Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case No: **2048/2022**
Heard on: **20/10/ 2023**
Delivered on: **16/02/2024**

In the matter between:

JACOBUS STEPHANUS BURGER Applicant

and

BERDINE BURGER N.O
(in her capacity as trustee of Westring Family Trust) First Respondent

DAVID FRANCOIS ROUX N.O
(in his capacity as trustee of Westring Family Trust) Second Respondent

PHILLIPUS JACOBUS PETRUS COETZER N.O
(in his capacity as trustee of Westring Family Trust) Third Respondent

MASTER OF THE HIGH COURT, KIMBERLEY Fourth Respondent

JUDGMENT

MAMOSEBO J

[1] The central issue in this application is the interpretation of the provisions of clause 5.3 of the trust deed of the Westring Family Trust (the Trust) pertaining to the right to appoint substituting trustees.

[2] The following facts are common cause. The applicant, Mr Jacobus Stephanus Burger, is a farmer at De Hoek, Prieska, in the Northern Cape. He was married to the first respondent, Ms Berdine Burger N.O. out of community of property which marriage was dissolved on 04 May 2021. The applicant founded the trust on 08 May 2002 with his ex-wife Ms Burger and one Mr Ockert Gerbrandt Olivier as trustees. The Master issued the initial trustees with Letters of Authority on 20 June 2002 annexed to the papers as "JB2".

[3] The Trust Deed, "JB1", makes provision for situations when a trustee ceases trusteeship. This can happen upon resignation by giving notice to the co-trustees and the Master and when his or her estate is sequestrated. Despite Olivier having served a resignation letter dated 11 May 2004 on the trustees, Mr and Mrs Burger as the remaining trustees, it is unclear whether the Master was notified of his resignation. The applicant's estate was finally sequestrated on 02 July 2021 leaving the first respondent as the sole trustee. The trust deed requires a minimum of three (3) and a maximum of five (5) trustees at all times. The applicant, the first respondent and their three major children are the beneficiaries of the Trust.

[4] On 02 March 2022 the first respondent resolved to appoint the second respondent, Mr David Francois Roux, an attorney in Port Elizabeth, and the third respondent, Mr Phillipus Jacobus Petrus Coetzer, an attorney in Pretoria, as substituting trustees. On 29 June 2022 the Master issued them with Letters of Authority to act as trustees of the Westring Family

Trust. The Master of the High Court Kimberley is cited as the fourth respondent but no cost order is sought against him.

[5] In his notice of motion the applicant is seeking the following relief which is opposed by the first, second and third respondents:

5.1 That the resolution taken by the first respondent on 02 March 2022 nominating the second and third respondents as trustees of the Westring Familie Trust be declared unlawful and invalid and set aside;

5.2 That the Letters of Authority issued by the fourth respondent on 29 June 2022, certifying that second and third respondents are authorised to act as trustees of the Westring Familie Trust, be reviewed and set aside;

5.3 A declarator that the applicant is authorised and entitled, in his discretion, to nominate substituting trustees in terms of paragraph 5.3.1 of the Trust Deed of the Westring Familie Trust;

5.4 That the first respondent and such further respondents (second and third) opposing the application be ordered to pay the costs of the application, jointly and severally.

[6] From clauses 5.2 and 5.3 the trust deed provides[1]:

[1] 5.2 Daar sal te alle tye DRIE (3) en hoogstens VYF (5) trustees in amp wees.
5.3 Die dienende trustee(s) is geregtig om bykomstige trustee(s) van hulle keuse te benoem en aan te stel onderhewig daaraan dat JACOBUS STEPHANUS BURGER (ID nr 5511065104086) die reg en bevoegdheid sal hê om:
5.3.1 Kragtens of gedurende sy leeftyd in ‘n ander skriftelike document ‘n nuwe trustee of trustees aan te stel in die plek van enige trustee of trustees, wat te sterwe kom of wie se amp beëindig word in terme van 5.6 en onderhewig aan die maksimum aantal trustees in terme van 5.2, een of meer bykomstige trustee(s) aan te stel; en
5.3.2 Kragtens testament of gedurende sy leeftyd ‘n ander skriftelike dokument enige ander persoon of persone (insluitende ‘n persoon of persone wat een van die begunstigdes mag wees of word) aan

