

**CONVEYANCING PRACTICE
PART 1**

1 SEPTEMBER 2021

MEMORANDUM

GENERAL NOTE AND DISCLAIMER: This memorandum serves as a guideline to candidates to prepare for the conveyancing examination. The information is provided in good faith by the Law Society of South Africa (LSSA) and the LSSA, the drafters and the examiners will not be liable for any errors or omissions.

The content of the memorandum may not reflect the most current developments. Further, there may be justifiable variations in practice which are brought out in the answers.

The purpose of questions that require drafting is to ensure that the candidate can properly draft documents to be registered. Answers that are not exactly the same as those contained in this memorandum but which are nonetheless correct, will be marked accordingly.

QUESTION 1 **[8]**

- 1.1 8th August 2021 (1)
- 1.2 R2 million. The transfer duty is calculated on the purchase price or the fair value as it was when the option was granted. (3)
- 1.3 Transfer duty is R50 250,00 and calculations are:
- | | |
|-----------------------|---|
| 1 – 1 000 000 | 0% |
| 1 000 001 – 1 375 000 | 3% of the value above R1 000 000 |
| 1 375 001 – 1 925 000 | R11 250 + 6% of the value above R 1 375 000 |
| 1 925 001 – 2 475 000 | R44 250 + 8% of the value above R 1 925 000 |

Below not necessary for question

2 475 001 – 11 000 000 R88 250 +11% of the value above R2 475 000

11 000 001 and above R1 026 000 + 13% of the value exceeding R11 000 000 (4)

QUESTION 2 **[4]**

“**deed of alienation**” means a document or documents under which land is alienated;

“contract”—

- (a) means a deed of alienation under which land is sold against payment by the purchaser to, or to any person on behalf of, the seller of an amount of money in more than two instalments over a period exceeding one year;
- (b) includes any agreement or agreements which together have the same import, whatever form the agreement or agreements may take.

QUESTION 3

[12]

- 3.1 He is survived by his wife and three children. The marriage was out of community of property and the balance for distribution is R460,000.00.

Spouse and descendant(s) as heirs.

If a deceased person is survived by both a spouse and descendants, the spouse inherits the greater of R250,000.00 or a child's share of the intestate estate (section 1(1)(c)(i) of the Intestate Succession Act), and the descendants inherit the residue of the intestate estate (section 1(1)(c)(ii)).

A child's share is determined by dividing the net monetary value of the estate by the number of children plus one.

$R460\ 000.00 / 3+1 = R115\ 000.00$ (child's share)

R250 000.00 is larger than a child's share. The surviving spouse will inherit R250 000.00.

The balance for distribution equals $R460\ 000.00 - R250\ 000.00 = R210\ 000.00$.

$R210\ 000.00 / 3$ (children) = R70 000.00

Each child will inherit R70 000.00 (4)

- 3.2 He was a bachelor and is survived by his father, his two brothers and two children of his sister. His sister died in 2018. The balance for distribution is R425,000.00.

If a deceased person is not survived by a spouse or descendants, but is survived by one of his parents, the surviving parent inherits half of the intestate estate and the descendants of the deceased parent the other half (section 1(1)(d)(ii)).

A's father will inherit $\frac{1}{2}$ of the intestate estate, being R212,500.

The other half of the estate will devolve as follows:

Brother 1: $\frac{1}{6}$ (R70,833.33)

Brother 2: $\frac{1}{6}$ (R70,833.33)

The deceased sister's $\frac{1}{6}$ will devolve on her children in equal shares, each child will receive $\frac{1}{12}$ (R35,416.66) (4)

- 3.3 He was married out of community of property and survived by his wife, one child born from that marriage, an adopted child and step child, being the child of his wife from a previous marriage. The balance for distribution is R625,000.00.

The surviving spouse will receive the larger of R250 000.00 or a child's share.

A child's share is determined by dividing the net monetary value of the estate by the number of children (eligible to inherit) plus one.

$R625\,000.00 / 2+1 = R208,333.33$ (child's share)

R250 000.00 is larger than a child's share. The surviving spouse will inherit

R250 000.00.

