Conveyancing Law for Paralegals and Law Students

Matome M. Ratiba

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Preface

The importance of paralegals spread and working across Southern Africa cannot be overstated. They bring legal advice and assistance to the poor and empowering communities to act for their rights. They also reach out to poor communities, where they are often the only access people have to information about their rights, and how to enforce those rights. The past two to three decades has borne witness to an increased drive by public institutions of higher learning to provide the requisite paralegal training, coupled with a noticeable proliferation of private sector training centres all of which has indeed seen over 5,000 paralegals trained and working or volunteering in advice centres, attorneys offices, legal aid clinics and specialised service organisations dealing, for example, with workers' or women's rights.

The purpose of this book is to act as a basic guide and thereby equipping paralegals and law students with practical skills in the law and procedures relating to conveyancing: that is, the drafting, evaluation and registration of deeds required for the lawful creation and transfer of ownership and other real rights in land in South Africa. The opening chapter will present a history and overview of the South African Land registration system. In the second chapter, a discussion of the various rights relating to immovable property will be dealt with. The third chapter focuses on the office of the conveyancer and/or notary, particularly the practices and procedures involved therein. The fourth chapter will continue with the same theme albeit from the point of view of the Deeds office. In other words the emphasis will be on the Deeds office practice and procedures. Chapters five and six will respectively deal with the two processes of transferring and mortgaging immovable property as well as zooming in on the relevant instruments of implementing same. Lastly, servitudes and notarial deeds are the subject matter of discussion for chapter seven.

Finally a word of thanks to the following people who contributed in one way or the other to ensure the appearance of this book:

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MM Ratiba
PRETORIA
JUNE 2015

1 The Historical Overview of the South African Land registration system

1.1 Chapter introduction

This chapter presents a history and overview of the South African Land registration system. The starting point is the historical tracking and discussion of land registration system as it existed in the Nerthelands and covers the period shortly before the arrival of Dutch settlers in South Africa. This is followed by an elucidation of the land registration system in the early Cape shortly after the Dutch settlement.

1.2 The period before the Dutch Settlement (Pre 1652)

The system of registering land dates back to the earliest times. In the year 3000 BC the Egyptians already had a form of land registration. Towards the end of the middle Ages in some areas of the Netherlands, the practice arose of transferring the right of ownership of immovable property by registration before a court in the region in which the land was situated. On 10 May 1529 Emperor Charles V issued an edict that in Holland all *"verkoopingen, belastingen, vervreemdingen ende hypotheecqueeringe"* of immovable property must take place *"voor den rechter ende ter plecken daer die goedere gelegen zijn" otherwise all such "verkoopingen, belastingen, vervreemdingegen endehypotheecqueeringe"* will be deemed *"as nul, eggen ende van onwaerden"*. The writers on Roman Dutch Law interpreted this edict to mean that the informal transfer of immovable property, which did not take place before the court, was legal and binding between the parties, but null and void regarding third parties.

According to the writers on Roman Dutch Law, in order to bind third parties the immovable property had to be transferred formally before the court of the place where the property was situated. On 9 May 1560 Philip II issued an edict to the effect that a register of all transfers of immovable property had to be kept. The Secretary of the court in each city or district had to keep a register of all transfers of land situated within the region of that court. This was the origin of our register regarding land. The Romans never had a registration system for land. These provisions for the registration of transfers of immovable property and the keeping of registers were entrenched and expanded by sections 37 and 38 of the Political Ordinance of 1 April 1580. Thereafter in both the states of Holland and West Friesland, legislators of the provinces levied taxes on the transfer of immovable property by means of various edicts. Incidentally this was the origin of our modern payment of transfer duty.

According to the Dutch practice, the transfer took place with the compilation and presentation of the title deeds in duplicate to the court that had jurisdiction over the area where the land was situated. The original title deeds, which were written in large letters and sealed with a wax seal, were then handed in to the court receiver. The registration of the transfer took place when the secretary of the court entered a copy of the title deed into the protocol register of the court. This completed the registration of the transfer.

1.3 The period after the Dutch settlement (Post 1652)

The South African system of registration is based on the 16th century Dutch law. With the first issue of land to the Free Burgers in 1657 it was laid down that alienation had to be executed in front of the commander or his delegates. Later it was executed before two members of the Court of Justice which took care of the formalities prescribed for the transfer of immovable property, after it broke away from the Politieke Raad in 1680 and formed a separate legal institution.

Initially there was no real registration of title deeds. This position held until 1 July 1686 when Governor Simon van der Stel, in accordance with a resolution and proclamation of the same date, made registration of deeds compulsory. This was essential since there was an intolerable situation regarding the ownership of land. Owners who had lost or destroyed their title deeds could not have them replaced since there was no official record. They were compelled to prove their right of ownership *de novo* so that new title deeds could be issued to them. In terms of the Proclamation, the owners were granted two months to register their title deeds and if they neglected to do so they forfeited their right of ownership. Thus deeds registration, in the sense of an official register of title deeds, came into existence. It should also be noted that in that same year transfer duty on immovable property was instituted in the same year.

In accordance with the first deed of transfer that could be tracked down (dated 12 October 1658) both the transferor and the transferee had to appear before the Court and both signed the deeds in the presence of the Secretary and the seal of the Company was affixed in red wax on the title deeds.

From 1695 the transferor and transferee appeared before the "Agbare Raad deser Gouvernments in plaetse van schepenen". From 1716 this was changed to the honourable "Raad van Justitie deser Gouverments in plaetse ven schepenen."

From 1823 the parties appeared before the State Secretary who was the official conveyancer. The parties or their agents were introduced by the clerk in charge of the deeds section in the office of the Secretary. The deeds were prepared by or under the supervision of the Secretary. When the parties appeared before the court, the clerk quoted the main points of the deeds. The deeds which were in duplicate were then handed over to the judge who briefly scrutinised them and then signed them, whereupon the deeds obtained legal force. The parties then left the room and the next group came in and the procedure was repeated until all the deeds that were ready for execution were completed. In the office of the Secretary there were two clerks. One received the applications from the persons who wanted to transfer their properties. These applications were accompanied by the original title deed or existing deed of transfer. No professional knowledge of legal principles regarding the forms to be completed was expected of the clerk. He was allowed in instances of doubt to refer to the President of the Court for guidance. In those days the execution of deeds of transfer took place on Fridays and each deed was accompanied by a certificate from the Receiver of Tithes for Transfer Duty to the effect that the latter had been paid. This tax was payable within four months from the date of the transaction in as far as it concerned the Cape districts and six months for the other districts. Sales frequently took place on credit for which bonds were passed. These bonds were also compiled in the same office in which the Deeds of Transfer were compiled. Here too the forms used were elementary and seldom exceeded one page.

In 1828, Commissioners Bigge, Colebrooke and Blair made certain recommendations regarding the procedural aspects of registering property. Ordinance No. 39 of 1828 was adopted as a result thereof and the three consecutive stages for the establishment of a valid deed of transfer or bond, namely preparation, execution and registration were entrusted to one official who occupied the newly created post of Registrar of Deeds. The cost of the preparation, examination and registration of the deeds was 97½ cents per deed.

As a result of the great expenditure due to the construction of roads, an investigation was instituted in 1844 to cut expenses where possible and since three of the five clerks in this office were busy with the preparation of deeds, these three office bearers were discharged and the work was entrusted to advocates or persons authorised therefor by Ordinance No. 14 of 1844. Although Deeds could still be compiled in the Deeds Office the conveyancers monopolised the compilation of all deeds and this gave rise to the regular and methodical examination of deeds by the staff of the Deeds Office. The owners or hypothecators (mortgagors) had to appear before the Registrar to sign the deeds in his presence. The deeds were then examined and if found to be in order, were signed by the Registrar a few days later, but the deeds were backdated to the day of submission. No further appearance of the owner was necessary, even when the deeds were rejected and resubmitted later.

The case of *The Cape of Good Hope Bank v Fischer, (1885–1886) 4 SC 368 4* which was decided in 1886 sheds an interesting light on the examination of deeds. The conveyancer obtains a power of attorney from the seller together with a deed of transfer receipt and proof of Quit rent payment (if any) as well as the title deed(s) of the owner before he can compile a deed (in duplicate) in favour of the buyer. Any existing bond was endorsed on the seller's deed. This endorsement was affixed by the conveyancer and signed by the Registrar. At transfer the bond, properly cancelled, had to be submitted, or the bondholder had to agree to the transfer. If these formalities were not complied with, the transfer was refused by the Registrar.

In 1891 The Deeds Act No. 19 of 1891 comprising 23 sections was promulgated. This piece of legislation laid down the practice and procedure that had to be followed for the acceptance of deeds of transfer and bonds for registration in the Deeds Office in Cape Town. In terms of section 4 thereof, the judges of the Supreme Court were empowered to make rules and regulations "for the order and management of the Land and Debt registers". The regulations were drawn up and came into effect in the Cape, Kimberley and King Williams Town Deeds Offices. Notes by deeds office examiners on deeds were first made in November 1891. They were written on a separate sheet of paper in ineffaceable (permanent) pencil and attached to the deed concerned. A few weeks later the notes were written on the front of the deeds. The conveyancers' replies were written in soft pencil. The first notes on the reverse of the deed itself were made in October 1892 and by that time the number of examiners in the Cape office had increased to seven.

The system of land registration at the Cape was eventually incorporated into the provinces of the Union of South Africa. After unification in 1910 the registration system was accepted on a national basis in accordance with the Deeds Registries Act 13 of 1918. The application of Act 13 of 1918 soon revealed what defects there were and what problems still had to be solved. On 1 September 1937 the present Deeds Registries Act 47 of 1937, came into effect: the title of the Act explains the objective of the Act as being *"to consolidate and amend the laws in force in the Union relating to the registration of deeds."* The present South African deeds registration system has had a long history and today the present Deeds Registries Act 47 of 1937 is still being supplemented and amended, to keep pace with developments. In the larger Deeds Offices computers and a micro-film system are used to save storage space and to render a more efficient service to the public. Without a doubt the registration system in South Africa is one of the best and most effective systems, if not the best system, in the world.

2 The distinction between real and personal rights (Ownership vs. Limited rights)

2.1 Chapter introduction

There are generally many conditions linked to rights of ownership of immovable property registered in the deeds office. Some of these conditions are deemed by our law to be registrable in the deeds office, together with immovable property, and some of the conditions are deemed to be unregistrable.

This chapter will therefore give a detailed account of the distinction between Real and Personal rights as well as determining when a condition is registrable in the deeds office.

2.2 Real and Personal rights

The right of ownership is the most complete right that a legal subject (person) can have over a legal object (a possession). Right of ownership in an immovable thing always consists of the *ius utendi* (commonly meaning the right to use the property), *ius fruendi* (meaning the right to collect and consume the fruits/ proceeds of the property), and lastly *ius abutendi* (again meaning the right to abuse and destroy the property).

2.2.1 Limited rights

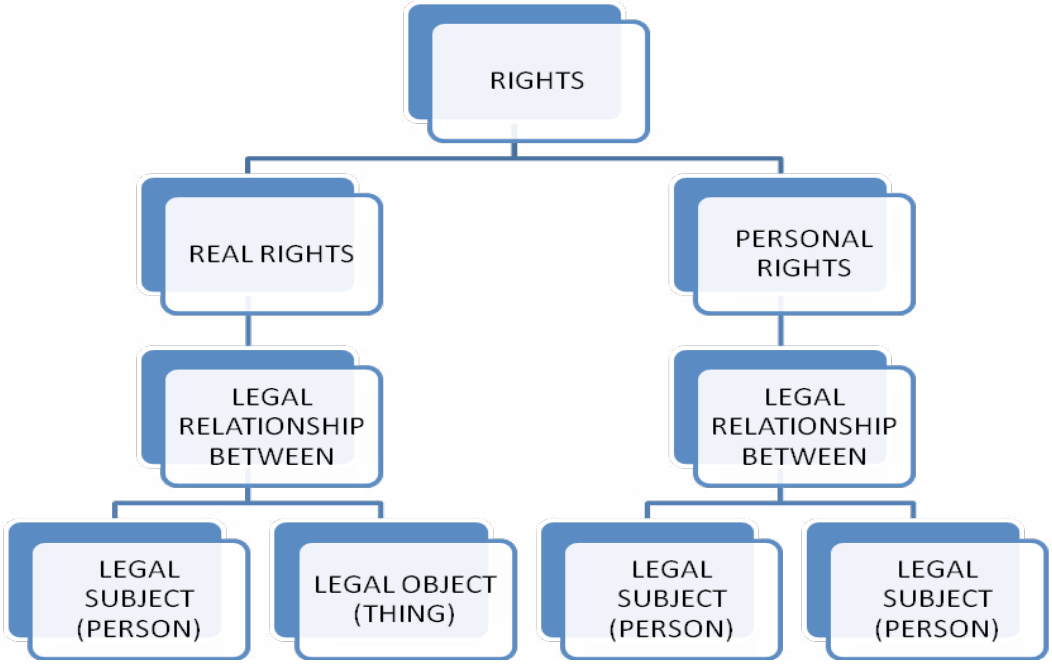
Rights of ownership are often subject to legal restrictions. This is mainly because one of the functions of a legal system is to balance the interests of different parties and uphold them in order to prevent conflict. The acquisition of rights by one party necessarily leads to the curtailment/diminution of the rights of another. Where one person has certain limited rights over another person's property, this is known as *iura in re aliena*. An example will be where in order to enable him to access the main road, a landowner acquires a right of way servitude (limited real right) over his neighbor's property which is situated in front of his, resulting in the neighbour's right of ownership being restricted.

2.2.2 Real rights

Because the deeds office registers mainly real rights in immovable property, it is important to know and understand the distinction between these rights and conditions that are real. A real right necessarily involves a legal relationship between a legal subject (a person) and legal object (a thing) that is enforceable against third parties. It is also possible for different legal subjects to have different rights concerning the same legal object, and for these respective rights to be enforceable against all third parties. One or more legal subjects may even have different rights over different objects that are enforceable against all third parties. For example, the owner of farm A has a right of way over farm B and an aqueduct servitude over farm C. At the same time, the owner of farm B has a right of grazing over certain parts of farm A, and his electricity cable runs across farm C. Farm C has a right of way over both farms A and B.

2.2.3 Personal rights

A personal right, in contrast, necessarily entails a legal relationship between two legal subjects. The focus of a personal right is therefore not an object or possession but the performance of another person. It follows logically that this right to performance (legal claim) is enforceable only against the other legal subject with whom the legal relationship exists and not against third parties. The following diagram summarizes the differences between real and personal rights:



2.3 Registration of rights

The difference between real and personal rights is very crucial and must always be kept in mind because the general rule for registrability is that only limited real rights/conditions that pertain to immovable property are registrable.

2.3.1 Real rights

Section 3(1) (o) of the Deeds Registries Act 47 of 1937 authorizes and requires the registrar to register, modify or cancel personal servitudes and praedial servitudes. Section 3(1) (r) authorizes and requires the registrar also to register, cede, modify or cancel real rights that are not specifically referred to in section 3(1).

2.3.2 Personal rights

Personal rights that do not restrict the exercise of right of ownership (in immovable property) are generally not registrable, unless they are covered by section 63 of the Deeds Registries Act 47 of 1937.

2.3.3 Criteria for determining whether the condition results in a personal or real right

How will the registrar determine whether the condition gives rise to a personal or real right? The Deeds Registries Act contains no criteria, so one has to therefore look elsewhere. There are various tests and theories, but only the subtraction from *dominium* test will be briefly considered.

2.3.3.1 Subtraction from dominium test

The subtraction from *dominium* test (diminution of right of ownership) is the most generally accepted test. It entails that a condition must place a restriction on the owner's right of ownership in order to qualify as real and thus registrable. A restriction can be placed on the owner's right of ownership by for instance (a) granting to another person certain rights that necessarily form part of a full right of ownership (for example, when a non-owner performs a positive ownership action), or (b) placing certain restrictions on the owner's exercise of his/her right of ownership (for example, when an owner is prohibited from performing certain ownership actions). A prerequisite for this test is, of course, that the owner and the intending holder of the right to be registered may not be one and the same person.

2.3.3.2 Objections to the test

There are two main objections to the test. The first is that the right of ownership, which is the most comprehensive and common real right, does not satisfy the criteria of the test, because ownership must already exist before the test can be applied. The second objection is that personal rights can also partially restrict the right of ownership. For example, because owner A is allergic to Maple trees, he/she persuades hi/her neighbours to agree never to plant maples on their premises as long as he/she is living next door. This is just a personal right and an agreement between owners, but it still restricts one neighbour's right of ownership because they can no longer freely utilize their premises by planting whatever they like there.

2.4.1 Summary of the distinction

This chapter has dealt with the concept of rights, which can be either personal or real. Personal rights concern a legal relationship between people. Real rights concern the right holder's right to a thing, and they are valid against third parties. It was also pointed out that a registrar must register, transfer, modify and cancel personal servitudes, praedial servitudes and real rights. Personal rights, however, may be registered, transferred, amended or cancelled only if they are ancillary or complementary to another registrable condition, or if they form part of a mortgage bond, a lease or a deed falling under section 3(1)(c), (l), (m), (p) or (q) of the Deeds Registries Act. In conclusion, it was confirmed that the subtraction from *dominium* test (diminution of right of ownership) is commonly used to determine whether a right is real in nature or not.

3 Conveyancing and Notarial practice

3.1 Chapter introduction

This chapter deals with the legal office of both a conveyancer and notary with specific reference to the requirements for acting as such. It entails discussing the functions, legal duties and responsibilities of both as the preparers of various deeds for lodgment and registration in a deeds registry as well as the actual deliverer of such deeds for lodgement in a deeds office.

3.2 The Conveyancer

At present only qualified attorneys may become conveyancers. A conveyancer is admitted by the court and is an officer of the court in both his office as conveyancer and attorney. This does not mean that he is a civil servant, or employed by the court – merely that he should be honest and impartial, acting in the interests of truth and justice. In his office as conveyancer he enjoys special privileges, for example certain work is reserved for him as conveyancer.

3.2.1 Requirements for becoming a conveyancer

Section 102 of the Deeds Registries Act 47 of 1937 defines a conveyancer as: *a person practising as such in the Republic, and includes a person admitted as an attorney in terms of the relevant Transkeian legislation and physically practising as such within the area of the former Republic of Transkei on or before the date of commencement of Proclamation No R9 of 1997.* Additionally section 18 of the Attorney's Act 53 of 1979 imposes a further requirement that a person first be admitted to practice as an attorney before he/she can be enrolled as a conveyancer. Such admitted attorney must then pass two written national examinations (one of which may be an oral examination), before being eligible for admission to practice as a conveyancer by the High Court. The prospective conveyancer must in addition have himself/herself placed on record at the local deeds registry and provide a specimen of his/her signature. The latter requirement is as a result of Regulation 16 of the Deeds Registries Act, 1937 that makes provision for each registrar of deeds to keep a register of conveyancers, essentially for the registrar to be able to determine whether a conveyancer has the authority as such to appear in his office to execute deeds and to prepare deeds that are registered in his office.

3.2.2 The duties of a conveyancer

The conveyancer has a number of duties to discharge in his capacity as such. The duties in question are discussed in detail below.

3.2.2.1 The duty to ensure valid agreement of sale of land

In terms of Section 2(1) of the Alienation of Land Act 68 of 1981 no alienation of land will be of any force or effect unless it is contained in a deed of alienation, signed by the parties or their agents acting on their written authority (it should be noted that "alienation" of land means the sale, exchange, or donation of land). However there are exceptions for public auctions and where an agent acts on behalf of a close corporation or company still to be formed. In these instances where there is no written agreement or authority, special procedures have to be followed. Only once the conveyancer is certain that there is indeed a valid sale can he/she proceed with the further transfer of the property.

3.2.2.2 The practical duty to manage financial matters and the transaction process

In every registration transaction where there is a transfer of rights in exchange for a payment of money, the conveyancer must manage the financial matters. This implies the following:

- The conveyancer must ensure that he/she has sufficient cash funds and/or guarantees and undertakings to cover the consideration (purchase price) payable, including any occupational rental payable in terms of the agreement of sale. This is one of a conveyancer's primary responsibilities. The conveyancer will accordingly check the amounts and totals of the guarantees and undertakings, interest rates, limits, conditions of payment and authorised signatures.

- The conveyancer must ensure that the purchase price is sufficient to cover the capital and interest required to cancel the existing bond or that the seller has alternative funding available, as no property may be transferred unless the existing bonds have been disposed of (cancelled or the property released from the operation of the bond). It is quite tricky because the conveyancer cannot predict exactly when the bond will be cancelled and thus know how much interest will be payable to the existing bondholder.
- The conveyancer must ensure that the transfer duty, municipal rates and taxes, deeds office levies and transfer fees have been paid, and collect the money for all this from the party liable for such costs in terms of the deed of sale.
- Should the conveyancer be required by the client/seller to furnish undertakings in writing on behalf of the seller (to pay for instance the estate agent's commission), the conveyancer must ensure that there will in fact be sufficient funds on registration of transfer to honour these undertakings to third parties. In such instances the conveyancer must be particularly careful regarding the interest that may be payable on the existing bond as described above. Should there be an extended and unexpected delay in the registration, this interest may accrue to such an extent that there is little or no proceeds of the sale or alternative funding left to cover these undertakings.
- The conveyancer must remember to present guarantees and undertakings for collection on date of registration of the transaction and to pay out his/ her undertakings on behalf of the seller or purchaser, before paying over the proceeds of the sale to the seller.

In addition to the above, the following practical interactions are undertaken by the conveyancer soon upon receipt of instructions. It must be emphasized that these interactions take place parallel to each other and sometimes even simultaneously. It is also possible for all activities to be concentrated in the hands of one conveyancer and in different representative capacities:

Liaison with the seller which takes place both telephonically and in person
• Contact seller for copy of ID, marital status, ANC and electrical compliance certificate • Receives requested documents • Draws up documents and draft deed using seller and purchasers details and existing title deed • Check documents and draft deeds • Arranges for signature by transferor(s) and transferee(s) • Checks and prepares deeds and double-checks finance • Arrange for lodgment of deeds • Ultimately lodges the deeds • Transfer comes up on prep – final check, especially finances • Registers transfer • Accounts to all parties

Liaison with the purchaser which takes place both telephonically and in person
• Contact Purchaser for details of financing of purchase, copy of ID, proof of marital status, ANC (Ante nuptial contract) and transfer costs • Receives requested documents and payment of costs • Draws up documents and draft deed using seller and purchasers details and existing title deed • Check documents and draft deeds • Arranges for signature by transferor(s) and transferee(s) • Checks and prepares deeds and double-checks finance • Arrange for lodgment of deeds • Ultimately lodges the deeds • Deeds comes up on prep – final check, especially finances • Registers deeds • Accounts to all parties • And most importantly advises local authority of details of the new owner

Liaison with the bond holder which take place mainly telephonically and electronically
• Contact Bondholders requesting cancellation requirements and original title deed • Receives bond cancellation figures, title deed and (if applicable) details of cancellation attorneys • Forward guarantee in favour of existing bondholder and pays cancellation costs on behalf of seller • Arranges lodgment • Lodges the deeds • Existing bond cancellation comes up on prep • Cancels bond • Uses finances to pay outstanding amount on existing bond

Liaison with the new bondholders ' representatives which also mainly take place telephonically and electronically
• Contact Attorneys registering new bond to finance the purchase • Receives confirmation of amount available on bond • Sends bond attorneys details of guarantee required by existing bondholder and balance in favour of trust and copy of new draft deed, enabling them to draft their bond and supporting Documents • Receive guarantees- • Arranges lodgment • Lodges the deeds • New bond comes up on prep • Registers bond • Uses finances to pay purchase price to seller

Liaison with the Local Authority mainly in person
• Contact Local authority to apply for rates clearance certificate • Receives estimated account 120 days in advance • Pays local authority for rates and SARS for transfer duty • Receives transfer duty receipt and rates clearance • Checks correctness and reapplies or amenwd if necessary

Liaison with Estate agent both telephonically and electronically
• Contact Estate agent to confirm proceedings and undertaking to pay commission • Reports every step to the Estate agent

3.2.2.3 The duty to prepare deeds and documents and take responsibility for correctness of facts

In practice this duty entails checking the contents of the deed thoroughly and thereafter signing the preparation clause on the top right-hand corner of the first page with a view to certifying the correctness of certain facts. The signatory's responsibility in this regard arises in terms of section 15A (1) and (2) and regulation 44(A) of the Deeds Registries Act 47 of 1937. The purpose of the preparation clause is to firmly place the responsibility for the documents and deeds prepared by the conveyancer with that conveyancer logically because he/she is the one who coordinates and manages the particular transaction as opposed to the registrar, who has no knowledge or control of that particular transaction until it is lodged for registration. Because the conveyancer is now responsible and liable (to the extent provided for in regulation 44A), it is therefore not necessary to lodge proof of certain facts contained in the deed, such as identity numbers and marital status, at the deeds office. This obviously has time saving benefits for the deeds office personnel, who will practically and simply accept the correctness of the allegations of the preparing conveyancer in this regard.

According to section 15 of the Deeds Registries Act 47 of 1937, before a registrar of deeds may attest, execute or register a deed of transfer, certificate of registered title for registration or a mortgage bond, it must be prepared by a conveyancer. Similarly regulation 43(1) of the Act provides that all deeds of transfer, certificates conferring title to immovable property, deeds of cession and mortgage bonds must be prepared by a conveyancer.

In terms of regulation 43(2) a conveyancer must also personally initial all alterations or interlineations in any deed, certificate, cession or bond he/she prepares, and initial every page of that deed, certificate cession or bond not already containing the conveyancer's signature. The reason is that the conveyancer is responsible for the correctness of the contents and facts as stipulated and contained in the deeds, so all pages and all changes need to be initialled by the conveyancer to ensure that no unverified information has been inserted. Examples of material alterations or interlineations to the documents and deeds referred to in regulation 44(2), which therefore must be initialled by the preparer of the deed/document, are amendments to (a) names, identity numbers or marital status of transferor or mortgagor, (b) date of sale, (c) description of property, (d) purchase price and (e) amount of mortgage bond. It is furthermore important to note that Section 15A essentially provides that, by signing the preparation certificate of a deed, consent, power of attorney, etc, the conveyancer accepts responsibility for the accuracy of the facts as prescribed in regulation 44A. Regulation 44A provides that the preparer of the deeds is responsible to ensure the following: being that

a) All copies of the deeds or documents are identical on date of lodgment. (This is only relevant for deeds offices where microfilming is not yet in place and multiple copies of deeds still need to be lodged.)
b) In the case of a deed of transfer or certificates of title to land, the entire applicable township and other conditions have been correctly brought forward from the previous title deed. This is particularly problematic in the case of consolidated properties, where the component parts are subject to different conditions. However, the registrar of deeds must still examine the title conditions to ensure that they do not, for instance, contain conditions that have lapsed, a prohibition against alienation, or require certain consents to alienation or a pre-emptive right (first right to purchase).
c) Where deeds and documents are being signed by an executor, trustee, tutor, curator, liquidator or judicial manager, or by a person in any other representative capacity, the preparer (from perusal of the documents evidencing the appointment which have been exhibited to him/her) must ensure that such person has in fact been so appointed, is acting within his/her powers and has furnished the necessary security to the Master of the High Court.

d) To the best of the preparing conveyancer's knowledge and belief and after due enquiry has been made, the names, identity number, or date of birth, and the marital status of any natural person who is party to the deed or document is correctly reflected in the deed or document; and the names and registered number, if any, of any other (legal) person or a trust are correctly reflected in that deed or document.
e) Where deeds and documents are being signed on behalf of a company, close corporation, church, association, society, trust or other body of persons, or an institution, the signatory is in fact authorised (that is with proof that the signatory is duly authorised by the management to sign the documentation, by way of a resolution) and (except in the case of a company) the relevant transaction is authorised by and according to the constitution, regulations, founding statement or trust instrument.
f) In the case of a deed of transfer, certificate of title or mortgage bond, the particulars in the deed have been correctly brought forward from the special power of attorney or relevant application. This means that, where the deed of transfer, certificate of title or mortgage bond is based on a preceding power of attorney or application, drafted and prepared by someone else, the preparer of that power of attorney is responsible for the correctness of the names, identity numbers, registration numbers and marital status of the parties. (See regulation 44(1) read with regulation 44A.) The conveyancer who thereafter prepares the deed of transfer, certificate of title or mortgage bond takes responsibility for the correct carrying forward of this information from the power of attorney to the new deed – not for the actual content of such information.

A further practical point to note is that when preparing a deed, power of attorney, consent or application for lodgment in the deeds office and in particular before signing the preparation certificate at the top of the deed and accepting personal responsibility for the items set out above, the preparer (conveyancer, attorney or notary) will check the above matters meticulously and will keep proof of any facts for which he/she took responsibility on file. Section 15A(3) of the Act provides that, in the course of examining the deed or document, the registrar of deeds must accept that the facts for which the preparer of the deed accepted responsibility have been conclusively proved, unless the deed or document is *prima facie* incorrect. The registrar is duty-bound to examine the deed or document (s 3(1) (b)) and may in terms of section 4(1) (a) call for proof, by way of affidavit or otherwise, of any other necessary fact.

