REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: **A5084/2014**

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

……………………………… **SIGNATURE** …………………… **DATE**

In the matter between:

MONTIC DAIRY (PTY) LTD First Appellant
(1st Respondent in Court a quo)

MONTIC TRANSPORT (PTY) LTD Second appellant
Appellant
(2ndRespondent in court a quo)

MONTIC INVESTMENTS (PTY) LTD Third Appellant
(3rd Respondent in Court a quo)

MONTIC ASSETS (PTY) LTD Fourth Appellant
(4th Respondent in court a quo)

HUNTERS PROPERTIES (PTY) LTD Fifth Appellant
(5th Respondent in court a quo)

TROPICA FOODS (PTY) LTD Sixth Appellant
(6th Respondent in Court a quo)

TROPICA INVESTMENTS (PTY) LTD Seventh Appellant
(7th Respondent in Court a quo)

KARL KERBERT N.O. 8th Appellant
(as trustee of the Karl Kerbert Trust) (8th Respondent in Court a quo)

MICHAEL SEGAL N.O. 9th Appellant
(as trustee of the Karl Kerbet Trust) (9th Respondent in the Court a quo)

SOLLY GROSS N.O. 10th Appellant
(as trustee of the Karl Kerbet Trust) (10th Respondent in the Court a quo)

APOSTOLOS MORAITIS N.O. 11th Appellant
(as trustee of the Karl Kerbet Trust) (11th Respondent in the Court a quo)

KARL KERBERT N.O. 12th Appellant
(as executor of the late Julia Lamer) (12th Respondent in the Court a quo

KARL KERBERT 13th Appellant
(13th Respondent in the Court a quo)

THE SHERIFF, JOHANNESBURG 14th Appellant
(14th Respondent in the Court a quo)

Versus

MORAITIS INVESTMENTS (PTY) LTD 1st Respondent

(1st Applicant in the Court a quo)

APOSTOLOS MORAITIS N.O. 2nd Respondent

(2nd Applicant in the Court a quo)

ATHANASIOS MORAITIS N.O. 3rd Respondent

(as trustee of Moraitis Trust) (3rd Applicant in the Court a quo)

CHRISTOS MORAITIS N.O 4th Respondent

(as trustee of Moraitis Trust) (4th Applicant in the Court a quo)

APOSTOLOS MARAITIS 5th Respondent

(5th Applicant in the court a quo)

SUMMARY

Trust and Trustees- Trustee of Family Trust and also Director of Companies (Moraitis) singly enters into settlement negotiations and settlement agreement in respect of trust and companies' affairs- court a quo having set aside the settlement agreement as void and unenforceable on basis that the trustee had no actual authority to conclude the settlement agreement on behalf of the family trust in spite of his warranty that he had been so authorised and in regard to company, that the transfer of all the company's shares constituted a disposal of all or the greater part of the assets of the company which required a special resolution of members as contemplated in section 112(2) read with section 115 of the Companies Act 71 0f 2008 for order to be enforceable however, on appeal, majority judgement (per Matojane J and Hawyes AJ), upholding appeal on grounds, inter alia, that the settlement agreement constituted a compromise of the pending litigation and coming from trustee's company group however, in terms of minority judgement (per Moshidi J) the settlement agreement remains void abnition and un-enforceable largely based on the trite legal principle that requires that trustees must act jointly, unless the Trust Deed provides otherwise.

JUDGMENT

MATOJANE J, HAWYES AJ, CONCURRING (MOSHIDI J DISSENTING)

Introduction

[1] This is an appeal against the Order of the Court *a quo* granting an application declaring the Settlement Agreement "void and unenforceable" and setting aside the ensuing consent order which incorporated the settlement agreement.

[2] In the court below, Windell J found that the settlement agreement was void and unenforceable for the following reasons:

1. Moraitis had no actual or implied authority to conclude the settlement agreement on behalf of the Moraitis Family Trust.

2. Moraitis was not properly authorised to sign the settlement agreement on behalf of Moraitis Investments (Pty) Ltd.

3. In signing the settlement agreement Moraitis purported to dispose of the greater part of the assets of the company and that in terms of section 112 of the Companies Act 71 of 2008 this requires a special resolution that had not been passed.

The parties

[3] The adversaries in this matter are two people, namely, Mr Karel Kebert ("Kebert") and Mr Apostolos Moraitis ("Moraitis"). They conduct their business through special purpose vehicles in the form of limited liability Companies, duly incorporated and that the shareholding in the said Companies are held by either other

Companies or Trusts with each of such Trusts having multiple trustees and beneficiaries.

