

I AM ACTING FOR OUR FAMILY TRUST: WARNING BELLS

Rossiter NO v Nedbank Limited (AR94/19, 8244/2010) [2020] ZAKZPHC 7 (14 February 2020)

What powers do you have to defend and raise actions in a court as trustee of a family trust, or of any other trust? Trustees should be mindful to follow the trust deed in all regards; and where the deed is silent on this aspect, trustees must act in unison. The below judgment illustrates an instance where a trustee sought to defend an action against the family trust, acting as trustee but on her own, despite the trust deed setting out specific requirements regarding how many trustees are required in legal proceedings. The outcome was that the defence could not be entertained as the trustee lacked locus standi.

The Judgment can be viewed [here](#).

FACTS

The Trust entered into a loan agreement with the Bank for some R 23 million and bonds were registered over three properties that belonged to the Trust. In concluding the loan agreement, the Trust was represented by T Rossiter, duly authorised.

After the Trust fell into arrears with its repayment obligations, the Bank instituted proceedings against it in October 2010 for recovery of the outstanding amounts. In the papers, two trustees of the Trust (GW Rossiter and T Rossiter) were named in their capacities as trustees; and T Rossiter was further also listed as further defendant in his personal capacity having signed a suretyship in favour of the Bank.

On the merits, it was averred that the trustees who concluded the loan agreement and subsequent amendments were not authorised to do so, alternatively, that the credit agreement constituted reckless lending by the Bank.

The Bank subsequently amended its particulars of claim to refer to the four trustees who were, at the time of the amendment, registered with the Master (and indicated on the Letters of Authority) as duly appointed trustees of the Trust. They were then GW Rossiter, T Rossiter, RL Rossiter and H Rossiter.

After some exchange of pleadings, GW Rossiter delivered an amended plea, together with a counterclaim which related to defences raised and relief sought on behalf of the Trust. **GW purported to do so as the only trustee of the Trust.**

The Bank then issued a (rule 30) notice calling upon GW to rectify her amended plea and counterclaim, alleging that she lacked the authority to represent the Trust. Eventually an exception was delivered by the Bank and at a hearing, the exception was upheld. Pursuant to that order, a default judgment was granted against the Trust.

GW, as trustee, then appealed, raising the issue whether GW, who had been cited in her capacity as trustee, had *locus standi* (legal standing) as trustee of the Trust to defend proceedings on behalf of the Trust and raise defences on behalf of the Trust, or whether she could only do so with the authority of the majority of the trustees of the Trust.

HELD

(The discussion in the judgment is quite technical, especially relating to the exchange of pleadings and notices, and not replicated here. The summary below deals only with the aspects raised by the trustee as to her capacity to act on behalf of the Trust.)

- When suing in the name of a trust, it is necessary to cite all the trustees of the trust, and it is impermissible merely to cite the name of the trust. This is because the general rule is that trustees must act jointly, and unless provided for otherwise, a trust is not a legal person with separate existence capable of being sued or instituting proceedings.
- Where this is not done, or not done correctly (the wrong trustees are cited, or not all the trustees are cited), the trustees cited must raise this in pleadings, failing which the (incorrect) citation of the trustees will be deemed to have been admitted (rule 22(3)). If the citation of the trustees is denied, that is a matter for the trial court to decide, unless the plaintiff thereafter seeks to amend its particulars of claim.

After dealing with the required way to deal with the failure to list the correct trustees in pleadings, the Court proceeded with the issue whether GW could act on her own in raising a defence, as follows:

- At some stage in the proceedings, GW Rossiter sought to amend her plea and deliver her counterclaim. In that plea and counterclaim, RW made it clear that she did not have authority or a mandate to act for the other trustees, and was purporting to defend the matter in her individual capacity as trustee alone.

Could GW represent the Trust? In the present matter, the answer was no, because:

- A trust is under the management and control of its trustees. According to the Rossiter Family Trust deed, the powers of the trustees specifically included the borrowing of monies and the pledging of immovable properties owned by the trust to secure the trust's indebtedness; and the trustees were further entitled to sue and be sued in respect of any matter arising out of the trust in the name of the trust. However, the deed also required that there had to be no less than two and no more than four trustees at any time; the decisions of the trust were to be taken by a majority of the votes of the trustees; and a quorum of two trustees was required for conducting the business of the trust and for making decisions.
- Instituting and defending actions by and against the Trust clearly fell within the conduct of the business of the Trust, and accordingly required the requisite quorum of two trustees to do so. Any act falling within that category which is purportedly performed by a single trustee is clearly invalid, and cannot bind the Trust.

CONCLUSION

The actions of GW in purporting to instruct her attorneys on the plea and counterclaim were accordingly invalid and could not have legal consequences for the Trust.