



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED. <i>yes</i>
<i>22/04/2016</i>	
DATE	<i>C. Rabie</i>
	SIGNATURE

22/4/16
Case no. 78012/2014

In the matter between:

DD WATSON

Applicant

and

N. COCKIN NO

First Respondent

N.F. COCKIN

Second Respondent

N.A. COCKIN

Third Respondent

WOODLANDS ENGINEERING (PTY)LTD

TRADING AS WOODLANDS FIRE

Fourth Respondent

WOODLANDS CORPORATE PROPERTIES (PTY)LTD

Fifth Respondent

THE MASTER OF THE HIGH COURT. PRETORIA

Sixth Respondent

JUDGMENT

RABIE, J

1. This is an ongoing battle about a family trust. The applicant approached this Court in order to resolve disputes which arose between herself, her mother and her two brothers relating to an *inter vivos* trust, the Colton Trust (hereinafter "the trust"), created during March 1996 by her late father who passed away on 26 June 2013.
2. The applicant's late father (hereinafter "the deceased") and her mother, the first respondent, were appointed as the first trustees of the trust and were authorised to act as such in terms of Letters of Authority dated 3 July 1996 issued by the Master of this Court. The second and third respondents are the two brothers of the applicant and also the children of the first respondent and the deceased. The fourth and fifth respondents are companies which are run by the third and fourth respondents respectively. The trust is the sole shareholder of both the fourth and fifth respondents.
3. In terms of the joint will of the deceased and the first respondent one third of the value of their common residence was bequeathed to the applicant. The remaining two thirds of the value of this property was bequeathed to the trust. All rights and membership interests in the Close Corporation known as Woodlands Fire CC (apparently the predecessor of the fourth and fifth respondents) were also bequeathed to the trust as well as all personal assets of the deceased, with the first respondent retaining a usufruct in respect of the personal assets until her death.
4. According to the Deed of Trust the trust was created in order to benefit the capital beneficiaries which were defined by the Deed of Trust as the deceased and the first respondent together with their children, namely, the second respondent, the

third respondent and the applicant. The income beneficiaries were defined as "the persons who shall benefit from the income of the trust in terms of the discretionary powers of the trustees, and may include the capital beneficiaries, their parents, spouses, widows, lawful issue and such other natural persons who the Trustees may appoint from time to time."

5. As mentioned, the deceased and the first respondent were the first trustees of the trust. This was stipulated in paragraph 4.1 of the trust deed. According to paragraph 4.2 thereof the trust shall during its existence have not less than two or more than five trustees in office at any time except in the event of a Financial Institution as described in Act 56 of 1964 being appointed as trustee, in which event such financial institution may act as sole trustee. The maximum number of trustees may be exceeded by testamentary stipulation by the deceased. He, however, had not done so.
6. Paragraph 4.2 further provides that except in the event of a Financial Institution being the sole trustee, if the number of trustees are reduced to less than two, the remaining trustee shall have no power to act with respect to the trust fund, except to the extent that it may be necessary to appoint new trustees in terms of paragraph 4.3 of the trust deed. Paragraph 7.7 thereof in addition specifically stipulates that a quorum of trustees shall be two trustees unless a Financial Institution is the sole trustee. It is further stipulated that the trustees shall not conduct any business at any meeting unless there is a quorum present, other than the appointment of a further trustee, if there is only one trustee at the time.
7. The powers as well as the obligations of the trustees are comprehensively dealt with in the trust deed including the obligation to keep proper records and

accounts reflecting truly and correctly the trustees' administration of the trust fund. The trustees have absolute discretion as to the appropriation, awarding and distribution of the income of the trust and are entitled to pay from time to time from the income of the trust fund to any capital beneficiaries such amounts as the trustees in their sole discretion deem necessary and reasonable for the maintenance of the beneficiaries. They also may in their absolute discretion pay at any time to any income beneficiary so much of the income of the trust as they deem necessary and reasonable.

