

**CONVEYANCING
PART 2**

7 SEPTEMBER 2016

MEMORANDUM

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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

A diagram is an "A4" SIZE document which is drawn up by a surveyor, which is then submitted to the surveyor-general for approval, and which shows the boundaries and beacons of a property. A diagram depicts a small piece or small pieces of land e.g. a sub-divisional diagram on which a single farm plot or stand is shown, or a consolidated diagram on which a single consolidated property is drawn.

A general plan is a combination of diagrams on a single large sheet of paper on which more than one property is shown. A general plan indicates a large number of properties which are the product of a large scale subdivision of land. The most usual application of a general plan is for a township development scheme, where an entire new township is being laid out.

QUESTION 2

2.1 A restrictive real right is a right which limits the rights of the owner e.g.

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- Land which is subject to a mortgage bond cannot be transferred without the bondholder's consent. The mortgage bond restricts alienation.
- A servitude registered over land in favour of another person or another piece of land restricts the rights of the owner of that land.

2.2 The Registrar will require:

- a) An application, in terms of section 68(1) of the Deeds Registries Act 47, from the registered owner of the property which is subject to the servitude, for the noting of the title deed of the land and servitude, that the servitude of right of way (by reason of the completion of the road) has lapsed and;
- b) A suitable consent/letter/authority from the local authority (as proof thereof) in terms whereof mention has been made of the fact that a road has been completed and that the temporary servitude of right of way has lapsed by reason thereof.

QUESTION 3

Condition cannot be automatically left out of the transfer. Condition must be dealt with in terms of Section 68(1). The holder must waive exercise of waiver of his/her rights. The Registrar will require an application by the owner or authorised agent to lapse the condition together with proof of lapsing.

QUESTION 4

Yes, he must however obtain consent from the Master of the High Court in terms of Section 80 bis of the Insolvency Act 24 of 1936. The provisional trustee must make written consent to the Master stating the reasons for his recommendations. If the property is subject to a right of preference, the Master may not authorise the sale unless the person who has the right of preference has given his consent or he has been guaranteed against loss.

QUESTION 5

5.1 A purchaser acquiring commercial or residential immovable property from a non-resident must, under section 35A of the Income Tax Act, Act 58 of 1962, withhold from the amount due to the

non-resident seller an amount equal to 5% of the amount due if the seller is a natural person. Y will therefore have to withhold an amount of R1 250 000.00 to pay over to SARS.

- 5.2 Where the seller is a company, the rate of the withholding tax under section 35A of the Income Tax Act, Act 58 of 1962, is 7.5% of the amount due and in the case of a trust it is 10%.
- 5.3 Section 35A of the Income Tax Act, Act 58 of 1962, provides that the conveyancer (and the estate agent) are legally required to inform the purchaser in writing of the fact that the seller is non-resident for tax purposes in South Africa before any payment is made to the seller, and that the provisions of section 35A may apply to the transaction under consideration.

If the conveyancer (or estate agent) knows or reasonably should have known that the seller is non-resident for tax purposes in South Africa and fails to comply with the legal obligations arising under the section, that conveyancer (or estate agent) will be jointly and severally liable for the payment of the amount which the purchaser is required to withhold and pay over to SARS under the Act.

QUESTION 6

- 6.1 By the Notarial Deed of Cession of Usufruct the executor in the estate will first cede the usufruct over half-share in the property to X. Thereafter the whole property is transferred to both X and Y. Y's half-share being subject to the usufruct created in the notarial deed.
- 6.2 Have X and Y pass the bond over the property in accordance with the provisions of section 69(3). X would pass the bond in her capacity both as an owner of one half-share and as usufructuary in respect of the other one half-share. Y would pass the bond in her capacity as the bare dominion owner of one half-share. This course, apart from being cheaper than arranging for X to waive preference in respect of her usufruct, also reflects the reality of the situation more accurately – i.e. both X and Y are joint borrowers (co-debtors).

QUESTION 7

- 7.1 "A," the seller (transferor) must acknowledge the existence of the unregistered servitude which he does by signing the power of attorney to transfer wherein the servitude is created. This condition is then carried forward to the deed of transfer.

- 7.2 "B," the purchaser (transferee) must in writing consent to the registration of the servitude.
- 7.3 "C," the owner of the property must, in person or by his authorised conveyancer, accept the servitude in favour of his property.

QUESTION 8

- 8.1. A consent to cancellation as prescribed (form MM), signed by the mortgagee together with the notarial bond.
- 8.2. A notarial deed cancelling the servitudes must be lodged, signed by the owners of the two properties (or their authorized agents), the notary and the witnesses. The mortgagee of the bond registered over the dominant tenement must consent to the cancellation of the servitude. His/her consent must therefore also be lodged-(section 75(2)bis).
- 8.3. An order of the High Court is required to authorize a Registrar of Deeds to cancel such a servitude.

