

Pitfalls in contracting with trusts

THE Supreme Court of Appeal recently went out of its way to warn about some of the legal pitfalls in contracting with trusts. These pitfalls relate mainly to the capacity of the trust to conclude the transaction and the authority of a trustee to bind the trust.

The cases in question were *Nieuwoudt & Another NNO v Vrystaat Mielies (Edms) Bpk*; and *Land and Agricultural Bank of SA v Parker and Others*.

Unlike a company, a trust is not a legal person. The assets of the trust vest in the body of trustees whose powers to deal with the assets are determined by the provisions of the trust deed. Any action taken by the trustees outside the scope of their powers is null and void. It is important for anybody contracting with a trust to make sure that whomever they are dealing with in fact has the power to conclude the contract.

They should examine the trust deed carefully to satisfy themselves on the following points: Who are the trustees? Have they been authorised to act by the Master? Does the minimum number of trustees still hold office? Does the trust deed impose restrictions on the powers of the trustees, for example in relation to the types of contract into which they might enter?

Where the trust deed stipulates a minimum number of trustees, a sub-minimum is incapable of binding the trust and the trust lacks the capacity to act until further trustees are appointed.

It is a fundamental rule of trust law that unless the trust deed says otherwise the trustees must act jointly if the trust is to be bound by their acts. Even if a majority of the trustee signs the contract, the agreement is not binding unless the

trust deed makes provision for this. This goes to trust capacity: the group in question is not the body of trustees empowered by the trust deed to act.

If the trust deed does provide for decisions to be taken by majority vote, the majority cannot act without consulting the minority; that would be an abuse of power, as pointed out in the Parker case.

The trustees as a group must consider the matter and if there is disagreement the majority view will prevail. If one or more trustees is unable to attend a meeting of the board due to absence or illness, the majority can take decisions without them (provided that a quorum is present); but all trustees must be given notice of the meeting, so that they can attend if they are able or so wish.

The fact that trustees have to act jointly does not preclude them from expressly or impliedly authorising someone to act on their behalf, and that person may be one of the trustees. Acting jointly, they may delegate certain functions to one of their number, or even to an outsider, while retaining responsibility for the actions taken on their behalf. This brings the law of agency into play.

ACCORDING to general principles of agency, when a trustee purports to contract on behalf of the trust or board of trustees, the trust will be bound only if the agent had the requisite authority, express or implied. If the contract fails because the trustee lacked authority, an action for damages will lie against the trustee for breach of warranty of authority, but this may be of little solace in the circumstances.

The trust will be bound despite the trustee's lack of authority if:

- The board subsequently ratifies

the actions taken on its behalf, or

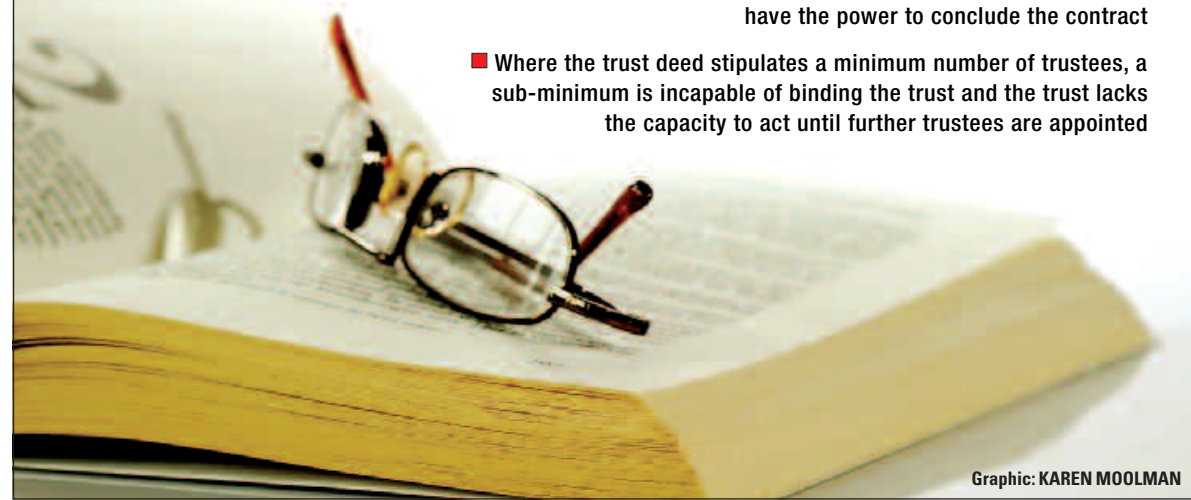
- If the trustee had "ostensible authority" to bind the trust; that is, if the board of trustees created the impression that the trustee had the necessary authority to represent them, and the other party reasonably relied on that representation. In such circumstances the board would be precluded from denying the existence of the authority.

As regards ratification, in the recent case of *Thorpe and Others v Trittenwein and Another*, it was held that ratification is not possible if a statute requires prior written authority for the act in question (as does the Alienation of Land Act 1981, when an agent signs a deed of sale on behalf of a principal).

What if it is clear from the trust deed that an individual trustee can have authority to represent the trust provided certain internal formalities are met, for example, that the body of trustees has resolved to delegate to the trustee the power to sign contracts on its behalf? In those circum-

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Graphic: KAREN MOOLMAN

stances, must a third party dealing with the trustee check that the formalities have been met, or is it entitled to assume that all is regular? That depends on whether or not the so-called "Turquand Rule" of company law applies to trusts too.

Persons dealing with a company are deemed by law to have "constructive notice" of its memorandum and articles, and to know of any restrictions on the authority of a director or officer to bind the company. This limits their ability to hold the company bound to a contract on the basis that the director or officer had ostensible authority.

The harshness of the doctrine of constructive notice is mitigated by the Turquand or "indoor management" rule. The effect of the rule is that the company will be bound even if the director or officer lacks authority because the internal formalities have not been met.

In *Nieuwoudt* and again in *Parker* the appeal court expressly left open the question whether the Turquand

rule could apply to trusts.

Clearly, in the present state of the law, it would be prudent for those dealing with trusts to assume that the rule does not apply to trusts. Before committing themselves to the contract, therefore, they should:

- Insist on seeing letters of authority from the Master appointing the trustees;
- Insist on seeing the trust deed itself, to make sure that the board of trustees is properly constituted and has the capacity to enter into the type of contract in question; and
- Check that all internal formalities have been met, particularly as regards the granting of authority to a particular trustee to enter into and sign the contract. An assurance from the co-trustees that the contracting trustee has the necessary authority will usually suffice, since that will preclude the board from subsequently denying his or her authority.

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