

GENERAL NOTICES • ALGEMENE KENNISGEWINGS

DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM NOTICE 589 OF 2017

The Minister of Rural Development and Land Reform hereby publishes the Deeds Registries Amendment Bill, 2017 and the Explanatory Memorandum for public comment.

Members of the public are invited to submit written comments within 30 calendar days of the publication of this notice to the following address:

By post to: The Chief Registrar of Deeds: Rural Development and Land Reform
Attention: Antoinette Reynolds
Private Bag X918
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By e-mail to: Antoinette.reynolds@drdlr.gov.za

Comments received after the closing date will not be considered.

REPUBLIC OF SOUTH AFRICA

DEEDS REGISTRIES AMENDMENT BILL

*(As introduced in the National Assembly as a section 75 Bill; explanatory summary of
Bill published in Government Gazette No. 41041 of 15 August 2017)
(The English text is the official text of the Bill)*

(MINISTER OF RURAL DEVELOPMENT AND LAND REFORM)

[B — 2017]

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[] Words in bold type in square brackets indicate omissions from existing enactments.

 Words underlined with a solid line indicate insertions in existing enactments.

To amend the Deeds Registries Act, 1937, so as to provide for the registration of waivers of preference in respect of registered real rights in favour of leases; to delete reference to the registration of copies of powers of attorney in another deeds registry; to further regulate the duties, appointment and remuneration of members of the deeds registries regulations board; to provide for gender issues; to provide for the Minister to make regulations; to further regulate the registration of unalienated State land; to further regulate the issuing of certificates of registered title of undivided shares in land; to further regulate the substitution of debtors in respect of bonds over land; to further regulate the registration of a notarial bond in more than one deeds registry; to provide for the registrar or official employed in a deeds registry to be liable in instances where reasonable care or diligence was not carried out in relation to their duties in a deeds registry; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 2 of Act 47 of 1937, as amended by section 2 of Act 43 of 1957, section 2 of Act 43 of 1962, section 1 of Act 87 of 1965, section 2 of Act 61 of 1969, section 2 of Act 3 of 1972, section 7 of Act 62 of 1973, section 3 of Act 27 of 1982, section 2 of Act 62 of 1984, section 1 of Act 14 of 1993, section 35 of Act 47 of 1997, section 1 of Act 93 of 1998 and section 1 of Act 12 of 2010

1. Section 2 of the Deeds Registries Act, 1937 (Act No. 47 of 1937) (hereinafter referred to as "the principal Act"), is hereby amended by the substitution in subsection (1) for paragraph (a) of the following paragraph:

"(a) a chief registrar of deeds, who shall as such be the [chairman] chairperson and executive officer of the deeds registries regulations board mentioned in section nine and who shall, subject to the directions of the Minister, exercise such supervision over all the deeds registries as may be necessary in order to bring about uniformity in their practice and procedure;"

Amendment of section 3 of Act 47 of 1937, as amended by section 14 of Act 50 of 1956, section 2 of Act 43 of 1957, section 2 of Act 43 of 1962, section 2 of Act 87 of 1965, section 1 of Act 41 of 1977, section 1 of Act 92 of 1978, section 1 of Act 44 of 1980, section 3 of Act 27 of 1982, section 28 of Act 88 of 1984, section 2 of Act 14 of 1993, section 9 of Act 122 of 1993, section 68 of Act 67 of 1995, section 1 of Act 11 of 1996, section 110 of Act 28 of 2002; section 53 of Act 24 of 2003, section 46 of Act 11 of 2004, section 1 of Act 11 of 2005, section 1 of Act 5 of 2006 and section 2 of Act 12 of 2010

2. Section 3 of the principal Act, is hereby amended—

(a) by the substitution in subsection (1) for paragraph (i) of the following paragraph:

"(i) register waivers of preference in respect of registered real rights in land, in favour of mortgage bonds and leases, whether registered or about to be registered;" and

(b) by the substitution in subsection (1) for paragraph (u) of the following paragraph:

"(u) register powers of attorney whereby the agents named therein are authorized to act generally for the principals granting such powers, or to carry out a series of acts or transactions registrable in a deeds registry[, and register copies of such powers registered in another deeds registry, which have been certified by the registrar thereof, or which have been issued for the purpose of being acted upon in a deeds registry by a Master or registrar of the High Court of South Africa];".

