Reportable:	YES / **NO**
Circulate to Judges:	**YES** / NO
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)

CASE NO:	**1193/2017**
DATE HEARD:	**8 JUNE 2018**
DATE DELIVERED:	**15 JUNE 2018**

In the matter between:

DOMINGO, MARIA MAGDALENA Applicant

and

FARMER NO, JASPER JACOBUS	1st Respondent
MOYO NO, NEO	2nd Respondent
KOCK NO, LAMBERT HENDRIK	3rd Respondent
ASSMANG LTD	4th Respondent
THE MASTER OF THE ABOVE HONOURABLE COURT	5th Respondent

Coram: Olivier J

JUDGMENT

Olivier J:

INTRODUCTION

[1.] The applicant, Mrs M M Domingo, married the late Mr E Domingo in 1984. Mr Domingo was an employee of Associated Manganese Mines of SA Limited, a name by which the 4th respondent was earlier known. The 4th respondent has in this application been cited as Assmang Limited, but according to the deponent for the respondents its correct name is actually Assmang (Pty) Ltd.

[2.] Although there is to an extent a dispute about this, it will be assumed for purposes hereof that Mr Domingo was one of a relatively large number of employees of the 4th respondent who were dismissed in 1987.

[3.] Subsequent legal attempts by the National Union of Mine Workers (*"the NUM"*) to hold the 4th respondent liable for compensation on the basis that the employees had been unfairly dismissed and had lost property when evicted from the mine's property, were unsuccessful. The so-called Dismissed Workers' Committee (*"the DWC"*) was nevertheless formed to represent the dismissed employees. According to the applicant this happened in September 1994, while according to the respondents the committee had already existed by December 1989.

[4.] It is not disputed that the DWC, despite the earlier failed legal attempts to hold the 4th respondent liable, over the years thereafter pressurised the 4th respondent to make payments to the dismissed workers. The actions of the DWC and its members included sit ins at the entrance and exit points to the 4th respondent's head office premises in Sandton and persistent and harassing telephone calls to employees of the 4th respondent at all times of day and night, and compelled the 4th respondent to resort to the Courts for interdictory relief more than once. They, *inter alia*, threatened to stage a sit in at the 4th respondent's said premises for three months.

[5.] In 2008, and as a result of negotiations between the DWC and the 4th respondent, the Kuruman Former Employees of 1987 Trust (*"the Trust"*) was created for purposes of settling claims that the 4th respondent was constantly being confronted with by the DWC and its members.

[6.] It is important to keep in mind that those negotiations took place under the circumstances referred to above, and as extensively described in the answering affidavit. This is not disputed by the applicant.

[7.] The founder of the Trust was the 4th respondent. Mr J J Farmer (1st respondent), Mr N Moyo (2nd respondent) and Mr L H Kock (3rd respondent) are the trustees. It was recorded in the trust deed that the beneficiaries of the Trust, as represented by the NUM through the 2nd respondent, "*accept*(ed) *the benefits conferred on them subject to the terms and conditions set out in* (the) (Trust) *Deed*".

[8.] The concept of "*beneficiaries/eligible beneficiaries*" of the Trust is defined in clause 2.1.3 of the Trust Deed. These provisions originally read as follows:

> "*the beneficiaries / eligible beneficiaries – means the 518 former employees of the founder* ***whose services were terminated for participating in industrial action/unlawful strike action*** *in 1987 and who will be identified to the trustees by way of valid identity documents plus a pay slip bearing the name of the beneficiary and which was issued by the founder, Assmang Limited, at any time prior to their dismissal for taking part in the strike action in 1987, and identified in terms of a list of such beneficiaries verified and agreed to by the founder,* ***and who have met all the conditions imposed in terms of this deed***" (My emphasis)

[9.] According to the respondents these provisions have been amended and now read as follows:

> "*The beneficiaries / eligible beneficiaries means the approximately 518 former employees of the founder* ***whose services were terminated for participating in industrial action/unlawful strike action*** *in 1987 and who will be identified to the trustees by acceptable form of proof of employment with the founder at the time of the industrial action/unlawful strike action in 1987 and acceptable proof of identity* ***and to have further met all the conditions imposed in terms of this Deed***" (My emphasis)

[10.] As will be seen the two versions are, for purposes of what follows, essentially similar. The reference in the definition to conditions *"imposed in terms of this deed"* constitutes a clear qualification of the description of *"former employees"* preceding it.

