

SOUTH AFRICA / JUDGMENT

JP Van Schalkwyk Attorneys v Botha N.O and Another (65348/2020) [2021] ZAGPPHC 189 (23 March 2021) [2021] ZAGPPHC 189

COURT

North Gauteng High Court, Pretoria

BEFORE

N Davis

CASE / FILE NUMBER

65348/2020

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HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 65348/2020

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

In the matter between:

JP VAN SCHALKWYK ATTORNEYS

Applicant

and

JAN JONATHAN DURAND BOTHA N. O

First Respondent

JAN JONATHAN DURAND BOTHA N. O

Second Respondent

J U D G M E N T

This matter has been heard in open court in terms of the Directives of the Judge President of this Division dated 25 March 2020, 24 April 2020 and 11 May 2020 and revisions thereof. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1]

Introduction

This is the judgment in an application for the sequestration of a trust by the attorney of the trust's founder. It was initially launched in the ordinary course but subsequently converted to an urgent application when the trust reneged on a settlement agreement and attempted to dispose of its principal asset.

[2] The parties

2.1 The applicant is a firm of attorneys. It, together with counsel it had briefed, had represented Mr Jan Jonathan Durand Botha (snr) in extensive negotiations regarding the sale of a valuable game farm in Madikwe to the Government.

2.2 Mr Botha (snr) was the founder the trust in question, the Durand Botha Family Trust ("the trust") and is a trustee thereof. His one son, Jan Jonathan Durand Botha (jnr) is one of the trustees and his other son, Berend Botha, is a newly proposed trustee. Another attorney, Mr Dawid Daniel Roodt ("Roodt")

is an erstwhile trustee of the trust.

2.3 Mr Botha (snr) and Mr Botha (jnr) have been cited in their capacities as trustees of the trust. Due to issues regarding locus standi of the trust, Mr Botha (snr) has been allowed to intervene in the matter in his personal capacity to, in the words of his counsel, be "the voice" of the trust.

[3] The debt

3.1 Mr Botha (snr) has appointed the applicant to act as his attorney in various matters since 1 January 2021.

3.2 As already mentioned, one of the matters attended to by the applicant, was the sale of the aforementioned game farm by the trust to the South African Government.

3.3 For purposes of securing the fees due to the applicant and the advocate briefed by it (who, it is alleged by Mr Botha (snr), did most of the work) the applicant was furnished with a deed of suretyship, on the face of it, by the trust. Both Mr Botha (snr) and Mr Botha (jnr) had signed the deed of suretyship on 18 March 2019. The deed of suretyship is extensive and covers some 16 pages. There is no dispute as to its terms. I deal with its subsequent disputed validity in paragraph 7.7 hereunder, when the trustees' conduct is considered.

3.4 The negotiations with the Government had commenced in 2016 but transfer of the farm, attended to by Eugene Kruger attorneys, only took place in October 2019. Due to a dispute about the game on the farm, final payment was only made in July 2020.

3.5 In the meantime, Mr Botha (snr) had signed an acknowledgement of debt in favour of the applicant for R 337 860,33 in respect of the applicant's fees and disbursements and R 451 971, 08 in respect of Adv Van der Merwe's fees, being the advocate briefed as already aforesaid, totaling R 789 831, 41.

3.6 It is this debt, secured by the suretyship, which the applicant sought to recover from the trust and, upon its non-payment, on which the applicant now relies for purposes of the sequestration of the trust.

3.7 What caused the initial sequestration application not to proceed on the normal motion court roll, is this: on 13 January 2021, attorneys Eugene Kruger & Co who had up to then represented the trust, but who indicated that they would no longer do so "in litigation matters", should the matter not be settled, made the following

offer, namely that "the respondents will pay an amount of R 500 000.00 (five hundred thousand Rand) on or before the 7th of February 2021 and the full balance owing will be paid on or before 31st August 2021. The application made by your client to be withdrawn on payment of the first amount". This offer was accepted in writing by the applicant on 14 January 2021 together with the following undertaking "Upon receipt of the amount of R 500 000.00 ... our offices will remove the sequestration application from the roll and re-enroll the sequestration application for the first week of September 2021 and upon receipt of the full outstanding balance, including interest by 31 August 2021, our offices will withdraw the application ...".

3.8 The agreement which had been reached by way of the exchanged emails was confirmed by Messrs Eugene Kruger & Co as follows: "The Respondent accepts your proposal. Upon receipt by your offices of the R 500 000.00 ... we request you to provide proof that the Sequestration Application has been removed from the roll".

