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**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA**

CASE NO: 5502/2023

REPORTABLE: YES

OF INTEREST TO OTHER JUDGES: YES

REVISED: NO

DATE 20 October 2025

SIGNATURE

In the matter between:

JAN LODEWIKUS PRETORIUS N.O.

First Applicant

MARTINA JACOBA LOOTS N.O.

Second Applicant

and

THABA CHWEU LOCAL MUNICIPALITY

First Respondent

REGISTRAR OF DEEDS, MPUMALANG

Second Respondent

JUDGMENT

MANAGA AJ

Introduction

[1] The applicants have brought an application to declare a deed of sale between the first respondent and the Luanza Swanepoel Familie Trust (IT 1665/11(T)) (“the Trust”), dated 3 August 2011, void *ab initio*.

[2] The deed of sale relates to the following properties: Erf 5[...] L[...] Extension 73 Township, Registration Division JT, Province Mpumalanga and Erf 5[...] L[...] Extension 73 Township, Registration Division JT, Province Mpumalanga. In terms of the deed of sale, the Trust purchased the properties from the first respondent.

[3] The applicants also seek an order setting aside the decision to transfer the properties in terms of the deed of transfer 743/2012 and 744/2012 and an order for the repayment of the purchase price, together with the rates and taxes paid by the Trust to the first respondent.

[4] The Trust had two trustees at the time of entering into a deed of sale with the first respondent. They were Ms Luanza Swanepoel and Mr Jacobus Cornelius Swanepoel.

[5] The central feature of the applicants' case is that one of the two trustees of the Trust was not aware of the deed of sale and therefore Ms Luanza Swanepoel (one of the then trustees) unlawfully signed a resolution purporting to be a decision by the Trust to purchase the said properties. It is for this reason that the applicants argue that the decision of Ms. Luanza Swanepoel to enter into a deed of sale cannot bind the Trust.

[6] I was referred to the Trust Deed and the principle set out by the Supreme Court of Appeal ('SCA') in *Land and Agricultural Development Bank of SA v Parker* ('*Parker*'),¹ relating to this question. In a nutshell, the Trust Deed and *Parker* require trustees to act jointly to bind the Trust.

[7] My reading of the principle set out in *Parker* is based on the distinctive nature of the Trust i.e. it is not a company or individual hence the SCA afforded a protection to it against the illegal conduct of the trustees. It also requires the third party to be circumspect when entering into a transaction with the Trust. In summary, this constitutes the applicants' case.

¹ *Land and Agricultural Development Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA) ("*Parker*").

[8] On the other hand, the first respondent raised a number of defences to the applicants' claim. Among the defences raised is estoppel, a question which the SCA did not decide in both *Parker* and *Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk* ('*Nieuwoudt*').² However, I am well aware that in both cases, the SCA did discuss the distinct features of the Trust which make it different from a company and other entities with distinctive features. In deciding the question whether the estoppel applies to Trust, I will closely examine these distinct features to determine the question.

[9] Other defences raised by the first respondent are dispute of facts, presumption of validity of the deed of sale in terms of section 2(1) of the Alienation of Land Act 68 of 1981 and that the Trust has not provided any evidence to justify the claim for the repayment of the monies claimed. I intend to deal with all of them as they are equally capable of disposing of the matter.

The applicants' case

[10] The applicants, Jan Lodewikus Pretorius and Martina Jacoba Loots, are the current trustees of the Trust.

[11] The applicants were appointed as trustees in 2021. They argued that they were unaware of the transfer of the immovable properties at the time, as was Mr Jacobus Cornelius Swanepoel, who was the trustee.

[12] The applicants only became aware that the properties had been registered in the name of the Trust when the first applicant, in his capacity as a trustee, received accounts from the first respondent for the outstanding rates account.

[13] The applicants' case is that one of the two trustees of the Trust was not aware of the deed of sale between the first respondent and the Trust, and therefore, such a transaction cannot bind the trust because the trustees did not act jointly as required by the Trust deed.

² *Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA) ("*Nieuwoudt*").

