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TRUSTEES AND THEIR AUTHORITY TO ACT ON BEHALF OF THE TRUST

It's of paramount importance that trustees of a family trust must familiarize and comply with all the rules of a trust deed or they can be held accountable, and it could lead to the trust having its contracts declared invalid, or enforceable even though the trustees did not have the necessary authority.

In Nedbank Limited v Mhlari N O and Others (37766/2018) [2022] ZAGPJHC 719, the trust deed required that there must be a minimum of three trustees acting on behalf of the Trust. At the time the loan agreement was concluded with the bank there were only two trustees.

The trust argued that the loan agreement together with any suretyship concluded during the time when there were two trustees was invalid and the trust could not be bound by it.

The two trustees however provided Nedbank with a resolution stating that they were the authorised representatives of the Trust.

The bank argued that the two trustees could bind the Trust as the primary debtor through the principle of ostensible authority, which refers to where a representative appears to have the power to act but did not have the actual authority, and where a reasonable third party could comprehend that the agent (trustees) had the authority to act.

The court held that the Trust was bound by the terms of the loan arrangement. The court also concluded that ostensible authority and estoppel are legitimate defences to be invoked and ostensible authority was established when the trustees furnished a signed resolution to the bank confirming their authority to act and sign on behalf of the Trust, and the trust must be estopped from relying on a lack of authority to act.

To avoid lengthy litigation agents should ensure that they obtain the trust deed and letters of authority and ascertain that the trustees may indeed act.