8. It is further provided that pending the distribution of the trust capital, which would include all accumulated and unpaid income, no portion of the trust fund shall be considered to be a specific share on behalf of an ultimate capital beneficiary, but shall be kept by the trustees as one undivided portion.
9. Since the passing of the deceased the disputes between the parties, with the applicant on the one hand and the first, second and third respondents on the other hand, escalated to such an extent that it can only be described as a very serious, uncompromising and acrimonious family feud.
10. Matters came to a head approximately three weeks after the deceased passed away when the first respondent, in a letter dated 19 July 2013, advised her children, the applicant and the second and third respondents, of the minutes of a meeting of the trust held on 19 July 2013. According to the letter the purpose of the meeting was to nominate and appoint trustees to act in terms of the trust deed after the passing of the deceased. According to the resolution she appointed the second and third respondents as trustees and also appointed them as "beneficiaries" of the trust. In a letter addressed to the applicant's attorneys

dated 15 January 2014 the attorney acting on behalf of the first, second and third respondents, stated the following in respect of the applicant: "According to our client your client is not a beneficiary of The Colton Trust anymore."

11. It is not clear what the first respondent intended by appointing the second and third respondents as "beneficiaries" to the exclusion of the applicant. If this was an attempt to exclude the applicant from any benefits arising from the trust fund or to amend the trust deed to the effect that the applicant is no longer a capital and income beneficiary, such attempt had obviously been invalid. This stance, that the applicant is not a beneficiary of the trust, was later abandoned in the correspondence between the attorneys representing the parties except that it seems that the first, second and third respondents still deny that the applicant is an income beneficiary of the trust.
12. It is common cause that the sixth respondent has to this date not issued Letters of Authority to the second and third respondents. According to the provisions of the trust deed, including those referred to above, the second and third respondents cannot act as trustees and neither can the first respondent do so either individually or with the second and third respondents. This also accords with the provisions of section 6(1) of the Trust Property Control Act which reads as follows:

"Any person whose appointment as trustee in terms of a trust instrument, section 7 or a court order comes into force after the commencement of this Act, shall act in that capacity only if authorised thereto in writing by the Master."
13. A trustee is accordingly prohibited from acting until the Master has issued Letters of Authority. See *Lupacchini N.O. v Minister of Safety and Security* 2010 (6) SA

457 (SCA) at paragraph 3; *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA) at paragraphs 10 and 11. In paragraph 11 of the *Parker* matter Cameron JA (as he then was) held as follows:

"It follows that a provision requiring a specified minimum number of trustees must hold office is a capacity-defining condition. It lays down a prerequisite that must be fulfilled before the trust estate can be bound. When fewer trustees than the number specified are in office, the trust suffers from an incapacity that precludes action on its behalf."

14. Despite being unable to act on behalf of the trust and to deal with assets of the trust, that is exactly what the first, second and third respondents had been doing and are still doing, despite having been made aware of their lack of authority by the applicant and her attorney. I shall refer to a few examples of the first, second and third respondents purporting to act on behalf of the trust.
15. Since the passing of the deceased the first, second and third respondents have alienated assets and distributed capital and most probably also income from the trust. A Land Rover motor vehicle and a Mercedes-Benz Unimog Camper belonging to the trust were sold for R620 000,00 and R170 000,00 respectively. In selling the Mercedes-Benz vehicle the second respondent stated in writing to the purchaser that he was authorised to act as a trustee on behalf of the trust and to dispose of the trust's assets.
16. The second and third respondents are in the *de facto* control of the fourth and fifth respondents. They are conducting the day-to-day business of these companies of which the trust is the sole shareholder. The fourth and fifth respondents conduct a manufacturing business. Despite her best efforts to have access to the

business records of either the trust or the fourth and fifth respondents, the applicant was unable to achieve that for more than a year prior to the launching of the present application. According to the applicant, the combined value of the fourth and fifth respondents, including the fixed property on which they are situated, are no less than R 15 million. As the liquidation and distribution account in the deceased estate, which had been prepared by the attorneys of the first, second and third respondents, shows the value for distribution as less than R1 million, the applicant has filed an objection against the account with the Master alleging misappropriation and non-disclosure of certain assets which belonged to the deceased and which have been inherited by the trust.

