



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

Case number: 29090/2019

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES/NO

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SIGNATURE

2022-06-17
DATE

In the matter between:

AMe VAN RHYN

FIRST APPLICANT

FOURIE ALDIRICH VAN RHYN

SECOND APPLICANT

And

HENDRIKA VAN RHYN

FIRST RESPONDENT

**THE MASTER OF THE HIGH COURT,
PRETORIA**

SECOND RESPONDENT

JUDGMENT

PHAHLAMOHLAKA A.J.

INTRODUCTION

- [1] This is an application for the removal of the First Respondent as a trustee of the Blue Mountain Trust and causing her to be replaced by Johan van Rhyn (the first and second applicant's grandfather) and Andre Roux (a Chartered Accountant).
- [2] This application was launched in terms of section 20 of the Trust Property Control Act 57 of 1988 as amended, alternatively in terms of the common law, and by virtue of which the first respondent is removed as a trustee of the Blue Mountain Trust, IT number 5866/2006. Section 20 of the Act provides as follows:

BACKGROUND AND FACTS

- [3] The Applicants are the children of the first respondent and due to the circumstances as set out in the affidavits filed of record, require her to be replaced by alternative trustees and her to provide such documentation and information as may be necessary for the new trustees to enable them to execute their responsibilities as trustees of the trust.
- [4] The basis upon which the removal of the first respondent as trustee is sought, is that she has not acted in the interest of the beneficiaries of the trust and there is a real apprehension that, unless removed, she will continue to act in this manner.

GROUND FOR REMOVAL OF THE FIRST RESPONDENT AS TRUSTEE

- [5] The following grounds for removal of the first respondent as trustee will be relied on and dealt with in detail further below:
 - 5.1 The first respondent frustrated the trust objective and made realisation of same wholly impossible.
 - 5.2 The failure of the first respondent to act in good faith towards the trust and all beneficiaries of the trust.
 - 5.3 The failure of the first respondent to avoid a conflict of interest between her personal interest and the interest of the trust.
 - 5.4 The fact that the first respondent caused the financial statements of the trust, to show a purported claim in her favour, which includes an amount of R935 000.00 which, on her own version, was funds paid to the trust by her ex-husband and not funds to which she was personally entitled.
 - 5.5 Infringement of the right of privacy of the first applicant.

- 5.6 A complete abuse of the trust funds, including the fact that the first respondent failed to separate her own finances from that of the trust.
- 5.7 The first respondent failure to ensure that the relevant submission were made to the South African Revenue Services as well as her failure to ensure that financial Statement are compiled on a yearly basis.

THE APPLICABLE LAW

[6] Section 20 of the Trust Property Control Act 57 of 1988 determines as follows:

"20 Removal of Trustee

(1) A trustee may, on the application of the Master or any person having 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.

(2) A trustee may at any time be removed from his office by the Master:-

(a) if he has been convicted in the Republic or elsewhere of any offence of which dishonesty is an element or any other offence for which he has been sentenced to imprisonment without the option of a fine; or

(b) if he fails to give security or additional security, as the case may be, to the satisfaction of the Master within two months after having been requested thereto or within such further period as I allowed by the Master; or

(c) if his estate is sequestrated or liquidated or placed under judicial management; or

(d) if he has been declared by a competent court to be mentally ill or incapable of managing his own affairs or if he is by virtue of the Mental Health Act. 1973 (Act 18 of 1973), detained as a patient in an institution or as a State patient; or

(e) if he fails to perform satisfactorily any duty imposed upon him buy or under this Act or to comply with any lawful request of the Master;

(f) Section 10 of the Act provides that wherever a person receives money in his capacity as trustee, he shall deposit such money in a separate trust account at a banking institution or building society.

(3) If a trustee authorised to act under section 6(1) is removed from his office or resigns, he shall without a delay return his written authority to the Master

[7] According to the affidavits filed in this matter the following issues are common cause, either due to it being expressly admitted or due to the fact that it is by law regarded as being admitted, which would be the case if the first respondent failed to admit, deny or confess and avoid the issue:

- 7.1 The first respondent is a trustee of the trust;
- 7.2 The trust is the owner of a smallholding, Portion 328 (Portion of Portion 74) of the Farms Boschkop 369 JR ("the Property");
- 7.3 The first respondent concluded an agreement, (or attempted to do so) between herself and the trust, in terms whereof she funded improvement to the property owned by the trust and in respect of which she now alleges to have a claim against the trust, to an amount of approximately R1 199 122.00.;
- 7.4 The trust acquired an immovable property known as Enterprise 44B, Nelspruit ("the Enterprise property") in 2007;
- 7.5 The Enterprise property was sold and the Boschkop property acquired in 2015;
- 7.6 The first respondent and Massyn currently reside in the residence on the Boschkop property without a formal rental agreement;
- 7.7 First Respondent invested the proceeds from the Enterprise property (which has its origin in the amount of R935 000.00 her erstwhile husband paid) for the purchase and improvement of the Boschkop property whilst Massyn from 2015 to 2019 similarly contributed and invested the total sum of R1 909 336.43 in the Boschkop property for the improvement of the communal home;
- 7.8 There is a complete breakdown of the trust between both Applicants and First Respondent, the relation deteriorated to such extend that there is no contact and/or communication between Applicants and First Respondent, First Applicant obtained a family violence interdict.

