IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 57607/16

23/1/18

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED.

23/01/2018

DATE SIGNATURE

In the matter between:

DANIEL ELYN SHEVEL	APPLICANT
and	
ELLIOT JACK SHEVEL	RESPONDENT

Coram: HUGHES J

JUDGMENT

HUGHES J

[1] The applicant, Daniel Elyan Shevel, is the son of the respondent, Elliot Jack Shevel. In this application the applicant seeks an order to remove the respondent, in terms of section 20 of the Trust Property Control Act 57 of 1998 (the Act), as trustee of the family trust, JSE Share Trust (the trust), to which he is also a beneficiary.

[2] The applicant asserts that as trustee and beneficiary of the trust duly registered with the Master of this court he has *locus standi* to bring this application. The trust has two other trustees, that being the respondent and Mr Leonard de Vos, a chartered accountant, practising as such at De Vos Richards. The trust is a family trust founded by the respondent in 2000. It is not in dispute that the trust deed has been amended from time to time. One of such amendments took place in 2005 causing the removal of a family trust and replacing it with the applicant's appointment as a beneficiary and trustee. A final amendment during June 2015, by the applicant himself, effectively recorded the beneficiaries of the trust as himself, the respondent and the applicant's minor son, Kelly.

[3] The trust is the sole shareholder of a private company since 2005, Stand 752 Parktown Extension (Pty) Ltd (the company). The company owns a property in Parktown Johannesburg since 1993, Erf 752 Parktown Extension, also known as 45 Empire Road Parktown, Johannesburg (the property). Therefore, the only asset of the trust is the property. The company, according to the respondent, acquired the property for the benefit of his medical practice, Dr E Shevel Incorporated trading as the Headache Clinic. This was so, in order for the practice to no longer pay rental as it had been doing so in the past. The respondent is the sole shareholder and director of the Headache Clinic and has been the sole director of the company since 2007.

[4] By virtue of a longstanding agreement between the company and the Headache Clinic, the respondent states, that the Headache Clinic was to occupy the property rent free in return the Headache Clinic would be fully responsible for the payments of rates, insurance and maintenance of the property. Thus, the Headache Clinic pays the expenses such as insurance, maintenance, rates, taxes and other running expenses of the property, at no costs to the company. The respondent states further that the aforesaid averments are inherent of the tacit terms of the agreement concluded between the company and the Headache Clinic. Incidentally, the respondent is director

of both the company and the Headache Clinic and is alleged to have represented both in the conclusion of the agreement. According to the respondent the agreement was never reduced to writing but the arrangement has been in place since 2005 when the property was acquired.

[5] The respondent established the Headache Clinic in 1992 and the applicant held the position of practice manager of the Headache Clinic since 1999. Even so, the respondent assisted the applicant, until the applicant accused him the respondent of meddling with his management. Thus, since 2002 the applicant was left to manage the Headache Clinic on his own. The respondent essentially concentrated with the medical side of the practice of the clinic and this was the position until the applicant was relieved of his duties during mid-December 2015.

[6] The respondent raised a *point in limine* of non-joinder which he abandoned at the commencement of argument. I therefore will not be venturing into that terrain.

[7] The issue raised is one which is narrow in my view, being, that the applicant seeks the removal of the respondent as trustee due to his failure to comply with his fiduciary duties as a trustee. He relied upon section 20 of the Act, specifically section 20(1) states that a trustee may on application of the Master or any person having an interest in the trust property, at any time, be removed from their office by a court, if such court is satisfied that the removal will be in the interests of the trust and the beneficiaries.

[8] Before embarking on the task at hand I pause to consider the *dicta* of Murray J in **Volkwyn N.O. v Clarke and Damant 1947 WLD 456** at **464**, after an analysis and consideration of cases such as **The Master v Edgecombe's Executors 1910 TPD** at **271,** where the court stated that, the courts possessed the same common law power for the removal of administrators, trustees and executors alike. This common law power is fortified by section 20 of the Act. I am mindful of the additional cases of **Lettersterdt v Broers (9, A.C.371)** and **Sackville West v Nourse and Another 1925 A.D. 516**, where the following was stated:

"To my mind it is a matter of delicacy (as expressed in *Letterstedt's* case (*supra*) but of seriousness to interfere with the management of the estate of a deceased person by removing from the control thereof persons who, in reliance upon their ability and character, the deceased has deliberately selected to carry out his wishes. Even if the executor or administrator has acted incorrectly in his duties, and has not observed the strict requirements of the law, something more is required before his removal is warranted. Both the statute and the case cited indicates that the sufficiency of the cause for removal is to be tested by a consideration of the interest of the estate. It must therefore appear, I think, that the particular circumstances of the acts complained of are such as to stamp the executor or administrator as a dishonest, grossly inefficient or untrustworthy person, whose future conduct can be expected to be such as to expose the estate to risk of actual loss or of administration in a way not contemplated by the trust instrument."

[9] I turn to deal with the assertions made by the applicant. He commences by illustrating that he established that the value of the property is R11 million. In addition, he calculated that a reasonable estimation of the gross income, which could be obtained annually from the property was R 1 473 112. 00, whilst the net income that could be attained annually would be R1 104 834.00 or R92 069.50 per month. Hence, it was unacceptable for the Headache Clinic to use the property rent free as the potential income, for the benefit of the beneficiaries, from renting the property is lost, so argues the applicant.

