REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO. 6900/2009

In the matter between:

ANDRÉ RENÉ ROY MOORE N.O.	FIRST APPLICANT
BRIAN NEVILLE GAMSU N.O.	SECOND APPLICANT
CHARLES MICHAEL SEGALL N.O. .	THIRD APPLICANT

and

MRS DU TOIT, ASSISTANT MASTER OF THE HIGH COURT FOR THE PROVINCE OF KWAZULU-NATAL	FIRST RESPONDENT
GLEN USHER	SECOND RESPONDENT
ANDRIES JONATHAN LATEGAN GEYSER N.O.	THIRD RESPONDENT
MDUDUZI CHRISTOPER NKOMO N.O.	FOURTH RESPONDENT
YASHICA CHETTY N.O.	FIFTH RESPONDENT
MAHMOOD ESSOP CAJEE N.O.	SIXTH RESPONDENT

JUDGMENT Delivered on 30 November 2009

SWAIN J

[1] The first respondent (the Assistant Master for the High Court) acting in terms of Section 7 (2) of the Trust Property Control Act No.

57 of 1988 (hereafter referred to as the Act) appointed the second respondent, as an additional trustee to the Banavie Trust (the Trust) of which the applicants, as at the time of the launch of the present application, were all trustees. The resignation of the third applicant, as a trustee of the Trust, has in the interim become effective, as the requisite three months' notice provided for in the Trust Deed has expired.

[2] The applicants seek an order in terms of Section 23 of the Act, setting aside the appointment of the second respondent by the first respondent and join the third to the sixth respondents, in their capacity as the provisional trustees of the insolvent estate of Robin Patrick Thorpe, who was formerly a trustee of the Trust.

[3] The main ground upon which the applicants base their claim, is that the first respondent before acting in terms of Section 72 of the Act, on the basis of information concerning the affairs of the Trust, supplied to the first respondent by the third respondent, was obliged to afford to the applicants an opportunity to make representations, in accordance with the maxim *audi alteram partem.*

[4] Section 7 of the Act provides as follows:

"7. **Appointment of trustee and co-trustee by the Master** – (1) If the office of trustee cannot be filled or becomes vacant, the Master shall, in the absence of any provision in the trust instrument, after consultation with so many interested parties as he may deem necessary, appoint any person as trustee

(2) When the Master considers it desirable, he may, notwithstanding the provisions of the trust instrument, appoint as co-trustee of any serving trustee any person whom he deems fit."

[5] Mr. Lopes, S.C., who together with Mr. M.F. Moosa, appeared for the applicants, submitted that the provisions of Section 7 (1) and (2) must be interpreted together as a composite provision, with the result that the obligation imposed upon the first respondent in Section 7 (1) to consult "with so many interested parties as he may deem necessary" before appointing a trustee, applied with equal force when the first respondent exercised his/her powers in terms of Section 7 (2) of the Act.

[6] I disagree. Section 7 (1) and Section 7 (2) are clearly intended to deal with two different situations. Under Section 7 (1) the first respondent is only entitled to appoint a trustee "in the absence of any provision in the Trust instrument" if the "office of trustee cannot be filled or becomes vacant". Under Section 7 (2) however, the first respondent is empowered to appoint a co-trustee to any serving trustee "notwithstanding the provisions of the trust instrument".

[7] Under Section 7 (1) of the Act not only express, but also tacit and implied provisions contained in the Trust instrument, would exclude the power of the Master to act in terms of Section 7 (1) of the Act.

Honoré and Cameron – Honoré's South African Law of Trusts
5th Edition pg 193 Section 118

Conversely, under Section 7 (2) of the Act, the first respondent has the power to appoint a co-trustee, even though the founder may have expressly named the persons intended to serve as trustees, may have limited the number of trustees who can hold office, and stipulated the exclusive manner of their succession.

