



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 1270/2021

In the matter between:

SHEPSTONE & WYLIE ATTORNEYS

APPELLANT

and

ABRAHAM JOHANNES DE WITT N O

FIRST RESPONDENT

RAYMOND ERNST VOLKER N O

SECOND RESPONDENT

SEBASTIAN SYLVO VOLKER N O

THIRD RESPONDENT

THOMAS PASCAL VOLKER N O

FOURTH RESPONDENT

Neutral Citation: *Shepstone & Wylie Attorneys v Abraham Johannes de Witt N O & Others* (1270/2021) [2023] ZASCA 74 (26 May 2023)

Coram: ZONDI, MOCUMIE, MBATHA, WEINER JJA and KATHREE-SETILOANE AJA

Heard: 16 February 2023

Delivered: 26 May 2023

Summary: Deed of suretyship signed by majority of trustees in absence of authority from the trust deed – trustees required to act jointly and unanimously by the trust deed – if not, suretyship invalid and unenforceable.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (E Bezuidenhout AJ, sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Mbatha JA (Zondi and Mocumie JJA concurring)

Introduction

[1] This appeal is against the judgment and order of the KwaZulu-Natal Division of the High Court, Pietermaritzburg, (E Bezuidenhout AJ) (the high court). The high court dismissed the appellant's claim to hold the Penvaan Property Trust IT 5932/1994 (the Trust) liable in terms of a deed of suretyship signed on 25 May 2013. The deed of suretyship was signed in favour of Shepstone & Wylie Attorneys (the appellant) for the personal indebtedness of Mrs Mignon Renate Volker (Mrs Volker), in respect of legal fees incurred in her divorce action. The appeal serves before us with leave of this Court.

Background facts

[2] At the time of the litigation the trustees for the time being of the Trust were Mr Thomas Wilhelm Volker (Mr Volker), Mrs Volker and Mr Abraham Johannes de Witt (Mr De Witt). During 2012, Mrs Volker requested the appellant to represent her in a divorce action against her husband, Mr Volker. The Trust owns property from which various companies, in which it is a sole shareholder, were trading. It survived on an income generated by these companies. Firstrand Bank Limited (Firstrand) liquidated these companies. Mrs Volker had no independent source of income. She depended on income received from the companies concerned and stayed on a farm belonging to the Trust.

[3] During 2013, Firstrand brought an application in the high court for the sequestration of the Trust. On 16 May 2013, Mrs Volker and Mr De Witt, in their capacities as trustees of the Trust requested the appellant to represent the Trust in the litigation with Firstrand. They signed a power of attorney authorising the appellant to represent the Trust in the litigation with Firstrand and to engage the services of senior counsel on their behalf. The appellant agreed to represent the Trust. Due to the impecunious state of Mrs Volker, the appellant requested security for its fees and disbursements in the divorce action. This culminated in the signing of the deed of suretyship in favour of the appellant, in terms of which the Trust bound itself as surety and co-principal debtor, jointly and severally in favour of the appellant for the due payment of any and all amounts which are now or which at any time in the future may become, due by the debtor to the creditor in respect of any indebtedness or obligation of the debtor to the creditor arising from any cause whatsoever, including but not limited to any and all legal costs or disbursements due by the debtor to the creditor on an attorney and own client basis.

[4] On 16 May 2013, Mrs Volker gave notice of a meeting of the trustees to be held on 23 May 2013 in Tweedie for the purposes of tabling and considering the following resolutions that: (a) the Trust resolves to oppose the sequestration proceedings instituted by Firstrand; (b) the Trust ratifies the signature of the power of attorney signed by Mrs Volker and Mr De Witt on 16 May 2013; and (c) the Trust resolves to sign the deed of suretyship in favour of the appellant for Mrs Volker's legal fees and disbursements. Mr Volker's response to the invitation to attend the meeting was that, in principle he had no problem with the trustees' meeting as long as it would be a 'productive meeting'. He conveyed that he would, however, be unavailable during that week due to the urgent meetings previously arranged with the liquidators. He also pointed out that the trust meetings should be held at Penvaan, Vryheid as he could not afford to travel eight hours to Tweedie for a one hour meeting. Mrs Volker responded by rescheduling the meeting to 25 May 2013 to be held closer to Mr Volker in Vryheid. I point out that all the exchanges that took place via email communications were copied to Ms Estelle de Wet, the attorney representing the appellant in these proceedings.

