

# Fideicommissums and our registration system

By: W F H C Swanepoel  
(former Registrar Kimberley) Rossouws Attorneys BLOEMFONTEIN

## A. EXCLUSION FROM COMMUNITY

Where property is bequeathed or donated to a person married in community of property subject to a fideicommissum, such condition of fideicommissum excludes community of property (see *Barnett v Rudman* 1934 AD 203). Thus, where property is transferred to a fiduciary who is married in community of property, the vesting clause of the deed should be worded as follows:

*“Noel Kriel  
Identity number: 590106 5051 08 3  
Married in community of property to May Kriel”*

The condition of fideicommissum must be inserted in the conditional clause of the deed and referred to in the **causa**.

If the fideicommissary heirs die before the fiduciary heir, the fideicommissum will lapse and the property will form part of the joint estate.

In the Registrar's Conference Resolution 17 of 1974 it was resolved that a condition constituting a fideicommissum may be accorded the status of a personal servitude and the provisions of section 68(1) Act 47 of 1937 may be applied where the fideicommissum lapses.

## B. REGULATION 61(2) OF THE DEEDS REGISTRIES ACT 47 OF 1937 AND UNDERHAND WAIVER OF THEIR RIGHTS BY FIDEICOMMISSARIES

Regulation 61(2) of the Deeds Registries Act 47 of 1937 provides, *inter alia*, that a Registrar of Deeds may accept for registration a unilateral notarial deed of cancellation of fideicommissum by the fideicommissary heirs.

In view of the decision in *Van der Merwe v Registrateur van Aktes* 1975 (4) SA 636 T (where a fideicommissary right was held to be *ius in persona* and not a *ius in rem*), if a fiduciary has sold property in respect of which the competent fideicommissary heirs have waived their rights, Registrars of Deeds will allow transfer of the unencumbered property by the fiduciary, provided that an underhand waiver of their rights by the fideicommissary heirs is lodged with the deeds of transfer.

## C. PROVISIONS OF SECTION 30 AND REGULATION 56 OF THE DEEDS REGISTRIES ACT 47 OF 1937 WITH REGARD TO REAL RIGHT OF FIDEICOMMISSUM IN LAND PARTITIONED

Section 30(1) of the Deeds Registries Act 47 of 1937

provides that if the whole of a property, or any share thereof, is subject to a fideicommissum and all the fideicommissary heirs are ascertained, such property may be partitioned by the fiduciary (unless there is a specific prohibition against partition in the instrument creating the fideicommissum) with the written consent of:

- all major fideicommissary heirs;
- the master in respect of any such heirs who are minors; and
- the trustees of any such heirs who are insolvent or the curator of any such heir who are under disability.

If none of the fideicommissary heirs are ascertained, or if some are ascertained and some are not, then the last part of subsection (1) of section 30, read with regulation 56 of the Deeds Registries Act 47 of 1937, will apply. Regulation 56 provides that proof must be submitted that the land or share awarded on partition to the owner of any share in the partitioned property subject to a fideicommissum is an equivalent of that share. This must be done by means of a written report of a sworn appraiser or of an impartial person approved by the Magistrate of the district in which the property is situated. If the whole property, i.e. every share held in it, is subject to a fideicommissum, the provisions of Regulation 56 will also be applicable.

## D. RENUNCIATION BY A FIDUCIARY

When a fiduciary renounces his or her right in land, such a renunciation has the effect of vesting the inheritance in the fideicommissary or in the fideicommissaries if there is more than one, provided all are in **esse**, unless there is a clear indication that the testator intended otherwise on refusal to adiate or later repudiation (see *ex parte Odendaal* 1957 (2) SA 15 (O)).

When the fideicommissaries are undetermined, the Registrar of Deeds will not act under any supposed presumption that a fiduciary is beyond child-bearing age; for this he would require an order of court (see Registrar's Conference Resolution 6 of 1980 and 28 of 19878). To give effect to a renunciation of a registered fideicommissum, the fiduciary passes transfer of the property to the fideicommissary.

## E. JOINT TRANSACTIONS BY FIDUCIARY AND FIDEICOMMISSARY

If the owner of land subject to a fideicommissum and the fideicommissary, if the latter is competent to do so, have disposed of the land or any portion thereof, together with the fideicommissary rights to any other person, they may

together give transfer to that person (section 69bis(1) of the Deeds Registries Act 47 of 1937).

In the preamble of the deed and power of attorney, the parties will be described as follows:

“Noel Kriel  
Identity number: 590106 5051 08 3  
*Married in community of property  
(as fiduciary)*

*May Kriel  
Identity number:  
Married out of community of property (as the holder  
of the Fideicommissary right) (or as fiduciarii)”*

The provisions of section 69 apply to land only, but there would be no objection in applying the principles laid down in section 69 and 69bis to a cession of real rights and notarial deeds of registration and cancellation of servitudes, and the joinder of such persons will be regarded as having taken place with their consent. Underhand consents can also be accepted (see in this instance Registrar's Conference Resolution 42 of 1967).

Where the fiduciary and fideicommissary have together disposed of the land and the fiduciary has died before transfer can be registered, the executor in the fiduciary's estate must give effect to the contract and accordingly a transfer in terms of section 69bis by the executor and the fideicommissary heir will be allowed by the Registrar of Deeds (see Registrar's Conference Resolution 22 of 1964.)

Section 69bis can also be invoked if the executor in the fiduciary's estate has sold property together with the fideicommissary, provided that the Master's Certificate under section 42(2) of the Estates Act 66 of 1965 is lodged.

If, in the administration of the estate of a deceased fiduciary, any redistribution of the assets take place among the fideicommissary heirs, the executor of such an estate may transfer the land or cede the Real Right direct to the person entitled thereto in terms of such redistribution (section 14(1)(b)(iii) of the Deeds Registries Act 47 of 1937).

#### F. FIDEICOMMISSUM RESIDUE

Where property is subject to a fideicommissum residue, the fiduciary is entitled to alienate the property subject to the provisions of Justinian's 108th Novel whereby, if the fiduciary alienates more than three-fourths of the fiduciary estate, security must be furnished for the one-fourth to which the fideicommissary heirs are entitled. Such security will not be insisted upon in the following instances:

- If the testator specifically dispenses with the furnishing of security.

- Where the fiduciary is a parent of the fideicommissary (***Ex parte Armstrong and Another*** 1957 (3) SA 625 (O)).
- In the case of a joint will by spouses appointing the survivor as heir, subject to a fideicommissum residue (***Brown v Rickard*** 2 SC 314).

In Registrars Conference Resolution 2:11 of 1999 it was resolved that it is not the duty of a Registrar of Deeds to insist on proof that security has been furnished.

#### G. FIDEICOMMISSUM INTER VIVOS

Fideicommissa may also be imposed by agreement ***inter vivos*** created on transfer of land imposed by the transferor and may be inserted direct into the deed of transfer from the power of attorney to transfer such land. Until the fideicommissum has been accepted by the fideicommissary, a fideicommissum ***inter vivos*** can be revoked by the person imposing it with the consent of the fiduciary (***Van der Plank v Otto*** 1912 AD 327).

In the case of a fideicommissum ***inter vivos***, the fideicommissum does not fail if the fideicommissary heir dies before the fiduciary. It passes to the heir of the fideicommissary in the absence of any specific direction to the contrary (***Ex Parte Isted*** 1948 (2) SA 71 (K)) page 78.

#### H. THE IMMOVABLE PROPERTY (REMOVAL OF RESTRICTIONS) ACT 94 OF 1965

This act came into operation on 1 October 1965 (Proclamation R234 of 1965). The purpose of the act is, inter alia, to restrict a fideicommissum which is in favour of more than two successive fideicommissaries, to the second successive fideicommissary. The act is also applicable to immovable property already vested on 1 October 1965, subject to a fideicommissum in favour of more than two successive fideicommissaries. Where any immovable property is already registered in the second or later successive fideicommissary subject to such fideicommissum, the Registrar of Deeds must, on application by the fideicommissary accompanied by the title deed of the property together with such other proof as the Registrar of Deeds may consider necessary in regard to the vesting free of the fideicommissum, endorse the title to that effect.

Great care must therefore be exercised by Conveyancers encountering a registered fideicommissum to ensure that this has not perhaps lapsed by virtue of the provisions of section 6 and 7 of the said Act 94 of 1965.

When a transfer to a second fideicommissary is effected, the cause of the deed of transfer will be drafted along the following lines:

“And the appearers declared that whereas the deceased is the registered owner by virtue of Deed of Transfer T8/2001 of the property mentioned hereafter, which property is subject to the following condition:

(mention the condition)

And whereas the transferor died on .....

And whereas the transferee is the second fideicommissary heir who is entitled to the property free of the fideicommissum in terms of section 7, Act 94 of 1965.”

#### I. WHEN FIDUCIARY INTEREST TERMINATES AND FIDEICOMMISSARY FAILS

Section 14(1)(b)(vi) of the Deeds Registries Act, 47 of 1937 provides that if a fiduciary interest in land or in a real right terminates before transfer of the land or cession of the real right has been registered in favour of the fiduciary, it shall be competent to transfer the land or cede the real right directly to the fideicommissary.

At a Conference of Registrars of Deeds in 1968, the Registrar of Cape Town has held that a direct transfer to a fideicommissary need not necessarily be from a testator's estate and that in the case of a fideicommissum to the fourth generation, for example, the executor in the estate of a fiduciary who is the registered owner and survived the first fideicommissary may also pass transfer directly to the second fideicommissary.

It seems that the first fideicommissary in such cases becomes a fiduciary on the death the first fiduciary. See *Ryklief's heir v Ryklief's Executors* 1986 C (13SC) 64 referred to on page 302 of Steyn's Law of Wills (Second Edition).

Registrar's Conference Resolution 12 of 1968 on this point reads as follows:

*“Where intermediate fideicommissaries fail, a direct transfer to the next fideicommissary must be effected from the fiduciary's estate.” See Union Government (Minister of Finance) v Olivier 1916 A74 at 85 and 91.*

#### J. DISPOSAL AND MORTGAGES OF FIDUCIARY INTEREST

Fideicommissa are usually created by last will and it is first registered in the deed of transfer conveying the subject property to the fiduciary from the testator's estate. Where, for example, the fideicommissum provides that the immovable property shall pass to the fideicommissary heir on the death or on the remarriage of the fiduciary or on the occurrence of other events, the fiduciary may transfer the fiduciary right or interest. The new owner of the fiduciary interest will receive transfer of the property subject to the fideicommissum, and the condition of fideicommissum will thus be carried forward *verbatim* in the conditional clause of the deed of transfer. No consent is necessary from the fideicommissary,

unless there is a provision to the contrary in terms of the fideicommissum.

A fiduciary, unless prohibited by the condition of fideicommissum, may mortgage his/her fiduciary interest in the immovable property. When a fiduciary interest is mortgaged, the security (fiduciary interest) in the bond will have to be made subject to the fideicommissum in terms of regulation 41(1) of the Deeds Registry Act.

In the mortgage bond, the fiduciary interest will be described as follows:

*“All right title and interest in the following property”:* (full description on of property). The mortgage of a fiduciary interest is seldom acceptable, as such security might at any time disappear.

Where a fiduciary interest only has been mortgaged and subsequent to registration the fiduciary interest ripens into full ownership, there appears to be no necessity to pass a new bond unless the mortgagee requires this (see in this instance Registrar's Conference Resolution 35 of 1967.

#### K. SI SINE LIBERIS DECESSERIT PROVISION

A fideicommissum can be created by implication. This will be the case only if it can be inferred from the terms of the will, considered in its entirety, that the bequest is to be encumbered with fideicommissum.

A *si sine liberis decesserit* provision can be illustrated by the example of a testator bequeathing an asset to A subject to the condition that, should A die without leaving issue, then the asset is to pass on to B.

In the event of A having issue, then the fideicommissum in favour of B would fail.

An implied fideicommissum in favour of the children of A can be presumed. In the case of *Du Plessis NO v Strauss* 1988 (2/SA105), it was found that a *si sine liberis decesserit* provision in a will that is coupled to a conditional fideicommissum, gives rise to a presumption that the testator tacitly appointed the children as fideicommissaries, provided that the children are also descendants of the testator.



## land affairs

Department:  
Land Affairs  
REPUBLIC OF SOUTH AFRICA

# Subdivision of Agricultural Land and Consent in terms of Act 70 of 1970

By: Allen West  
Deeds Training, PRETORIA

Practitioners and deeds office examiners alike still have problems with the application of the provisions of section 3 and 6A of the Subdivision of Agricultural Land Act, 70 of 1970.

The most recent reported case of **Kotzé v Minister van Landbou en Andere** 2003 (1) SA 445 T has now eliminated all confusion as to which land is deemed to be agricultural land. In the said case it was held that agricultural land is to mean what it meant when the Act was enacted.

Although the confusion has been eliminated, practitioners and deeds office staff still have to apply the following ruling provided for in the Chief Registrar's Circular 6 of 2002, namely:

*"The following documents must be lodged with all deeds in which subdivision of farm land is being given effect to:*

- *A consent by the Minister of Agriculture in terms of Act 70 of 1970 or*

- *A letter by the Department of Agriculture to the effect that the land in question is not agricultural land as defined in Act 70 of 1970 and a consent by the local authority in whose area of jurisdiction the land is situated, as required by the relevant provincial legislation, if any.*
- *With regard to transactions having the effect of increasing the number of registered owners of farm land in undivided shares, the consent of the Minister of Agriculture must be lodged or a letter referred to in paragraph 5.2 must be lodged. No consent by the local authority is necessary in this instance."*

The above ruling will thus be applied in all transactions where the word "farm" is included in the property description.

## Update of the De-Registration of Mineral Rights

By: Sydney Mekwe  
Deeds Training, PRETORIA



### 1. INTRODUCTION

The passing of the **Mineral and Petroleum Resources Development Act No 28 of 2002 (hereinafter referred to as MPRD Act)** had profound implications on the registration function of the Deeds Offices relating to mineral rights, prospecting contracts and dealings with such rights. This Act ushered a new era in the domain of mineral and petroleum products development in the history of our country. It encapsulated among others the basic principles contained in the Freedom Charter relating to free and equitable access to the wealth of this country by all of its citizens, and the recognition of the State as the sovereign custodian of the mineral and petroleum resources of this country.

The coming into effect of this Act necessitated the amendment of the **Deeds Registries Act 47 of 1937** and the **Mining Titles Registration Act 16 of 1967**. In the process our common law understanding of mineral rights was turned upside down, resulting in the disappearance from our vocabulary, or the concept of mineral right. In terms of Schedule I and II of the MPRD Act all the holders of the old order mineral rights or prospecting contracts would have to convert such rights into prospecting permit or mining permit for them to continue enjoying ownership of such rights. The era of an individual holding on to the

right to any mineral over a particular area without him doing anything about such mineral was over.

**The Mining Titles Registration Amendment Act No. 24 of 2003** which regulated the registration of mineral and petroleum titles as well as other rights connected therewith, was also passed to give effect to the objectives of the MPRD Act. The result was that all registration functions relating to minerals and petroleum titles were removed from the Deeds Registries Act, and entrusted to the Department of Minerals and Energy.

### 2. DE-REGISTRATION PROCEDURE

In response thereto the Chief Registrar of Deeds issued circulars setting out how the Deeds Offices were to apply the provisions of the two Acts that affected the functions of the Deeds Offices. These were CRC 11 of 2004 and CRC 18 of 2004. With these circulars the Chief Registrar, in line with the abovementioned Acts, reiterated the discontinuance of all further acts of registration relating to mineral rights and prospecting contracts in the deeds offices, and set out the procedure for deregistration of the mineral rights and prospecting contracts in the deeds offices.

The de-registration procedure that must be followed in respect of mineral rights and prospecting contracts in the deeds offices, is provided for in items 4, 5, 6, 7 and 8 of schedule II of the MPRD Act. The process starts with the holder of either mineral rights or a prospecting contract making application within the prescribed period (which is to the Minister of Minerals and Energy) to convert his or her mineral rights or prospecting contract into either a mining permit or prospecting permit subject to the requirements for that purpose prescribed by the MPRD Act.

Once the Minister is satisfied that the requirements for conversion have been complied with he or she issues the applicant with the notice of conversion of the right into a prospecting permit or a mining permit. Upon receipt of the notice the applicant must approach the mineral and petroleum titles registration office to register the converted right and simultaneously lodge the notice of conversion at the relevant deeds office where the rights were registered to de-register such mineral rights or prospecting contract. In terms of CRC 11 of 2004 the application must be accompanied by the title of the rights together with the title of the land. In respect of any right to minerals in respect of which no prospecting or mining was being conducted (referred to as “old order right”) this process had to take place within a period of one year from the coming into operation of this **Act (which is 1 May 2004) or continues to be in force subject to the terms and conditions under which it was granted, acquired or issued (Item 8(1) schedule II of MPRD Act as amended)**, whichever is earlier. In respect of old order prospecting contracts the conversion had to be done within **two years of the coming into operation of the Act (Item 7(6) schedule II of MPRD Act)**. Any right not converted to a prospecting or mining permit within the prescribed time period ceases to exist by operation of law. The result is that it is deemed forfeited to the State as the supreme custodian of all the mineral and petroleum resources in the land. Until all these registration actions had taken place there would be no dealings with such rights except for such registrations as the rectification of errors in the titles of such rights in terms of section 4(1)(b), change of name, conversion from a Company to a Close Corporation, bond cancellations, etc.

Enquiries at the Department of Minerals and Energy revealed that to date only about twenty-seven (27) conversions have been registered. This does not even make a dent on the number of rights that are not converted and that under the circumstances will remain in the land titles. The reason for the low number of conversions may be that the holders were not well-informed about the conversion process, or that the quantities of the rights could not be economically exploited so as to warrant conversion. There have been reports of court cases against the Department of Minerals and Energy on the issue of forfeiture of the rights due to failure to comply with the MPRD Act by the holders of such old-order rights. All these issues compound the problem of how the deeds offices should

deal with these rights.

## 2.1 Mineral and Petroleum Resources Development Amendment Bill

Recently the **Mineral and Petroleum Resources Development Amendment Bill (hereinafter referred to as the MPRD Amendment Bill)** was published for public comment in Parliament.

The Bill seeks among others to remove any ambiguity that may exist in the MPRD Act by amending certain definitions, and to amend the Transitional Chapter in the MPRD Act to rectify certain omissions of existing old order rights, such as mynpachten and tributing agreements, etc so as to also afford statutory protection to such rights.

Other amendments that have some impact on the deregistration of the mineral and prospecting contracts in the deeds offices relate to the fact that the registration of the notice of conversion is now registered in the Mineral and Petroleum Titles Registration office instead of the Mining Titles Registration office referred to in the MPRD Act. The period of validity of such old order rights is amended by the addition thereto that such rights may **remain valid for the period for which they were granted, issued or acquired** or for the prescribed period of one (1) year from the date on which the MPRD Act took effect whichever is the shortest. This clause is also added to the periods of validity of all the other rights such as an old order mining right which is given as five (5) years from the coming into operation of the MPRD Act. It cannot be comprehended what the motivation was to make this addition to the period of validity especially since most of the periods, except for the old order mining rights which were in force immediately prior to the MPRD Act, have already expired anyway. It can only be to address loopholes that are exposed in the different court cases instituted against the Department of Minerals and Energy. The other flipside of it is that the mining rights that existed prior to the MPRD Act can be deemed expired/lapsed if the period of validity for which they were acquired, granted or issued is less than the five years prescribed by the principal Act.

## 3. CONCLUSION

As things stand at the moment the only time that the Deeds Registry will know if an affected right has been converted is when the holder brings the application for de-registration in terms of CRC 11 of 2004, or possibly when the Registrar is requested for a report to court, in a case involving forfeiture of such rights. There is no compulsion on the holder of the affected rights to lodge an application to note the lapsing of such rights due to disuse. This state of affairs is not desirable if one were to maintain the high standard of our land registration system. The period prescribed in terms of item 6, 7, and 8, of Schedule II has so far prescribed and accordingly the rights are forfeited to the state provided that a court

rules otherwise.

It is submitted on that this state of affairs must not be left unaddressed. The land titles and the other title deeds of these rights must be endorsed regarding the lapse or de-registration thereof by virtue of the provisions of MPRD Act, especially since the lapse thereof happens by operation of law. It is true that some of them might be the subject of court cases which we are not aware of, but

some cut-off date must be set from which onwards the rights will be removed from our records. The mere act of removal of such entries in our records would not mean that such rights no longer exist (if they are the subject of legal contention), but that notice of their existence to third parties will no longer appear in the land titles but elsewhere.

## Deeds office stalwarts retire

By: L.J. Vosloo  
Deeds Registry, CAPE TOWN

**Two senior Cape Town Deeds Registry officials have retired from the Department of Land Affairs at the end of August 2007 bringing to an end a combined service of nearly sixty seven years.**

### PIET VAN ZYL

Pieter Louw van Zyl started his Deeds Office career in Cape Town in 1967 originally wanting to serve in a Department connected with agriculture. The Deeds Office did not disappoint him. He moved up the ranks to the position of Assistant Registrar of Deeds serving all this time in Cape Town, commuting from his home town of Malmesbury to Cape Town during the earlier years. Piet has always been a committed and dedicated official. As a Senior Deeds Examiner he was responsible for the training of several officials who in later years have made their mark in the Deeds Office.

Piet had a reputation for thoroughness. His personal library of circulars legislation, etc. was extensive. More than often Piet was the only source to solve esoteric deeds issues, long forgotten by everybody else!

In later years Piet was singled out to handle complex court reports, and his thoroughness in researching complex legal issues once earned him the distinction of his report being incorporated lock stock and barrel into a High Court judgment!

Piet is married and has one son. He is wished a well deserved retirement.

