

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No:42070/21

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED NO

11 August 2022 Judge

Dippenaar

In the matter between:

OBED BAPELA NO

(In his capacity as Trustee of Zonkizizwe
Investment Trust IT NO 9170/02)

First Applicant

ZONKEZIZWE INVESTMENT (PTY) LTD

Second Applicant

And

GLADSONE REUBEN NO

(In his capacity as Trustee of Zonkizizwe
Investment Trust IT NO 9170/02)

First Respondent

ARVIND MAGAN NO (In his capacity as Trustee of Zonkizizwe Investment Trust IT NO 9170/02)	Second Respondent
NAZIR AHMED KATHRADA	Third Respondent
BLUE NIGHTINGALE 74 (PTY) LTD	Fourth Respondent
THE MASTER OF THE HIGH COURT PRETORIA	Fifth Respondent
L MAFETSA ATTORNEYS	Sixth Respondent
TAMASA (PTY) LTD	Seventh Respondent

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 11th of August 2022.

DIPPENAAR J:

[1] The applicants in application proceedings launched during September 2021, sought far ranging relief against the first and second respondents pertaining to their appointment as trustees and agents of the Zonkizizwe¹ Investment Trust IT 9173/02 ("the trust") and declaratory relief pertaining to their conduct as trustees of the trust, with ancillary relief.

[2] The first applicant, Mr Bapela is a trustee of the trust. He was appointed together with Messrs Makgothi and Loots ("collectively referred to as "the first trustees") in terms of a trust deed, which established the trust, dated 10 December 2002. Letters of

¹ Incorrectly spelt by the applicants in their papers as Zonkezizwe

authority were issued in favour of the first trustees by the Master on 17 February 2003. Mr Makgothi passed away on 24 March 2011 and Mr Loots on 25 January 2016.

[3] Letters of authority were issued to the first and second respondents as trustees of the trust by the Master on 29 January 2014.

[4] The basis of the applicants' case is that the first and second respondents have hijacked the trust and that their appointments as trustees are irregular, unlawful and void *ab initio* and consequently that their appointment must be set aside and all steps taken by them as trustees should be set aside as such decisions have no effect in law. Declaratory relief is sought that the conduct of the first and second respondents as trustees of the trust is contrary to the Trust Property Control Act² and the trust deed. The remainder of the relief is aimed at declaring the first and second respondents as delinquent trustees and setting aside the appointment of the third respondent as attorney of the trust as irregular and void.

[5] At the hearing, the applicants in argument persisted only with the relief sought in prayers 1 to 5³ of the notice of motion and jettisoned the relief sought in prayers 6, 7 and 8. The relief sought is: (i) that the appointment of the first and second respondents as trustees of the trust, is declared to have been irregular, unlawful and void *ab initio*; (ii) the appointment of the first and second respondents as trustees is reviewed and set aside and has no force or effect; (iii) that all decisions taken using the majority of the first and second respondents are reviewed and set aside and have no effect in law; (iv) the appointment of the first and second respondents as agents of the trust is declared to have been irregular, unlawful and void *ab initio*; (v) the appointment of the first and second respondents as agents is reviewed and set aside and has no force or effect; (vi) costs were sought against any respondent who opposed the application. The applicant did not persist with the relief pertaining to a declaration that the conduct of the first and second respondents as trustees of the trust was contrary to both the Trust Property

² 57 of 1988

³ In their supplementary heads of argument, the applicants also sought an order in terms of prayer 6

Control Act⁴ and the trust deed⁵; a declaration that the first and second respondents are delinquent trustees and a declaration that the appointment of the third respondent as attorney and legal advisor of the trust is irregular, unlawful and invalid ab initio.

[6] The first and second respondents (“the trustee respondents”) opposed the application and sought its dismissal alternatively a referral to oral evidence in terms of a proposed draft order, on issues pertaining to the validity of the signatures of Mr Bapela and Mr Loots on documents pertaining to the decisions sought to be set aside and the sale of share and loan agreements, on which factual disputes exist on the papers.

