



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

CASE NO: 11802/2012

In the matter between:

SIFISO GOLDRICH CLIFFORD DLAMINI

FIRST APPLICANT

MUNTU HECTOR DLAMINI

SECOND APPLICANT

MUNTU HECTOR DLAMINI N.O.

THIRD APPLICANT

RAYNDEL DUMISANI DLAMINI

FOURTH APPLICANT

and

JOY NGCOBO

FIRST RESPONDENT

DOREEN ZINHLE DLAMINI

SECOND RESPONDENT

NANDI ZAMASIBA MATJELE

THIRD RESPONDENT

ORDER

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1. The application is dismissed with costs.
 2. Such costs are to include the costs occasioned by the employment of Senior Counsel where applicable.
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JUDGMENT

HENRIQUES J

Introduction

[1] This is an application for an interim interdict pending the final determination of an action instituted by certain of the applicants under case number 4070/2012.¹

[2] The relief foreshadowed in the notice of motion is the following, namely:

‘1.

(a) that pending the final determination of an action to be instituted under case number 4070/2012 against the First Respondent and Kentucky Fried Chicken within thirty days of the grant of this Order (“the action”):

(i) the Gil Family Trust is ordered to continue to pay R12 689.00 to the First, Second and Third Applicants pending the final determination of the action;

(ii) the Respondents are interdicted and restrained from causing the income of the KwaMashu KFC outlet being paid into any bank account other than the bank account with details as follows:

First National Bank (Overport branch)

Account Number: [6.....]²

(“the first bank account”)

(iii) the Respondents are ordered to account to the Applicants in respect of all monies paid into and out of the bank account with details as follows:

First National Bank

Account Number: [6.....]

(b) that the Respondents are to pay the costs of this application jointly and severally, the one paying, the other to be absolved.’

[3] When the application first served before the court, no interim relief was granted.

¹ The action was instituted on 22 March 2012 in this court and pleadings have closed.

² The original notice of motion referred to an incorrect bank account number. At the hearing of the matter both parties confirmed the correct details of the bank account number.

[4] The relief which the applicants seek can be dealt with under three headings, namely:

[4.1] for the Gil Family Trust to continue paying to the first, second and third applicants the sum of R12 689.00 pending the final determination of the action;

[4.2] the respondents be interdicted and restrained from causing any income from the KwaMashu Kentucky Fried Chicken (KFC) outlet being paid into any bank account other than the one specified;

[4.3] the respondents provide to the applicants an account of all monies in the bank account specified in their notice of motion, and, if necessary, debate such account.

[5] A number of preliminary matters need to be dealt with. The first is whether the applicants have made out a case for the relief sought, and whether the relief is interim or final in nature. The second is whether there are disputes of fact on the affidavits filed.

[6] Normally *pendente lite* relief is granted to protect a disputed right pending the right being finally determined in subsequent proceedings. The test for interim relief is trite and was set out by the Appellate Division³ as follows:

'An applicant must establish a *prima facie* right though open to some doubt, a well-grounded apprehension of irreparable harm if the interim relief is not granted, the balance of convenience must be in favour of granting the interim relief and there must be no other satisfactory remedy.'⁴

[7] If one considers the particulars of claim in the action instituted under case number 4070/2012, the applicants essentially seek a declaratory order declaring that the first respondent was not entitled to be a trustee of the SGC Dlamini Family Trust. Consequently, upon such declaratory order being granted, the master be directed to remove her as trustee in the trust deed and revoke her letters of authority so that both be amended to reflect *inter alia* the first and second applicants as trustees of

³ *Setlogelo v Setlogelo* 1914 AD 221.

⁴ My summary.

the trust. In addition, an order is sought for the debatement of an account which is to be provided by the first respondent to the applicants of all income earned in the name of the SGC Dlamini Family Trust from the KwaMashu KFC outlet.

[8] Some of the issues in these proceedings will not be dealt with and finalised in the action. Consequently, in respect of the relief the applicants seek in this application, the relief constitutes final relief. Both parties acknowledge that there are disputes of fact in these proceedings and neither has requested the matter be referred for the hearing of oral evidence. As such, whether the applicants are entitled to final relief is determined by applying the well-known test⁵ namely, whether the facts as stated by the respondent together with the facts alleged by the applicant which are admitted by the respondent justify the court in making such an order.

