

SOUTH AFRICA / JUDGMENT

Slabbert v Van Der Westhuizen N.O and Others (115/2022) [2024] ZAECKMKHC 109 (4 October 2024) [2024] ZAECKMKHC 109

COURT

Eastern Cape High Court, Makhanda

BEFORE

Rugunanan

CASE / FILE NUMBER

115/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, MAKHANDA)

OF INTEREST

CASE NO. 115/2022

In

the matter between:

JACO

SLABBERT

APPLICANT

and

GIZELLE

KLARA VAN DER WESTHUIZEN N.O.

FIRST RESPONDENT

In

her capacity as joint trustee for the
time

being of the LA TRUST – IT 927/95

HUGO

VAN DER WESTHUIZEN N.O.

SECOND RESPONDENT

In

his capacity as joint trustee for the

THE

MASTER OF THE HIGH COURT

THIRD RESPONDENT

JUDGMENT

Rugunanan J

- [1] This is an application for inter alia the removal of the first and second respondents as trustees of the LA Trust (IT 927/95) (the trust) and the appointment in their stead of two other trustees, one of them being the applicant. The primary issue for determination in what will hereinafter be referred to as the main application (where contextually appropriate) is whether the conduct of the first and second respondents, allegedly in their refusal to account, justifies granting the applicant relief for their removal in terms of s 20(1) of the Trust Property Control Act 57 of 1988[1] (the Act).
- [2] The applicant is a major male who resides in Gauteng where he pursues a career in software development. He is a capital beneficiary of the trust and has the requisite interest entitling him to institute these proceedings.[2] His assertion that he is an income beneficiary is disputed. That, however, is not relevant to his locus standi.
- [3] The first and second respondents are trustees of the trust having been authorised by written endorsements issued by the Master of the High Court, Makhanda. They reside on the property and are married to one another. They both hold legal qualifications but have dissimilar occupational pursuits. The first respondent is a prosecutor and the second respondent, a practising attorney.
- [4] Save for the first and second respondents who have opposed the applicant's relief, the third respondent chose not to engage with the facts alleged by the parties and took no part in these proceedings. As such, where mention is made of 'the respondents' in this judgment it must be understood to be the collective citation of the first and second respondents.
- [5] At the heart of the matter lies the respondents' administration of the main asset in the trust comprising of 9 hectares of fixed property known as portion 414 of the farm Zwavelpoort 373 located in Gauteng (the property).
- [6] Before all else it is significant to point out that the first respondent's uncontradicted version is that the intended purpose of the purchase of the property by her and her late husband, Mr Leon André Slabbert, was to shield it from creditors – and that it was never intended to exclude her or her late husband from residing on it.
- [7] This version assumes importance since the respondents' maintain that the intent of the applicant in launching these proceedings is to take control of the trust to terminate the residence of the first respondent on the property and to lay claim to what he assumes he is now entitled by virtue of having attained majority status.
- [8] The respondents argue that the applicant's course is premature and is at odds with the provisions of the trust deed. The deed

stipulates[3] that no asset or income of the trust will vest in any beneficiary until it is awarded, paid over, or transported to such beneficiary by the trustees. Being a discretionary trust, no beneficiary will have a claim in relation to the income or capital of the trust during the term of the validity of the trust. The deed furthermore provides that in the event of a beneficiary holding out that he has a claim in relation to the income or capital of the trust prior to having any related or vested interests, the trustees will be entitled to let the trust continue until such time as they deem appropriate[4].

[9] According to the respondents, these provisions find application to the present matter.

The procedural context of the hearing

[10] There were two applications before this court, both under the same case number: (a) the main application, and (b) a contempt application, in which the applicant sought punitive relief against the respondents.

[11] The main application was set down for hearing on 1 September 2022.

[12] By agreement between the parties an order was taken before Bloem J on 23 August 2022 in terms of which:

12.1 The main application was postponed sine die; and

12.2 The first and second respondents were ordered to provide the applicant with the following documents within thirty (30) days:

12.2.1 A copy of the written disclosure as per clause 12.1 of the trust deed;

12.2.2 A copy of the minute book as per clause 17.6 of the trust deed;

12.2.3 The bank statements of the trust from date of opening thereof; and

12.2.4 All source documents relied upon by the accountant for the trust in the preparation and finalisation of the financial statements for the financial years 2005 to 2021.

[13] The respondents' non-compliance with the order taken before Bloem J culminated in the institution of the contempt application in which the applicant, in addition to seeking punitive relief against them, sought compliance with the terms of that order. The contempt application and the main application are separate matters that were enrolled for hearing on 9 May 2024. They were not consolidated although technically the contempt matter arose from an order interlocutory to the main proceedings. The applicant did not proceed with the contempt application but urged that its material be considered in the main application. On allegations of fact meant to achieve what was essentially contemplated in the order by Bloem J, the applicant's approach spawned a conundrum in the main application, presenting a departure from the standards for the formulation of affidavits in motion proceedings. More than this, the factual discord in the papers between the two matters was glaring. And as will become apparent later, the specific aspects in regard to which the applicant required the respondents 'to account' were undefined in the order formulated in

his notice of motion to the main application. In line with these remarks this judgment reveals the inherent difficulty with the approach foisted upon the court by the applicant and accentuates the necessity for observing the required standards for drafting affidavits in motion proceedings.

