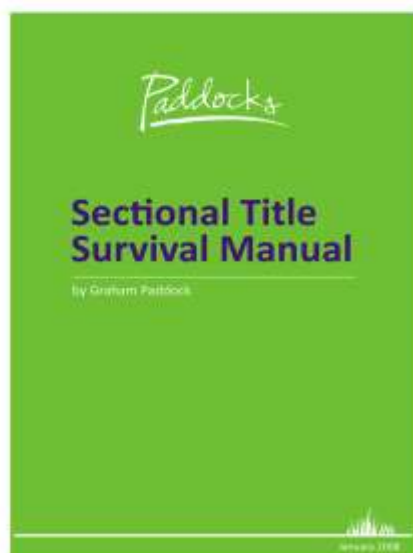
There was no anticipation of the resistance that we currently experience from some of the land owners, nor did we anticipate the disputes involving traditional leaders, etc. All these pose real constraints for us, and we are waiting with anxiety to see what will happen. The reality is that we will need at least five years to settle the approximately 5 000 claims that are still outstanding.

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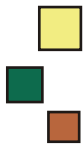
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WAIVER OF LEGAL EXCEPTIONS - A FOLLOW-ON

By: Allen West
Deeds Training
PRETORIA

The National Credit Act, Act 34 of 2005 (the Act), which has been operative for more than one year now, defines a credit agreement as an “agreement which meets all the requirements of section 8 of the Act”. Furthermore, it defines a mortgage “as a pledge of immovable property that serves as security for a mortgage agreement”, which in turn is defined as “a credit agreement that is secured by a pledge of immovable property.”

Given the above definitions, section 90 of the Act provides that a credit agreement must not contain any unlawful provision. Should a credit agreement contain such an unlawful provision, the court *inter alia* may declare the entire agreement unlawful. The waiver of certain legal exceptions as provided for in regulation 32 may not be waived and should same be waived the credit agreement will be unlawful (see section 90(2)(c)).

The question now begging an answer is whether there rests an onus on the Registrar of Deeds to register a mortgage bond containing the waiver of such legal exceptions.

The Chief Registrar of Deeds was approached for an opinion in this regard and the matter was discussed at a Registrars' management meeting where the Registrars concluded as follows:

“There is no indication in the National Credit Act that there is an obligation or duty on a Registrar of Deeds to see to it that bonds comply with the provisions of the Act.

The duty in the above-mentioned regard is on the Banks and credit suppliers.

Bonds serve a dual purpose:

- *on the one hand it is a credit note/instrument of security;*
- *on the other hand, on registration of a bond, it creates a real right over immovable property.*

A Registrar of Deeds only concerns himself/herself with the registration of real rights.

In terms of section 50A of the Deeds Registries Act, No 47 of 1937, a Registrar of Deeds shall not examine any provisions relating to a bond which are

not relevant to the registration of such bond.

Therefore, the question to be answered is whether the waiver of the exceptions relates to:

- *the instrument of security;*
- *the registration of a real right.*

The answer is obvious that it is not relevant to the registration of bonds.”

It is respectfully held that the response contains numerous contradictions. As a Registrar is responsible for the registration of real rights over immovable property, surely the registration of a bond, which has the effect of creating a real right over immovable property, must be lawful to create such a real right.

It is further submitted that the provisions of section 3(1)(b) of the Deeds Registries Act 47 of 1937 prohibits a Registrar from registering unlawful deeds and documents, and there thus rests an onus on the Registrars to determine the lawfulness of a bond before registering it. Lawfulness obviously only in respect of the facts which are ***prima facie*** available.

Another school of thought, however, holds the view that Deeds Registries should not raise a query that has nothing to do with the applicable deeds registration requirements. It is also held that the Registrar is not qualified to express a legal opinion on the applicability or otherwise of the Act in relation to a deed lodged for registration in a deeds registry. Whether or not the mortgage bond complies with the requirement of the Act is not a factor that entitles the Deeds Registry to reject the document.

Lastly, it is also held that a general covering bond does not constitute a “credit agreement” for the purposes of the Act.

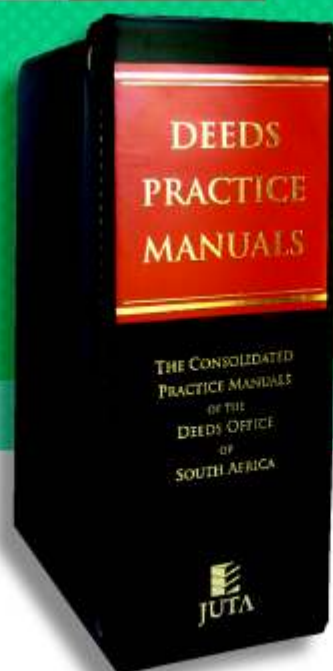
All this is very confusing and ultimately, it will be the financial institutions/conveyancer who have egg on their faces, should a bond be regarded unlawful and not constitute a real right.

Readers' views would be appreciated regarding this interesting legal dispute.

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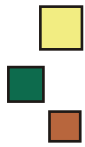
While the underlying legal principles are addressed, the focus is on specific procedures, with numerous examples of endorsements and other specimen documents accompanied by the guidelines for deeds examiners.



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WHAT IS FRACTIONAL OWNERSHIP?

By: Allen West
Deeds Training
PRETORIA

Syndication or the Fractional Ownership of Property

Fractional ownership simply means the joint ownership of any asset by more than one individual or legal entity. The most commonly used form of fractional ownership on a global scale is when a luxurious leisure property is purchased by a group of shareholders, normally three to up to 13. The ownership is usually structured in a company whereby the property is the only asset. Shareholders thus own the property together and usage and all costs are shared in relation to percentage shareholding. Structures are put into place for both the utilisation as well as the management of the property, but ultimately shareholders are the owners of the property and have complete control over all aspects of the company and the property it owns.

Who is registered?

A purchaser physically acquires a percentage (%) shareholding in a company, usually a private company that owns the property or an undivided share in the property. You receive a share certificate, or copy thereof. The ownership form allows you the use of the property on a certain number of allocated weeks depending on your shareholding. In most cases Fractional Ownership Opportunities provide for a 13th shareholding in the relevant property, thus allowing 4 weeks usage per annum, on a rotational basis.

Benefits of owning a share in a Fractional Property

- Any increase in the value of the property accrues to the shareholders. This is the major differentiating factor between fractional ownership and timeshare;
- Better value for money you only pay for your utilisation and not for the remainder of the year;
- Affordable ownership in exclusive destinations;
- The most exclusive addresses in South Africa normally increase in value faster than other residential properties;
- Ability to rent out your unutilised weeks;
- Lower maintenance costs as it is shared between all shareholders;
- Less security concerns because of higher Occupancy and high estate security.

The Shareholders Agreement

This is an agreement signed by all shareholders

that governs the relationship between the shareholders and the company. The agreement is in addition to the normal Company's Act, and governs the following, amongst others:

- Meetings of shareholders
- Voting rights
- Sale of shares
- Appointment of directors, auditors, etc.

Usage Agreement

The Usage Agreement governs the relationship between the shareholders and the property. Among others it includes:

- Right of use
- Property management
- Maintenance
- Levies, etc

Property Management

It is important for all shareholders to understand that both the property and the company that owns the property need to be managed.

- The company needs to make payments, do annual audits, have annual general meetings, etc.
- The property needs to be insured, maintained, cleaned, etc.

Usage Roster

Preferred usage is different for every resort and area and rosters are developed for the maximum utilisation of the owners. A specific roster is designed for each property before the effective date of the syndication. In most of the roster systems the usage weeks are rotated on an annual basis. This means that if "shareholder 1" uses the property for the first week in December, next year he will use the second week and week three the year after that. Therefore, all the shares have the same value and all shareholders will have equal opportunity to use the property in peak periods.

Every shareholder thus knows exactly in which periods he will have usage. Again, this is at the shareholders' discretion should they want to change the roster in future. Weeks can also be swapped on an individual basis.

