

SOUTH AFRICA / JUDGMENT

**P.M.M N.O and Another v D.M
N.O and Another (26855/2021)
[2022] ZAGPPHC 313 (4 May 2022)**
[2022] ZAGPPHC 313

COURT

North Gauteng High Court, Pretoria

BEFORE

Holland-Müter

CASE / FILE NUMBER

26855/2021

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

Case

Number: 26855/2021

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED:

YES

3

May 2022

In

the matter between:

P[....]
M[....]2 M[....]1 N
O
1st Applicant
(In
his capacity as appointed trustee of the
Tshedza
Business Trust, the LMZ Property
Trust,
the LMZ Business Trust and the LMZ
Family
Trust)
JEFFREY
GORDON WISEMAN N
O
2nd Applicant
(In
his capacity as nominee of Momentum Trust,
Trustee
of the Tshedza Business Trust, the LMZ
Property
Trust, the LMZ Business Trust and LMZ
and
D[....]
M[....]1 N
O
1st Respondent
(In
her capacity as appointed trustee of the
Trust,
the LMZ Business Trust and LMZ
Family
Trust
MASTER
OF THE HIGH COURT, PRETORIA
2nd Respondent

JUDGMENT

(Judgment was heard in open court but delivered electronically by uploading onto Case Lines to the electronic file of this matter electronically submitted to the parties/their representatives by Case Lines and Email)

- [1] The present application and counter application before the court stems from a marriage relationship which ran aground and settled on the rocky shores of the divorce courts door. The 1st applicant and 1st respondent were married to one another but drifted apart into the divorce court where the estranged marriage was finally dissolved on 6 September 2021. The divorce proceedings continued and unlike the Titanic, it took more than six years to be laid to rest, or so it looked.
- [2] The parties, while still in calm waters, created four trusts (cited above in the heading) and were appointed by the Master of the High Court as trustees of the above mentioned trusts. The Master issued the necessary letters of authority on 30 April 2014.
- [3] It is common cause that the 1st respondent, for reasons of her own, did not participate in the management of the trusts as was required from the diligent trustee. She however avers that the conduct of the 1st applicant made it impossible for her to attend to her duties as trustee. It is further common cause that the 1st respondent, despite being invited to attend to trustee meetings on numerous occasions, she did not attend any meeting since 16 November 2017 until recently during 2021. For almost five years she did not attend to trustee meetings. I will deal with her reasons

for not attending below.

- [4] Although the 1st applicant and 1st respondent disagree with what the other one deposed to, there is in my view no real material disputes as envisaged in Rule 6(5)(g) of the Uniform Rules of Court to refer the matter for oral evidence. I am satisfied that the matter can be adjudicated on the papers as is. See Erasmus, Superior Court Practice Vol 2 p 01-69 and in particular Plascon- Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634. In my view a robust approach in hearing and deciding in this matter is warranted.

JURISDICTION:

- [5] The 1st respondent raised the issue of alleged lack of jurisdiction of the court to hear the matter. The parties (referring to the 1st applicant and 1st respondent) were residing in Klerksdorp in the now North West Province when the Master of the Pretoria High Court issued their letters of authorization as trustees for the respective trusts. Klerksdorp was then still within the jurisdiction of this court. The divorce action was also instituted in this court during 2015 and the 1st applicant has relocated to Gauteng since then.
- [6] The applicants and the 2nd respondent are subject to the jurisdiction of this court and I am satisfied that this court has jurisdiction to hear the matter.

LEGAL POSITION:

- [7] The crux of the dispute is that the alleged conduct of the 1st respondent in not attending trustee meetings amounts to a breach of her duties as trustee as envisaged in the Trust Property Control Act 57 of 1988 (hereafter referred to as "The Act"). Section 9(1) of the Act

provides that: "A trustee shall in the performance of his/her duties and the exercise of his/her powers, act with care, diligence and skill which can reasonably be expected of a person who manages the affairs of other". The issue is in my view whether the absence of the 1st respondent for almost five (5) years from any trustee meetings is sufficient to find that she did not comply with the requisites laid down in section 9 of the Act.

- [8] It is common knowledge that a trust is not a legal persona but can be seen as a legal institution *sui generis*. See *Braun v Blann and Botha NNO & Another*

1984

- (2) SA 850 (A) at 859H: "The trustee is the owner of the trust property for purposes of administration of the trust but qua trustee he has no beneficial interest therein".

- [9] In *Land and Agricultural Bank of South Africa v Parker and others*

- (2004) 2 SA (A) at 56; and 2005 (2) SA 77 (SCA) at [par] Cameron JA held that: "A trust is an accumulation of assets and liabilities constituting an trust estate which is a separate entity... with no legal personality. It vests in the trustees, and it must be administered by the trustees and it is only through the trustees that a trust can act".

- [10] The question is whether the conduct of the 1st respondent, if measured against the above and what was held in *Sackville West v Nourse* 7 Another 1925 AD 516 at 534: 'The standard of care to be observed is accordingly not that which an ordinary man generally observes in the management of his own affairs, but that of the prudent and careful man, or, to use the technical expression of the Roman Law, that of the *bonus et diligens paterfamilias*'.

- [11] It is not required of a trustee to be total impartial or no connection with the beneficiaries, but rather that he or she is capable of bringing the necessary independent mind to bear the business of the trust and of deciding what is in the interests of the trust. See *Hoppen & Others v Shub & Others* 1987 (3) SA 201 (C) at 217F.

