IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED.
DATE 24/10/14 SIGNATURE

24/10/2014

CASE NUMBER: 50560/2013

In the matter between:

LERNA BEATRIX MULLER N.O	**APPLICANT**
AND	
WILHELM KARL MULLER N.O	**1ST RESPONDENT**
WILHELM KARL MULLER	**2ND RESPONDENT**
ABSA BANK LIMITED	**3RD RESPONDENT**
WILKA BELEGGINGS (PTY) LTD	**4TH RESPONDENT**
MASTER OF THE HIGH COURT	**5TH RESPONDENT**

JUDGMENT

LEPHOKO AJ

[1] This is an application brought in terms of section 20 of the Trust Property Control Act 57 of 1988 for the removal of the first respondent as trustee of the Wilka Trust. The applicant and the first respondent are trustees of the Wilka Trust. The first respondent is cited in his capacity as trustee of the Wilka Trust. The second respondent is cited in his personal capacity and as sole director of the fourth respondent. The fourth respondent is Wilka Beleggings (Pty) Ltd, a private company which is wholly owned by the Wilka Trust (the Trust).

[2] The applicant seeks an order, *inter alia*, that the first respondent be removed as a trustee of the Wilka Trust and that the first and second respondents be interdicted from dealing with or disposing of any assets of the Wilka Trust and or the fourth respondent, with immediate effect. The application is opposed by the first and second respondents.

[3] The relief sought by the applicant depend on whether the applicant is a trustee and/or a beneficiary of the Trust following the applicant's prior resignations as trustee and beneficiary of the Trust in terms of a divorce settlement agreement between the applicant and the second respondent.

POINTS IN LIMINE

[4] The first, second and fourth respondents (the respondents) raised five points *in limine,* being:

(i) The applicant lacked *locus standi*.

(ii) The first respondent is a "hoof trustee".

(iii) The applicant is not a director and or shareholder of the fourth respondent.

(iv) The applicant lacked authority and mandate to act on behalf of the real beneficiaries of the Trust.

(v) The matter involved a factual dispute that may not be resolved on the papers.

LOCUS STANDI

[5] The respondents contend that the applicant has no interest in the Trust as she is neither a trustee nor a beneficiary of the Trust having resigned as a trustee and a beneficiary of the Trust on 25 February 2011 and on 11 March 2011 respectively.

[6] The applicant and the second respondent were previously married to each other and were divorced on 25 November 2010. The applicant and second respondent signed a divorce settlement agreement on 08 March 2011. The agreement is central to the interpretation of the resignation of the applicant from the Trust. The settlement agreement provides, *inter alia*, that the applicant resigns as trustee and beneficiary of the Trust but the resignation shall come into effect upon fulfilment of all the following conditions on or before the 01 April 2011 (clause 3 read together with clauses 1, 2, 5 and 9):

- Registration of 70% of the shares held by the Elbie Trust in "Just Letting" into the name of the applicant.
- Payment of an amount of R593 000-00 to the applicant.
- Payment of an amount R500 000-00 to the applicant alternatively provision of a bank guarantee for payment of the amount of R500 000-00.

[7] Clause 9 of the settlement agreement specifically provides that should any party fail to fully perform in terms of the agreement, the other party shall not be compelled to give effect to the agreement and the parties shall retain their rights which they had before signature of the agreement.

[8] The terms of the settlement agreement are common cause. The second respondent admits that he failed to fully comply with all the terms of the agreement on or before the 01 April 2011 or thereafter.

[9] It is clear from the provisions of the divorce settlement agreement that the resignation of the applicant as trustee and beneficiary of the Trust was subject to the fulfilment of certain suspensive conditions. When those conditions were not fulfilled the resignation did not come into effect. In my view, the admission by the second respondent that he did not fulfil all the suspensive conditions as stipulated in the settlement agreement put paid to his argument that the applicant had resigned as trustee and beneficiary of the Trust.

[10] It was further argued that the resignation of the applicant as trustee had come into effect as it complied with section 21 of the Trust Property Control Act and the Trust Deed. In terms of section 21 a trustee may resign by notice in writing to the Master and the ascertained beneficiaries who have legal capacity, or to their tutors or curators of the beneficiaries of the trust under tutorship or curatorship. It was however not established that the applicant had given written notice of her resignation to the other beneficiaries. In my view, even if the provisions of section 21 had been fully complied with, the subsequent removal of the applicant as trustee would have been invalid by virtue of the second respondent's failure to fully comply with the suspensive conditions of the settlement agreement. The purported resignation would have remained open to setting aside at the instance of any person affected thereby.

