

**THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT**

CASE NO: A43/2023

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 09 January 2024

SIGNATURE

In the matter between:

NICOLA GIULIA KATHLEEN MOHLE N.O. FIRST APPELLANT

MARK DARYL MCLEAN MASON N.O. SECOND APPELLANT

ZELDA SHEIN N.O. THIRD APPELLANT

WEINRICH GERBER DE RUITER N.O. FOURTH APPELLANT

JASON RYAN MOHLE N.O. FIFTH APPELLANT

and

R[...] L[...]N[...] FIRST RESPONDENT

R[...] L[...]N[...] N.O. SECOND RESPONDENT

J U D G M E N T

RATSHIBVUMO ADJP:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10H00 on 09 January 2024.

- [1] It is not enough for agent to say: “here are my books and vouchers - you are free to use them to make up your own accounts.” In addition he is obliged to allow inspection by the principal of all relevant vouchers and entries in the agent's books, this duty being in no way affected by an action pending between the principal and the agent and by the fact that the principal could obtain similar rights under the Rules of Court.¹

Background.

- [2] This appeal involves the duty of the trustees towards the beneficiaries of a trust. In 2020, the First Respondent, acting in her representative capacity on behalf of her minor child who is the capital beneficiary of the trust and in her capacity as the income beneficiary of the trust and also the executrix of the deceased's estate, launched an application in this Division under case no. 3278/2020, for an order directing the trustees (the Appellants) to provide her with *inter alia*, the financial statements of a trust for the year ending 2019. An order to that effect was granted by agreement between the parties on 18 January 2021. On 17 March 2021, the Appellants furnished the First Respondent with the trust's financial statements. Upon scrutinising the furnished statement, the First Respondent realised that there was a loan amount reflecting the amounts different to what she knew. The loan was made in favour of her deceased husband, M[...] N[...] and her minor child, N[...] N[...].
- [3] According to the First Respondent, she knew the loan amount of R4 200 000.00 whereas the amount reflected in the furnished financial statement was

¹ Slomowitz AJ in *Doyle v Board of Executors* 1999 (2) SA 805 (C) at 814A-B.

R3 400 000.00, about R800 000.00 less than what she knew. When she asked for supporting documents making up the amount in the financial statements, the Appellants refused to provide the same. The Respondents then approached the court seeking an order in which the Appellants are directed to furnish them with “*any and all supporting documents in respect of all loan accounts on behalf of and against the N[...] Trust for the year ended 29 February 2020, including but not limited to all ledgers, journals and explanatory notes,*”² which order was granted by the court *a quo* on 26 May 2022. It also refused leave to appeal but appeal to the full court was allowed by the Supreme Court of Appeal (the SCA).

Grounds of appeal.

- [4] Grounds on which the application for leave to appeal was launched and granted by the SCA can be summarised as follows. It was submitted that the order of the court *a quo*, in terms of which the Appellants were ordered to deliver “*any and all supporting documents in respect of all loan accounts on behalf of and against the N[...] Trust*” is unenforceable for reason that the description of the documents sought to be delivered is broad, wide and vague. It was argued in this regard that the Appellants run the risk of being in contempt of court as they are incapable of complying with the court order.
- [5] The Appellants further challenged the Respondents’ *locus standi* to apply for the delivery of the said documents. They argue that the court *a quo* should not have found that the Respondents had the necessary *locus standi*. It was further submitted that the court *a quo* erred in ordering what amounts to discovery while there was no pending action between the parties. According to the Appellants, the Respondents should rather have applied for an order compelling them to account, which they did not do.
- [6] The appeal is opposed by the Respondents who relied on *Doyle’s*³ judgment in arguing that the duty to account and to give detailed statements arises from the fiduciary responsibilities the Appellants have toward the Respondents being the executrix of the deceased’s estate and the beneficiaries of the trust. The

² See Notice of Motion on p. 1-2 of Vol I of the paginated bundle.

³ See *Doyle v Board of Executors supra*

Respondents further argue that in agreeing to furnish the statement of account in the earlier judgment, the Appellants conceded that the Respondents were entitled to it and therefore, had *locus standi* not only to apply for it, but to also access the supporting documents thereto.

- [7] It is common cause between the parties that the order by the court *a quo* is equivalent to discovery order, which a party would ordinarily only be entitled to, when there is a pending action. It is also common cause that *in casu*, there is no pending action between the parties. According to the Founding Affidavit, the Respondents required the supporting documents in order to quantify and determine the amounts to claim from the Appellants in an action yet to be launched. The correctness of the *Doyle*'s decision was not challenged by the Appellants. The facts therein were only distinguished from the facts *in casu* with the Appellants arguing that unlike in *Doyle*, the application before the court *a quo*, was not an application to compel them to account.

