The Registerability of Contingent Usufructs and Related Matters

Intestate Succession of Black Estates – A new Era
Contents

NEWS
• Beware of turning a blind eye!! .................................................

NEW LEGISLATION
• A Brief Overview in respect of New Legislation and an update on The Registrars’ Conference, 2004 ................................................. 3 - 4

PROPERTY LAW UPDATE
• The Promotion of Administrative Justice Act, 2000 – The Impact on Examination of Deeds ................................................. 5 - 7
• The Registrability of Contingent Usufructs and related matters ................................................. 7 - 8
• Calculation of Stamp Duty: Duties of Public Officers ................................................. 8
• Amendments to the Deeds Registries Act 47 of 1937 ................................................. 9
• New Schedule of Fees of Office ................................................. 10 - 11
• Clarity and Legibility of Deeds and Documents with reference to Regulation 20(1) of the Deeds Registries Act 47 of 1937 ................................................. 12
• Covert Sales and Donations in Re-Distribution Agreements ................................................. 13 - 14
• Endorsement in terms of section 40 of the Administration of Estates Act (Act 66 of 1965) Lodgement of bonds for disposal or consent of bondholder ................................................. 15
• Intestate Succession of Black Estates ................................................. 16 - 17
• May a Permission to Occupy serve as security under a Notarial Mortgage Bond? ................................................. 18
• Section 13 of the Sectional Titles Act, 1986 and the Examination of Deeds ................................................. 19
• Subdivision of the Common Property in a Sectional Title Scheme – Part II ................................................. 20 - 21

CASE LAW
• All the cases you must take note of and how to read a court case ................................................. 22 - 27

RECENTLY PUBLISHED ARTICLES AND RESEARCH
• References to all relevant published articles and legal research ................................................. 28 - 29

BOOKS
• A list of books relevant to the field of property law ................................................. 29

OTHER FEATURES
• Let us get to know our neighbouring registrars and their offices better ................................................. 30 - 32
• Interview with Mr. Jodwana – A previous Registrar of the Ciskei Deeds Office ................................................. 14 & 26
• Interview with Ray Kretzmann (Former Registrar of Deeds Cape Town) ................................................. 33 - 34

Did you know? ................................................. 34 - 35

LETTERS TO THE EDITOR
• Attachment against fixed property – Beware the Judgment Creditor ................................................. 36 - 37
• Response to Letters to the Editor on Sectional Title ................................................. 37 - 38

ADVERTISEMENT
• LEAD: PRACTITIONERS’ GUIDE TO CONVEYANCING AND NOTARIAL PRACTICE – Seventh Edition ................................................. 40

Editorial
This being the first issue for 2005, it is trusted that you have had a well-deserved rest over the festive season and are all geared and ready to approach the new year with all its challenges.

From the outset, a word of congratulations to Pogiso Mesefo for his appointment as Registrar of Deeds, Pretoria. We all know that it is going to be a challenging task, but knowing Pogiso he will take up his challenge, as he did as law lecturer, and make the best of it.

In the October issue, letters from an anonymous conveyancer were published to which Mr. George Tsotetsi responded in detail in the previous issue. However, it has now come to the fore that the letters were not from a conveyancer, but from Mr. Ozzie Wade of the Deeds Registry in Pietermaritzburg. The letters were sent to the office of the Chief Registrar of Deeds for comment. These concerns were also addressed at the Sectional Titles Regulations Board Meeting held during October 2004.

In this issue, interviews were held with two former Registrars, Mr. Jodwana and Mr. Kretzmann. In subsequent issues of this Journal, we expect to interview other former Registrars, to determine their whereabouts and what they are now doing after their retirement.

This year’s challenge for deeds registries and the Department of Land Affairs is the implementation of the Communal Land Rights Act 11 of 2004. The regulations are in the process of being drafted.

For all the persons who contributed to this issue, my sincere thanks and appreciation. Keep up the good work!

Allen West - Editor

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For all the persons who contributed to this issue, my sincere thanks and appreciation. Keep up the good work!
INTRODUCTION

This article provides a brief discussion of the Communal Land Rights Act, 2004 (Act No. 11 of 2004) and of a few resolutions of the Registrars’ Conference, 2004.

THE COMMUNAL LAND RIGHTS ACT

This Act will come into operation on a date to be determined by the President by proclamation in the Gazette. The regulations to the Act are in the process of being drafted, and the Act will therefore impact on the deeds office at some future date. As a Chief Registrar’s Circular will be issued in due course, only a general discussion is provided here.

The Act is designed to obtain tenure security for the benefit of persons and communities that occupy or would occupy communal land in the areas to which the Act applies. Thus, communal land will vest in the name of a community and a ‘communal land right’ will vest in a person or persons. In order to accomplish its objectives, the Act makes provision for the endorsement of existing title deeds to vest ownership of communal land in a community and the registration of what is referred to in the Act as ‘a deed of communal land right’ to vest a communal land right in the name of a person or persons. As regards communal land rights, the Act makes provision for the opening of a communal land register. The communal land rights, subject to the approval of the community, may be converted into full ownership. A ‘suitably qualified official of the Department of Land Affairs’ may prepare the deeds that convey communal land rights.

It is worth mentioning that the Act will effect certain amendments to the Deeds Registries Act 47 of 1937, with one such amendment concerning the definition of ‘Person’.

Finally, it is important to note that the main intention of discussing the Act is to make the reader aware of the presence of the Act.

REGISTRARS CONFERENCE, 2004

The Registrars’ Conference was held from 17 to 18 November 2004. The 2004 conference resolutions are all straightforward. I will discuss a few of them to highlight certain practical aspects of the topics dealt with by such resolutions. I will first quote the relevant resolution in full and then discuss its practical aspects.

RCR 1 OF 2004, RCR 8 OF 1969: EXPROPRIATIONS / RATES CERTIFICATES: (BLOEMFONTEIN AND LEGAL SUPPORT)

In view of section 118 of the Local Government Municipal Systems Act 2000 (Act No. 32 of 2000) as amended, it appears that the abovementioned resolution can be withdrawn. Expropriation transfers are no longer exempt from the lodgement of a clearance certificate.

RESOLUTION

In terms of section 118 of Act No. 32 of 2000, read in conjunction with section 20 of the Expropriation Act 63 of 1975, a clearance is required for the registration of an expropriation transfer. RCR 8 of 1969 is hereby withdrawn.

In order to discuss this resolution, it is necessary to describe the circumstances that lead to the resolution.

Certain para-statals have expropriated certain properties and attempted to register such properties in their name without lodging rates clearance certificates, relying on RCR 8/1969. Therefore, the Conference was requested to review RCR 8/1969.

It must be noted that RCR 8/1969 was handled prior to the Expropriation Act coming into operation and the Conference thus resolved that such a resolution cannot stand in the face of the clear and unambiguous

**RCR 18/2004 SERVITUDE OVER AGRICULTURAL LAND (JUSTICE COLLEGE)**

Where a servitude over agricultural land is not depicted on a diagram, but is described in general terms, i.e. the route will be determined at a later stage, must the consent of the Minister, as contemplated in terms of section 6A of the Subdivision of Agricultural Land Act 70 of 1970, be insisted upon?

**RESOLUTION**

The consent must be insisted upon or proof must be provided that the provisions of Act No. 70 of 1970 are not being contravened.

It has transpired that in some deeds offices, the consent of the Minister for Agriculture is not insisted upon for the registration of a servitude in general terms over agricultural land. This is not sound practice and should, in view of this resolution, be discontinued. It is worth mentioning that the mere fact that a route for the relevant servitude is to be determined at a later stage is no justification for non-compliance with the provisions of Act 70 of 1970. It must be noted, however, that with the advent of wall-to-wall municipalities, it is not easy to identify agricultural land.

In this regard, the Chief Registrar’s Circular No. 6 of 2002 must be borne in mind. In other words, a letter from the Department of Agriculture confirming that the particular land is not agricultural land will also suffice, where a servitude is to be registered over agricultural land.

**RCR 19 OF 2004 CANCELLATION OF PERSONAL OR PRAEDIAL SERVITUDE (JUSTICE COLLEGE)**

Where a personal or praedial servitude is cancelled, either in terms of section 68(1), section 68(2) or section 75(3) of Act No. 47 of 1937, must the registrar of deeds insist on a transfer duty receipt or an exemption certificate?

**RESOLUTION**

Yes,  a transfer duty receipt or an exemption certificate must be lodged.

A spurious argument that in cases of this nature, a minimal transfer duty of ten rand is usually payable and that this does not justify the trouble of obtaining a transfer duty receipt, has introduced practice of not calling for the lodgement of a transfer duty receipt in some deeds offices. This practice constitutes a flagrant contravention of the provisions of the Transfer Duty Act 40 of 1949 and ought to be discontinued. It is not within the power of the deeds office to disregard the law for flimsy reasons of expediency.

**RCR 21 OF 2004 DIVORCE ORDERS (JUSTICE COLLEGE)**

Should the divorce court order be insisted upon, where an owner who was formerly married out of community of property, or whose marriage was governed by the laws of another country, and who is now in possession of the land, is described as divorced or unmarried?

**RESOLUTION**

Yes, a divorce court order must be lodged to determine whether the rights of third parties are affected and whether the terms of the divorce court order, where applicable, are adhered to.

Paragraph 2.2.3.2.1.3 of chapter 3 of the Deeds Registration Law Manual states as follows: ‘If the person was married out of community of property at the time the land was registered in his/her name, or if he/she was a bachelor/spinster at the time that the land was registered in his/her name and thereafter he/she married out of community of property and is still married out of community of property at the time of divorce, the registrar of deeds accepts that the land registered in his/her name is retained by him/her unless the contrary is proved.’

Although the above paragraph is silent about a divorce order, one can legitimately draw the reasonable conclusion that it conveys the message that a divorce order does not need to be lodged. This resolution has been included in this discussion solely for information purposes.
Section 33 of the Constitution of the Republic of South Africa, Act 108 of 1996, reads as follows:

(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given reasons.

(3) National legislation must be enacted to give effect to these rights and must -

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in sub-sections (1) and (2); and

(c) promote an efficient administration.

HOW DID THE LEGISLATURE GIVE EFFECT TO THIS RIGHT?

The Promotion of Administrative Justice Act 3 of 2000 (hereafter referred to as “AJA”) came into operation on 30 November 2000 as a measure to give effect to the fundamental principles of Administrative Justice as envisaged in section 33 of the Constitution: that is the right to administratively fair administrative action that is lawful, reasonable, and procedurally fair. Everyone has the right to written reasons for administrative action that adversely affects their rights.

The AJA applies to all Organs of State as defined in section 239 of the Constitution 108 of 1996. In brief, the stipulations of the Act require two letters to be written as soon as an administrative action is anticipated that has the potential of adversely affecting a person’s rights. This is based on the audi alteram partem rule which gives the applicant the opportunity to be heard, and is a way of making sure that such action is procedurally fair. (Director, Mineral Development, Gauteng Region v Save the Vaal Environment 1992 (2) SA 709 SCA).

WHAT IS THE PROCEDURE WHEN THE ACTION IS CONSIDERED TO FALL WITHIN THE AMBIT OF THE AJA?

The procedure for the first letter/notice is set out in section 3(2)(b)(a) and (b) of the AJA:

“In order to give effect to the right to procedurally fair administrative action, an administrator, subject to sub-section (4), must give a person

(a) adequate notice of the nature and purpose of the proposed administrative action;

(b) a reasonable opportunity to make representations;

This letter is structured in such a way that it contains all the compulsory information as to who, what, when, where, why and how the action will be taken, and when, how, to whom and where representations should be made.

The second letter informs the person of the action that was taken after considering all the relevant information and his/her right to written reasons. Adequate notice of the right to internal appeal and right to review is also given.

Sub-section 4(1) contains the very important escape or safety measure that refers to the fact that if it is reasonable and justifiable under the circumstances, an administrator may depart from any requirements referred to in sub-section 2. This measure may, however, only be used under exceptional circumstances. (This implies that you have to give reasons why you are not going to give reasons for the decision made!).