### JACKIE VILJOEN

Jacobus (Jackie) Viljoen joined the Deeds Office in 1968 – a year later than Piet, and like his colleague, served his entire tenure in the Cape Town Deeds Office, attaining the rank of Deputy Registrar of Deeds in 1998. Jackie is by nature a quiet person, yet immensely popular among all, be it his colleagues or conveyancers.

During the early 2000s Jackie served as Acting Registrar of Deeds in Cape Town on several occasions during a period which at times posed severe challenges as the Deeds Office progressed into an era of transformation. Indeed on his very

last day before retiring, Jackie acted as Registrar, a fitting finale for a distinguished civil service career!

In recent years his popularity among the conveyancing fraternity was ubiquitous. His extensive knowledge on all Deeds matters was well known and respected, and this made him almost indispensable.

Jackie has several interests which he pursues with passion, among them racing pigeons. After retirement he plans to devote his attention to a bed and breakfast guest house he has established in Van Rhynsdorp and he hopes to also find time for some small scale farming. Jackie is married and has two children, a son who pursues a career in Information technology and a daughter who is presently studying law.

Jackie is looking forward to a fruitful retirement, and he is wished all the best with his new enterprises.

*Piet and Jackie – You will be sorely missed – Editor*



PIET VAN ZYL



JACKIE VILJOEN

# Stamp duty amendments affecting leases of fixed property

By: South African Revenue Services

The following memorandum dated 17 May 2007 was issued by the South African Revenue Services and is of the utmost importance to practitioners and deeds office staff:

"The Minister of Finance announced during February 2007 that no stamp duty will be imposed on short term lease agreements of fixed property (see paragraph 1 below). This amendment is effective from 1 June 2007.

A difficulty has arisen as the draft proposed amendment in the Taxation Laws Amendment Bill, 2007, must still be signed by the President and the Act promulgated.

At this stage until the end of May 2007 leases must still be stamped in accordance with the current provisions of the Stamp Duties Act, e.g. **duty at 0,5% irrespective of the period of the lease** and not in terms of the proposed amendments.

However, as from **1 June 2007** the new amendments, as indicated below, must be applied to all lease agreements executed on or after 1 June 2007 the following will be applicable to lease agreements:-

## 1. SHORT TERM AGREEMENTS

The duty on short term leases executed on or after 1 June 2007 will be abolished. A short term lease is a lease with a lease period of 5 years or less.

## 2. LONG TERM AGREEMENTS

Lease agreements with a term of longer than 5 years (e.g. 5 years and one day) will be subject to a duty at a flat rate of 0,5%.

## 3. INDEFINITE PERIOD ONLY

Previously, when a lease agreement was entered into on a month to month basis (indefinite period), stamp duty was calculated for a period of 2 years.

Agreements entered into for an indefinite period only, and which is executed on or after 1 June 2007, must be **regarded to be for a period of 5 years (but please note that the 5 year period will in any event be exempt as the period is 5 years to which the new proposed exemption will apply).**

## 4. AGREEMENT WITH A DEFINITE AND AN INDEFINITE PERIOD

Where a lease consists of a definite period (e.g. 10 years) as well as a subsequent indefinite period (5 years), the

lease must be stamped for the total period of 15 years.

## 5. CONTINUED, RENEWED OR EXTENDED AGREEMENTS

All lease agreements must be stamped for the total period of the lease (i.e. including any renewal or extension period), irrespective whether the renewal or extension period of the lease should be in writing or not.

Example: A lease agreement with a definite period of 4 years and renewal or extension period of 2 years must be stamped for the total period of 6 years.

## 6. SHORT TERM AGREEMENTS EXECUTED BEFORE 1 JUNE 2007 WITH CONSIDERATION QUANTIFIABLE AFTER 1 JUNE 2007

Where a lease for a period of **5 years or shorter** was concluded before 1 June 2007 and any consideration becomes quantifiable after 1 June 2007 no stamp duty will be payable.

### Example A:

Lease executed on 1 January 2003. Period of lease: 5 years. The full consideration is not quantifiable at date of execution. No duty shall be payable on any consideration which becomes quantifiable after 1 June 2007.

## 7. CONSIDERATION NOT QUANTIFIABLE AT DATE OF EXECUTION

The 2006 amendment which allows for the charging of stamp duty on consideration which becomes quantifiable after the date of execution of a lease agreement is still applicable.

## 8. LONG TERM AGREEMENTS EXECUTED BEFORE 1 JUNE 2007 WITH CONSIDERATION QUANTIFIABLE AFTER 1 JUNE 2007

Lease agreements for a period of longer than 5 years which were concluded before 1 June 2007 where any consideration becomes quantifiable after 1 June 2007 are subject to stamp duty.

### Example B:

Lease executed on 1 January 2002. Period of lease: 12 years. The full consideration is not quantifiable at date of execution. Duty will be payable for the period from 1 June 2007.

#### 9. LEASE TERMINATING BEFORE END OF PERIOD

Where a lease is cancelled or in the process of being cancelled before the end of the lease period in respect of which duty has been paid, the amount of such duty paid can be refunded:

- (i) in full, where the lease is cancelled within a period of five years from the date of the commencement of the rental period; or
- (ii) on a proportionate basis, where the lease is cancelled after a period of five years from the date of the commencement of the rental period.

#### 10. R200 EXEMPTION

No stamp duty is payable on a lease where the duty was less than R200 and the agreement was executed between 1 January 2005 and 28 February 2006. As from 1 June 2007 this exemption falls away.

#### 11. R500 EXEMPTION

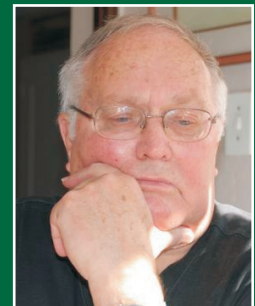
No stamp duty is payable on a lease where the duty was less than R500 and the agreement was executed between 1 March 2007 until 31 May 2007. As from 1 June 2007 this exemption falls away.

#### 12. CONSIDERATION EXCEEDS THE VALUE OF THE PROPERTY

In respect of agreements where the consideration exceeds the value of the property and the value of the property is determined in accordance with the provisions of sections 5, 6, 7 and 8 of the Transfer Duty Act, 1949 (Act No. 40 of 1949), duty shall not exceed 8 per cent of the value of the property in relation to that agreement. This is applicable on agreements executed on or after 1 June 2007."

## The first surveyor General of the "Zuid-Afrikaanse Republiek" (ZAR) alias Transvaal: Magnus J.F. Forssman (1822 - 1889)

By: A.B. Schoeman  
Professional Land Surveyor, PRETORIA



Oscar W Alric Forssman (1822 - 1889), son of a Swedish advocate and judge, S J Forssman left Sweden circa 1844 at the age of 22 years, and lived at Potchefstroom, first capital of the Z.A.R. since 1852 where he was a successful importer and merchant. Oscar also acted as Portuguese Consul-General (chevalier) during the period 1862 – 1881, and brought a group of Swedes to the Z.A.R. in order to start a Scandinavian settlement on the banks of the Vaal River south of Potchefstroom. (Hence the well-known hamlet Scandinavia Drift on the Vaal River). Amongst these immigrants who arrived in 1863 was O W A Forssman's elder brother, Magnus J F Forssman, who is reported to have been resident in Potchefstroom in April 1869, that is, nine years since Pretoria became the new capital of the ZAR on 3 April 1860. Quite a number of Magnus' former countrymen settled in ZAR (Transvaal) and not one of those settlers ever returned to Sweden.

The Forssman's were of noble ancestry and claimed descent without a break from Pepin, King of France, who preceded Charlemagne (Charles the Great), Holy Roman Emperor, as well as Eric Wadenhatt, King of Sweden, and Waldemar the Great King of Denmark. From this ancestry Magnus J F Forssman was born in Kalmar, Sweden in the year 1820. He was the second child of Samuel Jonas Forssman (1773 - 1835) who was judge of the Supreme Court and Counsellor for

War to the King of Sweden. Samuel Jonas Forssman was an only child of Magnus Olaf Forssman, a land surveyor. The young Magnus J F Forssman was only fifteen years of age when he lost his father, Samuel in 1835. Magnus' mother did not marry again and lived to a ripe old age. Out of Samuel Jonas Forssman's marriage in 1815, six children were born:

Emelie	(1818 – 1903)
Magnus	(1820 – 1874)
O W Alric	(1822 – 1889)
Hildegarde	(1823 – 1913)
Jenny	(1825 – 1912)
Sofia	(1827 – 1900)

Chevalier Alric Forssman, living in the Transvaal since 1846 until his move to Potchefstroom in 1852, arranged with the Republican Government of the ZAR to offer Magnus Forssman, a practising land surveyor in Sweden, the post of Surveyor-General for the Transvaal. This matter was finally settled when the Chevalier visited Sweden in 1862, when Magnus had been 42 years of age.

Having obtained five years' leave from the Swedish Government, Magnus Forssman sailed for South Africa late in 1863 at a time when Willem C Janse van Rensburg was State President of the ZAR during the civil war between two rival

factions striving for supremacy and presidency of the ZAR. Magnus Forssman arrived in Potchefstroom early in 1864, executed several surveys and assumed duty as the first Surveyor General of the ZAR on 9 April 1866.

His wife, Gustava, and their six daughters joined him later in 1866. The youngest of the six sisters, Marie, died in the ZAR (Transvaal) in 1868 at the age of three years.

Potchefstroom in 1866 comprised 362 erven, (each 2 acres in area), 275 residences and a population of 1 200 citizens of whom 200 were foreigners, whilst Pretoria at that time, the next largest town in the Transvaal, had a population of only 300 settlers.

In 1868 the six family members of Magnus Forssman returned to Sweden as they found the harsh living conditions of the ZAR very trying owing to a lack of proper education facilities and opportunities of life which neither Potchefstroom nor Pretoria could provide, and Gustava's land surveyor husband always away from home traveling and surveying. The family, having departed for Sweden, never saw their father again.

Back in Sweden, Gustava gave birth to their only son, John, who had a successful academic career and was appointed professor of skin diseases at the Swedish University of Lund. He never saw his father in person. Gustava, born in 1830, survived her land surveyor husband Magnus by 42 years when she died in 1916.

Magnus Forssman who was of very jovial disposition and well liked by his fellow citizens, became very attached and devoted to the ZAR, his adopted country. When his leave of five years duration expired, he was recalled to Sweden. He, however, resigned from his post with the Swedish Government in 1868, and spent the rest of his days in the Transvaal until his death in 1874. He was the first Master of the Potchefstroom Masonic Lodge, member of the first English School Committee, and an active member of the Agricultural Society.

The salary of the Surveyor General at that time was only 300 pounds (1 pound = R2 in 1961) per annum, and even this small amount of money the State found difficult to meet. Very often Magnus was obliged to accept a farm or two in settlement of arrears in his salary. Living was however cheap during those early years. It was noted that in 1873 a bullock fetched 4 pounds (R8), biltong six pence (5 cents in 1961) per pound, dried peaches 3 pennies (3 cents) per pound, whilst artisans such as bricklayers and carpenters earned 10 shillings (R1) per day. As Magnus' brother, Alric, prospered as businessman and farmer, Magnus had the opportunity of meeting several famous explorers, missionaries and travelers who passed through Potchefstroom. It was with the assistance of these occasional visitors and other almost forgotten men that Magnus Forssman compiled the now famous historical map of the then ZAR territory in 1868.

In 1868, during the presidency of M W Pretorius, Magnus Forssman published what is believed to be the oldest original map of the Transvaal.

When shown to officials of the office of the Surveyor General, they commented unanimously on the fine draughtsmanship and, according to them, the oldest map seen by them.

According to the prominent inscriptions on the map, it was framed from individual surveys and observations made by Surveyor General Magnus Forssman, Carl Mauch, F Hammer, J Brooks (Surveyor) and from several other official documents combined with the results of individual explorations by Fred Jeppe and A Merensky. The map indicated the routes followed by explorers Dyke in 1844, J Sandersen in 1851, D Livingstone in 1849 and 1853, Paxton and Rider in 1853, Merensky in 1862 and C Mauch in 1866 and 1867.

Magnus Forssman's signature appears on a large number of diagrams and general plans of erven and farms in the Transvaal, both as practicing land surveyor and as Surveyor General of the ZAR. A fine example of his supreme technical skills and draughtsmanship is demonstrated in the general plan of the township of Wakkerstroom which was surveyed by himself. A few random examples of his own surveys and diagrams are to be inspected in diagram books (DB) filed in the office of the Surveyor General: Pretoria:

- DB 18 Folio 16 : Approved by State President M W Pretorius
- DB 18 Folio 17 : Farm Kafferskraal surveyed in March 1866 i.e. one month prior to his appointment as SG: ZAR
- DB 18 Folio 10: Farm Sweet Home alias Hollaagte, surveyed 30 March 1866

As Surveyor General of the ZAR he examined and approved a large number of diagrams during the years 1866 – 1874, amongst these several farms acquired by his brother Alric, well-to-do businessman and politician residing at Potchefstroom:

- DB 6 Folio 5: The farm Gruisfontein, registered on 20 July 1868
- DB 8 Folio 8: Five farms at Waterberg registered on 25 September 1869

State President Thomas F Burgers announced Magnus Forssman's death in the Transvaal Government Gazette of 14 October 1874. He died of natural causes and was accorded a State funeral. The "Volkstem" newspaper of Pretoria gave a report of the funeral proceedings, and Magnus received his share of recognition for his sterling services to the former Transvaal Republic and its people.

Magnus Forssman shares the same grave with his brother Alric, who died some years later in the family plot in the old cemetery, Church Street, Pretoria. It is perhaps noteworthy that a third male relative of Magnus and Alric was also interred in the same grave several years later.

Magnus Forssman was officially succeeded by Samuel Melvill who was Surveyor General from 08 October 1874 until 08 August 1881.

# The responsibility and functions of the notary

By: Allen West  
Deeds Training, PRETORIA

It has been long established practice, which has been confirmed by the common law on numerous occasions, however, it would appear, may just be a perception, that the office of the Notary Public is slowly but surely being watered-down to something non-existent. Why this harsh opinion or perception? More and more it is required of a notary to lodge documents with a Registrar of Deeds confirming a given duty placed on the Notary (see for example section 29 of the Sectional Titles Act 95 of 1986, just to mention one.

For this reason, it is deemed necessary to once again provide extract from the case ***The Transvaal Land Co. Ltd v Registrar of Deeds*** 1909 August 19 to 20 to confirm the responsibility of the Notary and which the Registrar of Deeds should not intrude upon.

Judge Solomon had the following to say:

*“Now in considering that question I think it is very important to bear in mind that the contract in question is not one which was executed before the Registrar. It is not a document like a deed of transfer, or a mortgage bond, which is certified and signed by the Registrar himself, and for which, therefore, he is responsible. This is a contract executed before a notary; the parties to it appeared before the notary; and it is he who certifies and signs the contract and who is responsible for it. And I think it is important also to bear in mind that a notary public is a responsible officer of the Court, in whose solemn acts great confidence is reposed. The office of notary is one not only of great antiquity, but also of great importance. The functions which are discharged by a notary are varied and important, and, as is stated in the passage in Van Zyl quoted by Mr. Tindall, the presumption is that all proper solemnities have been observed by the notary.*

*That is the reason why the law requires in so many cases that a document cannot be registered in the Deeds Office unless it is executed before a notary, and it is for that reason that prospecting contracts amongst others require to be notarial. And in respect of notarial contracts, which by law the Registrar of Deeds is required to register in his office, it appears to me that his duty is limited to registering the contract – provided, of course, that the rules and regulations of the Deeds Office have been observed and that the contract is in proper form. It has not been suggested that in this case the rules and regulations of the Deeds Office have not been observed by the notary. The*

*sole objection raised by the Registrar is that the contract is not in proper form. But the considerations which I have mentioned lead me to the conclusion that the question of the capacity of the persons who appear before the notary is one for the notary himself to determine. It is he who has to satisfy himself as to the authority of the persons who appear before him. And if he is satisfied, and has stated as a fact in the contract which is executed in his presence, that the persons who appear before him are duly authorized, then I think the Registrar should presume that the notary has done his duty, and should accept the statements contained in the notarial contract. By doing so the Registrar takes no responsibility upon himself for anything which is stated in the contract. That such has been the practice in the past is deposed to by three attorneys of long standing in this Court, who state on affidavit that “It has been the practice in the Transvaal since the date of deponent’s admission for a notary to satisfy himself as to the authority and capacity of any party who appears before him to execute a deed, and it has not been the practice for registration officers to call upon the notary to supply proof of the authority upon which the notary acted.” The statements contained in these affidavits have not been called in question, and therefore I think I am justified in accepting them as correctly stating what has been the practice in the past. That, in my opinion, is the correct practice, and if that be so, I do not think that it can be said that this document is not in form. In my opinion such a document is correct in form when it states that the appearers are the agents of the parties to the contract, “as will appear on reference to powers of attorney, copies of which are filed in the notary’s protocol;” and I do not think that it is necessary that it should go further and state that the original powers are filed in the notary’s protocol or have been exhibited to him. For, so far as I can see, the only object of making such a statement is to enable the Registrar of Deeds to examine the powers himself, so that he may satisfy himself as to the authority of the persons who appeared before the notary; and in my opinion that is a matter for the notary, and not for the Registrar.” (my underlining)*

The above extract provides food for thought.



## land affairs

Department:  
Land Affairs  
**REPUBLIC OF SOUTH AFRICA**

# Proposed amendments by the sectional titles regulation board to the sectional titles Act 95 of 1986

By: Allen West  
Deeds Training, PRETORIA

The Sectional Titles Regulation Board Meeting held their annual meeting on the 22<sup>nd</sup> and 23<sup>rd</sup> May 2007 where various proposals for the amendment to the Sectional Titles Act 95 of 1986 and the regulations promulgated thereunder were considered, and proposals made to the Minister for the amendment of the Act and regulations.

It is not endeavoured to address all the issues discussed, but merely to allude to those proposals which will have an impact on the existing practice. The proposals will be dealt with individually, providing the proposed amendment and how the amendment will impact on the practice.

## SECTION 5(5)

The board resolved that section 5(5) be amended to read as follows:

*“(5) For the purposes of subsection (3)(d) the boundaries of a section shall be defined –*

*(a) by reference to the floors, walls and ceilings thereof, or as may be prescribed; Provided that any window, door or other structure which divides a section from common property or from any other section shall be deemed to form part of any such floor, wall or ceiling; and”.*

This will make it clear that any door, window or other structure which closes/fills an aperture in the exterior wall, floor or ceiling of a section forms part of that wall, floor or ceiling for the purposes of determining the boundary of the section.

## SECTION 11(3)(d)(iii)

It is proposed to amend section 11(3)(d)(iii) as follows and provide for a new prescribed form.

It is proposed that section 11(3)(d)(iii) be amended by the deletion of the **proviso** thereto and the inclusion of the following sub-section under section 11:

*(dA) Where a bond is registered against one or more pieces of land shown on the sectional plan, upon written application by the developer and with the consent of the mortgagee, all the land shown on the sectional plan may be substituted for the land originally mortgaged under the bond: Provided that if different pieces of the land shown on the sectional plan are mortgaged under different bonds, the sectional plan may not be registered unless the bonds are cancelled.*

- and the inclusion of the following sub-regulation under regulation 10:

(4) *An application and consent for the substitution of the land*

*under a mortgage bond in terms of section 11(3)(dA) of the Act, shall be in the form of form AJ in Annexure 1.*

- and a new prescribed form which reads:

### FORM AJ

Prepared by me

.....

Conveyancer

.....

(State surname and initials in block letters)

### APPLICATION AND CONSENT IN TERMS OF SECTION 11(3)(dA) OF THE SECTIONAL TITLES ACT, 1986 (ACT 95 OF 1986)

I ....., the developer having applied for the registration of a sectional title plan SG. No. .... (insert sectional plan number issued by the Surveyor General) and opening of a sectional title register in respect of the scheme known as ..... (insert the name of the scheme) on the land ..... (describe the land mortgaged under the bond, mortgaged under Bond ..... (describe the number including year number) and other land, do hereby apply for all the land shown on the sectional plan to be substituted for the land mortgaged under the bond.

DATED at ..... this ..... day of .....

#### WITNESSES:

- .....
- .....

Developer .....

and I, ....., the legal holder of the aforesaid bond do hereby consent to the substitution of all the land shown on the sectional plan for the land mortgaged under the bond.

DATED at ..... this ..... day of .....

#### WITNESSES:

- .....
- .....

Legal Holder .....

**N.B.:** Alternatively the mortgagor and mortgagee may furnish their consents in separate documents.

This amendment merely eradicates the confusion which the section provided in practice, however it does not change the practice. It merely now clarified the existing practice and provides a unique prescribed form.

#### SECTION 12(1)(e)

It is proposed to amend section 12(1)(e) and form F as follows:

*“issue to the developer, in the prescribed form, a certificate **or certificates** of real right in respect of any reservation made by him in terms of section 25(1), subject to any mortgage bond registered against the title deed of the land;”.*

- **Amendment of footnote to Form F:**  
*\*Delete whichever is not applicable.  
†State which rights, i.e. section 25(1)(a), (b), (c) are reserved **and where such rights are subdivided, state each right in a separate paragraph.**  
‡State name of township/suburb and local authority.*

These amendments will now allow for the lodgement of one real right of extension or for separate certificates of the subdivided right, if such right has already been sub-divided into identifiable portions.