Monthly rates and upkeep costs

The monthly levy varies from one leisure estate to the next and also according to the size of the

residence. A budget is drawn up at the beginning of the project and the property manager will manage according to this budget. This will typically include estate levies, maintenance, cleaning, gas, electricity, water, sewer, property taxes, DSTV, insurance, bookkeeping, audits, etc.

All the shareholders have full access to the budget and actual spending of the company. Monthly costs can be reduced should all the shareholders so decide, for example, not to employ a full-time cleaner, each owner will take his/her own "smart-cards" (DSTV), or not to employ the services of a property manager.

Transfer Duties

This will depend on the entity in which you prefer to buy and hold the share. When you buy the share in your individual capacity, no transfer duty is applicable from R0 to R500 000. Above R500 000 normal duties are payable according to the sliding scale. When you buy the share as a Close Corporation, Company or Trust, an 8% transfer duty will be applicable on the value of the property. Should you at a later stage decide to sell your shares in the company, the new buyer will have the same responsibilities.

Capital Gains Tax

All over the world shares in joint-ownership companies have increased significantly. Any increase in the value of your investment will constitute a taxable capital gain if you sell your share at a later stage.

If I can't use my scheduled weeks in the property, how could I let them?

It is important to remember that the property is owned by the joint-ownership company in which you own a share. The shareholders agreement that all shareholders enter into upon investing in a joint-ownership company stipulates that each shareholder has the right to let the weeks allotted to him. Accordingly, a shareholder could either let weeks in the property himself or request the property manager to let the weeks on his behalf.

If the shareholders of a specific property are not comfortable with the letting of the property, the right of a shareholder to let his weeks could be withdrawn by the amendment of the shareholders agreement. Obviously, the shareholders agreement can only be amended by the shareholders themselves in the manner prescribed by the shareholders agreement.

COMMON LAW MASSING AND JOINING OF SURVIVING SPOUSE WITH EXECUTOR IN TERMS OF SECTION 21 OF THE DEEDS REGISTRIES ACT 47 OF 1937

By: Wiseman Bhuqa
Deeds Training
PRETORIA

This article seeks to provoke debate around the applicability of section 21(c) of the Deeds Registries Act in cases where massing has taken place, specifically in the mode of common law massing; the latter being the type of massing where, after adiation (acceptance), the property is transferred to the surviving spouse and not just a limited interest, as would have been the case in statutory massing.

While section 21(c) provides that a surviving spouse in a joint estate may not join an executor in dealing with assets in a joint estate where massing and adiation has occurred, experience has shown numerous section 45(1) Act 47 of 1937 transfers by endorsements, where a surviving spouse acquires property by common law massing and still joins the executor despite the lodgement of an adiation certificate (regulation 50(2)(b) Act 47 of 1937).

The justification behind section 21(c) with regard to

the exclusion of the surviving spouse is clearly discernable in the premises that the executor is dealing with the "massed estate of the deceased and the survivor" and not with their joint estate per se. It therefore goes without saying that the surviving spouse should not join the executor.

The difference between the above two concepts is at the core of the concept of massing, in terms of which a new estate is formed and put at the executor's disposal on the one hand, and the normal joint estate, manifested in the existence of each spouse's share on the other. The massed estate is entirely under the administration of the executor in the former, while only the share of the deceased is under administration in the latter. Whether section 45(1) applies or not is another question, given the fact that the surviving spouse is now acquiring the massed unit, not shares.

The foregoing statement obviously also challenges

the resolution in RCR 15 of 1968. In terms of the said resolution a surviving spouse in a marriage out of community of property who has adiated to massing of their estate, must pass transfer. This would lead to a counter-productive position, especially in common law massing, whereupon the surviving spouse in a marriage out of community of property, relying on RCR 15 of 1968, passes

transfer to him/herself.

In conclusion the provisions of section 21(c) are quite clear, the surviving spouse does not join the executor, where massing and adiation has taken place. To this end an adiation certificate is lodged under regulation 50(2)(b) of the Act.

VRYBURG DEEDS REGISTRY GETS NEW REGISTRAR

By: Allen West
Deeds Training
PRETORIA

Mosenki Theresa Lemme (born Moalosi) was born on 28 November 1971 in Mafikeng. She matriculated at Kebapile High School in 1989. She started her career in deeds registry in Mmabatho (former Bophuthatswana) on 27 February 1991.

In 1997 she relocated to the Pretoria Deeds Registry because of the rationalisation of former self-governing states. She completed her National Diploma in Deeds Registration Law in 1998. She was promoted to the post of Assistant Registrar on 1 October 2005 and has been acting as Deputy Registrar at the Pretoria Deeds Registry up to her appointment as Registrar.

She was appointed a Registrar of Deeds for the Vryburg Deeds Registry on 1 February 2008. Her mission for the Vryburg Deeds Registry is to achieve transformation by promoting equal training opportunities and career advancement for all, and ultimately strive for equitable representation across all occupational classes and levels. Her dream is the establishment of the North West Provincial Deeds Registry, which will be aligned to the



Mosenki Theresa Lemme

provincial boundaries.

Mosenki is married and has four daughters. Her free time is devoted to her family. Her hobbies are baking and reading, if not on the road with family.

PERSONAL CONTACT WITH DEEDS OFFICE PERSONNEL

By: Allen West
Deeds Training
PRETORIA

The Law Society of the Northern Province has provided guidelines for conducting interviews with Deeds Registry staff. The guidelines are of the utmost importance to the conveyancer and deeds office staff and are therefore quoted for information purposes:

- Controversial notes or notes of substance should be discussed with the examiner by a Conveyancer and not by a "prep clerk" or candidate attorney.
- Conveyancers should be thoroughly prepared

to discuss the note.

- If deeds office personnel need to be consulted over matters other than notes raised in deeds, a prior appointment will ensure the availability of the examiner. Applications for restoring or expediting deeds must be done by a conveyancer and not a clerk or candidate attorney.
- Always follow the correct administrative procedure and do not pressure junior staff members to bypass internal procedures.

There are good reasons for such procedures and they should be adhered to.

- Do not enter offices and sift through deeds without having obtained the necessary permission beforehand. Deeds often get lost in the Deeds Office, not through negligence of the Deeds Office, but through unauthorised entry and handling of deeds by the employees of conveyancers.
- Unless prior consent has been expressly obtained from the relevant official, no deeds, books, records or property belonging to the Deeds Office may be removed from strong rooms or place of storage. It is prohibited to carry such records or property around the passages of the Deeds Office. If necessary, the examiner must accompany you to the place of record to inspect and discuss the document in question.
- When executing deeds, always greet the registering official to whom deeds are handed for registration. Except for conveyancers, the only other people allowed in the execution room are those accredited people with permission from the Registrar.
- Accept responsibility when you have made a mistake and do not blame the Deeds Office.

- Discuss notes with the examiner who made them or his/her senior. Do not go directly to a senior examiner unless the responsible examiner is not available.
- Sometimes “prep clerks” act as free agents or independent contractors and work for more than one firm. This obviously creates a problem of discipline and control for the Deeds Office. The Registrar will only allow such a person access if he or she can produce a letter from a firm confirming that such a person is in their employment and that the firm accepts responsibility for the conduct and behaviour of such person. Conveyancers are discouraged from making use of such persons, but if they do, it is important to make certain that such a prep clerk is accredited in the Deeds Office and it is advisable to have a letter of appointment setting out the duties of such person.
- Remember that the profession has established channels of interface with the Deeds Office. Regular meetings are held with a view to facilitating the whole registration process, marrying the needs of the professionals and the Deeds Office personnel. In need, you should contact the Property Law Committee of the relevant Attorneys Association or members of the relevant Law Society Property Law Committee.

