

SOUTH AFRICA / JUDGMENT

**Meijer NO and Another v Firststrand Bank Ltd
(formerly known as First National Bank of
Sourthern Africa) and Another, In re: Firststrand
Bank Ltd (formerly known as First National Bank of
Sourthern Africa) and Another v Meijer and Others
(2123/2010) [2012] ZAWCHC 23 (4 April 2012)**

[2012] ZAWCHC 23

COURT

Western Cape High Court, Cape Town

BEFORE

Dlodlo

CASE / FILE NUMBER

2123/2010

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IN THE HIGH COURT OF SOUTH AFRICA (WESTERN CAPE HIGH COURT, CAPE TOWN)

REPORTABLE

CASE NO. 2123/2010

In the matter between:

JOHANN HINRICH EVERS MEIJER N.O.FIRST APPLICANT

ALEXANDER STRACHAN KOTZE N.O.SECOND APPLICANT

And

FIRSTRAND BANK LIMITED

(formerly known as FIRST NATIONAL BANK

OF SOUTHERN AFRICA)FIRST RESPONDENT

MARCELLE MEIJERSECOND RESPONDENT

In re:

(formerly known as FIRST NATIONAL

BANK OF SOUTHERN AFRICA)PLAINTIFF

JOHANN HINRICH EVERS MEIJER N.O.FIRST DEFENDANT

MARCELLE MEIJER N.O.SECOND DEFENDANT

ALEXANDER STRACHAN KOTZE N.O.THIRD DEFENDANT

MARCELLE MEIJERFOURTH DEFENDANT

JUDGMENT DELIVERED ON WEDNESDAY, 04 APRIL 2012 DLODLO, J

INTRODUCTION

- [1] This is an application for rescission of the judgment granted on 22 December 2010 by the Registrar. This application also seeks to set aside a warrant of execution granted on the strength of the said judgment. The application seeks an interdictory relief as well against the First Respondent (Firststrand Bank Limited - pending the finalization of the action contemplated).
- [2] This matter concerns the law of trusts which constitutes a dynamic and rapidly changing field of South African Law. The trust as an instrument of estate planning enjoys enormous application. The popularity of this legal institution in recent times is probably mainly due to the fact that it is extremely versatile and flexible and that it is not currently subjected to extensive Government regulation in creation, operation and administration. See *Land and Agricultural Bank of South Africa v Parker and Others* 2005
- (2) SA 77 (SCA) at paragraph [23]; *Pace and Van der Westhuizen* 2005: B1; *Honore and Cameron* 2002: 19; *Honore* 1996: 871, 872. A further reason for the trust's popularity in recent decades has been for tax reasons. However, many of the advantages

which the employment of the trust figure traditionally entailed have not been curtailed by legislation. See *Pace and Van der Westhuizen* 2005: B1 et seq; *Honore and Cameron* 2002: 443-489; *Honore* 1996: 871, 872. The trust's versatility is illustrated by the various forms which it can assume, although wills and contracts (giving rise to testamentary and inter vivos trusts respectively) are the primary vehicles through which trusts are constituted. From a comparatively humble and uncertain reception, the trust has developed to such an extent that a unique and distinctively South African law of trust has been formed. Although this development was initially almost exclusively undertaken by the Courts, it later became clear that the intervention of the legislature was required in order to clarify some of the uncertainty created by the piecemeal (at times fragmented) judicial development which had taken place. To this end a number of statutes of direct (and at times indirect) application to the South African Law of trusts were promulgated. Although these statutes succeeded, to a large extent, in providing the clarity sought, a number of problematic issues continue to exist. In consequence of the South African Law commission findings a Bill was approved and promulgated on 17 June 1988 as the Trust Property Control Act 57 of 1988 which came into operation on 31 March 1989. It repealed inter alia the Trust Money Protection Act 34 of 1934 and Chapter 111 of the Administration of Estates Act 64 of 1965.

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BACKGROUND FACTS

- [3] The First and Second Applicants and the Second Respondent were appointed as the first trustees of the Veendam Trust, a trust which was registered by the Master of the High Court, Pretoria on 17 November 1998 ("the Trust"). The First Applicant, the Second Respondent, the two children born of their marriage (Orpa and Rut) and the Primary School Anton van Wouw are the designated beneficiaries of the Trust whilst the two daughters are designated in the

Trust Deed as the capital beneficiaries. The Trust is the registered owner, through its trustees from time to time, of the immovable property known as Erf 4305, Plettenberg Bay. The value of the Trust property had been enhanced by the construction of a residential dwelling thereon. The marriage between the First Applicant and the Second Respondent was dissolved by a decree of divorce on 10 November 2000. The First Applicant, in terms of a deed of settlement which had been made an order of Court on the aforesaid date, agreed to resign as trustee of the Trust. At the time of the First Applicant and the Second Respondent's divorce nothing at all was owed on the property and it was unencumbered.

