

**PROPERTY AND TRUSTS – BE CAREFUL!**

*“This case yet again demonstrates the need to be careful when dealing with a trust”  
(extract from judgment below)*

For most of us, business dealings with trusts are most likely to happen when selling a property to, or buying a property from, a trust. But no matter why or how it happens, have your lawyer check that whoever signs for the trust is fully authorised to do so.

***For want of authority, the case is lost***

Otherwise you could be in for a major shock if you come to blows and need to ask a court for assistance. Witness the case of a bank trying to enforce a trustee’s personal suretyship –

1. A trust concluded instalment sale agreements with a bank
2. Owed R1m by the trust, the bank tried to enforce a personal suretyship signed by one of the trustees in which she had bound herself as surety and co-principal debtor with the trust
3. The High Court however found that the suretyship was invalid because the instalment sale agreements themselves were invalid. They had only been signed by one trustee, whereas the trust deed required a unanimous decision by two trustees.

*What to look for*

- **Check the letters of authority:** The Master of the High Court must authorise the trustees to act so a vital first step is to have these checked and on record.
- **Check I.D.:** Keep copies of all signing trustees’ I.D.s to avoid any dispute as to identity.
- **Check the trust deed:** The trust will only be bound by what the trustees do if their appointment and actions comply strictly with the trust deed’s requirements, such as –
  - Appointment of trustees: Check that the Board of Trustees has been properly constituted.
  - Capacity to contract: Whilst many trust deeds authorise trustees to enter into virtually every type of transaction you can think of, some are more restrictive so make sure the trustees have authority for your particular type of contract.
  - Minimum number of trustees: If the deed requires a minimum number of trustees to be in office, they must all be in place for the trust to have any capacity at all. In this case for example, the trust deed required there to be always between 3 and 5 trustees in place, whereas in fact there were only 2. The only exception – and this saved the bank’s neck on this particular leg of the fight – other clauses

in this particular trust deed provided specifically for the case of there being only 2 trustees, and empowered them to still bind the trust in this way.

- Number of trustees required to act jointly: Unless the trust deed provides to the contrary, trustees must always act jointly. Or, as in this case, a trust deed may specify certain actions that can be carried out by one trustee acting alone, or by two trustees acting jointly, or by all trustees acting unanimously. In this case, the deed required only 2 trustees acting jointly to enter into this sort of contract.
- Delegation of authority: Often, as in this case, trust deeds empower the trustees to authorise one or more of them to sign certain documents. In the event of a dispute, you will have to prove that such authority was validly given - something the bank in this case failed to do. Alternatively you may be able to prove ratification or inferred or “ostensible” authority (where trustees create the impression that the trustee had the necessary authority to represent them) but it’s much safer to require written proof of actual authority upfront.

All the other little requirements and formalities: Even “template” trust deeds are usually tweaked in one way or another and the differences can be subtle but critical.

**So as always, sign nothing until your lawyer has checked it!**

Miltons Matsemela Incorporated is a level 4 (100%.) B-BBEE contributor

Table View: +27 (0) 21 521 1300  
Email: [tvinfo@miltons.law.za](mailto:tvinfo@miltons.law.za)

Cape Town: +27 (0) 21 419 4642  
Email: [ctinfo@miltons.law.za](mailto:ctinfo@miltons.law.za)

Claremont: +27 (0) 21 671 5141  
Email: [clmt@miltons.law.za](mailto:clmt@miltons.law.za)

Johannesburg: +27 (0) 11 483 0166  
Email: [jhbinfo@miltons.law.za](mailto:jhbinfo@miltons.law.za)

Tygervalley: +27 (0) 21 914 4100  
Email: [bvinfo@miltons.law.za](mailto:bvinfo@miltons.law.za)

Hout Bay: +27 (0) 21 790 0435  
Email: [hbinfo@miltons.law.za](mailto:hbinfo@miltons.law.za)

Kuils River +27 (0) 21 903 3090  
Email: [tvinfo@miltons.law.za](mailto:tvinfo@miltons.law.za)

