



/SG

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

DATE:

CASE NO: 50881/2012

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ☒ YES/NO
(2) OF INTEREST TO OTHERS JUDGES: ☒ YES/NO
(3) REVISED

20/11/2013

DATE

SIGNATURE

21/11/2013

In the matter between:

MPU DANIEL MOFOKENG

1st APPLICANT

NEO MOFOKENG

2nd APPLICANT

KHAMA MOFOKENG

3rd APPLICANT

And

THE MASTER OF THE NORTH GAUTENG HIGH COURT

1st RESPONDENT

JACQUELINE MOTLAGOMANG MOFOKENG

2nd RESPONDENT

MPU DANIEL MOFOKEN N.O.

3rd RESPONDENT

JUDGMENT

MAKGOBA, J

- [1] The applicants have launched an application in terms of section 23 of the Trust Property Control Act 57 of 1988 for the review and setting aside of the decision of the first respondent to re-appoint the second respondent as a trustee of the Phoka Trust (“the trust”).

The second respondent has opposed same on the ground that her reappointment was valid and within the discretion of the first respondent who was initially misled by the first applicant in the removal of the second respondent as the trustee in the first instance.

- [2] The first respondent does not oppose the application and has given a notice to abide the decision of the court.
- [3] The first applicant and the second respondent are erstwhile husband and wife who divorced on 7 March 2012. They are currently co-trustees of the Trust. The only property owned by the trust is a house, the former matrimonial home. The second respondent resides and has always resided in the trust property being the house. The first applicant also used to reside in the trust property until the parties’ marriage

became acrimonious and the first applicant vacated the matrimonial home, the trust property.

[4] It is common cause that:

4.1 Both parties are beneficiaries of the Trust;

4.2 At all material times the second respondent was paying the bond, utilities and upkeep of the house (i.e. the trust property)

4.3 The second respondent has a financial interest in the trust property and is owed monies by the Trust.

[5] The second respondent has been a trustee of the trust since the trust's inception in 1999 until 12 August 2011 when she was removed as trustee at the behest of the first applicant. The second respondent was reappointed as trustee by the Master on 31 July 2012. It is the reappointment of the second respondent that is the subject of this application.

[6] As a result of the deadlock between the trustees the first applicant on 12 August 2011 applied to the first respondent to have the second respondent removed as a trustee in order for the trust to become functional again. The Master subsequently removed the second respondent. Following some representations by the second respondent's attorneys the Master reappointed the second respondent as a trustee on 31 July 2012.

[7] It is common cause that during June 2011 the second respondent instituted action against the trust and that the second respondent applied and obtained default judgment against the trust in the sum of R3 128 856.98. The second respondent embarked on this course of action whilst she was a trustee of the trust and did not give prior notice to the first applicant as a co-trustee.

The evidence on papers illustrate that the second respondent contrived the situation in which default judgment was obtained against the trust by ensuring that the first applicant was not served with the summons in the action.

- [8] Of importance the following allegations which have not been seriously challenged by the second respondent, appear in the first applicant's founding affidavit:

"The relationship became strained to such an extent that the Trust was unable to function since the two Trustees could not agree on any issues."

- [9] It is common cause that the default judgment has since been rescinded and the litigation between the second respondent and the trust is proceeding. The first applicant states that if the second respondent is reinstated as trustee she will frustrate the Trust from pursuing the litigation against her. Furthermore the first applicant states that as a result of the breakdown of the marriage relationship between the parties and the resultant litigation there currently exist a deteriorated and acrimonious relationship between the first applicant and second respondent.

- [10] It is evident on the common cause or undisputed facts before me that the second respondent, whilst still a trustee of the trust, placed her own interests above those of the trust beneficiaries.
- [11] The issue to be determined is whether the reappointment of the second respondent as trustee subsequent to the alleged blatant breach by the second respondent of her duties as trustee and a deadlock between the trustees can be justified. The first applicant contends that the decision of the Master falls to be set aside in the light of serious and fundamental breaches by the second respondent of her duties as trustee as well as the fact that the reappointment of the second respondent has lead to the recurrence of the deadlock situation prevailing prior to the second respondent's initial removal as trustee.
- [12] Section 23 of the Trust Property Control Act 57 of 1988 ("the Act") provides as follows:

"Any person who feels aggrieved by any authorization, appointment or removal of a trustee by the Master or by any decision, order or direction of the Master made or issued under

this Act, may apply to the Court for relief, and the court shall have the power to consider the merits of any such matter to take evidence and to make any order it deems fit.”