> *"5.2 There shall at all times be THREE (3) and at most FIVE (5) trustees in office.*
>
> *5.3 The serving/incumbent trustee(s) is entitled to nominate and appoint additional trustee(s), subject thereto that JACOBUS STEPHANUS BURGER (ID number 551106 5104 086) shall have the right and power/capacity/authority to:*
>
> *5.3.1 By/In terms of a will or during his lifetime by another written document appoint a new trustee in the stead/place of any trustee or trustees who passes away or whose office is terminated in terms of 5.6 and subject to the maximum number of trustees in terms of 5.2, appoint one or more additional trustee(s); and*
>
> *5.3.2 By/In terms of a will or during his lifetime by another written document appoint any other person or persons (including a person or persons that may be or become a beneficiary) to exercise the rights afforded JACOBUS STEPHANUS BURGER (ID number 551106 5104 086) in terms of 5.3.1 and this sub-paragraph/the rights pursuant to 5.3.1 and this sub-paragraph."*

[7] The applicant asserts that Clause 5.3.1 of the trust deed clothes him alone with the authority to appoint substituting trustees. To the contrary, the first respondent maintains that, by virtue of his sequestration, he is no longer capable of filling the vacancies and that a trustee in his insolvent estate had to approach the Master for his substitution.

Points *in limine*

[8] The respondents objected *in limine* to the *locus standi* of the applicant, who is an unrehabilitated insolvent. The second point *in limine* is that the applicant has no *locus standi* by virtue of not being a trustee anymore after being declared insolvent. The contention by the

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te stel om die regte wat JACOBUS STEPHANUS BURGER (ID nr 5511065104086) ontleen aan 5.3.1 en hierdie sub-paragraaf uit te oefen.

respondents is that the applicant should have been assisted by a trustee of his estate.

[9] The applicant's argument is that his authority to fill vacancies at clause 5.3.1 is vested in his personal capacity. Section 12 of the Trust Property Control Act[2] stipulates:

"Trust property shall not form part of the personal estate of the trustee except in so far as he as trust beneficiary is entitled to the trust property."

As already stated the applicant is the founder of the trust.

[10] Section 23(6) of the Insolvency Act[3] provides:

> *"(6) The insolvent may sue or may be sued in his own name without reference to the trustee of his estate in any matter relating to status or any right in so far as it does not affect his estate or in respect of any claim due to or against him under this section, but no cession of his earnings after the sequestration of his estate, whether made before or after the sequestration shall be of any effect so long as his estate is under sequestration."*

This aspect is made clearer at para 4.3.1 dealing with proceedings which may be brought or defended personally by an insolvent where Sharrock *et al*,[4] lists these instances under which an insolvent may sue or be sued in his own name and without reference to the trustee of his estate in terms of s 23(6) – 10.

[11] The second point *in limine*: Applicant as an insolvent lacks *locus standi*. In as far as this point is concerned, the respondents contend that since

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[2] 57 of 1988

[3] 24 of 1936

[4] Sharrock et al, Hockly's Insolvency Law (ninth edition) at 66

the applicant is no longer a trustee by virtue of being declared insolvent, he lacks the necessary *locus standi* to challenge actions of the current trustees. To counter this challenge, the applicant maintains that the right to appoint substituting trustees vests in him in his personal capacity having instituted these proceedings enforcing his personal right.

[12] At paras 30 and 42 of their opposing affidavit the respondents argue that the applicant's trustee in the insolvent estate should have applied to the Master of the High Court to appoint that trustee in the applicant's stead, which was not done.

[13] The settled principle regarding an insolvent's *locus standi in judicio* is that he/she/it is not affected by his/her/its sequestration. Phrased differently, the fact that a person is insolvent does not necessarily preclude him/her/it from litigating. What is affected is his/her/its ability to litigate in respect of the assets of the estate. See *Grevler v Landsdown & 'n ander NNO*[5]. The respondents contend that, since the applicant is not only the founder and trustee but also a beneficiary of the Trust, any benefit which he derives or would derive would be for his insolvent estate, the argument by the applicant that the proceedings do not pertain to his estate, is wrong and bad in law. The respondents further argued that the applicant has been removed as a trustee and cannot be dictating to the trust as to how it should function.