- 7.9 The first respondent contends that she should not be removed and that she has caused her father ("Louw") appointed as a trustee of the trust, during or about September 2019 (being a date after the application was launched).

THE APPLICANT'S CASE

[8] The applicant contends that:

- 8.1 the first respondent, unilaterally and without alleged in the involvement of any other trustee, concluded an agreement, (or attempted to do so) between the trust and her fiancé Dries Massyn, the detail of which she fails or refuses to disclose, in terms whereof he provided "Monies, material and labour" to fund or facilitate improvements to the property owned by the trust and in respect of which she now alleges him to have a claim against the trust to an amount of approximately R1 909 567.00.
- 8.2 This first respondent and her Mr Massyn reside in the house owned by the trust free of payment of any rental.
- 8.3 The relationship between the first respondent and the first applicant is strained, and had deteriorated to the extent that the first applicant had approach a court for a family violence interdict against the first respondent.
- 8.4 There no longer exist any mutual trust and respect between the first applicant and the first respondent, as is evident from the fact that the first applicant suspect the first respondent of stealing the money of the trust and the first respondent resorted to spying on the first applicant.
- 8.5 The relationship between the second applicant and the first respondent is strained, to the extent that they do not communicate with each other.
- 8.6 Until September 2019, when the first respondent's father "Louw" was apparently appointed as trustee, all actions taken (including all contract concluded) by the first respondent as trustee, with the exception of the signing of the agreement of sale, for which the first respondent contends she had a resolution signed by Dunn, were done by alone. (Either because Dunn was no longer a trustee, or simply because the first respondent chose not to involve him as Counsel for the Applicant argued that:
- 8.7 The first respondent, as trustee of the trust caused the trust to be at risk of claims by herself and her fiancé, which if proven would result in the trust losing its only asset and which claims she, as trustee, regard as valid.
- 8.8 The first respondent as trustee of the trust, believed herself to be free to deal with the trust assets in accordance with her unfettered discretion. She express this belief as follows:

“... that the trust is a discretionary trust, that in am an income beneficiary, that I, as one of the trustees, was empowered to deal with any assets of the trust for the time being as I in my sole and absolute discretion may decide with full plenary powers equal to an unqualified General Power of Attorney.”

8.9 The first respondent as trustee of the trust, believed herself to be entitled to use rental income of the trust. “... for either myself (or Ame and Fourie) as I deemed it apposite.” (My underlining for emphasis)

8.10 In addition, she states her belief in her right to utilize the trust funds at will for her own purposes as follows in paragraph 26.2 of the answering affidavit:

“... I have unfettered full discretionary authorisation as if capital Power of Attorney to utilize the income of the trust.”

8.11 The financial statement of the trust, for the period of February 2007 to February 2019, was only compiled in July 2019.

8.12 The first respondent refused to provide information pertaining to the finances of the trust to Swanepoel and Partners Attorneys, who represent the applicants as beneficiaries of the trust (based purely on her unfounded suspicion that their father was behind the request for information.)

8.13 That the amount of R935 000.00 paid to the trust by the first respondent's erstwhile husband, was a payment to the trust and not to the first respondent, made to the transferring attorneys when the trust obtained a property, referred to as the “Enterprise Property.”

8.14 When the Enterprise property was sold, the income received from the sale, including the R935 000.00 was utilised to purchase and improve the now property, referred to as the “Boschkop property”.

8.15 The first respondent caused the amount of R935 000.00 which was an amount paid to the trust to enable it to purchase of the property, to be reflected in the in the accounts of the trust, as a loan extended by her to the trust.

THE FIRST RESPONDENT'S CASE

[9] The first respondent contends that there is a dispute of fact that requires the court to refer the matter for trial.

[10] According to the first respondent the following are common cause facts;

10.1 The trust acquired an immovable property known as 44B, Nelspruit in 2007.

10.2 The enterprise property was sold and the Boschkop property acquired in 2015;

10.3 The first respondent and Massyn currently reside in the residence on Boschkop property without a formal rental agreement;

10.4 The first respondent invested proceeds from the Enterprise property (which has its origin in the amount of R 935 000.00 her erstwhile husband paid) for the purchase and improvement of the Boschkop property whilst Massyn from 2015 to 2019 similarly contributed and invested the total sum of R 1 909 336.43 in the Boschkop property for the improvement of the communal home.

