WHAT IS CONVEYANCING AND THE SYSTEMS OF CONVEYANCING

1. Conveyancing deals with the transfer of immovable property, the hypothecation of immovable property by means of a mortgage bond and the execution of various other acts with regard to immovable property.

2. Conveyancing is also the branch of our law that deals with the preparation of deeds and documents for registration or filing in the deeds registry. It refers to the whole registration process, including the drafting, lodgement and signing of documents by different authorised persons.

TYPES OF LAND REGISTRATION SYSTEMS

Negative land registration systems	**Positive land registration systems**
➢ State does not guarantee accuracy of register and third parties cannot rely on accuracy of records and often guarantee their rights by pvt insurance	➢ State completes and maintains a register of title and guarantees accuracy and correctness of register
➢ State incurs no liability for inaccurate or incomplete records	➢ State is liable for shortcomings in records
➢ No examination of deeds by the State prior to recording - State simply records deeds submitted at face value	➢ State examines/investigates documents and transactions for legality
➢ Transfer is effected in the new deed, and not in the State register, and therefore a new deed is required for each transaction	➢ Transfer takes place when the register of title is annotated and deeds are merely endorsed - new deeds not required for each transaction
➢ Usually no link to a cadastral system of maps and diagrams	➢ Register of title linked to cadastral systems of maps and diagrams
➢ Minimal state interference	➢ High degree of state interference
	➢ Linking of transactions occurs

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Land registration in SA (SA system): is based mainly on legislation and is nominally negative, but has some characteristics of a positive system.

General Rule:
In our system the State gives an implied guarantee that the person who is the registered owner of a right to land in the deeds registry is indeed the owner therof.

However, because our system is also negative, the general rule is subject to a number of limitations because other ways by which ownership is acquired, such as acquisition of ownership through succession, marriage in community of property etc are not recorded in the registers.

Positive characteristics of the SA land registration system

- State investigates and examines deeds before annotating the register.
- State accepts liability for shortcomings in specific, limited circumstances
- State completes and maintains a register of title
- Linked to a cadastral system of maps and diagrams
- Linking of transactions occurs
- High degree of state interference
- State does not record deeds at face value
- State provides owners with security of title
- Public relies on the accuracy of the deeds registry

Negative characteristics of the SA land registration system

- State does not guarantee correctness of data or accuracy of the register, BUT parties do rely on the correctness of information.
- Transfer is effected in the new deed and a new deed must be executed for each transaction
- State incurs no liability for inaccurate records - If there are defects in title, a party may claim delictual or contractual remedies against the Conveyancer, however the State is only liable for damages in terms of section 99 DRA, if it can be proved that:
  a) the loss resulted from an act/omission of a registrar or an official employed in a registry; and
  b) it was committed in bad faith or as a result of a failure to exercise reasonable care and diligence.

When will the SA register not reflect the true registered owner?

1. Where land is expropriated, the expropriating authority becomes owner of the land on the date in the expropriation notice, and transfer is later registered in the deeds office.

2. Where ownership in land is acquired by prescription, the person becomes owner on the date of the court order, and formal transfer is later effected in the registry in terms of the court order.

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3. Where an unmarried person owns property and later marries in community of property, the existing deed will not reflect his spouse as co-owner.

Although the State does not guarantee the correctness of the Deeds Registry records, it does provide security of title and it is not necessary for parties to take out private insurance - titleholders and third parties do rely on the correctness BUT are third parties who rely *bona fide* on the Deeds Office records protected?

View 1
The first view is that where land is transferred and the bond is not cancelled, the Transferee acquires the land subject to the bond.

Standard Bank v Breitenbach: it was held that a bond which had mistakenly not been endorsed on the Title Deed was still duly registered once the Registrar of Deeds signed the bond, and that any *bona fide* purchaser who later purchased the land, acquired it subject to the bond.

Barclays National Bank Bpk v Registrateur van Aktes: where a *bona fide* purchaser acquired land which was subject to a bond, which had not been cancelled, the bondholder retained its real right and the purchaser received the land subject to the bond.

View 2
The second view is that land title automatically includes a tacit guarantee of indisputable title.

Heyl JWS *Grondregistrasie in Suid-Afrika*. Perskor feels that under this view the land would be acquired free of the mortgage bond.

Supreme Court of Appeal
The case of *Legator McKenna Inc and Another v Shea and Others* provides authority for the fact that even if the original cause of a transaction, which is registered in the Deeds Office, is defective, if there is a real agreement to transfer ownership and both parties have performed in terms of that agreement, then the transfer is valid. This is known as the abstract theory of passing ownership.

In this case, Ms Shea was incapable of managing her own affairs on account of brain injury. Attorney McKenna was appointed as her curator during March 2002 and letters of authority were issued in June 2002, however, in April 2002, before receiving his letter of appointment he sold Ms Shea's immovable property, under his capacity as curator, so as to pay Ms Shea's debts. The transfer was registered in the Deeds Office on 27 July 2002. Ms Shea later improved and she was declared capable of managing her own affairs, whereafter she applied for an order for the return of her immovable property against repayment of the purchase price. The purchasers instituted a claim for damanges against the Curator for breach of his implied warranty that he was authorised to sell the property.

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Ms Shea succeeded in the court *a quo* and the sale and registration in the Deeds Office were declared void as Attorney McKenna did not have the authority to sell the property – the *causa* of the sale was void.

The appeal court reversed the decision of the court *a quo* and applied the abstract theory.

The SA land registration system includes *inter alia* the following:

- Deeds Registries:

Government offices under the control of a Registrar of Deeds, where real rights in land are registered. There are deeds registries in: Jhb, Pta, Pmb, CT, Bloem, Vryburg, Kimberley, Nelspruit, King Williams Town & Umtata.

At the head of each deeds registry there is a Registrar of Deeds, while the Chief Registrar is situated in Pretoria.

- Conveyancers:

Are admitted attorneys who have written and passed a specialized conveyancing exam set by the Law Society, & have been subsequently admitted as a conveyancer by the High Court.

- Land Surveyors:

Are persons with specialised survey qualifications. Before land may be registered in the deeds registry, it must be defined, measured and depicted on a plan/diagram with reference to its position in relation to the gridline coordinates.

- Surveyor-General offices:

Are government offices where a cadastral system of maps and diagrams is recorded and maintained for all the land in SA based on a grid coordinate system.

- Local Authorities:

Must consent for all developments & subdivisions of land. Local authority levies, rates, taxes and service accounts for water and electricity in respect of a specific property must be paid up to date and in advance before transfer of that property may be registered.

- State Departments:

Must consent and cooperate, in some instances, before registration can be effected.

- SARS:

Must provide proof that all taxes, particularly transfer duty, have been paid (or that the transaction is exempt), before transfer of a property may be registered in the deeds office.

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- Property Developers:

Establish townships, subdivide land and erect residential and business complexes.

- Financial Institutions:

Provide finance for the purchase and development of land, securing repayment by registering mortgage bonds against the property.

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THE CONVEYANCER

A Conveyancer is an admitted attorney who has:

1. specialised in the preparation of deeds & documents destined for registration in the deeds registry
2. passed two additional national conveyancing exams (one of which may be an oral exam)
3. been admitted to practice as an attorney by the High Court (section 18 Attorneys Act)
4. been enrolled on an electronic register of conveyancers, maintained by the Registrar of Deeds in terms of Regulation 16 DRA and has provided a specimen of his /her signature.

The general rule is that a mere attorney may not act as a Conveyancer, however, in terms of s 102 DRA, a Conveyancer is a person practising as such in the Republic, and includes a person admitted as an attorney in terms of the relevant Transkeian legislation and physically practising as such within the area of the former Republic of Transkei on or before the date of commencement of Proclamation No R9 of 1997.

Duties of the Conveyancer

1. Ensure valid deed of alienation (agreement of sale of land) – section 2 Alienation of Land Act
2. Manage financial matters and the transaction process
3. Prepare deeds and documents – guaranteeing and taking responsibility for correctness of facts, accepting personal liability and complying with formal requirements – subsection 15 & 15A and regulation 44 & 20 DRA
4. Link simultaneous transactions (Deeds) – section 13 DRA
5. Lodge deeds – regulation 45(1) DRA
6. Execute and register deeds in the presence of the registrar of deeds, on behalf of the transferor, if authorised by a power of attorney – section 20 DRA

Duty 1: Ensure valid deed of alienation

Section 2(1) Alienation of Land Act: No alienation of land will be of any force or effect unless contained in a deed of alienation, signed by the parties, or their agent, acting on their written authority.

There are exceptions for public auctions and where an agent acts on behalf of a company still to be formed. In these instances a special procedure must be followed. Only when the conveyancer is certain that there is indeed a valid sale can he proceed with further transfer of the property (*Thorpe NNO and Another*).

Section 28(2) of the Alienation of Land Act: even if s 2(1) is not fully complied with, where the transferee has performed in full and the transfer is registered, the alienation will be valid. (*Legator Mckenna Inc* case) - AND the

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Conveyancer should have picked up that the Sale Agreement had been signed before the letters of authority had been issued by the Master.

Duty 2: Manage financial matters and the transaction process

The Conveyancer must:

- ensure he has enough funds/guarantees/undertakings to cover the consideration.
- ensure that the purchase price will cover the capital and interest to cancel the existing bond or that the seller has alternative funds - no property may be transferred unless the existing bonds have been cancelled or the property released from their operation.
- ensure that the transfer duty, municipal clearance and/or levies to body corporates, deeds office levies and transfer fees have been paid, and collect this money from the party who is liable therefore in terms of the deed of sale.
- should he be required to furnish written undertakings (e.g. agent's commission), he must ensure that there will be sufficient funds on registration of transfer to honour these undertakings.
- present guarantees and undertakings for payment on date of registration and pay out his undertakings, before paying over the proceeds of the sale to the seller.

Conveyancer must make contact with the following:

- Attorney who is registering the new bond
- Bond holder for cancellation
- Seller for copy of identity document, ascertain his / her marital status and obtain necessary antenuptial contract and to get the electrical compliance certificate.
- Purchaser for details of finance, copy of identity document, ascertain his / her marital status and obtain necessary antenuptial contract and to ensure that he has sufficient money to place on trust for transfer costs
- Local Authority in order to obtain a rates clearance certificate
- Estate Agent in order to ascertain the amount of commission to be paid over.

Duty 3: Prepare deeds & documents

Section 102 of the DRA: A South African conveyancer may prepare deeds for lodgement anywhere in SA.

Section 15 of the DRA: before a registrar of deeds may attest, execute or register a deed of transfer, certificate of title to immovable property/mortgage bond, it must be prepared by a conveyancer (unless another Act provides otherwise).

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Usually all documents drafted and lodged by conveyancers must have a signed prep clause, except

- affidavits: a conveyancer cannot vouch for the correctness of someone else's affidavit (except an affidavit and application in terms of section 4(1)(b) which must bear a prep clause), and

- conveyancer's certificates: the conveyancer already signs and certifies the correctness of the facts.

"To prepare" = to check the contents and sign the prep clause to certify the correctness of the facts (subsection 15A(1) & (2) and regulation 44(A)). The prep clause places the responsibility for the documents prepared by the conveyancer with that conveyancer, not with the registrar of deeds. It is not necessary to lodge proof of certain facts in the deed, such as id numbers and marital status.

General Rule: only a conveyancer may sign the prep clause.

Eg: of a prep clause in a deed:

Prepared by me

Conveyancer
J Hill

Section 15A: by signing the prep clause, the conveyancer accepts responsibility for the accuracy of the facts as prescribed by regulation 44A.

Deeds that may only be prepared by a conveyancer
- Deed of Transfer
- Partition Deed of Transfer
- Deed of Cession
- Mortgage bond

(Regulation 43(1): Deed of transfer's, certificates conferring title to immovable property, deeds of cession & mortgage bonds must be prepared by a conveyancer.)

Deeds that may be prepared by an attorney, notary or conveyancer
- Power of Attorney
- Applications
- Consents
- Partition agreement

If the preperation clause is signed by an attorney/notary, the fact that the he is a practising attorney/notary must be confirmed by a practising conveyancer, who must countersign the preperation certificate. – Regulation 44 (The attorney/notary signs the preperation clause at the top right-hand corner and the conveyancer countersigns at the top left-hand corner).

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Eg: of a preperation clause and counter-signed clause in a power of attorney:

Counter-signed by me	Prepared by me
Conveyancer J Hill	Attorney W Brown

Notarial bonds are not conventional bonds and do not contain a preperation clause – they may only be drafted and executed by a notary, not a conveyancer.

Certain legislation, for example the Agricultural Debt Management Act and the Land and Agricultural Development Bank Act, allow for deeds to be prepared by certain officials who are not conveyancers.

Alterations:

Initialling/alterations/amendments: A conveyancer must initial all alterations in any document he prepares, and initial every page which he doesn't sign (regulation 43(2)) to ensure that no unverified information is inserted.

Regulation 44(2): the preparer who accepted responsibility for the original correctness of the document must initial any amendments.

Material alterations: must be initialled by the preparer (regulation 44(2)):
1. names, id no's / marital status;
2. date of sale;
3. description of property;
4. purchase price;
5. amount of mortgage bond

Minor errors: The registrar of deeds may allow the executing conveyancer, instead of the preparing conveyancer to initial the amendments or interlineations (regulation 43(2)).

Regulation 43(2): Whether an alteration is minor or material depends on the "opinion of the registrar".

Take responsibility for correctness of facts – Section 15A and Regulation 44

Regulation 44A: the preparer of the deeds is responsible to ensure:

a) All copies of documents are identical on date of lodgement.

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b) All applicable townships and conditions have been correctly brought forward from the previous deed into the new deed/certificate of title.
   - The Registrar of deeds must still examine the conditions to ensure they do not require consents or contain lapsed conditions, prohibitions, or pre-emptive rights.
   - The Registrar of deeds need not examine any conditions relating to the bond which are irrelevant to the registration of the bond (section 50A).

c) If documents are signed by an executor, trustee, tutor, curator, liquidator or judicial manager / a person in any other representative capacity, that the person
   - has been so appointed,
   - is acting within his powers and
   - has furnished security to the Master

d) The names, id no's / date of birth, and marital status of any natural person is correctly reflected in the deed; and the names and registered number, if any, of any other (legal) person are correctly reflected.

e) If deeds are signed on behalf of a company, CC, church, association, society, trust or other body of persons, or an institution, that
   - the signatory is authorised (by resolution) and
   - (except in the case of a company) the transaction is authorised by and according to the constitution, regulations, founding statement or trust instrument.

f) The particulars in a new deed, certificate of title or bond, have been correctly brought forward from the special power of attorney or application.
   - Where the document is based on a preceding power of attorney/application drafted and prepared by someone else, the preparer of that power of attorney is responsible for the correctness of the names, id no's, registration no's and marital status of the parties. (regulations 44(1) & 44A).
   - The conveyancer who prepares the deed, certificate or bond takes responsibility for the correct carrying forward of this information from the PA to the new deed, not for the actual content of the information.

The preparer must check the above and keep proof of any facts for which he undertook responsibility on file.

Section 15A(3): when examining deeds, the registrar of deeds must accept that the facts for which the preparer accepted responsibility have been conclusively proved, unless the deed is *prima facie* incorrect. The registrar is duty-bound to examine the deed (section 3(1)(b)) and may in terms of section 4(1)(a) call for proof, by way of affidavit or otherwise, of any necessary fact.

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Rules applicable to the registration of deeds and registrable documents:

1. good quality A4 paper to be used (Regulation 20(1));
2. printing or typing must be of good quality (Regulation 20(1));
3. the top half of the first page is to be left blank for endorsements (Regulation 20(2)) – on every deed of transfer, mortgage bond or certificate of registered title;
4. blank spaces are to be ruled through (regulation 22)
5. a 4cm binding margin on the left-hand side (this requirement is no longer strictly enforced where deeds are microfilmed);
6.
   a. Only black ink to be used – no faint writing, typing or printing (Regulation 20(4));
   b. all interlineations and alterations to be initialled in black ink (Regulation 20(4));
7. copies of documents, the originals of which are lodged in the government offices, to be certified by a notary, conveyancer or head of that government office (regulation 20(7));
8. Page numbering - all pages must be consecutively numbered (Regulation 22);
9. One side of page only – deeds and documents must be printed or typed on one side only;
10. Place and date of execution – every deed and document must disclose the place and date of execution thereof (Regulation 25);
11. More than one transferor/transferee – parties must be numbered – only exception if parties are married in community of property and partnerships.
12. More than one property – each property must be numbered and described in a separate paragraph. (Regulation 27(2));

The Registrar of deeds has a discretion to waive compliance with any of these requirements, many of which have become obsolete, for example copies of documents are no longer bound and filed, but are electronically stored, so no binding margin is required, however these requirements have not been removed from the regulations.

Duty 4 – Linking

Linking means the linking of deeds to be lodged in the Deeds Registry by means of a number/letter code (barcode) to ensure that the deeds are registered simultaneously as a batch. A number is allocated to each deed. The documents are then lodged on the same day in separate lodgement covers. The deeds will then be examined and registered simultaneously as a batch.

The linked deeds are all deemed to be registered only when the last act of registration in the batch has been signed by the registrar of deeds (section 13). Where one of the deeds is not in order, the whole batch is rejected. **Deeds are principally linked for financial reasons.**

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The linking usually occurs numerically but the covers may also be linked in pencil in Roman numerals, in which case the registrar of deeds will pass any deeds that are passed for registration, and will reject only those deeds in the batch that are not in order.

The nature of the different transactions and the linking of the deeds must be indicated by the conveyancers on the front covers of all the linked deeds.

- If the covers do not indicate a linking, but each shows only a single transaction, the transactions will be registered individually.
- If the covers of the linked batch do not correspond, they will be returned to the respective conveyancers with a note "simuls not lodged".

The following distinctions appear on the different covers:

1. The details of the different attorneys lodging the different deeds are given in the top left-hand corner of the cover (All conveyancing firms have designated numbers for easy identification).

2. The reference block in the middle of the page on the left-hand side indicates the different conveyancers' file references.

3. The linking block in the middle of the page on the right-hand side indicates the linking, if any. The first figure in the double box, with the heading "Linking" indicates the number of transactions to be registered in the batch. The second figure indicates the position of that transaction in the batch.

4. The original documents (e.g., the deed or bond) included in that specific cover are indicated under Title deeds in the linking block. Supporting documents are lodged with the transaction they corroborate and are not lodged or numbered separately.

Examples of codes/abbreviations:

T Deeds of transfer, transfers by endorsements, certificates of title and deeds of grant
B Mortgage bonds and charges
BC Bond cancellations, releases from the operation of the bond
PA General powers of attorney
H Antenuptial contracts
VA Copies of lost or destroyed deeds in terms of reg 68

Duty 5 - Lodgement

This is the formal handing in of deeds at the deeds registry for purposes of registration. This involves the transferring conveyancer contacting the other conveyancers, to check whether they have satisfied their requirements and are ready to lodge their deeds on a fixed date at the deeds office.

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If one of the simuls is not yet ready for lodgement, then none of the linked deeds can be lodged.
If one of the linked transactions is not lodged on the fixed day, the other transactions will be rejected and re-lodgement will have to be arranged.

Regulation 45(1): Deeds, bonds, etc must be lodged by a conveyancer practising at the seat of the deeds registry, for execution or registration (as opposed to preparation of the deeds, which may be done by any SA conveyancer).

Documents lodged on behalf of government departments may be lodged by any person employed by that government department, even if not a notary or conveyancer and even where that government department does not have an office at the seat of the relevant deeds registry, in a manner approved by the registrar of deeds.

Most deeds registries have a tracking system for lodged deeds, referred to as DOTS (Deeds office Tracking System): A sticker with a bar code is attached to the bottom right-hand corner of the lodgement cover, and the bar code is then scanned by various sections of the deeds office, which allows one to track the progress of a particular deed through the process.

Duty 6 - Execute and register deeds

After ± 5 – 6 working days, the deeds should "come up on prep". This means that the conveyancers have a final opportunity to make amendments and corrections as required by the examiner's notes and to check their finances before the deeds are registered.

Once the corrections and amendments have been completed, the deeds are ready for registration. They are first handed to a final registration clerk, who scans the deeds to record their progress from prep to registration and places them in special execution pigeon holes for the conveyancer's to execute.

