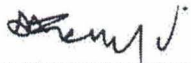


**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

**APPEAL CASE NO: A5099/2020
HIGH COURT CASE NO: 44142/2017**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
09.09.2022	
DATE	SIGNATURE

In the matter between:

BRENDAN CHRISTIAAN DE KOOKER N.O.

First Appellant

ROBERT WESSEL ROBERTSE N.O.

Second Appellant

LOUIS THEODORE ADENDORFF N.O.

Third Appellant

and

RUANDA SNYMAN (nee STAPELBERG)

Respondent

JUDGMENT

CRUTCHFIELD J:

[1] The appellants, Brendan Christiaan de Kooker N.O, Robert Wessel Robertse N.O. and Louise Theodore Adendorff N.O, the first, second and third appellants respectively, being the duly appointed trustees of the Stapelberg Investment Trust, appealed the entirety of the judgment of Her Ladyship N P Mali, including the order for costs, delivered on 31 August 2018.

[2] The respondent in the appeal, Ruanda Snyman (born Stapelberg), was the applicant in the court *a quo*. The respondent opposed the appeal.

[3] Tonya Nadine Ehlers, the fourth respondent and founder of the Trust, the Master of the High Court, being the fifth respondent and the Road Accident Fund ('RAF'), the sixth respondent, were cited in the proceedings *a quo* but were not parties to the appeal.

[4] The appeal came before us with the leave of the court *a quo* granted on 23 January 2020, to the Full Bench of the Gauteng Local Division, Johannesburg. The costs of the application for leave to appeal were ordered to be in the appeal.

[5] The appellants sought an order that the appeal be upheld with costs, the order *a quo* be set aside and replaced with an order dismissing the application with costs.

[6] At the outset, the appellants applied for the reinstatement of the appeal and condonation for the late application for a date of the appeal. Whilst the respondent delivered papers opposing the condonation and reinstatement application, the respondent did not advance arguments in support of that opposition.

[7] The appellants' attorney of record ('the appellants' attorney'), omitted to apply for a date of the appeal with the filing of the record, mistakenly applying after the delivery of the heads of argument. The appellants' attorney filed the record on 27 July 2020, the

practice note on 17 December 2020 and applied for a date for the hearing on 21 December 2020. Whilst there certainly was some delay, the extent of the appellants' attorney's non-compliance was not flagrant and gross¹ and he took responsibility for the error, making a frank and full disclosure that he erred.

[8] In addition, the appellants contended that they had real prospects of success on the merits of the appeal, in that the court *a quo*'s termination of the Trust and order that the respondent's attorneys of record establish a new trust, (to protect the award made to the respondent by the RAF), served to render the respondent vulnerable in the interim. I agree that the appellants have sufficient prospects of success in the appeal on this ground.²

[9] In the light of the absence of a flagrant and gross violation of the Rules, a delay that was not significantly prejudicial in the overall context of the prevailing circumstances and the appellants' prospects of success aforementioned, I am of the view that the interests of justice require that condonation of the late application for a date be granted and that the appeal be reinstated by this Court.

[10] Accordingly, I propose an order that the appellants' failure to apply for a date for the appeal timeously in accordance with Rule 49(6)(a) is condoned in terms of Rule 49(7)(a)(ii), and, that the appeal is reinstated in terms of Rule 49(6)(b) of the Uniform Rules of Court. The appellants are ordered to pay the costs of the application for reinstatement and condonation and the respondent the costs of their opposition to that application.

[11] As to the appeal, the respondent sought that it be dismissed with costs.

¹ *Federated Employers Fire & General Insurance Co Ltd and Another v McKenzie* 1963 (3) SA 360 (AD).

² *Melanie v Santam Insurance Co Ltd* 1962 (4) SA 531 (A); *Ferreira v Ntshingila* 1990 (4) SA 271 (A).

[12] The factual background of this matter, briefly stated, was that the respondent was involved in a motor vehicle accident, in which she sustained damages for which the RAF was liable. The settlement between the respondent's representatives and the RAF under case number 44638/13, ordered the RAF to pay an amount of R4 973 922.00 in full and final settlement of the respondent's claim, into the trust account of Ehlers Attorneys, the respondent's attorneys of record in the trial action.

