

SOUTH AFRICA / JUDGMENT

AECOM SA (Pty) Ltd v Rustenburg Local Municipality (CIV APP FB 07/2023) [2024] ZANWHC 72; 2024 (6) SA 188 (NWM) (12 March 2024) [2024] ZANWHC 72

COURT

North West High Court, Mafikeng

BEFORE

Hendricks JP, Petersen J, Dibetso-Bodibe AJ

CASE / FILE NUMBER

CIV APP FB 07/2023

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FLYNOTES:

COMPANY – Locus standi – Professional
registration – Interpretation of Engineers Profession Act 46
of 2000 – Definition of registered person
– Section 21
of Act, following registration, gives recognition to those who
qualify for registration to be accorded
titles for their
achievements – A company cannot hold any of those titles –
Court a quo in failing to properly
apply its mind to special plea,
misdirected itself in finding that appellant is required to
register as a firm in terms of
Act – Appeal upheld.
IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION,
MAHIKENG
CASE NUMBER: CIV APP
FB 07/2023

HIGH COURT CASE NO: 1341/2017
In the matter between:-
AECOM
SA (PTY) LTD
Appellant
and
RUSTENBURG
LOCAL MUNICIPALITY
Respondent
CORAM: HENDRICKS JP,
PETERSEN J, Dibetso-Bodibe AJ

HEARD: 23 February 2024
The judgment was handed
down electronically by circulation to the parties'
representatives via email. The date and time for hand-down is
deemed to be 12 March 2024 at 10h00am.

ORDER
(i)
The appeal is upheld.
(ii)
The order of the court a
quo is set aside and replaced with the

following order: "The
First Special Plea of the Defendant is dismissed with costs."
(iii)
The respondent is ordered to pay the costs of
appeal, which costs shall include the costs of the application for
leave to appeal,
and the costs of Counsel.

JUDGMENT

PETERSEN J

Introduction

- [1] This is an appeal against the whole of the judgment and order of the court a quo (per Mahlangu AJ) handed down on 01 February 2023. The court a quo upheld the first special plea by the respondent (defendant) with costs and ordered the appellant (plaintiff) leave if so advised, to file an amended declaration within 15 days of the order. Leave to appeal was granted to the Full Court of the Division by Petersen J on 26 May 2023.
- [2] The appellant seeks an order, substituting the order of the court a quo with an order that the first special plea of the respondent be dismissed with costs, and that the respondent be ordered to pay the wasted costs occasioned by the postponement of the trial, which trial was set down for hearing for three (3) days.

- [3] The issue in this appeal is very narrow. Is the appellant (as a juristic person) required to register as an engineer in terms of section 18 of the Engineering Profession Act 46 of 2000. If this Court agrees with the appellant that a company, as a juristic person, is not required to register as an engineer, the appeal stands to be upheld. If this Court is not with the appellant, the appeal stands to be dismissed, but the dictates of fairness in litigation would necessitate an order determining the conduct of the litigation going forward.

Background

- [4] The appellant instituted the action against the respondent on 11 July 2017. The claim was initially brought by way of simple summons in terms of which the appellant sought payment of ten
- (10) invoices for services rendered to the respondent in terms of a service level agreement. The appellant subsequently delivered a declaration which was later amended. In the declaration the appellant cited itself as AECOM SA (PTY) LTD (formerly known as BKS (Pty) Ltd, a company with limited liability, duly registered and incorporated in accordance with the company laws of the Republic of South Africa, with its principal place of business situated at 263A West Avenue, Centurion, Gauteng.
- [5] The first special plea which is central to this appeal, was formulated as follows by the respondent:

“A SPECIAL PLEA – NON LOCUS STANDI

1 The Plaintiff is claiming certain fees in respect of professional engineering services which claim stems from its Simple Summons served on the Defendant on 7 August 2017 and its Declaration which was served on the Defendant on 1 November 2018.

