TRUSTEES OF FAMILY TRUST CANNOT CRY FOUL IF THEY DID NOT DO THEIR HOMEWORK

Nedbank Limited v Mhlari N O and Others (37766/2018) [2022] ZAGPJHC 719 (22 September 2022)

When a Trust Deed stipulates that a certain number of trustees must hold office for the trust to operate, compliance therewith is vital, failing which contracts entered into by the Trust risk being declared invalid. This is exactly what was sought here after the (only) two trustees of a trust entered into a R16 million loan on behalf of the Trust. The Trust Deed had stipulated that there must always be three trustees and, as the trustees argued here (after falling into arrears), this fact rendered the loan agreement invalid. That may be so, the Court said, but they were nonetheless estopped from taking this point – the trustees had, in furnishing a signed resolution to the bank confirming their appointment and authorisation to act on the Trust's behalf, established ostensible authority and are to be held thereto.

The Judgment can be viewed here.

FACTS

In May 2013, the Patrick Malabela Family Trust ("the Trust") concluded a loan agreement with Nedbank Limited ("the Bank"). At the time of concluding this loan agreement, the Trust was represented by two trustees ("trustee 1 and 2"). Pursuant to the conclusion of the loan agreement, a covering bond was registered in the Deeds Office over their immovable property in an amount of some R16 million.

At the time of the present judgment, it appears that there were 8 trustees in total.

During April 2013 and June 2014 respectively, 4 of the Trust's additional trustees each signed separate Deeds of Suretyship binding themselves jointly and severally *in solidum* with the Trust in favour of the Bank, as sureties and co-principal debtors for the due performance of the Trust's obligations under the loan agreement.

The Trust fell into arrears with its repayments under the loan and the Bank approached the Court. In claiming judgment for the principal sum outstanding, the Bank also sought an order that the immovable property be declared executable, and a writ of execution be authorised for the immovable property, be attached and sold in execution.

Six of the trustees defended the action, arguing mainly that the provisions of the Trust Deed were breached when the loan agreement was concluded and that it therefore was invalid. This was because, according to clause 4.4 of the Trust Deed, there always had to be no less than 3 and no more than 5 trustees. The trustees advised that in the period March 2010 to October 2018, there were only two trustees and, accordingly, that trustee 1 and 2 who entered into the loan agreement, could not in law bind the Trust. As a result of the alleged invalidity of the loan agreement, any suretyship concluded pursuant thereto was equally invalid.

The Bank however pleaded that the conduct of the two trustees was such that the Trust is estopped* from escaping liability by arguing that there was insufficient authority (less than 3 trustees) for the Trust to be bound to the loan agreement. (*The principle which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person.) An example of this conduct was, amongst other things, that trustee 1 and 2 provided the Bank with a resolution to the effect that they were authorised at a meeting of trustees in March 2013 to complete and sign all documents incidental to the conclusion of the loan agreement on behalf of the Trust. The Bank accordingly argued that there was **ostensible authority** that trustee 1 and 2 could bind the Trust and that the Trust as principal debtor must be held liable.

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HELD

Could the Trust be held bound to the loan agreement despite the fact that, at the time when the loan was concluded, only two trustees were appointed instead of three, contrary to the requirements of the Trust Deed?

- In the well-known SCA judgment in *Land and Agricultural Bank of South Africa v Parker & Others*, the Court had the occasion of examining the circumstances where trustees acted or purported to act on behalf of the Trust when the required number of trustees in terms of the Trust Deed had not been achieved. In *Parker*, the Court held that, in these circumstances, the Trust suffered from an incapacity which precluded it from acting on its behalf when the required number of trustees was not achieved. In such circumstances, the trust estate was not capable of being bound.

Estoppel

- In this matter, only two trustees instead of three were in office when the loan agreement was concluded, effectively invalidating the loan agreement.

- According to the Bank, however, the Trust should be estopped from relying on invalidity by virtue of the doctrine of ostensible authority. The Bank alleged that ostensible authority was established by the following:

    - The Trust was established by Mr Malabela who was also trustee 1 and a beneficiary of the Trust, together with children born from the marriage between him (trustee 1) and his wife, whom he appointed as trustee 2. This was therefore a typical family Trust. The duty to appoint a third trustee rested with trustee 1 (Mr Malabela), who failed to do so. A third trustee was only appointed at a later stage, after the loan agreement had been concluded.

    - Trustees 1 and 2 had represented by the resolution submitted to the Bank, that they were the representatives of the Trust authorised to act and bind the Trust. The bank submitted that it could not have been expected of the Bank to have known that the Trust Deed was not complied with: It was definitely within the knowledge of trustees 1 and 2 that only two and not three trustees were in office at the time of the conclusion of the agreement.

- In *Parker*, the SCA found that it is the responsibility of the trustees to ensure that the formalities provided in the Trust Deed were complied with. Outsiders are in no position to know that internal formalities have been complied with.

- In addition, where it is evident that the Trust form has been abused, the courts should intervene to avoid injustice. Considering injustice, it was relevant that in the present matter, the Trust received the loan amount from the Bank and although payments were made towards the debt, the loan was now substantially in arrears. In fact, no payments were made since June 2018.

- In *Investec Bank Limited v Adriaanse and Another NNO*, the Court found that outsiders dealing with Trusts are obliged to observe provisions of the Trust Deed, but that the primary responsibility for compliance with the Trust Deed rests with the trustees.

- In this matter trustee 1 failed to ensure that a third trustee was appointed. In addition, and notable, neither did any of the trustees lead evidence at the trial to explain why the resolution was submitted to the Bank to the effect that trustees 1 and 2 were the authorised representatives of the Trust, and that they were authorised to act on behalf of the Trust, contrary to the Deed of Trust.

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- The *Parker* judgment is authority for the proposition that the Trust could not be bound where there were fewer than the required number of trustees in terms of the Deed of Trust, except where the statute provides otherwise. The *Parker* decision however left open the question of ostensible authority and estoppel in this scenario.

- There appears not to be any legitimate basis upon which it can be asserted that these defences cannot be invoked in a case such as the present, where the other party was lured to believe that internal formalities were complied with when in fact that was not so.

- On the undisputed facts here regarding the conduct of the trustees, the Trust should be estopped from relying on lack of authority to contract.

CONCLUSION

Accordingly, the loan agreement was binding on the Trust, and the trustees who stood surety were held equally bound to the debts owed by the Trust to the Bank.

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