SUPPORTING AFFIDAVIT TO PROVE THAT THE SURVIVING SPOUSE WAS MARRIED TO THE DECEASED IN COMMUNITY OF PROPERTY

By: D Mngcolwani
Deeds Registry
KIMBERLEY



It is established Deeds Office practice to request a supporting affidavit where the title of the land is registered in the name of one spouse, and the accompanying marriage certificate does not disclose the type of marital regime governing the parties' marriage. This often occurs where the surviving party is inheriting from the estate of the deceased by virtue of the marriage in community of property.

The matrimonial regime will also determine whether any benefit in favour of the surviving spouse should be created notarially or in the power of the attorney. It is therefore imperative for the examiners to request an affidavit from the surviving spouse to establish whether the marriage is in community or out of community of property.

Often this affidavit only contains one sentence reading: “I hereby make oath that I was married to

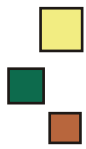
the late Prameter Poppies in community of property on the 5th May 1999.”

The abovementioned information, with the exception of the type of marital regime, can be gathered from the abridged marriage certificate. Whereas it is critical to mention the matrimonial regime, it is further important to mention in the affidavit that **at the date of death:**

- The survivor was still married to the deceased **in community of property.**
- The parties (the surviving spouse and the deceased) did not conclude the matrimonial property change agreement in terms of **Section 21 of Matrimonial Property Act 88 of 1984** during the deceased's lifetime.

Your comments will be appreciated -Editor





INTERDICTS: DEEDS EXAMINERS BEWARE!

By: Allen West
Deeds Training
PRETORIA

The onus to check interdicts that have been served upon a Registrar rests solely with the examiner (deeds controller) and is an exceptionally onerous task, which could result in major financial losses for both the State and examiners.

As far back as 1979, examiners were warned in this regard. To, once again, warn our newcomers to the system of their duties in this regard, CRC 2 of 1979 is now quoted in toto:

“CRC 2 OF 1979

INTERDICTS

1. Registration of transactions contrary to interdicts that have been served upon the Deeds Office can result in serious financial loss to the State. It is therefore, imperative that the greatest care be taken by all officers who receive, record or withdraw interdicts and by examiners to ensure that no transaction is registered contrary to an interdict. Attention must also be drawn to section 99 of the Deeds Registries Act No 47 of 1937 which provides inter alia that an officer can be held personally liable for any damage sustained as a result of such officer failing to exercise reasonable care and diligence in the exercise of his duties.

2. DUTY SHEET OF INTERDICT CLERK

2.1 The duty sheets of the interdict clerks must be comprehensive. Every step to be taken by the interdict clerks in the performance of their duties must be set out in detail and so far as possible all contingencies that may arise must be covered. In the following paragraphs attention is focused on some of the duties of an interdict clerk.

2.2.1 Attachments served upon a Registrar are not always typed on paper with a letterhead of the particular Sheriff or do not bear the official office stamp or are not the original signed copy. Where this happens the attachments must nevertheless be noted but the imperfection must be brought to the notice of the Sheriff.

2.2.2 Rule 43(2) of the rules of the Magistrates' Court provides that the notice of attachment served on the Registrar of Deeds shall be accompanied by a copy of the warrant of execution upon the execution debtor. Should the warrant of execution not accompany the notice of attachment, it must nevertheless be noted and the Sheriff of the Court

advised of the discrepancy.

It must be noted that the corresponding rule of the Rules of the High Court does not require the Sheriff of the Court to attach a copy of the warrant of execution to his attachment notice to the Registrar of Deeds.

2.3 Where an interdict is noted against immovable property the correct spelling of the owner's name must be ascertained from the records before the interdict is noted in the interdict day-book or the interdict index to ensure that the particular property is not dealt with contrary to the provisions of the interdict.

An attachment received between the time of lodgement and execution was missed because the entry in the interdict day-book followed the erroneous name in the notice of attachment which did not agree with the name reflected in the title deed.

2.4 Where the property description as disclosed in an attachment, master's notice or other interdict differs from the description reflected in the title deed, the interdict must be treated with the greatest caution. If the property can be identified with reasonable certainty, the interdict must be noted but the person or body who lodged the interdict must be notified of the difference. If the property cannot be identified with reasonable certainty the interdict must be returned by certified post. Where the interdict relates to more than one property and all the properties cannot be identified, the interdict must only be noted against those properties that can be identified and the person or body who served the interdict must be advised accordingly.

2.5 Should the judgment debtor reflected in the attachment not be the registered owner of the property attached, the attachment must not be noted but it must immediately be returned by certified post to the Sheriff with the reason why the attachment has not been noted. Where the description of the property is correct but the spelling of the owner's name is erroneous, the attachments must be noted. Minor errors in the spelling of the judgment debtor's name can be ignored but where there may be a doubt whether it is the same person, for example the omission of a Christian name, the difference in the names should be brought to the attention of the Sheriff.

2.6 In addition to land any real right in land may also be attached, for example the interest of a lessee in a registered lease or that of a mortgagee in a bond. Furthermore it is possible to attach a purchaser's interest in a deed of sale in respect of land. Notwithstanding what has been stated in paragraph 2.5, such an attachment must be noted to prevent the purchaser from dealing with the land once it is registered in his name. It is, therefore, necessary in such a case to bring the attachment forward when the property is transferred by the registered owner. Should the transfer conflict with the transaction in the deed of sale, for example the seller gives transfer to a person other than the purchaser, an appropriate note must be raised to bring the facts to the attention of the conveyancer.

2.7 Releases from and withdrawals of attachments must comply with the following requirements:-

- (a) It must be the original copy, signed by the Sheriff.
- (b) The letterhead of the Sheriff must appear on the document and/or it must bear his official stamp of office.
- (c) The case number must be disclosed. Should the case number differ in the release or withdrawal from that disclosed in the notice of attachment, the release or withdrawal must not be noted but it must be returned to the Sheriff. In a recent instance two attachments were noted against a property and the wrong attachment was purged because the interdict clerk omitted to check the case number.
- (d) Where the attachment covers two or more properties, a withdrawal which relates to some but not all the properties attached must be dealt with great care to ensure that all the properties are not erroneously released from the attachment.
- (e) The interdict clerk and the officer responsible for checking his work must initial the endorsement made on an attachment relating to a withdrawal or release before such endorsement is signed by the officer charged with this duty.

3. The work of the interdict clerk must be checked by another officer.

4. INTERDICT DAY-BOOK

4.1 Experience has shown that the type of interdict which, when overlooked, has resulted in financial loss to the State, has almost without exception been attachments.

A separate interdict day-book or other suitable index must, therefore, be kept in which the properties relating to attachments, Master's notices and any other interdict coupled with a specific property must be noted alphabetically. The names

of the owners of properties attached or in respect of which Master's notices, etc., have been received must nevertheless be noted in the main day-book or other index, in a like manner to insolvencies and liquidations. Immediately before execution or registration all deeds must be checked against both sets of interdict day-books or indexes. Although this procedure is admittedly cumbersome it is justified in view of the dangers inherent to the procedures followed. There is no objection to Registrars in the small Deeds Registries arranging for the final black-booking of deeds prior to execution being done direct from the interdict index if all interdicts received have already been noted on such index, provided a separate check must be made against the entries of properties in the interdict day-book as herein stipulated.

4.2 In Pretoria Deeds Office the names of companies and other juristic bodies are entered in the interdict day-book with a red ball-point pen. This has been found to facilitate the black-booking procedure.

4.3 Often the names of parties in sequestration and other interdicts are not precise. Queries should therefore be raised wherever there is a reasonable possibility that the name in the interdict day-book can refer to the party in the deed being black-booked.

5. DUTIES OF EXAMINERS IN RELATION TO INTERDICTS

5.1 The duty sheet of examiners must specifically specify their responsibility and duties in relation to interdicts.

5.2 In offices where the records have not been computerised absolute responsibility will rest on the junior examiner for checking the interdict index and land register for interdicts. Where the records are computerised examiners will rely on the computer printout for interdicts. It will be the duty of the junior examiners to consult the interdict itself to ascertain whether it is applicable to the particular deed.