#### SECTION 24(6)(d)

It is proposed to amend section 24(6)(d) as follows:

*“(d) any sectional mortgage bond to which the section may be subject, together with a certificate by a conveyancer stating that there is not a deviation of more than 10 per cent in the participation quota of any section as a result of the extension, or if there is a deviation of more than 10 per cent, that the mortgagee of each section in the scheme has consented to the registration of the sectional plan of extension of a section; and for the purposes of this subsection it shall be sufficient for a notice to be posted to a mortgagee by registered post, citing details of the mortgage bond, the mortgagor and the reference number of the mortgage loan, if any: Furthermore such notice shall indicate details of the proposed extension to its size, location and impact upon the security of such mortgagee as to the diminution of the participation quota allocated to the mortgaged unit. Should the mortgagee fail to respond in writing to the notice within 30 days of the posting thereof, the failure will be deemed to convey the consent of the mortgagee to the proposed extension; and”.*

This amendment will facilitate the obtaining of bondholders consents.

#### SECTION 25(1)

It is proposed to amend section 25(1) as follows:

*“25. Extension of schemes by addition of sections and exclusive use areas.*

*-(1) A developer may, subject to the provisions of section 4(2), in his application for the registration of a sectional plan, reserve, in a condition imposed in terms of section 11(2), the right to erect and complete from time to time, but*

*within a period stipulated in such condition, or such extended period as may be agreed upon from time to time prior to the lapsing of the stipulated period between all members of the body corporate and registered bondholders which agreement must be entered into in terms of a bilateral notarial deed, for his personal account-”.*

This amendment will allow for the extension of the duration for which a right of extension was reserved without the necessity of approaching court.

#### SECTION 25(1) AND (2)

It is proposed to amend section 25(1) and (2), as follows:

*“(1) A developer may, subject to the provisions of section 4(2), in his application for the registration of a sectional plan, reserve, in a condition imposed in terms of section 11(2) the right to erect and complete **or include** from time to time, but within a period stipulated in such condition, for his personal account-*

- (a) a **[further]** building or buildings;
- (b) a horizontal extension of an existing building;
- (c) a vertical extension of an existing building,

(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 **[to be erected]** 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 **[to be erected]** are to be divided into a section or sections and any exclusive use areas;
- (d) particulars of any substantial difference between the materials to be used in the construction of the building or buildings **[to be erected]** and those used in the construction of the existing building or buildings;”

This will have the effect that a right of extension can be reserved in respect of an already erected building. Although this has always been the practice, the Act has merely been brought into line with the practice.

#### SECTION 25(4A)

The board resolves that section 25 be amended by the insertion of 25(4A):

“25(4A) The registrar shall not register a cession of a real right of extension or a portion or an undivided share therein, unless there is produced to him-

- (a) a conveyancer's certificate confirming that as at date of registration-
- (i) (aa) if a body corporate is deemed to be established in terms of section 36(1), that body corporate has certified that all moneys due to the body corporate by the cedent in respect of the said real right have been paid, or that provision has been made to the satisfaction of the body corporate for the payment thereof; or
- (bb) If a body corporate is not deemed to be established, no moneys are payable.”

This new inclusion will require a conveyancers certificate, similar to the 15(B)(3)-certificate, to be lodged on the cession of a real right of extension, to confirm that all money owed to the body corporate has been paid, etc.

#### **SECTION 27(4)(b)**

The board resolved to amend section 27(4)(b) as follows:

“27(4)(b) If an owner ceases to be a member of the body corporate as contemplated in section 36(2), any right to an exclusive use area still registered in his or her name vests in the body corporate free from any mortgage bond or registered real right.”

The amendment has the effect that the exclusive use area will vest in the body corporate free from bonds and real rights, such as usufructs, etc. Previously real rights, such as personal servitudes or lease agreements were not addressed in the section and confusion existed as to their existence.



Members of Sectional Title Board - 2007

#### **SECTION 27(5)**

It is proposed to amend section 27(5) as follows:

“(5) A right to the exclusive use of a part of the common property delineated on the sectional plan registered in favour of an owner of a section may with the written consent of the mortgagee and holder of registered real right of the **[relevant section and] exclusive use area** be cancelled by the registration by the registrar of a notarial deed of cancellation entered into by the **[owner of the section entitled to such right] holder of such right** and the body corporate duly authorized by a special resolution of its members on behalf of all the owners of sections in the scheme.”

This amendment will have the effect that the bondholder of the bond over the exclusive use and holders of real rights over the exclusive use area must consent to the said cancellation. Previously the bondholder over the exclusive use area and the holders of real rights did not have to provide their consent.

#### **SECTION 29(3)**

The board resolved that section 29(3) be amended to read as follows:

“29(3) If the land to be burdened by a servitude or restrictive agreement is hypothecated, the written consent of every mortgagee to the registration of such servitude or restrictive agreement shall be **[lodged with the registrar] obtained by the notary and filed in his or her protocol.**”

This allows for the Notary to obtain the consent and retain same in his/her protocol and not to lodge same at the Deeds Registry.



Members of Title Board at work

## SECTION 35

The Board resolved that Form V be amended by the insertion of the following prior to the footnotes of the said form:

Filed at the Office of the Registrar of Deeds at .....  
on .....

Signed at ..... on .....

**Registrar of deeds: \_\_\_\_\_ Date: \_\_\_\_\_**  
**(Seal of Office)**

- \* *Particulars not applicable in a particular case must be omitted.*
- \*\* *State name of township/suburb and local authority.*
- † *Particulars not applicable in a particular case must be omitted.*

This amendment to the form will provide a clear indication when the substituted rules became operative. Previously no proof was obtainable that the rules were filed.

***Photo on the right:***  
*Sam Lefafa - Chairperson of the Board*

## SECTION 60 AND 60A

These sections have merely been revisited *in toto* to eradicate all archaic provisions.

As already stated the above is mere proposals and still has to go through a lengthy procedure before becoming law.

It is merely provided to indicate to practitioners and staff of Deeds Registries what is envisaged in the future.

Please do not shoot the messenger.



## Other languages in Deeds and documents

By: Edgar Morake  
Conveyancer, PRETORIA

It would be appreciated to know the reason why one cannot find a registered deed of transfer which is written in one of the other official South African languages, except English or Afrikaans. I have not seen a single registered document at the Deeds Office, which I mainly deal with, and it has been just over 13 years into the new dispensation in South Africa.

I acknowledge that, should the Deeds Offices across the country register documents in languages other than the two mentioned above, all sorts of problems may arise.

One being that we may not have enough conveyancers who are able to prepare documents in those languages; two being that we may not have sufficient competent deeds examiners who can examine those deeds/documents well enough. A third is that the financial institutions may not be willing and/or able to be supportive of this initiative.

Despite all these likely imminent stumbling blocks that I've mentioned and many others that one can think of, I feel that registration of the documents in all other languages should be encouraged.

I suggest that the Law Society of South Africa's Property Committee should consider forming some sort of Legislation and Rules (or consider amending/adding to existing laws).

Most of the citizens in this country do not use English or Afrikaans as a home language and, for that reason, I think they should be given the option to choose an official language they would prefer their documents to be written in. The Law Society would also have to look into providing some sort of training to practitioners who are not conversant in a language they would like to practice in. The financial institutions would have to follow suit by offering their clients an option to choose any local official language they would prefer.

It has been suggested by some practitioners that English should be used in all documents tendered for registration at the Deeds Office. I do not think it is fair that Afrikaans and all other official African languages must give way to English. If we are to promote the use of one language at the expense of others in our own country of birth, who will promote and encourage their usage?

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# Statistics of Chief Directorate: Deeds Registration Monetary values of transfers and bonds

2006  
(January 2006 to December 2006)

## TRANSFERS MONETARY VALUE

REGISTRY	ERVEN	FARMS	HOLDINGS	ST UNITS	TOTALS
PRETORIA	R104 468 582 892,39	R21 804 401 734,35	R2 927 630 685,17	R22 812 914 921,17	R152 113 530 233,08
CAPE TOWN	R60 423 131 335,46	R6 767 938 959,00	R0,00	R17 190 952 970,04	R84 382 023 084,50
JOHANNESBURG	R49 472 345 438,64	R0,00	R0,00	R9 256 936 202,00	R58 729 281 640,64
PIETERMARITZBURG	R21 976 132 560,80	R2 916 835 060,84	R0,00	R11 584 427 950,00	R36 477 395 571,64
BLOEMFONTEIN	R5 804 909 110,52	R1 496 794 933,77	R211 584 698,81	R1 756 660 108,38	R9 269 948 651,48
KIMBERLEY	R1 000 555 099,91	R325 855 998,16	R123 214 643,00	R17 784 900,00	R1 467 410 641,07
KING WILLIAM'S TOWN	R2 896 714 417,62	R277 720 894,79	R0,00	R228 988 779,32	R3 403 424 091,73
VRYBURG	R974 540 469,00	R470 662 316,00	R48 460 910,00	R7 740 692,00	R1 501 403 387,00
UMTATA	R237 451 111,24	R1 862 605,89	R0,00	R245 200,00	R239 558 917,00
<b>TOTALS</b>	<b>R247 354 362 435,58</b>	<b>R34 062 072 502,80</b>	<b>R3 310 890 936,98</b>	<b>R62 856 651 542,91</b>	<b>R347 583 977 418,27</b>

# Statistics of Chief Directorate: Deeds Registration Monetary values of transfers and bonds

## NUMBER OF PROPERTIES

REGISTRY	ERVEN	FARMS	HOLDINGS	ST UNITS	TOTALS
PRETORIA	94 236	8 265	3 007	38 887	144 395
CAPE TOWN	81 922	2 879	0	21 490	106 291
JOHANNESBURG	51 905	0	0	18 171	70 076
PIETERMARITZBURG	29 762	1 628	0	16 248	47 638
BLOEMFONTEIN	17 701	1 460	0 429	3 570	23 160
KIMBERLEY	3 521	154	30	52	3 757
KING WILLIAM'S TOWN	5 754	213	0	507	6 474
VRYBURG	3 072	377	82	22	3 553
UMTATA	1 295	9	0	3	1 307
<b>TOTALS</b>	<b>289 168</b>	<b>14 985</b>	<b>3 548</b>	<b>98 950</b>	<b>406 651</b>

# Statistics of Chief Directorate: Deeds Registration Monetary values of transfer and bonds

## AVERAGE MONETARY VALUE

REGISTRY	ERVEN	FARMS	HOLDINGS	ST UNITS	TOTALS
PRETORIA	R1 109 645,81	R2 638 161,13	R973 605,15	R586 646,31	R5 308 058,40
CAPE TOWN	R737 569,05	R2 350 795,05	R0,00	R799 951,27	R3 888 315,37
JOHANNESBURG	R953 132,56	R0,00	R0,00	R509 434,60	R1 462 567,16
PIETERMARITZBURG	R738 395,69	R1 791 667,73	R0,00	R712 975,62	R3 243 039,04
BLOEMFONTEIN	R327 942,44	R1 025 202,01	R493 204,43	R492 061,66	R2 338 410,53
KIMBERLEY	R284 167,88	R2 115 948,04	R4 107 154,77	R342 017,31	R6 849 287,99
KING WILLIAM'S TOWN	R503 426,21	R1 303 853,97	R0,00	R451 654,40	R2 258 934,57
VRYBURG	R317 233,23	R1 248 441,16	R590 986,71	R351 849,64	R2 508 510,73
UMTATA	R183 359,93	R206 956,21	R0,00	R81 733,33	R472 049,47
<b>TOTALS</b>	<b>R5 154 872,79</b>	<b>R12 681 025,29</b>	<b>R6 164 951,05</b>	<b>R4 328 324,14</b>	<b>R28 329 173,27</b>

# Statistics of Chief Directorate: Deeds Registration Monetary values of transfer and bonds

## BONDS MONETARY VALUE

REGISTRY	ERVEN	FARMS	HOLDINGS	ST UNITS	TOTALS
PRETORIA	R1 443 106 192 451,27	R135 051 559 316,76	R10 756 707 468,78	R72 324 620 552,17	R1 661 239 079 788,98
CAPE TOWN	R260 028 244 265,80	R19 718 324 645,00	R0,00	R143 096 064 807,00	R422 842 633 717,80
JOHANNESBURG	R243 224 151 848,00	R0,00	R0,00	R28 809 110 917,00	R272 033 261 865,00
PIETERMARITZBURG	R80 072 508 852,99	R16 100 960 283,00	R0,00	R55 528 039 952,00	R151 701 509 087,99
BLOEMFONTEIN	R27 143 149 644,51	R13 176 608 512,49	R398 317 903,31	R2 189 554 308,04	R42 907 630 368,35
KIMBERLEY	R9 727 962 082,07	R725 976 929,00	R72 215 863,00	R27 526 195,00	R10 553 681 069,07
KING WILLIAM'S TOWN	R6 364 202 844,68	R480 937 061,00	R0,00	R4 413 996 665,20	R11 259 136 570,88
VRYBURG	R2 009 025 460,00	R991 748 531,00	R222 841 011,00	R13 527 000,00	R3 237 142 002,00
UMTATA	R3 223 980 510,47	R5 771 000,00	R0,00	R0,00	R3 229 751 510,47
<b>TOTALS</b>	R2 074 899 417 959,79	R186 251 886 278,25	R11 450 082 246,09	R306 402 439 464,41	R2 579 003 825 980,54

# Statistics of Chief Directorate: Deeds Registration Monetary values of transfer and bonds

## NUMBER OF PROPERTIES

REGISTRY	ERVEN	FARMS	HOLDINGS	ST UNITS	TOTALS
PRETORIA	148 773	15 027	5 148	53 043	221 991
CAPE TOWN	132 867	7 032	0	30 413	170 313
JOHANNESBURG	85 158	0	0	26 298	111 456
PIETERMARITZBURG	55 376	3 362	0	22 243	80 981
BLOEMFONTEIN	19 527	4 044	729	4 654	28 954
KIMBERLEY	2 002	329	103	78	4 512
KING WILLIAM'S TOWN	8 150	353	0	1 120	9 623
VRYBURG	3 669	628	284	33	4 614
UMTATA	869	5	0	0	874
<b>TOTALS</b>	<b>458 391</b>	<b>30 780</b>	<b>6 264</b>	<b>137 883</b>	<b>633 318</b>

# Statistics of Chief Directorate: Deeds Registration Monetary values of transfer and bonds

## AVERAGE MONETARY VALUE

REGISTRY	ERVEN	FARMS	HOLDINGS	ST UNITS	TOTALS
PRETORIA	R9 700 054,39	R8 987 260,22	R2 089 492,52	R1 369 509,24	R22 140 316,37
CAPE TOWN	R1 957 056,64	R2 804 084,85	R0,00	R4 704 940,65	R9 466 082,13
JOHANNESBURG	R2 856 151,53	R0,00	R0,00	R1 095 486,73	R3 951 638,26
PIETERMARITZBURG	R1 445 978,56	R4 789 101,81	R0,00	R2 496 427,64	R8 731 508,01
BLOEMFONTEIN	R1 390 031,73	R3 258 310,71	R546 389,44	R470 467,19	R5 665 199,08
KIMBERLEY	R2 430 775,13	R2 206 616,81	R701 124,88	R3352 899,94	R5 691 416,76
KING WILLIAM'S TOWN	R780 883,78	R1 362 427,93	R0,00	R3 941 068,45	R6 084 380,17
VRYBURG	R547 567,58	R1 579 217,41	R784 651,45	R409 909,09	R3 321 345,53
UMTATA	R3 709 989,08	R1 154 200,00	R0,00	R0,00	R4 864 189,08
<b>TOTALS</b>	<b>R24 818 488,44</b>	<b>R26 141 219,73</b>	<b>R4 121 658,29</b>	<b>R14 834 708,92</b>	<b>R69 916 075,38</b>

# Deeds registration course: Level VII

By: Allen West  
Deeds Training, PRETORIA

Senior officials from the deeds registries attended the Deeds Registration Course: Level VII (Modules I and II) during 2007. The aim of this course was to afford officials an update on all new legislation, case law, etc.



**From Left to Right:** *1st Row:* Sydney Mekwe (Lecturer); Allen West (Deputy Registrar of Deeds: Deeds Training); Wiseman Bhuqa (Lecturer); Zandr  Lombard (Lecturer) *2nd Row:* SE Hurter; RC Francis; RN Khanyile; MB Mbambo  
*3rd Row:* W Odendaal; SG Kleynhans; M Scheepers; BR Mdunge; M Mahlangu  
*4th Row:* MG Mnguni; F Strydom; BB Titi; NH Smithers; EM Sibisi

# Promulgation of Corporate Laws Amendment Act 24 of 2006



By: Lizelle Kilbourne  
Conveyancer  
Igqwetha Training Academy (Pty) Ltd

The long awaited Corporate Laws Amendment Act 24 of 2006 was promulgated on 17 April 2007 in Government Gazette No. 29804. The Act will come into operation on a date fixed by the President.

This Act, which consists of 64 sections, brings about important changes to the Companies Act and Close Corporations Act.

A summary (derived from the long title of the Act) is provided below:

## To amend the Companies Act, 1973, so as to amend:-

- Certain definitions and insert new definitions;
- To make a distinction between widely held companies and limited interest companies;
- To limit the liability of various office bearers to that arising from gross negligence in relation to the performance of their functions;
- To make further provisions relating to the use of electronic aids in the furnishing of information relating to companies;
- To broaden the Minister's powers of delegation;
- To provide for new ways of giving notices;
- To make further provision regarding financial assistance for the purchase of a company's shares;
- To eliminate certain formalities regarding the memorandum and articles;
- To allow the registrar to restore the registration of a company which has been deregistered in certain circumstances;
- To make further provisions regarding matters to be stated in a prospectus;

- To change the requirements relating to the disposal of the undertaking of a company;
- To make a new provision in respect of the disclosure of information;
- To make new provisions for the appointment of auditors and audit committees;
- To provide anew in respect of financial statements;
- To make new provision regarding the Securities Regulation Panel;
- To make provision in respect of financial reporting standards;
- To establish and make further provision for a Financial Reporting Standards Council and a Financial Reporting Investigations Panel;
- To create an offence in respect of non-compliant financial reports; and
- To amend Schedule 4 by inserting definitions and amending other provisions relating to financial reporting.

## To amend the Close Corporations Act, 1984, so as:-

- To insert definitions;
- To make further provision relating to the use of electronic aids in the furnishing of information;
- To provide for new methods of giving notice;
- To make further provision with regard to disclosure of information;
- And to allow the registrar to restore the registration of a corporation which has been deregistered in certain circumstances.

*A full discussion on how this Act will impact on land registration will be contained in the next issue Editor.*

# Mpumalanga Deeds Registry Update



By: Wiseman Bhuqa  
Deeds Training, PRETORIA

It was once again a privilege to meet with the Registrar of the Mpumalanga Deeds Registry, Mr. L T du Pont, at the Pretoria Deeds Registry. He embellished readers with a concise update on the establishment of the said office.

According to Mr. du Pont, his project team has made mega strides in this project since the last in issue no. 11 of the Journal.

The key critical managerial positions and other administrative positions have been successfully filled, namely the posts of Deputy Registrar of Deeds and two Assistant Registrars, administration clerks, etc. The total staff compliment will comprise of about 40 members. The Registrar is absolutely upbeat about filling more posts in the near future.

Currently the said staff are housed and trained at the Pretoria Deeds Registry and await their exodus to Nelspruit (official seat of the Mpumalanga Deeds Registry) on or about 31st July 2007.

The Registrar has adopted a highly efficient communication strategy, to bolster the success of the project thus far. The media, namely the press and the radio, are pivotal means of communication in his strategy, running parallel to other common mechanisms including, Conveyancers information sessions, the eye catching posters pinned up on the various Deeds Registries notice boards, etc.

Towards this effective communication strategy relevant advertisements about this project have been broadcast on the following radio stations, namely;

SA FM, Ikwekwezi FM, Ligwalagwala FM, Radio Sonder Grense and Thobela FM all catering for a diverse audience in terms of the population dynamics of Mpumalanga.

The positive outcome of this strategy is clearly evidenced by the number of calls management receives on a daily basis from various stakeholders about the project, in reaction to the radio advertisements. Currently one of the Assistant Registrars of Deeds is already stationed in Nelspruit to ensure service delivery and provision of information to clients.

The Registrar avers that his next move is to publish similar advertisements, as those mentioned above in the local newspapers, and personally hold a talk show on some of the

local radio stations. He also highlighted the overwhelming response he has received from the local conveyancing fraternity.

The Registrar extends a word of enormous gratitude to all the members of staff at the Pretoria Deeds Registry for their support during these critical phases of the project and also to the Sub-Directorate: Deeds Training for the functional training they have unselfishly offered to provide while the new office is yet to fill the post of Law Lecturer, as well as for the up and coming topic courses they will offer.

As the saying goes: "A project is a series of programmes aimed at achieving one major objective.". We have seen the remarkable progress achieved by the team thus far.

*The Deeds Registry officially opened on the 25th September, 2007 - Editor*

## Confirmation of Conveyancing Practice in Western Cape

The Practice Committee of the Deeds Office Cape Town recently held a meeting to discuss the 2005 Registrars' Conference Resolutions.

The implementation of two resolutions in particular needs to be kept in mind when drafting documents.

### 1. RCR 7/2005

A Power of Attorney may not in future simply state "duly authorized".

It must now state either "DULY AUTHORIZED BY RESOLUTION" or "DULY AUTHORIZED BY GPA NO ..."

### 2. RCR 14/2005

In future all parties to foreign marriages (including England etc) must be assisted by the spouse when signing documents.

*These two resolutions appear to be established practice and applied uniformly by all the other Deeds Registries - Editor*

## Translation and Abbreviation of Company Names

By: Allen West  
Deeds Training, PRETORIA

Much confusion surrounds the practice of abbreviations in the names of companies, and for this purpose the Chief Registrar of Deeds issued the following guidelines, as far back as 1981.

