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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

CASE NO: 41972/2019

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

1 December 2020

Signature

In the matter between

THOMSON NEBOTALO N.O

Applicant

o.b.o THE NEBOTALO FAMILY TRUST

(IT No. [...])

And

PRIME FURNITURE GROUP (PTY) LTD

Respondent

JUDGMENT

COWEN, AJ:

Introduction

- [1] This is an application for summary judgment in terms of Rule 32 of the Uniform Rules of Court. The applicant is Thomson Nebotalo NO, who cites himself as a trustee of the Nebotalo Family Trust with Registration No [...] and acting on its behalf. The respondent is Prime Furniture Group (Pty) Ltd.
- [2] The applicant is a plaintiff in an action instituted on 3 December 2019 for payment of R1 250 000.00 (one million two hundred and fifty thousand Rands), interest and costs. The amount claimed is monies outstanding in terms of an acknowledgement of debt, in which the defendant acknowledged indebtedness to the plaintiff in the amount of R2 050 000.00 (two million and fifty thousand Rands). The plaintiff pleads that the defendant performed by making three payments totalling R800 000.00. The remainder, it is alleged, is outstanding, due and payable.
- [3] The application came before me on the opposed roll on 26 November 2020. Mr Bhima appeared for the plaintiff, the applicant for summary judgment. Mr Sibuyi appeared for the respondent. The application was argued via Microsoft Teams video-conferencing in view of the ongoing COVID-19 pandemic.
- [4] The question for decision is whether the defendant has a *bona fide* defence to the plaintiff's action in the sense contemplated by Rule 32. At the commencement of the hearing, Mr Sibuyi informed me that the only defence the respondent persisted with raising to defend the application for summary judgment application concerned whether Mr Nebotalo NO had standing to institute and pursue these proceedings on

behalf of the trustees of the Trust, which the defendant disputes in its special plea. However, Mr Bhima addressed the issue as one of authority and, viewed in that light, submitted that the proper course for the defendant to have pursued was to raise the issue in terms of Rule 7 of the Rules of Court which it has not done. Mr Sibuyi addressed the issue as one of both standing and authority.

- [5] The plaintiff is described in the particulars of claim as follow: ‘*The plaintiff is Thomson Nebotalo NO o.b.o. the Nebotalo Family Trust (IT No: [...]).*’ The pertinent denial in the plea is raised as part of a special plea. It reads, as a reason for asserting that the plaintiff has no *locus standi*: ‘*The plaintiff (Thomson Nebotalo) has not been duly authorised by the trustees (if any) of the alleged trust to institute this action.*’ It is common cause that there are three trustees of the trust, Mr Nebotalo, Mulalo Brenda Rapao and a Susanna Elizabeth Thatcher. There is no allegation in the particulars of claim to the effect that Thomson Nebotalo has been authorised to act alone on behalf of all of the trustees in these proceedings nor is there any authorisation to that effect attached in the particulars of claim or indeed in the affidavit supporting summary judgment. The high water mark of the evidence in that regard is a single allegation in Mr Nebotalo’s founding affidavit in the application for summary judgment stating that he is duly authorised to act on behalf of ‘the plaintiff’. Mr Nebotalo urged me to interpret the reference to the plaintiff as a reference to the Trust itself. The trust deed has not been placed before the Court.

- [6] It is trite that, subject to the trust constitution, trustees in their capacity as such (*nominee officii*) are the proper persons to bring and defend actions in relation to a trust.¹ Moreover, the balance of authority holds that unless one or more of the trustees

¹ Cameron, De Waal and Solomon, *Honore’s South African Law of Trusts* (6 ed) at 465.

are authorised by the others, all the trustees must be joined in suing and all must be joined when action is instituted against a trust.² Where one or more trustees act without other trustees, their authorisation to do so must be alleged,³ and such authorisation (or delegation) must not be prohibited by the trust deed.⁴

[7] These legal principles derive from the non-juristic nature of a trust and the nature of trustees' joint ownership of trust property.⁵ And they ultimately concern whether a litigant is properly before a Court and whether the Court will recognise the litigant. These are not 'technical' issues. Where trust property is concerned, as in the present case, all of the trustees in whom the trust property vests have an interest in any judgment and a judgment will not be effective against all trustees unless they are properly before the Court.

[8] The defence raised is thus one of legal substance and in the circumstances of this case, I am satisfied that summary judgment should not be granted. The Court has not been placed in a position to conclude, in line with the balance of authority as cited in footnote two, that Mr Nebotala is indeed authorised by the other trustees to pursue these proceedings on their behalf and there is no impediment to this course under the trust deed.⁶ Furthermore, in these circumstances, the Court dealing with that issue is best placed to decide whether it must follow the cases cited in footnote 2 above (or any

² Id at 466. *Goolam Ally Family Trust v Textile, Curtaining & Trimming* 1989(4) SA 985 (C) (*Goolam Ally*) 988. *Rosner v Lydia Swanepoel Trust* 1998(2) SA 123 (W) at 127A-B. *Deutschmann NO and others v Commissioner for the SARS*; *Shelton v Commissioner for the SARS* 2000(2) SA) 106 (ECD) at 119F-H; *Luppacchini v Minister of Safety and Security* 2010(6) SA 457 (SCA) at para 2.

