

**NOTARIAL PRACTICE**

**12 NOVEMBER 2020**

**MEMORANDUM**

**PLEASE NOTE THAT THE GUIDELINE ANSWERS TO PREVIOUS PAPERS MAY NOT BE A CORRECT REFLECTION OF THE LAW AND/OR PRACTICE AT THE MOMENT OF READING.**

**NOTE TO EXAMINER:** *This guideline records the views of the drafters. There may be justifiable variations in practice which are brought out in the answers. When this happens the examiner should apply his discretion in marking the answer.*

**QUESTION 1**

**[8]**

- 1.1 a) A General Power of Attorney. (it would also be correct for the candidate to state the Power of attorney to pass transfer plus a General Power of Attorney). (1)
- b) The document can be authenticated in terms of the procedure set out in terms of the Convention for the Abolition of the Requirement of Legalisation for Foreign Public Documents, the object of which convention was to shorten and simplify the procedure for authentication. The document would need to be signed before a Notary Public.
- The only requirement in terms of the convention is the addition of a certificate to the document, called an 'Apostille' which is issued by a 'competent authority', which is either affixed to the reverse of the front page or on a separate page (an Allonge) which must be incorporated into the document usually by means of a ribbon and seal. Each member state of the Hague convention designates its own competent authority which in most cases is the Registrar of the High Court or a magistrate or additional magistrate in the jurisdiction of the notary. (4)
- 1.2 Firstly, the notary would need to see to document and satisfy herself that it is the original document. A copy would be made on which the Notary would affix her stamp and certify that the document is a true and correct copy of the original document. The certified document would then be taken to the High Court for the issuing on an Apostille, which would confirm that the Notary is registered as such in the republic of South Africa. (3)

**1.**  
**MASSING AND BEQUEST**

We record that we are the joint registered owners of Erf 123 Cape Town. On the death of the first dying of us, our individual shares in the property are to be massed and to be administered as one estate.

On the death of the first dying we bequeath the above property to our daughter, Thandi Modise subject to the condition that the survivor of us shall be entitled to occupy the cottage situated on the property during his/her lifetime.

The costs of registering the Right of Habitation, including the drafting and approval of diagrams and the registration of a notarial servitude are to be borne by the estate of the first dying of us.

**REST AND RESIDUE OF ESTATE OF JANE SIMPSON (INCLUDING A USUFRUCT)**

In the event of me, Jane Simpson, being the first dying, I bequeath the rest and residue of my estate to Thomas Modise, subject to a usufruct in favour of Thandi Modise for a period of five years over my R1 000 000,00 (one million rand) money market investment held at Investment Bank.

I direct that Thandi shall be absolved of furnishing security to the Master in respect of this usufruct.

**REST AND RESIDUE OF ESTATE OF THOMAS MODISE**

In the event of me, Thomas Modise, being the first dying of us, I bequeath the rest and residue of my estate to Jane Simpson. (6)

**2.**

S4(q) of the Estate Duty act 45 of 1955 is applicable if the Commissioner of the South African Revenue Service is satisfied that the person is in a permanent union, in which event they would qualify as a 'spouse'. Any bequest to such person would be deducted from the total value of the assets for purposes of calculating the dutiable value of the estate. (2)

**3.**

Section 2(1)(v) of the Wills Act 7 of 1953 is applicable. Jane would direct another person to sign the will in her presence and by her direction and in the presence of a commissioner of oaths. The Commissioner of oaths must certify that

- He has satisfied himself as to the identity of the testator
- That the will signed by the person so directed, is the will of the testator
- The commissioner is also required to sign each page of the will and provide a certificate on one of the pages of the will (usually the last page) which reads as follows:

"I, the undersigned, Sue Notary, hereby certify that I have satisfied myself as to the identity of Jane Simpson and that this document, signed by Tessa Friend, in her presence and by her direction, is the will of the said Jane Simpson. " (4)

**3.1**

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PROTOCOL NUMBER 675

NOTARIAL AGREEMENT OF SUBLEASE

BE IT HEREBY MADE KNOWN

THAT on this the 10 October 2020, before me, KARINA KAPOOR, Notary, practicing at Cape Town in the Province of the Western Cape, and in the presence of the undersigned witnesses, personally came and appeared:

1. JAMES FARMER  
IDENTITY NUMBER 520304 4444 087  
Married, which marriage is governed by the Laws of the Netherlands and duly assisted herein by his wife SHARON FARMER, as far as needs be  
(the SUB LESSOR)

AND

2. JOHN BULL  
IDENTITY NUMBER 660208 3333 089  
Married out of community of property  
(the SUB LESSEE)

WHEREAS the sub-lessor is the lessee of the following property:

FARM Weltevreden No 231, Phillipi  
In the City of Cape Town  
Cape Division  
Province of the Western Cape

Measuring 1000 (one thousand) hectares  
HELD by Deed of Transfer T 5436/1998

In terms of a NOTARIAL LEASE AGREEMENT K9870/2015 ("the MAIN LEASE") entered into between the sub-lessor and:

PAUL OWNER  
IDENTITY NUMBER 530409 7889 087  
UNMARRIED

And WHEREAS A PORTION OF THE PROPERTY more fully described hereunder has been framed in a subdivisional diagram and the relevant consent from the Minister of Agriculture in terms of the SUBDIVISION OF AGRICULTURAL LAND ACT 70 of 1970 has been obtained:

PORTION 2 OF THE FARM WELTEVREDEN, PHILIPPI  
In the City of Cape Town  
Cape Division  
Province of the Western Cape

Measuring 400 (four hundred) hectares  
As will appear more fully from annexed diagram SG 123/2020  
(the property)

Now THEREFORE the parties agree as follows:

1. SUB LEASE  
The sub-lessor has obtained the written consent of the said PAUL OWNER and the sub-lessor hereby lets the property to the sub-lessee, who takes the property on hire.
2. PERIOD OF LEASE  
The lease shall commence on the 1 January 2020, notwithstanding the date of signature hereof and shall endure for a period of 15 (fifteen years) being the remaining period of the main lease.
3. RENT  
The sublessee shall pay rental in the sum of R45 000 (forty-five thousand rand) per month, monthly in advance on or before the 7<sup>th</sup> day of each month, into a bank account designated by the sublessor from time to time.
4. INCORPORATION OF MAIN LEASE  
The terms and conditions of the main lease attached hereto marked "A" shall apply *mutatis mutandis* to this lease.  
  
The sublessee undertakes to carry out and perform all obligations of the sublessor in terms of the main lease and not to breach any provisions thereof.
5. GRAZING  
The sublessee shall be entitled to graze not more than 100 (one hundred) livestock on the property and shall not at any time over graze the property or exceed this number of cattle.

6. WATER

The sublessee shall be entitled to use the existing water supply on the property and may at his own expense build additional dams, watering holes, which shall on termination of the lease become the property of the owner of the property.

7. DOMICILIA

The parties choose as *domicilium citandi et executandi* as follows:

Sub lessor: \_\_\_\_\_

Sub Lessee: \_\_\_\_\_

8. REGISTRATION AND COSTS

The parties agree that this agreement shall be registered against the title deed of the property and all costs related to the drafting and registration thereof shall be born by the sub lessee.

THUS DONE AND EXECUTED AT CAPE TOWN ON \_\_\_\_\_, in the presence of the undersigned witnesses.

**AS WITNESSES:**

1. \_\_\_\_\_

2. \_\_\_\_\_

QUOD ATTESTOR

NOTARY PUBLIC  
LPCM Number

(15)

**3.2**

- Registered notarial deed of lease K9870/2015
- Notarial deed of sub lease
- the title deed of the property
- the subdivision diagram of the portion of the leased land
- the consent of the Minister of Agriculture issued in terms of the provisions of Subdivision of Agricultural Land Act 70 of 1970. (3)

**3.3**

The bank would need to consent to the release of the portion of land that is being sublet from the operation of the mortgage bond. The consent would be in the form of form MM of the Deeds Registries Act and would have to be lodged at the Deeds Office. (2)

a)

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Protocol No. 67/2020

**NOTARIAL COLLATERAL BOND****IT IS RECORDED THAT:**

On 15<sup>th</sup> November 2020 before me, **PIET PRETORIUS**, Notary, practising at PRETORIA, Province of Gauteng, and in the presence of the undersigned witnesses, there personally appeared

**JONATHAN BALL,**

Duly authorised hereto by a resolution of the directors of

**Freight Forwarding Company Proprietary Limited**  
**Registration number 1987/023091/07**  
**(Hereinafter referred to as the "mortgagor")**

Having its registered office at **69 Station Road, Pretoria, Gauteng** and carrying on business as carriers at that address and elsewhere in the Republic of South Africa.

A certified copy of which resolution is retained in my protocol together with the minute hereof.

