

RESOLUTIONS TAKEN AT THE REGISTRARS' CONFERENCE 2012

INTRODUCTION

The Annual Registrars' Conference was held from 22 to 26 October 2012. This Conference was attended by senior managers from the ten deeds registries, as well as the senior managers from the offices of the Surveyors General. Also present were representatives from each of the Provincial Law Societies.

In total 81 matters were discussed and resolutions taken. These relate to the day-to-day practice of Conveyancing and Notarial Practice, and will become operative on the 2nd January 2013 *vide* CRC 16 of 2005.

All persons involved in conveyancing and notarial practice must take cognizance of the resolutions, as some have altered the practice and others have merely confirmed the existing practice.

The resolutions taken have been divided into specific categories, which are now dealt with under the said headings.

A. WITHDRAWAL OF PREVIOUS REGISTRARS' CONFERENCE RESOLUTIONS

Item 1 of 2012

The following Registrars' Conference Resolutions are withdrawn:

- RCR 21 of 1961: (see RCR 27 of 2012);
- RCR 15 of 2002: (see amendment to regulation 68(11A) of the Deeds Registries Act, 47 of 1937);
- RCR 45 of 2003: (see RCR 63 of 2011, as well as RCR 3 of 2012);
- RCR 42 of 2005; (see RCR 5 of 2011);
- RCR 4 of 2009: (see amendment to regulation 68(11A) of the Deeds Registries Act, 47 of 1937);

- RCR 77 of 2010: (see regulation 25A of the Sectional Titles Act, 95 of 1986);
- RCR 79 of 2010: (see amendment to Form AK);
- RCR 13 of 2011: (see RCR 10 of 2012).

B. PREVIOUS REGISTRARS' CONFERENCE RESOLUTIONS

Item 2 of 2012

RCR 36 of 2002: Cancellation of an exclusive use area

Where the same exclusive use area was erroneously transferred to two owners of sections in a scheme, why does RCR 36 of 2002 state that both exclusive use areas must be cancelled and the body corporate re-reserve the right *de novo*? Shouldn't only the faulty owned exclusive use area be cancelled?

Resolution:

No. The Sectional Titles Act, 95 of 1986 does not provide for the cancellation of an erroneously registered right of exclusive use area.

(RCR 36 of 2002 is confirmed)

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Item 3 of 2012

RCR 45 of 2003 and RCR 63 of 2011: Transfer of whole of common property

RCR 45 of 2003 is affected by RCR 63 of 2011 in respect of the transfer of the whole of the common property. RCR 45 of 2003 should be amended to indicate that section 57 of the Deeds Registries Act, 47 of 1937 cannot be applied for the transfer of the whole of the common property.

Resolution:

The bonds must be cancelled. Where the whole of the common property is transferred (or a part thereof including more than one section, subject to different bonds, is transferred) section 57 of the Deeds Registries Act, 47 of 1937 cannot be applied.

(RCR 45 of 2003 is withdrawn)

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Item 4 of 2012

RCR 55 of 2006: Description of developer

According to RCR 55 of 2006 the developer must be a party to the notarial deed for purposes of registering an encroachment. How must the developer be described?

Resolution:

The developer must be described in the following manner:

“Name of Developer, developer of the Scheme (name of scheme) No SS”

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Item 5 of 2012

RCR 60 of 2008 and RCR 13 of 2011: Noting of lapsing of a section 25 right

Why must the lapsing of a section 25 right be noted in terms of section 68 of the Deeds Registries Act, 47 of 1937, while section 15B(1)(d) of the Sectional Titles Act, 95 of 1986 provides for the cancellation of the registration of a real right which has lapsed for any reason, on production of proof that the real right has lapsed?

Resolution:

RCR 60 of 2008 and RCR 13 of 2011 must be amended to refer to section 15B(1)(d) of the Sectional Titles Act, 95 of 1986. However the provisions of section 68(1) of the Deeds Registries Act, 47 of 1937 apply with the necessary changes.

- **RCR 60 of 2008 is amended to read as follows:**

“RCR 60/2008: - Section 25 of the Sectional Titles Act, 95 of 1986: Subdivision of real right of extension

A real right of extension is subdivided into numerous portions. What procedure must be followed for purposes of the endorsement of the lapsing of the right on the section 11(3)(b)-schedule of conditions?

Resolution:

The 11(3)(b) schedule must only be endorsed, in terms of section 15B(1)(d) of Act No. 95 of 1986, when the whole of the right has lapsed. The provisions of section 68(1) of Act No. 47 of 1937 must be applied with the necessary changes.”

- **RCR 13 of 2011 is amended to read as follows:**

“RCR 13 of 2011: - RCR 8 of 2009 and RCR 31 of 2010: Right of Extension and section 15B(3) Certificates

RCR 8 of 2009 and RCR 31 of 2010 are in contradiction to CRC 6 of 1988 (paragraph 14.5). If a section 25 right has expired must an application be lodged to note the lapsing of the right before the developer applies for a right to extend in terms of section 25(6A)?

Resolution:

Yes, section 15B (1)(d) of Act no. 95 of 1986 must be invoked to note the lapsing prior to the developer applying for a right to extend in terms of section 25(6A) of Act No. 95 of 1986. The provisions of section 68(1) of Act No. 47 of 1937 must be applied with the necessary changes.”

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Item 6 of 2012

RCR 54 of 2010: Property sold in execution

RCR 54 of 2010 should be revisited given the case of *Edkins v Registrar of Deeds* (Case No. 16117/2011).

Resolution:

RCR 54 of 2010 stands, pending the outcome of the appeal of the *Edkins*-case.