- [4] On 15 February 2001 the Trust purported to resolve to, inter alia, accept the resignation of the First and Second Applicants and it was minuted that "...die oorblywende Trustees M Meijer voortaan as Trustees van die Veendam Familie (sic) Trust sal optree in ooreenstemming met die bepalings van die Trust Akte." On 19 February 2001 the First and Second Applicants addressed letters to the trustees of the Trust wherein they informed the trustees of their respective resignations with immediate effect. They also, inter alia, requested the trustees to notify the Master of the High Court accordingly. On 19 February 2001 the Second Applicant addressed a letter to the Master, Pretoria, to which copies of resignation and the "resolution" of the Trust alluded to above were enclosed and wherein he requested the Master to adjust his records accordingly. He also requested the Master to issue an amended letter of authority.
- [5] The aforesaid letters of resignation, however, did not find their way to the Master's office and were only filed with the Master (under cover of a letter of Rooth Wessels Attorneys) on or about 5 April 2011. Subsequent to the settling of the divorce and the furnishing of the letters of resignation by the two Applicants as alluded to above, the Second Applicant, as remaining trustee of the Trust, proceeded to act on her own and did not take any steps to have additional trustees appointed in the place of the First and Second Applicants. During or about January 2007 the Second Respondent, professing to act on behalf of the Trust, applied to the First Respondent for a loan of R450 000.00, which loan was to be secured by the registration of a mortgage bond over the immovable property of the Trust. In the documents required by First Rand Bank Limited to be completed and submitted for purposes of granting the loan and registering the bond, it was repeatedly made clear that the Second Respondent was the only trustee in the office.
- [6] The First Respondent granted the loan to the Trust and caused a bond in the amount of R450 000.00 as security for the due repayment of the aforesaid loan, to be registered over the immovable property of the Trust. The Second Respondent thereafter defaulted on repayment of the loan, to the extent that the First Respondent caused summons to be issued against the Trust as well as the Second Respondent in her personal capacity. The order issued by the Registrar makes it clear that the First and Second Applicants and the Second Respondent are sued in their capacities as Trustees of the Trust having been cited as First, Second and Third Defendants. Judgment in the amount of R448 553.84 was also granted against the Second Respondent personally, jointly and severally with the Trust, the one

paying the other to be absolved. This apparently means that the Second Respondent has bound herself to the First Respondent as surety and co-principal debtor for the debt which she purported to incur on behalf of the Trust. The summons was not served on either of the two Applicants and they only became aware of the fact that judgment had been granted against the Trust when the First Applicant fortuitously heard that the property was advertised to be sold in execution at an auction scheduled for 15 April 2011.

WHEN DID THE RESIGNATIONS BY THE APPLICANTS BECOME EFFECTIVE?

[7] The Applicants, in their Founding Affidavits, departed from the premise that as neither of them had been replaced as trustees by the Master, they have residual legal obligations in terms of their respective positions as trustees. In his Replying Affidavit the First Applicant referred to the fact that he has since learned that the Master had not been informed of the resignations which had been tendered in 2001 and that the resignations were ostensibly only delivered to the Master on 5 April

2011. The First Applicant then proceeded as follows:

"Even if it should be held that the resignation of the applicant became effective already in 2001, despite the fact that the master did not replace us as trustees, and this is not conceded, the second respondent could not legally on her own take decisions binding the trust at the time that she signed the 'certificate in respect of a loan to a trust' on 22 January 2007

Indeed at common law, in the absence of provision in the trust instrument, a trustee was not entitled to resign office except for good reason with the consent of Court. See Cameron, De Waal and Wunsch Honore's South African Law of Trusts 5th ed (2002) at p 227. In terms of the provisions of Section 21 of the Trust Property Control Act a trustee now has the general power of resignation subject to the conditions set forth in the section. The trustee must resign by notice in writing to the Master and, inter alia, to the ascertained beneficiaries who have legal capacity. The entitlement to resign, however, is not subject to the Master's or the Court's permission. The question which is more vexed, however, is (a) whether the resignation of a trustee is of any force and effect until such time as the Master has appointed and authorised another trustee to act in his or her stead and (b), if not, whether or not the statutory mode of resignation (as provided for in Section 21) was meant to lay down the rule for all resignations

- regardless of the fact that the internal requirements provided for in the trust instrument have been met.

[8] Mr La Grange, inter alia, relied on *WM Soekoe and Others v Le Roux* (an as yet unreported judgment of the Free State - Case 898/2007 (O)), where Rampai J held as follows: "I have already found that the Respondent's resignation on 10 October 2006 did not legally relieve him of his duties as trustee. He remained legally accountable to his fellow trustees for the entire period until the Master of the High Court officially removed him from office as a trustee. ... The respondent's duties did not fall away when he resigned, but when he was replaced by the third applicant."

It is true that judgment in *Soeke matter supra* has been the subject of criticism particularly in academic circles. See for instance Olivier Strydom & Van den Berg *Trust Law and Practice*, p 3.17 et seq, where the authors point out that the decision creates practical problems. What is important to note, however, is that the authors also justify their criticism by saying that: "Once a trustee has, in our opinion, complied with the provisions of Section 21 we find it hard to understand how it could be the intention of the legislator that that trustee still remain liable until new letters of authority had been issued by the Master of a High Court". Olivier et al, *Trust Law and Practice*, seem to be more circumspect. At p 3-18 they say the following: "Furthermore if a trust deed provides for resignation by a trustee in a certain manner, compliance with that provision of the trust deed should be enough. It might be worthwhile to include a clause in a trust deed stating that a trustee's resignation will be effective from the date upon which the Master of the High Court receives notice of such resignation." With regard to the question posed in (b) *supra*, Cameron et al, in *Honore's South African Law of Trust* seem to subscribe to the view that the statutory mode of resignation provided for in Section 21 is not prescriptive in instances where the trust instrument permits resignation: "Apart from the requirement of written notice introduced by the Trust Property Control Act, when the trust instrument permits resignation there are no particular formalities for resigning, apart of course from those the instrument itself may specify. The object of the statutory provision concerning resignation appears to be to allow a trustee to resign notwithstanding the provisions of the trust instrument, not to impose a formality of written notice of the Master and others on all resignations. The statutory mode of resignation is additional, and is capable of being exercised alongside other methods permitted by the trust instrument."

