

IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO.: 8598/11

In the matter between:

MAXWELL BARRINGTON DALES NO
ANDREW MARK DUNSDON NO
FAY MARY PICKUP NO
UDO HERBERT GOEDEKE NO

First Plaintiff
Second Plaintiff
Third Plaintiff
Fourth Plaintiff

and

DAVID ALLEN JAMES HERD

Defendant

JUDGMENT

Delivered : 5 September 2013

JEFFREY AJ:

- [1] This is an action for provisional sentence.
- [2] The plaintiffs have been cited in their capacities as the trustees of the MBD FAMILY TRUST ('the trust').

- [3] The plaintiffs in their said capacities sued the defendant for payment of R649 474.00, interest and costs in terms of an acknowledgment of debt.
- [4] The defendant has admitted in his opposing affidavit that he signed the acknowledgment of debt.
- [5] The defendant did not, however, advance any defence on the merits contending he had been advised that, although he had a *bona fide* defence to the plaintiffs' claim, he was not required to set out any defence because the proceedings brought against him by the applicants were fatally defective.
- [6] The proceedings were fatally defective, so the defendant contended, because:
- (a) A notice contemplated in s 129 of the National Credit Act, No. 34 of 2005, was sent to his previous business address by the plaintiffs. They knew, so he said, that this business had been sold and that he had moved from that address during or about June 2001. He denied furthermore that this notice had been received

by him. He contended that the s 129 notice had not been given to him by the plaintiffs before these proceedings were instituted and this failure constituted an irregularity that could not be cured on the papers.

- (b) At the time when the proceedings in this matter were instituted, there were in fact *five* and not four trustees as cited in the provisional sentence summons. The defendant annexed a copy of the Letters of Authority issued by the Master on 20 July 2011 indicating that, as at the material date, there were *five* trustees of the MBD Family Trust. In essence this second point taken by the defendant is that the provisional sentence action against him is a nullity because all the trustees were not joined in suing him.

- [7] Had the defendant raised the first point only, I would have been inclined to grant an order in terms of an amended order prayed handed to me by the plaintiffs' counsel at the commencement of his argument. The terms of this amended order were based on an order granted by this court in *Absa Bank Ltd v Mkhize & Two Similar Cases* 2012 (5) SA 574 (KZD).

- [8] I, however, do not agree with the submission by the plaintiffs' counsel that the second point is merely a technical one that can be brushed aside as 'grasping at straws' by the defendant. On the contrary, it is an issue that goes to the very heart of the juristic nature of trusts and it must be closely examined in the light of the facts before the court.
- [9] The plaintiffs admit in their replying affidavit that there were five trustees of the trust when the provisional sentence action was instituted. The replying affidavit was deposed to by the first plaintiff and confirmatory affidavits were delivered by the remaining plaintiffs and the trustee who was not joined, Mr Brian Vernon Dales. A confirmatory affidavit was also delivered by the plaintiffs' attorney.
- [10] The first plaintiff explained that at the time when the plaintiffs' attorney was first instructed to represent the trust in some unrelated legal matters, there were only four trustees and the plaintiffs' attorney was told this. But towards the end of August 2011 when the defendant allegedly did not pay the amount due in terms of the Acknowledgment of Debt, there were five trustees – the 'missing' trustee, Mr Brian Vernon Dales, having been appointed in the interim – and all five, according to the first

plaintiff, "collectively agreed to instruct (the plaintiffs' attorney) to take legal action against the defendant ...". He said that both he and Mr Brian Vernon Dales, acting in terms of this collective agreement and "duly authorized by all the trustees" consulted with the plaintiffs' attorney. But, he continued: "Unfortunately, during the consultation it was not brought to (the plaintiffs' attorney's) attention that Brian was in fact now a trustee of the trust." That was the only reason, he said, that the 'missing' fifth trustee was not cited in the action. He added that the plaintiff's attorney had simply relied on the information previously given to her about who the trustees were. In passing, I do not think that the plaintiffs' attorney acted improperly in this regard. The plaintiffs on their own showing only have themselves to blame for this mis-instruction to their attorney.

