THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case no: 186/2003
REPORTABLE

In the appeal between:

LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA Appellant

and

J L PARKER First Respondent
D G PARKER Second Respondent
T T PARKER Third Respondent

Before:	Mpati DP, Cameron JA, Brand JA, Erasmus AJA and Jafta AJA
Appeal:	Thursday 9 September 2004
Judgment:	Thursday 23 September 2004

Trusts – Authority to bind trust – Sub-minimum of trustees cannot bind trust – Even where majority of trustees have power to bind trust, power must be properly exercised – Trusts – Abuse of trust form – Courts' duty to develop trust law in accordance with business efficacy, commercial accountability and the reasonable expectations of outsiders – Master's power to appoint trustees and

co-trustees and to authorise trustees – Should ensure that trusts in which all trustees are beneficiaries and all beneficiaries are related to each other have an independent outsider as trustee

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JUDGMENT

CAMERON JA:

1] This is a battle about a family trust. It concerns an outstanding debt of over R16 million the appellant bank ('the bank') claims the respondent trust ('the trust') owes to it. Though the appeal in the end turns on the trust's legal standing in the court below, that question depends on the main argument the bank advanced on the merits of the appeal. And that in turn brings to the fore yet again questions about the use and abuse of the trust form in business dealings.

2] The three respondents are the current trustees of the trust. (At the hearing of the appeal the bank's application to join the third trustee was granted without opposition.) The trust was established in 1992. The founder, Mr DW Parker, a Lichtenburg farmer of formerly substantial means, named the trust for his wife ('the Jacky Parker Trust'). The beneficiaries are Parker and Mrs Parker ('the Parkers') and their descendants. The first trustees were the Parkers and one

Senekal, the family attorney. But Senekal resigned in 1996. This left the Parkers as the only trustees.

3] The trust deed requires that 'there shall always be a minimum of three trustees in office'. And when the number falls below three, it gives the power to appoint a third to the remaining trustees – who were the Parkers. This power, coupled with the minimum requirement, in effect placed a duty on the Parkers to appoint a third trustee when Senekal resigned. In breach of their duty to give effect to the terms of the trust deed,[1] they failed for nearly two years to do so. Only in June 1998 did they notify the Master of the High Court – who has common law and statutory jurisdiction over the administration of trusts[2] – that Senekal had resigned.

4] The fact that they were the only trustees did not stop the Parkers from accepting loans for the repayment of which they purported to bind the trust. In particular, between April and October 1998 they purported to bind the trust as co-principal debtor and surety in a series of agreements in which companies associated with their family business obtained very substantial advances from the bank. The last of these

1 *Honore's South African Law of Trusts* (5ed, 2002) page 262.

2 Trust Property Control Act 57 of 1988, s 3. Section 6(1) provides that 'Any person whose appointment as trustee in terms of a trust instrument, s 7 or a court order comes into force after the commencement of this Act, shall act in that capacity only if authorised thereto in writing by the Master'.

agreements was concluded in October 1998. By that time, the Parkers – prompted by a direction from the Master – had at last appointed a third trustee. But they did not replace Senekal with an independent outsider. Instead, they selected their son, DG Parker ('the son') – also a beneficiary. His affidavit – which the bank did not dispute – stated that he was not consulted or informed about the last agreement. That involved a loan of R30 million from the bank.

5] Things went awry, and the bank moved to sequestrate the Parkers and the trust. In September 2000 it obtained a provisional order sequestrating the trust and Parker's estate. (Its application to sequestrate Mrs Parker failed because it could not demonstrate benefit to creditors.) Roux J confirmed the orders of sequestration on 27 October 2000, and refused leave to appeal. Parker petitioned this Court. He failed. But the trust obtained leave, and successfully appealed to the full court, which set aside the order sequestrating it.[3] With special leave granted by this Court, the bank now appeals against that decision.

