DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
8-11-2009 SIGNATURE

9/12/09
REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 1796/08

IN THE MATTER OF:

ANDRIES PETRUS PRETORIUS **PLAINTIFF**

AND

PETRUS CORNELIUS MEYER NO

ABRAHAMA DE KLERK NO
(In their capacity as co-trustees of the
MAHEMSRUS TRUST) **DEFENDANT**

JUDGMENT

MAKGOBA, J

[1] An unfortunate disaster that gave rise to the present case occurred on the 7th of September 2006 during which the property known as Plot 67 Cuckoo Street, Irene Park, Klerksdorp belonging to a Trust, viz Mahemsrus Trust was gutted by fire. The property was insured with ABSA Insurance and a claim for compensation was subsequently lodged by one of the trustees with the assistance of their accountant, Mr Jan Bothma. The co-trustees of the aforesaid Trust are Mr Petrus Cornelius Meyer and Mrs Abrahama De

Klerk. The two trustees are cited in these proceedings in their representative capacities as trustees of the Mahemsrus Trust.

[2] The Plaintiff, an employee of a firm of liquidators but acting in his personal capacity, sued out a summons against the defendant trust for payment of the sum of R247 898-55, being the balance of an amount representing 10% commission on an insurance payout from ABSA Insurance totalling R2 524 951-20, allegedly due as a result of an alleged oral agreement entered into between the plaintiff and the defendant on 29 November 2006. It is alleged that in terms of the oral agreement the plaintiff would act as agent for the defendant to handle and process the insurance claim.

[3] The main dispute between the parties is whether:

3.1 Mr Meyer, one of the trustees, at all material times duly represented the defendant Trust;

3.2 there was a contract of mandate whereby plaintiff should have handled and finalised the insurance claim on behalf of the defendant;

3.3 there was an undertaking to pay remuneration;

[4] The plaintiff alleges in paragraph 3 of his particulars of claim that the defendant, the Mahemsrus Trust, was duly represented at all relevant times

by Petrus Cornelius Meyer who is one of the two duly appointed trustees of the Defendant Trust.

The defendant in paragraph 3 of its plea to paragraph 3 of the plaintiff's particulars of claim, denies the averment that the defendant, the Mahemsrus Trust, was duly represented at all relevant times by Petrus Cornelius Meyer and placed this averment to be proved by the plaintiff.

[5] The defendant further denied the existence of the alleged oral agreement. The defendant pleaded in paragraph 5.2 of its plea that it is specifically denied that the plaintiff had any influence at all on the decision to pay any amount as compensation to the Defendant arising from the insurance claim and put the plaintiff to the proof thereof.

[6] In the light of the Defendant's denials as set out above, the plaintiff bears the onus to prove that Mr Meyer was properly representing the defendant trust and further that the plaintiff was given and received any mandate to process the insurance claim on behalf of the defendant trust.

[7] Should the plaintiff succeed in proving that the defendant trust was duly represented by Mr Meyer, the matter does not end there. He still have to show that it was through his efforts or influence that the amount of R2 524 951-20 was paid out by ABSA Insurance, bearing in mind that the claim had

already been lodged through the assistance of Mr Bothma when he, the plaintiff made his first contact with Mr Meyer regarding the claim.

[8] The plaintiff testified personally and did not call any witness. He testified that he had a conversation with Mr Meyer on 29 November 2006 during which conversation Mr Meyer complained that he, Mr Meyer, does not know what is going on as ABSA paid an amount for rent for some months but then the rental payments stopped. During the conversation the plaintiff indicated that he could assist in his personal capacity with the insurance claim relating to the fire damage of the property insured by ABSA Insurance.

[9] The Plaintiff requested Mr Meyer to bring all the relevant documentation for the plaintiff to read. Mr Meyer responded positively and delivered some documents, namely, a copy of the completed claim form, a copy of the Trust Deed and Master's Authorisation letter indicating who is appointed as trustees of the defendant. Subsequent to the delivery of the document the plaintiff studied same and contacted Mr Meyer to come and sign a documents the plaintiff had prepared.

[10] The document which was prepared by the plaintiff and signed by Mr Meyer is a power of attorney which is reflected on page 34 of Bundle A. The following is the contents of the document:

"SPECIAL POWER OF ATTORNEY

I, the undersigned, Petrus Cornelius Meyer (Identity Number 4003315050088) Hereby nominate, constitute and appoint Andries Petrus Pretorius ID. 6407235022085 to be my lawful agent, in my name, place and stead to lodge a claim against ABSA Insurance, arising from a claim which occurred on 7 September 2006, to be done whatsoever shall be requisite, as full and effectually, for all intends and purposes, as I might or could do if personally present and acting herein hereby ratify in, allowing or confirming all whatsoever my said Agent shall lawfully do, or cause to be done, by virtue of these presents.

