

SOUTH AFRICA / JUDGMENT

Mumiyeti and Another v Master of the High Court, Pretoria and Others (42755/20) [2021] ZAGPPHC 527 (6 August 2021)

[2021] ZAGPPHC 527**COURT**

North Gauteng High Court, Pretoria

BEFORE

T B Antulay

CASE / FILE NUMBER

42755/20

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Source record**IN THE REPUBLIC****OF SOUTH AFRICA****IN THE HIGH COURT OF SOUTH****AFRICA GAUTENG DIVISION, PRETORIA****CASE****NO: 42755/20****(1) REPORTABLE:****NO****(2)****OF INTEREST TO OTHER JUDGES: NO****(3)****REVISED: NO****In the matter between:****ELIZABETH****MUMIYETI****First****Applicant****MBALATI FANISA****MBALATI Second****Applicant****and****THE****MASTER OF THE HIGH COURT, PRETORIA First****Respondent****TIYANI VAVANUNA MBALATI****Second****Respondent****BAUGISTA BERNARD MKHONDO**

Third
Respondent
GLORIA
GWEBU Fourth
Respondent

JUDGMENT

ANTULAYAJ:

[1] This matter has been allocated to the above Honourable Court for adjudication.

1.1 The Applicant brings an application to compel the Master of the High Court ("the Master") to direct the Trustees of the Mbalati Family Trust ("the Trust") to account on the administration of the Trust as well as to compel the Master to appoint an independent qualified person to investigate the administration of the financial affairs of the Trust in terms of section 16 of the Trust Property Control Act No 57 of 1988 ("the Act").

[2] Facts which are common cause

2.1 There is no opposition to this application from the Master of the High Court.

2.2 On 20 January 2011, the late Mr Obed William Mbalati (" Mr Mbalati") created the Mbalati Family Trust in terms of the Act for the benefit of his surviving spouse and all of his children.

2.3 Mr Mbalati passed on around 2012 and died testate, in his Last Will, Mr Mbalati bequeathed his entire estate to the Trust.

2.4 The Mbalati Family Trust was created for the benefit of his surviving spouse and all of his children.

2.5 The first and second Applicants are beneficiaries of the Mbalati Family Trust.

2.6 The second, third and fourth Respondents are collectively the sole trustees of the Mbalati Family Trust as well as beneficiaries of the said Trust.

2.7 In total, there are nine beneficiaries of the Mbalati Family Trust. Four other beneficiaries have not been joined in these proceedings

2.8 The financial statements for the periods 2014 to 2019 were served on the Applicants attorneys of record on 28 October 2020.

2.9 For the past eight (8) years the Trustees have been administering the Trust on behalf of the beneficiaries of the Trust.

[3] The Applicants Argument

3.1 The Applicants by relying on Section 16 of the Trust Property Control Act, Act 57 of 1988 ("the act") seek relief against the First Respondent.

3.1 The provisions of Section 16 of the act are as follows:

The Master may call upon the trustees to account

- (1) A trustee shall, at the written request of the Master, account to the Master to his satisfaction and in accordance with the Master's requirements, for his administration and disposal of trust property and shall, at the written request of the Master, deliver to the Master any book, record, account or document relating to his administration or disposal of the trust property and shall to the best of his ability answer honestly and truthfully any question put to him by the Master in connection with the administration and disposal of the Trust property.
- (2) The Master may, if he deems it necessary, cause an investigation to be carried out by some fit and proper person appointed by him into the trustee's administration and disposal of trust property.
- (3) The Master shall make such order as he deems fit in connection with the costs of an investigation referred to in sub-section"

3.4 It is alleged by the Applicants that the Master has since failed and or refused to direct the Trustees to account in terms of section 16

3.5 It is further alleged that the purported financial statements of the Trust that were provided by the trustees, are inadequate, and fail to disclose the assets of the Trust.

3.6 A further submission is that upon construction of the above-mentioned purported financial statements, it appears that there are only four 4 (four) transactions listed in the all the 6 (six) financial statements, namely:

3.6.1 Transfer of property to the value of R100 000.00 (Plot 5335 and plot 1384 in 2014);

3.6.2 Transfer of property to the value of R800 000.00 (Plot 12182 in 2015);

3.6.3 An unsecured loan to an unnamed beneficiary to the value of R32 850.00 in 2018; and

3.6.4 Unsecured loans to further unnamed beneficiaries to the value of R101 600.00 and R685 113.00 in 2019 respectively.

3.7 It is the Applicants submission that the Trustees have not properly attended to the affairs of the Trust and that an independent person ought to be appointed to investigate the affairs of the Trust and to restore the role of the trustees to what it should be.

3.8 The Applicants further argued that the Trustees did not provide a resolution mandating the first Respondent to depose to the answering Affidavit and that as a result same is not before court.

