
SOUTH AFRICA / JUDGMENT

Van Wyk v Daberas Adventures CC (1431/2016) [2018] ZANCHC 31 (1 June 2018)

[2018] ZANCHC 31

COURT

Northern Cape High Court, Kimberley

BEFORE

Williams, Olivier, Mamosebo

CASE / FILE NUMBER

1431/2016

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IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape High Court, Kimberley)

REPORTABLE: YES

CIRCULATE TO JUDGES: YES

CIRCULATE TO MAGISTRATES:NO

CIRCULATE TO REGIONAL MAGISTRATES: NO

CASE NO: 1431/2016 DATE HEARD: 21 MAY 2018 DATE DELIVERED: 01 JUNE 2018

In the special review:

VAN WYK, MARIANNA

Appellant

and

DABERAS ADVENTURES CC

Respondent

Coram: Williams ADJP et Olivier J et Mamosebo J

JUDGMENT ON SPECIAL REVIEW

Olivier J:

[1.] The appellant, Ms Mariana Van Wyk, in her capacity as a trustee of the Chris Van Wyk Trust (“the Trust”) had instituted motion proceedings against the respondent, Daberas Adventures CC.

[2.] In the founding affidavit it was averred by the appellant that she had been authorised by her co-trustees to bring the application on behalf of the Trust. She attached a copy of the relevant resolution, which reflected^[1] that the appellant and all the other trustees had decided that the appellant was authorised, in her capacity as a trustee, to institute motion proceedings against the respondent for, inter alia,

orders:

2.1 that the respondent, its members and its employees vacate the property of the Trust;

2.2 that the respondent, its members and its employees cease all work on the property, and that they demolish and remove all the erected constructions without damaging the property of the Trust;

2.3 that the respondent replace or repair the fences to the condition in which they had been prior to the respondent’s activities there;

2.4 that the barricades and the lock preventing access to the property through the main gate be removed; and

2.5 that the Trust be allowed to erect certain fences.

[3.] Annexed to the founding affidavit there were also supporting affidavits by the remaining trustees Mr C J Van Wyk , Ms Marianné van Wyk and Mr C J P Van Wyk, in which they stated that the appellant was authorised in her capacity as trustee to institute against the respondent such legal proceedings as she may in the exercise of her own and exclusive discretion deem fit.

[4.] It was common cause that the appellant and the said trustees had at the time been all the serving trustees of the Trust.

[5.] At the hearing of the application the respondent raised three in limine objections, one of which was that the appellant lacked locus standi. This particular objection was upheld and the application was dismissed with costs on that basis. In this regard the Court a quo (Snyders AJ) found:

5.1 that the resolution to authorise the appellant to bring the application was invalid because the decision had been taken without the vote of Mr B C Van Wyk, which was found to have been a requirement in terms of clause 8.3 of the trust deed; and

3.2 that the other trustees had in any event not been entitled to delegate the power as set out in the resolution:

3.2.1 because the delegation of this particular power was not provided for in clause 8.8 of the trust deed; and

3.2.2 because the trust deed contained no other express provision for the right to delegate any power, including this one.

[6.] The Court a quo granted the appellant leave to appeal, and ordered the costs of an application for condonation and the costs of the application for leave to appeal to be costs in the appeal.

[7.] The arguments set out in the heads of argument on behalf of the appellant were briefly:

7.1 that the authorisation of the other trustees had not been required for the appellant to have deposed to the founding affidavit;

7.2 that the respondent could only have challenged the appellant's authorisation through the mechanism of Uniform Rule 7(1); and

7.3 that, as each of the trustees had been properly identified and had supported the application, the Trust should not have been non-suited merely because they had not been joined and cited as co-applicants.

[8.] I do not understand the findings of the Court a quo to be that the lack of locus standi resulted from the appellant not having been authorised to depose to the founding affidavit, or that the mechanism of Uniform Rule 7(1) should have been utilised by the respondent. In argument before us Mr Van Aswegen, counsel for the appellant, did not pursue these arguments and they therefore do not have to be considered.

[9.] Suffice to say that the provisions of the Rule apply to "the special type of power which is given by a client to his attorney to authorise him to institute or defend legal proceedings on the client's behalf"[2] and that they are to be used where there is a "fear that a person may deny that he was a party to litigation carried on in his name"[3]. The issue here was not whether the appellant, who was herself the "client" and also the "party" as envisaged in Uniform Rule 7(1)[4], had authorised the attorney. It was whether she had been entitled to do so.

ABSENCE OF THE VOTE OF MR B C VAN WYK

[10.] At the time of the launching of the application Mr B C Van Wyk had, as a result of the sequestration of his estate, ceased to be a serving trustee.

[11.] Mr Nel, counsel for the respondent, argued that Mr Van Wyk had to be a trustee "for the Trust to function", that in his absence, and in fact until his death, "no decisions (could) be taken that would bind the Trust estate" and that the rest of the trustees did "not have capacity to make decisions" in the absence of Mr Van Wyk and for so long as he was alive. This argument was based upon provisions of clause 8.4 of the Trust Deed, the relevant part of which reads as follows:

"Alle besluite en optredes van die Trustees sal by wyse van meerderheidstem geskied mits die stem van

BAREND CHRISTIAAN VAN WYK

en na sy/haar dood die stem van

MARIANNA VAN WYK

en by sy/haar dood die stem van die TRUSTEE testamentêr aangewys deur
as sy opvolger, een van die meerderheidstem is.

...”

