

SOUTH AFRICA / JUDGMENT

T.C v D.C and Others (54491/2018) [2019] ZAGPPHC 189 (23 May 2019)

[2019] ZAGPPHC 189**COURT**

North Gauteng High Court, Pretoria

BEFORE

NGD Maritz

CASE / FILE NUMBER

54491/2018

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Policy**REPUBLIC OF SOUTH AFRICA****IN THE HIGH COURT OF SOUTH AFRICA****GAUTENG DIVISION, PRETORIA****(1)****REPORTABLE:**

YES/NO

(2)

OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED

Case No: 54491/2018

23/5/2019

In

the matter between: T[....]
C[....]
Applicant
and
D[....]
C[....]
First Respondent
J[....]
P[....] L[....] C[....]
Second Respondent
THE MASTER
OF THE HIGH COURT
Third Respondent

JUDGMENT

NGD MARITZ AJ:

1. The applicant and the first respondent, who were married in 1994 out of community of property and subject to the accrual system, and divorced on 30 November 2015, have at all times since the establishment of the C[....] Family Trust (IT502/1998) in 1988, been and still are the only two trustees of the Trust. The applicant, as plaintiff, during 2013 instituted an action for divorce against the respondent. On 5 August 2015, the parties acting in their personal capacities and in their capacities as the two trustees of the Trust, entered into a written settlement agreement in the divorce action. On 27 November 2015 the first respondent, being the defendant in the divorce action which had been set down for hearing on 27 November 2015, applied for a postponement of the divorce action and of the determination of the question whether the settlement agreement concluded on 5 August 2015 was binding on the parties. The application was heard by Legodi J, who on 30 November 2015 made an order refusing the postponement and declaring that the settlement agreement was binding on the parties. The divorce action was then referred to Kollapen J. who on 30 November 2015 granted a divorce order. The settlement agreement was not made part of the order granted by Kollapen J. The respondent subsequently in February 2017 applied for, and was granted leave to appeal the declaratory order made by Legodi J, but thereafter failed to pursue the appeal, which consequently lapsed. The first respondent in his answering affidavit and in argument before me persisted in contending that the settlement agreement is not binding or has lapsed, and that the divorce has not yet been finalised in that he has not seen a signed and stamped divorce order and because there has allegedly not been a division of the accrual in the applicant's

estate. The settlement agreement entered into in the divorce proceedings, and bearing the case number in those proceedings, and

which has by order of this court been declared to be binding on the parties, in express terms finally disposes of all claims which either of the two parties to the marriage may have had against the other, including any claim which the first respondent may have had to share in the accrual of the applicant's estate. Even if his claim had not been compromised and extinguished in the settlement agreement, the claim vested at the date of divorce, being 30 November 2015, and would by now have become prescribed in terms of the provisions of the Prescription Act, 1969.

2. During 1998 the applicant's father Willem Erasmus as donor and the applicant and first respondent as trustees established the C[...] Family Trust in terms of a written Trust Deed. The beneficiaries (both in respect of income and capital) were stipulated to be the children born out of their marriage, at which time no children had yet been born. Subsequently three sons were born of the marriage, the elder two of whom are majors and full time students, the third being a scholar, and all three being dependent on the applicant for their maintenance. Neither the applicant nor the first respondent are beneficiaries of the Trust. During 1997 the first respondent was injured in a motor collision, and received payment of a substantial amount in damages. He advanced a most of the compensation which he received as a loan to the Trust, to enable the Trust to acquire certain immovable properties. It is common cause, and was confirmed in argument by applicant's attorney on her instructions, that this resulted in the first respondent having a credit loan account in the Trust.
3. The applicant seeks the removal of the first respondent as trustee, whereas the first respondent in a counterapplication seeks the removal of the applicant as trustee. It is common cause between the parties that it is in the best interests of the Trust and its beneficiaries that they should not both be trustees, and that one of them should be removed. In the hearing before me, the applicant was represented by attorney Michael Wagener, whereas the first respondent appeared in person. The Master of the High Court filed a notice to abide in which certain concerns were raised, and the second respondent, against whom no relief was claimed, did not oppose the application or appear before me. As the first respondent had no legal representation and claimed to be unable to afford legal representation, and himself drafted the answering affidavit, counterapplication and written heads of argument, I in the hearing went out of my way to ensure that the submissions which he wished me to consider were properly formulated by him in the context of the facts properly placed before me on affidavit, the issues in the application, and the relevant principles of law, in order to ensure that he had a full and fair opportunity to present his case.
4. The written settlement agreement concluded in August 2015 dealt, inter alia, with their parental rights and responsibilities relating to their three sons, who at the time were all minors, maintenance for the minor children, proprietary matters and three immovable properties owned by the Trust. The settlement agreement provided that the first respondent shall make payment of a sum of R300 000 to the credit of the banking account of the Trust within three months, failing which an undeveloped erf owned by the Trust, known as Erf 190 Kaapsche Hoop would be sold for not less than R350 000, and the nett proceeds of the