[14] The applicants submit that the deed of sale is unenforceable and that no legal agreement was ever concluded between the Trust and the first respondent for the following reasons:

- 14.1. Clause 20.2 of the trust deed provides that all decisions of the trustees must be taken by a majority;
- 14.2. At the time of the purported sale and transfer of the properties in question, there were two trustees in office, Ms L Swanepoel and Mr J C Swanepoel;
- 14.3. One of the trustees, Mr J C Swanepoel, was unaware of the transaction ever having taken place;
- 14.4. The resolution upon which the transfer was passed was signed only by Ms L Swanepoel;
- 14.5. As such, there could not have been true consensus between the Trust and the first respondent to enter into an agreement in respect of the two properties; and
- 14.6. Moreover, the Trust could not have properly consented to receive transfer of the two immovable properties, while one of the trustees was unaware of the transaction.

The first respondent's case

[15] The first respondent opposes the application on the following basis:

- 15.1. Firstly, in terms of the provisions of the Alienation of Land Act, and on the version advanced by the applicants, the sale of the properties is *ex lege* deemed to be valid *ab initio*;
- 15.2. Secondly, by virtue of the conduct of the trust, and specifically the fiduciary obligations of the trustees in keeping proper accounting

records and acting as responsible trustees, the conduct of the trust over the past 12 years created the impression that the trust was duly authorised to enter into the deed of sale and, as such, that the trust is estopped from denying the authority;

15.3. The Trust, up to date hereof, has failed to confirm (or even attempt to evidence) that the Trust itself had in fact made payment of the purchase price. The Trust, therefore, has no right or entitlement to claim payment of the monies without evidencing payment thereof by itself or alleging further circumstances that would allow such a claim; and

15.4. Lastly, the municipality disputes that the Trust, at the date of entering into the deeds of sale and the transfer of the properties, had not fully complied with the prescripts and formalities of the transfer of the properties. Insufficient evidence has been placed before the Court to sustain the relief sought. Concomitant upon the aforesaid, the first respondent contends that, at the very least, and as a result of the substantial disputes of fact, the extremely limited knowledge of the first applicant and the basically non-existent contemporary documentation, the applicants ought to have been advised to utilise the mechanisms of the action procedure.

[16] The first respondent referred to the original letters of authority of the Trust attached to the applicant's founding affidavit (seemingly dated 24 June 2011) with Luanza Swanepoel and Jacobus Cornelius Swanepoel being the duly appointed trustees at the time, i.e. relevant to the time of the sale of the properties. This is in support of the argument that the trustees acted in accordance with the Trust Deed and/or jointly.

[17] Furthermore, the first respondent quoted an excerpt from the applicants' founding affidavit, which reads as follows:

"Some of the history of this matter is not within my own personal knowledge, since I was not a trustee at the time when the events occurred. I have reconstructed the

events from the available records, as well as discussions with the former co-trustee at the relevant time, i.e. Mr Jacobus Cornelius Swanepoel, a confirmatory affidavit who is attached as 'C' hereto."

[18] The first respondent argued that the applicants, in reply, changed their version and conceded that, after additional enquiries had been made, it would seem that the deed of sale was indeed signed by the founder of the Trust, i.e. Mr Jacobus Albertus Johannes Swanepoel.

[19] The first respondent argued further that the applicants clearly have no actual knowledge of the events resulting in the sale of the properties. The high water mark of the applicants' case is the document appended as Annexure "G" to the founding affidavit ("the decision"), which states that "Luanza Swanepoel had *apparently* signed a document purported to be a decision by the trustees as taken at a meeting.

[20] In his confirmatory affidavit, Jacobus Cornelius Swanepoel (i.e. Luanza's co-trustee at the time of the sale), also does not seem to have any knowledge of the circumstances under which the properties were purchased.

[21] Lastly, the applicants indicated that he had contacted the transferring attorneys; however, he was informed that their office file (containing the pertinent contemporary documentation that could clarify or support this application) was destroyed.

Whether the trustees acted jointly as required by the Deed of Trust

[22] As a point of departure, it is important to consider the content of the Trust Deed relating to the powers of the trustees.