[5] On 25 May 2013, the meeting proceeded in the absence of Mr Volker. Mrs Volker and Mr De Witt passed the relevant resolutions and thereafter proceeded to sign the deed of suretyship in favour of the appellant.

Proceedings before the high court

[6] The fees due and payable to the appellant for the legal services rendered on behalf of Mrs Volker, remained unsatisfied. This led to the application by the appellant, to seek judgment against the Trust. The appellant relied on the deed of suretyship to claim the payment of all amounts that were due. The Trust opposed the application and one of the grounds of opposition was that the deed of suretyship on which the appellant sued was not signed by all the three trustees and was for that reason invalid.

[7] The Trust contended that contrary to the provisions of the trust deed, the trustees did not act jointly and unanimously in signing the deed of suretyship. Furthermore, it contended that the suretyship was not for the benefit of the Trust or beneficiaries of the Trust, but for the personal benefit of Mrs Volker (although she was also a beneficiary of the Trust).

[8] The high court upheld the Trust's defence. It found that the resolutions relating to the opposition of the sequestration of the Trust were clearly for the benefit of the Trust, but the same could not be said to apply to the deed of suretyship signed for the personal legal costs of Mrs Volker. Mr Volker had not tabled his views on the subject of the meeting and could not be said to have acted jointly with the other two trustees. The trust deed, reasoned the high court, required that they act unanimously on an external subject like the signing of the suretyship agreement. It accordingly concluded that the resolution taken at the meeting of 25 March 2013 to bind the Trust, was invalid and of no force and effect, as was the deed of suretyship.

[9] The issue before us is whether the high court was correct in upholding the Trust's defence and finding that the resolution taken to sign the deed of suretyship was invalid and of no force and effect.

The trust deed (as amended)

[10] The salient provisions of the amended trust deed are as follows:

“2. The beneficiaries” mean THOMAS WILHELM VOLKER, RENATA MIGNON VOLKER (born SCHROEDER) and the lawful descendants of THOMAS WILHELM VOLKER.

...

4. TRUSTEES

There shall at all times be not less than three trustees of the Trust. The first Trustees shall be Thomas Wilhelm Volker, Renata Mignon Volker (born SCHROEDER) and MANFRED LOTHAR SCHUTTE who accept their appointment as such.

...

POWER OF TRUSTEES

11.1. Any Trustee shall have the power to deal with the trust property and trust income for the benefit and purpose of the Trust in their discretion for which purpose they are granted all necessary powers and authority including (but without limitation) the powers stated in the appendix. The powers conferred upon the Trustees shall be complete and absolute and exercisable in the discretion of the Trustees;

11.2. The Trustees shall have the power to ratify, adopt or reject, in their discretion, contracts made on behalf or for the benefit of the Trust, either before or after its formation.

...

MEETINGS OF TRUSTEES

13.1. The Trustees may meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit. Any Trustee shall be entitled on reasonable written notice to the other Trustees to summon a meeting of the Trustees. All Trustees for the time being in the Republic of South Africa shall be given reasonable notice of any meeting of the Trustees.

13.2. . . . [T]he quorum necessary at any such meeting shall be two Trustees. (as amended on 31 January 2000).

13.3. A Trustee may be represented at a meeting of Trustees by a proxy appointed as such in writing.

13.4. A written resolution signed by all Trustees for the time being or their respective alternates or proxies shall be as effective as a resolution taken at a meeting of Trustees.

EXECUTION OF DOCUMENTS

14. All negotiable instruments, contracts, deeds and other documents which require to be signed on behalf of the Trust shall be signed in such manner as the Trustees shall from time to time determine, provided however that all such negotiable instruments, contracts, deeds and other documents shall be signed by at least two Trustees.