[13] In addition, the RAF was ordered to furnish an undertaking for the payment of any future medical and associated costs incurred by the respondent as well as the costs of the establishment and administration of a trust, the Stapelberg Investment Trust ('the Trust') to protect the award for the exclusive benefit of the respondent, the sole beneficiary of the Trust. The RAF was ordered to pay the costs of the action.

[14] The respondent was represented by a curator *ad litem* during the course of the trial, ('the curator'), who recommended that the award be paid into a trust. The curator recommended the appointment of the appellants as trustees as they possessed the necessary experience and could provide the required security, which they did. The trustees furnished a security bond and the first appellant signed personal suretyship.

[15] The respondent launched the application *a quo* allegedly due to a lack of adequate accounting on the part of the appellants, a potential conflict of interest between the appellants and the Trust and negligent conduct on the part of the appellants. The respondent claimed that the trustees be removed and that the Trust be terminated.

[16] The court *a quo* ordered the termination of the Trust in terms of s 13 of the Trust Property Control Act 57 of 1988 ('the Trust Act'), (effectively dismissing the appellants as trustees in terms of s 20 of the Trust Act), that the proceeds of the Trust be paid into the respondent's attorney's trust account, that he create a trust *inter vivos* in terms of

the order dated 19 November 2014 handed down by the Gauteng Division under case number 54196/14 ('the RAF order').

[17] Furthermore, the court *a quo* permitted the respondent to claim relief consequential on the outcome of the accounting and that the appellants be ordered to pay the costs of the application *de bonis propriis* including indemnification of the Trust for expenses incurred by the appellants themselves or in their official capacities in opposing the litigation.

[18] Three issues arose for determination between us; the court *a quo*'s termination of the Trust and the consequent dismissal / replacement of the appellants as trustees, whether the appellants failed to account adequately to the respondent and the costs of the proceedings *a quo* and the appeal.

[19] The respondent categorised her concerns in respect of the Trust, the trustees and their administration of the Trust funds into three broad categories:

- 19.1 That she had not received all the funds due to her under the RAF order and that the trustees had failed to investigate that issue;
- 19.2 That the trustees were not claiming the administration costs and medical expenses from the RAF, in effect not claiming the money due to the respondent from the RAF; and
- 19.3 That the respondent did not know if the trustees were acting in the Trust's best interests and expressed concern that the trustees' position with regard to the Trust might lead to a conflict of interest that would impede the administration of the Trust to the respondent's benefit.

[20] Furthermore, the respondent alleged that the Trust deed did not give effect to the RAF order and prejudiced the respondent's interests in the Trust such that the Trust had to be terminated.

[21] Counsel for the appellants argued that the respondent did not demonstrate compliance with s 13 of the Trust Act, which provides that a trust deed may be varied by a court if the deed hampers the achievement of the objects of the founder, prejudices the beneficiaries' interests or conflicts with the public interest.

[22] The appellants contended that the respondent relied upon secondary conclusions without providing primary facts for the claims made by her.

[23] The respondent argued that the Trust deed contained multiple clauses that did not further the respondent's interests or those of the Trust itself, that certain clauses gave the trustees an unfettered discretion to deal with the Trust assets that potentially might be in the benefit of the trustees personally and inimical to the respondent's interests. One such clause was that empowering the trustees to make secured or unsecured loans, with or without interest, to any person or persons including any trustee, director or shareholder of a trustee or any company in which any trustee is interested. Loans by the Trust should, however, only be made for the benefit of the respondent, the Trust's beneficiary, not in the wide terms provided by the Trust deed.

[24] In addition, the Trust deed provided for a waiver of security and empowered the trustees to enter into indemnities, guarantees or suretyships of every description be they gratuitous or for consideration, to accept and require gifts for the purpose of the Trust any to employ a wide range of 'agents', such as the trustees might consider necessary to transact Trust business and to pay the fees pursuant thereto.

[25] The aforementioned are merely examples of some of the clauses in the Trust deed that are better suited to a commercial trust than a trust established to preserve an award from the RAF for the sole benefit of the beneficiary.

[26] The Trust does not appear to be registered as a Special Trust Type A in terms of section 6B(i) of the Income Tax Act 58 of 1962. It may be that the Trust does not meet the requirements for such registration but it should be considered by the trustees given that a Special Trust Type A enjoys lenient tax treatment.

