



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

Case No: 2011/9643

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

In the matter between:

FIRSTRAND BANK LIMITED

Plaintiff

and

VAN WYK, WILLEM STEFANUS JOHANNES

First Defendant

UNIVERSAL IMAGE (PTY) LTD

Second Defendant

PEACON 270 HARTBEESPOORT CC

Third Defendant

**JUDITH MARY VAN WYK N.O., MARISSA CLAIRE BEKKER
N.O., ROBERTO JORGE MENDONCA VELOSA N.O.**

(Representing iProtech Trustees (Pty) Ltd cited herein in
Their capacity as trustees for the time being of the Anchorville
Trust (IT6474/97))

Fourth Defendant

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/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 31 October 2023.

JUDGMENT

CARRIM AJ

Introduction

- [1] In this matter, the plaintiff, First Rand Bank Ltd, seeks a money judgment against the fourth defendant, the Anchorville Trust (IT6474/97)), together with an order declaring Erf 271 Pecanwood Extension 5 Township, Registration Division J.Q., North- West Province, measuring 502 square metres, held by deed of transfer number T111413/1997 (“Erf 271 Pecanwood”), specially executable.
- [2] Judith Mary van Wyk N.O., Marissa Claire Bekker N.O. and Roberto Jorge Mendonca Velosa N.O. are cited in the capacities as trustees for the time being of the fourth defendant.
- [3] For ease of reference, I will refer to the plaintiff as FirstRand, alternatively “the Bank”, and the fourth defendant as “the Trust”.
- [4] Mrs van Wyk was married to the first defendant, who also served as a trustee of the Trust at all relevant times.
- [5] The first defendant, Mr van Wyk has been sequestrated. The second and third defendants have been liquidated. The only *lis* that remains is that between FirstRand and the Trust.

Factual Background

[6] The claim against the Trust arises from 2006, when Mr Van Wyk, who was granted a single credit facility by FirstRand, signed a suretyship agreement on behalf of the Trust.

[7] The common cause or undisputed facts, as agreed between FirstRand and the Trust, are set out in a joint practice note in terms of paragraph 15.4 of practice directive 2 of 2019, dated 14 October 2022 (“October 2022 joint practice note”).¹

[8] On or about 17 October 2005, FirstRand, represented by Mr van Zyl, entered into a written agreement in terms of which FirstRand granted Mr van Wyk a loan in the form of a single credit facility (“the facility”) in the amount of R4,000,000. The material terms of the facility included *inter alia* the following:

8.1. The facility was subject to the registration of first covering mortgage bonds in favour of FirstRand over two immovable properties situated in Ferndale and owned by Mr van Wyk (“Erf 812 Ferndale” and “Erf 810 Ferndale”, collectively referred to as “the Ferndale properties”).

8.2. The facility amounts and interest thereon, would be repaid by way of monthly instalments and the outstanding balance would bear interest at the rate linked to the published RMB Private Bank Facility rate.

¹ Section 029-61 to 021-75 on CaseLines.

8.3. In the event of Mr van Wyk failing to pay punctually any amount payable to FirstRand in terms of the facility, FirstRand would be entitled to claim repayment of any amounts owing.

8.4. Pursuant to the conclusion of the facility, FirstRand advanced the amount of R4,000,000 to Mr van Wyk and first covering mortgage bonds were registered over the Ferndale properties in favour of FirstRand.

[9] On or about 31 March 2006 (“March 2006 variation”), the facility was increased to an amount of R4,280,000 in terms of a variation agreement concluded between FirstRand and Mr van Wyk Pursuant to the conclusion of the March 2006 variation, FirstRand advanced the amount of R4,280,000 to Mr van Wyk.

[10] A further variation agreement was concluded between FirstRand and Mr van Wyk on 27 July 2006 (“July 2006 variation”). The facility was increased to an amount of R5,600,000. In terms of the July 2006 variation, the facility was subject to the registration of first covering mortgage bonds in favour of FirstRand over Erf 271 Pecanwood (which is owned by the Trust) and Erf 270 Pecanwood (which is owned by Hartbeespoort) (collectively referred to as “the Pecanwood properties”). Pursuant to the July 2006 variation, FirstRand advanced the amount of R5,600,000 to Mr van Wyk and first covering mortgage bonds were registered in favour of FirstRand, in terms of which the Pecanwood properties were hypothecated as continuing covering security.

[11] On 27 July 2006, Mr van Wyk signed a deed of suretyship (“the suretyship”) on behalf of the Trust.² The relevant material terms of the suretyship include *inter*

² Section 85-76 to 85-78 on CaseLines.

alia the following:

- 11.1. The Trust bound itself jointly and severally as surety for and co-principal debtor in solidum with Mr van Wyk, for the due and punctual payment by Mr van Wyk, of all and any monies which Mr van Wyk may then have owed or which may thereafter have become owing by Mr van Wyk to FirstRand in terms of any agreements entered into, or about to be entered into, between FirstRand and Mr van Wyk.
- 11.2. The Trust accepted liability for FirstRand's legal costs as between attorney and own client.
- 11.3. The Trust renounced the benefits of the legal *exceptions non causa debiti, errore calculi, excussionis et divisionis, de duobus vel pluribus reis debendi*, no value received, cession of action and revision of accounts, the meaning and effect whereof the Trust declared itself to be fully acquainted with.
- 11.4. A certificate signed by any manager of FirstRand, whose appointment or authority it would not be necessary to prove, would constitute *prima facie* evidence of the outstanding balance owing and/or due and payable by the Trust to FirstRand, and of the interest rate applicable.

[12] On 27 July 2006, when Mr van Wyk signed the suretyship, there were two trustees in office being Mr van Wyk and Mrs van Wyk. The suretyship on behalf of the Trust was signed only by Mr van Wyk.³

³ Section 029-83 on CaseLines.

[13] It was also common cause, and not disputed by the Trust that Mrs van Wyk signed two resolutions.⁴ The first resolution is dated 27 July 2006.⁵ This resolution is for the sake of convenience referred to as “the 27 July resolution”. The second resolution is dated 27 and 31 July 2006 respectively.⁶ This resolution for the sake of convenience is referred to as “the 31 July resolution”.

[14] The essential terms of the two resolutions are:

14.1. In the 27 July 2006 resolution, the two trustees resolved that the Trust would stand surety for the loan made by the first defendant, that it would pass a first covering bond over Erf 271 in favour of the bank, and that the first defendant, in his capacity as trustee, be authorised to sign the necessary power of attorney for the registration of the bond on behalf of the trust.

14.2. In the 31 July 2006 resolution, the two trustees resolved that the Trust *inter alia* would stand as surety and co-principal debtor for all sums due to RMB by the first defendant arising from the Single Credit Facility dated 26 July 2006, that any deed of suretyship or other security document signed by anyone purporting to act on behalf of the Trust prior to the date of the resolution is ratified, that a first covering bond be passed in favour of the bank over Erf 271, and the first defendant be authorised in his sole discretion to settle the terms of such documents and sign a power of attorney for the registration of the bond.