[11] The argument that the applicant had resigned and that such resignation was unconditional is not supported by the conduct of the applicant and the first respondent regarding the Trust. As on 7 February 2013 they communicated and negotiated with each other in writing as co-trustees of the Wilka Trust. This was also reinforced in various correspondence exchanged between their respective attorneys long after the 01 April 2011. In the result the point *in liminne* on *locus standi* must fail.

HOOF TRUSTEE

[12] It was argued that the first respondent is a "Hoof Trustee" (principal trustee) and in terms of clause 4.6 of the trust deed a "Mindere Trustee" is precluded from

demanding the resignation of a principal trustee. The relief sought by the applicant is not based on clause 4 .6 of the Trust Deed but on section 20 of the Trust Property Control Act 57 of 1988 ("the Trust Property Control Act) which provides for removal of a trustee by the court. The applicant would in any event had been entitled to invoke the provisions of clause 4.6 of the Trust Deed as she is also a "Hoof Trustee"). In the result this point *in limine* is dismissed.

DIRECTOR AND SHAREHOLDER OF 4TH RESPONDENT

[13] It was argued that the applicant was neither a director nor a shareholder of the fourth respondent and therefore had no interest in the affairs of the fourth respondent that entitled her to bring the application. It should suffice to state that the applicant as a trustee and a beneficiary of the first respondent which wholly owns the fourth respondent, has a direct and substantial interest in the affairs of the fourth respondent.

AUTHORITY AND MANDATE

[14] It was argued that the applicant does not have the authorization of the Trust and the other beneficiaries to bring the application. Section 20 (1) of the Trust Property Control Act empowers any person having an interest in the Trust property to approach a court for the removal of a trustee in the interest of the Trust and its beneficiaries. As a beneficiary of the Trust the applicant is an interested person and therefore entitled to approach the court for the removal of the first respondent: See Ras And Another NNO v

Van Der Meulen 2001 (4) SA 17 (SCA). In my view it would not make any practical sense to insist that a beneficiary must first obtain a resolution of an obstructive trustee before bringing an application to remove that trustee from office or that she should not be able to approach the court if she did not have the approval of the other beneficiaries. This point *in limine* must fail.

DISPUTE OF FACT

[15] It was submitted that the applicant should have foreseen that the matter involved a dispute of fact that may not be resolved by motion proceedings. The removal of the first respondent as trustee turns on a fairly narrow issue, namely, whether it has been established on a balance of probabilities on the papers that the first respondent has acted against the interest of the Trust and its beneficiaries. For what constitute a dispute of fact and the test applied by our courts: see *Room Hire Co (Pty) Ltd v Jeppe Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163. On how to determine whether a genuine dispute of fact exists: see *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634I-635A, *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154F. On the fact of this case, I do not think that a genuine dispute of fact exists that cannot be resolved on the papers. As a result this point *in limine* is dismissed.

APPLICANT'S CASE FOR REMOVAL OF FIRST RESPONDENT AS TRUSTEE

[16] The applicant alleges that the Trust is the owner of several immovable properties all of which are bonded in favour of the third respondent. These properties generate rental income of approximately R120 000-00 per month. This income is received into the bank account of the Trust and is, inter alia, used to pay off the bond repayments to the third respondent and to pay rates and taxes to the local authority. After these payments the Trust is supposed to have a monthly surplus of approximately R60 000-00.

[17] Until July 2013 the applicant had no access to the bank account as she was refused access by the first respondent. The applicant submitted copies of bank statements of the Trust for the period 01 April 2013 to 09 August 2013. It is not disputed that the transactions that appear on these bank statements were made by the first respondent. It is alleged that the first respondent without authorization withdrew some funds from the Trust bank account on a monthly basis for his own account and personal benefit.

[18] The withdrawals that are alleged to have been for the personal benefit of the second respondent which were not authorized by the applicant as co-trustee include, *inter alia*, the following: payments towards the bond of the WK Muller Trust of which the second respondent is a trustee and beneficiary; payments to C Motsa, an employee at the second respondent's residential property; payments for the swimming pool situated at the private residence of the second respondent; payments to the second respondent's private gardner; payments to the second respondent personally;

payments to utility service providers on behalf of the WK Muller Trust; payment to Matt's Plumbing for installation of a gas geyser at the private residence of the first respondent.

