

SADJ

South African Deeds Journal

July 2007 • Issue No. 12

**Check-list for the
Sub-division of a
Section**

**Overview of
Registrar's Conference
Resolutions (Capita Selecta)**



land affairs

Department:
Land Affairs
REPUBLIC OF SOUTH AFRICA

Cancellation of a Lost Bond

**Children's Act and
The Age of Majority**

Department of Land Affairs
CHIEF REGISTRAR OF DEEDS

Application of the Civil Union Act

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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



As you might have noticed from the Editorial Committee, the office of the Surveyor-General has joined hands with us to extend the boundaries of this journal to include the whole of the cadastral system. Included in this issue is a history of the office of the Surveyor-General which truly makes for interesting reading.

This issue of the journal also contains further interesting articles and the promised continuation of the checklists, which is making the work of conveyancers and examiners a lot easier.

The editorial committee chose the articles by Allen West in the March issue, as the best articles.

Readers are requested, in future, to provide their input as to which article they found the most informative and which article should be selected as best article of the issue. The Editor will provide the winner with a bag (see photo on page 20).

Please keep the articles and comments coming.

ALLEN WEST - EDITOR

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COVER PHOTO

The cover photo is merely a reminder to readers of the Deeds Practice Manuals which have now been updated.

PREVIOUS EDITIONS

This edition, and all previous editions of the SADJ are available on the following website, under publications: <http://land.pwv.gov.za>

In Memoriam: Magda Deetlefs

By: Alexandré Lombaard, Deeds Training



On Friday, 4 May 2007, at the crack of dawn, the sun was suddenly setting over Vryburg: one of the cornerstones of the Vryburg deeds registry had quietly passed away.

Magda M Deetlefs, born on 26 November 1958, accepted service in the Vryburg deeds registry on 1 September 1989. She soon proved to be truly a token of the new season – blossoming in potential, not only in the workplace, but in the community as well. Developing her potential, Magda was promoted to the rank of assistant registrar of deeds on 1 October 1999. Over the years, the once promising blossom grew into a well-pruned tree, bearing nourishing fruit of knowledge and expertise, aptitude, discipline and leadership for all who knew her. Magda was also one of the proud guardians watching over the birth and growth of the SADJ. As one of the founding editorial committee members, Magda never let the SADJ down. Her place is empty and she will be sorely missed by everyone involved with the journal.

During June 2006, Magda was confronted with one of her primal fears – she was diagnosed with cancer. Magda proved that fear can be met and conquered with

courage and faith. The last eleven months of Magda's life are a testament to her courage to live life to the fullest, even in the shadow of death. Magda will be remembered not as a victim of cancer, but as a person who died, having lived.

Everyone whose lives were touched by Magda will sorely miss her in the years to come. May all find consolation in knowing that the sudden sunset on 4 May 2007 was not the end of the last day of Magda's life. In fact that sudden sunset was momentarily surpassed by the dawning of yet another day: the birthday of her eternity.

“Take off my pain
Carry me slow
I won't fight here anymore

Find me a sky
Give me my wings
Frozen and broken but free

Find me the sun
Give me it whole
Melt all the chains in my soul

Tell them I'm all right
I'm coming home
This war is over
I'm coming home”*

*Inspired by Melissa Etheridge: “This war is over”

Magda, you will be sadly missed by us all - Editor

A Brief Overview In Respect Of Recent Registrars' Conference Resolutions

By: George Tsotetsi, Office of the Chief Registrar of Deeds



The 2006 Conference marked the beginning of an era in which the jurisdiction of deeds registries will ultimately coincide with provincial boundaries. Thus the Registrar of Deeds: Mpumalanga was, for the first time, part of the Conference. In this article, as is the custom, only some of the resolutions of the 2006 Registrars' Conference will be discussed. A resolution will be quoted in full and then followed by a discussion.

7/2006 (RCR 19/2005 and RCR 7/1994) – Section 57 of Act No. 47 of 1937

It is submitted that the provisions of Section 57 can only be invoked where “the whole of the land mortgaged is being substituted”.

Resolution:

RCR 19/2005 and RCR 7/1994 are hereby confirmed.

In the previous edition, Mr. Thabo Nqhome expressed certain views that support this resolution. In view of this, no comments with regard to this resolution will be made at this stage. The intention is to give the reader the opportunity of reading and perhaps digesting Mr. Nqhome's views before formulating a response. In short, this resolution will be discussed in the next edition, simultaneously with the response to Mr. Nqhome's views.

23/2006 Further Lease Agreements

May a further lease agreement be registered whereby it is agreed that the said lease will only become operative once the initially registered lease has lapsed by effluxion of time or for any other reason?

Resolution:

Yes. No objection exists to the postponement of the date of coming into operation of a lease agreement. A lease may run from one fixed date to another; or from a fixed date for a definite period (see *Bowhay v Ward* 1903 TS 772 and *Dick v Hiddingh* (1830) Menzies 499).

This resolution permits the registration of two or more lease agreements. This will lead to a situation in which a property would be made subject to, for example, three lease agreements that take over from each other. However, a thorough perusal of the Deeds Registries Act revealed no provision supporting this kind of registration. The reasons given to justify the resolution, unfortunately, do not address the registration procedure introduced by the resolution. The mere fact that no objection exists to the postponement of the date of coming into operation of a lease agreement is not a justification for the registration of more than one lease agreement at a time. The fact that a lease may run from one fixed date to another or from a fixed date for a definite period is also true, but is also no justification of the registration procedure introduced by the resolution.

28/2006 Proof of intestacy

Given the fact that a death notice cannot be accepted as proof of children born out of wedlock, the same should also not be accepted as proof that a person died leaving no valid will. Does the Conference concur and if so, what proof should be required?

Resolution:

A death notice cannot serve as evidence of intestacy. Proof in the form of an affidavit

from the executor must be insisted upon.

This resolution contradicts RCR 7/1997. The relevant part of the said resolution is reproduced here for the reader's convenience.

- R:7.1 Registrars' Conference Resolution No. 29/1996 is withdrawn.*
- 7.2 As a Death Notice is a statutory document in terms of §7 of the Administration of Estates Act, 1965 (Act No. 66/1965), it may be accepted as proof of: -*
- 7.2.1 Death;*
- 7.2.2 Intestacy; and*
- 3.3.3 Immediate ascendants and descendants*

NB: For proof of any further heirs (including illegitimate children), an affidavit of next-of-kin must be called for.

The possibility that the person who notifies the Master about the death of another person might not necessarily be privy to the existence or otherwise of a will renders a death notice an unsatisfactory document to serve as proof of intestacy. It is this state of affairs that inspired the Conference to resolve that only an affidavit by the executor should be accepted as proof of intestacy. It is, however, an oversight that the 2006 resolution does not expressly revoke the 1997 resolution. This matter would be referred to the Conference for rectification. It stands to reason, therefore, that the 1997 resolution should not be implemented.

30/2006 New marriage, new contract

Where parties have entered into an antenuptial contract and subsequently divorce and remarry each other, does the contract revive or must a new contract be entered into?

Resolution:

A new contract must be entered into.

It is doubtful that the issue raised in the resolution falls within the ambit of the Conference. Firstly, does a registrar of deeds have the authority to compel parties to register an antenuptial contract? It is beyond any shadow of doubt that the registrar of deeds has no such power. Secondly, there is a possibility that a subsequent antenuptial contract is, indeed, registered in another deeds registry. It must be noted that an

ANC is registrable in any of the deeds registries.

32/2006 Cancellation of usufruct, usufructuary over 100 years old, no death certificate

Is it really necessary to obtain a court order where no death certificate or death notice is available to prove the death of a usufructuary who is over a hundred years old? A sworn affidavit by her surviving children regarding her death is available.

Resolution:

No.

The manner in which the resolution is framed renders it open to misinterpretation. One may legitimately read it as saying, "No, it is not really necessary to obtain a court order." What the Conference really resolved, however, is that a sworn affidavit is not acceptable, but that an application for a court order must be lodged.

34/2006 Antenuptial contracts – un-rehabilitation

The following clause has been inserted into an antenuptial contract:

The accrual system is to apply without modification to their intended marriage, provided that should either party be an unrehabilitated insolvent at the time of the dissolution of the intended marriage, then the said accrual system shall not apply. Is the proviso legal and enforceable?

Resolution:

Such a proviso is not legal and to the disadvantage of future creditors. The Matrimonial Property Act only allows certain assets to be excluded from the accrual system. See *Vorster v Steyn* 1981 (2) SA 831 (O).

No comment is to be made with regard to the content of the resolution. Comment will be made only in relation to its effect with regard to the examination process. Examiners are, therefore, implored to read the entire contents of an ANC in the examination process. Once found, it stands to reason that rejection is inevitable.

57/2006 Section 27A rights

A sectional plan, reflecting exclusive use areas, is to be registered. No certificate

of real right of exclusive use areas is included in the batch. The application for the registration of the sectional plan and opening of the sectional title register makes no mention of the exclusive use areas. However, section 27A rights are created and assigned in the rules. In compliance with section 27A(b), with regard to the layout plan, reference is made to the sectional plan. Is this plan registerable?

Resolution:

No, if the exclusive use areas are depicted on a sectional plan, such exclusive use areas cannot be created and assigned in the rules.

This resolution puts an end to an unsound practice of dealing with exclusive use areas that are depicted in a sectional plan in terms of Section 27A of the Sectional Titles Act. Once exclusive use areas have been depicted on the sectional plan, the developer has chosen to deal with the same in terms of Section 27, a choice that can be abandoned only by having the sectional plan duly amended. It is clear from Subsections (1)(b) and (4)(a) of Section 27 that depiction of exclusive use areas in a sectional plan renders the registration of the same compulsory and therefore leaves no room for the application of Section 27A. Lastly, it must be noted that a sectional plan can only be registered in toto and never partially.

58/2006 Section 27(5)

The mortgagee of a bond registered against the relevant section must consent to the cancellation of the exclusive use area. What if the exclusive use area is mortgaged? The act provides no guidance in this matter.

Resolution:

The mortgagee of the bond over the exclusive use must consent to the release of the exclusive use area from the operation of the bond, before such exclusive area can be cancelled.

This resolution clearly identifies the instance in which a mortgagee's consent is necessary and the nature of the relevant consent. It is evident from the resolution that consent is necessary only where the relevant exclusive

use area itself is also hypothecated, by the bond that hypothecates a unit, and that the relevant mortgagee must consent to the release thereof from the operation of the bond and not necessarily the cancellation thereof. It stands to reason that the procedure would be different in relation to a bond that hypothecates the relevant exclusive use area only. In this instance, the relevant bond must be cancelled.

59/2006 Right of extension about to lapse

Where a right of extension is about to lapse due to effluxion of time, may all interested parties, in terms of Section 3(1)(r) of Act 47 of 1937, enter into a notarial modification of the initial right, to extend the period?

Resolution:

The duration of the right of extension can only be extended by a court order.

At first glance, this resolution may seem not to be in the interests of the sectional title scheme community, but the converse, however, is true. It must be noted that, although an extension of a scheme might benefit the registered owners of units, in the sense that it would increase the revenue base, an extension under these circumstances would primarily be of benefit to the developer. There is also the possibility that the diminution of the share in the common property that would result from extension would far outweigh the benefit of the increase in the revenue base. Lastly, it must be pointed out that a resolution to the contrary would fall foul of Section 25 of the Sectional Titles Act.

See also page 17 (Editor)

Editorial Committee at work



The History Of The Office Of The Surveyor-general: 1870 - 2007

By: A B Schoeman, Office of the Surveyor-General, PRETORIA



A B Schoeman

Names And Terms Of Office Of The Surveyor-general Of The Transvaal (Pretoria Office)

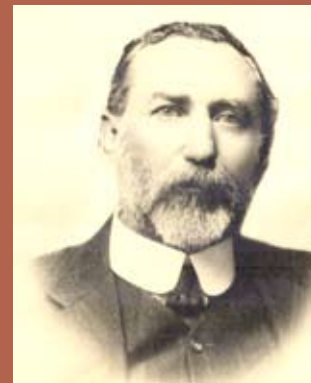
1. Magnus Forssman	09/04/1866 – 07/10/1874
2. Samuel Melvill	08/10/1874 – 08/08/1881
3. George Pigot Moodie	27/09/1881 – 10/04/1884
4. Gideon Retief von Wielligh	08/08/1884 – 15/06/1895
5. Johann Frederick Bernhardt Rissik	13/06/1895 – 31/05/1902
6. Hugh Milbourne Jackson	07/03/1903 – 28/04/1905
7. William Heathcote Gilfillan	01/05/1905 – 31/05/1912
8. Herman Eugene Schoch	01/04/1913 – 10/09/1922
9. Walter Pears Murray	10/09/1922 – 08/02/1929
10. William Maxwell Edwards	08/02/1929 – 27/05/1934
11. Michiel Louw van der Spuy	28/05/1934 – 16/12/1937
12. Nicolaas Snyman	17/12/1937 – 27/07/1942
13. Cuthbert Sholto Douglas	18/07/1942 – 21/02/1947
14. Johannes Stephanus Maritz Guldenpfennig	22/01/1947 – 09/06/1953
15. Jacobus Johannes Boonzaaier	10/06/1953 – 30/09/1953
16. Martin Willie Wedepohl	01/10/1953 – 31/03/1964
17. Leonard Wahl Pentz	01/04/1964 – 31/10/1969
18. Eric van der Spuy	01/11/1969 – 31/10/1972
19. Daniel Jacobus Grundlingh	01/11/1972 – 30/09/1984
20. Neville Charles O'Shaughnessy	01/10/1984 – 30/11/1987
21. Dennis J. Janse van Rensburg	01/12/1987 – 30/06/1993
22. Jacob Johannes Badenhorst	01/09/1993 – 30/09/1995
23. Abraham Johannes van den Berg	01/11/1995 – 31/08/1997
24. Christiaan van Dyk	01/09/1997 – present



William Maxwell Edwards



Samuel Melvill



William Heathcote Gilfillan



George Pigot Moodie

1. The Office Of The Surveyor-general: Introduction

The concept of the “cadastral system” has developed almost informally, as a four-tier system primarily involving four key role-players, over many years:

The professional land surveyor
The Surveyor-General's office (since 1870)
The Conveyancer
The Registrar of Deeds

Should any one of these constituent parties be removed, the cadastral system would break down. Since the founding of the Institute of Land Surveyors of the former Transvaal in 1904, a working symbiosis was created between the land surveyors, the Surveyor-General and the Institute. The gradually developing country, subsequent to the Anglo-Boer War II (1899 - 1902), gave rise to associations, councils and boards such as the Central Committee (1934 - 1950), the Central Council of Land Surveyors of South Africa (1950 - 1984), the Survey Regulations Board (1927 - currently), townplanning organisations and the Townships Board, the Council for Professional and Technical Surveyors of the RSA alias PLATO (1984 - currently), the Education Advisory Committee (1984 - currently), the Sectional Titles Regulations Board and a number of others, all of which had a particular relationship with the office of the Surveyor-General.

2. Political Developments In The Former Transvaal Affecting The Roles Of The Office Of The Surveyor-general And The Land Surveyors

2.1 Should one wish to obtain an objective understanding of the contributions made by the hundreds of land surveyors constituting the profession and the 24 incumbents of the post of Surveyor-General and their personnel, as well as the history of the Institute of Land Surveyors of the former Transvaal, together with the legislation which has shaped the land-surveying profession since the arrival of the Voortrekkers from the Free State and Natal after 1838, it is almost essential to contemplate the historical-political development of the territory that which ultimately became known as the “Zuid-Afrikaansche Republiek” (South

African Republic), subsequently the Province of Transvaal of the Union of South Africa in 1910 and ultimately, since 1995, the Provinces of Gauteng, Mpumalanga, Limpopo and Northwest of the Republic of South Africa .

2.2 Constituent Republics and States which were relevant in the former Transvaal

2.2.1 The Republic of Potchefstroom-Winburg (1838 – 1845) was also known as the Dutch African Republic. It was founded by A H Potgieter, with the capital of Potchefstroom being established in 1838/1839, which was later moved to Ohrigstad. This first republic was known as the “Company of the South Dutch Emigrants within the 26th Degree of Southern Latitude behind the Portuguese Harbours” and the Potchefstroom district became a deputy colony of this political entity. This Republic embraced the territory between the Vaal and Vet Rivers and present Botswana (previous Betchuanaland) and Standerton. The Ohrigstad-Smaldeel part of this Republic included Middelburg, Barberton, Lydenburg and Ermelo.

2.2.2 Republic of Potchefstroom (Nov 1838 – 17/01/1852) The capital was Potchefstroom. The territory was former Matabele country under Mzilikazi. The Matabele were dispelled by the Voortrekkers (Boers), led by Hendrik Potgieter, who felt frustrated by developments at Winburg. This was the first Boer republic north of the Vaal River: In 1852, it gained recognition as an independent entity under the name of the Dutch African Republic. The Head Commandants were Hendrik Potgieter (1838 – 1845) and Andries Pretorius (1845-January 1851). The Commandant-General from January 1851 to January 1852 was Andries Pretorius.

2.2.3 The Dutch African Republic (17/01/1852-16/12/1856) was also known as the African Republic or the South African Republic. It became known as the “Zuid- Afrikaansche Republiek” in 1856, a year after Pretoria was founded in 1855.