[12.] In my view the provisions clearly apply to only decisions reached by majority vote, as opposed to unanimous decisions taken by all serving trustees. In my view the intention was that, in the event of split decisions, only majority votes which included the vote of Mr Van Wyk would carry through.

[13.] Mr Nel’s interpretation of the provisions would mean that the Trust would be rendered incapacitated for as long as Mr Van Wyk is alive. The rules of interpretation that are applicable to contracts also apply to the interpretation of trust deeds[5]. The approach to be followed is by now trite and was reaffirmed in *Sea Plant Products Ltd v Watt*[6].

[14.] In my view the “grammatical and ordinary meaning” of the language used in this clause is clear and unambiguous and does not “result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument”[7].

[15.] Mr Nel’s interpretation of the provisions is in my view inconsistent with the clear meaning of the words and would lead to

the absurd result that the Trust would be incapacitated for as long as Mr B C Van Wyk is alive.

[16.] The provisions should also be read in the context of those of the preceding clause, which requires the presence of Mr Van Wyk to

constitute a quorum in the event that a meeting is attended by a majority of the serving trustees, as opposed to all the serving

trustees.

[17.] It could also be argued that an interpretation that would result in the failure of the Trust should be avoided[8].

[18.] Decisions taken by majority vote must be distinguished from those taken unanimously by all serving trustees. It must be kept in mind that, although common, a provision that a decision can be reached by majority vote (as opposed to decisions taken jointly and unanimously) to an extent constitutes an abrogation of the joint action requirement that generally applies to Trusts[9].

[19.] It follows that I am of the view that the Court a quo erred in finding that the serving trustees had, in the absence of Mr Van Wyk, not been able to take valid decisions by means of what was in this case a unanimous vote by all of them jointly.

DELEGATION

[20.] In terms of clause 9.2.8 of the trust deed one of the powers of the trustees would be to institute or defend legal proceedings.

[21.] Clause 8.8 of the trust deed provides that trustees could authorise one another to sign, for official purposes, any document required for the administration of the Trust and for the execution of any transaction in connection with the affairs of the Trust.

[22.] The wording of the latter clause is similar to the wording of a clause considered by the Supreme Court of Appeal in *Nieuwoudt NO and Another v Vrystaat Mielies (Edms) Bpk*[10] and which was held not to have empowered a trustee to authorise another trustee to sign, in his or her capacity as such, a contract

of sale on his behalf.

[23.] In my view it is clear that the power to institute or defend legal proceedings is not a power as envisaged in clause 8.8, and accordingly its delegation to another trustee is not provided for by the provisions of that clause. The present trust deed in fact does not make express provision for trustees to delegate the power and the function to institute and defend legal proceedings.

[24.] Mr Nel, relying on *Hoosen and Others NNO v Deedat and Others*[11], submitted that the right to delegate this specific power may not be implied from the provisions of a trust deed and that, in the absence of an express provision to this effect in a trust deed, it cannot be delegated.

[25.] Mr Nel furthermore latched on to the fact that the appellant's three co-trustees had, in their supporting affidavits, stated that the appellant had been authorised to institute such proceedings as she would deem fit in her own and exclusive discretion. Words to the same effect appear in paragraph 6 of the resolution, in terms of which the appellant was authorised to obtain such other relief as she would deem fit in her own and exclusive discretion. Mr Nel argued that a delegation in these terms would constitute an irregular abrogation of their powers of the part of the co-trustees.

[26.] In the *Hoosen* case a trustee purported to authorise a third party to represent him at all future meetings of trustees. The power of attorney

authorised the third party, in very wide and general terms, to do everything that the authorising trustee would have been able to do. It was held that the express provision for the delegation of powers in the particular trust deed was limited to "matters that are by and large purely administrative" and that the particular provision did not apply "to areas where the exercise of a discretion is called for by the trustees in carrying out their duties and management and control"[12].

[27.] The Court found that the general principle "that the fundamental decisions relating to a Trust need to be taken by the trustees" and the concomitant "general prohibition against the delegation of a fundamental discretionary power" would militate against an argument that such a trust deed impliedly provided a right to delegate functions "in the manner sought to be done by (the trustee) in terms of the power of attorney".

[28.] In my view these findings in the Hoosen case pertained specifically to the delegation of “fundamental decisions” and of “fundamental discretionary power”. The right to delegate such a power would have to be expressly provided for in a trust deed and, if not, it will not readily be implied[13].

[29.] It is also important to take note of the distinction that was drawn between the power to take part in decisions, on the one hand, and the power to implement such decisions, on the other hand. It was expressly held that the “implementation” of fundamental decisions may be delegated to others[14].

[30.] In my view the Hoosen case is therefore not authority for the general proposition that the right to delegate a power of a trustee could only arise from an express provision in a trust deed or, as put in the heads of argument on behalf of the respondent, “a delegation of trustees’ duties must be permitted in the trust deed. If not, it cannot be done”. The finding of the Supreme Court of Appeal was that the particular delegation was not legally tenable in the absence of express provision therefor in the particular deed, not delegation in general. The finding pertained to a delegation in the terms concerned in that specific matter or, as it was put in paragraph [25] of the judgment, a delegation in “the manner sought to be done”, and “in (the) terms of (that) power of attorney”[15]. This also appears from the finding that the delegation in that matter “properly construed, seeks to transfer to the first respondent the third respondent’s rights and duties, and concomitant powers, arising from attendance and voting at meetings of the Trust. This amounts to a delegation to the first respondent of the third respondent’s judgment and discretion in relation to the decision-making process of the Trust. It constitutes at least a temporary abdication of the third respondent’s functions in favour of a non-trustee”[16].

