REPUBLIC OF SOUTH AFRICA

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

CASE NO: 28258/2016

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

……………………… ……………………………
DATE SIGNATURE

In the matter between:

SORAYA NADINE THOMAS RAMALHO CORREIA
(IDENTITY NUMBER: …) Applicant

and

JEAN BEZUIDENHOUT
(IDENTITY NUMBER: …) First Respondent

NICOLAOS AKAKIOS Second Respondent

JEAN BEZUIDENHOUT N.O. Third Respondent

NICOLAOS AKAKIOS N.O. Fourth Respondent

THE MASTER OF THE HIGH COURT,
JOHANNESBURG Fifth Respondent

J U D G M E N T

MAKUME, J:

[1] In this application the Applicant seeks an order for removal of First and Second Respondents as Trustees of a Trust known as Fine Two Trust IT 4318/2008 (the Trust). The Applicant relies on the provisions of Section 20(1) of the Trust Property Control Act No 57 of 1988 (the Act). The Applicant also seeks an order appointing her as a Trustee of the Trust in place of the First and Second Respondents.

[2] The issue in this application is twofold. Firstly it is whether the Applicant has the required *locus standi* to bring this application. Secondly, whether she has satisfied the requirements of Section 20(1) of the Act in order to succeed with the application for removal of First and Second Respondents as Trustees of the Trust.

BACKGROUND FACTS

[3] The Trust was founded in the year 2008. According to the Letters of Authority the Trustees are the following persons:

3.1 Christina Maria Martins Fernandes (ID Number …) Founder Member.

3.2 Bisessar Jairaj Badal (ID Number …).

3.3 George Michaelides (ID Number …) First Trustee.

[4] During or about November 2008 one Antonio Carlos Brigham Da Silva Ramalho Correia ID Number … (the deceased) entered into a loan agreement with the Trust in terms of which the deceased advanced to the Trust an amount of R4 650 000 (Four Million Six Hundred and Fifty Thousand Rand) ("*the loan amount*"). Clause 3.3 of the loan agreement regulated the manner of repayment of the loan to the deceased.

[5] The loan amount was advanced to the Trust to enable it to acquire 24 shares in a company known as Cosmo-Net (Pty) Ltd Registration Number 1999/17525/07.

[6] On the 24th January 2012 purportedly acting in accordance with Clause 20 of the Deed of Trust a resolution was passed amending the Deed of Trust in order to resolve issues relating to the non-payment of the loan amount by the Trust to the deceased. This resolution was signed by one Trustee namely the founder and two other persons who are described as Nominated Trustees. Those persons happened to be the First and Second Respondents.

[7] The amendment sought to replace George Michaelides as a beneficiary and in his place the deceased was appointed a beneficiary of the Trust. Secondly, provision was also made for termination of the Trust on the date of death of the deceased at the sole discretion of the Trustees who retained the authority to extend the lifespan of the Trust. In the resolution the founder resigned as a Trustee of the Trust.

[8] Pursuant to the resolution the Loan Agreement was varied to stipulate the following:

8.1 That the Trust owed the deceased an amount of R6 196 000,78 (Six Million One Hundred and Ninety Six Thousand Rand and Seventy Eight Cents).

8.2 That the pledge held by the deceased as security for the loan namely the 24 shares in the company Cosmo-Net is hereby relinquished and in its place the deceased would be entitled to receive dividends as and when same are declared by the Director of Cosmo-Net Limited.

8.3 Clause 2.3 of the amended Loan Agreement reads as follows:

> "*The Borrower (the Trust) undertakes to do all necessary to change the current Trustees of the Five Things Two Trust to Nicolaos Akakios and Jean Bezuidenhout.*"

[9] The deceased was married to the Applicant on the 9th April 2011 and in his will dated the 5th July 2013 he bequeathed to the Applicant the residue of his estate and effects whether movable or immovable. He passed away on the 6th November 2014. It is common cause that such residue included amongst others the dividends as and when declared by the directors of Cosmo-Net.

[10] The financial year end results of Cosmo-Net for the period ending 29th February 2016 indicate that First and Second Respondents are two of the directors of Cosmo-Net.

THE ISSUES

[11] It is against this factual background that I now deal with the issues in this matter.

[12] It appears that the Trustees Bisessar Jairaj Badal (Badal) and George Michaelides (Michaelides) resigned on the 24th January 2012 leaving only the founder Christina Maria Martins Fernandes as the Sole Trustee. In accordance with Clause 20 the Trust Deed may be varied if agreed to by the founder Christina Maria Martins Fernandes and by all the Trustees in this instance Badal and Michaelides.

