

Registrars' Conference Resolutions

supplement to the

Self-Study Deeds Course

The Registrar's Conference Resolutions have been sorted and follows the sequence of the chapters and paragraphs in Parts 1, 2 and 3 of the course notes.

Part 1

Conveyancing Practice and the Deeds Registries Act

Chapter 1 - General Background

Paragraph 3 The Deeds Registry

Paragraph 4 The role of the conveyancer

Question Regulation 45(1) to the Deeds Registries Act provides amongst other that "All deeds, bonds, documents and powers of attorney proper for execution or registration, as the case may be, shall be lodged for examination by a conveyancer practising at the *seat* of the Deeds Registry or by a person employed by such conveyancer..."

How must the phrase "conveyancer practising at the seat of the deeds registry" be interpreted in so far as boundaries or a radius from a deeds registry is concerned?

Resolution RCR18/2003 ¹ is confirmed - (RCR7/2008).

Chapter 2 - Transfer procedures

Paragraph 4.3 Clearance figures

Question Is any discretion still permitted as to the non-lodgement of rates clearance certificates in respect of "property" as defined in the Municipal Property Rates Act 6 of 2004?

Resolution No, only the local authorities can provide evidence in this regard ² - (RCR

¹ RCR18/2003 provides that the word "seat" is not defined in the Deeds Registries Act. Deeds registries must be guided by the definition of "deeds registry" in section 102 of the Deeds Registries Act. Section 102 of the Deeds Registries Act provides amongst other that deeds registry means: i) when used in relation to immovable property, the deeds registry which serves the area in which that property is situate; and when used in relation to any deed or other document, any deeds registry in the Republic wherein that deed or other document is registered or registrable. In other words a conveyancer practising in the area which is served by a particular deeds registry, may lodge documents in that registry.

² This means that if a local authority cannot provide you with a clearance certificate for any "property" (which includes the cession of real rights and sectional title units, exclusive use areas, real rights of extension etc), they must provide you with a certificate that they are unable to provide you with such clearance certificate and that

47/2009).

Rates Clearance Certificates for Transfer of Same Property

Problem statement: A transfers property to B who immediately transfers the same property to C. The transaction between B and C is not lodged simultaneously with the one of A to B. The rates clearance certificate issued for the transaction involving A to B is valid for a period of 60 days and within this period a transaction involving B to C is lodged with the rates clearance certificate lodged in the previous transaction of A to B. The understanding is that if the whole batch was lodged simultaneously this only rates clearance certificate would have been accepted. Does the conference agree?

Resolution No, the same rates clearance certificate may not be used – (RCR 36/2011).

Paragraph 8 Lodgement, preparation and registration

Question It appears that there are not a uniform procedure in deeds registries to deal with certain documentation. Certain deeds registries will file a document with the deed requiring the document (consent) and make a note on the relevant lodgement cover that the document is now filed in another cover. Some registries give it a BC number and other lodge it as a supporting document with the deed etc.

Resolution Acts of registration, as provided for in regulation 39(1), must be lodged in a separate lodgment cover, having a BC code, and attracts a fee. See CRC 2 of 2009. All supporting documents must be lodged with the relevant deed and not in a separate cover. This resolution is, with the necessary changes, applicable to the opening of a sectional title register - (RCR 26/2009).

Paragraph 8.3 Circumstances where the title deed need not be lodged

Regulation 51(2)

Question This regulation provides for the transfer of immovable property without the production of the title deed. May factual endorsements be made on the office copy of the title deed which are necessary for effecting transfer? (May applications be endorsed on the office copy of the title deed, e.g. section 4(1)(b) application, in order to effect transfer?)

Resolution Yes, the wording of the regulation must be interpreted to mean that all acts of registration necessary to effect transfer can be done on the office copy of the title deed, provided that the applicant has *locus standi* to bring the relevant application – (RCR32/2011)

Copies of receipts in terms of regulation 20(7) of the Deeds Registries Act

Question May a registrar accept, in terms of regulation 20(7) of the Deeds Registries Act, a copy of a transfer duty receipt or rates clearance certificate, certified by a conveyancer or notary as a true copy of the original?

Resolution No, a copy of a rates clearance certificate cannot be accepted, as the original is not filed in the government office. However, a copy of a transfer duty receipt, certified by the Receiver of Revenue as a true copy of the original, may be

transfer may be passed without such clearance.

accepted – (RCR39/2010).

Chapter 4 - Deed of transfer

Chapter 3 Rules applicable to preparation of deeds and registrable documents

Regulation 23: Font size of words in deeds

Question There are circulars regarding the font size for deeds drafted, for purposes of legibility on microfilm. Can a smaller font be accepted or not?

Resolution No. A font size smaller than 2 mm shall not be accepted – (RCR30/2011).

Paragraph 4.3 Preamble

DESCRIPTION OF PERSONS ACTING IN THEIR PERSONAL CAPACITY

General rules applicable to the description of natural persons - abbreviation of identity number

Question The Deeds Practice Manuals state that the identity number in deeds and documents must be preceded by the word “identity number” and that the abbreviation “ID number” may not be used as it is the recognized abbreviation for *idem* (the same). May the abbreviation “ID” (capital letters) not be allowed?

Resolution No. Abbreviations with regard to the identity number is not allowed in deeds and documents - (RCR31/2006).

RCR 21 of 2004: Divorce orders

Question RCR 21 of 2004³ must be extended to cover instances where the former spouse has passed away. It shall be imperative for the lodgement of the death certificate of the deceased spouse as supporting document.

Resolution RCR 21 of 2004 is confirmed. The matter in question has already been dealt with in RCR 15 of 2005⁴ - (RCR10/2010).

Item 8 - Persons married under the laws of any other country

Registrar has a discretion to waive assistance by spouse

Question Must the spouse acting with property registered in his/her name be assisted in such act by his/her spouse?

Resolution Yes, but a registrar of deeds may exercise his/her discretion in waiving the necessary assistance by a spouse in terms of section 17(6) of the Deeds Registries Act for the execution of any deed or document required or permitted to be registered in a deeds registry - (RCR14/2005).

³ In this resolution, it was decided that a divorce court order must be lodged where an owner who was formerly married out of community of property or whose marriage was governed by the laws of another country now deals with the land and is described as unmarried. The reason for this is that the deeds office must determine whether the rights of third parties are affected and that the terms of the divorce court order, where applicable, are adhered to.

⁴ In this resolution, it was decided that where the status of parties married out of community of property or whose marriage is governed by the laws of a foreign country have changed due to the death of the spouse, it is not necessary to lodge a death certificate or death notice to prove that the spouse has died and that divorce did not occur. A certificate from a conveyancer will suffice.

Item 11 - Registration in name of partnership - parties married in community of property

- Scenario** Where parties are married in community of property and have entered into a partnership, there should be no objection to the registration of immovable property in the name of the partnership. A person married in community of property is entitled to enter into a partnership agreement with another person.
- Question** Why should they be prevented from entering into such an agreement with each other?
- Resolution** From a registration point of view there is no prohibition against the registration of immovable property in the name of a partnership where two partners are married in community of property to each other - (RCR3/2005).

- Scenario** Parties married in community of property to each other are each entitled to one half share in the assets of the joint estate.
- Question** May the partnership agreement read that each partner has a different share in the partnership?
- Resolution** The common law position regarding the share of each party to a marriage in community of property cannot be changed with a partnership agreement. The property must be vested in the name of both spouses married in community of property to each other i.e. “.... carrying on business in partnership as” - (RCR5/2006).

- Question** May parties married in community of property enter into a partnership with each other?
- Resolution** Yes.⁵

Item 17 - Nature of marriage

- Scenario** A conveyancer may certify with regard to the nature of a marriage, if the identity document/marriage certificate is silent regarding the nature of the marriage.
- Question** May the conveyancer certify in the first instance as to the nature of the marriage, or may he/she only certify that the identity document/marriage certificate is silent about the nature?
- Resolution** The marriage certificate will suffice unless it is silent regarding the nature of the marriage. In this instance an affidavit by the party/parties must be lodged - (RCR4/2006). *(Most marriage certificates are silent regarding the nature of the marriage. This means that where the marriage certificate is silent regarding the nature of the marriage, an **affidavit by the couple** must be lodged stating the nature of their marriage, for example whether they are married in or out of community of property, according to muslim or hindu customs, or the laws of a foreign country, etc.).*

Item 17 - Proof of Customary Marriage

- Question** What proof must be lodged that a valid customary marriage, in terms of the Customary Marriages Act 120 of 1998, exists?

⁵ Registrars' conference resolution 8 of 2007 whereby RCR3/2005 and RCR5/2006 were confirmed.

- Resolution** a) Proof from the Department of Home Affairs; or
b) an Order of Court - (RCR31/2005 as confirmed by RCR8/2006).

DESCRIPTION OF PERSONS ACTING IN A REPRESENTATIVE CAPACITY

Item 1 - Companies and close corporations

Reference to Company Resolution

Question In terms of Regulation 44A(d)(ii)(aa) is it a requirement to refer to the company resolution in the power of attorney?

Resolution The preamble of a power of attorney, application or consent must state whether the authorization is in terms of a resolution or general power of attorney without disclosing full particulars of the resolution - (RCR7/2005 and confirmed by RCR8/2008).⁶

Abbreviation of registration number companies, close corporations, trusts, etc.

Question There are different kinds of abbreviations used in respect of the words “registration number” in deeds and documents, for example: Reg number, Registration No. What is acceptable?

Resolution Abbreviations with regard to the words “registration number” of companies, close corporations, trusts etc. are not permissible in deeds and documents tendered for registration – (RCR14/2008).

Item 6 - Insolvent estates (natural persons)

Question How must the preamble of a deed of transfer be couched, where property is registered in the names of A, married out of community of property, and B, married out of community of property, and the trustee in the insolvent estate of A also sells the property belonging to B (being the spouse of A), in terms of section 21(3) of the Insolvency Act, 1936?

Resolution The trustee in the insolvent estate of A
Identity number ...
Married out of community of property
and acting in terms of section 21(3) of Act 24 of 1936
in the insolvent estate of
B
Identity number ...
Married out of community of property - (RCR46/2009).⁷

⁶ According to the resolution: “The preparer does not assume responsibility in terms of regulation 44A(d)(ii)(aa) for the mandate in terms of a general power of attorney (see reference to regulation 65 in regulation 44A(d)(ii)(aa)). Thus it is still the responsibility of a registrar of deeds to check general powers of attorney referred to in the preamble of a power of attorney, application or consent. The preamble must merely state whether the authorisation is in terms of a **resolution** or **general power of attorney** without disclosing full particulars of the resolution.”

⁷ The spouse of the insolvent must also be cited, as it is deemed that he/she is also insolvent for purposes of the Insolvency Act, unless the trustee gives a disclaimer in respect of the property registered in the name of such spouse.

Paragraph 4.4 The *causa* clause

Question Where land formed an asset in a joint estate and the parties divorced and subsequent to the divorce the spouses amended the agreement without prejudice to third parties and together sell the land, must the *causa* of the transfer disclose the full facts or merely reflect that the appearers' principal sold the land?

Resolution The *causa* of the deed of transfer needs only to reflect the sale -(RCR24/2006).

Question The South African National Roads Agency Limited expropriates a portion of a property measuring 200 square metres. When ownership of the expropriated property must be transfer, it transpires that in the interim another agreement was reached with the owner of the property to transfer and additional 400 square metres. One diagram is presented in respect of the whole 600 square metres. In the transfer deed reference is made to a dual *causa*, namely the expropriation of 200 square metres and to the written agreement to transfer the other 400 square metres. Can this be done in one deed of transfer?

Resolution No, as the *causa* is not the same the expropriation transfer and the transfer by agreement must be done separately. The *causa* for a section 31 transfer is either a vesting or expropriation. However, where the expropriation notice is uplifted ownership of the whole property can be transferred by one deed of transfer. Alternatively, it can be effected in one vesting transfer as provided for in section 31 of the Deeds Registries Act, provided the provisions of section 41(3) of the South African Roads Agency Limited and National Roads Act 7 of 1998 have been complied with - (RCR37/2009).

Question Is the mere reference to an agreement a valid *causa* for a transfer of immovable property?

Resolution No, a mere reference to an agreement is not sufficient - (RCR38/2009).⁸

Paragraph 4.5 The vesting clause

Question Is it permissible to vest property as follows:

- 1 Bellandia (Pty) Ltd
Registration number. 1967/006312/07
- 2 Boness Development Phase 3 (Pty) Ltd
Registration number. 1994/008516/07
- 3 Southern Spirit Properties 156 (Pty) Ltd
Registration number 2005/020284/07
trading in Joint Venture as BREE STREET JOINT VENTURE

if parties do not trade as partners, but have merely embarked on a joint venture?

Resolution The vesting in a joint venture is not permissible, as it is not a legal persona - (RCR29/2007).

⁸ It must be stated from what the agreement emanates, for example a divorce, sale donation etc.

Item 8***Vesting of agricultural land in names of spouses whose marriage is governed by foreign country***

Question Where parties are married to each other in community of property the provisions of the Subdivision of Agricultural Land Act 70 of 1970 are not contravened as provided for in section 17(5)(a) of the Deeds Registries Act. How should vesting take place where spouses are married according to the laws of a foreign country, to comply with Act 70 of 1970, where the marriage is deemed to have the effect of a marriage in community of property?

Resolution Where the property was purchased by both spouses the vesting must read as follows:

- 1 Joseph Dreyer
Date of birth / identity number
married, which marriage is governed by the laws of (the foreign country)
- 2 Elizabeth Dreyer
Date of birth / identity number
married, which marriage is governed by the laws of (the foreign country)
Consent by the Minister in terms of Act 70 of 1970 must be lodged
where the property vests in the name of both spouses - (RCR39/2009).

Description of same sex parties in a foreign civil marriage / union

Question How should parties be described if they are in a union / marriage, which union / marriage is governed by the law of a foreign country?

Resolution

- 1 Partner 1
Identity number / born on
Married, which marriage is governed by the law of (the foreign country)
- 2 Partner 2
Identity number / born on
Married, which marriage is governed by the law of (the foreign country) -
RCR40/2009.

RCR 40 of 2009: Foreign marriages: Description of same sex parties in a foreign civil union/marriage

Question It is not always certain whether foreign marriages must be described as a marriage or a union

Resolution RCR 40 of 2009 is hereby confirmed – (RCR24/2010).

Item 2 - Trusts**Foreign trust**

Question What formalities must be complied with before a foreign trust can have immovable property registered into its name?

Resolution The foreign trust must firstly be registered with the Master of the High Court and letters of authorization issued to the trustees, as contemplated in section 8 of the Trust Property Control Act 57 of 1988 - (RCR24/2009).

Paragraph 4.8 The conditional clause

Home Owners Association Conditions

Scenario A condition prohibiting the alienation or transfer of a property without the consent of the home owners association is contained in the title deed of the property. On transfer of the property the conveyancer lodges a certificate stating the home owners association has not been established.

Question

- 1 May the registrar of deeds accept this certificate; and
- 2 may the condition be brought forward in the deed of transfer?

Resolution

- 1 No. The consent must be insisted upon, failing which the matter must be referred to court for permission to transfer without the consent.
- 2 The condition must be brought forward in the title deed - (RCR2/2007 and RCR43/2003).

Home Owners Association Conditions - last proviso to section 65

Question Is it correct to accept only a clearance / certificate from the Home Owners' Association that the transferee has bound himself/herself to become a member of the association and that the constitution of the association have been complied with whenever the property is transferred? Should consent from the transferee himself/herself not be lodged signifying that he/she has accepted? In many cases these condition are proclaimed conditions.

Resolution Yes, it is correct. No acceptance by the transferee is necessary as this is a registered condition - (RCR27/2009).

Change of Name of a Home Owners' Association

Question In the event of a Home Owners' Association changing its name sometime after the township was proclaimed in the Provincial Gazette, how must the change of name be dealt with?

- a) Must the Proclamation be followed *verbatim*?
- b) What will be the position where the company registration number was incorrectly published in the Proclamation?

Resolution

- a) No. The new name must be followed. Proof of the change of name must be filed on the township file and the affected deeds must be endorsed in terms of section 3(1)(v) of Act No. 47 of 1937 regarding the new name. A *caveat* must be noted against all relevant erven in the township to the effect that the new name must be followed.
- b) The correct registration number must be followed. Proof of the correct number must be filed on the township file and the affected deeds must be endorsed in terms of section 3(1)(v) of Act No. 47 of 1937 regarding the correct number. A *caveat* must be noted against all relevant erven in the township to the effect that the correct registration number must be followed – (RCR 42/2011).

Restriction on alienation

Question Given the *obiter dictum* in the case of *Standard Bank of South Africa Ltd v*

Hunkydory Investments 188 (Pty) Ltd and others, case no. 154/27/2008, is it still a requirement that the person in whose favour such restriction on alienation is registered consents to the registration of a bond where the property is subject to a restriction on alienation?

Resolution Yes, RCR 35/2005; RCR 2/2006; and RCR 12/2008 are confirmed - (RCR6/2009).

Removal of restrictive conditions

Question A title condition (contained in all the title deeds in a township) in favour of the developer (or any other beneficiary) provides that the owner shall not become the owner of more than one property in a specific township. How should the condition be dealt with when it is clear that transfer of the property will lead to the contravention of such registered condition? The condition does not provide for the beneficiary to consent.

- a) Is the Removal of Restrictions Act or a court order the only means of cancellation given that this condition has been imposed against all properties in the township?
- b) Can the developer consent to transfer?"

Resolution

- a) Conference cannot take a resolution in this regard because every condition must be decided on upon its own merits.
- b) No, the developer cannot consent to the transfer, as the condition does not provide for consent – (RCR63/2010).

Paragraph 5 Deeds to follow the sequence of their relative causes

Question A sold his property to B on 01/10/2008 but before the deed of sale between A and B was signed, B already sold the property to C on 01/10/2007.⁹ Will the provisions of section 14 of the Deeds Registries Act be contravened if these transfers are allowed in the deeds registry?

Resolution No, it will not be a contravention. A must transfer to B and B must transfer to C - (RCR13/2009).

Paragraph 5.3 Exceptions provided by section 14

Section 14(1)(b)(iii) - *Usufructuary party to redistribution agreement*

Question Where property is bequeathed to A and B subject to a *usufruct* in favour of C, must the usufructuary also be a party to the redistribution agreement between A and B?

Resolution No, unless the usufructuary also redistributes the *usufruct* -(RCR12/2006).

⁹ A seller may sell property of which he is not the owner, as long as he can comply with his obligations in terms of the contract.

Chapter 5 - Power of attorney

Paragraph 2.2 Preparation and signing of the preparation certificate

Consents prepared by attorney, notary & conveyancer

Question Which consents, required for the performance of an act of registration as envisaged by regulation 44 of the Deeds Registries Act, must be prepared by an attorney, notary & conveyancer?

Resolution Only consents required for purposes of an act of registration and prepared by a practising attorney, notary or conveyancer must contain a preparation clause - (RCR20/2006).

Paragraph 2.3 Regulation 44A - Responsibility for correctness

Regulation 44A and CRC 7 of 2010:¹⁰ Value of property

Question Will the preparing conveyancer be responsible for the correctness of the value of the property? In some cases the Receiver of Revenue does not require a valuation (e.g. divorce order). Will valuation certificates have to be obtained?

Resolution No, it is not necessary to lodge a valuation certificate. In the absence of a transfer duty receipt reflecting the value of the property, the amount reflected in the deed or document, based on the municipal valuation, will be accepted as proof of the value of the property – (RCR40/2010).

Responsibility of conveyancer

Scenario If a bond is passed in favour of the trustee of an insolvent estate, the practice is to accept it if it is for the balance of the purchase price (the resolution of the trustees needs not to be lodged to ascertain whether the trustee or the curator has the legal capacity to do so).

Question Is it not the duty of the registrar of deeds but rather the responsibility of the conveyancer in terms of regulation 44A? What will the position be in a scenario where an insolvent sold his property in June 2006 to his mother for R900,000, and is thereafter declared insolvent in December 2006. His mother was the applicant. The mother registered a first bond in favour of the trustee of the insolvent estate in July 2007 for R190,000. The causa was not for the balance of the purchase price.

Resolution It is not the responsibility of the registrar of deeds to determine the causa of the bond and whether the trustee acts in terms of his powers. **It is the responsibility of the conveyancer to determine the validity of the transaction** - (RCR18/2007).