[23] Clause 3 of the Trust Deed reads as follows:

"3. DIE TRUSTEES

3.1 Die TRUSTEES is die persone wat in die aanhef hiervan aangewys is en hulle opvolgers wat kragtens hierdie akte aangewys word.

3.2 Daar sal ten alle tye ten minste twee TRUSTEE wees.

[24] Clause 20 of the Trust Deed reads as follows:

“20 VERRIGTINGE VAN DIE TRUSTEES

20.1 Tensy die betrokke TRUSTEES skriftelik van sy reg afstand doen, is elke TRUSTEE geregtig op 7 (SEWE) dae skriftelike kennisgewing vooraf van vergaderings van TRUSTEES.

20.2 Alle besluit van die TRUSTEES moet kragtens meerderheidsbesluit geneem word ten einde geldig te wees. Gedurende die lewe van LUANZA SWANEPOEL sal sy 'n vetoreg hê op alle besluite en geen besluit wat nie sy steun dra sal geldig wees nie.

20.3 'n TRUSTEE mag ter eniger tyd, onderworpe aan die bepalinge met betrekking tot kennisgewing, 'n vergadering van TRUSTEES byeenroep.

20.4 'n Geskrewe besluit, ondereken deur al die TRUSTEES sal geldig wees asof dit goedgekeur is op 'n behoorlike saamgestelde vergadering van TRUSTEES.”

[25] The Trust Deed requires the decision of the Trust to be made by a majority of the trustees. Since there were only two trustees, it effectively means that both trustees have to participate in the decision-making process for the decision to bind the Trust.

[26] Glancing through the resolution of the Trust relating to the decision to enter into the deed of sale and the copy of the deed of sale attached to the applicants' founding affidavit, it is clear that only one trustee, Luanda Swanepoel, signed the documents. This is not in line with the provisions of the Trust Deed, which require the majority of the trustees to make decisions on behalf of the Trust.

[27] Apart from the fact that the decision of the trustees must be taken by a majority of the trustees, I could not find any provision in the Trust Deed which confers powers on one of the trustees to transact on behalf of the Trust in the absence of another trustee. I am aware there are instances where the Trust Deed may confer veto powers on one of the trustees. In this regard, the trustee entrusted with such powers will be able to make decisions on behalf of the Trust. However, the Trust Deed must be clear about such powers conferred. It is not the case here.

[28] The fact that the Deed of Sale was signed by one trustee is not dispositive of the question whether the trustees acted jointly as required. The requirement to act jointly relates to a decision-making process. In this case, the decision-making process is the resolution of the trust to enter into a Deed of Sale. I have already indicated that it, too, was signed by one trustee.

[29] I was correctly referred to the principles set out in *Shepstone & Wylie Attorneys v De Witt NO and Others*³ *Nieuwoudt* and *Parker*.⁴ These judgments emphasize the requirement that the trustees must act jointly to bind the Trust.

[30] The principle was first set out by the Supreme Court of Appeal in *Parker* as follows:

“[10] 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 as 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 can not be bound.

[11] It follows that a provision requiring that a specified minimum number of trustees must hold office is a capacity-defining condition. It lays down a prerequisite that must be fulfilled before the trust estate can be bound. When fewer trustees than the number specified are in office, the trust suffers from an incapacity that precludes action on its behalf.”

[31] In recent years, the Supreme Court of Appeal repeated the above principle in *Shepstone & Wylie*.⁵ The relevant excerpt of the judgment reads as follows:

“...the trustees, when dealing with trust property, are required to act jointly. Even when the trust deed provides for a majority decision, the resolutions must be signed by all the trustees. A majority of the trustees may take a valid internal decision, but a valid resolution that binds a trust externally must be signed by all trustees, including the absent or the dissenting trustee. It is a fundamental rule of trust law, which this

³ *Shepstone & Wylie Attorneys v De Witt NO and Others* [2023] JOL 59149 (SCA) (“*Shepstone & Wylie*”).

⁴ *Supra*.

⁵ *Shepstone & Wylie*, paras 25 – 26.

