REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case No: HC-MD-CIV-ACT-CON-2023/02608

In the matter between:

THE TRUSTEES FOR THE TIME BEING OF
THE NAMIBIA PROCUREMENT FUND II TRUST **PLAINTIFF**

and

IMPRINT INVESTMENTS (PTY) LTD **1ST DEFENDANT**
BPLC MANAGEMENT CONSULTANTS (UK) **2ND DEFENDANT**
VEIINASTOCKS HOLDING GROUP INTERNANTIONAL
(PTY) LTD **3RD DEFENDANT**
JUSTUS STANLEY VEII **4TH DEFENDANT**
MARIA NDANDELILA VEII **5TH DEFENDANT**
BARRY GERALD STOCKS **6TH DEFENDANT**

Neutral Citation: *The Trustees for the time being of the Namibia Procurement Fund II Trust v Imprint Investments (Pty) Ltd* (HC-MD-CIV-ACT-CON-2023/02608) [2024] NAHCMD 191 (25 April 2024)

Coram: MASUKU J
Heard: **8 April 2024**

Delivered: 25 April 2024

Flynote: Civil Procedure – Summary judgment in terms of rule 60 – Requirements to be met by applicant – Types of claims subject to rule 60(1) – Rule 32(9) and (10) – Whether failure to comply strictly therewith in the context of this matter, should lead to striking out the application for summary judgment – Law of Contract – Circumstances in which a contract can be resiled from on grounds that duress was applied before entry into the contract - Law of Trusts – Whether a trustee can enter into an agreement without evidence that the other trustees support that agreement.

Summary: The parties, being the applicant and the respondents entered into an agreement for the advancement of funds. The applicant claims that the respondents failed to comply with their undertakings in terms of that arrangement. As a result, an acknowledgement of debt was signed by the parties, with a trustee signing purportedly on behalf of the trustees and the respondents signing same. The applicant approached the court seeking payment of the amount acknowledged to be owing in terms of the acknowledgement of debt and ancillary relief. The respondents contend that some of the relief sought is incompetent on account of the applicant seeking the transfer of shares of the first respondent to the applicant. The respondents further contend that the acknowledgment of debt was signed by them pursuant to a threat by the applicant's trustee and for that reason, the summary judgment should not be granted. The respondents further alleged that there was no evidence that the trustees were involved and took part in the signature of the acknowledgement of debt.

Held: That the relief sought by the applicants relating to the transfer of shares to the applicant from the first respondent, is incompetent as it does not fall within the relief set out in rule 60(1).

Held that: The parties moved the court to condone their respective non-compliances – the applicant in not filing the rule 32(10) report timeously and the respondents in filing their opposing affidavits late. As such, the overriding objects of judicial case

management did not warrant that the issue raised by the respondents be entertained. The policy of the courts to deal with matters on their merits and the quest to avoid loss of time and increasing costs militated against upholding the respondents' contention that the application should be struck from the roll for non-compliance with rule 32(10) timeously.

Held further that: The respondents did not make factual averments in support of their claim that there was duress behind their decision to sign the acknowledgment of debt in question.

Held: The respondents' contention that the trustees were not involved in the signing of the acknowledgement of debt has merit for the reason that in terms of the applicable law, trustees are required to act jointly and in the instant case, there was no evidence or allegation that the trustees were involved in the decision to sign the acknowledgement of debt. As such, the court could not therefor grant summary judgment and the matter was thus referred to trial.

ORDER

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1. The application for summary judgment as prayed, is refused.
2. The applicant is to pay the respondents' costs, subject to the provisions of rule 32(11).
3. The parties must file a joint case plan, together with a proposed case planning draft order on or before close of business on 17 May 2024.
4. The matter is postponed for a case planning conference on **23 May 2023** at **08h30**.

RULING

MASUKU J:

Introduction

[1] The question confronting this court in this ruling, acuminates to this – is this a proper case in which to grant summary judgment and some other ancillary relief? The parties are at odds regarding this very question. The applicant states without equivocation that this is an appropriate case for the court to grant this relief. The respondents, on the other hand claim that a grave injustice would be occasioned to them if this relief against them is granted as prayed. For that reason, they claim that the application must thus be dismissed with costs.

