

CONVEYANCING

PART 2

09 MAY 2018

MEMORANDUM

GENERAL NOTE AND DISCLAIMER: This memorandum serves as a guideline to candidates to prepare for the conveyancing examination. The information is provided in good faith by the Law Society of South Africa (LSSA) and the LSSA, the drafters and the examiners will not be liable for any errors or omissions.

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 We, the undersigned

John Cleese

Identity Number

And

Doug Smith

Identity Number

Partners in a civil partnership in community of property registered in terms of the Civil Union Act 17/2006

1.2 We, the undersigned

1. John Cleese

Identity Number

A partner in a civil partnership out of community of property registered in terms of the Civil Union Act 17 of 2006

2. Doug Smith

Identity Number

A partner in a civil partnership out of community of property registered in terms of the Civil Union Act 17 of 2006

QUESTION 2

Conditions of this nature can be created in the power of attorney to pass transfer of the land burdened thereby and are embodied as a condition in the deed to pass transfer. The person in whose favour the condition is created must clearly be defined in the condition and such person, if he or she is not the transferor, must accept the right created in his or her favour. Proof of such acceptance must be lodged as a supporting document with the deed of transfer concerned.

QUESTION 3

Section 40(5) (b) provides that if properties which are to be consolidated are each mortgaged under separate bonds, the bonds must be cancelled. In this case, it will be sufficient to cancel only one bond and the provisions of Section 40(5)(a) can then be applied to the other bond. Section 40(5)(a) stipulates that if a portion only of the land to be consolidated is mortgaged by the same bond, all the land to be consolidated may be substituted for the land originally mortgaged under the bond.

A must obtain a re-advance from Best Bank to pay Prestige Bank. The bond in favour of Prestige Bank can then be cancelled and ERF 102 can then be substituted by the consolidated property under the bond in favour of Best Bank.

QUESTION 4

- 4.1 The joint estate of the late Mary Conley
And surviving spouse John Conley
Identity Number 760901 0024 082
Widower / Unmarried
The heirs, executors, administrators or assigns

- 4.2 The joint Estate of the late Sue Gibbs
And subsequently deceased spouse
Fanie Gibbs
The heirs, executors, administrators or assigns

- 4.3 The Joint Estate of the Late
Sue Gibbs
And the late
Fanie Gibbs

The heirs, executors, administrators or assigns

- 4.4 The joint estate of the Late Sue Gibbs
And surviving spouse
Fanie Gibbs
Identity Number 760901 5024 082
Now married in community of property to Anne Gibbs

QUESTION 5

- 5.1 A negative personal servitude merely prohibits the owner of land from exercising his rights of ownership. In other words, the owner is restricted from exercising his right, and the beneficiary or holder of the personal servitude has a veto right should the owner of the tenement wish to do so. These servitudes are nothing more or less than restraints, prohibiting the owner of the land from doing something. Most conditions imposed under Municipal Ordinances or by township developers (transferors) are in the nature of restraints, for example prohibiting more than one building to be erected on the property, prohibiting subdivision without consent and the very common one of prohibiting transfer of the land without the consent of a Home Owners Association.
- 5.2 It falls within the definition of a “transaction” in the Transfer Duty Act 40 of 1949 and transfer duty may be payable – see RCR 43/2012.
- 5.3 a) A servitude feature of uniform width or a servitude feature at a specified distance from and parallel to a surveyed line shown on a registered diagram, in either instance extending along the entire length of such surveyed line, may be registered by description without a supporting diagram.
- b) Any other servitude may, at the discretion of the surveyor general be registered if he is satisfied that such servitude can be plotted on the diagram of the land affected.
- c) It is not necessary to annex a diagram to a deed in which a servitude is created, if the servitude is represented on the general plan.
- d) When a servitude is described in general terms, for example when a servitude is registered over an area or along a route as the parties may agree to later on or from time to time.
- e) Where a servitude, for example a usufruct, is registered over the whole property held under the deed of transfer.

(Any three of the above)

QUESTION 6

- 6.1 The Title deed need not be lodged. The Sheriff must sign an affidavit. The mortgage bond need not be lodged.
- 6.2 The title deed need not be lodged. The curator must provide proof of unavailability. No need to lodge the mortgage bond.
- 6.3 The title deed need not be lodged. The liquidator must provide proof of unavailability. No need to lodge the mortgage bond.
- 6.4 Both the title deed and the mortgage bond need not be lodged.
- 6.5 The title deed must be lodged. A Regulation 68(11) application must be lodged as the bond is being cancelled.

