
SOUTH AFRICA / JUDGMENT

Rossiter NO v Nedbank Limited (AR94/19, 8244/2010) [2020] ZAKZPHC 7 (14 February 2020) [2020] ZAKZPHC 7

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Lopes, Pitman, Jikela

CASE / FILE NUMBER

AR94/19, 8244/2010

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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

(SITTING IN DURBAN)

Case No: 8244/2010

Appeal Case No: AR 94/19

In the matter between:

Gail Wingrove Rossiter NO

Appellant

and

Nedbank Limited

Respondent

Judgment

Lopes J

- [1] This is an appeal against the whole of the judgment of Kruger J, handed down on the 12th March 2018. The order upheld an exception setting aside a plea and counterclaim on behalf of The Rossiter Family Trust ('the trust'). The judgment found that the appellant, Ms Rossiter, had no standing on her own to defend an action instituted by Nedbank Limited ('the bank') against the trust, and to institute a counterclaim against the bank on behalf of the trust.
- [2] The appellant seeks an order upholding her appeal, dismissing the bank's exception and the default judgment subsequently granted against the trust, and granting the appellant leave to defend the action in her capacity as a trustee of the trust.
- [3] The history of the dealings between the parties may be summarised thus:
- (a) On the 14th October 2010, the bank instituted an action against Terrence John Rossiter (Terrence Rossiter') and the trust (originally citing two trustees, the appellant and Terrence Rossiter).
 - (b) The bank's cause of action against the trust was the breach of a loan agreement concluded on the 31st March 2008 between the bank and the trust. In concluding the loan agreement, the trust was represented by Terrence Rossiter, duly authorised.
 - (c) The bank loaned and advanced R23.27 million to the trust. The trust failed to repay the loan as agreed, and the bank sought payment of an amount of R24 662 736.85, interest thereon, costs on an attorney and client scale, as well as orders declaring three immovable properties executable (the loan was secured by various covering mortgage bonds registered over immovable properties of the trust, situated in KwaZulu-Natal). Terrence Rossiter was also sued in his capacity as a surety of the trust.
 - (d) A plea was delivered reflecting Terrence Rossiter as first defendant, and himself and the appellant as trustees of the trust as second defendant. The plea raised two points in limine:
 - (i) the first objecting to the omission of a third trustee (Patrick Claude Rivalland ('Rivalland') as nominee of BoE Trust Limited) in the plaintiff's particulars of claim; and
 - (ii) the second being that there was no allegation in the summons that the monies claimed had in fact been loaned and advanced to the trust.

On the merits, it was averred that the trustees who concluded the loan agreement and subsequent amendments were not authorised to do so, alternatively, that the credit agreement constituted reckless lending by the bank.

- (e) The bank amended its particulars of claim to refer to the four trustees who were, at the time of the amendment, registered with the Master. They were Terrence Rossiter, the appellant, Reeve Luke Rossiter and Hayley-Noon Rossiter. The bank replicated regarding the necessity to cite the initially omitted trustee. The bank further denied the applicability of the National Credit Act, 2005.

- (f) The appellant then delivered an amended plea, together with a counterclaim. The amended plea and counterclaim relate to defences raised and relief sought on behalf of the trust. The appellant, however, purported to do so as the only trustee in the trust.
- (g) The bank then issued a rule 30 notice calling upon the appellant to rectify her amended plea and counterclaim, alleging that she lacked the authority to represent the trust. Eventually an exception was delivered by the bank. An application was then brought by the bank seeking to set down the exception on shorter time limits than would normally have applied. This led to the hearing of the 12th March 2018. At that hearing, Kruger J set aside the amended plea and upheld the exception to the counterclaim. Pursuant to that order, a default judgment was granted against the trust.
- (h) Leave to appeal against the judgment of Kruger J was refused on the 26th April 2018, but was later granted to this court by the Supreme Court of Appeal. The appellant's Notice of Appeal describes the 'crisp issue' before this court as being:

'... whether the Applicant who has been cited and served has locus standi in her capacity as trustee of the Rossiter Family Trust to defend proceedings on behalf of the trust and raise defences on behalf of the trust or whether she could only do so with the authority of the majority of the trustees of the Rossiter Family Trust.'

- (i) The following points are also raised in the Notice of Appeal:
 - (i) Whether by its own conduct, the bank waived any right to object to the appellant defending the action on behalf of the Rossiter Family Trust.

