IN THE HIGH COURT OF SOUTH AFRICA

TRANSVAAL PROVINCIAL DIVISIOI

NOT REPORTABLE

CASE NO: 25659/03
DATE: 17/4/2007

In the

K 0 INVESTMENT TRUST — First plaintiff

DR SULIMAN OMAR TAYOB — Second plaintiff

Third plaintiff

Fourth plaintiff

and

APPLETON SECURITIES (PTY) L TD — Defendant

JUDGMENT

JOOSTE, AJ:

BACKGROUND:

[1] The plaintiff is a trust namely K 0 INVESTMENT TRUST. This action was instituted by the first, second and third plaintiffs on behalf of the trust in their capacity as trustees. The trust has always had four trustees and the fourth plaintiff was joined as a party to the proceedings at the hearing of the matter. In paragraph 1 of the

particulars of claim the identity of the plaintiffs is set out and it is averred that they are cited herein in their capacities as trustees of K.O. Investment Trust ("the Trust"). These averments are denied by the defendant and the plaintiffs are put to the proof thereof in the defendant's plea. Consequently the *locus standi* of the plaintiffs had to be proven by way of evidence.

[2] The second plaintiff, **DR SULIMAN OMAR TAYOB** ("Dr Tayob") testified at the outset on behalf of the plaintiffs. The Trust is one of the business units which the Tayob family utilises for the conduct of what Dr Tayob describes in his evidence as "family business". This business comprises several investment vehicles which are active *inter alia* in property investments, as well as security investments. The defendant conducted two such accounts for vehicles in the "family business" namely the one in the name of the Trust and the other in the name of Punenz Investments CC. In May 2002 the trust and the defendant came to be in dispute regarding the account conducted in the name of the Trust. A letter of demand was sent by Dr Tayob and in a subsequent letter the defendant confirmed that the parties were in dispute regarding the account.

[3] The present action was instituted in September 2003. The plaintiffs rely on the validity of a certain resolution (page 41, bundle A). This document reads as follows:

"Extract from the minutes of a meeting of the trustees of K O Investment Trust held at Mokopane on 5 July 2002:

Resolved:

1. *That the Trust institute legal action in the High Court of South Africa (Transvaal Provincial Division) against Appleton Securities (Pty) Ltd for recovery of losses suffered by the Trust.*

2. *That Suliman Omar Tayob in his capacity as Trustee of the Trust be and is hereby authorised and entitled to take all action and sign all documentation required to give effect to this resolution.*

3. *That the said Suliman Omar Tayob be and is hereby authorised and entitled to appoint and instruct an Attorney and Counsel on behalf of the Trust for all purposes relating to the said action".*

[4] In his evidence Dr Tayob confirmed the plaintiffs' reliance on this document for the institution of the action. As will become clear later, it is necessary to deal to a relatively full extent with the evidence of Dr Tayob in this regard.

[5] At the outset Dr Tayob was referred to clause 9.1 of the Trust Deed (page 583, bundle D) that reads as follows:

"9. *DECISIONS OF THE TRUSTEES:*

9.2 *All decisions of the TRUSTEES shall -*

9.2.1 *If there are more than two TRUSTEES, by way of majority vote;*

When asked whether the business of the Trust was conducted in such a fashion, the witness answered: *"Yes, I have or* we *have"*.

[6] Dr Tayob was also referred to the provisions of clauses 10.10 and 10.11 of the Trust Deed (bundle D, pp 585 to 586) which deals with the powers of the trustees and which reads respectively as follows:

"to sue for, recover and receive all debts or sums of money, goods, effects and things whatsoever which may become due, owing, payable or belonging to the Trust; and

to defend, oppose, adjust, settle, compromise or submit to arbitration all accounts, debts, claims, demands, disputes, legal proceedings and matters which may subsist or arise between the Trust and any persons, company, corporation or body whatsoever, or for the purpose aforesaid to do and execute all necessary acts and documents;"

Again Dr Tayob confirmed that *"we* have" normally acted in accordance with these provisions and also did so in the present action.

[7] With reference to the resolution referred to above, the testimony reads as follows:

"Q: That is an extract of the minutes of a meeting of the trustees of the Trust held at Makopane on 5 *July 2002. That is the heading of the document. Was such a meeting held?*

A: It was held.

Q: *And who were the trustees present?*

A: *The three trustees that were present was my father, Omar Moosa Tayob, myself and my bother (Inaudible) Tayob".*

He confirmed that what was resolved at that meeting was the quoted resolution which he repeated in his evidence and also confirmed that he is acting in that capacity.

