TYPES OF LAND REGISTRATION SYSTEMS

ensure you distinguish between types of land registration systems (negative and positive) and South Africa's negative and positive qualities

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

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

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

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.

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

1. Where land is expropriated.
2. Where ownership in land is acquired by prescription.
3. Where there is a marriage in community of property.

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? Eg where land is transferred and the bond in not cancelled.

View 1: NO - the Transferee acquires the land subject to the bond. (*Barclays National Bank Bpk*)

View 2: YES - land title automatically includes a tacit guarantee of indisputable title.

Supreme Court of Appeal - *Legator McKenna Inc*: 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.

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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
3. been admitted to practice as an attorney by the High Court
4. been enrolled on an electronic register of conveyancers 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.

Duties of the Conveyancer

1. Ensure valid deed of alienation
2. Manage financial matters and the transaction process
3. Prepare deeds and documents and take responsibility for correctness of facts
4. Link simultaneous transactions (Deeds)
5. Lodge deeds
6. Execute and register deeds in the presence of the registrar of deeds, on behalf of the transferor

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.

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).

2. Manage financial matters and the transaction process

The Conveyancer must:

- ensure he has enough funds.
- 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.
- he must ensure that there will be sufficient funds on registration of transfer to honour these undertakings (agents commission).
- present guarantees and undertakings for payment.

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3. Prepare deeds & documents

All documents drafted and lodged by conveyancers must have a signed preperation clause, except affidavits, and conveyancer's certificates.

"To prepare" = to check the contents and sign the preperation clause (certify the correctness of the facts - S15A(1) & (2) and reg 44(A)). This places responsibility for the documents prepared with the conveyancer, not with the ROD.

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

General Rule: only a conveyancer may sign the preperation clause. (Deed of Transfer, Partition Deed of Transfer, Deed of Cession, Mortgage bond, CRT's)

Exception: (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. (Reg 44)

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.

Take responsibility for correctness of the following facts Reg 44A & S15A:

a) All copies of documents are identical on date of lodgement.
b) All applicable townships and conditions have been correctly brought forward from the previous deed into the new deed/certificate of title.
c) If documents are signed by an executor, trustee, tutor, curator, liquidator or judicial manager (business rescue practirioner) / 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;
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
   - the transaction is authorised.
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.

Rules applicable to the registration of deeds (FORMAT):

1. good quality A4 paper to be used;
2. printing or typing must be of good quality;
3. the top half of the first page is to be left blank for endorsements;
4. blank spaces are to be ruled through
5. a 4cm binding margin on the left-hand side;
6. Only black ink to be used;

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7. copies (the originals of which are lodged in the government offices) must be certified by a notary, conveyancer or head of that government office;
8. all pages must be consecutively numbered;
9. deeds and documents must be printed or typed on one side only;
10. every deed and document must disclose the place and date of execution;
11. numerous parties must be numbered – only exception is if married in community of property and partnerships.
12. each property must be numbered and described in a separate paragraph;

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. 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. Where one of the deeds is not in order, the whole batch is rejected. **Deeds are principally linked for financial reasons.**

Linking 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".

Linking is normally done in numerical numbers but you can add linking in roman numerals in pencil – this allows the register to pass any deeds in a batch that are in order and reject only those who aren't.

5. Lodgement

This is the formal handing in of deeds at the deeds registry for purposes of registration.

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).

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 it allows one to track the progress of a particular deed through the process.

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.

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After this the deeds are ready for execution and registration. Execution involves the respective conveyancers of the simultaneous transactions signing their deeds in the execution room in the presence of the Registrar of deeds.
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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THE REGISTRAR OF DEEDS

Duties of the Registrar of deeds

1. Take charge of and preserve all records
2. Examine all deeds
3. Record Interdicts
4. Keep registers
5. Give access to public registers and records

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
4. updating the deeds registry records

Examination does not include examination of the facts (coveyancers responsibility). 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.