2 The Plaintiff has not alleged that it is a duly registered engineering firm in (sic) registered in terms of the Engineering Profession Act 40 of 2000 (as amended) in either its Simple Summons served on the Defendant on 7 August 2017 or its Declaration which was served on the Defendant on 1 November 2018.

3 The Plaintiff accordingly does not allege facts capable of sustaining a cause of action for such professional fees and accordingly does not plead as case capable of being proven to establish that it has locus standi in iudicio.

WHEREFORE the Defendant prays that it may please the above Honourable Court to dismiss the Plaintiff's claim with costs.”

- [6] The appellant replicated to the first special plea as follows:

“A AD FIRST SPECIAL PLEA – LOCUS STANDI – PARAGRAPHS 1 TO 3

1 The Defendant alleges that the Plaintiff does not have the required locus standi insofar as the plaintiff has seemingly not alleged that it is a duly registered engineering firm, registered in terms of the Engineering Profession Act, 40 of 2000.

2 The Plaintiff pleads that it is a registered engineering firm and that it is not necessary to plead this out in the citation.

3 In addition to the aforesaid, the Defendant has admitted that the bulk of the services, which forms the basis of the Plaintiff's claims have been attended to, as per paragraph 22 of the Defendant's amended plea.

4 By the acceptance of the services, the Defendant is estopped from relying on the issue of locus standi. The acceptance of the services constitutes a waiver of this issue, where same may have existed.

5 Wherefore the Plaintiff prays for the dismissal of the first special plea with costs."

The proceedings in the court a quo

[7] The first special plea was argued before Mahlangu AJ on 31 October 2022, which was the first day of three days allocated for trial. It happened to be the last day of the acting appointment of Mahlangu AJ as judge in this Division. The judge resultantly proposed to hear the parties only on the first special plea of the respondent, in which the parties acquiesced.

[8] In the brief judgment of the court a quo, it simply failed to engage the issue on appeal in its judgment. It is apposite to quote from the judgment of the court a quo to appreciate its failure as aforesaid. The only provision of the Act referenced in the judgment is section 18(2) and the submissions of the parties is limited to this section. The following appears from the brief

judgment:

"[12] Section 18(2) of the Act provides that:

"(2) A person may not practice in any of the categories contemplated in subsection (1), unless he or she is registered in that category"

[13] The defendant submitted that, in terms of section 18(2) of the

Act, a person may only practice as an engineer if he or she is registered as an engineer with an engineering body and his or her membership subscription with the engineering body is

renewed annually. The defendant further submitted that, the plaintiff did not establish in its declaration that it has locus standi and that it did not allege that it is duly registered in terms

of the Act. There was a need for the plaintiff to be registered with an engineering body that would oversee its projects to protect the public. The defendant further submitted that, failure to register with an engineering body is an offence which is punishable in terms of section 41(3) of the Act which provides that:

“(3) A person convicted of an offence in terms of section 18(2), may be liable to a fine equal to double the remuneration received by him or her for work done in contravention of section 18(2) or to a fine equal to the fine calculated according to the ration determined for three years imprisonment in terms of the Adjustment of Fines Act, 1991.”

- [14] The plaintiff submitted that it was procedurally incorrect to make a special plea to the pleadings and that the defendant could have taken an exception. The plaintiff further submitted that, the special plea of locus standi is a technical complaint, if it was an exception it could have been cured by an amendment to its pleadings.
- [15] The plaintiff further submitted that, section 18 of the Act makes reference to individual engineers and not to a firm of engineers. It further submitted that there is not requirement in the Act for a firm to be registered with an engineering body. I am of a view that these submissions are without substance, a firm of engineers cannot operate without being registered with any engineering body that would oversee its projects.

CONCLUSION

- [16] I am of a view that the plaintiff failed to establish locus standi in the declaration. The plaintiff failed to allege in its declaration that it is duly a registered engineering firm in terms of section 18 of the Act. I am of a view that it is a statutory

requirement to register engineers in terms of section 18 of the Act.”