3.9 The R 500 000.00 was not paid. New attorneys came on board for the trust and Mr Botha (snr) who alleged he only personally received a copy of the sequestration application on 21 January 2021.

A notice of intention to oppose was delivered, resulting in the matter being removed from the unopposed roll.

3.10 Mr Botha (snr) later alleged that the settlement offer was not made on behalf of the trust as respondent or on behalf of the trustees as respondents in the sequestration application, but on his personal behalf. I shall deal with this aspect later. Mr Botha (snr) also alleged that the reason why the agreed first payment of the settlement agreement had not been paid, was that a sale of the trust's principal asset, another farm, negotiated during December 2020, had fallen through.

3.11 The full outstanding debt is therefore still relied on by the applicant as basis for its sequestration application against the trust.

[4] The locus standi of the trust

4.1 In terms of clause 4.4 of the trust deed, there must always be no less than three trustees (and no more than five).

4.2 This was the position when the deed of suretyship had been furnished on 18 March 2019 and which prevailed until the resignation of attorney Roodt on 4 September 2020. Mr Botha alleges that at that time he hoped that he could still patch up his relationship with Roodt, but according to Roodt's attorney, he saw to the lodging

of his resignation with the Master (apparently on 18 September 2020 already).

4.3 At the time when Messrs VZLR Attorneys were appointed to act on behalf of the trust on 22 February 2021, Mr Botha (snr) and Mr Botha (jnr) resolved to appoint Mr B. Botha as third trustee. The Master has however not yet issued him with letters of authority. In terms of section 6(1) of the Trust Property Control Act, No 57 of 1988, it is only when such letters are issued that a trustee may act as such.

4.4 Accordingly, the trust can therefore currently not perform any legal juristic acts nor does it have locus standi to oppose the sequestration application. See: *Hyde Construction CC v Deuchar Family Trust and Another* 2015 (5) SA 388 (WCC) and *Land and Agricultural Bank Ltd v Parker* 2005 (2) SA 77 (SCA).

4.5 It was for this reason and to prevent a situation where the trust is not "heard", that Mr Botha (snr) sought to act as its "voice". The applicant opposed Mr Botha (snr)'s application to intervene on this basis but could not demonstrate any real prejudice. On the basis that, where a party is facing a threat to its status but can, for whatever reason, not formally oppose such an application, a court should still, in the interests of justice and fairness, take all relevant or available evidence into account, Mr Botha (snr) was allowed to intervene. He was not a party to the application in the customary sense nor did he claim to be a creditor or acting as a beneficiary, but his participation was in the form of a witness, presenting evidence. It was also on this basis that this court took into account the contents of the "answering" affidavits. Insofar as possible, the principles of audi alterem partem and the Constitutional rights of access to a court were thereby also satisfied, despite the trust's lack of formal locus standi.

[5] Jurisdiction

5.1 Prior to dealing with the merits of the sequestration application, I need to deal with the alleged lack of jurisdiction of this court, as raised by Mr Botha (snr).

5.2 The argument is that since both Mr Botha (snr) and Mr Botha (jnr) reside outside the area of jurisdiction of this court and the sole or principal asset of the trust is situated outside the area of jurisdiction, there is no jurisdictional factor present entitling this court to hear the application. Reliance was also placed on section 149 of the Insolvency Act, 24 of 1936, which has the requirement of residence or conducting of business within a court's area of jurisdiction for purposes of sequestration proceedings.

5.3 Section 3(1)(a) of the Trust Property Control Act No 57 of 1988 provides that, in the case of a trust created by a will, the Master in whose office the will has been registered, shall have jurisdiction over the administration of such a trust. In any other case, so the section provides, the Master in whose area of jurisdiction "...

the greater or greatest portion of the trust property is situated" shall have jurisdiction.

5.4 At the time when the trust was created, the farm then owned by the trust fell in the area of jurisdiction of the Master, Pretoria, who exercised jurisdiction over all areas of the then province of Transvaal, except for those areas in the jurisdiction of the offices of the Masters in Mafikeng and Johannesburg. Subsequent to the establishment of a Master's office in Polokwane, that office exercised jurisdiction over the Limpopo Province, wherein the

subsequently purchased property of the trust is situated. The parties could however not furnish any information or evidence as to when this establishment happened and neither was there any evidence of transfer of the administration of any trusts previously

administered by one Master to another or if this has taken place at all. It was common cause, however, that no such transfer had taken place in respect of the trust in question.

