IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Reportable/Not Reportable
CASE NO: 5140/2019

In the matter between:

SHEPSTONE & WYLIE ATTORNEYS	**APPLICANT**
and	
ABRAHAM JOHANNES DE WITT N.O	**FIRST RESPONDENT**
RAYMOND ERNST VOLKER N.O	**SECOND RESPONDENT**
SEBASTIAN SYLVO VOLKER N.O	**THIRD RESPONDENT**
THOMAS PASCAL VOLKER N.O	**FOURTH RESPONDNET**

ORDER

1. The respondents' first point *in limine* is upheld with costs, such costs to include costs of two counsel.
2. It is declared that the deed of suretyship dated 23 May 2013 signed by the first respondent and Mrs Renata Mignon Volker, in their capacities as trustees of the Penvaan Property Trust in favour of the applicant, was not duly authorized.

JUDGMENT

delivered on:10 June 2021

BEZUIDENHOUT AJ

Introduction

[1] The applicant, Shepstone & Wylie Attorneys, claims judgment against the four respondents in their capacities as trustees of the Penvaan Property Trust (IT No 5932/94) ('the trust') for payment of various sums of money, totalling R2 589 208.49, consisting mostly of legal fees and disbursements due to it, based on a deed of suretyship signed on 25 May 2013.

[2] The respondents oppose the application. Various factual disputes emerge from the papers. The parties, through their respective counsel, have however agreed that I am at this stage only required to deal with and rule on one issue, raised as the first point *in limine* in the respondents' answering affidavit, namely whether the deed of suretyship signed on 23 May 2013 by the first respondent, Mr Abraham Johannes de Witt (Mr de Witt), in his capacity as a trustee, and Mrs Renata Mignon Volker (Mrs Volker), at the time also a trustee of the trust, was duly authorised by the trust, and hence legally competent. .

[3] In terms of the deed of suretyship, which bears the heading 'Undertaking to pay fees and suretyship', the trust (referred to in the document as the surety) would bind itself jointly and severally in favour of the applicant (referred to as the creditor) as surety for and as co-principal debtor with Mrs Renata Mignon Volker, (referred to as the debtor), for

'the due payment of any and all amounts which are now or which at any time in the future may become due by the debtor to the creditor in respect of any indebtedness or obligation of the debtor to the creditor arising from any cause whatsoever, including but not limited to any and all legal costs or disbursements due by the debtor to the creditor on an attorney and own client basis.'

[4] At the time the deed of suretyship was signed by the first respondent and Mrs Volker as trustees, the trust however also had a third trustee, namely Mr Thomas Volker (Mr Volker).

[5] Mr Volker and Mrs Volker were married to each other in community of property, and were at the time in the process of getting divorced. Mrs Volker was

being represented by Ms Estelle de Wet, employed as an attorney at the applicant. Both Mr Volker and Mrs Volker were also beneficiaries of the trust.

The Penvaan Property Trust Deed

[6] Most clauses in the trust deed are preceded with a heading but I will only refer to particular headings when necessary to do so. In terms of clause 4 of the trust deed, '[t]here shall at all times be not less than three Trustees of the Trust'.

[7] In terms of clause 11, the powers of the trustees are set out as follows:

'11.1 Any trustee shall have the power to deal with the Trust property and Trust income *for the benefit and purpose of the Trust* in their discretion for which purpose they are granted all necessary powers and authority including (but without limitation) the powers stated in the Appendix. The powers conferred upon the Trustees shall be complete and absolute and exercisable in the discretion of the Trustees;

11.2 The Trustees shall have the power to ratify, adopt or reject in their discretion, contracts made on behalf or for the benefit of the Trust, either before or after its formation.'

(My emphasis.)

Attached to the trust deed is an appendix which sets out further powers of the trustees, which will be discussed below.

[8] Clause 13 deals with the meetings of trustees, and reads as follows:

'13.1 The Trustees may meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit. Any Trustee shall be entitled on reasonable written notice to the other Trustees to summon a meeting of the Trustees. All Trustees for the time being in the Republic of South Africa shall be given reasonable notice of any meeting of the Trustees.

