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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 5793/2023

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED.

DATE: 14/05/2025

SIGNATURE:

In the matter between:

FIRSTRAND BANK LIMITED

APPLICANT

And

ADRIAAN ADOLPH BADENHORST

FIRST RESPONDENT

JACOBUS FREDERICK NICOLAAS BADENHORST

SECOND RESPONDENT

JOHANNA MARTHINA BADENHORST

THIRD RESPONDENT

ADRIAAN ADOLPH BADENHORST N.O.

FOURTH RESPONDENT

ANNA MARIA ELIZABETH BADENHORST N.O.

FIFTH RESPONDENT

JACOBUS FREDERICK NICOLAAS BADENHORST N.O. SIXTH RESPONDENT

MARTHINUS JOHANNES GREYLING N.O.

SEVENTH RESPONDENT

BOUVEST 2376 PROPERTY LIMITED

EIGHTH RESPONDENT

JUDGEMENT

KGANYAGO J

[1] The first to third respondents are directors of Radask (Pty) Ltd in liquidation (Radask). The fourth to seventh respondents are trustees of Tripple AJ Trust (trust). The trust is the registered owner of the farms portion 1252 of the farm Loskop Noord 12 (portion 1252); four fifth shares in and to portion 8 (a portion of portion 2) of the farm Welverdiend 201 (portion 8); portion 469 of the farm Loskop Noord 12 (portion 469); portion 470 of the farm Loskop Noord 12 (portion 470); and portion 497 of the farm Loskop Noord 12 (portion 497). These farms will be jointly referred to as properties.

[2] During the period 4th July 2019 to August 2022 the applicant and Radask entered into several loans and facility agreements. The first to third respondents and the trust have executed unlimited suretyships in favour of the applicant for the indebtedness of Radask to the applicant. The eighth respondent executed a suretyship limited to R2 000 000.00 and R15 000 000.00 in favour of the applicant for any and/or obligations of Radask at the time or in the future towards the applicant. As security for the trust's obligations under its suretyship, mortgaged bonds in favour of the applicant were registered over the properties.

[3] On 7th March 2023 the directors of Radask filed a resolution for the voluntary winding-up of Radask. On 7th June 2023 the applicant demanded payment in the

amount of R16 685 669.02 from the respondents regarding Radask indebtedness to the applicant by virtue of the suretyships. On the failure to comply with the demand, the applicant instituted action seeking money judgment against the respondents in their capacities as sureties for Radask. The applicant is also seeking a declaration of the executability of the immovable property mortgaged in its favour.

[4] The respondents are opposing the applicant's application. In their answering affidavit, the respondents have submitted that the applicant is an accountable institution as contemplated by the Financial Intelligence Centre Act 38 of 2001 (FICA). That all details relating to the trust, including the trust deed, must be acquired by the applicant whenever it engages in a transaction with the trust, which will include the executing of suretyship agreements; and/or executing mortgage bonds in favour of the applicant.

[5] The respondents have further submitted that the first to third respondents had very little to no option but to execute suretyships in favour of the applicant, because had they refused to do so, the applicant would not have provided the necessary finance to Radask. It is the respondents' contention that this would have left Radask without the ability to farm, which in itself would have been a financial catastrophe. However, the respondents have pointed out that they did not act under duress or undue influence. According to the respondents, the finance which they have obtained from the applicant by Radask was extensive finance. For reasons unknown to the respondents, the applicant demanded that the first to third respondents in their personal capacities execute suretyships in favour of the applicant. The first to third respondents does not have financial capacity to satisfy any of the debts to the magnitude which the applicant had entered into with Radask.

[6] The applicant has demanded personal suretyships without doing investigation whether the personal suretyship has any actual value. Private persons are protected by the mechanisms relating to reckless credit in terms of the National Credit Act 34 of 2000 (NCA). The respondents have conceded to the non-applicability of the NCA in this matter, but submitted that the development of the common law was necessary in this regard. Although it is undesirable that juristic entities do not require such protection, the general course of conduct by financial institutions of demanding

suretyships from private individuals without any degree of reasonable indication that such private individuals can satisfy, at least a reasonable portion of the debt, only serves to operate *in terrorem* of sureties.

[7] With regard to the trust the respondents have submitted that a trust can only act through its duly authorised trustees, with the trustees deriving their powers strictly from the trust deed. Clause 9.1 of the trust deed state that the trustees of the trust determines which of the trustees will have signing powers in terms of contracts, deeds and other documents. The purported suretyship by the trust was allegedly entered into on 4th July 2019. The resolution by trustees purports to appoint the second respondent as the person authorised to sign the suretyship on behalf of the trust despite the fact that the second respondent was not a trustee of the trust on 4th July 2019. The trustees of the trust had no authority to appoint the second respondent as the authorized signatory, and any purported act doing so constitutes an act *ultra vires* the trust deed and is invalid.

