THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 20062/2014

In the matter between:

STANDARD BANK OF SOUTH AFRICA LIMITED **APPELLANT**

and

GERHARDUS JOSHUA SWANEPOEL NO **RESPONDENT**

Neutral Citation: *Standard Bank v Swanepoel NO* (20062/2014) [2015] ZASCA 71 (22 May 2015)

Coram: Lewis, Mhlantla, Pillay JJA and Schoeman and Dambuza AJJA

Heard: 11 May 2015

Delivered: 22 May 2015

Summary: The naming of a trust as a party to a contract, despite the fact that it does not have legal personality, does not render the contract invalid where it is clear that its trustees or trustee acted for the trust in concluding the contract.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Hughes J sitting as court of first instance).

The appeal is upheld with costs. The order of the court a quo is set aside and replaced with the following:

'The exception is dismissed with costs.'

JUDGMENT

Lewis JA (Mhlantla and Pillay JJA and Schoeman and Dambuza AJJA concurring)

[1] At issue in this appeal is whether a duly registered trust can be named as a party to a contract, concluded by the sole trustee on its behalf. If not, the respondent, the defendant in the court a quo, claims that he is not bound by two transactions: a contract of loan (for agricultural production) and a business banking overdraft facility.

[2] The appellant is the Standard Bank of South Africa Ltd. On 3 November 2011 it concluded an 'Agricultural Produce Loan' with the first respondent, Johannes Swanepoel, acting for the Harne Trust, undertaking to lend some R1 312 860 to it on various terms. (I shall refer to the trust by name or as 'the trust'.) Secondly, Swanepoel had, also as trustee of the Harne Trust, opened a business banking account with the Bank in 2008, in terms of which the Bank undertook to lend and advance moneys from time to time on the overdraft facility granted.

[3] Swanepoel, in his personal capacity, had in 2009 signed a deed of suretyship guaranteeing the trust's obligations to the Bank, which would also have covered liability under the 2011 loan agreement. The trust defaulted on repayment of the loan capital and interest, and was overdrawn on the business account. The Bank instituted action against Swanepoel in his capacity as trustee of the trust and against him personally as surety. (It had also claimed against his brother as co-trustee, but withdrew the action against him as it transpired that he was not a trustee of the trust.)

[4] Swanepoel excepted to the particulars of claim, contending that the loan agreement purported to be between the Bank and the Harne Trust: a trust is not a legal person, he contended, and has no contractual capacity and thus no valid contract was concluded. Accordingly, no valid cause of action was disclosed against Swanepoel in his capacity as trustee and his accessory obligation as surety was also unenforceable being in respect of an invalid contract. The same exception was raised in so far as the business account was overdrawn.

[5] Hughes J in the Gauteng Provincial Division of the High Court upheld the exception. She held that because the trust was not a legal person, and that it could act only through its trustees, no contract of loan had been concluded and moneys advanced by the Bank to the trust, by way of overdraft, also had no valid underlying transaction. Thus the suretyship, being in respect of non-existent obligations, was likewise unenforceable. The appeal against this judgment is with the leave of the court a quo.

[6] The Bank argued on appeal that the finding of the court a quo, that a trust cannot enter into a contract because it is not a legal person, is contrary to legal principle and precedent, and fails to distinguish between trust capacity, authority and nomenclature. Accepting as we must, for the purpose of determining whether the particulars of claim disclose a cause of action, the fact that Swanepoel was the only trustee, or was authorized by any other trustee to enter into a binding contract for the

trust, the question is whether the loan to the trust was concluded by him on behalf of the trust.

[7] The basic principles governing the conclusion of a contract for a trust are worth repeating. They are set out clearly in *BOE Bank Ltd (formerly NBS Boland Bank Ltd) v Trustees, Knox Property Trust* [1999] 1 All SA 425 (D) at 432-7, a decision approved by Cameron, De Waal and Wunsh in *Honore's South African Law of Trusts* 5 ed (2002) at 71. McCall J, referring inter alia to *Commissioner for Inland Revenue v Friedman & others* 1993 (1) SA 353 (A) at 370E-I, and *Braun v Blann and Botha NNO & another* 1984 (2) SA 850 (A) at 859E-F, said (at 434h-i)

'However, whatever its true legal nature may be, both our common law and our legislation have recognised the existence of an arrangement whereby assets and liabilities are vested in a trustee or in trustees. This arrangement is, in everyday parlance referred to as "a trust" and individual trusts are often given a name in the deed conferring the trust property, and the powers to administer it, on the trustee or trustees.'

[8] This court in *Braun v Blann*, as McCall J pointed out, has referred to a trust as a 'legal institution sui generis'. It is a legal entity though it does not have legal personality. And the Trust Property Control Act 57 of 1988 defines a trust as 'the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed' to a trustee or to beneficiaries designated in the trust instrument.

[9] McCall J continued, in *BOE Bank* (at 436d-e): '[I]t is clear that in the developing law of trusts in South Africa, it is recognised that a trust has a legal existence, whether it be called "an entity", "an institution" or "an arrangement".' Moreover, said the court, cases in the name of a trust are not unknown – a reference to *Rosner v Lydia Swanepoel Trust* 1998 (2) SA 123 (W).

