Republic of South Africa

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

Case no: 15493/2014

NICOLENE HANEKOM	**APPLICANT**
v	
LIZETTE VOIGT N.O.	**FIRST RESPONDENT**
LIZETTE VOIGT	**SECOND RESPONDENT**
JANENE GERTRUIDA GOOSEN N.O.	**THIRD RESPONDENT**
JANENE GERTRUIDA GOOSEN	**FOURTH RESPONDENT**
LINDA MARAIS N.O.	**FIFTH RESPONDENT**
LINDA MARAIS	**SIXTH RESPONDENT**
THE MASTER OF THE HIGH COURT, CAPE TOWN	**SEVENTH RESPONDENT**
ELIZABETH RENE MARAIS	**EIGHTH RESPONDENT**

Court: Judge J I Cloete

Heard: 10 December 2014

Delivered: 10 December 2014

EX TEMPORE JUDGMENT

CLOETE J

[1] There are essentially three applications before me. In the main application for declaratory relief the issue is whether a memorandum of agreement concluded on 5 April 2001 (*'the new trust instrument'*) is valid or void. The applicant, acting in her personal capacity, claims that it is void. The first to sixth respondents (*'the respondents'*) maintain that it is valid. Both the seventh respondent (*'the Master'*) and the eighth respondent (who is the mother of the applicant and the respondents) do not oppose and abide the decision of the court. In the counter-application the respondents seek the removal of the applicant as trustee of the trust administered under the new trust instrument (*'the new trust'*). The applicant opposes the relief sought and has in turn sought additonal relief by way of an application to amend her notice of motion, namely for herself and the respondents to be removed as trustees, and for the court to appoint new trustees in their stead (*'the removal application'*). The Master and the eighth respondent similarly abide the decision of the court in respect of both the counter-application and the removal application.

The main application for declaratory relief

[2] The relevant common cause facts are as follows:

2.1 The applicant and the respondents are the granddaughters of the late Willem Daniel Marais Senior (*'the grandfather'*).

2.2 On 8 December 1980 the grandfather executed a Will in terms of which he left his entire estate to two testamentary trusts in equal shares. The first testamentary trust was *'Die Dr Willie Marais Trust'* to be administered by his one son, Johannes Marais, who is the father of the applicant and the respondents (*'the father'*) in the latter's sole and absolute discretion. I will refer to this trust as *'the old trust'*. The second trust was to be administered by his other son and is not relevant for present purposes. The sole beneficiaries of the old trust are the applicant and the respondents. The old trust instrument provided in clause D(d) that, in the event of more than one administrator (or trustee) being appointed, decisions in respect of the trust had to be unanimous. Clause H thereof conferred the sole discretion on the trustee to decide when the old trust would terminate.

2.3 The grandfather passed away on 25 May 1986. Thereafter his two sons, in their capacities as administrators (trustees) of the respective trusts, concluded a redistribution agreement in respect of the late grandfather's assets on 24 November 1986. In terms of the redistribution agreement each trust received immovable property with a value of about R130 000 and cash, policies and shares of some R30 000. The father was appointed as sole trustee of the old trust under letters of authority issued by the Master on 7 March 2000.

2.4 Subsequently the father, a businessman, placed a number of assets in the old trust. These were either his own assets, were purchased, or were held in entities under his control. As a result of the father's investment skill and expertise, by 2003 the trust had amassed assets of some R15 million.

2.5 On 5 April 2001 the father, the applicant and the respondents concluded the new trust instrument which *inter alia* provided for their appointment as additional trustees with the father. On the same date the father deposed to an affidavit in support of an application to the Master for the variation of the old trust instrument by its replacement with the new trust instrument, which bears the identical name to that of the old trust. Both the applicant and the respondents supported this application. In the applicant's words, all were in favour of the new trust instrument. In his affidavit for submission to the Master the father declared that:

> *'2.2 It can be seen that the late Dr Marais intended to establish a trust into which his property would ultimately devolve upon and be preserved for the benefit of my children. Also evident is the fact that I was given total discretion in how to administer the assets of the trust and the trust itself. It is in terms of these powers that I have consented to the amendment of the trust deed as proposed.*
>
> *2.3 I have preserved the trust property to the best of my ability and in fact have considerably increased the value of the assets held and also have contributed a number of new assets to the trust that previously fell into my own estate.'*

2.6 Both the old trust and new trust instruments were properly lodged with the Master. On 11 July 2001 the Master appointed the applicant and the respondents as trustees along with the father *'...in die bogemelde trust, geskep in die testament gedateer 8 Desember 1980 van Willem Daniel Marais wat oorlede is op 25 Mei 1986'.* Thereafter further assets were amassed by the father in the new trust, which also retained some of the assets of the old trust.

2.7 The new trust instrument provides at clause 8.2 that, generally speaking, decisions of trustees will be taken by way of a simple majority.

2.8 The father passed away on 30 January 2002, since which date the applicant and the respondents have been the only trustees of the trust.