[9] Before applying the test as set out in para 8 above, it is convenient to set out the factual background against which the application must be determined. In doing so for purposes of the judgment, I have summarised the facts as contained in all the affidavits filed.

[10] The facts can be briefly stated as follows:

[10.1] Albertina Dlamini (Albertina), the mother of the first to third applicants, opened the KwaMashu Kentucky Fried Chicken (KFC) outlet as a franchisee in 1985. She ran the business from 1985 until 1997 when she retired and the administration of the business was handed over to the first applicant, Sifiso Dlamini (Sifiso).

[10.2] When Albertina died, Sifiso caused the S.G.C Dlamini Family Trust (The Dlamini Family Trust) to be formed and caused ownership of the KwaMashu KFC to be transferred to the Dlamini Family Trust, he being the sole trustee.

[10.3] In 2002/2003, Sifiso fell ill and the first respondent, Joy assisted him in running the KFC business. This arrangement continued until 2006 when Joy

⁵ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634.

is alleged to have evicted Sifiso from the KwaMashu KFC outlet on the basis that she owned the business.

[10.4] Between 1997 and 2006, the trading licence of the KwaMashu KFC outlet was in the name of Sifiso and thereafter in the name of the Dlamini Family Trust. The accounts submitted by the local municipality for the consumption charges and costs levied to the KFC outlet, as well as the vat registration number of the outlet was that of the Dlamini Family Trust.

[10.5] In 2006, when Sifiso was allegedly evicted from the business, he did not have access to documents proving ownership of the KFC outlet by Albertina. It was only in 2010 when he came across a box containing Albertina's documents that he was able to confirm ownership of the business.

[10.6] In 2012, Sifiso and certain of the other applicants instituted an action under case number 4070/2012 for *inter alia* the return of the business, loss of income, return of equipment and the value of stock.

[10.7] In the interim, Sifiso discovered that the Dlamini Family Trust Deed had been amended and suspected that the letter of resignation by the second applicant Muntu Hector Dlamini (Muntu) was forged.

[10.8] Joy formed the Gil Family Trust and in terms of clause 2 of the trust deed, she was a trustee together with a second trustee who would have the power of assumption to assume no more than five other co-trustees. Joy assumed the second and third respondents as co-trustees of the Gil Family Trust, together with Muntu.

[10.9] Clause 3 of the Gil Family Trust Deed identified the income beneficiaries of the trust as Muntu, Sifiso, Rayndel Dumisani Dlamini, Raymond Bongani Dlamini and any of their further children.⁶

⁶ Raymond Dlamini is deceased.

[10.10] Although alleging the KwaMashu KFC outlet is owned by the Gil Family Trust, the interests of the first, second and fourth applicants as income beneficiaries of the Gil Trust were recognised by the first respondent.⁷

[10.11] The first, second and fourth applicants were paid a monthly income of R12 689.00 and the Gil Family Trust acquired motor vehicles for them at the instance of Joy.

[10.12] In light of the dispute between parties, an agreement was brokered in terms of which the action was held in abeyance, and the income received from the KwaMashu KFC would be paid into a bank account, maintained with First National Bank, Overport in the name of the Gil Family Trust. Muntu and Doreen, the second respondent, were the joint signatories to such account.⁸ This bank account was utilised to operate the business and the applicants received payment of the monthly sum of R12 689.00 until March 2012.

[10.13] Settlement negotiations were unsuccessful and in March 2012, payments to the applicants of the monthly sum ceased. In addition, enquiries revealed that a new bank account had been opened in the name of the Gil Family Trust and no monies generated from the KwaMashu KFC outlet were paid into the bank account mentioned in para 10.12.

Issues for determination

[11] It is against this factual background that the following issues in this application must be determined:

[11.1] are the applicants entitled to continue to receive a monthly income in terms of the Gil Family Trust Deed?

[11.2] did an agreement exist that the income of the KwaMashu KFC outlet would be paid into the bank account number as stipulated by the applicants?

⁷ It is common cause that the applicants were income beneficiaries of the Trust.

⁸ The account number of this bank account was 62138337656.

[11.3] are the applicants entitled to an account and a debatement of such account?

[12] In determining these issues, one must remember that the onus rests on the applicants to show their entitlement to final relief and that such a case must be made out in the founding affidavit, unless new matters are raised in opposition by the respondent.