(emphasis added)

The Engineering Professions Act 46 of 2000

- [9] It is important to have regard to section 18 of the Engineering Professions Act 46 of 2000 (‘the Act’) and all other relevant provisions related thereto, to fully appreciate the narrow issue before this Court. Section 18 of the Act provides which categories of persons are required to register in the engineering profession:

“18 Categories of registration

- (1) The categories in which a person may register in the engineering profession are -
- (a) professional, which is divided into-
- (i) Professional Engineer;
- (ii) Professional Engineering Technologist;

- (iii) Professional Certificated Engineer; or
- (iv) Professional Engineering Technician; or
- (b) candidate, which is divided into-
 - (i) Candidate Engineer;
 - (ii) Candidate Engineering Technologist;
 - (iii) Candidate Certificated Engineer; or
 - (iv) Candidate Engineering Technician; or
- (c) specified categories prescribed by the council.
- (2) A person may not practise in any of the categories contemplated in subsection (1), unless he or she is registered in that category.
- (3) A person may practise in a consulting capacity in the category in which he or she is registered.
- (4) A person who is registered in the category of candidate must perform work in the engineering profession only under the supervision and control of a professional of a category as prescribed.”

[10] Section 19 of the Act sets out the application process for registration in the engineering profession as follows:

“19 Registration

- (1)(a) A person must apply, in the prescribed application form, to the council for registration in a category referred to in section 18 (1).
- (b) The application form referred to in paragraph (a) must be accompanied by the prescribed fee.
- (2) The council must register the applicant in the relevant category and issue a registration certificate to the successful applicant in the prescribed form if, after consideration of an application, the council is satisfied that the applicant-
 - (a) in the case of a person applying for registration as a professional-
 - (i) has demonstrated his or her competence as measured against standards determined by the council for the relevant category of registration; and
 - (ii) has passed any additional examinations that may be determined by the council;
 - (b) in the case of a person applying for registration as a candidate or a candidate in a specified category, has satisfied the relevant educational outcomes determined by the council for this purpose, by-

(i) having passed accredited or recognised examinations at any educational institution offering educational programmes in engineering; and

(ii) having passed any other examination that may be determined by the council; or

(iii) presenting evidence of prior learning in engineering.

(3)(a) Despite subsection (2), the council may refuse to register an applicant-

(i) if the applicant has been removed from an office of trust on account of improper conduct;

(ii) has been convicted of an offence in the Republic, other than an offence committed prior to 27 April 1994 associated with political objectives, and was sentenced to imprisonment without an option of a fine, or, in the case of fraud, to a fine or imprisonment or both;

(iii) if the applicant has, subject to paragraph (b), been convicted of an offence in a foreign country and was sentenced to imprisonment without an option of a fine, or, in the case of fraud, to a fine or imprisonment or both;

(iv) if the applicant is declared by the High Court to be of unsound mind or mentally disordered, or is detained under the Mental Health Act, 1973;

(v) for as long as the applicant is disqualified from registration as a result of any punishment imposed on him or her under this Act;

(vi) if the applicant is an unrehabilitated insolvent whose insolvency was caused by his or her negligence

or incompetence in performing work falling within the scope of the category in respect of which he or she is applying for

registration.

(b) For the purposes of paragraph (a) (iii), the council must take cognisance of the prevailing circumstances in a foreign country relating to a conviction.

(c) The council must provide the applicant with a notice of a refusal referred to in paragraph (a).

(4) For the purposes of this section ‘prior learning’ means the previous learning and experience of a learner, howsoever obtained, against the learning outcomes required for a specified

qualification and the acceptance for the purposes of qualification of that which meets those requirements.”

[11] A registered person in any of the section 18(1) categories may in terms of section 21 of the Act describe herself or himself as follows:

21 Authorised titles

- (1) A person who is registered in any of the categories referred to in section 18 (1) may describe himself or herself and use the title-
 - (a) Professional Engineer;
 - (b) Professional Engineering Technologist;
 - (c) Professional Certificated Engineer;
 - (d) Professional Engineering Technician;
 - (e) Candidate Engineer;
 - (f) Candidate Engineering Technologist;
 - (g) Candidate Certificated Engineer; or
 - (h) Candidate Engineering Technician.
- (2) A registered person may use a title prescribed by the council for the specified category.
- (3) The council may determine abbreviations or acronyms for the titles referred to in subsection (1).

