

SOUTH AFRICA / JUDGMENT

Bezuidenhout and Others v Malan and Others (31201/2020) [2020] ZAGPPHC 450 (11 August 2020)

[2020] ZAGPPHC 450

COURT

North Gauteng High Court, Pretoria

BEFORE

DS Fourie

CASE / FILE NUMBER

31201/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 31201/2020

(29761/2020)

DATE-11/8/2020

In

the matter between:

G J
BEZUIDENHOUT
First Applicant
N
COETZEE
Second Applicant
J
MALAN
Third Applicant
Q
MALAN
Fourth Applicant
and
H
MALAN
First Respondent
H
MALAN N.O.
Second Respondent
AA
DOORS FAMILY (PTY) LTD
Third Respondent
MASTER
OF THE HIGH COURT,
GAUTENG
DIVISION, PRETORIA
Fourth Respondent
ABSA
BANK LIMITED
Fifth Respondent

JUDGMENT

D S FOURIE, J:

[1] On 21 July 2020- Louw J granted an ex parte order against the respondents, the relevant part of which reads as follows:

"

1. A rule nisi with return date 4 August 2020 for the respondents to show cause why the rule, in the following terms, should not be confirmed:

1.1 The fifth respondent is ordered to immediately freeze the bank accounts of the PJM Family Trust trading as AA Doors, with account numbers 406[...] and 405[...], to prevent any withdrawal or transfer of funds from the accounts pending adjudication of Part 2 of the application.

1.2 The first and second respondent are interdicted and restrained from_ dealing in any way with the assets and/or funds of the PJM Family Trust tla AA Doors.

1.3 The first and second respondent are ordered to grant access to the applicants to the property of the PJM Family Trust t/a AA Doors, situated at 34 Geoffrey Street, Roodepoort, Gauteng, in order to safeguard and protect the movable assets of the Trust on the property."

[2] It was also ordered that paragraphs 1.1, 1.2 and 1.3 referred to above will operate as interim interdicts with immediate effect.

[3] In Part 2 of the application the applicants apply for the following relief:

[3.1] Confirmation of the rule nisi granted on 21 July 2020;

[3.2] That the second respondent be removed from office as trustee of the PJM Family Trust t/a AA Doors in terms of section 20(1) of the Trust Property Control Act No 57 of 1988, with immediate effect;

[3.3] That the second and third applicant be appointed as trustees of the said Trust and that the fourth respondent be ordered to issue Letters of Authority to that effect within 7 days;

[3.4] That the first respondent be ordered to immediately hand over to the second or third applicant all keys to the property of the said Trust situated at 34 Geoffrey Street, Roodepoort, Gauteng and all books, statements, documents, in hard copy or electronic format, and any property, materials, equipment, tools, vehicles and the keys to such vehicles, of the Trust in her possession or under her control;

[3.5] That the first respondent be ordered to pay the costs of Part 1 and Part 2 of the application on a scale as between attorney and client.

[4] The first and second respondent (who is the same person, cited in her personal and official capacity as trustee) have in the meantime filed an answering affidavit opposing the application. She requests that the rule nisi be discharged, alternatively that the application be dismissed, further alternatively that the Court, if necessary, appoint an independent trustee. The parties have agreed that the order as a rule nisi granted on 21 July 2020 shall remain in force and be effective until this matter has been finally decided.

BACKGROUND

[5] The first respondent was married to the late P J Malan who passed away on 2 May 2019. She has been employed in an administrative or managerial position in the business of the Trust until now. The applicants in this application are the beneficiaries of the Trust. The first respondent is not a beneficiary, but only a trustee.

[6] The second to fourth applicants are the children of the deceased, born from a previous marriage of the deceased. Between September 2011 and May 2020, until the death of the deceased, the deceased and the second respondent were the only trustees of the Trust.

- [7] The main purpose of the Trust is to benefit the beneficiaries. The Trust Deed provides, inter alia, that there must at all times be a trustee in office who is also a beneficiary of the Trust and the first respondent has no authority to appoint any other trustee if she is to be the only remaining trustee. It also provides that the assets and funds of the Trust will vest in the trustees in their official capacities to enable them to deal with it to the benefit of the beneficiaries and not to their own benefit. The Trust conducts business in the manufacturing, installation and automation of various types of roller shutter- and safety doors.

