Deeds Training Newsletter

Office of the Chief Registrar of Deeds

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MUNICIPAL BY-LAWS: IMPACT OF THE GLENCORE OPERATIONS SOUTH AFRICA (PTY) LTD AND OTHERS V STEVE TSHWETE LOCAL MUNICIPALITY AND OTHERS CASE ON CERTFICATES FOR REGISTRATION

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CANCELLATION OF TITLE-DEED CONDITIONS IMPOSED UNDER THE ADVERTISING ON ROADS AND RIBBON DEVELOPMENT ACT 21 OF 1940

AUTHENTICATION OF DOCUMENTS BY A NOTARY PUBLIC IN NORTHERN IRELAND AND THE REPUBLIC OF IRELAND.

agriculture, land reform & rural development
Department:
Agriculture, Land Reform and Rural Development
REPUBLIC OF SOUTH AFRICA

2030 NDP

STAY SAFE
PROTECT SOUTH AFRICA
TOGETHER WE CAN BEAT THE CORONAVIRUS

Office of the Chief Registrar of Deeds

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The views expressed in the articles published in the newsletter do not bind the Department of Agriculture, Land Reform and Rural Development and the Office of the Chief Registrar of Deeds.

Commentaries on articles may be sent to the Editor at tania.shawe@drdlr.gov.za.

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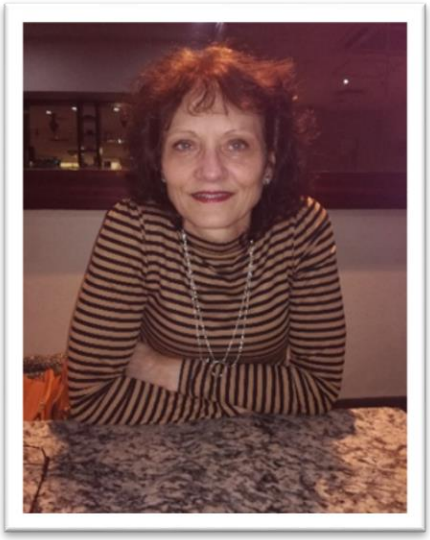
FROM THE FRONT DESK



TANIA SHAWE
DEPUTY REGISTRAR
DEEDS TRAINING

In this third issue we are dealing, amongst others, with the aspects of the validity of documents with expiration dates and a further article on how to compute the lawfully prescribed period for registration of certain transactions in the deeds registries, which often become a bone of contention during the registration process. The latest Glencore-case declaring certain requirements in the by-laws of three Mpumalanga municipalities as a requirement for registration as unconstitutional has opened the floodgates for other municipalities seeing the need to amend their by-laws and is further discussed in this issue. A further article on the impact of the Spatial Planning and Land Use Management Act, 2013 on the removal of conditions in title deeds will be further of great assistance to examiners.

We further want to make use of this platform to invite all officials of our merged DALLRD wishing to be sensitised on land registration requirements, to engage with Directorate: Deeds Training to attend our Deeds Registration Induction Course specifically relating to their responsibilities, as further digressed on below.

INTRODUCING THE TRAINING FUNCTIONS OF THE DIRECTORATE: DEEDS TRAINING

Amongst other responsibilities, Deeds Training is the component of the Office of the Chief Registrar of Deeds that oversees the implementation of examination of deeds training programmes in deeds registries as well as the provision of additional training courses predominantly to deeds examiners, but also on request to other Chief Directorates.

Completion of some of these courses is a prerequisite for successful examination of deeds. The Junior Module 1 & 2 and Senior Deeds Registration courses are presented by the Assistant Registrars of Deeds: Training in each deeds office for which a set programme and quality assurance system exist. All learners must be found competent by completing each decentralised course.

The Deeds Training law lecturers further present annual Advanced Courses and Refresher Courses for examiners who were found competent in the Junior-and Senior Examination Deeds Registration courses as well as specialised Topic courses requested by the deeds registries on deeds related aspects. The Deeds Training Law Lecturers are further responsible, with input received from the ARD's Training, for the availability and updating of comprehensive Deeds Practice Manuals for examination purposes.