6] Before the full court, the trust's central defence to the bank's

3 *Parker NO v Land and Agricultural Bank of SA* [2003] 1 All SA 258 (T) ((Kirk-Cohen J, Hartzenberg and Shongwe JJ concurring). The relevant provisions of the trust deed are set out at 261.

claim was that the Parkers on their own did not have power to bind the trust in concluding the loan agreements with the bank, whether before or after they appointed the son as third trustee. This defence the full court upheld. Kirk-Cohen J pointed out that the trust deed does not empower two trustees to transact business in the absence of the peremptory minimum of three trustees:

> 'While the trustees (defined in clause 1 as being the minimum of three trustees) acting together could delegate any rights and duties to one or more of them, such delegation would only be effective if the minimum of three trustees so delegated. In the papers no case is made out that [the Parkers] were in fact carrying out powers or duties so delegated to them.'[4]

7] Although the trust deed requires that there must be a minimum of three trustees, it does make provision for decisions to be taken by majority vote, and for the trust to appoint agents to act on its behalf. That agent could obviously be one of the trustees, if duly authorised. But, as the full court emphasised, the bank's case was not that the Parkers were at any stage authorised to act on behalf of the trust as its agents. Its case throughout was that two trustees acting alone could bind the trust.

8] Before the son's appointment, the bank's argument rested on the general proposition that trust law permits trustees who are

4 [2003] 1 All SA 258 (T) 263*d-e* and 263*g*.

in office, acting together, to bind a trust estate. After his appointment, the bank contended that since the trust deed authorised majority decision-making, it conferred power on the Parkers to bind the trust acting without the son.

9] These contentions rest on an erroneous approach to the questions of trust capacity and trustee authority. Given the way the bank pleaded its case, and the evidence it presented, two principles of trust law entail that its submissions cannot prevail. The first is that a trust does not have legal personality. The second is that, in the absence of authorisation in the trust deed, trustees must act jointly. I deal with these in turn.

A sub-minimum of trustees cannot bind the trust

10] The first principle accounts for the fact that the trust could not be bound while there were fewer than three trustees. Except where statute provides otherwise, a trust is not a legal person.[5] It 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

5 *Commissioner for Inland Revenue v MacNeillie's Estate* 1961 (3) SA 833 (A) 840D-H; *Commissioner for Inland Revenue v Friedman NO* 1993 (1) SA 353 (A) 370E-I.

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.[6] Outside its provisions the trust estate can not be bound.

11] It follows that a provision requiring that a specified minimum number of trustees must hold office is a capacity-defining condition. It lays down a prerequisite that must be fulfilled before the trust estate can be bound. When fewer trustees than the number specified are in office, the trust suffers from an incapacity that precludes action on its behalf.

12] This is not to say that the trust ceases to exist. Nor is it to say that the trust obligation falls away. Counsel for the bank cited passages from *Honoré*[7] establishing that a trust will not be allowed to fail for want of a trustee, and that the administration of a trust proceeds even when not all the trustees can be appointed in the precise manner envisaged in the trust deed. This is to confuse the existence of the rights and obligations that constitute the trust estate with the question whether and in

6 Compare *Honoré's South African Law of Trusts* (5 ed, 2002) p 262 (§ 160).

7 *Honoré's South African Law of Trusts* (5 ed, 2002) pages 201-202 (§ 122), 207-208 (§ 124) and 228 (§ 136).

what manner the trust estate can be bound. It is axiomatic that the trust obligation exists even when there is no trustee to carry it out. The court or the Master will where necessary appoint a trustee to perform the trust.[8] But it does not follow that a sub-minimum of trustees can bind a trust.

13] In the present case, the Parkers alone were not 'the trustees' as defined in the trust deed. Nor, while fewer than three trustees were in office, were there 'trustees' on whose behalf the Parkers could act, or from whom they could receive authority to bind the trust estate. The fact that they acted jointly in signing the contracts does not change this, because the trust's incapacity during this period does not arise from the joint action requirement, but from the trust's incapacity while a sub-minimum of trustees held office.

14] The Parkers in other words could not bind the trust because no one could. This does not mean that their duties as trustees ceased. On the contrary, their obligation to fulfil the trust objects and to observe the provisions of the trust deed continued. These required that they appoint a third trustee when a vacancy occurred – a duty they signally failed to fulfil.

8 Trust Property Control Act s 7(1) gives the Master a default power to appoint trustees: 'If the office of trustee cannot be filled or becomes vacant, the Master shall, in the absence of any provision in the trust instrument, after consultation with so many interested parties as he may deem necessary, appoint any person as trustee'.

