

SOUTH AFRICA / JUDGMENT

Botha and Others v Ruthven and Others [2023] ZAGPPHC 159; 29145/2021 (8 March 2023)

[2023] ZAGPPHC 159

COURT

North Gauteng High Court, Pretoria

BEFORE

Noko AJ

CASE / FILE NUMBER

29145/2021

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IN

THE HIGH COURT OF SOUTH AFRICA,
GAUTENG
DIVISION, PRETORIA

CASE

NO: 29145/2021

REPORTABLE:

NO
OF
INTEREST TO OTHER JUDGES: NO

REVISED:

NO
8
March 2023
In

the matter between:

ANJA
BOTH A
FIRST
APPLICANT
JOEY
BOTH A
SECOND APPLICANT
SAREL
JOHANNES PETRUS ROUX N.O.
THIRD APPLICANT
And
STEPHANUS
RUTHVEN

FIRST RESPONDENT
STEPHANUS
RUTHVEN N.O.
SECOND RESPONDENT
CHARLES
BOTH A N.O.
THIRD RESPONDENT
NADINE
BOTH A N.O.
FOURTH RESPONDENT
CHARMONÉ
BOTH A N.O.
FIFTH RESPONDENT
CHARLES
BOTH A N.O.
SIXTH RESPONDENT
NADINE
BOTH A N.O.
SEVENTH RESPONDENT
CHARLOTTE
PRINSLOO N.O.
EIGHTH RESPONDENT
ABSA
BANK LTD
NINTH RESPONDENT
THE
MASTER OF THE HIGH COURT,
GAUTENG
DIVISION, PRETORIA
TENTH RESPONDENT
THE
REGISTRAR OF DEEDS, MBOMBELA
ELEVENTH RESPONDENT

JUDGMENT

Coram NOKO AJ

Introduction

- [1] The applicants brought an application for an order declaring three resolutions adopted on 28 May 2021 by the second respondent in his capacity as the sole trustee of Botha Ruthven Family Will Trust (IT11143/2002) (Botha Ruthven Trust) illegal, void and unenforceable and be set aside.
- [2] The resolutions adopted were as follows:

2.1. First, the resolution withdrawing the action instituted in the Mpumalanga High Court under case number 4390/18 against third to the eight respondents for certain reliefs[1] (including setting aside sale and registration of a farm, to wit, Gedeelte 4 (Gedeelte van Gedeelte 2) van Plaas Grootrietvley 210, (“the farm”) by the second respondent and the late Stephanus Botha who was a co-trustee with the second respondent of Botha Ruthven Trust.

2.2. Secondly, a resolution terminating Botha Ruthven Family Will Trust as the Trust Deed authorises termination of the Trust 1 year after the death of the surviving spouse between Stephanus Botha and his wife, Johanna Dorothea Botha (born Clack).

2.3. Thirdly, a resolution withdrawing the mandate given to Gerhard Botha and Partners to represent the Trustees in the court action in the Mpumalanga High Court under case number 4390/18.

[3] The applicants further sought an order removing the second respondent as a Trustee of Botha Ruthven Trust.

[4] There are only two respondents who opposed this application, and reference to the respondent shall refer to only those respondents.

Background

[5] The main parties in this application are related to each other, and to this end, it is imperative to set out the family background and their relation. Stephanus Botha, a grandfather to the first respondent, passed on 30 June 2002 and together with his wife had, for the purposes of this application, three children, namely, Charles Botha, Stephanus Botha[2] (Stephanus Botha jnr.) and the respondent’s mother. Stephanus Botha jnr. is survived by the two daughters, Anja and Joey Botha, who are the first and second applicants in this lis. Respondent’s mother was survived by two sons, George Dederick Ruthven (Dederick Ruthven) and Stephanus Ruthven, the latter being the first respondent in this lis. The first respondent is, therefore, a cousin to the first and second applicants.

[6] The late Stephanus Botha snr executed a Will in terms of which three trusts were to be established. One of the trusts to be established was a Bewind Trust.[3],[4] , in terms of which the trustees thereof will manage the farm, which would be registered in the names of Botha Ruthven Trust. The late Stephanus Botha jnr. is the beneficiary in the Botha Ruthven Trust.

[7] The second respondent, together with the late Stephanus Botha jnr. believed that the farm was bequeathed to the respondent and his brother, Dederick Ruthven. The second respondent and his brother Dederick Ruthven, having realised they could not afford to maintain the farm, decided to sell it. Their uncle Charles Botha made an offer of R1 million, which had to be increased to match the R1.2 million offer made by the late Stephanus Botha jnr. The farm was then sold and transferred in 2012 to Charles Botha Trust, and from the proceeds of the sale, an amount of R1 million was shared equally between the second respondent and his brother Dederick Ruthven.