[11.] One of the conditions to be met in order to qualify as an eligible beneficiary, and to claim payment, is contained in clause 8.2.1 of the trust deed, in terms of which, *inter alia*:

> *"the beneficiary must be alive at the date that the claim for such share of the trust assets is made. If the beneficiary has died at any time prior to the deadline date for making such claim, no share of the trust asset shall be payable to the estate of the deceased beneficiary"*

[12.] Mr Domingo passed away in March 2001. This means that Mr Domingo, because he passed away before the Trust was created (let alone filing a claim), could not be a beneficiary of the Trust in terms of the provisions of the trust deed as they read at the moment.

RELIEF SOUGHT IN NOTICE OF MOTION

[13.] The applicant's case is, however, that the provisions of clause 8.2.1 are unconstitutional, in that:

13.1 they *"unfairly discriminate ... against the spouses, dependents and/or legal successors of* (the) *deceased mine workers"*; and

13.2 they are *"against public opinion read with the Constitution of the Republic of South Africa"*

and the applicant seeks declaratory orders to this effect, as well as orders that:

> *"(a) clause 8.2.1, and 'all the discriminating parts of the Trust Deed' be struck out;*
>
> *(b) the amount of R3000.00, stipulated in the trust deed as the amount of the* ex gratia *donation that would be paid to beneficiaries, be increased to R40 000.00;*
>
> *(c) the cut-off date in the Trust Deed for the filing of claims be extended to 30 September 2019; and*
>
> *(d) the legal successors of the deceased minors be allowed to lodge claims against the Trust."*

LOCUS STANDI

[14.] Although the manner in which the relief is set out in the notice of motion suggests that the applicant is seeking the relief on behalf of the spouses, dependents and legal successors of all deceased mine workers, she has not in her founding affidavit claimed to have been authorised to do so.

[15.] When challenged on the issue of her legal standing in respect of a claim that would be part of her late husband's estate, the applicant replied that she had been appointed as executrix in the deceased estate and that the Master's letter of appointment had mistakenly not been included in the annexures to the founding affidavit.

[16.] Mr Snider, counsel for the respondents, pointed out that, according to the letter (a copy of which has now been annexed to the replying affidavit), the applicant has in fact not been appointed as an executrix, with the normal powers that such a person would have. The letter is indeed clearly not a letter of "*appointment*". It is titled "*Letter of Authority*". The letter reads that the applicant is in terms of section 18(3) of the **Administration of Estates Act**[1] authorised *"to take control of the assets ... reflected in the inventory ..., to pay the debts, and to transfer the residue of the estate to the heir/heirs ..."*. Only one asset is mentioned in the inventory that forms part of the letter, and that is an amount of R35 000.00 in the Compensation Fund.

[17.] Section 18(3) of the **Administration of Estates Act** reads as follows:

> *"If the value of any estate does not exceed the amount determined by the Minister by notice in the Gazette, the Master may* ***dispense with the appointment of an executor*** *and give directions as to the manner in which any estate shall be liquidated and distributed"* (My emphasis)

[18.] The letter clearly does not authorise the applicant to institute legal proceedings on behalf of the deceased estate. In reply Mr Strydom, counsel for the applicant, countered by submitting that the applicant would in any event have been entitled to bring this application as spouse, and as mother of children of the late Mr Domingo. This can clearly not be correct. According to the marriage certificate the applicant and Mr Domingo were married out of community of property. The applicant has not made out a case that she is an heir in the estate, and she has not alleged that there are minor children who were born from the marriage and whom she is representing.

[19.] I will nevertheless proceed to consider the merits of the application, because the applicant's standing has not been raised on an *in limine* basis.