COURSES AVAILABLE TO OTHER BRANCHES OF DALRRD

Special Deeds Registration Introductory courses are available to colleagues of other branches of DALLRD, on request. These courses have been presented prior to the merger of the DRDLR and DAFF to the Offices of the Surveyor-General, the then Land Tenure Administration and the Land Claims Commissioners Offices, after special needs analyses were done. Special provision for courses to other branches has been made in the 2021/2022 Annual Training Programme to any officials interested in registration of land aspects. All training is currently presented online by virtue of Microsoft TEAMS. A typical two-day Induction Course programme may consist of the following topics:

1. Introduction to the Deeds Registration System (DRS); Examination of deeds; Section Processes.
2. Interpretation of Endorsements: types and codes and interpretation thereof.
3. Certified Copies: implication, how to recognise on p/out and title.

4. Introduction to Sectional Titles.
5. Interpretation of Interdicts and other encumbrances, e.g. Insolvency: expropriation interdicts on printouts.

All interested branches are therefore invited to contact Deeds Training at tania.shawe@drdlr.gov.za for further information.

MUNICIPAL BY-LAWS: THE IMPACT OF THE GLENCORE OPERATIONS SOUTH AFRICA (PTY) LTD AND OTHERS V STEVE TSHWETE LOCAL MUNICIPALITY AND OTHERS CASE ON CERTFICATES FOR REGISTRATION

BY ANDRIES BADENHORST
ASSISTANT LAW LECTURER
DEEDS TRAINING

In *Glencore Operations South Africa (Pty) Ltd and others v Steve Tshwete Local Municipality and others* no. 2607/2019, the court had to decide on the constitutionality, validity and enforceability of some sections of Municipal By-laws relating to the restriction of transfer and registration of immovable properties.

It was argued that these Sections of Municipal By-laws infringe on Section 25(1) of the Constitution in that they constitute an arbitrary deprivation of the right to alienate property, the provisions fall outside the legislative competence of municipalities as contemplated in Section 156 of the Constitution and the provisions conflict with national legislation, namely Section 118 of the Local Government: Municipal Systems Act, 32 (Act No. 32 of 2000) (the “MSA”) or with the Spatial Planning and Land Use Management Act, 16 (Act No. 16 of 2013) (“SPLUMA”).

The Applicants claimed that virtually insurmountable obstacles are placed by certain Sections of the Municipal Planning By-laws of the Steve Tshwete local municipality, Govan Mbeki local municipality and Emalahleni local municipality to the registration of transfer of the properties, which lead to long delays in registration of deeds.

The Sections in question, namely Section 82 of the Steve Tshwete By-law, Section 76 of the Govan Mbeki By-law; and Section 86 of the Emalahleni By-law, are virtually identically worded in their relevant Subsections.

These Sections each prohibit a person from applying to the Registrar of Deeds to register the transfer of a land unit unless the municipality has issued a certificate in terms of that Section to the effect that its wide-ranging prerequisites for transfer have been met.

The Registrar of Deeds requires such certificate to be lodged with the application for the transfer documents, failing which the transfer is rejected. There is no statutory provision that prescribes this action by the Registrar. It is based on a policy decision to accommodate the municipalities.

The court found that the deprivations are arbitrary in so far as the municipalities interpret certain parts of their respective challenged provisions to authorise the municipalities' demand for an occupancy certificate, a zoning certificate and approved building plans.

These Sections have been declared to be inconsistent with Section 25 and Section 156 read with Part B of Schedule 4 of the Constitution of the Republic of South Africa, 1996 and invalid in terms of Section 156(3) of the Constitution because it conflicts with Section 118 of the Local Government: Municipal Systems Act, 32 of 2000 in so far as it requires the Applicants to provide occupancy certificates, approved building plans, zoning certificates and a certificate that "funds" have been paid, for purposes of the registration of transfer of the Applicants' properties.

The court further found that section 118(1) and (3) of the Municipal Systems Act and Section 53 of SPLUMA offer sufficient safeguards to ensure compliance with the transferor's obligations in respect of municipal debts before transfer of property is registered and in this premises, it is of the view that these disputed By-laws are invalid on the principle of legality in so far as it prescribes prerequisites for the transfer and registration of immovable property, because it is not authorised by any empowering provision and are in conflict with Section 118 of the Systems Act.

