IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 11895/19

In the matter between:

THE TRUSTEES OF THE RAE FAMILY TRUST (T2031/2000)	Applicant/ First respondent in reconvention)
and	
NEVILLE JOHN LEDGER	First respondent/ Second applicant in reconvention
THE TRUSTEES OF THE GRACE VIRTUE LEDGER TRUST (IT5322/1996)	Second respondent/ Third applicant in reconvention
BISIPLEX (PTY) LTD T/A TRAKA LEGACY INVESTMENTS	Third Respondent/ First applicant in reconvention
PETER SHAUN ARCHER	Second respondent in reconvention
WILLY JOHN MERTEN	Third respondent in reconvention
RALPH WERNER KOSTER	Fourth respondent in reconvention
THE WESTERN CAPE PROVINCIAL MINISTER FOR TRANSPORT AND PUBLIC WORKS	Fifth respondent in reconvention

THE WESTERN CAPE DEPARTMENT FOR TRANSPORT AND PUBLIC WORKS Sixth respondent in reconvention

Date of hearing: 29 October 2020 and 2 November 2020
Date of Judgment: 6 November 2020
(to be delivered via email to the parties' legal representatives at 12h30)

REASONS FOR ORDER DATED 2 NOVEMBER 2020

Henney, J:

Introduction:

[1] This is an application by the applicant ("Bisiplex") in which it disputes the authority of the attorneys of the respondents, the Rae Family Trust ("the Rae Trust"), in terms of rule 7 (1) of the Uniform Rules of court. A condonation application, in which the applicant seeks to condone late filing of rule 7 (1) application, a striking out application in respect of paragraph 39 of the answering affidavit filed by the Rae Trust and an application postponing the counter application until such time as the Rae Trust has fully complied with the applicant's rule 7 (1) notice.

[2] The Rae Trust is an *inter vivos* Trust, duly constituted as such in terms of a written Trust deed, and is registered with the Master of this court in terms of the Trust Property Control Act, 57 of 1988 ("the Act") and registration number T2031/2000. It is stated as such in the main application in which it is described as being represented by Trustees for the time being, and having its address at Edward Nathan Sonnenberg Inc. ("ENS"). It is also so cited in the counter application.

Mr. Weinkove SC and Miss Neser appear for Bisplex and Mr. Dickerson and Mr. Edmunds appear for the Rae Trust.

The facts which underpins this application

[3] In its founding affidavit in support of this application, Mr. Paul Andrew Craig Clarke ("Clarke") the director of the applicant in reconvention states that according to the letters of authority, the Rae Trust appointed two trustees as of 8 October 2015. They were identified as Barry Louis Rae ("Rae") and Alwyn Van Graan. On 13th October 2020 during the course of proceedings in this matter, Rae passed away, which caused the proceedings to be adjourned. According to Clark, this raises questions regarding the authority of the ENS attorneys to act on Rae Trust's behalf and continue with these proceedings.

[4] Regarding the application for condonation, Clarke states that he has been advised that the rule 7 (1) allows for a party to challenge an opposing attorney's authority to act, within 10 days after it has come to the notice of a party that such person is so acting, or with leave of the court, on good cause shown at any time before judgment. According to Clark, it was only following the passing of Rae during the course of the proceedings that Bisiplex began doubting the applicant's attorney's authority to continue acting and not before. Accordingly, there was no reason at any time prior hereto, to serve a rule 7 (1) notice on the applicants.

[5] He submits that there is now good cause to request the Rae Trust's attorneys to produce proof of their authority to continue acting for the Rae Trust. Mainly, so as to avoid wasting the court's time and the accumulation of unnecessary costs by the respective parties. It is their view that given the fact that the applicant is a Trust, it is not unreasonable for Bisiplex to request sight of the documents identified in the enclosed rule 7 (1) notice following the passing of one of the trustees of that Trust.

[6] He further stated that their attorneys addressed a letter in which it requested the applicant's attorneys to clarify the authority to act on behalf of the applicant. In

the letter to ENS, Bisiplex's attorneys at paragraph 5 state that their client has always been of mind to settle this matter and now more than ever wish to pursue the possibility earnestly. They stated that insufficient time has passed to allow the Rae Trust to properly assess its position and consider the prospects of settlement. They further stated that they were advised that counsel appearing for the Trust has conveyed that a settlement of this matter is unlikely and as such, they deemed it necessary to enquire as to whom they are now taking instructions from and require a copy of the Trust instrument and resolution granting ENS its mandate.

