Copy

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No.: **22526/11**

In the matter between:

ADV LEON LUKE ZAZERAJ NO (in his capacity as curator ad litem for **JOHAN PAUL JORDAAN "die PASIËNT")**	Applicant
and	
JOHANNES HENDRIK JORDAAN	First Respondent
ANDRE DU PLESSIS	Second Respondent
W A BOONZAAIER	Third Respondent
PROFESSOR KOBUS VAN SCHALKWYK	Fourth Respondent

JUDGMENT: 22 MARCH 2012

MEER J.

[1] The applicant in his capacity as curator *ad litem* to Johan Paul Jordaan ("the Patient") brought an application on an urgent basis to protect the Patient's interests in various trusts. The respondents are cited in their capacity as trustees of the trusts. The first respondent, who is the Patient's father, is also sighted in his personal capacity.

[2] The initial relief sought was an interim order forbidding the trustees of the Johannes Jordaan Trust and the Groothoek Trust from making any payments to the first respondent and directing the trustees to furnish complete reports and accounts for these two trusts as well as in respect of the Johannes Jordaan Beleggings Trust, The Jomar Trust and Joposama Trust pending the finalisation of final relief to be sought for:

- a declaration that the agreement of 1 June 2000 between the first and second respondents to amend the Johannes Jordaan Trust was invalid;
- a declaration that the agreement of 1 June 2001 between the first and second respondents to amend the Groothoek Trust was invalid;
- the removal of the first and second respondents from their respective trusteeships of the Johannes Jordaan Trust, the Groothoek Trust, the Johannes Jordaan Beleggings Trust, the Jomar Trust and the Joposama Trust;
- an order preventing the trustees of the Johannes Jordaan Trust and the Groothoek Trust from revoking the trust by agreement with the founder without the written permission of the Patient.

The ultimate relief sought was however for a final order in respect of the above. It was argued that the applicant was entitled to a final order in view of the admissions by the first respondent in his answering affidavit as well as his failure to respond to certain allegations.

[3] The respondents have agreed that pending the finalisation of the application as a whole no payments will be made to the first respondent. The respondents nonetheless oppose the application and raise the defence of *res judicata*. They argue that this Court has already made a final ruling relating to the issues in dispute in the determination of divorce proceedings between the first respondent and the Patient's mother in March 2000, in the matter of *Jordaan vs Jordaan* 2001 (3) SA 288 (C). There the Court found *inter alia* that it was just and equitable to take into account the assets of the trusts when determining whether a redistribution order should be made in terms of Section 7 (3) of the Divorce Act 70 of 1979.

Background facts

[4] The applicant was appointed as curator *ad litem* to assist the Patient in legal proceedings to protect his interests in the trusts. The Patient, born on 29 July 1981, is blind, handicapped and in need of full time care. The first respondent is his father. The deponent to the founding affidavit, the Patient's mother, Mrs SJ Jordaan, was married to the first respondent from 1976 until 2000 when a decree of divorce was granted together with an order for the redistribution of assets in terms of Section 7 (3) of the Divorce Act No 70 of 1979.

[5] During the course of their marriage the first respondent created certain trusts for the purposes of estate and tax planning. The intention was that the trusts would be for the benefit of the children. Initially Mrs Jordaan and first respondent were trustees. In 1986 the Johannes Jordaan Trust ("the JJ Trust") was founded and in 1990 the Groothoek Trust ("the GH Trust") followed.

[6] The trust deeds of both trusts are virtually identical. They describe the beneficiaries as the children of Mrs Jordaan and the first respondent, their lawful offspring as well as Mrs Jordaan herself or any later lawful spouse of the first respondent. The GH Trust also provides for intestate heirs of the first respondent to be beneficiaries. The deeds authorise the trustees to enter into transactions which are necessary for the maintenance and growth of trust assets in the interests of the beneficiaries. They also authorise them(at clause 12.5) "from time to time and until the vesting date" to pay the net income of the trust funds to beneficiaries and to credit to loan accounts the net income to which beneficiaries have vested rights.