[31.] It is also important to bear in mind that the Court in the Hoosen case was concerned with a purported delegation of power by an individual trustee, as opposed to the delegation of a power by the

body of trustees. The remark, in paragraph [23] of the judgment, that the trust deed concerned there made “no provision for the exercise of any powers or functions by individual trustees unless authorised thereto by the body of trustees” in my view suggests that, at the very least, “the body of trustees” could delegate, at the very least, the type of power:

30.1 that cannot be said to amount to a “fundamental discretionary power”; and

30.2 that does not relate to an area “where the exercise of a discretion is called for by the trustees in carrying out their duties of management and control”.

[32.] The resolution concerned in the present matter reflects, and as far as the relief indeed sought in the notice of motion is concerned, that the body of trustees delegated, by unanimous decision, only the power to institute legal proceedings against the respondent and to sign all documents and take all steps to bring such proceedings to finality. The resolution in itself, and once again as far as the relief is concerned that is sought on the strength thereof, does not purport to delegate any discretionary power[17], let alone one that could be said to relate to the

“judgment and discretion (of the other trustees) in relation to the decision-making process of the Trust”[18].

[33.] The fact that the other trustees have in their supporting affidavits interpreted the resolution as meaning that the appellant would have a discretion, presumably as regards the type of legal proceedings to be instituted, is of no consequence. It is the objective contents of the resolution which are decisive, and not what the other trustees may subjectively have intended to decide, and the resolution “must be interpreted objectively in order to determine (its) precise ambit and legal effect”[19].

[34.] In any event, even on their subjective interpretation and intention, the discretion referred to would have pertained to only the type of legal proceedings to be instituted, and not the general “decision-making process of the Trust”.

[35.] As long as a delegation of power does not amount to an abdication of the fundamental discretionary powers of a trustee in the exercise of his or her duties as a trustee, and unless it is prohibited by a trust deed, “a delegation of powers ... can validly be done in law by trustees”[20], which could include “decision-making functions in respect of litigation”[21].

[36.] The Court a quo interpreted the following dictum in *Goolam Ally Family Trust t/a Textile Curtaining and Trimming v Textile Curtaining (Pty) Ltd*[22] to mean that a right to delegate a power can only exist if it is not only not prohibited in the trust deed, but in fact expressly provided for in it:

"The general rule is that joint trustees must act jointly. Generally speaking a joint trustee may delegate his duties to a co-trustee or to any other agent but the power to do so depends on the provisions of the trust deed ... If it is prohibited it cannot be done "

[37.] I respectfully disagree with this interpretation. The words “If it is prohibited it cannot be done” simply cannot be read to also mean “If it is (not expressly provided for) it cannot be done”. The Court in the *Goolam* case was in any event only called upon to decide whether a case had been made out in the papers that “the application or the decision to bring the application” had been authorised by the second trustee, who had not deposed to a supporting affidavit like the other trustees had[23]. Whether the second trustee would, in terms of the particular deed of donation, have been entitled to authorise it, was not the issue.

[38.] The following remarks in the *Nieuwoudt* case[24] also imply that express provision for the right to delegate a power or a function is not a general requirement:

"Although there was nothing in the trust deed which prevented the trustees from delegating certain functions to one of their number or even to an outsider (cf *Coetzee v Peet Smith Trust en andere* 2003 (5) SA 674 (T) at 680I-J), the first appellant did not deal expressly in his affidavit with the question as to whether powers of management over the trust business had been delegated to him so as to enable the day to day business of the trust to be carried on.”[25] (My emphasis)

[39.] In a concurring judgment it was held that “..... the ordinary principles of the law of agency (applied)”, that “trustees may expressly or impliedly authorise someone to act on their behalf and that person may be one of the trustees” and that “..... whether a particular trustee has the ostensible authority to act on behalf of the other trustees is a matter of fact and not one of law”[26].

[40.] There is no indication in the present trust deed that the intention was to limit the delegable powers to those envisaged in clause 8.8. In fact, when regard is had to the provisions of clause 7 it is in my view clear that no such limitation was intended. In terms of this clause a trustee could be authorised to act on behalf of a co-trustee in his/her temporary absence.

[41.] The “decision-making functions in litigation” are not the type of functions that are not delegable in the absence of express provision therefor in a trust deed[27].

[42.] I have already alluded to the distinction drawn in the Hoosen case between the process of arriving at decisions through the exercise of a trustee’s fundamental discretionary powers, on the one hand, and the implementation of those decisions, on the other, and to the fact that it was held that “(T)he implementation of such decisions may be delegated to others ...”[28]. Even if it could be said that the power to make a decision whether to institute or defend legal proceedings, as envisaged in clause 9.2.8 of the trust deed in the present matter, constituted a “fundamental discretionary power”[29], and one that could only be delegated if the trust deed expressly provided for such delegation[30], this is not what was delegated in the present matter if regard is had to the contents of paragraphs 1 to 5 of the resolution. The decision to institute the legal proceedings was taken by all the trustees jointly. Paragraphs 1 to 5 of the resolution delegated only the implementation of that particular decision to the appellant.

