IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 7021/2016

In the matter between:

LOUIS LE GRANGE	**FIRST APPLICANT**
BEULAH LE GRANGE	**SECOND APPLICANT**

and

THE LOUIS AND ANDRE LE GRANGE	
FAMILY TRUST NO. 1562/95/PMB	**FIRST RESPONDENT**
FRACOIS LE GRANGE *NOMINO OFFICIO*	**SECOND RESPONDENT**
JACQUELINE LE GRANGE *NOMINO OFFICIO*	**THIRD RESPONDENT**
HENDRIK MENTZ *NOMINO OFFICIO*	**FOURTH RESPONDENT**
THE MASTER OF THE HIGH COURT	
PIETERMARITZBURG	**FIFTH RESPONDENT**

ORDER

The following order is granted:

a. The first respondent is ordered to pay the first and second applicants jointly the following after deducting payments already made to the applicants or on their behalf:

i. a sum of R15 000.00 per month in respect of their living costs from the date of 30 June 2012 until the death of the surviving of the first and second applicants;

ii. an annual escalation of 10% on the sum of R15 000.00 until the death of both the first and second applicants calculated from 31 January 2013;

b. Interest *a tempore morae* on all late payments as follows:

i. at the rate of 15.50% per annum on all amounts which were due at the end of each month from the date of the said agreement being 19 November 2011 to 31 July 2014;

ii. thereafter from 1 August 2014 up to and including the 23 February 2016 at the rate of 9% per annum;

iii. and thereafter from 1 March 2016 at a rate of 10.25% per annum.

c. Cost of suit.

d. The counter-application is dismissed with costs.

JUDGMENT

D PILLAY J

[1] The applicants Louis Le Grange and Beulah Le Grange seek an order against the first respondent, The Louis and Andre Le Grange Family Trust to pay them the sum of R15 000 per month for their living costs, interests and ancillary relief. Francois Le Grange, Jacqueline Le Grange and Hendrik Mentz are the second, third and fourth respondents cited in their capacities as trustees of the first respondent. The Master is the fifth respondent. The first to fourth respondents oppose the application. They counter-applied for a declarator that a variation agreement concluded by the first to third respondents varied the settlement agreement concluded under case number 1305/11 in November 2011. At the outset the applicants challenge the first to

fourth respondents' standing to oppose the application and to launch the counter-application.

[2] The first respondent has three trustees. Two of them, the second and third respondents, resolved at a meeting of trustees held on 26 July 2016 to oppose the application, to launch a counter-application for a declarator and to authorise the third respondent to instruct attorneys and counsel and to sign all documentation necessary for the litigation. The fourth respondent abstained from voting and signing the resolution.

[3] By notice in terms of rule 7(1) of the Supreme Court Rules the applicants challenged the authority of the attorneys Tatham Wilkes Incorporated to act for the first to fourth respondents. The latter replied to the rule 7(1) notice on 7 September 2016 by delivering a special power of attorney dated 31 August 2016, which drew on the mandate from the resolution of 26 July 2016, and which was signed by the second and third respondents.

[4] Out of caution the first to fourth respondents delivered a further reply to the rule 7(1) notice on 12 January 2017. They attached the extracts of minutes of a meeting held at Dundee on 11 January 2017 by the second and third respondents and the resolution they took at that meeting. The extract records that the resolution purportedly taken on 26 July 2016 was in fact taken on 22 July and the respondents cannot account for how the error in the date occurred. Nothing turns on this error as the date is immaterial. Furthermore, neither the substance of the resolution nor the abstention of the fourth respondent from voting is in dispute.

[5] The extract further records that on 9 January 2017 the fourth respondent was invited to ratify steps taken by the second and third respondents pursuant to the resolution of 22 July 2016. Although the fourth respondent was not available to meet to discuss the resolution he indicated that he would nevertheless abstain from voting on matters concerning this case. The second and third respondents proceeded to meet in the absence of

the fourth respondent. They resolved to ratify the steps that they and their counsel and attorneys took to give effect to the resolution of 22 July 2016.

