

REAL ESTATE MATTERS

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The effect of divorce on a property owner

The Deeds Registries Act, 47 of 1937 (the Act) provides a procedure for the endorsement of the title deeds of immovable property (and any mortgage bond) upon the divorce of spouses who are married in community of property, where the property forms an asset in their joint estate.

Section 45bis(1) of the Act applies where a spouse acquires the share of his or her former spouse in the property in terms of a divorce order or settlement agreement. It should be noted that the endorsement procedure is optional and need not necessarily be followed.

Written application is made to the Registrar of Deeds by the spouse acquiring the property for the endorsement of the title deed to the effect that he or she is entitled to deal with the property as if such spouse had taken formal transfer of the other spouse's share in the property. The endorsement procedure does not apply where the spouses were married to each other out of community of property and the same situation arises. In such a case, formal transfer of the half-share must be registered by way of a deed of transfer.

Although section 45bis(1) provides for an unconventional form of transfer of property in that it is effected by means of an endorsement of the title deed, the same requirements apply as in the case of formal transfer by means of a deed of transfer. The requirements are in essence the following:

- a rates clearance certificate must be obtained from the local authority;

- where sole ownership of either the whole or a portion of the property registered in the name of one spouse is acquired by the other spouse as a result of the dissolution of the marriage, irrespective of whether the marriage was in or out of community of property, the acquisition is exempt from the payment of transfer duty (a transfer duty exemption receipt must however be obtained from SARS);
- any mortgage bond registered over the property must be dealt with:
 - by cancellation;
 - by the release of the former spouse's share of the property from the operation of the bond; or
 - by the release of the former spouse from liability under the bond and the substitution of the acquiring spouse as the sole debtor under the bond (with the written consent of the bondholder).

Where circumstances permit, the optional procedure contemplated in section 45bis(1) as outlined above, is undoubtedly the most cost effective way of dealing with the property. However, in practice, the substitution of a debtor under a mortgage bond may pose certain legal risks and administrative complications for a bondholder and, as a result, certain financial institutions will not readily consent to this procedure. In such a case, it is necessary for the existing mortgage bond to be cancelled.

Muriel Serfontein

Sectional title rates clearance certificates - Municipal Property Rates Act

Sectional title developments and sectional title sales were attractive as an expeditious form of development or sale. Transfers of units were swift and subject only to obtaining a municipal clearance certificate for first transfers upon opening of a sectional title register, or obtaining a levy clearance certificate from the managing agents for subsequent transfers. Since the implementation of the Municipal Property Rates Act 6 of 2004 (the Act), the necessity for individual municipal rates clearance certificates for sectional title units and exclusive use areas has frustrated the simple transfer process.

Section 1 of the Act includes in the definition of 'property', registered immovable property, including, in the case of a sectional title scheme, a registered sectional title unit, real rights of extension and exclusive use areas.

Sectional title units, real rights of extension and exclusive use areas are now rated individually. Previously, assessment rates were levied in respect of the land on which a sectional title-scheme was established with the body corporate being liable for payment of the municipal assessment rates. The body corporate, in turn, collected the assessment rates on a pro-rata basis from the individual owners by way of levies.

In terms of Section 25 of the Act, municipalities are now given the power to rate sectional title units, real rights of exclusive use and real rights of extension in a sectional title scheme separately. With regard to exclusive use areas, only real rights depicted on a sectional plan and reserved by a certificate of real right of exclusive use (or held by notarial deed of cession), require a rates clearance certificate before transfer or cession can be registered. In circumstances where the cession of an exclusive use area is registered together with the transfer of a unit, a single rates clearance certificate is acceptable provided that reference is made on the certificate to both the unit and the exclusive use area.

In order for municipalities to rate sectional title units, rights of exclusive use and any right of extension, separate valuations for each must be performed by a qualified valuator, taking into account the purchase price that the unit or right would realise if sold in the open market by a willing seller to a willing and able purchaser.

Where the required valuations have not yet been performed, there are delays in obtaining rates clearance certificates. This in turn delays registration of transfer. Delays in performing valuations occur primarily because of a lack of manpower. The seller must be prepared to pay rates for a four month period in advance and a rates clearance certificate will be issued.