[14] In an attempt therefore to render the judgment more easily understood the procedural context in which the hearing took place will be set out. In that regard the manner in which the applicant required the court to approach the contempt application despite not pursuing it, is addressed at the onset.

[15] It is not possible to traverse all the allegations and material contained in the papers to both applications. In argument applicant's counsel contended – on the basis of the respondents' own version – that there was a 'capture'

of the trust supported by documentary proof evincing their 'brazen' and 'stark' perpetration of 'fraud and theft' upon the trust. To begin with, the approach is misdirected. In motion proceedings it is trite that the affidavits constitute both the pleadings and the evidence; hence the issues and averments in support of the parties' cases should appear clearly therefrom.[5] It is to the founding affidavit that a court will turn to determine what the complaint is, and for that reason the founding affidavit

must in itself contain sufficient facts to support the complaint.[6] It is imperative that a litigant should make out its case in its founding affidavit and not belatedly in argument.[7] The applicant's founding affidavits both in the contempt application and in the main application, evinces a weighty absence of factual matter directly venting or even remotely corresponding with the epithets articulated by counsel. Summing up the crux of his case in his replying affidavit to the main application, is the applicant's explicit assertion:

'No impropriety in the administration of the trust [is] alleged save to complain that the first and second respondents refused to account ...'

[16] That is the *lis*. Put differently, it is not the applicant's case that the trust has been captured or that there is impropriety in its administration

due to theft or fraud, nor is it his case that the respondents' refusal to account is due to fraud or theft.

[17] The contentions aforementioned are extraordinary considering that they were not foreshadowed in the applicant's founding papers in the main application; correctly triggering an objection by respondents' counsel. Fraud is an illegality. In keeping with the principles underlying affidavits it must be alleged and it must be clearly and distinctly proved.[8] It is not anything to be lightly inferred[9]. The same holds for any act of dishonesty associated with the capture of the trust, or theft, or such other related conduct.

[18] Apart from the obvious failing in the applicant's founding affidavit the documentary proof upon which counsel relied is located in voluminous annexures in the contempt application. The papers in the contempt matter are burdened by factual disputes. This prompted concerns about the court having to make findings of wilfulness and mala fides beyond reasonable doubt solely on affidavit evidence without any indication of any parties being called for cross-examination under uniform rule 6(5)(g). Although the applicant (quite sensibly in my view) elected not to proceed with the contempt application, the court was requested to consider its content in the main application. In that regard it was little short of testifying for the applicant when – from the bar – the attempt was made to traverse the annexures in the contempt application.

[19] Central to the nature of motion proceedings is the established practice that they are adjudicated and assessed on a set of papers comprising of founding, answering, and replying affidavits. The obvious difficulty with the course adopted by the applicant is that it falls foul of the purpose of a founding affidavit and what is required to be set out in affidavits, generally. It is impractical for the court to import into the main application material (on disputed issues) emanating from documents included as annexures in the contempt application. The annexures comprise inter alia of an extract from the general ledger of the trust and so-called proof of financial transactions; quotations for surveillance,

building maintenance, slate tiles, blinds and paint, including payment of monies by the first respondent to the second respondent

from the trust banking account; invoices; and so-called conduct by the second respondent relating to the trust allegedly prior to him being authorised to act as trustee.

[20] In motion proceedings the evidence is placed before the court in the form of affidavits containing factual allegations made under oath. In argument the attempt was made to prove the applicant's case by referencing the aforementioned series of annexures or documents included in the contempt application. It is not open to a party to merely annex to its affidavit a document and to request the court to have regard thereto. What is incumbent is the identification of portions thereof on which reliance is placed as an indication of the case sought to be made out on the strength of the document concerned.[10] The document merely serves as proof of the source of the information, which information ought properly to have been stated as facts or evidence made under oath and not marshalled from the bar[11]. It cannot be expected of the court to conduct a forensic examination by trawling through a mass of printed documents in the contempt

application and to speculate on the possible relevance of their contents in the main application. This is a slothful means of placing

evidence before court in the expectation that factual findings favourable to the applicant's case would be made on issues that have not been properly raised – or raised at all – in his affidavit founding the main application.

