
SOUTH AFRICA / JUDGMENT

Collett N.O and Others v DA and Another (618/2016) [2016] ZAECHGC 70 (8 September 2016) [2016] ZAECHGC 70

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M.J Lowe

CASE / FILE NUMBER

618/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO: 618/2016

DATE:

8 SEPTEMBER 2016

In

the matter between:

DENWILL
COLLETT
N.O.....First
Applicant
NOLA
COLLETT
N.O.....Second
Applicant
C.....
R..... A.....
N.O.....Third
Applicant
HELETTE
PRETORIUS
N.O.....Fourth
Applicant
DIRK
JACOBUS ACKERMAN
N.O.....Fifth
Applicant
CRAIG
COLLETT
N.O.....Sixth
Applicant
ROELOF
CILLIERS KRAUSE
N.O.....Seventh
Applicant
And
D.....
J.....
A.....First
Respondent
THE
MASTER OF THE HIGH COURT,
BLOEMFONTEIN.....Second
Respondent

JUDGMENT

Date heard: 23 June 2016

Date delivered: 08 September 2016

LOWE, J

Introduction:

- [1] The first Five Applicants in this matter are Trustees of the Dick Collett (for Carmen) Trust (“the Trust”) which is a Trust registered in accordance with The Trust Property Control Act.
- [2] First Respondent, because of his marriage to the Third Applicant, was appointed as a Trustee of the Trust. Their marriage has broken down and divorce proceedings have been instituted. At a meeting of Trustees on 25 November 2015 it was resolved that First Respondent be removed as a Trustee of the Trust. At the same meeting it was resolved that Sixth and Seventh Applicants be appointed as Trustees of the Trust.
- [3] The Trust was established on 23 October 1990 by First Applicant’s father R C, the donor. It was established for the benefit of First Applicant’s daughter, (Third Applicant) who was then the only income and capital beneficiary of the Trust.
- [4] Third Applicant married First Respondent on 17 February 1996 by ante-nuptial contract out of community of property with the application of the accrual regime. At this time First Respondent was a farmer in the V district.
- [5] On 11 December 1997 and by way of an amendment to the Trust Deed blood relatives of Third Applicant were added as income and capital beneficiaries of the Trust.
- [6] Amongst these were Third Applicant’s two sons.
- [7] First Respondent as aforesaid was appointed as a Trustee of the Trust on 23 June 2008.
- [8] The Trust is the owner of two substantial farms in the Middelburg district. It also owns certain livestock and farming equipment. Prior to ownership of the existing farms, the Trust owned other farms, equipment and livestock the details of which are not relevant hereto. Applicants allege that during the period May 2014 to November 2014 a “use arrangement existed” in which the farming business of the Trust and the First Respondent’s farming business were managed together. Applicants allege that the crux of the arrangement was that the daily farming operations were conducted as one, but there was no sharing of profits. It seems that for practical reasons First Respondent managed the day-to-day farming activities of the Trust on its behalf.
- [9] What followed this however is not all common cause and I will revert thereto in due course.
- [10] In this application the Trust seeks to have the livestock, implements and farm properties which it owns restored to its possession. In short the Trust issued the application on the basis that it had given possession of its assets to the First Respondent, first as manager, and in later circumstances where it had been agreed in principle to lease its farms to him, as an interim arrangement subject to the terms of a lease being negotiated, reduced to writing and signed after it had first been authorized by the Trustees. The agreement aforesaid was concluded between First Applicant and First Respondent at a time when Third Applicant and First Respondent were still happily married.