[11] The first plaintiff denied in these circumstances that the plaintiffs were not acting jointly in instituting the provisional sentence action against the defendant, contending that it was "certainly not a situation where Brian had not authorised the action against the defendant."

[12] As I have mentioned, the first plaintiff specifically averred that Mr Brian Vernon Dales and he were "duly" authorised by all the

trustees to instruct that plaintiffs' attorney to institute action against the defendant.

[13] Such "due" authorisation was not established. The trust deed attached by the defendant to his opposing affidavit - and not denied by the plaintiffs - provided in clause 20 with regard to trustees meetings that: "The trustees shall keep a minute book wherein shall be recorded all decisions come to by them in connection with any matter affecting the trust fund..."

[14] In the absence of a meeting of the trustees, clause 21 provided for round robin resolutions as follows: "A resolution in writing, signed by the trustees then in office, shall have the same force and effect and be valid and effectual as if it had been passed at a meeting of trustees duly called and constituted and shall be entered into the minute book as a resolution of the trustees."

[15] No resolution authorizing the action to be instituted against the defendant was relied upon by the plaintiffs. And the plaintiffs' replying affidavit makes no mention of such a document. Nor was an extract from the trustees' minute book referred to by the plaintiffs. If the first plaintiff and Mr Brian Vernon Dales were "duly" authorized to represent all the trustees in instructing their

attorney to institute action against the defendant, then these documents should have been placed before the court particularly once the issue of the non-joinder of all the trustees had been raised by the defendant.

[16] The general principle with regard to the joinder of all the trustees was restated by Cameron *et al* in *Honoré's South African Law of Trusts* 5ed § 256 page 419, as follows: "(u)nless one or more of the trustees are authorised by the others, all trustees must be joined in suing and all must be joined when action is instituted against a trust."

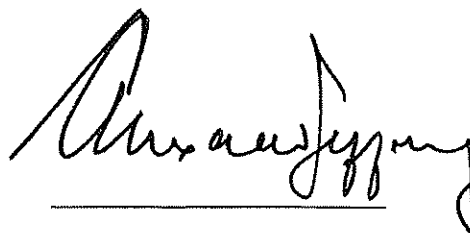
[17] This general principle was confirmed and explained in *Bonugli v Standard Bank of SA Ltd* 2012 (5) SA 202 (SCA) 207F-G at para [15] where Wallis and Petse JJA said: "It is of course trite that a trust does not have legal personality. A trust is in truth an accumulation of assets and liabilities, which constitute the trust estate vesting in the trustee. The trust can only act through its trustees. Trustees must therefore act jointly unless the trust deed provides otherwise. It follows that in legal proceedings the trustees must all be cited in their representative capacity as such, as the trust itself cannot be either a plaintiff or defendant as an entity in its own right." (footnotes omitted)

matter arising out of the trust ...". The defendant's counsel submitted that the reference to "the trustees" in this clause must mean all the trustees. I agree.

[20] Clause 27 does, however, provide that any trustee is entitled under a power of attorney to delegate his powers as trustee to any person approved of by his co-trustees. But it is not alleged that the 'missing' trustee, Mr Brian Vernon Dales, had in fact done this. In any event, such an allegation would be contrary to the first plaintiff's version of events that I have set out above; namely, that the non-joinder of all the trustees of the trust was the result of a mis-instruction to the plaintiffs' attorney. This is completely different from Mr Brian Vernon Dales authorising his remaining co-trustees to sue in his name. The latter was not established by the plaintiffs.

[21] The provisional sentence summons is fatally defective. I find that the result of the non-joinder of all the trustees of the trust is that this action is a nullity.

[22] The plaintiffs' action for provisional sentence is accordingly dismissed with costs.

A handwritten signature in black ink, appearing to read 'Jeffrey AJ', written over a horizontal line.

JEFFREY AJ

Counsel for the plaintiffs	:	Mr S Hoar
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