2.2.4 Zuid-Afrikaansche Republiek (ZAR) (1856-

1877) The capital was originally Potchefstroom (16/12/1856-03/04/1960), and later Pretoria (03/04/1860-12/04/1877). The Presidents involved were M W Pretorius (16/12/1856-01/01/1857) (acting), M W Pretorius (01/01/1857-06/02/1860), Johannes Grobbelaar (06/02/1860- 09/10/1860) (acting), Stephanus Schoeman (09/10/1860-02.04.1862) (acting), W C Janse van Rensburg (02/04/1862-24/10/1863) (acting), W C Janse van Rensburg (24/10/1863-10/05/1864), M W Pretorius (10/05/1864-16/11/1871), Daniel Erasmus (16/11/1871-01/07/1872) (acting), Thomas Burgers (01/07/1872-16/02/1875), Piet Joubert (16/02/1875-04/1876) (acting), Thomas Burgers (04/1876 – 12/04/1877).

2.2.5 Theophilus Shepstone became the Administrator when the Transvaal was annexed by Britain (12/04/1877-08/08/1881) and called it the “Colony of Transvaal”.

2.2.6 The Republic of Ohrigstad (11/08/1845-1846). The capital was Andries-Ohrigstad, established in 1845. Hendrik Potgieter left Potchefstroom in 1845 after the British occupation of Natal and headed northwards, where he bought a new area from the Pedi Tribe and built a new republic around the town of Andries-Ohrigstad, named after the head of a Dutch trading company. In 1846, Potgieter left Ohrigstad to found Zoutpansberg and, shortly thereafter, the small Republic of Ohrigstad came to an end, plagued by fever and the tsetse fly, and he moved southwards to found the territory of Lydenburg.

Owing to the general movement of the Voortrekker descendants to the north-eastern Transvaal in 1845, the founding of Andries Ohrigstad and the transfer of the Volksraad to this town, the centre of gravity moved away from Potchefstroom. The founding of Andries Ohrigstad was meant to bring the new seat of government outside the British sphere of influence, and no further meetings of the Volksraad were held in Potchefstroom, as that area would - after the migration to Andries Ohrigstad - be deemed to be an “adjunct colony” of the ZAR. The sitting of the Volksraad

on 3 April 1849 was the last of the Volksraads of Ohrigstad, and the Volksraad of the ZAR was convened on 23 May 1849 at Derdepoort.

2.2.7 Republic of Zoutpansberg (1849 – 1852). The town of Zoutpansberg was established on 2 May 1848, under the leadership of A H Potgieter. This settlement was later named Schoemansdal. After 1852 it became part of the ZAR, with Potchefstroom as the capital. Schoeman rebelled against the new constitution of the ZAR in 1857, but re-amalgamated with the ZAR in 1858.

2.2.8 Republic of Lydenburg (1856 – 1860). The capital was Lydenburg and the republic was founded due to political and religious differences. In 1858, a formal unification with the inhabitants of the Buffalo River territory (Utrecht) was concluded. In 1860, Lydenburg and Utrecht amalgamated with the ZAR.

2.2.9 Republic of Utrecht (1856 – 1860). This republic, also known as the “Ou Republiek” (Old Republic), was founded by Andries Spies, J C Klopper and C J van Rooyen after the annexation of Natal by the British, with the approval of Panda, the Zulu king. It co-operated with the Lydenburg Republic but became part of the ZAR in 1860. In 1902 it became part of Natal after the Peace Treaty of Vereeniging.

2.2.10 The South African Republic (30/12/1880-05/04/1881). This republic was also known as the “Zuid-Afrikaansche Republiek (ZAR)”, with its capital at Pretoria. The Republic of Heidelberg, only two weeks old, became part of the ZAR again in 1881. It was governed by a triumvirate consisting of S J P Kruger, P Joubert and M W Pretorius.

2.2.11 The Transvaal State (05/04/1881-02/02/1884). The State was also known as the Transvaal Colony and was previously the “Zuid-Afrikaansche Republiek” or the “South African Republic”, with its capital at Pretoria. It was governed by a triumvirate consisting of S J P (Paul) Kruger, Piet Joubert and M W Pretorius until a president could be elected:

S J P Kruger (President Elect) (16/04/1883 – 08/05/1883)

S J P Kruger (08/05/1883-09/1883)

P Joubert (acting) (09/1883 – 02/02/1884)

2.2.12 The Republic of Stellaland (26/07/1882-07/08/1883). This republic was founded, with Vryburg as the capital, by Gerrit van Niekerk when the Boers technically invaded British territory. In 1883 it merged with the Republic of Goosen (Goshen) as the “United States of Stellaland”.

2.2.13 The Republic of Goosen (24/10/1882-07/08/1883). This republic was founded by Gey van Pittius in the eastern part of British Betchuanaland-/Korannaland, with its capital at Rooigrond, and was established on land ceded to the Boers by the Betchuana Chief Moshete. In 1883, it merged with Republic Stellaland to form the “United States of Stellaland”.

2.2.14 The Nieuwe Republiek (16/08/1884-11/09/1887). This republic was also known as the Vryheidsrepubliek and New Republic. It was founded with the capital at Vryheid in North Western Zululand (Northern Natal) by Lucas Meyer. The Transvaal Boers took half of Zululand, incorporating the districts of Vryheid, Utrecht, Wakkerstroom to create the New Republic. In 1887 it was incorporated into the ZAR as the District of Vryheid. In 1902 it was added to Natal after the Peace Treaty of Vereeniging.

2.2.15 The Klein Vrystaat Republic (10/03/1886-02/05/1891). This republic was too small to have a capital as such, and was located in the Eastern Transvaal, south-west of Swaziland. It was founded in 1886 when King Umbandine of Swaziland ceded a small area of his kingdom to F I Maritz and J F Ferreira, two Transvaal officials. When the Republic of Klein Vrystaat was proclaimed, with a population of 72 Boers, it was intended as a first foothold in Swaziland. In 1891, it became Ward I of the District of Piet Retief in the ZAR. It was governed by a triumvirate throughout its entire period of existence.

2.2.16 The Zuid-Afrikaansche Republiek (ZAR) (02/02/1884-31/05/1902). It was initially governed by a triumvirate consisting of Kruger, Joubert, M W Pretorius, but finally by Paul Kruger until the Peace Treaty of Vereeniging had been concluded.

2.2.17 The Colony of Transvaal (31/05/1902-06/12/1906). After the Anglo-Boer War had ended by the signing of the peace treaty of Vereeniging, the Transvaal became a British colony under the administratorship of Alfred Milner.

2.2.18 The Transvaal Colony (06/12/1906-31/05/1910). The Transvaal remained indirectly under the control of Britain, but received responsible government status.

2.2.19 The Transvaal Province of the Union of South Africa (31/05/1910-31/05/1961).

2.2.20 The Transvaal Province of the Republic of South Africa (31/05/1961-1995).

2.2.21 The Transvaal was subjected to subdivision and an incorporation process to form the Provinces of Gauteng, Mpumalanga, Northwest, Northern Province alias Limpopo (1995-present).

3. THE SYNOPTIC VIEW OF TWO CAPITALS

3.1 According to historians, the town of Potchefstroom was not founded where it is now situated. The original Mooiriviersdorp had been established at Oudedorp, some fourteen kilometers down the Mooi River to a position near North Bridge. It is believed that the town of Potchefstroom was founded shortly after Hendrik Potgieter's return from Natal in May 1838.

3.2 By the year 1855, in the whole territory between the Vaal and Limpopo Rivers, there had been only five towns: Potchefstroom (1838), Schoemansdal (1848), Lydenburg (1850), Rustenburg (1851) and Pretoria (1855), compared to the year 1852 when only four towns had existed in the Transvaal, namely Potchefstroom, Rustenburg, Lydenburg and

Ohrigstad (1845). In 1855, when Pretoria was founded as the future capital of what was then the “Zuid-Afrikaansche Republiek” (abbreviated to ZAR), matters relating to the survey and registration of land in that state were still substantially unorganized, and there had been no legislation to define the duties and responsibilities of land surveyors. Pretoria, however, was reasonably centrally situated at the geographical point of gravity in the ZAR, and therefore destined to become the capital.

4. Aspects Of The History Of The Office Of The Surveyor General Of Transvaal

Surveyor-General's Office in existence for 137

Years:

The history of the physical Surveyor-General's Office of the Transvaal, whether as a self-standing government department or subsequently as a subservient component of another government department (Department of Lands, Department of Agricultural Credit and Land Tenure, Department of Public Works and Department of Land Affairs) spans a period of more than 137 years (1870-2007), while the post of Surveyor-General has hitherto been occupied by 24 incumbents over a period of more than 141 years (1866-2007).

Early Constitutional Developments:

To fully understand the circumstances that ultimately led to the appointment of a Surveyor-General and the establishment of a Surveyor-General's Office in the Transvaal, it is beneficial to consider the constitutional developments that have taken place since approximately 1844, subsequent to the initial occupation of the Transvaal by the Voortrekkers during the years 1838/1839, when the “Adjunct Raad” was constituted at Potchefstroom.

This “Adjunct Raad” was granted legislative powers subject to confirmation by the Volksraad of the Republic at Pietermaritzburg. A more formal independent government was heralded by the adoption at Potchefstroom on 9 April 1844 of the “33 Articles” which briefly defined the rules of the court, punishable offences, the duties of medical doctors and government officials, rules for the election of members of the Volksraad and general provisions to safeguard law and order in the new State, which was referred to as “deze maatschappij”. The “33 Articles” called “Artikels” were

subsequently approved by the Volksraad on 23 May 1849. This date is to be regarded as the date of the consolidation of the scattered components of what was then the Republic, constituting “een Vereenigde Bond van de hele Maatschappij aan deze zyde van Vaal Rivier”. Prior to 1844, the government of the Transvaal was based on no organized constitution, and that situation led to much dissent on legal issues among the three main groups of emigrants who had settled in the vicinity of the towns of Potchefstroom in the Transvaal, Winburg in the Orange Free State and Pietermaritzburg in Natal between the years 1836 and 1844 (the year in which the 33 Articles were adopted on 9 April). The old district of Potchefstroom included all of the modern Transvaal, except Lydenburg, Piet Retief, Ermelo, portions of Standerton, Wakkerstroom, Utrecht and Vryheid, while large parts of Zoutpansberg and Middelburg, including the districts of Stellaland and Goosen, belonged to it as well as the territory occupied by Sechele's Bakwena and by Montsuwa's Barolong.

Sand River Convention approved:

The signing on 17 January 1852 of the Sand River Convention guaranteed non-interference by Britain to emigrants residing north of the Vaal River and was approved by the Volksraad on 18 March 1852.

The Constitution of 1858:

The “Grondwet” of the “Zuid-Afrikaansche Republiek” (ZAR), containing more than 200 clauses, was adopted in 1858, and made provision for a “Volksraad” as the highest authority, with a President and Executive Council at the head. Next in descending order of seniority came the Commandant-General, Commandants and Field-Cornets, while a landdrost (magistrate) and heemraden for each district were responsible for the implementation of the judicial functions. Clause 17 of the original “Grondwet” (Constitution) determined that Potchefstroom should be declared the “hoofdplaats” (capital), and Pretoria the seat of government. Hence the Office of the Surveyor-General was to be established in Pretoria, which became the capital on 3 April 1860. The formal transfer of the government to Pretoria occurred on 1 May 1860, after Pretoria had been founded on 16 November 1855.

Establishment of Surveyor-General's Office in 1870:

The establishment of the Office of the Surveyor-General occurred in 1870, although certain officials had acted in

a capacity equivalent to that of Surveyor-General prior to 1866. The term of office of the first Surveyor-General, Magnus Forssman, commenced on 9 April 1866.

Act No. 5 of 1870 made the first provision for the post and the duties of the Surveyor-General, and regulated the activities of land surveyors to a limited extent.

Two Capitals: Potchefstroom and Pretoria:

The first capital of the South African Republic, called the "Zuid-Afrikaansche Republiek" (ZAR) and was founded on 16 December 1856, was Potchefstroom - until 2 April 1860 when Pretoria became the capital on 3 April 1860, and ever since the formation of the Union of South Africa in 1910 it has been the administrative capital of South Africa.

President T F Burgers arriving at Pretoria:

On 1 July 1872, when the parson T F Burgers, 38 years of age, was sworn in as President of the ZAR, he made his acquaintance with the arcadian and ideally rustic town, Pretoria, only 17 years old, which was founded in 1855 by Marthinus Wessel Pretorius, an enterprising landowner acting as township developer in his private capacity, i.e. approximately two years prior to the commencement of his term of office as first State President of the ZAR, on 16 December 1856.

In the midst of his little town, Pretoria, stood the government building, which was the only structure in the Transvaal at all known to the outside world, a ramshackle one-storeyed thatched building, which accommodated the office of the Registrar of Deeds.

In addition, the office of the Surveyor-General's Department was erected on the corner of Church Square and Market Street (now Paul Kruger Street).

Paintings and Photographs:

In a booklet compiled by the Public Relations Office of the City Council of Pretoria, printed in August 1970 by the Co-Operative Press of SA Ltd, a landscape painting depicted - in the foreground - a rustic scene of the area which would become the site of modern Church Square, containing the aforesaid government building together with a few adjoining buildings and the church which was erected on the site of the present Church Square.

This painting was the first known illustration of Pretoria circa 1857, and unmistakably depicted the Daspoort

Range and protruding Magaliesberg as a northerly background. Three prints of actual photographs showing the same government building (also known as the Volksraad Building) were taken at different times over these historic years.

The occasion of a military review parade held outside the old government building in 1877 during the British occupation of the Transvaal, which occurred on 12 April 1877 and lasted until 8 August 1881, was photographed from a north-eastern vantage point situated on the site of modern Church Square, simultaneously capturing various new buildings adjacent and directly south of the government building which must have been erected between 1855 and 1857.

The third photograph of the old government building shows the attentive audience of burghers (male citizens) mounted on their horses during the first swearing-in ceremony of Paul Kruger as State President of the ZAR on 9 May 1883.

In the book "Lost Trails of the Transvaal" by T V Bulpin, a clear drawing in ink of the first old government building on Church Square is unmistakably almost identical to the clear unobstructed photograph neatly printed in the aforesaid booklet.

Old Raadzaal on Church Square:

When Paul Kruger had been elected as President of the ZAR for a second term of office in 1888, he set out to strengthen his administration by, inter alia, appointing Dr Leyds, a Dutch immigrant, as State Secretary.

A showpiece of economic prosperity was the erection of the beautiful government building on Church Square, Pretoria, for which the President laid the corner stone on 6 May 1889.

This was presumably the building known to the people as the "Old Raadzaal", which possibly accommodated all senior government officials, probably including the Deeds Office and Surveyor-General's office at that time, and it has been used for government purposes ever since.

The Volksraad Building, alias the "Ou Raadzaal", was designed by the architect Sytze Wierda, and upon completion during the reign of President Paul Kruger became the first important building in the ZAR, built in

the Italian Renaissance Style.

It was originally designed to consist of two floors only, but because the then two-storeyed Grand Hotel had been built on a nearby site (currently occupied by the Standard Bank Building), the Volksraad in its wisdom decided that the government building (Volksraad Building) had to be made higher. It is, however, uncertain whether the "Old Raadzaal" also accommodated the SGO.

The author has been verbally informed by Mr. D M Keith, who retired from the SGO in 1972 after 25 years of service, that in the 1940s the SGO was housed on the upper floors of the old Plaza Theatre/Cinema Building in Pretorius Street near the south-eastern corner of Church Square.

It is even presently unknown when exactly the Office of the Surveyor-General was moved to the new government building which abuts the equally historic post office buildings situated along the western side of Church Square.

When the Office of the Surveyor-General had been relocated to the new government building, it was referred to as the "New Government Office, Pretoria" (circa 1934/35).

It was occupied by the staff of the Surveyor-General on an unknown date from an equally unknown prior location, and the SG Office occupied a substantial part of one floor, or the whole of a floor ever since it first moved to the central government building.

A lay-out plan of the erven comprising the street block bounded by Church Street, Koch (later Bosman) Street, Vermeulen Street and Palace Street, and indicating the names of land owners, areas, deeds of transfer, as well as the names of the land surveyors who surveyed those erven and placed the erf beacons, had been compiled on 8 November 1922 by the Office of the Surveyor-General, presumably for planning purposes and the acquisition of erven registered in private ownership at the time, and required for the building of the envisaged "New Government Offices". One of these portions had been surveyed by Sam Melvill, then Surveyor-General, in May 1878.

The building was designed by Mr J S Cleland (FRIBA), Chief Government Architect of the Public Works

Department, and the name of Mr O W Staten, Secretary of that department, appears with that of Mr Cleland, but no date had been indicated on the "Foundation Plan" (Drawing No. 6058/2) or the "Ground Floor Plan".

The abovementioned lay-out plan was only issued by the Surveyor-General on 4 December 1929. A report dated 9 December 1929 and a supplementary report dated 27 December 1929, signed by Mr. Talbot, deal in great detail with the position of the property beacons and the setting-out of the foundations of the new building.

From the relevant correspondence, it becomes evident that building operations could only have commenced in 1930, and that the building was erected in phases spread over several years until approximately 1934, the apparent completion date of the project.

It is therefore evident that the Office of the Surveyor-General could only be accommodated in the central government building towards the year 1934/1935, or possibly even later during the early forties of the previous century.

Lack of identity of physical Address:

Random inspection of a number of the closed correspondence files stored in the Surveyor-General's archives as well as those current files stored in the safe room managed by the Registration Section of the Surveyor-General's office in Pretoria, revealed that since 1902 no physical address had been indicated on the letterhead of what was then the Land Department, while the postal address was given as P O Box 436, Pretoria, and telegraphic address as "Boerlands".

In 1906, the postal address was given as P O Box 551, Pretoria. Outgoing correspondence for the years 1904 to 1906 was on letterheads of the Surveyor-General's Department in Pretoria, with the contact address given as P O Box 403, together with the British Royal Crest and Coat of Arms of Britain.

