



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

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

Date: 13/10/2022 **Signature:**

CASE No. 2021/6789

In the leave to appeal application:

DEVROG FAMILY TRUST

Applicant/Respondent

(Registration Number: IT 2383/87PMB0)

and

FUTURE INDEFINITE INVESTMENTS 180 (PTY) LTD

Respondent/Applicant

(Registration Number 2002/021851/07)

and

In the matter between: -

DEVROG FAMILY TRUST

First Applicant

(Registration No. IT2383/87) (PMB)

GOVINDSAMY CHETTY N. O

Second

Applicant

ROGINI CHETTY N. O

Third

Applicant

and

FUTURE INDEFINITE INVESTMENTS 180 (PTY) LTD

First Respondent

(Registration Number 2002/021851/07)

HENKEL GREGORY INCORPORATED

Second Respondent

JUDGMENT

MAHOMED AJ

INTRODUCTION

1. In my judgment of 28 April 2022, I ordered specific performance, for payment of the balance of the purchase price of immovable property, Future Indefinite Investments 180 ("F180"). The Devrog Family Trust, ("DFT") the applicants in this application, argued at the hearing that the agreement of purchase and sale of the immovable property was void ab initio, in that Govindsamy, a trustee, did not have the necessary written authority to bind the DFT when he signed the agreement. No resolution was in place and there is no evidence before the court that the two trustees, Govindsamy Chetty and his wife Rogini, held a meeting and passed a resolution to purchase the property.

THE APPLICATION

2. Moodley SC, represented the applicants and submitted that the DFT applies in terms of s16 of the Superior Courts Act 10 of 2013, and that this court is to determine the application in terms of s17(1)(a).

3. Counsel submitted that my judgment was based largely on the interpretation of the provisions of the deed of trust and that it is open for another court to apply a different interpretation and therefore the application ought to meet the higher threshold in the section which provides that “leave may be granted only where the appeal ‘would’ have a reasonable prospect of success.”

No Written Resolution

4. It was submitted that the respondents herein relied on inferences that F180 drew. Counsel submitted that F180 assumes there was a meeting between Govindsamy and Rogini, as trustees and therefore there was a resolution to enter into the agreement. There is no evidence that a meeting was held, and a resolution taken or that Govindsamy would have exercised his casting vote.

5. Moodley SC submitted that another court would arrive at different finding when one has proper regard for the words in clause 7.4 of the

deed of trust, which provides, *“in the event of the trustees becoming “deadlocked” by an “equality of votes” on a matter of their decision, then that matter shall be decided by the casting vote of Govindsamy or his successor.”* Counsel submitted that on an interpretation of that clause, another court will arrive at a different finding, in that before the casting vote by Govindsamy can be invoked there has to be a participation by the joint trustee, Rogini Chetty and only in a situation of deadlock would Govindsamy be able to exercise his casting vote.

6. The DVT attacks my judgment at 022-28 para 101, where I stated, *“the deed is clear Govindsamy holds the final authority in his casting vote, whether in a situation of a deadlock or otherwise.”* Counsel submitted the “words or otherwise” are not in the deed and were imported by the court. The casting vote can only be invoked where there is deadlock, and it did not cater for any situation outside of a deadlock. Another court on interpretation would differ from my judgment and there are reasonable prospects of success on this point.
7. Moodley SC argued further, that one cannot simply invoke a casting vote to the exclusion of another trustee because it would make no sense. Govindsamy could go out and bind the trust to the exclusion of the other joint trustee. It would serve no purpose then to have another trustee.

8. He referred to 7.3 of the deed and proffered that all trustees must participate in a vote. The decision would be taken by the majority. F180's argument is a patriarchal one, when Rogini could simply be ignored, she would have no purpose, which is incorrect. She has a purpose being included in the trust.

9. By reference to the other clauses in the deed of trust, it clear that a written resolution must be in place to bind the trust. F180 bears the onus to prove that a valid purchase and sale agreement was entered into. They failed to prove that there was a written resolution.

Alienation of Land – s 2(1) Act 68 of 1981

10. F180 failed to comply with the provision of s 2(1) of the Alienation of Land Act 68 of 1981, which provides that all alienation of land must be authorised in writing. There is no written authority that was given to Govindsamy Chetty, either my written resolution or any other written form by Rogini Chetty. F180 failed to procure a resolution and therefore failed to comply with the peremptory provisions of the Alienation of Land Act. The intention of this section is to ensure certainty and to avoid unnecessary litigation. Counsel submitted that another court would find that the contract concluded was void ab initio, in that it did not comply with s 2(1) of the Act,

11. In my judgment¹ I found that the necessary authority was in place, if one read the provisions of the trust deed, together with the letters of authority, noting that the deed was drafted when there were three trustees at that time, and the conduct of Govindsamy and his family members, in particular his son Mr Yolan Chetty, who was integrally involved in the negotiations to the conclusion of the purchase and sale agreement and the correspondences between the parties. In casu the context is important given that one of the trustees and another family member, not a trustee, were involved in the negotiations which led to the conclusion of the agreement of sale.