Court restated in *Nieuwoudt N O and Another v Vrystaat Mielies (Edms) Bpk* [2004] 1 All SA 396 (SCA), that in the absence of a 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.

It therefore follows that where a trust deed requires that the trustees must act jointly if the Trust is to be bound, a majority decision will not bind the Trust where one of the trustees, such as in this case, did not participate in the decision-making. This is imperative particularly when the trustees are required to take a decision involving the assets of the Trust. In the case where the majority decision prevails, all trustees are still required to sign the resolution. In *Land and Agricultural Development Bank of SA v Parker and Others* ('Parker') 2005 (2) SA 77 (SCA); [2004] 4 All SA 261 (SCA), this Court held that when dealing with third parties, even if the Trust instrument stipulates that the decision can be made by the majority of trustees, all trustees are required to participate in the decision making and each has to sign the resolution. The court in *Blockpave* restated the aforementioned principles in Parker. It went on to state that a trust operates on resolutions and not on votes. This is significant as the Trust does not explicitly provide that external decisions may be taken by a majority vote." (My emphasis.)

[32] In the case of *Nieuwoudt*,⁶ Farlam JA stated the following:

"[21] The trust deed in this case provided that if there are two trustees, they have to act jointly but if there are more than two the majority vote counts. Whether both trustees have acted in a particular manner is not a matter of internal management but rather one determining the scope of their authority. Whether, on the facts of the case, the issue in *MAN Truck & Bus (SA) Ltd v Victor en Andere* 2001 (2) SA 562 (NC) concerned the ambit of authority (as Cameron *et al loc cit* suggest) or a matter of internal management need not be considered."

[33] The first respondent's argument does not engage this question. In response to this argument, the first respondent only state that "Other than to note that the immovable properties were transferred and finalised on 24 January 2012 as per the Deed of Transfer appended as annexure 'H1' and 'H12' to the founding affidavit, the content is denied". Furthermore, the first respondent places reliance on the absence of knowledge on the part of the applicants. I am not convinced such an argument addresses the objective evidence placed by the applicants regarding the failure on the part of the trustees to act jointly.

[34] Furthermore, It is not clear from the first respondent's papers whether the argument is that both trustees acted jointly in taking the decision to purchase the two properties, and if so, why is it that only one trustee signed the resolution and deed of

⁶ *Supra*.

sale. There is no cogent explanation on the part of the first respondent save for the alleged dispute of fact, which I will address in the later headings.

[35] I therefore conclude that the trustees did not act in accordance with the Trust Deed and/or jointly as required by the *Parker* judgment. Thus, the conduct of the trustees cannot bind the Trust.

Whether Section 28(2) of the Alienation of Land Act renders the Deed of Sale valid

[36] There are two sections which are relevant to this issue, to wit, section 2(1) and 28(2) of the Alienation of Land Act. As I understand the first respondent's case, it lies in the interpretation of these sections. Section 2(1) is a controlling provision, and section 28(2) is the *proviso* to section 2(1).

[37] Section 2(1) reads as follows:

“(1) 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.”

[38] Section 28(2) of the Alienation of Land Act provides that:

“(2) Any alienation *which does not comply with the provisions of section 2(1)* shall in all respects be valid *ab initio* if the alienee had performed in full in terms of the deed of alienation or contract and the land in question has been transferred to the alienee.”

[39] As I have indicated above, section 2(1) sets out the formalities which must be met by parties who seek to enter into a deed of sale, and section 28(2) sets out an exception to section 2(1). The purpose of section 2(1) is also set out in *Philmatt (Pty)*

Ltd v Mosselbank Developments CC.⁷ The then Appellate Division remarked as follows:

“The general object of s 2(1) of the Act, and similar enactments which preceded it, has been considered in a number of cases, and it is generally accepted that the policy underlying this legislation is to prevent disputes, uncertainties and possible malpractices in respect of transactions which, as a rule, are of considerable value and importance.”