INDUSTRIAL ACTION/UNLAWFUL STRIKE ACTION

[20.] To begin with, the applicant's case is obviously dependent on her late husband having been one of the 518 employees *"whose services were terminated for*

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[1] 66 of 1965

participating in industrial action/unlawful strike action in 1987", as envisaged in the definition of beneficiaries (or eligible beneficiaries) in the trust deed. This must be so, because her case is clearly that it is only the unconstitutional requirement that claimants must still be alive when claims are submitted, that disqualifies the late Mr Domingo and his successors from the definition of beneficiaries in the trust deed. This was conceded by Mr Strydom.

[21.] In this regard the allegations in the founding affidavit are the following:

22.1 On 13 August 1987 a total of 158 employees were unfairly dismissed.

22.2 This caused a dispute which led to the dismissal on 21 September 1987 of a further 2 500 employees, of which the late Mr Domingo was one.

[22.] In the founding affidavit the applicant made no allegation that Mr Domingo's employment was terminated because of his participation in industrial action or in an unlawful strike action. This was also conceded by Mr Strydom.

[23.] Mr Strydom argued, however, that such an inference can be drawn from the *"CLAIM DOCUMENT"* that the applicant had in February 2014 unsuccessfully submitted in an attempt to obtain payment from the Trust. In the document the claimant was required to indicate *"The mine where the Claimant was employed during the averred unfair dismissal"*, to which the applicant respondent *"Blackrock Assmang"* (presumably one of the mines of the 4th respondent).

[24.] The applicant did, in the first place, not in her founding affidavit refer to this specific part of the claim document, and she is therefore not entitled to rely thereon for these purposes at this stage[2].

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[2] Compare **Minister of Land Affairs and Agriculture and Others v D&F Wevell Trust and Others** 2008 (2) SA 184 (SCA) para [43]

[25.] Secondly, the part relied upon by Mr Strydom is not even susceptible to an inference that Mr Domingo's dismissal had been unfair, because the reference to an "*unfair dismissal*" is clearly qualified by the word "*averred*".

[26.] Lastly, even if the inference could be drawn from the document that the late Mr Domingo's dismissal had been unfair, it would not follow that the unfair dismissal had been the result of Mr Domingo's "*participating in industrial action/unlawful strike action*", as envisaged in the definition.

[27.] It is trite that an applicant has to make out its case in founding. The applicant has, in any event, not event attempted to rectify this in her replying affidavit. This after the deponent for the respondents stated that a total of 518 workers had been dismissed – in other words not 158 and then later another 2 500 as alleged by the applicant. The deponent for the respondents furthermore stated that this happened in October 1987, and in other words not on the date or dates alleged by the applicant.

[28.] In dealing with this clear challenge the applicant went no further in reply than to "*re-iterate that* (her) *husband was in fact an employee of the 4th respondent during 1987 and prior to that*" and that he was dismissed "*all of a sudden after one night shift when there was trouble at the mine*". Even then she therefore did not allege that the late Mr Domingo had participated in industrial action or in an unlawful strike and had been dismissed because of that. She also did not challenge the respondents' version of the number of employees that were dismissed or the date of the dismissals, and in the circumstances it can also not even be said that the applicant has made out a case that the late Mr Domingo was indeed one of the "*518 former employees*" referred to in the definition.

[29.] It follows that the applicant has not made out a case that the late Mr Domingo would have been an eligible beneficiary, as defined in the trust deed, had he not passed on before the Trust was created. The application should on this basis alone be dismissed.

IMPLIED VARIATION OF THE TRUST DEED?

[30.] The trust deed initially provided for a payment of R3 000.00 to eligible employees/beneficiaries who filed claims timeously and properly. This amount was then not acceptable to the dismissed workers. This is a bit strange, seeing that Mr Moyo had purportedly, as a representative of the NUM, represented all of them in signing the trust deed.

[31.] Be that as it may, the 4th respondent then offered to increase the amount to R40 000.00, which was eventually accepted and paid out to dismissed employees who subsequently lodged claims.