Amendment of section 9 of Act 47 of 1937, as amended by section 3 of Act 3 of 1972, section 17 of Act 71 of 1972, section 8 of Act 62 of 1973, section 9 of Act 57 of 1975, section 4 of Act 27 of 1982, section 4 of Act 14 of 1993 and section 3 of Act 12 of 2010

3. Section 9 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

"(1) There shall be established a deeds registries regulations board (in this section called "the board"), **[with power to make regulations upon the subjects mentioned in section 10]** which shall—

(a) make recommendations to the Minister concerning any matter specified in section 10 in regard to which the Minister may make regulations;

(b) keep the operation and implementation of this Act and the regulations under regular review and which may make recommendations to the Minister in regard to any amendments or other action which may be advisable; and

(c) advise the Minister on any matter referred to it by the Minister.";

(b) by the substitution in subsection (2) for the words preceding paragraph (a) of the following words:

"The board shall consist of the chief registrar of deeds as **[chairman]** chairperson and executive officer in terms of section 2 (1)(a), and four other members appointed by the Minister, of whom—";

(c) by the substitution in subsection (3) for paragraph (a) of the following paragraph:

"(a) A member of the board appointed by the Minister shall hold office for the period determined by the Minister, but the Minister may, if in his or her opinion there is good reason for doing so, terminate the appointment of such a member at any time before the expiration of his or her period of office.";

- (d) by the substitution in subsection (3A) for paragraph (c) of the following paragraph:

"(c) The provisions of ~~[subsection]~~ subsections (3), (3B) and (3C) are, with the necessary changes, applicable to the appointment of an alternate member.";

- (e) by the insertion after subsection (3A) of the following subsections:

"(3B) If a member of the board dies or vacates his or her office before the expiration of his or her period of office, the Minister may, subject to the provisions of subsection (2), appoint a person to fill the vacancy for the unexpired portion of the period for which such member was appointed.

(3C) A member of the board, excluding a member in the full-time service of the State, shall, while he or she is engaged in the business of the board, be paid such remuneration and travelling and subsistence allowances as the Minister, with the concurrence of the Minister of Finance, may determine."

- (f) by the substitution for subsection (4) of the following subsection:

"(4) (a) The board shall meet at the times and places determined by the ~~[chairman]~~ chairperson.

(b) The Minister may at any time direct the ~~[chairman]~~ chairperson of the board to convene a meeting of the board at a time and place specified by the Minister.";

- (g) by the substitution for subsection (5) of the following subsection:

"(5) In the absence of the **[chairman]** chairperson of the board, the member referred to in subsection (2)(a) shall act as **[chairman]** chairperson.";

(h) by the substitution for subsection (8) of the following subsection:

"(8) **[With the Minister's approval the]** The board may make **[regulations]** recommendations to the Minister concerning matters specified in section 10 also without holding a meeting, provided that any **[regulations]** recommendation so made have been agreed to by all the members of the board.";

(i) by the substitution for subsection (9) of the following subsection:

"(9) **[No regulation]** Regulations made by the **[board]** Minister shall **[take effect unless it has been approved by the Minister and has been]** be published in the *Gazette* at least one month before the date specified in the relevant notice as the date of commencement thereof."; and

(j) by the substitution for subsection (10) of the following subsection:

"(10) The provisions of section 17 of the Interpretation Act, 1957 (Act No. 33 of 1957), shall apply *mutatis mutandis* with reference to regulations **[approved]** made by the Minister and published in the *Gazette* under subsection (9).".