13.2 Subject to 5 above, the quorum necessary at any such meeting shall be three Trustees.

13.3 A Trustee may be represented at a meeting of Trustees by a proxy appointed as such in writing.

13.4 A written resolution signed by all Trustees for the time being or their respective alternates or proxies shall be as effective as a resolution taken at a meeting of Trustees.'

Clause 13.2 was amended in terms of an amendment to the trust deed signed on or about 26 June 1998, to require a quorum of only two trustees at a meeting of trustees.

[9] In terms of clause 14, all negotiable instruments, contracts, deeds and other documents which are required to be signed on behalf of the trust, 'shall be signed by at least two Trustees'.

[10] Clause 16, under the heading 'Disagreement between trustees' deals with the eventuality of a disagreement between trustees, and states as follows:
'16.1 At and for each meeting of Trustees, the Trustees present, in person or by proxy, shall elect a Chairperson, provided for as long as Thomas Wilhelm Volker is a Trustee, he shall be Chairperson.
16.2 In the event of any disagreements arising between the Trustees at any time the view of the majority shall prevail. Should there be an equality of votes, the Chairperson shall have a second or casting vote.'

[11] In terms of clauses 23 and 24, under the heading 'Distribution of Income and Trust Property', the trustees were entitled to use, pay or apply the income of the trust or the whole or portion of the trust property for the 'welfare' of its beneficiaries. 'Welfare' was included to mean 'the benefit, comfort, maintenance, education, advancement and pleasure' of the beneficiaries, as well as all purposes which the trustees may consider to be in the interest or for the advantage of the beneficiaries.

[12] The appendix attached to the trust deed sets out the powers of the trustees in detail. Its introduction reads as follows:
'Without prejudice to the generality of any of the provisions of the accompanying Deed constituting the above Trust the Trustees shall have the following powers which shall be exercisable in their sole and absolute discretion *for the purpose and benefit of the Trust*.' (My emphasis.)

[13] In terms of clause 11 of the appendix, the trustees were given the power 'to defend, oppose, compromise or submit to arbitration all accounts, debts, claims,

demands, disputes, legal proceedings and matters which may subsist or arise between the Trust and any person'.

[14] Clause 19 of the appendix deals with the trustees' power to pay out of the funds of the trust all debts incurred on behalf of the trust by the trustees in the bona fide exercise of their powers.

[15] Clause 25 of the appendix gives the trustees the power 'to contract on behalf of the Trust' and to ratify, adopt or reject contracts made on behalf of or for the benefit of the trust, either before or after its formation.

[16] Clause 26 of the appendix does not set out a particular power, but rather appears to possibly prescribe how the powers set out in the preceding twenty five clauses should be exercised. It reads as follows:
'Provided the Trustees unanimously agree, to conduct business on behalf of and for the benefit of the Trust, and to employ Trust property in such business.'

The 2013 litigation

[17] It is important to deal with the events that led to the signing of the deed of suretyship. In 2013, Firstrand Bank Ltd brought an application in this court under case no 4035/2013 for the sequestration of the trust. The three trustees at the time were Mr Volker, Mrs Volker and Mr de Witt.

[18] Mr Volker was cited as first respondent in his capacity as trustee and did not oppose the application. Mrs Volker and Mr de Witt, cited as second and third respondents, opposed the application on behalf of the trust. Poyo Dlwati AJ, dealt with the question as to whether the second and third respondents had the authority to instruct Shepstone and Wylie to act for the trust and to oppose the application for sequestration. It was raised by Firstrand Bank Ltd as a point *in limine*, which point Poyo Dlwati AJ dismissed.

[19] When dealing with her reasons for dismissing the point *in limine*, Poyo-Dlwati AJ referred in detail to a meeting of trustees held on 25 May 2013, at which meeting it was inter alia resolved to oppose the proceedings instituted by Firstrand Bank Ltd,

appoint Shepstone and Wylie to represent the trust in those proceedings, and to sign the deed of surety which is the subject of the current proceedings.