¹⁰ According to Chief Registrar's Circular 7 of 2010, the consideration clause in a deed of transfer or application for the transfer by means of an endorsement, must make reference to the value of the property where the purchase price is not applicable. Such reference will serve as proof of the value of the property. It further provides that where a transfer duty receipt contains a reference to both the purchase price and the value of the property, then both purchase price and value must be reflected in the consideration clause of the deed of transfer or application for a transfer endorsement. The reason behind the inclusion hereof, is that the deeds office fee is to be calculated on the greater of the purchase price or the value of the property.

Question Is there an onus on the registrar of deeds to establish that the preparing conveyancer is a “conveyancer” and has thereby the authority to sign the preparation clause on deeds and documents?

Resolution Yes. In terms of section 15 deeds, bonds, certificates of title shall not be registered / attested / executed by a registrar of deeds unless it has been prepared by a conveyancer - (RCR15/2009).

Retention of maiden name

Question In the event of a party to a deed retaining a maiden name after marriage, must proof be lodged, in the form of an affidavit from the party concerned, or is it covered by the provisions of regulation 44A?

Resolution It is covered by the provisions of regulation 44A - (RCR24/2007).

Question Should a party to a deed revert to her maiden name or elect to retain her maiden name, must the registrar of deeds insist on proof from such party as to the retention or reversion?

Resolution It is covered by the provisions of regulation 44A - (RCR25/2007).

Agricultural land - transferee married in community of property

Question Is it the responsibility of the registrar of deeds to call for proof of a marriage in community of property where the transferee of agricultural land is married in community of property?

Resolution No, in terms of the provisions of regulation 44A it is the responsibility of the conveyancer - (RCR38/2007).

Identity number and status of insolvent

Question It is established practice to disclose the identity number and status of any insolvent when a trustee transfers land as a result of a sale in insolvency. However, the status of the insolvent might have changed since registration and as the trustee is the owner, the conveyancer does not assume responsibility for the correctness thereof. Should the identity number and status as disclosed in the title deed be followed, or must the registrar of deeds assume responsibility for it?

Resolution The status and identity number as disclosed in the title must be followed - (RCR33/2008).

Paragraph 2.5 Initialling of powers of attorney, applications and consents

Retyping of first page

Question Where the first page of a power of attorney is retyped, or where the first page of an affidavit is retyped, must the power of attorney be re-executed and the affidavit redone, or will mere full initialing suffice?

Resolution The power of attorney must be re-executed and a new affidavit must be provided - (RCR29/2006).

Paragraph 2.6 Authentication

Rule 63 of the High Court rules

Question Who has the capacity to authenticate a document executed in the Antarctica for use in the Republic of South Africa, given the provisions of Rule 63 of the High Court?

Resolution Documents executed in the Antarctica does not require authentication as a result of the provisions of section 2(1) of the South Africa Citizens in Antarctica Act 55 of 1962. The said section provides that the laws in the Republic shall apply to South Africa Citizens while they are in the Antarctica – (RCR45/2010).

Rule No. 63 of the High Court Rules

Question May a document executed in Namibia for use in South Africa be duly authenticated before a Notary Public?

Resolution No. However, the formalities as prescribed by the Hague Convention dated 5 October 1961 may be followed, as Namibia is a party to such Convention – (RCR 46/2011).

Authentication of Affidavits

Question Must *an affidavit* executed outside the Republic of South Africa be authenticated in terms of Rule 63 of the High Court?

Resolution Yes, unless the affidavit is made before an officer prescribed by section 8 of the Justices of Peace and Commissioners Oaths Act 16 of 1963 - (RCR21/2009).

Paragraph 2.7 Analysis of a power of attorney

Person authorizing the power of attorney

Authority to sign documentation: Constitution of South Africa, Act 108 of 1996

Question In terms of section 139(1)(b) of the Constitution of the Republic of South Africa, 1996, the Provincial Cabinet appoints an administrator for a struggling municipality to take full responsibility of administration inclusive of staff, financial and technical functions of that municipality. Does this taking of full responsibility include the authority to sign form DDD deeds for transfer of immovable properties?

Resolution Yes, the appointment letter covering such powers of the administrator, must be lodged for filing – (RCR49/2011).

Comment It must be ascertained however, that such person does indeed have the authority, as such authority it will be set out in the letter of appointment.

The agent (Appearer)

A conveyancer executes deeds on behalf of another firm

Question It often happens that a conveyancer from another firm executes deeds on behalf of the firm who has lodged the deeds. Must the Registrar be informed in such

cases or is it not his/her responsibility?

Resolution No. The conveyancing firm must accept responsibility for the execution of their own deeds - (RCR33/2006).

Substitution of conveyancers in power of attorney

Question RCR 49 of 1962 must be withdrawn in light of RCR 18 of 2009, however, RCR 18 of 2009 must also be revisited in view of the Namibian case Roads Contractor Company Ltd v AE/ Gams Engineering Company Namibia (Pty) Ltd

Resolution The name of the conveyancer, not disclosed on the power of attorney, may be inserted on the power of attorney with full initialing, alternatively a deed of substitution, by the conveyancer appointed in the power of attorney, may be lodged: provided that the power of attorney makes provision for substitution. RCR 49 of 1962 and RCR 18 of 2009 are hereby withdrawn – (RCR7/2010).

The execution clause

Place of the Execution of a Power of Attorney

Question Should regulations 25 and 65(2) not be given a wider interpretation with regard to the place of the execution of a power of attorney to include the particular country of execution?

Resolution No. However, where uncertainty exists, the registrar of deeds may require the conveyancer to provide a certificate to indicate the country of execution of such power of attorney – (RCR31/2011).¹¹

Paragraph 5 General Power of Attorney

Copy of Power of Attorney

Question A certified copy of a power of attorney that has been registered in one office is lodged for registration in another office and it is found to be unfit for registration. How must the matter be addressed?

Resolution The power of attorney must not be registered until the discrepancies have been addressed in the first office of registration. Alternatively, a new power of attorney must be registered - (RCR34/2008).

Destroy or deliver after registration

Question Before microfilming was introduced the agent in a general power of attorney was left without his/her instrument of appointment once the general power of attorney has been registered. The remedy for him/her was to apply for a certified copy. The question now is whether the general power of attorney should be destroyed after scanning or should it be delivered to the firm?

Resolution Deeds registries must destroy the general power of attorney after scanning to avoid further dealings with a power of attorney, which may possibly already be revoked. The power of attorney is in any case not registerable in any other deeds registry - (RCR40/2008).

¹¹ If a power of attorney has for instance been signed in Parys, South Africa, it would be good conveyancing practice to indicate that it was sign in Parys (South Africa) and not in France.

RCR 40 of 2008: General Power of Attorneys – Destroy or deliver after registration

Question It is suggested that the word ‘*destroyed*’ alluded to in the resolution be substituted with ‘*endorsed as to the fact that it may not be used for purposes of registration in any deeds registry*’. Does Conference agree?

Resolution Yes. See RCR 40 of 2008, as amended. (RCR 40 of 2008 is amended to read as follows:

General Power of Attorneys – Destroy or deliver after registration

*Before microfilming was introduced in deeds registries the agent was left without his/her instrument of appointment once the general power of attorney has been registered. The remedy for him/her was to apply for a certified copy. The question, which now arises, is whether the general power of attorney **should be endorsed as to the fact that it may not be used for purposes of registration in any deeds registry?***

Resolution *The General Power of attorney must be endorsed after scanning as to the fact that it may not be used for purposes of registration in any deeds registry.”) – (RCR9/2011).*

After registration of general Power of Attorney granted by Bank / Company - change of name / transfer of assets

Question Can an agent appointed by a bank or company still act in terms of a power of attorney which was granted and registered by the bank or company who subsequently changed its name or transferred its assets to another entity?

Resolution a) Yes, the power of attorney will not terminate with a change of name; but
b) No, the power of attorney will terminate tacitly by the transfer to the new entity which is formed - (RCR41/2008).

Revocation of General Power of Attorney by virtue of a revocation clause contained in the new General Power of Attorney lodged for registration

Question Numerous general powers of attorney lodged for registration contain a clause revoking an existing power of attorney. Must a separate notice of revocation be lodged to cancel the existing general power of attorney?

Resolution No. The registration of a general power of attorney and the revocation of an existing general power of attorney may be contained in the same document. In this instance the document will receive a PA code which code will also be used for purposes of the cancellation of the existing general power of attorney. However, the revocation of an existing general power of attorney may be contained in a separate document, constituting a separate registration act - (RCR42/2008).

Cancellation of PA registered in more than one office

Question General powers of attorney, especially by financial institutions, are registered separately in each deeds registry. Implementation of cancellation of powers of attorney by financial institutions registered in multiple deeds registries poses practical challenges.

Resolution The status quo must remain – (RCR61/2010).

Regulation 65: Use of Copies of General Powers of Attorney

Question A copy of a General Power of Attorney ('GPA') is issued by the deeds registry of first registration for use in another registry in accordance with regulation 65(6). Can a copy of such registered General Power of Attorney be lodged as a supporting document in another registry or must it be registered in such registry?

Resolution No, the copy certified by the registrar in the first registry, issued in terms of regulation 65(6), must be registered in subsequent registries to facilitate easy location should the mandant decide to revoke/cancel the General Power of Attorney – (RCR 33/2011).¹²

Chapter 6 - Servitudes

Paragraph 3.5 Creation of personal servitudes

A The General Rule

RCR 24/2005: Unilateral notarial deeds of cession of personal servitude

Question Should RCR 24 of 2005 no be withdrawn, given the fact that regulation 61(2) of the Deeds Registries Act has been amended? A unilateral cession is now permissible, provided no burden is placed on the cessionary.

Resolution No. RCR 24 of 2005 is hereby confirmed. Regulation 61(2) of the Act is in the process of being amended to only permit unilateral cession of personal servitudes as provided for in section 66¹³ of the Deeds Registries Act – (RCR 12/2010).

Creation of servitudes on or over public land

Question The creation of a servitude, being the transfer of rights over a public street, could well be a deprivation of the public's rights in any street. Notwithstanding the fact that it may not affect the enjoyment of its rights, it is still a transfer of rights to a party other than the general public.

- a) Does the local authority have the power to act on behalf of the general public?
- b) What public participation is necessary when their rights are impinged?

Resolution a) No, it is not necessary for the general public to be party to the agreement. The Premier of the Province must consent on behalf of the general public, and not the municipality. Alternatively a court order may be obtained – (see section 65(1) of Act 47 of 1937)

b) None. However, the publication notice in the Government Gazette for public comment provides the necessary interaction – (RCR87/2010).

¹² Note that you can "convert" a general power of attorney into a special power of attorney. The conveyancer can do so by certifying on such general power of attorney that it will only be used for, for example the transfer of Erf 1 Pretoria and then it can be lodged as a supporting document to such transaction. This will obviously not be possible if such general power of attorney has already been registered in another deeds registry.

¹³ Section 66 only provides for the unilateral cessions of a usufruct, usus and habitatio, where no burden is placed on the cessionary.

B Exceptions to the general rule

Section 65 - interpretation of “savings clause”

Question How does conference interpret the savings clause: “save as provided for in any other law”, in section 65 of the Deeds Registries Act? Does this mean that a particular piece of legislation must specifically oust the provisions of the Deeds Registries Act when it relates to a creation of personal servitudes? Alternatively, that if the piece of legislation allows an authority to impose conditions, the provision of section 65 need not be adhered to?

Resolution No. The general rule is that a personal servitude must be created by the registration of a notarial deed. However, the provisions of section 65 need not be adhered to only where another law provides otherwise - (RCR14/2009).¹⁴

Cession of a personal servitude

Question Must a cession of a personal servitude of *usufruct*, *usus* or *habitatio*, when such cession of the personal servitude is in favour of the owner of the land encumbered thereby, be done by an unilateral notarial deed?

Resolution Yes - (RCR24/2005).

C Other exceptions to the general rule

Transfer Duty / Right of way in favour of general public

Question Is transfer duty payable and by whom when a right of way is created in favour of the general public?

Resolution No transfer duty is payable, however an exemption certificate must be lodged - (RCR35/2006).

Paragraph 3.6 Registration of personal servitudes

Section 68(1) - Waiver of personal servitudes

Scenario The application of section 68(1) when the holder of a personal servitude waives or renounces his/her right is questioned. The mere fact that the title deed of the real right need not be lodged (that is the servitude title), leaves much to be desired as same can be used for a pledge, etc and even in the case of a lease agreement.

Resolution Section 68(1) provides that the title deed of the servitude be lodged only if it is available. The deeds registry copy should be endorsed and the necessary caveat noted - (RCR19/2006).

¹⁴ “Another law” includes an Ordinance. If conditions are created in terms of an ordinance, they do not have to be created in the power of attorney, for example township establishment conditions.

Lapsing of personal servitude by merger

Question Should the owner of land comply with the provisions of section 68(1) of the Deeds Registries Act where a personal servitude (*usufruct*) lapses by merger or does conference confirm RCR29(1)/1966?

Resolution The provisions of section 68 should not be invoked. Registrar's Conference Resolution 29(1)/1966 is confirmed - (RCR3/2008).¹⁵

Usufruct for a specific time

Question Is the following *usufruct* registrable? "Subject to a *usufruct* in favour of the surviving spouse for a period of one year less than the life expectancy of the surviving spouse..."?

Resolution Yes, it is registrable. The period can be determined in terms of the tables contained in the Estate Duty Act 45 of 1955 - (RCR42/2009).

Paragraph 3.7 Transfer and mortgage of land with personal servitude thereon

Sale in insolvency and personal servitudes

Scenario Regarding the disposal by a trustee of an insolvent estate of property subject to a personal servitude.

Resolution Where immovable property which is subject to a personal servitude is sold in insolvency, such immovable property must be transferred subject to such personal servitude. However, should the holder of the personal servitude dispose of his/her rights together with the trustee, the provisions of section 69(1) may be invoked. Where a waiver of preference by the holder of the personal servitude provides that the immovable property may be sold free from the personal servitude, the provisions of section 68(1) must be complied with - (RCR3/2006).

Paragraph 3.8 Joint transactions by fiduciary and fideicommissary

Scenario An order of court was granted to establish the *fideicommissaries* and to sell the property to one of the *fideicommissary* heirs.

Question Who must give transfer? Section 69*bis* cannot be applied. It is not a transfer "to any other person" and the *fideicommissary* cannot transfer to him/herself.

Resolution The transfer of the property must be effected by the *fiduciary*, in terms of the court order, to the purchaser concerned - (RCR27/2007).

¹⁵ Merger only takes place from the moment that the registered owner of the property also becomes the holder of the personal servitude or vice versa, thus on date of registration of the transfer or cession. It would therefore be incorrect to omit the servitude from the new deed of transfer at the time of transfer. It must be embodied in the deed of transfer and simultaneously with registration, or thereafter, the deed of transfer must be endorsed that the servitude has lapsed through merger. No application is needed.

Section 53(2): “Reversionary Right Proper”

Question Does conference agree that section 53(2)¹⁶ of Act No. 47 of 1937 can only be applied in respect of a “reversionary right proper”¹⁷ and not a “reversionary right condition”?

Resolution Yes, section 53(2) can only be applied in respect of a reversionary right, not binding successors in title – (RCR27/2011).

Paragraph 4.3 Creation of praedial servitudes

Section 76 - Creation of servitudes

Question Where land is subdivided into numerous portions in terms of a small scale subdivision, may the provisions of section 76 be applied to create praedial servitudes over or in favour of the respective portions, or must such praedial servitudes be created notarially?

Resolution Yes, the provisions of section 76 may be applied without the necessity of applying for the issuing of CRT’s - (RCR17/2007).

Comment *(In other words, praedial servitudes may be created directly in the deeds of transfer of portions of land in the case of small scale subdivisions of land. It is not necessary to create them notarially and to apply for CRT’s).*

Paragraph 5 General

Regulation 73 - Plotting of servitude

Question Is it possible to plot a servitude registered in terms of section 65 or 75 on an already registered general plan and not on a diagram of the property?

Resolution Yes it is possible, provided it is depicted on the general plan approved by the surveyor-general - (RCR22/2007).

Chapter 7 - Estate transfers

Paragraph 3.1 Section 42(1) certificate

Section 42(1) Certificate in terms of Act No. 66 of 1965

Question Must a section 42(1) of Act No. 66 of 1965 certificate, for an application in terms of section 45, be accepted or must the registrar insist on a certificate in terms of regulation 49(1)(f)? Alternatively, must a section 42(1) of Act No. 66 of 1965 certificate in all instances follow the wording in regulation 49(1)(f)?

Resolution Yes, the wording of the section 42(1) certificate must always follow regulation 49(1)(f) of Act No. 47 of 1937 – (RCR 44/2011).

Comment In other words there are three things that must be stated in the certificate, namely that –

- a) The proposed transfer or endorsement is in accordance with the

¹⁶ According to this section, land held subject to a condition that, on the happening of a certain event, such land shall revert back to a person named in such conditions, may be mortgaged by the owner thereof and such person by means of a bond passed by then jointly and severally, or may be mortgaged by the owner of such land with the consent of such person.

¹⁷ A reversionary right proper does not bind successors in title.

- liquidation and distribution account;
- b) It has lain open for inspection; and
- c) No objection thereto has been received.

Paragraph 3.2 Section 42(2) certificate

Property sold by executor on death by fiduciary

Question Is a section 42(2) certificate all that is needed when an executor in the estate of a *fiduciary* sells and transfers immovable property which is subject to a *fideicommissum*?

Resolution Yes. A section 42(2) endorsement by the Master is necessary. It is established practice that the executor in the estate of the fiduciary has the right in terms of the Administration of Estates Act 66 of 1965 to sell immovable property directly from the estate of the fiduciaries, provided the Master affords an authorization in terms of section 42(2). The waiver by the fideicommissary heirs is not a prerequisite for the sale - (RCR2/2008).¹⁸

Question RCR2 of 2008 fails to protect the rights of the fideicommissary heirs and its application is too broad. Section 69bis(1) of the Deeds Registries Act requires that the fideicommissary heirs transfer the property with the executor. How should the conditions be removed?

The executor in the deceased estate of a deceased fiduciary is only entitled to sell property which is subject to a *fideicommissum* if the estate is insolvent in terms of section 34 of the Administration of Estates Act 66 of 1965. RCR 2/2008 must be amplified to state that in these cases the section 42(2) certificate is not sufficient.

Resolution RCR 2 of 2008 is confirmed - (RCR9/2009).¹⁹

Selling of deceased person's property prior to an executor being appointed

Question A person passed away. After death a family member sells the deceased person's property prior to an executor being appointed. How must the matter be dealt with?

Resolution Had the family member purported to act on behalf of the deceased person, such transaction is null and void – (RCR66/2010)

Paragraph 5.1 The causa clause for an inheritance

Testamentary conditions

Question Where immovable property is bequeathed to heirs subject to a certain testamentary condition for example the exclusion of the community of property, and the heirs enter into a redistribution agreement in terms of which one of the heirs is entitled to the property, must such property as a whole be made subject to the aforesaid testamentary condition or is the share(s) of the property obtained in terms of the agreement not subject to such testamentary condition?

¹⁸ RCR37 of 2007 has been amended by the deletion of the words "provided the *fideicommissary* heirs waive their rights".

¹⁹ The reasoning behind the resolution that a section 42(2) certificate from the Master is sufficient, is that before the Master will issue a consent in terms of section 42(2), he will require the consent from all the heirs (including the *fideicommissary* heirs).

Resolution The whole of the property must be made subject to the conditions of the will - (RCR27/2006).

Paragraph 5.4 Supporting documents for estate transfers due to inheritance

Proof of intestacy

Question Can a death notice be accepted, amongst other things, as proof of intestacy?

Resolution

- 1 A **death notice** may be accepted as **proof of death** but not as proof of intestacy or proof of descendants and ascendants.
- 2 For proof of heirs, including illegitimate children (children born out of wedlock), an affidavit of next-of-kin must be called for.²⁰

Question Given the fact that a death notice cannot be accepted as proof of intestacy (that a person died without leaving a valid will), what proof should be required?

Resolution

- 1 Proof, in the form of an **affidavit from the executor** / representative, must be insisted upon.
- 2 However, in the case of a transfer by endorsement in terms of section 45 of the Deeds Registries Act 47 of 1937 a regulation 49(1)(g) certificate from the Master will be acceptable - (RCR3/2007).