5.5 In my view, the answer lies in the proviso to section 3(1)(a) which reads as follows: "Provided that a Master who has exercised jurisdiction shall continue to have jurisdiction notwithstanding any change in the situation of the greater or greatest portion of the trust property". This proviso is clearly intended to ensure that there remains certainty and stability in the continuation of the administration of a trust. Such administration shall remain in the office of the Master where the trust was initially registered, despite subsequent changes in the trust property or in which province or area of jurisdiction such property may be registered. This will prevent trusts "migrating" as it were, from Master's office to Master's office as circumstances change. The notion that, save by consent as provided for in section 3(1)(b), the Master's office who first exercised jurisdiction over the administration of a trust, remains the Master "of choice", is confirmed by section 3(3) which provides as follows: "If more than one Master has in such bona fide belief exercised jurisdiction in respect of the same trust property, that property shall ... be administered or disposed of under the supervision of the Master who first exercised such jurisdiction ...".

5.6 In the present case, there has been no transfer and the Master, Pretoria, is the Master who, at the time of the application, exercised jurisdiction over the administration of the trust. It is also to that Master to which Mr Botha (snr) turned to have his other son issued with letters of authority. It is also the Master who shall oversee the administration of the sequestration of the trust, should such an order be granted. It is also the Master,

Pretoria, who has issued the certificate of security as required by the Insolvency Act and on whom service had taken place in terms of that Act. Should there be an order for the removal of trustees, it is also the Master, Pretoria who will have to see to the consequential administration of the trust.

5.7 Section 21 of the Superior Courts Act, No 10 of 2013 determines that a High Court has jurisdiction “over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognizance”.

5.8 Our courts have, for more than a century interpreted this to mean that the jurisdiction of the High Courts is to be found in common law. See: Forsyth, *Private International Law* 4th ed at 167 and footnotes 64 and 65 for the list of cases dealing with the predecessors of this section with similar wording.

Similarly, in respect of the similarly worded Section 19(1) (a) of the Supreme Court Act 59 of 1959, Harms DP found in *Gallo Africa v Sting Music (Pty) Ltd* 2020 (6) SA 329 (SCA) at 333B – E as follows: “Although [at common law] effectiveness lies at the root of jurisdiction and is the rationale for jurisdiction, it is not necessarily the criterion for its existence. What is further required in a ratio jurisdictionis. This ration may, for instance, be domicile, contract, delict and ... *ratione rei sitae*. It depends on the nature of the right or claim whether the one ground or the other provides a ground for jurisdiction”.

5.9 I find that the supervision over the administration of a trust, which includes the supervision over the sequestration of that trust is a sufficient ratio jurisdictionis for jurisdiction to exist. It is “one of those matters” of which a court may take cognizance, according to law, which is in this instance the Trust Property Control Act. Lastmentioned determined, as pointed out in paragraph 5.6 above, that the supervision exercised over the administration of the trust, vest in the Master, Pretoria. In accepting this fact as the ratio jurisdictionis (the reason for exercising jurisdiction), the principle of effectiveness is also served. Should there be a sequestration of the trust, the Master, Pretoria, where the trust is registered would be where the most effective implementation of such an order would take place. For purposes of sequestration of a trust in terms of sections 10 and 149 of the Insolvency Act, I find that a trust is deemed to “reside” in the area of jurisdiction of the Master’s office where it is registered. Accordingly, the objection to this court exercising jurisdiction over this application, is rejected.

[6] Should the trust be sequestrated?

6.1 It is clear, from the conduct of Messrs Botha, that the trust, had it been a company, would be “commercially insolvent”. It is not in a position to readily pay the amount which it owes in terms of the deed of surety. It can only do so, if it disposes of its assets.

6.2 However, “commercial insolvency” is neither applicable, nor what the applicant relies on. The applicant alleges that the trust has committed an act of insolvency as contemplated in section 8(g) of the Insolvency Act, 24 of 1936, that is that the trust has given written notice to the applicant as one of its creditors that it is unable to pay its debts. The manner in which the attempted sale of the trust’s sole asset, were to take place would possibly have had the effect of prejudicing the applicant as creditor, which would, in addition, constitute another act of insolvency as contemplated in either section 8(c) or 8(d) of the Insolvency Act. I shall refer to this aspect hereunder when dealing with the trust’s solvency.

