

CHAPTER 33:02 DEEDS REGISTRY

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Act 63, 1970,
Act 69, 1970,
Act 70, 1970,
Act 17, 1975,
Act 10, 1996,
Act 11, 2008.

An Act to consolidate and amend the laws in force in Botswana relating to the registration of deeds.

[Date of Commencement: 15th July, 1960]

PART I
Preliminary (ss 1-11)

1. Short title

This Act may be cited as the Deeds Registry Act.

2. Interpretation

In this Act, unless the context otherwise requires-

"court" means the High Court or any judge thereof;

"deeds registry" means the deeds registry established under section 3;

"diagram" means a diagram which has been signed by a surveyor, and which has been approved or certified by the Director or other officer empowered so to approve or certify a diagram on his behalf and includes a diagram or a copy thereof prepared in the Director's office and approved or certified as aforesaid, or a diagram which has, at any time prior to the commencement of this Act, been accepted for registration in the deeds registry or the Director's office;

"Director" means the Director of Surveys and Lands;

"general plan" means a plan which represents the relative positions and dimensions of two or more pieces of land and has been signed by a surveyor, and which has been approved or certified as a general plan by the Director or other officer empowered so to approve or certify a general plan on his behalf, and includes a general plan or copy thereof prepared in the Director's office and approved or certified as aforesaid, or a general plan which has, at any time, prior to the commencement of this Act, been accepted for registration in the deeds registry or the Director's office;

"immovable property" includes-

- (a) any registered lease of rights to minerals; and
- (b) any registered lease of land which, when entered into, was for a period of not less than 10 years or for the natural life of the lessee or any other person mentioned in the lease, or which is renewable from time to time at the will of the lessee indefinitely or for periods which together with the first period amount in all to not less than 10 years;

"land" includes an undivided share in land;

"Master" means the Master or Assistant Master of the High Court;

"mortgage bond" means a bond attested by the Registrar specially hypothecating immovable property;

"notarial bond" means a bond attested by a notary public hypothecating movable property generally or specially;

"notarial deed" means a deed attested by a notary public, and does not include a document a signature to which is merely authenticated by a notary public, or a copy of a document which has been certified as correct by a notary public;

"notary public" means, in relation to any document, a person practising as such in the

place where the document is executed;

"owner", in relation to immovable property, means the person registered as the owner or holder thereof and includes the trustee in an insolvent estate, the liquidator of a company which is an owner and the representative recognized by law of any owner who has died or who is a minor or of unsound mind or is otherwise under disability, where such trustee, liquidator or legal representative is acting within the authority conferred on him by law;

"prospecting contract" means a notarial deed whereby the owner of land from which the right to minerals had not been excluded, or the registered holder of the right to minerals in land, grants the right to prospect and seek for any mineral or minerals in the land, together with-

- (a) the right to purchase the land or any portion thereof or to purchase the right to any such mineral or minerals: or
- (b) the right to lease any right to any such mineral or minerals;

"real right" includes any right which becomes a real right upon registration;

"registered" means registered in the deeds registry;

"Registrar" means the Registrar of Deeds appointed under this Act;

"registry duplicate" means the counterpart or copy of a deed consisting of more than one copy which is filed or intended to be filed of record in the deeds registry;

"settlement" means a group of pieces of land or of subdivisions of a piece of land which are used or intended for use mainly for farming or horticulture, and includes a combination of such groups which is suitable for registration in one register;

"share", in relation to land, means undivided share;

"surveyor" means a land surveyor qualified to practise in terms of the Land Survey Act;

"township" includes-

- (a) a group of pieces of land, or of subdivisions of a piece of land, which are combined with streets and public places and are used mainly for residential, business, industrial or similar purposes, or are intended to be so used;
- (b) any combination of such groups which is suitable for registration in one register;
- (c) any area of land registered or recognized at the commencement of this Act, in the deeds registry as a township if a general plan thereof is filed in the deeds registry or in the office of the Director; and
- (d) any township established, approved, proclaimed or otherwise recognized as such

under any law.

3. Establishment of deeds registry

There shall be a deeds registry for Botswana situate at such place as the President may prescribe.

4. Appointment of Registrar and Assistant Registrars

The President, by notice in the *Gazette*, may appoint a Registrar of Deeds for Botswana and such Assistant Registrars as may be necessary who shall have the power to do any act or thing which may lawfully be done under this Act or any other law, by the Registrar of Deeds.

5. Duties of Registrar

The Registrar shall, subject to the provisions of this Act-

- (a) take charge of and preserve all records which were prior to the commencement of this Act, or may become after such date, records of the deeds registry;
- (b) examine all deeds of other documents submitted to him for execution or registration, and after examination reject any such deed or other document the execution or registration of which is not permitted by this Act or by any other law, or to the execution or registration of which any other valid objection exists;
- (c) register grants or leases of land lawfully issued by the Government or grants issued by any other competent authority (and register amendments, renewals and cancellations of such leases, and releases of any part of the property leased);
- (d) attest or execute and register deeds of transfer of land, and execute and register certificates of title to land;
- (e) attest and register mortgage bonds;
- (f) register cessions (including cessions made as security) of registered mortgage bonds, and register cancellations of such cessions if made as security;
- (g) register cancellations of registered mortgage bonds, releases of any part of the property hypothecated thereby or of all such property if the debt is further secured by a collateral bond, releases of any joint debtor or of any surety in respect of any such bond, the substitution of another person for a debtor in respect of any such bond, reductions of cover in respect of any such bond intended to secure future debts, and part payments of the capital amount due in respect of any such bond other than a bond intended to secure future debts;
- (h) register waivers of preference in respect of registered mortgage bonds and notarial bonds in favour of other bonds, whether registered or about to be registered and waivers of preference in respect of registered notarial bonds in favour of other notarial

bonds whether registered or about to be registered;

- (i) register waivers of preference in respect of registered real rights in land, in favour of mortgage bonds, whether registered or about to be registered;
- (j) register notarial bonds, and cancellations and cessions thereof (including cessions made as security) and cancellations of such cessions if made as security;
- (k) register releases of any part of the property hypothecated by any registered notarial bond or of all such property if the debt is further secured by a collateral bond, releases of any joint debtor or of any surety in respect of any such bond, reductions of cover in respect of any such bond intended to secure future debts, and part payments in respect of the capital amount due in respect of any such bond other than a bond intended to secure future debts;
- (l) register antenuptial contracts, and register such notarial deeds of donation (including a donation to be held in trust), and such other notarial deeds having reference to persons and property within the area served by the registry as are required or permitted by law to be registered;
- (m) register grants or leases lawfully issued by the Government, of rights to minerals;
- (n) register notarial cessions, leases or sub-leases of rights to minerals, notarial cessions of such registered leases or sub-leases, notarial cancellations of such leases or sub-leases, certificates of registration of such rights, and reservations of such rights made in grants or transfers of land;
- (o) register on the title deeds of the land and of the rights to minerals affected, and in the relative registers, the issue of *mijnpachtbrieven*;
- (p) register any servitude, whether personal or praedial, and record the modification or extinction of any registered servitude;
- (q) register notarial leases, sub-leases, and cessions of leases or of sub-leases, of land, and notarial amendments of such leases and sub-leases, and notarial renewals and notarial cancellations of such leases and sub-leases and notarial releases of any part of the property leased;
- (r) register notarial prospecting contracts and notarial cessions thereof and cancellations of such contracts;
- (s) register any real right, not specifically referred to in this section, and any cession, modification or extinction of any such registered right;
- (t) register against any registered bond any agreement entered into by the mortgagor and the holder of that bond, whereby any terms of that bond have been varied;
- (u) register general plans of subdivisions of land, and record in the registers kept under

this Act any conditions upon which the subdivisions have been laid out or established;

- (v) 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 the deeds registry, and register copies of such powers registered in any other deeds registry, which have been certified by the Registrar thereof;
- (w) make, in connection with the registration of any deed or other document, or in compliance with the requirements of any law, such endorsements on any registered deed or other document as may be necessary to give effect to such registration or to the objects of such law;
- (x) record all notices, returns, statements, or orders of court lodged with him in terms of any law;
- (y) remove from his records with the approval of the Master and after the lapse of 10 years from the date of entry in such records, any entry made therein, whether before or after the commencement of this Act, in pursuance of the transmission to him of a notice of liquidation or an order of liquidation or sequestration or in pursuance of the lodging with him by the Master of a return under section 22 of the Administration of Estates Act;
- (z) make such entries in the registers kept under this Act and any other law as are necessary for the purpose of carrying out the provisions of this Act or such other law and of maintaining an efficient system of registration calculated to afford security of title and ready reference to any registered deed,

and generally the Registrar shall discharge all such duties as by law may or are to be discharged by the Registrar of Deeds or as are necessary to give effect to this Act.

6. Powers of Registrar

- (1) The Registrar shall have power-
 - (a) to require the production of proof upon affidavit or otherwise of any fact necessary to be established in connection with any matter or thing sought to be performed or effected in the registry;
 - (b) whenever it is in his opinion necessary or desirable to rectify in any deed or other document, registered or filed in the registry, an error in the name or the description of any person or property mentioned therein, or in the conditions affecting such property, to rectify the error:

Provided that-

- (i) every person appearing from the deed or other document to be interested in the

rectification has consented thereto in writing;

- (ii) if any such person refused to consent thereto, the rectification may be made on the authority of an order of court;
 - (iii) if the error is common to two or more deeds or other documents, including any register in the registry, the error shall be rectified in all those deeds or other documents,
 - (iv) no such rectification shall be made if it would have the effect of transferring any right;
- (c) to issue, under prescribed conditions, certified copies of deeds or other documents registered or filed in the registry;
 - (d) if in his opinion any deed or other document submitted to him has become illegible or unserviceable, to require that a certified copy thereof be obtained to take its place.

(2) The Registrar shall perform, in case of dispute, all the functions of a taxing officer of the court in relation to fees charged by conveyancers and notaries public for performing any acts which are required or permitted under this Act to be performed by conveyancers or notaries public in connection with deeds executed, registered or filed or intended to be executed, registered or filed in the deeds registry or in relation to fees charged by other legal practitioners in connection with the preliminary work necessary for the purpose of any such deed.

7. Seal of office

The Registrar shall have a seal of office which shall be affixed to all deeds executed or attested by him and to all copies of deeds issued by him to serve in lieu of the original deeds.

8. Registered deeds not to be cancelled except upon an order of court

Except as is otherwise provided in this Act or in any other law, no registered deed of grant, deed of transfer, certificate of title or other deed conferring or conveying title to land, or any real right in land other than a mortgage bond, and no cession of any registered bond not made as security, shall be cancelled by the Registrar except upon an order of court.

9. Inspection of records and supply of information

The Registrar shall on such conditions as may be prescribed and upon payment of the prescribed fees, permit any member of the public to inspect the public registers and other public records in the registry, and to make copies of those records or extracts from those registers and to obtain such other information concerning deeds or other documents registered or filed in the registry as prior to the commencement of this Act, could, customarily, be made or obtained:

Provided that no such fee shall be payable in respect of any search or inspection made in the deeds registry-

- (i) by a conveyancer or notary public in connection with any deed which he has been instructed to prepare, attest or lodge in the registry;
- (ii) by any surveyor in connection with any survey which he has been instructed to perform; or
- (iii) by any sheriff or messenger of a magistrates' court, or his deputy, in connection with the exercise of his duties as such.

