REPUBLIC OF SOUTH AFRICA

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

CASE NUMBER:5696/2019

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: ~~YES~~/NO

2.OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

3.REVISED

05/09/2019 .....
DATE **SIGNATURE**

In the matter between:

MABIKWE, JOHN VUYO Applicant

and

ABSA TRUST LIMITED First Respondent

ROAD ACCIDENT FUND Second Respondent

JUDGMENT

DIPPENAAR J:

Introduction

[1] This is an opposed application relating to an order granted by Tsoka J under case number 30287/2014 on 12 May 2017 ("the order") in proceedings between the applicant and the second respondent pursuant to injuries sustained by the applicant in a motor vehicle accident on 17 February 2013.

[2] In terms of the order, the plaintiff's attorneys were directed to establish a trust of which Mr Maphosa of Absa Trust Ltd was to be appointed as trustee and was obliged to set security to the satisfaction of the master of the high court. The applicant is the sole capital and income beneficiary of the Mabikwe JV Trust ("the trust"). The order expressly provided that any amendment of the trust instrument would be subject to leave being granted by a court.

[3] The relief sought by the applicant envisages the variation of the trust instrument in various respects. First, it envisages the substitution of the present trustee of the trust by the applicant and his uncle, Mr Mabikwe snr. Second, it serves to remove the obligation on the trustee to furnish security.

[4] Simultaneously, the applicant further sought the termination of the trust and the transfer of the trust funds to the trust account of the applicant's present attorneys of record, Sisa Nhlabathi attorneys, appointed pursuant to the termination of the mandate of the attorneys who represented the applicant in the proceedings before Tsoka J.

[5] In argument, the applicant persisted with all the relief sought, notwithstanding that it encompassed not only the variation of the trust deed but also the termination of the trust.

[6] Applying the principles set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A),[1] the averments set out in the first respondent's affidavit should be accepted unless farfetched or clearly untenable.

The facts

[7] The trust was duly established on 27 September 2017. In terms of clause 14 of the trust deed any provisions thereof may only be amended in writing jointly by the founder, applicant's former attorneys of record and Absa Trust Ltd, if consent is granted by a court.

[8] In terms of the order, an amount of R700 000.00 was payable by the second respondent in respect of general damages. After deduction of their fees, expenses and disbursements, the plaintiff's erstwhile attorneys were directed to pay the balance of the funds held by them to the trust. The applicant's claim for loss of earnings was postponed. The papers do not mention what award was made in respect of such claim or what amount was ultimately transferred to the trust.

[9] It was common cause that the applicant completed a needs analysis questionnaire on or about 26 June 2018 in terms of which he declared a monthly income of R5000 and R4600 as expenses. As a result, the first respondent determined that the applicant required a monthly maintenance amount of R3000, which amount was paid monthly to the applicant until it was increased to R4 500 in March 2019 to cater for the transport requirements of the applicant's children. Further ad hoc payments have been made to the applicant as and when he required additional funds, including the costs of property valuations.

[10] The applicant complains that he experiences difficulties in obtaining financial assistance from the first respondent.

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[1] At 634E-635C; see also: *PMG Motors Kyalami (Pty) Ltd & another v Firstrand Bank Ltd, Wesbank Division* [2014] ZASCA 228; 2015 (2) SA 634 (SCA) para 23.

[11] No comprehensive statement pertaining to the trust funds was provided by the first respondent. The expense schedule attached to the answering papers, is confusing in various respects. It refers to an opening balance as at 29 May 2015 of R1 379 149.89, a date after the establishment of the trust. It reflects the funds presently held in the trust as R1 409 095 .07. The schedule further contains entries pertaining to "maintenance R Mbeleni" in an aggregate amount of R30 000.00 for the period June 2018 to March 2019, constituting payments of R3000 per month. The applicant understandably took issue with the accuracy of the statement and queried the payments made to R Mbeleni as maintenance. The statement does not reflect any of the maintenance payments made to the applicant, which was in the same amount as the applicant admittedly received. During argument, the first respondent contended that the description on the statement was an error and should have referred to the applicant.

[12] It was common cause that the applicant approached the first respondent on various occasions to assist him in purchasing a suitable residential property for him and his family, which proposals the first respondent rejected. He refers to this as 'a refusal to assist".