[8] In terms of section 6 of the General Law Amendment Act 50 of 1956, in order for a suretyship agreement to be valid, binding and enforceable, it must be signed by the surety. As the trustees could not confer any power on the second respondent to sign the suretyship, the second respondent could not sign the suretyship on behalf of the trust and, accordingly, the suretyship relied upon by the applicant does not comply with the law on suretyship agreements and is, in the premises, invalid and unenforceable. The applicant's claim against the trust is based squarely of the existence of the impugned suretyship. The trust is not indebted to the applicant in the sums as claimed in terms of the notice of motion as having been the principal debtor, as such the trust is not liable to the applicant, as contemplated by the mortgage bond for any sum of money from any cause whatsoever nature. As there exist no legal suretyship, there is no debt that is secured by the mortgage bond which would allow the applicant to execute on the bonds and have the properties declared specially executable.

[9] Counsel for the respondents has filed heads of arguments only in respect of the fourth to seventh respondents who are the trustees of the trust. In respect of the first to the third respondents, counsel for the respondents has applied for a postponement

of the matter submitting that they intend to pursue their constitutional challenge of the NCA, but that they have delivered their Rule 16A notice late. The first to third respondents' application for postponement was refused and counsel for the respondents submitted that he held no instructions to argue the merits on behalf of the first to third respondents. The first to third respondents were not before court, and the court was satisfied that they were aware of the trial date, and the matter proceeded in their absentia.

[10] The first to third respondents are sureties in their personal capacities. The fourth to seventh respondents are sued in their capacities as trustees of the trust which it is alleged had signed sureties in favour of the applicant. The first to third respondents defence is on the basis that they had little to no option but to execute the suretyships, for if they did not do that, the applicant would not have advanced credit to Radask. However, the first to third respondents concede that they were not under duress or unduly influenced when they signed the suretyships. Further that the common law relating to conclusion of personal suretyships in respect of debts of juristic persons requires development so as to prevent meaningless and irrational suretyship. The fourth to seventh respondents contest liability on behalf of the trust on the basis that the second respondent who executed the suretyship on behalf of the trust was allegedly not authorised to do so.

[11] Since counsel for the respondents has no mandate to argue merits on behalf of the first to third and eighth respondents, and the said respondents are also in default and have failed to file heads of argument, their matter will be disposed on default basis. What remains is the matter of the fourth to seventh respondents. The question to be decided is whether the second respondent had executed valid suretyship agreements despite he been not a trustee of the trust at the time. Should it be found that the second respondent had executed valid suretyship agreements on behalf of the trust that will be end of the matter for the fourth to seventh respondents as they did not raise any other defence. Should their defence fail, the trust immovable properties will be declared specially executable as the fourth to seventh respondents did not seriously answer the applicant's case regarding a declaration of the executability of the immovable properties mortgaged in favour of the applicant.

[12] Section 6 of the *General Law Amendment Act*¹ provides as follows:

“No contract of suretyship entered into after the commencement of this Act, shall be valid, unless the terms thereof are embodied in a written document signed by or on behalf of the surety: Provided that nothing in this section contained shall affect the liability of the signer of an aval under the laws relating to negotiable instruments”.

[13] It is trite that a trust does not have legal personality, and in the absence of authorisation in the trust deed, trustees must act jointly. In *Land and Agricultural Bank of SA v Parker and Others*² Cameron JA said:

“The first principle accounts for the fact that the trust could not be bound while there were fewer than three trustees. Except where statute provides otherwise, a trust is not a legal person. It is an accumulation of assets and liabilities. These constitute the trust estate, which is a separate entity. But though separate, the accumulation of rights and obligations comprising the trust estate does not have legal personality. It vests in the trustees, and must be administered by them – and it is only through the trustees, specified in the trust instrument, that the trust can act. Who the trustees are, their number, how they are appointed, and under what circumstances they have power to bind the trust estate are matters defined in the trust deed, which is the trust’s constitutive charter. Outside its provisions the trust estate cannot be bound”.

[14] The second respondent on signing the suretyships agreements on behalf of the trust was acting on the basis of a resolution signed by the three trustees on 4th July 2019 at Groblersdal. The said resolution reads as follows:

“RECORDED THAT:

1. For purposes of this resolution, FIRSTRAND BANK LIMITED (Reg. No. 1929/001226/08, acting through its First National Bank division, herein referred to as “the Bank”);

¹ 50 of 1956

² 2005 (2) SA 77 (SCA) at para 10

2. Draft copies of the below mentioned documents were provided to each trustee and the terms and conditions thereof approved.

