



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

DATE

5/2/15

SIGNATURE

5/2/2015

CASE NUMBER: 50560/2013

In the matter between:

LERNA BEATRIX MULLER N.O.

APPLICANT

AND

WILHELM KARL MULLER N.O.
RESPONDENT

31ST

WILHELM KARL MULLER

2ND RESPONDENT

ABSA BANK LIMITED

3RD RESPONDENT

WILKA BELEGGINGS (PTY) LTD

4TH RESPONDENT

MASTER OF THE HIGH COURT

5TH RESPONDENT

JUDGMENT

LEPHOKO AJ

[1] This is an application for leave to appeal the judgment removing the first respondent as trustee of the Wilka Trust (the Trust) and other ancillary relief granted by the court. In this judgement the parties are referred to as in the main application.

[2] The applicant and the second respondent were previously married to each other and were divorced on 25 November 2010. They signed a settlement agreement on 08 March 2011. The settlement agreement provides, *inter alia*, that the applicant resigns as trustee and beneficiary of the Trust but the resignation shall come into effect upon fulfilment of certain conditions by the second respondent on or before the 01 April 2011. The applicant had resigned as a trustee on 25 February 2011 and resigned as beneficiary on 10 March 2011.

[3] The application for leave to appeal is primarily premised on the interpretation of the settlement agreement regarding the applicant's resignation as trustee and beneficiary of the Trust as well as her *locus standi* to bring the main application.

THE SETTLEMENT AGREEMENT

[4] It was contended by the first, second and fourth respondents (the respondents) that the applicant in her founding affidavit claims that she is a trustee and beneficiary of the Trust and makes no mention of the fact that she had unconditionally resigned as a trustee and beneficiary. It was contended that the settlement agreement was only introduced by the applicant in her replying affidavit after the respondents in their

answering affidavit took the point *in limine* that the applicant has no *locus standi* as she had resigned as a trustee and beneficiary of the Trust.

[5] The applicant's case is made out in her founding affidavit and the main relief that was granted by the court is sought in her notice of motion. The settlement agreement was merely introduced as evidence to counter the respondents' allegation that she lacks standing as she had resigned as a trustee and beneficiary. The settlement agreement does not introduce a new cause of action. It was not necessary for the applicant in her founding affidavit to give the historical background that she had resigned as trustee and beneficiary of the trust and that the resignations had not come into effect. It is abundantly clear from the conduct of the applicant and the first respondent as demonstrated throughout the papers that the applicant was at all times recognised and treated as a trustee.

[6] The alleged resignation of the applicant as a trustee took place on 25 February 2011. The argument that the applicant had resigned as a trustee and that such resignation was unconditional is contrary to the deliberate and unequivocal conduct of the applicant and the first respondent regarding the Trust. As on 7 February 2013, they still communicated and negotiated with each other in writing as co-trustees of the Trust. On 16 August 2013 well over two years after the alleged resignation, the applicant was in her capacity as trustee invited to the half yearly meeting of trustees scheduled for 23 August 2013. The recognition of the applicant as a trustee was also reinforced in various correspondence exchanged between their respective attorneys. The conduct of

these parties as well as that of their attorneys is in line with the applicant and the second respondent's intention that is clearly set out in the settlement agreement.

LOCUS STANDI

[7] The preamble to the settlement agreement states that both parties are trustees of the Elbie and Wilka Trusts and that they have agreed to settle all the claims between them as set out in the settlement agreement. The settlement agreement deals amongst others with claims arising from the divorce order, the Elbie Trust, the Wilka Trust and the resignation of the applicant as a trustee and beneficiary of these trusts.

[8] Clause 9 of the settlement agreement provides that should any party fail to fully perform in terms of the agreement, the other party shall not be compelled to give effect to the agreement and the parties shall retain their rights which they had before signature of the agreement. It is common cause that the second respondent failed to fully perform in terms of the agreement on or before the 01 April 2011.