[6] Against this factual background the applicants persist that neither first respondent nor its attorneys have the authority to act in these proceedings. The bases of the applicants' objection to standing are:

a. The fourth respondent was not notified at all or timeously of meetings, agendas and resolutions.
b. No properly constituted meetings were held to adopt the resolutions.
c. The fourth respondent abstained and did not vote for the resolutions.
d. A majority vote is not a decision of the first respondent unless it is supported by a resolution.
e. All trustees must sign the resolutions of the first respondent to signal externally their obligation to act jointly as custodial owners of the first respondent's property.

In the circumstances the resolutions signed by the second and third respondents only without having convened a meeting of the trustees is invalid.

The first to fourth respondents rely on specific clauses of the Trust Deed. Clause 5.2 allows for a minimum of two and a maximum of five trustees. Clause 8.2 requires resolutions to be supported by majority vote. Clause 9 prescribes the usual powers of the trustees, in particular the power to institute and defend legal actions. Clause 24.1(b) provides for the formalities of recording resolutions passed at meetings as prescribed in s 204 of the Companies Act 61 of 1973, the subsequent amendment of which the respondents submit is s 73 of the Companies Act 71 of 2008. Notwithstanding these formalities, clause 24.2 recognises that a 'written resolution signed by all the trustees has the same legal implication as a resolution passed at a meeting of trustees.' Clause 24.4 typically enables the trustees to authorise one or more of their number to sign all documents for transacting the business of the trust. Additionally,

> '[a]ny resolution certified by a trustee to be a true extract from the minutes of a resolution passed by all the trustees shall in all respect have the same legal force as a resolution signed by all the trustees.'

[7] The point of departure between the parties is not what the principles relevant to standing of the respondents are but how they apply to the facts in this case. I deal first with the general principles as applied in other cases before turning to their application in this case.

[8] In *Land and Agricultural Bank of South Africa* v *Parker and others* 2005 (2) SA 77 (SCA) the Supreme Court of Appeal reaffirmed two principles of the common law pertaining to trusts:

> '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.'[1]

Both principles rest on 'the trust deed, which is the trust's constitutive charter. Outside its provisions the trust estate cannot be bound'.[2]

[9] *Parker* also emphasises that 'the trustees must act jointly if the trust estate is to be bound by their acts,' 'in the absence of contrary provisions in the trust deed',[3] and 'unless authorised otherwise'.[4] The reason for this rule arises from the nature of the trustees' joint ownership of the trust property. Co-owners must act jointly; trustees manage trust assets in a representative capacity must also act jointly. [5]

[10] Acting jointly means that the trustees must participate in the decisions taken on behalf of the trust. Participation usually involves meetings or consultations amongst trustees, negotiating or mediating contested decisions

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[1] *Land and Agricultural Bank of South Africa* v *Parker and others* para 9.
[2] *Parker* para 11, 15, 16, 17.
[3] *Parker* para 15.
[4] *Parker* para 16.
[5] *Van der Merwe NO and others* v *Hydraberg Hydraulic CC and others* 2010 (5) SA 555 (WCC); *Hoosen and others NNO* v *Deedat and others* 1999 (4) SA 425 (SCA) at para 23, 24, 26; *Steyn NO and others* v *Blockpave (Pty) Ltd* [2010] ZAFSHC 134.

and ultimately in the absence of consensus or resolution contested issues are determined by a vote. Trustees may participate in a vote in three ways: vote for or against a motion or abstain from voting altogether. All three forms of participation in the decision-making are self-conscious and deliberative actions.

