

CONTRACTING WITH A TRUST

Newsletter 14/2014

It is common practice for a trustee of a trust to enter into a contract with a third party on behalf of his/her trust. However trustees must be aware that they must obtain the prior written (not verbal) authorization of all (or in the case of some trusts, a majority) of trustees before entering into contracts on behalf of a trust. If there is no prior written authority (usually in the form of a resolution), the contract will be void. This situation doesn't apply to companies or close corporations where authorization can be given after the contract has been concluded.

A void contract cannot be rectified by ratification (i.e. the remaining trustees can't approve - and thereby resurrect - a void contract after it has been signed). This was confirmed by our Supreme Court of Appeal in the case of ***Thorpe and Others v Trittenwein and Another 2007 (2) SA 172 (SCA)***. In this case one trustee (who was also the founder and a beneficiary of a trust) signed a sale agreement for the purchase of land without the prior written authority of the other trustees. The other trustees subsequently ratified the first trustee's act but the Court held that this was not possible and the seller was free to sell to someone else.

A second vital aspect to consider is the trust deed itself. Trustees can only exercise a power if that power is given to them in the trust deed. If, for example, the trust deed doesn't give the trustees the power to buy and sell property, a unanimous resolution of trustees to do so doesn't cure this defect – the agreement will still be void.

If you are dealing with a trust (or if you are a trustee of a trust), you should be very careful to ensure that you are concluding a valid agreement. It is important to remember that:

1. A trust is not a Partnership and should not be treated as such;
2. the trustees are not the agents of the trust or beneficiaries;
3. the trustees must act jointly;
4. the trust deed must authorize the proposed transaction.

Third parties considering contracting with a trust should therefore call for:

1. the latest Letters of Authority for the trust (to confirm who the current trustees are);
2. a resolution of trustees (dated before the date of the transaction) authorizing the transaction and the trustee who will sign the contract on behalf of the trust;
3. the trust deed (to confirm that the trust deed authorizes the proposed transaction).

Obtaining proper authorization before a contract is concluded and scrutinizing the trust deed will ensure that the contract remains valid and binding and that unnecessary litigation costs are avoided.

Should you require advice on any aspect regarding trusts or need us to review, advise on or amend your trust deed, please contact either Stuart Fourie or Vicky Stott.

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