[27] Notwithstanding the respondent's criticisms of the provisions of the Trust deed, the respondent did not place a proposed draft of an amended Trust deed before us or the appellants. Nor did the respondent raise her specific criticisms of the Trust deed in the correspondence or meetings with the appellants, prior to the launch of the application. In the event that the respondent had done so, the application *a quo* may not have been necessary.

[28] It is apparent that the respondent's interests will be better protected by certain amendments being made to the Trust deed. The proposed draft Trust deed should include provisions to the effect that:

- 28.1 The creation of the Trust is not a donation but a payment for compensation for injuries sustained in terms of the Road Accident Fund Act, 56 of 1996.
- 28.2 The trust be registered as a special Trust Type A in terms of section 6B(i) of the Income Tax Act 58 of 1962, if the trust meets the requirements for such registration.
- 28.3 Any loans to be made should be for the benefit of the beneficiary and in the sole interest of the beneficiary and/or the Trust fund.

- 28.4 To call up and/or collect any amounts that may become due to the Trust from time to time.
- 28.5 To take advice from any attorney or advocate or any other expert for the reasonable account of the relevant Trust account.
- 28.6 The trustees should keep complete and current records, statements and accounts of all transactions and prepare proper statements in connection with all financial activities in accordance with generally accepted accounting practices in South Africa.
- 28.7 The trustees should be entitled to a management fee of 1% per annum plus vat on the amount under administration.
- 28.8 The trustees should be obliged to furnish security to the satisfaction of the Master of the High Court for the proper compliance of their duties.
- 28.9 The trustees and any person in their employ should insofar as it is valid in terms of the Trust Property Control Act, 57 of 1988, be indemnified against liability for expenses incurred in the execution of their duties as trustees in terms of the Trust deed and against any loss to the Trust as a result of the depreciation of any investment made by the trustees.
- 28.10 No beneficiary receiving benefits under the Trust deed may utilise any interest in the Trust fund as security for debt or encumber it in any manner whatsoever and should such event occur, the encumbrance of benefits of those beneficiaries shall not be recorded against the Trust fund.
- 28.11 Any benefit accruing or payable to the beneficiary in accordance with the Trust deed must not form part of any joint estate of the beneficiary and that person's spouse and no husband of any female person, whether the marriage be in or out of community of property shall have or receive any control, power of alienation or administration in respect of any benefit received by any such female beneficiary under this deed.

- 28.12 The provisions of the Trust deed should only be amended with the leave of a High Court.
- 28.13 The costs to be incurred in the establishment of the trust including the administration and/or management of the capital amount and the proceeds thereof should be claimed back from the RAF by the trustees. This includes the remuneration of the trustees in administering the capital amount as well as the costs of the security to be provided by the trustees.
- 28.14 The order made by a court in respect of any award to be made by the RAF should provide that the plaintiff's attorneys be entitled to make payment of reasonable disbursements in respect of accounts rendered by a sheriff, expert witnesses and counsel employed on behalf of the plaintiff from the funds held by them for the benefit of the plaintiff.
- 28.15 The plaintiff's attorneys should not recover their fees until such time as the party and party bill of costs has been taxed by the Taxing Master.
- 28.16 The number of trustees should not be less than three unless it is a professionally managed trust.
- 28.17 The appointment of new or replacement trustees should be subject to the approval of the Master.

[29] The list above is not intended to be a closed list of provisions suitable for inclusion in a trust deed for the benefit of a major who requires assistance in the management of his / her financial affairs. The parties are referred to the judgment of the Full Bench of this Division, Pretoria, in *The Master v LPC and Others*.³

[30] The order *a quo* terminating the Trust and the transfer of the Trust funds into the respondent's attorney's trust account will result in the dismissal of the trustees, their

³ *The Master v LPC and Others* case no 35182/2016 20 May 2022 GDP.

replacement with parties of the respondent's choice, not subject to the scrutiny of the Master, and the absence of security in the interim in respect of the Trust fund. The consequences of such order are potentially prejudicial in the extreme to the respondent. In addition, the unwinding of the extant investments may serve to incur costs that might otherwise be avoided, for the account of the Trust.

[31] I agree that terminating the Trust as ordered *a quo* will render the respondent vulnerable and will not advance the beneficiary's interests.

[32] Moreover, the Trust deed can be amended so as to ensure that the purpose of the court order is served by the amended Trust deed, that the respondent remains protected by the existing security in the interim, and the amendment of the Trust deed is subject to the oversight of this Court.

[33] It is not this Court's task however to amend or redraft the Trust deed as it is not for a court to draft contracts for the parties. The appropriate manner of amending the Trust deed, in my view, is that the appellant and the respondent's legal representatives draft a proposed amended Trust deed and place it before us for consideration.

[34] Accordingly, I propose that the order *a quo* terminating the Trust be set aside and that the parties legal representatives furnish this Court with the proposed amended draft Trust deed, within 15 days of the date of the electronic delivery of this judgment, for the consideration of this Court.

[35] The removal of trustees is governed by s 20 of the Trust Act, which provides that the court be satisfied "that such removal will be in the interest of the trust and its beneficiaries".

[36] The appellants relied upon *Gowar & Another v Gowar & Others*,⁴ which clarified that in addition to the powers sourced in the Trust Act, a court has an inherent power to remove a trustee “when continuance in office will prevent the trust being properly administered or will be detrimental to the welfare of the beneficiaries”. In *Volkwyn N.O. v Clarke and Damant*⁵ the court found that even if an executor had not acted strictly in accordance with his duties and the strict requirements of the law, something more was required before removal from office was warranted.

[37] The court in *Gowar*⁶ found that in order to succeed in the removal of the appellants as trustees, the respondent had to show that their conduct imperilled the trust property or that the trustees’ removal would otherwise be in the interests of the Trust or the respondent.⁷

[38] The Trust deed provides that:

“The trustees shall keep a true and correct account of their administration of the Trust and should it become necessary in terms of legislation or should the trustees so decide that the accounts of the Trust are to be audited, the trustees shall in their absolute discretion appoint an auditor or accounting officer. The trustees shall submit annually a signed copy of the accounts of the Trust to the founder.”

[39] Accordingly, there is no obligation to audit the Trust accounts absent the trustees making a positive decision to do so. Notwithstanding, the trustees are obliged to maintain accurate and up-to-date accounts of the Trust’s administration. The respondent argued that the appellants were not doing so and that the answering affidavit together with the annexures thereto, demonstrated as much.

⁴ *Gowar & Another v Gowar & Others* 2016 (5) SA 225 (SCA) (‘Gowar’).

⁵ *Volkwyn No v Clarke and Damant* 1946 WLD 459 at 464.

⁶ *Gowar* note 9 above at para 10.

⁷ Judgment *a quo* [10].

[40] The respondent relied upon *Doyle v Board of Executors*,⁸ which dealt with accounting to a capital beneficiary and on the entitlement of a Trust beneficiary to demand proper accounting from a trustee.⁹

[41] I agree that the obligation to account to a sole beneficiary, as in respect of a capital beneficiary, should include an accurate reflection of both income and expenditure during the period covered and of the prevailing state of the Trust fund up to and including the relevant date. Entries should be precise and dates should be provided.

[42] The trustees, prior to the launch of the application, provided the respondent with the documents and information requested by the respondent to the respondent's legal representatives' apparent satisfaction.

[43] The appellants provided a summary of the investment portfolio as at 26 July 2016, prior to the parties' meeting on 15 August 2016, convened by the respondent and her advisors. The latter did not raise any issue in respect of the bank statements, the investment portfolio summary or the appellants' explanations. -

[44] Furthermore, the respondent advised thereafter, that she would approach Ehlers Attorneys in respect of her queries regarding their accounts.

[45] On 7 December 2016, the appellants provided proof in respect of certain queries raised by the respondent in respect of her medical aid claims from the RAF.

⁸ *Doyle v Board of Executors* 1999 (2) SA 805 (C) at 813 ('Doyle').

⁹ *Mia v Cachalia* 1934 AD 102.

[46] On 13 January 2017 the respondent requested further bank statements and investment information. The bank statements were provided to her that day and the investment information on 16 January 2017.

[47] Thereafter, by way of correspondence dated 24 January 2017, the respondent threatened to approach a court urgently in the event that her monthly allowance was reduced from R20 000.00, a reduction that was necessary if the award was to be preserved for the respondent's remaining lifetime.