Affidavit of next-of-kin as proof of heirs

Question In RCR7/1997 it was resolved that for proof of any further heirs, (including children born out of wedlock) an affidavit of next-of-kin must be called for. Does this mean that an affidavit of next-of-kin must be called for in all cases where the testator nominates his/her children as heirs without identifying them as well as children born out of wedlock?

Resolution Yes. RCR7/1997 is confirmed. In all cases mentioned above, an affidavit of next-of-kin must be lodged - (RCR11/2005).

Question The Master only requires that an affidavit of next-of-kin be filed in cases where the deceased did not leave a valid will. There are cases where wills bequeath property to “my child or children”. How should these children be proved? RCR5/2007 provides that an affidavit of next-of-kin must be called for to prove heirs (intestate or testate). What if there is no affidavit of next-of-kin filed at the Master? Can the liquidation and distribution account be accepted as proof?

Resolution No, the liquidation and distribution account is not acceptable. An affidavit of next-of-kin must be lodged - (RCR9/2008).

RCR 9 of 2008: Proof of unnamed testate heirs

Question What is the position if an affidavit of next-of-kin is not filed with the Master and the Master does not want to accept a new next-of-kin affidavit? Can the original next-of-kin affidavit be accepted and will this not be in contravention of regulation 50 of the Deeds Registries Act?

²⁰ In RCR7/1997 Conference resolved that a death notice can be accepted, amongst other things, as proof of intestacy. In RCR28/2006 Conference resolved that a death notice cannot be accepted as proof of intestacy. In RCR5/2007 the latter resolution, 28/2006 was confirmed and RCR29/1996 and RCR7/1997 were withdrawn.

Resolution The original affidavit of next-of-kin cannot be accepted. The Registrar shall only accept a Master's certified copy of the affidavit of next-of-kin to prove the heirs in this instance – (RCR 16/2010).

Proof of heirs

Question What proof must a registrar of deeds insist upon to prove a descendant as defined in section 1 of the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 (i.e. a person not being a descendant of the deceased, but was accepted by the deceased person as his or her own child)?

Resolution An affidavit of next-of-kin, certified as a true copy by the Master, which makes reference to such "descendant" - (RCR44/2009).

Proof of "discarded wife"

Question A "discarded wife" ²¹ is deemed to be a surviving spouse for purposes of intestate succession. However, as such marriage was never registered, what documentation must a registrar of deeds insist upon as proof that such "spouse" can inherit in terms of the **Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009**?

Resolution An affidavit of next-of-kin, certified a true copy by the Master, disclosing such discarded wife - (RCR45/2009).

Power of Attorney granted by Executor - original acceptable for transfer of property

Question Can the registrar of deeds accept an original power of attorney granted by the executor of the estate or must it be a certified copy by the Master of the High Court, the so-called "estate power of attorney"?

Resolution Yes, an original power of attorney is acceptable, as nothing prohibits the executor from appointing someone to do certain things on his/her behalf - (RCR44/2008).

Section 14(1)(b)(iii) - *Usufructuary party to redistribution agreement*

Question Where property is bequeathed to A and B subject to a *usufruct* in favour of C, must the usufructuary also be a party to the redistribution agreement between A and B?

Resolution No, unless the usufructuary also redistributes the *usufruct* - (RCR12/2006).

Redistribution agreements

Question It is established practice that: "*redistribution agreements are nothing less than a contract (see Bydawell v Chapman NO and Others 1953 (3) SA 514 (A)) and thus all the requirements pertaining to contracts must be complied with*". Deeds are rejected to have the agreements redrawn if the identity numbers and marital status of parties to the agreement have not been included on the agreements. Is this practice correct?

Resolution No, the registrar cannot require the redistribution agreements to be redrawn solely due to the omission of the identity number and marital status.

²¹ A discarded wife is a woman who entered into a customary union before 15 November 2000 and thereafter her husband entered into a civil marriage with another wife. The first wife is regarded as not married, in other words her "marriage" is nul and void.

Documentary evidence may be called for if the identity numbers and marital status of the parties to the agreements are not apparent from the agreement – (RCR52/2010).

Question From a legal opinion it is evident that a redistribution agreement need not be entered into by the executor. The agreement is only final once the Master has accepted such agreement. The following questions emanate from the said legal opinion:

- a) Must the agreement contain an acceptance endorsement from the Master or will a certified copy suffice?
- b) Estates administered in terms of section 18(3) are not advertised and therefore the agreement is not lodged with the Master. May the original agreement be accepted as a supporting document by the registrar? In the same vein may an originally signed affidavit of next-of-kin be accepted for estates administered in terms of section 18(3) of Act 66 of 1965?

Resolution a) Only a redistribution agreement containing the acceptance certificate by the Master may be accepted. A certified copy is no acceptable.
b) No. Only certified copies by the Master of the redistribution agreement, duly accepted, and certified copies of affidavits of next-if-kin are acceptable – (RCR68/2010).

Lodgement of proof

Question Property is bequeathed to certain persons with the option to transfer it to a company/close corporation/trust if it is not possible to transfer it to the persons, for example in terms of the provisions of Act 70 of 1970. Is it the responsibility of the deeds registry to call for proof that the persons named in the will as heirs are the members of the close corporation, shareholders of the company or beneficiaries of the trust created?

Resolution No, it is not the responsibility of the deeds registry to call for proof – (RCR 53/2010)

Proof of Muslim marriage

Question The Daniels' decision has been amplified in the decision of *Hassam v Jacobs, N.O. CCT 83/2008*, where it is provided that all spouses in a polygamous Muslim marriage are entitled to inherit in the intestate estate of their deceased spouse. What proof may be accepted to prove such marriage?

Resolution An affidavit from the surviving spouse, together with any other supporting documentation as determined by the registrar of deeds, must be accepted as proof of heirs - (RCR46/2006).²²

Proof of (civil) marriages - former TBVC states

Question Many Deeds of Grant are registered in the name of one spouse only, and with subsequent transfers (e.g. section 18(3) transfer to the surviving spouse), proof of the marriage must be lodged. In the absence of a marriage certificate, what documentation can be accepted as proof of such marriage?

Resolution A sworn affidavit by both parties, alternatively by the surviving spouse to such

²² RCR 46 of 2006, which required a court order as proof for a Muslim marriage has been withdrawn by this resolution. Other proof will for example be a certificate from the Muslim Judicial Council .

marriage may be accepted as proof. Such a sworn affidavit may also be accepted in respect of any deed or document without a preparation clause, as required in terms of section 15 of the Deeds Registries Act - (RCR33/2009, as amended by RCR 23/2010).

Transfer in favour of minor children & maintenance claim on behalf of minor children

Question It sometimes happens that the terms of a will are completely altered by virtue of a maintenance claim which was served on the Master's office, during liquidation of the estate by the guardian, in terms of the Children's Act 38 of 2005. Which documentary proof must be lodged with an estate transfer or section 40 of the Administration of Estates Act endorsement in favour of children, originating from a maintenance claim against the parent's estate? Will the section 42(1) of the Administration of Estates Act conveyancer certificate suffice?

Resolution Yes, the section 42(1) of the Administration of Estates Act will suffice. The causa of the deed / application must set out all the facts - (RCR55/2008).

Paragraph 5.5 Divesting clause

Divesting in deceased estates

Question Must the deceased estate or the executor of such estate be divested in the divesting clause of estate transfers?

Resolution The deceased estate must be divested in terms of regulation 50(2)(c) and not the executor of the deceased estate - (RCR 29/2005).

Paragraph 6.1 Section 45(1) endorsement

Conditions of will

Question Should the application in terms of section 45 be made subject to the conditions of the will, if any, in *extenso* (extensively) or is a mere reference to the condition sufficient?

Resolution No. A brief reference to the conditions of the will is acceptable -(RCR14/2006).

Paragraphs 6.2 & 6.3 Sections 39(2) and 39(3) endorsements

Application of endorsements to section 18(3) estates

Question Does Conference agree that it is not possible to apply for section 39(2) and (3) of the Administration of Estates Act endorsements on a title deed where the estate is administered in terms of section 18(3) of the Administration of Estates Act 66 of 1965?

Resolution It is not permissible. The provisions of sections 39(2) and (3) of Act 66 of 1965 only refer to the executor. However, should the Master give a directive that undue hardship exists, or that there are unascertained heirs in a section 18(3) estate, and requests the registrar of deeds to apply similar provisions as provided for in the above section 39, registrars will give effect to such directive - (RCR51/2009).

Paragraph 6.4 Section 40 endorsement

Rates clearance certificate

Question Must a rates clearance certificate be insisted upon when application is made in terms of section 40 of the Administration of Estates Act?

Resolution No. In terms of the wording of section 118 of the Local Government Municipal Systems Act 32 of 2000 a rates clearance certificate must be insisted upon with the transfer of property. Section 40 does not constitute a transfer of property - (RCR39/2005).

Termination of *mortis causa* trust before endorsement is effected

Question

- 1) Where a *mortis causa* trust has terminated, prior to the endorsement in terms of section 40 being effected, can the land be transferred directly into the names of the beneficiaries, provided the causa of the transfer discloses the full facts?
- 2) Furthermore, may such beneficiaries enter into a redistribution agreement?

Resolution

- 1) Yes.
- 2) Yes. See section 14(1)(b)(i) and RCR3/1954 as confirmed by RCR1/1969 - (RCR47/2008).

Name of *mortis causa* trust

Scenario Johan Marais is the testator and bequeaths property to the Mia Marais Testamentary Trust and Magdel Marais Testamentary Trust. Different properties are bequeathed to the two trusts. Transfer was effected into the names of the two trusts respectively by way of formal transfers, and not by means of section 40 of the Administration of Estates Act endorsement. The Master registered the trust as the Johan Marais Testamentary Trust (for the benefit of Mia and Magdel) and not as Mia Marais Testamentary Trust or the Magdel Marais Testamentary Trust.

Question

- 1) In the event of the testator naming the testamentary trust (i.e. Mia Marais Testamentary Trust or the Magdel Marais Testamentary Trust), can the Master register a testamentary trust under a different name (i.e Johan Marais Testamentary Trust)?
- 2) How must transfer be effected? Is section 40 of the Administration of Estates Act preremptory or can a formal transfer take place?
- 3) If the Master has issued letters of authority in favour of the Johan Marais Trust can transfer of all the property take place to this trust?
- 4) Is a section 4(1)(b) amendment allowed to reflect the correct position?

Resolution

- 1) Yes it can be registered. See CRC11/1995
- 2) Section 40 is preremptory.
- 3) No. The Master will differentiate between the two beneficiaries.
- 4) A section 4(1)(b) amendment is allowed to reflect the correct position - (RCR54/2008).

Title deed erroneously endorsed in terms of section 40 of Act 66 of 1965

Question Property was bequeathed in a will to an existing trust. The title deeds was erroneously endorsed in terms of section 40 of the Administration of Estates Act instead of the registration of a formal transfer to the trust.²³ How can this be rectified?

Resolution The executor²⁴ in the estate must do a formal transfer, setting out the full details of the erroneous endorsement in terms of section 40, in the causa of the deed of transfer - (RCR52/2009).

Paragraph 7.7 Restriction on minor's interests - section 80

Waiver of preference of usufruct

Question Must the provisions of section 80 of the Administration of Estates Act be complied with where a minor waives his/her preference of a usufruct in favour of the bond?

Resolution Yes, this is tantamount to alienation of immovable property and the provisions of section 80 must be complied with - (RCR51/2006).

Entering into a redistribution agreement by a minor

Question According to a discussion with the Chief Master, the provisions of section 80 of the Administration of Estates Act are not applicable to redistribution agreements (*entered into by a minor where immovable property belonging to such minor forms the subject of the distribution*).²⁵ Should RCR 48 of 2008 and 11 of 2009 no be withdrawn?

Resolution Section 80 of the Administration of Estates Act 66 of 1965 does not find application. RCR 48/2008 and 11/2009 are hereby withdrawn - (RCR30/2010).

Master Notices

Question Where there is a Master's Notice (interdict) noted that a minor has an interest in property and such property is being transferred to any person other than the minor, how must the Master's Notice be dealt with?

Resolution If there is a section 42(2) certificate or consent by the Master, the deeds registry will purge the Master's Notice with the understanding that the Master has taken notice of the interest of the minor – (RCR50/2011).

Comment When a minor is an heir the master will give notice of this fact to the deeds registry in order to ensure protection of the minor's interests. However, in some deeds offices, these notices are not received from the Master any more.

Paragraph 8 Miscellaneous

Section 18(3) of the Administration of Estates Act

Question Can a representative appointed in terms of section 18(3) donate the property?

Resolution No. There is no sanction for a representative to donate property in terms of the

²³ Section 40 is only applicable in respect of a mortis causa trust and not an inter vivos trust as was the case here.
²⁴ As section 40 is not a registration endorsement, the executor must transfer the property.

²⁵ The part in italics has been inserted by writer hereof to make the question more clearly, in light of the previous question that was asked, the resolution to which question has been withdrawn.

Administration of Estates Act No. 66 of 1965 - (RCR38/2005).

Question When a representative sells immovable property from the estate he is administering for a purchase price in excess of R125 000,00, does the onus rest on the registrar of deeds to request authorization from the Master to sanction such sale?

Resolution Yes. The deeds registry should not allow transfer of immovable property in terms of section 18(3) estates without the written approval of the Master - as per instruction from the Master's office - (RCR2/2003 and RCR3/2003 are withdrawn by RCR46/2008).

Proof of Adiation / Repudiation

Question Who has the capacity to adiate or repudiate the terms of a joint will, should the surviving spouse die before exercising such option?

Resolution The power to adiate or repudiate vests in the heirs and not the executor - Eyszel and Another v Barnes NO and Others (unreported case 3617/1992 (High Court NPD)) - (RCR29/2008).

Section 14 - assets in joint estate

Question Where property forms an asset in a joint estate and both spouses die successively, i.e. one year apart, may the executors in both spouses' estates sell the property, or must section 14 be complied with?

Resolution Section 14 is applicable. The estate of the first dying spouse must be dealt with first. Thereafter the executor in the estate of the last dying spouse can transfer the property - (RCR12/2009). This resolution has been amended, see the resolution right below, RCR 21/2010.

RCR 12/2009: Section 14 of the Deeds Registries Act

Question RCR 12 of 2009 must be withdrawn or the resolution amended to provide that section 14 of Act 47 of 1937 must only be complied with in the case of testate or intestate **succession**²⁶

Resolution RCR 12 of 2009 is hereby amended to read as follows:
"Where property forms an asset in a joint estate and both spouses die successively, i.e. one year apart, may the executors in both spouses' estates sell the property, or must section 14 be complied with?"

Resolution Yes, the executors in both spouses' estates may jointly sell the property. A sale by both executors is not a contravention of section 14 – (RCR21/2010)

Revocation of inheritance by executor

Question Has an executor the capacity/authority to revoke an inheritance belonging to an heir?

Resolution No – (RCR59/2010).

²⁶ In other words, not where a transfer due to a sale is involved, but only due to an inheritance.

Interpretation of the Provisions of a Will

Question In the administration of estates, the interpretation of the law of succession and wills are the function of the executor, Master or the Court. Can the deeds registry question such interpretation when the liquidation and distribution account has lain for inspection without objection?

Resolution Yes, see RCR 4 of 2010²⁷ which applies *mutatis mutandis* to intestate succession – (RCR51/2011).

Chapter 8 - Partition transfers

Paragraph 3 The power of attorney to pass partition transfers

Creation of servitude in power of attorney

Scenario A & B are the joint owners of two separate pieces of land Erf 1 and Erf 2. A & B decide to partition the land and in terms of the partition agreement A is awarded Erf 1 and B Erf 2. In order to equalize the partition A grants a personal servitude (usufruct) over his defined property to B.

Question How must this servitude be created? Can it be created in the partition transfer or must it be created notarially?

Resolution It can be created in the power of attorney for the partition - (section 26(2)(d)) - RCR9/2006 and RCR37/2005).

Partitioning of land registered in the name of the deceased - regulation 52(1) of Act 47 of 1937

Question If in a partition of land the undivided shares in such land are registered in the name of a deceased person, or in his or her estate, or in the surviving spouse, the registrar of deeds shall, if such share has been bequeathed, require not only the consent from the Master in terms of section 53 of the Administration of Estates Act **1913**, on behalf of heirs or legatees whom may be minors, but also proof to his/her satisfaction by documentary evidence that the partition was agreed upon during the lifetime of the testator.

Will the consent by the Master be required if a deceased died after 1 October 1967? Even with documentary evidence that the partition was agreed upon during the lifetime of the testator? The Administration of Estates Act does not require the Master's consent. Only if the deceased died prior to 1 October 1967, the Master's consent in terms of section 53 of the repealed Administration of Estates Act of 1913 will be required.

Resolution The consent of the Master is required (see *Prinsloo v Swart en Andere 1965 (3) 686 at 689 (OPA)*) - (RCR30/2009).

²⁷ RCR4/2010: RCR 35 of 1955 must be withdrawn since the resolution was adopted prior to the promulgation of the Administration of Estates Act 66 of 1965.

Resolution: No, RCR 35 of 1955 is confirmed. It is the duty of the Registrar to ensure that the transaction being registered is in accordance with the provisions of the will.

Chapter 9 - Certificates of registered title

Paragraph 1 Section 34 CRT for a joint owner's undivided share

Section 34 (1A): Joint Estates

Question Will it be a contravention of section 34(1A) of Act 47 of 1937 if parties married in community of property to each other apply for a certificate of registered title for a fractional share of the property they own?

Resolution No, it is not a contravention where they together obtain a fractional share of the undivided share in the property – (RCR 25/2011).

Paragraph 5 Section 38 CRT to replace lost deed

Section 38(3)

Question In terms of section 38(3), a draft of the proposed certificate should lie open for inspection. What if the certificate is lodged and rejected because of incorrect conditions, etc? Should it be made available for inspection again? If not, what is the use of making a draft available for inspection in the first place?

Resolution The certificate must be lodged for examination only after it was made available for inspection and after the expiry of the six week period. Re-advertisement in the case of incorrect conditions which could affect the rights of third parties is within the discretion of the registrar of deeds - (RCR13/2006).

Section 38: Upgrading of title reference in bonds

Question The title reference of the title deed in the property description of bonds must be updated upon issuing of a title in terms of section 38 of the Deeds Registries Act. Should all bonds not be lodged for endorsing to update the title reference in the bonds?

Resolution Yes, bonds registered over the property must be lodged when a title is issued in terms of section 38 – (RCR33/2010).

Section 38 and regulation 68 of the Deeds Registries Act: Missing pages:

Question Section 38 does not deal with missing pages and regulation 68 deals with lost or destroyed titles. How does one deal with an incomplete title or bond. Examples:

- a) A page in the title deed of the client's copy and the deeds registry copy is missing.
- b) The annexure of a sectional bond in the client's copy and the deeds registry copy does not contain all pages.

Resolution

- a) Section 38 of the Deeds Registries Act must be applied.
- b) In respect of bonds, the provisions of regulation 68(11A) must be complied with and a substituted bond registered. Alternatively, the matter must be referred to court – (RCR34/2010).

Paragraph 8 Certificate of consolidation - section 40

Servitude omitted on consolidation diagram

Question If a servitude has been indicated on the subdivisional diagram of a portion, and such portion is thereafter consolidated with the omission of that servitude from the consolidation diagram, must the consolidation diagram be referred back to the surveyor general for amendment?

Resolution Yes. The consolidation diagram must be referred to the SG for amendment - (RCR37/2006).

Section 40(1)(d) - Two farms and a settlement being consolidated to form a farm

Question In terms of Section 40(1)(d) property may be consolidated if registered in the same property register. Is a consolidation registrable where one property is a farm and the other a settlement or agricultural holding and the SG diagrams are approved by the Surveyor General?

Resolution Yes, provided the conversion of the different components into the same property register has been effected - (RCR18/2005).

Tie-conditions

Question Where two pieces of land are consolidated and the components are subject to a tie-condition, how should such condition be dealt with? Does lapsing through merger occur or must section 68(1) be applied?

Resolution Section 68 is not applicable. The condition must be perpetuated in the certificate of consolidated title and the registrar must endorse the certificate of consolidated title as to the lapsing of the tie-condition.

However, the holder of the right must consent to the issuing of the certificate of consolidated title - (RCR21/2008).

Section 40: Consolidation of properties situated in different local authorities

Question May two contiguous pieces of land, which complies with all the requirements of section 40, be consolidated if they are situated in different local authorities?

Resolution Yes, it can be done as it is not a contravention of section 40 of Act No. 47 of 1937 – (RCR26/2011).