Execution involves the respective conveyancers of the simultaneous transactions signing their deeds in the execution room in the presence of the Registrar of deeds.

The signed deeds are then handed to the registrar of deeds, who attests the signatures of the conveyancers and registers the deeds in the batch. Now execution of the deeds has taken place.

Once the registrar affixes his signature to the deed or to the last deed in a batch, then the deed or batch is deemed to be registered (section 13(1)).

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After Registration the conveyancers

- advise their clients of the registration,
- present and honour guarantees and undertakings for payment
- account to their clients for the monies received and debit their fees.

After about a month or two, the registered deeds are returned to the conveyancers, after having been sealed, a sequential number allocated, recorded on the deeds office database and electronically recorded (microfilmed or scanned).

The conveyancers deliver the new deeds to their clients, or other persons entitled thereto (e.g., the bondholder will hold the title deeds of the land over which he/it holds a bond as security for repayment of the debt.)

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THE REGISTRAR OF DEEDS

Section 2 DRA: For a person to be appointed as a Chief, Deputy or Assistant Registrar of deeds, he must have:
- a Diploma *Juris*, or
- an equivalent diploma / degree, and
- proven appropriate expertise / the capacity to acquire the ability required to perform the functions of the office of a registrar of deeds within a reasonable time.

Each Registrar of deeds is in charge of the Deeds Registry for which he has been appointed. Each Deeds Registry will include the following sections:-
- examination
- storeroom
- data
- microfilming/scanning
- information
- personnel
- administration

Deeds and documents usually pass through all of these sections as part of the registration process.

Duties of the Registrar of deeds

1. Take charge of and preserve all records (section 3(1)(a))
2. Examine all deeds (section 3(1)(b))
3. Record Interdicts (section (1)(w))
4. Keep registers
5. Give access to public registers and records (section 7(1))

The examination of a deed entails:

1. checking that all the legal provisions relating have been complied with
2. checking and disposing of interdicts
3. endorsing the deeds and documents to give effect to such registration or law (section 3(1)(v)) ("endorsing" a deed involves placing a stamp and/or a short note on an existing deed or document referring to subsequent transactions, for instance "mortgaged" endorsement on a deed of transfer)
4. updating the deeds registry records by recording the details of the new registration

Examination does not include examination of the facts that the preparing conveyancer accepts responsibility for in terms of regulation 44A, however, the Registrar of deeds must still check deed conditions to ensure that there are no prohibitions and that any necessary consents have been lodged. The Registar of deeds is specifically obliged to check conditions relating to consolidated land consisting of component parts which were originally subject to different conditions.

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Interdicts: usually prevent persons from dealing freely with their properties and are recorded and numbered by placing the code **I** before the consecutive number followed by the year (I 326/1997). Many different types of interdicts may be recorded:

I	General interdicts and court orders
I AT	Attachments
I C	Caveats
I CY	Liquidation and judicial management
I SG / I LG	Surveyor-General Interdicts
I Reh	Rehabilitations
EX	Expropriations
S	Sequestrations

Expropriations and sequestrations are numbered using only the code Ex or S before the consecutive number, without the I (Ex 628/2006).

The powers of the Registrar of deeds: are set out in section 4 DRA:

1. The Registrar of deeds may require the production of proof, by affidavit or otherwise, of any fact necessary to be established in connection with any matter or thing sought to be performed or effected in his registry (section 4(1)(a)). The Registrar of deeds may refuse registration pending production of further documentary proof or even require parties to obtain a court order authorising registration.

2. The Registrar of deeds may rectify deeds or documents registered or filed in his deeds registry relating to an error in the name or the description of any person or property, or the conditions affecting the property (section 4(1)(b)).

3. The Registrar of deeds may issue certified copies of deeds or documents registered or filed in his deeds registry (section 4(1)(c)).

4. The Registrar of deeds may order that certified copies be obtained to replace illegible or unserviceable deeds or documents (section 4(1)(d)).

5. The Registrar of deeds may submit reports to court relating to applications for performance of any act in a deeds registry (section 97(1)).

A Registrar of deeds must also be familiar with common law, court decisions, legal opinions, instructions issued by the Chief Registrar of deeds and prescribed by the Registrars' Conference Resolutions to ensure correct registration of deeds and documents.

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Liability of the Registrar of deeds

As a general rule, there is no liability for the State or the Registrar of deeds, as we have a negative registration system in SA.

Section 99 DRA: the government, the registrar and officials employed at the deeds office will not be liable for damages sustained by any person due to any act or omission on their part, unless:

1. the act or omission was *mala fide,* or
2. the registrar and/or official did not exercise reasonable care and diligence in carrying out their duties.

Should *mala fide* be an element, the registrar or official may incur personal liability to the State for any loss or damage suffered.

Simply because a registration is faulty does not mean that there has been *mala fide* or that there was not reasonable care and diligence by the official.

THE REGISTRATION PROCESS

Day 1

The conveyancer lodges the deeds under cover of a lodgement slip at the lodgement counter in the deeds registry.
When more than one conveyancer is involved in the simultaneous transactions, all the deeds relating to that transaction are reconciled as a batch by means of the linking system, dated and scanned into the DOTS by the officers at the lodgement counter.
If only one conveyancer is involved, it is also dated and scanned into the DOTS.

When all the deeds have been dated at the lodgement counter, they are sent to the data section, where they are again scanned and computer data printouts are made of the existing deeds office data relating to the persons and property concerned.
These printouts are inserted into the lodgement covers.

The deeds then proceed to the distribution room, where (after being scanned) the sorters allocate a value to the single deeds and batches of deeds corresponding with their degree of difficulty for examination purposes and distribute them among the deeds controllers so that all the deeds controllers receive a similar quota of deeds to examine.

Day 2

The deeds controllers examine the deeds for the first time:
1. They endorse the deeds to reflect the transaction to be registered.
2. They check interdicts against the persons and property to ascertain whether there are any court orders prohibiting the proposed registration or restraining dealings by the person or with the property.

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3. They raise notes in respect of any errors or oversight in the deeds or request lodgement of further evidentiary proof.

The conveyancers have to comply with these notes in order to have the deeds or documents registered.

Day 3

The deeds controllers return the deeds to the distribution room, where they are scanned and distributed to the chief deeds controllers, who examine them for a second time. The chief controllers must ensure that all the applicable provisions have been complied with, raise further notes if necessary and decide whether the deeds are registrable.
They will indicate on the lodgement cover of each deed whether the deed it has been rejected (by endorsing it with a capital R) or passed for registration or execution (by initialling the cover).

Day 4

After scanning, the deeds destined for execution or registration, proceed to the assistant registrar who monitors them to ensure that he agrees with the chief controller's decision.

The rejected deeds are sent to the delivery counter for scanning and returned to the conveyancer, who must correct the errors in the deeds and thereafter re-lodge them.
If the conveyancer is satisfied that after correction a deed is in order, he may request the chief deeds controller, in his discretion, to restore same. If the deeds were incorrectly rejected the chief deeds controller has no option but to restore them.

The restored deeds or documents and those monitored and passed by the assistant registrar of deeds then proceed to the preparation room, where they are scanned, sorted and placed in the relevant conveyancing firm's pigeon hole for the attention of the conveyancer.

Day 5

Unless they have obtained a prior extension from the assistant registrar, conveyancers have 3 days within which to comply with the notes raised by the deeds controllers, failing which the deeds will be rejected and sent to the delivery counter for collection by the conveyancer.

When all the notes in the deeds have been complied with and deleted by the deeds examiner, the deeds are scanned for execution and checked by the data typists for any new interdicts that may have been received after to the initial examination done by the deeds controller.
This process is called "black booked".

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If new interdicts that are applicable have been received, the batch is rejected (unless the conveyancer certifies that the particular interdict is not applicable) and sent to the delivery counter for collection by the conveyancer.
If not, the deeds are sent to the execution room, sorted and placed in the conveyancer's pigeonhole.

Days 6 – 9

The conveyancer has a further period of 3 days within which to appear before the registrar of deeds and register or execute the deeds, failing which they will be rejected and returned to the delivery room for collection by the conveyancer.

Day 7

After execution of the deeds by the conveyancer and registrar and, where applicable, registration of the deeds, the deeds are scanned, numbered, sealed and dated.
(The registrar has a seal of office that must be affixed to all deeds executed or attested by him and to all copies of deeds serving in the place of the original, issued by him. This, together with his signature, serves to authenticate the deed so that it may serve as an official public document.)

Days 8 – 9

The data section captures the information from the registered deeds on the deeds registry computer database and, in those deeds registries not using microfilm or digital scanning, the registered transactions are manually cross-referenced against the office copies of the title deeds, as well as in the relevant registers.

Day 10

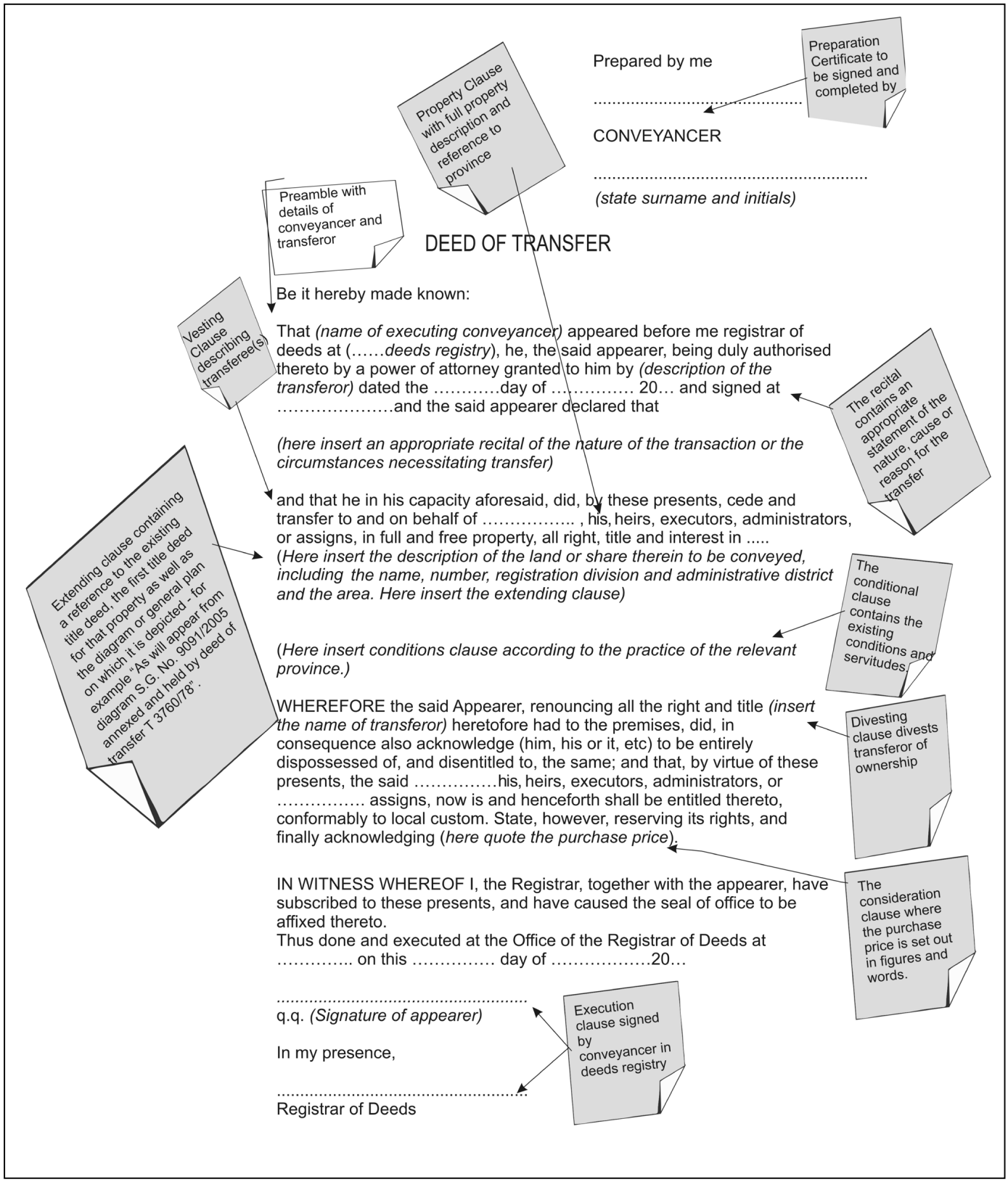
Any specific office instructions from the deeds controllers in respect of the deeds are attended to.

Days 11 – 13

In mechanised offices, copies of the deeds are captured on microfilm or scanned into the computer database, after which the deeds or documents proceed to the delivery room for delivery to the lodging conveyancer, who in turn delivers the registered deeds to the client. (In the non-mechanised offices, an additional copy of the deed must be lodged, which is then retained and filed by the deeds registry for record purposes in place of the microfilmed/scanned copy kept in the mechanised offices.)

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THE DEED OF TRANSFER - FORM E



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General Rule: Section 16 DRA: ownership in land is conveyed by Deed of Transfer and save for a few exceptions, this is the only means by which ownership of land is transferred.

The Deed of Transfer serves a dual purpose

- as a deed transferring ownership and
- as a deed proving ownership.

In some instances the Deed of Transfer does not serve as a transfer document but as confirmation of an already existing situation to prove ownership.

Section 20 DRA: a Deed of Transfer must be drawn in the forms prescribed by the DRA and regulations, although minor deviations are allowed (regulation 19(8)).

COMPONENT CLAUSES

1. Preparation certificate / clause

The preparation clause is the certificate at the top right-hand corner of the first page of the Deed of Transfer, which a conveyancer signs in terms of regulation 43, to indicate that he accepts responsibility for the deed.

Section 15 DRA: a Registrar of deeds may not attest, execute or register a deed unless it has been prepared by a conveyancer, or as provided for in any other law.

2. The Heading

This is the title or heading indicating the nature of the deed, e.g. "Deed of Transfer" or "Mortgage Bond".

3. The Preamble

The preamble contains the:

1. details of the conveyancer appearing before the registrar
2. name, id number and status of the transferor/owner or person who granted the power of attorney authorising the conveyancer
3. date and place of signature of the power of attorney authorising the conveyancer to execute the transaction.

Regulation 18(1)(a): A natural person must be identified by his name and id number or:

1. if his id is incorrect, by his name, id number and date of birth
2. if no id has been issued to him, by his name and date of birth
3. if no id has been issued to him and his date of birth is unknown, by a method approved by the Registrar of deeds
   AND
4. by his marital status (section 17(2) DRA), except for persons acting in a representative capacity (e.g. an executor of a deceased person).

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Regulation 18(b): Legal persons must be identified by their name and registered number, if any.

Although section 20 provides for the owner acting personally in the deeds office, the deeds must still be prepared and lodged by a conveyancer in terms of section 15.

Who is the 'owner'?

The definition of owner in relation to immovable property in section 102 DRA stipulates in paragraph (a) that it is "the registered owner or holder of the property", including:

1. the trustee of an insolvent estate
2. the liquidator of a company or close corporation owner
3. the executor (or legally recognised representative) of a deceased owner
4. the legally recognised representative of a minor, insane or otherwise disabled owner

if the trustee/liquidator/executor or legal representative is acting within his legal authority

This definition is subject to subsection (b), where "owner" in relation to immovable property, real rights in immovable property and notarial bonds which are registered as follows:

1. in the name of both spouses in a marriage or civil union in community of property, means either spouse or both spouses
2. in the name of only one spouse and which forms part of the joint estate of both spouses in a marriage or civil union in community of property means either spouse or both spouses
3. under section 17(1) in the name of both spouses in a marriage in community of property to which the provisions of Chapter III of the Matrimonial Property Act do not apply, means the husband*
4. in the name of only one spouse, and which forms part of the joint estate of both spouses in a marriage in community of property to which the provisions of Chapter III of the Matrimonial Property Act do not apply, means the husband.*

*Item 3 & 4 = unconstitutional but have not been removed from s 102 DRA due to the abolishment of marital power of husband; and *Gumede*: Customary marriages before & after the Recognition of Customary Marriages Act = must be treated the same.

Section 96: where a person who has a right to receive transfer, executes a deed, it "shall be deemed to have been executed by the owner of such property" upon such person receiving transfer. This means that the same piece of land can be sold in sequential transactions, and all the transactions can be linked as one batch of deeds, lodged and registered simultaneously.

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Land owned by two or more persons in undivided shares may be transferred by one deed from those persons to any other person/persons in undivided shares (section 23(2)).

Two or more persons owning a different piece of land may not transfer those pieces of land by the same deed, unless authorised by the provisions of the law or an order of court (section 22(1)). Each owner must give transfer in a separate deed in respect of his separate piece of land.

Each transferor in a deed must be the sole owner or the owner of a share in each property to be transferred (section 22(1)).

4. The Recital (*Causa*)

The recital/*causa* follows the preamble to the deed.

It provides the reason for, or cause of the transfer enabling the registrar to judge whether the transfer is permissible and registrable. (Tell the "story")

An example of a transfer that is not registrable is one which is passed as security for a debt or other obligation (section 91 DRA).

There is no prescribed form for the recital, but sufficient reasons must be given explaining why a piece of land must be transferred to a specific person: e.g.: sale, donation, succession, exchange or rectification.

Sale:

"…and the said appearer declared that his/her principal had truly and legally sold on 9 May 1998…"

It is practice to insert the date of sale in the recital or the consideration clause, to indicate when the transferee acquired a right to the land.

If land is sold to someone and he dies before the land is registered in his name, the fact that he died after the date of sale must be mentioned in the recital: "*… and the said appearer declared that the said deceased Johny Jones did during his lifetime on 9 May 1998 truly and legally purchased the hereinafter mentioned property…"*

If it's a sale by execution it must contain both the plaintiff and defendants names, the case number, the details of the land and the fact that it is registered in the name of the deceased. Further you must state that it was attached by the sheriff in terns of an order of court, and which court and the fact that it was sold on auction.

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Donation:

The date of the donation determines which procedure must be followed to transfer the land to the donee.

"… the said appearer declared that his principal had truly and legally donated on 6 May 2010…."

Section 2(1) Alienation of Land Act: no alienation, including a donation of land, is of any force or effect unless it is contained in a deed of alienation (deed of donation) signed by the parties. In the case of donations after this Act, it is no longer necessary to refer to the acceptance in the recital of the deed to prove the donation, notwithstanding the reference to such acceptance in form E to the regulations.

Succession:

The following must be mentioned in the recital:
1. date of testator's death
2. mode of inheritance
3. short explanation of why the transferor/s is entitled to the land
4. short explanation of how testamentary conditions are dealt with

For the purpose of the cause description of a deed of transfer a destinction is made between:
(i) property bought or sold by the deceased during his lifetime but transferred after his death; and
(ii) property sold by an executor after the owner's death (transfer will also be passed after the owner's death)

If land is **purchased** during the lifetime of a person and such person dies before the transfer of such land is registered in his name, the fact that he died after the date of sale must be stated in the causa in order to explain why land is transferred to his estate. Eg:

"AND the said appearer declared that –
WHEREAS his principal had truly and legally sold the property herein to John Cohen on 15 April 2004;
AND WHEREAS the said John Cohen, who died on 1 May 2004, was married in community of property to Susan Cohen…"

If land is **sold** during the lifetime of a person and he dies before the transfer of such land is registered in the purchaser's name, the fact that the property was sold by the deceased during his lifetime shall be clearly indicated in the causa. Eg:

"AND the said appearer declared that the said late James Brown during his lifetime had truly and legally sold on 15 April 2004…"

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Property sold by the executor

Where the executor himself sells property the recital to the deed of transfer must indicate this fact clearly.

"AND the said appearer declared that the said executor had truly and legally sold on 6 June 1994…"

Exchange:

The recital must disclose a minimum number of elements, namely:
- refer to the exchange agreement;
- state what land is to be exchanged for the land to be transferred; and
- refer to the deed of transfer according to which such other land is held.

Normally two deeds will be registered simultaneously but does not have to be done.

Eg: "…and the said appearer declared that his principal did, on 18 July 2010, agree with the transferee to transfer the property hereby conveyed in exchange for Erf 304 Witkoppen Extension 3 Township, Registration Division I.Q., Province Gauteng, held by the transferee according to Deed of Transfer Number T48836/1996…"

Rectification:

When a rectification of an error in registration will have the effect of a right being transferred, the 4(1)(b) application procedure cannot be followed and a rectification transfer must be registered. In such transfer the recital varies depending on the nature of the error being rectified. The full facts must be disclosed in the recital, e.g. how the error occurred and how it is to be rectified.