...

DISAGREEMENT BETWEEN TRUSTEES

16.1. At and for each meeting of Trustees, the Trustees present, in person or by proxy, shall elect a Chairperson; provided for as long as THOMAS WILHELM VOLKER is a Trustee, he shall be Chairperson.

16.2 In the event of any disagreements arising between the Trustees at any time the view of the majority shall prevail. Should there be an equality of votes, the Chairperson shall have a second or casting vote.

...

DISTRIBUTION OF INCOME AND TRUST PROPERTY

23.1. The Trustees shall use, pay or apply the whole or portion of the net income of the Trust, in such proportions and at such time or times as they in their sole discretion determine, for the welfare of all or any one or more of the beneficiaries;

23.2. As used in 23.1 above and 24 below, "welfare" shall, besides the ordinary meaning of the word, also mean the benefit, comfort, maintenance, education, advancement and pleasure of the beneficiaries and shall include in general all those matters and purposes which the Trustees in their discretion may consider to be in the interests or for the advantage of the beneficiaries.

24. The Trustees shall pay, use or apply the whole or portion of the trust property in such proportions and at such time or times as they in their sole discretion determine, for the welfare of all or any one or more of the beneficiaries.'

[11] In addition, the 'Appendix to the Penvaan Property Trust' (the appendix) granted the following powers to the trustees:

'POWER TO THE TRUSTEES;

Without prejudice to the generality of any of the provisions of the accompanying deed constituting the above Trust the trustees shall have the following powers which shall be exercisable in their sole and absolute discretion for the purposes and benefit of the Trust, namely:

...

8. To mortgage, pledge, hypothecate or otherwise encumber any property forming part of the trust property.

...

11. To defend, oppose, compromise or submit to arbitration all accounts, debts, claims, demands, disputes, legal proceedings and matters which may subsist or arise between the Trust and any person.

...

16. To guarantee the obligations of any beneficiary and/or any company of which the Trust and/or beneficiary is a shareholder and to bind the Trust as collateral security for any such

obligation undertaken by the Trust, to mortgage, pledge or hypothecate any asset forming part of the trust property.

...

18. To engage the services of professional practitioners and tradesmen for the performance of work and rendering of services necessary or incidental to the affairs of the Trust.

...

25. To contract on behalf of the Trust and to ratify, adopt or reject contracts made on behalf or for the benefit of the Trust, either before or after its formation.

26. Provided the Trustees unanimously agree, to conduct business on behalf of and for the benefit of the Trust, and to employ trust property in such business.'

[12] The appellant challenges the order granted by the high court on various grounds, most importantly, that the deed of suretyship was valid and enforceable. It relies on clauses 13.1, in terms of which a trustee was entitled on reasonable written notice to the other trustees to summon a meeting; 13.2 which requires the presence of two trustees to constitute a quorum; and 14, which requires deeds and other documents to be signed by at least two trustees, to submit that the meeting was properly constituted. The appellant argued that reasonable notice was given to the trustees considering that the Firstrand application was to be heard in court the following week. The appellant further contends that the two trustees who were in attendance constituted the required quorum in terms of clause 13.2 of the trust deed. Hence, the resolution was passed by the majority, who subsequently signed the deed of suretyship in favour of the appellant in accordance with clause 14 of the trust deed.

[13] The appellant asserts that once proper notice of the meeting was given to all the trustees, the requirement that trustees were to act jointly was satisfied. For this assertion, it relied on *Van der Merwe N O and Others v Hydraberg Hydraulics CC and Others (Van der Merwe)* 2010 (5) SA 555 (WCC) para 16, where the court stated:

'A majority decision is competent only if adopted by a majority of the trustees present at a quorate meeting of trustees. Whether such a "meeting" would need to be one at which the trustees attending were physically present together, or whether the "meeting" could be held in some alternative form, is a question which it is not necessary to decide. It is evident, however, that in order to qualify as "a meeting", all the trustees in office would have to receive notice thereof so as to be able to participate in it if they so wished.'

