



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of interest to other Judges:	NO
Circulate to Magistrates:	NO

Case no: **4720/2023**

In the matter between:

TRISTIAN HARTMANN	1 st Applicant
JEAN -GABRIEL HARTMANN	2 nd Applicant
MARK KEISER HARTMANN	3 rd Applicant
and	
INGE JOANNE HACKER N.O.	1 st Respondent
TIMOTHY JAMES HACKER N.O.	2 nd Respondent
WENDY FIONA HAY N.O.	3 rd Respondent
THE MASTER OF THE HIGH COURT BLOEMFONTEIN	4 th Respondent

Coram: DAFFUE J

Heard: 11 OCTOBER 2024

Delivered: 25 NOVEMBER 2024

This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 15H00 on 25 NOVEMBER 2024.

ORDER

1. Leave is granted to the applicants to appeal to the Supreme Court of Appeal.
 2. The costs of the application for leave to appeal shall be costs in the appeal.
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JUDGMENT

Daffue J

[1] On 30 July 2024 an acting judge dismissed the applicants' application with costs. The applicants filed an application for leave to appeal which was allocated to me in accordance with the provisions of s 17(2)(a) of the Superior Courts Act 10 of 2013 (the Act), the reason being that the acting judge's acting stint had come to an end.

[2] A family feud about the administration of the Hartmann Family Trust led to the litigation in the High Court. An application was brought by two brothers and their father against the trustees of the trust. The founders of the trust were the late Mr and Mrs Hartmann, respectively the grandparents and parents of the applicants. In terms of clause 12.1 of the trust deed the trust capital was to be finally distributed to the capital beneficiaries six months after the death of the surviving founder unless the trustees determine a later date. Mrs Hartmann happened to be surviving founder. She died on 22 July 2021. The principal issue to be decided was the date of the 'distribution event'. The applicants are of the view that the 'distribution event' occurred on 22 January 2022 as contemplated in clause 12.1 of the trust deed. Consequently, they sought a declaratory order and a further order directing the trustees to pay the trust's income and capital in accordance with clause 12.3 of the trust deed.

[3] *In case* the narrow question that had to be decided in the application was whether the trustees of the Hartmann Family Trust could lawfully ratify an earlier decision taken to postpone the 'distribution event' after the date of the 'distribution event' had passed. It is apparent from the papers that on 23 July 2021, *ie* more than six months after the surviving founder's passing, the third respondent purported to vary

the distribution date to 29 February 2024. However, accepting that this decision by the third respondent was invalid, the trustees apparently purported to ratify that decision on 31 October 2022. Therefore, on the applicants' version the 'distribution event' occurred on 22 January 2022, but on the respondents' version the 'distribution event' had been scheduled to take place on 29 February 2024 which last mentioned date had come and gone. The application was heard on 22 February 2024, a week before the aforesaid scheduled distribution date, although judgment was delivered on 30 July 2024 only.

[4] The grounds of appeal are the following:

- a. the court erred in finding that the applicants lacked *locus standi*.
- b. the court erred in failing to decide the issues presented by prayers 1 and 2 of the notice of motion, being to declare that the 'distribution event' occurred on 22 January 2022 and that the respondents be directed to forthwith pay the trust's income and capital in accordance with clause 12.3 of the trust deed.

[5] I am acutely aware that I am not sitting as a court of appeal on the judgment and that I should place myself in the position of the acting judge who adjudicated the application. Having considered the judgment and the issues involved I am satisfied that the appeal would have a reasonable prospect of success.

[6] Where an act has to be done within a fixed time, performance of that act by an unauthorised agent cannot be ratified by the principal after the lapse of such fixed time to the prejudice of another who has acquired some right or advantage from non-performance within the fixed time.¹ A court of appeal may well apply this principle *in casu*.

[7] The court of appeal may also find that the first and second applicants have *locus standi* as they are income beneficiaries of the Hartmann Family Trust. Reliance may be placed on *Potgieter v Potgieter NO and Others*.² I am also satisfied that there is a reasonable possibility that another court may find that the first and second applicants also have *locus standi* as contingent capital beneficiaries. Even on the

¹ *Fibro Furnishers (Pty) Ltd v Peimer* 1935 CPD 378 at 380, a decision by the full bench, cited with approval on this point in *Smith v Kwanonqubela Town Council* 1999 (4) SA 947 (SCA) para 12.

² 2012 (1) SA 637 (SCA).

respondents' own version, they must have been regarded as contingent capital beneficiaries as payments from the trust capital were made to them in the past. In any event, if the first and second applicants lacked *locus standi*, then the third applicant as capital beneficiary had *locus standi*. It is reasonably possible that another court may find that although the third applicant did not depose to a confirmatory affidavit in support of the founding affidavit, that was irrelevant. The facts were fully presented and showed that the third applicant would be a capital beneficiary. Another court may well find that the applicants did not try to make out a new case in the replying affidavit.

[8] I conclude that another court may well find that the court erred in failing to consider and make a declaratory order pertaining to the distribution event, *ie* that it occurred on 22 January 2022 as alleged by the applicants.

[9] During the application for leave to appeal it was strenuously argued on behalf of the respondents, relying on s 16(2)(a)(i) of the Act, that leave to appeal should be dismissed as it would have no practical effect or result. It was submitted that our courts are called upon to settle concrete controversies and as the issue between the parties are not 'live' anymore, no court of appeal should deal with an appeal *in casu*. Such court shall not concern itself with a matter that may be of importance in a hypothetical future case only.

[10] Although I considered the argument about mootness seriously, I have not been convinced that this is such a case. The administration of the trust continued after 22 January 2022 for another two years. If the extension of the 'distribution event' is to be declared unlawful by the court of appeal, it will have serious repercussions on the dealings of the trustees during this extra two-year period. The consequences of the administration of the trust may well have a huge impact on not only the income, but also and in particular the capital beneficiaries. Respondents' counsel submitted that payments had been effected after 29 February 2024 whilst judgment was awaited and that nothing prevented the applicants to institute action if they would be in disagreement. Applicants' counsel denied in reply that final payments had been effected. No final distribution account was placed before the court and except for contradictory submissions from the bar, no evidence was presented.

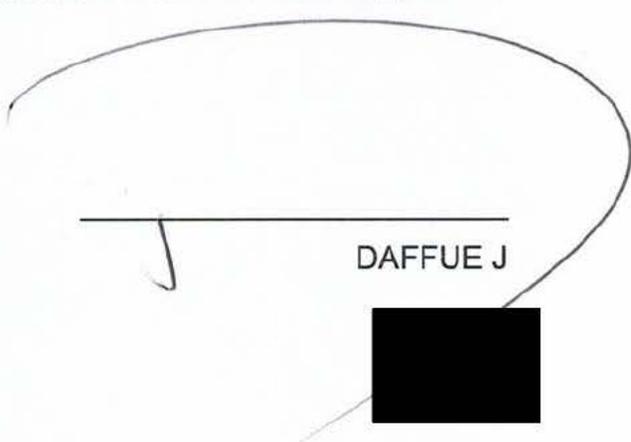
[11] I am satisfied that the substantive issues raised and identified by the applicants warrant the attention of the Supreme Court of Appeal and therefore, leave to appeal should be granted to that court.

Order

[12] Consequently, the following order is made:

1. Leave is granted to the applicants to appeal to the Supreme Court of Appeal.
2. The costs of the application for leave to appeal shall be costs in the appeal.

DAFFUE J



Appearances

For Applicants: Adv D Watson
Instructed by: Hendre Conradie Inc
BLOEMFONTEIN.

For 1st to 3rd Respondents: Adv A White
Instructed by: Honey Attorneys
BLOEMFONTEIN.