CONCLUSION

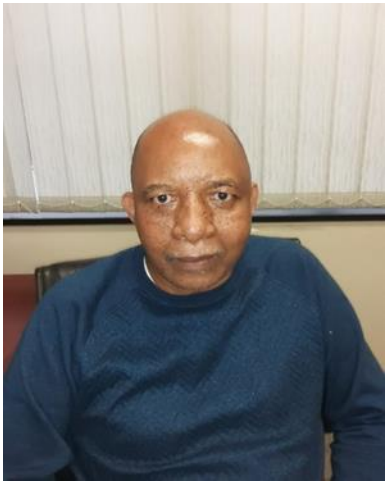
One could therefore conclude that the court had to decide on the legality of the provisions in question on the basis that they have no legislative legitimacy due to there being no empowering provision on which they can be imposed by a municipality.

The court ‘s view seems to be that only at national or provincial level can transfer of property be legislated upon and this has already been done by way of the Deeds Registries Act 47 (Act No. 47 of 1937) and Municipal Systems Act 32 of 2000.

If the judgement remains unchallenged, the municipalities will have to amend the By-laws so that there must not be provisions regulating the transfer of land between parties for there is no legislative basis for that competency. This may path the way for other municipalities to follow suit.

Note: This judgement applies within the jurisdiction of the Mpumalanga High Court and still to be confirmed by the Constitutional Court in terms of s172 of the Constitution. The affected entities have 6 months to bring their By-laws in order, failing which the declaration of invalidity of the By-laws will take effect.

COMMENTARY ON REGISTRARS CONFERENCE RESOLUTION 4 OF 2015



BY M S MEKWE
LAW LECTURER
DEEDS TRAINING

The Registrar's Conference Resolution in RCR4/2015 on the question of an exclusive use area that is erroneously registered in the names of two different parties does not, for some reason, go down well.

The question had been previously deliberated upon in RCR13/ 2013. Therein the problem statement was couched as follows:

"There is no basis in law for ruling that there is no authority for the cancellation of an erroneously registered right of exclusive use area, but which then permits both the erroneously registered exclusive use area as well as the correctly registered exclusive use area to be cancelled.

This does not make sense. Section 27 (5) of the Sectional Titles Act (STA), 95 (Act No. 95 of 1986) clearly authorises a cancellation of a right to the exclusive use area of a part of the common area in favour of an owner by the holder thereof and the body corporate, and it is not clear where the prohibition against the cancellation of an erroneously registered right of exclusive use area comes from, whilst a correctly registered exclusive use area can be freely cancelled."

Towards the resolution of the problem, the conference concluded that the right must be cancelled in terms of Section 27(5) of the STA and re-delineated on the Sectional Plan, whereupon it would be ceded to the rightful owner by the body corporate.

The conference recognised its mistake and in 2015, it sought to rectify the shortcoming of the Resolution by adopting Resolution in RCR4/2015.

In that resolution Conference resolved the same question as follows:

“Where the same exclusive use area is registered in the names of two or more owners, the erroneously registered deed may be cancelled in terms of Section 27(5).”

The issue which makes this resolution not to go down well is the apparent confusion of the provision of Section 27(5). The said Section provides that:

“a right to the exclusive use of a part of the common property delineated on the sectional plan registered in favour of an owner of a section may, with the written consent of the mortgagee of the exclusive use area and holder of a registered real right, be cancelled by the registrar of a notarial deed of cancellation entered into by the holder of such right and the body corporate, duly authorised by a special resolution of its members, on behalf of all the owners of sections in the scheme”.

Now, a quick glance over the Section will reveal that it deals with a totally different situation. It deals with cancellation of a right to the exclusive use of part of the common property delineated on the sectional plan, and not the deed evidencing title to the exclusive use area itself as seemingly suggested in RCR4/2015.

If we recognise the ‘‘problem’’ in our problem statement, as the two or more titles to the same exclusive use area, it follows that the solution must address the fate of the titles and not the exclusive use area itself. The resolution in RCR4/2015 seems to go for the exclusive use area itself but referring to puzzling legislative authority.

This resolution presupposes an amicable voluntary agreement between the body corporate and the owner.