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Item 7 of 2012

RCR 83 of 2010, as amended by RCR 19 of 2011: Opening of sectional title register by executor

In terms of RCR 83 of 2010 (as amended by RCR 19 of 2011) the executor may apply for the opening of a sectional title register “*where the deceased had sold units in the scheme*”. The word “*sold*” should be substituted with “*dealt with*” as the deceased, during his/her lifetime, might have donated, exchanged or afforded a real right over a unit.

Resolution:

RCR 83 of 2010 is amended to read as follows:

“RCR 83/2010: May the executor apply for the opening of a sectional title register?”

May an executor, administering the estate of a deceased “developer”, apply for the opening of a sectional title register?

Resolution:

Yes, where the deceased had sold, donated, exchanged, alienated, bequeathed, or encumbered units in the scheme, or where it has become necessary for the executor in the exercise of his/her duties in the winding up of the estate, the executor may continue with the application for the opening of the scheme.”

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Item 8 of 2012

RCR 89 of 2010 (as amended by RCR 20 of 2011): Cancellation of servitude to which the common property is entitled to and section 72(2)*bis* of Act No. 47 of 1937

RCR 89 of 2010 (as amended by RCR 20 of 2011) states that the consents need not be lodged, but filed in the notaries' protocol. Only the bonds existing at date of the execution of the notarial deed of cancellation of the servitude must be lodged.

Resolution:

RCR 89 of 2010 is confirmed.

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Item 9 of 2012

Incorrect Heading to RCR 11 of 2011

The heading to RCR 11 of 2011 is incorrect and must be amended.

Resolution:

Yes, see RCR 11 of 2011 as amended.

The heading to RCR 11 of 2011 is amended to read as follows:

“RCR 11/2011: RCR 61 of 2008: Compliance of section 25(2)(a) and (b) of Act 95 of 1986”

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Item 10 of 2012

RCR 13 of 2011, RCR 8 of 2009 and RCR 31 of 2010: Noting of lapsing of section 25 right

RCR 13 of 2011, RCR 8 of 2009 and RCR 31 of 2010 are in contradiction to CRC 6 of 1988. If a section 25 right has expired must a section 15B(1)(d) application be lodged to note the lapsing of the right before the developer or body corporate apply for a right to extend in terms of section 25(6) or section 25(6A)?

Resolution:

Yes, a section 15B(1)(d) application must be lodged to note the lapsing prior to the body corporate or developer applying for a right to extend, in terms of section 25(6) or section 25(6A) of the Sectional Titles Act, 95 of 1986. The provisions of section 68(1) of Act No. 47 of 1937 apply with the necessary changes.

COMMENT:

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Item 11 of 2012

RCR 67 of 2011: Acquiring of extended right in terms of section 25 of the Sectional Titles Act, 95 of 1986

How must the extended right be acquired?

Resolution:

RCR 67 of 2011 is amended to read as follows:

“RCR 67 of 2011 Section 25 extensions and transfer duty

If the developer deviates from the section 25 plans when he/she extends the scheme, must the registrar insist on a transfer duty receipt for the rights he/she acquire to extend the scheme on the portions of the common property on which the right was not reserved?

Resolution:

If the developer has encroached on areas of the common property not so reserved, such existing right will have to be cancelled and recreated by the body corporate and ceded to the developer, on which acquisition transfer duty must be paid.”

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Item 12 of 2012

RCR 76 of 2011 – consent of bondholder

According to RCR 76 of 2011 the consent of the holder of a real right registered over the section which is linked with the exclusive use area, must also be lodged. What if, e.g. a usufruct is registered over the section only, and the exclusive use area is cancelled? Is the consent of the holder of the usufruct over the section still required?

Resolution:

It will not be necessary to lodge the consent of the holder of a real right if the real right is registered over the section only, and the exclusive use area linked to that section is cancelled. RCR 76 of 2011 only applies when the exclusive use area, which is to be cancelled is subject to a real right.

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Item 13 of 2012

RCR 31 of 2006 and RCR 14 of 2008: Use of Abbreviations in deeds and documents

RCR 14 of 2008 does not allow for the use of certain abbreviations. However, the said practice is permitted in terms of the provisions of section 11 of the Companies Act, 71 of 2008. Should RCR 14 of 2008 not be revisited?

Resolution:

RCR 14 of 2008 is confirmed.

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Item 14 of 2012

RCR 48 of 2007 referring to consents in terms of Act 70 of 1970 must be reconsidered

Resolution:

RCR 48 of 2007 is confirmed, which reads as follows:

“RCR 48/2007: Subdivision of Agricultural Land Act 70 of 1970
Where a sectional title register is opened on land encompassing the word “farm” in the property description must CRC 6 of 2002 be applied in that the consent of the Minister must be obtained, alternatively proof that such land is not deemed to be agricultural land?
RESOLUTION:
Yes, CRC 6 of 2002 is applicable.”

COMMENT:

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C. DEEDS REGISTRIES ACT NO. 47 OF 1937

Item 15 of 2012

Section 4(1)(b)

How must “*interested party*” in section 4(1)(b) of the Deeds Registries Act, 47 of 1937 be interpreted, i.e. who must be regarded as an interested party and provide the necessary consent(s) for the amendment of the error in registration?

Resolution:

It must be interpreted as any person whose rights may be affected in the rectification of the error.

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Item 16 of 2012

Dealing with bonds where title is cancelled in terms of section 6 of the Deeds Registries Act 47 of 1937

When a title is cancelled in terms of section 6 of the Deeds Registries Act, 47 of 1937 and the court orders that bonds that existed over the property, under the original title, must be re-instated, how must the said re-instatement of the bonds be endorsed on the revived title?