10. Power to undertake conveyancing functions

Notwithstanding anything in this or any other law, whenever the State is a party to any transaction involving real rights in land the preparation and execution of any documents, notarial or otherwise, and the conveyance of any rights necessary to give effect to such transaction may be undertaken by the Attorney-General or any person appointed by him in writing.

11. Regulations

- (1) The President may make regulations prescribing-
 - (a) the fees of office (if any) to be charged in respect of any act, matter or thing required or permitted to be done in or in relation to the deeds registry, including any report made to the court by the Registrar in connection with any application or action to which he is not a party;
 - (b) the fees and charges of conveyancers and notaries public in connection with the preparation, passing and registration of deeds or other documents registered or filed or intended for registration or filing in the deeds registry and the fees and charges of any other legal practitioners in connection with the preliminary work required for the purpose of any such deed or other document and the fees and charges in connection with the taxation of any such fees or charges;
 - (c) the manner and form in which any deed or other document required or permitted to be lodged, registered or filed in the deeds registry shall be prepared, lodged, executed, registered, filed or delivered;
 - (d) the manner and form in which endorsements or entries required by this Act or any other law to be made on registered deeds or other documents or in the registers shall be made thereon or therein;
 - (e) the particular documents which, when produced in the deeds registry, shall be attested or witnessed, and the manner in which any such document shall be attested or witnessed;
 - (f) areas (hereinafter referred to as "allotment areas") in which the registration of pieces of land shall be confined to a single register or set of registers;

- (g) the method according to which pieces of land in any such allotment area shall be numbered;
- (h) the manner and form in which pieces of land in allotment areas may be registered;
- (i) the manner and form in which information which is required by law to be furnished to the Registrar shall be recorded in the deeds registry, the manner and form in which information permitted by law to be furnished by the Registrar to the public shall be furnished and the manner and form in which the identity of persons shall be established;
- (j) the conditions upon which conveyancers, surveyors and other persons may conduct any search in the deeds registry, and the precautions which shall be taken to ensure preservation of the records from damage by improper handling or otherwise;
- (k) the conditions under which copies of deeds and other documents registered in the deeds registry may be issued for judicial purposes, or purposes of information or in substitution of deeds or other documents which have been lost, destroyed, defaced or damaged and the conditions under which extracts from registers or from any documents registered or filed in the deeds registry may be furnished;
- (l) the manner and form in which consent shall be signified to any cancellation, cession, part payment, release or amendment of or other registrable transaction affecting any bond or other document registered in the deeds registry;
- (m) the conditions under which a copy of a power of attorney may be accepted by the Registrar in lieu of the original;
- (n) the forms of deeds which shall be used in circumstances not provided for in this Act;
- (o) any matter which under this Act is required or permitted to be prescribed.

(2) Any regulation made by the President in terms of subsection (1) shall be published in the *Gazette* at least one month before the date on which it is expressed to take effect.

(3) In making any regulation under this section prescribing the fees and charges of conveyancers in connection with the preparation and passing of deeds, the President may prescribe separate fees for the preparation and the passing of deeds in the event of the deeds being prepared by one conveyancer and passed by another.

PART II

Registration (ss 12-18)

Registers (ss 12-13)

12. Registers

- (1) The Registrar shall design, prepare, open and keep such personal, property and other

registers as may be necessary to carry out the provisions of this Act.

(2) Any such register in which any debts secured by bonds are entered shall be deemed to be a continuation of the debt registers kept in the registry prior to the commencement of this Act, and any entries made therein shall have the same effect in law as they would have had if they had been made in the said debt registers.

13. Continuation of existing registers

Until such time as any new register has been prepared and opened under the provisions of section 12 the Registrar shall continue to keep the corresponding register in use in the registry immediately prior to the commencement of this Act, and to make therein the like entries as were customarily made therein prior to such date.

Deeds (ss 14-18)

14. When registration takes place

(1) Deeds executed or attested by the Registrar shall be deemed to be registered upon the affixing of the Registrar's signature thereto, and deeds, documents or powers of attorney lodged for registration shall be deemed to be registered when the deeds registry endorsement in respect of the registration thereof is signed:

Provided that no such deed, document or power which is one of a batch of interdependent deeds, documents or powers of attorney intended for registration together, shall be deemed to be registered until all the deeds, documents or powers of attorney or the registration endorsements in respect thereof, as the case may be, have been signed by the Registrar.

(2) If by inadvertence the Registrar's signature has not been affixed to a deed executed or attested by him, or to the registration endorsement in respect of the registration of a deed, document or power of attorney lodged for registration at the time at which the signature should have been affixed in the ordinary course, the Registrar may affix his signature thereto when the omission is discovered, and the deed, document or power of attorney shall thereupon be deemed to have been registered at the time aforesaid.

(3) All endorsements or entries made on deeds, documents or powers of attorney or in registers, in connection with the registration of any deed, document or power of attorney, shall be deemed to have been effected simultaneously with the affixing of the signature of the Registrar thereto in respect of deeds executed or attested by the Registrar or with the signing of his registration endorsement in respect of deeds, documents or powers of attorney lodged for registration, although in fact they may have been made subsequent thereto.

15. Deeds to follow sequence of their relative causes

(1) Except as otherwise provided in this Act or in any other law or as directed by the court-

(a) transfers of land and cessions of real rights therein shall follow the sequence of the successive transactions in pursuance of which they are made, and if made in

pursuance of testamentary disposition or intestate succession they shall follow the sequence in which the right to ownership or other real right in the land accrued to the persons successively becoming vested with such right;

- (b) it shall not be lawful to depart from any such sequence in recording in the deeds registry any change in the ownership in such land or of such real right:

Provided that-

- (i) if the property has passed in terms of a will or through intestate succession from a deceased person to his descendants, and one or other of these descendants has died a minor and intestate and no executor has been appointed in his estate, transfer or cession of the property which has vested in that descendant may be passed by the executor in the estate of the deceased person direct to the heirs *ab intestato* of the descendants;
- (ii) if the Registrar is satisfied that the value of the immovable property which has vested in any heir or legatee in terms of a will or through intestate succession would be equalled or exceeded by the costs involved in transferring or ceding it to the heir or legatee, and the heir or legatee has sold the property, transfer or cession thereof may, with the consent in writing of the heir or legatee, be passed by the executor in the estate of the deceased person direct to the purchaser;
- (iii) if in the administration of the estate of a deceased person any redistribution of the whole or any portion of the assets in such estate takes place among the heirs (including ascertained *fideicommissary* heirs) of the deceased, or between such heirs and the surviving spouse, the executor or administrator of such estate may transfer the land or cede the real rights therein direct to the persons entitled thereto in terms of such redistribution;
- (iv) in a redistribution mentioned in proviso (iii) it shall be lawful to introduce movable property not forming part of the estate for the purpose of equalizing the division;
- (v) the provisions of proviso (iii) shall apply *mutatis mutandis* with reference to a redistribution of assets of the joint estate of spouses who were married in community of property and have been divorced or judicially separated, and with reference to a redistribution of assets of a partnership on dissolution of the partnership;
- (vi) if a *fideicommissum* is created in a will and the *fiduciary* dies before transfer of his rights is effected in his name, the executor or the administrator (as the case may be) of the testator's estate, may transfer or cede the full property direct to the *fideicommissary*.

(2) In any transfer or cession in terms of any proviso to subsection (1)(b) there shall be paid the transfer and death duties which would have been payable had the property concerned been transferred or ceded to each person successively becoming entitled thereto.

16. Preparation of deeds by conveyancer

(1) Except as is otherwise provided in any other law, no deed of transfer, mortgage bond or certificate of title or registration of any kind mentioned in this Act shall be attested, executed or registered by the Registrar unless it has been prepared by a conveyancer admitted or entitled to practise as such in terms of the Legal Practitioners Act.

(2) Such conveyancer, whether or not he practises at the seat of the registry, may recover the fees and charges to which he may be entitled in accordance with any regulations.

(3) The provisions of this section shall not apply in relation to any instrument attested under the provisions of the Married Persons Property Act.

17. How real rights shall be transferred

Except as otherwise provided in this Act or in 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 deed of cession attested by a notary public and registered by the Registrar:

Provided that where the State has become entitled to acquire the ownership of the whole or portion of any land held under a title deed and such whole or portion, as the case may be, is depicted on a diagram or diagrams, the Registrar shall-

- (i) make, free of charge to the State, such alterations and entries in his registers and such endorsements on the title deed as may be necessary to register the conveyance to the State of such whole or portion of land, and
- (ii) simultaneously execute, free of charge to the State, a certificate of registered State title in respect of such whole or portion of land with the diagram or diagrams annexed thereto.

18. Special provisions relating to women

(1) All deeds executed or attested by the Registrar, or attested by a notary public and required to be registered in the deeds registry, and made by or on behalf or in favour of any person shall disclose the full name and marital status of the person concerned, whether married, widowed or divorced, as the case may be.

(2) If the person is married the full name of his or her spouse shall be disclosed and it shall be stated whether marriage was contracted in or out of community of property or is governed by the law of any other country which does not impose community of property on marriage.

(3) A person married whether in community of property or not shall not require the assistance of his or her spouse in executing any deed or document required or permitted to be registered in the deeds registry or required or permitted to be produced in connection with any such deed or document, and immovable property may be transferred or ceded to the person

as if such person was married out of community of property.

(4) Immovable property bequeathed or donated to a person married in community of property may be transferred or ceded to that person and shall not form part of the joint estate where, by a condition of the bequest or donation it is excluded from the community of property.

(5) If immovable property not excluded from the community is registered in the name of a spouse married in community of property, neither spouse may, irrespective of when that property was so registered, alone deal with such property unless he has the consent, in writing, of the other spouse, or has been authorised by an order of court to deal therewith.

(6) If immovable property has been acquired by one or other of two spouses married in community of property in such a manner that the said property would on transfer or cession thereof become part of the joint estate, and the marriage has been dissolved by the death of one of the spouses before the property is transferred or ceded, the property shall be transferred or ceded to the joint estate of the spouses, pending liquidation thereof, and shall, subject to the provisions of any disposition affecting the property, be deemed to be the joint property of the surviving spouse and of the estate of the deceased spouse.

(7) When immovable property or a bond is registered in the name of a person, who has married since the registration was effected or who at the date of the registration was married out of community of property or whose marriage was not subject to community of property and who has since been widowed or divorced, it shall be competent for the Registrar on written application by such a person and on production of the relevant deed and of proof to his satisfaction of the changes in such a person's status, to record such change on such deed and the registers:

Provided that where there are two or more interdependent deeds, all such deeds shall be produced for endorsement.

PART III

Registration of Land (ss 19-45)

Transfer of Land (ss 19-31)

19. Manner of dealing with State land

(1) The ownership of unalienated State land may be transferred from the State only by deed of grant, and except as hereinafter provided, having a diagram of the land annexed thereto.

(2) The ownership of land alienated from and reacquired by the State may be transferred from the State either by deed of grant or by deed of transfer, as the case may be, but in either case the deed of grant or transfer shall contain a reference to the title deed by which the State held the land and to the title deed to which the diagram of the land is annexed and shall set forth the conditions upon which the land is alienated and the rights to the land reserved by the State on this alienation.

(3) If any piece of unalienated State land has been surveyed and is represented on a

diagram the Registrar shall, upon written application by any duly authorized person, 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.