⁴ October 2022 joint practice note paragraph 34.2, 029-91.

⁵ Section 86-300 on CaseLines.

⁶ Section 86-301 to 86-302 on CaseLines.

[15] A further variation agreement was concluded between FirstRand and Mr van Wyk on 6 September 2006 ("September 2006 variation") in terms of which the facility was further increased to an amount of R7,500,000. Mr van Wyk, representing the Trust, acknowledged, and agreed to the September 2006 variation and accepted liability for payment of the increased facility. Pursuant to the conclusion of the September 2006 variation, FirstRand advanced to Mr van Wyk the amount of R7,500,000.

[16] The facility was further increased to an amount to R8,000,000 in terms of a variation agreement concluded between FirstRand and Mr van Wyk on 8 December 2006 ("December 2006 variation"). Mr van Wyk, on behalf of the Trust, acknowledged and agreed to the December 2006 variation and accepted liability for payment of the increased facility. Pursuant to the conclusion of the December 2006 variation, FirstRand advanced to Mr van Wyk the amount of R8,000,000.

[17] It suffices to say that by the last variation, on 8 December 2006, the following financial picture was in place:

17.1. Facility R8,000,000.00 (Eight Million Rand).

17.2. Mortgage Bonds in favour of RMB Private Bank:

17.2.1. Erf 812 Ferndale Willem Stefanus Johannes van Wyk first
R2,500 000.00;

17.2.2. Erf 810 Ferndale Willem Stefanus Johannes van Wyk first
R2,500 000.00;

17.2.3. Erf 271 Pecanwood Extension 5 Anchorville Trust R2,800

000.00;

17.2.4. Erf 270 Pecanwood Extension 5 Peacan Hartbeespoort CC 270
R950 000.

17.3. Sureties in place:

17.3.1. Universal Image (Pty) Ltd;

17.3.2. Peacan 270 Hartbeespoort CC;

17.3.3. Anchorville Trust.

[18] A certificate of balance produced by the plaintiff reflects that the amount owing is R11,704,010.95.

[19] Notwithstanding these common cause facts, the Trust put up several defences in its pleadings. It is unnecessary for me to reproduce these here in detail because the parties at a pre-trial conference⁷ defined the issues in dispute requiring decision (“the issues for adjudication”) as follows:

19.1. whether Mr van Wyk was duly authorised to represent the Trust, at the time when he signed the suretyship (onus on the Trust),

19.2. if not, whether the Trust ratified the conclusion of the suretyship, as alleged in FirstRand’s replication; or, put differently: whether Mrs van Wyk could retrospectively ratify the act or conduct of an unauthorised representative, and did so ratify such act or conduct (onus on the Trust),

19.3. whether *ex facie* the suretyship, a valid deed of suretyship was entered into (onus is on Plaintiff), and

⁷ Minutes of pre-trial conference of 31 January 2017: See section 005-38 and 005-39 on CaseLines at paragraph 5.3 and fourth defendant’s reply to minutes of pre-trial conference held on 31 January 2017: see sections 005-94 on CaseLines at paragraph 3.

19.4. the quantum of FirstRand's claim (onus on Plaintiff).

[20] Soon after the commencement of the hearing, the issue of the quantum of FirstRand's claim was clarified and conceded by the Trust. This issue therefore no longer needs to be decided by me. Furthermore, the Trust has confirmed that Erf 271 is not the primary residence of Mrs van Wyk.

[21] At the end of closing arguments, I queried from the Trust's representatives whether they persisted with the denial that *ex facie* the document a valid suretyship had been signed or whether in effect the Trust was denying its validity on lack of authorisation on the part of Mr van Wyk.

[22] Since then they communicated that they do not require a detailed decision on the issue of whether *ex facie* the document a valid suretyship was signed but that the concession it makes is to concede "*that there appears to be a valid suretyship agreement (for the reasons set out in the Plaintiff's heads of argument), but that the honourable court still has to determine whether there is indeed a valid Suretyship Agreement with reference to the remaining issues (being (a) whether Mr van Wyk was duly authorised to represent the trust (b) if not, whether the Trust could retrospectively ratify the conclusion of the suretyship agreement and (c) if so, if the Trust did in fact ratify the conclusion of the Suretyship Agreement)*".⁸

[23] FirstRand has no objection to this.

[24] I understand this to be a concession from the Trust that on the face of it the

⁸ Email from van der Linde Attorneys 20 September 2023.

suretyship is a valid document, signed by Mr van Wyk, on behalf of the Trust but it persists with its argument that Mr van Wyk was not authorised at the time on behalf of the Trust.

[25] The matter was heard on a virtual platform because two of FirstRand's witnesses were in remote locations. FirstRand called Mr Ernest van Zyl,⁹ Mr Dante Fogolin, Mr Ashraf Rocker and Mr Bradley Bourne.¹⁰ The Trust called only one witness, Mrs van Wyk.

[26] Before turning to consider the merits of the matter, it is important to set out how the facility came about.

[27] Mr van Zyl, on behalf of FirstRand, explained that at the time he was employed as a specialised structured lender, managing a portfolio of debt at Rand Merchant Bank (RMB). In this role, his division would create a "one account" structured facility where they would structure lending to a client using residential assets, commercial assets, cash, and any other assets that they deemed good security for the bank. This was one way in which small businesses could leverage personal assets to raise capital to grow their businesses. RMB would consolidate all the assets Mr van Wyk would put up as security against one lending account, whether the asset was in his personal name or in the name of one of his entities.

[28] Mr van Zyl testified that in general, he was the relationship manager and would interact with the client and work out a structured deal. He would obtain all the relevant documents and submit these to other divisions of the bank, namely

⁹ Now based in Australia.

¹⁰ Based in Cape Town.

credit who would then do a financial due diligence on the clients and indicate what documents and securities (if any) such as guarantees, suretyships or mortgage bonds were required. Where for example entities were involved, these would be handed over to the legal department who would require all the statutory documents and financial information. This would entail details of directors, trustees, copies of incorporation documents, and the like. The legal department would then draft all documents and they would meet with the client, discuss the nature of the document, standard terms and conditions of the bank, and indicate where signatures were required.

[29] A client would need to sign several documents before money was advanced. For example, if mortgage bonds over immovable property were required, the money would not be advanced unless the bond had been registered. Likewise, if a suretyship was required money would not be advanced unless this was in place and checked by legal.¹¹ At times, in simple transactions, the signing took place simultaneously. At other times, the client would take the documents with him to obtain legal advice or other required approvals and would bring signed documents back to legal who would vet those documents and process the lending. The same banker did not always co-sign the documents. At times, legal would sign for the banker.

