

SOUTH AFRICA / JUDGMENT

Boezacht and Others v Niegaardt and Others (1726/11) [2012]

ZAECPEHC 73 (9 October 2012)

[2012] ZAECPEHC 73

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

N G Beshe

CASE / FILE NUMBER

1726/11

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE – PORT ELIZABETH)

CASE NO.: 1726/11

In the matter between:

RODNEY BOEZACHT

.....First

Applicant

BUSTON BOSCH

.....Second

Applicant

ASHLEY KLEINHANS

.....Third

Applicant

MARBEN ROCKMAN

.....Fourth

Applicant

IVOR WARREN

.....Fifth

Applicant

JAMES TAMBOER

.....Sixth

Applicant

And

RONALD HENRY NIEGAARDT

.....First

Respondent

RONALD HENRY NIEGAARDT
.....Second
Respondent
(as trustee of the
Bethelsdorp Development Trust)
DAVID THEOPHILUS LEWIS
.....Third
Respondent
DAVID THEOPHILUS LEWIS NO
.....Fourth
Respondent
LIZETTE CLARISE OOSTHUIZEN
.....Fifth
Respondent
LIZETTE CLARISE OOSTHUIZEN NO
.....Sixth
Respondent
The
remaining (actual or contingent) beneficiaries
Of
the Bethelsdorp Development Trust
.....Seventh
Respondent

JUDGMENT

BESHE J:

Introduction

- [1] This is an application for the removal, alternatively the suspension of the second respondent as the trustee of the Bethelsdorp Development Trust (BDT). The other trustees, being fourth and sixth respondents have since resigned from their positions as trustees. The appointment of the new trustees, Hilton Craig Killian and Shanti Cham-Sam is also sought by the applicants.

Parties

- [2] According to the six applicants, they derive their locus standi from the fact that they have been identified as, and dealt with as beneficiaries to the “BDT” as defined in clause 1.9 of the BDT deed of trust. That they were identified as beneficiaries at a meeting of BDT trustees.
- [3] Clause 1.9 of the BDT deed of trust defines “beneficiaries” to mean: historically disadvantaged persons and communities in the Northern Areas and the Nelson Mandela Metropole; particularly, the youth, women, veterans and the disabled.

- [4] First applicant describes himself as a project manager residing at 81 Rensberg Street, Salt Lake Port Elizabeth. Second applicant is described as a community worker who resides at 60 Marock Road, Sancor, Port Elizabeth. Third applicant is chairman of the Bethelsdorp Disabled Association. Fourth applicant is chairperson of the Northern Areas Youth Council. Fifth and Sixth applicants are community workers. However the applicants were unable to locate a copy of the minutes of the meeting during which they allege they were identified as beneficiaries of the BDT.
- [5] Applicants allege that as beneficiaries they received intermittent payments from BDT.
- [6] First respondent is Ronald Henry Niegaardt. He is also cited as second respondent in his representative capacity as trustee for the time being of BDT. Henceforth first and second respondents will be referred to as the respondents. Since no relief is sought against the third to the seventh respondents, I do not propose to describe them.

Locus Standi

- [7] Applicants' locus standi is contested/placed in issue by the respondents on the basis that they do not possess substantial interest or legal standing to apply for the removal of the first respondent as a trustee. Respondents deny that the applicants have been identified as beneficiaries at any stage.
- [8] In the answering affidavit, respondents allege that BDT entered into written agreements with various corporations which were represented by, inter alia, second, third, fourth and sixth respondents and not with applicants in their personal capacities. It is further alleged that close

corporations that entered into agreements with the BDT have since been deregistered.

- [9] Although the legal standing of the applicants to launch these proceedings was challenged by the respondents, applicants persisted in seeking the removal of the first respondent as trustee of the BDT. They admitted that in certain cases beneficiaries were in fact close corporations some of which were represented by the second, fifth and sixth applicants respectively. With regard to the deregistration of the close corporations, in reply applicants state that the close corporations were deregistered by reason of "annual return non-compliance". To this end second and sixth applicants will ensure that the relevant annual returns are duly submitted and will endeavour to have these close corporations reregistered as soon as possible.
- [10] At the date of hearing and pursuant to the objections raised in respect of lack of locus standi, applicants sought the joinder of close corporations represented by third applicant being Business Zone 1220 CC. As well as a close corporation represented by sixth applicant Lezmin 2821 CC trading as Siyathemba Enterprises as well as Northern Areas Youth Council represented by the fourth applicant. There was however no explanation of how Business Zone 1220 CC is connected/related to the Bethelsdorp Disabled Association third applicant being chairperson of latter mentioned Association.

