

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 2896/2004

In the matter between:-

GABRIELLE LUPACCHINI

First Plaintiff

ROCHELLE CONRADIE Second Plaintiff

LUIGI DAVIDE GABRIELLE LUPACCHINI

Third Plaintiff

and

MINISTER OF SAFETY & SECURITY

Defendant

HEARD ON:

17 August 2007

JUDGMENT BY:

RAMPAI J

DELIVERED ON:

15 FEBRUARY 2008

[1] The matter came by way of an action. The summons was issued on 24 August 2004. The plaintiffs, who are acting on behalf of the Lupacchini Family Trust, are suing the defendant for a payment of the sum of R2 994 756,71 plus ancillary relief. The action is defended. The defendant's plea was filed on 22 February 2005 and its special plea on 9 July 2007. Not so long afterwards and on 26 July 2007 the plaintiffs filed their amended particulars of claim.

[2] The matter was then enrolled for hearing on 8 August 2007.

Four days before the hearing was due to commence, the defendants delivered notice of an application, which application was to be heard on 14 August 2007. The main purpose of the interlocutory application was to have the defendant's special plea argued prior to and separate from the main action – *vide* case number 3642 of 2007.

[3] On 14 August 2007 the special plea could not be argued and the main action could not commence. The bickering carried on for three days. On the third day the parties agreed to file a special stated case in terms of rule 33(1). The record of the stated case consists of 107 pages which include 23 annexures. It was filed on Thursday 16 August 2007. The written heads of argument were also filed. At long last the special plea was argued on Friday 17 August 2007.

[4] I am, accordingly, called upon in accordance with the stated case to decide, firstly, whether the action for damages allegedly suffered by the Lupacchini Family Trust could validly have been instituted as it was on 24 August 2004 or at any other date prior to 15 December 2004; secondly, whether the action of the first two plaintiffs can still be entertained in view of the belated public appointment of the second plaintiff as a trustee of the Lupacchini Family Trust. The whole thing is about the issue of *locus standi in iudicio*.

[5] The historical background of the dispute will be helpful.

There were four individuals involved in the creation of the Lupacchini Family Trust, namely, Mr. Lambertus R. Preller as the founder, Ms Gabrielle Lupacchini as the one founding trustee, Ms Melinda Lupacchini also as the other founding trustee and Mr. Luigi D.G. Lupacchini as the patron or protector. These four individuals signed the trust deed in Bloemfontein on 29 September 1994. The trust deed is an agreement that binds the founder, the trustees and the patron. The date of inception of the trust was 1 October 1999.

- [6] The primary objectives of the trust are expressed as follows:

“DIE HOOFDOELSTELLINGS VAN DIE TRUST IS OM:

Tot voordeel van die begunstigdes in die Trust bates, beleggings en inkomste te bekom en dit te bestuur, administreer en uit te keer tot voordeel van die begunstigdes onderworpe aan die voorwaardes en bepalings hierin vervat en uiteengesit.”

- [7] The capital beneficiaries and the income beneficiaries of the Lupacchini Family Trust are the children of the patron, Luigi Davide Gabriele Lupacchini, living or still to be born. At the time of inception there were two living beneficiaries, namely, Lucio Antonio Gabrielle Lupacchini aged about 17 years and Massimiliano Francesco Lupacchini aged about 12 years – *vide* par. 1 annexure “Q3”. Ms Melinda Lupacchini and Mr. Luigi D.G. Lupacchini were at all times relevant to this matter, the natural guardians of those beneficiaries. The two minor children were born of their marriage.

- [8] The following are some of the provisions of the trust deed – annexure “A” – pertinent to the trustees. According to the trust deed there shall be no less than two and no more than six trustees. The board of trustees consisted of only two trustees at the time of inception, namely, Ms Gabrielle Lupacchini and Ms Melinda Lupacchini. It was envisaged that the board of trustees would have a chief executive trustee and that only such trustee may contractually bind the trust. A trustee may resign by written notice to the board of trustees – *vide* annexure “A”.
- [9] The aforesaid two original trustees were empowered to nominate additional trustees or subsequent trustees. Such an additional or subsequent trustee would have all the authority as any other trustee already in office, taking into consideration the directives of clause 5.4 annexure “A”. In the event of failure of the aforesaid trustees to nominate an additional or subsequent trustee, the trust deed authorises the patron or the president of “The Law Society” to do so – *vide* clause 7.2.5 p. 24 (part 2) annexure “A”; clause 7.3.1 p. 24 (part 2) annexure “A”.
- [10] The trustees have authority to institute legal proceedings on behalf of the trust in connection with any claim the trust may have – *vide* clause 5.3.1 p. 9 (part 2) annexure “A”. They are also authorised to appoint other persons to institute legal

action in any court of law – *vide* clause 5.3.5 p. 11 (part 2) annexure “A”.

