



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 41942/2017

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE 20 JULY 2021

SIGNATURE

In the matter between:

GROCAPITAL FINANCIAL SERVICES (PTY) LTD

Plaintiff

and

INA SALALIDIS N. O.

First Defendant

STANLEY FELIX MAGID N. O.

Second Defendant

IOANNIS SALALIDIS N. O.

Third Defendant

MICHAEL BRETT HORWITZ N. O.

Fourth Defendant

SEGERAN MOONSAMY N. O.

Fifth Defendant

J U D G M E N T

(Re postponement and other interlocutory issues)

This matter has been heard by way of a virtual hearing and disposed of in the terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

The plaintiff is claiming some R3, 2 million with interest from the defendants as sureties for the principal debtor, J P Krugerrand Deeds (Pty) Ltd. The initial first defendant (Mr Salalidis) was cited in his personal capacity as a surety and his co-surety was the JPKL Empowerment Trust (the Trust). Mr Salalidis, a Mr Magid, a Mr Horwitz and a Mr Moonsamy were cited as the trustees of the Trust. At the eventual trial date of 19 July 2021, the defendants raised certain incapacity issues regarding the Trust as well as the substitution of Mr Salalidis by the executrix in his deceased estate (Mrs Salalidis) and applied for a postponement of the trial. The circumstances relating to these and other interlocutory issues, more fully appear from the chronology of the matter, set out hereunder.

[2] Relevant Chronology

- 2.1 13 March 2015 – Mr Salalidis signs a deed of suretyship in favour of the plaintiff – this is not in dispute.
- 2.2 13 March 2015 – Mr Magid signs the deed of suretyship binding the Trust in favour of the Plaintiff, having been duly authorised in terms of a written resolution, signed by all the abovementioned cited trustees.

- 2.3 8 May 2016 – Unbeknown to the plaintiff, Mr Horwitz resigned as trustee. No new letter of authority is issued by the Master.
- 2.4 20 January 2017 – The Principal debtor commences business rescue proceedings, entitling the plaintiff to act on the aforementioned suretyships.
- 2.5 20 June 2017 – Action is instituted.
- 2.6 19 October 2017 – After having been placed under bar, the defendants deliver their plea, claiming that the plaintiff's agreement with the principal debtor was subject to unfulfilled conditions precedent and that their suretyships should be rectified to limit the extent of each suretyship.
- 2.7 8 March 2019 – Attorneys Schultz Inc (specifically Ms Candice Schultz), now Scultz Demarthe Inc, appointed as attorneys for the defendants with Mr Magid as the "primary point of contact".
- 2.8 29 November 2019 – Unbeknown to the plaintiff Mr Moonsamy passed away.
- 2.9 2 July 2020 – Unbeknown to the plaintiff Mr Salalidis passed away.
- 2.10 15 July 2020 – Unbeknown to the plaintiff Mrs Salalidis is appointed the executrix in Mr Salalidis's deceased estate.
- 2.11 31 August 2020 – Attorneys Schultz Inc (again specifically Ms Candice

Schultz), withdraw as attorneys of record for the late Mr Salalidis in both his personal capacity and his capacity as trustee for the Trust. The notice says nothing of his passing and gives his last known address and draws the plaintiff's attention to rule 16 regarding service of documents (on such last known address). No rule 15 notice is delivered by the said attorneys in substitution of their late client and in protection of his estate.

2.12 21 January 2021 – Notice of set down for trial on 19 July 2021 is served.

2.13 24 May 2021 – The plaintiff gives notice of its intention to amend its plea to insert an alternative cause of action, based on unjustified enrichment as well as an averment that, had there been suspensive conditions, the fulfillment thereof was frustrated by the defendants.

2.14 8 June 2021 – The plaintiff's amended pages to its particulars of claim are delivered (the defendants attorney says this was done on 7 June 2021).

2.15 8 June 2021 – Ms Candice Schultz, the defendants' attorney and deponent to the principal affidavit delivered in support of the application for striking the trial matter from the roll, alternatively postponing it, states that, "in response" to the amended pages, she informed the plaintiff's attorneys that:

- there were no trustees of the Trust "currently in office".

- accordingly she was unable to take instructions in order to respond to the amendment and “*more importantly, unable to even begin preparing for trial*” and
- the substitution of the executrix had not yet occurred and “none of the defendants are before the court”.

2.16 8 June 2021 – A rule 15 notice, substituting Mrs Salalidis for Mr Saladadis is delivered and an amended notice is delivered two days later by the plaintiff’s attorneys.