[32.] That offer was contained in a letter dated 27 August 2008, in which it was stated that the offer would be kept open for payment to any person "*identified as part of the 1987 former Kuruman employees*".

[33.] The applicant has placed much store on the fact that this letter, and also a letter from the 4th respondent years later (on 25 September 2012) did not, in referring to the former Kuruman employees, distinguish between those still alive and those not.

[34.] In my view this is of no significance at all. It is very clear, particularly in the first letter and its reference to the "*1987 former Kuruman employees*", that reference was being made to the eligible employees, as defined in the trust deed.

[35.] The provisions of the trust deed could in any event never have been amended in this way and, even if it was theoretically possible, the contents of neither letter could by any stretch of the imagination be interpreted as having been intended as a variation of the provisions of the trust deed pertaining to which employees would be eligible to claim through the mechanism of the Trust.

[36.] In any event, what the applicant has not mentioned in her founding affidavit, but was pointed out in the answering affidavit, is that the 4th respondent's attorneys, in a letter dated 30 September 2013, made it clear to the applicant's attorney that the offer of R40 000.00, and of an extended period within which to lodge claims, would only apply to employees that *"qualify as eligible claimants under the provisions of the trust deed"*. On 7 October 2013 attorneys Cliffe Dekker Hofmeyr, purporting to act on behalf of "*comity* (sic) *members*" (presumably referring to members of the DWC), accepted the offer of R40 000.00 on these terms.

[37.] The applicant says that the attorneys were not, in doing so, mandated to act on behalf of spouses, dependants and legal successors of deceased workers, but the deponent for the respondents has pointed out that the attorney had in fact lodged more than one claim in respect of employees who were no longer alive, and which claims were rejected. The lodging of those claims is indeed difficult to reconcile with an allegation that the attorney had not been representing people who wanted to obtain payment in the names of already deceased employees.

CONSTITUTIONALITY

[38.] The applicant's case is clearly based on the allegation that her late husband had, when he was dismissed, acquired a right to be compensated by the 4th respondent, and that upon his death the right vested in the deceased estate.

[39.] The question is, however, whether this right could be said to have been affected by the provisions of the trust deed. In this regard it is important, in the first place, that the applicant says that Mr Moyo, in accepting the terms of the trust deed on behalf of the dismissed workers, was not authorised to represent her late husband's successors. She says that as far as she knows Mr Moyo was also not authorised to do so on behalf of the successors of deceased minors generally.

[40.] In this the applicant appears to be correct. It is borne out by the fact that the provisions of the trust deed apply only to workers who were alive when the settlement was reached and when the Trust was created. It is only those employees whose claims were compromised in the settlement, and that are the subject of the provisions of the trust deed. The definition of *"beneficiaries/eligible beneficiaries"*, read with the qualification already referred to in clause 8.2.1, makes this very clear.

[41.] Mr Strydom placed much store on clause 3.3 of the trust deed, in terms of which each beneficiary would receive R3 000.00 *"as a donation and in full and final settlement of all or any claims or grievance against the founder"*, and in particular on the word *"all"*. The parties to the negotiations and to the trust deed quite clearly did not intend to settle or compromise claims by successors of already deceased workers. They were, on the evidence, not even aware of the existence or potential existence of such claims at the time and they were in fact at pains to make sure that such successors would not be beneficiaries for purposes of the Trust. The word *"all"* quite clearly was not intended to refer to such claims. Lastly, on the applicant's own version such successors were not represented in those negotiations and, whatever the parties to the negotiations and to the conclusion of the trust deed may therefore have intended, could therefore not have prejudiced the rights of such successors.

[42.] Therefore, even if there exists a claim for compensation in the deceased estate, an issue upon which I do not need to make a finding, that claim is in no way compromised or affected by the provisions of the trust deed in its present form. Nothing would prevent the applicant, theoretically, from pursuing such a claim against the 4th respondent outside the provisions of the trust deed.