3.2.2.4 The linking of deeds

All deeds and documents presented to the deeds registry for purposes of registration must be lodged in separate lodgment covers for each transaction. Deeds that must be registered simultaneously for financial reasons, although prepared and lodged by different conveyancers, can be linked as a batch (by completing their lodgment covers in a specific way) and lodged on the same day in separate lodgment covers. The deeds are then examined and checked by the deeds office personnel as a batch and are registered simultaneously as a batch. In terms of section 13 of the Act, the linked deeds are all deemed to be registered only when the last act of registration in the batch has been signed by the registrar. Linking of deeds for simultaneous execution in a batch is usually done because the finances of the various transactions are linked. A number is allocated to each deed for execution or document for registration (sometimes called "units"). The linking of deeds will be reflected as required by the practice prevailing in the relevant deeds office. The following codes/abbreviations are commonly used on the lodgment cover:

a) **T** for deeds of transfer, transfers by endorsements, certificates of title and deeds
b) **B** for mortgage bonds and charges
c) **BC** for mortgage bond cancellations, releases from the operation of the bond
d) **PA** for general powers of attorney
e) **H** for antenuptial contracts
f) **VA** for copies of lost or destroyed deeds in terms of regulation 68

The nature of the different transactions and the linking of the deeds must be indicated by the conveyancers (regulation 63(3)) on the front covers of all the linked deeds.

3.2.2.5 The duty to lodge deeds

When a conveyancer has completed the financial arrangements and the transaction process, checked, prepared and linked the deeds (in collaboration with the conveyancers attending to the other simultaneous transactions, where applicable), the conveyancer will arrange for simultaneous lodgment of all the linked deeds at the relevant deeds office. This involves the transferring conveyancer contacting for instance the bond cancellation conveyancer and the new bond conveyancer (if different conveyancers are involved), checking that they have all satisfied their financial and procedural requirements and are ready to lodge and execute the deeds for which they are responsible – and, if so, arranging to lodge their deeds on a prearranged date at the deeds office. If one of the simultaneous transactions is not yet ready for lodgment, then lodgment cannot take place for any of the linked deeds. If one of the linked transactions is not lodged on that particular day, the remaining transactions will be rejected and relodgment will have to be arranged. It must be noted that in terms of regulation 45 of the Deeds registries Act, deeds, bonds, documents and powers of attorney must be lodged by a conveyancer practising at the seat of the deeds registry, or by a person employed by such conveyancer, for execution or registration. Regulation 45(1) makes an exception for state departments, to the effect that documents lodged on behalf of government departments may be lodged by any person in the employ of that government department, even though he/she is not a notary or conveyancer and even where that government department does not have an office at the seat of the relevant deeds registry, in a manner approved by the registrar.

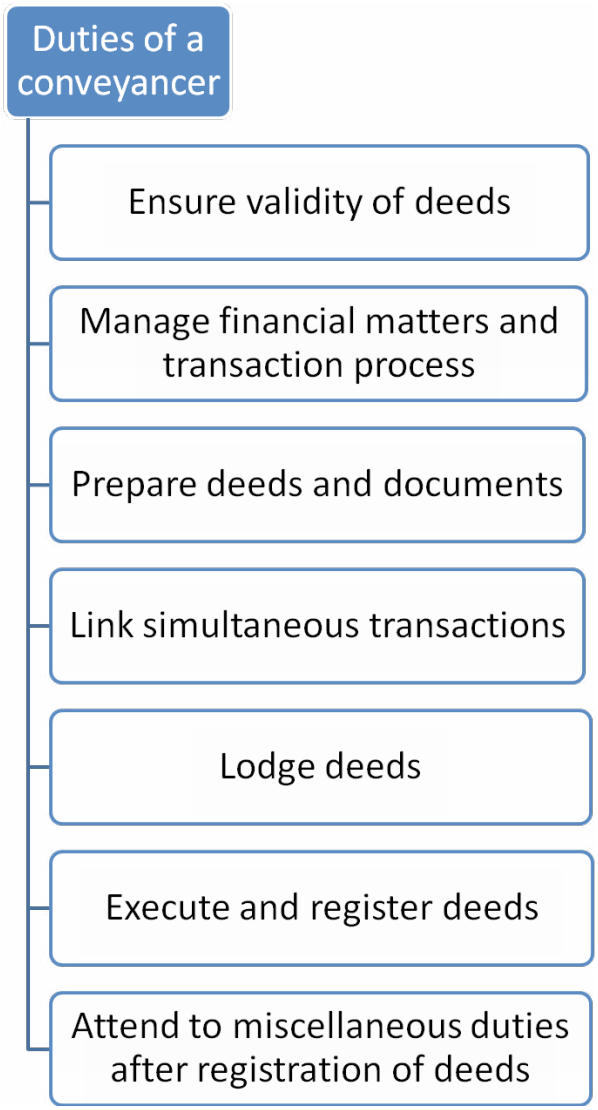
3.2.2.6 The duty to execute and register deeds

After about five to six working days (regulation 45(3)), the deeds should have completed their progress through the deeds office and "come up on prep" meaning that the respective conveyancers have a final chance to make such amendments and corrections as are required by the deeds examiner's notes and to check their financial arrangements before the deeds are registered or executed. Once all the corrections and amendments have been completed, the deeds are ready for registration. The deeds are first handed to a final registration clerk, who again scans the bar code or the deeds to record their progress from "prep" to registration and thereafter places them in special execution pigeonholes for the conveyancers to execute. This involves the respective conveyancers of the simultaneous transactions signing their respective deeds in the execution room of the deeds registry in the presence of the registrar of deeds. The deeds thus signed are then handed to the registrar for execution, who attests the signatures of the conveyancers and registers the deeds in the batch. At this stage then execution of the deeds has taken place. Once the registrar affixes his/her signature to the deed (or the endorsement on a document or power of attorney lodged for registration only) or to the last deed in a batch of simultaneous transactions, then such deed or batch of deeds is deemed to be registered (s 13(1) of the Act).

3.2.2.7 Miscellaneous duties after registration of deeds

After registration the respective conveyancers advise their clients of registration, the guarantees and undertakings relating to the various linked transactions are presented for payment and honoured, the conveyancers account to their clients for the monies received and debit their fees. After approximately a month, the registered deeds are returned by the deeds office to the respective lodging conveyancers, after having been sealed, a sequential number allocated, recorded on the deeds office database and electronically recorded (microfilmed or scanned). The conveyancers deliver the new deeds to their clients, or in some instances to some other person entitled thereto; for instance the bondholder will hold the title deeds of the land over which he/she/it holds a bond as security for repayment of the debt. Old, defunct deeds will also be handed to the client or simply be retained in the conveyancer's file.

All of the above duties can schematically be represented as follows:



3.3 The notary

At present only qualified attorneys may become notaries. A notary is admitted by the court and is an officer of the court in both his office as notary and attorney and as notary he enjoys special privileges, for example certain work is reserved for him as notary. In terms of section 83(1) of the Attorneys Act 53 of 1979, a person may not practise as a notary unless he is admitted by a competent court to practice as such after he has passed his admission examination.

Section 102 of the Deeds Registries Act determines that the execution of any deed creating or conveying real rights in land may only take place before a notary who is practising in the province in which the land is situated. Therefore a notary practising in the Cape Province cannot execute a notarial servitude on land situated in the province of Gauteng. Any other notarial deeds for example, antenuptial contracts or notarial bonds may be executed in front of any notary irrespective of the province in which he practices and irrespective of the deeds office in which their registration must take place. It is practise although not compulsory that each notary has an official seal and that all documents executed by him are sealed with it. Legislation further requires a notary to keep a protocol register and a protocol. The protocol register is a numerical and date sequential record of all notarial deeds executed before such a notary and kept in his protocol. A protocol is a minute of all the original deeds signed or executed before the notary and attested by him and recorded in numerical and date order. These are called protocol copies. A notary is obliged to keep his protocol and protocol register in safe-keeping behind lock and key.

3.3.1 Functions of a notary

A notary has, among others, the following functions and powers regarding the place where he can practise and perform the professional work exclusively reserved for him:

a) the creation of personal and praedial servitudes;
b) the handling of long-term lease contracts and related transactions;
c) the drafting and execution of cession of mineral rights
d) the drafting of mining leases;
e) the drafting of notarial bonds;
f) the drafting of antenuptial contracts;
g) the notarial collation and certification of copies of memorandum and articles of association of a company that must be handed in to the Registrar of Companies at incorporation, as well as other documents.
h) the protest of a bill after receipt of a dishonouring;
i) certification of documents for use outside the republic;
j) the preparation of powers of attorney for use in the Deeds Office, and
k) The preparation of various collusive documents, for example deeds of donation, deeds of trust, power of attorney, wills et cetera.

4 Deeds office practice

4.1 Chapter introduction

This chapter deals with the description of the deeds office, the staff of the deeds office, functions of the deeds office, powers and duties of the registrar of deeds and finally the description of the deeds registration process in a particular deeds registry.

4.2 The deeds office

A deeds office can broadly be described as a government office where information relating to land and certain other related judicial information (such as antenuptial contracts) are readily provided for public access. The main objective of a deeds office is to establish the right of ownership in land and other real rights by means of the registration of deeds, contracts and related documents including sectional titles and leaseholds. In South Africa there are currently up to ten such offices and one office of the Chief Registrar of Deeds. The seven offices are the Bloemfontein Deeds Registry, the Cape Town Deeds Registry, the Johannesburg Deeds Registry, the Kimberley Deeds Registry, the King Williams Town Deeds Registry, the Mpumalanga Deeds Registry, the Mthatha Deeds Registry, the Pietermaritzburg Deeds Registry, the Pretoria Deeds Registry and finally the Vryburg Deeds Registry.

4.3 Functions of the deeds office

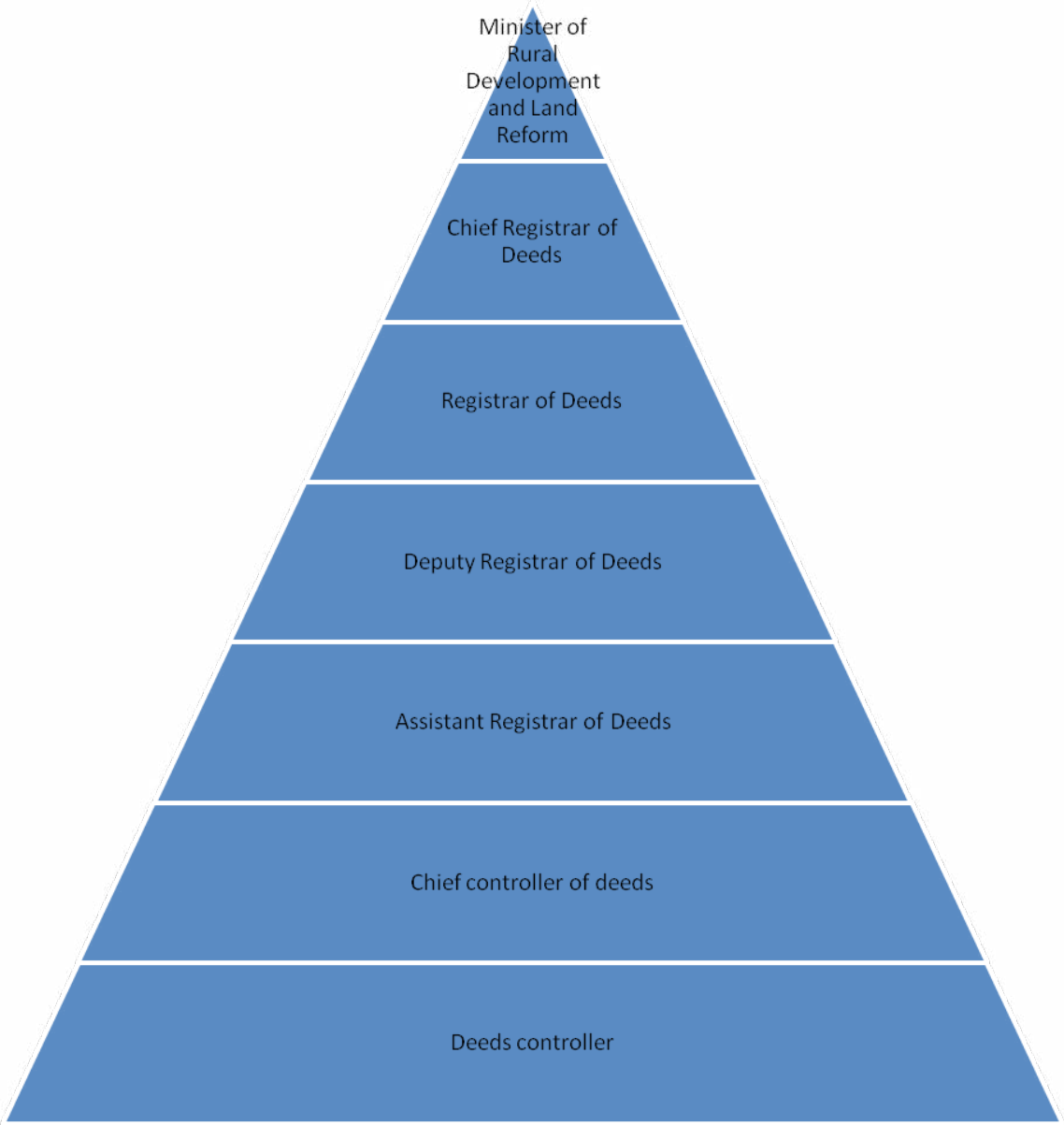
The main function of a deeds office is to maintain an effective land registration system for the area over which it has jurisdiction in order to ensure legal certainty. A deeds office offers owners an indisputable title regarding real rights which is a unique characteristic of our registration system. The security of a right established with regard to all real rights and the fact that there can be total reliance on the deed of transfer as a legally valid document, is of the greatest importance for the public and the economy of the country. The ordinary citizen need never have any misgivings that his registered ownership right, usually his greatest material possession, namely his house or his land, will ever be doubted.

A further function of the deeds office is to supply information on demand to members of the public regarding any registered deeds. Anybody may acquaint himself with the full particulars of a property that he wishes to purchase, for example: the previous purchase price of the land; what restrictions there are to the use and enjoyment of the property i.e. to what rights is the land subject to or to what rights is the land entitled; whether there are mortgages or liabilities registered against the land; whether there is any attachment or other impediment against the transfer of the property; and whether the seller has contractual capacity regarding the land and whether he is not perhaps insolvent. This information is however not supplied over the telephone as a fee must be paid for the information. Information must be requested in writing or the person must personally visit the office and request the information. It must be mentioned that certain persons like conveyancers, surveyors and messengers of court are exempt from paying for the information. However, even they will not be able to obtain the information over the telephone, but a computer link-up with the deeds office is now available for which a fee is charged.

Deeds offices also supply local authorities with information regarding the names of new owners, property descriptions, purchase price etc. on the transfer of all taxable properties. Local authorities use this information to determine which persons in their jurisdiction are liable for the payment of property tax and also to compile the necessary valuation lists for properties.

4.4 The deeds office staff

The following organogram gives a clear depiction of the hierarchy and management structure of the deeds office.



a) **The Minister of Rural Development and Land Reform** is in charge of the Department of Rural Development and Land Reform, which is one of the departments of the South African government responsible for topographic mapping, cadastral surveying, deeds registration, and land reform. Significant components of the department include the Deeds Registries, the office of the Chief Surveyor-General, the Chief Directorate: National Geo-spatial Information (South Africa's national mapping agency), and the Land Claims Commission.
b) **The Chief Registrar of Deeds** is the Chairperson and executive officer of deeds registries regulation board. He/she supervises all deeds registries to bring about uniformity in practice and procedure.

c) **The Registrar of Deeds** is in charge of an individual deeds office for which he/she has been appointed, usually comprising the following sections: examinations, strong room, data, microfilm/scanning information, personnel and administration. Lodged deeds and documents are usually routed through all of these sections as part of the registration process. There are therefore currently one such registrar in deeds registries at Pretoria, Johannesburg, Cape Town, Bloemfontein, Pietermaritzburg, King William's Town, Kimberley, Vryburg, Umtata and Nelspruit.

d) **The Deputy Registrar of Deeds** are appointed one or more per deeds registry. For a person to be appointed to this position, section 2 of the Deeds Registries Act 47 of 1937 requires him/her to have the Diploma Juris or an equivalent diploma or degree and to have proven appropriate expertise or the capacity to acquire the ability required to perform the functions of that office within a reasonable time.

e) **The Assistant Registrar of Deeds** are appointed one or more per deeds registry. Similarly, section 2 of the Deeds Registries Act 47 of 1937 requires a person appointed to this position to have the Diploma Juris or an equivalent diploma or degree and to have proven appropriate expertise or the capacity to acquire the ability required to perform the functions of that office within a reasonable time.

f) **The Chief controller of deeds** are appointed in several numbers at each deeds registry .They control the legal validity and registrability of deeds, tests notes for the existence of defects in the deeds and eliminates notes after defects have been corrected. They also pass or reject deeds and manage subordinates.
g) **The deeds controllers** are similarly appointed in several numbers at each deeds registry and controls the information registers, and makes and in some cases, removes notes on defects in deeds.

4.5 The duties of a registrar of deeds

The duties (and responsibilities) of the registrar of deeds are set out in section 3 of the Act, and will differ depending on the type of transaction. Among other things therefore the registrar has the following duties (and responsibilities).

4.5.1 Take charge of and preserve all records

The registrar takes charge of and preserves all records of the deeds registry for which he/she is appointed (s 3(1) (a)).

4.5.2 Examine all deeds

The registrar is responsible for the examination of all deeds or other documents submitted for execution or registration and rejects any deed or document which cannot be registered under the Act or any other law or to the registration of which any other valid objection exists (s 3(1)(b)).The examination of a deed entails:

a) checking that all the legal provisions relating to the transaction have been complied with
b) checking and disposing of interdicts against the relevant persons and property
c) endorsing the relevant deeds and documents to give effect to such registration or law (s 3(1) (v)) ("endorsing" a deed involves placing a stamp and/or a short note on an existing deed or document referring to subsequent transactions, for instance "mortgaged" endorsement on a deed of transfer)
d) Updating the deeds registry records by recording the details of the new registration. Examination by the registrar will not include the examination of the facts referred to in regulation 44A, for which the preparing conveyancer accepts responsibility.

4.5.3 Record interdicts

The registrar records interdicts, that is court notices, returns, statements or orders lodged with the registry in terms of any law (s 3(1) (w)). Interdicts usually prevent or restrain a person from acting or dealing freely with his/her property and are recorded and numbered by placing the code **"I"** before the consecutive number followed by the year, as follows: I 326/2007 – which means that the relevant property is subject to an interdict, and is the 326th interdict recorded at the deeds office during 2007. Several types of interdicts may be recorded against a property. For instance:

a) General interdicts and court orders: **I**
b) Attachments: **I AT**
c) Caveats: **I C**
d) Liquidation and judicial management: **I CY**
e) Surveyor-General interdicts: **I SG/I LG**
f) Rehabilitations: **I Reh**
g) Expropriations and sequestrations are numbered using only the code EX or S before the consecutive number, without the **I** – for instance **ex 628/2006.**

4.5.4 Keep registers

The registrar keeps registers (computerized or otherwise) necessary for compliance with the Act or any other law and maintaining an efficient land registration system that provides security of title and ready reference to any registered deed. All the registration information is thus captured electronically and reproduced on microfilm, or more recently by scanning and capturing on the electronic deeds registry database.

4.5.5 Give public access to registers and records

The registrar must, if any person complies with the prescribed conditions and pays the prescribed fee, permit that person to inspect the public registers and records, to make copies and extracts of the records and registers, and to obtain other information about the registered deeds or documents (s 7(1)).

In compliance with this requirement there is currently a triple supply of information:

a) The Deeds Web system is a computerized system permitting registered users to access the deeds office mainframe computer system by way of a data link, either electronically via the Internet or by physically visiting the deeds registry, where deeds office employees will access the computerized information on request.

b) The scanned, electronic copies of deeds on the deeds office database which can be viewed on computer monitors. This recently replaced the microfilm system by which one could browse celluloid copies of registered deeds and their supporting documents on special viewers set up in the deeds office.
c) The manual card-based recording system. This is still used in some deeds offices and can only be accessed by physically visiting the deeds office.

The above duties of the registrar are summarized in the schematic representation indicated hereunder:

4.6 Powers of registrar

The powers of the registrar are set out in s 4 of the Act and are briefly stipulated as follows:

a) The registrar may require the production of proof, by affidavit or otherwise, of any fact necessary to be established in connection with any matter or thing sought to be performed or effected in his/her registry(s 4(1)(a)) in respect of deeds or documents lodged for registration. The registrar may thus refuse registration pending production of further documentary proof or even require parties to obtain a court order authorizing registration.

b) The registrar may rectify deeds or documents registered or filed in his/her deeds office relating to an error in the name or the description of any person or property, or the conditions affecting the property (s 4(1) (b)).
c) The registrar may issue certified copies of deeds or documents registered or filed in his/her deeds office (s 4(1) (c)).
d) The registrar may order that a certified copy be obtained to replace an illegible or unserviceable deed or document (s 4(1) (d)).
e) The registrar may submit reports to court relating to applications for performance of any act in a deeds office, where it will carry a good deal of weight (s 97(1)).
f) A registrar must also be familiar with the common law, court decisions, legal opinions, instructions issued by the chief registrar and prescribed by the Registrars' Conference Resolutions to ensure correct registration of deeds and documents. Although the office of the registrar of deeds evolved from that of judge, the registrar today is not regarded as a judicial officer, but rather as a semi-judicial officer.

It is also important to keep in mind that Section 99 of the Act provides that the government, the registrar and officials employed at the deeds office will not be liable for damages sustained by any person due to any act or omission on their part, unless: (a) the act or omission was *mala fide* or (b) the registrar and/or official did not exercise reasonable care and diligence in carrying out their duties. In each instance the court will have to decide whether one or both the above exceptions apply, based on the proven facts before the court. However, should *mala fide* be an element, the registrar or official concerned may incur personal liability for any loss or damage suffered. Remember: Merely because a registration is faulty does not necessarily mean that there was not reasonable care and diligence by the official concerned.

4.7 The registration process in detail

Following hereunder is a full exposition of the procedure to be followed from the date of purchasing a piece of land to the date on which the title deed to the land is handed to the purchaser or his agent.

4.7.1 Purchase contract

Private sales of land must be in writing and must be signed by the parties or their agents. The deed of sale is therefore the hinge around which the purchase transaction revolves. A deed of sale is prepared either by an attorney or an estate agent. After the deed of sale has been signed by the parties, it is dispatched to the conveyancer nominated therein by the seller.

4.7.2 Preparation of the deed of transfer

On receipt of a deed of sale, the nominated conveyancer checks the validity of the contract and determines which conditions and/or requirements must be complied with before the land can be transferred to the purchaser. The most important condition is naturally the payment of the purchase price. Usually the purchase price is payable in cash on registration of the land in the name of the buyer and it is therefore necessary that the conveyancer obtain a guarantee or undertaking which will secure the purchase price before the land is transferred.

After the purchase price has been paid or secured and the fees for the preparation of the deed of transfer and other sundry expenses (which naturally include the transfer duty) are paid, the typist, known as the conveyancing typist, starts to type/draft the deed of transfer and all supporting documents.

After the deed of transfer and its supporting documents have been prepared and all other receipts and proofs have been obtained, the typist hands them to the conveyancer to check and sign the necessary certificates and if necessary to call for the parties to sign the required affidavits or attestations.

If the deed and its accompanying documents have been prepared and the purchase price paid or secured, the deed is ready for lodging in the relevant deeds office. From here onwards the process traces the progress of the deed from the day on which it is lodged in the deeds office to the day on which it is returned to the conveyancer. The sequence of events is briefly described as follows:

(a) Day 1 – one

The conveyancer lodges the deeds or documents under cover of a lodgment slip at the lodgment counter in the deeds office. When more than one conveyancer is involved in the simultaneous transactions, all the simultaneous deeds and documents relating to that transaction are reconciled as a batch by means of the linking system, dated and scanned into the Deeds Office Tracking System (DOTS) by the officers at the lodgment counter. If only a single transaction/ conveyancer are involved, it is similarly dated and scanned into the DOTS.

A sticker with a bar code is affixed to the bottom right-hand corner of the lodgment cover. This bar code is scanned by various sections of the deeds office as the batch of deeds proceeds through the process; this allows the conveyancer and the deeds office management to track or manage the progress of a particular deed or batch of deeds through the process and to predict when it may be ready for registration or execution.

When all the single deeds and batches have been dated at the lodgment counter, they are sent to the data section, where the bar code is scanned and computer data printouts are made of the existing deeds office data relating to the persons and property concerned. These printouts are inserted into the lodgment covers.

From the data section the deeds proceed to the distribution room, where (after scanning the bar code) the sorters allocate a value to the single deeds and batches of deeds corresponding with their degree of difficulty for examination purposes. Then the sorters distribute the single deeds and batches of deeds among the deeds controllers in such a manner that all the deeds controllers receive a similar quota (comparable variety) of deeds to examine.

(b) Day 2 – two

The deeds controllers examine the deeds for the first time: They (1) endorse the deeds to reflect the transaction to be registered (2) check interdicts against the person and property to ascertain whether there are any court orders prohibiting the proposed registration or restraining dealings by the person or with the property (2) raise notes in respect of any errors or oversight in the deeds or question the authenticity of documents or request lodgment of further evidentiary proof. The conveyancers have to comply with these notes in order to have the deeds or documents registered.

(C) Day 3 – three

The deeds controllers return their quota of deeds to the distribution room from where the bar code is scanned and the deeds are distributed to the chief deeds controllers, who examine them for a second time. In particular they must ensure that all the applicable provisions of the Act have been complied with, raise further notes if necessary and decide whether the deeds, documents and batch are registrable. They will indicate on the lodgment cover of each deed or document whether the deed, documents or batch has been rejected (by endorsing it with a capital R) or passed for registration or execution (by initialling the cover).

(d) Day 4 – four

After scanning the bar code, the deeds and documents destined for execution or registration proceed to the assistant registrar who monitors them to ensure that he/she agrees with the chief deeds controller's decision.

The rejected deeds and documents are sent to the delivery counter for scanning the bar code and are then returned to the relevant conveyancer, who must correct the errors in the relevant deeds or documents and thereafter re-lodge the deeds and documents at the lodgment counter to go through the whole process again. If the conveyancer is satisfied that after correction a deed or batch is in order, he/she may request the chief deeds controller, in his/her discretion, to restore same. If the deeds or documents were however incorrectly rejected, the chief deeds controller has no option but to restore the deeds.

The restored deeds or documents and those monitored and passed by the assistant registrar of deeds then proceed to the preparation room, where the bar code is scanned and the deeds are sorted and placed in the relevant conveyancing firm's pigeonhole for the attention of the conveyancer.

(e) Day 5 – five

Unless they have obtained a prior extension from the assistant registrar, conveyancers have three days within which to comply with the notes raised by the deeds controllers, failing which the deeds will be rejected and sent to the delivery counter for collection by the relevant conveyancer.

When all the notes in the deeds or batch have been complied with and accordingly deleted by the deeds examiner, the bar code of the deeds or batch of deeds are finally scanned for execution and checked by the data typists for any new interdicts that have been received in respect of any of the parties or the property subsequent to the initial examination done by the deeds controller. This process is called "black booked". If new interdicts that are applicable have been received, the batch is rejected (unless the conveyancer certifies that that particular interdict is not applicable) and sent to the delivery counter for collection by the conveyancer.

If not, the deeds, batch of deeds or documents are sent to the execution room, sorted and placed in the relevant attending conveyancer's pigeonhole.

(f) Day 6 – six

The conveyancer has a further period of three days within which to appear before the registrar of deeds and register or execute the deeds or documents, failing which the batch will be rejected and returned to the delivery room for collection by the lodging conveyance

(g) Day 7 – seven

After execution of the deeds by the conveyancer and registrar and, where applicable, registration of the deeds or documents, the deeds and documents are numbered, sealed and dated. (The registrar has a seal of office that must be affixed to all deeds executed or attested by him/her and to all copies of deeds serving in the place of the original, issued by him/her. This, together with his/her signature, serves to authenticate the deed so that it may serve as an official public document.)

(h) Days 8 – eight and 9 – nine

The data section captures the information from the registered deeds on the deeds registry computer database and, in those deeds registries not using microfilm or digital scanning, the registered transactions are manually cross-referenced against the office copies of the title deeds, as well as in the relevant registers.

