

# DISPUTE RESOLUTION ALERT

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INCORPORATING  
KIETI LAW LLP, KENYA

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**Trusts and suretyship: Is consent from a majority of trustees enough for a trust to conclude an agreement?**

In the decision of *Shepstone & Wylie Attorneys v Abraham Johannes de Witt N O and Others* (1270/2021) [2023] ZASCA, the Supreme Court of Appeal (SCA) had to determine whether the court *a quo* was correct in finding that a resolution taken by the majority of a trust's trustees was sufficient to authorise the conclusion of a deed of suretyship in favour of a third party.



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## Trusts and suretyship: Is consent from a majority of trustees enough for a trust to conclude an agreement?

In the decision of *Shepstone & Wylie Attorneys v Abraham Johannes de Witt N O and Others* (1270/2021) [2023] ZASCA, the Supreme Court of Appeal (SCA) had to determine whether the court *a quo* was correct in finding that a resolution taken by the majority of a trust's trustees was sufficient to authorise the conclusion of a deed of suretyship in favour of a third party.

### Issue before the court

The Penvaan Property Trust (trust) had allegedly signed a deed of suretyship in favour of Shepstone & Wylie Attorneys (appellant) as security for the personal indebtedness of Mrs Mignon Ranate Volker in respect of legal fees incurred in her divorce action.

The trustees of the trust were Mr Thomas Wilhelm Volker (Mr Volker), Abraham Johannes De Witt and Mrs Volker.

At the time of the divorce proceedings Mrs Volker had no independent source of income. She depended on income received from companies owned by the trust and lived on a farm owned by the trust.

Due to Mrs Volker's financial situation, the appellant requested security for its fees and disbursements in the divorce action. This resulted in the signing of a deed of suretyship in favour of the appellant, where the trust apparently bound itself as surety and co-principal debtor, jointly and severally in favour of the appellant for the due payments

of any and all amounts which were then or which at any time in future may become due, including but not limited to any and all legal costs or disbursements.

As at the date this matter was before the SCA the appellant had not been paid the legal fees incurred for Mrs Volker's divorce.

The appellant sought to enforce its security by seeking judgment in its favour holding the trust liable for the payment of these legal fees to the appellant under the terms of the deed of suretyship.

The trustees contended that no valid deed of suretyship had been concluded with the appellant and the trust was therefore not liable to the appellant for Mrs Volker's legal fees.

### Background to signing of the deed of suretyship

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, amongst other things, tabling a resolution for the trust to sign the aforementioned deed of suretyship.



The graphic features a gold diagonal stripe across a grey background. At the top left, it displays 'The LEGAL 500 EMEA' logo. Below this, the text reads: 'Dispute Resolution 2023 Rankings', 'Dispute Resolution practice is ranked in Tier 1.', 'Leading Individuals: Tim Fletcher', 'Recommended Lawyers: Jackwell Feris | Anja Hofmeyr | Corné Lewis | Rishaban Moodley | Mongezi Mpahlwa | Kgosi Nkaiseng Lucinde Rhodie | Clive Rumsey | Tim Smit', and 'Next Generation Lawyers: Kgosi Nkaiseng | Tim Smit'.

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Mr Volker responded stating that he would be unavailable during that week. Mrs Volker re-scheduled the meeting for 25 May 2013, and accommodated Mr Volker by making the location of the meeting closer for Mr Volker. This notwithstanding, Mr Volker was absent from the meeting, and Mrs Volker and De Witt passed the relevant resolution and signed a deed of suretyship in favour of the appellant.

### **Court a quo**

When the fees due and payable to the appellant remained unpaid, the appellant, relying on the deed of suretyship, brought an application to seek judgment against the trust. The trust opposed the application on the basis that the deed of suretyship was not signed by all three trustees and was thus invalid.

The trust contended that contrary to the provisions of the trust deed (i) the trustees did not act jointly and

unanimously in deciding and resolving to sign the deed of suretyship; and (ii) the suretyship was not for the benefit of the trust or its beneficiaries but for the personal benefit of Mrs Volker.

The High Court upheld the trust's defence.

### **Facts**

The issue before the SCA was whether the High Court was correct in upholding the trust's defence and finding that the resolution to sign the deed of suretyship was invalid and of no force and effect, thereby nullifying the deed itself.

