



Reportable:	Yes/No
Circulate to Judges:	Yes/No
Circulate to Magistrates:	Yes/No

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

CASE NO.: 2137/2019
Date heard: 12-03-2021
Date delivered: 01-10-2021

In the matter between:

**Derrick Giyose t/a Giyose Holding
Consultants & Associates**

Applicant

and

**Master of the High Court, Kimberley
Longlands Development Trust**

**1st Respondent
2nd Respondent**

CORAM: WILLIAMS J:

JUDGMENT

WILLIAMS J:

1. During November 2017, the applicant, Mr Derrick Giyose t/a Giyose Holding Consultants and Associates who renders consulting and investigation services, was appointed by the Master of the High Court, the 1st Respondent, as an investigator into the affairs of the 2nd respondent, the Longlands Development Trust (the Trust) as a result of some conflict between the trustees of the Trust and other alleged irregular activities.

2. The applicants' appointment was made in terms of s 16 (2) of the Trust Property Control Act 57 of 1988 (the Act). For the sake of convenience I reproduce the entire s 16 of the Act as follows

16. Master may call upon trustee to account.—(1) A trustee shall, at the written request of the Master, account to the Master to his satisfaction and in accordance with the Master's requirements for his administration and disposal of trust property and shall, at the written request of the Master, deliver to the Master any book, record, account or document relating to his administration or disposal of the trust property and shall to the best of his ability answer honestly and truthfully any question put to him by the Master in connection with the administration and disposal of the trust property.

(2) The Master may, if he deems it necessary, cause an investigation to be carried out by some fit and proper person appointed by him into the trustee's administration and disposal of trust property.

(3) The Master shall make such order as he deems fit in connection with the costs of an investigation referred to in subsection 2.

3. During and upon conclusion of the investigation the applicant submitted certain preliminary and *interim* reports and a final report on 30 May 2018 to the Master regarding the investigation. Thereafter the applicant submitted an invoice for his services to the Master in the amount of R1 188 258, 35.

4. The Master has to date refused to pay the applicant hence this application in which the applicant seeks the following relief:

(1) An order declaring that the 1st respondent is liable for the payment of the invoice for the investigation services rendered by the applicant to and in favour of the 1st Respondent.

(2)Alternatively, declaring whether paragraph 4 of this Honourable Court's order granted by the Honourable Acting Justice Coetzee on the 31 May 2018, attached hereto marked "DG-1", has the effect of indemnifying the 1st respondent herein against liability and payment of costs incurred by the 1st respondent payable to the applicant.

(3)Ordering the 1st respondent to pay an amount of R1 188 258, 35 to the applicant in terms of the invoice attached hereto marked annexure "DG -2" within 7 (seven) days from the date of the granting of the court order."

5. The court order mentioned in the applicant's Notice of Motion relates to an application under case no 143/18, which served before Coetzee AJ regarding the dispute between the trustees of the Trust, which gave rise to the appointment of the applicant by the Master. The Master was cited therein as the 12th respondent.
6. The abovementioned application was brought by nine of the trustees against ten of the trustees during January 2018, some two months after the appointment of the applicant by the Master. It appears from the portions of the application under case no 143/18 which have been annexed to the application *in casu* that that application had been postponed on several occasions awaiting the finalization of the applicant's report.
7. After the applicant's final report was delivered and on 31 May 2018, the parties negotiated a settlement which was made an

order of court and of which paragraph 4 of the order is relevant to these proceedings. It reads as follows:

“4. The Longlands Development Trust No IT6/2000 is hereby ordered and directed to pay the investigation costs incurred by the Twelfth Respondent.”

