



MEUMANN WHITE

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A T T O R N E Y S

**BUYING THROUGH TRUSTS, COMPANIES  
AND CLOSE CORPORATIONS**

Presented by Meumann White Attorneys

## **OUTLINE**

### **TRUSTS**

- A: BUYING PROPERTY IN THE NAME OF A TRUST - ALREADY IN EXISTENCE
- B: BUYING PROPERTY IN THE NAME OF A TRUST - NOT YET IN EXISTENCE
- C: SALE OF THE TRUST

### **COMPANIES**

- A: BUYING PROPERTY IN THE NAME OF A COMPANY - ALREADY IN EXISTENCE
- B: BUYING PROPERTY IN THE NAME OF A COMPANY - NOT YET IN EXISTENCE
- C: SALE OF THE COMPANY

### **CLOSE CORPORATION**

- A: BUYING PROPERTY IN THE NAME OF A CLOSE CORPORATION - ALREADY IN EXISTENCE
- B: BUYING PROPERTY IN THE NAME OF A CLOSE CORPORATION - NOT YET IN EXISTENCE
- C: SALE OF THE CLOSE CORPORATION

## **TRUSTS**

### **A: BUYING PROPERTY IN THE NAME OF A TRUST - ALREADY IN EXISTENCE**

When a trust is purchasing property, the estate agent should check whether the trustees have authority to purchase.

It is advisable to obtain:-

- 1) a copy of the deed of trust;
- 2) copies of the letters of authority in favour of the trustees; and
- 3) where not all the trustees are signing the agreement, a resolution of trustees.

Likewise, if a trust is selling or bonding immovable property, the estate agent must ensure that the trust has authority to sell or bond.

When immovable property is acquired by a trust, the property is registered in the name of the trustees for the time being, acting in their capacities as trustees of the trust.

The estate agent usually has little if any knowledge of the trust's financial stability, and it is thus advisable to include a clause in the sale agreement in terms of which the signatory, by his signature to the contract, binds himself personally liable to carry out the obligations of the trust if the trust fails to carry them out.

**ADVANTAGES** of buying property in the name of a trust:-

1. **Limited Liability**

Like a Company or Close Corporation, a trust has a legal personality separate from its trustees and beneficiaries.

2. **Continuity**

The trustees and the beneficiaries enjoy the benefit of continuity as the trust's continued existence is not effected by changes in membership.

3. **Estate Planning**

Estate duty is charged on the "dutable amount" of the estate of a deceased person. The trust is not a person for the sake of the Estate Duty Act and therefore, whatever happens to the trust fund (or to the trustees) has no estate duty implications.

In certain circumstances, the beneficiary's right in the trust fund will not be "property" in the estate of the beneficiary - and will also thus not form part of his estate for estate duty purposes.

However, if anti-generation skipping provisions are introduced by legislation (which seems likely in the near future according to recommendations), the trust will be considered to have died and estate duty will have to be paid at a pre-determined rate, then a major attraction and benefit of the trust will fall away.

**DISADVANTAGES** of buying property in the name of a trust:-

1. **Transfer Duty**

Prior to 1996 the rate at which a trust paid transfer duty was determined by the identity of the beneficiaries. If they were all natural persons, then transfer duty was determined on the scale applicable to natural persons.

The trust is now deemed to be a person other than a natural person (ie. a legal/juristic person) with regards to the imposition of transfer duty and thus transfer duty is payable at a flat rate of 10 % of the value of the property where a trust acquires immovable property.

2. **CAPITAL GAINS TAX**

Capital Gains Tax is payable where a trust is the Seller of the property.

**B: BUYING PROPERTY IN THE NAME OF A TRUST - NOT YET IN EXISTENCE**

1. **The Prohibition**

According to our common law, an agent or representative cannot bind or represent a non-existing principal - except in the case of a Company or Close Corporation where the legislature has provided, in the Company's Act and Close

Corporation's Act respectively, for persons to enter transactions for and on behalf of Company's and

Close Corporations to be formed. There is however no similar legislation in existence for trusts.

In terms of the Trust Property Control Act the trustee can only conclude agreements on behalf of the trust after the trust has been registered AND the trustees have been authorised thereto in writing by the Master of the High Court by the issue to them of letters of authority.

