**PROPERTY SALES AND TRUSTS: DEMAND PROOF OF TRUSTEE AUTHORITY**

"If you want to make your house easy to sell, make it easy to buy" (Anon)

You are overjoyed at receiving a good offer for your property – not easily achieved in these hard times and of course you certainly don’t want to do anything to jeopardise the sale.

But perhaps do that little bit extra homework before accepting the offer if it comes from a trust. The pitfall here – and it’s one that perennially takes sellers by surprise – is that the trustee/s signing the offer to purchase/sale agreement must have the necessary authority to do so. Drop the ball on that one and you will find yourself without any sale at all.

As a seller learned to its cost recently in the Supreme Court of Appeal (SCA)…

For want of a second signature the seller goes down R3m

* In 2013 a company sold to a trust for R1.45m a “real right of extension” in a sectional title development (a right in this case to build on common property).
* An agreement to sell a “real” property right of that type must, as with a standard property sale, be in writing and signed by both seller and buyer (or their authorised agents) to be valid.
* The seller’s problem here was that only one of the trustees signed the sale agreement. The other trustee refused to sign, and in 2017 the seller found itself trying to convince the High Court to order the trust to pay it the R1.45m plus interest (by then a total just shy of R2m), alternatively to order the trustee who signed the deal to pay up personally in return for taking transfer into his own name.
* The High Court however pointed out that where a trust has more than one trustee, they must act jointly, and a property sale agreement needs the signatures of all the trustees. One trustee signing alone would be regarded as an agent and would need either general authorisation in the trust deed or written authorisation to sign the particular agreement. Otherwise, as in this case, the signing trustee acted without authority and the sale was void.
* Defeated in the High Court, the seller appealed to the SCA, abandoning its claim against the trust itself and now trying only to hold the signatory trustee liable in his personal capacity.
* Its argument was that, despite the invalidity of the sale, the trustee was still liable – in his personal capacity - to pay and take transfer as he was guilty of breaching the clause (standard in property sale agreements involving corporates and trusts) that he “warrants and binds himself in his personal capacity by virtue of his signature hereto … that he is duly authorised to enter into this agreement on behalf of the company, close corporation or trust”.
* No claim there, held the SCA, commenting that “The ingenuity of this argument is surpassed only by its lack of substance … what [the seller] is essentially seeking is specific performance of a void and invalid contract against the person who signed that contract but was not a party to it – this on the basis that if he’d had the authority to sign, which he had not, the property would have been sold to another. This merely had to be stated to be rejected.” This appeal, said the Court, was doomed to fail.
* The end result – six years down the line the seller loses its claim (no doubt over the R3m mark including interest by now) and its legal bill will be a hefty one.

**Could you sue the trustee personally for damages?**

“Theoretically”, said the SCA, the signing trustee could be held liable to the seller for damages flowing from his breach of warranty, and that is of course a strong warning to those signing for trusts and companies - make 100% sure that you have full authority to do so!

But, said the Court, the seller in this case didn’t formulate its claim as a damages claim against the trustee personally and even it had, it would have had to provide evidence as to what damages it had actually suffered.

Indeed proving damages in a case like this is never going to be easy – the seller would have been much better off insisting upfront on proof of the trustee’s authority to sign alone.

**As always, get professional advice before you sign anything.**