

NOTARIAL PRACTICE

12 SEPTEMBER 2019

ANSWERS

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

[20]

1.1

Protocol No: 28/2018

NOTARIAL DEED OF SERVITUDES

KNOW ALL MEN WHOM IT MAY CONCERN

That on this the _____ day of _____ in the year Two Thousand and Eighteen (2018) before me,

BRIAN MURPHY

Notary Public a lawful authority, duly sworn and admitted, practising at Pietermaritzburg in the Province of the Kwazulu Natal, and in the presence of the subscribing competent witnesses, personally came and appeared

KAREN TAYLOR

She being duly authorized hereto by a Special Power of Attorney granted to her by:

1. **JACK HAMMER**
Identity Number: 560228 5472 080
Married, which marriage is governed by the Laws of France and duly assisted in as far as needs be by his wife
JOAN HAMMER
Identity Number: 591208 0432 087

on 18 June 2018 at Newcastle, Kwazulu Natal (hereinafter referred to as "the Grantor").

2. **DONALD SMITH**
Identity Number: 600523 5083 081
Married out of community of property
on 20 June 2018 at Newcastle, Kwazulu Natal (hereinafter referred to as the "the Grantee").

which Powers of Attorney now remain filed in my Protocol with the Minute hereof.

AND THE APPEARER DECLARED THAT

WHEREAS the Grantor is the registered owner of

THE FARM FRANSCHOEK NUMBER 2163, REGISTRATION DIVISION ET,
PROVINCE OF KWAZULU NATAL;
IN EXTENT: 1524 (ONE THOUSAND FIVE HUNDRED AND TWENTY FOUR)
hectares;
under Deed of Transfer No T2994/1995
(hereinafter referred to as "the servient tenement")

AND WHEREAS the Grantee is the registered owner of

THE FARM FLORENCE NUMBER 5786, REGISTRATION DIVISION ET, PROVINCE
OF KWAZULU NATAL;
IN EXTENT: 1075 (ONE THOUSAND AND SEVENTY FIVE) hectares;
under Deed of Transfer No T1108/1998
(hereinafter referred to as "the dominant tenement")

AND WHEREAS the Grantor has agreed to subject the servient tenement to the servitudes and to the restrictive conditions hereinafter more fully set out

NOW THEREFORE THESE PRESENTS WITNESSES:

- 1.1 That there is hereby created over the servient tenement, held by the Grantor as aforesaid, in favour of the dominant tenement, held by the Grantee as aforesaid:-
 - 1.1.1 A general servitude of right of way EIGHT (8) metres wide along such route as may from time to time be agreed upon between the owners from time to time of the servient tenement and of the dominant tenement, such right of way to embrace pedestrian, vehicular and mounted traffic;
 - 1.1.2 A general servitude of pedestrian right of way THREE (3) metres wide along such route as may from time to time be agreed upon between the owners from time to time of the servient tenement and of the dominant tenement, for the purpose of enabling the owner of the dominant tenement, any of his tenants, invitees or guests to gain pedestrian access to the "koppie" and to view the surroundings and waterfall on the servient tenement.

The aforesaid servitudes created in this clause shall be subject and subordinate to, and shall in no way prejudice, interfere or compete with, the rights conferred under any prior servitude over the servient tenement.

2. The servient tenement, held by the Grantor as aforesaid, shall be subject to the restrictive condition in favour of the Grantee that:
 - 2.1 The servient tenement shall not be transferred or leased (including any periods of renewal) for a period exceeding one (1) year or otherwise be disposed of until it shall first have been offered for sale to the Grantee, who shall then have the right to purchase the same:-

