IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT)

REPORTABLE

CASE NO. 19940/2009

In the matter between:

FIRST RAND BANK LIMITED	**APPLICANT**
And	
JAN JOHANNES CALITZ N.O.	**1st RESPONDENT**
JOHANNES PETRUS MARAIS N.O.	**2ND RESPONDENT**

Coram	:	**DLODLO, J**
Judgment by	:	**DLODLO, J**
For the Applicant	:	**ADV. LM OLIVIER**
Instructed by	:	**DE KLERK & VAN GEND INC** 3rd Floor, ABSA Building 132 Adderley Street CAPE TOWN 8001 Ref. A. Human
For the Respondents	:	**ADV. JC MARAIS**
Instructed	:	**JOHAN MARAIS & ASSOCIATES** C/o Heyns & Partners 50 Keerom Street CAPE TOWN 8001 Ref. PF Theron
Date(s) of Hearing	:	**10 MAY 2010**
Judgment delivered on	:	**01 JUNE 2010**

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

REPORTABLE

CASE NO. 19940/2009

In the matter between:

FIRST RAND BANK LIMITED	**APPLICANT**
And	
JAN JOHANNES CALITZ N.O.	**1st RESPONDENT**
JOHANNES PETRUS MARAIS N.O.	**2ND RESPONDENT**

JUDGMENT DELIVERED ON TUESDAY, 01 JUNE 2010

DLODLO, J

[1] This is an opposed application for the sequestration of the Trust. The Applicant is Firstrand Bank Limited, a company with limited liability duly incorporated in accordance with the company laws of the Republic of South Africa and having its registered address at 2 First Place, Bank City, Simmon Street, Johannesburg. The latter company is trading as First National Bank of Southern Africa Limited. The First Respondent is Jan Johannes Calitz N.O. in his capacity as trustee for the time being of the Jan Johannes Calitz Family Trust residing at 3 Draai Avenue, Stellenbosch, 7600. The Second Respondent is Johannes Petrus Marais N.O. in his capacity as trustee for the time being of the Jan Johannes Calitz Family Trust residing at 3 Culemborg Crescent, The Boord, Stellenbosch, 7600. Jan Johannes

Calitz Family Trust is duly incorporated in terms of the Trust Property Control Act 57 of 1988. Messrs Olivier and Marais appeared on behalf of the Applicant and the Respondent Family Trust respectively.

[2] It is common cause that the Respondents are indebted to the Applicant in the amount of Fourteen Million One Hundred and Thirty Three Thousand One Hundred and Twenty Five Rand and seventeen cents (R14 133 125.17) as at 2 August 2009 together with interest thereon at prime per annum compounded monthly and calculated from 3 August 2009 to date of payment. This is in respect of monies lent and advanced to The Dunes Partnership at its special instance and request in respect of a commercial property finance loan facility entered into between the Applicant and the Partnership on 26 April 2007. The Applicant is the holder of security in the nature of personal suretyship limited to certain amounts by Deon Van Wyk and Johannes Calitz as well as covering sectional title bonds in the cumulative amount of Fifteen Million Rand (R15 000 000.00) over certain merits of the sectional schemes.

BACKGROUND

[3] On or about 26 April 2007 and at Bellville the Applicant and the Partnership entered into a commercial Property Finance Loan Agreement. The Dunes Partnership consisted of a joint venture between the Respondents and one Deon Van Wyk Familietrust to develop Portion 9 of the farm Matjiesfontein No. 304, Plettenberg Bay as a sectional title development. It is common cause that the

development was registered as the Sectional Scheme, The Dunes. In terms of the loan agreement:

(a) The Applicant advanced Fifteen Million Rand (R15 000 000.00) to the Partnership to be repaid over a period of one hundred and twenty (120) months with an initial instalment of Two Hundred and Twelve Thousand Six Hundred and Fifteen Rand (R 212 615.00).

(b) A certificate signed by a manager of the Applicant shall be *prima facie* proof of the indebtedness of the partnership to the Applicant.

(c) The Partnership's failure to make punctual payment in terms of the Agreement and to remedy such failure within seven (7) days of Notice having been given to do so, will result in interest being calculated on the outstanding balance on the Standard Default Penalty Rate.

[4] On or about 9 October 2007 the Partnership dissolved. In terms of the dissolution agreement:

(a) The Respondents therein referred to as the remaining party, shall have the right to carry on business under the name and style of The Dunes Partnership.

(b) The Respondents shall purchase and take transfer of the thirty percent (30%) share of the Deon Van Wyk Familietrust for a

purchase consideration of Twelve Million Rand (R12 000 000.00)

(c) The Respondents shall apply to be substituted as Mortgager in respect of the current Mortgage bond in favour of the Applicant.