[13] The rejection of the applicant's proposals was admitted by the first respondent. On its version, the applicant utilised the services of an estate agent who sourced an RDP house, which could only be sold after eight years and in respect of which the State had the first option to purchase. It is the first respondent's standard practice not to purchase such houses as it involves the risk of ownership issues developing in due course.

[14] In relation to the second property, the seller refused to accept the first respondent's terms of sale and insisted on appointing their own conveyancer, as a result of which the sale could not be implemented. The applicant has refused to use the services of a different estate agent to find suitable residential property.

[15] Pursuant to the submission of a third offer to purchase submitted by him, the first respondent stopped communicating with the applicant. This is not expressly addressed in the answering papers. In the replying papers it is alleged that the applicant was invited to the offices of the first respondent to persuade him to withdraw the offer.

[16] The first respondent further contended that the applicant's conduct thus far has illustrated that he is not a person capable of managing his own affairs and is very impressionable. His willingness in the present application to have his uncle appointed as trustee, without requiring that any security be provided renders credence to this submission.

[17] The applicant's case is that his main objective is to acquire a suitable residential property for himself and his family and a motor vehicle to transport his children and for work purposes. He complains that the first respondent does not cooperate with his requests and that his interests will be better served if the funds were administered by himself with the assistance of his uncle, Mr Mabikwe Snr.

[18] The applicant further contended that the trust has incurred unnecessary expenses, such as the property valuations and administration costs and that periodical payments are being made to an unknown person, "R Mbeleni", as reflected on the statement produced by the first respondent.

[19] The first respondent disputed that the expenses were unnecessary or that it acted in its own interests.

Misjoinder

[20] The founding papers referred to the first respondent as "Absa Bank Limited'. The first respondent in its answering papers raised the misjoinder of Absa Trust Ltd, who, it is common cause, was the party referred to in the Tsoka J Order. A plea of misjoinder is

dilatory in nature. The answering papers were deposed to by an employee of ABSA Trust Limited, one of the individuals authorised by Absa Trust Limited to represent the trust with Mr Maphosa.

[21] The Applicant, on 20 February 2019 served a notice of intention to amend the citation of the first respondent to ABSA trust Limited. No opposition was delivered to this notice. There is no indication on the papers that amended pages were ever delivered to complete the amendment. Instead; the applicant simply changed the citation of the first respondent to "ABSA Trust Limited' in its replying papers and heads of argument. The applicant during argument insisted that the amendment had been properly effected and that the amended pages had been delivered. However, he could not produce them.

[22] In argument, the first respondent persisted in its misjoinder argument and argued that the amendment had lapsed as no amended pages were delivered. I agree with that proposition if no amended pages were delivered. It follows that if the amendment lapsed, the first respondent's plea of misjoinder must succeed.

[23] Inasmuch as there is lack of clarity on whether the amended pages were indeed delivered, I turn to deal with the merits of the application.

Discussion

[24] The fiduciary duties of trustees are reiterated in section 9(1) of the Act which provides: "*A trustee shall in the performance of his duties and the exercise of his powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another.*"

[25] In *Gowar v Gowar*[2] ("*Gowar*") with reference to the relevant authorities, the position is stated thus:

In Sackville West v Nourse & another 1925 AD 516, Kotze JA whose judgment was supported by the other members of the bench, succinctly stated the position relating to the fiduciary duties of trustees as follows (at 534):
'The effect of this authority is that a tutor must invest the property of his ward with diligence and safety. It is also said that a tutor must observe greater care in dealing with his ward's money than he does with his own, for, while a man may act as he pleases with his own property, he is not at liberty to do so with that of his ward. The standard of care to be observed is accordingly not that which an ordinary man generally observes in the management of his own affairs, but that of the prudent and careful man; or, to use the technical expression of the Roman law, that of the bonus et diligens paterfamilias . . .'
The learned judge of appeal continued (at 535):
'We may accordingly conclude that the rule of our law is that a person in a fiduciary position, like a trustee, is obliged, in dealing with . . . the money of the beneficiary, to observe due care and diligence, and not to expose it in any way to any business risks.'