sale would be deposited to the credit of a banking account of the Trust, to be used solely for the payment of expenses to be incurred by the applicant in respect of the school fees and other scholastic needs of the three minor children.

The settlement agreement also provided that a second immovable property owned by the Trust, being Erf 240 Summer Place would immediately be sold for not less than R275 000, and the nett proceeds of the sale would be deposited to the credit of the Trust's banking account, to be used solely for payment of the monthly school fees and further scholastic expenses which the applicant may incur in respect

of the three children, being the Trust beneficiaries. The settlement agreement further provided that the first respondent's brother, being the second respondent, would be appointed as trustee of the Trust, and that on his appointment the applicant would resign as trustee. The relevant clause 5.4.1 and 5.4.4 of the settlement agreement provide as follows:

" Die Eiseres en die Verweerder ondemeem om binne sewe (7) dae vanaf ondertekening hiervan die nodige resolušie deur te voer om JPLC (the brother of the respondent, and the second respondent in the application before me) aan te stel as trustee van die Trust, en die partye ondemeem om nie onredelik hulle handtekeninge of toestemming te weerhou daarvoor nie, en om all handelinge en aksies nodig uit te voer en te verrig om te voldoen aan enige vereistes deur en vorskrifte van die Meester van die Hooggeregshof (the third respondent in the application before me) vir JPLC se aanstelling. Die Eisers sal op dieselfde dag waarop die nodige resolušie om LPLC as trustee aan te stel deurgevoer word bedank as trustee van die trust."

.....

Die partye ondemeem elk om enige en a/le dokumentasie soos vereis mag word te onderteken op die dag waarop die nodige reso/usie om JPLC as trustee aan te stel deurgevoer word en die Eiseres bedank as trustee van die trust." (my emphasis)

Subsequently, the first respondent disputed that the settlement was binding on the parties thereto, and refused to act in terms of these provisions. The R300 000 was not paid by the first respondent, and neither the Kaapsche Hoop nor the Summer Place erven were sold. Offers to purchase at the minimum prices stipulated in the settlement agreement could also not be procured, and the first

respondent refused to consent to the sale at lower prices. The applicant has continued to maintain the three still dependent children with no financial assistance from either the first respondent or the Trust. Under the circumstances where first respondent disputed that the settlement agreement was binding, and refused to act in terms thereof, the second respondent declined to accept appointment, and as a consequence the applicant and the first respondent remained and still are the only trustees of the Trust. In argument before me the first respondent confirmed that he was the cause of clause 5.4.1 of the settlement agreement not being implemented and of the fact that second respondent was not appointed as trustee.