8. The applicant was not a party to the application under case no 143/18, though he was by virtue of his appointment as investigator, aware of the proceedings. In fact, the applicant in his address in court stated that he had met with the trustees regarding the application and had encouraged the settlement of the matter.
9. Be that as it may, the applicant states that he submitted an invoice for his services to the Master on 4 September 2018, which invoice has remained unpaid.
10. On 8 July 2019 the applicant sought to have his investigation costs taxed and served a Notice of Taxation on the Master.
11. On 29 August 2019 the Taxing Master of this court notified the applicant that the bills presented fall outside the ambit of a Taxing Master's powers and functions.
12. This application was then launched. The applicant's main contentions in support of the relief sought are (i) that the appointment by the Master of the applicant to render services to the Master created a contractual relationship between the two

parties to the effect that once the applicant had rendered such services he would be duly compensated by the Master; and (ii) that the court order of 31 May did not absolve the Master from his contractual obligation to pay the applicant's fees.

13. In dealing with the applicants' first argument it is necessary to have regard to the letter of appointment issued by the Master on 7 November 2017. The relevant portion reads as follows:

"LONGLANDS DEVELOPMENT TRUST

The abovementioned trust refers;

You are hereby appointed as an investigator in terms of Section 16(2) of the Trust Property Control Act No 57/1988, as amended.

You need to investigate the nomination procedure and the authenticity thereof and the appointment of trustees in my office.

You also need to investigate whether there is irregular administration taken place in this trust.

You need to report back to me on or before 31 January 2018, in order to consider whether any further steps may be considered.

If necessary, you need to apply to me timeously, for an extension of this investigation report to be lodged with me."

14. The applicant is not ignorant of the provisions of s 16 of the Act. In fact it would appear from his address to court that he had previous experience as an investigator under s 16. The applicant is also well aware that s 16(3) empowers the Master to make an order he deems fit in connection with the costs of an

investigation. Nowhere in the letter of appointment does the Master relinquish this discretion.

15. The high water mark for the applicant's submissions lies in the order granted by Coetzee AJ. In this regard the applicant takes the point that the order confirms that the Master is contractually responsible for his fees in that paragraph 4 of the order directs the Trust to pay the investigating costs "*incurred*" by the Master. The argument goes a step further however in that by abiding with the order made, the Master had abandoned his discretion to determine who would be liable for the costs of the investigation.
16. The argument appears to be rather contradictory. If the Master is recognized to have had a discretion in the matter when the applicant accepted the appointment, when did the contractual relationship between the parties ensue?
Surely not when Coetzee AJ granted the order. The court is not there to make contracts between parties and in any event the applicant was not even a party in that application. The Master in his answering affidavit states that he had already at the time the order was taken decided, in the exercise of his discretion, that the Trust should pay the costs of the investigation. This decision, the Master states, was made known to Coetzee AJ and was then by agreement between the trustees incorporated into the order granted. It is therefore not a case of the Master having abandoned his discretion. The applicant had chosen not to file a replying affidavit and as such the Master's version stands uncontroverted and there is nothing in the Master's allegations

which is so far fetched or so clearly untenable that it warrants its rejection merely on the papers. (See *Plascon-Evans Paints Ltd v V Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 AD at 634H to 635 C).

17. To compound matters for the applicant, the trustees had written a letter which is attached to the Master's answering affidavit and is stamp dated by the Master's Office on 2 August 2019, wherein they state *inter alia* that:

"It was agreed in the aforementioned case (before Coetzee AJ) and the said Agreement made an order of court that the Longlands Development Trust shall bear the costs of the investigator appointed by the Master to look into the affairs of the Trust."

(own insertion in brackets)

18. I pause at this stage to mention that the applicant had filed a supporting affidavit during November 2020, deposed to by one of the trustees, Mr Attie Gert, on behalf of four of the trustees. The supporting affidavit is a diatribe against the Master and the continued shenanigans of one of the trustees and in the main has nothing to do with the issues in this application. The only aspects relating to the application *in casu* are that (i) these four trustees quite opportunistically and cryptically state that they support the applicant in this application that the Master pay the investigation fees, despite having agreed to the order made by Coetzee AJ; and (ii) they ask to be joined in the application whilst they are already parties to the application. Ms Olivier for the

Master correctly requested that this affidavit be ignored due to its irrelevance.

