

SOUTH AFRICA / JUDGMENT

# Van Graan N.O and Others v Waisman and Others (2509/2022) [2023]

## ZAECMKHC 27 (21 February 2023)

[2023] ZAECMKHC 27

## COURT

Eastern Cape High Court, Makhanda

## BEFORE

JE Smith

## CASE / FILE NUMBER

2509/2022

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## Policy

IN THE HIGH COURT OF

SOUTH AFRICA

(EASTERN CAPE DIVISION

– MAKHANDA)

CASE NO.: 2509/2022

## Matter heard on:

19 January 2023

Judgement delivered

on: 21 February 2023

In the matter between: -

JENNIFER ELIZABETH VAN

GRAAN N.O.

First Applicant

(as Trustee of the

Godfrey van Graan Family Trust)

JENNIFER ELIZABETH VAN

GRAAN N.O.

Second Applicant

(as Trustee of the Gowan

Hill Trust)

JENNIFER ELIZABETH VAN

GRAAN N.O.  
Third Applicant  
and  
MARILYN  
ELIZABETH WAISMAN  
First Respondent  
CAROLYN ANNE  
JOHNSON  
Second Respondent  
SANDRA LEE  
BOSCH  
Third Respondent  
BERNICE ROSSLYN DICKIE  
Fourth  
Respondent  
MARK ALISTAIR  
BRADLEY  
Fifth Respondent  
GABRIELLE ANN  
JOHNSON  
Sixth Respondent  
RYAN RICHARD  
JOHNSON  
Seventh Respondent  
KAYLIE-ANN  
BOSCH  
Eight Respondent  
DEVAN STOW  
BOSCH  
Ninth Respondent  
ROSS DOUGLAS  
DICKIE  
Tenth Respondent  
JUSTIN DYLAN  
DICKIE  
Eleventh Respondent  
JENNIFER ELIZABETH VAN  
GRAAN N.O.  
Twelfth Respondent  
MARILYN  
ELIZABETH WAISMAN  
Thirteenth Respondent  
MARK ALISTAIR  
BRADLEY  
Fourteenth Respondent  
MASTER OF THE HIGH  
COURT  
Fifteenth Respondent

## JUDGMENT

SMITH J:

## Introduction

[1] At the heart of this matter lies a bitter family feud between a mother and her daughters regarding the management and control of two family trusts. The deceased patriarch, Mr Godfrey van Graan, was by all accounts an astute and accomplished businessman who had amassed a considerable estate during his lifetime, including two trusts, namely the Godfrey van Graan Family Trust (the Family Trust), which he founded during 1989 and the Gowan Hill Trust, which he acquired during

1990. He passed away during 2016.

[2] As he was nearing the end of his life, he set about composing a ‘Letter of Wishes’ wherein he, amongst others, recorded his wishes for the administration of his estate after his death. With commendable meticulousness and sensitivity, he gave directives for the management of his various businesses and the family trusts, and imparted words of wisdom, sagaciously encouraging his family always to ‘save part of what you earn for a rainy day’. At first glance then the epistle is an instructive and perhaps even moving farewell by a man who had done everything in his power to ensure that his family would be well taken care of after his death. But, then an incongruously harsh statement intrudes into the aura of beneficence and magnanimity that otherwise permeates the letter. Regrettably, it seems that Mr van Graan had succumbed to that most basic and chauvinistic instinct that impels men to devise schemes aimed at controlling their surviving spouses from beyond the grave. For, he declares with unexpected ferocity that in the event of his wife remarrying or finding another romantic partner, she will ‘immediately

lose half of what is allocated to [her]’ and will have to move out of their house. It is hardly surprising then that when Mrs Jennifer van Graan eventually did meet someone else, this unfortunate statement would either precipitate or aggravate an internecine enmity between her and one of her daughters, Mrs Marilyn Waisman, rendering the family trusts dysfunctional and threatening to destroy the very legacy that he had worked so hard to establish.

[3] When it had become clear that the hostilities between her and Mrs Waisman had deteriorated to the extent that it imperils the functioning of the trusts, Mrs van Graan instituted proceedings for an order, inter alia, removing her and Mrs Waisman as trustees of both trusts and appointing three independent trustees in their stead. The application was opposed by Mrs Waisman and her two sisters, the second and third respondents, as well as other beneficiaries, being the sixth to ninth respondents.