The balance for distribution equals $R625\,000.00 - R250\,000.00 = R375\,000.00$

The child born from the marriage will receive R187 500.00

The adopted child will receive R187 500.00

The stepchild is not entitled to anything. (4)

QUESTION 4

[4]

2. Recognition of customary marriages —

- (1) A marriage which is a valid marriage at customary law and existing at the commencement of this Act is for all purposes recognised as a marriage.
- (2) A customary marriage entered into after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognised as a marriage.
- (3) If a person is a spouse in more than one customary marriage, all valid customary marriages entered into before the commencement of this Act are for all purposes recognised as marriages.
- (4) If a person is a spouse in more than one customary marriage, all such marriages entered into after the commencement of this Act, which comply with the provisions of this Act, are for all purposes recognised as marriages.

QUESTION 5

[5]

“**civil union**” means the voluntary union of two persons who are both 18 years of age or older, which is solemnised and registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in this Act, to the exclusion, while it lasts, of all others;

“**civil union partner**” means a spouse in a marriage or a partner in a civil partnership, as the case may be, concluded in terms of this Act;

QUESTION 6

[10]

6.1 A distinction must be made between a “**foreign company**” and an “**external company**”.

A *foreign company* is an entity incorporated in another country outside of the RSA. This is irrespective of whether it is a non-profit company or whether it carries on business or non-profit activities with the RSA

But where a *foreign company* carries on business or non-profit activities within the RSA, it qualifies as an *external company* that must be registered as such in terms of the Companies Act. (4)

6.2 According to Chief Registrar's Circular 28/2013, it is uncertain, in terms of section 23(2) read with section 23 (2A), whether a foreign company can acquire immovable property or be a mortgagee without being registered as an external company. A Registrar's Conference Resolution therefore provides that a foreign company can acquire property or act as a mortgagee, provided that a conveyancer provides a registrar of deeds with documentary evidence (for example an auditor's certificate or affidavit from a director of such foreign company) in terms of section 23(2). (3)

6.3 An external company must be described by rederring to-

- a) Its name as reflected on its registration certificate or similar document; together with;
- b) The country of incorporation being appended to its name; and
- c) The registration number allocated to it by the Commission.

Examiners can further study CRC 28/2013 for examples

(in the case of a private company and public company)

*Blue Mountain * ... (Incorporated in Australia)*

Registration Number: 2011/000678/10

(where the name of the external company is a foreign registration number)

15789456 (Canada)

Registration Number: 2011/000753/10

**Insert the relevant suffix*

(Note: an external company registered in South Africa takes on exactly the same name and suffix as its name and suffix with which it is registered abroad. The suffix used in the country of incorporation must therefore be added here) (3)

QUESTION 7

[4]

Yes. If property which is registered in the name of the solvent spouse has not at the time of registration of the bond, been released by the trustee of the estate of the insolvent spouse, the mortgagee cannot acquire a secured or preferent right and, as far as the insolvent's trustee is concerned, the registration of the bond is a nullity. (De Villiers NO v Delta Cables (Pty) Ltd 1992 (1) SA 9 (AD)).

QUESTION 8

[7]

In practice the question often arises whether a person may purchase a property on behalf of a trust that is still to be formed. **The answer is no.** A deed of sale may not be entered into by a person on behalf of a trust if that trust is not yet formed. If so, such agreement is invalid ab initio and cannot be ratified by the trustees (once the trust is formed), the master of even the court.

There are two possible ways of overcoming this problem, namely:

- a) *Stipulatio Alteri*

B can sign the purchase agreement on behalf of a third (party) namely the Trust. After the Trust has been formed and the trustees appointed, the trust can accept the benefit.

Note: SARS refuses to accept a Stipulation Alteri.

Contra however

The SCA judgment in **Loggenberg NO v Maree (286/17) [2018] ZASCA 24 (23 March 2018)** provides a good example.