[7] Clause 18.1 provides *inter alia* for the trustees to divide amongst the beneficiaries on the vesting date, such trust funds as have not already been transferred, such division to occur at the first respondent's discretion or equally between beneficiaries. Clause 21 specifically prohibits any part of the capital or income of the trust funds from being paid or used directly or indirectly for the

benefit of the founder. Clause 7 provides for the trustees to prepare trust accounts on 28 February each year, to be provided to the beneficiaries on request.

[8] Mrs Jordaan and the first respondent were the original trustees of the two trusts. According to Mrs Jordaan the first respondent ignored her as a trustee and took unilateral decisions on behalf of the trusts. The major asset of the JJ Trust was a beach house in Onrust. When the marriage relationship between first respondent and Mrs Jordaan came to an end, the first respondent formally removed Mrs Jordaan as trustee of both trusts. The first respondent also established and made use of three other trusts, namely the Johannes Jordaan Beleggings Trust, the Jomar Trust and the Joposama Trust.

[9] It is common cause that before and after his divorce the first respondent dealt with the trust assets as if they belonged to him. For years he incurred substantial expenses on behalf of the JJ Trust in relation to a publishing and brokerage business which brought in no income. As a trustee of this trust the first respondent lent an amount of R3 263 715.00 to a company of which he was chief shareholder and managing director. He then authorised the writing off of the entire loan as irrevocable, only to authorise a further loan of R7 000.00 the following year to the insolvent company.

[10] As trustee of the GH Trust the first respondent received payments on behalf of the Patient and his daughter Martine, and credited these as loans against the GH Trust. In 1999 the loans amounted to R109 000.00, which increased yearly with interest at a rate of 17% per annum. The first respondent has not provided any accounts or financial reports pertaining to such loans. It is common cause that the first respondent has already received a substantial portion of the capital amounts of the JJ and GH Trusts and that he has applied for all the existing capital to be transferred or lent to him.

[11] It is also common cause that the first respondent employed the assets in the Johannes Jordaan Beleggings Trust to pay his personal debts pertaining to the divorce settlement with Mrs Jordaan. He also used trust monies to pay for his personal maintenance obligations. The first respondent was not a beneficiary of that trust and his liquidation of the trust funds made it impossible for the trust to repay loans owing to the Patient and Martine Jordaan.

[12] Divorce proceedings between the first respondent and Mrs Jordaan culminated in a decree of divorce in 2000. The Court as aforementioned took the assets of the trusts into account in making a redistribution order in terms of Section 7 (3) of the Divorce Act No 70 of 1979 ("the Act"). In the judgment of *Jordaan v Jordaan* supra, Traverso DJP said that although the defendant's (first respondent in the instant case) powers were subject to the provisions of the

various trust deeds and the law, sight could not be lost of the fact that he had in the past used the trusts for financial gain in his personal capacity and would undoubtedly do so again in the future. She accordingly found that it would be just and equitable in terms of Section 7 (5) of the Act for the Court to take the assets of the trusts into account in ordering a redistribution. (See paragraphs 25 & 26 at 299 G – 300 C / D).

[13] In arriving at this decision Traverso DJP noted that the manner in which the trusts had been administered in the past was a relevant factor. She said that it appeared from the financial statements and the uncontested evidence that a vast amount of money had flowed between the various trusts without any formal decisions to that effect. It had been done at the initiative and on the instructions of the defendant (first respondent in this case). Loans had been made to the defendant by the trustees without any formal decisions by the trustees. The defendant's own evidence had shown that the trusts were actually his *alter ego,* were regarded by him as such and a means whereby he could gain a financial advantage for himself. See paragraphs 29 and 33 at 300 E / F – G and 301 B / C – C. The Court found that it was not necessary to pierce the corporate veil. See para [34] at pg 301 D.