Honoré and Cameron *supra* at pg 197 Section 119

[8] Mr. Mthembu, who appeared for the first respondent, submitted that in seeking to ascertain the intention of the Legislature in this regard, it was significant that although express provision was made in Section 7 (1) of the Act for the first respondent to consult with interested parties, Section 7 (2) was silent in this regard. The maxim "unius inclusio est alterius exclusio" is not a rigid rule of statutory construction and must, at all times, be applied with great caution.

Administrator, Transvaal & Others v Zenzile and others
1991 (1) SA 21 (A) at 37 F – H

Relevant to this enquiry are the words of Milne J A in the case of

S A Roads Board v Johannesburg City Council
1991 (4) SA 1 (A) at 10 G – I

"In the first place, this Court has expressed a preference for the view which regards the *audi* principle as a rule of natural justice which comes into play whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in his liberty or property or existing rights, or whenever such an individual has a legitimate expectation entitling him to a hearing, unless the statue expressly or by implication indicates the

contrary, as opposed to the view which requires the *audi* principle, if it is to apply, to be impliedly incorporated by the statue in question.

The appointment of a co-trustee by the first respondent, in terms of Section 7 (2) of the Act, would prejudicially affect the right of an existing trustee to exercise his powers as a trustee. The issue for determination is whether the Act by implication, excludes the right of an individual to a hearing, before the first respondent acts in terms of Section 7 (2). Such exclusion must be found by way of implication, because there is no express ouster of the right in the Act.

[9] Where the enquiry is whether the statute by implication, excludes the right to a hearing, it is with the greatest respect, difficult to see how the implied denial of a legitimate expectation of a hearing, may be found solely within the confines of the statute itself. This is because the determination of whether a legitimate expectation of a hearing exists may depend upon facts which are extraneous to the provisions of the statute. For example, a legitimate expectation of a hearing "may arise from an express promise given on behalf of a public authority, or from the existence of a regular practice, which the claimant can reasonably expect to continue"

Administrator Transvaal & Others v Traub and others
1989 (4) SA 731 (A) at 756 I

per Corbett J A citing the speech of Lord Fraser in

Council of Civil Service Unions & Others

v

Minister for the Civil Service

[1984] 3 All ER 935 (HL) at 943 J – 944 a

In addition, a legitimate expectation may arise "first where a person enjoys an expectation of a privilege or a benefit of which it would not be fair to deprive him or her without a fair hearing; and secondly, in circumstances where the previous conduct of an official has given rise to an expectation that a particular procedure will be followed before a decision is made"

Premier Mpumalanga v Association of State-Aided Schools

1999 ***(2) SA 91 (CC) at pg 107 F – G***

citing Corbett C J in Traub's case *supra* at pg 758 D – F. In other words, an official albeit not legally obliged in terms of an empowering statute to afford a hearing to a person, may agree to do so, or may by his course of conduct in granting hearings, create such an expectation. In this context, even where a statute expressly excludes the right to a hearing, a person may establish a legitimate expectation of one.

[10] Due regard being had to the caution which must be exercised in applying the rule of construction referred to above, as well as the dictum in the SA Roads Board's case *supra*, I am however driven to the conclusion that the Legislature intended in Section 7 (2) of the Act, to impliedly exclude an obligation upon the first respondent, to afford a hearing to any interested parties, before acting in terms of the sub-section. Express provision was made in Section 7 (1) for

prior consultation with interested parties because when the first respondent acts in terms of this Section, he specifically does so in the absence of any provision in the Trust instrument, to fill the vacancy in the office of trustee. That in doing so, he should act with due regard to the views of interested parties is perfectly understandable. In acting in terms of Section 7 (2) the objective is entirely different. F. du Toit in his work

South African Trust Law Principles and Procedure pg 59

citing the Law Commission Reports: Review of the Law of Trusts para 7.4 says the following

"The Master will in all probability exercise the discretionary power bestowed by the above subsection if the appointment of a co-trustee will avail the trust administration of specialised knowledge or expertise not possessed by a serving trustee or when the intervention of a co-trustee is likely to diffuse any tension or friction between serving trustees *inter se* or between serving trustees and trust beneficiaries".

