3/11/17

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: (YES) / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: (YES) NO
(3) REVISED.
(4)

SIGNATURE 3/11/2017 DATE

In the matter between CASE NO: 50776/16

HAROLD DE KOCK	APPLICANT
And	
JOAN CYNTHIA GRIESSEL NO	FIRST RESPONDENT
SHIRLEY ANN VAN WYK NO	SECOND RESPONDENT
CARYN SCHULTZ NO	THIRD RESPONDENT
JOAN CYNTHIA GRIESSEL	FOURTH RESPONDENT
SHIRLEY ANN VAN WYK	FIFTH RESPONDENT
DE VILLEBOIS ETIENNE DE KOCK	SIXTH RESPONDENT
CELESTE MARIE DE KOCK	SEVENTH RESPONDENT
THE MASTER OF THE HIGH COURT, PRETORIA	EIGHTH RESPONDENT
MANYELETI (PTY) LTD	NINTH RESPONDENT

JUDGMENT

BAM AJ

[1] The Applicant has approached the court for an order in the following terms:

(i) the reinstatement of the Applicant's vested rights as a beneficiary under the (Arathusa) trust;

(ii) the removal of First, Second and Third Respondents as trustees of the trust and the appointment of independent and impartial trustees in their place.

The chronological sequence of events that culminated in the bringing of this application is provided below in a summarised version of the facts gleaned from arguments and the papers.

[2] The late Harold Lee Abrahamse and Kathleen Cecilia Abrahamse created the Theron-Abrahamse Trust in the 1950's for the well-being and maintenance of their two daughters, Joan and Shirley, the Fourth and Fifth Respondents herein. The two are also cited as First and Second Respondents in their capacities as Trustees of the Arathusa Family Trust. The Applicant, the Sixth and Seventh Respondents are brother and sisters respectively – the children of the Fifth Respondent. The Fourth Respondent is their aunt.

The most important asset which passed on to these beneficiaries through the purchase of shares in Manyeleti (Pty) Ltd was a piece of farmland in the Sabi Sands area of Mpumalanga. The shares were subsequently bought from the company by the newly formed trust by the Fourth and Fifth Respondents in 1999.

[3] The ARATHUSA FAMILY TRUST which was registered in the Master's office under reference number IT4883/99, is a family trust of which the First and Second Respondents

are trustees and are also beneficiaries together with the Applicant and his two sisters. Caryn Schultz; the Third Respondent; is a trustee as well as auditor of the company. The Fifth, Sixth and Seventh Respondents are also directors of Manyeleti (Pty) Ltd, the company whose sole asset is the Arathusa farm that is the subject matter of this case. The trust is a 100 percent shareholder in the company.

[4] The trust and the company are not trading entities. With regard to the only trust asset that is now held through the company; the trustees drew up a schedule according to which the family members / beneficiaries would vacation on the farm during the course of the year. The Fourth and Fifth Respondents, the Applicant and his two sisters made up this pool of beneficiaries in respect of whom the schedule was drawn. The Applicant at some stage stopped visiting the farm because he was apparently protecting his young children from possible malaria affliction, but then resumed the visits when he considered the children old enough.

[5] During 2006, the trustees embarked on an exercise aimed at generating income through the building of a lodge on the farm. Certain circumstances prevented the project from getting off the ground, with the result that the Environmental Impact Assessment that was done at the request of the Sabi Sands Wildtuin (an association of owners of farms/resorts in the Sabi area) allegedly became outdated. The Applicant, who was a member of the Wildtuin Exco was allegedly not in favour of the lodge and made this clear to the family. When the Exco took the decision to stop the trust or company from proceeding with construction, the Applicant had recused himself from the meeting; although through his conduct, he did support the decision. It appears that this is where the whole strife began and various unpalatable exchanges between the Applicant and the rest of the family ensued. It emerges that the lodge was eventually built but the Applicant still continued to voice his opinions about the way the trust property was being administered. This eventually led to the removal of the Applicant as a beneficiary under the Arathusa Trust through the amendment of the trust deed. He challenged his removal

in court and before the matter went to trial, he entered into a settlement agreement with the trustees which agreement was made an order of court by Ledwaba J under case number 44989/2014.

