REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 33222/2011

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

4 May 2018 .....

4/5/18

In the matter between:-

NEDBANK LIMITED Plaintiff

And

PC JANSE VAN VUUREN First Defendant

MM JANSE VAN VUUREN Second Defendant

JUDGMENT

WANLESS, AJ

[1] The Plaintiff is NEDBANK LIMITED, a public company duly registered and incorporated with limited liability in accordance with the laws of the Republic of South Africa, carrying on business as a commercial banker and financier in terms of the provisions of Act No. 94 of 1990 (as amended) with its principal place of business situated at 135 Rivonia Road, Sandown and who is duly registered as a credit provider, as required by the National Credit Act. No. 34 of 2005.

[2] The First Defendant is PIETER CORNELIS JANSE VAN VUUREN, an adult male and the Second Defendant is MARIA MAGDALENA JANSE VAN VUUREN, an adult female. At all material times both Defendants were the duly appointed Trustees of the TRUCK SOLUTION TRUST (hereafter referred to as "the Trust"). They were also the **only** duly appointed Trustees of the Trust which has been sequestrated. Further, the defendants were both the **only** beneficiaries of the Trust which had been created specifically for their benefit.

[3] The Plaintiff has instituted the present action before this Court to recover monies from the Defendants (jointly and severally the one paying the other to be absolved) in their capacities as sureties and co-principal debtors for all of the indebtedness of the Trust (in sequestration) to the Plaintiff. The aforesaid indebtedness has arisen in respect of monies due, owing and payable to the Plaintiff in relation to four instalment sale agreements (hereafter referred to as "the agreements"), all of which were concluded between the Plaintiff and the Trust on the 15th of January 2008.

[4] Before properly and fully considering the Plaintiff's cause of action and the defence raised by the Defendants thereto, as placed before this Court, it is expedient to first consider the facts of the matter, with particular reference to those facts which are either common cause or are not seriously disputed by any of the parties.

[5] These facts are:-

(a) the conclusion of the agreements and the terms and conditions thereof, which are the subject matter of the four monetary claims of the Plaintiff and which are claims A to D as set out in the Plaintiff's Particulars of Claim;

(b) the conclusion of the two Deeds of Suretyship which are "unlimited" and in terms of which the Defendants bound themselves as sureties and co-principal debtors to the Plaintiff, together with the terms and conditions thereof (Exhibits G and H);

(c) that the Plaintiff duly complied with all of the applicable provisions of the National Credit Act 34 of 2005 prior to the institution of the action and in respect of the conclusion of the agreements;

(d) that the Second Defendant signed the agreements on behalf of the Trust and that the First Defendant did not;

(e) that the Trust breached its obligations to the Plaintiff as set out in the agreements as it was sequestrated and failed to make timeous payment of the instalments due on the date thereof, or at all;

(f) that the Defendants, acting jointly, provided the Plaintiff with the Resolution of Trustees of Truck Solution Trust dated 17 June 2006 which is at page 134 of Exhibit C (the original of which was handed in during the trial as Exhibit F);

(g) the quantification of the Plaintiff's claims (including the calculation of interest and costs) as set ot in the Notice of Intention to Amend which is Exhibit J; and

(h) as set out earlier in this judgment the Defendants were the only Trustees of the Trust at all relevant times hereto.

[6] Against this background, it is then necessary to consider the Plaintiff's cause of action and the defence raised, by the Defendants, thereto. Before doing so, it must be noted that each of the agreements which form the subject matter of this dispute read similarly, insofar as the terms and conditions of each are concerned. For that reason, it was agreed between the parties that the evidence placed before this Court would be confined to the agreement which relates to Claim A at pages 26 to 36 of Exhibit C. In the premises, any reference to that agreement and other documents relating thereto in this judgment, is applicable to all four agreements.

[7] The Plaintiff has pleaded that the Trust, duly represented by the Second Defendant, concluded the agreements. In their defence the Defendants have pleaded that the agreements are void insofar as they have been signed by one person only acting on behalf of the Trust and that the Deed applicable to the Trust requires Trustees of the Trust to act jointly and the Trust, at all relevant times, had more than one Trustee.

