Waarmerkingsvereistes by die oordrag van eiendom

Dit gebeur dikwels dat ons kliënte hulself in die buiteland bevind en begerig is om hul eiendom in Suid-Afrika te verkoop. Die volmag wat die verkoper teken magtig en stel ons firma in staat om die eiendom oor te dra aan die koper. Dit is die belangrikste dokument wat deur die verkoper geteken moet word ten einde registrasie in die aktekantoor te bewerkstellig. Aangesien die volmag die dokument is waarin die verkoper sy belang in eienaarskap afteken is dit van kardinale belang dat die handtekening van die verkoper geverifieer moet word.

Daar is twee prosedures wat ons kliënte wat in die buiteland verkeer, kan volg ten einde te verseker dat hul volmag korrek gewaarmerk word en aldus vir die aktekantoor aanvaarbaar sal wees. Waarmerking word omskryf as: "die bevestiging van 'n handtekening daarop" – Hooggeregshofreël 63.

Die eerste prosedure word omskryf in Hooggeregshofreël 63. Hiervolgens word 'n dokument wat op 'n plek buite die Republiek verly is, geag voldoende gewaarmerk te wees vir doeleindes van gebruik in die Republiek indien die handtekening en ampseël van 'n Suid-Afrikaanse diplomatieke of konsulêre beampte of van'n staatsamptenaar van daardie buitelandse plek wat met die waarneming van dokumente belas is, daarop aangebring is. Hierdie proses kan soms duur en tydsaam wees aangesien sekere lande se diplomatieke amptenare baie vêr geleë is van die ondertekenaar.

Indien die verkoper homself egter bevind in die Verenigde Koningryk, Zimbabwe, Lesotho, Botswana of Swaziland kan waarmerking geskied deur slegs die handtekening en ampseël van 'n notaris van die betrokke land.

Die tweede prosedure, is die proses soos voorgeskryf deur die internasionale konvensie ter afskaffing van die vereistes van attestasie vir buitelandse openbare dokumente en is in werking gestel as alternatief tot Hooggeregshofreël 63 om die proses te vergemaklik. Die konvensie bepaal dat die enigste formaliteit wat vereis word om die egtheid van 'n handtekening te waarmerk, die byvoeging is van 'n sertifikaat uitgereik deur 'n bevoegde owerheid van die staat waar die dokument voortgebring is. Hierdie sertifikaat word 'n Apostille genoem en word deur 'n notaris geteken asook die Griffier van die betrokke Hooggeregshof. Persone wat hulself dus bevind in lande wat die konvensie aanvaar het kan van die eenvoudiger en goedkoper proses gebruik maak.

Ten einde ons kliënte soveel moontlik ongerief te spaar is ons voorstel dat daar eerder gepoog word om 'n afspraak met ons te skeduleer voor die verkoper na die buiteland vertrek, ten einde die nodige volmag te teken.

- Nicole Rokebrand

MCademy

Gedurende Februarie word die volgende onderwerp aangebied by MCademy:

Die Oordragprosedure

Opleidingskedule:

7 Februarie: 09:00 – 10:00 Engels
(Donderdag) 11:00 – 12:00 Afrikaans

14 Februarie: 09:00 – 10:00 Afrikaans
(Donderdag) 11:00 – 12:00 Engels

20 Februarie: 09:00 – 10:00 Engels
(Woensdag) 11:00 – 12:00 Afrikaans

28 Februarie: 09:00 – 10:00 Afrikaans
(Donderdag) 11:00 – 12:00 Engels

Bespreek u plek by:mcademy@mcvdberg.co.za

During the month of February the following topic will be presented at MCademy:

The Transfer Procedure

Training Schedule:

7 February: 09:00 – 10:00 English
(Thursday) 11:00 – 12:00 Afrikaans

14 February: 09:00 – 10:00 Afrikaans
(Thursday) 11:00 – 12:00 English

20 February: 09:00 – 10:00 English
(Wednesday) 11:00 – 12:00 Afrikaans

28 February: 09:00 – 10:00 Afrikaans
(Thursday) 11:00 – 12:00 English

Book your seat at: mcademy@mcvdberg.co.za

MCSudoku

	1		6		8			
						4	6	1
	3	4			7			
				1				
		1	9	6			5	
	7						9	
9					1	3		
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				5	2	7		9

10 Minute Sudoku

M.C. Monthly

Issue 9 M.C. van der Berg Incorporated - Your Property Attorneys January 2013

The Newsletter with a difference

Formalities of agreements

An agreement will only be valid and enforceable if it is manifested in a particular outward form. This form is generally referred to as the formalities or legal requirements of an agreement.

Our law recognises two kinds of agreements and terms:

1. Express agreements and terms:
In this instance the intention of the contracting parties is articulated expressly. This express articulation can either be orally or in writing.