[11] An obligation to consult before appointing a co-trustee to diffuse a situation of conflict, may unreasonably stultify a need for urgent intervention. Dealing with the situation where a statute authorises emergency, ex parte, action the learned author Baxter states that it might be implicit in the statue that unless natural justice is excluded altogether, a hearing need only be given after the decision is taken.

Baxter Administrative Law pg 587

Section 7 (2) clearly does not expressly authorise such urgent intervention, but if one of the objectives of the section was to diffuse a situation of conflict, this may be considered as support for my view that the intention of the Legislature was that a hearing is not to be afforded before a decision is made.

[12] As regards the provision of a hearing after a decision has been taken in terms of Section 7 (2), the provisions of Section 23 of the Act are relevant

"Access to court – Any person who feels aggrieved by an authorization, appointment or removal of a trustee by the Master or by any decision, order or direction of the Master made or issued under this Act, may apply to court for relief, and the court shall have the power to consider the merits of any such matter, to take evidence and to make any order it deems fit."

[13] Although it is clear that the provision of an administrative appeal, in respect of a decision taken in breach of the principle of a fair hearing, does not necessarily cure the failure

Baxter *supra* at pg 589

the following consideration is however significant

"It is important to draw a distinction between the type of appellate proceeding which allows for a complete rehearing *de novo*, totally superseding the original decision process, and appellate proceedings which are self-contained and not a replacement of the original proceedings. In the case of the former, it is possible for the appellate tribunal, by observing the precepts of natural justice,

to gather completely fresh evidence in a fair manner and to weigh it objectively and impartially. To this extent the injustice of the first hearing can be remedied."

Baxter *supra* at pg 589

[14] Section 23 affords an "aggrieved" person the opportunity of having any decision of the first respondent, appointing a co-trustee, to be re-heard *de novo*. This is because this Court, in dealing with such an application, has the power "to take evidence" and "consider the merits of any such matter" and "make any order it deems fit".

[15] The denial of a right to be heard, before the first respondent grants any order in terms of Section 7 (2), is therefore not absolute.

[16] What has to be considered now is whether the applicants had a legitimate expectation of being heard before the first respondent appointed the second respondent as a co-trustee of the Trust, in terms of Section 7 (2) of the Act. This issue was raised by Mr. Thatcher, who was appointed as a *curator-ad-litum* to those descendants yet to be born of Thorpe and his wife. Thorpe and his wife and his descendants are the income beneficiaries of the Trust. Mr. Thatcher, relying upon a passage in Honoré, *supra* at pg 198 Section 119, submitted that such a legitimate expectation existed on the part of the applicants. The passage relied upon in Honoré reads as follows:

"The Master's discretionary power is not attended by any express requirement of consultation. But in so far as the appointment of a co-trustee could affect the interests of beneficiaries or indeed constitute an adverse reflection upon the serving trustee, these parties may have a legitimate expectation of being heard before the appointment is made. It would in any event clearly be proper for the Master to consult interested parties before appointing a co-trustee. But no procedure is prescribed."

[17] As is apparent from the passage in the S A Roads Board's case, which I have previously cited, any claim to a legitimate expectation of a hearing, may impliedly be excluded by the statute in question, unless of course such an expectation arises from factors extraneous to the statute itself. That the appointment of a co-trustee in terms of Section 7 (2) could affect the interests of beneficiaries, or constitute an adverse reflection upon the serving trustee, are consequences which inevitably flow from the provisions of the Act itself. A legitimate expectation of a hearing must therefore equally be impliedly excluded, for the reasons I have set out above. There is nothing before me on the papers which suggests that such a legitimate expectation could arise from anything extraneous to the Act, i.e. a promise by the first respondent to do so, or any prior conduct on the part of the first respondent in this regard.

[18] I therefore do not, with respect, agree with the views of the learned authors in this regard.

[19] However, I agree with the views of the learned authors that it would generally be "proper" for the first respondent to consult with interested parties before appointing a co-trustee in terms of Section 7 (2), albeit that the first respondent is not legally obliged to do so.

