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**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case number: 1263/2022

Reportable: YES/NO

Of interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

NOMPI TRIPHINA TSHABALALA N.O.

1st Applicant

NOMPI TRIPHINA TSHABALALA

2nd Applicant

ERIC SIMANGELE MBELE

3rd Applicant

MADITSEBE EMMA MTHEMBU

4th Applicant

MANTOA MOLOI

5th Applicant

TSHEPO MTHEMBU

6th Applicant

MADITABA MARIA MOLOI

7th Applicant

And

NONDLADLA JOHANNA LEPEE

1st Respondent

TEMBISA GLORIA NYOLA

2nd Respondent

THE MASTER OF THE FREE STATE HIGH COURT,
BLOEMFONTEIN

3rd Respondent

HEARD ON: 01 SEPTEMBER 2022

JUDGMENT BY: DANISO, J

DELIVERED ON: This judgment was handed down electronically by email to the parties' representatives and by release to SAFLII. The date and time for hand-down is deemed to be 14h00 on 17 January 2023

[1] This matter involves a dispute between trustees namely, the first applicant, the first and second respondents over the management of a Trust registered with the third respondent ("the Master") on 8 October 2008 under name Nyola Trust ("The Trust) with registration number IT[...].

[2] The Trust was established by the respondents' mother the late Mirriam Nyola ("the deceased"). Ms Nyola passed away on 7 November 2012 and upon her demise, the first applicant, first and second respondents remained as co-trustees and income and capital beneficiaries.

[3] The third to seventh applicants respectively, are the children and grandchildren of the first applicant. They are also the beneficiaries of the Trust.

[4] In the applicants' notice of motion the following relief is sought:

"1. That the First Respondent is removed as trustee of the Nyola Trust- IT[...];

2. That the Second Respondent is removed as trustee of the Nyola Trust- IT[...];

3. That leave is granted to the First Applicant to appoint co-trustees in their stead within 30 days of the Order as there shall at all times not be less than two (2) Trustees;

4. *That the Third Respondent appoints and grant Letters of Authority to such trustees as contemplated in paragraph 3 above, alternatively to such person or persons whom the Third Respondent deems fit and proper to be a trustee of the Trust;*

5. *That the Trust be ordered to pay the cost of the application; and*

6. *That, in the event that the application be opposed by any of the First and Second Respondent/s, such Respondent/s be ordered to pay the costs of the application..."*

[5] The application is opposed by the second respondent only.

[6] The applicants rely on the provisions of s9 and 10 of the Trust Property Control Act¹ ("The Act") on the basis that, the respondents have neglected their duties to act with due care and diligence in administering the Trust. The applicants accuse the respondents of lack of disclosure in respect of the financial affairs of the Trust, failing to keep proper accounting systems of the affairs of the Trust and the misappropriation of the funds of the Trust.

[7] In terms of s20(1) of the Act alternatively, the common law the onus is on the applicants to satisfy the court that the removal of the respondents as trustees will be in the interests of the Trust and its beneficiaries or their continuance in office of the trustee will be detrimental to the beneficiaries or prevent the Trust from being properly administered. (*Gowar and Another v Gowar and Others* **[2016] ZASCA 101**; **[2016] 3 All SA 382** (SCA); **2016 (5) SA 225** (SCA); *Haitas v Froneman and Others* **[2021] ZASCA 01**).

[8] It is the applicants' case that from the inception of the Trust, no proper records including financial statements of the Trust have been kept by the respondents. On 26 September 2012 the first applicant, through its attorneys transmitted a letter to the deceased requesting to be furnished with the Trust's financial records. The records were not provided, the follow up letter on 13 November 2019 also did not yield a favourable result.²

¹ Act No, 57 OF 1988.

² Annexure "J" and "X1" of the applicant's founding affidavit.

[9] The Trust owns a farm described as portion 21 of Farm 1[...] situated in the district of H[...] in the Free State. The applicants complain that the respondents have been engaged in negotiations to conclude lease agreements in respect of portions of the farm to various entities including Cell C, Eskom, South African Revenue Services and Genesis Eco-Energy for the erection of sub-stations, mobile phone towers and cable lines. The details of these transactions including the circumstances under which the agreements are to be concluded are unknown to the applicants.

[10] The respondents also leased portions of the farm to Mr Ntsane for livestock grazing for the period May 2014 to April 2015 at an amount of R400.00 per month. The arable land was leased to Mr Maree of Toekomst Boedery, he paid R33 600.00 on 12 August 2014. Then during October 2017 to October 2019 Mr and Mrs Mbhele leased hectares of the farm at an amount of R83 200.00 per annum.

[11] Mr Ntsane and Maree's rental payments were deposited into the Trust's banking account, while Mr Mbhele's rental payments were deposited into the respondent's personal bank account. None of these payments were disclosed to the applicants and they were also not paid the dividends in that regard.

[12] The Trust's banking account has since been closed by the bank due to inactivity and non-compliance with the Financial Intelligence Centre Act.

[13] As a result of the respondents' conduct, the applicants lodged a complaint with the Master. Having found that the applicants' complaint involves "factual disputes and unproven allegations" which can only be resolved by the court the Master recommended that the dispute be referred to court.