[13] The preamble to the resolution dated the 24th January 2012 reads as follows:

> "*Whereas Christina Maria Martins Fernandes as founder of the Trust is desirous to amend certain provisions of the Trust Deed in terms of Clause 20 of the Trust Deed …*"

This preamble clearly trumps the provision of Clause 20 which requires that the proposed variation be agreed to by the founder and all the Trustees. The resolution on which the amendment is founded was not signed or agreed to by Badal and Michaelides instead it was signed by persons who were not authorised namely First and Second Respondents.

[14] In this case the founder was not authorised by the then existing co-Trustees namely Badal and Michaelides to sign the resolution in contravention of Clause 20 of the Deed of Trust and neither were First and Second Respondents authorised to represent the Trust in contravention of Section 6(1) of the Trust Property Control Act 57 of 1988 which reads as follows:

> "*Any person whose appointment as Trustee in terms of a trust instrument, Section 7 or a Court Order comes into force after the commencement of this Act, shall act in that capacity only if authorised thereto in writing by the Master.*"

First and Second Respondents were only authorised to act from the date when the Master (Fifth Respondent) issued Letters of Authority which was only on the 26th May 2016 some four years after the impugned resolution and amendment.

[15] Accordingly both the resolution as well as the variation Loan Agreement on which the Applicant based her application are a nullity and of

no force and effect and could not bind the Trust. See *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA) in which Cameron JA elaborated as follows:

> "*A Trust is an accumulation of assets and liabilities. These constitute the Trust estate which is a separate entity. But though separate the accumulation of rights and obligations comprising the Trust estate does not have legal personality. It vests in the Trustees and must be administered by them and it is only through the Trustees specified as in the Trust instrument that the Trust can act. It follows that a provision requiring that a specified number of Trustees must hold office is a capacity-defining condition. It lays down a prerequisite that must be fulfilled before the Trust estate can be bound. When fewer Trustees than the number specified are in office, the Trust suffers from incapacity that precludes action on its behalf.*"

[16] The second issue is whether the Applicant has set out sufficient grounds and reason why First and Second Respondents should be removed as Trustees of the Trust and why she should be appointed a Trustee of the Trust.

[17] It is now trite that the Court has inherent power to remove a Trustee from office at common law. This power also derives from Section 20(1) of the Act which provides as follows:

> "*[20]* *<u>REMOVAL OF TRUSTEES</u>*
>
> *(i)* *A trustee may, on application of the Master or any person having an interest in the trust property, at any time be removed from his office by the Court if the Court is satisfied that such removal will be in the interest of the trust and its beneficiaries.*"

[18] The Act is silent and does not spell out what grounds will suffice to justify a removal of a trustee. The authors of *Honore's South African Law of Trusts* 5th Edition (2002) at 223 say that the general principle which has crystallised over the years in the Courts exercise of its common law jurisdiction and now strengthened in Section 20(1) of the Act is that a Trustee will be removed from office when continuance in office will prevent the Trust being properly administered or will be detrimental to the welfare of the beneficiaries.

[19] Some circumstances which justify removal of a Trustee by the Court are where the Trustee without explanation removes Trust funds from an apparently safe investment with a financial institution and transfers them to his or her personal account, where the Trustee fails to inform his co-Trustees about a crucial decision for example sell the Trust property when the Trust instrument demands of him or her to so inform them and get their consent, also where a Trustee treats Trust property as his or her own property.

[20] In this matter for the Applicant to succeed she must prove that the First and Second Respondents' conduct imperils the Trust property or its proper administration or that the removal will otherwise be in the interests of the Trust and its beneficiaries.

[21] The entire factual basis for the relief claimed by the Applicant is set out in the following paragraph of the founding affidavit:

"*29. It is apparent that the First and Second Respondents have contrived a stratagem to prevent the declaration and payment of dividends. I suspect that this goal is being achieved by the First and Second Respondents either remunerating themselves with exorbitant salaries or creating fictitious loan accounts.*

30. This comprises a blatant abuse of the fiduciary duty owed by the First and Second Respondent in their capacity as trustees to the deceased and now myself as the beneficiary of the Trust.

31. The First and Second Respondents have placed themselves in a position where their own interests conflict with and are placed above my interests as the beneficiary of the Trust.

32. I have caused correspondence to the addressed to the First and Second Respondents on my behalf as the beneficiary of the Trust requesting that they furnish me with Audited Annual Financial Statements of the company from the time of the conclusion of the variation agreement to date.

33. My request in this regard has been ignored.

34. This in itself grants credence to my suspicions. In addition thereto the First and Second Respondents' conduct amounts to a failure to account to me properly on at all as a beneficiary of the Trust."