AND the Appearer, on behalf of the mortgagor, declared that the mortgagor is truly and lawfully indebted and held and firmly bound to and in favour of

**African Bank Limited**  
**Registration number 1990/002309/06**  
(Hereinafter referred to as "the mortgagee")  
Its successors in title or assigns

in the sum of **R3 000 000.00 (three million rand) ("the capital")**, arising from and being money lent and advanced by the mortgagee to the mortgagor, as security for which indebtedness the mortgagor has registered Notarial Bond **BN 6876/2020** ("the principal bond") in the Deeds Registry at **PRETORIA** on 1 June 2020 over the movable property thereby especially hypothecated.

**AND WHEREAS** the mortgagee consented to the release of five of the bonded trucks from the principal bond on condition that the indebtedness of the mortgagor under the principal bond be further secured by the hypothecation of the undermentioned movable property as collateral security therefore.

NOW THEREFORE the Appearer, on behalf of the mortgagor, renounces the legal exceptions "non numeratae pecuniae", "non causa debiti", "errore calculi", "revision of accounts" and "no value received" and all other legal exceptions which could or might be taken to the mortgagee's claim for payment of all or any of the amounts secured hereunder and did by these presents declare and acknowledge the mortgagor to be held and firmly bound to and in favour of the mortgagee, its order, successors in title or assigns, in the aforesaid sum of **R3 000 000,00 (three million rand)** together with the sum of **R400 000,00 (four hundred rand)** as a preferent charge for costs and other charges, as more fully set out in the principal bond, and as collateral security for the due and property repayment of the aforesaid sums with interest on the said capital sum and for the due and proper fulfilment of all the terms and conditions mentioned or referred to in the principal bond.

AND as security therefore the Appearer, on behalf of the mortgagor, declared to cede and assign to the mortgagee and to pledge and hypothecate in terms of the Security by Means of Movable Property Act No. 57 of 1993 the following movable assets of the mortgagor, namely:

- i) 2006 Mercedes Benz 5 ton truck – Registration Number BTR256GP, Engine Number BC935, Chassis Number 44507.
- ii) 2006 Mercedes Benz 5 ton truck – Registration Number NLT451GP, Engine Number BC567, Chassis Number 33678.
- iii) 2007 Mercedes Benz 5 ton truck – Registration Number KSS332GP, Engine Number BC976, Chassis Number 26788.
- (iv) 2006 Mercedes Benz 5 ton truck – Registration Number BTR678GP, Engine Number BC935, Chassis Number 423807.
- (v) 2006 Mercedes Benz 5 ton truck – Registration Number NLT976GP, Engine Number BC567, Chassis Number 112278.

AND the Appearer, on behalf of the mortgagor, declares that this notarial collateral bond shall be subject to all the terms and conditions set out in the principal bond as fully and effectually as if the same had been inserted herein and to the special condition that upon payment and discharge of all obligations secured under the principal bond, including future debts generally and any advances or re-advances made under clause 4.5 of the principal bond, this notarial collateral bond shall be null and void but shall otherwise be and remain of full force and effect.

Signed at Pretoria on the said date in the presence of the undersigned witness.

As witnesses:

1. \_\_\_\_\_

q.q. \_\_\_\_\_

2. \_\_\_\_\_

**QUOD ATTESTOR**  
**NOTARY**  
LPCM Number

(15)

Countersigned by me

Prepared by me

\_\_\_\_\_  
CONVEYANCER  
Jane Austin  
LPCM number

\_\_\_\_\_  
NOTARY  
Emily Bronte  
LPCM Number

**CONSENT TO RELEASE**

I, **Adam Ismail**, duly authorised hereto by a resolution of the directors of

**African Bank Limited**  
**Registration number 1990/002309/06**

The legal holder of the undermentioned Notarial Bond

NUMBER : **BN 6876/2020**  
PASSED BY **Freight Forwarding Company Proprietary Limited**  
**(Registration number 1987/023091/07)**

IN FAVOUR OF : **African Bank Limited**  
**Registration number 1990/002309/06**

FOR THE SUM OF : **R3 000 000, 00 (three million rand)**  
Together with a further sum of **R400 000, 00 (four hundred thousand rand)** to secure contingent costs and payments

Do hereby consent to **the release** from the operation of the said notarial bond of the following movable assets hypothecated thereunder, namely-

- 1 Volvo Truck – 2000 model, Registration number DWX125GP, Engine number BC522, Chassis number 1240206.
- 2 Volvo Truck – 2002 model, Registration number XTF333GP, Engine number B990. Chassis number 1112345.
- 3 Volvo Truck – 2003 model, Registration number MAX878GP, Engine number BC322, Chassis number 0087654

Dated at Pretoria on this                      day of                      2020.

As witnesses:

1. \_\_\_\_\_
2. \_\_\_\_\_

\_\_\_\_\_  
A ISMAIL

(5)



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Protocol No. ....