[30] If there was a secondary trust involved or the client held a benefit in a trust or a company, his team would get all those related documents as well. He would package them with the financials and the credit assessment and submit to the credit division. So, for example, if there was a house held by a trust (as in this

¹¹ See Transcript pages 24-26 17 July 2023.

case) and there was another house held by a company, they would present that, as well as all the related parties surrounding that and make recommendations for suretyships, bond registrations or whatever it would be to 'perfect' that security. After that, it would go off to legal and legal would draft all the related documents and that would then come back to the relationship manager or banker to get the documents signed and actioned with the bank. Securities are 'perfected' when a suretyship has been signed or a bond has been registered.¹²

[31] Mr van Wyk's business at the time when he applied for the single lending facility at RMB was Universal Image (Pty) Ltd ("Universal"). His business account was at First National Bank commercial banking. Mr Bradley Bourne was the client relationship manager at commercial banking.

[32] Mr Bourne explained that from a commercial banking perspective they would leverage the balance sheet for Universal Image to whatever number he felt comfortable with. In other words, whatever credit facility he felt comfortable with given the balance sheet of the company. This was the initial transaction. Over time, Mr van Wyk asked for increases and they indicated that there was a maximum they (commercial) could leverage over the balance sheet. However, it seems there was appetite at RMB Private Bank to increase Mr van Wyk's facilities as a single credit facility. The two sister divisions had internal mechanisms whereby RMB issued commercial banking with an inter-departmental allocation. So, if the customer defaulted with RMB, commercial also had security through this allocation.

¹² Transcript 17 July 2023 page 45

[33] Mr Bourne did not have a relationship with the Trust but was aware that it had a relationship with its sister division, RMB.¹³

Legal Framework

[34] It is trite that a trust is not a legal person but is an accumulation of assets and liabilities.

[35] In ***Land and Agricultural Development Bank of SA v Parker and Others***¹⁴ the Supreme Court of Appeal confirmed a trust is not a legal person. Unlike a company a trust does not enjoy a separate legal personality. A trust “*is an accumulation of assets and liabilities. These constitute the trust estate, which is a separate entity. But though separate, the accumulation of rights and obligations comprising the trust estate does not have legal personality. It vests in the trustees and must be administered by them – and it is only through the trustees, specified as in the trust instrument, that the trust can act. Who the trustees are, their number, how they are appointed, and under what circumstances they have power to bind the trust estate are matters defined in the trust deed, which is the trust’s constitutive charter. Outside its provisions the trust estate cannot be bound.*”

[36] In other words, the trust cannot be bound outside the provisions of the trust deed. However, the SCA in ***Parkers*** made a distinction between questions of trust capacity and trustee authority.¹⁵

[37] In ***Parkers*** the SCA identified two core principles, pertaining to legal capacity

¹³ Transcript 17 July 2023 page 96.

¹⁴ (186/2003) 2005 (2) SA 77 (SCA) (23 September 2004) at paragraph 10.

¹⁵ Paragraph 9.

relevant to the facts of that case namely that a sub-minimum of trustees cannot bind the trust and, relying on *Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk*,¹⁶ the trustees must act jointly.

[38] If the number of trustees falls below the minimum prescribed by the trust deed, then the remaining trustees will be incapable of binding the trust and the trust will lack the capacity to act until further trustees are appointed.

[39] In *Nieuwoudt*,¹⁷ it was held that a fundamental rule of trust law that in the absence of contrary provisions in the trust deed the trustees must act jointly if the trust estate is to be bound by their acts.

[40] Thus, even if a majority of trustees agrees to and signs a contract, the contract will not be binding upon the trustees, unless the deed provides for this. If the trust deed provides for decisions to be taken by a majority vote, the majority cannot act without consulting the minority and if there is a disagreement the majority view will prevail.¹⁸

[41] The requirement to act jointly does however not mean that the trustees have to act at the same time, but they must act collectively. See *Wishart and Another v FirstRand Bank Limited*.¹⁹ This principle does not preclude trustees from expressly or impliedly authorising someone to act on their behalf.²⁰

[42] A lack of authority can be ratified whereas a lack of capacity cannot. Where a party does not have the capacity to act, a purported act in its name is a nullity

¹⁶ 2004 (3) SA 486 (SCA).

¹⁷ 2004 (3) SA 486 (SCA) paragraph 16.

¹⁸ *Parker* at paragraph 17.

¹⁹ 3459/2013) [2014] ZAKZPHC 59 (28 November 2014) paragraph 42.

²⁰ Honores South Africa Law of Trusts (6th Ed) Cameron De Waal Solomon.

and cannot be ratified.²¹

[43] A trust cannot stand surety unless the trust deed authorises the trustees to authorise the suretyship in the particular circumstances.²²

[44] The courts are not powerless in appropriate cases to ensure that the trust form is not abused. In **Parker** the SCA held that (paragraph 37) that:

44.1. *“The courts have the power and the duty to evolve the law of trusts by adopting the trust idea to the principles of our law ... This power may have to be invoked to ensure that trusts function in accordance with principles of business efficacy, sound commercial accountability and the reasonable expectations of outsiders who deal with them.”*

[45] The burden of proving a lack of authority to contract lies on the party setting it up as a defence.²³

Discussion

[46] The plaintiff's case is that it was presented with a suretyship signed by Mr van Wyk on behalf of the Trust and two resolutions signed by the two trustees in office at the time, Mr and Mrs van Wyk. This should suffice as *prima facie* evidence that the Trust was bound as surety to the bank. The plaintiff relied on these documents and advanced monies to Mr van Wyk, to its prejudice.

[47] In addition, the plaintiff submits that in the event the ratification of Mr van Wyk's

²¹ *Hyde Construction* paragraph 36.

²² Forsyth and Pretorius, *Caney's: The Law of Suretyship in South Africa*, 6th Edition, page 53.

²³ Bradfield, *Christie's Law of Contract in South Africa*, 7th Edition, paragraph 6.1.

conduct is found not to be valid the Trust must be estopped from relying on lack of authority.

[48] The Trust cannot deny that resolutions exist. What it seeks to do through the testimony of Mrs van Wyk is to argue that the suretyship is null and void for the following reasons –

- 48.1. Clause 14 of the Trust deed requires two trustees to sign a document for it to be binding on the Trust. Only Mr van Wyk had signed the suretyship and accordingly was not binding on the Trust.
- 48.2. Mr van Wyk was disqualified by the provisions of clauses 11. 2 and 11.3 to act on behalf of the Trust because he did not disclose to the other Trustee Mrs van Wyk that the loan was used for his personal business.
- 48.3. The 27 July resolution was 'fraudulent' because it was signed on 31 July 2006 by Mrs van Wyk.
- 48.4. Mr van Wyk was put under undue pressure by the officials of the bank to obtain Mrs van Wyk's signature.
- 48.5. The true nature of the resolution (document) that Mrs van Wyk was asked to sign was not explained to her by the plaintiff and ought to have been, and
- 48.6. Had she been made aware of the contents of the document she would not have signed it. (*Justus error* argument).

