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GUIDELINES FOR ARTICLES IN THE SADJ

South African Deeds Journal (SADJ) welcomes contributions, in any of the eleven official languages, especially from deeds office staff and practitioners.

The following guidelines should be complied with:

Contributions should, as far as possible, be original and not published elsewhere.

Contributions should be useful or of interest to the conveyancing practice and land issues.

The decision of the editorial committee is final.

Authors are required to provide their involvement or interest in any matter discussed in their contributions.

Footnotes should be avoided. Case reference, for instance, should be incorporated into the text.

Authors should limit their articles to a maximum of 3 000 words, however, should an article exceed the said amount of words, the editorial committee may split it and publish it in two successive issues.

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.

The editorial committee and the editor reserve the right to edit contributions as to style and language and for clarity and space.

Acceptance of material for publication is not a gua-rantee that it will be included in a particular issue.

Articles should be in a format compatible with Micro-soft Word and should either be submitted to Wiseman Bhuqa via e mail: wisemanzolani.bhuqa@drdlr.gov.za or by post to: Private Bag X918, Pretoria 0001. Letters to the editor, however, may be submitted in any format.

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Designed by:
Lehlogonolo Ledwaba

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Contributions may be sent to the Editor: Via e-mail or post at:
wisemanzolani.bhuqa@drdlr.gov.za or;
W.Z. Bhuqa
Private Bag X918
PRETORIA
0001

This journal is published on the Department of Rural Development and Land Reform
website: www.drdlr.gov.za

CONTRIBUTORS:

W Z Bhuqa
H Tayler
M A Grovè
T E Shawe
N A Ngoasheng
M S Mekwe

EDITORIAL NOTE

Welcome to our first electronic version of the South African Deeds Journal (SADJ). I am immensely enamoured to finally present to you the long awaited Issue No. 36 after an arduous period of transition and migration to the electronic platform, coupled with detailed compliance requirements. It is indeed long overdue.

We, the editorial team of the SADJ, would like to convey our profuse apologies to the readers for this inconvenience and to express our sincerest gratitude for your forbearance during this lengthy period of transition.

The SADJ continues to reap high accolades as an indispensable knowledge sharing publication issued under the auspices of the Chief Registrar of Deeds.

As we continue to grow in leaps and bounds, we attribute the continued survival of this sterling product to our dedicated contributors and the loyal readers.

Examiners and Conveyancers must brace themselves for the avalanche of Spatial Planning and Land Use By-laws as we embark on an adaptation paradigm from old order legislation (Ordinances and Planning Laws) to a Spatial Planning and Land Use Management Act (SPLUMA), by-law- centered practice mainly affecting land subdivision, consolidation, township establishment, removal of restrictions, etc. One must ensure to keep abreast with these changes by means of respective Registrars' Circulars.

We also bid a valediction to one of the astute deeds office senior managers, Mr Johan Badenhorst, Registrar of Deeds, King Williams Town, on his retirement after an illustrious 46 year-career within the deeds environment.

He has indeed left an indelible mark in the entire Branch: Deeds Registry and for that we are so proud of him. Showers of accolades rained from all corners of the deeds registry on the news of his retirement.

1 Creation and Subdivision of a Right to Extend a Sectional Title Scheme in Terms of Section 25 of The Sectional Titles Act 95 of 1986

By: Marie Grovè, Law Lecturer | Deeds Training | PRETORIA (Now retired)

1. Reservation of a section 25 right of extension with the opening of the sectional title scheme

Section 25 of the Sectional Titles Act No 95 of 1986 (STA) makes provision for the developer to reserve a right of extension of sectional title scheme which the developer must reserve with the opening of the scheme.

However, the Act also makes provision for such right to be created in other circumstances subsequent to the registration of the opening of the sectional title register, which will be discussed in this article.

The right to extend the scheme encompasses the right to erect, complete or include, from time to time, within a stipulated time period one or more buildings, a horizontal and/or vertical extension of existing buildings.

Section 25(1) reads as follows:

(1) A developer may, subject to the provisions of section 4 (2), in his or her application for the registration of a sectional plan, reserve, in a condition imposed in terms of section 11(2), the right to erect, complete or include from time to time, but within a period stipulated in such condition or such extended period as may be agreed upon (by unanimous resolution of the body corporate and with the consent of the bondholders existing on the date of the taking of the unanimous resolution, which resolution and consent must be obtained by the notary and filed in his or her protocol) prior to the expiry of the stipulated period, by way of a bilateral notarial deed, for his or her personal account;

(a) a building or buildings;

(b) a horizontal extension of an existing building;

(c) a vertical extension of an existing building, on a specified part of the common property, and to divide such building or buildings into a section or sections and common property and to confer the right of exclusive use over parts of such common property upon the owner or owners of one or more sections, or to delineate exclusive use areas on or in specified parts of the land and buildings in terms of section 5 (3) (f) and to confer the right of exclusive use over such areas upon the owner or owners of one or more sections.

When a section 25 right of extension is reserved with the opening of the scheme, sheet 1 of the sectional title plans must contain a caveat to the effect that the developer reserved a section 25 right of extension. Such right must then be imposed as a condition in the section 11(3)(b) schedule of conditions. Documents, as provided for in section 25(2), must be lodged with the creation of the right:

(2) In the event of a reservation in terms of subsection (1), the application for the registration of the sectional plan shall, in addition to the documents referred to in section 11(3), be accompanied by:

(a) a plan to scale of the building or buildings and on which -

(i) the part of the common property affected by the reservation;

(ii) the siting, height and coverage of all buildings;

(iii) the entrances and exits to the land;

(iv) the building restriction areas, if any;

(v) the parking areas; and

(vi) the typical elevation treatment of all buildings,

are indicated;

(b) a plan to scale showing the manner in which the building or buildings are to be divided into a section or sections and exclusive use areas or the manner in which the common property is to be made subject to the rights of exclusive use area only;

(c) a schedule indicating the estimated participation quotas of all the sections in the scheme after such section or sections have been added to the scheme;

(d) particulars of any substantial difference between the materials to be used in the construction of the building or buildings and those used in the construction of the existing building or buildings;

(e)

(f) The certificate of real right which is to be issued in terms of section 12 (1) (e) and

(g) Such other documents and particulars as may be prescribed.

It is important to note that the caveat on sheet one must be completed only when the right is reserved with the opening of the scheme. It has become practice to include the caveat once again when sectional plans are prepared in terms of section 25(8), i.e. when the right of extension has been exercised, which is incorrect and should be discontinued. Refer to regulation 5(2)(a)(vii) in this regard:

5(2)(a) A first sheet which shall be substantially in the form of Form AC in Annexure 1 and which shall contain, in addition to the particulars mentioned in sub regulation (1)(n), the following: (vii) a caveat, if a developer should reserve the right under section 25 of the Act to erect a further building or buildings to horizontally or vertically extend an existing building;

When the right has already been reserved, it should not appear once again on the amending sectional plans to be registered when the right has been exercised.

2. Reservation of a section 25 right of extension other than with the opening of the sectional title register

A section 25 right of extension may also be reserved/ created under the following circumstances:

- *When a section 25 right has not been reserved with the opening of the scheme, or was reserved but expired or lapsed and the body corporate has not yet been established, the developer may, in terms of section 25(6A), apply for the issuing of a certificate of real right of extension: (6A) If no reservation has been made by a developer in terms of subsection (1) and the body corporate has not yet been established, the registrar may issue a certificate of real right of extension as contemplated in section 12(1) (e) on application by the developer accompanied by the sectional mortgage bond and the written consent of any bondholder and such of the documents contemplated in subsection (2) as are applicable.*

- *If no reservation was made by the developer or such right has lapsed, the right to extend the scheme vests in the body corporate: "(6) If no reservation was made by a developer in termsof subsection (1), or if such a reservation was made and for any reason has lapsed, the right to extend a scheme including land contemplated in section 26, shall vest in the body corporate which shall be entitled, subject to this section and after compliance, with the necessary changes, with the requirements of paragraphs (a), (b), (c), (d) and (g) of subsection (2), to obtain a certificate of real right in the prescribed form in respect thereof: Provided that the body corporate shall only exercise or alienate or transfer such right with the written consent of the mortgagee of each unit in the scheme:*

Provided further that a member or mortgagee shall not withhold such approval without good cause in law." In all the above instances the documents as provided in in section 25(2) must be lodged.

3. Subdivision of a section 25 right of extension

Subdivision of a section 25 right of extension is provided for in the following two instances only:

- When the right of extension is reserved or created:

Section 11(3)(fB) provides for the issuing of a certificate or certificates of real rights to the developer with the opening of the scheme. *"(3) An application in terms of subsection (1) shall be accompanied by (fB) the certificate or certificates of real right in respect of any right which has or have been reserved by him or her in terms of section 25(1)".*

(My underlining)

The only instance in which more than one certificate of real right can be issued in terms of this section will be when the section 25 right has already been subdivided with the opening of the scheme. According to RCR 70/2011 the subdivisions may be indicated on the block plan or on a sub-divisional plan which is filed on the mail file. The subdivision can therefore be indicated on the block plan only when the section 25 right has been reserved with the opening of the scheme.

Currently sections 25(6) and 25(6A) provides for the body corporate and developer, respectively, to right of extension is reserved subsequently to the opening of the scheme. However, it is submitted that more than one certificate should be permitted when the body corporate or developer apply for more than one certificate of real right in terms of the aforesaid sections. In this instance the subdivided right will have to be indicated in a separate plan to be filed on the main file.

• In terms of section 25(4):

*(4) A right reserved in terms of subsection (1), vested in terms of subsection (6) or registered in terms of subsection (6A), and in respect of which a certificate of real right has been issued (a) shall for all purposes be deemed to be a right to immovable property which admits of being mortgaged; and (b) may be transferred by the registration of a notarial deed of cession in respect of the whole, a portion or a share in such right: Provided that in the case of a cession affecting only a portion of the land comprising the scheme only such portion shall be id*entified to the satisfaction of the Surveyor General.

(My underlining)

Save for the provision mentioned in 11(3)(fB), a right of extension can only be subdivided upon cession of a portion of the right. Therefore amendment plans may only be prepared for purposes of a cession in terms of section 25(4). Under no circumstances may plans for the subdivision of section 25 right of extension be accepted in a deeds office. In this case the subdivision of the right must be indicated on a separate amending plan prepared in terms of section 25(4).

It must be noted that only the portion(s) to be ceded should appear on the said amending sectional title plan. Information on a sectional plan that is not yet registered or that will not be registered simultaneously should not appear on any plan or diagram lodged for registration, e.g. a plan indicating a few subdivisions of a section 25 right may not be lodged for registration of a cession of one or some of the subdivided portions indicated on such plan.

The following RCRs find application in this instance: ***RCR 45/2014:*** If more than one servitudes are shown on one servitude diagram over the same piece of land, can the servitudes be registered piecemeal in favour of different parties? Resolution: No. Servitudes shown on a single servitude diagram, which are not already registered, must be registered simultaneously, either in one deed or more than one deed in favour of the relevant parties.

RCR44/2014: When a sub-divisional diagram is to be registered, can unregistered servitudes (delineated on another unregistered servitude diagram) be shown on the diagram being transferred remain unregistered, only to be registered in the future? Resolution: No. Servitudes shown on a diagram must already be registered or be registered simultaneously with the deed, subject to regulation 60(1) of Act No. 47 of 1937, and regulation 21(4) of the Land Survey Act No.8 of 1997.

RCR 6/2011 may serve as confirmation of the above facts. It states that where the sectional title register is opened and one Certificate of Real Right is issued to the developer, the developer cannot obtain Certificates of Real Rights for subdivided portions of the section 25 right.

4. Relevant Registrars' Conference Resolutions
Following are registrars' conference resolutions that must be taken into consideration in respect of a section 25right of extension.

When a portion of a section 25 right has been ceded and the developer/body corporate transfers the remainder, the description of such remainder was questioned and deliberated in a registrars' conference.

Therefore, according **RCR 22/2013**, when a real right of extension is sold (ceded)/mortgaged, certain phases have been exercised and a remainder still exists, the real right must be described along the following lines:

"The right to erect and complete from time to time within a period of five years for his personal account on the specified portion of the common property as indicated on the plan referred to in section 25(2)(a) of the Act, filed in this office, and to divide such building or buildings into a section or sections and common property upon the owner or owners of one or more units in the scheme known as Ivory Park in respect of the land and building or buildings situated at (disclose the description of the underlying land), and shown on Section Plan No. SS ....., with the exclusion of the rights of extension already ceded."