[14] I share the sentiment expressed by the court in *Marais v Engler Earthworks (Pty) Ltd; Engler Earthworks (Pty) Ltd v Marais*[6] which followed *Grevler* when it said:

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[5] 1991 (3) SA 175 (T) at 177

[6] 1998 (2) SA 450 (E) at 453C - G

"The correct starting point to my mind is the fact that prior to the sequestration of his estate, the applicant had full locus standi in iudicio. His capacity to litigate was affected by the sequestration to the extent only provided for by the Act. In such regard, s 20(1) states specifically that the effect of the sequestration order is to divest the insolvent of his estate, and to vest it in the Master until a trustee is appointed and thereafter in the trustee. Section 23(1) states that subject to the provisions of s 23 and s 24…, all property acquired by an insolvent shall belong to his estate. The Act further recognises persona standi in iudicio of the insolvent in specific circumstances: the insolvent may sue or be sued in his own name without reference to the trustee in any matter relating to status or any right insofar as it does not affect his estate or in respect of any claim due to or against him under s 23 (s 23(6)); the insolvent may for his own benefit recover any pension to which he may have been entitled for services rendered by him (s 23(7)); the insolvent may for his own benefit recover any compensation for any loss or damage he may have suffered by reason of any defamation or personal injury (s 23(8)); subject to the rights of the trustee to the insolvent's income, the insolvent may recover for his own benefit the remuneration or reward for work done or for professional services rendered by him after the sequestration of his estate (s 23(9)).

I do not see these particular instances of locus standi of an insolvent to be exhaustive. The Act nowhere specifically deprives the insolvent of locus standi. In the absence of such provision, an insolvent retains general competency to sue and be sued (Grevler v Landsdown en 'n Ander NNO 1991 (3) SA 175 (T) at 177H)."

[15] This, in my view, is not a case referring to the insolvent's estate but essentially about the assets of the trust not the assets of the insolvent estate. The fact that the applicant is an unrehabilitated insolvent does not automatically preclude him from litigating in his own name without referring to the trustee of his estate. His insolvent estate and the estate of the trust are separate and cannot be conflated. The applicant has the necessary legal standing to challenge the action by the respondents.

It is therefore my finding that the applicant has the necessary *locus standi*.

It follows that the objections *in limine* stand to fail.

[16] Central to this application is the interpretation of certain clauses of the trust deed on which this case turns. The question to be answered is whether or not the trust deed conveyed an intention that the applicant is clothed with the power to nominate substitute trustees.

[17] Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 *(*4) SA 593 (SCA) at para 18 made this observation:

> *[18] 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…. 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] The same interpretive approach was followed in *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at para 12. Wallis JA said in *Bothma-Batho* at par 25:

> *"Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'. Accordingly it is no longer helpful to refer to the earlier approach."*

Emphasis, in my view, seems to be that the correct approach of interpreting is not to limit yourself to the literal meaning of the words but to consider them contextually whilst simultaneously considering the circumstances which brought the document into existence.

[19] It is common cause that at the time when the applicant founded the Trust he was married to the first respondent. It was meant to benefit him, his wife and children who are beneficiaries. It is further common cause that the Trust had to comprise a minimum of three (3) and a maximum of five (5) trustees at all relevant times. It is this omission to have the required number of trustees that has led to the first respondent's action to resolve to nominate the second and third respondents. The question is whether the resolution taken by the first respondent can withstand scrutiny when interpreting clauses 5.3.1 and 5.3.2.

[20] Clause 5.3 gives the serving or incumbent trustees the power to nominate and appoint additional trustee(s) *subject to* the applicant having the right or power to *appoint a new trustee* where a trustee has died or had his office terminated. In as far as 5.3.2 is concerned, the applicant is still alive and there is no will that has to come to the fore. He has also not drafted another written document that needs interpretation. My focus will therefore be limited to clause 5.3.1 despite the parties relying on both clauses 5.3.1 and 5.3.2.

[21] It is salutary to remind ourselves that a Trust Deed is a contract and the principles of interpretation of contracts are applicable to it. Further, it is to be interpreted as at the time of its execution. In this regard see *Mohamed and Others NNO v Ally*[7].