17. The applicant also referred to documentation which would indicate a transfer of offshore funds of the deceased of more than R 6,3 million to the HSBC Bank in Jersey. A few months before the death of the deceased the name of the account was changed to "Messrs Cockin & Mrs N Cockin" which implies a disappearance of the money from the estate of the deceased.
18. Subsequent to the death of the deceased all these funds were withdrawn from the HSBC account and paid to entities in Mauritius, ostensibly for holiday properties. These properties were not purchased in the name of the trust but in the names of the first, second and third respondents. The applicant stated that she was not aware of any Deed of Donation prior to the deceased's death in respect of the HSBC funds but even if that were to be the case, the deceased's will makes no provision for collation with the result that such donations would have to be repaid to the estate.

19. In the answering affidavit on behalf of the respondents the third respondent stated that on the day that he drafted his will, the deceased donated all the funds in the HSBC account to the first, second and third respondents with the result that this amount did not fall into his estate, and with the further result that the trust did not inherit this amount. It was stated by the applicant, and submitted on her behalf, that these factors constitute very good reasons why independent trustees should be appointed. The trust is the sole beneficiary that stands to gain if the donation were to be set aside or the money were to be paid back to the deceased's estate for any other reason. However, only independent trustees would be willing to investigate the alleged donation of probably the bulk of the deceased's estate. The third respondent in fact stated that the applicant was not supposed to know of the existence of the offshore funds. This attitude, if anything, is even more of a reason why independent trustees should be appointed. The trust, as sole beneficiary, has an interest in this amount and to establish the validity of the alleged donation to the first second and third respondents. If the first, second and third respondents, who had benefited from the alleged donation, were to be left with the sole control of the trust as trustees, this donation would, as in the past, never be investigated and challenged on behalf of the trust.
20. The applicant further pointed out that apart from not answering the Master's queries, the respondents have failed to advise how they, as the recipients of the funds in the amount of R 6 341 666, 00 have treated the donations tax of 20%, *i.e.* an amount of R 1 268 333, 20 payable to SARS if the aforesaid amount in fact constituted a donation. The applicant suggested that the respondents had not paid such tax which is a further indication that it is unlikely that any donation was

in fact made to the respondents as alleged. Even if there was a donation, it would have to be repaid to the estate in terms of the principle of collation.

21. In her replying affidavit the applicant also responded to the financial statements of the fifth respondent as at 28 February 2014. Therein the fifth respondent recorded that an unsecured long-term liability in favour of the trust increased from R 1 082 022, 00 on 28 February 2013 to R 1 253 923, 00 on 28 February 2014. The conclusion to be drawn is that the trust lent and advanced the sum of R 171 901, 00 to the fifth respondent during the time when the first respondent was the only trustee and would not have had the power to do so.
22. The applicant also pointed out that the financial statements of the fourth and the fifth respondents for the financial years 2012 to 2014 have not been audited as it was supposed to have been done.
23. The applicant also pointed out that in 2011, the trust's loan account to the fifth respondent was R 879 436, 00, in 2013 it was R 1 082 022, 00, in 2014 it was R 1 253 923, 00. According to the applicant this would indicate increasing amounts lent to the fifth respondent by the trust. In particular, an amount of R 171 901, 00 was lent after the deceased had passed away.
24. Similarly, it appears that a loan was made to the trust by the fourth respondent in the amount of R 783 157, 00 during the 2014 financial year. The first respondent, in her capacity as the only remaining trustee, would not have had the power to lend and borrow the aforesaid amounts. The applicant suggested that it is more probable that the first respondent was totally unaware of these transactions and

that the second and third respondents were indeed the operating minds behind same.

25. In response to the above the third respondent stated in a further answering affidavit that the amount of R171 901,00 presents interest charged on a loan which the fifth respondent made from the trust during 2002/2003.

26. In respect of the loan account owed by the trust to the fourth respondent it was explained in paragraph 12 to 15 in the further answering affidavit as follows:

"12. The surplus cash reserves of the fourth respondent are transferred on a regular basis which are transferred to the Colton trust as a type of untouchable reserve which would need to be instantly accessible to secure overseas stock purchases.

