Elements of a contract of sale – Part 6
Over the last few weeks we have been discussing elements of a contract of sale. This week, we continue our discussion of the various elements of a contract of sale.

I have previously mentioned that the essentials of an agreement of sale of immovable property are commonly known as the 4Ps, meaning that for a valid agreement of sale the parties, property and price must be identified in the agreement and the prescribed formalities must be complied with. The prescribed formalities are that the agreement of sale must be in writing and signed by the buyer and seller.

The buyer or seller could be:

1. An individual (natural person);
2. More than one individual, like married persons or people buying a property together; and
3. An artificial person, like a company or trust.

There are specific requirement when dealing with each type of buyer or seller. It may happen, that a buyer wishes to buy a property on behalf of company or trust to be formed. Is this legally permissible?

The general principle in our law, is that one cannot act on behalf of someone who does not exist. Section 21 of the Companies Act 71 of 2008 makes provision for what is called a pre-incorporation contract. A pre-incorporation contract is a contract that would be entered into prior to a company being formed or incorporated. Section 21 says that a person may enter into a written agreement in the name of, or purport to act in the name of, or on behalf of, an entity that is considered to be incorporated in terms of the Companies Act but does not yet exist at the time. Therefore, a person may enter into an offer to purchase on behalf of a company to be formed because the Companies Act specifically allows for this.

What about a trust?

Section 6(1) of the Trust Property Control Act 57 of 1988 provides that:

"Any person whose appointment as trustee in terms of a trust instrument, section 7 or a court order comes into force after the commencement of this Act, shall act in that capacity only if authorized thereto in writing by the Master."

In the very interesting case of Simplex (Pty) Ltd v Van der Merwe and Others NNO, the Court had to consider the impact of the Master of High Court issuing Letters of Authority to trustees who had entered into a contract on behalf of a trust, without having the Letters of Authority issued.

Bear in mind, that Section 6(1) of the Trust Property Control Act says that you can only act as a trustee if you are authorised to do so by the Master of the High Court.

The Court in the Simplex case held that because the trustees did not have the Master of the High Court's written authorisation at the time of conclusion of the agreement, this meant that the agreement was null and void from the beginning. It was therefore not possible to make the contract valid when the trustees were in fact issued their Letter of Authority by the Master.

What are the important lessons here for property practitioners (PPs)?

1. Do not entertain any agreement of sale where the buyer purports to act on behalf of trust to be formed. Such an agreement would be null and void.
2. If someone is acting as a trustee on behalf of trust, ensure that you see a copy of the trust deed and the trustee's Letters of Authority from the Master of the High Court.
3. Read the trust deed and take note of its requirements and ensure that you follow the requirements laid down in the trust deed.

Next week we will continue discussing various elements of the agreement of sale. Don't forget to read my Monday Contemplation each week. Previous blogs are available on various websites.

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