



Republic of South Africa
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no: 8399/2013

In the matter between:

LEANA BURGER N.O.

Applicant

v

NIZAM ISMAIL

First Respondent

ESSOP ISMAIL

Second Respondent

MEELAN VALA

Third Respondent

THE MASTER OF THE HIGH COURT, CAPE TOWN

Fourth Respondent

NIZAM ISMAIL N.O.

Fifth Respondent

ESSOP ISMAIL N.O.

Sixth Respondent

MEELAN VALA N.O.

Seventh Respondent

Court: Judge J Cloete

Heard: 4 and 5 September 2013, supplementary note from counsel requested by
12 September 2013, but delivered on 18 October 2013.

Delivered: 6 December 2013

JUDGMENT

CLOETE J:

- [1] The applicant is the executrix of the estate of the late Antonio Henrico (*'the deceased'*) who passed away on 29 November 2010. She applies for the discharge and/or removal of the 1st to 3rd respondents as trustees of the Trivest Trust (*'the trust'*); and that Pieter Andreas Venter, an attorney, be appointed as trustee in their stead. The Master (the 4th respondent) abides the court's decision. The 5th to 7th respondents are cited in their capacities as trustees of the Anmark Trust, which is the sole beneficiary of the trust. No relief is sought against the 4th to 7th respondents who are cited only as interested parties. Accordingly, and for sake of convenience, I will refer to the 1st to 3rd respondents as *'the respondents'*.
- [2] The trust is the registered owner of five immovable properties, four of which are residential and one which is a mixture of commercial and residential. All are usually rented out to tenants. All were acquired largely with loans secured by way of mortgage bonds registered over the various properties in favour of Standard Bank and Absa Bank respectively. During the period May 2007 to July 2010 the deceased bound himself as surety and co-principal debtor for the trust's obligations under the mortgage bonds to Standard Bank in a maximum amount of R360 000 (plus interest and costs); and in an unlimited amount to Absa Bank on a substantially similar basis.

- [3] The applicant alleges that the respondents have misappropriated the trust funds, and in particular, the rental income. The misappropriation is alleged to lie in the following, namely that: (a) rental is collected in cash without being accounted for and is thus not appropriated to mortgage bond payments in relation to the trust's properties; and (b) rental has been paid into the personal bank account of the first respondent.
- [4] The applicant avers that this has caused the mortgage bond instalments to fall into arrears and that municipal accounts and VAT have also not been paid. As a result of non-payment of the mortgage bond instalments, the risk to the estate of the deceased as surety and co-principal debtor to the mortgage bond holders increases on a daily basis, given that the banks may call up the loans. The applicant contends that if the banks proceed against the deceased's estate there is a '*possibility*' that the estate will not be able to exercise its right of recourse against the trust because it has insufficient assets. In her replying affidavit the applicant changed tack to an extent but, given that an applicant must make out a case in its founding papers, and further that the respondents were not afforded the opportunity to reply to the new allegations, it would be inappropriate to deal therewith.
- [5] The respondents oppose the relief sought on the following grounds, namely that: (a) the applicant does not have the necessary *locus standi* to have brought the application as required by s 20(1) of the Trust Property Control Act 57 of 1988 (*'the Act'*); (b) it is not open to a surety, in order to protect its potential exposure, to seek relief from a court to interfere with the affairs of the principal

debtor save in very limited circumstances, none of which are present; and (c) in any event, the applicant has failed to make out a case sufficient to satisfy the court that the removal of the trustees will be in the interests of the trust and its sole beneficiary. As to (c) it is alleged that: (i) the assets of the trust exceed its liabilities, thus eliminating the risk complained of; and (ii) rather than misappropriating the trust's funds, the respondents are doing more than what could reasonably be expected of trustees in order to protect the trust assets. An objection was also made to the substitute trustee proposed by the applicant, but for the reasons that follow it is not necessary to consider this aspect.

[6] S 20(1) of the Act provides that:

'A trustee may, on the application of the Master or any person having an interest in the trust property, at any time be removed from his office by the court if the court is satisfied that such removal will be in the interests of the trust and its beneficiaries.'

