

IN THE HIGH COURT OF SOUTH AFRICA JvZ
NORTH GAUTENG, PRETORIA

26/3/09
NOT REPORTABLE

Date heard: 23 March 2009

Case Number: 56836/2007

In the matter between:

ISMAIL SULIMAN DADABHAY

First Applicant

FAZILA DADABHAY PARUK

Second Applicant

SAYDA (AKA SAIDA BANOO) DADABHAY

Third Applicant

NAFISAH DADABHAY OMARJEE

Fourth Applicant

and

AHMED SULIMAN DADABHAY

First Respondent

ROCKEYA SULIMAN DADABHAY

Second Respondent

RASHID SULIMAN DADABHAY

Third Respondent

AKHTER MOOSA

Fourth Respondent

THE MASTER OF THE HIGH COURT

Fifth Respondent

JUDGMENT

LOUW J

Introduction

1. The applicants seek various forms of relief in their main application, which, according to the notice of motion in the main application, are to be granted in a staggered fashion:

- 1.1 The first and introductory part of the relief is for the substitution of Mr Berrangé for the current fourth respondent as the trustee of the Suliman Dadabhay Will Trust ("the Trust") which became terminated on 28 February 2007 (notice of motion in main application, p3).
 - 1.2 That, once Mr Berrangé has substituted the fourth respondent as trustee of the Trust, his powers (to be derived from the order of Court of 8 November 2006 – pp14 and further) be "*stayed pending final determination of the action to be instituted*" by the applicants, forming the subject matter of prayer 4 (prayer 3 in main notice of motion, p4).
 - 1.3 The applicants then seek interim preservation and management relief in relation to a list of assets, alleged to be assets of the Trust, pending the determination of the said action to be instituted by them. This interim relief relates to preservation and management steps that are to be taken by Mr Berrangé, once he has been appointed pursuant to a determination of the relief sought in prayer 1 (notice of motion in main application, pp5-12, paras 5-10).
 - 1.4 The interim preservation and management relief is then to endure pending the determination of the action which the applicants propose instituting for declaratory relief as to the ownership of the long list of assets set out on annexure "B" to the notice of motion (notice of motion in main application, para 4; annexure "B" – p18).
2. The first three respondents, on the one hand, and the fourth respondent, on the other, delivered separate answering affidavits to the applicants' notice of motion in the main application. The four respondents have identified substantial

and far-reaching disputes of fact relating to a whole array of complicated issues arising from these affidavits. The four respondents are therefore of the view that the application should be referred to trial in terms of the provisions of rule 6(5)(g) and that a referral to oral evidence is totally inappropriate.

3. Notwithstanding this view of the four respondents which has over a period of time consistently been conveyed to the applicants' attorneys, the applicants proceeded with the current interlocutory application namely an application for referral to oral evidence
4. Before we get to the referral application it is necessary to emphasise the following:

There are six private companies which are closely related to the Dadabhay family, the trust and investments but so far these companies have not been joined in the application. Realising this difficulty the first four applicants on 28 January 2009 delivered an application for the joinder of these companies. In that application, which was not opposed I granted the following order:

1. I E Dadabhay and Company (Pty) Ltd, Littonia investments (Pty) Ltd, Sedson industries (Pty) Ltd, Dadaville Estate (Pty) Ltd, S E Dadabhay Family Investment Company (Pty) Ltd and 139 Dadaville (Pty) Ltd are joined respectively as the sixth to the eleven respondents in this matter.
2. The applicants are directed jointly and severally to pay the costs of the first to the fourth respondents caused by the joinder.

5. There was a further application by the applicants before we could deal with the main issue of referral to trial or to evidence. This flowed from the fact that in the answering affidavits of the respondents it was pointed out that whilst the original notice of motion did not ask for any final relief in respect of assets, the proposed amended draft order now do so. According to the original notice of motion the ownership of the assets of the trust would have been determined in a trial action (see application page 3 prayer 4)
6. The applicants have now changed their original approach as per the 2007 notice of motion. Instead what I have before me is a notice of application delivered on 6 March 2009 in terms of which:
 1. The matter is to be referred for the hearing of oral evidence on a preferential basis.
 2. The oral evidence will determine what percentage if any of the shareholding in the six companies that have just been joined, is beneficially owned by the SE Dadabhay trust.
 3. Whether the trust is also the owner of three immovable properties namely portions 45 of the farm Vlakfontein, Erf 205 and 219 Dadaville estate
 4. The last substantial relief that is requested is an inquiry into the manner Mr Moosa performed his duties as trustee, obviously with the intention of having him removed and a certain Berrange substituted as trustee for Moosa.

7. The first to fourth respondents objected to this proposed list of issues for referral to oral evidence, as that was not contemplated in the original notice of motion. According to the original notice of motion, paragraph 4 thereof, ownership of all the various assets listed in annexure B to that affidavit would have been determined by a trial court. Apart from the fact that the respondents argue that that is the only sensible way to do so, having regard to the multiplicity of issues and massive disputes of fact, it is further unfair to now, order the respondents to evidence in circumstances where they have only so far opposed an interim interdict with the assurance that the trial will happen later, during which trial their full versions could have been stated and ventilated in a proper way.
8. A further aspect that militates against a referral to evidence at this stage is the fact that six new respondents namely respondents six to eleven have just been joined and their versions are not before the court.
9. Faced with these difficulties the applicants at a late stage i.e. 20 March 2009, attached to their written argument, an amended notice of motion marked A. At the hearing the applicants asked for the original notice of motion to be substituted by that amended notice of motion marked A. There was no opposition from the other parties and therefore I granted the following order:
 1. The original notice of motion is amended to read as per annexure A to the applicants heads of argument dated 20 March 2009.
 2. The first to fourth applicants are ordered jointly and severally to pay the costs of the first to fourth respondents caused by the amendment.