The question is; which owner between the contesting parties? The resolution fails to recognise that in circumstances of multiple owners of one property there is likely to be contestation, bickering, collusion and animosity. True ownership cannot be determined at this stage without a ruling from some independent tribunal.

It is submitted that as a solution, any of the aggrieved parties who feel strongly about their position vis-a-vis the other claimants to the exclusive use area can approach the court for a declaratory order.

The court has the advantage of hearing each claimant's point of view and can make an informed and well-reasoned judgment about the dispute.

A recent case in point was the case of *Prophitius & Another v Campbell & others* [2008] JOL 21372 (D), in which three parties, each with its own registered title deed, had claimed ownership of the same erf. In upholding the abstract theory of transfer of ownership the judge held,

"The public system of deeds registration is a notice to the world of the ownership of immovable property and this would take no consideration for the underlying causa of the transaction''.

The court considered that the owner of the property could be found guilty of fraud but none of the claimants seem to have acted with knowledge of the fraud. In concluding the case, the court continued…

"The fact that the applicants obtained transfer first means that they became the real owners by the delivery of the immovable property. This is in accordance with the principle *qui prior est tempore potior est jure*." (first in time is stronger in law)

From the above, it is clear that the courts follow the abstract theory of transfer and the first in time rule to determine who has title to the right or property.

Various other facts are considered (including absence of collusion in the fraudulent act) to make the determination. Once the court has made that determination, the Registrar of Deeds can then give effect to the judgement by cancelling the title specified in such order.

The enabling authority is Section 6 of the Deeds Registries Act 47 of 1937 (DRA). The said S*ection provides;*

"Save as is otherwise provided in this Act or in any other law no registered deed of grant, deed of transfer, certificate of title or other deed conferring or conveying title to land, or any real right in land other than a mortgage bond, and no cession of any registered bond not made as security, shall be cancelled by a registrar except upon an order of Court."

It is submitted that this provision seems the appropriate one to give effect to the resolution that the deed must be cancelled. Section 27(5) only entertains the cancellation of a right to the exclusive use of part of the common property delineated on the sectional plan whilst section 6 deals with cancellation of a deed conveying or conferring title to land or real right to land. It is submitted that Section 6 of the DRA will find application in STA matters on the strength of section 3(1) of the STA. The said Section 3(1) of the Act provides;

"Save as is otherwise provided in this Act or any other law or the context otherwise indicates, the provisions of the Deeds Registries Act shall, in so far as such provisions can be so applied, apply mutatis mutandis in relation to all documents registered or filed or intended to be registered or filed in a deeds registry in terms of this Act."

It is submitted that the resolution should be reconsidered to refer to the correct authority to achieve its object, and Section 6 of the Deeds Registries Act is specifically enacted to solve for such "problems". It may not be a cheaper option, but it is my submission that it is the correct solution.

CANCELLATION OF TITLE-DEED CONDITIONS IMPOSED UNDER THE ADVERTISING OF ROADS AND RIBBON DEVELOPMENT ACT 21 OF 1940

BY BRENDA NDALA
ASSISTANT LAW LECTURER
DEEDS TRAINING

The Advertising on Roads and Ribbon Development Act, 1940 (Act No. 21 of 1940) (the Advertising Act), has little to do with deeds registration and appears to be mainly concerned with provincial authority and management of public roads.

However, under specific circumstances, Section 11 of the Advertising Act places a duty on the Registrar of Deeds to refuse to register certain transfers and to insert conditions in the title deed in terms of this Act.

Section 11(8) and (9) of the Advertising Act make provision for the cancellation of title-deed conditions by the Registrar of Deeds upon written approval from the controlling authority concerned and application from the registered owner of the land in question.

The controlling authority, within the meaning of the Act, refers to the Premier of the Province. Therefore, only a Provincial authority may cancel these title deed conditions.

POSITION WITH SPATIAL PLANNING AND LAND USE MANAGEMENT ACT, 16 OF 2013, (THE SPLUMA)

The SPLUMA was enacted to align the statutory regulations of land use and planning matters with the constitutional allocation of powers and encompasses the different spheres of government. Its coming into operation repealed some laws while others remained unrepealed. However, with the unrepealed laws, Section 2(2) of SPLUMA acknowledges that some decision-making processes in respect of land-use management and development will continue to exist under such unrepealed statutes, provided that they are only permissible to the extent of their consistency with the SPLUMA.

