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FROM THE FRONT DESK

In this issue, we look at how contingency personal servitudes of usufruct or usus are able to be registered notwithstanding the provisions of s66 of the Deeds Registries Act, 1937 (Act No. 47 of 1937), that personal servitudes may not, under any circumstances, be registered nor transferred to any other person other than the owner of the land. We further discuss a question that was posed to the 1968 Registrars' Conference -whether Conference agreed that where a partnership is dissolved and the partners insist on a formal transfer being passed to them, the bond, if any, must be cancelled, and that Section 57 of the DRA cannot be invoked.

Massing, election, adiation and repudiation of benefits under a will are concepts that many examiners have challenges to fully comprehend. Clarity is further provided hereon.

Further, the articles look at the two situations where extension of a unit onto an exclusive use area will call for either one or two separate sectional plans to be lodged, and a case where a registrar is entitled to register a 4(1)(b) amendment without the necessary consents of interested parties.

BY MS TANIA SHAWE
EDITOR

EXTENSION OF A SECTION WHICH ENCROACHES ONTO AN ADJOINING EXCLUSIVE USE AREA

In this modern day, Sectional Title Schemes are as common in South Africa as biltong. With Sectional Title Schemes come a huge variety of registrations, including, but not limited to, the opening of a sectional title register, partial destruction of a section or building, subdivision and consolidation of sections and extension of a sectional title scheme by addition of sections and/or exclusive use areas (EUA). The list goes on, but for the purpose of this article, the focus is on the registration of extension of a section as provided by s24 STA, more particularly when such extension encroaches onto an adjoining EUA.

Extensions of sections come in different formats, from the more common registration of an extension of a section by addition of floor area right on top of the existing floor area (single to double storey), to the registration of less common extensions where the addition of floor areas is done even without moving any boundaries of the existing section (the so called pyjama lounges). But what is the position when a section is extended and such extension encroaches onto an adjoining EUA, e.g. a garden?

We can further differentiate between encroachment over the whole of the EUA and encroachment over only a part of the EUA, however, the outcome in both instances stays the same. In other words, when a section in a sectional title scheme is extended and it encroaches onto an adjoining EUA, the EUA must be cancelled. When only a portion of the EUA is affected, the EUA must also be cancelled as the STA does not provide for subdivision of an EUA and a new EUA must be delineated, issued and ceded in terms of s27 STA in respect of the remaining part of the original EUA, which was not affected. Considering the abovementioned, I want to focus on RCR 76/ of 2012, which reads as follows:

Extension of a section onto adjoining exclusive use area

When a section is extended, in terms of section 24 of Act No. 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.

Conference resolved that it is not necessary to lodge two separate plans, the plan for the extension of the section, in terms of Section 24 of the STA, as well as a plan for the creation of the EUA in terms of Section 27(2) of the STA. One plan indicating both the extended section as well as the redelineated EUA can be lodged, however, two separate plans may still be lodged of so required. When considering Section 24(3) of the Act, which provides for an owner of a section to have sectional plans drafted, while Section 27(2) of the Act provides for the body corporate to have the plans drafted, it is easy to understand why some confusion may exist regarding who will be responsible to have the plans drafted, i.e. the owner of the relevant section to be extended, or the body corporate?

When the plans are lodged at the deeds office, it is of no concern to the registrar as to who instructed the land surveyor or architect to prepare the plans. However, in practice, the body corporate and the owner of the relevant section will have to be in agreement about the preparation of the plans and payment of the costs thereof. As there are two possibilities pertaining to the plans, separate plans for both extension of the section (Section 24(3)) and a plan for the creation of the remaining unaffected part of the EUA (s 27(2)), or a combined plan for both extension of section and creation of EUA, endorsing of the plans can be confusing. The plans prepared in terms of Section 24(3) will be allocated a new "SS" number on registration thereof, but the plan for the EUA, prepared in terms of Section 27(2), will not be numbered when lodged on its own. When one combined plan is prepared for both, it will have to be numbered upon registration in compliance with regulation 23(1)(b) of the Act.

