

NOTARIAL PRACTICE / NOTARIËLEPRAKTYK

7 JUNE / JUNIE 2017

ANSWERS/ANTWOORDE

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

[15]

- 1.1 A. (i) BRENDA SUGARPIE
Identity Number: 380625 0608 08 1
Unmarried
- (ii) SHAWN TURNSTILE
Identity Number: 620521 5234 08 3
Unmarried
- (iii) SALLY TURNSTILE
Identity Number: 641201 0272 08 5
Unmarried
[hereinafter referred to as the GRANTOR]

B. PETER HOSKINS

in his capacity as Manager Real Estate and Valuations, duly authorized by resolution of the Strategic Management Committee of the Msunduzi Municipality at a meeting held on 13 August 2013
[hereinafter referred to as the GRANTEE]

(4)

1.2. THAT there be and is hereby created over

ERF 18 ASHBURTON, REGISTRATION DIVISION FT, PROVINCE OF KWAZULU NATAL;
IN EXTENT:TWO comma ZERO ZERO ZERO ONE (2,0001) Hectares;

Held by Deed of Transfer No T15748/1982;

In favour of the MSUNDUZI MUNICIPALITY, its Successors in Title or Assigns, the following condition:-

The property or any portion thereof shall not be transferred without the consent of the Municipality, which shall be provided upon receipt of written acknowledgement from the Purchasers that they have been advised of their duties and obligations relating to the terms and conditions contained in clauses 7.1 & 7.2 of the letter of approval, Ref: Plan No. 095/14/PD095 dated 29 April 2014.

(3)

- 1.3 A. (i) BRENDA SUGARPIE
Identity Number: 380625 0608 08 1
Unmarried
- (ii) SHAWN TURNSTILE
Identity Number: 620521 5234 08 3
Unmarried
- (iii) SALLY TURNSTILE
Identity Number: 641201 0272 08 5
Unmarried
[hereinafter referred to as the SERVIENT OWNER]
- B. THERESA BEATRICE MANZI
duly authorized hereto by resolution of
DR T B MANZI INCORPORATED
Registration Number: 2013/008209/21
[hereinafter referred to as the DOMINANT OWNER]

(4)

1.4 THAT there be and is hereby created over

REMAINDER OF ERF 18 ASHBURTON, REGISTRATION DIVISION
FT, PROVINCE OF KWAZULU NATAL;
IN EXTENT: ONE comma ONE ZERO ZERO ZERO (1,1000) Hectares;

Held by Deed of Transfer No T15748/1982 (the SERVIENT PROPERTY)

In favour of

PORTION 1 OF ERF 18 ASHBURTON, REGISTRATION DIVISION FT,
PROVINCE OF KWAZULU NATAL;
IN EXTENT:NINE THOUSAND AND ONE (9001) Square Metres;

Held by Deed of Transfer about to be registered (the DOMINANT PROPERTY)

A perpetual Right of Way and Services Servitude 5,00 metres wide lettered D G H E
on Sub-divisional Diagram SG No.669/2014.

(4)

Highrise Builders (Pty) Ltd
Registration Number: 2004/068791/07
Its Successors in Office or Assigns

The Right to erect and complete from time to time within a period of THIRTY (30) years from date of registration of the Certificate of Real Right under Section 12(1)(e) of Act 95 of 1986 for its personal account such further building or buildings on the specified portion of the common property identified on the block plan as "Reserved Area 2" as indicated on the plan referred to in Section 25(2)(a) of Act 95 of 1986 filed in the Office of the Registrar of Deeds at Pietermaritzburg and to divide such building or buildings into TEN (10) sections (units) and common property, and to confer the right to exclusive use over a portion of such common property upon the owner or owners of one or more units in the scheme known as CLARIDGES in respect of the land and building or buildings situate at Pietermaritzburg, in the Msunduzi Municipality as shown and more fully described on Sectional Plan Number SS 215/2009; The said Right of Extension held by Certificate of Real Right No. SK 56/2009.

THUS DONE AND EXECUTED at PIETERMARITZBURG on the day, month and year
aforewritten, in the presence of the undersigned witnesses.