RCR 57/2011: The question submitted to conference was whether or not the developer may reserve a general right of extension together with portions of real rights.

It was stated that the developer cannot reserve a general right of extension together with portions of real rights in a section 11(3)(b) schedule.

Where the developer wishes to reserve real right areas together with a general real right, he/she will have to reserve the general real right as such and thereafter cede portions of rights of extension of the general real right title.

Where portions of the right had already been ceded (and not yet exercised) and the developer wishes to obtain a title deed of a further portion with the intention of exercising the right, the whole right may be cancelled and a new right, consisting of portions, may be re reserved.

In this instance an amending sectional plan of subdivision and certificates of real rights may be issued in respect of each subdivided portion in terms of section 25(6) or 25(6A) of the STA.

It is important to note that where a real right of extension already exists a further real right or portion of the right may not be registered as the STA does not prescribe this. Refer to section 25(6) and 25(6A) in this regard. If a right already existed, a further right can only be registered if the existing right has lapsed or has been exercised.

The following RCR's find application in this regard:
RCR 6/2016-Where a developer has reserved a right of extension, but such right of extension has lapsed due to effluxion of time, may such developer, **prior to the establishment of the body corporate** reserve a further/another right of extension, given the wording of section 25(6A) of Act No.95 of 1986, viz:

"Where a right of extension has lapsed, must the lapsing of such right be noted prior to reserving a new right of extension? Resolution: Yes, lapsing of the right of extension must be noted. A section 15B(1)(d) of Act 95 of 1986 application must be lodged to note the lapsing prior to the reservation of the new right. The provisions of section 68(1) of Act 47 of 1937 apply with the necessary changes."

It must be noted that the Registrar of Deeds may not on own accord note the lapsing of a right of extension upon exercising of the whole right of lapsing of the stipulated time period of extension. Also note RCR 10/2012 regarding the lapsing of a right of extension: a section 15(B)(1)(d) application must be lodged to note the lapsing prior to the body corporate or developer applying for a right to extend, in terms of section 25(6) or section 25(6A) of Act No. 95 of 1986. The provisions of section 68(1) of Act No. 47 of 1937 apply with the necessary changes.

2 The Effect of The Sectional Title Schemes Management Act No 8 of 2011 on The Sectional Titles Act No 95 Of 1986

By: Marie Grovè, Law Lecturer | Deeds Training | PRETORIA (Now retired)

The Sectional Title Scheme Management Act No 8 of 2011 ('STSMA') came into operation on 7 October 2016.

The purpose of the STSMA is to "provide for the establishment of bodies corporate to manage and regulate sections and common property in sectional title schemes and for that purpose to apply rules applicable to such schemes; to establish a sectional title schemes management advisory council; and to provide formatters connected therewith".

It repeals some of the sections in the Sectional Titles Act No 95 of 1986 ('STA') and also provides for the amendment of some of the sections in the STA.

The purpose of this article is to discuss the effect of the repeal and amendment of the STA by the STSMA on the future practice in the deeds registries.

The following table sets out the sections of the STA affected by the STSMA, and the impact thereof, if any, on the application of the STA:

Sectional Titles Act, 1986 Act No 95 of 1986	Sectional Title Schemes Management Act, 2011 Act No 8 of 2011
S 1(1) – Definition of 'body corporate' is amended to refer to the establishment of the body corporate in terms of the STSMA. The existing practice does not change: 'body corporate' means the body corporate as defined in the Sectional Title Schemes Management Act	'body corporate', in relation to a building and the land in a sectional title scheme, means the body corporate of that building referred to in section 2 (1); (same as STA before amendment) S 2(1): With effect from the date on which any person other than the developer becomes an owner of a unit in a scheme, there shall be deemed to be established for that scheme a body corporate of which the developer and such person are members, and any person who thereafter becomes an owner of a unit in that scheme is a member of that body corporate. (same as s 36(1) STA before amendment)
S 1(1) – Definition of 'rules' refers to the STSMA. Rules are removed from the STA.	S 1(1) – rules referred to in s 10(2)(a) and (b). 'rules', in relation to a building which is divided into sections and common property, means the management rules and conduct rules referred to in section 10 (2) (a) and (b), respectively.
S 1(2) – (3A) which relates to 'special-' and 'unanimous resolutions' are repealed, i.e. notices to members of the body corporate. Definitions of 'special resolution' and 'unanimous resolution' remained unchanged in the STA.	Included under S 6 : Meetings of Body Corporate
S 11(3)(e) amended – with the opening of a scheme a certificate by the Chief Ombud must be lodged and not by a conveyancer, i.e. pertaining to the rules. This is about the only change in the practice of the deeds registry. 'S 11(3)(e): a certificate by the Chief Ombud stating that the rules contemplated in section 10 of the Sectional Titles Schemes Management Act have been approved'	Amended the STA to the effect that a certificate by the Chief Ombud must be lodged with the opening of a scheme pertaining to the rules, not by the conveyancer. In instances where the statutory rules are to be made applicable to a scheme, a conveyancer's certificate may be lodged to the effect that the Rules contained in Annexures 1 and 2 of the Regulations to Act 8 of 2011 are applicable. Refer to CRC 13 of 2016 in this regard.

Sectional Titles Act, 1986 Act No 95 of 1986	Sectional Title Schemes Management Act, 2011 Act No 8 of 2011
A body corporate is now established in terms of the STSMA and references to s 36 are, where it appear in the STA, amended to refer to the relevant section in the STSMA: • S 15(B)(3)(a)(i)(aa) and (b)(ii) (i) (aa) if a body corporate is deemed to be established in terms of section [36(1)] 2 (1) of the Sectional Titles Schemes Management Act, that the body corporate has certi fied …… • S 15(B)(3)(b)(ii)(ii) the transfer will result in the establishment of a body corporate in terms of section [36] 2 of the Sectional Titles Schemes Management Act. • S 25(6A) (6A) If no reservation has been made by a developer in terms of subsection (1) and the body corporate has not yet been established in terms of section 2 (1) of the Sectional Titles Schemes Management Act, the ….. • S 27(1A) (1A) [Notwithstanding section 27(1)(a)] If no reservation was made by a developer in terms of subsection (1) and the body corporate has not yet been established in terms of section 2 (1) of the Sectional Titles Schemes Management Act, …. • S 31 "The provisions of the Deeds Registries Act shall not apply …. enforceable immediately upon the establishment of the body corporate in terms of the Sectional Titles Schemes Management Act." • S 34(4)(b) "… there is produced to the registrar a certificate by a conveyancer confirming that, if a body corporate is deemed to have been established in terms of section [36(1)] 2 (1) of the Sectional Titles Schemes Management Act, that body corporate has certified" ….	A body corporate is established in terms of s 2 of the STSMA: S 2(1): With effect from the date on which any person other than the developer becomes an owner of a unit in a scheme, there shall be deemed to be established for that scheme a body corporate of which the developer and such person are members, and any person who thereafter becomes an owner of a unit in that scheme is a member of that body corporate
Amended S 36: '(1) When a unit is registered in the name of any person other than the developer, the registrar must issue a certificate in the prescribed form. (2) The effect of the registration referred to in subsection (1) is the establishment of a body corporate for the scheme, in terms of the STSMA. (3) The registrar must lodge a copy of the certificate referred to in subsection (1) with the Chief Ombud.'	2(1) – a body corporate is established on date when any person other than the developer becomes an owner of a unit in the scheme (remains unchanged) S 2(2) – a developer ceases to be a member of the body corporate (remains unchanged) S 2(3) – an owner of a section ceases to be a member of the body corporate (remains unchanged) S 2(4) – Description of a body corporate (similar to the repealed s 36(3)): "S 2(4): The body corporate must be designated as the 'Body Corporate' and must have the name and number contemplated in sections 5 (3) (b) and 12 (1)

Sectional Titles Act, 1986 Act No 95 of 1986	Sectional Title Schemes Management Act, 2011 Act No 8 of 2011
	2(1) – a body corporate is established on date when any person other than the developer becomes an (a) of the Sectional Titles Act, respectively". E.g: 'The body corporate shall be designated as 'the Body Corporate of the .....(name)..... Scheme, No .....'
S 36 (4) – (7) repealed i.e. duties/responsibilities of a body corporate	Incorporated into S 2(5) – (10): Bodies corporate (remain unchanged)
The following sections refer to lodgement of unanimous/special resolutions and consents of the Trustees and have been amended to refer to authorisation in terms of the STSMA. However, the current practices do not change: • S 17(1) – (2) – unanimous resolutions are still required in terms of the STSMA. • S 21(1) – consent of the trustees for subdivision and consolidation of sections is still required, now in terms of STSMA. • S 24(3) – special resolution is still required in terms of the STSMA. • S 27(2) – unanimous resolution is still required in terms of the STSMA:) "A body corporate may, subject to the provisions of section 5 (1) of this Act and section 5 (1) (d) of the Sectional Titles Schemes Management Act), request an architect …" • S 29(1) – a special resolution is still required in terms of the STSMA.	•In terms of s 5(1)(a): "may, upon unanimous resolution, on direction by the owners and …" • In terms of s 7(2)(a): "……. the trustees of the body corporate must receive and may consent to applications for subdivision of sections or consolidation of sections, made by the owners of sections" • In terms of S 5(h): "must, on application by an owner and upon special resolution by the owners, approve the extension of boundaries or floor area of a section in terms of the Sectional Titles Act" • In terms of s 5(1) (d) (e) (wrong reference - to be amended): "(e) may, upon unanimous resolution by the owners, request the delineation and cession of exclusive use rights to particular owners in terms of section 27 (2) of the Sectional Titles Act" •In terms of s 5(1)(g): "may, upon special resolution by the owners, execute on behalf of the owners a servitude or a restrictive agreement burdening the land shown on the relevant sectional plan and may accept on their behalf a servitude or restrictive agreement benefiting such land, as contemplated in section 29 of the Sectional Titles Act;"
S 19(1) – (2) repealed (i.e. notice & compensation). It does not affect the practice in the office as expropriation transfers will still be registered in terms of section 19(3) – (5)	Incorporated into s 12: Expropriation of common property
S 25(3) – repealed (payment of monies)	
S 25(5A)(b) "(b) If the developer or his or her successor in title fails to take such steps and fails to register the relevant plan of extension within 90 days of completion for occupation of the unit, the developer or his or her successor in title shall be liable to the body corporate for the amounts payable in terms of section [37(1)] 3 (1) (b) of the Sectional Titles Schemes Management Act as if the unit has been included in the relevant sectional title register on the date of completion."	Amounts payable in terms of s 3(1)(b): (1) A body corporate must perform the functions entrusted to it by or under this Act or the rules, and such functions include- (b) to establish and maintain a reserve fund in such amounts as are reasonably sufficient to cover the cost of future maintenance and repair of common property but not less than such amounts as may be prescribed by the Minister ….; Reference to '(b)' appears to be incorrect and to be amended to read '(d)'. In terms of s 3(1)(d) – developer who is entitled to extend the scheme in terms of a s 25(1) right, to make additional contribution to the funds ….

