

SOUTH AFRICA / JUDGMENT

Steyn NO and Others v Blockpave (Pty) Ltd (2959/2010) [2010] ZAFSHC 134 (12 October 2010) [2010] ZAFSHC 134

COURT

Free State High Court, Bloemfontein

BEFORE

Rampai

CASE / FILE NUMBER

2959/2010

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No. : 2959/2010

In the matter between:-

ANDREAS JACOBUS STEYN N.O.First Appellant

CARL PETRUS PRETORIUS N.O.Second Appellant

MARGARETHA ELIZABETH MOOLMAN N.O.Third Appellant

and

BLOCKPAVE (PTY) LTDRespondent

HEARD ON: 16 SEPTEMBER 2010

JUDGMENT

BY: RAMPAL, J

DELIVERED ON: 21 OCTOBER 2010

- [1] The matter came before me by way of motion proceedings. September 16, 2010 was the further extended return date of the rule nisi which was granted on June 17th 2010 by my brother Jordaan J. The trust claims that the respondent owes it the sum of R1 057 806,64 in respect of rent arrears and ancillary relief. The applicant trust seeks to have its tacit hypothec over such assets confirmed. The respondent company resists the confirmation of the rule nisi.
- [2] There are facts which are common cause or not seriously disputed. This preliminary judgment concerns certain points raised in limine at the commencement of the argument before me. Therefore I shall confine myself to the summary of the facts relating to such points and not the merits. In what follows hereafter I shall refer to the applicants as the trust and to the individual applicants specifically wherever necessary. The applicants act in these proceedings in their representative capacities as the trustees of the Dries Steyn Trust (annexure "A" from the affidavit). The founding affidavit was deposed to by the first applicant. The second applicant confirmed the averments contained therein.
- [3] The third applicant, Ms M.E. Moolman, is the biological daughter to the first applicant. The first applicant is also the father to the respondent's deponent, Mr. Petrus Steyn. In addition, the first applicant is also a director of the first respondent. The other directors of the first respondent are: Mr. Andreas Jacobus Steyn Jnr, Mr. Petrus Steyn and Mr. Johan Steyn. They are all the first applicant's sons. It will therefore be readily appreciated that this case is a classical family feud.
- [4] The Dries Steyn Trust owns certain immovable properties situated in Piet Human Street, Hamilton, Bloemfontein in the Free State Province. The properties are commonly known as 2 to 8 as well as 3 and 5 Piet Human Street. The respondent carries on its operations from the aforesaid premises of the trust. Its movable assets are kept on the same premises. The relationship between the trust and the respondent is one of landlord and tenant. The first applicant is no longer supposed to be involved in the business affairs of the respondent. Apart from this particular trust and company the first applicant and his children are also involved in other business's enterprises and trusts. Since January 2009 the respondent has paid no rent to the trust.
- [5] On the 19th November 2009 Rossouws Attorneys, on behalf of the trust, addressed a letter of demand to the directors of the respondent (save for Steyn Snr) in respect of the rent arrears which the respondent, as alleged, had not paid for ten months. On the 30th November 2009 Neuhoff Attorneys, on behalf of the respondent, repudiated the demand of the trust. The attitude of the respondent was that it owned no rent to the trust.
- [6] The following allegations were, among others, in dispute. Whether there was a valid lease agreement (annexure "D" founding affidavit) between the trust and the respondent; whether the trust had undertaken to forgo rent due by the respondent to the trust; whether the first applicant, in collaboration with his first son, A.J. Steyn Jnr, was trying to take over the control of the respondent from his middle son and current managing director, Petrus Steyn;

whether the current application was supported by all the trustees, in particular the third applicant, as the first applicant alleged and whether the respondent's deponent was properly authorised to oppose the current application.