[4] Both Kebert and Moraitis are directors of Moraitis Investments (Pty) Ltd. Moraitis Investments (Pty) Ltd is a 20% shareholder in the first, second, fourth, fifth and sixth applicants. The only shareholder and member of Moraitis Investment (Pty) Ltd is the Moraitis Family Trust. Moraitis Family Trust is a 20% shareholder of the third applicant

[5] Kebert is a trustee of the 8th applicant. He is the twelfth appellant in his capacity as executor of his late mother's estate, he is the thirteenth appellant in his personal capacity. He is also a director of the first to seventh appellants.

[6] Moraitis is the fifth applicant. He is the director of the first respondent, he is also a joint trustee of the Moraitis family trust and the fifth respondent. He also acts on behalf of the first, third and fourth respondent.

[7] There is a complete breakdown in the business relationship between Kebert and Moraitis and they want to sever their relationship in a multiplicity of companies and businesses they are associated in with each other.

Litigation history

[8] On the 8th December 2006 the first to fourth respondents ("MORAITIS GROUP") launched an urgent application for the winding-up of the first to sixth appellants on the ground that it would be just and equitable to do so. There was an alternative prayer for a forced buyout of the respondents' 20% shareholding in the Montic Group. The shareholding in these companies were

held by entities and trusts in which Kebert and Moraitis had interests.

[9] The matter came before Sapire AJ on 25 October 2007 who granted an order by consent. He ordered a buyout at a price to be determined by a third party. He stated in his judgment delivered on the 19 October 2007 that: -

> "It has emerged that the parties are agreed that there is to be a complete and permanent severance of their hitherto existing relationship as shareholders in the several companies in which they are interested, and that that is to be achieved by the Kebert Group purchasing the entire interest of the Moraitis Group comprising its shares and loan accounts in the companies.
>
> What is not yet agreed is the price to be paid, when it is to be paid, and the choice of an independent referee who is mandated to place value on the interest purchased and so fix the purchase price.
>
> A draft order suggested by the applicants and comments thereon by the respondents, have ben placed before me. It has been left to the court to make an appropriate order to give effect to and regulate the agreement governing the termination and severance of the relationship."

[10] The relevant portion of the court order reads as follows: -

> "1. "The KEBERT GROUP shall purchase the complete 20% interest of the MORAITIS GROUP in the 1st to 6th respondents comprising shares held by the seller in such companies and the relative claims on loan accounts owing to the seller. Karl Kebert shall, if he so desires, be entitled to take transfer of the shares and loan accounts into his own name.
>
> 2. Notwithstanding that the sale relates to the interest in several different companies, the sale is one of all the assets and indivisible."
>
> 3. THAT the purchase price shall be conclusively determined and finally determined by an independent third party who shall act as valuer and not as arbitrator.

[11] Paragraphs 8 and 9 of the Order envisage that the sale should be finally concluded on appointment by agreement between the

Kebert Group and the Moraitis Group of the independent valuator whose valuation would be conclusive and final of the value of the 20% interest. The sections read: -

> 8. Should any problems or difficulties become manifest pending the valuation the valuer may on notice to the parties approach the court for directions in this regard.
>
> 9. The purchase price as determined by the valuer shall be payable within 90 days after the same has been determined and intimated to the parties, against delivery by the purchaser to the seller of all share certificates, share transfer forms and cessions of claims on loan account, completed signed and executed in due form, so as to convey to the purchaser the shares and loan accounts bought and sold in accordance with the provisions hereof.

[12] The parties agreed to the appointment of Ernest and Young Advisory Services Ltd to act as the “independent third party” to value the respondents’ 20% interest in the Montic Group . Their report was received on 5 March 2009 and the respondents were unhappy with the report and considered it to be wrong.

[13] Kebert on behalf of the Kebert Group instituted an action against Moraitis Group and the Valuator in the North Gauteng High Court under Case Number 41065/2006 seeking an order setting aside the valuation alternatively, setting aside the valuation and referring such valuation back to Ernst & Young for reconsideration.

[14] On 14 December 2009 Kebert in his capacity as executor and sole heir of his late mother’s estate instituted action against Moraitis in the South Gauteng High Court claiming a purchase price of certain shares under Case NO.52206/09. The settlement agreement was later made an order of Court.

[15] On 28 August 2013 the attorneys representing Moraitis contacted Kebert’s attorneys asking if Kebert would be prepared to settle all

matters between Kebert and Moraitis. After protracted negotiations, Kebert agreed to pay Moraitis R600 000.00 in full and final settlement of all three pending cases between the parties.

[16] On 5 September 2013 the action became settled between the parties and the impugned settlement agreement was made an order of court. That should have been the end of the acrimonious litigation between the Kebert and Moraitis but this was never to be.