Resolution:

Re-instated bonds must be re-endorsed and signed on the reviving title and a hand written endorsement, explaining the reason for re-instatement, must be made directly above the new bond endorsements.

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Item 17 of 2012

Section 20 and passing of transfer

Where immovable property was attached and sold in execution, and the owner subsequently dies, who must pass transfer of the property?

Resolution:

The Sheriff as statutory agent may proceed with the transfer. The provisions of section 30 of the Administration of Estates Act, 66 of 1965 do not find application.

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Item 18 of 2012

Consent in terms of section 65(3) re Eskom and Rand Water Board

Are servitudes to be registered in favour of Eskom and the Rand Water Board exempt from having to obtain the consent of bondholders and holders of real rights, as referred to in section 65(3) of the Deeds Registries Act, 47 of 1937?

Resolution:

No, Eskom and the Rand Water Board are not exempt from the provisions of section 65(3).

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Item 19 of 2012

Erroneous removal of condition in terms of section 68(1) and rectification thereof

If a condition was erroneously cancelled in terms of section 68(1) of the Deeds Registries Act, 47 of 1937 instead of the applicable legislation (e.g. Removal of Restrictions Act), how should the error be dealt with or rectified?

Resolution:

Section 4(1)(b) of the Deeds Registries Act, 47 of 1937 must be applied to revive the condition and the applicable legislation (e.g. Removal of Restrictions Act) utilized for the removal thereof.

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D. REGULATIONS TO THE DEEDS REGISTRIES ACT 47 OF 1937

Item 20 of 2012

Calculation of Fee in terms of Regulation 84

When more than one property is included in an application in terms of section 45, how must the office fee be calculated? Must it be calculated on each property separately or on the aggregate amount?

Resolution:

The fee must be calculated on the sum total of all the property values.

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E. GENERAL (ACT NO. 47 OF 1937)

Item 21 of 2012

Bewind trust

How must a “*bewind trust*” be described in deeds and documents?

Resolution:

It must be described in the same manner as any other **mortis causa** or **inter vivos** trust (see the definition of ‘*trust*’ in the Trust Property Control Act, 57 of 1988).

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Item 22 of 2012

Description of a *Commandite Partnership*

Can a vesting disclose or refer to a *commandite* partner in deeds and documents?

Resolution:

No, the provisions of section 24 of the Deeds Registries Act, 47 of 1937 does not allow for such disclosure or reference.

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Item 23 of 2012

Passing of bond by executor

May a bond be passed by an executor/representative of a deceased estate?

Resolution:

Yes, provided it is authorized in terms of the will. However, if not authorized in terms of the will, the executor will require an order of court before he/she can pass a mortgage bond, except where the mortgage is for the purpose of paying estate duty assessed against the estate. In such a case it is sufficient if the Master consents. See '*Law and Practice of the Administration of Estates*' by Meyerowitz.

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Item 24 of 2012

Waiver of limited interest

Where massing and adiation have occurred, may the person who has adiated the terms of the will, simultaneously with the transfer of the immovable property to the heir, waive his/her limited interest in the massed property?

Resolution:

Yes, see *Rampathy v Krumm NO and Others* 1978 (4) SA 935.

COMMENT:

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Item 25 of 2012

Power of executors to transfer

Where a company, consisting of only one director, has sold immovable property during the lifetime of such sole director and the land must now be transferred, who has the capacity to affect such transfer? The Companies Act No. 71 of 2008 is not clear in this regard.

Resolution:

The executor cannot pass transfer. A new director will have to be appointed to perform the act of registration.

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Item 26 of 2012

Registration of a lease agreement in respect of a portion of a building

Can a long term lease agreement be registered in respect of a part of a building, without a sectional title register having been opened in respect of such building?

Resolution:

Yes, if a diagram is provided as required in terms of regulation 73(2) of the Deeds Registries Act, 47 of 1937.

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Item 27 of 2012

Date of transaction where massing and adiation takes place

In terms of the Transfer Duty Manual issued by SARS, there is a vast amount of confusion as to the date of transaction where massing and adiation take place, as well as with repudiation, in cases of testate and intestate succession. What must the “*date of transaction*” be?

Resolution:

The date of the death of the “*testator*” will be the date of the transaction.

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Item 28 of 2012

Description of parties to a polygamous marriage

Given the case of *Ngwenyama v Mayelane and Another 474/2011* [2012] ZASCA 94 dated 1 June 2012, how must a person be described who currently is a spouse in a monogamous customary marriage, deemed to be one of in community of property, and who has entered into a polygamous customary marriage, without the required order of court as provided for in section 7(6) of the Recognition of Customary Marriages Act, 120 of 1998?

Resolution:

The following is the appropriate manner to describe such a person:

*“A Identity Numberand B Identity Number
Married in community of property to one another*

and

A.... married in terms of customary law”

COMMENT:

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Item 29 of 2012

Diagrams for *habitatio*: regulation 73(2)

Is it always necessary for the submission of a diagram for the registration of a *habitatio*, given the fact that a *habitatio* can only be in respect of a dwelling on the land?

Resolution:

Yes, see the provisions of regulation 73(2) of the Deeds Registries Act, 47 of 1937, and also the unreported case *Kidson vs Jimspeed Enterprises (Case No. 3857408)*.

(RCR 21 of 1961 is withdrawn)

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Item 30 of 2012

Disclosure of particulars in Consents

Where a consent drafted in accordance with prescribed form MM is lodged, must such consent disclose the particulars of all previous dealings with such bond, such as cessions, part payments, etc?