10.5 There is a complete breakdown of trust between both applicants and first respondent, the relationship deteriorated to extent that there is no contact and/or communication between applicants and the first respondent, first applicant obtained a family violence interdict against first respondent in December 2018 with the first applicant accusing the first respondent of fraud and theft;

10.6 First respondent did not account to the applicants (as beneficiaries) when requested to do so;

10.7 did not on annual basis prepare financial statements;

[11] The first respondent admits the following;

11.1 That there is a complete breakdown in trust between the first respondent and applicants;

11.2 that first respondent did not involve her co-trustee, (Mr Dunn at the time) in the decision to 'invest' or utilise the monies derived from the sale of the Enterprise property in Nelspruit and reflect that as long-term loan against her name whilst unilaterally allowing Massyn to use his personal funds for the betterment and improvement of the Boschkop property;

11.3 The first respondent failed to render financial statements and failed to account to the South African Revenue Services (SARS);

[12] The most recent authority on the removal of trustees is the judgment of the Supreme Court of Appeal of **Fletcher v McNair**¹

[13] Mr Dunn resigned as a co-trustee of the trust and the first respondent never did anything to appoint another trustee. In fact she continued to run the affairs of the trust as a sole trustee. However, Mr another trustee has been appointed and the first respondent is willing to have another trustee appointed.

¹ (1350/219) [2020] ZASCA 135 (23 October 2020)

CONCLUSION AND ORDER

[14] I am of the view that the first respondent did not act in the best interest of the trust and the beneficiaries and therefore I am satisfied that her removal will be in the best interest of the trust and the beneficiaries.

[15] In the result I make the following order:

- (a) That the first respondent be removed as trustee of the Blue Mountain Trust, IT number 5866/2006.
- (b) That Andy Roux be appointed as trustee of Blue Mountain Trust, IT number 5866/2006.
- (c) The first respondent to pay costs on party and party scale.
- (d) The amended draft order marked "X" hereby made an order of this court.

**KGANKI PHAHLAMOHLEKA
ACTING JUDGE OF THE HIGH
COURT, GAUTENG DIVISION,
PRETORIA**

Delivered: this judgment was prepared and authored by the judge whose name is reflected and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of his matter on Case lines. The date for handing down is deemed to be 17 June 2022.

JUDGMENT RESERVED ON	: 31 January 2022
FOR THE APPLICANTS	: ADV Q PELSER SC
INSTRUCTED BY	: MICHAEL VAN RENSBURG ATTORNEY
FOR THE RESPONDENTS	: ADV JGW BASSON
INSTRUCTED BY	: DP DU PLESSIS INC.
DATE OF JUDGMENT	: 17 June 2022



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SECOND APPLICANT

And

HENDRIKA VAN RHYN

FIRST RESPONDENT

**THE MASTER OF THE HIGH COURT,
PRETORIA**

SECOND RESPONDENT

ORDER

Having read the papers filed of record and heard counsel, it is ordered that:

1. That the first respondent be removed as trustee of the Blue Mountain Trust, IT number 5866/2006;
2. That Andry Roux, alternatively such nominate as the Honourable Court may direct, be appointed as trustees of Blue Mountain Trust, IT number 5866/2006;
3. That the second respondent be ordered to amend its records accordingly in order to reflect the change in trustees;
4. That the first respondent be ordered to provide the applicant, within 20 days of the court order being granted, with:
 - 4.1 Copies of bank statements of all bank accounts held by the Blue Mountain Trust from 2006 to date hereof;
 - 4.2 Copies of any and all amendments to the trust deed of the Blue Mountain Trust together with proof of same being lodged with the Master;
 - 4.3 Copies of any and all contracts concluded by the Blue Mountain Trust in respect of fixed property, inclusive of but not limited to rental agreements and agreements of sale, since registration of the

Trust.

5. That the Sheriff for the district of Bronkhorstspuit may do or cause be done anything that may be necessary to give effect to this Court Order, including but not limited thereto, that he may demand / cause demand any documents, computer hardware and/or information referred to in the final order pertaining to prayers 4.1 to 4.3 hereinbefore and to take such steps that he deems lawful and relevant in order to seize and/or attach and/or take in his possession those documents, computer hardware and/or information in execution of the final order and that the first respondent be responsible for payment for all costs incurred by the sheriff in that regard.
6. That the first respondent be prohibited from utilising trust funds or assets in any way whatsoever to pay or contribute to payment of her legal costs in this application.
7. That the costs of this application be awarded in favour of the applicants on a scale as between ^{party and party} ~~attorney and own client~~. *KJ*
8. That such further and/or alternative relief as the Honourable Court deems meet.

BY ORDER OF COURT

Counsel for the Applicants: Adv. Q Pelser S.C
Cell: 082 463 1072
Email: qpelser@lawcircle.co.za

Briefed by:

Michael van Rensburg Attorneys
Cell: 071 895 4108
Email: michael@mvratt.co.za

Counsel for the First

Respondent: Adv. JGW Basson
Cell: 083 272 7899
Email: org.basson@mweb.co.za

Briefed by

DP Du Plessis Inc
Tel: 012 664 6767
Email: henniedupsr@gmail.com /
dalene@dpdup.co.za