[20] It appears that around 16 May 2013, Mrs Volker gave notice of a meeting of trustees to be held on 23 May 2013 for the purpose of debating and passing three resolutions namely that:

(a) the trust resolves to oppose the sequestration proceedings instituted by Firstrand Bank Ltd;

(b) the trust ratifies the signature of the power of the attorney signed by Mrs Volker and Mr de Witt on 16 May 2016; and

(c) the trust resolves to sign 'the attached suretyship agreement'.

[21] Poyo Dlwati AJ said the following at para 3 of her judgment:

'The first respondent supports the sequestration of the trust and in my view nobody could have expected him to arrange a meeting that would be contrary to his wishes. The second respondent then took it upon herself to facilitate a meeting of the trustees as urgently as possible but the first respondent was constantly unavailable despite the urgency of the meeting . . . If the first respondent wanted to attend any trust meeting, he would have attended the meeting or at least sent a proxy once he realized his difficulty in attending the meeting. He knew of the looming meeting as early as 14th May 2013 but instead of suggesting earlier dates he suggested dates further from those upon which respondents were to file their answering papers.'

[22] From the papers before me and from the judgment, it is clear that after the meeting of trustees was scheduled for 23 May 2013, it was moved to Saturday, 25 May 2013 as a result of Mr Volker's unavailability. It is common cause that the meeting on 25 May 2013, at which the resolutions referred to above were taken was attended only by Mrs Volker and Mr de Witt..

[23] Poyo Dlwati AJ made the following finding regarding the meeting, and the consequences thereof:

'As held in *Van der Merwe NO and Others v Hydraberg Hydraulics CC and others; Van der Merwe NO and others v Bosman and others* 2010(5) SA 555 (WCC) at para 16 that in order to qualify as a meeting all trustees in the office would have to receive

notice thereof so as to be able to participate in it if they so wished. The first respondent did receive such a notice but was not available to attend the meeting instead he sent an email dated 21 May 2013 outlining his views. Accordingly, I have no doubt in my mind that the first respondent has participated and his views were known in the meeting. In my view, therefore, the trustees acted jointly even though there was no unanimity.'

[24] Poyo Dlwati AJ also dealt with an argument raised relating to the absence of Mr Volker at the meeting with reference to clause 16.1 of the trust deed, in terms of which 'he shall be Chairperson' at and for each meeting of trustees. It was argued that the meeting on 25 May 2013 was void as a result of Mr Volker's absence. The learned judge held:

'Clause 16.1 in my view envisages a situation where the first respondent is in fact present in a meeting otherwise one will have to accept that the trustees cannot hold a meeting in the absence of the first respondent. The trust deed does not provide for this.'

After discussing the language used in clause 13.1 and 16.1 and the authorities dealing with the interpretation of clauses, she found:

'As required by the provisions of the trust deed two trustees resolved that the sequestration application of the Trust be opposed and for this purpose Shepstone and Wylie attorneys were duly authorised to oppose the application, hence I dismiss the point in limine.'

[25] It was submitted by Mr Skinner SC, appearing on behalf of the applicant before me, that I was bound by the findings of Poyo Dlwati AJ and that the deed of suretyship signed by Mrs Volker and Mr de Witt was duly authorised. It is clear from the judgment that the validity of the resolution to sign the deed of suretyship was at no stage considered by Poyo Dlwati AJ.

[26] Whereas the resolutions dealing with the opposition of the sequestration proceedings were clearly to the benefit of the trust, and in fact proved to be well taken as the application for sequestration was dismissed, thus saving the assets of the trust from creditors, the same cannot be said of the deed of suretyship, which would be saddling the trust with Mrs Volker's debts.

[27] As far as Poyo Dlwati AJ found that that Mr Volker participated in the meeting, I respectfully disagree. In the email dated 21 May 2013, upon which reliance was placed, Mr Volker informs Mrs Volker and Mr de Witt inter alia that he is not able to attend the meeting that week and that he will supply dates 'well in advance'. Nothing is mentioned about what is set out in the notice of the meeting of trustees sent out by Mrs Volker nor is any view expressed in relation thereto. One can however infer from the fact that he was not opposing the sequestration application that he would also not be agreeable to the resolution proposing the opposition thereof. But that is as far as it goes.

