THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

JUDGMENT

Case No: 5525/2018

In the matter between

ANDRIES TJAART VAN DER WALT	**APPLICANT**
and	
CATHARINA ELIZABETH VAN DER WALT N.O.	**FIRST RESPONDENT**
MARGARETHA ELIZABETH NEL N.O.	**SECOND RESPONDENT**
RENE THOMASON N.O.	**THIRD RESPONDENT**
THE MASTER OF THE HIGH COURT, CAPE TOWN	**FOURTH RESPONDENT**

Coram: Rogers J

Heard: 13 October 2020

Delivered: 20 October 2020 (by email to the parties and same-day release to SAFLII)

JUDGMENT

Rogers J:

[1] The applicant ('Mr van der Walt') and the first respondent ('Mrs van der Walt') used to be married. They got divorced on 31 July 2012. Mr Van der Walt applies for orders (a) removing the first, second and third respondents as trustees of the Van der Walt Family Trust ('WFT'); (b) appointing him as a trustee; (c) authorising him to appoint an independent third party as an additional trustee; (d) that Mrs van der Walt repay the WFT R300,000 which she allegedly appropriated from the WFT's assets; (e) that the WFT's financial statements be amended to reflect that it owes him R588,493; and (f) that the costs be paid by the first, second and third respondents.

[2] The WFT is an *inter vivos* trust founded by Mr Van der Walt in 1994. On 25 August 2008 he resigned as a trustee. On 16 February 2009 he confirmed his resignation as a trustee and also asked that his name be removed as a capital and income beneficiary

> '*in alle gevalle behalwe die eiendom te Struisbaai bekend as Erf 2560 Struisbaai en die notariele Akte geregistreer ten gunste van die van der Walt Familie Trust ten opsigte van Boat House no 5, verwys Notariel Akte van Sessie no. SK5186/2002S*'.

[3] The precise meaning of the quoted proviso was not explored in the papers. The WFT disposed of the Struisbaai property and boat house in 2009 were so Mr Van der Walt's waiver of rights as a beneficiary became fully operative. The case was argued on the basis that Mr van der Walt was neither a trustee nor a beneficiary.

Procedural history

[4] The application was issued on 29 March 2018. It is opposed by Mrs van der Walt and the second and third respondents, to whom I shall refer collectively as the respondents. The fourth respondent, the Master, filed a report but has not participated in the proceedings.

[5] The second and third respondents resigned as trustees in mid-December 2017. Their intention to do so was noted at a meeting of trustees on 2 December 2017, and the trustees (including the two who intended to resign) decided that four named persons should be proposed to the Master as new trustees to serve with Mrs van der Walt. Three of the four nominees were Mrs Van der Merwe's children, the fourth was a professional person.

[6] Because of Mr Van der Walt's application, the Master took the view that the matter was *sub judice* and that new letters of authority should not be issued until the application was finalised. The second and third respondents have not been involved in the administration of the WFT's affairs since their resignations.

[7] The first respondent delivered her opposing affidavit on 4 May 2018. She stated that her affidavit was in support of opposition by her and the second and third respondents. She filed a short supplementary opposing affidavit on 21 June 2018, raising prescription in relation to the loan account claim.

[8] In response to the answering papers, Mr van der Walt served three rule 35(12) notices. The last of the respondents' replies was served on 7 September 2018. Among the documents Mr van der Walt sought was a resolution from the trustees authorising opposition. Mrs van der Walt could not produce a resolution, because the second and third respondents had resigned, and the Master refused to issue new letters of authority until the present case was finalised.

[9] On 22 February 2019 Mr van der Walt issued a subpoena on the respondents. It is unclear to me under what procedural authority this was done in motion proceedings.

[10] On 1 April 2019, at which stage the respondents had not yet responded to the subpoena, Mr van der Walt delivered his replying affidavit. It was way out of time, and there was no satisfactory explanation for the delay. Nevertheless, the respondents do not oppose condonation, and I am willing to overlook the delay in view of the absence of prejudice.

[11] On 6 June 2019 Mr van der Walt served a further subpoena on the respondents. On 21 June 2019 the respondents replied to the subpoenas, although in law I doubt that they were obliged to do so.

[12] On 31 October 2019 the registrar issued a notice of set down for 21 April 2020.

