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December 2019

Property Sales and Trusts: Demand Proof of Trustee Authority

*"If you want to make your house easy to sell, make it
easy to buy" (Anon)*

You are overjoyed at receiving a good offer for your property – not easily achieved in these hard times and of course you certainly don't want to do anything to jeopardise the sale.

But perhaps do that little bit extra homework before accepting the offer if it comes from a trust. The pitfall here – and it's one that perennially takes sellers by surprise – is that the trustee/s signing the offer to purchase/sale agreement must have the necessary authority to do so. Drop the ball on that one and you will find yourself without any sale at all.

As a seller learned to its cost recently in the Supreme Court of Appeal (SCA)...

For want of a second signature the seller goes down R3m

- In 2013 a company sold to a trust for R1.45m a "real right of extension" in a sectional title development (a right in this case to build on common property).
- An agreement to sell a "real" property right of that type must, as with a standard property sale, be in writing and signed by both seller and buyer (or their authorised agents) to be valid.
- The seller's problem here was that only one of the trustees signed the sale agreement. The other trustee refused to sign, and in 2017 the seller found itself trying to convince the High Court to order the trust to pay it the R1.45m plus interest (by then a total just shy of R2m), alternatively to order the trustee who signed the deal to pay up personally in return for taking transfer into his own name.
- The High Court however pointed out that where a trust has more than one trustee, they must act jointly, and a property sale agreement needs the signatures of all the trustees. One trustee signing alone would be regarded as an agent and would need either general authorisation in the trust deed or written authorisation to sign the particular agreement. Otherwise, as in this case, the signing trustee acted without authority and the sale was void.



- Defeated in the High Court, the seller appealed to the SCA, abandoning its claim against the trust itself and now trying only to hold the signatory trustee liable in his personal capacity.
- Its argument was that, despite the invalidity of the sale, the trustee was still liable – in his personal capacity - to pay and take transfer as he was guilty of breaching the clause (standard in property sale agreements involving corporates and trusts) that he “warrants and binds himself in his personal capacity by virtue of his signature hereto ... that he is duly authorised to enter into this agreement on behalf of the company, close corporation or trust”.
- No claim there, held the SCA, commenting that “The ingenuity of this argument is surpassed only by its lack of substance ... what [the seller] is essentially seeking is specific performance of a void and invalid contract against the person who signed that contract but was not a party to it – this on the basis that if he’d had the authority to sign, which he had not, the property would have been sold to another. This merely had to be stated to be rejected.” This appeal, said the Court, was doomed to fail.
- The end result – six years down the line the seller loses its claim (no doubt over the R3m mark including interest by now) and its legal bill will be a hefty one.

Could you sue the trustee personally for damages?

“Theoretically”, said the SCA, the signing trustee could be held liable to the seller for damages flowing from his breach of warranty, and **that is of course a strong warning to those signing for trusts and companies - make 100% sure that you have full authority to do so!**

But, said the Court, the seller in this case didn’t formulate its claim as a damages claim against the trustee personally and even it had, it would have had to provide evidence as to what damages it had actually suffered.

Indeed proving damages in a case like this is never going to be easy – the seller would have been much better off insisting upfront on proof of the trustee’s authority to sign alone.

As always, get professional advice before you sign anything.

Visiting South Africa with Kids Just Became Easier – Here’s What You Need to Know

“We’re all going on a summer holiday...” (Cliff Richard)

With the Festive Season (and our Summer Holidays!) well and truly upon us, you may be inviting family or friends to visit you from overseas with their children, or perhaps you are a foreigner planning a family trip to South Africa. Either way here’s some good news in the form of a welcome concession from government in regard to the documentation you will need to produce on entry.



In a nutshell foreign children until now have only been able to enter the country with unabridged birth certificates and consent letters. That requirement was waived – for accompanied children only (check the full details in the table below) - from 8 November 2019.