Section 20 of the Land Survey Act No. 8 of 1997

Question The extent of properties often differs when consolidations and sub-divisions are registered, for instance where a consolidated property is subdivided the combined extent of the sub-divisions differ slightly from the extent in the title. For many years it was accepted practice that where the differences are minor the deeds registry does not reject the deeds, as the surveyor general acknowledged that there is a certain percentage tolerance allowed because of the fact that on re-survey it can be explained. Can Conference provide guidance in this regard?

Resolution The extent given on diagram is the responsibility of the Surveyor General and not that of the registrar of deeds – (RCR48/2011).

Comment In other words the deeds office will not query the extent of the properties under

these circumstances.

Paragraph 9 CRT for a portion of land - section 43

Rates Clearance Certificate for remainder of land

Scenario Where a portion of land is already registered as an entity, the rates clearance certificate for the remainder of the land is lodged. When the rates clearance certificate for that specific portion is requested, the conveyancers avers that the municipality's records are not updated and that such portion does not appear on their records, and they then issue a clearance certificate in respect of the remainder. The conveyancers furthermore avers that the municipalities are not willing to provide a certificate to the effect that such registered portion does not appear on their records.

Question Can the rates clearance certificate of the remainder be accepted in such cases, with a certificate from the conveyancer to the effect that such portion does not appear on the records of the municipality and that the rates clearance certificate lodged, covers such portion?

Resolution A rates clearance certificate for the remaining extent accompanied by an explanatory letter from the local authority to the effect that such rates clearance certificate covers the land about to be transferred, may be accepted - (RCR36/2006).

Prohibition against subdivision

Question Where land is subdivided but no additional land parcel is created, is the condition of title that prevents a subdivision applicable in this instance, where the subdivided portion will be consolidated simultaneously?

Resolution Registrar of deeds will not permit this subdivision as it is not legally provided for. The title conditions preventing subdivision, without the option of consent, must first be removed prior to subdivision - (RCR 43/2009).

Leaseholds

Question Section 56(3) of the Black Communities Development Act 4 of 1984 provides that a township developer may grant a right of leasehold without first obtaining a certificate of registered title in respect of the premises concerned. Analogous to this, may the township developer issue a leasehold in respect of a portion of an erf appearing on a general plan, without firstly obtaining a certificate of registered title for the parent property?

Resolution No. A certificate of title must firstly be obtained – (RCR84/2010).

Chapter 10 - Township establishment

Paragraph 3 Township on a portion of a piece of land

Section 46(4) and Section 43 Certificate of Township Title

Question Is the taking out of a certificate of township title in terms of section 46(4) compulsory or is a certificate of registered title in terms of Section 43 also permissible if the land on which the township is to be laid out comprises a portion

of an existing unit of land?

Resolution Both are acceptable - (RCR16/2006).

Paragraph 4 Township laid out on two or more pieces of land

Question May three different owners, who own three different properties separately, open one township on all three properties (e.g. one general plan approved and depicting that the township is laid out on all the properties)?

Resolution This is not allowed. The provisions of section 22 of the Deeds Registries Act²⁸ cannot be applied where the remainder of the township is to be transferred. The owners also do not have *locus standi* in respect of the property not owned by them to open such a township - (RCR 34/2009).

RCR 34 of 2009: One township on more than one property

Question May a township be opened on more than one property owned by different owners, in instances where the township application was approved prior to the coming into operation of RCR 34 of 2009, which resolution prohibits such opening?

Resolution No, RCR 34 of 2009 finds application – (RCR 14/2011).

Paragraph 8 Transfer of a whole township or of a portion thereof

Transfer of the remainder of a township

Question May a formal transfer for the remainder of property in a township be permitted where only streets remain in such township?

Resolution No, a formal transfer cannot be utilized. Section 31 of the Deeds Registries Act must be invoked - (RCR35/2009).²⁹

Paragraph 9 Miscellaneous

Eskom servitudes - ancillary rights

Question In respect of the transfer of erven from a township title, it often occurs that, due to the situation of the erf, such erf cannot by virtue of its situation be subject to the ancillary rights of the Eskom-servitudes. Is it still necessary to bring such conditions forward into the new deed?

Resolution Yes, unless the holder of the servitude provides documentary evidence that the ancillary rights are abandoned on the land concerned - (RCR47/2006).

Section 82 of the Townships and Town-planning Ordinance 15 of 1986 (TVL)

Question In terms of section 82 of Ordinance 15 of 1986, the registrar shall not register a deed of transfer of an erf in a township until such time as the local authority within whose area of jurisdiction the township is situated, has certified that it will, within a period of 3 months from the date of the certificate, be able to provide the

²⁸ According to section 22(1), two or more persons each owning a different piece of land may not transfer those pieces of land to one or more persons by the same deed of transfer unless such transfer is authorized by the provision of a law or by an order of court.

²⁹ Unless those street have an erf number or a street closure is done.

erf with such services as it may deem necessary and that it is prepared to consider an application for the approval of a building plan in respect of the erf. The question is whether the aforesaid section must be complied with if the developer transfers a unit in a scheme opened on an erf in a township of which a section 82 certificate has not yet been provided?

Resolution Yes, section 82 must be complied with upon the opening of the sectional title scheme and the transfer of units in such scheme. However, where a certificate of registered title is issued, a caveat must be noted against the property concerned to the effect that on the transfer of the erf or the unit/s in the scheme by the developer, the provisions of section 82 must be complied with – (RCR70/2010).

Chapter 11 - Endorsements

Paragraph 1 Section 3(1)(v) endorsement

Question Where an owner of immovable property undergoes a sex change and changes his/her names subsequent thereto and a new identity number is afforded such owner, how must the new identity number be recorded against the title deeds of the immovable property concerned?

Resolution The provisions of section 3(1)(v) must be invoked and documentary evidence as to the new identity must be lodged together with the application - (RCR16/2005).

Question Spouses are married out of community of property. They mass their estates and provide that on the death of the first dying the land must devolve on the surviving spouse subject to a *fideicommissum* in favour of the children. What act of registration must be effected where the land is registered in the name of the surviving spouse?

Resolution An endorsement in terms of section 3(1)(v) of the Deeds Registries Act must be made - (RCR31/2008).

Transfer to Departments of Government

Question If a deed of transfer was registered and the property was vested in the name of a Department of Government, for example Department of Land Affairs, how must the vesting be changed to reflect the owner as being the National Government of the Republic of South Africa?³⁰

Resolution An application in terms of section 3(1)(v) of the Deeds Registries Act, to reflect either the National or Provincial Government of the Republic of South Africa as owner of the property, must be made by an authorized official of the relevant Government Department – (RCR56/2010).

Paragraph 2 Section 4(1)(b) endorsement

Amendment of conditions: schedule for lengthy conditions

Question RCR 19 of 2007 recommends a schedule in case of lengthy conditions of title when it is impractical to endorse the title deed in terms of section 4(1)(b) of the

³⁰ After the coming into operation of the Constitution of the Republic of South Africa, property may only be vested in the National or Provincial Government.

Deeds Registries Act. Is it correct to charge the office fees on the schedule of conditions simply because it is contained in a separate cover and that cover is given a code S...../.....K?

Resolution No, the Schedule of Fees does not provide for a separate fee in this regard. The schedule of the conditions must be lodged with the application in one cover and only one fee charged – (RCR 15/2010).

Amendment of cancelled bonds

Question Must a section 4(1)(b) amendment be done to rectify an error in a bond, for example an incorrect erf number, spelling error in the name of the mortgagor other than the amendment to the particulars of the bondholder (mortgagee) when such mortgage bond is cancelled?

Resolution No, only incorrect particulars pertaining to the mortgagee must be rectified - (RCR11/2006).

Amendment to mortgage bond to be cancelled

Question Where it is endeavoured to cancel a mortgage bond but on closer perusal it is determined that the bond is passed by the mortgagor in favour of the mortgagor. Can such cancellation be effected by the correct mortgagee where a section 4(1)(b) amendment is brought by such correct mortgagee?

Resolution Proof as to the correct situation must be called for in terms of section 4(1)(a) of the Deeds Registries Act. The bond must then be amended with a section 4(1)(b) application, made by the correct mortgagee, whereafter such bond must be cancelled. The consent of all interested parties must be insisted upon - (RCR30/2008).

Registrar has a discretion

Question A caveat is noted against the name of A to the effect that his/her name is differently spelt in deeds registered in the deeds registry. However, A has passed away and the executor in his/her estate now wants to pass transfer of some of the properties registered in A's name. Must a section 4(1)(b) application to rectify the said mistake be brought prior to registration of the transfer?

Resolution The registrar of deeds has a discretion to admit transfer without rectification of the mistake - (RCR17/2005 and RCR6.23/1999).

Multiple errors rectified by one application

Question Should the words "the error" in section 4(1)(b) of the Deeds Registries Act be interpreted that only one error per application can be amended or is it permissible to amend multiple errors with one application. What if different errors occur in different titles?

Resolution Multiple errors may be amended in one application even though there are different errors in different titles - (RCR18/2008).

RCR 10 of 2009: Section 4(1)(b)

Question RCR 10 of 2009³¹ is still not being applied uniformly in deeds registries. Either

³¹ **Question** In terms of RCR 19 of 2008, a conveyancer may apply to have a title amended in terms of section 4(1)(b) of the Deeds Registries Act. Should the resolution not be amended to read that "a conveyancer duly

the practice must be spelt out or the matter must be resolved in the form of a Chief Registrar's Circular.

Resolution A conveyancer, not under oath, duly authorized by a power of attorney, mandating him/her to do anything that the owner might do, can bring an application in terms of section 4(1)(b), provided the error is not in connection with the personal particulars of the owner. In the latter instance, the owner must bring the application, under oath, or the conveyancer may bring the application if he/she is duly authorized thereto. Documentary evidence must be provided as to the correct state of affairs. In the case of forced sales, the executor / sheriff / trustee may bring the application, not under oath, and provide documentary evidence as to the correct state of affairs – (RCR 20/2010).

Question Is it necessary to call for the bondholder's consent where an amendment to the title deed are not going to have a negative effect on the bondholder's security? How does conference interpret the words "interested parties" in section 4(1)(b)?

Resolution Yes, a bondholder's consent is required in terms of section 4(1)(b) of the Deeds Registries Act. A bondholder will always have an interest in the rectification of the title deed – (RCR 32/2010).

Omission of component property in Certificate of Consolidated Title

Question A certificate of consolidated title of three properties, A, B and C is registered in 2006, under T1/2006 and the new property is called D. In 2009, it is realized from the diagram attached to T1/2006 that property B has not been included in the certificate of consolidated title together with its distinct conditions. How must the situation be rectified?

Resolution The situation can be amended with a section 4(1)(b) application - (RCR31/2009).

Conditions in title deeds of former TBVC states

Question Township conditions were omitted from certain title deeds of the former TBVC states when Deeds of Grant were registered. Such conditions need to be brought forward into the new deed of transfer upon subsequent registration. Does section 4(1)(b) of the Deeds Registries Act find application? If yes, who must make such an application?

Resolution Yes, section 4(1)(b) of Act 47 of 1937 finds application. The conveyancer may apply with the consent of the owner and all interested parties - (RCR 32/2009).

Paragraph 4 Section 17(4) endorsement

Section 3(1)(v) endorsement - property registered only in name of the husband before 1984

Scenario A property is registered only in name of the husband before 1984. (See section 17(4)(c)).

authorised thereto by the owner of the land may apply in terms of section 4(1)(b)?

Resolution No. Section 4(1)(b) does not require an application by the owner of the land. The owner can apply with the consent of other interested parties. Alternatively the conveyancer can apply with the consent of the owner and all other interested parties. RCR 19 of 2008 is hereby withdrawn - (RCR10/2009).

NOTE THAT RCR10/2009 HAS BEEN REPEALED BY RCR1/2011.

Question Is it necessary to automatically endorse the title deed in terms of section 3(1)(v) with regard to the vesting of the property in the name of the husband and wife married in community of property to each other?

Resolution No, it is not necessary to automatically endorse the title deed. Section 17(4) may be invoked - (RCR13/2007).

Paragraphs 8, 9, 10 & 11 - Section 45 and 45bis endorsements

Sections 45 and 45bis endorsements

Question Can section 45 and 45bis applications be applied where spouses got married in community of property subsequent to the death or divorce of a spouse or must a formal deed of transfer take place?

Resolution Yes, section 45 and 45bis may be invoked - (RCR14/2007).

Comment (*This means that the share must be transferred either by way of a section 45 or 45bis endorsement or a deed of transfer. But either the one or the other must be done*).

Registration fee and section 45

Question A transfer duty receipt usually refers to the value of the whole property and not to the value of the half share being acquired (where applicable). Is the registration fee payable on the whole property as indicated on the transfer duty receipt or only on the half share being transferred?

Resolution A registration fee is payable on the value of the half share of the property – (RCR58/2010).

Section 45bis and section 45bis(1A)

Question Section 45bis and section 45bis(1A) deal with applications and contracts in terms of sections 20 and 21 (1) of the Matrimonial Property Act 88 of 1984. What about the situation where parties agree to marry out of community of property and the antenuptial contract was never executed prior to their marriage. The court authorizes a contract to be entered into in terms of section 88 of the Deeds Registries Act.³² Before registration of the notarial contract in terms of section 88, the parties have property registered in their names describing them as married in community of property. Can section 45bis and 45bis(1A) be applied or will a factual endorsement in terms of section 3(1)(v) of the Deeds Act suffice?

Resolution Section 45bis(1)(b) and section 45bis(1A) must be applied – (RCR35/2010).

Paragraph 9 - Section 45bis(1)(a) endorsement

An exemption certificate must be lodged

Question Is it necessary to always lodge an exemption certificate from SARS in instances

³² According to section 88 of the Deeds Registries Act, a court may, subject to such conditions as it may deem desirable, authorise postnuptial execution of a notarial contract having the effect of an antenuptial contract, if the terms thereof were agreed upon between the intended spouses before the marriage.

such as the recent amendments to the Transfer Duty Act exempting duty to be paid on transfers due to divorce?

Resolution Yes. A transfer duty exemption certificate from SARS must be lodged - (RCR43/2006).

Copies of foreign divorce orders

Question Who may certify a copy of a foreign divorce order, where property situated in South Africa is dealt with? Must the foreign divorce order be accepted in a South African Court?

Resolution a) A foreign order does not have to be accepted by the High Court of South Africa.
b) The foreign court order may be certified as a true copy of the original, by a conveyancer or notary – (RCR64/2010).

Paragraph 11 - Section 45bis(1A)(b) endorsement

Incomplete court order

Question Where parties change their matrimonial property regime in terms of section 21 of the Matrimonial Property Act 88 of 1984 from in community of property to out of community of property, but the order of court ordering the registration does not address any immovable property registered in the name of the joint estate, how must such property be dealt with? Should the provisions of section 45bis(1A)(b) be applied or must a variation of the court order be requested?

Resolution Section 45bis(1A)(b) must be applied, however, should the parties disagree, the matter must be referred back to court - (RCR30/2007).

Marital status - registration of a postnuptial contract

Scenario Immovable property is purchased and registered in the name of an owner described as married out of community of property. Subsequent to the registration, it is discovered that no antenuptial contract was registered. The spouses now apply for the registration of a postnuptial contract. The contract is silent as to the immovable property.

Question How must the registrar of deeds rectify the matter before the property can be dealt with?

Resolution The title will firstly have to be rectified in terms of section 4(1)(b), where after an application must be brought in terms of section 45bis(1A)(b) - (RCR32/2005).

Section 45bis(1A): Rates Clearance Certificate

Question Is a rates clearance certificate required for an application in terms of section 45bis(1A)?

Resolution No, a rates clearance certificate is not required – (RCR36/2010 as confirmed by RCR28/2011).

Paragraph 12 Section 58 endorsement

Application of section 58 to insolvent usufructuary

Question Must the provisions of Section 58 also be applied to a usufructuary in case of insolvency?

Resolution Yes, section 58 is applicable - (RCR18/2006).

Section 92: Transfer by endorsement

Question Is it peremptory for the lodgement of a rates clearance certificate for the following acts of registration?

- a) Transfer by endorsement in terms of section 24 *bis* (2);
- b) Transfer by endorsement in terms of section 25(3);
- c) Transfer by endorsement in terms of section 45(1);
- d) Transfer by endorsement in terms of section 45 *bis* 1(a)/(b);
- e) Transfer by endorsement in terms of section 45 *bis* (1A)(a)/(b); and
- f) Transfer by endorsement in terms of section 58(2).

Resolution

- a) No;
- b) No;
- c) Yes (also see RCR 5 of 2002);
- d) Yes;
- e) No (also see RCR 36 of 2010);
- f) No.

(28/2011).

Paragraph 13 Section 68(1) endorsement

Application of section 68(1)

Question Where a personal servitude has lapsed and the land encumbered thereby is transferred, is it peremptory to request an application in terms of section 68(1), or will the documentary proof lodged as a supporting document suffice?

Resolution Section 68(1) must be complied with in all instances where a personal servitude lapses for any reason - (RCR15/2007).

Question Uncertainty prevails as to what practice should be followed when cancelling reversionary and pre-emptive rights. Is an underhand waiver acceptable or should the provisions of section 68(1) of the Deeds Registries Act be applied.?

Resolution Registrar's Conference Resolution 15/2007 is confirmed - (RCR16/2008).³³

Lapse of usufruct over 100 years old - no death certificate available

Question Is it really necessary to obtain an order of court where no death certificate or death notice is available to prove the death of the *usufructuary* who would have been more than a hundred years old? A sworn affidavit by her surviving children re her death is available.

Resolution Yes, a court order must be obtained where no death certificate or death notice is available to prove the death of the usufructuary - (RCR32/2006).³⁴

Section 68(1) - Property sold in execution

Scenario A *usufructuary* died and a bond was passed subject to the *usufruct*. The property

³³ In other words, an application in terms of section 68(1) should be brought for an endorsement. An underhand waiver does not suffice.

³⁴ The resolution is very obscure and the question badly formulated. I have edited both the question and resolution to make sense and to comply with the Deeds Practice Manuals on page 3-28.

is sold in execution. The *usufructuary* waived preference in favour of the bondholder.

Question Who must apply for the cancellation of the *usufruct* in the abovementioned case? The registered owner refuses to sign any documents.

Resolution Section 68 need not to be applied. The sheriff acts as statutory agent on behalf of the court - (RCR16/2007).

Comment *This means that no application is needed, neither by the sheriff nor by the owner of the land.*

Lapsing of reversionary rights

Question What is the correct position in instances where a title deed contains a condition (reversionary right) that binds successors in title, that a dwelling must be erected within a specific period of time?

- a) Must the condition automatically be left out from further title deeds upon transfer of the property, in instances where a dwelling has indeed been erected?
- b) Must the condition automatically be left out upon transfer of the property in instances where the period of time has expired?
- c) What is the position where the period of time has expired and the dwelling has not been erected?

Resolution

- a) The provisions of section 68(1) of the Deeds Registries Act must be complied with. Consent must be lodged to indicate that the building has been erected.
- b) No, section 68(1) of the Deeds Registries Act finds application. The holder must exercise or waive his/her right.
- c) Section 68 applies, provided that the imposer of the condition waives such condition – (RCR49/2010).

RCR 49 of 2010: Reversionary rights

Question RCR 49 of 2010 does not deal with the position where the period of time has not expired, and the dwelling has not been erected. How must the condition be dealt with?

Resolution The condition must be perpetuated in the new deed – (RCR 17/2011).³⁵

Cancellation of conditions imposed in terms of sections 10A and 10B of Act 107 of 1997

Question Section 10B(6)(b) of Act 107 of 1997 provides a procedure for the cancellation of conditions imposed in terms of sections 10A and 10B of the Housing Act 107 of 1997. What procedures must be followed for the cancellation of conditions and should a transfer duty receipt/exemption certificate be called for?

Resolution

- a) Section 68(1) must be followed. Transfer duty receipts or exemption certificates are not required for the cancellation of these conditions.
- b) Conditions imposed in terms of section 10A and 10B of the Housing Act

³⁵

This resolution only applies if the reversionary right was imposed on the transferee **and his/her successor in title**. If it was only imposed on the transferee, the right will have to be cancelled and if it has to be perpetuated, it must be re-imposed in terms of the last proviso to section 65(1) of the Deeds Registries Act.

107 of 1997 must be cancelled by section 10B(6)(b) of Act 107 of 1997 by way of an endorsement as provided for in the Act – (RCR72/2010).