[40] The Supreme Court of Appeal reiterated the purpose in *Thorpe and Others v Trittenwein and Another*⁸ and stated as follows:

“The object of this provision, as in the case of its predecessors, is undoubtedly to put the proof of such an ‘alienation’ of land beyond doubt and thereby in the public interest to avoid unnecessary litigation. See eg *Philmatt (Pty) Ltd v Mosselbank Developments CC* 1996 (2) SA 15 (A) at 25B-D and authorities there cited. The need for the authority of an agent to be in writing is no less necessary to achieve this object than the need for the deed to be in writing.”

[41] The question is whether the remit of section 28(2) includes a situation where a trustee acted against the Deed of Trust. I do not think so. As I have already indicated, the purpose of section 28(2) is to provide certainty once the transaction is concluded. However, it is not a shield against judicial scrutiny.

[42] This case is similar to what the SCA found in *Thorpe*. The fact that in *Thorpe* the sale had not been concluded does not distinguish it from this case. The underlying principle is the same i.e. the trustee was not authorised to act on behalf of the Trust and therefore the deed of sale was declared invalid.

[43] The interpretation proffered by the first respondent opens up section 28(2) to abuse. For instance, if an unscrupulous government official and a private individual decide to enter into an unlawful sale of land agreement and the transaction is completed, does it mean that the court cannot set it aside because it is protected by section 28(2)? I do not think it was the intention of the section to create a parapet for unlawful activities.

⁷ *Philmatt (Pty) Ltd v Mosselbank Developments CC* 1996 (2) SA 15 (A) at 2C-D (“*Philmatt*”).

⁸ *Thorpe and Others v Trittenwein and Another* 2007 (2) SA 172 (SCA) para 8 (“*Thorpe*”).

[44] The Court in *Thorpe*, in this regard, summarised the position as follows:

“[14] The answer I think is that even if one regards the decision of the co-trustees to enter into the agreement of sale as no more than a matter of internal trust administration, the point remains that in the absence of the joint decision of the co-trustees (or the majority if that is all the trust deed requires), the assent of a single trustee to a contract (unlike in the case of a partner) will not bind the trust. The reason is the rule that requires co-trustees to act jointly. This much is well established and was readily conceded by counsel. A trustee who was not party to the decision-making process and who therefore has not authorised the contract would be free to contest the validity of the transaction. In that event the other contracting party wishing to hold the trust bound would be obliged to prove the existence of that authority. The discharge of such a burden of proof would ordinarily be no easy matter.

[15] As previously indicated, the very object of s 2(1) of the Act is on grounds of public policy to facilitate that proof by requiring the authority to be in writing and so avoid needless litigation. Whether one regards *Thorpe* as having acted as a functionary of the trust and in that sense a principal or as both a principal (as co-trustee) and agent of the other co-trustees, the result in my view must be the same. Given the object of the section, it must be construed, I think, as being applicable on either basis. In other words, the reference in the section to ‘agents’ must be understood as including a trustee who may in a sense be said to sign as a principal (ie as the trust), but whose power to bind the trust is nonetheless dependent upon the authority of the co-trustees. To do otherwise would be to thwart the clear object of the section. It follows that in my view the agreement of sale (as supplemented by the addenda) is void *ab initio* and of no force and effect.”

[45] I therefore do not find merit in the first respondent’s argument for reasons set out above.

Whether Estoppel Applies to a Trust

[46] The question whether estoppel applies to a Trust is a novel question. I could not find an authority from the Supreme Court of Appeal or the Constitutional Court that provides a direct answer to the question. As I have indicated above, the *Parker* and *Nieuwoudt* judgments provide guidance on this issue. These judgements discuss the unique nature of the Trust and how it differs from other entities.

[47] Furthermore, there is a High Court judgment penned by Mdalana-Mayisela J in the matter of *Nedbank Ltd v Mhlari NO and Others*⁹ which discusses this question. I will discuss the judgment in the later paragraphs.

[48] The first respondent's case is that since the applicants could not provide a response to the notice in terms of Rule 35(12) regarding the financial information of the Trust, they are estopped from denying the authority of Ms Luanda Swanepoel.