6.3 Apart from acts of insolvency, section 10(b) of the Insolvency Act provides that a court may provisionally sequester the estate of a debtor if the debtor is actually insolvent. It appears from the

papers that, prior to the finalization of the sale of the farm which the trust later sold to the Government, it had acquired another farm, which farm together with the movables thereon, operated as a going concern, constitutes its sole asset. The agreement with the bondholder of this latter mentioned farm, was that part of the proceeds of the sale of the first farm should be paid into the account of the bond passed over the second farm. This was done, and, so it was alleged, thereby creating a credit on the bond account. The “credit” is however, only a pre-payment of installments and not an actual credit. There is still an actual huge amount due on the loan secured by the bond. In fact, Mr Botha (snr) alleged that the second farm was purchased for R41 million (which is currently, on the papers, the only indication as to its value. The amount due to the bondholder is, having regard to statements attached to the papers, R 44,9 million, even taking the pre-paid installments into account. It appears that each instalment is in excess of R 500 000.00. On a prima facie basis, having regard to these figures, the trust is factually insolvent. The alleged value of moveables in the amount of R 500 000.00 does not disturb this inference.

6.4 It has been stated that the “best proof” of solvency is payment by a debtor of his debts. See: Mars, *The Law of Insolvency in South Africa*, De La Rey (Ed) at paragraph 5.3.4 and the cases quoted there. This has not taken place in the present case. In the circumstances of this case, the principal debtor, Mr Botha (snr) has at his specific request, been admitted as the “voice” of the trust, but not only has he not paid, but his allegations that the trust is solvent, has been done in the most vague and unsatisfactory manner. Where the trust cannot “speak” for itself due to lack of locus standi, one would have expected the creator of the trust, the principal mind of its trustees and the one for whose debts the trust stood surety, to be able to demonstrate the trust’s solvency position in clear and unequivocal terms. The failure to do so, justifies a negative inference to the contrary.

6.5 Even if a creditor has relied on an act of insolvency as the basis upon which it approached a court, the court may, if it appears that the debtor is in fact insolvent, grant an order based on this latter ground “even if not specifically relied on in the application”. See: *Saber Motors (Pty) Ltd v Morophave* 1961 (SA 759 (W) and *Smith & Walton (SA) (Pty) Ltd Holt* 1961 (4) SA 157 (N) at 166.

6.6 In terms of section 10 of the Insolvency Act, all of the above aspects need only be established on a prima facie basis at this stage where a provisional order of sequestration is sought. I find that this has indeed been so established. It appears that the applicant is therefore entitled to a provisional sequestration order, subject only to the issue of the validity of the suretyship, which I deal with in paragraph 7.7 hereinlater.

[7] The trusteeship of Mr Botha (snr) and Mr Botha (jnr)

7.1 In the urgent application, the removal of Messrs Botha is sought as separate and distinct relief from the sequestration of the trust.

7.2 The basis for this claim is that the two mentioned trustees breached the obligations imposed on them by the Trust Property Control Act. The relevant sections of this Act provide as follows:

“9. Care, diligence and skill required of a trustee –

- (1) A trustee shall in the performance of his duties and the exercise of his power act with the care, diligence and skill which can reasonable be expected of a person who manages the affairs of another ...
12. Trust property shall not form part of the personal estate of the trustee except insofar as he as trust beneficiary is entitled to the trust property ...
20. Removal of trustee –
 - (1) 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 interest of the trust and its beneficiaries ...”

7.3 Once Mr Roodt has resigned (and the relationship between him and Mr Botha (snr) could not be restored, at an undisclosed date, as claimed by Mr Botha (snr)), the trustees could no longer validly act on behalf of the trust. This situation, which clearly placed the trust at risk and potentially prejudiced its beneficiaries, was allowed to continue right up to the point where the applicant in terms of Rule 7, challenged the attorneys’ authority to represent the trust in these proceedings. It was only then, that Mr Botha (snr) saw fit to attempt to remedy the situation by nominating his other son as a third trustee.

7.4 Before this, Mr Botha (snr) (and, clearly also Mr Botha (jnr)) was quite content to maintain the inadequate status quo. This contentment is evinced by the attempted sale of the trust’s sole asset in January 2021. This was attempted despite the lack of authority occasioned by the breach of the three trustee-minimum requirement.

7.5 The sale of the trust's assets, contain in the heading of the sale agreement the inscription that it was done in terms of a resolution of trustees dated 24 December 2020. This agreement provides that the purchase price would be the sum total of the trust's indebtedness to the bondholder, Obaro (including the amount of pre-paid installments), plus R 16,2 million. This lastmentioned amount would have been paid in three equal installments of R 5,4 million each on 31 August 2021, 31 December 2021 and 31 August 2022. In the meantime, the farm would have been rented by the purchaser at R 1 million from 1 February 2021 to 31 August 2021 and R 1 million from 1 September 2021 to 31 January 2022 (These clauses are also the source of the dates mentioned in the settlement proposal mentioned in paragraph 3.7 above). The purchaser would take over the bond payments once the credit in respect of pre-payments became exhausted. On that date, the purchaser would nominate new trustees and the Botha's would resign. It appears that the beneficiaries would then also be changed or

replaced. No domicilium was chosen in the agreement for the trust and the farm was chosen as the purchaser's domicilium.

