

**CONVEYANCING
PART 2
10 MAY 2017

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

The servitude may be created in the Power of Attorney for the partition.

Section 28(2(d)) as well as RCR 9/2006 and RCR 37/2005 read together with the Ex Parte Jocate case.

Nothing, however, prohibits same from being registered notarially.

QUESTION 2

2.1 The 3 legal exceptions that may not be waived in credit agreements where the National Credit Act is applicable are:

- a) non numeratae pecuniae - this is an exception which may be taken by a debtor on the ground that, although he has signed an acknowledgement of debt, the amount thereof was not paid over;
- b) non causa debiti - this is an exception taken to the effect that there is no causa or reason for the obligation or debt;
- c) revision of accounts, errore calculi, no value received - this is an exception taken to the effect that the outstanding balance which the creditor avers the debtor owes him her, is incorrectly calculated.

2.2 The waiver of the legal exception will not be binding on the debtor and will be regarded as an unlawful provision. Such an unlawful provision is void, not the whole agreement. The provision must be severed from the agreement. However, a court can declare the entire agreement unlawful.

2.3 The National Credit Act will not be applicable to the following agreements:

- a) credit agreements where the consumer is a juristic person whose asset value or annual turnover exceeds R 1 million at the time the agreement was entered into;
- b) a large agreement described in section 9 (4) where the consumer is a juristic person with an asset or annual turnover below the R 1 million threshold;
- c) a credit agreement between a juristic person and someone who has a controlling interest in that juristic person;
- d) credit agreements where the consumer is the South African Reserve Bank, the state or an organ of the state;
- e) all leases of immovable property.

Any form of the above

QUESTION 3

1. Application in terms of Section 45
2. Holding title deed
3. Copy of the Will certified and accepted by the Master of the High Court
4. Rates clearance certificate
5. Transfer duty exemption receipt
6. Section 42(1) certificate by the Conveyancer

7. Adiation certificate

Any of the above, however, ½ mark allocated to 2,4,5 and 6

QUESTION 4

An application in terms of Section 4 (1) b of the Deeds Registries Act for the rectification of the title deed, must first be made to reflect the registered owner's marital status as in community of property to his spouse. Thereafter an application in terms of Section 45bis (1A)(b) must be lodged, to be signed by both registered owners, married in community of property and in terms whereof the property is allocated to each in equal one half shares (RCR 32/2005).

QUESTION 5

1. In whose favour
2. For what amount
3. The rate of interest
4. On what amount is the interest to be calculated
5. From which date is interest payable
6. Where is the guarantee payable
7. Which transactions should be registered
8. On whose advice should the guarantee be paid out

Any five of the above

QUESTION 6

No, the bank will not have a preferential claim. Any mortgage bond, except a "kustingsbrief" intended to secure a debt which has been incurred **more than two months before lodgment at the deeds registry, does not give the mortgagee a preferential claim if the estate of the mortgagor is sequestrated within six months after the date of lodgment:** provided that a bond is not deemed to have been lodged if it is withdrawn from registration (section 88 of the Insolvency Act).

QUESTION 7

A collateral bond must be registered over Erf 800 Worcester. The principal bond must be registered first or simultaneously with the collateral bond. A copy of the principal bond must be lodged with the collateral bond if registered in different registries.

QUESTION 8

The Registrar of Deeds will register the transfer on condition that the transfer duty receipt relating to the donation of the property to the wife is lodged. (Section 92 (2) of Act 47/1937).

QUESTION 9

- 9.1 General Plan
- 9.2 Servitude Diagram
- 9.3 Sectional Plan of Extension
- 9.4 (1) diagram – also referred to as the parent diagram
(2) sub divisional diagram

QUESTION 10

No, the agreement will be null and void. Mr Smith must be authorized to act on behalf of his wife by a written and signed Power of attorney.

QUESTION 11

Yes, Section 3(2) provides that the Purchaser may cancel the sale if the seller does not forthwith after the auction furnish him/her with a copy of the contract.

QUESTION 12

A cannot bind himself as surety without his wife signing as he will be binding the joint estate. The fact that the parties were married prior to the coming into operation of the Matrimonial Property Act is immaterial.

QUESTION 13

Section 20 (2) (a) of the Alienation of Land Act empowers the Registrar concerned to register a Mortgage Bond over land in respect of which a contract has been recorded. In practice the ranking clause of such bond will be worded as follows:

“As a second bond subject to the recording of a contract in terms of section 20 of the Alienation of Land Act 68/1981 in favor ofand registered vide B...../AL

Section 9 (8) of the Act provides that a mortgagee in whose favour a mortgage bond over the land concerned is registered subject to such recording, is deemed to have consented irrevocably and unconditionally to the discharge or release of the land from such bond. It is thus debated whether a mortgagee will accept land which has been sold under a contract, as security under a mortgage bond.