*"The addition of the words "Limited" or "Proprietary Limited" to the name of a company is clearly only for the purpose of indicating whether such company is a public or a private company. There can, therefore, be no objection to these words being translated to the other official language when the name of a company is used in deeds. Apart from the words "Proprietary" and Limited no translation to the other official language of the name of the company can be permitted.*

*The use of the recognized abbreviations "Pty" and "Ltd" (in Afrikaans "Edms" and "Bpk") for the words "Proprietary" and "Limited" when used in deeds is also acceptable.*

*It may be of interest that the new programme that has been compiled for the computer provides that for the purpose of making an enquiry the computer will ignore the words "Proprietary", "Limited", "Eiendoms" and "Beperk".*

It is trusted that the above now sheds more light on the mystified practice of abbreviations.

# Black Marriages in Terms of Section 35 (1) of the KwaZulu Legislative Assembly Act No. 16 of 1995

By: Allen West  
Deeds Training, PRETORIA

In terms of the provisions of Section 35(1) of the KwaZulu Legislative Assembly Act (16 of 1985) (KwaZulu Act on the code of Zulu Law 16 of 1985) a civil marriage between citizens contracted after the commencement of the Act shall produce the legal consequences of a marriage out of community of property between the spouses, provided that the intending spouses may at any time within one month of the celebration of such marriage declare jointly before any Commissioner, or Magistrate, or other Marriage Officer, that it is their intention and desire that community of property and profit and loss shall be included in their marriage, except with regard to any land in the location held under quitrent tenure which land shall be exclusive from such community. The definition of a citizen was governed in terms of the National States Citizenship Act No. 26 of 1970 which was repealed in terms of Schedule 7 of Act 200 of 1993, and in terms of Section 3 thereof defined that every Black person shall be a citizen of particular Territorial Authority Area:

- (a) if he was or is born in that area from parents one of whom were or are citizens of that Territorial Authority Area at the time of his birth;
- (b) if he has made application for Citizenship of a Territorial Authority Area having lived in such Territorial Authority Area for a period of five years;
- (c) if he is not a citizen of any other Territorial Authority Area and speaks any Black language used by the Black population in a particular Territorial Area including any dialect; and

- (d) if he is not a citizen of any other Territorial Authority Area and is related to any member of the Black population of a particular Territorial Authority Area, or has identified himself with any part of such population, or is associated with any part of such population by virtue of his cultural or racial background.

It would therefore appear that a marriage between two "KwaZulu" citizens between the 27th March 1987 and the repeal in terms of Schedule 7 of Act 200 of 1993 (in 1994) are out of community of property, by virtue of the provisions of Section 35(1) of the KwaZulu Black Administration Amendment Act of 1998, KwaZulu Government Notice No. 105/1988, and accordingly should be described as such.

In terms of the Matrimonial Property Act No. 88 of 1984, the Act was applicable to Blacks with effect from the 2nd December 1988 as Act 3 of 1988, being the Marriage and Matrimonial Property Law Amendment Act (by Proclamation 203 of 1988) amended various sections, but it appears from the amendment of those sections 21 and 25 that it only referred to marriages governed by Section 22(6) of Act 38 of 1927. In view of the provisions of Section 35(1) of the KwaZulu Act which was with effect from the 28th November 1986 and only repealed in terms of Act 200 of 1993 with effect from the 27th April 1994, KwaZulu citizens who were married during this period irrespective of the provisions of the Matrimonial Property Act, appear to have been married out of community of property until such time as the Act is repealed. **Accordingly KwaZulu citizens married between 2nd December 1988 and 27th April 1994 are married out of community of property in terms of Section 35(1) of KwaZulu Act No. 16 of 1985.**

## Notes on Fractional Ownership

By: C J de Jager  
Conveyancer, Snyman de Jager, PRETORIA

My firm has perused various agreements and promotional material regarding the sale of so-called Fractional Ownership interests in property-owning companies granting exclusive use of the properties during certain periods to the purchaser.

The sale of shareholding in the said companies together with the right to usages of the company's property create the impression that this kind of transaction falls within the ambit of the Share Blocks Control Act (Act 59 of 1980). This is, however, not the case as various owners share the same property during certain determinable periods of the year hence the term "Fractional Ownership".

What is very clear is that all these transactions fall within the definition of 'time sharing interest' as provided for in the

Property Time-Sharing Act, Act 75 of 1983. A timeshare confers the exclusive right to use accommodation (immovable property) of the Company or any part/portion thereof for a determined/determinable period during the year.

The fact that the industry refers to certain upmarket shareholding interests as "Fractional Ownership" does not deter from the fact that these are Time Share Interests within the scope of the Property Time-Sharing Control Act. All contracts for the sale of their interests must comply with the provisions of the said Act and in this regard cognizance must be taken of inter alia the section 4 requirement regarding full disclosure, etc.

We do recommend that sellers of the so-called "Fractional Ownership" Timeshare interests immediately address the shortcomings of their existing contracts as these clearly do not comply with the Act.

The website: [www.fractionalownership.co.za](http://www.fractionalownership.co.za) unfortunately errs in its assumption that Fractional Ownership grants "the added benefit of the ownership of the property through your shareholding".

All that you own is a shareholding in a company which owns the property. Although there is a smaller (and limited) number of shareholders, it still falls under the Property Time-Sharing Act and must be dealt with accordingly.

*Republished with permission from Ghost Digest - Editor*

## Individual Rating of Sectional Title Units

By: Lizelle Kilbourne  
Conveyancer, Igqwetha Training Academy (Pty) Ltd

Recently the City of Cape Town has produced a general valuation role in terms of the Municipal Rates Act for the period of 1 July 2007 until 30 June 2011.

One of the key aspects of this Act is that Sectional Title Units are now valued separately and owners will be liable to pay rates as per the values assessed for their individual units. This means that rates clearance certificates will need to be lodged for all transfers, including sectional title transfers.

According to the City Council, they will be equipped to start receiving applications for rates clearance certificates as of 1 July 2007. The procedure to follow is the same as for non-sectional title transfers, and the fee payable will still be R90. The Deeds Office has not yet issued a circular about this, but have confirmed that all Deeds of Sale signed on or after 1 July 2007 will require the clearance certificate to be lodged. If it turns out that the Unit has in fact not been individually rated confirmation from the Council to that effect will need to be lodged.

This new process could take some time to effectively implement. We foresee as the main problem the capacity of council to issue certificates and hope that an upcoming meeting between council and the Deeds Office will ensure an effective phasing in of this process.

*"The Cape Town Deeds Office issued the long awaited Registrar's circular (No. 3 of 2007) recently. In essence this requires that in respect of a unit situated within the jurisdiction of the City of Cape Town, a separate rates certificate must be lodged for the transfer of a sectional title unit in respect of transactions entered into on or after 1st July 2007.*

*In respect of other Municipalities, and until notification is received from the relevant municipality that the units are rated separately, for all transactions entered into on or after 1st September 2007, the transfer of the unit must be accompanied by an exemption or a certificate, issued by the relevant municipality that the property is not rated." - Editor*

## Who is the Conveyancer's Client

By: CPH Geldenhuys  
Office of the Chief Registrar of Deeds



In the past the issue of who the conveyancer's client is was debated at length. It was and still is apparent that conveyancers do not know and/or do not understand that they are "independent officers of the court" and as such they should act for both the seller and the buyer. For the buyer they are instrumental in providing an undisputable title, and on registration of the deed ensure that the seller gets his money.

Herewith is an extract from Legalbrief Today dated 24 May 2007. It is with great concern that a conveyancer of a top law firm could make a statement that in accordance with his firm's so-called "know-your-client" policy he was acting for the seller and that the buyer was not his responsibility.

"General: Top law firm caught up in Fidentia saga

*Ousted Fidentia Chairman Arthur Brown and his wife Susan*

*stole R24.5m, partly to buy a building, the sale of which they negotiated with a major law firm "and now there's a possibility Cliffe Dekker's inaction will be investigated by the Financial Intelligence Centre (FIC). A Moneyweb report points out that lawyers are obliged to alert the FIC about so-called suspicious transactions: funds that may be the proceeds of crime or terrorism-related. If they don't report to the FIC, and it is found they should have, the law firm can be fined up to R10m and the lawyer sentenced to up to 15 years in jail, according to the FIC, whose director Murray Michell was quoted recently as saying it 'fully intends to pursue alleged failures to comply with the FIC Act in relation to the Fidentia matter'. It will 'provide the investigators and relevant supervisors with its full support to ensure that those responsible for compliance failures of this nature are held accountable' he said. The Moneyweb report notes Cliffe Dekker didn't call the center when Brown got a*

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enquiries please contact: **Allen West Tel.: 012 481 2815**

**E-mail: [ASWest@dla.gov.za](mailto:ASWest@dla.gov.za)**

**Fax: 012 481 2890**

Fidentia company to pay for a building purchased in the name of his family investment trust about 18 months ago. As reported in Legalbrief Today this week, Fidentia's curators obtained a forfeiture order allowing them to sell off the building in order to help recover some money for the hundreds of thousands of beneficiaries of the Living Hands Trust. Mike Collins, the Cliffe Dekker lawyer who processed the transaction, is quoted as saying there were some unusual aspects to the deal, but that at the time he didn't smell a rat.

Hence, he did not alert the authorities. In addition, Collins said that Cliffe Dekker's know-your-client policies were such that he does not believe it was his duty to interrogate the origins of the money used to buy the building. As he was acting for the seller of the building, and the Brown trust was the buyer, it was not his responsibility. However, a FIC official said conveyancers had an obligation to report to it in terms of buyers and sellers regardless of whom the conveyancer represented."

## Check-list for the Consolidation of Units

By: Allen West  
Deeds Training, PRETORIA

Where an owner for practical or commercial reasons, wants to consolidate a unit the following procedures is to be followed:

### Consolidation of units

- Obtain consent from trustees
- Obtain approved consolidation plan
- Apply to the Registrar of Deeds and lodge the following:
  - Application (Form O)
  - Sectional plan of consolidation (in duplicate)

- Sectional title deeds of the sections to be consolidated
- Bond for disposal
- Certificate of registered sectional title (Form Q)

Cognizance should be taken that exclusive use areas cannot be subdivided or consolidated (see RCR 5 of 1991 and RCR 4 of 2003). The right must be cancelled, re-delineated and re-ceded by the body corporate.

## Interpretation of Section 4(2) of the Sectional Title Act, Act 95 of 1986

By: George Tsotetsi  
Office of the Chief Registrar of Deeds

Section 4(2) of the Sectional Titles Act deals with two related, but distinct, issues. The first issue relates to the number of buildings and the number of properties to which a scheme may relate and the second issue relates to the location of the building/buildings which is/are to be divided into sections.

In interpreting this section, the following maxims are instructive, namely the **Judicis est ius dicere sed non dare**, the **Casus omissus** and, most importantly the **Expressio unius est exclusio alterius**.

The first issue is addressed in the first part of the section and the second issue is addressed in the **proviso** thereto. It must be noted that the buildings referred to in the first part of the section need not necessarily be sections, but such buildings could be exclusive use areas as well. The buildings referred to in the **proviso**, however, can only relate to sections and nothing else. Thus, it is possible to have buildings comprising of sections on one property and buildings comprising of exclusive use areas on another, non-contiguous property, forming part of one development scheme.

It must be noted that, though the section provides for the establishment of a scheme on properties that are non-contiguous to each other, it does not, however, provide for buildings comprising of sections to be erected on non-contiguous properties as mooted in some circles. The proviso to the section expressly, and exclusively, deals with the location of the building(s) comprising of sections in instances

where a scheme is to be developed on more than one property. It makes provision for two scenarios, namely that the building/s should be erected on one property only and that, if the building/s is/are to be erected on more than one property, then such can occur only in respect of contiguous properties, and only if the same have been notarially tied.

An argument, in support of a proposition seeking to justify an interpretation of the section to the effect that it provides for the erection of buildings comprising sections on non-contiguous properties has been raised. This argument opines that the **proviso** could not make reference to non-contiguous property because it is not possible to erect one building on non-contiguous properties. Though plausible, this argument, is self-defeating and cannot be supported because the **proviso** not only relates to a building, but relates to buildings as well, yet it is possible to erect buildings on non-contiguous properties. It is, therefore, submitted that the maxim **Expressio unius est exclusio alterius** finds application in this instance, and there are no compelling reasons why it should not.

Lastly, it is submitted that, if the exclusion of reference to non-contiguous properties in the proviso constitutes a **Casus Omissus**, then it is not for the interpreter to fill-in such gap, but for the legislature to do so, more specifically in the light of the maxim **Judicis est ius dicere sed non dare**.

*Readers' views on this issue will be appreciated - Editor*

# Robben Island - The Title Deed History

By: LJ Vosloo  
Deeds Registry, CAPE TOWN



*A Citation Jet from the South African Air Force approaches the navigational beacon adjacent to the old disused airfield on Robben Island before landing at the nearby Air Force Base at Ysterplaat. Table Mountain, some 10 km away can be seen in the distance. The aeronautical beacon on Robben Island is an important arrival and departure fixture for air traffic in Cape Town (Photograph: L J Vosloo)*

## ROBBEN ISLAND - THE TITLE DEED HISTORY

Robben Island is certainly one of the most talked about attractions in South Africa. Tourists flock there in their thousands, and not without reason. This island represents an important icon in South Africa's history and today it is one of eight UNESCO world heritage sites in South Africa.

Undoubtedly this island lends its significance to the fact that it has since the arrival of the colonists at the Southern tip of Africa been used to keep unwanted people, be they prisoners or the sufferers of dangerous diseases.

Much has been written about the island's most recent past that of a maximum security prison where political prisoners, among them our first democratically elected State President, Nelson Mandela, were incarcerated.

Robben Island is a barren 475 hectare island, some 9,3 kilometres north west of Green Point, a suburb in the Cape Peninsula. It is the largest island along the South African

coastline with evidence that it had been inhabited by early man in the days when it still formed a geological unit with the main land.

It is not clear whether there had been active human habitation and exploitation in the times immediately before the European maritime explorers rounded the Cape on their way to discover new maritime routes to the East.

However, historians do suggest that as early as 1498 the Portuguese seafarer Vasco da Gama landed on the island in search of shelter.

Some one hundred and fifty four years later, in 1652, the Dutch under Jan van Riebeeck established a permanent presence in the Cape in the name of the Dutch East India Company.

Van Riebeeck almost immediately realized the potential of the nearby Island he named after the many seals ("Robben") found on the island at the time and utilized it for various purposes, not surprising also as a convenient place to establish a prison.

And so a more or less permanent presence on Robben Island came about in 1658 when Jan van Riebeeck banished the indigenous Khoikhoi leader Autshumato to the island the first prisoner to be incarcerated there.

The remainder of the seventeenth century saw a succession of political prisoners and Muslim holy men being sent to the island for opposing the Dutch colonial government not only on the nearby mainland but also the Dutch possessions in the Far East. Among them was the Imam Tuan Guru, a prisoner from the Trinate Islands in Dutch East Asia imprisoned on Robben Island in 1780 and who, upon his release, is said to have introduced Islam to the slaves on the mainland.

Jan van Riebeeck soon after his arrival at the Cape issued the first grants to free burghers (or "Vryburgers") on the outskirts of the Cape Peninsula, and although Robben Island was used by him and his successors, not only as a prison but also for sundry other purposes such as the mining of limestone, no title was issued to anyone at this time, even though the entire island remained a **de facto** possession of the then government.

However, during the first British occupation at the Cape one John Murray (born in Aberdeen Scotland on the 14th March 1749) and his twelve year old juvenile son (born in Edingburgh, Scotland in 1785) came to the Cape and soon established himself as an entrepreneur and property owner.

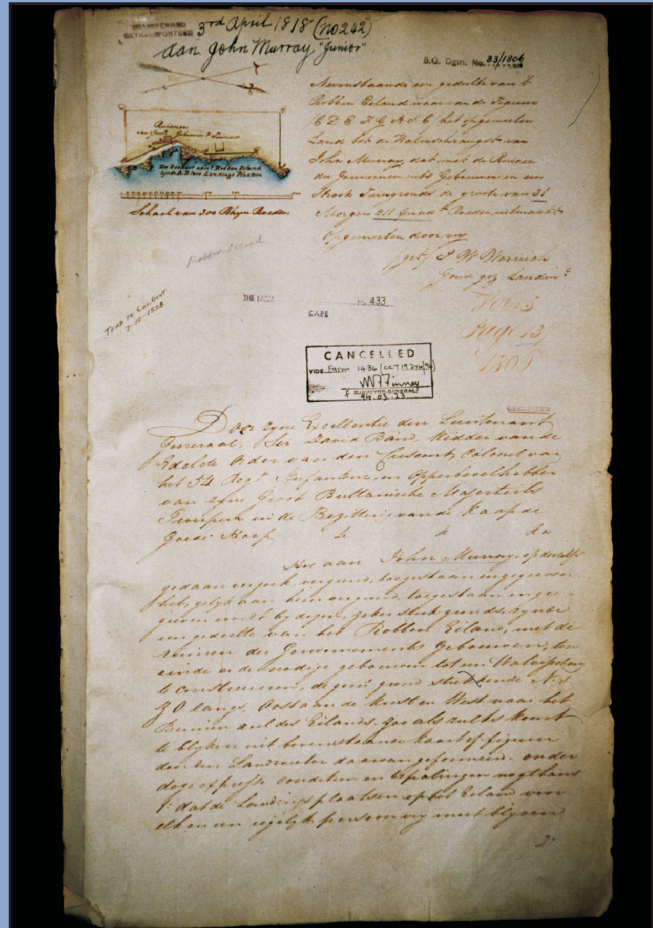
As early as 1798 Murray (who in 1803 as a citizen of the Cape of Good Hope swore allegiance to the Batavian Republic, the Dutch possession in South East Asia from where the Cape was administered as a trading post for passing ships) acquiring a whaling business but competition from Dutch entrepreneurs from Amsterdam forced him out of this business, albeit only temporarily.

He returned to whale fishing during the second British occupation of the Cape and established a whaling station and associated accommodation on Robben Island on land acquired from the then Government of the Cape of Good Hope.



This diagram or map represents the first surveyed portion of land on Robben Island and was placed on the head of the first Deed of Grant to the whaler John Murray. The area was 26,8537 Hectares in extent, and is still reflected as a component of the present day Surveying diagram of the island which can be seen elsewhere in this feature. (Photograph: L J Vosloo)

The then Governor, Lieutenant General Sir David Baird granted him a 21 Morgen and 211 square Roods piece of land on the North Eastern corner of the Island. John Murray received his grant on the 24th November 1806 (Old Cape Freeholds Vol 5 number 137), and so he became the first person to own property on Robben Island.



The first page of the Deed of Grant to John Murray. This is the first ever title deed for property on Robben Island and shows the diagram of the area at the head of the document. The then Cape Governor (Lieutenant General Sir David Baird) granted this property to Murray on the 24th November 1806 (Photograph: L J Vosloo)

This historical document is still kept at the Cape Town Deeds Office, and reveals fascinating historical detail.

Property descriptions were elaborate, and so the area earmarked and surveyed for the whaling station was described (interestingly in the Dutch language of the time rather than English) as follows:

"...zeker stuk gronds zynde een gedeelte van het Robben Eiland met de ruinen der Gouvernements Gebouwen ten einde en de nodige gebouwen tot een Walvisjachtery te construeeren, de.....grond strekkende N O Z O langs, Oost aan de kust en West waar het binnen deel des Eilands - zo als zulks konst te blyken uit bovenstaande kaart of figuren door den Landmeter daarvan geformeerd" (Fortunately in modern times this land is now simply described as "The farm No 433, Cape")

Certain conditions were imposed in the grant which in themselves are historically significant and certainly provide a glimpse to the social conditions at the Cape during this period. The original Dutch language and the faded script in the original grant make interpretation rather difficult, but the four conditions appear to relate to Murray being obliged to allow free passage at the ship's landing ground, to ensure sufficient provisions to be left for those workers remaining on the island for longer than a month, to ensure that no ships containing contraband are allowed to "land" on the island and finally, provisions relating to limestone on the island.

Murray, by all accounts was rather successful not only as a whaler (he exported much of the harvested whale oil and bone to London) but also property owner, with property interests as far afield as the present day Knysna. However his health soon deteriorated, and shortly before he died, application was made to allow his son to be declared a "major" or *venia aetatis* so that he could continue with his father's business interests, including that of whaling from Robben Island.

Murray, senior passed away on 5th December 1815 and in terms of his will left everything, including the whaling operations on Robben Island to his son John, who took transfer of this Robben Island property by Deed of Transfer number 38 dated 3rd April 1818.

This deed, like its predecessor, also in the Dutch language, gives one an insight how property transfers were registered. In this case Murray's executor, one Joseph Davy appeared before the Government Secretary of the Cape of Good Hope and the transfer was duly registered in this office. This title deed remains to this day at the Cape Town Deeds Office.

By now, according to this deed of transfer, the elaborate property description of the land had been simplified to:

*"Zeker stuk grond met de daaropstaande gebouwen, zynde een gedeelte van het Robben Eiland, groot.....Een en Dertig Morgen en Twee Honderd en Elf (vierkante) roeden, voorts bekend en bepaald als de Erfgrondbrief en daarboven.....kaart (gedateer) 24 November 1806".* (Here and there there are illegible portions, but in essence the property was described by way of its location, extent and original surveyed diagram drawn at the head of the original Grant).

As was the custom in those days, the conditions under which the transfer was registered were not repeated in the new transfer, but a mere reference to them being contained therein.

John Murray junior carried on with his whaling operations. However, at the same time the Colonial Government, now under British control, continued to banish political adversaries to the island.