(4) Transfer of the ownership of land held by the State either under certificate of registered State title or certificate of registered title superseding such certificate of registered State title shall be effected by deed of grant, but it shall not be necessary to annex a diagram of the land thereto:

Provided that the grant shall contain a reference to the certificate under which the land is held and to the diagram annexed thereto.

(5) No deed (other than a deed of grant conveying ownership) purporting to create or deal with or dispose of any real right in any piece of unalienated State land shall be capable of registration until a certificate of registered State title has been executed in respect of that piece of land.

20. Form and manner of execution of deeds of transfer

Deeds of transfer shall be prepared in the forms prescribed by regulation, and, except as provided in this Act or any other law or as ordered by the court in respect of deeds of transfer executed by the Registrar, shall be executed in the presence of the Registrar by the owner of the land described therein, or by a conveyancer authorized by power of attorney to act on behalf of the owner, and shall be attested by the Registrar.

21. Transfer from joint estate

In any transfer lodged in the deeds registry relating to land which is an asset in a joint estate, the surviving spouse shall be joined in his personal capacity with the executor of the estate of the deceased spouse except-

- (a) where the executor is only dealing with the share of the deceased spouse;
- (b) where the land has been sold to pay the debts of the joint estate;
- (c) where there has been a massing of the joint estate and the surviving spouse has adiated;
- (d) where such transfer is in favour of the surviving spouse; or
- (e) where the surviving spouse has signed as executor, the power of attorney to pass such transfer.

22. Transfer of two or more pieces of land by one deed

(1) Two or more persons each owning a different piece of land may not transfer those pieces of land to one or more persons by the same deed of transfer, unless such transfer is

authorized by law or by an order of court.

(2) Two or more pieces of land may by one deed be transferred 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.

(3) Each piece of land so transferred shall be described in a separate paragraph of the deed of transfer.

(4) Two or more portions of a piece of land may by one deed be transferred 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.

(5) Each portion so transferred shall be described in a separate paragraph in which reference is made to the diagram of that portion.

(6) The diagrams of all such portions shall be annexed to the deed.

23. Transfer of undivided shares in land by one deed

(1) Land held by one person may be transferred by one deed from that person to two or more other persons in undivided shares.

(2) Land held by two or more persons in undivided shares may be transferred by one deed from those persons to any other person, or to two or more other persons in undivided shares.

24. Special provisions relating to transfer of undivided shares

(1) No transfer of an undivided share in land which is intended or calculated to represent or purports to represent a defined portion of land shall be capable of being registered.

(2) If a piece of land is owned by two or more persons in undivided shares and one or more of such persons acquires the share or shares of the remaining owner or owners in a defined portion of that piece of land, all the owners jointly, including the owner or owners acquiring the share or shares, may transfer such portion to the person or persons acquiring it.

25. Transfer to unascertained children

(1) If land is donated or bequeathed to the children born or to be born of any person or of any marriage, transfer of the land on behalf of such children may be passed in the case of children born or to be born of a person, to that person, and in the case of children born or to be born of a marriage, to the person who would be the natural guardian of those children during their minority.

(2) If land is donated to the children born or to be born of any person or of any marriage, the person to whom transfer may be passed in terms of subsection (1) may, for the purposes of such transfer, accept the donation.

(3) When the identity of all such children has been established the Registrar shall make an

endorsement on the transfer deed setting out their names, whereupon the transfer deed shall be deemed to be to and in favour of such children in the same manner as if the transfer had originally been passed to them by name.

26. Deeds of partition transfer

(1) If two or more persons who own in undivided shares the whole of any piece or pieces of land, have agreed to partition that land, the Registrar shall, on production to him of a power of attorney by such persons authorizing the passing of deeds of partition transfer of such land in accordance with the agreement of partition, which agreement shall be embodied in the power of attorney or annexed thereto, and on compliance with the further provisions of this section, attest deeds of partition transfer which shall be as nearly as practicable in the prescribed form conveying to the respective owners the land or shares therein awarded to them under the said agreement.

(2) In the power of attorney or agreement of partition referred to in subsection (1) there shall be described-

- (a) the land to be partitioned;
- (b) the share or shares registered in the name of each joint owner;
- (c) the land or share therein awarded to each of the owners;
- (d) the conditions (if any) affecting any land or share therein so awarded; and
- (e) the consideration (if any) given for the purpose of equalizing the partition.

(3) There shall also be produced to the Registrar the title deeds of the land to be partitioned and the necessary diagrams:

Provided that no new diagram need be produced in respect of the whole or the remaining extent of any one of the pieces of land to be partitioned.

(4) Subject to the provisions of this section, the provisions of sections 20, 21, 22, and 23 shall *mutatis mutandis* apply in respect of deeds of partition transfer.

(5) Any deed of partition transfer attested under subsection (1) shall in respect of the land therein described take the place of the deed or deeds by which it was previously held, but the partition transfer shall not vary or affect the conditions of tenure of the said land or any other conditions affecting the said land generally, except in so far as such last-mentioned conditions may be varied, defined or limited by the agreement of partition or the consent of interested parties.

(6) The provisions of this section shall *mutatis mutandis* apply to a partition of land ordered by the court or determined by an award of arbitrators.

27. Requisites where share in land partitioned is mortgaged

(1) If the share or shares owned by any of the parties to a partition is mortgaged, the partition transfers shall not be attested unless the bond is produced to the Registrar together with the written consent of the legal holder of the bond to the partition and to the substitution of the land awarded on partition to the mortgagor for the share or shares mortgaged.

(2) In registering the transfer the Registrar shall-

- (a) endorse on the bond that the land awarded to the mortgagor has been substituted for the share or shares mortgaged;
- (b) make an entry of the substitution in the registers; and
- (c) endorse on the transfer that the land described therein is, in accordance with this section, mortgaged by the bond.

(3) If only a fraction of the share or shares owned by any of the parties to a partition is mortgaged, the substitution referred to in this section shall only take place in respect of the fraction so mortgaged if from the agreement of partition or from other evidence it appears that a defined portion or share therein has been separately awarded in respect of such mortgaged fraction.

(4) Where more than one property is partitioned by the same partition and the whole of any one or more of the properties affected is awarded to an owner, such property or properties may be substituted under that owner's bond, if the bond is over his share in all the properties partitioned.

28. Requisites where share in land partitioned is subject to other rights

(1) If the share or shares owned by any of the parties to a partition appear from the title deeds of the land partitioned to be subject to a lease, personal servitude or other real right, the written consent of the holder thereof, together with the deed, if any, by which the lease, servitude or real right is held, shall be produced to the Registrar.

(2) The land described in the deeds of partition transfer shall be made subject to the lease, servitude or real right to the same extent as the share or shares for which it is substituted, and the deed, if any, by which the lease, servitude or real right is held, shall be endorsed by the Registrar in the same manner as the bond mentioned in section 27.

(3) If there exists any bond by which the lease, servitude or real right is itself mortgaged, that bond shall also be produced to the Registrar, together with the written consent of the legal holder thereof and the Registrar shall make the endorsements and entries mentioned in section 27 on the bond, the deeds concerned and in the registers.

29. Effect of compliance with sections 27 and 28

Upon completion of the endorsements and entries mentioned in sections 27 and 28 the land described in the deeds of partition transfer, and the lease, personal servitude or real right (if any) shall be deemed to be as fully and effectually mortgaged as if they had been

hypothecated by the bond at the time of its execution and the said land shall be deemed to be as fully and effectually encumbered by the said lease, personal servitude or real right as if it had been encumbered thereby at the time of the registration thereof.

30. Partition of land subject to *fideicommissum*

(1) Any piece of land the whole or any share of which is subject to a *fideicommissum* may, where partition has not been prohibited, be partitioned with the written consent of the *fideicommissary* heirs or successors if they are ascertained and are majors and otherwise competent; if they are ascertained but any of them are minors, the consent of the Master shall be produced in respect of the minors; if they are ascertained but any of them have been declared insolvent, or if they are under curatorship or otherwise under disability the consent of their trustees or curators or other legal representatives shall be produced on their behalf: if they are not ascertained or if they cannot be found, proof shall be produced to the satisfaction of the Registrar that the land awarded in the agreement of partition to the owner of any share subject to the *fideicommissum* is an equivalent of that share

(2) The land so awarded shall in the deed of partition transfer be made subject to the *fideicommissum* in the same manner as the corresponding share was in its title deed made subject thereto before partition.

31. Registration of title by other than the ordinary procedure

(1) Any person who has acquired in any manner, other than by prescription or expropriation, the right to the ownership of immovable property registered in the name of any other person and who is unable to procure registration thereof in his name in the usual manner and according to the sequence of the successive transactions or successions in pursuance of which the right to the ownership of such property has devolved upon him, may in lieu of applying to the court, apply in writing to the Commission constituted in terms of this section for an order authorizing the registration in his name of such property.

(2) The Commission referred to in subsection (1) shall consist of the Registrar, the Director or his nominee, and the Master of the High Court.

(3) The Registrar shall be chairman of the Commission.

(4) The President may, by statutory instrument, make regulations prescribing the powers, jurisdiction and privileges of the Commission referred to in subsection (1).

(5) All applications under this section shall be made to the chairman of the Commission.

(6) The applicant shall submit, together with his application, sworn declarations and all available documentary evidence in support thereof.

(7) Particulars of any such application received by the chairman of the Commission shall be published at the expense of the applicant in three successive ordinary issues of the *Gazette*, and once every week during three successive weeks in one or more newspapers circulating in

the district or other area in which the property concerned is situate.

(8) Any person objecting to the granting of such application shall within a period of two months from the date of the first publication in the *Gazette* or in a newspaper, whichever be the later date, or within such extended period as the Commission may on application allow, submit in writing to the chairman of the Commission full particulars of the grounds upon which his objection is based, together with any sworn declarations or documentary evidence which he may be able to produce in support of his objection.

(9) Upon the expiration of the period mentioned in subsection (8) the Commission concerned shall inquire into the application and the objections, if any lodged thereto, and shall, if satisfied that the applicant is entitled to the ownership of the property to which the application relates, order the Registrar to register the said property in the name of the applicant subject to the conditions, if any, mentioned in the order.

(10) The Commission may make such order as to the costs of or in connection with the application or the objections thereto as it may deem just and such costs may be taxed and any such order enforced in the same manner as if the order were an order of court.

(11) Any order made under this section by the Commission to the Registrar shall be subject to an appeal to the court.

(12) Notice of such appeal shall be given, within 14 days of the date of the order, to the chairman of the Commission, the registrar of the court and any other party concerned.

(13) The Registrar shall not act thereon until the aforesaid period allowed for noting an appeal has expired, or, if an appeal has been noted, until such appeal has been determined in favour of the respondent or has been withdrawn.

(14) Subject to the terms of any order made under this section, any deed of transfer passed in pursuance of such order shall be passed subject to every condition, servitude, bond or other encumbrance to which, according to the records of the deeds registry the property to which the application relates, is subject, and the Registrar shall, in connection with such condition, servitude, bond or other encumbrance make the usual and proper entries and endorsements upon or in respect of such deed of transfer in the registry, before such deed is delivered to the applicant.

(15) A registration of immovable property made in the name of any person in pursuance of an order made under this section shall have the effect of vesting such person with a title to such property which shall be liable to be annulled, limited or altered on every ground on which the title of such person to such property would have been liable to be annulled, limited or altered if such property had been transferred to such person in the ordinary course.

