

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITBURG**

CASE NUMBER: AR 699/17D

In the matter between:

PETER NAIR N.O.

APPELLANT

And

JAMES NAIR N.O.

FIRST RESPONDENT

THE MASTER OF THE HIGH COURT,

PIETERMARITZBURG

SECOND RESPONDENT

LUTCHMEE NAIR

THIRD RESPONENT

LIZANNA NAIR

FOURTH RESPONDENT

JUDGMENT

VAN ZÿL, J. (STEYN et NKOSI, JJ concurring)

[1] This is an appeal with leave of the Court *a quo* (D Pillay, J) in a dispute essentially arising from a fraternal quarrel which escalated into near proverbial internecine warfare. The immediate battleground relevant to the present appeal is the affairs of the PPC Property Trust (the Trust) of which the brothers Peter and James Nair (respectively the appellant and the first respondent) are the sole trustees. As a matter of convenience they are herein referred to as the

applicant and the first respondent. The Master was cited as the second respondent, but has taken no active part in these proceedings.

[2] In order to consider the issues arising from the appeal in context, it is convenient firstly to set out the background facts and circumstances. It is common cause that the brothers were associated in businesses over a number of years. The businesses comprised ProTrans and ProTrans Plant & Civils, businesses in respect of which the applicant claimed to be in equal partnership with the first respondent and ProTrans Plant & Civils CC, a close corporation in which the applicant claimed entitlement to a 50% membership interest.

[3] The first respondent on the other hand contended that he was the sole proprietor of the businesses and had a 100% membership interest in the close corporation. For convenience these disputed business interests are referred to herein collectively as the business or as ProTrans. According to the first respondent the applicant's involvement in the business was as general manager and thus as an employee, alternatively as an independent contractor of the first respondent and without entitlement to any proprietary interest in the business.

[4] The dispute between the applicant and the first respondent involving the form of their business relationship is the subject of separate pending litigation under case number 7077/2012D and wherein the present applicant is seeking declaratory relief. Details of this dispute are only of peripheral interest to the present appeal which involves the affairs of the trust.

[5] It is not disputed that the first respondent came up with the idea of creating a trust. But the parties differ as to the context in which this came about. According to the first respondent he wanted premises from which to conduct his business and he decided that the trust was the vehicle to be used for this purpose. He also decided to include the applicant and his family as trust beneficiaries as an act of charity and as a token of appreciation for the contribution made to his business by the applicant over a period of some sixteen years.

[6] By way of contrast the applicant claimed that he was the one who started and grew the business and who had the idea of purchasing property from which to operate the business. He also claimed to have secured the consent of the seller for the acquisition of the property. However he left the structuring of the business and the property ownership in the hands of the first respondent because he was a chartered accountant by profession. According to the applicant the first respondent suggested a trust as the appropriate vehicle for the ownership of the property.

[7] The personal and business relationships of the applicant and the first respondent hit troubled waters when, according to the applicant, he realized that the first respondent was favouring himself and his family financially at the expense of the applicant and his own family. The last formal contact between the brothers occurred during a meeting, ostensibly of the trustees of the trust, at their mother's residence on 23 May 2012 when they unsuccessfully sought to resolve the disputed issues between them. Since then, it appears to be common cause that their relationship has irretrievably soured, that they are no longer on speaking terms and that there have been no further meetings, either personal or as trustees, between them.

[8] The applicant as applicant commenced proceedings seeking an order in terms of which the first respondent was removed as trustee and replaced by one Anil Ramnath. The first respondent opposed the application and brought a counter application seeking to replace the applicant as trustee with one Ravendran Naidoo, alternatively terminating the trust. In reply the applicant contended for the replacement of both himself and the first respondent as trustees by independent persons to be appointed as trustees by the second respondent (the Master).

[9] Fundamental to the dispute concerning control of the trust is the basis upon which the trust properties were developed and improved and have been occupied by the business. The trust was initially established and acquired the property described as portion 5 of Erf 2941, Marburg, which was thereafter developed at a cost of about R2,8 million and is occupied by the business. The trust later acquired portion 12 in addition to portion 5.