- [21] Application proceedings are designed to achieve a relatively speedy resolution to disputes compared to action proceedings. Compliance with the standards for the formulation of affidavits allows for the orderly use of the resource capacity of a court to evaluate an application and to give due attention to the other matters on its roll. The bottom line is that the applicant chose not to proceed with the contempt application. Engaging with its material is an exercise fraught with uncertainty and strain. It may result in the court inadvertently choosing sides and in this way compromising the independence and objectivity expected from the bench. Endorsing the approach would put in place an unpredictably porous regimen and may set a standard of deviation from established practice with disturbing imprecision that diminishes certainty, fostering dysfunction^[12] and prejudice. *Cadit quaestio*.
- [22] There are two further aspects about the general manner in which the applicant conducted his case. The first relates to a sizeable document entitled Applicant's Chronological Table of Events, and the second relates to bundles of case authorities that were handed up from the bar. In argument reference was made to the chronological table filed by the applicant on 24 April 2024. The document is a compilation of abbreviated material extracted from the applicant's affidavits in both applications. There is no doubt that the document was intended to chart a timeline for navigating through the volume of material in each of the applications, but then only on the narrative of the applicant's version. Apart from the repeated reference to the 'capture' of the trust, which is not the case presented in the main application, the inherent difficulty occasioned by venting the content of the contempt application in deciding the main application is that the sifting process is rendered murky and concomitantly diminishes the significance of the founding affidavit in the latter. This serves yet again to accentuate the necessity for factual matter to have been properly assimilated on oath in affidavit form if the case meant to be argued is one of capture perpetrated by the respondents.
- [23] At the commencement of the hearing, two bundles comprising of legislation, case authorities and extracts from academic texts on trust law and estates were summarily introduced. The first bundle contains 77 pages and the second 151 pages. In total the bundles amount to a substantial 228 pages containing 21 case authorities. Except for ten case authorities identified in the applicant's practice note filed on 19 April 2024, none of the 11 remaining cases in the larger bundle are referenced in his heads of argument (filed on 11 August 2022), or in his supplementary heads (prepared on 23 November 2023 without indication of date of filing).
- [24] The practice directives in this division make it plain that heads of argument shall be accompanied by a list of authorities to be quoted in support of the argument, and that the practice note applicable to opposed motions shall inter alia set out the principal authorities to be relied on.^[13] This allows the court to do its preparation and research in advance of the hearing of the matter, facilitating constructive engagement

with practitioners and disposing of the business of the court in an efficient, effective and expeditious manner. The peremptory list does not feature in the applicant's main heads and in his supplementary heads. Accepting that counsel appearing for the applicant was not the author of the heads of argument, the issue nonetheless arises with the introduction of the case material in the larger of the two bundles. It is necessary to quote, albeit in the context of a criminal trial, the utterance in *S v Ntuli*[14]:

'Unless counsel properly represents his or her client, the right to a fair trial and the right to a fair appeal may be negated. At issue is simply the basic proposition that the minimum required of counsel is to prepare and present a proper argument on behalf of his or her client. Heads of argument serve a critical purpose. They ought to articulate the best argument available to the appellant. They ought to engage fairly with the evidence and to advance submissions in relation thereto. They ought to deal with the case law. Where this is not done and the work is left to the Judges, justice cannot be seen to be done. Accordingly, it is essential that those who have the privilege of appearing in the Superior Courts to their duty scrupulously in this regard.'

[25] In none of the additional case reports has the applicant identified for consideration by the court the specific facts, or pages and paragraphs believed to be relevant, not to mention the applicable legal principle. The same applies to the cases referenced in his practice note, none of which were mentioned, even in passing, except for two that featured in the supplementary heads of argument. The dictum in *Ntuli* is of pertinence in the current matter for yet another shortcoming in the presentation of the applicant's case.

[26] In summary: (a) the applicant's material failure to make out a case posited on 'fraud', 'theft' and 'capture' of the trust; (b) the unavailing approach that material in the contempt application assumes relevance where that application itself was not pursued; and (c) the failure to deal with the case law in the manner described – points to the impracticality of doing justice where it is entirely left to the court to conceive a case far removed from the material in the main application.

[27] Cumulatively, these considerations do not support the relief the applicant claims in the main application and justifies dismissal solely on that basis. But in any event, even if the conclusion in that regard is incorrect, there are a few aspects of its merits that deserve consideration. In that regard, and in the light of the views expressed hereinabove, factual matter from the contempt application does not feature.

The main application

[28] Following an amendment to his notice of motion the applicant in his founding affidavit, by mere substitution of an unsigned and unattested amended page, states that the purpose of the application is to obtain the following relief:

'6.1 A declarator that the ostensible appointments of the first and second respondents, as trustees of the trust, were not valid in law and therefore null and void;

6.2 In the alternative, an order that the first and second respondents, in their personal capacities, be removed as trustees of the trust in terms of section 20 of the Act;

6.3 An order that the Master of the High Court be requested and authorised to issue letters of authority in terms of section 6(1) of the Act to the applicant and Louis Stephanus Venter^[15] as joint trustees for the time being of the trust;

6.4 An order that the Master be requested and authorised to call upon the first and second respondents to account in terms of section 16 of the Act; and

6.5 An order that the first and second respondents be directed to comply with the [Master's] request to account, alternatively an order that the first and second respondents be directed to perform their duty imposed upon them by clause 13 of the trust deed.'

[29] In addition, the applicant seeks an order that the first and second respondents pay the costs of the application in their personal capacities, jointly.