Amendment of section 10 of Act 47 of 1937, as amended by section 5 of Act 43 of 1957, section 5 of Act 43 of 1962, section 4 of Act 87 of 1965, section 4 of Act 3 of 1972, section 2 of Act 92 of 1978, section 5 of Act 27 of 1982, section 3 of Act 62 of 1984, section 5 of Act 14 of 1993, section 3 of Act 170 of 1993, section 68 of Act 67 of 1995 and section 1 of Act 11 of 2000

4. Section 10 of the principal Act is hereby amended by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:

"The [board established under section nine] Minister may, upon recommendation of the deeds registries regulations board, make regulations prescribing—".

Amendment of section 18 of Act 47 of 1937, as amended by section 4 of Act 93 of 1998, section 6 of Act 3 of 1972, section 8 of Act 27 of 1982 and section 10 of Act 14 of 1993

5. Section 18 of the principal Act is hereby amended by the substitution for subsection (3) of the following subsection:

"(3) If any piece of unalienated State land has been surveyed and is represented on a diagram, the registrar concerned shall, upon written application by the Minister of Public Works or an officer of the State authorized by him or her, accompanied by the diagram of the land [in **duplicate**], enter particulars of the land in the appropriate registers and execute in the prescribed form and in accordance with the diagram, a certificate of registered State title thereof prepared by a conveyancer."

Amendment of section 34 of Act 47 of 1937, as amended by section 14 of Act 87 of 1965 and section 5 of Act 12 of 2010

6. Section 34 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) Any person who is the joint owner of a piece of land the whole of or shares in which is or are held by such person and others under one title deed, may, subject to the provisions of section *thirty-seven*, obtain a certificate of registered title of his or her undivided share in such land, and no transfer of a fraction only of his or her undivided share or hypothecation or lease of the whole or any fraction of his or her undivided share in the land or real right thereover shall be registered in a deeds registry unless a certificate of registered title of such undivided share is produced to the registrar:

Provided that all the joint owners so holding under one title deed may together transfer an undivided share in the land or a fraction of the share held under such deed or hypothecate or effect the registration of a lease of the whole of such land or share without the production of such a certificate: Provided further that such a certificate shall not be necessary where a joint owner disposes of the whole of his or her share by deeds of transfer to be registered simultaneously."

Amendment of section 57 of Act 47 of 1937, as amended by section 27 of Act 43 of 1957, section 24 of Act 43 of 1962, section 7 of Act 92 of 1978, section 16 of Act 27 of 1982 and section 4 of Act 24 of 1989

7. Section 57 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) If the owner (in this section referred to as the transferor) of land which is hypothecated under a registered mortgage bond other than a mortgage bond to secure the obligations of a surety (not being a person referred to in paragraph (b) of subsection (1) of section *fifty-six*), transfers to another person the whole of the land hypothecated thereunder, and has not reserved any real right in such land, the registrar may, notwithstanding the provisions of subsection (1) of the said section, register the transfer and substitute the transferee for the transferor as debtor in respect of the bond: Provided that for the purposes of this subsection, reference to the whole of the land shall exclude a share in the land: Provided further that there is produced [to him, in duplicate], the written consent in the prescribed form of the holder of the bond and the transferee to the substitution of the transferee for the transferor as the debtor in respect of the bond for the amount of the debt disclosed therein or for a lesser amount."

Amendment of section 62 of Act 47 of 1937, as amended by section 2 of Act 15 of 1953, section 29 of Act 43 of 1957, section 25 of Act 43 of 1962 and section 18 of Act 14 of 1993

8. Section 62 of the principal Act is hereby amended by the substitution for subsection (5) of the following subsection:

"(5) A notarial bond which is required to be registered in more than one deeds registry shall be registered in the first registry within the period prescribed by subsection (1) of section *sixty-one*, in the second registry within **[an additional] a period of [one month] four months from the date of its execution** and in each successive registry within a further **additional** period of one month **or within such extended period as the court may on application allow.**".

Substitution of section 99 of Act 47 of 1937

9. The following section is hereby substituted for section 99 of the principal Act:

"Exemption from liability for acts or omissions in deeds registry

99. No act or omission of any registrar or of any officer employed in a deeds registry shall render the Government or such registrar or officer liable for damage sustained by any person in consequence of such act or omission: Provided that if such act or omission is *mala fide* or if such registrar or officer

has not exercised reasonable care and diligence in carrying out his or her duties in connection with such act or omission, the Government shall be liable for the damage aforesaid: Provided further that the registrar or officer guilty of such act or omission shall be liable to make good any loss or damage resulting therefrom to the Government if such act or omission was *mala fide* or if such registrar or officer did not exercise reasonable care and diligence in carrying out his or her duties in connection with such act or omission.".

Short title and commencement

10. This Act is called the Deeds Registries Amendment Act, 2017, and comes into operation on the date of publication in the *Government Gazette*.

MEMORANDUM ON THE OBJECTS OF THE DEEDS REGISTRIES AMENDMENT BILL, 2017

1. BACKGROUND

1.1 The Department of Rural Development and Land Reform ("the Department") drafted the Deeds Registries Amendment Bill, 2017 (hereinafter referred to as "the Bill"), which proposes certain amendments to the Deeds Registries Act, 1937 (Act No. 47 of 1937) (hereinafter referred to as "the Act"), in order to improve the application and implementation of the Act. The Act generally provides for the registration of deeds.

1.2 The deeds registries regulations board ("the board") met and discussed the proposed amendments in order to streamline and enhance the administration and registration of deeds. The proposed amendments are technical in nature and do not have any financial, social or economic impact.

2. OBJECTS OF BILL

2.1 The Bill mainly seeks to amend the Act, for the objective of improving and enhancing the application and implementation of the Act, by addressing shortcomings identified in the implementation of the Act.

2.2 The Bill seeks to provide for the registration of waivers of preference in respect of registered real rights in favour of a lease; provides for the deletion of the reference to the registration of copies of powers of attorney in another deeds registry

and provides for the duties, appointment and remuneration of members of the board; the Minister of Rural Development and Land Reform ("the Minister") makes regulations as opposed the board; regulates the issuing of certificates of registered title of undivided shares in land; provides for the substitution of debtors in respect of bonds over land and the regulation of the registration of a notarial bond in more than one deeds registry and the liability of the registrar or official employed in a deeds registry in cases where reasonable care or diligence was not carried out in relation to their duties in a deeds registry.

3. CLAUSE- BY- CLAUSE ANALYSIS

3.1 Clause 1

Clause 1 of the Bill is a technical amendment seeking to substitute "chairman" for "chairperson".

3.2 Clause 2

3.2.1. Clause 2 of the Bill seeks to amend section 3 of the Act, which deals with the duties of the registrar of deeds. Section 3(1)(i) of the Act provides that the registrar must register waivers of preference in respect of registered real rights in land, in favour of mortgage bonds. This provision, however, does not provide for the registration of waivers of preference of registered real rights (usufruct etc.) in favour of leases. The proposed amendment to section 3(1)(i), as contained in clause 2(a) of the Bill, aims to rectify the position by including leases.

3.2.2. Section 3(1)(u) of the Act deals with the registration of powers of attorney. The Act currently provides for the registration of copies of powers of attorney in more than one deeds registry. However, problems are being experienced with the

continued usage of powers of attorney that have been cancelled in one deeds registry, but not in the deeds registry in which its copy was registered. This creates administration problems and opens a door for fraudulent transactions to be registered. The proposed amendment to section 3(1)(u), as contained in clause 2(b) of the Bill, aims to rectify the position.