But until they did so the trustee body envisaged in the trust deed was not in existence, and the trust estate was not capable of being bound. For the Parkers to purport to bind the trust estate during this period was an act of usurpation that simply compounded the breach of trust they committed by failing to appoint a third trustee. Such conduct may, as I indicate later (para 37.3), provide the basis for impugning the very existence of the trust; but that was not the bank's case.

Joint action requirement entails that trustees must act together

15] For the Parkers to purport to bind the trust estate after the son's appointment, without (according to his evidence) consulting him, constituted a further usurpation and a further breach of their obligations under the trust deed. It is a fundamental rule of trust law, which this Court recently restated in *Nieuwoudt NO v Vrystaat Mielies (Edms) Bpk*,[9] that in the absence of contrary provision in the trust deed the trustees must act jointly if the trust estate is to be bound by their acts. The rule derives from the nature of the trustees' joint ownership of the trust property. Since co-owners must act jointly, trustees

9 2004 (3) SA 486 (SCA) para 16 (Harms JA for the Court).

must also act jointly.[10] Professor Tony Honoré's authoritative historical exposition[11] has shown that the joint action requirement was already being enforced as early as 1848.[12] It has thus formed the basis of trust law in this country for well over a century and half.

16] So unless authorised otherwise the Parkers and the son had to act jointly if the trust was to be bound. The bank's argument sought to accommodate the change the son's appointment wrought by claiming that the particular provisions of the trust deed permitted the Parkers to bind the trust without consulting him. It is true that the son's appointment remedied the incapacity from which the trust suffered. Now, according to the trust deed, the three trustees in office, acting either unanimously or by majority decision, could bind the trust. Similarly, 'the majority' of the trustees in office could constitute a quorum at trustees' meetings.

17] The bank contended that since the Parkers were a majority of the trustees in office, and since they could form a quorum at trust meetings, they could bind the trust acting together. But

10 See the judgment of van Dijkhorst J in *Coetzee v Peet Smith Trust* 2003 (5) SA 674 (T).

11 Tony Honoré Chapter 26, 'Trust', in R Zimmermann and D Visser *Southern Cross – Civil and Common Law in South Africa* (1996) page 854 note 39.

12 *Trustees of Dodds, King & Co v Watson* (1848) 1 Menz 140, followed by *Walker & Co v Beeton's Trustees* 1869 Buch 225. Both decisions were clarified and explained, and the report of the former corrected, by de Villiers CJ in *Muller Bros v Lombard, van Aarde & Co* (1904) 21 SC 657

this is to confuse power to act with its due exercise. The deed empowered the majority of the trustees to meet and to make decisions. To this extent the joint action requirement was abrogated – but the majority remained part of a three-trustee complement, and it had to exercise its will in relation to that complement. The bank does not suggest that any meeting or consultation of the trustees was convened, or that any vote took place in which the majority will was exercised. On the contrary, on the evidence which it has chosen not to challenge no such meeting, consultation or majority decision ever occurred. In these circumstances the Parkers on their own were not entitled to bind the trust. Again, conduct of this sort may give rise to an inference concerning the abuse of the trust form; but, again, this was not the case the bank sought to make.

'Internal formalities' argument must also fail

18] The bank also contended that the question whether the Parkers were authorised after the son's appointment to bind the trust was an internal formality which it as an outsider was entitled to assume had been observed (*Royal British Bank v*

Turquand).[13] This court in *Nieuwoudt* recently left open the question whether and in what circumstances the *Turquand* rule could be applied to trusts, while pointing to certain difficulties in its application.[14] Within its scope the rule may well in suitable cases have a useful role to play in securing the position of outsiders who deal in good faith with trusts that conclude business transactions. This case does not provide the opportunity for considering its application, however, since the bank's case was never that it thought, or was entitled to think, that the Parkers were authorised by the son to conclude the last loan agreement. Its case was that they were entitled to do so regardless of his authorisation. That proposition has to be rejected for the reasons given, and with it the 'internal formalities' argument.

Evidence here does not justify going behind the trust form

19] This disposes of the bank's contentions on the merits of the full court's judgment. But before proceeding to apply these conclusions to the bank's alternative argument, some observations are needed about the abuse of the trust form this

13 (1856) 119 ER 886 (Exch Ch).

