Republic of South Africa

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

Case No: 10503/2013

Before: The Hon. Mr Justice Binns-Ward

Date of hearing: 11 February 2015
Date of judgment: 13 February 2015

In the matter between:

THE NATIONAL EMPOWERMENT FUND TRUST Applicant

And

CAPE WINDS TRADING 26 CC First Respondent
AND FOUR OTHERS Second to Fifth Respondents

JUDGMENT

BINNS-WARD J:

[1] In this matter the applicant (the National Empowerment Fund ('NEF'))[1] has proceeded on motion against the respondents to recover a monetary debt. The claim lies against the first respondent for payment of the balance allegedly owed in terms of a loan

[1] Erroneously cited in the papers as the 'National Empowerment Fund Trust'. Section 2 of Act 105 of 1998 provides: '*A trust called the '**National Empowerment Fund**' (NEF) is established.*'. As discussed in this judgment, it is evident from the provisions of the statute that the trust so established is a trust in the wide, rather than in the narrow or strict sense of the term.

agreement. The claim against the remaining respondents is made on the grounds of their having stood as sureties for, and co-principal debtors with, the first respondent in respect of the latter's obligations under the loan agreement. The loan was advanced to assist the first respondent in setting up a franchise outlet business. The franchise business was established pursuant to a franchise agreement entered into between the first respondent and a food business chain known as Primi Piatti. The applicant had previously committed to making an amount of R50 million available to assist the establishment of franchised Primi Piatti businesses by previously disadvantaged persons. The terms on which that commitment was made were integrated in a co-operation agreement concluded between the applicant and Primi Piatti.

[2] The respondents have opposed the application on a number of grounds. One of them was the raising of a challenge to the allegation that the NEF had authorised the institution of the proceedings. In this regard the respondents pointed to the provisions of s 4(2) of the National Empowerment Fund Act 105 of 1998 ('the NEF Act'), which provides '*The Trust shall consist of not less than 7 but not more than 11 trustees appointed in terms of section 8*'. They asserted that it appeared that the Board of Trustees in fact comprised of 13 persons and was thus unlawfully constituted. The contention proceeded that in the circumstances a decision could not validly have been taken to institute the proceedings.

[3] In reply, the applicant admitted that the Board consisted of 13 persons and that this was more than the maximum number provided in terms of the statute. The applicant, however, contended that the relevant provisions of the Act were stipulated for the benefit of the NEF and that the statutory non-compliance was irrelevant. The implication in this contention was that the statutory regulation of the composition of the Board could be waived. Who might do the waiving, and on what authority, do not appear to have been considered. The applicant also relied on s 15 of the Act, which provides:

> **15 Proceedings of Board not invalid in certain circumstances**
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> A decision taken by the Board or an act performed under the authority of such a decision must not be invalid by reason of-
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> (a) an irregularity in the appointment of a trustee;
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> (b) a vacancy on the Board;
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> (c) the fact that a trustee is guilty of an act or omission justifying his or her removal from office; or
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> (d) the fact that any person who is disqualified from being a trustee or who was removed from that office sat as such on the Board at the time when such decision was taken,

> if such decision was taken by a majority of the trustees lawfully entitled to vote and the said trustees at the time constituted a quorum.

[4] An annexure to the replying affidavit (annexure KA 10) suggests that the decision to institute the current proceedings may not have been taken by the Board, but rather by a committee. The actual decision-making process that was followed in this respect is not clearly explained, however, in the body of the affidavit. It bears mention in this regard that s 16 of the Act provides for the appointment of a chief executive officer ('CEO') for the Trust. The Board is empowered to delegate to the CEO such powers as may be necessary for him to manage the activities of the Trust. The CEO is deemed to be a trustee[2] and is empowered to further delegate any of the powers delegated to him by the Board to '*the staff, committees, other trustees or other structures of the Trust*'. Whether this is in fact how it came about that a committee appears to have authorised the institution of these proceedings and, if so, whether the relevant delegation of power was competently given earlier by a lawfully constituted Board consisting of no more than 11 members is not apparent in the applicant's replying papers.