So, from the pleadings in this matter, it is clear that the central issue before this Court is whether or not the signature of only one Trustee renders the agreements which are the subject matter of this dispute void, in that the Deed of Trust, according to the Defendants, requires both of the Trustees at the time to act jointly.

It is necessary to add that the Plaintiff also pleaded an alternative cause of action based on enrichment to which the Defendants raised the defence of prescription. This alternative claim was specifically abandoned by Mr Killian, who appeared on behalf of the Plaintiff as the Plaintiff, had not led any evidence in respect thereof during the trial.

[8] It must follow from the aforegoing that in the event of this Court holding that the Deed of Trust did not require the Defendants, as Trustees, to act jointly when the agreements were entered into, then the fact that the agreements were not signed by the First Defendant and were signed by the Second Defendant only, is not a bar to the Plaintiff recovering the monies to which it is, in terms of the same agreements, entitled. In that instance, judgment should and would, be granted in favour of the Plaintiff.

However, if this Court holds that the Deed of Trust did require both Defendants to act jointly when the agreements were entered into then, in light of the fact that it is common cause in this matter that the First Defendant did not sign the agreements, it becomes necessary for this Court to decide whether or not, on the evidence placed before it, the Second Defendant acted with the requisite authority of the First Defendant to enter into the agreements and, in consequence thereof, to bind the Trust in terms of those agreements. If the answer to the aforegoing is in the affirmative then the Plaintiff should succeed in the action. If not, the agreements would be void and the Defendants would have raised a valid defence to the claims of the Plaintiff.

[9] It is also necessary, at this stage, to note one further aspect of the pleadings. It is this. The Plaintiff did not replicate to the Defendants' Plea by averring that the Second Defendant, when signing the agreements, acted on the actual or ostensible authority of the First Defendant.

This "deficit" (if indeed it is one) in the Plaintiff's pleadings, is remedied by the fact that both Counsel for the Plaintiff and Counsel for the Defendants correctly accepted the principles of law as set forth, by the Supreme Court of Appeal, in the matter of *Nieuwoudt and Another v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA) that, in matters of this nature, the ordinary rules of agency apply and there is nothing to prevent a third party, who may be a Trustee, from acting on the authority of another Trustee.

With regard to the issue as to whether the Plaintiff relied on the actual or ostensible authority of the Second Defendant to act on behalf of the First Defendant, it was confirmed by Mr Killian (who appeared on behalf of the Plaintiff) that the Plaintiff relied on the actual authority of the Second Defendant, acting on behalf of the First Defendant, when entering into (and signing) the agreements.

[10] The Plaintiff led the evidence of only one witness, namely Lauren-Lorraine Webber Froneman ("Froneman"). This witness was an erstwhile manager of the Plaintiff in the legal recoveries department at the relevant time. Her evidence dealt largely, if not exclusively, with formal aspects of the Plaintiff's case which have become common cause between the parties. In light thereof, this Court will not deal with her evidence in any detail. Reference will, however, be made to those aspects of her testimony which are relevant to this matter, later in this judgment.

What is worthy of consideration is the Resolution of Trustees of Truck Solution Trust dated the 17th of June 2006 (Exhibit F). This document was introduced via the evidence of this witness who identified it and it is common cause that it was signed by both of the Defendants.

The Defendants closed their cases without placing any evidence before this Court.

[11] When attempting to answer the first question as to whether or not the Deed of Trust required the Trustees to act jointly when entering into the agreements, the clauses thereof which require consideration are:-

(a) the Trustees shall act jointly as Trustees (clause 6.5); and

(b) the Trustees could make decisions by their unanimous consent, evidence of which would be a signed resolution recording their decision (clause 6.20).

[12] Upon an ordinary grammatical interpretation of the aforesaid clauses contained in the Deed of Trust and further, following an ordinary grammatical interpretation of the same document as a whole, it is clear that the Deed of Trust requires the Trustees to act jointly when entering into agreements such as were to be entered into in the present matter between the Plaintiff and the Trust. Indeed, I did not understand it to be strongly contended, on behalf of the Plaintiff, that this was not the case.

