CONVEYANCING PRACTICE
PART 1

11 NOVEMBER 2020

MEMORANDUM

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The content of the memorandum may not reflect the most current developments. Further, there may be justifiable variations in practice which are brought out in the answers.

The purpose of questions that require drafting is to ensure that the candidate can properly draft documents to be registered. Answers that are not exactly the same as those contained in this memorandum but which are nonetheless correct, will be marked accordingly.

QUESTION 1

Section 13 provides that –

A home builder shall ensure that the agreement concluded between the home builder and a housing consumer for the construction or sale of a home by that home builder complies with the following requirements –

1. The agreement must
   a) be in writing and signed by both parties;
   b) set out all material terms, including the financial obligations of the housing consumer.

2. Attached to the written agreement as annexures must be –
   a) the specifications pertaining to materials to be used in construction of the home; and
   b) the plans reflecting the dimensions and measurements of the home, as approved by the local government body.

3. Provision may be made in the agreement for amendments to the plans as required by the local government body.

QUESTION 2

It happens quite often lately that companies are deregistered for, inter alia, not paying the prescribed fees. When a company is deregistered, its assets becomes *bona vacantia* in the hands of the state. This was also discussed at the 2013 Registrars Conference.

Normally a consent to the cancellation of a bond must be drawn in accordance with prescribed Form MM to the Regulations of the Act and be signed by the **present holders(s)** of the bond. However, the Company has been finally deregistered and thus one of the following procedures must be followed:

1. An order of court be obtained for such cancellation.

2. A registrar of deeds may accept a consent for the cancellation of a bond signed by the head of the National Treasury of the Republic of South Africa, provided the indebtedness secured by the bond has been paid in full **(RCR 29 of 2013)**, and see the case of Rainbow Diamonds.

3. The deregistration of the Company may also be purged and placed back on the registrar of Companies at CIPRO through a process involving the previous auditors and directors, if they can be found. This will be done through an administrative process.

QUESTION 3

The Community Schemes Ombud Service Act 9 of 2011 functions are:

- to provide for the establishment of the Community Schemes Ombud Service;
- to provide for its mandate and functions; and
- to provide for a dispute resolution mechanism in community schemes; and
- to provide for matters connected therewith.

QUESTION 4

Contingent Usufruct
A contingent usufruct is a usufruct which will only come into existence after the lapsing of an existing registered usufruct, and must be ceded by the bare dominium owner on lapsing of the first usufruct. (It is personal by nature)-see **RCR47/1987**.

Usufruct in favour of more than one person
Where a usufruct is, ceded to two or more persons in equal undivided shares and one of the usufructuaries die, the servitude will only lapse in respect of the undivided share of the deceased, and the property will remain subject to the usufruct in respect of the other holders' undivided share. A usufruct may be ceded to more than one usufructuary in undivided shares.

QUESTION 5

The marriage is not recognized as a valid marriage in terms of South African law and thus the parties are deemed to be unmarried.

They will be described as:

1. Name: Moegsin Ismail
   Identity number: 790813 5085 089
   Married according to Muslim Rules

2. Shakeera Gulum
Identity number: 810714 0102 083
Married according to Muslim Rules

* **They may also be described as Unmarried. (See CRC 5 of 1994).**

QUESTION 6

Where a spouse in a *monogamous customary marriage* (which is a *marriage in community of property*), after the commencement of the Act enters into a further customary marriage (polygamous customary marriage), and fails to make an application to court in terms of section 7(6), such *further customary marriage*, if valid, should be considered to be a marriage *out of community of property*, however, spouses will be described in deeds and documents as follows:

1. 'Peter Khumalo
Identity Number 631024 5094 089

AND

Esther Khumalo
Identity Number 680111 5062 087
Married in community of property to one another and

Peter Khumalo
Identity Number 631024 5094 089
Married in terms of customary law

AND

2. Molly Khumalo
Identity Number.790201 0045 089
Married in terms of customary law.'

(See CRC 27 of 2013 for a full discussion there on as well as the relevant case law).
This answer assumes that both spouses acquire the property-examiners must please use their discretion in case of other answers with motivation thereof.

QUESTION 7

The Notarial Tie Agreement must be registered in both the Deeds Registries of Limpopo and Pretoria.

The following must be lodged in each office:

1. Title Deed;
2. Notarial Tie Agreement;
3. Transfer duty receipt;
4. Copy of Tie Agreement to be registered in the other office.