(ii) That the court a quo failed to recognise that a previous court order granted on the 30th October 2017 allowing the bank's amendment of the citation of the defendants was 'defective' because:

(aa) it did not state in the order what amendment was allowed; and

(bb) the matter was adjourned by consent to the 12th March 2018 for trial. The complaint was that the appellant was the only cited representative of the trust, the attorneys for Terrence John Rossiter having previously withdrawn. If the appellant had no standing to appear for the trust, she should not have been allowed to agree to an adjournment of the action to trial.

[4] Before dealing with the submissions of the parties, it is appropriate to examine some of the principles applicable to actions instituted by and against trusts:

- (a) When suing in the name of a trust, it is necessary to cite all the trustees of the trust, and it is impermissible merely to cite the name of the trust. This is because the general rule is that trustees must act jointly, and unless provided for otherwise, a trust is not a legal person. The rights and obligations comprising the trust estate do not bestow legal personality on the trust – see: *Land and Agricultural Bank of South Africa v Parker & others* 2005 (2) SA 77 (SCA), para 10.

- (b) The same principle applies when suing a trust as defendant.
- (c) When this is not done, or not done correctly (the wrong trustees are cited, or not all the trustees are cited), the trustees cited must plead accordingly – see rule 22(2). If this is not done, then the citation of the trustees will be deemed to have been admitted – see: rule 22(3).
- (d) If the citation of the trustees is denied, that is a matter for the trial court to decide, unless the plaintiff thereafter seeks to amend its particulars of claim.

See: *Smit v Van der Werke NO en Andere* 1984 (1) SA 164 (TPD) at 174 B-H.

Van der Westhuizen v Van Sandwyk 1996 (2) SA 490 (W) at 494 G – 495E.

Rosner v Lydia Swanepoel Trust 1998 (2) SA 123 (W) at 126H-127C.

- [5] In this action, the bank originally cited the trust represented by two named trustees, Terrence Rossiter and the appellant. In the preamble to the plea, the appellant denied all the allegations in the particulars of claim, save those allegations in the particulars of claim which were specifically admitted in the plea. The plea then alleges that the bank failed to cite one trustee, namely Rivalland.
- [6] The bank then replicated, admitting that at the time of institution of the action, BoE Trust Limited was a trustee of the trust, and that Rivalland was its appointed nominee. The replication further pleaded that it was unnecessary to amend its particulars of claim to cite Rivalland as a trustee because he was no longer a trustee, and BoE Limited was no longer able to nominate a trustee of the trust. The bank pleaded that the four trustees cited in its later amendment were the four trustees of the trust.
- [7] By way of a notice (purportedly in terms of rule 28) delivered on the 11th October 2017, the bank had notified its intention to amend its citation of the trust in its particulars of claim, ‘at the hearing of this matter’. On the 20th October 2017, the appellant delivered a notice in terms of rule 30 and rule 30A, alleging that the bank had not delivered a rule 28 notice prior to amending its particulars of claim, and that service of the intended amendment on two of the trustees, Reeve Luke Rossiter and Hayley-Noon Rossiter, had irregularly been served on the appellant’s attorneys.
- [8] On the 30th October 2017, the matter came before D Pillay J who granted the application for an amendment and adjourned the action to the 12th March 2018 for trial. The amended pages were delivered by the bank’s attorneys on the 16th November 2017, as confirmed by the filing notice in the papers.
- [9] The appellant then sought to amend her plea and deliver her counterclaim on the 20th November 2017. In that plea and counterclaim, the appellant made it clear that she did not have authority or a mandate to act for the other trustees, and was purporting to defend the matter in her individual capacity as trustee alone. The appellant’s amended first point-in-limine persisted with the allegation that Rivalland should have been cited as a trustee at the

time the action was instituted. A plea of prescription was included on the basis that the original summons was defective, and the appellant again averred that Reeve Luke Rossiter and Hayley-Noon Rossiter had not been served individually (service was subsequently effected on them on the 22nd November 2017). The amended plea and counterclaim prompted the bank's exception to the counterclaim dated the 8th December 2017, and its rule 30 application to the appellant's amended plea on the 12th December 2017. Ultimately, this all culminated in an application for an urgent hearing, which was heard on the 12th March 2018.

[10] The history set out above invites a reassessment of the issues in dispute in this appeal. Much of what is suggested in the appellant's legal representative's heads of argument are not relevant, either because orders were made with regard thereto (not appealed against), or because they have simply been overtaken by time or events and it is no longer open to the appellant to have them debated in this hearing. This includes the matters of waiver and estoppel raised in the appellant's heads of argument. In this regard:

(a) The complaints about the orders made by D Pillay J on the 30th October 2017 relate to a decision which has not been challenged by way of either appeal or review, and is not before us. It therefore

stands.