2. Tacit agreements or terms:
Here the intention is inferred from the unarticulated conduct of the parties. A good example is when you buy a can of Coke at the convenience store. Normally not a word is said by either yourself or the person behind the till but everyone knows exactly what both the parties' intention are.

In our law, as a general rule, it can be said that as a point of departure no specific formalities are required for a contract to be valid. In essence this means that verbal agreements are normally in order and legal.

In some instances however specific requirements are laid down to which an agreement has to comply before it will be valid. Non-compliance with these formalities will render the agreement null and void.

For reasons of policy and legal certainty compliance with outward form is in exceptional cases laid down as a requirement and formality. As an example, the Alienation of Land Act requires alienation of land (sale, donation etc.) to be in writing and signed by the parties.

The parties to the contract themselves can also make compliance with certain formalities a requirement for validity of the agreement. Parties can therefore decide that an agreement – e.g. to rent a property – which will be valid if concluded verbally, will only have effect once it is in writing and signed by the parties. In this regard it is important to distinguish between instances where the documentation and signing of the agreement is indeed a prerequisite or purely for evidential purposes.

Formalities imposed by statute or by the parties can be diverse in nature. Normally it requires that the agreement must be in writing and signed by the parties. Another typical example of a self-imposed formality, although not for the initial validity of the agreement, is that all amendments, alterations or variations have to be in writing and signed by the parties.

It is of the utmost importance that contracting parties comply with the legal formalities of their agreement whether imposed by statute or by themselves.

- Tiaan van der Berg

Non conventional ways of concluding a contract

The formality that a contract needs to be in writing and signed is well established in the Alienation of Land Act. Often the question is asked if a contract can be signed by one party and faxed or electronically submitted to the other party. Various Appeal Court cases laid down the principle that a contract need not be contained in one document, thus permitting contracts to be concluded in various electronic formats like fax or email – it does comply with the requirement of writing in all of these instances. The only difference between most other contracts and agreements of sale for immovable property, is that last mentioned must be signed by the parties concluding it or their appointed agents.

Legal writers explored the question whether it will be permissable to conclude an agreement of sale of immovable property in terms of the Electronic Communications and Transactions Act, where a document is generated and "signed" with an encrypted data signature. The legislature was wise in this regard and excluded immovable property transactions from the ambit of the act, therefore still requiring parties to sign the contracts by hand.

Duplicate copies, signed by the parties seperately will also constitute a valid agreement, provided that the agreements are identical. This is however not advisable, as it opens the door to a lot of problems should one party try to escape his contractual obligations. Should there be no other option, it would be better to insert a clause stating that the parties are signing duplicate copies of the agreement, and that no alterations to the contract are permissible.

- Rich Redinger

The Company as purchaser: Authority to act

In terms of the previous Companies Act it was deemed that a person had knowledge of the contents of any document relating to a specific company because all company documents are accessible for inspection. In terms of the current Companies Act 71 of 2008 (hereinafter the new act) a person is not deemed to have such notice. The exception to the aforesaid rule is when dealing with so-called ring fenced (RF) companies.

The suffix RF is added to a company name to indicate to anybody dealing with the company that there are restrictive conditions applicable to the company which are incorporated in the Memorandum of Incorporation (MOI) of the company. It is thus important to peruse the MOI of a RF company and to ensure that there is no prohibition or specific requirements before the company by way of its authorised representative (usually the director) can act on behalf of the company.

When a company purchases a property, a natural person (usually one of the directors), needs to act on its behalf. The director represents the company and often the question arises whether the director or other person was duly authorised to act on behalf of the company. Many court cases have been decided on this topic. The new Companies Act brought about change in the principles regarding the authority to act on behalf of the company.

Authority to act on behalf of the company can be conferred in the following ways:

1. Actual authority – as conferred by an act
2. Express authority – as set out in the MOI
3. Implied authority – when the person who acts on behalf of the company purports to have the necessary authority, but is exceeding his actual authority.

The Turquand rule, a common law rule, can supplement the lack of actual authority to act in certain circumstances. This rule states that if a third party (in the sale of a property, the seller) is dealing with a person who has authority to bind the company, but for the particular act there is an additional internal requirement or restrictive condition, the third party can accept that the additional requirement has been complied with. The company cannot claim that the representative lacked authority. The third party must act in good faith and there must be nothing suspicious about the transaction. The common law Turquand rule is retained in a modified form in terms of section 20(7) of the Companies Act.

To avoid litigation regarding the question whether the signatory had the authority to act or not, agents or sellers should approach us to assist them in examining the companies MOI to ensure that the necessary resolution authorising the purchase of the property and the person representing the company is produced before signature of the deed of sale.

- Sonja du Toit

As jy hierdie boodskap lees beteken dit net een ding! 'Die wêreld het nie op 21 Desember 2012 tot 'n einde gekom nie". Het julle mos gesê dit gaan nie gebeur nie! Ek weet agter nie of mens dankbaar of teleurgesteld moet wees nie.

'n Wonderlike jaar met hope vol geleenthede lê weer voor ons deur.

