

SUBMISSION BY THE LAW SOCIETY OF SOUTH AFRICA ON THE DEEDS REGISTRIES AMENDMENT BILL, 2016

Contents

A. INTRODUCTION.....	2
B. TIME ALLOWED FOR CONSULTATION	3
C. SUBSTANCE OF ELECTRONIC DEEDS REGISTRATION SYSTEM.....	3
D. PHASED APPROACH	4
E. POWER OF ATTORNEY SIGNED BY PURCHASER AND SELLER	5
F. DISTINCTION BETWEEN CONVEYANCER AND NOTARY	6
G. ADVANCED ELECTRONIC SIGNATURES	7
H. COMMENTS ON SPECIFIC SECTIONS	8

A. INTRODUCTION

1. The Law Society of South Africa (LSSA) represents more than 24 000 practising attorneys and almost 6 000 candidate attorneys countrywide. It is the umbrella body of the attorneys' profession in South Africa and its constituent members are the Black Lawyers Association (BLA), the National Association of Democratic Lawyers (NADEL) and the four statutory provincial law societies, namely the Cape Law Society (CLS), the KwaZulu-Natal Law Society (KZNLS), the Law Society of the Northern Provinces (LSNP) and the Law Society of the Free State (LSFS).
 2. The LSSA welcomes, in principle, the introduction of an electronic deeds registration system, which is long overdue.
 3. South Africa's land registration system is arguably one of the best in the world. It affords security of title without the need on the part of the State to guarantee such security. The Supreme Court of Appeal¹ has recently restated that registration is intended to protect the real rights of those persons in whose names such rights are registered in the Deeds Office and it is a source of information about those rights.
 4. Taxpayers, especially those who do not own land, are consequently not burdened with this obligation. Title insurance is also unknown in this country, simply because it is unnecessary. The same cannot be said of an advanced country such as the United States of America where title insurance is the norm and places a financial burden on property owners.
 5. The South African land registration works well not only because of the important role played by our Deeds Registries, but also because of the role played by property attorneys (referred to herein as property lawyers or conveyancers).
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6. The integrity and security of the deeds registration system must be maintained and upheld. To ensure this, the involvement of various stakeholders is of paramount importance.

¹ *Nedbank Ltd v Mendelow NO and Another (686/12) [2013] ZASCA 98*

7. The LSSA is of the view that the introduction of an electronic deeds registration system can significantly enrich South Africa's deeds registries system if introduced and managed correctly, or distort it significantly, if introduced hurriedly.

B. TIME ALLOWED FOR CONSULTATION

8. The time allowed for comments on the entire Bill that will vastly change the way in which conveyancing will be practised, is completely insufficient.
9. The consultations with the LSSA referred to in 5.1 (B) of the Memorandum to the Bill, were not recent. They were superficial and of a general nature only, and at the time were on the basis that an entirely new act will have to be written. The LSSA reserves the right to make further comments and proposals as and when may be appropriate.
10. Interaction with the Department of Rural Development and Land Reform and/or its service providers has been desultory, fragmented and limited, which is not satisfactory. We are also unsure as to whether stakeholders such as banks, local authorities and surveyors have been properly consulted.
11. The LSSA aspires to work with the Department and relevant stakeholders to bring about the necessary changes, especially as property lawyers have been very involved with banks and others for years and we do not want to see unnecessary duplication (or worse) of systems and processes.

C. SUBSTANCE OF ELECTRONIC DEEDS REGISTRATION SYSTEM

12. Section 1(2) of the Bill provides that:

"The Minister must prescribe—

(a) standards for—

(i) the operation of the electronic deeds registration system in deeds registries; and

(ii) the collection and storing of data through the electronic deeds registration system;

(b) procedures to be adopted and technological specification required for the electronic deeds registration system; and
(c) other matters related to the functioning of the electronic deeds registration system."