QUESTION 8

See section 38 of the DRA

1. If the title deed of any land has been lost, destroyed incomplete or unserviceable, and the registry duplicate of such title deed has also been lost, destroyed, incomplete or unserviceable, the registrar shall, on written application by the owner of the land, accompanied by a diagram of the land, in no diagram thereof is filled, in the registry or in the office of the surveyor-general concerned, execute a certificate of registered title in respect of such land in accordance with the diagram of the land.

2. Before issuing the certificate the registrar shall, at the expense of the applicant, publish in the prescribed form notice of intention to issue the certificate in two consecutive ordinary issues of the *Gazette* and in two consecutive issues of a newspaper printed in the division, district or country in which the land is situate, or if there is no such newspaper then in any circulating in such division, district or country.

3. A draft of the proposed certificate and a copy of the diagram, if any, accompanying the application, shall be open for inspection in the registry free of charge by an interested person, for a period of six weeks after the date of the first publication of the notice in the *Gazette*, during which period any person interested may object to the issue of the certificate.

4. Any person who has lodged with the registrar an objection to the issue of the certificate may, in default of any arrangement between him and the applicant, apply to the court within one month after the last day upon which an objection may be lodged, for an order prohibiting the registrar from issuing the certificate, and the court may make such order on the application as it may deem fit.

5. A certificate of registered title issued under this section shall be as nearly as practicable in the prescribed form and shall take the place of the lost, destroyed, incomplete or unserviceable title deed and shall embody or refer to every condition, servitude, bond, lease or other encumbrance which according to the records of the registry was embodied or referred to in the lost, destroyed, incomplete or unserviceable title deed or in any endorsement thereon.

QUESTION 9

If any deed referred to in regulation 68(1) of the TRA or any registered lease or sub-lease or registered cession thereof or any mortgage or notarial bond has for any reason become unserviceable, the registrar must issue a certified copy thereof to serve in place of the original on written application being made to him/her by the owner or the legal holder or the duly authorised agent of such owner or holder. The original deed must be lodged with such application. If any such deed, lease or sub-lease or registered cession thereof, or bond is lodged for any purpose without an application for a certified copy, the registrar has power, if in his/her opinion the same is not serviceable for the purpose intended, to require, a certified copy to be taken out provided all the requirements are met (regulation 68(8)). However, no advertisement is required.
No affidavit or statement in writing by the owner or legal holder is required. However, the written application above must be made by the owner, legal holder or duly authorised agent.
No consents from interested parties are required.

QUESTION 10

See Section 33 of the DRA

1. Any person who has acquired in any manner, other than by expropriation, the right to the ownership of immovable property registered in the name of any other person and who is unable to procure registration thereof in his name in the usual manner and according to the sequence of the successive transactions in pursuance of which the right to the ownership of such property has devolved upon him, may apply to the court by petition for an order authorizing the registration in his name of such property.

2. Every petition to the court under the provisions of this section shall be lodged with the registrar of the said court and the allegations contained in such petition shall be supported by sworn declarations and all available documentary evidence which the applicant may be able to adduce.

3. Every such petition shall be laid before one of the judges in chambers, who shall make such order thereon as to him shall seem fit, and any such judge may order that any matter arising upon any such petition shall be argued before and determined by the full court.

4. The court considering any petition for registration of title, may, if such court shall deem it expedient to do so, grant a rule *nisi* setting forth the description of the immovable property mentioned in such petition, and calling upon all persons claiming to have any right or title to such property to appear and establish their claims to the same upon a day to be named in the rule, and may give directions as to the mode of service of publication of such rule.

5. Upon the return day of any such rule granted as aforesaid, and no cause being shown to the contrary, the court may order the registrar of deeds to register the property mentioned in such order as the property of the person therein named, subject to such terms and conditions as may be therein mentioned.

Documents:

- Court order
- RCC
- TDR
- New Deed of Transfer as per Form H

QUESTION 11

These extending clauses are prepared according to the practice in Pretoria Deeds Office.

11.1 "As will more fully appear from annexed Consolidation Diagram SG No. 582/2016".

11.2 "First Registered and still held by Certificate of Consolidated title T43/2017 with Consolidation Diagram SG No. 582/2016 annexed thereto".

11.3 "First registered by Certificate of Consolidated title T43/2017 with Consolidation Diagram SG No. 582/2016 annexed thereto and held by Deed of Transfer T2000/2018".