This was the modus operandi until presumably 31 May 1910, when the letterhead contained in bold lettering "Union of South Africa", followed by "Surveyor-General's Office, Province of Transvaal" together with the Union's Coat of Arms and the previous P O Box 403, Pretoria, followed by Telephone No. 189 and Telegraphic address "Surveys", or Telephone: PWD Exchange.

Subsequently, for instance in 1912, the letterhead consisted of the bold heading "Department of Lands, Pretoria" together with the Coat of Arms of the Union of South Africa appearing above the words "Union of South Africa", followed by the telegraphic address "Boerlands" but by a new postal address, PO Box 444, Pretoria.

Correspondence of July 1929 appears on a letterhead entitled "Union of South Africa" under the crest of the Union, followed by "Surveyor-General's Office, Province of Transvaal, Pretoria, PO Box 403, Telephone 1408 Central, Telegraphic Address "Surveys".

It is presumed that a physical address has only been used together with a postal address since the Surveyor-General's Office moved its premises to the central government building in circa 1935/1940, from where it operated for a period of about 65 years.

Staff of Surveyor-General's Office:

The history of the Office of the Surveyor-General has not only been shaped by its physical locality and the buildings that it might have occupied throughout its existence of 137 years, but foremost and more importantly by the multitude of staff members, from the rank of Surveyor-General downwards to Assistant Surveyor-General or Deputy-Surveyor General, Examiner of Diagrams, Professional Assistants, technicians, examiners, draughtspersons, administrative and manpower staff, strongroom assistants, messengers and cleaners who occupied the various posts established to execute the multitude of tasks enabling the SGO to deliver the tangible evidence of the trade in pursuing the legal and statutory obligations and prescriptions relative to the land survey functions coupled with land registration, as defined in relevant legislation in the public interest.

The 24 Surveyor-Generals, together with their supportive staff members, had hitherto been subject to many statute acts, ordinances, proclamations and notices emanating from parliament and provincial administrations, promulgated by a wide spectrum of political ideologies, and served both the State and the public continually in spite of dramatic and far-reaching events affecting the Transvaal and the entire country.

With the appointment of Magnus Forssman on 9 April 1866 as the first Surveyor-General of the ZAR, a tradition of quality and accuracy relative to the survey of land in the Transvaal set the trend for a system of

land tenure and security of title, which became the envy of many countries.

Annexure No. 2, entitled "Instructions for the Surveyor-General", to Act No. 9 of 1891, which was known as the "General Survey Law", provides a general description of the Surveyor-General's Office structure and general information regarding the activities of the staff members.

The incumbent at the time of the promulgation of Act No. 9 of 1891, holding the title of Surveyor-General: Transvaal, was G R von Wielligh, only 25 years of age when he assumed office as Surveyor-General on 8 August 1884 for a period of almost eleven years, spanning the intermediate years between the two Anglo-Boer Wars 1880-1881 and 1899-1902.

Act No. 9 of 1891, the fore-runner of Act No. 9 of 1927:

Act No. 9 of 1891 determined that there should be a Surveyor-General, an Assistant Surveyor-General, and as many land surveyors as should be admitted by the government upon recommendation of the Surveyor-General.

In modern contemporary jargon, these persons would probably include Deputy Surveyors-General and Professional Assistants, as well as land surveyors in private practice.

The Surveyor-General (SG) was responsible to the government and received his instructions directly from the government. The SG was charged with the regulation of every activity pertaining to the surveying and mapping of land, and surveyors admitted to private practice were obliged to follow the instructions of the SG.

The SG was also charged with the duty of examining all inspection reports received from Beacon Inspectors, and general plans submitted to the Executive Council, as well as to submit a report to the Executive Council.

Clause 5 prescribed that, in every survey, and in the framing of each diagram, the Cape or existing standard measure had to be used, and the standard had to be under the control of the SG.

Clause 6 instructed the Surveyor-General to submit an

annual report concerning the General Survey (almost being an orchestrated mass survey of all remaining farms) to the government.

Clause 9 required that, where any farm or piece of land had been surveyed by a surveyor, the diagrams had to be submitted in triplicate to the SG, who had to examine the diagrams and, if found correct, signed them and publish a notice in the 'Staatscourant' (Government Gazette) and approve them if no protest was received.

Clause 11 stated that it shall be the duty of the SG to show the deduction of all subdivisional diagrams of such farms on the original diagrams of farms.

Clause 13 expected the SG to lay down regulations for certain boundary lines.

5. Early Standard Bases At Pretoria And Johannesburg

According to the SA Geodetic Report (1908) Volume V, Colonel W G Morris, Superintendent of Trigonometrical Survey, made use of his survey team to lay down Ground Standards of Length in Pretoria and Johannesburg prior to 1906, during the period when Mr. W H Gilfillan was Surveyor-General of the Transvaal.

Three bases were laid out at each of the following localities:

In Pretoria, along the western passage running in a north-south direction parallel to Bosman Street, of the so-called new Central Government Building bounded by Church Street, Bosman Street, Vermeulen Street and the Main Post Office Building.

The base consisted of bar measures of 50, 100 and 150 Cape-feet.

- At the Pretoria Race Course, where the base consisted of 150, 300, 400, 500 and 600 Cape feet.
- In Johannesburg at Joubert Park, where the base consisted of 50, 80, 100 English feet and 50 Cape feet, as well as a wire measure of 150, 300, 400, 500 Cape feet.

In 1911 the Surveyor-General of the Transvaal decided

to establish a new standard base in the New Law Courts in Johannesburg, owing of the envisaged construction of an art gallery on the site of the standard base laid down by Colonel Morris in Joubert Park.

This new base, in the corridor of the New Law Courts, was copied from the Pretoria base by Dr W C van der Sterr while in private practice, prior to his appointment in August 1919 as Director of Secondary and Tertiary Triangulation. The terminals were established at 0,100 English feet, 100 Cape feet, 150 Cape feet and 300 Cape feet.

The steel tape (measuring band) known as "Bosman's Standard", which was the best-known of all base-measuring apparatus in South Africa for laying down or checking ground standards of length, was checked on 22nd July 1932 against the New Law Courts Base, Johannesburg, and on 2nd November 1932 against the Government Buildings Base, Pretoria.

An example of a surviving standard baseline may today be inspected on the groundfloor of the "Ou Raadzaal" in Pretoria. Its locality has been suitably marked by a brass plaque mounted against the corridor wall.

New Offices:

During the period from 7 to 10 April 2006, the offices of the Surveyor-General as well as the Deeds Registry were almost simultaneously relocated to the Merino Building at corner of Bosman and Pretorius Streets, and this move hails the advent of a new era and a new chapter in the history of these offices.



Transfer Duty: Exemptions From Payment Of Transfer Duty For Land Reform Projects

By: Allen West, Deeds Training, PRETORIA

According to the minutes of a meeting of the South African Revenue Services, the undermentioned Land Reform Projects, when tendered for registration in the Deeds Registry in order to give effect to the provisions of the different Land Reform Projects, do not have to be accompanied by a transfer duty exemption receipt issued by the Receiver's offices.

Sections In Land Reform Legislation Referring To Exemption From Transfer Duty

Land reform legislation has been scrutinized and the following sections referring to exemption from transfer duty have been identified:

RESTITUTION OF LAND RIGHTS ACT (ACT NO. 22 OF 1994)

Section 42 – Transfer duty and fees

(1) The Minister may direct that any transfer duty or other fees payable by a claimant in respect of any transfer of land or of a right in land in terms of this Act shall be defrayed in full or in part from money appropriated by Parliament for that purpose.

(1) Where, in terms of this Act, the Court orders the State to acquire or expropriate land in order to restore or award the land to a claimant. The claimant shall become owner thereof on the date of such acquisition or expropriation.

(2) No duty, fee or other charge is payable in respect of any registration in terms of subsection (1).

Section 42D – Powers of Minister in case of waiver of rights to relief

If the Minister is satisfied that the claimant is entitled to restitution of a right in land, and where that person has entered into an agreement in terms of which he/she has waived any or all of his or her rights to relief under this Act, the Minister may, after consultation with the Commission and or such condition as he or she may determine –

- (a) award to the claimant land, a portion of land or any other right in land and where necessary, acquire such land, portion of land or other right in land; or
- (b) pay compensation to such person; or
- (c) make both an award and pay compensation to such person.

Expenditure in connection with the exercise of the powers conferred in subsection (1) shall be defrayed from monies appropriated by Parliament for that purpose.

LAND REFORM (LABOUR TENANTS) ACT, ACT NO. 3 OF 1996

Section 38(A) – Deeds registration

Transfer duty shall be payable in respect of the acquisition land or a right in land in terms of this Act.

EXTENSION OF SECURITY OF TENURE ACT, ACT NO. 62 OF 1997

Section 4 Subsidies

- (5) No transfer duty shall be payable in respect of any transaction for the acquisition of land in terms of this section or in respect of any transaction for the acquisition of land which is financed by a subsidy in terms of this section.

PROVISION OF LAND AND ASSISTANCE ACT, ACT NO. 126 OF 1993

Section 9 Registration of ownership

- (8) Section 17(1) and (2) of the Deeds Registries Act, 1937 (Act No. 47 of 1937), shall not apply to and no transfer or stamp duty shall be payable in respect of the -
 - (a) transfer of ownership of land referred to in section 2(1); or
 - (b) acquisition of land or the right in land by any person contemplated in section 10: Provided

that section 17(1) and (2) of the Deeds Registries Act, 1937, shall apply in respect of the acquisition of land contemplated in section 10(1)(d).

UPGRADING OF LAND TENURE RIGHTS ACT, ACT NO. 112 OF 1991 (AS AMENDED BY ACT 34 OF 1996)

Chapter 1

2(b) No transfer duty, stamp duty or other fees shall be payable in respect of any such entries and endorsements.

(8) Sections 17(1) and (2) of the Deeds Act shall not apply to and no transfer duty or stamp duty shall be payable in respect of the transfer of ownership of any erf or piece of land in terms of this section.

LAND TITLES ADJUSTMENT ACT, ACT NO 111 OF 1993

Section 10(6)

If a direction was published under Section 5(7), the commissioner shall cause the land, share or portion concerned to be transferred to the person entitled thereto and such land, share or portion shall, subject to the provisions of this Act, be registered in terms of the Deeds Registry Act, 1937 (Act No. 47 of 1937), and shall be exempted from the payment of transfer duty, stamp duty or other fees.

TRANSFER AND DISTRIBUTION OF CERTAIN STATE LAND ACT, ACT NO 119 OF 1993

Section 15 – Duties of the Director-General

(10) A transfer of land, or a share in or a portion of land, in terms of this section is exempted from the payment of stamp duty and of registration and other fees.

GENERAL

In terms of Registrars' Conference Resolution 44 of 2006, no proof is required that VAT has been paid on these transactions.

Interpretation of Section 101(4) of Ordinance 15 of 1986

By: George Tsoetsi, Office of the Chief Registrar of Deeds, PRETORIA

From the outset, cognizance must be taken that where a township register is opened, in respect of land that is subject to a mortgage bond, the effect thereof is to render each erf in such a township subject to the relevant bond.

In this regard, see Section 46(2) of the Deeds Registries Act 47 of 1937, which reads as follows:

“(2) For the purposes of registration of such a general plan, the title deed of the land which has been sub-divided shall be produced to the registrar with the diagram thereof and any mortgage bond endorsed on the title deed and the mortgagee's consent to the endorsement of such bond to the effect that it attaches to the land described in the plan.”

As a corollary, mortgaging land in respect of which a township register has been opened, has the effect of mortgaging every erf still held under the relevant township title.

In short, opening a township register on a farm has the effect of converting a farm into a township, in that, from a registration point of view, the farm ceases to exist. This, in other words, means that once a township register has been opened, it becomes impossible to deal with the former farm as the same ceases to exist.

Turning to the interpretation of section 101(4) of the Ordinance, it will be noticed that the section refers to 'any land situated in the township'.

This, naturally, would include erven and streets in the township, as well as the entire land comprising the township.

It is evident that the entire land on which a township has been established cannot be excluded from the words 'any land situated in the township'.

It must be pointed out, therefore, that mortgaging the farm, now known as a township, would have the effect of mortgaging all the erven in the townships, which fall squarely within the ambit of the words 'any land situated in the township'.

Should the wider interpretation be given to the provisions of Section 101(4), in that a mortgage bond

can be registered over the farm subsequent to the opening of the township register, it would be contrary to the clear provisions of Section 101(4) and, therefore, lead to absurdity, which the legislature could not have intended.

Readers' response will be appreciated. - Editor

In response to this article, the Registrar of Deeds in Pretoria issued Registrars Circular 5 of 2007 which reads, as follows:

Approval of Application for Township establishment in terms of Section 71 or 98 of Ordinance 15/1986

- i. In terms of Section 2(1)(g) of Ordinance 20 of 1986 no consent to subdivision is required where a subdivision of Agricultural Land is registered in order to establish a Township in respect of an application approved under Section 71 or 98 of Ordinance 15 of 1986.

Proof must, however, be furnished that the property is not Agricultural Land as defined in Act 70/1970, and a consent or letter as envisaged in Chief Registrars Circular 6/2002 must be provided.

- ii. Where exemption is granted under Section (1)(g) of Ordinance 20/1986 for Registration of a subdivision, the Township register must be opened simultaneously with registration of the subdivision.
- iii. Where an application for Township establishment has been approved in terms of Section 71 or 98 of Ordinance 15 of 1986 and a Township Register has been opened, but the Township has not yet been declared an approved Township in terms of Section 79 or 103 of Ordinance 15/1986, no further transactions in respect of land in this Township may be registered until the Township is declared

an approved Township in terms of Section 79 or 103 of Ordinance 15/1986 – See Sections 76(4) and 101(4) of Ordinance 15/1986 in this regard. This means that neither the Township, nor part thereof, or any Erf therein may be transferred, mortgaged or otherwise dealt with until it is declared and Approved Township.

- iv. Some Townships have been transferred before proclamation and this was causing tremendous problems. In order to prevent such future mistakes, a caveat must be filed when a Township register is opened, prohibiting dealings with the Township until proclamation has taken place. A copy of such caveat is annexed hereto and must be referred to Interdict Section to be noted against the Township and farm property on which the Township will be opened.
- v. Please note this caveat only applies to Townships established under Ordinance 15/1986. It does not apply to Act 4/1984, Act 113/1991, Act 112/1991 and Act 67/1995 townships.



land affairs

Department:
Land Affairs
REPUBLIC OF SOUTH AFRICA

Amendment Of Transfer Duty Act 40 Of 1949

By: Allen West, Deeds Training, PRETORIA

Section 16 of the Small Business Tax Amnesty and Amendment of Taxation Laws Act (No. 9 of 2006) has amended Section 9 of the Transfer Duty Act of 1949. As from 25 July 2006, divorced and surviving spouses in all types of marriage unions will now be exempt from paying transfer duty on property arising from divorce or death. This follows from the announcement that Finance Minister Trevor Manuel made in his budget speech in March 2006.

Section 9 of the Transfer Duty Act, 1949, has been amended

- (a) by the deletion of Section 9(1)(f); and
- (b) by the substitution of Section 9(1)(i) to read as follows:

“a surviving or divorced spouse who acquires the sole ownership in the whole or any portion of property registered in the name of his or her deceased or divorced spouse, where property or portion is transferred to that surviving or divorced spouse as a result of the death of his or her spouse or dissolution of their marriage or union;”.

The Act also amends the rates of transfer duty, which came into effect on 1 March 2006.

Annual Conference Of Registrars 2006

By: Allen West, Deeds Training, PRETORIA

The Registrars of Deeds from the ten deeds registries (yes ten, because Mpumalanga now also has a Registrar) met in Kimberley to cogitate, contemplate and deliberate over aspects causing headaches to all practitioners and examination staff. In excess of 60 resolutions were taken and have already come into operation vide CRC 17 of 2005, on 2 January 2007.

It will be worthwhile for all persons involved in conveyancing to study these resolutions and to apply them diligently. Copies are available from the Office of the Chief Registrar of Deeds.

NAMES:

George Tsoetsi has discussed some of the resolutions taken by the Registrars (see page 2).



From left to right:

Front row: A van der Ross, N Mantanga, K Pillay, A Stephens, A Sepp

Second row: A Lombaard, L Smit, C Knoesen, Z Rahman,

A Reynolds, J Badenhorst, G Hattingh

Last row: L du Pont, G Tsoetsi, A West, H Geldenhuys, H Basson



Members of Editorial Committee at work

“Oom Hennie” Basson bows out after almost five decades of service

By Kelebogile Modisaemang

After 49 years of service in different Deeds Registries, it was time for Mr. Hennie Basson, the current Registrar of Deeds in Pietermaritzburg, to call it quits. Born in Revielio near Vryburg 65 years ago, Hennie's first qualification was a Legal Diploma in the Registration of Deeds in 1968. At that time Oom Hennie, as he is affectionately known, was already working in the Bloemfontein Deeds Registry where he started his career at the tender age of 16.

Oom Hennie worked in different Deeds Offices during his career including Ciskei, King Williams Town and in Kimberley. In 1991, he started working in the Pietermaritzburg Deeds Office as Registrar. Speaking at a farewell function organised by his colleagues, Oom Hennie highlighted some of the memorable challenges that came across his way while working in DLA. To encourage staff to work independently, to provide adequate and relevant training to officials and advancing people to reach their full potential, was but a few of the challenges he mentioned. When asked how he overcame these challenges, he answered: “I think it was within me”. Oom Hennie sounded like a talented problem-solver who always took pride in his work, subordinates and colleagues. In all these years, maintaining one of the most complete property registration systems in the world and serving the people of South Africa has been enough reward for him. Some of Mr Basson's milestones include, bringing tangible recommendations to regular planning meetings, seeing the deeds registration system growing from a manual to a computerised one, the emancipation of women in the workplace and lending a hand in creating a new South Africa in which all people are equal.