[19] The second respondent does not deny that these payments were for his own benefit and that they were not authorized by a resolution of trustees. The second respondent alleges that these payments for his personal benefit were in respect of certain loan accounts. The applicant avers that the alleged loan accounts were are unknown to her and were never authorized by a resolution of trustees. The second respondent did not provide any proof that the said loan accounts were authorized by a resolution of trustees.

[20] The applicant further alleges that certain additional unauthorized payments were made from the Trust funds allegedly on behalf of the Trust. These payments include, *inter alia,* the following payments: payments to MC Administration Services; payments to Wimmag; payments to Briterock in respect of an insurance policy on the life of the first respondent; payments to Auto Magic and payments to Proud Heritage Properties 154 (Pty) Ltd.

[21] Although some of these payments may have been for the benefit of the Trust, there applicant denies that they were authorized by a resolution of trustees. The first respondent has not provided any proof that these transactions were actually authorized by a resolution of trustees. The applicant avers that the foregoing transactions by the

respondent for his own benefit and/or the Trust were never authorized by resolution of trustees. No such authority was provided for these transactions.

[22] It is alleged that the second respondent in contravention of section 45 of the Companies Act 71 of 2008 ("the Companies Act") caused a personal loan of R400 000-00 to be made to himself by the fourth respondent without a special resolution first having been obtained from the Trust as the only shareholder. This is not disputed by the second respondent. His response is simply that the applicant has no *locus standi* to apply for an interdict prohibiting the first respondent from dealing or disposing of any assets of Trust and or the fourth respondent.

[23] The applicant also alleges that the second respondent in his capacity as director of the fourth respondent acted in contravention of section 115 of the Companies Act when he sold Auto Magic Nelspruit, the only asset of the fourth respondent, without a special resolution of the Trust as the only shareholder. The second respondent has not established that there a special resolution of shareholders was obtained. The purpose of the special resolution is to protect the shareholders. See *Stand 242 Hendrik Potgieter Road Ruimsig (Pty) Lt And Another v Gobel NO And Others* 2011 (5) SA 1 (SCA) where the court dealt with a similar provision contained in section 228 of the Companies Act No 61 of 1973.

RESPONDENTS' VERSION

[24] The respondents argued that the applicant does not take the court into her confidence in her founding affidavit as she did not mention that she resigned as trustee and beneficiary of the Trust and only introduced the divorce settlement agreement in her replying affidavit and rely thereon by claiming that the resignations were never intended to stand alone. It was argued that the applicant should have made out the whole of her case in her founding papers.

[25] In my view, it can be inferred from the conduct of the parties to the settlement agreement that they had at all times since the second respondent's default considered the applicant as a trustee. The first respondent on numerous occasions invited the applicant to meetings of trustees after the 01 April 2011. Some of the correspondence addressed to the applicant by the first respondent's attorney unequivocally stated that the applicant is a trustee of the Wilka Trust. One such correspondence is a letter dated 07 August 2013 addressed by the second respondent's attorneys to the applicant's attorneys. On 16 August 2013 the first respondent invited the applicant to a meeting of trustees which was scheduled for the 23 August 2013. Against this background, it was reasonable for the applicant to assume that she was still a trustee and a beneficiary and not foresee that her being a trustee and beneficiary would be placed in dispute. The applicant can therefore not be faulted for not raising the issue of her resignation in the founding affidavit as she reasonably deemed the circumstances thereof to be common cause between herself and the respondents.

[26] The respondents allege that the applicant has never been involved in the business of the Trust and the first respondent has since registration of the Trust solely attended to the day to day administration of the Trust. It is further alleged that the applicant did not attend duly scheduled meetings of the trustees. This is denied by the applicant. The fact that the applicant acted as alleged did not give the first respondent the right to act contrary to the provisions of the Trust Deed nor did it legalize his irregular conduct.

[28] The three major sons of the second respondent who are beneficiaries of the Trust confirmed that they were satisfied with the first respondent's administration of the Trust. The test as to whether the first respondent properly administered the Trust has to be measured against the provisions of the Trust Property Control Act, the provisions of the Trust Deed and the trustee's fiduciary duty towards the Trust and its beneficiaries. The views of the beneficiaries which are at variance with the law and objective principles applicable to trusts are not of any consequence.

