TRUST RESOLUTION’S VALIDITY DENIED: SCA EXPLAINS THE REQUIREMENTS FOR BINDING RESOLUTIONS

Shepstone & Wylie Attorneys v De Witt and Others NNO 2023 (6) SA 419 (SCA)

What is the consequence if a suretyship is signed on the strength of a trustee resolution in circumstances where (i) the trust deed requires unanimity for trustees’ decisions; (ii) notice of the meeting and emails regarding the proposed resolution were shared amongst the trust’s three trustees; (iii) only two trustees could ultimately make it to the meeting; and (iv) the resolution was signed at this meeting? The answer is that the absence of a valid resolution rendered the suretyship of no force and effect.

The Judgment can be viewed [here](#)

FACTS

A firm of attorneys (‘SWA’), acting in a divorce matter that they attended to on behalf of Ms Volker, had accepted a suretyship made out in their favour from the Penvaan Property Trust (‘Trust’). Ms Volker had no independent source of income and thus, to ensure payment of their fees and disbursements, the request for a suretyship arose. In the suretyship document that was signed on behalf of the Trust, it had agreed to bind itself as surety and co-principal debtor, jointly and severally in favour of SWA for the due payments of any and all amounts that Ms Volker owes to SWA.

Ms Volker was one of three trustees of the Trust and arranged for a trustee meeting where the resolution to grant the suretyship, was discussed. One of the trustees lived quite far away and indicated that he could not attend the meeting at the place suggested. To accommodate him, the meeting was moved to a venue closer to him, but at the required time, he was not present. This trustee had however received the details of the meeting and the proposed resolution in prior email correspondence between the trustees. Ms Volker and the remaining trustee, constituting a majority, then discussed the matter and proceeded to sign the resolution.

Some time later, it became apparent that Ms Volker was not able to settle the debt owing to SWA and they invoked their rights under the suretyship. The Trust however refused to pay, arguing that the alleged suretyship was an invalid document. This, they submitted, was the result of non-compliance with the Trust Deed which required a unanimous decision to enter into such a transaction; a majority decision was not sufficient. Ms Volker denied this and argued that the Trust Deed allowed for a majority of trustees to pass a resolution.

The High Court upheld the trust’s defence and SWA appealed to the Supreme Court of Appeal (‘SCA’).

HELD

Was the High Court correct in finding that the resolution was invalid and of no force and effect?

- In our law a joint decision of all trustees is required to bind a trust, unless the trust deed contains a clause stating that majority decisions suffice.
- The 2017 finding in *Le Grange and Another v the Louis and Andre Le Grange Family Trust* explained the requirements in the following terms: “…. the trustees must act jointly if the trust estate is to be bound by their acts,’ ‘in the absence of contrary provisions in the trust deed’, and ‘unless authorised otherwise’. That matter also stated that “[a]cting jointly means that the trustees must participate in the decisions taken on behalf of the

trust. Participation usually involves meetings or consultations amongst trustees, negotiating or mediating contested decisions and ultimately in the absence of consensus or resolution, contested issues are determined by a vote. Trustees may participate in a vote in three ways: vote for or against a motion or abstain from voting altogether. All three forms of participation in the decision-making are self-conscious and deliberative actions."

- One must be mindful of the differentiation highlighted in *Steyn and Others N N O v Blockpave (Pty) Ltd*, in the following excerpt: "… the distinction between internal and external business … although trustees may disagree internally on a matter, they are prohibited from disagreeing externally. Internal matters may be debated and put to a vote, thereafter the voice of the majority will prevail. However, in so far as the trust is required to deal with external business all trustees are required to participate in the decision-making."
- In the present matter, it was apparent that "the exchange of emails between the trustees … indicates that Mr Volker was not available to attend the meeting nor did he participate in the meeting by way of a proxy. The emails are also silent on his views about the resolutions to be discussed at the meeting. Therefore "[a]s held by this court in *Le Grange*, the trustees, when dealing with trust property, are required to act jointly. Even when the trust deed provides for a majority decision, the resolutions must be signed by all the trustees. A majority of the trustees may take a valid internal decision, but a valid resolution that binds a trust externally must be signed by all trustees, including the absent or the dissenting trustee.…". Accordingly, even if majority decisions are authorised in the trust deed, those decisions had to be (i) considered by all the trustees; and (ii) confirmed by resolutions signed by all the trustees, even those dissenting, unless there is a clear provision to the contrary.

CONCLUSION

Against this background, and with reference to the wording used in the Trust Deed as a whole, the resolution was invalid because the third trustee did not participate in the decision-making. Accordingly the signing of the suretyship was also of no force and effect.