[14] It is common cause that after the divorce order the first respondent continued using the assets of the trust in the afore described manner. In

February 2010 Mrs Jordaan learned that the first respondent planned to sell the beach house held in the JJ Trust, so as to increase his cash flow. She further discovered that the first respondent by agreement with a fellow trustee had changed the trust deed of the JJ Trust in 2000 so that he himself was made beneficiary. The Master was however only notified of the change in October 2008. Thereafter on 1 June 2001 the first respondent and his fellow trustee arranged to change the GH Trust to provide for the first respondent as a beneficiary. This, as was pointed out by Mrs Jordaan, is contrary to the deeds of both trusts

[15] On 20 October 2011 the third respondent trustee gave notice that the first respondent had applied for the capital in the JJ Trust and the GH Trust to be transferred or loaned to him. These circumstances gave rise to the present application.

[16] In August 2010 the applicant had requested full reports and accounts of the trusts. The first respondent has indicated that he would only provide the information sought in respect of the JJ Trust and GH Trust from 2004 and against payment for such information. The applicant has tendered to pay but the reports continue to be outstanding. The respondents have also been requested to provide the IT numbers for the Jomar and Joposama Trusts, but these too have not been provided.

The Respondents' defence of *Res Judicata*

[17] The respondents contend that the defence of *res judicata* prevents the applicant from succeeding in this application. It is argued that the application concerns the same issue between the same parties, in respect of which a final judgment has already been granted in the divorce proceedings of Jordaan *supra.*

[18] The issue before the court in the divorce proceedings 12 years ago concerned the dissolution of the marriage between the first respondent and Mrs Jordaan, and in particular the custody of the minor children, their maintenance, that of Mrs Jordaan and the division of the matrimonial property. The judgment in *Jordaan v Jordaan* reveals that in determining these issues the Court made orders concerning the custody of the minor children, their maintenance, certain monetary payments to Mrs Jordan, the division of movable and immovable property and granted a redistribution order for which the trusts' assets were taken into account.

[19] The respondents' defence of *res judicata,* as I understand it, is based on the argument that the Court in the divorce proceedings made a final finding that the trusts were part of the first respondent's assets. This is simply not so. A reading of the judgment in Jordaan *supra* makes clear that the Court did not make a finding that the trust assets were the personal assets of the first

respondent. In noting that he had used the trust assets for financial gain and regarded the trusts as his alter ego, it cannot be said that the Court made such a finding. The Court in fact expressly found that it was not necessary to pierce the corporate veil. Nor did the Court's finding sanction the manner in which the first respondent dealt with the trust assets, as alluded to on behalf of the respondents.

[20] The issue in the current application is not the same issue that was decided in the divorce proceedings. In this application the applicant seeks relief to protect the Patient's interests in the trust assets, in essence to prevent the further dissipation thereof by the first respondent. To that end the relief sought seeks the prevention of further payments to the first respondent, a proper accounting of trust assets and declarations of invalidity of amendments to the trust deeds and sanctions against the trustees.

[21] The respondents' submission that the current application is in effect an application for maintenance by the Patient and that an order in respect thereof was already granted in the divorce court, cannot be sustained. It is in any event noted that the Patient's claim for maintenance was against the first respondent only, in his personal capacity, whilst the Patient's claim in this application is as a beneficiary against the trustees. The Court in the divorce proceedings moreover did not take the trust assets into consideration for the determination of

maintenance for the Patient. It took such assets into account for the purposes of the redistribution between the parties to the divorce proceedings. Neither the issues between the parties, nor the parties themselves were the same in the two matters. The parties in the divorce proceedings were the first respondent and Mrs Jordaan, unlike the parties to this application, namely the applicant on behalf of the Patient and the trustees of the various trusts. This being so, the defence of *res judicata* cannot succeed.

[22] With regard to the amendment of trust deeds, it is established law that beneficiaries of discretionary trusts who have received conditional benefits, as have the Patient and his sister, have vested rights and the trust deeds cannot be changed without their consent. See *Potgieter v Potgieter* 2012 (1) SA 637 SCA para 28. Clause 28 of the trust deeds of both the JJ and the GH Trusts specifically prevents this. Accordingly the amendments which occurred without the permission of the beneficiaries stand to be declared invalid.