“[22] The submission is unsound. A typical stipulatio alteri or contract for the benefit of a third party, is a contract concluded between A and B for the benefit of a third party C, who by accepting the benefit becomes a party to that contract so that it is A and C who are bound to each other. [15] Such a contract has been recognised as enforceable in relation to a company not yet formed. [16]

So, nothing turns on the fact that the Trust was not in existence when the oral agreement was concluded. It appears that the agreement was a fairly typical stipulatio alteri. Once the Trust was established, by accepting the benefit of the oral agreement, it could obtain the right Mr Loggenberg contracted for, i.e. the transfer of Weltevreden. And since the oral agreement was capable of being construed other than as a sale, it would not be prohibited by s 2(1) of the Act. Of course, it is an entirely different matter whether the oral agreement can be proved and whether the Trust indeed accepted the benefit of that agreement. But these are matters for trial, not exception”. [footnotes omitted]

b) Tripartite agreement

B can sign the purchase agreement in his capacity as purchaser and compel the seller to enter into a tripartite agreement later on in which the sale between B and the seller is cancelled and the seller sells the property to a trust (subject to the same terms and stipulations) once the trust has been formed.

A third possibility is if the purchaser buys on behalf of a nominee. B can sign the agreement of sale as purchaser on behalf of a nominee, which nominee should be appointed within a determined period of time for example 21 days after conclusion of the contract. The trust can then be registered and be nominated as purchaser within the determined time period. In this case, however, SARS shall regard it as two transactions and double transfer duty will be payable.

(Note – not one of these possibilities is free from risk. If all the documents have been property drawn the result will be that a transaction that would otherwise have been impossible can in fact now be concluded.)

QUESTION 9

[4]

Note to examiner: the answer contains more information than required from a candidate. The candidate must show he/she has an understanding of the purpose of the Act and need not repeat all the information contained herein.

To establish a Financial Intelligence Centre and a Counter-Money Laundering Advisory Council in order to combat money laundering activities and the financing of terrorist and related activities;

to impose certain duties on institutions and other persons who might be used for money laundering purposes and the financing of terrorist and related activities; to clarify the application of the Act in relation to other laws;

to provide for the sharing of information by the Centre and supervisory bodies;

to provide for the issuance of directives by the Centre and supervisory bodies;

to provide for the registration of accountable and reporting institutions;

to provide for the roles and responsibilities of supervisory bodies;

to provide for written arrangements relating to the respective roles and responsibilities of the Centre and supervisory bodies;

to provide the Centre and supervisory bodies with powers to conduct inspections;

to regulate certain applications to Court; to provide for administrative sanctions that may be imposed by the Centre and supervisory bodies;

to establish an appeal board to hear appeals against decisions of the Centre or supervisory bodies;

to amend the Prevention of Organised Crime Act, 1998, and the Promotion of Access to Information Act, 2000; and to provide for matters connected therewith.

QUESTION 10 **[5]**

To regulate the display of advertisements outside certain urban areas at places visible from public roads, and the depositing or leaving of disused machinery or refuse and the erection, construction or laying of structures and other things near certain public roads, and the access to certain land from such roads.

QUESTION 11 **[4]**

“participation bond” means a mortgage bond over immovable property—

(a) which is described as a participation bond and is registered as such in the name of a nominee company and is included in a collective investment scheme in participation bonds; and

(b) which is a first mortgage bond or which ranks equally with another first participation bond and has the same mortgagor;

QUESTION 12 **[8]**

1. Conduct a deeds office search re. property description and any bond registered over the property.
2. Prepare all transfer documents and call on both the Seller and Purchaser to sign documents.
3. Collect your costs, transfer duty, disbursements etc from the purchaser/seller.
4. Call for the title deed and guarantee requirements from the existing mortgage bond holder.

5. Apply for clearance certificate and obtain transfer duty receipt. Obtain clearance certificate.
6. Call for guarantees from conveyancer attending to the registration of the new mortgage bond.
7. Upon receipt of the guarantees, deliver the guarantee to the conveyancer attending to the cancellation of the existing mortgage bond.
8. Arrange simultaneous lodgement.

QUESTION 13 **[5]**

1. Written application by owner;
2. Proof of lapse of servitude;
3. Title deed of land;
4. Title Deed of the servitude if there is a separate title deed and the usufruct has lapsed for any reason other than death;
5. Transfer duty receipt or exemption.