[30] In view of the approach adopted to the contempt application the salient issues to be decided in what remains as the main application are whether or not the applicant has succeeded in making out a case that the appointments of the first and second respondents as trustees of the trust were invalid, alternatively, that the first and second respondents should be removed as trustees. Accordingly, consideration of the relief in paragraphs 6.3 and 6.5 will not be necessary if the applicant fails to secure orders in respect of 6.1, 6.2 and 6.4.

[31] In argument reference was made to various provisions of the Act, such as the maintenance of a trust account, registration and identification

of trust property, and the custody/destruction of documents^[16]. Mention was also made of the amended Act^[17] where it deals with the disqualifications from office as a trustee. In sum, these are matters that have not been dealt with in the applicant's papers, or found their way into supplemented papers incorporating factual material traversing the statutory prescripts relied upon. A litigant who relies on a specific illegality must plead it. If he relies on a particular section of a statute he must say so, but in addition to referring to the section, he must plead those facts which entitle him to invoke the section.^[18]

[32] The matter will accordingly be adjudicated on the basis of the legislation prior to the amendments. This judgment and the cases to which reference is made must be read from that perspective.

Overview

[33] The trust is an inter vivos trust. It was lodged and registered within the jurisdiction of the Master on 23 May 1995 following its establishment in a deed by its founder, the applicant's father, Mr Leon André Slabbert. As appears to be the position to date, the trust deed attached to the founding affidavit identifies the applicant solely as its beneficiary.

[34] Upon registration of the trust, Mr Slabbert was appointed as trustee. At that time he was not legally married to the applicant's biological mother Ms Tarina Slabbert. Subsequent to her passing during 1996 the applicant's father married the first respondent, who had a three year old child of her own, a son named Kyle. The applicant was also about three years of age at the time.

[35] In May 1999 the trust acquired the property for a purchase price of R370 000.[19] The applicant's father passed away in February 2002. His mortal remains are interred in a grave on the property. Subsequent to the death of the applicant's father, the first respondent was awarded guardianship of the applicant by the high court[20] after a dispute between herself and the applicant's uncle, Mr Johannes Slabbert. The first respondent's uncontradicted

evidence is that the uncle would assume guardianship of the applicant upon the passing of both herself and the applicant's father.

[36] Since the passing of the applicant's father, the position of trustee was held by Mr Daniel Johannes Rudolph Schutte. Upon his resignation he was replaced by the first respondent on 10 March 2004. The first and second respondents were married on 23 June 2004, whereafter on 29 May 2006 the second respondent was endorsed by the Master to act as trustee together with the first respondent. The applicant resided on the property with both respondents until 2012 when, having attained the age of 19, he alleges he was requested to leave (or it may be on the respondents' version that he elected to exclude himself from the family unit due to his deviant behaviour and his desire to do as he pleases). The respondents together with Kyle and their biological daughter Cara, have since been living on the property though indications are that the applicant returned and resided there from time to time.

[37] Further insight into this overview can be gleaned from the following uncontradicted averments in the first respondent's supporting answering affidavit:

'The father of the applicant and I had a joint last will and testament wherein we jointly recorded our combined related intentions. [I]t was always our intention that only upon the passing of the both of us, guardianship of the applicant would pass to the brother of my late former husband. I confirm that the property being the principal asset of the trust, was purposefully sourced by my late former husband and I, that we secured a mortgage bond registered in both our titles with which to settle a portion of the purchase price, and that we subsequently secured a second mortgage bond over the property, again in both our titles, the amount of which was utilised by my late former husband to financially stabilise his business enterprise which was not faring well at that time.

The property was purchased into the trust with the exclusive purpose of shielding it from potential creditors, never to exclude either my late former husband or indeed me from residing upon it. ... [The applicant] cannot deny the related assertions of the second respondent and I pertaining to his upbringing and the way in which we ... have improved and maintained, and continue to maintain the asset of the trust.'

- [38] The revealing feature of what the first respondent says is that it lays the foundation for the intended purpose of the purchase of the property and the intention that she resides thereon.
- [39] Having dealt with the procedural context in the conduct of the matter and following the above overview, attention shifts to the applicant's founding affidavit in the main application. The affidavit is a terse document, 26 pages in length annexed to which are 73 pages of material comprising of the deed of trust, the Master's endorsements, and a series of protracted correspondence typical of a 'paper war' exchanged between the parties' attorneys/agents. In motion proceedings it is incumbent upon an applicant to plead his case in his founding affidavit. Apart from generically identifying the purport of the correspondence the applicant does not address the matter contained therein which, if considered pertinent to the relief claimed, ought to have been stated as facts or evidence read as if included in the founding affidavit. The second respondent pertinently emphasises that

the correspondence is discordant with the content of the founding affidavit. The other drawback is that authorship of the correspondence is unconfirmed in a confirmatory affidavit by the applicant's legal representative as indicative that their contents be read into the founding affidavit. The practise of merely attaching annexures to an affidavit without dealing with or identifying the material portions in the expectation that a court will accomplish the sifting process is to be frowned upon. It is not intended to repeat what is said elsewhere in this judgment.

- [40] That said, focus shifts to whether the applicant has made out a case for his relief.