[7] The sixth respondent abided the court’s decision. The fifth, sixth and seventh respondents did not actively participate in the application.

[8] No relief was sought by the applicants against the fourth respondent, who was simply cited as a party in the application papers without disclosing its interest in the proceedings. In the applicant’s founding papers, the only reference to the fourth respondent is in relation to documents disclosed by the first respondent in arbitration proceedings launched by the fourth respondent.

[9] The fourth respondent, after delivering a notice to abide on 21 September 2021, withdrew such notice shortly before the hearing on 13 May 2022 and on the same date, delivered an intention to oppose. No opposing papers were filed, but the fourth respondent was represented at the hearing and submitted heads of argument. The stance adopted by the fourth respondent was to support the application and to argue against the defences raised by the trustee respondents, despite filing a notice of opposition.

[10] The first and second respondents objected to this approach contending that the fourth respondent had not established any legal nexus to the issues before the court as

⁴ 57 of 1988

⁵ An issue raised in their supplementary heads of argument.

it has no legal, financial or commercial interest in the relief claimed. It further only shortly before the hearing sought to withdraw a right it had consciously waived. The stance adopted by the fourth respondent is, at first blush, contradictory and no explanation was tendered as to its interest in the proceedings. In light of the view I take of the matter, it is not however for present purposes necessary or appropriate to make any finding on whether the fourth respondent is obliged to establish any legal nexus to the issues before court before it may make submissions.

[11] In argument, the applicants' case was that the central issue was a crisp legal issue based on common cause facts, being whether they established that the appointment of the first and second respondents did not accord with the trust deed. It was argued that there were no factual disputes on the papers which precluded the relief sought being granted. Their central contention was that neither of the applicants was involved in the decision to appoint the trustee respondents at a time when the trust only had two trustees.

[12] The trustee respondents on the other hand, argued that there were numerous bona fide factual disputes which are not resolvable on the papers requiring a referral to oral evidence, including the involvement of Mr Bapela in the trust and the validity of his signature on one of the documents pertaining to one of the resolutions sought to be set aside, which Mr Bapela broadly alleged is a fraud.

[13] The applicant seeks final relief. The matter is thus to be determined on the basis of the so called Plascon Evans test⁶. It is well established that motion proceedings, unless concerned with interim relief, are about the resolution of legal issues based on common cause facts. Where there is a genuine dispute of fact, the respondent's version must be accepted. A dispute will not be genuine if it is so far-fetched or so clearly untenable that it can be safely rejected on the papers.⁷

⁶ Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd, 1984 (3) SA 623 (A) at 634E to 635C; National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) para [26]

⁷ Wightman t/a J W Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371(SCA) para [12]-[13]

[14] The applicants, supported by the fourth respondent, argued that the trustee respondents' version should be rejected as contradictory, palpably false and untenable on the papers. By way of example, the applicants argued that the trustee respondents' contestations regarding Mr Bapela's signature on the resolution of 4 August 2020 should be ignored as it is not a real, genuine or bona fide dispute of fact even on the respondent's version. It was further argued that the respondents have not in their affidavit seriously and unambiguously addressed the facts said to be disputed.

[15] I do not agree. The test for rejection of a respondent's version on paper as palpably false or untenable⁸ is a stringent one⁹ and I am not persuaded that such threshold has been met. The trustee respondents have not persisted with bald denials but have grappled with the issues raised by the applicants in their founding papers and have provided a detailed version of events. That version cannot be rejected on the basis of probability findings, as the applicants and the fourth respondent urged me to do on various issues.

[16] In *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd and Another*¹⁰, the Supreme Court of Appeal enunciated the approach to be followed in relation to whether disputes of fact are bona fide thus:

"The court should be prepared to undertake an objective analysis of such disputes when required to do so. In J W Wightman (Pty) Ltd v Headfour (Pty) Ltd 2008 (3) SA 371(SCA), it was suggested how that might be done in appropriate circumstances.