Discussion.

- [8] Contrary to the Appellants' submission, this case appears to have a lot in common with *Doyle*. In *Doyle*, the plaintiff's mother had created a trust making her (the plaintiff) the income beneficiary. The defendant was appointed as co-trustee in 1951 and as sole trustee in 1965. The trustees were entitled to realise all of the assets and re-invest the proceeds whenever and however they deemed fit. The plaintiff's mother died in 1994, whereupon the plaintiff became entitled to the trust capital. The plaintiff brought an action, averring that the defendant owed him a duty to account fully for what it had done as trustee since being appointed as such.
- [9] The plaintiff's main claims were thus for (1) accounting from the defendant setting out, *inter alia*, each and every asset the trust owned at the time the defendant was appointed the trustee as well as an accounting of every transaction concluded or transacted on behalf of the trust from the time the defendant was appointed the trustee and (2) debatement of the account and payment of the amount found to be due to the plaintiff.

[10] The defendant's answer to the claims was that it was the income beneficiary alone, and not the plaintiff, who had been entitled to any account of the administration of the trust prior to her death. The defendant averred further that, that right ceased on her death, and that the plaintiff was entitled to an accounting beginning from the date of her death. The defendant thus contended that its account need only begin with no more than a description of the trust assets in its trust at the date of the income beneficiary's death. After summons, but prior to the trial, the defendant made discovery of documents reflecting its administration of the trust assets, but persisted in its refusal to account 4beyond the production of the statements.

[11] Slomowitz held,

“At this stage of the case I am concerned only with the first prayer. It involves the delivery of an appropriate account. The proper practice, with remedies of this kind, was adverted to in detail by the H highest Court in *Doyle and Another v Fleet Motors PE (Pty) Ltd* 1971 (3) SA 760 (A). Holmes JA pointed out (at 763) that, if it appears that the plaintiff has already received an account, which he avers is insufficient, the Court may enquire into and determine the issue of sufficiency, so to decide whether to direct an account which is in fact sufficient. In addition, the learned Judge drew attention to the possibility of supererogation in this aspect of the matter and the element of debate. Where they are correlated, a court might, in an appropriate case, find it convenient to undertake both enquiries in one hearing. There is no hard and fast rule. I enjoy a discretion to deal with this matter with such flexibility as practical justice requires. Instances in which accounts rendered were held to be insufficient are to be found in the various judgments given in *Krige v Van Dijk's Executors (supra)*, as well as that of the same Court in *Mia v Cachalia (supra)*. In the present case no proper account has been delivered. What has been given instead is discovery. If an account is due at all, then that is wholly inadequate.”

[12] It appears from the Appellants' submission that the duty to account is not questioned, hence they agreed to a judgment by agreement when the application was made initially. The Appellants further submit that instead of bringing a new

application, the Respondent should have brought an application to enforce compliance with the order in that case, if the furnishing of supporting documents is part of the accounting that was ordered by agreement. This court has to decide if the application for the provision of the supporting documents is different from a request to account.

[13] The Appellants appear to bear a view that the duty to account (or to furnish statements of account), which they already agreed to in the initial order, does not include fully accounting for the transactions therein, hence the statement in the opening paragraph, “*here are my books and vouchers - you are free to use them to make up your own accounts.*”

[14] As for the argument that the Respondents should have applied for an order to account instead, the Respondents submitted that the suggested prayer in a claim for statement of account, according to Amler’s,⁴ is that *the defendants be ordered to render a full account, supported by vouchers, alternatively render a true and proper account with substantiating documents*. They therefore submitted that the wording of the relief sought by the Respondents in the Notice of Motion is similar to the suggested prayer in Amler’s. The Appellants appear to be of a misguided view that if the Respondents could have achieved their remedy in a particular way, the other avenues are therefore closed and unavailable to them.

[15] The court *a quo* agreed with the Respondents’ assertion above and quoted from *Doyle* with approval where it was held,

“And so, at last, to matters of principle. The right to an account is at once two distinct concepts. It is both substantive and procedural. It is a right as well as a remedy. The duties of good faith, which are owed by an agent to his principal, are no different in kind to those which fall on a trustee. They are set out in *De Villiers and Macintosh Agency* 3rd ed at 322 ff...

