
SOUTH AFRICA / JUDGMENT

Tshaka N O and Others v Standard Bank of South Africa Limited and Another (141/2019) [2020] ZASCA 73 (25 June 2020) [2020] ZASCA 73

COURT

Supreme Court of Appeal

BEFORE

Ponnan, Mbha, Mocumie, Nicholls, Matojane

CASE / FILE NUMBER

141/2019

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 141/2019

In the matter between:

KGOMOTSO S. TSHAKA NO FIRST

APPELLANT

MARGARET M. MONNAKGOTLA NO SECOND

APPELLANT

JABULANI B. GUMBI NO THIRD

APPELLANT

WENGLIAN MA NO FOURTH

APPELLANT

and

STANDARD BANK OF SOUTH AFRICA

LIMITED FIRST

RESPONDENT

BAKUBUNG ECONOMIC DEVELOPMENT

UNIT SECOND

RESPONDENT

Neutral citation: Tshaka N O & others v Standard Bank of South Africa Limited & another (Case no 141/2019) [2020] ZASCA 73 (25 June 2020)

Coram: PONNAN, MBHA, MOCUMIE, NICHOLLS JJA and MATOJANE AJA

Heard: 15 May 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be delivered at 12H00 on 25 June 2020.

Summary: Claim by trust against bank for recovery of monies transferred out of bank account – bank acting on instructions of authorised signatories – bank insisting on the written instruction of all trustees to stop further transfers – such instruction not forthcoming - bank not liable.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Van der Nest J, sitting as court of first instance):

The appeal is dismissed with costs.

Mocumie JA (Ponnan, Mbha and Nicholls JJA and Matojane AJA concurring)

[1] This appeal arises over a dispute between the parties in respect of the transfer of R9,5 million by officials in the employ of the first respondent, the Standard Bank of South Africa Limited (the Bank), from the bank account of the Bakubung-Ba-Ratheo Economic Development Trust (the Trust) to the second respondent, the Bakubung Economic Development Unit. Van der Nest AJ, sitting in the South Gauteng High Court Division, Johannesburg, dismissed the appellants' claim. The appeal is with leave of the court a quo.

[2] The appellants, are the four Trustees of the Trust. Three of the four, Kgomotso Sediela Tshaka NO (the first appellant), Margaret

Mapaseka Monnakgotla NO (the second appellant) and Wenliang Ma NO (the fourth appellant), were appointed by the Master of the North

Gauteng High Court, Pretoria in terms of s 6(1) of the Trust Property Act 57 of 1988 on 12 August 2013. The fourth trustee, Jabulani Ben Gumbi NO (the third appellant), has been a trustee since the establishment of the Trust. The Trust was established in 2006 by way of donation from the Wesizwe Platinum Limited (the donor) in the sum of R10 million, with the broad object of

advancing the socio-economic development and upliftment of the Bakubung-Ba-Ratheo community (the community). At inception there were five trustees. Aside from the third appellant, the remaining trustees were the Kgosi of the community, Michael Henry Solomon, Lorna Maloney and Choice Franscinah Tshetlhe. In terms of the Trust Deed, Mr Solomon and Ms Maloney were appointed by the donor, whilst the third appellant and Ms Tshetlhe were appointed by the Kgosi in consultation with the Traditional Council of the community. At a meeting of the Trust on 28 November 2011, the resignations of Mr Solomon and Ms Maloney were tabled and accepted; and Mr Tshaka and Mr Ma were appointed in their stead.

[3] The Trust Deed provided:

‘11. ACCOUNTING MATTERS, AUDIT AND BANKING AND OTHER ACCOUNTS

11.4 The banking account shall be opened in the name of the trustees for the time being of the Bakubung Ba Ratheo Economic Development Trust into which account all payment of cash received by the parties shall be deposited by 1(one) person authorised to trustees and from which account all payments due by the Trust shall be made by means of cheques or electronic fund transfers drawn on such banking account and signed by 1(one) person authorised thereto by the trustees’

[4] In a document dated 23 July 2007, entitled Resolution of Bakubung Ba Rantheo Economic Development Trust it is stated:

‘By resolution of trustees of Bakubung-Ba Rantheo Economic Development Trust as at LEDIG, Republic of South Africa.