³ *Goolam Ally* at 988. *Desai-Chilwan NO v Ross and another* 2003(2) SA 644 (C) (*Desai-Chilwan NO*) at para 21; *Van der Westhuizen* at 497A-D albeit subject to the findings at 494G-495E.

⁴ *Goolam Ally* at 988C-D;

⁵ *Honore's South African Law of Trusts* at 405; *Parker* at para 15; *Van der Westhuizen* at 495D-E.

⁶ Though obiter, see *Hyde Construction v Deuchar Family Trust*, supra at para 47 on whether a citation in the name of a trust rather than its trustees is competent.

other relevant case) or the approach in *Van der Westhuizen's* case, which appears to hold that all trustees should be joined.⁷ It is neither necessary nor appropriate for me to decide that issue now.

[9] Mr Bhima submitted that the Court should postpone the application for summary judgment to allow his client to supply an affidavit to cure the difficulty and submitted that the Court is entitled to receive such evidence notwithstanding the provisions of Rule 32(4). Mr Sibuyi submitted that, whatever discretion the Court may have to receive further evidence, it should not enter the fray to come to the aid of one party. It is not necessary for me to decide whether it would be open to the Court to receive such further evidence because, in the circumstances of this case, I am of the view that the defence is *bona fide* and justice between the parties requires that it should be ventilated in the ordinary course by recourse to pre-trial, or if the matter does not settle as a result, trial process.

[10] Finally, Mr Bhima submitted that the issue is one that ought to have been raised in terms of Rule 7 of the Uniform Rules of Court which provides a procedure for a party to challenge the authority of anyone acting on behalf of a party to so act. The Rule applies not only to a challenge to authority of an attorney acting for a party in litigation but to the authority of a person allegedly acting on behalf of the purported litigant.⁸ But

⁷ In *Van der Westhuizen NO v Sandwyk* 1996(2) SA 490 (W) at 494G-495E, this Court adopted the view that all trustees must be joined. The authors of *Honore's South African Law of Trusts*, supra, at 466 fn 21 regard this approach to be incorrect and favour the approach in the balance of authority cited in fn 2 above and other cases.

⁸ *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA); *ANC Umvoti Council Caucus and Others v Umvoti Municipality* (AR 392/2009) [2009] ZAKZPHC 47; 2010 (3) SA 31 (KZP) (25 September 2009) and see *Bafokeng Land Buyers Association and Others v Royal Bafokeng Nation and Others* (CIV APP 3/17) [2018] ZANWHC 5; [2018] 3 All SA 92 (NWM); 2018 (5) SA 566 (NWM) (9 March 2018).

this submission does not assist the applicant for two reasons. First, the protections of Rule 7 can be invoked at any time before judgment. It can be invoked as of right within ten days after it comes to the notice of a party that such person is so acting and with the leave of the Court thereafter. Accordingly, to the extent that Rule 7 may provide a procedural device to raise the defence, which I need not decide, it remains available to the defendant with the leave of the Court which can be sought. Second, even to the extent that questions of authority as contemplated by Rule 7 are raised when a Trust is cited by name⁹ or when one trustee is cited to the exclusion of others, the issue raised is not solely one of authority. In *Desai-Chilwan NO*, Ngwenya J framed the issue as one of non-joinder rather than *locus standi*.¹⁰ However, in *Van der Westhuizen*, in this division, Streicher J framed the issue as one of standing. Either way, in the circumstances of this case, the defendant has, in substance, raised the defence.

[11] In the result, I conclude that the application for summary judgment must be refused. I make the following order:

1. The application for summary judgment is refused.
2. The defendant is granted leave to defend the action.
3. The applicant shall pay the costs of the summary judgment application on a party and party scale.

⁹ As in *Hyde Construction*, supra, where the full bench held *obiter* at para 47: “Given the legal character of a trust, the citation of a trust by name in litigation must, I think be understood as a reference to the trustees for the time being of the trust, whomever they may be.”

¹⁰ Supra at para 30.

S COWEN (Ms)

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Electronically submitted therefore unsigned

The judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/ legal representatives by email and by uploading it to the electronic file of this matter on Case lines. The date for hand down is deemed to be November 2020.

Date of hearing: 26 November 2020

Judgment delivered: 27 November 2020

APPEARANCES:

In the case number 34482/2018

For the Applicant: Adv R Bhima

Instructed by: E Botha and Y Erasmus Incorporated

For the Respondent: D Sibuyi, DMS Attorneys.