- [4] Mrs Waisman, supported by the second to ninth respondents, brought a counter-application seeking, inter alia: (a) the removal of Mrs van Graan as a trustee; (b) appointment of herself, the second and third respondents, as well as her other sister, Mrs Bernice Dickie, as trustees; and (c) the appointment of an independent trustee by the Master. The counter-application was opposed by Mrs van Graan and Mrs Dickie. Mrs Waisman also applies for certain portions of Mrs Dickie's opposing affidavit to be struck out on the basis that they constitute irrelevant and vexatious matter or inadmissible hearsay evidence.
- [5] Mrs van Graan's application is grounded in the contention that the enmity between her, on the one hand, and Mrs Waisman and her other siblings on the other, 'runs so deep that the court's assistance is necessary to ensure that the two trusts, around which all the disputes revolve, are saved from collapse.'
- [6] The Family Trust deed provides, inter alia for: (a) the appointment as trustees of Mr Graan, 'failing for any reason his wife', Mrs Van Graan, their daughter Mrs Carolyn Ann van Graan and an independent trustee, one Mr Biggs of Pim Goldby; (b) distribution of the nett income to beneficiaries; (c) trust resolutions to be taken by virtue of joint decisions, and in the event of differences between the trustees, for disputes to be referred for arbitration; (d) trustees to keep proper books of account and; (e) the submission of audited financial statements to all major beneficiaries.
- [7] The current beneficiaries of the Family Trust are Mrs Van Graan, Mrs Waisman and the second to ninth respondents. Mrs van Graan and Mrs Waisman are currently the only trustees, after the resignation of the independent trustee, Mr Mark Alistair Bradley, during 2020. The trust assets, which include an engineering company, are valued between R60 million and R70 million. It is common cause that the last signed audited financial statements of the Family Trust were approved in 2018.
- [8] Mrs van Graan and Mrs Waisman are also the only current trustees of the Gowan Hill Trust. That trust deed provides, inter alia:
- (a) for trust resolutions to be passed by majority decision; (b) in the event of equality of voting, for a dispute to be referred for arbitration and; (c) that trustees have discretionary powers to distribute nett income to beneficiaries.
- [9] The last financial statements of the Gowan Hill Trust were also approved in 2018, and they reflect an immovable property valued at R15 million as the Trust's only asset.

#### Mrs van Graan's application

- [10] Mrs van Graan contends that the relationship between her and Mrs Waisman has deteriorated to the extent that there is no possibility of its restoration. According to her, the prevailing enmity has resulted in conduct 'so egregious and prejudicial to the administration of the trusts' that the removal of the current trustees is both inevitable and necessary to avoid a complete collapse of the trusts.

- [11] She cites a number of instances where communication between her and Mrs Waisman points to a complete lack of trust between them and an irredeemable toxicity that threatens to destroy the trusts. She does not seek to allocate blame, and accepts her complicity in the current impasse, but laments the fact that their relationship 'had reached a point of no return.' These hostilities are regrettably not confined to her and Mrs Waisman, but also extent to her other siblings, who are now in different camps.
- [12] I do not believe that it is necessary for me to go into the detail of the unfortunate communications between mother and daughter, suffice it to say that the epitaphs that Mrs van Graan has ascribed to them – namely, 'disgraceful', 'egregious' and 'toxic' - are justified and apposite. They speak not only to accusations of dereliction of fiduciary duties, lack of mental capacity but, more ominously, also of theft and fraud. No wonder then that the simmering hostilities have rendered the trusts dysfunctional.
- [13] Mrs van Graan contends that the inability of her and Mrs Waisman to communicate meaningfully has resulted in the trustees not being able to agree on the finalization of financial statements since 2018. According to her, financial record-keeping for both trusts 'came to a grinding halt during 2019, after the 2018 statements were signed'. In addition, the enmity has led to the freezing of the trusts' bank accounts, resulting in the trusts being unable to make any payments for a few months.
- [14] She asserts that the situation can only be salvaged by the removal of both her and Mrs Waisman as trustees and the appointment of three independent trustees, namely Mr Parker, the managing director of the law firm, Rushmere & Noach, Mr van der Merwe, a chartered accountant and Mr Wood, a quantity surveyor and expert in the field of property management.
- [15] In addition, she seeks ancillary relief that will, inter alia, facilitate investigations into the trusts' financial affairs, finalization of financial statements and regularization of the trusts' tax obligations.

#### Mrs Waisman's counter-application

- [16] As mentioned, in her counter-application, Mrs Waisman seeks an order removing Mrs van Graan as trustee of both trusts, appointing her and her siblings as trustees and directing the Master to appoint an independent trustee for both trusts.
- [17] Mrs Waisman lives and works in the United Kingdom and has been employed by a commercial and residential investment company for more than 25 years. She is also a trustee of two charitable trusts, positions which she contends have enabled her to become well-versed with the fiduciary duties of trustees.