[17] On 30 September 2013 the application, which forms the subject matter of the order under appeal was issued in the High Court of South Africa, Gauteng Division, Johannesburg for an order declaring the Settlement Agreement void and unenforceable, setting aside of the consent order and costs.

[18] I first wish to start by analysing the nature of the business relationship between Kebert and Moraitis. It would appear that in substance Kebert and Moraitis were business partners even though they were carrying on business by means of the machinery of corporations and trusts. At all relevant times Moraitis decided all matters relating to the Moraitis Family Trust on his own and the consent order made by Sapire AJ was clearly intended to bring about the dissolution of a partnership. This is borne by the following conduct of Moraitis:-

[19] While Kebert and Moraitis comprised the full board of the first respondent, Moraitis to the exclusion of Kebert passes a resolution to bring an application for the liquidation of first to sixth appellants.

[20] He decided all matters on behalf of the Moraitis family Trust without reference to his co-trustees. For example, he passed a resolution to bring the aforementioned winding-up resolution without the consent of his two co-trustees.

[21] In his founding affidavit filed in the Winding-up application before Sapire AJ Moraitis describes the relationship between himself and Moraitis as one of business partners and that there was a partnership relationship outside the business. He states in paragraph 60 of the affidavit that over the years and by virtue of their agreed association, which was both tacit and implied, they equally participated in the the partnership business. He states that it was accepted that he will market and manage the affairs of the partnership and Kebert will attend the production side of the business.

[22] In paragraph 51 he states: -

"51. The partnership had its origins in 1980 and has continued to underlie the entire corporate structure of Montic Diary and the associated entities.

52. Moreover, the aforesaid inter-relationship will attest to the following, *inter alia:-*

52.1 the partnership business was conducted as a group:

52.2 the management structure was self-same:

52.3 the business links are indistinguishable;

52.4 there are corresponding directors;

52.5 there is a complete identity of interests."

[23] In paragraph 54 Moraitis states:

"54. Over the passage of time since our first introduction, not only were Kebert and I business partners, but a close-knit friendship ensued between us. We recognised that if we combined our respective skills and experience in a joint business venture, we would stand to reap huge commercial rewards. We

> entertained the prospect of setting up our own business in the liquid consumer industry."

[24] To fortify the evidence of Moraitis that his relationship with Kebert was in substance and in fact a partnership which carried on business by means of special purpose vehicles, Moraitis duly assisted by his attorney and Senior Counsel without reference to his two co-trustees negotiated and concluded an agreement in full and final settlement.

[25] The settlement agreement was a compromise of all pending litigation between Kebert and Moraitis as shown firstly, by the fact that Kebert in his personal capacity as opposed to the seventh to eleventh respondents in the Sapire order, is ordered to pay to Moraitis in his personal capacity the amount of R600 000.00.

[26] Secondly, Kebert, both in his personal capacity and in his capacity as executor in the estate of his late mother, abandoned any claims he or the estate had against Moraitis in respect of shares held in an offshore company. It is significant that this claim did not form part of the Sapire judgment but was included as a compromise to terminate the three pending litigation between the parties.

[27] Thirdly, the shares and/or loan accounts disposed of are to be transferred to Kebert in his personal capacity as opposed to the seventh to eleventh respondents in terms of the Sapire order.

[28] Moraitis and/or the Moraitis Family Trust and/or Moraitis Investments (Pty) Ltd cede all and any loans and/ or claims they may have had in the Companies or associated entities to Kebert in his personal capacity.

[29] The settlement agreement was concluded not only by the parties cited in the heading thereof but also as well as parties

incorporated into the agreement by reference via the warranties recorded in clauses 8 and 9 of the settlement agreement. The preamble to the agreement states:

"WHEREAS the aforementioned parties are involved in the litigation and wish to resolve the litigation and all and any dispute between them;

AND WHEREAS, the above parties have reached an agreement with regards to the disputes between them and wish such agreement to be reduced to writing, and with leave of the above Honourable Court, be made an order of Court."

[30] Moraitis signed the settlement agreement on behalf of Moraitis Investments (Pty) Ltd and in his capacity as a director and also signed the agreement on behalf of the Moraitis Trust in his capacity as a trustee of Moraitis trust. Kebert, on the other hand, signed the agreement in his capacity as trustee of the Karl Kebert Family Trust and in his capacity as executor of the estate of his late mother.