[49] I deal with each of the issues in turn.

[50] Although the Trust's heads of argument referred to a lack of capacity based on

the Letters of Authority, during the hearing Ms Liebenberg conceded that that was an error and should be a reference to the provisions of the Trust Deed. There was no question that both Mr and Mrs van Wyk had been issued with Letters of Authority by the Master at the time the suretyship was signed and there can be no suggestion that either lacked capacity on this ground.

[51] The Trust Deed was registered in Afrikaans, but a sworn English translation was provided.²⁴

[52] Clause 14 provides –

“14. REPRESENTATION

All deeds, agreements and/or other documents to be effected and executed by or on behalf of the Trust shall be deemed to have been validly effected and executed if it—

14.1 is signed during the term of office of the Interested Trustee by the Interested Trustee and at least one Trustee; and

14.2 in all other cases by at least two Trustees.”

[53] In relation to clause 14, it was argued that the trust deed required both trustees to sign the suretyship at the same time if it were to be binding upon the Trust. Trustees were required to act jointly. The signing of the suretyship was *void ab initio* because it did not comply with the provisions of clause 14 and could accordingly not be ratified.

[54] However, an ordinary reading of clause 14 does not lend itself to this interpretation. While the heading of the clause states “Representation”, the contents of the clause relate to the circumstances in which the documents

²⁴ See CaseLines section 002-135.

listed therein would be deemed to be validly effected and executed. The clause simply states that if a deed, agreement, or any document is signed during the term of office of the Interested Trustee by the Interested Trustee and at least one Trustee; such a document would be deemed to be validly effected. In all other cases, if such a document was signed by at least two trustees such a document would be deemed to be validly effected and executed. It is a deeming provision and not a requirement provision. The clause does not state that unless a document was signed as contemplated in clause 14, it would not be binding on the Trust.

[55] One can imagine that such a provision would be eminently sensible in small family trusts where trustees do not necessary adhere to strict formalities. Third parties could take comfort from the deeming provision, in the absence of a resolution, if the document was signed as contemplated in clause 14.

[56] Clauses 11.2 and 11.3 of the Trust Deed provide that –

“11.2 A Trustee with a personal interest in any transaction with or matter involving the Trust—

11.2.1 shall not be disqualified to act as Trustee because of such interest; and

11.2.2 does not forfeit his right to vote as Trustee,

in respect of that transaction or matter, provided that, at the meeting where such transaction or matter is considered, he fully disclosed the nature and extent of his interest verbally or in writing, prior to the transaction or matter going to vote under the Trustees.

11.3 No transaction of the Trust in which a Trustee has a personal interest shall be void or voidable because of such interest and such Trustee shall not be liable for any profit or benefit gained from such transaction, provided that he disclosed the nature

and extent of his personal interest to the Trustees in terms of the previous paragraph.”

[57] In relation to clauses 11.2 and 11.3, it was argued that because Mr van Wyk had not disclosed to Mrs van Wyk, the other trustee at the time she signed the resolution, that he had a personal interest in the loan and therefore the suretyship, Mr van Wyk would be disqualified to act (clause 11.2) and the transaction was void or voidable (clause 11.3) at the instance of the Trust. Linked to this issue is the Trust's version that the 27 July resolution was signed on 31 July 2006.

[58] It is notable that that no formalities are prescribed for how the disclosure contemplated in the clauses ought to take place. Hence it could be a verbal disclosure.

[59] Mr van Wyk was not called to testify although he was available. Only Mrs van Wyk testified.

[60] The first part of Mrs van Wyk's testimony related to her involvement in the business and whether she knew about the single facility (loan) and the suretyship.

[61] She testified in chief that she had been involved in the business from inception when it started as WSJ van Wyk trading as Stasie. She had wanted to retire and so Mr van Wyk employed two other people in 2005. She was aware that Mr van Wyk had borrowed some money but was under the impression that it was one of those properties in Main Avenue either 810 or 812 and "*we were in*

*disagreement about that.”*²⁵

[62] She claimed not to know the financial status of Universal Images (Pty) Ltd. She denied knowing about the loan and suretyship Mr van Wyk had concluded with the plaintiff, or the covering bond documents over Erf 271 and claims only to have seen them in 2010 when she confronted Mr van Wyk and he obtained copies of these documents from RMB and Tim du Toit.

[63] Under cross-examination deeper insights were gathered about the van Wyk's. Mr van Wyk and Mrs van Wyk were married to each other in 1968. They are separated now but not divorced.

[64] Mrs van Wyk testified that Mr van Wyk was in business for approximately 30 years. She admitted that she was involved in the administration of the business and was aware of his endeavours over the last 30 years. She was a teacher by profession but started helping in the business and did the books (financial statements).

[65] She does not refer to the business as that of Mr van Wyk's but rather as their joint business, using the plural pronoun “we”.

[66] They had started the first business on the 8th of March 1978, and she had been involved from the beginning.

[67] They had 10 shops in all which were opened at various times.

[68] It appears that the first shops were under WSJ van Wyk trading as Stasie, a

²⁵ Transcript 18 July 2023 page 54.

mini chain store, which was aimed at black customers. The stores sold music and food, had a space for a hairdresser and a section for dancing if customers felt like it. There were three shops in town (Johannesburg CBD) that were similar.

[69] They had used the proceeds of an earlier container business of Mr van Wyk to start the business. According to her they started the business with R9 000.00, and they didn't take a cent out of that business.

[70] The first photographic shops were in Sanlam Centre, Fourways. Then one in Morningside and one in Appleton's. They had three or four shops to begin with.²⁶ The time periods are not clear from her evidence, but it suggests this was around 1997, prior to Universal being established in Cresta Centre.

[71] Stasie (the company) was registered in 1980 in the name of Stasie (Pty) Ltd. It later changed its name to Universal Images (Pty) Ltd through a company name change. The business of Universal Images started in 1998.

[72] She testified that although they had 10 shops at one stage, they never required financing of any sort and over the years never applied to a bank for capital. It's not clear what she meant by this because according to Mr Bourne, Universal had been granted a lending facility (overdraft) by commercial banking based on the balance sheet of the business and that he was unwilling to increase it when asked by Mr van Wyk. Mrs van Wyk as the bookkeeper would have known about this loan at the very least.

²⁶ Transcript 18 July 2023 pages 22- 25.

[73] Although wanting to retire, she was still helping in 2005. She was at the business office when someone from the bank visited. When she met Mr Bourne, she was aware that he was someone from the bank. She was aware that Mr van Wyk had opened two current accounts with Bradley Bourne, one under the name of WSJ van Wyk trading as Stasie and the other Universal and that was in June 2006.²⁷

[74] She eventually conceded that she was aware that Mr van Wyk had applied for and had indeed obtained financing from the plaintiff.