Mr La Grange correctly submitted that the question when precisely the resignation of the two Applicants actually became effective does not materially impact on the central issue which falls to be determined, namely whether or not the Second Respondent had the requisite authority to bind the Trust to a loan agreement and allow trust property to be mortgaged. In this regard there are only two possible scenarios, namely: (a) The loan was effected and the mortgage bond was registered at a point in time when the Second Respondent was the only trustee in office, or (b) the loan was effected and the mortgage bond was registered at a point in time when all three trustees were still in office (either due to the fact that the resignation had by then not yet been communicated to the Master or as a result of the applicability of the *Soekoe-principle*, as alluded to *supra*).

- [9] On both the above-mentioned scenarios it does seem that the Second Respondent did not have the required capacity to bind the Trust. The Applicants maintain that the estate of the Trust could not be bound to transactions of the nature which the Second Respondent, as single trustee, has purported to conclude with the First Respondent. Even if it can be said that the Applicants were still in office at the time, the undisputed facts show that the resolution to enter into a loan agreement and pass the mortgage bond over trust property was not taken by the trustees acting together/jointly or by the Second Respondent as delegated by the remaining trustees. It seems that the Second Respondent, acting alone simply had no power to bind the Trust. I undertake to revisit this aspect *infra*. For now it

suffices to say at the very best for the Respondents, the date upon which the resignations became effective might have some role to play in deciding the issue of the legal standing of the Applicants to institute these proceedings (and to intervene in the pending proceedings which had been instituted by the First Respondent).

- [10] If a trustee wishes to resign as trustee, he/she is required to lodge a resignation letter with the Master of the High Court in terms of Section 21 of the Trust Property Control Act 57 of 1988. The said provision provides that the trustees are entitled to resign as trustee of any trust by providing a notice in writing to that effect to the Master and the ascertained beneficiaries who have legal capacity, or to the tutors or curators of the trust under tutorship or curatorship. The Act further provides that if a trustee who has been authorised by the Master to act as such is removed from his/her office, or resigns, he or she must without delay return his or her written authority to the Master. See *The Law of South Africa (LAWSA)* 2nd ed, 2011 - Joubert p.358. The effect of the common law is that it is not competent for a trustee to give up his/her fiduciary duties simply by electing no longer to fulfil them. See Cameron et al where the common-law position is set out in *Honore's South African Law of Trusts* 5th ed. at 135. I set out *infra*, though the provisions of Section 21 of the Trust Property Control Act referred to *supra*:

"Whether or not the trust instrument provides for the trustee's resignation, the trustee may resign by notice in writing to the Master and the ascertained beneficiaries who have legal capacity, or to the tutors or curators of the beneficiaries of the trust under tutorship or curatorship."

- [11] The Founding papers including the Supplementary papers are strangely silent on how the Applicants who intended to resign in fact resigned. I am not told, for instance, that the resignation letter was sent to the Master. To send the resignation to the remaining trustee/trustees only obviously does not, in my view, amount to proper resignation contemplated by Section 21 of the Act. It remains of absolute importance that the Master receives the resignation in writing. To comply with the provisions of Section 21 of the

Act, whoever alleges resignation must prove that not only the ascertained beneficiaries were sent notification of resignation but that the Master as well was similarly sent such notification. I am more than aware of what was decided in *Soekoe's*

judgment.

My view would be that proof of the fact that the necessary notice of resignation (letter of resignation) was in fact given to both the Master and the ascertained beneficiaries in writing should suffice. Importantly, the Act is silent on when the resignation of a trustee actually takes effect, namely it can be the date of resignation or the date on which the resignation is received by the Master or which other date. It is important that there be legal certainty in this regard. I am of the view that this is exactly why *Rampai J* in *Soekoe* matter *supra* decided that matter in the manner already referred to in this Judgment. To ameliorate any possible hardship that may result

from the above finding made by Rampai J, it is suggested that proof of the fact that resignation had been sent to the Master in writing coupled with an acknowledgement of receipt by the Master's office should suffice. In my view, in the latter scenario, the trustee should be deemed as having resigned. In other words, the resignation should take effect not only upon it being shown that the written notice was sent to the Master and the ascertained beneficiaries, but upon an acknowledgement by the Master of the receipt thereof. Merely because the papers in the instant matter do not prove that the Master was notified in writing of the two Applicants' resignation, I hold that they remained trustees. Even if I may be wrong in this regard, the discussion that follows *infra* will indicate that the decision to enter into a transaction with Firstrand Bank was indeed not without difficulties. See also *Van der Merwe N. O. and Others v Hydraberg Hydraulics CC and Others; Van der Merwe N.O. and Others v Bosman and Others* 2010

- (5) SA 555 (WCC) where this Court held that co-trustees must act jointly is derived from the nature of the trustees' joint ownership of property and that in the absence of a contrary provision in the trust deed, the trustees had to act jointly if the trust is to be bound by their acts. The Court in the above matter further held that, because the trust instrument did not provide for a power to the

trustees, authorising one or more of their number to make decisions on the trust's behalf, the Turquand rule could not find application.