Should a junior examiner find that an interdict is not applicable to the particular transaction he must note the reasons for his finding against the interdict on the computer printout to enable the senior examiner to control his finding.

The words "not applicable" or "N/A" are not sufficient. In offices where the records are not yet on the computer all the interdicts noted against the particular person's name or in the land register must be listed on the examiner's note sheet and should an interdict be found to be inapplicable the interdict note should be removed in the usual manner and the reason for removal stated.

Whether the senior examiner must himself investigate the applicability of an interdict will depend on the circumstances, for example the nature of the transaction or the reason given by the junior examiner why the interdict is not applicable.

5.3Where examiners are not absolutely certain about the effect of an interdict they must consult their seniors. For example, in one instance recently the Court authorised the Deputy-Sheriff to sign the Power of Attorney to pass transfer where the owner refused to do so, and an attachment against the property was erroneously ignored because of the Court Order.

The position would have been different if the Order of Court had authorised the transfer free from bonds and other encumbrances.

5.4On re-lodgement rejected deeds must be black-booked anew. There have been instances where interdicts received since the prior lodgement have been missed because this has not been done.

5.5When an examiner has reason to believe that there should be an interdict but there is no interdict noted in the interdict index or land register, for example where a subdivisional diagram is endorsed "Act 21 of 1940 conditions," it is the duty to ask the conveyancer to obtain such document or a certified copy thereof.

5.6As stated in paragraph 4.3 interdicts received often contain discrepancies as to the full names and the exact spelling of the names of the parties. This poses a particular problem in regard to sequestration and liquidations as there is no double check as in the case of attachments and Master's notices, which are also noted against the property in the land register.

It is of course impossible to check all possible variants of the names that must be black-booked. Where the interdicts are recorded on a card-index, the existing practice of checking under known variant names is sound and must be continued. Where the interdicts have been recorded on the computer, the listing on the computer printout can be accepted.

5.7Separate notes must be made about rehabilitation orders, i.e. separate from sequestration orders, but where an examiner is able to link a rehabilitation order with a particular sequestration order, this must be indicated in his notes.

5.8Examiners must be most careful not to assume that a rehabilitation order applies to a person mentioned in a particular sequestration order, as rehabilitation orders often do not disclose the date

of the sequestration order and there are in fact instances in some offices where rehabilitation orders have been linked to sequestration orders and there is no evidence to substantiate the linking.

5.9Furthermore, particular care must be taken not to remove insolvency notes or to disregard sequestration orders where property is purchased or otherwise acquired before or during the period of insolvency and the insolvent is rehabilitated subsequent to the date of acquisition. The provisions of section 58 of Act 1937 must be borne in mind in such cases.

[5.10 Repealed by RCR 74 of 1987]

5.11.1A most important function of examiners is to ensure that the necessary instructions are given to the interdict section to purge interdicts which have been complied with. Obsolete interdicts which remain in the interdict index cause endless trouble to both examiners and conveyancers. In the past the interdict index in all the large Deeds Offices has been cluttered with obsolete interdicts.

5.11.2It must be noted that a sequestration interdict cannot be purged because the insolvent has been rehabilitated. In terms of section 20(2) of the Insolvency Act all property belonging to the insolvent person at the time of insolvency and property acquired during the insolvency vests in the trustee of the insolvent estate.

Such property is not re-vested in the insolvent on his rehabilitation except where his rehabilitation has been effected pursuant to section 119 of the Insolvency Act, 1926 and the deed of composition expressly provides for the re-vesting of the property in the insolvent.

Cases have occurred where a rehabilitated insolvent has attempted after his rehabilitation to deal with property which ostensibly still vests in his trustee. In such cases a disclaimer by the trustee or an order of Court confirming the re-vesting of the property in the rehabilitated insolvent to deal with the property is needed.

5.11.3Like all other acts of registration, applications for the amendment or change of name of a party to a deed must be black-booked.

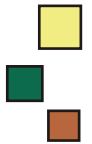
What is important is that there may be interdicts which do not prohibit the registration of the amendment or change of name but are nevertheless applicable to that party or the property reflected in the deed. In such instances examiners must make an office note for the interdict clerk to also index the interdict against the name as amended or changed.

5.12 Except where transfer is given by the Sheriff in pursuance of a sale in execution, all attachments must be withdrawn before a deed can be marked in order, and in offices where the records are computerised, the computer printout which accompanies the deed must not list any attachments. Where transfer is passed pursuant to a sale in execution, examiners must give the necessary written instruction to the interdict clerk to

urge the relevant attachment interdict or interdicts.

5.13 Attention is drawn to section 20(1)(c) of the Insolvency Act No 24 of 1936 which provides that a sequestration will stay the execution by a Sheriff of a Judgment of the Court. Examiners must, therefore, raise the usual insolvency queries where a transfer is passed by a Sheriff in pursuance of a Court judgment."

PROJECT VATSUTSUMI - GROUP TWO PRIZE GIVING



On 13 June 2008, 41 students who attended the Deeds Registration Level I and II course in Pretoria attended a prize-giving to commend the top achievers. The Law Society of South Africa made three book prizes available and the top three students were presented with their prizes.



Left: A representative from the Law Society of South Africa, provides the book prize to one of the top achievers



Above: The Registrar of Deeds, Pretoria, Mr Pogiso Mesefo, hands over the prize to Ms Pika from King Williamstown, who achieved an average of 89%



Left: Pogiso Mesefo, bids the students farewell and law lecturer, Sydney Mekwe, listens attentively to the farewell speech

DEEDS TRAINING AFFORDS TRAINING TO BOTSWANA OFFICIALS

The Sub-Directorate: Deeds Training, in conjunction with the Acting Law Lecturer of the Pretoria Deeds Registry presented functional training to 12 officials attached to the two Deeds Registries in Botswana on conventional and sectional title matters. The Botswana Government places a high priority on this course as the officials' promotion is dependent on the successful completion of the course.

Botswana has a Deeds Registries Act and Sectional Titles Act, which are very similar to those of South Africa.



*From left: 1st row: Sydney Mekwe (lecturer); Daniel Malatsi (lecturer); Wiseman Bhuqa (lecturer); AS West (Chief: Deeds Training)
2nd row: Chipso Phillimon; Nonofa Sekgopo; Montle Dithupa; Lesego Gabasiane
3rd row: Julia Raletsatsi; Dorothy Tiroyaone; Mosetsana Disang; Onalenna Natale
4th row: Terence Modikwe; Gaboutlwelwe Phiase; Gladys Tladi; Kealeboga Gobonywe*

IMPLEMENTING DECISIONS TO ALIENATE A PART OF THE COMMON PROPERTY

By: Prof Graham
Paddock and
Mr. Anton Kelly
Paddocks
Cape Town



A significant number of sectional title schemes, built when lower densities were permitted under town planning regulations, include undeveloped areas of common property which can either be subdivided or further developed.

When a sectional title body corporate considers the alienation of a part of the common property, so that the area will be removed from the scheme and become a separate property, the provision of section 17(1) of the Sectional Titles Act, 1986 ("the Act") applies. This section is headed "Alienation and letting of common property" and reads:

"The owners and holders of a right of extension contemplated in section 25 may by unanimous resolution direct the body corporate on their behalf to alienate common property or any part thereof, or to let common property or any part thereof under a lease, and thereupon the body corporate shall, notwithstanding any provision of section 20 of the Deeds Registries Act, but subject to compliance with any law relating to the subdivision of land or to the letting of a part of land, as the case may be, have power to deal with such deed required for the purpose: Provided that if the whole of the right referred to in section 25 or section 60(1)(b) is affected by the alienation of common property, such right shall be cancelled by the registrar with the consent of the holder thereof on submission of the title to the right."

Prior to its amendment in 1997, the introduction to this provision read:

"The owners may by unanimous resolution direct the body corporate ..."