5. The third immovable property owned by the Trust is a smallholding with a dwelling house and outbuildings, known as Tigerpoort, and which was during the marriage, and until the applicant and the three minor children left the home during April 2013, the communal home of the parties and their minor children. There is a mortgage bond registered over this property in favour of ABSA Bank as security for an amount lent to and owing by the Trust to the bank. The first respondent has remained in occupation of the Tigerpoort property since the applicant and the minor children left in April 2013, and is still in occupation of the property. The first respondent initially by agreement between him and the applicant made payment of the monthly mortgage bond loan repayments to ABSA Bank, but after the parties had become divorced and since March 2016, the first respondent ceased payment of the bond instalments, resulting in Absa Bank during January 2017 instituting legal action against the applicant as surety, for payment of the full outstanding loan balance secured by the mortgage bond registered over Tiegerporot. The applicant negotiated with Absa Bank to pay the arrears, and has since early 2017 made payment of the arrears owing to ABSA Bank, and continues to make payment of the monthly bond instalments to ABSA Bank. The first respondent has continued to reside on the Trust's property, Tiegerpoort. The first respondent has not in the past and still does not pay any rental in respect of the Tigerpoort property to the Trust, which has no source of income. The

first respondent is unemployed and claims to be unable to make any payments in respect of the Tigerpoort property or to pay any

maintenance in respect of the three children, all three of whom are still dependent. The first respondent has no professional qualifications, and due to the disability of his left arm resulting from the motor vehicle accident in 1997, he will probably be unable to obtain fulltime employment. The applicant, who is a qualified attorney but practises as a cost consultant, has also been making payment of the municipal charges and taxes in respect of the three immovable properties owned by the Trust, as the Trust has no income and none of the properties can be sold without the first respondent as co trustee agreeing thereto, which he refuses to do. Had it not been for the fact that the applicant has funded payment of the Trust's liabilities for several years, in respect of which her loan account in the Trust has been credited, the inevitable outcome would have been that one or more creditors would have obtained judgement against the Trust, and one or more of the Trust properties would have been sold in execution.

6. The applicant seeks an order that the first respondent be removed as trustee of the Trust, that Human Anderson (an experienced Chartered

Accountant with no connection to either the applicant or the first respondent) be appointed as trustee of the Trust, that the applicant's position as trustee be confirmed, and the costs of the application be borne by the Trust. In a counterapplication the first respondent seeks an order that his position as trustee be confirmed, that the applicant be removed as trustee, and that the first respondent's father be appointed as trustee, and that the Trust's accountants be removed from office. It was common cause on the affidavits filed, and in argument before me, that either the applicant or the first respondent should be removed as trustee, and that a new second trustee

should be appointed.

7. The grounds upon which the applicant seeks the removal of the first respondent as trustee are in summary as follows:

- The first respondent allegedly does not acknowledge that any of the trust properties belong to the Trust and should be appropriated for the benefit of the beneficiaries, and has on occasions stated that the trust properties belong to him in his personal capacity. The first respondent in his answering affidavit stated the following:

"It was represented to me (during negotiations preceding the conclusion of the settlement agreement) that I receive the Tigerpoort property as my own. I do believe that I should have a loan account against both the Tigerpoort and Kaapschehoop properties. In the form of these loan accounts I do believe that I should have some right to these properties. I do acknowledge that these are trust properties. These properties are long term investments and currently are not able to provide an income, nor did they ever provide income... The applicant forced the agreement on me, including the pretence that I receive this property as my own."

- Despite the terms of the settlement agreement, the first respondent has refused his consent as trustee to the sale of the Summer Place and Kaapsche Hoop properties. The reasons which the first respondent in the answering affidavit advanced for his refusal to agree to the sale of these two erven is that the settlement agreement is not binding, and that he believes that the properties are worth more than the prices at which the applicant wishes to sell the properties. He does not dispute that there are substantial amounts owing in respect of municipal rates in respect of these properties, and that the Trust has no income with which to pay these liabilities.
- The three sons of the applicant and the first respondent and who are the beneficiaries of the Trust are now at an age where they have substantial maintenance requirements, two being full time students,