Sectional Titles Act, 1986 Act No 95 of 1986	Sectional Title Schemes Management Act, 2011 Act No 8 of 2011
S 25(6) – amended to refer to s 5(1)(b) in the STSMA. Amended S 25(6) "…. shall vest in the body corporate, which shall be entitled, subject to this section, section 5 (1) (b) of the Sectional Titles Schemes Management Act and after compliance, with the necessary changes, with the requirements of paragraphs (a), (b), (c), (d) and (g) of subsection (2), to obtain a certificate of real right in the prescribed form in respect thereof." This does not change the current practice. Written consent of all the owners and the consent of the mortgagee of units in the scheme of each unit as previously required in terms of s 25(6) are still required in terms of s 5(1)(b).	S 5(1)(b) – "may, with the written consent of all the owners as well as the written consent of the mortgagee of each unit in the scheme, alienate, or in terms of the Sectional Titles Act exercise or cede, a right of extension of the scheme by the addition of sections: Provided that an owner or mortgagee may not withhold such approval without good cause in law".
S 26(1) repealed – authorisation of body corporate to acquire land now incorporated in the STSMA. The current practice remains unchanged. It must be registered in the name of the body corporate.	S 5(1)(d) - "may, subject to subsection (2), purchase land to extend the common property, if duly authorised thereto in writing by all the owners" S 5(2)(a) - "must be registered in the name of the body corporate in terms of the Sectional Titles Act and the Deeds Registries Act, 1937 (Act 47 of 1937)"
STSMA prescribes when a developer or owner ceases to be a member of the body corporate. The following sections have therefore been amended to refer to the relevant sections in the STSMA. However, the amendment does not change existing practice. • S 27(1)(c) – a developer ceases to be a member • S 27(4)(b) – an owner of a section ceases to be a member	• S 2(2) – when developer ceases to have a share in the common property as contemplated in s 34(2) STA • S 2(3) – when member ceases to own a unit in the scheme
S 27(3) – amended by inter alia the deletion of: "The body corporate, duly authorised thereto by a unanimous resolution of its members". A unanimous resolution is no longer required. The notarial deed of cession by the body corporate will therefore not make reference to such resolution or the notary will not certify to that effect.	Amended s 27(3) as indicated.
S 27A repealed – Rules regarding EUAs are now lodged with the Chief Ombud.	Incorporated into S 10(7) – (8): Rules regarding exclusive use areas
S 32(3) – quota of a section as far as it relates to value of votes and contributions deleted.	Incorporated into S 10(7) – (8): Rules regarding exclusive use areas
S 32(3) – quota of a section as far as it relates to value of votes and contributions deleted.	Incorporated into S 11(1): Effect of quotas and variation thereof
S 35 repealed, i.e. Rules	Now incorporated into s 10: Rules

Sectional Titles Act, 1986 Act No 95 of 1986	Sectional Title Schemes Management Act, 2011 Act No 8 of 2011
The following sections pertaining to administration issues were repealed, however, it does not affect the deeds offices: S 37 ..... S 38 ..... S 39 ..... S 40 ..... S 41 ..... S 42 ..... S 43 ..... S 44 ..... S 45 ..... S 46 ..... S 47 ..... S 48: Notification must still be lodged with the registrar.	Incorporated with no or minimal changes: S 3: Functions of bodies corporates S 4: Powers of bodies corporates S 7: Trustees of body corporates S 8: Fiduciary position of trustees S 9: Proceedings on behalf of bodies corporate S 9(5) - (6): Curator ad litem S (7) S 13: Duties of owners S 14: Insurance by owners S 16: Appointment of administrators S 15: Recovery from owners of unsatisfied judgment against bodies corporate, etc. S 17: Destruction of or damage to buildings. Same as repealed s 48. The new s 17(9) provides for the lodgement of a notification with the registrar.
S 49 (1) amended pertaining to reference of s 48 which has been repealed and incorporated in the STSMA: "When in terms of section 17 (3) of the Sectional Titles Schemes Management Act the building or buildings comprised in a scheme is or are deemed to be destroyed …" Unanimous resolution still required. Reference to subsection (3) is incorrect and must be amended to refer to subsection (1).	S 48(1)(a) – (c) incorporated into S 17 (3) (1) (wrong reference - to be amended) S 17(9): "When in terms of subsection (1) the building comprised in a scheme is considered to be destroyed and the owners have by unanimous resolution resolved not to rebuild … the body corporate must lodge a notification …"
S 51 repealed: valuation	
S 55(k) repealed: arbitration	
S 60(4) – (8) re. Rules repealed. It does not change existing practice. Rules granting a right to exclusive use areas in terms of the Sectional Titles Act, 1971 shall upon request still be transferred to the person entitled thereto in terms of s 60(3) STA.	S 10(9)
S 60A (4) – (8) re. Rules repealed. It does not change existing practice – s 60A(3) STA	S 10(9)

S 49 refers to buildings deemed to be destroyed in terms of s 17(3) STSMA. (However, reference to s 17(3) appears to be incorrect. It is s 17(1) of the STSMA that prescribes when buildings are deemed to be destroyed. The reference to s 17(3) must therefore be amended to refer to s 17(1).

Section 49 will find application when all the buildings in the scheme are deemed to be destroyed and the owners have by unanimous resolution (s 17(9) resolved not to rebuild. The result will be that the scheme will be closed and the land reverts to the land register.

The question that begs an answer is how s 17 STSMA must be applied. As mentioned above, nothing is different from the repealed s 48 STA, save for the addition which is incorporated as s 17(9) STSMA which is also verbatim to what is prescribed in s 49(1) STA.

Section 17(9) STSMA reads as follows: "When in terms of subsection (1) the building comprised in a scheme is considered to be destroyed and the owners have by unanimous resolution resolved not to rebuild the building, the body corporate must lodge with the registrar of deeds a notification in the form and with such supporting documents, as may be prescribed in terms of the Sectional Titles Act."

One can reason that because s 49 STA must be applied when all the buildings in the scheme are destroyed and not to be rebuilt, s 48(9) must be applied when part of the buildings are deemed to be destroyed and will not be rebuilt. In this case, regulation 31 STA must be applied.

Summary:

The only amendment that will be of interest for the deeds office and that is different from the previous one is that of s 11(3)(a) STA that prescribes that the certificate pertaining to the rules must be provided by the Chief Ombud and nota conveyancer. The reason for that is that substitution, addition, amendment or repeal of the rules must be lodged with the Chief Ombud, who must examine the rules in terms of s 10(5) STSMA.

The STA no longer refers to resolutions taken by the body corporate in respect of any transactions as prescribed in the STA before amendment. All those matters where the body corporate has to pass a special or unanimous resolution are incorporated in s 5 of the STSMA under the heading "Additional powers of the body corporate." Therefore, all such references to resolutions were removed from the STA and replaced with references to s 5 of the STSMA.

Nothing has changed pertaining to the establishment of the body corporate, save for the fact that a body corporate is now established in terms of s 2 of the STSMA. The content of s 2(1) STSMA does not differ from the repealed s 36(1) STA. However, where the repealed section 36(3) STA clearly stipulates how a body corporate must be described, i.e. "the Body Corporate of the ...(name).... Scheme, No .....". s 2(4) STSMA provides that a body corporate must be designated as the "Body Corporate" and must have the name and number, which may result in a slightly different manner of describing it.

For example, according to the repealed s 36 STA: The Body Corporate of the Palm Tree Scheme, No 10/2010, and the description in terms of s 2(4) STSMA: Body Corporate, Palm Tree, No SS 10/2010. It is a small and insignificant difference, but it is submitted that the practice in the offices must be uniform and that the first example supra must be continued with in the deeds registries.

Another difference is that a notary will no longer request a unanimous resolution when an exclusive use area is transferred (ceded) in terms of s 27(3) STA. The STA is amended by the deletion of the reference to the said resolution.

The Chief Ombud referred to above will be appointed in terms of section 14 of the Community Schemes Ombud Service Act No 9 Of 2011 which was also assented to on 11 June 2011, and will come into operation on a date fixed by the President by proclamation in the Gazette.

The purpose of this Act is 'to provide for the establishment of the Community Schemes Ombud Service; to provide for its mandate and functions; and to provide for a dispute resolution mechanism in community schemes; and to provide for matters connected therewith.'

3

Rescue procedures under The New Companies Act, 2008: How is The Registrar of Deeds affected?

By: Tania Shawe, Law Lecturer | Deeds Training | PRETORIA

One of the changes effected by the New Companies Act 71 of 2008 (the Act) is the provision of Rescue Procedures and the repeal of inter alia Judicial Administration as provided for in the Deeds Registries Act 47 of 1937.

Where a company was insolvent under the Companies Act 61 of 1973, the mere noting of a CY Interdict alerted the examiner that no further dealings were allowed with such company's immovable property unless it was the liquidators transferring the property by virtue of the court order filed, or with a disclaimer from the liquidator.

The examiner had to ensure that the liquidator or trustee was duly authorised to deal with the property by confirming the letter of appointment. The only other aspect was to ensure that Regulation 51(2) of the Deeds Registries Act 47 of 1937, with regard to any registered bonds over the property, was complied with.

According to the definition of "Business Rescue" in the Act, it means: proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for:

(i) the temporary supervision of the company, and of the management of its affairs, business and property;

(ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and

(iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximizes the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company;

The legislator's intention is clearly to assist companies in financial trouble and to prevent closure of a company as a result of winding up by liquidators. Section 133 of the Act, therefore places a moratorium on legal proceedings against a company which has been granted rescue proceedings in terms of chapter six of the Act. The implication hereof is the temporary supervision of the company by managing its business, property and affairs.

In terms of section 140 the Business Rescue Practitioner has full management and control over the company. The company continues to operate as before, but it will be under supervision of the Rescue Practitioner. In terms of Section 133 there will also be a temporary moratorium on claims against any possessions of the company. No legal proceedings against the company may be commenced or proceeded with, except:

- with the written consent of the Business Rescue Practitioner;
- as a set off against any claim which the company made;
- criminal proceedings against the directors or company;
- with the leave of the court;
- proceedings by a regulatory authority in the execution of its duties after written notification to

the Business Rescue Practitioner; and
- proceedings concerning any property or right over which the company exercises the powers of a trustee.

The latter exemption will concern the Registrar of Deeds. It briefly implies that a company may continue to act as an agent under a General Power of Attorney if so appointed.

If business rescue procedures are implemented, any General Notarial Bond over the company's movable assets will be affected. The Notarial Bond would have to be perfected prior to liquidation, as there will be no time to apply to court to have it perfected.

Only if the creditor believes that the Business Rescue plan is not going to succeed, may he or she apply to court in terms of the exceptions of Section 133 of the Act to act upon its General Notarial Bond.

If the company has ceded its book debts to a bank, the bank might enforce its rights prior to the commencements of the rescue proceedings, however, the book debt will probably no longer be in its lawful possession- all the more a warning to the bank to apply to court to perfect the Notarial Bond.

It is interesting to know that section 135(2) of the 2008 Act allows for post-commencement funding during the business rescue process, and therefore bonds may still be registered over the company's immovable and movable property.

Existing contracts

A further question to ask is; what would be the effect of Business Rescue Procedures on existing contracts or uncompleted contracts, e.g., the sale of company property entered into prior to a Business Rescuer being appointed?

Sections 136(2) of Act 71 of 2008 allows the practitioner to entirely, conditionally or partially suspend any obligations entered into prior or during commencement of the procedures.

There is a school of thought that reasons that affording the Practitioner such a wide discretion is contrary to the standards entrenched in the principles of South African laws of contract and that the practitioner should only have two options to either bind himself to the contract and to offer full performance or the other options to repudiate the contract where claims to damages will not be preferential.

This has been amended by Section 87 of the Companies Amendment Act, 2011 so that the Practitioner has to apply to court to entirely, partially or conditionally cancel a contract. The onus will be on the Practitioner to advise the Registrar of the cancellation in which case an interdict will be noted against the relevant property. However, in Knipe and another v Noordman No and others 2015(4)SA338 a provisional liquidator was afforded the power to sell company assets after a final liquidation order was granted.

It was not curbed by a supervening business rescue application as per section 131(6) of the Act. This case is, however, contrasted with Elias Mechanicos Building & Civil Engineering Contractors (Pty) Ltd v Stedone Developments (Pty) Ltd and Others 2015 (4) SA 485 (KZD) where it was held that leave to institute legal proceedings should be obtained before instituting Rescue Proceedings and not sought as part of the main application.

It should, however, be noted that the latter deals with s 133(1)(b), and not s 131(6), of the Act. The fact is that the Registrar when registering such a sale in execution will not be aware if rescue proceedings were instituted and a Practitioner appointed.

In terms of Section 134 the company may dispose of property only in the ordinary course of business; in a bona vide transaction for fair value approved in advanced and in writing by the Practitioner or in a transaction undertaken as part of the approved rescue plan. If the Rescue Practitioner elects to honor the deed of sale, such transfer may be registered as per CRC28/2013.

Contracts entered into with or by the company may continue to exist- unless the contract regulates the relationship in the event of liquidation. The registrar is therefore dependent on the conveyancer whether it will be the directors of the company duly authorised, or the Rescue Practitioner transferring the property, unless the notification of appointment as Rescue Practitioner was received prior to the transaction.

The Rescue practitioner may however, partially or conditionally suspend any obligation arising from an agreement to which the company was a party at the commencement of the business rescue proceedings and that would become due during the proceedings (Section 136(2)). Provisos do apply however.

Repealed Judicial Management under Act 61 of 1973 compared to Business Rescue Procedures under Act 71 of 2008

Where it appeared that a company or close corporation was in financial difficulty but could restore its situation with proper management, the court could order under Section 427 of the Companies Act 61 of 1973 the appointment of a judicial manager, but subject to the court's supervision.