[43.] On the papers there does not exist any dispute about this in particular. Mr Strydom's only answer to this was that litigation against the 4th respondent would be expensive and that the applicant would not be able to afford it. Apart from the fact that it is strange then that the applicant can apparently afford the present litigation, this would of course not detract anything from the legal existence of such a remedy.

[44.] Mr Strydom argued that provisions that allow for only claims of live employees, discriminate unfairly against the successors of the late Mr Domingo. In my view they do not.

[45.] The trust property, which initially consisted of R2 000 000.00 donated by the 4th respondent, has not been shown to be the only source from which compensation could be paid. If it has not been shown that the applicant would have had no other way of pursuing the claim against the 4th respondent, on what basis can she be said to have been unfairly discriminated against? To put it another way, could it be said that the applicant has shown that, despite the existence of another remedy, it had nevertheless been unfair not to include a claim like hers as eligible for compensation by means of the mechanism created in the trust deed? Again, I am of the view that the answer to this should be in the negative.

[46.] In this regard it must be kept in mind that the applicant's case is not premised upon any of the grounds set out in section 9(3) of the Constitution. It was therefore for the applicant to show that any perceived discrimination is unfair[3]. A crucial factor in the determination of whether discrimination has been shown to be unfair as envisaged in the Bill of Rights, is the impact of the discrimination on the complainant[4].

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[3] Compare **Harksen v Lane NO and Others** 1998 (1) SA 300 (CC) (1997 (11) BCLR 1489 (CC)) para [48]
[4] See **South African Constitutional Law The Bill of Rights, Cheadle, Davis and Haysom, p4 - 51**

[47.] What the 4th respondent was confronted with at the time of the negotiations was the claims of living workers. Potential claims in the estates of dismissed workers who may already have passed on were not the issue and not in the contemplation of the negotiating parties. Due to a lack of records after such a long time there was in fact not even certainty about the identity of living workers who had been dismissed as a result of participating in the industrial action/unlawful strike action. It would not, in the circumstances, have been unfair of the 4th respondent to settle only the claims that it was being confronted with.

[48.] Mr Strydom has not directed my attention to any authority for the proposition that parties that want to settle a claim should anticipate the possibility of more claims and should in their settlement make provision for that, and that such a requirement would be in the public interest. The case of **Barkhuizen v Napier**[5], on which Mr Strydom relied, is clearly distinguishable and does not assist him.

[49.] According to the applicant Mr Domingo had a valid claim for compensation when he passed away in 2001. Nothing would have prevented her then from pursuing that claim, assuming of course that she would have had the legal standing to do so herself. When the 4th respondent decided to agree to settle the claims of living workers in 2008, more than two decades after the dismissals, it could in fact probably have resisted those claims on the basis of them having become prescribed. The relief that the applicant is now seeking, a further 10 years down the line, would effectively deprive the 4th respondent from this defence, and provisions that would allow this would in fact discriminate unfairly against the 4th respondent.

[50.] The applicant says that she finds it strange that, while the trust deed does not provide for claims in respect of employees no longer alive when the claim is lodged, it does provide for the payment of claims that were lodged while

[5] 2007 (5) SA 323 (CC)

employees were still alive, but subsequently died. There is nothing strange or anomalous about this, having regard to the uncertainty that existed as regards the identity of the particular group of employees.

[51.] Mr Strydom also argued that the Trust was in fact the product of unequal bargaining power. I must say that I find this argument difficult to understand. On the applicant's own version neither Mr Domingo nor she was a party to the negotiations that culminated in the trust deed, nor were they represented by the NUM or the DWC in the creation of the Trust or in the acceptance of the benefits in terms thereof. It is difficult to fathom then how either Mr Domingo or the applicant could in the circumstances have been the victim of unequal bargaining.

[52.] The DWC may have had inferior bargaining power from a legal point of view, in the sense that legal steps against the 4th respondent long before that had failed and that any claims that may have remained in existence had probably in the meantime become prescribed, but the undue pressure that had nevertheless since then been exerted upon the 4th respondent had effectively put the DWC in a strong bargaining position insofar as the 4th respondent was by then desperate to end the harassment.