Interdicts: usually prevent persons from dealing freely with their properties.

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

1. The ROD 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 in his registry. The ROD may refuse registration pending production thereof.
2. The ROD may rectify deeds relating to an error in the name or description of any person or property, or the conditions affecting the property.
3. The ROD may issue certified copies of deeds.
4. The ROD may order that certified copies be obtained to replace illegible or unserviceable deeds or documents.
5. The ROD may submit reports to court relating to applications for performance of any act in a deeds registry.

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.

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THE REGISTRATION PROCESS

Day 1

- The conveyancer lodges at the lodgement counter in the deeds registry.
- Deeds are sent to the data section (scanned and computer data printouts are made of the existing deeds office data relating to the persons and property). These printouts are inserted into the lodgement covers.
- Then proceeds to the distribution room (scanned and sorted and distribute among the deeds controllers).

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.
3. They raise notes in respect of any errors or oversight. - The conveyancers have to comply with these notes in order to have the deeds registered.

Day 3

- The deeds controllers return the deeds to the distribution room,
- Deeds are distributed to the chief deeds controllers (examine them again).
- They will indicate whether the deed it has been rejected (by endorsing it with a capital R) or passed (by initialling the cover).

Day 4

- Passed deeds proceed to the assistant registrar who monitors them to ensure that he agrees with the chief controller's decision.
- Rejected deeds are sent to the delivery counter (go back to conveyancer),
- Deeds then proceed to the preparation room.

Day 5

- Conveyancers have 3 days within which to comply with the notes raised by the deeds controllers, failing which the deeds will be rejected.
- When the notes have been complied with, the deeds are checked by the data typists for any new interdicts. This process is called "black booked". If new interdicts that are applicable have been received, the batch is rejected. If not, the deeds are sent to the execution room.

Days 6 – 9

The conveyancer has 3 days within which to appear before the ROD to register or execute the deeds.

Day 7

After execution, the deeds are scanned, numbered, sealed and dated. (The registrar's seal and his signature - authenticates the deed so that it may serve as an official public document.)

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Days 8 – 9

The data section captures the information on the deeds registry computer database.

Day 10

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

Days 11 – 13

- deeds are captured on microfilm or scanned into the computer database,
- then the go to the delivery room for delivery to the lodging conveyancer, who in turn delivers the registered deeds to the client.

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THE DEED OF TRANSFER - FORM E

This has two functions:
- transfer ownership
- prove ownership

COMPONENT CLAUSES (Be able to take info and draft the required clause)

1. **Preparation certificate / clause** (only be signed by conveyancer)

2. **The Heading**

3. **The Preamble** contains details of the conveyancer appearing before the registrar, the name, id number and status of the transferor/owner and the date and place of signature of the power of attorney.

DESCRIPTION OF THE PARTIES (NB – know how to draft)
Reg 18(1)(a): A natural person must be identified by:
- name;
- id number or:
    a. if id is incorrect - date of birth
    b. if no id has been issued - date of birth
    c. if no id has been issued and date of birth is unknown - a method approved by the ROD
- by his marital status. (state type of marriage)

Reg 18(1)(b): Legal persons must be identified by:
1. name
2. registered number

Some examples:

Unmarried (never married before / divorced / widowed) or married out COP

Michelle Adams
Identity number …
Unmarried

Married out and both own property – parties are cited separately and numbered

Person married in community of property:

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

or
Mike Adams
Identity number …
Married in community of property to Michele Adams

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Persons married according to Hindu / Muslim customs

Michelle Adams
Identity number …
Married according to Hindu rites

Persons married under the RCMA – before 15/11/2000

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
or
Married, which marriage the proprietary consequences thereof are governed by an order of court issued in terms of the RCMA 120 of 1998 and filed as I..

or as per normal

Persons married by the laws of a foreign country

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

Partnership

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 …, …, …

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

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Transferee:

cite all partners individually

Together carrying on business in partnership as ABC Partnership

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

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

Deceased / Insolvent Estates

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

Transferee: The estate of the late Michelle Adams

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

Who is the 'owner'?