13. From the outset it must be made absolutely clear that it is extremely difficult to comment on a Bill without having knowledge of the anticipated solution envisaged. The electronic deeds registration system has been discussed as far back as the 1990's and numerous solutions have been anticipated, but nothing has been cast in stone.
14. It is vital for the LSSA and other stakeholders to be involved in the process of developing standards and procedures as referred to in section 1(2) of the Bill, which should also take account of existing South African Revenue Service (SARS) and SANS standards and guidelines for storage and retrieval of data.
15. **Recommendation:** The Department appoints an *e-DRS Task Team* consisting of various stakeholders to attend to and finalise the Deeds Registries Amendment Bill and the development of appropriate standards and procedures for the effective introduction of an electronic deeds registration system.
16. **Recommendation:** Terms of Reference be developed for the *e-DRS Task Team* to also develop a shared workflow process.

D. PHASED APPROACH

17. It appears from the context that the change to the electronic deeds registration system (as and when it happens) will be instantaneous and without any transitional period that allows for both paper and electronic systems. The approach followed in the United Kingdom, where electronic deeds registration was introduced gradually, whereafter it was elevated to "preferred" status, and presumably to be followed by a cut-off date when paper documents will no longer be processed, appears to be more practical.
18. It is recommended that a gradual phasing-in is preferable to an absolute and immediate changeover, not least on account of previous experience of conveyancers with

comparable changeovers, such as with the introduction of new electronic systems at the National Home Builders Registration Council, at municipalities and at SARS with e-filing for transfer duty. Almost invariably these changeovers resulted in huge delays and unsolvable problem cases with resultant frustration for the public and the conveyancers serving them.

19. It is also evident that the database does not use contemporary technology and is non-relational whilst its integrity and accuracy are not always what they should be.

The LSSA believes that the database structure should be overhauled and its integrity thoroughly checked as a precursor to any digital registration process. We also wonder what happened to the earlier e-Cadastre concept. An integrated approach of that sort would present the Deeds Office with substantial e-commerce opportunities and also allow consumers to drill down easily into relevant information from many sources through a Deeds Office portal.

20. **Recommendation:** The Deeds Registries Amendment Bill must provide for a transitional period with transitional clauses that cater for a parallel hard copy process to allow those not yet digitally enabled to participate, although over time the process will become purely digital.
21. **Recommendation:** Section 2(5): The insertion of the word “electronically” before the word “executed” in subparagraphs (a) and (b) will keep the door open for any transitional period where paper registration can still be effected in case of need during a transition period.

E. POWER OF ATTORNEY SIGNED BY PURCHASER AND SELLER

22. It is not clear whether the legislator appreciates or intends the far-reaching effects [section 20(2)(a)] of the conveyancer being appointed to act in a Power of Attorney signed by or on behalf both purchaser and seller. The implications of the conveyancer being appointed by both parties are still being debated, as (for example) in the recent Supreme Court of Appeal case of *Minister of Agriculture v CM De Klerk (747/2012) [2013] ZASCA* where three Judges of Appeal ruled that the conveyancer was acting for

the purchaser as its client, while the minority judgement ruled that the appointment of a conveyancer by both parties in the deed of sale indicated that the conveyancer was acting for both parties in the transaction. The entire case and its outcome turned on the question: "for whom was the conveyancer acting?"

23. The proposed section will create a division between the common law attorney-and-client relationship guiding other attorney work (e.g. litigation where the interests of the client are paramount) on the one hand, as opposed to conveyancing work where the conveyancer acts for both parties who may have conflicting interests that must be balanced, on the other.
24. **Recommendation:** The proposed section 20(2)(a) should be seriously reconsidered and, if necessary, a formal legal opinion should be obtained as to the implications and liability flowing from the conveyancer being appointed to act as representative and agent of both the purchaser and the seller in the same transaction.

F. DISTINCTION BETWEEN CONVEYANCER AND NOTARY

25. The distinction between a conveyancer and a notary does not always appear to be strictly observed in the Bill and care should be taken to always distinguish between notarial documents for the transfer of rights (that are executed before a notary and registered in the Deeds Office), as opposed to conventional conveyancing transactions for the transfer of property that are executed in the Deeds Office, either by a conveyancer or by the Registrar as they case may be.
26. The current requirement that original documents must be preserved in the notary's protocol must be considered and appropriately dealt with in the Bill, to establish where and what the original executed notarial document is and what the relationship between the protocol copy and the electronic "original" in the registry must be.
27. **Recommendation:** The Bill should be reviewed in its entirety to draw a clinical distinction between notarial documents for the transfer of rights, as opposed to conventional conveyancing transactions for the transfer of property.