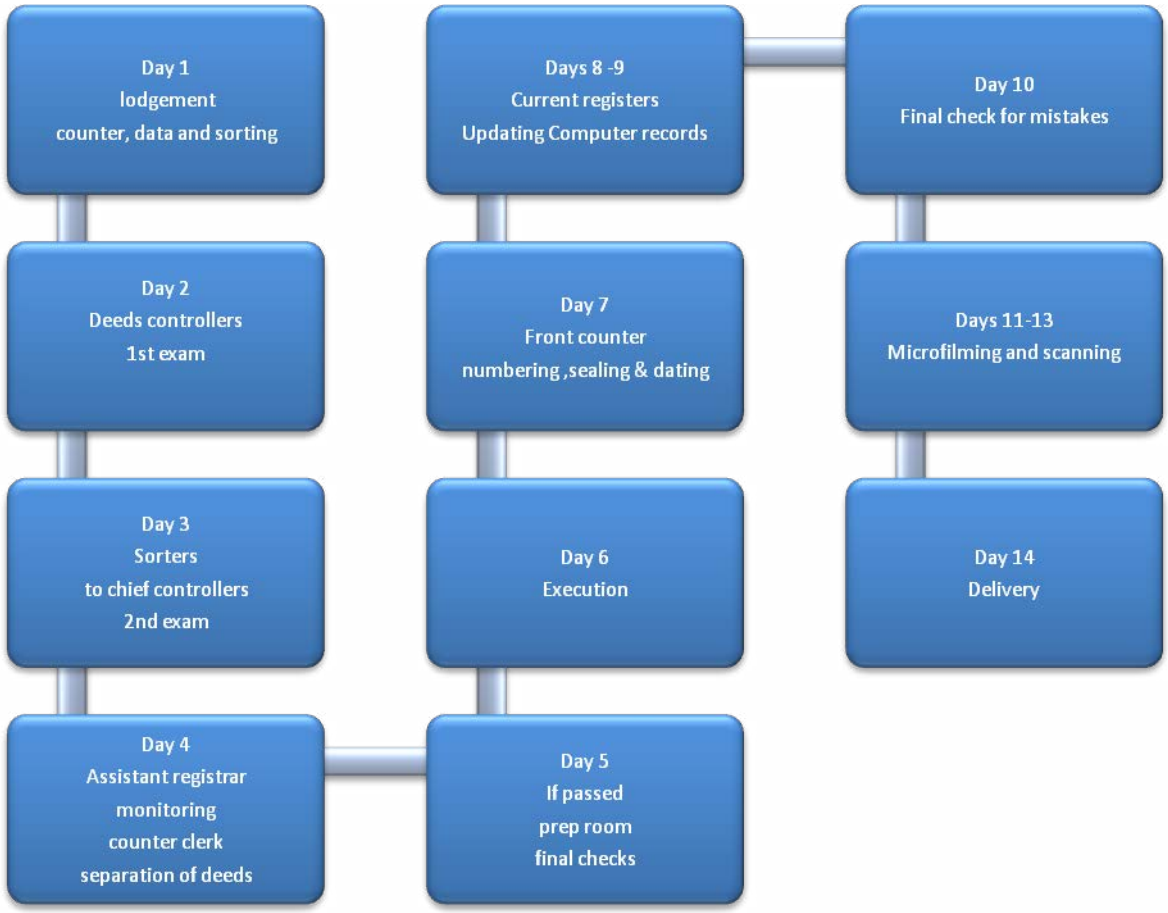
(I) Day 10 – ten

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

(j) Days 11 – eleven and possibly up to 13 – thirteen

In the mechanized offices copies of the deeds and documents are captured on microfilm or the whole deed is scanned into the computer database, after which the deeds or documents proceed to the delivery room for delivery to the lodging conveyancer, who in turn delivers the registered deeds to the client concerned. (In the non-mechanized offices an additional copy of the deed must be lodged, which is then retained and filed by the deeds registry for record purposes in place of the microfilm/scanned copy kept in the mechanized offices.)

The above process is schematically reproduced and summarized below



5 Transfer of immovable property (Deeds of transfer and Supporting documents)

5.1 Chapter introduction

This chapter deals in greater detail with the process by which land (immovable property) is transferred from one person to another and most importantly by virtue of the deed of transfer. The chapter begins by highlighting the events and the various processes preceding the main one of transferring land through the deed of transfer. This is then followed by an analysis of the deed of transfer with specific emphasis placed on inter alia the significance of the various clauses of a standard deed of transfer, the drafting of key clauses and the operative parts of a deed of transfer under different circumstances, the incorporation into and qualification of conditions in a deed of transfer. Lastly, the chapter presents a discussion of the documents that must be lodged simultaneously with and in support of an ordinary deed of transfer.

5.2 The sale of land as an antecedent to the deed of transfer

In practice the preparation of a deed of transfer is naturally preceded by a purchase contract between the seller and the purchaser, also known as a deed of sale. It is therefore absolutely essential and imperative that the definition of as well as the requirements needed for a valid purchase contract or deed of sale be looked at to begin with.

5.2.1 Definition of a purchase contract

A purchase contract is defined as "a mutual agreement whereby one person, the seller, undertakes to deliver a thing to another, the purchaser, and the other, in exchange therefore undertakes to pay the former a sum of money" (De Wet and Yeats, 1978. 4th ed. *Die Suid-Afrikaanse Kontraktereg en Handelsreg*, p. 278). From these it follows therefore that a contract which does not comply with the requirements as laid down, will not qualify as a purchase contract. In practice however the parties are given leeway to add all sorts of different provisions for example, how, when and where the thing must be delivered or how, when and where the price must be paid et cetera.

5.2.2 Formalities applicable to all purchase contracts of land

In terms of section 2 of the Alienation of Land Act 68 of 1981, any alienation of land must: (i) be in writing; and (ii) be signed by the parties themselves or by their agents acting on their written authority. According to section 3(1) of the above Act, these requirements, which are legally referred to as *Essentialia* of a contract, are however not applicable to a sale by public auction.

Before a contract is considered valid, there must be consensus between the seller and the purchaser regarding the following *essentialia*:

a) The identity of the parties – it is good policy to use the description that will be used in the deed of transfer, namely the full names, identity number and the marital status.
b) The description of land so that it is identifiable – again it is good policy to use the property description that appears in the title deed of the land or if the land is not registered the description as it appears on the diagram of the land.
c) The purchase price with an explanation of the means of payment – the purchase price must be money; otherwise the contract is a contract of exchange. The method of payment can for example be cash on signing the contract or on registration, payable by the purchaser. Usually the contract makes provision for the purchaser to obtain a loan from a financial institution within a certain period of time and/or guarantees which must be delivered to the seller or his agent within a certain period of time.
d) An indication that both parties intend to buy and sell respectively, i.e. there must be consensus.

If the formalities are not complied with, the transaction, subject to the provisions of section 28 of the Alienation of Land Act of 1981, is null and void. Section 28 provides that where any person has performed partially or in full in terms of a contract which has been declared void the party who has performed is entitled to recover from the other party certain costs for example interest and expenditure for improvement and occupational rent and compensation for damage to property.

5.2.3 Clauses that may form part of purchase contract of land

A purchase contract usually contains various material clauses over which the parties have reached consensus, and these are legally referred to as the *Naturalia* and *Incidentalia* of a purchase contract. The most important *naturalia* and *incidentalia* of a purchase contract are:

a) Occupation – the date on which the purchaser occupies the land, usually against the payment of occupational rent pending the registration of the transfer. Mainly because the prediction of the exact date of registration of transfer on which the purchaser would usually become entitled to possession and occupation is difficult, the parties usually agree on an occupation date.
b) Risk, profit and loss – it usually provides that the risk, profit or loss passes to the purchaser on the date on which he obtains the right to occupy the property.
c) Payment of rates and taxes – the parties will agree on which date this obligation passes to the purchaser. Normally the purchaser is liable for the payment of rates and taxes once the property is registered in his name unless otherwise provided.
d) Voetstoots (buy as it stands) – where no guarantees are supplied regarding the property and the property is sold voetstoots. This clause will of course not exonerate the seller where he was aware of the latent defect.
e) Conditions of title – the property is sold subject to the existing conditions of title i.e. the onus rests on the purchaser to satisfy himself as to these conditions – this position finds reflection in the principle of *Caveat emptor* – let the buyer beware.
f) Beacons and boundaries – no obligation rests on the seller to indicate beacons and boundaries to the purchaser. The validity of the contract is not affected, if they should later prove to be incorrect.
g) *Domicilium citandi et executandi* – both parties choose an address to which legal notices may be sent and where legal processes can be served.
h) Jurisdiction – the parties determine which court will have jurisdiction to settle a dispute arising out of the contract.
i) Costs – the parties must determine which party is responsible for the costs of the transfer. If the contract does not stipulate the responsible party, the seller will be responsible.
j) Attorney responsible for the transfer – usually the seller appoints his attorney (conveyancer).

k) Alteration of agreement – it is in the interest of both parties to state that no guarantees have been supplied or proposals made, that the contract concerned contains the entire agreement and that any later alterations must be put in writing before they will be effective.

l) Cancellation – the way in which the parties may assert their rights if the other party should break the contract.

m) Agent's commission – usually paid by the seller. If the agent should accept that which was stipulated in his favour in the contract he can enforce it against the party on whom the obligation rests to pay the agent's commission.

n) Interest rate – if the purchase price is not immediately paid off, it can be stipulated that the purchaser will pay interest on the outstanding purchase price. This interest rate is regulated by the National Credit Act 34 of 2005.

o) Sundry provisions – these may be added according to the specific needs existing at the time.

5.2.4 Sales of land in installments

It is practically possible for the seller and the purchaser to agree on the payment of the purchase in installments of more than two and payable over more than one year. These are known as installment sales and provision for these types of sales is made in the Alienation of Land Act 68 of 1981, the most important of which are sections 20, 26 and 27. Because this type of sales are not an everyday occurrence, they will therefore not form the subject matter of this book save only to raise the students' awareness to their existence.

5.3 The analysis of deed of transfer

The deed of transfer usually serves a dual purpose – as a deed transferring ownership and as a deed proving ownership. Section 20 of the Act provides that a deed of transfer must be drawn in the forms prescribed by the Act and regulations, although minor deviations are permitted (regulation 19(8)). There are different forms of deed of transfer prescribed in the regulations to the Act:

a) form E, which is used for sales, donations, inheritance, etc (this is the most common form)
b) partition transfers – form F
c) expropriation transfers – form G
d) transfer in compliance with a court order – form H
e) transfer of initial ownership in terms of the Development Facilitation Act 67 of 1995 – form CCC
f) transfer in terms of certain other Acts – form DDD

For the purpose of this chapter only form E is discussed and analyzed since that is the one with which contact will be made the most in the conveyancing section of a law firm.

In terms of regulation 20 all deeds lodged in the deeds registry must comply with the following format requirements and formalities:

a) good quality A4 paper to be used
b) top half of the first page to be left blank for endorsements
c) blank spaces to be ruled through (regulation 22)
d) a 4 cm binding margin on the left-hand side
e) only black ink to be used – no faint writing, typing or printing
f) all interlineations and alterations to be initialed
g) copies of documents, the originals of which are lodged in government offices, to be certified by a notary, conveyancer or head of that government office (regulation 20(7))

However the registrar has discretion to waive compliance with any of the above requirements, many of which have now become obsolete in any event; for instance copies of deeds are no longer bound and filed, but electronically stored, so no binding margin is required. However, these requirements remain in regulation 20 and are mentioned for this. The following are component clauses of a form E deed of transfer.

5.3.1 The preparation clause or certificate

This is the certificate at the top right corner of the first page of the deed of transfer, which a conveyancer signs in terms of regulation 43 to indicate that he/she accepts responsibility for the deed. Section 15 of the Act prohibits a registrar from attesting, executing or registering a deed unless it has been prepared by a conveyancer, or as provided for in any other law. An exception, where someone other than a conveyancer may prepare a deed of transfer, is provided for by the Land and Agricultural Development Bank Act 15 of 2002. In terms of Regulation 43(2) of the Deeds Registries Act, the conveyancer whose name appears in the preparation certificate shall initial personally all alterations or interlineations in such deed of transfer, certificate, deed of cession or mortgage bond and also every page thereof not requiring his signature. If, in the opinion of the registrar of deeds, an alteration or interlineations in the deed of transfer or mortgage bond does not require initialing by the conveyancer who prepared the deed, such an alteration or interlineations may be initialed by the conveyancer executing the deed.

5.3.2 The heading

The heading serves to disclose the nature of each deed registered in the deeds office and mainly for the purpose of registration procedure i.e. to determine at a glance the nature of a deed without having to examine it. The heading for a deed of transfer normally appears as "Deed of Transfer."

5.3.3 The preamble

The preamble normally contains the details of the conveyancer appearing before the registrar, the name, identity number and status of the transferor/owner or person who granted the power of attorney authorizing the conveyancer, and the date and place of signature of the power of attorney authorizing the conveyancer to execute the transaction.

The preamble in an ordinary deed will therefore read as follows:

> "Be it hereby made known:
>
> That …… appeared before me Registrar of Deeds at …… he, the said appearer, being duly authorized thereto by a power of attorney granted to him by ……..dated the ……..day of ……and signed at……."

5.3.4 The recital

The recital which at times is also called the *causa* or story normally follows the preamble to a deed of transfer. Its purpose is to give the reason for, or cause (*causa*) of the transfer enabling the registrar of deeds to judge whether the transfer is permissible and registrable or not. The precise wording of a recital or *causa* depends on the discretion and draftsmanship of each conveyancer. There is no prescribed form, but sufficient reasons must be given explaining why a particular piece of land must be transferred to a specific transferee.

Different causas with different wordings applicable thereto are encountered in conveyancing. The following are examples of some with applicable wordings:

5.3.4.1 Sale

The sale causa is characterized by the following recital which is commonplace.

> *…and the appearer declares that his/her principal truly and lawfully sold on 4 December 2006….*

It is common practice to insert the date of sale either here or in the consideration clause, as this indicates when the transferee acquired a right to the land. This is an important factor when the question arises whether or not a sequestration or insolvency order is applicable to that property. In the case of rehabilitation, providing the date of sale can establish whether a right to the property was acquired after the rehabilitation order and, consequently, whether the transferee can deal freely with the property – for example transfer or mortgage it. If land is sold to someone, and he/she dies before the land is registered in his/ her name, the fact that he/she died after the date of sale must be mentioned in the recital. Such recital will therefore appear as follows:

> *…and the appearer declares that the said deceased Donot Wannadie did during her lifetime on 6 January 2007 truly and legally purchase the hereinafter mentioned property….*

In the case of sales in execution resulting from the judgment of a court of law, the recital must refer to the names of the plaintiff and the defendant in the court case, and state that the particular land is registered in the name of the defendant, that it was attached by the sheriff in execution of an order by a specific court and that the property was sold by public auction on a particular day.

The *causae* in sales in liquidation must state that the property was sold by the liquidator on a specific day with the consent of the members of the company, or by virtue of a specific court order, as the case may be.

Where land is sold on behalf of persons who have no legal capacity to act (for example insolvents), or by persons with restricted legal capacity (for example minors) who have the necessary assistance, the recital must state who sold the property, and with whose approval or authority. For instance, the sale may have taken place by virtue of a court order or the approval of the Master of the High Court, or on the written authority of a valid will or other document (for example, section 80 of the Administration of Estates Act 66 of 1965).

5.3.4.2 Donation

If the causa is donation, then the applicable recital will accordingly give particulars of the Deed of Donation. This is in line with section 2(1) of the Alienation of Land Act 68 of 1981 in terms of which no alienation, including a donation of land, is of any force or effect unless it is contained in a deed of alienation (deed of donation) signed by the donor and donee or by their agents acting on their written authority.

5.3.4.3 Succession

The recital will mention the following facts which will be dependant on the circumstances of each case i.e. the date of testator's death, the mode of inheritance, a short explanation of why the transferee (or each transferee) is entitled to the land and a short explanation of how testamentary conditions are dealt with.

5.3.4.4 Exchange

If the transfer results from an agreement of exchange, the recital must disclose which land is given in exchange for the land which is the subject of the transfer with reference to the title deed under which the other land is held.

5.3.4.5 Rectification

In a rectification transfer the recital will vary depending on the nature of the error being rectified. The full facts must be disclosed in the recital, for example how the error occurred and how it is to be rectified.

The recital will therefore look as follows:

Whereas the Appearer's Principal did on 7 December 2006 sell certain property to the undermentioned transferee;

And whereas by deed of transfer no. T 7234/7983 transfer was passed to the transferee herein of property thought to have comprised all the land sold as aforesaid;

And whereas it has since been discovered that the property hereby transferred also comprised part of the property sold as aforesaid which was in error omitted from the aforementioned deed of transfer;

Now therefore, in order to rectify the matter, the Appearer in his capacity aforesaid, did….

5.3.5 The vesting clause

The vesting clause contains the name(s) of the transferee(s) to whom the property is transferred.

In the case of a natural person or his/her estate, the transfer is registered in favour of such person or estate and "his heirs, executors, administrators or assigns".

In the case of a local authority, company, close corporation, association, statutory body, etc, the transfer is registered in favour of such body and "its successors in title or assigns".

Where vesting is in trustees or office bearers, transfer should be passed to such trustees or office bearers and "their successors in office or assigns".

5.3.6 The property clause

The property clause contains information about the land being transferred and should include the following:

5.3.6.1 A full description of the land

In terms of regulation 28(1) (b), the registered number (if any) of the land (farm land, agricultural holding or township erven) must be given. If the land has been subdivided into smaller portions, the property description must include a reference to the relevant portion number or the fact that it is the remaining extent of the land that is being dealt with.

In the description of the land the term "share" must be used when an undivided share in a piece of land is being dealt with. This does not represent a defined portion of land. In other words, if a half share in erf 20, Westphalia, is registered in a person's name, it does not represent an independent, demarcated half portion of the property.

In describing land, no reference must be made, to any building or other property, movable or immovable, which may be on or attached to the land. This is in terms of regulation 28(2).

5.3.6.2 The situation of the land

Regulation 28(1) (a) of the Act prescribes generally that the name of the registration division, administrative district and province in which the land is situated must be mentioned. In the case of land situated in a township, the registration division concerned, administrative district, the name of such township and the province must be mentioned.

Accordingly an erf in a township will, for instance, be described as:

Erf 28 in the township Witbank, Registration Division KR, Province of Mpumalanga

And a portion of an erf as:

Portion 3 of Erf 28 in the township Witbank, Registration Division KR, Province of Mpumalanga

A farm will for example be described as:

The farm Bankriver 278, Registration Division JP, Province of Gauteng

And a portion of a farm as:

Portion 78 (a portion of Portion 28) of the farm Bankriver 278 Registration Division JP, Province of Gauteng

5.3.6.3 The extent or area of the land

In a deed, reference is made to the extent of the land and not the area. The extent must be expressed in words and figures. For example: *3, 5076 (THREE COMMA FIVE ZERO SEVEN SIX) hectares OR 8565 (EIGHT FIVE SIX FIVE) square metres*

In terms of section 22(2), two or more pieces of land may be transferred in one deed by one person, or by two or more persons holding such pieces of land in undivided shares to one person or to two or more persons acquiring such pieces of land in undivided shares. In such a case, each piece of land must be described in a separate paragraph.

Similarly, in terms of section 22(3), two or more portions of a piece of land may be transferred in one deed by one person, or by two or more persons holding the whole of such piece of land in undivided shares to one person or to two or more persons acquiring such portions in undivided shares. Once again, each portion must in terms of regulation 27(1) be described in a separate paragraph, in which reference is made to the diagram of that portion in the extending clause.

5.3.7 The extending clause

The extending clause is prescribed by regulation 26, together with forms TT and UU. This clause follows immediately after the property clause in a deed of transfer. The purpose of the extending clause is twofold: Firstly, it provides a reference to the diagram or general plan that was approved by the Surveyor-General for the land, so that an interested party can determine the whereabouts of the land, namely the boundaries of the land, its width and length, and its general situation in relation to adjoining land. Secondly, it indicates the title under which the land was held at the time of execution of the current deed of transfer. It usually takes one of two forms.

5.3.7.1 On the diagram deed or original deed

In respect of land which was not previously registered (for example a sub-division): this new piece of land will be represented on an approved diagram by the Surveyor- General or on a general plan. In this instance the extending clause might read as follows:

As will appear from the general plan/annexed diagram SG Number A 1711/ 1992 and held by deed of transfer (or grant or certificate of title) Number T3578/1980.

The extending clause of the first deed of transfer following the diagram deed will read as follows:

First transferred and still held by deed of transfer T3729/1993 with diagram SG Number A 1711/92 annexed thereto.

5.3.7.2 As a subsequent deed of transfer

Here the extending clause might read as follows:

First transferred by deed of transfer T 3729/1993 with diagram SG Number A 1711/92 annexed thereto and held by deed of transfer T 43765/2002.

In some instances the first registration is not a transfer. For example where an owner subdivided the property in which case it will read:

First registered by certificate of registered title T 3729/1993 and general plan S G Number AS 1711/92 relating thereto and held by deed of transfer T 43765/2002.

It must be noted that where the number of the diagram does not appear in the extending clause of the preceding deed, it is not necessary to refer to it in the following deed. Hence

First transferred by deed of transfer T 3729/1993 and held by deed of transfer T 43165/2002.

5.3.8 The conditional clause

This clause contains all the conditions applicable to the land on registration of the transfer. The conditions that appear in the conditional clause are not necessarily the only conditions applicable to the land. The conditional clause encompasses only those conditions that have already been registered against the land and that were inserted in the conditional clause when the deed of transfer was first passed. All other conditions imposed after registration of the title deed are endorsed against the title of the land. If someone wishes to ascertain what conditions are applicable to a specific piece of land, he/she must not look at the conditional clause only, but must also satisfy himself/herself that there are no conditions endorsed against the title deed. On transfer of the land the conditions of the endorsement are "brought forward" and are embodied in the conditional clause of the new deed, as additional conditions immediately following the existing conditions.

Conditions must be quoted from preceding deeds and must therefore be inserted in the conditional clause in the language in which they were originally created. Conditions will also follow the order in which they were set out in the preceding deed, and thereafter all the new conditions or servitudes endorsed against the preceding deed will follow in order of registration.

Each deeds registry has its own practice with regard to the conditional clause. For instance, in the Cape Town deeds registry the "pivot deed" system is used. The head of each deeds registry also has the authority to prescribe the office procedure.

5.3.9 The divesting clause

This is the clause that declares the previous registered owner divested of his/her ownership. It is not necessary again to indicate the full marital status of the transferor(s), and parties can be merely referred to as "married as aforesaid". In terms of regulation 35(1)(f),The last part of the divesting clause where the rights of the state are reserved must be omitted in the case where transfer is in favour of the Republic of South Africa

5.3.10 The consideration clause

Form E prescribes that the purchase price must be embodied in the deed of transfer. Where transfer duty was paid on another amount than the purchase price, it is established practice that the amount on which transfer duty was paid is also embodied in the deed of transfer along with the reason why it differs from the sum of the consideration.

5.3.11 The execution clause

In terms of section 3(1) (d), this is the clause in which the act of execution by the conveyancer (or owner) before the registrar is recorded. Execution of the deed of transfer occurs before the relevant registrar of deeds, who attests the deed by signing it as a witness: once the registrar has signed the deed it is regarded as attested and registered. Ownership passes at that moment, unless the deed is linked with others in a batch, in which case ownership passes only when the last deed in the batch is signed (s 13(1)).The full date when the deed was executed appears in the execution clause.

5.4 Supporting documents

The following documents are usually the basic supporting documents that must be lodged with a new deed of transfer. However additional supporting documents may depending on the *causa* of the deed in question be deemed necessary as well and as such be lodged with the deed. The normal supporting documents are:

a) special power of attorney
b) transfer duty receipt or exemption certificate
c) rates clearance certificate
d) any consent required in terms of a title condition (or otherwise) for the registration of the deed, or proof of compliance with a title condition
e) solvency affidavits

In addition to the above documents the existing/current title deed(s) is also lodged as well as any mortgage bonds that need to be disposed of.

5.4.1 Special power of attorney

A special power of attorney is the written authority to represent somebody else in performing a juristic act. The juristic act which the conveyancer is obliged to undertake, in this case, is to appear before a registrar of deeds on behalf of the owner and to do all that is necessary to pass transfer of ownership of the land to the transferee. The person granting the authority to the conveyancer is the owner (transferor) of the land. Because of the practical problems surrounding appearance in the deeds office by the owner himself and because deeds of transfer must be prepared by a conveyancer in any event, almost all deeds of transfer are accompanied by a special power of attorney authorizing a conveyancer to appear before the registrar of deeds and to effect the transfer (or other transaction) on behalf of the owner.

Powers of attorney must generally be initialled on all the pages (including any annexure) by both the grantor and the witnesses except on the last page which is signed in full. This is done in accordance with the Registrars' Conference Resolution 19 of 1989.Furthermore and in terms of regulation 44(2), any material alterations to or interlineations in a power of attorney must also be initialled by the person who signed the document and the person who attested to the grantor's signature. Minor alterations such as typing errors may be initialled by the preparing conveyancer. Any material alteration to any power of attorney must be initialled by the person who has prepared the document. Clearly, therefore, any alterations in respect of information for which the preparer takes responsibility must be initialled by that preparer.

This means that all material alterations to a power of attorney must be initialed by the person who executed the document, by the witnesses and by the preparer of the document. This is the requirement in the case of the following (but not limited) common errors: (a)the amendment of an error in the names, identity number or marital status of the transferor or mortgagor, (b)an error in the date of sale, (c)an error in the property description with regard to an erf number or the portion number of an erf, agricultural holding or farm, (c)a material error in the extent of the land, as this may affect the purchase price or the security under the mortgage bond, (d) an error in the purchase price and lastly (e)an error in the capital amount or cost clause in a mortgage bond.

There is no prescribed form for a power of attorney. It is, however, established practice that the written power of attorney consists of the following, most of which information must correspond with the information in the deed of transfer:

a) preparation clause
b) preamble (including date of alienation and consideration)
c) name of appearer
d) *causa*
e) name of transferee
f) description of property
g) new registrable conditions
h) execution clause

Each of the above is discussed in greater details below.

5.4.1.1 The preparation clause

In terms of regulation 44 of the Deeds Registries Act, the power of attorney must contain a preparation clause completed by a practising attorney, notary or conveyancer. Regulation 44(5) provides that where the power of attorney was prepared by an attorney or notary, a practicing conveyancer must countersign the certificate. This is done by providing and signing a further certificate and attaching it to the power of attorney. The purpose thereof is to confirm that the signatory is a practicing attorney or notary.

5.4.1.2 The preamble

The preamble contains full details of the grantor who is the person or entity who granted the special power of attorney and who is referred to as the transferor. The transferor must be the owner of the land which is being transferred. In the case of a natural person, the preamble must contain the full names, identity number and/or date of birth and marital status of the transferor as provided in regulations 18 and 24.

In the case of a person other than a natural person, the full name and registration number, where applicable is given.

In the case of a power of attorney to pass transfer from a deceased estate, the grantor of the power of attorney should be described as follows:

> *John Shyster, in my capacity as executor in the estate of the late Donnot Wannadie (full name) acting herein under letter of executorship no. 357/2006 dated 10 July 2006 issued by the Master of the High Court, xyz Provincial Division*

In terms of section 15(2) of the Matrimonial Property Act 88 of 1984, a person married in community of property requires the consent of the other spouse for certain transactions. Where immovable property is involved, either of the spouses may act with the written consent of the other spouse; alternatively both parties may sign the power of attorney, in which case both parties must be cited in the preamble to the power of attorney.

By law the grantor of the power of attorney as described in this preamble must have contractual capacity and persons who have limited contractual capacity must be duly assisted. Although it is the responsibility of the conveyancer to correctly cite the parties and to ensure that persons, whether signing in person or in a representative capacity, are in fact authorised so to sign, it is the duty of the registrar of deeds to ensure that the transferor has the necessary contractual capacity to effect transfer. If the transferor does indeed have this capacity, the registrar must establish whether that capacity is in any way restricted by a registered condition of title or statutory restriction or any other law. The following table contains a discussion of status of contractual capacity relating to different types of grantors:

Type of grantor	Contractual capacity status
Persons married in community of property	Any person married in community of property has limited contractual capacity. The spouse must consent in writing to the alienation in the presence of two witnesses in terms of section 15(2) (a) of the Matrimonial Property Act 88 of 1984.
Persons married out of community of property	Any person married out of community of property, irrespective of the date on which the marriage was concluded has full contractual capacity.
Persons whose marriage is governed by the laws of a foreign country	The husband has full contractual capacity and the wife must be assisted by her spouse unless the contrary can be proved.
The minor	A minor under the age of seven has no contractual capacity and his guardian must act on his behalf subject to the provisions of section 80 of the Administration of Estates Act 66 of 1965, which places certain limitations on the alienation of immovable property belonging to minors. A minor between the age of 7 and 18 has limited contractual capacity and must be assisted by his/her guardian subject to the provisions of section 80 of the Administration of Estates Act of 1965.
Deceased persons	If property which does not form an asset in a joint estate is registered in the name of a deceased person, the executor in the deceased's estate is the appointed person to transfer such property. Where the land or property forms an asset in a joint estate the surviving spouse shall in terms of section 21 of the Deeds Registries Act, be joined in his personal capacity with the executor of the estate of the deceased spouse, except: (a) where the executor is dealing only with the share of the deceased spouse; or (b) where the land has been sold to pay the debts of the joint estate; or (c) where there has been massing of the joint estate and the surviving spouse has adiated; or (d) where such a transfer is in favour of the surviving spouse; or (e) where the surviving spouse has signed, the power of attorney to pass such transfer, as executor. The capacity of the executor in a deceased estate is further subject to and limited in terms of the Administration of Estates Act No 66 of 1965.