- [12] It is trite that a trustee's appointment can be terminated if he resigns or dies. In terms of Section 21 of the Trust Property Control Act (as pointed out earlier on) a trustee is entitled to resign whether or not the trust instrument provides for this. I have pointed out *supra* that prior to the enactment of Section 21 the common law position applied in terms of which the trust instrument could permit a trustee to resign, but if it did not, the permission of the Court had to be obtained and this would be granted only for a good reason. Hence an attempted resignation did not relieve a trustee of liability. See *Alexander v Opperman* 1951

- (1) SA 609 (O) at 617; *Soofie v Hajee Goolam Mohamed Trust* 1985
- (3) SA 322 (N) at 330 and *Boyce N.O. v Bloem* 1960
- (3) SA 855 (T) at 859. The statute contains a general power of resignation obviously subject to conditions. See Honore's 184. The latter author interprets Section 21 to mean: "(t)he trustee must resign by notice in writing to (a) the Master and (b) the ascertained beneficiaries who have legal capacity or, in the case of beneficiaries under tutorship or curatorship to the tutors or curators concerned." It is required from a trustee who resigns (also where he is removed) to return without delay, his written authority to the Master.

INDEPENDENT LEGAL STANDING (FIRST APPLICANT)

- [13] The First Applicant is not only an income beneficiary of the Trust, but he also acts herein on behalf of an income beneficiary, Rut Meijer, his minor daughter. The present application is ultimately directed at nullifying the transaction which the Second Respondent has purported to enter into on behalf of the Trust (and upon which transaction the First

Respondent's action against the Trust is founded). The general rule is that it is for the party instituting proceedings to allege and prove that he has locus standi, and the onus of establishing that issue rests upon the Applicant. It is and remains an onus in the true sense; the overall onus. See: Mars

Incorporated v Candyworld (Pty) Ltd [1990] ZASCA 149; 1991

(1) SA 567 (A) at 575 H-I;

Gross and Others v Pentz [1996] ZASCA 78; 1996

(4) SA 617 (AD) at 632.

[14] Mr Scott emphasised that the First Applicant makes the allegation that he has a legal duty (as parent of the two beneficiaries) to protect the interest of the beneficiaries but does not suggest that he brings the application in his capacity as guardian of his children, one of whom is a major. In Mr Scott's submission even if the First Applicant were able to establish his locus standi in reply, if he was representing his minor child in the application he would not be acting in his personal capacity but rather in a representative capacity as father and natural guardian of his minor child. The fact of the matter is that the First Applicant does expressly state that he has a legal duty as parent of the two beneficiaries to protect the interest of the beneficiaries. How otherwise can he protect the interest of the beneficiaries apart from acting on their behalf? The allegation of acting in a representative capacity is clearly made and established. In any event, the application qualifies as a "representative action in terms of the "Beningfield exception" which in terms of the decision in Gross v Pentz 1996(4) SA 617 (A) is available to beneficiaries (such as the First Applicant and his minor daughter) whose rights to future income or capital of the Trust have not yet vested, since they do have vested interests in the proper administration of the Trust. In this regard I should point out that in Gross matter supra a distinction was drawn between actions brought on behalf of trusts to, for instance recover trust assets or nullify transactions entered into by the trust or to recover damages from a third party, on the one hand and, on the other, actions brought by trust beneficiaries in their own right against the trustee for maladministration of the trust estate, or for transferring to a beneficiary what is not due.

[15] The significance of the distinction referred to supra which has a direct impact on the standing of an aggrieved beneficiary, is explained thus in Honore's South African Law of Trusts at page 37:

"In the judgment the first type of action was called 'representative' and the second 'direct'. The general rule applying to representative actions is that the proper person to sue is the trustee and normally a trust beneficiary has no legal standing to do so. However, the court recognised what it calls the Beningfield exception and that the general rule had to be modified by it. This rule was derived from Beningfield v Baxter (1886) 12 AC 167 (PC).... in which the Earl of Selborne LC said: 'When an executor cannot sue, because his own act and conduct, with reference to the testator's

estate, are impeached, relief which (against a stranger) could be sought by the executor alone, may be obtained at the suit of a party beneficially interested in the proper performance of his duty ... !

The rationale for the rule is the impossibility of the delinquent trustee being both plaintiff and defendant."

Clearly the First Applicant does indeed have the required locus standi -standing in law to bring this application in his own name and in his capacity as father and natural guardian of his minor daughter, Rut Meijer.

THE SECOND RESPONDENT'S CAPACITY TO ENTER INTO A LOAN AGREEMENT FOR AND ON BEHALF OF THE TRUST AND HER POWER TO MORTGAGE TRUST PROPERTY

[16] At common law a trustee has no power to mortgage trust property, unless such power is given by the trust instrument, expressly or by implication. See: Honore's South African Law of Trusts at

312. In plain terms the trustees do not automatically possess the right, among other things, to enter into loan agreements and to mortgage trust assets. Both Respondents maintain that the Second Respondent at all relevant times intended to act as sole trustee and as a matter of fact, kept office as sole trustee of the Trust. The Respondent further contend that, as such, the Second Respondent was in reality clothed with a general authority to do whatsoever joint trustees would have been authorised to do pursuant to the provisions of the Trust Deed, had the full complement of joint trustees been in office. It is significant to note that the Second Respondent specifically maintains that she derived her authority to encumber the Trust property with a bond from the provisions of Clause 11.3.7 of the Trust Deed. It is necessary to set out the provisions of Clause 11.3.7 hereunder: "11.3. Die Trustees het te alle tye al sodanige magte as wat nodig is om met die goedere van die Trust te handel as wat hulle, volgens hulle uitsluitlike diskresie nodig ag om die trustfonds te beheer tot voordeel van die begunstigdes. Sonder inperking van die algemene bevoegdhede van die trustees, is die trustees geregtig, en waar wetlik vereis verplig, om: ... 11.3.7. enige bate van die Trust onder verband te beswaar, dit te verhipotekeer of 'n retensieregdaarop te he."