G. ADVANCED ELECTRONIC SIGNATURES

28. It is regrettably clear that the complexities of advanced electronic signatures (AES) have not been fully comprehended. An accurate understanding, regulation and implementation of advanced electronic signatures is vital for the integrity of an electronic deeds registries system. Mark Heyink's incisive comments about it are attached as Annexure "A".
29. It is also doubtful whether the Department is equipped to introduce a digital registration process as yet, as its systems are currently largely non-digital, its staff lacks digital competence and its equipment is certainly not contemporary or particularly effective, especially from a consumer's perspective. Proper data security and awareness is vital (especially with the imminent promulgation of the Protection of Personal Information Act) to ensure continuing trust of the process and the Department cannot take such continuing trust for granted, especially if the digitisation process is not as inclusive as possible as it unfolds. Its processes and equipment, as they currently stand, do not bode well for continuation of trust and we would like to be able to work with it to ensure that trust continues and is well founded.
30. The LSSA believes that any AES-based approach should be common throughout our society and existing processes, including the Department of Home Affairs, SARS and others, should be explored and integrated whilst their mistakes and missteps should also not be repeated.
31. **Recommendation:** The *e-DRS Task Team* should also include representatives from the Department of Telecommunications and Postal Services and other authorised encryption service providers and potential Registration Authorities and should be tasked with developing clear procedures, regulations and standards pertaining to advanced electronic signatures.
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32. **Recommendation:** the e-DRS Task Team must also look at the integrity of the existing database and its somewhat antiquated electronic structures should be made contemporary, whilst data and personal information security must be priorities.

IMPORTANT CAVEAT:

The comments below may be premature as the solution, as already alluded to, is unclear.

H. COMMENTS ON SPECIFIC SECTIONS

These are by no means definitive or complete, especially in the light of the abbreviated period allowed for comment and the general lack of consultation to date.

33. **Section 2(5):** In sub-paragraph (b) the words "or notary" should be inserted after "a conveyancer".
 34. **Section 3(5):** The wording of this sub-section is confusing as any document scanned or incorporated into the electronic deeds registration system cannot be the only and valid record. Cognizance should be taken of, for example, court orders, etc.
 35. **Section 4(1)(a):** It is not clear if this section will encompass all supporting documents, such as Powers of Attorney, transfer duty receipts, rates clearance certificates, etc.
 36. **Section 4(1)(b):** This clause should be amended once and for all to provide that the conveyancer appointed in a Power of Attorney by the owner/holder may apply for rectification of minor errors that are not material and will not affect the meaning of the deed or the rights of the holder/owner. Much paper, time and effort are wasted to rectify minor matters, such as spelling errors and other instances where the meaning and intent are obvious notwithstanding the technicality of a minor error and where no doubt exists as to what it should be. The current proposed amendment will merely add unnecessary time, cost and complexity to correction of minor, factually verifiable errors.
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37. **Section 10 (1)(dA):** The Deeds Registries Act cannot prescribe the qualifications of conveyancers as this is done by other legislation, like the Attorney Act and the Legal Practice Act.

38. **Section 10(1)(m):** The need for this sub-section is not clear. Upon registration in the deeds office any deed with the AES of the Registrar becomes a public document. The AES serves as authority for any legitimate purpose, once verified, that neither the document nor the AES of the Registrar has been tampered with. How does a Registrar again authenticate or verify an original document that already has its own authentication built in by way of the AES?
39. This sub-section also has a repetition with regard to information purposes.
40. **Section 13(1):** This section does not cater for notarially attested deeds and documents.
41. **Section 13(2):** It is not clear whether this section has any relevance, given the fact that the seal will be procured electronically.
42. **Section 15:** This section does not explicitly refer to a notary and sub-section (2) should include a notary to be registered as an authorised user. There are notaries who are not qualified as conveyancers and who lodge notarial deeds in the Deeds Office.
43. **Section 15(A)(4):** Current legislation implies that electronic registration documents must be retained indefinitely by the conveyancer or notary concerned. There needs to be consideration of what happens if a practitioner dies or is no longer in practice and the banks and Law Society, in particular, would be concerned about ensuring continuity of access to such information. At the same time, we believe that there should be provision for a hard copy issued on request by conveyancers or (preferably) the Deeds Office for "information only", especially of title deeds, for members of the public who will not generally have ready online access for some considerable time or want to have a digital copy only of their title deeds.

