TRUSTEES: YOUR RISK OF PERSONAL LIABILITY IN PROPERTY SALES

Firstly, a warning to anyone selling or buying property to/from a trust - have your lawyer check upfront that you are adequately protected by the terms of the sale agreement.

The problem is that contracting with trusts has its own specific set of rules and, as a recent High Court case illustrates, standard sale agreements don’t always provide adequately for them.

A seller sues an unauthorised trustee for R2m - personally

* A company sold a “real right of extension” (a right to build additional buildings in a sectional title development) to a trust,
* The agreement of sale was signed by only one of two trustees,
* The sale agreement was invalid because the trustee who signed had no authority to sign alone,
* The seller sued the trustee in an attempt to hold him personally liable for payment of the purchase price of R1,45m (almost R2m with interest),
* The seller relied on a clause in the sale agreement – standard in such agreements – in which the trustee “warrants and binds himself in his personal capacity” that he had authority to sign and that the trust would perform in terms of the sale,
* A further provision bound any unauthorised signatory as surety and as the purchaser in his/her personal capacity. The seller’s problem here was that this provision specifically only applied to anyone signing for a company or close corporation yet to be formed. There was nothing specifically binding an unauthorised trustee to similar personal liability,
* The seller tried to persuade the Court that the trustee was nevertheless liable as a surety, or that there was an implied term in the agreement holding him personally liable, but the Court was unimpressed on both counts and dismissed the seller’s claim.

The risk for trustees

As the Court pointed out, the seller could have sued the trustee personally not for the purchase price as such, but rather for damages arising from the trustee’s “breach of warranty”.

There’s a warning there for all trustees - you risk a damages claim in your personal capacity if you don’t make sure that you are fully authorised to sign, that you hold the necessary letter of appointment from the Master of the High Court, that your trust has the power to do whatever you are binding it to do, and that all the terms of the trust deed have been complied with.

And a lesson for property sellers and buyers

On the other hand the seller, to succeed in such a damages claim, would have had to prove the extent of its loss, causation of that loss, mitigation of its damages and so on. Its position would have been much clearer, safer and easier had it, before signing the sale agreement –

* Checked for all the necessary signing authorities, compliance with the trust deed etc (prevention being as always better than cure), and
* Inserted a clause giving it clear and strong personal remedies against any unauthorised trust signatory.

The same advice applies of course to anyone buying property from a trust.

Mistakes here will be expensive – take legal advice before you sign anything!