Type of grantor	Contractual capacity status
The mental patient	Mental patients have no contractual capacity. They cannot perform legal acts even if such legal acts only create rights and incur no obligations. The person who acts on behalf of a mental patient is the curator who is appointed by the Court or according to a will. A curator only has the capacity as contained in the letter of appointment. This capacity is subject to the provisions of the Administration of Estates Act and more specifically section 80.
The partnership	As long as the partnership comprises the same partner, the partnership property may be transferred or dealt with according to a power of attorney bearing the name of the firm and that partner who signs on behalf of the partnership (regulation34(2) otherwise all the partners must act.
Insolvent persons	The curator in an insolvent estate must transfer the property. In terms of section 18(3) of the Insolvency Act 24 of 1936, a provisional curator does not have the capacity to sell property without the authorisation of the Court or the Master.
Liquidated companies	The liquidator must act on behalf of such company subject to the following authorisations: (a) authority granted by a meeting of creditors and members or contributories or by virtue of the instructions of the Master in terms of section 387 – if the company was liquidated by the Court; (b) authority granted by a meeting of creditors – if the company was voluntarily liquidated by the creditors; (c) authority granted by a meeting of members – if the company was voluntarily liquidated by the members. Refer to section 386(3) read with section 386(4) (h) of the Companies Act 61 of 1973.
The trust	The trustees who have been duly appointed by virtue of the Letters of Appointment issued by the Supreme Court obtain their authority from the deed of trust and must act within that capacity.

5.4.1.3 Appointment of Appearer

The power of attorney must contain the name of the appearer, who must be a conveyancer as provided for by section 20 of Act 47 of 1937 and appointed to appear before the registrar of deeds on behalf of the transferor. The identity number and/or date of birth and marital status of the appearer are not required and should not be disclosed in the power of attorney.

5.4.1.4 The Cause

The power of attorney must contain the cause (*causa*) of the transfer; for example, for a sale, the date of the transaction and the purchase price must be disclosed, corresponding to the transfer duty receipt.

A power of attorney usually contains one of five types of *causae*: a sale, donation, inheritance, exchange or rectification. The *causa* must substantially correspond to the deed of transfer.

5.4.1.5 The transferee

In terms of regulation 24 of the Act, the power of attorney must disclose the full names, identity number and/or date of birth and marital status of the transferee if he/she is a natural person, alternatively the full name and registration number of a transferee other than a natural person.

5.4.1.6 Description of the property

The power of attorney must contain a complete description of the property, including the extent of the property and the title reference (regulation 65(3)). This will for example be reflected as follows:

The farm Ratibashoek 383, Registration Division KR, Province of Mpumalanga [description of property]
In extent: 5 000 (Five Thousand) Hectares [extent of property]
Held by Deed of Transfer T 2798/1967 [reference]

5.4.1.7 Creation of new registrable conditions

The power of attorney must contain a comprehensive disclosure of any new conditions. This may include those conditions created for example in terms of sections 65, 67 or 76 of the Act. A personal servitude will be reflected as follows:

> *The property to be transferred is subject to a lifelong right of usufruct in favour of Gregirl Ratiba, identity number 120908 5089 084, unmarried.*

A praedial servitude will on the other hand be reflected as follows:

> *The property hereby transferred is subject to a right of way 3 metres wide in favour of Erf 45 Dagcity Township, Registration Division KR, Province of the Mpumalanga, held by Certificate of Registered Title No. T750/1996 as indicated by the figure AB on diagram SG No 96542/2006.*

5.4.1.7 Execution clause

Section 95 and regulation 25 require that the power of attorney be signed by the grantor and duly witnessed, with reference to its date and place of execution of the power of attorney. The place of execution must be clear, in order that it can be ascertained whether the land is inside or outside the Republic.

Any power of attorney which is signed within the Republic of South Africa and lodged for registration in a deeds registry must be attested either by two witnesses over the age of 14 years, competent to give evidence in any court of law in the Republic, or by a magistrate, justice of the peace, commissioner of oaths or notary public, duly described as such. No person is permitted to attest any power of attorney under which he/she is appointed as an agent or from which he/she derives any benefit. This is in accordance with section 95(1) of the Act and Registrars' Conference Resolution 49 of 1967. If the power of attorney is attested by a commissioner of oaths, his/her full names, business address and official title must be reflected.

On the other hand if the power of attorney was signed outside the Republic, it must be duly authenticated in accordance with the Hague Convention Abolishing the Requirement of Legislation for Foreign Public Documents or Rule 63 of the Supreme Court or the formalities of Rule 63 of the Supreme Court. Such document then need not also be attested by two witnesses or a commissioner of oaths. This includes authentication of the signed documents either by a foreign notary public or the South African Consulate. Regulation 20(8) affords the registrar discretion to dispense with these authentication requirements.

A principal's signature by way of a mark is sufficient, provided that the mark is made in the presence of and witnessed by a commissioner of oaths and two witnesses.

If a power of attorney has been granted by one of the parties to a marriage in community of property, and the other spouse has signed the power of attorney too, thereby giving his/her consent, it must be clearly stated in the power of attorney that the signature contemplates the necessary consent as required by the Chief Registrar's Circular 5 of 1994. In such a case, the signature of the other spouse will be regarded as a consent, in terms of section 15(2)(a) of the Matrimonial Act 88 of 1984, in which case two witnesses must attest such signature in accordance with section 15(5). In terms of Registrars' Conference Resolution 2 of 1986 however, if both spouses act as grantors in the power of attorney, the power of attorney can be attested in the normal way either by two witnesses or by a commissioner of oaths.

5.4.2 Transfer duty receipt or exemption certificate

Transfer duty is the tax payable in terms of the Transfer Duty Act 40 of 1949 to the Receiver of Revenue on the consideration or value when land or rights in land are acquired. (S 12 of the Act prohibits the transfer of land or rights in land without a transfer duty receipt.) It is paid by the person acquiring the property and for natural persons it is calculated on a sliding scale based on the value or purchase price of the property. The higher the value or price, the higher the transfer duty payable. For persons other than natural persons, for example companies, close corporations and trusts too the transfer duty is set at a flat rate – currently 8 per cent of the purchase price or value.

In terms of section 92(1) of the Deeds Registries Act 47 of 1937, a deed of grant or transfer of land may be registered only if it is accompanied by a receipt certificate, issued by a competent public revenue officer to prove that all taxes, duties, fees and so forth payable on the property have been paid – alternatively, that the transaction is exempt from transfer duty. It is no longer the duty of the registrar to calculate transfer duty, but deeds controllers may raise notes if they do find errors.

As a general rule, a transfer duty receipt or an exemption certificate must thus accompany every deed of transfer. This transfer duty receipt will either be endorsed by the South African Revenue Services and contain their cash register receipt, or it can be issued to the relevant conveyancer electronically by the South African Revenue Services, in which case it must contain a verification by a conveyancer, notary or commissioner of oaths as follows:

I … hereby certify that this is a true copy of transfer duty receipt no …/exemption certificate no……that has been extracted from the SARS website.

Date:……Conveyancer/notary/commissioner of oaths signature and particulars

Even where land or real rights in land have been donated to an intended spouse in an antenuptial contract, but not transferred to such spouse, the land may not be transferred or mortgaged unless transfer duty (if any) has been paid. A receipt for the full amount of the transfer duty payable must be lodged. A transfer duty receipt marked "Deposit" is not acceptable. The only exception is when the receipt is accompanied by a certificate duly signed by the Receiver in terms of section 11(3) of the Transfer Duty Act 40 of 1949, which provides for possible further transfer duty to be paid.

Transfer duty receipts amendments may be effected only by the Receiver of Revenue under his/her signature and official stamp. Where there are small errors, like the incorrect spelling of names, which do not affect the validity of the receipt, a certificate by the conveyancer may be called for, indicating that the receipt relates to that transaction. Otherwise the receipt must be sent back to the Receiver for amendment.

5.4.3 Rates clearance certificate

In terms of section 118(1) and (1A) of the Local Government Municipal Systems Act 32 of 2000, a registrar of deeds may not register the transfer of property, unless the prescribed certificate issued by the municipality in which the property is situated has been lodged. This certificate must: (a) be valid for 120 days from date of issue and (b) certify that all amounts due have been paid – for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties, during the two years preceding the date of the application for the certificate

The above requirement does not apply to transfers from the national or provincial or local government, or financed by loans from the national, provincial or local government; nor does it apply where vesting of ownership is the result of conversion of land tenure rights (leaser) into ownership in terms of the Upgrading of Land Tenure Rights Act 112 of 1991.

It follows therefore that a municipal clearance valid for more than 120 days from the issue date of signature must be lodged with every transfer of property. Transfer cannot be registered after the expiry of such certificate.

5.4.4 Consents

The title may contain conditions entirely prohibiting the transaction that is about to be registered or may require the consent of another person for the transaction to be registered. These consents are beyond the scope of this book and students need only be aware that such conditions might exist.

5.4.5 Insolvency and solvency affidavits

Once a person has been sequestrated, he/she will remain insolvent until the court issues a rehabilitation order or until he/she is automatically rehabilitated ten years after sequestration.

Once the registrar of deeds has been informed of the sequestration of a person by the registrar of the court, a sequestration interdict is noted against the name of that person in the deeds registry. The interdict prevents such person from personally dealing with his/her property as the trustee of the insolvent estate is, in terms of section 102 of the Deeds Registries Act, now regarded as the owner of any immovable property of that person.

However, the registrar of deeds often cannot positively link a sequestration order to a specific person, because, although it is a requirement under the Insolvency Act, the court order does not usually contain the insolvent's date of birth or identity number. The registrar then links the insolvency interdict to all persons of that name. If it is a common name like Johan Smit, this interdict could erroneously delay all the transactions whereto a Johan Smit is a party. It is therefore common practice for the owner of a property to be transferred, to lodge a solvency affidavit with the transaction: to the effect that he/she is not insolvent, has never been insolvent and that any court order to that effect does not apply to him/her but to someone with a similar name.

Alternatively, on the basis of such an affidavit, the conveyancer may instead lodge a conveyancer's certificate that the interdict is not applicable to the transferor. It will then be deemed by the registrar that the person concerned may freely deal with the property and prevent undue delay. However, the affidavit will not avert sequestration orders issued after the date of the affidavit.

If the deponent declares in the solvency affidavit that he/she was once sequestrated, but has since been rehabilitated, the registrar of deeds must ascertain whether or not ten years have passed since the sequestration. If ten years have passed, the person may deal freely with the property. If the ten-year period has not expired, section 58 of the Act must be complied with.

The solvency affidavit must obviously comply with the usual requirements for an affidavit: supply full names, identity number, date and place of affidavit, and full particulars (name, capacity, physical address and area) of the commissioner of oaths before whom it was sworn to.

6 The Mortgaging of immovable property and Mortgage bonds

6.1 Chapter introduction

This chapter deals with the mortgaging of immovable property and Mortgage bonds

6.2 Definition of a mortgage bond

Section 102 of the Deeds Registries Act 47 of 1937 defines a "bond" or "mortgage bond" as a bond, attested by the registrar, which specially hypothecates immovable property. From the definition it follows that only immovable property is bound by a mortgage bond as opposed to movables which can only be bound by a notarial bond.

A mortgage bond creates a contractual relationship between the mortgagor and the mortgagee. Such contractual relationship arises between the parties by way of an agreement in terms of which rights and obligations are created for the relevant parties. This implies that a mortgage bond enables the creditor (also referred to as the mortgagee/bondholder) to secure repayment of a debt by the debtor (also referred to as the mortgagor) in the sense that by registering a mortgage bond in their favour over the immovable property of the debtor, the creditor, on registration of the mortgage bond, converts their personal right for payment to a real right enforceable against third parties. Ideally the following aspects must be present for a mortgage bond to come into existence:

a) There must be an agreement to create a debt or obligation, which may not be *contra bones mores*.
b) There must be immovable property that is capable of being mortgaged
c) There must be a deed (bond) calling the mortgage right into existence (the mortgage bond that is to be registered in the deeds registry).

In a practical context, a registered owner of land usually approaches the financial institution to access credit therefrom. The owner then provides the land as security for the payment or repayment of any monies owing to the particular financial institution. A mortgage bond is then registered over the land in favour of the institution, whereafter the title deed of the land will bear an endorsement indicating that the land held under that title is subject to the mortgage bond, preventing the registered owner from dealing freely with that land because the mortgagee's consent to such dealings will be required in most instances. In terms of section 13 of the Deeds Registries Act 47 of 1937, the limited real security vests the moment registration takes place in a deeds registry meaning that at the time of affixation of the registrar of deeds' signature to the bond the mortgagee acquires a limited real security right over the land of the mortgagor designated in the bond.

A mortgage bond therefore vests a limited real security right, which affords the bondholder/mortgagee a preferential claim to the proceeds of the burdened immovable property and furthermore prevents the debtor/mortgagor from alienating the immovable property without the knowledge and consent of the bondholder.

6.3 Analysis of a mortgage bond

Apart from making provisions for form KK (for collateral bonds) and form LL (for surety bonds) ,the Deeds Registries Act 47 of 1937 does not prescribe a form for conventional mortgage bonds and thus leaving the standard structure and form for a conventional mortgage bond to emerge and evolve over the years from common practice and deeds office requirements. Generally, to be acceptable for registration a mortgage bond must:

a) Be prepared by a conveyancer
b) Identify the parties (mortgagor and mortgagee)
c) State the cause of debt/obligation and
d) State the immovable property serving as security under the mortgage bond.

The following are component clauses of a conventional mortgage bond deed.

6.3.1 The preparation clause

This is the certificate at the top right corner of the first page of the mortgage bond deed, which a conveyancer signs in terms of regulation 43 to indicate that he/she accepts responsibility for the deed. Section 15 of the Act prohibits a registrar from attesting, executing or registering a deed unless it has been prepared by a conveyancer, or as provided for in any other law. In terms of Regulation 43(2) of the Deeds Registries Act, the conveyancer whose name appears in the preparation certificate shall initial personally all alterations or interlineations in such deed of transfer, certificate, deed of cession or mortgage bond and also every page thereof not requiring his signature. If, in the opinion of the registrar of deeds, an alteration or interlineations in the deed of transfer or mortgage bond does not require initialing by the conveyancer who prepared the deed, such an alteration or interlineations may be initialed by the conveyancer executing the deed.

6.3.2 The heading

The heading will usually be “Mortgage Bond” or “Bond”. Depending on the nature and purpose of the bond the heading may also indicate that it is a collateral, surety, participation, covering, debenture, kinderbewys or substituted bond.

6.3.3 The preamble

The preamble will contain (a) the name of the conveyancer appearing before the registrar of deeds on behalf of the mortgagor who must also be the property owner, as well as the date and place of the signing of the power of attorney in terms of which that person is acting and (b) a description of the mortgagor, just as the transferor is described in the preamble to a deed of transfer. It usually reads as follows:

> *Be it hereby made known that MATOME MELFORD RATIBA appeared before me, the Registrar of Deeds, at Pretoria, the said Appearer being duly authorised hereto by virtue of a power of attorney signed on 08 December 2012 at Tshwane and granted to him by*
>
> *X (full names)*
>
> *Identity number*
>
> *Marital status…*

The mortgagor is the person who borrows the money or is liable for the obligations reflected in the bond, or the person who stands surety for the obligations of the actual debtor. Either the mortgagor or his agent (conveyancer) signs the bond (a unilateral document) before the registrar of deeds in terms of which the real security rights over the property are given to the mortgagee/recipient creditor.

Section 50 of the Deeds Registries Act 47 of 1937 states that mortgage bonds must be executed before a registrar by the owner of the immovable property described in the bond, or by a conveyancer duly authorised to do so by a power of attorney given by the owner.

6.3.4 Acknowledgement clause

In the acknowledgment clause, the mortgagor acknowledges that he owes the money to the mortgagee and gives the reason for the debt. In an ordinary bond, the acknowledgment will read as follows:

> *…and the appearer acknowledged his principal, the said X, to be lawfully indebted to S Bank Limited (registration number…), the said debt being for monies lent and advanced.*

6.3.5 Mortgagee (Bondholder)

The mortgagee is the person in whose favour the bond is passed, in other words the creditor. In most cases the mortgagee is the financial institution. The mortgagee is described in the same manner as the transferee in the deed of transfer.

As a general rule there may be more than one mortgagee/bondholder in a single mortgage bond; however, as per section 50(5) of the Act, debts or obligations to more than one bondholder (creditor) arising from different causes may not be secured by a single mortgage bond save as provided by a law other than the Deeds Registries Act 47 of 1937 or a court order.

In terms of section 55(2) of the Act, a mortgage bond may not be passed in favour of two or more persons where the mortgage bond provides that the share of one mortgagee ranks prior in order of preference to the share of another mortgagee. By the same token, no transaction may be registered which would have the effect of giving preference to the share of one bondholder over another bondholder.

6.3.6 Amount

The Act does not state that the amount of the debt must be disclosed in the bond. In practice, however, this is always done. A deeds office registration fee/levy is payable for bonds, among other things, which is calculated on the amount of the debt secured. According to section 51(1) of the Act, in a bond which is intended to secure future debts (as opposed to existing debt), the fixed sum must be disclosed as an amount beyond which future debts will not be secured by the mortgage bond. Practically the bond will for instance state that the mortgagor owes the mortgagee R100 000, 00 (the capital sum) and a further sum which will not exceed R10 000, 00 for future debts.

Because the amount of the bond is not required by legislation, it is possible for a bond amount to be expressed in foreign currency. In such a case a certificate from a commercial bank reflecting the exchange rate on the date of registration must be produced. The practical example will be where the bond states that the mortgagor owes Mortgagee $25 000, 00, with the certificate stating that according to the exchange rate, this amount is equivalent to R200 000, 00 (or whatever amount is applicable at the time of registration).

As per Registrars' Conference Resolution 21 of 1954, if there are co-mortgagees, the full amount of the bond must be mentioned first and thereafter the separate amounts due to each mortgagee. A practical example will be where the mortgagor owes the first mortgagee and second mortgagee R20 000, 00 and R80 000, 00 respectively and a single bond is registered for the total debt of R100 000, 00, with the bond stating that mortgagor owes first mortgagee R20 000, 00 and second mortgagee R80 000, 00.

6.3.7 Cause of debt (causa for the bond)

The reason for the existence of a mortgage (evidenced by the mortgage bond) is to provide security for a debt for which a creditor has a claim for payment against a debtor. According to the case of *Kilburn v Estate Kilburn* 1931 AD 501, if there is no claim in respect of a debt, there can be no bond.

An agreement to create an obligation between a creditor and a debtor is generally referred to as the reason for or *causa* of the bond. The most common examples of such a reason or cause are money lent and advanced or to be advanced, goods sold and delivered or to be delivered, the balance of the purchase price of immovable property, professional services rendered and so forth. Section 50(2) of the Act even makes it possible to secure future debts by way of a covering bond.

Furthermore, the registration of a bond can also arise from more than one cause of debt. A bond may for example be registered for an amount of R40 000, 00 of which R30 000, 00 is for money lent and advanced and R10 000, 00 for goods sold and delivered. However, as stated before, section 50(5) of the Deeds Registries Act 47 of 1937 provides that debts or obligations to more than one creditor arising from different causes may not be secured by a single mortgage bond, unless this is authorised by another law or by a court order.

The cause of debt must not be illegal, for example the securing of debt to cover blackmail debts.

6.3.8 Waiver of legal exceptions

A debtor is entitled to introduce certain exceptions with regard to his/her liability for payment, as defences in the event of a mortgagee applying for a foreclosure of the bond, thereby placing the burden of proof on the plaintiff/mortgagee to disprove the allegations. These defences, dating from Roman times, are often not compatible with contemporary financial transactions; accordingly financial institutions generally insist that mortgagors/debtors waive the benefit of these exceptions as a condition for providing the finance. By waiving these exceptions in the mortgage bond, the mortgagor will not be able to raise them against the mortgagee when the latter demands payment. The defences in question are the following:

6.3.8.1 *Non causa debiti*

According to the case of *Conradie v Rossouw* 1919 AD 279, this means that the debt has no cause or *causa.* This exception is renounced in any bond not securing a monetary loan but for instance securing payment of goods sold and delivered.

6.3.8.2 *Non numeratae pecuniae*

This exception avers that although the mortgagor/debtor signed the acknowledgment of debt, the money mentioned in the acknowledgment of debt was not actually paid to him/her. Of course with the electronic payments used today, such a defence could be costly, cause delays and be difficult to refute. This exception is waived in bonds where the *causa* is "money lent and advanced". In the case of *Cohen v Louis Blumberg* 1949(2) SA 849 it was held that a renunciation of this exception places the burden of proof on the defendant/mortgagor, who is required to prove for his/her successful defence that he/she did not receive the money

6.3.8.3 *"Revision of accounts", errore calculi and "no value received"*

These three exceptions usually appear together. Waiver of these exceptions will mean that where the financial institution forecloses on the mortgage bond and claims a certain sum which they aver is outstanding, it will be up to the mortgagor/ defendant to prove that this claimed sum is incorrect, and not for the financial institution to meticulously prove, item by item, that their calculation is in fact correct.

These three exceptions thus apply where money changed hands and written records exist of the transaction(s) concerned. They are then usually waived in bonds where the cause of debt is goods sold and delivered and to bonds in favour of financial institutions, when the capital is paid back in installments.

6.3.8.4 *De duobus vel pluribus reis debendi*

In general, where two or more persons bind themselves as co-principal debtors, they are each only liable for their specific proportions of the debt. If a creditor should claim the full amount from one of the creditors, that creditor can successfully raise this exception as a defence. However, if the benefit of this exception is renounced, each debtor (mortgagor) is jointly and severally liable for the debt and cannot, in a foreclosure case, raise as a defence the fact that the plaintiff can claim proportionately only from the individual co-debtors. The waiver of this exception is thus necessary in mortgage bonds where there is more than one mortgagor or debtor.

6.3.8.5 *Beneficium ordinis seu excussiones*

As a general rule, where a debt is due by a debtor, which debt is also secured by a suretyship of a third party, the creditor is obliged to first fully excuse or "shake out" the debtor before the creditor may claim from the surety. Should the creditor not do this, but claim directly from the surety, this exception is thus available to a surety to compel a creditor to proceed against the principal debtor first and obtain all he/she can from that debtor's estate before proceeding against the surety. The renunciation of this exception allows the creditor to proceed against the surety before proceeding against the principal debtor, should he/she wish to do so. The renunciation of this exception is found, *inter alia*, in surety bonds.

6.3.8.6 *Beneficium divisionis*

Where there is more than one surety for a debt, the creditor is as a general rule obliged to claim only proportionally from each surety, failing which the defendant surety can successfully raise this exception. This exception (similar to 3.8.4 above) thus prevents the creditor from holding a surety liable and being sued for more than his/her *pro rata* share. Where the sureties renounce the benefit of this exception, it permits the creditor to sue any one of the sureties separately for the full amount outstanding, without reference to the other sureties. This renunciation, too, is found *inter alia* in surety bonds.

6.3.9 Interest and repayment clauses

There is no statutory requirement that interest rates be disclosed in bonds. The National Credit Act 34 of 2005 limits the interest rates, but the registrar of deeds is not obliged to ensure that there has been compliance in this regard. Notwithstanding this and the fact that most mortgage bonds also provide for variable interest rates, it is common practice to disclose the current interest rates in mortgage bonds.

As regards the repayment of the capital amount and the interest thereon, this depends on the agreement between the parties. It is usually repayable in instalments, together with the interest, within a certain period.

In practice the interest and repayment clause will probably read something like this:

> *…which aforesaid sum of R700 000,00 and the interest thereon calculated at the rate of 9% per annum from the date of registration of the bond, Jackie Whodunnit is hereby bound to pay or cause to be paid to Absa Bank…*

6.3.10 Cost clause

The cost clause secures the payment of any costs and expenses the creditor may have incurred, for which the debtor/mortgagor is liable, over and above the original amount of the debt already secured by the mortgage bond. In practice it may happen that the mortgagor borrows R100 000,00 from the mortgagee, who will register a mortgage bond securing the repayment of that R100 000,00.However, should the mortgagor fail to make the repayments the mortgagee may find that in addition to the capital sum of R100 000,00, X owes S Bank interest on the capital sum owed, legal costs, insurance premiums, municipal taxes and even maintenance and security costs for the property, which exceeds and is not secured by the bond sum of R100 000,00. For this reason mortgage bonds usually include additional security for the creditor in respect of costs and expenses in the form of the costs clause. In the event of the mortgagor failing to discharge their obligations in terms of the mortgage bond, this clause secures the mortgagor's contributions on behalf of the mortgagee in regard to insurance premiums, taxes, etc., as well as legal expenses incurred in suing for the recovery of the amount due under the bond.

The repayment of these costs incurred by the mortgagee then enjoys preference above the unsecured claims of third parties. The additional amount mentioned in the bond to secure the abovementioned costs usually constitutes 20 per cent of the capital sum of the mortgage bond. If these expenses are not incurred, they are of course not recoverable and therefore also not secured by the mortgage bond.

Not all bonds contain cost clauses, since the amount which is available to secure future advances may, in the case of a covering bond, include the amount allocated for costs.

6.3.11 Ranking

The Deeds Registries Act 47 of 1937 or the regulations do not require that a mortgage bond must disclose the order in which it ranks over the bonded property. If the mortgagee has not waived preference in respect of his/her mortgage bond, the mortgage bond's rank against earlier or subsequent mortgage bonds is in order of preference according to their date of registration/execution by the registrar: *qui prior est tempore potior est iure* – literally meaning "that which is earlier in time ranks higher in law".

The practice of disclosing the ranking of a specific bond is, however, an old and established one. It indicates the ranking that a specific bond enjoys at the time of registration: that is, whether it is a first, second or third bond over a specific property. A bond cannot, however, be denied registration if it is described only as a mortgage bond and not as a first, second or third mortgage bond, etc. The ranking simply indicates the preference to which the creditor is entitled in respect of a secured debt against a particular property. Where two or more mortgage bonds enjoy the same ranking or preference, the preference or ranking is said to be *pari passu* (literally translated, "on an equal footing").

As per regulation 45(4) of the Act, if two or more mortgage bonds are passed on the same day by the same mortgagor over the same property, the registrar must, if each bond does not disclose the order in which it is to rank, note on each bond the exact time at which he/she affixed his/her signature to the bond. If two bonds are to be registered simultaneously and are deemed to rank *pari passu*, no waiver is required if the ranking clauses in both powers of attorney are clear as to the intention.

In this instance the ranking clause in the bond will read as follows:

A bond that ranks pari passu *with Mortgage Bond No. B ……/20……in favour of……registered this day*

A mortgagee's consent is not required in respect of the waiver of preference, since the statements contained in the power of attorney are sufficient authorisation for the registration of the *pari passu* ranking.

6.3.12 Property and security clause

Only immovable property as defined in section 102 of the Deeds Registries Act 47 of 1937 may serve as security for a debt under a mortgage bond. The immovable property may be registered land or a registered real right (for example a usufruct).

Every mortgage bond must contain a full and clear description of the property to be hypothecated, including the extent of the property. If two or more properties are to be hypothecated, each property must be described in a separate numbered paragraph. The number (comprising the serial number and year) of the relevant title deed must be quoted in each paragraph. If more than one property is held by one and the same deed, the number of the deed can be quoted after the description of the last property. All of this is in accordance with regulation 41(2) of the Act.

6.3.13 Special conditions of title

Regulation 41(1) of the Act makes provision for the registrar to require that the existing special conditions limiting the rights of the owner of the land to be mortgaged be set out in the bond or a suitable reference thereto to be made. In the interest of uniformity, Registrars' Conference Resolution 5 of 1987 and 22 of 2005 provides that when land is subject to a preemptive right, a right of reversion, etc, the bond should be made specially subject to that right.

The following conditions of title can be encountered in practice.

6.3.13.1General conditions: township conditions, praedial servitudes, etc

The land in this case will be described as being *"subject to the conditions of title*".

3.13.2 Restriction in respect of mortgaging, alienating or disposing of land

Where a title deed contains a condition that the land described in the title deed may not be alienated and/or mortgaged without the written consent of a specific person, an underhand consent must be obtained from the person concerned, in which the bond is properly identified, and this consent must be filed with the mortgage bond.

If a condition states that the property may not be "disposed" of, this term does not include mortgaging and it is thus not necessary to obtain consent for the registration of the bond. If the holder of a pre-emptive right, right of reversion or other restraint on the ownership does not waive preference of the right or restraint in favour of the bond, the bond should be made subject to the right or restraint, and provision for this is made in regulation 41(1) of the Act and Registrars' Conference Resolutions 52 of 1958, 35 of 1962, 5 of 1987 and 22 of 2005).

6.3.13.3 A lease

Where the land which is to be mortgaged is subject to a lease, the lessee's consent is not required in order to hypothecate the leased land, but the fact that the land is subject to a lease must be disclosed in the bond (*Huur gaat voor koop*).