- [7] The issue in the case is a narrow one. The first crucial question is whether the trust was properly before the court. This was the first preliminary question I am called upon to adjudicate. Mr. Fischer, counsel for the respondent, submitted that the answer was in the negative. Mr. Snellenburg, counsel for the applicants, submitted that the question has to be answered in the affirmative. This was the first preliminary point raised by the respondent. I propose to deal with this first. If needs be, I shall then deal with the point in limine raised by the trust, namely that the respondent's deponent was not authorised to oppose the current application.
- [8] The general principle of the law of trust is that a trust functions through its appointed trustees. The legal personality of a trust requires that all trustees act together for and on behalf of the trust.
- [9] The decision-making of the trust is regulated by clause 3 of the trust deed. Sub clause 3.1 thereof reads as follows:

"3.1 All decisions of the Trustees, shall, save as otherwise provided be determined by majority vote.

It is specifically provided that, notwithstanding any other provisions contained herein, all decisions whereby capital and/or income is to be distributed shall only be valid and binding if:

all the positions of Trustees are filled; (i.e. a minimum number of three not taking into account any additional trustees appointed in terms of 2.4)

a quorum shall be all the Trustees in office; and

should the number of Trustees be more than three there is not more than one dissenting vote of all the Trustees but a unanimous decision if there are only three Trustees."

Sub clause 3.3 of the trust deed reads as follows:

"3.3 A written resolution signed by all the Trustees shall have the same force and effect as if a resolution has been passed at a meeting of Trustees convened for that purpose, the date of the resolution being the date of the last signature to the resolution."

[10] The founding affidavit was signed in Bloemfontein on the 17th June

2010. The respondent challenged the authority of the first applicant to act on behalf of the other two trustees. In the answering

affidavit the respondent's deponent asserted that the first applicant was not authorised to depose to the founding affidavit for and on behalf of his fellow trustees and in particular the third applicant. The essence of the respondent's point in limine was that no proper decision was ever taken by the trust to sue the respondent.

[11] In its replying affidavit the trust persisted that a proper decision was taken to sue the respondent. To this effect the trust attached annexure “R9”. The annexure was a document in which were recorded minutes of the meeting of the trustees of Dries Steyn Trust held at Bloemfontein on the 14th January 2010. There were six items on the agenda. Apparently four points were discussed under item 4. Precisely what was discussed under item 4.1 and 4.2 does not appear. Similarly item 5.1 was also blank. These lacunae were never explained and the original source was never exhibited.

[12] I deem it necessary to quote item 4.5 since it relates specifically to the respondent. A heading thereof is:

“Besluit insake agterstallige huurgelde”. The item reads:

“4.5.1 Kennis word geneem van verskeie skrywes tussen Mnr A J Steyn (Snr) namens Trust en Mnr P Steyn namens Blockpave (Pty) Ltd.

Dit word dan ook bevestig dat die Trust voorsitter die nodige erns gemaak het om namens die Trust die vordering van agterstallige huurgeld te probeer vorder het. Die verhuurder bevestig dat hy hom hou by kontrak asook die hernuwingsvereistes.”

Aanbevole oorwegings hoe om huurgeld te betaal deur huurder. Daar is in die korrespondensie gevra in skrywe van 05/01/10 via Prokureurs Rossouws om voor 31/01/10 aanbevelings te maak hoe om huur verskuldig op datum te bring. (paragraaf 2)

[13] It is very clear from the foregoing passage in particular or extract in general: that the meeting relied upon was held some five months before this proceedings were launched on the 17th June 2010; that the third applicant did not attend such meeting; that no concrete decision was taken to sue the respondent and that no written resolution in terms of clause 3.3 was ever passed and signed by all three trustees.

[14] The trust decisions (annexure “R9”) in this instance have to be supported by a minimum of two trustees to be internally valid and binding on the body of three. The trustees meeting of the 14th January 2010 was seemingly quorid because only one trustee was absent. (Clause 3.1 annexure “R10”) The first and the second applicants attended the meeting. The two could theoretically have taken the decision to sue the respondent on behalf of the trust provided the third applicant was consulted in advance about such matter. Whether she was for or against such a decision would not have been an important matter, if only she was properly consulted but outvoted by two to one ration of the trust body with three (3).