[11] Gabrielle Lupacchini and Melinda Lupacchini were in terms of the provisions of section 6(1) of the Trust Property Control Act, No. 57 of 1988, duly authorised to act as trustees of the trust. The written authorisation was signed by the Master of the High Court, Bloemfontein on 4 October 1994 – *vide* annexure “B”.

[12] At a meeting of the trustees, held on 19 October 1998, they resolved that the trust would enter into business and open a pub, a bar or a knight club at a suitable venue. At another meeting of the trustees, held on 9 November 1998, they resolved that a pub or a club would be conducted from leased premises situated at 142A Voortrekker Street, Bloemfontein – *vide* annexure “D”. At yet another meeting of the trustees, held on 20 September 1999, they decided that the Lupacchini Family Trust would register with the South African Revenue Services as a vendor for the purposes of value added tax – *vide* annexure “E” - an extract of the minutes of the particular meeting.

[13] The trustees held the meeting on 3 July 2000 where they resolved that the trust had to open a second business called “Reds Night Club” at the venue situated at 132 Voortrekker Street, Bloemfontein – *vide* annexure “F” – an extract of the

minutes of that meeting.

- [14] At a meeting held on 3 June 2003, the trustees resolved, *inter alia*, that Melinda Lupacchini should resign as a trustee and that Luigi Davide Gabrielle Lupacchini should act as a temporary trustee. In addition it was also decided that a certain Leon van Niekerk would deliver the necessary documentations pertaining to such resignation to the Master – *vide* annexure "G" – an extract of the minutes of the meeting in question.
- [15] Three weeks later, on 24 June 2003, Ms Melinda Lupacchini wrote a letter of resignation to the Master. The Master received the letter in question approximately nine weeks later on 2 September 2003 to be precise – *vide* annexure "H" - an official rubberstamp endorsement by the Master on the same letter.
- [16] The Master replied Melinda Lupacchini's letter by means of two letters on 3 September 2003. The one letter was addressed to Me G. Lupacchini, 49 Ryk Tulbach Street, Bayswater, 9301. At that time Ms Melinda Lupacchini and not Ms G. Lupacchini was resident at this particular address – *vide* annexure "H1" – a copy of the first letter. The other letter was addressed to the same person, namely, Me G. Lupacchini of 229 Andries Pretorius Street, Bloemfontein, 9301 – *vide* annexure "H2" – a copy of the second letter in

question. The address of the second letter was and still is the address of the trust as was supplied to the Master upon registration of the trust approximately nine years earlier. It was also the address where Ms Melinda Lupacchini and her husband, Luigi Lupacchini, resided until 1997. On 3 September 2003 the couple was resident elsewhere. The second letter was returned to the Master as “unclaimed” almost six weeks later.

[17] The trustee who notified the Master of her intention to resign, was Ms Melinda Lupacchini. However, the Master did not respond directly to her. Instead, the Master replied to her letter but addressed the replies to Me G. Lupacchini, supposedly Ms Gabrielle Lupacchini. She was the executive trustee which was why the Master wrote the letters to her. Ms Gabrielle Lupacchini did not reside at any of the two addresses. As on 3 September 2003 Ms Melinda Lupacchini was staying at the first address, but as already pointed out, no letter was addressed to her. None of the three plaintiffs received any of the two letters, annexures “H1” and “H2” and none of the two letters ever came to the knowledge of Ms Melinda Lupacchini.

[18] On 8 September 2003 a meeting was held between Ms Gabrielle Lupacchini, and the first plaintiff and Mr. Luigi Lupacchini, the third plaintiff. They were the remaining original trustee and the acting trustee respectively. They

resolved that:

“The trustees of the Lupacchini Family Trust hereby agree to the pursuit of a civil legal action against the State and the police for the disruption of business.”

See annexure “I” – a copy of the relevant resolution.

[19] On 13 November 2003 Ms Gabrielle Lupacchini and Mr. Luigi Lupacchini held a meeting where they decided that Ms Rochelle Conradie, then the secretary to the trust, now the second plaintiff, be appointed as a trustee with immediate effect. The appointment was made in terms of clause 7.2 of annexure “A”. As a result of the aforesaid decision the third plaintiff addressed a letter to the Master on the same day advising the Master of the said decision – *vide* annexure “K” – a copy of the relevant letter.

[20] On 20 November 2003 Ms Gabrielle Lupacchini, the first plaintiff, Mr. Luigi Lupacchini, the third plaintiff and Ms Rochelle Conradie, the second plaintiff, held a meeting where it was resolved that Ms Rochelle Conradie

“will be appointed as a trustee and all documentations and communications with the Master of the Court will be done by Leon van Niekerk.”

Vide annexure “J” – a copy of the relevant resolution. The

second plaintiff declared her willingness to be so appointed.

[21] Although Mr. Leon van Niekerk, the financial advisor to the trust, sent a copy of the resolution of 13 November 2003 – annexure “K” – together with a copy of the resolution of 20 November 2003 – annexure “J” – to the Master by post, the Master did not receive the relevant letter. However, the trust was not aware of this fact.