It is common cause that Mr Volker received the notice for the meeting but did not attend.

[14] The appellant furthermore submits that the high court misdirected itself in relying on clause 26 of the appendix to the trust deed for the finding that the trustees had to act unanimously in executing the trust deed. It contends that clause 11 of the trust deed defines, as a general principle, what powers the trustees, acting in accordance with the trust deed have, in dealing with property belonging to the Trust. According to the appellant, clause 26 of the appendix merely defines what the trustees may and may not do with trust property.

[15] Furthermore, the appellant relies on clause 16.2 read with 13.2 of the main provisions in support of its contention that only two trustees are required to constitute a meeting, and view of the majority shall prevail. In that regard, it is argued that once proper notice of the meeting was given to the third trustee, that constituted a quorum and the requirement that the trustees were to act jointly was satisfied.

[16] The appellant further submits that the finding by the high court, that a unanimous decision was required was erroneous, as it was in conflict with clause 16, of the main provisions which expressly provides for decisions of the majority to prevail. It is argued that this finding was also in conflict with the decisions in *Van der Merwe, supra and Le Grange and Another v The Louis and Andre Le Grange Family Trust No 1562/95/PMB and Others (Le Grange)* [2017] ZAKZPHC 2. These decisions found that the requirement to act jointly will be satisfied where proper notice of a meeting was given and a decision made at the ensuing meeting is taken by the trustees who chose to attend.

[17] The trustees countered the appellant's submissions by contending that the trust deed is not a majority decision. They seek support for this contention in clause 26 of the appendix, which requires decisions and resolutions to be taken unanimously by the trustees, acting jointly in resolving to sign instruments such as the deed of suretyship on behalf of the Trust. They therefore, argue that the resolution to sign the deed of suretyship is void and not binding, since Mr Volker did not abstain from voting at the meeting nor did he express his views in respect of the resolution taken at the meeting of 25 March 2013, in any manner including by way of a proxy.

[18] Furthermore, the trustees contend that the high court correctly found that Mrs Volker and Mr De Witt had no power to sign the deed of suretyship as it was not for the benefit of the Trust or for the 'welfare' of a beneficiary.

The legal principles

[19] The Trust Property Control Act 57 of 1988 (the Act) regulates *inter vivos* trusts. In *Lupacchini N O and Another v Minister of Safety and Security* [2010] ZASCA 108; 2010 (6) SA 457 (SCA) para 1, this Court described a trust as follows:

'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 *Honore'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 . . .".'

[20] The principles governing trusts are well established. It is trite that for purposes of administration of the trust, trustees are deemed to be the co-owners of the immovable property and other assets. Equally trite, is the principle that trustees must act jointly in taking decisions and resolutions for the benefit of the Trust and beneficiaries thereof, unless a specific majority clause provides otherwise. Trustees are legally bound to comply with the terms of the trust deed. In line with their fiduciary duties, trustees must be legally authorised to act through competent resolutions.

[21] In *Thorpe and Others v Trittenwein and Another* 2007 (2) SA 172 (SCA); [2006] 4 All SA 129 (SCA), this Court endorsed the principle that unless the trust deed provides otherwise the trustees must act jointly if the Trust is to be bound by their acts. At paragraph 14, this Court expressed itself as follows:

'The answer, I think, is that even if one regards the decision of the co-trustees to enter into the agreement of sale as no more than a matter of internal trust administration, the point remains that in the absence of a joint decision of the co-trustee (or the majority if that is all the trust deed requires), the assent of a single trustee will not bind the trust.'

Most importantly, the court stated the following:

'A trustee who was not a party to the decision making process and who therefore has not authorized the contract would be free to contest the validity of the transaction.'

[22] In *Steyn and Others N N O v Blockpave (Pty) Ltd* 2011 (3) SA 528 (FB) (*Blockpave*), the court succinctly drew the distinction between internal and external

business with outsiders. The court held that although trustees may disagree internally on a matter, they are prohibited from disagreeing externally. Internal matters may be debated and put to a vote, thereafter the voice of the majority will prevail. However, in so far as the Trust is required to deal with external business all trustees are required to participate in the decision-making.