(d) The Respondents and the Deon Van Wyk Familietrust failed and/or refused to pay the monthly instalments due to the Applicant. **"BDB6"** – **"BDB12"** represent copies of the relevant correspondence between the parties. What emerges from **"BDB 11"**, which is a letter addressed to the Applicant by Jan Calitz is that the Trust is *"not in a position to service the interest"* and that the trust *"cannot service any bond"* and *"needs a window period till 1 February 2010."* It was consequent upon **"BDB11"** that the Applicant instructed its Attorneys to demand payment of the arrears from the Respondents. The Applicant also wanted the Attorneys to prepare an acknowledgement of debt and power of Attorney to entitle it inter alia, to find buyers for the Respondents' immovable properties and to sell such properties to satisfy the Trust's indebtedness to the Applicant should the Respondent further fail to make payment of its indebtedness as per conceived acknowledgment of debt. No such acknowledgment of debt, however, materialized.

DISCUSSION

[5] The indebtedness is admitted by the Trust. The Trustees do also admit that the First Respondent (being a trustee of the Trust) sent a letter, **"BDB11"** to the Applicant, but importantly it is contended that he sent such letter in his personal capacity and could not and did not bind the Trust in that the Second Respondent, being the other joint trustee, did not authorize the First Respondent to write the letter under consideration. Mr. Marais contended that in these proceedings it is incumbent that the Applicant must show that the Trust committed an act of insolvency – not The Dunes Partnership. To this end, contended Mr. Marais further, the Applicant must show that the trustees (both Respondents) acted in concert and that they both made the statement against the interest of the Trust, alternatively that the First Respondent was authorized to act on behalf of the Trust. The Respondents maintained that the First Respondent sent the letter **("BDB11")** in his personal capacity during what Mr. Marais labelled as "informal discussions" with the Applicant. This is indeed a powerful submission made by Mr. Marais. I undertake to exhaustively deal with it *infra*. He emphasized that the Second Respondent was at all material times unaware of this communication and never consented or authorized the First Respondent to send the letter. Mr. Marais submitted that in order to bind the Trust both trustees are by law required to consent to any action to act in concert. Mr. Marais referred me to ***Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk*** 2004 (3) SA 486 (SCA) and ***Land and Agricultural Bank of South Africa v Parker and Others*** 2005 (2) SA 77 (SCA).

[6] It is indeed so that in the ***Nieuwoudt*** case *supra* (as Mr. Marais maintained) the Court held that one must not believe that the ambit of authority conferred by a trust deed is simply a matter of internal management with which outsiders need not acquaint themselves. In the ***Parker*** case *supra* the Court held that it is a fundamental rule of law that in the absence of contrary provisions in the trust deed, the trustees have to act jointly if the Trust estate was to be bound. This flows from the fact that trustees are joint owners of the trust property and as such have to act jointly. In Mr. Marais' submission the Applicant has failed to prove that the Trust committed an act of insolvency in terms of section 8 (g) of the Insolvency Act 24 of 1936. Therefore, in his view, the Applicant has not made out a case for the relief sought and as such the application stands to be dismissed with costs.

[7] On the other hand, Mr. Olivier contended that the letter is a clear and unequivocal acknowledgement that The Dunes Partnership is not in a position to service interest on the bond and that from the contents of **"BDB11"**, it is clear that it is acknowledged that The Dunes Partnership is unable to pay its debts. The letter was sent during July/August 2009 whilst the partnership had dissolved (as mentioned above) during October 2007. The Trust was then the only remaining party liable to the Applicant. It is perhaps necessary to quote certain portions of the letter concerned:

"Hello Bennie

RE: THE DUNES PARTNERSHIP

We are not in a position to service the interest of ± R12,000 000.00. However, what monies we receive from The Dunes will be paid over to FNB.

1. *We cannot service any bond. We need a window period till 1 Feb 2010 (± R900 000.00 in arrears). No extra penalties or costs.*
2. *By December 2009 we will know whether March is on board, and if we will be receiving funds from them by June 2010 (approximately R1.5M).*
3. *We are busy with a number of options with regards to the management of The Dunes Hotel, Duplexes etc. the moment it is finalized, you will be informed.*
4. *By the end of January 2010 we will be able to assess the situation. We will possibly be in a position to service the bond or selling of units/hotel, or a combination of the two.*
5. *We are prepared to surrender more surety. You have a bond over ten units (duplexes). A further bond of R15.0M over the hotel will bring the total to R30.M over 10 duplexes and the hotel.*
6. *We undertake to sell 16 duplexes. The following door numbers, 1, 4, 57, 66, 76, 99, 116, 12, 98, 100, 107, 121, 122, 123, 133, 11. Number 114 and 115, 14 is sold but not transferred yet. The hotel @ R17.0M.*

NB: (All prices excl Vat – vat to be added). The proceeds of these units will be paid to FNB till the bond is covered……

……"

[8] Were the contents of **"BDB11"** fabricated to deceive the Applicant that something was being done to address its concerns about the non payment of the interest in the loan it advanced to the Respondent Trust? This letter came about as a product of prolonged negotiations between the Applicant and Mr. Calitz whom the bank believed was acting in the best interest of the Trust. If Mr. Calitz was presenting an untruth to the Applicants, why then did he drag in the Trust? The letter has a heading, namely, Re: The Dunes Partnership. The letter is couched in the plural which perfectly fits in with the two (2) members of the Trust, the two (2) Respondents in this matter. One needs to examine this Annexure **"BDB11"** very closely. Section 9 of the Insolvency Act provides as follows:

"(1 A creditor (or his agent) who has a liquidated claim for not less than fifty pounds, or two or more creditors (or their agent) who in the aggregate have liquidated claims for not less than one hundred pounds against a debtor who has committed an act of insolvency, or is insolvent, may petition the Court for the sequestration of the estate of the debtor.

