IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Not reportable

Case no: 4720/2023

In the matter between

TRISTAN HARTMANN	**FIRST APPLICANT**
JEAN-GABRIEL HARTMANN	**SECOND APPLICANT**
MARK KEISER HARTMANN	**THIRD APPLICANT**
and	
INGE JOANNE HACKER NO	**FIRST RESPONDENT**
TIMOTHY JAMES HACKERS NO	**SECOND RESPONDENT**
WENDY FIONA HAY NO	**THIRD RESPONDENT**
THE MASTER OF THE HIGH COURT BLOEMFONTEIN	**FOURTH RESPONDENT**

Coram: Mgudlwa AJ

Heard: 22 February 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be 15h30 on 30 July 2024.

Summary: Redistribution of trust assets – Trustees required to comply with clause 12(1) of the Trust Deed of the Hartmann Family Trust – issue is whether the first and second respondents have *locus standi* in the context of the Distribution Event – whether the confirmatory affidavit of the third applicant validates the founding affidavits of the first applicant in respect of distribution of the capital assets of the trust.

ORDER

Application is dismissed with costs on a Rule 67A on scale B.

JUDGMENT

Mgudlwa AJ:

INTRODUCTION

[1] This is an application for an order to compel the first to third respondents, the trustees of the Hartmann Family Trust (the Trust), to distribute Trust income and capital in accordance with the terms of the Trust Deed. In the alternative, the applicants seek an order terminating the Trust in terms of s 13 of the Trust Property Control Act 57 of 1988 (the Act), together with an order directing the first to third respondents to distribute the Trust income and capital in accordance with the trust deed.

[2] In 1983, Faith and Johan Hartmann established a Hartmann Family Trust. Both founders are survived by two children, Inge Hacker – first respondent (Inge) and Mark Hartmann – third applicant (Mark). Johan Hartmann passed away on 12 January 2012, followed by the passing of Faith Hartmann on 22 July 2021. They both established a family trust which was intended to hold assets and distribute the income and capital of those assets, for the benefit of their family. After the death of Faith, six months lapsed with no distribution of the trust capital taking place; this accordingly prompted the applicants to lodge this application.

[3] The central issue for determination in this application is whether the trustees have failed to comply with the provisions of clause 12.1 of the Trust Deed and whether the first and second applicants have *locus standi* to institute this application. Clause 12.1 of the Trust Deed provides as follows:

'12.1 The trust capital shall be distributable 6 months after the death of the survivor of Johan and Faith (the date on which the period of 6 months expires being "the distribution event"), provided that if the trustees in their absolute discretion consider that there are good and sufficient reasons for an earlier or later date being regarded as the distribution event they may in their discretion determine an earlier date or (before the expiry of the said period of 6 months) a later date which is no later than 50 years after the date of the death of the survivor of Johan and Faith and the date so determined shall then be deemed to be the distribution event.'

[4] The provisions of clause 12.3 of the trust deed deals with the occurrence of the distribution event and must also be considered:

'12.3.1 . . .

12.3.2 the balance of the trust capital shall be paid to the descendants of JOHAN and FAITH per stirpes **but no descendants whose parent, being a descendant of JOHAN and FAITH, is alive shall receive any payment except to the extent that parent declines or refuses to accept payment from the trust**, but a beneficiary to whom an amount falls to be paid in terms of this clause 12.3 shall receive payment of his share of the trust capital on the basis only that he has reached or subsequently reach the age of 25 years, he shall receive and be paid one half of his share of the trust capital, and the remaining part of his share of the trust capital shall continue to be held and administered by the trustees for his benefit, but subject to all the terms of this trust deed until he reaches the age of 30 and if he has reached, or when he reaches the age of 30 years he shall receive his share of the trust capital, or that part of it which has not previously not been paid to him as the case may be.'