[13] On 28 February 2020 Mr van der Walt filed an application for leave to file a supplementary replying affidavit though in substance it was a supplementary founding affidavit (‘the interlocutory application’). He made an affidavit in support of the interlocutory application, and attached to that affidavit an unsigned version of the supplementary affidavit he wished to file. The notice of motion stated that the interlocutory application would be heard on 25 March 2020.

[14] On 23 March 2020 the respondents filed affidavits in opposition to the interlocutory application. They pleaded over in the event of the court allowing the supplementary affidavit to be filed. The second and third respondents filed confirmatory affidavits (they had not previously done so).

[15] On 25 March 2020 the interlocutory application was, by agreement, postponed for hearing with the main application on 21 April 2020. Because of the national lockdown, the matter could not be heard on 21 April 2020 and was later set down for 13 October 2020.

No authorised opposition?

[16] In the replying affidavit Mr van der Walt asserted that the trustees had not validly resolved to oppose the application. This complaint was premised on the notion that the second and third respondents remained trustees because the Master had not accepted their resignations.

[17] The premise of the argument is bad. In terms of s 21 of the Trust Property Control Act 57 of 1988 ('the Act'), a trustee may resign by notice in writing to the Master and the ascertained beneficiaries. The Master's consent or acceptance is not required, and no point is taken about absence of notice to beneficiaries. The Master confirmed in his report that the second and third respondents' resignations were lodged with him on 1 March 2018.

[18] The second and third respondents were thus no longer trustees when the application was launched. Because the Master has refused to authorise new trustees until the present application is finalised, the WFT has had to limp along with Mrs van der Walt as sole trustee.

[19] It follows that no resolution of trustees was required. To the extent that the relief sought by Mr van der Walt is properly sought against the WFT, Mrs van der Walt as the sole trustee has opposed such relief. It is necessary to add, however, that the relief directed at the removal of trustees involves the respondents in their personal, not their nominal capacities (*Stander & others v Schwulst & others* 2008 (1) SA 81 (C) para 32). A deponent such as Mrs van der Walt does not need authority to give evidence in support of opposition noted by the second and third

respondents. If Mr van der Walt suspected that the second and third respondents had not authorised the opposition, his proper course was to invoke rule 7(1) so as to require the respondents' attorneys to establish their authority to act for them (*Ganes v Telecon Namibia Limited* 2004 (3) SA 615 (SCA) para 19; *Unlawful Occupiers School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) paras 14 to 16.)

The interlocutory application

[20] Mr van der Walt sought to justify the interlocutory application on the basis that his rule 35(3) notices and subpoenas had elicited significant additional information. As the respondents pointed out in their opposing papers, this explanation was wholly unmeritorious for two reasons:

(a) First, by 7 September 2018 the respondents had replied to all the rule 35(3) notices. By the time Mr van der Walt delivered his replying affidavit on 1 April 2019, he had been in possession of this information for seven months. He could have dealt with it then, if not sooner. As to the subpoenas, the respondents replied thereto on 21 June 2019. The eighth-month delay from that date to the delivery of the interlocutory application was unexplained.

(b) Second, the points which Mr van der Walt wished to raise in the supplementary affidavit were, in the main, not based on information disclosed for the first time in the rule 35(12) responses and subpoenaed documents. The relevant information was contained in the resolutions and financial statements, full sets of which were attached to the respondents' opposing papers filed in early May 2018.

[21] One of the 'new' complaints which Mr van der Walt wanted to raise was that it had now become apparent that the second and third respondents had acted improperly by abandoning their duties as trustees, despite the Master's non-acceptance of their resignations. Apart from the fact that the point is

misconceived, the opposing affidavit explicitly stated that since their resignation in mid-December 2017 the second and third respondents had played no part in the WFT's affairs.

[22] Another 'new' complaint was a repetition of the allegation, made in the replying affidavit, that there was no resolution by the WFT to authorise opposition. Apart from the point's lack of merit, there was nothing new in it.

[23] The other two 'new' matters were (a) the WFT's failure to prepare and approve financial statements for its 2018 and 2019 financial years; (b) the manner in which the WFT had dealt with the proceeds from the sale of its Vermont property in June 2017.