13. These transactions happen regularly to excess funds and as a result, there are many in and out transactions of this nature throughout the year.

14. The only other transaction that occurred in the year was an annual interest charge.

15. From the description of the above, it can be seen that this is not a loan that was advanced to the fourth respondent by the Colton Trust but in fact a only reserves of the fourth respondent that is kept in the account of the Colton Trust to be utilised when the funds are required for purposes of purchasing stock abroad by the fourth respondent." (*sic*)

27. If my understanding of this explanation is correct, I find it quite disturbing for it would seem that the fourth respondent is using the accounts of the trust as if it is the fourth respondent's own business account. To say that this was the practice while the deceased was still alive, is obviously no answer.

28. According to the applicant neither she nor her children have received anything from the trust as beneficiaries and she submitted that the appointment of the second and third respondents as trustees, is a blatant attempt to exclude her as a beneficiary from the trust.
29. It is clear that as matters stand, the first, second and third respondents are unlawfully administering the business of the trust as well as the businesses of the fourth and fifth respondents. This is so because the second and third respondents have not been authorised to act on behalf of the trust by the Master and since the trust is the sole shareholder of the third and fourth respondents respectively, no decisions can be taken by the third and fourth respondents to allow for the second and third respondents to act lawfully on their behalf.
30. It is undisputed that there exists an acrimonious relationship between the applicant and the first, second and third respondents regarding the business and interests of the trust. A conspectus of the evidence before this court also makes it clear that there is a deliberate attempt by the first, second and third respondents to push the applicant out and to deprive her of the required information regarding the trust and in sharing in the benefits of the trust. Furthermore the second and third respondents appear to be using the trust as their *alter ego* and the trust assets as their own, and also the fourth and fifth respondents as their own property. Clearly the rights of the applicant and her daughter, as beneficiaries of the trust, are presently denied by the first, second and third respondents. It is also clear that with the first, second and third respondents as trustees, this situation would not change and, as stated above, the alleged donation by the

deceased of the bulk of his estate to the first, second and third respondents shortly before his death, would, to the detriment of the trust, remain unchallenged.

31. In Parker, *supra*, Cameron JA said the following in paragraphs [19] and [20] on p86:

[19] ... some observations are needed about the abuse of the trust form this case yet again brings to light. The core idea of the trust is the separation of ownership (or control) from enjoyment. Though a trustee can also be a beneficiary, the central notion is that the person entrusted with control exercises it on behalf of and in the interests of another. This is why a sole trustee cannot also be the sole beneficiary: Such a situation would embody an identity of interests that is inimical to the trust idea, and no trust would come into existence. It may be said, adapting the historical exposition of Tony Honoré, that the English law trust, and the trust-like institutions of the Roman and Roman-Dutch law, were designed essentially to protect the weak and to safeguard the interests of those who are absent or dead. 15

[20] This guiding principle provided the foundation for this Court's major decisions over the past century in which the trust form has been adapted to South African law: That the trustee is appointed and accepts office to exercise fiduciary responsibility over property on behalf of and in the interests of another."

In paragraph [22] Cameron JA added the following (without references):

"[22] ... The essential notion of trust law, from which the further development of the trust form must proceed, is that enjoyment and control should be functionally separate. The duties imposed on trustees, and the standard of care exacted of them, ... derive from this principle. And it is separation that serves to secure diligence on the part of the trustee, since a lapse may be visited with action by beneficiaries whose interests conduce to demanding better. The same separation tends to ensure independence of judgment on the part of the trustee - an indispensable requisite of office ... - as well as careful scrutiny of transactions designed to bind the trust, and compliance with formalities (whether relating to

authority or internal procedures), since an independent trustee can have no interest in concluding transactions that may prove invalid."