[13] Even if the above interpretation of the Deed of Trust is incorrect and it is accepted that the Deed of Trust contains no direction, express or otherwise, that the Trustees were required to act jointly when the Trust wished to enter into the agreements then, as correctly pointed out by Mr Lubbe for the Defendants, the default position which applies, is that the Trustees must act jointly, in every meaning of the word, to render their acts valid and binding upon the Trust.[1]

[14] It is accordingly held that when the Plaintiff and the Trust entered into the agreements, it was necessary for the Defendants to act jointly in order to

[1]Coetzee v Peet Smith Trust 2003 (5) SA 674 (TPD) at 678 G-J and applied in Land and Agricultural Bank of South Africa v Parker and Others 2005 (2) SA 77 (SCA).

avoid the agreements being void ab initio but, rather, valid and binding upon the Trust. As such, the fact that the agreements were signed by the Second Defendant only, makes it necessary for the Plaintiff to prove, on a balance of probabilities, that when the Second Defendant signed the agreements, she did so with the authority of the First Defendant, in order for the Plaintiff to be successful in its claims against the Defendants.

[15] In support of discharging this onus the Plaintiff relies solely upon the Resolution already referred to in this judgment (Exhibit F). Mr Killian has submitted that, on its plain language and with particular reference to paragraph 4 thereof, this document evidences authority for either the First or Second Defendant to sign documents on behalf of the Trust. Further, he argues, once again with reference to paragraph 4, the Resolution does not restrict the Second Defendant to signing specific documents but, on the contrary, authorises a Trustee or Trustees to sign any and all documents required by the Plaintiff. Finally, regarding the Resolution itself, he relies on paragraph 3 which provides that the Resolution would remain valid until it was cancelled or replaced by the Plaintiff and that such cancellation or replacement had been confirmed, in writing, by the Plaintiff.

[16] The argument put forward by Mr Lubbe, on behalf of the Defendants, is one which supports a far "narrower" interpretation of the Resolution, supported, he argues, by the evidence of Froneman, together with the existence of certain other documents.

[17] In the first instance, Mr Lubbe submits that the Resolution authorises both Defendants to act jointly as contemplated by the Deed of Trust. His reasoning is that the existence of the specimen portion and the purpose thereof, is exactly (and therefore solely) to obtain the specimen signatures of both Defendants (as Trustees). Also, he submits that the full names of both Defendants at that portion of the Resolution only serve to facilitate the identification of the signatures appearing immediately next to each name. So, on the argument put forward by Mr Lubbe, it is contended that the aforegoing portion of the Resolution does not, in any way, confer authority from one of the Defendants to the other Defendant, to sign the agreements on his or her behalf.

[18] Alternatively to the aforegoing and in the event of this Court holding that the Resolution did confer authority on one Defendant to sign the agreements on behalf of the other Defendant, then it was submitted by Mr Lubbe that the Resolution had been replaced by a subsequent Resolution dated 21 August 2006 (Exhibit F having been signed on 17 June 2006) and which appears at page 148 of Exhibit C. It is further submitted that this subsequent Resolution makes no reference to the Defendants being able to sign documents required by the Plaintiff on his or her own. The fact that it is not signed at the "lower" portion of the document and only at the "Specimen portion" thereof does not, according to Mr Lubbe, render the Resolution void, either in terms of the provisions of Clause 6.20 of the Deed of Trust or in law. Finally, Mr Lubbe pointed out that the validity thereof was not made subject to the cancellation of any previous Resolution, including Exhibit F.

[19] Having regard to the only viva voce evidence placed before this Court, namely that of Froneman, this witness testified, in her evidence in chief, that the word "OR" inserted in Exhibit F, in bold capital letters, between the names and signatures of the Defendants in the specimen signature portion of Exhibit F and in paragraph 4 thereof, to her reading of the document, had the effect of authorising any one of the Defendants to sign the agreements. The Exhibit (this is common cause and was also confirmed by the witness) not only contains the specimen signatures of the Defendants but, also, their signatures at the bottom of the document, evidencing that the Resolution was passed by both of them. On these facts the witness testified that the Second Defendant was duly authorised to sign the agreements and bind the Trust. She further testified to the fact that the Resolution was still valid as it had not been cancelled or replaced by the Trust as set out in paragraph 3 of Exhibit F. Finally, the witness testified that the Resolutions which appear at pages 135 and 148 of Exhibit C, dated the 12th of September 2006 and the 21st of August 2006 respectively, were not valid Resolutions since, whilst they may bear the specimen signatures of the Defendants, neither have been signed by them in the lower portion thereof.

