

**CONVEYANCING
PART 2
10 APRIL 2019**

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

- 1.1 1.1.1 Certificate of incorporation of the company;
Certificate to commence business;
Memorandum and articles of association of the company;
Ratifying resolution by the directors of the company.

- 1.1.2 The memorandum of association must, in terms of Section 21 of the Companies Act, contain as an object of the company the ratification or adoption of or the acquisition of rights and obligations in respect of such contract, and that two copies of such contract, one of which shall be certified by a notary public, have been lodged with the Registrar together with the lodgement for registration of the memorandum and articles of the company.

The ratifying resolution must be properly passed and minuted.

1.1.3 If the memorandum does not comply with the provisions of section 21, the contract will be a nullity. The 'trustee' is not personally bound in this contract.

1.2 Draft the contract in the form of a *stipulatio alteri*.

Provide for a specific period within which the company must be formed and ratify the contract, failing which David Wright is bound personally as purchaser.

Bind David Wright as surety for the newly formed company.

If company formed and does not perform David Wright bound as purchaser.

QUESTION 2

No. Section 28(2) provides that an alienation shall, in such circumstances, in all respects be valid *ab initio*.

QUESTION 3

Half share property =	R1 100 000.00
Whole property = R1 100 000.00 x 2	R2 200 000.00
Transfer Duty = 0% (R0 – R900 000.00)	R0.00
= 3% (R900 001 – R1 250 000)	R10 500.00
= 6% (R125 001 – R1 750 000)	R 30 000.00
= 8% (R1 750 001 – R2 250 000)	
= (R2 200 000-R1 750 000) *8%	
=	R36 000.00

Therefore, R 76 500.00 divided by 2 = R38 250,00

QUESTION 4

1. A prescribed questionnaire completed and signed by the executor in which the executor must provide certain information which the Master requires (form JM33).
2. The original deed of sale or a copy thereof, certified by a conveyancer.

3. Consent of heirs (unless sold by the deceased during his life time).
4. If sold by public auction, proof that the sale was properly advertised and attended, and that the purchase price is fair and reasonable.
5. The power of attorney.

QUESTION 5

As regards the section, X would have to take steps to subdivide it in accordance with the provisions of Section 22 of Act 95 of 1986, read with Sections 20 & 21. He will, in the first instance, have to obtain the consent of the trustees of the body corporate to make application to the local authority for approval of the proposed subdivision. Thereafter the draft sectional plan of subdivision will have to be approved by the Surveyor-General, whereupon the way of the registration of the sectional plan of subdivision, in terms of Section 22, is clear. If the present unit is mortgaged, Section 22(2)(c) will have to be complied with. A new Certificate of Registered Sectional Title will be issued by the Deeds Office in respect of each of the two new sections.

The exclusive use area presently held by X cannot be subdivided. There are no provisions for such subdivision in the Act. X will have to arrange with the body corporate for cancellation of the existing exclusive use area and for the re-delineation, in terms of Section 27(2) and (3) of the two smaller exclusive use areas. These must then be ceded by the body corporate to X and Y by way of bilateral notarial cessions.

QUESTION 6

A must apply for a Certificate of Registered Title (at the State's expense by agreement with the State) in respect of the property so acquired, and that Certificate of Registered Title must simultaneously be endorsed pursuant to the proviso to Section 16 of Act No. 47 of 1937 at the expense of the State.

QUESTION 7

No. The signature of the Power of Attorney signed in a foreign country must be authenticated in terms of Rule 63 or the Hague Convention.

QUESTION 8

1. Waiver of builder's lien
2. Cession of builder's risk policy.

QUESTION 9

John must first obtain a letter of appointment issued by the Master of the High Court in terms of section 6 of the Trust Property Control Act. He will have to provide security to the satisfaction of the Master unless he has been exempted from payment of security.

QUESTION 10

- 10.1 No. The definition of sale/sold includes a sale subject to a suspensive condition and is thus in violation of section 3(e) of the Act.
- 10.2 No. Section 6A(1)(b) only applies if it is in favour of one person.

QUESTION 11

Transfer of the property in the name of B cannot proceed until the recordal of the sale of the property to X has been cancelled in terms of section 20 of the Alienation of Land Act.

QUESTION 12

A may not bind himself as surety without his spouse's written consent in terms of Section 15(2)(h) of the Matrimonial Property Act No 88 of 1984.