Transfer duty receipt with cancellation of personal or praedial servitude

Question Where a personal or praedial servitude is cancelled, either in terms of section 68(1), section 68(2) or section 75(3) of the Deeds Registries Act, must the registrar of deeds insist on a transfer duty receipt or an exemption certificate?

Resolution Where a personal or praedial servitude is cancelled, either in terms of sections 68(1), 68(2), 75(2)*bis* or section 76(1)(*bis*) of the Deeds Registries Act, the registrar of deeds must insist on a transfer duty receipt or an exemption certificate, unless the servitude has served its time, for example, the death of a usufructuary or effluxion of time, etc. - (RCR5/2005).

Pre-emptive Right in favour of a Deregistered Company

Question How must a pre-emptive right in favour of a deregistered company be cancelled?

Resolution A pre-emptive right can be cancelled in terms of section 68(1) of Act No.47 of 1937, only upon receipt of proof that such company has been finally de-registered – (RCR 37/2011).

Paragraph 15 Section 93(1) endorsement

Question In terms of Registrar’s Conference Resolution 6.5/1999 a copy of the government gazette must be lodged as proof for an application for a change of name in terms of section 93 of the Deeds Registries Act. Is this resolution still applicable?

Resolution Yes, Registrar’s Conference Resolution 6.5/1999 is confirmed - RCR5/2008).

Chapter 12 - Lost deeds

Paragraph 2.1 Regulation 68(1)

General power of attorney mandating agent is unacceptable

Statement An authorized person (agent) cannot make an oath on behalf of his/her principal (in terms of RCR 6.12 of 1999).

Question What is the position with an affidavit in terms of regulation 68(11), where the agent (conveyancer) acts in terms of a general power of attorney on behalf of the Mortgagee (the Bank)?

Resolution RCR 6.12 of 1999 must also be applied to applications and affidavits in terms of regulation 68(11). A general power of attorney mandating an agent to make an affidavit on behalf of his/her principal is *contra bonis mores* and should not be allowed - (RCR7/2007).

Certified copy (“VA copy”) already issued

Question Where application and affidavit is made for the issue of a certified copy of a title

deed, bond, etcetera, for which a certified copy (“VA copy”) has already been issued, must the application be made in terms of regulation 68(7) or regulation 68(1)?

Resolution The application must be made in terms of regulation 68(1) and not 68(7). However, the full facts must be disclosed - (RCR20/2007).

Unknown circumstances

Question Regulation 68(1) provides that the circumstances must be mentioned in the application. What if the circumstances are not known? Can it be omitted from the application or must it be stated that the circumstances are unknown?

Resolution Reference to the fact that the circumstances are not known, need not be disclosed in the application - (RCR21/2006).

Question Registrar’s Conference Resolution 21/2006 provides that reference to the fact that the circumstances under which the deeds were lost are not known, need not be disclosed in the application. Regulation 68(1) stipulates that the circumstances must be mentioned where possible. If the fact that the circumstances are unknown are not mentioned in the application, it may be interpreted that the applicant ignored the fact that the circumstances must be mentioned. How will the examiner know whether the circumstances are unknown or whether the circumstances are known, but not mentioned? This will result in the examiner raising a note to include the circumstances when nothing in this regard is mentioned.

Resolution Reference to the fact that the circumstances are not known, need not be disclosed in the application. RCR21/2006 is confirmed - (RCR13/2008).

Application brought by a spouse married in community of property

Question Can only one spouse married in community of property apply for a certified copy of a deed?

Resolution Yes, either spouse can apply. However, the registrar of deeds has a discretion to call for the consent of the “non-applicant” (see regulation 68(2) - (RCR26/2005).

Who must apply if director of company has died?

Question Who has the capacity to apply for a certified copy of a title deed registered in the name of a company, where the sole director of such company has died?

Resolution The executor may apply. It is the responsibility of the conveyancer to determine whether the executor has been entered into the register of members of the company (see Corporate Law by Cilliers, Benadie, Botha, Oosthuizen and Delarey, 1987 edition, chapter 11, page 131) - (RCR32/2008).

Lost notarial deed

Question If an original notarial deed of servitude is lost and the deeds office copy is also lost but the protocol copy is still in possession of the notary, may a deeds registry copy be generated from the protocol copy?

Resolution A substituted notarial deed cancelling the existing servitude and replacing the lost notarial deed must be registered - (RCR38/2008).

RCR 38 of 2008: Lost notarial deed

Question The resolution only deals with notarial deeds of servitude and not other notarial deeds filed in the notary's protocol, (e.g. notarial bonds, leases and antenuptial contracts). How must the aforesaid be dealt with if the deeds office copy is lost or destroyed?

Resolution RCR 38 of 2008 is confirmed. With regard to a lost notarial bond, the bond must be dealt with in terms of regulation 68(11A)³⁶ of the Deeds Registries Act. As far as antenuptial contracts and leases are concerned, a court order must be obtained – (RCR18/2010).³⁷

Reference to bondholder in application

Question Does Conference agree that it is not necessary to refer to the particulars of the bond(s) registered over the property in the application (affidavit) applying for a certified copy in terms of regulation 68(1) of the Deeds Registries Act?

Resolution Yes, it is not necessary to refer to the particulars of the bond(s) in the application for the issuing of a certified copy of a title deed. However the provisions of regulations 68(1) and (2) must be complied with in so far that the affidavit must state that the title has not been pledged or held as security and the bondholder must consent³⁸ - (RCR 17/2009).

Paragraph 2.2 Application for copy where land is mortgaged – (regulation 68(2))**Regulation 68(2): Bondholder's consent on letterheads**

Question It is practice in certain deeds registries to insist that when application is made for a certified copy of a title deed, which is mortgaged, that the bondholder's consent, as required in terms of regulation 68(2), be provided on the letterhead of the financial institution concerned. This practice causes undue hardship and no authority for the insistence thereof exists. Should the practice be perpetuated?

Resolution No, the practice should be stopped – (RCR41/2010).

Paragraph 2.4 Regulation 68(11)**Lost pages of lost bond**

Scenario Where a bond is lodged for cancellation in terms of regulation 68(11) and it is discovered on examination that the pages of the office copy, *inter alia* the property description page, has not been scanned/ micro-filmed, what procedure must be followed to cancel such a bond?

Resolution An order of court must be sought unless one can ascertain that the bond is applicable to the application made - (RCR21/2007).

Client's copy and deeds office copy of bond to be cancelled is lost

Question The procedure for the cancellation of a bond where the client's copy and the

³⁶ In other words the lost bond must be cancelled according to the procedure of regulation 68(11A) and a substitutive bond must be registered.

³⁷ The reason why the protocol copy of the notary cannot be used, is that it is not updated with any further transactions in the deeds registry.

³⁸ The bondholder must not only consent to the issue of a certified copy, but must also state that he is not in possession of the lost deed.

deeds registry copy of a bond is lost must be reconsidered. RCR 15 of 2002 must be withdrawn.

Resolution RCR 15 of 2002³⁹ is confirmed, pending the issuing of a Chief Registrar's Circular providing guidelines that include publication of a notice of intention to the cancellation of a lost / destroyed bond - (RCR4/2009).

Paragraph 2.5 Regulation 68(11A)

Application of regulation 68(11A)

RCR 42 of 2010: Application of Regulation 68(11A)

Question Is this Resolution not in conflict with CRC 1 of 2010 insofar it relates to the number of advertisements to be placed in the Government Gazette?

Resolution Pending the amendment of regulation 68(11A), the guidelines in CRC 1 of 2010 must be followed, in that two consecutive advertisements must be placed. (RCR 42 of 2010⁴⁰ is withdrawn) – (RCR 16/2011).

Comment Note that in terms of CRC 1/2010, publication is only required in two consecutive issues of the government gazette and not in any ordinary newspapers.

Chapter 14 - Mortgage bonds

Paragraph 3.7 Ranking clause

Cession of bond as second ranking cession in *securitatem debiti*

Question Is it possible to register a cession of a bond as a second ranking cession in *securitatem debiti*?

Resolution No. The Deeds Registries Act does not make provision for the registration of such cessions - (RCR28/2007).

Paragraph 7.5 Consent to various registration procedures

Interpretation of the concept "alienate"

Question What is the correct interpretation of the concept "alienate" - does it include mortgage?

Resolution Mortgage is the 'first step' to alienation. It must be regarded as *sui generis* and be treated as if it is alienation. Thus, where a title deed contains a restraint on alienation, the person in whose favour such restraint is registered must consent to the hypothecation of the relevant property - (RCR2/2006).

Question Certain offices do not apply RCR35/2005 which relates to a request for a

³⁹ According to this Registrar's Conference Resolution a court order is required for such cancellation.

⁴⁰ **RCR 42/2010:**

Question Regulation 68(11A) provides that "... if satisfied that no good reason to the contrary exists ...". What proof must be insisted upon by a registrar given this vague discretion?

Resolution Advertisement in the Government Gazette will suffice – (RCR42/2010).

consent when mortgaging land where there is a restriction on alienation. Is the ruling preremptory or merely directory?

Resolution RCR35/2005 as amended by RCR2/2006 is confirmed and must be applied uniformly. In other words alienation must be regarded as to include mortgaging and a consent to the hypothecation of a mortgage bond must therefor be lodged where there is a restriction on alienation contained in the title deed of the land as part of the title conditions - (RCR12/2008).

Question Given the *obiter dictum* in the case *Standard Bank of South Africa Ltd v Hunkydory Investments 188 (Pty) Ltd and Others Case no 154/27/08*, is it still a requirement that the person in whose favour such restriction on alienation is registered consents to the registration of a bond where the property is subject to a restriction on alienation?

Resolution Yes. RCR 35 of 2005; RCR 2 of 2006 and RCR 12 of 2008 are confirmed - (RCR 6/2009).

RCR 35 of 2005, RCR 2 of 2006, RCR 12 of 2008, RCR 6 of 2009: Consent by bondholder for alienation

Question These resolutions suggest that “mortgage” is the “first step” to alienation. Section 1 of the Alienation of Land Act No. 68 of 1981 defines “alienate” as sell, exchange or donate, which does not include mortgage.

Resolution RCR 35 of 2005, RCR 2 of 2006, RCR 12 of 2008, and RCR 6 of 2009 are hereby confirmed, for the reasons provided in the said resolutions – (RCR 4/2011).

Paragraph 3.5.1 Amount of the bond

Question One of the requirements for a bond is that there must be a debt. A debt need not necessarily be monetary. Having said that, it is not a pre-requisite that a bond, other than a covering bond, must disclose an amount. No authority can be found for a bond to disclose an amount except section 51(1) (of the Deeds Registries Act), which only relates to covering bonds.

Resolution It is trite law that the amount must be disclosed and it is a necessity to determine the registration fee payable. Also see Silberberg’s “The Law of Property” on page 39 - (RCR22/2009).

Paragraph 3.8 Property or security clause

Mortgaging a share in a long-term lease agreement

Question May an undivided share in a long-term lease agreement serve as security under a mortgage bond?

Resolution No, the Deeds Registries Act does not provide for the mortgaging of a share in a long-term lease - (RCR23/2009).

Paragraph 7 Consents - Regulation 39

Cancellation of mortgage bond

Question Where it is endeavoured to cancel a mortgage bond but on closer perusal it is determined that the bond is passed by the mortgagor in favour of the mortgagor. Can such cancellation be effected by the correct mortgagee where a section 4(1)(b) amendment is brought by such correct mortgagee?

Resolution Proof as to the correct situation must be called for in terms of section 4(1)(a) of the Deeds Registries Act. The bond must then be amended with a section 4(1)(b) application, made by the correct mortgagee, whereafter such bond must be cancelled. The consent of all interested parties must be insisted upon - (RCR30/2008).

Question Regulation 39(1) provides for a separate consent to be lodged for the release of "property" from the operation of a bond. May one consent be utilized for the release of more than one "property" from the same bond?

Resolution Yes. Regulation 39(1) provides that one consent may be utilized for the release of more than one "property" from the same bond - (RCR16/2009).

Section 56(1)(b) of the Deeds Registries Act: Voluntary liquidations

Question Is it peremptory that where a company or close corporation is voluntarily wound up by virtue of a special resolution because it cannot pay its debts, that the open bonds be lodged for disposal? The opinion is that the bonds need only be lodged for disposal where the company or close corporation is wound up by a court of law

Resolution Where the company or close corporation is not wound up by the High Court, the open bonds must be lodged for disposal – (RCR37/2010).

Section 56(1)(b) of the Deeds Registries Act: Voluntary liquidation of company / close corporation and cancellation of bonds

Question It is practice to accept a certificate from a conveyancer in instances where a company is unable to pay its debts. Should it not be the liquidator who certifies as to this fact?

Resolution Yes. In order to comply with section 56(1)(b) of the Deeds Act, it is necessary that a transfer of property belonging to the company / close corporation in liquidation be accompanied by a certificate from the liquidator that the company / close corporation is unable to pay its debts – (RCR38/2010).

Paragraph 8 Substitution of debtor

Consent of co-mortgagor

Question Is the consent of the co-mortgagor necessary with substitution in terms of section 57?

Resolution a) Yes, the consent of the co-mortgagor is necessary (RCR19/2005); but
b) section 57 can only be invoked where "... the 'whole of the land mortgaged' is being substituted" - (RCR7/2006 and RCR7/1994).

Miscellaneous

Question T1/1999 is registered in the name of Mr. Y and the property is subject to B1/1999. Mr X applies to court to cancel T1/1999 as he contends that Mr. Y acquired the property by a sale in execution. Mr. X applies to revive his title, T2/1987. Mr X had registered B9/1988 over the property when he was the registered owner. How must B1/1999 (existing bond over the property) be cancelled? How will B9/1988 be revived? Will Mr X now receive a bond free title?

Resolution The matter must be referred back to the court for an order to state the manner in which both bonds must be dealt with - (RCR41/2009).

Chapter 15 - General

Paragraph 1 - Expropriation transfers

Question In view of the *ratio* contained in the unreported case South Africa's National Roads Agency Limited v Chief Registrar of Deeds (Case No. 9147/2009) it would appear that the practice to request a rates clearance certificate for all expropriation and vesting transfers is no longer a requirement. Is the assumption correct?

Resolution Yes, no rates clearance certificates are required for any expropriation and vesting transfers - (RCR 5/2009).⁴¹

Paragraph 3 – Transfers in terms of section 18(3) of the Administration of Estates Act

Transfer by a Master's representative of property donated by the deceased during his lifetime

Question Will approval be required if property was donated during the lifetime of the deceased and the Master's representative is now required to transfer the property?

Resolution No. The value of the property is disclosed. If the value exceeds the prescribed amount published, then the matter must be referred back to the Master for consent – (RCR60/2010).

Question Where land is inherited in terms of an estate that is administered in terms of section 18(3) of the Administration of Estates Act 66 of 1965, and subsequently sold for a purchase price in excess of R125 000,00 and the transfer is being effected simultaneously, must the Master be approached to approve the subsequent sale?

Resolution No. The subsequent sale is of no concern to the Master, neither the Registrar – (RCR67/2010).

⁴¹ Registrar's Conference Resolutions 1/2004, 13/2005, 9/2007 and 10/2008 are withdrawn by this RCR.

16 - Miscellaneous

Section 6: Cancellation of deed

Question There is no procedure in Act No. 47 of 1937 as to how a deed must be cancelled once the Court has made such ruling. It is practice that an application be lodged with the title deeds/certified copies of the deeds, etc. In practice a court order instructing the registrar of deeds to cancel a title is served on the registrar. Usually the court order is filed and noted as a caveat against the titles. If any copy of the affected titles are requested before the application was lodged, the titles will not reflect the true facts as per the court order. What is the correct procedure to be followed?

Resolution On receipt of the court order, the office copy of the relevant title deed must be endorsed to cancel the title deed and to revive the previous title deed. A *caveat* must be noted to the effect that once the client's copy of the title deed is lodged, it must be updated with the endorsement. Data must then be updated and the office records rescanned – (RCR 22/2011).

Comment In other words no application must be lodged by the conveyancer. The deeds office from its own initiative must endorse the deeds office copy regarding the cancellation and revival.

Sections 6(1) and 6(2): Revived title deed

Question *Problem statement:* - A portion of a farm is subdivided into portion 1 and the remainder. Portion 1 is then transferred. An order is granted cancelling the transfer of portion 1. In terms of section 6(2) the previous title must revive. What happens to the subdivided land parcel? How must the title be endorsed?

Resolution The title deed of the subdivision must be endorsed regarding its cancellation. The previous title deed must be revived and endorsed regarding the cancellation of the title deed of the subdivision. The office of the surveyor general must be notified with regard to the cancellation of the registration of the subdivision – (RCR 23/2011).

Section 33 transfers: rates clearance certificates and transfer duty receipts

Question Must a rates clearance certificate and a transfer duty receipt be lodged with a section 33 transfer?

Resolution Yes, see sections 33(10) and 92(1) of Act No. 47 of 1937, as well as section 118 of the Municipal Systems Act No. 32 of 2000 – (RCR 24/2011).

Conveyancer's certificate to proof that death occurred before divorce

Question Where the status of parties married out of community of property or whose marriage is governed by the laws of a foreign country have changed due to divorce, the divorce court order must be lodged to determine whether the rights of third parties are being affected. However, if the spouse has died, what must be lodged to prove that the spouse has died and that the divorce did not occur?

Resolution A certificate from the conveyancer must be lodged to prove that the spouse has in fact died and that divorce did not occur - (RCR15/2005).

Insolvency

Question Can the trustee of an insolvent estate transfer property, vested in the trustee before rehabilitation of the insolvent, 10 years after the insolvent was automatically rehabilitated?

Resolution No. See the provision in section 25 of the Insolvency Act 24 of 1936 - (RCR37/2008).

Question The notice of sequestration of an insolvent person, married out of community of property, is also noted against the solvent spouse. When the solvent spouse deals with his/her property, is a certificate from the conveyancer that the sequestration does not apply to the solvent spouse sufficient?

Resolution No. The trustee must issue a release - (RCR39/2008).

Registration copies of diagrams

Question Deeds Registries require diagrams, as provided for in regulation 32 of the Deeds Registries Act, to be lodged in duplicate. Must this practice still be continued?

Resolution Regulation 32 makes reference to "a diagram". Only one diagram need therefore to be lodged. Regulation 79bis⁴² must still be complied with - (RCR3/2009).⁴³

Calculation of registration fee

Question Where a deed of transfer or mortgage bond expresses the purchase price or amount borrowed in a foreign currency, at what point in time must the registration fee be calculated according to the exchange rate?

Resolution The registration fee must be calculated at date of registration - (RCR 20/2009).

Duty to inform conveyancer that deeds are not registered

Question Is it the duty of the deeds registry to inform the conveyancer that deeds were not executed or is it the duty of the conveyancer to satisfy him/herself that the deeds were executed before informing the bank?

Resolution It is not the duty of the deeds registry to inform the conveyancer. The conveyancer needs to satisfy her/himself that the deeds were executed - (RCR 25/2009).

Trust deeds filed and registered in deeds registries - Chief Masters Directive 2 of 2009

Question Chief Masters Directive 2 of 2009 imposes stricter control with regard to information/copies of trust documents registered in the offices of the Master. There are still many trust deeds previously registered and filed in deeds registries. May deeds registries still give information and copies to clients as previously?

Resolution Yes, deeds registries may still give information and copies to clients - (RCR 28/2009).

⁴² According to this regulation it shall be the duty of the registrar to notify the Surveyor-General where any act of registration affects a diagram.

⁴³ This resolution does not apply to sectional titles. Examples of diagrams whereof only one needs to be lodged, are in the case of:- a) subdivision of a property; b) certificate of registered title; c) certificate of consolidated title; d) notarial deed of servitude; e) notarial deed of lease agreement; f) notarial deed of sublease.

Notarial deed for mining methods

Question Is a notarial deed, which defines what mining methods the holder of mineral rights must use when exercising her/his right, registrable in the deeds registry?

Resolution No. It may not be registered in the deeds registry. The notarial deeds must be referred to the Department of Minerals and Energy - (RCR 29/2009).⁴⁴

Mineral rights

Question May the deeds registry attend to the modification of mineral certificates?

Resolution No. It may not be registered in the deeds registry. The notarial deeds must be referred to the Department of Minerals and Energy - (RCR 36/2009).

