REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 5430/20

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 26/10/2020 Signature: [signature]

In the matter between:

HEIDI ROSSOUW	APPLICANT
and	
MOMENTUM (A DIVISION OF MMI GROUP LIMITED)	FIRST RESPONDENT
CATHARINA WILHELMINA NEETLING N.O. In her capacity as trustee of the MAC-MAC TRUST	SECOND RESPONDENT
TRUST MEDIATOR (PTY) LTD represented by JACOBUS NICOLAAS VENTER N.O. In its capacity as trustee of the MAC-MAC TRUST	THIRD RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

[1] The Applicant approached the Court for a declaratory order to the effect that the proceeds of Momentum Policy Number 211322511 ("the policy") be paid over to her. The Second and Third Respondents subsequently filed a counter-application seeking an order that the proceeds of the policy be paid to the MAC-MAC Trust IT Number 2835/00 ("the Trust").

[2] The First Respondent, abides the judgment of the Court.

Background facts

[3] The following timeline captures the common cause facts and provides the context within which the applications before the Court must be adjudicated:

i. On 13 March 2000, an *inter vivos*, risk-only, discretionary trust was founded by Johannes Casparus Lemmer Ferreira. David Ferreira ("the deceased") and the second Respondent were appointed as trustees.

ii. On 15 March 2013, during a meeting of trustees, the deceased was delegated to act on behalf of both trustees.

iii. In May 2014, the deceased, in his capacity as trustee of the Trust, took out a life insurance policy on his own life in the Trust's name, with the First Respondent.

iv. On 5 November 2018, the deceased, in his capacity as trustee of the Trust, appointed the Applicant as a 100% beneficiary of the policy.

v. On 13 November 2018, the deceased committed suicide.

vi. On 14 December 2018, the Third Respondent was appointed as co-trustee of the Trust in the deceased's stead.

vii. The Applicant submitted a claim to the First Respondent for payment of the policy to herself on 5 March 2019. The Second and Third Respondents oppose this claim in their capacities as trustees of the Trust.

viii. On 11 June 2019, the Second and Third Respondents, as trustees of the Trust, decided that all funds payable under the policy must be paid into the

Trust's account. A counter-application to this effect was instituted. Due to the dispute between the parties, the First Respondent has to date, not paid out any benefit to either the Applicant or the Trust.

The parties' respective cases

(i) The Applicant's case

[4] The Applicant states that she met the deceased in 2010, they got engaged on 27 July 2018. The deceased was a financial planner who regularly worked with trusts and investments. The deceased committed suicide on 13 November 2018 and allegedly left a note in which he *inter alia* wrote that he left her a policy of approximately R1.8 million. The argument proffered on behalf of the Applicant essentially entails that on a proper interpretation of the Trust Deed and the resolutions, it will be found that:

i. The deceased had the necessary capacity and authority to act on behalf of the Trust when he nominated the Applicant as the beneficiary of the trust;

ii. At best for the Second and Third Respondents, they have a delictual claim against the deceased estate for any losses the Trust may have suffered;

iii. There is no indication that the trustees elected persons to be beneficiaries of the Trust in respect of trust income or trust capital;

iv. The Trust was a family trust founded to care for the beneficiaries, and a liberal interpretation of the object and purpose of the Trust in accordance with the spirit of the Trust Deed would not disentitle the Applicant to receive the benefit in terms of the policy;

v. It has always been the parties' intention that the Trust would be the *deceased's alter ego* to do with it as he pleases.

(ii) The Respondent's case

[5] The Second and Third Respondents opposed the relief sought by the Applicant and instituted a counter-application. They deny that the Applicant was engaged to the deceased, and they dispute the authenticity of the suicide note. The Second and Third Respondents essentially aver that:

i. The Trust was the owner of the policy, and only a beneficiary in terms of the Trust Deed could benefit from the policy;

ii. The deceased acted *ultra vires* by appointing the Applicant as the beneficiary of the policy, and the changing of the beneficiary is thus void or voidable;

iii. The change of beneficiary of the policy by the First Respondent was founded on an unauthorised unilateral act of the deceased;

iv. The objects and purpose of the Trust was to benefit the family of the deceased and not the Applicant;

v. The relief sought by the Applicant is incompetent because the Applicant does not seek a declarator that she is entitled to the policy funds.

Competency of the relief sought and factual disputes

[6] The Respondents aver that the relief sought by the Applicant is incompetent because the Applicant does not seek a declarator that she is entitled to the policy funds. Counsel, in his heads of argument, submitted that this is to be attributed to the fact that the Applicant 'simply has no legal basis on which to claim the benefits of the policy'. In view of the relief sought in the notice of motion, namely an order that the proceeds of the Momentum Policy Number 211322511 be paid to the Applicant, this objection is neither here nor there. For the relief to be granted, the Applicant must make out a case that she is entitled to the policy funds.