[12] The definitions relevant to the registration of engineers in terms of the Act provide as follows:

“‘actively practise’ means to practise on an ongoing basis in one of the categories contemplated in section 18, and includes a person qualified in the engineering profession who is employed by any sphere of government or an educational institution;

...

‘registered person’ means a person registered under one of the categories referred to in section 18;

‘registration’ means the process-

- (a) of assessment of competency of applicants for the purpose of registration under this Act; and
- (b) of entering the names of the applicants who qualify into the register referred to in section 11 (c);...”

[13] Save for persons specifically identified in section 18 who are required to register as engineers in terms of the Act, the Act provides for recognition of voluntary associations in terms of section 25. The Act provides that the Engineering Council of South Africa may determine the requirements for recognition of Voluntary Associations. The Rules in terms of Section 36(1) of the Act sets out the Requirements for Recognition as a Voluntary Association, by providing for two categories of Voluntary Associations, as follows:

“Category A

- (1) Associations whose membership consists of natural persons who, subject to the applicable provisions of Rule 3, are practising in engineering in any particular discipline or sub-discipline of engineering; or in any particular category of registration contemplated in section 18 of the Act.

Category B

- (2) Associations whose membership consists of juristic persons, including sole proprietors (corporate members), who, subject to the applicable provisions of rule 4, are engaged in carrying out work of an engineering nature.”

Submissions

The appellant

- [14] The thrust of the argument in the heads of argument by Adv Posthumus for the appellant is that under no construction can it conceivably arise that the appellant was required to plead out a legal consequence that does not exist. Simply put, the submission goes, that the Act does not define a “firm” or require that a “firm” be registered in terms of the Act to attend to certain duties. Upon a contextual reading of the Act, the purpose of the Act is to regulate individual engineers. Section 18(1)(a) –
- (c) of the Act specifically speaks to individuals and not firms.
- [15] The appellant further contends that the court a quo failed to consider the pleadings. In terms of the pleadings, the respondent accepted the name of the appellant as pleaded in paragraph 1 of the amended declaration; the respondent accepted that a written service level agreement was entered into on 19 June 2008 between the parties; an inception report was submitted in July 2008; written instruction/agreement was reached in January 2013 instructing the appellant to commence with the works identified in the agreement; the appellant complied with its obligations and provided a list of defined services, which the respondent accepted; the appellant submitted invoices which values reflected therein are partly disputed, but portions thereof paid; and a claim for enrichment has been included as an alternative to the claim advanced in respect of the services rendered by the appellant and accepted by the respondent.

The respondent

- [16] Adv van Rooyen for the respondent places heavy reliance on the judgment in Meredith Woods Johnson & Associates v Deep Blue See Properties (Pty) Ltd 2005 JDR 0476 (SE). To this end, a comparative analysis is extrapolated between the Engineers Profession Act and the Architectural Profession Act 44 of 2000, to advance a contention that Meredith Woods Johnson & Associates should be of a highly persuasive value to this Court, unless that Court was clearly wrong. The two Acts as aforesaid were promulgated in the same year and

followed a parallel course through the parliamentary process until enactment.