There is considerable emotion attached to having title deeds in a tangible form, especially in view of our dark history of land ownership and dispossession and there must be proper provision for this. Some may be happy to only have digital access to any title, right or record but we believe that many people will not be happy with that for some time to come.

44. **Section 16:** The existing section 16 in the Deeds Registries Act, as read with section 31, is apparently interpreted differently by different parties. The existing system allows transfer by endorsement if the entire property is affected, but some Registrars insist on a separate deed of transfer notwithstanding the clear wording of Section 16 that "*such endorsements on any such title deed as may be necessary to register transfers*" must be done by the Registrar. The entire concept of transfer by endorsement must be re-examined. By now the reasons for transfer by endorsement (e.g. simplicity and reduction of paperwork) no longer apply and it is recommended that, as a rule, all transfers of immovable property or rights should be embodied in a new deed. Transfer by endorsement in an electronic system is neither necessary nor desirable and will be bound to cause problems, as it currently does in the existing paper system.
45. **Section 17:** Under the Deeds Registries Act it is the responsibility of the conveyancer to collect and lodge all deeds affected by a change in status. Under an electronic system the originals are already in the Deeds Office, the conveyancer cannot "collect" same and by implication it can no longer be the responsibility of the conveyancer to collect or submit other affected documents. In the event of a lost document (presumably electronic deeds can get lost in cyber space or can be destroyed), will there then be an obligation on the conveyancer who previously registered such document to produce same from his/her safe-keeping?
46. **Section 20(1):** This section cannot be amended as proposed as the Sheriff must also be allowed to execute deeds on behalf of an owner, for example in sales in execution.
47. **Section 31(1)(b):** With reference to the above discussion concerning transfer by endorsement, the meaning of this sub-paragraph is unclear as to which land and which title deed must be endorsed.
48. **Section 44(1):** If rectification of title is required, presumably the word "may" in line 4 should be replaced by "must", unless it is intended that the Registrar may refuse to rectify a title deed.
49. **Section 64(1):** The use of the words "as nearly as practicable" should be extended to all references to forms prescribed pursuant to the Regulations issued under the Deeds

Registries Act. This will prevent compliance with the absolute letter when there can be no doubt about the meaning and intent, or when a slight deviation from the form will make the document more intelligible and the meaning clearer.

50. **Section 95(3):** While the need for identifying witnesses is clear, the Bill should clarify whether the names and identity numbers of witnesses must then also be examined by the Registrar and compared to other documents where the same person may be recorded, whether as a party or whether as a witness only. It is recommended that such duty should not be extended to the name and identity numbers of witnesses, as same would add an entire new level of checking and cross checking for conveyancers and deeds office officials.

51. **Section 102:** The definition of "person" must be revisited, as it does not cater for notarial bonds.

We look forward to further and closer collaboration with the Department and others to ensure we implement the best possible electronic deeds registration system for all.

We will make ourselves and any others in our profession who can contribute available at any time and can arrange proof of concept trials as necessary, with demographically and geographically varied and representative practitioners whenever asked to do so.

COMMENT BY MARK HEYINK ON THE DEEDS REGISTRIES AMENDMENT BILL 2016

Introduction

I have been requested to assist the Law Society of South Africa ("LSSA") in providing comment on the aforementioned Amendment Bill and would wish in due course to take part in the comprehensive consultation process on behalf of various interested parties, after the Bill has been approved by Cabinet for purposes of the publication for public comment as contemplated in paragraph 5.2 as well as further consultation processes that may be necessary in terms of the consideration of the Bill in parliamentary portfolio committees.

In further consultation I will act on behalf of the LSSA as I may be instructed, other interested third parties, a number of which I represent in the normal course and who I believe would wish to make representations in further deliberations on the Bill, and in my personal capacity.

