IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No 12237/06

In the matter between:

GIDEON JOHANNES JACOBUS THERON N.O.	First Applicant
ANTOINETTE THERON N.O.	Second Applicant
GIDEON JOHANNES JACOBUS THERON	Third Applicant
ANTOINETTE THERON	Fourth Applicant

and

ANDREW THOMAS LOUBSER	First Respondent
ANNA LOUBSER	Second Respondent
THE MASTER OF THE HIGH COURT	Third Respondent

(Hereinafter referred to as ***"THE JACKNET APPLICATION"***)

Case No: 12238/06

GIDEON JOHANNES JACOBUS THERON N.O.	First Applicant
ANTOINETTE THERON N.O.	Second Applicant

and

ANDREW THOMAS LOUBSER First Respondent

ANNA LOUBSER Second Respondent

THE MASTER OF THE HIGH COURT Third Respondent

(Hereinafter referred to as ***"THE NAMAKWARI APPLICATION")***

Case No: 13978/11

GIDEON JOHANNES JACOBUS THERON N.O. First Applicant

ANTOINETTE THERON N.O. Second Applicant

and

ANDREW THOMAS LOUBSER First Respondent

ANNA LOUBSER Second Respondent

ANDREW THOMAS LOUBSER N.O. Third Respondent

ANNA LOUBSER N.O. Fourth Respondent

THE MASTER OF THE HIGH COURT Fifth Respondent

(Hearinafter referred to as ***"THE 2011 APPLICATION")***

Coram: **CLOETE, A.J.**

Heard: 14, 15, 16 AND 17 MAY 2012

Delivered: 15 JUNE 2012

JUDGMENT

CLOETE, A.J:

Introduction

[1] These three applications are to a certain extent inter-related since they involve the same four family members who have been engaged in a bitter feud since 2004 in relation to certain trusts of which they are co-trustees. Limited consequential relief is sought against the Master in the first two applications and he is cited only as an interested party in the third application. The Master abides the decision of the Court.

[2] Since each set of warring parties bears the same surname I will for sake of convenience refer to them in this judgment either by their first names or collectively as "*the Therons*" and *"the Loubsers"* respectively.

[3] Gideon Theron ("*Gideon*") and Anna Loubser ("*Anna*") are siblings. Gideon is married to Antoinette Theron (*"Antoinette"*) and Anna is married to Andrew Loubser (*"Andrew"*).

[4] The first application relates to the Jacknet Trust (*"Jacknet"*) of which the Therons and the Loubsers were co-trustees until the Therons were allegedly unlawfully removed as trustees by the Loubsers on 31 March 2005. Jacknet previously owned 100% of the shares in Dip & Spin Galvanisors (Pty) Ltd -

essentially the family business – which was placed in liquidation on 31 August 2005 as a result of a deadlock between its "*shareholders*". It is not apparent from the papers but during argument I was informed by counsel for the Therons that Jacknet is dormant and that its only "*assets*" are "*loan accounts by outsiders and other Trusts*". I will refer to this application as "*the Jacknet application*".

[5] The second application relates to the Namakwari Trust ("*Namakwari*") of which the Therons and Anna were co-trustees until 23 August 2006 when the Therons allegedly unlawfully removed Anna as a co-trustee (the "*appointment*" of Andrew as trustee of Namakwari on 20 June 2006 was conceded by his counsel during argument as being invalid for purposes of determination of the merits.) Namakwari was a property holding and property development trust although the extent of its current assets is not clear. I will refer to this application as "*the Namakwari application*".

[6] The third application relates to whether or not the Loubsers committed acts of insolvency which it is alleged by the Therons resulted in their automatic discharge as trustees, not only in respect of Jacknet and Namakwari, but also in respect of other trusts to which I will collectively refer as "*the Traka trusts*" (in respect of the Traka 6 Trust, only Anna is a co-trustee along with Gideon and an independent trustee). I will refer to this application as "*the 2011 application*".

[7] Each application will be considered in turn.

The Jacknet application

[8] The Therons seek a declaratory order to the effect that the "*decision*" taken by the Loubsers at a "*trustees meeting*" on 31 March 2005 to remove them as co-trustees is void and of no force and effect. The narrow issue to be determined is whether the correct procedure was followed by the Loubsers in giving notice of the trustees meeting at which the *"decision"* was taken.

