**Elements of a contract of sale – Part 7**

Last week we discussed the legality of someone entering into an agreement of sale as a buyer on behalf of a trust to be formed. One of the points that was made, is the importance of ensuring that when dealing with a trust, that you follow the provisions of the trust deed.
In Shepstone and Wylie Attorneys v Abraham Johannes de Witt N O and Others 2023 (6) SA 419 (SCA), a case that dealt with a trust signing as a surety, the Supreme Court of Appeal held:

1. The resolution that binds the trust, must be signed by all the trustees, even if the trust deed provides that decisions that bind the trust can be made by a majority of the trustees. (Editor's note: This was clearly an error that the SCA made, as you will see below)
2. If the trust deed provides for decisions to be made jointly by the trustees, then all the trustees need to sign the relevant resolution or documentation.
3. Where the trust deed makes provision for decisions of trustees to be taken at properly constituted meetings of the trust, there needs to be a written resolution of the trustees as well.
4. A trust deed will provide a list of all the powers of the trustees. If any of those powers requires unanimous consent of the trustees, then all of the powers of the trustees in that list will require the unanimous consent of the trustees. (Editor's note: This was also an error made by the SCA).

You can imagine the challenges created if the SCA decision above stood as is. Effectively, even where a trust deed was set up to provide for decisions to be taken by the majority of the trustees, the decision in the Shepstone and Wylie case in essence meant that trustees must act unanimously and not by majority.

Fortunately, the judgement of the Supreme Court of Appeal was overturned by the Constitutional Court in a judgement handed down on 1 August 2025.

The Constitutional Court made a very important distinction between unanimous decision trusts and majority decision trusts. In a unanimous decision trust, decisions must be taken unanimously by the trustees. (Editor's note: Logically speaking!)

If the trust deed provides for trustees to act by majority decision, decisions can be taken by the majority of the trustees as long as the notice and quorum provisions in the trust deed are adhered to. (Editor's note: Again, logically speaking!)

The Constitutional Court also held that if the trust deed does not have a "majority decision" clause, then the trustees must act jointly and unanimously.

The lesson here for all property practitioners (PPs) – ensure that you read and understand the provisions of the trust deed when dealing with a trust.

Likewise, when dealing with an entity like a company, PPs need to ask for a copy of the company's Memorandum of Incorporation (MOI). The MOI will indicate what requirements need to fulfilled when it comes to dealing with a company.

Of importance for PPs is the following:

1. Not all directors may necessarily have the authority to bind a company.
2. When it comes to binding a company, authority may be required from a majority or all of the directors.
3. The authority required, may be as a result of a monetary limit that is set out in the MOI. As an example, any transaction under R1m may be approved by a director acting on their own. However, a transaction in excess of R1m may require a unanimous resolution from the full board of directors.

4. It is suggested that you not only obtain the resolution required from the company but also request that the company's auditor indicate in writing, that the proposed transaction and the requisite authorisations are in accordance with the company's MOI.

5. As an interesting aside, if you are dealing with a company whose only or major asset is a property, which is now being sold, then Section 112 of the Companies Act 71 of 2008 is of importance. Section 112 says that a company may not dispose of all or the greater part of its assets or undertaking unless the disposal has been approved by a special resolution of the shareholders. Hence, if the only asset that the company owns is a property and it is that property which is being sold, then Section 112 must be complied with. The good news for PPs is that the required resolution is something that the conveyancer should be taking care of and not something for you as a property practitioner to be concerned about, other than to have knowledge of what is required.

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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