- 2.1.a. In the case of a proposed sale by the Grantor to a third party or third parties who shall have submitted to the Grantor a bona fide offer to purchase the servient tenement, at the purchase price and upon the terms on which the Grantor is prepared to sell the servient tenement to such third party or third parties; NB in this instance the Grantor is obliged to furnish the Grantee with a copy of the offer to purchase;
- 2.1.b. In any other case, at a purchase price mutually agreed upon by the Grantor and Grantee as being the fair market value of the servient tenement and, failing such agreement, to be determined by arbitration in accordance with the arbitration laws then in force in the Republic of South Africa.
Note to Examiner: Accept any other reasonable, objective method of valuation.
- 2.2 The Grantee shall, should the Grantee wish to exercise his right of pre-emption aforementioned, notify the Grantor in writing of the Grantee's intention to do so:-
- 2.2.a. within seven (7) days (excluding Saturdays, Sundays and Public Holidays) of the Grantee having been furnished with a copy of the offer to purchase received by the Grantor from the third party/parties;
- 2.2.b. in a case other than that envisaged under 2.1.a. above, within 1 (one) calendar month of the purchase price having been agreed upon or determined by arbitration as aforementioned;
- 2.2.c. In the event of the Grantee failing to exercise his right of pre-emption within the aforesaid period of seven (7) days or one (1) calendar month, as the case may be, the Grantor shall be entitled to sell, lease or otherwise dispose of the servient tenement to third party or third parties.
- 2.3 The right conferred upon the Grantee by this clause 2, shall continue to be operative until the servient tenement has been transferred from the Grantor to a third party/parties following upon the failure or refusal on the part of the Grantee to exercise this right and thereafter it shall lapse.
3. The aforesaid servitudes and restrictive condition shall be registered against the title deeds of the properties affected thereby in the Office of the Registrar of Deeds at Pietermaritzburg. All costs of and incidental to the negotiation, preparation, execution and registration of this deed including any transfer duty and any value-added tax, shall be borne by the Grantee.
4. No consideration shall be payable by any of the Parties to the other in respect of the grant of the aforesaid servitudes and restrictive condition. The Parties declare the value of:
- 4.1 each of the servitudes granted in terms of paragraph 1. above to be the sum of ONE THOUSAND RAND (R1000,00);
- 4.2 the value of the right conferred upon the Grantee in terms of paragraph 2. above to be the sum of ONE THOUSAND RAND (R1000,00);
5. The, Appearer, on behalf of the Grantee, hereby accepts the benefits of the foregoing servitudes and restrictive condition subject to the aforementioned conditions.

THUS DONE and SIGNED at PIETERMARITZBURG on the date first aforewritten in the presence of the subscribing competent witnesses:

AS WITNESSES:

1. _____ Qq _____
2. _____

QUOD ATTESTOR

NOTARY PUBLIC

(16)

- 1.2 a) A servitude of uniform width or at a specified distance from and parallel to a surveyed line shown on a registered diagram extending along the entire length of such surveyed line other than a servitude for road widening;
b) If the servitude is plotted on a general plan;
c) If the Surveyor General is satisfied that the servitude can be plotted on the diagram of the property in question;
d) When the servitude is described in general terms.
e) If the servitude is registered over the entire property. (4)

QUESTION 2

[10]

- 2.1 "the Husband hereby undertakes to donate to the Wife the common home of the parties at the time, once he is in a financial position to do so by having settled any and all mortgage bonds that may have been registered against the property, to allow transfer to the Wife free of any encumbrance".

Transfer duty is payable within six months from the date of acquisition of property, meaning the date of the transaction, and not registration thereof in the deeds office. The date of the transaction is the date upon which the right to claim transfer has vested, i.e. normally the date of execution of the ANC. It is suggested that an undertaking to donate does not create or vest a right to transfer, but merely a personal right to claim fulfilment of the undertaking, in such a way then preventing the payment of transfer duty on a transaction which may never happen. (3)

- 2.2 An ANC only becomes effective after solemnisation of marriage, and both our Courts and the Registrar of Deeds (in its circulars) accept that an amendment by agreement may be effected at any time, even after registration, but before conclusion of the marriage. In order to be effective against third parties, any amendment also needs to be registered in the deeds office, failing which it will only bind the parties *inter partes*. It is submitted that the notary can either (a) have the parties sign a deed of cancellation of the first ANC, and redraft the ANC as now required by the parties for lodgement, or (b) lodge the deed of amendment together with the first deed. (3)

- 2.3 See 2.2 above. The original deed needs to be lodged with the amending deed for endorsement. Lodgement needs to take place in the same deeds registry where the original deed was registered. (2)
- 2.4 Our courts have ruled that amendment after marriage will only be allowed in exceptional circumstances, and only by order of court. It is submitted that, *in casu*, there should in any event be no need to amend the ANC, as the donation is only effectively a promise by the husband to the wife, and non-compliance will not affect any third party. (2)

QUESTION 3**[5]****CERTIFICATION OF AUTHENTICATION**

I, JOHN DRAKE, Notary Public, residing and practising at Durban, Province of Kwazulu Natal, Republic of South Africa, by lawful authority duly admitted and sworn, do hereby certify and attest that I was present today and did see ALBENA MARINOVA TODAROV, who identified herself to my satisfaction by the production of Identity number 600521 0791 086 issued to her by the relevant Government authority of the Republic of South Africa, personally sign and execute the document annexed hereto, marked "A" and that the signature subscribed to the said document is that of the proper handwriting of the said ALBENA MARINOVA TODAROV.