In this regard I refer to the period for comment of 30 days allowed from the 9th March 2016. Considering the importance of the effect of the Bill as well as the various stakeholders that it will be necessary to deal with in addressing the detail of what is required it is my view that this period is unreasonably short, particularly in light of the intervening Easter holidays. This has unnecessarily truncated the period for comment and not allowed for consultation amongst commentators providing input on the Bill as it stands.

General Comment

The initiatives to establish an Electronic Deeds Registration System are long overdue and are to be welcomed. However, this having been said, if the "Security of title", which is the first issue dealt with in the background provisions to the memorandum providing guidance on the Amendment Bill, is to be maintained in South Africa the issues of information security in the communication and processing of electronic records will need to be considered in far greater depth than currently appears to be the case in the Amendment Bill. It may be argued that these are issues which are to be dealt with by prescription at a later time but that would be the wrong approach. It is accepted information security practice that the design of information systems, particularly of the nature of a deeds registries system that demands high degrees of security, must be considered and built into technologies and the processes governing the use of the technologies in the design of the system. If this has been done it is not evident from a reading of the Amendment Bill.

Further, it appears that the Bill, and one assumes the development of the Electronic Deeds Registration System itself, has been considered primarily in the context of the Deeds Office itself. The problem with this is that the Deeds Office interfaces with several entities, most notably conveyancers. While it is currently the conveyancer's obligation to obtain certain documents that

need to be lodged in the Deeds Office to satisfy current deeds registration practice and to verify information provided to the conveyancer and Deeds Office for the purposes of the registration of rights in the Deeds Office, consideration needs to be given to how this may be achieved differently. In short the paper process should not be computerised but the ability to utilise the technology available to its optimum capability should be examined. For instance direct interfaces with certain of the entities providing information on which registration relies, without limitation local authorities and SARS, is not only desirable but may provide the quantum leap necessary if the conveyancing process and the deeds registration process be properly streamlined to cope with the loads that the background memorandum indicates will need to be dealt with.

It is also self-evident that one of the cornerstones of the current deeds registration process is signature. This is to be substituted in an Electronic Deeds Registration System with advanced electronic signatures. However, the drafting of the Bill betrays a lack of appropriate knowledge in the workings of electronic signatures generally and advanced electronic signatures specifically. A proper understanding of the use of advanced electronic signatures in fulfilling not only the functions of signature but also in securing electronic information would benefit both the technologies and the processes governing the use of the technologies that may be employed by the Deeds Office.

It is strongly recommended that these general issues be addressed properly and that the Bill as it stands is not presented and approved by Cabinet until these issues have been thoroughly considered and redrafting of these provisions undertaken.

Comment on Sections

1. Ad Paragraph 1

It is contemplated that paragraph 1B be inserted into the Act. In general terms this allows for the establishment and maintenance of an Electronic Deeds Registration System and ancillary Deeds Office tasks. It is subsection (2) that is critical and in terms of which it would appear significant work would need to be done. Central to the Deeds Registries System in its current form and in the contemplated electronic system is security. Indeed, in providing the background in the memorandum dealing with the Amendment Bill the first words are "Security of title ...". Therefore both the prescribed technologies and processes governing the security of the proposed Electronic Deeds Registration System requires proper consideration. Of course further prescriptions governing how conveyancers may use the system that may be contained in Deeds Office Regulations and other mechanisms of guidance which may be used (for instance Chief Registrar Circulators) will require careful deliberation and proper definition if the security of title that South Africa can be proud of, is to be maintained.

It is also important to note that the Electronic Communications and Transactions Act to which the Amendment Bill is subject also requires consideration, particularly relating to the

provisions governing signature. The fact is that this Act has remained un-amended since 2002 despite the criticisms of provisions in that Act which present barriers rather than facilitate electronic communications and transactions, as is the stated purpose of the Act and the significant development of technology during that period. It would be wise for the Ministry of Rural Development and Land Reform to engage with the Department of Telecommunications and Postal Services (the custodian of the ECT Act) relating to amendments to the ECT Act which may not only result in facilitation of an electronic deeds registries system but also resolve some of the difficulties that the ECT Act currently presents in this regard.

2. Ad Paragraph 2

Central to the security that is contemplated in the Bill is the use of advanced electronic signatures. What is clear is that neither of the accredited providers of advanced electronic signatures have been consulted in this regard and fundamental issues relating to the use of advanced electronic signatures and the inherent security that can be provided remain unaddressed.