[6] Despite the Settlement Agreement, the Applicant had to approach the court again to challenge the decision by the trustees to remove him from the schedule of the farm vacations. In addition he wants the trustees removed on grounds of mismanagement of the trust asset and in this regard it is alleged they failed to pay levies due the Sabi Sands Wildtuin and the account was even handed over to the attorneys who issued a letter of demand in February 2016.

[7] The Fifth Respondent is a trustee of the trust and she, together with her two daughters are Directors of Manyeleti (Pty) Ltd. With this picture in mind, I will now refer to some of the terms of the trust deed which I believe are worthy of note for purposes of this case:

The first part of the preamble reads as follows:

A. *Joan Cynthia Griessel and Shirley Ann de Kock ("the Settlors"), out of the affection they bear for their family, wishes to create a trust to enable them to arrange their personal affairs in such a way as to provide for their security, maintenance, education and welfare.*

[8] The beneficiaries are defined as those persons selected by the Trustees in their entire and absolute discretion to be a beneficiary of "*income or capital or both under this trust amongst the following potential beneficiaries:*

1. Shirley Ann de Kock
2. Joan Cynthia Griessel
3. Harold Lee de Kock
4. De Villebois Etienne de Kock
5. Celeste Marie de Kock
6. Any trust established for the benefit of any of the aforementioned.

Further on at sub-clause 3.4 is the definition of the Arathusa Family Trust as comprising of the initial donation or R100.00 as well as "*all sums of money, property or assets subsequently acquired whether by donation, purchase, loan, exchange, inheritance, reinvestment or otherwise for the purpose of the trust*"

When it comes to the income of the trust, 5.2 reads thus:

"*The trustees shall have the power, in their entire discretion, from time to time, and at any time to pay to, or to apply the whole or any part of the income of the trust fund for the general advantage of any one or more of the beneficiaries as the Trustees may decide, and in such proportions and from such source as the Trustee may determine, and any income so paid or supplied shall accrue to the beneficiary.*"

[9] Clause 12 lists the powers of the trustees and these are preceded by the statement to the effect that in the exercise of these powers, *the trustees shall have unrestricted powers of dealing with the trust fund as if they were beneficially entitled thereto.*

The trustees can deal with the income by investing and reinvesting it *where ever, in any part of the world.....regardless of limitations or restrictions imposed by statute or otherwise*.....

One of the powers listed under sub-clause 12.5 is *to allow any beneficiary free use and enjoyment of any property controlled by them or forming part of the trust fund, whether movable or immovable, upon such conditions, if any, as to maintenance, insurance, rates and taxes and other expenses as they may deem fit.*

Finally, sub-clause 13.1 provides that ....*Any beneficiary may be a trustee, however, where a beneficiary is a trustee, there shall always be not less than two trustees.*

[10] The Respondents raised an issue of non-joinder with regards to the Third Respondent who has been cited only in her capacity as trustee. It was argued that she clearly had a personal interest in the matter and should therefore have been cited in person as was the case with the other trustees. This failure by the Applicant should be considered as fatal to the application; so it was contended on behalf of the Respondents.

[11] With regard to the Applicant's claim to reinstatement of his benefits, it was argued that he did not have a vested right in the trust property. The court was told further that the right to use the farm was not a benefit because the farm belongs to the company, the ninth Respondent, and not to the trust. The company as the registered owner had a right to decide who comes onto its property. It was also pointed out that the Applicant is the only "unhappy" beneficiary, and this should be taken as an indication as to his disruptive conduct which alienates other family members. His was a case of a disgruntled son objecting to a project hence the "owner" of the farm was justified in barring him from entering or enjoying its facilities.

[12] The Respondents argued that the Applicant has not motivated the application to have the trustees removed and further that the cases relied on in support of this issue were irrelevant. The Applicant could not give instances of gross mismanagement of trust assets in the hands of the trustees. Counsel concluded by stating that this case is abound with disputes of fact and the **Plascon-Evans** rule should be applied. In the premises, the Respondents asked for the dismissal of the application with costs, including those of two counsel.