Eg: "… and the said appearer declared that his principal purchased Erf 304 Witkoppen Extension 3 Township, Registration Division I.Q., Province Gauteng, measuring 1000 square metres and in error received transfer of Erf 305 in the said township, measuring 800 square metres, by Deed of Transfer Number T2000/2006…"

5. The vesting clause

The vesting clause contains the name/s of the transferee/s to whom the property is transferred.

Where vesting is in
- a natural person or his estate, the transfer is registered in favour of such person or estate and "*his heirs, executors, administrators or assigns"*.
- a local authority, company, cc, association, statutory body, etc, the transfer is registered in favour of such body and *"its successors in title or assigns"*.

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- trustees or office bearers, transfer should be passed to each trustee or office bearer and "*their successors in office or assigns*".

DESCRIPTION OF THE PARTIES
(refer to SG for all possible descriptions)

Natural persons

Unmarried (never married before / divorced / widowed)

Transferor/Transferee: Michelle Adams
Identity number …
Unmarried

Person to whom no identity document has been issued

Transferor/Transferee: Michelle Adams
Born on 5 May 1999
Unmarried

Person married in community of property:

OPTION 1
Transferor/Transferee: Mike Adams
Identity number …
and
Michelle Adams
Identity number …
Married in community of property to each other

OPTION 2
Transferor/Transferee: Mike Adams
Identity number …
Married in community of property to Michele Adams
(and consent in terms of s 15(2)a of the Matrimonial Property Act must be lodged)

Persons married out of community of property and the immovable property is registered/to be registered in the name of only one

Transferor/Transferee: Michelle Adams
Identity number …
Married out of community of property

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Persons married out of community of property and the immovable property is registered/to be registered in both names

Transferor/Transferee: 1. Mike Adams
Identity number …
Married out of community of property

2. Michelle Adams
Identity number …
Married out of community of property

Property registered in name of a woman who has changed her surname since registration

Transferor only: Michelle Adams (formerly James)
Identity number …
Unmarried

Persons married according to the Civil Union Act

It will be cited the same as an ordinary marriage depending on whether it is in / out of community of property and is stated that he / she is married in terms of the Civil Union Act 17 of 2006.

Persons married according to Hindu / Muslim customs

Transferor/Transferee: Michelle Adams
Identity number …
Married according to Hindu rites

No consent or co-signature of the spouse is required

Persons married under the Recognition of Customary Marriages Act 120 of 1998 – before 15/11/2000

Transferor/Transferee: Mike Adams
Identity number …
Married, which matrimonial property system is governed by customary law in terms of the Recognition of Customary Marriages Act 120 of 1998

Persons married according to African customary marriages – after 15/11/2000 in community of property

Transferor/Transferee: Mike Adams
Identity number …
and
Michelle Adams
Identity number …
Married in community of property to each other

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Persons married according to African customary marriages – after 15/11/2000 out of community of property

Transferor/Transferee: Mike Adams
Identity number …
Married out of community of property

Persons married according to African customary marriages – after 15/11/2000: Second and further customary marriages in terms of court order

Transferor/Transferee: Mike Adams
Identity number …
Married, which marriage the proprietary consequences thereof are governed by an order of court issued in terms of the Recognition of Customary Marriages Act 120 of 1998 and filed as I…

Persons married and that marriage governed by the laws of a foreign country. Property registered / to be registered in the name of only one

Transferor: Mike Adams
Identity number …
Married, which marriage is governed by the laws of Germany, and duly assisted by his spouse

Transferee: Mike Adams
Identity number …
Married, which marriage is governed by the laws of Germany

Minor – under the age of 7

Transferor: Mike Adams and Michelle Adams
in our capacity as parents and natural guardians of
Celene Adams
Identity number …
A minor

Transferee: Celene Adams
Identity number …
A minor

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Minor – 7 and older

Transferor: Celene Adams
Identity number …
A minor / an unmarried minor
duly assisted by my parents and natural guardians Mike Adams and Michelle Adams

Transferee: Celene Adams
Identity number …
A minor / an unmarried minor

Juristic Persons

Partnership (other than KZN)

Transferor:

In Power of attorney:

1. If membership of partnership is intact – no change in membership, then one partner can sign the power of attorney on behalf of all partners:

   Mike Adams, duly authorised by a resolution of ABC Partnership consisting of partners …, …, …

2. if a change in members takes place, then all existing partners must sign

Transferee:

Mike Adams
Identity number …
Married in community of property to Michelle Adams

and

Alwyn De Wet
Identity number …
Divorced

and

Jamie Jones
Identity number …
Unmarried

Together carrying on business in partnership as ABC Partnership

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In deed:

(Same as transferee above)

Company:

In power of attorney:

Transferor: Mike Adams, in my capacity as director and duly authorised thereto by a resolution of ZYX Proprietary Limited, Registration Number 1994/567890/07

Transferee: XYZ Proprietary Limited
Registration Number1994/567890/07

In deed: XYZ Proprietary Limited
Registration Number 1994/567890/07

Close Corporation:

In power of attorney:

Transferor: Mike Adams, in my capacity as member and duly authorised thereto by a resolution of QRS CC, Registration Number 1994/456789/23

Transferee: QRS CC
Registration Number 1994/456789/23

In deed: QRS CC
Registration Number 1994/456789/23

Inter Vivos trust or trust *mortis causa* and to which the testator has assigned a name

In power of attorney:

Transferor: Mike Adams, in my capacity as trustee of the Adams Family Trust, Registration Number IT 5678/1995 duly appointed by virtue of a letter of authority issued by the Master of the North Gauteng High Court, Pretoria dated 18 April 2009

(all the trustees must sign the power of attorney, unless one trustee has been authorised by all the others by a resolution taken at a meeting to sign all transfer documents on their behalf. The trustees may only sign the power of attorney on a date **after** the issue of the letter of authorisation by the Master.

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Transferee: The trustees of the Adams Family Trust
Registration Number IT 5678/1995

or

The trustees for the time being of the Adams Family Trust
Registration Number IT 5678/1995 (this description is outdated and is not generally used any more. Its use is nevertheless not incorrect)

In deed: The trustees for the time being of the Adams Family Trust, Registration Number It 5678/1995

or

The trustees of the Adams Family Trust
Registration Number IT 5678/1995

Trust created in a will (*mortis causa*) where no name has been assigned to the trust

In Powerof attorney and Deed:

Transferor: Mike Adams in my capacity as trustee in the estate of the late Michelle Adams duly appointed by virtue of a letter of authority number MT3889/2010 issued by the Master of the North Gauteng High Court, Pretoria on 1 February 2010

Persons acting in a representative capacity

Sheriff of the court

In power of attorney:

Transferor: Boetie Botha in my capacity as Sheriff of the Magistrate's Court of Germiston and duly authorised by virtue of a writ issued by the clerk of the court at Germiston on 18 January 2011

In Deed: The Sheriff of the Magistrate's Court of Germiston

Deceased / Insolvent Estates

Single deceased estate (whether deceased married in/ out cop)

In Power of attorney:

Transferor: Mike Adams, in my capacity as the executor in the estate of the late Michelle Adams, acting by virtue of letters of executorship number 5678/1992 issued to me by the Master of the South Gauteng High Court at Johannesburg on 5 May 1992

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Transferee: The estate of the late Michelle Adams

In Deed: The executor in the estate of the late Michelle Adams

6. The property clause

Contains a description of the land being transferred, which should include:

1) A full description of the land (regulation 28(1)(b))
2) The situation of the land (regulation 28(1)(a))
3) The extent or area of the land (regulation 29)

7. The extending clause

The extending clause follows after the property clause. The purpose of the extending clause is to:

1) provide a reference to the diagram or general plan that was approved by the Surveyor-General for the land;
2) indicate the deed under which the land was held at the time of execution of the current Deed of Transfer

Extending clauses can take one of two forms:

1) As a diagram or original deed

   In respect of land previously not registered, the new piece of land will be represented on an approved diagram by the Surveyor-General or on a general plan.
   The extending clause may read as follows:

   As will appear from general plan / annexed diagram SG No. A 5678/1985 and held by deed of transfer (grant/certificate of title) No. T6789/1997

   The extending clause of the first deed of transfer following the diagram will read as follows:

   First transferred / registered and still held by Deed of Transfer T6789/1997 with diagram SG No. A 5678/1985 annexed thereto.

2) As a subsequent deed of transfer

   The extending clause:

   First transferred by Deed of Transfer (or grant) No. T 6789/1997 with diagram SG No. A 5678/1985 annexed thereto and held by Deed of Transfer (or grant/ certificate of title) No. T 3415/2007

   OR

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First registered by certificate of registered title No. T 6789/1997 and general plan No. SG A 6789/1985 relating thereto and held by Deed of Transfer (or deed of grant / certificate of title) No. T 3415/2007

Where the number of the diagram does not appear in the extending clause of the preceding deed, it is not necessary to refer to it in the new deed.

8. The conditional clause

Contains all the conditions applicable to the land. This includes registered real rights in favour of others (personal and praedial servitudes), restrictive conditions in the land and rights to which the land is entitled as dominant tenement.

The conditional clause includes only those conditions already registered against the land, and any other conditions imposed after registration are endorsed against the deed of the land. On transfer, the conditions of the endorsement are brought forward into the new deed immediately following the existing conditions.

Conditions must be contained in the deed immediately after the extending clause. Only in exceptional circumstances may they be contained in an annexure.

No conditions imposing a duty or obligation upon a Registrar of Deeds that is not sanctioned by law may be included.

9. The divesting clause

Declares the previous registered owner divested of his ownership. It is not necessary to indicate the full marital status of the transferor/s, and the parties can be referred to as “married as aforesaid”.

The last part of the divesting clause where the rights of the state are reserved must be omitted in the case of transfer in favour of the Republic of SA.

10. The consideration clause

Only the purchase price must be contained in the deed. Where transfer duty is paid on a higher amount than the purchase price, that amount is also contained in the deed. If transfer duty is paid on another amount than that of the consideration, the sum on which it is paid is mentioned in this clause, with the reason why it differs.

When the amount on which transfer duty is paid includes other properties, not transferred in the deed, this must be disclosed in the consideration clause.

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11. The execution clause

This is the clause in which the act of execution by the appearer/owner before the registrar is recorded. Execution of the deed occurs before the Registrar of deeds, who attests the deed by signing it as a witness. Once the Registrar of deeds has signed, it is regarded as attested and registered. The full date when the deed was executed appear in the execution clause.

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SUPPORTING DOCUMENTS

BASIC SUPPORTING DOCUMENTS TO BE LODGED WITH A NEW DEED

1) Existing Deed of Transfer
2) Special Power of Attorney to transfer
3) Transfer duty receipt or exemption certificate
4) Rates clearance certificate
5) Consents
6) Solvency affidavits (not lodged in practice but kept on file)

SUPPORTING DOCUMENTS KEPT ON FILE

- Marital status affidavit;
- Personal affidavit;
- FICA affidavit;
- Transfer duty declarations (only if submitted electronically to SARS).

SPECIAL POWER OF ATTORNEY

A power of attorney is the written/oral authority, given by one person (the principal) to another person (the representative) to perform the acts authorised in the power of attorney, on behalf of the principal.

A special power of attorney to transfer is a written power of attorney granted by the owner of the land in his personal capacity as transferor, to a Conveyancer, to perform on behalf of the transferor all acts necessary to effect transfer of the land described in the power of attorney to the acquirer, the transferee. The Conveyancer is also specifically authorised to execute the Deed of Transfer on behalf of the transferor, before the Registrar of Deeds.

The principal must have contractual capacity. If a person has limited contractual capacity, he must be assisted.

Section 20 DRA: all Deeds of Transfers must be executed in the presence of the Registrar of deeds by the owner of the land, or by a Conveyancer authorised by power of attorney to act on behalf of the owner (unless the DRA or another law provides otherwise).

A power of attorney has no prescribed form, however, regulation 65(3) DRA provides that a special power of attorney to deal with immovable property must contain:

- a clear and sufficient description of the land, including the extent;
- the registered number of the land or property (if any);
- the number of the existing deed (serial number and year);
- the date of disposal.

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A power of attorney consists of:

- **A preparation clause** – in terms of regulation 44 a conveyancer/attorney/notary can sign a preparation clause but if it is signed by an attorney or notary it must be counter-signed by a conveyancer

- **Preamble** - date of alienation
  - consideration
  - full description of owner/transferor:

    - Natural Persons: full names, ID No/date of birth & marital status
    - Legal Person: name & registration no
    - Deceased estate: name of executor, name of deceased, and *date and place of issue of letters of executorship* (a power of attorney which is signed prior to the date of appoitment is invalid = *Legator McKenna* case).
    - Married in COP: Both spouses/one spouse with written consent of other spouse (section 15(2) Matrimonial Property Act)

- **Name of appearer** – full name (no id number or status) of Conveyancer appointed to execute the deed in front of the Registrar of Deeds

- ***Causa*** – contains the date of the transfer, the reason for the transfer, eg sale, donation, inheritance, redistribution, exchange, and the purchase price/value

- **Name of transferee** – full names, id no, marital status/registration no of transferee (purchaser/donee/heir)

  - Natural Persons: full names, ID No/date of birth & marital status
  - Legal Persons: name & registration no

- **Description of property** – full description including extent & title reference

- **New registrable conditions** – if there is a comprehensive disclosure of all new registrable conditions, example: personal servitude or praedial servitudes

- **Execution clause** – the power of attorney must be signed by the grantor and duly witnessed. Refernce must be made to the date and place of execution (signature)
  If registered:
  - In SA = 2 competent witnesses of 14 yrs + who are competent to give evidence in court / commissioner of oaths / notary / justice of the peace / magistrate (but not someone appointed in / benefiting from the Power of attorney)
  - Outside RSA = authenticate : Hague Convention

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- Registrar has discretion to dispense with these requirements – *Hersh; Wollach*
- Signature by mark – in presence of commissioner of oaths & 2 witnesses
- Power of attorney may not be dated and signed before the date of alienation.

Other aspects / concepts

- Initialling: All pages must be initialled except the page signed in full.

- Material alterations must be initialled by the grantor, witnesses & preparer = Full initialling.

  Full initialling = initials by grantor, witnesses & preparer.
  Required for:
  - amendment to names / id no/ marital status of transferor/mortgagor;
  - date of sale;
  - property description (erf no & extent);
  - purchase price and
  - capital amount/costs clause.

- Witness not the same = full signature, not just initials.

- Minor alterations = initialled by preparer

  Minor alterations:
  - to names/id no/status of transferor/ mortgagor;
  - spelling error of township;
  - registration division/province; or title deed reference

= certificate by conveyancer.

Power of attorney in foreign language = accepted if accompanied by a translation by a sworn translator/other translator if a sworn translator is not available.

Who must pass transfer of land registered in the name of the following:

A minor

- **under 7**: No contractual capacity - may not sign a power of attorney.
  Both parents, guardian or curator may do so on his behalf.

- **over 7 and under 18**: Limited contractual capacity.
  may personally sign, but must be assisted by both parents, guardian or curator, OR
  both parents, guardian or curator may sign on behalf of the minor.

Section 80 Administration of Estates Act requires authorisation of the
- High Court (property valued over R250 000) or
- the Master of the High Court (property valued under R250 000)

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Minority terminates when the minor

- attains the age of 18 years;
- enters into a valid marriage;
- obtains an order by the High Court in terms of the Age of Minority Act.

An insane/mentally ill person: No capacity to act and cannot perform legal acts = cannot transfer immovable property.

Master of High Court may appoint a curator or administrator to act on behalf of the insane person to administer his property.

Section 80 Administration of Estates Act: curator may not alienate property which he has been appointed to administer, unless he is authorised to do so by:

1. will or other written instrument by which he has been nominated as curator; or
2. the High Court (if the value of the property is more than R250 000) or the Master of the High Court (if the value of the property is less than R250 000).

Legator McKenna case.

An Association: In the case of an association that is a body corporate, a specific person(s), duly authorised by way of a special resolution of the governing body may pass transfer on behalf of the association.

For a voluntary association, trustees or officials of the association, authorised by way of a special resolution taken at a general meeting of the members, or as determined by the constitution, may pass transfer.

The names of the representatives, trustees or officials, together with the date of the special resolution, must be disclosed in the special power of attorney.

A Partnership: Whilst the partnership consists of the same partners, land of the partnership may be transferred on a power of attorney bearing the signature of the firm and the partner who affixes the firm's signature.

If partnership remains intact: one of the partners may pass transfer provided a consent or resolution signed by the other partners authorises him.

If partnership being dissolved and the property is being transferred to new partners/ex-partners in their personal capacity, all current partners must pass transfer.

A *mortis causa* trust: Once transfer has been effected from the deceased estate to the *mortis causa* trust, it may be further transferred by the duly authorised trustee - The trustee must be authorised by will or trust deed.

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An *inter vivos* trust: The duly authorised trustee/s (authorised in terms of the trust deed).

A deceased estate: The executor/representative of the estate.

A deceased estate, including the joint estate: Where the land formed an asset in the joint estate, the surviving spouse, who is owner of an undivided half-share must always be joined in his personal capacity with the executor of the deceased estate.

Where massing of the estates has taken place, the registered owner and not the executor must pass transfer.

An unrehabilitated insolvent: The trustee / the insolvent with the consent of the trustee.

A person placed under curatorship: The curator, duly appointed by the Master of the High Court.

A person whose land has been sold in execution: The sheriff of the High/Magistrates Court.

A divorced person: The registered owner.

A person married / civil union out of community of property: The registered owner.

A man married / civil union in community of property: The husband assisted by his wife; or the wife assisted by the husband; or both spouses, or one spouse with the consent of the other.

A person whose marriage is governed by the laws of a foreign country: The registered owner, with the assistance of his/her spouse, but the Registrar of deeds may in his discretion dispense with the assistance by the spouse.

Consent is not required:
- when land is donated/bequeathed to a person married / in a civil union icop, subject to the express condition that it is excluded from the cop;
- when the High Court orders the registrar of deeds
- when the land is excluded from community of property by law;
- when the land was purchased by a person married / in a civil union in cop with the proceeds from a property that was previously excluded from the cop.

A person married according to Hindu or Muslim custom: These marriages are not recognised under SA law. The registered owner may pass transfer without the assistance of the other spouse as he/she is considered unmarried.

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A person in a customary marriage: Husband has only one wife:
- In community of property: transfer may be passed by either spouse assisted by his/her spouse or by both spouses, or by one spouse with the consent of the other spouse;
- Out of community of property (governed by antenuptial contract): The registered owner.

A person in a customary marriage: Husband has two or more wives: Contractual capacity of the spouses is governed by customary law, subject to section 6 of the Recognition of Customary marriages Act:
- The husband may enter into further customary marriages, but must apply to Court for approval of a written contract to regulate future matrimonial property system of existing and prospective marriages – this will be noted as an interdict, whereafter no immovable property may be dealt with until s 45*bis*(1)(b) or 45*bis*(1A)(b) DRA are complied with.

A liquidated company: The liquidator, appointed by the Master of the High Court.

A close corporation: The person authorised by a resolution of the close corporation, provided the founding statement authorises the transaction.

Owner of land and holder of a personal servitude: in terms of section 69 the parties must jointly give transfer or the usufructory must first waive his / her preference.

A sheriff: this would generally be the sheriff but the sheriff may not transfer the property if the estate has been sequestrated or subject to a section 20 contract.

TRANSFER DUTY RECEIPT / EXEMPTION CERTIFICATE

Transfer duty is the tax payable in terms of the Transfer Duty Act (by the person acquiring land) to the Receiver of Revenue on the consideration or value when land or rights in land are acquired.

Section 12 Transfer Duty Act prohibits the transfer of land or rights in land without a transfer duty receipt.

Section 92(1) DRA a deed of transfer/grant may be registered only if accompanied by a receipt or certificate, issued by SARS to prove that all taxes, duties & fees have been paid OR that the transaction is exempt from transfer duty.

General rule: a transfer duty receipt or exemption certificate must accompany every deed of transfer.