This authority, the Respondents say, was bestowed on the Second Respondent by the provisions of Clause 7.1 of the Trust Deed, which reads as follows:

"7.1. Daar moet te alle tye minstens DRIE (3) trustees in amp wees, met dien verstande dat in geval daar minder oorbly as gevolg van bedanking of dood van 'n mede-trustee, die oorblywende trustee/s gemagtig is om alle magte van trustees uit te oefen vir behoud en administrasie van die trustfonds tot tyd en wyl 'n verdere trustee aangestel is. ..." Underlining supplied. I agree with the loose translation of the above which Mr La Grange supplied, namely:

"There shall at all times be at least three (3) trustees in office, provided that in the event that less than three remain due to the resignation or death of a co-trustee, the remaining trustee/s are authorised to exercise all powers of trustees for the jetention and administration _of the Trust fund until such time as a further trustee is appointed".

- [17] The Respondents' case is of course not that Second Respondent was at any stage authorised by her co-trustees to act as agent of the Trust. The Respondents' case is that Clause 7.1 of the Trust Deed means that in circumstances where the quorum requirement has not been met, a single trustee acting alone could bind the trust to the same extent as the full complement of trustees would have been entitled to do had they been in office. This in effect means that a single trustee would under these circumstances enjoy much more freedom than joint trustees would have had - he or she will for instance not be bogged down by restrains imposed by joint trusteeship, such as the duty to meet with co-trustees or obtain their consensus in matters. With regard to the interpretation of Clause 7.1 set out above, Mr Scott found it necessary to refer to the dictionary meaning of the word "behoud". "Behoud" is defined in the Trilingual Legal Dictionary (written by VG Hiemstra and HL Gonin) as meaning "conservation, keeping, preservation, salvation, or retention." According to Mr Scott the use of the word "behoud" in Clause 7.1 is in keeping with the description of the general powers of a trustee, namely to hold (or retain) and administer the trust assets. Relying on *Coopers & Lybrand v Bryant* [1995] ZASCA 64; 1995
- (3) SA 761 (A) at 767 E - 768 E, Mr Scott submitted that in interpreting Clause 7.1 one should have regard to the "golden rule" of interpretation, namely that the language in the document should be given its grammatical and ordinary meaning unless this would result in some absurdity or some repugnancy or inconsistency with the rest of the instrument. I hasten to mention that there is no complication whatsoever in understanding the provisions of Clause 7.1 of the Trust instrument.
- [18] It would appear that reliance by the Respondents on the provisions of Clause 7.1 as support for their contention or proposition deserves to be described as flawed and legally untenable. The Trust Deed requires that there shall always be at least three trustees in office. And when the number falls below three, the Trust Deed gives the power to appoint a third trustee to the remaining trustee/s. Clause 7.1 specifically provides that if a single trustee remains in office, such trustee will be obliged to appoint further trustees within 90 days of the resignation or death of the other trustees, and failing that, the serving auditor must either himself act as trustee or appoint a second trustee of his choice, which second trustee must then be appointed as further trustee within 30 days. I thus agree with Mr La Grange's submission that the aforesaid power, coupled with the minimum requirement in effect placed a duty on the Second Respondent to appoint a second and third trustee when the Applicants resigned. In breach of her duty to give effect to the terms of the Trust Deed, the Second Respondent has (up to at least 25 August 2011

- being the date when she deposed to her Answering Affidavit) failed to do so. See *Land and Agricultural Bank of South Africa v Parker and Others* 2005
- (2) SA 77 (SCA) at par [3]. See also Honore's *South African Law of Trust* at page 262. It is indeed trite law that except where statute provides otherwise, a trust is not a legal person. The effect of this has been explained thus by Cameron JA (as he then was) in *Parker* case (supra) par [7]:

"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 cannot be bound."

[19] In the case of a trust a Trust Deed is therefore its "constitutive charter" and "[w]hen fewer trustees than the number specified [in the trust deed] are in office, the trust suffers from an incapacity that precludes action on its behalf". See *Parker* (supra) par [11]. Also see *Lynn NO v Coreejas* (687/2010)

[2011] ZASCA 159 at par [9]. Even where trustees act jointly, they cannot in law bind the trust estate where they are not the requisite number stipulated in the trust deed, because "the trust's incapacity during this period does not arise from the joint action requirement, but from the trust's incapacity while a sub-minimum of trustees held office. See *Parker* (supra) par [13]. Clause 7.1 of the Trust Deed which is presently under discussion is undoubtedly a capacity - defining condition. The clause

in question not only specifies the number of trustees that is required to be in office, but also defines and restricts the scope of authority which the remaining trustees or trustee will have to bind the trust once the trust has been incapacitated by virtue of the fact that the quorum requirement is not met. Based on the clear wording of the clause the residual authority of the remaining trustee/s is limited and restricted to matters which relate to the preservation/maintenance and administration of the trust fund only

((("behoud en administrasie van die trustfonds").