[7] The Rae Trust attorneys in response thereto in their letter, do not sufficiently demonstrate their authority to act on behalf of the Trust for the reasons set out in the rule 7 (1) notice attached to his founding affidavit. It is their wish to have the dispute between them amicably resolved and as such, they need to know who to approach in order to discuss the possibility of settlement. And as Rae was the principal driving force of this litigation on behalf of the Rae Trust, they do not know who the Trust's instructing attorneys is. He was advised that should the Rae Trust's attorneys in fact not be validly authorised so to act, any such action stands to be reviewed and set aside.

<u>The Rae family Trust on the other hand opposes the application on the following grounds:</u>

[8] Firstly, the condonation for the late filing of the rule 7 (1) notice and leave to dispute ENS' action should be refused on the grounds that judgment has already been given in relation to a number of aspects, of the main application and certain aspects of the counter application, which precludes Bisiplex from invoking rule 7 (1). That the dispute in relation to ENS's authority is not bona fide and it is hopelessly out of time. That in any event, no good cause is demonstrated for Bisplex to be granted leave to dispute the authority and the dispute is in any event, not bona fide. Secondly, no case is made for condonation of Bisiplex's non-compliance with the rules of court *inter alia* because Bisiplex inexcusably delayed any challenge to ENS'

authority. The primary ground for disputing the authority is that the Rae Trust did not attach to their affidavits a resolution authorising their opposition to the counter application and mandating ENS or the late Rae to act, but Bisplex has known about this since those affidavits were filed on 24 March 2020. That ancillary ground relied upon is the death of Rae on 13 October 2012, but Bisiplex knew of this when it agreed on 14 October 2020 to resume the hearing on 28 October 2020 and then delayed the rule 7 challenges for 11 days until Sunday, 25 October 2020 which is unacceptable and prejudicial. Thirdly, there is no legal and factual basis to compel ENS to comply with the notice or to obtain a postponement for this purpose, as rule 7(1) merely requires ENS to satisfy the court that it is authorised to act, failing which it may no longer do so.

[9] In this regard, they submit that ENS has from the outset been duly mandated and authorised by all the trustees of the Rae Trust to oppose the counter application; and the original mandate continues until it is discharged by the conclusion of these proceedings, or otherwise terminated by the Rae Trust. And in any event following Rae‘s death, Mr. Tommy Dunn (“Dunn”) was appointed and now holds office as a trustee in his place. Both the current trustees (Dunn and Van Graan) have confirmed on oath that ENS remains mandated to oppose the counter application. Furthermore, there is in any event a written trustees’ resolution passed in 2019 authorising Van Graan to appoint ENS and he has stated that he has authorised the proceedings and ENS’ mandate.

[10] Before dealing with the issues as raised by the parties, it would be appropriate to once again have a look at the provisions of rule 7 (1), which forms the basis of this application. It stipulates that “… *the authority of anyone acting on behalf of the party, may within 10 days after it has come to the notice of a party that such a person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, where after such person may no longer act unless they satisfy the court that he is authorised so to act, and enable him to do so the court may postpone the hearing of the action or application.”*

[11] It seems that the reason for this application was unfortunate and untimely death of Rae, a Trustee of the Rae Trust. This led to Bisiplex doubting the Rae Trust's attorneys to continue acting; and not before. Clark in his affidavit states that there was no reason at any time prior to this happening to serve a rule 7 (1) notice on the Rae Trust. This was fortified by the belief that given that the applicant is a Trust, it was not unreasonable for them to have requested a copy of the Trust instrument and resolution granting ENS its mandate. The Trust deed of the applicant provides as follows in paragraphs 4.3 and 4.4:

"There shall at all times be not less than 2(TWO) trustees, provided that in the event of the number of trustees being less than two due to death or resignation of a trustee or trustees, or for whatever reason, then the remaining trustee or trustees as the case may be, shall be entitled to act for the purposes of appointing fresh trustees, and failing unanimity of the trustees in this regard, then the majority decision shall suffice.

Barry Rae, shall at any time be entitled to nominate a person to succeed him as Trustee on his death. Any aforesaid nominations will be made either in any last will and testament or in any other written document…"

It is not in dispute that in his will, Rae appointed Dunn to succeed him as trustee and also as executor of his estate, which Dunn accepted.

Condonation:

[12] Regarding the application for condonation, the Rae Trust submits that this application is hopelessly out of time for various reasons cited above.

But more importantly, that at no stage during Bisiplex's joinder application to challenge ENS's mandate or entitlement to act on behalf of the Rae family Trust or its trustees. They did so for the first time on Sunday, 25 October 2020, only two court days before the agreed date for the resumption of the hearing. Had the authority been challenged prior to Rae's death, they would have procured the power of attorney from the Trustees of the Trust authorising ENS to act on behalf of the

applicant in the main and counter applications. Now that Rae has passed away, Bisiplex has chosen opportunistically to challenge such authority in order to engineer a postponement of the proceedings. This has been done at the latest possible stage, days before the agreed resumption, and after counsel had been retained and costs incurred in respect of the resumption.