The appointment of the respondents as trustees

- [41] The complaint is that (a) the first respondent's appointment as trustee was not in terms of the trust deed, nor a court order; (b) the respondents' appointments were not authorised in writing by the Master; and (c) the trust deed disqualifies the second respondent from holding office as trustee because he is married to the first respondent.
- [42] The appointment of the first respondent as trustee followed her nomination as such by the Mr Schutte who preceded her. Relevant to her appointment, the applicant does not specifically identify a provision in the trust deed that (i) either disqualified her predecessor from nominating her or, (ii) disqualified her from being appointed. The basis upon which the applicant contends that the first respondent's appointment was not in terms of a court order is unsustainable where material allegations are not candidly disclosed to demonstrate the professed necessity of a court order authorising her appointment (assuming, on the version of the applicant that such an order is a legal requirement – and if it is a statutory requirement, then he should say that).
- [43] The challenge to the first respondent's appointment is also posited on the applicant's assertion:

‘Should it be that the first respondent was properly and legally appointed as trustee of the trust in terms of section 6(1) of the Act, then I wish to point out that the trust deed provides therefore that the majority of beneficiaries could elect to terminate her appointment as trustee in terms of clauses 6.6 and 6.6.2 of the trust deed.’

[44] Assuming that the applicant is correct in asserting that there are other beneficiaries, the fallacy with his approach is that proof that they are interested persons who support such relief, is wanting.

[45] Turning to the written authorisation with which the applicant takes issue, the endorsement in favour of the first respondent reads:

‘This is to certify that as Daniel Johannes Rudolph Schutte is no longer trustee of the above-mentioned trust, Gizelle Klara Slabbert is authorised to continue with the administration of the said trust’.

[46] As for the second respondent, the endorsement reads:

‘It is hereby certified that Hugo Van Der Westhuizen is authorised to act as trustee of the above-mentioned trust together with Gizelle Klara Slabbert’.

[47] The endorsements were issued on 10 March 2004 and on 29 May 2006, respectively. They appear on separate pages and are in each instance

signed and date-stamped by the Master’s representative. Section 6 of the Act permits the appointment of any person as

trustee ‘...if authorized (sic) thereto in writing by the Master.’ The mode of writing (whether by means of human agency, mechanical or electronic means) or the medium on which the writing must appear is not specified in the Act or in the regulations

promulgated thereunder[21].

[48] It is not particularly clear what the applicant suggests by his postulation that the respondents’ appointments were not authorised in writing. Accordingly, no sustainable basis has been proffered for upholding his contention. I point out in passing, organs of state are duty bound to assist the courts to ensure their effectiveness[22]. The Master’s input would have been of assistance to this court in its reflections on this specific issue.

[49] Adverting to the alleged disqualification of the second respondent, it is necessary to examine the provisions in the trust deed. Relevant for present purposes are the following clauses:

‘1. WOORDOMSKRYWING:

In hierdie trustakte, tensy dit uit die samehang anders blyk:

1.1 sluit woorde wat die enkelvoud aandui, ook die meervoud in emgekeerd; ...

...

4. AANSTELLING VAN TRUSTEES

4.1 Die eerste trustees wat hiermee aangestel word, is soos in die aanhef hiervan aangewys (en word hierin na verwys as “die eerste trustee”).

4.2 Daar moet te alle tye minstens 1 (een) trustee in amp wees.

4.3 Indien die aantal trustees, om welke rede ookal, benede die vereiste minimum getal daal, word die getal binne 60 (sestig) dae deur die oorblywende trustees aangevul. As dit, om welke rede ookal, nie moontlik is nie, of nie gedoen is nie, kan die begunstiges in esse – indien nodig deur hulle voodge bygestaan – sodanige vakature aanvul;

Tot tyd en wyl die vakatures aangevul is, is die oorblywende trustee or trustees gemagtig om alle magte van trustees uit te oefen vir die behoud van die trustbates.

4.4 Die trustees is geregtig om bykomstige trustees van hulle keuse te benoem en aan te stel onderhewig aan die volgende beperkende bepalinge:

4.4.1 Indien enige trustee ‘n getroude persoon is, sal enige gade van hom of haar nooit kwalifiseer om as ‘n trustee van die trust te ageer nie tensy die diensdoende trustees eenparig en gesamentlik so besluit en notuleer of sodanige gade ingevolge sub-paragraaf 4.4.2 testamentêr aangewys is.’

[50] The applicant’s complaint against the second respondent is limited to his concise assertion:

‘[On] a proper interpretation of clauses 4.4 and 4.4.1 ... the appointment of [a] further trustee, being a spouse of one of the trustees, is only permissible if the trust had more than one trustee and those trustees took a decision in terms of clauses 4.4 and 4.4.1. ... [T]he second respondent’s aforesaid nomination, subsequent acceptance and appointment as trustee were done against an express provision of the trust deed and is therefore null and void.’