Dated at Klerksdorp on this 29th of November 2006

____

Signature

As witnesses:

1. ______________________

2. ______________________"

[11] It should be noted at this stage that nowhere in the power of attorney is the name of the defendant trust mentioned. Mr Meyer does not state that "I, in my capacity as the trustee of Mahemsrus Trust ..." He states that he appoints plaintiff to be "my lawful agent, in my name" to lodge a claim against ABSA Insurance.

It is significant to state that this power of attorney was drawn up by the plaintiff who had the Trust Deed in his possession and had studied it. I shall return to this aspect later in my judgment.

[12] The plaintiff gave evidence explaining that after he perused the Trust Deed with specific purpose to determine the identity of the Trustees he made a telephonic contact with the other trustee, Mrs De Klerk, who effectively did not want to discuss the matter regarding the fire damage claim with the plaintiff.

[13] The power of attorney signed by Mr Meyer was forwarded to ABSA Insurance by the plaintiff under a covering letter dated 29 November 2006. In the said letter the plaintiff clearly indicated that he is acting on behalf of Mr P C Meyer. No mention is made of the defendant trust. This letter is reflected on page 32 of bundle A.

[14] The plaintiff alleges that he agreed with Mr Meyer that he, the plaintiff would be paid 10% of the amount ABSA Insurance would pay out.

The plaintiff conceded that he never prepared any invoice, account or written demand for payment of the amount calculated as 10% of the payment amount. It is common cause that ABSA Insurance ultimately made a payout amount of R2 524 951-20 direct to the defendant trust and that the plaintiff was not paid any amount out of the aforesaid payout.

[15] Mr Meyer testified that he is the co-trustee of the Mahemsrus Trust and that the trust owned the property that was damaged by the fire on 7 September 2006. Mrs De Klerk is the other trustee. That he lodged the insurance claim with ABSA Insurance through the assistance of the Trust accountant, Mr Bothma. After the claim was lodged an assessor appointed by ABSA Insurance advised that he would wait for about six months for the finalisation of the claim.

[16] According to Mr Meyer the plaintiff offered to help him to process the insurance claim but he declined the offer and told the plaintiff that Mr Bothma would help. When the plaintiff approached him, he the plaintiff informed him that he could get him a better and higher payout of up to R4 500 000-00 from ABSA Insurance. Although he did not believe him Mr Meyer agreed that in that event he would be prepared to pay the plaintiff an amount of R500 000-00 as commission.

It is against this background that he furnished the plaintiff with the requested documentation and signed the power of attorney on 29 November 2006.

[17] Mr Meyer testified that he was informed by one Lily Fourie of ABSA Insurance that an offer of R2 524 951-20 was made, which offer he accepted and signed the release form at ABSA. The amount was then paid out into the Trust's bank account. Mr Meyer learnt later that a further amount of R4 596-57 in respect of his insurance premiums was refunded by ABSA Insurance.

[18] Upon insistence by the plaintiff Mr Meyer authorised ABSA Insurance to pay the amount of R4 596-57 to the plaintiff. According to Mr Meyer he gave this amount to the plaintiff as a "bonus" not as remuneration for any work done by the plaintiff.

[19] Mr Meyer denies that he agreed to pay 10% of the insurance payout to the plaintiff. He went on to state that when he dealt with the plaintiff he did that without the authority of his co-trustee and that as a trustee he is not supposed to act alone in matters involving the affairs of the Trust. That on the 29th November 2006 he and the plaintiff never discussed anything involving the trust.

[20] Mr Meyer stated that he was extremely upset and confused after the fire and did not think of obtaining the required permission from his co-trustee, Mrs De Klerk and that Mrs De Klerk would not have given permission for the defendant Trust to engage the services of the plaintiff. Mr Meyer was never cross-examined on this extremely important issue in dispute regarding the involvement of the defendant trust and/or Mrs De Klerk. On questions by the court he stated that he did inform the co-trustee Mrs De Klerk but the latter did not expressly approve of his dealings with the plaintiff.

[21] The plaintiff claims the amount sued for from the defendant, a trust, based on an alleged oral agreement. It is trite law that a trust can only be represented by its trustee(s) and can only act through the authority of its trustee(s) as it is regulated by the contents of the particular trust's deed.

[22] The Supreme Court of Appeal confirmed in *Hoosen and Others v Deedat and Others* 1999 (4) SA 426 (SCA) the principle that only actions authorised by trustees are binding.

