

SOUTH AFRICA / JUDGMENT

van Rensburg v van Rensburg N.O and Others (1458/2019) [2020] ZAECHGC 29 (24 March 2020)

[2020] ZAECHGC 29

COURT

Eastern Cape High Court, Grahamstown

BEFORE

S M Mfenyana

CASE / FILE NUMBER

1458/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION,

GRAHAMSTOWN

Case

No: 1458/2019

In

the matter between:

UNA
VAN
RENSBURG
Applicant
and
RICHARDT
VAN RENSBURG N.O
First Respondent
CECILE
OBERHOLZER N.O
Second Respondent
UNA
VAN RENSBURG
N.O

Third Respondent
(In
their capacities as trustees for
The
time being of the D H Van Rensburg
Trust
Registration No. MT 1952/2015, Eastern Cape)
RICHARDT
VAN RENSBURG
Fourth Respondent
CECILE
OBERHOLTZER
Fifth Respondent
TERTIA
BRITZ
Sixth Respondent
THE
MASTER OF THE HIGH COURT
Seventh Respondent
GRAHAMSTOWN
ABSA
BANK
LIMITED
Eighth Respondent

JUDGMENT

Mfenyana AJ

[1] The applicant, the fourth, fifth and sixth respondents (respondents) are descendants of Dickie Heugh van Rensburg (the Testator) and Vona Margaret van Rensburg (the Testatrix) who died on 20 May 2015 and 26 June 2018 respectively. Prior to the Testator's death, they signed a joint will in terms of which upon the Testator's death (in the event that he predeceased the Testatrix by a period of seven days) a Trust to be known as 'DH van Rensburg Trust' would be created. The relevant portion of the will, (translated) sets out the purpose of the Trust as follows:

“(i) ...

(ii) To apply for the maintenance, well -being or other advantage of my wife Vona Margaret van Rensburg so much of the income, and if necessary from the capital, which includes capital gains and additions thereto, as my Trustees in their absolute discretion consider necessary.

(iii) To pay to or to apply for the benefit of Vona Margaret van Rensburg the benefits provided for in Clause (ii) above until the termination of the trust.

(iv) ...

- (v) With the death of my wife the trust is to terminate and the capital, which includes capital gains thereon and additions thereto, together with any unpaid income, is to be paid in equal shares to my children Richardt van Rensburg (Identity Number 59[...]), Una van Rensburg (Identity Number 49[...]), Cecile Oberholtzer (Identity Number 51[...]) and Tertia Britz (Identity Number 53[...]) or the survivors of them...”.

- [2] In Clause 12 the will stipulates:

“Ons benoem en stel Cecile Oberholtzer (Identiteits nommer 51[...]), Tertia Britz (Identiteits nommer 53[...]), Prokureur Richardt van Rensburg en Una van Rensburg (Identiteits nommer 49[...]) aan as die Trustees van enige trusts geskep in temme van hierdie ons Testament en ons bepaal dat die genoemde Trustees of die een van hulle wat die amp beklee as die ander in gebreke bly:...”. (or any one of them may hold this office should the other be in default)

- [3] It is common cause that in terms of the will the Trust would endure until the death of the Testatrix at which point it would terminate and the capital and capital gains shared equally among the four siblings. The Testatrix died on 26 June 2018. Upon her death, and on 29 June 2018 the first respondent, in a bid to wind up the Trust sent an email to his siblings advising them inter alia that the balance of the funds would be distributed to them and requested their banking details. Annexed to the email was a resolution to be signed by all the trustees (applicant and respondents), authorising the first respondent to pay out the remaining amount to the trustees. The applicant responded and sent her banking details to the first respondent. It later transpired that the emails were intercepted by a hacker who fraudulently sent and confirmed incorrect banking details to the first respondent’s employee, in so doing, diverting the payment to a fraudulent account. On 10 July 2018 the first respondent, believing the banking details to be those of his sister, authorised payment of R934 913.16 to the fraudulent bank account. Upon finding out, the applicant sought to resolve the issue with her siblings and they indicated that they consider the fact that she did not receive the payment to be her problem and not fraud perpetrated against the trust.
- [4] The applicant now seeks the removal of the trustees on the basis that there is a conflict of interest between their duty as trustees and their interests as trust beneficiaries. She contends that as a result of their interest as beneficiaries, the trustees are unable to take decisions on whether the Trust should act against the beneficiaries or whether action should be taken against the fourth respondent to recover losses suffered by the trust due to his negligence. For this reason, she contends that new trustees should be appointed to make these decisions.
- [5] The application is opposed by the first, second and fifth respondents on four grounds as follows:
- (a) that the Trust ceased to exist upon the death of the Testatrix, and whether it can be said that the first, second and sixth respondents are still trustees;
- (b) whether the applicant and her siblings are beneficiaries of the Trust;

- (c) the nature of the applicant's claim which gives rise to a conflict of interest;
- (d) whether the applicant has made out an adequate case in terms of section 20(1) of the Act, for the removal of her brother and sisters as trustees.