The Registrar was provided with a copy of the Judicial Management order although the act did not make provision for it, which was then filed as an interdict. The bonds registered over the land title had to be disposed of as Section 56(1)(b) of the Deeds Registries Act did not apply due to the fact that the company was not wound up.

The manager assumed the position of a director with the same powers in so far as the old Act and the directions in the court order permitted.

The manager however, could not act as a liquidator or sell or dispose of assets unless the court authorised the manager or acted upon in the normal course of business. Similar to Rescue Proceedings under Act 71 of 2008, the court usually ordered that while the company was under judicial management, all actions, executions of writs and summonses or procedures against the company be stayed and not proceeded with without the court's consent.

It is submitted that the Registrar is still in the same position regarding notifications under Rescue Procedures under Act 71 of 2008 as under Judicial management under Act 61 of 1973. With regard to the appointment of the Business Rescue Practitioner, nowhere in the 2008 Act does it mention that the court must advise the Registrar of Deeds of the appointment of a Business Rescue Practitioner.

The Practitioner will not be liable for any act of omission performed in good faith during exercise of his or her powers and functions, but may be held liable for gross negligence. It is totally up to the discretion of the Rescue Practitioner to notify the Registrar.

Such a notification is filed as an interdict against the companies' immovable property. Where the notification is not filed, the registrar would be none the wiser that the company is in trouble and that property may only be dealt with by the Rescue Practitioner.

The directors might unknowingly sell property or honour a sale in contravention of Section 142(3) of the Act, without the practitioner's knowledge, and such transfer may be registered in the Deeds Office unless the registrar is notified of the appointment of the Rescue Practitioner.

Currently the examiner has to rely on the conveyancer and the provisions of Regulation 44A(c) of the Deeds Registries Act regarding the authentication of the transfer.

As the Registrar will not be held responsible in the unauthorised sale of company property when a Rescue practitioner has been appointed, and the prevalence of fraud in our society, perhaps the legislature should consider combatting this occurrence by additional compulsory notice to the Registrar of Deeds.

4 The Proper Construction and Interpretation of Section 43 of the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA)

By: Wiseman Bhuqa, Law Lecturer | Legal Support & Deeds Training

This article seeks to inculcate a proper construct of the provisions of Section 43 in order to curb the prevailing prevarications on the application thereof. It is almost trite law that most land development applications are approved with pre-promulgation or pre-establishment conditions and/or post-establishment conditions.

By land development applications we mean the following applications as prescribed in terms of Section 41(1) & (2) of SPLUMA as well as relative By-Laws:

- A township establishment application;
- A subdivision and/or consolidation of an erf/erven in an approved township or the subdivision of any other land application;
- An extension of boundaries of an approved township application;
- An amendment or cancellation either wholly or in part of a general plan of an approved township application;
- A removal, amendment or suspension of a restrictive or obsolete condition, servitude or reservation registered against the title of land application; and
- Any other application as provided for in this By-law.

In terms of Section 40(7) of the Spatial Planning and Land Use Management Act 16 of 2013 "A Municipal Planning Tribunal may— (a) approve, in whole or in part, or refuse any application referred to it in accordance with this Act; (b) in the approval of any application, impose any reasonable conditions, including conditions related to the provision of engineering services and the payment of any development charges"

We distinguish between conditions relating to various aspects of land use namely:

1) Provision of engineering services;
2) Payment of development charges and/or contributions for the provision of engineering services;
3) Provision or transfer of land to any competent authority for use as public open space and parks, private open space or the payment of an endowment in lieu of the providing thereof;
4) Provision of engineering services in terms of section 49 of Act 16 of 2013, relevant Municipal Planning By-Law or any Council Policy;
5) Making of arrangements with regard to the maintenance of any engineering services, open spaces and public and private parks;
6) Matters contained or governed in a Land Use Scheme and related issues;
7) Registration of servitudes and conditions of title;
8) Provision of land for educational or other social facilities, or the payment of an endowment in lieu thereof;
9) Transfer of land to an entity specifically established for the provision and maintenance of engineering services in terms of the relevant By-law or other applicable legislation; and
10) Any other matter considered necessary by the Municipality.

The Municipality may further distinguish between conditions that are to be complied with:

- prior to the rights coming into operation;
- after the land use rights have come into operation, but before the rights can be exercised;
- without which the rights may not be exercised; and/or
- prior to the approval of building plans.

Section 43 of SPLUMA specifically regulates the aspect of mandate, period of compliance and the lapse of a land development application which is approved subject to conditions as aforesaid.

The section in question reads as follows:

Conditional approval of application 43.

(1) An application may be approved subject to such conditions as—
  (a) are determined by the Municipal Planning Tribunal; or
  (b) may be prescribed.

(2) A conditional approval of an application lapses if a condition is not complied with, within—
  (a) a period of five years from the date of such approval, if no period for compliance is specified in such approval; or
  (b) the period for compliance specified in such approval, which, together with any extension which may be granted, may not exceed five years.

From the outset, emphasis must be made that the primary purpose of the foregoing provision is to regulate the lapsing of a conditional approval imposed by the Municipal Planning Tribunal (MPT) or by the Authorised Official (AO) and to elucidate the dynamics and premises of such lapse.

For a proper construct of the dynamics of the lapse, two different positions regarding conditional approvals must be clearly distinguished, namely:

- Conditional approval with a defined period of compliance.
- Conditional approval without a defined period of compliance. In the case of a conditional approval with a defined period, the notice of approval will disclose the period for such compliance. The period disclosed as such, including any relevant extensions, must not exceed 5 years from the date of approval. Deeds examiners must actually peruse the notice in the township file to determine if the application has not lapsed before registration of the relevant transaction. The date of approval is key-critical in this exercise.

However, one must take cognisance of the fact that over and above the period disclosed in the approval, there is still a prescribed period within which an application must be registered in the deeds office which is disclosed in the relevant legislation.

Usually, applications must be registered within 6-12 months from date of approval.

With regard to the conditional approval without a defined period, Section 43(2)(a) states that the approval lapses within a period of 5 years from the date of approval. The date of approval is the point of departure in computing the period of 5 years.

As far as the mandate is concerned it is clear from the provisions of Section 43(1) that an application may be approved by a MPT or AO and therefore the conditions of approval may also be imposed by the MPT and the AO.

5 Transfer of Land Ownership in a Deceased Estate of a Person Married in Terms of Customary Law

By: Wiseman Bhuqa, Law Lecturer | Legal Support & Deeds Training

There is a maelstrom of dynamics and relative transitional measures surrounding the aspect of transfer of ownership from an intestate estate of an indigenous person whose marriage was governed by customary law.

These dynamics are extremely crucial in order to have a proper construction and cognition of the relevant deeds practice.

The point of departure is that the deceased might have died testate or intestate.

Testate Succession:
If the deceased died testate, obviously the provisions of the will be followed and there has never been any degree of quandary pertaining thereto.

Such estates have always been treated the same as the estates of other racial groups envisaged in the Administration of Estates Act 66 of 1965.

In other words; the Administration of Estates Act 66 of 1965 has always applied without any prohibitions to testate estates of persons governed by indigenous law.

Intestate Succession:
However, in the case of Intestate Succession, there is a plethora of variants and dynamics that determine how the property must devolve and thus the manner of registration.

The date of death is crucial for the purposes of determining the dynamics that are applicable per case.

The date of death is key-critical in this regard.

If the deceased died intestate before 27 April 1994 but the deceased estate was reported after 27 April 1994, the deceased estate will be administered by the Master of the High Court in terms of the laws that were applicable before that date, e.g. Reg 4(1) Proc R200/87. See RCR40/2013.

Most importantly, this means that the relevant deeds will be accompanied by a Certificate of Determination of Heir in terms of Regulation 4(1), and a Certificate of Approval in terms of Section 4(2) Proc R200/87.

If the deceased died between 6 December 2001 and 15 October 2004, the deceased estate can be administered either by the Master of the High Court or the Magistrate.

Court in terms of the Black Administration Act 38 of 1927.
If the deceased died after 15 October 2004 the estate will only be administered by the Master in terms of the Administration of Estates Act 66 of 1965.

If the deceased died after 20 September 2010 the estate will be administered by the Master in terms of the Administration of Estates Act 66 of 1965 read with Section 2(1) of the Reform of Customary Law of

Succession and Regulation of Related Matters Act 11 of 2009 and the Intestate Succession Act 81 of 1984.

NB: from 6 December 2001-24 November 2014, where the deceased estate was valued under R125 000 the Master would appoint a representative in terms of Section 18(3) Act 66 of 1965.

With effect from 24 November 2014, where the deceased estate is valued under R250 000, the Master may appoint a representative in terms of Section 18(3) Act 66 of 1965.

These letters of authority under S18(3) are not lodged in the Deeds Office. Should they be lodged the examiners in the deeds office will mark them “R” for expungement by the relevant conveyancer.

The transfer ownership may take the form of a Deed of Transfer or a simple Application for endorsement in terms of S45(1) Act 47 of 1937 or Section 39(3) Act 66 of 1965.

The latter only applies to property which is an asset in a joint estate between the transferee and the deceased.

The relevant deed or application must be accompanied by the following documents:

- Proof of intestacy;
- Proof of intestate heirs (next of kin affidavit);
- Certificate of Determination of Heir in terms Regulation 4(1), and a Certificate of Approval in terms of Section 4(2) Proc R200/87 where the deceased estate was reported before 27 April 1994;
- Conveyancers Certificate in terms of Section 42(1) Act 66 of 1965 in the case of an estate above R250 000 where the person died after 24 November 2014 or in the case of an estate valued R125 000 if the person died before 24 November 2014;
- Redistribution agreement where applicable; and
- Any other relevant documents.

6 The Quandary surrounding Section 53 of The Spatial Planning and Land Use Management Act 16 of 2016

By: Wiseman Bhuqa, Law Lecturer | Legal Support & Deeds Training

It has been observed that there is a persisting conjecture around the correct interpretation of the provisions of Section 53 of SPLUMA on the one hand as well as its conception within the purview of Section 41(1)&(2) thereof which compromises the validity of registration of transactions arising from land development applications.

The divergent deductive constructions held by various practitioners on the matter continue to pose a serious threat to legal certainty and ultimately to registration of relevant deeds as aforementioned.

The purpose of this article, therefore, is to make elucidatory remarks on a proper construction of the section in question.

One cannot emphasise enough the fact that the section in question is prohibitory in nature and as such it calls for the utmost degree of accuracy, unflawed and unambiguous conception of the meaning and objectives entrenched therein; lest the incumbents invoke it contrary to its spirit and tenor.

The section in question reads as follows:
"Commencement of registration of ownership 53. The registration of any property resulting from a land development application may not be performed unless the municipality certifies that all the requirements and conditions for the approval have been complied with."

The primary debacle in this provision and cause of confusion lies in the fact that the heading refers to commencement of registration of ownership whereas the content thereof broadly relates to registration of any property resulting from a land development application including matters that are not related to transfer of ownership.

While it is relatively easy to determine the scope of "any property resulting from a land development application" within the ambit of Sections 41(1) and (2) of SPLUMA as well as relative provisions in the respective Municipal Planning By-Laws; not all the registrations as aforementioned have any bearing on the commencement of ownership, e.g. removal of restrictions; yet they are classified as land development applications.

Thus the use of the phrase "The registration of any property resulting from a land development" is a statutory anomaly if one takes the heading thereof into cognisance and therefore aligns the meaning thereof to transfer of ownership as couched in the heading.

Basically the heading is incompatible and therefore misaligned with the content of the section, hence the conjecture.

In order to give the section, the latitude of proper construction, a comparative analysis must be made of clear and unambiguous prohibitory provisions in related legislation as espoused in a plethora of sources.

It has been observed that there is a persisting conjecture around the correct interpretation of the provisions of Section 53 of SPLUMA on the one hand as well as its conception within the purview of Section 41(1)&(2) thereof which compromises the validity of registration of transactions arising from land development applications.

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While it is relatively easy to determine the scope of “any property resulting from a land development application” within the ambit of Sections 41(1) and (2) of SPLUMA as well as relative provisions in the respective Municipal Planning By-Laws; not all the registrations as aforementioned have any bearing on the commencement of ownership, e.g. removal of restrictions; yet they are classified as land development applications.

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Basically the heading is incompatible and therefore misaligned with the content of the section, thereby creating a conjecture.

In order to give the section the latitude of proper construction, a comparative analysis must be made of clear and unambiguous prohibitory provisions in related legislation as espoused in a plethora of sources.