[2] In the ensuing pages of this judgment, hopefully not too many, I will attempt to decide this major question and in the process, justify the decision with full reasons whether or not to grant the application.

The parties

[3] The applicant for summary judgment in this matter is the Trustees for the Time Being of the Namibia Procurement Fund II Trust, which is a trust registered in terms of the applicable law. Its principal place of business is cited as being the corner of Jan Jonker and Lazarette Streets, Windhoek. The first respondent is Imprint Investments (Pty) Ltd, a company duly incorporated in terms of the company laws of this Republic, with its chosen *domicilium* situate at No 144, 4th Floor, Ikon Building, Jan Jonker Road, Ausspannplatz, Windhoek. The second respondent, is BPLC Management Consultants (UK), a corporation duly registered in terms of the company laws of the United Kingdom, with its chosen *domicilium* situated at the address of the first respondent. The third

respondent is Veiinastocks Holding Group International (Pty) Ltd, a company duly incorporated in terms of the company laws of Namibia, with its place of business situated at the *domicilium* of the first respondent.

[4] The fourth respondent is Mr Justus Stanley Veii, a male adult, whose address is situate at Erf No 250, Okaramba Street Wanaheda, Katutura, Windhoek. The fifth respondent is Ms Ndandelila Veii, an adult female, whose chosen address is No 1 Grace Court, Gladiola Street, Khomasdal, Windhoek. The sixth respondent, is Mr Berry Gerald Stocks, an adult male, whose address of service is the same address as that of the first respondent stated above.

[5] For purposes of this ruling, regardless of the appellations above, this being an application for summary judgment, I will refer to the applicant for summary judgment as such, alternatively, as 'the Trust'. The defendants will be referred to as 'the respondents'. Where it is necessary or expedient to refer to a particular respondent in his, her or its name, the appellation as a respondent in the citation above will be employed.

The relief sought

[6] The applicant has approached this court seeking the following relief, as prayed for in the notice of motion:

'1. Payment in the amount of N$30 467 486, 82.

2. Interest on the amount of N$30 467 486,82 at the rate of 2% per month and compounded monthly from 31 March 2023 to the date of final payment as agreed, alternatively at the rate of 20% per annum *a tempo morae*.

3. Leave for the plaintiff to apply to this court on amplified papers for the following order:

3.1 THE SHARES IN THE FIRST DEFENDANT:

3.1.1 An order in terms whereof the First to Sixth Defendants are directed to sign necessary documents and do such things as are necessary to effect transfer of 100% of the issued shares

in the First Defendant, from the Second and Third Defendants (or any other persons) into the name of the Plaintiff within five (5) business days of the order herein.

3.1.2 In the event of the First to Sixth Defendant's non-compliance with prayer 1 hereof, an order in terms whereof the Deputy-Sheriff for the District of Windhoek be duly authorized to sign all necessary documents and do such things on the First to Sixth Defendants' behalf as directed by Plaintiff's legal practitioners to effect transfer 100% of the issued shares in the First Defendant, from the Second and Third Defendants (or any other persons) into the name of the Plaintiff.

3.1.3 The Plaintiff is authorized to, upon compliance with prayer 1 and or 2 above, and at its sole election in terms of POC5 and POC6 to the particulars of claim:

3.1.3.1 sell or otherwise realise the Ceded Rights and Interests or any one of them by public auction; or

3.1.3.2 sell or otherwise realise the Ceded Rights and Interests by private treaty or.

3.1.3.3 take over the Ceded Rights and Interests at a fair value which, in the absence of agreement within 10 (ten) Business Days after delivery by the plaintiff to the first defendant of a written notice stating that it intends to exercise its rights pursuant to this clause 2.1.1.3.2 (of the acknowledgement of debt), shall be determined by an independent accountant agreed to by the parties or, failing agreement within 2 (two) Business Days, appointed, at the request of either party, by the President for the time being of the Institute of Chartered Accountants of Namibia (or the successor body thereto), shall be instructed to make his determination within 10 (ten) Business Days of being requested to do so and shall determine the liability for his charges which will be paid accordingly.