Natural Person: it is calculated on a sliding scale based on the value or purchase price of the property eg:

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Transfer Rates
The transfer rates applicable to transactions entered into after November 2014 are as follows:

0% on the value of property not exceeding R750 000;
3% on the value of property exceeding R750 000, but not exceeding R1 250 000;
5% on the value of property exceeding R1 250 000, but not exceeding R1 750 000;
8% on the value of property exceeding R1 750 000 but not exceeding R2 250 000;
11% on the value of property exceeding R2 250 000 but not exceeding R10 000 000
13% on the value of property exceeding R10 000 000.

Section 92(2) DRA: Where land/real rights are donated to an intended spouse in an antenuptial contract, but not yet transferred to such spouse, the following transactions may not be executed in respect of the property unless transfer duty has been paid, and a caveat will be noted against the property, until this has been done:

- Transfer/cession of the land/real right to any other person (not donee)
- Mortgage of the land

Sometimes VAT is payable by the transferor, and the transaction will then be exempt from transfer duty (the principle against double taxation).

RATES CLEARANCE CERTIFICATE

Section 118 Local Government Systems Act: a registrar of deeds may not register a transfer of property, unless a certificate issued by the municipality in which the property is situated has been lodged. The certificate must:

a) be valid for 60 days from date of issue
b) certify that all amounts due have been paid, during the two years preceding the date of the application for the certificate.

A municipal clearance must be lodged with every transfer of property (including sectional titles and exclusive use area), except *inter alia* tenure upgrades.

Section 118(4) provides that nothing shall preclude the subsequent collection by a municipality of any amounts owed to it, in respect of the property at the time of transfer (prior to the two year-period).

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CONSENTS

a) Consents required in terms of title conditions: The title may contain conditions prohibiting the transaction or may require the consent of another person for the transaction to be registered.

i) in terms of pre-emptive rights: This is a deed condition whereby the holder of the pre-emptive right has the right to buy a property before anyone else.

ii) in terms of reversionary rights: In terms of a reversionary right, the ownership of a property will revert to the previous owner, in the event of the occurrence or non-occurrence of some event.

b) In terms of statutory provisions
Numerous statutory requirements in various Acts impact on conveyancing, and are not apparent from the title deed. Some of these include:

i) in terms of section 3 of the Subdivision of Agricultural Land Act
ii) in terms of section 11(4) of the Advertising on Roads and Ribbon Development Act
iii) in terms of the Agricultural Holdings (Transvaal) Registration Act
iv) in terms of section 15 of the Matrimonial Property Act
v) in terms of the Further Education and training Colleges Act
vi) in terms of section 56 DRA
vii) in exceptional instances in cases of insolvency

General guidelines for consents

The consent must be clearly and unambiguously drawn up and the date and place of execution of every signature must appear on it.

It must contain the full names, identity number/date of birth and marital status of the person who is consenting for a natural person, and the full names and registration number for a legal person.

If the consent is to be registered, it must bear a preparation clause signed by a conveyancer.

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SOLVENCY AND INSOLVENCY AFFIDAVITS

When a person is sequestrated, he remains insolvent until the court issues a rehabilitation order, or until he is automatically rehabilitated ten years after the sequestration.

When the registrar of deeds is informed of a person's sequestration, by the registrar of the court, a sequestration interdict is noted against that person's name in the deeds registry. This interdict prevents the person from personally dealing with his property since his trustee is regarded as the owner of the immovable property in terms of section 102 DRA.

It is common practice for the owner of a property to lodge a solvency affidavit with the transaction, to the effect that he is not insolvent, has never been insolvent and that any court order to that effect does not apply to him but to someone else with a similar name, or the conveyance may, on the basis of the affidavit, lodge a conveyancer's certificate to state that the interdict is not applicable to that person.

If the person declares in the solvency affidavit that he was once sequestrated, but has since been rehabilitated, the registrar of deeds must determine whether ten years have passed since the sequestration:

- If ten years have passed, the person may deal freely with the property.
- If the ten-year period has not expired, section 58 DRA must be complied with – endorsement.

Supporting documents kept on file:

- marital status affidavit
- personal affidavit
- FICA affidavit
- Transfer duty declarations

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SPECIAL TRANSFERS

DECEASED ESTATE TRANSFERS

In transactions relating to a deceased estate, the executor acts on behalf of the estate/deceased owner.

An executor is someone who is:
1) authorised to act by virtue of letters of executorship granted by the Master of the High Court, or
2) authorised to act by virtue of an endorsement of the appointment of an assumed executor, or
3) "any representative of a deceased owner recognised by law" in terms of section 102 DRA, including the representative of an estate administered in terms of section 18(3) of the Administration of Estates Act and regulation 4(11) of the Black Administration Act.

The preamble to the power of attorney granted by the executor must disclose the name of the executor and the date and place of issue of the letters of executorship. The letters of executorship do not need to be lodged.

The preamble in the deed refers to "…the executor in the estate of the late Johny Jones, Number 456/1995". It must not contain any reference to the executor or the letters of executorship.

Where the property does not form an asset in a joint estate, the executor of the estate must pass transfer.

Where the property is registered in the name of a surviving spouse who was married to the deceased out of community of property and massing of the estates has taken place, the registered owner must pass transfer.

General rule: Where the property formed an asset in a joint estate, the surviving spouse of the deceased, who owns an undivided half share of the property, must always be joined in his personal capacity with the executor of the deceased spouse's estate. The surviving spouse does not need to participate when:

Exceptions in terms of Section 21:

(a) Where the executor is only dealing with the share of the deceased spouse,
(b) Where the land has been sold to pay the debts of the joint estate,
(c) Where there has been a massing of the joint estate and the surviving spouse has adiated,
(d) Where the transfer is in favour of the surviving spouse, or
(e) Where the surviving spouse has signed, as executor.

In other words, if one of the above five exceptions is applicable, it is only the executor of the deceased's estate who passes transfer.

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The preamble to the deed must indicate that the transaction is being effected on behalf of the joint estate and the joint estate must be divested in the divesting clause.

For estate transfers, the possible *causa* (recital) include:

1) testate succession

2) intestate succession

   The Intestate Succession Act 81 of 1987 is applicable to persons who died intestate after 18 March 1988. Estates of persons who died before this date will either be administered by Act 38 of 1927 or Act 13 of 1934. For this reason it is important that the date of death of the deceased be mentioned in the *causa* of the transfer.

3) sales by the deceased during his lifetime

   The recital of the deed must specifically mention that the deceased sold the property during his lifetime.

4) donations by the deceased during his lifetime

5) sales by the executor

6) transfers in terms of section 18(3) of the Administration of Estates Act

   Where the value of the deceased estate is relatively low (less than R250 000), section 18(3) authorises the Master to give directions on the manner in which an estate must be liquidated and distributed. The Master may also give directions regarding the appointment of the representative.

7) take-overs in terms of section 38 of the Administration of Estates Act

   A section 38 take-over occurs where the Master, at his/her discretion in order to preserve the assets of the estate as a whole for the benefit of the surviving spouse and deceased's children, allows the surviving spouse to take over all or part of the estate assets at valuation, even though the children or other heirs may be entitled to some of these estate assets. In such a take-over, the surviving spouse will usually be required to furnish the Master with a bond over the property to secure the rights of the minor heirs.

8) sales by an executor in a deceased insolvent estate in terms of section 34(2) of the Administration of Estates Act

   This type of sale occurs when a natural person dies and the executor or representative establishes that the liabilities in the estate exceed the assets.

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No sequestration order is recorded against the name of the deceased in the deeds registry because the deceased is not formally declared insolvent in terms of the Insolvency Act and therefore no reference to insolvency is made in the preamble of the deed or power of attorney. The *causa* of the deed must reflect that the executor is selling the property in terms of the provisions of section 34(2).

9) property registered in the name of the survivor of spouses who were married in community of property

   Once one has ascertained that the survivor is in fact entitled to the whole property, a section 45 transfer by endorsement of the deceased's half share is effected.

10) property registered in the name of a spouse who was married out of community of property, whose spouse died and massing of estates had taken place

11) transfer from an estate of a black person whose estate is being administered in terms of the Black Administration Act according to customary law. In terms of Bhe the magistrate will no longer deal with deceased estates of black people but rather that all estates will be dealt with the same. In a polgymous marriage each wife is entitled to receive R250000 or a child share.

Supporting documents

Any document, the original of which is filed with the Master of the High Court, must be certified a true copy by the Master, including death notices, redistribution agreements and affidavits of next-of-kin and marriage affidavit. Different *causa* will require different supporting documents.

With transfers from deceases estates, either a transfer duty exemption or a certificate by the executor to the effect that VAT is not payable by the estate, prepared by the conveyancer and approved by SARS must be lodged, or a VAT exemption certificate issued by SARS must be lodged.

Could also require section 42(1) certificate (transfer in terms of a liquidation and distribution account to an heir) or a section 42 (2) (if the property is sold by the executor)

Acquisition of land by succession, or as a result of a redistribution agreement is usually exempt from transfer duty. This previously also applied to assets acquired from someone other than the deceased, eg, where massing and adiation took place.

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A 1989 amendment changed this position and now exemption of transfer duty is only allowed in respect of assets belonging to the deceased. Thus, transfer duty is now payable on immovable assets not belonging to the deceased. If A and B are married in community of property, and they mass their estates and bequeath their immovable property to their children on the death of the first-dying of them, transfer duty will be payable on the survivor's half share of the fair value of the property.

Drafting of the *causa* of an estate transfer

The following information, if applicable, should be mentioned:

1) The date of death of the testator = This is deemed to be the date of transaction

2) The way in which the land devolves = the mode of inheritance – testate/intestate succession whether in terms of the common law or a statute, etc.

3) A short explanation of why the inheritance devolves on the transferee = in terms of the will and testament / in terms of s 1(1)(c) of the Intestate Succession Act, etc – if substitution / redistribution etc occurs

4) A short explanation of how testamentary conditions are complied with = if the bequest is subject to a codition, it must be registered against the title deed - subject to the following conditions as contained in clause 6 of the deceased's last will and testament: "6. …"

5) Transfer from a massed estate = If any of the exceptions to s 21 DRA apply, the *causa* should indicate that the transfer is on behalf of the joint estate.

Eg: "WHEREAS the late John Ross, who died on 1 May 2010, bequeathed the whole of the undermentioned property in terms of his will, dated 20 November 2000, to Mary Ross, to whom he was married out of community of property, subject to clause 3 therein contained."

Conditional clause

If there are any registrable testamentary conditions, these must be disclosed, and stated in the power of attorney and in the conditional clause of the deed (after all the existing conditions).

Divesting clause

Where transfer is passed on behalf of an estate/joint estate, the estate/joint estate must be divested instead of the transferor.

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PARTITION TRANSFERS

Purpose
To divide co-owned land between the co-owners in such a way that each of them receives a demarcated piece of land in lieu of their respective shares in the land (or a new undivided share in land where the co-ownership of some continues).

Co-ownership
When land is owned as a whole by more than one person, it is held in co-ownership by those persons.

Undivided share
Means an undivided share in respect of the whole of the land and not ownership of a demarcated piece of land. A person cannot be forced to remain a co-owner if he would prefer to have full ownership of a piece of the land, equivalent to the share held in co-ownership.

Agreement
Partition agreements are usually in writing (section 2(1) of the Alienation of Land Act). Section 26(1) DRA, the agreement must be embodied in the power of attorney and attached thereto. If the parties cannot agree on the terms of the partition, the court can order the partition or arbitrators can award the partition.

Partition vs Subdivision

When an owner of land subdivides that land, the piece of land is "split" into two or more separate pieces. The original owner is still the owner of the land, but now of demarcated portions of the original piece of land, still with the original combined extent. The owner may then apply to the registrar of deeds for a separate deed for one or more of the portions or may transfer one/more directly to a new owner. The remainder of the land remains registered in the name of the original owner. Joint owners of a piece of land may also subdivide it, whereafter those same joint owners will still be joint owners of the new portions of land in the same proportions.

With a partition transfer, the whole of the jointly owned property must be divided between the co-owners. Each party to the partition must acquire a defined portion of the partitioned land in place of the undivided share he previously held. Jointly owned property cannot be partially partitioned and partly still held in undivided shares. The whole property must be partitioned if it is to be partitioned. A single owner cannot partition his property – that would simply amount to a subdivision.

Restrictions
If subdivision of land is prohibited by statutory restrictions, the restriction must either be cancelled or the consent of the relevant authority must be obtained.

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THE PARTITION DEED: FORM F

The partition transfer must adhere strictly to the partition agreement. All the existing title deed/s to the land held in co-ownership are replaced by the deeds of partition transfer. New deeds of partition transfer will be issued individually to each of the co-owners - there will be as many deeds of partition transfer as there are co-owners.

Supporting documents

1) Partition agreement or court order and Power of Attorney

There must be a partition agreement or a court order and a power of attorney

a. Forms of Agreement

The basis of the partition transfer may be an agreement to partition or it may be in the form of a court order or an arbitration award. If it is in the form of an agreement, it must be signed by all the co-owners of the land or shares in the land being partitioned. The agreement can be separate or embodied in the power of attorney.

b. Contracting parties

Each party to a partition must own a share in the property.
The shares held by each owner need not be equal.
The joint owners must be competent to conclude the agreement.

Requirements for the partition agreement

The partition agreement or power of attorney must contain:

a) the land being partitioned
b) the shares registered in the name of each owner, with reference to all the titles
c) the land (portions or shares) which has been allocated to each owner
d) any conditions which may have been created in respect of each allocated portion or share
e) any consideration that may have been given to equalise the partition.

One or more of the parties to the partition may receive money or something else of equal value in order to equalise the partition, but a party may not receive money alone in the place of his share in the partitioned land.

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2) Bondholder's consent

If the share/s of one of the parties to a partition is encumbered by a bond, the partition transfer cannot be attested unless the bond is lodged at the registrar of deeds for disposal (cancellation, release or substitution).

Section 27(1) DRA: the lawful holder of the bond may consent in writing both to the partition and to the substitution of the mortgaged shares for the land awarded to the mortgagor on partition.

3) Partition diagrams

Partition diagrams must be lodged in duplicate with the partition transfers where each party to the agreement receives a demarcated portion of the land. No diagram is required for the remainder.

4) Clearance certificate

If the land to be partitioned is rated, a clearance certificate issued by the local authority must be lodged.

5) Consents to subdivision

If there are statutory restrictions or restrictions in the conditions against subdivision of the land, the necessary consents must be lodged for registration of the partition transfers.

6) Consent by spouse married in community of property to transferor

If any party to the partition agreement is married in community of property, and the spouse of that person did not also sign the partition agreement, that spouse must consent in writing to the partition, which consent must be witnessed by two competent witnesses.

After registration of the partition transfers, each party to the agreement will be in possession of a new title deed to the property he acquired on registration of the partition transfers. All the former title deeds are replaced by the deeds of partition transfer.

Mineral rights

Since the coming into operation of the Mineral and Petroleum resources Development Act, the Registrar of deeds has no authority to register any transactions relating to mineral rights, except to deregister same. If the title deed contains a condition relating to the reservation of mineral rights, the condition must remain in the deed. (this clause refers to the "mother" deed where the property remains in the possession of the owners who have partitioned) and no separate deeds have been issued for the partitioned portions.

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From 1 January 2010 all mineral right conditions (including prospecting rights) in existing title deeds must be omitted when drafting new deeds of transfer, that is with the transfer of the property to a new owner. However, where such mineral right condition contains ancillary rights, the mineral right condition must be retained in the title deed.

Conditions

Section 26(5) DRA: no partition transfer may vary or affect the conditions, unless it has been stipulated that these conditions may be varied, defined or limited by the partition agreement, and by the consent of interested parties.

Praedial servitudes

Parties to a partition may not create/amend a praedial servitude in the power of attorney in respect of the partitioned land or any portion thereof, in favour of any other land belonging to the parties, but not forming part of the partition. The granting/amendment of such servitude can be a condition of the partition, but must be created in a notarial deed, not in the power of attorney.

The parties to a partition may agree that rights in respect of partitioned land be awarded to one or more specified portions.

Personal servitudes

Personal servitudes can be created in the power of attorney, provided that the provisions of subsections 65 to 67 of the Act are complied with.

Consideration

Section 26(2)(e): any consideration given to equalise the partition must be disclosed in the power of attorney or partition agreement to allow the Registrar of deeds to determine the position in regard to transfer duty. The consideration need not consist in money, but if it does, the amount must be disclosed in the consideration clause of the partition transfer of the party who paid the consideration with reference to whom the consideration was paid.

Each party must however receive land or a share in land and he/she cannot receive cash or jewellery in lieu of land (section 26(2)(c)).

If the consideration takes the form of immovable property, which does not form part of the partition and which is to be transferred or ceded from one/more party to another party/parties, this must be fully disclosed in the recital and acknowledged in the consideration clause of the partition transfer of the party who has undertaken to transfer it. A consideration of this nature is transferred by means of a separate deed of transfer.

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EXPROPRIATION TRANSFERS

When land is expropriated, the expropriating authority must serve a notice of expropriation on the registered owner, to state that on a certain date the expropriator will become owner of the land, and the registered owner will receive a consideration in return. No transfer duty is payable. The expropriating authority acquires the property without the consent or cooperation of the owner. This is why it is not transfer in the true sense.

Requirements for the registration of an expropriation transfer:
1) land must be authorised by law
2) only the State, a public or local authority, corporate body or an association of persons may expropriate land
3) the owner must have been notified in writing of the expropriation
4) the date of effect of the expropriation must already have passed
5) the registrar of deeds must be furnished with a certified copy of the notice of expropriation and the expropriation plans (if applicable) by the expropriating authority.

The registrsr of deeds examines the notice to ensure it has been served on the correct person, and then files it as an interdict. Once the client's copy of the deed has been endorsed, the interdict remains noted against the property until formal transfer or cession is effected because the expropriation notice must still be examined when the expropriation transfer or cession is dealt with, and can only then be removed.

With expropriations, ownership vests in the State before registration of the deed of transfer: the transfer of ownership takes place on the date stated in the expropriation notice. The registration of the deed of transfer / endorsement is merely confirmation of an already existing fact and an updating of records and not a registration of transfer of ownership.

Restraint on the expropriating authority: The expropriating authority may not transfer, create rights or deal with the land, until the transfer of the land has been registered in its name by expropriation transfer.

Restraint on the registered owner:
- Where all the land of an owner is expropriated, the registered owner is prohibited from transferring / otherwise dealing with the land, other than to allow the registration of a deed of transfer in favour of the expropriator.
- Where only a portion of the land / a servitude is expropriated, the registered owner may transfer / otherwise deal with the land, however this must be made subject to the expropriation by bringing it in as a condition in the new deed or making any other act of registration subject to it.
- If a portion of land is only provisionally expropriated, the registered owner may not deal with that land until the expropriation is made final or withdrawn.

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TRANSFERS BY VIRTUE OF AN ORDER OF COURT

Section 14 DRA: transfers and cessions of real rights in land must follow the sequence of the successive transactions by which the right to ownership devolved from one person to another.

BUT: Section 33(1): If a person acquires the right to ownership in land (other than by expropriation) and cannot register it in his name in the usual way, he may apply to the court for an order authorising the registration of the land into his name (for example, acquisition by prescription, or when a person buys and pays for a property, but the seller is unwilling to transfer it to the buyer or cannot be traced.)

In such cases, ownership vests before registration of the deed of transfer. The registration of the deed is merely an updating of records and does not constitute the registration of a transfer of ownership.

The new owner may not deal with the property (sell/mortgage) until he obtains a title for the property.

The former owner will not be entitled to deal with the property until the court has made a ruling – he will receive notice of the application to the court and will not be able to transfer or mortgage the property while the court is considering the application.

DEEDS OF GRANT

Section 3(1)(c) DRA: provides for the registration of deeds of grant issued by the State or any other competent authority.

A deed of grant is a formal deed or document by means of which ownership of unalienated or acquired state land is transferred from the State to another person.

The deed of grant does not require a Regulation 43 preperation clause and the duties and responsibilities of the preparer in terms of Section 15A and Regulation 44A do not apply. No power of attorney is required as no-one is appointed to execute the deed.

Unalienated state land may only be transferred by a deed of grant and as the land would never previously have been registered, a diagram of the land must be annexed.

Acquired state land is land that has previously been registered in the deeds office and which has subsequently been transferred to the State. Acquired state land may be transferred by the State either by way of a deed of grant or a deed of transfer.