(2) A liquidated claim which has accrued but which is not yet due on the date of hearing of the petition, shall be reckoned as a liquidated claim for purposes of subsection (1)."

[9] It is trite that once a trustee receives a letter of appointment from the Master of the Court such a trustee is authorized to act on behalf of that trust. The First Respondent has at all material times been issued with a letter of authority and has on many occasions acted on behalf

of the Trust. Various e-mail messages annexed to the Founding Affidavit and the fact that the First Respondent signed various documents on behalf of the Trust (Annexures **"BDB5"** and the Acceptance of Loan Facility attached to Annexure **"JPM1"**) bear testimony to this. The First Respondent apparently held meetings with the Applicant and even entered into the various discussions regarding certain proposals between the parties as is clearly evident from Annexure **"BDB7"**. It has been submitted on behalf of the Applicant that if it is found that the First Respondent acted in his personal capacity, the Trust is estopped from relying on this fact to oppose the present application due to the First Respondent's negligent representation. I have been referred to the work of the Honourable PJ Rabie and JC Sonnekus – **The Law of Estoppel in South Africa** at page 49 paragraph 2.1.1 where the following appears:

"In principle, the doctrine of estoppel does not operate in circumstances where no representation can be attributed to the estoppel denier. Estoppel is thus in principle not to be confused with "vicarious liability". This said, the requirement that, to found an estoppel there must have been a representation, made by the representor to the representee, does not mean that the representor) the person against whom the estoppel is raised) must necessarily have made the representation himself. A person can be estopped from denying the truth of a representation made by someone who was entitled in law to do so on his behalf, for example his agent. In principle a liquidator cannot be held responsible for any unauthorized representations made by the employees of a company

that has since been placed under liquidation. The liquidator does not represent the insolvent but the interest of the creditors. One can, in given circumstances, also be estopped from denying that another person had authority to make a representation on one's behalf although no such authority in fact existed. See e.g. Quinn and Co Ltd v Witwatersrand Military Institute 1953 (1) SA 155 (T). As to the question of agency by estoppel see generally Strachan v Blackbeard & Son 1910 AD 282; Monzali v Smith 1929 AD 382; De Wet Lawsa vol 1 ss 136 and 137."

[10] In ***Monzali v Smith*** 1929 AD 382 at 385 Stratford JA expressed himself as follows:

"To establish agency by estoppel there are two requisites: first, the principal sought to be bound must represent by his words or conduct that the person professing to bind him has authority to do so, and secondly, that the person to whom the profession is made acts on the faith of the representation to his prejudice. The rule is stated in Bowstead on Agency (4th ed., art. 88) thus:

"Where any person by words or conduct represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of such other person with respect to any one dealing with him as an agent on the faith of any such representation, to the same extent as if such other person had the representation to the same extent as if such other person had the authority which he was so represented to have."

The Second respondent has not questioned the agency of the First Respondent on all numerous instances the latter having dealt with the

Applicant as though he was authorized to do so. I take it that was no issue because indeed when the First Respondent so acted previously, he achieved goodness for the Trust. His actions are now questionable when it comes to Annexure **"BDB11"** because he has disclosed what the Second Respondent never wanted to be known.

[11] In ***Coetzee v Peet Smith Trust en Ander*** 2003 (5) SA 674 (T) Van Dijhorst J made the following telling statement:

"Die reël dat besluite gesamentlik eenparig moet wees verhinder nie die trustees om op die wyse sekere funksies te delegeer aan bepaalde trustees of buitestaander nie. Dit geskied egter met behoud van uiteindelike verantwoordelikheid en die verpligting tot behoorlike toesig. 'n Reël dat trustees oor belangrike sake eenparig moet besluit maar dat oor onbelangrike sake die meerderheid beslis, sal meer probleme skep as wat dit oplos aangesien daar geen vaste maatstaf kan wees van wat onbelangrike sake is nie. Trouens, tans onbelangrike besluite kan later blyk ernstige gevolge te hê. Ek vind geen grond vir die onderskeid in die gesag nie."

[12] The ***Nieuwoudt*** case *supra* on which Mr. Marais placed heavy reliance also decided the following:

"[6] 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 (compare 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. Nor did he state whether he told his co-trustee, the second appellant, of the contract he had signed as seller – although, as he stated elsewhere in his affidavit, it was never the intention that he should contract in his personal capacity – nor, if he did tell her, whether she had, by words or conduct, expressed agreement with what he had done or denied his authority to conclude the agreement."

Harms JA (as he then was) in the above ***Nieuwoudt*** case went on to decide at 494 para [23] the following:

"[23] However, as mentioned by Farlam JA, the fact that trustees have to act jointly does not mean that the ordinary principles of the law of agency do not apply. The trustees may expressly or implicitly authorize someone to act on their behalf and that person may be one of the trustees. There is no reason why a third party may not act on the ostensible authority of one of the trustees, but 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."

