

## SHOULD THE REAL AGREEMENT BE SUBJECTED TO FORMALITIES?

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### Summary

No formalities are required in South African law in respect of the real agreement relating to the transfer of ownership in immovable property. The agreement is, for example, derived from surrounding circumstances, such as the fact that the parties concluded an obligatory agreement which is aimed at the transfer of property, or the fact that the transferor has signed a power of attorney, or the fact that the transferee has paid transfer duty. However, this circumstantial evidence is not conclusive proof that an agreement to transfer property has in fact been concluded. The transferor might have signed the power of attorney, for example, while he was erroneously under the impression that he was signing an option, or the transferee might refuse to take delivery because the property does not correspond to the thing agreed upon. In each situation neither of the parties has the intention to transfer property, and ownership could therefore not be transferred. Yet registration is possible even in the absence of a valid real agreement. This may result in an incorrect register because the person who is indicated as the owner is in fact not. It therefore appears that there is a deficiency in South African law with regard to land registration and a need for greater certainty regarding the question as to whether or not a real agreement has in fact been concluded. In this paper two solutions are explored: (1) the defect can be rectified by requiring the parties to appear (either in person or by a representative) before a conveyancer and to declare that they respectively intend to transfer and obtain property, as is the case in the Netherlands and Germany. The conveyancer should reduce the agreement to writing and the document by which the parties are bound should

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then be lodged with the registrar as proof of the real agreement; (2) the real agreement may be incorporated into the deed of transfer. Any one of these proposals will remove any doubt regarding the existence of the real agreement and will ensure that the register reflects the true legal position.

**Key words**

Transfer of immovable property

Deeds registration

Deeds of transfer

Conveyancer

Real agreement

Notary