[10] The applicant contended that the development costs should have been funded from the partnership business which would also as tenant be liable for the payment of rental to the trust. The first respondent disputed the applicant's version and claimed that he, as owner of the business, advanced the development capital for the property development to the trust, which in turn became indebted to him and that consequently he, as owner of the business, was not liable for rentals to the trust. There was also a dispute as to whether the applicant's interest in the trust was limited to that of a capital beneficiary, or also included benefits as an income beneficiary. However, this issue appears since to have been conceded by the first respondent.

[11] From the foregoing it is apparent that the applicant and the first respondent were *ad idem*, at least insofar as they were both of the view that they could not continue to co-exist as the sole trustees of the trust. That view found support in the fact that they are unable to communicate with each other, let alone meet and agree upon matters relating to the conduct of the affairs of the trust. The position was further complicated by the as yet unresolved disputes about their respective interests in the affairs of the business and the fact that the business, as the subject of dispute, was also the occupant of the trust properties and according to the applicant, was and remains deeply indebted to it, a version disputed by the first respondent.

[12] The matter was argued as an opposed motion in the court below. The first respondent opposed the application, delivered his answering affidavit and the applicant replied. Simultaneously with the delivery of the respondent's answering affidavit he also caused to be delivered a notice of a counter application supported by affidavits and in which he in addition cited Lutchmee Nair, the wife of the applicant as the third respondent and Denise Nair and Lizanne Nair, both daughters of the applicant and the third respondent, respectively as the fourth and fifth respondents, as interested parties. The only active parties to the dispute, however, were to two brothers. The answering and replying affidavits in the counter application broadly repeated the allegations in the main application and neither party sought a referral to oral evidence.

[13] The main thrust of the relief sought by the applicant in his notice of motion was the removal of the first respondent as a trustee of the trust and his replacement with the applicant's nominee. Supplementary relief included compelling the respondent to disclose the basis upon which the business occupied the trust property and the disclosure by the first respondent of trust records. In the counter application the first respondent sought the removal of

the applicant as a trustee of the trust and his replacement by the first respondent's nominee. In the alternative an order was sought that the trust properties be valued together with a somewhat convoluted order the effect of which was that the first respondent pays to the applicant the assessed value of his family's capital interest in the trust and that the trust properties then be transferred to the first respondent or his nominee.

[14] The Court below, recognizing that the strained relations between the two individual trustees effectively paralyzed the administration of the affairs of the trust, opted for the alternative order sought by the first respondent, albeit in amended form and involving the sale of the immovable properties owned by the trust and its termination upon registration of transfer.

[15] The applicant appeals this approach on a twofold basis. In the first instance he contended that it was impermissible and inappropriate to have ordered termination of the trust by reason of a deadlock as between the existing trustees and reliant upon the provisions of section 13 of the *Trust Property Control Act* 57 of 1988 (the Act). Secondly he contended that the correct approach which should have been followed by the court *a quo* would have been for the court to have exercised its powers in terms of section 20 of the Act and to have replaced both existing trustees with two independent trustees. The first respondent opposed the appeal and supported the decision of the court *a quo*.

[16] The trust was, according to the trust deed, created by the mother of the two brothers, being the applicant and the first respondent. Therein the income as well as capital beneficiaries were described as her two sons, together with their wives and upon their demise their widows and their descendants.

Effectively the beneficiaries were her two sons and their respective families, each family grouping to benefit as to one half of benefits accruing from the trust.

[17] The two siblings were to be the first trustees, without any time limitation placed upon their terms of office. Provision was however made for them to appoint further trustees, limited to a maximum of four trustees in all and for the replacement of any trustee where a vacancy occurred. The trust deed provided for decisions to be taken by majority vote. In practice that meant a unanimous decision because no other trustees have ever been appointed.

[18] Section 13 of the Act provides that:-

“13 Power of court to vary trust provisions

If a trust instrument contains any provision which brings about consequences which in the opinion of the court the founder of a trust did not contemplate or foresee and which-

(a) hampers the achievement of the objects of the founder; or

(b) prejudices the interests of beneficiaries; or

(c) is in conflict with the public interest,

the court may, on application of the trustee or any person who in the opinion of the court has a sufficient interest in the trust property, delete or vary any such provision or make in respect thereof any order which such court deems just, including an order whereby particular trust property is substituted for particular other property, or an order terminating the trust.”