[7] 1999 (2) SA 42 (SCA) at 49I - J

[22] Importantly, in interpreting clause 5.3.1, regard must be had to the circumstances in existence when the trust deed came into being, the material that was known to the applicant as the founder of the trust deed, the background to the preparation of the trust deed and the purpose to which the establishment of the trust deed was directed. What is known is that the applicant was married to the first respondent and they, together with the children born out of this marriage, formed their family unit. The purpose of this Trust was meant to benefit their family with the applicant retaining the right to control who participates in this Trust either as trustees or beneficiaries.

[23] The submission on behalf of the respondents was that the trust deed envisaged a situation in future where the Trust may be left with one trustee and afforded such trustee the right to nominate and appoint any further trustee(s) of his/her choosing. Therefore, clause 5.3 bestows upon the first respondent the right to appoint additional trustees of her choosing. It is further contended by the respondents that there is no conditional rider/proviso on this right. The respondents invoked *Erwee N.O. en 'n Ander v Erwee N.O. en Andere*[8] which case focused on the meaning of the words *"benoem"* and *"aan te stel"* contained in the trust deed and whether or not they are used as synonyms. The court observed that in clause 5.3(b) the phrase "*aan te stel" was missing. Erwee,* in my view, is distinguishable because *in casu,* the words *"benoem"* and *"aan te stel"* appear in clause 5.3 as follows: *Die dienende trustee(s) is geregtig om bykomstige trustee(s) van hulle keuse te benoem en aan te stel, onderheuwig daaraan dat Jacobus Stephanus Burger die reg en bevoegdheid sal hê om:…"*

[8] [2006] 1 All SA 626 (O)

[24] The trust deed states that the nomination and appointment of additional trustees is "*subject to"* ("*onderhewig aan*") the applicant having the right and power/authority to….

The contention by the respondents can therefore not be correct that there is no rider/proviso to the right. It is clear that the first respondent's resolution resolved to fill the vacancies and was not merely appointing additional trustees in terms of clause 5.3. She stated in her affidavit that the appointments of the second and third respondents were linked to the sequestration of the applicant and the resignation of Olivier. Her powers in my view are limited to the appointment of additional trustees and not to fill vacant positions created by the applicant and Olivier.

[25] A consequence of applying the applicant's interpretation of clause 5.3 might well be that despite his sequestration he still has the right to vet who the trustees are to be appointed to the Westring Familie Trust which accords with the broad object of the trust, which is to advance the interests of the beneficiaries of the trust.

[26] In my interpretation of the relevant clause of the trust deed, I further took cue from the statement by Wallis JA in *Endumeni* at para 26:

> *"[26] …[I]n most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used. Here it is usually said that the language is ambiguous, although the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the problem, the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration."*

[27] I therefore conclude that the interpretation of the applicant is correct and that the interpretation by the respondents cannot be sustained. Schutz JA in *Mohamed and Others NNO v Ally*[9] reiterating the rule that a trust speaks from the time of its execution: see *Moosa and Another v Jhavery* 1958 (4) SA 165 (D) at 169. In my view, the aforesaid, contextually, support the contention by the applicant that whereas the incumbent trustees may appoint the additional trustees substituting those whose terms have ended, in this instance, the two vacancies created by the applicant's sequestration and Olivier's resignation, the applicant is not divested of his authority to fill vacancies. Notwithstanding that the first respondent is the incumbent trustee she could not fill the vacancies as allowing her to do so would be in direct conflict with the provisions of clause 5.3.1.

[28] On the question of costs there is no reason why costs should not follow the result.

[29] In the result, the following order is made:

1. The resolution by the first respondent on 2 March 2022 nominating the second and third respondents as trustees of Westring Familie Trust are declared unlawful and invalid and hereby set aside.

2. The Letters of Authority issued by the fourth respondent on 29 June 2022, certifying that the second and third respondents are authorised to act as trustees of the Westring Familie Trust, are reviewed and set aside.

[9] 1999 (2) SA 42(SCA) at 49I

3. The applicant is authorised and entitled, in his discretion, to nominate substituting trustees in terms of paragraph 5.3.1 of the Trust Deed of the Westring Familie Trust.

4. The first, second and third respondents are ordered to pay the costs of the application jointly and severally, the one paying the other to be absolved.

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MAMOSEBO J

NORTHERN CAPE DIVISION

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