[11] Participation is elicited after proper notice to the trustees. A trustee who has no knowledge of decisions taken or to be taken on behalf of a trust and consequently does not vote in any decision, cannot be said to have participated in decision-making on behalf of that trust. Consequently even if the majority of trustees arrive at a decision but without the participation of all the trustees, unless the trust deed authorises otherwise, the ensuing decision albeit a decision of the majority is not a decision on behalf of the trust.[6] The decision purportedly taken by two of the three trustees required in terms of the trust deed in *Land and Agricultural Bank of South Africa* v *Parker and Others* was invalid for this reason. The third trustee had not been consulted or invited to participate in any process in which 'the majority will was exercised'.[7]

[12] Just as in *Parker* one of the three trustees in *Van der Merwe* had not been notified or given any opportunity to participate in the decision of the trust to sell fixed property.[8] Even though the trust deed which provided that majority decisions would bind the dissenting or absent trustees it could not avoid the application of the rule that the 'minority is obliged to act jointly with the other trustees in executing the resolution adopted by the majority'.[9] This was said in the context of a dispute concerning the transfer of immovable property.

[13] The obligation to act jointly does not imply that the minority has to agree with the majority or that votes have to be unanimous for any decision to be binding on the trust. *Van der Merwe* confirms that

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[6] *Van der Merwe* para 16, 17
[7] *Van der Merwe* para 17.
[8] *Van der Merwe* para 16.
[9] *Van der Merwe* para 16.

> 'unanimity amongst the trustees is not required in order for decisions to be made effectively in respect of transactions concerning the administration of the trust and the dealing with its assets in terms of the powers conferred on the trustees in terms of clause 6 of the trust deed. It is sufficient if the relevant decision enjoys the support of a majority.'[10]

[14] Dissenting trustees must subject themselves to the democratic vote of the majority.[11] Trustees have to present a united front irrespective of internal descent. Such 'unity of purpose and function' must be manifest publicly usually by a written resolution signed by all the trustees.[12] For 'the external sphere' *Van der Merwe* required 'resolutions which have to be supported by its full complement of the trust body.' *Steyn* continues:

> 'A quorate meeting of trustees may perfectly take a valid decision on the internal front. However, such decision will remain only a decision and not a valid resolution unless it also enjoys the support of an absent trustee(s) in whose absent (sic) it was taken.' *(sic)*[13]

And

> 'A majority of trustees in office may form a quorum internally at a trust meeting, but can still not externally bind a trust by acting together. These are two features of the decision that are instructive. It is not the majority vote, but rather the resolution by the entire complement, which binds a trust estate. A trust operates on resolutions and not votes.'[14]

[15] *Van der Merwe* was a dispute about an immovable property transaction. Its insistence on a resolution to communicate the decision of the trust must be seen in that context. I do not read *Van der Merwe* to be inflexible about the form by which decisions of trust are communicated publicly unless as in the case of a property transaction a resolution of the trust is prescribed by law. Otherwise any other unambiguous, accessible form of communicating decisions of the trust possible in the information age will do.

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[10] *Van der Merwe* para 16.
[11] *Van der Merwe* para 37.
[12] *Van der Merwe* para 19; 37-39; *Steyn NO and Others* v *Blockpave (Pty) Ltd* (2959/2010) [2010] ZAFSHC 134 (12 October 2010).
[13] *Steyn NO and Others* v *Blockpave (Pty) Ltd* para 38
[14] *Steyn* para 39.

[16] Regarding meetings *Van der Merwe* applying *Parker* elaborated on how the trustees should take decisions. The court acknowledged that

> 'A majority decision is competent only if adopted by a majority of the trustees present at a quorate meeting of trustees. Whether such a 'meeting' would need to be one at which the trustees attending were physically present together, or whether the 'meeting' could be held in some alternative form, is a question which it is not necessary to decide. It is evident, however, that in order to qualify as 'a meeting', all the trustees in office would have to receive notice thereof so as to be able to participate in it if they so wished.'[15]

Although the court in that case did not decide on the meaning of 'meeting' the trust deed did provide for resolutions to be contained in more than one document signed by the trustees.

