



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO:
37766/2018**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

22 September 2022

In the matter between:

NEDBANK LIMITED

Plaintiff

and

PORTIA KHENSANI MHLARI N.O.

1st Defendant

PATRICK JEALOUSY MALABELA N.O.

2nd Defendant

PORTIA KHENSANI MHLARI

3rd Defendant

PATRICK JEALOUSY MALABELA

4th Defendant

LULAMA BUSINESS ENTERPRISES CC

5th Defendant

(REG NR: 2011/106203/23)

MAMPEPU PROJECTS CC

6th Defendant

(REG NR: 2002/080738/23))

MASORINI VULSTASIE (PTY) LTD

7th Defendant

(REG NR: 2003/006349/07)

PATIENCE LETHABO MLENGANA N.O.

8th Defendant

JUDGMENT

Mdalana-Mayisela J

1. The Plaintiff is a commercial bank registered and incorporated in South Africa in terms of the company laws of the Republic. It has instituted an action against the Defendants arising from the written loan agreement that was concluded between the Plaintiff and Patrick Malabela Family Trust (IT752/01) ("Trust") on 7 May 2013 at Boksburg. In concluding this loan agreement, the Trust was represented by its trustees, who are cited as the First Defendant and the Second Defendant respectively.
2. On or about 23 April 2013 and 21 June 2014 and at Hyde Park and Edenvale respectively the Third, Fourth, Fifth, Sixth and Seventh Defendants each signed a separate Deed of Suretyship ("Suretyships") binding themselves jointly and severally in *solidum* with the trust unto and in favour of the Plaintiff as surety and co-principal debtors for the due performance of the Trust in terms of the loan agreement unto the Plaintiff.
3. Pursuant to the conclusion of the loan agreement, a covering bond was registered in the Deeds Office over immovable property described as PORTION 5 OF ERF 645 HYDE PARK EXTENSION 110 TOWNSHIP, REGISTRATION DIVISION I.R, PROVINCE OF GAUTENG, held by deed of transfer T149476/2007 situated at 6 TEESDALE ROAD, HYDE PARK, EXTENSION 110, SANDTON, JOHANNESBURG ("the property") in favour of the plaintiff as a continuing covering security for all and any amounts advanced, or to be advanced by the Plaintiff from time to time for whatsoever cause arising to or on behalf of the Trust or otherwise owing by the Trust to the Plaintiff in terms of the loan agreement and the bond.
4. The loan amount was the sum of R14,005,700,00 (Fourteen million five thousand and seven hundred rand), and the bond was registered for the sum of R16,005.700.00 (Sixteen million five thousand and seven hundred rand).
5. The Trust acknowledged itself to be truly and lawfully indebted to the Plaintiff in the sum of R16,005,700.00 together with interest, and a further sum of

R4,002,000,00 (Four million and two thousand rand), which was described as the additional amount. The loan amount was to be repaid in monthly instalment of R146,444,39 (One hundred and forty six thousand four hundred and forty four rand and thirty nine cents) over a period of 180 months, subject to alteration as set out in the loan agreement.

6. The Third, Fourth, Fifth, Sixth and Seventh Defendants each bound themselves with the Trust in favour of the plaintiff for repayment on demand of all amounts which the Trust may now or at any time owe the Plaintiff, its successors in title or assigns. There were no conditions suspending the operation of the suretyships or obligations arising from the loan agreement.
7. The Third to Seventh Defendants renounced the benefit of excussion which means that these Defendants are no longer entitled to claim that the Plaintiff first exhaust its remedies against the Trust before proceeding against them. These Defendants also renounced the benefit of division which means that these Defendants are no longer entitled to claim that their obligations be divided proportionately between them, any co-sureties or the Trust. They also renounced the legal exception of non numeratae pecuniae, which means that these Defendants are no longer entitled to claim that no moneys were in fact paid over to the Trust, the legal exception of non causa debiti, which means that these Defendants are no longer entitled to claim that the principal debtor for which they undertook liability does not exist, the legal exception of errore calculi which means that these Defendants are no longer entitled to claim that the amount which is claimed has been incorrectly calculated and the legal exception of revision of accounts which means that these Defendants are no longer entitled to claim that the Plaintiff revises its accounts in respect of their or the Trust's indebtedness. These Defendants have renounced all other exceptions which might or could be pleaded in defence to the payment of their obligations or any part thereof, with the full force and effect of the exceptions, these Defendants declare themselves to be fully acquainted.
8. The Plaintiff has pleaded in the particulars of claim both in their original form and amended form that the Trust breached the loan agreement by being in

arrears by five months totalling the sum of R827 667,21. As at 1 May 2018, the Trust was indebted to the Plaintiff in the sum of R12,316,632,37 with interest accumulating. In terms of the suretyship agreement, the indebtedness of the Trust is axiomatically the debt of these Defendants.