[3] The status of the trust

- 3.1 It is trite that where the number of trustees fall below the required number prescribed in a trust deed, such a trust cannot perform any legal juristic acts or, more precisely, the remaining trustees cannot legally bind the trust. See: *Hyde Construction CC v Deuchar Family Trust and Another* 2015 (5) SA 388 (WCC) and *Land and Agricultural Bank Ltd v Parker* 2005 (2) SA 77 (SCA) (the *Landbank* – case).
- 3.2 This does not mean that the trust ceases to exist and it can, for example still be sequestrated. See *JP van Schalkwyk Attorneys v Botha NO and Another* (65348/2020) [2021] ZAGPPHC 189 (23 March 2021).
- 3.3 At the time that action had been instituted in this matter by the plaintiff, it pleaded that Mr Horwitz was a trustee of the Trust. This allegation has been admitted by the defendants at the time and need not be proven by the plaintiff, according to the rules of pleadings generally.

- 3.4 The defendants' attorneys now allege that Mr Horwitz had resigned prior to the date of their plea. No explanation is given for this discrepancy and neither has the admission been withdrawn. It might be that the pleader has simply not taken proper instructions or it might be that Mr Horwitz had not complied with the formalities required by section 21 of the Trust Property Control Act 57 of 1988 for his resignation to have been effective.
- 3.5 Either way, the remaining three trustees have since passed away. The consequence is that, even if Horwitz might still be a trustee, the trust deed requires a minimum of three trustees for the Trust to be able to legally transact. The defendants' attorneys indicate that three new trustees have been proposed who have signed the necessary documents but letters of authority could not be issued by the Master because it could not locate the Trust's files in its office. The regularisation of the Trust's incapacity or impediment to act was apparently only initiated in July 2021.
- 3.6 Apart from the administrative ineptitude by an organ of state, which, in the experience of this court, is nothing out of the ordinary, what I find astounding is how the attorneys who vehemently claim to act on behalf of the Trust, have done nothing until their authority to act has been challenged to assist the Trust in regularizing its position. Nothing has been done in this regard since the passing of Mr Salalidis in July 2020, nor after the attorneys withdrew as his attorney in his capacity as trustee, nor since the passing of Mr Magid in March of this year. The excuse that the attorney only became aware of these issues during the course of June 2021 "in preparation for trial" after the plaintiff had amended its particulars of claim, carries with it the admission that no preparations had been done in the period since the service of the set-down in January 2021, being the preceeding five months before trial.

- 3.7 Not only is the lack of preparation deplorable, but the attorney's allegation that she could not obtain instructions due to the absence of trustees in order to file a plea to the amended particulars, further implies that she had received the Rule 28 Notice of intention to amend on 24 May 2021 but either ignored it or allowed the dies mentioned therein to lapse without attempting to take instructions. Counsel for the defendants, in passing, also relied on the fact that no plea has yet been filed in respect of the amended claims. He alleged that the cause of action introduced thereby had probably become prescribed. One would have expected such an objection to have been considered or at least debated with clients by any attorney with serious concern for her client's case. This is after, on her version, she had received an instruction on behalf of Mr Magid (when he was still alive) to "*urgently commence preparation for trial*".
- 3.8 The result of all this is, however that the Trust has no living trustees and the resignation of Mr Horwitz is open to some doubt. To all intents and purposes, the Trust is "incapacitated" and unable to proceed with the trial.
- 3.9 Counsel for the plaintiff argued that this should not be a bar to default judgment being granted against the Trust and argued that the case was in that sense, analogous to the judgment of this court in *JP van Schalkwyk Attorneys*. I must immediately point out that in the *JP van Schalkwyk* – case, as appears from the judgment therein, the court was at pains to allow "a voice" to be heard on behalf of the trust in that case, via the remaining trustees.
- 3.10 To allow the trial to proceed at the present juncture, would be to disallow any "voice" on behalf of the Trust, given the facts of the matter. In this

regard, the sole or principal beneficiary also threw his weight behind the application not to have the trial proceed.

- 3.11 The case against the Trust should however, not be struck off the roll. The plaintiff was unaware of the change in the landscape of trusteeship, was entitled to rely on the admissions contained in the plea and was not, until it was too late, alerted to the current status of the Trust by the attorney claiming to act on its behalf. In this sense the matter is distinguishable from the Parker Trust in the *Landbank* – case, which was never properly before even the court a quo.
- 3.12 Rather than striking the matter from the roll, it should be postponed sine die insofar as the Trust is concerned.