In Registrars Conference Resolution *(RCR 45/2012)* the question posed was:
‘In terms of the various Provincial Ordinances land in a township cannot be sold, exchanged, leased or disposed of in any manner before the proclamation date. Can the owner, based on the Huntrex 148 (Pty) Ltd v J A van Jaarsveld, case 217/2010, sell property before the townships is proclaimed (sic)?’”

The Conference resolved: “The Ordinances must be adhered to; alternatively, a court order is required.”

Section 101(4) of the Town Planning and Townships Ordinance 15 of 1986 reads as follows:

Having endorsed or registered the title deeds as contemplated in subsection (1) the Registrar shall notify the authorised local authority forthwith of such endorsement or registration, and thereafter the Registrar shall not register any further transactions in respect of any land situated in the township until such time as the township is declared an approved township in terms of Section 103.”

It is clear in the foregoing provision that all “transactions” arising from a township are prohibited. One of the

aspects that makes it clear is the absence of a contradictory heading.

Section 8(5) of the Free State Townships Ordinance 9 of 1969 reads as follows:

"After an owner of land has taken steps to establish a township thereon, no person shall –

(a) enter into any contract whereby any land in such township is sold, exchanged, leased or disposed of in any other manner;

(b) erect a building on such land, except with the approval of the responsible member or otherwise than in accordance with the conditions imposed by the responsible member when granting such approval, until –

(i) .....; or

(ii) .....;

(iii) .....; or

(iv) the responsible member shall have declared the township an approved township and, in the case of such an owner who is not a local authority, the responsible member shall have satisfied himself that the services and amenities which have to be provided in connection with such land in terms of the conditions subject to which the establishment of such township was approved, are available and shall have issued a certificate to that effect."

Section 8(7) of the Ordinance further provides that any contract entered into in conflict with the provisions of subsection (5) shall be of no force or effect.

It is clear from the above extracts that the prohibition will easily extend to leases, mortgage bonds, etc., whereas the same cannot be said about Section 53 of SPLUMA as it only seems to prohibit registration of ownership (at least according to its heading).

Given the ambiguity of the above section, one wonders what exactly the purpose of the prohibition is; is it merely prohibition of transfer of ownership or restriction against any form of alienation or transaction before compliance with conditions of establishment?

This conundrum can be resolved by invoking the hermeneutical rules of statutory interpretation.

It is easily discernible from the foregoing remarks that the orthodox approach to interpreting the section will be a futile exercise given the contradiction between the heading and the related content.

According to the golden rule of interpretation, if the 'plain meaning' of the word is ambiguous, vague or misleading or if a strict literal interpretation would result in absurd results then the court may deviate from the literal meaning to avoid such an absurdity.

In the case in hand, the words "registration of any property" are vague and are incompatible with the heading that refers to "registration of ownership" given the fact that registration of ownership presupposes only those acts that will involve transferring an erf from the developer to the transferee or the issue of a Certificate of Registered.

Title in favour of the developer while "registration of any property" on the other hand means a plethora of transactions beyond the scope of transfer of ownership, e.g. mortgage bond, servitude, lease, etc.

This leaves us with the golden rule of interpretation whereby the plain meaning of the text must be dispensed with and instead the intention of the legislator or the purpose of the provision must be determined.

One must therefore adopt the purpose-oriented (text in context) approach, in terms of which the purpose or object of the legislation (the legislative scheme) is the prevailing factor in interpretation.

An accurate diagnosis of the real purpose of section 53 can be achieved by first determining the mischief being prevented by the legislation enacting this section. Premature transfer of erven in a township, i.e. transfer before a proclamation that the township is declared an approved township may result in absurdity in the event that the township application is ultimately rejected or not approved.

In the same token, registration of a lease, any disposal or mortgage over an erf in a township before it is declared approved is absurd. Such registration would be void ab initio. Another misconception involves the invoking of the provisions of Section 53 without due consideration and observance of the transitional measures.

This misconception manifests itself in the indiscriminate practice of calling for Section 53 Certificates to be lodged with all deeds arising from land development applications submitted after 1 July 2015. Such practice is flawed in the sense that not all deeds arising from a land development application after 1 July 2015 are completely amenable to SPLUMA as some land development applications may still be approved in terms of the respective ordinances or unrepealed planning laws. A typical example of this scenario is where a municipality has not yet passed a Municipal Planning By-Law. In such instance, it would be absolutely ludicrous to invoke Section 53.

Instead the relevant compliance Certificates prescribed in the respective Ordinance or un-repealed Ordinance must be called for, e.g. Certificate in terms of Section 82 and Section 92(3) Ordinance 15 of 1986 read with Regulation 38 of the ordinance.

7 SPLUMA Part (III): The Removal of Restrictions

By: Wiseman Bhuqa, Law Lecturer | Legal Support & Deeds Training

Removal of Restrictions relates to the process of amendment, suspension or removal of obsolete conditions, obligations, servitudes or reservations and related matters from the registered title deeds of a particular property. There is a plethora of reasons that orchestrate the process of removal of restrictions.

The restrictive conditions relate to the following spectrum of land use matters:

- A restrictive condition or servitude registered against
  the title deed of a particular land parcel;
- A provision of a law relating to the establishment of townships or town planning;
- A provision of a by-law or regulation relating to a town planning scheme, etc.;
- A provision of a town planning scheme and a restrictive condition or servitude registered against the title deed of a particular land parcel; and
- A provision of a town planning scheme and a provision of a law relating to the establishment of a townships or town planning.

Conditions of title are those contained in deeds of **transfer, deeds of grant, certificates of** ownership, quitrent grants, permission to occupy certificates and other forms of ownership registered in the Deeds Office. The purpose of title restrictions is mainly to protect the amenity and character of a particular land development area.

In Van Rensburg No and another v Naidoo No and others, Naidoo No and others v Van Rensburg No and others (155/09,455/09) [2010] ZASCA 65, [2010] 4 all SA 398(SCA); 2011 (4) SA 149 (SCA) (26 May 2010) the court confirmed the view of the Appeals Court in Ardcornnel Investments (Pty) Ltd that restrictive conditions are imposed for the benefit of all the other erven in a township and are inserted in the respective

title deeds for the public benefit as well as to preserve the essential character of a township. It follows that when an owner removes such a condition, the rights of other owners in the township are diminished or extinguished.

Title deed restrictions are for the reciprocal benefit of the owners in a township; thus, each erf is simultaneously burdened or encumbered thereby.

The removal process solely focuses on restrictive conditions and not benefit conditions. The former are basically characterised by distinctive phrases such as “Subject to...”, “Onderhewig aan...”, “The owner of the lot shall...”, “Except...” or “No...”. while the latter are distinguished by the expressions such as “With the benefit of...”, “Met die voordeel van...” or “With the use of...”

The process basically involves an approval phase and publication of the approval in the Provincial Gazette as well as a registration phase to be complete. In short, an application must be lodged by the land owner or by the controlling authority, e.g. a municipality, in terms of the relevant legislation and after approval by the relevant administrator, tribunal or controlling authority the owner or municipality, must lodge an application for endorsement of the relevant title deeds with the Registrar of Deeds regarding such removal.

The application may relate to any of the following acts of registration:

- Amendment of a condition;
- Suspension of a condition;
- Relaxation of a condition; and
- Permanent removal of a condition.

Presently the removal of restrictions remains one of the most abstract and perplexing areas of planning law due to the changes ushered on the one hand by the advent of the constitutional epoch on 27 April 1994, more especially the assignment of the Removal of Restrictions Act 84 of 1967 to the respective provincial governments in terms of Section 235(8) of the Interim Constitution of the Republic of South Africa No 200 of 1993 (Proclamation R160 Government Gazette 16049, 31 October 1994); its subsequent amendment and repeal in different provinces; the advent of Section 47 of the Spatial Planning and Land Use Management Act 16 of 2013 and its relative Municipal Planning By-Laws on the other.

Some Provinces still apply the Removal of Restrictions Act 84 of 1967 and others have enacted their unique legislation in lieu thereof.

The quandary of transitional measures in the midst of these nuances remains a menacing challenge to the proper conception and application of the process. Consequently there are divergent procedures relating to removal of restrictions nationwide. It is therefore at the backdrop of the foregoing dynamics that the aspect of removal of restrictions must be conceived.

There are three distinct methods for removal of restrictions, namely:

- Removal in terms of a Court Order in which case a rule nisi is issued by the High Court for the expungement of title restrictions;
- Removal in terms of legislation; and
- Removal in terms of a notarial agreement between the administrator, council or tribunal and the affected land owner.

This article focuses on the second method, namely removal in terms of legislation. It must be highlighted here that in the current planning dispensation the legislation refers to National Legislation, Provincial Legislation and Municipal Legislation(By-Laws). As far as removal of restrictions by means of legislation is concerned the following authoritative framework provides a basis for application:

(i) Section 2 and 3(1) the Removal of Restrictions Act 84 of 1967;
(ii) Section 6 of the Gauteng Removal of Restrictions Act 3 of 1996;
(iii) Section 59(1) of the Northern Cape Planning and Development Act;

(iv) Section 60 of the KwaZulu-Natal Planning and Development Act;
(v) Section 3(2) of the Less Formal Townships Establishment Act 113 of 991;
(vi) Section 34 of the Development Facilitation Act 67 of 1995;
(vii) Section 7(1) of the Upgrading of Land Tenure Rights Act 112 of 1991;
(viii) Section 49(6) of the South African National Roads Agency Limited and National Roads Act 7 of 1998;
(ix) Section 11(9) Advertising of Roads and Ribbons Development Act by-law;
(x) Section 31(7) of the National Heritage Resources Act 25 of 1999;
(xi) Section 47(1) of the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA); and
(xii) Various Municipal Planning By-Laws and Ordinances.

In Camps Bay, Ratepayers and Residents Association and Others v Minister of Planning, Culture and Administration, Western Cape 2001(4) SA294 (C), the judge pointed out that one or more of the following central factors must underpin any feasibility study of removal of a restriction:

a. It must be desirable to remove the restriction in the interests of the public;
b. It must be desirable to remove the restriction in the interests of an establishment;
c. It must be desirable to remove the restriction in the interests of a development;
d. It must be desirable to remove the restriction in the interests of any area.

Any removal, amendment or suspension of a restrictive title deed condition must be in accordance with section 25 of the Constitution of the Republic of South Africa, 108 of 1996 in so far as it implies a deprivation of land rights.

Over and above the aforementioned factors Act 84 of 1967 further states that other factors include the fact that the land must be required for ecclesiastical purposes, public purposes by the State or Local Authority, erection of any building by the State of Local Authority and any other incidental purpose relating to the above.

In the current dispensation removal of restrictions must be understood within the purview of Section 47 of SPLUMA which reads as follows:

"(1) A restrictive condition may, with the approval of a Municipal Planning Tribunal and in the prescribed manner, be removed, amended or suspended.
(2) A removal, amendment or suspension of a restrictive condition contemplated in subsection (1) must, in the absence of the contemplated written consent, be effected—
(a) in accordance with section 25 of the Constitution and this Act;
(b) with due regard to the respective rights of all those affected, and to the public interest; and
(c) in the prescribed manner, if such removal, amendment or suspension will deprive any person of property as contemplated in section 25 of the Constitution."

Section 47(5) further states that "an applicant at whose instance a restrictive condition is removed, amended or suspended in terms of this Act, must, within the prescribed period and in the prescribed manner, apply to the Registrar of Deeds concerned for the appropriate recording of such removal, amendment or suspension, and the Registrar of Deeds must in the prescribed manner record such removal, amendment or suspension..."

Before a further exploration of the cardinal dynamics that influence removal of restrictions, it is extremely crucial to take cognisance of various existing mechanisms or processes that govern the process within the purview of South African Law.

This background is of utmost importance if one aims to unravel the rigmarole of removal of restrictions in the SPLUMA and Municipal By-Law dispensation.

The process focuses on the following key aspects: The removal of any restriction, obligation, servitude or reservation which relates to the subdivision of the land or the purpose for which the land may be used in connection with the erection of structures or buildings on or the use of the land, which is binding on the owner of the land arising out of-

(a) any restrictive condition or servitude which is registered against the title deed or leasehold title of such land; or

(b) a provision of a by-law or of a town-planning scheme; or

(c) the provisions of a title condition contained in the schedule to the proclamation of a township; or

(d) the provisions of a law relating to the establishment of townships or town planning.