The lessee of a registered long lease can waive preference in favour of the mortgage, either by notarial deed or in the mortgage bond itself (see in this regard regulation 41(7) and Registrars' Conference Resolution 20 of 1966). In each case, the condition must be quoted in full in the bond. If the preference is waived in the bond itself, the lessee must give a conveyancer a power of attorney to appear on his/her behalf before the registrar of deeds to waive his/her right of preference in favour of the bond. The waiver clause appears at the end of the mortgage bond, just before the execution clause as follows:

> *Also appeared the said…duly authorised by a power of attorney executed at…on…and granted to him by X, Identity number xxxxxxx, unmarried.*
>
> *And the Appearer, on behalf of the said X, waived and postponed in favour of this mortgage bond, the lease over the said property held by his principal by virtue of…*

6.3.13.4Personal servitudes (usufruct, usus and habitatio) and other real rights

Where the land being hypothecated is subject to a personal servitude or usufruct, *usus* or *habitatio*, this is dealt with as follows in the bond:

a) Firstly, the land described in the bond can simply be made subject to such personal servitudes and the servitude concerned must be quoted in full in the bond. Since the personal servitude or other real right then enjoys preference over the bond and therefore diminishes security, the bondholder will not easily accept it and as a rule it is not done. However if it is, the general condition may for example read as follows:

Subject to the conditions of title and a lifelong usufruct in favour of Matome Ratiba, Identity number 720110 0032 088, unmarried.

b) Secondly, the holder of the personal servitude can waive his/her right of preference in favour of the bond (s 3(1) (i) of the Act), in which case the condition must be set out in full in the bond. Where there has been such a waiver, and the property is subsequently sold in execution at the instance of the mortgagee, the transfer to the execution sale purchaser may proceed without reference to or compliance with the personal servitude or other real right, which was waived. The waiver can be effected either by way of a separate notarial deed, which means that the new bond must be endorsed in regard to the waiver, or the waiver can be incorporated in the new bond (regulation 41(7) of the Act). In the latter case the holder of the right gives a conveyancer, usually the conveyancer who is executing the bond on behalf of the mortgagor, power of attorney to appear on his/her behalf before the registrar of deeds and to waive his/her right of preference in favour of the bond. The waiver clause appears at the end of the bond, just before the execution clause. If the personal servitude is held under a separate title, the waiver must be noted on it (regulation 41(7) of the Act). An example of a general condition in such an instance will read as follows:

Subject to the conditions of the title and a lifelong usufruct in favour of Matome Ratiba, identity number 7201 10 0032 088, unmarried, which right is being waived in favour of this bond, as will appear later on in the bond.

c) Thirdly, the owner of the bare *dominium* and the holder of the personal servitude may jointly and severally mortgage the land to the full extent of their respective rights in the land (s 69(3) of the Act). This can only happen if the holder of the personal servitude is a co-debtor. In this case, the condition will not be set out in the bond and the mortgagors will, depending on the details, be described as follows:

Identity number……
unmarried
The bare dominium owner of the undermentioned land
and
Identity number……
unmarried
The holder of the usufruct/usus/habitatio

d) Fourthly, the owner or the bare dominium may pass a principal bond over the property, and the holder of the personal servitude can bind the personal servitude as surety in the same bond (s 69(4) of the Act). In such an instance full details of the servitude must be set out in the bond.

6.3.13.5A fideicommissum

Where land is subject to a *fideicommissum*, the security under the mortgage bond is of limited value and duration. Nevertheless, the bond may be registered subject to the *fideicommissum* and the mortgagor will be described as follows:

Matome Ratiba *Identity number……* *Unmarried* *the fiduciarius of the undermentioned land*

6.3.13.6 Expropriation of a portion which has not yet been transferred to the expropriating authority

In this case, the bond must be made subject to the expropriation to indicate that the expropriated land is not encumbered by the bond.

6.3.13.7 Restriction against separate alienation of properties

If the land being bonded is notarially linked to and subject to a restriction against separate alienation of the land, the bond must specifically be made subject to that restriction.

6.3.13.8 Attachment against the property

If an attachment is noted against the land, it may not be mortgaged until the attachment has been uplifted.

6.3.14 Conditions

As a general rule any condition may be inserted in the bond or an annexure to the bond. However, manifestly illegal conditions or dishonest conditions that seek to disguise the nature of the bond may not be inserted in the bond or even in an annexure to the bond.

The following prohibitions regarding certain conditions are contained in the Deeds Registries Act 47 of 1937 and other legislations:

a) No mortgage bond may be passed in favour of two or more persons, where the share of one holder ranks prior in order of preference to the share of another; nor may any transaction be registered which would have the effect of giving preference to one share in the bond over another share (s 55(2)).
b) No condition may be included in a bond which purports to impose upon a registrar any duty or obligation not sanctioned by law (regulation 35(6)).
c) The insertion of what is commonly known as a "general clause" attempting to simultaneously bind immovable and movable property of the mortgagor is prohibited (s 53(1)).
d) A condition in terms of which the repayment of the debt or a portion of the debt by a license holder in favour of the holder of a wholesale liquor license, beer-brewing license or sorghum brewing-license within a specified time is void (s 149 of the Liquor Act 27 of 1989).
e) An agreement stating that, if the debt is not paid by a certain date or the mortgagor is otherwise in default, the mortgagee may hold or keep the security as his/her own property, is known as a *pactum commissorium*. Such an agreement is unlawful and unenforceable (*Mapenduka v Ashington* 1910 AD 343; *McCullough and Whitehead v Whiteaway & Co* 1914 AD 599 on 626).
f) A condition in a bond stating that the mortgagor may not repay the debt before a certain date, if it is coupled with a *pactum antichresis*, is void (*McCullough and Whitehead v Whiteaway and Co* 1914 AD 599). A *pactum antichresis* is an agreement which gives the creditor (mortgagee) the use of the mortgaged property in lieu of interest.
g) A condition in a mortgage bond based on an agreement between the mortgagor and mortgagee that the hypothecated property can be sold in settlement of the debt, without recourse of law, is known as a *parate execute*. Such an agreement is invalid (*Iscor Housing Utility Co and Another v Chief Registrar of Deeds and Another* 1971 (1) SA 613(T)).

Notwithstanding section 3(1) (b) of the Act, a registrar need not examine any provisions relating to a bond which are not relevant to the registration of the bond (s 50A).

6.3.15 Domicilium citandi et executandi

The mortgagor chooses a place where notices and processes can be served on him/her, and this is known as his/her *domicilium citandi et executandi*. The mortgagee is permitted to make use of this address to serve notices on the mortgagor (*Gerber v Stolze and Others* 1951 (2) SA 166 TPD).

6.3.16 Executions clause

Section 50(1) of the Act provides that a mortgage bond must be executed in the presence of a registrar of deeds by the owner of the immovable property or by a conveyancer duly authorised by the owner, and the mortgage bond must be attested by the registrar. This is a dual process of execution, consisting of the signing of the deed by either the debtor or his/her representative (the conveyancer) and the registrar. The registration function of the registrar's signature attests (certifies) that the owner or his/her representative in fact signed the bond before him/her.

A mortgage bond attested by a registrar is deemed to be registered once the registrar has affixed his/her signature to it (section 13(2)), even though the recording of the new data has not yet taken place. Where, however, a mortgage bond is one of a batch of interdependent deeds intended for registration together, it will not be deemed to be registered until all the deeds in the batch have been signed by the registrar. If the registrar inadvertently omits to affix his/her signature to a mortgage bond attested by him/her, at the time when the signature should have been affixed in the ordinary course of events, this signature may be affixed when the omission is discovered and the mortgage bond will then be deemed to have been registered at the time the registrar was supposed to sign (s 13(2).

If two or more mortgage bonds are passed together on the same day by one and the same mortgagor over the same property, the registrar must, if each bond does not disclose the order in which it is to rank, note on each the exact time at which he/she affixed his/her signature to each (regulation 45(4)).

Provision must be made on the last page of the bond for the signatures of the appearer and the registrar of deeds. Both signatures must appear on the same page.

6.3.17 Special power of attorney

There must be a properly executed, witnessed and dated power of attorney that authorises the appearer to execute the bond (regulation 25). This power of attorney generally includes a draft bond as an annexure which must be fully initialled by both the mortgagor and the preparer of the bond.

No material alteration or addition to the power of attorney or draft bond is acceptable without the initialling of the mortgagor and witnesses (regulation 20(4)). Non-material amendments may be initialled by the preparer. The signatures of new witnesses are required only if no witnesses originally attested the power of attorney. It is important to note that in the power of attorney granted by the mortgagor, a holder of real rights can waive his/her rights in favour of the bond (Chief Registrar's Circular 17 of 2006).

7 Servitudes and Notarial deeds

7.1 Chapter introduction

This chapter deals with both personal and praedial servitudes as well as notarial deeds. Consequently, the chapter will discuss in detail how servitudes may be created and registered in the deeds office, the restrictions on registration of servitudes, and the title deeds by which they are held and ultimately how they lapse and are deregistered.

7.2 The distinction between personal and praedial servitudes.

Servitudes are a type of a limited real right and may be public or private, positive or negative, and these in turn can be one of two types of servitudes:

a) Personal servitudes (*servitus personalis*): In this instance, a specific person (natural or legal) in whom the servitude vests inseparably personally has certain limited real rights in respect of a specific property (for our purpose immovable, called the servient tenement) of another person who is the owner. In principle a personal servitude cannot be alienated or bequeathed. It terminates or lapses on the death of the holder or after 100 years in the case of a legal person or after a shorter specified period.
b) Praedial servitudes (*servitus praediorum*): In this instance, the servient tenement is subject to the servitude in favour of a dominant tenement (property).

Servitudes, being limited real rights related to immovable property, are registered in the deeds office.

7.3 Personal servitudes

In Roman law there were only three personal servitudes, namely usufruct (*usus fructus*), use (*usus*) and occupation (*habitatio*). In South African law we still have these classical personal servitudes but also many more. These classical personal servitudes have all the typical characteristics of personal servitudes as set out in the definition above. Classical personal servitudes inseparably linked to holder are inalienable and cannot be bequeathed. They however terminate on the death of holder.

In addition these personal servitudes of *usus, usus fructus* and *habitatio* are subject to the following restrictions:

a) They may not be registered (by the registrar) for longer than the lifetime of the person in whose favour they are created.
b) They may not be transferred or ceded to any person other than the owner of the land – that is, such a transfer or cession may not be registered by the registrar.

Other personal servitudes also generally lapse on the death of the holder and may not be ceded to another person, but this depends on the wording and type of servitude.

Thus the maximum period for these specific personal servitudes is the lifetime of the holder. Should the holder of such a servitude wish to dispose of it, it must be ceded to the landowner, subject however, to the fact that:

a) Section 67 provides for succession by a surviving spouse who was married to the usufructuary in community of property.
b) Where a usufruct is retained in favour of a specific holder subject to the condition that on the death of that usufructuary the right of usufruct should pass to another person (not his/her spouse married in community of property as stipulated in section 67), then that so-called contingent usufruct is initially registered as a condition in the title deed, not constituting a real right but merely as a caveat. On the death of the first usufructuary that usufruct ceases, but the owner of the immovable property, in compliance with the condition (contingent usufruct), notarially creates/registers a new servitude of usufruct in favour of the new holder (Registrars' Conference Resolution 47/1987). It is not the usufructuary who cedes the usufruct to the contingent usufructuary. This is therefore not an exception to the general rule that a personal servitude can only be ceded back to the owner, because it does revert to the owner. A new servitude is ceded to the contingent usufructuary, and it does last at most until the death of the usufructuaries.

c) Servitudes of *usus fructus, usus* and *habitatio* can be created and registered in favour of a legal person or corporate body such as a church, a company or local authority, as the Deeds Registries Act 47 of 1937 (and particularly section 66) does not restrict the meaning of "person" to natural persons, although it restricts the duration of these servitudes to "the lifetime of a person". In such instances the servitude terminates when the legal person ceases to exist; that is, it is deregistered or liquidated. Alternatively, the servitude ceases after 100 years, which is regarded as the maximum natural life expectancy (*Johannesburg Municipality v Transvaal Cold Storage Ltd* 1904 TS and *Goliath v Estate Goliath* 1937 CPD 312).

These classical servitudes are discussed below.

7.3.1 Usus

A servitude of use (*usus*) is a limited real right in terms of which the right holder may use the immovable (or movable) property of another person. The servitude holder or his/her family may also use or consume the fruits of that property, but they may not alienate (sell or lease) either the land or the fruit.

7.3.2 Usus fructus

A servitude of usufruct (*usus fructus*) is a limited real right in terms of which the holder may use and enjoy the immovable (or movable) property of another person.

The usufruct servitude holder or his/her family may also use, consume or alienate all the fruits and use the proceeds of the alienation from that property. A usufruct holder's rights are thus much wider than the use holder's rights, in that the usufructuary can use or alienate all the fruits and even use the proceeds thereof. Although not initially permitted, a practice has developed permitting the usufruct holder to alienate the actual right of usufruct (by way of lease or mortgage bond). This alienation is, however, subject to the limitation of the usufruct since it is for a limited time only.

7.3.3 Habitatio

A servitude of dwelling or occupation (*habitatio*) is a limited real right in terms of which the right holder may reside or live in the dwelling house of another person. The *habitatio* servitude holder, his/her family and servants may live on the property, but in contrast to the usufruct, they may not use the fruits of the property. As with the usufruct, the *habitatio* holder may lease out the right of *habitatio* (not the property itself), but such lease will be subject to the same conditions and time limits as the right of *habitatio*. As in the case of the lease of a usufruct discussed above, this lease of a right of occupation is not registrable in the deeds office.

7.4 The creation and registration of personal servitudes

Section 65 of the Deeds Registries Act 47 of 1937 prescribes some of the specific ways in which personal servitudes may be created, registered and vested. Section 16 also provides a general rule that limited real rights must be transferred by way of notarial cession. In practice it is customary for personal and praedial servitudes to be created first, then registered and finally vested notarially and bilaterally. However given the expensive nature of bilateral notarial agreements both sections 65 and 67 of the Deeds Registries Act 47 of 1937 provide for exceptions where a practically executable, less expensive method of creation may be used but only if this fits precisely into the requirements for these exceptions. Most importantly section 67 of the Deeds Registries Act 47 of 1937 provides another method of creating servitudes (personal or praedial) in a transfer deed, where the transferor reserves a personal servitude for themselves at the time of transfer. Following hereinafter are various ways of creating personal servitude in practice

7.4.1 Personal servitudes in bilateral notarial deeds

Beyond the exceptions contained in both sections 65 and 67 personal servitudes are customarily created by means of an agreement between the landowner and the prospective servitude holder, executed before and attested by a notary public. It must also be noted that reference in section 65 to the "owner" who may enter into this bilateral notarial agreement, includes:

a) the registered owner
b) the trustee of the insolvent estate of the registered owner
c) the liquidator of a company which is the registered owner
d) an administrator of the registered owner in terms of the Agricultural Credit Act
e) the lawful representative of a registered owner who is deceased, a minor, a mental patient or person otherwise incompetent, provided that the representative acts within his/her legal authority

7.4.2 Personal servitudes in unilateral notarial deeds

The first proviso of section 65 authorises the registrar of deeds, in his/her discretion as to practicality, to accept a unilaterally executed notarial deed of servitude where it is in favour of (a) the general public or (b) all or some owners or occupiers of erven/lots in a township or settlement This is the only exception in the Act providing for unilateral notarial creation of a personal servitude. Despite this, servitudes of *usus, usus fructus* and *habitatio* are often created or registered by means of a unilateral notarial deed of cession. This is made possible through regulation 61(2) of the Deeds Registries Act 47 of 1937, in terms of which a unilateral cession by the owner of a servitude of *usus, usufruct* or *habitatio* is acceptable if it places no obligation on the cessionary (i.e. the prospective servitude holder).

7.4.3 Personal servitude without notarial execution but simultaneous with registration of a subdivision

This method is contained in the second proviso of section 65, which reads: "Provided further that where it is desired to register a road…" The proviso (which is usually used to insert a condition imposed by the council or local authority for consent to subdivision) relates to the situation where: (a) a property is subdivided, (b) simultaneously a road or thoroughfare servitude is created/registered in favour of the general public, and (c) the road serves the subdivision

It must be emphasised that the registration of the servitude can be done in this manner where the right of way is over the subdivision only, because the servitude can be included in the subdivision deed (which is then the creative deed for the servitude), and clearly the subdivision is served by the road as required in the list above.

7.4.4 Restraints or restrictive conditions registered simultaneously with transfer

This method is contained in the third and last proviso of section 65, which reads: "Provided further that conditions which restrict the exercise of any right of ownership…" and which proviso applies only in the following respects:

a) To personal servitudes that limit the owner in exercising his/her rights of ownership: These are generally known as restraints or restrictive conditions that is, negative servitudes that are exercisable only by way of vetoing the owner's actions, not by positive acts by the servitude holder. This is what distinguishes the procedure under this proviso of section 65(1) from that of section 67.
b) If these restraints or restrictions are included (created/registered/vested) in a deed of transfer of the property.
c) If these restraints/restrictions are enforceable by someone who is either mentioned in the deed of transfer or ascertainable from the deed of transfer or from other evidence.
d) If the "enforcer", if determinable, accepts the right.

If the proposed personal servitude does not comply with all the above requirements, it cannot be created/registered/vested in terms of this shortcut proviso, and must then generally be created and/or registered by a notarially executed bilateral agreement.

7.4.5 Reservation of personal servitude in favour of transferor and/or spouse in a deed of transfer

This method of creation and registration of a personal servitude as a condition in a deed of transfer, as stipulated in section 67 of the Deeds Registries Act 47 of 1937 differs from the previous one in that:

a) it is created/registered in terms of a different section of the Act;
b) it is created/registered as a condition in a deed of transfer
c) it may be any personal servitude (not just a restraint),
d) but it must be in favour of the transferor, or the transferor and his/her spouses or their survivor if they were married in community of property, or the surviving spouse only if transfer is passed from the joint estates of spouses married in community of property. In terms of the last two requirements above, therefore, there must be a marriage in community of property if a servitude is reserved in favour of the spouse.

When the deed of transfer or notarial cession is registered, this is done subject to the personal servitude. In practice, however, the servitude is generally mentioned for the first time (created) in the deed of alienation (deed of sale) of the land or mineral rights, since the transferee/cessionary must be aware that the land or mineral right about to be transferred to him or her is subject to a personal servitude. It is then set out again in the power of attorney and signed by the seller/ transferor/cedent appointing a conveyancer to appear in the deeds office to register the transfer or cession.

Although the servitude has thus been put in writing in two different deeds/documents up to this stage, it is registered only once the transfer/cession containing the reservation of the servitude is registered in the deeds office.

The reason for this limitation of section 67 to spouses married in community of property relates to transfer duty. Transfer duty is payable on all acquisitions of land or acquisitions of an interest in land. A servitude could be such an acquisition on which transfer duty should be paid. However, where the servitude takes the form of a reservation in a deed of transfer, there is no "acquisition" as the transferor is already the owner of all the rights to the land, and so there are no transfer duty implications.

Where the transferor and his/her spouse are married in community of property, they are both joint owners of the property in undivided half shares by virtue of the marriage in community of property. Hence the transfer duty issue still does not arise. However, if the marriage were out of community of property and the land being transferred was registered in the name of one spouse only, a reservation of a personal servitude in favour of both of them, their survivor or the other spouse could have transfer duty implications. For this reason the shortcut provision of section 67 applies only if the servitude is in favour of the transferor and/or his or her spouse married in community of property.

7.5 Procedural requirements for the registration of servitudes

Over and above the usual standard procedural requirements for the transfer, subdivision and so forth, where a personal servitude is created/registered, there are some further requirements as explained below.

7.5.1 Acceptance of the right by the person(s) who can enforce the restraint

As a general rule, if there is a group of right holders, only those right holders who are in existence and who are legally competent need to signify their acceptance which acceptance is signified as follows:

a) If the condition is created/registered in favour of the transferor, the conditions should be contained in the power of attorney, which is signed by the transferor. This will be sufficient proof of acceptance of the right.
b) If the last proviso applies, namely where the local authority has consented to a subdivision of an erf on condition that a servitude is registered simultaneously, then express acceptance by the local authority is not necessary, because the local authority's initial consent to the subdivision subject to this condition that is lodged in the deeds office is sufficient proof. (Similarly, where a new township is laid out according to a general plan showing certain servitudes in favour of the local authority, or the servitude is part of the proclaimed conditions of the township, then no express acceptance will be necessary from the local authority.)

c) In all other cases the acceptance of the right may be signified by a signed endorsement on the power of attorney or by a separate underhand document signed by the right holder. Both of these should be duly witnessed and dated.

7.5.2 Number of copies to be lodged

As most of the deeds registries are now computerised, the number of copies lodged need correspond only to the number of right holders and the number of title deeds for the servient property. The deeds office copy is recorded and stored electronically. Where the deeds office is not yet computerised, an additional deeds office copy will have to be lodged. (The right holders' copies are not signed in the original by the registrar of deeds, only stamped with the registrar's name stamp and endorsed "For information only").

7.5.3 Bond and bondholder's consent to be lodged

If the land over which the personal servitude is about to be registered is encumbered by a mortgage bond, the relevant bond must be lodged together with the bondholder's written consent to the registration of the servitude free from the bond.

This is similar to praedial servitudes. If consent cannot be obtained, a court order authorising the registrar to dispense with lodgement of the consent must be lodged instead (Registrars' Conference Resolution 15/1989).If there are two or more mortgagors who are jointly and severally liable in terms of the bond, then the consent of the co-mortgagors is also required where a servitude is being registered over the property of one of the mortgagors, as this may comparatively increase the burden of the co-mortgagors (Registrars' Conference Resolution 8/1988).

7.5.4 Title to real right and real right holder's consent to be lodged

Similarly, if the land over which the personal servitude is about to be registered is subject to a registered real right that may conflict with the new servitude, the registered deed of the real right must be lodged together with the right holder's written consent to the registration of the servitude as provided for in section 65(3) and Registrars' Conference Resolution 52 of 1994. If consent cannot be obtained, a court order authorising the registrar to dispense with lodgement of the consent must be lodged instead (Registrars' Conference Resolution 15/1989). In the event of uncertainty as to whether the new servitude conflicts with any other real rights, a conveyancer's certificate confirming that it does not should be lodged.

7.5.5 Title deed for the servitude being created/registered/vested

Section 64 of the Deeds Registries Act 47 of 1937 deals with the issuing of title deeds for real rights in the form of certificates of registered real rights. In accordance therewith:

a) Where land is transferred subject to a reservation of real rights, a certificate of registered real rights may be issued by the registrar of deeds, provided the holder applies and lodges the title deeds of the land (section 64(1)).
b) Where a real right holder wants to mortgage or otherwise deal with the real right separately or transfer/cede a share of the real right, he/she must obtain a certificate of registered real rights before the transaction can be registered. If the right holder merely waives preference in favour of a mortgage bond being passed by the landowner, it is not necessary to have a certificate of registered real rights issued. The right holder may waive his/her rights by way of a notarial deed (if the bond is already registered) or simply by an underhand consent (generally included in an additional power of attorney). Neither is it necessary to obtain a certificate of registered real rights where the right holder transfers the whole of the real right (section 64(2)).

7.6 Cession, assignment, mortgaging and lapsing of personal servitudes

7.6.1 Cession and assignment

Section 16 provides that where a real right in land is transferred it must be done either by a deed of transfer in the case of ownership or by a notarial deed of cession in other cases (except where it is the transfer of rights in terms of a mortgage bond, or the state or local authority acquires land). Thus where the servitude is registered in terms of section 65 by way of a notarially executed deed, it is in fact also covered by the general notarial cession provision in terms of section 16. In terms of section 64 the rights held in terms of a personal servitude may generally only be ceded or assigned to the owner of the burdened land, and this may be done in the following ways:

a) By registration in the deeds office of a notarially executed deed of cession in terms of section 16 of the Deeds Registries Act 47 of 1937. On registration of the notarial deed of cession, the registrar of deeds will note the merger (of the limited real right or personal servitude with the ownership rights to the land) on the title deed of the land and on the notarial deed of cession.
b) By joining the bare dominium landowner in transferring the property to a third person, who acquires the full/whole property; that is, the landowner and the servitude holder together transfer all their rights to the new whole property owner. (This can also be done by a bare dominium owner and a *fideicommissarius* in terms of section 69*bis*.)

c) By a notarially executed cancellation of the servitude. This is done before expiry of the servitude: the parties agree to terminate it and it then lapses (as discussed below). Then all the limited real rights held by the servitude holder automatically revert to the owner of the burdened property just as though it had been ceded as described above. Reference in this case is made to section 68(2) of the Deeds Registries Act 47 of 1937. The notarial cancellation may be executed unilaterally by the servitude holder if it does not place any obligation on the landowner (regulation 61(1)).

7.6.2 Mortgaging of personal servitudes

Personal servitudes may be subject to a mortgage bond, which can happen in one of the following ways:

a) The land over which a personal servitude is about to be registered may already be mortgaged. In this case the bondholder may consent to the servitude being registered free from the bond (as we have already learned) in terms of section 65(3). Alternatively, the bondholder of the mortgage bond over the land may insist that the personal servitude also be made subject to the bond, in which case a surety bond will have to be registered over the personal servitude. (The servitude holder stands surety for the debt of the landowner and registers a mortgage bond to secure the obligation.)

b) If the servitude holder wishes to mortgage the registered personal servitude as security for a loan, this can be done in principle. In practice, however, few prospective bondholders would be prepared to accept such perilous security. The servitude may lapse, for instance, on the death of the servitude holder or by merger should the servitude holder become owner of the property.
c) The servitude holder and the landowner may jointly register a mortgage bond over the land (as provided for in section 69 of the Deeds Registries Act 47 of 1937. In this instance, both the land and the servitude are subject to the same mortgage bond.

7.6.3 Lapsing of personal servitudes

Naturally, servitude may expire, be cancelled or terminated. If a personal servitude that has lapsed, been cancelled or been terminated is depicted on a diagram approved by the Surveyor-General, the registrar of deeds must inform the Surveyor-General so that the diagrams in the Surveyor-General's office can be annotated accordingly. There are three ways in which the lapsing of servitude may be recorded in the deeds office. In practice any of the three ways listed below may be used, depending on the circumstances.

7.6.3.1 Where the servitude expires due to effluxion of time or the happening of an event.

Section 68(1) authorises and requires the registrar to record it. The landowner should lodge the following:

a) An application – this may be done on behalf of the owner by the conveyancer on the strength of a power of attorney; even an implied authority contained in the power of attorney will suffice
2) Proof that the servitude has lapsed – for example, a certified copy of the death certificate of the servitude holder or an underhand waiver of the servitude rights by the servitude holder (Registrars' Conference Resolution 39/1972)
c) The title deed of the land
d) The title deed of the servitude (if available)
e) A transfer duty receipt where applicable

The registrar will then record the lapsing of the servitude on the title deed of the land and on the servitude (if lodged) by an endorsement setting out the facts (e.g. "Usufructuary deceased 22.2.99"). Where the lapsing of the servitude is due to effluxion of time, no proof of its lapsing need be lodged, and a conveyancer acting on behalf of the owner need not lodge a power of attorney (Registrars' Conference Resolutions 44/1954 and 30/1958). Servitudes also lapse where the landowner and the servitude holder, by acquisition, become one and the same person

7.6.3.2 Where a servitude is cancelled by agreement

Here section 68(2) authorises and obliges the registrar to record it. The following must be lodged:

a) A notarial agreement (bilateral or unilateral, depending on whether the landowner incurs any obligation as pointed out previously, but not underhand)
b) The title deed of the land
c) The title deed of the servitude (if available)
d) The consent of the mortgagee (if any) to the cancellation of the bond over the servitude or the release of the servitude from the operation of the bond (the consent is not to the cancellation of the personal servitude, as the servitude must first be freed from the operation of the bond before it can be cancelled)
e) Transfer duty receipt if applicable

7.6.3.3 Where a servitude is terminated due to failure to perform

In terms of section 90 of the Deeds Registries Act 47 of 1937, among others, a servitude may be terminated because of the servitude holder's failure to perform. This applies only in those rare instances where the servitude obliges the servitude holder to make continuous payments.

7.7 Format and content of notarial deed of personal servitude

There is no prescribed format for this deed, because the contract options of the parties are infinite. However, it must comply with certain requirements for notarial deeds for registration in the deeds office. These requirements are as follows:

a) Proof that transfer duty, when applicable, has been paid
b) The protocol number, evident on the deed (and on the protocol copy filed by the notary)
c) Preferably a heading, although not necessary for its validity
d) Dated (this is generally apparent on the first page)
e) The name of the notary before whom it was executed and where he/she practices
f) A description of the parties to the contract as prescribed by section 17 and regulations 18 and 24 of the Deeds Registries Act 47 of 1937 (the contractual capacity of the parties should be kept in mind in this regard)
g) A description or *causa* of the servitude, i.e. what kind of servitude is it and how it came to be registered
h) A correct and complete description of the servient tenement in accordance with the title deed of the property
i) The terms and conditions of the servitude as agreed upon by the parties, but obviously these may not be *contra bonos mores*
j) Proof of execution/signature of the deed

7.8 Praedial servitudes

A praedial servitude entails the limited real right of a dominant property over the servient property, in contrast to personal servitudes, where a specific person is holder of the limited real right. In other words, a praedial servitude is a real right that is vested in favour of a specified property (the dominant property) over another specified property (the servient property). In terms of this real right, the dominant property is entitled to the real right concerned, whereas the servient property is subject to it for a limited period (determinate or indeterminate) or in perpetuity. Such a real right is in principle indivisible and adheres inseparably to the respective properties. It adheres to the respective properties regardless of who the owners of the properties are and regardless of the fact that ownership passes from one person to another. When the ownership changes, the real right is transferred together with the property or properties. The owner of the dominant property acquires the benefit of the right of use of the real right, and the owner of the servient property must tolerate the exercise of this real right.

7.9 Creation of praedial servitudes

As with personal servitude, the creation of a praedial servitude is also by way of an agreement between two parties (people), but the servitude is over and in favour of properties. Again the grantor of the praedial servitude will be the owner of the servient property, although this person is not the subject of the servitude but the property is. The grantor of the servitude is just a party to the creation agreement. However, unlike personal servitudes, the grantee of the servitude is not a person but another property. However, the property cannot be party to an agreement, so the person who is owner of the dominant property will be a party to the creation agreement, although the servitude is not granted in favour of this owner but in favour of the property.