[10] In *BOE Bank* the court had to determine an issue on all fours with this matter: whether the principal debtor, for which a defendant had bound himself as surety, was sufficiently identified when referred to as a trust. McCall J said (at 436f-g):

'It may well be that it would have been more correct to describe the principal debtor as the named Trustees, in their capacity as Trustees of the Trust or as the Trustees for the time being of the Trust. Certainly, as appears from *Rosner's* case . . . where there is litigation against a trust, the trustees in their representative capacity and not the trust, as such ought to be cited. That however, is not the end of the matter because it is clear that . . . the identity of the creditor, the surety and the principal debtor must be capable of ascertainment by reference to the provisions of the Deed of Trust, extrinsic evidence . . . .'

[11] That principle has been affirmed often by this court including in *Sapirstein & others v Anglo African Shipping Co (SA) Ltd* 1978 (4) SA 1 (A) at 12B-E which dealt with the identity of the parties to a suretyship or of the principal debtor. If the identity of all the parties can be ascertained by having regard to a trust deed, or extrinsic evidence, a suretyship must be read accordingly. Indeed, even in construing a will where an estate, or its residue, is left to a trust, or a bequest is made to a trust, regard may be had to the trust deed to ascertain the identities of the trustees: *Kohlberg v Burnett NO & others* 1986 (3) SA 12 (A) at 25F-26B.

[12] In *BOE Bank* the court held that the description of the principal debtor as a trust in the deed of suretyship was sufficient identification and that the suretyship was enforceable. The principles enunciated by the court, and all the authorities on which it relied, are in my view correct. The question that then arises is whether this matter is in any way distinguishable.

[13] The Bank's particulars of claim (which I shall reflect as if action had not been instituted against Swanepoel's brother) alleged that Swanepoel had entered into a written agreement of loan in his capacity as a trustee of the Harne Trust duly represented by him. A copy of the agreement was attached. The agreement reflected Harne Trust, with its registration number set out, as the 'borrower'. The

agreement set out the amount of the loan, which was to be repaid over a period of eight months. The Bank was entitled to charge interest on the outstanding balance and to debit the account of the trustees for all advances, bank charges and interest. The agreement was signed by Swanepoel 'on behalf of the borrower', referred to again as the Harne Trust with its registration number.

[14] In so far as the overdraft with the Bank was concerned, the Bank also alleged that the application to open the business account was signed by Swanepoel on behalf of the Harne Trust, and that the suretyship signed by Swanepoel guaranteed the repayment of advances and payment of interest and costs.

[15] The Bank, according to the particulars, made advances in terms of the agricultural production loan, and pursuant to the business loan agreement, and debited the accounts with interest, fees and costs. The amount advanced and repayable to the Bank, it contended, was some R640 688, and the amount by which Swanepoel's account was overdrawn in February 2013 was some R66 342. It claimed these amounts plus interest.

[16] The agreements are both in standard form, as is the suretyship. The agricultural loan was authorized by a resolution of the 'Trustees of Harne (Proprietary) Ltd' a puzzling nomenclature (but undoubtedly an error arising because the resolution was in standard form and catered for companies, trusts and other legal entities), but was signed by Swanepoel as trustee. A resolution was embodied in the application for the business account, and that too was signed by Swanepoel 'for' the Harne Trust.

[17] In my view, while the documents were not carefully drawn, it is patent that Swanepoel, when signing the loan agreement and the application for the business account, was clearly doing so in his capacity as trustee of the trust. I fail to understand the argument for Swanepoel, accepted by the court a quo, that ex facie

the two agreements the Bank intended to contract with the trust, and not its trustee. Both contractual documents clearly designate the trust (as duly registered) as the party to the contract (the borrower) acting through Swanepoel as trustee. There is no indication whatsoever that Swanepoel was acting in his personal capacity. And there is nothing in the particulars of claim that suggests that the trust was in some way acting without a trustee.

[18] The court a quo quoted passages from the judgment of this court in *Land and Agricultural Bank of South Africa Ltd v Parker & others* 2005 (2) SA 77 (SCA) paras 9 and 10, where Cameron JA reaffirmed that a trust does not have legal personality and, in the absence of the authorization of the trustees, as required by the deed of trust, cannot be bound by a contract. The court a quo concluded from this that the Harne Trust could not have entered into a contract with the Bank. But *Parker* says no such thing. It simply emphasizes the principle that all trustees must act jointly in order to bind a trust, unless otherwise permitted by a trust deed, which might provide for prior authority to be given by the trustees to one of them. (See also *Thorpe & others v Trittenwein & another* 2007 (2) SA 172 (SCA) paras 9 and 12 to 14.)

[19] Hughes J also found that a court may not refer to extrinsic evidence to identify the parties to a contract, citing in this regard *KPMG Chartered Accountants (SA) v Securefin Ltd & another* 2009 (4) SA 399 (SCA) para 39. Again, the authority has no bearing on the issue. That paragraph dealt with interpretation of a contract and the parol evidence rule. Evidence to explain a provision or to identify parties or a merx is admissible, as the cases cited above show, and the passage in *KPMG* cited does not in any way suggest otherwise. It points out only that parol evidence may not be led to alter or vary the terms of a contract. And it says expressly that in interpreting a contract the court must have regard to the context, or factual matrix, which in this case would be all the documents relied upon and the trust deed.

[20] In the circumstances it is clear to me that, on the facts as alleged in the particulars of claim, a valid cause of action arising from default on the agricultural production loan and on repayment of the funds advanced on overdraft, is disclosed.

[21] Accordingly, the appeal is upheld with costs. The order of the court a quo is set aside and replaced with the following:

'The exception is dismissed with costs.'

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C H Lewis

Judge of Appeal

APPEARANCES

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