**NOTARIAL DEED OF HABITATIO**

BE IT HEREBY MADE KNOWN:

That on 23 July 2020 before me, Philippa Campbell, Notary, duly sworn and admitted as such, practicing at CAPE TOWN in the Province of the Western Cape, and in the presence of the undersigned witnesses, personally came and appeared

**1 Jack Spratt** in his capacity as representative in the estate of the **late Rachael Johnston, estate number 5560/2011** duly appointed in terms of section 18(3) of the Administration of Estates Act 66 of 1965 by means of a letter of appointment issued by the Master of the High Court, Cape Town on 15 April 2011  
(Hereinafter referred to as the "representative")

and

**2 Karen Johnston**  
**Identity Number 800601 0025 083**  
**Unmarried**

a certified copy of which letter of appointment is filed in my protocol together with the minute hereof.

AND the Appearers declared that-

WHEREAS the said late **Rachael Johnston**, is the registered owner of the herein mentioned property, namely –

**Erf 123 Cape town**  
**In the City of Cape Town,**  
**Cape Division**  
**Province of the Western Cape**

**Measuring 680 (six hundred and eighty) square meters**

**Held by Deed of Transfer T4578/2000**

(Hereinafter referred to as "the property")

AND WHEREAS in terms of the will dated 17 May 2003 of the late **Rachael Johnston**, who died on 16th December 2011, the within mentioned property was bequeathed to her grandson Timothy Paulse, to be held in trust until he attains the age of 21 years, subject to a personal servitude of habitatio of the outbuildings on the property as more fully set out hereunder;

NOW THEREFORE the representative in his capacity aforesaid cedes to and in favour of the said **Karen Johnston**, a personal servitude of habitatio for the remainder of her life over the outbuildings on the property, which outbuildings are indicated by the figure abcd on attached servitude diagram SG No. 2754/2020.

SUBJECT to the following condition as contained in clause 8 of the will, dated 17 May 2003 of the late **Rachael Johnston**, namely –

"The rights conferred herewith shall be excluded from and not form part of the joint estate of any beneficiary married or to be married in community of property and shall also not form part of the accrual in the estate of any beneficiary married out of community of property or whose marriage is subject to the accrual system".

AND the said **Karen Johnston**, hereby accepts the cession of the habitatio.

THUS DONE AND SIGNED at Cape Town on the day and the month aforesaid, in the presence of the subscribing witnesses

As witnesses:

1. \_\_\_\_\_

**Jack Spratt**  
(Representative)

2. \_\_\_\_\_

**Karen Johnston**

**QUOD ATTESTOR**  
**NOTARY**  
**LPCM Number**

(10)

**QUESTION 6**

**[10]**

- 6.1 Capital distributions on which the trust has paid taxes can be distributed tax-free. (1)
- 6.2 Donations are taxed at a flat rate of 20%, or 25% if the donations are over R30m. (2)
- 6.3
- casual gifts by companies and trusts: annual exemption up to R10 000
  - donations by individuals: annual exemption up to R100 000
  - donations between spouses
  - donations mortis causa
  - any donation of which the donee will not benefit until the death of the donor
  - any donation cancelled within six months from when it took effect
  - donation to a traditional community, council or tribe
  - donation to charitable, ecclesiastical or educational body
  - donations between companies in the same group
  - donation to approved PBO

- donation to government, provincial administration, local authority, political party or retirement fund
- see section 56(1) for more obscure exempted donations (5)

6.4 The donor is liable for the payment of donations tax. However, if the donor fails to pay the donation tax in time, the donor and donee become jointly and severally liable for donations tax. (2)

## **QUESTION 7**

**[10]**

Examiners should give the normal marks for the recordal (date and place of execution and names and seat of notary, as well as citing of the parties, with the wife being assisted by her father and natural guardian), the causa (the intended marriage) and then the execution clause.

When it comes to the body of the contract:

The facts contained in the question are (with some adjustments) roughly the facts that faced the Supreme Court of Appeal in *B v B* (2014) ZASCA 14 (24 March 2014). In that instance the body of the contract read as follows:

- “1. That there shall be no community of property between them.
2. that there shall be no community of profit and loss between them.
3. that the marriage shall be subject to the accrual system in terms of the provisions of chapter 1 of the Matrimonial Property Act 1984 (Act no 88 of 1984).
4. that for purposes of proof of the net value of their estates at the commencement of the marriage, the intended spouses declared the net value of their estates to be the following:
  - That of the husband
    - (a) ...
    - (b) ...
  - That of the Wife
    - (a) ...
    - (b) ...
5. That the following assets of the parties or any one of them listed below and the stated values, as well as all debts in relation thereto, or any other asset acquired by such party as a result of his/her possession or former possession of such asset, will not be taken into account as part of such party’s estate, at either the beginning or dissolution of the marriage.