The Department of Home Affairs (DHA) says it has communicated this very welcome new development to all role players, most importantly to the immigration officials at ports of entry who are tasked with enforcing the rules, but if you do happen to have documentation handy it can’t hurt to bring it along in case of any queries. If you need visas to visit you will anyway have to produce the documents when applying.

South African children (and unaccompanied foreign children) must still provide a list of required supporting documents – see below.

Note that the above is just a summary – it is extremely important that you check the DHA table below for full details, and that you ask your lawyer for help if you think any exemptions may apply, if you have any difficulty in understanding what is required, or if you cannot get the necessary documentation together.

DOCUMENTS REQUIRED FOR CHILDREN TRAVELLING THROUGH A PORT OF ENTRY OF THE REPUBLIC

CATEGORY	SOUTH AFRICAN CHILD	FOREIGN VISA EXEMPT CHILD
CHILD ACCOMPANIED BY BOTH PARENTS	<ul style="list-style-type: none"> • valid passport • copy of a birth certificate / equivalent document or passport containing the details of the parent or parents of the child 	<ul style="list-style-type: none"> • valid passport

CHILD ACCOMPANIED BY ONE PARENT	<ul style="list-style-type: none"> • valid passport • copy of a birth certificate/equivalent document • parental consent letter • copy of the passport / identity document of the absent parent • contact details of the absent parent • <i>where applicable-</i> <ul style="list-style-type: none"> ◦ copy of a court order granting full parental responsibilities and rights or legal guardianship in respect of the child. ◦ copy of a death certificate of the deceased parent 	<ul style="list-style-type: none"> • valid passport
CHILD TRAVELLING WITH PERSON WHO IS NOT HIS / HER BIOLOGICAL PARENT	<ul style="list-style-type: none"> • valid passport • copy of a birth certificate/equivalent document • parental consent letter(s) • copy of the passport(s)/ identity document(s) of the parent(s)/legal guardian(s) • contact details of the parent(s)/legal guardian(s) • <i>where applicable-</i> <ul style="list-style-type: none"> ◦ copy of a death certificate ◦ copy of an adoption order ◦ copy of a court order granting full parental responsibilities and rights / legal guardianship in respect of the child. 	<ul style="list-style-type: none"> • valid passport
UN-ACCOMPANIED CHILD	<ul style="list-style-type: none"> • copy of his /her birth certificate • parental consent letters • copy of the passport(s)/identity document(s) of the parent(s) / legal guardian(s) • contact details of the parent(s)/ legal guardian(s) • letter from the person who is to receive the child in the Republic, containing his / her residential address and contact details in the Republic where the child will reside • copy of the identity document / valid passport and visa or permanent residence permit of the person who is to receive the child in the Republic • <i>where applicable-</i> <ul style="list-style-type: none"> ◦ copy of an adoption order ◦ copy of a death certificate of the deceased parent/ parents or legal guardian; ◦ copy of a court order granting full parental responsibilities and rights or legal guardianship in respect of the child 	
CHILD IN ALTERNATIVE CARE	<ul style="list-style-type: none"> • valid passport • letter from the Provincial Head of the Department of Social Development where the child resides authorising his or her departure from the Republic as contemplated in section 169 of the Children's Act (Act No. 38 of 2005). 	

(Source – Department of Home Affairs)

All Companies: Prepare for the Mandatory New CIPC Compliance Checklist

The CIPC (Companies and Intellectual Property Commission) has announced that its new “compliance checklist” requirement, voluntary until now, becomes **mandatory for all companies and close corporations from 1 January 2020.**

You must complete the checklist before submitting your annual return. So firstly check when your due date for the annual return is – for companies you will have 30 business days from the day after its date of registration, whereas for close corporations you will have the two months from the first day of the registration month until the end of the following month.

Then log on to the CIPC website and find what CIPC calls its “new user-friendly service” under “e-Services for Customers”.