(16) If in pursuance of any order made under this section the Registrar registers any property in the name of any person, such person shall be liable to pay such taxes, duties and fees of office in respect of such registration as he would have been liable to pay if such property had been transferred to him in the usual manner directly from the last registered

owner thereof, and shall not be liable to pay any tax, duty, quit-rent or interest thereon which such owner or any intermediate holder of the right to such property may have become liable to pay, unless he has by agreement bound himself to pay such tax, duty, quit-rent or interest, or unless the delay in obtaining the registration in his name was due to the neglect or default of himself or his agent:

Provided that any person who has become liable to pay any such tax, duty, quit-rent or interest shall continue to be so liable notwithstanding that such property has, in pursuance of an order made under this section, been registered in the name of another person.

(17) Upon production to the Registrar of any order made under this section and of a certificate by the proper officer as to the payment of the transfer duty, if any, which the person named in the order is liable to pay, and on compliance with any other requirements which have under this Act or any regulations made thereunder, to be complied with, the Registrar shall register such property in accordance with the said order, by executing a deed of transfer thereof in the prescribed form in favour of the person named in the order.

Substituted Title Deeds (ss 32-41)

32. Certificate of registered title of undivided share

(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 35, obtain a certificate of registered title of his undivided share in such land, and no transfer of a fraction only of his undivided share or hypothecation or lease of the whole or any fraction of his undivided share in the land shall be registered in the 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.

(2) If the title deed under which land or shares therein is held in joint ownership is lost or destroyed, any joint owner may, upon compliance with the prescribed requirements, obtain a certificate of registered title in respect of his share in the land without obtaining a certified copy of the deed which has been lost or destroyed.

(3) The provisions of subsections (1) and (2) shall apply where two or more pieces of land or shares therein are held in joint ownership by the same title deed:

Provided that all the pieces of land or the shares therein shall be included in the certificate of registered title and shall be described in separate paragraphs.

33. Certificate of registered title of aggregate share

Any person who is, by virtue of more than one title deed, the owner of undivided shares in one or more than one piece of land may, subject to the provisions of section 35, obtain a

certificate of registered title in respect of his aggregate share in the land:

Provided that if there are two or more pieces of land the several pieces of land or shares therein shall be described in separate paragraphs.

34. Certificate of registered title of one or more properties held under one deed

Any person who holds two or more pieces of land, or undivided shares therein, by one title deed may, subject to the provisions of section 35, obtain a certificate of registered title in respect of one or more of such pieces of land or of the undivided share or shares held by him therein if at least one of the pieces of land or the share therein held by such deed remains held thereby.

35. Conditions governing the issue of certificates of registered title

(1) A certificate of registered title mentioned in section 32, 33 or 34 may be obtained upon written application by the owner from the Registrar accompanied, except as provided in section 32(2), by the title deed of the land and shall be as nearly as practicable in the prescribed form.

(2) If the property concerned is subject to a registered mortgage bond or to any registered deed of lease or other registered deed whereby any real rights in the land are held by other persons, that bond or other deed shall be produced to the Registrar by the holder thereof, upon the request and at the expense of the applicant for the certificate of registered title.

(3) Before issuing any such certificate the Registrar shall cause to be made upon the title deed or deeds in question and the registry duplicates thereof or in the case provided in section 32(2) upon the registry duplicate only, and upon the mortgage bond or other deed (if any) an endorsement that a certificate of registered title has, in accordance with the appropriate section of this Act been substituted for the said title deeds or deeds in respect of the property in question.

(4) The Registrar shall further make entries in the registers of the issue of the certificate and shall, if the property is mortgaged, endorse that fact upon the certificate.

(5) Any such certificate when issued shall in respect of the property described therein take the place of the title deed or deeds by which such property was previously held and the issue of the certificate shall not in any manner affect any right or obligation in connection with such property.

36. Certificate of registered title taking place of lost or destroyed deed

(1) If the title deed of any land has been lost or destroyed and the registry duplicate of such title deed has also been lost or destroyed, the Registrar shall, on written application by the owner of the land accompanied by a diagram of the land, if no diagram thereof is filed in the registry or in the office of the Director, execute a certificate of registered title in respect of such land in accordance with the diagram of the land.

(2) Before issuing the certificate the Registrar shall, at the expense of the applicant, publish

in the prescribed form notice of intention to issue the certificate in two consecutive ordinary issues of the *Gazette* and in two consecutive issues of a newspaper printed in the district in which the land is situate, or if there is no such newspaper then in any newspaper circulating in such district.

(3) A draft of the proposed certificate and a copy of the diagram, if any, accompanying the application, shall be open for inspection in the registry free of charge by any interested person, for a period of six weeks after the date of the first publication of the notice in the *Gazette*, during which period any person interested may object to the issue of the certificate.

(4) Any person who has lodged with the Registrar an objection to the issue of the certificate may, in default of any arrangement between him and the applicant, apply to the court within one month after the last day upon which an objection may be lodged, for an order prohibiting the Registrar from issuing the certificate, and the court may make such order on the application as it may deem fit.

(5) A certificate of registered title issued under this section shall be as nearly as practicable in the prescribed form and shall take the place of the lost or destroyed title deed and shall embody or refer to every condition, servitude, bond, lease or other encumbrance which according to the records of the registry was embodied or referred to in the lost or destroyed title deed or in any endorsement thereon.

37. Certificate of registered title to correct error in registration

(1) If by reason of an error the same land has been registered in the names of different persons, the Registrar may, upon transfer of the land being given to one of them by the other or others, issue to the person to whom transfer is so given a certificate of registered title of the land held by him under the various title deeds.

(2) Any person who is the registered owner of any one or more defined portions of land under a registered deed reflecting conditions or servitudes which have lapsed by merger duly noted or which have been cancelled, may apply for the issue to him of a certificate of registered title in respect of such land free of such conditions or servitudes.

(3) The certificate of registered title referred to in subsection (2) shall be in the form prescribed and shall supersede the title under which the land was previously held.

(4) The provisions of section 35 shall *mutatis mutandis* apply in respect of the issue of such certificate.

38. Certificate of consolidated or amended title of two or more pieces of land

(1) If a diagram represents two or more pieces of land which are-

- (a) contiguous to each other (or contiguous to any portions of each other notwithstanding that those portions have been separated from other portions by intervening deductions);

- (b) owned by the same person or by two or more persons in the same undivided shares in each such piece of land; and
- (c) registered in the same property register,

the title deed or deeds of the said pieces of land may on compliance with the requirements of this section be superseded by a certificate of consolidated title issued by the Registrar in the prescribed form.

(2) If a diagram represents such pieces of land as are mentioned in subsection (1) but includes any rectification to any common boundary therein found necessary in consequence of any survey or re-survey, the title deed or deeds of the said pieces of land may on compliance with the requirements of this section be superseded by a certificate of amended title issued by the Registrar in the prescribed form.

(3) Every such certificate shall be in accordance with the new diagram and shall be issued on written application by the owner or owners of the pieces of land in question accompanied by the title deed or deeds thereof and any bond thereon, together with the written consent of the holder of the bond.

(4) In registering the certificate, the Registrar shall endorse on the title deed or deeds that they have, in respect of the land described in the certificate, been superseded by the certificate, and on the certificate that the land therein described or the share thereof referred to in such endorsement, is mortgaged by such bond and shall make such endorsements on the bond and such entries in the registers as shall clearly indicate that the land is now owned by virtue of the certificate and that the land or such share thereof is subject to such bond.

(5) If a portion only of the land represented on the new diagram is mortgaged, a certificate may not be issued unless the bond is cancelled:

Provided that on the written application of the owner and with the consent of the mortgagee, all the land included in the new diagram may be substituted for the land originally mortgaged under the bond.

(6) If different portions of the land represented on the new diagram are mortgaged under different bonds, the certificate may not be issued unless the bonds are cancelled.

(7) If a portion only of the said land is subject to any registered deed of lease or other registered deed other than a bond, whereby any real right in the land is held by any other person, the certificate shall not be issued unless a diagram of such portion is already annexed to the said registered deed, or, if no such diagram is so annexed, unless a diagram in duplicate (or triplicate if required by the Registrar) of such portion is produced:

Provided that it shall not be necessary to produce a diagram of such portion if the diagram of the consolidated land shows that portion by dotted lines or in such other way as to identify it.

(8) The said diagram shall be annexed to the registered deed aforesaid and the registry duplicate thereof, and shall be mentioned in any endorsement made on or reference made in

the certificate concerning such registered deed.

(9) No diagram representing a combination of portions of two or more pieces of land shall be accepted in the deeds registry for purposes of transfer until a certificate of consolidated or amended title has been issued for the land represented on such diagram.

(10) More than one combination of portions of two or more pieces of land, each of which combinations is represented on a separate diagram, may be included in one certificate of consolidated or amended title but each combination shall be described in a separate paragraph therein.

39. Certificate of amended title of one piece of land

(1) A certificate of amended title in the prescribed form may also be issued by the Registrar in respect of any one piece of land where rectification of title is required in consequence of a survey or re-survey of such land.

(2) The provisions of section 38(3) to (8) inclusive, shall *mutatis mutandis* apply in respect of such certificate.

40. Certificate of uniform title

(1) If the owner of two or more pieces of land which are-

- (a) contiguous to each other;
- (b) situate in the same district;
- (c) registered in the same property register; and
- (d) held on different conditions of tenure, or subject to different rights reserved in favour of the State,

desires to consolidate his title in respect of those pieces of land on uniform conditions of tenure or subject to the reservation of uniform rights in favour of the State, the title deeds of the said pieces of land may, with the written consent of the President and on compliance with the provisions of this section, be superseded by a certificate of uniform title issued by the Registrar, in the prescribed form, subject to such uniform conditions of tenure or to the reservation of such uniform rights in favour of the State as are set forth in such written consent.

(2) The provisions of section 38(3) to (8) inclusive shall *mutatis mutandis* apply in respect of such certificate.

(3) The President may agree with the owner as to the aforesaid uniform conditions of tenure or uniform rights in favour of the State, and may consent to the issue of a certificate of uniform title.

(4) If the said land is subject to any bond or if the said land or any portion thereof is subject

to any registered deed of lease or other registered deed whereby any real right in the land is held by any other person, there shall be produced to the Registrar the written consent of the holder of any such bond, lease or right to the issue of the certificate of uniform title and to the uniform conditions of tenure or uniform rights in favour of the State, which may have been agreed upon.

41. Certificate of registered title of portion of a piece of land

(1) If a defined portion of a piece of land has been surveyed and a diagram thereof has been approved by the Director, the Registrar may on written application by the owner of the land accompanied by the diagram of such portion, the title deed of the land, any bond thereon and the written consent of the holder of any such bond, issue a certificate of registered title in respect of such portion in the prescribed form.

(2) In registering the certificate the Registrar shall endorse on the title deed that it has been superseded by the certificate in respect of the land described in the certificate, and on the certificate that the land described therein is mortgaged by the bond, and shall make such endorsements on the bond and such entries in the registers as shall clearly indicate that the land is now owned by virtue of the certificate and is subject to such bond.

(3) The provisions of this section shall also apply where two or more defined portions of a piece of land have been surveyed and the diagrams thereof approved:

Provided that each of such portions shall be described in a separate paragraph in the certificate.

(4) No defined portion of a piece of land shall be mortgaged until the owner thereof has obtained a certificate of registered title in respect of such portion in accordance with the provisions of this section.

(5) Except in the case of a transfer of a whole piece of land, no owner of a township or settlement in whose title deed the individual pieces of land are not separately described, shall deal separately in any way with an individual piece of land in such township or settlement or any portion thereof or share therein until he has obtained a certificate of registered title of such piece of land in the prescribed form.