[22] At all relevant times thereto the plaintiffs, especially the first and the second plaintiffs, were of the opinion that the necessary steps had been taken by the aforesaid Mr. van Niekerk, on the one hand and the Master on the other, to give effect to annexure “K” and annexure “J”. They thought that the Master had duly executed whatever was necessary to have the second plaintiff appointed and registered as a trustee of the Lupacchini Family Trust.

[23] Subsequent to her private appointment as a trustee, as set out above, the second plaintiff, Ms Rochelle Conradie, attended, *inter alia*, the following meetings during which meetings certain resolutions were taken concerning the business of the trust:

- On 5 January 2005, where it was resolved that the trust “will give away” a motorcar during a three months marketing campaign – *vide* annexure “L” – a copy of the relevant resolution;

- On 14 June 2004, where the trustees resolved that the business enterprise of the trust known as “Reds” be closed – *vide* annexure “M” – a copy of the relevant resolution;
- On 12 July 2004, where the trustees resolved that the trust would open another business enterprise to be called “LuRock” – *vide* annexure “N” – copy of the extract of the resolution;

[24] As I have already indicated, the summons was issued on 24 August 2004. Two days later it was served upon the defendant. It was issued on the instructions given to the lawyers by the first and the second plaintiffs, acting as trustees of the Lupacchini Family Trust. They supplied their attorneys of record with a copy of the trust deed. According to the trust deed, as it stood at that stage, the trustees were Ms Gabrielle Lupacchini and Ms Melinda Lupacchini. The attorney concerned assumed that they were still acting as such at the time the summons and the particulars of claim were drafted. The summons was therefore issued in the names of Ms Gabrielle Lupacchini, Ms Melinda Lupacchini and Mr. Luigi Lupacchini. It was not brought to the attorney’s attention that Ms Melinda Lupacchini had since resigned and replaced by Ms Rochelle Conradie.

[25] Subsequent to her private appointment as trustee, Ms Rochelle Conradie attended and actively participated in consultations with the legal practitioners who represented the

trust. She provided documentation, facts and figures requested by counsel in order to advise on the prospects of success in claiming damages from the defendant. The opinion of counsel was only finalised subsequent to the decision to have the business enterprise “Reds” closed down on account of loss of income. After legal opinion was obtained from counsel, Ms Rochelle Conradie, together with the other trustee and patron, decided to continue with legal steps and that action should be instituted against the defendant.

[25] Ms Rochelle Conradie has been associated with the Lupacchini Family Trust for a long time since 1988 up until 20 November 2003. She attended almost all the meetings of the trustees as a secretary in order to take notes and to type all the resolutions. She is willing to formally ratify in writing the decision to institute legal proceedings against the defendant which was taken before 13 November 2003 when the Master was informed of her private appointment to serve as a trustee. At all relevant times Melinda Lupacchini was aware of the resolution to institute legal proceedings against the defendant and she was in favour thereof.

[26] Before the defendant pleaded, the defendant’s attorney mentioned to the plaintiffs’ attorney that Melinda Lupacchini, cited as the second plaintiff, had resigned as a trustee of the Lupacchini Family Trust before the action was initiated. The

discussion between the two attorneys prompted the plaintiffs' attorney to visit the offices of the Master where he perused the file held by the Master in respect of the Lupacchini Family Trust. He discovered that the Master had received no replies to the letters marked annexure "H1" and "H2". Moreover, he also discovered that as a result thereof the Master had not issued an amended letter of authority to Rochelle Conradie to act as a trustee of Lupacchini Family Trust.

[27] The plaintiffs' attorneys then took the matter up with his clients in order to respond to the aforesaid two letters from the Master – annexure "H1" and "H2". The required original letter of authority, which the Master had issued on 4 October 1994, was missing. But a copy thereof was at all relevant times still kept in the file of the Master. The attorney obtained a copy thereof from the Master.

[28] On 13 December 2004 Ms Rochelle Conradie deposed to an affidavit - annexure "P" - in which she stated that the original letter of authority had gone missing and that it could not be found. This was done in response to the Master's requirement that the original letter of authority be returned to that office so that an amended letter of authority could be issued – *vide* annexure "H1" and "H2". On behalf of the chief executive trustee, Ms Gabrielle Luppacchini, Ms Rochelle Conradie sent annexure "P" together with annexures "Q1" to

“Q5” to the Master.

[29] Two days later, on 15 December 2004, the Master issued an amended letter of authority in terms of which Ms Melinda Lupacchini was subsequently replaced by Ms Rochelle Conradie as a trustee of the Lupacchini Family Trust – *vide* annexure “R”. Over 18 months later, on 26 May 2006 to be precise, the plaintiffs’ attorneys delivered notice in terms of rule 15, whereby Ms Melinda Lupacchini was substituted by Ms Rochelle Conradie, as the second plaintiff in this action.