[31] In terms of paragraph 8 of the settlement agreement: -

"Kebert warrants that he is authorised to enter into the settlement agreement on behalf of the companies and as executor of the estate late Julia Lamer and on behalf of his Trust (as trustee) and that the companies and his trust have authorised Kebert to enter into the settlement on their behalf"

[32] Paragraph 9 of the settlement agreement reads: -

"Moraitis warrants that he is authorised to enter into this settlement agreement on behalf of his trust (as trustee) and Moraitis Investments (Pty) and that Moraitis Investments (Pty) Ltd and his trust have authorised Moraitis to enter into this settlement agreement on their behalf"

[33] Paragraph 11 states:

"This agreement constitutes the full and final settlement of the Litigation "

Paragraph 12 states:

"The parties agree that this settlement agreement will remain confidential as between the parties"

[34] Moraitis argued in the court below that the settlement agreement was void against the trust because at the time he signed the settlement agreement, neither third nor fourth respondents in their capacities as the trustees of the Moraitis trust, had authorised him to conclude the settlement agreement on their behalf, in their capacities as trustees of the Moraitis Trust. Nor had they had a meeting of trustees to discuss the settlement agreement of all the pending litigation by any one trustee on behalf of the trust.

[35] The two trustees of the Moraitis Family Trust were cited as co-applicants in the application which resulted in the Sapire AJ judgment. The two trustees delegated to Moraitis in terms of clause 6.5 of the Moraitis Family Trust Deed the power to bring the application. The trustees were represented by the same attorney who had ostensible authority to compromise the action or any matter in it unless he had received instructions to the contrary. See **Hlobo v M.M.V Accident Fund.**[1] This authority carried over into the negotiations "to compromise … or settle upon such terms and conditions as deemed advisable, all claims made by or against the trust" as provided for in clause 9.25 of the Trust Deed.

[36] In my respectful view, the trial judge erred in finding that Moraitis had no actual or implied authority to conclude the settlement agreement on behalf the Trust.

[37] Moraitis further submitted that the transfer of all of first respondent's shares and loan accounts in the first to Sixth Respondents:

37.1 would, by all accounts, be a "disposal" thereof: and

[1] 2001 (2) SA 59 SCA at para [10] and [11]

37.2 would constitute a disposal of "all, or the greater part", of the assets of the company and would therefore require a special resolution of members as contemplated in Section 112(2) read with Section 115 of the Companies Act 71 of 2008 in order to be enforceable.

[38] As per the judgment of Sapire AJ delivered on the 19th October 2007 all parties agreed to the buyout by the Kebert Group of the interests of the Moraitis Group. This effected the disposal of the 20% interest by the Moraitis Group to the Kebert Group. What is not yet agreed upon is the price to be paid, when it is to be paid, and the choice of an independent referee who is mandated to place value on the interest purchased and so fix the purchase price.

[39] It follows therefore, in my view, that the trial court erred in finding that in signing the settlement agreement Moraitis purported to dispose of the greater part of the assets of the company which required the compliance with Section 112 of the Companies Act. The settlement agreed as stated earlier was a compromise of the three pending litigation and such offer of compromise came from the attorneys for Moratis Group.

[40] Order

1. The appeal is upheld

2. The Order of the Court *a quo* on the merits is set aside and substituted by an order that the application is dismissed.

3. Respondent are ordered to pay appellants' costs of the appeal which includes the costs for the application for leave to appeal and to include the costs incurred consequent upon the employment of Senior Counsel.

<u>MOSHIDI J (DISSENTING)</u>

[41] I have read the majority judgment prepared by my brother, Matojane J and in which Hawyes AJ concurred. I do not, however, respectfully, agree with the reasoning and conclusion reached.

<u>The Factual Matrix</u>

[42] The factual matrix, the history of the matter, as well as the issues in dispute, have been sufficiently sketched in the judgment of the court *a quo* and in the main judgment. It is therefore truly unnecessary to repeat these here, save to record that the present appeal is with the leave of Windell J ("*the court a quo*"). The appeal is directed at the whole of the judgment on the merits of the court *a quo*, excluding the order awarding the costs to be paid by the fifth applicant (Apostolos Moraitis) to the respondents.

<u>The Crucial Issue</u>

[43] The crucial issue in this appeal is the question whether the court *a quo* was correct in declaring the settlement agreement entered into between Mr Karl Hans Kebert NO ("*Kebert*") and Mr Apostolos Moraitis ("*Moraitis*") on 4 September 2013, to be "*void and unenforceable and the consent order which incorporated the settlement agreement is set aside*". The court *a quo* also made an order that the costs of the application be paid to the respondents, and to be paid by the fifth applicant (Moraitis). There are other related issues, such as the effect which the settlement agreement had in disposing of the entire 20% shareholding and loan accounts of Moraitis Investments (Pty) Ltd in the first, second, fourth, fifth and sixth appellants; whether there was compliance with the provisions of secs 112(2) and 75(1) of the Companies Act 71 of 2008 ("*the 2008 Companies*

Act"); whether the relationship between Moraitis and Kebert was properly and in substance a partnership; and finally, whether the respondents were entitled to a rescission of the court order, making the settlement agreement an order of court, either in terms of Uniform Rule 42 or in terms of the common law. All these issues were fiercely contested in the court *a quo*.