[49] Before dealing with the question whether estoppel applies to a Trust, it is important to examine the structure of the Trust and its legal standing as an entity. The SCA in *Parker* and *Nieuwoudt* set out the nature of the Trust. The Court stated the following:

[32] No comfort can be derived in this state of affairs from the fact that the bank had the trust deed (as it did) or that it drew up the loan documents itself (as it did). *It is correct, as Harms JA warned in Nieuwoudt, that outsiders dealing with trusts must be warned to be careful. It is also correct, as Mpati DP has recently pointed out, that an outsider dealing with a trust has a manifest interest in ensuring that trustees have authority to encumber the trust property.* But trust deeds may be complex, prolix and obscure: In the present case, the point that has foiled the bank was rejected at first instance (where Roux J regarded it as 'nonsense' and 'opportunism'), and established only after toilsome appellate litigation."

[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 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. 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.

[22] This has not changed. The essential notion of trust law, from which the further development of the trust form must proceed, is that enjoyment and control should be functionally separate. *The duties imposed on trustees, and the standard of care exacted of them, derive from this principle. And it is separation that serves to secure diligence on the part of the trustee, since a lapse may be visited with action by beneficiaries whose interests conduce to demanding better.* The same separation tends to ensure independence of judgment on the part of the trustee – an indispensable requisite of office – as well as careful scrutiny of transactions designed to bind the trust, and compliance with formalities (whether relating to authority or

⁹ *Nedbank Ltd v Mhlari NO and Others* 2022 (6) SA 438 (GJ) ("*Mhlari*").

internal procedures), since an independent trustee can have no interest in concluding transactions that may prove invalid.

[23] *The great virtue of the trust form is its flexibility, and the great advantage of trusts their relative lack of formality in creation and operation: 'the trust is an all-purpose institution, more flexible and wide-ranging than any of the others'. It is the separation of enjoyment and control that has made this traditionally greater leeway possible. The Courts and Legislature have countenanced the trust's relatively autonomous development and administration because the structural features of 'the ordinary case of trust' tend to ensure propriety and rigour and accountability in its administration."*¹⁰ (My emphasis.)

[50] In *Nieuwoudt*, Farlam JA stated:

"[9] *In my view, however, whether or not the Turquand rule should be applied to trusts, particularly business trusts - a matter on which I express no opinion - it cannot be applied in the present case. I say this because I am satisfied that clause 23.4 of the trust deed does not afford a foundation for the contention advanced in this regard by the respondent.*

...

[19] Whether knowledge of the contents of a trust deed should be attributed in law to the public seems to me to be less than obvious. An underlying principle of company law and the Turquand rule, namely that a person who deals with a company is bound by the limitations contained in the memorandum and articles of association because these documents are accessible to the public, is consequently difficult to apply to trusts.

[20] Nevertheless, as Van Dijkhorst J convincingly explained in *Coetzee v Peet Smith Trust en Andere* 2003 (5) SA 647 (T), all this does not justify a departure from the principle that trustees have to act jointly. And one should not believe, as Cameron *et al* *Honore's South African Law of Trusts* 5 ed para 198 point out, *that the ambit of authority conferred by a trust deed is a matter of 'internal management' with which outsiders need not concern themselves.*

...

[22] What does need to be emphasised is that even if the Turquand rule is extended to business trusts, and even if a trust deed were to provide that the trustees could delegate their powers to one of their number, the Turquand rule would without more be of no assistance to third parties. This is because a third party would not be entitled to assume, merely from the fact that one trustee can be authorised to exercise the powers of all of them, that such authorisation has in fact been given: *Legg & Co v Premier Tobacco Co* 1926 AD 132 139; *Wolpert v Uitzigt Properties (Pty) Limited & Others* 1961 (2) SA 257 (W) 262G-263F; *Tuckers Land & Development Corporation v Perpellief* 1978 (2) SA 11 (T) 15A-H."¹¹ (My emphasis.)

¹⁰ *Parker* paras 10, 11, 15 – 18, 22 and 23.

¹¹ *Nieuwoudt* paras 9, 19, 20, and 22.