Resolution:

It is only necessary to refer to previous cessions (see Form MM).

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Item 31 of 2012

Partition of land subject to Fideicommissum: Consent of the trustee in respect of the Insolvent Fideicommissary Heir

In terms of section 30 of the Deeds Registries Act, 47 of 1937 the trustee must consent to the partition of land if a fideicommissary heir is insolvent. According to the definition of '*property*' in section 2 of the Insolvency Act, 24 of 1936, '*property*' means movable or immovable property and excludes the contingent interest of the fideicommissary heir in the property. The fideicommissary heir is not recognized as the property owner. Must the consent of the trustee be required if the provisions of section 2 of the Insolvency Act, 24 of 1936 are taken into consideration?

Resolution:

Yes. The consent of the trustee on behalf of the insolvent fideicommissary must be obtained in terms of section 30 of the Deeds Registries Act, 47 of 1937.

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Item 32 of 2012

Referral of the servitude diagram to the SG for plotting – should it be before or after registration of the servitude?

Scenario: A right of way was created in a Notarial Deed of Servitude but the right was not depicted on a new diagram. The notary attempted to comply with regulation 73(2) of the Deeds Registries Act, 47 of 1937, and the deeds were lodged and registered. The diagram, attached to the diagram deed, was then referred to the Surveyor General for plotting but the Surveyor General informed the deeds registry that the servitude could not be plotted and that the deed was incorrectly registered.

When a diagram is filed in the deeds registry and the Surveyor General needs to plot a servitude, such diagram must be referred to the Surveyor General before lodgement. Must approval be obtained from the Surveyor General before lodgement?

Resolution:

No. The Surveyor General's approval is only required in instances where the servitude is not of a constant width and does not extend the entire length of a surveyed line on a diagram (see regulation 73(2) of the Deeds Registries Act, 47 of 1937).

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Item 33 of 2012

Consents to sub-division and endorsements on Power of Attorney in terms of Regulation 38 of Ordinance 15 of 1986

Must the Registrar insist upon a regulation 38 certificate in terms of Ordinance 15 of 1986, as well as the consent to subdivision from the local authority, with the subdivision of an erf?

Resolution:

Yes, the regulation 38 certificate, as well as the consent to subdivision, in terms of section 92 of Ordinance 15 of 1986, must be lodged. The latter is necessary in order to establish whether there are registerable conditions that must be created or brought forward.

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Item 34 of 2012

Value of property

Must the value of a property be referred to in the *causa* (form H – sectional title deed), and in the consideration clause (form E – conventional deed), or may these formats be deviated from?

Resolution:

In sectional title transfers the value should be disclosed in the *causa* (see form H).
In conventional deeds of transfer the value should be disclosed in the consideration clause (see form E).

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Item 35 of 2012

Portion of a public space or public street closed and converted to an ordinary erf in terms of Ordinance 15 of 1985

The ownership of public places and public streets vest in the local authority in whose jurisdiction that land is situated (section 28 of Ordinance 15 of 1985). What is the correct registration procedure when a portion of a public space or public street is closed and converted into an ordinary erf?

Resolution:

A section 31 vesting transfer must precede the transfer to the third party.

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Item 36 of 2012

Attachment notice referring to incorrect property description

Scenario: The whole of a property has been subdivided into two erven subject to a SGO *caveat* indicating that the property has been subdivided, leaving no remainder. One of the erven has been transferred in the meantime. The remainder of the property, which represents the last erf to be transferred, has subsequently been attached and a sheriff transfer is now lodged. Instead of referring to the “*remainder*” as per the attachment notice, the sheriff transfer now refers to the new erf as per the SGO *caveat*. Can this be allowed?

Resolution:

The transfer referring to the created erf should be allowed, provided the relevant diagram is attached.

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Item 37 of 2012

Powers of a business rescue practitioner

Can the business rescue practitioner mortgage company property without the resolution of the board of directors?

Resolution:

Yes, see section 140 of the Companies Act, 71 of 2008.

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Item 38 of 2012

Language of draft bond

May a draft bond be couched in a different language to that of the bond that has to be registered?

Resolution:

No, the bond must follow the language of the draft bond.

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Item 39 of 2012

Home Owners Association conditions

Scenario: A developer of a township is placed under liquidation and the whole development is transferred to a new owner. The new owner forms a Home Owners Association with new conditions. How must the conditions that are referring to the first Home Owners Association (which is not operational) be dealt with?

Resolution:

The conditions creating the first Home Owners Association must be removed in terms of the relevant legislation or an order of court must be sought.

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Item 40 of 2012

Cession of a long term lease

Can the holder of a long term lease over immovable property cede an undivided share to someone else?

Resolution:

Yes, provided that such cession is not prohibited by the provisions of the lease.

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F. OTHER LEGISLATION THAT HAS AN IMPACT ON DEEDS REGISTRY PRACTICE AND PROCEDURE

Item 41 of 2012

Section 42(2) of Act No. 66 of 1965

Where immovable property is sold by the executor in the estate of the sole member of a Close Corporation, must the Master, in terms of section 42(2) of the Administration of Estates Act, 66 of 1965, provide the necessary consent?

Resolution:

No, the provisions of section 42(2) of the Administration of Estates Act, 66 of 1965 are not applicable.

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Item 42 of 2012

Section 20 of the Alienation of Land Act, 68 of 1981

May a contract as envisaged under section 20 of the Alienation of Land Act, 68 of 1981, be recorded against residential property which has been attached?