THE EFFECT OF THE AJA ON THE DEEDS
REGISTRY

The Deeds Registry, as administrator, falls within the definition of Organ of State, as mentioned previously, which effectively means that the AJA comes into effect whenever an examiner makes the decision to reject a deed in accordance with Regulation 45(7) Act 47 of 1937.

Not every decision made by an administrator needs to follow this procedure. It is only necessary if the decision (or failure to take a decision when one is required) amounts to an administrative action. It is therefore necessary to know what the requirements for an administrative action are.

Section 1 of the AJA gives a complicated definition of “Administrative Action”, but it can be summarized as follows:

- a decision;
- of an administrative nature;
- made by an organ of state;
- in terms of an empowering provision that is not specifically excluded by the AJA;
- that adversely affects rights; and
- that has a direct external effect.

These requirements are cumulative and all six of these have to be satisfied before an action can be considered to be an administrative action. In President of the Republic of South Africa v Sarfu 2000 (1) SA 1 (CC) it was held that any decision relating to the implementation of legislation is an administrative action.

Due to the nature and core function of the deeds registry, the 2nd, 3rd and 4th requirement are obviously complied with, and it will only be necessary to determine whether the rejection of a deed fulfils the 1st, 5th and 6th requirement.

Three questions arise from the above, to establish whether such a rejection is in fact

(i) a decision that
(ii) adversely affects people’s rights,

If the answer is in the affirmative, whose right? Will it be that of the conveyancer or that of his/her client? It stands to reason that if a right has not been adversely affected, the AJA does not apply.

The third question is whether the rejection of a deed is in fact an administrative action taken in the process of deeds registration? Thus, does the rejection comply with all six requirements for an administrative action?

The AJA provides a definition for “Decision” in section 1, the appropriate part for examination purposes being:

(iii) Imposing a condition or restriction; and
(iv) Doing or refusing to do any other act or thing of an administrative nature.

Most decisions by examiners to reject a deed are derived from empowering provisions, which give authority to act, and most are found in an enabling statute. This could either be a section in the Deeds Registry Act, or any other legislation stipulating: “The Registrar shall or must ...”

These are considered to be mandatory provisions and examiners do not have discretion in this instance.

Where a provision is discretionary, e.g. The Registrar “may”, or “in the opinion of the Registrar”, the AJA proposes that the administrator should consider what options are available and should ask himself/herself questions in order to determine whether the decision he or she has made is not biased? Furthermore he/she has to consider whether or not all relevant facts have been taken into account (or whether or not the irrelevant ones have been ignored)? He/she also has to ask himself/herself whether or not the decision was taken in bad faith, etc? These are questions asked when the courts review a decision as provided for in section 6 of the AJA.

From the above, one can conclude that the rejection of a deed does in fact fall within the ambit of a “decision” as provided for in section 1 of the AJA. A validly rejected deed, however, does not fulfil the sixth requirement of an administrative action: that is that it must have a direct external effect. One can argue that the external effect of a validly rejected deed is of a conveyancer’s own doing as an examiner’s empowering provisions to reject a deed are the provisions of regulation 45(7) of the Deeds Registries Act, 47 of 1937.

IS A RIGHT ADVERSELY AFFECTED?
The next aspect to determine is, whether by rejecting a deed, a right is adversely affected, and whether it is the conveyancer’s right or that of his/her client? As only a conveyancing firm or an approved department as prescribed in regulation 45(1) of the Deeds Registry Act may lodge deeds, and as the examination section deals only with conveyancers on a daily basis, the examiner’s client is the conveyancer, and not the client whom he represents. As to whether a right is adversely affected, the courts recognized “the doctrine of legitimate expectations” in Administrator, Transvaal v Traub 1989 4 SA 731 A. The impact of this decision is that conveyancers have a legitimate (reasonable) expectation not to have their deeds rejected upon lodgement, which has now become a right, and they could use the AJA to protect themselves. But then again, conveyancing requires specialization and a high degree of professionalism.

Could the conveyancer then, notwithstanding Regulation 45(7), enforce the right not to have his/her deeds rejected, and insist on justice, as provided for in the AJA? An affirmative answer to this question boils down to absurdity: The examiner would have to inform the conveyancer by letter that he/she is about to reject his deed unless he/she complies with a provisa. The deed would have to be held over for a mandatory time period of up to 3 months, allowing the conveyancer time to reply. The examiner would have to allow the deed to be amended in his/her office. If the deed cannot be amended and is still rejected, the examiner would have to supply written reasons and inform the conveyancer of internal remedies to appeal against the validly rejected deed. During this process a further period of 3 months could have lapsed.

CONCLUSION

The conclusion is that the conveyancer only has a right not to have his/her deeds erroneously, or unreasonably rejected. Once it is determined that the latter is the case, the rejection of a deed does have the effect of adversely affecting his/her right and only then does the administrative action have a direct, external effect on his/her client, thus satisfying the requirements for an administrative action as provided for in section 3 and 4 of the Provision for Administrative Justice Act, 2000.

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Section 66 of the Deeds Registries Act 47 of 1937 limits the duration of a usufruct to the lifetime of the person in whose favour it was created, and further restricts the cession thereof to the owner of the land thus encumbered.

Strictly, according to the above section, a contingent usufruct cannot be registered. However, practice does allow for the registration of such a contingent right. Contingent is defined in the Concise Oxford Dictionary as: “that can be anticipated to arise if a particular event occurs”.

Before embarking on a discussion of the contingent usufruct and the registrability thereof, a clear distinction must be drawn between a contingent usufruct and a usufruct in favour of more than one person. In terms of trite law, a usufruct may be created in favour of more than one person. The wording of the instrument that creates the right will determine the extent of the usufruct in the event of death of any of the usufructuaries or of a waiver by any of them.

Where a usufruct is, for example, ceded to two or more persons in equal, undivided shares and one of the usufructuaries dies, the servitude will only lapse in respect of the undivided share of the deceased, and the property will remain subject to the usufruct in respect of the other holder’s undivided share. However, where a usufruct is created in favour of two persons jointly, the principles of the lus accrescendi apply on the death of the first dying. In the same vein, where a usufruct is created in favour of spouses married in community of property, the usufruct does not lapse partially or in respect of an undivided half share when one of the spouses dies, but the share of the deceased accrues to the surviving spouse. The usufruct thus will only lapse in toto on the death of the surviving spouse.

In terms of trite law, more than one usufruct cannot exist concurrently on the same property. Furthermore, in terms of the maxim nemo plus iuris ad alium transiere potest quam ipse habet, nobody can transfer more rights than he owns. It is thus clear that where a usufruct concerns a property which is already subject to a usufruct, the second usufruct can not be registered. To circumvent this, practice has allowed for the registration of a contingent usufruct. Registrars of deeds will allow that the bare dominium be registered subject to the existing usufruct and the deed will further be made subject to the condition in respect of the second usufruct (this being the contingent usufruct). The second usufruct is not registered, and may only be claimed from the bare dominium owner once the first usufruct has lapsed. In terms of Registrars Conference Resolution 47 of 1987, a registrar of deeds will insist on the cession of the contingent usufruct as soon as he becomes aware of the
From page 7

The above ruling has been confirmed by RCR 2 of 2004 and RCR 4.24 of 1984 has thus been repealed.
ADVERTISEMENTS (REGULATION 68)

Regulation 68(1A) provides for the advertisements that must be obtained before a certified copy may be issued. In the following instances no advertisements are required:

• Where it can be proven that the registry duplicate of a title has been lost or destroyed, defaced or damaged through the negligence of the registrar of deeds (regulation 68(1B)).

In the above instance, the provisions of Regulation 68(2) need not be complied with:

• Where a title deed has, for any reason, become unserviceable (Regulation 68(1C)).

Similarly, the provisions of Regulation 68(2) need not be complied with:

• Where a title deed is in respect of land which is held by the Minister of Land Affairs -
  - for any person or persons;
  - for any nominee or nominees;
  - for or on behalf of any other person or persons, and where the land is registered in the name of the State, a Minister or any official of the State;
  - for land which is administered by the Minister of Land Affairs (Regulation 68(1D)).

CORRESPONDENCE (REGULATION 71)

The amendment to this regulation clearly provides that no preparation, lodgement or registration of any deed or document shall be done in a deeds registry by means of correspondence.

For a full exposition of the amendments, readers are kindly requested to read the Act and CRC 12 of 2004.

PROPOSED NEW AMENDMENTS

The Deeds Regulation Board has decided to repeal the provisions of Regulation 68(1A) - (1D) as the advertisements merely place an onerous burden on the owners of property. Statistics have shown that the advertisements do not significantly contribute to the reduction of copies being issued. Readers are advised to be on the look-out for a future amendment to the Deeds Registries Act 47 of 1937, which will hopefully be enacted during the course of the year.
In terms of Government Notice R 1115 published in the Government Gazette Volume 472, No. 26842 dated 1 October 2004 (Regulation Gazette No 8067) the Minister for Agriculture and Land Affairs has, in terms of Section 9(9) of the Deeds Registries Act 47 of 1937, approved the amendment to the Schedule of Fees of Office as prescribed by Regulation 84 of the Deeds Registries Act 47 of 1937.

The Schedule of Fees of Office is substituted by the following and will come into operation on 1 November 2004.

**NEW SCHEDULE OF FEES OF OFFICE**

By: Allen West
Justice College Pretoria

<table>
<thead>
<tr>
<th>Item</th>
<th>Fee (R)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. For a certificate by a registrar of any fact</td>
<td>25,00</td>
</tr>
<tr>
<td>2. For a report to Court made by a registrar in terms of Section 97 of the Act</td>
<td>250,00</td>
</tr>
<tr>
<td>3. (a) For a copy issued in a Deeds Registry in terms of Regulations 66, 67, and 70 of -</td>
<td>30,00 per copy, 4,00 per page</td>
</tr>
<tr>
<td>a deed</td>
<td></td>
</tr>
<tr>
<td>a document</td>
<td></td>
</tr>
<tr>
<td>(b) For the application for and for issuing a certified copy of a deed in terms of Regulation 68(1)</td>
<td>225,00 per copy</td>
</tr>
<tr>
<td>(c) For the keeping of a client’s copy of a deed on approval and at discretion of the registrar</td>
<td>150,00 per copy, 15,00 per year or part thereof</td>
</tr>
<tr>
<td>4. (a) For an enquiry relating to:-</td>
<td></td>
</tr>
<tr>
<td>(i) a property or deed, obtaining a computer printout and for the inspection of any deed, document, folio, register or microfilm relating thereto (including the search of the index) for each enquiry per property or deed</td>
<td>6,00</td>
</tr>
<tr>
<td>(ii) a person obtaining a computer printout and for the inspection of any deed, document, folio, register or microfilm relating thereto</td>
<td></td>
</tr>
<tr>
<td>(b) For any unattended, continuous search for information for each hour or part thereof</td>
<td>15,00</td>
</tr>
<tr>
<td>(c) For any enquiry not specially provided for, a fee is to be fixed by the registrar, provided that the minimum fee shall be</td>
<td>6,00</td>
</tr>
<tr>
<td>(d) For obtaining an off-line computer print-out, PC diskette or magnetic tape in respect of a series of properties, for every 100 properties or part thereof</td>
<td>50,00 plus an administration fee of 60,00</td>
</tr>
<tr>
<td>(e) For preparing a quotation for the supply of information relating to a series of properties, a refundable deposit of</td>
<td>300,00</td>
</tr>
<tr>
<td>(f) For information regarding the daily transfer of property acquired by electronic means</td>
<td>0,50 per property</td>
</tr>
<tr>
<td>(g) For issuing an alphabetical list, in electronic or paper format, containing the names of all the townships, or sectional title schemes, or allotment areas, or agricultural holdings or farms, in a registration office</td>
<td>50,00 per list</td>
</tr>
<tr>
<td>5. For transmitting any certificate, deed, document or any other information by using fax or any other electronic media as approved by the Chief Registrar of Deeds</td>
<td>3,00 per page</td>
</tr>
<tr>
<td>6. (a) For registering as an Aktex or DeedsWeb user, a registration fee of</td>
<td>240,00</td>
</tr>
<tr>
<td>(b) For reconnecting an Aktex or DeedsWeb user, whose service has been suspended because of outstanding debts</td>
<td>80,00</td>
</tr>
<tr>
<td>(c) For subscribing to Aktex or DeedsWeb, a fee of</td>
<td>10,00 per month</td>
</tr>
</tbody>
</table>
7. For information obtained through the Aktex or any other electronic system:

(a) For enquiries relating to a person, property or deed where the total number of a user’s enquiries for a month:

- does not exceed 100  3,00 per enquiry
- exceeds 100 but not 300  2,00 per enquiry
- exceeds 300 but not 1,000  1,50 per enquiry
- exceeds 1,000  1,00 per enquiry

(b) For issuing copies for information on deeds and documents by using fax or any other electronic media as approved by the Chief Registrar of Deeds  3,00 per page

(c) For any enquiry on the system which is unsuccessful as a result of insufficient or incorrect information or where no registration information was found  1,00 per enquiry

(d) For a list of erven in a township, or units in a sectional scheme, or portions of a farm, or holdings in an agricultural holding area, or erven in an allotment area, or any other similar list of registered properties  50,00 per 100 properties or part thereof

8. For the registration of -

(a) A transfer of land or cession of mineral rights of which the purchase price -

(i) does not exceed R80,000  55,00
(ii) exceeds R80,000 but does not exceed R150,000  200,00
(iii) exceeds R150,000 but does not exceed R300,000  260,00
(iv) exceeds R300,000 but does not exceed R500,000  340,00
(v) exceeds R500,000 but does not exceed R1,000,000  400,00

(b) A bond of which the amount -

(i) does not exceed R150,000  200,00
(ii) exceeds R150,000 but does not exceed R300,000  260,00
(iii) exceeds R300,000 but does not exceed R500,000  340,00
(iv) exceeds R500,000 but does not exceed R1,000,000  400,00
(v) exceeds R1,000,000 but does not exceed R2,000,000  500,00
(vi) exceeds R2,000,000 but does not exceed R3,000,000  650,00
(vii) exceeds R3,000,000 but does not exceed R5,000,000  800,00
(viii) exceeds R5,000,000  1,000,00

(c) A cancellation or release of a person or property from the operation of a registered mortgage or notarial bond and an application in terms of Section 4(1)(b) of the Act  60,00

(d) Any other registration or annotation in registers or records, including certificates of title, and all other registrations which are not exempted by a law or where no purchase price is involved  95,00

9. For any information, copy or other service referred to in this schedule other than the registration of deeds and documents, which may be required for official purposes by the Accounting Officer of the Department of Land Affairs, or her or his delegate, per item  0,00

EXEMPTIONS

No fees shall be levied by a registrar in respect of the performance of any act prescribed in Section 3(1)(w) of the Act.
The author has grave concerns pertaining to amendments to deeds and documents and the legibility of the handwriting in deeds and documents lodged at the deeds registries. She considers it necessary to address this issue. Regulation 20(1) of the Deeds Registries Act 47 of 1937 provides as follows in this regard: “Deeds and other documents lodged for execution, registration or record shall be on paper approved by the Registrar and shall be in clear writing, print or type, of good quality .......”. (the author’s underlining)

Amendments in deeds are brought about where it is not possible to change information due to the lack of space, and where it would rather be advisable to redraft the page. Certain handwritten amendments are too small and not legible, not to mention the problems which may occur when microfilming or scanning takes place. It would appear that once documents are lodged, their subsequent rectification takes place in a haphazard fashion. It often occurs that copies of deeds are issued, in which changes or amendments were not clearly affixed and are therefore not legible, once copied.

A further issue that needs to be addressed, is the endorsement of deeds. Regulation 20(1) does not only apply to conveyancers and should also be applied when deeds are endorsed. The endorsement of deeds and the handwriting in the endorsements leave much to be desired. Not only are endorsing and handwriting matters of concern, but also the clarity of the writing and the quality of the ink [Regulation 20(4)]. Notes raised in deeds are scribbled in such a manner that a person would sometimes think it is a foreign language.

In this regard, some guidelines were provided in a registrar’s circular issued at the Pretoria Deeds Registry, which address the matter of clarity and legibility of deeds and documents. (Registrar’s Circular 6/1994 - intern for the examiners). The registrar appealed to the examiners to apply greater care in the endorsement and completion of endorsements, and to write in block letters. Endorsements must also be affixed in a chronological order and, most importantly, must be approximately 20 mm apart. When the first page of a deed has already been endorsed, an additional page, which has been identified with the title deed by writing the page and title number at the top, must be added to the deed. These principles should be strongly enforced to address the aforesaid concerns.

Initializing of amendments is another aspect for discussion. It is often noticed that amendments in endorsements are not made properly, are illegible, or are not initialled by the person who effected the amendment. Sometimes, when title deeds are lodged, it is uncertain at what stage amendments were made to such title. Did the client / conveyancer / clerk / typist amend the deed subsequently to the registration thereof, or was it properly amended and initialled before registration? To preclude any doubt, the date of amendment should be affixed together with the initials, in respect of any amendment made by the conveyancer in the deed, or by the examiner in the endorsements.

It is proposed that conveyancers should not accept poor endorsements and handwriting in deeds. If spotted on preparation, prior to registration of the deed, conveyancers must insist on having it re-endorsed properly.

Note the registrar’s plea at the end of the above-mentioned circular: “Ondersoekers, ons wil graag saam met u trots wees op die professionele werk wat in die ondersoekafdeling gedoen word.” “Translated: “Examiners, we would like to be proud together with you with regard to the professional work performed in the examination section.” - Editor
Are we proud?

Please take note that the above observation is based on the author’s personal experience in one deeds registry. It is not an assumption pertaining to all examiners or to other deeds registries.
COVERT SALES AND DONATIONS IN
RE-DISTRIBUTION AGREEMENTS

By: Wiseman Bhuqa
Pietermaritzburg Deeds Registry

It is a generally accepted, legal principle of common law that the key essence of every last will and testament is to express the last wishes of a testator, and that therefore any transactional dispensations and estate administration pertinent thereto may not deviate widely from the provisions of the relevant testament, irrespective of any standing agreement between the interested parties: (De Wet v De Wet 1951(4) SA 212 (CPD)

However the foregoing principle is quite frequently infringed, as there may be various circumstances, often unpredicted by the testator, that present stumbling blocks in a particular deceased estate administration, for example;

• The cases provided for under Section 14(1)(b) of the Deeds Registries Act 47 of 1937.

• The prohibitions of certain transfers including more than one transferee in Agricultural land as prescribed under the Subdivision of Agricultural Land Act, 70 of 1970.

• Prohibitions orchestrated by certain unfavourable Municipal legislation regarding subdivisions of land etc.

The above circumstances and more, may justifiably sway the beneficiaries more towards a redistribution agreement to surmount these hindrances.

There are various formative requirements that a re-distribution agreement must comply with; however, for the purposes of this article only the aspect of covert sale and covert donation are discussed:

In Klerk NO v Registrar of Deeds 1950 (1) SA 626T, it was decided as follows: "...that in every redistribution there must be involved a sale, exchange or donation ......but the mere fact that a sale between two heirs or between an heir and the surviving spouse is entered into does not necessarily mean that a redistribution is brought about by that sale."

Therefore, quite clearly, the above quote admonishes against manipulating the redistribution agreements by using the latter as a safe bastion for covert sales and donations.

In the face of the foregoing quote from the Klerk-case, one begins to ponder as to how to establish whether a certain donation or sale in the re-distribution agreement is covert or otherwise.

Although the test is provided by Lubbe v Commissioner for Inland Revenue 1962(2) SA 503 (o), namely that if one were to ignore the re-distribution agreement, would there be a proper allocation of the estate assets irrespective of the introduced movables?

Whereupon, if the answer is in the affirmative that the agreement is forthcoming, the above test is in its own susceptible to uniform interpretation and application.

The Master Of The High Court, on the other hand, applies a more conceptualistic approach in testing if re-distribution agreements do not contain covert sales or donations, namely:

❖ The presence of all the elements of a sale in a transaction.
❖ In the case of a donation, the presence of all the elements thereof.

For example, in a certain will (X), the testator had directed that his farm Rolling Hills No 2370 be subdivided and the portions thereof be allocated to his two children respectively.
Whereas it appeared that such bequest could not be granted, as it was tantamount to the infringement of the provisions of Section 2 of The Subdivision of Agricultural Land Act (Act 70 of 1970), the heirs had to enter into a re-distribution agreement whereby (Y), the eldest daughter, was allocated ownership of the entire farm, but had to pay an amount of R10,000.00 to the other heir.

Due to the terminology used in the said distribution agreement, the latter looked more like an agreement of sale than a re-distribution agreement as it read as follows:

“Whereas the parties hereto have agreed that Y will receive ownership of the whole property, while Z will receive an amount of R10,000.00 from Y in consideration of his waived share in the bequest”

Relying on the conceptualistic approach, the Master ordered that the parties enter into a new agreement, as the words “...R10000.00 in consideration of” were indicative of a covert sale.

The Master advised that the following wording be used “...An amount of R10000.00 is paid into the estate by Y and Z will receive an award of R10000.00 from the estate...it should not read in consideration of”

In simple terms, the words “in consideration for” must not appear in any redistribution agreement as they imply the presence of a purchase price and thereby pointing more to a sale than a re-distribution agreement.

Instead the words x amount was awarded to Z, must be used.

It is proposed that examiners take cognizance of the above.

BACKGROUND

Mr. Jodwana started his career in the civil service in the Magistrate's Office. In 1977 he joined the Deeds Office in the Ciskei as a deeds controller. He quickly rose through the ranks in the deeds office, and by 1985, he was Acting Registrar of Deeds. In 1990 he was appointed as Registrar of Deeds: Ciskei.

Mr. Jodwana was always renowned for his open-door policy, which was appreciated by all his staff. He was an excellent administrator, who stressed the importance of proper administration within a deeds office. In 1997, the Ciskei and the King William's Town Deeds Offices merged. In 1999 Mr. Jodwana accepted a severance package. Mr. Jodwana was a manager deserving of the affection that the entire staff had for him.

On the 18 October 2004 an interview was held with Mr. Jodwana, to discuss his years in the Deeds Office.

THE INTERVIEW

Question
What was the biggest challenge in your career?

Answer
The biggest career challenge was working toward being appointed as Registrar of Deeds.

Question
What would you like to see happening with the Registration System in South Africa?

Answer
That is a very broad question, and a difficult one to answer, as I have been out of the Deeds Office scene for a while.

Property Law has never been static, so I can say with confidence that I am sure the Deeds Registration system will adapt as the need arises. This, I feel, is one of the strengths of the Deeds Registration system, namely, that the system is adapted on an ongoing basis to keep up with changing times. This includes the use of technology.

Question
What would you advise a person who is interested in following a career in the Deeds Office?

Answer
I would encourage them. If you apply yourself and are prepared to work to the best of your abilities, you will be successful in the Deeds Office.

What I enjoyed about the examination of deeds is that you have to apply your mind. I like the nitty-gritty of property law.
In the midst of the present uncertainty as to whether an endorsement in terms of Section 40 of the Administration of Estates Act 66 of 1965 constitutes a transfer of ownership or not, deeds registries do not insist that bonds be lodged for disposal or that the mortgagee consent to the endorsement. From a practical perspective, it is submitted that this practice is incorrect and might render the Registrar liable for damages sustained by a mortgagee.

In Holness and Another v Pietermaritzburg City Council 1975 (2) SA 713, Shearer J held that, once the Section 40 endorsement was made, the executor was *functus officio* in relation to the immovable property to the same extent as if he had transferred the property to the legatee. Other case law and opinions indicate that the trustees do not become owners of the trust assets, but that the property vests in the trustees for the benefit of trust beneficiaries. Nevertheless, it is clear that the current owner of the property (the executor) is forever out of the picture once the endorsement is registered.