Section 11(8) of the Advertising on Roads and Ribbons Development Act 21 of 1940

Question Where conditions contained in a title deed are cancelled in terms of section 11(8) of the Advertising on Roads and Ribbons Development Act 21 of 1940, does such cancellation necessitate the lodgement of a transfer duty receipt or exemption certificate?

Resolution No, a transfer duty receipt or exemption certificate is not required - (RCR49/2009).

RCR 39 of 2006, RCR 57 of 2009⁴⁵ and RCR 50 of 2009⁴⁶: Sales in Execution

Question How must the registrar of deeds apply the case of *Sheriff Kuilsrivier v Registrar of Deeds Cape Town* 2011, in sales in execution?

Resolution In respect of sales in execution, pursuant to section 66(4) for the Magistrates' Courts Act No. 32 of 1944, after the lapse of a year from the date of attachment, the registrar of deeds must call for a certificate from the sheriff of the relevant magistrate's court which clearly states that the property is not subject to any claim preferent to that of the judgment creditor referred to in the notice of attachment – (RCR5/2011).

Citing of amount in a deed or document

Question CRC 18 of 1973 provides that the amounts in deeds and documents must be set out with a comma before the cents. Is this practice peremptory or can a full stop

⁴⁴ Note however, that rights ancillary to mining, for example a right of way or a right to water in favour of the mineral right holder is still registrable in the deeds registry.

⁴⁵ **Question** Does this section refer only to preferent claim sales in execution in respect of attachments issued by the Magistrate's Court or all sales in execution in respect of attachments issued by the Magistrate's Court against immovable property? See *September and Another v Nedcor Bank Ltd and Another 2005(1) SA 500*, for the actual reason for the section.

Resolution The existing practice must prevail in that either the attachment must be withdrawn or proof must be submitted that it has not lapsed or has been extended - (RCR 57/2009 as confirmed by RCR 28 of 2010).
NOTE THAT RCR57/2009 HAS BEEN REPEALED BY RCR1/2011.

⁴⁶ **Question** Section 66(4) of the Magistrate's Court Act 32 of 1944 provides that if the relevant property has not been sold in execution or released from the attachment within a period of one year from the date of attachment, the attachment lapses. What date just be regarded as the date of the attachment?

Resolution Due to lack of clarity as to the date of the attachment, registrars must regard the date of service of the attachment on the registrar of deeds, as the date of commencement of the calculation for the one year period.
NOTE THAT RCR50/2009 AS BEEN REPEALED BY RCR1/2011.

also be used?

Resolution CRC 18 of 1973 is still applicable – (RCR43/2010).

Value of property

Question An executor in the estate of B, who died in 1979 is transferring from the estate to the heir. At the time of the executor's appointment (1980) the value of this property was R80 000,00 as reflected in the liquidation and distribution account. The children of the deceased (heirs) have concluded a sale transaction with Q and are selling this property for R400 000,00 being its current value. These two transactions are linked and lodged simultaneously. In the consideration clause of the first deed of transfer from the executor to the heirs, which value must be reflected: R80 000,00 or R400 000,00?

Resolution In the first deed of transfer the value will be R80 000,00 as reflected in the liquidation and distribution account. In respect of the second transfer the registration fee must be calculated on R400 000,00 – (RCR50/2010).

Is it obligatory for sheriff to go to public auction?

Question An owner has taken a mortgage loan with a bank. Due to inability to properly service the loan, the bank decides to attach the property. Just before the sheriff goes to auction, A makes an offer to buy the property. The bank agrees to the sale and does not want to proceed with the sale in auction.

- a) Who must pass transfer?
- b) Is it obligatory for the sheriff to go to public auction?

Resolution

- a) The owner must pass transfer and the attachment must be uplifted.
- b) No, it is not necessary in this case as the owner will pass transfer – (RCR51/2010).

Property sold in execution

Question If property was sold in execution and the debtor is sequestrated after such sale, does the sequestration prevent the sheriff from transferring the property to the purchaser of the sale in execution?

Resolution Yes. However in *Dirk Cornelius De Jager No and Others v Balju van die Hooggeregshof, Bloemfontein-Wes and Others* dated 4 June 2010, the sale of the property is not suspended when application for the sequestration is made. However, once the sequestration order has been granted, only the trustee may pass transfer subject to the provisions of section 5 of the Insolvency Act – (RCR54/2010).

Property attached by the sheriff after the death of owner

Question A property is attached by the sheriff after the death of the owner and sold in execution. Who is responsible for transferring the property, the sheriff or the executor in the deceased estate?

Resolution The sheriff must pass transfer – (RCR 65/2010).

Sales in Execution

Question In *Elsie Gundwana v Steko Development CC and Others* CCT 44/10 [2011]

ZACC 14, it was held that “*where execution against the homes of indigent debtors who run the risk of losing their security of tenure is sought after a judgment on a money debt, further judicial oversight by a court of law ...*” is a must. Does this place a responsibility on the deeds registry to ask for a court order authorizing a sale of the property, in addition to an attachment order?

Resolution No, there is no duty on the registrar of deeds to call for such an order – (RCR 41/2011).

Certified Copy Where Property is Attached

Question May a registrar of deeds refuse to issue a certified copy of a deed on the grounds that the property in question is attached?

Resolution No, an application for a certified copy of a deed is not deemed to be a dealing with the property – (RCR 43/2011).

Comment An attachment only affects the dealing with the property.

Sequestration and Divorce

Question It often occurs in practice that immovable property is registered in the names of spouses married in community of property to one another who, subsequent to the registration of the immovable property, got divorced and thereafter one of the spouses was declared insolvent. The question is who is entitled to deal with such immovable property: the person entitled to such property in terms of the divorce agreement, or the trustee appointed in the insolvent estate of the former spouse?

At present we are confronted with two contradictory judgments *viz. Corporate Liquidators (Pty) Ltd v M A Wiggill* 2007 (2) SA 520 T and *Middleton v Middleton* 2010 SA 179 (D). What practice should be followed?

Resolution The case of *Corporate Liquidators (Pty) Ltd v M A Wiggill*, should be followed as it was heard on appeal by a full bench. The division of ownership takes place upon the grant of the divorce – (RCR 35/2011).

Transactions involving Land on Which a Land Claim Interdict is Noted

Question A transaction involving a property which has a land claim interdict noted against it was rejected because the interdict was not uplifted.

- a) Is it correct to reject such a transaction?
- b) How must such an interdict be uplifted?

Resolution

- a) No.
- b) The interdict does not have to be uplifted, as the interdict is not a prohibition on the alienation of the property – (RCR 38/2011).

Mortgages and Land Claim Interdicts

Question Can the owner of a property against which a land claim interdict is noted, mortgage such property?

Resolution Yes, there is no prohibition against the mortgaging of the property – (RCR 39/2011).

Land Claim Caveat and Bonds

Question If an interdict relating to a land claim is noted against property about to be hypothecated, must the bond specifically be made subject to the claim?

Resolution No – (RCR 40/2011).

Reversionary Right Condition and the Option to Extend the Time Period

Question If a reversionary right condition has the option to extend the time period, must the extended time period be disclosed in the consent? If so, must this new time period be disclosed in the condition? Is the consent to transfer sufficient, or must the provisions of section 68(1) first be complied with and a new condition imposed reflecting the extended time?

Resolution No, it is not necessary to disclose the extended time period in the consent. The condition will only lapse once the holder of the reversionary right has consented to the cancellation, or the condition has been fully complied with, in which case section 68(1) finds application – (RCR 45/2011).

Comment Note that the time period may only be extended, if the condition binds successors in title. If not, the condition must be cancelled (by means of section 68) and then re-imposed with the extended period.

Proclamation 293 of 1962 and Regulation 51(2) of Act 47 of 1937

Question Is regulation 51(2) of Act No. 47 of 1937 applicable to Proclamation 293 of 1962 deeds?

Resolution No. Regulation 51(2) relates to titles issued under Act No. 47 of 1937, and cannot find application where a different mode of transfer is effected, i.e. the same grant is being endorsed with consecutive transfers – (RCR53/2011).

Part 2

Sectional Titles and Deeds Office Procedure

Chapter 1 - Sectional titles

Paragraaf 3.3 A scheme on one or more pieces of land

Reservation of a rights of extension

Question Where a sectional title register is opened and a right of extension is reserved over land, contiguous or non-contiguous, and it is evident that the extension envisages sections on land, must the notarial tie-agreement occur simultaneously with the initial opening of the scheme, or only when the right is exercised?

Resolution It must be registered simultaneously on the opening of the sectional title register - (section 70/2009).

Notarially tied two pieces of land

Question A scheme is opened on two pieces of land that are contiguous and notarially tied. The developer builds on one of the pieces of land but not on the other. Is it correct to accept a rates clearance certificate for the property built on and note a caveat in respect of the other piece of land to the effect that a rates clearance certificate shall be lodged whenever building takes place on such other piece of land?

Resolution. No. The two pieces of land are notarially tied for the purposes of opening a sectional title scheme and form part of one scheme. Therefore rates certificates for both pieces of land must be lodged – (RCR85/2010).

Paragraph 4.2 Documents to be lodged for

- a) opening of sectional title register and
- b) registration of sectional plan

Section 14: Substitution of sectional plans

Question Deeds registries and the offices of the surveyors general are being inundated with requests to substitute sectional plans which are alleged to be incorrect in respect of the numbering in that the *de facto* position and the *de jure* position do not correspond. Should these plans be capable of being substituted, if they are not patently incorrect?

Resolution Rectification transfers must be registered to amend the situation, or a court order must be obtained to authorize the substitution of plans in terms of section 14 of Act No. 95 of 1986 – (RCR58/2011).

Comment This situation happens if a person do not receive transfer from the developer of the section that he has bought, but of another section, due thereto that the physical number of the section as indicated on its door, differ from the section number as indicated on the sectional plan or due thereto that when he buys his section (for instance proposed section 5), the final numbers of the sections on the sectional plan have not been allocated and approved by the Surveyor-

General.

Section 14(3): Amendment of Sectional Plans

Question Where an amendment of a sectional plan in terms of section 14(3) is being done, should an application for the registration of the amendment of the plan be lodged?

Resolution Yes, an application must be lodged which will be afforded a *SBC* code, and it will attract a registration fee – (RCR60/2011).

Copy of section 11(3)(b) schedule of conditions is lost

Question Where both the deeds registry's copy and the client's copy of the section 11(3)(b) schedule of conditions is lost, under what authority can application be made for a copy thereof?

Resolution The principles contained in section 38 of the Deeds Registries Act can be used - (RCR40/2007).

Comment (NOTE THAT THE REGULATIONS TO THE SECTIONAL TITLES ACT HAVE BEEN AMENDED, WHICH AMENDMENT IS EFFECTIVE AS FROM 28 OCTOBER 2011. REGULATION 13A NOW SETS OUT THE PROCEDURE TO BE FOLLOWED IN THIS INSTANCE).

The imposition of registrable conditions in the 11(3)(b) schedule of conditions in terms of section 11(2) of the Sectional Titles Act

Question Section 11(2) of the Sectional Titles Act refers to "registrable conditions". How should this be interpreted? Must the provisions of section 63 of the Deeds Registries Act find application?

Resolution All the newly imposed conditions must be registrable in terms of section 63 of the Deeds Registries Act - (RCR58/2008).

Comment Section 63 of the Deeds Registries Act provides that a personal right or a condition which does not restrict the exercise of any right of ownership shall not be capable of registration, except if such condition is in the opinion of the registrar complementary or otherwise ancillary to a registrable condition.

Section 11: Issuing of certificates

Question Section 11(3)(d) allows for the issuing of more than one certificate, whilst the following sections still allow for only one certificate: section 25(6), section 25(6A), section 25(10)(d), section 25(11)(c). How must this be applied in the deeds registries?

Resolution Pending the amendment of the act, the issuing of more than one certificate must be allowed – (RCR56/2011).

Paragraph 5.2 The deed of transfer

Paragraph 5.2.4 The property clause

Question One of the footnotes to Form H provides that in the property description clause of the transfer of a section the description of the farm must be disclosed. Does this description include the registration division and the province, or will the farm

name and number suffice?

Resolution The full description, inclusive of the registration division and province is required - (RCR64/2008).

Paragraph 5.2.6 - The conditional clause

Question It appears that RCR 29 of 2002 and RCR 6 of 2008 contradict one another. RCR 29 of 2002 refers that the restrictive conditions should be included in the deed of transfer (Form H of Act No. 95 of 1986), whereas RCR 6 of 2008 refers that the restrictive conditions must be incorporated in the certificates of registered sectional title and then brought forward in all successive deeds of transfer.

Resolution RCR 29 of 2002 and RCR 6 of 2008 are not contradictory and must be read in conjunction with one another.

(RCR 6 of 2008 is amended to read as follows:

Incorporating restrictive / home owners association conditions contained in section 11(3)(b) schedule in new deed of transfer

The section 11(3)(b)-schedule of conditions must be checked to ascertain whether there are restrictive conditions. If there are restrictive conditions, the conveyancer must lodge the necessary consent, authorization or clearance. If such conditions are not as yet contained in the title deed, must the conveyancer incorporate it in the deed of transfer?

Resolution: *RCR 29/2002 is confirmed. When a sectional title register is opened and restrictive conditions exist and/or are imposed in terms of section 11(2) of the Act, such conditions must be incorporated in the certificates of registered sectional title **and certificates of real rights of exclusive use areas and real rights of extension** and brought forward into all successive deeds of transfer **and cession of real rights**. In respect of existing schemes, where the conditions were not brought forward into the title deeds, it must be brought forward into the new deeds – (RCR 3/2011).*

Paragraph 5.4 Section 15B(3)(a) conveyancer's certificate

Right of extension and section 15B(3)(a) certificates

Question Must section 15B(3)(a)(ii) of the Sectional Titles Act be adhered to where the causa for the transfer of a sectional title unit is not a sale?

Resolution No, the provisions of section 15B(3)(a)(ii) need not be complied with - (RCR59/2008).

Comment Section 15B(3)(a)(ii) provides that the registrar shall not register a transfer of a unit or of an undivided share therein without a conveyancer certificate wherein is confirmed that there is no real right of extension registered in favour of the developer of the body corporate in terms of section 25 or if there is that there was compliance with the provisions of section 25 of the Sectional Titles Act.

Lapsing of right of extension

Question Forcing an owner / the body corporate to attend to the cancellation of the right to extend causes unnecessary hardship. Section 15B(3)(ii) of the Section Titles Act

95 of 1986 only requires that the certificate must disclose that the right to extend is registered and that the necessary disclosures have been made in the deed of alienation.

Resolution RCR 17 of 2008 and RCR 42 of 2007 are hereby withdrawn.⁴⁷ However, it is still the registrar's duty to determine that the section 15B(3) certificate with regard to the right of extension, is correct - (RCR 8/2009).⁴⁸

Paragraph 5.5 Affidavit by developer - Section 15B(3)(c)

Transfer from the estate of the developer

Question Where the executor in the estate of a developer transfers a section in a sectional title scheme to an heir, must the provision of section 15B(3)(c) be adhered to?

Resolution Yes - (RCR57/2008).

Paragraph 5.6 Documents to be lodged on transfer of unit and cession of exclusive use area

Clearance certificate

Question The Local Government: Municipal Property Rates Act 6 of 2004 will become fully operative on 1 July 2009. Does this result in the Act also being applied in respect of a "right registered against immovable property" as referred to in section 3 thereof? If so, will this also include exclusive use areas, rights of extension etc?

Resolution Yes, Act 6 of 2004 is clear. If the right registered against immovable property is not rated, a clearance certificate from the local authority must be issued accordingly - (RCR65/2008).

Question Where common property of a sectional title scheme is alienated and sections are cancelled, must a registrar of deeds insist on a rates clearance certificate for such cancelled section(s)?

Resolution No - (RCR69/2008).

Question In some cases the valuation roll of the municipalities are incomplete in respect of some sectional title schemes. Is it correct to only rely on a conveyancer certificate in terms of section 15B(3)(b) stating that "no provision is made as yet for the separate rating of the unit" or must the municipality themselves give a certificate to this effect?

Resolution The municipality must give the necessary certificate, not the conveyancer - (RCR70/2008).

⁴⁷ According to these two resolutions, it is the duty of the conveyancer to determine whether or not the right of extension has lapsed. If it has been determined that such right has lapsed, then a section 68(1) application in terms of the Deeds Registries Act by the body corporate must be lodged. The 15B(3) certificate must reflect that a right of extension has been registered, but that such right has lapsed - (RCR42/2007).

⁴⁸ The section 15B(3) certificate must still be true and just. In other words, if the real right of extension has lapsed, it must reflect that the right has lapsed through effluxion of time or because the right is exhausted.

Question In terms of section 15B(3)(b) of the Sectional Titles Act, a clearance certificate must be produced for the land and buildings of the scheme, if provision is made by law for the separate rating of units. In terms of the Municipal Property Rates Act 6 of 2004 this has the effect that two clearance certificates must be lodged, i.e. one for the land and one for the buildings. Is this interpretation of section 15B(3) correct?

Resolution No, it is not necessary for the lodgement of two clearance certificates with the transfer of a unit. However, on the **first transfer** of a unit that will result in the establishment of the body corporate in terms of section 36 of Act 95 of 1986, a clearance certificate for the land as well as the unit / exclusive use area being transferred / ceded, are required. **Thereafter**, only one clearance certificate must be lodged with the transfer of a unit (not the land) and one clearance certificate with the cession of an exclusive use area (where applicable) - (RCR58/2009).⁴⁹

Question When a sectional title register is opened or a phase development registered and transfer is simultaneously affected of newly created sections, must a rates clearance certificate be lodged for such sections, or may one clearance certificate be lodged for the land on which such scheme is to be opened?

Resolution Yes, a rates clearance certificate must be lodged for each section. Alternatively, one clearance certificate may be lodged for the land on which the scheme is to be registered together with proof from the local authority that such sections have not been rated – (RCR 26/2010).

Paragraph 7 Joint ownership of a unit in undivided shares – S 15B(4), (5) & (5A)

Certificate of registered title of aggregate share

Question Section 15B(5A) of Act No. 95 of 1986 has been inserted to provide for a person who is the sole owner of a unit to obtain a certificate of registered sectional title of any fraction of his or her undivided share in such unit. This amendment was mainly to provide for time share. There is no provision in Act No. 95 of 1986 for the owner of undivided shares in a unit to obtain a certificate of registered title of an aggregate share, as provided for in section 35 of Act No. 47 of 1937. May an owner who has acquired various titles for individual shares in a unit within a scheme make use of the provisions of section 35 of Act No. 47 of 1937 to obtain a certificate of registered title of an aggregate share?

Resolution The provisions of section 35 of Act No. 47 of 1937 may be used. See section 3(1) of Act No. 95 of 1986 – (RCR79/2011).

Paragraph 9 Dealings with common property - section 17

Section 17(5) - consent

Question Section 17(5) provides for titles of units and rights registered over such units and for titles of exclusive use areas to be surrendered for cancellation. However, no

⁴⁹ The previous reference to “no separate rating of units” in the section 15B(3) certificate must now be omitted completely.

provision is made for the consent of holders of registered rights over exclusive use areas and such titles to be surrendered. In this regard one can refer to section 27(6), which provides for the registration of various rights over exclusive use areas. It should also be contemplated whether or not holders of such registered rights should be required to consent to cancellation of their rights. The rights cannot be “converted” to rights over the land, thus they will have to be cancelled.

Resolution Pending the amendment of the Act, the rights registered over exclusive use areas must first be cancelled - (RCR59/2009).

Section 17: Personal Servitudes

Question Section 17 does not deal with a personal servitude (e.g. usufruct) registered over a section or exclusive use area when the whole or part of the section or exclusive use area is included in the transfer of common property. It is submitted that the title deed of such servitude must be lodged together with the consent of the holder thereof to the cancellation of the unit/exclusive use area or part thereof. The title deed of the servitude must be cancelled if the whole of the unit/exclusive use area is transferred. If only a portion is involved, the title deed must bear a factual endorsement to that fact. Does Conference agree?

Resolution Yes. Pending the amendment of the Act, the title deed of such servitude must be lodged together with the consent of the holder thereof to the cancellation of the unit/exclusive use area. If only a portion is involved, the title deed of the servitude must be lodged together with the consent of the holder thereof. A factual endorsement must be placed upon such title deed – (RCR61/2011).

Section 17: Consent to be lodged

Question When a whole section is included in the transfer of common property, the owner of the section must consent to the cancellation of the section (section 17(4)(a)). However, when a part of a section is included in the transfer of the common property it is not clear whether the consent must be lodged. Conference must give guidance.