S102 - "the registered owner or holder of the property", including:

a. the trustee of an insolvent estate
b. the liquidator of a company or close corporation owner
c. the executor (or legally recognised representative) of a deceased owner
d. the legally recognised representative of a minor, insane or otherwise disabled owner

acting within his legal authority

This definition is subject to subsection (b):

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

*Item 3 & 4 = unconstitutional and *Gumede*: Customary marriages before & after the Recognition of Customary Marriages Act = must be treated the same.

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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. Land can be sold in sequential transactions, transactions can be linked and registered simultaneously.

Land owned by two or more persons in undivided shares may be transferred by one deed from those persons to any other person.

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.

4. The Recital (*Causa*) – This provides the reason for the transfer. 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. Causes include: sale, donation, succession, exchange or rectification.

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

6. The property clause – This contains a description of the land which includes a full description of the land, the situation of the land and the extent or area of the land.

7. The extending clause – The purpose is to provide a reference to the diagram or general plan and to indicate the deed under which the land is held

8. The conditional clause – This contains all the conditions applicable to the land. This includes registered real rights in favour of others (servitudes) and restrictive conditions in the land. This includes conditions already registered against the land, and any other conditions endorsed after registration.

9. The divesting clause – This declares the previous registered owner divested of his ownership.

10. The consideration clause – this contains the purchase price or the amount on which transfer duty is paid.

11. The execution clause – This is the clause in which the act of execution by the appearer/owner before the registrar is recorded. Once the ROD has signed, it is regarded as attested and registered.

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SUPPORTING DOCUMENTS

SPECIAL POWER OF ATTORNEY

S20 DRA: all Deeds of Transfers must be executed in the presence of the ROD by the owner of the land, or by a Conveyancer authorised by power of attorney to act on behalf of the owner.

This 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.

A power of attorney 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.

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 (by grantor, witnesses & preparer) is 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.
- Minor alterations = initialled by preparer only

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 but 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)

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.

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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).

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:
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.

An *inter vivos* trust: The duly authorised trustee/s (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 / a person married / civil union out of community of property: The registered owner.

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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 in cop, 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 / 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: The registered owner.

A person in a customary marriage: Husband has only one wife (as per above)

A person in a customary marriage: Husband has two or more wives: 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.

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.

TRANSFER DUTY RECEIPT / EXEMPTION CERTIFICATE

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

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.

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

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RATES CLEARANCE CERTIFICATE

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.

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.

Upon sale of a property it is common practice for the owner of a property to lodge a solvency affidavit, 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.

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.

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DECEASED ESTATE TRANSFERS

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 ito S21):
(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.

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

1) testate succession
2) intestate succession
3) sales by the deceased during his lifetime (mention date sold in recital)
4) donations by the deceased during his lifetime
5) sales by the executor
6) transfers in terms of s 18(3) of the Administration of Estates Act (the value of the estate is relatively low = representative not executor).
7) take-overs in terms of s 38 of the Administration of Estates Act (where the Master allows the surviving spouse to take over all or part of the estate assets at a valuation).
8) sales by an executor in a deceased insolvent estate in terms of s 34(2) of the Administration of Estates Act (where the liabilities in the estate exceed the assets - no sequestration order because the deceased is not formally declared insolvent).
9) property registered in the name of the survivor of spouses who were married in community of property
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.

Drafting of the *causa* of an estate transfer

The following information, if applicable, should be mentioned:
1) The date of death of the testator
2) The way in which the land devolves
3) A short explanation of why the inheritance devolves on the transferee
4) A short explanation of how testamentary conditions are complied with
5) Transfer from a massed estate

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PARTITION TRANSFERS

The purpose is 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.

Partition vs Subdivision

Subdivision: the 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 obtain 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.

Partition: the whole of the jointly owned property is divided between the co-owners. Each party to the partition must acquire a defined portion of an undivided share he previously held. A single owner cannot partition his property – that would simply amount to a subdivision.