[9] The relevant clauses of the trust deed are clauses 4.5.2 and 4.5.3 which read as follows:

> *"4.5.2 Voldoende kennis (afhangende van hoe dringend die vergadering gehou moet word) van elke vergadering van die Trustees en die sake wat by sodanige vergadering bespreek sal word, moet aan elke Trustee gegee word by sy woonadres (as hy 'n natuurlike person is) of sy besigheidsadres (as hy 'n regspersoon is) soos in die rekords van die Trust opgeteken. Die tydelike afwesigheid van 'n Trustee by sodanige adres wanneer sodanige kennis gegee word, maak die kennisgewing nie ongeldig nie.*
>
> *4.5.3 Geen besluit geneem by enige vergadering van Trustees sal gelding [sic] en van krag wees nie tensy die Trustees wat teenwoordig is 'n kworum uitmaak en almal ten gunste van die besluit stem."*

[10] It is common cause that in terms of a resolution of the trustees dated 5 August 1999 two trustees constitute a quorum. *In casu* the Loubsers constituted a quorum at the "*trustees meeting*" held on 31 March 2005.

[11] Gideon says that on approximately 25 August 2005 it came to his attention that he and Antoinette had been removed as trustees in accordance with a certificate issued by the Master on 15 June 2005, despite the Therons having received no notice of any trustees meeting at which such a resolution was intended to be taken. The Loubsers claim that the requisite notice was given.

[12] The Loubsers also say that the notice of the trustees meeting was prepared on 22 March 2005 and delivered "*personally*" at the Theron's home address by a Leon Walker ("*Walker*") on 24 March 2005. It was also sent by registered post to the Therons at the address of the erstwhile family business, although it is common cause that neither of the Therons still worked there at that stage. In any event, delivery by registered post at the Theron's *"business address"* could never have constituted proper delivery since clause 4.5.2 of the trust deed limits delivery in this manner to a trustee who is a *"regspersoon"* and clearly neither of the Therons are legal entities.

[13] As to the "*personal*" delivery of the notice at the Theron's home address, Gideon claims that to the knowledge of the Loubsers he, Antoinette and their three daughters were away from 24 March 2005 until 4 April 2005 attending a festival in Oudtshoorn. He says that the Loubsers knew of this for two reasons. First, a mutual friend contacted the Therons frequently during their period away and knew of their whereabouts. Second, Gideon and Anna's mother who still lived with the Therons at the time and had not accompanied them to Oudtshoorn was in frequent contact with Anna. However the Therons did not file confirmatory affidavits by either the mutual

friend or Gideon's mother and these allegations are thus not helpful, save to the extent that they are not denied by the Loubsers, who contented themselves with bare allegations to the effect that they had no knowledge of these allegations; that there had been proper delivery; and that *"alle redelike stappe geneem is"* to inform the Therons of the meeting.

[14] Further, the confirmatory affidavit of Walker, a messenger employed by the former family business, does not specify how the *"personal"* delivery at the home address of the Therons took place, nor does it indicate whether anyone was even present at their home at the time. In the face of the Theron's contention that to the knowledge of the Loubsers they were not even in Cape Town when the notice was delivered, one would have expected the Loubsers to place facts before the Court to refute that contention and to have Walker detail the steps that he had taken in order to effect "*personal*" delivery at the Theron's home address.

[15] While it is so that clause 4.5.2 of the trust deed provides that the temporary absence of a trustee from his or her home address does not render such notice invalid, the Loubser's counsel correctly conceded that it could not seriously be suggested that if the Loubsers in fact knew that the Therons were away at the time, delivery at their home address would nonetheless be sufficient. This would render the provisions of clause 4.5.2 readily open to abuse.

[16] The test adopted in motion proceedings as formulated in *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 632 (A)* at 634H, is that relief *"may be granted if those facts averred in the applicant's affidavit which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order."*

[17] *In casu*, I am satisfied that the Therons have met the aforementioned test. Despite the absence of confirmatory affidavits by the mutual friend and Gideon's mother the Loubsers have nonetheless failed to deal in a manner which is even vaguely satisfactory with the Theron's direct allegation that the Loubsers knew that they were away, when it would have been a simple matter for the Loubsers to have done so. This taken together with the lack of information contained in the confirmatory affidavit of Walker leads me to conclude that at least by implication the Loubsers have admitted that they knew that the Therons would not receive the notice in question.

[18] In these circumstances I find that the Therons are entitled to the declaratory relief sought.