The question one is confronted with now is who has *locus standi in judicio* to be sued on the bond? One cannot sue the previous owner (executor) because the control over property was handed over to the trustees and the executor is no longer in the picture. On the other hand, although the deeds registry practice over the last seventy years or so has been to regard the trustees as the owner of the property, it is also evident that deeds registries do not regard an endorsement in terms of Section 40 as a transfer of ownership, and therefore the trustees cannot be sued either. The trustees might even argue that they are not the mortgagors who passed the bond and that they were not substituted as debtors under the bond.

In Registrar of Deeds v Shaws Executors 1928 AD 425 it was decided that a creditor could waive his rights to payment. This means that if a mortgagee consents to the title of the mortgaged property being endorsed under Section 40, he releases the executor from liability and must go to the trustees for payment. A mortgagee should not consent unless he has established that the trustees have full power to mortgage the property and are thus able to be sued under the bond. A trustee has only those powers which are conferred upon him by the will. If he cannot alienate the property, the administration of which has been entrusted to him, he may have no *locus standi in judicio* to be sued on the bond and the mortgagee may find that he has no remedy, e.g. where the beneficiaries are undetermined.

In the past, registrars of deeds called for a consent from the holder of a mortgage bond to be lodged when an application was made for endorsement under Section 40. It is submitted that the current practice of not insisting that bonds be lodged for disposal is dangerous and might lead to claims for damages. Executors applying for endorsements are nevertheless urged to obtain at least such a written consent from the mortgagee to protect both themselves and the trustees.

What is your opinion in this regard?
Section 23 of the Black Administration Act 38 of 1927 has for many years been a thorn in the flesh for many people. Alas! the court has now ruled that the said Section is unconstitutional. The cases in question were as follows:

*Bhe and Others v The Magistrate, Khayelitsha and Others* CCT 49/03, *Shibi v Sithole and Others* CCT 69/03; and *South African Human Rights Commission and Another v President of the Republic of South Africa and Another* CCT 50/03.

The following media summary is provided to assist in reporting this case and is not binding on the Constitutional Court or any member of the Court:

These three cases concern a constitutional challenge to the rule of male primogeniture as it applies in the African customary law of succession, as well as constitutional challenges to Section 23 of the Black Administration Act, 38 of 1927, regulations promulgated in terms of that section and Section 1(4)(b) of the Intestate Succession Act, 81 of 1987. The Constitutional Court today upholds the challenges, strikes down the impugned statutory provisions and regulations, and puts in place a new interim regime to govern intestate succession for black estates.

The first two cases (the *Bhe* and *Shibi* cases) are applications for confirmation of orders of constitutional invalidity made by the Cape High Court and the Pretoria High Court respectively. Both Courts found Section 23(10)(a),(c) and (e) of the Black Administration Act and Regulation 2(e) of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks unconstitutional and invalid. Section 1(4)(b) of the Intestate Succession Act was also declared to be unconstitutional insofar as it excludes from the application of Section 1 of that Act any estate or part of any estate in respect of which Section 23 of the Black Administration Act applies.

The application in the *Bhe* case was made on behalf of the two minor daughters of Ms Nontupheko Bhe and her deceased partners. It was contended that the impugned provisions of the customary law rule of male primogeniture unfairly discriminated against the two children in that they prevented the children from inheriting the deceased estate of their late father. In the *Shibi* case for similar reasons, Ms Shibi was prevented from inheriting the estate of her deceased brother.

The South African Human Rights Commission and the Women’s Legal Trust were permitted direct access to the Court in the third case which was brought in the public interest, and as a class action on behalf of all women and children prevented from inheriting by reason of the impugned provisions and the rule of male primogeniture.

The Commission for Gender Equality was admitted as *amicus curiae* and, together with the Minister for Justice and Constitutional Development (who was a respondent in each of the cases), presented oral and written submissions.

Langa DCJ, writing for the majority of the Court, holds that, construed in the light of its history and context, Section 23 of the Black Administration Act is an anachronistic piece of legislation which ossified “official” customary law and caused egregious violations of the rights of black African persons. The section created a parallel system of succession for black Africans, without sensitivity to their wishes and circumstances. Section 23 and its regulations are manifestly discriminatory and in breach of the rights to equality in Section 9(3) and dignity in Section 10 of our Constitution, and therefore must be struck down. The effect of this order is that not only are the substantive rules governing inheritance provided in the section held to be inconsistent with the Constitution, but also the procedures whereby the estates of black people are treated differently from the estates of white people are held to be inconsistent with the Constitution.

Langa DCJ then considers the African customary law rule of male primogeniture, in the form that it has come to be applied in relation to the
inheritance of property. He holds that it discriminates unfairly against women and illegitimate children. He accordingly declares it to be unconstitutional and invalid.

He holds that, while it would ordinarily be desirable for courts to develop new rules of African customary law to reflect the living customary law and bring customary law in line with the Constitution, that remedy is not feasible in this matter, given the fact that the rule of male primogeniture is fundamental to customary law and not replaceable on a case-by-case basis. However, he holds that an interim regime to regulate intestate succession of black persons is necessary until the legislature is able to provide a lasting solution. As such, the Court orders that estates that would previously have devolved according to the rules in the Black Administration Act and the customary law rule of male primogeniture must now devolve according to the rules provided in the Intestate Succession Act. Special provision is made in the order for polygamous unions.

The order of this Court in respect of the rules of inheritance is made retrospective to the 27 April 1994, but will not apply to completed transfers of ownership, except where an heir had notice of a challenge to the legal validity of the statutory provisions and the customary law rule of male primogeniture.

In relation to the administration of estates, the Court orders that in future, deceased estates which would have previously been administered by magistrates in terms of the Black Administration Act, must now be administered by the Master of the Supreme Court in terms of the Administration of Estates Act, 66 of 1965. However the order of the court in respect of the administration of estates is not retrospective, so estates currently being administered by magistrates in terms of Section 23 of the Black Administration Act will continue to be administered by those magistrates. From the date of this judgment, new estates will be administered by the Master of the High Court in terms of the Administration of Estates Act.

In a partially dissenting judgment, Ngcobo J agreed with Langa DCJ that Section 23 of the Black Administration Act together with the regulations made under that Act, and Section 1(4)(b) of the Intestate Successions Act violate the right to equality and the right to dignity and are therefore unconstitutional. He also agrees that the principle of male primogeniture discriminates unfairly against women. He holds, however, that the principle of primogeniture does not unfairly discriminate against younger children. He stresses the fact that one of the primary purposes of the rule is to determine someone who will take over the responsibilities of the deceased head of the family. These responsibilities include the obligation to maintain and support the minor children and other dependants of the deceased. They also include the power to control and administer the family property on behalf of all family members. He also stresses the fact that an indlalifa (heir) does not become the owner of the property but holds the property on behalf of all family members.

Ngcobo J also holds that courts have an obligation under the Constitution to develop indigenous law so as to bring it in line with the rights in the Bill of Rights, in particular, the right to equality. He holds therefore that the principle of primogeniture should not be struck down but instead should be developed so as to be brought in line with the right to equality, by allowing women to succeed to the deceased as well.

As the striking down of Section 23 and the relevant regulations would result in the absence of choice of rules to determine when indigenous law is to be applied, Ngcobo J holds that Parliament must make laws governing the application of indigenous law. He accepts that pending the enactment of that law, an interim measure must be put in place to regulate succession. He finds that the application only of the Intestate Succession Act may, in certain circumstances, lead to an injustice. This is so because the provisions of this statute are inadequate to cater for the social settings that indigenous laws of succession were designed to cater for, in particular, the transfer of the obligation to look after minor children and other dependants of a deceased. He also finds that the application of the indigenous laws of succession may be inappropriate in certain circumstances. He therefore holds that pending the enactment of the relevant law by Parliament, both the indigenous laws of succession and the Intestate Succession Act should be applied subject to the requirements of fairness, justice and equity. He holds that in the interim, the questions of which system of law should be applied must be determined by agreement among family members. However, where there is a dispute, such a dispute must be resolved by the magistrates’ court having jurisdiction.
When contemplating and analyzing the possible registration of a notarial bond over a Permission to Occupy, it is of vital importance to determine what may be registered under a notarial bond and what may not be registered.

Section 102 of the Deeds Registries Act, Act 47 of 1937 is clear in this regard, "Notarial bond means a bond attested by a Notary Public hypothecating movable property generally or specially".

To emphasize this point even more, Section 53(1) of the Deeds Registries Act, Act 47 of 1937, forbids a registrar of deeds from registering a mortgage bond, which purports to bind immovable property.

This begs the question whether a Permission to Occupy is regarded as movable or immovable property?

The definition of immovable property in the Deeds Registries Act, 47 of 1937 does not clarify the matter, as it is silent with regard to Permissions to Occupy.

The regulations under the Black Administration Act, Act 38 of 1927 which defines a Permission to Occupy as "permission in writing granted or deemed to have been granted in the prescribed form to any person to occupy a specified area of trust land for a specific purpose" also does not shed any further light on the matter.

Attention is also drawn to the Upgrading of Land Tenure Rights Act, Act 112 of 1991, which describes the holder of the "PTO" as a "putative holder". A "putative holder" in the definitions of the Upgrading of Land Tenure Rights Act, Act 112 of 1991, means that the person occupies an erf as if he or she is the holder of the land tenure right in respect of that erf, but who is not formally recorded in the register of land rights as the holder of the right in question.

This means that a permission to occupy was regarded as a land tenure right. This statement can be confirmed by the definition of Land Tenure Right set out under the definitions of the Upgrading of Land Tenure Rights Act, Act 112 of 1991. The definition reads as follows "land tenure right means any leasehold, deed of grant, quitrent or any other right to the occupation of land created by or under any law and, in relation to tribal land, includes any right to the occupation of such land under the indigenous law or customs of the tribe in question."

It also means that a Permission to Occupy is upgradable to freehold property (as defined in terms of Section 102 of the Deeds Registries Act, Act 47 of 1937) in terms of the Upgrading of Land Tenure Rights Act, Act 112 of 1991.

The test to establish if this is feasible is as follows: If a notarial bond is registered over a permission to occupy and such permission to occupy is upgraded to freehold in terms of the Upgrading of Land Tenure Rights Act, Act 112 of 1991, what security will be there for the bondholder of the notarial bond?

It is therefore submitted that a notarial bond cannot be registered where the security thereunder is that of a Permission to Occupy. The reason being that a Permission to Occupy is regarded as immovable property and in terms of Section 53(1) of the Deeds Registries Act, Act 47 of 1937, the Registrar is prohibited from registering a notarial bond, which purports to bind immovable property.

Readers comments in this regard is sought - Editor.
Subsection (2) of Section 13 of the Sectional Titles Act, 1986 (Act No. 95 of 1986) (‘the Act’) provides as follows:

‘(2) A sectional plan, together with the schedule of servitudes and conditions referred to in Section 11(3)(b), shall upon the registration of such plan be deemed to be part of the sectional title deed, ...’

In terms of Section 3(1)(b) of the Deeds Registries Act, the Registrar of Deeds is enjoined to examine all deeds submitted to him for execution or registration, and, after examination, to reject any deed the execution or registration of which is not permitted by the Act or by any other law, or to the execution or registration of which any other valid objection exists.

It stands to reason, in the process of examination of a deed, that the existing title must be examined for the verification of the existing conditions of title. It is unquestionable that Section 13 of the Act finds application in the process.

On examination of a third sectional bond purporting to hypothecate a section in a scheme, I found that the relevant Section 11(3)(b) schedule contained the following condition:

‘C The property in paragraph 2A above, shall not be alienated, transferred, leased or otherwise dealt with without prior written consent of NBS Bank Limited No. 87/01384/06, by virtue of a notarial deed still to be registered.’

A notarial deed containing this condition was duly registered and the opening of the relevant scheme duly noted thereon.

I rejected the bond on the basis that the registration of the said bond constituted an alienation that is prohibited by the above-mentioned condition and therefore consent by NBS had to be lodged. The conveyancer concerned raised an argument that states that this restriction was only applicable in relation to the developer of the scheme and not to subsequent purchasers of the relevant sections. I did not concur with the argument of the conveyancer as the wording of the condition does not support the conveyancer’s argument. It is noteworthy to mention that the registration of the second bond was previously rejected for the same reason. The consent of NBS was eventually lodged and the bond duly registered.

