

SOUTH AFRICA / JUDGMENT

Van Der Meulen v Ras N.O. and Others (45647/2008) [2009]

ZAGPPHC 313 (14 August 2009)

[2009] ZAGPPHC 313

COURT

North Gauteng High Court, Pretoria

BEFORE

Ledwaba

CASE / FILE NUMBER

45647/2008

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IN

THE HIGH COURT OF SOUTH AFRICA

(NORTH

GAUTENG HIGH COURT, PRETORIA)

CASE

NO: 45647/2008

DATE:

14 AUGUST 2009

In

the matter between:

NICOLINE

VAN DER MEULEN.....Applicant

And

MARGARETHA

ALETTA RAS N.O.....First

Respondent

MARGARETHA

ALETTA VISSER (BORN RAS) N.O.....Second

Respondent

PIETER

VISSER N.O.....Third

Respondent

MASTER

OF THE HIGH COURT-PRETORIA

.....Fourth

Respondent

JUDGMENT

LEDWABA, J

INTRODUCTION

- [1] The applicant issued this application seeking an order set out in the notice of motion. First, second and third respondents are opposing the application. The fourth respondent did not file opposing papers. The order sought against the fourth respondent is set out in prayer 4 of the notice of motion wherein the applicant prays that the fourth respondent to be ordered to make an investigation in terms of section 16 of the Trust Property Control Act 57 of 1988 (the TPC Act) concerning the administration of the Bokfontein Trust.
- [2] The late filing of applicant's replying affidavit was condoned by the court and the issue of costs was to be determined after the arguments in the main case.
- [3] Applicant's counsel, Advocate Heiberg SC, when he commenced with his submissions abandoned prayer 5 of the notice of motion. He also submitted that the court should postpone the application sine die and order the fourth respondent to have an investigation and file a report for the court before the court can hear the main application.
- [4] However, Advocate Louw SC, for the respondents, submitted that the court should first determine the issue of locus standi of the applicant raised by the respondent.

FACTUAL

BACKGROUND

- [5] The summary of the facts which are common cause that:

5.1 The founder/donor of the trust in issue herein, Bokfontein Trust, Mr. Johannes Cornelis Ras, died in February 2006. He also created other trusts for his children as an estate planning exercise.

5.2 The applicant and the second respondent are the donors daughters and the third respondent is the second respondent's husband. The first respondent is the donor's wife.

- [6] When the Bokfontein Trust was created on the 25th May 1994, the appointed capital beneficiary was the applicant. The initial trustees of the trust were the donor, first respondent and Venter and de Jager Trustees (Pty) Ltd represented by Jacob Nicolaas van der Westhuizen.
- [7] On the 25th March 1999 the trustees made a resolution to amend the trust deed by deleting paragraph 21.1.3.1(a) of the trust deed, see annexure L4. A further resolution was made to amend the capital beneficiary by removing the applicant and replacing her with the second respondent.

- [8] Venter and de Jager Trustees were removed as trustees on 13th November 2004 and were substituted with the second respondent.
- [9] In December 2004 the trust deed was further amended by agreement, see annexure C1 page 64, between the donor and the trustees. Johannes

Cornelius Ras acted in his capacity as a donor and as a trustee. Clause 1, 2 and 3 of the said agreement to amend reads as follows:

“

1.

Die partye kom ooreen dat die bepalings van die trustakte van die Trust gewysig word deur die invoeging by die omskrywing van “Kapitaalbegunstigdes” op bladsy 2 van die trustakte en na die die naam Nicolene van der Meulen die volgende “en MARGARETHA ALETTA VISSER (gebore 17 Desember 1954)”.

2.

Die Partye kom voorts ooreen dat in die interpretasie en toepassing van die trustakte deur die trustees van tyd tot van die Trust die bepalings van die Trust so interpreter en toegepas sal word om gevolg te gee ann voormelde wysining.

3.

Geen ander bepalings van die Trustakte word gewysig buiten sodanige wysings hierin vermeld nie. ”

- [10] November 2008 after the applicant issued this application the Trustees passed another trust resolution dated 4th November 2008 revoking previous trust resolutions and revoking the 2004 resolution, the result of which would be the removal of the applicant as a capital beneficiary of the trust.