THE PARTITION DEED: This 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.

Bondholder's consent: If the share 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 ROD 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.

Mineral rights: Since ne legislation, the ROD 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. All mineral right conditions in existing title deeds must be omitted when drafting new deeds of transfer.

Conditions: 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. 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.

Personal servitudes – These can be created in the power of attorney.

Consideration: Must be disclosed = transfer duty

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EXPROPRIATION TRANSFERS

A notice of expropriation must be served on the registered owner stating the date of expropriation and compensation to be received. 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 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 ROD must receive a certified copy of the notice of expropriation (note an interdict).

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

Restraint on the registered owner:
- Where all the land is expropriated, the registered owner is prohibited from transferring / otherwise dealing with the land.
- Where only a portion 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.
- If a portion of land is only provisionally expropriated, the registered owner may not deal with that land until it is made final or withdrawn.

TRANSFERS BY VIRTUE OF AN ORDER OF COURT

(prescription or paid for property but seller wont transfer / cant be found)

S14 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: S33(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.

The new owner can't deal with the property until he obtains the property title.

DEEDS OF GRANT

(ownership is transferred from the state to another person)

S3(1)(c) DRA: provides for the registration of deeds of grant issued by the State or any other competent authority.

There is no preperation clause and the duties and responsibilities do not apply. No power of attorney is required.

Unalienated state land may only be transferred by a deed of grant and a diagram of the land must be annexed (never been previously registered).

Acquired state land is land that has previously been registered and which has subsequently been transferred to the State. May be transferred by DOG / DOT.

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TRANSFERS BY ENDORSEMENT

GR: ownership may only be conveyed by a DOT. Exception – endorsements.

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

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),

No registration fee is payable.

Requirements: 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, 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 the land vests in the individual members/partners.

If the property is not allotted to ALL the partners, a deed of transfer must be used. You can't endorse.

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

If land is registered in the name of the parent / guardian of children during their minority, to be held in trust for those children and the identity of all the children has been established, an endorsement 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.

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.

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.

If the insolvent is rehabilitated by the court within 10 years, the rehabilitation must be noted against the name of the insolvent.

An application is required to be lodged by the insolvent or trustee and 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.

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.

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 COP, 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.

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

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.

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.

Application is made by both spouses.

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SUBSTITUTING TITLES / CERTIFICATES OF REGISTERED TITLE

A CRT is a deed in which the ROD certifies who the owner of the property or share in the property is. It is issued on application by the owner. No transfer of ownership takes place.

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, for a CRT for his undivided share. He must obtain a CRT before he can transfer his fraction.

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, for a CRT of an undivided share in land, without having to apply for a certified copy of the lost or destroyed deed.

The owner of the last remaining share under a lost deed must apply for a certified copy of that deed in terms of regulation 68, not for a CRT.

Section 34(2) vs Regulation 68

A s34(2) CRT 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 other co-owners.

In terms of reg 68(1) DRA, a certified copy of a lost or destroyed deed may be issued to single / joint owner/s 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 reg 68 copy. Once the copy has been issued, the original deed becomes null and void.

3. **Section 35: CRT OF AGGREGATE SHARES**

The owner obtains 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 (S40) vs CRT of aggregate shares (S35)

Consolidated title: - the separate properties are not only held under one title deed, but are actually merged into one property.
In terms of S35, the owner obtains a single title in respect of his total share in a property / properties – 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 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.

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

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

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. The only way to remove them is to obtain a CRT. 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 – except where he wants to transfer it.

2) When an owner of a township or settlement wants to deal with an individual erf.

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.

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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.

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.

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.

Requirements:
1. The constituting components:
   a. There must be a common boundary.
   b. The pieces of land must be recorded in the same property register.
   c. The pieces of land must be situated in the same administrative district.
   d. The pieces of land must be owned by the same person.