[22] In my view the Applicant's main complaint is in fact contained in paragraph 28 of his founding affidavit and that is that the First and Second Respondents as directors of Cosmo-Net have since the death of the deceased in 2014 not made payment of dividends to the Trust to enable her as a beneficiary of the Trust to access such dividends.

[23] In response to the complaint the First and Second Respondents confirm that no dividends have been paid not only to the deceased nor any other shareholders. The Respondents explain that the Directors of Cosmo-Net decided not to declare dividends since 2016 but rather to conserve cash

and maintain adequate debt room to ensure that the company Cosmo-Net is best placed to withstand any prolonged adverse economic conditions.

[24] In reply to the above statement the Applicant admits that no dividends have been distributed and then denies the remaining contents of paragraph 21.7 and does not base her denial on any concrete facts. It is a bad denial. The Applicant's case is premised solely on suspicion, speculation and conjecture as she has not proffered any positive primary facts from which legitimate inferences can be drawn to demonstrate that the First and Second Respondents have contrived a stratagem to the declaration and payment of dividends.

[25] In this regard Nicholas JA in the matter *Bateir and Lloyd Aviation (Pty) Ltd and Another v Aviation Insurance Co* 1985 (3) SA 916 (A) at 939F-940A stated the principles as follows:

> "*Inference it was observed by Lord Wright in Caswell v Powell Duffryn Associated Collieries Ltd 1939 (3) All Er 722 (HL) at 733E-G must be carefully distinguished from conjecture or speculation:*
>
> > *'There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which inferences can be made, the method of inference fails and what is left is more speculation and conjecture.'*"

[26] In applying the aforegoing principle to this case, I find that there are no primary facts which establish on a balance of probabilities that First and Second Respondents have abused their fiduciary duties as Trustees nor is

there evidence that they have contrived a stratagem to prevent the company Cosmo-Net to declare payment of dividends.

[27] In view of the decision I have come to it is not necessary for me to decide whether indeed the Applicant has the necessary *locus standi* to bring an application for removal of the Trustees in terms of Section 20(1) of the Act.

[28] The fact that the company Cosmo-Net has not declared dividends since the passing away of the deceased has been explained. In any case Section 46 of the Companies Act 71 of 2008 stipulates the requirements for the declaration of dividends in a company they are:

28.1 The Board of Directors of the company must have authorised the distribution.

28.2 It must reasonably appear that the company will satisfy the solvency and liquidity test immediately after completing the proposed distribution.

28.3 The Board of the company by resolution must acknowledge that it has applied the solvency and liquidity test and have concluded that the company has satisfied the solvency and liquidity test immediately after completing the distribution.

[29] Even if I had found that the variation agreement was validly concluded the Applicant would still have no grounds to demand that dividends be paid because in terms of Clause 2.4 of the purported variation of Loan Agreement it is only when and if the dividends are received by the Trust that they can be passed on to the deceased estate or to his heirs. Clause 2.4 places no obligation on the company to declare dividends. That clause reads as follows:

> "*2.4 With effect the date of signature this Variation Agreement any dividends received by the Borrower as a result of its ownership of the shares in Cosmo-Net (Pty) Ltd shall be passed on to the Lender as and when requested by the Lender.*"

[30] It is common cause that the company Cosmo-Net has neither declared nor paid dividends to any of its shareholders including the Trust since the death of the deceased and thus no dividends have accrued to the Trust since the death of the deceased.

[31] In my view the fact that no dividends have been declared and distributed does not demonstrate any endangerment to the Trust property or its proper administration or that the removal of the Trustees will otherwise be in the interest of the Trust and its beneficiaries.

[32] In the circumstances it is my view that the Applicant has not satisfied the requirements for the removal as Trustees of First and Second Respondents and accordingly this application falls to be dismissed with costs.

ORDER

[33]

33.1 The application is dismissed.

33.2 The applicant is ordered to pay the First and Second Respondents' taxed party and party costs which shall include costs of counsel.

DATED at JOHANNESBURG this the day of MARCH 2017.

M A MAKUME
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING	20 FEBRUARY 2017
DATE OF JUDGMENT	MARCH 2017
APPLICANT'S COUNSEL	N LOMBARD
INSTRUCTED BY	MESSRS BRUGMAN MOODLEY ATTORNEYS JOHANNESBURG Tel: (011) 646-0335 Ref: Ms S Moodley/BD/BMC004
RESPONDENTS' COUNSEL	W G PRETORIUS
INSTRUCTED BY	B J R BURT ATTORNEYS JOHANNESBURG Tel: (011) 487-0123 Mr B Burt/Mr S Thwala