- [17] Notably, the issue in Meredith Woods Johnson & Associates involved an exception and not a special plea as in the present appeal. The issue in that matter was “whether an architect who sues for payment for services rendered in his professional capacity is obliged to allege that he is registered as a professional architect in terms of the provisions of the Architectural Profession Act 44 of 2000...and whether a failure to do so renders his claim excipiable.”
- [18] Adv van Rooyen highlights that the architect in Meredith Woods Johnson & Associates was a trust duly registered in terms of the Trust Property Control Act 57 of 1988. For that reason, the submission further goes, section 1 of the Architectural Profession Act defines a “registered person” as a person registered under one of the categories referred to in section 18, like the categories of persons referred to in section 18 of the Engineers Professions Act. The high watermark of the reliance on Meredith Woods Johnson & Associates at pages 10 and 11 of the judgment, is the finding by Leach J (as he then was) that: “... in order to recover remuneration for services rendered, it is an integral part of an architect’s case that he or she be registered. Consequently, on the bases of the reasoning set out in the IS & GM Construction v Tunmer 2003
- (5) SA 216 (W), unless an allegation of registration is made, an architect’s particulars of claim for professional fees will not disclose a cause of action.”
- [19] A further arrow in the bow of Adv van Rooyen which speaks directly to this matter, since we are dealing here with a firm (a company), is the definition of a “person” in section 2 of the Interpretation Act 33 of 1957 (as amended) – (the Interpretation Act), read with section 1 of the Interpretation Act. Section 1 of the Interpretation Act provides:

“1 Application of Act

The provisions of this Act shall apply to the interpretation of every law (as in this Act defined) in force, at or after the commencement of this Act in the Republic or in any portion thereof, and to the interpretation of all by-laws, rules, regulations or orders made

under the authority of any such law, unless there is something in the language or context of the law, by-law, rule, regulation or order repugnant to such provisions or unless the contrary intention appears therein.”

- [20] The term “person” is defined in section 2 of the Interpretation Act as follows:

“‘person’ includes –

- (a) any divisional council, municipal council, village management board, or like authority;
- (b) any company incorporated or registered under any law;
- (c) any body of persons corporate or incorporate.”

[231] Adv van Rooyen with reliance on the Interpretation Act, therefore contends that persons for the purpose of the definition of “registered persons” in section 18 of the Act includes all firms such as individuals, companies, bodies of persons corporate or unincorporate. On this basis, it is contended that the court a quo did not misdirect itself in finding that the appellant had failed to allege that it was a firm (entity or company or body corporate)

registered in terms of section 18 of the Act.

Discussion

[222] Before turning to the real issue in this appeal, it is prudent to deal with the respondent’s reliance on Meredith Woods Johnson & Associates. I respectfully disagree with the reasoning and finding in Meredith Woods Johnson & Associates, which I note was followed with approval in Moditi Consulting Engineers (CC) v Tectura International (Pty) Ltd 2022 JDR 0166 (GP) by Motha J.

[233] In Meredith Woods Johnson & Associates, Leach J (as he then was) identified the question in issue before him as follows: “The question in issue in this exception are whether an architect who sues for payment for services rendered in his professional capacity is obliged to alleged that he is registered as a professional architect in terms of the provisions of the Architectural Professions Act No. 44 of 2000 (“the 2000 Act”) and whether a failure to do so renders his claim excipiable.”

[244] After identifying the plaintiff as a trust duly incorporated in accordance with the Trust Property Control Act 57 of 1988, stated that: “Apparently architects are able conduct their professional business through trusts (precisely how this works is not relevant to the issue before me). For present purposes I can regard the plaintiff as being an architect.”

[255] The plaintiff in Meredith Woods Johnson & Associates, being able to conduct its business as a Trust and precisely how that worked should with respect have been a very relevant issue in the matter. The acceptance by Leach J that, for purposes of the case before him, he would regard the plaintiff as an architect, led to a finding which does accord with the authorities of the Supreme Court of Appeal and its predecessor in title, the Appellate Division. It will be demonstrated that the finding was wrong in law and is therefore of no persuasive value to this Court, sitting as a Full Court, which is in any event bound by authorities of the SCA.

[266] There is a plethora of case law and legal articles on the nature of Trusts. For present purposes, however, the judgment in Tusk Construction Support Services (Pty) Ltd and Another v Independent Development Trust (Case no 364/2019) [2020] ZASCA 22 (25 March 2020), should suffice as it encapsulates the authorities very succinctly. The following was said in the judgment:

“[1] The facts of this appeal are uncontroversial. But the legal question for determination arising from those facts is remarkable. It is this: is a summons that cited a trust rather than the trust’s trustees in their representative capacity a nullity that cannot be cured by way of an amendment substituting the trustees for the trust?”