[24] As to (a), by June 2019 Mr van der Walt knew that the WFT had not yet approved financial statements for its 2018 and 2019 financial years, although the respondents say that he was aware that the WFT's accountants had provided draft financial statements for the 2018 year.

[25] As to (b), the resolution setting out how the Vermont proceeds were to be dealt with was part of a batch of resolutions attached to the answering affidavit filed in May 2018, while documents evidencing the implementation of the resolution were produced in a rule 35(12) reply delivered on 28 June 2018.

[26] In my view the interlocutory application must be dismissed. Mr van der Walt has been shown an indulgence in regard to his late replying affidavit of 1 April 2019. He has shown no grounds for a further indulgence. The interlocutory application has all the hallmarks of an attempt to make out a new case after the case advanced in the founding papers had been fully answered. The complaint in regard to the 2018 and 2019 financial statements relates to a state of affairs which did not even exist when he launched proceedings.

Locus standi

[27] The respondents raise a preliminary defence that Mr van der Walt lacks standing to seek the claimed relief. The trust deed itself does not reserve any such power to the founder. In his founding papers Mr Van der Walt relied for standing on s 20(1) of the Trust Property Control Act 57 of 1988 and on the definition of 'trustee' in that Act. Section 20(1) provides that a court may, on the application of the Master 'or any person having an interest in the trust property', remove a trustee if the court is satisfied that such will be in the interests of the trust and its beneficiaries. 'Trustee' is defined as meaning 'any person (including the founder of the trust) who acts as a trustee by virtue of an authorization under section 6'.

[28] I agree with the respondents' contention that Mr van der Walt does not, merely by virtue of having been the founder, have an interest in the trust property. Since he is not a beneficiary, he does not have a beneficial interest, vested or contingent, in the WFT's property. A trustee has a fiduciary interest in the trust's property, but Mr Van der Walt is not a trustee of the WFT. A founder is only included within the statutory definition of 'trustee' if he is a person who acts as a trustee by virtue of an authorisation granted under s 6. Mr van der Walt was not such a person when he instituted the application.

[29] In oral argument, Mr Van der Walt's counsel relied on standing at common law. The respondents' counsel did not object, but submitted that there was no standing at common law, and again I agree. In Cameron et al *Honoré's South African Law of Trusts* 6 ed the learned authors say (para 243 p 464) that the founder of a trust who is not a trustee or beneficiary, and who has not reserved the right to enforce, vary or revoke the terms of the trust, has no legal standing in relation to its affairs apart from a right to take steps to have the trust declared invalid. Having transferred the trust property to the trustees, he is *functus officio*, and has no further part to play. I agree, as did Williams J in *NAFCOC Northern*

Cape & another v Modise NO & others [2013] ZANCHC 8 para 26 (and see also M J de Waal 2013 *Annual Survey* 1004-1005).

[30] Although the learned authors of *Honoré* add that the concept of 'interest' under the Act 'may be sufficiently wide to give the founder legal standing in relation to the trust for certain purposes', their cross-reference is to para 118, which deals with the power of the Master in terms of s 7(1) of the Act to appoint a trustee in case of vacancy after consulting 'so many interested parties as he may deem necessary'. The learned authors raise for consideration that even where the founder has no interest in the trust property, he might have a sufficient interest to be consulted in the filling of the vacancy (pp 223-224). In their discussion of the removal of trustees (para 140 at pp 268-270), they do not say that a person's capacity as founder confers standing to seek removal.

[31] Because an *inter vivos* trust is a contract, consensual variations of the contract require the founder's participation (Cameron et al *op cit* pp 491-497 and 503-504). In the case of variation, the founder's act (which is not a unilateral power) does not concern the administration of the trust but the content of the trust deed.

[32] Both sides referred in argument to *Kidbrooke Place Management Association v Walton* 2015 (4) SA 112 (WCC), where Binns-Ward J considered arguments advanced to him with reference to *Ras NO & others v Van der Meulen & another* [2010] ZASCA 163; 2011 (4) SA 17 (SCA) para 9. In *Ras* the court held that the lower court had been wrong to accept an applicant's standing without resolving the disputed question whether the applicant was or was not a beneficiary of the trust. It was in that context that Leach JA stated that the applicant would only have standing if she were a beneficiary. The learned judge of appeal was not

intending to rule out other forms of interest in trust property, ie interests not conferred by status as a beneficiary.