This affects not only sales in existing sectional title schemes but also sales in newly developed schemes where the scheme still needs to be captured on the municipality's system prior to any valuation being performed. Developers are urged to lodge the transfers of as many units as possible in a single batch upon opening of the sectional title register (where a single clearance certificate issued in respect of the land will suffice). If this is not done, there can be delays of many months before the scheme is captured by the municipality and the units and rights of exclusive use in the new scheme valued.

Currently, only the City of Tshwane Municipality has notified the Pretoria registrar of deeds that it can fully comply with the requirements of the Act. Accordingly, clearances for sectional schemes falling within this municipal area can be issued without undue delay.

John Webber and Fatima Valli Gattoo

Frustration by a seller of an option to purchase immovable property

In the recent case of *Du Plessis & Smith NNO v Goldco Motor & Cycle Supplies 2008 SCA 372*, the Supreme Court of Appeal (SCA) considered the validity and enforceability of an option to purchase immovable property where the seller had deliberately frustrated the exercise of the option by the purchaser.

The appellants (trustees) owned immovable property on which a building was erected. The respondent (Goldco) leased premises in the building. In terms of the lease agreement, Goldco was granted an option to purchase the leased premises within two years of the commencement of the lease.

The option would be exercised by the signing of a written contract of sale between the trustees and Goldco to be drafted by the trustees' attorney.

Within the period of two years, Goldco intimated to the trustees' attorney that it wished to exercise the option to purchase. However, the attorney failed to draw up the contract within the said period. The trustees subsequently refused to sell the premises to Goldco on the grounds that the option had not been exercised within the time period.

The High Court held that the attorney deliberately failed to draw up the written contract timeously and that the performance was therefore deemed to have occurred by virtue of the doctrine of fictional fulfilment. This doctrine provides that where a contract is subject to a condition that both parties sign it, one party cannot escape the contract by making it impossible for the other to sign. The doctrine of fictional fulfilment will apply when there has been bad faith and where there has been a deliberate intention no matter the motive, unless the terms of the contract and the surrounding circumstances indicate to the contrary.

The High Court ordered that the contract envisaged in the option clause be drafted and signed.

On appeal to the SCA, counsel for the trustees argued *inter alia* that the right to purchase simply by indicating acceptance in writing was merely an agreement to agree, even if it was an option that would not have resulted in a binding contract because the premises were inadequately described and there was no deliberate failure to perform.

The SCA dismissed the trustees' arguments. It held that the essence of an option is that it is binding on the option grantor and constitutes an offer that cannot be revoked. Only the option holder has the choice whether or not to exercise its right.

The court further held that although Goldco's right could not be exercised simply by notifying the trustees (in writing), it does not mean that there was no right conferred on Goldco. It was held further that there was no need to specify precisely what and where the premises were, as this was already contained in the lease agreement. According to the court, it was clear that the attorney acted on behalf of the trustees as it was provided for in the option clause of the lease that the written contract would be prepared by the trustees' attorney.

The SCA found that the effect of the application of fictional fulfilment was to bind the trustees after the expiry of the option period because of their frustration of the right of Goldco to exercise the option timeously. The sale was held to be enforceable and the trustees were ordered to take steps to transfer the premises to Goldco.

Hugh Jackson and Corné Lewis

Is the value of your property wasting away?

Owners of immovable property and lenders holding land as security should be concerned about the provisions in the National Environmental Management: Waste Act, 59 of 2009 (the Waste Act) governing contaminated land.

Contaminated land is defined in the Waste Act as "*the presence in or under any land, site, buildings or structures of a substance or micro-organism above the concentration that is normally present in or under that land, which substance or micro-organism directly or indirectly affects or may affect the quality of soil or the environment adversely.*"

The Waste Act allows competent authorities to identify as investigation areas, land that is reasonably believed to be contaminated or land upon which high-risk activities have taken place or are taking place. A high-risk activity is defined as "*an undertaking, including processes involving substances that present a likelihood of harm to health or the environment.*" Land that has been declared an investigation area could decrease in value and could obviously have a negative impact on the value of the land.

An owner of an investigation area or the person responsible for the high-risk activity that caused (or may have caused) the contamination of an investigation area may be directed to appoint an independent person to conduct a site assessment at its own cost and to submit a site assessment report to the competent authorities.

