Monday Contemplation No 69

This week we discuss **dispute resolution in real estate disputes.**
Given the large number of court cases that we see dealing with real estate transactions, there are clearly many disputes in the real estate environment. One supposes that this is to be expected given the volume of real estate transaction in the country. Anyone who has been involved in litigation will know that the process is extremely lengthy and costly. Taking a tongue-in-cheek approach, we know that there are always two winners in a legal dispute, being both attorneys on each side of the dispute.
There are however alternatives than having to resort to the legal process and litigation.

These are primarily as follows:
1. Mediation – in the event of mediation, the parties to the dispute appoint a neutral third party who assists the parties to achieve resolution of the dispute. The mediator is not empowered to make any binding decisions and is there to facilitate open discussion between the parties; and

2. Arbitration – an arbitrator has significantly more decision-making power than a mediator. The arbitrator in essence is appointed to adjudicate the dispute which is binding on the parties and that the parties have to comply with.

Given the backlog in our court system, with litigants sometimes waiting many years for a matter to get to trial, Rule 41A has been added to the Uniform Rules of Court. Rule 41A is designed to promote alternative dispute resolution as a way of resolving disputes before the matter gets to trial. Without going in to all the details regarding Rule 41A, we are moving closer to the point where mediation will become a mandatory process prior to going to trial. This should go some way to alleviating the backlog in the judicial system and ensuring that disputes get resolved timeously and cost effectively.

Mediation has many advantages:
1. It is a relatively simple process to appoint a mediator - the parties would agree on the identity of the mediator and there are few formalities thereafter. Check that the mediator that you appoint has a formal qualification in mediation.
2. Mediation is voluntary and non-binding - the parties enter into the mediation on a voluntary basis and can exit from the mediation at any time. The mediator does not make any decisions that are binding and the parties do not need to agree to anything should they not wish to do so.
3. Mediation is quick and cost effective – as mentioned, the appointment of the mediator can be done swiftly and the mediation proceedings can take place shortly thereafter. The costs of the mediation are shared between the parties and the mediator usually charges an hourly rate. In my experience, most successful mediations take between 4 and 6 hours to conclude.
4. The relationship between the parties tends to not become as acrimonious as it would with a litigious process.

In my experience, mediation is usually successful with only a very small number of disputes not able to achieve resolution via mediation. Mediation could be used to assist with dispute resolution between buyers and sellers and landlords and tenants, as well as between buyers and sellers and property practitioners in the event of a commission dispute.
I am personally qualified as a mediator through the South African Association of Arbitrators as well as through the Society of Mediators in the UK and am qualified as a court annexed mediator. You are welcome to contact me for any advice regarding mediation or should you wish to appoint a mediator.

Next week we will discuss the property practitioners duty to avoid disputes.

You are welcome to email me on graeme@cpmd.co.za