It is clear that an extension of a section which encroaches onto an adjoining EUA, consists of two separate registrations. Firstly, the extension of the section and secondly, the cancellation of the existing EUA and delineation and creation of the new EUA (the part not taken up by the extension of the section). Therefore, when it gets to the issue as to which documents must be lodged, one should separate the transactions/registrations.

The following documents for extension of the section must be lodged as provided for in Section 24(6), read with regulation 23(1)(a) of the STA, i.e.:

- An application by the registered owner of the relevant section, in prescribed form AR (See CRC2/2021 regarding new form).
- Two copies of the sectional plan of extension, which include the newly created EUA:
- PQ sheet in case of floor area being increased (s 24(4)(b))
- The block plan must be lodged, but it will not be necessary if the block plan has not changed, provided there is a note on the floor plan to that effect by the surveyor / architect (RCR 62/2009);
- The title deed of the section being extended;

- Any sectional mortgage bond over the section;
- A certificate by a land surveyor or architect stating that there is not a deviation of more than 10 % in the participation quota (PQ), or if there is a deviation of more than 10 %, a certificate by the conveyancer stating that the mortgagee of each section in the scheme has consented to the registration of the sectional plan of extension of the section. (See RCR 64/2011 in this regard.); and
- Transfer duty receipt (RCR 40/1989 and RCR 76/2010).
- It is not necessary to lodge a rates clearance certificate (RCR 75/2010) or the special resolution of the members of the body corporate, referred to in section 24(3) of the STA
- In addition, the following must also be lodged for the creation of the new exclusive use area where the section 27(2) STA option was used:
- A bilateral notarial deed of cession of EUA to the owner who is entitled thereto (s 27(3) and RCR 11/1994);
- A rates Clearance Certificate for the cession of the EUA to the owner entitled thereto (CRC 2/2006); and
- A transfer duty receipt, alternatively one transfer duty receipt may be issued for the extension of the section and the creation of the EUA.

One should take note that Section 27(2) of the Act does not provide for a lodgment of an application and so too the unanimous resolution of the members referred to in Section 27(2) need not be lodged. The unanimous resolution referred to in Section 27(3), i.e. for the transfer of the EUA to the owner, will be filed in the notary's protocol, therefore the notarial deed of cession must make reference to the unanimous resolution, and that it is filed in the protocol.

Finally, when it gets to endorsing the deeds, firstly the registrar of deeds will endorse the title deed of the relevant unit with regard to the extension of the section (new floor area) and then the section 11(3)(b) schedule of conditions must be endorsed with the cession of the EUA to the cessionary as a title deed is not issued for the newly created EUA.

In conclusion, the purpose of this article wass to simplify extension of a section which encroaches onto an adjoining EUA, to provide clarity on all the requirements thereto and to eradicate any confusion on the different aspects thereto. As it is natural for people to seek better security together with more living space, extension of sections will always be one of the best options to make this a reality.

BY ANDRIES BADENHORST
ASSISTANT LAW LECTURER

ON CONTINGENCY USUFRUCTS

Transactions involving contingent usufructs can sometimes be missed by a conveyancer in the preparation of deeds and by the examiner in the examination of deeds alike. This can be due to oversight or even lack of understanding of the concept. It is hoped that this article will shed some light on the concept and thereby improve both a practitioners' and examiner's understanding of these types of transactions. Because these types of servitudes could have been created many years before, it remains for the practitioners and examiners to recognise the event that can gives rise to them and know which registration action must follow thereupon.

Section 66 of the Deeds Registries Act, 1937 (47 of 1937) (DRA) is very clear on the issue of registration of certain personal servitudes beyond the lifetime of the holder thereof. It provides;

No personal servitude of usufruct, usus, habitatio purporting to extend beyond the lifetime of the person in whose favour it is created shall be registered, nor may transfer or cession of such personal servitude to any person other than the owner of the land encumbered thereby be registered.