- [11] Some of the above and its detail is contested by First Respondent, save that he is now the estranged husband of Third Applicant, he asserting that he is entitled to possession of the Trust assets as these have been leased to him and the Harveya Trust in terms of leases which he signed on behalf of the Trust.
- [12] The Trust's assertion is that it did not convene a meeting of its Trustees and that the Trustees did not resolve to conclude the leases upon which the First Respondent relies and, further, that the Trustees did not authorize First Respondent to conclude the leases on the Trust's behalf. In short the Trust alleges that it did not conclude any valid agreements with First Respondent or anyone else regarding the use, or transfer, of its assets relevant to this application.
- [13] There are disputes of fact which cannot be resolved on the affidavits, and that would have to be referred to oral evidence, if appropriate, unless the matter can be determined simply on the basis of whether the trust validly concluded agreements of lease, and sale, in respect of its properties with First Respondent. Put otherwise Applicants allege that the provisions of the Deed of Trust in this regard were not complied with and that no valid or effective resolutions were taken by the Trustees in this regard. First Respondent contends the contrary.
- [14] The application was launched by the Trustees knowing only of the interim agreement referred to above entered into between First Applicant and First Respondent – the validity of which is in any event in question – that the Trust would let its farms and livestock to the First Respondent in the interim in expectation of agreement being reached upon the terms of a lease acceptable to all parties and in respect of which the Trustees of the Trust would have had to resolve accordingly. Applicants contend that this was at no time properly so resolved.
- [15] In First Respondent's opposing affidavits, however, he disclosed the written agreements of lease, of which the Applicant Trustees were not previously aware, so they contend, which were signed on behalf of the Trust by First Respondent. One agreement is in respect of the one Trust farm, this let to First Respondent, and the other in respect of the other Trust farm, this let to the Harveya Trust. The Trustees of the latter Trust are First Respondent, Third Applicant and First Respondent's attorney, Mr Rossouw, all of whom have deposed to affidavits in the application.
- [16] In terms of The Deed of Trust relevant:
- 16.1 This is capable of amendment during the lifetime of the donor;
- 16.2 The Trustees are entitled to delegate their duties;
- 16.3 All meetings of Trustees are required to be convened upon 14 days written notice, unless the period of notice is waived by written notice by the Trustee;
- 16.4 All decisions of Trustees must be by majority decision;

16.5 Written minutes are required to be kept of all meetings and decisions of the Trustees in a minute book signed by the chairman of the Trust;

16.6 Any two or more Trustees authorized to sign documents on behalf of the Trust (but clearly only if the transaction had first been authorized by the Trustees);

16.7 Any two of the Trustees are authorized to sign documents binding on the Trust (but clearly only if the Trust had agreed to the terms and provisions of the documents referred).

The Disputed Issues:

- [17] When the application was launched, Applicants allege that the state of knowledge relevant to the crucial issues was as follows, it being important to note that on occasions First Applicant concluded arrangements with First Respondent, he making it clear that he did not do so with the concurrence of the Trust.
- [18] During May 2014 to November 2014 a “use arrangement” existed in which the farming business of the Trust and First Respondent’s farming business were managed together. In December 2014 an agreement in principle was concluded between First Applicant and First respondent that First Respondent and the Harveya Trust would, in that order, hire the Trust’s farms and stock in anticipation of reaching final agreement for signature, First Respondent to pay the Trust an agreed rental of R25 000.00 per month in advance for three months. In March 2015 a meeting was attended by First Respondent and his attorney, the Trust’s accountant, First Applicant and his wife and son, (not a meeting of Trustees), to negotiate the terms of the agreements of lease previously contemplated, the conclusion of which would be contingent upon the preparation of a written agreements of lease and resolution by the Trustees to enter into same.
- [19] At this meeting no finality as to the terms of the proposed lease agreements was reached and the meeting was adjourned on the basis that attorney Rossouw was to put up draft leases, which were not, says First Applicant, ever produced.
- [20] First Respondent continued to lease, in his own name, the farming properties and livestock on a month-to-month basis.
- [21] During December 2014 First Respondent presented a document he had prepared which did not accord with the prior discussions. This was not acceptable to the Trustees and was not agreed to. Applicants allege that the ad hoc arrangement of December 2014 was only with First Respondent and not the Harveya Trust. On the day following the presentation of this document First Respondent announced his intention to terminate his marriage to Third Applicant revealing that he had been involved in an intimate relationship with another woman.
- [22] An action for a decree of divorce issued in August 2015 which remains pending, or at least was pending at the time the founding affidavit was signed.

