

ALARM BELLS: YOU'RE A TRUSTEE OF A TRUST TOGETHER WITH YOUR EX

PM N.O and Another v DM N.O and Another (26855/2021) [2022] ZAGPPHC 313 (4 May 2022)

Of course it can be very tricky to remain a trustee of a trust together with a person to whom you were previously married. But as this judgment illustrates, one must remember that a trust is a unique legal arrangement and its trustees must always act in the best interests of the trust, and leave personal issues aside. If this cannot be achieved, the ex-spouse can be successful in an application to remove the other trustee.

The Judgment can be viewed [here](#).

FACTS

Mr and Mrs M were previously married to each other. Their marriage terminated in September 2021 after an acrimonious and protracted divorce.

Before the divorce, they had created four trusts and were both appointed by the Master of the High Court as trustees (with another third party) in these trusts.

Mrs M did not participate in the management of the trusts. It was common cause that she, despite being invited to attend on numerous occasions, did not attend any meeting of the trustees since 16 November 2017 until recently during 2021. Thus, for almost five years she did not attend trustee meetings.

Mr M brought an application in the High Court for her removal as a trustee. She defended the matter and advised that her non-participation was due to her husband's attitude towards her; and because he did not make transport available to her to attend meetings (she had moved away after the divorce) and because he, in any event, did not take account of her participation. Thus she contended that her ex's conduct made it impossible for her to attend to her duties as trustee.

HELD

Legal position

- Section 9(1) of the Trust Property Control Act 57 of 1988 ('the Act') provides that a trustee "shall in the performance of his/her duties and the exercise of his/her powers, act with care, diligence and skill which can reasonably be expected of a person who manages the affairs of other".
- A trust is not an 'ordinary' legal person but a *sui generis* (meaning, unique) institution. The trustee is the owner of the trust property for purposes of administering and administration of the trust, but in his/her capacity as trustee he/she has no beneficial interest in the property of the trust. Trust assets vest in the trustees and must be administered by the trustees.
- It has been said the standard of care to be observed by trustees of a trust is not that which an ordinary man generally observes in the management of his own affairs, but that of the prudent and careful man, the *bonus et diligens paterfamilias*. (In Roman law, the term *bonus paterfamilias* (good family father) refers to a standard of care, analogous to that of the reasonable man in English law.)
- It is not required of a trustee to be totally impartial or to have no connection with the beneficiaries, but rather

that he or she is capable of bringing the necessary independent mind to bear the business of the trust and of deciding what is in the interests of the trust.

Was the absence of Mrs M for almost five (5) years from any trustee meetings sufficient to find that she did not comply with the requisites laid down in section 9 of the Act?

- The question to answer is whether, under the prevailing circumstances and on-going divorce litigation between Mr and Mrs M since 2015 until September 2021, Mrs M's absence at trustee meetings was warranted.
- Mrs M's defence was without substance. She alleged no vehicle was made available to her to attend a trustee meeting – but there is provision in the trust deed for virtual meetings which provision she did not make use of. The allegation that she, being in the minority, was overruled in decisions taken was also no reason for her to fail to attend meetings - there is no clause in the deed of the trust for unanimous decisions.

Removal of a trustee

- Section 20(1) of the Act enables the court to remove a trustee from office on application by the Master of any interested party. The court has to be satisfied that the requested removal will be in the best interest of the trust and the beneficiaries.
- Our courts have held that a mere conflict of interest between trustees and beneficiaries or amongst the trustees was insufficient for the removal of a trustee. The overriding question is always whether or not the conduct of the trustee imperils the trust property or its administration.
- The discretion afforded to a Court in terms of section 20(1) of the Act to remove a trustee is exercised with circumspection. Bad faith or misconduct is not a pre-requirement for a court to order the removal from office of a trustee. Rather, the essential test is whether such disharmony, as in the present matter, imperils the trust estate or its proper administration. In the present matter, the negative impact of the disharmony is evidenced in the following:
 1. Mr M averred that the removal of Mrs M as trustee would be in the best interest of the trust and the beneficiaries for the following reasons:
 2. Mrs M had failed to attend meetings from 2016 to 2021 or to respond to any requests from the trustees;
 3. Mrs M only started attending meetings after the application was served on her;
 4. Mrs M was not involved in the affairs of the trusts for a period of five (5) years and did nothing to safeguard the interests of the trust;
 5. Mrs M failed to deliver any assistance as trustee;
 6. Mrs M resided in a trust owned property but failed to maintain such and paid no rent at all despite receiving the amount of R 10 000,00 per month towards property expenses incurred. One of the trusts also defrayed the full operating costs of the said property, including rates and taxes and water and electricity consumed by Mrs M whilst residing in the property.
- It appeared accordingly that Mr M and the other trustee had shown sufficient cause to have Mrs M removed

from the office of trustee.

CONCLUSION

The application succeeded.