It is for me very clear that the First Respondent quite apart from having been appointed by the Master, had implied authority to act on behalf of the Trust. This remains a factual finding regard being had to all the circumstances attendant to this matter. I fully agree with Cameron JA in ***Land and Agricultural Bank of S.A. v Parker and Others*** 2005 (2) SA 77 (SCA) at 90 paragraph [37.2] where the learned Judge of Appeal stipulated as follows:

"[37.2] The inference may in appropriate cases be drawn that the trustee who concluded the allegedly unauthorized transaction was in fact authorized to conduct the business in question as the agent of the

other trustees. (In Nieuwoudt, the matter was sent back for evidence to be heard on how the farmer there conducted the ordinary business of farming without being authorized thereto by his wife, the other trustee). Such an inference may in a suitable case be drawn from the fact that the other trustees previously permitted the trustee or trustees in effective charge of affairs free rein to conclude contracts. A close identity of interests between trustee-beneficiaries, as in most family trusts, may make it possible for the inference of implied or express authority to be more readily drawn."

[13] I have already alluded to the fact that since the inception of the financial relationship between the parties the only person who has been acting for and on behalf of the Trust is the First Respondent. It is not denied that the Trust is presently in arrears with regard to the loan agreement. It is once again the same First Respondent who is negotiating with the Applicant on the way forward. In my view, it is only fair to draw an inference that the First Respondent was authorized because clearly previously he was conducting the business of the Trust unhindered. It is only convenient that the Second Respondent now alleges that the First Respondent was not so authorized. It appears the First Respondent has disclosed what was kept as a top secret of the Trust. This has afforded the Applicant a window through which it can now see what obtains in the domestic affairs of the Trust. Mr. Marais complained that the question of estoppel was raised for the first time in reply. If this was so important, the Trust could have asked for leave to deal with it by way of Supplementary Affidavit. This was not done. The contents of

"BDB11" does indeed communicate an act of insolvency as envisaged in section 8 (g) of the Act. Accordingly I am satisfied that the Applicant has made out a *prima facie* case entitling it to the relief sought. In this regard perhaps it is apposite to refer to the words of wisdom by Corbett JA (as he then was) in ***Kalil v Decotex*** 1988 (1) SA 943 (AD) at 797B, namely:

"Where on the affidavits there is a prima facie case (i.e. a balance of probabilities) in favour of the applicant then in my view, a provisional order of winding-up should normally be granted and, save in exceptional circumstances, this Court should not accede to an application by the Respondent that the matter be referred to the hearing of oral evidence. This does no lasting injustice to the Respondent for he will on the return day generally be given the opportunity, in a proper case and where he asks for an order to that effect, to present oral evidence on disputed issues."

[14] The factual insolvency of the Trust need not even be considered in a matter such as the present where the Applicant relies on the act of insolvency. The Court is entitled to order the sequestration of the Trust even if its assets (fairly valued) exceed its liabilities. In ***D.P. Du Plessis Prokureurs v Van Aarde*** 1999 (4) SA 1333 (T) at 1335 E-G Hartzenberg J gave the following statement of the law in this regard:

"Artikel 10 (b) van die Insolvensiewet bepaal dat as 'n skuldenaar 'n daad van insolvensie begaan het of insolvent is 'n Hof 'n sekwestrasiebevel kan uitreik, mits die skuldeiser 'n behoorlike eis het en dit tot voordeel van die krediteure sal wees as die skuldenaar

se boedel gesekwstreer word. Hy kan dus gesekwstreer word selfs al is hy tegnies solvent. In 'n geval soos hierdie waar die skuldenaar kommersieël insolvent is, is dit duidelik tot voordeel van sy krediteure as daar reeds op hierdie stadium 'n begin gemaak word om sy boedel te likwideer en die bates eweredig onder krediteure te verdeel. Indien daar deur 'n skuldeiser op die los goed beslag gelê kan word kan dit maklik daartoe lei dat daar weldra nie meer 'n voordeel sal wees om sy boedel te sekwestreer nie. Kyk ook na Wilkins v Pieterse 1937 CPD 165 op 166 en na Meskin & Co v Friendman 1948 (2) SA 555 (W) op 559."

The Applicant has thus *prima facie* shown in these papers that it is a creditor who is owed a liquidated claim of more than One hundred rand (R100.00). The Applicant has shown that the Respondents have committed an act of insolvency within the meaning thereof as contemplated in section 8 (g) of the Act. Clearly the sequestration of the Trust would be to the advantage of its creditors.

[15] In the circumstances, I make the following order:

(a) The Jan Johannes Calitz Familietrust (IT926/93) is hereby placed under a provisional sequestration order.

(b) A *Rule Nisi* is hereby issued, calling on all persons or entities interested to appear and show cause, if any, to this Court, on Tuesday, 06 July 2010 at 10h00 as to why:

(i) The Jan Johannes Calitz Familietrust (IT926/93) should not be placed under final sequestration; and

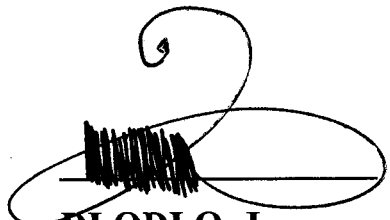
(ii) Why the costs of the application should not be costs in the sequestration.