Therefore, once the owner of the servient property and the owner of the dominant property have concluded the agreement, the praedial servitude will have been created. From that moment the servitude rights and obligations exist between the two properties and not so much between the people who have concluded the agreement. Thus, although the rights and obligations of the praedial servitude exist immediately after its creation between the two pieces of land, these rights and obligations can be enforced by the parties to the agreement only after registration in the deeds office.

Praedial servitudes can also be created by the operation of law. When a servitude is created by the operation of law, however, it is also vested through the same operation of law and not, as when created by agreement, through registration. Operation of law includes court orders, prescription and expropriation.

Once the praedial servitude has been registered against the title deeds of the respective pieces of land, it is also enforceable by and against third parties, including successors in title of the landowners. In their capacity as owners of the servient and dominant properties, the respective owners are obliged to maintain the servitude. The owner of the dominant property acquires the right of use of the servitude (*Hotel de Aar v Jonordon Investment (Pty) Ltd* 1972 (2) SA 400 (A)). When the ownership changes, therefore, the person entitled to this right of use also changes. The same principle applies in respect of the servient property: the owner of the servient property must tolerate the exercise of the right of use.

7.10 Registration of praedial servitudes

Section 16 of the Deeds Registries Act states the general rule in broad outline, but the specific procedure for the registration of praedial servitudes is set out in sections 75 and 76 of the Deeds Registries Act. The various possible means of registration are therefore as follows:

a) Registration by means of a notarial deed in terms of section 75 of the Deeds Registries Act
b) Registration by means of a proviso in a deed of transfer in circumstances detailed in section 76 of the Deeds Registries Act
c) Registration of an unregistered servitude by means of a deed of transfer in circumstances as detailed in the proviso to section 76(1) of the Deeds Registries Act

As in the case of personal servitudes, for which the general rule for the registration procedure is contained in section 65(1) of the Deeds Registries Act, there is also a general rule for the registration procedure of praedial servitudes. This general rule is contained in section 75(1) of the Deeds Registries Act

7.10.1 The general rule

The general rule with regard to the registration and vesting of praedial servitudes is laid down in section 75(1) of the Deeds Registries Act, namely that they must be vested notarially. Therefore, if the landowner wants in general to transfer a praedial servitude in favour of a specified piece of land over a servient piece of land, and to have this registered against the title deeds of the respective pieces of land, the agreement for vesting of the servitude must be embodied in a deed prepared by the notary and executed before him/her (section 75(1) of the Deeds Registries Act).

In order to transfer the servitude and have it registered, the owner of the dominant land and owner of the servient land must have a notarial deed of servitude prepared by a notary, and must sign it. Praedial servitudes are thus in principle transferred by means of a bilaterally executed deed. Only then will the registrar of deeds register the servitude.

There are certain exceptions to this rule, however, as contained in the provisions of section 76 of the Deeds Registries Act. These exceptions are aimed mainly at practicability and cost-effectiveness.

7.10.1.1 Exception in section 76 (1)

This exception provides that the praedial servitude need not be contained in a notarial deed, but may in certain circumstances be vested in a condition in a deed of transfer of land.

The registration and vesting of a praedial servitude in this way will be possible in the following circumstances:

a) If the praedial servitude extends over the servient property (the land being transferred) and is in favour of the dominant property (other land registered in the name of the transferor) – in other words, if the future servient property (that is to be transferred) as well as the future dominant property belong to the same person OR
b) If the praedial servitude is in favour of the dominant property (the land being transferred) and extends over the servient property (other land registered in the name of the transferor) – in other words, if the future servient property as well as the future dominant property (that is to be transferred) belong to the same person

In both cases it will therefore not be necessary to embody the praedial servitude in a notarial deed and then to register the deed. It can be included directly as a condition in the title deed. However, to make use of this method of vesting a praedial servitude, there are certain requirements:

a) With the vesting of the praedial servitude there must also be a simultaneous transfer of land, so that the servitude can be embodied in the deed of transfer.
b) It may not be the transfer of just any piece of land: The land being transferred must form either the servient or dominant property in respect of the servitude.
c) The other piece of land affected by the servitude, whether it will form the dominant or servient property, must also be registered in the name of the transferor.

It follows therefore for the exception to be utilized the following must apply:

a) A person must be owner of at least two pieces of land.
b) This person must transfer to another person one of the pieces of land, either entitled to or subject to a praedial servitude.
c) This praedial servitude must be either over or in favour of the other piece of land.

Land that is registered in the name of more than one owner cannot, on transfer to a third party, be made subject to a praedial servitude in favour of other land that is the property of just one of the joint owners. Such a servitude would have to be created notarially in terms of the provisions of section 75(1) of the Deeds Registries Act (Registrars' Conference Resolution 3/1958).

This exception is also often used where land is sub-divided and servitudes must be vested over and in favour of the portion(s) and the remainder. These servitudes that are reciprocally created and vested between the portion(s) and the remainder may be embodied in a deed of transfer only if all the subdivisions and the remainder are transferred simultaneously. Otherwise the servitude must be vested notarially.

7.10.1.2 The exception in the proviso to section 76 (1)

This exception is to the rule that a praedial servitude may be registered only by means of a bilateral notarial deed. As with the first exception, the servitude is not embodied in a notarial deed in this case, but in a deed of transfer of land. The aim of this second exception is the registration of unregistered servitude rights. Servitude rights are thus created earlier, before the intended registration of the transfer of the land, but they are never registered against the title deed of the land. This characteristic makes for a clear distinction between the first exception (contained in section 76(1)) and the second exception (contained in the proviso to section 76(1)).

This exception may also be used only in certain circumstances. The servitude may be embodied in the deed of transfer if:

a) the land being transferred is acknowledged by the transferor to be subject to unregistered servitude rights in favour of land registered in the name of a third person
b) the transferee consents in writing to the servitude's being embodied in the deed of transfer
c) the third person (or a duly authorised representative of this person) appears in person at the signing of the deed of transfer before the registrar and accepts the servitude in favour of his/her land

From the above account of the proviso contained in section 76(1) of the Deeds Registries Act it seems clear that this exception may be used only if the land that is to be transferred is subject to unregistered servitude rights in favour of other land registered in the name of another (third) person.

In practice the servitude is referred to in the special power of attorney to pass transfer of the land. The reference and signing of the power of attorney by the transferor serves as acknowledgement of the existence of the servitude rights. The written consent of the transferor is usually given in the same document as the special power of attorney, or by means of a further document. This consent (in whichever document) is then signed by the transferee. Usually the third person does not appear in person before the registrar but appoints a conveyancer as proxy to appear for him/her. In the clause in the deed of transfer where the servitude is embodied, it is then stated that the third person, or the proxy, appears before the registrar and accepts the servitude.

If the land is later again transferred to someone else, the acceptance clause is simply omitted from the condition. Only the servitude, as condition, will then be mentioned in the conditional clause. The title deed of the land of the third person, who is entitled to the servitude, must be lodged in the deeds office together with the deed of transfer and the title deed of the land being transferred. This title deed must be endorsed to indicate that the servitude has been registered and that the land is consequently entitled to the servitude.

7.10.2 Exception in section 76 (4)

A further exception to the general rule for the creation of praedial servitudes is found in the provisions of section 76(4) of the Deeds Registries Act. As in the other two exceptions, the praedial servitude in this case is not embodied in a notarial deed. In this case, however, one of the main requirements is that a subdivision of land must occur.

In terms of this exception, if the whole piece of land of which only a portion is to be transferred is entitled to a servitude over other land, the transferor may on transfer of the subdivision (portion of the whole) stipulate in the power of attorney to pass transfer that the exercise of the rights is restricted to the land still held by the transferor (the remainder of the land). To make use of this exception, therefore, a subdivision of land entitled to a praedial servitude must first take place, while the remainder of the land remains the property of the transferor (Registrars' Conference Resolution 10/1974). This subdivision must be transferred by the owner to another person. At the same time as the transfer (by means of a deed of transfer) of the portion, the transferor may stipulate that the portion concerned is not entitled to the praedial servitude but that only the remainder of the land will still be entitled to it.

In practice, the transferor indicates this restriction on the special power of attorney for passing transfer of the portion. This power of attorney is also signed by him/ her/them. The title deed of the property that is being subdivided must, of course, be lodged in the deeds office. With the endorsement regarding the transfer of the portion, this title deed is simultaneously endorsed to indicate that only the remainder will in future be entitled to the servitude (Registrars' Conference Resolution 10/1974). The title deed of the land that is subject to the servitude is not endorsed, however, and is consequently not lodged in the deeds office (section 76(4) of the Deeds Registries Act).

Usually the servitude, as a condition, is just omitted from the conditional clause of the deed of transfer of the portion. However, there are cases where the condition must first be indicated, followed by a divesting clause directly after the condition, indicating that the right to enjoy the servitude is withdrawn. Normally such a clause is applicable in the following cases:

a) Where ancillary rights are included in the servitude
b) Where water rights are at issue in the servitude

7.10.3 Expropriation servitudes

Servitude rights over land may be expropriated in favour of other land by some competent authority, such as the state or a local management body. Where a praedial servitude is thus expropriated by a competent body, the provisions of section 32 of the Deeds Registries Act are applicable to the registration procedure of the servitude.

Section 32 of the Deeds Registries Act provides for the cession of such an expropriated servitude by means of a deed of cession prepared by a conveyancer and executed before a registrar of deeds. Such servitude is therefore not embodied in a notarial deed.

Praedial servitudes registered in terms of the provisions of sections 75 and 76 of the Deeds Registries Act result in their transfer and vesting. Expropriation servitudes are transferred by the expropriation and vested by means of the operation of law and not by registration.

7.10.4 Consent in terms of sections 75(3) and 76(2) of the Deeds Registries Act

In considering personal servitudes above, the position of the mortgagee when the land over which the servitude is to extend is mortgaged was explored and discussed. Similarly as in the case of praedial servitudes, the question whether the mortgagee's position will also be affected by the registration of praedial servitudes has to be addressed.

Sections 75(3) and 76(2) of the Deeds Registries Act contain specific provisions in this regard. Section 75(3) of the Act makes the provisions of section 65(2) and (3) of the Act applicable to the registration of praedial servitudes as well, with the necessary modifications. The written consent of the mortgagees in respect of the servient land must be lodged on registration of the praedial servitudes. On the registration of personal servitudes, consent to the granting of the servitude, free of the bond, must be given. However, on the registration of praedial servitudes this is not a requirement: the mortgagee(s) must merely consent in writing to the registration of the praedial servitude (Registrars' Conference Resolution 20/1987). The relevant mortgage bond must, of course, also be lodged for endorsement. However, it is not only the mortgagee's position that is affected; holders of other registered real rights must also consent to registration of the praedial servitude. If the servient land is subject to any other real right with which the servitude could conflict, the legal holder of that real right must consent in writing to the registration of the praedial servitude. Together with this, the registered deed in terms of which that real right is held must also be lodged for endorsement

7.11 Duration of praedial servitudes

A personal servitude may be registered for no longer than the lifetime of the servitude holder. Because the personal servitude is granted and registered in favour of a specific person, a logical consequence is that the servitude cannot apply for longer than the person's lifetime. In contrast, praedial servitudes are not granted and registered in favour of a particular person, but in favour of a particular piece of land.

Sections 75(1) and 76(1) of the Deeds Registries Act state explicitly that a praedial servitude may be registered for a limited period or in perpetuity. It is therefore possible to grant a praedial servitude for a certain number of years or linked to the occurrence or non-occurrence of a condition or event in the future. It is also possible not to link any period to the duration of the servitude. Equally, the servitude may be made in perpetuity.

From this explanation it is evident that the duration for which personal and praedial servitudes may be registered is distinctive for each type.

7.12 Transferability of praedial servitudes

A praedial servitude is granted and registered over a specified piece of land and in favour of another piece of land. The actual servitude holder is the dominant property. No particular person is holder of a praedial servitude. When the land (the servient or dominant property) is transferred from one owner to another, therefore, the servitude is transferred together with the right of ownership in the land, unless the servitude is cancelled before transfer of the ownership takes place. In principle, therefore, a praedial servitude may not be transferred in any other way.

Where an owner of the dominant property (in respect of a specific praedial servitude) wants to transfer the servitude rights to which the property is entitled to another piece of land which this owner also owns, this will not be permissible unless the written consent of the owner of the servient property is also obtained. Therefore, where a person is owner of two pieces of land, for example, and one piece is entitled to a servitude of right of way over another piece of land, the owner of the two pieces of land may not simply transfer the servitude of right of way from the one piece of land to the other. The owner of the property over which the servitude of right of way extends will first have to consent to this.

7.13 Termination of praedial servitude

Praedial servitudes, whether for a limited period or not, can be terminated in various ways. We explained above that in practice a servitude could already have lapsed or been cancelled but that this might not be reflected in the deeds office's records. There is a certain registration procedure that must be followed to indicate the termination of the registration of a servitude.

The operation of praedial servitudes can be terminated under one of the following circumstances:

a) If the owners of the respective pieces of land have agreed to cancel the servitude
b) If one of the owners of the pieces of land has waived the servitude and as a result the servitude is cancelled
c) If the servitude was granted and registered for a limited period, and this period has expired
d) If merger occurs, where the owner of either the dominant or servient property also becomes owner of the other piece of land
e) If periodic compensation must be paid for the servitude rights, and the owner of the dominant property fails to pay it
f) If a court order is issued for termination of the servitude or it is terminated by operation of law

7.14 Format and content of a notarial deed of a praedial servitude

As is the case for the notarial deed of personal servitude, there is no specific prescribed format for a notarial deed of praedial servitude. However, the format does not usually differ much from that of a notarial deed of personal servitude. The only differences are the following:

a) In a personal servitude, only the property or properties subject to the servitude is/are at issue and not, as in praedial servitudes, a dominant and a servient property.
b) In a personal servitude the rightful holder of the servitude is a person, but in a praedial servitude it is the servient property that has the rights to the servitude.
c) A further consequence is that the format differs, in the sense that the parties to the agreement are described differently. In a personal servitude the parties are described first and the property thereafter. In a praedial servitude the owner of one property is described first together with the property (dominant or servient) as one party, and thereafter the owner of the other property is described together with the property (servient or dominant) as the other party.
d) As previously explained in respect of personal servitudes, the cedent is the person who cedes the servitude. The same applies in respect of praedial servitudes. Therefore, where the servitude is granted and subsequently ceded notarially, the cedent will be the owner of the servient property. The cessionary will then be the owner of the dominant property.

7.15 Transfer duty implications of a praedial servitude

Transfer duty is levied on the value of a servitude acquired by means of a transaction or in any other way or on the amount by which the value of any property is increased as a result of the waiver of the servitude (section 2(1) of the Transfer Duty Act 40 of 1949). The fact that the deed in which the servitude is embodied or in which the right is waived states specifically that no payment is made, does not affect the position. The exemption from payment of transfer duty, contained in section 9 of the Transfer Duty Act 40 of 1949, also applies to servitudes.

7.16 Servitude diagram

Sometimes a servitude diagram is included with the deed in which the servitude is embodied. In this case the description of the servitude will refer to the servitude figure indicated on the diagram and to the diagram number. In certain cases, however, it is not necessary for a servitude diagram to be lodged on registration of the servitude.

8 Appendix: Document Examples

1 Deed of sale

MEMORANDUM OF AGREEMENT FOR
SALE OF PROPERTY

1 THE PARTIES

1.1 **SELLO MCABA**

IDENTITY NUMBER 611104 5380 085

UNMARRIED

ADDRESS: _____ ["the Seller"]

1.2 **MARGARET LINDA**

DENTITY NUMBER 660127 0409 08 8

UNMARRIED

ADDRESS: _____ ("the Purchaser")

2 PURCHASE AND SALE

2.1 The Seller hereby sells to the Purchaser who hereby purchases

ERF 566 SOSHANGUVE – X TOWNSHIP REGISTRATION DIVISION J.R PROVINCE OF GAUTENG

MEASURING 300 (THREE HUNDRED) SQUARE METRES

HELD BY DEED OF TRANSFER NO. T98502/2001

["the property"]

2.2 The purchase price of the property is **R 7000,00 (SEVEN THOUSAND RANDS**)

3 PURCHASE PRICE AND GUARANTEES

3.1 The purchase price is **R 7000,00** and is payable as follows: -

3.1.1 immediately after the Seller has signed this Agreement, the Purchaser shall make an initial payment of R 7000,00 in trust to the Conveyancer, who shall immediately thereafter invest the same in an interest bearing trust account opened by the Conveyancer, the interest accruing to the Purchaser;

3.1.2 the balance of the purchase price shall be paid to the Seller against registration of transfer of the Property into the name of the Purchaser;

3.1.3 immediately after registration of transfer of the Property into the name of the Purchaser, the Conveyancer shall pay to the Seller the initial payment referred to in 3.1.1 above and to the Purchaser the interest that has accrued on such initial payment.

3.2 The Purchaser shall within 30 days after fulfillment (or waiver in terms of 7.1 hereunder, as the case may be) of all suspensive conditions contained in this Agreement, lodge with the Conveyancer a guarantee or guarantees, which shall: -

3.2.1 be issued by an Institution or Institutions, the terms and conditions of which shall be reasonably acceptable to the Seller (or the Conveyancer on his behalf); and

3.2.2 secure payment of the said balance to the Seller on registration of transfer of the Property into the name of the Purchaser and registration of a mortgage bond, if applicable.

provided, however, that the aforegoing provisions shall not apply in the event of this Agreement being subject to the provisions of 6.2 hereunder.

4 OCCUPATION AND OCCUPATIONAL INTEREST

4.1 It is hereby recorded that:-

4.1.1 the Property is not let to a third party ("the tenant").

4.1.2 occupation of the Property shall be given to the Purchaser on _____ on which date the Purchaser shall take occupation thereof.

4.2 If the date of occupation does not coincide with the date of registration of transfer, the party enjoying occupation of the Property while it is registered in the name of the other party shall, in consideration of such occupation and for the period of such occupation, pay to the other party occupational interest of R 700, 00 per month, which amount shall be limited to 1% (ONE percent) of the full purchase price.

4.3 If occupation of the Property is given to the Purchaser prior to registration of transfer, the Purchaser shall not be entitled to make any alterations or additions to the Property before the date of registration of transfer. The Purchaser shall be obliged in the event of the cancellation or lapse of this Agreement to forthwith vacate the Property and restore it to the Seller in the same condition as when the Purchaser took occupation, it being acknowledged that no tenancy shall be created by the Purchaser taking occupation prior to registration of transfer.

4.4 All occupational interest shall be payable monthly in advance, provided that the Purchaser shall be entitled to a refund of a proportionate share of the payment in respect of the month during which the Property is registered into his name and calculated from the date of such registration.

5 SUSPENSIVE CONDITIONS

(Delete those sub-clauses, which are not applicable, i.e. 5.1 and/or 5.2, 5.3, 5.4 hereunder)

This Agreement is subject to the following condition(s):

5.1 **Approval of Bond**

The Purchaser obtains approval, by not later than _____ of a loan by an Institution of not less than R _____ upon the security of a first mortgage bond to be registered over the Property at such rates of interest and on such conditions as are stipulated by the Institution to which application for the loan is made.

and/or

5.2 **Sale of Purchaser's property**

It is recorded that the Purchaser is the owner of certain property known as _____ _____ ("the Second Property") which has been or is to be sold to a third party. The Seller acknowledges that the Purchaser requires the proceeds of the sale by him of the Second Property in order to meet his commitments under this Agreement. It is accordingly agreed that this Agreement is subject to the following additional suspensive condition consisting of four parts: -

5.2.1 if the Purchaser has not yet concluded an agreement of sale in respect of the Second Property, he shall by not later than _____ have concluded an agreement for the sale of the Second Property for not less than R _____; and

5.2.2 all suspense conditions contained in that agreement for the sale of the Second Property shall be fulfilled by not later than _____; and

5.2.3 the Purchaser shall be furnished with a guarantee securing payment to the Purchaser of the purchase price (or part thereof) of the Second Property and a copy of such guarantee is to be furnished by the Purchaser to the Seller by not later than _____; and

5.2.4 transfer of the Second Property shall be registered into the name of the Purchaser thereof within 90 days after the date referred to in 5.2.3 above.

5.3 The Purchaser shall within 30 days after compliance with his obligation in terms of 5.2.3 above and (if applicable) fulfillment of the condition referred to in 5.1 above, whichever occurs last, lodge with the Conveyancer a guarantee or guarantees which shall: -

5.3.1 be issued by an Institution or Institutions, the terms and conditions whereof shall be reasonably acceptable to the Seller or the Conveyancer on his behalf; and

5.3.2 secure payment of the balance of the purchase price of the Property to the Seller on registration of transfer of the Property into the name of the Purchaser and registration of a mortgage bond, if applicable.

5.4 The Purchaser and the Seller undertake to co-operate with each other to procure as far as possible that the transfer of the Property and the Second Property shall be linked in the convincing and financing processes, it being their intention that the transfers and payments shall take place simultaneously. The Purchaser and the Seller hereby authorise their respective conveyancers to take such reasonable steps as may be necessary or conducive for the implementation of their aforesaid intention.

6 WAIVER OF CONDITIONS AND LAPSE OF AGREEMENT

6.1 The Purchaser may at any time prior to the fulfillment of any suspensive condition contained in this Agreement, advise the Seller in writing that he waives the benefit of such condition, in which event this Agreement will no longer be subject to such condition; provided however that 4.2 shall only be capable of being waived in its entirety.

6.2 Should any suspensive condition contained in this Agreement not be timeously fulfilled, this entire Agreement shall automatically lapse and be of no further force or effect. In such event, all amounts paid by the Purchaser (excluding the occupational interest referred to in 4.2 and 4.3 above) shall be refunded to him together with any interest that has accrued thereon.

7 RISK AND BENEFIT

7.1 The risk in and the benefit of the property will pass to the Purchaser on transfer, from which date the Purchaser shall be entitled to all benefits flowing from the property and shall be liable for all rates, taxes and other outgoings in respect of the property.

7.2 Possession and occupation of the property will be given to the Purchaser on _____.

8 TRANSFER

8.1 Transfer of the property into the name of the Purchaser shall be given and taken as soon as is reasonably possible after the:-

8.1.1 fulfillment of any suspensive conditions, if applicable, referred to in this agreement; and

8.1.2 receipt of the guarantee referred to in Clause 3 hereof, if applicable; and

8.1.3 payment by the Purchaser of the necessary costs;

8.2 Transfer shall be effected by **SKHOSANA & ASSOCIATES and/or RATIBA INCORPORATED ATTORNEYS (in association);**

8.3 The Seller and the Purchaser shall sign all such documents as may be required in connection with the transfer immediately they are called upon to do so by the Attorneys referred to in Clause 8.2 herein.

9 COSTS

The Purchaser shall bear and pay all of the costs payable in accordance with the normal conveyancing tariffs, together with all and any duties in relation to the transfer.

10 DEFAULT

Should the either party default with the due performance of any of its obligations in terms of this agreement and persist in such default for a period of 14 (fourteen) days after it will have received a notice calling upon it to remedy such default, then notwithstanding any prior waiver, and without prejudice to any other claim which the other party may have, either in terms of this agreement or at law, it shall be entitled to either: -

10.1 Where the aggrieved party is the Seller ,declare this agreement cancelled and to resume possession and occupation of the property and to recover from the Purchaser all damages it may have suffered or sustained by reason of such default; and

10.2 Where the aggrieved party is the Purchaser, declare this agreement cancelled and to recover from the Purchaser all damages it may have suffered or sustained by reason of such default, OR

10.3 Where the aggrieved party is the Seller, claim and recover from the Purchaser the full balance of the purchase price then outstanding which shall be deemed to be due and owing; and

10.4 Where the aggrieved party is the Purchaser, claim specific performance from the Purchaser;

11 THE PROPERTY

The property is sold "*voetstoots*" subject to all the conditions and servitudes set out above and/or referred to in the current and/or prior title deeds of the property and to such other conditions and servitudes as may exist in regard thereto, and in the condition and to the extent such as it now lies. The Seller shall not be liable for any defects, latent or patent, which may exist in respect of the property, provided that the Seller had no prior knowledge thereof and therefore had no obligation to disclose their existence.

12 WARRANTIES

12.1 The Seller hereby gives and makes to the Purchaser the warranties set out hereunder on the basis that the Purchaser has entered into the agreement on the strength of such warranties which the Seller represents will be true and correct both as at the signature date and as at the date of registration of transfer. All of the warranties given in terms of this agreement shall be deemed to be material.

12.2 The Seller warrants that:

12.2.1 the Seller is the registered owner of the Property and will be entitled and able to give transfer of the Property to the Purchaser;

12.2.2 save for a first mortgage bond in favour of _____ in the amount of _____ the Property is otherwise unencumbered and save further for any conditions of title contained in the Title Deeds relating to the Property, is free of any and all restrictions;

12.2.3 no person has any right to occupy or has an option to occupy the Property or any improvements thereupon;

12.2.4 the buildings on the Property will not encroach on any neighbouring properties, nor does any neighbouring building encroach on the Property;

12.2.5	the Property and the buildings thereon will comply in every respect with all government, provincial and local authority requirements affecting them or relating thereto and the Seller has not been called upon by any competent authority and is not under any obligation to make any alterations, repairs or additions to the Property or the building, particularly and without limiting the generality of the aforegoing, in regard to the disposal of effluent or the state of the buildings;
12.2.6	the buildings on the Property will not be subject to any demolition orders;
12.2.7	there is no contamination of the soil, ground, water or surface on or emanating from the Property;
12.2.8	the plans relating to the buildings on the Property have been approved of by the necessary authorities and the buildings have been built substantially in accordance with such plans;
12.2.9	to the best of the Seller's knowledge, there are no leaks and/or other damp-proofing problems in regard to the roof of any other part of the building;
12.2.10	all assessment and rates and taxes relating to the property are up to date.
12.2.11	to the best of the Seller's knowledge and having made all reasonable enquiries, the Seller is not aware of any facts, matters or circumstances, which may give rise to:
12.2.11.1	any change in the zoning of the Property; or
12.2.11.2	any expropriation of the Property;
12.2.12	the transaction recorded in this agreement does not constitute a breach of any of the Seller's contractual obligations, nor will it entitle any person to institute any proceedings against the Purchaser arising out of such transaction;
12.2.13	the Seller has disclosed to the Purchaser all facts and circumstances material to the transaction recorded in this agreement and which would be material or would be reasonably likely to be material to a Purchaser of the Property.
12.3	Save for the aforegoing the Property is sold voetstoots and subject to such conditions as may be mentioned or referred to in the Title Deeds relating to the Property and/or the relevant diagrams in respect thereof. In particular, the Seller shall not:
12.3.1	be responsible to point out any boundaries of the Property to the Purchaser; nor
12.3.2	be responsible to the Purchaser for any deficiency in the extent of the Property that may be found upon the measurement thereof; nor
12.3.3	be entitled to an increase in the purchase price in respect of any excess in the extent of the Property.

13 SOLE AGREEMENT

This agreement constitutes the entire contract between the Seller and the Purchaser and no representations or statements made on behalf of any party during the negotiations shall in any way affect the respective rights of the parties under this agreement.

14 NON-VARIATION

No variation or consensual cancellation of this agreement shall be of any force or effect unless reduced to writing and signed by the parties or their duly authorised representatives.

15 NON-WAIVER

No latitude, extension of time or other indulgence which may be given or allowed by the Seller to the Purchaser or vice versa in respect of the performance of any obligation in terms of or arising from this agreement shall be a waiver or otherwise affect any of the rights of the Seller against the Purchaser or *vice versa*.

16 DOMICILIA AND NOTICES

16.1 The parties respectively choose as their *domilicium citandi et executandi* for all purposes of and in connection with this agreement as follows: -

16.1.1 the Seller: _____

_____

_____

_____

_____

16.1.2 the Purchaser: _____

_____

_____

_____

_____

_____

16.2 Any notice given by one party to the other in terms of this agreement shall be sent by pre-paid registered post or be delivered by hand and shall be deemed to have been received by the addressee on the 4th (fourth) day after posting, including the date of posting, or on the day of delivery, if delivered by hand, and no notice shall be deemed to have been validly given if given otherwise than in terms of the aforegoing.

17 CLAUSE HEADINGS

The headings of the clauses of this agreement are intended for convenience only and shall in no way effect the construction of this agreement.

18 OCCUPANCY AND ELECTRICAL INSTALLATION CERTIFICATES

The Seller shall within _____ days of signature hereof, furnish the conveyancers attending to the transfer with up to date occupancy and electrical installation certificates as provided for and required in terms of the relevant regulations and applicable legislation.

19 COOLING OFF PERIOD

Should the amount of the purchase price not exceed R_____, then the Purchaser shall be entitled to a period of five days from date of signature hereof within which he or she can cancel the contract should he or she deem it necessary.

