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Immovable Property Sales involving a Deceased Estate

Introduction

Estate Agents are often approached to sell immovable property which forms part of a deceased estate. The purpose of this note is to explain the different types of deceased estate transfers and the common pitfalls associated with these sales.

Transfer of property to an heir in a deceased estate

The transfer of property contemplated here is where the property is transferred from the deceased estate to the person that inherited that property from the deceased.

When a person dies the Master of the High Court appoints an executor to administer the deceased estate. The executor's function is to collect the assets of the deceased, pay any debts and thereafter distribute the inheritance to those entitled to such inheritance.

The executor drafts a liquidation and distribution (L&D) account which represents the final affairs of the deceased and includes a distribution account which sets out who is entitled to inherit what assets. This account is generally drafted towards the end of the winding up process.

Where a person is entitled to property, this property will only be transferred in the deeds registry after the Master has approved the L&D account, the account has lain for inspection free from objection and after the Master has given the go ahead to transfer.

This transfer is thus a delayed transfer as the transfer to the heirs takes place at the end of the winding of the deceased estate. A simple deceased estate can take 12 plus months to finalise.

Sale by an heir before that heir has taken transfer from the deceased estate

This is an extension of the above process and contemplates the scenario where the person entitled to inherit a property from a deceased estate wishes to sell that property on to a third party purchaser before taking transfer from the deceased estate.

The transfer of the property from the deceased estate to the heir and on to the third party purchaser can take place simultaneously in the deeds registry.

Caution must be exercised in this type of sale as the heir is only entitled to sell the property once the Master of the High Court has approved the L&D account referred to above. Prior to this date the heir has inherited the property but the right to the property has not in law vested in him.

The sale agreement can be proceeded with before the approval of the L&D account but the sale must be made subject to the approval of such L&D account within a specified time. Further caution is required as the property transfer process will be delayed and lengthy due to the need to finalise the estate before transfer can take place. The purchaser's attention should be drawn to this fact in the agreement of sale.

Due to the issues with the above sale, it is where possible preferable and quicker for the executor to sell the property from the deceased estate to the third party purchaser. As will be seen below this transfer process is quicker.

Sale of property from the deceased estate directly to a purchaser

In this case the property is sold by the executor of the deceased estate from the deceased estate directly to a third party purchaser.

The executor signs the agreement of sale on behalf of the deceased estate. The seller can be described as: The Executor in the estate of the Late Joe Bloggs.

The only person authorised to sign the sale agreement is the executor. The executor must be appointed by the Master of the High Court in terms of a document called a "Letter of Executorship". In terms of section 13(1) of the Administration of Estates Act 66 of 1965 a person may not sign an agreement if he/she has not been issued with letters of executorship.

In order to satisfy the requirements of Section 2(1) of the Alienation of Land Act, the Executor must be appointed in writing before he signs the sale agreement.

Where there is more than one executor, all executors must sign the sale agreement or where one executor signs on behalf of both in terms of a resolution, the resolution must be signed prior to the executor signing the sale agreement.

The transfer process in this kind of deceased estate sale is quicker than the transfer described above but can still be delayed to an extent due to the requirement that the Master of the High Court must, prior to transfer, issue a certificate in terms of Section 42(2) of the Administration of Deceased Estate Act.

In practice the Master does not issue an actual certificate, rather the Conveyancer submits to the Master the Power of Attorney to pass transfer (to be used in the Deeds Registry) and the Master stamps the Power of Attorney with a stamp that reads:

When application is made to the Master of the High Court for the Section 42(2) certificate, the executor completes and signs an application in terms of Section 42(2). This document contains various questions which, when answered, enable the Master of the High Court to effect the endorsement.

It is important to note that all major heirs must consent to the sale of the property and this consent is submitted to the Master of the High Court with the Section 42(2) application.

Prior to selling the property it is thus prudent to ensure there are no objections to the sale from these heirs.

From an administration of estates perspective, this transfer process may, depending on the circumstances, be preferable to the first process above inasmuch as it reduces the ongoing holding costs related to ownership of the property, such as rates, electricity, maintenance and the bond repayments where applicable.

After registration of transfer to the purchaser in the deed office, the proceeds of sale are paid into the deceased estates banking account to be dealt with by the executor.

Conclusion

In order to determine the best way to deal with immovable property in a deceased estate regard must be had to the particular circumstances of the deceased and the heirs. Consultation with the executor is essential.

CERTIFICATE
I hereby certify that in terms of
Section 42 (2), Act No. 66 of
1965, that there is no objection
to transfer as stated herein"
.....
Master of the High Court