I am advised that annexure "A" hereto is in the Wakandese language and that it is a Power of Attorney granted by the said ALBENA MARINOVA TODAROV in favour of her brother SALVATORE PAPINO. As I am not conversant in any way with the language, I have not been able to verify the correctness of this information. To the best of my knowledge and belief there is no Notary Public practising in the Province of Kwazulu Natal who is in any way conversant with the Wakandese language. In testimony whereof I, said Notary, have hereunto subscribed my name and affixed my Seal of Office at PIETEMARITZ BURG aforesaid on this the day of , 2018.

NOTARY PUBLIC

Alternatively, follow the Rules for the authentication of documents executed within the Republic of South Africa for use outside this country. These appear in Government Notice R277 dated 3rd March 1967 and they, in essence, provide that the signature of the Notary Public must be further authenticated by a Magistrate, an Additional Magistrate or Assistant Magistrate or by a Registrar or an Assistant Registrar of any Division of the High Court within the area of jurisdiction of which such Notary practises. The Rules go on to provide for the further authentication of this later signature by a senior official of the Department of Justice and for the authentication of such further signature by the Department of Foreign Affairs. (See the Regulations for details). Lastly the authorities of Wakanda could be contacted to establish their requirements for authentication.

QUESTION 4**[20]**

- 4.1 Section 61 provides that the following should be disclosed:

1. The place where the notary practises
2. The date and place of execution of the notarial bond
3. The place where the mortgagor resides and carries on business

It makes no difference if the mortgagor is a company; sec 62(4) simply provides that registration in the deeds registry for the area in which its registered office is situated will be effective as registration for the whole Republic. (4)

4.2 iii) Indemnity bond

- a) Whereas A (Mortgagee) has bound himself to and in favour of ABC Bank Limited as surety and co-principal debtor, jointly and severally and in *solidum* with the mortgagor in terms of an agreement or suretyship dated 15 May 2008 for the due and punctual payment of the mortgagor of all amounts owing to or claimable by ABC Bank Limited from the Mortgagor up to a maximum sum of R100 000.00 (one hundred thousand rand)

And whereas the mortgagor has agreed to indemnify and hold the mortgagee harmless against any claim made by ABC Bank Limited and has agreed to pass this indemnity notarial bond as security for the payment of the mortgagee of all amounts which the mortgagee is required to pay to ABC Bank Limited arising from the said agreement of suretyship.

Now therefore the Appearer declared that the mortgagor is truly and lawfully held and firmly bound to and in favour of

A
Identity number 760809 5078 08 3
Unmarried
(the mortgagee)

his heirs, executors, administrators or assigns

in the sum of R100 000.00 (one hundred thousand rand) arising from the cause aforesaid. (5)

4.3 Special Notarial Bond

- a) Whereas A and B (the mortgagors) purchased on credit a welding plant more fully described hereinafter from the mortgagee who requires that this notarial bond be registered over the said plant as security for the payment of the credit granted

Now therefore the mortgagors declared themselves to be jointly and severally truly and lawfully indebted and held and firmly bound to and in favour of

XYZ Suppliers (Pty) Ltd
Registration number 2001/098712/07
(the mortgagee)
its successors in title or assigns

in the sum of R10 000.00 (ten thousand rand) being the purchase price of the property bonded

As security for the due payment of the sum of R10 000.00 (ten thousand rand), all interest claimable from the mortgagors in terms of this bond, and all costs which the mortgagee may incur to recover from the mortgagor the amount owing, the mortgagors hereby declared to cede and assign to the mortgagee and to hypothecate specially in terms of the Security by Means of Movable Property Act 57 of 1993 the following movable property of the mortgagors:

Afrox Welding Plant, Model T12 with serial No. 1234 (7)

- 4.4 Both are over movable property. For a pledge – actual or constructive delivery, and physical possession of the movable property is required. A Notarial Bond has similar characteristics to both a mortgage and a pledge except no actual delivery is required. No better right is created in a notarial bond other than a preference on insolvency. (2)
- 4.5 A Special Notarial Bond hypothecates specified movable assets in terms of the Security by Means of Movable Property Act 57 of 1993 and is deemed to be a pledge. A General Notarial Bond hypothecates all the movable assets of the Mortgagor. (2)

QUESTION 5

[30]

