

SOUTH AFRICA / JUDGMENT

De Wit and Others v De Wit and Others (8370/23) [2024] ZAWCHC 101 (10 April 2024) [2024] ZAWCHC 101

COURT

Western Cape High Court, Cape Town

BEFORE

Joubert AJ

CASE / FILE NUMBER

8370/23

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

CASE

NO: 8370/23

In

the application between:

LENETTE

JANSE DE

WIT

First Applicant

LENETTE

JANSE DE WIT

N.O.

Second Applicant

[Cited

in her capacity as trustee for the time being

of

the Elbert De Wit Familie Trust (IT813/94)]

MARYKE

SMIT

Third Applicant

and

TOERIEN

DE WIT

N.O.

First Respondent

PHILLIP
RALL
N.O.
Second Respondent
[The
Second Applicant and the First and Second
Respondents
are cited in their capacities as trustees
for
the time being of the Elbert De Wit Familie Trust
(IT813/94)]
TOERIEN
DE
WIT
Third Respondent
PHILLIP
RALL
Fourth Respondent
KARMIEN
KRUTH
Fifth Respondent
ELBERT
DE WIT
JR
Sixth Respondent
THE
MASTER OF THE HIGH COURT, CAPE TOWN
Seventh Respondent
Date
of hearing: 21 February 2024
Date
of judgment: 10 April 2024

JUDGMENT

ELECTRONICALLY DELIVERED ON 10 APRIL 2024

JOUBERT AJ:

INTRODUCTION

1. Mr Elbert De Wit (“Elbert Snr”) passed away on 26 February 2019. He had established the Elbert De Wit Farmilie Trust (IT813/94) (“the Trust”) during February 1995.
2. The first applicant (“Lenette”) is the surviving spouse of Elbert Snr and is one of the trustees, and a beneficiary, of the Trust. She is cited as the second applicant in her capacity as a trustee.

3. The third applicant (“Maryke”) is a daughter of Elbert Snr and a beneficiary of the Trust.
4. The third, fifth and sixth respondents (“Toerien”, “Karmien” and “Elbert Jr” respectively) are also the children of Elbert Snr and Lenette and they are also beneficiaries of the Trust. Karmien makes common cause with the applicants.
5. Toerien is also a trustee of the trust and is cited in that capacity as first respondent. The second respondent (“Rall”) is the third trustee. He is an attorney and long-time advisor of Elbert Snr.
6. The matter essentially involves a dispute between one of three trustees, being Lenette, supported by two of her children who are beneficiaries of the Trust, being Maryke and Karmien, on the one side, and the two other trustees, one of which is her son Toerien, supported by her other son Elbert Jr, on the other.
7. The applicants (Lenette and Maryke) seek the following relief:
 - “1. That the Elbert De Wit Familie Trust (IT813/94) be terminated as contemplated in section 13 of the Trust Property Control Act, 57 of 1988 (“the Act”).
 2. That Mr Herman Bester be appointed as a Receiver for the purposes of holding, dealing with, and giving effect to the distribution of the property of the Trust to the beneficiaries of the Trust;
 3. That Mr Bester’s duties are those set out in Annexure “A” to the Notice of Motion and that he be authorised and empowered to do all things necessary to give effect to those duties.
 4. In the alternative to paragraphs 1 to 3 above, –
 - 4.2 that the first and second respondents be removed as trustees of the Trust in terms of section 20(1) of the Act;
 - 4.3 that pursuant to paragraph 4 above, the second applicant, as the remaining trustee of the Trust, be authorised to appoint additional trustees to the Trust as contemplated in clause 4.1.3 of the Trust Deed, annexed to the founding affidavit as ‘FA2’.
 5. That the costs of this application, if unopposed, be paid from the Trust assets on an attorney and client scale, including the costs occasioned by the engagement of two counsel.
 6. That any respondent/s opposing the relief sought be ordered, jointly and severally, to pay the applicants’ costs of this application, including the costs occasioned by the engagement of two counsel.
 7. That further and/or alternative relief be granted to the applicants.”

