

Dear colleagues

The topic of a trustee's authority to sign a valid agreement of sale on behalf of a trust in the absence of a resolution or other written authority authorising such signing, has yet again come before the courts. This time the **Supreme Court of Appeal** gave judgement on the matter in the case of **Thorpe v Trittenwein 2006 SCA**. Judgement was delivered on 24 March 2006.

I attach the judgement itself as it is very important from practicioners' point of view. It is recommended that estate agents working with us also be briefed about the matter. Read especially from paragraph 8 onwards.

Summary:

On 8/12/2000 an agreement was signed for the sale of a certain property, by Trittenwein as seller and the Thorpe Trust as purchaser (represented by Thorpe; he being one of three trustees). The agreement was subject to the condition that a township be approved on the property and had other complicated clauses regarding nominating a second purchaser, and so on, which facts are not directly relevant to the present discussion.

There was no formal resolution or other written authority by the trustees authorising Thorpe to sign on behalf of the trust. He was the main decision maker and although it appears the other trustees knew about and orally approved the purchaser on behalf of the trust, no written authority by them for Thorpe's signing existed.

Eventually after many events but little progress the seller in 2002 wrote a letter of cancellation to the purchaser and in 2003 sold the property to a third party (the second respondent). Shortly thereafter, in May 2003, the trust launched an application to court requesting the court to declare the sale of the property to the trust valid and enforceable.

The seller opposed the application, raising a number of defences including the defence that the agreement never came into existence, as the provisions of section 2 of the Alienation of Land Act were not met- the trustee lacked written authority of the other trustees for the conclusion of the agreement.

The court a quo upheld the defence, and the trust appealed to the SCA. The court considered the provisions of section 2 ALA and agreed with the court a quo: the transaction was void for lack of compliance with section 2 ALA and because of being void ab initio could not be ratified, even if the trustees could prove they gave written authority afterwards.

This is the court's reasoning:

- A trust is not a legal persona
- The trustees must administer the assets and liabilities of the trust **jointly** (unless the trust deed provides otherwise)
- The trustees may authorise one of their number to act on their behalf
- (the court distinguished the law relating to trusts from that relating to partnerships- in a partnership any one partner can act on the partnership's behalf)
- In signing the agreement of purchase, Thorpe signed both as principle (he himself being a trustee) and as agent (on behalf of the other trustees)
- Section 2 ALA requires the authority of an agent to be in writing
- Such written authority was not obtained in the present case
- The agreement was void ab initio.

In conclusion the court said this:

"Those who choose to conduct business through the medium of trusts of this nature do so no doubt to gain some advantage... But they cannot enjoy the advantage of a trust when it suits them and cry foul when it does not. If the result is unfortunate, Thorpe has only himself to blame."

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