[11] Before dealing with the contentions of the parties I consider that it would conduce to clarity if I deal first with the law relating to the status of a trust. There have been numerous decisions of our courts that grappled with the status of a trust. I shall, however, not cite them all in this judgment, still less analyse them. The concept of a trust has its origins in English law. It was analysed by this Court more than six decades ago in *Crookes NO and Another v Watson and Others* 1965 (1) SA 277 (A); [1965] 1 All SA 277 (A) at 297E where the position was stated by Van den Heever JA as follows: ‘In his valuable monograph “Trust en Stigting” p. 25 Prof. W. M. R. Malherbe says: “Watter reëls aangaande die trust geld by ons? Seker nie die van die Engelse trust nie. Met die resepsie van die Engelse terme trust en trustee het ons die Engelse trustreg nie oorgeneem nie. Reeds is ‘n begin gemaak met die ontwikkeling van ‘n eie trustreg, ooreenkomstig die grondbeginsels van ons eie regstelsel.” With that observation I agree.’

[12] In his judgment in *Braun v Blann & Botha NNO and Another*

[1984] ZASCA 19; 1984 (2) SA 850 (A); [1984] 2 All SA 197 (A) Joubert JA said the following at 859D-G: ‘The trust of English law forms an integral part of all common law legal systems, including American law. In its strictly technical sense the trust is a legal institution sui generis. In South Africa, which has a civil law legal system, the trust was introduced in practice during the 19th century by usage without the intervention of the Legislature but the English law of trusts with its dichotomy of legal and equitable ownership (or “dual ownership” according to the American law of trusts) was not received into our law. Our Courts have evolved and are still in the process of evolving our own law of trusts by adapting the trust idea to the principles of our own law. ‘What rules of

trust are applicable with us? Certainly not that of the English trust. With the reception of the English terms trust and trustee, we did

not take over the English trust law. Already a start has been made in developing our own trust law, in accordance with the principles of our own legal system.’ See *Crooks NO and Another*

v Watson and Others 1956 (1) SA 277 (A) at 297E-F and Coertze [Coertze in his doctoral thesis *Die Trust in die Romeins-*

Hollandse Reg (1948) at 133]: “Die wasdom en ontwikkeling van die Treuhandidee in ons reg het plaasgevind onder die invloed van die Engelse reg. Die Engelse terme trust en trustee is adopter maar nie die Engelse trustreg nie. ‘n Eie trustreg is

deur ons regspraktyg en deur ons Howe ontwikkel; maar dis nog ver

van voltooi.”

[13] In *Commissioner for Inland Revenue v Friedman and Others* NNO

[1992] ZASCA 190; 1993 (1) SA 353 (A); [1993] 1 All SA 306 (A); 55 SATC 39(A) the same learned Judge of Appeal said (at 370 E-I): ‘Is a trust a legal persona? According to the Anglo-American law of trusts a trust has no legal personality. P W Duff *Personality in Roman Private Law* Cambridge University Press

(1938) at 206: “Maitland showed [Collected Papers vol 3 (1911) 321-404)] that by vesting property in trustees, rather than in

corporations or associations, English lawyers evaded many questions that have caused difficulty abroad.” See R W Ryan in his unpublished Cambridge doctoral thesis entitled “The Reception of the Trust in the Civil Law” (1959) at 11: “A trust is certainly not a legal person”. The position is the same in our law of trusts. See *Commissioner for Inland Revenue v MacNeillie’s Estate* 1961 (3) SA 833 (A) at 840G-H: “Neither our authorities nor our Courts have recognised it as a persona or entity. It is trite law that the assets and liabilities in a trust vest in the trustee.” Consult also *Braun v Blann and Botha* NNO and *Another*