[7] In *Ras and Others NNO v Van der Meulen and Another* 2011 (4) SA 17 (SCA) the first respondent had launched an application in the High Court, alleging that she was a capital beneficiary of a certain trust, and applied for an order removing the trustees, contending that they had acted in bad faith in the performance of their duties. The trustees (in addition to other defences raised) denied that the first respondent was a beneficiary of the trust, and argued that she was accordingly not entitled to the relief sought. The High Court found that even if the first respondent was not a trust beneficiary (in respect of which the learned judge made no finding), she nonetheless had a sufficient interest in the

matter which entitled her to have brought the application, given the existence of a dispute as to whether she had been appointed as a beneficiary in terms of particular resolution. On appeal the Supreme Court of Appeal held at para [9] that: -

'The Court clearly erred in finding that, short of being a beneficiary, the respondent had an interest in the trust which justified her being entitled to seek the relief claimed. It is only if she is a beneficiary that she would be entitled to seek the removal of the trustees, and the respondent correctly did not seek to support the High Court's contrary conclusion. If the trustees are correct and the respondent is not a beneficiary, her application would fall to be dismissed.'

- [8] The *Ras* case appears to be decisive of the *locus standi* issue, save for one further aspect raised on the applicant's behalf during argument, namely that she enjoys *locus standi* in any event, because as executrix she has stepped into the shoes of the deceased, who was the founder or settlor of the trust. The applicant relies on a passage in Honore's South African Law of Trusts (5th Edition) at para 118, p195 where it is stated that:-

'The founder would likewise retain a "sufficient interest in the trust property" for the purposes of making an application to court to delete or vary any provision in the trust instrument or to obtain copies of trust documents, to constrain the trustee to perform trust duties or even to apply for the trustee's removal from office.'

- [9] I am unable to agree for the following reasons. First, an executor is appointed to the estate of a deceased person. He or she does not succeed to the *persona* of the deceased: see LAWSA (2nd Edition) Vol 31 at para 213. S 26(1) of the

Administration of Estates Act No 66 of 1965 provides that an executor is charged with custody and control of the estate property. Second, the applicant did not approach the court purporting to act as founder or settlor of the trust, but on the basis that the estate is a contingent debtor.

[10] However, even if I am incorrect, I am not persuaded that the applicant has made out a case on the merits.

[11] The applicant relies on sworn valuations of the trust properties dated November 2010. The total value at that date was R8 125 000. At my request the parties provided an agreed table of mortgage bond balances, by way of a supplementary note.

[12] The Master appointed the respondents as trustees on 14 March 2012. At February 2012 the total amount owing under the mortgage bonds was R5 157 836.06. Merle Gie ('Gie'), who handled the collection of the rentals and administration of the trust at least until the beginning of 2012, formally handed over these responsibilities to the trustees during July 2012. In August 2012 the total amount owed under the mortgage bonds was R5 187 469.28. One of the mortgage bonds, namely that of the mixed use property known as Wolfgebou, was in arrears at 1 September 2012 in an amount of R295 183.13 and, by the end of May 2013 (when the applicant launched these proceedings on an urgent basis) the arrears had reduced to R248 083.83. The respondents' version is that they have kept the business of the trust afloat in lean times by way of personal loans. Their undisputed version is further that, shortly after taking over

the trust's administration, they reached an agreement with the relevant bank to make increased monthly payments to reduce the arrears.

- [13] According to bank statements annexed to the respondents' answering papers, none of the other mortgage loan accounts were in arrears as at May 2013. At August 2013, shortly before the matter was argued, the total mortgage bond liability in respect of all of the trust properties was R4 906 243.81, meaning that, based on the 2010 valuations, the total asset value exceeded the total liabilities by R3 218 756.19. Even allowing for the applicant's concern that forced sales would result in a reduction in the overall sale price of between 15% to 20%, and ignoring any expected increase in the value of the properties over the almost 3 year period since November 2010, the net result would still be that the total asset value exceeds the total liabilities by R1 593 756. This is calculated as follows:

Total value as at November 2010	8 125 000
Less 20%	1 625 000
Less total bond liability	<u>4 906 243</u>
	<u>1 593 756</u>

- [14] Accordingly, on the applicant's own version, her fear that there was a '*possibility*' that the estate, if called upon to pay the loans, would not be able to exercise its right of recourse against the trust, proved to be groundless.