5.1 Clause:

1. The parties record that they are both VAT-vendors with registration numbers...
2. The business constitutes an income-generating activity on date of sale and will be an income-generating activity upon transfer.
3. The business is being sold as a going concern
4. As such the transaction should be subject to VAT at zero percent, as provided for in section 11 (1) (e) of the VAT Act.
5. The purchase price has been recorded inclusive of VAT, but at zero percent. Should SARS for whatever reason raise VAT at 15% on the transaction, this shall be added to the purchase price and be payable by the purchaser. (4)

5.2 Resolutions required:

1. Directors of Cyclops, authorising the transaction and one of their number to sign all documents required, including the cession of lease
2. Shareholders of Cyclops, special resolution ito sect 112/115 of the Companies Act authorising the transaction
3. Directors of Letsoale Inv, authorising one of their number to sign the resolution in 2 above (it is submitted that a special resolution by shareholders is not necessary, as the shares are not being sold)
4. Trustees of Trescott Trust, authorising one of their number to sign the resolution in 2 above
5. Resolution of all trustees of the Kingdom Trust, authorising the acquisition and one of their number to sign all documents required to give effect thereto, including the cession of lease. (it is to be noted that the trust resolutions are required to be signed prior to the transaction)
6. Resolution by the trustees of the Ingonyama Trust authorising the transaction and one of their number to sign (12)

Note: as there are no set format for these resolutions, it is up to the examiner to satisfy himself to the contents thereof.

5.3

K

PROTOCOL NO.

NOTARIAL CESSION OF LEASE AGREEMENT

KNOW ALL WHOM IT MAY CONCERN

THAT on the _____, before me,

SHARON ANN DE LANGE

Notary Public by Lawful authority duly admitted and sworn, and practising at Bloemfontein in the Province of Free State,
Appeared

Acting by virtue by a special Power of Attorney signed at _____ on _____ and granted to her by _____ duly authorised by a resolution by

The Trustees of the time being of
INGONYAMA TRUST
(_____)

_____ "THE LANDLORD"

And acting by virtue of a Special Power of Attorneys signed at _____ on _____ granted by her by _____ duly authorised by a resolution of

CYCLOPS INVESTMENTS PROPRIETARY LIMITED Registration No. _____
("THE CEDENT")

AND

Acting by virtue of a Special Power of Attorneys signed at _____ on _____ granted to her by _____ duly authorised by a resolution of

THE TRUSTEES OF THE TIME BEING OF
THE KINGDOM TRUST
REGISTRATION NUMBER

_____ ("THE CESSIONARY")

Which Special Powers of Attorney and certified copies of Resolutions now remains filed in my protocol;

- 1. RECORDAL

- 1.1 The CEDENT is the TENANT of certain premises situate at Portion 14 of the Farm Jozini 59 KT measuring 5, 1088 hectares, "the premises" in terms of a written lease between it and the LANDLORD dated _____ the ("the main lease"), which lease has been registered in offices of the Registrar of Deeds in Pietermaritzburg under no K5666/2017 L, a copy of which is attached to this cession marked X.
- 1.2 With the consent of the LANDLORD, which has been granted, the CEDENT wishes to cede and assign its rights and obligations under the main lease to the cessionary.

2. CESSION AND ASSIGNMENT

- 2.1 The CEDENT hereby cedes **and assigns** to the Cessionary its right title and interest in the main lease.

Note to examiner: should the candidate not refer to an assignment, no marks should be given.

2.2 PERIOD

Notwithstanding the date of signature hereof, this lease shall be deemed to have commenced on _____ and shall terminate on the termination date as contained in the main lease.

3. INCORPORATION OF THE MAIN LEASE

All the provisions of the main lease, shall apply mutatis mutandis, to this lease.

4. MAIN LESSEE'S OBLIGATION

The Cessionary agrees and undertakes to carry out and perform all the Cedent's obligations in terms of the main lease, and not to breach or permit any breach of the main lease.

5. PERMISSION, CONSENT OR AUTHORITY BY LANDLORD

The Landlord confirms its consent to this cession and assignment.

6. DOMICILIUM CITANDI ET EXECUTANDI

For all purposes hereof the parties choose domicilium citandi et executandi as follows

- The landlord
- The cessionary

Each of the parties shall be entitled from time to time by notice in writing to the other to vary its domicilium citandi et executandi for the time being to any other address within the _____ provided that such other address shall not be a post office or post restante.

7. COSTS

All costs of and incidental to the drawing, preparation and conclusion and registration of this agreement and shall be borne and paid by the cessionary.