[13] I do not agree with these submissions of the applicant that the rule 7 (1) application is out of time for the simple reason that it is common cause that Bisiplex, never disputed ENS's authority to act on behalf of the applicant until Rae's passing. It is common cause that the rule 7 challenge was launched on 25 October 2020, 8 court days after Rae's passing. It was only then that Bisiplex began doubting the ENS's authority to continue acting and not before. In terms of the rule, such an application must be brought within 10 days after it has come to the notice of a party that such person is acting. And this is common cause on the papers that has come to the notice of the respondents on the death of Rae on 13 October 2020.

[14] There was no dispute as to the authority of ENS to act on behalf of the applicant prior to that event. Therefore, Bisiplex brought the application within the time period as prescribed in the rule.

<u>The striking out application:</u>

[15] Bisplex submitted that paragraph 39 of the answering affidavit of Mr. Levetan ("Levetan"), be struck out in terms of rule 6 (15) because it is scandalous, vexatious and irrelevant. They further submit that the matter contained in paragraph 39 of the Rae Trust is not only an answering affidavit, is not only hearsay, vexatious and scandalous but it also discusses details of settlement negotiations made without prejudice and it is therefore improperly included in this affidavit. It is written to create a false impression that Bisiplex has attempted to extort Rae and has acted in bad faith, which is prejudicial to Bisiplex.

[16] They further contend that as a rule of law, the without prejudice is truly based on public policy. The parties to disputes are to be encouraged to avoid litigation with the expense, delay, hostility and inconvenience it usually entails, by resolving the differences amicably in full and frank discussions without the fear that, if the negotiations fail, any admissions made by them, during such discussion may be used against them in ensuing litigation. According to Bisplex, this rule has not been respected by Mr. Levetan in this paragraph. It is devoid of any reliable allegations and has been drafted for no other purpose than to try to paint the Bisiplex in a bad light.

[17] In reply to this application in their heads of argument, the Rae Trust submits that no offer of settlement had been made since the application was argued in May 2020. They further submit that settlement discussions conducted in bad faith are not protected by privilege and the purpose of raising this issue was to demonstrate that Bisiplex has no genuine intent on settling.

[18] A court in coming to the conclusion whether the material contained in an affidavit should be struck out, it must be satisfied that, such a matter sought to be struck out must be scandalous, vexatious or irrelevant. The following is said by Levetan in paragraph 39 "*… On 4 September 2020, the applicant's legal team consulted with Messrs Rae and Dunn in the chambers of senior counsel, in preparation for the oral testimony phase of this litigation. The question of settlement was raised. Mr Rae explained that prior settlement discussions had broken down: he characterised Bisplex's demands for substantial sums of money in order to withdraw its claim to a via ex necessitate as being in bad faith and extortionate, and that Bisiplex's failure to respond to a reasonable proposal made by the Rae Family Trust meant that the matter would have to be fought to its end, inclusive of any appeal. I was accordingly, and forcefully instructed, that no further settlement discussions should be entertained".*

[19] The content of this paragraph, in my view, is clearly aimed at creating the impression that Bisiplex wanted to extort a substantial amount of money from Rae in exchange for them (Bisiplex) to withdraw the counter application. It further creates the impression that Bisiplex, acted in bad faith and were unreasonable in its demands. This is clearly an attack on the credibility of Bisiplex and is highly prejudicial. It is furthermore, based on inadmissible hearsay and irrelevant evidence and deserves to be struck out. Paragraph 39 of the answering affidavit is therefore, struck out.

Submissions regarding ENS's mandate

[20] Rae Trust contends that because Van Graan had appointed Dunn and Dunn after having accepted the appointment, he is a properly appointed trustee. They contend that Bisplex is wrong in their submission that a trustee is not appointed and has no locus standi until the Master has issued letters of authority in terms of section 6 of the Trust Property Control Act. In this regard, they rely on *Honore*[1] at 218 where the learned authors' states *"... A Trustee who is properly designated, qualified and has accepted office thereby becomes a trustee."*

[21] Mr. Dickerson in his heads of argument submitted that Bisiplex 's argument is legally flawed, and conflates the appointment of a trustee, with a trustee's written authorisation under the act, which is plainly wrong and contrary to the established authority. In this regard, he further relies on the view of the learned authors *Honore,* where they on page 219 express the position as follows:

"The *act recognises and preserves the distinction between the appointment of a trustee, which occurs in terms of the trust instrument, and the trustee's written authorisation, which derives from the Master by virtue of statutory powers. The trust instrument remains a defining source of the trustee's power and may have to be*

[1] Honore's South African Law of Trusts, 5th edition.

consulted by persons i dealing with the trustee… While the creation of a trust in general thus remains a private act, the authorisation of a trustee ceases to be so."