REMOVAL OF RESTRICTIONS IN THE PROVINCE OF KWAZULU-NATAL

By: Wiseman Bhuqa, Law Lecturer | Legal Support & Deeds Training

In KwaZulu-Natal removal of restrictions is effected in terms of the provisions of section 69 of the KwaZulu-Natal Planning and Development Act 6 of 2008. However, where a municipality has promulgated its Land Use Management By-law the application will be effected in terms of such By-law.

Note that all applications that fall within the transitional period between 1 July 2016 and the relevant date of the by law, e.g. 19 January 2017, in the case of the Mthonjaneni Municipality Spatial Planning and Land Use Management By-law, etc. will be dealt with in terms of the Removal of Restrictions Act 84 of 1967.

In terms of the Act, the following documents must be lodged in the Deeds Office:

- Title Deed containing the restrictive condition being removed.
- A certified copy of the decision of the municipality or Appeal Tribunal.
- A certificate issued by the municipality stating that the conditions of approval that have to be complied with before the condition may be altered, suspended or deleted have been complied with.

NB: although a bond holders consent is required before approval, it is not necessary to lodge same in the deeds office.

The Registrar of Deeds and the Surveyor-General must endorse the respective registers, title deeds, plans and diagrams respectively.

Where a By-law is already in operation, the provisions of Section 47 of SPLUMA apply and thus the procedure outlined in the respective by-law will be followed.

Also note that if it is evident that the application was made prior to the coming into operation of the PDA, the procedure outlined in Sections 2 and 3 of the Removal of Restrictions Act 84 of 1967 will apply.

In respect of all the properties situated in the jurisdiction of the Msunduzi Municipality, Section 80 of the Msunduzi, Municipality Spatial Planning and Land Use Management By-Law provides, inter alia, as follows:

"(1). The land owner must ensure that the deeds and other documents that the Registrar of Deeds may require to record the removal, amendment, or suspension of a restrictive condition of title or servitude are lodged with the Registrar of Deeds.

(2). A person may not apply to the Registrar Deeds to record the removal, amendment, or suspension of a restrictive condition of title or servitude, unless the municipality has issued a certificate stating that the conditions of approval that must be complied with before the condition of title or servitude may be removed, amended or suspended have been complied with."

REMOVAL OF RESTRICTIONS IN THE PROVINCE OF GAUTENG

In the Gauteng Province removal of restrictions is effected in terms of the Gauteng Removal of Restrictions Act 3 of 1996, however, where the relevant municipality has implemented its land use management by-law, Section 47 of SPLUMA finds application in terms of which the application must be made in terms of the relevant by-law read together with Act 3 of 1996.

However, if the application was submitted before the coming into operation of Act 3 of 1996, the application will still be approved in terms of the provisions of Section 2 and 3 of the Removal of Restrictions Act 84 of 1967.

Note that all applications that were submitted in the transitional period between 1 July and the date of commencement of the relevant by-law, e.g. 2 March 2016 in the case of the City of Tshwane must be finalised in terms of the Gauteng Removal of Restrictions Act 3 of 1996.

With regard to all properties situated in the jurisdiction of the City of Johannesburg Metropolitan Municipality, the amendment, suspension or removal of restrictive or obsolete conditions or obligations, servitudes or reservations and matters related thereto is effected in terms of Section 42(4) of the City of Johannesburg Municipal Planning By- law read with Section 5 of Act 3 of 1996 since 1 September 2016.

The application must be lodged by the owner of the land in terms of Section 42(2) or by the Municipality in terms of Section 42(5).

In terms of Section 44(1) the application must be lodged with the Registrar of Deeds within 28 days from date of approval.

The By Law will be applied in conjunction with the Act as far as practicable because the Act is not repealed.

The following documents must be lodged in the in the deeds office:

- Application;
- Title deed; and
- The Provincial Gazette.

The primary duty of the registrar is to endorse the relevant title deed regarding the removal of restriction. The relevant title deed and copy of the provincial gazette have to be lodged at the township section for endorsement.

With regard to property situated in the City of Tshwane Metropolitan Municipality; the amendment, suspension or removal of restrictive or obsolete conditions or obligations, servitudes or reservations and matters related thereto is effected in terms of the Gauteng Removal of Restrictions Act 3 of 1996 in conjunction with the City of Tshwane Metropolitan Municipality Land Use Management By-law since 2 March.

The application process must fully comply with the provisions of Section 47(1) of SPLUMA. An application for the removal of restrictions may be effected by a Municipality on its own initiative or the owner of the land in terms of Section 4 of the Act or by the land owner in terms of Section 5 of the Act read with Section 16(2) of the By-law.

Although the bondholders' consent is required for approval of the application, it is not required for lodgement of deeds in the deeds office.

The following documents must be lodged in the deeds office for the purposes of registration of the application:

- Application;
- Gazette; and
- Title deed.

The Registrar of Deeds must endorse the relevant title deed in terms of Section 5 of the Gauteng Removal of Restrictions Act read with Section 16(2)(g) of the By-law any condition so specified, any restrictive condition.

(2) An applicant who wishes to have a restrictive condition amended, suspended or removed must apply to MLM for the amendment, suspension or removal of the restrictive condition in the manner provided for in Chapter 6.

In terms of Section 52(1) the application for endorsement of the title by the Registrar of Deeds must be accompanied by the following documents:
(a) A copy of the original title deed;
(b) A copy of the original letter of approval; and
(c) A copy of the notification of the approval.

REMOVAL OF RESTRICTIONS IN THE PROVINCE OF MPUMALANGA

In the Mpumalanga Province, removal of restrictions is effected in terms of Section 2 and 3 of the Removal of Restrictions Act 84 of 1967.

The following documents must be lodged in the deeds office for the purposes of registration of the application in terms of Act 84 of 1967:
- Application;
- Gazette; and
- Title deed.

Where a municipality has passed its land use management by-law, the removal of restrictions will be effected in terms of Section 47 of SPLUMA to the effect that the application will be carried out in terms of the relevant By-law read with the Removal of Restrictions Act.

Applications submitted within the transitional period between 1 July 2015 and the date of commencement of the relevant by-law, e.g. 24 February 2016 in the case of Emalahleni Municipality; 10 July 2015 in the case of Mbombela Municipality, etc. must be finalised in terms of the Removal of Restrictions Act 84 of 1967 subject to SPLUMA.

Section 51 Of the Mbombela By-Law on Spatial Planning and Land Use Management provides as follows:

(1) Mpumalanga Metropolitan Municipality (MLM) may, on its own accord or on application by notice in the Provincial Gazette, amend suspend or remove, either permanently or for a period specified in the notice and either unconditionally or subject to any condition so specified, any restrictive condition.
(2) An applicant who wishes to have a restrictive condition amended, suspended or removed must apply to MLM for the amendment, suspension or removal of the restrictive condition in the manner provided for in Chapter 6.

In terms of Section 52(1) the application for endorsement of the title by the Registrar of Deeds must be accompanied by the following documents: (a) a copy of the original title deed;
(b) a copy of the original letter of approval; and
(c) a copy of the notification of the approval.

REMOVAL OF RESTRICTIONS IN THE PROVINCE OF THE WESTERN CAPE

In the Western Cape Province, removal of restrictions is effected in terms of the Western Cape Land Use Planning Act, 2014 (Act 3 of 2014) (LUPA).
There are different dates of commencement of the Act for various municipalities:

It must be also highlighted here that there are four transitional periods to be observed in respect of the municipalities in the Western Cape namely:
1. The period between the date of commencement of the Land Use Planning Ordinance 15 of 1985 (LUPO) and the said LUPA (bearing in mind that the latter differs from one municipality to another) 2.

The period between the date of commencement of the LUPA and the date of commencement of SPLUMA.
3. The period between SPLUMA and the commencement of the respective by-law.
4. The period after the commencement of the respective by-law.

There are different dates of commencement for per municipality or per group of municipalities namely:

- The City of Cape Town (1 July 2015).
- Berg River Municipality (1 August 2015).
- George Municipality (1 September 2015).

The commencement date in respect of the following Municipalities is 25 April 2016:

- City of Cape Metropolitan Municipality
- Cape Winelands District Municipality
- Karoo Central District Municipality

The commencement date in respect of the following Municipalities is 7 October 2015:

- Beaufort Wes
- Cape Augulhas,
- Hessequa,
- Langeberg and
- Saldanha Bay

The commencement date in respect of the following Municipalities is 1 December 2015:

- Bitou,
- Breede Valley,
- Laingsburg,
- Matzikama,
- Mossel Bay,
- Stellenbosch and
- Theewaterskloof

The commencement date in respect of the following Municipalities is 1 February 2016:

- Drakenstein,
- Overstrand and
- Swellendam

The commencement date in respect of the following Municipalities is 15 March 2016:

- Prince Albert and
- Witzenberg Municipalities

The commencement date in respect of the following Municipalities is 1 June 2016:

- Cederberg and
- Knysna Local

The commencement date in respect of the following Municipalities is 8 November 2016:

- Eden District Municipality
- Overberg District Municipality
- West Coast District Municipality, and
- Oudtshoorn.

Section 39(1) of the Western Cape LUPA provides inter alia as follows in this regard:
(1) A competent person must apply to the municipality if he or she requires the removal, suspension or amendment of a restrictive condition. (6) A municipality must publish its decision to remove, suspend or amend a restrictive condition in at least the Provincial Gazette and notify the Registrar of Deeds accordingly.

In terms of Section 40(11), a person may not apply to the Registrar of Deeds to transfer an erf unless the person has proved, to the satisfaction of the municipality, compliance with the conditions of approval that have to be complied with before the land may be transferred.

Where land use planning by-laws have been passed, applications will be approved in terms of the relevant by-laws read with the LUPA.
Note that all applications submitted within the transitional period between the LUPO and the date of commencement of the LUPA per municipality and the date of commencement of the relevant by-law must be finalised in terms of the LUPO.

Applications submitted after the date of commencement of the LUPA where a by-law has been put in operation will be processed in terms of the relevant by-law read with the LUPA. However, applications submitted prior to the promulgation of the LUPA will be finalised in terms of the Removal of Restrictions Act 84 of 1967.

The following documents must be lodged in the deeds office for the purposes of registration of the application in terms of Act 84 of 1967:

- Application;
- Gazette; and
- Title deed.

Section 45 of the City of Cape Town Municipal Planning By-Law provides as follows:

(1) The City may, on its own initiative, in respect of any land unit, or on application, remove, suspend or amend a restrictive condition.

In terms of Section 46(1) the application to the Registrar of Deeds for endorsement of title must be accompanied by the following documents:

(a) The original title deed;
(b) The original letter of approval; and
(c) A copy of the notification of the approval.

REMOVAL OF RESTRICTIONS IN THE PROVINCE OF THE FREE STATE

In the Free State Province, removal of restrictions is effected in terms of Section 2 and 3 of the Removal of Restrictions Act 84 of 1967.

The following documents must be lodged in the deeds office for the purposes of registration of the application in terms of Act 84 of 1967:

- Application;
- Gazette; and
- Title deed.

Where a municipality has passed its land use management by-law, the removal of restrictions will be effected in terms of Section 47 of SPLUMA to the effect that the application will be carried out in terms of the relevant by-law read with the Removal of Restrictions Act.

Note that all applications that were submitted within the transitional period between 1 July 2015 and the date of commencement of the relevant by-law, e.g. 3 July 2015 in respect of the City of Mangaung the application must be finalised in terms of Section 2 and 3 of the Removal of Restrictions Act. However, where the application is submitted after 3 July 2015, the application must be finalised in terms of the by-law.

Section 34 of the Municipal Land Use Planning By-law provides as follows: "(1) The Municipality may, on its own initiative or on application in terms of section 16(2), by notice in the Provincial Gazette amend, suspend or remove a restrictive condition."

In terms of Section 35(1) of the By-law, the following documents must accompany the application for endorsement of title by the Registrar of Deeds:

(a) The original title deed;
(b) The original letter of approval; and
(c) A copy of the notification of the approval.

REMOVAL OF RESTRICTIONS IN THE PROVINCE OF THE EASTERN CAPE

In the Eastern Cape Province, removal of restrictions is effected in terms of Section 2 and 3 of the Removal of Restrictions Act 84 of 1967.

Where a municipality has passed its land use management by-law, the removal of restrictions will be effected in terms of Section 47 of SPLUMA to the effect that the application will be carried out in terms of the relevant by-law read with the Removal of Restrictions Act.

The following documents must be lodged in the deeds office for the purposes of registration of the application:

- Application;
- Gazette; and
- Title deed.