[1984] ZASCA 19; 1984 (2) SA 850 (A) at 859E-H: “In its strictly technical sense the trust is a legal institution sui generis . . . The trustee is the owner of the trust property for purposes of administration of the trust but qua trustee he has no beneficial interest therein.” It is clear therefore that a trust is not an incorporated company. Nor is a trust a body of persons unincorporate whose common funds are the collective property of all its members. There is also no basis for a submission that because the statutory definition of “person” in s 1 of the 1962 Act was extended to include a deceased estate, it should by analogy be further extended to include a trust. The conclusion is inescapable that a trust is not a “person” within the meaning of that word in the 1962 Act.’

[14] This principle was restated by Nugent JA in *Lupacchini NO and Another v Minister of Safety and Security* 2010 (6) SA 457 (SCA); [2011] 2 All SA 138 (SCA) who said (para 1): ‘A trust that is established by a trust deed is not a legal person – it is a legal relationship of a special kind that is described by the authors of *Honoré’s South African Law of Trusts* as “a legal institution in which a person, the trustee, subject to public supervision, holds or administers property separately from his or her own, for the benefit of another person or persons or for the furtherance of a charitable or other purpose”. In *Land and Agricultural Bank of South Africa v Parker Cameron* JA elaborated: “[A trust] 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 . . . 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.”

[15] It should by now be self-evident from the analysis of the decisions referred to in the preceding paragraphs that whilst a trust lacks legal personality it is nevertheless a legal entity sui generis (see, for example, *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA); [2004] 4 All SA 596 (SCA) para 10; *Standard Bank of South Africa Ltd v Swanepoel NO*

[2015] ZASCA 71; 2015 (5) SA 77 (SCA); para 8).

[16] It is trite that in legal proceedings by or against a trust the trustees must be cited in their representative capacity and not in their private capacity. (See *Goolam Ally Family Trust t/a Textile, Curtaining and Trimming v Textile, Curtaining and Trimming (Pty) Ltd* 1989 (4) SA 985 (C) at 988 D-E; *Mariola and Others v Kaye-Eddie NO and Others* 1995 (2) SA 728 (W); [1995] 3 All SA 287 (W) at 731 C-F; *Van der Westhuizen v Van Sandwyk* 1996 (2) SA 490 (W); *Rosner v Lydia Swanepoel Trust* 1998

(2) SA 123 (W) at 126H). Nonetheless, instances in which the trust was cited as such in legal proceedings are not unknown

(see, in this regard, *Rosner v Lydia Swanepoel Trust* already referred to in this para at 127I; *BOE Bank Ltd (formerly NBS Boland Bank Ltd) v Trustee, Knox Property Trust*

[1999] 1 All SA 425 (D); *First National Bank of South Africa Ltd v Strachan Family Trust* [2000] 3 All SA 379 (T)). And this practice has happened with more frequency lately.”

(emphasis added)

[27] For the reasons afore stated, no reliance can be placed on *Meredith Woods Johnson & Associates*. The decision was clearly wrong.

[28] In the present appeal, we are dealing with a company and not a Trust. A company has legal status as a juristic person. It falls under the definition of the term person in the Interpretation Act. That is accepted. In our constitutional dispensation the approach to interpretation is that adumbrated in *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012), which has mustered constitutional approval. The Interpretation Act, being legislation enacted prior to our constitutional dispensation, ironically contains one principle which

is central to the approach to interpretation which *Endumeni* has brought about. It provides, in relevant part, that “The provisions of this Act shall apply to the interpretation of every law (as in this Act defined) in force, at or after the commencement of this Act in the Republic or in any portion thereof...unless there is something in the language or context of the law,..repugnant to such provisions or unless the contrary intention appears therein.” The contextual approach to

interpretation of, inter alia, legislation, through the prism of the Constitution is the prevailing approach in our constitutional dispensation.