9. In claiming judgment for the principal sum outstanding from the loan account in the sum of R12,316,632,37, the Plaintiff also wants an order that the immovable property be declared executable, and a writ of execution be authorised for the immovable property, be attached and sold in execution.
10. The First to Sixth Defendants have defended the action and filed a special plea and a plea. The special plea was concerned with the non-joinder of a third Trustee, by the name of Patience Mlengana. This Trustee was subsequently joined by the Plaintiff as the eighth Defendant and this special plea fell by the wayside. On the merits, the Defendants did not dispute the material averments of the Plaintiff's claim as pleaded in the particulars of claim and the amended particulars of claim. The Defendants raised legal objections pertaining to breach of the provisions of the Trust Deed. The thrust of the defence is that the loan agreement is invalid because it was concluded in circumstances where the Trust Deed was breached. According to clause 4.4 of the Trust Deed, at all relevant times, no less than 3 and no more than 5 persons may be appointed as Trustees to the Trust.
11. The Defendants have pleaded that during the period 2 March 2010 to 4 October 2018, an insufficient number of Trustees as contemplated by clause 4.4 of the Deed of Trust were appointed and the remaining Trustees, Malabela and Mhlari were not able, as a matter of law, to bind the Trust to any agreement. As a result of the alleged invalidity, any suretyship concluded pursuant to an invalid loan agreement is invalid.
12. The plaintiff replicated to this defence and pleaded that the conduct of the First and Second Defendants is such that the Trust is estopped from raising lack of authority of the two Trustees and the absence of the required number of Trustees in terms of clause 4.4 of the Deed of Trust as a defence. For instance, they inter alia provided the Plaintiff with a resolution purporting to

have been adopted in the meeting of Trustees held on 19 March 2013 to the effect that the First and Second Defendants are authorised to complete and sign all documents incidental to the conclusion of the loan agreement on behalf of the Trust.

13. In countering the Defendants' defence of lack of authority, the Plaintiff has pleaded ostensible authority to bind the Trust by the First and Second Defendants, and that the Trust as principal debtor must be held liable. The Plaintiff has pleaded that the Trust is estopped from denying the authority of the First and/or Second Defendant to have concluded the loan agreement.
14. As a cautionary measure, the Plaintiff amended its particulars of claim and pleaded in the alternative an enrichment claim. The Defendants are defending that claim as well and filed a plea to it and a counter claim. The Defendants' counter claim is brought by the First, Second and Eighth Defendants as Trustees. The counter claim is centred around an allegation that the First and Second Defendant were not authorised to conclude the loan agreement and register a covering bond on behalf of the Trust. The order sought by these Defendants in the counter claim is that the Plaintiff be ordered to cancel the covering bond. A legal defence of prescription of Claim B, the enrichment claim has been raised by the Defendants. However, they did not lead evidence to discharge their evidentiary burden on this point, that the claim has prescribed. The defence of prescription to Claim B is dismissed. This is however of no moment, because if I find for the plaintiff in the main action based on the loan agreement and the suretyship agreements concluded, it is unnecessary for me to consider the alternative claim of undue enrichment.
15. What is astonishing about the Defendants' counter claim is that it is brought by the same Trustees who represented to the Plaintiff that they were authorised to act for and on behalf of the Trust, and now make an about turn and allege that they were not authorised. What is further astonishing about this counter claim is that despite making these averments in the counter claim, these Defendants elected not to testify or call any witness at the trial. They closed their case without calling any witness, whilst the Plaintiff called

Mr Perie Kemp (“Kemp”), an employee of the plaintiff in its recoveries division, stationed in Paarl, Western Cape Province as a witness. His evidence was by and large unchallenged. I find that the Defendants’ counter claim is a nonstarter, and I find that the Defendants have failed to discharge the onus of proof resting upon them in so far as the counter claim is concerned. The counter claim is accordingly dismissed.

16. This leaves me only with the main action by the Plaintiff. It is common cause from the pleadings that the merits of the Plaintiff’s claim are uncontested. What is in dispute is whether the First and Second Defendants had the necessary authority to bind the Trust, and if they did not, whether the doctrine of ostensible authority binds them. Central to this question is whether the Trust could be legally bound to the loan agreement and obligations arising from the loan agreement despite that when the loan agreement was concluded, only two Trustees were appointed instead of three.
17. In *Land and Agricultural Bank of South Africa v Parker & Others (2005) 2 SA 77 (SCA)*, the Court had the occasion of examining the circumstances where the Trust has acted or purported to act on behalf of the Trust when the required number of Trustees in terms of the Trust Deed has not been achieved. In *Parker supra*, the Court held that the Trust suffers from an incapacity which precludes it from acting on its behalf when the required number of Trustees is not achieved. In such circumstances, the Trust estate was not capable of being bound.
18. It is common cause in this matter that only two Trustees instead of three were in office when the loan agreement was concluded. In such circumstances the question that remains is whether this defect rendered the loan agreement concluded on its behalf invalid, thus excusing the Trust from liability from the Plaintiff. The Plaintiff has pleaded that the Trust should be estopped from relying on invalidity by virtue of the fact that only two and not three Trustees were in office at the time, by virtue of the doctrine of ostensible authority. The Plaintiff has submitted that the following facts should be taken into account. First, that this Trust was established by the Second Defendant, who was also