[8] Having realised that the farm was bequeathed to Botha Ruthven Trust and should not have been sold to Charles Botha Trust and further that the proceeds should not have been paid to the second respondent and Dederick Ruthven, the late Stephanus Botha jnr consulted attorneys in 2018 and procured services of the third applicant, in his capacity as an attorney in the employ of Gerhard Botha and Partners attorneys, to cancel the sale and registration of the transfer of the farm to the Charles Botha Family Trust. To this end, a resolution was prepared in terms of which the Trustees of Botha Ruthven trust (being the late

Stephanus Botha jnr. and first respondent) would resolve to commence legal proceedings for an order, inter alia, to cancel the sale agreement and the registration of the transfer of the farm into the names of Charles Botha Family Trust. A second resolution was prepared, which indemnified the second respondent for liability to legal costs. Pursuant thereto, civil proceedings were commenced in the Mpumalanga High Court, and at the time of hearing of this application, leading of evidence has been concluded. The late Stephanus Botha jnr. passed on at the end of the trial but before heads of arguments were filed.

[9] Subsequent to the death of Stephanus Botha jnr. a request by the first and second applicants was made for them to be added as co-trustees, and the second respondent refused as the late Stephanus Botha jnr. did not make provision in his Will that upon his passing, he should be substituted by the said daughters or anyone else.

[10] The second respondent then took three resolutions as set out above, on the advice of his attorneys. The applicant launched these proceedings for a declaratory order, setting aside the said resolutions. The first and second respondents oppose the application, and reference to respondents in this judgment will refer only to the first and second respondents.

Condonation application

[11] The respondents delivered their answering affidavit out of time and therefore brought an application for condoning the late filing of the affidavit. Though the applicants did not vociferously argue for the striking out of the answering affidavit, it does not appear that the applicants were not prejudiced in the preparation of the replying affidavit and have accordingly replied to facts raised in the answering affidavit, which enabled this Court to comprehensively identify and interrogate issues between the party. To this end, the requested condonation for late delivery of the answering affidavit is granted.

Issues

for determination.

[12] The Court is invited to decide on the legality and enforceability of the resolutions and possibly to set them aside.

[13] To consider whether the applicants have made out a case for the removal of the first respondent as a trustee in Botha Ruthven Trust.

Parties' arguments

[14] The *raison d'être* underpinning the resolutions is predicated on the grounds dealt with hereunder.

Withdrawal of the mandate and termination of the litigation.

[15] The applicants contended that when the proceedings in Mpumalanga High Court were launched, the late Stephanus Botha jnr conveyed to the respondent that he would be liable for the legal costs relating to the legal proceedings and the second respondent was indemnified. And further that it is what the first respondent insisted on before signing the resolution authorising the commencement of the legal proceedings. In retort, the respondent asserted that he was misled into signing the resolution as he was informed that the resolution's object was only to investigate the sale of the farm. Had he been made aware of the possible outcome, being that his brother and himself may have to return the monies paid to them, he would not have agreed to authorise the launching of proceedings to cancel the sale agreement.

[16] The first respondent contended further that he decided to withdraw the action as he intended to halt the feud between him and his late uncle, which should have been stopped from the beginning as it brought unnecessary animosity in the family. To him, there were also no prospects of success in the litigation. The sale agreement took place in 2012, and the late Stephanus Botha jnr was a trustee and even offered to buy the farm. There was as such, nothing sinister with the sale transaction.

[17] There are no cogent contentions to gainsay the evidence pointing to the fact that the first respondent's concern was the exposure to attendant legal costs for which he was indemnified, and to this end, the contention that he was misled into signing the resolution appears to be without basis and therefore unsustainable. In fact, the second respondent appears to be approbating and reprobating as he stated that he was misled and, at the same time, stated in paragraph 10 of the answering affidavit that he was persuaded to sign, and he did thereafter sign the resolution.[5] This Court is, however, alive to the fact that the facts surrounding the dispute regarding the validity of the resolution are pending

before the High Court in Mpumalanga.

No assets or funds

[18] The first respondent contended that since the Trust did not have a bank account or even cash, he was worried that he might ultimately become personally liable for the legal costs incurred. This was also aggravated by the fact that the attorneys of record for the Trustees were not open with him and did not even give him a statement of fees. Such fees, he contended, could have even been more than R1 million.