- [29] It is inimical to interpreting the Engineers Profession Act, to have regard to the very “Title” of the Act. The Act speaks to a “Profession”, that being, of engineers. “Profession” is not defined in the Act. In the English judgment of *IRC v Maxse* [1919] 1 KB 647 (CA) 61, Lord Justice Scrutton said: “A profession involves the idea of an occupation requiring either purely intellectual skill, or if any manual skill as in painting or sculpture or surgery, skill controlled by the intellectual skill of the operator...” In the Oxford Dictionary of Law Tenth Edition, the author in defining “profession” in the context of English Law states that: “The traditional the approach of the courts is to say that a company cannot carry on a profession as the profits of a profession must be dependent mainly upon the personal qualification of the person by whom it is practiced, and that can only be an individual (*William Esplen, Son and Swainston v IRC* [1919] 2 KB 731).” The Oxford South African Concise Dictionary Second Edition defines profession as “a paid occupation, especially one involving training and a formal qualification.”
- [30] That is the starting point of the contextual approach to interpretation. The next step in the process is to look at the relevant definitions that seek to regulate the profession of engineers which is a paid occupation, which involves prolonged training and formal qualifications. Each of the relevant definitions actively adopt the word “person” in a specific context. Thus, to “‘actively practise’ means to practise on an ongoing basis in one of the categories contemplated in section 18, and includes a person qualified in the engineering profession who is employed by any sphere of government or an educational institution;” As with the ordinary dictionary meaning of a profession, reference is made to a person qualified in the engineering profession. A company logically speaking cannot possess qualifications to actively practice in the engineering profession.
- [31] The central issue in this appeal turns on an interpretation of the definition of ‘registered person’. As with the definition of actively practice, the definition of a registered person refers to section 18 of the Act, which identifies with specificity the categories of persons who are required to register in terms of the Act. The definition of registration provides further specific requirements for registration of the categories of persons. It means the process of assessment of competency of applicants for purpose of registration and entering the names of applicants who qualify into the register. Section 19 of the Act speaks to assessments, examinations and qualifications which are germane to natural persons and not companies (firms). Section 21 of the Act, following registration, gives recognition to those who qualify for registration to be accorded titles for their achievements. A company cannot hold any of those titles.

- [32] All categories of persons referred in section 18 are natural persons and the context of the Act, the wording and language employed speaks only to natural persons. The definition of the term “person” in section 2 of the Interpretation Act, to include a company, read with section 1 of the said Act, and the contextual approach to interpretation, is ousted in this matter.
- [33] The only relevance of juristic persons in the Act relates to the recognition of voluntary associations whose membership consists of juristic persons, otherwise section 25 of the Act makes it clear that associations whose membership consists of natural persons practising in engineering in any particular discipline or sub-discipline of engineering; or in any particular category of registration contemplated in section 18 of the Act; are distinct from juristic persons.

Conclusion

- [34] The court a quo in failing to properly apply its mind to the first special plea, misdirected itself in finding that the appellant is required to register as a firm in terms of the Act. The appeal accordingly stands to be upheld.

Costs

- [35] Costs ordinarily follow the result. The appellant contends that, save for the costs of appeal and costs of the application for leave to appeal, the court should grant it the costs of the two days of trial which were not utilised because of what it contends is the insistence of the respondent in pursuing its first special plea. It is clear as stated above, the parties acquiesced in the proposal of the trial judge that only the first special plea be adjudicated. This Court will therefore not accede to the prayer by the appellant for the award of wasted costs of two additional trial days. The appellant is entitled to the costs that should have been awarded by the court a quo had the first special plea been dismissed, and the costs of the application for leave to appeal and costs of appeal and costs of

Counsel.

Order

- [36] In the premise the following order is made:

- (i) The appeal is upheld.
- (ii) The order of the court a quo is set aside and replaced with the following order:
- (iii) The respondent is ordered to pay the costs of appeal, which costs shall include the costs of the application for leave to appeal, and the costs of Counsel.

A H PETERSEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION,

MAHIKENG

I agree.

R D HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA

Y DIBETSO-BODIBE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

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