[22] Mr. Dickerson further submits that the significance of this decision in the context of civil litigation is clear: a trustee who has been appointed, notwithstanding that the Master may not have issued letters of authority in terms of section 6 of the Act, nonetheless has *locus standi* to oppose the proceedings. In this regard, he relies on the decision of *Watt v Sea Plant Products Beperk [1998] 4 All SA 19(C).* He, therefore based on this decision, submits that both Van Graan and Dunn now have *locus standi* to oppose the counter application and because they have *locus standi*, they are similarly empowered to appoint legal representatives to oppose the application. He further submitted that moreover, Van Graan remains authorised to engage ENS in terms of the resolution referred to above.

[23] He submits that Bisiplex's reliance on *Lupacchini v Minister of Safety and Security 2010 (6) SA 457 (SCA*) is entirely misplaced. In that case, he says the trust deed required a minimum of two trustees and at the time of issuing summons, only one of the trustees had been issued with letters of authority by the Master. The summons was thus judged to be a nullity. The case did not concern rule 7 or deal with the question of, if, and when a validly given mandate terminates. It furthermore did not consider the situation in which the parties presently find themselves, in which there was a valid mandate when proceedings were commenced and the counter application defended. And if this thesis is correct, then every defendant trust with a minimum trustee requirement in its deed of Trust, could, if not faring well in litigation, simply bring litigation to a halt by allowing one or more trustees to resign.

[24] Mr. Dickerson submitted that *Lupacchini* went to great lengths to distinguish *Watt* because it recognised explicitly (and said so in paragraph 13), the views expressed by *Conradie J* in *Watt* could not be faulted. It was for that reason that *Nugent JA* in *Lupacchin*i stated that the real question was "*not whether the trust has a sufficient interest, but instead whether they were capable of suing or being sued*

that all." And he submitted that in this case, the question does not even arise because it is not about whether the Rae Trust is capable of being sued as proceedings are well underway and are being conducted pursuant to a court order. There is thus no room to question the capacity of the trust to be sued under the circumstances.

[25] He further submitted that at the time when the main application was instituted and the opposing affidavit in the counter application was filed, the Rae Trust plainly and properly authorised both trustees or anyone of them to instruct ENS. In this regard, Rae said on oath that he was authorised to institute the main application and to oppose the counter application, and he had clearly appointed ENS as the Rae Trust's attorney of record for this purpose. He submitted that even if Rae was the representative of the Trust who engaged mostly with ENS, he was acting as a representative of the Trust, and not as a principal. His death did not terminate the mandate as his principal continued in law to exist.

[26] Bisiplex admitted that Rae was authorised to oppose the application and it identified ENS as the Trust's attorneys of record and service address. Both Van Graan and Rae were involved in the prosecution of the main application and the counter application, and the payment in ENS' fees in that regard. Therefore, the mandate of ENS, he submits, continues and Bisiplex erroneously assumes that the death of a trustee terminates a mandate or contract of agency to which the Trust is a party. These principles apply in the case of an individual, the Trust he submits should be regarded as a separate entity, and the death or resignation of a trustee does not bring Trust to an end, and a Trust, unlike a natural person, does not "die".

[27] A contract of agency in which the principal is a natural person terminates upon his death, because an agent cannot act for non-existent principal. This plainly does not apply in the case of a Trust, because the Trust (which is a legal entity), survive the death or resignation of his Trustees. Consequently, an instruction or

mandate given by the Trust remains unaffected by the death or resignation of one or all of its Trustees or representatives.

[28] He further submitted that the relationship between an attorney and its client is based on *mandatum* with some features which are peculiar to that kind of agency.[2] And that the attorney has authority to conclude a juristic act on behalf of his or her client, which the client has by word or conduct expressed the intention that the attorney has power to do so. There can be no doubt that the Rae Trust authorised ENS and appointed it as its attorney of record. In these circumstances, the relationship between the attorney and his or her client is usually terminated by the completion of the services to be rendered generally or in connection with a particular matter.[3] Or it is terminated as a result of a number of possible reasons such as death or revocation.

[29] Regarding Bisiplexi's contention based on the rationale that the rule 7(1) is to establish the mandate of the attorney concerned, which is to prevent a person whose name is being used throughout the process, from repudiating the process altogether, who would afterwards say that he or she had given no authority. This procedure is to prevent persons bringing an action in the name of a person who never authorised it. He submits that, that does not arise in the context and facts of this case, which is based on the affidavits filed by Rae, Van Graan, Dunn and Levetan that there is no prospect of the Rae Trust ever repudiating or suggesting that ENS was not authorised or was acting on a frolic of its own.