and the other being a high school scholar, and it is necessary that trust properties be disposed of to generate an income to meet their maintenance requirements, particularly under circumstances where the first respondent makes no contribution to their maintenance. The first respondent's answer to this in his affidavit is that the beneficiaries have received a complete and privileged education at the highest level for the past eighteen years, at the cost of the applicant without any financial contribution for maintenance from him or the Trust, that the applicant has the financial means to provide alone for the maintenance of the children, that the Trust deed does not permit any distributions to be made to the beneficiaries before the youngest reaches the age of 25 years, and that he does not believe that the beneficiaries would agree to the sale of the properties. Even if he were to be correct, the Trust Deed expressly stipulates that it may be amended by agreement between the trustees while the founder (the applicant's father) is still alive, which he is, but that would require an agreement between the applicant and the first respondent as trustees. The parties in clause 5.4.3 of the settlement agreement undertook to pass all such resolutions and perform such actions which may be necessary to give effect to the

agreement and to comply with any legal requirements or directives of the Master to do so. This on a proper interpretation would include an amendment to the Trust Deed should this be required in order to permit the trustees to give effect to the settlement agreement. The applicant disputes that she has the financial means to maintain her three sons without any financial assistance from the first respondent or the Trust.

- It has become impossible to manage the Trust's affairs with the applicant and the first respondent as trustees, in that the first respondent refuses to cooperate with the applicant in regard to the affairs of the Trust. Furthermore, the applicant during March 2015 obtained a family violence interdict against the first respondent, in

terms of which the first respondent is prohibited from communicating with the applicant except for the purpose of discussing arrangements

regarding the children. In February 2017 the first respondent was found guilty of contempt of this court order, and sentenced to one year imprisonment, suspended for five years. As a result all matters regarding the Trust have to be raised through third parties and attorneys. These allegations are subject to any real or bona fide dispute in the respondent's answering affidavit. The answering affidavit is replete with allegations not relevant to the issues to

be decided in this application, invective and rhetoric, and conclusions by the first respondent constituting secondary facts, without the allegation of primary facts to support those conclusions. It is clear from the first respondent's answering affidavit

that he still harbours a high level of animosity and bitterness towards the applicant and the legal representatives, and has levelled

numerous, in my view unfounded, allegations of mendacity, perjury and fraud against the applicant. In my view it is not in the interests of the beneficiaries of the Trust that the trust assets be controlled and administered by trustees who continue, due primarily to the first respondent's conduct, to have such a toxic and confrontational relationship.

8. The grounds upon which the first respondent seeks the removal of the applicant as trustee, and the appointment of his father in her place, are in summary as follows:
 - That the applicant during the negotiations leading to the settlement agreement in the divorce proceedings fraudulently and falsely

represented to him that he would receive the Tigerpoort property as his own and now wishes to have him removed as trustee to deprive him of the property. This is disputed by the applicant, who points out that the first respondent was during the negotiations represented by both an attorney and counsel, and that the terms of the settlement agreement and the Trust Deed do not support the first respondent's

allegations. In my view the first respondent's allegations, which have little or no relevance to the issues which I am called upon to decide, are without foundation .

- That the attorney and advocate who were acting for him when the settlement agreement was negotiated and concluded gave him wrong advice and failed to act in his best interests, and that his signature to the settlement agreement was procured by fraud and undue influence. In my view the first respondent's allegations, which have little or no relevance to the issues which I am called upon to decide, are without foundation.
- That the applicant in the settlement agreement agreed to resign as trustee, but has failed to do so. He contends that this resulted in the lapsing of the settlement agreement. In my view there is no merit in this complaint, as the settlement agreement, on a proper

interpretation thereof, provides that the applicant would resign upon the appointment of the second respondent as trustee in her place, the first respondent refused to act in terms of the settlement agreement to have the second respondent appointed as trustee, and the second respondent subsequently declined to accept appointment as trustee. The Trust Deed requires that there should at all times be two trustees, and the obvious consequence was therefore that the applicant and the first respondent at that time remained the only two trustees.

