REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Reportable: Yes
Of interest to other judges: Yes
5/9/19
DATE
SIGNATURE

Case No.: A5023/18

In the matter between:

McNair Gillian Claire **Appellant**

and

Crossman Gerald **First Respondent**

Fletcher Warren John **Second Respondent**

JUDGMENT

Vally J

Introduction

[1] The appellant is the former wife of the late Mr Steven McNair (Steven). Prior to his death he registered the McNair Family Trust (the trust) with the Master of the High Court. Initially the trust was operated by Steven, the appellant and the first respondent. Upon his death the second respondent, in terms of the last will and testament of Steven, replaced Steven as a trustee. The first respondent was Steven's step-father. The second respondent was a long-time friend of Steven. Steven had a brother, named Mr David McNair (David), who

was involved with the first respondent in one of his businesses. The trust owns a share portfolio, which at the time of the application was valued at approximately R2 800 000.00, and a 75% shareholding in a company named and styled Top Spin Investments 101 (Pty) Ltd (Top Spin). The beneficiaries of the trust are the appellant and her two children.

[2] The second respondent is an accountant by profession and a director of a firm operating under the name and style of Alchemy Financial Services Incorporated (AFSI). He is also a director of a firm operating under the name and style of Alchemy Audit Services Incorporated (AASI).

[3] The relationship between the appellant, the first respondent (her step-father in law) and David made a turn for the worse, to the point where it has completely broken down. This has impacted on the operations of the trust as both the appellant and the first respondent are co-trustees. The second respondent, who is the third trustee, has been unable to avoid getting enmeshed in the conflict between the appellant and the first respondent. Perceiving him to be acting in cahoots with the first respondent and David, the appellant, with the support of her two children, brought an application to have both him and the first respondent discharged from their duties as trustees and replaced by two other individuals. They both opposed the application.

[4] The application was called before Mudau J who, in a carefully thought out judgment, considered her contentions and concluded that it should be dismissed with costs, and accordingly issued an order to that effect. Aggrieved

at the outcome the appellant, with the leave of Mudau J, appealed to this Court to overturn the order.

[5] Prior to the hearing the appellant settled her dispute with the first respondent who resigned as trustee of the trust, thus making it unnecessary for her to proceed with the claim against him. We were told that the settlement included a payment by the first respondent for some of the costs she incurred in pursuing her claim. The second respondent, on the other hand, elected to resist the appellant's quest to overturn the order. This appeal therefore is only concerned with the case against him. However, the nucleus of her case is to be found in her allegations against the first respondent and David. Hence, those allegations have to be scrutinised in detail in order to evaluate the merits of her case.

[6] As mentioned before the relationship between the appellant on the one hand and the first respondent and David on the other has irretrievably broken down. The cause, it seems, lies in the business dealings they had with each other. Their business relationship originates in the holdings of Steven in a company operating under the name and style of Applied Pneumatics SA (Pty) Ltd (Applied) and in the holdings of the trust in Top Spin.

Applied

[7] Applied started operating in 1991. It was initially owned solely by the first respondent. In March 2000 Steven acquired 100% of the shareholding of Applied. Sometime between 2000 and 2010 the first respondent acquired a 25%

shareholding in Applied leaving Steven with 75%. They were both directors in the company. In 2010 Steven was diagnosed with stage 4 lung cancer. He asked David to assist him in the running of Applied. He also gave 24% of the shareholding of Applied to David leaving himself with 51%. David and the appellant became directors of the company on 3 August 2010. On 7 August 2010 Steven passed away and upon his death the appellant inherited his 51% shareholding in Applied. For a while after Steven's death David managed the day-to-day affairs of Applied. In July 2014 the first respondent resigned as a director of Applied but retained his shareholding. At some point, the appellant's son Teven, who is also a beneficiary of the trust, was employed by Applied. At the beginning of 2015 the relationship between the appellant, David and Teven soured. Teven accused David of unlawfully benefitting financially in the way he conducted the affairs of Applied. The appellant made common cause with Teven. The acrimony between the appellant and David intensified and in June 2015 the appellant took complete control of the management of Applied.