4. Costs of suit on the scale of attorney and own client as agreed.

5. The matter was defended by all the defendants who equally oppose this application for summary judgment. The plaintiff proceeded with the Rule 32(9) and (10) process and subsequently filed its application for summary judgment. Where there was non-compliance with rule 32(9) and (10) the plaintiff submits that compliance was dealt with and both parties' failure to comply and or serve the necessary papers in terms of the court order dated 18 January 2024.

6. Prayer 3 is abandoned for purposes of the summary judgment and the plaintiff only seeks judgment on the monetary claim in prayers 1, 2 and 4.

7. In opposition to the application, the defendants deposed to opposing affidavits attempting to satisfy the court that they have bona fide defence, which affidavit must of course disclose fully the nature and grounds of the defence and material facts relied upon.'

Background

[7] The applicant avers, in its particulars of claim, that on 14 March 2022, in Windhoek, the plaintiff entered into a written capital facility agreement with the first respondent. The latter breached this agreement, culminating in the parties entering into an acknowledgement of debt on 23 February 2023, between the applicant and the respondents.

[8] In pursuance of the terms of the acknowledgment of debt, the applicant claims the relief stated above, namely summary judgment. As intimated above, the respondents contest liability to the applicant. I deal with the applicant’s contentions and the bases of opposition by the respondents below.

The application and the defences raised

[9] The application for summary judgment is based on an affidavit deposed to by Ms Kaunapaua Ndilula, who states that she does so in her capacity as a trustee for the time being and executive trustee of the applicant. She makes the salutary allegations in the said affidavit and claims that the respondents have no bona fide defence to the claim but have entered an appearance to defend for no other purpose than to delay the applicant’s enjoyment of the fruits of the judgment.

[10] The respondents deny the allegation that they have defended the matter for purposes of delaying the enjoyment of the fruits of the judgment by the applicant. In their respective affidavits, they raise similar grounds and on which they claim the application for summary judgment should be dismissed with costs. First, they claim that the applicant has failed to comply with the provisions of rule 32(9) and (10) of this court’s rules.

[11] The respondents further contend that the relief sought by the applicant in relation to the transfer of shares to it, is incompetent and is not covered by the provisions of rule

60. They contend that it should, for that reason, be dismissed. Coming to the defences on the merits, the respondents' claim that the acknowledgement of debt relied on by the applicant in the application, is not valid. This is so, contend the respondents, because the deponent to the affidavit in support of the summary judgment, Ms Ndilula, alleges that she signed the acknowledgement of debt in a capacity that is unknown. The respondents state that in terms of the law, it must be the trustees that enter into a contract representing the trust and not an individual trustee as in the instant case.

[12] In the alternative, the respondent allege that should the court find that the acknowledgement of debt was signed by Ms Ndilula in her capacity as a trustee of the applicant, then in that event, the acknowledgement of debt was not signed by the trustees on behalf of the trust, resulting in the Trust not being legally bound by their acts. The last defence raised by the respondents is that when the acknowledgement of debt was signed by the respondents, they were coerced by Ms Ndilula into doing so. In this connection, it is alleged, she threatened them by saying that if they failed to sign the acknowledgement of debt, she would immediately terminate the Facility Agreement signed by the parties and exercise the 'step in clause' in terms of which she would take over the operations relating to the manganese ore at the centre of the agreement between the parties.

[13] It is the respondents' further case that as an incentive to the respondents signing the acknowledgement of debt, Ms Ndilula undertook not to pursue any litigation against the respondents in relation to any alleged breach of contract by the first respondent. On this score, the respondent roundly claim that the signatures on the acknowledgement of debt were procured improperly and thus renders the said acknowledgement unenforceable at law.

<u>Concessions or confessions</u>

[14] In the course of the arguments presented by the parties, certain concessions were made by both parties. First, the applicant conceded that the point taken by the

respondents that the relief sought in para 3 of the notice of application, was incompetent. This concession was correctly made when regard is had to the provisions of rule 60(1), which states that summary judgment may be moved only in respect of a liquid document; a claim for a liquidated amount; delivery of specified movable property and for ejectment.