QUESTION 13

Transfer duty will be the same if he acquires the property in his own name or in the name of a company.

The exclusions from capital gains tax only applies to natural persons in case of a primary residence used for private or domestic. The situation regarding capital gains tax is thus more onerous if he decides to buy the property in the name of a company.

QUESTION 14

Section 14(1)(b)(iv) of the Deeds Registries Act specifically provides that it shall be lawful to introduce movable property (e.g. cash) not forming part of the estate for the purpose of equalising any division.

QUESTION 15

15.1 In terms of Section 26(3) of the Alienation of Land Act no consideration shall pass until the unit is registerable. This prohibition does not apply if:

1. The deposit is paid to an attorney or estate agent and kept in trust for the benefit of the Seller, or
2. The Seller furnishes the Buyer with an unconditional, irrevocable guarantee that the amount will be repaid to the Buyer should the erf not be registerable.

15.2 In terms of Section 26 of Act 68 of 1981, he may not accept any payments until the contract is recorded in the Deeds Office.

QUESTION 16

Section 38 of the Deeds Registries Act, 47 of 1937, may not be applied. In accordance with RCR 7/2018, pending the amendment of the Act, the court may be approached for an appropriate order.

QUESTION 17

RCR2/2018 – Where an application in terms of section 4(1)(b) of the Deeds Registries Act 47 of 1937 is lodged in a deeds registry to amend an error in the names of any of the parties in a registered antenuptial contract and the parties allege that the original contract is lost, the office copy of the antenuptial contract must be endorsed and a caveat to that fact should be noted against the names of the parties.

QUESTION 18

A Body Corporate comes into being automatically with the first transfer of a unit in the scheme. That owner together with the Developer is thereafter members of the Body Corporate that was established. However, should all units be purchased by one owner, then

the Body Corporate will only consist of one member. See RCR 32 of 1988, as well as Van der Merwe and Butler on Page 249.

QUESTION 19

Form W should be lodged in triplicate (see CRC 13 of 2016).

QUESTION 20

The Power of Attorney may not be authenticated before a Notary Public. However, the formalities as prescribed by the Hague Convention may be followed as Namibia is a party to the said Convention. Thus, a certificate, described as an Apostille, must be placed on the document itself or on a separate page incorporated therewith. Alternatively, it must be authenticated before the Ambassador etc (see RCR 46 of 2011).

QUESTION 21

- (i) The change of the company's name is done in accordance with section 44 of the Companies Act 61 of 1973. The documents that have to be lodged will include all CIPC documentation in order to prove the change of name of the company, as well as the verification certificate. Alternatively, proof of change of name from the Registrar of Companies.
- (ii) No. A company that has changed its name after 1 May 2011, must bring an application in terms of section 93(1) of the Deeds Registries Act 47 of 1937 to record such change of name (see CRC 28 of 2013).
- (iii) In terms of section 93(1)(a) of the Deed Registries Act 47 of 1937 no consent by affected persons is necessary in the case of a change of name of a company. The consent of the bondholder is therefore not necessary. However, the mortgage bond should be lodged for endorsement.

QUESTION 22

In terms of section 40 of the National Credit Act 34 of 2005, a person must register as a credit provider if the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeds the threshold determined by the Minister of Trade and Industry. On 11 May 2016 a new threshold of R 0 was published and from 11 November 2016, 6 months after the publication of the new threshold, all credit

providers (irrespective of the number of credit agreements) should register as credit providers. However, should one of the exceptions in accordance with the Act apply, it will not be necessary to register as a credit provider.

QUESTION 23

- (iv) Yes, in accordance with Regulation 20(7).
- (v) No, RCR 31/1988, as confirmed by RCR 21/2005.
- (vi) Yes, in accordance with Regulation 20(7).
- (vii) Yes, in accordance with Regulation 20(7).

QUESTION 24

Section 56(1)(b) of the Deeds Registries Act 47 of 1937 provides the authority for the lodging of bonds for disposal when land belonging to a company is transferred by the liquidator.

In the event that the company is subject to the creditors' voluntary winding up under the supervision of the Master or winding up by the Court and the company is unable to pay its debts, the bonds need not be lodged for disposal, provided proof is provided of the inability to pay its debts in the form of a certificate from the liquidator (see RCR 8 of 2016).

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