(6) The provisions of this subsection shall not apply in respect of State land.

Change of Title by Endorsement (ss 42-45)

42. Rectification of title by endorsement

(1) If rectification of title is required in respect of any one piece of land in consequence of a survey or resurvey of such land or of the correction of any error in the diagram thereof approved by the Director, the Registrar may, on written application by the owner of the land accompanied by the title deed and the new or the corrected diagram thereof, any bond thereon and any registered deed of lease or other registered deed whereby any real right therein is held by any other person and the written consent of the holder of such bond, lease

or right, endorse on the title deed in the prescribed form a description of the land according to the new or corrected diagram, which shall supersede the description already appearing in the title deed.

(2) If a new diagram is produced the Registrar shall in making the said endorsement substitute the new diagram for the old one in the manner prescribed.

43. Transfer or cession by means of endorsement

(1) If immovable property or a bond is registered in the deeds registry in the name of the survivor of two spouses who were married in community of property or in the name of the joint estate of such spouses and such survivor has lawfully acquired the share of the deceased spouse in the property or bond, the Registrar shall on written application by such survivor or by the executor of the estate of the deceased spouse, accompanied by such other documents as may be prescribed, endorse on the title deeds of the property or on the bond that the survivor is entitled to deal with such property or bond, and thereupon such survivor shall be entitled to deal therewith as if he had taken formal transfer or cession into his own name of the share of the deceased spouse in the property or bond.

(2) If the immovable property mentioned in subsection (1) is hypothecated under a registered mortgage bond the endorsement provided for in the said subsection shall not be made unless-

- (a) such bond is cancelled;
- (b) the estate of the deceased spouse is released from liability under the bond; or
- (c) the said bond has been passed by the survivor alone and a written consent (which shall be in duplicate, in the prescribed form and signed by the survivor and the legal holder of the bond) to the release of the estate of the deceased spouse from liability under the bond and to the substitution of the survivor as sole debtor in respect thereof, is produced to the Registrar together with the bond.

(3) The Registrar shall, in any case of release and substitution in terms of subsection (2)(c), when he endorses on the title deeds of the property that the survivor is entitled to deal therewith-

- (a) make in the appropriate register an entry setting forth that the estate of the deceased spouse is released from liability in respect of the obligation secured by the bond and that the survivor has become sole debtor in respect of the bond;
- (b) annex one duplicate of the written consent referred to in the said paragraph to the bond and file the other with the registry duplicate of the bond; and
- (c) endorse 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) As from the date of the endorsement on the title deeds of the property in terms of subsection (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.

44. Endorsement of deeds where marriage dissolved by divorce

(1) If immovable property or a lease under any law relating to land settlement or a bond is registered in the deeds registry in the name of one of two spouses who were married in community of property but have been divorced, and the person in whose name such property, lease or bond is registered has lawfully acquired the share of his former spouse in the property, lease or bond, the Registrar may, on written application by that person, accompanied by such documents as the Registrar deems necessary, endorse on the title deeds of the property or on the lease or the bond that such person is entitled to deal with such property, lease or bond, and thereupon such person shall be entitled to deal therewith as if he had taken formal transfer or cession into his name of the share of the former spouse in the property, lease or bond.

(2) If any immovable property referred to in subsection (1) is hypothecated under a registered mortgage bond, the provisions of section 43(2), (3) and (4) shall *mutatis mutandis* apply.

45. Cancellation of State Grant upon occurrence of specified event

(1) Where any Deed of State Grant provides that on the happening or non-happening of any event the State may resume ownership of any land or require transfer to it of such land the President may, upon the happening or non-happening of such event as aforesaid, and after compliance with any conditions precedent to such resumption or transfer which may be imposed by the said Deed, serve on the owner of any real right in the land and shall publish in two successive issues of the *Gazette* and a newspaper circulating in Botswana a notice setting out details of the land to be forfeited, the reasons for the forfeiture, and calling upon any person who objects to such forfeiture to lodge a notice of objection with the Attorney-General within 30 days of such service or such publication setting out his reasons why the Deed of State Grant under which the land was held prior to the forfeiture shall not be cancelled by the Registrar.

(2) When a notice of objection has been lodged within the time, and in the manner, set out in subsection (1) and has not been withdrawn in writing by the person making the objection, the ensuing dispute shall be resolved by the High Court on the application of the State or any party to the dispute and the High Court may make such order therein as it may think fit:

Provided that an objection shall be deemed to have been withdrawn if the objector does not, within three months of the lodgement of his objection, make application to the High Court as aforesaid.

(3) On receipt of a certificate in writing by a person authorized by the President in terms of

section 4 of the State Land Act, to the effect that-

- (a) the State is entitled to resume any land by virtue of the provisions of any State Grant; and
- (b) that the notice required by subsection (1) has been given in respect of such land; and
- (c) that either-
 - (i) no notice of objection has been lodged to the resumption; or
 - (ii) notices of objection have been received but that all objections have been withdrawn in writing by the person making the objection or are deemed to have been withdrawn by virtue of the provisions of the proviso to subsection (2),

the Registrar shall cancel the Deed of State Grant issued in respect of that land and endorse his registers accordingly and, thereupon, the land shall be deemed to be State Land.

(4) The certificate prescribed in subsection (3) shall be accompanied by any written notice of the withdrawal of an objection which may have been given under subsection (2).

PART IV

Townships and Settlements (ss 46-47)

46. Requirements in the case of subdivision of land

(1) If land has been subdivided into pieces of land shown on a general plan, the owner of the land subdivided shall furnish a copy of the general plan to the Registrar, who shall, subject to compliance with the requirements of this section and of any other law, register the plan and open a register, or if the land forms part of an allotment area open new sections of the register for that allotment area in which all registrable transactions affecting the respective pieces of land shown on the plan shall be registered.

(2) For the purposes of registration of such a general plan the title deed of the land which has been subdivided shall be produced to the Registrar together with the diagram thereof and any mortgage bond endorsed on the title deed and the mortgagee's consent to the endorsement of such bond to the effect that it attaches to the land described in the plan.

(3) If the land subdivided as shown on the general plan forms the whole of any registered piece of land held by the title deed, the Registrar shall make upon the title deed and the registry duplicate thereof an endorsement in the prescribed form indicating that the land has been laid out as a township or settlement, as the case may be, in accordance with the plan, and that the pieces of land shown on the plan are to be registered in the relative register.

(4) If the land subdivided as shown on the general plan forms a portion only of any registered piece of land held by the title deed the Registrar shall, on written application by the owner of the land, issue a certificate of township or settlement title in his favour in respect of the said portion as nearly as practicable in the prescribed form and in accordance with a

diagram thereof.

(5) If the land subdivided as shown on the general plan comprises the whole or portions of two or more registered pieces of land, the Registrar may require the owner to obtain a certificate of consolidated title of the land so subdivided.

(6) The Registrar shall make on such certificate the endorsement mentioned in subsection (3).

(7) The provisions of section 41 and of section 38(3) to (8), inclusive, shall respectively and *mutatis mutandis* apply in respect of the certificates of township or settlement title mentioned in subsection (4), and the certificates of consolidated title mentioned in subsection (5).

47. Transfer of township or portion thereof

The owner of land in respect of which a general plan has been registered under section 46 may transfer, by one deed, the whole or any portion of such land or a share in the whole of such land:

Provided that-

- (i) if a portion only of the land is sought to be transferred the boundaries of such portion shall coincide with one or more lines of division shown on the general plan and shall not intersect any of the pieces of land shown thereon;
- (ii) the deed of transfer shall disclose that the land conveyed thereby has been laid out as a township or is a portion of land so laid out, that such land remains subject to the provisions of the law relating to townships, and, if any public place or portion thereof in such township forms part of the land transferred, that the rights of owners of pieces of land and of other persons to such public place are not affected by such transfer;
- (iii) the deed of transfer shall disclose any conditions which have been applied to the township or the part thereof concerned and recorded in the deeds registry under the provisions of any law.

PART V

Bonds (ss 48-59)

General Provisions (ss 48-53)

48. Execution of bonds

(1) A mortgage bond shall be executed in the presence of the Registrar by the owner of the immovable property therein described or by a conveyancer duly authorized by such owner by power of attorney, and shall be attested by the Registrar.

(2) A bond may be registered to secure an existing debt or a future debt or both existing and future debts.

(3) Bonds intended to secure loans for building purposes shall be deemed to be bonds to secure existing debts.

(4) If in a bond purporting to secure a future debt the amount of an existing debt is mentioned, such existing debt shall be deemed to be secured as part of the maximum amount intended to be secured by the bond.

(5) Except as authorized by any other law or by order of the court, debts or obligations to more than one creditor arising from different causes may not be secured by one bond.

49. Requirements in case of bonds intended to secure future debts

(1) No bond attested or registered after the commencement of this Act shall be of any force or effect for the purpose of giving preference or priority in respect of any debt incurred after the registration of the bond, unless-

- (a) it is expressly stipulated in the bond that the bond is intended to secure future debts generally or some particular future debt described therein; and
- (b) a sum is fixed in the bond as an amount beyond which future debts shall not be secured by the bond.

(2) If a bond purports to secure payment by the mortgagor of the costs of preserving and realizing the security or of fire insurance premiums, cost of notice or bank exchange, such costs and charges shall not be deemed to be future debts within the meaning of subsection (1).

50. Cession of bond securing future debts

A cession of a bond passed to secure future advances may be registered and the registration of such a cession shall not affect the provisions of the bond relating to future advances up to the amount stated in the bond.

51. Exclusion of general clause in mortgage bonds

(1) Except as provided in any other law, the Registrar shall not attest any mortgage bond which purports to bind movable property or which contains the clause, commonly known as the general clause, purporting to bind generally all the immovable or movable property of the debtor or both and shall not register any notarial bond which purports to bind immovable property.

(2) No mortgage bond shall be passed by two or more mortgagors unless it purports to bind immovable property of each mortgagor:

Provided that land held subject to a condition that, on the happening of a certain event, such land shall revert to a person named in such condition, may be mortgaged by the owner thereof and such person by means of a bond passed by them jointly and severally, or may be mortgaged by the owner of such land with the consent of such person.

52. No bond to be passed in favour of an agent

No bond shall be passed in favour of any person as the agent of a principal.

53. Requirements in case of bonds passed by or in favour of two or more persons

(1) If a bond is passed by two or more mortgagors, no release from the bond-

- (a) of any mortgagor and his property, or of a portion of the property of any mortgagor may be registered without the written consent of the other mortgagor or mortgagors; or
- (b) of all the property of any mortgagor may be registered unless such mortgagor is also released.

(2) No bond may be passed in favour of two or more persons in which it is stipulated that the share of one holder shall rank 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 a bond over another share.

Rights of Mortgagees (ss 54-58)

54. Transfer of hypothecated immovable property

(1) No transfer of mortgaged land shall be attested or executed by the Registrar, and no cession of a mortgaged lease of immovable property or of any mortgaged real right in land, shall be registered until the bond has been cancelled or the land, lease or right has been released from the operation of the bond with the consent in writing of the holder thereof or unless, in the case of any such mortgage bond which has been lost or destroyed, the Registrar has on application by the registered holder thereof, cancelled the entry in his register in respect of such bond:

Provided that no such cancellation or release shall be necessary if the transfer or cession is made-

- (i) in execution of the judgment of any court by the competent officer;
- (ii) by the trustee of an insolvent estate, an executor administering and distributing an estate under section 43(3) to (7) of the Administration of Estates Act, the liquidator of a company which is unable to pay its debts and which is being wound up by or under the supervision of the court; or
- (iii) in any other circumstances in this Act or in any other law specially provided or as ordered by the court.

