

**CONVEYANCING
PART 2
SEPTEMBER 2018**

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 The conveyancer who signs the preparation clause of a power of attorney may sign the power of attorney as the only witness, provided he does so in his capacity as a commissioner of oaths.
- 1.2 Section 95 of the Deeds Registries Act, 47 of 1937 stipulates that the conveyancer who is appointed as appearer to appear before the Registrar of Deeds may not sign the power of attorney as a witness.
- 1.3 In the event where only one spouse, who is married in community of property, acts as grantor, the power of attorney may only be signed by such spouse, provided that the other spouse grants a separate consent to the transaction in terms of section 15(2)(a) of the Matrimonial Property Act, 88 of 1984.
- 1.4 RCR 2/1986: Yes, on condition that both spouses act as grantors in the power of attorney. If only one spouse acts as a grantor, but both spouses sign the power of attorney, the signature of the other spouse will be regarded as a consent in terms of section 15(2)(a) of Act 88 of 1984, in which case two witnesses must attest to such signature.

QUESTION 2

- 2.1 The general rule in terms of 65(1) of the Deeds Registries Act, 47 of 1937: By means of a bilateral notarial deed.

Exception in terms of section 67 of the Deeds Registries Act, 47 of 1937:

A personal servitude may be created by reserving same as a condition in the deed of transfer, if such condition is in favour of:

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

Exception in terms of section 65(1) of the Deeds Registries Act, 47 of 1937:

Negative personal servitudes may be created by reserving same as a condition in the deed of transfer and are exercised by way of a veto. These servitudes include a restraint or restrictive condition in favour of the person who is the holder of such servitude.

- 2.2 No, in terms of section 66 of the Deeds Registries Act, 47 of 1937 a personal servitude may not extend beyond the lifetime of the holder thereof.
- 2.3 The hereinafter mentioned property is subject to the condition contained in the will of Rick Jones dated 10 May 2013, which reads as follows:

“Upon my death, my spouse Pree Jones shall be entitled to occupy the property, free of rental, for the rest of her lifetime.”

as will more fully appear from Notarial Deed K .../.....

QUESTION 3

- 3.1 Consent to cancellation in terms of Form MM, which must be signed by the mortgagee; and The notarial bond.
- 3.2 The bilateral notarial deed together with the mortgage bond and the consent of the bondholder of the dominant tenement.

3.3 The Premier of the Province or in terms of a court order in analogy with RCR 15/1989.

QUESTION 4

4.1 Yes. In terms of section 96 of the Deeds Registries Act, 47 of 1937 the execution of a document or deed by a person who has acquired the right to receive transfer of property will be deemed to have been executed by the owner of such property.

4.2 A title deed means any deed which proves a person's right in respect of a piece of land, whether it is the right of ownership or any other real right, which includes deeds of transfer, mortgage bonds and deeds of servitudes.

4.3 A deed of transfer is a document by which property is transferred from one person to another, and after registration it serves as the owner's title to proof his ownership in land.

A certificate of title is an extract of facts provided by the Registrar of Deeds to the existing owner of land. It can only prove ownership of land, but can never effect transfer of land.

4.4 The conveyancer executes the deed in terms of the power of attorney in his or her favour by signing it before the Registrar of Deed, and the Registrar attests the conveyancer's signature by also signing as witness to the conveyancer's signature.

QUESTION 5

5.1 In the power of attorney:

I, the undersigned,

Jack Black, in my capacity as curator in the estate of

Johnny Walker (a mental patient)

Identity number 630101 5082 087

Married out of community of property

Duly appointed by virtue of a Letter of Appointment issued by the Master of the High Court, Pretoria dated 10 May 2018.

In the deed of transfer:

The curator in the estate of

Johnny Walker (a mental patient)

Identity number 630101 5082 087

Married out of community of property

5.2 As transferor in the power of attorney:

We, the undersigned;

Jack Black and Johnny Walker in our capacities as trustees of the Body Corporate of Happy Days, scheme number SS53/2001, duly authorised by a unanimous resolution of a meeting of the Body Corporate on 10 May 2018.