[23] In *Coetzee v Peet Smith Trust en Andere* 2003 (5) SA 674 (T), the court also held that unless the trust deed contained provisions to the contrary, there was legally no reason to follow a different rule. In the case of trusts, joint and unanimous conduct in the alienation, handling and management of trust assets was a prerequisite.

Analysis

[24] It remains to be considered whether the trustees acted jointly and in accordance with the trust deed in authorising the signing of the deed of suretyship. This requires the Court to interpret the salient provisions of the trust deed and the appendix thereto. It is undisputed that the meeting was convened by Mrs Volker on an urgent basis. However, the exchange of emails between the trustees and the representative of the appellant indicates that Mr Volker was not available to attend the meeting nor did he participate in the meeting by way of a proxy. The emails are also silent on his views about the resolutions to be discussed at the meeting. One of them suggested that Mr Volker was not keen on opposing the sequestration of the Trust. This is not conclusive as the resolutions were yet to be debated at the meeting. Mr Volker could have been persuaded to go with the views of the other trustees. Clause 13.1 provides that the trustees may meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit. Any trustee shall be entitled on reasonable written notice to the other trustee to summon a meeting of the trustees. All trustees for the time being in the Republic of South Africa shall be given reasonable notice of any meeting of the trustees. In terms of clause 13.2, as amended in January 2000, the quorum necessary for the meeting was two trustees. Clause 13.3 provides that the absent trustee may be represented by a proxy appointed as such in writing. The absent trustee, Mr Volker, was not represented by a proxy. In this case the decision was taken by two trustees, Mrs Volker and Mr De Witt, who signed the deed of suretyship in favour of the appellant, in the absence of Mr Volker. This was contrary to the provisions of clause 13.4 of the trust deed, which provides that a written resolution signed by all

trustees for the time being or their respective alternates or proxies shall be as effective as a resolution taken at a meeting of trustees.

[25] As held by this Court in *Le Grange*, the trustees, when dealing with trust property, are required to act jointly. Even when the trust deed provides for a majority decision, the resolutions must be signed by all the trustees. A majority of the trustees may take a valid internal decision, but a valid resolution that binds a trust externally must be signed by all trustees, including the absent or the dissenting trustee. It is a fundamental rule of trust law, which this Court restated in *Nieuwoudt N O and Another v Vrystaat Mielies (Edms) Bpk* [2004] 1 All SA 396 (SCA), that in the absence of a 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.

[26] It therefore follows that where a trust deed requires that the trustees must act jointly if the Trust is to be bound, a majority decision will not bind the Trust where one of the trustees, such as in this case, did not participate in the decision-making. This is imperative particularly when the trustees are required to take a decision involving the assets of the Trust. In the case where the majority decision prevails, all trustees are still required to sign the resolution. In *Land and Agricultural Development Bank of SA v Parker and Others (Parker)* 2005 (2) SA 77 (SCA); [2004] 4 All SA 261 (SCA), this Court held that when dealing with third parties, even if the Trust instrument stipulates that the decision can be made by the majority of trustees, all trustees are required to participate in the decision making and each has to sign the resolution. The court in *Blockpave* restated the aforementioned principles in *Parker*. It went on to state that a trust operates on resolutions and not on votes. This is significant as the Trust does not explicitly provide that external decisions may be taken by a majority vote.

[27] Similarly, in *Van der Merwe*, the court also endorsed the principle that trustees have to act jointly and that the minority is obliged to act jointly with other trustees in executing the resolution adopted by the majority. A majority decision prevails only where there has been participation by all trustees where the trust deed expressly provides for it. In this case, on every possible interpretation of what happened on 25 March 2013, there is no room to conclude that Mr Volker participated in the decision-

making. It is a misnomer for the appellant to infer participation in the meeting only on the basis that Mr Volker received reasonable notice thereof. The high court was therefore correct to conclude that the trustees did not act jointly.