Signed at

on this

day

2019

As witnesses

1. _____
2. _____

Signed at _____ on this _____ day _____ 2019

As witnesses

1. _____
2. _____

Signed at _____ on this _____ day _____ 2019

As witnesses

1. _____
2. _____

- 5.4 Documents to be lodged at deeds office (8)
1. Deed of Cession and Assignment
 2. Existing Notarial Lease
 3. Rates clearance certificate (this is not required upon the first registration of a lease, but with a cession)
 4. TDR
 5. Consent to cancellation of the mortgagee
 6. Mortgage bond
 7. Title Deed (2)

- 5.5 Termination of lease:
1. Effluxion of time
 2. Breach of contract
 3. Agreement
 4. Merger of title (4)

QUESTION 6 [15]

6.1 OF SOUTH AFRICA

PROTOCOL NO.

NOTARIAL DEED OF CANCELLATION OF EXCLUSIVE USE AREA

[In terms of Section 27(5) of the Sectional Titles Act No. 95 of 1986]

BE IT HEREBY MADE KNOWN:

THAT on this the 12 July 2018, before me

WILLIAM HUNT

of Pietermaritzburg, Province of Kwa-Zulu Natal, a duly admitted and sworn Notary Public,
and in the presence of the undersigned witnesses there appeared:

1. HENRY TOWNSEND

Duly authorized hereto by a Resolution of the Body Corporate of
WHITEHALL
SS 45/1996
("the Body Corporate")

A certified copy of Resolution now remains filed in my Protocol;

2 PERCY SMUTS

In his capacity as Attorney and Agent of
SAM TITUS
Identity Number: 860908 5451 083
Unmarried

Acting under a Special Power of Attorney granted to him on 28 February 2018 at Durban,
Kwazulu Natal
("the First Party").

3. DAWN PETERS (born SMITH)

Identity Number: 880606 0632 086
Married out of community of property
("the Second Party").

AND the Appearers declared that:

AND WHEREAS the Exclusive Use Area described as GARAGE G4, in extent sixteen
(16) square metres, being as such part of the common property, comprising the land in
the scheme known as Whitehall in respect of the land and building or buildings situate at
La Lucia, in the Ethekwini Municipality, as shown and more fully described on Sectional
Plan SS 45/1996

Has been inadvertently registered in the names of:-

1. SAM TITUS
Identity Number: 860908 5451 083
Unmarried

Under Notarial Deed of Cession of Right to Exclusive Use Area No. SK 561/1998S

And

2. DAWN PETERS (born SMITH)
Identity Number: 880606 0632 086
Married out of community of property

Under Notarial Deed of Cession of Right to Exclusive Use Area No. SK 261/2002S

AND WHEREAS the parties hereto have agreed to in terms of Section 27(5) for the cancellation of Notarial Deeds SK 561/1998S and SK 261/2002S under and by resolution dated 24 April 2018.

AND WHEREAS the BODY CORPORATE has passed a special resolution authorising the cancellation.

NOW THEREFORE, the Appearer declared that:

1. In accordance with the provisions of Section 27(5) of the Sectional Titles Act 95 of 1986, the notarial cessions of the aforesaid Exclusive Use Area G4 forming part of the common property under Notarial Deeds SK 561/1998S and SK 261/2002S are hereby cancelled.
2. The First and Second Parties accept cancellation of the cessions of Exclusive Use Area G4 in their respective names subject to the correct the cession of the correct Exclusive Use Areas being registered in their name.
3. No valuable consideration of any sort whatsoever has been or is to be given by any one PARTY to the OTHER in respect of this cancellation
4. This Deed shall be registered in the Deeds Registry at Pietermaritzburg and all costs of and incidental to its preparation, execution and registration, including transfer duty shall be paid by the Body Corporate
5. As a consequence, the rights to the said Exclusive Use Area G4 now vest in the Body Corporate of Whitehall

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

AS WITNESSES:

1. _____ H TOWNSEND
1. _____ qq P SMUTS

D PETERS

QUOD ATTESTOR

NOTARY PUBLIC

6.2

- i) Notarial Deeds of Cession SK 561/1998S and SK 261/2002S;
- ii) Notarial Deed of Cancellation of Exclusive Use Area;
- iii) Transfer Duty Exemption Certificate;
- iv) Bond Holders' Consents if necessary
- v) Notarial Deeds of Cession I r o the correct Exclusive Use Areas x 2

(10)

(5)

TOTAL: [100]

LAW SOCIETY
OF SOUTH AFRICA