[8] In cross-examination Dr Tayob was referred to the plaintiffs' particulars for trial (paragraph 45) where they advised that at all material times four trustees were appointed for the trust and that they inadvertently failed to refer to the fourth trustee in the particulars of claim, i.e. Culsen Tayob, a major woman. The witness was also referred to a supplementary discovery affidavit that was deposed to on 26 April 2005 wherein the trust deed was discovered. He stated that he presumed that someone called for the trust deed and when he looked at the trust deed he was reminded that Culsen Tayob was a trustee.

[9] The relevant cross-examination pertaining to this aspect reads as follows:

"Q: *The explanation for not having the need to join her was simply that it escaped your attention,* am *I right?*

A: *That is correct.*

Q: *And it escaped your attention right up until the events in April 2005 when the trust deed was located and you were reminded that she was a plaintiff?*

A: *That is correct.*

Q: *You have not discussed it with her before that?*

A: *No. Can you repeat that? I had not discussed?*

Q: *You had not discussed this litigation with her as a trustee before that?*

A: *No, she was aware of the litigation,* we *just did not record her.*

Q: *Yes, but she was aware (inaudible) because she is a family member. You did not consult her as a trustee.*

A: *Well, I consulted everybody, with respect.*

Q: *Well, there is a resolution upon which you rely Dr Tayob the trustee's resolution, as I understood the evidence yesterday from my learned friend, he directed us to a trustee resolution and pointed out that there were three of you present and all three of you have voted in favour of the institution of the litigation.*

A: *That is correct.*

Q: *And upon that you rely for locus standi.*

A: *That is correct.*

Q: *And upon no other act by the trustees do you rely for the locus standi.*

A: *Well, my mother was aware of the litigation.*

Q: *Why do you say that?*

A: *Because we were all at my father's house on* {sic} *the table.*

Q: *Very different Dr Tayob, being aware and being consulted as a trustee. At no stage did you consult her as a trustee.*

A: *She was aware and she consented it.*

Q: *Why did you ask her to consent?*

A: *She was there, we made family decisions.*

Q: *Was she making a decision as a family member or a trustee?*

A: *I am not sure.*

Q: *Kilsim Tayob was not at the meeting on* 5 *July 2002 was she?*

A: *The meeting was held at my father's house. She was present. She did not sign the document.*

Q: *Where was the meeting?*

A: *At my father's house.*

Q: *Where?*

A: *In the dining room.*

Q: *She did not participate because everyone lost sight of the fact that she was* a *trustee, is it not so*?

A: *The issue on the table was, I explained the situation that arose and that we needed to institute legal action and everybody consented to it.*

Q: *She did not sign the minute because everyone lost sight of the fact that she was* a *trustee?*

A: *She did not sign the minute, that is correct.*

Q: *So, on behalf of the trust you and your father and your brother took* a *resolution?*

A: *We signed the minute, yes.*

Q: *Believing that you were the only three trustees and believing that you were the only three people whose consent was necessary in order to take* a *valid resolution?*

A: *That is correct.* "

[10] In re-examination Dr Tayob again stated that the meeting took place at his parents' house with his mother also present. He also confirmed that the meeting took place on 5 July 2002 referring to page 41 of bundle A. He furthermore stated that items 1, 2 and 3 of the extract on page 41 was discussed at that meeting where his mother was present and that she did not object to any of the issues raised. The document on page 41 of bundle A (the extract), was not created the same day but was created subsequently and also signed subsequently.

[11] 11.1 From Dr Tayob's evidence in chief it appears that the resolution was taken at a meeting of trustees held on 5 July 2002 and that only himself, his father and his brother were present at the meeting. Furthermore that in passing the resolution, the three trustees present acted in terms of clause 9.2.1 of the trust deed being by way of a majority vote. There is no evidence of the minutes of a meeting held at his father's home and such a document was not discovered.

11.2 In cross-examination for the first time the meeting at his father's home came to the fore and only after Dr Tayob conceded that up to April 2005 it escaped his attention that there was a need to join the fourth plaintiff. Only after

originally conceding that he did not discuss the issue with the fourth plaintiff before, the statement is made that she was aware of the litigation and the meeting at his father's house then developed.

11.3 Re-examination was simply an embroidering on the meeting at his father's house and for the first time then the evidence comes to the fore that the resolution signed by the three trustees were in fact drawn up and signed only days after the meeting at his father's house.

[12] 12.1 Dr Tayob impressed me as a very intelligent and clever person. The impression is that he realised in cross-examination the problem of only relying on the meeting attended by himself and his father and his brother and that the family meeting was only then mentioned. Dr Tayob, as pointed out, conceded that at the time neither he nor any other of the family members were mindful of the fact that the fourth plaintiff was a trustee of the trust.