20 AGENTS COMMISSION

The parties hereto acknowledge that an amount of R_____ (including Vat) and being agents'commision is payable to the following estate Agents:

Agent name: _____
Agent tel. No: _____
Agent ref. No: _____
Agent bank ACC: _____

Agent bank Name: _____

THUS DONE AND SIGNED BY THE SELLER AT _____ ON _____

AS WITNESSES

1 _____ _____
2 _____ _____

THUS DONE AND SIGNED BY THE PURCHASER AT _____ ON _____-

AS WITNESSES

1 _____ _____
2 _____ _____

2 The power of attorney to pass transfer

Prepared by me

_____

CONVEYANCER
RATIBA MM

POWER OF ATTORNEY TO TRANSFER

We, the undersigned

COLE INVESTMENTS (PROPRIETARY) LIMITED
No. 73/004239/07

herein represented by JOH LENE, duly authorised thereto by virtue of a resolution, do hereby nominate, constitute and appoint

MATOME RATIBA

with power of substitution to be our true and lawful Attorney/s and Agent/s as the Transferors, and to appear before the REGISTRAR OF DEEDS at Pretoria and there to declare that in exercise of an option granted on 19 July 1990, we entered into an agreement on to transfer, without compensation or payment to:-

TEN INVESTMENTS (PROPRIETARY) LIMITED
No. 73/003405/07

the bare *dominium* ownership of the following property, namely –

Portion 1 or Erf 292 THOBELA TOWNSHIP,

REGISTRATION DIVISION I.R., GAUTENG PROVINCE;

MEASURING 1 558 (ONE THOUSAND FIVE HUNDRED AND FIFTY EIGHT) SQUARE METRES

HELD BY DEED OF TRANSFER T3760/1978

and further cede and transfer the said property in full and free property to the said Transferee; to renounce all right, title and interest which the Transferors heretofore had in and to the said property, to promise to free and warrant the said property and also to clear the same from all encumbrances and hypothecations according to law, to draw, sign and pass the necessary acts and deeds, or other instruments and documents; and generally, for effecting the purposes aforesaid, to do or cause to be done whatsoever shall be requisite, as fully and effectually, to all intents and purposes, as the Transferors might or could do if personally present and acting therein; hereby ratifying, allowing and confirming all and whatsoever the said Agent/s shall lawfully do or cause to be done in the premises by virtue of these presents.

Signed at on in the presence of the undersigned witnesses.

AS WITNESSES

1 _____ _____
JO BERG

2 _____ _____

3 The Deed of transfer

PREPARED BY ME

CONVEYANCER
RATIBA MM

DEED OF TRANSFER

BE IT HEREBY MADE KNOWN:

THAT MATOME **MELFORD RATIBA**

appeared before me, REGISTRAR OF DEEDS at PRETORIA, he, the said Appearer, being duly authorised thereto by virtue of a Power of Attorney signed at PRETORIA on the 22nd of MAY 2OO3 by

CORNELIUS JOHANNES HATTINGH

Identity Number 000000 0000 000

Unmarried

And the Appearer declared that the transferor had truly and legally sold, and that he, the said Appearer, in his capacity aforesaid, did by these presents, cede and transfer to and on behalf of-

MATOME MELFORD RATEBA

Identity number: 000000 0000 00 0

UNMARRIED

His heirs, Executors, Administrators or Assigns, in full and free property

ERF 1474,situated in the township of CHANTELLE EXTENSION 14, Registration

Division J.R, PROVINCE OF GAUTENG

MEASURING 804 (EIGHT HUNDRED AND FOUR) square metres

First transferred by deed of transfer number T21037/1993 with General Plan SG No A6975/1991 relating thereto and held by deed of transfer number T115787/2001

SUBJECT TO THE FOLLOWING CONDITIONS:

1. Subject to the reservation of all rights to minerals in favour of Erwe & Huise (Proprietary) Limited No 85/02006/07 as will more fully appear from certificate of rights to minerals K 720/1992 RM and which reservation was made in respect of Portion 41 (a portion of portion 4) of the farm HARTEBEESTHOEK 303, Registration Division J.R, Transvaal, measuring 87326 (EIGHT comma SEVEN THREE TWO SIX) Hectares.

2. (a) The erf is subject to a servitude, two metres wide, in favour of the Local Authority, for any two boundaries other than a street boundary and in the case of a pan-handle erf, an additional servitude for municipal purposes 2 metres wide across the access portion of the erf, if and when required by the Local authority: Provided that the Local Authority may dispense with any such servitude

2. (b) No building or other structure shall be created within the aforesaid servitude area and no large rooted trees shall be planted within the area of such servitude or within 2 metres thereof

2. (c) The Local Authority shall be entitled to deposit temporarily on the land adjoining the aforesaid Servitude such material as may be excavated by it during the course of the construction, maintenance or removal of such sewerage mains and other works as it, in its discretion may deem necessary and shall further be entitled to reasonable access to the said land for the aforesaid purposes, subject to any damage done during the process of construction, maintenance or removal of such sewerage mains and other works being made good by the Local authority

2. (d) The erf is subject to a servitude two metres wide indicated by the letter ab on general plan SG No A 6975/91, for municipal purposes in favour of the Local Authority.

SUBJECT FURTHER TO any such conditions as may be contained in the said Deeds.

WHEREFORE the Appearer, renouncing all the right and title which the transferor heretofore had to the property, did in consequence also acknowledge them to be entirely dispossessed of and disentitled of the same and that by virtue of these presents, the said:-

MATOME MELFORD RATEBA

His Heirs, Executors, Administrators or Assigns, now is and henceforth shall be entitled thereto, conformably to local custom, the State, however, reserving its rights, and finally acknowledging the purchase price to be the sum of R197

000.00. (ONE HUNDRED AND NINETY SEVEN THOUSAND RANDS) and the date of sale to be the 22ND MAY 2003.

IN WITNESS WHEREOF I, the said REGISTRAR, together with the Appearer q.q, have subscribed to these presents and have caused the Seal of Office to be affixed thereto.

THUS DONE AND EXECUTED at the Office of the **REGISTRAR OF DEEDS AT**

PRETORIA.

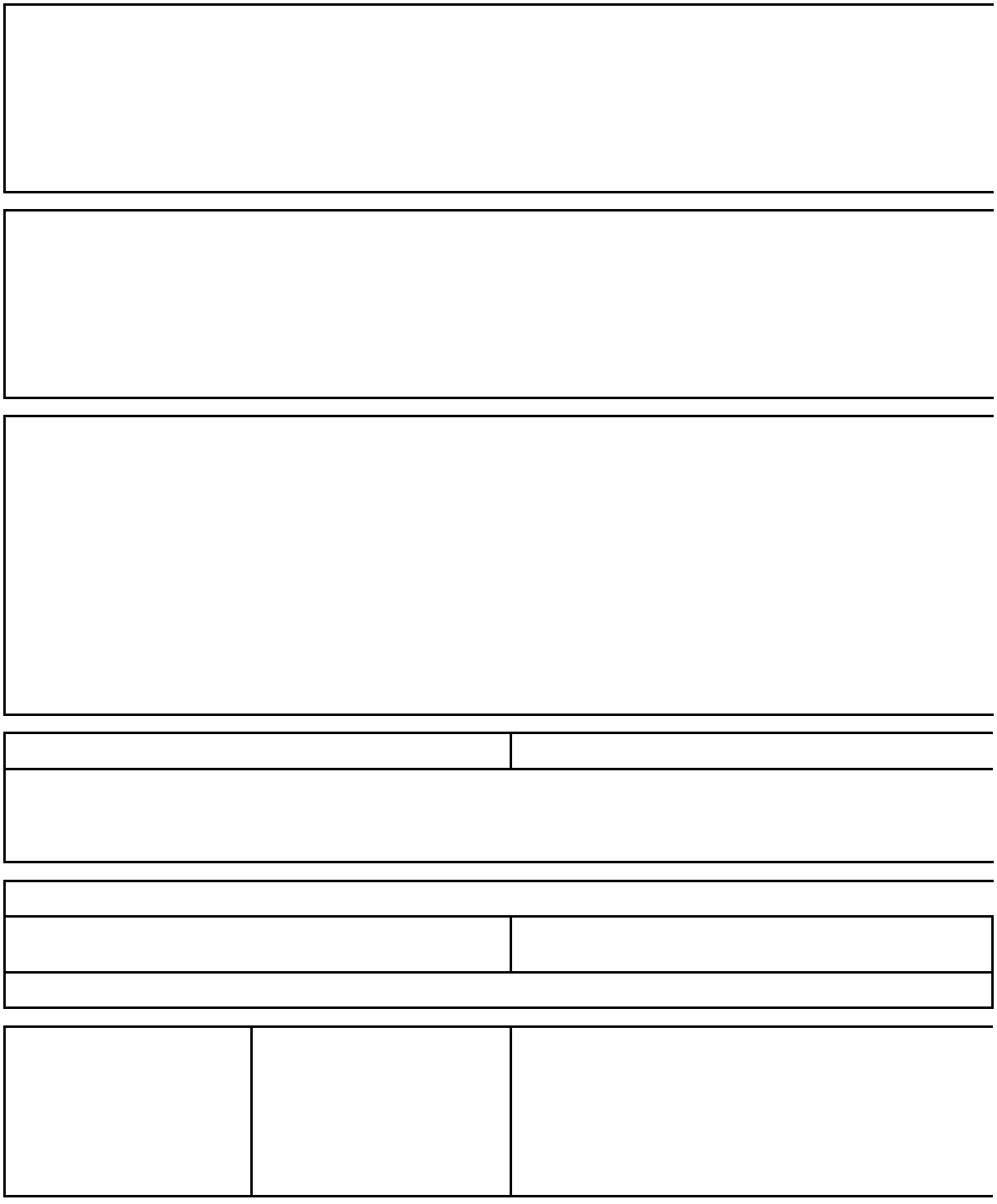
ON

q.q.