[15] It is common cause that the relief prayed for by the applicant in prayer 3 relates to the transfer of 100 per cent of the shares in the first respondent to the applicant within five days of the granting of the application for summary judgment. It is plain, on whatever construction that the relief of transfer of shares is beyond the circumference of the relief obtainable by summary judgment as stipulated in rule 60(1). The concession was accordingly properly made by the applicant in this regard. Should the summary judgment application succeed, prayer 3 shall not be part of the order that will be granted.

[16] Mr Silungwe, for the respondents, also went into a concession corner. He conceded that there are no factual allegations made by the respondents on the basis of which it can be held that the signatures to the acknowledgment of debt were procured by undue influence, thus affecting the reality of consent, as it were. This concession was also properly made.

[17] I say so for the reason that case law is awash with the allegations that must be alleged by a party seeking to resile from an agreement, based on duress as the respondents do in this case. In a summary judgment, all that the respondents would have to allege, would be the grounds on which the trial court may, after the adduction of evidence, be satisfied that the reality of consent was indeed lacking. I am of the considered view that they would not be required, considering the nature and procedure followed in summary judgment, to persuade the court that what they allege as a basis for resiling from the acknowledgment of debt is indeed true.

[18] In *Sefelana Cash & Carry (Namibia) (Pty) Ltd t/a Metro Hyper v Eises*,[1] it was held that for a party to succeed on a defence in which a party alleges duress, the following elements must be alleged and proved, namely, actual violence or reasonable fear; the fear must be caused by the threat of some considerable evil to the party concerned or his or her family; the threat must be of imminent or inevitable evil; the threat or intimidation must be *contra bonos mores* and that the moral pressure applied must have caused damage.

[19] It is plain, from reading the allegations contained in the respondents' various affidavits that these requirements are not dealt with at all. As I have previously mentioned, in a summary judgment, the respondent would not be required to lead evidence of what happened that allegedly affected the reality of consent. The minimum they should do, is to make proper allegations, that meet all the requirements stated above, In other words, they have to make factual allegations on oath that would suggest to the court that there may have been some duress. In this regard, they have to deal with each of the necessary allegations. To merely make conclusions in that regard, devoid of any factual allegations, does not meet muster. The concession was accordingly correctly made by Mr Silungwe.

[20] In any event, as correctly pointed out by Ms Shigwedha, the pressure allegedly applied to the respondents, inducing them to sign the acknowledgement, are not, on any construction, evil or *contra bonos mores*. On the respondents' very version, the applicant or its representative, threatened to follow the agreement, as there was an alleged breach, namely, to institute proceedings as envisaged in the loan agreement.

[21] This cannot, on any interpretation, be said to be immoral or evil, as it is plain that the parties, in the agreement, contemplated that there may be non-compliance with the conditions by the respondents. The parties accordingly agreed that the applicant could approach the court for appropriate relief. Where the applicant, comprehending, rightly or

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[1] *Sefelana Cash & Carry (Namibia) (Pty) Ltd t/a Metro Hyper v Eises* (HC-MD-LAB-APP-AAA-2021/00028) [2021] NALCMD 46 (26 October 2021).

wrongly, that there was such a breach by the respondents, the respondents cannot be heard to say a threat to institute proceedings in terms of the agreement, is tantamount to duress, as alleged.

[22] It must be borne in mind what a respondent in an application for summary judgment is required to do. In this regard, reference is made to the learned author SJ van Niekerk.[2] He says the following, in part:

> '2.1 A defendant must go beyond the mere formulation of disputes and must disclose the grounds upon which he disputes the plaintiff's claim with reference to the material facts underlying the disputes raised.
> 2.3 Although the opposing affidavit need not focus upon each and every particular and the defence need not be presented with the precision of a plea, the affidavit must at least disclose the material facts of the defence. Vague allegations do not suffice – the court is not obliged on the defendant's behalf to search for a defence between loosely made allegations. The defendant must state his defence unequivocally or, at the very least, a defence must appear from the content of the opposing affidavit. The defendant cannot rely on the court to make deductions.'