Top Spin

[8] Top Spin's shareholding is divided between the trust and the first respondent in the proportion of 75% and 25% respectively. The appellant and the first respondent are both are directors in Top Spin. David has no interest in Top Spin. During or about March 2011 the AFSI was appointed to assist in managing the affairs of Top Spin. In terms of that appointment the second respondent, as a representative of AFSI, was mandated to take over and run the Top Spin bank account.

[9] Top Spin is a property holding company. It purchases, sells and lets property. It had concluded a contract of lease with Applied wherein it let one of its properties to Applied. During June 2015 Applied fell into arrears with the rental payments due to Top Spin.

Conflict in Applied and in Top Spin

[10] On 28 October 2015 the second respondent issued a formal notice to the appellant, the first respondent and to David inviting them to a meeting of Top Spin shareholders to discuss, amongst others, the "*action to be considered*" against Applied "*for continued breach of property rental leases*". The meeting would be held on 12 November 2015 at the premises of AFSI. This notice and the meeting that followed is a matter of controversy between the parties. The appellant contends that David was not a shareholder of Top Spin and therefore not entitled to an invitation to the meeting, nor was he entitled to attend the meeting and participate in the decision making regarding the affairs of Top Spin. According to the second respondent the first respondent "*sold his interest in Applied and in Top Spin to David as he* (the first respondent) *intended to retire.*" The second respondent claims that David was invited because he took over the shareholding of the first respondent in Top Spin. If this were true, then the second respondent needed to explain why the first respondent was invited to the meeting. However, he failed to do so.

[11] The meeting was held on 12 November 2015. The appellant, both respondents and David were present. The second respondent advised the

meeting that Applied was approximately two months in arrears with its rental obligations and that there was no formal lease agreement between Applied and Top Spin. The second respondent then suggested that each of the shareholders advance monies to Top Spin to meet operating costs. To this end it was suggested that the trust and David advance the required funding in the respective proportion of 75% and 25%. The second respondent claims that this was suggested because David was the 25% shareholder of Top Spin as he had purchased the shareholding of the first respondent. The problem with this explanation (assuming for the moment that it is accepted) is that it is a confession that the first respondent had no business to be invited to and attend the meeting. The second respondent cannot get away from the fact that only David or the first respondent should have been at the meeting as only one of them was a shareholder. Yet he invited both and he allowed both to be present. As it turned out the second respondent accepted that David was not a shareholder of Top Spin. This is dealt with later.

[12] Furthermore, David, despite being a shareholder and director of Applied asked why Applied had failed to meet its rental obligations. He was advised by someone present (the minutes do not say by whom) that it had cash flow problems. A resolution was passed stating that should Applied not bring the account up to date within three months then the appellant would personally be responsible for the payment of all outstanding rentals. The appellant claims that she was bullied by the two respondents and David to give this undertaking as she indicated in the meeting that she was concerned about protecting the interests of Applied. In her founding papers she goes further and alleges that it

was clear to her at the meeting that all three of them were determined to destroy Applied. She further contends that both respondents were fully aware that Applied had the funds to meet its rental obligations and that David was preventing Applied from making payment. In their answering papers, both respondents deny bullying her as well as colluding to destroy Applied. However, neither deal with her allegation that Applied was capable of meeting its financial obligations to Top Spin, and that David was obstructing Applied from liquidating its debt to Top Spin. Finally, given that either David or the first respondent was not entitled to be present when the resolution was passed (with both of them participating therein) it is of dubious legal validity. In fact, the situation gets worse for the second respondent. In a later meeting called by the second respondent, which will be dealt with in greater detail hereafter, David was not invited nor present because both respondents accepted that David was not and never was a shareholder of Top Spin.

[13] Nevertheless, given that all parties had acknowledged the indebtedness of Applied to Top Spin, the appellant, in her quest to ensure that Applied meet this obligation, wrote an email to David on 8 February 2016 stating:

> "Hi Dave
> We urgently require the Stanlib funds in order to continue trading. This includes paying creditors, buying more stock and paying the rent to Topspin [sic].
>
> Please will you release the funds, alternatively, I'll send you the invoice for the creditors and pro forma invoices for stock which we intend on [sic] purchasing and you can release the funds directly to these various entities.
>
> Please let me know as this is in the best interest of the [sic] Applied and [sic] we all have to act in the best interest of the company notwithstanding our differences and the time it takes to resolve it.