The purpose of the 1997 amendment to the introduction was clearly to add the requirement that the holder of any real right under section 25 of the Act should consent to any alienation or letting under this section. But the wording is awkward, suggesting that the unanimous resolution must be taken by owners and the holder of a section 25 right, i.e. that the holder of a section 25 right can and must participate in the taking of the unanimous resolution.

A unanimous resolution is, in terms of the definition in section 1 of the Act, a consensus of members of the body corporate. The holder of a future extension right under section 25 of the Act is not, in

that capacity, a member of the body corporate in terms of section 36(1) of the Act. In addition, the rights in terms of section 25 may not be applicable to the area which the body corporate is considering leasing or alienating.

The interests of any section 25 right holder which need protection require not that he or she participate in the body corporate's decision-making process, but that any unanimous resolution taken by the body corporate which affects a part of the common property which is subject to the holder's rights should not become effective without the holder's approval.

The better interpretation of the provision is that the body corporate must take a unanimous resolution authorising the alienation or leasing and, in addition, the holder of any right in terms of section 25 which applies to the part of the common property in question must give consent.

The wording should be adjusted to make this point clear and more details of the additional consent should be inserted. Must the consent be in writing? Must it be obtained prior to the unanimous resolution or can it be given at any time thereafter? Assuming that the consent may be given at any time, the introduction to the provision should read:

"The owners may by unanimous resolution, and with the written consent of the holder of any applicable right of extension contemplated in section 25, direct the body corporate on their behalf to alienate common property or any part thereof, or to let common property or any part thereof under a lease ..."

Until the section is amended to make its intent more clear, it is suggested that the body corporate should ensure that the holder of any section 25 right participates in the process of obtaining the unanimous resolution, for example by specifically approving the wording of the resolution and the description of how the proceeds of the alienation are to be distributed amongst the body corporate, owners and the holder of the extension rights. In addition, a formal written consent should be obtained to the unanimous resolution in the form in which it is recorded in the body corporate minute book.

This matter will be referred to the Sectional Title Regulation Board for consideration - Editor

NUMBER OF REGISTRATIONS AND RECORDALS IN THE DEEDS REGISTRIES 2007-2008 FINANCIAL YEAR

Conventional Deeds	PTA	CTN	JHB	PMB	BLM	KWT	KMB	VBG	UMT	MPU	Total 2007/2008
Transfers	102,156	100,843	48,344	36,769	24,142	6,095	3,461	4,430	1,698	8,439	336,377
Bonds	115,658	108,279	70,651	46,090	18,321	7,157	3,436	4,109	985	7,786	382,472
Bond Cancellations	131,984	107,737	70,523	47,611	19,649	7,745	3,940	4,485	1,067	8,406	403,147
Contracts / Servitudes	3,998	1,492	628	1,539	377	201	43	37	17	280	8,612
General Powers of Attorney	1,651	2,070	1,552	615	248	185	96	92	36	262	6,907
Antenuptial Contracts	8,701	7,879	6,921	3,693	1,667	760	240	302	54	367	30,584

Sectional Titles	PTA	CTN	JHB	PMB	BLM	KWT	KMB	VBG	UMT	MPU	Total 2007/2008
New Schemes	1,113	762	380	664	424	13	9	0	0	41	3,406
Certificates of Registered Sectional Title Transfers	18,486	0	7,023	4,374	2,052	136	97	0	0	451	32,619
Transfers	32,314	38,295	16,386	23,929	5,509	728	152	23	1	413	117,750
Bonds	36,509	22,642	38,182	18,193	3,870	728	120	20	0	307	120,571
Bond Cancellations	43,266	22,264	32,121	19,204	3,646	757	175	16	0	343	122,492
Contracts	4,605	8,109	3,846	4,510	979	83	32	8	2	92	22,266

Leasehold	PTA	CTN	JHB	PMB	BLM	KWT	KMB	VBG	UMT	MPU	Total 2007/2008
Transfers	1,814	0	2,218	125	264	28	0	0	0	0	4,449
Bonds	2,236	0	2,104	74	95	28	0	0	0	0	4,537
Bond Cancellations	2,355	0	2,096	71	220	25	0	0	0	0	4,767
Contracts	0	0	0	0	0	0	0	0	0	0	0

Rationalisation	PTA	CTN	JHB	PMB	BLM	KWT	KMB	VBG	UMT	MPU	Total 2007/2008
Transfers	3,836	0	0	2,349	104	270	0	31	0	0	6,590
Bonds	5,518	0	0	1,674	136	199	0	14	0	0	7,541
Bond Cancellations	6,810	0	0	2,053	215	275	0	5	0	0	9,358
Contracts	80	0	0	0	0	0	0	0	0	0	80
DevelopmentAid	PTA	CTN	JHB	PMB	BLM	KWT	KMB	VBG	UMT	MPU	Total 2007/2008
Transfers	0	0	0	801	0	0	0	0	0	0	801
Bonds	0	0	0	419	0	0	0	0	0	0	419
Bond Cancellations	0	0	0	627	0	0	0	0	0	0	627
TOTAL	523,090	21,072	302,975	215,384	81,918	25,413	11,801	13,572	3,860	27,287	1,626,372
Other	PTA	CTN	JHB	PMB	BLM	KWT	KMB	VBG	UMT	MPU	Total 2007/2008
Copies of lost deeds issued	17,136	10,364	6,451	8,391	2,593	667	364	489	223	752	47,430
Interdicts / Sequestrations noted	17,194	11,992	10,038	6,447	7,858	2,488	2,369	3,003	1,985	743	64,117



GOVERNMENT: MUNICIPAL PROPERTY RATES ACT (ACT NO. 6 OF 2004)

By: Allen West
Deeds Training
PRETORIA

INTRODUCTION

The Local Government: Municipal Property Act, 2004 (hereinafter referred to as "the Act") came into operation on 2 July 2005, and provides a simpler and more uniform approach to collect revenue for local government. In the past rates were levied by local authorities in terms of the various Provincial Ordinances. The major changes introduced by this Act will include inter alia that property owners and holders of real rights in land will be rated on the market value of their properties/rights. Sectional title property-owners will be rated individually. The amount of rates payable is now directly linked to the value of the property/right. A register of all properties/rights is established from which a valuation roll is compiled and updated, regularly. The Act makes provision for exemptions, reductions and rebates, for inter alia the aged; educational; rezone of the inner city; farming; higher density buildings in Town Planning Schemes, etc.

DATE OF IMPLEMENTATION OF THE ACT

In terms of section 3 of the Act, all municipalities must adopt a policy on the levying of rates. Such policy takes effect on the effective date of the first valuation roll prepared by the respective municipalities, in terms of the Act.

The Department of Provincial and Local Government has agreed that, although the Act has been enacted, it will only become operative once the valuation roll is prepared and finalised. Each municipality will notify the relevant Registrar of Deeds in its jurisdiction area of the date of the implementation of such municipality's valuation roll. However, with effect from 1 July 2009, all

municipalities will be affected and the Act will be fully operational.

IN RESPECT OF WHAT PROPERTY IS THE ACT APPLIED

"Property" in terms of section 1 of the Act, means

- immovable property registered in the name of a person, including, in the case of a sectional title scheme, a sectional title unit registered in the name of a person;
- a right registered against immovable property in the name of a person, excluding a mortgage bond registered against the property;
- a land tenure right registered in the name of a person or granted to a person in terms of legislation; or
- public service infrastructure.

From the above definition, it is clear that the Act is applicable to all land registered in the name of a person, inclusive of a sectional title unit.

Furthermore, it is also applicable to a right registered against immovable property, excluding mortgage bonds.

The rights referred will include, inter alia;

- servitudes
- lease agreements
- exclusive use areas
- real rights of extension, etc.,

The above examples are by no means exhaustive.

As the Act refers to "an already registered right", the Act will not apply on the creation of such rights, but only the cession of such rights (see Chief Registrar's Circular 2 of 2006).



