

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: 2023-055003

(1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED

In the matter between:

GLENHAZEL INVESTMENT (PTY) LTD	Applicant
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And

GREGORY MASSIMO BARBAGLIA NO	1st Respondent
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DOMENICO SATURININE MAZZA NO	2nd Respondent
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CARLOS FERNANDO PIRES PEDREGAL NO	3rd Respondent
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LLG CENTURION (PTY) INVESTMENT CC	4th Respondent
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TOTAL ENERGIES MARKETING SA (PTY) LTD	5th Respondent
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YA CHESA SERVICE STATION (PTY) LTD	6th Respondent
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JUDGMENT

MOTHA J

Introduction

1) Following the applicant's sale of the Eersterust Property on 15 August 2024, the application for specific performance became moot; what remains before this court is the adjudication of the counter-application for the return of the deposit in the sum of R1000 000.00, paid on 1 October 2021. On 10 April 2025, the applicant threw a spanner in the works by launching an action for damages.

The parties

2) The applicant is GLENHAZEL INVESTMENTS PROPRIETARY LIMITED, a company duly incorporated in accordance with the company laws of South Africa.

3) The first respondent is GREG MASSIMO BARBAGLIA N.O., a businessman who acts in his capacity as a trustee of the Novaprop Eight Trust (trust number: IT4237/2008).

4) The second respondent is DOMENICO SATURNINE MAZZA N.O., a businessman, who acts in his capacity as a trustee of the Novaprop Eight Trust (trust number: IT4237/2008).

5) The third respondent is CARLOS FERNANDO PIRES PEDREGAL N.O., a businessman who acts in his capacity as a trustee of the Novaprop Eight Trust (trust number: IT4237/2008).

6) The fourth respondent is LLG CENTURION PROPERTY INVESTMENTS CC, a close corporation duly incorporated in accordance with the laws of South Africa.

7) The fifth respondent is TOTALENERGIES MARKETING SOUTH AFRICA PROPRIETARY LIMITED, a private company duly incorporated in accordance with the laws of South Africa.

8) The sixth respondent is YA CHESA SERVICES PROPRIETARY LIMITED, a private company duly incorporated in accordance with the laws of South Africa.

Facts in brief

9) The applicant is the owner of Portion 0 of Erf 2[...], in the township of Eesterust Ext 2, City of Tshwane Metropolitan Municipality, Gauteng, situated at 5[...] D[...] D[...] Avenue, Eesterust ("Property"). The applicant leased the Property to a well-known seller of petroleum products, the fifth and sixth respondents jointly.

10) On 24 August 2021, the Trust, represented by Mr. Greg Barbaglia, made a written offer to purchase the Property from the applicant, and the offer was accepted by the applicant's representative, Mr. Wolpe, on 25 August 2021. Accordingly, the applicant, represented by Mr. Wolpe, and the Trust, represented by Mr. Greg Barbaglia, concluded a written commercial immovable property sale agreement ("Agreement").

11) In terms of the agreement, the purchase price of the Property was the sum of R47 840 000.00 (forty-seven million, eight hundred and forty thousand Rand) exclusive of VAT ("Purchase Price").

12) An amount of R1 000 000.00 (one million Rand) was the deposit ("Deposit"). The Deposit was payable within 7 (seven) days after the successful conclusion of the due diligence. On 1 October 2021, Mr Barbaglia paid the deposit of R1000 000.00 into the trust account of Millers Attorneys, the applicant's Attorneys.

13) Pursuant to the respondents' failure to pay the balance of the purchase price, the applicant instituted an application for specific performance, and the respondents responded by launching a counter-application for the deposit. On 24 August 2024, the applicant sold the property at an auction for R30 000 000.00. Hence, the application for specific performance has become moot.

The issues

14) In developing the counter-application for the return of the deposit, the respondents submitted that Mr Barbaglia's purported conclusion of the Eersterust

Sale Agreement on behalf of the Trust fell foul of clause 9.6 of the Trust Deed, which reads:

“9.6 The unanimous agreement of all trustees must be obtained before any significant transaction affecting the trust should be valid and binding upon the trust.”

15) The submission is that Mr. Barbaglia did not have the authority to bind the Trust. Under oath and confirmed by his fellow trustees by way of confirmatory affidavits, he stated that:

“... it was only during the course of the preparation of the first to fourth respondents' answering affidavit to the main application, which Mr Barbaglia signed on 13 July 2023, that Mr Barbaglia became aware, for the first time, and by way of the advice given to him by Bowmans, that the unanimous consent of all trustees was required under the trust deed to bind the Trust.”¹

16) The applicant submitted that there is a material dispute of fact on the assertion that:

“It was therefore only nearly two years after the deposit had been paid that Mr Barbaglia became aware that he had not been authorised to conclude the Eersterust Sale Agreement or to pay the deposit...”²

17) Having rejected that version, the applicant argued that it did not accept that the two trustees were not aware of Mr. Barbaglia's conduct, and maintained:

“ If it is true, as Mr Barbaglia claims, that he paid R1 million of the Trust's money to the applicant when he was not authorised to do so and without the knowledge of the two other trustees, then clearly he is guilty of the theft of the Trust's money. Yet, there is no indication of any sort that the two other trustees took any action against Mr Barbaglia. It must therefore mean that they have no reservations about keeping a thief of the Trust's money in his position as a trustee, apparently without consequence. It will be argued on behalf of the

¹ Para 18 of the respondents' Heads of argument.