Ons sal, soos in 2012, weer voortgaan mat ons MC²Agents, MC²Principals, ons koerantjie MCMonthly asook ons opleidingsakademie MCademy.

Voorspoed vir 2013! En al sê iemand die wêreld gaan hierdie jaar tot 'n einde kom wil ek julle herinner aan die ou wysheid:

"Even if I knew that tomorrow the world will go to pieces, I will still plant my apple tree"

- Martin Luther King

Looney Law-

A doctor told his patient that she only had six months to live. The distraught patient asked the doctor what she could possibly do to have more time. The doctor advised, "Marry a lawyer. It will be the longest six months of your life."

SARIE VAN LELYVELD

Sarie werk al sedert Januarie 2009 by ons. Aanvanklik as ontvangsdame en later as Tiaan se persoonlike assistent.

Sarie moet behoorlik hare op haar tande hê want die baas is baie kwaai! Sarie is verantwoordelik vir al die funksies en bemarkingsmateriaal van die kantoor.

Sy is ook die moeder in die kantoor wat almal se seer moet regmaak. Ons 'luv' haar almal.

Electric fence certificates

Regulation 12 of the Electrical Machinery Regulations (issued in terms of the Occupational Health and Safety Act, Act No. 85 of 1993) imposes an obligation on the user of an electric fence system to have an electric fence system certificate of compliance.

If there is an electric fence system, the electric fence certificate will be an additional requirement and it will be issued separately from the electrical compliance certificate.

This requirement does not apply to a system installed before 1 October 2012. However, it will be required where an addition or alteration is effected to the system or if there is a change of ownership after 1 October 2012 of the property on which such a system is installed.

The certificate is transferable – once it has been issued, there is no need to obtain a new one upon change of ownership. As mentioned above, a new certificate will however be required if there is any alteration or addition to the installation.

Such a certificate may only be issued by a registered Electric Fence System Installer. The Deputy Director for Electrical Engineering at the Department of Labour, Head Office, Pretoria (Mr Pieter Labuschagne) advised that they are in the process of issuing temporary registration certificates to Electric Fence System Installers.

Provision should be made for an appropriate clause in a sale agreement with regards to immovable property, either for the issuing of such a certificate or for the transfer of the existing certificate to the purchaser. You can find an example of such a clause on our website: www.mcvdberg.co.za – agents tools – clauses.

Where the property will be financed by way of a mortgage bond, the banks will most probably require an electric fence certificate in addition to the electrical compliance certificate prior to the registration of the bond.

With regards to new developments, the electric fence will obviously only be installed on the perimeter wall, and the onus will most probably be on the Developer (as the first seller) to obtain the electrical fence certificate.

In a sectional title scheme or security estate (where the electric fence is installed on the perimeter wall), the onus will be on the Body Corporate / Home Owner's Association to obtain the electric fence certificate.

Clarity on many of these issues will hopefully soon be given

- Annele Odendaal

Procedural fairness

In the previous MC Monthly substantive fairness and the test to determine substantive fairness was discussed. In this issue I would like to briefly discuss procedural fairness which is the second leg for a fair dismissal.

In terms of the Labour Relations Act a fair procedure is a requirement for a fair dismissal.

The requirement of a fair procedure prior to a dismissal derives from the principal in the administrative law in terms of which the rules of natural justice apply:

Adopting the rules of natural justice not only ensures justice and transparency, but also labour peace and a contribution to democracy within the work place.

The first rule of natural justice to be applied, is the audi alteram partem rule. This rule requires an employee to be afforded a hearing at which he/she is able to state his/her case, call witnesses and cross-examine witnesses called by management.

If found guilty of misconduct, the employee should further be allowed to make submissions with regard to an appropriate sanction. It has become common practice to conduct a disciplinary hearing to afford the employee an opportunity to state his/her case.

However, a formal hearing need not be conducted in all circumstances. It is quite acceptable to be flexible during the proceedings, with the only proviso that the employee must be heard. It is, therefore possible to relax the principles of a formal hearing and conduct a more informal investigation to determine whether a disciplinary rule has in fact been contravened.

Secondly a disciplinary hearing should be judged by an impartial person. The chair person of a disciplinary hearing is, therefore required to be unbiased.

Having regard to these basic rules, the elements of a fair procedure are set out as follows:

The employee should be notified in writing of the following:

- The charges against him;
- The time , date and place of the hearing;
- His rights at the hearing;

If the employer has implemented disciplinary proceedings, whether unilaterally or by collective agreement, the provisions thereof must be followed, such as the prescribed time for notice to be given of a hearing, who may act as a representative, the period in which the hearing should be held, the time period in which an appeal may be lodged etc.

It is therefore of the utmost importance that when you do consider taking any disciplinary steps against any employee that a fair procedure should always be followed. Should you consider dismissal, the requirements of substantive fairness as discussed in our previous issue should also be taken into account.

- Bennie Reynders