NEW PRACTICE FOR DFA-TRANSFERS IN PIETERMARITZBURG DEEDS REGISTRY

The Registrar of Deeds, Pietermaritzburg made the following ruling with regard to section 64(1) of the Development Facilitation Act 67 of 1995:

Due to the uncertainty on First Transfers in terms of section 64(1) of the above act it has been decided that either form "E" or "DDD" in terms of the Deeds Registries Act Number 47 of 1937 could be used when passing transfer.

When using Form "E" the normal requirements with regard to Transfer Duty, Power of Attorney, Rates, etc. will apply.

The above will also apply to the Documents (Transfers) drawn up prior to issuing of this circular.

See Pietermaritzburg Registrars Circular 4 of 2008 (Editor)

PROJECT VATSUTSUMI

GROUP THREE

By: A S West
Deeds Training
PRETORIA

The last intake comprising 29 officials commenced their training on 4 August 2008 and have returned to the offices of Pretoria, Pietermaritzburg, Umtata and Cape Town.

The programme is on track and we are confident that by April 2010 we will have 90 fully trained examiners.



From left to right: 1ST Row: P Mohloding; N I Senyolo; H de Klerck (Lecturer); W Z Bhuqa (Lecturer); M S Mekwe (Lecturer); A S West (Deputy Registrar of Deeds: Deeds Training); M S Grovè (Lecturer); B E Bentele;

2ND Row: P M Moshwana; J E Mongwe; M I Nesengani; M M Mmileng; M P Mafadza-Tshifane; N Davhana; N B makalima; N F Khondo; T S Mosome; L J Ramashia; S Ramphaka; R Keikabile; D M Tshidzumba;

3RD Row: R Khosa; F Nkwinika; P C Nkondo; N C Mkhabela; M Phalakatshele; M J Maake; P M Napo; D M Mahambane; M A Letsoalo; J O Mushwana; J T Ramadibane; M M Makeng; L S Radebe

APPLICATION OF SECTION 228 OF THE COMPANIES ACT 61 OF 1973

- VARIOUS VIEWS -

By: A S West
Deeds Training
PRETORIA

Section 228 of the Companies Act 61 of 1973 provides that, notwithstanding anything contained in its memorandum or articles, the directors of a company shall not have the power, save with the approval of a general meeting of the company to dispose of

- the whole or substantially the whole of the undertaking of the company; or

- the whole or the greater part of the assets of the company.
(my underlining)

The burning question that begs an answer is whether dispose of as referred to in the said section includes a mortgage bond. Should one read the Afrikaans text, it refers to 'vervreem', which according to our common law **includes a mortgage**

bond (see *Foley's Trustees v Natal Bank* 1882 3 NLR 26 and *Ex parte De Jager* 1926 27 NLR 413).

As the English text of the Act was signed it is submitted that dispose of does not include a mortgage bond. It is thus opined that when registering a mortgage bond, the required resolution is not peremptory.

In response to the above opinion Thabo Nqhome, a conveyancer, agrees with the above to the effect that “dispose of”, in section 228 of the Companies Act 61 of 1973 (“the Act”), does not include “mortgage”. However, his agreement is based on an additional, if not different, ground.

He is of the opinion that it was not the intention of the legislature, in section 228 of the Act, that “vervreem” should include “mortgage”, as contemplated by the common law. This is evident, in particular, from the Afrikaans text of paragraph (b) of Schedule 2 to the Act.

The English text of Schedule 2 to the Act provides, amongst other things, as follows:

“Included in the powers of every company are the following powers:

(b) to **mortgage, dispose of** its undertaking or all or any part of its property and assets;”

The Afrikaans text of Schedule 2 to the Act provides, amongst other things, as follows:

“By die bevoegdhede van elke maatskappy is die volgende gewone bevoegdhede ingesluit:

(b) om sy onderneming of al of enige deel van sy goed en bate **met verband te beswaar, te vervreem**”

In the Act, the legislature, therefore, makes a clear distinction between “dispose of” and “mortgage”, on the one hand, and “vervreem” and “met verband te beswaar”, on the other hand.

Esther-Lana Housego, also a conveyancer, also agrees, and refers readers to page 442(1) of Henochsberg which refers as follows:

Their view is that “dispose” does not include a mortgage bond:

It is submitted that passing a mortgage bond is not within the section (cf Advanced Seed Co (Edms) Bpk v Marrok Plase (Edms Bpk 1974 (4) SA 127 (C) at 132; and see L Hodes op cit in the General Note at F7 9) ...

However, Amorie le Roux, a conveyancer from Pretoria, has the following view:

Cognizance of Henochsberg on the Companies Act

(pages 442 and 442(1)) is taken where it is submitted that “dispose of” does not include a mortgage bond. However, the effect of the required resolution not being registered is that such a transaction is void, with dire consequences to the banks if it should transpire that “dispose of” indeed included bond registration.

In *Cohen NO and Others v SAPHI (Proprietary) Limited* (103/94) [1995] ZASCA 122 (29 September 1995) the definition of “disposition” in terms of the **Insolvency Act of 1936** was considered. This Act was signed by the Governor General in Afrikaans during 1936 in terms of which the definition of “vervreemding” or “vervreem” included a mortgage bond.

Section 2 of Act 27 of 1987 which amended the Insolvency Act, amended only the English version of the Insolvency Act, substituting the words “disposes of” and “disposition” in subsections (1) and (3) of section 34 of the Act for “alienates” and “alienation”.

In the Afrikaans version of the Insolvency Act, which is the signed one, the words “vervreem” and “vervreemding” are used. These words are defined in terms identical with the definition of the word “disposition” whereas the words “alienates” and “alienation” are not defined at all. In terms of section 34(1) of the Act “disposition” is defined in section 2 of the Act as “any transfer or abandonment of rights to property and includes a sale, lease, **mortgage**, pledge, ...”

Who carries the risk of loss should the mortgagor company by reason of being unable to pay its debts be liquidated after registration of the bond? As this will then be a **disposition** in terms of the Insolvency Act the registration of the bond without the required section 228 resolution will most definitely be set aside by the liquidators for lack of compliance with the provisions of section 228.

Apart from what the effect will be in cases of insolvency, I also foresee problems with the loan application and registration of a bond if section 228 is not adhered to. When a bond is registered, although there has not been a “disposition” as such, an abandonment of rights takes place. A real right is granted. It appears accordingly that, even if one does not necessarily require the resolution required in terms of section 228 for **registration** of the bond, it should definitely at least be required in respect of the **loan application** by the company in respect of the funds.

The purpose of a number of provisions of the Companies Act, including section 228, is to protect minority shareholders. Hypothecating the company's sole or major asset should definitely be a matter of concern to minority shareholders.

Roelie Rossouw summarises the position as follows:

SECTION 228(1) AND MORTGAGE BONDS

Section 228(1) of the Companies Act 1973, after its substitution in terms of section 21 of Act 24 of 2006, now provides as follows:

228 Disposal of undertaking or greater part of assets of company

(1) Notwithstanding anything contained in its memorandum or articles, the directors of a company shall not have the power, save by a special resolution of its members, to dispose of-

(a) the whole or the greater part of the undertaking of the company, or

(b) the whole or the greater part of the assets of the company.

- Prior to its said substitution section 228(1) of the Companies Act 1973 read as follows:

(1) Notwithstanding anything contained in its memorandum or articles, the directors of a company shall not have the power, save with the approval of a general meeting of the company, to dispose of -

(a) the whole or substantially the whole of the undertaking of the company; or

(b) the whole or the greater part of the assets of the company.

- the conveyancer who has to register a mortgage bond over a property which constitutes "the whole or the greater part of the assets" of a company needs to decide whether both a resolution by the directors and a special resolution by the shareholders are required.
- It is, from the wording of section 228(1) clear that, had (prior to its substitution as aforesaid) the approval of the general meeting of the company been required for the valid registration of the said mortgage bond, a special resolution by shareholders will now be required. The approval of the General meeting of a company would have been required for the valid registration of a mortgage bond only if the passing of that mortgage bond would have been regarded as a 'Disposal' as contemplated in section 228(1). The only question that thus needs to be answered is whether the passing of a mortgage bond over property constitutes a 'disposal' of that property. It would appear that in terms of current case law and opinions of legal writers (as more fully discussed in paragraph 2 of this memorandum) the registration of a mortgage bond did not constitute a 'disposal' as contemplated in section 228(1) prior to its amendment and, I

submit, neither would it do so now.