[28] The deed of suretyship potentially imposes a significant obligation on the trust in that it accepts liability as surety and co-principal debtor for Mrs Volker's debts to the applicant. Mr Volker's views regarding the deed of suretyship which was attached to the notice of the meeting are not known.

Discussion

[29] It is the applicant's case that decisions by the trustees must be made jointly but not unanimously. Poyo Dlwati AJ also found that the trustees acted jointly 'even though there was no unanimity'.

[30] Counsel for the applicant also placed great reliance on another decision of this division, namely that of D Pillay J in *Le Grange and another v The Louis and Andre Le Grange Family Trust and others* [2017] ZAKZPHC 2 paras 20-21:

'. . . the fourth respondent was aware of these proceedings when the application was served on him in July 2016. If not by 22 July 2016 when second and third respondents adopted the resolution to litigate then certainly by 11 January 2017 when they sought ratification he had an opportunity to participate in the decision on behalf of the first respondent. He consciously chose to abstain. The same attorneys for the first to third respondents represent him. His attorneys asked him to support their case with a confirmatory affidavit but none has been forthcoming. Even though the fourth respondent did not attend meetings of the trustees he was aware of resolutions that were being proposed and had an opportunity to participate in the decision by abstaining.

[21] He has a fiduciary and professional duty to respond to these proceedings and he has done so by abstaining. . .'

[31] It appeared from the facts of that case that the fourth respondent actively abstained from voting on any matters pertaining to the particular case, and also did not sign the relevant resolution. The trust deed also contained a specific clause requiring resolutions to be supported by majority vote. D Pillay J sounded a warning against the 'tyranny of the majority' and also over putting form over substance, and said the following at para 23:
'In these circumstances the decision of the trust to litigate and to appoint attorneys is manifest from the resolution signed by the majority of two trustees, the emails from the fourth respondent and his conduct in allowing the litigation to proceed unimpeded. To insist on having the fourth respondent's signature on the resolution would amount to putting form over substance.'

[32] The learned judge continued to address the constitutional issue of access to courts and said the following at para 26:
'All the objections the applicants raise against the resolutions are formal; substantively the fourth respondent received notice and participated in the decision on behalf of the first respondent by abstaining. Therefore they are not reasonable and justifiable limitations sufficient to occlude the first to fourth respondents from exercising their right of access to the court.'

[33] The facts of *Le Grange* differ from those of the present matter before me, as the relevant trustee in *Le Grange* by all accounts actively abstained from taking part in any voting regarding the particular matter, which cannot be said of Mr Volker.

[34] The principle that trustees must act jointly is part of our common law, and was reaffirmed in the decision of *Land Agricultural Bank of South Africa v Parker and others* 2005 (2) SA 77 (SCA) para 15, where the following was said by Cameron JA (footnotes omitted):
'It is a fundamental rule of trust law, which this Court recently restated in *Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk*, that in the absence of contrary provision in the trust deed the trustees must act jointly if the trust estate is to be

bound by their acts. The rule derives from the nature of the trustees' joint ownership of the trust property. Since co-owners must act jointly, trustees must also act jointly.'

Joint ('jointly' being an adverb of 'joint') has been defined in legal terms as 'A combined, undivided effort or undertaking involving two or more individuals. Produced by or involving the concurring action of two or more.' (see The Free Dictionary-Legal –Dictionary, https://legal-dictionary.thefreedictionary.com/joint)

The Oxford Paperback Thesaurus 3ed (2006) lists the following similar words for jointly.

'Together, in partnership, in cooperation, cooperatively, in conjunction, in combination, mutually'.

In the present matter before me, it appears that only two of the three trustees acted jointly.