11.4 "First registered by Certificate of Consolidated title T43/2017 with Consolidation Diagram SG No. 582/2016 annexed thereto and held by Deed of Transfer T1234/2019".

QUESTION 12

As will appear from annexed Sub-divisional Diagram SG No. 46/2020 and held by Deed of Transfer T99/2017.

QUESTION 13

½ mark for each correct entry

1. Application in terms of Section11(1) of the Sectional Titles Act 95/1986;
2. Title deed
3. Mortgage Bond plus consent by mortgagee
4. Approved Sectional Plans in duplicate;
5. Schedule of conditions in terms of Section 11(3)(b) of the Sectional Titles Act 95/1986;
6. Certificate by conveyancer regarding statutory rules or certificate by Chief Ombud regarding amended rules
7. Certificate of Real Right of Exclusive Use areas in terms of Section 12(1)(f) of the Act, - Form G;
8. CRST'S for units
9. Certificate of Real Right of extension in terms of Section 12(1)(e) of the Act in accordance with Form F;
10. Letter by Minister as required by the provisions of Act 70/1970
11. Documents required in terms of section 25 (Section 25(2)(a), Section 25(2)(b), Section 25(2)(c), Section 25(2)(d)
12. Certificate by Surveyor or Architect
13. Maybe SPLUMA CERTIFICATE if required in terms of Bylaws of the Local Authority

QUESTION 14

14.1 If an heir cannot pay the costs involved for the transfer into his/her name of immovable property to which he/she is entitled in accordance with a legacy or if it is not possible without imposing a heavy burden on such heir, the master may authorize the executor to have the title deed endorsed that the property has been bequeathed or inherited.

This situation is left entirely to the discretion of the Master and the Master's permission, usually in the form of a section 39(3) endorsement on the application that must accompany the application.

14.2 KOOS BESTER in my capacity as Executor in the Estate of the late SAREL VAN DER MERWE duly authorized hereto by virtue of Letter of Executorship No. 32/2019 issued by the Master of the High Court at Cape Town, on 12 April 2019.

QUESTION 15

15.1 Section 1 of the new Companies Act defines a ***"pre-incorporation"*** contract as "*a written agreement entered into before the incorporation of a company by a person*

who purports to act in the name of, or on behalf of, the proposed company, with the intention or understanding that the proposed company will be incorporated and will thereafter be bound by the agreement".

In other words, a pre-incorporation contract –

- must be *in writing*;
- had to be entered into *before* the company comes into existence;
- is entered into by and between a third party and a person, as agent.

who purports to act in the name of or on behalf of the company?

15.2 The board of directors may –

- *completely*,
- *partially; or*
- *conditionally*

ratify or reject the contract within three months after the company was incorporated.

15.3 3 months

15.4 According to Section 21(7), when a company rejects an agreement or any part of it, a person who bears liability for that rejected agreement may assert a claim against the company for any benefit it has received, or is entitled to receive in terms of the agreement.

15.5 The Turquand Rule was an exception to the doctrine of constructive notice. It was originally designed to mitigate the severe effects of the doctrine of constructive notice. In terms of this rule *bona fide* third parties contracting with the company are entitled to assume that all the company's internal formalities required for a valid contract have been complied with. Such party does not have a duty to enquire whether the company has complied with its internal formalities and procedural requirements.

Section 20(7) of the new Act provides that a person dealing with a company in *good faith* may presume that the company has complied with all formal and procedural requirements of –

- the Act;
- its memorandum of incorporation; and
- its rules

in making a decision in the exercise of its powers.

However, this arrangement does not apply when the person –

- knew or should reasonably have known

of the company's failure to comply with the requirement. Directors, prescribed officers or shareholders of a company may not rely on this provision when dealing with the company.

As can be gathered from the above, section 20(7) resembles the common law *Turquand rule*. Section 20(8) states that section 20(7) does not substitute any relevant common law principle relating to the presumed validity of the actions of the company, but applies concurrently.

15.6 The disposal of all or the greater part of its assets or undertaking by a company constitutes a *fundamental transaction* and if a regulated company is the one disposing of the assets or undertaking, then it also constitutes an affected transaction and which requires involvement of the Take-over Regulation Panel.

In terms of section 112(2) and (3), a company may only dispose of all or the greater part of its assets or undertaking if the following requirements are met –

- the specific disposal must be approved by a *special resolution* of the shareholders of the disposing company.