[6] They submit that the Plascon-Evan[1] rule should be applied in the determination of the disputes of fact.

Applicable legal framework

[7] Section 20(1) of the Trust Property Control Act (the Act)[2] states:

“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.”

[8] It was contended on behalf of the applicant that the continuance of the trustees in office would prevent the trust being properly administered as there is a manifest conflict of interest which justifies the removal of the respondents as trustees and their replacement. The applicant further relies on section 9 of the Act which requires a trustee to act with care, diligence and skill in the discharging their duties, as can reasonably be expected of a person who manages the affairs of another.

Trust beneficiaries

- [9] Before dealing with whether the trustees of the DH van Rensburg Trust stand to be removed by the court for the reasons stipulated in the applicant's notice of motion it is apposite to consider whether the said trustees are beneficiaries of the said trust. As stated in
- [1] above, the trust deed stipulates in unambiguous terms what the purpose of the trust is, i.e, to cater for the maintenance and well-being of the Testatrix during her lifetime. Thus the Testatrix was the beneficiary in terms of the trust deed. The Trust was created for her benefit and for no other purpose. This is apparent from the terms of the will. There can thus be no issue in respect of the interests of the respondents vis-à-vis their duty as Trustees. In terms of Clause 12 of the will, they were appointed as Trustees and were not designated as beneficiaries. That they were to receive the benefits from the estate after the Trust had been terminated is in itself indicative of the fact that they were not intended to have the assets held in Trust for them. Upon the death of the Testatrix, the Trust would terminate and the remainder of the capital and income would be shared equally among the deceased's children as heirs. Their benefit emanated not from the trust but from the estate of their parents after the death of their mother. On this basis alone the applicant's contention as a ground for the removal of the Trustees is without merit and stands to be dismissed. It was contended on behalf of the applicant that the trust assets could not simply disappear from the Trust estate and reappear in the deceased estate, which in any event, had been finally wound up, as they had already vested in the Trust estate. Counsel for the respondents pointed out, correctly in my view that the remaining assets could be distributed in terms of the residuary provisions

of the will.

Did the Trust terminate on the death of the Testatrix?

- [10] There can be no doubt that the Trust was created for the benefit of the Testatrix. What appears to be in dispute is whether the Trust did in fact terminate upon the death of the Testatrix. If one considers the strict terms of the trust deed, it must be accepted that it did. What the applicant contends is that this defence has been raised by the respondents ex post facto and is bad in law, as contemporaneous documentation show that the respondents all along believed that the Trust still existed after their mother's death. These consist of the email that was sent by the first respondent calling on the applicant and the other respondents to sign a resolution terminating the trust and making payment of the capital held in the Trust to the "beneficiaries", being the applicant and the respondents. From this, the applicant contends that the trust did not and could not terminate upon the death of the Testatrix as the relevant assets were made over and transferred from the estate to the Trust upon the death of the Testator.
- [11] The respondents on the other hand aver that the termination of the Trust did not occur only as a result of the object of the Trust having been fulfilled, but also because it was specifically so directed in terms of the will.

Removal as Trustees

- [12] It is trite that the court must be circumspect in exercising its power to remove a Trustee. In *Volkwyn N.O. v Clarke and Damant*[3] the court stated:

'... [I]t is a matter not only of delicacy ...but of seriousness to interfere with the management of the estate of a deceased person by removing from the control thereof persons who, in reliance upon their ability and character, the deceased has deliberately selected to carry out his wishes. Even if the ... administrator has acted incorrectly in his duties, and has not observed the strict requirements of the law, something more is required before his removal is warranted. Both the statute and the case cited indicates that the sufficiency of the cause for removal is to be tested by a consideration of the interests of the estate. . .'[4]

- [13] Mr Brown appearing for the applicant submitted that the continuance of the present Trustees in office will be detrimental to the welfare of the beneficiaries. The truth of the matter is that, with the purpose of the Trust having been fulfilled, the Trust had 'run its course'. Moreover the distribution of the assets in accordance with the will, has taken place. In distributing the remaining assets to his siblings, the first respondent was not administering the Trust, but fulfilling the remaining provisions of his parents' will. Without pronouncing on the merits thereof, it would appear that this is where the applicant's claim lies and not on the 'trust or the trustees, most of whom were not involved in the impugned transaction. The applicant seeks the removal of all the trustees, including herself, so that new trustees may be appointed in order to institute legal proceedings against the trustees. There is no merit to this proposition. Whether or not the applicant has a claim against the

trustees and/ or her siblings in their personal capacities, I can find no impediment to her bringing that claim. She has in any event been able to do as much in the present proceedings, and has cited them both in their representative and personal capacities. As an aside, it appears to me that the relief sought by the applicant, were it to be regarded as competent, would amount to a variation of the trust deed in so far as it seeks the appointment of new Trustees. No case has been made out by the applicant for such relief. She does not in any event place any reliance on it.