If you run into problems take professional advice immediately. You really don't want to drop the ball on this! If you can't complete the compliance checklist, you can't submit your annual return, which will put your company at risk of deregistration because CIPC assumes that your company has stopped doing business.

Deregistration means your company ceases to exist, with drastic negative consequences for your company, for its business operations, and for you personally.



Property Owners, Buyers and Agents: Lost Title Deeds and Bonds – Don't Delay!

"He who hesitates is lost" (Wise old proverb)

In January 2019 new amendments to Regulations for the replacement of lost title deeds (and similar documents like mortgage bonds and notarial bonds – see below) were published. They were very onerous and slated to come into effect at short notice, but after criticism they were suspended – until now.

Revised amendments have been published, to come into effect on 1 January 2020.



Firstly, what is a "Title Deed"?

A title deed (deed of transfer) is legal proof of ownership of a property. It also contains a lot of other important information relating to the property, such as a full description, its size, names of previous owners, bonds registered over it, conditions and legal restrictions relating to it and so on.

Why should you care if yours is lost?

Without the original title deed you cannot pass transfer to a buyer. So if you sell your property, your conveyancing attorney will need the title deed from you (if your property is mortgaged and the bond not yet paid off and cancelled, the bank should be holding the title deed as security).

All good if the title deed is readily to hand, but if it has been lost your attorney must apply for a certified copy. Until now – and this changes on 1 January 2020 – this was a relatively quick and cost-effective matter of attesting to an affidavit in which you confirm that a "diligent search" has failed to locate the title deed and that it isn't pledged or held as security by anyone. All being well, a few weeks and a reasonable legal fee later, the Deeds Office issues a certified copy of the title deed and the transfer proceeds.

Act now!

- **All property owners (not just active sellers):** The new procedures to come into effect on 1 January are not quite as onerous as the January amendments were, but what is new is that your attorney will have to publish "a notification of intention to apply for such certified copy in an issue of a newspaper circulating in the area in which the land is situated and in the case of a notarial bond in an issue of one or more newspapers circulating in the area of every deeds registry in which such notarial bond is registered." Any "interested person" then has two weeks to object to the issue of a copy.

That's extra expense and complication, but perhaps more important is the extra - and potentially very costly - delay. The good news is that all of that is avoidable if you act before the new requirements take effect.

So – *whether or not you intend to sell your property in the near future* - check immediately that you know where your title deed is, and if you can't find it ask your attorney to apply urgently for a certified copy.

- **Buyers:** You and the seller are no doubt in the same boat here in that the last thing either of you wants is unnecessary delay in the transfer process. So if you are buying property, **forward this** to the seller or estate agent with a request that they confirm possession of the title deed or act to replace it immediately.
- **Agents:** Again, unnecessary delay in transfer will prejudice both you and your client. So **forward this** to everyone with a property on your books (you're doing them a favour as well as yourself).
- **Bondholders:** As mentioned above, the new amendments apply equally to lost mortgage bonds, notarial bonds, registered leases, holders of real rights etc, so what is said above applies equally to you.

With Deeds Offices always closing earlier than normal in December, don't hesitate - act now!

Your Website of the Month: A Festive Season Home Security Checklist

Every year the criminal fraternity welcomes the onset of the Holiday Season – lots of empty homes, lots of high-value new gadgets around, lots of relaxed homeowners letting their guard down...

Here's how to foil the bad guys while enjoying your year-end break as a time of celebration and relaxation, not a time of worrying about whether your home-sweet-home will be ok without you, and stressing over the aftermath of a burglary (or worse).

"Locking Up For The Holidays: Your Home Security Guide" on the Private Property [website](#) has a useful checklist for you. It's written mostly for home owners headed out of town, but there's also a lot of good advice there for "holiday at home" families.



Thank you for your support in 2019.

***Have a Wonderful Festive Season, and a
Happy and Prosperous 2020.***

Enjoy the Break!

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