[33] In *Kidbrooke*, Binns-Ward J understood *Ras* in this way, pointing out the obvious example of a trustee as a person having an interest in trust property. In that particular case, the applicant had a life right to occupy a portion of land owned by the trust. The court held that this gave him an interest in the trust property for purposes of s 20(1) of the Act. This judgment does not assist Mr van der Walt, who does not, as founder, have any interest in the WFT's property.

[34] I thus conclude that Mr van der Walt lacks standing to claim the relief summarised in (a) to (d) of para 1 above. In regard to para (e), it is unclear from the papers whether Mr van der Walt claims the relief in question as a matter of maladministration (in which case he lacks standing) or in his capacity as an alleged creditor (in which case he would have standing). I shall deal with it on the latter assumption.

Mr van der Walt's loan account

[35] It is common cause that Mr van der Walt once had a loan claim of R588,493 against the WFT. It was so recorded in the WFT's financial statements for the year ended 28 February 2009. This loan, and a loan claim of Mrs van der Walt in the amount of R192,500, were stated to be unsecured, rent-free and with no repayment terms. It appears that Mr van der Walt's loan account came about, at least in part, because he used his own money to improve the WFT's Struisbaai property.

[36] The 2010 financial statements recorded that Mr van der Walt now owed the WFT R697 on loan account. He alleges that his loan account was improperly reduced.

[37] The respondents' version is the following. During 2008 Mr van der Walt borrowed R300,000 from Mrs van der Walt on the basis that he would repay her as soon as the WFT sold the Struisbaai property. In a typed note which Mr van der Walt signed on 18 November 2018, he acknowledged the aforesaid loan and its repayment terms, and also acknowledged having received R308,000 in payment of his loan account against the WFT.[1] On 2 February 2009 Mr van der Walt again signed a typed note acknowledging receipt of R308,000 in respect of his loan account.

[38] The Struisbaai property was sold later in February 2009. The WFT's conveyancers received into trust a net amount of R1,100,369,49. In November 2009 the WFT paid R300,000 to Mrs van der Walt, simultaneously debiting Mr van der Walt's loan account. This was done to give effect to the agreement between Mr and Mrs van der Walt that the former should repay the latter the personal loan from the proceeds of the Struisbaai property. What was done was the practical equivalent of the WFT paying Mr van der Walt R300,000 in reduction of his loan account and Mr van der Walt immediately paying Mrs van der Walt R300,000.

[39] Mr van der Walt's loan account was also debited with the acknowledged repayment of R308,000, which left him owing the WFT R19,506,78. In November 2009 his loan account was credited with R18,810, being the proceeds of the boat house, leaving a net amount due by him to the WFT at year-end of R696,78.

[40] In reply, Mr van der Walt does not dispute borrowing R300,000 from Mrs van der Walt. He alleges that he had a verbal agreement with her that the WFT would pay the proceeds from the Struisbaai sale to him in his capacity as a

[1] The note says 'R30800.00' but this seems to have been accepted on both sides as a typographical error.

beneficiary. He would repay the loan ‘pending the allocation of the proceeds’ of the Struisbaai sale from the WFT to him. He may have meant to say that he would repay the loan once the Struisbaai proceeds were received by him. At any rate, he alleges that Mrs van der Walt did not honour the agreement, and instead caused the WFT to pay her directly and to debit his loan account.

[41] Regarding his acknowledged receipt of R308,000, Mr van der Walt alleges that the note was signed during negotiations preceding the divorce, but that the note ‘never came to pass’ and has ‘no legal significance’. He draws attention to the fact that the respondents failed to produce evidence of the payment.

[42] Because Mr van der Walt seeks final relief, the *Plascon-Evans* rule applies. In regard to the acknowledged receipt of R308,000, there may be something in what Mr van der Walt says, because the alleged repayment was not reflected in the WFT’s financial statements for the year ended 28 February 2009, despite the fact that the payment was allegedly made on 18 November 2008. It is possible that the WFT’s auditors processed this in the next financial year purely on the strength of Mr van der Walt’s signed acknowledgment. However, and whether or not there was an actual repayment, the respondents produced two acknowledgments admittedly signed by Mr van der Walt which on their face justify the reduction of R308,000. The respondents’ version is not so far-fetched that I can reject it on the papers.

