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Proceed with caution: Transacting with Trusts and Trustees

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Our courts have once again sounded the alarm to all trustees and parties transacting with trusts to have regard to the provisions of the trust deed and ensure that the manner in which decisions are taken are in accordance with the trust deed.

In the recent case of *Shepstone & Wylie Attorneys v Abraham Johannes de Witt N O & Others***[1]**, the Supreme Court of Appeal was tasked to determine the validity and enforceability of a resolution passed by a majority of trustees when authorising the signature of a deed of suretyship. This case has highlighted firmly entrenched legal principles in our Law of Trust which dictate that the trust deed defines the framework in which the trust must operate, and the manner in which the powers and authority granted to the trustees may be exercised.

Given the prevalence of the use of trusts as an effective vehicle to manage and hold assets in property and commercial related transactions, it is important to take heed of the legal principles reaffirmed in this judgment, and the factors to bear in mind when dealing with trusts.

The facts of this case are significant in understanding why the deed of suretyship was declared invalid by the Court. In this matter, a majority of trustees of The Penvaan Property Trust (**the "Trust"**) signed a deed of suretyship in favour of Shepstone and Wylie Attorneys (**the "Appellant"**) for the personal indebtedness of one of the trustees of the Trust, Mrs Volker. After due notice was given to the trustees, the meeting of trustees took place in the absence of one of the trustees. Notwithstanding the absence of one of the trustees, the two trustees present at the meeting passed the relevant resolution authorising the signature of the deed of suretyship, and thereafter proceeded to sign the deed of suretyship in favour of the Appellant.

In terms of the deed of suretyship authorised by the majority of trustees, the Trust bound itself as surety and co-principal debtor in favour of the Appellant for the due payment of any and all amounts due by Mrs Volker to the Appellant in respect of any indebtedness or obligation arising from any cause whatsoever, including legal costs or disbursements.

The fundamental issue in dispute on appeal was whether the court *a quo* was correct in upholding the Trust's defence and finding that the resolution taken to sign the deed of suretyship was invalid and of no force and effect, due to the fact that the resolution was passed by a majority of the trustees.

In arriving at its decision the court considered the applicable legal principles, specifically, that it is trite law that trustees are deemed to be the co-owners of the immovable property and other assets for the purposes of administration of a trust, and are only authorised to act through competent resolutions. Equally trite is the principle that the trustees must act jointly in taking decisions and resolutions for the benefit of the trust and beneficiaries thereof, unless a specific majority clause in the trust deed provides otherwise.

In determining whether the resolution in question qualified as competent, the court considered the salient provisions of the trust deed and the appendix thereto. In terms of the specific clause of the trust deed relied upon by the Appellant, in the event of any disagreement between the trustees, the majority shall prevail. In terms of the appendix to the trust deed, all decisions and resolutions are to be taken unanimously by the trustees, acting jointly in resolving to sign documents on behalf of the trust.

The court quoted various judgments enunciating the legal principle that trustees must act jointly, especially when trustees are required to take a decision involving the assets of the trust. The court referred to the decision of the Supreme Court of Appeal in *Land and Agricultural Development Bank of SA v Parker and Others*, where it was held that when dealing with third parties, even if the trust instrument stipulates that the decision can be made by the majority of trustees, all trustees are required to participate in the decision making and each one has to

sign the resolution. The court in *Steyn and Others N N O v Blockpave (Pty) Ltd* **[2]** further elaborated on this legal principle by stating that a trust operates on resolutions and not on votes.

In the court's analysis of the arguments and legal principles applicable to this matter, the court reaffirmed that even when a trust deed provides for a majority decision, as in this instance where the decision to enter into the deed of suretyship was taken by two of the three trustees, the resolution itself must be signed by all the trustees. A majority of trustees may take a valid internal decision, but when dealing with third parties, a valid resolution that binds a trust externally must be signed by all trustees acting jointly on behalf of the trust.

The Court therefore held that the court *a quo* was correct in concluding that the trustees in this case did not act jointly. The resolution passed by the Trust was not an unanimous decision of the trustees, as one of the trustees did not participate in the decision. Therefore, neither the resolution signed in the absence of the one of the trustees authorising the conclusion of the deed of suretyship nor the deed of suretyship itself is valid and enforceable against the Trust.

The majority decision further noted that the where a trust deed requires trustees to act for the benefit of the trust, and for the purposes of conducting business for and on behalf of the trust, any decision to enter into a transaction or agreement for the personal benefit of a trustee or a beneficiary would be invalid.

Commentary

This case does not introduce any new legal principles, however, when dealing with trusts as often as one does in commercial and property transactions, the passing of the resolution in accordance with the terms of the trust deed by all the trustees acting jointly and unanimously can often be overlooked. This case serves as a reminder to all parties dealing with trusts, and specifically when contracting with a trust or transacting with trust assets, to err on the side of caution and ensure that, notwithstanding a majority decision, all resolutions are passed unanimously by the trustees acting jointly and duly signed by all the trustees. As demonstrated in this case, an invalid trust resolution invalidates an entire agreement, and as often quoted, "one cannot revive a nullity". All parties, specifically financial institutions, should therefore heed the warning given by the court in this matter and ensure that the necessary due diligence is conducted prior to entering into a transaction with a trust, and ensure that the various legal requirements to ensure the validity of the decisions taken by trustees on behalf of a trust are satisfied. It is always best to seek further legal advice as to whether a trust may enter into a specific transaction in order to avoid the potential consequences of having a transaction or agreement being declared invalid.

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[1] (1270/2021) [2023] ZASCA 74

[2] 2005 (2) SA 77 (SCA); [2004] 4 All SA 261 (SCA)

[3] 2011 (3) SA 528 (FB)



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