

Supreme Court of Appeal of South Africa

MEDIA SUMMARY– JUDGMENT DELIVERED IN SUPREME COURT OF APPEAL

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Land and Agricultural Bank of South Africa v Parker NO and others

The Supreme Court of Appeal today upheld an appeal against a judgment of the full court of the Pretoria high court in which the sequestration of a trust was set aside. The effect of the SCA judgment is to reinstate the judgment sequestering the trust.

The case concerned a family trust ('the Jacky Parker Trust') which the trustees had purported to bind as surety for loans of many millions of rands that companies associated with the family businesses accepted from the Land Bank. When things went awry, the trustees resisted liability on many grounds, including their own lack of capacity to bind the trust.

The SCA upheld one of these defences to the Bank's claim. This was that the trust deed required that there always be a minimum of three trustees in office. Because of a breach of trust by Mr and Mrs Parker, they were the only trustees in office when most of the loan agreements were signed. The SCA held that they could not bind the trust during this period.

Even after they appointed their son as a third trustee, they did not consult him about a further loan agreement with the Bank. The SCA held that although Mr and Mrs Parker were now a majority of trustees in office, they could not bind the trust without consulting the son.

However, by happy symmetry, the SCA found that the very same argument led to the conclusion that the proceedings before the full court (which set aside the sequestration order) had not been properly instituted on behalf of the trust. This was because when Mr Parker (who also stood surety with the Bank) was sequestered, he automatically ceased to be a trustee. The result was that the trust was not properly before the full court, and its judgment had to be set aside. The SCA indicated that in view of the unscrupulous conduct the case evidenced, this result was not unjust.

The SCA's judgment goes on to consider the problem that 'family trusts' of this sort – where the trustees are also the beneficiaries, and have no independent interest in seeing to the proper conduct of trust affairs – creates. The Court held that it would in a suitable case exercise its power to ensure that trusts function in accordance with principles of business efficacy, sound commercial accountability and the reasonable expectations of outsiders who deal with them. This could be achieved by (i) applying to trusts the rule that outsiders dealing in good faith with entities that conduct business do not have to concern themselves with whether 'internal formalities' have been complied with; (ii) drawing the conclusion that trustees who are in charge of a trust's affairs have actual or implied authority from the other trustees to conclude contracts; (iii) in suitable cases concluding that the trust itself is a sham, and that the assets should be used in satisfaction of the contested debt.

In the present case, the Land Bank did not rely on any of these approaches, but the SCA indicated that in a suitable future case they could be applied.

Finally, the SCA indicated that the various Masters of the High Court – who have statutory and common law jurisdiction over trusts – should ensure that family trusts are not controlled solely by family members who are beneficiaries. The Master should ensure that an independent outsider is appointed as trustee to each trust in which (a) all the trustees are beneficiaries; and (b) all the beneficiaries are related to each other. This outsider-trustee does not have to be a professional, such as an attorney or an accountant. But it has to be someone who with proper realisation of the responsibilities of trusteeship accepts office in order to ensure that the trust functions properly, that the provisions of the trust deed are observed, and that the conduct of trustees who lack

a sufficiently independent interest in the observance of substantive and procedural requirements arising from the trust deed can be scrutinised and checked. Such an outsider will not accept office without being aware that failure to observe these duties may risk action for breach of trust.