NON-JOINDER

[13] The Respondents argue that the failure by the Applicant to cite the Third Respondent in her personal capacity constitutes material non-joinder which alone should result in the dismissal of the application.

In the unreported case of **HJT v JMT, HFT NO, JMT NO, AJDJ NO, HJT and the Master of the High Court, Bloemfontein, case number 387/2017 heard by Snellenburg AJ on 15/06/2017 (judgement delivered on 6/07/2017) in the High Court Bloemfontein,** the court held that even if the Respondents were already before court in another capacity, it is still necessary to join them in their representative capacities. Rather than dismiss or postpone the application, the court chose to apply a common-sense approach which:

> *"dictates that the joinder of the trustees of the Trust in these circumstances would not cause any prejudice to them or the existing parties to the application and would allow the matter to be ventilated, rather than cause the parties further exposure to wasted costs if the matter is postponed for the inevitable joinder thereafter". (at [6])*

In the above matter, the Applicant had omitted to cite The Master, Mrs T in her capacity as Trustee as well as himself a Trustee. For the sake of completeness and convenience the joinder was allowed so that the case could proceed.

[14] The Third Respondent is already before court as a Trustee. The other trustees have been cited in their personal capacities and it must be remembered that they are also beneficiaries as well as directors of the ninth respondent. In the same vein as the court in **HJT** above, I am inclined to believe that the failure by the Applicant to cite the Third Respondent in her personal capacity will not result in prejudice to her. It is my view that this matter needs to be concluded as soon as practically possible so that the parties can assess their positions once the issues that were brought before court have been decided on. I will therefore; for purposes hereof; rule to include the Third Respondent also as a Respondent in her personal capacity.

[15] A trust is defined in South African Law as **a legal institution** in which a person called a Trustee; subject to supervision; holds or administers property separately from his or her own for the benefit of another person or persons (beneficiaries) or for the advancement of a charitable or other purpose – (Edwin Cameron et al: *Honore's South African Law of Trusts, 5th ed, Juta and Company,2002 pg 1*). An

inter vivos trust is governed by the terms of a Trust Deed as well as provisions of the **Trust Property Control Act 57 of 1988.** Of significance is the fact that a trust; though not a juristic person; is subject to legal supervision, from its inception up to its termination. The role of a trustee in administering the trust property calls for the exercise of a fiduciary duty. This duty is owed to the beneficiaries of the trust irrespective of whether they have vested rights or are contingent beneficiaries whose rights to the trust income or capital will only vest on the happening of some uncertain future event. (**Doyle v Board of Executors 1999 (2) SA 805 (C)**) The position of trustee comes with substantial responsibility which should not be taken lightly. Trustees are expected to exercise a greater standard of care, similar to that of a director of a company and can be sued if they do not honour their fiduciary duties or are negligent in any way. The degree of care, diligence and skill required of a trustee is that of a reasonable person managing the affairs of another.

[16] In **Potgieter v Potgieter NO 2012 (1) SA 637 (SCA)** the court stated that discretion does not mean that trustees can do as they please. When exercising their discretion, trustees must consider the needs of all discretionary beneficiaries. The SCA likened a trust to a *stipulatio alteri* in that once the beneficiary has accepted the benefits, the trust deed can only be varied with his consent.

[17] In **Land and Agricultural Development Bank of South Africa v Parker NO 2004 (4) ALL SA 261 (SCA)** the court expressed a concern about trusts that are controlled by family members who are also beneficiaries.

In that case, Mr and Mrs Parker (both trustees) took out a loan from the bank contrary to the trust deed provision that decisions of the trust must be taken by a minimum of three trustees. At the time of obtaining the loan, the third, and independent trustee, Senekal, had resigned and it took the Parkers over two years to appoint a replacement; their own son. When the bank sought to sequestrate the Parkers' and trust estates, the trust raised a defence that the loan had been obtained contrary to the sub-minimum provision and therefore it was not bound by the decision to apply for the loan.