AS WITNESSES:

1. _____
q.q. DEVELOPER

2. _____
q.q. CESSIONARY

QUOD ATTESTOR

NOTARY PUBLIC

(8)

- 2.2 a) Notarial Deed of Cession of Right of Extension duly executed by Notary.
b) Transfer Duty Exemption Certificate ito Section 9(15) of Act 40 of 1949.
c) Title Deed of Right of Extension – i.e. Certificate of Real Right No. SK 56/2009.
(2)

- 2.3. a) Powers of Attorney by Developer Company & Cessionary Company in favour of Bob Knight & Tom Cruise.
b) Notarial Deed of Cession duly executed – Minute
c) Resolutions by the Developer Company & Cessionary Company.
(2)

3.1

Protocol No. 123/2016

NOTARIAL SURETY BOND

BE IT HEREBY KNOWN

THAT on this the 31st day of July 2016, before me DAVID SMITH, Notary by lawful authority duly sworn and admitted, practising at Cape Town in the Western Cape Province and in the presence of the undersigned witnesses, personally came and appeared

JENNIFER AGENT

the said Appearer being duly authorised thereto by a power of attorney dated 5 July 2007 and signed at Johannesburg granted to her by Mary Johns in her capacity as director of

Dorothy's Flower Wholesalers Proprietary Limited
Registration number 1982/001675/07
(hereinafter referred to as the MORTGAGOR)

Having its registered office at 10 Dakota Road, Airport Industria, Cape Town and who carries on business at Cape Town International Airport, Cape Town and Johannesburg International Airport, Kempton Park

she being duly authorized thereto by a resolution passed at a meeting of directors held at Cape Town on 2 May 2016,

which power of attorney and a certified copy of which resolution now remains filed in my protocol.

AND THE APPEARER DECLARED THAT

WHEREAS

Neil Smith
Identity Number 620708 1027 081
Married out of community of property
(the "principal debtor")

Is truly and lawfully indebted to

Peter Johns
Identity Number 531107 5473 082
Married out of Community of Property
(The "Mortgagee")

His heirs executors administrators or assigns

in the sum of R2 000 000.00 (two million rand) in respect of money lent and advanced, which amount the principal debtor has undertaken to pay to the mortgagee in instalments of R50 000.00 (fifty thousand rand) per month on the 30th September each year, commencing on 30th September 2016, together with interest at the prime rate plus 2% charged by the mortgagee's bankers, ABSA Bank Limited, Cape Town, from time to time.

AND WHEREAS the mortgagee requires the mortgagor to bind itself as surety and co-principal debtor for the due payment of the aforesaid sum and interest thereon and to pass this Notarial Bond as security therefore.

NOW THEREFORE

1. The Appearer declared to bind the Mortgagor to be truly and lawfully indebted and held and firmly bound to the Mortgagee, their heirs executors administrators or assigns
 - 1.1 in the sum R2000 000.00 (two million rand) (hereinafter referred to as " the Capital") arising from the consideration aforesaid : and
 - 1.2 in the sum of R200 000.00 (two hundred thousand rand) (herein referred to as " the additional sum") as a preferent charge for costs and other matters more fully set out below and interest thereon as aforesaid.
2. The appearer further declared that as security for the due payment of the capital amount, the additional sum and such interest as may from time to time become due and for the due fulfilment by the mortgagor of all the provisions of this bond, the appearer on behalf of the mortgagor declared to
 - 2.1 specially hypothecate, cede and assign to the mortgagee in terms of Act 57 of 1993, as divisible and separate items of security, the following specified movable property of the Mortgagor:
 - Mercedes truck CA 120365, Chassis No. TT348976
 - Mercedes truck CA 120366, Chassis No. TT348977
 - Mercedes truck CA 120367, Chassis No. TT348978
 - Mercedes truck CA 120368, Chassis No. TT348979
 - Mercedes truck CA 120369, Chassis No. TT348980
 - 2.2 and generally hypothecate to the mortgagee all other movable property of the mortgagor, of whatever nature wherever situated.