[13] Before considering the issues for determination, it is necessary to deal with the two *points in limine* taken by the respondents in opposition. The first one does not merit the attention of this court as it takes the matter no further. The second relates to the non-joinder of the “issue” of certain income beneficiaries who have a direct and material interest in the application.

[14] The applicants submit that the interpretation which the respondents place on clause 3.1.5 of the trust deed is incorrect and relates to ‘any further issues of ... the income beneficiaries’. That is, children born after the trust was incorporated on 2 November 2006. The children of Sifiso who are affected have waived being joined in the application.⁹ Consequently, this point likewise is without merit and takes the matter no further.

I propose to now consider the issues in the application.

Payment of the monthly amount of R12 689.00

[15] The applicants’ case is that they are income beneficiaries of the Gil Family Trust and had previously been paid the amount of R12 689.00 monthly. The respondents admit that the applicants are income beneficiaries of the trust and that in March 2012 the trust ceased making payments of these monthly amounts. The respondents challenge to the continued payment of the monthly amount appears to rest on two bases, namely:

⁹ These affidavits are annexed to the papers and appear at pages 137 to 143.

[15.1] the monthly payments were salaries due to the applicants whilst they were employed in the business. These payments ceased as the applicants were no longer employed at the business;

[15.2] the trust deed empowers the trustees in their discretion to allocate money for the benefit of an income beneficiary. Income beneficiaries have no vested rights to the income or capital of the trust and consequently, the applicants as income beneficiaries do not automatically acquire a claim to any income of the trust, until such time as the trustees adopt a resolution to pay such income to the beneficiaries.

[16] In this regard, the respondents rely on clauses 2.8 and 3.5 of the trust deed. Clause 2.8. reads as follows:

‘During the existence of the Trust, the TRUSTEES may appropriate so much of the income of the Trust as they in their discretion consider fit to the benefit of any INCOME BENEFICIARY (as hereinafter defined) in such amounts and generally in such manner as the TRUSTEES in their absolute discretion think fit. Any appropriation of the Trust must be approved by the majority of the TRUSTEES. Any distribution of any asset or assets forming part of the capital of the Trust must be made to the CAPITAL BENEFICIARIES (as hereinafter defined) in the proportions as set out in Clause 3.1.2 hereof.

Any distribution whether it be INCOME or CAPITAL, may only be made with the unanimous decision of all TRUSTEES.’

[17] Clause 3.5 of the trust deed reads as follows:

‘Prior to the termination of the Trust, the BENEFICIARIES shall have no vested right to the income or capital of the Trust which has not been paid over or appropriated to that Beneficiary by the TRUSTEES.’

[18] It is for these reasons that the respondents submit that an income beneficiary does not acquire a claim to any income or capital of the trust, as beneficiaries have no vested right to the income or capital of the trust. The trust deed further requires the **MAJORITY**¹⁰ of trustees to adopt a resolution to pay the income of the trust to

¹⁰ My emphasis.

the income beneficiaries. Moreover, any distribution whether it be income or capital requires a unanimous decision of all trustees.

[19] Clause 3.1 of the Gil Family Trust Deed identifies the income beneficiaries of the trust as being Muntu Hector Dlamini, Rayndel Dumisani Dlamini, Raymond Bongani Dlamini, S'fiso Goldrich Dlamini and their futher issues. The capital beneficiaries of the trust are not specifically identified but nothing turns on this.

[20] Clause 3.4 makes provision for the payment of the capital of the Trust to capital beneficiaries. In addition, it also makes provision for monies required by a beneficiary to be made payable prior to the date of payment of the capital amount by the trustees.

[21] The relevant portion of clause 3.4 reads as follows:

'Notwithstanding the provision of this Clause if, in the opinion of the Trustees, any Beneficiary requires any amount for his her maintenance, support, education and advancement in life or for his reasonable pleasures or requires fund for the purpose of any business which such beneficiary desires to enter upon, acquire or improve, or for the purpose of a dowry or for the provisions of a home, or for the other purpose which the Trustees shall consider adequate, the Trustees are hereby empowered to pay such beneficiaries such sum as they deem fit, out of the capital amount of any request made to him or her hereunder. Any amount paid by the Trustees to such beneficiary shall be deducted from the capital amount failing to be paid to him or her on his or her distribution date.'

[22] Despite clause 3.4. in the trust deed, the applicants place no reliance on it for the relief they seek.