From the above it is clear that the personal servitudes mentioned therein may not under any circumstances be registered nor transferred to any other person other than the owner of the land. So, how then do contingency personal servitudes of usufruct or usus get registered notwithstanding the provisions of s66? To comprehend this, we need to familiarise ourselves with the meaning of contingency as applied in the concept. A careful reading of s66 will reveal that the legislature did not seek to prohibit the registration of the personal servitude in favour of two persons. The only proviso is that they should be enjoying the servitude at the same time. So, what the section prohibits is that the servitude be passed on from the holder thereof to another person without it reverting to the owner of the land.

An aspect to consider is the effect of S66 DRA on Matrimonial Regimes. Parties married in community of property are deemed enjoined in one estate belonging to them in equal undivided shares. Brought under the provisions of s66, the two or more parties in the community of property will be deemed to be a single entity, entitled to the rights under that personal servitude in equal undivided shares. While this scenario involves multiparty servitude holders, they still comply with the requirements of s66 in that the servitude is created in favour of them, enjoyed simultaneously and will not exist beyond their lifetimes. The same servitude created in favour of one of them will be treated differently upon the termination thereof for whatever reason. By reason that it was created in favour of a specified person before the community of property, it remains the exclusive benefit of such person even if he/she later marries in community of property. This is based on the principle that a personal servitude remains the property of the person in whose favour it was created and does not become part of a subsequent joint estate and in the light of s66, will not be transferrable to another party at the termination thereof.

In the instance of a marriage out of community of property there cannot be any confusion; the parties are deemed to hold their exclusive portion in the marital estate which is the exclusive separate property of each of them. A personal servitude of usufruct created in favour of either of them remains each party's exclusive property and upon his/her death it reverts automatically to the owner of the land because, on the analogy of s66, it cannot extend beyond the lifetime of the person in whose favour it was created.

A further aspect to consider is the contingency of a usufruct and s66 DRA. The concept of contingency is employed in the instance where the grantor wishes to create a usufruct which will be enjoyed by a first holder and upon the happening of an event, is then enjoyed by the subsequent usufructuary/ies. This will invariably apply in the circumstances where there is no community of estate between the first holder and the contingent usufructuary/ies. The second usufruct is mentioned in the registration of the initial usufruct and is clearly spelt out that the subsequent usufruct will be registered only upon the occurrence of the contingency. Such contingency can be the death of the first holder, marriage, attainment of a certain age etc. In such an event the holder of the lapsing usufruct or representative thereof, must cede the rights to the contingent usufructuary. It is at this stage that a contingent servitude can be missed by the conveyancer and deeds examiner alike. So where property subject to a usufruct is transferred, the examiner must check whether any contingency was included in the creation of the usufruct and whether such contingency has arisen.

A question that arises is the effect of the usufruct on the matrimonial property right and the right of accrual. Where both parties to the marriage in community were granted the usufruct simultaneously in distinct specified shareholding, upon the death or termination of the usufruct the remaining surviving spouse does not acquire the share of the deceased in the usufruct but such share of the deceased reverts to the owner of the land. This is because, unlike in a community of property, the parties held their specified shares in the usufruct separate from one another and the termination of the usufruct in respect of the one holder does not accrue such servitude rights to the survivor. If the creator of the usufruct clearly spelt out that after the death of the first holder the usufruct must be enjoyed by the surviving spouse, then in such a case we have a contingent usufruct and the executor of the deceased estate of the holder must formally cede the usufruct to the surviving spouse.

In a marriage in community of property, the parties enjoy the usufruct rights jointly as a single unit and upon the demise of either of them, the servitude rights become subject to the right of accrual *(jus accrecendi)* in favour of the surviving spouse who will enjoy such in full. There is no need for a cession of the rights the survivor as accrual happens by operation of law.

BY SYDNEY MEKWE
LAW LECTURER

RCR 22/1968 - SUBSTITUTION OF A BOND I.T.O. SECTION 57 OF THE DEEDS REGISTRIES ACT 47 OF 1937 AND PARTNERSHIPS

At the Registrars Conference held on 13 September 1968, a very interesting item was discussed under RCR 22/1968. The item is based on the factual statement that where a partnership is dissolved and the property is awarded to all the members, Section 24bis(2) of the Deeds Registries Act 47 of 1937 (hereafter referred to as DRA) provides for the transfer to the individual members of any land or real right by endorsement and Section 24bis(3) of the DRA, that further provides for the substitution of the individual members as debtors under the bond where such land, etc. is mortgaged. The question was posed whether conference agreed that where the partners insist on a formal transfer being passed to them, the bond, if any, must be cancelled and that Section 57 of the DRA cannot be invoked. It was unfortunately at the time of the conference that it was resolved that the item could not be finalised since the opinion of the State Law Advisors, which was requested by the Chief Registrar of Deeds on 30 August 1968, was not yet received and that the matter would be held in abeyance until a reply was received.

The letter from the Chief Registrar of Deeds to the State Law Advisors was based on a transaction which was lodged for registration in what appears to be the Pretoria Deeds Office, in which A and B in their personal capacities as owners of a property intended to transfer the property to A, B (this is the same A and B as the current registered owners of the property) and C, trading in partnership as X. The property held by A and B has been mortgaged and their intention was to substitute the partnership as debtor under the bond i.t.o. Section 57 of the DRA. In his letter to the State Law Advisors, the Chief Registrar questioned whether the substitution of the bond i.t.o. Section 57 of the DRA could be registered, considering that a partnership appears not to be a separate persona from its members, and that there is therefore no new person created for the purpose of the said Section 57. The Chief Registrar of Deeds however was of the opinion that, for registration purposes, the Deeds Registries Act 47 of 1937 throughout makes a distinction between the individual and the partnership of which they may be members of, and that partnerships are separate registration concepts vide

Section 24bis and Regulation 34 of the DRA, and from the said letter it appears that the Chief Registrar was in favour of the substitution i.t.o. Section 57 of the DRA.

In their response dated 20 September 1968 to the Chief Registrar of Deeds, the State Law Advisors agreed that the substitution of A and B with A, B and C in the bond as debtors can be registered as such. The State Law Advisors in their opinion remarked that on the interpretation of Section 57 of the DRA, it is not necessary to determine if a partnership should be viewed as a separate legal persona or not, but that the substitution can be effected for the simple reason that A, B and C as the persons to whom the property is going to be transferred to is not the same persons as A and B who are the current registered owners. The State Law Advisors further commented that they could not find any intention in Section 57 of the DRA, that it only applies to where all the persons to whom the property is transferred should be different from the persons who transfer the property. They further held the view that it is sufficient if the group of persons to whom the property is being transferred are different from the group of persons who transfers the property, and therefore the group of persons A, B and C to whom the property is transferred are not the same as the group of persons A and B who transfers the property. The State Law Advisors concluded in their opinion that the transfer of the property from A and B to A, B and C should for the purpose of Section 57 of the DRA be viewed as "another person" as provide for in the said Section 57

It should be noted that the question posed to conference relates to the dissolution of a partnership and the transfer of the property to the former partners, with the substitution of partners in their personal capacities as debtors in the bond i.t.o. Section 57 of the DRA, whereas the matter referred to the State Law Advisors was just the opposite in that it was the intended partners as owners of the property, subject to a bond, who wanted to transfer the property to the partnership of which they are partners by way of a formal deed of transfer, with the partnership being substituted as debtors under the bond in terms of Section 57 of the DRA. Regardless of the fact that the question posed to conference is the opposite of that referred to the State Law Advisors, the opinion of the State Law Advisors finds the same application.

Although an opinion from the State Law Advisors was received after the conference, it unfortunately appears that the resolution was never revisited and therefore no resolution as such was taken and published. However, considering that both the Letter from the Chief Registrar of Deeds and that of the State Law Advisers have been made available for publication as part of RCR 22/1968, the writer is of opinion that it can be considered by a Registrar of Deeds in similar cases, on its own merits.

Considering the fact that a partnership has no legal personality separate from its members, when property is registered in the name of a partnership, it is registered in the names of the partners on the analogy of Regulation 34(1) of the DRA, with a reference to that they are trading as a partnership, this results in a bound co-ownership. The implication thereof is that i.t.o. Regulation 34(3)(c) of the DRA the partners are prohibited from dealing with their separate shares in the property, separately from the partnership until transfer has been passed to such member of the share to which he/she is entitled, and thereby removing the share from the partnership.

When one considers that Regulation 34 of the DRA implies that a partnership is, at times, treated as a separate persona for registration purposes, one cannot but tend to agree with the State Law Advisors in their opinion that the partners in their personal capacity should be considered as "another person" seperate from their capacity as partner in a partnership, and when considering the requirement in Section 57 of the DRA that the substitution of a debtor in a bond can be registered where the transfers to another person consist of the whole of the land hypothecated under that bond, where such a substitution involves a partnership as discussed in this article, it is the opinion of this author that such a substitution could be considered for registration.

BY THEO BESTER

LAW LECTURER

THE DIFFERENCE BETWEEN MASSING AND ELECTION, AND MASSING AND ADIATION

Where two or more persons with testamentary capacity, not necessarily married to each other, combine their separate estates into a single massed estate, it is called massing. Massing can also happen where undivided half-shares of a joint estate where parties are married in community of property prescribe in the will what must be done with their massed estate on the occurrence of a specific event, which usually is the death of the first dying testator. The survivor typically receives a benefit in the form of a limited right or may enjoy a life interest from the massed estate. The limited right may be in the form of a usufruct, fiduciary interest, annuity or any other limited right.

Upon death the survivor must elect whether she accepts the benefits which she is entitled to in terms of their joint will; or whether she gives up ownership of his or her share in the massed property. If the survivor decides not to accept the benefits under the joint will, she will retain ownership and control of her own estate, in which event massing will not occur. Therefore, the survivor will have a choice to abide by the massing instruction of the joint will, or decline the massing instruction in the joint will. If the survivor elects to decline the massing created by the joint will, the estate of the first-dying party will then be wound up in accordance with the joint will (as far as possible), without taking the assets of the survivor into account.

Section 37 of the Administration of Estates Act, 1965 (Act 66 of 1965) provides for two forms of massing, namely, "statutory massing" and "common law massing." Statutory massing in section 37 provides as follows:

"If any two or more persons have by their mutual will massed the whole or any specific portion of their joint estate and disposed of the massed estate or of any portion thereof after the death of the survivor or survivors or the happening of any other event after the death of the first dying, conferring upon the survivor or survivors any limited interest in respect

of any property in the massed estate, then upon the death after the commencement of this Act of the first dying, adiation by the survivor or survivors shall have the effect of conferring upon the persons in whose favour such disposition was made, such rights in respect of any property forming part of the share of the survivor or survivors of the massed estate as they would by law have possessed under the will if that property had belonged to the first dying; and the executor shall frame his distribution account accordingly."

The most important requirements for an examiner to consider whether statutory massing has taken place are inter alia the following:

- The date of coming into operation of the Administration of Estates Act, 1965 (Act No. 66 of 1965) is 2 October 1967, therefore the first–dying testator must have died on or after this date.
- Two or more persons must make a joint will, (this is a will in which two or more testators have mutually benefited, in the same document, most commonly used by married couples who share the same assets and beneficiaries. ... a joint will is therefore one document signed by two people. A mutual will on the other hand represents two individual wills that are signed separately, but are largely the same in content). The parties to a joint will are usually married couples, either in or out of community of property whom make use of statutory massing, however, the parties may not even be related and could also be a brother and sister.
- The whole or part of their separate assets, which have been massed into a consolidated unit , must be disposed of in the joint will, however, there is no certainty whether this is an absolute requirement.
- As mentioned above, the mutual will must grant the survivor "a limited right" in respect of any property which has been massed. The limited right can be in the form of a usufruct, a fideicommissum or an income beneficiary of a trust, etc. This means that a direct bequest of the property of the first dying, which does not form part of the massed estate, will not be sufficient.
- The survivor must adiate on the death of the first dying.