2.9 Over time since the father's death, tensions between the applicant on the one hand, and the respondents on the other, have escalated to the point at which all agree that there is no prospect of unanimous decisions being taken by the trustees.

2.10 Since 2001 the trust has been administered in terms of the new trust instrument, i.e. on the basis *inter alia* that the applicant and the respondents (along with their late father, while he was still alive) are the trustees, and that decisions are generally taken by way of a simple majority.

2.11 During 2012 the applicant sought legal advice as to whether the new trust instrument is valid. She was advised that it is void. Since that date, albeit initially inconsistently, she has adopted the position that, because the new trust instrument is void, the old trust instrument is valid, and all decisions of the trustees must thus be unanimous.

2.12 Underlying the heart of the dispute is the fate of an historic property, Die Opstal, in the Durbanville area, which is one of the trust's assets. It has a market value of about R8 million. The trust has received an offer to purchase the property for that amount (i.e. R9.120 million inclusive of VAT). The respondents, by way of a simple majority, have voted in favour of accepting the offer. The applicant refuses to accept the offer and wishes to purchase the property herself through her family trust. She has made an offer of R8.005 million, but the respondents contend that she has played a cat and mouse game with them for months by refusing to commit to basic terms such as the identity of the transferring attorneys. The applicant has threatened to interdict the transfer to the prospective purchasers, who have repeatedly extended the period of their offer at the respondents' request. The latest offer expires on 19 December 2014, hence the urgency in making a finding in this matter. That having been said, both the applicant and the respondents agree that it is inevitable that Die Opstal must be sold because its running costs can no longer be carried by the trust.

[3] The question which arises is whether the new trust instrument constitutes a valid amendment to the old trust instrument. Inextricably linked to this enquiry is whether or not the declaratory relief sought by the applicant is competent for this court to grant, given the nature of such relief; and that it was the Master who issued letters of authority in terms of which the applicant and the respondents were authorised to act as additional trustees pursuant to his acceptance of the new trust instrument as being a valid amendment to, or variation of, the old trust instrument.

[4] Section 4 of the Trust Property Control Act 57 of 1988 (*'the Act'*) provides as follows:

> *'**4. Lodgement of trust instrument.** – (1) **Except where the Master is already in possession of the trust instrument in question or an amendment thereof**, a trustee whose appointment comes into force after the commencement of this Act shall, before he assumes control of the trust property, upon payment of the prescribed fee, lodge with the Master the trust instrument in terms of which the trust property is to be administered or disposed of by him, or a copy thereof certified as a true copy by a notary or other person approved by the Master.*
> *(2) **When a trust instument which has been lodged with the Master is varied, the trustee shall lodge the amendment or a copy thereof so certified with the Master**.'*
>
> [emphasis supplied].

[5] That the Master was of the view that the new trust instrument constituted a valid amendment to the old trust instrument is apparent from the following:

5.1 The only query raised by the Master in respect of the new trust instrument related to why it was necessary for four additional trustees to be appointed along with the father. This is evident from a letter dated 21 June 2001 addressed by the attorney acting for the trust, the father, the applicant and the respondents, one Mr Lood Hanekom who, coincidentally, is the brother-in-law of the applicant. This letter is annexed to the respondents' answering affidavit as **JGE4**.

5.2 The Master must have been satisfied with Mr Hanekom's response because he appointed the applicant and the respondents as additional trustees on 11 July 2001, a few weeks later.

5.3 The letters of authority (annexure **D** to the applicant's founding papers) reflect that they were appointed as additional trustees, together with the father, **of the trust created in the will of the grandfather**.

5.4 There is no suggestion on the papers that when the new trust instrument was lodged with the Master, any fee was paid as is required by s 4(1) of the Act when a new trust instrument is lodged.

[6] In Honore's South African Law of Trusts 5th Ed at 219 – 220 the authors write:

> *'The Act recognizes and preserves the distinction between the appointment of a trustee, which occurs in terms of the trust instrument, and a trustee's written authorisation, which derives from the Master by virtue of statutory powers. The trust instrument remains the defining source of the trustee's power and may*

have to be consulted by persons dealing with the trustee. While the creation of a trust in general thus remains a private act, the authorization of a trustee ceases to be so. Statutory authorisation is added for two purposes: not only in the interests of the beneficiaries, so as to reinforce the requirement of security, but to serve to outsiders as written proof of incumbency of the office of trustee.'

[7] The statutorily conferred power of the Master to issue the letters of authority of 11 July 2001 could only have been exercised as a result of his approval of the new trust instrument as a valid amendment of the old trust instrument in terms of s 6(1) of the Act, which provides that:

'Any person whose appointment as trustee in terms of a trust instrument, s 7 or a court order...shall act in that capacity only if authorised thereto in writing by the Master.'