Even as late as July 2006 she was helping with financial administration. When she signed the resolutions, she was still helping with salaries.

[75] The evidence of Mrs van Wyk thus far demonstrates that she was involved in the business to a great extent. She was involved in it from inception. It was 'their' business, not 'his'. As the bookkeeper of the business, she was aware of the finances of the business. She was knowledgeable about the growth of the business and the strategy that Mr van Wyk wished to pursue with the different companies. She understood the differences between the various forms of the businesses for example WSJ trading as Stasie and the legal entity Stasie (Pty) Ltd which later became Universal Images (Pty) Ltd. She demonstrated financial acumen, even recalling that they had started the business with R9000.00. She knew that Mr van Wyk had applied for finance from the plaintiff. She was aware of the two bank accounts of the businesses and knew that the one for Universal Images was opened in June 2006. She admitted that she was aware of the mortgages over the properties, 810 and 812 Main Avenue, and

²⁷ Transcript 18 July 2023 pages 29-30.

even had a disagreement with Mr van Wyk about them. She conceded that she was aware that Mr van Wyk had obtained financing from the plaintiff.

[76] In relation to the Trust, she testified that the Trust, with its one asset Erf 271, was given to her as a 'reward' by Mr van Wyk for all the years she had spent in the business. The beneficiaries of the Trust were herself and her two children. According to her this house in Pecanwood Estate was intended to be their retirement home. The house that was eventually built on Erf 271 was not built in accordance with her requirements (it was too far forward) so they then built the pool and Lapa on the adjoining Erf which was registered in Peacon 270 Hartbeespoort CC.

[77] Thus, there was effectively no separation between the Trust's assets (the one Erf) and those of the business, whether these were registered in Mr van Wyk's personal name or another entity. Moreover, there was no evidence put up that the Trust had its own independent sources of income.

[78] As to the signing of the resolutions Mrs Van Wyk admitted that these documents were signed by her but in the following circumstances.

[79] She was sitting next to one of their staff members in Mr Van Wyk's office in Randburg assisting with salaries. Mr Van Wyk came in and said he needed her signature. She asked where she should sign, and he indicated to her. It was a wide desk, and she stretched over and signed. She is unable to recall if she had her glasses on or not. She claimed that she did not think that it was anything official. She thought it was just a memorandum to staff or something or the other. Mr van Wyk did not ask her to read it. She trusted him and signed.

After she had signed the one document, he said, "*oh there's another one*" and came round to her side and she signed that one too.

[80] She can recall that she signed the 27 July resolution on 31 July 2006 because she utilises a visualisation method of recollection. She remembers distinctly that it was 31 July 2006 because she was sitting next to the staff member doing salaries and that month-end which was on Monday the 31st.

[81] It is not clear from her testimony in the transcript which document was signed when but at that time of the proceedings, documents had been shared with her on the screen and she was referring to them as "*that one*" and "*the other one*". However, it is clear that she was shown the 27 July resolution first,²⁸ when she says "*I remember these lines...I remember things through visualisation. I signed the resolution first and this meeting second, on the 31st in Randburg.*"²⁹

[82] In summary, her evidence on the 31 July resolution (which ratifies Mr van Wyk signing the suretyship) is that she just signed it by stretching over the desk, with or without her glasses and didn't read the document. On the 27 July resolution, her evidence is that Mr van Wyk brought it over to her side, she signed it on 31 July 2006 and can clearly recall that it was this document because of her visualisation method.

[83] Mrs van Wyk's evidence on this score has several inconsistencies and discrepancies.

[84] In relation to the 31 July resolution, if her version is to be accepted – that she

²⁸ Transcript 18 July 2023 page 6 ln 23 086-300.

²⁹ Transcript 18 July 2023 page 7 line 10.

leaned over and signed the document without reading it, if she was unsure whether she had her glasses on or not³⁰ how is it that she can recall with such precision that this was indeed the 31 July resolution?

[85] A cursory reading of the 31 July resolution shows that the heading is bold and clear "*Resolution of Trustees for the time being*", the signature section on the 31 July resolution is not just a one-line signature section (like in the 27 July resolution) but contains her full names, her ID number and the place and date of signature. Even if Mrs van Wyk had stretched over to sign it as she says, it is hard to believe that she would not have seen the details surrounding her signature line or that she could labour under the impression that this was a staff memo. Moreover, she lays no factual basis for why she would be asked to sign a memo to staff at all given that on her version she was no longer involved in the business.

[86] She says she "*trusted*" Mr van Wyk suggesting somehow that he had misrepresented the nature or contents of this document to her. Yet she does not set out any facts in support of this save to say that he said to her he needed her signature.

[87] But even if I were to accept her evidence as plausible, which I do not, her evidence on the 27 July resolution serves to render her version on the 31 July resolution even more implausible.

[88] She testified that the 27 July resolution, the document described as the 'meeting one', was brought to her side by Mr van Wyk. Therefore, it was put in

³⁰ Transcript 18 July 2023 pages 7-11.

front of her. She signed it. This was not a case of stretching across the desk to sign a document without reading it. She does not say that she did not read it, but only claims that she can recall that this was the document through her powerful visualisation method. A cursory glance at the 27 July 2006 resolution shows that the heading in bold, uppercase letters and in tram lines “*RESOLUTION PASSED AT A MEETING OF THE TRUSTEES FOR THE TIME BEING OF THE ANCHORVILLE TRUST...*”. The meeting was stated to be held at Westcliff on 27 July 2006. By no stretch of the imagination could she not have seen this bold heading in tram lines. Moreover, she does not explain why she could only recall the lines on the document through her powerful visualisation method and not the rest of the document. Her silence on this score is significant.

[89] Her version is even more implausible when regard is had to the contents of the two documents. The 31 July 2006 resolution is the more detailed one and in which the Trust resolves to stand as surety and co-principal debtor for all amounts due to RMB in terms of the single credit facility borrowed by Mr van Wyk, and for any further increases in that amount, ratifies the deed of suretyship or other security document signed prior to the date of the resolution, that a mortgage bond be passed by the Trust in favour of RMB and authorises Mr van Wyk to sign, in his sole discretion to settle the terms and conditions of and sign all documents as maybe necessary to implement the resolutions and sign the Power of Attorney for the registration of the bond on behalf of the Trust.

[90] The 27 July resolution is less detailed but resolves that the Trust stands surety

for the loan of WSJ van Wyk from FirstRand Bank Ltd; that a mortgage bond be registered over Erf 271 and that the first defendant is authorised to sign all documents in his sole discretion to give effect to this.

[91] If Mrs van Wyk had signed the more detailed 31 July resolution first, it seems illogical to sign a more limited – and by then possibly unnecessary – resolution of 27 July 2006 thereafter.