[43.] In terms of paragraph 6 of the resolution the body of trustees had also decided to delegate to the appellant any decision about whether to seek other relief than that set out in paragraphs 1 to 5 of the resolution. Whether the power to make this particular decision could be described as a “fundamental discretionary power” that could not be delegated, is not necessary to decide. The relief sought in the notice of motion is covered by and limited to the contents of paragraphs 1 to 5 of the resolution and the appellant has therefore not, in bringing the application, exercised the power envisaged in paragraph 6 of the resolution.

[44.] To summarise as far as the issue of delegation is concerned, the absence of express provision in a trust deed for the delegation of a decision regarding the institution or opposition of legal proceedings in a specific case would not render such a delegation invalid, and even less the delegation of only the implementation of such a decision, provided that it is not expressly or impliedly prohibited in terms of the trust deed. In such a case the “ordinary principles of the law of agency”[31] would prevail, which would allow a trustee to authorise another trustee to act on his or her behalf.

“ON BEHALF OF THE TRUST”

[45.] Mr Nel referred to the statement of the appellant in the founding affidavit that she had been authorised to bring the application on behalf of the Trust. Words to the same effect appear in the introductory portion of the resolution. Mr Nel argued that, because the Trust is not a legal persona, it would be legally impossible to institute legal proceedings on its behalf.

[46.] In my view there is absolutely no merit in this argument. If property and assets can be held and administered by trustees “on behalf of” a Trust[32], they could surely also institute legal proceedings on its behalf. The words are in fact commonly used in judgments to denote actions taken by trustees in the administration of the affairs of Trusts[33].

[47.] In support of his argument Mr Nel referred to cases like *Land and Agricultural Bank of South Africa v Parker and Others*[34] and *Gowar and Another v Gowar and Another*[35], in which it was reaffirmed that a Trust does not have legal personality. These cases do not, however, in my view provide

support for Mr Nel’s argument.

[48.] In *BOE Bank Ltd (Formerly NBS Boland Bank Ltd) v Trustees, Knox Property Trust*[36] it was held, in considering a similar argument:

45.1 that even though a Trust is not a legal persona “it is recognised that a Trust has a legal existence, whether it be called ‘an entity’, ‘an institution’ or ‘an arrangement’”[37];

45.2 that the “arrangement whereby assets and liabilities are vested in a trustee or in trustees ... is, in everyday parlance referred to as ‘a Trust’”[38];

45.3 that the real question is whether the party concerned is sufficiently identified and that, even though it would better to refer to the trustees “as the named Trustees, in their capacity as Trustees of the Trust or as the Trustees for the time being of the Trust”, rather than to the Trust itself, this is not decisive in circumstances where the true identity of the Trust is clear[39].

[49.] The Court in the *BOE Bank* case also referred to the case of *Rosner v Lydia Swanepoel Trust*[40] in which Goldstein J remarked at 128D to E that:

“... cases in the name of a trust are not unknown, ...”[41]

[50.] The *BOE Bank* case was referred to with approval in *Standard Bank of South Africa Limited v Swanepoel NO*[42], in which it was held:

47.1 that the Court in the *BOE Bank* correctly “held that the description of the principal debtor as a trust in the deed of suretyship was sufficient identification ...”[43]; and

47.2 that the dictum in the *Parker* case that “a trust does not have legal personality and, in the absence of the authorisation of the trustees, as required by the deed of trust,

cannot be bound by a contract” does not mean that a Trust cannot enter into a contract[44].

[51.] Mr Nel went on to argue that, because the other three trustees had purported to authorise the deponent to bring the application on behalf of the Trust, they had in effect not authorised her to institute the legal proceedings on their behalf, in their capacities

as co-trustees of the deponent. Mr Nel relied on the case of *Van der Westhuizen v Van Sandwyk*[45] where it was held[46] that, even if it is to be assumed that a trustee could in his/her name institute legal proceedings on behalf of all the other trustees, it would still be a requirement that such a trustee be authorised to act on behalf of the other trustees.

[52.] Even though the appellant and her co-trustees have in the present matter not explicitly averred that the appellant instituted these

proceedings on behalf of the other trustees, it is in my view abundantly clear that this is precisely what happened. The body of trustees intended legal proceedings to be brought against the respondent, and intended the appellant to represent them in doing so. The appellant clearly did not “bring this application on her own”, as Mr Nel would have this Court interpret the evidence.

JOINDER

[53.] Mr Nel argued that, in any event, all the trustees should have been joined as applicants. He once again relied on the *Van der Westhuizen* case, where it was held[47] that all trustees must be joined as parties.

[54.] In the *Van der Westhuizen* case Streicher J (as he then was) disagreed with the following obiter dictum in *Mariola and Others v Kay-Eddie NO and Others*[48]:

“Unless one of the trustees is authorised by the remaining trustee or trustees, all the trustees must be joined in suing and all must be joined when action is instituted against a trust.”

[55.] Streicher J interpreted the following passage at p 266 of the 4th edition of Honoré’s *South African Law of Trusts* as requiring that all trustees in any event be joined in suing or being sued:

"All the trustees must join in suing and all must be sued ..., though it is sufficient for one trustee, if properly authorised by the remaining trustees, to sign the power of attorney on their behalf. There appears moreover to be no requirement of formality regarding how the remaining trustees should signify their association with the action so long as adequate proof is produced that the litigating trustee has been properly authorised to act on behalf of all the other trustees." [49]

[56.] In essence the findings of Streicher J were:

54.1 that the Court in the *Mariola* case had mistakenly interpreted the words “though it is sufficient for one trustee, if properly authorised by the remaining trustees, to sign a power of attorney on their behalf” in the above-quoted passage from the 4th edition of the book as denoting an exception to the general requirement that all trustees should join or be joined, while the words were never intended to convey that anything more than the signing of a power of attorney could be authorised; and

54.2 that all the trustees should therefore have joined as plaintiffs when the particular action was instituted.

[57.] What the Van der Westhuizen judgment boiled down to was therefore that the words “Unless one of the trustees is authorised by the remaining trustee or trustees ...” in the above-quoted dictum in the Mariola case had resulted from a wrong interpretation of what was said in the 4th edition of Honoré’s South African Law of Trusts in respect of authorisation to sign a power of attorney.

[58.] The Mariola dictum – and that interpretation of the particular passage in Honoré’s South African Law of Trusts – has however, since the Van der Westhuizen judgment, been applied in cases like *Cupido v Kings Lodge Hotel*[50], *Glen Elgin Trust v Titus and another*[51], *Buffelsdrift Game Reserve Owners’ Association v Holkom and Others*[52], *Deutschmann NO & Others v Commissioner for the South African Revenue Service*; *Shelton v Commissioner for the South African Revenue Service*[53] and *Rosner v Lydia Swanepoel Trust*[54].

[59.] In *Desai-Chilwan NO v Ross and Another*[55] Ngwenya J disagreed with the interpretation of Streicher J of the particular passage in Honoré’s South African Law of Trusts and held that, while it was preferable to join and cite all trustees, the failure to do so “should (not) non-suit the trust where there was clear authority to bring the proceedings to court”[56].

[60.] Mr Nel argued that Ngwenya J disregarded the principle reiterated in the Parker case “that ... the trustees must act jointly if the trust estate is to be bound by their acts”[57]. The answer to this argument is that the trustees in the present matter did indeed act jointly, and as the body of trustees.

They took a unanimous decision that the legal proceedings be instituted, and that the appellant would take the necessary steps on behalf of the Trust. This is abundantly clear on the papers, and the fact that they had not all been joined as applicants, and cited as such, cannot in my view detract from this.

[61.] The qualification that, where not all trustees have been cited or joined, there would have to be evidence of “clear authority to bring the proceedings to court” on the part of the trustee that is indeed cited and joined, is in any event a clear indication that Ngwenya J recognised the need that trustees had to act jointly. However, the learned Judge found, with reference to the said passage in the 4th edition of Honoré’s South African Law of Trusts, that citing the remaining trustees would not be the only way to “signify”[58] the fact that they had in fact been part of a joint decision to institute proceedings or had been authorised to do so.

[62.] Mr Nel argued that the finding of Ngwenya J that the applicant-trustee had been duly authorised by the other trustee and was therefore

entitled to bring that application, had effectively placed the applicant-trustee in the position of an agent and that the finding

had disregarded the rule that an agent has no right to enforce the right of the principal in his/her own name. The resolution in the Desai-Chilwan case made it clear however that the applicant-trustee was in fact acting “on behalf of the Clivia Property Trust”.

[63.] In *Pro-Khaya Construction CC v Trustees for the time being of the Independent Development Trust*[59] the individual trustees had also not been cited in the notice of motion or in the founding affidavit. Their identities only

became known when they were cited in a counter-application. It was found that the failure to cite them in founding could be condoned and it was found, adopting the approach of Ngwenya J in the Desai-Chilwan case, that “Effectively all the trustees (were) before the court in their capacities as trustees”.

[64.] In coming to this finding the Court in the Pro-Khaya case referred to the 5th edition of Honoré’s *South African Law of Trusts*, where the following is also said at pp 419 – 420:

"Unless one or more of the trustees are authorized by the others, all the trustees must be joined in suing and all must be joined when action is instituted against a trust.

In legal proceedings the trustees must act *nomine officii* and cannot act in their private capacities. It is usual for the trustees to be cited as ‘A, B and C in their capacity as the trustees of the XYZ Trust’ but cases in which the trust as such is cited are not unknown and there should be no objection to a citation of ‘the trustees for the time being of the XYZ Trust’."

[65.] The words “Unless one or more of the trustees are authorized by the others ...”, which do not in this context appear in the passage relied upon in the *Van der Westhuizen* case, and the authors’ reference in a footnote to the *Mariola* dictum, appear to be a clear indication that the authors approve that approach and that it would therefore not in such a case be essential to join and cite the other trustees as parties, or at least fatal not to do so. I am fortified in this view by what is said by the authors at p71:

“Litigation is sometimes conducted in the name of a trust instead of, as is technically more proper, the trustees in their official capacity”[60]

[66.] In my view words like “unless one of the trustees is authorised ...” clearly denote an exception to the general rule that trustees should join or be joined in litigation, and this is in my view also how it was understood and applied in the cases referred to in paragraph [56] above.

[67.] In *Risseeuw NO v Alanza Boerdery (Edms) Bpk*[61] the Court considered itself bound by the earlier decision in the same division in the *Van der Westhuizen* case. Tuchten J went further and found that the *Van der Westhuizen* dictum was correct, but did not motivate this finding. With the exception of the *Mariola* case, none of the cases referred to in paragraph [56] above were mentioned.