[30] The defendant contends that seeing that the second plaintiff was only authorised by the Master of the High Court on 14 December 2004, which date should in fact be 15 December 2004, some 15 weeks subsequent to the issue of the summons, to act as a trustee of the Lupacchini Family Trust, no valid resolution by the trustee could, alternatively, had been taken to institute such an action on 24 August 2004 and that no valid action has or could have been instituted on behalf of the trust prior to the official appointment of the second plaintiff on 15 December 2004.

[31] The plaintiff contends that, although a letter of authority in terms of which the second plaintiff was publically appointed as a trustee of the Lupacchini Family Trust, had not been issued by the Master of the High Court prior to 24 August 2004, when the second plaintiff and others called for the

summons to be issued, the second plaintiff had prior to 24 August 2004, been duly appointed in terms of the provisions of the trust deed and in pursuance of its objectives. At all times material to the action, the Lupacchini Family Trust had the necessary *locus standi in iudicio*.

[32] Sec 6(1) TPC Act No. 57/1988 which provides that any person appointed as a trustee after the 31 March 1989 shall act in that capacity only if authorised thereto in writing by the Master. The section applies to any person whose appointment was made in terms of the trust instrument, or the current legislation itself or a court order.

[33] The dispute in the case is about the legal competence of the second plaintiff to sue on behalf of the trust before she was officially authorised to act as the trustee by the Master. The general principle of litigation is that any person who has a direct and substantial interest in a matter that has to be resolved through a process of court adjudication has the necessary legal standing – *locus standi in iudicio*

[34] The crisp question in the case is the scope of the prohibition contained in the section. The language of the section is quite emphatic: anyone, however appointed as a trustee shall act in that representative capacity only if, in addition to such appointment, has been granted written public authority by the Master. Is the prohibition absolute?

[35] Mr. Wessels, on behalf of the defendant, contended that the section does not exempt any act performed by a trustee. Therefore he submitted that the provisions of the section were absolutely peremptory. *Since the second plaintiff was not yet authorized by the Master to act as a trustee, at the time the summons was issued, he contended that there was only one instead of two trustees. That being the case, he submitted further, that the trust was incapable to function.

[36] Mr Van Rhyn, on behalf of the plaintiff disagreed. He contended that the section did not affect every single act performed by a trustee. He submitted that although the provisions of the section were peremptory, the prohibition was not absolute in respect of all acts performed by a trustee. He submitted that, whether the prohibition was absolute or relative depends on the nature of the act under the spotlight.

[37] In the case of **SIMPLEX (PTY) LTD v VAN DER MERWE & OTHERS NNO** 1996 (1) SA 111 (WLD) at 112 H – I Goldblatt J said the language of the prohibition was clearly of a peremptory nature, indicating an unambiguous prohibition on anyone acting as a trustee until authorised to do so in writing by the Master. In that case the trustee's act which was under judicial scrutiny pertained to a written agreement the trustees had concluded before they were authorised by

the Master to act as such.

[38] Dismissing the submission that such an originally unauthorised and dead contractual act by the trustee was resuscitated by the subsequent ratification by the later granting of the necessary authority, Goldblatt J held that there could be no subsequent resuscitation of a stillborn contractual deal which was nullified *ab initio* by a statutory prohibition since such an unauthorised agreement is regarded by law as never having been concluded.

[39] It follows from the foregoing that a trustee's act of concluding a contract prior to the grant of written authority by the Master, is not only unauthorised but absolutely prohibited by the section.

“It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect.”

Vide **SCHIERHOUT v MINISTER OF JUSTICE** 1926 AD 99 on 109 per Innes CJ.

[40] In **VAN DER MERWE v VAN DER MERWE & ANDERE** 2000 (2) SA 519 (CPD) the court was called upon to grapple with the construction of section 6(1) Trust Property Control Act No. 57/1988. The facts were not identical to the facts in the instant case. There a trust was created on 5 March

1997. Its founder was the defendant's father. The defendant and his father were appointed as the co-trustees in terms of the trust instrument. Both of them accepted their instrumental appointment. At the time the defendant was still married to the plaintiff out of community of property. Five days after the creation of the trust, the defendant entered into an agreement with the trust, whereby he sold the farm to the trust. In his personal capacity, as the farm owner, he signed the agreement as the seller. In his representative capacity as the trustee, he signed the agreement on behalf of the trust as the buyer. The Master issued the requisite written authority sixteen days later, on 26 March 1997.

[41] As can be seen the facts in **VAN DER MERWE v VAN DER MERWE & ANDERE**, *supra*, raised the same question which arose in the case of **SIMPLEX (PTY) LTD v VAN DER MERWE & OTHERS NNO**, *supra*. In both of those cases the courts were called upon to decide whether a trustee had legal authority to bind a trust in contract without the written authority from the Master first being sought and granted in terms of section 6(1).