Some of Oom Hennie's personal achievements are mentoring people, meaningfully contributing in team meetings and mastering the legal component of Deeds registration. As he speaks, he gives the impression that he still has what it takes to offer something to his colleagues and the people of South Africa. His last words of advice to his successor and colleagues were jokingly that “they must take care of the deeds registration system and to do their best not to mess it up”! Oom Hennie is still prepared to assist the Chief Directorate: Deeds Registration in any way possible to guarantee a smooth transition between Registrars. On a personal note, Oom Hennie loves music and has been collecting vinyl records for quite some time but confesses that due to his busy work schedule he didn't always get around to listen to them as much as he would like to. He intends to

make up for this during his retirement. His plans for the immediate future includes going on a well deserved holiday with his family, fiddling around with electronics, fixing cars and many other things he did not have time for in the past.

Registrars and other representatives from the Branch Land Planning and Information graced Mr Basson's farewell function. They took turns saying good-bye to a beloved and respected friend and colleague. Most described him as a friend, a brother, a father and an outstanding leader, dedicated civil servant and full of jokes. Mr. Sam Lefafa, Chief Registrar of Deeds, opened the function with a tribute to Oom Hennie as a willing foot soldier who maintained the integrity of the deeds registration system for many years. He continued to say that he has great respect for Oom Hennie, and he invited Mr Basson to pop in to assist or just for a social call as and when he wants to. Brian Mbatha, who will be the acting Registrar of Deeds in Pietermaritzburg and Edmund Sibisi who deputized for Mr Basson on many occasions in the past both said that “he is a humble, intelligent and very friendly man to work with”. They continued to praise Oom Hennie for being a “rare kind of leader who constantly consulted his colleagues before making major decisions”.

They added that Oom Hennie will be missed by his colleagues and clients alike. After all was said and done it was Oom Hennie's turn to speak: “Everyone that I came across in my career touched my life in a special way, even if we differed in the meetings sometimes, we still remained friends and found ways to work out our differences”. Mr Basson continued to say that “one must be able to tell your great, grand children that I built this and that you must be proud of the work you have done throughout your career”. Oom Hennie concluded by saying that: “I sincerely appreciate being employed in the Department for so many years and wish that the good work of this organisation will keep on flourishing in the decades to come.” SADJ wants to join all Mr Basson's colleagues, clients and friends in saying: “Go well Oom Hennie, you will be sorely missed by everyone and we sincerely hope that all your colleagues in the present and those in the past have learnt a great deal from your example to be a dedicated servant of the people”. Goed gaan Oom Hennie!



Cancellation Of Registration Of A Lost Bond

Practice As Laid Down By Pretoria Deeds Registry

By: Allen West, Deeds Training, PRETORIA

The registrar may effect the cancellation of the registration of a mortgage bond of which the client's copy has been lost or destroyed, and of which the registry duplicate has been lost or destroyed, after compliance with the following procedure:

The registrar must, at the expense of the person who purports to be the mortgagee, publish a notice of intent to effect the cancellation of the registration of the relevant bond in two consecutive ordinary issues of the Gazette and in two consecutive issues of a newspaper circulating in the area of jurisdiction of the deeds registry in which the mortgage bond is registered, as well as in the area where the property is situated.

The notice of intent to effect cancellation of the bond must call upon any interested person to furnish the registrar with any objection, if any, to the cancellation of the registration within a period of six weeks after the date of the first publication of the notice in the Gazette.

Should an objection to cancellation be received, the registrar must convey such objection to the person who purports to be the mortgagee and ensure that no cancellation takes place, except in terms of a court order.

After the expiry of the six-week period referred to above, the person who purports to be the mortgagee must lodge with the registrar consent to have the registration of the relevant bond purged from the deeds registry records. The consent must contain an affidavit or declaration stating:

- That the client's copy has been lost or destroyed and the registry duplicate has also been lost or destroyed;
- That a notice of intent to have the registration of

the relevant bond purged from the deeds registry records has been duly published;

- That the client's copy has not been pledged and that it is not being detained by anyone as security for debt or otherwise.

A copy of the notice of the intent to cancel registration must accompany the consent to cancel.

As this is a practice laid down by the Pretoria Deeds Registry, no other Registrar is bound by it. However, the practice could be followed, should such a Registrar also adopt this practice. - Editor

Check-list for the Subdivision of a Section

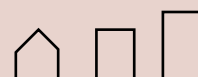
By: Allen West, Deeds Training, PRETORIA

Before an owner can subdivide his or her section, the consent of the trustees of the body corporate must be sought. Should the body corporate withhold such consent, the court may be approached for the necessary authorization.

Once the necessary consent or authorization has been obtained, the necessary draft sectional plan of subdivision must be submitted to the Surveyor-General for approval. After approval of the said sectional plan, application can be made to the Registrar of Deeds.

The following deed(s), document(s) and proof must be lodged with the Registrar of Deeds to register the subdivision of the section:

- Application
The application must be drafted in accordance with prescribed form O and the owner must apply for the registration of the plan and the issue of the certificates of registered sectional title.
- Two copies of the sectional plan of subdivision.



- The client's copy of the sectional title deed, being the subject of the subdivision.
- Any open bonds must be lodged for disposal, i.e. cancellation, release or substitution.
- Certificates of registered sectional title drafted in accordance with prescribed form O, for each new section created.

The conveyancer should link the above documentation in covers as follows:

- Cover No. 1 (Yellow)

Copies of Sectional Plan

- Cover No. 2 (Yellow)

Application and title

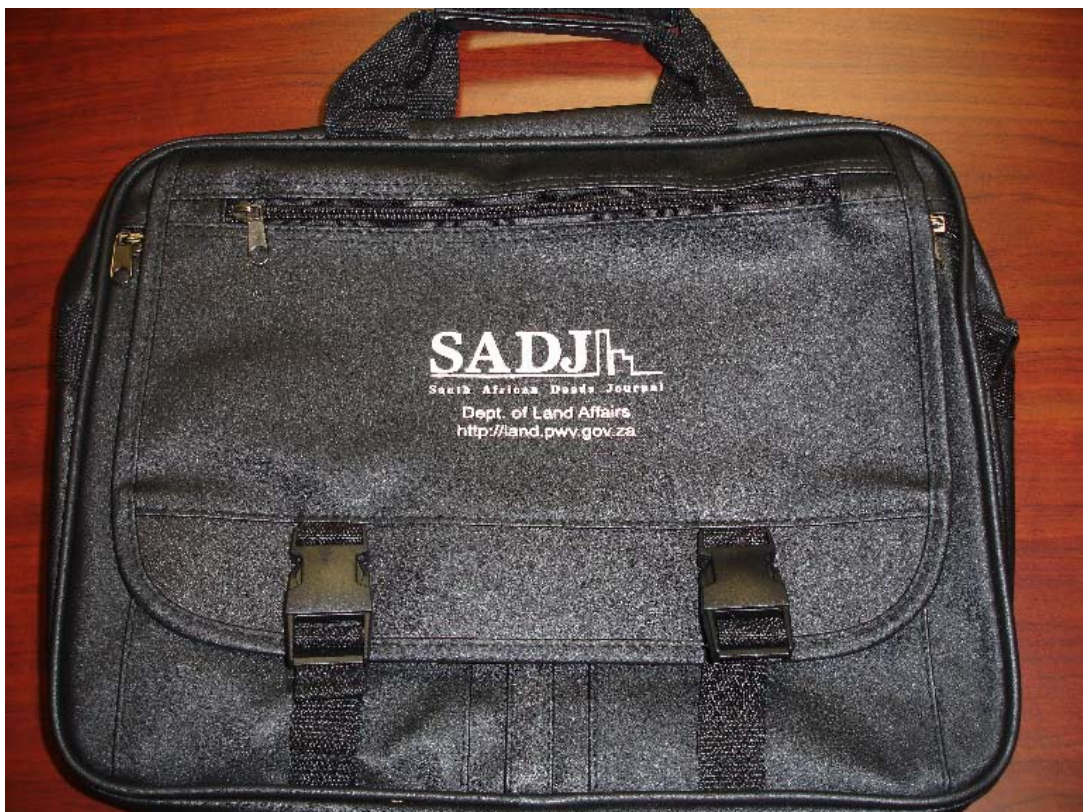
- Cover No. 3 (Yellow)

Bond(s), if any, for disposal

- Cover No. 4 and further (White)

Certificate of registered sectional title for each new section created.

This is the prize for the reader selecting the best article



Above is the prize for the reader who successfully selects the best article as from this issue - remember that the editorial committee's decision is final and that no debate in this regard will be entertained. Nominations must reach the editor within one month of publication.

Training of SGO Officials

By: Allen West, Deeds Training, PRETORIA

The Sub-Directorate: Deeds Training has embarked on the training of SGO officials on matters of mutual interest. The first course was held in October 2006 (see photo), and the second course in March 2007 (see photo). The training is ongoing and will be held in each province where an office of the SGO is situated.



*1st Row w.z Bhuqa (Lecturer), A. West (Lecturer), N.P Mnyandu; MS Mekwe (Lecturer),
2nd Row Z Lombaard (Lecturer); MA Thebe; R Mdubeki; B Nowsad; N Smith; HE Van Zyl; KP Motsoaledi
3rd Row E Maluleke; VN Chacha; K Momberg; E Janse Vn Rensburg; S Jones-Philipson; D De Nysschen; S Ramiah; B Gray*



1. Sydney Mekwe (Lecturer), 2. Cindy Cmchunu, 3. Laura Pinfeld, 4. Spencer Wiggins, 5. Lestrina Sithole, 6. Wiseman Bhuqa (Lecturer), 7. Colin Pow-Chong, 8. Paul Ryan, 9. Marie Grové (Lecturer), 10. Zandré Lombaard, 11. Errol Hartnick, 12. Adele Van Niekerk 13. Russell Ellwood, 14. Cheryl-Ann Ellwood, 15. Julian Williamson, 16. Jonathan Penfold, 17. Andrew Heath, 18. David Engelke, 19. Teresa Vlok, 20. Peter Phillips, 21. Michael Jones, 22. Chris Boonzaier, 23. Terrence Heath

Comment On Affidavits Required For Purposes Of Section 4(1)(b) And Regulation 68(1) Of Act 47 Of 1937

By: Dudley Lee, CAPE TOWN

The practice regarding affidavits required for the registration of the rectification of an error in terms of Section 4(1)(b) of the Deeds Registries Act 47 of 1937 (DRA) and the application for a certified copy in terms of regulation 68(1) of DRA needs a rethink.

The article by A S West in issue No. 10 of the SADJ on the application of Section 4(1)(b) of the Deeds Registries Act states that "although the aforementioned section does not require an application or affidavit, this is established practice". This is true, and so much so that examiners believe that there has to be an affidavit. Deeds are rejected, even by senior staff, on that basis. With respect, simple proof of the error in registration should, given the wording of the section, be all that is required for such a rectification to be made. Admittedly, an application makes for better conveyancing practice. However, established practice cannot usurp the provisions of the Act and the insistence on an affidavit should be relaxed, if not abandoned altogether.

The article also correctly points out that Section 4(1)(b) does not stipulate who may request the rectification of a deed, yet it is also established practice that deeds are rejected if someone other than the owner applies for their rectification. It is a simple fact that with few exceptions, owners of land, mortgagees, etc do not have, except for the spelling of their names and dates of birth (and sometimes even that!), any idea what requirements are involved in the registration of deeds.

The last paragraph of that article begs comment as well. Remember, if you make no mistakes, you make nothing. However, if firm A registered the title and firm B is now instructed to pass a bond over the property and realizes that some error exists in the title, what is there to do? Does he sue firm A? Try to force firm A to attend to the rectification? Blame it on the deeds office and its employees for not seeing the error? Must firm B now attend to the rectification for free? Time is money ... and maybe it is the mad rush to give good service that can sometimes be blamed for the errors! Batho Pele shooting itself in the foot?

As regards applications for the issue of certified copies under Regulation 68(1) of the Deeds Registries Act, it is submitted that conveyancers are responsible for their own misery in this instance. The regulation clearly states that the registered owner or his agent may make the application. It continues to specify an affidavit supporting the application, without specifying who should make that affidavit. Deeds registries insist that the owner must make the supporting affidavit, and conveyancers blindly comply with that view, but that practice does not make sense.

It is common knowledge that by far the majority of title deeds never pass through the hands of the owner, but are retained by the mortgagee. How can an owner in such a case be required to issue an affidavit as to the whereabouts of the title? He cannot know where it is! He believes it to be safe in the custody of the bank. Big mistake! Titles are lost by banks, conveyancers, post offices, couriers, other postal services, but relatively rarely by the owner himself, because he never sees it or has it in his possession. Surely, it would be far better practice to require the mortgagee or conveyancer, or whoever actually could have handled or possessed the title at some time, to issue the supporting affidavit.

What is the opinion of readers? - Editor



land affairs

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Registrars Of All Deeds Registries In South Africa

By: Allen West, Deeds Training, PRETORIA

It is the intention to compile a list of Registrars of Deeds for each Deeds Registry from inception to the present, as part of our history. For this purpose, the various Deeds Registries were approached and the following information was received:

At present, only the following information is available:

BLOEMFONTEIN DEEDS REGISTRY

1905 to 1908 – C Linder
1908 to 1912 – H B Austin
1912 to 1925 – G Denoon
1925 to 1933 – J S Louw
1933 to 1948 – H S Ham
1948 to 1961 – H W S Birch
1961 to 1966 – R L V Corrigan
1966 to 1967 – L J Vosloo
1967 to 1971 – C E Richter
1971 to 1974 – T H Clark
1974 to 1978 – A E Ross
1978 to 1982 – R D du Toit
1982 to 1987 – H C Victor
1987 to 2002 – C S Brink
2002 to date – C C Knoesen

KING WILLIAM'S TOWN DEEDS REGISTRY

1858 to 1861 – J H Bryant
1862 to 1866 – T H Giddy
1866 to 1869 – R Taylor
1869 to 1871 – Colonel Charles D Griffith
1871 to 1872 – T R M Cole – Acted
1872 – C Brownlee
1872 to 1873 – T R M Cole – Acted
1873 to 1879 – J Rose-Innes
1880 to 1881 – E A Judge
1881 to 1882 – W B Chalmers
1883 to 1885 – John Hemming
Percy Nightingale
1885 to 1890 – W B Chalmers
1890 to 1894 – B H Holland

1895 – J C Bayne
1895 to 1900 – E Garcia
1900 to 1912 – W B G Blenkins
1912 to 1915 – C J Sweeney
1915 to 1917 – W G Bellairs
1917 to 1923 – J H O'Connell
1923 to 1924 – C W Broers
1925 to 1928 – H Britten
1929 – V E P Bradshaw
1929 to 1931 – Henry W Drew
1931 to 1933 – J G Freislich
1933 to 1935 – C E Baber
1935 to 1937 – F P van Coppenhagen
1937 – H F Dowling
1937 to 1941 – D M M de Kock
1941 to 1944 – K F Court
1949 – S S Kirsten
1949 to 1956 – C C Cope
1956 to 1960 – R L V Corrigan
1960 to 1965 – R W Weaving
1965 to 1965 – C E Richter
1965 to 1968 – F J B D van Wijk
1968 to 1976 – R J M Jones
1976 to 1978 – A P L Kotze
1978 to 1982 – N P Cleary
1982 – J A Knibbs
1983 to 1990 – C Brink
1990 to date – J L Badenhorst

PIETERMARITZBURG DEEDS REGISTRY

1897 to 1904 - G Lamond
1904 to 1906 - H Millar
1906 to 1926 - A N M Lloyd
1926 to 1939 - P S Lambrechts
1939 to 1951 - C D Gawler
1951 to 1970 - L C H Billet
1970 - Sias Venter
1970 to 1976 - Mr. Barnard
1976 to 1979 – R B Murdoch

1979 to 1980 – Mr. Potgieter
1980 to 1981 – Mr. Fearick
1981 to 1982 – N Cleary
1982 to 1984 – M Kruger
1984 – J D S Schoonbee
1984 to 1992 - A J Hoffmann
1992 to 2007 - H P Basson
2007 to date - vacant

Unfortunately only the above three offices responded. If at all possible, the history of the other Deeds Registries should also be archived. Readers are urged please to confirm the above information and if it is incorrect please to inform us accordingly. - Editor

The Preparation Of The Consent Required For The Performance Of An Act Of Registration With Specific Reference To The Consent To Pass Transfer Given By A Home Owners' Associations

By: George Tsetetsi, Office of the Chief Registrar of Deeds, PRETORIA

The question as to which consents must be prepared by an attorney or a conveyancer or a notary is not a settled issue in the deeds registries and is, indeed, quite complex. This article will explain the issue and suggest the manner in which this topic ought to be dealt with.

Regulation 44(1) prescribes that all consents required for the performance of an act of registration in a Deeds Registry, except where a Registrar has waived compliance therewith in terms of Regulation 44(3), must be prepared by an attorney or a conveyancer or a notary. Regulation 44(3) compounds the problem by granting the Registrar the discretion to waive compliance with Regulation 44(1) in respect of those consents not provided for in the Act or the Regulations. This then means that a consent not provided for in the Act or the Regulations must, unless the Registrar has waived compliance with Regulation 44(1), be prepared by an attorney or a conveyancer or a notary.