2. Consolidation diagram: A Surveyor-General approved diagram of the pieces of land must be prepared

3. 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 pRegistrar of Deedsuced;
   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.

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MORTGAGE BONDS

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.

Structure of a bond

1. **Preparation Clause**

2. **Heading**

3. **Preamble**

The preamble must contain:
1) the name of the conveyancer and details of the power of attorney.
2) A description of the mortgagor

4. **Acknowledgement clause**

Acknowledge the indebtedness and gives the reason for the debt.

5. **Mortgagee (bondholder)**

6. **Amount**

The act does not prescribe the amount to be disclosed but in practice it is because a deeds office registration fee/levy is payable, 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.

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

The reason e.g. money lent and advanced

8. **Waiver of legal exceptions**

The National Credit Act ("NCA") prohibits the use of waivers and same are void. 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.

9. **Interest and repayment clauses**

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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.

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 additional amount usually constitutes 20% of the capital sum.

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.

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*.

A mortgagee's consent is not required in respect of the waiver of preference.

Any charge (the state has a hold on a property registered under a charge number) against land must be mentioned in the ranking clause of a bond because previously registered charges enjoy preference over the new bond.

12. Property and security clauses

13. Special conditions of title

If someone wants to mortgage land held under existing special conditions limiting the rights of the owner, the ROD may require those conditions to be set out in the bond.

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 may not be inserted.

The following conditions are prohibited by the DRA:

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 (S55(2)).
2) No condition may be included in a bond which purports to impose upon a registrar any duty or obligation not sanctioned by law (Reg 35(6)).

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3) The insertion of a general clause attempting to simultaneously bind immovable and movable property of the mortgagor is prohibited (S53(1)).
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.
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*

16. Execution clause

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DIFFERENT TYPES OF BONDS

1. **COLLATERAL BOND:** an additional bond to secure a debt or obligation for which security has already been provided to the mortgagee. The same mortgagor, mortgagee and debt/obligation.

2. **SURETY BOND:** passed by a third party, as further security for a debt which has already been secured by the principal debtor (principal bond). For the surety to be fully liable = surety and co-principal debtor.

3. **INDEMNITY BOND:** the principal debtor indemnifies a person who undertook to comply with an obligation on behalf of a principal debtor, should he be compelled to comply with the obligation. - 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.

4. **COVERING BOND:** is a special mortgage to secure future/fluctuating debts. It must be expressly declared to secure such debt, and a maximum amount must be expressly stipulated in the bond.

5. **DEBENTURE BOND: i**f authorised by its MOI, a company may raise money by creating and issuing secured debts (debentures). 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:** 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 paid over to the ss

7. **SUBSTITUTED BOND:** replaces an existing bond. The mortgagee and the mortgagor must be the same, but the property does not have to be. The existing mortgage bond is cancelled on registration of substituted bond.

8. **JUDICIAL MORTGAGE:** this is not a bond in the usual sense, but it 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.

9. **KUSTINGSBRIEF:** is a special mortgage bond in favour of the seller of land or a third party who advanced the purchase price, registered over immovable property to secure a principal debt (balance of the purchase price) incurred in respect of the purchased land. It is registered simultaneously with the deed of transfer.
   Requirements:
   a. It must be registered simultaneously with the deed of transfer
   b. It must secure the balance of the purchase price of the immovable property sold
   c. Since it is a first bond, the holder enjoys preference over other bondholders.
   d. The kustingsbrief bond must be registered over the property sold.

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10. **CHARGES:** this is when the owner of the land owes money. It is not a mortgage bond, but is comparable to a servitude, as it attaches to the land. The debt it secures becomes the responsibility of the successors in title to the owner who incurred it. A charge enjoys preference in ranking above all existing bonds, even if no waiver of preference has been given. A charge is never drawn up by a conveyancer, but by the Land Bank.

11. **ANNUITY BOND:** 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:** 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.