[48] On 23 May 2017, the respondent called for information in respect of the Trust's financial position, a record of all funds received into the Trust account, expenses incurred by the Trust and all amounts for which the RAF was liable to the fund to date of that correspondence. The appellants responded on 23 June 2017 to the effect that the bank and investment statements and remaining documentation was provided to the respondent.

[49] The appellants requested the respondent to advise if she required audited financial statements, in which case an auditor would be instructed accordingly at the cost of the Trust. Six days later the respondent launched the application, in the face of the appellants' request for an instruction in respect of clause 6 of the Trust deed, and a request that the respondent reply thereto.

[50] The Court in *Van Niekerk v Van Niekerk & Another*,¹⁰ with reference to *Volkwyn NO v Clark & Demant*¹¹, held that:

'Both the statute and the case cited indicates that the sufficiency of the cause for removal is to be tested by consideration of the interests of the estate. It must therefore appear, ... that the particular circumstances of the acts complained are such as to stamp the executor or administrator as a dishonest, grossly inefficient or untrustworthy person, whose future conduct can be expected to be such as to expose the estate to risk of actual loss or of administration in a way not contemplated by the trust instrument.'

¹⁰ *Van Niekerk v Van Niekerk & Another* 2011 (2) SA 145 (KZP) ('*Van Niekerk*') at para [9].

¹¹ *Volkwyn NO v Clark & Demant* 1946 WLD 456 at 463-464 ('*Volkwyn*').

[51] No facts were advanced before us by the respondent that the appellants *qua* trustees, or any one of them was dishonest, grossly inefficient or untrustworthy. Nor was their evidence that the trustees' future conduct might imperil the estate and risk actual loss, or of administering the Trust in a way not contemplated by the Trust deed, or in a manner that did not further the interests of the beneficiary or the Trust fund.

[52] The date on which the final order was granted by the trial court is a fact that Ehlers attorney must and should be able to clarify and the appellants should calculate the interest on the award due to the Trust accordingly.

[53] Queries raised by the respondent in respect of Ehlers Attorneys accounts must be dealt with by the respondent with Ehlers Attorneys.

[54] The appellants must ensure that the Trust received all the monies due to it under the award in terms of the court order. Furthermore, if Ehlers attorneys accounts stand to be taxed, then that should take place.

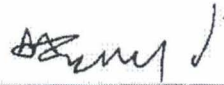
[55] The appellants should be claiming the administration and related costs of the Trust, the respondent's medical costs and such additional costs guaranteed under the RAF's undertaking, from the RAF and should do so on a regular basis.

[56] Nothing stated by the respondent however justified the finding *a quo* that the appellants, all professionals, were dishonest, grossly inefficient or untrustworthy. Nor did the respondent submit facts based on her founding papers that the appellants' conduct might expose the Trust or the respondent beneficiary's interests to actual loss. Furthermore, no basis existed in my view, for an order of costs *de bonis propriis* against the appellants.

[57] In the circumstances I am of the view that an order that the trustees be dismissed is unjustified.

[58] By virtue of the above, I propose the following order:

1. The appellants' failure to apply for a date for the hearing of the appeal timeously in accordance with Rule 49(6)(a) is condoned in terms of Rule 49(7)(a)(ii).
2. **The appeal is reinstated in terms of Rule 49(6)(b) of the Uniform Rules of Court.**
3. The appellants are ordered to pay the costs of the application for reinstatement and condonation.
4. The respondent is ordered to pay the costs of their opposition to the application for reinstatement and condonation.
5. The appeal is upheld with costs.
6. The order of the Court *a quo* is set aside and replaced with the following:
 - 6.1 The application is dismissed with costs.
7. The parties' legal representatives should furnish this Court with their proposed amended draft Trust deed, within 15 days of the date of the electronic delivery of this judgment, for our consideration.



CRUTCHFIELD J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

I agree and it is so ordered.



SENYATSI J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

I agree and it is so ordered.



DLAMINI J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal

representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 9 September 2022.

COUNSEL FOR THE APPELLANTS: Mr AJR Booysen.

INSTRUCTED BY: De Kooker Attorneys.

COUNSEL FOR THE RESPONDENT: Mr A C Diamond.

INSTRUCTED BY: Diamond Attorneys.

DATE OF THE HEARING: 20 April 2022.

DATE OF JUDGMENT: 9 September 2022.