[30] He further submitted that while subrule 7 (1) does not prescribe the method of establishing authority where it is challenged, it merely requires that the person concerned shall satisfy the court that he is authorised. This can be done by adducing any acceptable form of proof, and not necessarily by filing a written power of

[2] LAWSA. Legal Practitioners, Vol 14 Part 2 2ed. Paragraph 3 of 6 and the authorities cited in footnote 1.

[3] Mr Dickerson also made reference to the matter of Ex Parte Culverwell (1921) OPD 71 at 73

attorney. In this context, he referred to *Administrateur Transvaal v Mponyane and Others*[4], which held that the authorisation of the attorneys whose authority had been challenged can be inferred from the fact that they [the parties to the proceedings] made affidavits resisting the confirmation of the rule.

[31] Rae (as the former Trustee of the Rae Trust) made numerous affidavits in which he confirmed the authority of the Trust. Dunn and Van Graan have similarly made affidavits in the present proceedings. He submits the following factors decisively demonstrate ENS's authority: (1) resolution authorising each of Van Graan and Rae to appoint ENS; (2) Bisplex's own acknowledgement that ENS is the attorney of record for the Rae Trust for purposes of serving the counter application on the Rae Trust; (3) the affidavit by Rae filed in opposition to the counter application in which she confirmed that he was authorised to oppose application, and (4) Bisiplex's admission is replying affidavit of this authority.

[32] Miss. Neser on the other hand submits that there was no compliance by the Rae Trust with rule 7 (1) and that there can only be compliance until such time as the Master has issued Dunn with letters of authority in terms of section 6 (1) of the Act. The court cannot simply ignore the provisions of; and the requirements put in place by legislation. And before a trustee is recognised by law as such, and permitted by the law to bind a specific Trust, that person must be authorised in writing by the Master as described in section 6 (1) of the Act. This section provides that "… *Any person whose appointment as trustee in terms of the trust instrument, section 7 or a court order comes into force after the commencement of this act, shall act in that capacity only if authorised it in writing by the Master*."

[33] She submits that as a result of Dunn not being yet authorised to act as trustee, by the Master, the Rae family Trust currently has a sub minimum of trustees,

[4] 1990 (4) SA 407 (WLD) at 409 B-E; 409 G

and by virtue of clause 4.3 of the trust deed, the trustees cannot bind the trust, and the Rae family Trust suffers from an incapacity to act. Furthermore, the trustees cannot bind the Trust nor can ENS bind the Rae Trust by continuing on litigation and incurring liabilities purportedly on its behalf.

Analysis:

ENS' mandate

[34] It is not in dispute, that for the purpose of these proceedings, a resolution was taken by the trustees of the Rae family Trust between 13 and 14 February 2019 whereby they authorised anyone or more of Van Graan or Rae as representatives or any other person authorised by anyone of them to conduct business with ENS on behalf of the Trust. The question to consider is whether, this authority or mandate given to ENS, to proceed with further proceedings had been terminated upon the death of Rae. From the facts of this case, is clear that Rae, in his last will and testament appointed Dunn to succeed him as trustee of the Rae Family Trust upon his death. Following the passing of Rae, Van Graan appointed Dunn as co-trustee. It is common cause that Dunn has not yet submitted the prescribed documents to the Master to have his appointment as co-trustee of the Rae Family Trust authorised and confirmed by letters of authority.

[35] It is common cause that the only trustee of the Rae Trust to which the Master issued letters of authority to administer the Rae family Trust in terms of section 6 (1) of the Act on 5 October 2015, were the late Rae and Van Graan. Bisiplex contends that the main driving force behind the litigation, Rae passed away on 13 October 2020 and that the Master has not issued any further letters of authority since those issued on 5 October 2015. And in terms of clause 4.3, the Trust deed required at all times that there *shall at all times* be not less than 2 (TWO) trustees provided, in the event of the number of trustees being less …, the remaining trustee(s) be entitled to act for the purpose of appointing fresh trustees. In terms of clause 4.4, the trust

allows for Rae to nominate a person in his last will and testament to succeed him as trustee on his death.