13. **NOTARIAL BOND:** the security under a notorial bond is movable property. 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:** regulated by Collective Investment Schemes Control Act. It is a bond which is registered over immovable property in favour of a nominee company as mortgagee, and forms part of an investment scheme. It 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.
    <u>The Act requires the following:</u>
    a. 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.
    b. Participation mortgage bonds must be mortgage bonds over immovable property, registered in favour of a nominee company as mortgagee
    c. The debt secured by the participation mortgage bond is regarded as being owing to the participants in the scheme and not the nominee company.
    d. All the above participatory interests shall rank in preference concurrently with one another.
    e. 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.
    f. 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

GR: S56(1) DRA: mortgaged land may not be transferred unless it is cancelled or the land is released from the operation of the bond.

Exceptions in S56(1), where a mortgage bond need not be cancelled:
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.

2. RELEASE FROM MORTGAGE BONDS

Where more than one piece of land is hypothecated or there is more than one mortgagor, the mortgagee may consent to the release of one land / mortgagor.

When land is released – no longer serves as security for the debt.
When a person is released - the person is no longer bound to the mortgagee

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.

Consent by co-mortgagors is required

1. Release of part of co-mortgagor's property
2. Release of all immovable property of one of the mortgagors
3. Consent – co-mortgagors and a Collateral Bond (there is no release of a person)
4. Surety - the consent of the principal debtor to the release of a surety's property is not required. Where land is subdivided, the release of a portion of the land will only be allowed by the ROD, if the release takes place at the same time as the transfer of that portion.

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

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.

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Cession as security (to secure payment of the cedents debt to the cessionary).
A bond may be ceded by the mortgagee as security for repayment of debt incurred by that mortgagee. The cedent does not fall out of the picture and the cessionary may not further cede the bond. When the 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

4. SUBSTITUTION OF DEBTOR/MORTGAGOR BY ENDORSEMENT

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. The original mortgagor is released from any obligation and payment.

Various possible substitutions of a debtor:

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

S*24bis*(3): If land is mortgaged, an endorsement to transfer ownership on dissolution of a partnership should not be affixed unless:
1. the mortgage bond is cancelled; or
2. the mortgagee consents in writing to the substitution.

- **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.

- **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, the purchaser may be substituted as mortgagor under the bond.
If two/more transferees are substituted, they 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.
A surviving spouse may be substituted as mortgagor when acquiring property which is subject to an existing bond from the estate of the deceased spouse.

When a debtor may not be substituted under section 57

1. if the mortgagor is a trustee, executor or a liquidator
2. If the mortgaged property is not transferred in its entirety.
3. If the existing mortgagor reserves a real right for himself, e.g. a usufruct
4. If the new owner is not competent to mortgage the land, eg a minor
5. When the bond secures the obligations of a surety
6. Two / more mortgagors may not be substituted in the place of one mortgagor.

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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. A part payment can be registered only if the bond does not secure future debts. 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. Only the mortgagee can consent to the registration of a part payment.
The mortgagor's consent is not required.

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. A reduction in cover can only be registered in respect of a bond which secures future debts.

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 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.

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

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 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).

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
4. conditions relating to any additional amounts (costs clause).

The ROD will refuse to register a variation agreement in terms of section 3(1)(s) which changes the character of the bond.
Conditions can only be varied by agreement.
The amending deeds should be annexed to the agreement.

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SEQUENCE OF DEEDS

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. – (requires that transfers must follow the sequence).

The main purpose of section 14 is
- to ensure there are comprehensive deeds registry records, and
- to secure the payment of the prescribed taxes (transfer duty).

Section 14(2): even where transfer is effected in terms of an exemption to a general rule, transfer duty is still payable.

EXCEPTIONS TO THE RULES CONTAINED IN SECTION 14

Section 14(1)(b)(i): Transfer of land 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 devolved upon the descendant in a will / 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.

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
2) the ROD 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 - sworn appraiser

Section 14(1)(b)(iii): The GR: transfers must be registered in the same sequence as the transactions giving rise to the exception.