QUESTION 9

The attorney must keep record of:

- a) The identity of the client or any agent acting on behalf of the clients;
- b) The manner in which the identity was established;
- c) The nature of the business relationship or transaction;
- d) In the case of the transaction:
- i) The amount involved; and
 - ii) The parties to the transaction;
- e) All accounts that are involved in:
- i) Transactions concluded in the course of that business relationship; and
 - ii) That single transaction;
- f) All documents or copies of documents obtained by the attorney in order to verify any person's identity.

An attorney must keep the records mentioned above for a period of at least 5 years from the date on which the business relationship with a client has been terminated or from the date on which a transaction has been concluded.

QUESTION 10

The surviving spouse is entitled solely to her share in the joint estate. That is the half share which she owns in terms of the marriage in community of property. The half share of the deceased spouse must be transferred to the four children in undivided shares (1/8th share each). The surviving spouse by repudiation of the will, is not entitled to derive any benefit from it and is not entitled to the usufruct which now fails away.

QUESTION 11

Yes – section 34(1A) provides that section 34(1) shall apply, with the necessary changes to any person who is the owner of the whole or a share in a piece of land and who wishes to obtain a certificate of legal title of any fraction of his or her undivided share in such land.

QUESTION 12

12.1 A primary residence is exempt from Capital Gains Tax up to R 2 000 000.00.

12.2 Yes. The property must not exceed 2 hectares.

QUESTION 13

The Certificate of Registered Title should be made out in the name of the deceased and not his estate as provided for in regulation 54(2) of the Deeds Registries Act.

QUESTION 14

14.1 No. He must first take out a Certificate of Registered Title for each of the Erven before consolidation may take place-(Section 43(5)(a) of the Deeds Registries Act).

- 14.2 i) The owner must first apply for the issue of a Certificate of Registered Title in respect of the erven to be consolidated – section 43(5)(a). The Mortgagee must consent to the release of the two erven from the operation of the bond. The owner must apply for the issue to him of a Certificate of Consolidated Title - section 40.
- ii) “do hereby consent to the release of:
1. Erf 25 in township Balule Registration Division J.R Province of Gauteng measuring 800 (eight hundred) square metres and;
 2. Erf 26 in the township Balule Registration Division J.R Province of Gauteng measuring 900 square metres

from the operation of the bond”

- 14.3 A should apply for a Certificate of Registered Title, under the provisions of section 36 of the Deeds Registries Act, in respect of the property which the state has acquired from him. There will be a separate Title in respect of that property by utilising the provisions of the second proviso 16 of Act 47 of 1937. That proviso is only available where the state acquires all the land held under any title deed.

The taking out of a Certificate of Registered Title and transfer by endorsement of the property in question in terms of section 16 will be far cheaper than a formal transfer from A to the state of the owner's current title.

QUESTION 15

- 15.1 Firstly a section 45bis(1A) application by A and B assisted by D, so that each of them will be entitled to deal with one share independently.

Secondly an application in terms of section 45bis(1)(a) by A in terms of which he is entitled to deal with the share of his former spouse C on grounds of the court order.

- 15.2 In respect of section 45bis(1A) – no transfer duty is payable; however, a transfer duty exemption certificate must be lodged in the deeds registry-section 9(1)(i) of the Transfer Duty Act.

15.3 1. Hugo Boss

Identity number 550605 5063 08 1

Unmarried

2. Pierre Cardin

Identity number 570306 0429 08 2

married to Nina Cardin,

which marriage is governed by the law of the Italy and herein duly assisted by her

15.4 The Preparer accepts responsibility that the person signing the Power of Attorney has been appointed as executor and is acting within the powers granted to him and that any security required has been furnished to the Master of the High Court.

QUESTION 16

There are five possible ways of dealing with this situation:

In the first two cases below the mortgage bond can be registered subject to the personal servitude, but then the usufructuary must waive his preference in favour of the mortgagee.

This waiver can be effected in one of the two ways, namely;

Firstly, in terms of a notarial deed which is registered simultaneously with the mortgage bond.

Secondly, by inserting a waiver clause in the bond in which the servitude holder waives his preference in favour of the mortgagee.

Thirdly, the owner of the bare property and the holder of the usufruct can jointly mortgage the land to the full extent of their respective rights over the land. They then become joint mortgagors.

Fourthly, the owner of the land may pass a principal bond over the property and the holder of the personal servitude as surety in the same bond – section 69(4).

Fifthly, the personal servitude may always be cancelled, if the holder of such personal servitude consents thereto.