- [19] There would have been merits to the first respondent's argument as the trustee must act with care and diligence, not to recklessly expose the Trust to any form of risk. But in this instance, he insisted that the late Stephanus Botha jnr. should take responsibility for exposure to the risk associated with litigation costs; hence he acted with due diligence, and the first respondent may have been applauded to have acted with care and diligence.
- [20] The question remains whether such an indemnity would have been binding to third parties, including the other respondents, in the litigation matter launched in the Mpumalanga High Court. This Court has not been invited to make a pronouncement on this aspect, and as the Constitutional Court stated in *Molusi and Others v Voges NO and Others* 2016 (3) SA 370 (CC) at 381H-382B that the Court should adjudicate and make a decision on disputes presented before it. This Court will therefore, not delve into the merits or demerits of this issue.
- [21] The applicants contended that the first respondent knew that the late Stephanus Botha jnr. undertook to personally pay legal costs, which was also re-affirmed by the wife of the late Stephanus Botha jnr that the estate would carry the liability for the legal costs, and the second respondent remained indemnified.
- [22] There are no reasons to conclude that the indemnity given to the first respondent should not be binding on the estate of Stephanus Botha jnr. Ordinarily, once an executor is appointed in the deceased's estate, the executor takes over the obligations and rights of the deceased. This will also extend to the indemnity agreement, which the first respondent signed. To this end, the advice given to the first respondent is unfounded and lacks merits.
- [23] The applicant contended further that the interpretation of what is an asset, as understood by the first respondent, lacks substance. In this regard, it was submitted that the Court should defer to the definition in section 1 of the Trust Property Control Act 57 of 1988, which provides that "... moveable or immovable property, and includes a contingent interest in property, which in accordance with the provisions of a trust instrument are to be administered or disposed of by a trustee". To this end, so went the argument, the farm would have also qualified as a trust asset or property, and the first respondent's contention is therefore bound to fail.

Termination of the Trust

- [24] The second reason for taking the resolution was that the trust deed provides that the trustees may terminate the Trust once the period of 1 year has lapsed after the death of the surviving spouse, who died on 10 September 2017, and one year would have lapsed on 9 September 2018. The resolution having been adopted on 28 May 2021. The first respondent further stated that the Trust Deed authorised the trustees to terminate the Trust by exercising their unfettered or exclusive discretion. To this end, the first respondent did not need any reason to terminate the Trust, whether it was good or bad.[6] The counsel further contended that the reasons which were based on the advice from his legal advisor to terminate the Trust formed the basis of his decision to terminate the Trust and should be accepted by the Court.

- [25] The overriding consideration is that the trustee should always act in the interest of the Trust and/or the beneficiaries. The respondent has failed to put forward sound reasons why the termination was in the Trust's best interest or for the Trust's benefit. The facts suggest that, in fact, the respondent's decision was not in the interest of the Trust or its beneficiaries.

Conflict of interest

- [26] The counsel for the applicants contended on behalf of the applicants that on overall consideration of the facts and evidence presented, it is palpable that the first respondent was not acting in the interest of the Trust and the beneficiaries. The respondent's argument that he was advised that the interest of the second and third applicants were irrelevant failed to properly reflect on the trust deed, and the respondent should have noted that the said applicants have an interest as they stand to benefit from the farm as the beneficiaries of the estate of the late Stephanus Botha jnr. There was no reason to refuse to appoint the applicants as co-trustees. It, however, appears that the first respondent was conflicted, and this could be gleaned from his reasoning that he was concerned that he was likely to be ultimately forced to pay back the amount of R500 000.00 he benefitted from the sale of the farm. He was, therefore, in a compromised position to adopt the resolutions objectively as the interest of the Trust and his interest were at loggerheads.
- [27] The additional evidence which proves the conflict is, inter alia, the fact, which was not disputed, that the first respondent testified against the action brought by the Trust before Mpumalanga High Court. This could not have been in the interest of the Trust.

Removal of a Trustee

- [28] The counsel for the applicants submitted that the applicants are entitled to approach Court for the removal and do satisfy the requirements as set out in the Trust Property Control Act. The Master of the High Court is empowered in terms of section 20(1) of the Trust Property Control Act to remove a trustee from his office, and it provides that "[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". The first and second applicants, as beneficiaries and the third applicant, as the executor in the estate of the late Stephanus Botha jnr. have interest in the Trust and as such, satisfy the requirements in the Act. Their application is intended to ensure that the farm, being the trust asset, is returned to the Trust.
- [29] On the other hand, the respondent contended that what is critical is the wishes of the creator and his express rights bestowed upon the trustees at the time he created the Trust.[7] The respondent still fails to demonstrate in what way losing a farm could have been a wish of the creator. That notwithstanding the respondent's counsel quoted with approval the sentiments of the Court in *Volkwyn NO v Clarke and Damant* 1946 WLD 456 where Murray J stated that "... both the statute and the case cited indicate that the sufficiency of the cause for removal is to be tested by a consideration of the interest of the estate..."[8]

