

SOUTH AFRICA / JUDGMENT

Mokken N.O and Others v Master of the High Court, Pretoria and Others (33000/20) [2021] ZAGPPHC 742 (2 November 2021)

[2021] ZAGPPHC 742

COURT

North Gauteng High Court, Pretoria

BEFORE

DT Skosana

CASE / FILE NUMBER

33000/20

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED.

CASE NO: 33000/20

In the matter between:-

JAN ALEXANDER MOKKEN N.O

First Applicant

LIZE MOKKEN N.O

Second Applicant

COEN VERMAAK N.O

Third Applicant

(In their capacities as the trustees

for the time being of the Lijani Trust IT number 1400/99(T))

and

THE MASTER OF THE HIGH COURT, PRETORIA

First Respondent

MAHOMED CARIM N.O

Second Respondent

ABOO BAKER CARIM N.O

Third Respondent

(In their capacities as the trustees

Delivered. This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand down is deemed to be 10h00 on 02 November 2021.

JUDGMENT

SKOSANA AJ

- [1] In this matter, the applicants, in their capacities as trustees of Lijani Trust ("the Trust"), seek an order declaring that the first respondent ("the Master") has not formally authorized the amendment of the Trust deed, that such amendment is void ab initio and that the appointment of the second and third respondents as trustees of the Trust is void and of no effect. They further seek an order directing the Master to issue new letters of authority reflecting only the applicants as the trustees of the Trust. In the alternative to the latter remedy, they seek an order that the letters of authority of the Trust issued before 18 November 2019 be regarded as the true letters of authority.
- [2] In an amendment to the notice of motion effected on 12 August 2021, the applicants added an alternative prayer to the effect that this court should refer the application to trial in terms of Rule 6(5)(g) of the Uniform Rules and the current papers be converted into action pleadings accordingly.
- [3] The gravamen of the present proceedings is the resistance by the applicants of the implementation of the amended Trust deed whose effect was to add the second and third respondents[1] as the beneficiaries and trustees of the Trust. The main object of this application is to seek the removal of these respondents as trustees introduced by the amended Trust deed.
- [4] The factual predicate of this matter is briefly as follows:
- 4.1 The third respondent is a son to the second respondent. The second respondent therefore has been actively involved in conducting business with the applicants and they began to have business dealings towards the end of 2017.

4.2 The Trust owns and operates various agricultural properties which are actively involved in farming activities. It is also the sole shareholder in 3 related companies, namely, Lijani Beef (Pty) Ltd, Lijani Foods (Pty) Ltd and Lijani Boerdery (Pty) Ltd.

4.3 The second respondent started making cash investments into the Trust in 2018, the terms of which were contained in an oral agreement with the applicants to the effect that the second respondent and/or his nominees would, in exchange of such cash investments, benefit by being appointed as beneficiaries and trustees of the Trust.

4.4 Crucially, on 26 April 2019, the applicants and the second respondent concluded a written agreement in terms of which the second respondent would invest R5 million into the Trust in exchange of which the Trust deed would be amended by the inclusion of the second respondent and his nominees as trustees and beneficiaries of the Trust to the value of 51% of the Trust estate.

4.5 On the basis of the agreement above, the amendment of the Trust deed was embarked upon as well as the endeavour to obtain updated letters of authority from the Master reflecting the second respondent and his son, the third respondent as trustees of the Trust. At the time of the finalization of the respondents' opposing affidavit the second respondent had invested an amount of R3 887 606-30 into the Trust which fact is confirmed in clause 13.1.4 of the amended Trust deed.

4.6 On the same day, being 26 April 2016, heads of agreement were concluded between the applicants and the second respondent which in essence also constituted a recordal of an agreement that the second and third respondents were to become Trustees and beneficiaries of the Trust. The respondents[2], in their answering affidavit aver that the final version of the amended Trust deed was signed on 26 April 2019 and they attach a signed copy thereof.

4.7 In order to accommodate certain unconnected amendments to the Trust deed, which amendment did not alter the agreed inclusion of the second and third respondents as trustees and beneficiaries, a further amended Trust deed was resigned on 14 October 2019 by all the applicants, including the founder of the Trust as well as the second respondent. In addition, a resolution authorizing such amendment of the Trust was consensually signed by the applicants on the same day, being 14 October 2019.

4.8 The respondents also declare that none of the above-mentioned documents were signed at the second respondents' office or at his attorney's offices. The first applicant would arrange for documents to be signed by him and the other applicants with witnesses at their own convenience and place and then be returned to the second respondent's accountant, Mr Thokan.