[10] This culminated in the applicant convening a meeting to address his concerns, which eventually took place on 13 January 2016. At this meeting the applicant proposed that the arrangement between the Headache Clinic and the company be reconsidered. This, he states, would ensure that the benefit that could be derived from the use of the company property would be to the advantage of the trust.

[11] The applicant further contends that the respondent is conflicted as he does not appreciate the value of the property to the trust. Further, he is a director of both the company and the Headache Clinic, who are the parties in the arrangement to the detriment of the trust. This, in my view, is the crux of the issues before me.

[12] The respondent, on the other hand, asserts that the applicant as from 2005 acquiesced to the agreement in place between the Headache Clinic and the company. This arrangement, having been in place prior to him becoming a trustee and beneficiary of the trust. The respondent further states that the Headache Clinic has an agreement with the trust and the property owing company and is thus entitled to occupy the property rent free.

[13] In accessing the request of the removal of the respondent, consideration ought to be had of the interest of the trust. In doing so, it is thus vital to examine the conduct of the respondent and to determine if indeed such conduct is dishonest, grossly inefficient or untrustworthy to necessitate such removal. The said conduct should also be such that if continued in the future, could expose the trust to the risk of actual loss or the administration of which is not contemplated by the trust.

[14] On my examination of the papers before me I find that the interest of the trust is set out in the Amended Trust Deed at paragraph 4 with the heading: 'Purpose and objectives of the Trust'. The import of the principle objectives of the trust is set out in the following paragraph:

"4.1 The primary objective of the Trust is for the Trustees to accept, hold, add to, invest, enhance and administer the Trust Fund for the benefit and well-being of the Beneficiaries in the widest sense subject to the provisions of the Trust Deed."

[15] A further paragraph which points towards the interest of the trust is found under paragraph 5 headed 'Trust Fund to vest in Trustees' specifically 5.3 and 5.4 which I set out below:

"5.3 While the Trust is in operation the Trustees are hereby obliged to take possession of all the Trust Assets including title deeds and other documents and to ensure their preservation and safekeeping for the duration of the Trust.

5.4 However or wherever the Trust Fund may be held or registered, it shall be held on and for account of the Trust and on behalf of the Beneficiaries and at no time shall the Trustees be deemed to acquire for themselves or on their personal account any contingent and/or vested right or interest in the Trust Fund save insofar as the Trustees may be Beneficiaries of the Trust in terms of the Trust Deed."

[16] I am aware that the trust deed makes provision for the board of trustees to comprise of a minimum of three trustees all the time. The arrangement that's currently in place, between the company and the Headache Clinic, goes contrary to the purpose and objectives of the trust, as is set out in paragraph 4.1 of the trust deed. The company owning the property, of which the trust is the only shareholder, is the vessel which has an arrangement with the Headache Clinic. This arrangement, to my mind, is clearly not beneficial to the trust. Even though, the Headache Clinic pays the rates, maintenance and insurance for the property, one needs to bear in mind that this arrangement has been in place with the knowledge of the trust and the trustees over a period of time. Most importantly, in my view, is that the financial benefit alluded to

by the applicant in relation to the rental, had never formed part of the Trust Fund which the trustees have undertaken to "accept, hold, add to, invest, enhance and administer... for the benefit and well-being of the Beneficiaries in the widest sense". These duties fall in the domain of the property itself and not the proposed financial benefit that could be derived. In the circumstances where the benefit had not existed a trustee cannot be said to have been in derelict of their fiduciary duty as expressed above. I therefore cannot find that the conduct of the respondent is dishonest, grossly inefficient or untrustworthy to necessitate his removal. Neither can I conclude that his continued future conduct, in the circumstances, could expose the trust to the risk of actual loss or the administration of which is not contemplated by the trust. This is so, as the proposed benefit was never a part of the trust fund or put simply a benefit that the trustees had undertaken to protect, as it was not part of the trust fund, in terms of paragraph 4.1.

[17] What is crucial though, is whether on the facts before me the arrangement, in anyway caused a trustee to acquire for his/her personal account, that which would have been for the advantage for the beneficiaries (as per paragraph 5.4 of the Trust Deed). In the current instance, the applicant states that this is so, as the respondent is gaining for his personal account that which could have been benefitted by the beneficiaries. As such the respondent in his capacity as trustee is not acting for the benefit of the trust and the beneficiaries to such trust. This argument must fail for the reason already advanced, that being, the financial benefit had not existed for the trust and as such the respondent could not be accused of acquiring that which would have benefited the beneficiaries.

[18] Does such conduct warrant the removal of the respondent? In my view, such conduct does not amount to dishonesty, grossly inefficiency or untrustworthiness and does not imperil the trust property or the proper administration thereof. See **Gowar v Gowar 2016 (5) SA 225 (SCA) at para [31] and [32]** where Petse JA stated as followings :

"[31] ...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 & 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.

[32] Moreover, it must be emphasised that whilst a trustee is in law required to act with care and diligence, the decisive consideration is the welfare of the beneficiaries and the proper administration of the trust and the trust property. And, sight must not be lost of the crucial fact that the court may order the removal of a trustee only if such removal will, as required by s 20(1) of the Act, be '*in the interests of the trust and its beneficiaries*'. (My emphasis.)"

[19] Consequently the order I make is as follow:

[19.1] The application to remove the respondent as trustee of the JSE Share Trust (IT6957/00) is dismissed with costs.

W. Hughes
Judge of the High Court Gauteng, Pretoria

Date Delivered:

For the Applicant: MacRoberts Inc.
012 425 3400

For the Respondent: Bagraim Sachs Inc.
011 884 8952