[28] The appellant's reliance on clause 16 of the main provisions is misplaced. It is difficult to follow the rationale for relying on clause 16, as it refers to disagreements at the meeting. There were no disagreements at the meeting. *Honoré's South African Law of Trusts*, as pointed out by the high court, authoritatively confirms that all important decisions are to be taken unanimously. The reliance in *Le Grange on Van der Merwe*, which held that the decisions of the majority of trustees present at a meeting shall prevail, was misplaced (see para 15 of *Van der Merwe*). The decision in *Blockpave* paras 37-38 endorses the trite principle that a trust operates in two different spheres, that is internally and externally. Internally, trustees may disagree and if the trustees are not unanimous, a matter may be put to a vote. The majority vote prevails and the dissenting trustee has to subject himself to the democratic vote of the majority. Externally, trustees cannot disagree. In the external sphere the Trust functions by virtue of its resolutions, which have to be supported by the full complement of the Trust body. External decisions are those relating to the trust property with the outside world and internal decisions may relate to the use of income for the welfare of the beneficiaries of the Trust.

[29] The high court also correctly found that the powers envisaged in the trust deed were to be read together with the powers set out in the appendix thereto. This is apparent from the wording of the first paragraph of the appendix which state '[w]ithout prejudice to the generality of any of the provisions of the accompanying Deed constituting the above Trust, the trustees shall have the following powers which shall be exercisable in their sole and absolute discretion for the purposes and benefit of the Trust'. Amongst others, clause 8 of the appendix gives powers to the trustees '[t]o mortgage, pledge, hypothecate or otherwise encumber any property forming part of the trust property'; clause 16 '[t]o guarantee the obligations of any beneficiary and/or any company of which the Trust and/or beneficiary is a shareholder and to bind the Trust as collateral security for any such obligation undertaken by the Trust, to mortgage, pledge or hypothecate any asset forming part of the trust property', and clause 25 '[t]o contract on behalf of the Trust and to ratify, adopt or reject contracts made on behalf or for the benefit of the Trust, either before or after its formation'.

However, to safeguard the interests of the Trust and its beneficiaries, clause 26 places a caveat on the exercise of those powers, where it states that: '[p]rovided the trustees unanimously agree, to conduct business on behalf of and for the benefit of the Trust, and to employ trust property in such business'.

[30] Clause 26 of the appendix specifically requires that the trustees act unanimously for the purposes of conducting business for and on behalf of the Trust. The trust deed does not envisage that a suretyship should be concluded on behalf of a trustee or a beneficiary for their personal debts. The preamble to the appendix is specific in stating that the powers must be exercised for the purpose and benefit of the Trust. Similarly, clause 11 of the trust deed refers to the exercise of the powers for the benefit and purpose of the Trust in their discretion for which purpose they are granted all the necessary powers and authority, including (but without limitation) the powers stated in the appendix. The powers conferred upon the trustees shall be complete and absolute and exercisable in the discretion of the trustees.

[31] The suretyship agreement was drawn in very wide and over reaching terms as set out in paragraph 3 above. It states that should the debtor be liquidated/sequestered, wound up or placed under judicial management provisionally or finally, the surety undertakes not to prove a claim against the debtor for any amount the surety may be called upon to pay under the suretyship until all amounts due and payable by the debtor to the creditor, have been paid in full. This indicates that the terms of the suretyship were crafted to give a hundred percent protection to the appellant, which can surely not be for the benefit of the Trust.

[32] I hasten to add that this is not a lost cause for the appellant. On 1 December 2011, a court order was granted by consent against Mr Volker and Others in favour of Mrs Volker under case number 9759/2011. The order provided that one of the companies, Penvaan Estates (Pty) Ltd (Penvaan Estates), was to pay Mrs Volker reasonable legal fees incurred in the pending divorce proceedings between her and Mr Volker. Penvaan Estates was further directed to advance to the appellant, on behalf of Mrs Volker various sums of money commencing from 30 November 2011 and 30 January 2012 respectively, for Mrs Volker's costs in the pending divorce action. According to the trustees Penvaan Estates was finally liquidated during April 2013, without the appellant taking steps to enforce the terms of the court order. The trustees

allege that the appellant only lodged the claim against the insolvent company when it realised that its suretyship was invalid and not binding. The appellant's claim for Mrs Volker's legal fees may still be considered by the liquidators of the insolvent Penvaan Estates.