- [23] Applicants contend that there was no prospect of reaching further agreement with First Respondent and that the month-to-month lease was then terminated by written notice.
- [24] On 25 November 2015 Applicants allege that a meeting of Trustees was convened, after notice in terms of the Trust Deed, the agenda raising the issue of the arrangements in the future, and an analysis of those in the past relevant to First Respondent's dealings with the Trust assets. This proposed a cancellation of the oral lease agreements as per written notice, that First Respondent be in no way further involved in the day-to-day operations of the Trust, and that two new Trustees be appointed.
- [25] First Respondent did not attend the meeting and the proposed resolutions were passed.
- [26] First Respondent however remained in occupation of the farms. The Trust contended that it was entitled to an order declaring First Respondent to have no right or entitlement to be in possession or control of the properties and that he restore possession and control thereof to the Trust together with livestock and implements.
- [27] It is clear that at this time Applicants were unaware of what was disclosed in First Respondent's opposing papers, being two written agreements of lease, both signed purportedly on behalf of the Trust by First Respondent in respect of the two Trust farming properties, in terms of which one was let to First Respondent and the other to the Harveya Trust.
- [28] First Respondent contends that during June 2014 an agreement of lease was concluded between himself and the Trust, although he does not say who represented the Trust nor does he allege any resolution was passed in respect thereof.
- [29] First respondent further fails to set out the terms of the alleged agreement save that the rental was R25 000.00 plus VAT per month, and that he would provide staff and would maintain the farming properties.
- [30] It should be noted that the first rental payment was made in January 2015, not during June 2014, which accords with Applicants' version.
- [31] As to the meetings with attorney Rossouw, First Respondent says that on 14 August 2014 he met with the attorney and the Trust's accountant upon the instructions of all the Trustees and with their knowledge. He says that at this meeting it was agreed that he would lease the properties, he appearing to contend that he represented the Trust at this meeting as well as himself although not referring to any decision or resolution of the Trust accordingly.
- [32] First Respondent contends that after the meeting was held on 21 October 2014 attended by himself, the Trust's accountant, the attorney and First, Second and Third Applicants at which there was a discussion regarding the intended leases in respect of the Trust, it was agreed that no rental was payable as First Respondent was not raising interest on a loan to the Trust (Third Applicant denies having so attended).

- [33] He says finally that he was authorized to transfer the Trust's farm to the Harveya Trust, though not relying on any Trust resolution or meeting in this regard.
- [34] Finally he says that a further meeting was held in May 2015 attended by the said accountant, his attorney, himself and First, Second, Third and Sixth Applicants. Third Applicant denies that she was present and it is not alleged the Fourth Applicant was present or was given notice of the meeting. He says final agreement was reached and that the accountant and attorney were given instructions to effect the decisions, though he does not say what was agreed or that the Trustees of the Trust passed a resolution, or what its terms were if they did.
- [35] To cut a long story short First Respondent alleges the production of two agreements of lease, the first between the Trust represented by First Respondent relying on an authorization by the Trustees on 8 May 2015, and the Harveya Trust represented by the attorney and accountant also authorized at a meeting of Trustees on 8 May 2015; the second between the Trust represented by First Respondent (relying on an authorization of Trustees on 8 May 2015) and First Respondent in his personal capacity. Both would endure for a period of five years, the first from 1 January 2015, the second from 1 July 2015, both renewable at the lessor's option

for a further four years and 364 days. The first was signed on 12 June 2015 as was the second. There was further an agreement of sale, he alleges, between the Trust, again represented by First Respondent, authorizing the purchase of the Trust's farm by the Harveya Trust.

- [36] First Respondent does not annex any resolutions of the Trustees or any authorization by the Trustees to sign these agreements. There were further no written minutes accordingly. Applicants contend that they had never seen these agreements until the opposing affidavit was filed. First, Second, Third and Fourth Applicants all Trustees of the Trust allege that they did not resolve accordingly nor was First Respondent authorized as he alleges. They allege that there was no meeting of Trustees ever convened to consider the terms of the agreements which First Respondent contends for.

The

Analysis:

- [37] Whilst this is a matter in terms of which disputes of fact on the papers and their analysis must be dealt with as set out in *Plascon-Evans v Van Riebeeck Paints (Pty) Limited* [1984] ZASCA 51; 1984 (3) SA 623 AD 634-5, it may be that upon First Respondent's own version it can be resolved in any event.
- [38] It seems to me that the crux of First Respondent's case is that since his marriage to Third Applicant in 1996 he conducted the Trust farming and was solely or mainly responsible for its management having authority to conclude agreements for the Trust with the knowledge of First and Second Applicants and arising from his marriage to Third Applicant. He says

that there were from time to time what he refers to as informal Trust meetings at which its business was discussed. It is notable that he does not suggest that Fourth Respondent was involved in approving this arrangement, nor does he say by any means that this so-called authority which he relied upon extended to major events like leasing the Trust property to himself, let alone selling same. He says that the so-called resolutions of the Trust, with the exception of that of 25 November 2015, were simply drafted by the Trustees as if there had been a meeting.