[68.] Neither was mention made of the following dictum (obiter) in *Lupacchini NO and Another v Minister of Safety and Security*[62], where the Court also dealt with the position of trustees and held the following[63]:

"By the nature of the office of trustee, the control and administration of the trust property vests in each trustee individually. It follows that where there is more than one trustee they must act jointly unless the trust instrument provides otherwise. And because they have individual interests all must necessarily join in litigation concerning the affairs of the trust (though it seems that one trustee might authorise another to sue in his or her name)."[64]

[69.] In paragraph [4] of the judgment *Nugent JA* went on to find that one trustee would only be able to authorise another "to institute proceedings on his or her behalf" if the former is in terms of section 6(1) of the Trust Property Control Act[65] entitled to act as a trustee. This too, in my view, clearly implies that a trustee could delegate the power to institute or defend legal proceedings.

[70.] That this is, with respect, the correct position and that the right to do so would not necessarily have to appear in the trust deed, appears from the following discussion of the *Risseeuw and Van der Westhuizen* cases by prof. M J De Waal of the University of Stellenbosch in his article titled "Law of Succession (including Administration of Estates) and trusts" in 2014 Annual Survey 943 at pp 970 to 971 under the heading "Trust administration: General principles and the 'joint-action' rule":

"The court (In the *Risseeuw* case) apparently accepted, without stating it explicitly, that the joint-action rule is also applicable to legal proceedings instituted by joint trustees. It is trite that this is indeed the case and the court was consequently quite correct in its point of departure. However, on the authority of the judgment *Van der Westhuizen v Van Sandwyk* 1996 (2) SA 490 (W) 495A–D, the court took the view that all the trustees must be joined in the action. It was therefore not enough, as was the case in *Risseeuw*, that one of the trustees was duly authorised by the remaining trustees to institute the action on behalf of the trust. The court therefore upheld this ground of the exception.

However, authority appears to be against this conclusion by the court in *Risseeuw*. One way of alleviating practical difficulties with the joint-action rule is by employing the normal principles of the law of agency in this context (see in general *Nieuwoudt & another NNO v Vrystaat Mielies* (Edms) Bpk 2004 (3) SA 486 (SCA); *Parker* (above para [37.2]); 2013 Annual Survey 999–1000.) Regarding legal proceedings on behalf of a trust, the position has been formulated as follows (*Cameron et al* above 419)

'Unless one or more of the trustees are authorized by the others, all the trustees must be joined in suing and all must be joined when action is instituted against a trust.'

Other academic authors agree (see, for example, Du Toit above 101; RP Pace & WM van der Westhuizen Wills and Trusts (service issue 17, 2013) para B17) and there also seems to be general judicial support for this view in different divisions of the High Court (see the cases cited in Cameron et al above 419 n 21; Du Toit above 101 n 335). Moreover, this view has now also — albeit probably obiter — received the blessing of the Supreme Court of Appeal in Lupacchini NO & another v Minister of Safety and Security 2010 (6) SA 457 (SCA) where Nugent JA stated (para 2))

‘And because they [the trustees] have individual interests all must necessarily join in litigation concerning the affairs of the trust (though it seems that one trustee might authorise another to sue in his or her name).’

The view taken in Risseeuw can therefore no longer be seen as the correct one.’ ”

[71.] The facts in Villon Family Trust v Kirby[66] are distinguishable from those in the present matter, to the extent that in that matter the Trust was cited as the applicant, instead of a trustee being cited on behalf of the Trust. There was however also, as in the present matter, a resolution which authorised the deponent to the founding affidavit to institute the proceedings “on behalf of” that Trust. An argument “that the trustees of the applicant should either have been cited in their capacities as such or simply referred to as ‘the Trustees for the time being’ of the applicant” was rejected as being “overly technical”, and it was held that “Although it is desirable to cite the applicant in the manner contended for by the respondent, this does not mean that a failure to do so is fatal to the applicant’s case”[67].

[72.] Mr Van Aswegen, counsel for the appellant, also referred us to Rupert Investments (Pty) Ltd v JH Petzer Inc and Others[68]. In that case too all the trustees of the two Trusts had not been joined. In terms of a resolution the trustee who had been joined had been authorised by the remaining trustees to oppose the application. Fabricius J adopted the reasoning of Ngwenya J in the Desai-Chilwan case, found that it was clear “that all the Trustees were aware of the application and what was sought to be achieved thereby” and held that the non-joinder of the other trustees had not caused any prejudice.

[73.] In Pistorius NO and Others vs Competition Commission of South Africa[69] it was held that “it is not sound trust law unqualifiedly to assert that merely because all of the trustees were not joined as respondents from the outset, therefore the institution of the proceedings is a nullity”[70].

[74.] In the present matter “enough ha(d) been placed before (the Court a quo) to (have) warrant(ed) the conclusion that it (was) the (Trust, through its trustees) which (was) litigating and not some unauthorised person on its behalf”[71].

[75.] In the Rosner case referred to above it was, as already pointed out, remarked that it frequently happens that Trusts are cited as parties, without the individual trustees being joined and cited as parties in their representative capacities, that an amendment to join the individual

trustees did not in the circumstances of that matter affect the substance of the matter and that, had the amendment not been granted,

“any judgment granted in the proceedings would (have been) no different from what it will be now that the amendment has been granted”[72].

[76.] Mr Nel argued that Ngwenya J had in the Desai-Chilwan case, in interpreting the above-quoted passage in the previous version of Honoré’s South African Law of Trusts, erroneously equated the right to authorise the signing of a power of attorney (referred to in the passage) with the right to authorise the institution or opposition of legal proceedings. The Cupido and Glen Elgin Trust judgments, however, both expressly referred to the same passage, and both interpreted it (and therefor the reference to authorisation to sign a power of attorney) like the Court apparently did in the Mariola case[73]. The Deutschmann and Rosner cases also preceded the 5th edition of Honoré’s book, and yet both these judgments also followed the Mariola dictum.

