

SOUTH AFRICA / JUDGMENT

Weiss N.O and Others v Standard Bank of South Africa Ltd (945/2010)

[2013] ZANWHC 92 (16 May 2013)

[2013] ZANWHC 92

COURT

North West High Court, Mafikeng

BEFORE

A A Landman

CASE / FILE NUMBER

945/2010

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE NORTH WEST HIGH COURT
(MAFIKENG)

CASE NO: 945/2010

In

the matter between:

CONRAD

MAX WEISS N.O.

.....1ST

APPLICANT

REINIER

ADRIAAN FOURIE N.O.

.....2ND

APPLICANT

MANDA

FOURIE N.O.

.....3RD

APPLICANT

and

STANDARD

BANK OF SOUTH AFRICA LTD

.....RESPONDENT

In

re the action between: STANDARD
 BANK OF SOUTH AFRICA
 LIMITED.....APPLICANT
 RENIER
 ADRIAAN FOURIE N.O.
 1ST
 RESPONDENT
 CONRAD
 MAX WEISS N.O.
 2ND
 RESPONDENT

JUDGMENT

LANDMAN J:

Introduction

[1] Conrad Max Weiss NO, Reinier Adriaan Fourie NO and Manda Fourie NO apply for leave to appeal against the judgment and order granted in the above matter concerning the H[...] H[...] 5[...] S[...] T[...] IT[...] by Acting Judge Memani, on 29 November 2012 which dismissed the first two applicants' application for rescission of judgement granted in favour of Standard Bank Ltd (the respondent) with costs.

[2] The application for leave to appeal has been allocated to me for hearing. I reserved judgment pending the respective attorneys'

investigation into the record. I am informed that judgment may be delivered.

[3] Condonation for the late filing of these the applicants' heads of argument was sought and granted. Leave is granted for the record to be supplemented by the affidavit of Frederick John Walter Stanton. It deals with facts which do not appear on the record.

The proceedings before Memani AJ

[4] It is common cause that on 29 November 2012 Memani AJ was requested by the applicants' counsel to remove the matter from the unopposed roll as it had become opposed. It is alleged that the Judge, however, dismissed the application without hearing any argument. No judgment has been filed and no reasons for the order have been sought.

[5] The applicant's attorney, Mr Stanton, says that his firm instructed Adv D Smit to attend on 29 November 2012 merely in order to remove the matter from the roll. Mr Stanton was also present in Court on 29 November 2012. When the matter was called, Adv Smit informed the Court that the matter has become opposed and requested that the matter be removed from the roll.

- [6] However, the learned judge indicated that he was ready to deliver judgment in the opposed matter. Neither party had presented argument. Moreover the respondent still had to file its opposing affidavit and the applicants' their replying affidavit. None of the parties were afforded an opportunity to argue its case on the merits. The learned judge then proceeded to deliver its judgment. The application for rescission of judgment was dismissed, with costs.
- [7] Mr Wessels, the respondent's attorney of record, who appeared on the date when Memani AJ made the order, recalls that the judgment was based on the fact that the required number of trustees had not properly been appointed at the time of the bringing of the application for rescission of judgment.
- [8] The refusal of an application for rescission of judgement is final relief for purposes of section 20 of the Supreme Court Act 59 of 1959.

Reasonable prospects of success

- [9] The test to be applied is whether there are reasonable prospects of the appeal succeeding and whether the case is of substantial

importance to the parties. Put differently could a different court reasonably have come to a different conclusion than the court which granted the order?

- [10] It seems to be common cause that the only ground on which the application was dismissed was that the applicants did not have the requisite locus standi to bring the application for rescission of the judgment.
- [11] Mr Korf, who appeared for the applicants, contended that the applicants had the necessary locus standi although he, very properly, drew my attention to a decision which was against him. Mr Scholtz, who appeared for the respondent, submitted that none of the applicants had locus standi.

Locus standi in judicio

- [12] It is trite that a trust cannot sue or be sued in its own name. There are two questions which need to be decided. The first is whether any of the applicants (Weiss NO, R Fourie NO and M Fourie NO) have the locus standi in judicio to bring this application for leave to appeal. If any one of them has such status it is necessary to turn to the application for rescission of the order and to ask whether the applicants (R Fourie NO and Weiss NO) had locus standi in judicio to apply for that relief.
- [13] As the order of the parties in the application for leave differs from the order in the prior application, I shall refer to the applicants by their surname and initial where necessary. I proceed to examine the locus standi of each trustee or alleged trustee.
- [14] The Trust Deed provides that:

“Daar moet te alle tye minstens 2 (twee) en hoogstens 3(drie) trustees in amp wees, met dien verstande dat in geval daar minder as drie (3) trustees oorbly as gevolg van die bedanking of dood van mede-trustees, die oorblywende trustees gemagtig is om alle magte van trustees uit te oefen vir die behoud en administrasie van die trustfonds tot tyd en wyl ‘n verdere trustee aangestel is. Indien daar minder as 2 (twee) in amp is, is sodanige trustees verplig om 'n verdere trustee/s binne 90 (negentig) dae na die

uittrede of afsterwe van die ander trustees/s aan te stel”

- [15] Clause 5.5 provides that a trustee shall cease to act as a trustee of the trust, inter alia, when he resigns by written notice to his co-trustees.
- [16] Clause 9.2.10 provides that the trustees shall have the power to institute or defend legal proceedings.