[42] The courts in both matters found that a trustee who acted without the Master's written authority lacked legal capacity to bind a trust contractually. Such a contract, the courts found, amounted to an unauthorised act on the part of the trustee. Griesel J came to the conclusion that such an unauthorised

contract could not be ratified by the subsequent issue of the Master's written authority. The judge expressly agreed with the conclusion of Goldblatt J in the care of **SIMPLEX** – vide par. 21 **VAN DER MERWE v VAN DER MERWE & OTHERS** at par. 21.

[43] A distinction has to be drawn between a trustee's acts in connection with litigation on the one hand and a trustee's acts in connection with contract.

[44] In **SIMPLEX (PTY) LTD v VAN DER MERWE & OTHERS NNO**, *supra* at 114 E-G Goldblatt J said the following about the distinction:

The respondents further attempted to draw an analogy between their position and that of a liquidator or trustee in insolvency who litigates without the consent of creditors (for example *Patel v Paruk's Trustee* 1944 AD 469; *Waisbrod v Potgieter and Others* 1953 (4) SA 502 (W); *Sifris & Miller NNO v Vermeulen Bros* 1973 (1) SA 729 (T)). This analogy at first seemed appropriate but on due consideration is not apposite. The cases cited deal with *locus standi in judicio* and are not of application to a contractual situation."

[45] The import of the three decisions mentioned in the foregoing quotation was summarised by Conradie J as follows in **WATT v SEA PLANT PRODUCTS BPK & OTHERS** 1998 (4) ALL SA 109 at 112 C-F:

“In *Patel v Paruk’s Trustee* 1944 AD 469 the question was whether proceedings commenced by a trustee in an insolvent estate without the consent of the Master or the creditors, were invalid. The prohibition, contained in section 73 of the Insolvency Act 24 of 1936, was directed at preventing a trustee from obtaining legal advice or employing an attorney for the institution or defence of legal proceedings on behalf of or against an estate. The important phrase in the prohibition was ‘... the trustee shall not act as aforesaid unless he has been authorised thereto by the creditors or by the Master’. **The court held that the proceedings were not necessarily a nullity if authorisation had not been obtained: the prohibition operated only between the trustee and the creditors to prevent the estate from being dissipated in fruitless litigation.**

In *Waisbrod v Potgieter and others* 1953 (4) SA 502 (W) Ramsbottom J, finding support in *Patel v Paruk’s Trustee (supra)*, held that sections 130(2) (a) and 142(4) of the Companies Act 46 of 1926 were intended to prevent the assets of a company from being squandered in useless litigation **and that this did not give the person with whom the liquidator was litigating the right to object that the latter had not been authorised to institute the proceedings.** *Waisbrod v Potgieter (supra)* as well as an earlier case followed by it, *Tannenbaum’s Executors and Tannenbaum v Quakley and the Liquidator of Varachia Store (Pty) Ltd* 1940 WLD 209, **were both referred to with approval and applied by a full bench of the Transvaal Provincial Division in *Sifris and Miller NNO v Vermeulen Bros* 1973 (1) SA 729 (T).**”

[46] Turning to the distinction Conradie J in **WATT v SEA PLANT PRODUCTS**, *supra*, at 113 F-J put it as follows:

“*Locus standi in iudicio* or standing (‘verskyningsbevoegdheid’) and contractual power (‘kontrakeerbevoegdheid’) are not

identical concepts. Goldblatt J saw this, with respect correctly, in *Simplex (Pty) Ltd v Van der Merwe and others NNO* 1996 (1) SA 111 (W), a case dealing with a contract which had purportedly been concluded with trustees before the authority required by section 6(1) of the Act had been given to them by the Master. He held that the contract was invalid.

***Locus standi in iudicio* is an access mechanism controlled by the court itself. The standing of a person does not depend on authority to act. It depends on whether the litigant is regarded by the court as having a sufficiently close interest in the litigation.** In *Jacobs en 'n Ander v Waks en andere* 1992 (1) SA 521 (A) at 533J-534A Botha JA described the requirements for *locus standi* as “n voldoende belang... by die onderwerp van die geding om die hof te laat oordeel dat sy eis in behandeling geneem behoort te word.’ In *Jacobs’s* case the question was what interest the applicants had in the invalidation of a resolution of a local authority. The court commented –

‘Aldus beskou, spreek die feite sterk ten gunste daarvan dat die Hof toeganklik behoort te wees vir hierdie applikante, en gevolglik moet die bevinding wees dat hulle wel *locus standi* het om die nietigverklaring van die besluit aan te vra’ 536C-D).”