3. Ad Paragraph 2

Paragraph 2 is expressly subject to Section 19(3) of the ECT Act and deals with seals of office. This requires that a seal when electronically applies incorporates an advanced electronic signature. It is recommended that regard be had to the Regulation (EU No. 910/2014) of the European Parliament. This Regulation which becomes "law" in the European Union in July 2016 expressly deals with seals of office and their application in the context of the use of what is referred to in the Regulation as "qualified electronic signatures" (which are similar in intent and purpose to advanced electronic signatures as defined in the ECT Act). It is suggested that it would be productive for those entrusted with dealing with the prescribed regulations to, together with the Department of Telecommunications and Postal Services, to consider these international developments in electronic signature technologies and their regulation.

It would be important at an early stage to determine and define in the Act, as opposed to regulations, which Public Key Infrastructures providing the advanced electronic signatures for the purposes contemplated in the Bill, would be accepted. It appears at first blush that there would be two separate Registration Authorities (and possibly Certification Authorities) that would need to be considered. The first of these would be the Registration Authority which would verify the credentials of a conveyancer or a notary public, who may lodge documents in the Deeds Office for registration. It would seem that the LSSA would logically be best placed to deal with this, as currently the responsibility for the verification of this information is a Provincial Law Society issue, but will within a relatively short period of time become that of the Law Council of South Africa in terms of the Legal Practices Act.

On the other hand persons whose signatures may be required in the course of the processing of personal information in the Deeds Office, including execution by a Registrar, would be employed by the Department of Rural Development and Land Reform. Therefore a separate Registration Authority would appear to be necessary as the offices and authority of these persons are determined by that Ministry.

An omission from Section 2 appears to be notaries public who may also execute deeds which are registered in the Deeds Office by the Registrar. It would appear that it is important that the distinction between a conveyancer and notary public and their offices should not be lost and that this should be dealt with in the Act and not in subordinate regulation.

4. Ad Paragraph 3(a)(u)

It is not clear from these provisions whether it is intended that Powers of Attorney may be dealt with electronically, although it is logical that this is the case. This is an important consideration because in many instances documentation may be received by attorneys in paper and text form. Provision should be made to allow for the certification of these documents in terms of Section 18 of the ECT Act and that the documents can be rendered into digital form and certified as copies by a conveyancer using an advanced electronic certificate.

5. Ad Paragraph 3(a)(y)

In this instance the word "keep" is used and there are other instances in the draft Bill which refer to "storage". As the ECT Act specifically deals with "Retention" of documents in Section 16 it is recommended that the word "retention" should be used to ensure that in respect of electronic records that the wording used in the Amendment Bill and in the ECT Act are consistent.

6. Ad Paragraph 3(5)

While the intention of this provision is understood, it is submitted that it may not be achieved on the current wording. It should be borne in mind that "original" in the ECT Act is clearly defined and it caters for the possibility of electronic records not being linked to a unique record but rather that they remain an original as long as the information within the record remains complete and unaltered. The wording as it stands appears to pervert this intention in the ECT Act. If a print-out is made of an electronic record, Section 15(4) of the ECT Act expressly provides for the print-out to be used in various circumstances (including administrative processes) provided that it is certified as contemplated in Section 15(4).

7. Ad Paragraph 5(e)

It would appear that the word "information" between the 2 brackets should be deleted to make grammatical sense.

Attention is drawn to the provisions of Section 15(4) of the ECT Act that provides for copies, print-outs or extracts from data messages to be certified by an officer in the service of (in this case the Registrar) which on its mere production in civil, criminal, administrative or disciplinary proceedings constitutes rebuttable proof that the information contained in the print-out, extract or copy accurately reflects the electronic record. It is recommended that an alignment should be made with these provisions and those in the ECT Act.

8. Ad Paragraph 7

It is suggested that the provisions of 15(7) be dealt with in alignment with how advanced electronic signatures will be issued to either a conveyancer or a notary public. If there are any other offices which are allowed to lodge documents in the Deeds Office (I am not certain what the provisions are relating to documents possibly provided from surveyors) these may require separate consideration as the issue of advanced electronic signatures to these persons may come from a separate Registration Authority.

9. Ad Paragraph 8

It is recommended that this paragraph be reconsidered and that in addition to any prescribed procedures that may in the future be prescribed specifically to Deeds Office registration, that the wording of this section be aligned to the "Security Safeguards" provisions established in the Protection of Personal Information Act (Section 19). The electronic records in any event will almost invariably contain personal information and there seems to be value in ensuring that the Security Safeguards that would apply in this instance would be aligned to the Protection of Personal Information Act and to regulations which may be stipulated by the Information Regulator in terms of that Act. Further, this would also achieve the requirements of accuracy and integrity of information as defined in various sections of the ECT Act.

10. Ad Paragraph 13

It is recommended that subparagraph 2 be considered in light of comment relating to documents in paper and text that may be digitised by conveyancers for the purposes of electronic lodgement. This is dealt with in 7.

11. Ad Paragraph 19

In subparagraph 32(1)(b) endorsement of title deeds is contemplated but it is not clear how this will be dealt with. In using advanced electronic signatures (endorsements usually being signed by the Registrar) it must be recognised that in each instance that an electronic record

is changed in any manner, the whole record is re-signed. This is how the hashing mechanisms inherent in advanced electronic signatures ensure that any amendment of the electronic record is detectable. Thus, in addition to fulfilling the normal functions of signature in manuscript form an advanced electronic signature by its nature affords security that is not achievable using manuscript signatures. Therefore it is not as if an endorsement can be placed on the electronic record and only the endorsement signed. That would create difficulties with the integrity of the document as a whole. Therefore these provisions need to be reconsidered in light of the technological issues surrounding the use of advanced electronic signatures.

The same considerations would apply to Section 32(1)(c) as contemplated in the Amendment Bill.

12. Ad Paragraph 21

Prior comments relating to executing certificates that in current conveyancing practice may form part of the documents but in electronic records replace the document entirely, are repeated.

13. Ad Paragraph 23(b) and (c)

The issue of surveyors diagrams certified by the Surveyor General electronically need to be seen in the context of changes to the documents which are signed using an advanced electronic signature creating an entirely new electronic record.

14. Ad Paragraphs 26 and 27

Issues relating to paper documents that may be used being digitised and signed by the conveyancer (bearing in mind that in many instances persons or entities that may currently be required to sign consents etc. and who may not have the technological ability to do this electronically) needs to be carefully thought through. The provisions as they stand do not appear to adequately cater for this.

15. Ad Paragraph 28

The previous comment is repeated.

16. Ad Paragraph 33

Consideration would need to be given to the endorsements that relate to the application of signatures by conveyancers. As advanced electronic signatures "lock" the whole document it would appear to be unnecessary for a preparation certificate to be separately prepared on the document and appropriate wording relating to the preparation can be included in provisions in terms of which the conveyancer executes deeds.

17. Ad Paragraph 40(3)

The comments relating to how consents are to be dealt with which may be obtained in paper and text form are repeated.

18. Ad Paragraph 53(c)

As a diagram can be in electronic form should the wording relating to data message which appears in 53(b) not be replicated in respect of a diagram? Consistency needs to be achieved in the use of wording in finalising the Bill.

19. Ad Paragraph 53(e)

The previous comment is repeated relating to a general plan.

20. Ad Paragraph 53(k)

It may not be necessary in the Act but it certainly appears to be necessary in terms of regulations that advanced electronic signatures will need to emanate from Certificate Authorities which are recognised and the use of which are prescribed by the Deeds Office. The reasons for this are set out in prior comments and to some extent the Public Key Infrastructure that is necessary where the Deeds Office is the relying party (relying on the electronic signatures used by conveyancers and notaries public) also needs to be carefully considered. Even though the security may vest in the document itself, the facilitation of checking of certificates (perhaps automatically where this is appropriate) can enhance and significantly streamline the deeds registration process and the security of electronic records.

Conclusion

As is evident from this comment, the exciting initiatives of the Minister to establish an Electronic Deeds Registration System would be enhanced considerably by in-depth engagement with experts in the fields of electronic commerce, advanced electronic signatures and information security. It is important that the disciplines relating to these 3 issues are reflected in the proposed legislation and supplemented in further regulation. However, to enact legislation (which by experience we know is not easily changed) without considering these critical issues relating to the information system itself and the processes (which will be prescribed by the Act and Regulations) carefully and holistically, will result in the computerisation of a paper process instead of unlocking the enormous advantages that technologies hold in streamlining and optimising the registration process.

Further, as the system is designed to provide security of title, the information security issues (incorporated in which is the use of advanced electronic signatures) need to be considered in greater depth than is evident from the draft Bill as it currently stands.

It is also important to recognise that the deeds registries process is highly dependent on conveyancing practice outside of the Deeds Office and that this too needs to be addressed in equipping conveyancers and notaries public to ensure that the advantages which are heralded by this initiative may be realised.

Credentials

- I was admitted as a Conveyancer in 1983 and as a Notary Public in 1989. I was involved in the practice of conveyancing in my capacity as a commercial property attorney and the manager of the conveyancing department of a large firm of attorneys in Johannesburg for many years. This having been said I immediately stress that since the year 2000 I have not practiced conveyancing on a day to day basis.
- In 1996 I was seconded by the LSSA (Association of Law Societies of South Africa as it then was) Property Law Standing Committee for the specific role of working with the then Chief Registrar of Deeds Mr Jan Slothober and his Deeds Office team, as well as Mr Gustav Radlof, a member of the LSSA's Property Law Committee, who had extensive conveyancing and practical Deeds Office background, in the formulation of an electronic deeds registries system. In this regard I worked with both the Chief Registrar of Deeds and various other interested parties, including the technology service providers to the Deeds Office in the conceptualisation, planning and documentation of an electronic deeds registries system. Regrettably, although this project had been largely completed to the point of applying to the Minister of Finance for establishment of a public/private partnership, the then Minister of Rural Development and Land Reform abandoned that project. Nonetheless, on a reading of the Amendment Bill, while technology has advanced and there have been legislative developments relating specifically to electronic communications and transactions, the principles governing that project remain materially identical to those that appears from the Bill, to be contemplated by the Minister in this instance.
- In 2002 by association with KPMG, I led thought leaders and business leaders in workshops that addressed the Electronic Communications and Transactions Act and represented approximately 40 companies in preparing comment and making representations to Parliament in connection with the Bill. Since then I have been actively involved in various initiatives relating to proposed legislation addressing electronic evidence, the use of electronic signatures and advanced electronic signatures, and proposals relating to the amendment of the Electronic Communications and Transactions Act.
- In 2002 I was appointed by the then Minister of Justice to the South African Law Reform Commission to investigate the issue of privacy and the establishment of what is now known as the Protection of Personal Information Act, with my specific responsibility being information security. I had previously qualified as a Certified Information Systems Security Professional, an international qualification recognised globally. At the request of both the ANC and the DA

I assisted the Parliamentary Portfolio Committee in its deliberations and the finalisation of the drafting of the Protection of Personal Information Bill, to its enactment in 2013.

- I currently act for one of the only two accredited providers of advanced electronic signatures in South Africa, a major vendor of conveyancing software to the conveyancing profession, and various other parties who would have an interest in the planning and establishment of an Electronic Deeds Registration System. I stress that due to the time constraints already referred to, I have been unable to consult with those parties in the provision of comment.
- Over the recent past I have assisted the LSSA in its consideration of the use of electronic signatures and advanced electronic signatures by practitioners and had an oversight responsibility for the Advanced Electronic Signature Project embarked upon by the LSSA.
- In 1997 I acted as the Notary Public required to oversee and witness the key generation and key issuing ceremonies at which the first digital signatures (prior to enactment of the Electronic Communications and Transactions Act) were issued to the South African Reserve Bank and distributed by the South African Reserve Bank to banks using the SAMOS system for the purpose of verifying daily settlements between banks within the jurisdiction of the South African Reserve Bank. I have provided notarial oversight to many key ceremonies, generating the keys to be used for electronic and advanced electronic signatures, since that time.
- I currently serve on the National Cybersecurity Advisory Committee to the Minister of Telecommunications and Postal Services, which committee was established under the National Cybersecurity Policy Framework.

Kind regards,

Yours sincerely
MARK HEYINK