4.9 As a result of the amended Trust deed, arrangements were made for the opening of a new FNB bank account for the Trust in terms of which the first applicant and the second respondent or in the alternative Mr Thokan (the second respondent's nominee) would be signatories.

4.10 The respondents aver that it was only after a new investor had made its appearance and promised to invest money into the Trust that the applicants began to retract and to seek ways to exclude the respondents from the business of the Trust. Such efforts have culminated in the present application.

4.11 On 28 November 2019, an amended letter of authority was issued by the Master which included the respondents as trustees. The applicants were also presented with such letters of authority on 03 December 2019.

4.12 Since then the applicants have endeavored to remove the respondents as trustees of the Trust, essentially on the basis that after they had signed the amending documents on 14 October 2019, the applicants submitted documents to the Master on 24 October 2019 objecting to such amendment.

4.13 After several meetings were held between the parties with a view to resolve the matter to no avail, the applicants resorted to instituting the present application.

Dispute of fact

[5] As indicated earlier, the applicants amended the notice of motion by including therein an alternative prayer for the referral of the matter to trial. In support of such prayer, the applicants in its concise heads of argument, refer to the paragraphs contained in the respondents' answering affidavit apparently with a view to establish that there is a real dispute of fact with regard to whether there was consensus between the parties in relation to the amendment of the Trust deed. The applicants have not supported the prayer for referral in their own affidavits. In essence, the applicants rely on an allegation of duress, compulsion and/or misrepresentation on the part of the first respondent which, they contend, induced them to conclude the agreements with him.

[6] Of importance is that there are no facts alleged in the applicants' affidavits to support the existence of such duress, compulsion or misrepresentation. In *Arend v Astra Furnishers (Pty) Ltd*[3] it was held as follows:

“Duress may take the form of inflicting physical violence upon the person of a contracting party or of inducing in him a fear by means of threats. Where a person seeks to set aside a contract, or resist the enforcement of a contract, on the ground of duress based upon fear, the following elements must be established:

- (i) The fear must be a reasonable one.
- (ii) It must be caused by the threat of some considerable evil to the person concerned or his family.
- (iii) It must be the threat of an imminent or inevitable evil.
- (iv) The threat or intimidation must be unlawful or contra bonos mores.

(iv) The moral pressure used must have caused damage.”

- [7] In my view, none of the requirements referred to above were met. The defence raised by the applicants is purely artificial and appears to be contrived. In my view, the allegations of duress, compulsion or misrepresentation in this case seems to fall squarely under the category described in *Plascon Evans*[4] as allegations that are so far-fetched or clearly untenable that a court would be justified in rejecting them merely on the papers. It must also be kept in mind that “a person who signs a contractual document thereby signifies assent to the contents of the document, and if these subsequently turn out unfavourably there is no one to blame but him- or herself”[5].
- [8] In this case, there is absolutely no factual basis set out in the applicant’s papers for the allegations of duress, compulsion and misrepresentation. I agree with the respondents’ counsel that the applicants rely rather on financial pressure rather than duress, compulsion or misrepresentation for their case. The length of time taken by them to sign the amending documents in April and later in October by itself eliminates any possibility of duress or compulsion nor is there a basis laid for the alleged misrepresentation. There was clearly *quid pro quo* for the inclusion of the respondents as trustees and beneficiaries.
- [9] Rules 6(5)(g), as held by the Supreme Court of Appeal in *Law Society Northern Provinces v Mogami*[6], requires as a general rule that an application for the hearing of oral evidence or referral to trial be made in limine and not once it has become clear that the applicant is failing to convince the court on the papers. The applicants did exactly what the *Mogami* decision seeks to preclude. They belatedly and after realizing that they had not made out a case in the affidavit, sought to include a request for referral to trial as an alternative at that. It is for these reasons that I refused to refer the matter to trial. In any event, such remedy is only sought as an alternative to the main prayers.

Merits

- [10] First, the applicants could not overcome the respondents’ point in limine that the Master took a decision to accept the amended Trust deed and to issue the new letters of authority, which decision constitutes administrative action. It has become trite law that such a decision stands until it is set aside by a court of law. The reliance by the applicants’ counsel on section 23 of the Trust Property Control Act no. 57 of 1988 (the Trust Act) does not assist the applicants. Section 23, as its heading suggests, provides for access to court to persons who are aggrieved by the decision of

the Master. It does not specify the court procedure to follow when exercising such right or seeking such relief. In the present case where the decision of the Master, which constitutes an administrative action, is being challenged, a review of such decision in terms of Rule 53 is the appropriate court procedure, which the applicants have failed to follow.