Common law massing occurs where two or more persons mass their separate estates and disposes of the massed estate without granting the survivor a limited interest in the massed assets, but the survivor however may receive another benefit. An example hereof is where A and B, who are married to each other stipulate in their mutual or joint will that, when the first one dies, the survivor inherits their house while their sons inherit the residue of the massed estate. This creation does not fall within the scope of "statutory massing" as provided for in the provisions of Section 37 of the Administration of Estates Act. In this case, the survivor obtains full ownership of an asset and would have to elect whether to accept or repudiate the provisions of the will. Common law massing may further result in the survivor not receiving anything from the massed estate.

Election means that an heir or legatee must choose whether to dispose of his/her own property, it may also be bequeathed property, subject to certain conditions. Such beneficiary must then decide between accepting the testamentary benefit or rejecting it. This decision is known as election.

Many writers hold the view that the power to adiate or repudiate does not vest in the executor, but in the heirs of a deceased person who had the right to adiate or repudiate, but died without having exercised that right. Therefore if a legatee or heir had vested rights and died before he or she decided to elect or adiate a benefit, such right will pass to his or her estate. See also RCR 29 of 2008 in this regard.

Adiation is the acceptance of a benefit under a will in order to receive the bequeathed benefit. It also means the acceptance of all conditions attached to the benefit. Repudiation takes place where the beneficiary rejects a benefit under a will. This means he or she will forfeit all benefits but will be able to retain his or her own property. It is important that the beneficiary is aware of the consequences that will arise from such a choice, as the choice is final and the the High Court would have to decide the setting aside of such a choice.

In massing the beneficiary would have to adiate where a limited interest is received and the surviving spouse abided by the terms of the joint will. If no limited interest is received, election must take place. The surviving spouse in a joint estate does not have to join the executor as transferor (see S21 DRA), provided the spouse has adiated and the necessary certificate lodged in terms of Regulation 50(2)(b) DRA.

It is practice under Section 4(1)(a) of the DRA that documentary evidence for example an affidavit by the surviving spouse must be lodged to prove election by a surviving spouse in a joint estate where massing and election occurred. In this case the surviving spouse must join the executor as transferor in the transfer of the immovable property. Further whenever a joint estate is involved, regulations 50(2)(c) DRA must be complied with by divesting the joint estate.

BY MS TANIA SHAWE
EDITOR

AMENDMENT OF AN ERROR IN A SECTION 11(3)(B) ACT 95 OF 1986 CERTIFICATE-DISCUSSION OF GARY RUCKSTUHL AND ANOTHER V WAKENSHAW ESTATE HOME OWNERS ASSOCIATION- CASE

Rem of Ptn 405 (of 11) of Lot 56 No.931

Wakenshaw Manor	Clusters	Wakenshaw Estate	Ihlati Lodge
Rem of 405	Ptn 727 (of 405)	Ptn 726 (of 405)	Ptn 725 (of (405)
Sectional Title	**Freehold**	**Sectional Title**	**Sectional Title**
(No HOA cond)		(HOA cond rectified by Notarial deed)	(HOA Cond)

This article discusses the decision in *Gary Ruckstuhl and Another v Wakenshaw Estate Home Owners Association* (6969/2016) [2020] ZAKZDHC 25; 2021 (1) SA 269 (KZD) (13 July 2020), regarding a presumed omission of certain conditions in Section 11(3)(b) schedule of conditions with the opening of a scheme in terms of the Sectional Titles Act, 1995 (Act No. 95 of 1986) (STA), where the necessary consents in terms of Section 4(1)(b) of the Deeds Registries Act, (DRA), to amend the error cannot willfully be obtained.