REMOVAL OF RESTRICTIONS IN THE PROVINCE OF LIMPOPO

In the Limpopo Province, removal of restrictions is effected in terms of Section 2 and 3 of the Removal of Restrictions Act 84 of 1967.

Where a municipality has passed its land use management By-law, the removal of restrictions will be effected in terms of Section 47 of SPLUMA to the effect that the application will be carried out in terms of the relevant By-law read with the Removal of Restrictions Act.

The following documents must be lodged in the deeds office for the purposes of registration of the application:

- Application;
- Gazette; and
- Title deed.

All applications submitted in the transitional period between 1 July 2015 and the date of commencement of the relevant by-law will be dealt with in terms of the Removal of Restrictions Act. Applications submitted after commencement of the by-law will be dealt with in terms of the by-law.

REMOVAL OF RESTRICTIONS IN THE PROVINCE OF THE NORTHERN CAPE

In the Northern Cape Province, removal of restrictions is effected in terms of the Northern Cape Planning and Development Act 7 of 1998 (NCPDA).

Where a municipality has passed its land use management By-law, the removal of restrictions will be effected in terms of Section 47 of SPLUMA to the effect that the application will be carried out in terms of the relevant By-law read with the Removal of Restrictions Act (RORA).

However, where and application was submitted prior to coming into operation of the NCPDA, the application will be carried out in terms of Act 84 of 1967.

The following documents must be lodged in the deeds office for the purposes of registration of the application: • Application;

- Gazette; and
- Title deed.

In the Northern Cape, removal of restrictions can be divided into two transitional windows namely:

1. The period between the date of commencement of the Removal of Restrictions Act 84 of 1967 and the date of commencement of the Northern Cape Planning Act 7 of 1998.
2. The period between the date of commencement of Act 7 of 98 and the relevant by-law. Applications that were submitted in the transitional period between the date of commencement of the RORA and the NCPDA will be dealt with in terms of the RORA.

Applications submitted in the transitional period between the date of commencement of the NCPDA and the relevant of by-law will be dealt with in terms of the NCPDA. Applications submitted after the date of commencement of the relevant by-law will be dealt with in terms of that by-law.

REMOVAL OF RESTRICTIONS IN THE PROVINCE OF THE NORTH WEST

In the North West Province, removal of restrictions is effected in terms of Section 2 and 3 of the Removal of Restrictions Act 84 of 1967 (RORA). Where a municipality has passed its land use management By-law, the removal of restrictions will be effected in terms of Section 47 of SPLUMA to the effect that the application will be carried out in terms of the relevant By-law read with the RORA.

Note that all applications submitted within the transitional period between 1 July 2015 and the date of commencement of the relevant by-law, e.g. 26 January 2016 in the case of the Naledi Municipality; must be finalised in terms of the RORA.

Applications submitted after 26 January 2016 must be submitted in terms of the by-law.

The following documents must be lodged in the deeds office for the purposes of registration of the application:

- Application;
- Gazette; and
- Title deed.

References

Centre for Environmental Rights, July 1, 2015" "Western Cape Land Use Planning Act, 2015, Jeannie Van Wyk 2012, Planning Law, 2nd Edition

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King William's Town Deeds Registration Stalwart Retires

By: Soraya Thebus, Assistant Registrar of Deeds: Training | KING WILLIAM'S TOWN DEEDS REGISTRY

The Branch: Deeds Registration is bracing itself for a huge void pursuant to the retirement of another seasoned manager and stalwart, Mr Johan Badenhorst, Registrar of Deeds King William's Town.

Johann-Louw Badenhorst started his career in the Deeds Office in Pietermaritzburg at the tender age of 18 with a starting salary of R110.00 (one hundred and ten rand) per month. After an uninterrupted service of 46 years and 10 months, he enters his retirement years with a priceless wealth of knowledge.

In a sterling interview covered by Ms Soraya Thebus, Asst Registrar of Deeds: Training, King William's Town, the retired Registrar shares the highlights of his illustrious career with us:

ST: Where did it all begin? JB: I stepped out of school into the Magistrate's Court in 1969 and then went to Military Service and became an officer.

Thereafter, my career started on 3 January 1971 in the Pietermaritzburg Deeds Registry where Mr A.B Barnard 36 was the Registrar of the day. I went through the ranks and was put in charge of Registration, Data Section and Administration, which gave me a very good schooling to become a Registrar of Deeds combined with the examination functions.

One of the highlights of the Pietermaritzburg Deeds Registry was the fact that we had such a good relationship amongst all the young people that we started soccer, rugby and hockey teams and involved the women as well. The relationship we had as colleagues stood out best during my time in Pietermaritzburg.

ST: What made you decide to pursue a career in the Deeds Office? JB: I never thought of starting a career in the Deeds Office, and wanted to become an attorney. I did not know about deeds and this is where I got stuck for 46 years and 10 months.

ST: What would you describe as your career defining moment and the lessons learnt from the experience? JB: Everything in my career was good but the real turning point in my career was when I was appointed as a registrar of deeds in King William's Town at the tender age of 38.

Something that was very stimulating during my time here is the building extensions, the amalgamation with Bisho, computerising all the data with the re-alignment of Cape Town and Mthatha and challenges with accommodation.

The above developments prevented me from stagnating and kept me going. Another highlight was the leadership role I could play in the branch and this I thoroughly enjoyed. I had good relationships with not only the managers in the office, but also with other managers throughout the country.

ST: What was the biggest challenge of your career? **JB:** My biggest challenge in my career was to convert the Deeds Registry King William's Town into

a technologically advanced deeds registry, i.e. land registry to Microfilming, Deeds Scanning, and the Document Copy System, etc.

ST: What would you like to see happening with the e-Cadastre? JB: I was very involved with the development of the e-Cadastre from a deeds perspective together with the Office of the Chief Registrar of Deeds. I would like to see the e-Cadastre being a success, equal to that of SARS E-Filing.

ST: What advice will you give to emerging managers in the Deeds Office? JB: Whereas managerial skills are very important, one should never lose sight of the importance of the core function. Ultimately the Deeds Registry is about the security of title which should be the main focal point.

ST: Anything in particular you can think of that you could have done differently? JB: I really do not think I would have done anything differently, and would have bothered me if I have not treated people the way I would want to be treated from a Deeds Office perspective.

ST: Any interests you will be pursuing during your time at home? JB: I would like to improve my fitness level and that is from walking, kayaking, cycling and spend more quality time with my wife who is also looking forward in doing all of the above. I want to be creative in some of my many hobbies.

TRIBUTES FROM STAFF MEMBERS ON MR BADENHORST'S FAREWELL

"Farewell Mr B, you have relentlessly epitomised yourself in our midst as a genuine legend of astute leadership, wisdom and professionalism.

Your impartations and guidance to your subordinates (including myself as a product of your sterling management and leadership) have been simply unimpeachable. You abundantly exuded all the cardinal attributes of a manager: conceptual competency, technical skills and the like.

It has been 16 years since I was under your impeccable management in King William's Town Deeds Office, nonetheless you have always remained an indelible figure in my frame of reference.

You departure is tugging at my heartstrings at the same propensity as it does to any other staff member currently working in your office. Such is the impact of an assertive manager who effectively hybridizes leadership, interpersonal skills and management.

Your deeds registration acumen and efficacy has been second to none; Your managerial prowess has been unequalled;

Thank you for instilling in us and nurturing a culture of self-reliance especially in interpreting and applying the law. You have left behind a legacy that will be treasured and cherished by all;

I wish you all the best in your retirement and hopefully you will still offer your wisdom to the up and coming generation of deeds registry personnel through various forms of engagement".

"As you move outside the cold walls of the office, we can't wait to begin a warm friendship on the outside".- You have been a thorough-going professional and a hard-to-please boss (in a good way though).

I must confess I felt favoured when you shook my hand any said to me "Wiseman, you are doing well" after your farewell function at the 2016 Registrars Conference. This was a remark I had not received in 16 years from my ex-boss. Thank you...

Uphumule kamnandi lapho ekhaya uthokoze nomndeni wakho, Baba

Wiseman Bhuqa-Legal Support & Deeds Training, Office of the Chief Registrar of Deeds: Pretoria

"I would like to wish Mr B (as we fondly call him) the best years on his retirement, he must relax now he has done a good work. Everything I know about microfilming and developing in the Mechanisation section I learnt from him, I did not have such experience in the former Ciskei.

He was a good leader very firm and fair, I will be forever grateful because I had the opportunity to work under him and be able to sponge knowledge from him. I wish him the best health and prosperity for him and his family," **-Luleka Joe.**

"I worked with Mr Badenhorst for 26 years, so I can say I will truly miss him very much. Mr Badenhorst was a perfectionist and took pride in all he did. I learnt allot from him through the years. Wishing him all the best for the future". **-Delcia Watermeyer**

"There are no words to express the type of Registrar, Mr Badenhorst was...Working alongside Mr Badenhorst for the past 21 years was a great honour and privilege.

He not only mentored me, he motivated and encouraged me to always do my best. He was a man of his word. He worked hard and was dedicated in achieving the goals of the department. It was with great sadness to see him leave, as he was not only a boss but a friend too." **-Nadine Kirsten**

"Over the past 10 years I have worked with Mr B I have learnt that he was strict but reasonable. When Mr B spoke, everyone listened which was a symbol of admiration. Mr B was not only the Registrar; he was also a "counsellor" to staff members who shared their own matters with him.

The personal relationship with Mr B was more of a bond than just being a colleague, e.g. he listened, he guided and advised, shared knowledge, etc. Mr B will really be missed as the "father" of the deeds office, KWT. **-Debbie Van Greunen**

"I just want to thank Mr Badenhorst for being a strict but fair boss throughout the 26 years that I have worked with him. I will always remember the following 4 words I was asked when going to him for advice," Wat sê jou wet".

This forced me to do research before asking for any advice. **- Marius Watermeyer**

9 Foreign Court Orders as Supporting Documents

Assistant Registrar of Deeds: Johannesburg Deeds Office

The Constitution of the Republic of South Africa 1996, provides that a decision or order issued by a court binds all persons and state organs; it goes without saying that chapter 8 of the constitution makes provision for the organisation and functioning of judicial authority within the territory of the Republic of South Africa.

Deeds registries are sometimes confronted with transactions deriving from the enforcement of foreign court judgements, e.g. cross border insolvencies, foreign trust transactions and foreign divorce orders. In legal theory all states are sovereign and equal; the territorial principle in public international law bars a state from exercising its jurisdiction beyond their borders; Sovereignty dictates that a state may exercise its particular state functions within its own territory.

In Jones v Krok 1995(1) SA 677(A), it was held that a foreign judgment is not directly enforceable within the Republic of South Africa, but constitutes a cause of action.

At common law, a party wishing to have a foreign court judgment enforced in South Africa must apply to a local court for an order of recognition as noted by the registrar 's conference in RCR 34/2007(see figure 1) which deals with liquidation orders granted by foreign courts and foreign civil judgments may first registering the judgment with a local court under the Enforcement of Foreign Civil Judgments Act, 1998 (Act No. 32 of 1998; however, the Act applies to countries outside the Republic which the Minister has for the purposes of this Act designated by notice in the Gazette, comparable to the Cross-Border Insolvency Act 42 of 2000.

RCR 34/2007 Cross Border Insolvency

A Foreign Court has issued a judgment to liquidate a company that owns property in South Africa. A foreign trustee now requests the registrar of deeds to note a liquidation order against the company.

Does the registrar of deeds have the power to note such an order to enable a foreign trustee to deal with company's assets?

Resolution:

The registrar of deeds must decline to note such an order, unless it has been recognised by a South African Court. See Deutsche Bank AG v Moser and Another 1999 (4) SA 216 (C).

Authentication of the copy of the foreign judgment is considered by the court, in similar vein to a will executed outside the country lodged with the Master of the High Court upon reporting of an estate.

If the foreign judgment concerns the establishment of a certain legal status (e.g. divorce,) it is sufficient to seek recognition of that status, however, if the foreign judgment concerns also an order to perform a certain legal transaction (e.g. make a payment, transfer title, appointment as trustee, liquidator, etc.) then recognition of the foreign judgment shall entail leave to enforce.

In RCR 2/2016 (see figure 2), the registrar's conference resolved on the practice of accepting foreign divorce orders as a supporting document, evident from legal principles explained above, all foreign court orders must be recognised by a south African Court for enforcement in the republic.

The recognition of a foreign court order is a question of law to be decided by a court and a foreign court order may not be accepted by a registrar of deeds consequent to factual proof by a conveyancer through an affidavit or a certificate.