The trustees of Bakubung-Ba Rantheo Economic Development Trust hereby authorize Nyasa Tengawarima and Choice Franscina Tshetlhe in their capacities as Trustees/authorised signatories, to open bank account(s) for the Trust at Standard Bank of South Africa Ltd, to arrange and maintain electronic banking access as well as transnational limits and to sign all relevant documentation pertaining to the aforementioned.

The authority will remain in force indefinitely or until advised otherwise, by the trustees, by way of a further resolution.’

[5] On 19 December 2007, the Trust made an application to the Bank to open and operate a bank account for and in the name of the Trust. The application form lists Messrs Gumbi, Monnakgotla and Solomon as well as Mmes Tshetlhe and Maloney as trustees and describes Nyasa Tengawarima as an ‘authorised signatory’ and Choice Franscina Tshetlhe as ‘a further trustee and signatory’.

On 21 January 2008 the Bank approved the application and opened a bank account for and in the name of the Trust under Money Market

cheque account number [...]. A call account was linked to this cheque account for the use of the Trust when necessary. The call account number is [...]7.

[6] On 21 July 2011, Mr Gordon Millar of the Bank, described as the ‘account executive’ in respect of the Trust received a letter of instruction, stating:

‘Dear Gordon: Please accept this letter as the written instruction from the Trustees of the Bakubung Economic Development Trust (the Trust) to Standard Bank to immediately effect a transfer in the amount of R5 500 000 from the Trust’s bank account (Account No. [...]3) to the account of Bakubung Economic Development Unit (Account No. [...]1).’

[7] This letter of instruction was accompanied by a document entitled ‘Resolution of the Bakubung Economic Development Trust passed at a meeting held at Ledig on 21 July 2011’ This resolution stated:

‘1. The Trustees have approved the following:

1. . . .
2. The allocation of R5, 5 00 000 (five million five hundred thousand rand) for those projects.
3. The issuance of the written instruction by any authorised signatories for the bank account of the Trust at Standard Bank to transfer R5, 500 000 from the account of the Trust to the bank account of BEDU.

Signed by: Nyasa Tengawarima-Trustee appointed by MH Solomon and Choice F Tshetlhe.’

[8] Pursuant to this letter, on 26 July Mr Millar approved and authorised the transfer of R 5, 5 million to the account of the second

respondent. Nearly three months later, on 17 October, the third appellant went to the Bank and met with Mr Millar. He informed

Mr Millar that he was a trustee of the Trust and that it had come to his attention that R5, 5 million had been transferred

from the bank account of the Trust without a resolution or minutes of a Trust meeting or a suitable and legal quorum of the Board. Later that day, Mr Millar received an email from the third appellant. A number of issues were raised by the third appellant and concluded with the following instruction: ‘please stop any transfers from the account . . . until we notify you as trustees’. The next day Mr Millar replied to each of the queries. His response, concluded as follows: ‘Please urgently send us a written request signed by ALL trustees to this effect’.

[9] A week later, on 24 October 2011, Mr Millar received a second instruction from the Trust. It as well, emanated from Ms Tshetlhe and Ms Tengawarima and instructed Mr Millar to once again effect transfer to the second respondent in the sum of R4 million. Not having heard anything from the third appellant in the meanwhile, Mr Millar contacted Ms Tshetlhe, obtained approval and effected transfer in accordance with the instruction on 28 October 2011.