[19] Mr Morgan, who appeared for the applicant, submitted that upon a proper construction of the provisions of section 13 the court could only terminate the trust if the provisions contained therein brought about consequences which the founder failed to appreciate and which, in addition, hampered its objects, or prejudiced beneficiaries, or conflicted with the public interest, which counsel submitted had not been shown in the present instance.

[20] In developing his argument counsel submitted that the impasse arose, not because of deficiencies contained in the terms of the trust deed itself, but primarily because of the inability or unwillingness of the brothers, as current trustees of the trust, to interact and cooperate with each other in order to manage the affairs of the trust and give effect to its terms. Counsel suggested that the applicant's alternative contention, namely for the replacement of both current trustees with two suitably qualified and independent trustees, would resolve the difficulties in the administration of the trust.

[21] The Court *a quo* held that it had the power to remove and substitute the current trustees in terms of section 20 or to terminate the trust in terms of section 13 of the Act and posed the rhetorical question of which proposal should be preferred? It then answered the question in favour of termination.

[22] In arriving at its conclusion the Court *a quo* held that the applicant's proposal to substitute the current trustees with independent trustees would most closely correspond with the intention of the founder to create an enduring property trust, but then expressed doubt as to the viability of such a solution because such independent trustees would need to be remunerated. Such remuneration, so the court held, would diminish the benefits to the beneficiaries and would run counter to the intention of the founder.

[23] I do not understand the reasoning in this regard which, in my respectful view, runs counter to the provisions of clause 19 of the trust deed, which reads as follows:-

“The Trustees shall be entitled as remuneration for their services to such fees as are usual or customary in respect of trusts. In addition the Trustees shall be entitled to pay to themselves out of the Trust any usual raising fees or commissions accruing to them in the ordinary course of business in connection with the administration of the Trust and any trustee who is an attorney, notary or conveyancer or an accountant shall be entitled to receive and retain any fees earned by him in respect of services which the Trustees might reasonably have required to have been performed by an accountant or attorney. The Trustees shall be entitled to receive and retain for their own use any directors’ fees and emoluments which they may be paid in the ordinary course of business of any corporate body in which the trust holds shares.”

[24] It appears that the approach of the court *a quo* was to infer that the founder intended that the current trustees, as beneficiaries, would perform their functions and duties as trustees free of charge in perpetuity. With due respect, I do not see how such an intention could be inferred. In any event, clause 15 of the trust deed provides for the appointment of at least two further trustees and contains no suggestion that such trustees need to be beneficiaries who would impliedly act for free.

[25] The trust is a property owning trust and it is common cause that its two immovable properties comprise commercial premises which have at all material times been occupied by the business. According to the first respondent he, by which he includes the business in respect of which he claims sole ownership, is not obliged to pay rental to the trust in lieu of having funded the development

of the trust's properties. However, he claims that rentals due to the trust as reflected in the books of account of the trust, are the result of "*a legitimate tax plan*" to minimize his tax liability and to benefit "*my family as the beneficiaries of the Trust*". He envisages the development of Portion 5, being the second property acquired by the trust, financed by the business, which would then pay a market related rental to be agreed between the trust and the business. He placed a value of R2 805 000-00 upon the earlier development as financed by him.

[26] As indicated earlier, the respective versions of the applicant and the first respondent are in material conflict with each other. It is also apparent that the first respondent's interests are in conflict with those of the trust, in that he has been in de facto control of both the trust and the business since about 2012 and making decisions as to the rights and obligations between these two entities, one of which he claims to own. (See: O'Shea NO v Van Zyl and Others NNO 2012 (1) SA 90 (SCA) at 97 D-E). For that matter, the applicant himself, as a claimant to an interest in the business and as a beneficiary in the trust would find himself conflicted. Their inability to cooperate, coexist and communicate with each other apart, the two brothers, in the circumstances, cannot objectively be held as suitable trustees of the trust for the benefit of its beneficiaries, given the competing interests of the trust and the business.

[27] It seems to me that the distinction should be emphasized between, on the one hand the trust as a property owning entity, in the business of letting out its property for reward and on the other hand the business which, in relation to the trust, is its tenant from which rentals are to be collected and depending upon how the factual disputes are ultimately resolved, a creditor of the trust in respect of financing improvements to the property of the trust.