RCR 2/2016, RCR 28/2003 and RCR 64/2010 – Copies of foreign divorce orders May the Registrar of Deeds accept a foreign divorce order?

Resolution:
Yes. In terms of regulation 44A of the Deeds Registries Act 47 of 1937, the conveyancer takes responsibility for the correctness of the marital status of the parties to deeds and documents, inter alia, if the validity of the foreign divorce order has been recognised in terms of section 13 of the Divorce Act 70 of 1979.

Therefore, a copy of a foreign divorce order that is compliant with the provisions of Rule 63 of the High Court rules may be accepted.

10 Securitisation of Personal Servitudes under Mortgage Bond

By: M. S. Mekwe: Law Lecturer: Deeds Training

Introduction
The legality of personal servitudes serving as security under mortgage bonds has, over time, proven to be a challenge to deeds examiners and, to a limited extent, property law practitioners. In order to better understand the nature of a mortgage bond and its effect on the mortgaged property it would be necessary to first consider the meaning of the concept 'mortgage'.

According to K M Kritzinger, Principles of Mortgage, Pledge and Lien,1999, mortgage denotes a form of real security,' that is a real right which one person has in the property of another to secure an obligation owed to the holder of that right'. The same concept can be applied to movable property where such is delivered to the creditor as security for an obligation owed or still to be owed.

This discussion will, however, be limited to mortgage of immovable property.

What is a mortgage bond?
Section 102 of the Deeds Registries Act defines mortgage bond as 'a bond attested by the Registrar specially hypothecating immovable property'. Now, immovable property in the deeds registration parlance means land and everything permanently attached thereto and a real right to such immovable property including such right which becomes real upon registration thereof. It is importatnt that the bndholder's security interest in the property to be morgated be expressed in monetary terms.

These mortgage bonds can arise out of an agreement between the owner of the property (sometimes referred to as mortgagor) and the creditor (referred to as mortgagee) or by operation of law. From the definition of mortgage bond, it is clear that any property which is deemed in law to be immovable such as a registered long term lease or an undivided share in land will be amenable to this kind of bond except those that have been specifically excluded by legislation or judicial pronouncements.

This definition includes servitudes in the sense that they are rights in another's land and some of them like personal servitudes, become real rights upon registration.

Annexure A

Figure 1

RCR 34/2007 Cross Border Insolvency

A Foreign Court has issued a judgment to liquidate a company that owns peoperty in South Africa. A foreign trustee now requests the registar of deeds to note a liquidation order against the company. Does the registrar of deeds have the power to note such an order to enable a foreign trustee to deal with company's assets?

Resolution:

The registrar of deeds must decline to note such an order, unless it has been recognised by a South African Court. See Deutsche Bank AG v Moser and Another 1999.

(4) SA 216 (C)

Figure 2

RCR 2/2016

RCR 28/2003 and RCR 64/2010-Copies of foreign divorce orders May the Registar of Deeds accept a foreign divorce order?

Resolution: Yes. In terms of regulations 44A of the Deeds Registries Act 47 of 1937, the conveyancer takes responsibilty for the correctness of the marital status of the parties to deeds and documents, inter alia, if the validity of the foreign divorce order has been recognised in terms of section 13 of the Divorce Act 70 of 1979.

Therefore, a copy of a foreign divorce order that is complaint with the provisions of Rule 63 of the High Court rules may be accepted.

Effect of a bond

Once registered, a mortgage bond accords certain rights to the bondholder. The first effect is that the property mortgaged cannot be transferred to another or dealt with, without the consent of the holder of the mortgage bond.

The Deeds Registries Act, however, specifies certain instances in which the property will be capable of transfer despite lack of consent from the bondholder. These instances are mostly the so-called forced sales where the property is sold as a result of a court order of under insolvency law, etc.

This right of veto is very important in that it gives the bondholder the right to approve or disapprove the sale of the property if the rights secured thereby have not been satisfied or adequately guaranteed.

Any further rights over the property awarded to third parties would also require approval of the bondholder. Servitude subject to mortgage will also fall under the same right of veto should the holder of such servitude wish to cede it to another.

The second effect of the registration of the bond is to grant the bondholder the right to cause the property to be sold in satisfaction of the secured obligation should the owner thereof default in his or her obligations towards the bondholder.

This will usually be preceded by a court action to declare such property attached and especially executable.

The sheriff of the court will sell such property to the highest bidder and the proceeds of such sale are paid to the bondholders in the order of their ranking in law and then the balance, if any, will be paid to the owner of the property.

This is the instance where the thought of a mortgaged servitude being sold becomes a problem to examiners especially since some of them like the so-called common law personal servitudes are in law, incapable of being ceded to anyone else except back to the owner of the land (s66 of the Deeds Registries Act 47 of 1937).

This is usually the argument of the examiner to the conveyancer whenever servitudes are sought to be mortgaged.

It is submitted that this argument can only hold against common law personal servitudes standing alone as security under a mortgage bond precisely because s66 prohibits the cession thereof for any reason to anybody else than the owner of the land in question.

So, any attempt to sell such servitude in execution of judgment would be a nullity. However, s69 (3) provides as follows:
'The owner of land subject to a personal servitude and the holder of that servitude may together mortgage the land to the full extent of their respective rights therein", and s69bis (3) has a similar provision to wit
'The owner of land subject to a fideicommissum and the fideicommissary, if the latter is competent so to do, may together mortgage the land to the full extent of their respective rights therein.

This is a clear demonstration that the legislature did not intend a blanket prohibition of mortgage of personal servitudes.

The prohibition in respect of the s66 personal servitudes is tacitly implied when mortgaged on their own without the bare dominium, hence, the prohibition of their cession to anyone else but the owner of the land only.

Mortgaged together with the bare dominium, the bondholder acquires the totality of the land as security and if it can come to the point where the property has to be sold, it can be sold in its entirety including such personal servitude.

It must be noted that where the servitude holder is not a co-debtor under the principal obligation he/ she may still mortgage his/her servitude as surety under the same bond or under separate surety bond.

In this instance the bondholder will still have the totality of the rights in the property under mortgage albeit by separate instruments.

The third effect of registration of a mortgage is to grant the holder preference to the proceeds of the forced sale of the property over other creditors be it a case of insolvency or execution by the bondholder self or of another bondholder.

In a case of insolvency the bondholder will be able to assert his/her rights as a secured creditor before and above the other class of creditors.

This will be the case where a servitude holder whose rights under the servitude had been mortgaged becomes insolvent.

The bondholder will rank as a secured creditor to the estate of the servitude holder. In a foreclosure by the bondholder self or by another, the highest ranking bondholder will be entitled to be preferred first before the other creditors can be paid out of the proceeds of the forced sale.

Another consideration towards securitisation of servitudes is that obligations being sought to be secured thereby are not always obligations to pay money.

A bond can secure an obligation to render certain performance towards the bondholder. In such an instance the object of mortgaging the property is not to eventually sell it to recoup an amount outstanding but to secure a position of preference over and acquire some form of control of the property.

Conclusion

So for deeds examination point of view, it is important to note that the fact that the servitude on face value is not a viable security does not disqualify it to serve as such because the Deeds Registries Act or other legislation does not prohibit it.

It must be considered that the bondholder would have done his/her due diligence before agreeing to accept the servitude as security under the bond.

Also it must be considered that the object of mortgaging the servitude may not necessarily have been to eventually sell it but it can also be used to obtain leverage over other creditors of the servitude holder in the instance of insolvency and also to gain control over other real rights that can be sought to be registered over the property.

Registrars Conference has also expressed the view in RCR15/2003 that a personal servitude can be ceded to another if the conditions thereof do not prohibit such.

So, deeds may not be rejected outright solely because a servitude is being mortgaged. It is not much of a concern to the registrar that the security under the bond is not conventional or relatively strong as long as it is not in conflict with the Deeds Registries Act or other relevant legislation.

11 Termination of Sectional Scheme: The Legal Effect

By: Nkuba Ngoasheng: Assistant Registrar of Deeds: Johannesburg Deeds Office

The Sectional Titles Act 95 of 1986 provides the following procedures having the effect of the termination of a sectional title scheme:

- Cancellation of the sectional plans by the developer (s 14(6));
- Cancellation of the sectional plans by a person other than the developer (s 14(8));
- Alienation and transfer of the whole of the common property (s 17);
- Expropriation of the whole of the common property (s 19);
- Destruction of the buildings (s 48); and
- Dissolution of the body corporate (s 48).

Termination of a sectional scheme among others brings into effect-

- Cessation of separate ownership of sections as shown on the sectional plan.
- Co-ownership (in shares proportionate to the respective quotas of section) of the land comprised in the scheme and shown on the sectional plan, see subsection 3(a)
- Closure of the sectional title register.
- Cancellation of the sectional title deeds of units, exclusive use areas and real rights of extension.
- Cancellation of the sectional plan.
- Reversion of the land comprised in the scheme to the land register; and
- Revival of the title deed of the land comprised in the scheme or issuance of certificate of registered title in terms of section 43A of the Deeds Registries Act 47 of 1937.

The Registrar of Deeds and the Surveyor General are enjoined by the Act to make necessary notifications, entries and endorsements in their records upon compliance with relevant procedures invoked in the termination of a scheme.

The RCR 41/2015 (see Figure 1) which provides for the issuance of the certificate of title in the name of the body corporate in respect of the unit registered in the body corporate name contradicts the concept of a sectional scheme development as regulated by the Sectional Title Act:

The RCR 41/2015 above applies to a legal effect of termination of a sectional scheme on destruction of buildings in terms of section 49 of the Sectional Titles Act 95 of 1986.

The issuance of the certificate of title in the name of the body corporate contradicts the concept of a sectional scheme development as regulated by the sectional Title Act. Who will deal with the undivided share registered in the name of the Body corporate after termination of the sectional scheme in the absence of sectional ownership?

FIGURE 1

RCR 41/2015 Section 49-Closure of a scheme

The body corporate is the registered owner of a unit. The scheme is closed in terms of section 49 of Act 95 of 1986. Certificates of Registered Titles are to be issued in the names of the owners of the units according to their participation quota. In whose name must the certificate of registered titles be issued in respect of the unit registered in the body corporate name, i.e. in the

name of the body corporate or in the name of the members, i.e. the owners in equal shares? Does the body corporate cease to exist when the scheme is closed?

Resolution:
The procedure provided for in section 49 must be applied and the certificate of title must be issued in the name of the body corporate.

A body corporate cannot exist after termination of the scheme that is cessation of separate ownership of sections as shown on the sectional plan, reversion of the land to the land register and cancellation of the sectional plan. [See Section 49(2) (a) and (3) (c) and section 49(5)].

It is proposed that, where a body corporate is a registered owner of a unit in a scheme, the Participation quota of all sections must be varied because the Body corporate is, in essence, a collective of all unit owners.

The cancellation of all sectional title deeds as contemplated in subsection 4(a) and issuance of certificate of registered title to each of the owners of the units results in contractual capacity challenges in case of dealings with the undivided share registered in the name of the body corporate, since Section 36 (5) of the sectional titles Act provides that the provisions of the Companies Act shall not apply to the body corporate.

A body cannot be liquidated and deregistered in terms of the companies Act.

It is therefore proposed that a legislative intervention must provide for insertion of an express statutory provision for the dissolution of the body corporate in the Sectional Titles Act and variation of the Participation quota of all unit owners.

LETTERS TO THE EDITOR

LETTER NO. 1
RCRs 14 and 15/2015

Dear Editor

Regarding the 2015 conference resolutions 14 and 15/2015 referred to in the article by Ms Grovè. It is impossible for the Deeds Office data system to capture a transfer by endorsement of an exclusive use area with an ST code.

Accordingly, if for example, a section 45(1) application is made in respect of an exclusive use area and unit, separate covers must continue to be lodged, one with an ST code and one with an SK ... S code.

H. Tayler Senior Examiner (Training) Johannesburg Deeds Office

LETTER NO. 2
RCRs 13 and 15/2015

Dear Editor

Regarding the 2015 conference resolutions 13 and 15/2015 referred to in the article by Ms Grovè. It is impossible for the Deeds Office data system to capture a transfer by endorsement of an exclusive use area with an ST code.

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H. Tayler Senior Examiner (Training) Johannesburg Deeds Office

www.drdlr.gov.za
Toll-Free: 0800 007 095
@DRDLR_online
Department of Rural
Development and Land Reform
184 Jeff Masemola Street
PRETORIA
0001