[7] The only factual disputes that arise from the papers concern the Applicant's alleged engagement to the deceased and the suicide note's authenticity. Counsel for the Respondents argued that in light of the Plascon Evans Rule, the Respondent's version is to be favoured.

[8] The principles applicable to determining the relevant facts when final relief is sought in motion proceedings[1] were set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.[2] The rule stood the test of time and is still applied daily in motion courts throughout the country. However, it is trite that 'a bare denial of [an] Applicant's averments cannot be regarded as sufficient to defeat [an] Applicant's right to secure relief by motion proceedings in appropriate cases. Enough must be stated by [the] Respondent to enable the Court to conduct a preliminary investigation … and to ascertain whether the denials are not fictitious intended merely to delay the hearing',[3] or for some other purpose.[4] This principle has succinctly been explained in *Wightman t/a Construction v Headfour (Pty) Ltd and Another:*[5]

> '[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts 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 fact 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. There will, of course, be instances where a bare denial meets the requirement because there is no other way open to the disputing party, and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or

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[1] See BR Southwood *Essential Judicial Reasoning* (2015) LexisNexis, 23.

[2] 1984 (3) SA 623 (A) 634E-635D.

[3] *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1165.

[4] Southwood, *supra*, 25.

[5] 2008 (3) SA 371 par 12 and 13.

> accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the Court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances, all of which need to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the Court takes a robust view of the matter.'

[9] *In casu*, the Applicant stated in the founding affidavit that she met the deceased in 2010 and that they got engaged on 27 July 2018. She attaches a copy of a letter, the suicide note, as an annexure to the founding affidavit. The Second Respondent, the deceased's biological sister, denies that the Applicant and the deceased were engaged or that they were life partners. She states '[o]wing to the fact that the deceased was my brother as well as co-trustee I would have known same'. In reply, the Applicant states: 'I deny that the deponent has personal knowledge of the facts as she is clearly unaware of the fact that I was the fiancé of the late David Ferreira.'

[10] The Respondents addressed the fact that is disputed. They denied the engagement. The question is whether it can be said that 'more was expected' of

the Respondents. It was argued on their behalf that they could not prove a negative. The Court is not faced with a position where it can be said that the 'facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial.' I believe that this is a situation where a bare denial meets the requirements to indicate the existence of a dispute on facts. The Applicant made a blunt statement, and it was met with a bare denial. However, irrespective of whether the Applicant proved that she was in a committed relationship with the deceased, the fact remains that the relationship between them was of such a nature that the deceased deemed it fit to nominate her as the sole beneficiary of the policy.

[11] As to the Respondents' disputing the suicide note's authenticity, I agree that the note's authenticity cannot be ascertained in motion proceedings. The relevance of the suicide note is of no importance to the ultimate conclusion reached in this judgment.

Discussion

[12] The issue that needs to be determined is whether the deceased, as trustee, could lawfully nominate the Applicant as a beneficiary of the life insurance policy. In consideration of this issue, I take into account, among other things, (i) the Trust Deed with a specific focus on the powers afforded to the deceased as trustee in terms of the Trust Deed, and the subsequent resolution in terms of which the deceased was appointed as chairperson of the Trust and as sole signatory on all documents 'relating to the opening of bank accounts, signing of the proposal forms for taking out policies, transfer of shares, receipt of donations, purchase, and sale of shares, purchase, and sale of fixed property and any other acts specifically or generally authorised by the Trust Deed'; (ii) the nature of a trust and the trustee's fiduciary responsibility to the beneficiaries of the trust; and (iv) the legal implications of life insurance being procured without a specific beneficiary being nominated from the outset.

[13] The Trust Deed was concluded between the founder of the Trust, JCL Ferreira, and two trustees, D Ferreira and CW Neethling. The term 'beneficiaries' is defined to mean the following:

'2.1.2 'BEGUNSTIGDES' beteken:

2.1.2.1 Die persoon of persone, wie van tyd tot tyd, en ter enige tyd deur die Trustees in hul uitsluitlike en absolute diskresie gekies word om 'n BEGUNSTIGDE(S) te wees ten opisgte van die TRUSTKAPITAAL of TRUSTINKOMSTE en/of beide, uit die volgende persone in terme van hierdie TRUSTAKTE.

2.1.2.2 DAWID FERREIRA
(ID. NO. 630809 5065 08 3)

2.1.2.3 Die wettige kinders gebore uit die huwelike van die begunstigde soos in par 2.1.2 hierbo vermeld en/of kinders wettiglik aangeneem soos op datum van afsterwe, en by enige voormelde kinders se oorlye sodanige kinders se wettige afstammelinge "per stirpes".