Please let me know soonest as this is urgent."

[14] The next day David replied in the following terms:

"Hi Gill

You aren't being serious? [sic]

After all you have accused myself and the family of and the numerous threats that you have levelled? [sic]. And this after you took R1.5 million without the consent of fellow directors !!!

I think NOT !!!"

[15] It has to be borne in mind that the efforts of the appellant to ensure that Top Spin was paid, which if materialised would have benefitted Applied (as its debt to Top Spin would have been liquidated and it would have avoided legal proceedings by Top Spin), Top Spin (as it would have been paid) and the trust (as it owned 75% of Top Spin). It would have also been in the best interest of the first respondent as he owned 25% of the Top Spin and 25% of Applied. The first respondent was copied in on both emails. He did nothing. As for the second respondent, apart from being a co-trustee of the trust he was, through AFSI and AASI, intimately involved in the affairs of Applied and Top Spin and therefore was fully apprised of her efforts. This is borne out by the following facts: AFSI is responsible for the monthly bookkeeping of Top Spin, the secretarial administration of Applied as well as the trust; AFSI is also the accounting officer of the trust; the second respondent was in full control of the bank account of Top Spin; AASI was the appointed auditor of both Allied and Top Spin; the second respondent represented both AFSI and AASI in its dealings with Applied, Top Spin and the trust.

[16] On 1 March 2016 the second respondent sent an email to the appellant, the first respondent and to David indicating that it was important to hold a meeting of Top Spin shareholders to discuss new leases and the outstanding rental payment from Applied. He proposed a date. The appellant responded stating that the date did not suit her and that she was able to meet on either 30, 31 March or 1 April 2016. The second respondent maintained that time was of the essence and that holding the meeting in the last week of March would prejudice the interests of Top Spin. As a result he set the meeting down for the 23 March 2016. The appellant took issue with the notice period given. Notwithstanding the appellant's non-availability concerns the meeting was held with only the two respondents present. David was excluded as it was now accepted by them that he was not a shareholder in Top Spin, although all the emails calling for the meeting were sent to him. The minutes wrongly record that the appellant had furnished an apology for her non-attendance and goes on to further record that:

> "Those represented, [sic] having regard for [the appellant's] comments, still [sic] agreed to waive the required notice, being that a quorum was represented [sic] ..."

[17] The meeting resolved that should Applied still fail to meet its rental obligations by 31 March 2016, legal action should be pursued against both Applied and the appellant. The basis for suing the appellant for Applied's debt is that she gave an undertaking at the Top Spin meeting that she would liquidate the debt of Applied. According to her the undertaking was given under duress.

[18] By 12 April 2016 Applied had still not paid the rental due. As a result the appellant received a letter from attorneys acting on behalf of Top Spin demanding that she pay the arrear rental of Applied, failing which legal action against her would follow. The letter of demand was never sent to Applied nor to David and the first respondent the other shareholders of Applied. It was sent at the instance of both respondents and without the involvement or concurrence of the appellant in her capacity as shareholder or director of Top Spin.

[19] On 6 May 2016 the appellant sent the second respondent a lengthy email alleging that he had failed to perform numerous duties for Applied for which he was remunerated. She further informed him in the email that she respectfully requested that he resign as a trustee of the trust as he was not acting in the best interests of the beneficiaries. His response was that he disagreed with her. However, he would call a meeting of the trustees and should the first respondent agree with her he would accede to her request. He also suggested that her two children, the other beneficiaries of the trust, be present as he was keen to hear from them. On 25 May 2016 a meeting of the trustees was called where the second respondent recorded that the appellant had requested that he resigns as trustee and that he refused the request as he believed that there was no legal basis for it.

[20] The appellant's attorney sent the second respondent letters on 6 June and on 9 June 2016 calling on him to resign as trustee failing which legal steps to compel him to resign would be taken. He refused to do so.