[23] Having regard to what I have stated above, it becomes plain to me that insofar as the defence based on duress, is concerned, there are no facts stated in the affidavit that would suggest to the court that a case for the said defence has been made out. The affidavit falls far short of the required standard in terms of the content and the requisites to sustain the defence alleged.

[24] Having disposed of the concessions made by the parties, it is now opportune for the court to deal with what remain the live issues that require determination. The first is whether the provisions of rule 32(9) and (10) were not followed, requiring that the application be struck from the roll, therefor. The second issue relates to the question whether the acknowledgment of debt is valid for the reasons advanced by the

[2] SJ Van Niekerk, '*Summary Judgments – A Practical Guide,* Chapter 9.

respondents in that Ms Ndilula was not properly authorised to represent the Trust in appending her signature thereto. I shall deal with the rule 32 issue first.

[25] In his eloquent address, Mr Silungwe submitted that there was no proper or full compliance with rule 32(9) and (10). This, he contended, was for the reason that in terms of an order of court dated 2 November 2023, the applicant was required to comply with the said rule before 9 November 2023. In breach of that order, the applicant only complied with rule 32(10) on 17 November 2023.

[26] Relying on *Standard Bank Namibia Limited v Ngavetene,*[3] Mr Silungwe laid store on the finding that compliance with these subrules is mandatory and that strict compliance therewith is necessary. Whilst I have no compunctions regarding the correctness of the position taken in that case as being undoubtedly correct, sight must not however, be lost to the role that particular facts in a matter may play in the resolution of the question whether there must be a sanction for every non-compliance with rule 32(9) and (10). Ultimately, each case will turn on its peculiar facts and those will invariably determine how the court should exercise its discretion in that case, the facts playing a pivotal role in that enquiry.

[27] In this case, it is plain that the applicant was late in filing its rule 32(10) report. It was due to file this report on 9 November but only did so on 17 November 2023. For their part, the respondents failed to file their answering affidavits in due time. They were late by one day. Both parties intimated that they wished to file applications for condonation for the delay but they also implored the court, in order to redeem the time, to condone the non-compliance and to have the parties obtain dates as all the papers were already filed and the matter was ready for hearing. The court granted the latter order and relieved the parties from applying for condonation.[4]

[3] *Standard Bank Namibia Limited v Ngavetene* (HC-MD-CIV-ACT-CON-2020/04370) [2021] NAHCMD 45 (17 February 2021).

[4] See joint status report dated 16 January 2024.

[28] On 18 January 2024, the court issued an order allowing the parties to proceed with the matter on the merits, ie for them to file heads of argument and for the applicant to file a replying affidavit on the issue of condonation, if need be. The latter was abandoned by the applicant. In the premises, it is thus clear that the court decided, at the invitation of the parties, that the non-compliance with rule 32(10) and the late filing of the opposing affidavit by the respondents, were no longer of any moment. It is thus curious and concerning that the respondents would take a step back and seek to undo the court order by reverting to the rule 32(10) report, in the circumstances.

[29] In my considered view, the court took a pragmatic approach to the matter, considering that both sets of the protagonists, were *in pari delicto* as it were. In order not to run up costs; to redeem the time and to properly utilise the court's time and facilities, the court allowed parties to proceed with the matter without having to file fully fledged applications for condonation by both sides. As to why the applicant then developed withdrawal symptoms and sought to resuscitate the issue of non-compliance with rule 32(10), which the court had rendered unnecessary to deal with, considering the order it granted, is simply astounding.

[30] In the premises, the conclusion that this issue was not raised in good faith by the respondents, is in my view, inescapable. It was a closed issue that needed no resuscitation as there was, in any event, no proper basis to do so. In any event, the compliance with rule 32(10), is the responsibility of both parties. It is not the responsibility only for the applicant or plaintiff as the case may be. I therefor find that there is no merit in the rule 32(10) argument and it is thus dismissed.