I have highlighted above that on the Respondents' version the words "behoud en administrasie" should be interpreted and understood to mean that the authority of the remaining trustee/s was intended to remain unrestricted and even broadened. (In that sense the remaining trustee becomes virtually autonomous) - to the extent that the wide-ranging scope of powers which are bestowed on the joint trustees under Clause 11.3 of the Trust Deed (including the power to encumber the trust property with a mortgage bond) would not be affected at all. If the contention of the Respondents in this regard were to be accepted that would make a mockery of the fact that the parties to the Trust Deed bothered to include the stipulation regarding the three-trustee

requirement. I am of the view that the interpretation favoured by the Respondents overlooks the fact that the residual powers of remaining trustees are spelled out and provided for in that part of Clause 7.1 that starts with the words "met dien verstande ..." which follow on the principal part of the stipulation (consisting of the phrase "Daar moet te alle tye minstens Drie (3) trustees in amp wees") and therefore clearly amounts to a proviso. It is trite law that the true function of a proviso is to qualify the principal matter to which it stands as a proviso. See, for example, *Hira and Another v Booysen and Another* 1992

- (4) SA 69 (A) at 79 F - J. This is pithily explained by Morisen AJ in *Thula v Road Accident Fund* 2011
- (5) SA 446 (GSJ) at par [51] to mean that "a proviso taketh away, but it does not giveth"). If there is a principal matter (in this case the stipulation that there should at all times be at least three trustees in office) it is not the function of a proviso to increase or enlarge that which it follows, it is to reduce, qualify and limit that which goes before it in the text. It is thus correctly submitted by Mr La Grange that in this instance the proviso only entails that the remaining trustees would be in the position to make decisions regarding matters pertaining to the preservation or maintenance of trust assets (such as paying rates and taxes, effecting necessary repairs and the like) and perform administrative tasks (such as taking the necessary steps to have trustees appointed). When fewer trustees than the number specified in Clause 7.1 are in office, the Trust would suffer from an incapacity that precludes the borrowing of money or the encumbering of its assets by means of a mortgage bond. In any event, it is hardly known what the Second Respondent did with the proceeds of the loan.

[20] Therefore the Second Respondent was in law not in a position to bind the Trust when she purported to conclude the loan agreement with the First Respondent and when she caused the trust property to be mortgaged. As it is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law (whether the prohibition is express or otherwise) is void and of no effect, it follows that the resultant loan agreement and the bond which was passed to secure the loan are of no force and effect. Vide *Schierhout v Minister of Justice* 1926 AD 99 at 109. Notably it has not been contended by either of the Respondents that the Second Respondent was authorised to contract with the First Respondent by a trust resolution which was passed by the joint trustees. The following fundamental principle of trust law, as expounded by Cameron JA in *Parker supra*, was simply flaunted by the Second Respondent:

"It is a fundamental rule of trust law, which this Court recently restated in *Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk* 2004(3) SA 486 (SCA) at par [16] 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." See also *Van der Merwe v Hydraberg Hydraulics* 2010

- (5) SA 555 (C). Even if I should find that the Applicants were still in office at the time when the agreements with the First Respondent were concluded, it is clear that they were not party to any resolution by the Trust in terms of which the Second Respondent was authorised to enter into a loan agreement and pass the mortgage bond over the trust property. It remains common cause that no such decision was taken by the trustees acting together/jointly or by the Second Respondent as delegated by the remaining trustees. As such the

Second Respondent acted alone and had no power to bind the Trust.

- [21] There is another development in this matter which needs to be dealt with. I do so hereunder. At the inception of the hearing on 10 November 2011 I allowed the Second Respondent to supplement her Opposing papers by way of Affidavits deposed to by the Second Respondent one Barend Oosthuizen and Orpa Meijer respectively. Based on the information contained therein this Court accepts as a fact that the Master of the North Gauteng High Court (Pretoria) has indeed on 8 July 2008 authorised the Second Respondent, Barend Oosthuizen and Orpa Meijer to act as trustees of the Veendam Trust. The following appears in paragraph 7 of the Affidavit by Mr Barend Oosthuizen:

"Despite the fact that I am not cited as a respondent in this application, I am aware thereof and I support the Respondents in opposing the relief sought by the Applicants. Furthermore, and insofar as may be necessary, I ratify all decisions made by the Second Respondent, when acting as sole trustee, and more specifically, the decisions giving rise to the judgment obtained by the First Respondent against the Trust." Submissions were made before me that the "decisions" by the Second Respondent (i.e. entering into a loan agreement for and on behalf of the Trust and allowing the Trust property to be mortgaged - (the Firstrand transactions)) which Mr Oosthuizen belatedly seeks to ratify, are not susceptible to ratification. It may be helpful to deal with this in sub-topics infra.

THE SECOND RESPONDENT PROFESSED TO ACT AS SOLE TRUSTEE - NOT AS REPRESENTATIVE OF CO-TRUSTEES

- [22] It is important to bear in mind that it is not the Respondent's case that the Second Respondent, at the time of transacting the Firstrand transactions, purported to act pursuant to some or other resolution taken by her co-trustees whereby she was delegated or authorised to represent them (and therefore, the Trust) in the dealings with Firstrand. To the contrary, the Respondents maintain that the Second Respondent at all material times acted and professed to act as sole trustee of the Trust - their contention being that she was fully authorised to do so in terms of the trust deed (and she therefore did not require or need the support or authorisation of co-trustees).

- [23] One is therefore not dealing with the ordinary principles of agency. It is trite that unless the trust deed provides otherwise, trustees must act jointly. In the absence of a contrary provision in the deed they may, however, authorise someone to act on their behalf and that person may be one of the trustees. If this is what the Respondents alleged has happened the principles of law of agency might have had a role to play. See *Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk* 2004
- (3) SA 486 (SCA) at paras [16] and [23]. In this case there was indeed nothing in the trust deed which prevented the trustees from delegating certain functions to one of their number (see Clause 9 of the Trust Deed) at the time when they were in office. This, however, they did not do. The Second Respondent also does not maintain that any powers of management over the trust business had been delegated

to her at a stage when there were still three trustees in office.