DISCUSSION

- [8] According to the applicants the first respondent took over the control of the business of the Trust after the deceased's demise as if it was owned by her. It is pointed out by them that shortly after the death of the deceased, the first respondent instructed that payments of the Trust's rental income be made directly into her private bank account and that these arrangements have been confirmed by the relevant tenants. It is also alleged that the first respondent increasingly, after the death of the deceased, requested payments from customers of AA Doors to be made into a private bank account or into the account of the third respondent. According to the applicants the first and/or second respondent has, despite the Trust operating as a lucrative business, allowed the outstanding amount on the Trust's municipal account in respect of its immovable property, escalate to an amount of R813 164.07. A copy of the account dated 13 June 2020 is attached to the founding affidavit.
- [9] According to the first respondent and on the advice of their accountant, she and her erstwhile husband decided to register a separate legal entity from which the business would be conducted in future. To this extent a company was registered in the name of AA Doors Family (Pty) Ltd during April 2016, being the third respondent in this matter. According to her, and after an investigation was conducted, it came to light that the first applicant, with the assistance of his wife, created invoices for work done in the name of AA Doors but inserted his personal banking details on the invoices. The first respondent confirms that she is the sole trustee of the Trust and is still responsible for the running of the business on a daily basis.
- [10] With regard to the rental income the first respondent explains that the Trust never received any of the rental income. According to her these payments were made into the personal account of the deceased. She goes on to say:

"Prior to his passing and on his instructions I instructed Merco Industries and BR Maintenance by email at the end of May 2019 to pay the rentals into my personal account. It is only one of the residential units that see to the payment of rental into my account to the value of R5 000.00. The remainder of the two units does not pay rent as it is occupied by employees ... "

[11] With regard to the applicants' allegation that the first respondent also requested payments from customers of AA Doors to be made into her private account or into the account of the third respondent, she replies as follows:

"Payments that were made to the third respondent were made in line with the business model adopted and implemented before the passing of the deceased."

[12] According to the first respondent the outstanding municipal charges relates to only one of the immovable properties. She explains that the outstanding amount is disputed by the Trust and has also been disputed for the past five years.

[13] Section 20 of the Trust Property Control Act No 57 of 1988 provides for the removal of a trustee. Sub-section

(1) provides 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."

[14] It is clear from the evidence that the first respondent is receiving payment of the rental income of the Trust into her personal bank account. Her explanation for doing so, is that it had also been done by the deceased and that he instructed her to do the same. It goes without saying that this cannot be a defence. It also appears not to be in dispute that the business of AA Doors is being conducted through the third respondent, i.e. AA Doors Family (Pty) Ltd. Although this is according to the "business model" followed by the first respondent (and also her deceased husband} this can also not be a defence.

[15] A trustee is supposed to act as a *bonus et diligens paterfamilias* in the administration and management of the trust property and he/she must keep the

trust property separate from his/her own (*SA Association N.O. v Hoffman* 1913 AD 377). This means that trustees must carry out their duties with scrupulous

care for the benefit of the beneficiaries (*Colonial Banking & Trust Co Ltd v Estate Hughes* 1932 AD 1 at 16). These duties are also echoed in section 9(1) of the Trust Property Control Act which provides that a trustee shall in the

performance of his duties and the exercise of his powers act with care, diligence' and skill which can reasonably expected of a person who manages the affairs of another. It is clear to me that in this case the first respondent, in her capacity as a trustee, has failed to do so. I am therefore satisfied that it will be in the interests of the Trust and its beneficiaries if the first respondent, in her capacity as trustee, be removed from office as trustee of the PJM Family Trust t/a AA Doors.

[16] It has been pointed out by the first respondent that the first applicant is approaching the Court with dirty hands. However, the applicants are not seeking the appointment of the first applicant as trustee. They are seeking the appointment of the second and third applicants as trustees and I have no reason to think that they should be disqualified.

ORDER

In the result I make the following order:

1. The rule nisi granted by Louw Jon 21 July 2020 is confirmed.
2. The second respondent is removed from office as trustee of the PJM Family Trust t/a AA Doors in terms of section 20(1) of the Trust Property Control Act No 57 of 1998 with immediate effect.
3. The second and third applicants are appointed as trustees of the PJM Family Trust t/a AA Doors, and the fourth respondent is requested to issue Letters of Authority, if possible, within 10 (ten) days from date of service of this order.
4. The first respondent is ordered to immediately hand over to the second and/or third applicants all keys of the property of the PJM Family Trust t/a AA Doors, situated at 34 Geoffrey Street, Roodepoort, Gauteng, statements, documents, in hard copy or electronic format, and any property, materials, equipment, tools, vehicles and the keys to such vehicles of the said Trust in her possession or under her control.
5. In the event of the first respondent failing to comply with paragraph 4 above, the Sheriff for Roodepoort is authorised and directed to assist the applicants in executing the order.
6. The first respondent is ordered to pay the costs of Part 1 and Part 2 of this application.

DS FOURIE

JUDGE OF THE HIGH COURT

PRETORIA

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Prepared on 10 October 2026 · Esheria