IT IS RESOLVED THAT:

3. The trust signs an unlimited suretyship in favour of the Bank for the obligations of Radask (Pty), (Reg. No. 2017/067772/07 towards the bank.

RESOLVED FURTHER THAT:

4. The person/s listed below, in his/her/their capacity/ies as trustee/s and/or duly authorised representative/s of the Trust, are authorised and empowered to sign all documents and do all things necessary to give effect to the above on behalf of the Trust:

(a) Jacobus Frederick Nicolaas Badenhorst

AND/OR

(b) _____

5. The trustees confirm that, to the best of their knowledge and based on the information available to them as at date of the signature hereof, the provision by the Trust of the abovementioned agreements and/or security is in the best interest of the benefit of the Trust and the beneficiaries of the Trust;

6. This resolution may be signed in one or more counterparts, all of which together shall be considered to constitute one and the same resolution as at date of signature by the party last signing one of the counterparts.

(All trustees to sign)”

[15] The respondents in disputing that the second respondent had the authority to bind the trust estate is relying on clause 9.1 of the trust deed which provides as follows:

“Die TRUSTEES bepaal welke TRUSTEE(S) tekenmagte het ten aasien van kontrakte, aktes en ander dokumente met betrekking tot trustsake”.

The joint agreed translation of clause 9.1 read as follows:

“The TRUSTEES determine which TRUSTEE(S) has signing powers in respect of contracts, deeds and other documents with regard to trust business”.

[16] Counsel for the respondents has submitted that according to clause 9.1 only trustees can be conferred the necessary signing powers, and no third party, who is not a trustee, can be conferred such signing powers. Clause 7.2 of the trust deed read as follows:

“As alle dienende TRUSTEES Aldus afwesig of onbevoeg is, is hulle geregtig om by wyse van ‘n gesamentlike volmag ‘n ander person the magtig om tydelik namens hulle as agente op te tree vir die duur van hulle afwesigheid”.

The joint agreed translation of clause 7.2 reads as follows”

“If all serving TRUSTEES are so absent or incapacitated, they are entitled to by way of a joint power of attorney to authorise another person or persons to temporarily act as agent on their behalf for the duration of their absence”.

[17] Clause 7.2 of the trust deed empowers the trustees to appoint a third party to act on their behalf as an agent if they are all absent or incapacitated. As per clause 7.4 of the trust deed, the person so appointed must while he acts in the place/stead of the trustee that nominated him, exercise the duties and functions of the trustee that he represents and for that purpose is clothed with rights, powers and capacity of the trustee that he represents. This means for all intends and purpose he/she will required to do whatever act the trustee who nominated him/her was required to do without limitations. That will include signing any contract that will bind the trust estate.

[18] Even though clause 9.1 state that the trustees had to determine among themselves as to who of the trustee(s) has signing powers in respect of contracts, deeds and other documents with regard to trust business, the clause has not been worded in such way that it conferred signing powers only to trustees. The clause 9.1 cannot be read in isolation with clause 7.2. Reading the two clauses together, it can therefore not be said that only trustees can be conferred with the necessary signing powers, and that no third party, who is not a trustee, cannot be conferred with such signing powers.

[19] In *Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk*³ Harms JA said:

“However, as mentioned by Farlam JA, the fact that trustees have to act jointly does not mean that ordinary principles of the law of agency do not apply. The trustees may expressly or impliedly authorise someone to act on their behalf and that person may be one of the trustees. There is no reason why a third party may not act on the ostensible authority of one of the trustees, but whether a particular trustee has the ostensible authority to act on behalf of the other trustees is a matter of fact and not one of law”.

[20] As per the resolution of the 4th July 2019 all the trustees of the estate have expressly authorised the second applicant to act on their behalf and sign all necessary documents. That included signing unlimited suretyships in favour of the applicant for the obligations of Radask. The second respondent was ostensibly authorized to act on behalf of the three trustees since they have all signed the resolution. The trustees by jointly signing the resolution and authorising the second respondent to act on their behalf were not acting outside the provision of the trust deed since clause 7.2 permit the appointment of third a party to act as an agent.

[21] Under the circumstances, the respondents’ reliance on the second respondent’s lack of authority is misplaced. With regard to the first to third and eighth respondents, as I have pointed out above, their matter will be disposed on default basis. With regard to the executability of the immovable properties, the respondents did not seriously challenge the applicant’s version, and the applicant had made out a cogent case in its founding affidavit. The applicant is therefore entitled to judgment as prayed for in the notice of motion.

