TRUSTEES' ACCOUNTING DUTIES ENCOMPASS MORE THAN PROVIDING BANK STATEMENTS TO BENEFICIARY

Snyman v De Kooker NO and Others (400/2023) [2024] ZASCA 119 (2 August 2024)

Snyman was awarded damages by a court after she sustained injuries in a motor vehicle accident. The court awarding the damages required that a trust be set up to manage the funds on her behalf. Soon, unfortunately, it appeared that the trust funds were not applied in Snyman's interest or in accordance with the fiduciary duties of trustees. The latter includes accounting to her as income and capital beneficiary of the trust in a way that adequately explains the reasons for transactions. Providing bank statements and investment records is not enough.

The judgment can be viewed here.

FACTS

The dispute herein was about a trust that was established in terms of a court order to preserve and manage funds awarded to Snyman after a claim against the Road Accident Fund ('RAF') for injuries she had sustained in a road accident. Some R5 million was paid out - to be applied for Snyman's exclusive benefit. Her attorney was ordered to set up an *inter vivos* trust to protect and manage the capital. In addition, the RAF was ordered to pay Snyman's legal costs, including for the establishment and administration of the trust. Notably, the neuropsychologist stated that Snyman was regarded as "definitely capable of managing her own financial affairs on a day-to-day basis, but (she) would need assistance with large amounts."

The attorney created a 'standard' *inter vivos* trust, which accorded her (the attorney) expansive rights as the nominal founder of the trust. The trust deed further granted wide powers to the trustees to manage the capital and pay themselves professional fees.

Shortly after setting up the trust, Snyman expressed her concerns to the trustees regarding several issues relating to the trust's income and expenditure and the management thereof. She was particularly adamant that she required more detailed accounting. There were transactions for which there were no supporting vouchers: consulting fees for R102 462.85; Glacier administration fees for R23 594.31; 'portfolio management' fee for R33 426,66 which was managed by the second respondent in his capacity as a broker; R102 760.44 for financial intermediary fees; an insurance payment of R102 064.89; investment costs of R150 000 to invest the part of the awarded capital, which she considered to be inflated; administration costs of R387 883.21 over a period of two years, during which period, in contrast, only R536 773.38 was paid to her. The trustees had supplied her with bank statements and investment accounts, stating that those constituted adequate accounting.

Consequently, Snyman launched an application in the Gauteng High Court in which she sought an order that: (a) the trustees should account to her; (b) the trust be terminated and replaced with a new trust and new trustees, and matters incidental thereto; (c) alternatively, two additional trustees of her choice be appointed and the trust deed be amended; and (d) she be granted leave to seek relief upon the accounting by the trustees. The application was successful.

The trustees appealed against that order to a full bench, where they were successful. That court reasoned that there was no basis for the termination of the trust, and that the trustees had adequately accounted to Snyman. Snyman appealed to the Supreme Court of Appeal ('SCA').

HELD

- Before considering the merits of the appeal the SCA court observed that both lower courts, ie the High Court and the Full Court, had conflated two concepts, being the termination of a trust and the removal of trustees. Termination of a trust is embedded in section 13 of the Trust Property Control Act 57 of 1988 ('the Act'), while the removal of trustees is governed by the common law and section 20 of the Act. It was evident from their respective judgments that the two lower courts viewed the two provisions as being interrelated and interdependent.

- Despite Snyman's reliance on section 13 for the termination of the trust or for its amendment, the lower courts devoted attention to the removal of trustees in terms of section 20. The lower courts were of an erroneous view that when a court is minded with terminating a trust in terms of section 13, it is enjoined to also consider whether the trustees should be removed in terms of section 20. The reasoning is incorrect as there is no textual or contextual indication on the plain reading of the two provisions to support such a conclusion. The fact that the termination of a trust would result in the loss of office for the trustees does not implicate their removal in terms of section 20. The loss of office by a trustee pursuant to section 13 is a natural consequence of an order terminating a trust. It does not amount to a removal as envisaged in section 20, as suggested by the lower courts.

- The distinction between the two provisions can be explained as follows: Termination of a trust in terms of section 13 is premised on the provisions of the trust deed itself which the founder did not contemplate or foresee. The removal of trustees in terms of section 20, on the other hand, is informed by the conduct of the trustees and their relationship with beneficiaries. In sum, the remedies provided for in sections 13 and 20 must not be conflated. The one has nothing to do with the other, as they are distinct, stand-alone provisions with different requisites and outcomes. They may be asserted in the alternative, but never together.

The two issues for determination on appeal, are the following: (a) the trustees' accounting to Snyman; and (b) the termination/amendment of the trust deed

- Regarding the accounting, the basic premise is that the trustees stand in a fiduciary relationship to the trust and Snyman as capital and income beneficiary. Thus they are obliged to account to her. On the facts of the present matter, the accounting disclosures made by the trustees fell short of the standard set out in our case law as it did not answer the enquiries that Snyman raised. On this ground, the appeal succeeds.

Regarding termination of the trust

- Snyman argued that the trust deed did not advance the purpose of the court order in terms of which it was created.

- In the present matter, the SCA held that the wording of the trust deed was inappropriate to achieve the purpose for which it had been established. When a court orders the establishment of a trust, as in this case, then that court should review the terms of the proposed trust deed and not leave it to the attorney involved to do so without further supervision.

- The sole purpose of the trust set up by Snyman's attorney should have been to protect the capital received from the RAF for the exclusive benefit of Snyman. The trust deed should not have afforded residual authority to the attorney as the nominal founder of the trust.

- Snyman should also have had insight into the decisions of the trustees; they should not have had free reign. In the present matter, the trustees were afforded the power, in their sole discretion, to determine the remuneration payable to themselves, to charge professional fees for their services, and to conclude contracts with the trust for their personal benefit.

CONCLUSION

The SCA accordingly ordered that the trust be terminated and replaced by a new trust deed, the wording of which will be subject to the approval of both the High Court and the Master.

Notably, regarding costs, the SCA considered that the litigation was occasioned by, among other things, the trustees' failure to account adequately to Snyman as they were in law obliged to do. Although the facts in this case may not establish wilfulness or *mala fides* on the part of the trustees, they grossly disregarded their fiduciary responsibilities to account to Snyman. In the circumstances, it would be inappropriate for the trustees to be allowed to pay the costs utilising the funds of the Trust. Consequently, the SCA ordered that the trustees should pay the costs of the appeal *de bonis propriis.*