- [18] Deprecating the allegations in Mrs van Graan's founding affidavit as 'emotive invective' and 'devoid of necessary factual averments', she finds succour in Mr van Graan's last will and testament, and more particularly, the 'Letter of Wishes', which she contends explains the latter's 'intention and his rationale' in creating the Family Trust.
- [19] She contends that if regard is had to those documents, it is clear that the Family Trust deed exemplifies the fact that Mr van Graan intended the trusts to be controlled by family members. While the deed empowers the trustees to employ or consult professionals where necessary, it does not empower them to appoint such professionals as trustees (Clause 7.4.4 of the Family Trust deed). She maintains that if regard is had to other relevant provisions of the trust deed, it is manifest that her father intended that only one independent trustee should be appointed.
- [20] In respect of the Gowan Hill Trust, she contends that even though her father was not involved in the drafting of the trust deed, it is evident from resolutions adding her, her siblings and Mrs van Graan, and eventually the Family Trust, as income and capital beneficiaries; that her father intended to incorporate also that trust into the legacy he was building for his family.
- [21] While conceding that the trusts are dysfunctional, Mrs Waisman asserts that the situation is not beyond remedy and that whatever dysfunctionality there may be is not as a result of a family feud, as contended by Mrs Van Graan, but is rather caused by the latter's conduct and her complete disregard for her fiduciary duties as trustee of both trusts.
- [22] The following are some of the irregularities allegedly perpetrated by Mrs van Graan. During 2017, Mrs van Graan unilaterally approved a loan of R650 000 to herself for the purchase of an immovable property. The property was subsequently registered in her name. She has also actively concealed the transaction. Mrs van Graan allegedly also attempted to prevail upon Mrs Waisman to sign a resolution authorizing her to purchase another property during 2020. Despite the fact that Mrs Waisman refused to sign the resolution, Mrs van Graan nevertheless proceeded with the purchase. She subsequently discovered that six payments from the Family Trust account, totalling R1 300 000, were made to attorneys in connection with the purchase of the immovable property. Mrs van Graan had accordingly unlawfully utilized trust funds to pay for the property.
- [23] During August 2020, a further amount of some R399 000 was withdrawn by Mrs van Graan, presumably to pay the balance of the purchase price. Mrs van Graan has accordingly acted to the prejudice of the trust by diminishing its fixed interest earning investments in order to fund her own personal acquisitions. She has therefore, in flagrant breach of her fiduciary duties, placed her own personal interest above that of the trust.

- [24] In addition, Mrs van Graan, using outdated Letters of Endorsement showing removed and deceased trustees, fraudulently misrepresented that she was entitled to represent the trusts in dealings with a security company. This conduct, Mrs Waisman contends, is another example of her mother's flagrant disregard for her fiduciary duties.
- [25] Mrs Waisman also asserts that her mother has shown poor judgment in her dealings with her partner, Mr Parker. She has given him unauthorized access to highly confidential trust information without the other trustees' knowledge or consent. This is another indication of her poor judgment when it comes to the affairs of the trusts. According to Mrs Waisman, her mother continually demonstrates a potential to be influenced by others and her acts have served to imperil trust assets.
- [26] Furthermore, in a letter penned by former trustee Mr Bradley, he bemoans Mrs van Graan's irregular 'moving significant monies from one Investment Portfolio to another without knowledge or consent from all the trustees'. And in an email that Mr Bradley addressed to her on 11 March 2020, he expresses his concern for Mrs van Graan's lack of regard for her fiduciary duties as a trustee.
- [27] Mrs van Graan opposed the counter-application, but curiously elected not to answer the specific allegations levelled by Mrs Waisman and aimed at impugning her suitability to perform her fiduciary duties. She has instead labelled the application a 'guise' by Mrs Waisman to take control of the trusts and to run them as her own fiefdom. She also asserts that the allegations proffered by the former in support of the counter-application only serve to substantiate her contention that the trusts are dysfunctional and require the court's emphatic and effective intervention. To the extent that material disputes of fact may have arisen on the papers, she contends that those should be referred for oral evidence.