- The *notice of the shareholders' meeting* to consider the resolution –

  - must be delivered within the prescribed time and in the prescribed manner to each shareholder of the company, subject to section 62;

  - must include or be accompanied by a written summary of the precise terms of the transaction or series of transactions, to be considered at the meeting, and the provisions of section 115 and 164.

- The company must have satisfied all the other requirements set out in section 115, to the extent that those requirements are applicable to such a disposal by that company.

According to section 115(2) –

- the special resolution must be adopted by persons entitled to exercise voting rights on such a matter, at a meeting called for that purpose and at which sufficient persons are **present** to exercise, in aggregate, at least 25% of all of the voting rights that are entitled to be exercised on that matter, or any higher percentage, as may be required by the company's memorandum of incorporation;

- a special resolution is also required by the company's holding company, if any, if –
  - the holding company is a company or an external company;
  - the proposed transaction concerns a disposal of all or the greater part of the assets or undertaking of the subsidiary; and
  - having regard to the consolidated financial statements of the holding company, the disposal by the subsidiary constitutes a disposal of all or the greater part of the assets or undertaking of the holding company.
- court approval is only necessary in the circumstances set out in section 115(3) to (6).

Section 115(8) deals with the appraisal rights of dissenting shareholders. It provides that the holder of any voting rights in a company is entitled to seek relief in terms of

section 164 if that person –

- had notified the company in advance of his intention to oppose the special resolution; and
- had been present at the meeting and voted against that special resolution.

This right effectively entitles shareholders, who do not approve of the fundamental transaction, to opt out of the company (but not to prevent the transaction) by withdrawing the fair value of their shares in cash.

The above requirements do not apply to the disposal of or sale of all or the greater part of the assets or undertaking of a company where the transaction is –

- as a result of a business rescue plan;
- between a holding company and its wholly-owned subsidiary;
- between two or more wholly-owned subsidiaries of the same holding company; or
- between a wholly-owned subsidiary on the one hand, and its holding company and one or more wholly-owned subsidiaries of that holding company, on the other hand.

QUESTION 16

16.1 Should a building not have been erected on the land within the specified period of time, the enforcer must waive its right to the condition and the provisions of section 68 of the Deeds Registries Act 47 of 1937 must be applied to cancel the condition, subsect to the payment of transfer duty.

16.2 A condition worded like the example given above, will only lapse where the enforcer for the condition provides the registrar with documentary evidence that a dwelling has been erected on the property within the specified period of time.

In this instance the provisions of section 68(1) will be applied and the noting of the lapsing of the reversionary right will be endorsed against the title of the land, simultaneously with the transfer of the property into the name of the new owner (RCR 49 of 2010 and RCR 17 of 2011). No transfer duty is payable.

16.3 If a building has not been erected on the property and land is being transferred into the name of a new owner, the condition must be perpetuated into the new deed of transfer, if the specified period of time has not lapsed.

However, where the time period referred to in the condition has lapsed and the building has not been erected, the property must revert to the enforcer of the condition, alternatively the enforcer must waive his right and the condition be cancelled in terms of the provisions of section 68 must be complied with, subject to the payment of transfer duty.

16.4 The bond can only be passed by the owner and the enforcer of the reversionary right where they are jointly indebted to the mortgagee. This very seldom occurs in practice.

The second alternative of providing a consent by the holder of the reversionary right is also very risky. It is evident that the legislature did not anticipate a reversionary right

condition with section 53(2), merely a personal right, not binding successors in title.

It will, however, be prudent to have the holder waive such right in favour of the bond (see Regulation 41(8)).

QUESTION 17

17.1 Fideicommissum residue

When the fideicommissum lapses the fiduciary is entitled to at least one quarter of the assets subject to the fideicommissum.
In this case the fiduciary is entitled to alienate (except by *donatio mortis causa* or will) three-fourths of the property (see the 108th Navella of Justinianus). The Registrar of Deeds does not enforce the 108th Novella (see RCR 25 of 1999).

17.2 If the *fideicommissum* is created in a will and the fiduciary dies before transfer in his/her favour has been effected, the property may be transferred directly to the *fideicommissary* heirs free from the *fideicommissum* (section 14(1)(b)(vi)).

This is one of the exceptions to section 14, where the transactions do not have to follow the sequence.