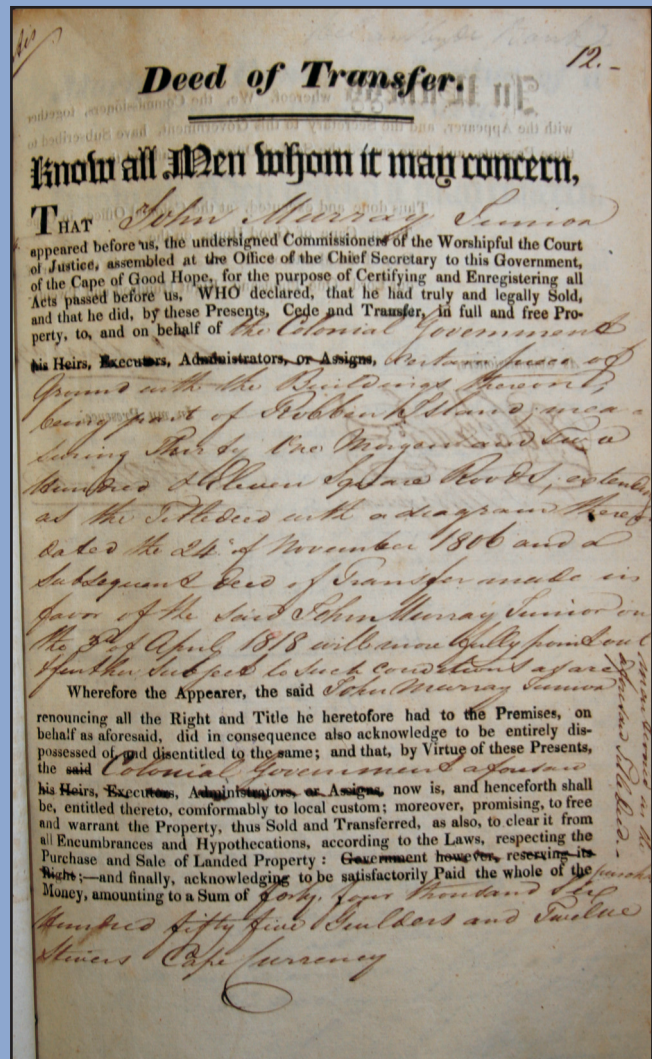
Among these prisoners was the Xhosa prophet Maqana Nxele (also known as Makana), arguably one of the most high profile prisoners on Robben Island at the time. He led the Xhosa armies during the 5th Xhosa border war of 1818-1919 in several attacks on the British, including one on Grahamstown in 1819. His subsequent capture led to his imprisonment on Robben Island.

On the 9th August 1820 he and several other inmates staged a

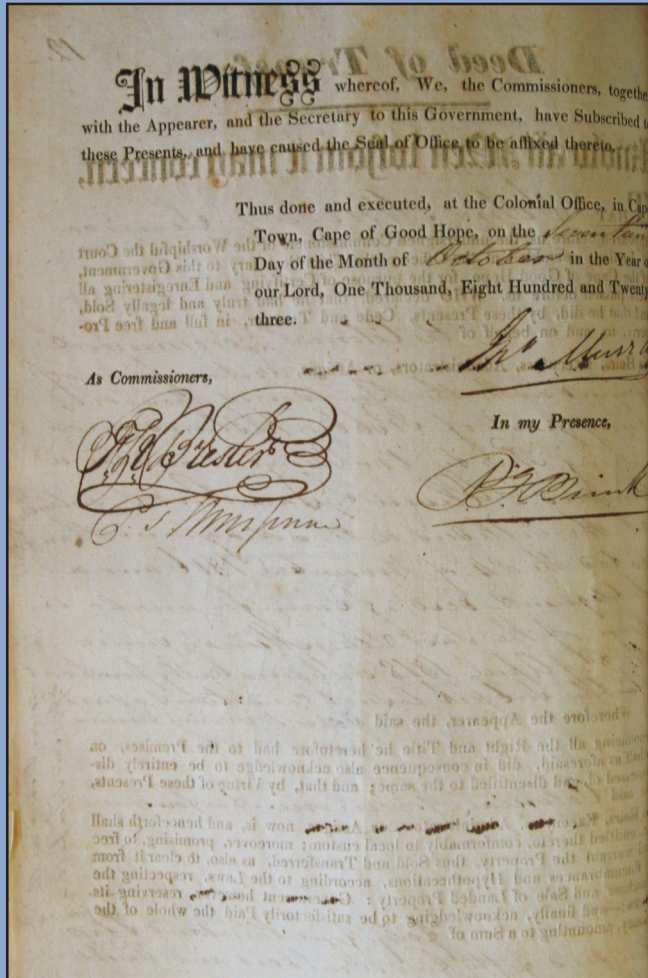
daring escape from Robben Island "appropriating" one of John Murray's whaling ships. Makana and his accomplices did not survive the escape, and all drowned before they reached the shores of Blaauwbergstrand. Today the greater municipality of Grahamstown is named after this Xhosa hero.

But the incident displeased the Colonial Government to such an extent that Murray was forced to sell his Robben Island property to the Colonial Government and move his whaling operations to the mainland, the reason being that the government feared that Murray's boats presented an easy escape method for the prisoners.

And so Murray sold his property to the Colonial Government in 1823 for "forty four thousand six hundred and fifty five Guilders and twelve Stuivers Cape Currency" as quoted in the Deed of Transfer number 12 of 17th October 1823 which shows that John Murray appeared himself in person at the Court of Justice (and signed the deed) in the presence of Colonial Secretary P G Brink.



A few years later, in 1846, the then prison on Robben Island was closed and the prison buildings converted to a hospital for those suffering from dangerous diseases such as Leprosy, although political prisoners continued to be imprisoned there right through to the late 19th century.

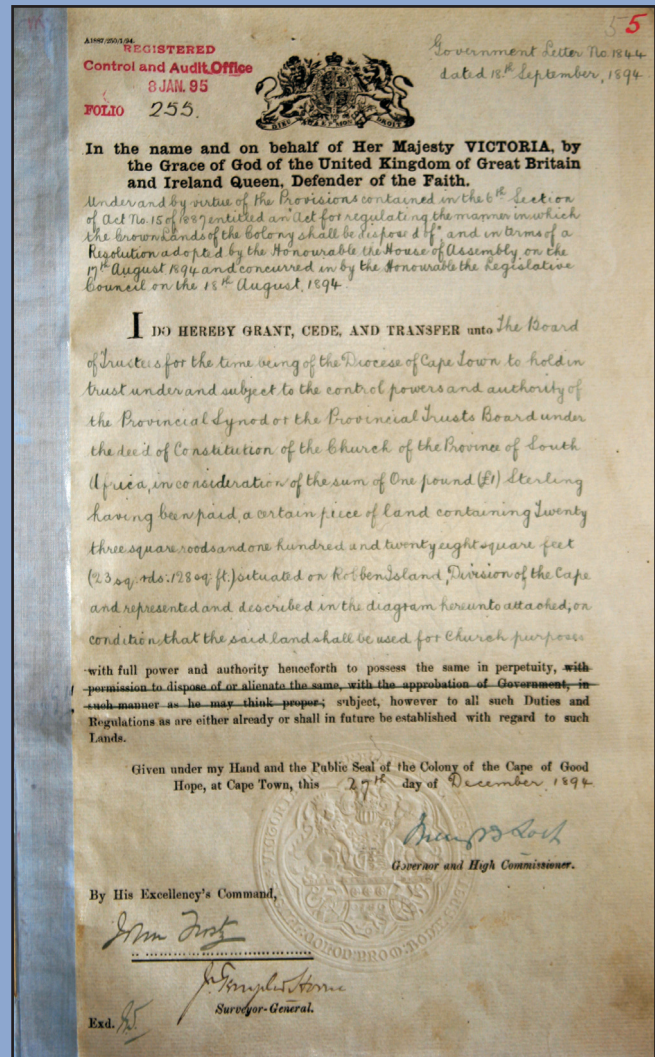


When Johan Murray was forced to abandon his whaling operations on Robben Island, his property was transferred to the then Colonial Government by this deed of transfer dated 17th October 1823. At this point the entire island was once again owned by the then Cape Colonial Government, the remainder still being unalienated State land, never registered before. (Photograph: L J Vosloo)

Leprosy was in these times a feared disease. Without adequate facilities on the mainland, the government found Robben Island a suitable place of isolation for those suffering from this disease. By the end of the 19th century there was a sizable population of around 500 lepers which even grew as time went by.

The Church of England (or Anglican Church as it is better known) had an active involvement with the plight of these patients, who were quarantined in segregated male-female areas in appalling conditions.

To that end certain land on the island was identified where a church specially for lepers was to be built. This piece of land twenty three square roods and One Hundred and Twenty Eight Square feet in extent was surveyed and sold for the nominal sum of one Pound to the "Board of Trustees for the time being of the Diocese of Cape Town to hold in trust under and subject to the control of powers and authority of the Provincial Synod or the Provincial Trust Board under the deed of Constitution of the Church of the Province of South Africa" in which name it



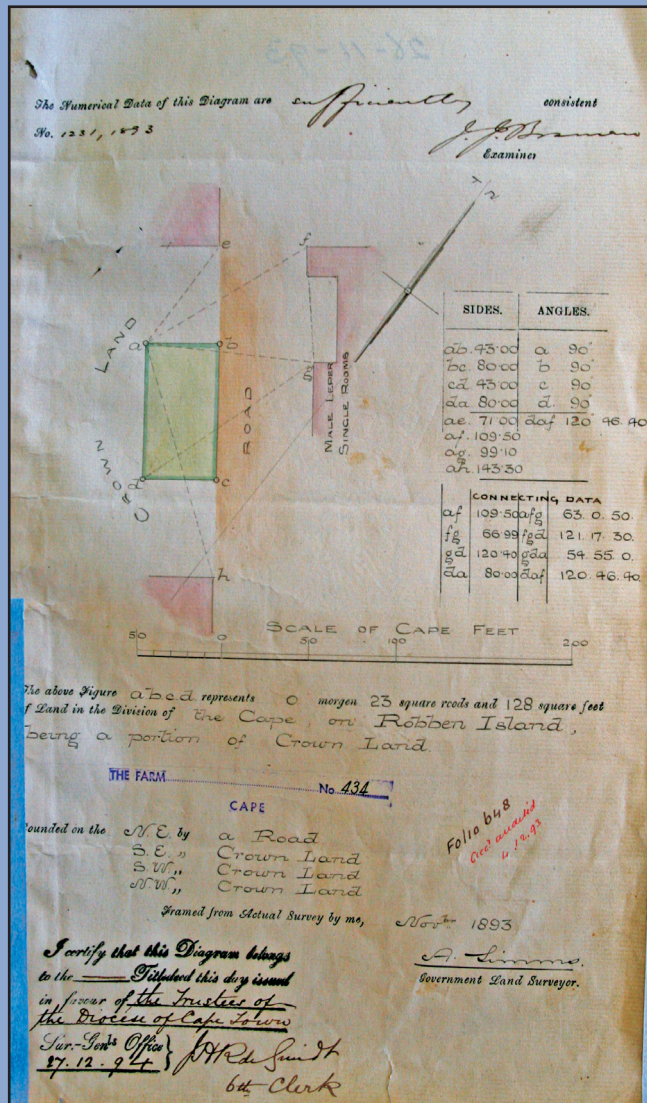
was thus registered by Crown Grant No 5 dated 27th December 1894.

The following year a stone Church, designed by renowned architect Sir Herbert Baker was built on the site by male lepers.

In 1931 it was decided to move all remaining lepers from Robben Island to the main land, following which all buildings and facilities which were used by these patients were destroyed and burnt in order to eradicate all traces of Leprosy that might remain.

The church known as the "Church of the Good Shepherd" but commonly referred to as the "Leper Church" survived and remained intact but steadily fell into disrepair, until in recent times it was restored to its former glory and reconsecrated by the Anglican Archbishop of Cape Town, the Most Revd. Njongonkulu Ndungane who himself spent time on Robben Island as a political prisoner. He dedicated the church as a "place of pilgrimage, a symbol of the whole world of God's power to heal and transform" It is now occasionally used as a venue for a variety of church related purposes in keeping with the only condition contained in the original Grant, which still remains the current title deed for this property.

Between 1931 and 1940 the only permanent inhabitants of Robben Island were the light house keeper and his family.



During the mid 1800s a sizable leper population was established on Robben Island, and with interest shown by missionaries and the Church, a piece of land, 341 square metres in extent was granted to the Church of England on which the Church of the Good Shepherd was built in 1895. This grant and the diagram attached thereto is still the current title deed for this area. (Photograph: L J Vosloo)



This aerial view shows the Church of the Good Shepherd on Robben Island, built by lepers in 1895. The 341 square metre site on which the church was built is the only land on the island not owned by the State. (Photograph: L J Vosloo)

Although bonfires on Minto's Hill, the highest point on Robben Island (a mere 30 m above sea level) were used as a navigation aid to warn ships of the perilous rocks surrounding Robben Island, a more permanent lighthouse was built in 1863, and is still in use today being the only South African lighthouse to use a flashing light instead of the more usual revolving light.

World War Two saw the Island being used for military purposes when it was feared that there might be an attack on Cape Town from the then enemy forces. Many disused and dilapidated guns remain on the island signifying its military past. It was during this time that the present harbour in Murray's Bay (named after the Murray whalers) and the now disused airfield were built on the island.



The harbour and entrance to Robben Island with the maximum security prison in the background. The prison is situated on a piece of land originally granted to John Murray, senior for whaling purposes. The land surrounding the harbour, which was built during the second World War, seems to be reclaimed if compared with the diagrams of the area illustrated elsewhere (Photograph: L J Vosloo)

After the Navy officially withdrew from the island, it was designated as the place where political prisoners were to be held in maximum security conditions. The then Prisons Department built a new prison in 1961 and for more than three decades Robben Island remained a notorious place where opponents of the then Apartheid Government were incarcerated.

In the final years of Apartheid political bargaining led to the release of several high profile political leaders among them Nelson Mandela, Govan Mbeki, and Tokio Sexwale.

All the remaining political prisoners had left the Island by 1991, and when full democracy was attained in 1994 the writing was on the wall for the prison on Robben Island. The last common law prisoners left in 1996 upon which was decided to close the prison facility

The prison buildings were then converted into a museum and declared a national monument in 1996 and later, in December 1999, became part of the Robben Island UNESCO World Heritage site. Since 1997 the Museum, which this year celebrates its tenth anniversary, is under the control of the Department of the Arts, Culture, Science and Technology.

Former Robben Island prisoner Ahmed Kathrada, who has subsequently been intimately involved in the affairs of the Robben Island museum once remarked : “ While we will not forget the brutality of apartheid, we will not want Robben Island to be a monument to our hardship and suffering. We would want Robben Island to be a monument reflecting the triumph of the human spirit against the forces of evil” .

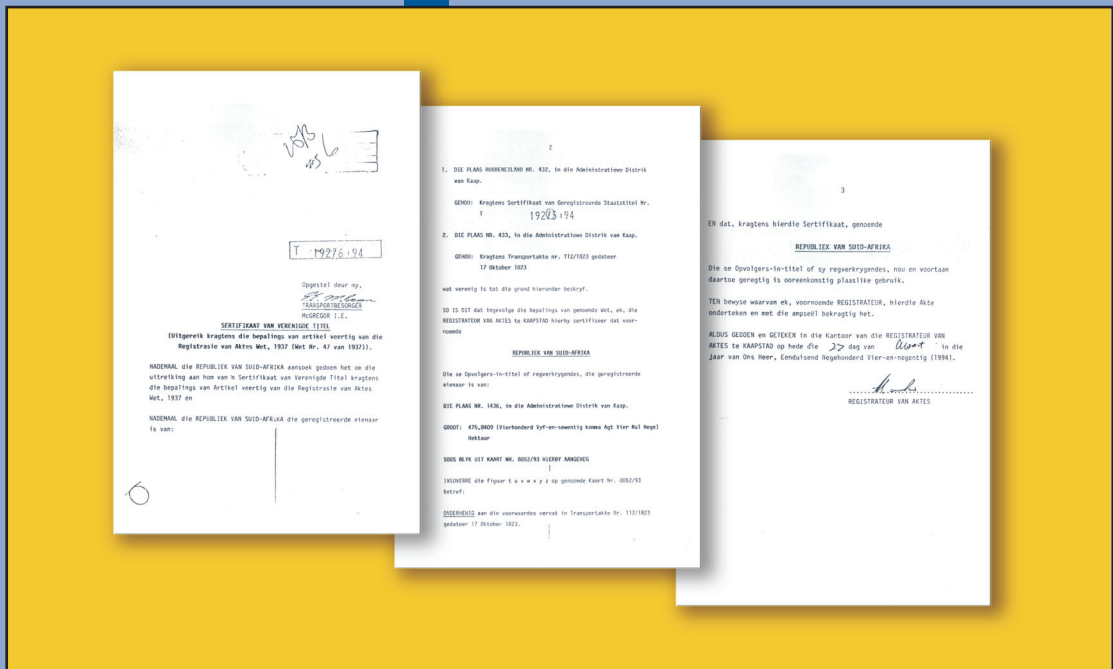
However at the time most of the island was still not officially registered in the Deeds Office. All land which has never been registered is deemed to belong to the State and is known as unalienated State land which does not require registration to enable the State to exercise its rights.

Apart from the land originally granted to John Murray for his whaling operations (and subsequently retransferred to the then Colonial Government) and one little piece of land, described in its original Grant to the Anglican Church (see above) simply as: “ A certain piece of land containing twenty three square roods and one hundred and twenty eight square feet situated on Robben Island, Division of the Cape and described in the diagram hereunto annexed” no other land on Robben Island had been formally surveyed and registered leading to a decision to obtain title of all the remaining as yet unregistered State land on the island.

This unregistered land was the largest part of the island including its entire coast line with the exception of the two



This aerial view of the North Eastern portion of Robben Island, facing South East, shows the entire area of the land originally granted to John Murray for his whaling operations. On the far end is the former maximum security prison, now a museum. The harbour is situated in Murray Bay, named after John Murray. (Photograph: L J Vosloo)



The present title deed for all the State owned land on Robben Island is a simple straight forward document consolidating the unregistered State land, which was property surveyed in September 1993 by the present Cape Surveyor General, John Obree, with the area of the whaling station originally transferred back to the Cape Colonial Government in 1823. The diagram attached to this deed is produced below (graphic: L J Vosloo)

portions just mentioned (that originally surveyed and granted by the erstwhile Colonial Government to John Murray and the small area on which the “Leper Church” was built).

So the only registered land held by the State at the time was the piece transferred back to the erstwhile Colonial Government by John Murray junior. In order to consolidate this

SIDES	EXCLUDED	ANGLES OF DIRECTION	FIGURE	CO-ORDINATES	BEACONS
Meters				Y System Lo 19° X	
EF	25,19	E 90°00'00"			
FG	13,54	F 90°00'00"			
GH	25,19	G 90°00'00"			
HE	13,54	H 90°00'00"			
Constant				± 0,00	+3700 000,00
INDICATORY					
BEACONS					
A				+ 59 230,61	+ 41 086,43
B				+ 58 009,16	+ 40 495,24
C				+ 57 410,11	+ 43 336,41
D				+ 58 891,79	+ 42 936,05
Δ 2° Robben Is Lt Hse				+ 57 887,61	+ 42 981,58
BEACON DESCRIPTIONS: A, B, C, D .. Concrete pillars 1,2m high					
COMPONENTS: 1. The figure bounded by the High Water Mark, excluding the figures Suwayz and EFGL represents the Farm Robben Island No. 422 Cape Vide Reg. No. 805193 2. The figure Suwayz represents the Farm No. 423 Cape Vide Reg. No. 837806 annexed to D/O G.C.F. 5-137.					
Scale 1: The figure bounded by the High Water Mark, excluding the figure EFGL represents 475,8409 Hectares of land, being THE FARM No 1436 (comprising 1 and 2 above) situate in Administrative District of CAPE Province of Cape of Good Hope. Surveyed in Compiled in September 1993 by me. J G OBREE Pr. Land Surveyor					
This diagram is annexed to No. 19276/94 dated 1/10.		The original diagrams are as shown above.		File No. 1436 5th No. Compiled Comp. Noting Map 5703	
Registrar of Deeds		Transfer/Grant No.			



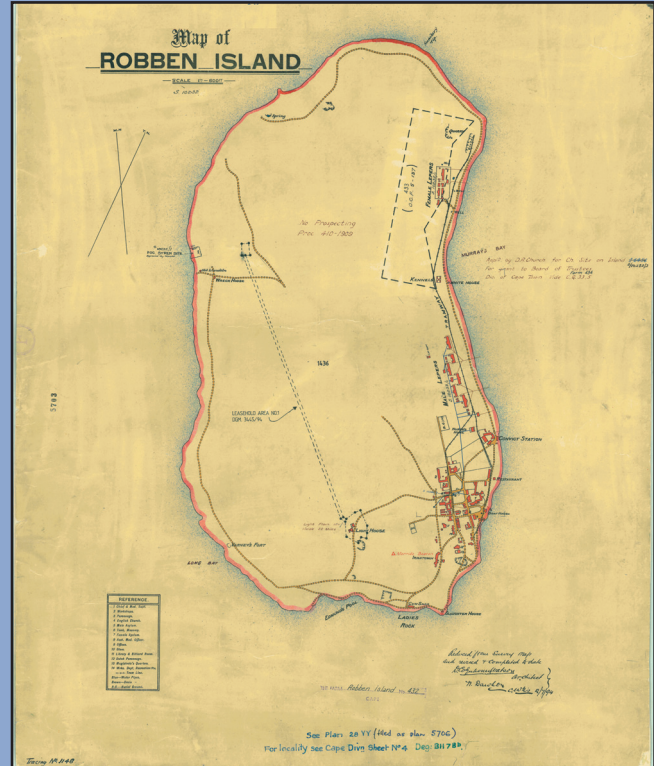
This image shows the current diagram for Robben Island which is attached to the Certificate consolidated title under which the island is registered in the Cape Town Deeds Office. This image has been manipulated to introduce a full colour background of the actual island which otherwise would not appear on the diagram. Note the inset for the farm 434, which represents the 341 Square metres of land on which the Church of the Good Shepherd is situated. This is the only area on Robben Island which is still held by a separate title and diagram. The area on which John Murray stated his whaling operations in the early 1800s is still clearly marked as one of the components on this diagram. (graphic: L J Vosloo)

piece with the balance of the Island, a fresh survey of the island was done in January 1989 and September 1993 enabling the Registrar of Deeds to issue a Certificate of Registered State title (No T19275/1994) to the Republic of South Africa for the land known as "Die Plaas Robbeneiland Nr 432, in die Administratiewe Distrik van die Kaap"

This land was in turn consolidated with the former Murray land to form the land which is now officially registered ( under Certificate of Consolidated title number T19276/1994) as "Die Plaas nr 1436 in die Administratiewe Distrik van die Kaap" - a rather austere description for such an important place!