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TRANSFERS BY ENDORSEMENT

Endorsements = Exceptions to Section 16 DRA that ownership of land may be conveyed only by means of a deed of transfer.

1. Section 16: ACQUISITION OF LAND BY THE STATE OR A LOCAL AUTHORITY (*Provisio)*

When:

a) a local authority acquires all the land held under one title deed from another local authority in terms of any law (eg. sale), or
b) the State acquires all the land held under one title deed (eg. expropriation),

the registrar of deeds will effect such transfer by means of an endorsement in terms of section 16. The local authority / State must apply to the registrar of deeds to make the endorsement. No registration fee is payable.

Requirements:

1) The State or local authority must acquire all the land under any title deed. Should two or more properties be held under a title deed and the State or local authority acquires only one of them, the *proviso* does not apply and transfer must take place by means of a normal deed of transfer. Where a local authority acquires the property, the acquisition must be by virtue of a law.

2) Transfer to the State due to expropriation can be effected by an expropriation deed of transfer or by a section 16 endorsement. Transfer by endorsement can only occur if the title deed is available and lodged with the application and section 31(4)(a) of the act is complied with.

The application must:

- describe the property,
- state the name of the registered owner, with reference to the title deed
- announce that the State or local authority has acquired all the land held by the Title Deed, and
- state the *causa* for the transfer.

2. Section 24*BIS*(2): DISSOLUTION OF A FIRM / PARTNERSHIP

Where land which belongs to a firm/partnership is allotted to ALL the members or partners, on dissolution of the firm/partnership, the deed may be endorsed to the effect that the land vests in the individual members/partners.

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Possible reasons for dissolution include:

1) an agreement between the partners
2) the death of one of the partners
3) the expiry of an agreed period of duration of the partnership
4) the insolvency of a partner
5) the provisions of a court order

If the property is not allotted to ALL the partners, a deed of transfer must be used to register the property into the name of the individuals; the endorsement cannot be used.

A written application signed by all the members/partners (or their representatives) must be lodged. The application must bear a regulation 44 prep clause and it must disclose:

1) the names, identity numbers and/or dates of birth, and marital status of all the former partners
2) the shareholding of the former partners
3) the reason for the dissolution
4) a full description of the property.

3. Section 25(3): ESTABLISHING THE IDENTITY OF CHILDREN

If land, a real right or a mortgage bond is registered in the name of the parent / guardian of children during their minority, to be held in trust for those children referred to in terms of section 25(1) and the identity of all the children has been established, an endorsement under section 25(3) can be affixed to the effect that the land or real right is being transferred to the parent / guardian in trust for the child/children. This does not depend on them attaining majority.

A written application by or on behalf of the children must be lodged. If some of them are minors or otherwise incompetent, they must be assisted or the application must be made by their legal representative. The names of the children must be stated.

After registration, the child(ren) will be able to deal with the property as if they had obtained transfer in their names by means of a deed of transfer or cession.

If any of the children are married in community of property, vesting must be effected in the name of both spouses (section 17(1)). If a child dies before the endorsement is affixed, vesting will be effected in his/her estate or joint estate.

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4. Section 58(2): REVERSION OF PROPERTY TO AN INSOLVENT

When immovable property vested in a trustee in terms of the Insolvency Act and is later re-vested in the insolvent, the insolvent may not deal with that property until the registrar of deeds makes an entry on the deed to indicate that the property has been returned to the insolvent in terms of section 58(2).

In *Ex parte Alberts* and *Ex parte Harksen* it was decided that the court has the authority to declare that property acquired by the insolvent during his insolvency belongs to him, and that the court may authorise the registrar of deeds to affix the relevant endorsement to that property in terms of section 58(2).

When a registrar of deeds is notified by the registrar of the High Court of any sequestration order, or if he later receives a certificate with a copy of a sequestration order from the curator, the date and time of receipt must be noted on the sequestration order by the Interdict Section of the deeds registry and a sequestration number allocated to it. The sequestration interdict lapses 10 years after the date of the sequestration order.

After the operative period of the sequestration order or the extension period thereof, or the section 18B *caveat* has lapsed, every act of registration brought by the insolvent in respect of the property will be valid; even though the property formed part of and vested in the insolvent estate and a section 58(2) transfer by endorsement back to the rehabilitated insolvent has not been registered.

If the insolvent is rehabilitated by the court within 10 years after sequestration, the rehabilitation order must be numbered and filed, and noted against the name of the insolvent by the Data Section of the deeds registry.

The sequestration interdict may not be removed from the deeds registry's records, as all the property of the insolvent remains under the control of his trustee after the rehabilitation, for the remainder of the 10 years after sequestration. Section 58 applies here too.

Although section 58(2) does not stipulate that an application must be lodged, but that the registrar must endorse, in practice the endorsement does not happen automatically and an application is required to be lodged by the insolvent or trustee.

The application must identify the property concerned and refer to the agreement that the insolvent entered into with his creditors, with the Master's approval.

The effect of registration is that the rehabilitated insolvent will be able to deal with the property freely and without the consent of his former trustee.

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5. Section 45: TRANSFER BY ENDORSEMENT IF ONE SPOUSE DIES

Section 45(1) DRA applies where
- there is immovable property, a registered lease or a bond,
- which forms an asset in a joint estate, and
- the surviving spouse has lawfully acquired the share of the deceased spouse.

The title deed, lease or bond can be endorsed in terms of Section 45(1) to indicate that the surviving spouse is entitled to deal with it as if he had taken formal transfer or cession.

If the surviving spouse remarries in community of property, before registration, section 45 can be used to register an undivided half share to the new spouse. Section 17(1) makes it possible for the section 45 procedure to be applied both to the surviving spouse, or to a joint estate of a later marriage in community of property.

Section 45(1) can be applied in respect of property registered in the name of one of the spouses only, e.g., in a partnership. If one partner is married in community of property and his spouse dies, that partner's share need not be transferred to the survivor before section 45(1) can be applied. An application can be made in terms of section 45(1) and the title of the partnership endorsed to the effect that the share of the deceased spouse devolves on the survivor.

If a marriage is governed by the laws of a foreign country, under which the patrimonial rights of the spouses are such that a joint estate is created, section 45(1) may be applied on proof (from the foreign mission/expert opinion in that country) that the immovable property forms part of the joint estate.

To effect the transfer of the deceased spouse's share to the surviving spouse, a written application must be made in terms of section 45 to endorse the title. The application must be signed by the surviving spouse and the executor in the estate of the deceased (unless the surviving spouse is the executor), and must be lodged in a white lodgement cover. Should the surviving spouse also have died, the executors in the deceased estates of both spouses must apply.

The application must contain the reason or *causa* for the transfer of the deceased's share, e.g.

a) that it is a bequest in terms of a will;
b) that the property has been taken over by the surviving spouse in terms of section 38 of the Administration of Estates Act;
c) that the property devolves in terms of section 1(1)(c) of the Intestate Succession Act
d) that the surviving spouse purchased the property from the estate

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6. Section 45*BIS*(1)(A): TRANSFER OF PROPERTY BY ENDORSEMENT WHERE SPOUSES ARE DIVORCE

An application in terms of section 45*bis*(1)(a) only applies if
- immovable property / a lease relating to land settlement / a mortgage bond
- formed an asset in a joint estate of spouses to a marriage in community of property, and
- one of them has legally acquired the share of the former spouse on divorce.

Application for endorsement must be made by the person who is entitled to the property according to the divorce order and settlement agreement, not necessarily the registered owner.

The application must contain:

1) the reason for the transfer, which may be a result of
   - a divorce agreement which was made an order of court;
   - a redistribution agreement following the divorce; or
   - a purchase agreement,
2) applicant's full names, identity number/date of birth and marital status
3) a regulation 44 preperation clause
4) the place and date of signature
5) a full description of the property and title deed

7. Section 45*BIS*(1)(B): TRANSFER OF PROPERTY BY ENDORSEMENT IN TERMS OF A COURT ORDER DURING MARRIAGE

An application in terms of section 45*bis*(1)(b) only applies where the marriage in community of property subsists.

Where, during the marriage in community of property, the court issues an order in terms of subsections 20 or 21(1) of the Matrimonial Property Act for the change of the matrimonial property regime, and orders that the immovable property, lease or mortgage bond be granted to one of the spouses, then a transfer by endorsement in terms of section 45*bis*(1)(b) can be effected.

Application will be made to the Registrar of deeds by the party entitled to the property (i.e. the spouse to whom the property has been granted) for an endorsement of the deed to the effect that he is entitled to deal with such property since he acquired the share of his spouse.

The application must mention the reason for the endorsement.

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8. Section 45*BIS*(1A)(a) OR (b): VESTING IN BOTH FORMER SPOUSES

The application is used when former spouses, who were married in community of property, are both entitled to the property after
- dissolution of the marriage OR
- their marital property regime changed.

An application in terms of section 45*bis*(1A)(a) or (b) only pertains to immovable property, a lease in terms of a land settlement, or a bond which formed an asset in a joint estate of spouses, in either of the following circumstances:

1) The spouses have been divorced, and such property, lease or bond accrues to both former spouses in undivided shares in terms of the division of the joint estate; or

2) A court has made an order, or has made an order and given an authorisation in terms of section 20 or section 21(1) of the Matrimonial Property Act, in terms whereof the property, lease of bond was allocated to both spouses in undivided shares.

Application is made by both spouses, to the registrar of deeds to endorse the deed to state that they are both co-owners or co-lessees or co-mortgagees in terms of the court order.

The application must include:

1) The reason for the endorsement, which could be:
   - a divorce agreement between the parties which was made an order of court, or
   - a redistribution agreement following the divorce, or
   - a change in the matrimonial property regime
2) the applicant's full names, identity number/date of birth and marital status
3) A regulation 44 preperation clause
4) the place and date of signature

The property and title deed must be fully described.

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SUBSTITUTING TITLES / CERTIFICATES OF REGISTERED TITLE

Certificate of registered title (CRT)

A CRT is a deed, prepared by a conveyancer, in which the registrar of deeds certifies who the owner of the property or share in the property is.

It is issued on application by the owner and is no more than a substituting title deed containing information derived from the existing titles, thereby replacing or partly replacing the existing title deed. No transfer of ownership takes place.

Procedure

CRT's have various prescribed forms, though the general procedure set out in section 37 DRA must be followed:

1) A written application, accompanied by the title deed of the land, must be lodged by the owner for the CRT's in terms of subsections 34 to 36 DRA (except for the section 34(2) application for a lost deed)

2) All registered bonds over the property must be lodged (no consent from the mortgagee is required)

3) The registrar of deeds will state on the title deed/s and mortgage bond/s that a CRT has been substituted for the title deed/s or bond/s.

4) A CRT replaces the title deed/s concerned.

VARIOUS DIFFERENT CRT'S

1. Section 34(1): CRT OF AN UNDIVIDED SHARE

If a person is a joint owner of an entire piece of land or a portion thereof, and all the land is held under one deed by all the owners, he can apply, under section 34(1) DRA for a CRT for his undivided share.

Such a co-owner must obtain a CRT before he can transfer a fraction of his undivided share or before he can hypothecate or lease the whole or a fraction thereof. A CRT is not necessary where a joint owner disposes of the whole of his share.

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2. Section 34(2): CRT OF AN UNDIVIDED SHARE IN THE CASE OF A LOST OR DESTROYED DEED

Where the client's copy of the deed has been lost/destroyed, he can apply, under section 34(2) DRA for the issue of a CRT of an undivided share in land, without having to apply for a certified copy of the lost or destroyed deed.

This deed does not replace a lost title deed and it remains valid in respect of the shares of co-owners.

The owner of the last remaining share under a lost or destroyed deed must apply for a certified copy of that deed in terms of regulation 68, not for a CRT of his share in terms of section 34(2) as the deed may not be exhausted by the issue of CRT's.

Section 34(2) vs Regulation 68

A CRT in terms of section 34(2) is issued to a co-owner of property who holds the property together with other co-owners by virtue of a deed that has been lost or destroyed. The lost deed remains valid in respect of the share/s of the other co-owners.

In terms of regulation 68(1) DRA, a certified copy of a lost or destroyed deed may be issued to a single owner or to joint owners of a piece of land who apply for the issue of a copy of the property title deed to replace the original which has been lost or destroyed. All the owners of that piece of land must apply for the regulation 68 copy. Once the copy has been issued, the original deed becomes null and void.

3. Section 35: CRT OF AGGREGATE SHARES

Section 35 allows the owner to obtain a single deed in respect of his total share in a property / properties, instead of separate titles in respect of the fractions he owns.

Joint owners may also follow this procedure. If different properties are involved, the joint owners can use this procedure only if their shareholdings are equal. If their shareholdings differ, each must obtain his own CRT.

Certificate of consolidated title (Section 40) vs certificate of title of aggregate shares (section 35)

With a consolidated title, the separate properties are not only held under one title deed, but are actually merged into one property.
In terms of section 35, the owner obtains a single title in respect of his total share in a property / properties, instead of separate titles in respect of the individual fractions owned by him – the properties are not merged into one.

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4. Section 36: CRT OF ONE OR MORE PROPERTIES HELD UNDER ONE TITLE DEED

If a person holds two or more pieces of land or undivided shares in land under one deed, he may obtain a CRT under section 36 in respect of one or more of those pieces of land or undivided shares. At least one of the pieces of land or shares must continue to be held under the original title deed.

This section is often used when an owner of more than one property held under the same deed only wants to mortgage one of the properties, without handing over the deed of all the properties to the mortgagee to secure the debt.

5. Section 38: CRT TAKING THE PLACE OF A LOST OR DESTROYED DEED (get a certified copy of the lost title deed)

Section 38 DRA allows for the issue of a CRT where the client's (transferee's) as well as the deeds registry's copy has been lost or destroyed.

To do this, the owner must first notify all interested parties of the intention to apply for a CRT. Only if there are no objections to the issue of such deed, may he apply for the CRT to be issued by the registrar of deeds.

Written application must be made by the owner for the CRT to be issued and an affidavit in terms of regulation 68(1) must also be submitted.

6. Section 39(1): CRT TO CORRECT AN ERROR IN REGISTRATION

Section 39(1) applies where, by reason of an error, the same land has been registered in the names of different persons. The registrar of deeds can only issue a CRT to the latter party, who now holds the property under two deeds, after one of the two parties has transferred the land to the other party by means of a rectification transfer.

7. Section 39(2): CRT TO OMIT CONDITIONS THAT ARE NO LONGER APPLICABLE

When conditions in a deed have been cancelled or have lapsed as the result of consolidation/merger, they are not always removed from the deed. The only way to remove them is to obtain a CRT in terms of section 39(2) DRA. The aim of such a certificate is not to have the conditions cancelled, but to remove from the deed those conditions that have already lapsed or been cancelled.

8. Section 43: CRT OF A PORTION OF A PIECE OF LAND

CRT's in terms of section 43 must be taken out in the following instances:

1) When the owner of a piece of land wants to mortgage/otherwise deal with a specific portion of that land he must first obtain a CRT in respect of that portion (section 43(4)) – except where he wants to transfer it.

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2) When an owner of a township or settlement wants to deal with an individual erf or a portion of that erf, he must first obtain a CRT in respect of that particular erf.

   This does not apply where
   - the owner of the township holds each erf separately in the deed – where each erf is set out in a separate paragraph; or
   - where the owner wants to transfer the entire piece of land which consists of a number of erven.

     In the case of township title deeds, the streets and public places will make up the remainder, which must remain under the existing title.

3) An owner of a property who divides it into two and wants to transfer the remainder must first obtain a CRT for that part of the property that he is retaining, before the transfer of the remainder can be registered.

9. Section 46(4): CERTIFICATE OF TOWNSHIP TITLE

Where a township is being laid out on a portion of land held under a deed, the Registrar of deeds may not open the township register, unless a certificate of township title has been issued in respect of that portion. Alternatively, a CRT in terms of section 43(1) can be issued.

Where a township is being laid out on the full property held under a title deed, it is not necessary to first obtain a CRT. The registrar of deeds may open the township register directly from that holding title deed.

10. Section 18: CERTIFICATE OF REGISTERED STATE TITLE

Often land owned by the State, which has never been alienated, has never been surveyed and is therefore not registered in any deeds registry. Before such land can be registered, it must be identified on a general plan or diagram approved by a Surveyor-General and a certificate of registered state title must be obtained if the state intends creating or dealing with or disposing of any real right in any piece of unalienated state land (section 18(5)).

11. Section 40: CERTIFICATE OF CONSOLIDATED TITLE (CCT)

A CCT consolidates two/more pieces of land belonging to the same owner, into a single unit of land - the separate properties are merged into one usually for development.

Requirements

1) Common boundary: The pieces of land must be contiguous/adjacent to each other (they must have a common boundary).

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2) Recording: The pieces of land must be recorded in the same property register – they may not be listed in registers of separate townships, even if they have a common boundary. This cannot be done even if it is just different extensions of the same township.

3) Administrative District: The pieces of land must be situated in the same administrative district and province, but they do not have to be in the same municipal or local authority.

4) Owners: The pieces of land must be owned by the same person or by two/more persons, each holding undivided shares of the same size, in each of the components.

5) Consolidation diagram: A Surveyor-General approved diagram of the pieces of land must be prepared (in accordance with the Land Survey Act) – the consolidation diagram serves as a basis for the CCT and the components being consolidated must be described in the diagram. If they are not described in the diagram, a certificate by the Surveyor-General (containing a clear description of the components) must be lodged with the application for a CCT (reg 59)

6) Certificate: Where a registered lease/other real right (excl a bond), whereby another person holds a real right in the land (e.g.. a servitude right over a portion of the land to be consolidated):

   a) a diagram indicating the portion to which the lease/real right applies must be attached to the relevant deed;
   b) diagrams reflecting the portion concerned must be produced;
   c) the diagram of the consolidated property must clearly indicate (by means of dotted lines, etc) that portion of the consolidated property that is affected by the lease/real right.

7) Process of consolidation
   Two/more erven cannot be consolidated directly from a township title even if they comply with all the requirements. A CRT in terms of section 43 DRA must first be registered in respect of all the erven concerned in the name of a specific party.

These conditions are cumulative and must all be met before a CCT will be issued to replace the deeds of the components.

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MORTGAGE BONDS

A mortgage bond is a means for a creditor to secure repayment of a debt by the debtor/mortgagor. By registering a bond is his favour over the immovable property of the debtor, the creditor, on registration, converts his personal right for payment to a real right enforceable against third parties.

A mortgage bond is thus a limited real right over a thing belonging to the mortgagor in order to secure repayment of a debt owed by the mortgagor or a third party to the mortgagee.

A mortgage bond:
- provides the mortgagee with a limited real over the thing of the mortgagor, which affords the mortgagee a preferential claim to the proceeds of that burdened immovable thing, and
- prevents the debtor from alienating the immovable property without the knowledge and consent of the mortgagee.

A notarial bond serves as security and is registered in the deeds registry. The security under a notarial bond is movable property and is executed before and attested by a notary public. Only a notarial bond in terms of the Security by means of Moveable Property Act provides real security on registration.

Requirements for a mortgage bond

The following items must be present for a mortgage bond to come into existence:

1) There must be an agreement to create a debt or obligation, which may not be *contra bonos mores*.
2) There must be immovable property that is capable of being mortgaged.
3) There must be a deed (bond) calling the mortgage right into existence (the mortgage bond that is to be registered in the deeds registry).

Structure of a bond

The DRA does not prescribe a specific form for a conventional bond, but , it is required that a bond must be prepared by a conveyancer, and it must at least clearly identify the mortgagor, mortgagee, cause of debt/obligation and the immovable property serving as security under the mortgage bond.

The standard structure of a conventional mortgage bond is as follows:

1. Preparation Clause

The preparation clause is the certificate which a conveyancer signs in terms of regulation 43, to indicate that he accepts responsibility for the bond.

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2. Heading

The heading will usually be "Bond" / "Mortgage Bond" / "Specifically named Bond".

3. **Preamble**

The preamble must contain:

1) the name of the conveyancer appearing before the registrar of deeds on behalf of the mortgagor, and the date and place of signature of the power of attorney.
2) A description of the mortgagor (as the transferor is described in the preamble to a deed of transfer)

The mortgagor is the person who borrows the money or is liable for the obligations reflected in the bond, or the person who stands surety for the obligations of the actual debtor.