PARTIES

[5] The first (Tristan) and second (Jean-Gabriel) applicants are both brothers and sons to the third applicant (Mark). They are both per stirpes descendants of the third applicant. The first respondent is Inge Hacker and she is a daughter to the founders of the Trust. The second respondent is Timothy James Hacker, a husband to the first respondent. They are both trustees of the Trust and also beneficiaries under the Trust. The third respondent is Wendy Fiona Hay and she is a trustee of the Trust. The fourth respondent is the Master of the High Court.

Point in Limine - Locus standi

[6] In opposing the application, the respondents pleaded that the relief sought by the applicants in their notice of motion is germane to their holding of a right that would qualify them to be considered as Trust Capital Beneficiaries at the time of the Distribution Event,

in terms of clause 12.3.2 of the Trust Deed. They further argued that on proper grammatical and contextual interpretation of clauses 2.4, 12.3 and 12.3.2, only the third applicant and the first respondent hold vested rights to receive Trust Capital upon the occurrence of the Distribution Event. According to the respondents, the first and second applicants only hold discretional rights in relation to such.

[7] *Locus standi* is an access mechanism controlled by the court itself.[1] Generally, the requirements for *locus standi* are the following: 'the [party] must have an adequate interest in the subject matter of the litigation, usually described as a direct interest in the relief sought; the interest must not be too remote; the interest must be actual, not abstract or academic; and, it must be a current interest and not a hypothetical one.'[2] Standing is thus not just a procedural question, it is also a question of substance, concerning as it does the sufficiency of the litigants' interest in the proceedings.[3] The sufficiency of the interest in this matter depends on the first and second applicants' rights which are determined by the Trust Deed which should be regarded as a trust's constitutive charter. The first applicant bears the onus of establishing in his founding affidavit that he has a standing in the matter.

[8] This brings me to a question of examining the founding affidavit as to how the first applicant established his *locus standi* for the relief that is sought. In the founding affidavit the first and second applicants are described as trust and capital beneficiaries under the Trust. The first applicant asserts that his *locus standi* is predicated firstly, on the basis that he previously received and accepted benefits from the trust. Secondly, the third applicant has repudiated his entitlement to a distribution and attached a letter dated 1 March 2023[4] to the founding affidavit.

[9] Of importance, the clauses of the Trust Deed to be considered in this regard are clause 2.4 which describes a beneficiary as any person who may benefit under the deed and clause 12.3.2. which records in mandatory terms that upon occurrence of the Distribution Event, the balance of the Trust's capital shall be paid to the descendants of Johan and Faith *per stirpes*, but no descendants whose parents, being a descendant of

[1] *Watt Sea Plant Products Bpk* [1998] 4 All SA 109 (C) at 113H.
[2] *Four Wheels Drive CC v Leshni Rattan NO* [2018] ZASCA 124; 2019 (3) SA 451 (SCA) para 7.
[3] *Firm-O-Seal CC v Prinsloo & Van Eeden Inc and Another* [2023] ZASCA 107 para 6.
[4] Annexure FA12.

Johan and Faith, is alive shall receive any payment except to the extent that the parent declines or refuses to accept payment from the trust. It is clear from the letter of clause 12.3 of the Trust Deed, that the argument raised by the first applicant to the effect that he, having previously received and accepted benefits from the trust, does not qualify as a beneficiary within the contextual meaning of the Distribution Event.

[10] It is in my view that, on a plain reading of clause 12.3.2 of the Trust Deed, it is readily apparent that.the persons referred to as beneficiaries are the third applicant and the first respondent, due to the fact that they are both surviving biological children of Johan and Faith. Furthermore, both the first and second applicant are *per stirpes* descendants of the third applicant. Accordingly, they can only qualify as descendant per stirpes in the context of the Distribution Event upon death of the third applicant or once the third applicant renounces his right as a beneficiary in accordance with clause 16 of the Trust Deed.[5]

[11] I now turn to consider the question of whether the third applicant ceded his rights to the first and second applicants as envisaged by clause 16 of the Trust Deed. The first applicant also deposed on the founding affidavit that the third applicant has 'purported to cede his rights as beneficiary to the first and second applicant'. As required by clause 16 of the Trust Deed, he attached a repudiation letter signed by the third applicant and dated 1 March 2023. This letter is addressed to Trustees of the Johan Hartmann Testamentary Trust. The third applicant accordingly repudiate his rights, title and interest in any and all distributions, inheritance, bequest or any property or assets from Johan Godfried Hartmann Testamentary Trust (Trust number: 1572/2012).