QUESTION 7

7.1. Yes

- a) If spouses were married in community of property to each other and one of them dies or they get divorced and the surviving spouse or one of the spouses is by law entitled to the half share of the deceased spouse or the divorced spouse, the spouse who is entitled to the half share may bring an application in terms of section 45(2)(c) of the Deeds Registries Act for the release of the deceased or divorced spouse from all liability under the said bond. Obviously the mortgagee must also consent to this –Form T is used for this purpose.
- b) If a bond is passed by two or more mortgagors over their respective properties and all the property of one of the mortgagors are released from the operation of the bond, such mortgagor and his property must be released from the operation of the bond. The co-mortgagor as well as the mortgagee must consent to the release- (Section 55(1). Form MM is used in this regard.
- c) If the whole of the land mortgaged under a mortgage bond is transferred from one person to another person, and the transferor has not held a personal servitude out for himself, the purchaser may be substituted as the only debtor under the bond in terms of section 57 of the Deeds Registries Act. Form W is used.

7.2 No, section 3(1) (s) of the Deeds Registries Act applies.

- 7.3 Yes, a collateral bond may be registered by the same mortgagor as in the principal bond in favour of the same mortgagee as in the principal bond in respect of the cause of debt or part thereof. Prescribed form KK is used.

A surety bond may also be registered by a third party for the indebtedness of the mortgagor in favour of the creditor of the principal debtor.

- 7.4 Yes, a substituted bond may be registered by the same mortgagor in favour of the same mortgagee for the same cause of debt as in the bond that is simultaneously with the registration of the substituted bond to be cancelled, which facts must state the causa of the new bond.

QUESTION 8

- 8.1 ERF 100 Nelspruit Extension 60 Township, Registration Division J.T., Province of Mpumalanga measuring 900(nine hundred) square metres

As will appear from general plan S.G. No 10/2006 and held by deed of transfer T200/1997

- 8.2 First transferred and still held by deed of transfer T8000/2006 with general plan S.G. no 10/2006 relating thereto

- 8.3 First transferred by Deed of Transfer T 8000/2006 with General Plan SG NO 10/2006 relating thereto and held by Deed of Transfer T 200/2007.

- 8.3.1 - A subdivision diagram must be approved by the Surveyor-General;
- All the conditions imposed by the local authority must be complied with; and
- A written application by the registered owner of the property must be lodged for the issue of a certificate of registered title in terms of section 43 of the Deeds Registries Act 47 of 1937 in respect of Portion 1 of ERF 100 Nelspruit Extension 60 Township.

- 8.3.2 First transferred by Deed of Transfer T8000/2006 with diagram S.G. No relating thereto and held by Deed of Transfer T200/2007.

QUESTION 9

- 9.1 No, can be created in the power of attorney. They are often created in a Will and then section 67 of the Deeds Registries Act may apply. In terms of Section 67 a personal servitude may be reserved by condition in a deed of transfer, if the reservation is in favour of:

- a) the transferor

- b) the transferor and his/ her spouse
- c) the survivor of them, if they are married in community of property; or
- d) in favour of the surviving spouse if the transfer is passed or given from the joint estate of spouses who were married in community of property

9.2 The fiduciary owns the property free from the *fideicommissum*.

QUESTION 10

10.1 This is a personal servitude as there is no dominant and servient tenement. It is in favour of the transferor and his successors in title. (4) See the case of *Resnekov v Cohen* 2012 (1) SA 314 (WCC) as discussed in SADJ July 2012 - issue 27 page 20.

10.2 Section 68 (1) of the Act provides that if a personal servitude, inclusive or pre-emptive rights and reversionary rights, has for any reason lapsed, the Registrar must on written application by or on behalf of the owner of the land encumbered thereby, accompanied by proof of the lapsing thereof, the title deed of the land, and if available, the title deed, if any, of the servitude, endorse the said title deeds to the effect that the servitude has lapsed (RCR 16 of 2008). In terms of RCR 15 of 2007 it is peremptory to lodge an application, however the title deed of the servitude must only be lodged, if available (see RCR 29 of 1990, as confirmed by RCR 19 of 2006.)

