

TRUSTEE RESOLUTION FOR LOAN CONSTITUTES OSTENSIBLE AUTHORITY DESPITE REQUIRED NUMBER OF TRUSTEES NOT APPOINTED

Nedbank Limited v Mhlari N O and Others (37766/2018) [2022] ZAGPJHC 719; 2022 (6) SA 438 (GJ) (22 September 2022)

Practitioners dealing with trust transactions will be aware of the rule in our law that when trustees purport to act on behalf of a trust in the absence of the required complement of trustees, the trust estate cannot be bound. In an important judgment, the Court here notes that compliance with trust deed provisions (and appointment of the required number of trustees) lies primarily with the trustees. This is particularly so in the instance of typical family trusts where the founder is often also a trustee, and the other trustees are family members and beneficiaries. A third party acting on the strength of a resolution passed by such trustees to the effect that they have authority to bind the trust, can indeed rely on the resolution: The trust is estopped by virtue of ostensible authority, from claiming that it is not liable because the loan was concluded when the required number of trustees had not been appointed.

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

FACTS

In May 2013, Nedbank entered into a loan agreement with the Patrick Malabela Family Trust (“the Trust”) for some R16 million. At the time, the Trust was represented by its trustees, Ms Mhlari and Mr Malabela. A bond was registered over the property as security for the Trust’s obligations to Nedbank under the loan.

In April 2013 and June 2014, Ms Mhlari and Mr Malabela and some others each signed separate Deeds of Suretyship (the “suretyships”) binding themselves with the Trust in favour of the Bank as sureties and co-principal debtors for the due performance by the Trust of the loan agreement obligations. In terms of the suretyships, the indebtedness of the Trust was necessarily also the debt of the sureties.

In 2018, the Trust fell into arrears with repayment of the loan and this matter relates to the bank’s proceedings against the Trust and the sureties to call up the loan and to obtain an order declaring the property executable.

The trustees and sureties defended the matter, arguing that the loan agreement was invalid because it was concluded in circumstances where the provisions of the Trust Deed were breached. According to the Trust Deed there had to be at least 3 trustees at all times. However, when the loan agreement was entered into, only two trustees had been appointed and they signed the loan on behalf of the Trust. The sureties argued that, as a result of the alleged invalidity of the loan agreement, the suretyships were also invalid.

Nedbank argued that the trustees were estopped* from raising lack of adequate authority and the absence of the required number of trustees as a defence, because: (i) they provided the bank with a resolution purporting to have been adopted in a meeting of trustees to the effect that Ms Mhlari and Mr Malabela are authorised to complete and sign all documents incidental to the conclusion of the loan agreement on behalf of the Trust. (**The basic concept of an estoppel is that where A has caused B to act on the basis of a particular state of affairs, A is prevented from going back on the words or conduct which led B to act on that basis, if certain conditions are satisfied.*) Nedbank further argued that the resolution and conduct of the parties constituted ostensible authority for them to bind the Trust and that the Trust therefore remained liable.

The questions to be decided were whether: (i) Ms Mhlari and Mr Malabela had authority to bind the trust; and (ii), if they did not, whether the doctrine of ostensible authority would nonetheless bind the Trust in the circumstances. In other words, could the Trust be legally bound to the loan agreement despite the fact that at the time of concluding the

The Big Small Firm

stbb.co.za

Commercial Law | Conveyancing | Development Law | Labour Law | Estates | Family Law | Litigation | Personal Injuries & Third Party Claims

Cape Town
Claremont
Fish Hoek
Helderberg

T: 021 406 9100
T: 021 673 4700
T: 021 784 1580
T: 021 850 6400

Blouberg
Tyger Valley
Illovo
Fourwavs

T: 021 521 4000
T: 021 943 3800
T: 011 219 6200
T: 010 001 2632

Centurion
Bedfordview
East London

T: 012 001 1546
T: 011 453 0577
T: 043 721 1234

loan, only two trustees were appointed instead of three (as required in the Trust Deed).

HELD

Did Ms Mhlari and Mr Malabela have the necessary authority to bind the Trust?

- The legal position that applies when trustees purport to act on behalf of a Trust in the absence of the required complement of trustees, is that the Trust suffers from an incapacity which precludes it from entering into agreements (amongst other things). In such circumstances, the Trust estate is not capable of being bound. In this matter, only two trustees instead of three were in office when the loan agreement was concluded and the agreement therefore could not bind the Trust, unless estoppel was proved, as argued by the bank.

Reliance on estoppel by virtue of the doctrine of ostensible authority

- The facts that support a finding that there was ostensible authority and that the Trust was therefore estopped from arguing that the required authority was lacking are the following:
 - the Trust was established by Mr Malabela who was also a trustee and beneficiary of the Trust. He was married to Ms Mhlari and it was him, Mr Malabela, who appointed Ms Mhlari as trustee. She was also entitled to enjoyment of all benefits of the Trust's assets. Thus, this Trust was a typical family trust, and the duty to appoint a third trustee rested with Mr Malabela who failed to do so. (A third trustee was appointed at a later stage after the loan agreement had been concluded.)
 - Mr Malabela and Ms Mhlari had represented by the resolution they submitted to Nedbank that they were the representatives of the Trust and authorised to act and bind the Trust. It was within their knowledge that only two and not three trustees were in office at the time of the conclusion of the agreement.
 - It must be remembered that our courts have held that it is the responsibility of trustees to ensure that the formalities provided for in a trust deed are complied with. Outsiders are in no position to know that internal formalities have been complied with. Where it is evident that the trust form has been abused, courts should intervene to avoid injustice. Our courts have also held 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, the Trust received the loan amount and made payments until 2018. The founder and trustee, Mr Malabela, failed to ensure that he appointed a third trustee at the relevant time. (Mr Malabela and Ms Mhlari did not lead evidence at the trial to explain why the resolution was submitted to Nedbank - to the effect that they were authorised representatives of the Trust, and that they were authorised to act on behalf of the Trust, contrary to the deed of trust.)
- There can be no reason why the defence of estoppel and ostensible authority cannot be invoked in respect of a trust's actions, where the other party was lured to believe that internal formalities were complied with when in fact that was not so.

CONCLUSION

The Trust was therefore estopped from relying on lack of authority to contract. The loan agreement was accordingly binding on the Trust and the sureties.