Resolution Pending the amendment of the Act, the consent must be lodged – (RCR62/2011).

Section 18 of Act No. 95 of 1986 and the application of sections 56 and 57 of Act No. 47 of 1937

Question Section 18 of Act No. 95 of 1986 makes sections 56 and 57 of Act No. 47 of 1937 applicable to transfers in terms of section 17 of Act No. 95 of 1986. Is it possible to apply section 57 when a transfer takes place in terms of section 17(5), i.e. where the whole of the land is transferred by the body corporate? There will most likely be different owners with different bonds. It is submitted that section 57 (substitution of bonds) cannot be applied with section 17(5) transfers.

Resolution Pending the amendment of the Act, the bonds will have to be cancelled – (RCR63/2011).

Transfer of part of real right of extension

Question Section 17 provides for instances where *it is sought to alienate common property on which part of a section or exclusive use area is erected or registered*. It is silent about when *common property on which part of a section 25 right of extension is registered*, is transferred (*alienated*). How must it be dealt with when a part of a section 25 right is transferred together with common property?⁵⁰

Resolution The procedure contained in section 17(4B) of the Sectional Titles Act 95 of 1986, pertaining to the cancellation of a portion of an exclusive use area, must be applied with the necessary changes until the Act is amended – (RCR73/2010).

Paragraph 11 Extension of sections - Section 24

Extension of numerous sections indicated on one sectional plan of extension

Question Where only one plan is provided for the extension of numerous sections belonging to different owners, may one application be lodged with reference to each owner, or must different applications be lodged and each be charged a fee, provided only one SS number is afforded?

Must all extensions be registered simultaneously?

Resolution One application may be lodged in one cover setting out the different owners / or different application may be lodged in one cover. One fee is payable in both instances.

All the extensions on the section plan must be registered simultaneously - (RCR61/2009).

Lodgement of block plan

Question When extending a section, there is no necessity to lodge a block plan. How will examiners determine whether the extension encroaches on the real right of extension or on any adjacent property? Should the block plan not always be insisted upon?

Resolution A block plan must also be lodged with the extension of a section. However, where the block plan has not changed and there is a note on the floor plan to that effect by the surveyor or architect, it need not be lodged - (RCR62/2009).

Section 24(6)(d): Application

Question Does conference agree that section 24(6)(d), as amended, must be applied as follows:

- a) If there are no bonds registered over any of the units in the scheme, compliance of this section is not necessary?
- b) If only the extended section is mortgaged it will only be necessary for the lodgement of that bond?
- c) If the extended section is not mortgaged, but any of the other sections are mortgaged, the certificate/s must be lodged with the application?

Resolution

⁵⁰ Writer hereof amended the wording of the question (by adding the words indicated in italics) in order for the question to be more clearly set out.

- a) Yes.
- b) Yes.
- c) Yes – (RCR64/2011).

Section 24 extension and rates clearance certificate

Question When a section is extended, in terms of section 24 of Act 95 of 1986, must a rates clearance certificate be lodged in terms of the Municipal Systems Act, 2000?

Resolution No. Act 32 of 2000 does not provide for this – (RCR75/2010).

Section 24 extension and transfer duty

Question Where a section is extended, without increasing the floor area of such section, must a transfer duty receipt or exemption certificate be lodged? In RCR 40 of 1989 it is a requirement where the floor area is increased.

Resolution In terms of section 5(1)(b) of the Transfer Duty Act 40 of 1949, a transfer duty receipt or exemption certificate must be lodged – (RCR76/2010).

Paragraph 12 Extension of schemes

Section 25(2)(a) and lost plans

Question When it is discovered upon lodgement for the registration of a real right of extension that the plans, as provided for in section 25(2)(a) and (b) of Act 95 of 1986, were never lodged or have been lost, how must the matter be addressed? The mere lodgement of plans can be detrimental to existing and potential owners.

Resolution The matter must be referred to court. However, the developer may cancel such right of extension and, in terms of section 25(6) of Act 95 of 1986, the body corporate can *de novo* cede the rights back to the developer – (RCR77/2010).

RCR 56 of 2006: More than one Certificate of Real Right in respect of reservation in terms of section 25(1) of Act No. 95 of 1986

Question According to RCR 56 of 2006 it is permissible to apply section 64(1) of Act No. 47 of 1937 and issue certificates of real rights for portions of a section 25-right once a certificate of real right issued for the whole of the section 25-right has been issued. However, section 64(1) allows for the issue of a certificate for the whole of a real right which is reserved in a title deed and not for portions of a real right when a certificate for that real right already exists. The purpose of section 64(1) is to obtain a title deed for a real right reserved and not for the subdivision of such a right by issuing certificates of real rights for portions of the real right. Furthermore, now that the Act allows the issue of certificates, is it still permitted to issue portions of the section 25 right subsequent to the opening of the scheme and the registration of the certificate of real right to extend in terms of section 25?

Resolution No, pending the amendment of the Act, the provisions of section 64 of Act No. 47 of 1937 cannot be invoked to enable the developer of a real right of extension to obtain certificates of real rights of subdivided portions of such real right – (RCR 6/2011).

Reservation of real right to extend

Question The recent amendment to section 11(3)(d) now provides that where the developer has made application for the opening of a sectional title register, exclusive use areas and rights of extension (portions of rights of extension) may have separate titles for each exclusive use area/rights. The question is whether or not the developer may reserve a general right of extension together with portions of real rights?

Resolution The developer cannot reserve a general right of extension together with portions of real rights in a section 11(3)(b) schedule. Where the developer wishes to reserve real right areas together with a general real right, he/she will have to reserve the general real right as such and thereafter cede portions of rights of extension of the general real right title – (RCR57/2011).

Comment A general right of extension cannot be registered, as such right must be reserved in respect of a *specified portion of the common property*.

Right of extension must be reserved for a specified period

Question Can a right of extension be reserved for an indeterminable period of time?

Resolution No. In terms of the wording of regulation 14, read in conjunction with the prescribed Form F as well as the wording of section 25(1), it is clear that the legislature intended that there should be a specified period - (RCR4/2005).

Section 25(1): Extension of time period

Question The recent amendment to section 25(1) provides that the time period may be extended if agreed upon by unanimous resolution of the body corporate and the bondholders prior to the expiry of the stipulated time period as indicated in the original right, by way of a notarial deed. With reference to the bilateral notarial deed it is obvious that the bilateral deed must be entered into between the body corporate and the holder of the real right or the portion of the real right. A question raised is whether the notarial deed indicating the extension of the time period must be registered before the expiry of the time period originally reserved, or whether the unanimous resolution must be taken before the expiry of the original time period reserved?

Resolution The notarial deed extending the time period must be attested prior to the lapsing of the right to be extended – (RCR65/2011).

Question With reference to the bilateral notarial agreement as provided for in section 25 to extend the period in which a right of extension must be exercised, the following concerns must be clarified:

- a) is transfer duty payable on the registration of the extension?
- b) must the consent of the bondholders be lodged?
- c) must the unanimous resolution be lodged?

Resolution

- a) Yes, transfer duty is payable as it qualifies as a transaction as defined in section 1 of the Transfer Duty Act No. 40 of 1949.
- b) No, however, the bondholders' consent must be obtained and filed in the notary's protocol.

- c) No, it must be filed in the notary's protocol – (RCR68/2011).

Question May the developer, prior to the body corporate being established, unilaterally extend the time period? And, where the original developer has ceded a portion of a right to extend (thereby becoming a co-developer in the scheme), can the co-developer, prior to the body corporate being established, extend the time period by entering into a bilateral deed with the original developer to extend the time period of his/her right of extension?

Resolution No, the developer may not unilaterally extend the time period prior to the body corporate being established, nor may the co-developer extend the time period of the right of extension prior to the body corporate being established. The developer must cancel the existing right and register a new right – (RCR66/2011).

Obtaining title to extend by a body corporate

Question a) Where a right of extension has lapsed and the body corporate obtains title for the right in terms of section 25(6), must such certificate of real right be for a specified period of time?

b) Furthermore, where the body corporate cedes the right to extension so reserved in terms of section 25(6), must the cession be for a specified period of time?

Resolution a) Yes, when a body corporate obtains a certificate of real right as contemplated in section 25(6), such rights must be for a specified period of time.
b) Yes, when the right is ceded it must be ceded for a specified period of time - (RCR65/2009).

No time limit for right of extension - section 25(1)

Question What procedure must be followed where it is ascertained, subsequent to registration, that the reservation of a right of extension does not disclose a period of time in which the right must be exercised?

Resolution A notarial variation agreement entered into between the body corporate and the developer, with the written consent of all members of the body corporate as well as with the written consent of the mortgagee of each unit in the scheme, failing the agreement or the obtaining of all consents, an order of court must be obtained.

Should a body corporate not be in existence, a section 4(1)(b) application may be lodged where a right has been reserved, from time to time, but no specific period has been stipulated in the condition - (RCR43/2007).

Section 25(4)(b): Subdivision of section 25 right

Question

- a) With the subdivision of the section 25 right, such subdivisions may not be indicated on the initial plan of the sectional title scheme and the deed of cession of the subdivided right must be accompanied by a plan indicating the portion ceded. However, it is not executable when the right is subdivided simultaneously with the opening of the scheme. Cessions of all the subdivided rights may also not be registered simultaneously with the opening of the scheme. How must the position be dealt with?

- b) If the subdivisional plan is filed on the main file, must plans still be lodged with the cessions of each of the subdivided section 25 rights?
- c) Must the extent of the subdivided rights be included in the plans?

Resolution

- a) The subdivided right must be identified to the satisfaction of the surveyor-general, and may be indicated on the block plan or a separate section 25(4) plan.
- b) No.
- c) Yes – (RCR70/2011).

Section 25(5): Cession of exclusive use areas

Question Section 25(5) of the Act, as amended, provides that the rights of exclusive use must be ceded within 12 months of their date of creation. What is the deciding date for the commencement of the 12 months: the date of the transaction or the date of execution of the notarial deed?

Resolution The date of registration of the certificate of real right creating the exclusive use areas will be the deciding date – (RCR71/2011).

Question A right reserved in terms of section 25(1) may be exercised by the developer or his or her successor in title thereto, even though the developer or his or her successor in title, as the case may be, has no other interest in the common property, by the addition of rights of exclusive use: Provided that the rights of exclusive use are to be **ceded** within 12 months after their creation thereof, either to the body corporate of the scheme or to one or more registered owners of a section in the scheme. The question is when does **cession** take place?

Resolution On the date of execution of the notarial deed – (RCR72/2011).

Section 25(5): Cession of exclusive use area to developer

Question What will the position be if the developer is still the owner of a unit in the scheme and the exclusive use area is allocated to the owner of that unit? Must it still be ceded within the prescribed period of 12 months? This will result in the developer having to cede the exclusive use area to himself.

Resolution Section 25(5) will not find application where the developer is still an owner of a section in the scheme – (RCR73/2011).

Question A right of extension may be reserved by the developer or his or her successor in title thereto, even though the developer or his or her successor in title, as the case may be, has no other interest in the common property, by the addition of rights of exclusive use: Provided that the rights of exclusive use must be ceded within 12 months after their creation either to the body corporate of the scheme or to one or more registered owners of a section in the scheme.

Should reference that such right must be ceded within 12 months be included as a restrictive condition against the certificate of exclusive use area to distinguish it from any other certificate of exclusive use area?

Resolution A caveat must be noted against the exclusive use areas to indicate that it must be ceded within the 12 month period – (RCR74/2011).

Right of extension - section 25(6) - consent needed

Question Where a right of extension is reserved by the body corporate and thereafter alienated, the consent of the members of the body corporate must be obtained and lodged. Is the consent of the *usufructuaries* over the units required?

Resolution No - (RCR46/2007).

Lapse of the right of extension - section 25(6A)

Question Where a developer has reserved a right of extension, but such right of extension has lapsed due to effluxion of time, may such developer, prior to the establishment of the body corporate reserve a further right of extension, given the wording of section 25(6A), viz: "Where no right of extension was reserved."

Resolution Yes, provided application is made in terms of section 68(1) of the Deeds Registries Act for the lapsing of the expired right - (RCR45/2007).

RCR 8 of 2009 and RCR 31 of 2010: Right of Extension and section 15B(3) Certificates

Question These resolutions are in contradiction of CRC 6 of 1988 (paragraph 14.5). If a section 25 right has expired must a section 68(1) application be lodged to note the lapsing of the right before the developer applies for a right to extend, in terms of section 25(6A)?

Resolution Yes, a section 68(1) application must be lodged to note the lapsing prior to the developer applying for a right to extend, in terms of section 25(6A) of Act No. 95 of 1986 – (RCR 13/2011).

Question In RCR1/1991 it was held that the sectional plan of extension may be registered subsequent to the lapsing of the duration of the right of extension relating to that scheme, provided the buildings have already been erected. What proof must be submitted to the registrar of deeds to prove that the building(s) were erected prior to the date of lapsing?

Resolution A certificate from the local authority that the buildings were erected prior to the date of the lapsing of the right of extension must be lodged - (RCR4/2008).

Cancellation of right of extension

Question The Sectional Titles Act does not provide for the cancellation of a right of extension. Given this lacuna, what authority exists for such cancellation?

Resolution This right can be cancelled in terms of section 15B(1)(d). Where a body corporate is established, a bilateral notarial deed of cancellation of such right is required - (RCR72/2009).

Question A real right of extension is subdivided into numerous portions. How and when must the provisions of section 68(1) of the Deeds Registries Act be applied, for purposes of the endorsement of the lapsing of the right on the section 11(3)(b)-schedule of conditions?

Resolution The 11(3)(b) schedule must only be endorsed, in terms of section 68(1) of the

Deeds Registries Act, when the whole of the right has lapsed - (RCR60/2008).

Withdrawal of RCR 47 of 2005 or RCR 8 of 2009: Section 25(10) lapsing of right of extension

Question RCR 47 of 2005 provides that the cancellation of the real right of extension is peremptory where the right has exhausted itself. This resolution is contradictory with RCR 8 of 2009.⁵¹ What procedure should be followed?

Resolution RCR 47 of 2005 is hereby withdrawn – (RCR31/2010).

Registration of usufruct over right to extend

Question Can a *usufruct* be registered over a right to extend, as provided for in terms of section 25(9) of the Sectional Titles Act 95 of 1986?

Resolution No, the Sectional Titles Act does not provide for a *usufruct* to be registered over a right of extension - (RCR6/2007).⁵²

Question A right of extension is registered in the joint estate of parties married in community of property. The parties change their matrimonial regime in terms of section 21 of the Matrimonial Property Act 88 of 1984 to out of community of property and the court orders that the right of extension must be divided equally between the spouses. The provisions of section 45bis(1A)(b) cannot be invoked as per RCR15/2006. How must registration occur as applying the provisions of section 25(4) will lead to absurdity?

Resolution The status quo followed in the offices must remain, pending the amendment of the Deeds Registries Act (RCR22/2008).

Comment One-half share in the real right of extension must thus be ceded by the registration of a notarial deed of cession to the husband and the other one half share in the same manner to the wife.

Section 25: Issuing of Certificates of Real Right of Extension

Question Where a right of extension is exercised in respect of exclusive use areas, the Act is silent whether more than one certificate of real right may be issued in respect of the exclusive use areas, as is the position on the opening of a sectional title register. This would appear to be an oversight by the legislature and conference must give guidance as to whether more than one certificate may be issued, pending the amendment of the Act.

Resolution Pending an amendment to the Act, the issuing of more than one certificate of real right must be allowed – (RCR69/2011).

Right of extension - buildings not in accordance with the plan to scale

⁵¹ According to this resolution, an owner / the body corporate does not need to attend to the cancellation of the right to extend, where it has been exhausted. However, it is still the Registrar's duty to determine that the section 15B(3) certificate with regard to the right of extension is correct. In other words, in the section 15B(3)(a) conveyancer's certificate it must be stated that there is a real right of extension, but that such a right has been exhausted.

⁵² As opposed to this section 27(6) of the Sectional Titles Act and RCR41/2003 specifically provides that an *usufruct* may be registered over a right of exclusive use of the common property, that is an exclusive use area.

Question In view of the unreported case *Dolphin Whisper Trading 10 (Pty) Ltd v The Registrar of Deeds and the Body Corporate, Skilliepark 2*, it would appear that the existing practice of examiners as provided for in RCR 10 of 2005 and RCR 4 of 1994 not to establish whether a right of extension is a deviation from the plans lodged in terms of section 25(13), should be discontinued. Should the practice now be that all deviations in the extension be referred to court?

Resolution Where the registrar of deeds determines that there is a deviation from the section 25(2) plans, such a deviation must be sanctioned by an order of court.⁵³ RCR 10 of 2005⁵⁴ and RCR 4 of 1994 are withdrawn - (RCR 2/2009).

RCR 2 of 2009: Section 25(13)

Question Is it the duty of the registrar of deeds to enforce compliance with regard to deviations?

Resolution No. See RCR 2 of 2009, as amended. (RCR 2 of 2009 is amended to read as follows:

Section 25 (RCR 4 of 1994 and RCR 10 of 2005)

In view of the unreported case Dolphin Whisper Trading 10(Pty) Ltd v The Registrar of Deeds and the Body Corporate, Skilliepark 2, it would appear that the existing practice of examiners as provided for in RCR 10 of 2005 and RCR 4 of 1994 not to establish whether the right of extension is a deviation from the plans lodged in terms of section 25(13), should be discontinued. Should the practice now be that all deviations in the extension be referred to court?

Resolution *In terms of CRC 7 of 2011 it is not the duty of a registrar of deeds to enforce compliance with regard to deviations. However, it is the duty of the registrar of deeds to ensure that the extension is within the physical boundaries of the reserved right.*”) – (RCR 12/2011).

Section 25 Deviation from section 25(2) plans and Transfer Duty

Question Where a developer deviates from the section 25 plans when he/she extends the scheme, must the registrar insist on a transfer duty receipt for the rights he/she acquired when extending the scheme on the portions of the common property on which the right was not reserved?

Resolution The developer has encroached on areas of the common property not reserved. The extension of the scheme is not registrable until such time as the extended right has been acquired by the developer, on which acquisition transfer duty will be payable – (RCR67/2011).

⁵³ In practice the deeds office will compare the participation quota sheet which was lodged with the reservation of the right indicating the participation quotas of all the sections, after the right of extension has been exercised, with the participation quota sheet when it is actually exercised, in other words when application for the registration of the sectional plan of extension is made. When these two sheets differ, the deeds will be rejected.

⁵⁴ According to RCR 10/2005, which confirmed RCR4/1994, changed circumstances can affect the extension of a scheme. It is not the duty of a registrar of deeds to enforce compliance with regard to deviations. However it is the duty of the registrar of deeds to determine that the extension is within the physical boundaries of the reserved right.

RCR 61 of 2008: Section 68 of Act No. 47 of 1937 – Right of Extension exhausted

Question Section 25(2) of Act No. 95 of 1986 sets out the requirements for the plans of extension where a right to extend is reserved. To ensure compliance with the technical requirements of such plans, can a registrar of deeds make it a requirement that a land surveyor or architect certify that the plans have been drawn in accordance with section 25(2)? Given the technical nature of the plans the expertise lies with the architect or land surveyor and it would place an unfair burden on the registrar of deeds to examine such plans

Resolution Yes, the registrar of deeds **must** call for such a certificate.(See RCR 61 of 2008, as amended).

(RCR 61 of 2008 is amended to read as follows:

Section 25(2) of Act No. 95 of 1986 plans

*Section 25(2) of Act No. 95 of 1986 sets out the requirements for the plans of extension where a right to extend is reserved. To ensure compliance with the technical requirements of such plans, can a registrar of deeds make it a requirement that a land surveyor or architect certify that the plans that have been drawn are in accordance with section 25(2)? Given the technical nature of the plans the expertise lies with the architect or land surveyor and it would place an unfair burden on the registrar of deeds to examine such plans. **R – Yes,** ~~section 4(1)(a) of Act No. 47 of 1937 authorizes the registrar of deeds to call for such certificate from the surveyor or architect, with regard to compliance to section 25(2)(a) and section 25(2)(b) of Act No. 95 of 1986.~~*

Resolution – Yes, the registrar of deeds must call for such certificate from the surveyor or architect, with regard to compliance to section 25(2)(a) and section 25(2)(b) of Act No. 95 of 1986.” – (RCR 11/2011).