[77.] In my view the citing of all trustees as parties constitutes a way of signifying, and of satisfying the Court, that at least on the face of it the Trust is not being involved in unauthorised litigation. This may be why it is preferable to do so, but where this is at the time that the proceedings are instituted signified by other information, the failure to join the authorising trustees should not in my view non-suit the authorised trustee. In this respect I find myself in respectful agreement with the judgment of Ngwenya J in the Desai-Chilwan case.

[78.] The Court in the Van der Westhuizen case did not have to consider a situation like this, in other words where although all trustees have not been joined, it is nevertheless

objectively clear that those who have not been cited have authorised the institution of the proceedings. Insofar as it could,

however, be said that the judgment in that matter is to the effect that the failure to join all trustees would always be fatal, even in such circumstances, I would be constrained to respectfully disagree. For the same reason I have to disagree with the judgment in the Risseeuw case.

[79.] In my view the facts of the Van der Westhuizen case are in any event also in another respect distinguishable from those in the present matter. The fact that it was only five years after the issue of summons in that matter that a resolution was signed, purporting to authorise Van der Westhuizen to institute the action in his capacity as trustee, and furthermore purporting to ratify steps already taken against him, leads to the inescapable inference that he had not been authorised as such at the time when the action was instituted. In the present matter the appellant has, as I have already concluded, been properly authorised when the application was lodged.

[80.] Finally, the trustees in the present matter have not only in their affidavits confirmed the authorisation of the appellant. They have themselves asked that the relief sought in the notice of motion be granted. To have non-suited the appellant, and effectively the Trust, under these circumstances and merely on the basis of the co-trustees not having been officially cited as co-applicants was, with respect to the Court a quo, to elevate form over substance.

CONCLUSION

[81.] It follows that I am of the view that the application should not have been dismissed on the basis of the specific point in limine. The order to that effect, and the concomitant costs order should therefore be set aside, and be replaced by an order that the point is dismissed with costs.

[82.] There is no reason why the costs of the appeal should not follow this result.

[83.] In the result the following orders are made:

1. THE ORDERS OF THE COURT A QUO THAT:

“1.1 THE IN LIMINE POINT REGARDING APPLICANT’S LOCUS STANDI IS UPHELD; AND

1.2 THE APPLICATION IS DISMISSED WITH COSTS.”

ARE SET ASIDE AND REPLACED WITH THE FOLLOWING ORDER:

“THE IN LIMINE OBJECTION TO THE APPLICANT’S LOCUS STANDI IS DISMISSED WITH COSTS.”

2. THE MATTER IS REMITTED TO THE COURT A QUO FOR FURTHER HEARING.

3. THE RESPONDENT IS ORDERED TO PAY THE COSTS OF THE APPEAL, INCLUDING THE COSTS OF THE APPLICATIONS FOR CONDONATION AND FOR LEAVE TO APPEAL.

C J OLIVIER

JUDGE

NORTHERN CAPE DIVISION

I concur.

C C WILLIAMS

ACTING DEPUTY JUDGE PRESIDENT

M C MAMOSEBO

For the appellant: ADV W H VAN ASWEGEN

(Instructed by Elliot Maris Wilmans & Hay)

For the respondent: ADV C J NEL

(Instructed by Duncan & Rothman Inc.)

- [1] In respectively paragraphs 1 to 5 of the resolution.
- [2] South African Allied Workers' Union and Others v De Klerk NO and Others 1990 (3) SA 425 (E) at 436 E-F; See also Erasmus Superior Court Practice, Jutastat e-publications, RS 5, 2017,D1 93-95
- [3] Eskom v Soweto City Council 1992 (2) SA 703 (W) at 705 E - F
- [4] In Uniform Rule 1 the word "party" is equated with "any reference to a plaintiff or other litigant in terms" (My emphasis), and it is therefore clear that the word "party" would for purposes of the Rule, and in the present context, refer to an applicant or a respondent.
- [5] See Honoré's South African Law of Trusts, 5th Edition, p 268; Kidbrooke Place Management Association and Another v Walton and Others NNO 2015 (4) SA 112 (WCC) para [44]
- [6] 2000 (4) SA 711 (C) at 720E - 721
- [7] Compare Coopers & Lybrand and Others v Bryant
- [1995] ZASCA 64; 1995 (3) SA 761 (A) at 767E - 768E
- [8] Compare Heath & another v Heath NO & others [2006] JOL 16886 (T) (2001 (JDR) 0970 (T)) at p 20
- [9] See Land and Agricultural Bank of South Africa v Parker and Others 2005 (2) SA 77 (SCA) (Also reported at [2004] 4 All SA 261 (SCA)) para [17]; See also Thorpe and Others v Trittenwein and Another 2007 (2) SA 172 (SCA) para [14]
- [10] 2004 (3) SA 486 (SCA) (Also reported at [2004] 1 All SA 396 (SCA))
- [11] 1999 (4) SA 425 (SCA) (Also reported at [1999] 4 All SA 139 (A))
- [12] Ibid, para [24]
- [13] Ibid, para's [24] to [26]
- [14] Ibid, para [24]
- [15] Ibid, para [29]
- [16] Ibid, para [14]; See also Claase v Transnet Bpk en 'n Ander 1999 (3) SA 1012 (T) (Also reported at [1999] 3 All SA 142 (T))
- [17] Compare Claase v Transnet Bpk en 'n Ander, supra, at 1025 I - J
- [18] Hoosen and Others NNO v Deedat and Others, supra, para [14]
- [19] Ibid, para [10]
- [20] KO Investment Trust & Another v Appleton Securities (Pty) Ltd
- [2007] JOL 19807 (T) (2007 JDR 0305 (T)) para's [15] to [17]; See also Visser v Estate Collins 1952