Should a personal servitude be cancelled in pursuance of an agreement between the holder of the servitude and the owner of the land encumbered thereby, such cancellation may only be effected by virtue of a bilateral notarial deed (section 68(2)). In this case the condition will, thus only be cancelled by a bilateral notarial deed. The documents to be lodged will be a bilateral notarial deed, the title deed and a transfer duty receipt or exemption certificate.

QUESTION 11

Application for the endorsement of the title deed in terms of Section 25(3) of the Deeds Registries Act must be made.

Documents to be lodged in the Deeds Office are;

1. Written application by or on behalf of the children. If some are minors or incompetent in any way, they should be assisted or, where necessary, the application must be brought by their lawful representatives.
2. If there is a bond it need not be lodged. (RCR 31/1972).
3. The title deed of the property.

4. Proof of Identity of the children has been determined. Depending on the circumstances a certificate of Next of Kin or court order must be lodged. A registrar will only accept a court order that a woman cannot procreate any further children.
5. No rates clearance certificate need be lodged.

QUESTION 12

In terms of Regulation 44A, the conveyancer should ascertain the following:

- a) that all copies of the deeds or documents intended for execution and registration are identical at the date of lodgement;
- b) that, in the case of a deed of transfer or a certificate of title to land, all applicable conditions of title contained in or endorsed upon the owner's copy of the title deed, together with any applicable proclaimed township conditions have been correctly brought forward in that deed of transfer or certificate of title to land; proclaimed township conditions, have been correctly brought forward in the Deed of Transfer or Certificate of Title to land;
- c) that, in the case of a document referred to in regulation 44(1) being signed by any person in his capacity as principal or representative appointed or recognised as such under or in terms of any act or court order including but not limited to an executor, trustee, curator, liquidator or judicial manager from perusal of the documents evidencing such appointment exhibited to him, such person has in fact been appointed in that capacity and is acting therein in accordance with the powers granted to him and that any security required has been furnished to the Master;
- d) that, to the best of his knowledge and belief and after due enquiry has been made-
 - i) the names, identity number or date of birth and marital status of any natural person being a party to a deed or document and in the case of any other person or a trust, its name and registered number, if any, are correctly reflected in that deed or document;
 - ii) in case of a document referred to in regulation 44(1)-
 - aa) subject to a provisions of regulation 65, the necessary authority has been obtained for the signing of such document in a representative capacity on behalf of a company, close corporation, church, association, society, trust or other body of persons or an institution whether created by statute or otherwise;
 - bb) the transaction as disclosed therein is authorised by and in accordance with the constitution, regulations, or founding statement or trust instrument of a trust, as the case

may be, of any church, association, close corporation, society, trust, or other body of persons, or any institution (whether created by statute or otherwise) other than a company, except a share block company as defined in the Share Blocks Control Act, 1980 (Act 59 of 1980), being a party to such document;

- e) that, in the case where a conveyancer is signing the preparation certificate on a deed of transfer. Certificate of title conferring title to immovable property or a mortgage bond, he shall accept responsibility that the particulars in the deed mentioned in paragraph (d)(i) have been brought forward correctly from the special power of attorney or application relating thereto.

QUESTION 13

Yes, he may. He must obtain the 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 authorize the sale unless the person who has the right of preference has given his consent or he has been guaranteed against loss.

QUESTION 14

The usufructuary can waive preference of her usufruct in favour of Security Bank's bond. Preference can be waived in one of two ways: by means of a separate unilateral notarial deed by the usufructuary or by inserting the waiver into the new bond itself. In this instance the second option would be the cheaper one. The waiver is done by inserting a renunciation clause at the end of the bond before the execution clause. The bond must be made subject to the usufruct by specially referring thereto and then it must be indicated that preference in respect thereof is waived. The usufructuary has to personally or through a conveyancer appear before the registrar of deeds to waive preference. In the event that the usufructuary appoints a conveyancer for this purpose a special power of attorney by the usufructuary should also be lodged together with the new bond.

QUESTION 15

Nothing has to be done. The erven do not have to be notarially tied. A sectional scheme can be erected on two or more contiguous pieces of land provided that the buildings to be divided into sections are erected on only one of the pieces of the land. Buildings comprising common property may be erected on other pieces of land.