3.3 Clause 3

3.3.1 Section 9 of the Act deals with the establishment of the "deeds registries regulations board". Section 9(1), however, does not clearly prescribe the duties of the members of this board. The proposed amendment of section 9(1), in clause 3(a) of the Bill, provides clarity in this regard and is also in line with the provisions of section 54 of the Sectional Titles Act, 1986 (Act No. 95 of 1986), which deals with the duties of the members of the Sectional Titles Regulations Board.

3.3.2 Clauses 3(b), (c), (f), (g), provide for amendments to section 9 in order to address gender issues.

3.3.3 Section 9 is silent in respect of a position where a member dies or vacates his or her office before the expiration of his or her period of office. It further does not provide for members to be paid such remuneration and travelling and subsistence allowances as the Minister of Rural Development and Land Reform, with the concurrence of the Minister of Finance, may determine. The proposed insertion of sections 9(3B) and 9(3C), as proposed in clause 3(e) of the Bill, aims to address the situation and is also in line with section 54 of the Sectional Titles Act, 1986. These

provisions are also being made applicable to alternate members in clause 3(d) of the Bill.

3.3.4. Section 9 of the Act empowers the board to make regulations in respect of the subjects mentioned in section 10 of the Act. However, the correct position is that the Minister makes the regulations upon recommendation by the said board. The amendment of sections 9(8) to 9(10), as proposed in clauses 3(h) to 3(j) of the Bill, aim to rectify the position and is in line with the provisions of section 54 of the Sectional Titles Act, 1986.

3.4 Clause 4

Section 10 contains a list of subjects in respect of which regulations may be made. Section 10(1) erroneously makes reference to the making of the regulations by the board, instead of the Minister. The amendment of section 10(1), which is aligned to the proposed amendments in clause 3 of the Bill, clarifies the position and is also in line with the provisions of section 55 of the Sectional Titles Act, 1986.

3.5 Clause 5

Clause 5 of the Bill amends section 18 of the Act, which provides for the manner in which State land must be dealt with. Section 18(3) provides for the lodgement, in duplicate, of diagrams of unalienated State land. However, the practice in deeds registries is to call for one diagram only. The proposed amendment to section 18(3), as contained in clause 5 of the Bill, addresses the issue, to provide for one diagram only.

3.6 Clause 6

Clause 6 of the Bill amends section 34 of the Act, which deals with certificates of registered title of undivided shares. Section 34(1) of the Act provides for the issuing of a certificate of registered title to a person who is the joint owner of a piece of land.

Section 34(1) further provides that a person may not transfer, hypothecate or lease a fraction only of his or her undivided share in land unless a certificate of registered title is obtained for his or her share in such land. Section 34(1), however, does not provide for a certificate of registered title to be obtained in instances where a person wishes to register a real right (usufruct etc.) over his or her undivided share in such land. The proposed amendment to section 34, as contained in clause 6 of the Bill, accordingly addresses this lacuna by including real rights.

3.7 Clause 7

Clause 7 of the Bill amends section 57 of the Act, which provides for the substitution of a debtor in respect of a bond. Section 57(1) provides that where the owner of land which is hypothecated under a registered mortgage bond transfers to another person the whole of the land hypothecated thereunder, the registrar may register the transfer and substitute the transferee for the transferor as debtor in respect of the bond. However, there is no uniformity in the deeds registries with regard to the implementation of section 57 due to certain deeds registries allowing for the substitution of bonds over shares in hypothecated land. The proposed amendment to section 57(1), as contained in clause 7 of the Bill, aims to create uniformity in this regard, in order to clarify that a reference to the whole of the land excludes a share in the land.

3.8 Clause 8

Clause 8 of the Bill amends section 62 of the Act, which provides for the registration of notarial bonds. Section 62(1) provides for the registration of a notarial bond in more than one deeds registry in instances where a debtor resides and carries on business in areas served by different deeds registries. Such a notarial bond must be registered in the deeds registry for the area in which the debtor resides as well as in every deeds registry serving any area in which such debtor carries on business. Section 62(5) provides for the registration of such notarial bond, in the first deeds registry within a period of three months after the date of its execution or within such extended period as the court may on application allow, and in the second deeds registry within an additional period of one month, and in each successive deeds registry within a further period of one month. The ambiguity of section 62(5) leads to notarial bonds being registered after the expiry date of the prescribed time period, due to the provisions of the said section being differently interpreted. The proposed amendment of section 62(5), as contained in clause 8 of the Bill, provides clarity in the manner in which the dates must be calculated.