[28] What is likely to emerge are disputes as to the amount of rentals due by the business and the amount owing by the trust in respect of development finance. These would best be resolved by independent control of the trust in its dealings with the business, whoever is eventually held to be its proprietor. Once resolved, the business affairs of the trust should not be complicated or difficult to administer, irrespective of the identity of the tenant or tenants of the trust properties. It would involve letting out to best advantage the premises to commercial tenants, collecting rentals, paying routine outgoings and crediting any surplus to the trust. The trustees would then be enabled to provide benefits to the beneficiaries, sufficient funds permitting.

[29] The trust property represents a stable investment in immovable business premises, suitable for being let to tenants. As such it should be commercially viable, once the disputes between the trust and the business have been resolved. Whilst it may be convenient, it is by no means compulsory for the business to occupy the trust property and the trust should be able to let out its premises to best advantage, ultimately for the benefit of its beneficiaries of which the brothers form only a part.

[30] Should it appear that the property holding of the trust is not commercially viable, then the trustees thereof would be able, in terms of their powers as set out in the trust deed, to dispose of properties to best advantage at the most opportune time. However, unless and until the properties need to be sold, they represent a long term inflation proof investment for the benefit of the trust and through it, its beneficiaries.

[31] In my view and with due respect, I believe that the Court *a quo* materially misdirected itself in coming to the conclusion that replacing the existing

trustees would be uneconomical and by reason thereof contrary to the wishes of the founder.

[32] On a plain reading of section 13 of the Act the court, if it forms the required opinion, is endowed with the discretionary powers therein contemplated. But it could only exercise such statutory powers as conferred by section 13 if the jurisdictional requirements of the section are met (*Gowar v Gowar* 2016 (5) SA 225 (SCA) at paragraph 35). In the first instance the trust instrument must contain a provision which brings about consequences which the founder of the trust had failed to contemplate or to foresee. Secondly and in addition such provision must also hamper the achievement of the objects of the founder, or prejudice the interests of the beneficiaries, or conflict with the public interest.

[33] Provided the court is able to form the necessary opinion and decides in the exercise of its discretion to intervene, then in terms of the section it may delete or vary, or make in respect of the offending trust provision such order as it deems appropriate. The section also specifically provides for the substitution of one trust property with another, such property in terms section 1 of the Act including both movable immovable property. The final option provided for in section 13 is an order terminating the trust.

[34] The Court *a quo* did not express the opinion or find any particular provision of the trust deed to be offensive within the meaning of section 13 of the Act. Instead it held that “*The beneficiaries are the two trustees. As a domestic or family owned and administered trust, consensual, unanimous decision making is indispensable for the efficient operation of the trust.*” It went on to hold that the founder had failed to contemplate or foresee a fractious

relationship developing between the two founding trustees which rendered the trust dysfunctional. In the circumstances it concluded that the Court was entitled *inter alia* to terminate the trust in terms of section 13 of the Act.

[35] I have some difficulty with the finding that the founder had contemplated that decisions by the trustees would be taken unanimously because, as already indicated, the trust deed provided for a minimum of two and a maximum of four trustees who, in terms of clause 29.4 of the trust deed would take decisions by majority vote (see: *O'Shea* (supra) at page 97C in paragraph 23).

[36] In *Pascoal and Another v Wurdeman and Others* 2012 (3) SA 422 (GSJ) the court declined to make an interim order requiring unanimous consent by trustees where the trust deed provided that decisions of the trust be taken by majority vote. In *Melville v Busane and Another* 2012 (1) SA 233 (ECP) at paragraph 17 the Court declined to hold that a solvent trust, unlike a company, could be sequestrated by reason of a situation of deadlock between the trustees and that the solution lay in the removal of a trustee in terms of section 20 of the Act.

[37] I also have difficulty with the concept that the trust was a “*domestic or family owned and administered trust*”. It is so that the two initial trustees, as appointed by virtue of clause 14 of the trust deed, namely the applicant and the first respondent, are brothers and “*family*” of the founder, but they are not qualified or described as such in that clause. Clause 15 dealing with trustees additional to the two initial trustees is neutral, as is Clause 30 dealing with the succession of trustees. The trust deed contains no other requirement that any trustee needs to be a family member to qualify for appointment.