(2) A consent to the release from the operation of a bond of all the property mortgaged thereunder shall, except where the debt secured by such bond is further secured by a collateral bond, be deemed to be a consent to the cancellation of that bond.

55. Substitution of debtor in respect of a bond

(1) If the owner (in this section referred to as the "transferor") of land which is hypothecated under a registered mortgage bond (not being a person referred to in proviso (ii) to section 54(1)) 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 where 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.

(2) In registering the transfer the Registrar shall-

(a) make, in the appropriate register in the prescribed form-

- (i) an entry setting forth that the debt of the transferor secured by the bond is cancelled; and
- (ii) an entry setting forth that the transferee has become the debtor in respect of the bond;

(b) annex one duplicate of the written consent referred to in subsection (1) to the bond and file the other with the registry duplicate thereof;

(c) endorse upon the bond in the prescribed form-

- (i) the name of the transferee;
- (ii) the date and number of the transfer;
- (iii) a reference to the said written consent; and
- (iv) that the transferee has been substituted for the transferor as debtor in respect of the bond; and

(d) make on the transfer deed an endorsement of mortgage containing the date and number of the bond and the amount due in terms thereof.

(3) As from the date of the transfer deed the transferor shall be absolved from any obligation secured by the bond and the transferee shall be substituted for him as the debtor in respect of such bond and shall be bound by the terms thereof in the same manner as if he had himself passed the bond and had renounced therein the benefit of all relevant exceptions.

(4) The provisions of this section shall not apply if the mortgaged land is to be transferred-

- (a) to a person who would not himself be competent to mortgage it;
- (b) to two or more persons, unless they take transfer of the land in undivided shares and renounce, in the written consent referred to in subsection (1) the exception *de duobus*

vel pluribus reis debendi; or

(c)

(5) Subsections (1) to (4), inclusive, shall *mutatis mutandis* apply in respect of immovable property other than land which is hypothecated under a registered mortgage bond.

56. Returns by Master in connection with insolvent estates and further provisions relative to insolvent estates

(1) If it appears from the liquidation account of any estate which has been sequestrated or from the vouchers relating thereto that a payment has been made to any creditor on account of a registered bond, the Master shall notify the payment to the Registrar who shall thereupon write off the amount thereof in the appropriate register, on the registry duplicate of the bond and also if possible on the original bond.

(2) The holder of the bond shall deliver the bond to the Master who shall forward it to the Registrar in order that the amount may be written off thereon.

(3) Except in cases where an insolvent has been rehabilitated in pursuance of a composition made by him with his creditors, the Master shall from time to time transmit to the Registrar a return specifying-

- (a) the name and address of every person who has been rehabilitated after the sequestration of his estate; and
- (b) the immovable property and registered bonds appearing in the schedules lodged with the Master by or on behalf of such person or in the liquidation account of his estate,

and upon receipt of that return the Registrar shall, in accordance therewith, cancel in the appropriate registers all bonds registered therein against the property of the said person prior to the sequestration of his estate and endorse the registry duplicates and, if possible, also the bonds themselves as cancelled.

(4) The holders of such bonds shall when requested to do so by the Master, deliver the bonds to him, and the Master shall forward them to the Registrar for cancellation.

(5) If any of the immovable property mentioned in the return has not yet been transferred by the trustee, the Registrar shall further note on the registry duplicate of the title deed of such property and in the appropriate registers that such property has in terms of the law relating to insolvency vested in the trustee.

(6) Immovable property which has vested in a trustee in accordance with the provisions of the law relating to insolvency and which has not in terms of that law been re-vested in the insolvent may, whether before or after rehabilitation of the insolvent, be transferred only by the trustee, and may not after such rehabilitation be transferred, mortgaged or otherwise dealt with by the insolvent until it has been transferred to him by the trustee:

Provided that if after rehabilitation, the trustee has been discharged or there is no trustee in existence, the Master shall, if satisfied that the rehabilitated insolvent is entitled to the property, give him transfer thereof in such manner as may be prescribed.

(7) If by virtue of the provisions of the law relating to insolvency an insolvent has been re-invested with the ownership of any property, such property may not be transferred, mortgaged or otherwise dealt with by the insolvent until an endorsement, in the manner prescribed, that the property has been restored to him, has been made by the Registrar on the title deed of the property.

(8) Nothing in this section shall be construed as modifying any provision of the law relating to insolvency.

(9) The provisions of this section shall apply *mutatis mutandis* in respect of-

- (a) estates administered and distributed under section 43(3) to (7) of the Administration of Estates Act;
- (b) companies which are unable to pay their debts and are liquidated or wound up by or under the supervision of the court under the law relating to companies.

57. Endorsement of bond after sale in execution

(1) Whenever any mortgaged immovable property has been sold in execution of a judgment of a competent court or under express authority contained in a special law, to satisfy any debt due in respect of a registered bond or otherwise, and the proceeds of the sale have been paid to the legal holder of the bond, the sheriff or deputy-sheriff or messenger concerned or the person acting under the authority of such special law shall notify to the Registrar how much of the capital sum due in terms of the bond has been paid, and shall transmit the bond to the Registrar.

(2) The Registrar shall thereupon write off the amount so paid in the appropriate registers and on the bond and registry duplicate thereof.

58. Consent of bondholder to registration of merger of rights of mortgagor

If the holder of a mortgaged lease of land or of mortgaged real rights in land acquires the ownership of that land, or if the holder of a mortgaged lease of real rights in land acquires those rights, or if the owner of mortgaged land which is entitled to rights of servitude over other land, acquires the ownership of that other land, such acquisition of the additional land or rights shall not be registered without the consent in writing of the holder of the bond.

Notarial Bonds (s 59)

59. Registration of notarial bonds

(1) Every notarial bond executed before or after the commencement of this Act shall be tendered for registration in the deeds registry within the period of two months after the date of

its execution or within such extended period as the court may on application allow.

(2) Unless so tendered, or if so tendered and rejected by the Registrar and not retendered within the said period, a notarial bond shall not be registered except upon an order of court within such further period as the court may direct:

Provided that if the Registrar suspends or refuses registration pending the submission of further information in order to enable him to determine whether any person mentioned in the bond is or is not a person whose name appears in any register or document in the deeds registry, such suspension or refusal shall not be deemed to be a rejection of the bond.

(3) Every notarial bond shall disclose-

- (a) the place at and the date on which it was executed, as well as the place where the notary practises; and
- (b) the place where the debtor resides and the place or places, if any, where he carries on business.

PART VI

Rights in Immovable Property (ss 60-81)

General Provisions (ss 60-61)

60. Restriction on registration of rights in immovable property

(1) No deed, or condition in a deed, purporting to create or embodying any personal right in respect of immovable property shall be capable of registration.

(2) No condition imposed after the commencement of this Act, purporting to restrict the exercise of any right of ownership in respect of immovable property shall be included in any title deed of such property tendered for registration in the deeds registry unless such condition is capable of being enforced by some person who is mentioned in, or if not mentioned therein, is ascertainable from, the said title deed or from other evidence available to the Registrar.

61. Certificates of registered real rights

(1) Any person who either before or after the commencement of this Act has transferred land subject to the reservation of any real right in his favour (other than a right to minerals) may on application in writing to the Registrar accompanied by the title deed of the land obtain a certificate of registration of that real right as nearly as practicable in the prescribed form.

(2) Such person shall not separately mortgage or otherwise deal with such right or transfer a share thereof (if transferable) unless he has obtained such certificate in the manner aforesaid.

(3) The provisions of section 35(2) to (5) inclusive shall *mutatis mutandis* apply in respect of such certificate.

Personal Servitudes (ss 62-66)

62. Registration of notarial deed creating personal servitude

(1) Except as provided in section 60(2) or in any other law, a personal servitude may be created by means of a deed executed by the owner of the land encumbered thereby and the person in whose favour it is created, and attested by a notary public:

Provided that-

- (i) in the case of a servitude in favour of the public or of all or some of the owners or occupiers of pieces of land in a township or settlement, the Registrar may, if in his opinion it is impracticable to require such deed to be executed by the persons in whose favour the servitude is created, register such deed notwithstanding the fact that it has not been executed by such persons;
- (ii) where it is desired to register a road or thoroughfare in favour of the public at the same time as the registration of a subdivision which it serves, it shall in like manner and without the registration of a notarial deed be permissible to register it in the deed relating to the subdivision and also to endorse the deed of the remainder accordingly.

(2) Such deed shall contain a sufficient description of the land encumbered by the servitude and shall mention the title deed of such land.

(3) For the registration of such a deed, the title deed of the land and, if the land is mortgaged, the bond and the consent in writing of the legal holder thereof to the registration of the servitude free of the bond, shall be produced.

63. Restriction on registration of personal servitude

No personal servitude of *usufruct*, *usus* or *habitatio* purporting to extend beyond the lifetime of the person in whose favour it is created shall be registered, nor shall a transfer or cession of such personal servitude to any person other than the owner of the land encumbered thereby, be registered.

64. Reservation of personal servitudes

A personal servitude may be reserved by condition in a deed of transfer of land, if the reservation is in favour of the transferor, or in favour of the transferor and his spouse or the survivor of them, if they are married in community of property, or in favour of the surviving spouse if transfer is passed from the joint estate of spouses who were married in community of property.

65. Registration of lapse of personal servitude

(1) If for any reason a personal servitude has lapsed, the Registrar shall, if satisfied as to such lapse and on the application of the owner of the land encumbered thereby, note the fact

to such lapse on the title deed of the land and on the title deed of the servitude, if any.

(2) Cancellation of the registration of a personal servitude in pursuance of an agreement between the owner of the land encumbered and the holder of the servitude shall be effected by notarial deed:

Provided that no such deed shall be registered if the servitude is mortgaged unless the mortgagee consents in writing to the cancellation of the bond or the release of the servitude from its operation.

66. Transfer and mortgage of land with personal servitude thereon or subject to a *fideicommissum*

(1) If the owner of land subject to a personal servitude and the holder of that servitude have disposed of the land or any portion thereof together with the rights of servitude to another person, they may together give transfer thereof to the person acquiring it.

(2) The transfer deed shall describe the transferors as the owner of the land and holder of the servitude respectively, but no mention of the servitude shall be made in the description of the land therein.

(3) The owner of land subject to a personal servitude and the holder of that servitude may together mortgage the land to the full extent of their respective rights therein.

(4) The owner of the land and the holder of the servitude may either of them as principal debtor mortgage the land or the servitude respectively and the other of them may in the same bond mortgage the servitude or the land as surety.

(5) Subsections (1) to (3) shall *mutatis mutandis* apply to land subject to a *fideicommissum*.

Rights to Minerals (ss 67-71)

67. Separation from ownership of rights to minerals

(1) Rights to minerals may be separated from the ownership of land by reservation under section 68 or 69 in a condition contained in a transfer of such land or by exclusion from a partition of such land in terms of section 70 or by cession of those rights by the owner of the land to another person.

(2) Such separation from the ownership may take place in respect of a portion of a registered piece of land, or of a share in the whole or a portion of a registered piece of land, and may be in respect of all minerals generally, or of a particular mineral or minerals.

