Conveyancing problems

Transfer of immovable property by endorsement: Spouses married in community of property (1)

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Query: Could you please place an analysis in De Rebus of the requirements for an endorsement under s 45 of the Deeds Registries Act 47 of 1937 dealing briefly – so as to enable a conveyancer to obtain information at a glance – with the following:

1 the essentials of s 45(1) and s 45 bis (1);
2 the documents or other proof to be lodged with the registrar of deeds for registration purposes;
3 stamp duties, deeds office fees and transfer duty payable; and
4 problems experienced in the application of s 45 with which a conveyancer is expected to be conversant – this to be done by way of notes dealing shortly with every individual difficulty.

Reply

1 General

Wherever a section or a regulation of an Act is referred to herein without mention of the Act concerned, the Deeds Registries Act 47 of 1937 is intended.

As is apparent from s 45 and s 45bis these sections cater for the situation where a spouse who was married in community of property and in whose name immovable property is registered, acquires the share of the other spouse in the joint assets as a result of death or divorce respectively. The sections provide for the registration of such acquisition by way of an endorsement on the existing title deed. Section 45 is set out in full at the end of this paragraph and s 45bis at the end of par 3 1. Section 45 must be read with regs 49, 47 and 34(3)(c). Section 45 will be dealt with first and s 45bis thereafter.

For the present purpose, land and other immovable property¹ eg mineral rights, rights to claim and stand licence monies, and long leases, but excluding mortgage bonds, will be dealt with under one heading and mortgage bonds under a separate heading. In so far as deceased estates are concerned, testate and intestate estates will be treated separately under each heading as far as documents and other items of proof to be lodged for registration purposes are concerned. Units under the Sectional Titles Act 66 of 1971 are dealt with in a separate paragraph below.

A point to note about s 45 (read with s 45bis) is that, taken at face value, the section purports to provide for an exceptional case where there is an “acquisition” (the word used in the section) of immovable property from a person who is neither the owner without registration (ie by operation of law, eg by way of expropriation) nor the registered owner (by way of a registered title deed); such an acquisition therefore does not envisage a passing of ownership because normally a registered title deed in the name of the transferee is absolutely essential for the passing of ownership from one person to another² other than by operation of law (which does not apply here). (See also remarks which follow.) This should be kept in mind for a proper understanding of s 45.

Considered superficially the provisions of s 45 constitute a simplified procedure for the transfer or cession of immovable property from one person to another; as such it can be seen as one of the exceptions referred to in the opening words of s 16 which prescribes that “save as otherwise provided in this Act or any other law” the ownership of land may be conveyed from one person to another only by means of a deed of transfer executed or attested by the registrar and other real rights in land may be conveyed from one person to another only by means of a notarial deed of cession registered by the registrar.³

Transfer/cession

That s 16 can actually not be applied to the set of circumstances outlined in

¹ s 45 and s 45bis is clear from the fact that the full property in question is already registered in the name of the spouse who acquires the share of the other spouse; this entails that transfer/cession just cannot be made to the first-mentioned spouse as no conveyance of ownership or real rights from one person to another as envisaged in s 16 can take place. In other words, the elementary registration principle applies that transfer/cession cannot be made to a person who, in already the registered owner of the property concerned; see eg South African Permanent Building Society v Levy,⁴ (It is accordingly unscientific and incorrect to transfer/cede immovable property from the estate of a deceased spouse to the surviving spouse of a marriage in community in whose name the property is already registered – by means of a deed of transfer or other applicable deed – as is sometimes done, although the end result is the same in the case of a s 45(1) endorsement.)

As an endorsement under s 45 (including s 45bis) strictly speaking does not effect transfer from one person to another – there being no conveyance of rights – the import of s 45 is that it provides for the exceptional case where on division of the assets in the joint estate by operation of law on dissolution of the marriage (in community of property or not) or by death or divorce, the spouse in whose name the immovable property in question is registered “acquires” the share of the other spouse but not by way of transfer of ownership. In other words, the “acquisition” by the survivor is no more than the right to have his title deed freed from the claim in favour of the other spouse in respect of the latter’s half share by virtue of the marriage in community of property. (This claim came into existence by operation of law on dissolution of the marriage in community, but will, in the case of a deceased estate, cease to exist – as will the survivor’s claim to the endorsement – if the property has to be sold to pay the debts of the joint estate.) This “acquisition” does not call for an act of conveyance (which is in fact not possible) but it must nevertheless be disposed of by way of an act of registration and this can effectively be done by means of a factual endorsement – which is what the endorsement in terms of s 45 (also s 45bis) purports to do. (See eg the wording of the endorsement in note 10 par 2 2.3 below which clearly shows that the holder of the endorsed title deed is the unrestricted owner of the full property held thereunder.)

The endorsement in terms of s 45 and 45bis is clearly an act of a transferee to the title deed of the spouse in whose name the property is registered from all claim in favour of the other spouse (deceased or divorced, as the case may be), but at the same time, in so far as a deceased spouse is concerned (in whose estate account, by the way, the full property is shown), the endorsement in terms of s 45(1) has the effect of clearing the full property in question from the estate account of the
Section 45 reads as follows:

Transfer or cession by means of endorsement.

As indicated in par 21 above s 45 can be applied only where there was a marriage in community of property. Proof of such marriage need not, however, be lodged. This is the practice apparently because it serves no purpose seeing that the s 45 endorsement would have no value or effect if the parties were in fact married out of community of property.

As already stated above (item 4 par 22.1), the application for the s 45(1) endorsement must be made by the executor of the estate of the first-dying, as well as by the surviving spouse if he is not the executor – s 45(1). If the surviving spouse died before the executor of the estate of the first-dying was ready to make application for the endorsement, the executor of the estate of the subsequently deceased spouse must, on behalf of the deceased survivor, join in making the application (i.e. the application will be by the executors of both estates).

The application, after reciting the capacities of the applicants in the usual way, will state that so-and-so (the survivor) who was married in community of property to the deceased, is the registered owner of the following property . . . (full description) . . . held under deed of transfer (or other title deed, as the case may be) no . . . dated . . .

Section 45(1) is hypothecated under a registered mortgage bond, the endorsement provided for in the said sub-section shall not be made unless –

(a) such bond is cancelled; or
(b) the said property or the share of the deceased spouse therein is released from the bond; or
(c) the said property or the share of the deceased spouse is released from liability under the bond; or

Whether the endorsement is made for or on behalf of the deceased survivor, join in application (i.e. the application will be by the executors of both estates).

(b) s 42(1) of the Administration of Estates Act 66 of 1965 to the effect that the transfer is in accordance with the liquidation and distribution account and see also reg 49(1)(f);

(c) endorsement on the bond that the estate of the deceased spouse is released from liability in respect of the obligation secured thereby and that the survivor has become sole debtor in respect of the bond.

(4) From the date of the endorsement on the bond in terms of sub-section (1), the estate of the deceased spouse shall be absolved from any obligation secured by the bond and the survivor shall become sole debtor in respect thereof in the same manner as if he had passed the bond at that date.

(5) Any reference in this section to a bond shall include a charge in favour of the Land and Agricultural Bank of South Africa or any Department of State.
and that the property accrues to the surviving spouse by virtue of... (setting out the causa – see note 5 below)... and that application is accordingly made for endorsement of the title deed in terms of s 45(1).

4 Share of deceased spouse

Although s 45(1) refers to the acquisition by the survivor of the share of the deceased spouse, this does not necessarily mean that the survivor must have acquired the full half share of the deceased. In practice it readily happens that the deceased bequeathed his/her half share to the survivor and the children in equal shares. Also, in intestate estates it often happens that the survivor acquires only a part (a fraction) of the share of the deceased, the rest accruing to the children or other intestate heirs of the deceased in terms of the Succession Act 13 of 1934 (see also notes 51 and 52 below). In all such cases where the survivor acquires only a part of the share of the deceased, the share accruing to the heirs other than the survivor must be transferred to the executor of the estate by deed of transfer or other applicable deed, as the case may be, to the parties concerned, and simultaneously or subsequently a s 45(1) endorsement will have to be made on the existing title deed in respect of the remaining share still held under that deed.

The matter is more fully discussed in para 241 below where it is also pointed out that transfer of shares in land and mineral rights is no longer permissible; the position where the survivor does not acquire anything at all from the deceased spouse is dealt with in para 242 below.

5 Causa

51 Testate estates

If the deceased died testate the causa (in the application for endorsement – see note 3 above) will state, as the case may be:

(a) that the property referred to in the application accrues to the survivor as to one half share by virtue of the marriage of the spouse in community of property and as to the other half or lesser share (see note 4 above), as the case may be, in terms of the will of the deceased dated at... on... or
(b) that the whole property accrues to the survivor by virtue of the massing of the estates of the spouses in their joint will dated at... on... and admission by the survivor; admission must be proved by means of a certificate by the master or a conveyancer or a statement by the survivor, duly witnessed (reg 50(2)(b)); or
(c) that the property accrues to the survivor as to one half share by virtue of the marriage of the spouses in community and as to the rest (one half or lesser share – see s 38 of the Administration of Estates Act 66 of 1965) by virtue of a taking-over by the survivor in terms of s 38. (In s 38, survivor may be either in or out of community to the deceased, may take over the whole or part of the property of the deceased spouse. Where the survivor does not take over the whole half share of the deceased (an unlikely occurrence), the last part of note 4 above will apply.)

See par 52 below for the position where the acquisition by a survivor is subject to a falsedocumentum.

52 Intestate estates

If the deceased died intestate the provisions of the Succession Act 13 of 1934 must be taken into consideration. The Act provides that the surviving spouse, married either in or out of community of property, shall be an intestate heir of a deceased spouse who died intestate, either wholly or partly, according to the circumstances of the case. In other words, the Act statutorily elevates a surviving spouse to the position of an intestate heir of the deceased spouse in accordance with the circumstances and to the extent set out in the Act.

For the purpose of s 45(1) which is concerned only with the position where there is a marriage in community of property, only subss 1(1)(a), (c) and (d) of the Succession Act are relevant. Accordingly these subsections must be studied in order to ascertain which subsection applies in any particular instance in relation to the descendants or other intestate heirs (if any) in the estate who are entitled to succeed ab intestato and also in relation to the balance for distribution according to the liquidation and distribution account in the estate. As will be seen from the Act the balance available for distribution and to exist by reason of ab intestato heirs are of paramount importance in determining to what extent the survivor who has a preferred claim in terms of the Act, succeeds to the deceased spouse. The causa must then be worded according to the facts of the case in point, the relevant subsection of the Act being referred to in every individual instance. It is all a matter of analysing the facts of every case and then to explain the set-up in order to substantiate why a particular subsection of the Succession Act is applicable. (No attempt is made here to offer illustrations in view of the large variety of possibilities.)

If the balance for distribution in the estate is sufficient to enable ab intestato heirs (descendants or as the case may be) to succeed along with the survivor, the survivor may with the approval of the master, take over the shares of the heirs in terms of s 38 of the Administration of Estates Act. In such case, the causa in the application for a s 45(1) endorsement (see note 3 above) should state that the property accrues to the survivor as to one half by virtue of his marriage in community of property to the deceased and as to the other half share by virtue of fact (a) that such and such a share or amount in the estate of the deceased accrues to the survivor in terms of section... of the Succession Act 13 of 1934 in that... (explaining the set-up) and (b) that the balance of the estate of the deceased accrues to the survivor as a result of a taking-over with the approval of the master in terms of s 38 of the Administration of Estates Act.

Where ab intestato heirs are entitled to succeed along with the survivor, the last part of note 4 above must be taken into consideration.

53 Miscellaneous: Testate or intestate estates

If the survivor has acquired the share of the deceased spouse by virtue of an order of court – reg 49(1)(d) – the causa must be adjusted accordingly. Similarly for any set of circumstances not dealt with above, e.g. registration by children or other heirs, testate or intestate, of shares accruing to them and consequent accrual to the survivor (where this is the case), or a redistribution agreement in terms of s 14(1)(b)(iii) between heirs and the surviving spouse (either as heir or on the grounds of his/her claim to a half share of the estate assets by virtue of the marriage in community of property to the deceased).

Generally, it is essential to disclose the causa in the application for a s 45(1) endorsement not only to enable the deeds office to verify whether registration is permissible (s 3(1)(b)) but also to enable the master to determine whether his certificate under s 42(1) of the Administration of Estates Act is justified.

6 Groupage

Groupage of the survivor and the deceased should be proved in the usual way: by means of a certificate by a conveyancer or an affidavit by any person who is a party to the deed lodged for registration as contemplated by reg 3 of the regulations under the Group Areas Act 36 of 1966. In practice, as no deed is being registered in which the group can be set out as required by reg 2 of the regulations, the group of the survivor and the deceased are referred to in the application mentioned in note 3 above. Strictly speaking, however, regs 2 and 3 under the Group Areas Act do not apply to a s 45(1) endorsement as no deed for registration in which the group can be set out is involved.

Proof of groupage does not apply to mineral rights or mortgage bonds – see definition of “immovable property” in s 1(iii) of the Group Areas Act.
(ie the deceased’s half share), an order of court confirming the sale must be lodged — see reg 49(1)(d) and compare also s 49 of the Administration of Estates Act. See also note 5 3 above. In the case of such a purchase it must be borne in mind that as the full property is already registered in the name of the survivor, transfer to him cannot be made by deed of transfer (or other applicable deed, as the case may be) — as discussed in par 1 above; a s 45(1) endorsement is the obvious method to be employed to dispose of the matter.

8 Wife as surviving spouse

Although s 45 is in practice applied mainly where the husband is the surviving spouse of a marriage in community — the property usually being registered in the husband’s name in terms of s 17(3) — the section can nevertheless also be applied where the wife is the survivor and the property is still registered in her name as a spinster, widow, divorcee or married out of community of property to a previous husband, provided the other essentials of s 45(1) are applicable. (The dissolution of a previous marriage — the section can nevertheless also be applied where the wife is the survivor provided the other essentials of s 45(1) are applicable. — and the property is still registered in her name as a spinster, widow, divorcee or married out of community of property to a previous husband, provided the other essentials of s 45(1) are applicable.)

9 Survivor who is a member of a partnership

According to reg 34(3)(c) it is permissible for a member of a partnership to register, during the continuance of the partnership, a s 45(1) endorsement affecting his share of the property of the partnership. See also note 11 3 below regarding s 45(2)(b).

10 Wording of endorsement on title deed

The endorsement (a rubber stamp) in terms of s 45(1) on a title deed, other than a mortgage bond in favour of the survivor (in respect of which see note 5 par 2 3 3 in 1980 April DR), reads as follows:

“endorsement under section 45 of act 47 of 1937
the conditions prescribed by the above section having been complied with, the within-named transferee... who was married in community of property to the late... is entitled to deal with the within property.
application filed with... Deeds Office... (place)... (date)...

as is apparent from the above wording the endorsement applies only where the title deed in question is a deed of transfer. Where the title deed of any immovable property other than land, e.g. rights to minerals or to claim and stand licence monies, but excluding a mortgage bond (dealt with in note 5 par 2 3 3 in 1980 April DR) is concerned, the wording must be adapted by substituting for the words “within-named transferee...” the words “within-named cessionary/holder of the rights hereunder...” as may be applicable depending upon the type of deed and also substituting for the words “... is entitled to deal with the within property” the words “... is entitled to deal with the rights held under this deed”.

(to be continued)

Footnotes

1 In regard to the meaning of “immovable property” see eg J W Heyl Grundregistrafil in Suid-Afrika Jurisdata (1977) 319f and the definition of “immovable property” in s 102 of the Deeds Registries Act 47 of 1937. See Grundregistrafil 132f and 128ff; see also reg 51(1).
3 1959(1) SA 228(T) 230H-
4 See also note 5 3 above. In regard to the meaning of “immovable property” see eg J W Heyl Grundregistrafil in Suid-Afrika Jurisdata (1977) 319f and the definition of “immovable property” in s 102 of the Deeds Registries Act 47 of 1937. See Grundregistrafil 132f and 128ff; see also reg 51(1).

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