[17] The court in *Steyn* adopted a similar approach when it said:

> 'The two [trustees] could theoretically have taken the decision to sue the respondent on behalf of the trust provided the third applicant was consulted in advance about such matter. Whether she was for or against such a decision would not have been an important matter, if only she was properly consulted but outvoted by two to one …'[16]

[18] The issue in that case was also whether that trust was properly authorised by the trustee to institute those proceedings.[17] The third trustee was not consulted in that case, consequently the decision albeit a vote by the majority of two trustees did not amount to proper authorisation for the trustees to institute proceedings.[18]

[19] The court also acknowledged that participation as trustee need not necessarily be by the physical presence of the trustee at the meeting.[19]

[15] *Van der Merwe* para 16.
[16] *Steyn* para 14.
[17] *Steyn* para 7, 10.
[18] *Steyn* para 15 .
[19] *Steyn* para 16

Physical presence at meetings is not required at all times but participation and input in the making of all decisions is essential.[20] All that is required is that all trustees who are required to participate in the decision have an opportunity to do so and they would be bound by the decision of the majority participating in such a decision.

[20] Turning to the application of the above precedents to this case, the fourth respondent was aware of these proceedings when the application was served on him in July 2016. If not by 22 July 2016 when second and third respondents adopted the resolution to litigate then certainly by 11 January 2017 when they sought ratification he had an opportunity to participate in the decision on behalf of the first respondent. He consciously chose to abstain. The same attorneys for the first to third respondents represent him. His attorneys asked him to support their case with a confirmatory affidavit but none has been forthcoming. Even though the fourth respondent did not attend meetings of the trustees he was aware of resolutions that were being proposed and had an opportunity to participate in the decision by abstaining.

[21] He has a fiduciary and professional duty to respond to these proceedings and he has done so by abstaining. His reasons for abstaining are not material to this application. Importantly, by allowing the attorneys to represent him and to continue with the litigation unimpeded he is acting jointly with the other trustees to present publicly a united front. If his abstention and omissions amount to undermining the majority, that would require going into the minority trustee's reasons. That I am not required to do.

[22] In passing I mention that although decisions by majority vote is the norm, one should always beware of the 'tyranny' of the majority. Especially when trustees are also beneficiaries conflicts of interests between their fiduciary duties, their personal interests and the interests of non-trustee beneficiaries can arise. An independent professional who disagrees with

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[20] *Steyn* para 18-19

beneficiary trustees might often find herself in the minority. If the minority's stance is in the best interest of the trust, then she should not be ousted from access to persuade a court merely on the basis that she lacks standing to represent the trust. If majority rule prevailed absolutely, injustices could go unchecked.

[23] In these circumstances the decision of the trust to litigate and to appoint attorneys is manifest from the resolution signed by the majority of two trustees, the emails from the fourth respondent and his conduct in allowing the litigation to proceed unimpeded. To insist on having the fourth respondent's signature on the resolution would amount to putting form over substance.

[24] The trust deed provides for meetings of the first respondent in paragraph 24.1 for resolutions to be passed. The applicants submit that the wish of the donor was that trustees be present when issues are discussed. Nothing in the trust deed suggests that the donor intended 'meeting' to be restricted to 'meeting physically in the presence of one another.' Naturally the donor could not have contemplated the technological revolution that has occurred since the formation of the first respondent in 1995. It would frustrate the first respondent from achieving its objectives efficiently if a narrow meaning is attributed to the word 'meet' and 'meeting', not to mention the unnecessary financial burden upon the first respondent convening physical meetings of the trustees when the same objectives can be accomplished electronically.

[25] Given my pragmatic approach to compliance with the formalities regarding standing, and the fact that the fourth respondent received notice of the resolution and these proceedings it is not necessary to canvass which provisions of the Companies Act of 2008 would apply to notices, meetings and keeping of records. Furthermore, the applicants' criticism of the first to fourth respondents is pitched no higher than their alleged citation of the

incorrect section and not that the first to fourth respondents failed to comply with relevant provisions of the Act.

[26] My approach is also informed by a consideration not raised by either side, namely, that standing implicates the right of access to the courts and is therefore a constitutional issue.[21] Any limitation on the right must be reasonable and justifiable in a democracy.[22] All the objections the applicants raise against the resolutions are formal; substantively the fourth respondent received notice and participated in the decision on behalf of the first respondent by abstaining. Therefore they are not reasonable and justifiable limitations sufficient to occlude the first to fourth respondents from exercising their right of access to the court.

[27] I turn now to the substantive dispute concerning the respective claims of each side. The applicants seek to enforce the settlement agreement referred to as LLG4 dated 17 November 2011 that was the outcome of litigation under case no. 1305/2011. A term of the settlement agreement was that it would be made an order of court. This was not done.

[28] On 17 November 2015 Ms Gray replied to applicants' attorney Mr Geyser of Venns saying that her file pertaining to the settlement agreement had been archived and might have been destroyed. The only explanation to emerge from the pleadings as to why the settlement agreement was not made an order of the court appears from an email dated 25 November 2011 from Mr Smythe of Austen Smith to 'Zelda' stating the following:

> 'You ask for the entire Agreement to be made an Order of Court. It is a longstanding practice of our Division that only those portions of settlement agreements which are capable of judicial enforcement, can be made an Order of Court. This differs from the Gauteng practice, and presumably yours. What I have done, therefore is prepare a Draft Order which I am reasonably confident the Court will be prepared to grant. Obviously we will need to let the

[21] S 34 of the Constitution of the Republic of South Africa, 1996.
[22] S 36 of the Constitution.

> other side know by giving them a copy of this document, but before we submit it to them, could we have your comments and suggestions?'

There is no evidence of what the response was to this email.

[29] On 30 November 2011 Mr Richard Scott of Austen Smith wrote to G M Parker Attorneys as follows:

> 'In respect of Case No. 1305/2011, you are to file a Notice of Withdrawal of Opposition to this Application, so as to enable an order by Consent in terms of the Draft Order Prayed annexed hereto can be taken on 12 December 2011.'

[30] The draft order prayed and obtained purportedly by consent consists of four paragraphs of two lines each dealing with matters of interest to the trust exclusively. It declares certain amendments to the trust deed to be null and void, the removal of three trustees including the two applicants in this application and the appointment of the second and fourth respondents as trustees. There is a disturbing absence of the applicants' claims against the first respondent for payments referred to in the settlement agreement and claimed in the notice of motion in this application.

[31] Mr Smythe was partially correct in saying that this Division was reluctant to make settlement agreements orders of court; the complete answer is that settlement agreements would not be made orders of court unless they are capable of enforcement. Undoubtedly the applicants' claim for the payment of a fixed amount plus interest from specified dates is enforceable. The failure by those responsible for giving full effect to the settlement agreement and recording the obligation of the first respondent to the applicants is at best a dereliction of their professional duties. The applicants' erstwhile attorneys must share responsibility for failing to ensure that the applicants were protected in the court order. If they had done so then

the applicants who are elderly, retired and financially insecure would have been able to execute to enforce their claim.

[32] I intend to rectify this omission unless I find that the variation agreement exists and is valid.

[33] The first to fourth respondents seek to enforce a variation agreement LLG6 on the basis that it was the outcome of protracted negotiations between the parties, that it was prepared by the applicants' attorney and presented as a proposal on their behalf after they had signed it. Furthermore by resolution dated 16 September 2015 the third respondent accepted the variation agreement on behalf of the first respondent. The applicants contend that they withdrew the variation agreement before the first to fourth respondents accepted it. The first to fourth respondents deny that the applicants withdrew the variation agreement and that no variation agreement came into being.