[21] During July 2016 the appellant requested that the second respondent furnish her with a letter confirming the shareholdings in Applied, which letter was to be sent to an overseas distributor for its satisfaction. The second respondent furnished the appellant with the letter wherein he identified the shareholders, spelt out their respective shareholdings and identified the directors of the company. This was all he was requested to do. However, he decided to include a damning paragraph at the end of the letter which he printed in bold. The paragraph reads:

> "Attention must be drawn to the fact that there are both criminal and legal proceedings that have been instituted by the directors and shareholders against each other, the outcome of which may have material statutory and financial consequences for the Company in the future."

[22] The context of the paragraph is this. The first respondent and David alleged that the appellant unlawfully enriched herself from the funds of Applied. According to the first respondent the actual amount by which she had enriched herself was R1 668 277. 62. According to David it was R1 500 000.00. The unlawful enrichment is supposed to have taken place after the first respondent had resigned as a director of Applied. The allegation is a very serious one. It had exacerbated the acrimony that initially was confined to the appellant, her son and David but now engulfed both the respondents. The appellant had laid a criminal charge against David, but David had not, at this stage, laid any criminal charges against her.

[23] The appellant wrote to the second respondent informing him that the contents of the paragraph were false as there were no criminal charges laid against her by David or anyone else. She asked him to alter the letter by

removing the damning paragraph. He refused to do so. As a result, the appellant chose not to send the letter requested by the overseas company. That company then cancelled the distributorship agreement between itself and Applied.

[24] The second respondent agreed that the contents of the paragraph were not true, but said that subsequently David had laid criminal charges against the appellant. Therefore he was not acting irresponsibly or unlawfully by including it in the letter. He does not deny though that this incorrect information which he insisted on including in the letter materially prejudiced the commercial interests of Applied. Nor does he explain how he came to believe (albeit incorrectly) that criminal charges were laid against her. The one inference is that either the first respondent or David or both of them informed him of this. The inference is bolstered by an averment in the first respondent's answering affidavit which states: "*I have no doubt that [the appellant's] fingers in the till was the cause of Applied's financial woes.*" This is as clear a statement as ever that the appellant according to the first respondent was guilty of criminal conduct. The first respondent's averment fits like a hand to the glove of the second respondent's averment that criminal charges were laid against the appellant.

[25] On 19 July 2016 the appellant launched the application. In answer, the second respondent made some extremely serious allegations against her. These are that she engaged in a power-grab at Applied[1]; that she destroyed her

[1] The averment to this end reads: "*...from June 2015 she continued to manage Applied without any authority from the other directors.*"

family unit;[2] that she was obstinate;[3] and that she only became involved in the affairs of Top Spin and the trust because she had had a fallout with David over Applied.[4]

The legal position regarding the removal of a trustee

[26] Before delving into the issue of the removal of a trustee it is important to note a few legal principles. These are: a trustee is required to administer the property of another; once appointed the trustee accepts fiduciary responsibility over the property of another; for purposes of administering trust property the trustees are co-owners of the trust property; they must act jointly (i.e. as a collective) when dealing with affairs of the trust;[5] and their decisions regarding trust matters must be unanimous.[6] It is with these principles in mind that the issue of the removal of trustee must be approached.

[27] Section 20(1) of the *Trust Property Control Act 57 of 1988* (the Act) provides that:

> "A trustee may on application of the Master or any person having an interest in the trust property, at any time be removed from his office by the court if the court is satisfied that his removal will be in the interests of the trust and its beneficiaries"

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[2] The averment reads: "*Through my interactions with the parties I gained the impression that it was [her] conduct that caused the destruction of the family unit.*"
[3] The averment to this effect reads: "*... [she] continuously rejected all attempts by the [first respondent] and David to exit Applied through the proposed sale of their interest* [sic]."
[4] The averment to this effect reads: "[she] *has always shown little or no interest in the running of Top Spin or the Trust until she and David had a fallout over Applied during June 2015*"
[5] *Land and Agricultural Bank of SA v Parker and Others* 2005 (2) SA 77 (SCA) at [15]
[6] *Nieuwoudt and another NNO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA (SCA) at [20]

[28] Statutorily then, a trustee could be removed from office if it is found that his/her continuance in office imperils the administration or affairs of the trust or would be detrimental to the interests of the beneficiaries. In *Gowar*[7] discord between a trustee and a beneficiary may not in and of itself meet the criteria set out in s 20(1) of the Act for the removal of a trustee. It was said that:

> "[T]hus, the overriding question is always whether or not the conduct of the trustee imperils the trust property or its proper administration. Consequently, mere friction or enmity between the trustee and the beneficiaries will not in itself be adequate reason for the removal of the trustee from office."[8]

[29] The court's power to remove a trustee though is not restricted to the statutory grounds. Its powers to remove a trustee is derived from its inherent power which has been recognised in our law for over a century and has now been entrenched in the law by s 173 of the Constitution of the Republic of SA, Act 108 of 1996 (the Constitution). Exercising this inherent power, courts have traditionally removed a trustee for misconduct, incapacity or incompetence. Though it must be said that each of these three grounds may also be a basis for an application for removal in terms of s 20(1) of the Act if it can be proved that the alleged misconduct, incapacity or incompetence imperils the trust property or the administration of the trust and courts have often found this to be the case. However, there is a further ground, which I elaborate upon below. It is that the relationship between co-trustees has broken down to the extent that they no longer have any mutual respect and trust for each other. This too, can be brought under s 20(1) of the Act, for it could imperil the property or administration of the trust. But it does not always have to be so.

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[7] *Gowar and Another v Gowar and Others* 2016 (5) SA 225 (SCA)
[8] Id. at [31]

The grounds upon which the appellant relies for her claim that the second respondent should be discharged of his duties as a co-trustee

[30] The nub of the case of the appellant is that her relationship with the second respondent has irretrievably broken down. She blames the second respondent for this. She says that his conduct has been so egregious that he is unable to objectively and fairly comply with his fiduciary duties as a trustee, has through his conduct jeopardised the administration of the trust and that his continuance in office is detrimental to the welfare of the beneficiaries. All the beneficiaries agree with her. In a sense, the architecture of her case is modelled on s 20(1) of the Act. The second respondent does not deny that the relationship between himself and the appellant has broken down irretrievably, but denies that he is to blame for this and that it has affected his ability to perform his fiduciary duties to the trust.

[31] The court *a quo* accepted that the relationship between the appellant and both respondents had faced extreme challenges but found that this had not jeopardised the administration of the trust nor detrimentally affected the interests of the beneficiaries. The court *a quo* agreed with the first respondent that the application for his and the second respondent's removal as trustees was motivated by malice. The malice being "*revenge for what had happened in and with Applied and the alleged financial losses the applicant sustained in Applied.*"[9] Accordingly, the court *a quo* dismissed the application with costs.

[9] Judgment of the court *a quo* at [32]

[32] The allegation of malice notwithstanding the first respondent has post the judgment of the court *a quo* settled the matter with the appellant and has resigned as a trustee. The second respondent, on the other hand, stands his ground. He maintains that he has always diligently performed his duties and has protected the interests of the trusts at all times.

Conclusion

[33] It is important to note that while the appellant and her children as beneficiaries seek the removal of the second respondent as trustee the appellant also does so as a co-trustee. To that extent the learning in *Gowar*, as expressed in the quotation at [28] above is of limited value to our facts for it focusses only on the conflict or enmity between a beneficiary and a trustee, and not between co-trustees.

[34] The contentions of the second respondent notwithstanding, in my judgment the allegations made by him against the appellant together with the allegations made by the appellant against him reveal an indisputable fact: the enmity between them is very deep. Aligned to this fact is more than a reasonable probability that neither of them will recover from such deep enmity in the near future. They clearly have no trust and respect for each other and this state of affairs will not abate anytime soon.

[35] Bearing in mind that the trustees are co-owners of the property of the trust and that they must act in unison in all trust related matters there should, in

my view, at least be some mutual respect and trust between trustees. They are free to hold different opinions and to robustly disagree with regard to any matter related to the trust or its property, but they should have mutual respect for each other. Each should accept that despite their differences the other is acting in the best interest of the trust and its beneficiaries. Once that mutual respect and trust is lost then their position as co-trustees is imperilled. At that point the dial has moved and the administration of the trust as well as the management of its property is placed at risk. Put differently, their incompatibility places the trust property and its affairs at risk. It is a risk that the trust should not be exposed to for the obvious reason that should it eventuate the detrimental effect on the trust could be devastating and irreversible.

