



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY

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SNYMAN v DE KOOKER NO & OTHERS (400/2023) [2024] ZASCA 119 (2 August 2024).

Today the Supreme Court of Appeal upheld an appeal against the judgment and order of the Full Court of the Gauteng Division of the High Court, Johannesburg (the Full Court). The dispute was about a Trust established in terms of a court order to preserve and manage funds received by the appellant because of injuries she had sustained in a road accident, for her exclusive benefit. The three respondents are the trustees of the Trust. Shortly after the creation of the Trust, the appellant expressed some disquiet to the trustees about several issues relating to its income and expenditure, the management thereof, including the trustees' duty to account to her. Despite negotiations, no amicable solution was found.

Consequently, the appellant launched an application in Gauteng Division of the High Court (the 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 consequential relief upon the accounting by the trustees. The High Court granted the orders as prayed for. The trustees appealed against that order to the Full Court, which upheld the appeal with costs. It reasoned that there was no basis for the termination of the Trust, and that the trustees had adequately accounted to the appellants. With its special leave, the appellant appealed to the Supreme Court of Appeal, seeking to restore the order of the court of the High Court.

Before it considered the merits of the appeal before it, the Supreme Court of Appeal (the Court) observed that both lower courts, ie the High Court and the Full Court, had conflated two concepts, ie the termination of a trust and the removal of trustees. The Court explained that the 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 the appellant'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, and by extensive reference to authorities on removal of trustees, such as *Gowar & Another v Gowar & Others* [2016] ZASCA 101; [2016] 3 All SA 382 (SCA); 2016 (5) SA 225 (SCA), which is the leading authority of the Court on the removal of trustees.

The lower courts were of an erroneous view that when a court is minded 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 Court rejected this reasoning and held that 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 Court further explained the distinction between the two provisions 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 Court further noted that the conflation might have arisen in the heads of argument of one of the parties, or during oral submissions. The Court repeated the caution it sounded in *De Wet and Another v Khammissa and Others* [2021] ZASCA 70 (SCA); 2021 JDR 1070 (SCA), that a court should not decide a matter based on a wrong basis simply because the parties had relied on it. It remains the task of a court to identify the true issue for determination, which task should never be left solely to the parties or their legal representatives.

The Court then turned to the two issues for determination on appeal, namely: (a) the trustees' accounting to the appellant; and (b) the termination/amendment of the trust deed. With regard to the accounting, the Court considered the common law jurisprudential basis for accounting by the trustees to beneficiaries, with reference to authorities such as *Mia v Cachalia* 1934 AD 102; *Doyle v Board of Executors* 1999 (2) SA 805 (C); *Doyle and Another v Fleet Motors PE (Pty) Ltd* 1971 (3) SA 760 (A). It determined that the trustees stood in a fiduciary relationship with the appellant as both the capital and income beneficiary. Thus, they were obliged to account to her. After considering the facts of the case, the Court concluded that the accounting made by the trustees fell short of the standard set out in the above authorities. It thus held that the appeal on this ground should succeed.

About the termination of the Trust, the Court considered the appellant's assertion that the trust deed establishing the Trust did not advance the purpose of the court order in terms of which it was created. To consider this submission, the Court embarked on an extensive examination of the provisions of the trust deed within the prism of section 13, under three rubrics: (a) the subject matter of the Trust; (b) the role of the court-appointed founder in the trust deed; and (c) the trustees' powers.

The Court found several problematic provisions in the trust deed, which, it concluded, could not have been contemplated or foreseen by the court when it ordered the creation of the Trust. This met the anchor jurisdictional factor in section 13, which requires that the trust instrument must contain any provision which brings about consequences which the founder of a trust did not contemplate or foresee. Furthermore, such a provision must have the effect that it: (a) hampers the achievement of the objects of the founder; or (b) prejudices the interests of beneficiaries; or (c) is in conflict with the public interest. As to these requisites the Court identified several provisions in the trust deed which, it held, met the requisites of section 13(a) – (c). The upshot was therefore that the combined jurisdictional factors of section 13 had been established. The appeal on this issue, too, had to succeed.

Turning to the remedy, the Court considered the alternative forms of relief provided for in section 13. It concluded that given the multiplicity of the offending provisions, their materiality and impact, the appropriate remedy is to terminate the trust as soon as possible and create a new one.

Finally, as regards costs, the Court considered that the litigation was occasioned by, among other things, the trustees' failure to account adequately to the appellant as they were in law obliged to do. The appellant was constrained to approach the court to enforce her right. While

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 the appellant. 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 Court concluded that the trustees should pay the costs of the appeal *de bonis propriis*.

Accordingly, the Court upheld the appeal with costs *de bonis propriis* to be paid by the trustees. It set aside the order of the Full Court and replaced it with an order dismissing the appeal and restoring the order of the High Court, but amended it extensively to make provision for, among other things: (a) the accounting by the trustees to the appellant, (b) the debatement of such accounting, if necessary; (c) the approval of a draft trust deed for a new Trust by a Judge in Chambers and by the Master of the High Court; (d) the termination of the Trust and the creation of a new one; and the transfer of the Trust assets from the trustees to the new trustees.

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