A court must always be cautious about deciding probabilities in the face of conflicts of facts in affidavits. Affidavits are settled by legal advisers with varying degrees of experience, skill and diligence and a litigant should not pay the price for an adviser's shortcomings. Judgment on the credibility of the deponent, absent direct and obvious contradictions, should be left open. Nevertheless the courts have recognised reasons to take a stronger line to avoid injustice. In Da Mata v Otto 1972 (3) SA 858 (A) at 689 D-E, the following was said:

⁸ PMG Motors Kyalami (Pty) Ltd (in liquidation) v Firstrand Bank Ltd, Wesbank Division 2015 1 All SA 437 (SCA); 2015 (2) SA 634 (SCA); Wightman supra para 13

⁹ National Scrap Metal (Cape Town) (Pty) Ltd and Another v Murray & Roberts Ltd and Others 2012 (5) SA 300 (SCA) paras [21]-[22]

¹⁰ 2011 (1) SA 8 (SCA) at paras [19] and [20]

In regard to the appellant 's sworn statements alleging the oral agreement, it does not follow that because these allegations were not contradicted – the witness who could have disputed them had died – they should be taken as proof of the facts involved. Wigmore on Evidence, 3rd ed., vol. VII, p.260, states that the mere assertion of any witness does not of itself need to be believed, even though he is unimpeached in any manner, because to require such belief would be to give a quantitative and impersonal measure to testimony. The learned author in this connection at p. 262 cites the following passage from a decision quoted:

“it is not infrequently supposed that a sworn statement is necessary proof, and that, if uncontradicted, it established the fact involved. Such is by no means the law. Testimony, regardless of the amount of it, which is contrary to all reasonable probabilities or conceded facts-testimony which no sensible man can believe-goes for nothing; while the evidence of a single witness to a fact, there being nothing to throw discredit, cannot be disregarded.”

[17] The papers are further replete with disputes regarding including how the various parties interacted and how the trust deed is to be interpreted. In interpreting the trust deed, the golden rule of interpretation was enunciated thus by Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹¹:

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

[18] Two principles, important to the present application, emerge from these authorities. The first, that motion proceedings should not be determined on the basis of probabilities; the second, that context is important. In motion proceedings, the affidavits constitute both the pleadings and the evidence¹².

¹¹ 2012 (4) SA 593 (SCA) at para [18]

¹² Hart v Pinetown Drive-In Cinema (Pty) Ltd 1972 (1) SA 464 (D)

[19] The founding affidavit does not provide sufficient factual context to the circumstances under which the trust deed was created or the role of group representatives, to allow for a proper interpretation of the relevant provisions. In the founding papers, particularity was provided as to who the beneficiaries were at the time of creation of the trust, but not who the present beneficiaries are, nor what their role is in the appointment of trustees. Mr Bapela's participation and role in the management of the trust is further not explained, nor whether the provisions of the trust deed were ever properly complied with and why the trust does not have a bank account. These are but examples of the various lacunas in the evidence presented by the applicants. In order to interpret agreements based on affidavits¹³, sufficient facts must be presented by an applicant in its founding papers to enable a court to do so.

[20] The applicant's argument envisages a very narrow approach which disregards the factual matrix underpinning the application. After reading the application papers one is left with more questions than answers and the impression that not all the material facts have been placed before the court, but only those which serves the causes of the respective parties.

[21] It is apposite to refer to *Seumungal and Another NNO v Regent Cinema*¹⁴, wherein Leon J held:

"In approaching this particular type of problem, it is not wrong for a Court at the outset to have some regard to the realities of litigation. What appears to be a good case on paper may become less impressive after the deponents to the affidavits have been cross-examined. Conversely, what appears to be an improbable case on the affidavits, may turn out to be less improbable or even probable in relation to a particular witness after he has been seen and heard by a Court. An incautious answer in cross-examination may change the whole complexion of a case".