[36] In such a case one or both of them should step aside, for their lack of respect and trust for each other will inevitably jeopardise the affairs of the trust. That is only natural. If neither of them is willing to step aside, then the court on application is entitled to have either or both of them removed. In our case, only the appellant has sought the removal of the second respondent. During the course of the hearing the removal of both the appellant and the second respondent was alluded to by counsel for the parties, but as there was no application for the removal of the appellant the Court should refrain from entertaining any prospect of her removal. All that was before the Court was that she and the second respondent had no respect for each other, had lost all trust and confidence in each other and that the continuation in office by the second respondent would make it impossible for the trust's affairs to be diligently conducted by the trustees. Hence, the application for his removal. The Court

should, therefore, restrict itself to the issue of his removal only. Had either of the respondents brought an application for the simultaneous removal of the appellant the outcome may have been different. It is not necessary though for us to speculate on the issue. The only issue before us is the removal of the second respondent. On that issue I hold that the appeal should succeed.

[37] There is another reason why the appeal should succeed. The court *a quo* did not consider the fact that the second respondent falsely represented to a third party that the appellant was subjected to a criminal charge with regard to her conduct at Applied; refused to withdraw the representation when the true facts were brought to his attention and that his action significantly damaged the business of Applied. While this significant failure of judgment on his part concerned Applied and not the trust, it must be remembered that his roles in both Applied and the trust were very closely connected. This is manifested in, *inter alia*, the allegations he made against the appellant in his answering affidavit, which is spelt out in [25] above, and in the meetings of the shareholders of Top Spin (in which the trust is the majority shareholder) where the issue with regard to Applied took central stage. In other words, the misrepresentation of the true facts with regard to the affairs of Applied contaminated the business affairs of the trust. It, I hold, justifies his removal as a trustee of the trust.

Costs

[38] The appellant being successful in the appeal is entitled to her costs. She sought costs on an attorney and client scale. In my view, the conduct of the

second respondent was, in the light of the carefully thought out judgment of Mudau J, entitled to defend the judgment and oppose the appeal. He should not be mulcted with a punitive costs order for doing so. As for the costs of the application itself, the appellant had asked for them to be paid by both the first and the second respondent jointly and severally, the one paying the other to be absolved. The appellant has settled her dispute with the first respondent, which settlement we were told by the counsel for the second respondent included the costs of the application itself. In those circumstances it would be unfair to order the second respondent to pay the full costs of the application. At best for the appellant the second respondent should only be liable for 50% of those costs.

Order

[39] The following order is made:

a. The appeal succeeds with costs.

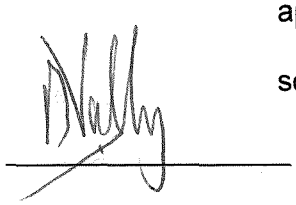
b. The order of the court *a quo* is set aside and replaced with the following:

i. The second respondent is hereby removed as a trustee of the McNair Family Trust IT 14417/2006;

ii. Carole van Vuuren is hereby appointed as an alternate co-trustee in the place and stead of the second respondent to the McNair Family Trust IT14417/2006;

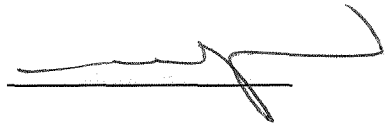
iii. The appellant is hereby authorised to take all the steps necessary and to sign all documents to give effect to the aforesaid removal and substitution of the trustee in the office of the Master of the High Court, Pretoria;

iv. The second respondent is to pay 50% of the costs of the application which costs are to be taxed on a party and party scale.



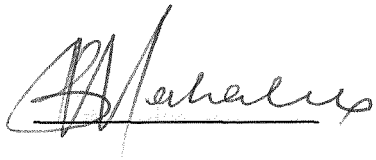
Vally J

I agree:



Wepener J

I agree:



Mahalelo J

Date of hearing:	13 August 2019
Date of judgment:	5 September 2019
For appellant:	J K Berlowitz
Instructed by:	Salant Attorneys
For second respondent:	G M Young
Instructed by:	Goêrtz Attorneys