[4] The representation of the Trust

- 4.1 On the date of the appointment of Schultz Inc, now Schultz Domarthe Inc in March 2019, there were still a valid number of trustees.
- 4.2 The plaintiff argued that the appointment and power to act as attorneys had to be confirmed by a resolution by the Trust. I disagree, a valid appointment can be proven in other ways and I am satisfied, without describing the various letters and documents, that at that time the Trust and its trustees had appointed the attorneys, the trustees intended for the attorneys to represent the Trust and the attorneys had not been acting on a frolic of their own but fully intended to represent the Trust. See also *Eskom v Soweto City Council* 1992 (2) SA 703 (W) and *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C) in this regard.
- 4.3 It is not certain what happened with the instructions to act on behalf of the Trust upon the demise of Mr Moonsamy in November 2019 or if the

attorney was made aware of this, but certainly she (referring to Ms Schultz specifically) became aware of the passing of her client Mr Salalidis, who was one of the remaining two trustees. Although the attorney claimed Mr Magid was the trustee authorized to appoint the attorneys, all indications are that Mr Salalidis was the actual witness and representative of the trustees. It was also expressly on behalf of the other trustees that he deposed to the discovery affidavit. He was also one of the signatories, not only to the resolution authorising the signing of the Trust's deed of suretyship, but also the facility letter granted to the principal debtor, the validity of which has been placed in dispute. In fact, he was the sole director of the principal debtor who the attorney is also representing in the business rescue proceedings. I find it irresponsible for the attorney to not alert her opponents of his passing and to not making any enquiries at the time as to her mandate to act on behalf of the Trust or as to the Trust's status generally.

- 4.4 Once the notice of set down for trial was delivered, the attorney would surely have informed her clients thereof and enquired as to witnesses and representation of the Trust. If not at that time, then surely at the time of the passing of Mr Magid, the attorney should have become aware of the lack of authority of the Trust and her consequential lack of authority to act on its behalf. Even if she was, due to her apparent lack of contact with her clients, unaware of the passing of Mr Magid at the time, in law, the Trust then ceased to have the capacity to act and to have the attorney act on its behalf.

[5] The executrix

- 5.1 It is not clear exactly when the plaintiff became aware of the particulars of Mrs Salalidis as executrix in the deceased estate of Mr Salalidis. It might

only be once Ms Schultz was galvanised into action in the beginning of June 2021. Fact of the matter is, she only formally became a party by 10 June 2021 at the instance of the plaintiff.

- 5.2 Thereafter, however, two weeks elapsed before a consultation was held by her with Ms Schultz.
- 5.3 Apart from the consultation, there is no evidence of what else Mrs Salalidis had attempted to do in order to either obtain legal advice or prepare for trial. The excuse that she was not served with all the documents and only given access thereto via Caselines and that this is a ground for postponement, is a feeble excuse. Her attorney, Ms Schultz, having acted for Mr Salalidis all along, had all the documents. Counsel's argument that Mrs Salalidis had to consider the case and had not pleaded to the amended claim is equally unconvincing. Almost a month had passed since her last consultation with Ms Schultz and there is no evidence of any trial preparation or any other activity. The dies for a consequential plea have also elapsed. Of most of this, Mrs Salalidis would be unaware, being a housewife and a lay person. The practitioner in whom she had placed her trust, Ms Schultz, was, however, not only steeped in the case, but schooled in the procedures of this court.
- 5.4 In the end, counsel for Mrs Salalidis conceded begrudgingly that what she was actually seeking, amounts to an indulgence. In my view, not to grant the indulgence would cause her more prejudice than the plaintiff would suffer, if a postponement is granted. The plaintiffs' prejudice would largely be addressed by the issue of interest and costs.

[6] Costs

- 6.1 The general principle is that he or she who seeks an indulgence must, by the payment of costs, ensure that the other party is not prejudiced thereby. I find that this principle is applicable in this instance in respect of the first defendant.
- 6.2 Since the passing of Mr Magid, the defendants' attorneys could have no mandate to act for the Trust. This is confirmed by their own argument that the Trust is not even properly before the court for purposes of trial. In this regard, when continuing with litigation on behalf of an incapacitated client, the attorney should be liable for costs *de boniis propriis*, so the plaintiff argues.
- 6.3 I considered granting a costs order against the attorneys for the Trust or Ms Schultz personally, not only on the above basis, but as a result of the other conduct (or lack thereof) outlined earlier, but in the end decided, in the exercise of my discretion, that the conduct fell just short of the requirements for such an order as discussed recently in both the majority and minority judgments of the Constitutional Court in *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC), although the context in that case was in relation to a public official.
- 6.4 I do find, however, that the plaintiff should not be out of pocket for the wasted costs occasioned by the postponement and costs shall therefore be on the scale as between attorney and client.
- 6.5 In view of the Trust's status and, following the judgment in the *Landbank* – case, there shall be no order against the Trust.

[7] Order:

1. The trial is postponed sine die.
2. The first defendant is ordered to pay the wasted costs occasioned by the postponement on the scale as between attorney and client.



N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 19 July 2021

Judgment delivered: 20 July 2021

APPEARANCES:

For the Plaintiff:	Adv A Duvenhage
Attorneys for the Plaintiff:	Van Gruenen & Associates Inc., Pretoria
For the Defendants:	Adv A Roeloffze
Attorney for the Defendants	: Schultz Demarthe Inc., Pretoria