[38] Counsel for the applicant submitted that the impasse was not due to any objectionable provision contained in the trust deed, but was in fact the result of the breakdown of the interpersonal relationship between the two existing trustees. It followed that the court could not vary the provisions of the trust to in order to provide a solution to this development and that the solution lay in dispensing with the cause by appointing additional trustees, or removing one or the other or both the offending individuals.

[39] In my view the jurisdictional requirements of section 13 were not satisfied because no provision of the trust deed was identified which brought about unforeseen consequences and in addition hampered the objects of the founder, or prejudiced the interests of beneficiaries. The Court *a quo* did not and could not in the circumstances have formed the required opinion which would have entitled it in the exercise of its discretion, to have terminated the trust. In this regard and with due respect I am of the view that the Court *a quo* misdirected itself.

[40] But even if the court were entitled to exercise a discretion in terms of the provisions of section 13 then in my view the drastic solution of terminating the trust would neither advance the objects envisaged by the founder, nor benefit the general body of beneficiaries. The founder's object of the long term protection of and benefit for the beneficiaries, effectively spanning generations, would be defeated by the premature termination of the trust. Nor would the conversion of an income producing and inflation proof investment in commercially lettable premises into cash provide any long term security to the general body of beneficiaries. The termination of a trust is, as I see it both drastic and should be resorted to only as a last resort.

[41] The immediate question then arising is whether interference with the composition of the trustees of the trust would be justified in the circumstances of this matter and if so, what form such interference should take. Section 20 of the Act provides that:-

“20 Removal of trustee

(1) A trustee may, on the 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 interests of the trust and its beneficiaries.”

[42] The appointment of an additional trustee or trustees would not in my view be a satisfactory solution because it would likely involve the additional trustees in the ongoing enmity between the brothers and would detract from their ability to act in the interests of the trust and its beneficiaries.

[43] There remains the proposed removal of both the current trustees of the trust, as contended for by the applicant both in the court below as well as before us, to be considered. In *Gowar* (supra) at paragraph 31 it was held that:-

“Thus, the overriding question is always whether or not the conduct of the trustee imperils the trust property or its proper administration. Consequently, mere friction or enmity between the trustee and the beneficiaries will not in itself be adequate reason for the removal of the trustee from office. (See also in this regard Tijmstra NO v Blunt-MacKenzie NO and Others 2002 (1) SA 459 (T) at 473E – G.) Nor, in my view, would mere conflict amongst trustees themselves be a sufficient reason for the removal of a trustee at the suit of another.”

[44] As already indicated, both trustees are compromised by virtue of their personal interests conflicting with those of the trust and the general body of beneficiaries. The personal interests of the brothers do not necessarily coincide with those of their other family members who are also beneficiaries. Trustees occupy a role where they attract fiduciary responsibilities which extend beyond their own interests as fellow beneficiaries.

[45] It appears beyond doubt that the breakdown in the interpersonal relationship between the applicant and the first respondent is irretrievable and that their inability to cooperate with each other in the interests of the trust and its beneficiaries generally, is not to the advantage of either. It was submitted that their replacement would not only remove the impediment in the way of the proper administration of the trust, but would also enable the trust, independently represented, to assert its rights as against one or the other or both the brothers, as well as the business and ultimately be to the benefit of the trust and its beneficiaries.

[46] In principle the court is empowered by section 20(1) to remove a trustee if it is satisfied that such removal will be in the interests of the trust and its beneficiaries, but this power should be exercised with some circumspection. It is, however, so that neither *mala fides* nor misconduct need to be established as a prerequisite for the removal of a trustee (*Gowar* (supra) at paragraph 30). Given the conflicting averments contained in the record, it is not possible to make factual findings apportioning blame to one or the other of the brothers.

[47] In all the circumstances of the matter before us I am driven to the conclusion that the conduct of the trustees imperils the trust property or its proper administration. The last formal meeting between the trustees occurred

as far back as in 2012 and since that time the trust administration has not been conducted in terms of joint decisions taken by the two trustees. That is a state of affairs which cannot be permitted to continue. In my view the only viable, as well as practical solution would have been for the Court *a quo* to have acceded to the applicant's alternative approach and to have removed the current trustees and to have replaced them with independent trustees.