Joinder or Substitution of the Applicants

[11] Applicants submitted that it would be convenient for the above mentioned entities to be joined in view of the fact that the respondents allege that the entities have the necessary locus standi to bring this application. They argued further that the individuals who deposed to affidavits in support of this application are members or representatives of the close corporations and associations sought to be joined and have been authorised to act on behalf of these entities.

[12] The founding affidavit was deposed to by first applicant Rodney Boezacht. At paragraph one of the affidavit he states:

“I am an adult male project manager, currently residing at 81 Ransburg Street, Salt Lake, Port Elizabeth, Eastern Cape Province”.

At paragraph 5

“I am also duly authorised to depose to this affidavit in support of the relief sought, on behalf of the second to the sixth respondent as appears from their confirmatory affidavits annexed hereto.”

[13] There is however no reference to entities Business Zone 1220 CC, Lezmin 2821 CC or Northern Areas Youth Council. Nor is there an indication that second to sixth applicants are cited in their representative capacities.

[14] Second, third, fourth and sixth applicants deposed to confirmatory affidavits. Fifth applicant passed away subsequent to the launching of this application. In his confirmatory affidavit, second applicant states that he authorised first applicant to act on his behalf for purposes of this application. So does the third, fourth and sixth applicants. Third and fourth applicants also state that they are chairpersons of the Bethelsdorp Disabled Association and Northern Areas Youth Council respectively.

[15] In opposing the application for the joinder of entities referred to above, Mr Smith argued that applicants seek to build a case on a foundation not previously laid by them in their founding papers. He argued further that the applicants seek to achieve a wholesale swapping out of one litigant, who does not have a cause of action against the respondent with another litigant with an assumed cause of action against the respondent. He referred me to the remarks of Harms JA in *Gross and Others v Pentz* [1996] ZASCA 78; 1996 (4) SA 617 (A) at 632 where he stated: “I am unaware of a rule of law that allows a court to confer locus standi upon a party, who otherwise has none, on the ground of expediency and to obviate impractical and undesirable procedures.”

[16] I however do not understand the applicants to be as seeking a substitution but rather a joinder of more applicants. But it is necessary to determine whether or not the current applicants are clothed with the necessary standing to seek an order for the removal of the remaining trustee of BDT.

- [17] In *Ras NNO v Van Der Meulen* 2011 (4) SA 17 at page 20 paragraph C – D Leach JA had this to say:

“[9] In opposing leave to appeal, the respondent argued that the order was not appealable and it is necessary to deal with this issue at the outset. The court clearly erred in finding that, short of being a beneficiary, the respondent had an interest in the trust which justified her being entitled to seek the relief claimed. It is only if she is a beneficiary that she would be entitled to seek the removal of the trustees, and the respondent correctly did not seek to support the High Court’s contrary conclusion. If the trustees are correct and the respondent is not a beneficiary, her application would fall to be dismissed. The issue of the respondent’s status as beneficiary would therefore be determinative of the parties’ rights, rendering the order granted in respect of those rights appealable.”

- [18] First applicant who is also the deponent to the founding affidavit, describes himself as “a project manager”. He does not identify the project that he manages. Second, fifth and sixth applicants are described as community workers. Third and fourth applicants are chairpersons of the Bethelsdorp Disabled Association and Northern Areas Youth Council respectively. First to sixth applicants aver that they were identified as beneficiaries of the BDT at a meeting. And further that this was minuted. They were unable to place the court in possession of the said minute. Respondent deny that the applicants were identified as beneficiaries.
- [19] In light of the denial by the respondents that the applicants were identified as beneficiaries of the BDT, and the inability by the applicants to provide the minutes which they allege exist, which confirms such identification, I am unable to find that the applicants have shown on a balance of probabilities that they are beneficiaries. Consequently I am unable to find that they have the standing to apply for the removal of the respondent as a trustee.
- [20] In an apparent bid to cover their basis, in case they were non-suited, after the hearing of the application which was on the 15 December 2011, and judgment having been reserved, applicants sought leave to file a supplementary affidavit. They also sought leave to have the matter set down so that they can make further submissions regarding the issue of deregistration of two entities being Business Zone 1220 CC and Lezmin 2821 CC. The two entities sought to be joined as applicants.
- [21] In the supplementary affidavit reference is made two letters that were received from the Companies and Intellectual Property Commission (CIPC) dated 23 December 2011. Save for being addressed to two separate entities, the Business Zone 1220 CC and Lezmin 2821 CC respectively, the contents of the letters are identical and read:

“Your application for registration was successfully processed and the status has been changed to “IN DEREGISTRATION PROCESS”.

The enterprise status will change to “In Business” once all annual returns have been lodged.”