[18] Cameron JA, after clarifying that a trust is not a legal person but an accumulation of assets and liabilities which vest in the trustees to be administered by them, went on to say:

> "*The core idea of the trust is the separation of ownership (or control) from enjoyment. Though a trustee can also be a beneficiary, the central notion is that the person entrusted with control exercises it on behalf of and in the interests of another.*" at [19]

He continued to map out the history of precedent on trust law and how this has always been based on the essential notion that:

> *"....enjoyment and control should be functionally separate. The duties imposed on the trustees, and the standard of care exacted of them, derive from this principle. And it is separation that serves to secure diligence on the part of the trustee, since a lapse may be visited with action by beneficiaries whose interests conduce to demanding better".* at [22]

The court went on to say that absence of functional separation invites abuses which are sometimes overlooked by the beneficiaries who through close family connection, have an identical interest with the trustees.

In light of the observations above, the court enjoined the Master and courts to intervene to restrict or prevent abuses. With the existing statutory powers, the Master should ensure that the requisite separation of enjoyment and control of trust assets by trustees is maintained through the appointment of an independent outsider as a trustee where:

(i) All trustees are beneficiaries

(ii) All the beneficiaries are related to each other.

The court stressed that the appointee should be someone who understands the responsibilities of a trustee and in particular who will ensure not only that the terms of the trust deed are observed, but also that the conduct of trustees who lack a sufficiently independent interest in the trust property can be kept in check.

[19] It appears that the court's message in Parker struck a chord with the Chief Master, because it was relayed to all the Masters as a directive. The recent Chief Master's Directive 2 of 2017 (Circular 13 of 2017) dated 6 March 2017 lends credence to this observation. Of interest is sub-paragraph 3.8 with a title: **"Implementing the Decision in Land and Agricultural Bank of SA v Parker and Others 2005 (2) SA 77 (SCA)".** In terms of this sub-paragraph, the Masters are enjoined to get involved and act in instances where a family business trust is being registered for the first time to ensure that independent trustees are appointed to avoid the conflict situations the likes of which is before court today. This is a positive step and I would dare suggest that this intervention should be

applied as well to existing trusts which exhibit the same conflict problems as herein. Section 7(2) of the Trust Property Control Act also authorises the Master, "*in the absence of any provision in the trust instrument, after consultation with so many interested parties as he may deem necessary, appoint as a co-trustee of any serving trustee any person whom he deems fit".*

[20] It is trite that any person who has a beneficial interest in the property of a trust possesses the necessary *locus standi* to bring action against the trustees in the event that the trustees are acting in a manner that is against the interest of the trust. The trustees must avoid a conflict of interest and avoid situations where their private interests are in conflict with their duties as trustees.

Section 20 of the Trust Property Control Act provides that "

(1) 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

(2) A trustee may, at any time be removed from his office by the Master -:

(a) if he has been convicted in the Republic or elsewhere of any offence of which dishonesty is an element or of any offence for which he has been sentenced to imprisonment without the option of a fine; or

(b) if he fails to give security…….

(c) …….

(d) ……...

(e) if he fails to perform satisfactorily any duty imposed on him by or under this Act or to comply with any lawful request of the Master.

(3) …….

[21] Trustees, as functionaries to a fiduciary relationship, are also not expected to unnecessarily discriminate between beneficiaries. They should not show favouritism and can only differentiate between beneficiaries on the basis of need. Thus the presumption of equality in parental bequests was held inapplicable to a trust fund for the maintenance and education of minor children (**Levin v Gutkin, Fischer and Schnieder NO 1997 (3) SA 267 (W)**). In other words the impartiality of treatment is permitted in cases where it favours the most needy. Under a Discretionary Trust, the trustee is given the discretion to choose recipients of a trust benefit, subject only to the duty to exercise this discretion in good faith.