[29] The respondents allege that shortly before this application was issued, the applicant unlawfully withdrew an amount of R32 000-00 from the Trust' savings account and paid the amount to her personal attorney of record. On 3 December 2013 the applicant transferred an amount of R5 000-00 from the Trust' savings account into her personal account. The respondents state that these withdrawals were to the detriment of the Trust and the money should be paid back. The applicant's version is that the money was paid to her attorneys as funding for the present application in order to

protect the interest of the Trust. There is no relief sought by the respondents against the applicant by way of a counter-application and this issue cannot be taken further in these proceedings.

THE TRUST DEED

[30] Clause 8.3 of the Trust Deed provides that a written resolution of trustees signed by all the trustees shall be as valid as if unanimously adopted at a meeting of trustees. Clause 10 thereof provides that in the event of a stalemate in votes of trustees the disputed issue shall be referred to arbitration. It is clear from these provisions that a resolution of trustees is valid only if it is a result of a unanimous decision of the trustees alternatively if it is resolved through arbitration.

[31] It has been held that that unless a trust deed provides otherwise, trustees must act jointly and that any decision taken by trustees contrary to the provisions of the trust deed is null and void. See *Meijer NO And Another v First Rand Bank Ltd* (2123/2010 [2012] ZAWCHC 23 (4 April 2012) at paras 23 and 32; *Nieuwoudt And Another v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA).

[32] In *Tijmstra NO v Blunt-Mackenzie NO And Others* 2002 (1) SA 459 (T) it was held that a trustee may be removed: even if the conduct complained of is *bona fide;* whenever the trust assets are endangered; where he acts *mala fide;* where he treats the

assets of the trust and its assets as his own, for example by selling the trust assets without the proper approval of the other trustees as required by the trust deed.

[33] The court is aware of the fact that the applicant and the second respondent have divorced and that the original intention of the settlement agreement was *inter alia* to deal with the assets of their matrimonial estate. It was intended that the second respondent and his three sons would remain as beneficiaries of the Trust to the exclusion of the applicant. I am mindful of the fact that the applicant has partly benefited from the settlement agreement. That notwithstanding, the applicant is entitled to remain a trustee in terms of an agreement that was voluntarily entered into between the parties, which the court is bound to enforce unless it is convinced that the agreement does not reflect the true intention of the parties.

[34] Section 9 of the Trust Property Control Act requires that a trustee must act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another. The trustee is therefore in a fiduciary relationship and may therefore, among others, not exceed his powers, exercise it for an improper purpose or allow his personal interests to be in conflict with his duties to the beneficiaries. It appears from several undisputed allegations made by the applicant that the first respondent did not act in the best interest of the Trust and its beneficiaries. I am of the view that it would be in the interest of the Trust and its beneficiaries that the first respondent be removed as a trustee of the Wilka Trust.

INTERDICT

[35] The court was asked to interdict the first and second respondents from dealing with or disposing of any assets of the Trust and or the fourth respondent. In order to be entitled to a final interdict the applicant must establish the requisites a final interdict, all of which must be present at the same time, namely: a clear right on the part of the applicant; an injury actually committed or reasonably apprehended; the absence of any other satisfactory remedy available to the applicant. The removal of the first respondent as a trustee disposes of the issue in so far as it concerns the Trust in that the first respondent will no longer have any authority to act on behalf of the Trust.

[36] The second respondent is a director of the fourth respondent. Interdicting him from dealing with the assets of the fourth respondent is likely to unreasonably hamper the business of the fourth respondent. In my view, the provisions of sections 45 and 115 of the Companies Act offer protection of the interests of the Trust and its beneficiaries. In the event that there is any contravention of these provisions the affected parties could obtain adequate redress by an award of damages.

In the premises following is ordered:

1. The applicant is authorized to have sole access and control over the bank account of the Wilka Trust (IT 7556/02) held with the third respondent and with account number 9126686163, to the exclusion of the first respondent, with immediate effect.

2. The first respondent is removed as a trustee of the Wilka Trust with immediate effect and is to be replaced by a new trustee to be appointed by agreement between the applicant and the second respondent within 30 days of the date of this order.
3. The applicant is authorized to make any reasonable and necessary payments for and on behalf of the Wilka Trust in the normal course of business of the Trust, including legal costs for this application and any other litigation for or against the Trust, from the funds of the Trust held with the third respondent.
4. The first, second and fourth respondents are ordered to pay the costs of the application.

A L C M LEPHOKO
ACTING JUDGE OF THE HIGH COURT

Heard on: 28 July 2014.

Judgment delivered on: 24 October 2014

For the Applicant: Adv C Zietman

Instructed by: Desire Koch Attorneys

For the First Respondent: Adv J Rust

Instructed by: Dawie DE Beer Attorneys