It is, however, possible that the intention of the parties was to have the condition applying in respect of the developer only, but unfortunately such intention does not appear in the condition. It is humbly submitted that for as long as the said condition is contained in the Section 11(3)(b) schedule of conditions, the deeds office has no option but to insist on compliance because the condition constitutes a valid objection as contemplated in Section 3(1)(b) of the Deeds Registries Act. Readers are implored to share their views in this matter for the purpose of correcting me, should my understanding be way off the mark.

The checking of the schedule of conditions for any restriction on alienation when examining any act of registration is imperative - Editor.
SUBDIVISION OF THE COMMON PROPERTY IN A SECTIONAL TITLE SCHEME – PART II

By: Alexandré Lombaard
Justice College Pretoria

In the first part of this article the reader was introduced to the concept of subdivision of the common property in a sectional title scheme; the basic preparatory steps to be taken for such subdivision; and the deeds and documents to be lodged at the deeds registry for registration thereof. An elaborated discussion ensued on the procedure for the transfer of a portion of the common property, in respect of which common property no registered sectional title rights exist (e.g. no sections, no exclusive use areas, no right to extend the scheme as contemplated by Section 25).

From the phrasing of Section 17 it is evident that a portion of the common property may not be transferred, if such portion is subject to existing sectional title rights, i.e. sections, exclusive use areas, etc. Therefore, if any such rights are registered in respect of the portion of the common property to be transferred, such rights must first be disposed of.

This part of the discussion is intended to deal with the procedure to be followed, where the whole or part of a section(s) is registered over the portion of the common property to be transferred.

If the whole of a section is affected by the intended transfer of the common property section, 17(4)(a) prescribes that such a section must be cancelled with the written consent of the registered sectional owner, prior to the registration of the transfer of the portion of the common property. It stands to reason that the participation quota of such a section will lapse upon registration of the cancellation of the said section (Section 17(4)(c)). Furthermore, the quotas of the remaining sections will have to be adjusted proportionately (Section 17(4)(c)). In terms of Section 17(4)(d) the registrar of deeds should notify the Surveyor-General whenever the cancellation of the section is registered; whereupon the Surveyor-General should make the requisite amendments to the original sectional plan, the deeds registry copy of the sectional plan and the schedule thereto, specifying the quota of each remaining section.

It is advised that the following documentation should be prepared and lodged at the deeds registry:

For the cancellation of the whole of the section:-
• the written consent of the owner of the section to the cancellation of the section;
• the sectional title deed of the unit (section);
• all the sectional mortgage bonds (if any) registered over such unit (section) together with the consent of the bondholder(s) to the disposal of such sectional mortgage bonds; and
• the title deeds of any other registered real rights over the unit, if any, for cancellation [In terms of CRC 18 of 1997, these title deeds must be lodged. However, the circular is silent about the written consent of the holders of such rights to the cancellation of the rights. Furthermore, the circular refers to Section 17(5) of the Act as authority for the lodgment of such title deeds. Section 17(5) of the Act, however, specifically deals with the alienation of the whole of the common property - not only a portion. The Act is silent about the lodgment of such title deeds upon cancellation of the section. It is submitted that the title deeds of such rights must be lodged, together with the written consent to the cancellation thereof by the holders of the rights] ; and
• a transfer duty receipt for the acquisition of the common property.

Where only part of a section is affected by the alienation of a portion of the common property, a proportionately amended participation quota schedule is sent to the Surveyor-General by the conveyancer concerned. As only the Surveyor-General may change the description and extent of a section (unit), the Surveyor-General is
informed about (and requested for approval of) the anticipated amendment to the section prior to lodgement of the transaction in the deeds registry (Section 17(4A)(a)).

Upon approval of the amendment, the Surveyor-General notifies the registrar of deeds concerned about the anticipated change in the description and/or extent of the section (Section 17(4A)(b)). This notification is annotated by the registrar of deeds as an “SG-interdict” against the section concerned.

Upon registration of the transfer of the portion of the common property the registrar endorses the sectional title deed of the affected unit (section) with regard to the amended description and/or extent as reflected on the said “SG-interdict”.

Subsequent to the registration of the transaction, the registrar notifies the Surveyor-General in this regard (Section 17(4A)(c)). Upon receipt of such notification the Surveyor-General notes the amendment on the original plan and the deeds registry copy of the sectional plan and the amended participation quota schedule, specifying the quota of each section (Section 17(4A)(c)). Thus, simultaneously with the registration of the transfer of the portion of the common property, the unaffected portion of the unit is substituted in accordance with the amended participation quota schedule (Section 17(4A)(b)).

It is advised that in this instance, the following documentation should be prepared and lodged at the deeds registry:

For the cancellation of the affected portion of the section:-
• the written consent of the owner of the section to the cancellation of the affected portion of the section;
• the sectional title deed of the unit (section);
• all the sectional mortgage bonds (if any) registered over such unit (section) together with the consent of the bondholder(s) to the disposal of such sectional mortgage bonds in respect of the affected portion of the unit (section), at least (i.e. release of the portion from the working of the bond or the cancellation of the bond);
• the title deeds of any other registered real rights over the unit, if any, for cancellation; and
• a transfer duty receipt for the acquisition of the common property.

Irrespective of whether only part of a section, or the whole thereof, will be affected by the transfer of the portion of the common property, the documentation to be prepared and lodged at the deeds registry remains the same and it is advised to include:

For the transfer of the portion of the common property:-
• a deed of transfer in the prescribed FORM H in Annexure I to the regulations (Section 17(3));
• a copy of the unanimous resolution, referred to in Section 17, certified by two trustees of the body corporate (Section 17(1) and Section 17(2) and CRC 18 of 1997);
• a diagram approved by the Surveyor-General if the portion of the common property to be alienated has not been demarcated and depicted on an already existing diagram that was approved by the Surveyor-General (Section 17(3)(a) and CRC 18 of 1997);
• all the mortgage bonds over the units and the scheme and related written consents of bondholders in terms of Section 56 and Section 57 of the Deeds Registries Act for disposal in respect of the portion concerned (Section 18; RCR 35 of 2002 and RCR 45 of 2003); and
• all usual, prescribed documentation, e.g. a special power of attorney to pass transfer; a transfer duty receipt, rates clearance certificate for the land, usual documentation pertaining to the subdivision of land, etc.

In the remaining two parts of the article, the procedure to be followed where exclusive use areas and the right to extend the scheme as contemplated by Section 25 are affected, will be discussed.
This column provides a brief exposition of the case law which is relevant to conveyancing and notarial practice. However, the cases should be read in toto.

Jaftha and Others v Van Rooyen and Others CCT 74/03

Sale in execution of homes because owners have not paid their debts - violates constitutional right to adequate housing

The Constitutional Court upheld the appeal against the decision of the Cape High Court delivered on 5 June 2003. The appellants challenge certain provisions of the Magistrates’ Courts Act 32 of 1944 (the Act) which provides for execution against the immovable property of judgment debtors.

This case concerns a small, poverty-stricken community in Prince Albert in the Karoo. The appellants are unemployed, with few assets. Both were threatened with losing their homes because of their failure to pay certain debts. Both were able to buy their homes as a result of state subsidies. If people lose their homes as a result of a sale in execution, they are disqualified from acquiring future state subsidies. The appellants therefore approached the High Court and argued that the effect of the impugned provisions was to render them homeless, potentially on a permanent basis. They argued that the impugned sections constituted an unjustifiable limit on their right of access to adequate housing.

The High Court rejected the arguments of the appellants and held that the right to adequate housing does not include the right to own one’s own home. The court held further that, to the extent that people might be rendered homeless as a result of the impugned provisions, this was either through vacating their homes voluntarily after the homes were sold in execution or as a result of eviction in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act). The court also held that the PIE Act includes sufficient safeguards to ensure that the rights of those similarly situated to the appellants are not violated.

In this Court, Mokgoro J, in a unanimous judgment, upholds the appeal against the decision of the High Court. She finds that any measure which removes from people their pre-existing access to adequate housing limits the right to housing in the Constitution.

The Court holds that the process of execution against immovable property is unconstitutional to the extent that it allows a person’s home to be sold in execution in circumstances where it is unjustifiable. The process can occur, from beginning to end, without oversight by the courts. The Court holds that an appropriate remedy would be to provide judicial oversight of the execution process, so that a court can determine, whether an execution order against the immovable property of a judgment debtor is justifiable under the circumstances of the case.

Mkontwana v Nelson Mandela Metropolitan Municipality CC T 57/03

The Constitutional Court gave judgment in three cases concerning the constitutionality of Section 118(1) of the Local Government: Municipal Systems Act 32 of 2000 and Section 50(1)(a) of the Gauteng Ordinance No 17 of 1939.

Bhe and Others v The Magistrate, Khayelitsha and Others CCT 49/03.

See the full discussion of the effect of this case in the article by Allen West in this issue.
1. INTRODUCTION

The purpose of this article is to develop a skill which will help you to read and summarize a court case. In the first instance a person has to know to find a court case. Although every person will have his own way of reading and summarizing a court case, some aspects however must be kept in mind.

FINDING A CASE

Each case that goes through the courts is indicated by a specific reference. A case reference contains certain key elements:

- The name of the case
- Year and volume of the case report
- Page where the case report starts
- Court where the case was decided

(a) The name of the case

All cases are reported by the reference to the name of the parties involved. The “v” between the names of the parties is an abbreviation for versus which means “against” for example Boland Bank v Du Plessis 1995 (4) SA 113.

When there is more than one person or institution involved, the case name usually refers only to the name of the first party, adding that there is another party appearing. For example United Building Society Ltd and Another v Du Plessis.

In some cases the abbreviation NO (plural NNO) appears after the name of one the parties, indicating that the person appeared in the case in his/her official capacity and not personally. This is an indication that the person is a curator or a trustee. See the Simplex case.

In criminal cases, the first party will always be “S”. The letter “S” refers to the state. The other party is the accused. For example S v Jeffers 1976 (2) SA 636 (A). In this example the accused is Jeffers. In this criminal case it was a case of the state against Jeffers. In criminal cases before 1961 the letter “R” was used instead of “S”. (Before South Africa became a Republic the King or Queen of England had sovereignty over South Africa). “R” refers to Latin “Rex” (King) or “Regina” (Queen).

In some cases there is only one party, who asks the court to grant a certain order on its behalf without acting against any specific opponent. For example Ex Parte Martens.

(b) YEAR AND VOLUME OF THE CASE REPORT

One of the South African series of Law Reports used most often is the South African Law Reports issued by Juta and Co. Ltd. When you are given a case to read you should take note of, and be able to interpret, its reference to aid location of the case itself. This is the reason why in the full reference to a case the year appears after the name of the parties. This indicates the year in which the case was reported. For example S v Jeffers 1976 (2) SA 636 (A). This case can be found in the second volume of 1976.

The most important decisions in South Africa and in a number of neighboring states are reported together as the South African Law Reports and the “SA” in the reference indicates that it was published as part of a series.

The South African Law Reports appears in the form of twelve monthly issues which are bound together in four numbered volumes of three issues each.

(c) PAGE WHERE CASE REPORT STARTS

Now that you have identified where to find the law report, you need to know the number of the page on which the case starts. For example S v Jeffers 1976 (2) SA 636 (A): This case starts on page 636.

(d) COURT WHERE THE CASE WAS HEARD
The letter which appears in brackets after the number of the page on which the case starts, is an abbreviation of the court’s name. For example S v Kohler 1979 (1) SA 861 (T): The Transvaal Division is where the case was heard. In Molefe v Mahaeng 1999 (1) SA 562 (SCA) the case was heard in the Supreme Court of Appeal. In S v Jeffers 1976 (2) SA 636 (A) the case was heard in the Appellate Division. Decisions of the Appellate Division have more authority than those of a Provincial Division.