This case involves an action by the Plaintiffs Mr. Gary Ruckstuhl and another instituted against the defendant, Wakenshaw Estate Home Owners Association (HOA) for an order declaring that the plaintiffs are not members of the HOA and that their titles further are not subject to the HOA conditions which were omitted from the section 11(3)(b) STA

certificate when the scheme was registered, which the Defendants attempted to rectify, resulting in the plaintiffs then becoming members of, and liable to the defendant and it's requirements.

The facts of the case are briefly as follow: The developer, Wakenshaw Trust, established housing developments on a property described as Remainder of portion 405 (of 11) of Lots 56 No. 931 (parent property). The application to layout a private township comprised of four subdivisions ,delineated by boundaries across the width of the parent property. The portions were Ptn 725, 726 and 727 (of 405) and Remainder of Ptn 405. It was a condition of the subdivision that a right of way servitude would traverse the remainder and Ptn 727 and 726 to ensure access to Ptn 725, 726 and 727. Ptn 727 was first to be developed on cluster housing which required the subdivision of that portion into separate housing plots which could be sold under freehold title. It was accordingly named ''Clusters''. Further development of the portions for sectional titles schemes took place; on Ptn 726 the scheme 'Wakenshaw Estate'; on Ptn 725 ''Ihlati Lodge'' and on the Remainder ''Wakenshaw Manor'' (of which two owners are the Plaintiffs and disputing to be the members of the Defendant HOA). Bodies Corporate were established for sectional title developments on these three properties, and each scheme was made subject to the Home Owners Association conditions of which each owner of a unit or an Erf had to become a member. The Cluster development though is freehold, not a sectional title and accordingly did not have a body corporate and the other constitution was for Wakenshaw Estate Home Owners Association, (the defendant). The constitutions of Clusters association and of Wakenshaw Estate HOA were almost the same even though the Clusters was a freehold title and Wakenshaw Manor was a sectional title scheme.

The circumstances that led to the errors are as follow: The administrator who was entrusted with the duty to draft the constitutions, drafted the constitution for Clusters first and carried forward almost the same contents into the Wakenshaw Estate Home Owners Association constitution. The definition of the word ''estate'', where it appears in clause 1 of the constitutions, was common to the two constitutions and was the correct definition for Clusters, however, one could not read into it for the Wakenshaw Manor scheme. These ''Omnibus Servitude for Services conditions and the Home Owners Association" conditions were contained in the title deeds of the Clusters portion but according to the Defendant erroneously omitted in the Section 11(3)(b) certificate of Wakenshaw Manor when the scheme was opened.

The relevant Home Owners Association conditions, reads that "neither the lot, nor any further subdivision, nor any unit thereon , as defined in the Sectional Titles Act No. 95 of 1986, shall be transferred to any person until he has bound himself to become and remain a member of the Home Owners Association for the duration of their ownership and a clearance certificate be issued by association to the effect that its articles of association have been complied with".

The plaintiffs' action against the defendant, Wakenshaw Estate Home Owners Association was that the plaintiffs are not members of the defendant, not subject to the defendant's constitution, and not liable to the defendant for any claims made against them under the defendant's constitution. The argument was that conditions under which the plaintiffs held their sectional titles, filed with the Registrar of Deeds in terms of Section 11(3)(b) of the STA did not contain conditions rendering the plaintiffs members of the Defendant or liable to the conditions. That would be that the error in the section 11(3)(b) justifies the declaratory relief the plaintiffs seeks. The defendants' plea was that the conditions were erroneously omitted and should be inserted either under common law of rectification of contracts or additionally under Section 4(1)(b) of the DRA. One can argue that if common law rectification of a contract must be applied then there should be evidence to proof that all members of the units in Wakenshaw Manor shared a common intention with the defendant, prior to acquiring ownership, that the conditions on the title reflected in the relevant Section 11(3)(b) certificate should be regarded as including those sought to be introduced or added.