[51] In response to this challenge the respondents assert that clause 4.2 unambiguously stipulates that there should always be at least one trustee in office, and since clause 1.1 prescribes that words denoting the singular shall include the plural and vice versa, the wording ‘diensdoende trustees’ in clause 4.4.1 meant that the first respondent took a valid decision and was empowered to appoint the second respondent as trustee. Where the applicant has not put up any further challenge supported by facts with reference to the trust deed the respondents’ interpretation accords with the current state of the law in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[23] regarding the interpretation of written instruments. Appositely, whatever the language of the document, objective consideration must be given to the language employed in the light of the ordinary rules of grammar and syntax with preference accorded to a sensible meaning and not one that leads to an insensible result.[24]

The removal of the respondents as trustees

[52] A trustee is a person in a fiduciary position and is obliged in dealing with the money or property of a beneficiary to observe due care and diligence – this on the standard analogous to that of the prudent and careful man.[25] A court has the inherent power to remove a trustee from office either in terms of the common law or the Act. Section 20(1) of the Act provides that:

‘A trustee, may, on 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 interests of the trust and its beneficiaries.’

[53] In a concise exposition of the law the Supreme Court of Appeal in *Haitas v Froneman and Others*[26] stated:

‘The general principle is that a court will exercise its common law jurisdiction to remove a trustee if the continuance in office will be detrimental to the beneficiary or will prevent the trust from being properly administered. A trustee has a fiduciary duty to act with due care and diligence in administering the property on behalf of another. However courts have taken a pragmatic approach as to what misconduct should be construed as imperilling trust assets.’

[54] Further in the judgment the Court went on hold[27]:

‘[T]he conduct of the trustees must be detrimental to the trust assets and it is only then that their conduct may warrant removal. It is not necessary that their conduct be unimpeachable, but generally where there is no impropriety and no financial gain on the part of the trustees, courts will not interfere.

[55] Elsewhere the Court made the further observation:[28]

‘That the trustees, have in some respects, been lax in maintaining proper accounting records of the trust cannot be denied. ... It was not necessary to apply for the trustees removal to obtain financial disclosures. This could have been obtained by far less drastic remedial action. In ... the notice of motion it is exactly this that is sought.

The appellant and his mother disapprove of the manner in which the trust is being run but this does not mean that it is rendered dysfunctional.’

[56] To sum up, to succeed in obtaining relief against the respondents the applicant must prove that their conduct imperils the trust property, or its proper administration[29], or is detrimental to him as beneficiary. In that regard the enquiry is factual.[30] Mere fiction or enmity between the trustee and the beneficiary/beneficiaries will not in itself be adequate reason for the removal of the trustee from office.[31]

[57] The indubitable legal position set out in the prescripts referred above were relied upon by the respondents and have been of assistance to this court in arriving at a decision.

- [58] As previously indicated the essence of the applicant's case is that there is no impropriety in the administration of the trust. His complaint is that the respondents have refused to account. To begin with, there is no manifestation of an overt refusal by the respondents to account. Indications from the answering papers are that the respondents (without specifying when exactly), have provided the applicant with financial information/statements for the period 2005-2012, notwithstanding being bombarded by a myriad of requests to disclose information which requests, they maintain, were continuously altered.
- [59] The second respondent pointedly states that both he and the first respondent have always been willing to account for their administration of the trust. Although the respondents set a deadline for compliance by 30 November 2021 but subsequently agreed to the period in the order taken before Bloem J, the requests required scrutiny of historical documents going back to the date of the appointment of the first respondent as trustee and even dates preceding that appointment. While failure to keep to self-imposed or agreed timelines may be scorned, the content of the answering papers, particularly on disputed issues, precludes concluding that the respondents' conduct amounts to a refusal.
- [60] In the context of the applicable law I turn to consider whether the respondents' alleged refusal to account imperils the administration of the trust property or is detrimental to the applicant.
- [61] Contrary to what was argued regarding 'fraud and theft', it is not the applicant's case that the property is imperilled by such conduct, nor has he shown that the respondents' alleged refusal to account has imperilled the property. The second respondent has put up a detailed version of the maintenance, improvements, repairs and upkeep of the property, the benefits of which the applicant enjoyed when he resided there. In reply, the applicant does not deny these assertions and merely dismisses them as being irrelevant. Far from any indication that the property is imperilled, it is clear that it has been improved and is maintained. While there can be no doubt that the respondents have been lax in consistently maintaining accounting records (and even minutes, whether in accordance with the trust deed itself or legislation such as the Companies Act[32] as was argued by analogy), it has not been shown how such conduct is detrimental to the interests of the applicant or imperilled the only asset in the trust such that the respondents' removal as trustees is necessitated.
- [62] Despite these findings it is necessary to consider the applicant's apprehensions mentioned in his founding affidavit. Because there are factual disputes on these aspects, it is prudent to observe that motion proceedings, as a rule, are determined on the basis of common cause facts[33]. It is well established under the Plascon-Evans rule that where disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.'
- [63] The applicant avers: (a) that in the 2005/2006 financial statements of the trust, a loan account of R3,5 million appears in regard to which he has not been

informed of its origin and purpose; (b) that in 2008 the property was encumbered with a mortgage bond in favour of Nedbank Limited in the amount of R1,7 million for which he has not been informed of its purpose or what became of the proceeds thereof; and (c) that 'other properties and businesses registered in the trust's name were sold for an amount in excess of R1,1 million' and a life policy in the amount of R1,1 million was paid to the first respondent instead of the trust.