[47] At par 114 a-e Conradie J went on to say the following about a trustee’s acts in litigating as apposed to contracting:

“The question, then, to be posed *in casu* is whether at the time summons was issued the trustees’ interest in the trust was too remote. The answer to this question depends upon the nature of a trustee’s appointment. Where a trustee has been appointed – in a trust deed or otherwise – the appointment is not void pending authorization by the Master in terms of section 6(1) of

the Act (cf. *Metequity Limited and another v NWN Properties Limited and others* [1997] 4 ALL SA 607 (T) at 611a-d). Although a trustee's power to act in that capacity is suspended by section 6(1) of the Act, he or she would, in my view, have a sufficiently well defined and close interest in the administration of the trust to have *locus standi in iudicio*. Any conclusion that the second and third defendants were by section 6(1) of the Act deprived of *locus standi in iudicio* (which would mean not only that they could not be sued but also that they could not approach the court to protect the interests of the trust) would not give effect to the intention of the legislature. Whilst recognising the desire of the legislature to regulate the rights and duties of trustees in the Act, one should, I think, be slow to conclude that it would have desired to accomplish this by controlling their access to, or accountability in, a court of law.

The focus of the legislation, after all, is on what trustees should or should not do; it is not on whether they may or may not sue or be sued."

[48] I am in respectful agreement, with the views expressed by Conradie J and the authorities he cited in the passages I have quoted above. What emerges from the caselaw is the firm view that, as regards legal proceedings, the statutory prohibition contained in section 6(1) is relative and not absolute, as is the case as regards contracts. Where a trustee litigates without the prior requisite authority from the Master his act to get involved in a litigious situation on behalf of a trust is not automatically null and void. If it is shown to the court, and not to the Master, that the alleged interest of a trust in the matter before a court for adjudication is too remote, a trustee concerned would be denied access primary

by a court using its inherent access control mechanism rather than by the statutory prohibition of the section. It does not mean that invoking the section as well would be wrong. However, if the alleged interest of a trust in the matter is sufficiently close, a trustee would be allowed access to court and given an audience notwithstanding the fact that he was, at the time legal proceedings were initiated, still unauthorised by the Master to act on behalf of the trust concerned.

[49] As I see it, section 6(1) prohibits unauthorised contracts by a trustee who purports to be acting on behalf of a trust. Similarly it prohibits unauthorised litigation by a trustee who purports to be acting on behalf of a trust. Now here comes a fundamental difference in the scope of the statutory prohibition. As regards the first category, in other words, the sphere of contracts, the prohibition is absolute. The unauthorised act is void right from the outset. It cannot be ratified afterwards. The subsequent grant of written authority from the Master does not have any redeeming legal effect. A court has virtually no discretion to condone such and unauthorised contract.

[50] However, the legal position is different as regards the second category, in other words, the actions of a trustee in the sphere of litigation. Here the statutory prohibition is relative. The unauthorised is not void from the onset. It may be ratified afterwards. The subsequent grant of written authority

by the Master has some relatively positive purifying effect. Here a court has discretion to validate or not to validate such unauthorised litigation retrospectively. Provided the trust has sufficiently well defined and close interest in the legal proceedings, the court would be inclined to grant access.

- [51] Harms JA has pointed out that the question of legal standing is in a sense a procedural matter. Cameron JA concurred but added that it is also a substantive matter. He commented that:

“It concerns the sufficiency and directness of interest in litigation in order to be accepted as a litigating party.”

Vide **LAND & AGRICULTURE BANK OF SA V PARKER AND OTHERS** 2005 (2) SA 77 (SCA) at 92F.

- [52] The right of access to court is so fundamental to the rule of law itself that our courts should be slow to give any statutory provision a construction which unnecessarily limits it. The participation of trustees in legal proceedings is a matter which pre-eminently resides within the province of the judicial and not legislative sphere. Upon digressive reading of the section we are here concerned with, I could find nothing to suggest that the converse was intended when this particular statutory provision was enacted.

[53] The defended heavily relied on the decision in **LAND & AGRICULTURE BANK OF SA v PARKER AND OTHERS** 2005 (2) SA 77 (SCA) Parker's case. The case was concerned with the trustee's actions in legal proceedings just as in the instant case. The trust instrument there provided that there should be a minimum of three trustees in order that the trust could legally function. The three collectively resolved to litigate on behalf of the trust. The judgment went against the trust. The number of the trustees dropped to two. Therefore a vacancy arose in the board of trustees. The vacancy was not immediately filled. The two remaining trustees resolved to appeal. They, purporting to act on behalf of the trust, instructed attorneys to lodge an appeal. It was done. The capacity of the trust was questioned. Upholding the objection Cameron JA said:

The Parkers in other words could not bind the trust because no one could. This does not mean that their duties as trustees ceased. On the contrary, their obligation to fulfil the trust objects and to observe the provisions of the trust deed continued. These required that they appoint a third trustee when a vacancy occurred... “

[54] The rationale of the decision was that, because there were only two instead of three trustees in office, at the time the appeal was lodged, the trust as a unit lacked legal capacity to function although the two trustees were duly appointed and duly authorised as individuals. *In casu* the situation is

different. The trust instrument provides for the minimum of two trustees to render the trust lawfully operational. The facts reveal that before the summons was issued two persons had already been appointed to serve as trustees. The first plaintiff, Ms Gabrielle Lupacchini, was already appointed and authorised in terms of the relevant section by the Master. The second plaintiff, Ms Rochelle Conradie was already privately appointed in terms of clause 7.2.1.1 p23 (Part 2) trust deed. However, she was not yet publicly authorised by the Master to act on behalf of the trust in terms of section 6(1).