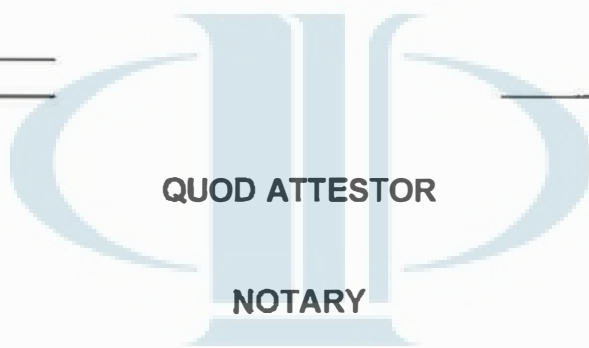
(All the hypothecated property being hereinafter referred to as "the assets")
3. The appearer on behalf of the mortgagor declared to renounce the benefits arising from legal exceptions *beneficium ordinis seu excussionis* and *de duobus vel pluribus reis debendi*", acknowledge the mortgagor to be fully acquainted with the full force, meaning and affect thereof , and
4. The appearer on behalf of the mortgagor declared that this bond shall be subject to the following terms, conditions and stipulations and that she binds her principal, the mortgagor, to submit to and observe carry out the same:
 - 4.1 Provision for liability to arise and mortgagee's right to foreclose in the event that the principal debtor does not fulfil his obligations and if the Mortgagor does not comply with provisions of the bond.

- 4.2 Place for payment of amount due.
- 4.3 Details of amounts included in the additional sum.
- 4.4 Specially mortgaged items not to be disposed of except with mortgagee's consent and mortgagee entitled to require alternative security before consenting. Generally mortgaged goods not to be disposed of other than in the ordinary course of business.
- 4.5 Mortgagee entitled to take possession of general mortgaged goods in event of default to established pledge and to apply to court if mortgagor fails give possession in such circumstances.
- 4.6 Assets to be insured and policy ceded to the Mortgagee as collateral security.
- 4.7 Domicillium clause.
- 4.8 Mortgagor to pay costs for preparation and registration of the bond.

Thus done and signed at Cape Town on the day, month and year first aforewritten, in the presence of the subscribing competent witnesses, both present at the same time.

As witnesses:

- 1. _____
- 2. _____



(15)

- 3.2 Certified copies of resolutions of the directors and shareholders (in view of the suretyship) and certificate by a director (confirmed by the company auditors) confirming details of the company and that the resolutions have been properly recorded. (3)
- 3.3 At the Cape Town Deeds Office (registered at the office serving the area within which the registered office of the company is situated is sufficient for the whole Republic), within three months of execution. (2)

QUESTION 4 **[10]**

Protocol no. _____/2016

POSTNUPTIAL CONTRACT

BE IT HEREBY MADE KNOWN

THAT on this the 30th July, 2016, before me, DEBBIE BOTHMA, Notary, practicing at Cape Town in the Province of the Western Cape personally came and appeared

ALEX PETERS
 IDENTITY NUMBER 610221 5067 08 7
 And

MICHELLE PETERS

IDENTITY NUMBER 621206 0145 08 1

Married in community of property to each other

AND the appearers declared that:

WHEREAS the parties entered into marriage with each other in community of property on 30th December 2000.

AND WHEREAS the parties have applied to the High Court of South Africa (Western Cape Provincial Division), and have obtained from such court in case number 123/2016, leave in terms of section 21 of the Matrimonial Property Act 1984, to change their matrimonial regime and to enter into a contract in terms thereof.

NOW THEREFORE the parties have agreed and now contract with each other as follows:

1. It is hereby recorded that the joint estate existing prior to the registration hereof has been divided as follows:
 - 1.1 ALEX PETERS shall take over the following assets:-
 - a) Immovable property described as –
ERF 61754 Cape Town at Claremont
In the City of Cape Town
Measuring 1000 (One Thousand) square metres
Held by Deed of Transfer T6723/1992
 - b) Mercedes Benz SK2003 model, registration number CA 976,
Chassis number 156789, Engine number BC980.
 - 1.2 MICHELLE PETERS shall take over the following assets:-
 - a) Jewelry
 - b) Household furniture
 - c) BMW 318 2005 model, registration number CA 16761, Chassis number 100987, Engine number BK987.
2. That from the date of registration of this contract:
 - 2.1 These shall be no community of property between them.
 - 2.2 There shall be no community of profit and loss between them.
 - 2.3 The accrual system referred to in chapter 1 of the Matrimonial Property Act 88 of 1984 is expressly excluded.
 - 2.4 The provisions of this contract shall not prejudice the rights of any creditors whose claims arose before registration hereof, whether their claims lie against the parties or the joint estate.