The Namakwari application

[19] In this application the Therons seek an order declaring that Anna's removal as a co-trustee of Namakwari at a trustees meeting held on 23 August 2006 was

valid. As I have said the declaratory relief sought in respect of Andrew's *"appointment"* as co-trustee on 20 June 2006 falls away if I am required to determine the merits.

[20] I deal first with the point *in limine* raised by the Loubsers, namely that the Therons are not properly before the Court.

[21] The Loubsers say that:

21.1 If regard is had to Gideon's founding affidavit the application was brought by both Therons only in their capacities as trustees of Namakwari. (Antoinette's "*confirmatory*" affidavit is of no assistance since it is a carbon copy of her confirmatory affidavit filed in support of the Jacknet application and refers to Jacknet and not to Namakwari.)

21.2 There is no allegation on the papers that the trustees (who, on their version, would only be the Therons themselves) resolved to bring the application or that the Therons were authorised to do so on Namakwari's behalf.

21.3 There is also no resolution of the trustees to that effect.

[22] The Loubsers thus contend that the Therons lack the necessary *locus standi* to ask for the relief sought.

[23] The Theron's answer advanced during argument on their behalf boils down to the following:

23.1 There is no substance in the *locus standi* point since both trustees are in any event before the Court and a resolution was thus not required.

23.2 The application was not brought on behalf of Namakwari but by the Therons in their capacities as "*individual trustees*".

23.3 The declaratory relief sought only affects the former co-trustee (i.e. Anna) and not Namakwari itself.

23.4 There was no other way that the Therons could have placed "*their*" case before the Court.

[24] Honore's *South African Law of Trusts (*5th Edition*)* at p 1 defines a trust as "*a legal institution in which a person, the trustee, subject to public supervision, holds or administers property separately from his or her own, for the benefit of another person or persons or for the furtherance of a charitable or other purpose*". And at p 288 – 289 "*the trustee thus owns the trust assets not as a private owner but in an official capacity*".

[25] The authors go on to say at p 419 that "*normally a trust does not possess juristic personality. In that case, subject to the trust constitution, trustees in their capacity as such (nomine officii) are the proper persons to bring and defend actions in relation to a trust and to make applications to court in connection with it*".

[26] The powers of the trustees derive from the trust instrument itself, although their duties arise, not only from the trust instrument, but from statutes (such as the Trust Property Control Act no 57 of 1988) and the common law.

[27] *In casu* clause 5 of the trust deed sets out the trustees' powers. Clause 5.10 provides that the trustees have the power –

> "*5.10 Namens en ten behoewe van die Trust enige verrigtinge in te stel, te verdedig of te bestry in enige geregshof of in enige bevoegde tribunaal of voor enige ander gesaghebbende persoon of liggaam.*"

[28] Clause 5.27 stipulates that the trustees also have the power –

> "*5.27 In die algemeen enige aanvullende magte uit te oefen wat na hulle mening noodsaaklik of wenslik is om hulle in staat te stel om enige spesifieke mag wat hulle hierkragtens verleen word uit te oefen en om alles te doen of te laat doen wat hulle as noodsaaklik of wenslik en in die belang van die Trust of enige Begunstigdes mag beskou.*"
>
> [Emphasis supplied]

[29] What seems clear from these clauses is that in exercising the powers set forth therein the trustees act on behalf of the trust itself and in no other capacity. Clauses 4.5.1. to 4.5.3 set out the procedure to be followed when the trustees take decisions and read as follows:

> *4.5.1 Twee (2) Trustees (waarvan een 'n party moet wees wat te alle tye onafhanklik en vry is van die beheer van die Stigter of van enige ander*

party wat enige bates aan hierdie Trust oorgemaak het) sal 'n kworum uitmaak.

4.5.2 *Voldoende kennis (afhangende van hoe dringend die vergadering gehou moet word) van elke vergadering van die Trustees en die sake wat by sodanige vergadering bespreek sal word, moet aan elke Trustee gegee word by sy woonadres (as hy 'n natuurlike person is) of sy besigheidsadres (as hy 'n regspersoon is) soos in die rekords van die Trust opgeteken. Die tydelike afwesigheid van 'n Trustee by sodanige adres wanneer sodanige kennis gegee word, maak die kennisgewing nie ongeldig nie.*

4.5.3 *Geen besluit geneem by enige vergadering van Trustees sal geldig en van krag wees nie tensy die Trustees wat teenwoordig is 'n kworum uitmaak en almal ten gunste van die besluit stem."*

[Emphasis supplied]

[30] It must surely be that before exercising any power conferred on them by the trust instrument the trustees must resolve to exercise that power; and that in order to effect a resolution they must follow the procedure set out in clauses 4.5.1 to 4.5.3.