[10] On 16 July 2014 the appellants issued summons, which consisted of a main claim against the Bank and a conditional claim against the second respondent seeking repayment of those amounts. The conditional claim, which is yet to be determined, was stayed pending determination of the main claim. In support of the main claim, the appellants alleged:

‘10.1 The first defendant will accept deposits lawfully made into the bank account for and on behalf of the Trust and credit the Trust with the amounts so deposited as funds available to the Trust;

10.2 The first defendant will authorise and approve withdrawal of funds from the bank account [of the Trust] only if–

10.2.1 it was expressly instructed to do so in terms of a written resolution passed or adopted by the trustees of the Trust; and

10.2.2 a copy of such resolution was presented to the first defendant’s authorised duly manager by two signatories authorised by the trustees to operate the bank account;

10.3 The first defendant undertook to exercise reasonable care to ensure that it will not authorise or approve the withdrawal of funds from the bank account without the relevant resolution of the trustees which was passed or adopted by the trustees in terms of the relevant provisions of the Trust’s Deed of Trust, a copy whereof was made available to the defendant when it agreed to open the bank account for the Trust.

...

10.5 The first defendant undertook to exercise reasonable care, to act in good faith and to ensure that it would not act negligently when managing the Trust’s account, specifically when disbursing funds from the plaintiff’s account.

10.6 Mr Millar acted negligently in that:

10. 6.1 he failed to realize, when he should or ought to have realised, by the exercise of reasonable care, that annexure ‘POC3’

10.6.1.1 was not a resolution properly passed or adopted by the trustees of the Trust;

10.6.1.2 was not signed by all or the majority of the trustees of the Trust;

10.6.1.3 was not a lawful instruction by the trustees to the first defendant to authorize and approve withdrawal of funds from the bank account’.

[11] The only witness to testify on behalf of the Trust was the third appellant. In his evidence in chief, before the high court, the third appellant maintained that the Bank acted outside its mandate and negligently by authorising the two transfers without the resolution of the Board or approval by all the trustees.

- [12] The high court found that the Bank was not negligent in acting on the instructions of the authorised signatories. It held that the Bank had ‘made its position clear’ in advising the third appellant, as one of the trustees at the time, when he reported allegations of fraud against the authorised signatories, exactly what steps he together with other trustees had to take.
- [13] The first transfer of R5.5 million was effected on 26 July 2011. As the third appellant conceded during the trial, at that stage, the appellants had not made any allegations of fraud against the two signatories to the Bank, nor complained to it about the alleged fraud. The Bank was thus simply unaware that anything untoward had occurred. Before us, counsel for the Bank submitted that, this should be the end of the matter. I agree with him, particularly because the third appellant had conceded as much in the high court.
- [14] The second transfer of R4 million, which was effected on 28 October 2011, came about after allegations of fraud in respect of the two signatories were made to the Bank. In his evidence in chief, the third appellant stated that on 17 October 2011, he approached Mr Millar and warned him about the illegality of the first transfer of R5.5 million and that he had received information that another transfer would be made without the authorisation of all the trustees. He put it as follows in his evidence in chief:
- ‘I told Mr Millar that the R5.5 m that he had approved was fraudulent and I told [him] that there is another request for R4 m that they [Pologwane] and the second defendant are planning to [withdraw], R4 m and I cautioned him to say he should not allow the transaction to take place, because as a trustee myself, I am making him aware that that instruction is also fraudulent’.
- [15] It is common cause that the third appellant later that same day, followed this up with an email. As Mr Millar’s response to that email on behalf of the Bank illustrates, the third appellant was informed that he had to secure ‘a written request signed by all of the Trustees’. Without such new resolution, Mr Millar stated that he was obliged to comply with the instructions which came from the Trust through the authorised signatories.
- [16] Under cross examination the third appellant, conceded that:
- (16.1) Annexure A to the plea of the Bank was the only application the Trust made to it for the opening of an account. In other words, the investment account bearing number [...]1, which is the subject of the claim of the Trust was activated pursuant to that application;
- (16.2) The completion and submission of the application was authorised by the Trust in terms of the resolution dated 23 July 2007;
- (16.3) The resolution reflected that the Trust authorised Mr Tengawarima and Ms Tshetlhe to be the authorised signatories on the Trust bank account;
- (16.4) There was nothing in the resolution preceding the completion and submission of the application that imposed an obligation upon the Bank to look at the Trust Deed before effecting a transfer;

(16.5) At the time that the R5.5 million was transferred he had not reached out to the bank and made any complaints in respect of the account in issue and;

(16.6) Mr Tengawarima and Ms Tshetlhe were the authorised signatories in respect of the account.