The witness also testified (in relation to Exhibit F) that had the Plaintiff not obtained the specimen signatures and names of the Defendants then the bottom signatures would not have conferred any authority on the Defendants to bind the Trust and certainly, not the authority in the sense that the Plaintiff imputed to the Resolution in question.

When cross-examined the witness conceded (correctly in the Court's view) that the specimen portion of Exhibit F served to obtain the

specimen signatures of the Defendants and in no way conferred any authority on either Trustee.

Also under cross-examination, Froneman was referred to a document at page 145 of Exhibit C styled "CERTIFICATE FOR A TRUST AND CONFIRMATION OF THE BENEFIT OF THE TRANSACTION(S) FOR THE TRUST BENEFICIARY/BENEFICIARIES ". It was put to her that paragraph 4 of this document is a recordal of a Resolution adopted on 15 January 2008 (which does not correspond with the date of any of the three Resolutions referred to above) to conclude the transactions mentioned in that document and which is a reference to the agreements. Froneman disputed this and stated that, having regard to this document in isolation, it evidences a decision taken by the Defendants on 15 January 2008 to conclude the agreements (it being common cause in this matter that all four agreements were signed by the Second Defendant on that date).

[20] In deciding whether or not the Second Defendant had the actual authority of the First Defendant to enter into the agreements on behalf of the Trust, as relied upon by the Plaintiff, it is fairly trite that actual authority (as opposed to ostensible authority or apparent authority or authority by estoppel) may be express or implied.[2]

[21] If the words of an express power or authorisation are clear, they are followed and no questions of interpretation arise. However, if the words are not clear the rule is that "authorisation should, if the language permits,

[2]Kerr: The Law of Agency (Third Edition), hereafter referred to as "Kerr", Chapter 2.

be benevolently interpreted so as to validate the acts of an agent honestly acting under it".[3]

Put differently, this would support an interpretation which gave the acts of the agent "business efficacy".

[22] In the matter of Mosenthals Ltd v Coetzer[4], it was held that:-

> "Once the facts are so found, it follows, in my judgment, that defendant is in law liable to plaintiff. The basis of that liability is a mandate conferred by defendant upon the partnership to purchase goods from plaintiff on his account. The existence of such a mandate arises as a matter of necessary inference from the essential facts of the case ... The present is a case of an actual mandate arising by implication from the defendant's conduct. On all the facts of the case, the conclusion that the defendant impliedly authorised the purchases made on his account is, in my judgment, legally inevitable and unavoidable."

[23] The Resolution (Exhibit F) is the only evidence of the unanimous decision taken by the Defendants for the Trust to enter into the agreements with the Plaintiff, as contemplated by clause 6.20 of the Deed of Trust. It is clear therefrom that paragraph 4 has a "dual purpose". Firstly, it is to identify the trustee or trustees who are authorised to sign any and all of the documentation required by the Plaintiff to give effect to

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[3] Kerr at page 66

[4] 1963 (4) SA 22 (AD) at 23E-H

the Resolution. Secondly, it provides for the specimen signature or signatures of that trustee or the specimen signatures of those trustees.

The word "OR" which appears between the name and specimen signature of the First Defendant and that of the Second Defendant, as noted earlier in this judgment, is in capital letters. It is also in bold type. In addition thereto, this word does not appear in the Resolution which is at page 135 of Exhibit C. However, it does appear in the Resolution at page 148 of Exhibit C. These Resolutions are dated the 12th of September 2006 and the 21st of August 2006 respectively. Further, it is common cause that the Resolution (Exhibit F) was presented by the Defendants to the Plaintiff.