From the manner in which Regulation 44 is worded, a reasonable inference, i.e. that all consents provided for in the Act or the Regulations must be prepared by an attorney or a conveyancer or a notary, can be drawn. However, I take the view that only those consents that are referred to in the Act and the Regulations need to be prepared by an attorney or a conveyancer or a notary, except of course the consent of the Master or the

consent of the Minister of Public Works. In this regard, it is obvious that it is absurd to expect those consents to be prepared by the above-mentioned officers. In other words, I do not support the discretion afforded to the Registrar by Regulation 44(3), in so far as it relates to consents not provided for in the Act or Regulations, as it complicates this issue. For example, how realistic is it to expect a consent to subdivision by the Minister of Agriculture or a Local Authority to be prepared by an attorney or a conveyancer or a notary?

A consent by a home owners' association (HOA) is definitely not a consent provided for in the Act or the Regulations and falls squarely within the ambit of Regulation 44(3). The question then is: How should the Registrar exercise the discretion conferred in Regulation 44(3)? I take the view that expecting an attorney or a conveyancer or a notary to prepare a consent by an HOA stretches the responsibilities of those officials too far, and that ought not to be encouraged.

I humbly submit that the rule should be to determine whether the consent concerned is provided for in the Act or Regulations or not. If provided for, then it must be prepared by the officers referred to above, and if not, then such consent need not be prepared by such officers. It should be noted that his proposition discards the discretion contained in Regulation 44(3).

An Historical Outline of the King William's Town Deeds Registry

By: Joanne Dusterhoft, Deeds Office, KING WILLIAM'S TOWN



J Dusterhoft

As with most of the Deeds Registries around the country, the King William's Town Deeds Registry has had an interesting and varied history. It is varied, in that often the Registrar of Deeds in King William's town was required to perform in more than just the capacity of the Registrar of Deeds.

The King William's Town Deeds Registry was established in 1858. J E Montague, of the Cape Deeds Registry was appointed as the first Registrar of what was then British Kaffraria. However, he never assumed duty. J H Bryant acted as Registrar from December 1858 until the end of 1861, when he was appointed as Surveyor-General for British Kaffraria.

From January 1862 to April 1866, T H Giddy was appointed as Registrar of Deeds and was also Master of the Supreme Court for British Kaffraria.

For the period from April 1866 to June 1869, R Taylor was appointed, not only as the Registrar of Deeds, but also as the Civil Commissioner and Resident Magistrate. From this date onwards, the Registrar of Deeds performed in all three capacities.

In April 1893, J C Gie was appointed as the first Assistant Registrar of Deeds in the history of the King William's Town Deeds Registry.

Some forty years later, by 9 January 1933, the present blue-stone building on the corner of Alexandra Road and Queens Road had been completed. Prior to the

construction of the existing Deeds Registry, the Deeds Office operated from the adjacent Magistrate's Court Building.

On Monday 9 January 1933, the Cape Mercury reported the following: "The new Deeds Offices in King William's Town are now completed and were occupied for business for the first time this morning."

The year 1933 was a milestone, not only due to the new building, but also as a result of the first separate appointment of a Registrar of Deeds. In August 1933, C E Baber became the first Registrar of Deeds who did not occupy any other post, save that of Registrar of Deeds.

In 1975 it was rumored that the King William's Town Deeds Office would be relocated elsewhere, but by 1977 this threat had passed.

On 9 May 1986 the Deeds Office was proclaimed a national monument. The historian, Denver Webb of the Amathole Museum had the following to say about the proclamation: "My personal opinion is that the building was proclaimed because the surrounding buildings are all national monuments. The proclamation of the Deeds Office now completes a block of national monuments."

The current Registrar of Deeds, J L Badenhorst, was appointed as such in 1990.

In 1991 the building was extended, due to the addition of a microfilm and data section. In the same year, the records of the office were computerized. In 1994 the microfilming section was established.

The rationalization of the King William's Town, Ciskei and Transkei deeds offices was the next significant event, with this process starting in 1996. Due to the intervention by State President Nelson Mandela, only the King William's Town and Ciskei deeds offices were amalgamated in 1997.

As technology advanced, so did changes in the King

William's Town deeds office. In 2001, the document faxing system became operational. In the latter part of 2002, the document tracking system was implemented.

A major extension of the deeds office building was commenced in July 2003. This extension was necessary to solve the accommodation problem experienced after amalgamation with the Ciskei Deeds Office. The extension of the building was completed in 2005.

It seems appropriate now to look to the future of the King William's Town Deeds Registry.

The year 2006 has seen in the initial phase of the scanning system, i.e. the installation of the server.

Hopefully, the scanning system will be completely operational in 2007.

It has been decided that the jurisdiction area of the King William's Town Deeds Office will be extended by the incorporation of the Eastern Cape land that is currently within the jurisdiction area of the Cape Town Deeds Office.

It is evident that the King William's Town Deeds Office has stood the test of time and is ready for the challenges that still await it.

- See also the names of all the Registrars of Deeds in King William's Town on page 23 (Editor)

Endorsement of Testamentary Trusts

By: Thabo Nqhome, Conveyancer,
Themba Mabasa Attorneys

According to Registrars' Conference Resolutions 1/1974 and 51/1994 ("the Resolutions"), an endorsement made against a title deed, specifically in terms of Section 40 (1) (b) of the Administration of Estates Act, 1965 (Act No. 66 of 1965), as amended, ("the AEA") does not constitute a transfer by endorsement. The Resolutions are in direct conflict with the Holness decision referred to in Paragraph 3 below and, in particular, are contrary to Paragraph (a) of the definition of "trust" in Section 1 of the Trust Property Control Act, 1988 (Act No. 57 of 1988), as amended ("the TPCA").

The relevant provisions of Section 40 (1) (b) of the AEA read as follows:

"(1) If a trustee has been appointed to administer any property of a deceased under a will, the executor shall – (b) cause the terms of the will, or a reference thereto, in so far as they relate to the administration, to be endorsed against the title deeds of such of the property as is immovable, and against any mortgage or notarial bond forming part of the property, and deliver the title deeds and any such bond to the trustee."

In *Holness and Another, NNO v Pietermaritzburg City Council* 1975 (2) SA 713 (N), in his consideration of the effect of a similar endorsement in terms of Section 61 (1) of the Administration of Estates Act 24 of 1913 upon the dominium, Shearer J stated under 718-719 that: "Mr Shaw, for the respondent, contended that it did not have the effect of transferring the dominium to the administrators and referred to the judgement of CURLEWIS, J.A., in, 1928 A.D. 425 at p. 427, a matter in which the Registrar of Deeds contended that where the ownership of trust property is bequeathed to trustees, registered transfer and not the procedure of endorsement is appropriate. This contention was not upheld by the Natal Provincial Division (1928 N.P.D. 214) and the appeal against that decision failed." The learned judge disagreed with Curlewis J.A.'s obiter dictum that: "The Registrar of Deeds erred in thinking that an endorsement could in certain cases transfer the ownership." Shearer J stated further: "In the present case the will contemplates the transfer of ownership. This transfer from the executor to the administrators can only be effected by the endorsement, or by operation of law, in which case

the endorsement registers the rights of ownership thus transferred. I must, therefore, respectfully disagree with the dictum referred to.” Shearer J stated further: “Once the endorsement was made, therefore, the executor was functus officio in relation to lot 199 to the same extent as if he had transferred the property to a legatee

There are other grounds on which the correctness of the Resolutions is doubtful:

Since the property may not be registered as a transfer by the executor of the deceased estate as provided for in Section 39 (1) of the AEA, it is submitted that it (the property) must be registered as a transfer by endorsement by the executor of the deceased estate in terms of Section 40 (1) (b) of the AEA. Thus there must be a transfer!

A transfer to a legatee, which includes a trustee in his/her official capacity, is contemplated in and is exempt from transfer duty under Section 9 (1) (e) (i) of the Transfer Duty Act, 1949 (Act No. 40 of 1949), as amended, (“the TDA”).

A transfer of trust property in pursuance of a will to the persons entitled thereto in terms of the will, is contemplated in and exempt from transfer duty under Section 9 (4) (b) of the TDA.

A trustee, in the circumstances referred to in Paragraph 4.3 above, would not be able to transfer the property unless he/she had previously taken transfer thereof.

Transfer by endorsement is implicitly recognized by Section 11 (1) (b) of the TPCA, which provides that: “Subject to ... Section 40 of the Administration of Estates Act, 1965 (Act 66 of 1965), and the provisions of the trust instrument concerned, a trustee shall – (b) if applicable, register trust property or keep it registered in such manner as to make it clear from the registration that it is trust property.” Furthermore it is clear from Section 11 (3) of the TPCA that “registration” means registration in the deeds registry where the property is situated.

If the legislature did not regard the registration of trust property in the name of a trustee in his/her official

capacity as a transfer, registration of such property would not have been exempted from transfer duty in terms of Section 9 (4) (d) and/or 9 (4) (a) of the TDA.

In Kropman and Others NNO v Nysschen, 1999 (2) SA 567 (T), it was held that a bond had been ceded by endorsement in terms of Section 40 (1) (b) of the AEA. MacArthur J stated under 578: “By endorsing a bond in this manner the executor is divested of his right to deal with the property and thereafter the trustees have the power to deal with it in accordance with the provisions of the will. See Meyerowitz (op cit at para 13.23).”

It is implied in Resolution 1/1974 that, if an endorsement in terms of Section 40 (1) of the AEA constitutes a transfer, the provisions of Section 56 (1) of the DRA would come into play. I do not agree because, in my view, a transfer by endorsement in terms of Section 40(1) of the AEA is “any other circumstance ... in any other law specially provided” contemplated in Section 56 (1) (c) of the DRA. The reader is requested to refer to Section 41 of AEA, which is also pertinent.

According to Resolution 55/1987, the terms of the will are endorsed against the mortgage bond registered over the property of the deceased in terms of Section 40 of the AEA. This not so. As is evident from Paragraph 4.7 above, Section 40 (1) (b) of the AEA requires the endorsement of a mortgage bond “forming part of the property” of the deceased (in other words, a mortgage bond in which the deceased was the mortgagee).

- Republished with permission from Ghost Digest – (Editor)



The Analysis Of The Identity Number

By: Allen West, Deeds Training, PRETORIA

An identity number consists of 13 digits, which are compiled as follows:

1 2 3 4 5 6 7 8 9 10 11 12 13

of which –

- (a) the first six digits represent the date of birth of the person as follows:

Digits 1 and 2, the year of birth; digits 3 and 4, the month of birth; and digits 5 and 6, the day of birth;

- (b) digit 7 indicates the gender of the person, namely the serial numbers 0 to 4, which are allocated to female persons, and serial numbers 5 to 9, which are allocated to male persons;

- (c) digits 8 to 10, inclusive, represent a serial number;

- (d) digit 11 represents the citizenship of the person as follows:

SA Citizen	Non-SA Citizen
0	1

- (e) digit 12 represents the index number 8 under which the person's particulars have been included in the population register; and

- (f) digit 13 is a control figure determined by the computer.



land affairs

Department:
Land Affairs
REPUBLIC OF SOUTH AFRICA

The Applicability Of The Civil Unions Act No. 17 Of 2006 On Conveyancing And Notarial Practice

By: Allen West, Deeds Training, PRETORIA

Only the relevant extracts from the Act pertaining to conveyancing and notarial practice follow:

1. DEFINITIONS

“civil union” means the voluntary union of two persons who are both 18 years of age or older, which is solemnized and registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in this Act, to the exclusion, while it lasts, of all others:

“civil union partner” means a spouse in a marriage or a partner in a civil partnership, as the case may be, concluded in terms of this Act;

“marriage officer” means –

- (a) a marriage officer ex officio or so designated by virtue of Section 2 of the Marriage Act; or
- (b) any minister of religion, or any person holding a responsible position in any religious denomination or organization, designated as marriage officers under Section 5 of this Act;

“Minister” means the Cabinet member responsible for the administration of Home Affairs;

2. OBJECTIVES OF ACT

The objectives of this Act are -

- (a) to regulate the solemnisation and registration of civil unions, by way of either a marriage or a civil partnership; and
- (b) to provide for the legal consequences of the solemnisation and registration of civil unions.

3. RELATIONSHIPS TO WHICH THE ACT APPLIES

This Act applies to civil union partners joined in a civil union.

4. SOLEMNISATION OF CIVIL UNION

- (1) A marriage officer may solemnize a civil union in accordance with the provisions of this Act.
- (2) Subject to this Act, a marriage officer has all the powers, responsibilities and duties, as conferred upon him or her under the Marriage Act, to solemnize a civil union.

8. REQUIREMENTS FOR SOLEMNISATION AND REGISTRATION OF CIVIL UNION

- (1) A person may only be a spouse or partner in one marriage or civil partnership, as the case may be, at any given time.
- (2) A person in a civil union may not conclude a marriage under the Marriage Act or the Customary Marriages Act.
- (3) A person who is married under the Marriage Act or the Customary Marriages Act may not register a civil union.
- (4) A prospective civil union partner who has previously been married under the Marriage Act or Customary Marriages Act or registered as a spouse in a marriage or a partner in a civil partnership under this Act, must present a certified copy of the divorce order, or death certificate of the former spouse or partner, as the case may be, to the marriage officer as proof that the previous marriage or civil union has been terminated.
- (5) The marriage officer may not proceed with the solemnisation and registration of the civil union unless in possession of the relevant documentation referred to in Subsection (4).
- (6) A civil union may only be registered by prospective civil union partners who would, apart from the fact that they are of the same sex, not be prohibited by law from concluding a marriage under the Marriage Act or Customary Marriages Act.

12. REGISTRATION OF CIVIL UNION

- (1) The prospective civil union partners must individually and in writing declare their willingness to enter into the civil union with one another by signing the prescribed document in the presence of two witnesses.
- (2) The marriage officer and the two witnesses

must sign the prescribed document to certify that the declaration made in terms of Section 11(2) was made in their presence.

- (3) The marriage officer must issue the partners to the civil union with a registration certificate stating that they have, under this Act, entered into a marriage or a civil partnership, depending on the decision made by the parties in terms of Section 11(1).
- (4) The certificate contemplated in Subsection (3) is prima facie proof that a valid civil union exists between the partners referred to in the certificate.

13. LEGAL CONSEQUENCES OF CIVIL UNION

- (1) The legal consequences of a marriage contemplated in the Marriage Act apply, with such changes as may be required by the context, to a civil union.
- (2) With the exception of the Marriage Act and the Customary Marriages Act, any reference to -
 - (a) marriage in any other law, including the common law, includes, with such changes as may be required by the context, a civil union; and
 - (b) husband, wife or spouse in any other law, including the common law, includes a civil union partner.

A discussion of the Act and its applicability to Conveyancing and Notarial Practice now follows:

INTRODUCTION

The Civil Unions Act No. 17 of 2006 (hereinafter referred to as the Act) published in Government Gazette No. 29441 dated 30 November 2006, came into operation on 30 November 2006 (see Section 16 of the Act).

AIM OF THE ACT

The main aim of the Act is to provide for the solemnisation of civil unions by way of marriage or civil partnership, and the legal consequences thereof as well as matters incidental thereto. A civil union is defined as being a voluntary union between two persons of the same sex or of opposite sexes, older than the age of 18 and

solemnized and registered either by way of marriage or civil partnership. "Civil union partners" thus have a choice between a marriage or a civil partnership.

APPLICABILITY OF ACT

It is clear from Section 8(6) of the Act, that a "civil union" may only be registered by prospective civil union partners who are not prohibited from concluding a marriage under the Marriages Act of 1961 or the Customary Marriages Act of 1998.

REGISTRATION CERTIFICATE

In terms of Section 12(3) of the Act, the "marriage officer" as defined in the Act must issue to the partners a registration certificate either indicating that they entered into a marriage or a civil partnership. Such registration certificate will serve as proof that a valid civil union exists, should such proof be required by the Deeds Registry.

MATRIMONIAL CONSEQUENCES

A civil union will have the same matrimonial and patrimonial consequences as a marriage concluded in terms of the Marriage Act of 1961. Thus, if the civil union partners refrain from entering into an antenuptial contract and having the same registered in the Deeds Registry, the civil union is one of in community of property and the provisions of the Matrimonial Property Act 88 of 1984 apply mutatis mutandis.

DISSOLUTION OF CIVIL UNIONS

Civil unions can only be terminated by the death of one of the parties or by virtue of divorce in the terms of the Divorce Act of 1979.

DESCRIPTION OF PARTIES AND DEEDS OFFICE PRACTICE

All the provisions of the Deeds Registries Act No. 47 of 1937 and the Sectional Titles Act No. 95 of 1986 can be applied to civil unions and civil union partners.

The same rules applicable to persons married in community/out of community of property (marriages in terms of the Marriage Act, 1961) are applicable to partners in a civil union (i.e. vesting of property);

however, where a "civil partnership" instead of a marriage, as referred to in the definition of 'civil union' in Section 1 of the Act, is registered, the parties must be described as follows:

- in instances where no antenuptial contract has been registered:
 - ABC
Identity Number
 - and
 - XYZ
Identity Number
 - partners in a civil partnership in community of property

- in instances where an antenuptial contract has been registered:
 1. ABC
Identity Number
 - partner in a civil partnership out of community of property
 2. XYZ
Identity Number
 - partner in a civil partnership out of community of property

The same rules applicable to the registration of antenuptial contracts of persons married in terms of the Marriage Act of 1961 apply to the registration of antenuptial contracts of persons married in terms of the Act; and

The same rules applicable to the lodgement of marriage certificates and divorce orders of persons married in terms of the Marriage Act of 1961 apply to persons married in terms of the Act.

AMENDMENT AND UPDATING OF EXISTING DEEDS

The provisions of Section 17(4) and 93 apply mutatis mutandis to deeds registered in the name of a civil union partner prior to conclusion of the marriage or civil partnership.

CHIEF REGISTRARS' CIRCULAR 1 OF 2007

This practice note must be read in conjunction with CRC 1 of 2007.

A Hole?

