TRUSTEE ACTING WITHOUT AUTHORITY, SURETYSHIP COLLAPSES

Smith v ABSA Bank Limited (A892/2014) [2015] ZAGPPHC 409 (30 June 2015)

"This case yet again demonstrates the need to be careful when dealing with a trust", in the words of the judge in this matter. The facts dealt with an instalment sale agreement entered into by a trust and the related suretyship afforded by one of the trustees in her personal capacity. The bank's reliance on the suretyship was in issue as the surety alleged that the underlying agreements were concluded without proper trustee resolution.

The Judgment can be viewed here.

FACTS

The Neelmarie Trust (the Trust) entered into 3 instalment sale agreements, the financing of which was provided by ABSA. Mrs Smith, a trustee of the Trust, executed a deed of suretyship in favour of ABSA and bound herself as surety and co-principal debtor of the Trust for the due payment of any amount owing by the Trust to the bank.

Mr Smith, the Trust donor, his wife, Mrs Smith, and Ms Keet were the first trustees of the Trust. Ms Keet at some point resigned as a trustee and Mr and Mrs Smith were the only two trustees in office when the instalment sale agreements were concluded.

The Trust fell into arrears with regard to the instalment sale agreements and ABSA instituted action against it. The court of first instance found that the 3 instalment sale agreements had been validly concluded and held the surety liable on the deed of suretyship. Mrs Smith, the surety, appealed. She argued that there was an absence of:

(i) *trust capacity*, and that the trust estate could not be bound because the trust deed required that there had to be a minimum of 3 trustees and there were only 2 in office at the time when the instalment sale agreements were purportedly concluded; and

(ii) there was no *trustee authority* to enter into the relevant transactions, as the person who purported to sign the agreements on behalf of the Trust did not have authority to bind the Trust.

HELD:

Trust capacity

- Our courts have held that a provision requiring that a specified minimum number of trustees must hold office, is a capacity-defining condition. It lays down a prerequisite that must be fulfilled before the trust estate can be bound. When fewer trustees than the number specified are in office, the trust suffers from an incapacity that precludes action on its behalf.

- The relevant Trust deed empowered 2 trustees to act and to bind the trust estate in the absence of the minimum of 3 trustees in office. One trustee in office was only empowered to perform administrative functions. But 2 trustees in office may exercise most of the powers conferred upon the trustees provided all their decisions were unanimous. A minimum of 3 trustees, however, are required to exercise certain powers. But the power to conclude the instalment sale agreements in question was not one that may only be exercised when the minimum of 3 trustees were in office. There was therefore no merit in Smith's contention that the Trust suffered from an incapacity that precluded the conclusion of the instalment sale agreements.

Trustee authority

- The argument here was that Mr Smith was not authorised to conclude the instalment sale agreements in the absence of joint and unanimous action of both trustees. In terms of our trust law, in the absence of contrary provision in a trust deed, the trustees must act jointly if the trust estate is to be bound by their acts.

- The instalment sale agreements in question were not signed by Mrs Smith in her capacity as the only other trustee of the Trust, but as surety. The trust deed required the decisions of two trustees to be unanimous. It also conferred the power on the trustees to authorise one or more of them to sign certain documents (such as the instalment sale agreements in question) and to act on behalf of all the trustees. There was no proof or confirmation of any such authority and this was a factual issue which ABSA did not address; nor did ABSA establish Mr Smith's authority to enter into the agreement as he did, apparently without the consent of his co-trustee.

- ABSA was of the opinion that the defences against the validity of the principal debts did not avail the surety, but was incorrect in this approach. Our law is clear that a surety's obligation is an accessory obligation. For there to be a valid suretyship there has to be a valid principal obligation between the debtor and the creditor.

The appeal accordingly succeeded.

CONTACT US

- CAPE TOWN Tel: 021 406 9100
- SOMERSET MALL Tel: 021 850 6400
- TYGER VALLEY Tel: 021 943 3800
- CENTURION Tel: 012 001 1546
- CLAREMONT Tel: 021 673 4700
- STELLENBOSCH Tel: 021 001 1170
- MENLYN Tel: 012 348 1682
- BEDFORDVIEW Tel: 011 453 0577
- FISH HOEK Tel: 021 784 1580
- TABLE VIEW Tel: 021 521 4000
- ILLOVO Tel: 011 219 6200