Taking all of the aforegoing into account, it is therefore highly probable that this paragraph of the Resolution evidences a clear decision, taken by both Defendants, that either one of them was authorised to sign any and all of the documentation required by the Plaintiff to give effect to the Resolution. As such, the signature of the Second Defendant only on the agreements is sufficient to bind the Trust in terms thereof, since, in terms of the Resolution (Exhibit F) the Second Defendant was duly authorised to act on behalf of the First Defendant to do so.

The argument put forward on behalf of the Defendants that this paragraph only serves to obtain the specimen signatures of the Defendants and does not confer any authority upon them to act separately, is without substance and is accordingly rejected by this Court. It may be true that if paragraph 4 was viewed in isolation then it may, at best for the Defendants, be possible to interpret that paragraph and give it the "narrow interpretation"

which the Defendants wish to ascribe to it, namely that it confers no authority whatsoever on either Defendant to act as set out therein. However, this interpretation cannot be upheld for the reasons set out hereunder.

Paragraph 4 cannot be viewed in isolation and must be interpreted within the meaning and purpose of the Resolution as a whole. This follows the well accepted principles of interpretation whereby the words in a document should not only be given their ordinary grammatical meaning but the document as a whole should be interpreted to give it business efficacy.[5]

Following thereon, paragraph 4 must be read in conjunction with the remaining portion of the Resolution and not to the exclusion thereof. As already noted in this judgment what follows paragraph 4 are the names and signatures of both Defendants. These names and signatures are (unlike paragraph 4) not separated by the word "OR" in any shape or form.

In the premises, it is clear that whilst paragraph 4 serves the dual purpose as set out above, it is this latter portion of the Resolution that actually confers that authority. It is, as required by clause 6.20 of the Deed of Trust, signed by both Defendants. Had it not been, it would not have satisfied the requirements thereof which, as set out earlier in this judgment, provides that "the Trustees could make decisions by their

[5] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at paragraphs [17] and [18]

unanimous consent, evidence of which would be a **signed** resolution recording their decision".

This is the only interpretation that can reasonably be given to the Resolution. There is no evidence to gainsay that interpretation, based either on documentation placed before this Court or the oral evidence of the Plaintiff's witness which, in all material respects, supports the interpretation relied upon by the Plaintiff. Coupled thereto the Defendants elected not to give evidence before this Court which may have persuaded the Court to interpret the Resolution in the manner sought by them.

[24] The alternative argument put forward on behalf of the Defendants is that the Resolution had been replaced by a subsequent Resolution dated 21 August 2006 (Exhibit F having been signed on 17 June 2006) and which appears at page 148 of Exhibit C.

In the first instance, it must be noted that it was never put to Froneman, on behalf of the Defendants, that there were any other Resolutions which governed the authority of the Defendants to bind the Trust or that this particular Resolution had replaced the Resolution relied upon by the Plaintiff (Exhibit F). Secondly, the submission made by Mr Lubbe that this subsequent Resolution makes no reference to the Defendants being able to sign documents required by the Plaintiff on his or her own, is difficult to understand, in light of the fact that the wording and structure of paragraph 4 of this Resolution is identical to that of Exhibit F, including the word "OR" in bold capital letters between the signatures appearing above and below it.

A further difficulty is that the names of the Trustees do not appear in paragraph 4 of this Resolution. Rather, four unidentified signatures appear thereon. In this regard, it was the undisputed evidence of Froneman (in relation to Exhibit F) that had the Plaintiff not obtained the specimen signatures and names of the Defendants then the bottom signatures would not have conferred any authority on the Defendants to bind the Trust and, certainly, not the authority in the sense that the Plaintiff imputed to the Resolution in question. Hence, even if this Resolution at page 148 of Exhibit C had been signed in the lower portion by both Defendants (which it was not) then the resolution would, on the undisputed evidence of this witness, be invalid.

In an attempt to overcome the absence of any signatures on the lower portion of the Resolution, Mr Lubbe has submitted that this does not render the Resolution void, either in terms of the provisions of Clause 6.20 of the Deed of Trust or in law. In light of the clear provisions of clause 6.20 of the Deed of Trust (as set out above) this submission, insofar as it pertains to the aforesaid clause, may safely be disregarded. Further, having relied squarely upon the provisions of the Deed of Trust in support of their argument that the signature of both Defendants was required on the agreements in order to bind the Trust, the Defendants cannot now attempt to rely on "the law", outside of the said Deed of Trust, in support of an argument that the failure of both Defendants to sign the Resolution at page 148 of Exhibit C does not render that Resolution invalid.