14 *Nieuwoudt NO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA) paras 9-12 (per Farlam JA, for the court) and paras 19, 22 (per Harms JA, for the court).

case yet again brings to light. The core idea of the trust is the separation of ownership (or control) from enjoyment. Though a trustee can also be a beneficiary, the central notion is that the person entrusted with control exercises it on behalf of and in the interests of another. This is why a sole trustee cannot also be the sole beneficiary: such a situation would embody an identity of interests that is inimical to the trust idea, and no trust would come into existence. It may be said, adapting the historical exposition of Tony Honoré, that the English law trust, and the trust-like institutions of the Roman and Roman-Dutch law, were designed essentially to protect the weak and to safeguard the interests of those who are absent or dead.[15]

20] This guiding principle provided the foundation for this court's major decisions over the past century in which the trust form has been adapted to South African law: that the trustee is appointed and accepts office to exercise fiduciary responsibility over property on behalf of and in the interests of another.

21] The first of those decisions, *Estate Kemp v McDonald's Trustee*,[16] arose because of difficulties stemming from a testator's bequest (in the words of Innes CJ) 'to persons who

15 Tony Honoré Chapter 26, 'Trust', in R Zimmermann and D Visser *Southern Cross – Civil and Common Law in South Africa* (1996) page 849.

16 1915 AD 491, per Innes CJ at 498.

are not intended by the testator to have any enjoyment of the subject matter, but are directed to possess and administer it on behalf of successive sets of beneficiaries'. Forty years later, in *Crookes NO v Watson*,[17] Schreiner JA again emphasised that 'the ordinary case of a trust' was 'where the trustee is not beneficially interested in the trust property'. The last of the previous century's major cases adapting the trust form, *Braun v Blann and Botha NNO*,[18] arose because it was contended that our law did not allow the conferment of discretionary powers of appointment 'on trustees who have no beneficial interests in the property in question'.

22] This has not changed. The essential notion of trust law, from which the further development of the trust form must proceed, is that enjoyment and control should be functionally separate. The duties imposed on trustees, and the standard of care exacted of them,[19] derive from this principle. And it is separation that serves to secure diligence on the part of the trustee, since a lapse may be visited with action by

17 1956 (1) SA 277 (A) 292 D-E.

18 1984 (2) SA 850 (A) 856G, per Joubert JA.

19 Trust Property Control Act 57 of 1988 s 9: '**Care, diligence and skill required of trustee** (1) A trustee shall in the performance of his duties and the exercise of his powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another. (2) Any provision contained in a trust instrument shall be void in so far as it would have the effect of exempting a trustee from or indemnifying him against liability for breach of trust where he fails to show the degree of care, diligence and skill as required by subsection (1).'

beneficiaries whose interests conduce to demanding better. The same separation tends to ensure independence of judgment on the part of the trustee – an indispensable requisite of office[20] – as well as careful scrutiny of transactions designed to bind the trust, and compliance with formalities (whether relating to authority or internal procedures), since an independent trustee can have no interest in concluding transactions that may prove invalid.

23] The great virtue of the trust form is its flexibility, and the great advantage of trusts their relative lack of formality in creation and operation: 'the trust is an all-purpose institution, more flexible and wide-ranging than any of the others'.[21] It is the separation of enjoyment and control that has made this traditionally greater leeway possible. The courts and legislature have countenanced the trust's relatively autonomous development and administration because the structural features of 'the ordinary case of trust' tend to ensure propriety and rigour and accountability in its administration.

24] But this has changed in the last two decades. This is not simply because trusts have increasingly been used to transact

20 *Honoré* pages 89-91 (§ 52), 264 (§ 160).

21 Tony Honoré Chapter 26, 'Trust', in R Zimmermann and D Visser *Southern Cross – Civil and Common Law in South Africa* (1996) page 850.

business. So long as the functions of trusteeship remain essentially distinct from the beneficial interests, there can be no objection to business trusts, since the mechanisms of the trust form will conduce to their proper governance, which will in turn provide protection for outsiders dealing with them.

25] The change has come principally because certain types of business trusts have developed in which functional separation between control and enjoyment is entirely lacking. This is particularly so in the case of family trusts – those designed to secure the interests and protect the property of a group of family members, usually identified in the trust deed by name or by descent or by degree of kinship to the founder.