[92] The 27 July resolution, which Mrs van Wyk does not dispute reading or signing, clearly discloses Mr van Wyk's interest in the loan in resolution 1 which states that *"Anchorville Trust stands surety for the loan of Willem Steenkamp Johannes Van Wyk who borrows from FirstRand Bank the sum of R5 600 000 (five million six hundred thousand rand)"*.

[93] As to her claim that she didn't know about the *nature* of documents, this is equally implausible. Mrs van Wyk is no babe in the wood. By all accounts she is a highly accomplished bookkeeper with demonstrable business acumen. On her own version – namely that the Trust was never meant to become involved in the business - taken together with her considerable business experience, one would have expected her to ask at the very least what these documents were about when they were placed in front of her, with their bold clear heading and the details contained therein. It seems highly unlikely that she would not have asked Mr van Wyk what she was being asked to sign or did not already know, when he brought the documents to her, what these entailed.

[94] As described earlier the date of the meeting is reflected in the heading as 27 July 2006 – the same day on which the suretyship was signed by Mr van Wyk.

It is no surprise that Mrs van Wyk claims that she signed this resolution only on 31 July 2006, a version clearly designed to render the resolution in contravention of clauses 11.2 and 11.3 of the Trust Deed. However, her account of events as to when she signed this resolution raises more questions than answers and stands uncorroborated.

[95] As discussed earlier, Mr van Wyk was not called although he was available to testify. Mrs van Wyk suggested that in her view he was not fit to testify but when pressed, conceded that she was not qualified to make that assessment. Furthermore, no medical reports were filed to support such an inference. In ***Sampson v Pim***³¹ it was held that if a witness was available to confirm a party's allegations and he was not called to give evidence, the inference would be overwhelming that his evidence would have been unfavourable to the party not calling him. In the circumstances, an adverse inference must be drawn that Mr van Wyk's evidence, were he called, would not corroborate Mrs van Wyk's version.

[96] In summary, Mrs van Wyk has not established a factual basis for the *justus error* argument, namely why she considered the 31 July resolution to be some other document such as a staff memo. Nor has she set out how Mr van Wyk misled her as to the nature of the documents she was asked to sign. As to her version regarding the 27 July resolution, this is equally questionable considering the inconsistencies and discrepancies identified.

[97] Accordingly, I find that the version put up by the Trust through the evidence of Mrs van Wyk, when taken as a whole, to be at best questionable and at worst

³¹ 1918 AD 657 662.

implausible.

[98] In **Hyde Construction CC v Deuchar Family Trust**³² Rogers J, writing for the full court, held that:

“Ratification is one of the ordinary principles of the law of agency. In principle, therefore, there appears to be no good reason why a decision taken ostensibly in the name of the trust by (say) two out of the four trustees should not subsequently be ratified by the full body of trustees. It is no objection that the original decision was unauthorised; that is always so where ratification comes into play. The principle that the trustees must act jointly is satisfied by the ratifying conduct of the full body of trustees. The position is in principle no different, to my mind, from the case where a decision is initially made on behalf of a company by (say) two out of four directors, and the decision is subsequently ratified by the full board.”³³

[99] The Trust relied on several decisions in support of its contention that Mr van Wyk’s signing of the suretyship was not capable of being ratified because it was nullity or *void ab initio*. However, all these cases can be distinguished. In **Van der Merwe and Van der Merwe & Others**,³⁴ the sale pertained to the sale of a farm. At the time, none of the Trustees had letters of authority issued by the Master. Accordingly, the Court held they lacked capacity to act on behalf of the Trust because section 6 of the Trust Control Property Act had been contravened. This is not the case in this matter. There is no question that Mr and Mrs van Wyk had been issued with letters of authority at the time.

³² 2015 (5) SA 388 (WCC) paragraph 42.

³³ *Hyde Construction* at paragraph 32.

³⁴ 2000 (2) SA 519 (C).

[100] In *Thorpe and Others v Twittenheim & Another*,³⁵ the transaction concerned the sale of immovable property. Section 2(1) of the Alienation of Land Act³⁶ requires written authority from the other trustees. No such written authority had been given. In *Lupacchini NO and Another v Minister of Safety and Security*³⁷ the Trust had initiated litigation against the State without the requisite minimum number of trustees being in office. The Court found a lack of capacity to act due to a contravention of section 6 of the Trust Control Property Act in that no letters of authority had been issued by the Master at the time.³⁸ Likewise in *Parker* the Court found that there were fewer trustees in office than required in the Trust Deed at the time when the loans were concluded, and the Trust was accordingly not capacitated.³⁹ There is no such lack of capacity on the part of Mr and Mrs van Wyk.

[101] The Trust relied on other cases in support of its argument that the ratification was not good in law because the trustee's acts were void. The one most relevant to the facts of this case is that of *Wishart*.⁴⁰

[102] In *Wishart* the court was faced with a rescission application to set aside a default judgment. The applicants were the trustees of the Logan Trust which had purportedly signed a suretyship with the principal debtor Eurocoal, on 27 February 2007.

[103] Prior to the conclusion of the contract of suretyship, the bank and Eurocoal entered into an instalment sale agreement. One of the conditions of the

³⁵ [2006] All SA 129 (SCA).

³⁶ Act 68 of 1981.

³⁷ [2010] ZASCA 108; 2010 (6) SA 457 (SCA); [2011] 2 ALL SA 138 (SCA) (17 September 2010).

³⁸ Paragraph 18 and 22.

³⁹ Paragraphs 11-14.

⁴⁰ Supra. [2014] ZAKZDHC 58 (28 November 2014).

instalment sale agreement was that the Logan Trust should bind itself as surety. The conclusion of the contract of suretyship together with the instalment sale agreement had to take place before the end of the financial year on 28 February 2007 so to obtain certain tax advantages which would accrue on or before that date.⁴¹

[104] The first applicant signed the contract of suretyship both in his personal capacity and on behalf of the Logan Trust on 27 February 2007 but had not consulted his fellow trustees in this regard, prior to signing of the contract of suretyship. No written resolution as contemplated in the trust deed had been prepared and signed by all the trustees authorising the first applicant to bind the Logan Trust.

[105] However, all the trustees subsequently signed a resolution, dated 27 February 2007, on 5 March 2007, six days after the first applicant had signed the contract of suretyship, with the intention to authorise the first applicant's conduct retrospectively.

[106] Eurocoal defaulted on its payment obligations and was liquidated. The bank turned to the Logan Trust for payment of the outstanding balance.

[107] The Logan Trust raised the defence that when the first applicant purportedly signed the contract of suretyship, he lacked the requisite authority to do so because he had not consulted with the other two trustees and nor had they authorised him to bind the Logan Trust. The bank replied that the other trustees' subsequent signing of the resolution authorising the first applicant to

⁴¹ Paragraph 51.

bind the Logan Trust, ratified or approved the first applicant's conduct retrospectively.

[108] The issue to be determined was therefore almost identical to the one *in casu*.