By: Donald Moore, Attorney, Guthrie & Rushton, Fish Hoek

Chief Registrars Circular 1/2007 clarifies how parties to a marriage or civil union in terms of the Act are to be described in conveyancing and notarial documents and this is to be welcomed.

There may be a gaping hole in the Act (perhaps intentionally so) and clarification may be needed for conveyancers and notaries. According to our common law, if a marriage takes place in South Africa and the husband is domiciled in a country other than South Africa, the proprietary consequences of the marriage are governed by the laws of that country. Of course if he is domiciled in South Africa, South African law will apply.

What then is the situation when both parties to a marriage or civil union in terms of the Act are of the same sex but one is domiciled in, say, England? Are the proprietary consequences of the marriage or civil union governed by the laws of England or South Africa? If both are male, are there two husbands? This would be very confusing. If both are female, there can be no problem, as the rule of our common law could not apply.

I think that the answer is that South African law will apply to the proprietary consequences of such a marriage or civil union, but I would appreciate comments from anyone interested.

One may also speculate as to whether the proprietary consequences of a heterosexual marriage or civil union in terms of the Act, where the husband is domiciled outside South Africa, will be the same as for a marriage in terms of the Marriage Act. Views on this would also be interesting.

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See also the article on the application of the Civil Union Act by Allen West on page 28 infra - Editor

The Children's Act No. 38 Of 2005 And The Age Of Majority

By: Allen West, Deeds Training, PRETORIA

The Children's Act 38 of 2005, which has been published in Government Gazette No. 28944 dated 19 June 2006, has become operative with effect from 2 July 2007.

This Act is very lengthy; however, the only part of the Act which really affects the conveyancing fraternity and the Registrar of Deeds is Section 17.

Section 17 reads as follows:

“A child, whether male or female, becomes a major upon reaching the age of 18 years.”

In view of the fact that this Act now deals with the age of majority, the Act on Majority No. 57 of 1972 is repealed by this Act, in terms of Section 313, read in conjunction with Schedule 4 of the Act.

From Section 17, it is thus clear that male or female becomes a major at attaining the age of 18. However, this Act has not been made effective with retrospective effect and thus persons will become majors at different ages for some time to come.

When the Act comes into operation, persons between 18 and 21 years of age will all become majors.

From a deeds registration point of view and to apply Section 80 of the Administration of Estates Act, 66 of 1965, one will have to determine when the “alienation”, as defined in the said Act, took place, to determine whether the party was a “minor” at such time, but older than 18. Similarly, with the conclusion of antenuptial contracts, one will have to check the date on which the contract was entered into, to determine whether assistance is necessary or not. The mere fact that the person is above the age of 18 does not necessarily mean that no assistance is required.

As already stated, this state of affairs will be phased out in the near future.

This column provides a brief exposition of case law relevant to the conveyancing and notarial practice. However, the cases should be read in toto:

1. SUSPENSIVE CONDITIONS

Murphy and Another v Durie 2006 JOL 18301 (C):

The main question in this case was whether or not the suspensive condition relating to the bond had been fulfilled.

The facts

S (Durie) sold to P (Murphy and another) a property in Somerset West in terms of an agreement dated 5 December 2003, for the amount of R999 000. Clause 13 of the agreement reads as follows:

"This sale is subject to the purchaser obtaining in principle a mortgage bond from a Building Society or Financial Institution to finance this transaction. The purchaser undertakes to sign all papers to permit passage of the said mortgage bond for an amount of not less than R700 000. Confirmation of such mortgage bond having been granted is to be given to (the seller's agent) by no later than 9 December 2003."

On the purchaser's version, the suspensive condition was fulfilled. On the seller's version, the suspensive condition was not fulfilled, and as a result the transaction lapsed. The purchaser obtained an interim interdict preventing the seller from transferring the property to someone else until the question of whether or not the agreement is binding has been resolved. The purchaser then launched this action, an action for transfer of the property to him.

This is what P says happened:

- Prior to the transaction, the purchasers had already obtained an indication from Standard Bank that they would qualify for a bond of R1.2 million;
- After concluding the agreement, on Monday 8 December, he faxed a copy of the deed of sale to one Esther at Standard Bank;

- On 9 December he phoned Esther and was told a valuator had gone out to value the property;
- Subsequently Esther phoned him and told him that a bond for R700 000 had been approved;
- He then telephoned his own estate agent, Tamara-Lee from Cluttons (who had introduced him to the property), to tell her the news;
- Tamara-Lee then phoned him again, requesting him to send her written confirmation of the bond grant, as the seller's agent (Adrienne from Richmond House Properties) required it;
- P phoned Standard Bank again, but was told that the bank's staff was at a Christmas party and that no-one was available to give written confirmation.
- P phoned Tamara-Lee to let her know;
- The next morning, that is, on 10 December (the suspensive condition stipulated due date as 9 December), Tamara-Lee phoned P confirming that she had received a letter (dated 10 December) confirming approval of the bond in principle.

Although P stated this version in his pleadings and a corroborating affidavit by Tamara-Lee was attached to the pleadings, neither Tamara-Lee nor Esther from Standard Bank testified at the hearing. This despite the plaintiff giving notice that they would be called, and despite the matter being postponed twice for Esther to be called.

This is what S says:

Counsel for S did not waste time debating the merits of the events concerning the fulfillment of the bond clause. S's view was simply that P's legal action is a claim for specific performance; as a result the onus to prove compliance with the bond clause was on the plaintiff, P. As P did not call Tamara-Lee or Esther to testify, there was no evidence that the suspensive condition was fulfilled. P's evidence about the alleged conversations were hearsay and therefore inadmissible.

As a result, S applied for absolution from the instance.

The Court's ruling

This is what the court said:

"In my view the suspensive condition was not fulfilled in this case and therefore there is no binding contract ... The deed of sale was subject to the obtaining of a bond from a bank, but not to its approval in principle. Something more than approval of a loan in principle was required in the context of Clause 13. The parties must be taken by the use of their language in Clause 13 to have intended that the plaintiffs were to conclude a binding agreement of loan with a bank. When one looks at letters from Standard Bank, it is clear that the loan was approved, subject to compliance with certain formalities. The letters from Standard Bank do not constitute fulfillment of the suspensive condition. Obtaining of the loan in principle had to be communicated to the defendant's agent by no later than 9 December 2003. This did not take place in the matter. What was communicated was the notification that the bond was approved on 10 December 2003. This did not constitute compliance with a suspensive condition ... The suspensive condition in the present case required a loan to be "obtained in principle" as opposed to "approved" in principle. I think this distinction should be borne in mind in an assessment of the language used in Clause 13.

Upon reflection

Herewith some personal observations and comments on how this case affects conveyancing practice, some of which may have merit, and some of which may not. I try to look at reported cases from the conveyancing attorney's point of view and to formulate 'lessons' from which we can learn so as to avoid similar problems in future. Colleagues' comments are invited.

Comments on the judgement

If the Court's ruling is that the purchaser (being the plaintiff and bearing the onus of proof) failed to discharge the onus of proving fulfillment of the suspensive condition by the due date, I agree. However, if the Court is saying that the condition was not approved because there is generally a distinction between obtaining a mortgage loan and approval of a loan in this context, and the purchaser only received approval, but did not obtain the bond, I strongly disagree. In making these comments, the Court relied on *De Wet v Zeeman 1989 (2) SA 433 (NC)* where, on those facts, the court distinguished between mere approval of a bond and the actual acquisition thereof.

Other conveyancers should voice their opinion, but in my view the words 'obtain' a loan/bond or 'to get approval of a loan/bond' or to 'secure' a loan from/by a bank mean one and the same thing (in the context of the wording of a typical bond clause). We all know the procedure: the purchaser or someone on his behalf applies to a bank and furnishes certain information, and the bank approves or turns down the application. The approval can be conditional or it can be final. Once approved, the purchaser can say he obtained the loan, or he can say that he 'secured the loan' or he can say that the bank 'approved' his loan. In everyday conveyancing practice, there is no distinction between these words, in contrast with what the Court stated in this case. It is possible that under exceptional circumstances there would be merit in making such a distinction, but in general commercial and conveyancing practice no such artificial distinction exists.

I do agree, though, that the words "in principle" are significant. Obtaining approval of a mortgage loan in principle is something less certain than obtaining approval of a mortgage loan. "In principle" seems to suggest that the bank gave the application a hasty overview and made a preliminary decision to approve, subject to later review.

If a bond condition in an agreement requires approval of a mortgage loan 'on the usual terms and conditions of the institution', would the clause be fulfilled if the bank indicates approval "in principle"? I am not sure: it seems to me that the phrases "in principle" and "usual terms and conditions" will need to be examined in more depth. Perhaps colleagues will give their views?

The defense: an afterthought?

The facts in the case seem to indicate that the question of non-fulfillment of the bond condition only arose after the parties had a difference of opinion about other aspects of the transaction, notably unauthorized improvements for which building plans were required. When he discovered that certain improvements made by a previous owner were not indicated on the building plans, the purchaser reported the non-compliance to the building authorities. He insisted that amended plans be provided by the seller and approved by the local authority. The purchaser refused to take 'possession' or to provide a guarantee until this had been done.

The reliance by the seller on the non-fulfillment of the suspensive condition seems to me to have been a 'technical' tactic rather than an initial issue of central importance. And it is precisely this ability of a suspensive condition to become an exit door to a reluctant party that makes the neglect of the due dates for fulfillment a dangerous practice. It is trite law that an agreement lapses in the case of non-fulfillment of a condition by the due date; it cannot be revived by belated compliance.

Improved wording required

The wisdom of hindsight is always easy, but I will still offer it: Many of the difficulties revealed in this matter can be avoided in similar situations by using well-worded bond clauses in agreements of sale. For example, by making 'notice of approval by the bank in writing' a prerequisite, there can be no debate afterwards as to whether oral discussions constituted compliance or not. There are many pitfalls to be avoided in the drafting of a bond clause and special effort should be made by conveyancers and commercial attorneys when drafting them.

Realistic time for compliance

The agreement was signed on a Friday 5 December and the bond (or rather, the loan to be secured by a bond) was supposed to be approved by Tuesday 9 December. Granted, we do not know the full facts but four days (two of them weekend days) seem to be an unrealistic period for obtaining a mortgage loan. Is it any wonder the purchaser was found not to have complied in time? Unless there is a good reason to do otherwise, one would expect the agent to recommend and the parties to agree to a reasonable period for bond granting.

About file notes and evidence about fulfillment of suspensive conditions

It is uncertain why in this case no direct evidence about the crucial conversation between the bank and the purchaser/purchaser's agent was offered.

In addition, no mention is made of any file notes made by the conveyancing secretary or the transfer attorney on the file. It would be interesting to see what, if any, notes were recorded on the file concerning due date for the bond and the alleged events. Ideally there should be evidence on the file (file notes of correspondence)

proving efforts on the part of the conveyancer or paralegal to establish whether and when the bond had been approved. The seller should then be notified of the status and evidence of this notification provided; especially if the loan was not approved/secured/obtained by due date.

Ideally then, there should have been a letter in this file by the conveyancer/paralegal addressed to the purchaser (and the agent and seller should have been copied) dated 9 December 2003, stating "I confirm your advising me that the required loan/bond for R700 000 has been /has not been granted." Transfer attorneys who do not have a standard practice of monitoring compliance with conditions in every transfer and who do not inform their sellers of non-compliance, risk opening themselves to negligence claims from a variety of sources.

What if oral approval was obtained?

Let us assume for the purposes of the argument that someone at Standard Bank telephonically communicated the approval/obtaining of a loan of R700 000 to the purchaser or the purchaser's agent on 9 December. No one else was informed. Would the suspensive condition be fulfilled?

I think not, but the reason for non-compliance would not be the lack of written confirmation – this particular bond clause does not require written confirmation – the reason would be that the confirmation was not 'given to Richmond House Properties (the seller's agent)'. Would it have been sufficient if the purchaser had phoned the seller's agent on 9 December and communicated the bank's approval of the loan? Judging by the wording of the clause, I think it would ...

On the discrepancy between the alleged oral approval and Standard Bank's letter: it is in theory possible that Standard Bank did approve the loan orally on 9/12 but that the date of 10/12 was reflected on the paper work due to the bank only processing it on that day (remember the Christmas party). If the significance of the date was not realized, I think it is possible that such a thing could happen. The mere fact that the paper work reflected the date of 10/12 instead of 9/12 would then, to my mind, not necessarily render the suspensive clause unfulfilled.

Of course all of the above is, in the absence of evidence,

mere speculation. In this case, as in many other conveyancing matters, the precise facts are crucial.

Conclusion

The bond clause in an agreement of sale of land can cause misery if poorly drafted or if factual disputes arise as regards its fulfillment. To eliminate problems, a reasonable due date for compliance must be stipulated in the agreement, and the transfer attorney ought to monitor fulfillment in co-operation with the estate agent. It is better to act before the due date; take timeous steps to try to avoid lapsing of the contract, for example by getting the parties to agree to an extension in writing. On fulfillment or non-fulfillment of the condition, the seller and other interested stakeholders should be notified. If there is any doubt as to how the clause should be interpreted or if the approval by the bank is conditional, the conveyancer should apply his or her mind to the legal consequences and should take steps to minimize risks for the client and the firm.

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2. NOTARIAL TIE AGREEMENTS

Pocock v D'Oliviera 2006 JOL 18407

This case relates to notarial tie agreements, demands for transfer, mistaken belief, and the need to study the conditions clause.

The facts of the case are as follows:

- D'Oliviera ("D") owned two erven, Erf 5554 and Erf 5555 Kensington (Johannesburg), each 495 square metres in extent.
- The erven were held by separate title deeds, but both deeds contained a title condition (with reference in the title deed to a 1938 notarial agreement) to the effect that the two erven comprised a 'block' and that only one residence could be built on them; the two erven were de facto treated as one stand; erf 5555 is landlocked, with no separate access to the street.
- A creditor of D'Oliviera attached one of the two

erven, Erf 5554, and caused it to be sold by public auction to one Du Plessis. (The creditor was the City Council, in respect of D'Oliviera's arrear rates). Pocock purchased the erf from Du Plessis (presumably a tripartite agreement was concluded) and it was transferred to her by the sheriff in December 2001.

- She was perhaps not aware at the time that the land comprised two erven and that she had really only acquired ownership of one of the two stands.
- A few years later D'Oliviera applied to court stating that he is the owner of Erf 5555 and asked for an order that he be granted a servitude of right over Pocock's erf in order to gain street access. This application is still to be decided upon.
- In response Pocock brought this application to the WLD division of the High Court, for a declaratory order to the effect that the erven are notarially tied and for an order that D'Oliviera transfer the erf to her.
- D'Oliviera opposed the application. He was firstly of the view that Pocock's claim, if any, prescribed (Erf 5554 was transferred to her in December 2001; this application was brought February 2006). He further defended the claim on the basis that Pocock's interpretation of the notarial agreement was incorrect. He also stated that the applicant has no factual or legal basis on which to claim transfer.

The findings

The issues before the court were therefore to decide whether the properties were in fact notarially tied and whether Pocock was entitled to transfer of Erf 5554 into her name. The Judge said NO to both questions and dismissed the application.

Discussion and comments

Is there a notarial tie agreement? The court says no, I think there is. Jahbay J did not find it necessary to deal with the question of whether the claim prescribed. I am not sure whether this was the correct approach.

Instead, he proceeded to rule that the present situation did not constitute a typical notarial tie situation, where the two erven are to be dealt with as one. The reason for

his finding (after considering evidence of what a notarial tie agreement in this context really is) was phrased as follows:

“In the present matter such notarial tie agreements have not been concluded. The properties have not been consolidated into a single erf. A notarial tie agreement, by its very definition, requires the agreement to be in writing, between the owners of the respective erven and the local authority (my underlining)”.

With respect, I beg to differ from the above finding by the learned judge. Firstly, the typical notarial tie agreement, as it is often used in the Johannesburg/Gauteng region, is concluded precisely because consolidation of the property has been deemed undesirable or unnecessary under the circumstances. Notarial ties are popular in cases of small erven, where building line restrictions are relaxed and a single residence is built over the boundaries of one of the erven. As a condition for allowing this, the local authority will insist on consolidation or at least a notarial tie agreement. The ruling by the Court in this matter – that because the properties have not been consolidated (I use the word in the conveyancing-technical sense), a notarial tie agreement has not been concluded – is not a sound one.

[The use of the term ‘notarial tie’ in this context is not to be confused with the use of the word as it is sometimes used in sectional title matters, especially in Cape Town, where an exclusive use area (or a section) is ‘notarially tied’ to a specific section so that the two cannot be sold separately from one another.]

Secondly, the judge’s finding that no such agreement has been concluded, as far as I can see from the facts, is incorrect. The 1938 notarial agreement concluded between the previous owner of both erven, Venter, the township owner and the Council, is that agreement. It has the effect of notarially binding the destinies of the two erven together. They were meant to be used as a block and not to be separated, if not in ownership then certainly in nature of use. This, to my mind, is precisely what the classical notarial tie agreement does. (Granted, the word “tie” appears not to be used in the agreement – maybe the word was not in use in 1938?). That agreement has been brought forward as a title condition and is binding on successors in title, in the present case Pocock and D’Oliviera.

Whether or not the right words were used, there is no doubt in my mind that the intention in 1938 was and still is, that the two erven are to be used as one entity of land. Pocock has presumably used it as such since she bought ‘the property’. Surely every other owner right back to 1938 and perhaps even beyond used it in this way? Until this interesting ‘split’ in ownership of the two erven, they have always belonged to the same owner. No residence can, in terms of the title conditions, be built on D’Oliviera’s stand. To grant access to that stand from the road (for what – to be used as a vegetable garden?) by means of an imposed right of way over an already very small stand seems to me unreasonable and contrary to the intention of the township owner, the local authority and the owner, Pocock.