- That the applicant, the accounting firm established by her father and which acts as accountant for the Trust, and her father are allegedly involved in dubious maladministration of the Trust's finances, and have manipulated the loan accounts in the Trust's books of account. These allegations are denied by the applicant. The first respondent also contends that the applicant and the trust accountants have failed to keep financial records for the Trust, have failed to keep minutes and resolutions relating to trust transactions, and have failed to maintain an asset register. The first respondent contended in his written heads of argument that the applicant has contributed an amount of R1 219 000 to the Trust and that he has contributed more than R542 000 to the Trust, but that the books of account do not correctly reflect the amounts owing to them by the Trust. These contentions must be evaluated in the light of the common cause fact that the first respondent after formation of the Trust lent most of the amount he had received as compensation for his personal injuries to the Trust, that the Trust is owner of three immovable properties and no other assets, that the Trust receives no income, has made no distribution of income or capital, has continued to incur liabilities in respect of the three immovable properties which have been financed by the applicant alone since 2016, and has not entered into any transactions which would require a resolution of trustees. It is also common cause that the trustees have since 2013, due to the acrimonious breakdown of their marriage, been unwilling and unable to meet and rationally discuss and decide upon the affairs of the Trust.

In my view there is no factual foundation on the affidavits before me for the first respondent's complaints in this regard against the applicant.

9. Section 20(1) of the Trust Property Control Act 57 of 1988 provides that "A trustee may, on the 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." The applicant as a trustee, even though not a

beneficiary of the Trust, is clearly a person having an interest in the property, with the necessary locus standi to apply for the removal of a cotrustee. (See *Kidbrooke Place Management Association and Another v Walton and Others* NNO 2015

(4) SA 112 (WCC) at [15] [18])

In the matter of *Tijmstra NO v BluntMcKenzie NO and Others* 2002 (1) SA 459 (TPD) *KirkCohen J* held that a trustee may be removed even if his conduct complained of was bona fide, that mala fides or even misconduct are not necessary requirements for a trustee's removal, that conduct of a trustee in treating a trust asset as his own would be a circumstance justifying the removal of the trustee, as would a failure by a trustee to take proper and reasonable steps to safeguard the trust assets.

In the matter of *Kidbrooke Place Management Association v Walton* NNO 2015 (4) SA 112 (WCC) at para [49] [54] *BinnsWard J* correctly stated that a trustee, even though innocent, whose position involves a conflict of interest and duty may be removed from office by the court, that the sufficiency of the cause for removal is to be tested by consideration of the interests

of the trust estate, and a misconstruing by a trustee in material respects of the nature of his role, duties and responsibilities as trustee, would justify his removal as being in the interest of the trust and its beneficiaries, as contemplated in section 20(1) of the Trust Property Control Act, 1988. To borrow from the language of *BinnsWard J* at para [54], it can be said in respect of the first respondent that "the unresolved issues that I have discussed in relation to the discharge of his functions as trustee are a festering problem in the administration of the affairs of the Trust that will not be laid to rest for so long as he remains in office."

See also *Gowar v Gowar* 2016(5) SA 225 (SCA)

10. The first respondent's ongoing disputes, bitterness and unhappiness in regard to the Trust, its properties and financial administration

appear to stem mainly from his dissatisfaction with the terms of the settlement agreement, the status of his loan account and a need, due to his precarious financial circumstances and physical disability, to receive payment of the amount owing to him by the Trust, and his contention that he has not received complete annual financial statements of the Trust from the applicant, who it is common cause has managed the Trusts' financial affairs from the outset and has instructed the Trust's accountants. In his written heads of argument the first respondent submitted the following:

"In the event that the court finds that the first respondent is to be removed as trustee, then as part of such an order, it should include a payout to the first respondent, regarding his loan account...
The first respondent respectfully

admits (sic) that he will abide by the court in the event that he be removed as trustee or the trust be terminated as described above, it will bring a final and fair closure to this extremely acrimonious and costly legal actions. Then the parties can both eventually continue with their respective lives...."