[22] The realities of litigation in my view require full trial proceedings in which oral evidence must be led. The complexities in the matter are exacerbated by the untimely demise of Mr Loots, who could have shed much light on the issues. It would in my view

¹³ Picbel Groep Voorsorgfonds (in liquidation) v Somerville and other related matters [2013] 2 All Sa 692 (SCA) para [17]; KPMG Chartered Accountants v Securefin Ltd & Another 2009 (4) SA 399 (SCA) at para [39]

¹⁴ 819 A-C,

be vital for oral evidence to be led to determine the central issues pertaining to the validity of the appointment of the trustee respondents and to ensure a proper interpretation of the trust deed, applying the relevant principles.

[23] I am fortified in this view by the principle that motion proceedings are by their very nature generally inappropriate for the purpose of making findings of fraud¹⁵. In my view similar considerations would be applicable in relation to the untoward conduct on the part of the trustee respondents alleged by the applicant.

[24] If a court were to set aside all decisions of the trust that were taken by majority of the first and second respondents, it would be exercising a discretion under s 23 of the Trust Property Control Act¹⁶. That section provides:

“Any person who feels aggrieved by an authorisation, appointment or removal of a trustee by the Master or by any decision, order or direction of the Master made or issued under this Act, may apply to the court for relief, and the court shall have the power to consider the merits of any such matter, to take evidence and to make any order it deems fit”.

[25] The court thus expressly has the power to take evidence on any relevant issue. The applicants’ affidavits are vague on numerous issues relevant to a proper exercise of that discretion. By way of example, only four decisions made by the trustee respondents as majority during the period 4 December 2019 to 21 June 2021 are referred to by the applicants in their founding papers, including decisions to open a bank account for the trust and the payment of certain dividends. It is unclear whether any other decisions were made by them prior to or after such dates, which would be effected by the wide ambit of the order sought by the applicants.

[26] It is well established that a court has the inherent power to protect and regulate its own process taking into account the interests of justice¹⁷ and that courts adopt a

¹⁵ Commissioner South African Revenue Service v Sassin and Others [2015] 4 All SA 756 (KZN) (“Sassin” paras [45]-[49] and the authorities cited therein

¹⁶ 57 of 1988

¹⁷ Constitution, s173

flexible approach in construing and applying the rules¹⁸. A court has a discretion as to the future course of the proceedings¹⁹.

[27] Rule 6(5)(g) empowers a court, whenever an application cannot properly be decided on affidavit, to make such order as to it seems meet with a view of ensuring a just and expeditious decision. A court is further empowered in particular, but without affecting the generality of the foregoing, to direct that oral evidence may be heard on specified issues.²⁰ It is well established that where the disputes are of a wide ranging nature, a referral to trial would be appropriate.

[28] The ambit of the sub rule is not limited to instances where oral evidence is called to resolve factual disputes on the papers. Such power is authorised under the court's inherent jurisdiction to regulate its procedures in the interests of the proper administration of justice²¹. As stated by Kumleben J in *Moosa Bros & Sons (Pty) Ltd v Rajah*²²:

*(c) Without attempting to lay down any precise rule, which may have the effect of limiting the wide discretion implicit in this rule, in my view oral evidence in one or other form envisaged by the rule should be allowed if there are reasonable grounds for doubting the correctness of the allegations concerned. (d) In reaching a decision in this regard, facts peculiarly within the knowledge of an applicant, which for that reason cannot be directly contradicted or refuted by the opposite party are to be carefully scrutinised*²³.

[29] On a conspectus of the evidence, in addition to the factual disputes referred to earlier, there are facts peculiarly within the knowledge of respectively the applicants and the trustee respondents, countered by other facts and circumstances that reasonably casts doubt on the correctness of their respective averments. Although not contradicted by direct evidence, those averments are thus in dispute.