THUS DONE AND EXECUTED at CAPE TOWN on the said date in the presence of the undersigned witness.

As witnesses:

1. _____

ALEX PETERS

2. _____

MICHELLE PETERS

QUOD ATTESTOR

NOTARY

QUESTION 5

[17]

- 5.1 One of the reasons for creating an *inter vivos* trust is to utilise the trust in order to protect assets against one's creditors. If, for instance,
- a) Yusuf and Kogi Mohidean create an *inter vivos* trust; and
 - b) arrange for the trustees of the trust to buy the town house utilising a loan by Yusuf and/or Kogi to the trust ("the loan account"); and
 - c) the town house increases in value (holiday homes tend to do); and
 - d) Yusuf and Kogi are sequestrated;

the trustee of the insolvent estate would only have a claim against the trustee for an amount equal to the loan account.

The abovementioned protection can be further enhanced if the trustees let the property and utilise the rental income to reduce the loan account or Yusuf and Kogi make use of the annual exempted donation of R100 000.00 each (but see below). However, the income will, if the loan account is interest free, be taxed in the hands of the Mohideans. (3)

- 5.2 They are buying from the developer of the sectional title scheme who will be a VAT vendor. The purchase price of the town house would include VAT and, because VAT is payable, the transaction will in both instances, be exempt from transfer duty.

VAT is payable to SARS by the **Seller**, (regardless of the status of the Purchaser. Thus, the VAT implications will be the same whether the parties purchase the property in their personal capacity or in their capacity as trustees of the Trust). (2)

- 5.3 If the **trustees** purchase the property in their **personal capacities** the transaction would not have any donations tax consequences whatsoever.

If the **trustees** purchase the property in their capacity as trustees of the Trust, and the Mohideans **donate** an amount equal to the purchase price to the trustees to enable them to pay the purchase price, the donation would draw donations tax at the rate of 20%.

Should the Mohideans however make a loan to the Trust, the loan would not constitute a donation but it is important to consider the implications of *Commissioner, South African Revenue Service v Woulidge 2002 (1) SA 68 (SCA)* when deciding whether the loan should be interest free or not.

It should be noted that a loan which is advanced with the intention of being written off (i.e. utilising the R100 000.00 annual exemption) may not be a bona fide loan but could be viewed by SARS as a simulated donation (see *SARS v. NWK Limited 73 SATC SS (2011) 2 All SA 347 (SCA)*). (3)

5.4 If the Trust is correctly drafted and if –

- a) Yusuf Mohidean creates an *inter vivos* trust; and
- b) Arranges for the trustees of the Trust to buy the town house utilising a loan by Yusuf to the Trust (“the loan account”); and
- c) The town house increases in value (which holiday homes tend to do); and
- d) Yusuf dies; then only the loan account (or what is left of it after the annual donations) will form an asset in the estate of Yusuf. A lesser amount estate duty will in such case be payable than what would have been payable if Yusuf was the owner of the town house.

(3)

5.5 It is possible that the Mohideans may, in the future, permanently move to the town house, the town house will then become their primary residence. They would, if the property was initially purchased by the trustees, lose the benefits afforded in respect of **primary dwellings** and also pay capital gains tax at a much higher rate. The exemption of capital gains tax applicable to the **first R2 million capital gain** in respect of primary dwellings only applies to natural persons and not to other entities, like trusts. Had they purchased the property in their personal capacities, even if not used as a primary dwelling, they would have been taxed on a lower rate than a trust.

(3)

5.6.1 0% in respect of the first R750 000.00; 3% in respect of the amount exceeding R750 000.00 up to and including R1 250 000.00; 6% in respect of the amount that exceeding R1 250 000.00 up to and including R1 750 000.00 and 8% in respect of the amount exceeding R1 750 000.00 up to and including R2 250 000.00; and 11% in respect of the balance exceeding R2 250 000.00.