Thus, any agreement entered into by a person as trustee of a trust yet to be formed, or by a trustee of a trust which is formed but in respect of which the trustee does not hold letters of authority, will be null and void; and cannot be ratified.

**2. What assistance is there in overcoming this prohibition.**

We used to advise clients of two solutions to this prohibition. However the Receiver of Revenue has taken the strong view that both solutions attract double transfer duty. We therefore recommend that no Sale Agreement for a Trust be signed before Letters of Authority relating to that Trust have been issued.

## **COMPANIES**

**A: BUYING PROPERTY IN THE NAME OF A COMPANY -  
ALREADY IN EXISTENCE**

**1. Does the Company have Authority?**

In terms of the Company's Act (Section 34) every Company has the power to sell, purchase or mortgage immovable property unless specifically excluded in the Company's memorandum. It is thus advisable to call for a copy of the company's memorandum.

However, in the unlikely event of the memorandum specifically excluding the purchase of immovable property by the Company, it still does not mean that the contract is void. In terms of Section 36 of the Company's Act, no act of the Company will be void by reason only of the fact that the Company was without capacity or that the directors had no authority to perform that act on behalf of the Company; and nor may the Company or any other person in legal proceedings rely on such lack of authority or contractual capacity.

So, a purchase of immovable property by the company, even if specifically prohibited in terms of the memorandum would not be void, provided the directors were prima facie duly authorised to bind the Company to the transaction.

This means that estate agents dealing with a Company can accept that the Company has the capacity to enter into a contract of sale of immovable property.

It is however an entirely different question whether the person representing the Company has the necessary authority to conclude the contract.

2. **Is the person signing authorised to represent the Company?**

a) WHO can be authorised to represent the Company?

The person representing the Company can either be an authorised person within the Company or an authorised outsider, such as an estate agent.

b) HOW is such person authorised?

The Company's articles must be examined as they might provide, for example, that only the board of directors may enter into a contract of sale of immovable property on behalf of the Company. In such a case, a single director would not be authorised to represent the Company unless he was authorised by the board of directors to do so.

If the articles and memorandum of the Company are silent and do not deal with exactly who shall be authorised, then it can be assumed that the board of directors or the Company's managing director has the necessary authority to conclude a contract of sale for the Company. A single director or the Company's secretary normally cannot conclude such contracts on behalf of the Company, unless authorised to do so by the Company's constitution (memo and articles) or by the board of directors.

c) **The Resolution**

It is always advisable to obtain a copy of a resolution authorising a person to enter into a transaction on behalf of the Company, and to annex this to the agreement.

d) **How is the signatory cited?**

The person authorised to enter the contract on behalf of the Company must sign the contract in a representative capacity ie) it must be clear that he signed the contract on behalf of the Company; eg. "for and on behalf of ABC (Pty) Ltd", otherwise he may be held personally liable on the contract.

However, the courts have held that where it is clear that the Seller or Purchaser is a Company and the contract is signed on its behalf by one of its officers without an indication that he signs on behalf of the Company, it will be assumed that he did sign on behalf of the Company;

e) **Section 228 of the Company's Act**

In terms of this section, the directors of a Company do not have the power to dispose of the whole or substantially the whole of the undertaking of the Company or the whole or the greater part of its assets except with the approval of 51 % of the shareholders at a general meeting of the Company.

This means that where the Company's only asset is the immovable property, the estate agent must ensure that he/she obtains a resolution of a general meeting of shareholders, which authorises or ratifies the specific transaction.

3. **Suretyship Clause**

It is advisable, especially where the estate agent has little knowledge of the financial stability of the Company, to include a clause in the sale agreement in terms of which the signatory, by his signature to the contract, binds himself personally to carry out the obligations of the Company if the Company fails to carry them out.

**B: BUYING PROPERTY IN THE NAME OF A COMPANY - NOT YET IN EXISTENCE**

It is possible to enter into a contract on behalf of a Company yet to be formed. This would arise, for example, where a person is interested in purchasing immovable property but wants to do so in the name of a Company not yet in existence.

Section 35 of the Company's Act is an exception to the rule that a person cannot bind a non-existent principal, and provides that a person may act as an agent for a Company to be formed.