<u>Validity of acknowledgement of debt</u>

[31] As foreshadowed earlier, the respondents take issue with the validity of the acknowledgement of debt. They do so primarily on the grounds that Ms Ndilula did not disclose the capacity in which she signed same. In this regard, so the respondents further contend, it is unclear whether she signed the said acknowledgement as a trustee

or in her personal capacity. This renders the said acknowledgment invalid, the respondents add.

[32] In this connection, Mr Silungwe referred the court to cases that deal with the legal status of a trust. In particular, great store was laid on the judgment in *Schuette v Schuette*[5] where this court held as follows:

'[11] It is trite that a trust is not a legal person. An *inter vivos* trust is governed by the terms of a trust deed as well as the provisions of the Trust Property Act 57 of 1988. In its strictly technical sense, a trust is a legal institution *sui generis*. In *Lupacchini v Minister of Safety and Security,* Nugent JA observed:
"A trust that is established by a trust deed is not a legal person – it is a legal relationship of special kind that is described by the authors Honore's South African Law of Trusts as a legal institution in which a person, the trustee, subject to public supervision, holds or administers property separately from his or her own, for the benefit of another person or for the furtherance of a charitable or other purpose.'

[33] He accordingly argued that the acknowledgement was not signed by the trustees but by Ms Ndilula in a capacity that is not explained on the face of the said document. It is thus unclear whether it was in her capacity as a trustee or in her personal capacity. This, it was argued, renders the acknowledgement of debt invalid. On another note, and in the event that the court finds that Ms Ndilula acted as a trustee when she signed the acknowledgement, Mr Silungwe had another bow up his string. He argued that in that event, Ms Ndilula could not act individually to bind the trust. Rather, all the trustees were required to act jointly so as to bind the trust. I will deal with these contentions below, starting with the earlier one.

[34] It is clear, on first principles that Ms Ndilula did not state the capacity in which she signed the acknowledgement of debt on the face of the said document. It is also plain that the trustees did however pass a resolution dated 7 April 2017, and by which Ms Ndilula was authorised to 'sign legal documents for and on behalf of NamPro Fund

[5] *Schuette v Schuette* (HC-MD-CIV-MOT-GEN-2019/00376) [202] NAHCMD 426 (18 September 2020).

II, which includes agreements pertaining to the establishment of facilities for the beneficiary clients, facility agreements, security agreements and guarantees issued by Bank Windhoek in favour of NamPro Fund II'.

[35] This included authority for her to sign service level agreements, third party agreements and agreements pertaining to the business operations of the applicant. I am of the considered view, and there is no countervailing argument to the contrary, that the wide scope of the language employed, included the signing of an acknowledgement of debt on behalf of the trust.

[36] The only issue is that the resolution was not attached to the founding papers. Should that, on its own, result in the court non-suiting the applicant and thus holding that it did not have the necessary authority to lodge these proceedings? Ms Shigwedha, for the applicant, helpfully referred the court to the judgment of this court in *Nedbank Namibia Limited v Ncel Contractors CC*[6] where this court, after referring to the works by Damaseb PT, entitled, Court-Managed Civil Procedure of the High Court of Namibia,[7] held that, 'The applicant need only allege that he or she is authorised to bring the proceedings. . . It was further held that if authority is then disputed, a resolution may be attached in reply or the bringing of the application may be ratified and proved in reply.'

[37] I am of the considered view that the resolution that was subsequently filed by the applicant, places the matter beyond doubt that Ms Ndilula was authorised to act for the trust in the instant application. That resolution is before court and it speaks for itself as to what powers were imbued on Ms Ndilula. I therefor find that the contention by the respondents that the capacity in which Ms Ndilula acted when she signed the acknowledgment of debt is unclear, cannot be upheld when regard is had to the resolution in question. Clearly, she could not and did not purport to act in her personal capacity but it is plain that what she did falls neatly within the rubric of the powers imbued on her by the resolution in question.

[6] *Nedbank Namibia Limited v Ncel Contractors CC* (HC-MD-CIV-ACT-CON-2022/02199) [2022] NAHCMD 511 (29 September 2022).

[7] P T Damaseb, *Court-Managed Civil Procedure of the High Court of Namibia* Juta & Co. 2021 p154.