Mr Weiss

- [17] Mr Weiss, an attorney, was one of the two founding trustees. Mr R Fourie was the other. Mr Weiss purported to resign as trustee on 22 January and handed in his written resignation to the Master of the High Court on 7 February 2011. But the Master has not released him as a trustee as required in terms of section 21 of the Trust Property Control Act 57 of 1988 (the Control Act). Is his intention to resign, leaving aside for the moment, his continued participation in the administration of the Trust, sufficient to rule that he has no locus standi?
- [18] Judgments which were delivered prior to the enactment of the Control Act eg *Ex parte Moodley and Another* 1968 (4) SA 622 (D) may no longer be entirely good authority. The Control Act permits a trustee to resign no matter what the Trust Deed may provide. See section 21 and Cameron et al *Honore’s South African Law of Trusts* 5th ed 227. Thus a trustee who wishes to resign must comply with the formalities set out in the Deed of Trust, if any and section 21 which reads:

“Resignation by trustee. – 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 trustee under tutorship or curatorship.”

- [19] But a trustee does not need the master’s permission to resign. There are circumstances where a trustee may not resign eg where there is no other trustee left. But that is not the position here. See *Honore* at 227-228. However, as there is no evidence whether Mr Weiss informed the beneficiaries he cannot be said to have resigned. See *Van der Merwe NO and Others v Hydraberg Hydraulics CC and Others*; *Van der Merwe NO and Others v Bosman and Others* 2010 (5) SA 555 (WCC).

Mr R Fourie

[20] Mr R Fourie was a founding trustee. He became insolvent and was sequestrated by the North Gauteng High Court on 6 December

2010. As an insolvent Mr R Fourie becomes liable to be removed from office by the matter in terms of section 20(2)(c) of the Control Act which reads:

“20(2) A trustee may at any time be removed from his office by the Master –

(c) if his estate is sequestrated or liquidated or placed under judicial management.”

[21] Until he is removed an insolvent trustee remains in office.

[22] A similar issue arose in *Lemmer v Borngraber N.O. and Others* (3842/09) [2011] ZAWCHC 308 (18 February 2011). Koen AJ (as he then was) said, in an application for the provisional sequestration of a trust, at para 3:

“Although the first Respondent has been declared by this Court to be incapable of managing his own affairs, and ought therefore to be removed from his office as trustee by the Master, this has not happened. The second and third Respondents are cited in their capacity as trustees of the trust. In the affidavits filed by them they tender their resignation as trustees, but do not allege that notice of such resignation has been given to the Master of this Court, and the trust beneficiaries, as is required by the provisions of section 21 of the Trust Property Control Act 57 of 1988. It follows, as I see it, that they continue to be trustees.”

Manda Fourie

[23] Mrs Manda Fourie, the wife of Mr R Fourie has not, on the evidence presented on the papers, been authorised by the Master to act as required by section 6(1) of the Control Act. See *Lupacchini NO and Another v Minister of Safety and Security* 2010

(6) SA 457 (SCA). The result is that she cannot act on behalf of the Trust.

[24] That the Master may have signed a letter of appointment which has not yet reached her is of no consequence as far as this application is concerned. She has been challenged and she must provide the necessary proof. She has been unable to do so. Mrs Fourie has an additional problem and that is that she may well not qualify for appointment in terms of the Trust Deed.

[25] In accordance with the Trust Deed two trustees are sufficient for the trust to take decisions. See *Land and Agricultural Bank of South Africa v Parker and Others* 2005

(2) SA 77 (SCA). It follows that I am of the opinion that Weiss NO and R Fourie NO had the necessary locus standi in both applications.

Good cause

[26] The respondent contends in paragraph 5 of the particulars of claim that the Trust concluded on or about 10 August 2005 a written deed of suretyship in terms whereof the Trust bound itself in favour of the respondent as surety and co-principal debtor in solidum with Telegenix Trading 239 CC.

[27] The applicant's defences are the following:

- (a) The conclusion and signing of the deed of suretyship in favour of the respondent was not authorised in that it fell beyond the powers of the Trustees set out in the Trust Deed.
- (b) This occurred to the knowledge of the respondent.
- (c) The applicant dispute the extent of the principal debt which related to the suretyship. The Trustees were brought under the impression that the principal debt would only be the overdraft facility, and not certain instalment sale agreements.
- (d) The Trust and respondent agreed that the Trust would pay an amount of R3.4 million to the respondent in respect of the overdraft

facility and that the Trust would then be released as surety. This amount was paid.

[28] Apart from the merits the applicants needed to apply for condonation their failure to have instituted this application for rescission timeously. They set out convincing reasons going to show why this was the case. The applicants have, in my view, shown good cause for condonation

[29] It follows that I am of the view that there is a reasonable prospect that another court could reasonably conclude that the application for rescission of judgment should be granted.

[30] In the result I am of the view that leave to appeal to the full bench should be granted and that the costs should be costs in the appeal.

Order

[31] I make the following order:

1. Leave to appeal is granted to the full bench.
2. The costs of the application for leave to appeal are to be costs in the appeal.

A A LANDMAN

JUDGE OF THE HIGH COURT

APPEARANCES:

date of hearing : 26 April 2013

date of judgment: 16 May 2013

counsel for applicants: adv c a c korf

counsel for respondent: adv h scholtz

attorneys for applicants: smit & stanton inc

attorneys for respondent: van rooyen tlhapi & wessels

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZANWHC/2013/92.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/weiss-no-and-others-v-standard-unknown-topic-anwhc-2013>

Prepared on 11 October 2026 · Esheria