[64] The second respondent in paragraphs 27 to 35 of the answering affidavit provides a detailed response to the applicant's apprehensions.

It is not intended to reproduce the lengthy explanations in those paragraphs save to state that they prompt disputes of fact more

particularly in the light of new matter raised by the applicant in reply thereto, which ought properly – in the first instance – to have been dealt with in the founding affidavit. The material in reply poses a drawback for the relief sought in paragraph 6.4 of the founding affidavit. The order calling upon the Master to direct the respondents 'to account' is open-ended. A prayer for specific relief must be formulated with precision and must be consistent with the preceding allegations of fact. Where the allegations are unclear from his affidavits in the main application, and where the applicant has not specified in his order what exactly he requires by calling on the respondents 'to account', such an order may be incapable of enforcement, and a court should refrain from granting it.[34] To illustrate the irrationality of the applicant's approach it was impermissibly mentioned from the bar that statements for amounts of R1.65 million and R689 000 were not before the court. It is indubitable that these are not insubstantial amounts but if they were issues in the applicant's complaint, they ought to have been properly identified and dealt with in his papers, foreshadowing them in his relief.

[65] For these reasons the application falls to be dismissed.

[66] There is a further disquieting aspect about the matter that bears mentioning. In the main application, the founding and replying affidavits were filed during January and March

2022. In his heads of argument respondents' counsel points out that on 2 August 2022 the respondents supplied the applicant's attorneys with the annual financial statements of the trust for the years ending 2005 until 2021. This occurred in the course of the contempt application (subsequent to the filing of the replying affidavit therein) and is confirmed by the applicant's attorney in an affidavit dated 10 August 2022. In that affidavit she identifies the financial statements as annexures X1 to X17.

[67] Despite the detail in the financial statements traversing some 221 pages, she goes on to state that the financial statements are relevant for adjudicating the main application.

[68] The approach constitutes an abuse of process.

[69] Exactly on what issues in the main application do the statements assume relevance is perplexing in the light of the fact the applicant's papers in that application were never supplemented. There is no indication by the attorney that the applicant's apprehensions in the founding affidavit to the main application have been laid to rest or whether they persist notwithstanding the availability of the financial statements. Presumably, it might have been contemplated that the several thousand entries in those statements would have been dealt with in oral argument.

[70] For the above reasons, the true basis for the contention that the respondents have failed and/or refused to account is wanting where

the obligation to expatiate it rested with the applicant. Little credit, if I might add, goes to those responsible for the preparation

of his papers.[35] Traversing the material in the contempt application would not have lent any assistance for reasons already mentioned.

[71] For what it is worth, the adversarial approach adopted by the applicant may have been justified had a proper case been made out in the main application. It is not intended to repeat what is said by the respondents about the years they had long spent in affectionately nurturing him as their son. It is clear that the applicant has his own point of view, but the friction or resentment engendered in his papers will not carry the day on a woefully inadequate set of papers.

Conclusion

[72] There remains one issue – costs.

[73] The applicant has not been successful and costs must follow the result.

[74] The parties agreed that the costs in the contempt application would be costs in the cause.

[75] The respondents did not seek punitive costs but contended that the costs of counsel be awarded on scale 'C' of uniform rule 67A. The rule addresses itself only to awards of costs as between party and party and permits a court to exercise control over the maximum rate at which the fees of counsel can be recovered under such an award.[36]

[76] In the present matter the applicant argued a case that was undoubtedly not articulated in his papers.

[77] His arguments were replete with emotive allegations without due consideration of their relevance and whether there was a plausible basis for them.

[78] The record speaks for itself.

[79] And as for the correspondence and annexures, no more needs to be said.[37]

- [80] This judgment demonstrates that the entire case was determined on the basis of the Plascon-Evans rule and that the acknowledged standards for the drafting of affidavits were wanting.
- [81] The argument for the respondents was crisp and focussed, and so too was the material contained in their heads of argument.
- [82] My sense is that the scale for counsel's fees should not be lowered.
- [83] Information on file indicates that there were two reserved costs orders; the first of which appears in the order taken before Bloem J on 23 August 2022, and the other appears in an order granted by Smith J (as he then was) on 30 November 2023. The circumstances that gave rise to these orders were not dealt with in argument and it is considered unnecessary to make orders in respect thereof.
- [84] In the result the following order issues:
1. The main application is dismissed.
 2. The applicant shall pay the first and second respondent's costs on the scale as between party and party including of the fees of counsel on scale 'C' in terms of uniform rule 67A.
 3. The applicant is further ordered to pay the costs of the contempt application on the same basis as in paragraph 2 hereof.

M S RUGUNANAN

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: R. Liddell, instructed by Schwimm Venter Inc., c/o Wheeldon Rushmere and Cole Inc., Makhanda, (Ref Mr van der Veen).