[36] I agree with the submission of Miss Neser, that a Trust does not have legal personality. In the well-known case often quoted as authority in cases like these of *Land and Agricultural Bank of South Africa v Parker and others ("Parker")*[5] *Cameron JA* (as he then was) laid down the following principles that have to be considered when dealing with a Trust at paragraphs [10] and [11], which can be summarized as follows: Except where statute provides otherwise, a trust is not a legal person. It is an accumulation of assets and liabilities, which constitutes the trust estate which is a separate entity. But though separate, the accumulation of rights and obligations comprising the trust estate does not have legal personality. It vests in the trustees and must be administered by them-and it is only through the trustees, specified as in the trust instrument that the trust can act. Who the trustees are, their number, how they are appointed, and under what circumstances they have power to bind the trust estate are matters defined in the trust deed which is the trust's constitutive charter. Outside its provisions, the trust estate cannot be bound. It follows that a provision requiring that a specified minimum number of trustees must hold office is a capacity defining condition. It lays down a prerequisite that must be fulfilled before the trust estate can be bound. When fewer trustees than the number specified are in office, the trust suffers from an incapacity that precludes action on its behalf. This is not to say trust ceases to exist. Nor is it to say that the trust obligation falls away.

[37] The existence of the rights and obligations that constitute the trust estate should not be confused with the question whether and in what manner the trust can be bound. It is axiomatic that trust obligation exists even when there is no trustee to carry it out. The Court or the Master will, where necessary, appoint a trustee to perform the trust, but it does not follow that a sub minimum of the trustees can bind a trust. It is therefore clear, that a provision requiring that a specified minimum number

[5] 2005 (2) SA 77 (SCA).

or sub minimum of trustees must hold office is a capacity defining condition. And as pointed out earlier above on the strength of the decisive authority of *Parker*, it lays down a prerequisite that must be fulfilled before the trust estate can be bound. That is when fewer trustees than the number specified in office, the trust suffers from an incapacity that precludes action on its behalf.

[38] I agree with Miss. Neser. Clause 4.3 of the Rae Family Trust deed contains such a capacity defining condition. In order for the Rae Family Trust to be bound by the actions of the trustees, it is necessary for there to be legally recognised trustees appointed to administer and act for the Rae family Trust. The importance of the Master's authorisation was underscored in *Simplex (Pty) Ltd v Van Der Merwe*[6] *where Goldblatt J said:*

> "*I am further of the view that s 6(1) is not purely for the benefit of beneficiaries of the trust but in the public interest to provide proper written proof to outsiders of incumbency of the office of trustee. (Honoré's South African Law of Trust 4th ed at 179.) The whole scheme of the Act is to provide a manner in which the Master can supervise trustees in the proper administration of trusts properly and s 6(1) is essential to such purpose. By placing a bar on trustees from acting as such until authorised by the Master, the Act endeavours to ensure that trustees can only act as such if they comply with the Act. This ensures that the trust deed is lodged with the Master and that security, if necessary, is lodged with him before trustees start binding the trust's property.*
>
> *It was further submitted on behalf of the respondents that, because the Act neither provided that unauthorised acts were invalid nor that such acts were criminal offences, it was not the intention of the Legislature to have such acts visited with the penalty of being treated as a nullity. I do not agree with this submission. It seems to me that the failure to provide for a criminal sanction points to the fact that the Legislature saw no need to punish a party criminally for an act which could have no legal consequences. Further, it seems to me*

[6] 1996 (1) SA 111 (WLD) at 112J-113E

that it was so self-evident to the Legislature that an act by a person not having the requisite authority was of no force and effect that it did not deem it necessary to spell out such a conclusion in the Act: '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.' Per Innes CJ in Schierhout v Minister of Justice 1926 AD 99 at 109".

[39] Mr. Dickerson relied on the case of *Watt v Sea Plant Products*[7] ,where *Conradie J* was of the view that in order for a trustee to act on proceedings on behalf of the Trust, it was not necessary for him or her to have an authorisation of the Master but merely the necessary locus standi to be sued. He said the following; *" Locus standi in iudicio is an access mechanism controlled by the court itself. The standing of a person does not depend on the authority to act. It depends on whether the litigant is regarded by the court as having a sufficiently close interest in the litigation."*

According to *Conradie J* "…*The question, then, to be posed in casu is whether at that time summons was issued the trustees' interest in the Trust was too remote*"

He further stated that "…*The answer to this question depends upon the nature of the trustee's appointment. Where a trustee has been appointed-in a trust deed or otherwise-the appointment is not void pending authorisation by the Master in terms of section 6 (1) of the act (cf. Metequity Limited and Another v NWN Properties Limited and others [1997] 4 All SA 607(T) at 611 a-d). Although a trustee's power to act in that capacity is suspended by section 6 (1) of the Act, he or she, in my view, have a sufficiently well-defined and close interest in the administration of the trust to have locus standi in iudicio. Any conclusion that the second and third defendants were by section 6 (1) of the act deprived of locus standi in iudicio (which would mean not only that they could not be sued but also that they could not approach the court to protect the interests of the trust) would not give effect to the intention of the legislature. Whilst recognising the desire of legislation to regulate the rights and*

[7] [1998] 4 All SA 19 (C).

duties of trustees in the act, we should, I think, be slow to conclude that it would have the desired to accomplish this by controlling the access to, or accountability in, a court of law."