Resolution:

Given the provisions of the Alienation of Land Act, 68 of 1981, such contract may be recorded, provided the purchaser, in writing, confirms knowledge of the attachment.

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Item 43 of 2012

Section 2 of the Transfer Duty Act, 40 of 1949

Must a transfer duty receipt or exemption from transfer duty be called for when a negative personal servitude is created in the power of attorney, and duly accepted?

Resolution:

Yes, it is a transaction as per the definition of '*transaction*' in the Transfer Duty Act, 40 of 1949, unless it is exempt for any other reason.

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Item 44 of 2012

Application in terms of section 39(3) of the Administration of Estates Act, 66 of 1965, where property is attached

Is the registration of an application in terms of section 39(3) of the Administration of Estates Act, 66 of 1965 allowed when the property is attached?

Resolution:

Yes, as section 39(3) of the Administration of Estates Act, 66 of 1965 is not an act of registration.

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Item 45 of 2012

Purchase date of a first transfer before the proclamation date of the township

In terms of various Provincial Ordinances land in a township cannot be sold, exchanged, leased or disposed of in any manner before the proclamation date. Can the owner, based on the *Huntrex 148 (Pty) Ltd vs JA van Jaarsveld, case 217/2010*, sell property before the township is proclaimed?

Resolution:

The Ordinances must be adhered to, alternatively a court order is required.

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Item 46 of 2012

Section 10A and 10B of the Housing Act, 107 of 1997 conditions

Where a conveyancer omitted to register the section 10A and 10B of the Housing Act, 107 of 1997 conditions on transfer of a property to the subsidized purchaser, how should these conditions be registered against the title deed?

Resolution:

The conditions can be registered upon lodgment by the owner of an application in terms of section 3(1)(v) of the Deeds Registries Act, 47 of 1937, together with the necessary proof.

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Item 47 of 2012

Transfer of remainder of farm with a date of sale prior to the date of issue of the Act 70 of 1970 consent

Where a certificate of registered title is taken out for a portion of a farm which is subject to the provisions of the Subdivision of Land Act, 70 of 1970, how must the Registrar ensure that neither the portion nor remainder is transferred with a date of sale prior to the date of issuing of the Act No. 70 of 1970 consent?

Resolution:

The examiner must note a *caveat* stating that on transfer of the subdivided portion or remainder, the date of sale cited in the deed of transfer must be compared with the date of issue of the Act 70 of 1970 consent, filed with the Certificate of Registered Title. This must be done to ensure that the sale took place subsequent to the issuing of the Act 70 of 1970 consent. The *caveat* may also be noted against the name of the registered owner.

COMMENT:

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Item 48 of 2012

Endorsement of title deeds in terms of Item 28(1) Schedule

A vesting in terms of Item 28(1) of Schedule 6 of the Constitution needs to be endorsed, but the title deeds are not available. How must the vesting be affected?

Resolution:

If the client's copy of the title deed is not available, the office copy may be endorsed to indicate the vesting provided that proof from the department is lodged to indicate the unavailability of the client's copy. A caveat must be recorded for purposes of the endorsement of the client's copy.

COMMENT:

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G. SECTIONAL TITLES ACT NO. 95 OF 1986

Item 49 of 2012

Section 14(8) and cancellation of plans by order of court

The Sectional Titles Act, 95 of 1986 is silent with regard to the procedure to be followed when a body corporate is established. Is it correct that in this case the developer's title cannot revive and that certificates of registered titles must be issued to the owners in accordance with their participation quota? The units, and sections 25 and 27 rights may also be mortgaged and the bonds must be dealt with, i.e. cancelled or substituted.

Resolution:

The certificates of registered titles must be issued and the bonds must be dealt with as provided for in section 18 of the Sectional Titles Act, 95 of 1986.

COMMENT:

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Item 50 of 2012

Section 17: extending clause in deed of transfer

When the transfer of part of the common property is to be registered (see Form H par. 2) a diagram must be lodged and an extending clause contained in the deed. How must the extending clause read?

Resolution:

Prescribed form TT must be followed alluding to the diagram and holding deed, the latter being the title deed of the land on which the register was opened.

COMMENT:

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Item 51 of 2012

Section 17: Transfer of part of the common property which includes part of an exclusive use area

When part of the common property, which includes part of a section, is transferred, an amended participation quota schedule indicating the extent of the remaining part of the section is lodged. When part of an exclusive use area, created in terms of section 27(1), is affected by the transfer, how does the exclusive use area need to be dealt with?

Resolution:

The whole of the exclusive use area must be cancelled.

COMMENT:

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Item 52 of 2012

Section 18 and bonds registered over real rights

Section 18 makes sections 56 and 57 of the Deeds Registries Act, 47 of 1937 applicable in respect of section 17 transfers. However, section 18 does not apply to exclusive use areas and section 25 rights. How must bonds be dealt with in respect of exclusive use areas and section 25 rights?

Resolution:

Until the Sectional Titles Act, 95 of 1986 is amended, section 18 must be applied in respect of exclusive use areas and section 25 rights. Cancellation of the bonds or release of the rights must be effected.

COMMENT:

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Item 53 of 2012

Sections 22 and 23 and usufruct

When a section is subdivided and such section is subject to a real right, e.g. *usufruct*, the certificates of registered sectional titles of the new sections must include the *usufruct* as a condition. However, when two sections are consolidated and one of the sections is subject to a *usufruct*, how must it be dealt with in the certificates of registered sectional titles of the consolidated section?

Resolution:

The conditional clause must be qualified to refer to the former section which was subject to the *usufruct*.