[17] The high court found:

‘[T]he first defendant made its position clear that it adopted the position that the two persons were still authorised signatories on the account, and that it urgently required written request from all trustees to give effect to a stop instruction on all transfers on the account. No such instruction was forthcoming from either Mr Gumbi or the remaining trustees’.

[18] Furthermore, the high court found:

‘At this stage the first defendant had heard nothing further from Mr Gumbi or any other trustees pursuant to the urgent request made by Mr Millar. The first defendant followed the same procedure as it did when it made the first payment, and telephonically contacted

Ms Tshetlhe who according to its records, was both trustee and an authorised signatory. The purpose was to check and confirm that the second payment request was indeed authorised. Contact was made with Ms Tshetlhe and the letter of instruction was annotated

accordingly by both an employee of the first defendant and by Mr Millar to indicate that contact had been made. Payment was then made in accordance with this instruction, on 28 October 2011. No contact was made by Mr Gumbi.’

[19] In those conclusions the high court cannot be faulted. In its strictly technical sense, a trust is a legal institution *sui generis*. [1] In *Lupacchini NO and Another v Minister of Safety and Security*, [2] this Court observed,

‘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”’. [3]

As pointed out in *Land and Agricultural Bank of South Africa v Parker and Others*: [4]

‘[I]t 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.’ (Footnotes omitted.)

[20] Furthermore, this Court, in *Parker*, stated: [5]

‘It is a fundamental rule of trust law, which this Court recently restated in *Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk*, that in the absence of contrary provision in the trust deed the trustees must act jointly if the trust estate is to be bound by their acts. The rule derives from the nature of the trustees’ joint ownership of the trust property. Since co-owners must act jointly, trustees must also act jointly. Professor Tony Honoré’s authoritative historical exposition has shown that the joint action requirement was already being enforced as early as 1848. It has thus formed the basis of trust law in this country for well over a century and half.’

[21] It follows that Mr Millar cannot be faulted in insisting that the third appellant urgently send him a written request signed by all the Trustees, before the Bank could act on his concerns. However, from the time the third appellant approached the Bank on 17 October 2011 it took almost fifty days before there was any response. On 6 December 2011 the Trust wrote to the Bank informing it of the resolution adopted on 28 November 2011, in terms of which:

‘4. Mr Nyasa Tengawarima and Ms Choice Tshetlhe be removed as signatories on account number [...]1 of the trust with immediate effect.

5. Mr Jabulani Ben Gumbi I.D Number [...]1 as (A) signatory and Ms Kgomotso Tshaka ID Number [...]7 or Mr Wenliang Ma Passport Number [...]3 as (B) signatory be and are hereby added as the new signatories needs to sign together...’

[22] Counsel for the appellants could not provide any answer as to what caused this delay in the light of the clear position adopted by the Bank. It follows that the Trust has simply failed to make out a case against the Bank and the appeal must fail.

[23] In the result, the following order is granted:

B C MOCUMIE

JUDGE OF APPEAL

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Appearances

For appellants: K Tsatsawane SC

Instructed by : Mkhabela Huntley Attorneys Inc., Sandton

Mc Intyre Van Der Post, Bloemfontein

For respondent: J Babamia SC

Instructed by: Bowman Gilfillan Inc.

[1] *Braun v Blann and Botha NNO & Another* [1984] ZASCA 19; 1984

(2) SA 850 (A) at 859D-H; *Commissioner for Inland Revenue v Friedman & Others NNO*

[1992] ZASCA 190; 1993 (1) SA 353 (A) at 370D-H.

[2] Lupacchini NO & Another v Minister of Safety and Security

[2010] ZASCA 108; 2010 (6) SA 457 (SCA) para 1.

[3] Griessel NO and Others v De Kok and Another [2019] ZASCA 95; 2019 (5) SA 396 (SCA) para 11.

[4] Land and Agricultural Bank of South Africa v Parker and Others 2005

(2) SA77 (SCA) para 10.

[5] Ibid para 15.

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