- [15] The applicant also relied on two letters of demand addressed on behalf of Absa Bank to a separate, unrelated surety of the trust, Mr P Grobler, on 19 March

2013. He was advised that two of the mortgage bonds, namely those relating to the units known as 7 and 109 Parkview, were in arrears in the amounts of R23 216.96 and R16 918.17 respectively. The respondents' retort was that the reason for this was that Gie had not transferred rental payments accumulated into the relevant mortgage bond accounts. They pointed out that at 31 May 2013 an amount of R37 497.73 was immediately available in a separate account to appropriate towards the total arrears of R40 135.13. Although the applicant in turn pointed a finger at the respondents for non-payment, she did not dispute the availability of those funds.

- [16] In reply the applicant also relied on two notices addressed by Absa Bank's attorneys to her dated 28 May 2013 and 25 July 2013 in terms of s 129 of the National Credit Act No 34 of 2005. The first letter indicated that arrears of R28 196.95 had accumulated on the one residential unit in Parkview, and the other that arrears of R6 654.41 had accumulated on another residential unit in Nooitgedacht. According to the agreed table produced subsequent to argument, in August 2013 the arrears on the Parkview unit had reduced to R19 729.68 (about 3½ months of arrears). The "arrears" on the Nooitgedacht property were the equivalent of a month's instalment. What is also apparent from the table is that an amount equal to the arrears on the Parkview unit had been inexplicably credited by the relevant bank to the bond account of another unit in the same complex, leaving that account in credit. There is also no allegation in the applicant's papers that legal action has in fact been instituted against the trust.

- [17] The applicant's allegation that the municipal accounts for the Parkview units were unpaid was based on the respondents' alleged failure to collect these accounts from Gie's office; it was contended that the ineluctable inference was that these accounts had not been paid. However the respondents annexed the relevant accounts dated 29 and 30 April 2013 which showed that the arrears (which were insignificant) had been settled in full by 24 March 2013.
- [18] In relation to unpaid VAT the respondents pointed out that only about 4% of the total rental income was subject to VAT, i.e. for commercial tenants, and that arrangements were being made to settle this amount. The figures produced by the respondents showed that, of the total rental income received of R446 821 over the 9 month period from September 2012 to May 2013, VAT payable amounted to only R18 429 (or 4.12%). The respondents' undisputed version was further that, after payment of any outstanding amount due to SARS, they would be taking the necessary steps to deregister the trust for VAT.
- [19] I was also informed that steps were being taken to open a separate trust bank account.
- [20] The anticipatory relief sought by the applicant, in order to protect the estate from potential risk under the suretyship, is to remove the trustees from the trust. It is my view that the application is misguided. First, the applicant has not persuaded me that the respondents have been recklessly squandering or wasting the trust assets; nor has she persuaded me that their conduct (albeit at times not strictly in accordance with the provisions of the Act) has been such as

to induce a reasonable fear in her mind that the trust may eventually be unable to render performance. Had she been able to show this, the path that she should have followed was to bring an action against the trustees to compel them to render the required performance to the banks and, pending the determination of that action, to ask the court for an interdict restraining the respondents from further disposal of the trust assets. It would also have been open to the applicant to seek an order calling upon the respondents to secure the estate's release from the suretyship: see LAWSA (2nd Edition) Vol 26 at para 306; *Douglas G Wylde and Co v Burger* 1970 (3) SA 618 at 620G-H. Instead however she sought to remove the respondents.

[21] That leaves the question of costs. In their answering papers the respondents asked for costs on the scale as between attorney and client. In argument they sought such an order against the applicant in her personal capacity on the basis that this litigation has been vexatious. In the exercise of my discretion I do not intend to go that far. Although misguided, there is not enough on the papers before me to persuade me that the applicant, in an attempt to safeguard the estate in her capacity as executrix, has behaved in such a manner that a punitive costs order against her personally, or the estate, is warranted.

[22] **In the result I make the following order:**
The application is dismissed with costs.

J I CLOETE