COMMENT:

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Item 54 of 2012

Section 22 and bonds

The Sectional Titles Act, 95 of 1986 provides for the issuing of certificates of registered sectional titles in the names of the persons entitled thereto according to the partition agreement.

- (a) What about a bond passed by both joint owners registered over the original section? Can the bond be substituted?
- (b) Was it the intention of the legislator that the certificate of registered sectional titles must be issued in favour of the persons entitled thereto and not to the joint owners of the original unit? Does this also mean that no partition transfers will be registered subsequent to the issuing of the certificate of registered sectional titles?

Resolution:

- (a) Yes. The bond can be substituted and the bond endorsement on the certificates of registered sectional titles must be qualified "*With other properties*" or "*WOP*".
- (b) The Act is clear in so far certificates of registered sectional titles must be issued in favour of the respective owners or persons entitled thereto in order to give effect to the partition.

COMMENT:

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Item 55 of 2012

Section 25 and lapsing of real right of extension

When it is evident from the deeds registry records that a real right of extension has lapsed because it has exhausted itself or the period of time has lapsed, should the Registrar not, on own accord, endorse the section 11(3)(b)-schedule of conditions as to the lapsing of the right. The eternal perpetuation of the right in deeds registry registers should not be allowed.

Resolution:

No.

COMMENT:

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Item 56 of 2012

Section 25 and RCR 70 of 2011

The extent of the right of extension must be mentioned on the subdivisional plans. However, prescribed form F (certificate of real right in terms of section 25) does not make provision for the extent of the initial section 25 right. Due to the fact that the section 25 right can be subdivided it has become a necessity for the extent to be inserted.

Resolution:

Pending the amendment of the regulations to the Sectional Titles Act, 95 of 1986, form F must be adapted to provide for the completion of the extent of the section 25 right.

COMMENT:

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Item 57 of 2012

Creation of servitudes under section 29(3)

May a developer, prior to the establishment of the body corporate, enter into a notarial deed as envisaged under section 29, restricting the common property of a sectional title scheme?

Resolution:

Yes, the developer has the right to enter into a notarial deed restricting the common property. However, a Registrar shall not register such servitude unless an affidavit by the developer is lodged to the effect that no unit in the scheme has been sold, donated or exchanged, or if a unit was so alienated, the developer had disclosed in writing to the acquirer thereof that the servitude is to be registered or in the absence thereof if the acquirer consented thereto in writing.

COMMENT:

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Item 58 of 2012

Section 48(3)(a): rebuilding of the whole or part of the building(s)

The owners may authorize for the rebuilding of the whole or part of the building(s).

- (a) What is the purpose of lodging a notification with the Registrar for rebuilding of the whole of a building, taking cognizance of the fact that the building must be rebuilt according to the existing plans? There is no significance in registering it, except for historical purposes. If such an application is lodged, will the registrar accept it and how will any of the title deeds that were affected, be endorsed, i.e. if endorsing is required?

- (b) Section 48(3)(a)(ii) provides for the transfer of the interest of owners partially or wholly destroyed, and form X mentions the transfer of the interest, however, if the whole of the buildings are rebuilt and reinstated a transfer of such interest will not take place as none of the sections in the scheme will be affected. Should the unanimous resolution referred to in section 48(3) and the prescribed form X omit such reference to the transfer of the interest of the owners of the affected sections?

Resolution:

- (a) It must be lodged and filed on the sectional title file for purposes of updating the status of the scheme and for a true reflection of the history of the scheme. The title deeds of the sections that were affected must be

endorsed with a factual endorsement to indicate that it had been deemed to be destroyed, but the whole of the section has been rebuilt and reinstated, with reference to the BC number allocated to the notification.

- (b) The unanimous resolution and form X will have to be adapted to omit reference to the transfer of the interest of owners of affected sections.

COMMENT:

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Item 59 of 2012

Section 49(3)(b) and rights of *habitat*

Where a sectional title scheme is closed in terms of sections 48 and 49 of the Sectional Titles Act, 95 of 1986, and one of the sections is subject to a right of *habitat*, this right shall be deemed to be converted into a real right over the undivided share in the land affected by such real right. The question is how can a *habitat* exist over land without a dwelling erected thereon?

Resolution:

The right of *habitat* still exists until cancelled.

COMMENT:

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H. REGULATIONS TO SECTIONAL TITLES ACT 95 OF 1986

Item 60 of 2012

Regulation 28 and separate title for exclusive use area

Regulation 28 provides that an owner of an exclusive use area may, on application, obtain a separate title for his/her exclusive use area. However, there is no prescribed form for such application.

Resolution:

Pending the amendment of the Act, form I must be utilized.

COMMENT:

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Item 61 of 2012

Sections transferred under the Sectional Titles Act, 1971 and Form H

Prescribed form H refers to section 11(3)(b) and section 28 of the Sectional Titles Act, 95 of 1986. However, where sections are transferred from a register which was opened under the repealed Sectional Titles Act of 1971, reference to form H and section 28 cannot be referred to. How must the new deed read?

Resolution:

Pending the amendment of form H, the following words must be used:

“endorsed on the sectional plan and the servitudes referred to in section 19 of the Sectional Titles Act, 1971 (Act No. 66 of 1971); and”

COMMENT:

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Item 62 of 2012

Regulation 28(2) endorsing of title deed

Regulation 28(2) was amended to include exclusive use areas created in terms of section 25(1), i.e. to endorse the schedule of conditions upon transfer (cession) of the exclusive use area. The amendment seems to be incorrect because a title deed (certificate of real right) is issued for the exclusive use area when the right of extension is exercised as provided for in section 25(1)(d), and the section 11(3)(b) schedule is endorsed with regard to the issuing of the certificate of real right. It is the title deed that must be endorsed with the cession of the exclusive use area and not the section 11(3)(b) schedule?

