THE REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number:16230/2022

In the matter between:

JACOBUS GIDEON BRAND Applicant

and

ANDRE THEUNIS BRAND First Respondent

THE MASTER OF THE HIGH COURT Second Respondent

Coram: Wille *et* Thulare JJ
Heard: 22 April 2024
Delivered: 26 April 2024

JUDGMENT

WILLE, J:

Introduction

[1] This is an application for the removal of the first respondent from his office as a trustee of a testamentary trust. Further, an order is sought for the second

respondent to appoint an alternative or more alternative trustees to undertake the testamentary trust's business.[1]

[2] The second respondent takes no part in this application and abides by the court's decision. The first respondent curiously also charters a belated application for the setting aside of an agreed arbitration award concerning the trust. This application needed to be properly before the court for adjudication. The applicant applies for an order in terms of the relevant, targeted legislation, alternatively, the common law for removing the first respondent as a trustee of the trust. The primary ground for this relief is that such removal will be in the interests of the trust and the beneficiaries of the trust.[2]

[3] The applicant is a trustee of the trust. The applicant is also a beneficiary of the trust. The first respondent and the applicant are brothers. Because a trust is not a discrete legal entity, it must act by and through its trustees. A trustee may be removed as a trustee by the second respondent on application or by any other person having an interest in the trust's property by the court. This is if the court is satisfied that such removal will be in the interests of the trust and its beneficiaries.[3]

[4] The applicant's case is that a trust can only act through its trustees. The trustees are thus obliged to cooperate. Put another way, the role of a trustee in the administration of a trust calls for the exercise of a fiduciary duty owed to all the beneficiaries, irrespective of whether they have vested rights or are contingent beneficiaries.[4]

[5] The applicant avers that removing the first respondent will be in the interests of the trust and its beneficiaries. The applicant advances that the trust must be administered properly. If this does not happen, the beneficiaries will not be

---

[1] *The Trust is called the "JK Testamentary Trust" with registration number MT125179/82 (the "trust").*

[2] *The application for the removal of the first respondent is in terms of section 20 (1) of the Trust Property Control Act 57 of 1988.*

[3] *This is in terms of section 20 (1) of the Trust Property Control Act 57 of 1988 (the "Act").*

[4] *Doyle v Board of Executors 1999 (2) SA 805 (C).*

adequately protected. The complaints are that the first respondent, among other things, (a) failed to fulfill his duties by not providing the necessary trust records requested, (b) refused to cooperate with his co-trustee, (c) hindered the recovery of potentially misappropriated funds and, (d) is motivated by a conflict of interest.[5]

Context

[6] The first respondent and the applicant are brothers. Their father passed away over four decades ago. Their late father's will and testament established this trust. The current trustees are the applicant and the first respondent. Regarding the testamentary trust deed, their mother, the applicant, and the first respondent were nominated as the executors and administrators of their late father's estate in terms of his will.[6]

[7] The testamentary trust instrument directed that the trustees must make unanimous decisions. In the case of disagreement, an arbitrator, either chosen by them or appointed by the second respondent, must resolve any dispute informally. This decision by the arbitrator is final and binding. The disputes that initially existed (and still so exist) between the applicant and the first respondent were referred to arbitration. The first respondent subsequently reneged on the outcome of an agreed arbitration award and sought to set aside this award through his counterapplication.[7]

[8] Upon their father's death, the first respondent was a major and thus eligible to be a trustee. The applicant was still a minor and not yet authorized. The first respondent was the original trustee of the trust, and his mother was also a trustee. They were also the joint executors of the deceased estate. The applicant was appointed as a trustee about a year later. However (according to him), he was never informed of any of the trustee's meetings regarding the trust's affairs.[8]

---

[5] *The first respondent allegedly obstructed the investigation of claims against the estate of Hester Johanna Retief.*
[6] *The trust was established per the will of the applicant's father through a testamentary trust.*
[7] *As alluded to, this application is not before the court and forms the subject of discrete proceedings.*
[8] *It is the applicant's case that he was excluded from the business of the trust by design.*

[9] Essentially, the trust in question was administered solely based on a power of attorney that the first respondent had granted to his mother shortly after his father's death. Thus, it was submitted that the first respondent had abrogated his powers and duties as trustee and was negligent in discharging his responsibilities as trustee. The applicant advances that the trust has a substantial recovery claim against his late mother's estate. In summary, the applicant's position is that the first respondent refused to abide by the terms of the trust instrument, which constitutes good cause for his dismissal as trustee.[9]

Consideration

[10] The first respondent claims that he attended training at a hotel management school after his father's death and was, therefore, unable to fulfil his duties as a trustee of the trust. He also later realized that his mother had abused her powers under the mandate given to her by him. The applicant alleges that the first respondent allowed his mother to manage the trust's affairs, causing substantial damage to the trust's business interests. It is contended that the first respondent is conflicted in that he is both a trustee and a beneficiary of his late mother's estate. The trust is believed to have substantial claims against his late mother's estate.[10]

[11] The applicant's allegation is that the trust anticipates an action against the first respondent, which cannot be seriously disputed since the first respondent admitted certain wrongdoings in the trust's administration. An action against him is thus to be expected. The argument is that it follows that he cannot remain a trustee of the trust.[11]