As transferor in the deed of transfer:

The trustees of the Body Corporate of Happy Days, scheme number SS53/2001

As transferee in the power of attorney and deed of transfer:

the Body Corporate of Happy Days, scheme number SS53/2001

- 5.3 Both the description as transferor and transferee in the power of attorney and the deed of transfer would be the same:

Jack Black

Identity number 980505 5082 087

Unmarried

- 5.4.1 If a beneficiary repudiates it means that he/she forfeits all benefits as beneficiary under the will, but retains her / his own property.

Because A and B were married in community of property, the surviving spouse, who has repudiated under the joint will, shall be entitled to one half share of the estate, by virtue of the marriage between the surviving spouse and the deceased.

The remaining half share will be divided and transferred to the four unmarried children. Each child shall then be entitled to 1/8 share of the estate.

- 5.4.2 Because the surviving spouse repudiated, he will not be entitled to any benefit and therefore the usufruct will not be created in favour of the surviving spouse.

QUESTION 6

- 6.1 And the Appearer declared that

Whereas the fiduciary being John Smith, who died on 10 May 2018, is survived by the sole fideicommissary heir who is entitled to the herein mentioned property in terms of the fideicommissum created in the will of Jack Smith dated 20 April 1990.

- 6.2 And the Appearer declared that

Whereas the herein mentioned property was donated on 10 April 2016 to the herein mentioned transferee subject to a usufruct in favour of James Smith, Identity number 540809 5082 087 and Jane Smith, Identity number 580908 0103 087, married in community of property to each other;

And whereas the property is further subject to a condition of the exclusion of community of property which may exist or hereinafter exist between the transferee and his intended spouse, as is more fully set out hereinafter.

QUESTION 7

- a. The owners and holders of a right of extension, direct the body corporate to alienate a portion of the common property. A unanimous resolution of the body corporate as well as the written consent of the holder of a section 25 real right to such alienation are required.
- b. A diagram is prepared and approved by the Surveyor-General in respect of the portion to be alienated.
- c. Transfer is effected by the trustees of the body corporate and registration is effected by means of a deed of transfer in favour of the transferee registered by the Registrar of Deeds. The Registrar shall make appropriate endorsements on his or her records. Transfer must be accompanied by a copy of the resolution referred to in (a) above, certified by two trustees of the body corporate and the written consent of the holder of the section 25 right.
- d. The consent of all the bondholders in respect of units must be obtained and lodged simultaneously.
- e. Section 17(1) of the Sectional Titles Act, 95 of 1986 requires compliance with any law relating to the subdivision of land and therefore the consent of the local authority to subdivision of the common property must also be lodged.
- f. The Registrar shall notify the Surveyor-General of the reversion of the land to the land register and the Surveyor-General shall make appropriate endorsements on the original sectional plan and on the deeds registry's copy.

QUESTION 8

- 8.1 Yes. Section 4(2) of the Sectional Titles Act, 95 of 1986 provides that a sectional title scheme may be opened on land which is non-contiguous, provided that the land on which the buildings

which will be divided in sections are notarially tied.

- 8.2 RCR 71/2009: No, the Act does not provide in this regard.
- 8.3 Yes, in terms of section 27(6) of the Sectional Titles Act, 95 of 1986 an exclusive use right is deemed to be a right to immovable property over which a mortgage bond, lease contract or personal servitude may be registered.
- 8.4 A bilateral notarial deed will have to be entered into between the body corporate and the owner of the neighbouring land for the creation of the praedial servitude. The consent of the bondholder of the neighbouring land will have to be lodged.
- 8.5
- Application in accordance with Form O;
 - Two copies of the sectional plan of extension, which have been approved by the Surveyor-General;
 - The sectional title deed of the section;
 - A transfer duty receipt;
 - Any sectional mortgage bond to which the section may be subject;
 - A certificate by a land surveyor or architect stating that there is not a deviation of more than 10% in the participation quota of the extended section. Where there is a deviation of more than 10%, a conveyancer must provide a certificate that the bondholder of each section has consented to the registration of the sectional plan of extension of the section.

QUESTION 9

Section 88 of the Insolvency Act, 24 of 1936 stipulates that a mortgage bond (passed for the repayment of existing debt) should be lodged with the Registrar within two months after the debt was incurred. If the mortgage bond is not lodged within two months, the mortgagee (creditor) will not be entitled to a preferential claim if the mortgagor is declared insolvent within six months after lodgement.