Section 50 DRA: mortgage bonds must be executed before the registrar of deeds by the owner of the immovable property described in the bond, or by a conveyancer duly authorised thereto by a power of attorney given by the owner.

EXAMPLE:

Be it hereby made known that TINA ROBERTS
appeared before me, the Registrar of Deeds, at Johannesburg, the said Appearer being duly authorised hereto by virtue of a power of attorney signed on 5 September 2015 at Benoni and granted to her by

Michelle Ann Smith
Identity number 751216 0154 084
Unmarried

4. Acknowledgement clause

In the acknowledgement clause, the mortgagor or his agent acknowledges that he owes the money to the mortgagee and gives the reason for the debt.

EXAMPLE

… and the appearer acknowledged his principal the said X, to be truly and lawfully indebted to Nedbank Limited (registration number 1986/024685/06), the said debt being for monies lent and advanced.

5. Mortgagee (bondholder)

The mortgagee is the person in whose favour the bond is passed and is described in the same way as the transferee in the deed of transfer.

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As a general rule there may be more than one mortgagee in a single mortgage bond. Debts or obligations to more than one bondholder arising from different causes may, however, not be secured by one mortgage bond, unless provided by another law/a court order.

A mortgage bond may not be passed in favour of two or more persons where it provides that the share of the one mortgagee ranks prior in order of preference to the share of another mortgagee. No transaction may be registered which would have the effect of giving preference to the share of one bondholder over another.

6. Amount

Although not required by legislation, it is established practice to state the amount of the bond so as to provide the creditor with a secured claim and registration in the deeds office, which serves as publication to other third parties of the bondholder's rights. It is also in the interest of the secured creditor, the debtor and third parties that the extent of the secured claim be determined.

A deeds office registration fee/levy is payable for bonds, which is calculated on the amount of the secured debt.

Where a bond secures future debts, the fixed sum must be disclosed as an amount beyond which future debts will not be secured by the bond.

The bond amount may be expressed in foreign currency, however, a certificate from a commercial bank, reflecting the exchange rate on the date of registration, must then be produced.

If there are co-mortgagees, the full amount of the bond must be mentioned first and thereafter the separate amounts due to each mortgagee.

7. Cause of the debt or *causa* of the bond

The reason for the existence of a mortgage is to provide security for a debt for which a creditor has a claim for payment against a debtor. If there is no claim in respect of a debt, there can be no bond. e.g. money lent and advanced

EXAMPLE *R100 000,00 (ONE HUNDRED THOUSAND RAND), being money lent and advanced, being the capital amount of the actual loan*

8. Waiver of legal exceptions

The National Credit Act ("NCA") prohibits the use of waivers and same are void (section 90), however, a debtor was previously entitled to include certain exceptions whereby certain legal defences would be excluded, thereby placing the burden of proof on the mortgagee to disprove allegations. By waiving these exceptions, the mortgagor could not raise the defences against the mortgagee if the latter demands payment.

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THE NCA NOW PROHIBITS THESE EXCEPTIONS

Non causa debiti: the debt has no cause.
This exception is waived in any bonds which do not secure a monetary loan but for instance securing payment of goods sold and delivered.

Non numeratae pecuniae: although the mortgagor signed the acknowledgement of debt, the money was not actually paid to him.
This exception is waived in bonds where the *causa* is "money lent and advanced".
By waiving this exception, the burden is placed on the mortgagor, to prove for his successful defence, that he did not receive the money.

"Revision of accounts", *error calculi* and "no value received"
These three exceptions usually appear together.
Waiver will mean that where the financial institution forecloses on the bond and claims a certain sum which they aver is outstanding, the mortgagor has to prove that the claimed sum is incorrect and not for the financial institution to prove that their calculation is correct.
These exceptions apply where money changed hands and written records exist of the transaction.
They are usually waived in bonds where the cause of the debt is goods sold and delivered and to the bonds in favour of financial institutions, where the capital is repaid in instalments.

THE NCA DOESN'T PROHIBIT THESE EXCEPTIONS

De duobus vel pluribus reis debendi: where two or more persons bind themselves as co-principal debtors, they are each liable for their specific proportions of the debt.
If this exception is waived, each mortgagor is jointly and severally liable for the debt and cannot, in a foreclosure, raise as a defence the fact that the mortgagee can claim proportionately only from the individual co-debtors.
This exception is waived in bonds where there is more than one mortgagor.

Beneficium ordinis seu excussiones: where a debt is due by a mortgagor, which is also secured by a suretyship of a third party, the mortgagee is obliged to first fully excuse the mortgagor before the mortgagee may claim from the surety. The waiver of this exception allows the creditor to proceed against the surety before proceeding against the principal debtor, should he wish to do so. This exception is waived *inter alia* in surety bonds.

Beneficium divisionis: where there is more than one surety for a debt, the mortgagee is obliged to claim only proportionately from each surety. This exception prevents the creditor from holding a surety liable and being sued for more than his *pro rata* share.
Where the sureties waive this exception, the mortgagee can sue only one of the sureties separately for the full amount outstanding, without reference to the other sureties. This waiver is found *inter alia* in surety bonds.

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9. Interest and repayment clauses

There is no statutory requirement that interest rates be disclosed in bonds.
The National Credit Act limits the interest rates, but the registrar of deeds is not obliged to ensure that there has been compliance in this regard.
Despite the fact that most mortgage bonds also provide for variable interest rates, it is common practice to disclose the current interest rates in mortgage bonds.

As regard the repayment of the capital amount granted and the interest thereof, this depends on the agreement between the parties.
It is usually repayable in instalments, together with the interest, within a certain period.

EXAMPLE

… which aforesaid sum of R100 000,00 and the interest thereon calculated at the rate of 9% per annum from the date of registration of the bond, X is hereby bound to pay or cause to be paid to Nedbank …

10. Cost clause

The cost clause secures the payment of any costs and expenses the creditor may have incurred, for which the mortgagor is liable, over and above the original amount of the debt already secured by the mortgage bond.

Mortgage bonds usually include additional security for the mortgagee in respect of costs and expenses in the form of the costs clause.
If the mortgagor fails to fulfil his obligations in terms of the bond, this clause secures the mortgagee's contributions on behalf of the mortgagor in regard to insurance premiums, taxes, etc, as well as legal expenses incurred in suing for the recovery of the amount due under the bond. The repayment of these costs incurred by the mortgagee then enjoys preference above the unsecured claim of third parties.

The additional amount usually constitutes 20% of the capital sum of the mortgage bond. If the expenses are not incurred, they are not recoverable and not secured by the mortgage bond.

Not all bonds contain cost clauses, since the amount which is available to secure future advances may include the amount allocated for costs (eg. a covering bond).

11. Ranking

A mortgage bond does not have to disclose the order in which it ranks over the property.
If the mortgagee has not waived preference in respect of his mortgage bond, it's rank against earlier or subsequent bonds is in order of preference according to their date of registration/execution: *qui prior est tempore potoir est iure*: that which is earlier in time ranks higher in law.

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The practice of disclosing the ranking of a specific bond indicates the ranking that a specific bond enjoys at the time of registration, i.e., whether it is a first, second or third bond over a specific property.
A bond cannot be denied registration if it is not described as a first, second or third bond, etc.
The ranking simply indicates the preference to which the creditor is entitled in respect of a secured debt against a particular property.
Where two or more mortgage bonds enjoy the same ranking or preference, the same is said to be *pari passu* (on an equal footing).

If two or more bonds are passed on the same day by the same mortgagor, over the same property, the registrar must, if each bond does not disclose the order in which it is to rank, note on each bond the exact time at which he affixed his signature thereto.
If two bonds are to be registered simultaneously and are deemed to rank *pari passu*, no waiver is required if the ranking clauses in both powers of attorney are clear as to the intention.

A mortgagee's consent is not required in respect of the waiver of preference, since the statements contained in the power of attorney are sufficient authorisation for the registration of the *pari passu* ranking.

Any charge against land must be mentioned in the ranking clause of a bond because previously registered charges enjoy preference over the new bond.

A charge is where the state etc has a hold on a property registered under a charge number.

A contract for the sale of land in instalments in terms of s 20 of the Alienation of Land Act, which is recorded in the deeds office, must be mentioned in the ranking clause because the purchaser's rights enjoy preference over those of the new mortgagee. The purchaser cannot waive preference of his rights in favour of a new bond.

EXAMPLE

A bond that ranks pari passu *with Mortgage Bond No. …….. /20 …… in favour of …….. registered this day*

… and for the security of the above obligations the appearer declares that this bond ranks pari passu *with a bond registered on this day in favour of ……. for the sum of ……..*

12. Property and security clauses

Only immovable property as defined in section 102 DRA may serve as security for a debt under a mortgage bond.
The immovable property may be registered land or a registered real right (e.g. Usufruct)

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Every mortgage bond must contain a full and clear description of the property to be hypothecated, including the extent of the property.
If two or more properties are to be hypothecated, each property must be described in a separate numbered paragraph.
The number (serial number and year) of the relevant deed must be quoted in each paragraph.
If more than one property is held by the same deed, the number can be quoted after the description of the last property.

13. Special conditions of title

If someone wants to mortgage land held under existing special conditions limiting the rights of the owner, the registrar of deeds may require those conditions to be set out in the bond or a suitable reference to be made to the conditions.

For the sake of uniformity, when land is subject to a pre-emptive right, a right of reversion, etc, the bond should be made specially subject to that right.

Types of special conditions:

a. General conditions, township conditions, praedial servitudes, etc

The land is described as being "subject to the conditions of title".

b. Restriction in respect of mortgaging, alienating or disposing of land

Where a title deed contains a condition that the land described in the title deed may not be alienated and/or mortgaged without the written consent of a specific person, an underhand consent must be obtained from the person concerned, in which the bond is properly identified, and this consent must be filed with the mortgage bonds.

A restraint on alienation automatically includes a restraint on the mortgage of the property; where such a property is to be mortgaged, the consent of the holder of the right must be obtained and lodged.

If a condition states that the property may not be disposed of, this term does not include mortgaging and it is not necessary to obtain consent for the registration of a bond.

If the holder of a pre-emptive right, right of reversion or other restraint on the ownership does not waive preference of the right or restraint in favour of the bond, the bond should be made subject thereto.

c. A lease

If the land which is to be mortgaged is subject to a lease, the lessee's consent is not required in order to hypothecate the leased land, but the fact that the land is subject to a lease must be disclosed in the bond (*huur gaat voor koop*).

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The lessee of a registered long lease can waive preference in favour of the mortgage, either by notarial deed or in the mortgage bond itself.
In each case, the condition must be quoted in full in the bond.
If the preference is waived in the bond, the lessee must give a conveyancer a power of attorney to appear on his behalf before the registrar of deeds to waive his right of preference in favour of the bond.
The waiver clause appears at the end of the mortgage bond, just before the execution clause.

d. Reversionary right

If land is subject to a condition that in the event of a certain occurrence the property vests to a person mentioned in the condition, there are various ways in which it can be dealt with:

1) The land can simply be made subject to the condition, in which case the condition must be quoted in full in the bond.
2) The holder of the reversionary right can consent to the registration of the bond.
   Here the holder of the right has merely consented to the bond, but has not waived any of his rights.
3) The holder of the right can waive his right of preference in favour of the bond, in which case the condition must be quoted in full in the bond.
4) The owner of the land, which is subject to the reversionary right and the holder of the right (if he has the capacity to do so) can jointly and severally hypothecate the land.
   This can happen only if the holder of the right is a co-debtor.
   In this case, the condition will not be set out in the bond.

e. Personal servitudes (*usufruct,* usus and *habitatio*) and other real rights

If the land being hypothecated is subject to a personal servitude or usufruct, *usus* or *habitatio*, there are various methods of dealing with this in the bond:

1) The land described in the bond can simply be made subject to such personal servitudes and the servitude must be quoted in full in the bond.
2) The holder of the personal servitude can waive his right of preference in favour of the bond, in which case the condition must be set out in full in the bond.
3) The owner of the bare dominium and the holder of the personal servitude may jointly and severally mortgage the land to the full extent of their respective rights in the land.
   This can only happen if the holder of the personal servitude is a co-debtor.
4) The owner or the bare dominium may pass a principal bond over the property, and the holder of the personal servitude can bind it as surety in the same bond.
   In such an instance full details of the servitude must be set out in the bond.

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f. A *fideicommissum*

If land is subject to a *fideicommissum*, the security under the bond is of limited value and duration.
Nevertheless, the bond may be registered subject to *fideicommissum*.

g. Expropriation of a portion which has not yet been transferred to the expropriating authority

In this case, the bond must be made subject to the expropriation to indicate that the expropriated land is not encumbered by the bond.

h. Restriction against separate alienation of properties

If the land being bonded is notarially linked to and subject to a restriction against separate alienation of the land, the bond must specifically be made subject to that restriction.

i. Attachment against the property

If an attachment is noted against the land, it may not be mortgaged until the attachment has been uplifted.

14. Conditions

As a general rule, any condition may be inserted in the bond or an annexure to the bond.
Manifestly illegal or dishonest conditions that seek to disguise the nature of the bond may not be inserted therein or even in an annexure thereto.

The following conditions are prohibited by the DRA, or are unlawful and may not be contained in the bond:

1) No mortgage bond may be passed in favour of two or more persons, where the share of one holder ranks prior in order of preference to the share of another; nor may any transaction be registered which would have the effect of giving preference to one share over another in the bond.
2) No condition may be included in a bond which purports to impose upon a registrar any duty or obligation not sanctioned by law.
3) The insertion of a general clause attempting to simultaneously bind immovable and movable property of the mortgagor is prohibited.
4) A condition in terms of which the repayment of the debt or a portion thereof by a licence holder in favour of the holder of a wholesale liquor licence, beer-brewing licence or sorghum brewing-licence within a specified time is void.
5) An agreement stating that, if the debt is not paid by a certain date or the mortgagor is otherwise in default, the mortgagee may hold or keep the security as his own property, is known as a *pactum commissorium*.
   Such agreement is unlawful and unenforceable.
6) A condition in the bond stating that the mortgagor may not repay the debt before a certain date, if it is coupled with a *pactum antichresis*, is void.
   A *pactum antichresis* is an agreement which gives the mortgagee the use of the property in lieu of interest.

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7) A condition in a bond based on an agreement between the mortgagor and mortgagee that the hypothecated property can be sold in settlement of the debt, without recourse of law, is known as a *parate execute* and is invalid.

Notwithstanding section 3(1)(b) of the Act, a registrar need not examine any provisions relating to a bond which are not relevant to the registration of the bond.

15. *Domicilium citandi et executandi*

This is the address which the mortgagor chooses, where notices and processes can be served on him. The mortgagee may then to make use of this address to serve notices on the mortgagor.

16. Execution clause

Section 50(1) DRA: a mortgage bond must be executed in the presence of a registrar of deeds by the owner of the immovable property or by a conveyancer duly authorised by the owner, and the bond must be attested by the registrar.
This is a dual process of execution, consisting of the signing of the deed by both the debtor or his representative (conveyancer) and the registrar.
The registration function of the registrar's signature attests that the owner or his representative in fact signed the bond before him.

A mortgage bond attested by a registrar is deemed to be registered once the registrar has affixed his signature to it, even though the recording of the new data has not yet taken place.

If the registrar omits to affix his signature to a bond at the time when same should have been affixed, this may be done when the omission is discovered and the bond is deemed to have been registered at the time the registrar was supposed to sign.

Provision must be made on the last page of the bond for the signatures of the appearer and the registrar.
Both signatures must appear on the same page.

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SPECIAL POWER OF ATTORNEY

There must be a properly executed, witnessed and dated power of attorney that authorises the appearer to execute the bond. The power of attorney generally includes a draft bond as an annexure which must be fully initialled by both the mortgagor and the preparer.

The power of attorney must be properly authenticated if it is executed outside South Africa.

No material alteration or addition to the power of attorney or draft bond is acceptable without the initialling of the mortgagor and witnesses.
Non-material amendments may be initialled by the preparer.

In the power of attorney, a holder of real rights can waive his rights in favour of the bond.

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DIFFERENT TYPES OF BONDS

1. COLLATERAL BOND

A collateral mortgage bond is an additional bond to secure a debt or obligation for which security has already been provided to the mortgagee. The bond must be granted by the same mortgagor in favour of the same mortgagee for the same debt/obligation already secured by the principal bond. There must accordingly be a principal bond.

2. SURETY BOND

A surety bond is passed by a third party, as further security for an unsecured debt/obligation.

A general surety is passed by a third party as further security for a debt/obligation which has already been secured by the principal debtor by means of a registered bond (principal bond).

Thus, a surety bond is a further bond registered to secure an existing debt between the principal debtor (mortgagee) and a third party for whom the surety is standing security.

For the surety to be fully liable for the debt, he must be bound as surety and co-principal debtor.

3. INDEMNITY BOND (VRYWARINGSVERBAND)

Where a person undertakes to comply with an obligation on behalf of a principal debtor, on the condition that the principal debtor indemnifies that person, should he be compelled to comply with the obligation.

An indemnity bond is registered where one person stands surety for another person's debt, however the indemnity bond is passed by the original mortgagor in favour of the person standing surety on his behalf.

(X) undertakes to comply with an obligation or pay a debt on behalf of another person (Y), on the condition that the principal debtor (Y) indemnifies X should X be compelled to comply with such obligations obo Y. To secure this indemnity by Y, X may insist that Y register an indemnity bond in favour of X.

4. COVERING BOND

A covering bond is a special mortgage to secure a future/fluctuating debts (which did not exist, or part of which did not exist, at the time of registration). It must be expressly declared to secure such debt, and a maximum amount must be expressly stipulated in the bond.

The preference conferred by this bond is determined by the date of its registration and not by the date on which the debt is incurred.

The security covers the liability that the parties agreed would arise at a future date, eg, security for future bank overdraft facilities, or to secure a debt that the mortgagor has under a fluctuating account with a supplier.

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5. DEBENTURE BOND

If authorised by its Memorandum of Incorporation, a company may raise money by creating and issuing secured debts. Where debentures are secured either by a notarial bond or a mortgage bond in favour of debenture holders or a trustee for the debenture holders.

6. KINDERBEWYS MORTGAGE BOND

A surviving spouse is entitled to any amount due to a child from a deceased spouses estate, provided a bond is passed to secure the amount. Where a surviving spouse passes a bond/notarial bond over property, in favour of the Master of the High Court, to secure a sum of money due to a child from the estate of the deceased spouse, and that sum of money is then paid over to the surviving spouse

7. SUBSTITUTED BOND

A substituted bond replaces an existing bond. The mortgagee and the mortgagor must be the same as in the existing bond, but the property does not have to be the same. The existing mortgage bond is cancelled on registration of the substituted bond.

8. JUDICIAL MORTGAGE

A judicial mortgage is not a bond in the usual sense, but is in fact a recording of an attachment in terms of a court order, which is noted in the form of an interdict, against immovable property. This prohibits further bonds from being registered over the land.

An attachment interdict is as effective as a special mortgage bond, because it prohibits transfer of the immovable property. In some respects it is even more effective as it prohibits registration of a further mortgage bond over the property. An attachment also affords some preference in the case of insolvency.

9. KUSTINGSBRIEF

A kustingsbrief is a special mortgage to secure a principal debt (the balance of the unpaid purchase price) incurred in respect of the purchased land, where the bond is registered simultaneously with the deed of transfer of that purchased land.

Requirements for the kustingsbrief:

1) The kustingsbrief must be registered simultaneously with the deed of transfer
2) The bond must secure the balance of the purchase price of the immovable property sold
3) Since it is a first bond, the holder enjoys preference over other bondholders.
   It is not necessary to register the kustingsbrief in favour of the seller only – it can be registered in favour of anyone who advanced the purchase price.
4) The kustingsbrief bond must be registered over the property sold.

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This type of bond provides better security than an ordinary bond: An ordinary bond which secures a debt (previously unsecured), which was incurred more than two months before lodgement in the Deeds office will have no preference if the mortgagor is sequestrated within 6 months of lodgement, whereas a kustingsbrief will provide preference in such case.