[40] Mr. Dickerson submitted that the court in *Lupacchini* went to great lengths to distinguish because it recognised explicitly that the views expressed by *Conradie J* could not be faulted and it was for that reason that *Nugent JA* said that the real question was "*not whether the trustees has a sufficient interest but instead whether they are capable of suing or being sued at all".* In this regard, he submitted that in this case, the question does not even arise, which is that it's not about whether the Rae Trust is capable of being sued, because proceedings are well underway and are being conducted pursuant to a court order. He therefore submits that there is no room to question the capacity of the Trust to be sued under the circumstances.

[41] I once again disagree with Mr. Dickerson because it is not about the question of the capacity of the trust of being capable to sue or be sued, because the trust, although it is a separate legal entity, does not have legal personality, such legal personality vests in the trustees who administers the rights and obligations of the trust. And in *Lupacchini Nugent JA* pertinently said that the court in *Watt,* although it could not find much fault with the views expressed by it, the true question it had to address was not whether the trustees had sufficient interest, but instead whether they were capable of suing or being sued at all. In this particular case, as well as in the *Watt* and *Lupacchini* case, true question was whether the trustees, for want of authorisation by the Master lacked the capacity to institute legal proceedings or to defend legal proceedings. Because it is only through the trustees that the trust can act. In this particular case, clause 4.3 of the Rae Trust deed requires that a specified minimum number of trustees must hold office which is a capacity defining definition, which lays down a prerequisite that must be fulfilled before the trust estate can be bound or conduct any business on behalf of the trust. On the passing of Rae, only Van Graan remains as a trustee.

[42] Although Dunn has been appointed by him, his letter of authority in terms of which he is authorised to act in the capacity as trustee on behalf of the trust, is still to be sought from the Master, in terms of section 6 (1) of the Act. Which clearly states that any person's appointment as trustee in terms of a Trust instrument such as Dunn, shall only act in that capacity if authorised in writing by the Master. *Nugent JA* in *Lupacchini* stated at paragraph 23 that "… *The section makes it clear that a trustee may not act in that capacity at all without the requisite authorisation. If we were to find that acts performed in conflict with that section are valid it seems to me that we would be giving legal sanction to the very situation that the legislature wish to prevent. Parker makes it clear that legal proceedings commenced by persons who lack capacity to act for the trust are a nullity, and I see nothing in the section to suggest that trustees who are prohibited from acting in that capacity are in a better position."*

[43] In my view, as things stand currently, even though, Van Graan appointed Dunn as trustee, Dunn can only act in such capacity unless he is authorised thereto in writing by the Master, which he at this stage has not been given. This clearly creates a situation that the Rae Trust has fewer trustees than the number specified and it therefore suffers from an incapacity that precludes the other trustee, Van Graan to act on its behalf.

[44] Mr Dickerson submitted that in terms of the mandate given to ENS, it permits any one or more of Van Graan or Rae or any other person authorised to conduct business with ENS. And Van Graan, being one of those anyone or more persons still has the authority to conduct business with ENS. That may very well be so but, that does not cure the incapacity. Which in terms of clause 4.3 makes it peremptory that "… *There shall at all times be no less than 2 (TWO) Trustees*" … which is the specified minimum number of trustees to hold office for a trustee to act on behalf of the Rae Trust. *(emphasis added).* In *Parker, Cameron JA*, said the following in this regard at [14] "…[*The] trustee body envisaged in the trust deed was not in existence, and the trust estate was not capable of being bound."*

[45] A further argument that may be raised is that *Parker* is distinguishable from this case, because in *Parker,* when obligations were incurred to bind the trust, there were fewer trustees than the number specified in the trust deed, whereas in this particular case, that was not the situation because both trustees were appointed by the Master and could at that stage bind the trust. And for this reason, Mr. Dickerson submits that the mandate is still valid and the rights and obligations of the trust still exist. Whilst I agree with him that the existence of the rights and obligations of the trust continues to exist, the difference is however, as stated by *Cameron J* in *Parke*r, is that there *shall be* a specified minimum number of trustees *at all times* to administer the trust and through which the trustees as specified in the trust can act. Whilst there might have been a mandate that gave ENS the authority to act, such mandate however, for it to be valid and for it to continue until the completion of this case, can only be proceeded with if the trustees have the authority to act on behalf of the trust. No such authority presently exists and the mandate ceases to be valid.

