



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

Shepstone & Wylie Attorneys v Abraham Johannes de Witt N O & Others (1270/2021) [2023] ZASCA 74 (26 May 2023)

Today, the Supreme Court of Appeal (SCA) handed down judgment dismissing with costs, an appeal against the decision of the KwaZulu-Natal Division of the High Court, Pietermaritzburg (the high court).

The issue before the SCA was whether the high court was correct in upholding the Penvaan Property Trust's (the trust) defence and finding that the resolution taken to sign the suretyship agreement was invalid and of no force or effect.

At the time of the litigation, the trustees of the trust were Mr Thomas Wilhelm Volker (Mr Volker), Mrs Volker and Mr Abraham Johannes de Witt (Mr de Witt). During 2012, Mrs Volker requested the appellant, Shepstone & Wylie Attorneys, to represent her in a divorce action against her husband, Mr Volker.

The trust owns property from which various companies, in which it is a sole shareholder, were trading. It survived on an income generated by these companies. Firstrand Bank Limited (Firstrand) liquidated these companies. Mrs Volker had no independent source of income. She depended on income received from the companies and was staying on a farm belonging to the trust.

During 2013, Firstrand brought an application in the high court for the sequestration of the trust. On 16 May 2013, Mrs Volker and Mr De Witt requested the appellant to represent the trust in the litigation with Firstrand and the trustees signed a power of attorney authorising the appellant to represent the trust in the litigation with Firstrand and to engage the services of senior counsel on their behalf. The appellant agreed to represent the trust. Due to the impecunious state of Mrs Volker, the appellant requested security for its fees and disbursements in the divorce action. This culminated in the signing of the deed of suretyship in favour of the appellant, in terms of which the trust bound itself as surety and co-principal debtor, jointly and severally, in favour of the appellant for the due payment of any and all amounts. On 16 May 2013, Mrs Volker gave notice of a meeting of the trustees to be held on 23 May 2013 for the purposes of tabling and considering the following resolutions: (a) that the trust resolves to oppose the sequestration proceedings instituted by Firstrand; (b) the trust ratifies the signature of the power of attorney signed by Mrs Volker and Mr de Witt on 16 May

2013; and (c) the trust resolves to sign the suretyship agreement in favour of the appellant for Mrs Volker's legal fees and disbursements.

On 25 May 2013, the meeting proceeded in the absence of Mr Volker. As result, the resolutions were taken by Mrs Volker and Mr de Witt, who subsequently signed the deed of suretyship in favour of the appellant. The trust contended that the deed of suretyship on which the appellant sued was not signed by all three trustees and was for that reason invalid.

The SCA held that a majority of the trustees may take a valid internal decision, but a valid resolution that binds a trust externally must be signed by all trustees, including the absent or the dissenting trustee. It found that clause 26 of the appendix specifically required that the trustees act unanimously for the purposes of conducting business for and on behalf of the trust. It found that on every possible interpretation of what happened on 25 May 2013, there was no room to conclude that Mr Volker participated in the decision-making. It therefore held that the high court was correct to conclude that the trustees did not act jointly.

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