[5] There is no substance in the claim in the NEF's replying papers that it is irrelevant that the Board of Trustees is purportedly comprised of more than the maximum number permitted by the statute. The provisions concerning the appointment of trustees are detailed. There is in addition provision for a balance between the number of trustees that may be appointed by the President on the recommendation of the Minister and that which falls to be appointed by the Minister on the recommendation of the presidentially appointed trustees from the ranks of management. There are other requirements that have to be satisified in the constitution of the Board. Its membership must, amongst other things, broadly represent a cross-section of backgrounds and professional skills enumerated in s 6 of the NEF Act. The purpose of the elaborate scheme is not starkly evident in all respects, but one must assume that the legislature had some rational object in view when it adopted it. The limitation on numbers has fiscal implications at the very least because the remuneration of trustees is liable to be funded, at least in part, by parliamentary appropriations. The scheme prohibits the appointment of more than 11 trustees. Accordingly any Board comprised of a greater number of trustees is invalidly constituted.

[6] The provisions of s 15 of the Act do not provide an answer to the point taken by the respondents. They are not directed at regulating a decision taken by an obviously invalidly constituted Board. They are directed at saving the decisions of an ostensibly validly

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[2] The CEO would therefore qualify as a twelfth permissible member of the Board.

constituted Board from invalidity on account of the disqualification of one or more members who participated in the decision making. It assumes the existence of a validly constituted Board. There cannot be 'a decision of the Board' in the sense comprehended in the opening phrase to s 15 if a legally constituted Board is not in existence. The provisions of s 15 are not directed at saving the decisions of an unlawfully constituted collective. A Board comprising of more than the maximum number of trustees permitted by the statute does not qualify as one ostensibly validly constituted. Legally, it does not exist. In such circumstances one does not get to examining the qualifications of individual members. It is also not obvious in any event, in a situation in which the purported members of the Board exceed the statutory maximum in number, that the irregular constitution of the body is due to the appointment of a single trustee, or even one or two of them. Thus if the President were to appoint eight trustees at the same time instead of the maximum of seven that he is permitted to, the appointment of all eight would be invalid because it would be impossible to distinguish their individual appointments. And if the eight trustees invalidly appointed were to purport to recommend to the Minister to appoint three additional trustees from the management team as the presidentially appointed trustees are permitted to do in terms of s 8(4) of the Act, their recommendation and the resultant appointments would also be invalid; cf. *Seale v Van Rooyen NO and Others; Provincial Government, North West Province v Van Rooyen NO and Others* 2008 (4) SA 43 (SCA), [2008] 3 All SA 245. Thus, when there is an excess of trustees above what the statute permits, it may be, depending on the facts, that none of them could have been validly appointed. Section 15 of the Act also could not save the purported decisions of the 'Board' in such a case.

[7] Thus, in order for the challenge to the authority to institute proceedings in the current case to be met, there has to be evidence as to the circumstances in which the number of persons purportedly appointed to the Board came to exceed that permitted in terms of the governing legislation, or if the decision was made by a functionary with delegated powers that the delegation occurred in terms of a decision made by a validly constituted Board.

[8] When confronted with these truths, counsel for the applicant sought a postponement so as to supplement the applicant's replying papers to deal with the issue properly. Payment of the wasted costs occasioned by the postponement, including the respondents' counsel's preparation costs was tendered. Counsel for the applicant also indicated that the applicant might wish, if required, to adduce evidence of a ratification by a competently constituted Board of Trustees of the decision to institute the current proceedings.