Certain Common Cause Facts

[44] It is not in dispute that the Moraitis Family Trust ("*the Moraitis Trust*"), established during 1977, consists of three trustees, namely Apostolos Moraitis ("*Moraitis*"), Athanasios Moraitis, and Christos Moraitis. The Letters of Authority issued in terms of sec 6(1) of the Trust Property Control Act,[2] authorised these three trustees to act on behalf of the Moraitis Trust.[3] It is further not in dispute that only one of the trustees, namely Moraitis, signed the settlement agreement in question [4] More specifically, the settlement agreement was entered into by Kebert NO and Moraitis. It was signed by Moraitis, firstly, on behalf of Moraitis Investments (Pty) Ltd, the first respondent in this appeal. Moraitis also signed the agreement "*as trustee of the Moraitis Trust*". There are no signatures of the other remaining trustees, namely Athanasios Moraitis NO, and Christos Moraitis NO, the third and the fourth respondents, respectively. This was so, in spite of the provisions of clause 6 of the Trust Deed, which requires the trustees to, either all of them sign the agreement, or alternatively,

[2] Act 57 of 1988.
[3] See p 50 vol 1 of appeal record.
[4] See annexure "AM2" - settlement agreement in High Court of South Africa, Gauteng Local Division, Johannesburg – under case no 52206/2009 – p 44 to 49 – vol 1, appeal record.

to have authorised properly, one of them to sign the settlement agreement.[5]

[45] Indeed, in the founding papers in the court *a quo*, Moraitis confirmed that, at the time he signed the settlement agreement, the other two trustees, had not authorised him to do so nor was a meeting of the trustees of the Moraitis Trust convened "*to discuss settlement of all the pending litigation by any one trustee on behalf of the Trust … In order for the settlement agreement to be valid and enforceable as against the Moraitis Trust, it was necessary for all three trustees to sign the settlement agreement jointly, in their capacity as trustees … The Trust Deed, annexure 4.1 hereto, does not provide for any trustee acting singly on behalf of the Trust, in the absence of which, so I am advised, as a matter of law, the trustees must act jointly if the trust estate is to be bound by their acts*".[6]

[46] It is also so that the majority of the parties to the settlement agreement, are not all the parties involved in the other pending litigation. For example, in the winding-up application, brought by the present respondents, as well as its *sequelae*, the review action, the majority of the parties were not cited in the action between Kebert NO and Moraitis, and in the course of which the settlement agreement was concluded and made an order of court.[7] The above exposition of the facts, save for the respective arguments in regard thereto, are common cause. These are also, coincidentally, mirrored largely, in the main judgment.

<u>Some Applicable Legal Principles</u>

---

[5] See "*the proceedings of trustees*", p 57 to 58, Deed of Trust, vol 1, appeal record.

[6] See paras 56 to 57 of F/A p 31 to 32, vol 1, appeal record.

[7] See court order, pp 124 to 125, vol 2, appeal record.

[47] I deal with some applicable legal principles. The settled law, over the past 96 years, is quite clear:

> "*The general rule is that joint trustees must act jointly. Generally speaking a joint trustee may delegate his duties to a co-trustee or to any agent but the power to do so depends on the provisions of the trust deed – in this case the deed of donation. If it is prohibited it cannot be done.*[8]

See *Goolama Ally Family Trust v Textile, Curtaining and Trimming*.[9] See also *Mariola and Others v Kay-Eddie NO and Others*,[10] for the proposition that all trustees have to be joined when a trust sues or is sued.

[48] In *Van der Westhuizen v Sandwyk,*[11] which referred with approval to *Mariola and Others* (*supra*), it was held, *inter alia*, that, since a trust was not a juristic person and its assets vested in the trustees in their capacities as trustees, all trustees had to be joined in an action to enforce a right pertaining to the trust.[12]

[49] The matter of *1 Thorpe NNO and Another v Trittennenin and Another,*[13] seems to me to be directly in point here. In that case, the appellant had signed an offer to purchase certain immovable property from the first respondent. In so doing, the appellant purported to act on behalf of a trust and a third party who was acting on behalf of a company yet to be formed. The agreement of sale made provision for two purchasers. The trustee's name was inserted as the first purchaser while, the space for the second purchaser's name was left blank. The sale was made conditional upon the first respondent being able to establish a