[53.] Mr Strydom also relied on the *audi alteram partem* principle and argued that the successors of deceased workers were never given the opportunity to take part in the negotiations that led to the acceptance of the trust benefits. In the first place, and as I have already pointed out, it was not at that stage known to the 4th respondent, or apparently to any of the parties involved in the negotiations, that one or more of the dismissed workers had already passed away. It is in any event difficult to conceive how the principle could find application in a contractual setting, and particularly on the facts of this case[6]. Mr Strydom has not argued,

[6] Compare **Gründling v Beyers & Others** 1967 (2) SA 131 (W) at 141D – E; **Lamprecht and Another v McNeillie** 1994 (3) SA 665 (A) at 668B - H

neither has such a case been made out, that the successors' right to be heard had somehow come into existence tacitly [7].

[54.] It is also relevant, for purposes of the exercise of the discretion whether or not to grant declaratory relief, that the applicant's attorney has on her own version been in possession of the trust deed from 24 June 2014, after she had even earlier, when she had lodged the claim already referred to, been made aware that only claims by employees alive at the time that the claim is lodged would, in terms of the trust deed, be eligible for payment. The applicant and her attorney were therefore since then aware of the issue of the eligibility of the late Mr Domingo and his successors to claim, and the amendments effected to the trust deed in December 2016 made no difference to this. The only explanation that Mr Strydom could give for why this application was only brought in January 2018 was that the claims of live dismissed workers were first attended to and that legal opinion was then obtained about the position of successors of deceased workers.

SECTION 13 OF THE TRUST PROPERTY CONTROL ACT[8]

[55.] The applicant has, apart from what has already been said, also not made out any case for the variations of the trust deed that are now sought.

[56.] It can in no way be said that the founder of the Trust, namely the 4th respondent, did not foresee the consequence that successors of workers that had already passed on would not be entitled to payments from the trust estate. This is what is required by section 13 of the Act. It is very clear that this was in fact precisely the consequence intended by the founder.

[57.] The provisions of clause 8.2.1 of the trust deed to not hamper *"the achievement of the objectives of the Founder"*, as envisaged in section 13(a) of the Act. On the

[7] Compare **Transman (Pty) Ltd v Dick and Another** 2009 (4) SA 22 (SCA) para [28]

[8] 57 of 1988

contrary, they indeed achieve the objective of certainty as far as claims to shares of the trust property and the identity of claimants are concerned.

[58.] They also do not prejudice the interests of the beneficiaries of the Trust, as envisaged in subsection (b).

[59.] Lastly they are also, as I have in effect already found, not "*in conflict with public interest*" as envisaged in subsection (c), and as contended on behalf of the applicant.

CONCLUSION

[60.] I am therefore of the view that, even if it could be said that the applicant has shown that her husband would have been an eligible beneficiary had it not been for his demise before the creation of the Trust, and even if the applicant could furthermore be said to have legal standing, she has in any event not made out a case that the relevant provisions are unconstitutional.

[61.] The need for the consequential relief that has been claimed would then fall away.

[62.] It follows that I am of the view that there is no merit in the application and that it should be dismissed.

[63.] There is no reason why the costs should not follow the result. Although the applicant has, as already mentioned, couched the relief sought in the notice of motion in terms suggesting that she is litigating on behalf of all successors of mine workers already deceased when the Trust was created, she has clearly not been authorised to do so. In fact, she has not even herself shown that any of the other dismissed workers had, like the late Mr Domingo, passed on by the time that the Trust was created. The applicant cannot in my view be seen as a litigant who has pursued a constitutional issue in the public interest.

[64.] It furthermore has to be kept in mind that the application in any event also falls to be dismissed on non-constitutional grounds.

[65.] In the premises the following order is made:

THE APPLICATION IS DISMISSED WITH COSTS.

C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

For the applicant:	**ADV W A F STRYDOM** (Instructed by **Hugo Mathewson & Oosthuizen**)
For the 1st, 2nd, 3rd and 4th respondents:	**ADV A N SNIDER** (Instructed by **Duncan & Rothman Inc.**)