THE TRUSTEES ARE NOT DOING THEIR JOB!

Haitas v Froneman and Others (1158/2019) [2021] ZASCA 1 (6 February 2021)

Our courts are often called upon to adjudicate in matters relating to a trust's management. The present judgment is another, dealing with a request by the sole beneficiary for removal of trustees because they are not 'doing their job'. But doing the job requires of trustees to follow the instructions in the trust deed and not their own judgment or that of the beneficiaries. In practice this can become very difficult. The judgment illustrates what is expected of trustees.

The Judgment can be viewed here.

FACTS

When wealthy businessman, Evangelos Haitas (the deceased), died in October 2018, a family feud broke out over the control of the restaurant businesses that he had built up during his lifetime. Mr Konstantinos Haitas ('K'), the deceased's son and sole surviving heir, was the only income and capital beneficiary of the Kam Trust (the Trust), established by his late father. The Trust was the vehicle through which the deceased's successful restaurant businesses are owned. While he was alive the deceased was the pivot of the businesses: His two co-trustees (Froneman, a chartered accountant and Haitas, the deceased's sister) played only small roles.

The deceased's death resulted in suspicion and hostility between K and the remaining two trustees. This was because, amongst other things:

(i) At the time of his father's death, K had commenced his studies at the University of Amsterdam in the Netherlands. These were abandoned soon after the death, ostensibly to attend to trust matters and to his father's estate. According to the trustees the deceased, while he was ill, warned them that his son was immature and would be unduly influenced by his mother (who was divorced from the deceased). This was a situation he wanted them to guard against at all costs. The undertaking they made to the deceased in this regard had inevitably informed most of their actions and had in turn infuriated K and his mother. Their attempts to do so had undoubtedly contributed to a pervasive mistrust between the trustees on the one hand and K and his mother on the other;

(ii) As sole heir, K was keen to maintain a certain lifestyle. The obstacle he faced was that the trust property would vest in him only when he turns 23 years old. Also, in terms of the deceased's will, any inheritance would be retained in a testamentary trust and only accrue to him once he turns 25 years old, if he was in possession of a university degree. If not, then a third will accrue to him at the age of 25 and the balance when he reaches 30 years of age. One of K's greatest grievances was the trustees' unwillingness to allow him to benefit from any trust monies;

(iii) The will made provision for K to succeed the deceased as a trustee of the Kam Trust on reaching the age of majority, which appointment was effected in May 2019. No meeting of the trustees could be held as Mr Froneman and Ms Haitas insisted that K could not have his advisors present;

(iv) K resented Ms Batista, his father's romantic partner since 2013. K accused the trustees of making various unauthorised and unlawful payments on behalf of Ms Batista, while refusing to give him any monies. Mr Froneman justified the payments as these were consulting fees owing to her for work she had performed. It was not contested that the work was done, although K thought too much was paid for the work; and

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(v) In May 2018, K was given access to various financial documentation relating to the businesses for the year 2009 to 2017 (in other words prior to the deceased's passing), as K requested. The financial statements were not audited despite the trust document requiring this and the statements for 2010 were missing.

During April 2019, K (then 19 years old) brought an urgent application in the Gauteng High Court seeking, in the main, the removal of Froneman and Haitas as trustees, and for the Master to urgently appoint two more trustees, one of whom should be an independent trustee. The High Court dismissed the application and K appealed to the Supreme Court of Appeal.

HELD

- The primary issue for determination was whether the conduct of the two trustees justified their removal in terms of the Trust Property Control Act 57 of 1988 (the Act), alternatively the common law. Section 20(1) of the Act provides that: *'A trustee, may, on 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.'*

- The general principle is that a court will exercise its common law jurisdiction to remove a trustee if the continuance in office of the trustee will be detrimental to the beneficiary or will prevent the trust from being properly administered. A trustee has a fiduciary duty to act with due care and diligence in administering property on behalf of another.

- Courts have taken a pragmatic approach as to what misconduct should be construed as jeopordising trust assets and the courts' power to remove a trustee is one that should be used with circumspection. Irrespective of whether the common law or section 20(1) is utilised, the courts have emphasised that when a deceased person has deliberately selected certain persons to carry out their wishes because they believe they are best placed to do so, a court should be loath to interfere.

- Neither *mala fides* (bad faith) nor misconduct necessarily warrant the removal of a trustee. Disharmony in the administration of a trust is only relevant if this imperils the trust assets and removal will only be necessary if it is in the interests of the Trust and its beneficiaries.

- Conduct by the trustees which does not find favour with the beneficiary does not on its own justify their removal. In fact this Court has found that enmity between the beneficiary and the trustees is not of and in itself an adequate reason for their removal. The conduct of trustees must be detrimental to the trust assets and it is only then that their conduct may warrant removal. It not necessary that their conduct be unimpeachable but generally where there is no impropriety and no financial gain on the part of trustees, courts will not interfere.

- In this matter there was nothing to suggest any impropriety, personal gain or of overcharging in the conduct of Mr Froneman and Ms Haitas. The criticism to be levelled against them is that they have been over-zealous in carrying out what they believed to be the deceased's wishes. What is clear is that since early November 2018 all meaningful communication between the trustees and K had broken down. That there is disharmony cannot be disputed. But it was not sufficient to warrant the removal of Mr Froneman and Ms Haitas as trustees.

- That the trustees have, in some respects, been lax in maintaining proper accounting records of the Trust cannot be denied. The problem pre-dates the death of the deceased who did not require audited financial statements and ran the businesses single-handedly. Certainly, it was negligent of the trustees to give the deceased free rein during his lifetime, and subsequent to his death they have not been forthcoming with financial information. The information that is available was provided to K once he became a trustee. It was not

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necessary to apply for the trustees' removal to obtain financial disclosures. This could have been obtained by far less drastic remedial action.

- K was entitled to an income from the Trust for his education and general well-being. This, Mr Froneman had stated under oath that he and Ms Haitas will consider once they receive an application. While this approach is unnecessarily formalistic, it neither imperils the Trust, nor subverts the interests of K as the beneficiary of the Trust. The trustees would be well-advised to properly consider K's needs in order to avoid further litigation.

- As regards the proposal that other independent trustees be appointed to break the deadlock, the issue is whether there is a deadlock to break. K and his mother disapprove of the manner in which the Trust is being run but this does not mean that it is rendered dysfunctional. Even if accepted that the Court has the power to appoint further trustees, there is insufficient reason to do so. K had elected not to attend meetings of trustees presumably because of the enmity with his co-trustees. The other trustees are his aunt and his father's trusted financial advisor who, whatever their shortcomings, have the Trust's interests at heart. K would be well advised to attend these meetings, and take legal advice thereafter, if he so wishes. Until he participates in the governance of the Trust, it is premature to claim that there is a deadlock requiring the appointment of an independent trustee. In any event K is at liberty to approach the Master under section 7(2) of the Act to appoint further trustees, if warranted.

- In conclusion, the conduct of the trustees, although leaving much to be desired in the way they handled certain matters, did not justify the primary relief sought against them - their removal.

CONCLUSION

The appeal was dismissed.

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