[35] The writers Cameron, De Waal and Solomon in *Honoré's South African Law of Trusts* 6 ed (2018) discuss the conduct of trust affairs and in particular its internal business at page 375 onwards and in particular seek to draw analogies from the law relating to voluntary associations. The following is said at page 377 (footnotes omitted):

'The conduct of a voluntary association rests on the basis that, apart from contrary provision in its constitution, the majority can bind a minority of dissentients. In procedural questions, such as the appointment of a chairperson, a similar rule clearly applies to trustees. But unless the trust instrument so provides- as it usually does- it is doubtful whether matters of substance can be regulated by majority decisions.'

And also further at 378:

'. . . it has been inferred, in our view correctly, that the basic rule for the conduct of a trust is that decisions of substance must be reached unanimously, and that in order to bind the trust the trustees must act jointly.'

The writers at 379-380 referred to the decision of *Coetzee v Peet Smith Trust en andere* 2003 (5) SA 674 (T) where the court confirmed the principle of unanimity, in the absence of the trust instrument being clear as to whether a decision could be taken validly by a majority of trustees..

[36] When dealing with outsiders, '. . . trustees must act jointly in their dealings . . . if they are to bind the trust estate by their acts'. (*Honoré supra* at page 380) The authors refer extensively to the decision of *Parker supra,* and state at pages 381-382 that '[a] trust instrument which makes provision that decisions can be taken by a majority vote consequently partly abrogates the joint-action principle.' (footnotes omitted.)

[37] Both Poyo Dlwati AJ in the sequestration application judgment and D Pillay J in *Le Grange supra*, as well as counsel for the applicant, placed great reliance on *Van der Merwe NO and others v Hydraberg Hydraulics CC and others; Van der Merwe NO and others v Bosman and others* 2010 (5) SA 555 (WCC) para 16, where the following was said by Binns-Ward J (footnote omitted):

'It is evident, however, that, in order to qualify as "a meeting", all the trustees in office would have to receive notice thereof so as to be able to participate in it if they so wished. Slabbert did not receive any such notice and was therefore not afforded an opportunity to participate in the decision by the Trust to sell the fixed property. The terms of the trust instrument which provide for the trustees to make decisions by a majority vote at a quorate meeting do not provide an exception to the rule that all the trustees must act jointly; they merely provide that, subject to the indemnity in clause 5.7, a majority decision will bind the dissenting or absent trustees. The minority is obliged to act jointly with the other trustees in executing the resolution adopted by the majority.'

The trust instrument contained a clause which made it clear that the decisions of the majority of trustees present at a meeting shall prevail (see *Van der Merwe supra* para 15).

[38] Mr Roberts SC, counsel for the respondents, referred me to *Steyn and others NNO V Blockpave (Pty) Ltd* 2011 (3) SA 528 (FB) paras 37-38 where Rampai J said the following:

'[37] I wish to add . . . that a trust operates in two different spheres. Internally, trustees may disagree. A matter on the agenda may be debated. If the trustees are not unanimous, a matter must be put to a vote. The majority vote then prevails as the decision of the trustees. The dissenting trustee has to subject himself to the democratic vote of the majority.

[38] Externally, trustees cannot disagree. The internal split decision becomes the resolution of the trust in its dealing with the world at large. The dissenting trustee is just as bound by the resolution as those who had supported it all along during the debate in the internal sphere. In the external sphere the trust functions by virtue of its resolutions, which have to be supported by its full complement of the trust body. A quorate meeting of trustees may take a valid decision on the internal front. However, such a decision will remain only a decision, and not a valid resolution, unless it also enjoys the support of an absent trustee(s) in whose absence it was taken.'
The trust deed in that matter contained a clause requiring a unanimous decision when there were three trustees in office.

Analysis

[39] In returning to the trust deed in the matter before me, two clauses are material, namely clause 16.2, in terms of which the view of the majority shall prevail, and clause 26 of the appendix which requires the trustees to agree unanimously.

[40] Clause 16.2 appears under the heading 'Disagreement between Trustees'. Clause 26 appears in the appendix setting out the powers of the trustees in the preceding 25 clauses.