[51] These judgments provide important considerations regarding the question whether estoppel applies to a Trust. The first consideration is that the Trust estate can only be bound by the decisions of the trustees which are in line with the Trust Deed. The second one is that the third party must be careful when dealing with the Trust. The third one is that, unlike the company, the Trust does not have internal formalities. The fourth one is that the Trust is a *sui generis* entity. The fifth one is that the Trust Deed is not an internal management.

[52] These considerations are important in order to determine the question whether estoppel applies to a Trust. First and foremost, estoppel by definition is meant to protect the interest of a third party against an entity by allowing the third party to assume that the principal gave the requisite authority to the agent. In terms of estoppel, even if there was no authority given by the principal, the company will be bound as a matter of law.

[53] On the other hand, a Trust is different. The trust estate can only be bound if there is adherence to the Trust Deed. Therefore, an argument that estoppel should apply to a Trust is against the foundational principle of the Trust. It will highly prejudice the beneficiaries of the Trust.

[54] Turning to the *Mhlari* judgment, which deals with a similar question, Mdalana-Mayisela J indicated that:

“[22] ... The Defendants have however stressed in their heads of argument, and correctly so that the *Parker* decision left open the question of ostensible authority and estoppel. *It is not clear whether these defences are legally available to the party such as the Plaintiff in the circumstances of this case. In my view, I see no legitimate basis upon which it can be asserted that these defences cannot be invoked in the case of the action of the Trust, where the other party was lured to believe that internal formalities were complied with when in fact that was not so. I am satisfied that on the undisputed facts, the Trust should be estopped from relying on lack of authority to contract. The loan agreement is binding on the Trust, and the Third, Fourth, Fifth, Sixth and Seventh Defendants are equally bound as sureties to the debts owed by the Trust to the plaintiff. I am also satisfied that the Trust breached the loan agreement by failing to honour its obligation to pay monthly instalments as they became due. The Defendants have also not provided evidence to the contrary as to why the property should not be declared executable.*”¹² (My emphasis.)

¹² *Nedbank Ltd v Mhlari NO and Others* 2022 (6) SA 438 (GJ) para 22.

[55] I have already set out the reasons why estoppel cannot apply to a Trust, and it is the same reasons why I respectfully disagree with the reasons and findings by Mdalana-Mayisela J relating to this question. Over and above what I have indicated above, I am of the view that the judgment does not recognise the unique nature of the Trust. Instead, it assumes that a Trust is like any other entity with distinctive features. It does not engage some of the features of the Trust identified above. Thus, I do not agree with the conclusion that estoppel applies to a Trust as it will defeat the very essence of the Trust.

[56] I therefore find that estoppel does not apply to a Trust.

Whether there is a dispute of fact

[57] The first respondent argued that there is a dispute of fact due to the minimal available documentation relating to this transaction. The first respondent has no clear and definitive knowledge of the actual documentation presented to the transferring attorneys.

[58] Furthermore, the first respondent served on the applicants a Rule 35(12) notice affording the applicants an opportunity to disclose the complete accounting records of the Trust, the proof of the bank account held in the name of the trust, and *the proof of payment of the purchase price*. No documents were furnished.

[59] Throughout the founding affidavit, the allegation is made that the purchase price was paid. Nowhere do the applicants, or any of the erstwhile trustees, confirm that the payment of the purchase price had been made by the Trust.

[60] In fact, the applicants in the replying affidavit indicate that:

“34.3 Even if it was paid by a third party on behalf of the trust, it still stands to be credit of the trust, as performance under a void agreement.”

[61] The first respondent argues further that if the monies had not been paid by the Trust (which has not been alleged or proved), the trust is not entitled to claim repayment of those monies. This is a simple principle in law.