[109] Madondo J found in this regard that the act of the signing the suretyship was unauthorised.⁴²

[110] However, an unauthorised act can be subsequently ratified. Madondo J held that, the general rule of the law of agency, as stated in **Smith v KwaNonqubela Town Council**⁴³, that an act of unauthorised agent can be ratified with retrospective effect could not hold good in this case for two reasons. The one was that because the contract of suretyship had to be signed, together with the instalment sale agreement, before 28 February 2007 so to obtain certain tax advantages. The court held that:

111.1. "In casu, the contract of suretyship had to be signed simultaneously with the [instalment] sale agreement so to provide immediate security to the [bank]. It, therefore follows that the signing of the [contract of] suretyship by the parties on 27 February 2007 intended to produce a transaction with immediate effect".

44

[111] Hence the unauthorised act performed by the first applicant on 27 February 2007 could not be ratified beyond 28 February 2007 because the conclusion of the contract of suretyship together with the instalment sale agreement had to

⁴² Paragraph 37.

⁴³ 1999 (4) SA 947 (SCA).

⁴⁴ Paragraph 49.

take place before the end of the financial year of 28 February 2007.⁴⁵ The trustee's was also not authorised because it did not comply with the provisions section 6 of the General Law Amendment Act⁴⁶ which requires that all contracts of suretyships must be in writing.⁴⁷

[112] The facts *in casu* can be distinguished from ***Wishart***. In this case, while there was a requirement from the bank that all formalities be complied with by the Trust, there was no time constraint attached to the loan and suretyship along the lines intended in ***Wishart***. Mr van Wyk could get the funding as soon as the formalities were complied with. Nor was it the case that *ex facie* the suretyship signed by Mr van Wyk did not comply with section 6 of the General Law Amendment Act⁴⁸. (On this latter issue, the Trust in its heads of arguments referred to the provisions of section 6 of the General Law Amendment Act, however it was unclear on what basis it had done so. It had not pleaded non-compliance with the Act and hence could not rely on it). The final distinguishing factor of the ***Wishart*** judgment is that the court was faced with a rescission application and the Logan Trust merely had to discharge an onus to show that it has a *bona fide* and *prima facie* defence to the bank's claim.⁴⁹ The merits of the defence could not be decided decisively at that juncture.

[113] In conclusion, in respect of the ***Wishart*** judgment, its facts are distinguishable and it cannot assist the Trust in this matter.

⁴⁵ Paragraphs 51-52.

⁴⁶ No 50 of 1956.

⁴⁷ Paragraph 49.

⁴⁸ Act 50 of 1996.

⁴⁹ Paragraph 54.

[114] Furthermore, unlike in ***Shepstone & Wylie***,⁵⁰ clause 13.5.16 of the Anchorville Trust Deed empowers the Trustees to “*guarantee the liabilities of any person and to bind the Trust as surety and joint principal debtor in solidum in respect of the liabilities of any person and as security for any liability undertaken by the trust to bind, pledge, cede or otherwise encumber any asset of the Trust.*”⁵¹

Undue influence by bank officials on Mr van Wyk

[115] Finally, I turn to consider the claim put up by the Trust that there was some kind of undue pressure put on Mr van Wyk by the officials of the bank to procure the signature of Mrs van Wyk. The reason why I deal with this last is because in my view this defence has no merit whatsoever and has simply been put up by the Trust to create dust. I nevertheless deal with it for purposes of completion.

[116] In its pleadings, the Trust pleaded a version in respect of how these resolutions came to be signed by Mrs van Wyk.⁵² It alleged that two officials from the plaintiff, Mr van Zyl and Mr Bourne, visited Mr van Wyk at the business premises of Universal Images in Randburg on or about 31 July 2006. When these officials visited Mr van Wyk, they knew that Mrs van Wyk had no knowledge, and did not authorise, as a trustee of the trust, the entering into by the trust of a suretyship in favour of the plaintiff. The officials requested Mr van Wyk to procure the signature of Mrs van Wyk in her capacity as trustee of the trust. The officials knew at the time that if it was disclosed to Mrs van Wyk that she was about to be requested to sign is in fact her granting authority on behalf of the trust to stand surety in favour of the plaintiff for the obligations of Mr van

⁵⁰ (1270/2021) [2023] ZASCA 74 (26 May 2023).

⁵¹ Section 002-149 on CaseLines,

⁵² Surrejoinder 001-139 paragraph 3.

Wyk and his businesses, Mrs van Wyk would never have given the required consent or permission for the trust to be so bound. The plaintiff through its officials therefore knew alternatively ought reasonably to have foreseen that Mrs van Wyk would be requested to sign a document the content of she would be unaware of.

[117] This version laid the groundwork for the multiplicity of defences raised by the Trust relating to the signing of the resolutions, including that the plaintiff was under a duty to disclose the nature of the resolution to Mrs van Wyk.

[118] During Mr van Zyl's and Mr Bourne's testimony this version was put to them. Mr van Zyl testified that as client relationship manager he had visited Mr van Wyk occasionally at his business premises. He might have gone to Mr van Wyk with Mr Bourne when he was busy handing over portfolios, clients, etc for his pending departure to Australia. He did not recall ever meeting Mrs van Wyk. His signature does not appear on any of the resolutions.

[119] In relation to the version that he, together with Mr Bourne, knew that Mrs van Wyk had no knowledge and did not authorise as a trustee the entering into by the Trust of a suretyship in favour of the plaintiff, Mr van Zyl categorically stated that this was not factually accurate.⁵³ His evidence was that he would have explained the suretyship to Mr van Wyk already in 2005. It was now a case of Mrs van Wyk having to sign. These discussions would have been had with Mr van Wyk, the client, he would not have had those discussions with Mrs van Wyk. Even when legal would have required Mrs van Wyk to sign as trustee, he would have had those discussions with Mr van Wyk. He would have handed

⁵³ Transcript 17 July 2023 page 38 line 6.

over the documents to Mr van Wyk to attend to the required formalities.⁵⁴

[120] As to whether the plaintiff knew or ought to have reasonably foreseen that Mrs van Wyk would be requested to sign a document the contents of which she was unaware of Mr van Zyl testified that this was not factually correct, because as he had stated previously, that in a case like this they would hand out a specific instruction to clients to seek independent legal advice.⁵⁵ However, the thrust of his evidence was that he had engagements with Mr van Wyk, and not Mrs van Wyk. Accordingly, he could not have known her state of mind and nor could he have made any representations to her about the nature of the resolution which was an internal matter between the trustees.