QUESTION 14

- 14.1 Transfer duty is payable on the amount of R 3 000 000.00. The Purchaser is liable to pay transfer duty in the sum of R 163 000.00.
- 14.2 Provided that both the Seller and Purchaser are VAT vendors, the transaction will be zero rated. The sale agreement must state that the property is income generating and sold as a going concern.
- 14.3 Sale agreement, TD 5, Vat numbers for both the Seller and the Purchaser.

QUESTION 15

- 15.1 No. If a document is signed outside the Republic of South Africa for use inside the Republic of South Africa, the signature on such documents must be authenticated by the signature and seal of specified persons, depending on the circumstances, as set out in rule 63 of the High Court Rules, for example if the document is signed in Lesotho, Botswana, Swaziland, Zimbabwe, the signature may be authenticated by a Notary. Another option is for the South African embassy in that foreign country to authenticate the signature.

South Africa is a member of the Hague Convention. If the other country in which the document is signed is also a member of the Hague Convention, the rules of the Convention apply, requiring only an Apostille to be attached or annexed as an “allonge” to the relevant document.

- 15.2 Cannot use the Power of Attorney to transfer as the mandate granted by the client ceases on his death. The death terminates the agency and a fresh Power of Attorney will have to be signed by the executor in X's estate once Letters of Executorship have been issued.

The position is different as regards the signed consent to cancellation. The debtor under the bond has already performed by repayment and the consent signed by X during his lifetime remains valid.

- 15.3 Movable property, not forming part of the estate of the deceased may be introduced for the purpose of equalizing the division in terms of a redistribution agreement (section 14(1) (b)(iv) of the Deeds Registries Act). No immovable property may however be brought in from outside the estate to effect an equal distribution. The one half share of a surviving spouse in immovable property on grounds of her in community of property marriage with her deceased husband is also not an asset that may be introduced to effect an equal distribution.

QUESTION 16

- 16.1 Transfer duty is normally calculated on the purchase price or the fair value whichever is the greater. When a property is however sold by public auction, transfer duty is only calculated on the purchase price even if it is below the fair value. Therefore, transfer duty is payable on the sum of R 1 000 000.00.

- 16.2 Transfer duty will be calculated on the sum of R 1 600 000.00 divided by two.

Transfer duty payable would therefore be:

R 31 500.00 divided by Two = R 15 750.00

QUESTION 17

Lodgement cover one

- The sectional plan
- The application for the opening of a sectional title register prepared in accordance with the prescribed Form B to Annexure 1 to the regulations

- The s 11(3)(b) schedule of conditions
- Plans and documents referred to in s 25 (if applicable)
- The certificate relating to the rules as contemplated by s 11 (3)(e) of the Act
- Any other consent that might be required and do not constitute a separate act of registration, attracting a separate registration fee

It should be noted that in some offices all the above documents are lodged in one cover (jacket), but in other offices the sectional plan is lodged in a separate cover and linked either prior or after the cover containing the application and supporting documents

Lodgement cover two

- In terms of s 11 (3) (d) of the Act, the consent of the mortgagee to the opening of the sectional title register and to the endorsement of the mortgage bond to the effect that it attaches to the sections and common property shown on the sectional plan, and the rights referred to in ss 25 and 27, must be submitted together with such a mortgage bond.

Lodgement cover three

- Where a Developer, in terms of s 27(1) of the Act, imposes a condition regarding a right to exclusive use areas of parts of common property in respect of one or more sections, a certificate or certificates of real right is issued to the developer, in terms of s 12(1)(f), in accordance with Form G to Annexure 1 to the regulations. Each type of exclusive use area will be set out in a separate paragraph, described in accordance with the said Form G.

Lodgement cover 4

- Where a developer, in terms of s 25 (1) of the Act, has reserved a right of extension of a scheme by the addition of sections and exclusive use areas, the registrar of deeds concerned will issue a certificate or certificates of real right to the developer, in terms of s 12(1)(e), in accordance with Form F to Annexure 1 to the regulations.

Further lodgement covers

The certificates of registered sectional title of each of the units in the scheme must be lodged in separate covers.

QUESTION 18

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

“Civil Union partner” means a spouse in a marriage in a civil partnership, as the case may be, concluded in terms of this Act.

- 18.2 (a) a person may only be a spouse or partner in one marriage or civil partnership, as the case may be, at any given time;
- (b) a person in a civil union may not conclude a marriage under the marriage Act or the Customary Marriages Act;
- (c) a person who is married under the marriage Act or the Customary Marriages Act may not register a civil union;
- (d) a prospective civil union partner who has previously been married under the Marriages Act or Customary Marriages Act or registered as a spouse in a marriage or a partner in a civil partnership under this Act, must present a certified copy of the divorce order, or death certificate of the former spouse or partner, as the case may be, to the marriage officer as proof that the previous marriage or civil union has been terminated;
- (e) the marriage officer may not proceed with the solemnization and registration of the civil union unless in possession of the relevant documentation referred to in subsection (4).

A civil union may only be registered by prospective civil union partners who would, apart from the fact that they are the same sex, not be prohibited by law from concluding a marriage under the Marriage Act or Customary Marriages Act