Acquisition of ownership by prescription, and accession

Pocock’s counsel argued on her behalf that she is entitled to transfer as a result of acquisitive prescription (the 30 years’ uninterrupted possession requirement). Jahbay J correctly found, I submit, that the requirements for acquisition by prescription were not met in the present case. I further agree with the judge’s finding that the argument of accession has no merit in these circumstances.

Pocock’s mistaken belief that she purchased both properties: who is to blame?

Who is to blame for the present difficulties, and how could this have been avoided?

The judge has the following to say: “The applicant’s mistaken impression can be attributed to her not diligently investigating the property, the warrant of execution, the conditions of sale, the sale agreement between her and Du Plessis (the person who bought at the auction and sold it to her) and finally the title deed of the property.”

This is true, of course. An experienced buyer would also have seen, on the date of signing, that the property description mentions an erf of 495 square metres, whereas the property she took occupation of was clearly larger than that. But Pocock, presumably a novice in matters of conveyancing and legal relevance, would have relied on the transfer attorneys to ensure that all legal requirements had been met and to notify her of

potential prejudicial factors. Should one not perhaps ask whether the transfer attorney had a responsibility to read the conditions clause and to have made enquiries as to why the other erf was not also transferred to Pocock?

Maybe it would be too harsh to impose such an obligation on the average, reasonable conveyancer. On the other hand, the conveyancer acting for the Council/ Sheriff in effecting the transfer ought to have known the history of the property and ought, perhaps, to have been more diligent in considering the effect of the notarial agreement. A simple deeds search on the name of D'Oliviera would have shown that he owned both erven (erven 5554 and 5555) and a reading of the conditions clause would have provided cause for wondering why only one of the two notarially linked properties was being transferred. It can be argued that the reasonable conveyancer, aware of the existence of the 1938 notarial agreement, would have realized that such a transfer would lead to a breach of the title conditions and would have foreseen the present difficulties in the case of separation of ownership of the erven.

Clearly a comedy of errors contributed to Pocock's unfortunate dilemma. I submit, however, that a simple deeds office print-out coupled with a careful reading of the title deed conditions could have prevented the problem. One could argue that the Council's litigation attorneys also erred in not attaching both properties. It is not clear from the stated facts, though, that this is indeed the case – perhaps both erven were attached.

Although the issue was not addressed in the judgement, there is the theoretical possibility that Pocock can seek recourse against the seller, Du Plessis (misrepresentation, mistake?) but there are insufficient facts available to consider the merit of such action here.

Is there any basis on which Pocock could demand transfer of D'Oliviera's erf? The Judge says 'no' and I agree.

Assuming that Pocock initially knew nothing about the problem, I cannot help but feel sympathy towards her. She faces an unenviable dilemma. Firstly, half of what she thought she owned, she does not own, and she cannot be too pleased about handing over her garden to D'Oliviera. Secondly, she will now potentially also

have to endure a servitude of right of way over her small stand in D's favour (unless the court hearing that application considers more favourably the effect of the nature and purpose of the notarial agreement).

However, the judge is right when he says: "The applicant is effectively requesting the Court to order that the first respondent transfer to her erf 5555 simply because, on her interpretation of the restrictive title conditions, the one erf could not be sold without the other. In doing so, the applicant tries to elevate a restrictive title condition contained in the notarial agreement and subsequent title deeds being limited real rights, to real rights granting her ownership of the property. This construction ignores the fundamental difference between the two types of rights. In fact [sic] it is only the first respondent that can pass legal title in the circumstances of the present case to the applicant."

Even assuming, then, that there exists a valid notarial tie agreement, which imposes a restriction on separating ownership (or use) of the two erven, that fact does not in itself grant to Pocock any legal entitlement to demand transfer of D'Oliviera's property. What needs to be done to remedy the breach of the notarial tie agreement and title conditions is not certain. The Council and/or township owner (or its successor, if any) will probably need to consider the issue and decide on a course of action.

Conclusion: lessons for conveyancers

In the meantime, all conveyancers and conveyancing paralegals can learn from this. In all transfers (and also bonds):

- obtain and carefully study the necessary deeds office print-outs (for property, seller and also for purchaser if the purchaser is reflected in the deeds office records);
- always read, with concentration and an awareness of general unknown risks, the conditions clause (and endorsements) in the title deed;
- in Cape Town there is the added dimension of the need to know about conditions in deeds registered before the 'pivot deed', although in practice this rarely presents problems.

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3. CANCELLATION OF DEED OF SALE

Chestnut Hill Investments v 169 Stamford Hill Road [2006] JOL 18330 (D) –

The case revolved around a case in which an agreement of sale of immovable property makes no provision for a guarantee date and the purchaser stalls in furnishing it. What must be done before the seller can cancel the agreement?

In terms of the law, the seller/conveyancer needs to place the purchaser in mora, give him reasonable time to rectify the breach and, if he does not rectify the breach, he can cancel. No surprises here – this has been the law all along. But see how this has turned out in practice, in this case.

The facts of the case are as follows:

The seller in this case cancelled – or rather purported to cancel – the agreement due to the purchaser’s failure to provide an acceptable guarantee for the purchase price after being placed on terms to do so. But the purchaser argued that the purported cancellation was not effective and applied to the court for a declaratory order that the agreement was still valid and binding, and that he was entitled to transfer of the property.

For those of you in a hurry, I will not keep up the suspense: The court (Southwood, AJ) found that the seller did succeed “albeit in a confused and inept way” in putting the purchaser in mora, and did effectively cancel the agreement. (I thought the ‘inept’ comment somewhat unfair, given the facts, but it is true that we must all remember the finer nuances of law that we sometimes overlook in the pressure of everyday conveyancing life.)

A brief discussion of the case follows below, but in the meantime here is a summary of the lessons that I learned from the case:

- Those who draft agreements of sale for immovable property must remember to insert a due date for furnishing guarantees. If such a date is not furnished it causes tremendous difficulties and could, like in the case under discussion, result in costly and lengthy litigation.
- An attorney dealing with an agreement which makes no provision for a guarantee, and where the purchaser fails to provide the required guarantee,

will first need to clearly place the purchaser in mora. If a purchaser is not duly placed in mora, any subsequent cancellation letter is void.

- Remember not to ask for the guarantee too soon: This may be premature and jeopardize all further attempts to enforce or cancel the agreement. In the unfortunate event of an agreement not making provision for a due date for guarantee, the prevailing law is as set out in Hammer vs Klein 1951 (2) SA 101 (A), as discussed, interpreted and applied by various subsequent cases.
- Be sure to study the breach clause in the relevant agreement and make sure of full compliance when sending “place you in breach” letters or cancellation letters to a party to the contract.

Hammer’s case provides: “In such a case, the date on which the buyer is obliged to provide a banker’s guarantee depends upon the date on which the seller will be able to lodge the documents required for transfer with the Registrar of Deeds. The seller does not require the banker’s guarantee until he is ready to lodge.”

This position is highly unsatisfactory, viewed from a transfer conveyancer’s prospective. Be this as it may, this is the prevailing law, and a good reason for ensuring that due dates for guarantees are inserted into the agreement.

Summary of case

- On 1 July 2004, the company known as 169 Stamford Hill Road (“S”) sold the remaining extent of erf 1436 Durban to Chestnut Hill Investments (“C”) 150 Pty Ltd.
- The agreement provides for a purchase price of R950 000 and Paragraph 2.2 states that the purchase price is to be provided by obtaining a loan from an acceptable financial institution “... which the parties record has already been obtained”. Nowhere in clause 2 is any specific mention made of a guarantee for payment of the purchase price.
- Paragraph 4 of the agreement reads as follows:
 1. The seller appoints conveyancers, J ... to attend to the registration of transfer.
 2. The property must be transferred to the purchaser as soon as possible after the purchaser has delivered the guarantee

referred to in 2 and paid the costs referred to in 4.3.

3. The purchaser shall pay the costs of the transfer, including transfer duty or VAT (if applicable) within seven (7) days after being called upon to do so by the conveyancers.
 4. The parties shall, on request by the conveyancers, sign any documents required in connection with the registration of transfer.
- Note that clause 4.2 states that there is a reference to a guarantee in Clause 2, but clause 2 does not mention such a guarantee.
 - Clause 11 of the agreement reads as follows:

“11. CANCELLATION FOR BREACH

11.1 Should either party commit a breach of this agreement and fail to remedy the breach three (3) days after receiving written notice to do so, then the other party will be entitled, without prejudice to any other remedy it may have, to cancel the agreement by giving written notice to that effect to the other party.

(No notice will be required if the purchaser fails to furnish the guarantee referred in in 2.1) (my emphasis).

- 11.2 Any notice sent to either parties pursuant to the agreement by way of a prepaid registered post addressed to the parties chosen domicilium shall be deemed to be received by the parties four (4) days after the posting thereof. Any notice delivered by hand shall be deemed to have been received on the day of such delivery.”
- Note that this breach clause makes reference to the guarantee in Clause 2.1, but Clause 2.1 bears no such reference. For 11.1 to become operative, there must first be a breach of the agreement. Secondly the breach must be followed by written notice to remedy the breach; and thirdly the notice to remedy must be followed by three (3) days during which there is a failure to remedy the breach complained of. Only if these three events occur a right to cancellation of the agreement arises.
 - The words “no notice will be required if the purchaser fails to furnish the guarantee referred to in 2.1” was found by the Court to mean that if the breach by the purchaser involved the

purchaser being in mora due to non-delivery of the guarantee, it was not necessary to give three days in which to remedy the breach. In such a case (in other words as soon as the purchaser was in mora), the agreement could be cancelled by written notice.

- The court found that the following rationale existed for this special treatment (no notice required, as soon as in mora may cancel) relating to breach of guarantee:
“... payment of the purchase price is the most important obligation imposed on the purchaser, and failure to provide for payment by a guarantee is a breach of the purchaser’s most fundamental obligation. Thus the words in brackets provide both an incentive to the purchaser to be prompt in ensuring performance of this most important obligation, and a means for the seller to escape more quickly from a purchaser who fails promptly to make a proper provision to pay.”
- The court then discussed three cases which have a bearing on the matter, namely *Hammer v Klein* 1951 (2) SA 101 (A), *Linton vs Corser* 1952 (3) SA 685 (A) and *Wehr vs Botha* 1965 (3) SA 46 (A). Even though an agreement does not expressly oblige a purchaser to provide a guarantee for the purchase price, and if no due date for it has been specified, the seller is entitled to ask for a guarantee (how else can he trust the purchaser to deliver payment against transfer?) but the seller cannot ask for this guarantee before a certain time in the transfer process.
- In the *Hammer* case, the rule was laid down that the buyer’s obligation to provide a guarantee depends on the date on which the seller will be able to lodge the documents required for transfer in the Deeds Office. *Linton’s* case tempered this rule somewhat by stating that there is no duty incumbent on the seller to inform the buyer of the exact date when he proposes to lodge. The rule is sufficiently complied with if it is obvious to the purchaser on receipt of the demand that the seller is in a position to take immediate steps to give transfer and will do so, as soon as he is furnished with a satisfactory guarantee. In *Wehr vs Botha* it was found that there may sometimes be good reason for a seller to call for a guarantee at an earlier stage, for example when a seller ‘parts with any possession’ before transfer or in case of another act which may cause him prejudice if he is not eventually paid.

- Despite the statement in Clause 2.2 of the agreement that the loan had already been obtained, it became apparent to the transfer attorneys during the course of administering the transaction that the loan was still to be obtained from a company called Business Partners (Ltd). The conveyancers contacted Business Partners who informed them that it required the sale to be advertised in accordance with Section 34 of the Insolvency Act. The conveyancers did this shortly before 6 August 2006 despite expressing a view that Section 34 was not applicable and that S, the seller, had no contractual obligation to do so.
- On 6th August the conveyancers wrote to C (the purchaser) insisting that they receive written confirmation from Business Partners that all the requirements have been met and that they were ready to proceed with registration of a bond. They stated in their letter: "We can unfortunately not tolerate any further delays in registering and, should the matter not be expedited, we will have no option but to give effect to the cancellation of the sale and give you notice to vacate the premises on a monthly tenancy." This letter does not contain an explicit demand for a guarantee and as such cannot be said to have placed the purchaser in mora.
- Also on 6 August 2004, the conveyancers received notification (the usual "letter from bond attorney to transferring attorney") from another firm of attorneys that they were attending to the registration of the relevant mortgage bond.
- On 18 August 2004, the conveyancers wrote to the bond attorneys enclosing their draft deed and containing the usual conveyancing provisions. As the judge put it, "thus the arrangement for the registration of the mortgage bond and payment of the purchase price were put in hand".
- On 17 August 2004, the conveyancers wrote to C asking for the company documents as well as a copy of the VAT registration certificate and other relevant conveyancing documents. They also said in their letter: "We call upon you in terms of Clause 11 of the agreement, which will be enforced should the above not be provided within three (3) days as stipulated in this clause." In other words, the conveyancers placed the purchaser in mora with regard to furnishing the personal documents required for conveyancing purposes.
- In the same letter, the conveyancers called for payment of costs "in terms of Clause 4.2 of the

Sale Agreement which indicates that we need payment of the transfer costs within seven (7) days from the date of this letter."

- On 2 September 2004, the conveyancers wrote to C stating that, despite an undertaking to that effect, the name and identity number of the person who would be signing documents on behalf of C had not yet been furnished and neither had costs of transfer been paid. The conveyancers gave three days' notice in terms of Clause 11.1 in regard to these items.
- On 9 September 2004, the conveyancers sent C various documents for signature and asked for their return duly signed and for payment of costs of transfer. Various telephone conversations took place and there are file notes confirm this.
- By 28 September 2004, the position was that the documents had still not been completed and that the costs of transfer had still not been paid. The conveyancers wrote a letter to C pointing out these facts and stating that they had cancelled the agreement.
- This drew a reply from C's attorneys dated 30 September 2004. C's attorneys stated that the conveyancers had prematurely tried to force their client's hand and that their client would shortly be in a position to "attend to the necessary". It also confirmed that certain documents had been delivered.
- By 20 October 2004, the only acts still outstanding/necessary to enable lodgement at the Deed's Office were:
 - (a) C giving its VAT number to the conveyancers;
 - (b) payment by C of its share of rates; and
 - (c) C's completion of the documents needed to register the mortgage bond in favour of Business Partners.
- On 20 October 2004, the conveyancers faxed the bond attorneys and asked them to "please advise when we may receive the guarantee as required in our letter to you dated 18 October 2004". The conveyancers on the same day also faxed C stating that they were still waiting for the VAT number to get the transfer duty exemption certificate as well as payment of C's share of rates of R10 000.
- By 5 January the only outstanding items were the furnishing of C's VAT number and the furnishing of a guarantee. C's representative had by then signed all documents required for registration of

the bond, with the bond attorneys. By 5 January 2005 both transfer attorneys and bond attorneys were ready to lodge their bond documents.

- Then came the important letter in this case. On 5 January 2005, the conveyancers wrote to C the following letter:-

"We refer to the above and note that we are still not in receipt of your VAT number nor payment of the purchase price or guarantees securing same despite numerous requests, both written and telephonically.

This transaction has been going on for seven months and we are no closer to registering the transfer. We now have been instructed that the sale will be cancelled should we not receive payment of purchase price or guarantees securing same and your VAT registration number.

In this regard we draw your attention to Clause 11.1 of the agreement of purchase and sale which reads as follows:

'should either party commit a breach of this agreement and fail to remedy the breach (3) three days after receiving written notice to do so, then the other party will be entitled, without prejudice to any other remedy it may have, to cancel the agreement by giving written notice to that effect to the other party' (no notice will be required if the purchaser fails to furnish the guarantee referred to in 2.1).

Due to your failure to comply with the above-mentioned clause, we have been instructed to give you notice as we hereby do that, unless you remedy such breach within three (3) days of date hereof, the seller shall have no alternative but to exercise its rights as set out in Clause 11 of the aforesaid agreement.

We look forward to hearing from you as a matter of extreme emergency."

- (**Dear reader: do you see the problem with this letter? If not, then you and I may easily have made the same mistake: The conveyancer assumed that the purchaser was already in breach and intended this to be the letter demanding rectification of breach. The purchaser was, however, not in breach, due to there being no specific due date for guarantee in the agreement, and due to it not having been placed in mora. The conveyancer

should first have placed it in breach (by writing a letter demanding delivery of guarantee within a specified reasonable period. Only once the purchaser was in mora, could the conveyancer write the 'breach letter' in terms of Section 11 of the agreement.)

- On 6 January the conveyancers received the applicant's VAT number.
- On 7 January the bond attorneys sent a guarantee dated 7 January 2005 to the conveyancers. The guarantee was for the right amount and contained the three usual conditions for transfer, namely (a) cancellation of all bonds (b) transfer into the name of the purchaser, and (c) registration of a new bond. However, it contained a fourth condition which read as follows:-
"1.4 Advertising of the sale in terms of Section 34 (of the Insolvency Act No.24 of 1936 and expiry of the thirty-day period referred to therein)"
- On 10 January the conveyancers wrote to Business Partners, to C and to the bond attorneys. In the letter to the bond attorneys and to Business Partners they stated that they had already – despite their own views on the legal necessity of the matter – complied with this request months ago and that they were not prepared to re-advertise in terms of Section 34. They then said: "In the circumstances we do not accept your conditional guarantee and have confirmed the cancellation of the sale with Chestnut Hill Investments."
- The letter to "C" read:
"We refer to the above matter and attach herewith correspondence from Business partners received from your bond attorneys and our reply thereto. You will note we have received a conditional guarantee from Business Partners which does not accord with the agreement between our client and yourself and in the circumstances we confirm the cancellation of sale as per our previous correspondence."
- C received the letter addressed to it. C's attorneys wrote to the conveyancers on 11 January stating that C had acted in terms of the agreement and requesting that transfer be registered.
- On 13 January 2005, the conveyancers answered this letter as follows:-

"We refer to your fax of 11 January 2005.