² Supra para 19.

applicant that, in so doing, the two other trustees are guilty of an egregious failure in their duties to act in the best interests of the Trust.”³

18) Against this background of incredulity, the applicants asseverated that: “It is for these reasons and others that the applicant seeks a referral of the application to trial, so that the applicant can cross-examine Mr Barbaglia on his version and also the two other trustees on why, if it is true that Mr Barbaglia was on a frolic of his own, that they forsook their fiduciary duties to the Trust by failing to take any action against Mr Barbaglia.”⁴

The law

19) Dealing with Trusts, the court in *Land and Agricultural Development Bank of SA v Parker and Others*⁵ held:

“Joint action requirement entails that trustees must act together.

[15] For the Parkers to purport to bind the trust estate after the son’s appointment, without (according to his evidence) consulting him, constituted a further usurpation and a further breach of their obligations under the trust deed. It is a fundamental rule of trust law, which this Court recently restated in *Nieuwoudt NO 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. Professor Tony Honoré’s authoritative historical exposition has shown that the joint action requirement was already being enforced as early as 1848. It has thus formed the basis of trust law in this country for well over a century and half.”⁶

Submissions

20) In brief, counsel for the respondents contended that there were two unanswerable bases upon which they maintained that the agreement was void. First,

³ ANSWERING AFFIDAVIT IN COUNTER APPLICATION AND IN THE replying affidavit in the MAIN APPLICATION, para 13.6

⁴ Supra para 13.7

⁵ (186/2003) [2004] ZASCA 56; [2004] 4 All SA 261 (SCA); 2005 (2) SA 77 (SCA) (23 September 2004).

⁶ Supra para 15.

Mr Barbarglia had no authority to represent the Trust; hence, there was no cognizable legal basis for the applicant to retain the deposit, which was paid under a void agreement. The Trust was entitled to its return under *condictio indebiti* or *condictio sine causa*, and more so now that the property had been sold, the argument went. He, furthermore, submitted that the action for damages was a ruse to hold on to the deposit.

21) The second string to the respondents' bow was s 2(1) of the Alienation of Land Act no 68 of 1981, which reads:

"No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority."

22) Referring to the matter of *Goldex 16 (Pty) Ltd v Capper NO and Others*,⁷ counsel submitted that the correct legal position is:

"Where a trust has more than one trustee, any alienation of land entered into by that trust would require the signature of all the trustees. In the absence of authority in the trust deed, in respect of a trust with more than one trustee, a trustee is regarded as an agent as intended in section 2(1) of the Alienation of Land Act, and would require the written authority of the other trustees to conclude a deed of alienation on behalf of the trust. In the absence of written authorisation a deed of alienation concluded by such a trustee would not be in accordance with the provisions of section 2(1) of the Alienation of Land Act and would be of no force and effect."⁸

23) When asked about the other defences, counsel submitted that without making any concessions, they relied on the authority point.

24) Counsel for the applicant submitted that this court could not divorce its pronouncement on the deposit from the action for damages. Without having been subjected to cross-examination, counsel submitted that Mr. Barbarglia should not be

⁷ (24218/2013) [2017] ZAGPJHC 305 (18 October 2017)

⁸ Supra para14.

believed when he stated that he did not have the necessary authority from the two other trustees. On the question of s 2(1), he contended that even if the court concluded that the Trust did not authorize Mr. Barbarglia to act on its behalf, he had an ace up his sleeve. The fourth respondent, LLG Centurion Properties Investment, was nominated to replace the Trust as the purchaser. Accordingly, a valid contract had been entered into, and the deposit ought not to be released to the respondents.

analysis

25) On 22 April 2022, the applicant dispatched a letter of demand for the balance of the purchase price. That precipitated a response from the respondents' lawyers, through a letter which placed in dispute the fulfilment of the suspensive conditions under clauses 3 and 6 of the agreement. At paragraph 5 of the letter, the attorneys said: "Pursuant to the sale agreement our client(s) paid a deposit of R1m which is repayable together with appropriate interest. Your client is called upon to forthwith return the deposit, with interest, to our clients."

26) At this juncture, it was apparent that the bone of contention between the parties was that the suspensive conditions had not been fulfilled, and, therefore, the agreement was of no force and effect. Of course, the applicant rejected that version of events and contended that this amounted to a repudiation of the agreement, which it did not accept.