- [13] By virtue of section 23 of the Act, the court is empowered to “consider the merits of any such matter to take evidence and to make any order it deems fit”.

Prior to the enactment of the Act, an ordinary right of appeal or review against an appointment by the Master did not entitle the Court to enquire into and retry the substantive merits of the matter.

See: ***Shenker v The Master* 1936 AD 136 and *Ex Parte Mandell* 1961 4 SA 332 (W).**

The terminology employed in section 23 of the Act makes it plain that the court may consider the disputed issues anew and the legislature appears to envisage a complete rehearing of and fresh determination on the merits of the Master’s appointment with or without additional

evidence or information and not an enquiry constrained by either the narrow limits of the court's common law review jurisdiction.

See ***Honoré's South African Law of Trusts* 5th Edition at para 119 at page 199.**

[14] In the light of the legal principles outlined above I shall then consider and decide the issues in this matter on the basis of the evidence on record. I need not and shall not approach the matter on basis that the Master has not given proper attention to the matters to which he should have given attention, or that he was motivated by an improper consideration or that his decision is so unreasonable as to lead inevitably to the inference that he was either *mala fide* or did not consider the matter properly.

[15] In short, the matter will be decided on the basis whether the applicant has adduced evidence to establish good grounds or reasons for the review and setting aside of the Master's decision.

[16] Section 19(1) of the Act provides that:

“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.”

The trustee is in general under a duty to conserve the trust property. One who deals with the property of another has to exercise due care in doing so. The office of trustee carries with it a duty to safeguard the personal rights of beneficiaries.

- [17] In ***Sackville West v Nourse* 1925 AD 516 at 533-4** the Appellate Division held that a trustee must use greater care in handling trust property than he might in dealing with his own property and that the “rule of our law is that a person in a fiduciary position, like a trustee, is obliged, in dealing with and investing the money of the beneficiary to observe due care and diligence and not to expose it in any way to any business risks”.

See: ***Honoré***, *supra* at page 263.

- [19] It is trite that a trustee must so far as possible avoid a position where his/her private interests conflict with his or her duty as a trustee. See: ***Hoppen and Others v Shub and Others* 1987 3 SA 201 (C) 210**. A person appointed as trustee is not entitled to benefit personally from the use of the trust property or to consume its fruits –

***Estate Kemp v MacDonald's Trustee* 1915 AD 491 at 499.**

- [20] The second respondent, as a trustee, has at the minimum a duty to keep the trust property administered separate from personal property and to avoid a conflict of interest with the beneficiary or the trust object.

A conflict between interest and duty, whether arising from an act of the trustee such as a claim made against the trust estate or from independent causes is a ground for removal of a trustee.

See: ***Grobelaar v Grobelaar* 1959 4 SA 719 (A); *Die Meester v Meyer en Andere* 1975 2 SA 1 (T)**.

[21] In my view, the second respondent's conduct in not only claiming against the trust, but obtaining default judgment against the trust is self-evidently a breach of her duties as trustee. Taking into account the breach of her duties as trustee coupled with the ensuing deadlock resulting from her reappointment, the Master erred in reappointing the second respondent and the reappointment of the second respondent is evidently not in the interest of the trust beneficiaries.

[22] In the circumstances the first applicant has made out a case for the review and setting aside the first respondent's decision to reappoint the second respondent as a trustee of the trust.

[23] In the result I grant the following order:

1. The decision of the first respondent dated 31 July 2012 to appoint the second respondent as joint trustee of the Phoka Trust is hereby reviewed and set aside.
2. The costs of the application shall be paid by the Trust.



E M MAKGOBA

JUDGE OF THE NORTH GAUTENG HIGH COURT

50881/2012/sg

Heard on:

13 November 2013

For the Applicants:

Adv M Mostert

Instructed by:

Wertheim Becker Inc c/o Friedland Hart
Solomon and Nicholson

For the Second Respondent:

Adv B Stevens

Instructed by:

Shapiro & Shapiro Inc

Date of Judgment: