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WITH COMPLIMENTS

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Buying and Selling Property: Who Pays What Costs?

"Risk comes from not knowing what you're doing" (Warren Buffett)

Don't risk not knowing what you're doing when you either sell or buy property. Avoid

nasty shocks by budgeting properly for the costs you will incur – some of them can be substantial, and some are less obvious than others.

The checklists below are of necessity not exhaustive and you would do well to take specific professional advice and to get cost quotes before you finalise your financial planning.

The costs you will pay as buyer

In the excitement of buying a house (particularly if it's your first one!) it's easy to underbudget and forget all the amounts of money you will have to pay over and above the purchase price.

One suggestion is to budget for costs totaling up to about 10% of the purchase price, but here's a list to help you with your own calculations (ignore any items that don't apply to your purchase) -

- Transfer duty (a government tax payable to the state via SARS unless the sale is subject to vat). You will pay on a sliding scale depending on the purchase price and beware – this can be a substantial cost!
- The applicable transfer fees that the conveyancers will charge for their services in handling the transfer (you must pay these before transfer)
- Deeds Office fees
- Bond registration fees charged by the bank's attorney
- Bond/Home Loan initiation fee payable to the bank (the bank may also require you to take out a home loan protection life policy)
- Occupational interest, if payable when you move in before the transfer takes place
- Pro-rata rates, municipal charges and levies (some payable in advance)
- If you are buying into a complex (sectional title or Homeowners Association) you may be liable for body corporate or HOA levy clearance fees in addition to pro-rata levies
- Don't forget other costs like moving costs, redecorating, telephone and internet connections, water and electricity deposits etc
- Also remember to budget for your ongoing monthly costs of property ownership – rates, levies, municipal services, insurance (building and contents), security, building maintenance and the like.

The costs you will pay as seller

Again, ignore any of these items that don't apply to your particular sale -

- Estate agent's commission (don't forget the vat component)
- Certificates of compliance – electrical, water, gas, electric fence, and the like. Provide also for the possibility of repairs and upgrades to ensure compliance with regulations
- Bond cancellation fees (be careful here to give the bank enough notice to avoid having to pay an early termination penalty as well)
- Rates and levies
- If you live in a complex, there may be other fees payable to your body corporate or Homeowners Association.

Trusts on Divorce: Are You Stuck with an Ex-Spouse as Trustee?

"Love is grand. Divorce is a hundred grand." (Anon)

Trusts may be formed for a variety of reasons, and the purpose and structure of each trust will inform the choice of trustees. When it comes to families aiming to preserve and protect family assets for future generations, often both spouses are appointed not only as beneficiaries, but also as trustees.

That's a great scenario whilst the marriage prospers, but what happens on divorce? A recent High Court decision addressed one such scenario –

'Not the Titanic' – this marriage took six years to sink

In 2014, whilst a marriage was (as the Court put it in a judgment rich in nautical imagery) "still in calm waters", the spouses formed four trusts. Two were called business trusts, one a property trust, and the fourth a family trust. Naming choices aside, the critical issue is that both spouses had been appointed as trustees.

Regrettably in 2015 the couple "drifted" apart and their marriage "ran aground and settled on the rocky shores of the divorce courts door" with the institution of divorce proceedings. "Unlike the Titanic" observed the Court, the relationship took six years more to be finally laid to rest - the divorce was only granted in 2021.

The ex-spouses apply for each other's removal as trustee

The ex-husband then applied to the High Court for removal of his ex-wife as trustee of all four trusts on the grounds that she had breached her duties as trustee. Most significantly, he said, she had failed to attend trustee meetings for some five years despite being invited to them.

- Her main defence was that, in the context of the ongoing divorce proceedings, her ex-husband's conduct made it impossible for her to attend to her duties as trustee.

  The Court was unconvinced by her various allegations in this regard, and two aspects in particular bear mention –

  - She complained that being in the minority her decisions were overruled – not an excuse for failing to attend meetings held the Court.

  - Her ex-husband failed to provide a vehicle to enable her to attend meetings – again no excuse, said the Court, there being a provision in the trust deed for virtual meetings.

- Also counting against her was the fact that she was living in a trust-owned property "but fails to maintain such and pays no rent at all despite receiving the amount of R10 000,00 per month towards property expenses incurred."

- Finding that she had not been involved in the trust's affairs and did nothing to safeguard them, the Court ordered her removal as trustee.

The Court then rejected as being without merit her counterclaim for her ex-husband's removal as trustee on the grounds of a breach of his duty of trust towards her and a conflict of duty between his private interests and his duties as trustee.

Let's have a look at the law behind those decisions -

What are a trustee's duties?

Per the Trust Property Control Act: *"A trustee shall in the performance of his/her duties and the exercise of his/her powers, act with the care, diligence and skill which can*

reasonably be expected of a person who manages the affairs of another".

Must a trustee be impartial?

The Court: “It is not required of a trustee to be total[ly] impartial or [to have] no connection with the beneficiaries, but rather that he or she is capable of bringing the necessary independent mind to bear [to] the business of the trust and of deciding what is in the interests of the trust.”

When will a court remove a trustee?

The court has a discretion which it must exercise “with circumspection”.

Per the Court: “The court has to be satisfied that the requested removal will be in the best interest of the trust and the beneficiaries … a mere conflict of interest between trustees and beneficiaries or amongst the trustees [is] insufficient for the removal of a trustee … the overriding question is always whether or not the conduct of the trustee imperils the trust property or its administration".

There is no requirement to prove bad faith or misconduct, rather “the essential test is whether such disharmony, as in the present matter, imperils the trust estate or its proper administration … It is therefore clear that **the court may remove a trustee from office in the event that such removal will be in the interest of the trust and its beneficiaries**.” (Emphasis supplied)

In closing…

If you are faced with a divorce scenario, avoid a situation such as the ex-spouses in this matter faced by making sure that all questions around any trusts involved – such as who is to remain as trustee, who is to remain as beneficiary and so on – are resolved as part of the divorce process, and not left for future resolution.

Even better, take professional advice upfront when setting up trusts on how to avoid any future disputes that may arise should your marriage ever sail into stormy waters.

Bodies Corporate: Forcing Access to Units, and Round Robin Resolutions

Owning your own property comes with a raft of benefits, including a general right to privacy and control over who can access your property and who can’t.

But of course there are exceptions. And apart from the obvious ones, a recent High Court judgment highlights one that is particular to sectional title schemes. It involved a unit owner whose “recalcitrant actions” prevented a body corporate from entering his unit to check for a water leak.

A recalcitrant unit owner blocks access to his unit for a leak test

- A unit in a sectional title scheme had a damp problem and the neighbouring unit owner initially allowed the body corporate access to his unit to conduct a leak test. No leaks were found.

- However three months later the damp problem was still unresolved, and this time the neighbour flat out refused access to his unit for a second leak detection test. Requests for access through the managing agents, loss adjusters, leak detection agents and the body corporate’s attorneys all fell on deaf ears.

- The body corporate applied to the High Court for an urgent order compelling access within 48 hours.

- Although the neighbour had initially taken the stance that there was no reason why a second inspection should be conducted, he had a last-minute change of mind (after taking legal advice) and accepted that **the body corporate is entitled to conduct reasonable inspections from time to time in order to properly manage the common property**. He made a settlement offer to this effect to the body corporate, which rejected the offer as it still wanted its costs.

- Ultimately the Court rejected the neighbour's attacks on the body corporate's standing to bring the court application and held the neighbour liable to the body corporate for both the leak detection costs and the legal costs (only on the Ombud's tariff - more on that below).

Were the body corporate's round robin resolutions valid?

At issue was the validity of two body corporate resolutions. The full details of the various legal challenges mounted against the resolutions will be of great interest to industry professionals, but for most bodies corporate and unit owners perhaps the most important practical aspect is the attack on the first resolution because it was signed only by two of the five trustees on a round robin basis.

The Court was unimpressed by the neighbour's argument that the resolution was defective because it was not signed by a majority of trustees and did not record date, place, and time.

"It is common practise" said the Court "what with the onslaught and the lagging effects of [Covid 19] that trustees, shareholders, governing bodies and directors meet virtually and sign documents via round robin."

"It is … not uncommon for [trustees] to manage the affairs of the body corporate as they deem fit and in the best interests of the owners. *Ad hoc* and informal meetings are often held in order to deal with incidents without having to call or convene a formal meeting of the trustees."

Each case will be different

The particular facts in this case clearly played a significant role in the Court's ultimate decision, and **there is no substitute for legal advice specific to each unique set of circumstances**.

For example, one of this scheme's Management Rules specifically caters for a trustee meeting by '*any other method*' which, said the Court "in my view would encompass and encapsulate the extension of the method of signing resolutions. It would be absurd to consider or apply anything to the contrary."

Important also was the Court's finding that "throughout the entire process all the trustees were aware of and informed of what was transpiring".

Finally, a warning from the Court to always approach the Ombud first

The Court once again confirmed the principle that in a matter such as this the parties should in the first instance approach the CSOS (Community Schemes Ombud Service) rather than the High Court.

Commenting that "I am of the view that this matter should never have been brought before this court as first instance" and "There are no exceptional circumstances pertaining to this matter, but rather issues that fall squarely within the ambit of the Ombud that can and would have been expeditiously dealt with at no cost as the employ of legal representatives is not permitted" the Court awarded legal costs to the body corporate only "on the tariff applicable in respect of proceedings under the ambit of the Ombud".

Reading between the lines, the body corporate was possibly fortunate that the High Court agreed to hear its application at all. It may well have been saved only by the Court's expressed displeasure with the neighbour's "recalcitrant actions" and by his conduct in opposing the application in the first place.

Verbal Agreements – Not Much Good, But Lots of Bad and Ugly

"The Good, The Bad, and The Ugly" (Spaghetti Western, 1966)

A common myth – one that can get you into a whole lot of trouble if you aren't alive to it - is that verbal contracts are not legally enforceable in South Africa.

The opposite is true. With very few exceptions, our law will hold you to all your agreements, whether oral or written.

What verbal agreements aren't binding?

Not many. Only a few types of agreement must be in writing to be fully valid, the most common being contracts for the sale, exchange, or donation of land or of any "interest in land", ante-nuptial contracts (ANCs); and deeds of suretyship.

So, watch what you say!

Firstly, although our laws of contract are complex, with many exceptions and "ifs and buts", at the most basic level the only requirements for a binding contract are an "offer" and an "acceptance" of that offer.

So, watch what you say! Make an offer to someone else, or accept another person's offer, and that little voice at the back of your mind telling you "Don't worry, you aren't actually tying yourself into anything here" is very likely to be (a) totally wrong and (b) getting you into a whole lot of trouble.

The danger – a little bit of Good, but mostly Bad and Ugly

Of course, verbal agreements do have their benefits – they're quick, easy, and cost-free. We enter into little give-and-take deals with others in our daily lives without a second thought and with not a drop of ink in sight. And that's absolutely fine for the little things.

But contracting orally is a terrible idea when the stakes are high -

1. **Our not-so-sharp memories:** As the old proverb warns us: "*The bluntest pencil is better than the sharpest memory*". It's a human trait for us to "hear what we want to hear". And to remember what we want to remember. You and the other person could well, in all innocence, come away from exactly the same discussion with totally different ideas and memories of what you actually agreed to.

   Next thing you know you're both in court, swearing to the truth of your own versions and leaving it to a judicial officer to try and decide whose recollection is the more accurate. That decision could go either way.

   Record what you agree to, for all to see.

2. **The fraud risk:** Worse, if your opponent isn't above stretching the truth a little (or a lot!) you have the same problem but magnified. Make it difficult for a dishonest party to wriggle out of an agreement – or to misrepresent its terms - by recording it in black and white.

3. **Proof:** Which brings us to the question of proof. With an oral agreement it is your word against theirs. At best, you may be lucky enough to have a witness available to support your version, but such a witness may or may not have a good memory and high credibility. That can never match up to the evidential weight of a "signed, sealed and delivered" contract.

4. **Certainty and Dispute:** Let's bring that all together under the heading of "certainty". Although written contracts aren't perfect - our courts are regularly faced with disputes over them - there's a lot less room for misinterpretation, uncertainty, and dispute when you can stand up in court waving a signed piece of paper rather than saying "As I recall it…"

An end note on electronic contracts

This is a whole other topic on its own, but bear in mind that since the arrival on the scene of the ECT (Electronic Communications and Transactions) Act you can often contract electronically via email, WhatsApp, and the like. There's both a warning there ("be careful what you agree to electronically!") and an opportunity ("paper, pen and ink not always needed!"). Take professional advice in any doubt.

Website of the Month: Don't Let Hybrid Work Break Your Company Culture!

As pandemic restrictions ease around the world, many businesses forced by lockdown to "go remote" are torn between returning to office and keeping everyone working remotely. An increasing number are opting for one or other hybrid model, which can come with major benefits but also major challenges.

One of those challenges is the risk of losing a cohesive company culture built up over years and perhaps decades of in-office teamwork.

Have a read of PwC's "Three ways to prevent hybrid work from breaking your company culture" **here** for some ideas on mitigating that risk.