3.9 The Applicants state that it was not necessary to join the remaining beneficiaries as they are aware of the application and it is of no interest or benefit to join them.

[4] Respondents' argument

4.1 The second, third and fourth Respondents ("the Trustees") are cited in the Applicants Founding affidavit, each in their capacity as a duly appointed trustee of the Mbalati Family Trust".

4.2 The relief sought against the first Respondent would normally flow from a mandamus application or a review application of, in this case, a failure

by the first Respondent to act or to make a decision. This has however not materialised.

4.3 on 28 October 2020 the Trustees provided the Applicants with financial statements. The Applicants have not indicated in any way that they have a problem with the financial statements.

4.4 is therefore respectfully submitted that the application has become moot by virtue of the financial statements being served on the Applicants on 28 October 2020.

4.5 The First Respondent has no obligation or duty towards the Applicants to make a decision in terms of Section 16(1) of Act 57 of 1988.

4.6 The Applicants have failed to join all the beneficiaries in the application as a result the application is not properly before court.

Conclusion

- [5] The Honourable court concludes that since all Trustees are cited in the Notice of motion in their capacity as a duly appointed trustee of the Mbalati Family Trust, the second Respondent has the necessary Locus standi to depose to the answering Affidavit.
- [6] The Honourable court notes that the relief sought by the Applicant is against the first Respondent, and the trustees, alternatively the trust is liable for the costs of the application.
- [7] In *Doyle v Board of Executors*[1] the court held that it is "unquestionable that a trustee occupies a fiduciary office by virtue of [which] alone he owes the utmost good faith towards all beneficiaries.
- [8] To succeed with either a mandamus or a review application, the Applicants need to show that there is a duty on the first Respondent to act in terms of Section 16 of Act 57 of 1988.
- [9] For the procedure of review to be applicable in this instance, the Master would have had to have taken some action or step which would then, ostensibly, become reviewable.
- [10] In *Estate Richards v Nichol*[2] and *Ras v Van der Meulen*[3] the Supreme Court of Appeal held that the Master under section 16(1) has wide powers to call upon trustees at any time to account to him regarding their administration of trust property. In the latter case, the Supreme Court of Appeal also stated that section 16(2) empowers the Master to carry out an investigation into trust administration if he deems it necessary. This is a discretion which vests solely in the Master.

- [11] The Master not having submitted an affidavit herein has not alleged that they have, indeed, applied their mind to the Applicant's request in terms of section 16 and accordingly this court finds that this application falls outside the scope of a judicial review. Rather, the applicant would be legally correct to apply for an order directing the Master to apply their mind and to consider their request for further and better financials to be submitted by the trustees (2nd and 3rd respondents). Once the Master has applied its mind to the request only then would it be within the Master's discretion to decide whether to ask for the financials or to declare that the existing financials are sufficient. Even thereafter, in the event that further financials were provided by the trustees, it would again fall within the discretion of the Master to decide whether they are sufficient. A decision taken after this discretion was exercised would be reviewable.
- [12] Having regard to the aforementioned the court finds that the master needs to apply its mind to the Applicants request for them to consider calling on the trustees to account to them. However, the applicants' request for the court to order the Master to direct the trustees to take the action requested cannot be granted as this decision falls, solely, within the ambit of the Master's discretion. It is only once the Master has made its decision that same may be subject to review.
- [13] Accordingly the court hereby directs the Master of the High Court to apply its mind and to make a decision in terms of Section 16(1) and 16(2) respectively.
- [14] With regard to costs the court finds that each party should pay their own costs since the relief granted is substantially different to the relief applied for in the notice of motion but which falls under the prayer for further and/or alternative relief.

Order

[15] The following order is made:

1. The Master of the High Court is hereby directed to apply its mind and to make a decision in terms of S16 (1) and S16 (2) in respect of the Mbalati Family Trust .
2. Each party is to pay its own costs.

T B ANTULAY AJ

Acting Judge of the High Court Gauteng Division of the High Court

Pretoria Electronically submitted

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 6 August 2021.

Date of hearing: The matter was heard by way of video conferencing or otherwise, the matter may be determined accordingly. The matter was set down for the motion court week of 2 August 2021.

Date of judgment: 06 August 2021

APPEARANCES:

APPLICANTS: Advocate Thembi Ntoane Instructed by Mncube Inc Attorneys

SECOND, THIRD AND FOURTH RESPONDENT: Advocate Henry Vermaak instructed by Morris Pokroy Attorneys

[1] 1999 2 SA 805 (CPD)

[2]

[1998] ZASCA 82; 1999 (1) SA 551 (SCA) 561A -B.

[3] 2011(4) SA 17 (SCA) 20E.

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