#### Application to strike out

- [28] As mentioned, the fourth respondent, Mrs Dickie, opposed the counter-application and filed a more comprehensive answering affidavit than that filed by Mrs van Graan. Before I consider the contents of the affidavit, I must first deal with the application to strike out. Mr Goodman SC, who acted for the applicants in the counter-application, has applied to strike out numerous portions of that affidavit on the grounds that they constitute unsubstantiated hearsay evidence or are scandalous, vexatious or irrelevant. In my view, the impugned portions indeed fall to be struck out on the grounds advanced by Mrs Waisman.
- [29] There was some attempt by Mrs Dickie belatedly to file confirmatory affidavits, but as Mr Goodman correctly pointed out, they did not remedy the defect. Mrs Dickie did not disclose the source of the hearsay information, neither did she say how she acquired it. She also did not apply for the hearsay evidence to be admitted in terms of section 3 of the Law of Evidence Amendment Act, 45 of 1988 or the common law. Those portions of her affidavit that have been impugned on this ground accordingly fall to be struck out.

[30] There can also be little doubt that the impugned scandalous and vexatious matter are prejudicial to the applicants in the counter-application. The proceedings are by their very nature highly emotionally charged and parties should be discouraged from unnecessary emotional assertions which have no factual basis and bear no relevance to the issues that fall for decision. Those portions of the affidavit assailed on this basis accordingly also fall to be struck out.

#### Discussion

[31] The striking out of substantial portions of Mrs Dickie's affidavit leaves insufficient factual challenges to Mrs Waisman's allegations in the counter-application so as to raise bona fide disputes of fact. And as I mentioned earlier, Mrs van Graan has not made any attempt to challenge Mr Waisman's averments regarding the alleged breaches of her fiduciary duties. In consequence the counter-application must be decided on the basis of the allegations contained in Mrs Waisman's affidavit.

[32] However, having said that, I do not believe that there is any factual basis for the assertion that Mrs van Graan has been guilty of theft, fraud or any unlawful appropriation of trust assets. And I do not think that Mrs Waisman herself was genuinely of this view. If she indeed believed this to be the case she would not have waited until Mrs van Graan brought her application before filing a counter-application for her removal as trustee. The undisputed facts contained in Mrs Waisman's affidavit do, however, establish that she has, at the very least, been guilty of dereliction of her fiduciary duties as a trustee.

[33] Our law demands exacting standards of trustees in their dealings with trust property, requiring greater care from a trustee than she might have shown in dealing with her personal property. A trustee's fiduciary duties require of her 'in dealing with and investing the money of the beneficiary, to observe due care and diligence, and

not to expose it in any way to any business risks.' (Sackville-West v Nourse 1925 AD 516, at 533 to 516) When measured against these exacting standards, Mrs Waisman's undisputed imputation of Mrs van Graan's conduct, compellingly points to a negligent disregard of her fiduciary obligations as a trustee.

[34] A court may remove a trustee, both in terms of the provisions of the Trust Property Control Act, 57 of 1988 (the Act) or in terms of its inherent common law powers. Section 20 (1) of the Act provides as follows:

'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 interest of the trust and its beneficiaries.'

[35] The power to remove a trustee must be exercised with circumspection, the primary consideration being to ensure that the trust remains functional and that trust property is not imperilled. (Gowar and Another v Gowar and Others 2016 (5) SA 225 (SCA) Thus a trustee may be removed from office, even though she is not guilty of misconduct or has not acted

maliciously, if her continued tenure as a trustee will endanger trust property. The mere existence of enmity between trustees is not in itself a ground for removal, the test being 'whether such disharmony as exists imperils the trust estate and its proper administration. (Tijmstra N.O. v Blunt-Mackenzie 2002 (1) SA 459 (TPD))

[36] In appointing a trustee, the court, while striving to achieve a harmonious body of trustees, enjoys a wide discretion, the overriding consideration being the best interests of the trust and the beneficiaries. While the court will take into account objections to a particular appointment, it is not an overriding consideration and may be outweighed by other factors. (Port Elizabeth Assurance Agency v Estate Richardson 1965 (2) SA 936 (C), at para 122)

[37] I am of the view that the evidence clearly establishes that the current enmity between the parties has rendered the trusts dysfunctional and is thus imperilling their proper functioning as well as the trust assets. Moreover, the parties are ad idem that there is a need for the court to intervene emphatically in order to break the impasse. The only question is whether it should be done on the basis contended for by Mrs van Graan or by virtue of the solution proffered by Mrs Waisman in her counter-application. As mentioned earlier, the fact that Mrs Waisman's allegations regarding Mrs van Graan's failings as a trustee remain

unchallenged, compels me to order her removal in terms of section 20

(1) of the Act.

