

SUMMARY OF THE JUDGMENT

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>> PROPERTY LAW UPDATE

SALE AGREEMENT 'STANDARD' WARRANTY: APPLICABLE TO PERSON SIGNING O.B.O. A TRUST?

**Goldex 16 (Pty) Ltd v Capper NO and Others (24218/2013) [2017]
ZAGPJHC 305 (18 October 2017)**

The facts of this matter make for a textbook example of things that can go awry when the basic requirements of dealing with a trust as a party to a transaction are not adhered to. The sale agreement was void as the trust's representative signed it without first obtaining the written authority to do so from the other trustee. The seller then sought to hold the trustee, in his personal capacity, bound to the agreement by relying on the 'usual' warranties clause contained in agreements pertaining to natural persons signing on behalf of entities (i.e. that the signatory warrants that he is "authorised to enter into the agreement on behalf of the trust, that all conditions had been complied with by the trust in order to make the agreement binding," and so forth). Could he do so?

The Judgment can be viewed [here](#).

FACTS

Goldex 16 (Pty) Ltd ('Goldex') and the Des Property Trust ('the Trust') entered into an agreement of sale in January 2013. Capper was a trustee of the trust.

In terms of the sale agreement, Goldex sold a real right of extension to the Trust. (It was not disputed that this right of extension constituted immovable property and the agreement therefore had to comply with the requirements of the Alienation of Land Act 68 of 1981 ('ALA').)

Clause 12 of the sale agreement provided:

"CAPACITY OF PURCHASER

12.1 Should the purchaser be a company, a close corporation or an existing trust, the signatory hereto warrants and binds himself in his personal capacity by virtue of his signature hereto –

12.1.1 that he is duly authorised to enter into this agreement on behalf of the company, close corporation or trust;

12.1.2 that the company, close corporation or trust is lawfully entitled to acquire and take transfer of the property;

12.1.3 that all conditions have been complied with in order to make this agreement binding on the company, close corporation or trust; and

12.1.4 that the company, close corporation or trust will duly and punctually comply

with all its obligations in terms of this agreement.

12.2 Should the signatory for the purchaser act as trustee for a company or close corporation to be formed, such signatory by his signature hereto –

12.2.1 undertakes to procure that the company or close corporation for which he is acting as trustee will be duly incorporated within the 3(three) months from the date of signature hereof and that it will adopt and ratify this agreement in order that it becomes legally binding upon it; and

12.2.2 binds himself as surety for and co-principal in solidum with such company or close corporation for the due and punctual performance by it of all its obligations in terms of this agreement, under express renunciation of the benefits of exclusion and division.

12.3 In the event that clause 12.2 is not fulfilled, the signatory hereto shall be deemed to have acted in his personal capacity and shall be deemed to be the purchaser in terms of this agreement.”

The sale agreement was signed by Capper on behalf of the Trust. However, Capper and IPROTECT (Pty) Ltd ('IPROTECT') were the appointed trustees of the trust and, in terms of the trust deed, there had to be at least two trustees at all times. Further, despite it being a requirement of the trust deed, there was no written authority given to Capper to enter into the sale agreement on behalf of the trust.

The Trust did not comply with its obligations in terms of the deed of sale relating to provision of guarantees, amongst other things and was in breach.

In this matter, Goldex sought to claim compliance with the provisions of the sale agreement from Capper, both in his capacity as trustee and in his personal capacity. Goldex argued that Capper was a surety for the obligations of the Trust or that there was a *tacit* or implied term that he would be liable personally if the warranties were not met.

HELD:

Claim against trustees of the Trust

- Where a trust has more than one trustee, any alienation of land entered into by that trust requires 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 section 2(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. In the absence of written authorisation a deed of alienation concluded by such a

trustee would not be in accordance with the provisions of section 2(1) of the ALA and would be of no force and effect.

- The trust deed in this matter did not authorise Capper, acting alone, to enter into agreements for the alienation of land on behalf of the Trust and there was no indication that he had any authority (as an agent) to enter into the agreement of sale on behalf of the Trust.
- The sale agreement was therefore of no force and effect. The consequence is that the claim for performance of the Trust's obligations in terms of the sale agreement, against Capper and IPROTECT, as trustees of the Trust, had to fail.

The claim against Capper in his personal capacity: Was he a surety?

- Clause 12 differentiated between the personal liability of the signatory to the sale agreement in the case where the purchaser is a company or close corporation to be formed, versus the situation where the purchaser is a trust. In the case of the purchaser being a company or close corporation to be formed then, in accordance with clause 12.3 of the agreement of sale, the signatory is deemed to have acted in his personal capacity and shall be deemed to be the purchaser in terms of the agreement, if the company is not formed. In addition, in such a case, the signatory will be a surety. Neither of these applies when the purchaser is a trust.
- Goldex pleaded that Capper, personally, bound himself as surety and co-principal debtor *in solidum* for the repayment on demand of all amounts which the trustees may now or at any time owe to Goldex and as such, was liable to it for the purchase price. This claim confuses and conflates the rights against a signatory of the sale agreement under 12.1 with the rights against such signatory under clauses 12.2 and 12.3. Had Capper, in his personal capacity, signed as trustee for a company or close corporation to be formed then, in accordance with 12.3, he could have been "*deemed to be the purchaser in terms of this agreement*". No equivalent right exists where the signatory represents an existing trust and there is no basis upon which Capper, in his personal capacity, could be deemed to be the purchaser.

Breach of warranty

- In fact, what clause 12.1 of the agreement amounts to, is a warranty by the signatory (Capper in his personal capacity) that he was duly authorised to enter into

the agreement on behalf of the Trust, that all conditions had been complied with by the Trust in order to make the agreement binding and that the Trust would duly and punctually comply with all its obligations in terms of the agreement. On the common cause facts, Capper in his personal capacity, was in breach of these obligations/warranties. The rights that Goldex had against Capper, in his personal capacity, are those against a warrantor or guarantor of the facts stated in clause 12.1.1 to 12.4 of the sale agreement. In the event of breach, Goldex's election would be to either require Capper, in his personal capacity, to fulfil his obligations under clauses 12.1.1 to 12.1.4 of the sale agreement or to claim damages for his failure to fulfil them. Expressed differently, Goldex could have required Capper, in his personal capacity, to ensure that he was duly authorised, to ensure that the Trust was lawfully entitled to acquire and take transfer of the property, to ensure that all conditions were complied with to make the agreement binding and to ensure that the Trust duly and punctually complied with all obligations in terms of the agreement. In this way Goldex would be obtaining specific performance of the obligations that Capper personally assumed.

- Goldex however, in the present matter, did not base its claim as one for damages resulting from a breach of warranties and also, were the Court to consider such a claim in the present matter, did not submit facts to prove the damages that it suffered. (For example, this would have required proof of the market value of the property at the time of entering into the sale and now, proof of attempts at mitigating the loss, and the like.)

Claim against Capper in his personal capacity: as implied or tacit terms of clause 12.1

- On the facts, it was not shown that any implied or tacit term existed that Capper would be personally liable under the agreement.

(**Note:** A large part of the judgment was committed to explaining how the matter would proceed were it based on a claim for damages flowing from the breach of the warranty. As this was not the line of attack chosen by Goldex here, we are not including those parts in this summary for purposes of this publication. For anyone planning to litigate on such a clause, it is recommended that the full judgment is read.)

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