[22] The Applicant was removed as a beneficiary of the trust by the trustees and approached the court for an order declaring his removal unlawful. On the 9th of December 2015, the parties reached a settlement which was made an order of court. The document is very brief, consisting of only 7 paragraphs. Paragraphs 1 and 2 read as follows:

1. *The purported amendment ("the amendment") and removal of the Plaintiff as a potential beneficiary of the Arathusa Family Trust IT4883/99 ("the Trust") is of not force and effect and invalid.*
2. *It is declared that the provision of the written trust deed of the Trust remain unaltered as they were prior to the amendment by the resolution adopted on 14 January 2013 by the trustees of the Trust. In order to facilitate this process the Trustees of the Trust, namely 1st, 2nd and 3rd defendants have passed another resolution a copy of which is annexed hereto marked "A".*

[23] The Applicant was removed by the trustees and reinstated by them by virtue of the deed of settlement. The ordinary meaning of the word "reinstate" is *to restore to a previous condition or position / restore to a previous state or rank".* The settlement agreement says the removal of the Applicant is *"of no force and effect and invalid"* and the provisions of the trust deed remain "unaltered". Before the purported removal, the Applicant enjoyed the use of the farm and was included in the schedule with all the other "potential beneficiaries" for the periodic use of the farm. His name was subsequently removed with his removal as beneficiary, and despite the agreement of settlement to reinstate him, this privilege was not restored.

[24] The Respondents argue that it is not the trustees who have barred the Applicant from visiting the farm, but the Ninth Respondent, the company. If one considers the fact that the company is 100 percent owned by the Trust and the second Respondent is also a director of the company together with her other two children to the exclusion of the Applicant, this argument has no basis at all. This is the typical muddling of roles, duties and obligations that the court was warning against in the **Parker** case. The trustees are now hiding behind the company they own and control in order to avoid being held accountable for their actions. If the trust then is this empty shell with no decision-making powers over its property then the question is why it still exists. The settlors are retaining control over the trust assets both directly and indirectly and the court has no option but to apply the principle of substance over form in order to determine the true picture behind the activities of the trust.

[25] This lack of functional separation can be clearly seen from the Opposing Affidavit by the second Respondent who states:

"What the Applicant has seen fit not state, that I also happen to be his mother"

"As a result of this matter and the acrimony that has arisen between the Applicant, myself and his siblings, he is apparently embarrassed to state this very pertinent fact.

As a result of the Applicant's conduct in the past, which conduct severely prejudiced the ninth Respondent, and as a result of the gross ingratitude displayed by the Applicant towards the ninth Respondent, its directors and member, as well as the trustees and other beneficiaries of the trust ..... the Applicant is unwelcome at the ninth Respondent's property."

This state of disunity is so contagious that it seems to have spilled over onto the parties' legal representatives. This can be seen from the correspondence between the attorneys after the signing of the deed of settlement and subsequent demand by the Applicant to be placed back onto the "vacation list". At the hearing of this matter, counsel for the Respondents kept referring to the Applicant as "Harold" and a "tree hugger" as if this was some kind of personality flaw; and even chastised him for disrespecting his mother. One would expect legal representatives to not get embroiled in their issues, but assist them to place facts before court in a formal manner.

[26] The Respondents also argue that the trust is a discretionary trust and the trustees are entitled to do as they please. It cannot be that an institution that is subject to supervision and regulation by law can exercise its discretion wantonly. If the settlors' aim was to do as they please with their property, they should not have

created a trust and no one would have forced them to. They chose to transfer their property into a trust and therefore they must adhere to the rules governing trusts. In the unreported case of **DD Watson v N Cook NO and Six others, Case no. 78012/2014 (judgment on 22/04/2014),** Rabie J made the following observation [at paragraph 30]:

> *"It is undisputed that there exists an acrimonious relationship between the Applicant and the first, second and third Respondents regarding the business and interests of the trust. A conspectus of the evidence before this court also makes it clear that there is a deliberate attempt by the first, second and third Respondents to push the Applicant out and deprive her of the required information regarding the trust and in sharing the benefits of the trust. Furthermore, the second and third Respondents appear to be using the trust as their* ***alter ego*** *and the trust assets as their own property, and also the fourth and fifth Respondents as their own."*

[27] The Arathusa Family Trust is not an income generating entity, as is the company that holds the farm property. This means that the farm is the only asset that the beneficiaries can, and do benefit from. The benefit has been and still is the scheduled vacations afforded the beneficiaries by the trustees or the company. In the same way that the trust is not permitted to discriminate between beneficiaries, one can say the same of the company that is holding the trust property. This is one of those cases where it is most appropriate to pierce the corporate veil. It is a typical example of the trustees failing to distinguish between their personal estates and trust property.