[9] The respondents contended that as the applicant had resigned as trustee on 25 February 2011 and as beneficiary on 10 March 2011 this meant that when the set conditions were not met, the resignations remained intact. The respondents contended that the resignation as trustee on 25 February 2011, the settlement agreement signed on 08 March 2011 and the resignation as beneficiary on 10 March 2011 were independent and separate agreements. It was contended that if the three documents were read independently the effect of clause 9 of the settlement agreement would be

that once the settlement agreement became unenforceable the resignations of the applicant on 25 February 2011 and on 10 March 2011 would stand. I disagree with this approach.

[10] The resignation on 25 February 2011 partly reads as follows:

"Die Trustees besluit dat Mev Lema Muller sal bedank as Trustee met onmiddellike effek na ondertekening van hierdi Besluit" (my emphasiss)

"Die Trustees onderneem verder om vir Mev Lema Muller vry te spreek as borg en ook verder vry te spreek van enige eis in haar hoedanigheid as Trustee"

[11] The actual act of resignation was effected through clause 3 of the settlement agreement. The above two clauses quoted from the resignation are directly in line with clause 3 of the settlement agreement which reads as follows:

"AD BEDANKING; ELBIE TRUST EN WILKA TRUST

Die partye kom hiermee ooreen dat Mev Muller bedank as Trustee uit die Elbie Trust en Wilka Trust. Die bedanking van Mev. Muller as trustee hou outomaties in dat sy ook geensins verder 'n begunstigde van enige van die twee trusts sal wees nie. Hierdie bedanking sal in werking tree na registrasie van bovermelde aandeelhouing in die naam van Mev Muller asook by betaling val alle bedrae verskildig aan Mev Muller van hierdie ooreenkoms.

Mnr Muller sal ook aan Mev Muller skriftelike bewys lewer dat sy onthef is as borg ten opsigte van beide die twee trusts vooraf op 1 April 2011."

[12] The resignation of the applicant as beneficiary of the Wilka Trust dated 10 March 2011 reads as follows:

"Hiermee dien ek, Lerna Beatrix Muller, my bedanking as begunstigde in van die Wilka Trust met ingang 1 April 2011."

[13] In my view the resignation of the applicant as beneficiary of the trust is not an independent act from the settlement agreement as contended by the respondents. It was merely intended to give effect to clause 3 of the settlement agreement which required the applicant to resign as beneficiary of the two trusts. The wording of the resignation ties perfectly with the stipulations in the settlement agreement that the second respondent had to meet the conditions set out in the settlement agreement on or before the 01 April 2011, in particular clause 9 thereof which reads as follows:

"GELYKTYDIGE PRESTASIE:

Die partye kom ooreen dat Mnre Tom Dryer & Stassen Prokureurs, genomineer word as die prokureurs wat moet toesien dat lewering van dokumentasie in hierdie ooreenkoms vervat, asook betalings gemaak te word deur Mnr Muller, alles gelytydig te die kantoore van Mnre Tom Dryer & Stassen Prokureurs geskied voor of op 1 April 2011. Sou enige van die partye nie volledig presteer in terme van hierdie ooreenkoms nie, sal die ander party nie verplig wees om uitvoering te gee aan die ooreenkoms nie. Meer spesifiek en sonder om afbreek te dien aan die algemeenheid van voorgande, kom die partye ooreen sou enige van die dokumentasie (Insluitende die bank waarborg) nie behoorlik gelewer word voor of op 1 April 2011 nie sal daar nie effek gegee word aan die

ooreenkoms nie en sal die partye al hulle regte hou vir wat hulle gehad het voor die ondertekening van hierdie ooreenkoms, waarook hulle alle regte in terme van hierdie ooreenkoms. Hierdie ooreenkoms stel dus nie 'n Novatio daar nie."

[14] The applicant and the respondents are in agreement that the settlement agreement became unenforceable on 01 April 2011 when the second respondent defaulted. That being the case, the resignations of the applicant as trustee and beneficiary of the trust are also not enforceable as in reality they are a direct consequence of the settlement agreement. The respondents can therefore not rely on the resignations that are a direct consequence of a settlement agreement that they contend is of no force or effect.