Inextricably bound up with this by no means exhaustive compendium of obligations is the agent's duty to *give an accounting* to his principal of all

⁴ Amler’s Precedents of Pleadings, 7th Edition, p.2-3. See the following authorities referred to in Amler’s: *Doyle v Fleet Motors PE (Pty) Ltd* [1971] 3 All SA 550 (A), 1971 (3) SA 760 (A), *Narayanasamy v Venkatrathnam* 1979 (3) SA 1360 (D) and *Field NNO v Compuserve (Pvt) Ltd* 1991 (4) SA 490 (Z)

that he knows and has done in the execution of his mandate and with his principal's property.

I have chosen to emphasise the obligation to *give an accounting* because I in no way read the authorities to contain this duty within generally accepted bookkeeping principles. That is the least of it. What is owed is, as I have already said, a substantive legal duty. The agent must explain himself. He must justify his actions and conduct. If this, by circumstance, falls to be done in Court, then, to put it in evidential terms, he bears the *onus* of demonstrating the proper discharge of his office. That, in turn, expresses the remedy as opposed to the right.

It follows that one of the substantive duties falling on an agent is, in *Silke's* words (at 331),

'to *maintain* accounts, i.e. he must at all times be ready with correct accounts of all his dealings and transactions carried on during the currency of the mandate.

It is not enough for him to say: "Here are my books and vouchers - you are free to use them to make up your own accounts." In addition, he is obliged to allow inspection by the principal of all relevant vouchers and entries in the agent's books, this duty being in no way affected by an action pending between the principal and the agent and by the fact that the principal could obtain similar rights under the Rules of Court."⁵

[16] The court *a quo* held that the Appellants tried desperately to cling to every excuse possible to avoid having to account to the Respondents, despite the fiduciary duty they have towards them as the trustees. It concluded as such, rightly so in my view, that the fiduciary relationship between the trustees and the beneficiaries, placed a duty and responsibility on them to account.

[17] As for the *locus standi*, I can find no reason advanced by the Appellants on why it is suggested that the court *a quo* erred in finding that the Respondents had the requisite *locus standi* to bring the application. The court *a quo* concluded that for the reason that the First Respondent acted in dual capacity, being the representative of

⁵ See para 11 of the judgment of the court *a quo* on p. 174 of the paginated bundle – Vol III, where the court quoted from *Doyle (supra)*, from p. 813D.

her minor child and in her capacity as the executrix of her deceased husband estate, she had the *locus standi* to bring the application. I find no fault in this reasoning.

- [18] The last ground of appeal deserving some attention is the argument to the effect that the order by the court *a quo* is unenforceable in that the description of the documents sought to be delivered is broad, wide and vague. In this regard, the court *a quo* ordered the Appellants to hand over “any and all supporting documents in respect of all loan accounts on behalf of and against the N[...] Trust for the year ended 29 February 2020, including but not limited to all ledgers, journals and explanatory notes.” The court *a quo* concluded, rightly so in my view, that paragraph 1 of the Notice of Motion describes the specific items of the financial statement wherein the supporting documents were required being “*items 4, 9 and 10 of the financial statements of the N[...] Trust for the year ended 29 February 2020.*”
- [19] It is also very clear from the founding affidavit that all that the Respondents needed were all the documents used to calculate the amount of the loans reflected in the financial statements, nothing more. I do not understand how it is suggested that the documents which were used to calculate these amounts can be said to be broad, wide and vague for purposes of complying with the court order, whereas they were not this broad or vague for purpose of calculating the financial statement. My understanding of the word “any” is that the Respondents did not know what supporting documents were used and they allowed the Appellants to provide any such documents, provided they were used in the calculations of the loan amounts reflected in the financial statements. The word “all” simply refers to every document that was used in the calculations.
- [20] It is possible that the Appellants could be concerned that the documents are huge or bulky just as the court *a quo* concluded. However, that is not what the Appellants averred. “Wide and vague” does not mean it is bulky, and such cannot be a reason for noncompliance with a court order. The Appellants’ submission in this regard is without merit and stands to be dismissed.
- [21] There is equally no reason to interfere with the order of the court *a quo* on costs

[22] For the aforesaid reasons, I propose the order in the following terms.

22.1 The appeal is dismissed with costs, such costs to include the employment of two Counsel by the Respondents, one being a Senior (where so employed).

TV RATSHIBVUMO
ACTING DEPUTY JUDGE PRESIDENT
MPUMALANGA DIVISION

I agree.

Z GUMEDE
ACTING JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION

I agree and it is so ordered.

J ROELOFSE
ACTING JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION

FOR THE APPELLANTS:
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NELSPRUIT

DATE HEARD:

13 OCTOBER 2023

JUDGMENT DELIVERED:

09 JANUARY 2024