(c) Service of the order shall be effected:

(i) by the Sheriff or his deputy on the First Respondent and the Second Respondent.

(ii) by the Sheriff or deputy Sheriff upon the employee(s), if any, and any registered Trade Union(s) representing such employees in compliance with section 11 (2A) of Act 24 of 1936.

(iii) By the Sheriff or deputy Sheriff upon the South African Revenue Service.



DLODLO, J

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO. 19940/2009

In the matter between:

FIRST RAND BANK LIMITED	**APPLICANT**
And	
JAN JOHANNES CALITZ N.O.	**1st RESPONDENT**
JOHANNES PETRUS MARAIS N.O.	**2ND RESPONDENT**

JUDGMENT DELIVERED ON TUESDAY, 01 JUNE 2010

DLODLO, J

[1] This is an opposed application for the sequestration of the Trust. The Applicant is Firstrand Bank Limited, a company with limited liability duly incorporated in accordance with the company laws of the Republic of South Africa and having its registered address at 2 First Place, Bank City, Simmon Street, Johannesburg. The latter company is trading as First National Bank of Southern Africa Limited. The First Respondent is Jan Johannes Calitz N.O. in his capacity as trustee for the time being of the Jan Johannes Calitz Family Trust residing at 3 Draai Avenue, Stellenbosch, 7600. The Second Respondent is Johannes Petrus Marais N.O. in his capacity as trustee for the time being of the Jan Johannes Calitz Family Trust residing at 3 Culemborg Crescent, The Boord, Stellenbosch, 7600. Jan Johannes

Calitz Family Trust is duly incorporated in terms of the Trust Property Control Act 57 of 1988. Messrs Olivier and Marais appeared on behalf of the Applicant and the Respondent Family Trust respectively.

[2] It is common cause that the Respondents are indebted to the Applicant in the amount of Fourteen Million One Hundred and Thirty Three Thousand One Hundred and Twenty Five Rand and seventeen cents (R14 133 125.17) as at 2 August 2009 together with interest thereon at prime per annum compounded monthly and calculated from 3 August 2009 to date of payment. This is in respect of monies lent and advanced to The Dunes Partnership at its special instance and request in respect of a commercial property finance loan facility entered into between the Applicant and the Partnership on 26 April 2007. The Applicant is the holder of security in the nature of personal suretyship limited to certain amounts by Deon Van Wyk and Johannes Calitz as well as covering sectional title bonds in the cumulative amount of Fifteen Million Rand (R15 000 000.00) over certain merits of the sectional schemes.

BACKGROUND

[3] On or about 26 April 2007 and at Bellville the Applicant and the Partnership entered into a commercial Property Finance Loan Agreement. The Dunes Partnership consisted of a joint venture between the Respondents and one Deon Van Wyk Familietrust to develop Portion 9 of the farm Matjiesfontein No. 304, Plettenberg Bay as a sectional title development. It is common cause that the

development was registered as the Sectional Scheme, The Dunes. In terms of the loan agreement:

(a) The Applicant advanced Fifteen Million Rand (R15 000 000.00) to the Partnership to be repaid over a period of one hundred and twenty (120) months with an initial instalment of Two Hundred and Twelve Thousand Six Hundred and Fifteen Rand (R 212 615.00).

(b) A certificate signed by a manager of the Applicant shall be *prima facie* proof of the indebtedness of the partnership to the Applicant.

(c) The Partnership's failure to make punctual payment in terms of the Agreement and to remedy such failure within seven (7) days of Notice having been given to do so, will result in interest being calculated on the outstanding balance on the Standard Default Penalty Rate.

[4] On or about 9 October 2007 the Partnership dissolved. In terms of the dissolution agreement:

(a) The Respondents therein referred to as the remaining party, shall have the right to carry on business under the name and style of The Dunes Partnership.

(b) The Respondents shall purchase and take transfer of the thirty percent (30%) share of the Deon Van Wyk Familietrust for a

purchase consideration of Twelve Million Rand (R12 000 000.00)

(c) The Respondents shall apply to be substituted as Mortgager in respect of the current Mortgage bond in favour of the Applicant.

(d) The Respondents and the Deon Van Wyk Familietrust failed and/or refused to pay the monthly instalments due to the Applicant. **"BDB6" – "BDB12"** represent copies of the relevant correspondence between the parties. What emerges from **"BDB 11"**, which is a letter addressed to the Applicant by Jan Calitz is that the Trust is *"not in a position to service the interest"* and that the trust *"cannot service any bond"* and *"needs a window period till 1 February 2010."* It was consequent upon **"BDB11"** that the Applicant instructed its Attorneys to demand payment of the arrears from the Respondents. The Applicant also wanted the Attorneys to prepare an acknowledgement of debt and power of Attorney to entitle it inter alia, to find buyers for the Respondents' immovable properties and to sell such properties to satisfy the Trust's indebtedness to the Applicant should the Respondent further fail to make payment of its indebtedness as per conceived acknowledgment of debt. No such acknowledgment of debt, however, materialized.