[14] Even if it were to be found that the Trust continued to exist beyond the death of the Testatrix, in *Gower v Gower*[5] the court was mindful of the fact that disharmony may exist in the administration of a Trust and that this is in itself not sufficient

for the removal of a Trustee. The court held that:

“(T)he overriding question is always whether or not the conduct of the trustee imperils the trust property or its proper administration.

Consequently, mere friction or enmity between the trustee and the beneficiaries will not in itself be adequate reason for the removal

of the trustee from office... Nor, in my view, would mere conflict amongst trustees themselves be a sufficient reason for the removal of a trustee at the suit of another.”[6]

[15] I was referred inter alia to the decision of this division in *Jurgens v Volschenk* where the court held an attorney liable for failure to verify the accuracy of banking details before making payment, where, as in the present case, funds were paid into a fraudulent account. Apart from my finding that the first respondent was not administering a trust in paying out the funds, I find *Jurgens* to be distinguishable from the present matter in that the first respondent did verify the banking details and at which time it appears the applicant’s email had already been hacked.

[16] I deem it necessary to consider the definition of ‘trust’ which has also been cited by the applicant and on which some reliance is, to whatever degree, placed. Section 1 states:

"trust" means the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed-

- (a) to another person, the trustee, in whole or in part, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument; or

(b) to the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument.”

[17] With the above definition in mind, it is necessary to delineate the various role- players in the present matter. This is important as one of the disputes that arose in this matter is whether the trustees were also beneficiaries of the Trust. The applicant holds that they were whilst the respondent contend that they were not. It is trite law that ‘an applicant who seeks final relief on notice of motion must, in the event of conflict, accept the version set up by his opponent unless the latter’s allegations are, in the opinion of the court, not such to raise a real, genuine or bona fide dispute of fact or are so far- fetched or clearly untenable that the court is justified in rejecting them merely on the papers.’ Simply put the respondent’s case is that no claim of the sort envisaged by the applicant exists in the hands of the Trust against the trustees as the applicant has not proved that the Trust was impoverished or that the respondents have been enriched. They contend that no enrichment occurred by virtue of the respondents receiving what was due to them in accordance with the will of the parents and that the loss suffered was suffered by the applicant and not the Trust. They also contend that the Trust was created for the sole benefit of the Testatrix and upon her death, it was to terminate. Whatever would be left of the estate would be shared equally among the parties. This is undisputed. What is suggested by the applicant is that the distribution of the remainder of the assets which were previously held in Trust entitles the Trustees to a benefit. That is so. However that benefit arises from their being heirs to their parents’ estate. That they referred to each other as beneficiaries does not make them beneficiaries in the Trust.

[18] In arriving at a decision whether to refuse or grant the relief sought by the applicants, this court has a duty therefore to interrogate the dispute of fact alleged by the respondent to determine whether it meets the test for a material dispute of fact. In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*[7] the court held:

“A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied”[8].

- [20] I do not find the respondent's version to be so untenable that it stands to be rejected. Having elected to proceed by way of motion proceedings, the applicant must live with that reality.
- [21] While it cannot be denied that the loss suffered by the applicant is significant, I am unable to agree with the applicant that such entitles her to a claim against the Trust or the trustees or that the Trust should exist in perpetuity for that purpose. I am equally not able to find any conflict of interest between duty and benefit as the trustees of the DH van Rensburg are not beneficiaries in the Trust. Not only would their removal be redundant, no proper case has been made out for their removal.

Costs

- [22] I can find no reason to deviate from the general rule that costs should follow the result.

Order

- [23] In the result I make the following order.

- (a) The application is dismissed with costs.

S. M MFENYANA

ACTING JUDGE OF THE HIGH COURT

For the applicant: Adv. G Brown

Instructed by: Wheeldon Rushmere & Cole Inc.

For the respondents: Adv. D H de la Harpe

SC Instructed by: Netteltons Attorneys

Date heard:

12 December 2019

Date delivered: 24 March 2020

- [1] 1984 (3) SA 623 (A)
- [2] Act 57 of 1988
- [3] 1946 WLD 456
- [4] At p.464
- [5] (149/2015) [2016] ZASCA 101 (9 June 2016)
- [6] At para 31
- [7] [2008] ZASCA 6; 2008 (3) SA 371 (SCA)
- [8] Id at para 13

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