10. The amended notice of motion now seeks final relief in regard to the removal of the fourth respondent as trustee. Secondly a determination that the entire shareholding in the six companies, already listed above, are assets of the trust and thirdly that three immovable properties are the properties of the trust.
11. In spite of the amendment the stance of the first to the third respondents and the fourth respondent remain the same. This they argue is not the kind of case that should be referred for the hearing of oral evidence. In that regard Mr Eloff SC referred to the well established principles applicable to the referral of disputed issues for the hearing of oral evidence.

PRINCIPLES APPLICABLE TO THE REFERRAL OF DISPUTED ISSUES FOR THE HEARING OF ORAL EVIDENCE

12. The procedure provided by Rule 6(5)(g) of the High Court Rules for the referral of one or more issues for the hearing of oral evidence (as opposed to a referral to trial) is only appropriate in cases where such issue/s can be easily and speedily resolved by oral evidence. The criterion is "*maklike en spoedige beslegting van 'n feitegeskil*" (**Cresto Machines (Edms) BPK v Die Afdeling Speuroffisier SA Polisie, Noord-Transvaal**, 1970 (4) SA 350 (T) at 365D-E).
13. In **Atlas Organic Fertilisers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd**, 1978 (4) SA 696 (T), a proposed referral of disputed issues for the hearing of oral evidence was refused, because the Court found that:

"... I cannot do so without finding that there were infringements and the extent thereof and that I cannot do without hearing viva voce evidence. Such hearing of evidence will inevitably assume substantial

dimensions, and will necessitate the examining of many witnesses. The applicable Rule of Court, viz Rule 6(5)(g), does not seem to me to contemplate that a hearing of that sort should be directed in a case such as the present."
(p698F-G)

The Court, in **Atlas Organic's** case, placed reliance on the judgment of this Court in **Combrinck v Rautenbach & Another**, 1951 (4) SA 357 (T), in which the old Rule 9, which was in terms very similar to Rule 6(5)(g), were discussed, and it was remarked at 359F-H that:

"Reël 9 was bedoel vir uitsonderlike gevalle, waar slegs een of 'n paar geskilpunte nie op die beëdigde verklarings besleg kan word nie. In so 'n geval kan die Regter beveel dat van die deponente, wat die Regter sal aandui, moet verskyn om getuienes viva voce te gee."

14. In **Standard Bank of SA Ltd v Neugarten & Others**, 1987 (3) SA 695 (W), it was pointed out at p699 that:

"But the hearing of oral evidence remains generally appropriate only to cases where it is found 'convenient', where the issues are 'clearly defined', the dispute is 'comparatively simple' and a 'speedy determination' of the dispute is 'desirable'."

15. This is not a case that can be solved easily and speedily as required by the authorities referred to above. The various disputes regarding the ownership of the immovable properties and the shareholding in the six companies have existed for a long time – it seems since at least the early 1990's. Papers in the main application of approximately one thousand pages were filed and I am told that one can expect to have twelve or more witnesses. This is apart from the issue of the impeachment of the trustee who points out that inter alia he had done what he as trustee could do to liquidate the trust and to distribute the trust

assets in accordance with his mandate. He further pointed out the following difficulties he experienced:

The enormous cost of investigation required and the fact that no evidence had been provided by the applicants to sustain their claims.

That no evidence had been produced to demonstrate that properties claimed as assets of the trust belonged to the trust

That the trust was not possessed of sufficient funds to conduct further investigations;

That there is no basis for his removal as trustee of the trust

16. Having regard to the extent of the dispute and furthermore the fact that six new parties have not even put their versions before court, there is no doubt that this application should be referred to trial.

Costs

17. The matter of costs remain. The four respondent consistently opposed applicant's application for referral of this application to evidence. The application was unsuccessful and costs should follow the event. I intend to order the applicants to pay the respondents' costs thereof.
18. Counsel for the fourth respondent, the trustee, also asks for costs of the fourth respondent in respect of the application to date, on the attorney and client scale, on the basis that there was a foreseeable dispute of fact when the

applicants launched the application. As long ago as 10 July 2008 the fourth respondent in his additional affidavit made the point that the appropriate course to be adopted both in regard to coming to a decision whether he should be removed as trustee and also determining what the assets of the trust are, is to refer the matter to trial (see papers page 613 to 615) The applicants, at their peril, decided not to follow this course. I therefore intend to grant the fourth applicant his costs incurred in the application as from 10 July 2008 to the date of hearing i.e. 23 March 2009.

19. All other costs in the main application are reserved including that part of the costs I have not already awarded to the fourth respondent.

I therefore make the following order:

1. The application is referred to trial
2. The notice of motion shall stand as a simple summons
3. The notices of intention to oppose shall stand as notices of intention to defend.
4. The sixth to the eleven respondents are to file their notices of intention to oppose within 5 days of date of this order, should they so wish.
5. The applicants shall deliver a declaration within 20 days of this order.
6. Thereafter the rules relating to actions shall apply.

7. The applicants are ordered to pay the costs of the application for the hearing of oral evidence dated 6 March 2009
8. The applicants are ordered to pay the fourth respondent's costs of the main application as from 10 July 2008 to the date of the hearing on 23 March 2009.
9. All other costs to date are reserved for determination by the trial court.

A.A LOUW
JUDGE OF THE HIGH COURT