This principle was elaborated upon by this court in Administrators, Estate Richards v Nichol & another [1998] ZASCA 82; 1999 (1) SA 551 (SCA) where the following was stated (at 557D-F):
'. . . [T]he standard was higher than that which an ordinary person might generally observe in the management of his or her own affairs. Such a person, it was pointed out, was free to do what he liked with his property and not infrequently selected investments which were of a speculative nature, particularly when the potential profits were high. A person in a fiduciary position such as a trustee, on the other hand, was obliged to adopt the standard of the prudent and careful person, that is to say the standard of the bonus et diligens paterfamilias of Roman law, and was accordingly, as Kotze JA concluded at 535, "obliged, in dealing with and investing the money of the beneficiary, to observe due care and diligence, and not to expose it in any way to any business risks". The need to avoid risks was emphasised in the judgments of both Solomon ACJ and Kotze JA.'

[26] The applicant's case is predicated on the contention that the appointment of the first respondent as trustee prejudices his interests as beneficiary. It is contended that

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[2] 2016 (5) SA 225 (SCA)

the first respondent has not complied with its fiduciary duties but has administered the trust for its own benefit and to the applicant's detriment.

[27] The relief sought by the applicant is, on his version, predicated on the common law and/or on section 13 of the Trust Property Control Act ("the Act") [3], although this is not clearly stated in the papers. Section 13 provides:

> *"Powers of court to vary trust provisions-*
>
> *If a trust instrument contains any provision which brings about consequences which in the opinion of the court the founder of a trust did not contemplate or foresee and which-*
>
> *(a) hampers the achievement of the objects of the founder; or*
>
> *(b) prejudices the interests of beneficiaries; or*
>
> *(c) is in conflict with the public interest,*
>
> *the court may, on application of the trustee or any other person who in the opinion of the court has a sufficient interest in the trust property, delete or vary any such provision or make in respect thereof any order which such court deems just, including an order whereby particular trust property is substituted for particular other property, or an order terminating the trust".*

[28] As pointed out by the Supreme Court of Appeal in *Gowar*, absent the jurisdictional criteria required in terms of s 13 of the Act, it would not be competent for the court to exercise the statutory power conferred on it by s 13 of the Act[4].

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[3] 57 of 1988

[4] Curators, Emma Smith Educational Fund v the University of KwaZulu-Natal & others [2010] ZASCA 136; 2010 (6) SA 518 (SCA) para 48.

[29] The court's common law powers to remove a trustee are echoed in section 20 of the Act. It provides:

> "A *trustee may, on the 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 such removal will be in the interests of the trust and its beneficiaries".*

[30] At common law, a trustee will be removed from office when continuance in office will prevent the trust from being properly administered or will be detrimental to the welfare of the beneficiaries[5].

[31] As stated in *Gowar*[6]:

"*For present purposes, two principles must be emphasised. First, the power of the court to remove a trustee must be exercised with circumspection. Second, neither mala fides nor even misconduct are required for the removal of a trustee. As to the former, Murray J explained this in Volkwyn N.O. v Clarke and Damant 1946 WLD 456 as follows (at 464):*
'. . . [I]t is a matter not only of delicacy (as expressed in Letterstedt's case [Letterstedt's v Broers (1884) 9 AC 371 (PC) at 387]) but of seriousness to interfere with the management of the estate of a deceased person by removing from the control thereof persons who, in reliance upon their ability and character, the deceased has deliberately selected to carry out his wishes. Even if the . . . administrator has acted incorrectly in his duties,and has not observed the strict requirements of the law, something more is required before his removal is warranted. Both the statute and the case cited indicates that the sufficiency of the cause for removal is to be tested by a consideration of the interests of the estate. . .'

As to the latter, Murray J said the following at 471:
'. . . . It is of course true that proof of dishonesty or mala fides is not essential for a case for the removal of executors or administrators. . .'
The learned judge continued (at 474):
'. . . [T]he essential test is whether such disharmony as exists imperils the trust estate or its proper administration. . .'
Thus, 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

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[5] Gowar v Gowar 2016 (50 Sa 225 (SCA) paras [27] and [28]
[6] Paras [30]-[33]

between the trustee and the beneficiaries will not in itself be adequate reason for the removal of the trustee from office. (See also in this regard: Tijmstra NO v Blunt-Mackenzie NO & others 2002 (1) SA 459 (T) at 473E-G.) Nor, in my view, would mere conflict amongst trustees themselves be a sufficient reason for the removal of a trustee at the suit of another.