If redistribution takes place among the beneficiaries, the executor may transfer the land/cede the real rights direct to the persons entitled thereto, in terms of the redistribution agreement.

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 in cop and have since been judicially separated.
2. When the assets of a partnership are redistributed on dissolution of the partnership

Section 14(1)(b)(vi): If a fiduciary interest in land or expires before transfer 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.

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Section 14(1)(b)(vii): If the right of a person to claim transfer of land vests in a 3rd person in terms of a judgment or court order, or a sale in execution held pursuant to such judgment or order, then transfer of the land may be passed direct to that 3rd person by the person against whom the right was exercisable.

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, he may apply to the court for an order authorising the registration of the property in his name.

Section 92(2): Land that has been donated to an intended spouse in terms of an anc, may not be transferred 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.

TRANSFER DUTY ON INTERMEDIARY TRANSFERS

S14(2): any transfer or cession in terms of a *proviso* to s14(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.

S12 of Transfer Duty Act and s92 DRA: a transfer duty receipt in respect of each acquisition must be lodged with the ROD. Section 14(2) DRA is also a safety precaution, ensuring that the avoidance of an intermediary transfer at the time of registration does not mean that transfer duty can be avoided.

DIVERSE APPLICATIONS AND ENDORSEMENTS

1. APPLICATIONS FOR THE AMENDMENT OF AN ERROR - S 4(1)(b)

An error in a registered deed 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, and should not have become an error after registration.

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

1. A person's name
2. The description of a person
3. The name of a property
4. The description of a property
5. The conditions affecting a property

An amendment cannot be made to a dead deed/bond – ie, cancelled
The name of a person who has no right under or interest in a deed is not amended once it has been registered, e.g. a transferor

Application: it is not required but it is common practice for an amendment to be recorded only on written application by the registered owner.
The provisions of section 4(1)(b) cannot be applied if it would have the effect of transferring any right.

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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 must be lodged.

2. APPLICATION IN TERMS OF S17(4)

If a person's marital status has changed or is not reflected in the deed, the ROD must (on written application) endorse the change in status or make a note to the effect that the person is a party to a marriage.

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.

This procedure cannot be used:

1. to rectify an error in a person's marital status at registration
2. to indicate a change in a person's marital status if the person was married in community of property at registration

3. APPLICATION FOR THE ENDORSEMENT OF A TITLE DEED - S44

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. The owner of land must submit an application.

4. APPLICATION TO NOTE THE LAPSE OF A PERSONAL SERVITUDE - S68(1)

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.

Lapsing v Cancellation

Cancellation: there must be consensus between the holder of the servitude and the owner of the property. The cancellation of a personal servitude by agreement must be effected by means of a bilateral notarial deed.

Lapsing: no agreement need be reached. A servitude lapses for a particular reason, e.g., the expiry of a period of time.

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 - S93(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.

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.

S26(1): 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.

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 is not obliged to furnish her previous surname in later deeds, if she has resumed her maiden name.

A written application must be lodged by the owner.

6. CHANGE OF NAME OF IMMOVABLE PROPERTY - S93(2)

S93(2): no change in the name of immovable property need be recorded in the deeds registry, unless required by the ROD 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, he may order the Surveyor-General to change the name in the registers, documents and diagrams.

7. APPLICATIONS IN TERMS OF S39(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 exceptions contained in section 39(2) of the AEA (endorsement can be made):

- 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.

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8. APPLICATION IN TERMS OF S39(3) OF THE AEA

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.

9. APPLICATION IN TERMS OF S40(1)(b) OF THE AEA

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, 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.

10. APPLICATIONS IN TERMS OF THE COMPANIES ACT

If a company changes its name, the ROD will amend the registers and endorse relevant deeds registered in the company's name, upon presentation of proof of the change from the CIPC.

11. APPLICATIONS IN TERMS OF S49 OF THE COMPANIES ACT

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*" (*in business rescue*), to the name of the company.

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