DISCUSSION

[5] The indebtedness is admitted by the Trust. The Trustees do also admit that the First Respondent (being a trustee of the Trust) sent a letter, **"BDB11"** to the Applicant, but importantly it is contended that he sent such letter in his personal capacity and could not and did not bind the Trust in that the Second Respondent, being the other joint trustee, did not authorize the First Respondent to write the letter under consideration. Mr. Marais contended that in these proceedings it is incumbent that the Applicant must show that the Trust committed an act of insolvency – not The Dunes Partnership. To this end, contended Mr. Marais further, the Applicant must show that the trustees (both Respondents) acted in concert and that they both made the statement against the interest of the Trust, alternatively that the First Respondent was authorized to act on behalf of the Trust. The Respondents maintained that the First Respondent sent the letter **("BDB11")** in his personal capacity during what Mr. Marais labelled as "informal discussions" with the Applicant. This is indeed a powerful submission made by Mr. Marais. I undertake to exhaustively deal with it *infra*. He emphasized that the Second Respondent was at all material times unaware of this communication and never consented or authorized the First Respondent to send the letter. Mr. Marais submitted that in order to bind the Trust both trustees are by law required to consent to any action to act in concert. Mr. Marais referred me to ***Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk*** 2004 (3) SA 486 (SCA) and ***Land and Agricultural Bank of South Africa v Parker and Others*** 2005 (2) SA 77 (SCA).

[6] It is indeed so that in the ***Nieuwoudt*** case *supra* (as Mr. Marais maintained) the Court held that one must not believe that the ambit of authority conferred by a trust deed is simply a matter of internal management with which outsiders need not acquaint themselves. In the ***Parker*** case *supra* the Court held that it is a fundamental rule of law that in the absence of contrary provisions in the trust deed, the trustees have to act jointly if the Trust estate was to be bound. This flows from the fact that trustees are joint owners of the trust property and as such have to act jointly. In Mr. Marais' submission the Applicant has failed to prove that the Trust committed an act of insolvency in terms of section 8 (g) of the Insolvency Act 24 of 1936. Therefore, in his view, the Applicant has not made out a case for the relief sought and as such the application stands to be dismissed with costs.

[7] On the other hand, Mr. Olivier contended that the letter is a clear and unequivocal acknowledgement that The Dunes Partnership is not in a position to service interest on the bond and that from the contents of **"BDB11"**, it is clear that it is acknowledged that The Dunes Partnership is unable to pay its debts. The letter was sent during July/August 2009 whilst the partnership had dissolved (as mentioned above) during October 2007. The Trust was then the only remaining party liable to the Applicant. It is perhaps necessary to quote certain portions of the letter concerned:

"Hello Bennie

RE: THE DUNES PARTNERSHIP

We are not in a position to service the interest of ± R12,000 000.00. However, what monies we receive from The Dunes will be paid over to FNB.

1. *We cannot service any bond. We need a window period till 1 Feb 2010 (± R900 000.00 in arrears). No extra penalties or costs.*
2. *By December 2009 we will know whether March is on board, and if we will be receiving funds from them by June 2010 (approximately R1.5M).*
3. *We are busy with a number of options with regards to the management of The Dunes Hotel, Duplexes etc. the moment it is finalized, you will be informed.*
4. *By the end of January 2010 we will be able to assess the situation. We will possibly be in a position to service the bond or selling of units/hotel, or a combination of the two.*
5. *We are prepared to surrender more surety. You have a bond over ten units (duplexes). A further bond of R15.0M over the hotel will bring the total to R30.M over 10 duplexes and the hotel.*
6. *We undertake to sell 16 duplexes. The following door numbers, 1, 4, 57, 66, 76, 99, 116, 12, 98, 100, 107, 121, 122, 123, 133, 11. Number 114 and 115, 14 is sold but not transferred yet. The hotel @ R17.0M.*

NB: (All prices excl Vat – vat to be added). The proceeds of these units will be paid to FNB till the bond is covered……

……"

[8] Were the contents of **"BDB11"** fabricated to deceive the Applicant that something was being done to address its concerns about the non payment of the interest in the loan it advanced to the Respondent Trust? This letter came about as a product of prolonged negotiations between the Applicant and Mr. Calitz whom the bank believed was acting in the best interest of the Trust. If Mr. Calitz was presenting an untruth to the Applicants, why then did he drag in the Trust? The letter has a heading, namely, Re: The Dunes Partnership. The letter is couched in the plural which perfectly fits in with the two (2) members of the Trust, the two (2) Respondents in this matter. One needs to examine this Annexure **"BDB11"** very closely. Section 9 of the Insolvency Act provides as follows:

"(1 A creditor (or his agent) who has a liquidated claim for not less than fifty pounds, or two or more creditors (or their agent) who in the aggregate have liquidated claims for not less than one hundred pounds against a debtor who has committed an act of insolvency, or is insolvent, may petition the Court for the sequestration of the estate of the debtor.

(2) A liquidated claim which has accrued but which is not yet due on the date of hearing of the petition, shall be reckoned as a liquidated claim for purposes of subsection (1)."

[9] It is trite that once a trustee receives a letter of appointment from the Master of the Court such a trustee is authorized to act on behalf of that trust. The First Respondent has at all material times been issued with a letter of authority and has on many occasions acted on behalf

of the Trust. Various e-mail messages annexed to the Founding Affidavit and the fact that the First Respondent signed various documents on behalf of the Trust (Annexures **"BDB5"** and the Acceptance of Loan Facility attached to Annexure "**JPM1**") bear testimony to this. The First Respondent apparently held meetings with the Applicant and even entered into the various discussions regarding certain proposals between the parties as is clearly evident from Annexure **"BDB7"**. It has been submitted on behalf of the Applicant that if it is found that the First Respondent acted in his personal capacity, the Trust is estopped from relying on this fact to oppose the present application due to the First Respondent's negligent representation. I have been referred to the work of the Honourable PJ Rabie and JC Sonnekus – **The Law of Estoppel in South Africa** at page 49 paragraph 2.1.1 where the following appears:

"In principle, the doctrine of estoppel does not operate in circumstances where no representation can be attributed to the estoppel denier. Estoppel is thus in principle not to be confused with "vicarious liability". This said, the requirement that, to found an estoppel there must have been a representation, made by the representor to the representee, does not mean that the representor) the person against whom the estoppel is raised) must necessarily have made the representation himself. A person can be estopped from denying the truth of a representation made by someone who was entitled in law to do so on his behalf, for example his agent. In principle a liquidator cannot be held responsible for any unauthorized representations made by the employees of a company

that has since been placed under liquidation. The liquidator does not represent the insolvent but the interest of the creditors. One can, in given circumstances, also be estopped from denying that another person had authority to make a representation on one's behalf although no such authority in fact existed. See e.g. Quinn and Co Ltd v Witwatersrand Military Institute 1953 (1) SA 155 (T). As to the question of agency by estoppel see generally Strachan v Blackbeard & Son 1910 AD 282; Monzali v Smith 1929 AD 382; De Wet Lawsa vol 1 ss 136 and 137."

[10] In ***Monzali v Smith*** 1929 AD 382 at 385 Stratford JA expressed himself as follows:

"To establish agency by estoppel there are two requisites: first, the principal sought to be bound must represent by his words or conduct that the person professing to bind him has authority to do so, and secondly, that the person to whom the profession is made acts on the faith of the representation to his prejudice. The rule is stated in Bowstead on Agency (4th ed., art. 88) thus:

"Where any person by words or conduct represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of such other person with respect to any one dealing with him as an agent on the faith of any such representation, to the same extent as if such other person had the representation to the same extent as if such other person had the authority which he was so represented to have."

The Second respondent has not questioned the agency of the First Respondent on all numerous instances the latter having dealt with the

Applicant as though he was authorized to do so. I take it that was no issue because indeed when the First Respondent so acted previously, he achieved goodness for the Trust. His actions are now questionable when it comes to Annexure **"BDB11"** because he has disclosed what the Second Respondent never wanted to be known.

[11] In ***Coetzee v Peet Smith Trust en Ander*** 2003 (5) SA 674 (T) Van Dijhorst J made the following telling statement:

"Die reël dat besluite gesamentlik eenparig moet wees verhinder nie die trustees om op die wyse sekere funksies te delegeer aan bepaalde trustees of buitestaander nie. Dit geskied egter met behoud van uiteindelike verantwoordelikheid en die verpligting tot behoorlike toesig. 'n Reël dat trustees oor belangrike sake eenparig moet besluit maar dat oor onbelangrike sake die meerderheid beslis, sal meer probleme skep as wat dit oplos aangesien daar geen vaste maatstaf kan wees van wat onbelangrike sake is nie. Trouens, tans onbelangrike besluite kan later blyk ernstige gevolge te hê. Ek vind geen grond vir die onderskeid in die gesag nie."

[12] The ***Nieuwoudt*** case *supra* on which Mr. Marais placed heavy reliance also decided the following:

"[6] 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 (compare 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. Nor did he state whether he told his co-trustee, the second appellant, of the contract he had signed as seller – although, as he stated elsewhere in his affidavit, it was never the intention that he should contract in his personal capacity – nor, if he did tell her, whether she had, by words or conduct, expressed agreement with what he had done or denied his authority to conclude the agreement."

Harms JA (as he then was) in the above ***Nieuwoudt*** case went on to decide at 494 para [23] the following:

"[23] However, as mentioned by Farlam JA, the fact that trustees have to act jointly does not mean that the ordinary principles of the law of agency do not apply. The trustees may expressly or implicitly authorize someone to act on their behalf and that person may be one of the trustees. There is no reason why a third party may not act on the ostensible authority of one of the trustees, but 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."

It is for me very clear that the First Respondent quite apart from having been appointed by the Master, had implied authority to act on behalf of the Trust. This remains a factual finding regard being had to all the circumstances attendant to this matter. I fully agree with Cameron JA in ***Land and Agricultural Bank of S.A. v Parker and Others*** 2005 (2) SA 77 (SCA) at 90 paragraph [37.2] where the learned Judge of Appeal stipulated as follows:

"[37.2] The inference may in appropriate cases be drawn that the trustee who concluded the allegedly unauthorized transaction was in fact authorized to conduct the business in question as the agent of the

other trustees. (In Nieuwoudt, the matter was sent back for evidence to be heard on how the farmer there conducted the ordinary business of farming without being authorized thereto by his wife, the other trustee). Such an inference may in a suitable case be drawn from the fact that the other trustees previously permitted the trustee or trustees in effective charge of affairs free rein to conclude contracts. A close identity of interests between trustee-beneficiaries, as in most family trusts, may make it possible for the inference of implied or express authority to be more readily drawn."