[38] I am, however, not convinced that the order sought by Mrs Waisman will be in the best interests of the trusts or all the beneficiaries. While Mrs Waisman is clearly not short of confidence and unapologetically promotes herself as the solution to all the trusts' ills, one cannot help but fear for Mrs van Graan if she were allowed free rein to control the trusts, as she clearly intends to do. It is manifest that she has nothing but disdain for her mother. Apparently spurred on by her father's unfortunate declaration in the 'Letter of Wishes' regarding the consequences for Mrs van Graan if she were to find another partner, she brazenly denigrates her mother's ability to act independently of Mr Parker and patronizingly and unfairly seek to portray her as a naive, love-struck woman who will blindly compromise trust assets at the former's behest. An order in the terms sought by her would therefore only aggravating matters.

[39] I also do not agree with Mrs Waisman's contention that the Family Trust deed envisages that there must be only one independent trustee at any point in time. In my view this construction of the deed is contrived and self-serving. Clause 3 thereof provides in explicit terms that 'the Trustees by majority shall be entitled to revoke the appointment of any Trustee and to appoint other Trustees in addition to or in substitution of the Trustees then in office.' It is also instructive that Clause 7.4.8 of the deed provides for the 'compensation of attorneys and accountants appointed as Trustees.' Mrs Waisman's contention that the words in Clause 7.4.9, to the effect that 'any person being a

Trustee under this Deed and being a person engaged in any profession or business or any firm' denote an intention to have only one independent trustee is not sustainable and is fundamentally irreconcilable with the very explicit provisions of the deed. In any event, under the common law, I am entitled to substitute one trustee for another even if the trust deed does not sanction it. I am accordingly satisfied that I am entitled to appointment more than one independent trustee if I consider such appointments to be in the best interests of the trusts and the beneficiaries. And in the light of the fact that Mrs van Graan will no longer be a trustee, I think it will be necessary to appoint at least two independent trustees in order to discourage any inclination on the part of the family trustees to take decisions out of vindictiveness. While there may understandably be some concern about Mr Parker's impartiality given his relationship with Mrs van Graan, there can be no reasonable objections to the other two names proposed by Mrs van Graan. They are both highly skilled and experienced professionals and I have no doubt that they will carry out their fiduciary duties as trustees impartially and to best of their abilities.

### Costs

[40] Insofar as the issue of costs is concerned, I think the appropriate order would be for the trusts to be bear all the costs occasioned by both the main application and the counter-application. I do not agree with Mr Woodman's submission that Mrs van Graan's application and Mrs Dickie's opposition to the counter-application were ill-advised and deserving of adverse costs orders. In my view, they were both motivated by a bona fide desire to find a judicially sanctioned solution for an impasse that poses a serious threat to the continuation of the trusts.

### Order

[41] In the result the following order issues:

1. Those portions of the Fourth Respondent's answering affidavit mentioned in the First Respondent's application to strike out, are hereby struck out.
2. The Third Applicant, Jennifer van Graan, is hereby removed from her office as trustee of the Godfrey van Graan Family Trust (Master's reference T[...]) and the Gowan Hill Trust (Master's Reference T[...]) (the Trusts), with immediate effect.
3. The following persons are hereby appointed as trustees of both Trusts:
  - (a) Carolyn Anne Johnson (the Second Respondent);
  - (b) Sandra Lee Bosch (the Third Respondent);
  - (c) Bernice Rosslyn Dickie (the Fourth Respondent);
  - (d) Mr J P van der Merwe of Bradley & van der Merwe Chartered Accountants; and
  - (e) Mr M J Wood of Bloch Quarmby Higgs & Partners.

4. The persons mentioned in paragraph 3 must, within 10 (ten) days from the date of this order, accept the appointments in writing, comply with all relevant statutory requirements and submit the necessary documents to the Master of the High Court.
5. The Master of the High Court is directed to issue Letters of Authority to the persons mentioned in paragraph 3 within 30 (thirty) days from the date on which they have complied with the requirements mentioned in paragraph 4.
6. The Godfrey van Graan Family Trust shall be liable to pay the costs of the main application and the counter-application on the party and party scale.

JE SMITH

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicants: Adv. DJ Coetsee Millers Inc. C/o Netteltons Attorneys 118A High Street MAKHANDA (Ref.: Ms. I Pienaar/Sam) Counsel for the Respondents: Adv. RG Goodman SC (First, Second, Third, Sixth, Seventh, Eighth & Ninth) Smith Attorneys C/o Neville Borman & Botha Attorneys 22 Hill Street MAKHANDA (Ref.: Mr. Powers) Counsel for the Fourth Respondent: Adv. DA Smith Louise Bain Incorporated C/o Netteltons Attorneys 118A High Street MAKHANDA (Ref.: Ms. I Pienaar)

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