26] In *Nieuwoudt*,[22] Harms JA drew attention to this 'newer type of trust' where for estate planning purposes or to escape the constraints imposed by corporate law assets are put into a trust 'while everything else remains as before'. The core idea of the trust is debased in such cases because the trust form is employed not to separate beneficial interest from control, but to permit everything to remain 'as before', though now on terms that privilege those who enjoy benefit as before while simultaneously continuing to exercise control.

22 2004 (3) SA 486 (SCA) para 17.

27] *Nieuwoudt* was a farming trust, where the sole trustees were the farmer and his wife. They were also the sole income beneficiaries. In the present case, the Parkers were amongst the three founding trustees. They are also the only named beneficiaries. The only other beneficiaries are their descendants. Parker, the founder, also reserved the power to himself 'by written deed inter vivos or by means of stipulation in his will, to determine the nature and extent of any benefit accruing to any beneficiary of the Trust'. Only in default of Parker's exercise of this power are the trustees entitled to award assets to beneficiaries.

28] When Senekal resigned, the Parkers as mentioned failed for nearly two years to appoint a third trustee as the trust deed required of them. And then they appointed their son. As will emerge, when a further vacancy occurred (because Parker's sequestration disqualified him), Mrs Parker and the son appointed the daughter: she is the third trustee who was joined at the hearing.

29] It is evident that in such a trust there is no functional separation of ownership and enjoyment. It is also evident that the rupture of the control/enjoyment divide invites abuses. The control of the trust resides entirely with beneficiaries who, in their

capacity as trustees, have little or no independent interest in ensuring that transactions are validly concluded. On the contrary, if things go awry, they have every inducement as beneficiaries to deny the trust's liability. And no scruple precludes their relying on deficiencies in form or lack of authority since their conduct as trustees is unlikely be scrutinised by the beneficiaries. This is because the beneficiaries are themselves, or those who through close family connection have an identity of interests with them.

30] The papers in this case manifest a string of unscrupulous defences to the bank's claim, most of which were abandoned by the time the litigation reached the full court, but which obliged the bank to go to the length of employing medical experts to pronounce on the mental state of Mrs Parker, since the Parkers unwarrantably put even this in issue. That a successful defence – the sub-minimum incapacity and the joint action requirement – eventually emerged from hundreds of pages of paper, and prevailed after many court appearances over four years of litigation, does the Parkers no credit, since it is their own breaches of trust in running the family trust that led to the unenforceable transactions.

31] As trustees who were simultaneously the principal beneficiaries

the Parkers had an interest in obtaining loans from the bank; as beneficiaries they had a simultaneous interest in contesting their repayment. The other beneficiaries were scarcely likely to have distinct interests: they were even more unlikely to hold the Parkers accountable for their breaches of trust in concluding the unenforceable transactions.

32] No comfort can be derived in this state of affairs from the fact that the bank had the trust deed (as it did) or that it drew up the loan documents itself (as it did). It is correct, as Harms JA warned in *Nieuwoudt*, that outsiders dealing with trusts must be warned to be careful.[23] It is also correct, as Mpati DP has recently pointed out, that an outsider dealing with a trust has a manifest interest in ensuring that trustees have authority to encumber the trust property.[24] But trust deeds may be complex, prolix and obscure: in the present case, the point that has foiled the bank was rejected at first instance (where Roux J regarded it as 'nonsense' and 'opportunism'), and established only after toilsome appellate litigation.

33] While outsiders have an interest in self-protection, the primary responsibility for compliance with formalities and for ensuring

23 *Nieuwoudt NO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA) para 24.

24 *Standard Bank of South Africa Ltd v Koekemoer* case number 73/03, judgment of 27 May 2004, para 12 [also a family trust that contested liability for a loan].

that contracts lie within the authority conferred by the trust deed lies with the trustees. Where they are also the beneficiaries, the debasement of trust function means all too often that this duty will be violated.