[15] The decision to sue the respondent, in such circumstances, would have been competently taken. The majority vote prevails in the running of the business affairs of the trust – clause 3.1. However, it was never done. It does not appear that she was ever consulted or participated by a proxy or otherwise in those proceedings. The record of the meeting leaves one with the cold feeling that the third applicant was not consulted about the agenda or the meeting itself. There was no apology or comment about her absence at all.

[16] It was not compulsory for her to attend any meeting of the trustees. (Clause 3.1) However, it is and it has always been fundamentally imperative for the majority trustees to keep the minority trustees informed about the meetings to be held, the agenda and the decision taken at such meetings. This is important for a variety of reasons. For instance, a trustee who cannot personally attend a meeting may want to send a proxy or make her input telephonically or otherwise. If she was aware of a meeting she could even have indirectly exercised her vote. An uninformed trustee, I should imagine, would not easily sign a decision taken in her absence to validate it as a written resolution as envisaged in clause 3.3.

[17] The first applicant had this to say about the participation or non-participation of the third applicant in the decision-making process pertaining to the affairs of the trust in general. At paragraph 24.6 of the replying affidavit he says the following:

“24.6 Die Derde Applikant was ten alle relevante tye bewus van die agterstallige huurgeld en die trust se voorneme om dit te vorder.”

At paragraph 24.7 of the replying affidavit the first applicant again says the following:

“24.7 Hoe dit ook al sy, verwys ek die Hof na bylaag “R9” synde ‘n notule van 14 Januarie 2010 waar die agterstallige huurgeld bespreek is en dat die nodige erns geneem sal word met die invordering van huurgeld. Die Hof sal merk dat die Derde Applikant nie die vergadering bygewoon het nie, wat niks ongewoon was nie, omdat haar teenwoordigheid nie noodsaaklik was vir die neem van meeste besluite nie, omdat Mnr. Pretorius daar was en vanweë die afstande wat ons van mekaar woon. Sy woon in Middelburg, Kaapprovinsie.”

[18] The foregoing comments by the first applicant concerning the exclusion of the first applicant in decision making processes relating to the affairs of the trust, were disturbingly astonishing. Although her physical presence at the meetings is not required at all times, her participation and input in the making of all the decisions is essential. The trust requires the full and complete participation of all its trustees in order to function legally. The participation of its full complement cannot be dispensed with on account of the physical distances between the trustees.

[19] The comments of the first applicant show lack of understanding of the juristic nature and functioning of the trust. The trustees have to decide, participate and act together as one in dealing with the affairs of the trust, even if they were not all agreed or even if they are not altogether in a meeting under the same roof. This means that internal dissent among the trustees on a particular point, has to be buried once the majority has spoken through the vote. Externally all the trustees have to present a united front notwithstanding earlier internal dissention. Such unity of purpose and function is publicly manifested by a written resolution signed by all the trustees.

[20] In the absence of any proof in this instance, I cannot find otherwise than that it was never resolved in terms of clause 3.3 to sue the respondent. The minutes (annexure “R9”) evidenced no decision by the quorum to sue the respondent. Instead, the respondent was asked to say how it proposed to bring its account up to date. This is the one thing.