EVALUATION OF THE MATTER

- [11] This court should scrutinise the aforesaid resolutions, in the light of other relevant factors to determine if the applicant has locus standi or not to file this application.
- [12] It is trite law that the donor and the trustee of a trust are entitled to cancel or amend the contract concluded between them at any time prior to the third party accepting the benefit in terms of the trust deed.
- [13] The 1999 resolution should be carefully considered in determining whether the applicant has locus standi or not.
- [14] Ex facie annexures L4 and L5 at the meeting of the trustees dated 25th March 1999 it was decided to effectuate the objectives of the trust, to amend the trust deed by deleting paragraph 21.1.3.1(a). The contents of annexure L4 read as follows:

“Ingevolge ’n trustee vergadering van die Bokfontein Trust IT3614/94 gehou te Brits is die volgende besluite genome:

Ten einde uitvoering te gee aan die doelstellings van die trust is besluit om die volgende wysiging tot die trustakte gedateer 25 Mei 1994 aan te bring naamlik:

Dat paragraaf 21.1.3.1(a) geskrap word.” (own underlining).

[15] In my view, the trustees made an amendment set out in annexure L4 so that the resolution in annexure L5 to appoint the second respondent as a beneficiary could be effective.

[16] To determine the validity of the resolution in annexure L5 the contents of the trust deed more particularly, clause 21 with the heading ‘WYSIGING VAN TRUSTAKTE which deals with the amendment of trustees reads as follows:

“21.1 Die TRUSTEES mag die bepalings van die trust wysig.

Hulle reg om te wysig is egter beperk tot die mate dat:

21.1.1 Geen wysiging die effek mag hê om die doelstellings van die trust te wysig nie;

21.1.2 Geen wysiging ten opsigte van die KAPITAALBEGUNSTIGDES hoegenaamd na die afsterwe van die langlewende van die TRUSTEES JOHANNES CORNELIS RAS en MARGARETHA ALETTA RAS mag plaasvind nie, en

21.1.3 niemand ooit as KAPITAALBEGUNSTIGDES van die trust corpus buite die volgende klas aangestel mag word nie:

21.1.3.1 een of meer van die volgende:

- (a) die persone volgens die omskrywing van KAPITAALBEGUNSTIGDES op bladsy 2 hierbo gemeld;
- (b) ’n trust of trusts waarvan die enigste begunstigdes bestaan uit een of meer van die persone gemeld in (a) en (b);

Of slegs by gebreke aan die bestaan van enige van 21.1.3.1 (a) of (b),

21.1.3.2 een of meer intestate

erfgename van die TRUSTEE, JOHANNES CORNELIS RAS.

Hierdie reg van die TRUSTEES om KAPITAALBEGUNSTIGDES te wysig, hou in dat hulle persone kragtens die omskrywing van KAPITAALBEGUNSTIGDES op bladsy 2 hierbo, kan uitsluit en ’n ander KAPITAALBEGUNSTIGDE kan aanstel ooreenkomstig die voormelde prosedure.”

[17] Advocate Louw SC submitted that the founder signed annexures L4 and L5 in his capacity as the founder not as the trustee. However, there is no direct evidence that Mr. Ras when annexures L4 and L5 were made was solely acting in his capacity as the founder and not the as a trustee

- [18] In my view, even though Johannes Cornelius Ras signed as the founder and trustee, having regard to the words “n trustee vergadering’ in annexure L4 the resolution was taken by the trustees of Bokfontein and Mr. Ras was acting in his capacity as a trustee.
- [19] When the founder formed Bokfontein Trust four other trusts wherein the only beneficiary was the founder’s children viz, Roodeport Trust, Eldorado Trust, the Heunig Trust and the Manzi Trust were in existence.
- [20] Now according to the resolution in annexure L4 if clause 21.1.3.1(a) is deleted the other entity that could be appointed as a beneficiary is a trust(s) wherein the beneficiary is a person mentioned in the deleted clause and in clause 21.1.3.1(b). The interpretation of clause 21.1.3.1(b) does not make sense in that no person is mentioned in subsection (b).
- [22] The validity of the resolution in annexures L4 and L5 is not challenged by both counsel. Advocate Louw SC submitted that in determining the validity of annexure L5 the intention of the founder is for the first respondent to benefit their four children equally by appointing them as capital beneficiaries in the trusts formed which should be considered.
- [23] To support the said submission that the founder and the first respondent wanted their children to benefit equally a hand written document prepared by Mr. Ackermann was attached, see annexure MAR3. They further alleged that a further trust was to be called Morêster Trust which was to be formed for the applicant and she was to be the only beneficiary, being a farm in the Free State.
- [24] Significantly, the applicant’s response to the said allegation is that if Mr. Boschhoff, who made a confirmatory affidavit, informed the founder and Mr. Ackermann that their intended actions were not only unfair but would also violate the trust deed. The issue of breach of fiduciary duty by the trustees, is in my view, raised by the aforesaid allegation.
- [25] The amendment in annexure L5 was, in my view, not in accordance with the remaining provisions of the trust deed authorising an amendment to the trust deed.
- [26] Despite the problem caused by the resolution amending the trust deed annexure L4, there is no application before me to vary the trust provisions in terms of section 13 of the TPC Act which reads as follows:

“13. Power of court to vary trust provisions.

If a trust instrument contains any provision which brings about consequences which in the opinion of the court the founder of a trust did not contemplate or foresee and which-

- (a) hampers the achievement of the objects of the founder; or
- (b) prejudices the interests of beneficiaries; or
- (c) is in conflict with the public interest,

The court may, on application of the trustee or any person who in the opinion of the court has a sufficient interest in the trust property, delete or vary any such provision or make in respect thereof any order which such court deems just, including an order whereby particular trust property is substituted for particular other property, or an order terminating the trust. ”

- [27] The issue of whether the applicant is the capital beneficiary to the Bokfontein Trust is exacerbated by the 2004 resolution of the trustees in adding the second respondent as a capital beneficiary after the name of the applicant.
- [28] The first respondent’s explanation is that when the trustees made the 2004 resolution they had forgotten about the 1999 amendment and resolution in annexure L5.
- [29] Advocate Louw SC correctly submitted that the resolution of 7 December 2004 makes no sense having regard to the resolution made on 25 March 1999 and should be regarded as void and unenforceable. Advocate Heiberg SC submitted that even if annexures L4 is a valid amendment, annexure. L5 and the 2004 resolution are contrary to the contents of the amended trust deed.
- [30] The November 2008 resolution was made by the trustees to revoke the 2004 resolution the aim being to appoint the second respondent as the sole capital beneficiary.
- [31] Applicant, inter alia, wants the fourth respondent to conduct an investigation in terms of section 16 of the TPC Act which reads as follows:

“16. Master may call upon trustee to account.

- (1) A trustee shall, at the written request of the Master; account to the Master to his satisfaction and in accordance with the Master’s requirements for his administration and disposal of trust property and shall, at the written request of the Master, deliver to the Master any book, record, account or document relating to his administration or disposal of the trust property and shall to the best of his ability answer honestly and truthfully any question put to him by the Master in connection with the administration and disposal of the trust property.
 - (2) The Master may, if he deems it necessary, cause an investigation to be carried out by some fit and proper person appointed by him into the trustee’s administration and disposal of trust property.
 - (3) The Master shall make such order as he deems fit in connection with the costs of an investigation referred to in subsection (2)”
- [32] As it is clear in the papers that there are disputes of facts in respect of certain issues and there is an allegation that the trustees did not act in good faith by Mr. Boschoff. It will not be proper, in my view, to replace the trustees unless a proper investigation has been conducted by the fourth respondent.

[33] Without making a ruling on whether the applicant is a capital beneficiary on the Bokfontein Trust or not I am satisfied that she has sufficient interest in the matter warranting that she can file this application and can request the Master to carry on an investigation in the matter.

[34] It will be fair and in the interest of justice that such an investigation should be held. Justice would be denied if the complex application of this nature could be concluded on the basis that because there is an issue on whether the applicant is a capital beneficiary or not then the applicant should be at a cul-de-sac.

[35] I therefore, make the following order:

- (1) The fourth respondent be and is hereby ordered to carry out an investigation in terms of Section 16 of the Trust Property Control Act 57 of 1988 a copy of the report to be served on the applicant and respondent's attorneys of record;
- (2) The application is postponed sine die to be enrolled by agreement between the parties after the report by the fourth respondent had been filed;
- (3) Pending the final adjudication of this application:

3.1 The first, second and third respondents may not take any decisions to the detriment of the Bokfontein Trust without the written approval of the fourth respondent, the Master.

3.2 The first, second and third respondents may not take any decisions regarding the appointment or removal of Capital Beneficiary or beneficiaries to the Bokfontein Trust.

(4) Costs reserved.

A.P. LEDWABA

JUDGE OF THE HIGH COURT

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