FACTUAL

ISSUES:

- [12] The question to answer is whether, under the prevailing circumstances and on-going divorce litigation between the 1st applicant and the 1st respondent since 2015 until 6 September 2021 warranted the 1st respondent's absence at trustee meetings. She alleged that at one meeting previously the 1st applicant spilled milk over her and that there was constant conflict between them. The applicants denied this.

- [13] The 1st respondent avers that the 1st applicant, in the absence of the 1st respondent, "appointed" his daughter from a previous marriage without any resolution thereto, to take over the duties of the 1st respondent. According to the 1st applicant, his daughter was only assisting him with the daily administration of the trust and that she was not "appointed" as a co-trustee or in any other capacity but to assist him in the absence of the 1st respondent.
- [14] The 1st respondent accuses the 2nd applicant of bias and mala fides in that he did not assist her to obtain legal representation. This is contrary the minutes of the trustee meeting held on 24 May 2015 where the 2nd applicant only offered to assist the parties' legal representatives in positioning the trusts but there was no "offer" of assistance to be provided with a legal representative.
- [15] The arguments on behalf the 1st respondent during arguments (and in the 1st respondent's heads of arguments) are in my view without substance. The alleged "refusal to use a vehicle to make it possible for her to attend a trustee meeting is without merit. There is provision in the trust deed for virtual meetings. The 1st respondent did not make use thereof. The allegation that she, being in the minority, was overruled in decisions taken is also no reason for her to fail to attend meetings. There is no clause in the deed of the trust for unanimous decisions. Her allegations towards the 2nd applicant of "misusing trust assets for its own advantage as in the instance of Tshedza Protective Services CC in Mahikeng are without any proof.
- [16] I am satisfied that, taking into account the issue of dispute of facts, and applying the Plascon-Evans Rule, that no material disputes arose to warrant a referral for oral evidence or trial. The reasonable court will be able to adjudicate the matter on the papers.

COUNTERCLAIM FOR REMOVAL OF THE SECOND APPLICANT:

- [17] The 1st respondent's counter application for the removal of the 2nd applicant is based on her allegation that the 2nd applicant breached his duty of trust towards her. She alleged that the 2nd applicant failed to avoid a conflict of interest between his private interests and his duty as a trustee. The averment made above was repeated in the arguments on her behalf. The further averment that he did not remain impartial because he elected to be joined as a party to the proceedings against her lacks any persuasion. I am not persuaded at all that this counter application has any merit and ought to be rejected.

REMOVAL OF A TRUSTEE:

- [18] Section 20(1) of the Act enables the court to remove a trustee from office on application by the Master of any interested party. The court has to be satisfied that the requested removal will be in the best interest of the trust and the beneficiaries. See *Du Plessis NO & Others v Fourie Van Niekerk & Others* 2018 (4) SA 131 FB at [par 26], judgment delivered by Daffue on 26 June 2018. The Master indicated that it will abide with the court's decision.

[19] The question of removal of a trustee (with opposing counter applications for similar relief) was decided in *Gower and Another v Gower and Others* 2016 (5) SA (SCA). The court held that a mere conflict of interest between trustees and beneficiaries or amongst the trustees was insufficient for the

removal of a trustee. Petse JA however held that "the overriding question is always whether or not the conduct of the trustee imperils the trust property or its administration". The court therefore should exercise its discretion in terms of Section 20(1) of the Act to remove a trustee from office with circumspection. No *Mala fides* or misconduct is required by the court to order the removal from office of a trustee. The essential test is whether such disharmony, as in the present matter, imperils the trust estate or its proper administration. See *Volkwyn N O v Clarke and Damant* 1946 WLD 456 at 471. It is therefore clear that the court may remove a trustee from office in the event that such removal will be in the interest of the trust and its beneficiaries.

[20] The applicants aver that the removal of the 1st respondent as trustee will be in the best interest of the trust and the beneficiaries for the following

reasons:

20.1 The 1st respondent has failed to attend meetings from 2016 to 2021 or to respond to any requests from the applicants;

20.2 The 1st respondent only started attending meetings after the application was served on her;

20.3 The 1st respondent was not involved in the affairs of the trusts for a period of five (5) years and did nothing to safeguard the interests of the trust;

20.4 The 1st respondent failed to deliver any assistance as trustee;

20.6 The 1st respondent seeks the "liquidation" of the trusts for some financial reward and therefore does not advance the interests of the trust. This is what she perceives to happen although it was only one of the probable suggestions made by the 2nd applicant at the 2015 meeting when the marriage boat of the 1st applicant and the 1st respondent sailed into troubled waters;

20.7 The 1st respondent resides in a trust owned property but fails to maintain such and pays no rent at all despite receiving the amount of R 10 000,00 per month towards property expenses incurred. One of the trusts also defrays the full operating costs of the said property, including rates and taxes and water and electricity consumed by the 1st respondent whilst residing in the property.

[21] The 2nd Respondent did not oppose the application and abides with the court's decision.

[22] I am therefore of the view that the applicants have shown sufficient cause to have the 1st respondent removed from the office of trustee.

The following order is made:

1. The application is granted with costs;
2. The counter application is dismissed with costs.

J HOLLAND-MÜTER

Acting Judge of the Pretoria High Court

(Application was heard on 12 April 2022)

(Judgment delivered on 4 May 2022)

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Prepared on 10 October 2026 · Esheria