Once a site assessment report has been furnished to the authorities, they may decide that the investigation area is contaminated and requires urgent remediation within a specified time, or that measures are required to address the monitoring and management of the risk to health or the environment. Where remediation is required, the land will be declared a remediation site and the authorities must make the necessary remediation order that must describe, among other things, the period in which the order is to be complied with and the measures to be taken to remediate and monitor the risk.

It is small comfort that an investigation area may only be identified after a consultative process that requires a public participation process in which interested parties may submit written comments and objections to the authorities.

A potentially significant challenge for landowners is the provision stipulating that no person may transfer contaminated land (even land that poses no immediate risk to health or the environment) without first informing the person to whom the land is to be transferred that it is contaminated. This will no doubt diminish the selling price of the land and therefore the seller's ability to recoup the actual value of the land.

In addition, a person may not transfer a remediation site without first notifying the Minister or MEC and complying with any conditions specified by the Minister or MEC. This clause may effectively require the Minister or MEC's consent for the transfer of a remediation site since consent could be withheld where stipulated conditions are not fulfilled. Furthermore, where ownership of a remediation site is transferred, the competent authorities may only amend a remediation order if the new owner has given written consent to assume responsibility for the remediation. It remains to be seen whether this clause will provide some protection to lenders who take ownership of land declared a remediation site in foreclosure proceedings.

Importantly, the Waste Act applies retrospectively to contamination that occurred before the Act's commencement. This means that landowners and lenders may already own or hold security over contaminated land, which would impact upon the value of the land.

Once the provisions governing contaminated land come into force, they will have far reaching and potentially prejudicial consequences for landowners and lenders holding land as security. The delay in the commencement of these provisions is an opportunity by landowners and lenders to ensure that the land owned or held by them is squeaky clean and worth the value paid or secured by it and where it is not, to take defensive steps.

Julie Kourie and Terry Winstanley, Environmental practice

Abolition of stamp duty on leases: more than meets the eye

With effect from 1 April 2009, Section 103(1) of the Revenue Laws Amendment Act, 2008 repealed the Stamp Duties Act, 1968 (the Act). However, certain provisions of the Act remain applicable to lease agreements executed before 1 April 2009.

In terms of the Act, every lease agreement on which stamp duty is payable, must be stamped on or before the time of execution, being the last date of signature of the lease agreement. The amount of stamp duty payable is determined in accordance with a formula set out in Item 14(1) of Schedule 1 to the Act and is based on the rental amount and the duration of the lease.

With the abolition of stamp duty, certain questions come to mind - *Is stamp duty payable on a lease agreement that remains under negotiation and was not finalised prior to 1 April 2009?*

As the liability and obligation to pay stamp duty only arises on the execution of the lease agreement, no stamp duty will be payable unless the lease agreement is executed prior to 1 April 2009. However, where negotiations revolve only around the renewal of a lease that was executed before 1 April 2009, stamp duty will remain payable in respect of any renewal executed on or after 1 April 2009.

Is stamp duty payable where an offer to lease was concluded before 1 April 2009 but the lease agreement itself is only executed on or after 1 April 2009?

Payment of stamp duty depends on the date of signature of a lease agreement, not an offer to lease. If a lease agreement is executed

on or after 1 April 2009, no duty is payable. It is important that the offer in this case only contemplates entering into a lease agreement at some future date and that it does not regulate the landlord/tenant relationship. If it does, it may be held to constitute an instrument for the purposes of the Act and then stamp duty may well be payable provided that the offer to lease was executed prior to 1 April 2009.

What is the situation where the lease agreement was executed before 1 April 2009 but the extension period only commences after 1 April 2009?

Where the consideration payable in respect of the period of extension under the lease was quantifiable at the time of execution, stamp duty will remain payable. The situation differs where the consideration was not quantifiable at the date of execution, where no further stamp duty will be payable.

Will I be able to claim a refund if stamp duty has already been paid for an initial long-term lease and any possible extension thereof?

The liability to pay stamp duty arose on execution of the lease agreement. This liability and obligation continue and are not diminished by the repeal of the Act. Therefore no refund will be possible.

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