- (2) SA 546 (C) (Also reported at [1952] 2 All SA 331 (C)) at 550
- [21] SA Freight Consolidators (Pty) Ltd v Chairman, National Transport Commission, and Another 1987 (4) SA 155 (W) (Also reported at [1987] 3 All SA 147 (W)) at 164 E
- [22] 1989 (4) SA 985 (C) at 988 D - E
- [23] Ibid, at 987 I
- [24] Nieuwoudt NO and Another v Vrystaat Mielies (Edms) Bpk , supra (para [22] and footnote 10),
- [25] Ibid, para [6] (of the majority judgment of Farlam J A).
- [26] Ibid, para [23]
- [27] See para [35] and footnote 21 above.
- [28] See para [29] and footnote 14 above.
- [29] See Hoosen and Others NNO v Deedat and Others, supra, para's [24] and [26]
- [30] Which is, as I have already concluded, not the position.
- [31] Nieuwoudt NO and Another v Vrystaat Mielies (Edms) Bpk, supra (para [22] footnote 10), para's [6] and [23]
- [32] See IM Verwey trading as Verwey Werkswinkel v Burger NO and others
- [2014] JOL 31765 (WCC) para [16]
- [33] Compare Odendal v Structured Mezzanine Investments (Pty) Ltd 2014 JDR 1134 (SCA) ([2015] JOL 33675 (SCA)) para [4]; Thorpe and Others v Trittenwein and Another, supra, para [6]
- [34] 2005 (2) SA 77 (SCA) (Also reported at [2004] JOL 12992 (SCA)) at para's [10] and [11]
- [35] 2016 (5) SA 225 (SCA)
- [36] 1999 (1) All SA 425 (D)
- [37] Ibid, at 436
- [38] Ibid, at 434
- [39] Ibid, at 436
- [40] 1998 (2) SA 123 (W)
- [41] See also Hyde Construction CC v Deuchar Family Trust and Another 2015
- (5) SA 388 (WCC) para [47]
- [42] 2015 (5) SA 77 (SCA)

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- [43] Ibid, para [12]
- [44] Ibid, para [18]
- [45] 1996 (2) SA 490 (W)
- [46] Ibid, at 497 C - D
- [47] Ibid, at 495 D - E
- [48] 1995 (2) SA 728 (W) (Also reported at [1995] 3 All SA 287 (W)) at 731 E
- [49] Essentially the same remarks appear in the 5th edition of the book, at pp 322 – 323.
- [50] 1999 (4) SA 257 (E) (Also reported at [1999] 3 All SA 578 (EC)) at 263 G
- [51]
- [2001] (2) All SA 86 (LCC) (2001 JDR 0002 (LCC)) para [14]
- [52]
- [2014] JOL 32107 (GP) (2014 JDR 1427 (GP))
- [53] 2000 (2) SA 106 (ECD) at 119 F - G
- [54] Supra (para [47] and footnote 37), at 126 I - J
- [55] 2003 (2) SA 644 (C) (Also reported at [2002] 2 All SA 413 (C)) para [21]
- [56] Ibid, para [21]
- [57] Land and Agricultural Development Bank of South Africa v Parker and Others, supra, at 85B - D
- [58] See para [53] above.
- [59]
- [2016] 2 All SA 909 (ECP) (2016 JDR 0629 (ECP))
- [60] My emphasis.
- [61] 2014 JDR 0437 (GNP)
- [62] 2010 (6) SA 457 (SCA) (Also reported at [2011] 2 All SA 138 (SCA))
- [63] Ibid, para [2]
- [64] My emphasis.
- [65] 57 of 1988
- [66] (9878/2011) [2012] ZAWCHC 45 (18 May 2012)

[67] Ibid, para's [24] and [25]

[68] (36878/2013) [2015] ZAGPPHC 118 (13 February 2015)

[69]

[2017] ZACAC 4 (10 October 2017)

[70] Ibid, para [43]

[71] SA Freight Consolidators (Pty) Ltd v Chairman, National Transport Commission, and Another, supra, at 157 G - H

[72] Rosner v Lydia Swanepoel Trust, supra, at 128 E; See also Hyde Construction CC v Deuchar Family Trust and Another, supra (footnote 40), para [46]

[73] Cupido v Kings Lodge Hotel, supra, at 263 G: "Unless one of the trustees is authorised by the remaining trustee or trustees, all the trustees must be joined in suing and all must be joined when action is instituted against the trust". (My emphasis) Glen Elgin Trust v Titus and another, supra, para [14]: "It is a well-established principle of our law that in legal proceedings brought by a trust, all trustees are required to sue jointly unless one trustee has the authority to act for the others". (My emphasis)

[73] Cupido v Kings Lodge Hotel, supra, at 263 G: "Unless one of the trustees is authorised by the remaining trustee or trustees, all the trustees must be joined in suing and all must be joined when action is instituted against the trust". (My emphasis)

Glen Elgin Trust v Titus and another, supra, para [14]: "It is a well-established principle of our law that in legal proceedings brought by a trust, all trustees are required to sue jointly unless one trustee has the authority to act for the others". (My emphasis)

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