STRUCTURE OF A REPORTED DECISION

At this stage you should know how to refer to a case and how to find a case in the law reports. Now we are going to deal with the way in which a case is set out (the structure of a reported decision):

(a) **Judge’s names**

The name of the judge(s) appear under the name of the court where the matter was heard. The letter that appear after the names of the judge(s) indicate the title(s) of the judge. For example:

- P - President of the Constitutional Court
- DP - Deputy President of the Constitutional Court
- CJ - Chief Judge
- JA - Judge of Appeal
- AJA - Acting Judge of Appeal
- J - Judge
- JP - Judge President
- DJP - Deputy Judge President

For instance in the case of Simplex (Pty) Ltd v Van der Merwe and Others NNO Goldblattt J was the Judge.

(b) **DATE ON WHICH THE CASE WAS HEARD**

The date on which the matter was heard appears under the name of the judges. In the Simplex-case 12, 23 May 1995.

If there are two more dates - in the example given above - it means that the case was postponed or that judgement of the final order was handed down at a date later than the initial trial date.

(c) **SUMMARY OR FLYNOTE**

Below the name of the case the relevant points of the facts and the decision are summarized in telegram style. The summary should always be used as the first indication of what a case is all about, before analyzing the judgement in detail.

(d) **HEADNOTE**

The summary is followed by the headnote. Usually both, the facts and decision of the court, are summarized in the headnote. The summary of the facts (usually the first paragraph of the headnote) and the court’s decision (usually preceded by the word “held”). For several reasons it is insufficient only to read the headnote.

(e) **LEGAL REPRESENTATIVES**

Just below the headnote and before the judgement, the names of the persons who represent the parties appear. In the Simplex-case P M Wullfsohn acted for the applicant and N N Lazarus for the respondents.

(f) **JUDGEMENT**

Below postea - meaning thereafter, later - (if it appears) the name of the judge appears again. The judgement is the main part of the case report. The judgement usually contains the following:

- The facts
- Legal question
- Finding
- Reasons for finding (Ratio decidendi)
- Order

(a) **FACTS**

The facts are usually summarized briefly in the headnote. The headnote is useful because it gives you some idea of what the case is about. After that, the judgement itself must be read. The court may discuss the
facts in length, especially if the facts themselves were in dispute, but the only relevant part is the court’s final finding with regard to the facts.

(b) THE LEGAL QUESTION

The legal question is not always stated very clearly. The summary and headnote might be of assistance in establishing the legal question. The answer will only be clear if the question is clear.

(c) FINDING

Once the legal question has been answered, the relevant legal principles can be applied to the facts of the particular case.

(d) REASONS FOR THE FINDING (RATIO DECIDENDI)

A literal translation of “ratio decidendi” means “the reasons for the decision”. Ratio decidendi (hereinafter referred as the “ratio”) consists of the legal principles that the court applied to the material facts in order to arrive at its decision. The ratio is the most important part of the judgement. In order to find the ratio, you have to know the law that is applicable to the case. The ratio can, therefore be described as a legal principle or rule. The ratio will usually be summarized in the headnote. The ratio must be distinguished from Obiter dicta which means remarks in passing. There are casual remarks made by the judge and therefore irrelevant to the point in discussion.

(e) ORDER

The court order is what the court tells the parties to do and must be distinguished from the ratio.

SUMMARIZING

When we summarize something we condense it, so that only the most important points of idea remain. It is like taking the flesh away so that only the bare bones remain.

When you summarize court cases, you should arrange them so that you can refer back to the summary to refresh your memory about the relevant facts of the case and the legal principle laid down in the case. All other irrelevant material, such as minute factual detail, should be left out.

For this purpose the case of Simplex (Pty) Ltd v Van der Merwe and Others NNO 1996 (1) SA 111 will be discussed. A summary will be made under the following headings: (a) Facts (b) Legal question (c) Finding (d) Reasons for finding: (Ratio decidendi).

FACTS

An agreement of sale was signed after the trustees were appointed, but before they had been authorized by the Master in terms of Section 6(1) of the Trust Property Control Act 57 of 1988.

According to Section 6(1) of the Trust Property Control Act 57 of 1988, any person appointed as trustee in terms of a trust instrument shall act in that capacity authorized thereto in writing by the Master.

The provisions of Section 6(1) are peremptory. An act by a person not having the requisite authority has no force or effect.

LEGAL QUESTION

Could the agreement be ratified either by the Master or by the trustees after receipt of the necessary authority?

FINDING

No.

REASON FOR FINDING (RATIO DECIDENDI)

The court cannot validate acts which are expressly prohibited by statute.

CONCLUSION

Now you know how important it is for you, to be able to read and understand court cases. This is something that you will do a lot in your work and studies. It must be practiced often.
The Department of Land Affairs has launched an initiative aimed at establishing at least one Deeds Registry per province in order to take deeds registry services to the people.

The Department of Land Affairs has launched an initiative aimed at establishing at least one Deeds Registry per province in order to take deeds registry services to the people.

The first phase of this project is the establishment of a Deeds Registry for the province of Mpumalanga at Nelspruit. This is followed by the expansion of the areas of jurisdiction of the Eastern Cape province Deeds Registries at Umtata and King William’s Town.

The provision of a records archive for the Nelspruit Deeds Registry presented a considerable logistical challenge. After extensive investigation of several alternatives, including manual replication, the Scanning Solution was found to be the most effective route to follow. The Scanning Solution also offers further benefits, which include:

- a means of establishing additional Deeds Registries,
- disaster recovery for existing paper archives,
- support for the proposed e-Cadastre, a system for the electronic submission and processing of deeds and diagrams, as well as

The Scanning Solution was found to be the most effective route to follow. It also offers further benefits, which include:

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The provision of a records archive for the Nelspruit Deeds Registry presented a considerable logistical challenge. After extensive investigation of several alternatives, including manual replication, the Scanning Solution was found to be the most effective route to follow.

The second phase of the project consists of two phases, the first of which entails the digitisation of the Pretoria Deeds Registry’s archives, the establishment of an archive for the Nelspruit Deeds Registry and a central image repository at SIT A Centurion, which will serve as back-up and disaster recovery site for the images of all the Deeds Registries.

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These benefits prompted the Department of Land Affairs to extend the project to include the nine current Deeds Registries. During 2003, the Department duly instructed the State Information Technology Agency (SITA) to invite proposals for the Scanning Solution from industry.

The project consists of two phases, the first of which entails the digitisation of the Pretoria Deeds Registry’s archives, the establishment of an archive for the Nelspruit Deeds Registry and a central image repository at SIT A Centurion, which will serve as back-up and disaster recovery site for the images of all the Deeds Registries.

The second phase will entail the digitisation of the paper and microfilm archives of the remaining Deeds Registries, commencing with the Cape Town Deeds

TAKING SERVICES TO THE PEOPLE
The functionality of the DeedsWeb, the Department of Land Affairs’ internet-based registration information system has been upgraded and extensively expanded to meet the needs of the Deeds Registries’ information clients.

Large-volume information users, including several information vendors and financial institutions, are still accessing deeds information via the Aktex Information System, forerunner of the DeedsWeb. These users are in the process of testing a web-based interface, which will enable them also to obtain their information via the internet.

In due course, the Aktex system, which is becoming increasingly difficult and expensive to maintain, will be phased out completely and replaced by the more efficient and user-friendly DeedsWeb system.

Using DeedsWeb

If you are a registered Aktex user, you can use your current Aktex user identification and password to access the DeedsWeb and proceed to sign onto the system directly.

If you are not a registered Aktex user, please register as a new user on the webpage.

Users connect to the www.deeds.gov.za web-address, which directs the browser to the WebSphere application server.

Despite the complexity of the system through which data is retrieved for users, sub-second response times are achieved with DeedsWeb.

If a man begins with certainties, he shall end in doubts; but if he will be content to begin in doubt, he shall end in certainties.

Francis Bacon • 1561-1626

No man can justly censure or condemn another, because indeed no man truly knows another.

Sir Thomas Browne • 1650

A truth that’s told with bad intent beats all the lies you can invent.

William Blake • 1757-1827

Never make a defence or apology before you be accused.

King Charles I • 1636
The nine Deeds Registries in South Africa are located in Pretoria, Cape Town, Johannesburg, Pietermaritzburg, Bloemfontein, Kimberley, King William’s Town, Vryburg, and Umtata. They are responsible for the registration of deeds and documents relating to real rights in land in respect of more than 7 million registered land parcels. These parcels represent what is known as “immovable property” and include township erven, farms, agricultural holdings, sectional title units and sectional title exclusive use areas.

**ADDRESS LIST: DEEDS OFFICES**

<table>
<thead>
<tr>
<th>STREET ADDRESS</th>
<th>POSTAL ADDRESS</th>
<th>TELEPHONE</th>
<th>FAX NR.</th>
<th>E-MAIL</th>
</tr>
</thead>
<tbody>
<tr>
<td>CHIEF REGISTRAR: MR N S LEFAFA</td>
<td>Private Bag X918 PRETORIA 0001</td>
<td>(012) 338-7227</td>
<td>(012) 328-3347</td>
<td><a href="mailto:SLEFAFA@dla.gov.za">SLEFAFA@dla.gov.za</a></td>
</tr>
<tr>
<td>PRETORIA: MR P MESEFO</td>
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<td>(012) 338-7103</td>
<td><a href="mailto:PEMesefo@dla.gov.za">PEMesefo@dla.gov.za</a></td>
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<td>KING WILLIAM’S TOWN: MR J BADENHORST</td>
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</tr>
</tbody>
</table>
Question
What do you think it takes to be successful in the Deeds Office?

Answer
The groundwork must be there, in other words if your foundation is not there it will be difficult to fully achieve success in the Deeds Office. For example, when you are a junior examiner, ensure that you learn all there is at that level before wanting to go higher and higher. Patience is very important.

As I said earlier, you have to work to the best of your abilities. As you move to higher positions, it is crucial to be transparent, let staff know what is happening and what is expected of them and what their boundaries are.

Furthermore, never try to avoid or run away from problems that you encounter, you have to work through them.

We would like to thank Mr. Jodwana for his words of advice and his willingness to be interviewed. - Editor

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An English summary of this article is available.

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**ANNUAL CONFERENCE OF REGISTRARS 2004**

By: Allen West
Justice College Pretoria

The Annual Conference of Registrars was held during November 2004 at the Blue Lagoon Hotel in East London. To curb costs, the Strategic Planning Meeting of the Department of Land Affairs preceded the conference.

The conference, under the chair of the Chief Registrar of Deeds, Mr. Sam Lefafa, took 44 resolutions, which resolutions are aimed at creating a uniform practice in all deeds registries throughout South Africa.

The Registrar of Deeds from Botswana provided a written apology for not attending the conference, but requested to be invited in future.

Readers are requested to obtain a full set of the resolutions taken from their local registrar of deeds.

Certain of the resolutions taken, have been discussed by George Tsotetsi in this issue.
Let Us Get to Know Our Neighbouring Registrars and Their Offices Better

By: A S West
Justice College Pretoria

Mr. Juba Dlamini
Registrar of Deeds for
The Deeds Registry for Swaziland

Introduction

The deeds registry for Swaziland, as established under Section 3 of the Deeds Registry Act 37 of 1968, was situated in Pretoria until 25 June 1973. At its establishment in Swaziland, all matters and records kept in the Pretoria deeds registry were brought to Swaziland and the Deeds Registry Department fell under the portfolio of the Ministry of Justice. When the office started operating in Swaziland, its staff component was (i) a Registrar of Deeds, (ii) an Assistant Registrar of Deeds, (iii) three Examiners of Deeds, (iv) a Clerical Officer, (v) a Typist, and (vi) a Messenger.

Mission Statement for the Deeds Registry:

(i) To examine all deeds or other documents submitted for execution or registration, and, after examination, to execute or register them as permitted by law.

(ii) To take charge of and preserve all the records of the deeds registry in a document processing system that will provide an effective storage and retrieval system, as well as maximum safety and security.

(iii) To collect revenue for the Central Government in the form of stamp duty, fees of office and search fees.