The appellant challenged the order granted in the High Court on various grounds, including that the deed of suretyship was valid and enforceable. Relying on clauses 13.1, 13.2 and 14, the appellant argued that reasonable notice was given to the trustees and that the two trustees who were in attendance constituted the required

quorum in terms of clause 13.2 of the trust deed. These clauses read as follows:

### ***"Meetings of trustees***

*13.1. ... Any trustee shall be entitled on reasonable written notice to the other trustees to summon a meeting of the trustees. All trustees for the time being in the Republic of South Africa shall be given reasonable notice of any meeting of the trustees.*

*13.2. ... [T]he quorum necessary at any such meeting shall be two trustees (as amended on 31 January 2000).*

### ***Execution of documents***

*14. ... provided however that all such negotiable instruments, contracts, deeds and other documents shall be signed by at least two trustees."*

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The trustees opposed the appellant's submissions contending that the trust deed did not allow for the trust to be bound merely by majority decisions. They sought support for this contention by relying on clause 26 of the appendix to the trust deed. Clause 26 required decisions and resolutions to be taken unanimously by the trustees, acting jointly in resolving to sign instruments such as a deed of suretyship on behalf of the trust.

In making its decision, the SCA referred to, *inter alia*, the decisions of *Coetzee v Peet Smith Trust en Andere* [2003] (5) SA 674 (T) and *Thorpe and Others v Trittenwein and Another* 2007 (2) SA 172 (SCA), confirming that it is trite law that unless the trust deed contained a clause stating that majority decisions sufficed, then a joint decision of all co-trustees is required to bind a trust. In other words, save a specific clause in the trust deed, joint and unanimous conduct of the trustees is required to bind the trust.

Furthermore, the SCA confirmed the finding made in *Le Grange and Another v the Louis and Andre Le Grange Family Trust No 1562/95/ PMB and Others* [2017] ZAKZPHC, that trustees, when dealing with trust property, are required to act jointly. Even when the trust deed provides for a majority decision, the resolutions must be signed by all the trustees. 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.

The SCA also relied on the case of *Steyn and Others N N O v Blockpave (Pty) Ltd* [2011] (3) SA 528 (FB), which:

*"... drew the distinction between internal and external business ... although trustees may disagree internally on a matter, they are prohibited from disagreeing externally. Internal matters may be debated and put to*

*a vote, thereafter the voice of the majority will prevail. However, in so far as the trust is required to deal with external business all trustees are required to participate in the decision-making."*

### Conclusion

Applying the above principles, the SCA found that in reading the trust deed as a whole, and applying clause 26 of the appendix, even if majority decisions were authorised, those decisions had to be (i) at least considered by all the trustees; and (ii) confirmed by resolutions signed by all the trustees, even those dissenting:

*"As held by this court in Le Grange, the trustees, when dealing with trust property, are required to act jointly. Even when the trust deed provides for a majority decision, the resolutions must be signed by all the trustees. A majority of the trustees may*



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*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 therefore follows that where a trust deed requires that the trustees must act jointly if the trust is to be bound, a majority decision will not bind the trust where one of the trustees, such as in this case, did not participate in the decision-making. This is imperative particularly when the trustees are required to take a decision involving the assets of the trust. In the case where the majority decision prevails, all trustees are still required to sign the resolution."*

As Mr Volker had neither considered and/or contributed to the decision making at the meeting, nor confirmed the decision in the resolution authorising the signing of the deed of suretyship, the court found that the deed of suretyship was in fact invalid and the appeal was dismissed.

Although the principles allied to this case are not by any means novel, the take-away is that parties should continue to be diligent when concluding agreements with trusts. They should ensure that they are aware of clauses within the trust deed that could affect the authorisation of trustees or limit a trust's ability to conclude a transaction.

**Belinda Scriba and  
Katekani Mashamba**



Cliffe Dekker Hofmeyr

### 2023 RESULTS

**Chambers Global 2022 - 2023** ranked our Dispute Resolution practice in **Band 2: Dispute Resolution.**

**Chambers Global 2018–2023** ranked us in **Band 2** for Restructuring/Insolvency.

**Tim Fletcher** ranked by **Chambers Global 2022 - 2023** in **Band 2: Dispute Resolution.**

**Clive Rumsey** ranked by **Chambers Global 2019 - 2023** in **Band 4: Dispute Resolution.**

**Tobie Jordaan** ranked by **Chambers Global 2022 - 2023** in **Band 4: Restructuring/Insolvency.**

**Lucinde Rhodie** ranked by **Chambers Global 2023** in **Band 4: Dispute Resolution**

**Jackwell Feris** ranked by **Chambers Global 2023** as an upcoming dispute resolution lawyer.

**Kylene Weyers** ranked by **Chambers Global 2023** as an upcoming restructuring/insolvency lawyer.

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**BBBEE STATUS:** LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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