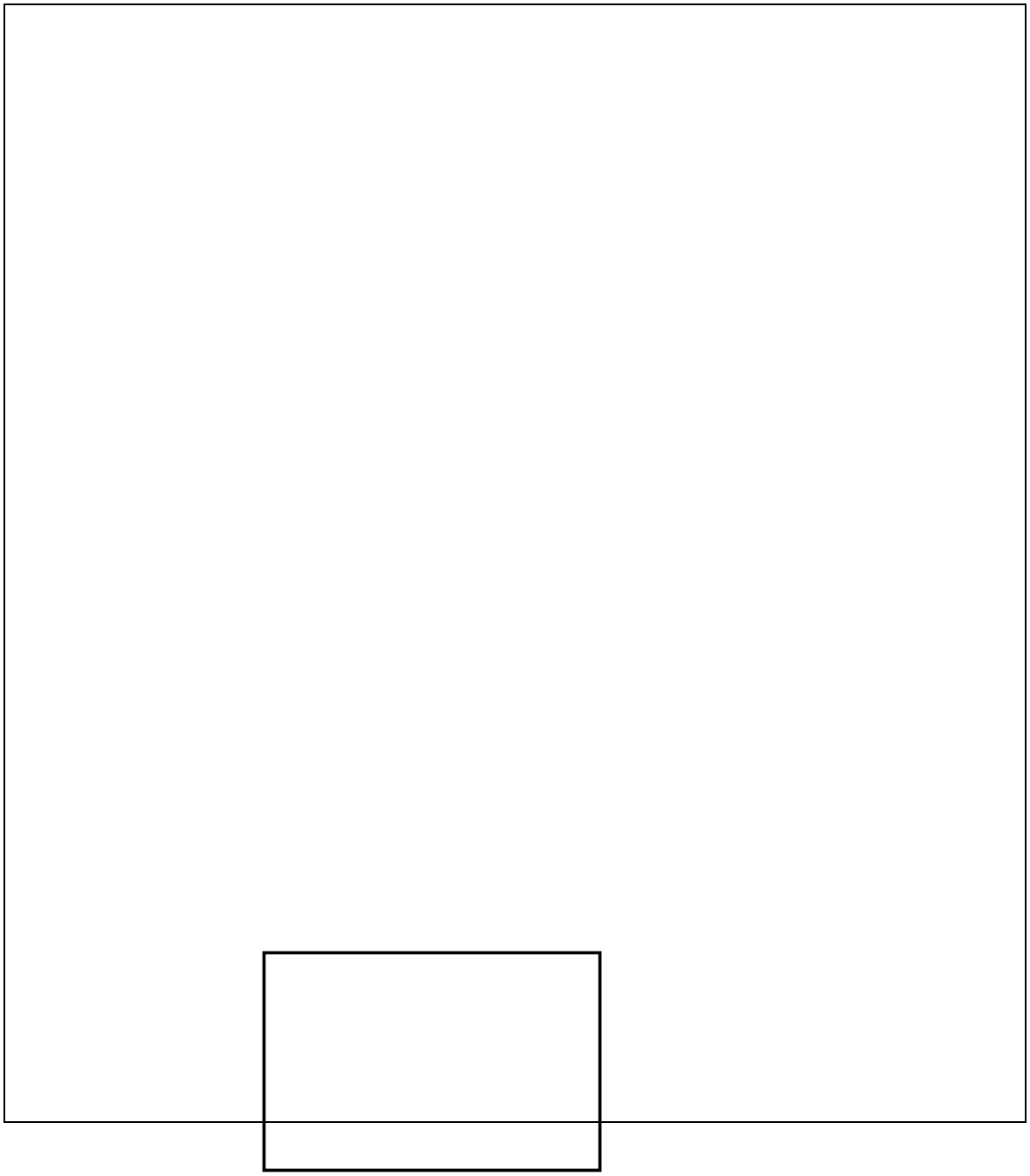
In my presence

REGISTRAR OF DEEDS

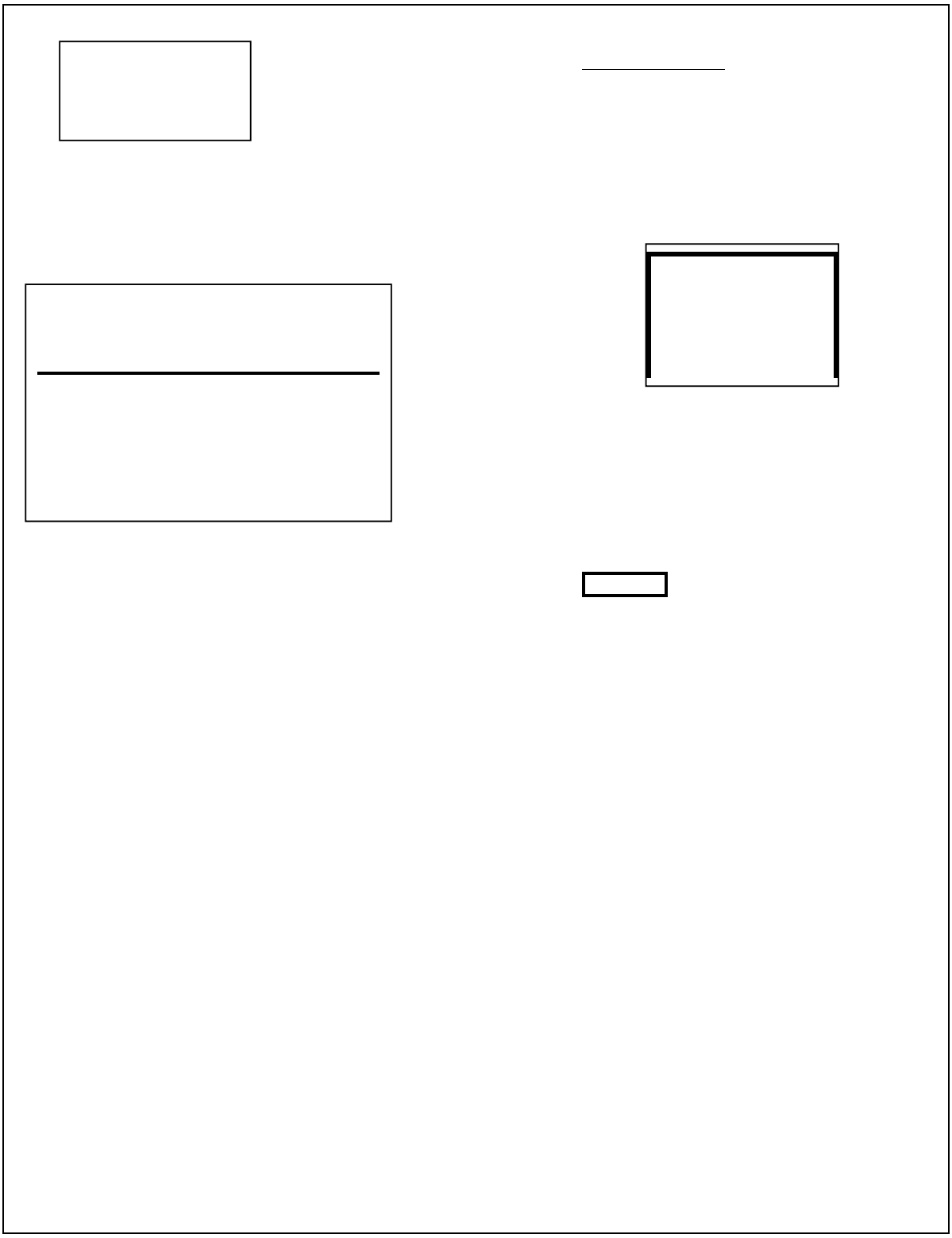
4 Transfer duty receipt

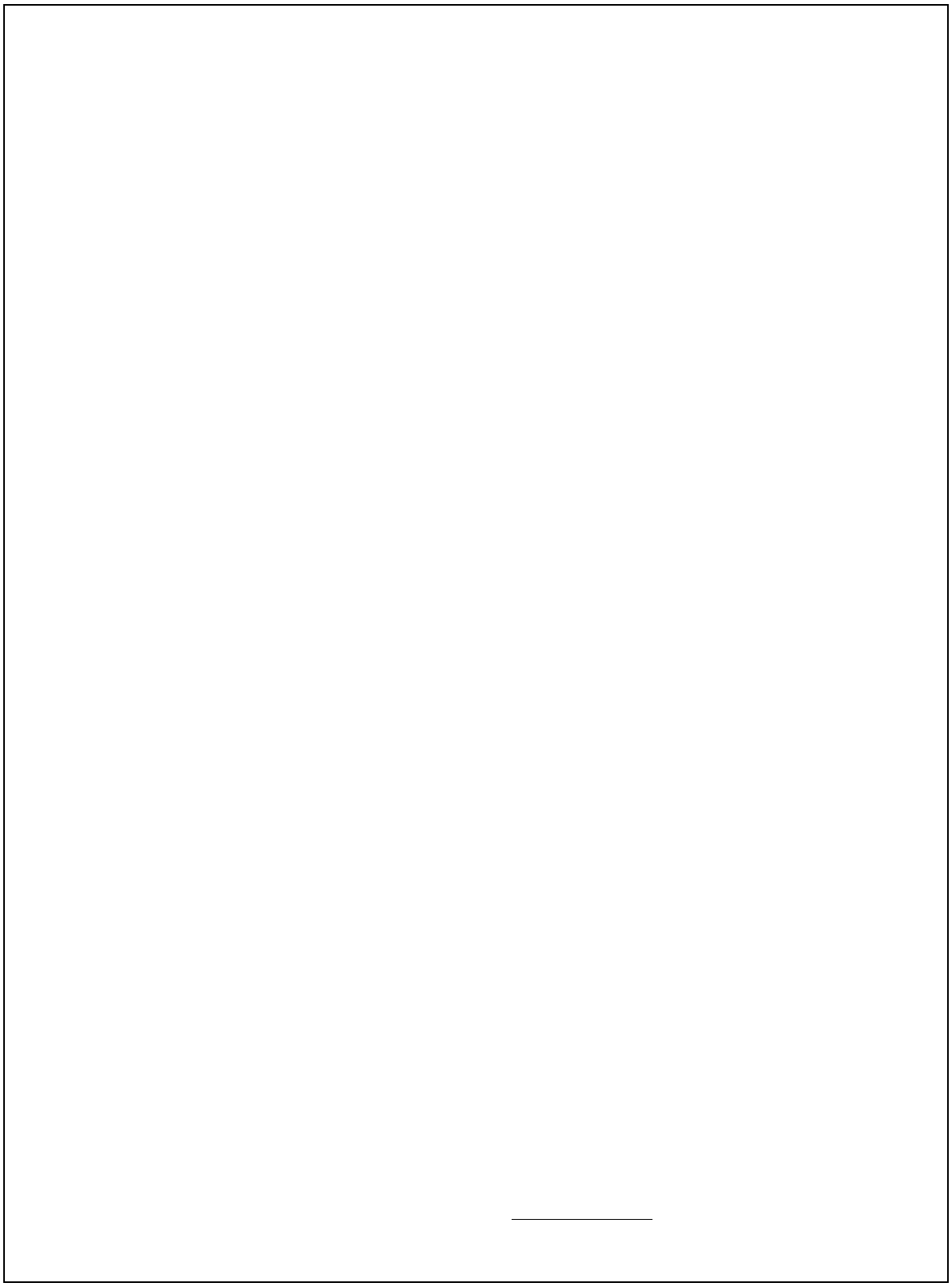


5 Clearance certificate

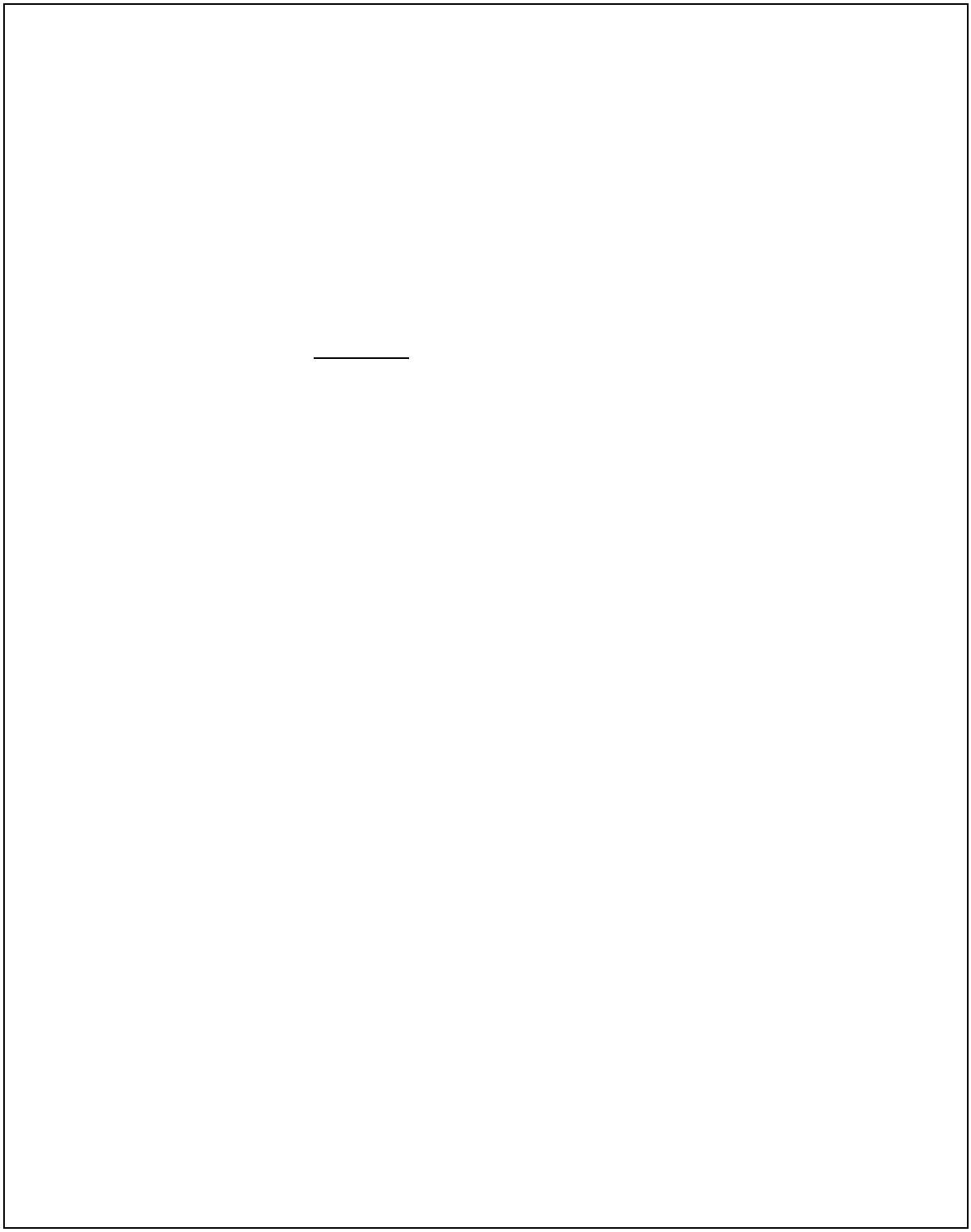


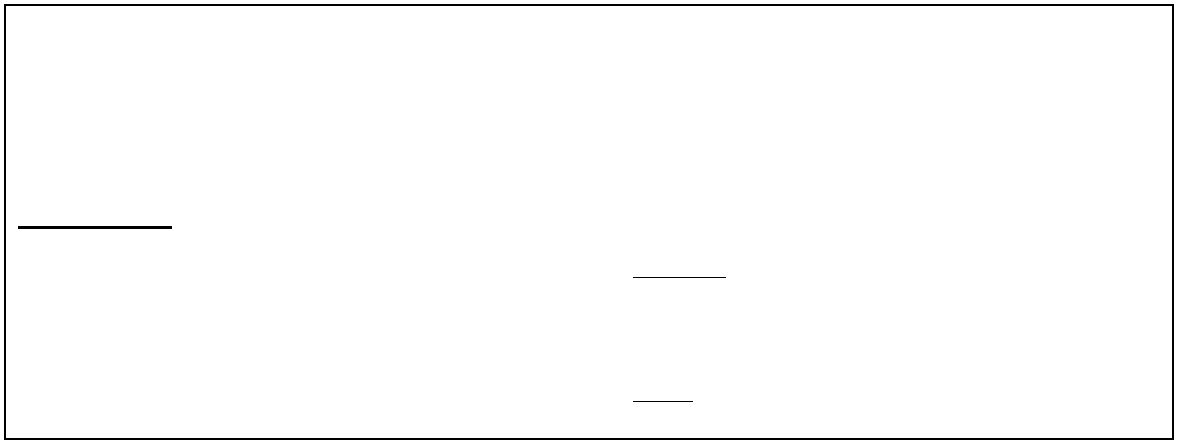
6 Mortgage bond



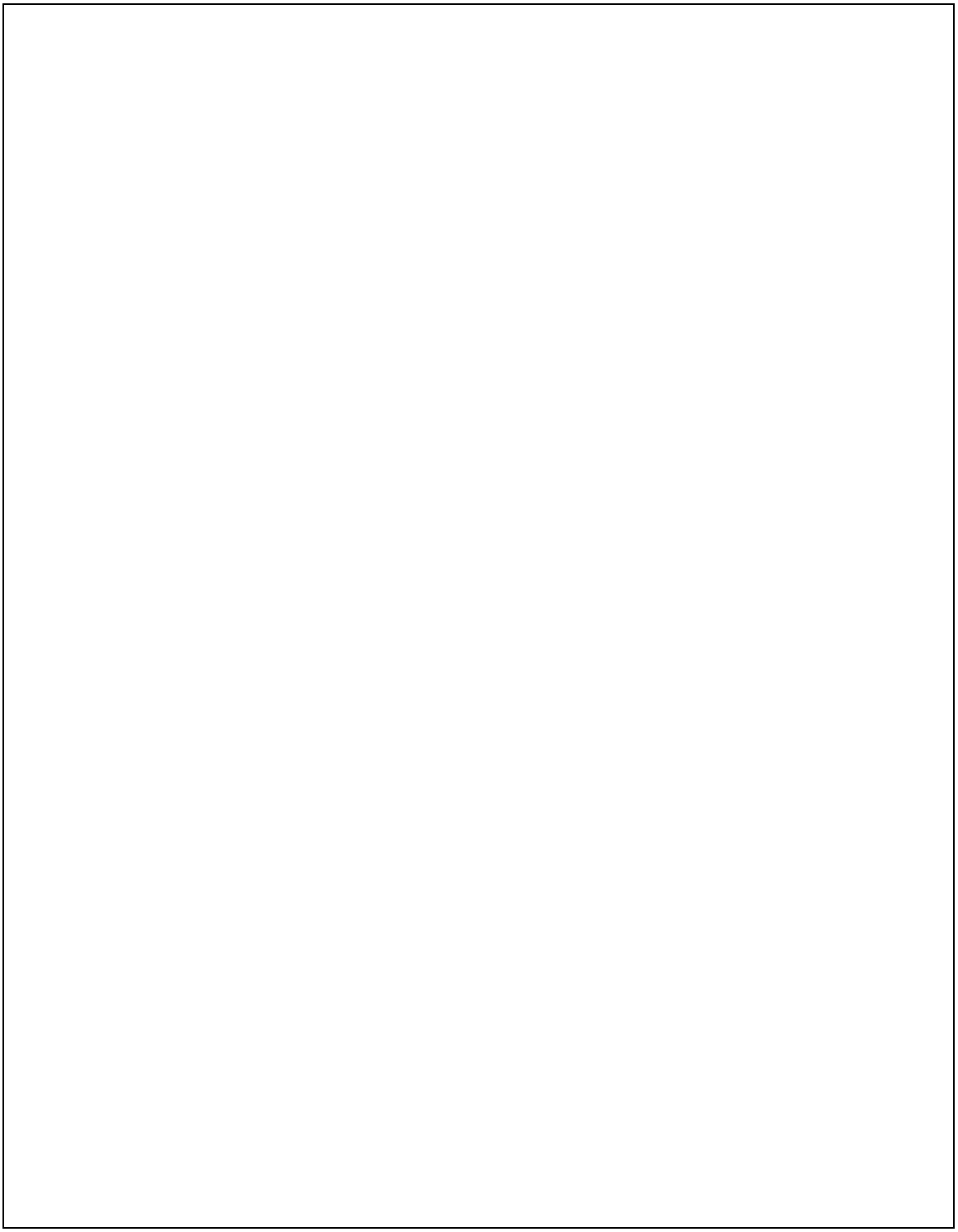


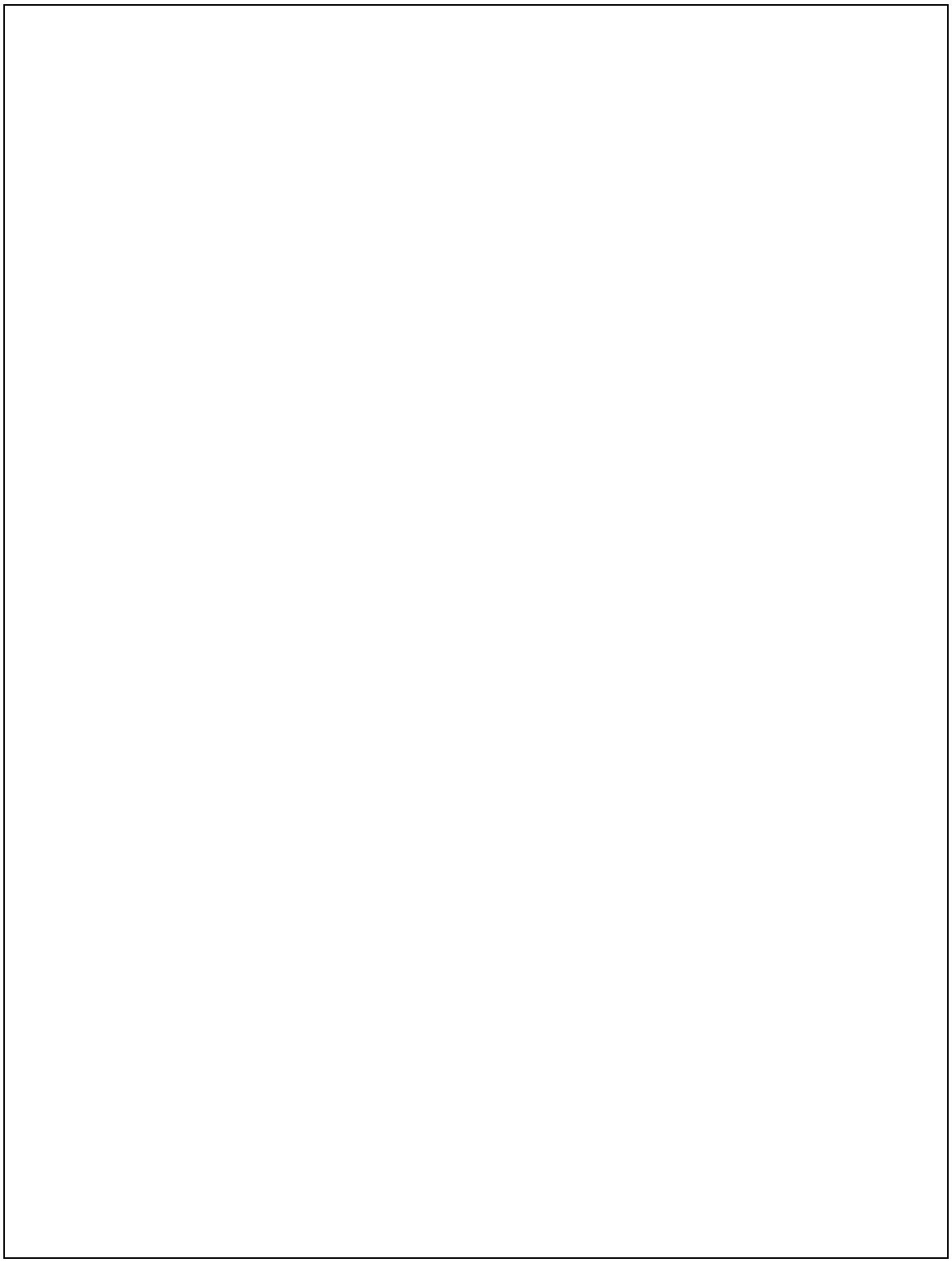
7 The consent to cancellation of a bond

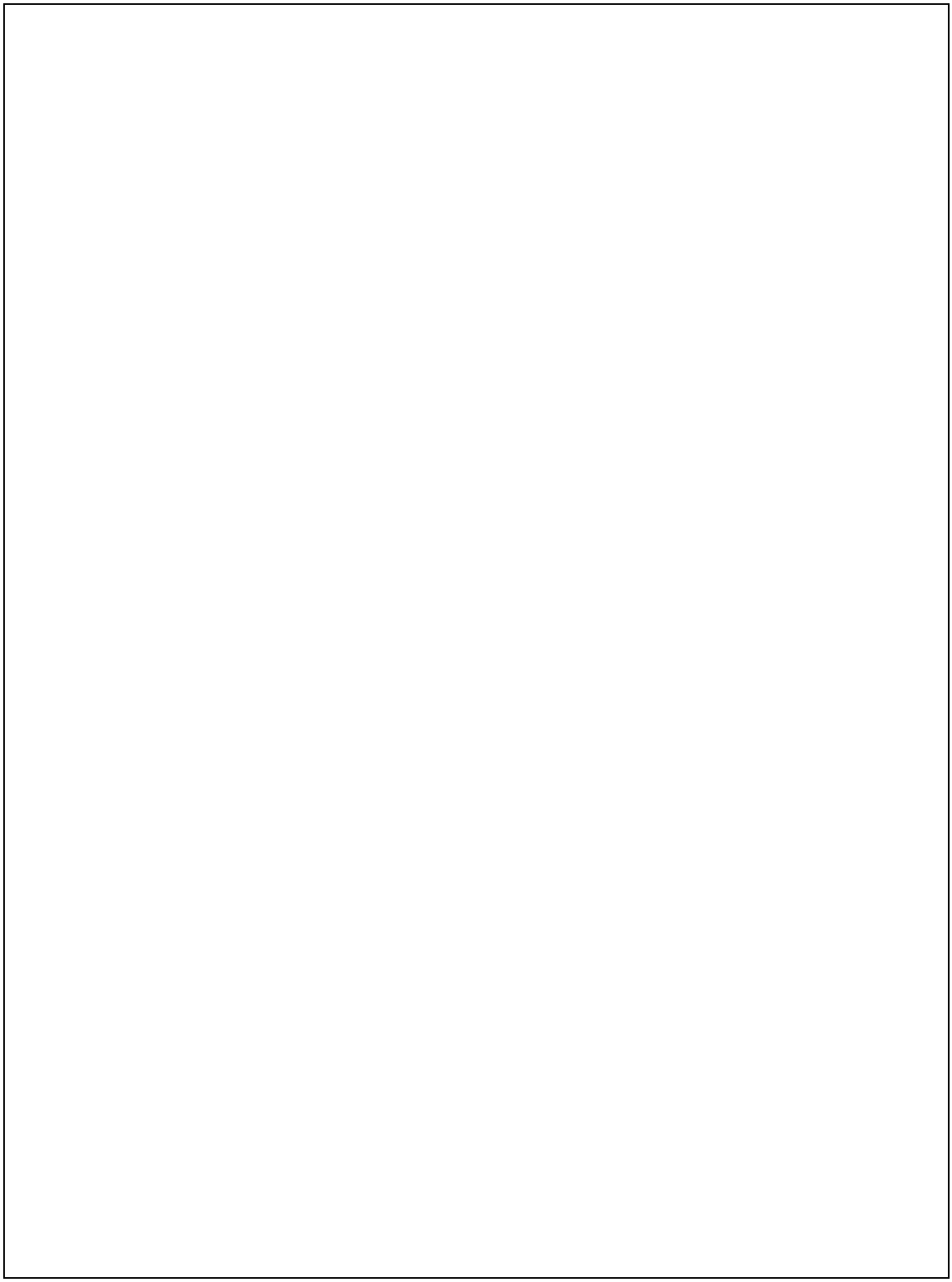


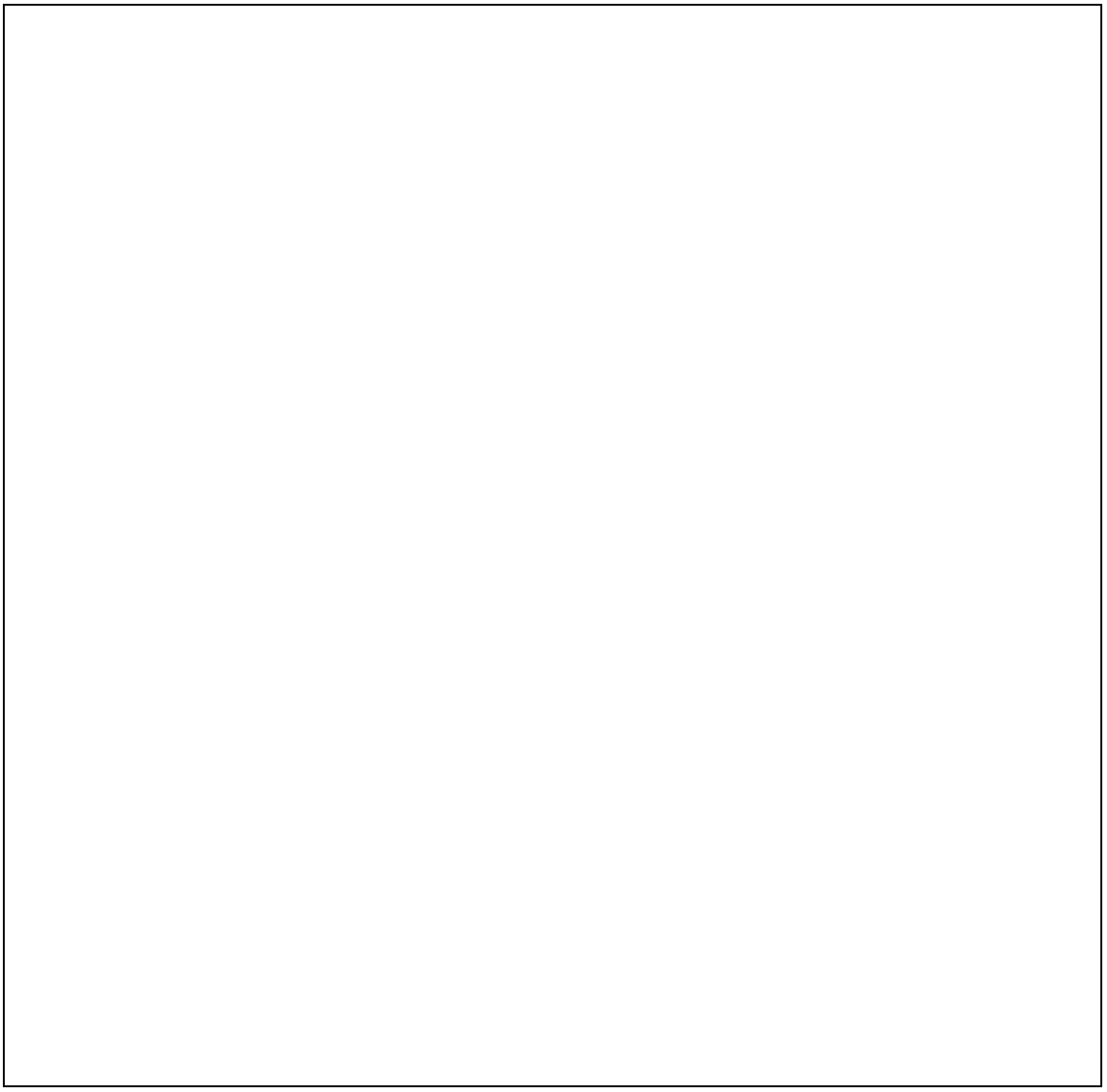


8 The notarial deed of servitude

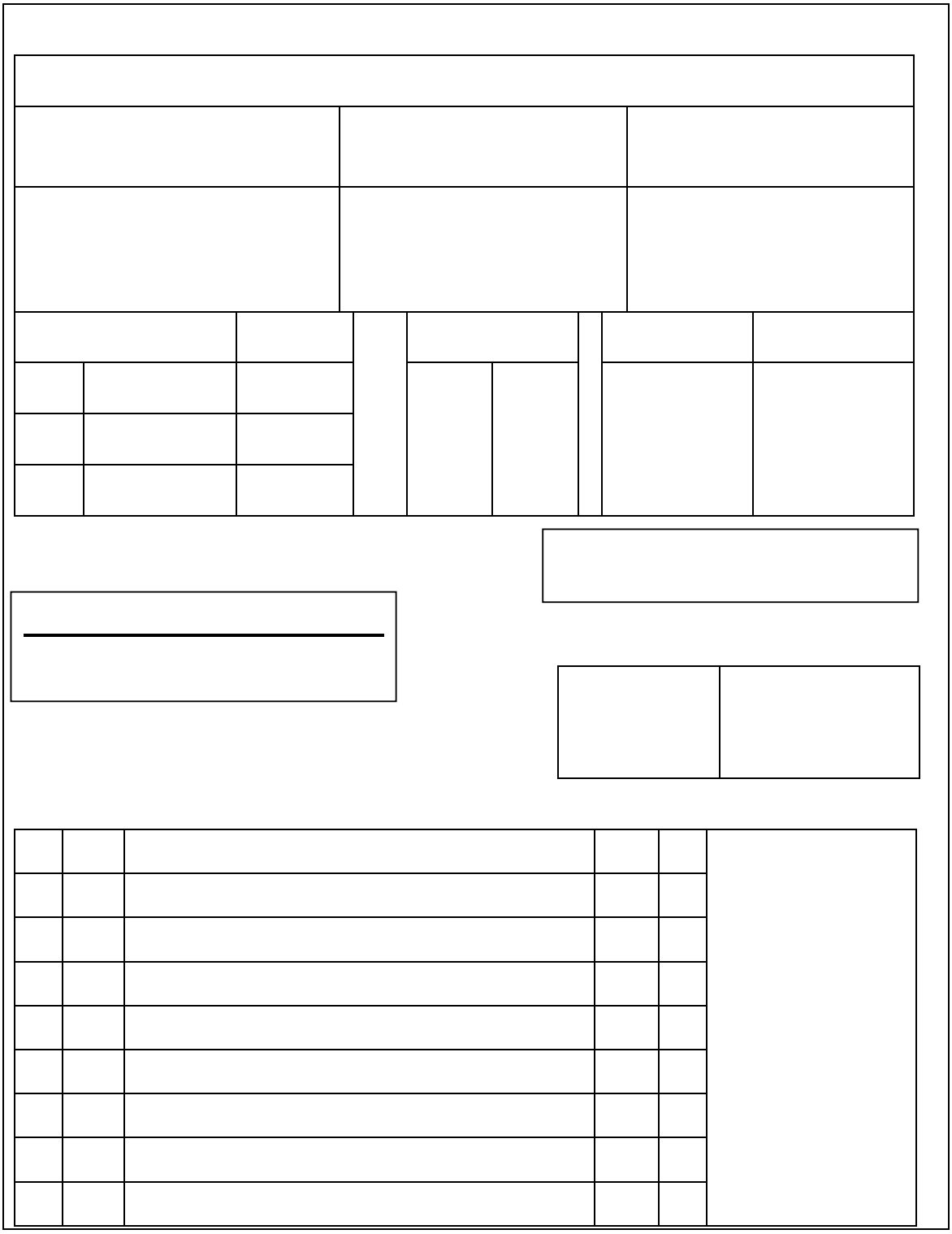




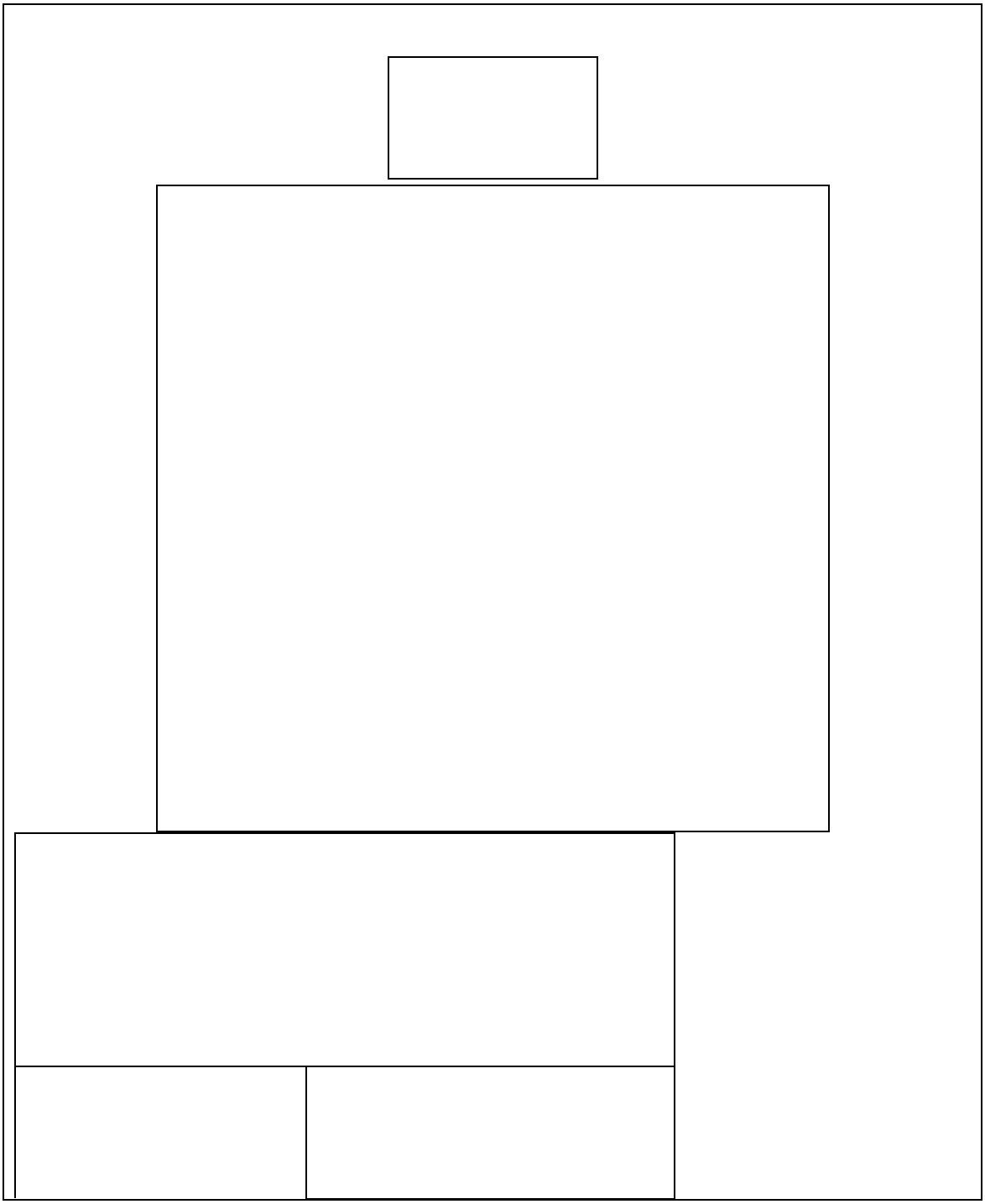




9 Lodgement cover



10 Various endorsements



9 Table of statutes/proclamations/ordinances

Administration of Estates Act 66 of 1965

Agricultural Credit Act 28 OF 1966

Alienation of Land Act 68 of 1981

Attorney's Act 53 of 1979

Companies Act 61 of 1973

Deeds Act No. 19 of 1891

Deeds Registries Act 13 of 1918

Deeds Registries Act 47 of 1937

Insolvency Act 24 of 1936

Land and Agricultural Development Bank Act 15 of 2002

Liquor Act 27 of 1989

Local Government Municipal Systems Act 32 of 2000

Matrimonial Property Act 88 of 1984

National Credit Act 34 of 2005

Ordinance No. 39 of 1828

Ordinance No. 14 of 1844

Proclamation No R9 of 1997

Transfer Duty Act 40 of 1949

Upgrading of Land Tenure Rights Act 112 of 1991

10 Table of cases

Cohen v Louis Blumberg 1949(2) SA 849

Conradie v Rossouw 1919 AD 279

Gerber v Stolze and Others 1951 (2) SA 166 (T)

Goliath v Estate Goliath 1937 CPD 312

Hotel de Aar v Jonordon Investment (Pty) Ltd 1972 (2) SA 400 (A)

Iscor Housing Utility Co and Another v Chief Registrar of Deeds and Another 1971 (1) SA 613(T)

Johannesburg Municipality v Transvaal Cold Storage Ltd 1904 TS 722

Kilburn v Estate Kilburn 1931 AD 501

Mapenduka v Ashington 1910 AD 343

McCullough and Whitehead v Whiteaway & Co 1914 AD 599

The Cape of Good Hope Bank v Fischer (1885–1886) 4 SC 368 4

11 Vocabulary

TERM	DEFINITION
Attachment	A formal act by the sheriff or deputy sheriff in terms of a court order (writ of execution) whereby the judgment creditor acquires a judicial real security right on the attachment object in fulfillment of the judgment debt
Acceptance of a composition	Agreement between the creditors and the insolvent's trustee
Adiation	Acceptance of benefits
Agent	Person acting on behalf of another, usually in terms of a power of attorney
Authentication/Attest	The verification of any signature on a document
Bequest price	A testator, in making a bequest to a particular legatee, may stipulate that, in consideration of such bequest, the legatee is to pay a fixed sum of money or transfer a property either to the estate or to another named beneficiary. Such payment is known as a bequest price.
Caveat	A notice or warning entered by the Registrar of deeds in the deeds registry database. It indicates a possible prohibition on dealings with the property or a possible restriction on the capacity of the registered holder of the right to act e.g. a provisional sequestration order.
Cession	The transfer of a right (a claim or a real right) by the holder of the right (the cedent) to the person who takes transfer of the right (the cessionary).
Contractual capacity:	The capacity to act, that is, the ability to perform legal acts, for example, the conclusion of a contract.
corpus:	Body

TERM	DEFINITION
curator bonis	person appointed by the Master of the High Court to act on behalf of a person
death notice:	A document which must be completed by a person required to do so by law. Among other things, it contains the names of the deceased and his/her surviving spouse, the date of death, whether or not a will was left, the names of the deceased's parents, and the names of the deceased's children.
deed of servitude	a document containing a servitude agreement, drafted and attested by a notary public and registered in the deeds registry
deed of transfer	A document prepared by a conveyancer and registered in the deeds registry, evidencing the transfer of land from the owner (the transferor) to the acquirer (the transferee) and which serves thereafter serves as proof of ownership.
divest:	Take out of the possession of
domicile:	Place of permanent residence
dominant tenement:	Property entitled to a praedial servitude
endorsement:	an official entry by hand or a stamp, on a deed or document regarding a transaction or to give effect to the registration
encumbrance:	mortgage or other burden on property
execution:	the formal act of signing a document or deed thereby giving it complete and full effect
Fideicommissum:	There are various kinds of *fideidommissums*, but basically it is a request by the testator to the heir or legatee (fiduciary) to carry over the whole or a portion of the bequest to the fideicommissary (further heir).
Forfeiture of rights	This means that when it comes to the dissolving of the joint estate, the plaintiff is entitled to claim, over and above his or her half-share in the joint estate, anything which he or she may have contributed to that joint estate. The guilty spouse is not called upon to surrender his or her half-share in the joint estate but only any financial benefit he or she may have derived from the fact that the innocent spouse contributed more than he or she did to the joint stock. Thus, if an order for forfeiture is granted and the innocent spouse is found to have contributed less than the guilty spouse, the spouse would be entitled to his or her half-share.
General plan:	A plan which represents the relative positions and dimensions of two or more pieces of land and has been signed by a land surveyor and which has been approved, provisionally approved or certified as a general plan by the Surveyor-General or another authorised official.
Heir	A person who inherits the estate or a part thereof (the estate consists of that which remains after all debts and legatees have been paid, in other words, the residue).
Habitatio	a personal servitude (limited real right) to live in another person's house
Intestate estate	This is an estate: • where the deceased died without leaving a will, or • where he/she did leave a will but this will was not accepted by the Master, or • where it was accepted by the Master but it failed for some or other reason.
Joint will	This is a document containing the wills of two or more persons, and is most frequently made by spouses married in community of property to each other.
Legal capacity	The power or ability to be the bearer of rights and duties
Legatee	A person to whom the testator has bequeathed a specific thing or general things or a sum of money, that is, a specific bequest
Linking	The linking of deed or documents lodged in the deeds registry by means of a number or letter code to ensure that the relevant deed or documents are registered simultaneously as a batch. Deeds are linked primarily for financial reasons.

TERM	DEFINITION
Liquidation	The process of winding up the affairs of a company or close corporation by establishing liabilities and apportioning assets
Liquidation and Distribution Account	This is an account drawn up by the executor which discloses distribution account: the assets of the estate, as well as the manner in which the executor is going to distribute these assets among the creditors, legatees and heirs
Lodgment	The formal handing in of deeds or documents at the deeds registry for purposes of registration
Massing	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 state, then upon the death after 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 (must) frame (the) liquidation and distribution account accordingly. An example of massing is when testators (married in community of property) mass their estates in their joint will and provide that on the death of the first dying the whole of their massed estate devolves upon their children, subject to a usufruct in favour of the survivor. If the survivor accepts (adiates) the terms of the will after the death of the first-dying, massing occurs. The effect of this is that the survivor waives his/her right to the half-share of the joint estate in exchange for the usufruct over the whole joint estate.
Matrimonial property regime	System regulating the matrimonial property
Mortgage Bond	Provides a limited real security right on the thing of another as security for the payment of a debt. A distinction is made between a mortgage over immovables and a notarial bond over movables.
Mortgage Bond disposed of	This means that the existing bond over the property must either be cancelled or the property released from the operation of the mortgage bond
Mortgagee	The person or institution who, as the mortgage creditor, on registration of a mortgage bond, acquires a mortgage over the property of the mortgagor
Mortgagor:	The person or institution who, as mortgage debtor, presents his/her/its immovable property in terms of a mortgage bond as security for payment of the mortgage debt to the mortgagee
Municipal clearance	A receipt issued by a local authority as proof of payment of taxes and levies
mutatis mutandis	With the necessary changes
Notarial bond	A mortgage over movable property embodied in a notarial mortgage bond
Personal servitude	A limited real right over the movable or immovable thing of another person granting specific entitlements of use and enjoyment to the holder in his/her personal capacity with regard to that thing for a specified period or as long as he/she lives, for example a usufruct
Pivot deed	Is a deed used in the Cape Province and intended to guarantee that no change of conditions has occurred between it and the present title deed and so to avoid the need for long, laborious searches
Power of attorney:	A written or oral authorisation given by one person, called the principal, to another person called the representative or agent, to perform the acts authorised in the power of attorney on behalf of the principal

TERM	DEFINITION
Praedial servitude:	A servitude (limited real right) which one property has over another property, which belongs to someone else
Proclamation	Notice in the *Gazette* regarding provincial legislation
Redistribution agreement	This is an agreement concluded by the heirs, legatees and, sometimes, the surviving spouse, during the administration of the estate, whereby they agree to vary the bequest(s) as they see fit. The executor of the estate must also be a party to the agreement.
Representative:	See Agent
Repudiation	Rejection (a surviving spouse can repudiate a joint will, but only in its entirety). If the survivor does not accept the terms of the will (thus repudiates it), the effect would be that the survivor would receive no benefit from the will, but would retain his/her half-share in the joint estate.
Renounces	Surrenders or gives up
Repealed	Cancelled or annulled
Servient tenement	Immovable property subject to a praedial servitude
Servitude	A limited real right over the immovable (or movable) thing of another, granting the holder certain entitlements, usually the use and enjoyment of the thing concerned.
Sequestrated	Temporary possession is taken of an insolvent person's estate
Sequestration	Court declaration of a natural person's estate as being insolvent
Special power of attorney to transfer	A written power of attorney granted by the owner of the land in his personal capacity as transferor, to a conveyance to perform on behalf of the transferor all acts necessary to effect transfer of the land described in the power of attorney to the acquirer, the transferee. The conveyancer is also specifically authorised to execute the deed of transfer on behalf of the transferor, before the registrar of deeds.

TERM	DEFINITION
Statutory limitation	Limitation in an Act, ordinance or proclamation
Substituting title deed	A title deed issued to the registered holder or holders of an existing title deed in respect of the whole or a part of the object of the right which he/she holds under the original title deed. No transfer of ownership takes place.
Testate	Where the deceased has left a will which has been accepted by the Master.
Title deed:	Proof of ownership or a limited real right
Transferee	A person or body who accepts transfer of ownership in land in by way of a deed of transfer
Transferor	The person or body who transfers ownership in land to the transferee in a deed of transfer
Unrehabilitated insolvent	A person who still has limited contractual capacity after insolvent: having been declared insolvent by a competent court
Usus:	The limited real right (personal servitude) to use someone else's movable or immovable property and the fruits of the property only for the needs of the holder and his/her family for a limited time, provided the servient property itself is not substantially changed (more limited than usufruct)
Usufruct:	A personal servitude to use and enjoy someone else's movable or immovable property and the fruits of the property for a limited time, provided the servient property itself is not substantially changed
Waiver:	This is a document signed by a beneficiary in which he/ she renounces a benefit which devolves (passes) to him/ her from the estate of the deceased. If it is a bequest in terms of a will, it can be said that he/she has repudiated the bequest