34] The situation may in due course require legislative attention. But that does not mean that the Master and the courts are powerless to restrict or prevent abuses. The statutory system of trust supervision invests extensive powers in the Master. These include the power to appoint trustees in the absence of provision in the trust instrument,[25] and to appoint any person as co-trustee of a serving trustee where he considers it 'desirable', notwithstanding the provisions of the trust instrument.[26] In addition, trustees require written authorisation from the Master before they may act in that capacity.[27]

35] The debasement of the trust form evidenced in this and other cases, and the consequent breaches of trust this entails, suggest that the Master should in carrying out his statutory functions ensure that an adequate separation of control from enjoyment is maintained in every trust. This can be achieved by insisting on the appointment of an independent outsider as

25 Trust Property Control Act 57 of 1988 s 7(1).
26 Section 7(2).
27 Section 6(1).

trustee to every trust in which (a) the trustees are all beneficiaries and (b) the beneficiaries are all related to one another.

36] The independent outsider does not have to be a professional person, such as an attorney or accountant: but someone who with proper realisation of the responsibilities of trusteeship accepts office in order to ensure that the trust functions properly, that the provisions of the trust deed are observed, and that the conduct of trustees who lack a sufficiently independent interest in the observance of substantive and procedural requirements arising from the trust deed can be scrutinised and checked. Such an outsider will not accept office without being aware that failure to observe these duties may risk action for breach of trust.

37] The courts will themselves in appropriate cases ensure that the trust form is not abused. The courts have the power and the duty to evolve the law of trusts by adapting the trust idea to the principles of our law (*Braun v Blann and Botha NNO and another*).[28] 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

28 1984 (2) SA 850 (A) 859F-G, per Joubert JA.

expectations of outsiders who deal with them.[29] This could be achieved through methods appropriate to each case.

37.1 As mentioned earlier, within its scope the rule that outsiders contracting with an entity and dealing in good faith may assume that acts performed within its constitution and powers have been properly and duly performed, and are not bound to inquire whether acts of internal management have been regular, may well in suitable cases have a useful role to play in safeguarding outsiders from unwarranted contestation of liability by trusts that conclude business transactions.

37.2 The inference may in appropriate cases be drawn that the trustee who concluded the allegedly unauthorised transaction was in fact authorised to conduct the business in question as the agent of the other trustees. (In *Nieuwoudt*, the matter was sent back for evidence to be heard on how the farmer there conducted the ordinary business of farming without being authorised thereto by his wife, the other trustee.) Such an inference may in a suitable case be drawn from the fact that the other trustees previously permitted the trustee or trustees in effective charge of affairs free rein to conclude contracts. A close identity of interests between trustee-

29 Compare the comments of Van Coppenhagen J in *Vrystaat Mielies (Edms) Bpk v Nieuwoudt NO* 2003 (2) SA 262 (O) para 12.

beneficiaries, as in most family trusts, may make it possible for the inference of implied or express authority to be more readily drawn.

37.3 It may be necessary to go further and extend well-established principles to trusts by holding in a suitable case that the trustees' conduct invites the inference that the trust form was a mere cover for the conduct of business 'as before', and that the assets allegedly vesting in trustees in fact belong to one or more of the trustees and so may be used in satisfaction of debts to the repayment of which the trustees purported to bind the trust. Where trustees of a family trust, including the founder, act in breach of the duties imposed by the trust deed, and purport on their sole authority to enter into contracts binding the trust, that may provide evidence that the trust form is a veneer that in justice should be pierced in the interests of creditors.

38] It is not necessary to determine the extent of these developments in the present case since Mr Subel conceded that the bank did not set out to establish a case along these lines. It chose to stand or fall by the two-trustee contention, and in the absence of evidence establishing another basis for holding the trust or its assets liable, that argument must on the

merits of the appeal fail.

Two trustees could not represent trust in appeal to full court

39] However, by happy symmetry the trust and the Parkers also chose to stand or fall by the two-trustee argument. That argument paradoxically, though by no means unjustly, entails that the appeal must succeed and the judgment of the full court be set aside. It will be recalled that Roux J granted a final order of sequestration against Parker. At that date, the trustees were Parker, Mrs Parker and the son. Clause 4.4.4 of the trust deed provides that on insolvency trusteeship is automatically terminated. So Parker automatically ceased to be a trustee on 27 October 2000. (In terms of s 150(3) of the Insolvency Act 24 of 1936,[30] his subsequent unavailing application for leave to appeal did not suspend his sequestration.) The trust once again had only two trustees – Mrs Parker and the son. Not until more than two years later was Parker replaced (by the daughter, the present third respondent).