QUESTION 14 **[3]**

Transfer or cession thereof shall be given by all the members or partners constituting such partnership.

QUESTION 15 **[5]**

15.1 The cause of the **debt, the security and the amount of the debt.** (3)

15.2 Where A is the owner of erf 10, which is mortgaged X, and A acquires the adjoining erf, Erf 11 and consolidated to be known as erf 111, erf 10 may be substituted under the bond by erf 111 - See section 40(5)(a) of the DRA – Form WW is used

Where A is the owner of a half share in erf 10 and his share is mortgaged to X, and A and his co-owner B agree to partition the erf in terms of which A will become the owner of Portion 1, the half share can be substituted by Portion 1 of erf 10 - section 27(1) Of the DRA -Form MM is used. (2)

QUESTION 16 **[5]**

Notes to examiners: See section 38 of the Deeds Registries Act - Candidates must show a clear understanding of the procedure prescribed

38. Certificate of registered title taking place of lost, destroyed, incomplete or unserviceable deed —

- (1) If the title deed of any land has been lost, destroyed, incomplete or unserviceable, and the registry duplicate of such title deed has also been lost, destroyed, incomplete or unserviceable, the registrar shall, on written application by the owner of the land, accompanied by a diagram of the land, if no diagram thereof is filed in the registry or in the office of the surveyor-general concerned, execute a certificate of registered title in respect of such land in accordance with the diagram of the land.

- (2) Before issuing the certificate the registrar shall, at the expense of the applicant, publish in the prescribed form notice of intention to issue the certificate in two consecutive ordinary issues of the Gazette and in two consecutive issues of a newspaper printed in the division, district or county in which the land is situate, or if there is no such newspaper then in the newspaper circulating in such division, district or county.
- (3) A draft of the proposed certificate and a copy of the diagram, if any, accompanying the application, shall be open for inspection in the registry free of charge by any interested person, for a period of six weeks after the date of the first publication of the notice in the Gazette, during which period any person interested may object to the issue of the certificate.
- (4) Any person who has lodged with the registrar an objection to the issue of the certificate may, in default of any arrangement between him and the applicant, apply to the court within one month after the last day upon which an objection may be lodged, for an order prohibiting the registrar from issuing the certificate, and the court may make such order on the application as it may deem fit.
- (5) A certificate of registered title issued under this section shall be as nearly as practicable in the prescribed form and shall take the place of the lost, destroyed, incomplete or unserviceable title deed and shall embody or refer to every condition, servitude, bond, lease or other encumbrance which according to the records of the registry was embodied or referred to in the lost, destroyed, incomplete or unserviceable title deed or in any endorsement thereon.

QUESTION 17

[7]

- 17.1** The candidates must show a clear understanding of sections 65, 66 and 67 of the Deeds Registries Act. The examiners must use their discretion in awarding marks with reference to the said sections. (4)
- 17.2** The candidates must show a clear understanding of section 76 of the Deeds Registries Act and the proviso which states when the praedial servitude may be registered other than by virtue of a Notarial Deed.

Section 76 reads: Conditions of registration of praedial servitudes — (1) A praedial servitude in perpetuity or for a limited period may be created in a transfer of land only if the servitude is imposed on the land transferred in favour of other land registered in the name of the transferor, or is imposed in favour of the land transferred on other land registered in the name of the transferor: Provided that if—

(a) the land to be transferred is admitted by the person seeking to pass transfer thereof to be subject to unregistered rights of servitude in favour of land registered in a third person's name; and

(b) the person to whom the transfer is to be passed consents in writing to such servitude being embodied in the transfer; and

(c) such third person appears either in person or by duly authorised agent before the registrar at the time of execution of the transfer and accepts the servitude in favour of his land, the servitude may be embodied in such transfer. The appearance of such third person as aforesaid and his acceptance of the servitude shall be recited in the deed of transfer and the title deed of the dominant tenement shall be produced for endorsement thereon of the terms of the servitude.

(3)

TOTAL: [100]