[13] I have already alluded to the fact that since the inception of the financial relationship between the parties the only person who has been acting for and on behalf of the Trust is the First Respondent. It is not denied that the Trust is presently in arrears with regard to the loan agreement. It is once again the same First Respondent who is negotiating with the Applicant on the way forward. In my view, it is only fair to draw an inference that the First Respondent was authorized because clearly previously he was conducting the business of the Trust unhindered. It is only convenient that the Second Respondent now alleges that the First Respondent was not so authorized. It appears the First Respondent has disclosed what was kept as a top secret of the Trust. This has afforded the Applicant a window through which it can now see what obtains in the domestic affairs of the Trust. Mr. Marais complained that the question of estoppel was raised for the first time in reply. If this was so important, the Trust could have asked for leave to deal with it by way of Supplementary Affidavit. This was not done. The contents of

"BDB11" does indeed communicate an act of insolvency as envisaged in section 8 (g) of the Act. Accordingly I am satisfied that the Applicant has made out a *prima facie* case entitling it to the relief sought. In this regard perhaps it is apposite to refer to the words of wisdom by Corbett JA (as he then was) in ***Kalil v Decotex*** 1988 (1) SA 943 (AD) at 797B, namely:

"Where on the affidavits there is a prima facie case (i.e. a balance of probabilities) in favour of the applicant then in my view, a provisional order of winding-up should normally be granted and, save in exceptional circumstances, this Court should not accede to an application by the Respondent that the matter be referred to the hearing of oral evidence. This does no lasting injustice to the Respondent for he will on the return day generally be given the opportunity, in a proper case and where he asks for an order to that effect, to present oral evidence on disputed issues."

[14] The factual insolvency of the Trust need not even be considered in a matter such as the present where the Applicant relies on the act of insolvency. The Court is entitled to order the sequestration of the Trust even if its assets (fairly valued) exceed its liabilities. In ***D.P. Du Plessis Prokureurs v Van Aarde*** 1999 (4) SA 1333 (T) at 1335 E-G Hartzenberg J gave the following statement of the law in this regard:

"Artikel 10 (b) van die Insolvensiewet bepaal dat as 'n skuldenaar 'n daad van insolvensie begaan het of insolvent is 'n Hof 'n sekwestrasiebevel kan uitreik, mits die skuldeiser 'n behoorlike eis het en dit tot voordeel van die krediteure sal wees as die skuldenaar

se boedel gesekwstreer word. Hy kan dus gesekwstreer word selfs al is hy tegnies solvent. In 'n geval soos hierdie waar die skuldenaar kommersieël insolvent is, is dit duidelik tot voordeel van sy krediteure as daar reeds op hierdie stadium 'n begin gemaak word om sy boedel te likwideer en die bates eweredig onder krediteure te verdeel. Indien daar deur 'n skuldeiser op die los goed beslag gelê kan word kan dit maklik daartoe lei dat daar weldra nie meer 'n voordeel sal wees om sy boedel te sekwestreer nie. Kyk ook na Wilkins v Pieterse 1937 CPD 165 op 166 en na Meskin & Co v Friendman 1948 (2) SA 555 (W) op 559."

The Applicant has thus *prima facie* shown in these papers that it is a creditor who is owed a liquidated claim of more than One hundred rand (R100.00). The Applicant has shown that the Respondents have committed an act of insolvency within the meaning thereof as contemplated in section 8 (g) of the Act. Clearly the sequestration of the Trust would be to the advantage of its creditors.

[15] In the circumstances, I make the following order:

(a) The Jan Johannes Calitz Familietrust (IT926/93) is hereby placed under a provisional sequestration order.

(b) A *Rule Nisi* is hereby issued, calling on all persons or entities interested to appear and show cause, if any, to this Court, on Tuesday, 06 July 2010 at 10h00 as to why:

(i) The Jan Johannes Calitz Familietrust (IT926/93) should not be placed under final sequestration; and

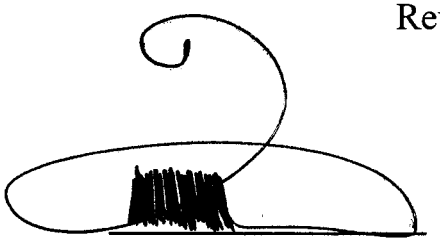
(ii) Why the costs of the application should not be costs in the sequestration.

(c) Service of the order shall be effected:

(i) by the Sheriff or his deputy on the First Respondent and the Second Respondent.

(ii) by the Sheriff or deputy Sheriff upon the employee(s), if any, and any registered Trade Union(s) representing such employees in compliance with section 11 (2A) of Act 24 of 1936.

(iii) By the Sheriff or deputy Sheriff upon the South African Revenue Service.



DLODLO, J