5.6.2 the same transfer duty scales as for natural persons as set out above shall apply.(3)

(Note to examiner:

- **transfer duty at 2016 rate**
- **these answers were drafted prior to the promulgation of Section 7C – please adjust)**

- 6.1 i) The parties to the agreement
 ii) The subject of the lease
 iii) The duration of the lease which should be longer than 10 years
 iv) The consideration (rent) payable (4)
- 6.2 "Notwithstanding anything else to the contrary contained in this agreement, it is expressly agreed between the parties that should the Lessee be in breach of its obligations relating to payment of the rent as provided herein, and fail to rectify such breach after notice to do so within 10 days has been dispatched to his domicile address, this lease shall lapse and the Lessee shall immediately vacate the premises." (2)
- 6.3 i) Written application together with affidavit by the lessor
 ii) Proof of notice by prepaid registered post given to the lessee
 iii) Proof of notice given to the mortgagee
 iv) Proof of publication in Government Gazette and newspaper
 v) Registered lease agreement
 vi) Title deed of the land (5)
- 6.4 "I, the undersigned, XX 44, hereby declare under oath as follows:
1. I am the owner of the property known as ----- and in that capacity the lessor thereof in terms of an agreement of long term lease registered in the Deeds Office, Pretoria, under number K.000/1999L.
 2. The lessee is ----
 3. In terms of the provisions of Clause __ of the Lease Agreement the rental is payable by way of periodical payments, currently being an amount of Rxxx per month, payable in advance on the first day of every month.
 4. Despite demand in terms of Clause __ of the lease agreement, the Lessee has remained in default, and is currently indebted to the lessor in an amount of R6 000.00.
 5. I gave proper notice to the Lessee by prepaid registered post as provided for in Clause __ of the lease agreement to the effect that:
 - 5.1 he should rectify his breach within 10 days from date of the notice
 - 5.2 that failure to do so would entitle the lessor to forthwith cancel the lease agreement, and the Registrar of Deeds to cancel the registration of the lease
- A copy of such notice together with the proof of prepaid registered post is attached hereto as Annexure A.

6. I have further given notice of my intention to cancel by way of publication in the Government Gazette and in a newspaper as prescribed by the Act. Copies of the notice are attached hereto as Annexure B and C.
7. I have similarly given written notice to the mortgagee, Boland Bank, of my intention to cancel. A copy of the said notice is attached as Annexure D.
8. I hereby apply to the Registrar of Deeds to cancel the lease agreement registered under number K.000/1999L.

(5)

QUESTION 7

[10]

7.1.1

SPECIAL POWER OF ATTORNEY

I, the undersigned

TOM MORRIS

Identity number.....

Married out of community of property

hereby nominate, constitute and appoint

CHARLES TODD

(Date of birth)

with power of substitution, to be my lawful attorney and agent in my name, place and stead to appear before a notary public in the United Kingdom and then and there on my behalf to execute a Notarial Deed of Servitude of Right of Way in accordance with the draft hereunto annexed which has been initialled on every page for the purpose of identification, with the power to make such amendments thereto as are necessary for the registration thereof; with power to make such other minor amendments as may be necessary;

and generally for effecting the purposes aforesaid, to do or cause to be done whatsoever shall be requisite, as fully and effectually, for all intents and purposes as I might or could do if personally present and acting therein; hereby ratifying, allowing and confirming and promising and agreeing to ratify, allow and confirm all and whatsoever the said attorney and agent shall lawfully do or cause to be done by virtue of these presents.

SIGNED at PRETORIA on _____.

Witnesses:

1. _____

2. _____

T MORRIS

(5)

7.1.2

NOTARIAL AUTHENTICATION CERTIFICATE

To all whom these presents shall come:

I, JOE NIEMAND, Notary Public, residing and practising at Johannesburg, in the province of Gauteng, by lawful authority duly admitted and sworn, do hereby certify and attest that I was present on the day of 2016, and did see Tom Morris, the person named in the special Power of Attorney annexed hereto, duly sign, seal and execute the said special power of attorney and that the name Tom Morris thereto subscribed is of the proper handwriting of the said Tom Morris and that the names CD and EF subscribed as attesting witnesses thereto, are of the respective proper handwriting of CD and EF.

In testimony whereof, I, the Notary, have hereunto subscribed my name and set and fixed my seal of office at aforesaid on this the day of 2016.

QUOD ATTESTOR

NOTARY PUBLIC

(3)

7.2

- Any magistrate or additional magistrate;
- Any Registrar or Assistant Registrar of the High Court of South Africa;
- Any person designated by the Director-General: Justice;
- Any person designated by the Director-General: Foreign Affairs.

(2)

TOTAL: [100]