---

[8] *Shahmahomed v Hendricks and Others* 1920 (A) 151.
[9] 1989 (4) SA 985 (C) at 988D-E.
[10] 1995 (2) SA 728 (W).
[11] 1996 (2) SA 490 (W).
[12] At 495C-E of the judgment.
[13] [2006] 4 All SA 129 (SCA).

township on the property. In ultimately dismissing the appeal with costs, it was held that:

> "*The trust deed in the present matter provided for three trustees. No provision was made for a trustee to act on behalf of the other trustees without their authority. Neither of the other two trustees in the trust signed the sale agreement, or gave the first appellant written authority to act on their behalf. This rendered the agreement void ab initio and of no force and effect.*"[14]

[50] The court *a quo* also referred, quite correctly so in my view, to *Land and Agricultural Bank of South Africa v Portter and Others,*[15] and the warning cautioned against by Harms JA, in *Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk*,[16] in concluding ultimately that the settlement agreement is void and unenforceable.[17] See also *Liebenberg NO v MGK Bedryfsmaatskappy (Pty) Ltd*,[18] and *Grainco (Pty) Ltd v Broodryk NO En Andere.*[19]

[51] The appellants contend that the settlement agreement was validly concluded even though signed by Moraitis only on behalf of the Moraitis Trust. The contentions include that the launching of the application in the court *a quo* was an abuse of court process, and that Moraitis sought a reason to avoid the settlement agreement; that in entering into the settlement agreement, Moraitis provided a written warrantee that he was indeed authorised to represent the Moriatis Trust, and that the founding papers simply contain

[14] At paras 9 to 13 of the judgment.
[15] 2005 (2) SA 77 (SCA) at para [10].
[16] 2004 (3) SA 486 (SCA).
[17] See para [30] of judgment – court *a quo* – p 285 – vol 3, appeal record.
[18] 2003 (2) SA 224 (SCA).
[19] 2012 (4) SA 517 (FB).

insufficient allegations to support Moraitis-assertion;[20] that it was not necessary for all three trustees to have signed the settlement agreement; that the Moraitis Trust was merely a vehicle created by Moraitis who held the shares in Moraitis Investments (Pty) Ltd (the first respondent); that at all times, Moraitis was the governing mind behind the Moraitis Trust and he decided all matters on behalf of it; that in the discussions leading to the drafting of the settlement agreement and having it made an order of court, and at court, Moraitis was represented by an attorney and senior counsel, and the latter withdrew from the matter when Moraitis developed cold feet or a change of heart in proceeding with the settlement agreement; the deponent to the answering papers (Kebert) conceded that the parties to the settlement agreement were not all the parties to the various litigation matters;[21] that in all their business relationships, spanning for some time, (from 1984), Moraitis at no stage required the permission of the remaining trustees in regard to any business decision; that the mere fact that there are three trustees of the Moraitis Trust does not mean that it is *per se* administered by three trustees; the business interests held by the Moraitis Trust were interests held by Moraitis and not by the remaining trustees; Moraitis was the only trustee of the Moraitis Trust who is a capital beneficiary thereof; that clause 6.5 of the Trust Deed permits the trustees to delegate their powers to committees consisting of one or more trustees; the purpose of the settlement agreement was an all embracing settlement of all disputes between Moraitis and Kebert; and that Moraitis should be estopped from denying that he was mandated by the other trustees pursuant to the warranty

[20] See paras 9.1 and 9.2 of answering affidavit p 131, vol 2, appeal record.
[21] See para 3.1 p 141 – AA – vol 2, appeal record.

he gave in the settlement agreement to the contrary. Based on all of the above, and other contentions, the appellants in the court *a quo* contended that the application launched by Moraitis and other trustees, was ill-conceived, not *bona fide*, and a waste of the court's time.

[52] I have deliberately set out in full the various assertions of the appellants in the court *a quo*. The reason is patent, that is to show just how misplaced, factually incorrect, and legally unsound these assertions are. A readily available example of such incorrectness can be discerned from the replying papers filed to Kebert's supplementary affidavit in this Court under case number 36463/2013.[22] In that action it is plain that the majority of the parties cited there, were not all before this Court when the settlement agreement was made an order of court. As stated before, the settlement agreement was entered into between Kebert and Moraitis only. This was under case number 2009/52206, as is apparent from the settlement agreement proper. There are other similar examples.

[53] The fundamental flaw in the applicant's submissions on this aspect lies in the blatant ignorance of the general rule, described in the legal principles above, that joint trustees must always act together in relation to the affairs of the trust. There is even some law, possible authority for the proposition that, even if one trustee has been authorised by the remaining trustees to institute action on behalf of the trust, this alone does not necessarily confer *locus standi* on that trustee (see *Van der Westhuizen and Van Sandwyk (supra)*).