[38] I now proceed to consider the alternative argument raised by Mr Silungwe. This was to the effect that the acknowledgment of debt was invalid for the reason that it was not signed by the other trustees. He relied on *Thorpe and Others v Trittenwein and Another*.[8] In that case, the Supreme Court of Appeal of South Africa dealt at length with the powers of a trustee to bind the trust. The court held that the trust could not be bound by the assent of a single trustee, in the absence of the joint decision of the co-trustees.

[39] At para [14] of the judgment, Scott JA made the following poignant remarks:

> 'The answer I think is that even if one regards the decision of the co-trustees to enter into the agreement of sale as no more than a matter of internal trust administration, the point remains that in the absence of the joint decision of the co-trustees (or the majority if that is all the trust deed requires) will not bind the trust. The reason is the rule that requires co-trustees to act jointly. This much is well established and was readily conceded by counsel. A trustee who was not party to the decision-making process and who therefore has not authorised the contract would be free to contest the validity of the transaction. In that event the other contracting party wishing to hold the trust bound would be obliged to prove the existence of that authority. The discharge of such a burden would ordinarily be no easy matter.'

[40] I am of the considered view, regard being had to the above reasoning that there is no evidence before this court to the effect that all or a majority of the trustees endorsed the decision to draft the acknowledgment of debt. There is no modicum of evidence that the trustees, who need to act jointly, assented to the acknowledgment of debt. This throws the validity of the acknowledgment of debt into question and that is not a matter that can be resolved by this court in proceedings such as the present.

[41] Not to be undone, Ms Shigwedha, in her argument submitted that in the event that the court relies, as it has done, on the finding in the *Thorpe* matter, the respondents are estopped from claiming that the parties in the action, are incorrect. She relied on the

[8] *Thorpe and Others v Trittenwein and Another* 2007 (2) SA 179 (SCA).

case of estoppel being *Wallis Trading Inc v Air Tanzania Co Ltd*,[9] where it was held that a party's contractual representations had the effect of contractually estopping it from subsequently alleging that an agreement it entered into, was invalid.

[42] I have not had the benefit of reading the actual judgment as it was not readily availed to the court. An attempt to search for it on line proved unsuccessful. What seems to me to be the position, from the little I could discern, however, is that it is where the party holds itself out as being duly authorised to act that it can be estopped from claiming that the agreement is invalid. In this case, it is not the respondents who would be regarded as having made the representations that they were authorised. This authority cannot, in the circumstances, apply to them. It was for the applicant to show that the trustees authorised the signing of the acknowledgment of debt and that averment is not before court.

[43] It must, in any event, be mentioned that what is serving before this court, is an application for summary judgment. Any finding that the trustees do not appear to have authorised the acknowledgment of debt, does not result in the dismissal of the claim. It merely means that the stringent nature and requirements of summary judgment, have not been met. The court is, in the premises, entitled to refer the matter to trial, where some evidence may possibly be placed before court in support of the version that the applicant has deposed to.

Conclusion

[44] In the premises, and having regard to the discussions, findings and conclusions made above, I am of the considered view that the application for summary judgment cannot be granted. There is no evidence that the applicant's trustees authorised the signing of the acknowledgment of debt as required by law. In the event, the application for summary judgment must be refused.

[9] *Wallis Trading Inc v Air Tanzania Co Ltd* [2020] EWHC 339 (Comm) (https://www.legalwise.co.za/help-yourself/legal-articales/acknowledgement-debt)

<u>Order</u>

[45] Having regard to what has been stated above, it seems to me that the proper order to grant in the circumstances, is the following:

1. The application for summary judgment as prayed, is refused.
2. The applicant is to pay the respondent's costs, subject to the provisions of rule 32(11).
3. The parties must file a joint case plan, together with a proposed case planning draft order on or before close of business on 17 May 2024.
4. The matter is postponed for a case planning conference on **23 May 2023** at **08h30**.

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T S MASUKU

Judge

APPEARANCES

PLAINTIFF:	E Shigwedha
	Of Dr. Weder, Kauta & Hoveka Inc., Windhoek
DEFENDANTS:	R Silungwe
	Of Ray Silungwe Practitioners, Windhoek