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CORPORATE & COMMERCIAL ALERT

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Do not trust a trustee (without the necessary authority)

In *Goldex 16 (Pty) Ltd v Capper NO and Others* (543/2018) (2019) ZASCA 105 (4 September 2019), the court considered whether a trustee who signed a sale agreement on behalf of a trust without the necessary authority could be held personally liable for payment of the purchase price.

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Goldex 16 (Pty) Ltd and the Des Property Trust (Trust) entered into a sale agreement in terms of which the Trust purported to purchase a real right of extension in respect of a sectional title scheme.

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The facts in this case are essentially as follows: Goldex 16 (Pty) Ltd (Goldex) and the Des Property Trust (Trust) entered into a sale agreement in terms of which the Trust purported to purchase a real right of extension in respect of a sectional title scheme. The Trust failed to deliver a guarantee to secure the purchase price and as a result, was in breach of the agreement. Goldex subsequently instituted action against the Trust represented by both its trustees, Dene Capper (Capper) and his co-trustee iProtect Trustees (Pty) Ltd, seeking, *inter alia*, payment of the purchase price. It also sued Capper in his personal capacity. The trustees argued that the Trust was not bound by the agreement as Capper signed the agreement on behalf of the Trust without the requisite written authority. Section 2(1) of the Alienation of Land Act, No 68 of 1981 (ALA) provides that no alienation of land shall be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or their agents acting on their

written authority. 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 deed, in respect of a trust with more than one trustee, a trustee is regarded as an agent as intended in s2(1) of the ALA and would require the written authority of the other trustees to conclude a deed of alienation on behalf of the trust. It was common cause that the sale agreement failed to comply with the provisions of the ALA, and was therefore void *ab initio*.

On the basis set out above, the court *quo* dismissed Goldex's claim against both the Trust and Capper. On appeal to the Supreme Court of Appeal (SCA), Goldex abandoned its claim against the Trust and restricted its appeal to the dismissal of its claim against Capper in his personal capacity. The appellant sought to hold Capper liable by relying on the warranties of authority provided in the agreement, including warranties by the signatory to the effect that:

- he was duly authorised to enter into the agreement on behalf of the Trust;
- all conditions had been complied with by the Trust in order to make the agreement binding; and
- the Trust would duly and punctually comply with its obligations in terms of the agreement.

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Goldex later tried to persuade the court that the claim as pleaded was susceptible to be understood as a claim for damages and that the measure of such damages would be an amount equal to the purchase price and to avoid injustice, it would tender transfer of the property in question.

Notwithstanding the invalidity of the sale, Goldex argued that Capper, as the person who signed the agreement on behalf of the Trust, should be compelled to pay the purchase price. This, Goldex contended, was due to Capper having breached the warranty he had given, that such warranty was severable from the sale itself, and that as it had been breached, Goldex should be put into the same position it would have been in had the warranty not been breached. The SCA disagreed, finding that the argument lacked substance as *'what the appellant 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'*.

Goldex further argued that it was a tacit condition of the warranties that if the Trust was not bound by the contract as a consequence of non-fulfilment of the warranties, then Capper would be liable to fulfil or to procure the fulfilment of the obligations that would have rested on the Trust had it been bound by the agreement. Goldex later tried to persuade the court that the claim as pleaded was susceptible to be understood as a claim for damages and that the measure of such damages would be an amount equal to the purchase price and to avoid injustice, it would tender transfer of the property in question. This argument was also rejected by the court

which held that while theoretically Capper could be held liable for damages flowing from his breach of warranty, no claim for damages was expressed in Goldex's claim and, notably, no evidence relevant to the quantum of damages was provided. The appeal was ultimately dismissed.

As the SCA pointed out, not only was the agreement void but Capper was not a party thereto and as such, seeking specific performance was not an appropriate cause of action. A signatory who warrants their authority to act on behalf of a contracting party may be sued for damages. Where a contract of sale of a marketable commodity is breached by non-performance, the extent of loss is generally established by measuring the difference between the price sold and the market value or some other proven measure of establishing that damages were suffered (see *Katzenellenbogen Ltd v Mullin 1977 (4) SA 855 (A)*). This was not done in Goldex.

In order to avoid unnecessary litigation, contracting parties are advised to:

- carefully consider the provisions of a contract before agreeing to its terms;
- carefully examine the constitutional documents of the counterparty; and
- ensure that the requisite authorising resolutions have been properly passed. In particular, when contracting with trusts in respect of the sale of immovable property, it is important to

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An extra cautious approach would be to instruct a legal advisor to render a legal opinion in respect of the contracting party's power and authority to enter into the contract and perform its obligations thereunder.

ensure that a resolution authorising the sale and the trustees to act on behalf of the trust is properly passed in writing and in accordance with the provisions of the relevant trust deed prior to the conclusion of the relevant agreement. Unlike a company, a trust is not a legal persona. As observed by Cameron JA in *Land and Agricultural Bank of South Africa v Parker and Others 2005 (2) SA 77 (SCA)*, it is trite that in the absence of a contrary provision in the trust deed, the trustees must act jointly if the trust is to be bound by their acts. Further, if the resolution is not validly passed, this could affect the validity of the sale as ratification is not possible in circumstances where the agent is required by statute (i.e. the ALA) to obtain authorisation from the principal before entering into the sale. On this ground a contract for the sale of immovable property was declared invalid in *Thorpe and Others v Trittenwein and Another 2007 (2) SA*

172 (SCA). In this case, the agreement had been signed on behalf of the trust by a single trustee whose conduct was later ratified by the remaining trustees. Consequently, although the trustee was authorised by his co-trustees after the fact, the absence of the written authority of the co-trustees rendered the agreement invalid for want of compliance with the provisions of s2(1) of the ALA. The very object of s2(1) of the ALA is, on grounds of public policy, to facilitate proof by requiring the authority to be in writing and so avoid needless litigation. The court held that there can be no ratification of a contract which is void *ab initio*.

An extra cautious approach would be to instruct a legal advisor to render a legal opinion in respect of the contracting party's power and authority to enter into the contract and perform its obligations thereunder.

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