32. Having regard to the aforesaid I am of the view that in the present instance there should be an adequate separation of control by the trustees from the enjoyment by the beneficiaries, in the trust. Something which is presently totally lacking. This would only be possible if sufficient independent trustees were to be appointed to avoid a situation where beneficiaries of the trust could take majority decisions to the detriment of other beneficiaries.
33. As far as the disputes relating to the estate of the deceased is concerned the trust is the sole beneficiary of the will and it is thus important that the trustees assert the rights of the trust. Up to now the respondents have failed to deal with the essence of the objections to the liquidation and distribution account and is clearly of the view that the aforesaid alleged donation should not come under scrutiny. It further appears that the same attorney appeared for the first second and third respondents and was also tasked with the administration of the deceased's estate. This was the same attorney who earlier informed the Master that according to his instructions the third respondent is not aware of any monies paid to him by the deceased. This is the opposite from the alleged donation which the respondents later mentioned in their answering affidavit. Clearly, only independent trustees would be able and prepared to establish and enforce the rights of the trust in respect of the will of the deceased.
34. The Master of this Court has the necessary powers in terms of the Trust Property Control Act to grant Letters of Authority only to such persons which in his view would enhance the trust principles referred to above. The Master similarly has the

authority to cause the required investigation to be carried out into the administration and disposal of trust property of the trust. On the facts before this court I am of the view that such trustees and such a number of trustees should be appointed so as to ensure that the trust would be able to take majority decisions that would enhance the principle of separation of control and enjoyment and also the fair treatment to all beneficiaries concerned. However, no more needs to be done by this court, in my view, then to direct the Master to consider the exercise of his powers in this regard.

35. What this court should do at this point is to pronounce on the rights of the parties and to ensure that the Master is placed in a position to exercise his powers in terms of the Act.

36. As far as costs are concerned I agree with the submission on behalf of the applicant that the trust is not properly before this court due to its lack of capacity and that the costs, which should follow the event, be paid by the second and third respondents jointly and severally. It was submitted on behalf of the applicant that a punitive order for costs should be made against the second and third respondents. I have considered all the submissions in this regard but in my view such an order should not be made.

37. In the result the following order is made:

1.

1.1 It is declared that the applicant, Diane Dawn Watson (born Cockin) (hereinafter "the applicant") is a capital beneficiary of the Colton Trust (bearing Master's Reference 3264/1996) (hereinafter "the Colton Trust");

1.2 It is declared that the applicant is an income beneficiary of the Colton Trust.

2. The Master is directed to consider exercising his power in terms of section 7 (2) of the Trust Property Control Act to appoint as co-trustee so many independent persons so as to ensure that an adequate separation of control (by the trustees) from enjoyment (by the beneficiaries) is maintained in the Colton Trust.

3. The Master is directed to consider exercising his power in terms of section 16 (2) of the Trust Property Control Act to cause an investigation to be carried out by some fit and proper person appointed by him into the trustee's administration and disposal of trust property of the Colton Trust.

4.

4.1 It is ordered that unless and until the Master issues Letters of Authority in favour of additional trustees, the first respondent is interdicted and restrained in her capacity as trustee of the Colton Trust from dealing with the assets of the Colton Trust and/or from entering into agreements on behalf of the Colton Trust and/or purporting to act on behalf of the Colton Trust in any manner save for the purpose of appointing new trustees in terms of clause 4.3 of the Deed of Trust.

4.2 It is ordered that unless and until the Master issues Letters of Authority in favour of the second and third respondents, the second and third respondents are each interdicted and restrained from acting or purporting to act as trustees of the Colton Trust and in any way dealing with the assets of the Colton Trust, whether the same are situated in South Africa, the Isle of Mann, Mauritius or elsewhere.

5. The first respondent, in her capacity as trustee of the Colton Trust is ordered to deliver to the Master and to the applicant:

5.1 The financial statements of the Colton Trust for the past three financial years;

5.2 the bank statements of the Colton Trust for the past three years.

6. The second and third respondents are ordered jointly and severally to pay the costs of this application.

A handwritten signature in black ink, appearing to read 'C.P. Rabie', is written above a horizontal line.

C.P. RABIE

JUDGE OF THE HIGH COURT