[9] Mindful that the lack of authority point, even if it was well made, is a technical one because there is no reason to believe on the face of matters that the NEF would not have wished to recover the substantial sum of money allegedly due to it in terms of the loan agreement, and that the courts, for good reason, prefer to decide cases on their substance rather than on technical points, I was inclined in favour of granting the postponement on the terms sought. Counsel for the first second and fourth respondents, however, opposed any such course. He did so on two bases. Firstly, he submitted that an invalidly taken decision by the NEF to institute proceedings was legally incapable of ratification. Secondly, he argued that little point would be served by the postponement if, as he submitted, proceedings to enforce the claim on motion had been misdirected and the case should have been instituted by way of action. Supplementing the applicant's replying could not meet that problem. In that case, he submitted, it would be preferable, and more convenient, to simply dismiss the application on the lack of authority point and leave it to the applicant to commence afresh on a summons.

[10] In support of the first of the aforementioned bases for his opposition to a postponement, counsel for the respondents argued that the NEF was a trust in the ordinary sense and that it was subject to the provisions of the Trust Property Control Act 57 of 1988. He sought support for this contention in the admitted fact that the NEF has a registration (IT) number issued by the Master. It is common knowledge that such 'registration numbers' are issued when a trust instrument is lodged in terms of s 4 of the Trust Property Control Act at the office of a Master. He then sought to rely on the judgments in *Simplex (Pty) Ltd v Van der Merwe and Others NNO* 1996 (1) SA 111 (W) and *Lupacchini NO and Another v Minister of Safety & Security* 2010 (6) SA 457 (SCA), which were to the effect that transactions purportedly concluded by trustees prior to their having obtained authority from the Master in terms of s 6(1) of the Trust Property Control Act were not only invalid, but also incapable of subsequent ratification.

[11] In my judgment the first basis for the respondents' opposition to the postponement is unsound for a number of reasons.

[12] The NEF is not a trust in the strict or narrow sense, or, in particular, in the sense of the Trust Property Control Act. As noted in Cameron et al, *Honoré's South African Law of Trusts* 5th ed. at §2, 'In the strict or narrow sense a trust exists when the creator or founder of the trust has handed over or is bound to hand over to another the control of property which, or the proceeds of which, is to be administered or disposed of by the other (the trustee or administrator) for the benefit of some person other than the trustee as beneficiary, or for some

impersonal object.' The Trust Property Control Act applies, almost without exception, to such trusts. The concept is defined for the purposes of that Act in s 1 as follows:

> '**trust** means the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed-
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> (a) to another person, the trustee, in whole or in part, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument; or
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> (b) to the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument,
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> but does not include the case where the property of another is to be administered by any person as executor, tutor or curator in terms of the provisions of the Administration of Estates Act, 1965 (Act 66 of 1965)'.

A '*trust instrument*' is defined in the same section to mean '*a written agreement or a testamentary writing or a court order according to which a trust was created*'. The trustees of the NEF do not dispose of the funds made available to the Trust by the *fiscus* or by donation in terms of a '*trust instrument*', as defined in the Trust Property Control Act. They are not appointed in terms of a 'trust instrument', as defined, and they do not derive or exercise their powers from or in terms of such a 'trust instrument'. The trustees do not fall to be removed by the Master or a court in the sense contemplated by s 20 of the Trust Property Control Act; their removal for misconduct or disability lies instead in the remit of the Minister of Trade and Industry. The Trust is a *sui generis* juristic person established in terms of a statute. Neither the Trust Property Control Act nor the NEF Act vests the Master with any oversight responsibility in respect of the NEF. The fact that the Master might have purported to treat the NEF as a trust within meaning of the Trust Property Control Act, notwithstanding that it plainly is not, obviously has no effect on its juridical character as determined upon a proper construction of the statutes.