And now the whole Robben Island consists of two pieces of land: The original land on which the Church of the Good Shepherd was built (now known as the "Farm 434 Administrative District of the Cape") and the consolidated land earlier described.

Today Robben Island and the museum thereon serve as a major tourist attraction. The 147 year old light house on Minto's Hill is still fulfilling its important role safeguarding shipping approaching Cape Town. Unbeknown to many travelers, aircraft use the aeronautical non directional beacon situated next to the runway on Robben Island's defunct airfield as the point from which most departures and arrivals to Cape Town



This map, rather than a properly surveyed diagram, was drawn in 1894 and shows a host of interesting features on Robben Island at the time. In addition there are several notes and annotations from surveying records. The entire coast line of the Island was however only surveyed in 1993 as a prelude to consolidating State land on the island. This map was sourced at the office of the Surveyor General in Cape Town.

are plotted on the aircraft's navigational instruments . Strict regulation of visitors to the island ensure that the island once again affords a place where otherwise threatened sea bird species may thrive again

**Acknowledgements:** The author wishes to record his appreciation to Peter G Murray from Riebeeckstad, for his invaluable assistance in respect of the details surrounding the Murray whaling operations which in itself form an important part of the history of Robben Island. The heading photograph and other aerial photography was made possible through the co-operation of No 35 Squadron, South African Air Force. Official documentation reproduced with permission from the relevant authorities. All rights reserved for all the photographic images.



## land affairs

Department:  
Land Affairs  
**REPUBLIC OF SOUTH AFRICA**

# Deed Registration Course: Level V

By: Allen West  
Deeds Training, PRETORIA

Candidates from most of the deeds registries attended the Deeds Registration Course: Level V. This course is mainly intended to bridge examiners from junior to senior examination.



**From left to right:** 1st Row: Zandr  Lombard (Lecturer); Wiseman Bhuqa (Lecturer); Allen West (Deputy Registrar of Deeds: Deeds Training); Marie Grov  (Lecturer); Sydney Mekwe (Lecturer) 2nd Row: ZB Rahman; A van Jaarsveld; FM Roberts; TL Landsberg 3rd Row: SE Duma; XJ Phungula; M Watermeyer; RO Mukhakhululi; ES Maphosa 4th Row: LD Mkhabela; ZW Ngququ; TS Phali; JM Matladi; LR Madikela



**From left to right:** 1st Row: Wiseman Bhuqa (Lecturer); Allen West (Deputy Registrar of Deeds: Deeds Training); Marie Grov  (Lecturer); Sydney Mekwe (Lecturer); Zandr  Lombard (Lecturer) 2nd Row: Adonia Titus; Anita Bergman; Janos Mihalik; Jabu Maphomolo; Segomotso Mallela 3rd Row: Erna van Biljon; Gerty Motsepe; Thozama Mtolo; Lungile Dhlamini; Ayafika Nyati; Natalie Erasmus 4th Row Gay Nkosi; Mawonga Kewu; Azwindini Musweswe; Elliott Jones; Andries Badenhorst; Tshoeu Taaibosch; Given Gabara

# Land Law in England and Wales: The Challenges of Modernisation

By: Paul Omar  
of Gray's Inn, Barrister  
Senior Lecturer, University of Sussex

## INTRODUCTION<sup>1</sup>

The major statutory reforms of 1925-1926 affecting land law in England and Wales resulted in the Law of Property Act 1925, which confirmed the relative ownership model, in which the free simple absolute in possession (colloquially known as the 'freehold') and the term of years ('leasehold') are the two methods of signifying the greatest interest inland. Also part of that omnibus of reforms, the Land Registration Act 1925 ('LRA 1925') continued a system of title by registration introduced near the end of the Victorian era. Statutory developments since these major reforms have been sporadic and of minor impact until the Land Registration Act 2002 ('LRA 2002'), which came into force on 13 October 2003. This Act deals not only with registration issues but with some substantive changes to land law. This article looks at some of the changes that were introduced by this Act as well as some proposals for future changes.

### 1. E-Conveyancing

Parts of the Land Register that was itself introduced in 1925 have for many years been undergoing a process of computerization, although the use of technology did not necessarily mean that transactions in land could also take place electronically. However, Part 8 of the LRA 2002 now introduces 5 sections, which set out a framework by which e-conveyancing will be permitted. Section 91 sets out the formality requirements applying to all dispositions by means of a document in electronic form, subject to the presence of a number of conditions for formal validity as listed in section 91(3): including date and time, e-signatures and how these are to be certified. Documents complying with the conditions are deemed in subsections 91(4)-(5) to be the equivalent of writing and of deeds. Section 92 gives the power to set up a Land Registry network and, furthermore, the existence of a network imposes a duty on the Land Registrar to facilitate do-it-yourself conveyancing, although in paragraph 7 of Schedule 5 of the Act the Registrar is not obliged to provide legal advice in connection with transactions. Next, section 93 contains a power to require the registration process to take place on-line, while section 94 sets up an electronic settlement scheme for the finalization of transactions. Finally, section 95 deals with data communication and electronic storage requirements.

The idea is that individuals (in all probability professional in the area, such as lawyers, licensed conveyancers and

others working on property developments) will have access to specific software to enable transactions to occur over a dedicated network. These services are, for the moment, not available over the Internet, although the duty to promote do-it-yourself conveyancing may require some form of public access framework to be provided. There remain a number of issues related to the delivery of services via technology, including that of Internet Service Provider liability, the licensing and control of trusted third parties for the issue of public and/or private keys for use in encrypting data as well as data protection itself. Some of these are dealt with by the Electronic Communications Act 2000, which served to implement a number of European Directives in this field. Section 1 of the Act creates a register of approved providers, with section 2 allowing for the granting and withdrawal of approval from providers. Section 4 contains a data protection and privacy guarantee and section 7 deals with the question of how electronic signatures are established. The Act also contains a power in section 8 enabling current rules on formalities to be disapplied in the case of electronic transactions.

Following the enactment of the LRA 2002, the strategy set out by the Land Registry in 2003, was, inter alia, to promote and introduce progressively new electronic transactions in land and property from 2005 as part of an e-conveyancing initiative with data terminals to be made available at local registries and solicitors' offices and to make all key Land Registry services available online by 2005 (the e-business element of the initiative), including 'instant access' pay-to-search facilities akin to how access is currently available to the Companies Register in the United Kingdom. Although the overall timetable has been a little delayed, the Land Registry Report on E-Conveyancing, produced in September 2005, has stated that it has been possible since 2002 for practitioners to lodge applications for updates to the Land Register in electronic form. A pilot project was also launched in 2004 to permit the electronic delivery of any application that could otherwise be made on a Land Registry paper form, while in the following year, a further project, this time dealing with mortgage lenders allowed the latter to signal electronically changes to the Land Register on the discharge of mortgages. Also according to the report, financial lenders were also further involved in a project extending over 2005-2006 to permit the registration of mortgage charges and updating of information.

In support of the initiative overall, the Land Registry was able to state in its 2003-2004 Annual Report that it had achieved completion in the computerization of all registers and index maps and in making key information

<sup>1</sup> The author would like to acknowledge the kind invitation by Professor André Boraine of the University of Pretoria to deliver a paper to the Pretoria and UNISA Property Law Group in May 2007, on which this summary is based.

services available over the Internet with a specific section of its website ([www.landreg.gov.uk](http://www.landreg.gov.uk)) now being devoted to e-conveyancing. More recently, in its 2005-2006 Annual Report, the Land Registry has reported the introduction of the first tranche of e-conveyancing facilities and that it has made all land registration data accessible via the Internet. It is intended ultimately for all transactions to take place electronically, although the process for the full implementation of this requirement rests on the ability of the Land Registry to roll out services to the various user sectors. However, taking a 'modular' and 'incremental' approach to e-conveyancing, the Land Registry will be experimenting further with a pilot project to test the ability to provide a full range of services, sometime after July 2007.

Apart from the desirability overall of proceeding with the provision of services by modern technological means, e-conveyancing will also have an impact on the priority rules for interests in land. For first registrations, the significance of sections 11(4) and 12(5) of the LRA 2002 is that freeholds and leaseholds respectively as estates are vested subject to entries at time of disposition. For dispositions of already registered land, sections 29 and 30 of the LRA 2002 will postpone to the legal estate any interest or charge not already protected by registration, subject to a limited range of exceptions, notably overriding interests. There remains, nonetheless, a potential 'registration gap' between disposition and registration. The delay between the creation and registration of estates and charges may offer in this 'window of opportunity' space for the unscrupulous in relation to dealings with assets. E-conveyancing will do much to narrow, if not eliminate, this gap, given that the simultaneous creation of interests and registration of transactions will become feasible.

## 2. Enhancing the Register

E-conveyancing is only one aspect of the process, the other being the initiative to enhance the content of the Land Register itself. In fact, the transition to registration was inaugurated by the Land Transfer Act 1897 and applied by the LRA 1925 progressively to England and Wales. The aim of this system is overall to eventually replace the old (and problematic) system of deed transfers with a one-stop shop system so that, in the words of Lord Oliver: 'title can be regulated by and ascertainable from the register alone' (*Abbey National BS v Cann* [1991] 1 AC 56 at 78C). Registration was accelerated by the compulsory registration requirement imposed in 1989, which made the whole geographical area of England and Wales an area of compulsory registration, but only where there was the kind of transfer of land that would trigger the terms of the legislation: all conveyances of freeholds and long leaseholds as well as all new grants of leaseholds falling under the ambit of this requirement. Encouragement was also given to this process by the possibility of reduced fees.

The LRA 2002 now cements registration as the norm, the important policy shift being the implicit assumption that its provisions will ensure that the quantity of unregistered land will eventually decline. It thus aims not just to simplify and modernize land registration law, given that it is the first major overhaul of the land registration system for 75 years, but also to make the register a more complete picture of a title to land showing more fully the rights and interests affecting it and provide a framework for the development of electronic conveyancing. In their Report on Land Registration for the Twenty-First Century (Law Com. No. 271), the Law Commission's intention was that the register becomes 'a complete and accurate reflection of the state of the title of the land at any given time, so that it is possible to investigate title to land on line, with the absolute minimum of additional enquiries and inspections' (paragraph 1.5). The idea is that the volume of unregistered estates and interests will eventually decline to an unimproved residue, while there will be a progressive accretion of titles and interests on the register. The fact that e-conveyancing is not being extended to unregistered land, except where dispositions will trigger registration, has been underlined as further encouraging the process of registration for the concomitant technological advantages and benefits. Supporting this is the strategy of the Land Registry, which aims to create a Land Register with comprehensive content and national coverage by 2012, estimates in 2005 being that it was over 85 per cent complete, even though the numbers of unregistered titles (5 million) and the land area uncovered (then some 20%) appeared still to be elevated. This unregistered land is formed for the most part of land held by the Crown in its own right as well as through Government Departments, the Forestry Commission and the Ministry of Defense being in 2001 the two largest property owners in the country. Other important landholdings are those owned by the Church of England, university colleges (such as Oxford, Cambridge and London) and large private estates in family hands. In recent years, changes to the ownership of land have led to non-Governmental organizations such as the National Trust and the Royal Society for the Protection of Birds becoming important accumulators of tracts of land, although this is often held for the benefit of the public. Furthermore, as a result of privatization initiatives in the 1990s, an important amount of land held by the former state utility companies is now in private hands.

The new registration requirements introduced by the LRA 2002 are set out in section 2, which defines what interests are capable of registration, including all estates of land (freeholds and leaseholds); rent charges (entitlements to revenue arising out of someone else's land); franchises (rights to hold markets and fairs); profits en gross (hunting, shooting and fishing rights); other rights secured on registered rights as well as interests created by disposition of registered title. Voluntary registration has always been encouraged since its introduction in the LRA 1925. Section 3 of the LRA 2002 now carries on the

provision and discounted fees for voluntary registration are available to encourage this process. Section 27 of the LRA 2002 also makes registration compulsory for dispositions of estates and charges through transfers, for grants for a term of more than seven years, for rights to buy under the Housing Act 1985, for grants of franchises or profits as well as for grants of all charges with limited exceptions in the case of transfers resulting from death, bankruptcy or corporate dissolutions (i.e. distributions to shareholders). Furthermore, section 5 of the LRA 2002 also allows the relevant Government Minister (currently the Lord Chancellor) to extend instances in which registration will be compulsory, thus supporting the policy aimed at the progressive accretion of titles and interests on the Land Register. Reduced fees also encourage this process. Under this section, examples of further powers that might be made include the possibility of requiring the registration of a parent estate (whether freehold or leasehold), where a lease (or sub-lease) carved out of that estate is in fact registered.

Under sections 11(3) (first registration of freeholds) and 12(3) (first registration of leaseholds), the effect of registration is to confer title and to make that title conclusive, subject to any statutory right of rectification. The effect of a failure to register when registration is compulsory is severe. Section 6 of the LRA 2002 imposes the duty to apply for registration within 2 months of disposition, while section 7 provides that the failure to register makes purported grant or conveyance void. In this instance, property will revert to former owner subject to bare trust for new owner, except where it is a new grant, in which case it takes effect instead as a contract for consideration to transfer land (an estate contract). Section 8 makes the former owner liable for costs and any reasonable consequences. Under this registration scheme, there is an incentive to register, particularly in light of the pre-Act decision in (*Brown & Root Technology Ltd v Sun Alliance Ltd*) [2002] 2 WLR 566, which held that a third party cannot deal with an unregistered transferee while the legal estate remains outstanding in transferor, despite any equitable interest that the transferee might have.

### 3. Minimizing Off-Register Interests

Part of the policy shift towards ensuring the full content of the register includes initiatives dealing with overriding interests, enhanced notice requirements and dealing with the problematic issue of adverse possession.

#### (i) Overriding Interests

The critical difference between the rules in registered and unregistered land is the concept of the overriding interest, which are exceptions to the rule that the Land Register mirrors or reflects the actual structure of title. Overriding interests, commonly interests held by third-parties in or on the land, are often termed the 'crack in the mirror'. There

is a list of interests that are overriding in the context of land transfers, which includes both legal and equitable types. The traditional explanation for these interests, first introduced and defined in section 70 of the LRA 1925 and renamed in the LRA 2002 as 'interests that override a registered disposition', is that people with these rights cannot reasonably be expected to protect them on a register. The list of overriding interests include a number of very important rights, including servitudes by prescription, rights based on the doctrine of estoppel, constructive and other implied trusts, short leases as well as occupiers' rights. Overall, however, this category will decline as more interests become subject to registration by virtue of powers that may be issued under section 5 of the LRA 2002. Furthermore, after the LRA 2002, some of the more obscure examples (often of mediaeval origin) of such interests are now subject to 'sunset clauses' and will no longer be overriding if not registered or protected by 13 October 2013.

Furthermore, the LRA 2002 alters significantly the application of 'overriding interests' by distinguishing between overriding at the point of first registration and when transfers are subsequently made of registered land. Schedule 1 of the Act deals with 'unregistered interests which override first registration' and preserves the impact of the doctrine of overriding interests as first enacted in 1925, in that these interests will override when land is first registered irrespective of any enquiry, inspection or investigation. Schedule 3, dealing with 'unregistered interests which override registered dispositions' contains provisions similar to those in Schedule 1, but with extra conditions or restrictions, the rationale here being that the law should be stricter in the case of claims for the creation and maintenance of overriding interests where the underlying land is already registered. For example, in relation to the interests of persons in actual occupation, these will continue to override subsequent transfers unless there is a failure to disclose the interest on inquiry when disclosure could have been reasonably expected or where a person's occupation would not have been obvious on a reasonably careful inspection of the land of which the purchaser had no actual knowledge.

#### (ii) More Notice of Other Interests

Under the LRA 1925, this category was known as 'minor interests', which were normally not binding unless registered or holder was in 'actual occupation', when they would be 'promoted' to overriding interests. Now, under LRA 2002, there are two classes of interest which require protection on the Land Register: (a) those that will bind a purchaser if appropriately protected by entry on the Land Register; and (b) Those that will not bind a



purchaser even when registered but will be overreached. The forms of registration for such interests are: (a) notices by an entry in the charges section of the Land Register) of two possible types: agreed notice (where the registered proprietor consents to notice) and unilateral notice (or hostile notice) which is valid for a limited period and can be challenged by the registered proprietor; and (b) restrictions by an entry in the proprietorship section of the Land Register); which are usually to prevent dealings with property unless certain conditions are met; for example to protect beneficiaries of a trust by making third parties aware of need to pay to two trustees in order to overreach their interests.

### (iii) Adverse Possession

The ordinary limitation rules for adverse possession (possession by prescription) have been disapplied for registered land and replaced with the scheme in section 96 and paragraphs 9(1)-(3) of Schedule 6 of the LRA 2002. The three-stage process involves an application by the adverse possessor after ten years in occupation together with notice to the registered owner being served by the Land Registry allowing for resolution by the owner and the initiation of recovery proceedings. In the absence of any response being received, the adverse possessor is entitled to immediate registration as owner. If, despite a response by the true owner, no further proceedings are taken by him, the adverse possessor is also entitled to make a further application after two years for registration as the owner. Where proceedings are initiated by the true owner, normally this will lead to the eviction of the adverse possessor. Nonetheless, the adverse possessor's application may still be saved by special conditions, including where it would be unconscionable (because of an estoppel) for the applicant to be dispossessed or there are circumstances in favour of registration. Furthermore, where the adverse possessor is entitled for some reason to be registered (usually where the adverse possessor is on the land under a belief that he has title or has been given a title that is not subsequently perfected) or where the issue relates to adjacent land where a boundary has not been determined and there is a reasonable belief of ownership, registration under Schedule 6 may also be permitted. The new regime for land registration reduces the function of adverse possession for land governed by the Land Registration Act 2002, although its impact may be limited mostly to genuine boundary disputes, such as in the context of new estate developments, where the developer puts fences up or delineates boundaries wrongly. Nonetheless, because the existing regime for unregistered land is being left untouched, under which 12 years in adverse possession will ground an absolute right to become registered as owner of the

land, this fact that may also lead to more land becoming registered to take advantage of the new (and more) restrictive rules under the LRA 2002.

## 4. Changes to Come

The position in the wake of the LRA 2002 is unlikely to remain static. There are important developments at the domestic level in relation to unfinished business in law reform terms. Furthermore, there may be an increasingly important European dimension to law reform.

### (i) Land Burdens

The law Commission recommended as long ago as 1966 the creation of a new scheme of land obligations and the possible unity of the law relating to covenants and servitudes, perhaps using the example of Scotland where there exists a unified system of land burdens. The utility of the covenant scheme is still recognized by the Law Commission, who have stated that, although there is a potential overlap between the planning law regime under the Town and Country Planning Act 1990 and the private enforcement of covenants, covenants remain often necessary to preserve the character and standard of old and new developments. Nonetheless, a new category of land obligation could, if created, encompass all types of covenant and avoid the inconveniences of arguments over the transmission of benefits or burdens and the impact of the privity rule, as stated in *Austerberry v Oldham* (1885) 29 Ch D 75. The issue of how long such private planning schemes should bind land has also been treated, with the Law Commission recommending in 1991 (Law Com. No. 201) that covenants should lapse 80 years post-creation with replacement by any 'new' land obligation noted on the Land Register. For servitudes, the views of the Law Reform Committee as early as 1966, noted by Kevin and Susan Gray in their book 'Elements of Land Law' (2002, Oxford University Press at paragraph 8.168), were hostile to the idea of the prescriptive acquisition of servitudes being able to continue as devoid of any 'moral justification' because of its representing a process that could be wholly accidental or involving the desire to 'get something for nothing'. Later recommendations, while not as hostile, would have limited the prescription of servitudes and profits to the scheme under the Prescription Act 1832. In any event, reforms proposed in this Consultative Document were put on hold pending a comprehensive review of the law of servitudes absent any justification for unilateral action in the context of registered land and improvements to the registration system. Reforms to the law in this area have recently been announced by the Law Commission, who intend resuming the work initiated in 1991 and will be publishing a consultation paper on this issue towards the end of 2007.

## (ii) The Remnants of Feudal Theory

Demesne land is that land held by the Crown over which no fee simple has been created. Part 7 of the LRA 2002 deals with this relic of feudal tenure. Section 79 states that Her Majesty may grant a freehold to Herself. This was previously impossible because of the doctrine of merger where any minor estate merges with the major estate, in this case the allodium of the Crown. Section 85 makes rules for *bona vacantia*, where property may, for a number of reasons, revert (or escheats) to the Crown, who is the ultimate feudal superior. Although the number of properties that succumb to the traditional type of escheat; escheat *propter defectum sanguinis* (for defect of blood, i.e. lack of heirs) amount to less than fifty properties a year, escheat for other reasons is more important, amounting to nearly 500 properties *per annum*. This occurs chiefly in the context of insolvency, where liquidators may under sections 178 and 315 of the Insolvency Act 1986 disclaim property because it is onerous. This is usually the case where property is encumbered by charges or interests that render its value to creditors negligible. Proposals for reform exist, which will seek to rationalize this last vestige of the feudal theory as the Law Commission has recently announced a review of this area to take place sometime in late 2007 - early 2008.