It has been practice that since the coming into operation of SPLUMA and its Regulations, the Registrar of Deeds calls for two consents for cancellation of title deed conditions imposed under the Advertising Act, that is the municipal consent in terms of Section 33 (2) of SPLUMA and consent from the controlling authority in terms of section 11(8) of the Advertising Act. The reason being that the Adverting Act is not repealed; therefore, the two legislations can exercise their powers jointly, either in an integrated document or by separate documents, as provided for in terms of Section 30 of the SPLUMA.

Section 33(2) provides that, where an application or authorisation is required in terms of any other legislation for a related land use, such application must also be made, or such authorisation must also be requested in terms of that legislation.

There has been some uncertainty between the deeds office's practice and the conveyancing practice in respect of which authority must consent to the removal of title-deed conditions imposed under the Advertising Act for purpose of giving effect to cancellation of those conditions by the registrar of deeds.

In *Riversands Developments Pty Ltd v Registrar of Deeds Pretoria, and others* Case No. 55768/2020, in the High Court of South Africa, (Gauteng Division, Pretoria) the court clarified the issue concerned:

In this case the applicant, Riversands Developments Pty Ltd, applied for the removal of title-deed conditions imposed by the Advertising Act, they lodged only the municipal consent to the registrar of deeds for removal of these conditions.

Their transactions were rejected on the basis that two consents must accompany the application, namely one from the local authority and another from the controlling authority since the Advertising Act is not repealed by SPLUMA. The Registrar of Deeds substantiated the rejection based on the said Section 33(2) SPLUMA. The applicants contended that the provision of subsection (2) merely allows other spheres of government, pursuant to their own competences, to issue authorisation that may affect land use- it in their opinion cannot mean that provincial authorities may be empowered under other legislation to decide municipal-planning matters. SPLUMA does not empower the premier to approve or refuse an application to delete title-deed conditions under Section 11(8) of the Advertising Act.

The applicant's argument was borne from Section 45(6) of SPLUMA, which expressly provides that, in respect of an application concerning title-deed restrictions, reference to the administrator, a premier, the townships board or controlling authority is deemed to be a reference to the municipality. The SPLUMA therefore recognises that, while provincial authorities may previously have acted as the controlling authority in respect of title-deed conditions, they are no longer competent to do so and that function must be discharged at municipal level. The matter was unopposed, and relief was granted to the applicants.

The court ordered that the powers and the functions of the controlling authority in terms of Section 11(8) (a) of the Advertising Act have devolved upon, and been assigned to the city council (municipality).

CONCLUSION.

The deeds offices have for so long after the SPLUMA came into existence overlooked the provision of Section 45(6) of SPLUMA, which is plain and clear that functions of the controlling authority is discharged at the municipal level, and the matters related to the title-deed conditions fell within the exclusive purview of local government authorities. Based on the court order in the *Riversands Developments*-case the Pretoria Deeds office has issued a circular RC03/2020 to provide a way forward. Examiners must now accept the consent of the relevant municipality within which jurisdiction the property falls as the necessary written approval of the controlling authority. Though the court order might be binding on a specific province, it can also be adopted by other offices because they might encounter the same issue, the provisions of PLUMA are at national level.

AUTHENTICATION OF DOCUMENTS BY A NOTARY PUBLIC IN NORTHERN IRELAND AND THE REPUBLIC OF IRELAND

BY THEO BESTER
LAW LECTURER
DEEDS TRAINING

When it comes to authentication of documents executed outside the Republic of South Africa, there are always many factors for registrars of deeds to consider; however, one of the most common confusions which exists is when it comes to documents authenticated by a notary public in Northern Ireland and the Republic of Ireland.

Without going into any discussion on the geography and politics of Northern Ireland and the Republic of Ireland, the most important fact to keep in mind when it comes to authentication of documents is that Northern Ireland is not a sovereign state on its own and can variously be described as a province, region or country, which is part of the United Kingdom of Great Britain, while the Republic of Ireland on the other hand is a sovereign state.

Where a registrar of deeds has to consider if a document which has been executed outside of the Republic has been properly authenticated, he or she has to rely on Rule 63 of the Uniform Rules of Court (formerly High Court Rule 63) and the Convention abolishing the requirement of legalisation (Also known as the Apostille convention).