40] In the meanwhile, inattentive as ever to the trust deed, Parker

30 Section 150(3): 'When an appeal has been noted (whether under this section or under any other law), against a final order of sequestration, the provisions of this Act shall nevertheless apply as if no appeal had been noted: Provided that no property belonging to the sequestrated estate shall be realised without the written consent of the insolvent concerned.'

continued to act as though he was a trustee. He signed the trust's petition for leave to appeal to this court. And the appeal to the full court was instituted in the names of Parker, Mrs Parker and the son 'in their capacities as appointed trustees for the time being of the Jacky Parker Trust'.

41] On the principles set out earlier, and vindicated at the insistence of the trust, it is clear that none of these actions was validly taken. Mrs Parker and the son could not act on behalf of the trust. No one could: for there were only two trustees. The trust accordingly did not validly petition this court for leave to appeal against the judgment of Roux J. Nor was it at any stage properly before the full court.

42] The point remained nascent, however, until it became evident to junior counsel representing the bank before the full court which way the wind was blowing. After argument he ascertained from the trust's attorneys that Parker had not been replaced as trustee. He then sought to place the point before the full court by submitting a memorandum. By this stage, the full court had already prepared its judgment allowing the trust's appeal and setting aside the order of Roux J. It now postponed handing down judgment, and gave counsel for the trust an opportunity to respond. He – paradoxically –

vigorously disputed the bank's entitlement to raise the question of the trust's standing or the two trustees' authority. In the meanwhile, a third trustee was hurriedly appointed – the Parkers' daughter. It is she who was substituted at the hearing of the appeal in this court.

43] The full court then delivered its judgment allowing the trust's appeal. In an accompanying ruling it declared that it refused to entertain the bank's submissions on legal standing because they were 'submitted informally, irregularly and without consent'.

44] It is not hard to understand the full court's exasperation at the turn of events. But it erred in refusing to entertain the bank's submissions. Harms JA has pointed out that the question of legal standing is in a sense a procedural matter, but it is also a matter of substance. It concerns the sufficiency and directness of interest in litigation in order to be accepted as a litigating party.[31] The bank was entitled to raise the trust's standing as a litigant at any stage – even when, after argument before the full court, it became clear that the appeal was likely to succeed on the two-trustee argument. The trust's complaint that this was expedient and inconsistent lies hollow in its

31 *Gross v Pentz* 1996 (4) SA 617 (A) 632B-C (dissenting on grounds not material to the exposition quoted).

mouth. The onus to establish that it had standing rested upon the trust. The argument it asked the full court to uphold on the merits embodied a proposition that necessarily entailed that it was not validly before that forum at all. That the bank should insist that the trust's argument be consistently applied was neither illogical nor, in this case, unjust.

45] Before us counsel for the trust sought to suggest that the original resolution the three trustees adopted to resist the sequestration application covered subsequent steps. But this is manifestly not so: the resolution was only to oppose the application for sequestration 'in the High Court of South Africa, Transvaal Provincial Division'. This neither contemplates nor authorises an appeal.[32] Nor was the full court appeal at any stage ratified on behalf of the trust: whether by design or oversight, no such ratification was attempted after the daughter's appointment as trustee. Whether or not they could have done so is a question that is not for resolution now.

46] It follows that the full court should have concluded that the trust was not before it, and struck the appeal from its roll on that ground. The appeal must therefore succeed, and the judgment of Roux J reinstated. The bank was represented

32 See *Pretoria City Council v Meerlust Investments Ltd* 1962 (1) SA 321 (A).

before the full court only by junior counsel, but before us by two counsel. Though counsel omitted to apply for the usual order – doing so in correspondence only after the appeal was heard – it was at all stages clear that the matter warranted the employment of two counsel, and the bank's omission caused the trust no prejudice.

Order

1. The appeal succeeds with costs, including the costs of two counsel.
2. The order of the full court is set aside. In its place there is substituted:
   '(a) The appeal is struck from the roll with costs.
   (b) The trustees Jacqueline Lesley Parker and Dakin Greig Parker who brought the appeal proceedings without authority are to pay the costs from their own pockets, jointly and severally.'

E CAMERON
JUDGE OF APPEAL

MPATI DP)
BRAND JA) CONCUR
ERASMUS AJA)
JAFTA AJA)