[46] A further argument advanced by Mr. Dickerson was that the mandate given, which was properly authorised to ENS, still subsists even after the death of Rae, and even though the number of trustees are fewer than the number specified. And such mandate subsists until the completion of the services rendered unless it is terminated. If this argument is correct, then it means that because of the fewer number of specified trustees, they will have no power to withdraw the mandate that was legitimately given by the previous trustees when they were properly constituted and had the capacity to grant such a mandate. Such a situation would be untenable because it would mean that ENS, would be able to proceed with a mandate in circumstances where there are no trustees that will have the power in law to give them instructions or to withdraw their mandate due to Dunn's lack of authorisation.

[47] In *Parker*, the High Court before a single Judge granted an order for the sequestration of the trust and the founder of the trust. The trust obtained leave to the full court which set aside the sequestration of the trust and upheld the appeal on

the basis that the trust's defence that the trust deed did not empower the two trustees to transact with the bank in the absence of the peremptory minimum of three trustees. It later became apparent during the proceedings that based on the arguments that the subminimum of trustees was not in office, even though a third trustee was appointed due to the fact that one of the trustees were declared insolvent, the trust during the appeal before the full bench once again had two trustees. Even though the insolvent trustee signed the trust's petition for leave to appeal to the SCA and the full Court, the remaining two trustees during the appeal process could not act on behalf of the trust. The trust did not validly petition the SCA as well as the full court.

[48] The argument of the trust that the original resolution which the three trustees adopted to resist the initial sequestration application covered the subsequent steps, i.e. the application for leave to appeal before the full court as well as the SCA was dismissed, because the original resolution that was authorised when all three trustees were in office was only to oppose the application for sequestration in the court of first instance and did not authorise an appeal.

[49] Whilst the facts and circumstances of that case may be different to this one, what is however apparent is that where there was a mandate that was given by the minimum specified number of trustees to proceed with legal proceedings at one stage, such a mandate lapses due to the fact that one of the trustees was disqualified to hold his position. This resulted in a situation that there was a fewer number of trustees than the minimum specified number as required, to proceed with the legal proceedings. In such a case, the SCA held that the trust was not before the court and the matter was struck from the roll with costs. Similarly, as happened in this case where as a result of the death of Rae, the trust lacked the minimum specified number of trustees to proceed with the legal proceedings in this case. The trust therefore, in my view, is not in a position to proceed unless the minimum

specified number of trustees are appointed and gives the necessary authorisation to proceed.

Conclusion:

[50] Given the nature and manner in which the hearing of this interlocutory application was dealt with, mainly on the papers, although I had given the parties the chance to address me on any further issue that they felt needed to be addressed in an open court on Monday, 2 November 2020. I granted an order without any reasons at 14:00 later that day, such order included that the costs of the application are granted in favour of Bisiplex.

[51] The question of costs should not have been dealt with in the manner I dealt with in the order of 2 November 2020, given the nature of this matter, which firstly dealt with the capacity of the trust to proceed with the counter application and secondly, the question whether ENS still has a mandate to act on behalf of the Rae Trust. Given the reasons for my ruling, which I set out above, it is clear that the trust was not before the court and that the attorneys, ENS, had no authority to act on behalf of the trust as the trustees lacked capacity to proceed further. In the order granted on 2 November 2020, I granted costs to Bisiplex, which was essentially a costs order against the trust that was incapable of acting and was not before the court. This order was a patent error and in terms of rule 42(1) (b), falls to be rescinded.

[52] In my view, such an order should not have been granted, whilst the proceedings are still pending before me and; whilst the Trust is in the process of remedying the Rae trust's lack of capacity to act through its trustees, which was not caused as a result of any conduct on the part of the trustees, but due to the unfortunate circumstances of Mr. Rae's death. The remedying of the trust's lack of capacity will give the trustees the power to issue a fresh mandate to ENS, in order

for the hearing to proceed. In my view, the appropriate order regarding costs should be that that costs of this application will be costs in the cause. The order given on 2 November 2020 in this regard, is then so amended. In the result therefore, the order issued on 2 November 2020 remains in place except paragraph 6 thereof, which is the following:

1) The application for condonation in terms of Rule 7(1) is granted.

2) The application to dispute the authority of Edward Nathan Sonnenbergs Inc (ENS) is granted.

3) The application to compel ENS to comply with the attached Rule 7(1) notice, insofar as the authority to act on behalf of the Rae Trust had been affected by the death of Mr Rae is granted.

4) The application to strike out para 39 of the Respondent (the Rae Trust) answering affidavit is granted.

5) The application for postponement in order for the Rae Trust to have the required number of trustees appointed by the Master in terms of Clause 4.3 of the Trust Deed and to grant Edward Nathan Sonnenbergs Inc the necessary authority to further proceed as attorneys on behalf of the Rae Trust in these proceedings, is granted. The proceedings are therefore postponed sine die.

6) The costs of this application will be costs in the cause.

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R.C.A. Henney

Judge of the High Court