- [21] The authority of the first applicant to make the founding affidavit in these proceedings should be ascertained from the written resolution and not an extract of minutes of the meeting of trustees. This is the second point. In this instance, I have already demonstrated that the extract relied upon, does not assist the case of the trust at all. The failure of the first applicant to attach the confirmatory affidavit by the third applicant fortifies my conclusion that no proper decision, let alone proper resolution, was ever taken to launch these proceedings.
- [22] The second point in limine raised by the respondent was that no proper resolution was ever adopted or for that matter a decision taken by the trust to instruct Rossouws Attorneys to initiate these proceedings. In the replying affidavit the first applicant also persisted that the trust properly took a decision whereby it properly instructed Rossouws Attorneys to initiate these proceedings. To that effect the document with the heading “Volmag om te litigeer” was served and filed on the 10th September 2010, some nine weeks after the launch of the application. Once again the document was only signed by the first applicant. Nowhere in the document is the respondents’ name specified. Instead there is repeated reference to an unnamed company. In my view, these are serious defects. They strengthen the contention of the respondent that the first applicant was not duly authorised by his fellow trustees to instruct attorneys to bring this current application.
- [23] The author, Erasmus: The Superior Court Practice, B1-59, comments as follows about Rule 7(1):
- “The type of authority contemplated by this rule means the special type of power which is given by a client to his or her attorney to authorise him or her to institute or defend legal proceedings on the client’s behalf; it does not contemplate a general authority by one person to another to represent him or her in legal proceedings. If an attorney acting for a party is authorised so to act, there is no need for any other person, whether he or she be a witness or someone who becomes involved, to be additionally authorised.”*
- [24] It follows from all this that the instructions which Rossouws Attorneys received from the first applicant to institute these proceedings against the respondent were irregular. This is so because such special power of attorney did not enjoy the backing of all the trustees. The document in question is dated 9 September 2010. This strengthens the respondent’s contention that when these proceedings were initiated eleven weeks earlier, the attorneys had nothing resembling a special power of attorney to launch these proceedings.
- [25] On 10 September 2010 yet another document was served and filed on behalf of the applicants. The document reads:

“UITTREKSEL UIT DIE NOTULE VAN ‘N VERGADERING VAN DRIES STEYN TRUST

BESLUIT DAT:

1.1 DIE DRIES STEYN TRUST (“die Trust”) aan ANDREAS JACOBUS STEYN magtiging verleen om alle stappe te doen wat nodig is om die huurgeld wat deur Blockpave (Edms) Bpk aan die Trust verskuldig is, in te vorder, met inbegrip van maar nie beperk tot die neem van stappe om sekuriteit te vestig.

1.2 Vir soverre dit nodig mag wees, word alle stappe wat deur een of meerdere Trustees in die verlede gedoen is hiermee geratifiseer, met inbegrip van die huurkontrak wat met Blockpave (Edms) beperk gesluit is gedurende Maart 2001, en enige hernuwings daarvan.

1.3 ANDREAS JACOBUS STEYN, in sy hoedanigheid as Trustee gemagtig word om alle dokumente wat nodig mag wees ten einde hieraan gevolg te gee, namens die Trust op te stel of te laat opstel en te teken op sidanige terme en voorwaardes as wat hy in sy diskresie mag besluit en in die algemeen alles te doen wat nodig mag wees ten einde gevolg te gee aan hierdie besluit.

GESERTIFISEER AS ‘N WARE UITTREKSEL UIT DIE NOTULE

A J STEYN

1e Trustee se Naam 1E Trustee se Handtekening

C P PRETORIUS _____

2e Trustee se Naam 2e Trustee se Handtekening

(Alle Trustees on te teken)”

[26] The aforesaid document purports to be an extract from the minutes of the meeting of the trustees of Dries Steyn Trust. Precisely when and where such meeting was held, does not appear ex facie the document. The minutes are undated. Where and when and by whom the document was extracted from such minutes, cannot be ascertained. Once again the document is not signed by the three trustees in office. Once again it is an extract from the minutes and not a proper resolution. There is only one legally regular and permissible way in which a trust communicates with the world and that is through its resolutions. I am persuaded by Mr. Fischer’s submission that the document was apparently created after 3 September 2010, a day on which the respondent’s answering affidavit was served. These then are some of the difficulties I have with the decision to ratify the irregular actions of the first applicant and the second applicant. Through this attempt to have things ratified, the first two applicants tacitly acknowledged that they have failed to run the affairs of the Dries Steyn Trust in accordance with the letter of the law.