[14] According to the applicants, the only meeting held to address the issues relating to the administration of the Trust was convened at the instance of the first applicant on 9 September 2013 and 19 October 2019 and it was only then, that the first applicant was paid her share of the dividends from the rental payments made by Mr Ntsane. Mr Mbhele has also been paying his rent into the applicants' attorney's trust account since October 2019.

[15] In the answering affidavit, it is conceded that the Trust has not been properly managed. The second respondent states that initially, the Trust was administered solely by the deceased. After her demise, none of the Trustees effectively managed the Trust and this is due to the fact that all the trustees are lay persons and at the time they assumed their responsibilities as trustees they had not received any training nor attended any programs regarding the administration of Trusts. It is due to this lack of knowledge that the trustees permitted the deceased to administer the Trust alone when she was still alive thereafter, the responsibility was delegated to the first respondent.

[16] With regard to the alleged misappropriation of the Trust's funds, the second respondent denies that Mr Mbhele was instructed to pay the rent into the respondents' personal banking account and points out these allegations are in any event unsubstantiated. Mr Mbhele has not filed a confirmatory affidavit in that regard the court must thus disregard the allegations as inadmissible hearsay.

[17] The second respondent admits receiving payments totalling an amount of R15 000.00 (fifteen thousand rand) from the Trust as an allowance. The payment was made to her by the first respondent in her (the first respondent) capacity as the chairperson of the Trust and in terms of the resolution taken at the meeting that was convened by the first applicant on 9 September 2013.

[18] According to the second respondent, Mbhele has been depositing rental payments into the trust account of the applicants' attorneys on the instructions of the first applicant from 2017 to 2019. The payments have been distributed to the first applicant and the other applicants with the exclusion of the respondents.

[19] The second respondent contends that despite her concessions, her conduct does not warrant removal as a trustee, it is the responsibility of all the trustees to manage the Trust therefore, the first applicant is jointly liable with the respondents for the breach of their fiduciary duties with the Trust. The application must accordingly be dismissed.

[20] The second respondent's contention that all trustees have a joint fiduciary duty to administer a Trust is well-founded and affirmed by s9 (1) of the Act which states that:

"9 Care, diligence and skill required of trustee

(1) A trustee shall in the performance of his duties and the exercise of his powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another.

(2) Any provision contained in a trust instrument shall be void in so far as it would have the effect of exempting a trustee from or indemnifying him against liability for breach of trust where he fails to show the degree of care, diligence and skill as required in subsection (1)."

[21] Clause 16 of the Trust Deed³ provides thus:

"DUTIES OF TRUSTEES

16. Subject to common law or any other statutory obligations attached to the office of trustee, the trustees are obliged-

16.1....

16.2...

16.3. to open, immediately, in compliance with the Act, a banking account in the name of the trust and to deposit all monies received by the trust into such account;

16.4. to take all possession of and hold for safe keeping (where applicable) all the assets, title deeds and documents concerning the trust;

16.5. to keep, or appoint someone to keep, detailed books of account of the affairs of the trust;

16.6. to keep the trust property separately at all times and to register it separately, enabling it always to be identified as such;

16.7. not to dispose of trust assets for their own advantage to act continuously with care and consideration as is reasonably expected of a person who handles the affairs of another."

³ See para 16.3 to 16.7.

[22] I hold that for the first applicant to extricate herself from her joint fiduciary duties and lay the blame for the inefficiencies in the administration of the Trust squarely on the respondents is quite disingenuous. *“They are all in this together.”*

[23] As regards the allegations of misappropriation of the Trust’s funds, it has been said that where financial gain by means of improprieties on the part of a trustee has been established the court is entitled to interfere and remove the dishonest trustee.⁴ In this matter what can be judged from the papers is that genuine factual disputes have been raised by the second respondent with regard to the funds received on behalf of the Trust, how they were managed and disbursed.⁵

[24] These disputed facts cannot be resolved by way of affidavits. They were apparent well before this application was launched in that, they were pointed out in the Master’s report as the basis for referring the matter to court. By choosing to proceed with this matter by way of motion proceedings the applicants confined themselves to have the prevailing disputes of facts decided on the affidavits alone landing them in an unenviable position of not being able to discharge the onus of proving that the respondents have obtained some financial gain as a result of their misconduct. It is important to note that, on her own admission the first applicant has also diverted rental payments due to the Trust to her attorneys’ trust account without the consent of the respondents.

[25] It is indisputable that the trustees including the first applicant have neglected their obligations as trustees therefore, to remove the respondents and effectively place the first applicant in control of the Trust would be unsound. I am not persuaded that the applicants have made out a case for the relief sought, the application ought to fail.

[26] There is no reason why the costs should not follow the result. I accordingly make the following order:

⁴ See *Haitas* at para 35.

⁵ *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* **1949 (3) SA 1155** (T).

1. The application for the removal of the first and second respondents as trustees of the Nyola Trust IT[...] is dismissed with costs.

N.S. DANISO, J

APPEARANCES:

Counsel on behalf of Applicant:

Adv. P.R. Cronje

Instructed by:

O.J. van Schalkwyk

BLOEMFONTEIN

Counsel on behalf of the 2nd Respondent:

Adv. Tlelai

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