[41] Counsel for the applicant relied on clause 16.2 for his submissions that the decision of the two trustees, Mrs Volker and Mr de Witt, at the meeting of 25 May 2013 to sign the deed of suretyship, was validly taken and binding on the trust, together with the fact that a quorum of only two trustees was provided for. It was also submitted that clause 26 in the appendix relied upon by counsel for the respondents, only related to when the trust was conducting its business and was employing trust property in such business, which the decision to sign the deed of suretyship was not.

[42] It was also submitted on behalf of the applicant that one of the purposes of the trust was to act for the benefit of its beneficiaries, of whom Mrs Volker was one.

[43] Counsel for the respondents referred me to clauses 11.1 and 11.2 of the trust deed which made it clear that the powers of the trustees had to be exercised for the

benefit of the trust. He submitted that agreeing to pay the debts of a trustee can never be for the benefit of the trust. I agree with this submission but one has to bear in mind that the trust deed makes provision for applying income for the 'welfare' of beneficiaries. It is debatable as to whether this would include accepting liability for a beneficiary's legal fees especially when there is no indication that any amount was mentioned to indicate the extent of this liability. The overall powers of the trustees are however directed towards the benefit of the trust.

[44] With reference to clause 26 of the appendix, counsel for the respondents further submitted that it is clear that the powers of the trustees had to be exercised through a unanimous decision for the benefit of the trust. As mentioned above, the clause commenced with the word 'Provided'.
The word 'provided' appears to have been used as a conjunction, meaning generally 'on condition that' or 'on condition or understanding that' (see R D Claasens *Claasen's Dictionary of Legal Words and Phrases* (Service Issue 23, June 2020), and *Oxford South African Concise Dictionary* 2 ed (9th impression (2010)) and the question will be whether it relates to all the powers set out in the preceding clauses or simply to what is contained in the remainder of clause 26.

[45] It is in my view clear from the wording of the heading to clause 16.1 and 16.2 and clause 16.2 itself, that the view of the majority shall only prevail in the event of a disagreement between the trustees. In *Sentinel Mining Industries Retirement Fund V. Waz Props 2013 (3) SA 132 SCA* at para 10 it was held that in the absence of express provisions to the contrary, headings in contracts can be taken into account in interpreting a contract and that where the heading and provisions can be read together, it should be done.

[46] There is no indication that the trustees disagreed on the issue of the signature of the deed of suretyship. It was not referred to in the email written by Mr Volker on 21 May 2013, and there is no indication that he chose to abstain from the particular decision. He simply did not participate in the meeting.

[47] D Pillay J in *Le Grange supra* para 11 stated, with reference to the decision of *Van der Merwe supra* paras 16-7, that
'even if the majority of trustees arrive at a decision but without the participation of all the trustees, unless the trust deed authorises otherwise, the ensuing decision albeit a decision of the majority is not a decision on behalf of the trust'.

[48] In my view, the trustees had to act unanimously when it came to exercising a power which had the effect of making the trust liable for Mrs Volker's debts. Even if I am wrong, and clause 26 is in fact not applicable to the exercise of the trustees' powers in this regard, in the absence of any other clauses in the trust deed, the general principle prevails, namely that decisions must be reached unanimously and the trustees must act jointly. This was not the case with the decision and the subsequent resolution authorising the signing of the deed of suretyship. The signing of a deed of suretyship is furthermore clearly a matter of substance as envisaged in by *Honoré supra* at 377, and at 381. As mentioned above, there was no indication of a disagreement and accordingly clause 16 does not come into play.

[49] I am accordingly of the view that the deed of suretyship signed by Mrs Volker and Mr de Witt was not duly authorised and is not legally competent.

[50] I was not addressed on the question of costs. In my view there is no reason to deviate from the general rule that costs follow the event.

[51] I make the following order:

1. The respondents' first point *in limine* is upheld with costs, such costs to include costs of two counsel.
2. It is declared that the deed of suretyship dated 23 May 2013 signed by the first respondent and Mrs Renata Mignon Volker, in their capacities as trustees of the Penvaan Property Trust in favour of the applicant, was not duly authorized.

BEZUIDENHOUT AJ

APPEARANCES

Date of hearing	:	30 April 2021
Date of judgment	:	10 June 2021

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