- [30] The applicants contended that the second respondent's conduct is a reflection of a person who does not appreciate the obligations and responsibilities of the office of the trusteeship. The absence of understanding his responsibilities is, without more, sufficient to justify his removal as a trustee. It is not a requirement that the trustee should have misconducted himself before the removal. Reference was made to *Gowar & Another v Gowar & Others*, 2016 (5) SA 225 (SCA) at para [30] that "... neither mala fides nor even misconduct are required for the removal of a trustee."
- [31] On a proper reading of section 20 referred to above, the only consideration is that it should be in the interest of the Trust for the Court to remove a person from the office of trusteeship. The resolutions adopted by the first respondent were not aimed at advancing the interest of the Trust and/or its beneficiaries; instead, the resolutions were directly or indirectly adopted for the sole purpose of frustrating or denying the Trust and or beneficiaries the benefit of having the farm back to where it rightly belongs.
- [32] Once the trustee is removed, the office of the Master of the High Court will follow the provision of section 7 of the Trust Property Control Act and "... in the absence of any provision in the trust instrument, after consultation with so many interested parties as he may deem necessary, appoint any person as trustee". The respondent did not refer the Court to any provision of the trust deed which prohibits the appointment of a trustee by the Master of the High Court.
- [33] The first respondent contended that if the Court decides to set aside the resolution terminating the Trust, it would be unnecessary for the first respondent to be removed from the Trust. He advanced the reasons that ordinarily, the trust office should not be left in a vacuum as the office of the Master would take time to fill in the vacuum left by the order removing the first respondent. Further that in any event, there may no longer be any need for the consultation with the attorneys as what is outstanding is only for the Mpumalanga High Court to give judgment since the heads of argument have already been submitted to the Court.
- [34] One would certainly be perturbed by the volte-face stance of the first respondent, who had earlier accused the third respondent of having misrepresented facts in pursuit of luring him to sign the resolution and now requested that the said attorney should act for the Trust in which he is a trustee. The first respondent stated that "I cannot believe that Swart now expects me, representing the Trust to retain him as the attorney for the Trust when he gave evidence which was directly in conflict with what I have stated and where he was the person, who under a misrepresentation, obtained my signature on the resolution to commence the action. Swart and I have never discussed the matter and have never contacted me for instruction, even after Stephanus Botha passed away".[9] It is therefore not reconcilable to have the respondent to remain being a trustee in the Botha Ruthven Trust.
- [35] In the premises, the applicants have advanced a formidable case to which the respondents failed to answer.

Costs

- [36] The applicant has requested that the second respondent be ordered to pay the costs of the application since it is glaringly clear from his conduct that he was attending to his personal interest. Further that this application would not have been necessary and the respondent could have arrested the proceedings timeously. On the other hand, the respondent seeks that the application be dismissed with cost on a normal scale.
- [37] The Court is persuaded that the costs de bonis propriis on attorneys and client scale as a punitive measure is warranted.

Conclusion

[38] In consequence, I make the following order:

1. That the three resolutions adopted by the second respondent on 25 June 2018, to terminate Botha Ruthven Trust, to withdraw the legal action pending at the Mpumalanga High Court and terminating the mandate granted to Gerhard Botha Attorneys are declared illegal, invalid and are set aside,
2. The second respondent is removed as a Trustee of the Botha Ruthven Family Will Trust (IT11143/2002), and the Master of the High Court is authorised to appoint a Trustee or Trustees in terms of the Trust Property Control Act.
3. The second respondent is ordered to pay the costs on an attorney and client scale, de bonis propriis.

Noko AJ,

APPEARANCES

Counsel for the Applicants

: Adv L.W. De Koning SC

Attorneys for the Applicants

: Gerhard Botha & Partners

Counsel for the first and second respondents : Adv S. Aucamp

Attorneys for the respondents

: Darryl Furman & Ass.

Date of hearing

: 14 February 2023

Date of judgment

: 8 March 2023

- [1] The said relief is not necessary and hence not set out in detail for the determination in this matter.
- [2] For the purposes of this judgment, Stephanus Botha shall be identified as Stephanus Botha jnr, and his father will be identified as Stephanus Botha snr.
- [3] See *Bafokeng Tribe v Impala Platinum Ltd & Others* 1999 (3) SA 517 (BH), where it was held that "... [I]n a bewind trust the ownership of the assets of the trust vests in the beneficiary, but the administration of the trust vest in the trustee or bewindholder."
- [4] The other two trusts were Botha Ruthven Family Trust and Charles Botha Family Trust
- [5] Para 5 of the answering affidavit states, "I should further point out that at the time when my consent was being sought by signing a resolution for the Trust to proceed with the legal proceedings (as I understood it), I was not agreeable to sign. However, after various discussions and Swart trying to explain what I was not understanding, certainly not the potential impact that the resolution would have on my personal life, I was eventually persuaded to give my consent because my uncle undertook that I would not be held liable for the legal costs". (underlining added).
- [6] See respondent's heads of argument in para 16.
- [7] See respondent's heads in para 11
- [8] Ibid at para 9.
- [9] See para 51.8 of the respondents' answering affidavit.

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