Rule 63(2)(e) of the Uniform Rules of Court (formerly High Court Rule 63) read as follow;

(*2) Any document executed in any place outside the Republic shall be deemed to be sufficiently authenticated for the purpose of use in the Republic if it be duly authenticated at such foreign place by the signature and seal of office –*

(e) of a notary public in the United Kingdom of Great Britain and Northern Ireland or in Zimbabwe, Lesotho, Botswana or Swaziland; (my underlining)

and from the wording of Rule 63(2)(e) of the Uniform Rules of Court (formerly High Court Rule 63) one can clearly see that it is only a notary public from Northern Ireland, being part of the United Kingdom of Great Britain which can be accepted in terms of the said rule.

Documents executed in the Republic of Ireland will therefore have to comply with the other provisions of Rule 63 of the Uniform Rules of Court.

This by no means does away with discretion afforded to a registrar of deeds in terms of Rule 63(4) of the Uniform Rules of Court to accept a document which was authenticated by a notary in the Republic of Ireland.

A BETTER UNDERSTANDING OF *FIDEICOMMISSUMS*

BY ANDRIES BADENHORST
ASSISTANT LAW LECTURER
DEEDS TRAINING

Fideicommissums are not an open and close topic- it will however be fruitful to have a general understanding of essential aspects thereof and how it is applied in the deeds environment. My intention with this article is to simplify this topic in general and then to touch on the parts I wish to refer to as “good to know” knowledge.

A fideicommissum may be defined as the granting of an interest in property to one person, subject to the interest passing to another person on the happening of a condition or certain event.

A practical example of a fideicommissum would be:

“I, Leone Marx (the testator), bequeath my immovable property, Erf 123 Waterkloof, to my son, Liam Marx (the fiduciary), and upon his death, the property must be transferred to his son, Caylum Marx (the fideicommissionary heir).”

A fideicommissum confers successive interests in the same property on two persons (the fiduciary and the fideicommissionary heir). The first interest vesting (as a rule) on the death of the testator; and the second being conditional and vesting only if and when the condition is fulfilled.

The legal effect of this disposition is that on the testator's death, if Liam Marx (the fiduciary) is still alive, the dominium of the property (or estate) vests in him subject to the interests of Caylum Marx, his son (the fideicommissionary heir). It is clear that Caylum Marx acquires no vested interest in the property but only a spes (a hope) of the property, for his interest vests only if and when the condition is fulfilled i.e. if he is alive when Liam Marx, his father dies; in that event the fideicommissum terminates and the absolute ownership vests in Caylum Marx.

If Caylum Marx dies before his father Liam Marx, the condition of the fideicommissum fails and the fideicommisionary heir's rights are extinguished.

From the practical example, it is clear that a burden rests on the rights of the fiduciary. The fiduciary cannot alienate his/her right freely and unencumbered by the fideicommissum so that the new owner acquires unencumbered property. However, certain exceptions exist to this rule, the most important from a deeds registry point of view being s 69 bis(1) of Act 47 of 1937, which reads as follow:

"*69bis Joint transactions by fiduciary and fideicommissary*

(1) If the owner of land subject to a fideicommissum and the fideicommissary, if the latter is competent to do so, have disposed of the land or any portion thereof, together with the fideicommissary rights, to any other person, they may together give transfer thereof to that person."

The transferors will be described as the owner of the land and the holder of the fideicommissary rights, respectively, but no mention of the fideicommissary rights are made in the description of the land therein (s 69bis(2)).

A fiduciary who wishes to make use of other exceptions to the above-mentioned rule will have to approach the court for sanction to act.

As mentioned, fideicommissums are not an open and close topic. It is important to take note of the following examples:

“I bequeath my entire estate to my wife, Leone Marx, with full and absolute power to alienate not more than half of my said estate on condition that, upon her death, whatever remains of my said estate shall devolve upon and be retained and administered by my said trustees who shall hold it in trust for the intents and purposes hereinafter set out.”

This is a clear example of a fideicommissum residui. The fiduciary (Leone Marx) may alienate not more than half of the estate; however, she cannot dispose of it by will.