(3) Notwithstanding anything to the contrary contained in any other law, whenever rights to minerals have been separated from the ownership of land under any provision of this Act, such rights to minerals and the land shall thereafter each be held under a separate title even though the holder of the rights to minerals is also the owner of the land:

Provided that where the owner of the land is also the owner of all the mineral rights and such rights are unencumbered, it shall be competent to register a merger on application by the owner.

68. Certificates of reservation of rights to minerals

(1) Any person who transfers land subject to a reservation in his favour of rights to minerals thereon, or on whose land a township or settlement is established subject to such reservation, shall simultaneously with the passing of transfer or the opening of a register in the deeds registry for such township or settlement, as the case may be, take out a certificate of rights to minerals in the prescribed form in respect of the rights so reserved; where the register has been opened, a certificate may be taken out in respect of the remainder of the township or settlement.

(2) Upon the written application to the Registrar of any person who has, before the commencement of this Act, transferred land subject to a reservation in his favour of rights to minerals thereon and who is the holder of such rights, the Registrar shall, on production of the title deed under which the land is held, issue to such person a certificate of rights to minerals in the prescribed form in respect of the rights so reserved.

(3) The holder of the title deed shall upon the demand and at the expense of the applicant produce the title deed to the Registrar.

(4) Any person who transfers land in the manner described in subsection (1) or who is an applicant under subsections (2) and (3) shall, if the Registrar so requires, lodge with him a diagram showing the area in respect of which the rights to minerals are reserved.

(5) A certificate of rights to minerals referred to in subsection (1) or (2) shall-

- (a) set forth the rights to minerals to which it relates and any rights ancillary to such rights;
- (b) be signed by the Registrar and be registered against the title deeds of the land in respect of which such rights to minerals have been reserved, and when so signed and registered shall be the title to the said rights to minerals.

(6) If the rights to minerals are subject to a registered mortgage bond, lease or other deed affecting such rights, the said certificate shall not be issued except upon production of the bond, lease or other deed, and the Registrar shall, when issuing the certificate, endorse-

- (a) upon the bond, lease or other deed that a certificate of rights to minerals has been substituted for the title under which such rights were formerly held; and
- (b) upon the certificate of rights to minerals that these rights have been hypothecated, leased or otherwise dealt with in accordance with such bond, lease or other deed,

and shall make the necessary entries in the registers; and thereupon the said rights to minerals shall be deemed to be as fully and effectually hypothecated, leased or otherwise

dealt with as if they were still held under the former title.

(7) No rights to minerals reserved before the commencement of this Act, and still held under the title deed of the land shall, until a certificate of rights to minerals has been issued in respect thereof, be hypothecated, leased or dealt with otherwise than by way of cession of all such rights.

69. Certificate of rights to minerals reserved by State

The provisions of section 68 shall *mutatis mutandis* apply in respect of a grant of land by the State made subject to a reservation of rights to minerals in favour of the State.

70. Exclusion of rights to minerals from partition of land

(1) If in any partition of land held in joint ownership the agreement of partition excludes from partition any rights to minerals in the land, the partition transfers shall set forth that exclusion.

(2) If rights to minerals are excluded from partition in accordance with subsection (1) there shall be lodged with the Registrar together with the deeds of partition, a certificate or certificates of rights to minerals in the prescribed form in respect of the rights so excluded.

71. Undivided share of rights to minerals

Section 32(1) shall *mutatis mutandis* apply in respect of persons who jointly hold a certificate or deed of cession of rights to minerals.

Praedial Servitudes (ss 72-73)

72. Creation of praedial servitude by notarial deed

(1) A praedial servitude whether in perpetuity or for a limited period may be created by means of a deed executed by the owners of the dominant and servient tenements and attested by a notary public.

(2) If the servient tenement is mortgaged or subject to any other real right with which the servitude may conflict, the bond or other registered deed by which such right is held shall be produced together with the consent in writing of the legal holder thereof to the registration of the servitude.

(3) If it is sought to cancel a servitude, and the dominant tenement is mortgaged, the bond shall be produced together with the consent in writing of the legal holder thereof to the registration of the cancellation.

(4) Section 62(2) and (3) shall *mutatis mutandis* apply in respect of praedial servitudes.

73. Conditions of registration of praedial servitudes

(1) A praedial servitude whether in perpetuity or for a limited period may be created in a transfer of land only if the servitude is imposed on the land transferred in favour of other land

registered in the name of the transferor, or is imposed in favour of the land transferred on other land registered in the name of the transferor:

Provided that if-

- (a) the land to be transferred is admitted by the person seeking to pass transfer thereof to be subject to unregistered rights of servitude in favour of land registered in a third person's name;
- (b) the person to whom the transfer is to be passed had knowledge of the existence of the said rights of servitude at the time when he acquired the right to the land or consents in writing to such servitude being embodied in the transfer; and
- (c) such third person appears either in person or by duly authorized agent before the Registrar at the time of execution of the transfer and accepts the servitude in favour of his land,

the servitude may be embodied in such transfer.

(2) The appearance of such third person as aforesaid and his acceptance of the servitude shall be recited in the deed of transfer and the title deed of the dominant tenement shall be produced for endorsement thereon of the terms of the servitude.

(3) If the servitude is imposed on other land in favour of the land to be transferred, and that other land is mortgaged or is subject to any other registered real right with which the servitude may conflict, the consent in writing of the legal holder of the bond or of such other right, to the registration of the servitude shall be produced, together with the bond or other deed evidencing such other right and the title deed of the servient tenement.

(4) In registering the deed of transfer in which the servitude is embodied the Registrar shall endorse the terms of the servitude and the number and date of the transfer on the title deed of the other tenement and if a bond or other deed is produced, as aforesaid, also thereon.

(5) In the subdivision of land which is entitled to a servitude over other land, it shall be competent for the owner when transferring such subdivision to stipulate in his power of attorney that the exercise of the rights is restricted to the land still held by him, and in that event the transfer of the portion in question shall make no reference to the servitude, nor shall it be necessary to record on the title of the servient tenement that the rights are so restricted.

(6) If in the subdivision of land which is subject to restrictive conditions in favour of a statutory body, such body consents to the subdivision contemplated, the consent shall in the absence of anything to the contrary therein contained, involve the application of all such restrictive conditions to each subdivision so authorized, and on registration of title of the subdivision the deed shall be drawn accordingly.

Leases (ss 74-79)

74. Registration of leases and sub-leases

(1) Except where provision to the contrary is made in any law, any lease or sub-lease of land or of any rights to minerals in land and any cession of such a lease or sub-lease intended or required to be registered in the deeds registry, shall be executed by the lessor and the lessee or by the lessee and the sub-lessee or by the cedent and the cessionary, as the case may be, and shall be attested by a notary public.

(2) If the land or right leased or sub-leased is mortgaged or subject to rights of any other person it shall not be necessary for purposes of registration of the lease or sub-lease or any cession thereof to produce the bond or the other deed whereby such rights are held or the consent of the legal holder thereof.

75. Termination of registered lease

(1) When a registered lease or sub-lease has terminated the Registrar shall, on written application by the owner of the land affected thereby, or the holder of the lease, as the case may be, accompanied by proof of the termination of the lease or sub-lease and, in the case of the termination of the lease, by the title deed of the land and, if available, the deed of lease, or in the case of the termination of the sub-lease, by the deed of lease and if available the deed of sub-lease, note, in the case of the termination of the lease, on the title deed of the land and on the deed of lease, if produced, or, in the case of the termination of the sub-lease, upon the deed of lease and upon the deed of sub-lease, if produced, that the lease or sub-lease as the case may be, has terminated.

(2) If the full term, including periods of renewal, of a registered lease or sub-lease has expired, no further transactions affecting that lease or sub-lease shall be registered.

76. Cessions of leases and sub-leases

No cession of a lease or sub-lease shall be registered in the deeds registry unless the lease or sub-lease has been registered therein.

77. Hypothecation of leases and sub-leases

No hypothecation of a lease or sub-lease shall be registered in the deeds registry unless such hypothecation is effected by means of-

- (a) a mortgage bond, if the lease or sub-lease is immovable property; or
- (b) a notarial bond, if the lease or sub-lease is not immovable property.

78. Notarial bonds hypothecating leases or sub-leases

(1) For the registration of a notarial bond specially hypothecating a registered lease or sub-lease the deed of lease shall be produced to the Registrar.

(2) In registering such bond the Registrar shall endorse on the deed that the lease or

sub-lease has been hypothecated by the bond.

(3) Section 54(1) shall *mutatis mutandis* apply in respect of any lease or sub-lease so hypothecated.

79. Hypothecation of and settlement lease after exercise of option to purchase

(1) If in any lease entered into under any law relating to land settlement the lessee is given the option to purchase the property leased or any portion thereof, and he has exercised the option, the rights to the property so acquired by the lessee may, if the lease is registered in the deeds registry and is not subject to an existing bond, be hypothecated by a notarial bond.

(2) Section 78 shall *mutatis mutandis* apply in respect of the registration of such a bond.

(3) If such lease is subject to an existing bond at the date of the exercise of the option the rights acquired by the exercise of such option shall be subject to such bond.

Prospecting Contracts (ss 80-81)

80. Registration of prospecting contracts

(1) If the prospecting rights granted under a prospecting contract are granted for a defined period with a right of renewal for any further period, registration of the contract shall be effective for that defined period only:

Provided that, if the holder of prospecting rights so granted under a registered prospecting contract lodges such contract at the deeds registry before the expiration of the said defined period together with an affidavit in terms of subsection (2), or within one month after the expiration of the defined period together with the grantor's written consent to such endorsement, the Registrar shall endorse upon the register of prospecting contracts and upon the contract and the registry duplicate thereof a statement that the said holder claims to have exercised his right of renewal for the period mentioned in the said affidavit, and the endorsement so made shall, as from the date thereof, be effective notice of the claim to all interested persons, other than the grantor of the prospecting rights, whose written consent to such endorsement has not been produced.

(2) The affidavit referred to in subsection (1) shall be made by the holder of the prospecting rights under a registered prospecting contract or by his duly authorized agent, and shall state that the holder has fulfilled all such conditions of the contract as entitled him to a renewal of the contract and that he has duly exercised his right to renew the same.

(3) If at the time when a prospecting contract is tendered for registration the defined period for which the prospecting rights were granted thereunder has already expired but a further period for which there is a right of renewal has not yet expired, the Registrar shall, upon the application of the person who was the holder of the prospecting rights under such contract and with the consent in writing of the grantor of those rights, register the contract, and the registration shall then be effective in respect of the period for which it is claimed that the

contract has been renewed.

(4) If a document purporting to be a prospecting contract contains any ambiguity and such document is in the opinion of the Registrar liable to be interpreted as constituting a grant or lease of a right to minerals, the Registrar may register that document as a prospecting contract if a supplementary document executed by all the parties to the first-mentioned document or by their assigns, or affidavit by such parties, explaining the purport and effect of the prospecting contract is lodged at the deeds registry, and such document or every such affidavit shall thereafter be deemed to form part of the prospecting contract to which it relates.

(5) Where, in the circumstances provided for in this section, a prospecting contract has been duly registered in the deeds registry, no further prospecting contract or contracts shall be registered against the title deed or title deeds of the same property or properties in respect of the same mineral or minerals until such time as the duly registered prospecting contract has lapsed by effluxion of time or has been cancelled in terms of section 81 or 85.