- [55] The authorisation of a trustee has two dimensions. The one dimension is the trust instrument. The other is the Master. But the primary foundation is undoubtedly the trust instrument.

“Dit is doenlik om uit die staanspoor daarop te wys dat mnr *Jordaan* se benadering dat die Meester ‘n trustee ingevolge artikel 6(1) ‘aanstel’ nie korrek is nie. ‘n Trustee word ingevolge die trustdokument aangestel. Die Meester magtig hom slegs om aldus op te tree. In Honorè: *SA Law of Trusts* 5uitg. word dit as volg op 256 (paragraaf [158] gestel:

‘A trustee acquires the office of trustee by appointment and acceptance and not ... by the Master’s written authorisation ... This is because the statute recognises the distinction between the appointment of a trustee (which takes place in terms of the trust instrument) and written authorisation to act as a trustee

(which he derives from the Master by virtue of the statute).’

Vergelyk ook aangehaalde werk op 179 (paragraaf [110]):

‘Despite the statutory formulation it is clear that a trustee’s appointment derives from the trust instrument itself and not from the Master’s authorisation and that the authority of the trustees derives from the term of the trust deed. This is because the office of trustee is created by the trust instrument and not by the Master or even the Court in filling it.’”

Per Cillie J in **ERWEE NO AND ANOTHER v ERWEE NO AND OTHERS** (2006) 1 ALL SA 620 (OPD) at 629e – g.

[56] I am in respectful agreement. The propositions that a trustee’s appointment originates from a trust instrument itself and not from the Master’s letter of authorisation and that the fountain of a trustee’s authority is to be found in the terms of such trust instrument – are shared by many authorities. This is so precisely because the office of a trustee is created by the trust instrument and not by any Master or even any court. An appointment of a trustee in terms of a trust instrument is in itself a legal act which must be effected primarily by a body of trustees and not the Master.

Vide par. 626g – h **ERWEE’s** case, *supra*.

See also **VAN DER MERWE v VAN DER MERWE & OTHERS** 2002 (2) SA 519 (CPD) at 522H. The reasoning in **SIMPLEX (PTY) LTD** was followed.

[57] By virtue of her appointment in terms of the aforesaid clause of the trust instrument, the second plaintiff obtained the

primary authorisation to act on behalf of the trust in legal proceedings. From that moment on until the summons was issued she acted jointly with the first plaintiff. At all times relevant to this case there were two appointed trustees in office. On 3 September 2003, the time it was resolved, on behalf of the trust, to sue the defendant, the second plaintiff had not been appointed to act as a trustee. She was appointed as such on 13 November 2003, nine months before the summons was issued. From then on until the summons was issued on 24 August 2004 she took collaborative steps not only to enable the trust to function but also to implement the resolution of September 3, 2003 whereby the civil action against the defendant was authorised.

- [58] In the instant case, unlike in the case of **LAND & AGRICULTURAL BANK OF SA v PARKER AND OTHERS**, *supra* the trust did not suffer from any legal disability as a result of deficient numerical strength. The vacancy that occurred following the resignation of Ms Melinda Lupacchini was timeously filled up before the summons was issued. On 15 December 2004, when the Master granted written authority to the second plaintiff, her initial appointment before the summons was issued was subsequently ratified. In **PARKER's** case the joint action of two instead of three trustees could not be retrospectively validated because there was nothing to validate. The trust entity was simply

dysfunctional at the time the two remaining trustees purported to appeal.

- [59] In **PATEL v PARUK'S TRUSTEE** 1984 (AD) 469 the dispute was about a trustee who litigated on behalf of an insolvent estate without the consent of the creditors in contravention of the express statutory prohibition in terms of section 73 (1) Insolvency Act No. 24 of 1936: The preliminary objection taken against the trustee's unauthorised action was that the application on behalf of the trust was void *ab initio* because the trust had not been authorised by the creditors or the Master.

On p. 475 Tindall JA in dismissing the objection said the following:

“The original proviso, prohibiting the trustee from instituting or defending any legal proceedings without the prescribed consent, was enacted, as between the trustee and the creditors, in order to protect the estate from being dissipated in litigation. The Legislature could not have intended that steps taken by a trustee to institute or defend proceedings must necessarily be a nullity because the prescribed consent had not been obtained.”