[20] Turning to the merits of the decision by the first respondent. Mr. Lopes, S.C. in his heads of argument, submitted the following:

"In the answering affidavits the third respondent has gone to considerable lengths to attack the competency and apparent lack of independence of the trustees of the Banavie Trust. This is not, however, the issue before the above Honourable Court and this application falls to be decided on the validity of the appointment of the second respondent by the first respondent."

[21] When I asked Mr. Lopes, S.C. in argument, whether the applicant challenged the merits of the decision made by the first respondent, he said this was so, but only as a secondary argument to the main argument, which was directed at the validity of the appointment in question.

[22] The approach of the applicants to the merits of the decision taken by the first respondent, appears to have been predicated upon an allegation that the conduct of the third respondent, in placing information before the first respondent, which resulted in the appointment of the second respondent, was nothing more than an attempt to obtain information about the Trust in a round-about manner. Because the third respondent was unable to obtain this information by way of the Section 152 enquiry, and because of the

difficulty in establishing by way of a direct challenge that the Trust is merely a front, sham or so-called "alter ego" of Thorpe, the third respondent had followed this route, with the ultimate object of having the assets of the Trust attached, for the benefit of creditors of Thorpe's insolvent estate.

[23] The answer of the first respondent to this allegation is that the purpose of appointing the second respondent was not to report to the third respondent and disclose confidential information that the second respondent might have become privy to, by virtue of his appointment as a co-trustee. The second respondent would report to the first respondent, who would then decide whether or not to invoke the provisions of Section 16 of the Act. The first respondent regarded the allegations made by the third respondent as serious, and decided that it was important to establish whether the Trust was administered properly, and whether or not the trustees were acting in terms of their authority, in terms of the Deed.

[24] The applicants have chosen not to respond in detail to the allegations made by the third respondent, save to place them in issue in broad outline. The applicants have certainly not availed themselves of a re-hearing of the issue of the appointment of the second respondent, on the papers before me, as they would be entitled to in terms of Section 23 of the Act. In the result, I am not satisfied that the applicants have discharged the onus of showing that the decision of the first respondent should be set aside on its merits. On the facts before me, and regard being to the reasons

furnished by the first respondent for her decision to appoint the second respondent, such decision was justified and reasonable.

[25] In the light of my conclusion on the merits of the application, it is unnecessary for me to consider a number of points *in limine* raised by the third to sixth respondents.

[26] The only remaining issue is the costs of the application. In this regard Mr. Mthembu asked that the applicants as trustees of the Trust, be ordered to pay the first respondent's costs, because the first respondent was obliged to oppose the application, because of the allegation of a "secret meeting" with the third respondent, where the third respondent allegedly furnished confidential information to the first respondent. The implication was that there was collusion between the first respondent and third respondents, which was denied.

[27] Mr. Harcourt, S.C., for the third to sixth respondents, submitted that the first applicant had made scurrilous allegations in the founding affidavit of complicity, secrecy and conniving between the Master, the provisional co-trustees and the second respondent, all of whom are professional people. As a result the first applicant should be ordered to pay the costs of the application *de boniis propriis,* on the attorney and client scale.

[28] Having carefully considered this request, I am satisfied however that the justice of the case will be met, if the Trust is ordered to pay the costs of the respondents.

[29] The order I make is the following:

A. The application is dismissed.

B. The Banavie Trust is ordered to pay the costs of the respondents.

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SWAIN J.

Appearances: /

Appearances:

For the Applicants	:	Mr. G. Lopes, S.C**.** with Mr. I. F. Moosa
Instructed by	:	Hancock & Associates C/o W H A Compton Attorney
Curator-ad-litem	:	Mr. G. R. Thatcher
For 1st Respondent	:	Mr. T.S.I. Mthembu
Instructed by	:	C/o Cajee Setsubi Chetty Inc Pietermaritzburg
For the 3rd 4th, 5th & 6th Respondent:		Mr. A.W.M. Harcourt,S.C.
Instructed by	:	Login Attorneys Pietermaritzburg
Date of Hearing	:	23 November 2009
Date of Filing of Judgment	:	30 November 2009