Resolution:

Yes, pending the amendment of the regulation the title deed must be endorsed, and not the section 11(3)(b) schedule of conditions.

COMMENT:

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I. GENERAL (ACT NO. 95 OF 1986)

Item 63 of 2012

Erroneous cancellation of a real right of extension

Where a real right of extension was erroneously cancelled in terms of section 68(1) of the Deeds Registries Act, 47 of 1937, what procedure must take place to revive such right?

Resolution:

The provisions of section 25(6) of the Sectional Titles Act, 95 of 1986 may be invoked. Alternatively a court order will have to be obtained to revive the right.

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Item 64 of 2012

Power of developer to subdivide, consolidate and extend

The Sectional Titles Act, 95 of 1986 is silent as to whether a developer, prior to the body corporate being established, has the power to subdivide, consolidate, extend sections or extend the common property. There is a school of thought that avers that it is the developers common law right, however, should the legislature have deemed it so, the Act would have been clear on this issue.

Resolution:

Yes, the developer has the right to enter into such acts of registration. However, a Registrar shall not register such acts unless an affidavit by the developer is lodged to the affect that no unit in the scheme has been sold, donated or exchanged, or if a unit was so alienated, the developer had disclosed in writing to the acquirer thereof, the act of registration so to be registered, or in the absence thereof the written consent of the acquirer to such acts of registrant is obtained.

COMMENT:

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Item 65 of 2012

Translation of exclusive use areas

Where a sectional plan refers in Afrikaans to an exclusive use area, for example “Werf – W 1”, may such exclusive use area be translated into English where the cession is now being done in English, for example “Y and W1”?

Resolution:

No, the wording of the sectional plan must be followed.

COMMENT:

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Item 66 of 2012

Registration of praedial servitude over a section

May an owner of a section afford a praedial servitude over his/her section in favour of the owner of another section in the scheme?

Resolution:

Yes, given the provisions of section 2(d) read in conjunction with section 15B (1)(d) of the Sectional Titles Act, 95 of 1986, the owner may afford such rights. However, the consent of the bondholder in respect of the servient tenement is required.

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Item 67 of 2012

Cancellation of a portion of a real right of extension

May a developer who has reserved a real right of extension, partially cancel the real right of extension?

Resolution:

No, the Act does not provide in this regard. The developer will have to cancel the right *in toto* and re-reserve a new right in respect of the portion.

COMMENT:

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Item 68 of 2012

Description of real right of extension

Where a real right of extension has been sold and it is determined that only the remainder of the real right still exists, as certain phases have already been exercised, how must the description of such real right of extension read in the notarial deed of cession?

Resolution:

The description must read along the following lines:

*“The right to erect and complete from time to time within a period of five years with effect as from the date of the registration of the real right of extension, for his/her personal account on the specified portion of the common property as indicated on the plan referred to in section 25(2)(a) of the Act, filed in this office, and to divide such building or buildings into a section or sections and common property, and to confer the right to exclusive use over a portion of such common property upon the owner or owners of one or more units in the scheme known as Ivory Park in respect of the land and building or buildings situated at Erf 1234, Zwartkops Province Gauteng, Registration division JR, and shown on Sectional Plan No. SS 43 / 2002, **with the exclusion of the rights of extension already ceded.***

RCR 45 of 2005 is also amended to read as follows:

“RCR 45 of 2005 Right of extension reserved and Bond to be registered over the remainder of the right

A developer reserved the right to extension of the scheme in terms of section 25 of Act No. 95 of 1986. Three of the intended five phase developments have already been registered. The developer now wants to register a bond over the remainder of the right of extension. Is it possible to register a bond over the remainder of such a right and if so how should it be described (identified)? Section 25 (4) (b) of Act No. 95 of 1986 is silent on this.

Resolution:

Yes it is possible to register a bond. The security under the mortgage bond must be described, as indicated in RCR 68 of 2012.

COMMENT:

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Item 69 of 2012

Revival of title deed and endorsement thereof

Section 14(7) and regulation 15(6)(b) of the Sectional Titles Act, 95 of 1986 make provision for the developer's title to revive, alternatively for the issuing of certificates of registered titles. If a servitude is registered over common property, subsequent to the opening of the scheme, the section 11(3)(b) schedule would have been endorsed with the servitude. When the title deed of the developer revives, how must the servitude so endorsed be brought forward onto the title deed that revives?

Resolution:

The developer's title may be endorsed with the existing servitude. Alternatively certificates of registered titles may be issued in cases where such changes were effected on the section 11(3)(b) schedule, with the effect of changing the conditions and resulting in the developer's title no longer being an updated version.

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Item 70 of 2012

Application for cancellation of plans and cancellation of servitudes

When an application is lodged by the developer for the cancellation of plans, the conveyancer must certify that the units, etc. are not leased or encumbered with a sectional mortgage bond or in any other way. This is interpreted that if a servitude is registered over a unit, the unit is encumbered and such servitude will have to be

cancelled, i.e. a usufruct. Chief Registrar's Circular 6 of 1988 also mentions that any real right must be produced for cancellation. Will this also apply to a usufruct that existed before opening of the scheme, where all the units are made subject to the usufruct upon opening of the scheme? The usufruct will be contained in the title deed of the land before the scheme is opened. When the title deed of the developer (of the land) revives the usufruct condition will automatically "revive". If the developer applies for the issue of a new Certificate of Registered Title the land can be made subject to the usufruct because it existed over the land prior to the opening of the scheme. Secondly, if such usufruct will revive, how can the conveyancer certify that the units are not "encumbered in any other way"? How must this be applied?