For the First and Second Respondents: C. M. Rip, instructed by Wentzel & Partners Attorneys, c/o Whitesides Attorneys, Makhanda (Ref: Mr Barrow/Mr Malaza).

Date heard: 09 May 2024.

Date delivered: 04 October 2024.

- [1] With effect from 29 December 2022, the Act has been amended by the General Laws (Anti-Money Laundering and Combatting Terrorism Financing) Amendment Act 22 of 2022 as per Government Notice 1535 in Gazette No. 47815.
- [2] Ras NNO v Van der Meulen 2011
- (4) SA 17 (SCA) para 9. See also the discussion in Geach, Trust Law in South Africa, Juta 2017 p238 para 5.18.1.2.
- [3] In clause 18.4.

- [4] Clause 18.4.4.
- [5] Minister of Land Affairs and Agriculture v D & F Wevell Trust 2008
- (2) SA 184 (SCA) at 200D.
- [6] Director of Hospital Services v Mistry 1979
- (1) SA 626 (A) at 635H and Elegant Line Trading 257 CC v MEC for Transport, Eastern Cape
- [2022] ZAECBHC 45 para 2.
- [7] My Vote Counts NPC v Speaker of the National Assembly 2016
- (1) SA 132 (CC) para 177, and see the authorities referred to in the footnote thereto.
- [8] Courtney-Clarke v Bassingthwaighte 1991 (1) SA 684 (Nm) at 690A.
- [9] Gilbey Distillers & Vintners (Pty) Ltd v Morris NO 1990 (2) SA 217 (SECLD) at 226A.
- [10] Van Loggerenberg, Erasmus Superior Court Practice, D1-58C, D1-58D [Service 20, 2022].
- [11] Concomitantly protracting argument and adding to the generation of a sizeable record.
- [12] See Ramaphakela v Municipal Employees Pension Fund and Another [2024] ZAGPJHC 634 para 8 in which TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and Others
- [2023] ZASCA 63 was quoted with approval in the context of assessing an application for leave to appeal. The principle applies by parity of reasoning.
- [13] Updated Joint Rules 3, 8 and 15 for the Eastern Cape Division of the High Court issued under directive of the Judge President on 27 January 2023.
- [14] 2003 (4) SA 258 (W) at 265B-D.
- [15] According to the notice of motion, in his capacity as representative of Wealth Succession Trustees and Executors (Pty) Ltd.
- [16] Sections 10, 11, and 17.
- [17] Section 6(1A).
- [18] Yannakou v Apollo Club 1974 (1) SA 614 (A) at 623F-624E; Courtney-Clarke v Bassingwaithe 1991
- (1) SA 684 (Nm) at 690A.
- [19] According to the applicant the purchase price was R240 000. In his founding affidavit executed on 14 January 2022, he attaches a 'GhostConvey' deeds office property search printed on 29 June 2015, some seven years prior to the institution of these proceedings. The document contains a disclaimer as to the accuracy of the information it contains.

- [20] Case No 6386/2002 and Case No 6500/2003 in what was then known as the Transvaal Provincial Division (TPD).
- [21] https://www.saflii.org/za/legis/consol_reg/ruttpca1988546/ (accessed on 29 September 2024)
- [22] Section 165(4) of the Constitution.
- [23] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012
- (4) SA 593 (SCA) para 18.
- [24] Ibid para 18.
- [25] Gowar and Another v Gowar and Others 2016 (5) SA 225 (SCA) para 25 in which reference is made to Sackville West v Nourse and Another 1925 AD 516 at 534.
- [26]
- [2021] ZASCA 1 para 30; see also the reference to Sackville West v Nourse & Another 1925 AD 516 at 52 and Gowar and Another v Gowar and Others 2016 (5) SA 225 (SCA) in fn 6 of the judgment.
- [27] Para 36.
- [28] Paras 36 and 40.
- [29] Gowar and Another supra paras 30, 31 and 37.
- [30] Fletcher v McNair [2020] ZASCA the 135 para 26.
- [31] Gowar and Another supra para 31 in which reference is made to Tijmstra NO v Blunt-Mackenzie NO & others 2002 (1) SA 459 (T) at 473E-G, see also Dhlomo NO and others v Chalwa NO and another
- [2023] ZAKZPHC 131 paras 63-65.
- [32] Act 61 of 1973.
- [33] National Director of Public Prosecutions v Zuma [2009] ZASCA 1; 2009
- (2) SA 277 (SCA) para 27.
- [34] Mansell v Mansell 1953 (3) SA 716 (NPD) at 721E.
- [35] A comment appositely made by Wallis JA in Knoop v Gupta 2021
- (3) SA 88 (SCA), para 145 in his trenchant condemnation of the practitioners responsible for the preparation of papers in that matter, and his sobering reminder of the professional responsibility upon practitioners who draft papers for their clients.
- [36] Mashava v Enaex Africa (Pty) Ltd
- [2024] ZAGPJHC 387 para 5.

[37] But see again Knoop v Gupta supra para 145.

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