[13] The two judgments upon which counsel for the respondents relied turned upon the proper construction of s 6 of the Trust Property Control Act. They held that the provision directly prohibited a trustee (within the meaning of the Act) from doing anything in that capacity unless authorised thereto in writing by the Master. Following the well-established principle enunciated by Innes CJ in *Schierhout v Minister of Justice* 1926 AD 99 at 109 that '*It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect.*', the judgments held that it is impossible to ratify that

which the law has prohibited; see also in this regard *Neugarten and Others v Standard Bank of South Africa Ltd* 1989 (1) SA 797 (A) at 808D-E. In the current matter there is no prohibition of any kind against the NEF instituting proceedings. On the contrary, it is expressly empowered to do so; and its trustees, who, collectively, are its guiding mind, are also empowered to delegate the function to do so to the CEO and he may sub-delegate the function to a committee or other structure. If any of these permitted functions were to be carried out by any functionary or structure of the NEF without the necessary authority, nothing in the Act prohibits the Board from ratifying it. The institution of proceedings in the current matter in the circumstances is not a nullity, as it would be if there had been an absolute lack of legal capacity; it is merely limping in the absence of authority. Any absence of authority is amenable to rectification by means of ratification. Moreover, in the case of the NEF, the trustees do not act personally in exercising their powers as trustees of the type of trusts regulated by the Trust Property Control Act do, they act rather on behalf of the trust as a juristic person, rather as the directors of a company would do.

[14] I am also not persuaded by the second leg of the respondents' counsel's argument that the requested postponement should be refused. As the argument is one that may still be pursued in the principal case, I do not propose to go into it in any detail. Suffice it to say that *prima facie*, at least, I consider that the issues relied upon in support of the contention that there was a reasonably anticipatable dispute of fact in the matter which made it inappropriate for the applicant to use motion proceedings is predicated on questions extraneous to the *lis* between the applicant and the respondents; more particularly, the operation of the franchise and co-operation agreements. The applicant was not a party to the franchise agreement and the respondents were not privy to the co-operation agreement. It would appear that the franchisor disposed of the first respondent's business to a third party in terms of the franchise agreement. The proceeds of such disposal were paid over by Primi Piatti to the applicant and credited to the first respondent's account with the applicant. The possibility of such a transaction taking place in given circumstances was something that was contemplated in terms of the co-operation agreement. There is an issue concerning the disposal of the first respondent's business by Primi Piatti and about the amount that was paid over by Primi Piatti to the applicant pursuant thereto. As I understand the papers, it is not in dispute that R650 000 was paid over to the applicant by the franchisor. The contention is that it should have been R700 000. That to me seems to give rise to an issue between the first respondent and Primi Piatti. The mutual rights and obligations created in terms of the franchise and co-operation agreements appear to me to be quite discrete to those which exist between the

applicant and the first respondent in terms of the loan agreement. The mere acknowledgement in the franchise agreement of the existence of the co-operation agreement did not give rise to any rights by the respondents in terms of the co-operation agreement. Any inadequacy in the amount paid by Primi Piatti to the applicant consequent upon the disposal of the first respondent's business appears to me *prima facie* to be a matter between the first respondent and the franchisor and does not affect the applicant's rights in terms of the loan agreement. Accordingly, I am not persuaded that it is probable that it will be held in the principal proceedings that the dispute between the first respondent and Primi Piatti concerning the terms on which the franchise outlet business was disposed of and the application of the proceeds rendered it inappropriate for the applicant to proceed against the first respondent for the recovery of the loan debt by way of application.

[15] The prejudice occasioned to the respondents by the postponement is capable of being met by an award of the wasted costs. The applicant's counsel confirmed that the tender of costs included the respondent's counsel's fee in respect of the preparation for the hearing, it being appreciated that because the matter is not likely to proceed for some months it will be necessary for counsel to work up the matter afresh when it is ripe for hearing.

[16] The following order is made:

1. The application is postponed *sine die*.
2. The applicant is given leave to supplement its replying papers to deal more fully with the authority challenge raised by the respondents in respect of the institution of these proceedings.
3. The applicant is ordered to pay the wasted costs incurred by the first, second and fourth respondents as a consequence of the postponement; such costs are to include counsel's fee in respect of preparation for the hearing on 11 February 2015.

A.G. BINNS-WARD

Judge of the High Court