It would not be competent for me to make an order in these proceedings that the Trust pay to the first respondent the amount which he claims should be reflected as a credit on his loan account in the Trust. During argument applicant's attorney, in reply to a question from me and after having taken instructions from the applicant, conceded that the first respondent has a credit loan account in the Trust. I invited the applicant (who was present in court) through her attorney, in order to avoid or limit inevitable further litigation, to consent to an order that she furnish the first respondent with a full statement of account in respect of his loan

account in the Trust from inception to date, reflecting all debits and credits, and furnish him with copies of annual financial

statements of the Trust signed by her as correctly reflecting the financial affairs of the Trust. The applicant to her credit consented

to such an order being made.

11. Taking into account the content of the affidavits and the written and oral submissions made to me, I am satisfied that the first respondent's removal as trustee of the C[...] Family Trust will be in the interests of the Trust and its beneficiaries, as contemplated in section 20(1) of the Trust Property Control Act 57 of 1988. I am further of the view that there is no merit in the first respondent's

counterapplication, and that he has failed to establish an entitlement to any of the relief which he claims.

The applicant has also sought an order that Mr Human Anderson be appointed as trustee of the C[...] Family Trust. Mr Anderson, whose confirmatory affidavit is annexed to the application, appears to be an independent and suitably qualified person to act as trustee. The third respondent has filed a notice of intention to abide, in which he records that he is not aware of any reason why Mr Anderson should not be appointed as trustee of the C[...] Family Trust. As section 13 of the Trust Property Control Act

57 of 1988 vests the Master with the power to appoint and authorise a trustee in the place of a trustee who ceases to hold office, such appointment should be made by the Master and not by the court.

In the third respondent's notice of intention to abide a concern is raised in regard to the applicant's request that the costs of the application be paid by the Trust and not by the first respondent. It is clear on the papers before me that the applicant, who has incurred legal expenses in advancing the interests of the Trust and its beneficiaries, is unlikely to be able to recover such costs from the first respondent in terms of any cost order which I might make. In regard to the concerns expressed by the third

respondent as to the appropriate cost order, clause 9.6 of the Trust Deed provides that the trust income may be applied to make any repayment to a trustee in respect of expenses which a trustee personally may have incurred in the execution of the trustee's duties for the benefit of the Trust. The first respondent raised no objection to the cost order sought by the applicant. Under these circumstances I am of the view that it would be just and equitable to order that the costs of this application, on a scale as between attorney and client, be borne by the C[...] Family Trust.

12. In the result I make the following order:

1. The first respondent is removed as trustee of the C[...] Family Trust IT502/1998.
2. I direct that the Master of the High Court, Pretoria (the third respondent) should appoint Mr Human Anderson and authorise him to act as trustee of the C[...] Family Trust IT502/1998. In terms of the provisions of the Trust Deed, Human Anderson should be exempted from the requirement to provide security to the Master of the High Court for the performance of his duties as trustee.
3. The costs of this application, on a scale as between attorney and client, are to be paid by the C[...] Family Trust IT502/1998.
4. The first respondent's counterapplication is dismissed, with the consequence that the applicant's position as trustee of the C[...]

Family Trust IT502/1998 is confirmed.

5. The applicant is directed to deliver to the first respondent within three months of date of this order, a detailed statement of account in respect of the first respondent's loan account in the C[...] Family Trust from inception of the Trust to 28 February 2019, reflecting and describing all debits and credits to the loan account, supported by copies of such vouchers or documents as may be available to the applicant to support the loan account entries.
6. The applicant is directed to deliver to the first respondent within three months of date of this order, copies of the annual financial

statements of the C[...] Family Trust for the financial years ending February 2015, 2016, 2017, 2018 and 2019, signed and confirmed by the applicant as being a fair and correct reflection of the financial affairs of the C[...] Family Trust.

NGD MARITZ AJ

Acting Judge of the High Court

Gauteng Local Division, Pretoria

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