No indication was furnished by the trustee as to the proceeds of the "sale". The trust is, as it were, "made over" to the purchaser who could, at its whim decide to keep the farm in the trust or to take separate transfer thereof. Nothing has been said by Mr Botha (snr) as to the fate of the proceeds or any allocation of trust assets. Although the sale did not go through, this mode of conduct is more indicative of the accrual of personal benefit than the benefit of the trust. No explanation was given why a fully functional farming business would suddenly be converted into cash. It is from the same cash proceeds (either as part of the purchase price or rental income) that Mr Botha (snr)'s personal liability to the applicant would have been paid as explained in paragraph 3.7above.

7.6 It further appears from the above, that Mr Botha (snr) has scant regard for the nature of the trust or its separate personality. He is quite willing to deal with its assets or sign documents on its behalf when the situation suits him. This is also evinced by his casual switching hats between that of trustee and his own

person. So, for example, when his attorney (who also features as the proposed conveyancer in the aforementioned sale) makes an offer on behalf of the respondents in the sequestration proceedings, clearly referring to the trustees and the trust as referred to in paragraph 3.7 above, Mr Botha (snr) is quite prepared to go along with it until the deal falls through, then he opportunistically

claims that the offer was made on his personal behalf, despite the fact that he was not a respondent in that capacity at the time (he only became personally involved at the hearing as already explained in paragraph 3.7 above).

7.7 It is clear that, despite the formal lack of authority, Messrs Botha (snr) and (jnr) intended the sale of the farm to be a valid sale when they signed the sale agreement. At the time when they signed the deed of suretyship in favour of the applicant, they also clearly intended the suretyship

to be a valid document, despite Mr Botha (jnr) only signing as a witness. He was clearly witnessing the granting of a suretyship and the fact that Mr Botha (snr) was signing “for: The Durand Botha Family Trust” as depicted at the conclusion of the document beneath his signature. There were no formalities required for the trustees acting in this regard and clearly, by their actions, they have resolved to do so. As the majority of trustees, they had been lawfully entitled to bind the trust. The statement now being proffered by Mr Botha (snr) that “as far as he can recall no resolution had been taken” and that the suretyship is therefore invalid, is a transparent attempt to falsely avoid the consequences of his conduct. This is even more so when viewed against the maintenance of the suretyship during the passage of time, the interim payments made from time to time and at the time of the settlement offer. The alleged invalidity only now raised when faced with sequestration proceedings is rejected as patently false.

7.8 The culmination of the above conduct, however, confirms that the position of trusteeship is clearly abused by Mr Botha (snr), with which abuse Mr Botha (jnr) is a willing participant.

7.9 In my view, this type of conduct falls foul of section 9 of the Trust Property Control Act and the removal of these trustees is justified, irrespective of what further happens with the trust.

[8] Costs

Counsel for the applicant argued that, in the circumstances of this case, the estate of the trust should not have to be burdened with the costs occasioned by its sequestration. The sequestration is, however at this stage only provisional and, in my view a final determination on the costs issue might be premature. In respect of the removal application, however, there is no reason why costs should not follow that event.

[9] Order

1. The Durand Botha Family Trust (IT...) is hereby provisionally sequestrated with return day 20 July 2021 whereby interested parties are called upon to show cause, if any, why it should not be finally sequestrated.
2. Jan Jonathan Durand Botha (snr) ID [...] and Jan Jonathan Durand Botha (jnr) ID [...] are removed as trustees of the Durand Botha Family Trust.
3. The costs of the sequestration application are reserved.
4. The first and second respondents shall, in their personal capacity, pay the costs of the application for their removal provided for in paragraph 2 above.

N DAVIS

Judge of the High Court

Gauteng Division, Pretoria

Date of Hearing: 16 March 2021

Judgment

delivered: 23 March 2021

APPEARANCES:

For the Applicant:

Adv A R van der Merwe

Attorney for the Applicant:

JP van Schalkwyk Attorney, Pretoria

For the Respondents:

Adv C J S Kock

Attorney for the Respondents: VZLR Incorporated, Pretoria

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