[48] Such an order would not require any amendment or alteration to the provisions of the trust deed but would place the trust in a position to impartially assess its position in relation to the business and to act in its own best interests, both in relation to the lingering disputes regarding its entitlement to rentals and any obligations resulting from the development costs of its premises, as well as the future letting or even marketing of its properties with a view to achieving the best advantages for its beneficiaries.

[49] Clause 30.2 of the trust deed provides that where the number of trustees fall below two, the remaining trustee becomes obliged to appoint a further trustee in order to comply with the requirements of Clause 15.1 of the trust deed which determines the minimum number of trustees at two. The effect of the removal of both trustees of the trust by the court would be that there is no remaining trustee to act in terms of Clause 30.2 and appoint replacement trustees. However, section 7(1) of the Act provides that if the office of trustee cannot be filled or becomes vacant, the Master shall, in the absence of any provision in the trust deed and after consultation with so many interested parties as he may deem necessary, appoint any person as trustee.

[50] Whist not wishing to limit or interfere with the discretionary powers of the Master (the second respondent in this matter) in any way, it nevertheless

occurs to me that it would be helpful if it were possible, when making the appointments of replacement trustees, if such trustees were to include a suitably experienced attorney and accountant.

[51] Clause 19 of the trust deed provides for the basis upon which trustees of the trust are to be remunerated for their services and essentially contemplates fees that are “*usual or customary in respect of trusts*”. It is not improbable that the remuneration of the replacement trustees may become the subject of dispute and debate. In this regard section 22 of the Act contemplates the remuneration of trustees as provided for in the trust deed or, where no such provision is made, to a reasonable remuneration, which shall in the event of a dispute be fixed by the Master. The Master is of course also entitled in terms of section 16 of the Act to call upon such replacement trustees to account to his satisfaction.

[52] I turn now to the question of costs, both of the appeal and in the court below. The costs of the application for leave to appeal were ordered to be costs in the appeal. The applicant in initiating the application proceedings, sought an order removing the first respondent as trustee and replacing him with a person nominated by the applicant. In the first respondent’s counter application he essentially sought similar relief as against the applicant. In reply to the main application and in opposing the counter application the applicant conceded that both trustees be replaced, a concession not matched by the first respondent.

[53] In the conclusion I have come to, the situation called for and the Court *a quo* should have found in terms of the applicant’s concession. The most equitable order regarding costs in my view therefore involves depriving the

applicant of a portion of his costs in the court below. As regards the costs of the appeal, both parties sought costs orders adverse to the other. I see no reason why costs should not follow the result.

[54] In the circumstances I am of the view that the appeal should succeed and the order made by the Court *a quo* be replaced with an order as appears below.

[55] The appeal succeeds and the following order is made, namely:-

- a. The order made by the Court *a quo* on 26 June 2015 under case number 10283/2013D is set aside and is replaced with an order that:-
 - i. The applicant Mr Peter Nair and the first respondent Mr James Nair are both removed as trustees of the PPC Property Trust, IT 905/2006/PMB (the trust) and they are directed forthwith to surrender their respective Letters of Authority as issued by the Master of the High Court, Pietermaritzburg (the second respondent herein) to the Master.
 - ii. The counter application by the first respondent is dismissed.
 - iii. The Master is directed to appoint, by virtue of the powers vested in him and by section 7(1) of the Trust Property Control Act 57 of 1988 (the Act), at least two suitably experienced and independent replacement trustees for the trust in conformity with the provisions of the trust instrument.
 - iv. The first respondent is directed to pay:-
 1. Eighty percent (80%) of the applicant's costs of the application.

2. The costs of the first respondent's counter application.
 3. Such costs to include the costs of senior counsel, where employed.
- b. The first respondent shall pay the costs of the appeal, such costs to include the costs of senior counsel, where employed.

VAN ZÿL, J.

STEYN, J.

NKOSI, J.

JUDGMENT RESERVED: 1 FEBRUARY 2019

JUDGMENT HANDED DOWN: 26 APRIL 2019

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