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What trustees should know about property transactions

ALL ABOUT TRUSTS

PHIA VAN DER SPUY

UNDER the Alienation of Land Act, any deed of sale of immovable property has to be in writing, and the parties thereto or their agents have to be legally authorised to act at the time of signing of the contract. Section 2(1) of the act provides that no alienation of land shall be effected unless it is contained in a deed of alienation signed by the parties or their agents acting on their written authority.

When a discretionary trust acquires property, a trustee may act only if authorised to do so by the Master of the High Court with a letter of authority (section 6 of the Trust Property Control Act).

Property transactions with a trust to be formed. A new trust comes into existence only once letters of authority are issued to the new trustees by the Master. Therefore, any transaction entered into by someone claiming to act on behalf of that trust without the requisite authority is invalid.

A "trust to be formed" may not be nominated as a purchaser for transfer duty purposes, not even with the wording *"stipulatio alteri"* (meaning that the agreement benefits a third party), because the trustees will not be in a position to ratify the transaction on behalf of the trust retroactively. In such a case, no transaction will be deemed to have taken place, because the contract was void to begin with. The trustees (once authorised by the Master) will be required to enter into a new contract with the seller if the ultimate intention is for the trust to acquire the property. This is in contrast to the situation with close corporations and companies, where a pre-incorporation contract can be ratified and consequently an immovable property can be purchased on account of an entity still to be formed.

The court held in the *Jansen v Ringwood Investments 87 CC* case of 2013 that the ratification of a contract by the trustees is not possible if a statute requires prior written authority for such action, no matter what the trust instrument provides. Therefore, even if the trust instrument allows for ratification, it will not override the requirements of the Alienation of Land Act, and the transaction will not be valid.

Can a property transaction later be ratified by trustees? If a sale agreement was signed by one or more trustees without the full board of trustees' approval, the seller will not even be in a position to claim specific performance as such agreement is null and void and cannot be relied on by the seller in any way. The trustees are also not the contracting parties – the trust is (*Goldex 16 (Pty) Ltd v Capper* case of 2019).

When can a trustee sign an offer to purchase? Trustees can act only once their appointments have been authorised by the Master. Therefore, unless a trustee is in possession of a letter of authority issued by the Master confirming their appointment, that trustee cannot act on behalf of the trust. While the requirements of section 6 of the act are for the benefit of the beneficiaries, they are also in the public interest in so far as providing proper written proof indicating who the serving trustees of the trust are (*Simplex v van der Merwe* case of 1996). In this case, it was held that any agreement entered into by trustees before authorisation is granted is deemed null and void, and cannot be ratified.

If and when can a sole trustee act on behalf of the trust? Where a trust has more than one trustee, any deed of alienation entered into by that trust would require the signature of all the trustees. In the absence of authority in the trust instrument, in respect of a trust with more than one trustee, a trustee is regarded as an agent as intended in section 2(1) of the Alienation of Land Act, and would require the written authority of the other trustees to conclude a deed of alienation on behalf of the trust.

The *Thorpe v Trittenwein* case of 2007 confirmed the principle that where one trustee is authorised to act on behalf of other trustees, and the sale of land is involved, such authorisation must be received in writing in the form of a resolution signed by the duly authorised trustees.

Any deed of sale entered into by one trustee purporting to act on behalf of other trustees, where that trustee is not authorised to do so by their co-trustees, will be deemed null and void. This is because it will not comply with the requirements of the Alienation of Land Act (section 2), and cannot be ratified thereafter. This case confirmed that a sale cannot be ratified by the signature of a written authorisation to act after the fact. The written authority, therefore, must be granted to the trustee before the signature of the deed of sale.

Be mindful of "standard" documentation on obtaining a loan. Trust compliance is all about paperwork! Many financiers or attorneys request the signature of standard documentation they use for all property transactions (such as companies), which, for example, gives one trustee the authority to negotiate and enter into agreements with the bank as they wish. This is not allowed in our trust law and may be indicative of an alter ego trust (where one person controls the trust). Also, the banks' standard documentation normally states that a meeting was held. Unless a physical meeting was held to approve the transaction, trustees should rather stipulate that it is a round-robin resolution (but only if the trust instrument allows for that).

Ensure all the facts are correct and procedures were followed as stipulated in the documentation required to be signed. It is a trustee's obligation to read and understand what they are signing. In many instances the documentation is set up incorrectly (factually and procedurally), which may come back to bite trustees.

Phia van der Spuy is a chartered accountant with a Masters degree in tax and a registered Fiduciary Practitioner of South Africa, a Master Tax Practitioner (SA), a Trust and Estate Practitioner and the founder of Trusteeze, the provider of a digital trust solution.

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