[23] The applicants maintain that as income beneficiaries they are entitled to this amount indefinitely, whereas the first respondent submits that this amount was only payable for as long as they were employed in the business.

[24] As already alluded to factual disputes exist. The first respondent, Joy, avers the KwaMashu KFC outlet was opened by her in 1986 and she concluded a franchise agreement in the name of Sifiso Hyperstores (Pty) Ltd, a company she

formed as sole shareholder. In 1991, Sifiso and Albertina forcibly removed her from the business. Even though the franchisor threatened to cancel the franchise agreement with her, she placated them and the business continued to operate.

[25] When the franchise agreement ended in 2006, a new agreement was concluded in the name of the Gil Family Trust founded by her. She assisted in the running of the KFC outlet not because Sifiso became ill, but rather as it was her duty to do so in accordance with the traditions and customs of their family. Joy, who was the wife of the applicants' deceased brother, regarded the business as providing a livelihood for the Dlamini sons and their issue in accordance with traditions and culture.

[26] It is common cause:

[26.1] the applicants are income beneficiaries of the Gil Family Trust;

[26.2] the applicants were paid a monthly sum of R 12 689.00 until March 2012;

[26.3] the first respondent purchased vehicles for the three (3) applicants;

[26.4] the first respondent was married to Mageba Dlamini, the deceased brother of the first, second and fourth applicants and Raymond Bongani Dlamini;

[26.5] the income derived from the KwaMashu KFC outlet was for the benefit of the applicants and their children.

[27] Of relevance to this matter and what is in dispute is the reason for such monthly payment. The applicants contend that such payment was made as they were income beneficiaries of the trust. The first respondent submitted that this constituted payment of salaries to the applicants, which is denied by the applicants. In addition, the first respondent indicates that the vehicles purchased for the applicants, were purchased from income from her other businesses, as it was her

duty to provide financial assistance to the applicants in accordance with tradition and culture, and was not paid from income received from the KwaMashu KFC outlet.

[28] In my view, the trust deed makes express provision for the income to be utilised for the benefit of the income beneficiaries. However, it is the majority of trustees who are entitled to in their absolute discretion, to make a decision to effect payment of the monthly sum to the income beneficiaries. Even though the applicants allege that Muntu was excluded from the decision, he was not the only trustee co-opted, and there is nothing to suggest that a majority of trustees did not take such decision.

[29] As this is a discretionary trust, the common law and the trust deed itself, confers such discretion on the majority of trustees. This court cannot interfere with the exercise of such discretion or usurp the functions of the trustees. There is a dispute of fact as to the reason for the monthly payment to the income beneficiaries.

[30] The difficulty which I have with the respondents' version is the following. The trust deed empowers the trustees by unanimous decision to distribute income of the trust to the beneficiaries. The first respondent specifically acknowledges at para 54 of her answering affidavit that '...I continued to regard this business as providing a livelihood for the four Dlamini "sons" and their issue, again out of respect for the cultural customs and traditions'. On the respondents' version, the monthly amounts were paid for a considerable period of time. There is nothing in the trust deed which appears to suggest that income could be used to pay the beneficiaries salaries.

[31] In addition, it is also inconsistent with the respondents' version that the franchisor wanted nothing to do with the first applicant and did not want him involved in the business at all. Why then would the franchisor permit the applicant to be involved as an employee and receive a salary? This is inconsistent with the respondents' version that the franchisor was only prepared to have her involved in the business and that the applicant was to have no involvement at all.¹¹

¹¹ References to this are to be found at paras 52 to 54, pages 87 and 88 of the indexed papers.

[32] The first respondent contends that the amount paid was not the same each year as deductions had to be made for PAYE. No further information is put up relating to the exact period of time the “salaries” were paid, the amounts each year and the deductions. In response to a notice in terms of rule 35(12), the documents at pages 165 and 166 of the papers have been served and filed confirming the Gil Family Trust’s registration with SARS as an employer for the period 2013.

[33] Even though I may be of the view that the first respondent’s version that this was a monthly salary is inconsistent with her averments that the franchisor did not want the income beneficiaries involved in the Kwa Mashu KFC outlet at all, or that on the probabilities, payments were made in accordance with tradition and culture to support the applicants, the applicants bear the onus to establish the criterion for a final interdict.