A pre-incorporation contract (ie. a contract concluded before the Company is incorporated) only becomes binding on the Company if all the following requirements stipulated in Section 35 are adhered to:-

- 1) the contract must be in writing;
- 2) the contract must have been entered into by a person acting as agent or trustee for a Company to be formed;
- 3) the memorandum of the Company must contain as one of its objectives the ratification or adoption of the contract;
- 4) 2 copies of the contract, one of which must be certified by a notary public, must be lodged with the Registrar of Companies;
- 5) The Company must actually ratify or adopt the contract after its incorporation.

If these requirements are not complied with, then the pre-incorporation contract is not binding on the Company after it has been formed.

It is commonplace in a property sales agreement for a person signing a contract as trustee for a Company to be formed that the said trustee is allowed a period of time within which to form the Company and thereafter, should the Company fail to be formed or should the contract fail to be ratified then the signatory will be personally bound by the obligations set out in the contract. The estate agent should thus be familiar with how long the process takes to form a Company.

**See clause to be inserted in the contract.**

If the clause is not included then the agent or trustee acting for the Company yet to be formed incurs no liability if the Company does not ratify the agreement after its incorporated.

### **CLAUSE TO BE INSERTED IN AGREEMENT**

#### **COMPANY / CLOSE CORPORATION**

1. If the signatory hereto is entering into this Deed of Sale as a Trustee or Agent for a Company or Close Corporation to be formed, it shall be deemed that:-

1.1 Where the Company/Close Corporation is not formed within one month of date of signature hereof or does not adopt the Deed of Sale within 7 days of its formation, the signatory shall be deemed to have entered into this Deed of Sale in his personal capacity.

1.2 Where the Company/Close Corporation is formed within one month from the date hereof and adopts this Deed of Sale the signatory hereto by his signature hereon binds himself as surety and co-principal debtor for the due and punctual performance by the Company of all its obligations hereunder.

#### **C: SALE OF THE COMPANY**

ie. The acquisition of shares in a Company which owns a specific immovable property for the purposes of acquiring the property.

This procedure generally presents no problems and the purchaser becomes the shareholder of the Company on registration of the transfer of shares in his name in the share registry in the Company's Registry in Pretoria.

The only difficulty that may arise is where the Purchaser needs to raise a bond on the property in order to pay the purchase price. In terms of Section 38 of the Company's Act, no Company is allowed to give financial assistance for the purpose of acquiring any shares of the Company. This in real terms means that where the Company is a property-owning Company, the purchaser cannot raise a bond on that property in order to pay the purchase price. The bond would be void and every director would be guilty of an offence. Such a purchaser can only bond the property to the extent of the Seller's loan account in the Company. To get around this prohibition, the Company may be converted to a Close Corporation if the shareholders do not exceed 10

in number and qualify for membership in terms of the Close Corporations Act, as there is no similar prohibition in the Close Corporation's Act.

In a situation where a buyer is purchasing shares in a property owning company from a seller and:-

- a) the buyer requires bond finance;
- b) they buyer requires to mortgage the property in order to raise the purchase price for the shares;
- c) there are no difficulties with Section No. 38 of the Companies Act;

a difficulty which often arises is that the seller will not transfer the shares in the company to the purchaser before the full purchase price is paid and consequently the purchaser is therefore unable to sign mortgage bond documents on behalf of the company. A way around this difficulty is to structure the Sale Agreement such that the Seller agrees to sign the bond documents on behalf of the company in order to raise the finance but ensures that any suretyships which are to be signed will be signed by the purchaser. In this way the mortgage bond is subsequently registered and thereafter the transfer of the shares takes place as against payment of the purchase price.

#### Advantages

1. The Asset is kept separate from the Estate of the purchaser.

#### Disadvantages

1. The purchaser cannot see the "skeletons in the cupboard". There is no way of knowing exactly what debts the Company has.

2. Capital Gains Tax is payable on the sale of shares.
3. Transfer duty is payable.

## **CLOSE CORPORATIONS**

### **A: BUYING PROPERTY IN THE NAME OF A CLOSE CORPORATION - ALREADY IN EXISTENCE**

#### **1. Authority**

In terms of the Close Corporations Act, the consent in writing of a member holding a member's interest of at least 75 % or of members holding together at least that percentage of the members interests, in the Corporation, shall be required for any acquisition or disposal of immovable property by the Corporation - unless an association agreement provides otherwise. (Sec46(b)(iv)).

Once the required consent has been obtained, the contract can be entered into by any member of the Corporation acting on its behalf provided the transaction falls within the scope of the business of the Corporation stated in its Founding Statement or actually carried on by it. If the transaction falls outside the scope of the Corporation's business, a particular member must be specifically authorised by the CC to conclude the transaction.

It is always advisable to obtain a copy of the resolution authorising a member to conclude the transaction and to annex it to the contract.

#### **2. Suretyship Clause**

As in the case of Company's, this is advisable if the estate agent is not familiar with the financial standing of the Corporation.

**B: BUYING PROPERTY IN THE NAME OF A CLOSE CORPORATION - NOT YET IN EXISTENCE**

Similar to the situation of companies in terms of the Close Corporations Act a pre-incorporation contract is allowed to be signed by an Agent or Trustee for Close Corporation to be formed. After its incorporation the contract must be ratified in the form of a written consent given by all the members of the Close Corporation within the time specified in the contract, or, if no time is specified, consent must be given within a reasonable time after the incorporation of the Close Corporation.

Similarly as is the case with Trustees who sign on behalf of a company to be formed most property sale agreements will contain a clause where a purchaser is a Trustee of a Close Corporation to be formed, that where the Close Corporation is not formed or where if it is formed it fails to ratify the contract, that the signatory will be bound personally to carry out the obligations of the contract. If this clause is not included in the agreement, the person who enters into the contract for the Close Corporation yet to be formed is not personally liable if the Corporation, on its incorporation, does not ratify or adopt the contract.

**C: SALE OF A CLOSE CORPORATION**

ie. Acquisition of the member's interest in a Close Corporation in order to acquire the property owned by the Close Corporation.

1. There is no provision in the Close Corporation Act similar to Section No. 38 of the Companies Act. Consequently where a company faces difficulties with structuring a deal because of the terms of Section No. 38 of the Companies Act, the one way around this difficulty for the company is to convert to a Close Corporation.

A Close Corporation may give financial assistance for the purpose of any acquisition of the member's interest in that CC by any person if:-

1. the previously obtained written consent of every member is obtained;
  2. after such assistance, the Close Corporation's assets (fairly valued) exceed its liabilities;
  3. the Close Corporation is able to pay its debts as they become due in the ordinary course of business; and
  4. such assistance will not render the Close Corporation unable to pay its debts as they become due in the ordinary course of business.
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2. Generally in all other respects a Close Corporation is very similar to a Company in terms of the legal implications of dealing with it.
  3. Disposal of a member's interest must take place in accordance with the Association Agreement if one exists. In the absence of an Association Agreement a member can dispose of his interest only with the consent of every other member of the Corporation. Similarly, no person can become a member of the Corporation unless the existing members agree to his introduction into the Corporation.
  4. The Purchaser of a member's interest becomes a member of the Close Corporation only after the rejection of the amended Founding Statement (CK2) in the Close Corporation's Registry in Pretoria.
  5. The advantages and disadvantages of buying shares in a Company as reflected on page 21 applies equally to a Close Corporation.

# **COMPANIES, TRUSTS AND CLOSE CORPORATIONS – PAYMENT OF TRANSFER DUTY**

On 13 December, 2002, the Government promulgated the Revenue Laws Amendment Act 74 of 2002. This Act had been anticipated to be promulgated in approximately March or April, 2003, and therefore it took the entire business community by surprise in that it was promulgated on 13 December, 2002, and came into effect on the same day. Often legislation is promulgated in a Gazette with the date of its coming into effect being some month to a month and half thereafter. However the Government in its wisdom decided that this Act would come into effect immediately on the day that it was first promulgated. The danger was that there must have been many people who did transactions on that day who were unaware of the fact that the Act was in force.

The reason the Government wished to bring in the Act was to fill a loophole in the payment of transfer duty in property transactions. For some time there had been concern from the Receiver of Revenue that where a Company, Trust or Close Corporation sold its shares/members interest/interest in the Trust, no transfer duty was payable. The only duty that was payable for the share transfer was stamp duty of .25%. The effect of the new legislation therefore is to do away with this stamp duty and make transfer duty payable in these situations.

The new legislation states that as of 13 December 2002, all sales of :-

1. shares in a residential property owning Company (including shareblock);
2. sales of a members interest in a residential property owning Close Corporation and;
3. sales of the interest in a residential property owning Trust;

shall be liable for payment of transfer duty. This will apply in respect of all sales entered into on or after 13 December, 2002.

The amount of transfer duty payable will be dependent on the identity of the Transferee (the person taking transfer). If the Transferee is a natural person

then the graduated rate of transfer duty will be payable. If the Transferee is a legal person then transfer duty at 8% will be payable.

The Act is only applicable to Companies, Close Corporations and Trusts that own residential property. It is not applicable where Companies, Close Corporations and Trusts own commercial or industrial property.

This new legislation is not applicable where a Company, Trust or Close Corporation sells its property because this is a basic conveyancing transaction where transfer duty has always been payable, the amount thereof being dependent on who the purchaser is.

In regard to how the transfer duty is to be paid generally it will be attended to by the Managing Agents/Company Secretary/ Accountants who will have to add the transfer duty to the account and effect payment thereof to the Receiver of Revenue in order to obtain a transfer duty receipt. The cost therefore of such a transfer will be the amount of the transfer duty, the amount of the usual secretarial fee and an additional fee for the extra work required in obtaining the transfer duty receipt. We understand that this fee has been set at between R250.00 and R300.00 excluding VAT.

In terms of the legislation the persons who are liable for payment of the transfer duty are:-

- i) in the case of a Company, the purchaser is liable in terms of the agreement for payment of the transfer costs, including the transfer duty. If the purchaser fails to pay such amount within a period of six months from date of the sale then the public officer of the Company is jointly and severally responsible for payment of that amount, together with the seller. As a consequence of this you can imagine that the public officer who will generally be the company secretary, is going to be careful to ensure that transfer duty is paid on all such transactions;
- ii) in the case of a Close Corporation, again the purchaser will be responsible in terms of the agreement and if he/she fails to pay within a period of six months the public officer of the Close Corporation together with the seller will be jointly responsible for such payment;

- iii) in the case of a Trust, if the purchaser fails to pay the Trust and Trustees will be jointly and severally liable for such payment.

In view of the fact that in terms of the agreement the purchaser is held responsible and the seller has a residual responsibility in the event of the purchaser not paying, our advice to buyers and sellers involved in such transactions is to ensure that they obtain from the managing agents/company secretaries who are attending to the transfer, a copy of the transfer duty receipt for their records. In this way they can ensure that the duty in terms of the law to pay the tax has been carried out properly.

Some interesting questions have emerged in regard to this law :-

- i) What is the situation where there is a sale of shares in a Company who owns a farm on which obviously the farmer and his family live? The answer we have received from the Receiver of Revenue is that a farm property is not zoned residential and therefore it will not fall within the ambit of the Act.
- ii) What of a situation where a double story building is owned by either a Company, Close Corporation or Shareblock Company and the ground floor unit is a shop and the upper level unit is a residential flat? Our queries to the Receiver of Revenue have been met with the response that this transaction will not fall within the ambit of the Act because the property must be a fully residential property. In view of the fact that this property is partially residential and partially commercial this will take it outside the ambit of the Act. This view might change in time but that is what pertains at present.

Our advice to Estate Agents in regard to the new Act is to amend their clauses in their sale agreements which refer to the payment of costs so as to include reference to transfer duty. The reason for this is that the transfer duty amount is a significant amount and the Agent wants to forestall any complaint from a Purchaser who states that he/she was not advised of the fact that transfer duty was payable. Furthermore we advise Agents to obtain a copy of the transfer duty receipt from the person attending to the transfer and retain it on their file so that the Agent can ensure that the Act has been complied with in the interests of both buyer and seller.

In our view it is not advisable for people to buy a residential property through a trust, company or close corporation for the following reasons :-

1. There is no longer any cost saving – the costs of a conventional transfer are now the same as a share transfer;
2. C.G.T. - Capital Gains Tax on the higher rate applicable to legal persons is payable and if the property is the primary residence of the owner the one million rand exemption is not allowed.
3. "Skeletons in the cupboard" - there are always risks in buying a trust, company or close corporation as you buy it with both its assets and **liabilities.**

In regard to Shareblock Conversion transfers the Receiver of Revenue has subsequent to this December 2002 promulgation, legislated for allowing the Sectional Title part of the transaction to be free of Transfer Duty, provided that Transfer Duty has been paid on the Share Transfer.