As will be indicated in the following example, it is also possible to substitute the fideicommissionary heir:

“I bequeath my immovable property, Erf 123 Waterkloof, to my son, Liam Marx, on condition that the said property shall not be mortgaged or sold during his lifetime and on his death it is to go to his eldest child. If my said son should die without leaving children surviving him such property shall go to the eldest child of my nephew, Clive Marx.”

The fideicommissionary heir (eldest son of the fiduciary) is therefore replaced by the eldest son of the testator’s nephew.

The last important aspect pertaining to fideicommissums, from an examiners perspective, is to take note that assets (immovable property) which are subject to a fideicommissum are not entered in the liquidation account but in the fiduciary assets account. The precise origin of that fiduciary interest in such assets (whether it was created by will, deed of trust etc) must be specified. The procedure used to transfer assets from the deceased’s estate, for example to a successive fiduciaries or fideicommissarius, must also be stated.

SOURCES:

Davis DM, Beneke C, Jooste RD Estate Planning Vol 2 (Lexis Nexis 2018)

Wiechers NJ, Vorster I, Blignaut EE Administration of Estates (Lexis Nexis 1996)

INTERPRETATION OF THE EXPIRATION DATE OF DOCUMENTS WHICH CONTAIN A VALIDITY DATE

BY THEO BESTER
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DEEDS TRAINING

When it comes to examination of deeds, examiners are constantly confronted with documents which are subject to an expiry date, whether provided for in law or otherwise, and since examiners cannot rely on such expiry date which is not always disclosed in the document, they are then placed in a position where they have to interpret the document itself in order to determine the expiry date thereof.

Fortunately, examiners have Section 4 of the Interpretation Act, 1957 (Act No. 33 of 1957) to rely on when interpreting the validity of a document which does not express a clear expiry date. To explain how to apply the said Section 4, one first needs to look at the wording of the Section, which reads as follow: *"When any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day happens to fall on a Sunday or on any public holiday, in which case the time shall be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday".*

Where a document refers to an expiry date of, e.g. 60 days from the date on which the document was issued, the start-off point will therefore be to look at the date on which the document was issued, and then start calculating 60 calendar days, including weekends,

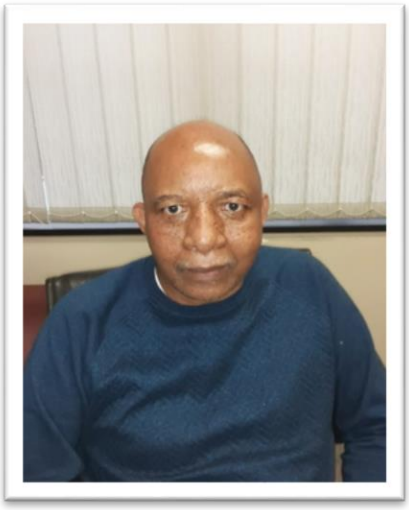
from the next day after the document was issued. The 60th day will then be the last day on which the document will expire. To comply with the said Section 4, one will have to calculate the 60 days by counting them on the applicable calendar for the year which relates to the document, and one cannot simply, e.g. count two months from the date of issue. What one needs to take note of is that Section 4 of the Interpretation Act provides that, if such a document expires on a Sunday or public holiday, the next working day will be the date on which such document will actually expire.

Interestingly, the said Section 4 does not address what happens to documents which expire on a Saturday, and that is because Saturdays are historically regarded as a working day. Since deeds registries are not open on Saturdays and due to the fact that the Interpretation Act is clear that an extension to the expiry date only finds application where the document expires on a Sunday or public holiday, any deed which is subject to a document which will expire on a Saturday will have to be registered on the Friday before the document expires.

Documents of which the validity period is not prescribed by statute and that express a clear expiration date, e.g. that the consent will lapse on, e.g. 30 June 2020, needs no further interpretation other than that after 30 June 2020, the document will no longer be valid, and the provisions of Section 4 of the Interpretation Act will therefore also not find application to such a document. Where the validity period pertaining to a document is prescribed by statute, e.g. Section 118 (1A) of the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000), which prescribes that a certificate issued in terms of Section 118(1) of the said Act, is valid for a period of 60 days from the date of issue thereof, such certificate will be regarded as valid for 60 days regardless of the reflection of a lesser date.