Finally, Mr Lubbe correctly pointed out that the validity thereof was not made subject to the cancellation of any previous Resolution, including

Exhibit F. Whilst this is undoubtedly correct, it does not assist the Defendants in their defence that the Resolution (Exhibit F) was replaced by the Resolution dated the 21st of August 2006 at page 148 of Exhibit C.

In the absence of any evidence whatsoever to support this alternative argument (the Defendants having elected not to give evidence at the trial in this matter) it is the Court's finding that, on a balance of probabilities and in light of the facts as set out above, Exhibit F was not replaced by any other Resolution, including that Resolution which appears at page 148 of Exhibit C.

[25] Having regard to all of the aforegoing, this Court holds that the Plaintiff has discharged the onus of proof incumbent upon it to prove, on a balance of probabilities, that when the Second Defendant signed the agreements with the Plaintiff she did so with the actual authority of the First Defendant. This authority was express and as set out in the Resolution dated the 17th of June 2006 (Exhibit F).

Even in the event of the aforesaid Resolution not conferring actual authority expressly upon the Second Defendant to sign the agreements on behalf of the First Defendant, this Court is satisfied that the Plaintiff has proven, on a balance of probabilities, that such authority was implied. This must be so, in light of the actions of both Defendants signing Exhibit F on the 17th of June 2006 and the simple fact that only the Second Defendant (to the satisfaction of the Plaintiff) subsequently signed the agreements during January 2008.

Following thereon, it is the judgment of this Court that the agreements entered into between the Plaintiff and the Trust are valid in every material respect.

[26] This court aligns itself with the common law principles as enunciated by the Supreme Court of Appeal in the matters of *Thorpe and Others v Trittenwein*[6] and *Land and Agricultural Bank of SA v Parker*[7] that the Trust in the present matter is typical of the modern business or family trust in which there is a blurring of the separation between ownership and enjoyment, a separation which is the very core of the idea of a trust. Those who choose to conduct business through the medium of trusts of this nature, like the present Defendants, do so no doubt to gain some advantage, whether it be in estate planning or otherwise. But they cannot enjoy the advantage of a trust when it suits them and cry foul when it does not. If the result is unfortunate the Defendants have themselves to blame.

[27] In the premises, the First Defendant and the Second Defendant are ordered to make payment to the Plaintiff, jointly and severally the one paying the other to be absolved, as follows:-

CLAIM A

1. Payment of the sum of R495 239,85;

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[6] 2007 (2) SA 172 (SCA) at paragraph [17]
[7] 2005 (2) SA 77 (SCA) at paragraph [19]

2. Interest thereon at the Plaintiff's prime lending rate plus 1% per annum, calculated from 13 March 2012 until date of final payment;

3. Costs of suit on the scale of attorney and client, to be taxed.

CLAIM B

1. Payment of the sum of R 182 449.03;

2. Interest thereon at the Plaintiff's prime lending rate plus 1% per annum, calculated from 13 March 2012 until date of final payment;

3. Costs of suit on the scale of attorney and client, to be taxed;

CLAIM C

1. Payment of the sum of R 459 792.10;

2. Interest thereon at the Plaintiff's prime lending rate plus 1% per annum, calculated from 13 March 2012 until date of final payment;

3. Costs of suit on the scale of attorney and client, to be taxed.

CLAIM D

1. Payment of the sum of R 749 075.85;

2. Interest thereon at the Plaintiff's prime lending rate plus 1% per annum, calculated from 13 March 2012 until date of final payment;

3. Costs of suit on the scale of attorney and client, to be taxed.

B C WANLESS
ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

Heard on:	5 February 2018
For the Plaintiff:	Adv J Kilian
Instructed by:	Baloyi Swart & Associates
For the Defendant:	Adv J. H. V. D. P Lubbe
Instructed by:	Paul Barnard Attorneys
Date of Judgment:	04/05/2018