The Order

[33] Accordingly, the appeal is dismissed with costs, including the costs of two counsel.

Y T MBATHA
JUDGE OF APPEAL

Kathree-Setiloane AJA (Weiner JA concurring)

[34] I have read the judgment prepared by my sister, Mbatha JA. I agree with the order but arrive at that decision on the limited basis set out below. I also agree with the summation of the facts in the first judgment and do not repeat them here.

[35] The question for determination in the appeal is whether the deed of suretyship signed by Mrs Volker and Mr de Witt (in their capacity as trustees) in favour of the appellant was duly authorised by the Trust and was legally binding on it. The trust deed does not explicitly provide that the decisions of the trustees may be taken by majority vote. It is settled law, in this regard, that in the absence of a provision in a trust deed that provides that decisions may be taken by majority vote, the trustees must act jointly if the Trust is to be bound by their acts.¹

[36] The appellant's reliance on the decision of *Van der Merwe* is, therefore, misplaced as the trust deed in that case contained a 'majority vote' clause and not a 'unanimity' clause. Binns Ward J observed as follows:

'It is evident from these provisions that unanimity amongst trustees is not required in order for decisions to be made effectively, in respect of transactions concerning the administration of the Trust and the dealing with its assets, in terms of the powers conferred on the trustees in terms of clause 6 of the trust deed. It is sufficient if the relevant decision enjoys the support of the majority. A majority decision is competent only if adopted by a majority of the trustees present at a quorate meeting of the trustees.'²

The appellant's reliance on *Le Grange*³ is similarly unwise as that case is distinguishable from the current one, in that the trust deed there contained a provision that required all resolutions of the trustees to be supported by majority vote.⁴

¹ *Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk* [2004] 1 All SA 396 (SCA); 2004 (3) SA 486 (SCA) para 16; *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA); [2004] 4 All SA 261 (SCA) para 16; *Van der Merwe NO and Others v Hydraberg Hydraulics CC and Others*; *Van der Merwe and Others v Bosman and Others* 2010 (5) SA 555 (WCC) para 16 (*Van der Merwe*).

² *Van der Merwe* para 16.

³ *Le Grange and Another v The Louis and Andre Le Grange Family Trust No 1562/95/PMB and Others* [2017] ZAKZPHC 2.

⁴ *Ibid* para 6.

[37] The trust deed in the present case is similar to the one in *Coetzee v Peet Smith Trust en Andere (Coetzee)*⁵ where the court held that:

‘Unless the trust deed or will contained provisions to the contrary, there was legally no reason to follow a different rule in the case of Trusts. Joint unanimous conduct in the alienation, handling, and management of Trust assets was a pre-requisite’.

However, unlike in *Coetzee*, in this case the requirement for ‘unanimity’ in the trust deed is express. Clause 26 of the appendix expressly states: ‘Provided the Trustees unanimously agree, to conduct business on behalf of and for the benefit of the Trust, and to employ trust property in such business’.

[38] The appendix which is entitled ‘Powers of the Trustees’ gives additional powers to the trustees.⁶ These powers are set out in clauses 1 to 26 of the appendix. They include the power to: ‘mortgage, pledge, hypothecate or otherwise encumber any property forming part of the trust property’ (clause 8); ‘guarantee the obligations of any beneficiary and/or any company of which the Trust and/or beneficiary is a shareholder and to bind the Trust as collateral security for any such obligation undertaken by the Trust, to mortgage, pledge or hypothecate any asset forming part of the trust property’ (clause 16); and to ‘contract on behalf of the Trust and to ratify, adopt or reject contracts made on behalf or for the benefit of the Trust, either before or after its formation’ (clause 25).