Moreover, it must be emphasised that whilst a trustee is in law required to act with care and diligence, the decisive consideration is the welfare of the beneficiaries and the proper administration of the trust and the trust property. And, sight must not be lost of the crucial fact that the court may order the removal of a trustee only if such removal will, as required by s 20(1) of the Act, be 'in the interests of the trust and its beneficiaries'. (My emphasis.)

[32] The applicant must thus prove that the first respondent's conduct imperils the trust property or its proper administration or that the removal of the trustees or termination of the trust will otherwise be in the interests of the trust and its beneficiaries.

[33] From the papers it appears that there is a difference of opinion between the applicant and the first respondent regarding what is in the applicant's best interests, specifically in relation to the acquisition of immovable property.

[34] The first respondent has adopted a cautious approach to the purchase of immovable property, as illustrated by appreciating the risks associated with the purchase of an RDP property. It does not appear from the papers that the applicant has appreciated such risks. In my view, the applicant has failed to establish that such conduct constitutes a ground for the removal of the first respondent. Rather it illustrates that the first applicant has acted in compliance with its fiduciary duties.

[35] The applicant has further not made out any proper case regarding the unnecessary expenditure complained of. The first respondent's remuneration is regulated by clause 8 of the trust deed which limits such remuneration to the tariffs in the Administration of estates Act.

[36] The applicant has in my view failed to make out a case for the removal of the first respondent as trustee.

[37] The applicant's case for the amendment of the trust deed and termination of the trust is substantially intertwined with its case for the removal of the first respondent as trustee.

[38] In terms of the trust deed, the trustee is obliged to furnish security to the satisfaction of the Master. Were the relief sought to be granted, there is no similar obligation to furnish security. This in my view strongly militates against the granting of such relief.

[39] At the time of granting of the order and after consideration of the facts, Tsoka J determined that it was necessary to create a trust to protect the applicant's interests rather than to allow the funds to be paid directly to him. No case has been made out that this position has changed and that the funds do not require protection. This militates strongly against any order which places the control of the funds in the hands of the applicant. No proper case has been made out on the papers qualifying Mr Mabikwe, Snr as an appropriate trustee. The applicant relies on his close familial bonds and trust of his uncle for the contention that he should be placed in control of the funds because of his business acumen. As pointed out by the first respondent, the applicant is impressionable, and his endorsement of his uncle in the circumstances is not substantiated by objective fact.

[40] I am not persuaded that the complaints raised against the first respondent in this application imperils the trust property or its proper administration. The complaints appear aimed at achieving a termination of the trust in order to place the funds in a trust account controlled by the applicant's present attorney of record or the substitution of trustees which would place the trust funds under the control of a family member of the applicant who could influence the applicant's decisions regarding the fate of the trust

funds. Neither of these results would protect the trust funds. To the contrary, such result would in my view in fact imperil the trust fund and its proper administration.

[41] Insofar as the applicant is not satisfied with certain of the decisions made by the first respondent as trustee or the accounting which he has received, there are more appropriate remedies available to him to protect his interests.

[42] Insufficient facts have been placed before me to make any proper determination of the applicant's complaints. There may be some merit in the applicant's complaint regarding the maintenance payments to "R Mbeleni" reflected on the first respondent's statement and it could be more than the 'clear error' contended for by the first respondent in argument. It is however significant that the statement does not particularise any of the payments made to the applicant, which it is common cause, was in the same amount. This issue can be clarified between the parties if a comprehensive statement is provided to the applicant pertaining to the trust funds by the first respondent.

[43] The statement provided by the respondent in its answering papers is not satisfactory and the applicant is entitled to a proper accounting of how the trust funds have been utilised and to hold the first respondent to its fiduciary duties.

[44] Considering all the facts, I am not persuaded that the jurisdictional criteria of section 13 of the Act have been satisfied and that it would be competent to exercise the statutory power afforded by section 13 of the Act. I am further not persuaded that the applicant has proved that the first respondent should be removed as trustee.

[45] For the above reasons, the application must fail.

[46] The normal principle is that costs follow the result. There is no reason to deviate from this principle.

[47] I make the following order:

The application is dismissed with costs.

F DIPPENAAR
JUDGE OF THE HIGH COURT GAUTENG
LOCAL DIVISION, JOHANNESBURG

APPEARANCES

DATE OF HEARING	:	02 September 2019
DATE OF JUDGMENT	:	05 September 2019
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APPLICANT'S ATTORNEYS	:	SISA Nhlabathi attorneys
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