The agreement was signed in excess of seven months

ago and your client is the author of its own misfortune. Your client has been placed on terms on several occasions and the goal posts are always shifted, a situation which has now ended with the cancellation of the agreement.

Our client believes that it has validly cancelled the agreement and we suggest that you point us to the clause in the agreement wherein our client agrees to accept the conditional guarantee or for that matter any guarantee for payment of the purchase price. We further call on you to point us to the clause in the agreement wherein our client is obliged to place Section 34 advertisements, which by the way were placed by our clients some months back and your client's mortgagee is now attempting to make it our client's responsibility to re-advertise due to your client's continual delay after the adverts were placed.

You request that we now proceed to transfer the property and we request that you advise how it is possible for us to do so in the light of Clause 1.4 of the guarantee provided by Business Partners.

You are further referred to Clause 2 of the guarantee entitling Business Partners to cancel the undertaking at their discretion, which no seller will be prepared to accept and which simply means that the purchase price has not been secured.

Should your client wish to continue with its allegations that the agreement is valid, we suggest that your client institutes appropriate proceedings which will be contested."

- The court, after a comprehensive deliberation and discussion of the legal issues at hand, found as follows:

- On 5 January 2004, the conveyancers were in a position to lodge the transfer immediately upon receipt of a proper guarantee. At this stage therefore, the conveyancers on behalf of S were entitled to demand that a guarantee be furnished. This is what the court said:

"In terms of the principles explained in the decisions I have cited above, respondent was entitled to demand that the guarantee be furnished by a fixed time occurring a reasonable time after the demand so

as to put the applicant in mora if it failed to comply with the demand. In the circumstances it would be putting form above substance to ignore the fact that the letter of 5 January 2005 actually demanded that applicant furnish a guarantee, which respondent was then entitled to do. It also demanded that the guarantee be furnished within three (3) days of applicant's receipt of the demand. Applicant received the demand on 6 January 2005, so the demand required the provision of the guarantee by the end of 9 January 2005. The correspondence I have quoted shows that when it received the demand, applicant knew that respondent was going to proceed to register the transfer without delay. If there was any doubt about this, it is dispelled by the last part of the last sentence of C's letter of 6 January 2005. If the three-day period was reasonable in the circumstances and the applicant failed to comply with the demand and had not furnished the guarantee by the end of 9 January 2005, there is no reason why the applicant would not then have been in mora in regard to the furnishing of the guarantee."

- The court then considered whether the three-day period was reasonable and found in the circumstances that the three-day notice period was reasonable.
- It then considered the adequacy of the guarantee that was furnished, and found that the condition requiring the notice in terms of Section 34 rendered it to be not suitable to enable simultaneous transfer and payment. As a result it found that the guarantee did not comply with what the agreement demanded.
- The court then found that S succeeded "albeit in a confused and inept way, in putting the applicant in mora by means of its letter of 5 January 2005. In terms of the letter the applicant, C was in mora as from 10 January 2005.
- Because C did not remedy the breach and was still in breach after 10 January 2005, the conveyancer's letter of cancellation on 10 January 2005 effectively cancelled the agreement.

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4. DEEDS OF ALIENATION AND SECTION 29A

Gowar Investments v Section 3 Dolphin Coast and Cameron [2006] SCA 162 (RSA)

The court on appeal had to answer the following question:

“Is a deed of alienation which does not reflect the right to revoke or terminate void as decided in *Sayers v Kahn* 2002 (5) SA 688 (C) or voidable at the instance of the purchaser as held (per Olsen AJ) in the present case (reported at 2006 (2) SA 15 (D))?”

Sub-section 2(2A) of the Alienation of Land Act 68 of 1981 (‘the Act’) provides as follows:

“The deed of alienation shall contain the right of a purchaser or prospective purchaser to revoke the offer or terminate the deed of alienation in terms of Section 29A.”

In answering the question, and dismissing the appeal, which was based on the premise that it was not the intention of the legislature to bring Section 29A rights to the attention of the purchaser only, Combrinck AJA overruled *Sayer v Khan* 2002 (5) 688 (C).

He concluded as follows:

“[16] I consider that *Sayers* case was wrongly decided. A narrow semantic and linguistic approach was adopted in interpreting the section instead of, as in this case, determining in the first place the overall intention of the legislature and seeking to interpret the section in such a way as to give effect to such intention. It would appear from a reading of the *Sayers* judgment that voidability at the instance of the purchaser or non-compliance was not considered. Had it been it would, I think, have assuaged the judge’s fears that the object of the legislature would be frustrated or seriously inhibited if the deed were to be valid (see Paragraph 5 above). The reasons given in the court below for not accepting the *Sayers* judgment are persuasive. It was said (inter alia):

“The construction of Section 2(2A) approved in *Sayers* allows a seller the opportunity to withdraw from a contract against the will of the purchaser. Such an outcome does not accord with the restriction of the benefit of rights under Section 29A to purchasers only.

Sellers also have second thoughts, and may also fall victim to unfair practices where commissions are to be earned. Notwithstanding that, the legislature left sellers out of the reckoning in Section 29A, and a construction of Section 2(2A) in conformity with that is to be preferred.” (Para 22.)

[17] Apart from the argument referred to in Paragraph [14] above, the appellant did not seek to rely on any of the other ground found in the *Sayers* judgment to justify the interpretation that the agreement is void. Nor did he attack any other of the reasons given by the court below for reaching its conclusion.

[18] The court a quo gave cogent and compelling reasons for reaching its finding. The grounds relied upon are more fully articulated in the judgment. The brief summary in this judgment does not do the careful and logical reasoning justice. The full judgment should be read in conjunction with this judgment.

[19] The answer to the question posed at the beginning of this judgment is therefore that a deed of alienation which does not comply with Section 2(2A) is not ipso facto void but at the instance of the purchaser.”



Letters To The Editor

Letter No. 1

The following letter was received from the firm MacRobert Inc.:

'Our firm acquired four Deeds Practice Manuals from JUTA – in our view one of the best investments we have ever made in our long history.

We wish to congratulate you and your staff on a brilliant piece of work – a true “magnum opus” which in our view will certainly contribute greatly to enhance the quality of conveyancing in South Africa.'

Letter No. 2

I express my views and observations on Marie Grovè's article on Regulation 68, which appeared in the SADJ of July 2006 (Issue No. 9) on Page 27.

With reference to an application for a copy of a lost deed in terms of Regulation 68(1) of the Deeds Registries Act, 1937, Marie Grovè states that, where a mortgage bond is registered over a property: “The title deed is more often than not held by the bondholder, as security for the debt.” I do not agree because, in such a case –

- (a) the security for the debt is the property over which the mortgage bond is passed; and
- (b) the title deed is retained by the bondholder purely for safe-keeping.

Marie Grovè argues further that, if the title deed was lost while in the possession of the bondholder, the application for a copy of the lost deed must be made by the bondholder: “the reason being that the registered owner will not always be aware of the circumstances under which the title deed went astray, while in the possession of the bondholder”. I do not agree because

- (a) in terms of Regulation 68(1), the application and affidavit must be made by “the registered holder thereof or his duly authorized agent”;
- (b) the fact that the title deed was in the custody of the bondholder does not detract or subtract from the competence of “the registered holder thereof or his duly authorized agent” to make the application and affidavit – refer to Sub-paragraph (d) below;
- (c) “the registered holder thereof or his duly authorized agent” would base his application and affidavit on

the report received from the bondholder about the loss, the circumstances relating thereto and the diligent search conducted – a supporting affidavit from the bondholder would be best; and

- (d) Regulation 68(2) provides, among other things, that: “If the circumstances of the loss or destruction are not stated, or if they are stated and the Registrar is of the opinion that further evidence is necessary, either from the applicant himself or some other person in whose custody the deed may have been before the loss or destruction thereof, to establish such loss or destruction, he shall be entitled to call for such evidence.”

On the basis of Paragraphs 2 and 3 above, I subscribe to the circular quoted by Marie Grovè, which circular is reported to have been issued by the Registrar of Deeds at Pretoria, to the effect that it is not necessary to refer to registered mortgage bonds in the applications for copies in terms of Regulation 68. Actually, and for the sake of clarity, I would state that it would be inappropriate to make such reference, since the safe custody of a title deed by a bondholder is not a pledge. It follows, therefore, that I see no need for the Regulation Board to reconsider the wording of Regulation 68(1) as suggested by Marie Grovè.

Marie Grovè submits that: “When a VA copy is issued, it serves as the original.” It is necessary to stress that, even if a VA copy “serves as the original”, it (the VA copy) is and remains a copy and may not be regarded as the original. The distinction between an original deed and a copy thereof is clearly spelt out and consistently kept throughout Regulation 68.

Finally, Marie Grovè questions the correctness of Registrars' Conference Resolution 26.1 of 1996 in so far as it requires an application/affidavit for a copy of a lost or destroyed copy under Regulation 68(7) to refer to all previously issued copies. I fully agree with Marie Grovè on her submission in this regard and would add that –

- (a) this requirement is neither expressed nor implied in Regulation 68(7), which clearly does not impose additional requirements;
- (b) each Registrar of Deeds has a record of previous applications/affidavits made as well as VA copies issued; and as a matter of course, no extra

burden should unnecessarily be placed on any application.

By: Thabo Nqhome, Conveyancer, Themba Mabasa Attorneys, and Dudley Lee

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Letter No. 3

In Power of Executor, published in GhostDigest on 14 December 2006, Mr. Allen West discusses conflicting opinions on the action to be taken by a Registrar of Deeds if a sale was concluded by an executor prior to his/her appointment by a Master of the High Court and, relying on Regulation 44A of the Deeds Registries Act, 1937, (“the DRA”), Sections 13(1) and 15 and of the Administration of Estates Act, 1965 (“the AEA”) and Section 3(1)(b) of the DRA, concludes that “any transaction entered into by an executor or representative prior to his or her appointment is ab initio null and void and must be rejected by the deeds examiners concerned” (my emphasis).

I take this opportunity to address the issues raised by Mr. West.

Section 3(1)(b) of the DRA provides for a rejection of a deed or document if its execution or registration is not permitted by the DRA (“Ground 1”) or by any other law (“Ground 2”) or if there is any other valid objection to its execution or registration (“Ground 3”). Therefore, since a (sale) transaction is not a deed or document submitted for execution or registration, it is incapable of rejection.

It is clear from Section 99 of the DRA that a Registrar of Deeds must exercise reasonable care and diligence in carrying out his/her duties. However, due to circumstances beyond his/her control, I doubt that he/she is required “to register an indisputable title deed”.

A Registrar’s determination of the date of a transaction results from the performance of his/her duty to examine deeds or documents in terms of Section 3 (1) (b) of the DRA. Although a contravention of Section 13 (1) of the AEA is an offence in terms of Section 102 (1) (g) thereof, a transaction in contravention of the said section has not been declared null and void by the AEA.

A Registrar of Deeds has no power to declare a (sale) transaction null and void.

Section 42 (2) of the AEA provides that: “An executor who desires to effect transfer of any immovable property in pursuance of a sale shall lodge with the registration officer, in addition to any such other deed or document, a certificate by the Master that no objection to such transfer exists.” This section is relevant to Ground 2.

Therefore, if an executor has been appointed by a Master in terms of Section 13 (1), albeit subsequent to the (sale) transaction, and the Master has subsequently issued a certificate in terms of Section 42 (2) of the AEA, I submit that a rejection of a deed of transfer, under the circumstances, would be unlawful, assuming, without necessarily accepting that Ground 3 would be relevant. Regulation 44A (c) of the DRA has nothing to do with the authority to enter into a (sale) transaction but everything to do with the authority to sign a power of attorney to pass transfer.

In Kriel v Terblanche N O en Andere 2002 (6) SA 132 (NC), it was decided that “where a contract for the sale of immovable property is void (for example, as in casu, because the agreement was entered into by a trustee who had, at the time of the signing of the contract, not yet received the necessary authorization from the Master in terms of Section 6 (1) of the Trust Property Control Act 57 of 1988, but who had the necessary authority at the time of registration of transfer), that does not have the effect that the subsequent registration of transfer of the land is not valid.” Refer to Gowar Investments, also published in GhostDigest on 7 December 2006, with regard to the Supreme Court of Appeal’s attitude towards the interpretation of Section 2 (2A) of the Alienation of Land Act, 1981.

Mr. Dudley Lee replies to this reply as follows:

Thabo Nqhome’s reply (Power of Executor – a reply) to Allen West’s article raises certain issues. Starting with the statement in Paragraph 7 that the Registrar of Deeds does not have the power to declare a transaction null and void: most certainly the Registrar may, given the current law as it is and as the Registrar understands it, decide that a sale/transaction is ab initio void, and should the parties to the contract disagree with the Registrar, it is up to them to refer the matter to the Court for a ruling. Mr. Nqhome refers to Section 3(1)(b) of the Deeds Registries Act No. 47 of 1937 (DRA), highlighting three reasons why a Registrar of Deeds may reject deeds. I submit that it is entirely within the power of a Registrar of Deeds to reject a transfer which is clearly void ab initio based on the information before him. No Registrar

of Deeds will register a transfer where a person acted as trustee before being authorized by the Master to do so, notwithstanding the decision in the Kriel case. It is a valid rejection based on legal fact.

It is all very well to refer to the decision in *Kriel v Terblanche* NO 2002 (6) SA 132 (NC) pointing out that the title is not invalid, but that the situation after registration, whereas Mr. West was referring to a matter lodged for examination and registration, if correct. That is what the case was about – one party requesting the Court to declare a title invalid after registration on the basis that the initial agreement of sale was invalid ab initio, based on various decisions, such as *Simplex (Pty) Ltd v Van der Merwe and Others* NND 1996 (1) SA 111. However, Mr. West was not referring to an already registered deed, but to a matter lodged for examination with the Registrar of Deeds, and it comes to light that a person acted as executor prior to his appointment as such by the Master. The decision in *Kriel v Terblanche* is therefore, in my opinion, not relevant here.

What is important is what was decided in a case such as the *Simplex* case. The first question that arose was whether it was within the capability of the parties to ratify an agreement, where a trustee acted in such capacity prior to being authorized to act by the Master of the High Court. This was in conflict with Section 6 of the Trust Property Control Act, No. 57/1998 (TPCA). The court referred to the well-established principle, quoting from *Neugarten and Others v Standard Bank of South Africa Ltd* 1989 (1) SA 797: “that there can be no ratification of an agreement which a statutory prohibition has rendered ab initio void in the sense that it is to be regarded as never having been concluded” and continues later with reference to *York Estates Ltd v Wareham* 1950 (1) SA 125 (SR) at 126: “As a general rule a contract or agreement which is expressly prohibited by statute is illegal and null and void when, as here, no declaration of nullity has been added by the statute.” Note the last part of the quote with reference to Mr. Nqhome’s statement in Paragraph 6 of his reply to Mr. West’s article.

In *Schierhout v Minister of Justice* 1926 AD 99 at 109 the judge states: “... it is not only of no effect, but must be regarded as never having been done” and in *Cape Dairy and General Livestock Auctioneers v Sim* 1924 AD 167: “there cannot be ratification of a bargain which is prohibited by statute” and on appeal Innes CJ states: “Ratification relates back to the original transaction, and there can be no ratification of a contract which is

prohibited and made illegal by statute” In *Re Townsend, Ex Parte Parsons* (1886) 16 QBD 532 (CA) at 546 the court also states: “If the Act of 1882 makes the instrument void, the rest follows easily enough. It follows that the parties cannot ratify or confirm a void agreement.”

The next question was whether the Court could “validate retrospectively acts performed as a trustee by one not duly so appointed”. The Court concludes under 114: “In my opinion, the Court cannot validate acts which are expressly prohibited by statute. To do so would be to arrogate to this Court the power to override valid legislative acts.”

If we look at the provisions of Section 13 (1) of the Administration of Estates Act 566/1965 (AEA) it is, in my opinion, as peremptory as the provisions of Section 6 of the TPCA, and it must therefore follow that an act performed by any person as executor without having been appointed as such by the Master, like in the case of a trustee acting without having been authorized to act as such by the Master, is void ab initio, and cannot be ratified either by the parties or validated by the Court. The section clearly states: “No person shall liquidate or distribute the estate of a deceased person except under letters of executorship ...”. If such a transaction is lodged with a Registrar of Deeds for examination and registration, I cannot imagine the Registrar of Deeds doing anything but reject the transaction. And the contract being void ab initio must be a valid reason for rejection of such a transaction.

It is interesting to note that neither the DRA nor the regulations to the DRA contain a provision that either prevents the Registrar of Deeds from calling for a copy of the deed of sale to be lodged or makes it unnecessary to lodge a copy thereof with the transaction to be registered. Given the provisions of Section 4(1) of the DRA, it would be perfectly within the powers of the Registrar to call for a copy of the deed of sale to be lodged as proof of the facts. I also do not think that the Court would force a Registrar of Deeds to register a transfer in pursuance of a void deed of sale. The statement by Mr. Nqhome “Therefore, since a (sale) transaction is not a deed or document submitted for execution or registration, it is incapable of rejection” is not, in my opinion, entirely correct. In my view, Mr. West came to the right conclusion.

By: Thabo Nqhome, Conveyancer, Themba Mabasa
Attorneys, and Dudley Lee

Guidelines for Articles in the SADJ

By: Allen West, Deeds Training, PRETORIA

SADJ welcomes contributions in any of the 11 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 have been 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. 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.
6. 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.
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