- [60] In pretty much a similar vein, Ramsbottom J remarked in **WAISBROD v POTGIETER AND OTHERS** 1953 (4) SA 502 (WLD) at 507 F – H:

“I do not find it necessary to decide whether or not the resolution authorised the applicant to institute these proceedings; I shall assume in the respondents' favour that it did not and that the applicant has not been authorised by a resolution of creditors and contributories to make this application. Assuming that to be the case, the question is whether it is open to the respondents to raise the objection that the applicant is not so authorised. In my opinion it is not. I think that the provisions of secs. 130 (2) (a) and 142 (4) were enacted for the protection of creditors and contributories and to prevent the assets of the company from being squandered in useless litigation. As between himself and the company the liquidator requires to be authorised before he embarks on litigation, and if he does so without the prescribed authority the Court may refuse to allow him his costs out of the assets of the company and he may have to pay them himself. **But that does not give a person with whom the liquidator is litigating the right to object that the liquidator has not been authorised to institute the proceeding.**”

[61] To this day that remains the law *in casu* initially the summons cited Ms Melinda Lupacchini instead of Ms Rochell Conradie as the second plaintiff. The citation was wrong because Ms Melinda Lupacchini had already resigned at the time the summons was issued. By then Ms Rochelle Conradie was the *de facto* subsequent trustee. The summons has since been amended. I am of the view that the initial wrong citation of the second plaintiff does not alter the conclusion I have reached. Practically speaking the statutory prohibition we are here concerned with really has

very, if any, restrictive impact or effect on a trustee's *locus standi in iudicio* – vide 2000 (63) THRHR 472 on p. 476 at par. 6.1 and p. 478 at par. 7 per M J de Waal;

Honoré's : South African Law of Trusts, 5ed 2000 p. 221, 270 and 419; per Cameron, De Waal, Wunsh.

[62] In the circumstances I make the following findings. At the time the action was instituted the number of the trustees in office formed the quorum as stipulated in clause 7.2.5 p. 24 (Part 2). The trustee in office could lawfully act for and on behalf of the trust. Together the two could properly institute the action. It was perfectly permissible for the first and second plaintiffs to instruct attorneys, as they did, to have the action instituted against the defendant. Consequently I have come to the conclusion that defendant's special plea cannot be upheld. The defendant's contentions fail. The plaintiff's contention succeeds. The action can be entertained.

[63] The plaintiff's including the former trustee, Ms Melinda Lupacchini, were not diligent at all in conducting the business affairs of the trust. The third plaintiff as the patron, together with the first trustees resolved that Ms Melinda Lupacchini resign. On 24 June 2003 Ms Melinda Lupacchini wrote a letter to the Master notifying the Master of her resignation. The letter took ages to reach the Master's office. It was mailed on 3 September 2003, nine long weeks later. It was not mailed in good time. The executive trustee probably did

not ensure it was. Similarly, the resolutions and correspondence concerning the subsequent appointment of Ms Rochelle Conradie were plagued by delays and series of acts of omissions. Important addresses were changed without notifying the Master. It seems that the executive trustee did not efficiently serve the trust. She clearly relied on others. She did not follow things up. All these exacerbated communication with the office of the Master.

[64] The matter was then left in the hands of a certain financial advisor, Mr. Leon van Niekerk, an employee of the trust. He was poorly supervised. One would have expected that the first plaintiff, as the chief executive trustee, would have vigilantly ensured that all the necessary practical steps were taken to bring the resolution relating to the change of trustees to the attention of the Master without delay. Time went by. Days became weeks and weeks became months. They received no response or a mere acknowledge from the Master. They were not bothered. The matter was not speedily followed up. Their alleged belief that the Master had, already authorised the second plaintiff to act as a trustee, is not based on any sound and reasonable grounds.

[65] Their attorneys were not informed about the resignation and substitution of Ms Lupacchini. As if all these acts of negligence were not enough, their attorneys took a considerable time to substitute Ms Rochelle Conradie for Ms

Melinda Lupacchini. It has to be mentioned that they were made aware by the defendant's attorney that Ms Melinda Lupacchini could no longer act on behalf of the trust as the second plaintiff since she had resigned some 14 months before the summons was issued. It is quite clear that had it not been for the reckless actions, particularly of the first and the third plaintiffs, the defendant would in all likelihood not have filed the special plea. Ordinarily this sort of negligence would be visited with an adverse order of costs. In this case, however, I am precluded from doing so by the prior pact between the parties.

[66] Accordingly I make the following order

66.1 The special plea is dismissed.

66.2 The defendant is directed to pay the costs including the costs occasioned by the employment of two counsels.

M.H. RAMPAL, J

On behalf of the defendant:

Adv. M.H. Wessels SC
with him

Adv. S.E. Motloutse
Instructed by
The State Attorney
BLOEMFONTEIN

On behalf of the plaintiffs

Adv. A.J.R. van Rhyn SC

with him

Adv. M.D.J. Steenkamp

Instructed by:

Kramer Weimann Joubert Inc
BLOEMFONTEIN

/sp