[31] To find otherwise would mean that each trustee would be able to act independently of the others in relation to the powers set out in the trust instrument. This would offend not only against the trust instrument itself but also the common law.

[31] With regard to legal proceedings the common law position is that unless one of the trustees is authorised by the remaining trustee or trustees, all of the trustees must be joined in suing and all must be joined when action is instituted against the

trust: Honore at p 419; *Goolam Ally Family Trust t/a Textile Curtaining and Trimming v Textile, Curtaining and Trimming (Pty) Ltd* 1989 (4) SA 985 (C) 988D-E; *Mariola v Kaye-Eddie NO* 1995 (2) SA 728 (W) 731E; *Cupido v Kings Lodge Hotel* [1999] 3 All SA 578 (E) 584 g – 585 b; *Deutschmann NO v Commissioner for the SA Revenue Service, Shelton v Commissioner for the SA Revenue Service* 2000 (2) SA 106 (E) 119 F-G.

[32] As pointed out by counsel for the Loubsers not all of the trustees have been joined despite it having been open to the Therons to join Anna in accordance with the mechanisms provided in the uniform rules of court. All that Gideon alleged is that he has brought the application "*in my hoedanigheid as trustee*" and that Antoinette "*bring hierdie aansoek ook in haar hoedanigheid as trustee*". Further, no mention is made of the trustees (i.e. on their version, the Therons) having followed the necessary procedure set out in clauses 4.5.1. to 4.5.3. of the trust instrument; nor is mention made of any resolution taken to institute the proceedings or that Gideon was authorised to do so on Namakwari's behalf. As I have said Antoinette's confirmatory affidavit does not even refer to Namakwari but to Jacknet. She is accordingly not before the Court in her capacity as a trustee. In addition, and although she does say that "*in die alternatief en insoverre dit nodig mag wees, bring ek die aansoek in my persoonlike hoedanigheid*" the fact of the matter is that she has pertinently failed to address on what basis any relief has been sought by her in such capacity, since on the papers she is not even a beneficiary of Namakwari; and since it is relevant to what follows immediately hereunder, neither is Gideon.

[33] S 20(1) of the Trust Property Control Act 57 of 1988 also does not assist the Therons. That section reads as follows:

> *"A trustee may, on the application of the Master or any person having an 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."*
>
> [Emphasis supplied]

[34] Since neither of the Therons are beneficiaries of Namakwari it cannot be said that they have any interest in the trust property. There is also nothing on the papers to indicate that they hold loan accounts in Namakwari. Certainly, they have duties *qua* trustees towards the trust property, but then they should have met the requirements for *locus standi* which I have outlined above since the relief sought clearly relates to the trust. To my mind support for this view is to be found in the wording of s 20(1) itself, namely that a trustee may only be removed by the Court if it is satisfied that such removal will be in the interests of the trust and its beneficiaries: not in the interests of the *"individual trustees"* as they were described by counsel for the Therons.

[35] Furthermore s 23 of the aforementioned Act has no application in the present matter. That section reads as follows:

> *"Any person who feels aggrieved by an authorisation, 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 the 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."

[36] Insofar as the Master is concerned the Therons do not complain of any "*authorisation, appointment or removal of a trustee by the Master or any decision, order or direction of the Master*". All they ask is that the Master be directed to give effect to their resolution of 23 August 2006 removing Anna as trustee. There is nothing on the papers to indicate that the Master has refused to do so - on the contrary, he abides the decision of the Court.

[37] Having regard to the aforegoing I have come to the conclusion that the Therons lack the necessary *locus standi* to have brought this application and it falls to be dismissed on that ground alone. It is accordingly not necessary for me to consider the merits of the application.

The 2011 application

[38] In this application the Therons ask for a declaratory order that the Loubsers, having allegedly committed acts of insolvency during 2009, have been automatically discharged as trustees in respect of eight different trusts.

[39] I again deal first with the point *in limine* raised by the Loubsers, namely that the Therons are not properly before the Court since they have again not met the *locus standi* requirements.