- [24] In my view and based on the facts of the matter, the principles of agency (which would only have entered the equation in circumstances where one trustee has purported to represent or act on the authority of one or all his or her co-trustees) do not apply. Cameron JA in the *Parker* case *supra* at para [10] correctly observed that a trust is "an accumulation of assets and liabilities". Although forming a separate entity, that entity, like a deceased estate, is not a legal persona. The assets and liabilities constituting the trust vest in the trustees and it is the trustees who must administer them. They are not the agents of the trust or for that matter of the beneficiaries. See *Thorpe v Trittenwein* 2007
- (2) SA 172 (SCA) at par [9]; *Hoosen v Deedat* 1999
- (4) SA 425 (SCA) at par [21]. Unlike an agent, a trustee therefore does not derive his powers from a principal to whom he is responsible.

RATIFICATION CURES LACK OF AUTHORITY AND NOT LACK OF CAPACITY

- [25] The purported reliance on ratification which has its roots in the law of agency appears to be misplaced. Ratification is directed at retrospectively bestowing authority on an agent, who lacked such authority to begin with. See generally, *LAWSA Vol 1*, par
200. "Agency" is used to denote the phenomenon of one person called the agent, concluding a juristic act on behalf of or in the name of another called the principal. In this meaning "agency" is an instance of representation. See *Joel Melamed & Hurwitz v Cleveland Estates (Pty) Ltd* [1984] ZASCA 4; 1984
- (3) SA 155 (A) 166 C-D. In order to conclude juristic acts on behalf of another so as to affect that other's legal relationships, the agent has to have the necessary authority. Where a person acts for another without authority, that lack of authority may in appropriate

circumstances, be cured by ratification.

[26] An act may only be ratified if, at the time when the agent or purported agent acted, he not only acted but also professed to act on behalf of another. It follows that the only person who may ratify is he for whom the agent intended and professed to be acting. See Kerr, *The Law of Agency* (4th Edition) page

82. As authorisation is a juristic act, a person who has no capacity to conclude juristic acts cannot authorise another to conclude juristic acts on his or her behalf. Thus an infant and a lunatic cannot validly authorise another to conclude a juristic act on his or her behalf. See *Pleasant v Warne* 1922 AD 481. The rule is that any act which admits of representation may be ratified if performed by a person who had no authority. However,

if prior authority is required an act concluded without such authority will not be capable of subsequent ratification.

[27] The act cannot subsequently be ratified even in writing. See LAWSA Vol 1, par 204. The effect of a valid ratification is therefore to cloak the agent's unauthorised acts with authority retrospectively,

establishing the relationship of principal and agent after the fact with retrospective effect, with the usual consequences of agency. See Francois du Bois et al: *Wille's Principles of South African Law* (9th Edition) at page 992 (with reference to, inter alia, *Reid v Warne* 1907 TS 961 at 976. Our case law leaves no doubt as to the fact that ratification is not possible if the transaction or act concerned is indeed null and void. See in the context of trust law for instance *Thorpe v Trittenwein* 2007

(2) SA 172 (SCA) (where it was emphasised that as ratification relates back to the original transaction, there can be no ratification if the contract is void ab initio) and *Luppachini NO v Minister of Safety and Security* 2010

(6) SA 457. See also *Simplex (Pty) Ltd v Van der Merwe and Others* NNO 1996

(1) SA 111 (W) where the enquiry concerned the lack of authority of a trustee to bind a trust in a contract, in the absence of being authorised thereto in writing by the Master. Goldblatt J held that, in a case like that, the trustee was not authorised to bind the trust, and the shortcoming could not be ratified. See also *Van der Merwe v Van der Merwe* 2000

(2) SA 519 (C) where it was re-affirmed that a juristic act performed by a person without the required authority of the Master is null and

void and the proposition that a Court has a discretion to retrospectively validate acts of a trustee that are performed without

such authority (as stated in *Kropman and Others NNO v Nysschen* 1999

(2) SA 567 (T)) was rejected.

[28] The question that needs to be addressed in the instant matter is not whether a lack of authority on the part of the Second Respondent to act on behalf of the co-trustees can be cured by ratification, but rather whether in incapacity of the Trust to operate (due to the fact that the required number of trustees were not in office) at the time of the conclusion of the Firstrand transaction can be cured by the ex post facto ratification of a trustee who was only appointed as such some four and a half years after the event. This, in my view, is not possible in terms of our law. 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. That much has been made clear by Cameron JA in Parker supra at par [11]. The Trust instrument makes provision of how the Trust in such an event can be capacitated.

[29] The legal impact of the resignation of a trustee (in circumstances where a minimum number was required to be in office) was explained thus in Steyn and Others NNO v Blockpave (Pty) Ltd 2011

(3) SA 525 (FB) at paras [32] and [34]:

"The resignation of Ms Moolman had a profound impact on the proceedings. It fundamentally crippled the capacity of the trust to operate — it functionally paralysed the trust. ... It is therefore temporarily dysfunctional, and was so at the time the replying affidavit was delivered. ... The true character of the trust that we are here dealing with is tripartite. The trust body with a full complement of three trustees, as envisaged in the trust deed, was not in existence, and the trust estate was unable to operate. In my view the Dries Steyn Trust did not de jure exist and operate in the way a trust has to operate in law". At the risk of being accused of being repetitive I emphasise that at the time of the conclusion of the Firstrand transactions, the Trust in the instant matter lacked the capacity to enter into the loan agreement and cause the property of the Trust to be mortgaged. As the Trust lacked contractual capacity to conclude the Firstrand transactions at the time, it cannot ratify even if it subsequently

(upon the appointment by the Master of two additional trustees) acquired full contractual capacity. The purported "ratification"

on the part of Mr Oosthuizen is, in the premises, of no consequence.