[12] Another complaint concerns the first respondent's alleged failure to fulfil his duties as a trustee by not providing his co-trustee, the applicant, with the required

---

[9] *The applicant avers that the first respondent walked away from his responsibilities as a trustee.*
[10] *The trust and the applicant intend to pursue claims against the first respondent.*
[11] *The first respondent would simply refuse to resolve that the trust institutes this action.*

trust documents and records despite numerous requests to do so by the applicant. The applicant suggests that this refusal has also prevented the applicant from administering the trust adequately, as he has been unable to compile accurate financial accounts relating to the trust's affairs.[12]

[13] In addition, the applicant complains that the first respondent failed to fulfil his duties as a trustee by refusing to cooperate with the applicant in holding trustee's meetings and making unanimous decisions necessary for the proper functioning of the trust, resulting in a deadlock.[13]

[14] The main complaint seems to be that the first respondent's conduct has been detrimental to the interests of the trust and its beneficiaries. Some of his conduct appears to be motivated by a conflict of interest, as he can potentially benefit as an heir to his late mother's estate, against which the trust may have substantial claims.[14]

[15] Thus, it is contended that the removal of the first respondent would break the current deadlock and enable the trust to properly investigate and pursue any claims it may have against the estate of his late mother and the first respondent himself for his failure to act against her misappropriation of trust income during his time as co-trustee of the subject trust.[15]

[16] The first respondent concedes to his ongoing disputes with his brother, the applicant. He concedes these disputes concern the management of the trust. The first respondent is steeped in the belief that the trust's claim against his late mother's estate is inflated. This is, in essence, the only shield raised by the first respondent that falls to be decided by this court other than the ill-advised counterapplication that needs to be properly presented before court.[16]

---

[12] *The applicant referenced numerous correspondences requesting this financial information from the first respondent.*
[13] *The first respondent refuses to be bound by the contents of the agreed arbitration award.*
[14] *The amount of this alleged claim by the trust may ultimately be decided by a court.*
[15] *The allegation is that the first respondent unlawfully interfered with this legitimate litigation.*
[16] *The first respondent's shield goes to the amount of the claim which is of no moment.*

[17] We say this because the first respondent erroneously pinned his hopes on what he believed was a competent counterclaim to the current application. Firstly, a proper review record concerning the counterclaim was not before us. Secondly, this counterclaim is the subject of a pending discrete application initiated by the applicant to have the agreed arbitration award made an order of court. This counterclaim (such as it is) has less to do with this application. It only reinforces the first respondent's attitude and attempts to imperil the administration of the trust affairs.[17]

[18] The applicant is not a potential heir to his late mother's estate. He contends that the first respondent failed in his fiduciary duties as trustee, including giving their late mother power of attorney to improper control the trust affairs. Therefore, removing the first respondent as a trustee is justified under the targeted legislation and the common law.[18]

[19] We say this because the targeted legislation allows the court to remove a trustee if the trustee fails to perform satisfactorily or prejudices the interests of beneficiaries. In addition, under common law, a trustee can be removed if their continuation in office would prevent the trust from being adequately administered or would be detrimental to the welfare of the beneficiaries.[19]

[20] The test in our jurisprudence concerning removing a trustee from being a trustee of a trust is whether the errant trustee's alleged conduct is jeopardizing the trust property and its affairs. The court has an inherent power to remove a trustee from office at common law. In addition, this power may also be sourced in our targeted legislation.[20]

---

[17] *The first respondent refuses to accept the validity of the agreed arbitration award.*
[18] *Section 20 (1) of the Trust Property Control Act, 57 of 1988.*
[19] *Both scenarios are present in the current application.*
[20] *Section 20 (1) of the Trust Property Control Act, 57 of 1988.*

[21] We have no doubt that the unfortunate disharmony between the applicant and the first respondent, among other things, (a) imperils the trust generally, (b) imperils the trust administration, and (c) imperils the welfare of the beneficiaries of the trust. The facts show this on a balance of probabilities. The disharmony is common cause.[21]

Costs

[22] There are no reasons why costs should not follow the result. The first respondent elected to oppose this application, and he sought to impermissibly prosecute his counterclaim for review in the same proceedings. This he did to promote his ill-advised attempts to imperil the administration of the trust and, in so doing, the interest of the trust's beneficiaries. However, we find no exceptional circumstances warranting the granting of costs on a punitive scale.[22]

Order

[23] As a result, the following order is granted:

1. With this order, the first respondent is removed from his office as a trustee of the JK Testamentary Trust bearing registration number MT125179/82 (the “trust”).
2. The second respondent is directed and authorized to appoint two suitably qualified professional independent trustees to serve as trustees of the trust jointly with the applicant.
3. The first respondent, in his personal capacity, shall be liable for the costs of and incidental to this application on the scale as between party and party, as taxed or agreed.
4. The costs of counsel shall be on scale “B” unless agreed otherwise.

---

[21] *Fletcher v McNair (1350 /2019) [2020] ZASCA 135 (23 October 2020).*

[22] *The first respondent is given the benefit of the doubt on this score, absent further evidence.*

WILLE, J

I agree:

THULARE, J