[40] Gideon says in his founding affidavit that he is a trustee of each of the eight trusts and that he brings the application "*in such capacity*". He says the same of Antoinette, save in respect of the Traka 6 Trust since she is not a co-trustee of that trust. Gideon says that in the alternative and only insofar as it may be necessary the application is also brought on behalf of the Gideon en Antoinette Familie Trust which is –

40.1 a beneficiary of both Jacknet and Namakwari;

40.2 an "*indirect*" beneficiary of the Traka trusts since Jacknet is the only beneficiary of the Traka trusts.

[41] Antoinette failed to file an affidavit confirming any of these allegations, not even in reply.

[42] Again it is common cause that -

42.1 There is no allegation on the papers that the trustees of any of the trusts (including the Gideon en Antoinette Familie Trust) have resolved to bring the application or that Gideon was authorised to do so on their behalf. (In respect of Jacknet and Namakwari two trustees constitute a quorum; the same applies to the Traka trusts;

no mention was made by Gideon as to the position concerning the Gideon en Antoinette Familie Trust.)

42.2 There is not a single resolution of the trustees of any of the trusts to that effect.

[43] The Loubsers pertinently raised this in their opposing papers. Gideon's somewhat ill-considered response was simply that "*I deny the contents of this paragraph. In any event my locus standi to bring this application, I am advised, entails legal argument which will be dealt with at the hearing of this application.*"

[44] Essentially the same arguments as in the Namakwari application were advanced. In reply counsel for the Therons informed me that an affidavit was being prepared to which a resolution by the trustees of the Gideon en Antoinette Familie Trust would be annexed, evidently authorising the launching of this application.

[45] At the commencement of proceedings on the next day counsel for the Therons sought leave to admit the aforementioned affidavit by way of a request from the bar. The admission of the affidavit was opposed by counsel for the Loubsers who correctly pointed out that -

45.1 No formal application had been made for leave to file a further affidavit annexing a resolution or otherwise.

45.2 It is trite that *"appropriate allegations to establish the locus standi of an applicant should be made in the launching affidavits and not in*

the replying affidavits": *Scott v Hanekom* 1980 SA 1182 (C) 1188H. The same principle applies to further or supplementary affidavits.

[46] I accordingly refused the request for the affidavit to be admitted.

[47] My reasoning and findings on the *locus standi* point in the Namakwari application apply equally here. Indeed, even less information has been placed by the Therons before the Court in order to establish *locus standi* on their part and their allegations in this regard are wholly inadequate.

[48] I thus find that this application must fail on that ground alone and again it is accordingly not necessary for me to deal with the merits of this application.

Costs

[49] In the exercise of my discretion I find that costs should in each instance follow the result and that the parties concerned should be held liable therefor in their personal capacities. However I do not agree with the Therons that there should be a punitive costs order against the Loubsers in respect of the Jacknet application. The saga between these four family members (and these applications are but three instances of much litigation which has raged between them over the past eight years) has revealed that they have equally and systematically devoted their energies to attempting to score unseemly points against each other. Various courts have voiced similar concerns in the past but all appear to have fallen on deaf ears. To my

mind no purpose would be served by adding further fuel to a fire which the parties seem intent on stoking at all costs.

Conclusion

[50] **In the result I make the following orders:**

1. **Case no 12337/06 (the Jacknet application)**

1.1 **The resolution taken by the first and second respondents on 31 March 2005 to discharge the first and second applicants as trustees of the Jacknet Trust (IT 951/95) is declared to be void and of no force and effect.**

1.2 **It is declared that the first and second applicants and the first and second respondents are the trustees of the Jacknet Trust.**

1.3 **The third respondent is authorised and directed to issue a Master's Certificate reflecting that the first and second applicants and the first and second respondents are the trustees of the Jacknet Trust.**

1.4 **The first and second respondents shall effect payment of the costs of this application jointly and severally in their personal capacities on the scale as between party and party.**

2. Case no 12238/06 (the Namakwari application)

The application is dismissed with costs, such costs to be paid by the first and second applicants jointly and severally in their personal capacities on the scale as between party and party.

3. Case no 13978/11 (the 2011 application)

The application is dismissed with costs, such costs to be paid by the first and second applicants jointly and severally in their personal capacities on the scale as between party and party: save that the costs of the first to fourth respondents' successful application for condonation for late filing of their opposing affidavits shall be borne by the first and second respondents on an unopposed basis jointly and severally on the scale as between party and party.

CLOETE, A.J.