



IN THE HIGH COURT OF SOUTH AFRICA /ES
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED✓

DATE 3.3.16 SIGNATURE

CASE NO: 24523/2015

DATE: 2/3/2016

IN THE MATTER BETWEEN

BRENDAN ARN DAVIDS N.O.

1ST APPLICANT

RIAAN WINTER N.O.

2ND APPLICANT

AND

TAI ROSS PROPERTIES VDBP (PTY) LTD

RESPONDENT

JUDGMENT

MSIMEKI, J

[1] Applicants, in this application, seek an order which finally liquidates respondent.

In the alternative, applicants seek the granting of a *rule nisi* inviting all interested parties to show cause on the return date as to why respondent should not be placed

under final liquidation. Costs of the application are to be costs in the cause. The application is opposed.

- [2] The parties are represented by Adv W W Gibbs ("Mr Gibbs") and Adv J A Venter ("Mr Venter") who represent applicant and respondent respectively. Applicants' heads of argument were prepared by Adv B Bergenthuin.
- [3] Applicants brought their application in their capacities as trustees of the Greenlands Investment Trust ("the Trust"). The application is brought in terms of section 344(f) read with sections 345(1)(a) and (c) and/or on the ground set out in section 344(h) of the Companies Act, Act 61 of 1973 ("the old Act").
- [4] Applicants contend that respondent is indebted to the Trust in the sum of R1 292 564,29. The debt is said to emanate from a loan agreement ("the agreement") concluded between the trustees of the Trust and respondent on 19 September 2013. Respondent denies the force, effect and validity of the agreement on the basis of the non-fulfilment of suspensive conditions and the National Credit Act, Act 34 of 2005.
- [5] Points *in limine* were raised on behalf of respondent. I shall only deal with the only remaining point *in limine* as the others were not pursued.
- [6] The point *in limine* to be dealt with by the court is that the agreement was not authorised and that that rendered same void and unenforceable. Mr Gibbs denies this.

[7] There are two resolutions which Mr Gibbs termed "extracts" simply by reason of the fact that the one, annexure "BAD1", is headed "EXTRACT OF A RESOLUTION BY THE TRUSTEES FOR THE TIME BEING OF GREENLANDS INVESTMENT TRUST (REGISTRATION NUMBER IT1809/2011 ('THE TRUST') PASSED AT CAPE TOWN ON 16/08/2014" and the other, "appendix B" headed "EXTRACT OF A RESOLUTION OF THE TRUSTEES FOR THE TIME BEING OF GREENLANDS INVESTMENT TRUST (REGISTRATION NUMBER IT809/2011 ('THE TRUST') PASSED AT CAPE TOWN ON 19/09/13".

[8] Annexure "BAD1" has been signed by the two trustees appointed by the Master of the High Court in terms of letters of authority, annexure "BAD2" dated 4 August 2011. The two trustees are Riaan Winter and Brendan Arn Davids. Appendix "B" bears only one signature. It does not indicate as to who the person is who signed. It can only be assumed that it is one of the trustees. This is not denied.

[9] Appendix "B" states:

"RESOLVED:

1. That the Trust enters into a loan Agreement with Tai Ross Properties VDBP Proprietary Limited (Registration Number 2004/026716/07) substantially upon the terms and conditions of the Agreement submitted to and approved by the trustees for the time being of the Trust.

RESOLVED FURTHER:

2. THAT MR BRENDAN ARN DAVIDS in his capacity as trustee of the Trust be and is hereby authorised and empowered to –

2.1 negotiate the final terms and conditions of the Agreement referred to in the preceding resolution;

2.2 sign the said Agreement and all other deeds or documents which may be necessary for the implementation of the abovementioned Agreement; and

2.3 generally do everything that may be necessary for the implementation of the abovementioned Agreement.

And any agreement, deeds or documents signed by the said Mr Brendan Arn Davids acting under authority of this and the preceding resolution, shall conclusively be deemed to be the agreement, deeds and documents authorised by this and the preceding resolution."

Appendix "B" ends:

"CERTIFIED A TRUE COPY

(There is a signature)
TRUSTEES"

[10] Annexure "BAD1" starts with:

Present:

1. BRENDAN ARN DAVIDS (...)

2. Riaan Winter (...).

It reflects apologies, notice and background. It is not necessary to repeat everything.

Page 2 of the annexure bears the resolution. This I shall quote. It reads:

"THEREFORE IT IS HEREBY UNANIMOUSLY RESOLVED THAT:

1. The Trust hereby authorise and empower BRENDAN ARN DAVIDS (...), in his capacity as trustee of the Trust, to –
 - 2.1 conclude, sign and execute all loan agreements and all other agreements, deeds, documents or forms to institute legal proceedings and to conclude negotiations on behalf of the Trust which may be necessary to give effect to, implement and conduct the business of the Trust as defined in the Trust Deed; and
 - 2.2 generally do everything that may be necessary for the implementation of the business of the Trust.
2. The Trust hereby ratifies and approves all that may have been done by BRENDAN ARN DAVIDS (...) in respect of the business of Trust until date hereof." (My emphasis.)

The annexure ends:

CERTIFIED TO BE A TRUE COPY

(<u>There is a signature</u>)	16/08/2014
TRUSTEE	DATE

(<u>There is a signature</u>)	16/08/2014
TRUSTEE	DATE

[11] It is common cause that:

1. a Trust has life of its own;

2. it functions and operates through trustees;
3. trustees act in accordance with authority. Put differently a trustee has authority or does not have authority;
4. authority is an expression of will by one person that another shall have the power to conclude juristic acts on his behalf;
5. an *ab initio* invalid contract of agency cannot be resuscitated or rectified retrospectively;
6. Trustees have to act jointly if they are to act legally. They must act, decide and participate together as one.