[34] They must establish a clear right to such payment. In my view they have not done so. Whilst the income is to be utilised for the benefit of the income beneficiaries, this is a discretion to be exercised by the majority of trustees on a monthly basis. The trust deed itself makes it clear that such is an absolute discretion. This court cannot usurp the function of the trustees nor direct them to do so. Any order directing them to do so will result in them acting *ultra vires* the trust deed. Correctly interpreted,¹² the discretion is not confined to the amount payable as contended by the applicants, but rather in keeping with the wording of the trust deed itself, relates to whether income is payable at all in the exercise of their absolute discretion.¹³

[35] This matter cannot be decided on what this court perceives to be fair and reasonable¹⁴ in the circumstances. In addition, even though s13 of the Trust Property Control Act 57 of 1988 (the Act)¹⁵ makes provision for a court to intervene

¹² *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) paras 18 to 23.

¹³ The fiduciary office of trustee and the protection of contingent trust beneficiaries, François du Toit BA LLB LLM LLD, Associate Professor, University of the Western Cape, 2007 *Stell LR* 469.

¹⁴ *Potgieter & another v Potgieter NO & others* 2012 (1) SA 637 (SCA) para 34.

¹⁵ Section 13 of the Trust Property Control Act empowers the court, where ‘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’, on

where it is of the view the trust deed results in a consequence not intended by the founder, neither of the parties relied on this.

[36] A matter which also requires mentioning is the question of the fiduciary duty of trustees. This case was not made in the founding affidavit but rather in reply by the applicants. It is trite that the applicants must make out a case for the relief sought in their founding affidavit, subject to certain exceptions. There are no facts alleged which in my view warrants this court considering the replying affidavit. In the event of me being wrong in this conclusion, I propose to briefly deal with this duty.

The Fiduciary Duty of Trustees

[37] Trustees have a fiduciary duty to beneficiaries by virtue of the office they hold. A trustee must act as a *bonus et diligens paterfamilias*. Such common law duty of care has been reflected in s9 of the Act. The section reads as follows:

'Care, diligence and skill required of trustee

(1) A trustee shall in the performance of his duties and the exercise of his powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another.

(2) Any provision contained in a trust instrument shall be void in so far as it would have the effect of exempting a trustee from or indemnifying him against liability for breach of trust where he fails to show the degree of care, diligence and skill as required in subsection (1).'

[38] The applicants in reply submit that irrespective of their discretion, the trustees have a fiduciary duty to act impartially, jointly and in good faith. By terminating the monthly payments, they did so without Muntu and secondly, did not provide an explanation for doing so. This evidences impartiality and bad faith.

[39] There is nothing to suggest on the facts presented, that the exercise of such discretion is a breach of the trustees' fiduciary duty. Even if I am wrong in this regard, there is nothing on the undisputed facts of the matter that warrants this court

the 'application of the trustee or any person who in the opinion of the court has a sufficient interest in the trust property, to . . . delete or vary any such provision or make in respect thereof any order which the court deems just . . . '.

interfering with the exercise of such discretion on the basis of a breach of a fiduciary duty. It also appears that the applicants in reply are making their case up as they go along.¹⁶

Payment into the specific bank account and an account and debatement.

[40] There is a dispute of fact regarding this issue. I accept that the dispute of fact relating to the ownership of the KwaMashu KFC outlet is the subject matter of the action, and strictly speaking, is not relevant to the adjudication of the relief in this matter. However, the other disputes of fact which arise in this matter, in my view, in the absence of a request for referral to oral evidence, must be decided on the respondents' version. This means that the applicants are not entitled to the relief they seek.

[41] In the action an account and debatement is part of the relief sought. In light of the dispute of fact, the applicants have not made out a case for the interdict, nor has a case been made out for the respondents to account.

Costs

[42] It is trite that the general rule is that a successful party is entitled to its costs. There appears to be no good reason to depart from the normal rule. In addition, both parties accept the application involved complex issues warranting the employment of two counsel in the case of the applicants, and, senior counsel in respect of the respondents. There is thus no reason not to make such an order allowing costs of senior counsel.

[43] In the premises, the application falls to be dismissed with costs. Such costs to include that of senior counsel.

¹⁶ Para 19. In the founding affidavit they rely on clause 2.8, then in reply on a breach of fiduciary duty then on a legitimate expectation.

Case Information

Date of Hearing : 31 October 2013

Date of Judgment : 06 May 2016

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