Resolution:

The certificate by the conveyancer in terms of section 14(6)(c) should only be in respect of servitudes registered subsequent to the opening of the register. Servitudes registered prior to the opening of the register automatically revive (see section 14(7) of the Sectional Titles Act, 95 of 1986).

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Item 71 of 2012

All units registered in developer's name: Section 14(6) and 14(7)

It is a requirement of section 14(6) that all the units must be registered in the developer's name and the developer must be the holder of section 25 and 27 rights. It does not specify which developer. What will the position be where the section 25 right was ceded and exercised, in terms of section 25(9), to another developer or

the developer has transferred his/her interest (whole or part) to another developer? The body corporate will not be established. Will this section still be to the avail of the developers? May both developers apply for the cancellation of the plans?

Resolution:

Yes. Section 14(6) is applicable where a real right of extension has been ceded and exercised in terms of section 25(9), thereby creating a co-developer. Similarly where a share is transferred in terms of section 34(3), the provisions of section 14(6) can also apply. If any real rights of extension have been ceded but not exercised, such rights must be cancelled or re-ceded to the developer before section 14(6) can be invoked. In the case of co-developers the title deed cannot revive, but certificates of real right must be issued to all co-developers.

COMMENT:

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Item 72 of 2012

Description of exclusive use areas

May an exclusive use area merely be described as an exclusive use area and not give specific reference to its use, e.g. stoep, parking, garden, etc?

Resolution:

No, the type of exclusive use area as delineated on the sectional plan must be referred to. If such use is described on the sectional plan as a general exclusive use area, then such description must be followed.

Reference to 'EUA' without specific reference to the type must not be accepted.

(Sectional plans approved prior to 2 January 2013 need not be amended)

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Item 73 of 2012

Section 25: no certificate of real right

Where a real right of extension has been indicated on the sectional plan as a *caveat*, but no documentation as per section 25(2) has been lodged and no certificate of real right for the extension has been registered, how must the matter be resolved?

Resolution:

The real right of extension never came into existence and must be created *de novo*.

COMMENT:

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Item 74 of 2012

Description of common property

Where a servitude is to be registered by the body corporate over common property, uncertainty prevails as to the manner of describing the servient tenement.

Resolution:

Par. 3 of form H must be applied with the necessary changes.

COMMENT:

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Item 75 of 2012

Section 11(3)(b) certificate

May a general reference to sections 25 and 27 rights be made in a section 11(3)(b) schedule in instances where more than one certificate of real right has been issued?

Resolution:

Yes, however where separate certificates of real right are issued in terms of section 25 and section 27 rights, it is advisable that it be fully set out in the section 11(3)(b) schedule.

COMMENT:

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Item 76 of 2012

Extension of a section onto adjoining exclusive use area

When a section is extended, in terms of section 24 of the Sectional Titles Act, 95 of 1986, into the adjoining exclusive use area, e.g. garden or yard, it is necessary to cancel the existing exclusive use area and register a new exclusive use area (in terms of section 27). Provided the section and the exclusive use area are in the same ownership the two amendments have historically been shown on the same amending sectional plan and apparently registered without any problem. If amendments as outlined above are to be dealt with as one registration batch does the Registrar require separate amending sectional plans prepared in terms of sections 24 and 27 respectively or is it acceptable to show both amendments on one plan?

Resolution:

Where an exclusive use area is directly affected by an amendment to the section and the exclusive use area is registered in the same ownership as the section, the two amendments may be shown on the same plan.

COMMENT:

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Item 77 of 2012

Partial destruction of a section

What procedure must be followed in the case of a partial destruction of a section?

Resolution:

The provisions of section 22 (if applicable), read with sections 48 and 49 of the Sectional Titles Act, 95 of 1986, are applicable.

COMMENT:

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Item 78 of 2012

Title conditions prohibiting opening of sectional title

Can a sectional title register be opened on land that contains a title condition prohibiting the subdivision of land?

Resolution:

Yes, the opening of a sectional title scheme is not tantamount to a subdivision of the land.

COMMENT:

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Item 79 of 2012

Lapsing of right of extension

Where the developer has reserved a right of extension for a certain time period, the developer may cede such right for a lesser period. If the lesser time period has lapsed without it being extended, does such right thereafter vest in the developer who ceded such right (as the right was for an extended time period which time period has not lapsed), or does that right now vest in the body corporate?

Resolution:

If there was no reversionary right reserved in the cession, the right of extension lapses.

COMMENT:

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Item 80 of 2012

Sectional Title scheme notarially tied to land outside of a scheme

May a sectional title scheme be notarially tied to land outside of a scheme?

Resolution:

Yes. The Act does not prohibit this.

COMMENT:

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Item 81 of 2012

Section 14(5) of the Sectional Titles Act, 95 of 1986: Amendment and cancellation of Sectional Plans

Section 14(5) of the Sectional Titles Act, 95 of 1986 does not refer to exclusive use areas or real right areas. Can extents or descriptions of such areas be amended in terms of section 14(5)?

Resolution:

No, section 14(5) does not provide for exclusive use areas. However, section 14(1) of the Sectional Titles Act, 95 of 1986 allows the Surveyor General to have any registered sectional plan found to be incorrect, to be altered or amended and this must be read to include extents or descriptions of exclusive use areas of real right areas.

COMMENT:

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Thank You!!

Typed by: Ms S S Kruger