- [27] Mr. Snellenburg urged me to strike out details of the telephone conversation which Mr. Petrus Steyn alleged he had with his sister, Ms Margaretha Moolman, on 28 July 2010. Indeed the alleged contents of the conversation was hearsay since it was not confirmed by way of a sworn statement. That much the respondent's deponent himself admitted. However, the first applicant chose to comment on such hearsay allegations instead of keeping his silence or declining the invitation to deal with them in the replying affidavit.
- [28] In commenting on such hearsay attributed to the third applicant's stance, the first replied that the third applicant had resigned as a trustee of the Dries Steyn Trust subsequent to the institution of these proceedings and that the remaining trustees, in order words, the first applicant and the second applicant, had since nominated the first applicant's elder son, Mr. Andreas Jacobus Steyn Jnr, for appointment by the Master of the High Court as a substitute to the third applicant. The founding affidavit was signed on 17 June 2010 and the answering affidavit on 10 September 2010. It follows, therefore, that the third applicant must have resigned somewhere between those two dates. Mr. Fischer hinted from the bar that her resignation took place during August 2010 and Mr. Snellenburg tacitly agreed.
- [29] It will be recalled that in June 2010 the third applicant did not make any confirmatory affidavit in support of the legal steps taken against the respondent. Unlike the second applicant she adopted a neutral stance. The founding affidavit was served on her brother, the managing director of the respondent, on 22 June 2010. She and her brother allegedly discussed this case according to the respondent's answering affidavit. Subsequent to the alleged discussion she resigned in August 2010. Again the replying affidavit, just like the founding affidavit, was not supported by the trustees en bloc. The third applicant resigned her office as a trustee before the replying affidavit was signed. What emerges from the conduct of the third applicant is that she did not want to be involved in this family dispute. She was apparently not prepared to side with her father against her brother. Instead she decided to resign.
- [30] Her conduct objectively enhanced the probative value of the hearsay allegations attributed to her by her brother. Moreover, the first applicant's reply and disclosures in connection with the third applicant also gave some credence to such hearsay. In the light of all this prevailing circumstances, I am moved by dictates of justice to take into account the averments contained in paragraph 4.1.2 of the respondent's answering affidavit as admissible evidence even though they were not verified by the third applicant's confirmatory affidavit. Her behaviour silently tells a story that is remarkably consistent with the version of the respondent. She did not want to be involved and to risk being caught in the crossfire between her father and brother.
- [31] What then was the legal impact of Ms Moolman's resignation on the trust itself? Her previous fellow trustees reckoned that the problem created by such resignation could be overcome by nominating someone else to replace her. They then approached Mr. A.J. Steyn Jnr to become the third trustee in accordance with the trust deed. They further reckoned that, although the nominee trustee had not yet been appointed by the Master of the High

Court, there were already three de facto trustees in office and that the majority of two, in other words, the first and the second applicant, was competent to continue with these proceedings. The replying affidavit was thus delivered against such backdrop.

- [32] The whole argument was fallacious. The resignation of Ms Moolman had profound impact on these proceedings. It fundamentally crippled the capacity of the trust to operate. It functionally paralysed the trust. The functional incapacity occasioned by her resignation could not be immediately remedied by the subsequent appointment of her brother, Mr. A.J. Steyn Jnr in terms of the trust deed by the remaining two trustees. Section 6(1) Trust Property Act No. 57 of 1988 provides that a person whose appointment as a trustee was made in terms of a trust instrument, shall act in that capacity only if subsequently authorised in writing by the Master. Therefore, it is the statutory appointment and not the instrumental appointment which will legally cure the ailing trust.

Until such time as the proposed or preferred substitute is authorised to occupy such office, the minimum complement essential for the lawful operation of the Dries Steyn Trust will remain lacking. Therefore, it is temporarily dysfunctional and so it was at the time the replying affidavit was delivered.

- [33] It would appear, on the first applicant's own version, that the Dries Steyn Trust has been suffering from the incapacity to function on account of the frequent, if not perpetual, albeit, irregular marginalisation of Ms Moolman by her two male co-trustees in the running of its affairs. The fact that she was accustomed to be excluded was not, is not and will never be a valid excuse to regularise a wrong practice which is intrinsic and systematic.
- [34] It was contended by the applicants that notwithstanding the lady's resignation, the remaining two trustees still constituted a majority envisaged in the trust instrument and thus, competent to represent and to act on behalf of the trust estate. Since Steyn Jnr was not yet in office when the matter was argued before me, there were only two trustees in office instead of three. The notion that two can be the majority of two is mathematically absurd. The plain truth is simply that there was no majority to talk about. There were only two trustees. The true character of the trust we are here dealing with is three faced. The trust body with a full complement of three trustees as envisaged in the trust deed was not in existence and the trust estate was not capable to operate. The Dries Steyn Trust, in my view, did not de iure exist and operate in a way a trust has to operate in law. LAND AND AGRICULTURAL BANK OF SOUTH AFRICA v PARKER AND OTHERS 2005 (2) SA 77 (SCA).