- [21] A close corporation ceases to exist upon deregistration. It appears to be common cause that at the launching of these proceedings the two entities had been deregistered. It is also common cause that application for the re-instatement of the two close corporations had been submitted to the Companies and Intellectual Property Commission.
- [22] According to the letters from the Companies and Intellectual Property Commission issued on 23 December 2011, the status of the two corporations had been changed to “IN DEREGISTRATION PROCESS” and will change to “IN BUSINESS” once all annual returns have been lodged.
- [23] Practise Note 2 of 2011 of Companies and Close Corporations Deregistration and Reinstatement Procedure, stipulates that:

“Once the company or close corporation has been referred for deregistration the status will be changed to “in deregistration process” and a CoR 40.3 (Demand notice concerning inactive company) will be issued. The company or close corporation will have 20 business days to either object or in the case of outstanding annual returns to submit all outstanding annual returns. If no objection has been received within the 20 business day period the Commission will issue a CoR40.4 (Notice of Pending Deregistration of company or close corporation). If no further response within the required 20 business day period, the Commission will refer the entity for final deregistration and issue a final deregistration letter.

If the entity was referred for deregistration due to annual return non-compliance a compliance certificate CoR139.1 will be issued

wherein the entity has 15 business days to submit all outstanding annual returns. If no annual returns are lodged, the Commission will issue a CoR40.4 and if still no annual returns are received within the required 20 business day period, the Commission will deregister the entity and issue a final deregistration letter.”

- [24] When argument was heard in this regard on the 20 March 2012 there was no indication that requirement of the Companies and Intellectual Property Commission had been complied with and that the status of the corporations had changed to “IN BUSINESS”. In my view this does not change the status of the two close corporations to be reinstated or registered. Their status will only change to “IN BUSINESS” once there has been compliance with the requirement of the CIPC. Clearly at the time of the launching of the proceedings the two corporations were not registered with the CIPC. Even at the date when the matter was argued in March 2012 the corporations had not been restored to the register concerned.
- [25] The further difficulty facing the application for joinder is that there is no indication that the first applicant who has since been found to be non-suited, was authorised to institute these proceedings at the instance of the parties sought to be joined (the entities). At paragraph 5 of the founding affidavit first applicant states that he has been only authorised to depose to the founding affidavit in support to the relief sought, on behalf of the second to sixth applicants as appears from their confirmatory affidavits. First applicant does not allege that he was

authorised by the applicants to institute these proceedings. In *Ganes and Another v Telekom Namibie Ltd* 2004 (3) SA 615 it was held that the deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings that must be authorised. In casu there was no authorisation to institute the proceedings.

Urgency

[26] Lack of locus standi in judicio is not the only objection raised in limine by the respondents. Lack of urgency is also raised in limine by the respondents. As indicated earlier, this application is concerned with the removal of the first respondent as a trustee of BDT.

[27] Chief amongst the reasons cited for seeking the removal of the first respondent as a trustee is that:

1. Over a period of time beneficiaries became increasingly disgruntled with the manner in which they were treated by the BDT trustees. Inter alia by not paying them monies that were allocated to them.
2. The existence of a report by Mr David Barrilt, director of Stratgem Consultants (Pty) Ltd a company that inter alia, conducts investigations into and provides consultancy advice on business and corporate management.

According to this report: In May / June 2010 investment funds were improperly removed from Standard Bank Investment Bank within 24 hours of having been deposited inspite of a written agreement that since funds should remain in the account for 5 years. BDT bank statements reveal improper payments made between 2007 and 2009.

3. There was lack of corporate governance.

[28] Mr Barrilt's report was presented to those who commissioned it in November 2010. This application was launched on an urgent basis in July 2011.

[29] It is trite that when applying for urgent relief, the applicant has a duty to justify the non-compliance with the time frames stipulated in the Uniform Rules of this court relating to applications. See *Caledon Street Restaurants CC and Monica D'Aviera* reported decision of South Eastern Cape Local Division (as it was then was) case number 2656/97.

[30] According to the applicants, the matter is urgent because:

1. BDT has allegedly received loans from the Development Bank of South Africa totalling some R4 000.000. An amount of R1 000.000 from the Eastern Cape Development Corporation which amount need to be managed. No dates are provided as to when these loans were received.
2. Fear that books of account may be stolen or go missing.

3. Pending litigation for the recovery of a loan of R1 500.00 to Mr George Ionnides, which litigation needs to be protected.
- [31] It appears to be common cause however that the litigation referred to above was set down for hearing on the 21 June 2011. It was however removed from the roll before the launching of this application.
- [32] I am not persuaded that the applicants, even if they were clothed with the necessary locus standi in judicio, have succeeded in showing that they are entitled to be heard on an urgent basis. Respondent's objection in this regard is also upheld.
- [33] Accordingly the application is dismissed with costs.

N G BESHE

JUDGE OF THE HIGH COURT

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