12. At the hearing of this application, Mr Joseph of F180 submitted that his client relied on all the above factors and representations. Counsel again referred the court to correspondence, dated 20 January 2021, signed by Govindsamy, which he submitted was crucial, in that, for the most part in this letter, the reasons for cancellation was based on factors related to the economic conditions due to the pandemic. He submitted that it is only in the last paragraph, that the DFT raised its issue on authority to bind the trust. Counsel argued that that is telling, and when one considers the import of that paragraph, the authority is clear.

12.1. In the last paragraph Mr Govindsamy Chetty stated:

¹ Caselines 022-28 paragraph 100 read with para 14 at 022-7

*“13. Finally, I point out that no resolution was obtained from the trustees of the Devrog Family Trust ‘when the addendum’, to the agreement was concluded and the agreement is also cancelled on that basis.”*²

13. Mr Joseph persisted with his argument that that paragraph, was the only way that the DFT could avail itself of the finding in the Goldex case.³

14. Mr Joseph, argued that it is clear Mr Chetty had the necessary authority to conclude the main agreement. The addendum pertained only to the terms of payment for the balance of the purchase price.
 - 14.1. Counsel proffered that any other interpretation, would lead one to conclude, that Govindsamy Chetty, on conclusion of this agreement had perpetrated a fraud, on the trust, on Rogini and on the F180.

15. Mr Joseph reminded the court that the DFT has stated that it has been involved in various businesses over many years. Mr Chetty was an astute businessman; he would have known the provisions of the deed of trust and as Chairman of the Trust he would have known the import of holding a casting vote and only one other trustee. Mr Joseph

² Caselines 022-53

³ (24218/2013) [2017] ZAGPJHC 305 (18 October 2017). (543/2018) [2019] ZASCA 105 (4 September 2019)

persisted with his argument that Govindsamy Chetty held two votes, sufficient to bind the trust, without Rogini, he agreed with the finding at paragraph 100 of the judgment.

Cancellation – supervening impossibility of performance

16. I found that the DFT did not lay a factual or legal basis for this defence.
17. Moodley SC argued that the cancellation of the contract due to impossibility of performance arising from the challenges posed by the pandemic, is a very valid point. He submitted it is “novel” and therefore open for another court to arrive at a different decision.
18. Mr Joseph submitted that the court has only the say so of the DFT, there was no substantiation of the defence, the DFT did very little to prove the impossibility.

In Limine -non joinder

19. Moodley SC persisted with the DFT’s non joinder point, in limine and argued that the trust cannot act on its own it requires the assistance of the trustees to litigate. They must be cited individually.

20. In my judgment I found that given that the DFT addressed “issues on the papers and sought relief”, logically it accepted that all parties were properly before the court. [my emphasis].
 - 20.1. Counsel argued that it was obliged to plead over as it correctly did, a litigant cannot simply ignore the other points raised.
 - 20.2. Mr Joseph conceded that the trustees were not individually cited in the “heading” to the papers, but each trustee was cited in the papers and the papers were served on each of the trustees. To view this otherwise, would simply be a case of the proverbial, “form over substance.”

In Limine- authority to act

21. Moodley SC furthermore, argued that Mr Gottschalk’s authority was not confirmed upon institution of the proceedings. He failed to state in his affidavit that “he was duly authorised to depose on behalf of the respondents.”
 - 21.1. Counsel argued further that the attorneys ignored a Rule 7(1) notice and only later in its reply annexed what purported to be a resolution taken authorising him. This does not cure the defect. It is a defective resolution by F180.

22. Mr Joseph argued that the authority was implicit in the papers and the resolution was annexed to the replying affidavit, which must be seen as a reply to the R7(1) notice.
23. I remain of the view that not much turns on this point, the authority was implicit in the founding papers and the DFT has continued to “engage” in the litigation. The DFT could have resorted to the Rules earlier, if it was prejudiced.
24. I considered Moodley SC’s arguments based on “a matter for interpretation of the provisions of the deed of trust,” and that the defence it relies on to cancel the agreement as being “a novel point”. I think it in the interest of justice that the two issues be further ventilated.
25. I grant this application for leave to appeal on the:
 - 25.1. Issue of the written authority to bind the trust, and the
 - 25.2. cancellation of the agreement based on the defence of a supervening impossibility of performance, due to the Covid 19 pandemic and its impact on DFT’s continued ability to do business.

Accordingly, I make the following order:

1. Leave to appeal is granted to the Full Bench of the Gauteng Division, of the High Court, Johannesburg.
2. Costs are to be in the appeal.

MAHOMED AJ

Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 13 October 2022.

Date of hearing: 31 August 2022

Date of Delivery: 13 October 2022

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