IS THE PASSING OF A MORTGAGE BOND A DISPOSAL?

- Henochsberg, The Companies Act has the following to say in this regard:
 - It is submitted that, in the context, the word "dispose" has its ordinary meaning of "to part with" or "to get rid of" (as to the ordinary meaning of the word, see *Cullinan Properties Ltd v Transvaal Board for the Development of Peri-Urban Areas* 1978 (1) SA 282 (T) at 285-286) and accordingly the only disposal to which it is intended to refer is one which would have the effect permanently depriving the company of its right to ownership of the assets involved.

Thus, the grant of a right of first refusal to purchase is not within the section (Lindner v National Bakery (Pty) Ltd 1961 (1) SA 372 (O)). Neither is a pledge nor a cession in security (Alexander NO v Standard Merchant Bank Ltd 1978 (4) SA 730 (W)), notwithstanding, it is submitted, the divesting effect of such a cession having regard to the residual interest which the company retains in relation to the right ceded. It is submitted that passing a mortgage bond is not within the section (cf Advance Seed Co (Edms) Bpk v Marrok Plase (Edms) Bpk 1974 (4) SA 127 (C) at 132.....

There is no substantial difference between section 70 dec (2) of Act 46 of 1926 and section 228(1) (as it read prior to its substitution). In *Advance Seed Co (Edms) Bpk v Marrok Plase (Edms) Bpk* 1974 (4) SA 127 (NC), where the court had to decide whether, as there had been no approval of the general meeting of the company, the passing of a mortgage bond had been in contravention of section 70 dec (2) of Act 46 of 1926, the following was said regarding whether the passing of a mortgage bond constituted a disposal: "Mnr. Kumleben se betoog op hierdie aspek van die saak was tweeledig. Hy het eerstens aangevoer dat die beswaring deur verband nie ingesluit is by die begrip "om te vervreem" ("to dispose of") nie. Hy het veral gesteun op Henochsberg, The Companies Act, 2de uit., bladsy 183 en Celliers en Benade, *supra* te bladsy 250, wat dieselfde mening huldig. Hy het daarna 'n baie volledige betoog gelewer wat hoofsaaklik dieselfde strekking het as die van Henochsberg. Ek meen dat daar veel te sê is vir hierdie standpunt, maar vir die redes wat hierna volg is dit nie nodig om daaroor uitsluitel te gee nie."

The pledge or cession in *securitatem debiti* of shares, I submit, is more of a 'disposal' than the passing of a mortgage bond over property and if such a pledge or cession is not a disposal neither would the passing of a mortgage bond be one. In *Alexander and Another NNO v Standard Merchant*

Bank Ltd 1978 (4) SA 730 (W) the court said the following regarding whether a pledge or cession in *securitatem debiti* of shares constituted a 'disposal' for the purposes of section 228(1): *But, even if I am wrong in law or fact and even if there is no distinction between the so-called "pledge" of the shares and a cession, although being a cession in securitatem debiti, has the effect of divesting the cedent of all his rights of the time being, such a cession is not, in my view, a disposal in terms of the section. The dominium of the right remaining in the cedent may be nebulous but there is nothing nebulous in the reversionary right. The authorities are clear that, during the currency of the cession, the cedent loses his right of action against the debtor, but as between himself and the cessionary there is a clear obligation of the cessionary to cede the right back to the cedent once the debit has been paid. During the currency of the cession there is therefore no disposal in terms of the section because the cessionary cannot freely dispose of the property but is under an obligation to cede the rights back to the cedent upon payment of the debt. It may be that, if the debtors should abandon their original intention of paying the debt or of enforcing a recession by deliberately refraining from paying the debt causing the right of the cessionary to become absolute, there would then be a disposal in terms of the section, but there cannot be a disposal while the reversionary right lasts.*

I have therefore come to the conclusion that, even if the shares in dispute constituted the whole or the greater part of the assets of UTL, the pledge of these shares to the respondent in securitatem debiti is not a disposal in terms of the section.

- I think that the following example shows that the passing of a mortgage bond cannot be a 'disposal' as contemplated in section 228(1):

1. Company A has, as its only asset, a property on which a building requiring renovation has been built. A borrows the money required in order to effect the renovations from a bank and, as security for the repayment of the loan, passes a mortgage bond over the property in favour of the bank.
2. Company B has, as its only asset a property exactly similar to the one owned by A on which A building also requiring renovation has been built. B borrows the money required in order to effect the renovations from a bank by way of an unsecured loan.
3. Both A and B default when the time for repayment arrives. In both instances the relevant bank institutes action against the borrower which leads to the property owned by the relevant borrower to be sold in execution.
4. It is clear that the actual reason for the eventual sale of the property was not the passing of the mortgage bond but the defaulting

under the loan agreements.

- It would, I submit, be absurd to interpret section 228(1) to mean that anything done which could lead to the eventual loss of the whole or the greater part of the assets of the company is a 'disposal' for which a special resolution is required. Such an interpretation would mean that even the incurring of debt in an insignificant amount would be a 'disposal' if it leads to the eventual sale in execution of "the whole or the greater part of the assets of the company."
- The passing of a mortgage bond is, for the reasons set out above, not a 'disposal' for the purposes of Section 228 of the Companies Act, 1973 and no special resolution is required for the validity thereof.

SECTION 228(2)

- Where there is an actual disposal of the whole or the greater part of the assets of the company (for instance where a company having only one asset being an immovable property sells that property) the passing of a special resolution becomes imperative and the other provisions of section 228, especially 228(2), need to be taken cognizance of.

- Section 228(2) provides as follows:

(2) If in relation to the consolidated financial statements of a holding company, a disposal by any of its subsidiaries would constitute a disposal by the holding company in terms of subsection (1) (a) or (b), such disposal requires a special resolution of the shareholders of the holding company.

SPECIAL RESOLUTION

- Conveyancers need to note the requirements for a valid 'special resolution' as contained in sections 199 and 203 of the Companies Act. In particular it should be noted that registration of the special resolution at the offices of the Registrar of Companies is required and that the resolution only becomes effective on registration.
- Under the "old" section 228(1) one could, by applying the principle of unanimous assent, get away without actually convening a general meeting of the company.
- In *Southern Witwatersrand Exploration Co Ltd v Bisichi Mining Plc and Others* 1998 (4) SA 767 (W) the said principle of unanimous assent was discussed and applied as follows:
- *This contention derived from what has come to be known as the principle of unanimous*

assent. In *Blackman's* formulation in *Joubert* (ed) *The Law of South Africa* (first reissue, 1996) vol 4 part 2 at para 40, even though generally company decisions are derived at by means of formal resolutions taken at properly constituted meetings of the company, 'the courts have recognised that the unanimous assent of all the members, when fully aware of what is being done, is an alternative method of passing valid company resolutions despite the fact that the procedures by the articles have not been observed'. The principle has been accepted and developed by the Appellate Division (now the Supreme Court of Appeal) (*Gohlke & Schneider and Another v Westies Minerale* (Edms) Bpk and Another 1970 (2) SA 685 (A) at 692694E; *Quadrangle Investments* (Pty) Ltd v *Witind Holdings Ltd* 1975 (1) SA 572 (A) at 581582B; *Alpha Bank Bpk en Andere v Registrateur van Banke en Andere*

- 1996 (1) SA 330 (A) at 348G-I), as well as in an increasing variety of first instance decisions.
- The principle of unanimous assent would, however, not apply where a special resolution (as now is the case) is required. In *Quadrangle Investments* (Pty) Ltd v *Witind Holdings Ltd* 1975 (1) SA 572 (A) the court held that in requiring a special resolution the Legislature also bore the wider interest of the general public in mind in prescribing those formalities. A purported alteration by the unanimous assent of the shareholders, which can occur informally, even by conduct, would therefore not serve those purposes. A special resolution must therefore be regarded as being essential. (See on this aspect, too, the well-reasoned and useful article, "The Principle of Unanimous Assent," by Professor Beuthin, in 91 (1974) SALJ at pp 11-15).