2.1.2.4 By totale uitwissing van die gesin, waar begunstigdes vermeld in par 2.1.2.2 en 2.1.2.3 nie meer bestaan nie, dan aanverwante.

2.1.2.5 Enige Trust (inter vivos en/of testamentêr) hoegenaamd, of enige regspersoon wat tot voordeel van sodanige begunstigdes en/of klas begunstigdes opgerig word, en/of tot voordeel soos deur die uitsluitlike diskresie van die TRUSTEES bepaal.'

[14] In terms of the Trust Deed, the founder donated R100-00 to the trustees because of the founder's love and affection for the beneficiaries. Together with other donations and assets later obtained by the Trust, this donation constitutes the trust -capital. The donation vested in the trustees and is to be administered by them in accordance with and subject to the provisions of the Trust Deed.

[15] The Trust Deed prescribes that there should always be a minimum of two trustees. In the event that the number of trustees decreases to less than the minimum (2), the remaining trustee would not be entitled to exercise any power for the

maintenance and administration of the trust capital until another trustee is appointed.

[16] The majority of trustees form a quorum, and the trustees are precluded from conducting business or making decisions if there is no quorum present. However, a trustee is permitted to be temporarily absent and provide a co-trustee with a written authority to act in its stead during its absence.

[17] The trustees are afforded the absolute discretion to make any decision in terms of the Trust Deed by way of a majority vote. They can appoint an administrator to execute the decisions taken, and they can nominate one or more of themselves to sign documents relating to the Trust's business. The trustees are obliged to act in the interest and on behalf of the Trust's beneficiaries and not for their own benefit. The extent of the trustees' power is at all times subject to this reservation. The trust-capital must be managed and used for the benefit of the beneficiaries.

[18] It is explicitly stipulated in the Trust Deed that the general powers of the trustees, that remained subject to a majority vote, *inter alia,* included the power to open bank accounts in the name of the Trust; to alienate any movable or immovable assets to the benefit of the Trust and the beneficiaries, to make donations for charity; and to take out life insurance on the life of the founder, the trustee or beneficiaries, and to pay the premiums thereof, and if the insured dies during the existence of the Trust, the proceeds of the policy form part of the trust-capital. Policy premiums are to be regarded as Trust expenses.

[19] The Trust Deed stipulates that the trustees can extend the group of beneficiaries through a majority vote. It is expressly stipulated that although a testamentary reservation existed in favour of the deceased, no person or body other than the beneficiaries could benefit from a testamentary division of trust assets.

[20] On 13 March 2000, at the first meeting of trustees, the deceased undertook *inter alia,* to take out life policies for and on behalf of the Trust.

[21] It is trite that a trust is not a legal *persona* but a legal institution *sui generis*. Cameron JA, as he then was, explained in *Land and Agricultural Bank of South Africa v Parker*:[6]

> '[A trust] is an accumulation of assets and liabilities. These constitute the trust estate, which is a separate entity. But though separate, the accumulation of rights and obligations comprising the trust estate does not have legal personality. It vests in the trustees, and must be administered by them - and it is only through the trustees, specified as in the trust instrument, that the trust can act.'

[22] Cameron *et al.* explain that a trust normally involves a transfer of property by the founder to the trustee subject to certain prescriptions regarding how the property is to be dealt with.[7] The authors explain that three main principles of general import govern the administration of a trust:

'(a) The trustee must give effect to the trust instrument, properly interpreted, as far as it is lawful and effective under the law of the place where the administration is to take place;

(b) the trustee must in the performance of duties and the exercise of powers act 'with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another'; and

(c) except as regards questions of law the trustee is bound to exercise an independent discretion.'[8]

[23] If it is considered that the trust instrument forms 'the statute under which the trustee acts' and that its source is a valid contract, it follows that the interpretation to be given to the relevant phrases of the Trust Deed must be done in accordance with

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[6] [2004] 4 ALL SA 261 (SCA).

[7] Cameron E, De Waal M and Solomon P *Honorè's South African Law of Trusts* 5th ed, JUTA, 43.