[34] On the undisputed facts the parties had recorded the material terms of an agreement in LLG6. On 14 September 2015 Mr De Wet of Acutt Worthington representing the applicants forwarded the draft agreement for consideration by the first to fourth respondents. On 7 October 2015 the attorney for the respondents, Ms Gray responded that her clients were satisfied with the draft and requested the applicants to sign and deliver the original agreement to her clients. Ms Gray noted in her email to Acutt Worthington that the second applicant alleged that she had delivered the agreement to the home of her clients but that the latter could not find it. Consequently, Ms Gray advised her clients 'not to effect payment again unless the original signed agreement is delivered to them'.[23]

[35] The applicants do not mention the date when the second applicant retrieved the variation agreement from the third respondent's home. However from the email of 7 October 2015 from Ms Gray to Acutt Worthington it

[23] Page 167 of the pleadings

emerges that at least by that date the second applicant had retrieved the variation agreement with their signatures on it.

[36] By letter dated 21 October 2015 the applicants now represented by Mr Geyser of Venns wrote to the first to fourth respondents attorney, Austen Smith reporting of his instructions to investigate the settlement agreement under case number 11305/11. Although the letter did not mention the variation agreement, the nature of the enquiries and the fact that the applicants had changed attorneys from Mr De Wet to Mr Geyser suggest that they intended to pursue their rights in terms of the settlement agreement. By direction of Mr Callum Smythe of Austen Smith Mr Geyser redirected his enquiries by letter dated 11 November 2015 to Ms Gray. In that letter he added that he would be proceeding urgently to protect the applicants' interests.[24]

[37] Ms Gray's reply on 17 November 2015 added that the settlement agreement was 'irrelevant' as the parties had concluded the variation agreement which she attached, affirming that her client had 'accepted alternatively hereby accepts' the variation.[25] She also stated that her client had not yet effected payment for October 2015 as initially they could not locate the signed agreement.

[38] The first to third respondents submit a resolution purportedly signed on 16 September 2015 in terms of which the second, third and fourth respondents authorise the third respondent to sign the variation agreement. The draft resolution together with the draft variation agreement had been sent under cover of the email of 16 September 2015 from Ms Gray to the third respondent. However from her email of 7 October 2015 it is clear that the third respondent had not received the variation agreement with the applicants' signature and that she had not herself signed it.[26] She signed it only on 23 October 2015 by which time the applicants had withdrawn their copy of the

[24] page 78 of the pleadings
[25] page 84 of the pleadings
[26] page 166 of the pleadings

variation agreement and were already consulting Mr Geyser to pursue their rights in terms of the settlement agreement.

[39] Accordingly I find that the parties to the variation agreement anticipated that it would be enforceable only after they signed it. The third respondent had not signed it before the applicants withdrew it. Consequently the variation agreement was not concluded. Furthermore, the unfortunate handling of the applicants' rights to payment under the settlement cries out for a correction.

[40] Order

a. The first respondent is ordered to pay the first and second applicants jointly the following after deducting payments already made to the applicants or on their behalf:
   i. a sum of R15 000.00 per month in respect of their living costs from the date of 30 June 2012 until the death of the surviving of the first and second applicants;
   ii. an annual escalation of 10% on the sum of R15 000.00 until the death of both the first and second applicants calculated from 31 January 2013;
b. Interest *a tempore morae* on all late payments as follows:
   i. at the rate of 15.50% per annum on all amounts which were due at the end of each month from the date of the said agreement being 19 November 2011 to 31 July 2014;
   ii. thereafter from 1 August 2014 up to and including the 23 February 2016 at the rate of 9% per annum;
   iii. and thereafter from 1 March 2016 at a rate of 10.25% per annum.
c. Cost of suit.
d. The counter-application is dismissed with costs.

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D. Pillay J

APPEARANCES

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		Ref: J vd Merwe
Date of Hearing	:	31 January 2017
Date of Judgment	:	07 February 2017