

TRUSTEE OF FAMILY TRUST REMOVED AFTER DODGING RESPONSIBILITY BY GIVING HIS MOM POWER OF ATTORNEY

Brand v Brand and Another (16230/2022) [2024] ZAWCHC 116 (26 April 2024)

If one peruses the weekly lists of judgments handed down in our High Courts, it is striking how many matters deal with rows arising within family trusts. There are likely to be many more that do not reach the courts, whether due to lack of funds or other reasons. This matter highlights a complaint that is often heard in these cases: A 'dominant' trustee neglected his duty to act in the best interests of the trust (in this instance, by leaving the matters in the hands of his mother in a Power of Attorney to that effect), and snubbed the other trustee's requests for access to meetings and records. The court ordered the removal of the trustee and, sensibly, the appointment of two additional qualified and independent trustees. Costs in the matter were loaded onto the shoulders of the errant trustee, to be paid from his personal account.

The judgment below is a valuable reminder that considerable care should go into directing, in the trust's founding document, who is eligible to hold the position as a trustee.

[Judgment](#)

FACTS

JG Brand ('JG') and AT Brand ('AT') are brothers, and both also trustees of a family trust that was created in terms of the will of their father who passed away some 40 years ago. At the time when the testamentary trust was created, AT was a major and thus eligible to be a trustee, and JG was still a minor and not yet authorised. AT and his mother were therefore the original trustees. JG was appointed as a trustee about a year later and replaced his mother in this capacity. Both JG and AT are beneficiaries of the trust, although only AT stands to inherit from their mother's estate, who passed away subsequently.

According to JG, he was never informed of any trustee meetings and essentially, the trust was administered solely by his mother after AT granted her a power of attorney to this effect, shortly after his father's death.

The testamentary trust instrument directed that the trustees must make unanimous decisions. In the case of disagreement, an arbitrator, either chosen by them or appointed by the Master, must resolve any dispute informally. This decision by the arbitrator is final and binding. Disputes that arose over time between JG and AT (and still so exist) were referred to arbitration. AT subsequently reneged on the outcome of an agreed arbitration award and made an attempt to have it overturned by a court.

AT claimed that he attended training at a hotel management school after his father's death and was, therefore, unable to fulfil his duties as a trustee of the trust. He also later realised that his mother had abused her powers under the mandate given to her by him. JG alleged that, in allowing his mother to manage the trust's affairs, substantial damage to the trust's business interests was done. It was acknowledged by both JG and AT that the trust has a recovery claim against their late mother's estate, although AT was not keen to investigate the extent thereof.

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JG advised further that the trust anticipates an action against AT since he had admitted certain wrongdoings in the trust's administration. In these circumstances, JG submitted, AT had abrogated his powers and duties as trustee and was negligent in discharging his responsibilities as trustee. Therefore, in the interests of the trust and its beneficiaries, there was good cause for the dismissal of AT as trustee.

HELD

- Because a trust is not a discrete legal entity, it must act by and through its trustees who are therefore must cooperate to achieve the goals of the trust.
- The role of a trustee in the administration of a trust calls for the exercise of a fiduciary duty owed to all the beneficiaries, irrespective of whether they have vested rights or are contingent beneficiaries.
- A trustee may be removed as a trustee by the Master, after an application made to a Court by any person that has an interest in the trust's property, and the Court being satisfied that removal will be in the interests of the trust and its beneficiaries.
- On a balance of probabilities, the facts in the matter showed that AT, among other things, (a) failed to fulfill his duties by not providing the necessary trust records requested; (b) refused to cooperate with his co-trustee; (c) hindered the recovery of potentially misappropriated funds; and (d), is motivated by a conflict of interest (as he can potentially benefit as an heir to his late mother's estate, against which the trust may have substantial claims).
- Our law allows a Court to remove a trustee if the trustee fails to perform satisfactorily or prejudices the interests of beneficiaries. In addition, under common law, a trustee can be removed if his or her continuation in office would prevent the trust from being adequately administered or would be detrimental to the welfare of the beneficiaries.
- Accordingly, the removal of AT as trustee is appropriate.

CONCLUSION

In addition to the removal of AT as trustee, the Court directed and authorised JG to appoint two suitably qualified professional independent trustees to serve as trustees of the trust jointly with him. Costs of the matter is to be paid by AT in his personal capacity.