[15] The resignation of the applicant as trustee on 25 February 2011 has additional difficulties. In terms of the Trust Property Control Act 57 of 1988 (the Act) a trustee vacates office when:

- (a) He is removed by the court in terms of section 20 of the Act, that is, on the application of the Master or any person having an interest in the trust property; or when
- (b) He resigns by notice in writing to the Master and the ascertained beneficiaries who have legal capacity, or to the tutors or curators of the beneficiaries of the trust under tutorship or curatorship as provided in section 21 of the Act.

[16] In the present case the applicant did not give notice of his resignation as trustee to the ascertained beneficiaries of the trust as required by section 21 of the Act. No

evidence was accepted by the court to the effect that the applicant had indeed notified the Master of her resignation. It is common cause that the conditions set out in the settlement agreement that were to validate the resignation of the applicant as trustee were not met. Even if the interpretation proffered by the respondents concerning the resignation of the applicant as trustee was accepted, that would not avail the respondents as the resignation of the applicant as trustee had not come into effect as she had failed to comply with the provisions of section 21 of the Act.¹

[17] The respondents raised the point that paragraph two of the judgment states that the application is opposed by the first and second respondents whilst it was also opposed by the fourth respondent. It was conceded by the respondents that on a proper reading of the judgment it is clear that it is opposed by the first, second and fourth respondents. The respondents also contended that in determining the issue the court did not apply the considerations in the *Plascon Evans* case. A judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention.² The import of the judgment is to the effect that the respondents' version is untenable.

[18] Section 17 (1) of the Superior Courts Act 10 of 2013 (the Superior Courts Act) *inter alia* provides that leave to appeal may only be given where the court hearing the

¹ *Weiss N.O. v Standard Bank of South Africa Ltd. In re: Standard Bank of South Africa v Fourie N.O. and Another ZANWHC 56* (16 May 2013) at [18] - [19]; *Van der Merwe N.O. and Others v Hydraberg Hydraulics CC and Others; Van der Merwe N.O. and Others v Bosman and Others 2010 (5) SA 555 (WCC)* at [17] - [23].

² *Firestone South Africa (Pty) Ltd v Genticuro A.G. 1977(4) SA 298 (AD)* at 304E-F

application is of the opinion that the appeal would have a reasonable prospect of success. Section 16 (2) (a) (1) of the Superior Courts Act provides that when at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

[19] In my view there is no reasonable prospect that another court would find that the resignation of the applicant as trustee had come into effect notwithstanding non-compliance with the provisions of section 21 of the Act. Compliance with section 21 of the Act is a statutory requirement that is not dependent on the interpretation of the settlement agreement.

[20] I am of the view that there is no reasonable prospect that another court would find that the applicant resigned as a beneficiary of the Trust and lacks standing. The applicant has made a compelling case for the removal of the first respondent as trustee of the Wilka Trust. Even if another court was to find that the applicant had not resigned as trustee, I do not foresee any reasonable prospect that it would condone the serious breach of his fiduciary duty by the first respondent who has abused and misappropriated Trust assets for his personal benefit to the serious detriment of the Trust and its beneficiaries.

[21] Granting leave to appeal on the basis that there was a reasonable prospect that another court would interpret clause 9 of the settlement agreement differently would render the appeal of no practical effect or result as the outcome would still be that the

applicant as beneficiary of the trust has *locus standi* to bring the application and that on the facts of the case it is in the best interest of the trust and its beneficiaries that the first respondent be removed as trustee.³ Accordingly the application for leave to appeal fails.

I make the following order:

1. The application for leave to appeal is refused.
2. The first, second and fourth respondents are ordered to pay the costs of this application.



A L C M LEPHOKO
ACTING JUDGE OF THE HIGH COURT

For the Applicant: Adv C Zietman
Instructed by: Desire Koch Attorneys

For the 1ST, 2ND & 4TH Respondents: Adv J Rust
Instructed by: Dawie De Beer Attorneys

³ Capendale and Another v Municipality of Saldanha Bay and Others, In re; Capendale and Another v12 Main ST, Langebaan (Pty) Ltd and Others ZAWCHC 3 (29 January 2014)