10. CHARGES

Various statutes require a registrar of deeds to note a charge against land in respect of moneys owed by the owner of the land.
A charge is not a mortgage bond, but is comparable to a servitude, as it attaches to the land.
A charge is not subject to section 56 DRA (that all mortgage bonds must be cancelled before transfer of the encumbered property can take place).
The debt it secures becomes the responsibility of the successors in title to the owner who incurred it.
The statute in terms of which a charge has been noted, usually provides for consents to be furnished by the holder in respect of the transfer of the burdened land or a portion of it or share in it.

A charge against a property enjoys preference in ranking above all existing bonds, even if no waiver of preference by mortgagees of existing mortgage bonds has been given in favour of the charge.
The registrar cannot insist upon a waiver from existing bonds.

A charge is never drawn up by a conveyancer, but by the Land Bank, the Department of Agriculture or a municipal officer.

11. ANNUITY BOND

An annuity is a certain sum of money payable either once off or at regular intervals for a specified or unspecified time.

If the party liable to pay the annuity cannot pay the annuity in one lump sum, an annuity bond can be registered to secure the regular payment of the annuity.

12. SECTIONAL MORTGAGE BOND

A sectional mortgage bond hypothecates units, leases over units, exclusive use areas, common property and real rights registered in a sectional title scheme.

The Sectional Titles Act prescribes a specific format for a sectional bond – the bond conditions are contained in an annexure to the prescribed form. The bond is signed and executed by the mortgagor in the presence of the conveyancer, who also attests it. Thereafter it is merely registered in the Deeds Office – it is not executed by the conveyancer on behalf of the mortgagor in the presence of the registrar of deeds.

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13. NOTARIAL BOND

Only movable property may be hypothecated by a notarial bond. Such bond are executed and attested before a notary public, whereafter it is simply registered (as opposed to executed) in the deeds registry.

14. PARTICIPATION MORTGAGE BOND

A participation mortgage bond is a bond which
- is registered over immovable property;
- is registered in favour of a nominee company as mortgagee, and
- forms part of an investment scheme,
- must rank as a first bond/*parri passu*.

It is an investment scheme in terms of which members of the public are invited to invest in a scheme (for a minimum of 5 years) which lends money to members of the public and businesses against security of mortgage bonds over the debtor's immovable property.

Where a number of investors invest for variable time periods, the mortgage bonds cannot be registered in favour of all these investors, so usually the mortgage bond is registered in favour of a nominee company.

Bonds are not ceded or dealt with freely by a nominee company but requires consent of the registrar of the company to register security.

The Collective Investment Schemes Control Act requires the following:

1) the nominee company must be registered with the registrar of companies and must have as its main object, to act as nominee for or representative of any person.
   It may not incur liabilities except on behalf of those persons for whom it holds property and it is limited concerning the management fees it can charge.
   It must in addition hold certain minimum capital reserves.

2) Participation mortgage bonds must be mortgage bonds over immovable property, registered in favour of a nominee company as mortgagee (not individual investors) and included in a collective investment scheme in participation bonds.
   This means that the participation mortgage bonds must not merely be called this, but must form part of an investment scheme.
   Participation mortgage bonds must rank as first bonds or equally with another first bond by the same mortgagor.

3) The debt secured by the participation mortgage bond is regarded as being owing to the participants in the scheme and not the nominee company.

4) All the above participatory interests shall rank in preference concurrently with one another.

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5) A nominee company may not transfer, cede or encumber any of the rights under a participation mortgage bond without the written consent of the registrar of companies.

6) Any collateral security obtained to secure the debt must also be registered in the name of the nominee company on behalf of the participants in the scheme.

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POSSIBILITIES WITH BONDS

1. CANCELLATION OF MORTGAGE BONDS

The General Rule: Section 56(1) DRA: mortgaged land may not be transferred unless

- the bond is cancelled or
- the land is released from the operation of the bond:

When a bond is cancelled, there is no longer any security for the debt under the bond.

Exceptions in section 56(1), where a mortgage bond need not be cancelled or property need not be released.

When the transfer of immovable property or cession of a bond is effected:

1) in accordance with a court order
2) by the trustee of an insolvent estate
3) by a liquidator of a company or cc which is unable to pay its debts and which is being wound up by or under the supervision of the court
4) by an executor administering and distributing an insolvent estate under section 34 of the Administration of Estates Act
5) in any other circumstances under the Act or any other law in terms of a court order.

When a bond registered in favour of a minor is cancelled, only the parents'/guardian' consent is required. It is not necessary to obtain further consent from the Master / the High Court.

2. RELEASE FROM MORTGAGE BONDS

Where more than one piece of land is hypothecated under one/more mortgage bonds, the mortgagee may consent to the release of one/more of the encumbered pieces of land from the operation of the bond.

A distinction is drawn between the release of property only and the release of both persons and property from a mortgage bond.

- When land is released, that land no longer serves as security for the debt and is free from burden of the bond. There must still be another property under the bond to serve as security, otherwise the bond will effectively be cancelled.

- If both a person and immovable property are released, the person is no longer bound to the mortgagee and the property cannot serve as security for the debt. There must still be another property under the bond to serve as security, or a person obliged to pay the debt, otherwise the bond will effectively be cancelled.

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Where there is one mortgagor with one property encumbered by one or more mortgage bonds, there can be no release of the person or the property, as this will amount to cancellation.

Where there is one mortgagor and two or more properties encumbered by one bond, one or more of the properties may be released, but not all of the properties, as this will amount to a cancellation.

Where there are two or more mortgagors and several properties encumbered under one bond, one or more of the properties, or one or more of the mortgagors may be released from the operation of the bond with the consent of the co-mortgagors. However:

- Not all the mortgagors may be released – this will amount to a cancellation;
- The release of all the property of a co-mortgagor is only possible if the person of the co-mortgagor is also released.

Where there are two or more mortgagors and one or more immovable properties encumbered by a mortgage bond and the debt is further secured by an additional collateral mortgage bond, there can be no release of a co-mortgagor – this will impact on the collateral mortgage bond.

Consent by co-mortgagors

1. Release of part of co-mortgagor's property

   If part of a co-mortgagor's property (but not all) is released, the consent of the other mortgagor/s is required, even though the person is not released.

2. Release of all immovable property of one of the mortgagors

   If a bond is passed by two/more mortgagors and the release of all the immovable property of one is required, the release is possible only if both the property and the co-mortgagor are released and the other co-mortgagor/s give their consent.

3. Consent – co-mortgagors and a Collateral Bond

   Where the debt under a mortgage bond with co-mortgagors is further secured by a collateral bond, the co-mortgagors cannot be released even if all his property under the principle bond is being released, since the collateral mortgagor relies on the full operation of the principal bond.

   The release of a co-mortgagor under the principal bond will be noted against that bond, but the principal bond will not be cancelled until the collateral bond has been cancelled.

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4. Surety

   The consent of the principal debtor to the release of a surety's property is not required for the surety's property, hypothecated under a separate bond, is released, since they are separate bonds and not co-mortgagors in the same bond.

As a general rule, where land is subdivided, the release of a portion of the land will only be allowed by the registrar of deeds if the release takes place at the same time as the transfer of that portion or the issue of a CRT in respect of that portion. Erven in an established township or depicted on a general plan can be released from a bond before the erven are transferred.

3. CESSION OF MORTGAGE BONDS AND CANCELLATION OF CESSIONS

A cession is an agreement whereby rights are transferred from the holder thereof (the cedent) to another person (the cessionary). A cession of a bond is the transfer of the right of the mortgagee (cedent), to claim payment of the debt from the mortgagor, to the cessionary.

A cession of a mortgage bond must be registered, to comply with the DRA, AND to ensure that the cessionary's rights are enforceable against third parties.

A distinction must be drawn between an out and out cession and a cession as security:

- where the bondholder cedes a bond out and out to a cessionary, the bondholder falls out of the picture and the cessionary becomes the effective holder of the bond and may cede the bond to another.
- if the bondholder cedes the bond onlu as security, that is to secure payment of the cedents debt to the cessionary by temporarily ceding his rights to and in the mortgage bond, the cedent does not fall out of the picture and the cessionary cannot further cede that bond.

Out and out cession

A bond is ceded "out and out for value received" where the existing mortgagee has received payment and has no further interest in the bond whatsoever. The original mortgagee falls out of the picture and the cessionary becomes the new bondholder and acts as creditor against the mortgagor and may further cede the bond, either out and out or as security.

If the bond is ceded for value received "without recourse against" the cedent, the new bondholder cannot demand payment from the previous holder (cedent) if the mortgagor does not pay.

If the bond is ceded for value received "with recourse against" the cedent, this constitutes an act of suretyship and the new holder of the bond (cessionary) may demand payment from the cedent if the mortgagor does not pay.

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An out-and-out cession of a bond can be cancelled in a deeds registry only on the strength of a court order or by the cessionary ceding the bond back to the cedent.

If a bond is erroneously ceded "out and out" instead of "as security", the only way to rectify the cession, other than by court order, is to cede the bond back to the former mortgagee, who may then cede the bond as security.

Cession as security
A bond may be ceded by the mortgagee as security for repayment of debt incurred by that mortgagee. Here, the existing mortgagee retains an interest in the bond and when his indebtedness is discharged, the *causa* in respect of the cession falls away, and the cession as security can be cancelled and the original mortgagee reverts to being the sole obligee, as against the mortgagor.

Where the bondholder cedes the bond only as security (to secure the repayment of the cedent's debt to the cessionary by temporarily ceding his rights to and in the bond), the cedent does not fall out of the picture and the cessionary may not further cede the bond.

To cancel a bond ceded as security, the mortgagee and cessionary may jointly consent to the cancellation of the bond, or the cessionary may give an underhand consent (notarial consent is not necessary) to the cancellation of the cession, whereafter the mortgagee may consent to the cancellation of the bond. Both transactions may be done simultaneously.

Operational clause
A cession cannot be a "consent to cession", it must be an actual cession of the rights under a mortgage bond.

When a bond is ceded from an estate to a fiduciary, the cession must be made subject to the terms of the will without quoting these terms in detail. After the death of the fiduciary, the executor must cede the bond, although the *fideicommissum* does not form part of the estate, because the fiduciary controls the goods.

***Causa* for cession**
The cession of a bond must disclose the *causa* for the cession, since a cession which contains no *causa* cannot be registered, except in the case of a cession by way of inheritance, where the *causa* does not have to be proved. The *causa* follows directly after the description of the cessionary (operational clause).

Supporting documents
As a general rule, a bond may only be ceded as a whole (*in toto*), as the cession must not worsen the mortgagor's position.

When a mortgage bond is ceded, the mortgagor's consent is not required, except where the onus in respect of payment is split:

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1) where the bondholder cedes only a part of the bond to one/more cessionaries; or
2) where a bondholder cedes the whole bond to two/more cessionaries

An indemnity bond may be ceded only if the surety bond and principal bond are ceded simultaneously.

4. SUBSTITUTION OF DEBTOR/MORTGAGOR BY ENDORSEMENT

Where there is a substitution of debtor, one person is substituted for another as mortgagor under a mortgage bond. The new mortgagor is then fully liable for the debt to the mortgagee, as if the new mortgagor had passed the mortgage bond from the start. The original mortgagor is released from any obligation and payment of the outstanding debt will be enforceable by the mortgagee against the new mortgagor.

If the bond secures future debts, the property mortgaged will secure any further/future advances made by the mortgagee of the bond to the new mortgagor.

Section 24*bis*(3) Substitution of mortgagor by endorsement

Section *24bis*(3): If land/real right is mortgaged, an endorsement to transfer ownership on dissolution of a partnership in terms of section 24*bis*(2) should not be affixed unless:

1) the mortgage bond is cancelled; or

2) the mortgagee consents in writing to the substitution of the individual members or partners as mortgagors in terms of the bond.

Section 45(2)(c) substitution of mortgagor by endorsement

Where property in a joint estate vests to the surviving spouse and is transferred in terms of section 45, and the property is mortgaged, the bond must be lodged for disposal:

1) for cancellation

2) for the release of the property / the deceased's share in the property, or

3) for the substitution of the surviving spouse as the sole debtor in place of the joint estate.

If the surviving spouse is to be substituted in terms of section 45(2)(c):
- the mortgagee and the surviving spouse must consent to the substitution,
- the title deed must be endorsed in terms of section 45(1).

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When substitution takes place in respect of only a portion of the capital, a part-payment or reduction in cover must first be registered (regulation 47)

A bond includes a charge in favour of the Land Bank or a State department, and accordingly this type of substitution of debtor may also be done in respect of a charge.

Section 57 substitution of debtor under a bond

When the mortgagor/seller of land has a bond over that land and the purchaser takes over the bond when purchasing all the land under the bond, the purchaser may be substituted as mortgagor under the bond.

If two/more transferees are substituted for a former owner, the new mortgagors under the bond must renounce the exception *de duobus vel pluribus reis debendi*. Waiver of this exception means that each transferee is jointly and severally liable for the debt, where otherwise they each would have been liable for their proportionate shares of the debt.

A surviving spouse may be substituted as mortgagor under section 57, when acquiring immovable property which is subject to an existing bond from the estate of the deceased spouse, whether the spouses are married in or out cop. This substitution is possible irrespective of the method of devolution, but only if the immovable property is transferred by means of a formal deed of transfer (not where the transfer of the property to the surviving spouse is effected by endorsement in terms of section 45)

Substitution of debtor of covering bonds in terms of section 57

A section 57 substitution of a debtor in a covering bond is only allowed if consent by the mortgagor/transferor and mortgagor/transferee is provided. A part payment or reduction of cover must first be registered if the substitution (in terms of section 57 or section 45) is not for the full amount of the bond.

When a debtor may not be substituted under section 57

1) The mortgagor may not be substituted by the transferee who acquires the land, if the existing mortgagor is:

   a) a trustee in an insolvent estate
   b) an executor administering an estate under section 34 of the Estates Act
   c) the liquidator of a company or CC is unable to pay its debts and being wound up by, or under the supervision, of the court.

2) If the mortgaged property is not transferred to the proposed new mortgagor in its entirety.

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3) If the existing mortgagor reserves a real right for himself, e.g. a usufruct (unless the usufructuary waives his preference in respect of the usufruct).

4) If the new owner is not competent to mortgage the land, eg a minor is incapable of passing the bond without assistance (if a minor is entitled to mortgaged land in terms of a bequest, the guardian may accept responsibility only with the consent of the High Court (value of bond over R250 000) or the Master of the High Court (under R250 000)).

5) When the bond to be substituted secures the obligations of a surety, the transferee cannot be substituted for the existing debtor.

6) Two / more mortgagors may not be substituted in the place of one mortgagor in respect of properties mortgaged under a mortgage bond. For example, a mortgagor may not transfer his 6 properties to 2 different trusts (3 properties each) and then substitute the trusts as mortgagors.

5. PART PAYMENTS

If a mortgagor has paid part of the amount due on a fixed debt which is secured under a mortgage bond, this payment can be endorsed on the bond, thereby reducing the amount secured by the bond. The endorsement can only be made on application by the holder of the bond. The purpose of the endorsement is to indicate that the sum of the debt has been reduced.

A part payment can be registered only if the bond does not secure future debts (it cannot be endorsed in respect of a bond which provides a continuing covering security), since, in the case of a covering bond, the amount owing under the bond may fluctuate. The registration of a part payment does not serve any purpose while the cover afforded by the bond remains unaltered, because the amount owed by the debtor can fluctuate at any stage.

Consent to part payments

Only the mortgagee can consent to the registration of a part payment.
The mortgagor's consent is not required.

When there is more than one bondholder and all the bondholders consent to the noting of a part payment iro the whole of the amount due to one bondholder, such bondholder may simultaneously consent to the cancellation of the bond relating to his share.

When the bond is cancelled, the consent of that bondholder is never required again. The bondholder who consents to the ultimate cancellation does not obtain preference in respect of the security.

It is not possible to reduce the amount of a surety bond by way of a part payment without affecting the principal bond. The correct procedure is to

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cancel the surety bond and to pass a new surety bond for the lower amount in substitution for part of the old bond.

6. REDUCTION IN COVER

A reduction in cover is registered against a covering bond to reduce the extent of the security afforded by the covering bond.

Sometimes a bond registered to which secures existing debts also becomes a covering bond for future debts up to the capital amount of the existing bond. This happens when the terms and conditions of the mortgage bond are such that moneys lent may be repaid and re-advanced repeatedly. In such a case, registration of a part payment of the mortgage bond will not affect the cover afforded by the mortgage bond, since the outstanding amount is continually fluctuating. Therefore a reduction in cover will be registered against the bond.

A reduction in cover can only be registered in respect of a bond which secures future debts. Where reductions in cover are registered to enable one of the several co-mortgagees to withdraw from a covering bond, it is not necessary to obtain the consent of the mortgagor.

7. WAIVER OF PREFERENCE

Section 3(1)(i) DRA: waivers of preference in respect of registered real rights in land in favour of mortgage bonds may be registered against

- bonds already registered, and
- bonds about to be registered.

Where a minor is concerned, waiver of such a real right is regarded as an alienation which is subject to section 80 of the Administration of Estates Act, and consent of the Master of the High Court may have to be lodged.

Although section 3(1)(i) restricts the registering of waivers of preference to registered real rights such as usufruct, *habitatio* and *usus*, it is common practice to register waivers in respect of other personal rights such as rights of pre-emption or reversion or fideicommissary rights.

Where preference is to be waived in respect of a bond about to be registered it is waived on the authority of a power of attorney from the holder of the real right. If the real right is held under a separate title deed from the land being mortgaged, the title deed must be lodged for endorsement regarding the waiver of preference.

A waiver of preference in respect of a real right is essentially an act of suretyship.

A registered bond is a registered real right and preference can be waived by the holder of a registered bond so as to give another bond equal or prior ranking. Whenever preference of a mortgage bond is waived in favour of

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another mortgage bond, that bond will be in a stronger position than the waived real right where the mortgagor is unable to meet his debts.

Notarial waivers

Any waiver of preference in respect of a registered real right in land in favour of a registered mortgage bond must be contained in a notarial deed. The waiver will be endorsed on the bond and noted against the title deed of the real right. If the waiver is in respect of a bond about to be registered, it may be contained in a notarial deed or in the bond.

Waivers of preference may be prepared by a conveyancer, notary or attorney, while a consent must be prepared by a conveyancer.

The waiver must be in favour of the bond and not the mortgagee.

If more than one property is mortgaged under an existing bond and a number of the properties are being mortgaged under the new bond, the consent should be duly incorporated by stating the properties descriptions after the word "registered".

If a mortgage bond or notarial bond is passed by two / more mortgagors, no waiver of preference by the mortgagee in favour of a further mortgage bond or notarial bond over the property of one of the mortgagors may be registered without the written consent of the other mortgagor/s.

Where two bonds, to be executed simultaneously, purport to rank *pari passu*, no waiver is necessary if the ranking clauses in both powers of attorney are clear as to the intention.

If a bond has already been registered over the bare *dominium* and the usufructuary waives preference in favour of a bond:

1) the bare *dominium* owner and the usufructuary may bind themselves jointly and mortgage the whole property in a subsequent mortgage bond, or
2) pass a second bond over the bare *dominium*, subject to the usufruct, and bind the usufruct in a separate paragraph stating that this ranks "as a mortgage", or
3) pass a bond by the owner of the bare *dominium* and the usufructuary as a bond over the whole property, which property must be described in a single paragraph in the deed.

If a bond is lodged and the ranking clause indicates a waiver of preference or *pari passu* ranking, the existing bondholder must waive preference, even if he is the holder of both bonds (section 3(1)(h) DRA).

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Section (3)(1)(s): AGREEMENTS VARYING THE TERMS OF A BOND

In terms of section (3)(1)(s), the following terms may **not** be varied:

1) conditions relating to the cause of the debt
2) conditions relating to the mortgaged security
3) conditions relating to the amount of the debt secured by the bond (this amounts to registration of a part payment or reduction of cover and not a variation of the terms of the mortgage bond)
4) conditions relating to any additional amounts (costs clause).

As a mortgage bond is a real right in land, the registrar of deeds will refuse to register a variation agreement in terms of section 3(1)(s) which changes the character of the bond. A new mortgage bond will have to be registered.

If a mortgage bond contains a condition making it a covering bond (where the debt / future debt will fluctuate), such condition may not be deleted by a variation agreement.