Accommodation

Section 3(1) of the Deeds Registry Act 37 of 1968 provides that the deeds registry for Swaziland shall be situated at such place as the Minister may prescribe by notice in the Gazette. The Registry is presently situated at the Government Offices in the Old Income-Tax Building.

Achievements

Staffing

Due to an increase in the volume of work, the staff component has been increased within the last decade as follows:

- Registrar of Deeds 1
- Senior Assistant Registrar of Deeds 1
- Assistant Registrar of Deeds 2
- Senior Examiner of Deeds 2
- Examiner of Deeds I 2
- Examiner of Deeds II 5
- Shorthand Typist 1
- Typist 1
- Accounts Officer 1
- Clerical Officer 2
- Messenger 1
- Cleaners 2

To complement this staff, the registry has requested four additional posts, namely that of a Security Guard, a Nightwatchman, a Telephone Operator and a Driver.

Execution and Registration of Deeds and Other Documents

In 1974, the number of deeds and other documents executed and registered in the deeds registry totalled 938. Two decades later, the number had increased to 1 850 (1994). To date, the number of these deeds and documents is estimated at 3 000. These are clear signs that this number will keep on increasing, as more and more people invest in real estate.

There are indications that land tenure might change with new forms of land markets and rights on land being introduced. Examples are the introduction of Sectional Titles and leasehold over crown land and Swazi Nation Land. These introductions may indeed impact on the capacity of the deeds registry staff and
could bring up the issue of institutional strengthening.

FROM MANUAL AGE TO DIGITAL AGE

In the late 1980s, the deeds registry conducted a feasibility study with the intention of establishing the most suitable and cost effective document management system.

The study came out with two solutions, namely:

• **Computerisation of all Deeds Office Records for easy access and retrieval:**

A capital project was submitted to Government Central Agencies in 1993 and eventually the Government funded this project, which started in April 1995. Since that year, the Registry has done away with manual land, debts and miscellaneous contract registers because all that information has been computerized and can be easily accessed or retrieved within seconds. This is an on-going project as the registers are updated daily when ownership changes hands and new contracts are entered into.

• **Imaging and indexing of all Deeds Office Records:**

This project, also fully sponsored by the Swaziland Government, started in the year 2000. Deeds office records are scanned, indexed and electronically stored for easy retrieval and archival purposes. The first step was to scan, index and store electronically all active deeds and documents from the year 1960 to 2000. This has been achieved, and the registry is now on-line. The second step, which is also complete, was to backfile from the year 1959 to 1910. All these active records can now be viewed and updated on the screen of the computer. In short, the deeds registry operates its own local network with work stations.

The two systems are integrated so that they check each other, whenever a need to do so arises. The main goal is establishing a paperless office in future.

HUMAN RESOURCE DEVELOPMENT

The deeds registry recruits and trains its personnel on the job. It has been fortunate, however, that in the 1980s it got technical assistance from the South African Government through her Embassy in Swaziland, to have its personnel study for a National Diploma in Deeds Registration Law. Some officers have taken advantage of this sponsorship and have obtained certificates, while some are still pursuing this goal. In addition, the deeds registry has its own Training Committee and two Training Officers, to guide and make needs assessment in an effort to train its personnel. As a result, officers have obtained certificates from various courses and are well equipped to carry out their respective duties, thus increasing productivity.

COLLABORATIVE EFFORTS

As a custodian of Swaziland’s Legal Cadastre, the deeds registry does not only supply other Government Departments dealing with land related data with information, but also attends to various workshops and committees where land is a subject matter, be it a project, policy, land allocation or dispute over ownership and so forth. Clear examples are the present urban development project, the formulation of a National Land Policy, Peri-urban Policy, Resettlement Policy and the future establishment of a Land Information System.

The deeds registry is also helping Central Government in the collection of revenue, mainly from stamp duties, fees of office and search fees.

THE FUTURE

The Deeds Registry intends to achieve the following in future:

• Reduce paperwork as an effort towards a
paperless office. This depends on the stability and reliability of the currently ongoing projects mentioned above.

- Electronic lodgement of deeds and documents:

Because deeds and other documents are now electronically stored, the Registry will investigate the possibility of putting an infrastructure in place, that will enable conveyancers to lodge and prepare their documents at their work place. For this to happen, conveyancers would have to apply and get licensed for a gateway facility. This would not only make conveyancing faster and more efficient, but would also improve revenue collection for the deeds registry.

- Moving Swaziland’s National Land Information Service into the public arena:

This can be achieved by linking and housing together the Deeds Registry and the Surveyor-General’s Office so that a one-stop information centre can be established.

- Establishing a Land Information System.

This is a long overdue and certainly costly, but cost effective exercise. Linking together the Deeds Registry and the Surveys Departments can form the basis of this National Project, which has invaluable benefits. Allocation of Natural Resources is best achieved when a National Land Information System is in place.

- Articulation and registration of all rights in and on land including allocations on Swazi Nation Land. This could facilitate solving Chiefs’ boundaries and community and individual disputes. It can further formalise land holdings on Swazi Nation Land and control informal settlements and land markets.

**CONSTRAINTS**

(a) The biggest constraint, perhaps for the Ministry as a whole, is budgetary. In order to realize the above goals the Deeds Registry must:

- Be adequately staffed. This is not easy because of the present zero growth.
- Obtain funds for establishing a National Information Service Centre and a National Land Information System,
- Obtain funds for hardware maintenance, software upgrading, software licensing and systems administration.

We are of the opinion that, unless government changes its National Budgeting approach, ministries and their departments may fail to perform to their utmost expectations.

(b) The absence of a National Land Policy hinders development of land generally for the whole country, in particular where issues of access to land, land use and security of tenure are concerned.

(c) The Deeds Registry is also affected by administrative procedures, namely:-

(a) Centralisation of the budget by the Ministry, and

(b) Allocation of funds by activity instead of by responsibility centre.

The main problem here is that a responsibility centre cannot order and dispatch payment on its own, as and when the need arises. In order to order material, a requisition form has to be filled by the centre. As if this were not enough, the money budgeted for an item might be exhausted by another centre sharing the same activity.

**CONTACT ADDRESS:**

THE REGISTRAR OF DEEDS  
P O BOX 297  
MBABANE  
SWAZILAND  
TELEPHONE NO: 4041633 / 4049831  
situate: old income tax building  
CONTACT PERSON: JUBA DLAMINI
Q: Tell us something about your career history.

A: “I started working at the King Williams Town Deeds Registry on the 12th of May 1958 as a clerk, the equivalent of a Deeds Controller Level 2.

Then, on the 2nd of January 1967, I was transferred to the Vryburg Deeds Registry at a time when our first child, Rhona, was only six months old. We did not own a house and my salary was R130.00 per month. I was promoted shortly after arriving in Vryburg.

I was seconded to Botswana in January 1969, and my task there was to bring their records and practices in line with those in South Africa, as they followed our Act 47/1937. I spent almost all of my time in Botswana on my own, as my wife had to return to Vryburg for medical treatment when she was expecting our second child, Colleen.

I was then transferred back to King William’s Town in May of 1969 and only stayed there for six months before being transferred to Pietermaritzburg in 1970. During my short stay in King William’s Town I was promoted to A/O “Chief Deeds Controller”.

I stayed in Pietermaritzburg for 13 years and our third child, Louise, was born there. I was promoted to Assistant Registrar of Deeds in Pietermaritzburg.

In 1984 I took a straight transfer to Cape Town, where I became a Deputy Registrar in 1991. I was the Registrar in Cape Town from November 1995 until I retired in December 1998. My Deeds Office career thus lasted for forty years and seven months.

Q: What was the biggest challenge of your career.

A: “Two things stand out, one being the work I did in the Botswana Deeds Registry, where I had to bring their systems, practices and procedures in line with that of the South African Deeds Registries. The other was the work I did on the drafting of the complete Sections and Regulations of the current Sectional Titles Act, 95 of 1986. The work was very satisfying. It was nice to draft legislation from a practitioner’s point, thus making the Act easy to use. The exercise was also exciting. I remember one occasion, where the Chief Registrar of Deeds, Mr. Van Vuuren phoned me in Cape Town at twelve in the afternoon and told me to be on the four pm flight to Pretoria. Once we had drafted the entire Act in English we had to translate it into Afrikaans. Mr. Cleary, ex-Registrar of King William’s Town and currently living in Cape Town, also assisted with this project.

Q: What was your best career move and why?

A: “It was my move from Pietermaritzburg to Cape Town, because the size of the office as well as the volume and variety of work I was exposed to gave me a lot of insight and experience. This experience enabled me to make the best use of later opportunities that presented themselves.

Q: What made you decide to pursue a career in the Deeds Office?

A: “Quite frankly, I had no idea what the Deeds Office was or what they did there, until I walked in and someone told me. I did, however, want a career in the civil service. The job security and benefits were appealing at the time. I enjoyed the work to such an extent that I ended up staying there for over 40 years.

Q: Was it always your eventual goal to become a Registrar and did the post of Registrar live...
up to all you dreamt it would be?
A; Yes, already early in my career I did aspire to becoming a Registrar and, yes, the job did live up to all my expectations, but at the same time it was very challenging and demanding.

Q; What would you like to see happening with the registration system in SA?
A; I would like the system to remain a “certain” one, where the validity of title is guaranteed by the quality of the registration process and not to follow foreign trends where title has to be guaranteed by insurance because they don’t have an effective and efficient registration system like ours.

Q; What advice would you give to the people coming up the ranks?
A; My advice to them would be to strive and to make themselves competent to such an extent that they will become indispensable.

Q; Would you advise a person to follow a career in the Deeds Office, and why?
A; Yes, provided the person has a genuine interest in the registration system and is not just there because they need to pay bills at the end of the month. I found it exceptionally rewarding to have a career that has such a profound impact on our economy as well as the lives of the majority of our citizens.

Q; How are you currently filling your days?
A; I enjoy spending time working in my garden. I also do a lot of handy-man jobs, which include woodwork, building cupboards, grouting, plumbing, etc. around the house and for the children and friends. Thys Bester, an “ex-Cape Town Registrar” and I still keep bees as a hobby. I hunt a few times a year and had a good hunting trip to Namibia earlier in the year. I try to go fishing in the Eastern Cape at least once a year. Occasionally I spend Sunday afternoons watching my eldest grandson, Bradley, the Western Province U/13A cricket captain, play his matches.

I am, however, spending an increasing amount of time working as an independent

Beware of turning a blind eye!!

An employee who witnesses an act of misconduct and chooses to remain passive in not identifying the perpetrators could face disciplinary action and even dismissal. The Labour Appeal Court, in Fawu v Amalgamated Beverage Industries in 1994, ruled in a case in which striking workers had assaulted a so-called scab worker that ‘in the field of industrial relations, it may be that policy considerations require more of an employee than that he merely remain passive and his failure to assist in an investigation of this sort may itself justify disciplinary action’.

COMMUNAL LAND RIGHTS

The Communal Land Rights Act 11 of 2004 was published in GG 26590 and will come into operation on dates to be determined by proclamation.

The Act aims to provide for

• legal security of tenure by transferring communal land to communities or by awarding comparable redress;
• the conduct of a land rights enquiry to determine the transition from older rights to new order rights;
• the democratic administration of communal land by communities;
• Land Rights Boards; and
• The co-operative performance of municipal functions on communal land;

Application

The Act applies to

• State land which is beneficially occupied;
• State land which is at any time vested in
  - a government contemplated in the Self Governing Territories Constitution Act 21 of 1971, before its repeal;
  - a government of the former Republics of Transkei, Bophuthatswana, Venda or Ciskei;
  - the South African Development Trust (excluding land which has been disposed
of in terms of the State Land Disposal Act 48 of 1961);

- State land which was listed in the schedules to the Black Land Act 27 of 1913, before its repeal, or the schedule of released areas in terms of the Development Trust and Land Act 18 of 1936, before its repeal;

- land to which the KwaZulu-Natal Ingonyama Trust Act 3 (KZ) of 1994 applies (but only to the extent provided for in Chapter 9 of the present Act);

- land required by or for a community whether registered in its name or not; and

- any other land determined by the Minister responsible for land affairs, including land which provides equitable access to land for a community as contemplated in Section 25(5) of the Constitution.