12.2 Mr Kirk-Cohen, SC, on behalf of the defendant argued that even on the basis that the family meeting indeed took place with the

purpose as the evidence of Dr Tayob suggests, it cannot be contended that such a meeting around a dinner table constitutes a resolution by the trust. It was namely an informal meeting which planned the road ahead and not a formal resolution. There is no evidence that any of the trustees regarded this as a meeting at which binding decisions were taken. The fourth defendant on Dr Tayob's evidence was not cognisant of her roll as trustee and was accordingly not mindful of her different capacities and not considering the issue being debated qua trustee. It cannot, according to the argument, in these circumstances be said that the fourth plaintiff ever exercised a "qua trustee".

[13] On Dr Tayob's evidence only it might be questioned whether the family meeting in fact took place and dealt with the issues at hand. For instance if this was indeed the case, the question arises why his evidence in chief was not presented on that factual basis and why it was necessary to rely on the majority vote clause. The impression is that that was done because only three trustees were present at the meeting on 5 July 2002. I am however of the view that notwithstanding this his evidence is not of such a contradictory nature that it can be considered as false. On the same basis a finding, as

contended for by Mr Kirk-Cohen, that the meeting around the dinner table did not constitute a resolution by the trust cannot be made. Further evidence as to exactly transpired at the meeting can still be presented.

[14] For the present purposes it can therefore be accepted that the resolution as evidenced by the extract was taken at the family meeting. It is therefore unnecessary to deal with the argument that, on the basis that the only meeting that in fact took place on 5 July 2002 was the one attended by only three trustees, the resolution taken at such a meeting is a nullity as the trust deed contains no variation on the residual common law situation that trustees are required to act jointly and that anything which flow from it, including the institution of the action, is also a nullity, incapable of ratification.

[15] The trust deed makes no provision specifically permitting a delegation of powers, but there is also nothing prohibiting it. Mr Kirk-Cohen argued that in the absence of a clause permitting a delegation of powers, such a delegation is not possible. Mr Du Plessis, SC who appeared for the plaintiffs, conversely argued that where there is nothing in the trust deed prohibiting a delegation of powers it can

validly be done. He referred to various authorities to substantiate his argument.

[16] 16.1 Firstly he referred to **Honore's:** South African Law of Trusts, Cameron et al, 5th edition, pages 326 to 329 where the authors deal with the question of delegation of powers versus abdication. A delegation is not improper so long as it amounts to a delegation in the sense of the appointment of another for whose acts one will be responsible, to act on one's behalf, and not an abdication in the sense of the appointment of another to act instead of oneself, so as to relief oneself of the responsibility. On this basis the authors point out that two trustees may thus validly decide to delegate the conduct of litigation concerning the trust to one of them, reliance being placed on **Rosner v Lydia Swanepoel Trust 1998 (2) SA 123 (WLD)** at 126. Clearly the instant case is not a case of abdication of powers.

16.2 Mr Du Plessis also referred to **Coetzee v Peet Smith Trust & Andere 2003 (5) SA 674 (T)** at 680I where Van Dijkhorst, J said the following:

"Die reel dat besluite gesamentlik eenparig moet wees, verhinder nie die trustees om *op die wyse sekere funksies te delegeer aan bepaalde trustees of buitestaanders nie. Dit geskied egter met behoud van uiteindelike verantwoordelikheid en die verpligting tot behoorlike toesig.* "

16.3 Also to Goolam Ally Family Trust v Textile, Curtaining and Trimming1989 (4) SA 985 (CPD) where Kuhn, AJ stated the following at 988D:

"The general rule is that joint trustees must act jointly. Generally speaking a joint trustee may delegate his duties to a co-trustee or to any other agent but the power to do so *depends on the provisions of the trust deed - in this case the deed of donation. If it is prohibited it cannot be done (cf Edenburg v Mercantile Credit (pvt) Limited 1980* (1) *SA* 744 *(ZR); Smit v Van der Werke N.O. & Andere* 1984 (1) *SA* 164 *(T).* "

[17] On the authorities above, it is obvious that unless a delegation of powers is prohibited by the trust deed, it can validly be done in law. It follows therefore that the resolution authorising Dr Tayob to institute the action is a proper delegation of powers not prohibited by the trust deed.

[18] I therefore find that the plaintiffs have proven their *locus standi* in the

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[19] As far as costs are concerned, the matter stood down to enable

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presented on 17 October 2006 which continued after the lunch break. Argument was

The plaintiffs being successful on the issue of *locus standi,* I am

therefore of the view that the defendant should pay the costs of the

day spent on argument.

[20] The following order is made:

20.1 It is declared that the plaintiffs have the necessary *locus standi*

to have brought and to continue with the action;

20.2 The defendant is ordered to pay the costs of 17 October 2006.

F J JOOSTE

ACTING JUDGE OF THE HIGH COURT OF PRETORIA