[12] I deem it appropriate to mention that the first respondent's response in this regard is to the effect that Johan Godfried Hartmann Testamentary Trust is an entirely separate and distinct trust which is not relevant in this matter. In my view, this response is correct. This is fortified by the fact that the first applicant, in his replying affidavit, attempted to rectify the error by acknowledging that the attachment of annexure FA12 was made in error and another renunciation letter signed by the third applicant and dated 12 December 2023 was filed as annexure RA4. I interpose to mention that the present application was

[5] Clause 16 – Renunciation of Beneficiary – 'Any Beneficiary shall be entitled, by written notice to the trustees to declare that he shall thenceforth ceases to be a beneficiary of the trust and upon delivery of such notice this trust shall thenceforth take effect as if that beneficiary were dead'.

launched on 8 September 2023 and axiomatically the latter renunciation letter postdates the date upon which the present application was launched. In my view this renunciation letter is of no assistance in the context of compliance with clause 16 of the Trust Deed when this application was launched.

[13] Pertinently, it is also important to mention that, the founding affidavit of the applicants is absent of any confirmatory affidavit deposed to by the third applicant in relation to any allegation made in relation to him or on his behalf, by the first applicant who deposed the founding affidavit. The third applicant's confirmatory affidavit was only filed with the first applicant's replying affidavit. It is trite law that an applicant must stand and fall by the averments made in their founding papers,[6] and as such it is imperative that the applicants define the relevant issues, and set out sufficient factual averments upon which they rely to discharge the onus of proof resting on them within the parameters of their founding affidavit[7] which will entitle them to the relief sought.[8] Daffue, J in *Mokoena and Others v Lengoabala; In Re Lengoabala v Nhlapo and Others*[9] (*Mokoena*), said the following:

'. . . the applicant in the application proceedings must make out his/her case in the founding affidavit. A litigant should not be allowed to try and make out a case in the replying affidavit. The founding affidavit must contain sufficient facts in itself upon which a court may find in the applicant's favour. An applicant must stand and fall by his/her founding affidavit. Referring with approval to *Director of Hospital Services v Mistry* 1979 (1) SA 626 (AD) at 635H – 636D.'[10]

In my view the repudiation letter dated 12 December 2023 does not assist the first and second applicants in discharging the onus on a balance of probabilities that they have *locus standi* in the context of Distribution Event. Similarly, the belated confirmatory affidavit of the third applicant does not salvage the situation. The first applicant has accordingly failed to discharge the onus on a balance of probabilities that they, being the first and second applicants, have *locus standi* in respect of the main relief sought.

[14] Notwithstanding the abovementioned finding, I deem it necessary to deal with the applicant's alternative relief, which is mainly based on maladministration by the trustees. The applicants' founding affidavit is interspersed with multiple factual allegations of mal-

[6] *Betlane v Shelly Court CC* [2010] ZACC 23; 2011 (1) SA 388 CC para. 29.
[7] *Swissborough Diamond Mines (Pty) Ltd & Others v Government of the Republic of South Africa & Others* 1999 (2) SA 279 (T) at page 323I – 324A.
[8] *Business Partners Ltd v World Focus* 754 CC 2015 (KZD).
[9] *Mokoena and Others v Lengoabala; In Re Lengoabala v Nhlapo and Others* [2016] ZAFSHC 4
[10] Ibid para 7.

administration by the trustees and discriminatory practices by the Hacker family beneficiaries. Further factual allegations, amongst others are as follows:

15.1 that the third applicant has been alienated from the administration of the administration of the trust and the property, and excluded from benefitting fully from it;

15.2 the third respondent is the first respondent's Psychologist and that she has previously advised at meetings of the trustees that she will vote based on how the first respondent directs her to vote;

15.3 the trustee's decision to postpone the Distribution Event only took place in response to the correspondence received from the applicants dated 1 November 2022, and that all of the trustees took part in a decision which could only be made by the third respondent;

15.4 the salary of the second respondent paid by the corporation John Micheal (Pty) Ltd is excessive and intended to dissipate trust income; and

15.5 that the first respondent has made use of the Trust's assets to fund her personal litigation against the third applicant.

[15] The respondents denied the allegations and argued further that the fourth respondent issued a report dated 27 September 2023 in which it is mentioned that he is 'not aware of any information which could be of assistance to the court'. Furthermore, according to the respondents the very nature of the allegations raised by the applicants against the trustees in the present matter would require the fourth respondent to have considered the version put by the trustees in their answering papers, and thereafter to apply his mind as to whether or not the provisions of s 16(2) of the Act would or would not find appropriate application.

[16] In my view, the aforementioned respondents' argument is on point. On the basis that the Master is given extensive powers in respect of the Trust matters, particularly regarding the conduct of the trustees in the administration of the Trust, the Master, amongst others, has the power to do any of the following:[11]

(a) call trustees to account to him for the administration and disposal of the trust property in terms of s 16(1) of the Act;

(b) require trustees to produce certain documents in connection with the administration and disposal of the trust assets (s 16(1) of the Act);

[11] W Geach *Trust Law in South Africa* at 121.

(c) cause an investigation to be carried out into how the affairs are administered (s 16(2) of the Act);

(d) require a trustee to provide security (s 6 of the Act);

(e) apply to court for an order directing the trustees to comply with any request by the Master in terms of s 16 (s 19 of the Act);

(f) apply to court for an order directing a trustee to perform any duty imposed upon him by the trust instrument or by the law (s 19 of the Act);

(g) remove a trustee in certain circumstances (s 20(2) of the Act). Grounds justifying removal of a trustee by the Master (without having to apply to a court) include (i) failure by the trustee to perform satisfactorily any duty imposed upon him by or under the Act or (ii) failure by the trustee to comply with any lawful request of the Master (for example failure to respondent to the Master to account for or produce documents in terms of s 16 of the Act).

It is therefore interesting to note that the Master can apply to a court in terms of s 19 (see (e) and (f) above) seeking compliance by the trustees, but in terms of s 20(2) the Master can remove a trustee without a court order.

[17] It is therefore my emphasis that the Master can play a key role in ensuring that the trustees of the trust conduct themselves in a proper way, in accordance with both the law and the trust instrument. The Master also has the power to ensure that there is good and transparent administration of the trust affairs by the trustees. As said in *Simplex (Pty) Ltd v Van der Merwe and Others*,[12] the whole scheme of the Act is to provide a manner in which the Master can properly supervise trustees in the proper administration of trusts. It is, therefore, apparent that the powers of the Master cannot be overlooked or underestimated, and that any person who has an interest in the trust property should approach the Master if he or she feels aggrieved by the conduct of the trustees, or has a complaint regarding the manner in which the affairs of the trust are being conducted. The aforementioned powers of the Master can be used in appropriate circumstances such as the complaints raised by the applicants in this matter, to provide appropriate relief. All that is required from them is to show that they have a sufficient interest in the trust property to request action by the Master.