Conditions can only be varied by agreement, they may not be rectified or amended. If it was registered incorrectly, it must be rectified in terms of section 4(1)(b). The usual conditions relating to acknowledgement of debt in the bond, such as those providing for the rate and payment of interest, the method and time of repayment of the capital, the *domicilium* clause, etc, can be amended / substituted or new conditions of this nature can be inserted.

If a bond has been ceded as security, the mortgagor (cedent), mortgagee and cessionary must all sign the variation agreement.

An agreement in terms of section 3(1)(s) between the mortgagor and cessionary can be registered at the same time as the cession of the bond.

If a debenture bond is registered and a copy of the debenture trust deed annexed to it, the bond stating that the trust deed should be deemed to be incorporated in and form part of the bond, and the trust deeds are subsequently amended, which amendments were not registered against the bond, they can be registered bmo an agreement entered into in terms of section 3(1)(s). The amending deeds should be annexed to the agreement.

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SEQUENCE OF DEEDS

Section 16 DRA: Ownership of immovable property and real rights therein may, with some exceptions (expropriation), be transferred only by registration in the deeds registry.

Section 14 DRA: The transfer of ownership of property and other real rights must be registered by means of a deed/endorsement, in the name of each person who successively becomes entitled to the property or right.

The main purpose of section 14 is
- to ensure there are comprehensive deeds registry records and in this manner protect the accuracy of the titles of all interested parties, and
- to secure the payment of the prescribed taxes payable on the acquisition of land and other real rights in the form of transfer duty.

Section 14 does not limit the existing method of taking transfer, but requires that transfers must follow the sequence in which the right to claim transfer occurred, irrespective of whether the acquisition was in respect of a juristic act, a will or intestate succession. If at the time of registration of transfer there is more than one sequential transaction, leading to the final registration to be effected, registration of transfers must follow the sequence in which each transaction took place.

Section 14(2): even where transfer is effected in terms of an exemption to a general rule, transfer duty is still payable, as would have been the case had the property been transferred to the persons who would successively have become entitled to it.

Unless the DRA, another law, or the court states otherwise, the general rules are:

1) Transfers of land and cessions of real rights therein must follow the sequence of the successive transactions in pursuance of which they are made.

2) If those successive transactions are made in pursuance of a will/intestate succession, they must follow the sequence in which the right to ownership/real right in the land accrued to the person/s successively becoming vested with the right.

3) It is unlawful to depart from any such sequence when recording any change in the ownership of land/real right in a deeds registry.

Section 14 does not apply: Immovable property of an insolvent automatically vests in a curator in terms of legislation and is not conveyed by virtue of a juristic act. A rehabilitated insolvent has the right to claim the immovable property that has remained in his estate and have it re-registered in his name.

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EXCEPTIONS TO THE RULES CONTAINED IN SECTION 14

Section 14(1)(b)(i)

Transfer of land or cession of a real right which devolved upon a descendant may be transferred by the executor of the deceased estate direct to the descendants' heir *ab intestatio*, provided that:

1) the land / real right devolved upon the descendant in terms of a will or through intestate succession, AND
2) the descendant died a minor and intestate before the deceased, AND
3) no executor was appointed in the intestate estate of such minor descendant.

All three requirements are required for an exception to apply.

Section 14(1)(b)(ii)

The executor in a deceased estate may transfer immovable property or cede a real right direct to a purchaser of such property if:

1) the immovable property has devolved upon an heir or legatee ito a will / intestate succession
2) the registrar of deeds is satisfied that the costs of transferring the property to the heir / legatee would equal / exceed the value of the property
3) the property was sold to the purchaser by the heir / legatee
4) the heir / legatee has consented to the procedure in writing
5) proof of the value of the property is furnished by means of a written valuation by a sworn appraiser

Section 14(1)(b)(iii)

The general rule is that transfers must be registered in the same sequence a sthe transactions giving rise to the exception.

If, in the administration of a deceased estate, any redistribution of the assets takes place among the beneficiaries, the executor may transfer the land/cede the real rights direct to the persons entitled thereto, in accordance with such redistribution agreement (which must have been reflected in the L & D account).

Any transfer by virtue of the redistribution must be reflected in the L & D account. A redistribution after the L & D account has been accepted is not possible.

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Section 14(1)(b)(v)

The proviso contained in section 14(b)(iii) shall apply *mutatis mutandis* to the following situations:

1. In the case of the redistribution of the assets of the joint estate of spouses who were married icop and have since been divorced or judicially separated.

2. When the assets of a partnership are redistributed on dissolution of the partnership: Since a partnership is not a separate *persona*, immovable property must be registered in the names of the individual partners, with reference to the fact that they are carrying on business as a partnership. When the partnership dissolves and the partners take ownership of the property in their individual capacity, it does not actually involve a transfer of ownership. In terms of section 9(3) of the Transfer Duty Act, transfer duty is payable.

Section 14(1)(b)(vi)

If a fiduciary interest in land or a real right expires before transfer/cession thereof has been registered in favour of the fiduciary or the fiduciary repudiates, the land can be transferred or the real right ceded direct to the fideicommissary.

This exception applies to both testamentary *fideicommissary* and those that are created *inter vivos*, as well as *fideicommissary* that create successor fiduciaries. When intermediary fideicommissary heirs fail, transfer must take place from the estate of the fiduciary heir.

Section 14(1)(b)(vii)

If the right of a person to claim transfer of land / cession of a real right vests in a third person in terms of a judgement or court order, or a sale in execution held pursuant to such judgement or order, then transfer of the land / cession of the real right may be passed direct to that third person by the person against whom the right was exercisable.

OTHER EXCEPTIONS IN THE DEEDS REGISTRIES ACT

Section 33(1):

If a person acquires the right to ownership of immovable property registered in the name of another person and cannot obtain registration in his name in the usual manner, and according to the sequence of the successive transactions in pursuance of which the right to ownership of the property has devolved upon him, he may apply to the court for an order authorising the registration of the property in his name.

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Section 92(2):

Land or a real right therein that has been donated to an intended spouse in terms of an anc may not be transferred / ceded by the donor to any person other than the donee. The donor may not mortgage the land, unless the transfer duty (if any) payable on settlement of the donation has been paid.

Section 24 *bis*:

A change in the shareholding of partners does not need to be followed by registration in a deeds registry where immovable property of the partnership is concerned. Where necessary, transfer duty will however be payable.

WHERE THE COURT DIRECTS OTHERWISE

The court can make a ruling that the transfer of a property or the cession of rights must be registered without following the sequence of transactions.

EXCEPTIONS CONTAINED IN OTHER ACTS

Certain other Acts provide for deviation from the general rule contained in section 14, eg the Prescription Act and the Restitution of Land Rights Act.

TRANSFER DUTY ON INTERMEDIARY TRANSFERS

Section 14(2): any transfer or cession in terms of a *proviso* to section 14(1)(b) is subject to the transfer duty that would have been payable had the property been transferred / ceded to each person successively becoming entitled to it.

Scetion 12 Transfer Duty Act and section 92 DRA: a transfer duty receipt in respect of each acquisition as referred to in the Transfer Duty Act must be lodged with the registrar of deeds on registration of transfer. These sections are safety precautions to ensure that registration does not occur without the transfer duty being paid. Section 14(2) DRA is also a safety precaution, ensuring that the avoidance of an intermediary transfer / cession at the time of registration does not mean that transfer duty can be avoided.

Even if the court states that in terms of section 33 an intermediary transfer need not be registered, transfer duty must still be paid on that transaction.

DIVERSE APPLICATIONS AND ENDORSEMENTS

1. **APPLICATIONS FOR THE AMENDMENT OF AN ERROR IN TERMS OF SECTION 4(1)(b)**

An error in a registered deed / document can only be amended in terms of section 4(1)(b) DRA. The error must have been an error at the date of registration of the deed/document, and should not have become an error after registration.

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Errors which can be amended in terms of Section 4(1)(b)

A registrar is empowered to amend an error in a deed/document with regard to one/more of the following:

1) A person's name
2) The description of a person (e.g. id no, date of birth, marital status, details of spouse)
3) The name of a property (incorrect spelling)
4) The description of a property (portion 2 instead of portion 2 of portion 6)
5) The conditions affecting a property (a servitude incorrectly included in the title conditions)

The amendment must not result in the contravention of another Act, and if the deed to be amended is mortgaged, the amendment must not be allowed to render the bond invalid.

An amendment cannot be made to a dead deed/bond – ie, where a bond has been cancelled, or all the property held under a deed has been transferred to another person.

The name of a person who has no right under or interest in a deed/document is not amended once it has been registered, e.g. a transferor in a deed of transfer or a cedent in a notarial cession, since they no longer have an interest in the property once the transfer or cession has been registered.

Mortgage bonds may also be amended, but bonds that are being cancelled are not amended, unless the error has a bearing on the description of the mortgagee.

Although there is no provision in the Act for amendment of an erroneous purchase price, a registrar may affix an endorsement to the deed if sufficient proof is submitted. In such case, extra transfer duty may be payable.

Application (& Affidavit)

Although not required, it is common practice for an amendment in terms of section 4(1)(b) to be recorded only on written application by the registered owner of the land or holder of the registered real right, substantiated by a sworn affidavit.

<u>The provisions of section 4(1)(b) cannot be applied if it would have the effect of transferring any right,</u> which is usually confirmed in the sworn affidavit, or the conveyancer can certify that no rights have been transferred as a result of the amendment.

The applicant is required to state in the application / affidavit, that there are no further deeds that need to be amended. If an error is common to two/more deeds, the registrar of deeds may insist that all the deeds be amended.

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Where a property is registered in the name of two people, and it should only have been registered in the name of one of them, this error cannot be amended by means of an application in terms of section 4(1)(b). A rectification transfer will have to be registered.

If the registered owner is insolvent and his trustee applies for an amendment in terms of section 4(1)(b) to amend the insolvent's particulars, the insolvent must be joined as an applicant or submit an affidavit regarding the amendment, or the trustee must provide proof of the error – hearsay evidence is not acceptable.

Operational clause

Both the incorrect and the correct information must be set out in the application. The applicant must apply for the deed to be amended.

The consent of all parties having an interest in the amendment (mortgagees/usufructuaries) must be lodged (section 4(1)(b)(i)). If anyone refuses to consent, the amendment may be made on authority of a court order (section 4(1)(b)(ii)).

If the error relates to a party to an antenuptial contract and the contract has been lost, the deeds office copy must be amended and a *caveat* noted to allow for amendment of the client's copy on lodgement – a certified copy of the contract is not required. The consent of the other party to the contract must be obtained.

If title conditions are being amended and the corrected conditions are too long to be reflected in the deed, the conveyancer must lodge a schedule of conditions in a separate lodgement cover. The schedule must mention the title deed, include a description of the property and reflect the correct conditions. The conveyancer must also certify that the schedule is a true extract of the original document, with the addition of the correct conditions.

The Parties consent is required to amend an error.

2. APPLICATION IN TERMS OF SECTION 17(4)

If a person's marital status has changed or is not reflected in the deed, the registrar of deeds must (on written application by the person and submission of the deed and proof of the real facts) endorse the change in status or make a note to the effect that the person is a party to a marriage. This may also be done where parties to a customary marriage prior to the coming into operation of the recognition of Customary Marriages Act, were described as unmarried.

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A section 17(4) endorsement may only be made:

1) If the person has married since the registration took place
2) If on the date of registration, the person was married out cop or if the marriage was at that stage governed by the law of another country and has subsequently been dissolved by death or divorce
3) If the land forms an asset in a joint estate and was registered prior to 1 November 1984 in the name of the husband only.

The marital status of the person must either have changed since registration in his name or not have been mentioned in the deed because of the provisions of the DRA at that time.

This procedure **cannot** be used:

1) to rectify an error in a person's marital status at registration (section 4(1)(b) applies)
2) to indicate a change in a person's marital status if the person was married in community of property at registration (the joint estate must be divested by means of a transfer by both former spouses, or section 45 and 45*bis* will have to be complied with)

Application

An application must be lodged by the person in whose name the property, a real right in property, a bond or a notarial bond is registered. The application must contain the person's full particulars and marital status.

Requirements

1. Mutually dependant deeds must be lodged simultaneously for endorsement, eg, the deed of transfer and all related mortgage bonds registered over the property;
2. Proof of marital status must be lodged;
3. If the applicant's spouse has died, a certified copy of the death notice must be lodged;
4. If the applicant divorced his former spouse, a certified copy of the divorce order must be lodged;
5. The relevant deeds must be lodged.

No consents are required.

3. APPLICATION FOR THE ENDORSEMENT OF A TITLE DEED IN TERMS OF SECTION 44

When a piece of land is re-surveyed and the extent is found to differ considerably from that reflected in the deed and on the existing diagram, the owner's title can be endorsed in terms of section 44 DRA and the new diagrams substituted for the old.

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Application

The owner of land must submit an application to the registrar of deeds to have the deed endorsed and the old diagram replaced by the new one. The application must contain all relevant facts, such as the property description, the extent of the property according to the deed, the deed number and the extent of the property according to the new diagram.

4. APPLICATION TO NOTE THE LAPSE OF A PERSONAL SERVITUDE IN TERMS OF SECTION 68(1)

Section 68(1) makes provision for the noting of the lapse of a personal servitude against the deed of the land encumbered by the servitude, as well as against the deed of the servitude, if any. Lapsing means that the personal servitude is no longer of force and effect. It has lapsed because of a particular occurrence or a waiver by the holder.

Lapsing v Cancellation

In the case of cancellation, there must be consensus between the holder of the servitude and the owner of the property. According to section 68(2), the cancellation of a personal servitude by agreement must be effected by means of a bilateral notarial deed.

No agreement need be reached in the case of lapsing. A servitude lapses for a particular reason, e.g., the expiry of a period of time, and no consent is required to cancel the servitude in such case. A servitude also lapses in the case of an underhanded waiver of the servitude.

A fideicommissary condition has the status of a personal servitude. The provisions of section 68(1) can also be applied if the *fideicommissum* lapses.

It is no longer necessary to apply for the deletion of building condition from the existing deed on transfer if the period of time has lapsed or the conditions are deemed to have been complied with.

If a building condition in a deed states that all building conditions therein lapse on registration of a building loan, the conditions may only be omitted on lodgement of a certificate by the mortgagee that the bond is being registered to secure a building loan, or if the bond clearly states that it secures a building loan.

If there is a lapse you can apply for an endorsement.

Where a personal servitude is registered over land, a written application prepared by a conveyancer must be lodged by or on behalf of the owner of the land encumbered by such personal servitude.

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5. APPLICATION FOR A CHANGE OF NAME OF A PERSON IN TERMS OF SECTION 93(1)

If a person / church / partnership has changed its name after registration, section 93(1) may be used to note the change in the registered deeds.

Natural persons: it applies to the change of first names and/or surnames but it may not bring about a change in the person who holds or grants a right.

A person who wants to change his surname must comply with section 93 DRA and section 26(1) of the Births and Deaths Registration Act.

Section 26(1) of the Birth and Deaths Regulations Act: the assumption of another surname must be authorised by the Director-General of Home Affairs, unless a woman:

1. assumes her husband's surname;
2. resumes a surname which she bore at any prior time; or
3. adds to the surname which she assumed after marriage, a surname which she bore at any prior time.

If a woman is divorced or widowed

- and resumes her maiden name or a surname which she used at any stage prior to her marriage, she can apply to change her name on registered deeds should she want to, but is not obliged to note the change of name against any deeds in order for her to be able to deal with the land or a real right held by her by virtue of that deed;

- she is not obliged to furnish her previous surname in later deeds, if she has resumed her maiden name.

With Hindu and Muslim marriages (which are not recognised by our law), the wife automatically assumes her husband's surname and she does not have to comply with section 93 before she can use her new surname in deeds. The conveyancer will however have to certify the reason for her new surname.

Application

A written application must be lodged by the owner. Both the old and the new names must be fully set out in the application, with the reasons for the change of name. Where the name of a partnership is involved, all the partners must sign the application. The application must also mention all the deeds and documents that must be amended.

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6. CHANGE OF NAME OF IMMOVABLE PROPERTY IN TERMS OF SECTION 93(2)

S 93(2): no change in the name of immovable property need be recorded in the deeds registry, unless required by the registrar of deeds and the Surveyor-General.

HOWEVER, an owner of immovable property may submit a written request to the Minister to change the name of the immovable property on the ground that the name may be offensive because of its racial connotations.

If the Minister is satisfied that the name may be offensive because of racial connotations, he may order the Surveyor-General to change the name in the registers, documents and diagrams.

The Surveyor-General notifies the registrar of the change of name, and the registrar then amends the relevant deeds and registers without an application having been lodged by the registered owner of the land.

7. APPLICATIONS IN TERMS OF SECTION 39(2) OF THE ADMINISTRATION OF ESTATES ACT

Usually, the executor is obliged to register inherited immovable property in the name of an heir, subject to any rights or conditions affecting the property. There are two exceptions contained in section 39(2) of the Admin of Estates Act:

> *If a usufructuary or other like limited interest in any immovable property has been bequeathed to any person with a direction that after the expiry of such interest the property shall devolve upon some person uncertain or that the proceeds of the property shall devolve upon any person, whether certain or uncertain, the executor shall, subject to the provisions of section 25 of the said Act, cause the terms of the will or a reference thereto to be endorsed against the title deeds of the property, & lodge with the Master a certificate by the registration officer concerned or a conveyancer that the title deeds have been so endorsed.*

<u>The endorsement can only be made in the following circumstances:</u>

- When a right of usufruct or other limited right in the property has been bequeathed, subject to the condition that the property passes over to an uncertain person, once the right has lapsed, an endorsement in terms of section 39(2) can be made; or

- If the will stipulates that the proceeds of the property should pass to another person once the right has lapsed, ie that the property must be sold after the lapse of the bequeathed limited real right & the proceeds of the sale must devolve on an identified person, then an endorsement in terms of section 39(2) can be made

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8. APPLICATION IN TERMS OF SECTION 39(3) OF THE ADMINISTRATION OF ESTATES ACT

If there is a possibility that the costs involved in transferring the property will result in hardship for the person entitled to the property, the Master may authorise the executor to have the existing deed endorsed to indicate that the land held thereunder has been bequeathed/inherited.

This endorsement does not vest the property into the name of the person entitled thereto, but merely creates a *caveat*.

9. APPLICATION IN TERMS OF SECTION 40(1)(b) OF THE ADMINISTRATION OF ESTATES ACT

Where a will states that any assets in a deceased estate must be administered by a trustee, the executor must hand the assets over to the trustee & cause the terms of the will, or a reference thereto, to be endorsed against the deeds of any immovable property, and against any bond forming part of the property of the estate.

Because the property is to be administered and not owned by the trustee, a formal transfer is not effected, but rather an endorsement in terms of section 40(1)(b) of the Administration of Estates Act.

Before the endorsement can be made, a trust must be created in the will and the beneficiaries of the trust named, and the will must make provision for the termination of the trust.

10. APPLICATIONS IN TERMS OF THE COMPANIES ACT

If a company changes its name ito the Companies Act, the Registrar of deeds will amend the registers and endorse relevant deeds registered in the company's name, upon presentation of proof of the change from the CIPC. (Section 1(4) Companies Act).

11. APPLICATIONS IN TERMS OF SECTION 49 OF THE COMPANIES ACT

In terms of section 49(7), if a company is liquidated by a Court order or placed under voluntary judicial management, the registrar, upon receipt of a copy of the court order, or on registration of the special resolution for the voluntary liquidation of the company, will amend the register to include or add the declarations "*In liquidation*", "I*n voluntary liquidation"* or "*Under judicial management*", to the name of the company.

If the liquidation or judicial management order is uplifted or the voluntary liquidation ends, the registrar will, upon receipt of a copy of the court order, amend the register to omit the declaration.

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12. CONVERSION OF A CLOSE CORPORATION TO A COMPANY

A close corporation can be converted to a company under section 1 of Schedule 2 of Act 71 of 2008. Section 1(4) of that schedule authorises the registrar of deeds to make amend the deeds register.

13. APPLICATION FOR ENDORSEMENT WRT THE CHANGE OF NAME OF A CLOSE CORPORATION, BANK, CO-OPERATIVE, INSURER OR STATUTORY BODY

If a bank, co-operative or insurer changes its name, a certificate of change of name is issued by the relevant registrar and when such statutory body's name changes, the relevant statutes impose a duty on the registrar of deeds to amend his registers and change endorsements on deeds.

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