17.3 An anonymous (or sleeping) partnership is created where parties agree to share the profits of a business which is to be carried on by one or more of the partners in his or their name, while the partners whose names are not disclosed remain anonymous partners (*Lamb Bros v Brenner & Co* (1886) 5 EDC 152 at 162 and *R v Siegel & Frenkel* 1943 S R 13 at 15). Although he/she may be described as a partner, the essence of the arrangement is that this fact must be carefully concealed from the outside world.

A partnership *en commandite* is carried on in the name of one or more partners, the other partner, whose name remains undisclosed, agreeing to contribute a fixed sum, on condition that he will receive a certain share of the profits, if any, but that in the event of loss he/she will not be liable for more than the fixed sum he has agreed to contribute as capital to the partnership (*Lamb Bros v Brenner & Co* (*supra*) at 161 and *Butcher & Sons v Baranov Bros* (1905) 26 NLR 589 at 592).

These two types of partnership are similar in the following respects (the term partner in each case comprehending anonymous and commanditarian partners):

- The partner is undisclosed.

- The partner is liable only to co-partners, and not creditors of the partnership. (*Chapman v Gersigny* (1882) 3 NLR 122). This is so even although a creditor is informed of the nature and terms of the partnership (*Hall v Millin & Hutton* 1915 SR 78; *R v Siegel & Frenkel* 1943 SR 13 at 15). Further, mere interference *per se* in the partnership business does not render the partner liable to third parties; to establish such liability, it must be proved that he/she held him/herself out publicly as a partner, or led third parties to believe that he/she was a partner by doing such acts as are done by a partner only (*Watermeyer v Kerdel's Trustees* (1834) 3 M 424 at 436).

- On the insolvency of the known partner, the partner cannot claim concurrently with the creditors of the partnership against the partnership: "*… 'n vennoot, en commandite of naamloos, [kan] nie in kompetisie met die krediteure van die vennootskap vir die terugbetaling van kapitale bydrae of profyte … eis nie. Hierdie stelling is gegrond op die beginsel dat daar die vennoot verantwoordelik is vir die vennootskapskulde, sodanige skuldeisers in werklikheid ook sy eie krediteure is, en hy kan nie toegelaat word nie om die vennootskap se bates te verminder tot die nadeel van diegene wat skuldeisers sowel van die vennootskap as van homself is nie.*" (*Venter v Naude NO* 1951 (1) SA 156 (O) at 163).

- A partner may not participate actively in the business of the partnership, and may not, while the partnership is still in existence, claim possession of assets of the business (*Eaton & Louw v Arcade Properties (Pty) Ltd* 1961 (4) SA 233 (T) at 239).

The important difference between an anonymous and a commanditarian partner is that the former is liable for his/her full share of the debts to the principal or known partner, who has lawfully contracted them, whereas the latter is liable to the known partner only to the extent of the amount of the capital contributed or agreed to be contributed by him. (*Lamb Bros v Brenner & Co* (1886) 5 EDC 152).

A partnership agreement will be construed in favour of its creating a general partnership, rather than an anonymous or commanditarian partnership (*Butcher & Sons v Baranov Bros* (1905) 26 NLR 589 at 593) but there seems no reason why the latter types cannot be constituted otherwise than by express agreement. All the circumstances must be examined to determine whether a partnership is general or not (see e g *Sacca Ltd v Olivier* 1954 (3) SA 136 (T) at 138). The fact that all the parties openly take part in the conduct of the partnership business is sufficient to disprove the existence of an anonymous or commanditarian partnership. In addition, it has been stated that a clause in a partnership agreement allowing each partner to draw cheques in the name of the partnership and another providing that no risks shall be undertaken on account of the partnership unless with the consent of the partners are completely inconsistent with the idea of a commanditarian or anonymous partnership (*Barker & Co. v Blore* (above)).

Clearly, the parties may agree at their discretion as to what share of profits and of losses the anonymous or commanditarian partner shall gain or bear (see *Watermeyer v Kerdel's Trustees* (1834) 3 M 424).

It is not necessary, in an action brought by the partnership, to include in the summons the name of an anonymous partner (*Lolly v Gilbert* (1830) 1 M 434).

The question posed to the registrars at their annual conference was whether a vesting can disclose or refer to a commandite partner in deeds and documents. The Conference held that in terms of section 24*bis* read with regulation 34(1) of the Deeds Registries Act 47 of 1937, reference or disclosure to such a partner will not be allowed (RCR 22 of 2012).

TOTAL: [100]