[39] He relies heavily on the meeting held on 8 May 2015 at the offices of Honey Attorneys. His version is that at this meeting a final agreement was reached in respect to the matters discussed and the Trust accountant and Honey Attorneys were given instructions to proceed with the execution of those agreements. He says that this included the two agreements of lease which he attached

and signed in each instance on behalf of the parties together with the agreement of sale signed as aforesaid.

[40] He says that this meeting was attended by First, Second and Third Applicants the accountant, an attorney and himself. He notably does not mention Fourth Applicant's presence.

[41] This is the same meeting referred to by Applicants (although they were not sure of the date), relevant to what Applicants regarded as a possible agreement of lease to be approved by the Trust. Applicants contend that Third Applicant was not present and dispute that a final agreement was reached. It is also clear that the agreements contended for had not been placed before a proper meeting of Trustees and that there are no resolutions relevant. It is also clear that First Respondent was in essence the only real beneficiary of the scheme.

[42] It must be remembered that First Respondent was only a Trustee of the Trust from 23 June 2008, the agreements in principle reached in December 2014 as to interim leases, which First Respondent contends was on 21 October 2014 but in different terms, all preceding his marital breakdown. It must be remembered that this was followed by an agreement presented in December 2014 annexed marked "J" to the founding affidavit which First Respondent says he cannot recall. This agreement was not acceptable to Applicants, they say they did not agree to it and on the day after that agreement was presented First Respondent announced his intention to terminate his marriage to Third Applicant. First Respondent denies that his relationship with another woman played a role in the breakdown of the marriage but does not dispute that this occurred, stating however that on 8 May 2015 there was no discussion of divorce and that he had not yet met the other woman. It is common cause that divorce proceedings were issued in August 2015.

[43] In my view, notwithstanding all this background and the disputes, the matter turns entirely, for the purposes of this application, on whether the meeting of 8 May 2015 on First Respondent's version, and the subsequent agreements concluded with the Trust, were validly authorized or approved by the Trust, having regard to the Trust Deed, and to the

background sketched by First Respondent, commencing at the time of his marriage to Third Applicant. He apparently relies on his original allegation that he was entitled to contract on behalf of the Trust, (this with the knowledge of First and Second Applicants and as a result of his marriage, also the Third Applicant), that no formal meetings were held and that resolutions were simply produced as if there had been formal meetings. His reliance on the meeting of 8 May 2015, of itself must accept that even on his version the Fourth Applicant was not present and was still a Trustee of the Trust, that there are no resolutions supporting any of the First Respondent's averments or transactions, whether produced at formal Trustee meetings or at informal meetings drafted later as he suggests they were, in his opening salvo.

[44] As I understand the papers, First Respondent does not rely on any meetings or communications, or resolutions passed relevant to this matter between 8 May 2015 and 12 June 2015, when the agreements were signed, nor, as I understand it, is it disputed that he received notice of termination of the oral leases and that there were not prior formal written agreements of lease.

[45] On First Respondent's own version, he faces several difficulties:

45.1 No notice of the meeting of Trustees, upon which First Respondent relies is alleged to have been given to the other Trustees,

which meeting was held on 8 May 2015, nor is it alleged that any Trustee in writing or otherwise waived his or her rights on 15 days' notice being given of any such meeting;

45.2 He fails to allege that a formal meeting was held, or for that matter any informal meeting, in respect of the approval of the agreements upon which he relies, it being clear that it was not his case that Third Applicant was present on 8 May 2015;

45.3 If he relies on his general authority to manage the farms (which appears to be the case) and enter into agreements for the Trust relevant to his management of the farming, he falls far short of any suggestion or allegation that this included the authorization to lease the farming property or sell same, nor does he suggest that this authority was given to him with the concurrence of the Trustees or that this was a resolution passed formally or informally, and later minuted;

45.4 He fails to allege that there was any later formal meeting, or for that matter informal meeting, at which all the Trustees concurred or agreed or were at least consulted, preparatory to a formal or informal resolution being taken by a majority, relevant to his authority to lease and/or sell the farms on the Trust's behalf;

45.5 He fails to point to any minutes of a Trustees meeting of the Trust which in any way supports his version of the events.

[46] The matter must be judged, effectively in this matter on First Respondent's version together with those facts in Applicants' affidavits which First Respondent admits, in the context of the provisions of the Trust Deed and the relevant legal position.