When a documents which has an expiry date reflected in years, e.g. a consent which will lapse after 5 years from the date on which the document was issued, Section 4 of the Interpretation Act does not find application since it only relates to days, and this same view was also held by the court in *Road Accident Fund v Masindi* (586/2017) [2018] ZASCA 94 (1 June 2018). The interpretation on when such a document will then expire, where the last day falls on a Sunday or public holiday will be in the discretion of the registrar of deeds.

THE COMPUTATION OF THE PRESCRIBED PERIOD FOR REGISTRATION OF CERTAIN DEEDS IN THE DEEDS REGISTRIES



M S MEKWE
LAW LECTURER
DEEDS TRAINING

INTRODUCTION

The computation of time relating to registrability of deeds-related transactions is very important for both conveyancers and deeds examiners, especially because any mistake can be costly to both.

LEGISLATIVE PROVISIONS

Section 4 of the Interpretation Act, 1957 (Act 33 of 1957) provides that; whenever any particular number of days are prescribed for the doing of an act, same shall be reckoned exclusively of the first day and inclusively of the last day, provided that where the last day happens to fall on a Sunday or public holiday then the calculation shall exclude such last day also.

This method is referred to as the statutory method of computation of time. On the other hand, the ordinary civil computation method prescribes that the first day of the period is included but the last day is excluded.

In the deeds registry environment, Section 61 of the Deeds Registries Act, 1937 (Act No. 47 of 1937) provides as follows:

"(1) Every notarial bond executed before or after the commencement of this Act shall be registered within the period of 3 months after the date (my underlining) of its execution or within……".

Section 87 relating to the registration of an Antenuptial contract is also similarly worded. The said section further provides that where such Antenuptial contract was executed outside of the RSA then it shall be registered within 6 months after such date (my underlining) or again within such period as the court may on application allow.

APPLICATION IN PRACTICE

The dilemma that faces examiners of deeds and sometimes the conveyancers is how that period is to be computed. In attempting to find an answer to this, resort must be made to the Interpretation Act, case law and Registrars' Conference Resolutions.

Now, according to Section 1 of the Interpretation Act, a month is defined as a calendar month. The courts have defined a calendar month as the corresponding day of the following month provided that such last day may be included or excluded depending on the computation method applied. (Vide S v Mogale 1989(4) SA(W)591, *Engelbrecht en 'n ander v Vaalblok Ondernemings BK* 1990(1) SA 676 (T)) and *Makhutchi NO v Minister of Police* 1980(2) SA 229(W).

To clarify the deeds office's position on this issue, the Registrars decided in **RCR6/1991** that the period relating to the three months shall be calculated including the first day and excluding the last day. So, in the application of the provisions of section 61 and 87 of the Act, the period shall be calculated using the ordinary civilian method. The result is that if a deed must be registered within 3 months after its execution and it was executed on the 29 January 2009, such deed will have to be registered by no later than the 29 April 2009.

This period is computed in such a manner that the 3 months period should start a day after 29 January, i.e. 30 January, since the first day (after the execution) is to be included and in fact ends on 30 April, but because the last day is excluded then the period effectively ends on 29 April by which date the deed must be registered.

The same applies to where such last day happens to be a public holiday or on a Sunday, since such a day will be excluded anyway. The fact that February month may not have the corresponding dates of the following month as defined by the courts will also not have a bearing on the computation since a calendar month (as defined by the courts) will be followed.

The resolution is in line with the court decisions regarding the calculation method of preference where no particular method is prescribed by the parties or legislation (*South African Mutual Fire and General Insurance Co. Ltd v Fouche en 'n Ander* 1970 (1) SA 302 (A)). Furthermore, the Interpretation Act cannot be followed since the prescribed period is not mentioned in days but months. The wording of the relevant clause also plays a very important role since it may determine the day from which the calculation is commenced. If it is worded in such a way that the period starts from a certain date or after a certain date, such may result in different dates even if the same method of computation is applied.

CONCLUSION

In the circumstances it is still important for examiners and practitioners alike to consider the exact wording of the clause that is sought to be applied in order to come to the correct date by which an event must have occurred, but as for transactions in the deeds registry, RCR6/1991 applies.

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