A rectification of an error in terms of Section 4(1) (b) of the DRA gives the registrar of deeds discretionary power, that is the power to rectify the Section 11(3)(b) certificates exists only if it is the registrar's opinion that it is necessary or desirable to do so. The section identifies limited areas where such rectifications may be made namely an error in respect of the names and description of the parties, description of the property, as well as a description of the conditions of the title. The rectification must satisfy certain requirements. Any interested party, such as bondholders must consent to the

amendment in writing (s4(1)(b)(i)). If such consent is refused, a party who seeks such rectification may apply to court for an order to rectify the title deed (s4(1)(b)(ii) and (iii)). Clearly this was the reason for the court application as the Plaintifs were not going to consent in terms of the S4(1)(b)(i) requirement.

The court ruled that the Registrar of Deeds should be authorised to proceed with rectification of the Section 11(3)(b) certificate relating to the Wakenshaw Manor scheme on condition that the registrar shares the view that the rectification is desirable, or regard it as necessary, and without the required consents of the "interested parties " (Plaintiffs) as required in terms of S4(1)(b)(i). Considering the section that rectification may take place when it is considered necessary or desirable to do so by the registrar of deed, the court too was compelled to mentioned matters that would affect a registrar's approach to a request for the rectification of the certificate in terms of Section 11(3) (b) STA by adding the conditions.

The discussion above highlights the diligent approach a conveyancer must have when preparing documents for the opening of schemes which could have dire implications affecting the developer and owners if important conditions binding the registered owners are not recorded.

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DID YOU KNOW?

The following are some random deeds registration good-to–know facts that can arise anytime for any examiner. They are meant to be quick reminders of the legal position relating to deeds registration for examiners.

1. It is permissible to amend an error in the description of a property in the Antenuptial Contract by application of the parties in terms of s4(1)(b), provided that the notary involved confirms the allegations in the affidavit of the applicants. RCR63/1949

2. Property registered in the name of A, unmarried, and B, divorced, may be consolidated in terms of s40(1)(b), where A and B, in whose names the properties are registered, have subsequently married in community of property to each other. RCR4/1951.

3. Property subject to a fideicommissum residui, may be sold to pay the debts of the estate of the fiduciary, provided that the Conveyancer or the Master certifies under s42(2) that it was sold to pay such debts of the fiduciary.

4. Generally, erven in an established township must be released from the operation of the applicable bond simultaneously with the transfer thereof, provided that erven depicted on a general plan or from a new township may be released from a mortgage bond before they are transferred. RCR 20/1954.

5. A Receiver of an estate, appointed in terms of a divorce order does not qualify as an "owner" as envisaged in s102 of the DRA. He/she must be clearly authorised by the court to transfer property on behalf of either party to the divorce. RCR10/1955.

6. A will or copy thereof lodged in support of a transaction to be registered in the deeds registry must bear evidence that it has been accepted by the Master of the High Court. No exception.

7. The provisions of s4(1)(b) DRA can be utilised to rectify an error where the registered owner obtained ownership of such property as to ½ share by virtue of the marriage in community and the other ½ share by virtue of a Will subjecting such half share to a fideicommissum, but the whole of the property was erroneously made subject to such fideicommissum.

8. Where the bare dominium owner together with the usufructuary sold the property to a purchaser and they agreed that a mortgage bond for the balance of the purchase price must be registered, such mortgage bond must be registered in favour of the usufructuary and not the bare dominium owner. RCR13/1980.

9. A developer of a Sectional Title scheme who did not reserve the right of extension with the opening of the scheme, may still reserve such right provided that there is not yet a body corporate of such scheme. s25 STA.

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