- [35] Cameron JA eloquently said the following about the numerical strength of a trust estate:

"[11] It follows that a provision requiring that a specified minimum number of trustees must hold office is a capacity-defining condition. It lays down a prerequisite that must be fulfilled before the trust estate can be bound. When fewer trustees than the number specified are in office, the trust suffers from an incapacity that precludes action on its behalf."

PARKER'S-case, supra, page 84, par. 11.

[36] At paragraph [17] thereof Cameron JA had this to say about the decision-making and the majority power:

“[17] The bank contended that since the Parkers were a majority of the trustees in office, and since they could form a quorum at trust meetings, they could bind the trust acting together. But this is to confuse power to act with its due exercise. The deed empowered the majority of the trustees to meet and to make decisions. To this extent the joint action requirement was abrogated

- but the majority remained part of a three-trustee complement, and it had to exercise its will in relation to that complement. The bank does not suggest that any meeting or consultation of the trustees was convened, or that any vote took place in which the majority will was exercised. On the contrary, on the evidence which it has chosen not to challenge no such meeting, consultation or majority decision ever occurred. In these circumstances the Parkers on their own were not entitled to bind the trust. Again, conduct of this sort may give rise to an inference concerning the abuse of the trust form; but, again, this was not the case the bank sought to make.”

[37] I wish to add and I do this at the risk of repeating myself. A trust operates on two different spheres. Internally, trustees may differ. A matter on the agenda may be debated. If the trustees are not unanimous, a matter must be put to a vote. The majority vote then prevails as the decision of the trustees. The dissenting trustee has to subject himself to the democratic vote of the majority.

[38] Externally, trustees cannot differ. The split internal decision becomes the resolution of the trust in its dealing with the world at large. The dissenting trustee is just as bound by the resolution as those who had supported it all along during the debate on the internal sphere. On the external sphere the trust functions by virtue of its resolutions which have to be supported by its full complement of the trust body. A quorid meeting of trustees may perfectly take a valid decision on the internal front. However, such a decision will remain only a decision and not a valid resolution unless it also enjoys the support of an absent trustee(s) in whose absent it was taken.

[39] A majority of trustees in office may form a quorum internally at a trust meeting, but can still not externally bind a trust by acting together. These are two features of the decision that are instructive. It is not the majority vote, but rather the resolution by the entire complement which binds a trust estate. A trust operates on resolutions and not votes.

[40] In the circumstances I have come to the conclusion that the Dries Steyn Trust was not properly before me. Firstly, there was no proper resolution taken by the entire complement of the trust body to launch these proceedings. Secondly, there was no proper special power of attorney given to the attorneys concerned to act for or on behalf of the Dries Steyn Trust. Therefore the points in limine were well taken by the respondent.

[41] In view of the conclusion I have reached in connection with the respondent's preliminary points, it becomes unnecessary to deal with the points in limine raised by the applicants or the trust.

[42] Accordingly I make the following order:

42.1 The respondent's points in limine are upheld.

42.2 The rule nisi is discharged.

42.3 The first and second applicants, the trustees who launched these proceedings without proper authority, are directed to pay the costs thereof out of their own pockets jointly and severally and not from the coffers of the trust.

M.H. RAMPAL, J

On behalf of applicants: Adv. N. Snellenburg Instructed by:

Rossouws Attorneys

BLOEMFONTEIN

On behalf of respondent: Adv. P.U. Fischer

Instructed by:

Lovius Block Attorneys

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