Jurisdiction of community

‘Community’ is defined in the Act as ‘a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group’.

Section 3 provides that a community, on registration of its community rules in terms of the Act, acquires a juristic personality with perpetual succession regardless of changes in its membership.

Such a community with juristic personality may

- acquire and hold rights and incur obligations; and

- own, encumber by mortgage, servitude or otherwise and dispose of or otherwise deal with movable and immovable property.

Transfer and registration

Communal land and the new order rights created under the Act will be capable of being and will have to be registered in the name of the community or person (including a woman) entitled to such land or rights in terms of the Act or the relevant community rules.

Conveyancer

Section 7 provides that a suitably qualified official of the Department of Land Affairs may perform the functions of a conveyancer in terms of the Deeds Registries Act.

Conversion into freehold

The holder of a registered new order right may apply to the community owning the land to which such right relates for the conversion of that right into freehold ownership. If the community approves the conversion, it may impose any condition or reserve any right in favour of the community. The Registrar of Deeds must record the conversion in the prescribed manner.

Other provisions

Other chapters of the Act deal with

- provision of comparable redress where tenure cannot be legally secured;

- the conduct of a land rights inquiry;

- content, making and registration of community rules;

- establishment of a land administration committee for a community;

- establishment of one or more Land Rights Boards by the Minister;

- special provisions relating to the KwaZulu-Natal Ingonyama Trust Land;

- acquisition of land by the Minister (including expropriation); and

- extension of access to the courts by providing that the Minister and a board each have the legal capacity to institute or intervene in any legal proceedings arising from or related to this Act, both in their own capacities and on behalf of any community or person.
ATTACHMENT AGAINST FIXED PROPERTY - BEWARE THE JUDGMENT CREDITOR

My firm attended to the registration of transfer of a property in the Free State, where we were unfortunately not covered for costs.

We had to sue the purchaser and, as a result thereof, obtained an attachment against the property that he had purchased. We then sat back, knowing that he would not be able to sell the property without the interdict first being lifted, as we were aware of a bond that had been registered against the property and that would have received preference.

Much to our surprise it transpired during a routine deed search, that the property had in fact been sold, in spite of our interdict. We asked our correspondent to approach the Registrar in this respect and to ascertain how this could possibly have occurred.

The reply we got from the Registrar of Deeds on 12 May this year was as follows:

“The property was sold in execution on 14 November 2003 by public auction in terms of Attachment Case .../2003 between ... and .... The transfer was registered under .../2004 on 25 March 2004. All other attachments were purged after the registration.”

On receipt of this letter from the Registrar we took issue with him, whereupon we received the following letter dated 20 May:

“1. In the case of more than one attachment noted against the property, the creditor who takes action and sells the property is entitled to demand transfer without withdrawal of the other attachments;

2. This ruling was already confirmed in 1958 (Registrars’ Conference Resolution 5/1958),”

This ruling seems crazy. What on earth is the purpose of an attachment if a later creditor can sell despite a previous creditor’s valid claim? In this particular case, the bank was no doubt a preferent creditor and sued on the bond. But what if this had not been so?

A V Theron
Attorney, Sasolburg

The unedited response from the office of the Chief Registrar of Deeds to the above letter is as follows:

In response to a letter that appeared on page 4 of the De Rebus, September 2004 under the heading ‘Attachment against fixed property - beware the judgment creditor’, an attorney by the name of A V Theron quotes the Registrar of Deeds: Bloemfontein as follows:

“1. In the case of more than one attachment noted against the property, the creditor who takes action and sells the property is entitled to demand transfer without withdrawal of the other attachments;

2. This ruling was already confirmed in 1958 (Registrars’ Conference Resolution 5/1958),”

and proceeds to make the following statement:

“This ruling seems crazy. What on earth is the purpose of an attachment if a later creditor can sell despite a previous creditor’s valid claim? In this particular case the bank was no doubt a preferent creditor which sued on the bond. But what if this had not been so?”

The circumstances leading to the above statement are clearly spelt out in the relevant letter and will not be repeated here.

Though the learned Theron does not clearly spell out what she/he expected the Registrar of Deeds to do under the circumstances, a reasonable deduction can be made that she/he expected the Registrar of Deeds to refuse registration and insist that prior attachments be first lifted by the Sheriff. In this regard, Theron seems to be oblivious of the provisions of Section 66(6) of the
Magistrates Courts Act, 1944 (Act No. 32 of 1944). The said section does not only make the attachment of property already under attachment possible, but also makes it possible that such property can be sold in execution at the instance of a later judgement creditor. It is interesting to note that this section makes no mention of the lifting of prior attachments by the Sheriff as being a *condictio sine qua non* for the sale contemplated therein. The question that then arises is: What would be the legal basis on which a Registrar of Deeds would refuse to give effect to a sale ordered by a Court of law? There seems to be no such legal basis.

As regards the question: What if this had not been so?, the answer is simple and is that nothing would change, because the identity of a judgement creditor is irrelevant under the circumstances.

From what has been said above, it is clear that Theron is venting her/his anger at the wrong target, for it is the law that permits the sale of a previously attached property by a later judgement creditor and not Registrars’ Conference Resolution 5/1958.

It must be categorically stated that the effect of noting an attachment interdict in a deed registry is to debar dealings by the registered owner of the property concerned. Once a Sheriff passes transfer, it is not for the deeds registry to question at whose instance the transfer is being passed. All that the deeds registry has to do is to ensure that the Sheriff passes transfer and not the registered owner. The practice is to purge all attachments and bonds noted against the relevant property as they are inextricably linked to the former registered owner. There is absolutely nothing wrong with this practice. It would be improper to keep interdicts that were noted prior to the transfer by the sheriff as the same would unnecessarily hinder subsequent dealings by the newly registered owner who was not party thereto.

RESPONSE TO LETTERS TO THE EDITOR ON SECTIONAL TITLE

By: O Wade
Pietermaritzburg Deeds Registry

It must be pointed out that I was the “anonymous conveyancer” referred to in the article that appeared in the July 2004-Edition of the SADJ. These submissions were originally sent for rulings to the Chief Registrars’ Office.

1. With regard to George Tsotetsi’s submission of lodging bonds for disposal, where a portion of the common property is transferred in terms of Section 17 of the Sectional Titles Act, Act 95 of 1986, I totally agree that all such bonds should be lodged for endorsing with regard to the release of a portion of the common property. Section 18 of the Act provides that the provisions of Sections 56 and 57 of the Deeds Registries Act, Act 47 of 1937, apply. Certain conveyancers and examiners have proposed not lodging the bonds, but merely filing such consents to release in the main file of the scheme. This was merely an alternative proposal put forward and was not the view of this examiner.

2. I have, however, severe criticism with regard to Mr. Tsotetsi’s notions on issues surrounding portions of rights to extend, which I will refer to as “split rights”. With regard to whether before the establishment of the Body Corporate, it is possible for a developer to whom part of the right to extend has been ceded, to create exclusive use areas, the following issues have to be looked at.

Where a new Developer “stepped into the shoes” of the original Developer in terms of Section 34(3) of the Sectional Title Act, Act 95 of 1986, which provides "when a developer has in one transaction alienated the whole of his interest in the land and the building or buildings comprised in the scheme, or a share in the whole of such interest, to any other person, the Registrar shall register the transaction by means of a deed of transfer in the case of units and by means of a bilateral notarial deed of cession in the case of rights reserved under section 25 and 27"; the developer’s successor in title may utilize the provisions of Section 25(6A) and Section 27(1A) of the Sectional Titles Act No 95 of 1986 as though he were the original developer of the scheme, where no body corporate has been established. The provisions of Regulation 29 would, however, have to be adhered to.

A distinction has to be made between the case, where the original developer, or his/her successor in title, is contemplated in terms of Section 34(3) of the above Act, and where the developer has ceded a portion of his right to extend in terms of Section 25(4)(b) of Act 95 of 1986. In terms of Section 25(4)(b) of the above Act, it is provided...
that a right to extend, reserved by the developer in terms of Section 25(1) of the Sectional Titles Act or vested in terms of Section 25(6) of the above Act, in respect of which a certificate of real right has been issued, “may be transferred by the registration of a notarial deed of cession in respect of the whole, or a portion in such right: Provided that in the case of a cession affecting only a portion of the land, comprising the scheme only to such portion shall be identified to the satisfaction of the Surveyor General.”

Section 34(3) provides for the transfer of the whole of his interest in the scheme, which includes all the units, Certificates of Exclusive Use Areas as well as Certificates of Rights to Extension = “steps in the shoes of the original developer”.

Section 25(4)(b) only refers to the Right of the Extension and that right is limited to what the original developer reserved, e.g. original developer A has reserved the right to erect 5 additional units within a time period of 2 years and has reserved no additional exclusive use areas. The original developer ceded the right to erect one of these additional units within that 2-year time period to developer B. Developer B’s right only includes the right to erect that unit within the 2-year time period. (The Surveyor General approves a Real Right diagram for the proposed section - within which that unit, and only that unit, may be erected). Once developer B has registered the phase in respect of his unit, the remainder of the real right becomes common property. If no body corporate has been established, then the original developer (Developer A) may utilize the provisions of Section 27(1A) and Section 25(6A) of the Sectional Titles Act, if desired, provided that Regulation 29 has been complied with. It has to be emphasized that the original developer can cede only as much as he originally reserved, e.g. if no exclusive use areas were reserved, either initially or thereafter in terms of Section 27(1A), he cannot cede the right to acquire such any exclusive use area to a subsequent purchaser of a portion of a real right to extend.

The argument from George Tsotetsi could result in all the developers, who received a portion of a right to extend in terms of Section 25(4)(b) of Act 95 of 1986, reserving their own rights to extend exclusive use areas, and making rules within such real right areas on their own accord, where no body corporate has been established. A more feasible alternative to the above arguments would have been that the original developer, in addition to all “other developers”, i.e. those who have registered schemes of extension in respect of their portions of real rights, jointly invoke the provisions of Section 25(6A) and Section 27(1A) of the above Act.

In addition, it is submitted, no matter what the arguments are, the same person is able to take out the Section 25(6A) and Section 27(1A) right, and in my view only the “original developer”.

With regard to the provisions of Regulation 29, which provides “A registrar shall not issue a certificate of real right contemplated in Section 25(6A) or Section 27(1A) of the Act, unless a conveyancer certifies:

(a) that no unit in the scheme has been sold, donated or exchanged; or

(b) if a unit was so alienated, the developer disclosed in writing to the acquirer thereof that application is to be made for the issuing of a certificate of real right in terms of Section 25(6A) or Section 27(1A) of the Act.”

Mr George Tsotetsi suggests that this regulation is primarily aimed at future owners and future developers. Surely I, as a future developer, could be greatly affected if the original developer or, according to another view, “any other developer”, wishes to reserve additional exclusive use areas and rights of extension over and above those that were originally reserved. I have purchased a cession of a portion of a Right to Extend with a superb sea view, taken out a million rand bond over such right, and thereafter the “original developer” reserves a right to extend in terms of Section 25(6A) for a double storey in front of my proposed section, or even an enormous carport, which would take away my sea view. According to George Tsotetsi, Regulation 29 does not protect me, as I am a future developer and not a future owner. This I cannot agree with.

Regulation 29 should be amended to afford protection.

As regards the question as to when the body corporate should be deemed to be established, I cannot comprehend how the imposition of a penalty will solve the problem of the formation of the body corporate. Where individual co-developers have registered their phases for their portions of their Rights to Extend and no co-developer has transferred his unit, there is still no body corporate.

The provisions of certain sections/regulations in the Sectional Titles Act No 95 of 1986 are vague, which leads to different interpretations, as can be seen from the above articles regarding only one aspect of the Act. It is suggested that the whole Sectional Titles Act be looked at with regard to vagueness of certain sections in the Act, which provide loopholes and cause uncertainty.

_Hopefully, these interpretations will be addressed in the legislation review process - Editor_
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The Practitioner’s Guide to Conveyancing and Notarial Practice has been updated with the latest practice pertaining to mineral rights and intestate succession.

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