27) In March 2023, the applicant launched the application for specific performance, contending that the suspensive conditions had been fulfilled. That Mr. Gregory Massimo Barbaglia did not have the authority to enter into the agreement on behalf of the Trust was mentioned for the first time in the answering affidavit. Indeed, the respondents' counter-application hinges on the absence of authority, especially when read with clause 9.6 of the Trust Deed.

28) Mr. Barbaglia stated in no uncertain terms that: "Although I was required to obtain my fellow trustees' unanimous consent to enter into the Agreement on behalf of the Trust, I did not do so."⁹ Furthermore, he asserted that: "I am advised that since

⁹ FIRST TO FOURTH RESPONDENTS' ANSWERING AFFIDAVIT para 12.

the unanimous consent of the trustees under the Trust Deed was not obtained, I was accordingly not authorised to enter into either the Agreement or the Ruimsig Sale Agreement on behalf of the Trust.”¹⁰

29) The thrust of the Trust’s argument is that the applicant would be unjustly enriched if they were to retain the deposit, because the agreement was pursuant to a void contract.

30) For the doctrine of unjust enrichment to succeed, the Trust must prove that Mr Barbaglia did not have the authority to act on behalf of the Trust. There is a patent and pertinent material dispute of fact on this issue of consent. It is rather curious, to say the least, that the authority issue emerged in the answering affidavit. It begs the question, because the respondents instructed the same lawyers from the commencement of the proceedings. Certainly, it required no legal advice for the two trustees to simply state, right from the beginning, that they were not consulted. Instead, the issue at stake was the non-fulfillment of the suspensive clauses.

31) This court endorses the submission made by the applicant’s counsel that it cannot finalise the counter-application for the deposit without making a ruling on the validity of the agreement, which would, *ipso facto*, have a direct impact on the action for damages. Consequently, this court disagrees with the respondents’ counsel that the action for damages is simply a ruse to retain the deposit. It would be a height of folly to turn a blind eye to the existence of the action for damages; the two are joined at the hip. Thus, this is one of those matters that cannot be decided on affidavits. For justice to be done, the cross-examination of Mr. Barbaglia and the two trustees is indispensable.

32) In instances such as these, what occupies the front and centre of the proceedings is Rule 6(5)(g) of the Uniform Rules of Court, which reads:

“When an application cannot properly be decided on an affidavit the court may dismiss the application or make such an order as it deems fit with a view to

¹⁰ Supra para 20.

ensuring a just and expeditious decision. In particular, but without affecting specified issues with a view to resolving any dispute of and to the end may order any deponent to appear personally or grant leave for such department or any person to be subpoenaed to appear and be examined and cross examined as a witness or it may refer the matter to trial with appropriate directions as to the pleadings and definitions of issues or otherwise.”

33) At the launch of these proceedings, the applicant could not have anticipated the existence of a material dispute of fact, since, under oath, Mr Barbaglia stated he only became aware of the requirement to inform his fellow trustees when he filed his answering affidavit.

34) I am of the considered view that this matter should be referred to trial, and the parties should use their best endeavors to consolidate this case and the action for damages, if possible.

Costs

35) Despite the cancellation of the agreement, in September 2024, the applicant failed to withdraw the matter. The submission of counsel for the applicant that its client could not have withdrawn the matter without the respondents’ consent, and when it sought consent, it was not forthcoming, or the respondents sought costs, is without merit. I can not conceive of any reason why the applicant should not be ordered to pay the costs of one counsel on scale B. The costs of the counter-application are to be costs in the cause.

Order

1. The main application is dismissed with costs on scale B.
2. The counter-application is referred to trial, the notice of counter-application stands as simple summons, the founding affidavit to counter-application as a declaration, the answering affidavit to the counter-application as a plea, the reply and supplementary affidavit as a replication, and the reply to the supplementary affidavit as a rejoinder.

3. The costs of the counter-application are to be costs in the cause.
4. Any further exchange of pleadings, request for further particulars, amendments, discovery, and the holding of a pre-trial conference shall follow the usual process as regulated by the Uniform Rules of Court.
5. Pending the finalization of the trial, the deposit of R1000 000.00 is to be retained in an interest-bearing Trust account of Miller Attorneys.
6. In case of any unreasonable delay in prosecuting the action or any deliberate and unreasonable non-compliance with the Uniform Rules of Court, this order shall lapse and the affected party shall approach the court for relief, on supplemented papers.

**MP MOTHA
JUDGE OF THE COURT
GAUTENG LOCAL DIVISION,
JOHANNESBURG**

APPEARANCES:

Date of Hearing: 29 April 2025

Date of Judgment: 25 July 2025

For Applicant: ADV C CREMEN

Instructed by YAIR MILLER ATTORNEYS

For 1st to 4th Respondents: ADV A.E. FRANKLIN SC

with ADV F.R. McADAM

Instructed by: BOWMAN GILFILLAN INC