CONVEYANCING THROUGH THE CASES

The following summaries of cases are of note, however, readers are advised to read the cases *in toto*:

CASE NO. 1
CONTRACT OF SALE AND PAYMENT OF ESTATE AGENT COMMISSION
Taljaard v TL Botha Properties [2008] JOL 21574 (SCA)

Acting as an estate agent, the respondent had facilitated the sale of the appellant's property. As had been agreed to between the parties, the appellant paid the respondent an amount of R30 000. Subsequently, the appellant discovered that a fidelity fund certificate had not been issued to the respondent under the Estate Agency Affairs Act 112 of 1976. He therefore contended that the respondent's mandate was invalid, and sought repayment of the R30 000. His claim in the court of first instance was dismissed, as was an appeal. He appealed further to the present court.

Held that section 26 of the Act prohibits any person from performing any act as an estate agent unless a fidelity fund certificate has been issued to him. However, in *Noragent* (Edms) Bpk v *De Wet* it was held that the section did not have

the effect of invalidating the contract of mandate of an estate agent who acts in contravention of its terms and that he was entitled to enforce a contractual claim for commission. The court therefore concluded that the payment that was made in this case was made pursuant to a valid contract and was not recoverable by the condictio.

The appeal was dismissed.

CASE NO. 2
CHANGE OF ROUTE OF SERVITUDE
Linvestment CC v Hammersley (643/2006) [2008] ZASCA1 (28 February 2008)

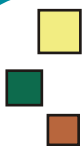
The issue of this appeal, simply stated, was whether the owner of a servient tenement can, of his own volition, change the route of a defined right of way registered against the title deeds of his property. The answer until recently was no. However, after a lengthy analysis of the established law which it was conceded by the appellant was against him *Gardens Estate Ltd v Lewis* 1920 AD 144 was in accordance with existing principle but sought relief based on the contention that the decision was based on a misinterpretation of the distinction between

servitudes constituted in general terms and those specifically constituted. This was rejected, as was the argument that the appellant was being deprived of his rights under section 25(1) of the Constitution. The attempt to introduce the rule that servitudes must be exercised **civiliter modo** was rejected as being misconceived. As was the equation of a general servitude with a defined one.

The rigid enforcement of servitudes without benefit to either parties seems indefensible, and properly regulated flexibility will not set an unhealthy precedent or encourage abuse. Therefore Heher JA proposed that in circumstances falling within the problem posed by the stated case, the law be developed to ensure that injustice does not result.

Accordingly the following order was made:

*"1. The order of the **court a quo** is set aside and replaced by the following-
It is declared that if the owner of a servient tenement offers a relocation of an existing defined servitude of right of way the dominant owner is obliged to accept such relocation provided that:
(a) the servient owner is or will be materially inconvenienced in the use of his property by the maintenance of the status quo ante;
(b) the relocation occurs on the servient tenement;
(c) the relocation will not prejudice the owner Of the dominant tenement;
(d) the servient owner pays the costs attendant upon such relocation including those costs involved in amending the registration of the title deeds of the servient tenement (and, if applicable, the dominant tenement)."*



LETTERS TO THE EDITOR

LETTER NO. 1

I find the magazine or journal quite fascinating and impressive. The name of the magazine is South African Deeds Journal and entails the most interesting topics to read and to communicate to.

Is the Magazine for sale or is it for gratis/or free, and if it is for sale what is the amount per annum so that one can subscribe to and if it is gratis/or free, will it be made available to me?

Regards
Thataone Gavin Mabuya (LLB, Post Graduate Diploma in Labour Relations)
Legal Services
Department of Transport, Roads and Public Works

The Editor responds as follows: I am inundated with calls and e-mails from readers regarding the costs to subscribe for this journal. This journal is available free of charge to any person interested in property law. Presently we have a distribution list exceeding 2500.

LETTER NO. 2

SECTION 18(3) ESTATES

I respond to the article by L J Vosloo in the March issue of SADJ on page 19.

If there is any need for the Deeds Office to enquire into the value of the property sold in an 18(3) estate, then there must be exactly the same requirement for all 18(3) transfers, whether arising from a sale or an inheritance.

If the Deeds Office needs to check on matters such as whether an 18(3) authority has been properly issued or is being properly used, then it seems to me that there should be some statutory provision to impose this responsibility. I would advise as strongly as possible against making the Deeds Office responsible for policing such aspects.

Consider where this may lead. It is possible that letters of executorship or other authorities have to be withdrawn. It is the conveyancer's responsibility to ensure that the executor's authority is in order, as it is with 18(3) appointments. If the Deeds Office has to police 18(3) appointments then will

someone tell me why they should not also police letters of executorship and the appointment of trustees on insolvency and liquidators and any other authority such as powers of attorney?

It is the conveyancer's responsibility. Please let it rest there.

Donald Moore
Conveyancer
Guthrie and Rushton Attorneys

LETTER NO. 3

I also respond to the article by Mr. L J Vosloo in the March issue of the SADJ on page 19.

Firstly, deceased estates practitioners are requested to follow either a "formal" or an "informal" process, hence the Section 18(3) process (commonly known as the "informal process"), as practitioners are not required to follow the process of advertising for creditors and so on in these instances. The Section 18(3) process has mainly been put into place by Legislators to assist the Master's Offices (and also our community) in speedier finalisation of the administration process of deceased estate administration, that may be prolonged by unnecessary administrative processes.

Properties that may be sold for more than what is reflected in the Initial Inventory (Section 9 of the Administration of Estates Act, as amended), may 'push' the estate's value over the Section 18(3) threshold, currently R125 000. However, the responsibility remains with the Executor to advise the Master of the High Court if and when the estate's value does exceed the threshold (set from time to time by the Minister of Justice). The executor cannot pass his responsibilities/duties on to a third party (even in the case of Power of Attorney) and it is not fair to expect either the conveyancer or the Deeds Office officials to carry this sort of responsibility. I agree on the other hand that an executor's list of responsibilities/duties remains lengthy, but fact remains fact and he cannot pass these responsibilities on to a third party. One should also not lose sight of the fact that all transfers are sighted (whether passed or not) by the SA Revenue Service.

There is further rumour that the threshold for Section 18(3) estates may be increased, so it may be a very good idea for Deceased Estates Practitioners and conveyancers to get their communication lines cleared up and understand who is responsible for what, as we live in an almost instantaneous society and things need to happen sooner rather than later (thanks to technology). After all, the Fiduciary Industry, contrary to popular belief, is an essential service that is required by our society.

Patrick Barnard, ExecTrust Administrators (Pty) Ltd

LETTER NO. 4

I am a very keen reader of the Deeds Journal and I store electronic copies of all articles in separate folders on my computer. However, I am recently having a problem copying these, for two reasons:

The website only has copies of the journals up to October 2007. Why has this now been stopped?

If I photostat and scan the articles, the quality is terrible. The reason for this is that the very pretty coloured pages don't photostat well. Is it possible to make the pages white and not coloured? If the journal is on the website, then the colour won't matter because I can download it directly from the website.

Please could you let me have your reply ASAP.

SUSAN COHEN

Reply: *We are very glad that you are such a keen reader of the SADJ and thank you for your enquiry.*

We have unfortunately neglected to inform our readers that the Land Affairs website is in the process of revamping, therefore updates are not as regular as it used to be. Also, double check by clicking on refresh, when on that page.

As soon as everything is up and running again, you'll find the SADJ on its normal place on the website.
Editor



land affairs

Department:
Land Affairs
REPUBLIC OF SOUTH AFRICA