[62] In determining whether there is a dispute, the court must decide whether there is a *bona fide* dispute of fact. The principle is addressed in *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*.¹³ The relevant excerpt of the judgment reads:

“The crucial question is always whether there is a real dispute of fact. That being so, and the applicant being entitled in the absence of such dispute to secure relief by means of affidavit evidence, it does not appear that a respondent is entitled to defeat the applicant merely by bare denials such as he might employ in the pleadings of a trial action, for the sole purpose of forcing his opponent in the witness box to undergo cross-examination. Nor is the respondent’s mere allegation of the existence of the dispute of fact conclusive of such existence.”¹⁴

[63] If a version of one of the parties is not *bona fide*, that version can obviously be rejected, and the other party will succeed. Where the respondent’s version is a bare denial or is far-fetched or clearly untenable, then there is no genuine dispute of fact, and then the applicant’s version will stand, and an order in favour of the applicant can be made on the papers, the court will adopt a “robust, common sense approach”.

[64] The “robust, common sense approach” is also applicable where the version is untenable as a whole, although detailed: *Truth Verification Testing Centre v PSE Truth Detection CC and others*¹⁵:

“I am also mindful of the fact that the so-called ‘robust, common-sense, approach’ which was adopted in cases such as *Soffiantini v Mould* 1956 (4) SA 150 (E) in relation to the resolution of disputed issues on paper usually relates to a situation where a respondent contents himself with bald and hollow denials of factual matter confronting him. There is, however, no reason in logic why it should not be applied in assessing a detailed version which is wholly fanciful and untenable.”

[65] In this case, it is common cause that there is a Deed of Sale and transfer of the properties from the first respondent to the Trust. I find it strange that the first respondent will accept that there was sale and transfer of the properties to the Trust and somehow raised a dispute of fact argument on the basis that the applicants

¹³ *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T).

¹⁴ *Ibid* at 1162-1163.

¹⁵ *Truth Verification Testing Centre v PSE Truth Detection CC and Others* 1998 (2) SA 689 (W) at 698I -J.

could not produce a proof of payment of the purchase price. There is no outright denial on the part of the first respondent that the purchase price was paid. And if it was not paid, how was the transaction completed without the payment of the purchase price? I find the defence raised scant and far-fetched. Therefore, I am of the view that a “robust, common sense approach” is applicable in this case and therefore the argument against the repayment of the purchase price is without merit.

[66] In relation to the rates and taxes, these are taxes which are paid to the first respondent by virtue of the ownership and enjoyment of the properties. Therefore, the finding of invalidity does not necessarily mean that the first respondent should repay the rates and taxes paid by the applicants. It is a question of just and equitable remedy. It is therefore not just and equitable to grant such an order.

[67] Lastly, in as much as I made a finding against the first respondent, I am alive to the fact that Ms Luanda Swanepoel is partly to be blamed for the impugned transaction. Further, the defence raised by the first respondent, though incorrect, is not frivolous. I am therefore not persuaded that costs should follow the event.

Order

[68] By virtue of the above-mentioned, I grant the following order:

1. That the deed of sale between Thaba Chweu Local Municipality and the Luanza Swanepoel Familie Trust (IT1665/11(T)), dated 3 August 2011, is declared void ab initio;
2. That the transfer of the 2 immovable properties known as:-
 - 2.1. Erf 5[...] L[...] Uitbreiding 7[...] D[...] Registrasie Afdeling JT, Provinsie Mpumalanga, and
 - 2.2. Erf 5[...] L[...] Uitbreiding 7[...] D[...] Registrasie Afdeling JT, Provinsie Mpumalanga.

under deeds of transfer 743/2012 and 744/2012 respectively, is declared invalid.

3. That the second respondent be directed to amend its records to cancel the transfer of the aforesaid properties into the name of the Trustees of the Luanza Swanepoel Familie Trust (IT1665/2011) under deeds of transfer 743/2012 and 744/2012;
4. That the first respondent and its relevant officials are directed to sign all documents necessary to correct the registration of the properties as may be required, within 30 days of receiving a written request to do so.
5. That the first respondent is directed to repay the purchase price of the 2 properties, in the amount of R1 203 700.00, to the applicants; and
6. Each party to bear its own costs.

P MANAGA AJ
ACTING JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION, MBOMBELA

Appearances

For the Applicants:	Advocate A Coertze
Instructed by:	JPA Venter Attorneys

For the First Respondents:	Advocate M Jacobs
Instructed by:	Seymore Du Toit & Basson Inc