[121] During his testimony Mr Bourne stated that he had did not have direct dealings with the Trust and only met Mrs van Wyk in passing. He did not have a business meeting with her. As to the version put up by the Trust, Mr Bourne testified that he had no idea of the resolution and could not recall any meeting at Mr van Wyk's business in connection with the resolution. As to whether he, as one of the officials of the bank, knew that Mrs van Wyk had no knowledge of and did not authorise the trust entering into a suretyship in favour of Mr van Wyk, Mr Bourne stated that this was false insofar as his involvement was concerned.⁵⁶ He testified that he had nothing to do with the signing of the documents, or the suretyship. This was the domain of RMB. He would never have interacted with Mrs van Wyk and the version pleaded by the Trust in para 3.5, that the officials knew that if it was disclosed to her that she was about to

⁵⁴ Transcript 17 July 2023 page 3 6-38.

⁵⁵ Transcript 17 July 2023 page 42.

⁵⁶ Transcript 17 July 2023 page 92-95.

grant authority for the trust to stand surety for Mr van Wyk, was false.⁵⁷

[122] Mrs van Wyk testified on behalf of the Trust. Mr van Wyk was not called to testify, although he was available and apparently living in Bloemfontein.

[123] As to the involvement of Mr van Zyl and Mr Bourne, it came to light during her testimony that Mrs Van Wyk had no first-hand knowledge of this. She had never met Mr van Zyl and had met Mr Bourne in passing. She had never met a representative of the plaintiff in July 2006.⁵⁸

[124] She had been told by Mr van Wyk in May 2010 that these two men had come into his office, unannounced and with no meeting and said, "*if you don't get your wife's signature, the deal is off*".⁵⁹

[125] Mr van Zyl and Mr Bourne have disputed this version.

[126] Mr van Zyl and Mr Bourne had no dealings with Mrs van Wyk. They were not present in the room when she signed the resolutions, they made no representations to her about the nature of the document she was about to sign and were not privy to the discussions between her and Mr van Wyk. Thus, the plaintiff, the other contracting party to the suretyship, could not have made any misrepresentations to Mrs van Wyk, or the Trust.

[127] As to whether there was a duty on the plaintiff to bring to Mrs van Wyk's attention the nature of the resolution she was about to sign, it was unclear how such a duty was said to have arisen. The plaintiff had no dealings with her.

⁵⁷ Reconstructed/Omitted Transcript 17 July 2023 page 1 line 13.

⁵⁸ Transcript 18 July 2023 page 33-34.

⁵⁹ Transcript 18 July 2023 page 14.

The resolution is not a complex financial document and is unambiguous.

[128] Indeed, on her own version Mrs van Wyk confirmed that Mr van Zyl and Mr Bourne were not present when she signed the resolution and the only reason why they were mentioned in the plea was because that is what Mr Van Wyk told her.

Conclusion

[129] When the evidence is considered in its totality, it is abundantly clear the plaintiff faced with a suretyship signed by Mr van Wyk as being duly authorised and two resolutions signed by the Trustees, placed reliance on these documents to advance large sums of money to Mr van Wyk.

[130] On the issue of lack of capacity on the part of Mr van Wyk the Trust has failed to show that clause 14 is a requirement provision and not a deeming provision. The Trust has failed to show that Mr van Wyk failed to disclose a personal interest as contemplated in clauses 11.2 and 11.3. Mrs van Wyk had been closely involved the financial administration of the business for 30 years, from inception. The couple were close and worked together in the business. She demonstrated in depth knowledge about the finances of the business and its growth over the years. As bookkeeper, she was aware that Mr van Wyk had opened a second bank account for Universal. She was aware of the mortgages on 810 and 812 Main Avenue, which were part and parcel of the single lending facility. She conceded that she was aware that Mr van Wyk had obtained financing from the plaintiff. It is highly unlikely that she would not have known about the July variation. Mr van Wyk was not called to corroborate her

version, although he was available. An overwhelming inference can be drawn that his testimony would not have supported her version.

[131] As to the *justus error* on the part of Mrs van Wyk, her version of the circumstances surrounding the signing of the resolutions has discrepancies and inconsistencies and was not corroborated by Mr van Wyk or for that matter the any other evidence. Mrs van Wyk is an experienced businesswoman and an ex-teacher. She is not a babe in the wood. It seems unlikely, given the headings of the documents and the contents thereof that she didn't know the nature of the document she was signing or would not have at the very least enquired what these were.

[132] As to the undue influence/pressure of the bank officials on Mr van Wyk, it emerged that this was hearsay evidence put up by the Trust. Mrs van Wyk had no direct knowledge of this and Mr van Wyk was not called to corroborate this version of the Trust. The evidence of Mr van Zyl and Mr Bourne is accordingly preferred over that of the Trust.

[133] As to the duty on the bank to disclose the nature of the documents to Mrs van Wyk, no facts were set out why such a duty would arise. The bank had no dealings with Mrs van Wyk, the plaintiff's officials were not present when she signed the resolutions, they were not privy to the internal workings of the Trust or the conversations between Mr and Mrs van Wyk. The resolutions themselves are not complex contracts or financial documents. The fact that the bank required the resolutions as a matter of compliance for their business does not create an obligation on it to attend to the internal formalities of the Trust.

That duty lies with the Trustees themselves.

[134] The Trust bore the onus of showing lack of capacity/authority and has failed to discharge its burden.

[135] Accordingly, I find that the act of ratification by the Trust of 31 July 2006 is good in law and fact.

[136] The plaintiff submitted that in the event act of ratification was found not to be good in fact, the Trust should be estopped from denying lack of authority. Given my findings above, there is no need for me to consider this issue. See however ***Nedbank Limited v Mhlari N O and Others***⁶⁰ . .

Order

[137] Accordingly, I make the following order-

1. Judgment is hereby granted in favour of the plaintiff, against the fourth defendant – the Anchorville Trust (IT6474/97), which judgment is to be joint and several with any judgment obtained or to be obtained against the first, second, and/or third defendants, for:
 - a. Payment of the sum of R11,704,010.95.
 - b. Interest on the amount mentioned in 1(a) at the rate of 13% per annum, calculated daily and compounded monthly in arrears from 27 June 2023 to date of payment, both days inclusive.

⁶⁰ (37766/2018) [2022] ZAGPJHC 719; 2022 (6) SA 438 (GJ) (22 September 2022) paragraph 22.

2. The following immovable property described below is hereby declared specially executable:

a. ERF 271 PECANWOOD EXTENSION 5 TOWNSHIP;
REGISTRATION DIVISION J.Q.; NORT WEST PROVINCE;
MEASURING 502 SQUARE METRES; HELD BY THE ANCORVILLE
TRUST UNDER DEED OF TRANSFER NO. T111413/1997.

3. The Registrar of this Court is directed to issue a writ of execution to enable the Sheriff to attach and execute upon the immovable property described in 2(a) in satisfaction of the judgment debt, interest and costs.

4. The fourth defendant is directed to pay the plaintiff's costs of suit on the scale as between attorney and client.

Y CARRIM
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

APPEARANCES

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Van Der Linde Attorneys

DATES OF HEARING:
2023

17-18 July, 19 September

DATE OF JUDGMENT:

31 October 2023