Restrictive Title Deed Conditions

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In terms of s 15A(1) read with reg 44A(b) of the Deeds Registries Act 47 of 1937 the preparer of a deed of transfer or certificate of title accepts responsibility that all ‘applicable’ conditions of title contained in or endorsed upon an owner’s copy of the title deed, together with any applicable proclaimed township conditions, have been correctly transcribed onto the new deed of transfer or certificate of title to land.

Conveyancers will, in the light of this responsibility, need to examine the title of land carefully to determine which ‘applicable’ conditions need be carried forward into the new deeds. Should the title deed contain conditions which absolutely prohibit the transaction envisaged, or necessitate that a consent be obtained before the registration can take place, or require that a specified condition be formally cancelled, these must be complied with, either prior to or simultaneously with the lodgment of the deeds at a deeds registry.

For obvious reasons it is impractical to deal with all the possible conditions which a conveyancer may encounter. For this reason I will restrict myself to dealing only with certain of the more common restrictions encountered in titles.

Conditions with a racial connotation

Any condition in a title deed of immovable property prohibiting or restricting ownership, occupation or use of such property by any person who is a member of a particular race or class, must be omitted from all subsequent deeds (see s 28 of the General Law Amendment Act 101 of 1969). No application, consent or other proof need be lodged with the deed containing such condition.

Pre-emptive right

If the title deed of property contains a condition whereby the owner is bound to offer his property to the pre-emptor before being able to offer and transfer it to anyone else, such property must either be transferred to such pre-emptor or, if the pre-emptor elects not to purchase the property, it may be transferred to anybody else free from the condition, provided the registrar of deeds is satisfied by way of documentary evidence that the pre-emptor elected not to exercise his right.

A right of pre-emption also lapses in the following circumstances:

- On the death of either the owner or pre-emptor. Where the pre-emptor has died, a registrar of deeds will require proof of death in the form only of a death notice or death certificate. An application in terms of s 68(1) of the Deeds Registries Act is unnecessary. In certain deeds registries the practice is to endorse the title with a factual endorsement in terms of s 3(1)(v) of the Act.
- By agreement between all parties concerned to cancel the condition in the title. Such agreement must be recorded in a notarial deed in terms of s 68(2) of the Act. If, however, the pre-emptive right has lapsed for any reason other than by mutual agreement, the provisions of s 68(1) of the Act may be applied (see Registrars’ Conference Resolution 39 of 1972 read with 29 of 1990).
- On compulsory sale. If the land is to be transferred, for example by the Sheriff in execution of a judgment or by a trustee in the estate of an insolvent, the land may be transferred free from the condition (see Bodasing v Christie NO and Another 1961 (3) SA 553 (A)).

However, if a right of pre-emption is created against the owner and his successors in title or otherwise in perpetuum, such right will not lapse, but will in certain instances have to be carried forward and also bind the new owners.

Reversionary rights

A reversionary right is a condition which provides that on the occurrence or non-occurrence of some or other event, the ownership or property will revert to the previous owner.

A condition often found in title deeds, whether it can be classified as a reversionary right in the true sense of the word or not, is one which provides that should a dwelling be erected on the land, subject to a personal servitude, the land will be transferred free of such personal servitude to the previous owner.

Where adwelling has been erected on the land and the imposer thereof has renounced his right, then the revaluation must be effected against the title deed in terms of s 68(1) of the Act, either prior to or simultaneously with the transfer of the land (see Registrars’ Conference Resolution 39 of 1972).

If the holder of the personal servitude and owner of the bare dominium, whether separately or together, have disposed of their respective rights to another person (being naturally the same person), they may together effect transfer to that person (see s 69(1) of the Act). In this instance no mention of the personal servitude must be made in the conditional clause (see s 69(2)).

In terms of s 66 of the Deeds Registries Act personal servitudes cannot extend beyond the