<u>The Warranty by Moraitis</u>

[22] See para 14 pp 250 to 258 vol 3, appeal record.

[54] The fact that Moraitis, in writing, warranted that he was authorised by the other two trustees to enter into the settlement agreement, can truly be of no assistance, legally speaking, to the appellants in their cause. Neither can it be justification for legitimising what is purely an unlawful settlement agreement. The courts ought not to be tempted to countenance such conduct in the absence of exceptional circumstances, in my view. It is unfortunate that the majority judgment,[23] placed undue reliance on the fact that Moraitis gave a written warranty that he was authorised by the remaining trustees to enter into the settlement agreement, when it is factually and objectively, not the case. The same applies to the finding in the majority judgment that because the remaining two trustees of the Moraitis Trust, who were cited as co-applicants in the application which resulted in the Sapire AJ judgment, and therefore entitling Moraitis subsequently to enter into the settlement agreement under discussion. It is attempted to buttress the finding on the fact that the trustees were represented by the same legal representative who had ostensible authority to compromise the action or any matter in it unless he had received instructions to the contrary, and with reference to *Hlobo v MMV Accident Fund*.[24] I respectfully disagree that this finding based on an assumption, as it does, can be a true reflection of the facts and applicable legal principles. The end result on this finding, is that in spite of the mere citation of all the trustees of the Moraitis Trust, the settlement agreement was not lawfully consented to by all such trustees, as is required by both the law and the Trust Deed. In addition, the Moraitis Trust was not a party to the litigation in which the settlement agreement was

[23] See paras [14] to [19] pp 10 to 12 of majority judgment.
[24] 2001 (2) SA 59 (SCA) paras [10] and [11].

subsequently made an order of court. The latter fact is undisputable.

[55] From the above, it follows, in my view, that the finding of the court *a quo* that Moraitis, whatever his motives were, lacked the requisite authority from the remaining trustees, and that therefore, the settlement agreement called to be declared void and unenforceable, was correct. It properly cannot be faulted. The same applies to the finding that Moraitis cannot be estopped from now denying that he did not have the requisite authority to act on behalf of the Moraitis Trust, at the time. The finding was correctly made with reference to case law, such as, *Stand 242 Hendrik Potgieter Road, Ruimsig (Pty) Ltd v Gobel.*[25]

[56] In my view, the true motive for Moraitis to have acted, as he did, in entering into the settlement agreement without authority from his co-trustees, cannot be properly established on the papers. However, it remains highly suspect based on the patent and vast experience in business deals involving diversed entities. This is why he was made to pay the costs of the application, even though successful, in the court *a quo*. At best, his conduct was unethical and improper if he knowingly warranted that he was clothed with the requisite authority at the time. Based on this, the additional finding of the court *a quo* that the applicants *a quo* were perfectly entitled to apply to her for the setting aside of the consent order in terms of Uniform Rule 42(1)(c), can equally not be faulted. I have to add the following, prior to concluding, on this aspect of lack of authority on the part of Moraitis to act on behalf of the Moraitis Trust. This is that, although clause 6.5 of the Trust Deed provides that the trustee shall have the power to delegate any of their powers to committees consisting of one or more

---

[25] 2011 (5) SA 1 (SCA).

trustees, such delegation of powers by the trustees of the Moraitis Trust had not taken place at the time of the conclusion of the settlement agreement. It was admittedly signed by Moraitis only, and as correctly argued by the respondents, in my view, whilst his co-trustees, the third and the fourth respondents, were totally oblivious thereof, and while it could never have been to the advantage of the beneficiaries of the trust. All the contentions of the appellants in this regard are not borne out by the objective facts. It is for this reason too that the view advanced in the majority judgment to the effect that Moraitis had actual or implied authority to conclude the settlement agreement on behalf of the trust, can with respect, not be sustained.

[57] In my view, the fact only that Moraitis entered into settlement negotiations solo, and proceeded to sign the settlement agreement in similar fashion, warrants the dismissal of the appeal. However, if I am incorrect in my above determination, I still believe that the appellants should also not succeed on the other two remaining defences. I deal with these briefly below.

<u>The Partnership Defence</u>

[58] First, the alleged partnership defence. Remarkably, this defence was only advanced for the first time in the supplementary affidavit of the appellants, when it was alleged as follows:

> "*It is evident from the founding affidavit of Mr Apostolos Moraitis in support of the application under case number 41065/2006, and in particular paragraphs 50 to 52 thereof, that: the relationship between him and myself was in reality a partnership business, conducted as a group by various entities which were established over many years and when circumstances demanded their establishment …*"[26]

[26] See para 4.1, p 188, vol 2, appeal record.