## (iii) A Future Role for Europe

The membership of the United Kingdom in the European Union has a potential land law dimension in the context of the formation of a Europe-wide Internal Market for goods and services. Barbara Bogusz has suggested that the e-conveyancing initiative will have the knock-on effect of improving access to land information within the Internal Market, consequently enabling lending institutions to offer mortgage services across frontiers. This will, she suggests, inevitably cause competition and perhaps result in more competitive interest rates for consumers ('Bringing Land Registration into the Twenty-First Century The Land Registration Act 2002' [2002] *Modern Law Review* 556 at 566). Furthermore, cross-border payment schemes facilitated by an agreement between the European Central Bank (representing the Euro-zone) and the Bank of England will enhance, in this context, the operation of the freedom of movement for capital, one of the pillars of the EC Treaty. Similarly, the participation of the Land Registry in a project titled the 'European Land Information Service' is designed to enable consumers in the currently and predominantly domestic markets to have a common portal for access to land information and potentially registers across all participating states. In terms of substantive law, Article 295 of the EC Treaty establishes that the rules in Member States

governing the system of property ownership cannot be the subject of regulation or intervention by European institutions. Nonetheless, there are proposals in the field of security interests (the 'Euro-Hypothec') as well as the creation of a common European Contract Law (and possibly a European Civil Code) that could have an impact on asset security arrangements. These proposals are based on arguments centering on the obstacles to the completion of the Internal Market that the current fragmentation of security systems in Europe represents. It is noteworthy that the agenda for reform in this area has moved to the European and international levels, with texts such as the EBRD Model Law on Secured Transactions 1994 and the UNCITRAL Draft Legislative Guide on Secured Transactions 2006 influencing work in this area.

## Summary

According to Martin Dixon, a noted Cambridge academic, the LRA 2002 and its predecessor, the LRA 1925, are reflections of the technology of the day. The Land Register was the invention of the Victorian era, just as electronic communications and 'high-tech' are the bywords of the modern age ('The Reform of Property Law and the land Registration Act 2002: A Risk Assessment' [2003] *Conveyancer and Property Lawyer* 136). The aim of these inventions, ancient and modern, was to simplify land transactions with any substantive changes being geared to the achievement of that objective. As noted, the aim of the LRA 2002 is apparently to bring conveyancing into the 21st century with all the benefits and disadvantages that entails. Has it succeeded? A five-yearly review was recommended by the Law Commission as part of the process of ascertaining whether the reforms introduced by the LRA 2002 in fact do work. It has now been nearly five years since its enactment and it is likely that the review will soon be launched by the Land Registry. It is likely that the review will tell us more about the success of the registration scheme. It might be wise to reflect on the transition from the pre-1925 regime to registration in the LRA 1925, which was quite arduous and at times a slow and lengthy process. It remains to be seen whether the transition to the post-2002 dispensation and the wonders of technology will prove as problematic.



## land affairs

Department:  
Land Affairs  
**REPUBLIC OF SOUTH AFRICA**

# Letters to the Editor

## POWER OF EXECUTOR - REPLY 3

In **Power of executor - reply to a reply**, Dudley Lee has raised new and disturbing arguments, which must be responded to. Mr Lee's most disturbing view is that: "No Registrar of Deeds will register a transfer where a person acted as trustee before being authorized by the Master to do so, notwithstanding the decision in the **Kriel** case. It is a valid rejection based on legal fact."

Further, Mr Lee discounts the relevance of the **Kriel** decision by drawing a distinction between a Registrar's rejection of transfer documents tendered for registration, on the one hand, and a High Court's confirmation of a registered Deed of Transfer, on the other hand.

If regard is had to (a) Allen West's advocacy, a **Power of executor**, that "a registrar of deeds must register an indisputable title deed", (b) the fact that a direct implication of the **Kriel** decision was a vindication of the Registrar's decision to register, and not to reject, the draft Deed of Transfer tendered for registration and (c) the principle of *stare decisis*, I am unable to subscribe to Mr Lee's approach to the matter. The Court in the **Kriel** decision considered the validity or otherwise of the sale transaction, in the light of facts similar to those postulated by Mr West, and actually upheld the Registrar's registration of the draft Deed of Transfer in the circumstances. The **Simplex** decision was applied in part and distinguished.

It is implied in Mr Lee's argument that, if the Court in the **Kriel** decision had, in the same circumstances, been approached by the Transferor and the Transferee, aggrieved by a rejection, by the Registrar, of documents tendered for registration, the Court would have upheld the Registrar's rejection of the documents. I do not agree because the specific reasons for the decision in the **Kriel** decision cannot be properly avoided, if not evaded, by a rejection of a draft Deed of Transfer.

Mr Lee is of the opinion that, similar to section 6 of the TPCA, a contract concluded in contravention of section 13(1) of the AEA is void **ab initio**. I am not aware of any decided case on section 13(1) of the AEA. However, there are conflicting decisions on section 6 of the TPCA: In (**Kropman and Others NNO v Nysschen**) 1999 (2) SA 567 (T), at 576, the Court held:

"Having regard to the purpose of the legislation, which is clearly designed to protect those who will ultimately benefit from the trust, there seems no reason why a Court in exercising its discretion cannot retrospectively validate any such actions if the circumstances deem it fit to do so. ...."

In the present matter the question of alienating trust property does not arise. The plaintiffs, in acting as trustees before being officially appointed, received the assets, including the claim against the defendant, and this was done for the benefit of the trust, and in the circumstances I am of the opinion that act should be approved and ratified."

Be that as it may, as set out earlier herein, on the clear facts postulated by Mr West in **Power of executor**, the **Kriel** decision is apposite and rules.

Finally, Mr Lee envisages an examination and/or lodgement of a Deed of Sale. If the purpose of such examination and/or lodgement is to verify the date of sale, which date of sale is reflected in the Power of Attorney to Pass Transfer, I have grave misgivings about the need for the said examination and/or lodgement, if regard is had to section 15(3) read with Regulations 44 and 44A of the DRA, which section provides that: "A registrar of deeds shall accept ..... that the facts referred to in subsection (1) ..... have been conclusively provided ....."

**By: Thabo Nqhome - Conveyancer  
Themba Mabasa Attorneys**

## POWER OF EXECUTOR - REPLY 4

I read Mr Nqhome's reply (**to my reply!**) dated 21 February 2007, with great interest. I fail to see why my reply should be seen as 'disturbing'.

I am not discounting the decision in **Kriel v Terblanche** at all. To the contrary. The case was keenly followed by myself and others for good reason. Historically the Registrar of Deeds at the Cape Town deeds registry did not require the conveyancers to provide reference in deeds and documents to the letter of authority issued by the Master when trustees acted in a deed, such as was always required in the case of an executor. The Registrar of Deeds, Cape Town, erroneously relied on regulation 44A of the Deeds Registries Act 47/1937 (DRA). After the decision in **Simplex (Pty) Ltd v Van der Merwe and Others NNO** 1996 (1) SA 111 the Registrar of Deeds at Cape Town issued Registrars Circular (RC) 7/1997, which required that reference be made to the trustee's letter of authority. However, as examiners did not fully grasp the effect of the circular, which did not outline the situation to them, RC 6/1998 was issued to elucidate the matter, with specific reference to the **Simplex** case. It is interesting to note the last sentence in paragraph 6 of RC 6/1998: "However, if the land has been transferred into the name of the trust, the title is deemed to be valid Section 28(2) Act 68/81". Is that not a statutory confirmation of the abstract mode of acquisition? However, despite what the Registrar of Deeds Cape Town stated in that sentence, the general opinion in the deeds registries at the time was that a large number of voidable titles may have existed in the various registries being cases where trustees indeed acted without authorization and that fact was not noted by examiners. When the **Kriel** case was decided and word thereof got out, it was realized that the case would for once and for all decide the matter. The rest is history.

The point is, however, that the case revolved around the question whether a title, **already registered** in terms of an invalid deed of sale, in the circumstances as found in the **Kriel**

case, is valid. There is no argument as to the Court's arguments. The point is that if a Registrar becomes aware of the fact that a deed of sale is invalid because a trustee acted prior to being appointed, he is in no position to act as though he is a Court. He must reject such a transfer. A Registrar of Deeds is not, by definition, a Court, and cannot call witnesses and cannot decide that the title registered as a consequence of a void deed of sale will be valid once registered, because there may be circumstances which he is not aware of, which he cannot ascertain or reasonably be expected to ascertain and which even a Court may decide will render a subsequently registered title void.

I did not or do not envisage that deeds of sale be lodged for examination. Fact is, however, that a Registrar may call for documentary proof of facts, but cannot, as stated above, call witnesses to prove or disprove statements. I therefore merely stated that the Registrar would be able to call for the deed of sale, should he consider it necessary for any reason. Section 15A (1) DRA should be read *in toto*. The words: "...to the extent prescribed by regulation..." is very important. Regulation 44A does not include deed of sale as being one of the matters prescribed by regulation as being the responsibility of the preparer of any document mentioned in either regulation 43 or 44 DRA, and nor should one lose sight of the provisions of section 4(1) DRA which provides each Registrar with the power "...to require the production of proof upon affidavit or otherwise of any fact necessary to be established in connection with any matter or thing sought to be performed or effected in his registry ..." The facts in a deed of sale can thus not be said to have been conclusively proved as stated in section 15A(3) DRA.

The law as it stands says the deed of sale is void *ab initio* if the trustee acted before being authorized by the Master to act in that capacity. The same goes for an executor. It is as if the act never happened. Numerous cases state that. Why should a Registrar then given consequence to an act which has no legal consequence at all? If a deed of transfer where such circumstances existed does get registered and an attempt is made to declare the title void on the basis that the deed of sale was void *ab initio*, because the trustee or executor was not duly appointed or authorized to act in that capacity by the Master at the time of the contract, then the *Kriel* decision will obviously find application.

I was not trying to imply that the Court would have upheld the Registrar's decision to reject a draft deed of transfer where the same circumstances as in *Kriel* existed. But now that Mr Nqhome mentions that, I suspect that the Court may very well uphold the Registrar's decision to reject such a draft deed of transfer. The Court would in such circumstances, in fact, have to decide on quite a different matter altogether. I doubt, with respect, that a Court would compel a Registrar to register a transfer based on a sale which is *ab initio* void.

It is true that the *Kropman* decision is in dispute with the *Simplex* decision. This does seem to fly in the face of a significant number of cases, some referred to in *Simplex*, some Appellate Division decisions, and some of which I refer to in my reply. What is interesting though is that the judge in *Kriel* does not dispute the fact that the deed of sale in question was invalid. In fact it was accepted as common ground by all the parties, based on the *Simplex* decision. Furthermore, the

*Kriel* decision was referred to the Appellate Division on review and, as far as I am aware, was upheld. The quote from the *Kropman* decision, I submit with respect, proves that different circumstances were present when the judge spoke those words and should possibly not find application here.

I wonder what Mr Nqhome's decision would have been, had he occupied a Registrar's seat in such circumstances. I would most certainly not be prepared to register a transfer if the deed of sale was entered into by a person acting as executor prior to having been appointed in that capacity by the Master.

**By: Dudley Lee**  
**Vanderspuy Attorneys - CAPE TOWN**

## **POWER OF EXECUTOR - REPLY 5**

In the last paragraph of *Power of executor - 4*, Dudley Lee remarks: "I wonder what Mr Nqhome's decision would have been, had he occupied a Registrar's seat in the circumstances." I state, in clear and unequivocal terms that, if I occupied a Registrar's seat, I would, like the Registrar of Deeds in the *Kriel* case, not hesitate to register a draft Deed of Transfer tendered to me for registration.

On page 295 of the 8th edition of Wille's Principles of South African Law, it is stated that: "From the above it follows that South African Law adheres to the so-called abstract system of passing of ownership. The mere intention of the parties to transfer and accept ownership is sufficient independent of the existence or non-existence of a valid underlying *causa*. Ownership will pass even if an underlying *causa* (like a contract of sale) is lacking, putative or invalid. Although the causal system according to which a valid *causa* is required for the transfer of ownership has been followed in earlier decisions and despite the fact that the passing of ownership is sometimes made dependent on whether the underlying contract is void or voidable in contracts induced by fraud, the abstract system prevails in modern South African Law."

I submit with all due respect, therefore, that Mr Lee's argument about "a title, *already registered* in terms of an invalid deed of sale," is untenable. The title deed must be registered on the basis of the common law as confirmed in the *Kriel* case. A person, who is aggrieved by a Registrar's decision to apply the law, is free to seek redress in a court of law. If a Registrar is of the opinion that his/her decision to register would, if challenged, be upheld in a court of law, he/she must register the title deed. I agree that a "Registrar is not, by definition, a court, and cannot call witnesses". However, I do not agree that a Registrar is required to "decide that the title registered as a consequence of a void deed of sale will be valid once registered." A Registrar is not required to speculate on the existence or non-existence "of circumstances which he is not aware of, which he cannot ascertain or reasonably be expected to ascertain and which even a Court may decide will render a subsequently registered title void." For the purpose of administering the law to the facts, there is no need on the part of a Registrar to call witnesses. This position applies equally to all registrations of deeds or documents.

Clearly, section 28(2) of the Alienation of Land Act 68 of 1981 is only applicable to the validity of an "alienation which does not

comply with the provisions of section 2(1)" of the Act. The said section 28(2) is only applicable "if the alienee had performed in full in terms of the deed of alienation or contract and the land in question has been transferred to the alienee." Further, the said section 28(2) has no bearing whatsoever on the mode of acquisition of ownership referred to in the *Kriel* case because, on the contrary, the said section 28(2) validates *ab initio* an alienation which is of no force of effect in terms of section 2(1) of the Act.

**By: Thabo Nqhome - Conveyancer  
Themba Mabasa Attorneys**

*This matter is now set to rest, until the High Court of Appeal decided otherwise - Editor.*

## AHOLE? - REPLY 6

In the article published in SADI No. 12 on page 31 Donald Moore invites comments from anyone interested.

Mr Moore's first question relates to the proprietary consequences of a marriage or civil union in terms of the Civil Union Act, 2006 (Act No. 17 of 2006), ("the Act"), if the parties to such a marriage or union are of the same sex, specifically if both of them are of the male sex and one of them is domiciled in, say, England.

In the last paragraph of his article, Mr Moore asks the second question, whether the proprietary consequences of a heterosexual marriage or civil union in terms of the Act, where the husband is domiciled outside of South Africa, will be the same as for a marriage in terms of the Marriage Act, 1961 (Act No. 25 of 1961), as amended ("the Marriage Act").

The answer to the second question is: "YES!" Section 13(1) of the Act provides that: "The legal consequences of a marriage contemplated in the Marriage Act apply, with such changes as may be required by the context, to a civil union." This position has been fully and authoritatively dealt with in paragraph 4.1 of Chief Registrar's Circular No. 1 of 2007.

I now answer the first question. As a point of departure, I refer to paragraph 4.2 of Chief Registrar's Circular No. 1 of 2007, from which it is clear that a reference to marriage, in the common law, in particular, includes a civil union and a reference to husband, wife or spouse, in the common law, in particular, includes a civil union partner. This means, therefore, that in a heterosexual marriage or union in terms of the Act, the law of the country, in which the husband is domiciled, will govern the proprietary consequences of the marriage or union.

Where the parties to a marriage or civil union in terms of the Act are of the same sex, the common law rule about the domicile of the husband does not apply because (a) neither of the parties is a husband or a wife, (b) naturally, there cannot be a husband without a wife and vice versa and (c) the said common law rule only finds application where there is a husband and a wife.

I refer to the first edition of the *Readers Digest Great Illustrated Dictionary*, in which "husband" is defined as: "A man joined to a woman in a marriage."

On the basis of the foregoing, there might be no hole after all. In conclusion, I make the observation that, because of its unfairly discriminatory nature, the aforementioned common law rule should, like the marital power which a husband uses to have over his wife be repealed sooner than later: in the so-called new South Africa, a husband is no longer a *pater familias*!

**By: Thabo Nqhome - Conveyancer  
Themba Mabasa Attorneys**

## SECTION 80 ACT 66 OF 1965

Regarding Mr. Allen West's article Section 80 of the Administration of Estates Act No. 66/1965 (AEA). Section 80(1) of AEA is indeed at times a thorn in the side of both the conveyancer and the Registrar of Deeds when it comes to redistribution contracts. Is the Master's or the Court's consent, as the case may be, necessary when a minor is party to a redistribution of immovables to which the minor is entitled? We all know the *Tofie* and *Venter* cases and I am not going to go there.

Whilst I fully agree with Mr. West's opinions expressed in his article, two things seem to be amiss from the article; firstly that all the scenarios deal with property already registered in the name of the minor and, secondly, there seems to be one crucial issue which is not addressed in the article, namely the words "...belonging to..." and what exactly the meaning of those two words implies. It seems crucial to me that the section deals specifically with immovable property belonging to a minor, i.e., of which he is the owner, and nothing less.

It is generally accepted that immovable property vests upon registration of transfer and that, as set out in section 16 of the Deeds Registries Act (DRA), ownership is transferred by means of a deed of transfer unless otherwise provided in the DRA or in other legislation. We are not considering expropriation, etc. here, as a minor heir to an estate will not obtain ownership in any fashion but by means of a deed of transfer. If a minor has not received transfer of the property from the executor in the estate, is the property immovable property belonging to the minor? From the decisions in *Estate Smith v Estate Follett* 1942 AD 364 at 384 and *Commissioner for Inland Revenue v Estate Crewe and Another* 1943 AD 656 at 668 it seems that an heir acquires only a vested right to action to enforce his claim against the executor on confirmation of the liquidation and distribution account and thus the minor is not the owner of the immovable property. The DRA also defines 'owner' as being the representative of an owner who is deceased.

One should also look at the meaning of the words or terms from the perspective of what is said and / or defined in the AEA. Immovable property is defined in the AEA as "land and every real right in land or minerals (other than any right under a bond) which is registerable in any office in the Republic used for the registration of title to land or the right to mine" Jones (*Conveyancing in South Africa*, fourth edition on p 268) states that an heir "obtains a real right on ... transfer or cession into his name of immovables". That real right as such is not registerable in the deeds registry and must then fall outside the parameters of the definition of immovable property in AEA. The

words “belonging to” are not defined in the AEA and one should therefore then attach to them the general legal meaning of the words to the words (see *Uitenhage Divisional Council v Port Elizabeth Municipality* 1944 EDL 1 and *S v Roos* 1967 (4) SA 320 (T)), which, in my opinion, finds the minor not to be the owner of the immovables which he/she is entitled to claim transfer or cession or from the estate.

The conclusion that I make is that, in the case of a redistribution agreement involving immovable property forming part of a deceased estate, and where a minor is entitled to claim transfer or cession of some of the immovables being redistributed and is party to the redistribution agreement, section 80(1) of AEA should not find application.

**By: D Lee**  
**CAPE TOWN**

The checklist compiled by Allen West and published in Ghost Digest on 1 February 2007, differs from the practice as followed in the Cape Town Deeds Registry. Registrars' circulars 1/2002 dated 20 February 2002 and 3/2002 dated 19 March 2002 can be perused in this regard.

This checklist is not exhaustive, as the prevailing circumstances will dictate whether anything additional is required.

The Cape Town checklist is as follows:

#### **Cover No. 1**

- Two copies of the sectional plan approved by the Surveyor General (section 11(1) and 11(3)(a)).
  - Check the plans for exclusive use areas.
  - Check the plans for encroachments.

If there are any encroachments, these must be registered prior to or simultaneously with the opening of the sectional title register.

If there are any exclusive use areas depicted on the sectional plan then a certificate of real right in respect of all such exclusive use areas,rafted in accordance with prescribed **Form G** to Annexure 1 of the regulations, must be lodged and issued to the developer (section 12(1)(f) and regulation 14(3))

Alternatively the sectional plans must be referred back to the Surveyor General and the exclusive use areas depicted on the sectional plan must be deleted.

- An application by the developer drafted in accordance with **Form B** (Section 11(1) and Regulation 10(1))
- The title deed of the land.
  - Check whether the title deed contains any restrictive conditions prohibiting the opening of a sectional title register and, if so, such conditions must be disposed of prior to or simultaneously with the opening of the sectional title register.
  - Check whether the title deed contains any conditions relating to the coverage of the erf as

regards buildings erected on the erf, as well as conditions relating to building restrictions on the erf. These conditions must either be adhered to or, such conditions must be disposed of prior to or simultaneously with the opening of the sectional title register.

- A schedule of conditions certified by the conveyancer setting out the conditions of title and newly imposed conditions (section 11(3)(b) and regulation 10(2)(b)).
  - Check for reservation of exclusive use areas.
  - Check for reservation of real right of extension.
  - Ensure that component references in the title deed are suitably qualified for identification on the Block Plan.

Should a right of extension be reserved, the documents as set out in Section 25(2) must be lodged and filed in cover No. 5.

- The titles of real rights
  - Check the title deed conditions to ascertain whether any registered real right is held under a separate title. If proof is submitted that the title is unavailable, the office copy must be endorsed and a caveat noted (Regulation 10(2)).
    - o Regulation 10(2)(a) provides *inter alia* - Notarial titles for servitudes, (for the land which is subject to the servitude) must be lodged for endorsement, to effect that a sectional title register has been opened on the servient property.
    - o Regulation 10(2)(a) does not apply to Notarial Tie agreements, where a Sectional Title Scheme has been opened on two or more Notarially tied erven.

Lodged in a white cover SS code.

#### **Cover No. 2**

- The scheme bond.
  - If any.
- The bondholder's consent.
  - Check to ascertain that the bondholder consents to the substitution in respect of the rights reserved.