[47] It is trite that a Trust is not a legal person, the Trust estate vesting in the Trustees to be administered by them it being only through the Trustees as specified in the Trust Deed that it can so act. The circumstances in which the Trustees have the power to bind the Trust estate are defined in the Trust Deed, outside the provisions of which the Trust cannot be bound. It is also well accepted that unless provided otherwise in a Trust Deed the Trustees must act jointly failing which the Trust cannot be bound. *Land and Agricultural Development Bank of SA v Parker and Others* 2005

(2) SA 77 (SCA) at para 9, 10 and 15.

[48] In this matter it flows from the Trust Deed that in order for First Respondent to have been in a position to bind the Trust to the agreements referred to, the subject matter of this application, notice of the meeting relied on (8 May 2015) would have had to be given to the Trustees; and failing each having waiving there entitlement thereto, their failure to attend a meeting, called otherwise than in accordance with this notice, would render the meeting and any resolutions taken as being improperly taken. Further, without notice having been given, and a waiver of entitlement thereto, there could not, in this matter, have been a majority decision of Trustees, at least one of whom was absent, and who for a valid resolution to have been taken would have had to contribute to the discussion and the taking of that resolution. It is simply not possible on the basis advanced by First Respondent to ride

roughshod over at the very least each of the Trustees entitlement to be informed of the meeting, attend same and contribute thereto.

[49] There is further, nothing on First Respondent's papers which can establish that the majority of Trustees, entitled to be present, resolved to contract in the terms of the agreements relied on, let alone authorized First Respondent to conclude those agreements on behalf of the Trust. It is further clear that in any event, the Trust Deed required documents to be signed on behalf of the Trust by two Trustees, this also fatal to First Respondent's argument in my view. Put otherwise, the majority of Trustees assembled, in the absence of a missing Trustee who did not receive notice of the meeting, and who did not waive the entitlement to adequate notice, could simply not take decisions which would be binding on the Trust. That the agreement of sale relied upon must also fail for want of compliance with Section 2 of The Alienation of Land Act, there being no written resolution authorizing First Respondent to sign the Agreement of Sale on behalf of the Trustees of the Trust, is clear.

[50] I should also make it clear, that I can find nothing in the general allegation that First Respondent was authorized to farm and conclude contracts for the Trust from the date of his marriage, which in any circumstances, (even if the resolution was passed to this effect at a properly convened meeting of Trustees, or even informally, which is not alleged), would have authorized the

conclusion by Respondent acting for the Trust of a far-reaching lease and agreement of sale.

[51] It follows, that the agreements relied upon by the First Respondent, on his own case, have not been established as being binding on the Trust.

[52] In the result the application succeeds and an order issues in the following terms:

1. First Respondent is declared to have no right or entitlement to be in possession or control of the farm properties H and C, and all livestock and implements belonging to the Dick Collet (for Carmen) Trust (“the Trust”);
2. First Respondent is ordered to restore to the trust within 24 hours of the service of this order upon him, possession and control of the farm properties H and C, more full described as:

2.1 Remainder of Portion 4 (a portion of portion 1) of the farm B No. 9., in the district of M, In Extent 9.....,5..... Hectares;

2.2 Portion 7 of the Farm B F No 9 in the district of M, In Extent 6....,5.... Hectares;

2.3 Portion 2 (M.....) of the Farm No 9 in the district of M, In Extent 1, Hectares;

2.4 Portion 2 (C)(A portion of portion 1) of the farm A B, Farm 9 in the district of M, In Extent 9... Hectares;

2.5 Portion 2 (Z K) (a portion of portion 1) of the farm W K, Farm 1 in the district of M, In Extent 5,,,,, Hectares;

2.6 The remaining extent of portion 1 of the Farm W K No 1, in the district of M, In Extent 8.... Hectares;

2.7 The remaining extent of the farm Kl Rif No. 112 in the district of M, In Extent 2..... Hectares;

2.8 The remaining extent of portion 1 of the farm V No 1...., in the district of M..... In Extent 9..... Hectares;

2.9 The farm C..... No. 100 in the district of M....., In Extent 6..... Hectares;

3. First Respondent is ordered to restore to the Trust all livestock and implements belonging to the Trust, to the Trustees of the Trust, within 24 hours of the service of the Order of the above Honourable Court upon him.

4. First Respondent is ordered to pay the Applicants costs of this application.

M.J LOWE

JUDGE OF THE HIGH COURT

Obo the Applicants: Adv. De La Harpe

Instructed by: Dold & Stone

African Street

Grahamstown

(Ref: Mrs Wolmarans)

Obo the Respondents: Adv. Lubbe

Instructed by: Netteltons

118A High Street

(Ref: Mr Nettelton)

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