The assets of the husband to be excluded in this manner is as listed above, and

The assets of the Wife to be so excluded in this manner is as listed above.

6. The parties record that they will execute a statement in terms of section 6(1) of the Act reflecting the net values of their respective estates at the commencement of their intended marriage.”

Any astute student would immediately see that the standard form of ANC’s as it appears on most conveyancing programs was used. The rub lies in the wording of clauses 4 and 5, which the court found to be contradictory and irreconcilable. In short, the court found that assets cannot on the one hand be listed as being subject to the accrual system, and in the next clause be excluded therefrom. This, the court said, was so contradictory and incoherent, that it vitiated the contract as a whole. It ruled that the contract was void for vagueness, with the result that the parties were married in community of property.

Being an Appeal Court ruling, this judgement has since been followed in all Divisions. Should the candidate have followed the above wording, or similar, that is including assets in the net value and then in the next clause excluding the selfsame assets from accrual, the candidate should get no marks, as the contract will be found to be void, which is the prevailing legal position.

In the interim, it is suggested that the wording along the following lines should pass muster:

- “4. That for purposes of proving the net value of their respective estates at the date of conclusion of their marriage as required to *inter partes* calculate the eventual accrual in terms of the provisions of section 4 of the Act, the parties declare and agree the net value of their respective estates to be as follows:

That of the Husband.....

That of the Wife.....

5. In determining the accrual of the estate of either spouse at the dissolution of the intended marriage, whether by death or divorce, there shall be excluded from the calculations the value of the following assets **that have not been included** in the declared values contained in paragraph 5:

The assets of the Husband so to be excluded are....

The assets of the wife so to be excluded are....”

Notaries have long believed that by stating the asset and its value as at commencement date, that would exclude from accrual the value of that asset up until date of marriage, and by then excluding the same asset from accrual, that would simply also exclude its further growth. That is unfortunately not how the courts interpret it, and care should be taken to refer to and explain how the calculation will be done, and not to exclude assets that had been included in the first clause.

Deeds examiners have in the past questioned the fact that assets that are not stated are then excluded (how can you exclude that we you do not have?) but it is after all an agreement between the parties not affecting any third party, and simply relates to the calculation to be done upon dissolution.

8.1 Section 44 of the Companies Act 71 of 2008, which came into operation on 1 May 2011, applies. According to section 44 such financial assistance is allowed provided that –

- a) such assistance is not prohibited by the memorandum of incorporation, and
- b) that statutory requirements are met, despite any contrary provision of the company's memorandum of incorporation.

The statutory requirements are set out in sections 44(3) & (4). These conditions are –

- a)
  - i) that the particular provision of financial assistance must be in terms of an employee share scheme which meets the requirements of section 97; or
  - ii) That the particular provision of financial assistance must be pursuant to a special resolution adopted within the previous two years by the shareholders which authorized such assistance to the specific person or to a person that falls in a specific class or category. In the latter case the person to whom assistance will be given must obviously fall in that class; and
- b) That the board must be satisfied that immediately after providing the financial assistance –
  - i) The company would satisfy the solvency and liquidity test; and
  - ii) That the assistance is given under terms that are fair and reasonable to the company.
- c) The board must also ensure that any conditions or restrictions respecting the granting of financial assistance set out in the memorandum of incorporation of the company have been complied with. (5)

8.2 The only way of dealing with the problem is to cancel the bond and to substitute it with a new bond in favour of the correct mortgagee – (Registrars' Conference Resolution 9 of 1956). The wrong mortgagee does not possess any rights which he can cede to the correct mortgagee. (2)

8.3. **Section 80 of the Administration of Estates Act 66 of 1965** applies only to immovable property. No consent by the Master of the High Court is required. Either guardian must assist the minor in the execution of the notarial bond. (1)

8.4 The response of the notary should be along the following lines:

- 1 This is a ***pactum commissorium*** which is invalid as being unduly oppressive and should not be included in the bond (Mapenduko v Ashington 1919 AD 343).
- 2 This is known as ***parate executie*** which, although invalid in the case of immovable property, is permissible in the case of movable in possession of the bondholder, provided the rights of the debtor are not prejudiced. It would accordingly be advisable to include a provision in the bond entitling the bondholder to take possession of the bonded assets in the event of default. the proceeds applied towards the debtor's liabilities. (2)

**TOTAL: [100]**