19. One should not lose sight of the fact that an investigation under s 16(2) of the Act is in furtherance of the Master's statutory entrusted supervisory role over trustees and not for his office's benefit. The applicant, as already stated is not unaware of the functions and powers of the Master but it would appear that his main concern is the alleged inability of the Trust to pay the costs of the investigation. In his own words he argued that "*the Trust is insolvent*", "*the Trust is a person of straw*", "*the trustees have no money to pay*" and "*they always end up fighting.*"
20. The applicant therefore expects that the Master recover his fees from the Trust and then pay him, based on the perceived "*contractual*" relationship between the parties. In Honore's *The South African Law of Trusts*; 5th ed, the authors say the following at p 415 thereof:

"The Act provides that the Master is to make such order as he or she deems fit in connection with the costs of the investigation. Thus the Master may order them to come wholly or in part out of the trust property or the income from it, or may impose them wholly or partly on the trustee to be paid personally (de bonis propriis), or may order them to be paid by the person at whose instance the investigation took place. The Master's decision is subject to challenge by a trustee who feels aggrieved."

21. Section 23 of the Act makes provision for any person who is aggrieved by an order of the Master to apply to court for relief.

The section reads as follows:

“ **23. Access to court.** – Any person who feels aggrieved by an authorization, appointment or removal of a trustee by the Master or by any decision, order or direction of the Master made or issued under this Act, may apply to the court for relief, and the court shall have the power to consider the merits of any such matter, to take evidence and to make any order it deems fit.”

(Own underlining)

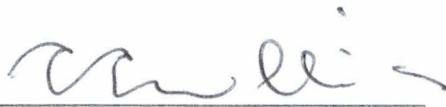
22. What s 23 envisions is a form of judicial review at the instance of any person aggrieved by the Master's decision. The provisions of s 23 could have assisted the applicant in his quest to have the Master's order reassessed. In *Fesi and Another v Trustees Elect of the Ndabeni Komunual Property Trust (IT 1056/98 [2018] JOL 39823 (SCA)*, the Supreme Court of Appeal discussed the nature of the review envisioned in terms of s 23 of the Act in paragraphs 54 and 55 thereof. The SCA supports the view of Honore (at page 251 of the work), that all the Master's decisions in terms of the Act are subject to reassessment by the Court and “*that the substantive justification for any action the Master may be scrutinized. The applicant will in other words not have to establish that the Master committed a reviewable irregularity but only that there are grounds for the court to substitute a decision it considers better. The court is expressly empowered to ‘consider the merits’ of the matter, to take evidence and to make*

'any order it deems fit'. This goes further than the entitlement to administrative justice now embodied in statute under the Constitution."

23. In the circumstances the relief sought by the applicant is unsustainable and the application must fail.
24. The only outstanding issue is that of the costs of the application. There is no reason why costs should not follow the result. Ms Olivier alerted me to the reserved costs of 9 October 2020, when the matter served before Mamosebo J. On that date the matter was postponed and the applicant ordered to pay the wasted costs occasioned by the postponement. The issue of the costs of the service of the Notice of Set Down was reserved for later determination. Ms Olivier submitted that after the applicant's erstwhile attorneys withdrew, the applicant failed to enrol the application. It became incumbent on the State Attorney (acting for the Master) to arrange dates for the hearing of the application and serve a Notice of Set Down on the applicant. The sheriff then experienced certain difficulties in serving the notice on the applicant's stated address contained in the previous attorney's notice of withdrawal. The applicant in fact admitted that he had been evading the sheriff because of other legal difficulties he was experiencing. In these circumstances it would only be fair and appropriate that the applicant bear the costs relating to the sheriff's service of the Notice of Set Down.

In the circumstances the following order is made;

The application is dismissed with costs, inclusive of the costs of the service of the Notice of Set Down.

A handwritten signature in dark ink, appearing to read 'CC Williams', is written over a horizontal line.

CC WILLIAMS
JUDGE

For Applicant: In Person

For 1st Respondent: Ms M Olivier
Office of the State Attorney