[12] The court has to determine if appendix "B", annexure "BAD1" and the agreement are legal in the eyes of the law.

[13] To determine all this, proper scrutiny must begin with the appendix, annexure "BAD1" and the agreement.

[14] Appendix "B" was executed first on 19 September 2013. The agreement, annexure "BAD6", was concluded on 19 September 2013 and lastly annexure "BAD1" was executed on 16 August 2014.

[15] Mr Venter conceded that annexure "BAD1" is without fault. However, he has problems with appendix "B" and the agreement. He contends that appendix "B" is invalid. His reason is that the trustees did not act jointly in producing appendix "B" and that that has the effect of rendering the agreement *ab initio*, null and void.

[16] Starting with annexure "BAD1", the following emerges:

1. The two trustees attended the meeting when annexure "BAD1" was born.
2. Both of them signed annexure "BAD1".
3. Annexure "BAD1" speaks of those who were present. This is borne out by the use of the words "Present, apologies, notice and the background".
4. Annexure "BAD1" purports to ratify and approve "all that may have been done by Brendan Arn Davids". The question is whether this can be done. Based on the common cause facts, this cannot be done.
5. Mr Venter, apart from the ratification of what B A Davids did, regards annexure "BAD1" as proper. This is so because the two trustees acted jointly.

[17] Appendix "B" reveals the following:

1. Only one trustee acted when the appendix was produced.
2. Only one trustee signed the appendix.
3. The appendix does not tell us if it was produced at a duly attended meeting as is the case with annexure "BAD1".
4. It is clear that the trustees, here, did not act jointly.
5. If there was a resolution from which appendix "B" was extracted such resolution is not part of these papers.
6. Mr Venter submitted that this shows that such a resolution never saw the light of day. Mr Gibbs did not request that the matter be postponed to enable them to produce the full resolution. The reason for his failure to do so is not known.

[18] Mr Venter submitted that if appendix "B" falls then the loan agreement must fall and that eventually the application must fail.

[19] It will be remembered that the case law and the work of the different authors referred to in respondent's heads of argument represent the law as it stands. This is that trustees must act jointly. The one trustee purporting to represent the Trust must be authorised so to act by both trustees and that an *ab initio* invalid contract cannot be resuscitated. (See *Thorpe and others v Trittenwein and another* 2007 2 SA 172 (SCA); *Van der Westhuizen v Van Sandwyk* 1996 2 SA 490 (W) at 496H; *Nieuwoudt and another NNO v Vrystaat Mielies (Edms) Bpk* 2004 3 SA 486 (SCA) at 494D-E, 494G-H, 494I-J and 495A-B; *Steyn and others NNO v Blockpave (Pty) Ltd* 2011 3 SA 528 (FB) at 532D-E and 537B-B; *Coetzee v Peet Smith Trust en andere* 2003 5 SA 647 (T) and *Goolam Family Trust v Textile, Curtaining and Trimming* 1989 4 SA 985 (CPD) at 988D-J and *Van der Merwe v Van der Merwe en andere* 2000 2 SA 519 (KPA) at 523E-G and 525B-.)

W A Joubert: *The Law of South Africa* Vol 1 at pp110-111 and 113-117 and A J Kerr: *The Law of Agency* 3rd edition at p74 also deal with authority that is required when one represents the other.

[20] It will be remembered that Mr Venter submitted that appendix "B" was invalid in that Mr B A Davids had not been properly authorised to act on behalf of Mr R Winter and therefore on behalf of the Trust. Mr Gibbs submitted that annexure "BAD1" and appendix "B" were but extracts. The complete resolutions have to date not been produced. Appendix "B" the basis of Mr David's authority has only been signed by one trustee. This is not proper. Apart from appendix "B" there is nothing that gives Mr Davids authority to act as he did when the agreement was concluded.

[21] It is important to note that both annexure "BAD1" and appendix "B" end the same way. The questions therefore are:

1. Why was appendix "B" signed by one trustee and not two?
2. Why, all of a sudden, is annexure "BAD1" signed by two trustees?

Two trustees, in my view, signed annexure "BAD1" because they realised that appendix "B" had been defective. This then begs the question whether the defect can be rectified. As shown above it cannot legally be rectified.

[22] It will again be remembered that applicants have based their application and in particular their cause of action for the debt that they claim respondent owes the Trust on the agreement. If appendix "B", as shown above, is invalid, that means that even the agreement is tainted and invalid and this simply means that there cannot be a debt based on applicants' cause of action, as correctly submitted by Mr Venter.

[23] Indeed if appendix "B" cannot be rectified or ratified that disposes of the application. This has clearly been demonstrated.

[24] Mr Gibbs submitted that even if the court were to uphold the point *in limine* applicants would still be able to proceed with the application as it was conceded that the amount of R800 000,00 had been received by respondent. This loses sight of the fact that the application and in particular applicants' cause of action is the agreement. The agreement, as shown above, is tainted and *ab initio* void and invalid. Applicants are left only with other causes of action, for instance, enrichment on the part of respondent. This then clearly demonstrates that applicants have other alternative

remedies. Applicants' founding affidavit fails to deal with undue enrichment. This again simply means that the application cannot succeed.

[25] In the result, I make the following order:

1. The point *in limine* is upheld.
2. The application is dismissed with costs.

M W MSIMEKI
JUDGE OF THE GAUTENG DIVISION, PRETORIA

24523-2015

HEARD ON: 2 MARCH 2016
FOR THE APPLICANTS: ADV W W GIBBS
INSTRUCTED BY: DE KLERK AND VAN GEND ATTORNEYS
FOR THE RESPONDENT: ADV J A VENTER
INSTRUCTED BY: W W B BOTHA ATTORNEYS