IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION DURBAN

CASE NO: 6084/2018

In the matter between:

Rajesperan Loganathan Moodley N.O.	First Applicant
Kogilambal Moodley N.O	Second Applicant
Savatri Moodley N.O	Third Applicant
Rajesperan Loganathan Moodley	Fourth Applicant
Kogilambal Moodley	Fifth Applicant
Theslin Moodley	Sixth Applicant
Rinalda Moodley	Seventh Applicant
and	
The Standard Bank of South Africa Ltd	First Respondent
Therins Freight Carriers CC	Second Respondent
The Registrar of Deeds, Pietermaritzburg	Third Respondent
Vukuzithathe Containers CC	Fourth Respondent

Judgment

Lopes J

[1] The applicants in this matter seek an order declaring null and void and of no force or effect *ab initio*, a suretyship and cession of claims executed on behalf of the Kogi Moodley Family Trust ('the trust'), as well as a continuing covering mortgage bond numbered B18377/2010 registered over Erf 9476 Durban ('the property'), which property is owned by the trust.

[2] The parties are as follows:

(a) The first, second and third applicants are the trustees of the trust;

(b) The fourth, fifth, sixth and seventh applicants are the beneficiaries of the trust (‘the beneficiaries’);

(c) The first respondent is the Standard Bank of South Africa Limited (‘the bank’);

(d) The second respondent is Therins Freight Carriers CC, a close corporation, of which the first applicant was at all material times the sole member (‘the close corporation’).

(e) The third and fourth respondents are parties against whom no relief is sought.

[3] On the 13th July 2001 and in terms of a document titled ‘Deed of Trust and Donation’ (‘the trust deed’) the trust was formed. The first, second and third applicants were appointed as trustees on the 1st August 2001.

[4] During August of 2010, the close corporation approached the bank for a loan of R1.8 million. That loan was granted to the close corporation on the basis that the trust register a continuing covering mortgage bond B18377/2010 over the property as security for the repayment of the loan by the close corporation to the bank. In addition the trust executed an unlimited suretyship agreement in favour of the bank for the repayment of the loan by the close corporation.

[5] On the 21st September 2017 the trust sold the property to the fourth respondent, Vukuzithathe Containers CC. When the transfer was being prepared by the conveyancers, they alerted the trustees to the fact that they did not have authority to have concluded the suretyship and register the continuing covering

mortgage bond over the property in favour of the bank. The trust now relies on this legal advice as the basis for its cause of action to set aside the suretyship and cession of claims. The continuing covering mortgage bond itself has been determined, in that the trust has provided security to the bank in exchange for which it has allowed the fourth respondent to obtain transfer of the property. The fourth respondent accordingly no longer has any involvement in the application, and no relief sought against it.

[6] The trustees rely upon the provisions of clause 4.13 of the trust deed to avoid liability. It is relevant to set out the preamble to clause 4 leading to clause 4.13:

> '4. POWERS OF TRUSTEES
>
> THE TRUSTEES shall have the fullest and widest powers in relation to the Trust assets and shall be entitled and are hereby empowered at their sole and absolute discretion, to invest the Trust Funds or any portion thereof in the Republic of South Africa or elsewhere in whatever manner they deem fit. Without prejudice to the aforegoing generality, they shall have power:
>
> . . .
>
> 4.13 To enter into indemnities, guarantees or suretyships of every description, which they in their sole and absolute discretion deem fit, whether gratuitously or otherwise, on behalf of and for the benefit of any Trustee or beneficiary of the Trust and to mortgage, pledge or otherwise encumber any of the assets of the Trust for such purpose'

[7] Mr *Morgan,* who appeared for the applicants, submitted that in order to comply with the provisions of clause 4.13 two requirements had to be met:

(a) The suretyship must be provided on behalf of a trustee or beneficiary; and

(b) The suretyship must be for the benefit of any trustee or beneficiary.

[8] Mr *Morgan* submits that the suretyship was given on behalf of the close corporation for a loan received by it as principal debtor. An indirect benefit accruing to the first applicant, as sole member of the close corporation, was insufficient to confer power on the trustees to conclude the surety on behalf of the close corporation and permit the registration of the mortgage bond against the trust's property. The trustees only had authority to furnish suretyships on behalf of a trustee or beneficiary, and not on behalf of a third party, to wit, the close corporation.

Mr *Morgan* referred me to Honore's *Law of Trusts*, 4th ed at page 257 where the learned author stated:

> 'at common law a trustee has no power to mortgage trust property unless such power is given by the trust instrument, expressly or by implication. The mere existence of a power to sell trust property does not imply the existence of a power to mortgage it since a mortgage may impose burdens on the trust property which the founder did not envisage authorising. A trustee wishing to mortgage the property must therefore generally apply to court on one of the grounds set out in chapter 11.'
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> (Authorities referred to in footnotes have been omitted)

[9] With regard to a trustee's power to guarantee a loan, Mr *Morgan* again referred to Honore at page 257 as follows:

> 'At common law a trustee has no power to guarantee a loan by third party to a beneficiary. Thus, when a will created a trust under which the trustee had the right to make advances to her children for business or marriage, it was held that this did not entitle her to sign a surety for a loan to her son in her capacity as administrator. Nor could she bind the trust by holding herself out to have powers which she did not possess. The argument that the trustee in such a case could be held to have bound the trust because the trust would have a remedy against the trustee for the unlawful action was rejected.'
>
> (Authorities referred to in footnotes have been omitted)

[10] These paragraphs are repeated verbatim at page 312 of the learned authors 5th edition.

[11] In chapter 11 of Honore, the learned author sets out the restrictions on a court of law in varying the terms of a trust deed, or allowing conduct expressly prohibited, and only permitted in certain circumstances. This is permitted, for example, to avoid frustrating the objects of the trust or prejudicing the beneficiaries. As I have not been asked to do so, I have no intention of varying the terms of the trust deed or permit anything to be done in contravention of the terms expressed therein. This matter deals only with the interpretation of the trust deed.

[12] Mr *Morgan* also referred to *Standard SA Limited v Redmond* (80438/2015) [2016] ZAGPPHC 396 (2 June 2016) para 1. That matter concerned a summary judgment application which was defended by the respondent on the basis that the founding affidavit was not properly deposed to, and that he had no knowledge of the suretyship allegedly signed by him. In addition, the respondent raised the fact that the particulars of claim were excipiable because the applicant had failed to attach the principle overdraft agreement or plead its terms. The court held that the applicant's cause of action lay in the suretyship agreement signed by the respondent. The other grounds of complaint were also dismissed. It is not clear to me why Mr *Morgan* referred to this authority.

[13] Mr *Morgan* also referred to *Tiefenthaler Attorneys v Kleinhans* (9018/13, 4325/13) [2015] ZAKZDHC 15 (24 February 2015) which dealt with an application for summary judgment based on a suretyship agreement. The defences raised in the summary judgment opposing affidavit were dismissed and judgment was granted. Once again, it is not clear to me why I was referred to this authority.

[14] Mr *Morgan* also referred me to clause 18.4 of the first applicant's founding affidavit in which he recalls having furnished the bank with a copy of the trust deed.

This was presumably done by the deponent to indicate that the bank had knowledge of the trust deed prior to the signing of the suretyship and the registration of the mortgage bond. I accept this as a fact.

[15] Mr *Van Rooyen,* who appeared for the bank, submitted that the process of interpreting the trust document is to be done objectively, and not subjectively. In this regard he referred to *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), paras 18-20. This new method of interpretation was expanded upon in *Bothma-Batho Transport (edms) Bpk v S Bothma and Seun Transport (edms) Bpk* 2014 (2) SA 494 (SCA), para 12.

[16] The approach in these cases provides that although the starting point is still the wording of the document, they are not interpreted literally, but considered in the light of relevant and admissible context, including the circumstances in which the document came into being. Essentially the interpretation process is one unitary exercise.

[17] Mr *Van Rooyen* pointed to the following matters as relevant to the interpretation of the clause in the trust deed;

(a) That the first applicant had already completed an unlimited suretyship on the 23rd August 2002 in favour of the bank for the debts of the close corporation;

(b) The second and third applicants are the spouse and mother of the first applicant, and the fifth and seventh applicants are his children. In those circumstances, it is inevitable that the first applicant is the controlling mind of the trust;

(c) The first applicant was appointed sole member of the close corporation on the 24th October 1997;

(d) The first applicant executed the suretyship agreement on behalf of the trust;

(e) As the sole member of the close corporation, the first applicant was then the controlling mind of both the trust and the close corporation respondent to whom the money was loaned.

[18] The only requirement to be established is whether the suretyship and the bond were executed 'on behalf of and for the benefit of any trustee or beneficiary of the Trust…'. The trust expressly authorised the signing of a suretyship agreement and the registration of a bond over the trust property. In my view, there is no doubt that the provisions of the suretyship agreement were in accordance with clause 4.13 of the trust deed. Although it is correct that the suretyship was provided to the close corporation, the first applicant had been the sole member of the close corporation since 1997. The trust was clearly a family trust, designed to benefit the first applicant, his wife (who are two of the trustees) and their minor children. As the first applicant was the operating mind of the trust, and a beneficiary thereof, it was clearly to his benefit that the close corporation, of which he had been the sole member since 1997, was given a loan by the bank.

[19] In addition to the aforegoing, it is necessary to interpret clause 4.13, and the preamble to the paragraph. There can be no doubt that the trust deed enables the trustees to do almost anything in the way of dealing with the trust assets and encumbering them, should they wish to do so. The submission that the monies were advanced by the bank to the close corporation, and was not done so either on behalf of, or for the benefit of, the first applicant, is, in the circumstances, a convenient but spurious interpretation of the trust deed. It would be closing one's mind to reality to suggest that the agreements were not on behalf of, and for the benefit of the first applicant. Failing such an interpretation the suretyship document and the registered bond would be, in effect, a nullity. That would be manifestly unfair and prejudicial to the bank. As it benefitted the aims of the first applicant, it is ultimately designed to benefit all the beneficiaries.

[20] I have no hesitation in accepting the argument set out by Mr *Van Rooyen* and in those circumstances I make the following order:

The application is dismissed with costs.

Lopes J

Date of hearing:	30th May 2019.
Date of Judgment:	14th June 2019
For the Plaintiff:	Mr *Morgan* (instructed by Govender, Pather & Pillay).
For the Defendant:	Mr *Van Rooyen* (instructed by Cox Yeats Attorneys).