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HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

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

1/7/2015

1/7/15

Case No. A892/2014

In the matter between:

MARIA ELIZABETH SMITH	Appellant
and	
ABSA BANK LIMITED	Respondent

JUDGMENT

MEYER, J

[1] On 12 August 2014, the Gauteng Division, Pretoria (Bam J) granted judgment against the appellant (the surety) in favour of the respondent bank (the creditor). The appellant executed a deed of suretyship in favour of the bank and bound herself as

surety and co-principal debtor with the trustees for the time being of the Neelmarie Trust (the trust) for the due payment of any amount owing by the trust to the bank. The bank claimed that the trust owed it a total sum of R1 012 592.35 plus interest arising from three instalment sale agreements. The court a quo inter alia found that the three instalment sale agreements had been validly concluded between the bank and the trustees of the trust and it held the surety liable on the deed of suretyship. The appeal to this Full Court is with the leave of the court a quo.

[2] Mr Cornelius Rudolph Smith was the trust donor. He, his wife, who is the appellant, and Ms Estelle Keet were the first trustees. Mr Smith and the appellant, their issue and adopted children are the income and capital beneficiaries of the trust. Ms Keet resigned as a trustee and Mr Smith and the appellant were the only two trustees in office when the instalment sale agreements were concluded on 6 February 2008, 1 April 2009 and 9 April 2009.

[3] The appellant raised a variety of defences to the bank's claims on the papers and before the court a quo, but before this court her central defence relates only to the questions of 'trust capacity' and 'trustee authority'. (See: *Nieuwoudt and another NNO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA); *Land and Agricultural Bank of South Africa v Parker and others* 2005 (2) SA 77 (SCA)).

[4] In her answering affidavit the appellant denied '. . . that the person who purported to sign the agreements on behalf of the Neelmarie Trust had authority to bind the Trust or to enter into the agreements.' She also states that the trust estate could not be bound because the trust deed requires that there must be a minimum of three trustees

and they were only two in office at the time when the instalment sale agreements were purportedly concluded.

[5] In *Parker*, para 11, the Supreme Court of Appeal held-

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

[6] Clause 5.1 of the trust deed in question prescribes that there shall at all times not be less than three and not be more than five trustees. This provision, however, must be read in the context of the trust deed as a whole. Clauses 7.2 - 7.4 provide as follows:

'7.2 Alle besluite wat die trustees neem, tensy in hierdie akte anders aangedui, geskied by wyse van 'n gewone meerderheid besluit van al die trustees (en nie net van die trustees teenwoordig op 'n spesifieke geleentheid nie) . . . .

7.3 Ongeag enige andersluidende bepaling in hierdie akte sal alle besluite by wyse van 'n eenparige besluit van trustees geskied indien daar op enige stadium slegs twee dienende trustees is.

7.4 Indien daar op enige stadium slegs een dienende trustee is mag sodanige trustee handgende die aanstelling van verdere trustees soos bepaal in hierdie akte slegs administratiewe funksies in sy/haar hoedanigheid as sulks uitoefen en sal hy/sy in besonder nie die bevoegdheid hê om ten gunste van homself/haarself of sy/haar boedel oor enige trustbates of gedeeltes daarvan te beskik nie.'

Clause 14.5 is also presently relevant. It reads:

'14.5 Onderhewig aan die bepalings van paragraaf 14.6, mag die Trustees te enigertyd en van tyd tot tyd en tot en met die beëindiging van die trust die netto inkomste van die trustfonds, wat mag insluit 'n verlies, betaal of aanwend tot die voordeel van alle of sodanige een of meer van die begunstigdes in sodanig aandele indien meer as een, en op sodanige wyse en onderhewig aan sodanige voorwaardes en beperkings as wat die trustees van tyd tot tyd in hulle algehele diskresie mag bepaal. Die diskresie is egter onderhewig daaraan dat die minimum aantal trustees in paragraaf 5.1 genoem, wel in hulle amp is.'