[8] Cameron *et al, supra*, 262.

the general principles of interpretation. The Supreme Court of Appeal aptly held in *Gavin Charlton Harvey NO v Georgina Elizabeth Crawford NO*:[9]

> 'It is a trite principle of our law that in order to determine what the author of a document intended, courts must examine the language used in the document, as well as all the facts which give it context. As correctly pointed out in *Novartis v Maphil* in relation to the interpretation of contracts, courts must consider all the facts and context in order to determine what the parties intended. It is expected to do so whether or not the words of the contract are ambiguous or lack clarity'.
> [References excluded]

[24] With the principles expressed in the relevant cases in mind, I now turn to consider whether the Trust Deed provisions allowed the deceased to nominate the Applicant as a beneficiary of a life policy, of which the Trust was the policyholder or policy owner. In coming to a decision, I specifically considered the following:

i. A particular and limited category of beneficiaries is identified in the Trust Deed, namely the deceased and the children of the deceased irrespective as to whether they were born in wedlock or lawfully adopted;
ii. The Trust Deed specifies that the trust-capital must be managed and utilised to the benefit of the beneficiaries;
iii. The Trust Deed provides that life policies could be taken out on the life of a trustee but that the proceeds would form part of the trust-capital if the policy paid out while the Trust still existed;
iv. Decisions relating to Trust assets or trust capital had to be taken by majority vote;
v. On 13 March 2000, the deceased was authorised to take out life policies 'for and on behalf of' the Trust;
vi. The trustees did not expand the category of 'beneficiaries' by majority vote.

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[9] (1016/2017) [2018] ZASCA 147 (17 October 2018), para 24. Also see *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18; *and Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para 12.

[25] The Trust Deed does not provide in any way for the inclusion of a spouse or life partner of the deceased in the category of beneficiaries. The argument proffered on behalf of the Applicant that on a liberal interpretation, she should be regarded as a trust beneficiary because the deceased cared for her, and the Trust was created by the founder because of the love and affection he cherished for the beneficiaries, does not hold water. The founder's objective was to benefit the deceased and his children, and the Applicant does not fall into the category of beneficiaries.

[26] A trustee retains a personal estate separate from the trust estate, and the two are not to be confused. The deceased acted contrary to the objects of the Trust when he nominated the Applicant as the beneficiary of the life policy. In addition, one of the fundamental rules of trust law, which was restated in *Nieuwoudt NO v Vrystaat Mielies (Edms) Bpk,*[10] namely that in the absence of a contrary provision in the trust deed, the trustees must act jointly if the trust estate is to be bound by their acts, finds application. *In* casu, the Trust Deed expressly determined that the Trust' business be conducted by way of majority vote. The resolution taken on 15 March 2013 in terms of which the deceased was authorised to act as sole signatory on 'all documents ... relating to ... signing of the proposal forms for taking out policies', did not amount to an authorisation to act contrary to the objects of the Trust. Neither did it amount to a delegation to act in the stead of the second trustee. It was a decision taken to facilitate the administration of the Trust in accordance with clause 11.9 of the Trust Deed. The deceased's action cannot bind the Trust because the Trust Deed did not sanction it. He acted *ultra vires*, contrary to the Trust's objects, and without his co-trustee's consent. This renders his action void.

[27] It was argued on behalf of the Applicant that no beneficiary was nominated in the life insurance policy prior to the Applicant being nominated. The relevance of this argument escapes me. It fails to take into consideration the fact that a policyholder, also referred to as the policy owner, is the entity eligible to be provided with the

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[10] 2004 (3) SA 486 (SCA) para 16.

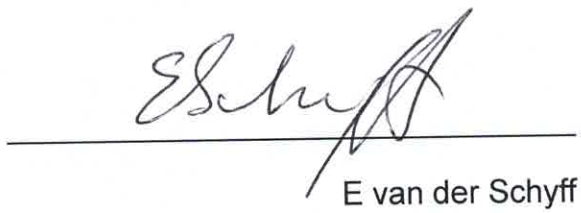
policy benefits under a long-term policy unless another beneficiary is nominated.[11] In the result, the Trust as policyholder was and remains entitled to the proceeds of the life insurance policy taken out on the deceased's life.

[28] For purposes of the order granted below, the Applicant in the main application is referred to as 'the Applicant'. The Respondent in the main application is referred to as 'the Respondent'.

ORDER

In the result, it is ordered that:

1. The Applicant's application is dismissed;
2. The Respondents' counter application is granted, and the proceeds of Momentum Policy number 211322511 are to be paid to the Mac-Mac Trust IT Number 2835/00;
3. The Applicant is to pay the costs of the application and counter application.



E van der Schyff

Judge of the High Court, Gauteng, Pretoria

Counsel for the Applicant:	Adv A du Plooy
Instructed by:	Richards Attorneys
Counsel for the 2nd and 3rd Respondents:	Adv R Arcangeli
Instructed by:	Jacque Venter Inc.
Date of the hearing:	13 October 2020

[11] Nienaber PM and Reinecke MFB *Life Insurance in South Africa* 2009 LexisNexis, 194, 197, 215.

Judgment delivered: 26 October 2020