

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

In the matter between:

Case No.: 21687/2010

THE STANDARD BANK OF SOUTH AFRICA LTD
and

Plaintiff

**THE TRUSTEES FOR THE TIME BEING OF
SMUTS FAMILY TRUST**

Defendant

JUDGMENT DELIVERED: FRIDAY 10 DECEMBER 2010

SALDANHA, J

[1] This is an unopposed application for Summary Judgment. Plaintiff claims the following relief:

[1.1] Payment of the sum of R9 409 138.45;

[1.2] Interest on the sum claimed in 1 at the rate of 8.20% per annum from 2 September 2010 to date of payment, such interest to be capitalized monthly in arrear;

[1.3] An order declaring Erf 10962 Somerset West, In the City of Cape Town, Stellenbosch Division, Province of the Western Cape, executable for the said sums;

[1.4] Costs of suit on the scale as between attorney and client;

[1.5] Further and/or alternative relief.

[2.] The defendant was cited as "the Trustees for the time being of the Smuts Family Trust". The court *mero motu* raised with counsel for the plaintiff whether the defendant had been properly cited. **Mr. Sievers** who acted on behalf of the plaintiff referred to the Letters of Authority attached to the Particulars of Claim which were issued out by the Master of the High Court on the 16th of November 2005 which in terms of section 16(1) of the Trust Property Control Act 57 of 1998 the Master certified that Zenita Smuts, Jaco Bekker and Nicolaas Michiel Smuts were authorized to act as trustees on behalf of the Smuts Family Trust. The court was also referred to the Mortgage Bond in which the mortgagor was described as "The Trustees for the time being of the Smuts Family Trust IT4473/2005"

[3.] It is trite that a Trust is not a legal persona but acts through its trustees *nomine officii*, see **Mariola and Others v Kaye-Eddie NO and Others 1995 (2) SA 728 (W) at 731C-F**;

"a trust is not a persona but a legal institution, sui generis. The assets and liabilities of a trust vest in the trustee or trustees. The trustee is the owner of the trust property for purposes of administration and the trust, but qua trustee he has no beneficial interest therein.....Unless one of the trustees is authorized by the remaining trustee or trustees, all the trustees must be joined in suing and all must be joined when action is instituted"

against a trust.....In legal proceedings trustees must act nomine officii and cannot act in their private capacities."

[4.] Counsel for the applicant referred to the text in **Honorés South African Law of Trusts 5th Edition by Cameron and De Waal at page 420** in which the following is said;

"In legal proceedings the trustees must act nomine officii and cannot act in their private capacities. It is usual for the trustees to be cited as 'A, B and C in their capacity as the trustees of the XYZ Trust' but cases in which the trust as such is cited are not unknown and there should be no objection to a citation of 'the trustees for the time being of the XYZ Trust'".

The decision referred to in the text is that of **Rosner v Lydia Swanepoel Trust 1998 (2) SA 123** which relates to the application for an amendment that was granted where the Trust was cited and not the individual trustees. The court stated at page **129 paragraph c-d**;

"Just as the citation of a deceased estate, despite its not being a persona, can be amended to reflect the executor, so can the citation of a trust which is not a persona be amended to reflect the trustee. See Gross and Others v Penz 1996 (4) SA 617 (A) at 625B-H.

It follows from all of this that the Court a quo correctly found that 'the plaintiff (had) been merely incorrectly cited' and that the amendment corrected this."

[5.] Counsel also referred to the decision of Meer J in **Standard Bank of South Africa Limited v The Trustees for the time being of Kairos Investment Trust** an unreported decision **Case No. 23270/2009 Western Cape High Court** handed down on the 12th February 2010 where a point *in limine* was taken in an application for Summary Judgment that the Trustees in their capacity *nomine officii* had not been cited but rather the Trust. The point was dismissed as being of a highly technical nature and the court stated;

"If cases cited in the name of a trust which has no legal persona are accepted, I cannot find any logical reason, nor was I provided with any as to why a case against the trustees for the time being such as the present, cannot be accepted, especially where it is not disputed that the assets of the trust vest in the trustees nor that the identities of the trustees are unknown or that there is confusion as to who they are. It would seem to me in the circumstances that the opposition is not well-founded and smacks of unnecessary formalism."

[6.] In this matter the names of each of the individual trustees are known notwithstanding the mortgagor simply being referred to as "The Trustees for the time being of the Smuts Family Trust IT4473/2005."

[7.] However in this matter the court has not had the benefit of any opposing submissions with regard to the citation of the defendant as the application was undefended. I am of the view though that the issue about the proper citation

remains arguable especially where no amendment is sought in respect of the citation.

Nonetheless the following order is made;

- (i) Summary Judgment is granted as prayed for inclusive of prayers 2, 3 and 4 of the Notice of Application for Summary Judgment.


SALDANHA, J