[39] The provisions of the trust deed including those in the appendix (which are part of the trust deed) must be interpreted in the context of the trust deed as a whole. The principles articulated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*,⁷ for the interpretation of legislation and other documents, apply.

⁵ 2003 (5) SA 674 (TPD) at 679A/B-B/C and C-C/D.

⁶ The relevant provisions of the appendix are referenced in the main judgment, as are the main provisions of the trust deed.

⁷ In *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) at para 18, this Court held that:

‘. . . Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.’

[40] The preamble to the appendix provides that: 'Without prejudice to the generality of any of the provisions of the accompanying Deed constituting the above Trust the trustees shall have the following powers which shall be exercisable in their sole and absolute discretion for the purposes and benefit of the Trust'. It is clear from its preamble that the powers afforded to the trustees in clauses 1 to 26 of the appendix must be exercised for the purpose and benefit of the Trust. This is a peremptory requirement for the exercise of these powers by the trustees.

[41] Clause 26 of the appendix contains a proviso that 'the trustees unanimously agree, to conduct business on behalf of and for the benefit of the Trust, and to employ trust property in such business'. The use of the word 'provided' in clause 26 of the appendix makes this plain. The word 'provided' must be given its ordinary grammatical meaning which is 'on condition that'.⁸ The proviso in clause 26 is a textual indicator that all the powers of the trustees, set out in clauses 1 to 25 of the appendix, must be exercised unanimously by the trustees.

[42] Clause 11.1 of the main provisions of the trust deed provides that: 'Any trustee shall have the power to deal with the trust Property and trust income for the benefit and purpose of the Trust in their discretion for which purpose they are granted all necessary powers and authority including (but without limitation) the powers stated in the Appendix . . .'. The reference in clause 11.1 to the word 'appendix' indicates that clause 26 is also a pre-condition for the exercise of the wide powers afforded to trustees in that clause. Properly construed, this means that all powers of the trustees must be exercised unanimously and jointly. It is specifically because clause 26 of the appendix demands 'unanimity', that there is no reference to 'majority vote' in the trust deed.

[43] The use of the words 'conducts business' in clause 26 of the appendix relates to the powers afforded to the trustees in clauses 1 to 25 of the appendix. In other words, the powers afforded to the trustees in clauses 1 to 25 cumulatively constitute the business of the Trust. The exercise of these powers by the trustees, on behalf of the Trust must, therefore, be unanimous and for the benefit of the Trust for it to bind

⁸ Cambridge Dictionary.

the Trust. If any one of these two requirements is not present in the exercise of these powers, it will not bind the Trust.

[44] The appellant contends that clause 26 of the appendix must be construed as applying only to instances where the trustees wish to conduct business on behalf of the Trust and to employ trust property in such business. To adopt this construction, would be to ignore the word 'provided' in clause 26 of the appendix. It is the use of this word that creates the nexus between clause 26 and the antecedent clauses of the appendix, namely clauses 1 to 25. This interpretation of clause 26 would not only lead to a sensible and business-like result, but it also gives effect to the object of the trust deed which is to protect the interests of the trust and its beneficiaries.

[45] It follows that the business of the Trust would include the exercise of the power to guarantee the obligations of a beneficiary which is envisaged in clause 16 of the appendix. Accordingly, the decision to conclude a deed of suretyship on behalf of the Trust, as we have in this case, has to be a unanimous decision of all the trustees and it must be for the benefit of the Trust. However, as we know, the resolution taken by Mrs Volker and Mr de Witt to sign the deed of suretyship, in favour of the appellant, was not unanimous as Mr Volker did not participate in that decision. In the circumstances, neither the resolution taken by Mrs Volker and Mr de Witt authorising them to conclude the deed of suretyship, nor the deed itself is valid and enforceable against the Trust. In view of this conclusion, there is no need to deal with the question of whether the deed of suretyship was concluded for the benefit of the Trust.

[46] For these reasons, the appeal is dismissed with costs, including the costs of two counsel.

F KATHREE-SETILOANE
ACTING JUDGE OF APPEAL

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