[43] The respondents allege that even if Mr van der Walt’s loan account was not repaid, it has long since prescribed because there were no fixed repayment terms and it was payable on demand. In reply, Mr van der Walt says that the loan account is not a ‘debt’ as contemplated in s 10 of the Prescription Act and that the loan was not recorded in the financial statements as being payable ‘on demand’.

[44] Neither of these points is sound. Mr van der Walt's loan account was a contractual claim against the WFT for monies lent. The WFT's matching obligation to repay the loan was a 'debt'. The correction he seeks to the WFT's financial statements is in essence a declaratory order that the debt still exists.

[45] The fact that the loan was not expressed to be payable 'on demand' does not mean that this was not its character. Ordinarily where money is lent without a fixed term for repayment, it is payable on demand, and in such circumstances demand is not usually a condition precedent for the borrower's debt to become 'due' for purposes of prescription (*Trinity Asset Management (Pty) Limited v Grindstone Investments 132 (Pty) Limited* [2017] ZACC 32; 2018 (1) SA 94 (CC) paras 101-105; *Frieslaar NO & others v Ackerman & another* [2018] ZASCA 3 paras 32-34).

[46] The circumstances of a particular case may show that a loan was not intended to be repayable on demand in the foregoing sense, and that something more was needed before prescription began to run (see, eg, *Stockdale & another v Stockdale* 2004 (1) SA 68 (C) and *De Jager NO & another v Van Onselen NO & another* [2019] ZAECGHC 7; and cf *Trinity Asset Management* para 124). Mr van der Walt has not alleged facts to show that his loan account was not payable on demand in the ordinary sense. There are some circumstances to suggest that Mr van der Walt did not expect repayment before the Struisbaai property was sold. However, and as Mr van der Walt's knew, that occurred in 2009. On the face of it, it is difficult to see how he could thereafter defer the running of prescription by failing to demand repayment.

[47] However, for present purposes I need not finally decide the question. It is enough to say that on the papers I cannot reject the defence of prescription. If Mr van der Walt wishes to pursue his loan claim against the WFT, he may issue

summons, and the question of prescription can then be fought out. His claim would not be precluded merely because the WFT has, in its accounting records, treated the loan claim as having been repaid.

[48] It follows that Mr van der Walt has not established his claim for the reinstatement of his loan account in the WFT's financial statements.

Other complaints and conclusion

[49] Since Mr van der Walt does not have standing to claim the other relief, it is not necessary to deal with the other complaints which underlie his claim for the removal of trustees. In his founding papers these were an alleged failure to keep minutes and proper accounting records. It is enough to say that if my finding that Mr van der Walt lacks standing is wrong, the answering papers show that the complaints were without merit.

[50] The respondents seek a punitive costs order against Mr van der Walt. In my view this is justified. He has attempted to meddle in the affairs of a trust in circumstances where he ceased to be a trustee and beneficiary during 2008/2009. He has advanced spurious grounds. He has flouted rules of procedure. His interference has caused the Master to hold back from authorising new trustees. He has claimed to be acting in the best interests of the beneficiaries when it is perfectly clear that he has his own selfish interests at heart. His proper remedy was simply to sue the WFT for any amount allegedly owing to him.

[51] There is also evidence that he is fuelled by vindictiveness. According to Mrs van der Walt, her ex-husband has communicated with their children, saying that he intends to sue her and the WFT, and that the children will be subpoenaed to testify in court. On 19 July 2018 he sent an SMS to their daughter which included the following threat: '*Ek gaan julle uitroei veral jy en jou ma*'. Mr van der Walt has not denied sending this message.

[52] I make the following order:

(a) The interlocutory application dated 28 February 2020 for leave to file a supplementary replying affidavit is dismissed with costs on the attorney and client scale.

(b) The main application is dismissed with costs on the attorney and client scale.

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O L Rogers

Judge of the High Court

Western Cape Division

APPEARANCES

For Applicant	C M van der Merwe Instructed by MHI Attorneys 295 Durban Road Bellville
For First to Third Respondents	J A Newdigate SC Instructed by Werksmans Attorneys, Stellenbosch c/o Werksmans Cape Town Level 1, 5 Silo Square V & A Waterfront Cape Town