3.9 Clause 9

Clause 9 of the Bill amends section 99 of the Act, which provides for exemption from liability for acts or omissions in deeds registries. Section 99 of the Act provides that no act or omission of any registrar or of any officer employed in a deeds registry shall render the Government or such registrar or officer liable for damage sustained by any person in consequence of such act or omission. Section 99 further provides that if such act or omission is *mala fide* or if such registrar or officer has not exercised reasonable care and diligence in carrying out his or her duties in

7

connection with such act or omission, the Government shall be liable for the damage aforesaid. Section 99 also provides that the registrar or officer guilty of such act or omission shall be liable to make good any loss or damage to the Government, if such act or omission was *mala fide*. The proposed amendment of section 99, as contained in clause 9 of the Bill, seeks to provide for the registrar or official to also be liable in instances where reasonable care or diligence was not carried out in relation to their duties.

3.10 Clause 10

Clause 10 of the Bill contains the short title and commencement of the Bill.

4. FINANCIAL IMPLICATIONS FOR STATE

None.

5. DEPARTMENTS/BODIES CONSULTED

The followings bodies were consulted:

- The Deeds Registries Regulations Board; and
- The Law Society of South Africa.

6. CONSTITUTIONAL IMPLICATIONS

None.

7. COMMUNICATION IMPLICATIONS

To be undertaken by the Department.

8. PARLIAMENTARY PROCEDURE

8

8.1 The Constitution prescribes procedure for the classification of Bills, therefore a Bill must be correctly classified so that it does not become inconsistent with the Constitution.

8.2 We have considered the Bill against the provisions of the Constitution relating to the tagging of Bills and against the functional areas listed in Schedule 4 (functional areas of concurrent national and provincial legislative competence) and Schedule 5 (functional areas of exclusive provincial legislative competence) to the Constitution.

8.3 The established test for classification of a Bill is that any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4 to the Constitution must be classified in terms of that Schedule. The process is concerned with the question of how the Bill should be considered by the provinces and in the National Council of Provinces. Furthermore, how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more the Bill affects the interests, concerns and capacities of the provinces, the more say the provinces should have on the contents of the Bill.

8.4 Therefore issue to be determined is whether the proposed amendments to the Act, as contained in the Bill, in substantial measure, fall within a functional area listed in Schedule 4 to the Constitution.

8.5 The Bill provides for the registration of waivers of preference in respect of registered real rights in favour of a lease and the remuneration, travelling and subsistence allowances of members of the board. The Bill rectifies and clarifies that

it is the Minister who makes regulations as opposed the board being vested with this power. The Bill seeks to regulate unalienated State land, the issuing of certificates of registered title of undivided shares in land and also seeks to substitute debtors in respect of bonds registered over land. The Bill provides for the liability of the registrar or official employed in a deeds registry in instances where reasonable care or diligence was not carried out in relation to their duties in a deeds registry.

8.6 The proposed amendments reflected have been carefully examined to establish whether, in substantial measure, they fall within any of the functional areas listed in Schedule 4 to the Constitution.

8.7 In our view the subject matter of the proposed amendments does not fall within any of the functional areas listed in Schedule 4 to the Constitution and it does not affect provinces whereby the procedure set out in section 76 of the Constitution would be applicable.

8.8 We are therefore of the opinion that since this Bill does not deal with any of the matters listed in Schedule 4 to the Constitution, it must be dealt with in accordance with the procedure set out in section 75 of the Constitution.

8.9 We are also of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.