- [11] As outlined above, the respondents have shown that the applicants voluntarily consented to the amendment of the Trust deed to include the respondents as the trustees and beneficiaries of the Trust. Not only was an oral agreement between the parties but also written agreements were signed mainly in April and October 2019. To me, the facts detailed by the respondents, which have not been adequately contradicted by the applicants, exclude any scope for the existence of duress, compulsion or misrepresentation. More so, they negate the awful allegation by the applicants that they were pressured into agreeing to or capitulating into this amendment.
- [12] The applicants allege that on 04 October 2019 they requested by email that certain matters in the proposed amended Trust deed be altered which did not happen. Strangely, on 14 October 2019 (10 days later), they signed the amended Trust deed as well as a resolution authorizing such amendment. This makes the applicants' version farfetched and untenable, to say the least.
- [13] On the basis of the above, I am convinced that the application falls to be dismissed, first on the basis that the applicants have failed to make out a case on the papers and, second, on the basis that there is no real dispute of fact relating to the allegations of duress, compulsion and misrepresentation or on any of the material facts. In that event, the well known principle of Plascon-Evans[7] case must apply. If such dispute of fact existed, it would have clearly been foreseeable and the applicant ought not to have instituted the motion proceedings. The correspondence between the parties as well as the enquiries and queries made by the applicants at the Master's office testify to this. It follows therefore that even if such dispute of fact existed, which does not in my view,

I would still have dismissed the application under Rule 6(5)(g).

- [14] Regarding costs, the respondents sought costs on an attorney and client scale to be paid personally by the applicants. They based this on the conduct of the applicants in these proceedings particularly the deliberate failure to disclose certain crucial facts to the court, which had to be exposed by the respondents, coupled with the issuing of a duplicate application under a different case number in this court.
- [15] It cannot be gainsaid that the applicant omitted to disclose crucial factual aspects in this case such as the conclusion of the heads of agreements and the first amended Trust deed as well as the signing thereof in April 2019, the huge amounts expended by the second respondent in exchange for their contractual right to be included as trustees and beneficiaries of the Trust and the payment of huge legal fees by the second respondent to protect the interests of the Trust and its trustees. This is to name but a few of such facts.
- [16] In my view, the flagrant non-disclosure of the crucial information by the applicants constitutes gross misconduct on the part of the applicants. Although the applicants' counsel indicated that they disclosed the existence of the present case and the perceived dispute of facts in the present case in their heads of argument filed under case number 55353/2020, they did not disclose the existence of that case in the present proceedings until the

respondents' legal team loaded the heads of argument and notice of motion in that case to the case lines of the present proceedings.

[17] I am also in agreement with the respondents that a costs order against the Trust is tantamount to a costs order against the respondents as they are also trustees and beneficiaries of the Trust. Consequently, the only effective way to show the court's displeasure and disapproval of the conduct of the applicants is to order that such costs be paid by the applicants *de bonis propriis*, i.e. out of their own pockets. Neither the respondents nor the Trust ought to be put out of pocket due to such untoward conduct.

[18] In the result I make the following order:

The application is dismissed;

The applicants are ordered to pay the costs of this application on a scale as between attorney and client *de bonis propriis* (out of their own pockets and not from the funds of the Trust).

DT SKOSANA

Acting Judge of the High Court

Gauteng Division, Pretoria

Date of hearing:

28 October 2021

Date of judgment:

02 November 2021

Appearances:

For the Applicants:

Adv R.A Arcangeli

Instructed by Jacques Venter Attorneys

707 Chamberlain Street

Riviera

Pretoria

For the First Respondent:

No appearance

For the Second & Third

Respondents:

Adv P. Cirone

Instructed by Sali Attorneys

c/o Khammisa Attorneys

98 Doreen Street

Harlequins Office Park

Colbyn

[1] I occasionally refer to the second and third respondent as ‘the respondents’ since the first respondent is not actively involved in these proceedings.

[2] The respondents refer to the second and third respondents as I refer to the first respondent as the Master.

[3] 1974(1) SA 298 (C) at 311A-B.

[4] Plascon-Evans Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984 (3) SA 623 A at 634-635.

[5] GB Bradfield: Christie’s Law of Contract South Africa 7ed (2016) at 205.

[6] 2010 (1) SA 186 (SCA) at 195(C).

[7] See footnote 4 above.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF’s page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2021/742.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/mokken-no-and-others-v-master-unknown-topic-agpphc-2021>

Prepared on 10 October 2026 · Esheria