¹⁸ Helen Suzman Foundation v Judicial Service Commission 2018 (4) SA 1 (CC) at para [87]

¹⁹ Sassin supra para [71] and the authorities cited therein; R6(5)(g)

²⁰ Nkwentsha v Minister of Law and Order and Another 1988 (3) SA 99 (A) at 117

²¹ Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd and Another 1984 (4) SA 149(T) at 171A-173D; Universal City Studios Inc and Others v Network Video (Pty) Ltd 1986 (2) SA 734 (A) at 754G-J

²² 1975 (4) SA 87 (D) at 93

²³ Moosa Bros & Sons (Pty) Ltd v Rajah 1975 (4) SA 87 (D) at 91A and 93; Khumalo v Director-General of Co-operation and Development 1991 (1) SA 158 (A) at 167G-168C

[30] In my view there are there reasonable grounds for doubting the correctness of various averments in the respective parties' affidavits. First, Mr Bapela's version as to the nature and extent of his involvement in the affairs of the trust and his compliance with his duties as trustee are only addressed in the broadest of terms in contending that *"he is obliged to act in the interests of the trust in compliance with his fiduciary duties to stop the reckless misconduct of the trustee respondents"* and a denial of knowledge of the circumstances of their appointment. Mr Bapela's own version begs the question of his actual involvement in and knowledge of the affairs of the trust.

[31] The trustee respondents expressly challenged Mr Bapela's involvement in the affairs of the trust, who they contended was an absent trustee and one in name only. They highlighted Mr Bapela's ignorance of their appointment for a period in excess of 6 years and his failure to do anything prior to or after the death of both Mr Makgathi's and Mr Loots or to or to take steps to nominate alternative trustees. In reply Mr Bapela baldly denied such averments and did not meaningfully grapple with facts which were peculiarly within his knowledge.

[32] I cannot agree with the applicants' contention that the question whether or not Mr Bapela participated with the trustee respondents in the affairs of the trust is irrelevant to the relief sought in the application. If the relief sought is granted, Mr Bapela would remain, contrary to the provisions of the trust deed, as the sole trustee of the trust, whose current beneficiaries are not identified or disclosed.

[33] Second, on Mr Bapela's own version, historically there were various instances where the requirements of the trust deed and the applicable trust law principles were not complied with after the death of both Mr Makgathi and Mr Loots and in relation to the proper management of the affairs of the trust, including the opening of a bank account for the trust. No explanation is further tendered for the substantial delay in seeking to set aside the appointment of the trustee respondents.

[34] Third, the trustee respondents' version is similarly unclear and lacking in various respects, pertaining, inter alia, to the sale of share and loan agreements and the advices and conduct of Mr Loots.

[35] Fourth, the averments made by the respective parties appear incongruous with the established principles applicable to trust law. In addition, it is impossible to exactly establish from the application papers as a whole, either what the relationship between the respective parties was or what their business dealings relating to the trust entailed.

[36] For these reasons I conclude that the application should be referred to trial for a full ventilation of the issues and disputes between the parties and that a referral to oral evidence on the proposed issues would not be appropriate.

[37] The trustee respondents argued that an adverse costs order should be granted at this stage against the applicants as the applicants had refused to consent to their proposed referral to oral evidence. I do not agree. At this stage a reservation of the costs would be more appropriate²⁴, which would preserve all parties' rights in relation thereto.

[38] I grant the following order:

[1] The application is referred to trial;

[2] The notice of motion shall stand as a simple summons whereafter the uniform rules of court will apply;

[3] The costs are reserved.

²⁴ Gray v Goodwood Municipality 1943 CPD 78

**EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG**

APPEARANCES

DATE OF HEARING : 18 May 2022

DATE OF JUDGMENT : 11 August 2022

APPLICANT'S COUNSEL : Adv. S. Baloyi SC
Adv. G. Badela

APPLICANT'S ATTORNEYS : SM Vakalisa Inc

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