Incorrect participation quota sheet

Question A real right in terms of section 25 was reserved by the developer on opening of the scheme. All the documents required under section 25(2)(c) were lodged and section 25((a) and (b) plans correctly reflected all the units that were going to form part of the extension. However, it transpired that when the scheme was opened the schedule indicating the estimated participation quotas of all the sections in the scheme, including the section to be extended was incorrect (e.g. it did not reflect all the units depicted on the section 25(2)(a) and (b) plans). How can this error be rectified?

Resolution If the omission is determined before the exercise of the right of extension, such omission must be rectified by requesting the correct participation quota sheet from the relevant conveyancer - (RCR64/2009).

Paragraph 13 Exclusive use of common property**Section 27(1)(c) to be in line with section 27(4)(b)**

Question Section 27(1)(c) of Act 95 of 1986 must be amended to be in line with section 27(4)(b) of the Act so as to include registered real rights (free from the bond or registered real right). How must same be applied in deeds registries until such time as the Act is amended?

Resolution Pending an amendment to the Act, it will vest in the body corporate free from any mortgage bond or any other registered real rights – (RCR75/2011)..

Registration of *usufruct* over exclusive use of common property

Question Can a *usufruct* be registered over an exclusive use area?

Resolution Yes, it is possible to register a *usufruct* over an exclusive use area.⁵⁵

Comment *Any personal servitude of usufruct, usus or habitatio may be registered over an exclusive use area - (section 27(6) of Sectional Titles Act).*

Leases over exclusive use areas

Question Can a developer grant a lease over exclusive use areas? If yes, can the developer grant a lease over an exclusive use area to a person who is not an owner in a scheme? When the developer ceases to be an owner, who enjoys the benefits of the lease now that the body corporate becomes the owner of the exclusive use areas? Can an owner in the scheme? How should section 27(6) of Act 95 of 1986 be interpreted?

Resolution Yes, a developer may grant a lease over an exclusive use area in terms of section 27(6) - (RCR73/2009).

Cession of exclusive use areas

Scenario Transfer of a unit in a sectional title scheme from the developer to A is registered in 1997. Simultaneously with said transfer an exclusive use area is ceded from the developer to A – forming part of the transaction. In 2000 transfer of the same unit from A to B is registered. No cession of the exclusive use area is registered, although it formed part of the transaction. Subsequently various transfers of the unit are registered (ie. from B to C, from C to D, from D to E, etc), emanating from the sale of the unit and the exclusive use area. Presently, yet another transfer of the unit is to be registered. Only now, in 2005, the omission to cede the exclusive use area with each of the previous transfers is discovered. From the records it appears that A is still the registered holder of the exclusive use area.

Question How must the said omission be dealt with? Who must now cede the exclusive use area?

Resolution Section 27(4)(b) and 27(4)(c) provide the procedure to be followed unless the holder of the real right is still a member of the body corporate in which case the provisions of section 14 read in conjunction with section 33 of the Deeds Registries Act must be adhered to - (RCR2/2006).

Comment *This means that, if the holder of the real right is no longer a member of the body corporate, the exclusive use area vests in the body corporate (free from any mortgage bond) and that the **body corporate** must apply to the registrar for issuing of a certificate of real right of such exclusive use area in its favour - (Section 27(4)(b)&(c)).*

Section 27(5)

Question Section 27(5) of the Sectional Titles Act 95 of 1986 provides for the cancellation

⁵⁵ RCR 41/2003 and RCR 37/1996 and section 27(6) of the Sectional Titles Act 95 of 1986.

of an exclusive use area with the consent of the mortgagee of the relevant section. Is the consent always necessary even where the exclusive use area is not secured by the bond over the section?

Resolution The consent of the bondholder is only required when the exclusive use area is also hypothecated under the bond – (RCR78/2010).

Section 27(5): Cancellation of exclusive use area

Question Section 27(5) of the Act was amended to make provision for the consent of the mortgagee of the exclusive use area (not section) and holder of a registered real right. It does not mention holder of a registered real right registered over the exclusive use area. What if a real right is registered over the relevant section to which the exclusive use area is linked?

Resolution The consent of the holder of the registered real right must also be lodged – (RCR76/2011).

Cancellation of exclusive use areas

Question How should an exclusive use area be cancelled where no body corporate is in existence, as section 27(5) provides that an exclusive use area can only be cancelled in terms of a bilateral notarial deed, entered into between the body corporate and the registered cessionary?

Resolution A unilateral notarial cancellation by the developer is permissible – (RCR80/2011).

Causa in cession of exclusive use area

Question Should the causa of a cession of an exclusive use area, when ceded in terms of section 27(1)(b) indicate that the exclusive use area forms part of the transaction (purchase price) whereby the specific section was sold?

Resolution Yes. The way in which the causa currently reflects the exclusive use area as forming part of the transaction, must be continued -(RCR63/2008)

Consent of bondholders

Question Should the bondholders of all units and rights of extension consent to the creation of exclusive use areas? The Act is silent in this regard.

Resolution No. The Act does not provide for the consent of the bondholders to be lodged - (RCR68/2009).

Section 27A rules

Question Section 27A provides that a body corporate or developer may make rules which confer rights of exclusive use and enjoyment of parts of the common property upon members of the body corporate:

- a) Are these rules to be incorporated in the management or conduct rules, or are they *sui generis* rules?
- b) How and with whose consent may these rules be amended?

Resolution a) These rules may be incorporated in the management or conduct rules.
b) These rules may be amended by special or unanimous resolution, depending on whether it has been created in the management or conduct rules - (RCR69/2009 as amended by RCR 15/2011).

Paragraph 14 Creation of servitudes

Right of way

Scenario In practice it often occurs that an owner of a section affords a right of way in favour of other sections or the general public over a portion of the section, for example a walk way, etc.

Question Is such a right of way registrable?

Resolution Yes, provided it is depicted on the sectional plan - (RCR51/2007).

Encroachments - Section 25 of the Sectional Titles Act

Question Where a plan of extension to be registered in terms of section 25 of the Sectional Titles Act refers to a servitude of encroachment on neighbouring land, how must such servitude be registered, i.e. by whom and who must consent thereto?

Resolution The right of encroachment should be registered between the body corporate, if established, if not, the developer and neighbouring owner, together with the consent of bondholders of neighbouring land with the registration of the plan of extension. Section 75(3) of the Deeds Registries Act applies - (RCR55/2006).

Paragraph 20 Sectional mortgage bonds

Sectional mortgage bonds and exclusive use areas

Question Should it not be made compulsory for the section and an exclusive use area, so closely related to the section, to be mortgaged under the same bond? The non registration of the bond causes unnecessary headaches on attachment, etc. Alternatively should exclusive use areas, which are incapable of existing separately from the section, not be notarially tied simultaneously with the opening of the sectional title register?

Resolution No, mortgaging of such section and exclusive use area cannot be enforced – (RCR81/2011).

Bond subject to conditions of title

Question Where a sectional title unit is subject to conditions, imposed in favour of the Home Owners Association, restricting transfer, etc., must the bond registered over such unit be made specially subject to such conditions?

Resolution Yes, sectional bonds must be made subject to restrictive home-owners association conditions.⁵⁶

Waiver of preference of usufruct

Question How must the waiver of preference of a real right, such as a servitude of usufruct, be couched in a sectional bond?

Resolution The usufructuary must either personally or in terms of an agent appear before the conveyancer. The servitude of usufruct must be made subject to the bond and the waiver must be contained in the bond and not the annexure - (RCR52/2007).⁵⁷

⁵⁶ Registrars' conference resolution 4 of 2007. RCR 5/1987 and 22/2005 were confirmed.

⁵⁷ The wording of the resolution is in my opinion wrong. It reads that: "The bond must be made subject to the usufruct and the waiver must be contained in the bond and not the annexure." The purpose of the waiver is to make the servitude subject to the bond, and not vice versa.

Sectional title scheme opened on land that is mortgaged under a bond

Question Where a sectional title scheme is opened in respect of land that is mortgaged under a bond, which bond has numerous other pieces of land serving as security for a loan, may the bond be converted into a sectional bond in respect of the land on which the scheme is being opened? If so, how will a variation of the terms of the bond be affected?

Resolution The bond is deemed to be converted into a sectional bond in respect of the affected property only. It is not necessary for the release of the other properties from the operation of such bond. It is possible for the registration of a variation of conditions in a bond. The endorsement relating to the variation of the conditions must be qualified according to the properties affected - (RCR67/2008).

Form AK in the regulations to the Sectional Titles Act

Question Must the new form for a sectional surety bond, Form AK, strictly be followed or may it be deviated from even if same is incorrect?

Resolution It may be adjusted to exclude reference to “appearer” – (RCR79/2010). Note that the form AK has been amended as from 28 October 2011 to exclude the reference to the “appearer”.

Paragraph 22

Miscellaneous

Scenario In terms of Section 60(3) exclusive use areas could be allocated in terms of management rules and as such did not have to be delineated in the sectional plan.

Question May the body corporate by special resolution resolve to formally cede such rights and have them registered at the deeds registry?

Resolution Yes, provided the provisions of section 27 is complied with -(RCR47/2007).

General

Endorsement in terms of section 42(2) of the Administration of Estate Act 66 of 1965

Question The executor in the deceased estate sold the unit and an exclusive use area in the sectional title scheme. Is it necessary that the Master endorse both the deed of transfer of the unit and the cession of exclusive use area in terms of section 42(2) of the Administration of Estates Act?

Resolution Where the power of attorney to transfer the unit makes reference to the cession of the exclusive use area, and such power of attorney is endorsed with regard to the section 42(2) endorsement, then it is not necessary to endorse the notarial deed of cession of exclusive use area in this regard - (RCR66/2008).

Change of name of a sectional title scheme

Question What procedure must be followed for a sectional title scheme to change its name?

Resolution The court must be approached. However, the matter must be referred to the Sectional Titles Regulations Board - (RCR68/2008).

Names allocated to sectional title schemes

Question It was a practice that developers should peruse the indices of the deeds registries to prohibit the duplication of names allocated to sectional title schemes, but it would appear as if this practice has fallen away. However, the duplication of names does cause confusion and legal battles. Should there not be some kind of control regarding the names allocated to sectional title schemes?

Resolution No, the uniqueness lies in the registration number – (RCR82/2011).

Certificate of registered title for defined portion of common property

Question Does the Sectional Titles Act permit the body corporate to apply for a certificate of registered title in respect of a portion of the common property?

Resolution No, the Act does not provide in this regard - (RCR71/2009).

RCR 30 of 1987: Sectional title scheme in conflict with title condition

Question In terms of section 7, read in conjunction with section 4(5) of Act 95 of 1986, it seems that an alternative practice has been developed or that no uniform practice is being followed with regard to the removal of all prohibitive title conditions from the title of the land prior to the opening of the scheme. Is it correct to accept a certificate to the effect of condonation or approval by the holder of the right (usually the municipality)?

Resolution RCR 30 of 1987 is confirmed. Where there is any conflict with the conditions, it must be removed or amended – (RCR8/2010).

RCR 45 of 2004: Usufructuary and opening of a section title register

Question Where land on which a sectional title registered is opened is subject to a usufruct, RCR 45 of 2004 provides that the usufructuary **may** join the bare dominium owner in applying for the opening of the register. Should this resolution not be preemptory or provide an alternative?

Resolution The usufructuary may join the owner in applying for the registration of the sectional scheme; alternatively the usufructuary may consent to the registration of the scheme – (RCR11/2010).⁵⁸

Leaseholds

Question May a sectional title register be opened on a leasehold?

Resolution No, in terms of the definition of owner in section 1 of Act 95 of 1986, this is not permissible – (RCR80/2010).

A sectional title register on Proclamation 293 of 1962 properties?

Question May a sectional title register be opened on proclamation R293 of 1962 properties?

Resolution No, see the definition of owner in section 1 of Act 95 of 1986. The holder of the Grant/Leasehold rights is not the registered owner of the land. The right must first be upgraded – (RCR81/2010).

⁵⁸ All the titles that are issued in terms of the scheme must be made subject to the usufruct in both instances. These principles apply mutatis mutandis to a *fideicommissum*.

RCR 80 and 81 of 2010: Sectional title register on Proclamation 293 of 1962 properties and Leaseholds

Question Section 4 of Act No. 112 of 1991 vests the holder of grant rights in terms of Proclamation 293 of 1962, and leaseholds in terms of Act No. 4 of 1984, with the same rights they would have had, had they been the owner of the underlying land. RCR 80 and 81 of 2010 appear to contradict section 4 of Act No. 112 of 1998. Does conference agree?

Resolution No, the provisions of section 4 of Act No. 112 of 1991 only becomes operative upon conversion of the right into full ownership in terms of section 2(1)(b) of that Act – (RCR 18/2011).

May a liquidator apply for the opening of a scheme?

Question May a liquidator of a company under liquidation apply for the opening of a sectional title register over the property of the liquidated company? If so, what must be done to the bonds registered over the property over which the sectional title scheme is to be registered?

Resolution Yes, a liquidator may apply if duly authorised thereto by the second meeting of the creditors. The bondholder must consent to the opening of the register as prescribed under Act 95 of 1986. The bonds must be carried forward onto the Certificate of Registered Sectional Title and Certificate of Real Right, if any – (RCR82/2010).

May the executor apply for the opening of a sectional title register?

Question May an executor, administering the estate of a deceased “developer” apply for the opening of a sectional title register?

Resolution Yes, where the deceased had sold ⁵⁹ units in the scheme, the executor may continue with the application for the opening of the scheme – (RCR 83/2010 ⁶⁰ as amended by RCR19/2011).

Cancellation of a real right over a unit

Question Can a real right over a unit which has lapsed for any reason be cancelled in terms of section 68 of the Deeds Registries Act?

Resolution No, a real right over a unit which has lapsed must be cancelled in terms of section 15B(1)(d) of the Sectional Titles Act – (RCR86/2010).⁶¹

Encroachment agreements for Sectional Title surveys

Question What proof is required when an approved sectional plan shows an

⁵⁹ This will be amended again to refer not only to sold, but to any dealing with a unit, for example donate, exchange, bequest etc.

⁶⁰ This resolution was reconsidered as it often occurs that the developer, prior to his/her death sold units in a scheme in respect of which the sectional title register had not as yet been opened, and the remainder of the estate, including the unsold units, is bequeathed to his/her heirs. The heirs could not receive transfer of the units already sold by the deceased, as they had to be transferred by the executor to the rightful owners in terms of RCR 83/2010, before it was amended.

⁶¹ As there is no prescribed form for this application, it can, with the necessary changes, be drafted along the lines of an application in terms of section 68(1) of the deeds Registries Act.

encroachment over an existing servitude?

Resolution The consent of the holder of the servitude must be obtained and lodged with the registrar – (RCR88/2010).

Creation of servitudes in favour of a sectional title scheme

Problem statement:- Company X is the owner of property A. On property B a sectional title scheme has been registered and company X is the developer and also the owner of all units and holder of all rights, i.e. the body corporate is not established. Company X wants to sell property A and reserve a servitude in favour of property B. However, the body corporate is not established to create the servitude in terms of section 29 of Act No. 95 of 1986. How should the servitude be created?

Resolution The provisions of section 76(1) of Act No. 47 of 1937 can be applied – (RCR83/2011).

Cancellation of servitude to which common property is entitled and section 75(2)*bis* of the Deeds Registries Act

Question How must section 75(2)*bis* of the Deeds Registries Act 47 of 1937 be interpreted when cancelling a servitude to which the common property of a sectional title scheme is entitled? The requirement that all bonds must be lodged is difficult to comply with especially in large schemes?

Resolution Section 75(2)*bis* of the Deeds Registries Act is clear. The bonds together with the consent of all bondholders, existing on the date of the execution of the notarial deed of cancellation of the servitude, must be lodged – (RCR89/2010,⁶² as amended by RCR 20/2011).

Winding-up of the affairs of the body corporate

Question Section 48(6)(a) indicates that the Court may, on the application of a body corporate or any member thereof or any holder of a registered real right concerned, or any judgment creditor, by order make provision for the winding-up of the affairs of the body corporate. And that the Court may, by the same or any subsequent order, declare the body corporate dissolved as from a date specified in the order.

There is no provision in the Act for when the affairs of the body corporate have been wound up and the body corporate dissolved. Where the Court has given an order to that effect and that the buildings are deemed to be demolished in terms of section 48, and that the land comprising the scheme be sold to a third party by an Administrator appointed under section 46 of the Act, does Conference agree that the provisions of section 17(5) can be used to affect transfer to a third party. As once all the buildings are destroyed, there is only common property held under the scheme. Section 48 refers to reversion to common property whereas section 49 has reference to reversion to the land register. And, in addition, section 46(3) of the Sectional Titles Act provides “*The administrator shall, to the exclusion of the body corporate, have the powers and duties of the body corporate or such of those powers and duties as the Court may direct,*” which,

⁶² Before the amendment the resolution only required the lodgement of the bondholders' consents and not the bonds as well.

therefore, allows the Administrator to alienate common property. Does conference agree?

Resolution No, the provisions of sections 48 and 49 of Act No. 95 of 1986 find application – (RCR77/2011).

Comment A body corporate can only be wound up if the scheme reverts back to the land register into sections 17 or 48 and 49.

Part 3

Deeds Practice and other acts

Chapter 3 – Alienation of Land Act

Section 20 of Act 68 of 1981 endorsements

Problem statement:- A section 20 of Act No. 68 of 1981 endorsement was endorsed against a title deed. The owner of the land died and the property was transferred to his heir. Section 20 was not dealt with but a condition referring to the section 20 endorsement was inserted in the deed of transfer. How must this condition be dealt with?

Resolution The endorsement was incorrectly brought forward into the title deed. The transfer, therefore, is *ultra vires* the provisions of section 20(2)(b) of Act No. 68 of 1981, and the matter must be referred to court – (RCR54/2011).

Comment According to section 20, once an endorsement has been effected on the title deed of the property, it may only be transferred to the purchaser as indicated in the endorsement. The estate will therefore have to be kept open up until the last installment has been paid.

Section 20 of the Alienation of Land Act No. 68 of 1981

Question May a contract, as envisaged by section 20 of the Alienation of Land Act No. 68 of 1981, be recorded against a real right of extension, as defined in Act No. 95 of 1986?

Resolution No, it does not fall within the definition of “land” in Act No. 68 of 1981 – (RCR78/2011).

Comment Note that a contract can be recorded against an exclusive use area.⁶³

Chapter 6 – Companies Act

Transactions Entered Into by a Foreign Company

Question In terms of section 23(2), read with section 23(2A), of the Companies Act No. 71 of 2008, it is uncertain whether a foreign company can acquire immovable property or be a mortgagee without being registered as an external company. Can conference provide guidance?

Resolution Notwithstanding CRC 6 of 2011, a foreign company can acquire property or act as a mortgagee, provided the conveyancer provides the registrar of deeds with documentary evidence, for example an auditor’s certificate or affidavit from a

⁶³ **RCR41/2004:** The definition of “land” in Act 68 of 1981 does not provide for the recordal of a section 20 contract against a right to an exclusive use area. Conference, however, is of the opinion that it could not have been the intention of the legislator to exclude an exclusive use area from the ambit of the definition of “land” and therefore resolves that the recordal of section 20 contracts against rights to exclusive use areas, should be allowed.

director of such foreign company to the effect that the company need not register as an external company, in terms of section 23(2) of Act No. 71 of 2008 – (RCR 47/2011).

Chapter 27 - Development Facilitation

Development Facilitation Act 67 of 1995

Question In terms of section 55(b) of the DFA, a sub-divisional diagram and a plan must be submitted for subdivisions under Chapter VI. This appears ludicrous as the diagram(s) would appear to suffice.

Resolution The sub-divisional diagram or general plan must be lodged.

Compiled by

Erinda Frantzen

BCom(Law)(UP) LLB (UNISA)

Attorney, Conveyancer and Notary of the High Court of South Africa

and

Gawie le Roux

BA(Law)(UP) LLB (UP) BA Honours (UNISA)

Attorney and Conveyancer of the High Court of South Africa

and published by

Self-Study Deeds Course CC

Registration number 1994/016876/23

PO Box 74047

Lynnwood Ridge

0040

Flinders Lane 451

Lynnwood, Pretoria

Tel: **(012) 361-1715**

Fax: **(012) 361-1108**

Web site: **www.aktepraktyk.co.za**

SOURCES

Registrars' Conference Resolutions

The Consolidated Practice Manuals of the Deeds Office of South Africa

Relevant acts, regulations and prescribed forms