[59] Once more, this approach by the appellants is clearly contrary to the rules of court and the law, as set out earlier in this judgment. For repetition, this is that, in motion proceedings, an applicant is required to set out all its case in the founding papers. In any event, as argued by the respondents, the undisputed facts are that, by the election of the parties concerned, all business was conducted through special purpose vehicles in the form of limited liability Companies, duly incorporated, and that the shareholding in the mentioned Companies was held by either other Companies or Trusts, with each of such Trusts having multiple trustees and beneficiaries, and which constitute a bar to a finding that the parties were ever true partners. This would undoubtedly violate the principles of both the Company Laws and the Law regarding Trusts. For the same reason, it would be contrary to the Law of Partnership which allows for partners to, by all accounts of their whim terminate partnerships. Interestingly, whilst dealing with this issue of partnership, the majority judgment observes that:

> “,,, *At all relevant times Moraitis decided all matters relating to the Moraitis Family Trust on his own and the consent order made by Sapire AJ was clearly intended to bring about the dissolution of the partnership …*”[27]

This, in the context of the proceedings leading up to the winding-up application.

[60] From the above, it is plain that the defence of the existence of an alleged partnership, or even akin to a partnership, has no merit at all. In any event, as mentioned, the objective facts do not show that the trustees of the Moraitis Trust consented to such a partnership.

<u>The Final Defence</u>

---

[27] See para [16] of majority judgment.

[61] I deal with the appellants' final defence. The appellants challenge the finding of the court *a quo* to the effect that in signing the settlement agreement, Moraitis purported to dispose of the greater part of the assets of the Company, and that it is clear from sec 112 of the Companies Act 71 of 2008 that this required a special resolution which had been passed. The appellants contended in both the notice of appeal and heads of argument that, the court *a quo* erred in not finding that the disposal of the entire interests of the Moraitis Group to the Kebert Group was consequently effected and regulated in terms of the order of court as recorded in the Sapire AJ judgment of 19 October 2007.

[62] In my view, the court *a quo* has indeed dealt comprehensively with the issue under discussion with due reference and regard to the objective facts and the applicable law. This finding can also not be faulted at all. It is truly unnecessary to repeat all here.

[63] In any event, it is plain that the appellants are driven to rely on the assertions they make simply in order to avoid the requirements of the applicable law, stated above. It is undoubted that the disposal of the relevant shareholding as well as loan accounts involved, were effected, not in terms of the Sapire AJ judgment, but the purported settlement agreement. This disposal of the shares and loans, clearly constituted all or the greater part of the assets of the Company. In addition, Kebert and Moraitis, as the only directors of the first respondent Company (Moraitis Investments (Pty) Ltd), plainly had an interest in the transaction (the settlement agreement), as envisaged in sec 75 of the 2008 Companies Act. It is clear that the purported settlement constitutes the *causa* for the transfer of the shareholding and the loan accounts which Kebert was hoping to become owner of in terms of the order granted by Mojapelo DJP on 5 September

2013.[28] The shares and/or loan accounts disposed of are to be transferred to Kebert in his personal capacity or his nominee (as opposed to the seventh to eleventh respondents in terms of the Sapire AJ order). The final observation to be made in comparing the terms of the settlement agreement, and the Sapire AJ order is the following: Kebert, both in his personal capacity and in his capacity as executor in the estate of his late mother (Julia Lamer), abandoned any claims he or the estate had against, who could only be, Moraitis in respect of shares in an off-shore Company, which issue had nothing to do and did not feature in the Sapire AJ judgment or order at all.[29] From this, it is also plain that the appellants' attack on the finding of the court *a quo* on this aspect as well has no merit at all.

Conclusion

[64] In all of the above circumstances, the appeal falls to be dismissed. The costs, which is a discretionary matter, should follow the result. The costs should also include the costs of senior counsel.

Order

[65] In the result, I would make the following order:

1. The appeal is dismissed with costs.
2. The costs shall include the costs of senior counsel.

D S S MOSHIDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

[28] See annexure "AM5", vol 1, pp 87 to 92 and *cf* annexure "KHK1", vol 2, pp 152 to 157.
[29] See vol 2, p 154, appeal record.

COUNSEL FOR THE APPELLANTS	D P J ROSSOUW SC
INSTRUCTED BY	RAMSAY WEBBER INC
COUNSEL FOR THE RESPONDENTS	L N DE KONING SC
INSTRUCTED BY	MILLS AND GROENEWALD INC
DATE OF HEARING	20 OCTOBER 2015
DATE OF JUDGMENT	12 MAY 2016