[18] With regard to 'sufficient interest' of the first and second applicants in the trust,

[12] 1996 (1) SA 111 (W).

counsel for the applicants referred to *Potgieter and Another v Potgieter NO and Other,*[13] where the appellants were contingent beneficiaries and the court held as follows:

'The only relevant consideration is whether the right is worthy of protection, and I have no doubt that it is. Hence, for example, our law affords the contingent beneficiary the right to protect his or her interest against mal-administration by the trustees (see. Gross v Pentz [1996] ZASCA 78; 1996 (4) SA 617 (A) at 628I-J).'[14]

In my view, it is not controverted that the first and second applicants are contingent beneficiaries and the only applicant with vested rights is the third applicant. Even though the first and second applicants are contingent beneficiaries, they have sufficient interest to protect their interest against mal-administration by the trustees.

[19] This brings me to a question of whether the applicants' application for the relief sought in terms of s 13 of the Act is appropriate and sound in law. I deem it apposite to mention that the founding affidavit is interspersed with factual allegations by the applicants against maladministration by the trustees of the trust. In *Mokoena* the court held as follows at para 8: 'A court should adjudicate disputes in application procedure having regard to the well-known *Plascon-Evans Paints*[15] *dicta*' which has been approved and considered in more depth in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another,*[16] in paras 12 and 13:

'[12] Recognizing that the truth almost always lies beyond mere linguistic determination the court have said that an applicant who seeks final relief on motion, must in the event of conflict accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of facts or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers...

[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed.'

[20] Having assessed the totality of all the evidence, it is my view that the arguments submitted by the applicants are untenable and fundamentally flawed for the relief sought in terms of s 13 of the Act. All the allegations relating to maladministration by the trustees, raised by the applicants are very serious. To safeguard their interest, they should have addressed them to the Master, who would have exercised the powers vested in him in terms of the Act. It is apposite to note that s 13 of the Act empowers a court to terminate

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[13] *Potgieter and Another v Potgieter NO and Other* [2011] ZASCA 181; 2012 (1) SA 637 (SCA).
[14] Ibid para 28.
[15] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).
[16] *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; 2008 (3) SA 371 (SCA).

a Trust or make some other order it deems just in the circumstances.

[21] In the event that the court orders that a Trust should be terminated, the order would certainly have to include instructions on how Trust assets must be dealt with. The power of the court to act only arises if the trust instrument contains a provision which; (a) brings about consequences which in the opinion of the court the founder of a trust did not contemplate or foresee and; (b) which: (i) hampers the achievement of the objects of the founder; or (ii) prejudices the interests of the beneficiaries; or (iii) is in conflict with the public interest. In *Gowar and Another v Gowar and Others*,[17] the court said that the provisions of s 13 have both subjective and objective criteria. The former relates to the founder's lack of foresight or contemplation and the latter relate to prejudice to the trust object, beneficiaries or the public interest. This requires the applicant to establish on a balance of probabilities that any of the trust deed has brought about any one of the consequences mentioned in s 13*(a)*, *(b)* and *(c)* and that the founder of the trust did not, at the time the trust was established, contemplate or foresee such a result.[18]

[22] In conclusion, the applicants failed to establish jurisdictional criteria[19] required in terms of section 13 of the Act, as a result it would not be competent for the court to exercise the statutory power conferred in it by section 13. Thus, the alternative relief sought for an order in terms of section 13 also stands to be dismissed.

COSTS

[23] I now turn to deal with the issue of costs. Costs are governed by two basic principles, firstly, that unless expressly otherwise enacted, the granting thereof rests within the discretion of the court, which discretion must be exercised judiciously and secondly, that generally, costs follow the result, that is, they are awarded in favour of the successful litigant. In my view the latter is found to be the most appropriate, in that costs should follow the results.

Consequently, I make the following order:

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[17] *Gowar and Another v Gowar and Others* [2016] ZASCA 101; [2016] 3 All SA 382 (SCA).

[18] Ibid para 34.

[19] *Curators Ad Litem to Certain Beneficiaries of Emma Smith Educational Fund v The University of KwaZulu-Natal* [2010] ZASCA 136; 2010 (6) SA 518 (SCA).

Application is dismissed with costs on a Rule 67A on scale B.

[redacted]

MGUDLWA AJ

ACTING JUDGE

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