VOID TRANSACTIONS CANNOT BE RATIFIED

[30] It is trite law that the Trust Deed forms the constitutive charter of the Trust. In the result the trust estate cannot be bound outside its provisions. See Parker supra at par [10]). In paragraph [10] of Parker case the Supreme Court of Appeal approved the statement in Honore's South African Law of Trust (5th Edition) at page 242 which reads as follows: "The trust instrument forms, as it were, the statute under which the trustee acts. Properly interpreted, it should be regarded, as Coertze says, as 'objektiewe reg', though its source will be a valid contract, will or other constitutive document."

The answer to the question whether a trustee or trustees has/have the capacity to enter into a particular contract must therefore be sought within the express and implied provisions of the trust deed. If the legal capacity on the part of a trustee to enter into a specific contract is not to be found there, then the trustee has exceeded his power in entering into the contract and it is null and void. In any event in the light of what the Supreme Court of Appeal said in *Parker supra* there is and can never be basis upon which it can be held that the doctrine of ultra vires, which applies to corporations or corporate bodies, should not apply to a trust. Cf *ABSA v SACCAWU* (697/10)

[2011] ZASCA 150 (27 September 2011) at par 31.

[31] As is the case with the constitution of a corporate body, the Trust Deed defines the acts which the trust (acting through the trustees) are permitted to do and also specifies the manner in which those acts are to be done (cf *Parker supra* par [10]). As Cameron JA eloquently explains in the *Parker* matter:

"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."

In the result the following principles, as crystallised in *Grundling v Beyers & Others* 1967

(2) SA 131 (WLD) at 139 - (and recently re-affirmed in *ABSA vSACCAWU*supra) find application:

"Now, the constitution does specify certain acts which the Union is required or permitted to do; it often specifies too the manner in which those acts are to be done. The former are the Union's powers, the latter, its internal management (cf. *Mine Workers' Union v. Prinsloo*, 1948 (3) S.A. 831 (A.D.)). If it exceeds the former powers, that is, does an act that the constitution does not require or permit it to do, that act is ultra vires, and null and void. Such an act cannot be validated by ratification or estoppel, and the Union, any outsider affected by it, or a member may, if necessary, have it set aside or declared null and void. On the other hand, if the act is within its powers, but the manner of doing it deviates from or is contrary to the constitution, it is not null and void; at most, it is voidable, but it can be validated by ratification or estoppel."

[32] In the instant matter the Second Respondent was in terms of the Trust Deed not permitted to enter into the Firstrand transactions. That in effect means the acts performed by her qua trustee (the obtaining of the loan and the mortgaging of the Trust's immovable property) are ultra vires the trust deed and null and void. Accordingly these acts cannot be validated by ratification. See *Van Niekerk v Clarke & Another* [2010] JOL 26111 (C) where Zondi J held that as the trustees could not rely on a provision in the trust deed as providing authority for them to delegate to an outsider the power to cede a trust claim, the deed of cession "... is void and invalid as the person who concluded it did not have authority to do so and it is an act which cannot be ratified."

Van Niekerk v Clarke & Another supra is thus a judgment by this Division which authoritatively confirms that acts which are ultra vires the constitutive charter of a trust such as the Firstrand transactions in the instant matter concluded by the Second Respondent as solo trustee

- are void and not susceptible to ratification.

THE RELIEF SOUGHT

[33] The common law empowers the Court to rescind a judgment obtained on default of appearance, provided sufficient cause therefor has been shown. See *De Wet and Others v Western Bank Ltd* 1979

(2) SA 1031 (A) at 1042; *Chetty v Law Society, Transvaal* 1985

(2) SA 756 (A). The term "sufficient cause" (or "good cause") defies precise or comprehensive definition, for many and various factors require to be considered. See *Cairn's Executors v Gaarn* 1912 AD 181 at 186. But it is clear that in principle and in the long-standing practice of our Courts two essential elements of "sufficient cause" for rescission of a judgment by default are: (a) that the party seeking relief must present a reasonable and acceptable explanation for his default; and (b) that on the merits such party has a bona fide defence which, prima facie, carries some prospect of success. See *PE Bosnian Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980

(4) SA 794 (A). According to Mr La Grange's submission both the requirements mentioned supra have been met. In his submission the Applicants have not only presented a reasonable and satisfactory explanation of their "default"

but have shown that there are bona fide grounds for resisting or defeating the First Respondent's claim against the Trust, which prima facie carries some prospect of success. The "default" in this instance is of an extraordinary nature - it consists not of a failure to defend an action qua Defendant, but a failure on the part of the two trustees, alternatively, the First Applicant qua beneficiary and in his capacity as father of a beneficiary, to intervene in the action in order to have the actions of a delinquent trustee nullified by way of a representative action. It shall be recalled that on the First Respondent's own version the two Applicants were at the time of the institution of the action perceived to be trustees who were in office - as such they ought to have been appraised of the action which had been instituted against the Trust. I am well aware that the current stance adopted by Mr Scott is that they were cited in error and that the Respondents concede that judgment against the Applicants only may be rescinded. Accordingly more than a compelling case has been established for the relief sought in the instant matter.

ORDER

[34] In the circumstances I make the following order:

- (a) It is ordered that the judgment by the Registrar on 22 December 2010 under case number 21231/2010 is hereby rescinded.

- (b) The warrant of Execution issued under case number 21231/2010 consequent to the judgment granted on 22 December 2010 is hereby set aside.
 - (c) The First Respondent is hereby interdicted from selling the said immovable property or allowing it to be sold pending the finalization of the action under case number 21231/2010.
 - (d) The First and Second Respondents shall pay the costs of this application, jointly and severally, the one paying the other to be absolved.
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