[7] The trust deed, therefore, empowers two trustees to act and to bind the trust estate in the absence of the minimum of three trustees in office. One trustee in office is only empowered to perform administrative functions. But two trustees in office may exercise most of the powers conferred upon the trustees provided all their decisions were unanimous. A minimum of three trustees, however, are required to exercise certain powers such as those contemplated in clause 14.5 of the trust deed. The power to have concluded the instalment sale agreements in question is not one that may only be exercised when the minimum of three trustees are in office. There is, therefore, no merit in the appellant's contention that the trust suffered from an incapacity that precluded the conclusion of the instalment sale agreements.

[8] I now turn to the appellant's contention that Mr Smith was not authorised to conclude the instalment sale agreements in the absence of joint and unanimous action of both trustees. 'It is a fundamental rule of trust law . . . that in the absence of contrary provision in the trust deed the trustees must act jointly if the trust estate is to be bound by their acts.' (*Parker*, para 15.)

[9] The instalment sale agreements in question are annexed to the founding papers. They were not signed by the appellant in her capacity as the only other trustee of the

trust. I have mentioned that the trust deed requires the decisions of two trustees to be unanimous. It also confers the power on the trustees to authorise one or more of them to sign certain documents (and I accept that the instalment sale agreements in question fall within the ambit of the documents so contemplated) and to act on behalf of all the trustees (clause 13.1.48). Whether Mr Smith was authorised or had the ostensible authority to act on behalf of the other trustee is a factual issue (see *Nieuwoudt* para 23).

[10] The bank did not set out to establish Mr Smith's authority or 'that it thought or was entitled to think' that he was authorised by his wife to conclude the instalment sale agreements (see *Parker* para 18). It is not suggested that a decision or decisions to conclude the instalment sale agreements were or must be inferred to have been taken unanimously by the two trustees prior or at the time of the conclusion of each agreement. Inferences can only be drawn from established facts. In reply to the appellant's averments that the trust could not be bound while there were fewer than three trustees and that Mr Smith was not authorised to conclude the instalment sale agreements the bank contented itself by stating that those averments 'will not assist' her and 'can be no valid defence' to the bank's claims against her 'in her capacity as surety.'

[11] The stance adopted by the bank was therefore merely that the defences under consideration against the validity of the principal debts do not avail the surety. It erred in its stance. It is a trite principle of law that a surety's obligation is an accessory obligation and for there to be a valid suretyship there has to be a valid principal obligation between the debtor and the creditor. (See: Caney *The Law of Suretyship in South Africa* 5th Ed. At 28; *LAWSA* Vol 26 2nd Ed para 287.) There are accordingly also

no real disputes of facts raised on the papers that should be referred to trial in terms of Uniform Rule 6(5)(g), as the respondent's counsel requested this court to do should the appeal succeed.

[12] This case yet again demonstrates the need to be careful when dealing with a trust. (See *Nieuwoudt* para 24; *Parker* para 1.)

[13] In the result I propose that the following order be made:

(a) The appeal succeeds with costs.

(b) The order of the court a quo is set aside and replaced with the following:

'The application is dismissed with costs.'

P.A. MEYER
JUDGE OF THE HIGH COURT

[11] I agree.

S.A.M BAQWA
JUDGE OF THE HIGH COURT

[12] I agree and it is so ordered.

C. PRETORIUS
JUDGE OF THE HIGH COURT

DATE OF HEARING:	17 June 2015
DATE OF JUDGMENT:	June 2015
FOR APPELLANT:	Adv CP Wesley
INSTRUCTED BY:	Friedland Hart Solomon & Nicolson, Pretoria
FOR RESPONDENT:	Adv J Minnaar
INSTRUCTED BY:	Hammond Pole Majola Inc, Johannesburg C/o Oltmans Attorneys, Pretoria