a Trustee and beneficiary of the Trust together with children born from the marriage with the Third Defendant. The Second Defendant appointed the Third Defendant as the Trustee, who was also entitled to enjoyment of all benefits of the Trust's assets. Thus, this Trust was a typical family Trust. The duty to appoint a third Trustee rested with the Second Defendant who failed to do so. The third Trustee was appointed at a later stage after the loan agreement had been concluded.

19. The First and Second Defendants had represented by the resolution submitted to the Plaintiff that they were the representatives of the Trust authorised to act and bind the Trust. The plaintiff submits that it could not have been expected of the Plaintiff to have known that the Trust Deed was not complied with. It was within the First and Second Defendants' knowledge that only two and not three Trustees were in office at the time of the conclusion of the agreement.
20. In *Parker* the Court found that it is the responsibility of the Trustees to ensure that the formalities provided in the 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, the Courts should intervene to avoid injustice. In this case, not only did the Trust receive the loan amount from the Plaintiff, but for several years repaid in terms of the loan agreement an amount in excess of R8 million in monthly instalments. The Trust continued to pay and subsequently debit orders were return, which rendered the loan account to be in arrears. According to the evidence of Mr Kemp, which was unchallenged, as from June 2018 no further payments were received after the debit orders were returned.
21. In *Investec Bank Limited v Adriaanse and Another NNO (2014) 1 SA 84 (GNP)*, the court found that outsiders dealing with Trusts are obliged to observe provisions of the Trust Deed, but the primary responsibility for compliance with the Trust Deed rests with the Trustees. In this matter the Second Defendant failed to ensure that he appoints the third Trustee at the relevant time. In my view the failure by the Defendants to lead evidence at the

trial was fatal in that they lost the opportunity to explaining why the resolution was submitted to the Plaintiff to the effect that the First and Second Defendants were the authorised representatives of the Trust, and that they were authorised to act on behalf of the Trust, contrary to the Deed of Trust.

22. The Defendants have relied on the *Parker* judgment supra in their heads of argument as authority for the proposition that the Trust is not bound by the terms of the loan agreement due to its invalidity. *Parker* supra is authority for the proposition that the Trust could not be bound where there were fewer than the required number of Trustees in terms of the Deed of Trust, except where the statute provides otherwise. The Defendants have however stressed in their heads of argument, and correctly so that the *Parker* decision left open the question of ostensible authority and estoppel. It is not clear whether these defences are legally available to the party such as the Plaintiff in the circumstances of this case. In my view, I see no legitimate basis upon which it can be asserted that these defences cannot be invoked in the case of the action of the Trust, where the other party was lured to believe that internal formalities were complied with when in fact that was not so. I am satisfied that on the undisputed facts, the Trust should be estopped from relying on lack of authority to contract. The loan agreement is binding on the Trust, and the Third, Fourth, Fifth, Sixth and Seventh Defendants are equally bound as sureties to the debts owed by the Trust to the plaintiff. I am also satisfied that the Trust breached the loan agreement by failing to honour its obligation to pay monthly instalments as they became due. The Defendants have also not provided evidence to the contrary as to why the property should not be declared executable.
23. Judgment is accordingly granted in favour of the Plaintiff against the First, Second, Third, Fourth, Fifth, Sixth and Seventh Defendants as follows:
1. Payment of the amount of R12,316,632,37;
 2. Interest at prime lending rate applicable from time to time from 2 May 2018 to date of final payment, both days inclusive.

3. That the immovable property described as PORTION 5 OF ERF 645 HYDE PARK EXTENSION 110 TOWNSHIP, REGISTRATION DIVISION I.R, PROVINCE OF GAUTENG, held under deed of transfer T149476/2007 situated at 6 TEESDALE ROAD, HYDE PARK, EXTENSION 110, SANDTON, JOHANNESBURG, be declared specially executable.
4. That a writ of execution is authorised in terms whereof the aforesaid immovable property may be attached and sold in execution.
5. The First, Second, Third, Fourth, Fifth, Sixth and Seventh Defendants are ordered to pay the costs of suit on the scale as between attorney and client.
6. In respect of the Defendants' counter claim, the counter claim is dismissed with costs.

MMP Mdalana-Mayisela J
Judge of the High Court
Gauteng Division

(Digitally submitted by uploading on Caselines and emailing to the parties)

Date of delivery: 22 September 2022

Appearances:

On behalf of the Plaintiff: Adv JM Killian
Instructed by: O' Connel Attorneys

On behalf of the Defendants: Adv L Hollander
Instructed by: Faber Goertz Ellis Austen Inc