[8] It is not suggested by the applicant that the Master, in so doing, was exercising any of the powers conferred upon him by s 7(1) or (2) of the Act, which deal with the filling of vacancies or appointment of trustees where the Master considers it desirable despite the provisions of the relevant trust instrument. Before issuing the letters of authority he took steps to satisfy himself that the appointment of four additional trustees, as envisaged in the new trust instrument, was both competent and appropriate. He thus made a decision that the new trust instrument was a valid amendment to the old trust instrument and thereafter exercised his power to issue the letters of authority in terms thereof. In *Deedat and Another v The Master and Others* 1998 (1) SA 544 (NPD) at 548A-C the court had no difficulty in treating a Master's decision to authorise a trustee to act in terms of s 6(1), which decision was sought to be impugned, as

an administrative act which is subject to judicial review. Further, in the present matter, even if the Master was wrong in his decision to authorise the applicant and the respondents to act as trustees, this does not affect the validity of any of the trustees' subsequent actions in terms of the issued letters of authority.

[9] In *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) the Supreme Court of Appeal, having found that certain permission granted by the Administrator was unlawful and invalid at inception, held at para [26] that:

> *'Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view, it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court* ***in proceedings for judicial review*** *it exists in fact and it has legal consequences that cannot simply be overlooked...No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.'*
>
> [emphasis supplied].

[10] The present proceedings are not review proceedings, but rather proceedings in which the applicant seeks declaratory relief. S 21(1)(c) of the Superior Courts Act 10 of 2013 confers upon a High Court the discretion, at the instance of any interested person, to enquire into and determine any existing, future or

contingent right or obligation, notwithstanding that such person cannot claim any relief consequential thereto.

[11] However a court will not grant a declaratory order where no benefit to the applicant in practical and real terms would result: see *inter alia* Herbstein and Van Winsen: The Civil Practice of the High Court of South Africa 5th Ed at 1440 and the authority cited therein.

[12] To my mind, this important consideration must militate against the applicant. Even were this court to find that she is entitled to the declaratory relief sought, she would derive no benefit in practical and real terms therefrom. First, an order declaring the new trust instrument void would effectively declare that the Master had no power to have issued the letters of authority of 11 July 2011; but the applicant has not sought to impugn his decision to do so. Even if she could overcome this hurdle (which in my view, for the reasons already given, she cannot) then, at best for the applicant the effect would be that the trust has no trustees, given that the only trustee appointed solely in terms of the old trust instrument died in 2002. The applicant has not shown that she and the respondents were appointed solely in terms of the old trust instrument, i.e. without any amendment thereto. Accordingly, neither the applicant nor any of the respondents would have *locus standi* to approach this court to determine any dispute between them as trustees, because they would not be trustees. Second, the applicant would derive no benefit from such an order as a beneficiary of the trust, but would rather likely be exposed to at least potential

prejudice (along with the other beneficiaries) at least until the Master or the Court step in to assist.

[13] In a nutshell therefore, I am compelled to conclude that the declaratory relief sought by the applicant is not competent. It follows that it fails. In the exercise of my discretion costs on the party and party scale should follow the result.

The counter-application and removal application

[14] The papers filed in respect of the counter-application for the applicant's removal as trustee run to just under 700 pages. This excludes those relating to the proposed removal application. The counter-application was launched largely in response to the declaratory relief sought by the applicant. While understandable to a degree, particularly in light of the pending offer in respect of Die Opstal, the plethora of factual disputes to which it has given rise are such that it cannot reasonably be expected of this court to determine it on the papers alone, particularly on an urgent basis two days before court term ends. In any event, given my finding that the application for declaratory relief must fail, any urgency which might previously have existed falls away.

[15] The fact of the matter is that, based on the *Oudekraal* principle, the respondents are at liberty to proceed with the sale of Die Opstal in accordance with the resolution passed by them by way of a simple majority.

[16] There is no reason why both the counter-application and the removal application (which seek far-reaching relief) should not be referred to trial in due course in terms of rule 6(5)(g) of the uniform rules of court, and in the exercise of my discretion I intend to make such an order, subject to the parties being afforded the opportunity to provide me with proposals as to appropriate directions on pleadings as well as the definition of issues.

Conclusion

[17] **Accordingly the following orders are made:**

1. **The applicant's application for leave to amend her notice of motion is granted.**
2. **The application for declaratory relief is dismissed with costs, including any reserved costs orders relating thereto as well as the costs of two counsel where employed. Such costs shall be paid by the applicant in her personal capacity.**
3. **The counter-application and removal application are referred for trial on a date to be arranged between counsel for the parties and the presiding judge.**
4. **The parties shall, in consultation with each other, provide the presiding judge with written proposals as to pleadings and the issues to be determined at the trial, by not later than Friday 6 February 2015.**

5. **In the event that the parties are not able to reach agreement on the aforegoing, or the presiding judge is not satisfied with their proposals, then she shall hold a conference in terms of rule 37(8) in order to make directions with regard thereto which shall be binding on the parties.**

6. **The costs of the counter-application and removal application (including those pertaining to the amendment of the applicant's notice of motion) shall stand over for later determination.**

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J I CLOETE