[28] The court is basically being asked to resolve a family feud, precisely because of the failure by the trustees to act in their official capacity where required. The Applicant signed the deed of settlement in good faith, but the same cannot be said of the trustees. In their capacities as trustees the law does not allow them to withhold the benefit enjoyed by the other beneficiary just because the mother and siblings have issues against him. He came to court as a beneficiary and instituted action against them as trustees, directors and beneficiaries, and this is what should concern this court at the end of the day.

[29] Even though the settlors seem to have expended a lot of money trying to maintain the property and keep the company solvent, and there isn't sufficient evidence pointing to financial mismanagement of the trust asset. It is my view however that they need to have an impartial party in their midst to avoid the obvious and substantial conflicts of interest existing now. At some stage, the loans to the company by the second Respondent will need to be repaid, and this will cause another major conflict if such repayments threaten the existence of the trust assets. The Third Respondent appears to be the "independent" trustee, but there is no indication whatsoever of how she operates in terms of preventing the individual interests from spilling into the trust arena. She is in an unenviable position where everybody around her is a chief and there are no subjects as it were. The appointment of another independent trustee might assist to quell the acrimony between the parties and restore the role of the trustees to what it should be. The Applicant on the other hand needs to realise that the trust assets will dissipate if there is no income to maintain them. The legacy of his grandfather that he seeks to protect cannot be sustained by passion alone. I also realise that to remove the trustees will not be a solution; such is the nature of a family trust.

Maybe when the problem persists when the trust/company starts running the lodge as a business, the court might be compelled to review the trustees' positions.

[30] It is stated in the founding affidavit that the First Respondent (Griessel) has since resigned as a trustee and that the Sixth and Seventh Respondents have been appointed but have not yet been issued with letters by the Master. This appointment will also turn them into seriously conflicted individuals – they are already directors of the company as well as beneficiaries of the trust. The Master's office is not a facility for rubberstamping documents and deeds without scrutinising them. If the letters have still not been issued, the Eighth Respondent will be in a relatively easy position to carry out the order of this court as appears below. Otherwise, the letters might have to be revoked. I also note that a copy of the settlement agreement that was made an order of court was filed with the Eighth Respondent's office. The Applicant sought no relief against the Sixth and Seventh Respondents.

In the premises I make the following order:

1. The Third Respondent is joined in this action in her personal capacity as Tenth Respondent.

2. The First, Second, Third and Ninth Respondents are ordered to forthwith reinstate the Applicant's rights as a beneficiary under the Arathusa Trust IT 4883/99, in particular, equal access to and enjoyment of the farm Arathusa 241 KU, Pilgrims Rest in Mpumalanga as was the practice before 14 January 2013.

3. The Eighth Respondent is ordered to appoint an independent co-trustee in consultation with the Respondents and other interested parties such that at any given time there are two independent trustees of the Arathusa Family Trust.

4. The First, Second, Third and Ninth Respondents are ordered to pay the costs of this application on a scale as between attorney and client; including the costs of two counsel jointly and severally, the one paying, the others to be absolved.

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L J N BAM AJ

ACTING JUDGE OF THE HIGH COURT

Date of hearing: **28 August 2017**

Date of Judgment: **23 October 2017**

APPEARANCES:

FOR THE APPLICANT:	**MP van der Merwe SC**
	R Oosthuizen
Instructed by :	**Jarvis Jacobs Raubenheimer Incorporated**
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	(012) 460 1930
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