<u>Elements of a contract of sale – Part 8</u>

Last week we discussed the authority required when dealing with a trust. This week we turn our attention to what is required when dealing with a company.
We have two main possibilities to consider when the potential purchaser of a property is a company:

1. The company exists; or

2. The company does not exist and is yet to be formed.

In scenario 1, the property practitioner (PP), would need to ensure that the requisite authority is in place. Most PPs should already know when dealing with a company that the following is required:

- The company's statutory documents which will include Company Certificate of Registration, Memorandum of Incorporation (MOI), Certificate of Name Change (if applicable) and signed by a director of the company;
- Proof of physical operating address;
- Letter from the company's auditors confirming shareholding;
- SARS issued document confirming Income Tax and VAT registration number;
- Directors resolution appointing the authorised representative of the Company;
- Certified copy of the ID document of the authorised representative;
- Certified proof of residential address of the authorised person.

In scenario 2, the company does not yet exist. I have previously discussed that 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.

Some important things for the PP to be aware of:

1. Let us assume that a potential purchaser of a property is a developer or experienced investor and may have a number of companies that they could use to purchase a property and perhaps may not be sure which entity they wish to use for a specific transaction. In such instance, the purchaser may be described in the agreement of sale as "X or his nominee". X must nominate the nominee, i.e: which company will be used for the transaction on the same day as the offer to purchase has been signed. If X fails to do so, then in terms Section 16(2) of the Transfer Duty Act 40 of 1949, SARS will levy a double transfer duty, firstly on the "sale" of the property by the seller to X and then X to the entity that will be used to ultimately purchase the property.

2. Furthermore, the wording that you use in your offer to purchase is very important. The courts have previously held a clause that stipulates that the property is sold to "X or his nominee" as indicated above, is also considered to be two agreements of sale by SARS and hence a double transfer duty would still potentially be payable. The first transaction would be the sale from the seller to X and the second transaction would be from X to the nominee, being the company still to be formed. The simple way to solve this

problem, is to change the wording in the agreement of sale and rather state that the property is sold to the “nominee of X”. It is then clear that there is only one transaction, namely from the seller to the nominee. Don’t forget that the nominee must be nominated on the same day as the offer to purchase is signed.

3. In the instance where the company has not been formed as yet, in terms of Section 21(2) of the Companies Act, the person who enters into a contract on behalf of a company to be formed is jointly and severally liable if the company is not formed or if the company is formed and does not adopt the contract. This means that the seller is protected and the person who purports to act as the buyer is then personally liable should they change their mind and not form the company (as the nominee), in order to get out of the contract and not buy the property.

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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