[22] In the result the following order is made:

³ 2004 (3) SA 486 (SCA) at para 23

22.1 Judgment is granted in favour of the applicant against the respondents for payment by the respondents, jointly and severally, the one paying the others to be absolved, of:

22.1.1 R803 831.96 together with interest thereon at the prime rate (currently 11.75%) plus 1.5% per annum compounded monthly calculated from 30 May 2023 until date of payment, both days inclusive in respect of account number 4[...];

22.1.2 R5 846 282.27 together with interest thereon at the prime rate (currently 11.75%) plus 2.25% per annum compounded monthly calculated from 30 May 2023 until date of payment, both days inclusive in respect of account number 4[...];

22.1.3 R 932 483.76 together with interest thereon at the prime rate (currently 11.75%) plus 2.25% per annum compounded monthly calculated from 30th May 2023 until date of payment, both days inclusive in respect of account number 4[...];

22.1.4 R5 780 940.96 together with interest thereon at the prime rate (currently 11.75%) plus 0,50% per annum compounded monthly calculated from 30th April 2023 until date of payment, both days inclusive in respect of account number 6[...];

22.1.5 R201 525.78 together with interest thereon at prime rate plus 2.5% per annum, calculated daily and compounded monthly in arrears from 2 May 2023 to date of payment, both days inclusive in respect of account number 8[...];

22.1.6 R18 098.93 together with interest thereon at prime rate plus 0.75% per annum, calculated daily and compounded monthly in arrears from 2 May 2023 to date of payment, both days inclusive in respect of account number 8[...];

22.1.7 R58 993.13 together with interest thereon at prime rate plus 0.75% per annum, calculated daily and compounded monthly in arrears from 2 May 2023 to date of payment, both days inclusive in respect of account number 8[...];

22.1.8 R206 893.89 together with interest thereon at prime rate plus 0.5% per annum, calculated daily and compounded monthly in arrears from 2 May 2023 to date of payment, both days inclusive in respect of account number 8[...]4;

22.1.9 R8 526.12 together with interest thereon at prime rate per annum, calculated daily and compounded monthly in arrears from 2 May 2023 to date of payment, both days inclusive in respect of account 8[...]5;

22.1.10 R376 840.36 together with interest thereon at prime rate per annum, calculated daily and compounded monthly in arrears from 2 May 2023 to date of payment, both days inclusive in respect of account number 8[...]6;

22.1.11 R235 660.21 together with interest thereon at prime rate plus 0.25% per annum, calculated daily and compounded monthly in arrears from 2 May 2023 to date of payment, both days inclusive in respect of account number 8[...]7;

22.1.12 R235 725.91 together with interest thereon at prime rate plus 0.25% per annum, calculated daily and compounded monthly in arrears from 2 May 2023 to date of payment, both days inclusive in respect of account number 8[...]8; and

22.1.13 R979 865.74 together with interest thereon at prime rate plus 0.25% per annum, calculated daily and compounded monthly in arrears from 2 May 2023 to date of payment, both days inclusive in respect of account number 8[...]9.

22.2 It is declared that the following immovable properties owned by Trippel AJ Trust (represented by the fourth to seventh respondents), are specially executable:

22.2.1 Portion 1252 of the farm Loskop Noord 12, Registration Division J.S., Limpopo Province, in extent 43, 7238 hectares held by certificate of consolidated title T8298/2020 ("Portion 1252");

22.1.2 Four Fifth (4/5) shares in and to Portion 8 (a Portion of Portion 2) of the farm Welverdiend 201, Registration Division J.S., Mpumalanga Province, measuring 263,4878 hectares, held by deed of transfer T11535/2019 ('Portion');

22.1.3 Portion 469 of the farm Loskop Noord 12, Registration Division J.S., Limpopo Province, measuring 61, 3161 hectares, held by deed of transfer T8294/2020 ("Portion 469");

22.1.4 Portion 470 of the farm Loskop Noord 12, Registration Division J.S., Limpopo Province, measuring 29, 0408 hectares, held by deed of transfer T8294/2020 ("Portion 470"); and

22.1.5 Portion 497 of the farm Loskop Noord 12, Registration Division JS., Limpopo Province, measuring 13,4840 hectares, held by deed of transfer T8294/2020 ("Portion 497").

22.3 The Registrar of this Court is ordered to issue warrants of execution to enable the sheriff to attach and execute upon the abovementioned immovable properties in satisfaction of the judgment debt, interest and costs.

22.4 The respondents jointly and severally to pay costs of the application on attorney and client scale.

KGANYAGO J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

Counsel for the applicant

: Adv NJ Horn

Instructed by

: Werksman Inc

Counsel for 4th to 7th respondents

: Adv CE Thompson

Instructed by

: Martin Van Vuuren Attorneys

Date heard

: 20th March 2025

Electronically circulated on

: 14th May 2025