[23] It is also so that it is inherent in the fiduciary duties of trustees to provide full reports and accounting to beneficiaries, including beneficiaries of discretionary trusts and to explain their dealings in relation to any shortcomings. See *Doyle v Board of Executors* 1999 (2) SA 805 CPD; *Mia v Cachalia* 1934 (SA) 102 (A).

[24] I am inclined to agree with applicant that in view of the admissions by the first respondent in the answering affidavit and the common cause facts, the applicant is entitled to the final relief as set out at paragraphs 5, 6, 7, and 8 of their Notice of Motion. With regards to the removal of the first respondent as trustee, it is trite that a trustee must behave with the care and trust inherent in the office. The handling of the trust assets by first respondent on his own admission displays the contrary. See *Tijmstra v Blunt – McKenzie and Others* 2002 (1) SA 459 TPD. I am of the view that the first respondent's conduct warrants his removal as a trustee.

Costs

[25] The applicant seeks costs against the first and second respondents in their personal capacity jointly and severally on a scale as between attorney and client, alternatively, against all the trusts jointly and severally on an attorney and client scale. I am of the view that the conduct, in particular of the first respondent, in seeking to oppose this matter, given his admissions about his use of the trust assets for personal gain, the common cause facts, his failure in his legal duty as trustee to account properly, as well as his persistence in a clearly untenable defence of res judicata, was vexatious and warrants the censure of such a punitive costs order. As the second respondent is no longer a trustee a costs order against him would be inappropriate. It would not in my view be in the

interests of the beneficiaries, nor just and equitable, to grant a cost order against the trusts jointly and severally as sought in the alternative.

[26] I note that the application had to be postponed on 1 March 2012. As this appears to have been for reasons of court administration and no party was to blame, I make no cost order in respect thereof.

[27] I accordingly grant the following order:

1. The current and previous trustees of the Johannes Jordaan Trust, the Groothoek Trust, the Johannes Jordaan Beleggings Trust, the Jomar Trust and the Joposoma Trust are ordered to provide full reports and accounts supported by the following documents:
   1.1 the financial statements from 1 February 1998 until the date of this order;
   1.2 the bank statements from 1 February 1998 until the date of this order;
   1.3 written resolutions and decisions taken from 1 February 1998 until date of this order;
   1.4 the lodged tax returns as well as concomitant statements from February 1998 until date of this order;

1.5 all source documents and agreements regarding distributions, loans, investments and realizations of capital and income from 1 February 1998 to the date of this order;

1.6 all source documents regarding expenses incurred in connection with the publishing and broking business conducted by the Johannes Jordaan Trust.

2. It is declared that the agreement of 1 June 2000 between the first and second respondent amending the Johannes Jordaan Trust is invalid;

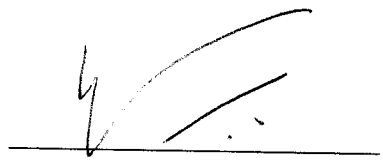
3. It is declared that the agreement of 1 June 2001 between the first and second respondent amending the Groothoek Trust is invalid;

4. The first respondent is removed from all duties as trustee of the Johannes Jordaan Trust, the Groothoek Trust, the Johannes Jordaan Beleggings Trust, the Jomar Trust and the Joposoma Trust;

5. The trustees of the Johannes Jordaan Trust and the Groothoek Trust are prohibited from revoking the trusts by agreement with the founder without the written permission of the Patient.

6. The first respondent shall furnish the IT numbers of all trusts.

7. The first respondent shall bear the costs of this application on a scale as between attorney and client. The first respondent shall also bear the costs of the application for the appointment of the curator *ad litem*, the costs of the curator *ad litem*, and the medical reports that were necessary for such application.



Y.S. MEER J.