(6) For the purposes of this section the grantor of prospecting rights means the person who from the records in the deeds registry appears to be the holder of the rights to minerals in the land in question.

81. Cancellation of registration on expiry of prospecting contract or failure to renew

(1) Upon the written request of the grantor of prospecting rights under a prospecting contract-

- (a) the registration of which has under section 80 ceased to be of effect; or
- (b) to the renewal of which no claim has been lodged at the deeds registry, or which, if such a claim has been lodged, has lapsed by effluxion of time,

the Registrar shall cancel the entries in the registers relating to the contract and the endorsement of the contract upon the grantor's title deed of the land or the rights to minerals affected by that contract.

(2) For the purposes of this section the grantor of prospecting rights means the person who from the records in the deeds registry appears to be the holder of the rights to minerals in the land in question.

PART VII

Antenuptial Contracts (ss 82-84)

82. Antenuptial contracts to be registered

An antenuptial contract executed before and not registered at the commencement of this Act, or executed after the commencement of this Act, shall be registered in the manner and within the time mentioned in section 83 and unless so registered shall be of no force or effect as against any person who is not a party thereto.

83. Manner and time of registration of antenuptial contracts

(1) An antenuptial contract executed in Botswana shall not be registered unless it has been attested by a notary public and unless it has been tendered for registration in the deeds registry within two months after the date of its execution or within such extended period as the court may on application allow.

(2) An antenuptial contract executed elsewhere outside Botswana shall not be registered unless it has been attested by a notary public or has been otherwise entered into in accordance with the law of the place of execution and unless it has been tendered for registration in the deeds registry within six months after the date of its execution or the commencement of this Act, whichever may be the later date, or within such extended period as the court may on application allow.

(3) Unless an antenuptial contract has been tendered for registration in terms of subsection (1) or (2), or if so tendered and rejected by the Registrar and not re-tendered within the respective periods prescribed in the said subsections, the contract shall not be registered except upon an order of court and within such further period as the court may direct:

Provided that if the Registrar suspends or refuses registration pending the submission of further information in order to enable him to determine whether any party to the contract is or is not a person whose name appears in any register or document in the deeds registry, such suspension or refusal of registration shall not be deemed to be a rejection of the contract.

(4) A signed original contract (or an equivalent thereof according to the law of the country where it was executed) bearing the attestation of the notary public or otherwise duly authenticated as required by law, for filing of record as the registry duplicate, and a further signed original, similarly attested or authenticated, or a grosse or a copy of the original contract certified by a notary public, shall be tendered for registration.

(5) For the purposes of this section an antenuptial contract executed at Mafeking immediately before the commencement of this Act shall within Botswana be deemed to have been executed within Botswana.

84. Postnuptial execution of antenuptial agreement

Notwithstanding the provisions of sections 82 and 83 the court may, subject to such conditions as it may deem desirable, authorize postnuptial execution of a notarial contract having the effect of an antenuptial contract, if the terms thereof were agreed upon between the intended spouses before the marriage, and may order the registration, within a specified period, of any contract so executed.

PART VIII

Miscellaneous (ss 85-97)

85. Cancellation of registration on lapse of certain registered rights

(1) If it is expressly provided in-

- (a) a registered lease of land or rights to minerals;
- (b) a registered deed creating or evidencing a servitude; or
- (c) a registered prospecting contract,

that it shall lapse upon failure to make regularly any periodical payments mentioned therein, the Registrar shall upon written application accompanied by an affidavit by the lessor or grantor of the registered right (as the case may be) that the said periodical payments have not been duly made, cancel the registration of the lease, servitude or contract:

Provided that-

- (i) if the address of the lessee or grantee is stated in the registered document, or the address or any change thereof has been notified to the Registrar, notice shall be given to such lessee or grantee by the applicant by prepaid registered letter that cancellation of the registration of the document is sought on the ground of failure to make the periodical payments mentioned therein, and that unless written objection to the cancellation specifying the grounds of objection is lodged with the Registrar within one month, or such further period as the Registrar may in special circumstances determine, application will be made to the Registrar for cancellation of the registration of the said document;
- (ii) if the address of the lessee or grantee is not stated in the document or has not been notified to the Registrar as aforesaid, the applicant shall publish the notice aforesaid once in the *Gazette* and twice in a newspaper circulating in the district in which the land in question is situate and in a newspaper (to be indicated by the Registrar) circulating in the district of the lessee's or grantee's last-known address, which shall be disclosed by the applicant in an affidavit;
- (iii) if any objection is lodged which, in the Registrar's opinion, discloses reasonable ground for refusing cancellation of the registration, he shall not cancel it until the objection is withdrawn or falls away or cancellation is ordered by the court;
- (iv) if any of the rights to be cancelled are mortgaged, notice in writing shall be given by the applicant by prepaid registered letter to the mortgagee of the intention to cancel such rights, before the cancellation is effected.

(2) For the purposes of this section the term "lessor" or "grantor" means-

- (a) in the case of a registered lease of land or a registered deed of servitude, the person who from the records in the deeds registry appears to be the owner of the land concerned; and
- (b) in the case of a registered lease of rights to minerals or a registered prospecting contract, the person who from the records in the deeds registry appears to be the

holder of the rights to minerals referred to in such lease or prospecting contract.

86. Transfer and cession not to be passed as security

No transfer of land and no cession of any registered lease or sub-lease or other real right in land made as security for a debt or other obligation shall be attested by the Registrar or registered in the deeds registry.

87. Taxes and transfer duty to be paid before transfer of land

(1) No deed of grant or transfer of land shall be registered unless accompanied by a receipt or certificate of a competent public revenue officer that the taxes, duties, fees and quit-rent (if any) payable to the Government or any local authority on the property to be granted or transferred have been paid.

(2) If land or any real right in land has been settled upon or donated to an intended spouse in terms of an antenuptial contract, no transfer or cession of such land or right by the donor to any person other than the donee and no mortgage thereof by the donor shall be executed, attested or registered by the Registrar unless the transfer duty (if any) payable on the settlement or donation has been paid.

88. Production of documents before transfer of land to a company

No deed of grant or transfer of land to a company shall be registered unless accompanied by-

- (a) in the case of a company incorporated in Botswana, the original or a certified copy of the certificate of incorporation issued to it under section 23 of the Companies Act; or
- (b) in the case of an external company, a certificate dated within three months prior to the date of lodgement of the deed of grant or transfer, under the hand of the Registrar of Companies, that subsection (1) of section 345 of the Companies Act has been complied with.

89. Registration of change of name

(1) If any person or partnership, whose name appears in any registered deed or other document has changed his or its name, the Registrar shall upon written application by that person or partnership, and on production of the consent in writing of every other person interested in such deed or other document or in the rights created, conveyed or evidenced thereby, if he is satisfied that no change of person in law is implied in such change of name, endorse on the said deed or other document that the name of the person or partnership has been changed to the name stated in the application:

Provided that-

- (i) if the old name appears in another deed or other document registered in the registry, that deed or other document shall be likewise endorsed, and in either case

corresponding entries shall be made in the registers;

- (ii) the Registrar shall, except in the case of a person or partnership whose name has been changed in accordance with the provisions of any law, refuse to make the endorsements until he has, at the expense of the applicant, published a notice of the application once in the *Gazette* and three times in a newspaper approved by him;
- (iii) if any objection, which is in the opinion of the Registrar *bona fide* and sufficiently material, is not later than one week after the last publication in the *Gazette* or newspaper, whichever may be the later publication, lodged with the Registrar to the endorsement being made, the Registrar may refuse to make the endorsement except upon the authority of an order of court, and the court shall have jurisdiction to make such order in the matter as it may deem just.

(2) No change in the name of any immovable property shall be recorded in the deeds registry unless that change is required by the Registrar and Director in order to put into effect any new system of land numbering.

90. Women witnesses of deeds

Any female person who would, if she were a male person, be competent to witness any document intended for registration or filing or production in the deeds registry, shall be competent to witness any such document and any such document which was witnessed before the commencement of this Act by a female person, shall be as valid as if she had been a male person.

91. Attestation of powers of attorney executed in Botswana

(1) Any power of attorney executed within Botswana shall, if it purports to give authority to pass, cede, amend or cancel a deed capable of being registered or to perform any act proper to be performed in the deeds registry, be attested either by two witnesses above the age of 14 years, competent to give evidence in any court of law in Botswana, or by a justice of the peace, commissioner of oaths or notary public, duly described as such.

(2) No person shall be competent to attest any power of attorney under which he is appointed as an agent or derives any benefit.

92. Execution of deeds by prospective owners

If any deed or document required to be executed by the owner of immovable property has been executed by a person who has acquired the right to receive transfer or cession of such property, such deed or document shall, upon the person aforesaid receiving transfer or cession of such property, for the purposes of this Act be deemed to have been executed by the owner of such property.

93. Notice to Registrar of application to court

Before any application is made to the court for authority for an order involving the

performance of any act in the deeds registry, the applicant shall give the Registrar at least 30 days' notice before the hearing of such application and the Registrar may submit to the court such report thereon as he may deem desirable to make.

94. Substituted copy of lost deed

(1) If a copy of a registered deed or other document has been issued, in the manner prescribed by regulation, in substitution of a deed or other document which has been lost or is believed to have been destroyed, the original deed or other document, if still in existence, shall thereupon become void.

(2) If a deed or other document which has become void as aforesaid, comes into the possession or custody of any person who knows that a copy has been issued in substitution thereof, he shall forthwith deliver or transmit such deed or other document to the Registrar.

95. Exemption from liability for acts or omissions in deeds registry

No act or omission of any Registrar or of any officer employed in the 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-

- (i) 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 duties in connection with such act or omission, the Government shall be liable for the damage aforesaid;
- (ii) 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*.

96. Formal defects

No act in connection with any registration in the deeds registry shall be invalidated by any formal defect, whether such defect occurs in any deed passed or registered, or in any document upon the authority of which any such deed has been passed or registered or which is required to be produced in connection with the passing or registration of such deed, unless a substantial injustice has by such act been done which in the opinion of the court cannot be remedied by any order of the court.

97. Special provisions relating to rights of occupation in the Ghanzi district

(1) The practice prevailing in the deeds registry, prior to the commencement of this Act, of transferring or mortgaging rights of occupation derived from certificates of occupation issued by the High Commissioner in respect of pieces of land of indefinite extent situate in the Ghanzi district, is hereby declared to have been lawful and of effect; and subject to the provisions of subsection (2) that practice shall continue to be legal and of effect in the registry until a day

appointed by the President by order published in the *Gazette*.

(2) The remaining provisions of this Act, *mutatis mutandis*, shall apply to the transfer or mortgage of rights of occupation referred to in subsection (1):

Provided that no such transfer or mortgage shall be registered if expressed as relating to the right to occupy any defined portion of such a piece of land.

(3) A deed of State grant of a piece of land which appears to be a piece of land occupied in terms of a certificate of occupation as referred to in subsection (1) and which is issued to the holder of the rights of occupation thereof in substitution of those rights shall not be registered unless-

- (a) subject to the provisions *mutatis mutandis* of section 32(2), the occupier has lodged with the Registrar the title deed to those rights; and
- (b) if those rights are subject to a registered mortgage bond, there is produced to the Registrar the written consent of the holder of the bond for the application of the bond to the property granted under the deed of grant in substitution for the rights of occupation so held,

and the provisions of section 35(3) to (5), *mutatis mutandis*, shall apply in respect of the deed of State grant and of its registration.