Smalberger JA wrote as follows on page 433-434:

> "It is apparent from a consideration of the trust deed that no express provision is made for the delegation by any individual trustee of any of his rights, duties or powers. The trust deed only provides for

collective action by the trustees. Control and management of the trust vests in the trustees jointly. Where specific provision is made for the delegation of functions such delegation is made by the trustees acting in concert (or at least a majority of them). The trust deed makes no provision for the exercise of any powers or functions by individual trustees unless authorised thereto by the body of trustees. This is in keeping with the general principle that where the administration of the trust is vested in co-trustees they must execute their duties in their joint capacity."

[23] *In casu* the contents of the trust deed and specifically the definition of "Trustees" in the introduction thereof and paragraphs 4.4, 5.5.1, 5.2, 6, 8, 12.1, 12.2, 12.3 and 13 clearly indicate that all decisions regarding the trust have to be by all trustees and only one exception is provided for in paragraph 13 (the latter paragraph is not applicable herein).

The clear effect of the contents of the defendant Trust's Deed is that at no stage any single trustee can represent or bind the defendant Trust. The deed simply makes no provision for any authority or delegation to be provided to any one single trustee.

[24] In *Niewoudt and Another NNO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA) it was held that any agreement or contract by a trust not acted in jointly by the trustees renders the agreement invalid and unenforceable. The

SCA stated that where no express delegation exists, which is in any event not allowed by the defendant Trust, there simply can be no binding agreement without a joint decision by all the trustees.

See also: *Coetzee v Peet Smith Trust en Andere* 2003 (5) SA 674 (T) where Van Dijkhorst J convincingly explained the principle that trustees have to act jointly. And one should not believe that the ambit of authority conferred by a trust deed is a matter of "internal management" with which outsiders need not concern themselves.

[25] The above judgments clearly indicate that every single act done by Mr Meyer without the action been agreed to or confirmed by the other trustee, Mrs De Klerk, was invalid and unenforceable.

[26] The above principle was again reiterated by the Supreme Court of Appeal in *Land and Agricultural Bank of SA v Parker and Others* 2005 (2) SA 77 (SCA) where it was stated that the wording of the trust deed must be adhered to strictly regarding the authority of trustees to act on behalf of trusts. Cameron JA, writing for the court, said the following at page 85A-C:

> "It is a fundamental rule of trust law, which this court recently restated in *Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk* 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.

The rule derives from the nature of the trustees' joint ownership of the trust property. Since co-owners must act jointly, trustees must also act jointly."

[27] Further the SCA again reiterated in *Thorpe and Others v Trittenwein and Another* 2007 (2) SA 172 (SCA) that any agreement by a trust or on behalf of a trust must be authorised by all the trustees. It was further decided that the other contracting party wishing to hold the trust bound would be obliged to prove the existence of that authority.

[28] The discharge of such burden of proof by the plaintiff in the present case is no easy matter. In his own version the plaintiff indicates that after he perused the trust deed he drafted the power of attorney and the covering letter to ABSA Insurance (as reflected on pages 32 and 34 of Bundle A) himself. The contents of these two documents clearly indicate that the plaintiff's discussions, whatever the contents thereof, with Mr Meyer led the plaintiff himself to believe that with the knowledge obtained from the contents of the trust deed he read and the conversation with Mrs De Klerk, the plaintiff was dealing with Mr Meyer personally.

[29] As mentioned earlier the contents of the power of attorney in particular, does not refer to the defendant Trust (who is the owner of

the property) but indicates that Mr Meyer acted in his own name or personal capacity.

On this ground alone, the plaintiff cannot succeed in his claim against the defendant Trust.

[30] Having found that Mr Meyer did not have the authority to bind the defendant Trust, I do not deem it necessary to decide whether there was a valid agreement between the plaintiff and Mr Meyer in his personal capacity. Such a finding will not take this matter any further in as much as Mr Meyer personally is not before court as the defendant.

[31] I accordingly come to the conclusion that the alleged oral agreement, if ever existed, and which is at all times denied by the defendant, is simply void *ab initio* and unenforceable against the Defendant as it was, if ever it existed, simply not authorised by both the trustees of the defendant. The plaintiff failed to provide any evidence that this required authority, which was specifically denied in the plea, existed. The plaintiff has thus failed to discharge the onus of proving proper authority on the part of Mr Meyer.

[32] The plaintiff's claim against the defendant is dismissed with costs.

EM MAKGOBA
JUDGE OF THE HIGH COURT

Heard on: 26-27 November 2009 & 2 December 2009

For plaintiff:	Adv A J Le Grange
Instructed by:	Van der Walt Rossouw Neethling Inc c/o Stopforth Swanepoel & Brewis Inc Pretoria
For Defendant:	Adv J C Klopper
Instructed by:	Erasmus Jooste Attorneys c/o Savage Jooste & Adams Inc Pretoria