Lodged in a yellow cover with SBC code.

#### **Cover No. 3**

- A certificate relating to the rules (section 11(3)(e)).
  - Check whether the new rules have been imposed, in which case they must be disclosed in the certificate.

Lodged in a yellow cover with SBC code

- The rules are numbered with a SBC code as well as the scheme SS number from cover No. 1. The rationale behind this decision is that the rules can get filmed and traced. This enables the Registrar to provide copies of the rules should they be requested

and serves as a copy should the rules filed in the scheme file be mislaid.

#### Cover No. 4

- Certificate of Real right of Exclusive Use Area drafted in accordance with Form G (section 12(1)(f)).
  - Check whether the condition was imposed on the 11(3)(b) schedule of conditions in Cover No. 1.

Lodged in a white cover with SK code.

- A question arises as to whether only one certificate of real right of exclusive use area for each of the rights set out in separate paragraphs must be issued or whether a separate certificate of real right of exclusive use area can be issued for each individual real right. The Act states that "a certificate of real right" be issued, however, in the interpretation of statutes we interpret the singular to include the plural. With the current delays of deliveries of registered deeds it may be more practical to obtain individual titles for these rights.

#### Copy No. 5

- A Certificate of Real Right of Extension.
  - Check that the developer reserved the right in the 11(3)(b) schedule of conditions.
  - Check whether the right was reserved for a determined period of time.
  - Check that the documents as provided for in section 25(2) have been lodged.
  - Check page 1 of the sectional plan for a caveat reflecting the reservation.

Lodged in a white cover SK code.

- A question arises as to whether only one certificate of real right of extension for individually identifiable rights of extension, each of the rights set out in separate paragraphs must be issued for whether a separate certificate of real right of extension can be issued for each individual real right. The Act states that "a certificate of real right" be issued, however, in the interpretation of statutes we interpret the singular to include the plural. With the current delays of deliveries of registered deeds it may be more practical to obtain individual titles for these rights.

#### Cover No. 6 and further

- A certificate of registered sectional title, drafted in accordance with prescribed Form C to Annexure 1 of the regulations, for each of the units in the scheme must be lodged in separate covers.
  - Check that the certificate of registered sectional titles is made subject to any restrictive condition affecting the sections such as e.g. conditions imposed in favour of the Home Owners' Association, etc.

Lodged in a white cover ST code

#### Further

- Where a body corporate has been established a certificate drafted in accordance with prescribed Form W to Annexure 1 of the regulations, must be lodged in triplicate.

Lodged in a yellow cover with SBC code.

- A rates clearance certificate for the transfer of the erf from the developer to the body corporate must be lodged with the first transfer of a unit.

As already stated, the above merely serves as a guideline and is by no means exhaustive. Readers are welcome to provide their own additions to this checklist.

**By: Warren Hamer  
Buchanan Boyes  
CAPE TOWN**

#### The Editor South African Deeds Journal

Sir,

I write to you in appreciation of the feature on past Registrars of Deeds which you ran in the July 2007 issue of SADJ.

I have a long association with the Deeds Registry dating back to my birth, when my father was Registrar of Deeds in Windhoek.

Indeed, I may proudly say that when my father retired as Chief Registrar of Deeds in 1971 he had more than 40 years service, and served in all the then Deeds Registries at one time or another, and as Registrar in Vryburg, Windhoek, Bloemfontein and Pretoria (later also as Chief Registrar).

May I correct an error in your listing. Rather than being Registrar in Bloemfontein in 1966 (when he had already been in Pretoria for close on six years), he served as Registrar of Deeds in Bloemfontein between 1957 and 1960 if my memory serves me correctly. As you can see from the names on your list, and also from my father's nomadic career, you had to grab every possible promotion offered to you in order to advance rapidly in your career.

As a matter of interest, in 1956 he held the position of Assistant Registrar in Cape Town, a position which I now hold at the same office more than 50 years later!

**L J Vosloo  
Assistant Registrar of Deeds: Cape Town**

*The error of the history will be rectified thank you kindly - Editor.*

## SECTION 57 OF THE DRA AND THE CONFERENCE RESOLUTIONS RELATING THERETO

In this letter, RCR 7/2006 will be discussed in answer to a letter written by the learned Thabo Nqhome which appeared at pages 33 and 35 of the March, 2007 edition of the SADJ. RCR 7/2006 reads as follows:

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

It is submitted that the provisions of section 57 can only be invoked where "the whole of the land mortgaged is being substituted".

#### **Resolution:**

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

It must be noted, from the outset, that reaction will be made only to the salient points raised by Mr. Nqhome, as it is not my intention to write a thesis on this subject.

It is unfortunate that Conference in RCR 7/1994 does not disclose the reason for its decision. However, Mr. Nqhome states as follows:

*"In view of the fact that section 57(1) of the Deeds Registries Act 47 of 1937 ("DRAQ") refers to "land", and "land", unless inconsistent with the context, is defined in section 102 of the DRA as including a share in land, I submit that it is inevitable to accept that section 57 of the DRA applies to a joint mortgagor also."*

What is inevitable, however, is arriving at a fallacious conclusion, as Mr. Nqhome has done, whenever one moves from an incorrect premise of only concentrating on one word in a section without reading a section as a whole. The correct manner of interpreting a section is to read it in its entirety. The fact of the matter is that section 57 contains internal modifiers which determine the parameters of its applicability. One of those modifiers reads as follows:

*"If the owner (in this section referred to as the transferor) of land which is hypothecated under a registered mortgage bond other than a mortgaged bond to secure the obligations of a surety (not being a person referred to in paragraph (b) of sub-section (1) of section fifty-six) transfers to another person the whole of the land hypothecated thereunder....."*

It is clear from the underlined words that the section should find application only if the whole of the hypothecated land is transferred. Transfer of a share in hypothecated land is not, and will never be, tantamount to transfer of the whole land so hypothecated. The underlined words clearly indicate that the transferor must be left with nothing, if section 57 is to find application.

A careful reading of Form W of the DRA clearly does not support the idea of the original mortgagor not disappearing from the picture. The relevant wording reads as follows:

*"Now, therefore, I agree under the provisions of the said Act, that the transferee aforesaid shall be substituted as debtor under the Bond and that from the date of execution of the transfer the transferor shall be released from any obligation under the said Bond."*

If the transferor shall be released from obligation, then how is it possible for section 57 to provide for the addition of a co-debtor? This fact is, unfortunately, the reality that Conference refused to accept in RCR 7/2006. It is further clear from the section that, the determining factor is what is contained in the relevant mortgage bond and not what is actually being transferred. In so far as I am concerned, this closes the matter, but I will respond to certain of the issues raised by Mr. Nqhome, for completeness' sake.

Mr. Nqhome further states as follows:

*"In section 57 of the DRA, the legislature has made provision for a cheap and short mechanism for the substitution of debtors and joint-debtors..."*

It is indeed correct that section 57 provides a cost effective mechanism, but the cost aspect does not, and will never, justify the application of this section beyond the parameters set therein.

Mr. Nqhome further states as follows:

*"A reference, particularly to sections 24bis(3), 45(2)(c) and 45bis(2)(a) and (b)(iii) of the DRA, casts a doubt on the correctness of some aspects of George Tsotetsi's understanding to the effect that a substitution will necessarily result in one person (who, affording to him, cannot be a current joint-debtor) taking the place of another and the other person disappearing from the picture altogether. It is clear, for example, from section 45(2)(c) of the DRA, that the substitution referred to therein results not only in the disappearance "from the picture altogether" of one joint-debtor but also in the substitution of the other and existing joint debtor for her/his former joint debtor."*

In section 24bis, the legislature acknowledges the quasi-legal personality that the South African legal system accords to a partnership. The fact of the matter, therefore, is that the DRA distinguishes a partnership from the individual members thereof, hence the provisions of section 24bis(3). The DRA, in section 45, further distinguishes a joint estate from the individuals that are married in community of property to each other.

Thus registration of real rights is always in favour of the joint estate and not in the individual estates of the persons so married. In this regard, see Form BBB of the DRA. Thus, there is nothing strange in substituting an individual in a bond that was registered over the property that once vested in a joint estate. It is, indeed, unfortunate that the learned Mr. Nqhome fails to appreciate the distinctions referred to above.

Mr. Nqhome further states as follows:

*"It is significant that, whereas section 57 of the DRA applies to the transfer by an owner of "land which is hypothecated under a registered mortgage bond ...", the absolution of the transferor from any obligation secured by the bond and the substitution in respect of such bond, there is no provision for such transfer, absolution and substitution in section 55 of the DRA. Accordingly, I submit that section 55 of the DRA does not provide for an alternative to section 57 of the DRA."*

It is important to note that if the release referred to in section 55 is not tantamount to absolution from liability, then there is no point in releasing property from the operation of a mortgage bond. It is further important to note that, in my article, at no

stage did I suggest that section 55 provides an alternative to section 57. All I suggested is that, instead of applying section 57 for purposes for which it was never intended, as proven above, it would be proper to deal with the issues relating to co-mortgagors in terms of section 55.

It is, also, fortunate that Conference in RCR 19/2005 does not disclose the reason for its decision, except to state that a co-mortgagor must consent and that all the relevant legal exceptions must be renounced. In my reading of section 57, nowhere have I seen provisions that support this resolution. Perhaps the learned Mr. Nqhome has seen the same, in support of his observation, which reads as follows:

*"For the reasons set out below, I do not doubt the correctness of Registrars' Conference Resolution 7/1994 ("RCR 7/1994") and RCR 19/2005."*

It is, also, unfortunate that Conference in RCR 7/2006 does not disclose the reason for its decision, except to state that it

confirms RCR 19/2005 and RCR 7/1994. Though I prefer not to discuss the argument that led Conference to its decision, but I do confirm that the said argument had nothing, whatsoever, to do with the interpretation of section 57.

It must be noted, however, that this is the last time that I engage myself with the discussion of section 57 as I do not, and will never, play the who gets tired first game.

In so far as I am concerned, Mr. Nqhome's arguments, and the relevant Conference Resolutions, are not supported by the wording of section 57, as well as the wording of Form W, period.

**George Tsotetsi**  
**OFFICE OF THE CHIEF REGISTRAR OF DEEDS**

## Conveyancing through the cases

By: Allen West  
Deeds Training, PRETORIA

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

### CASE NO. 1

#### EXERCISING OPTIONS TO PURCHASE

*Mostert/Van der Westhuizen and Another* (CPD) - Date of Judgement 28 March 2007; Per; Griessel, J

In the Cape High Court, Justice Griessel delivered a judgment on 28 March 2007 regarding the validity of an alleged agreement that had been concluded to purchase immovable property, in terms of an option that had been granted to the alleged buyer in a lease agreement.

Simply put, an option is an unconditional and irreversible right that is given to a person to buy a certain property within a certain time, at a predetermined price. The option is then exercised in writing by the purchaser, by simply advising the seller that he is now exercising the option, and in doing so, the sale is concluded. The seller may not refuse to then conclude the agreement.

In the present matter, Mr Mostert had leased certain land to a company, in terms of which lease the company was granted an option to buy the property during the duration of the lease, at an agreed sum, subject to an annual escalation. On a certain day, during the existence of the lease, the company's attorney then sent a letter to Mr Mostert indicating that his client had decided to exercise the option, and attached a draft Deed of Sale. The covering letter invited Mr Mostert to make such changes to the Deed of Sale as he thought might be necessary, and if he were happy with it in its present form, to please sign it and return it to the attorney for his client's

signature. Several months went by and the company heard nothing. After the lease expired, Mr Mostert wanted his property back. The company however refused to vacate the property on the grounds that it had exercised its option in terms of the lease. Mr Mostert then sued the company for eviction. The company defended the claim on the basis that it was entitled to the property on the basis of having exercised the option.

Mr Mostert then raised a point in law which he referred to the Court to be determined as a separate issue, namely that the option had in fact not been properly exercised, in that the proposed Deed of Sale that was sent to him contained a clause stating that the agreement would be subject to the company being able to obtain a bond from a financial institution first, within a certain time. In other words, the option was not properly exercised because the proposed Deed of Sale contained a suspensive condition.

The company argued that the condition that was attached was merely one of several terms and conditions that needed to be negotiated, and that this condition did not affect the question of price but only the manner of payment. The company also argued that Mr Mostert should have simply replied and stated that he was not prepared to make it subject to bond approval, and this clause could have been removed as Mr Mostert had been invited to do in the attorney's letter.

Mr Mostert however argued, and the Court agreed, that firstly there was no duty on him to supplement any shortcomings in the draft Deed of Sale, and secondly, that when one exercises an option, it must be completely in line with the option that was granted above all, it must not introduce terms or conditions that were not part of the original option. In this case the option was simply worded in the lease, namely that the company

would be entitled to buy the property at a certain price, within a certain period of time. No other terms or conditions were attached. As such, irrespective of the company's best intentions, by law, the option was not exercised. As such the company's defense was ruled out.

## CASE NO. 2

### VALIDITY OF DEED OF SALE

*EP Manna v JM Lotter* CPD 9708/04 - Reportable - Judgement handed down on 8 March 2007 Per; Griessel, J

Mrs Lotter, a Welsh citizen, placed her property in Sedgefield on the market via a local estate agent in October 2003. The estate agent found a willing buyer who signed an offer to purchase on 6 November 2003. Clause 10 of the offer stated that the offer was "irrevocable and expires at noon on the 9th November 2003 and on acceptance shall become a binding Agreement of Sale irrespective of whether the Purchaser has been notified of such acceptance or not...".

The estate agent faxed the offer to the seller on 9 November 2003. The seller then signed the offer and faxed it back to the agent on 12 November 2003.

The conveyancer dealing with the transfer then tried to reach the seller to sign the necessary documentation, but to no avail. The seller simply refused to sign the documents and wouldn't answer any calls or respond to any messages.

The buyer then launched an application in the Cape High Court to compel the seller (which was served in Wales after an application for edictal citation) to sign the necessary documents, so that transfer could be registered.

The seller opposed the application on three alternative grounds:

1. **That the Court had no jurisdiction as the Applicant had failed to attach the property, to confirm jurisdiction.** This line of defense was dismissed on the grounds that a High Court automatically assumes jurisdiction over any dispute regarding immovable property that falls within its jurisdiction. Hence, an application to confirm jurisdiction was unnecessary under the circumstances as this property fell within the jurisdiction of the CPD.
2. **That the buyer had failed to obtain the necessary bond approval timeously.** In terms of the Agreement, the sale was made "subject to the suspensive condition that the purchaser obtains approval to the granting of a loan against security of the property for an amount of not less than R485 000,00 from a bank, building society or financial institution with 21 days of acceptance of this offer" and if this loan was not approved within that time, "the period of approval shall automatically be extended for a period of 14 (fourteen) days." The buyer's bank only approved a 75% loan. However, it is trite law that a bond clause is to the benefit of the buyer and capable of unilateral waiver, provided such waiver takes place before the date for fulfillment of the condition in this case it would be within 35 days of acceptance, i.e., by no later than 17 December 2003. On 27 November 2003 the bank

notified the buyer, who on the same day advised the conveyancer that he would make alternative arrangements for the balance and wished to proceed with the transaction, whereafter he signed all the necessary transfer documents and paid the required conveyancer's costs. As such, the buyer undoubtedly indicated his waiver of the benefit.

3. **That because she accepted the offer after it had already lapsed, there was in fact no binding agreement - i.e., that you cannot accept an offer that no longer exists.**

The Court immediately drew the following distinction in his judgment: If an offer is accepted by a seller before the time to accept it has lapsed, then the buyer, who made the offer, is undoubtedly bound to the agreement. But what is the situation where the seller accepts the offer, after it has lapsed, and the buyer then still wants to proceed? Can the seller then escape the agreement by relying on the fact that the offer lapsed before she accepted it?

As there appear to be no precedents in South African law, the Court took cognizance of the views expressed by the learned authors Christie; Khan; Kerr and De Wet and Van Dyk, as well as the foreign authorities they relied on in their publications, in Germany, Italy, USA and Holland. In most instances the favourite argument was that late acceptance amounts to a "counter offer". However, in this instance the immediate problem was that, due to the strict requirements laid down by section 2(1) of the Alienation of Land Act 68 of 1981, such a "counter offer" would require a written acceptance mere acceptance by conduct was insufficient.

In the present matter the buyer never formally accepted the "counter offer" in writing. The reason for this was that the buyer only became aware of the seller's alleged "counter offer" in her Answering Affidavit (having remained silent after signing the offer two years earlier) and as such he was never aware that he "should" have formally accepted it in writing. Nevertheless, the Court rejected his theory in any event, because in its view this scenario specifically illustrated the artificiality of such a construction.

Another view expressed by the learned authors and which was accepted by the Court, was that the best way to approach this type of scenario would be to regard the expiry date as a stipulation that was inserted solely for the benefit of the buyer, which benefit he could elect to waive.

As such, the buyer would then be entitled to accept (or reject) the "irregular" acceptance of his initial offer. Naturally, this election of the buyer would have to be communicated to the seller within a reasonable time, depending on the circumstances. In this case the buyer, upon receipt of the signed offer to purchase, immediately proceeded with doing whatever he needed to from his side, to give effect to the agreement.

On this basis then, the court held that, notwithstanding a late acceptance of the offer, the fact that the buyer had

elected to proceed indicated his willingness to accept the “irregular” acceptance anyway, and as such the agreement remained valid and binding. The seller was ordered to pay the applicant's costs and to sign all necessary documents within a specified time, failing which the Sheriff was authorized to sign in her stead.

### CASE NO. 3

#### AGREEMENT OF SALE

*Maharaj & Another v Govindsamy & Another* [2007] JOL 19052 (D) - Case 17125/05 • 12/01/2007

#### Summary:

The applicants purchased immovable property from the two respondents. Their agreement of sale was subject to the applicant obtaining a loan within 21 days of the date of signature. Furthermore, this suspensive condition was for the benefit of the purchaser who could unilaterally waive compliance with it. After the applicant failed to fulfill this suspensive condition, the respondents wrote a letter to the

applicant to inform him that the contract had lapsed. In response the applicants lodged this application to claim transfer. In his founding affidavit the first applicant asserted that the respondents were aware that they had, inter alia, already obtained a “pre-approved bond” at the time when they signed the agreement. The obligation had been fulfilled; alternatively, they had elected to waive compliance with the condition. In addition, the respondents had not notified them in writing before purporting to cancel the agreement as was required by a clause in the agreement.

Held that in terms of section 19(1) of the Alienation of Land Act 68 of 1981 a seller of immovable property who decides to take action as a result of a breach is required to give the buyer written notice to rectify the breach before the seller can terminate the contract. Cancellation constitutes a drastic step that cannot be taken willy-nilly without following the necessary procedure. The agreement was declared to be valid and the respondent was directed to take steps to effect transfer of the property into the name of the applicants.

## Guidelines for articles in the SADJ

By: Allen West  
Deeds Training, PRETORIA

**SADJ welcomes contributions, in any of the 11 official languages, especially from deeds office staff and practitioners. The following guidelines should be complied with:**

1. Contributions should as far as possible be original and not published elsewhere.
2. Contributions should be useful or of interest to the conveyancing practice and land issues. The decision of the editorial committee is final.
3. Authors are required to provide their involvement or interest in any matter discussed in their contributions.
4. Footnotes should be avoided. Case reference, for instance, should be incorporated into the text.
5. When referring to publications, the publisher, city and date of publication should be provided. When citing reported or unreported cases and legislation, full reference details should be included.
6. Articles should be in a format compatible with Micro-soft Word and should either be submitted by e-mail or, together with a printout, on a stiffer or compact disk. Letters to the editor, however, may be submitted in any format.
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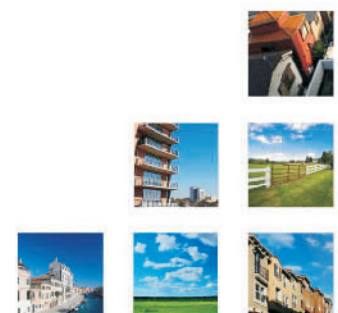
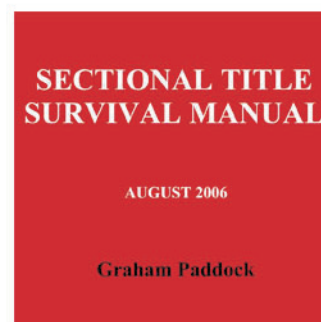
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Graham Paddock has written sectional title books, pamphlets and training manuals for trustees and managing agents. Paddocks Publishing sets, prints and publishes a range of electronic and 'hard copy' sectional title publications by Graham and other authors which make Sectional Title expertise easily accessible to the South African population at large.

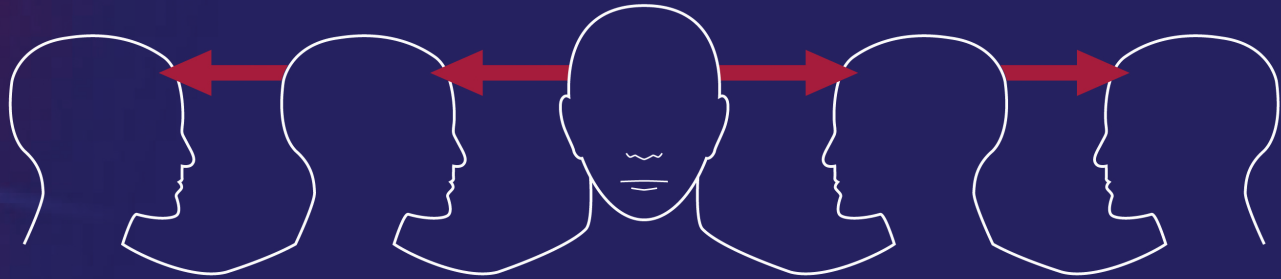
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