(b) The consent order that was granted adjourning the action to the 12th March 2018 was a procedural step taken to bring the action before a judge in order for the disputes (including the issue before this court) to be decided. That does not raise any issue of waiver or estoppel.

[11] The judgment of Kruger J is brief. That is because the learned judge correctly identified the issue in dispute (could the appellant represent the trust?), listed the requirements of the trust regarding representation, and concluded that the appellant alone could not represent the trust. Those facts include:

(a) That the trust was under the management and control of the trustees.

(b) According to the trust deed: there had to be no less than two and no more than four trustees at any time: the decisions of the trust were to be taken by a majority of the votes of the trustees: A quorum of two trustees was required for conducting the business of the trust and for making decisions.

(c) The powers of the trustees specifically included the borrowing of monies and the pledging of immovable properties owned by the trust to secure the trust's indebtedness.

(e) The trustees were entitled to sue and be sued in respect of any matter arising out of the trust in the name of the trust.

- (f) Instituting and defending actions by and against the trust clearly fall within the conduct of the business of the trust, and accordingly required the requisite quorum of two trustees to do so. Any act falling within that category which is purportedly performed by a single trustee is clearly invalid, and cannot bind the trust.
- (g) On the 13th March 2009 (when the summons was issued) the three trustees included both Terrence Rossiter and the appellant. On the 27th March 2017, the trustees included those two persons and Hayley-Noon Rossiter and Reeve Luke Rossiter, as reflected in the amended summons and particulars of claim.
- (h) The actions of the appellant in purporting to instruct her attorneys on the plea and counterclaim were accordingly invalid and can have no legal consequences for the trust.

In assessing the facts, the learned judge a quo was correct, and I can see no basis upon which his interpretation of the law was flawed.

- [12] Mr Chetty, who appeared for the appellant, sought to rely in argument upon the decision in *Lupacchini NO & another v Minister of Safety and Security* 2010 (6) SA 457 (SCA) at paragraphs 12 and 13 where Nugent JA distinguished between the capacity of a trustee to act, and the standing of a trustee. He referred to the dicta of Conradie J in *Watt v Sea Plant Products Bpk* [1998] 4 All SA 109 (C) referring to the fact that standing was an access mechanism controlled by the courts, and did not require authority, but rather rested on the interest of the trustee in the litigation. As *Watt* concerned the ability of a trustee to act on behalf of a trust prior to being authorized by the Master, Conradie J expressed the view that the legislature did not intend to deal with standing in s 6 of the Trust Property Control Act, 1988. Nugent JA was of the view that the question which should have been dealt with in *Watt* was not whether the trustee had a sufficient interest in the litigation, but rather whether they were capable of suing or being sued at all. Ultimately, Nugent JA relied on *Parker* which makes it clear that legal proceedings by persons who lack the capacity to act for the trust are a nullity and there is nothing in s 6 of the Act to suggest that trustees who were prohibited from acting in that capacity are in a better position.
- [13] Two practical examples illustrate that the submission of Mr Chetty cannot be correct:
- (a) The anomalous possibility discussed in *Watt* where, to allow an unauthorized trustee to act meant that the trustee could conduct litigation with huge potential consequences for a trust in circumstances where the trustee would not be capable of contracting for the purchase of a pen.
 - (b) Mr Chetty submitted that his argument led to the conclusion that different trustees could advance different pleas, all on behalf of the trust, even were those pleas to be diametrically opposed. I cannot conceive how such a situation could exist.

[14] In this appeal, whether the objection relates to standing or authority, the result is the same. The actions of the appellant in pleading and instituting a counterclaim are both a nullity, and can have no legal consequences.

[15] With regard to costs, the appellant persisted with her amended plea and counterclaim without the consensus of a majority of the trustees in accordance with the trust deed. The appellant had no legal standing or authority to act as she did. There is accordingly no reason why the trust, or the beneficiaries of the trust, should be prejudiced as a result of the appellant's actions. See: *Blou v Lampert & Chipkin NNO & others* 1973 (1) SA 1 (A).

[16] In all the circumstances, I make the following order:

The appeal is dismissed. The appellant is to bear the costs of the appeal personally.

Lopes J

I agree.

Pitman AJ

Jikela AJ

Date of hearing:

27th January 2020

Date of

Judgment:

14th February 2020

Legal representative for the Appellant: T Chetty of Theyagaraj Chetty Attorneys

Counsel for the Respondent:

A J Troskie SC, with P J Combrinck (instructed by Garlicke & Bousfield Inc).

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