As Dodgy Bank has already lent the money to the mortgagor more than two months ago, it shall not have a preferential claim because the mortgagor is declared insolvent within six months after the lodgement of the bond in favour of Dodgy Bank.

QUESTION 10

- 10.1 The separate pieces of land which are about to be consolidated:
- Must be contiguous to each other (section 40(1)(a));

- Must be owned by the same person, or by two or more persons who each hold the same undivided shares in each of the components of such land (section 40(1)(b));
- Must be registered in the same property register (section 40(1)(d));
- Must be situated in the same administrative district (section 40(1)(e));
- Must be situated in the same registration division (section 40(1)(e));
- Must be in the same province (section 40(1)(e)).

Besides the above prerequisites, a consolidation diagram of the component properties must be prepared by a land surveyor and approved by the Surveyor-General (section 40(1)).

10.2 An application in terms of section 44 of the Deeds Registries Act, 47 of 1937 may be lodged by the owner for endorsement of the title deed and for the substitution of the old diagram for the new diagram.

The documents to be lodged include the following:

- The application in terms of section 44 by the owner of the land;
- The title deed of the land;
- The substitute diagram approved by the Surveyor-General; the original diagram(s)
- The mortgage bond as well as the consent of the mortgagee;
- The title deed of the lease agreement as well as the consent of the lessee.

QUESTION 11

11.1 RCR 11/2015:

The property may be transferred to the person or entity mentioned as a nominee in instances where the divorce settlement has been made an order of court. Both former spouses must give transfer and the nominee must accept in writing.

11.2 RCR 19/2015:

The attachment must be purged on the basis of section 31(4)(a) of Act 47 of 1937.

11.3 RCR 22/2015:

Yes, it is permissible in terms of section 22(2) of Act 47 of 1937. The cause of the deed must make reference to both transactions. The purchase price of the transactions must be reflected separately in the consideration clause.

11.4 RCR 23/2015:

No reference must be made to the appearer or to the power of attorney in the preamble of the deed.

11.5 RCR 32/2015:

A certificate of registered title may be issued in terms of section 38 of Act 47 of 1937 in respect of two or more title deeds that are lost or destroyed, provided all title deeds are registered in the name of the same person or entity.

11.6 RCR 39/2015:

Section 3(1) of Act 95 of 1986 can be invoked to allow for the issuing of a certificate of registered title in terms of section 43 of Act 47 of 1937, provided a certificate by a conveyancer as provided for in regulation 29 of Act 95 of 1986 is submitted. The provision of section 17 and section 18 of Act 95 of 1986 applies mutatis mutandis.

11.7 RCR 40/2015:

The procedure provided for in section 49 must be applied and the certificate of title must be issued in the name of the body corporate.

11.8 RCR 13/2016:

The Power of Attorney will have to be cancelled in toto, and a new Power of Attorney will have to be registered by the party who wishes to grant his/her power of attorney to the agent.

11.9 RCR 11/2017:

No, section 10 does not find application.

11.10 RCR 8/2017:

The provisions of section 22 of Act No. 95 of 1986 (if applicable) read with section 17 of Act No. 8 of 2011 and section 49 of Act No. 95 of 1986 are applicable.

11.11 RCR 15/2017:

A valid causa is anything in law that authorizes the transaction, in other words, any legal action. The causa must be properly articulated at all times.

11.12 RCR 26/2017:

Yes, sections that are not attached to each other may be consolidated as section 23 of Act No. 95 of 1986 does not require contiguity of section.

11.13 RCR 22/2017:

Yes, the donation or exchange of a portion of agricultural land will be valid as the provisions of section 3(e)(i) of the Subdivision of Agricultural Land Act No. 70 of 1970 only refers to sale.

11.14 RCR 16/2016:

The bonds must be cancelled as it cannot be substituted due to it being regarded as different bonds as contemplated in section 40(5)(b).

The following may be a possible solution: Component two may be released from the operation of the 1st mortgage bond. Components one and two may then be consolidated and the consolidated property may then be substituted in terms of section 40(5)(a) of the Act. Alternatively, one of the bonds may be cancelled as provided for in section 50(5)(b).