LEGAL FRAMEWORK

8. Section 13 of the Act provides as follows:

“Power of Court to vary trust provisions

13. If a trust contains any provision which brings about consequences which in the opinion of the Court the founder of a trust did not

contemplate or foresee and which –

- (a) hampers the achievement of the objects of the founder; or
- (b) prejudices the interests of the beneficiaries; or
- (c) is in conflict with the public interest,

the Court may, on application of the trustee or any person who in the opinion of the Court has a sufficient interest in the trust property, delete or vary any such provision or make in respect thereof any order which such court deems just, including an order whereby a particular trust property is substituted for particular other property, or an order terminating the trust.”

9. The applicants presented and argued their case on the basis that the unforeseen consequences brought about by certain provisions of the Trust Deed (namely, according to them, a complete breakdown in the relationships between the family members, brought about by clauses 1.8 and 7.3) are hampering the achievement of the fundamental aims and purposes of the founder, and are prejudicing the interests of the beneficiaries. Whether or not this approach is correct requires some consideration with reference to the leading decided cases on the subject.

10. In *Gowar v Gowar* 2016 (5) SA 225 (SCA), the test for intervention in terms of section 13 of the Act was articulated by the Supreme Court of Appeal as follows:[1]

“Accordingly, as I see it, for the purposes of section 13 of the Act the appellants had to establish on a balance of probabilities that any provision of the Trust Deed has brought about any one of the consequences mentioned in section 13(a), (b) and (c) of the Act and that the founder of the Trust did not, at the time the Trust was established, contemplate or foresee such a result.”

11. In terms of this formulation, the first enquiry is whether or not the identified provisions of the Trust Deed have brought about any of the consequences mentioned in section 13(a), (b) and (c) and, if so, the next question is whether this was foreseen by the founder. On the face of it, this differs slightly from the approach adopted by the applicants.

12. In *Harvey NO v Crawford* 2019 (2) SA 153 (SCA) the Supreme Court of Appeal explained section 13 as follows:[2]

“For a court to intervene, two requirements need to be met. First the offending provision must bring about consequences which in the opinion of the court the founder did not contemplate or foresee. Second, the provision must either hamper the achievement of the object of the founder or prejudice the interests of the beneficiaries or be in conflict with the public interest.”

13. This formulation differs slightly from the Gowar formulation in that the first question is whether the offending provision brought about unforeseen consequences (the first jurisdictional requirement) and only if that is found to be the case, does the second question arise, namely whether the provision hampers the achievement of the objects of the founder, prejudices the interests of the beneficiaries or conflicts with the public interest (the second jurisdictional requirement).
14. The following explanation of the Gowar formulation was provided by Van Zyl J for a Full Court in the case of *Nair NO v Nair NO* 2019 JDR 0803 KZD:[3]

“In the first instance the trust instrument must contain a provision which brings about consequences which the founder of the Trust had failed to contemplate or to foresee. Secondly and in addition such provision must also hamper the achievement of the objects of the founder, or prejudice the interests of the beneficiaries, or conflict with the public interest.”

15. The *Nair NO* formulation accords with the Harvey formulation by placing the two jurisdictional requirements in the order as they appear in section 13. However, these formulations

relate the two requirements only to the provision and do not make it clear that there must be a link between the unforeseen consequence

and the second jurisdictional requirement.

16. The lack of contemplation or foresight of consequences is clearly the animating factor that allows intervention by a court in terms of section 13. Self-evidently, unless unforeseen consequences resulting from the offending provisions can be shown, the founder must be taken to have intended the outcome.
17. I am accordingly of the view that, on a proper interpretation of section 13 and the formulations of the test referred to above, the second jurisdictional requirement, more fully stated, is that the offending provision and the unforeseen consequence thereof must be the cause for the hampering of the achievement of the objects of the founder, the prejudice to the interests of the beneficiaries, or the conflict of the public interest. In reality this is no different to the basis upon which the applicants presented their case.
18. Two further aspects of section 13 of the Act must be noted, namely:
 - 18.1 An applicant seeking a court’s intervention in terms of section 13 must clearly identify the offending provision that brought about the consequences complained of;[4]
 - 18.2 The enquiry as to whether the consequences were foreseen by the founder or not entails a subjective enquiry whereas the enquiry into whether the achievement of the objects were hampered, the interests of the beneficiaries were prejudiced, or there is a conflict with the public interest, entails an objective enquiry.[5]
19. Section 20(1) of the Act provides as follows:

“20. Removal of trustee

- (1) A trustee may, on the application of the Master or any person having an interest in the trust property, at any time be removed from his office by the Court if the Court is satisfied that such removal will be in the interests of the Trust and its beneficiaries.”
20. This remedy is to be exercised with circumspection and the overriding question is whether or not the conduct of the trustee imperils the trust property or its proper administration. Mere friction or enmity between trustees and beneficiaries or conflict between trustees does not in and of itself provide sufficient reason for removing trustees.[6]

RELEVANT PROVISIONS OF THE TRUST DEED

21. In terms of clauses 1.5.1 and 1.5.2 of the Trust Deed, the income beneficiaries of the Trust are Lenette, Maryke, Toerien, Karmien and Elbert Jr respectively as well as those persons nominated by Elbert Snr in his will or any descendant of any income beneficiaries, per stirpes or as nominated by the income beneficiary in his or her will.
22. Clauses 1.6.1 to 1.6.3 provide that the capital beneficiaries of the Trust are the descendants or legatees nominated by Elbert Snr in his will as capital beneficiaries and contain further provisions applicable in the case of descendants or legatees dying before Elbert Snr, which are not relevant to this case. All of the aforementioned income beneficiaries were nominated as capital beneficiaries in Elbert Snr’s will.
23. Clause 1.8 is one of two provisions identified by the applicants for the relief they seek in terms of section 13 of the Act, and I accordingly quote the clause in full:

“1.8 Vesting Date The date which the Trustee may determine as vesting date, which shall indicate the time at which beneficiaries shall acquire vested rights with respect to the net trust assets.”

24. The objectives of the Trust, which are also very relevant to the matter, are set out as follows in clause 3:

“3. OBJECTIVES

3.1 The expansion of the Trust benefits[7] (assets) and the creation of sources of income for the Beneficiaries;

3.2 To pay such funds from the income of the Trust to the various Beneficiaries as may be reasonable and desirable in the opinion of

the Trustees and in accordance with the guidelines set out in clauses 6 and 7 below.”

25. Clause 4 deals with the powers of the trustees and clause 4.10 provides that in the event of any dispute between the trustees at any time, the decision of the majority shall prevail.

26. Clause 7 deals with the distribution of capital which, in terms of clause 7.1, is in the sole discretion of the trustees acting in accordance with certain further provisions when making such allocations.
27. Clause 7.3 is the other provision specifically identified by the applicants for the relief they seek. It provides as follows:

“7.3 The Trustees shall be entitled, in their sole discretion, to continue the Trust indefinitely, but upon termination thereof, subject to the constraints imposed herein, shall allocate the capital to the Beneficiaries in accordance with the provisions of clause 1.6 hereof. However, notwithstanding the provisions of clause 7.1, the trustees shall not be entitled to allocate capital to any Beneficiary unless he has reached the age of 25.”

28. The applicants’ case as stated in the founding affidavit by Lenette is that clauses 1.8 and 7.3 read together “...effectively provide the trustees with the power to continue operating the Trust indefinitely”.
29. It is not disputed by the respondents that the aforementioned two provisions, as well as others, create a discretionary trust which

confers on the trustees the wide discretionary powers that lie at the heart of the applicants’ complaint.

BACKGROUND

FACTS

30. In his lifetime, Elbert Snr established various businesses, with great success, and the Trust assets are valued at approximately

R120 000 000.

31. The businesses and the Trust together have become known as “the De Wit Group”. At the head of the De Wit Group is the Trust. It owns 100% of the shares in the De Wit Group (Pty) Ltd (“DWG (Pty) Ltd – not to be confused with the De Wit Group), 100% shares in Route 62 Investments (Pty) Ltd, and 50% shares in Gasvoorsieners Boland (Pty) Ltd (“Gasvoorsieners”).
32. DWG (Pty) Ltd, in turn, owns 100% of the shares in 11 companies, some of which will feature in the discussion below. Its directors are Toerien, Evert Mostert (“Mostert”), Wolfgang Beyer (“Beyer”) and Maryke’s husband Koos Smit (“Smit”).
33. The other 50% of shares in Gasvoorsieners are owned by Koos, who is a director together with Maryke.
34. The bulk of the total assets of the De Wit Group are in Breëvallei Buitelewe (Pty) Ltd (“Breëvallei”) (directors

valuation R43.2 million), Bester & Van der Westhuizen (Pty) Ltd (“BVW”) (directors valuation R44.6 million) and other assets in De Wit Group (Pty) Ltd (director valuation R15.3 million).

35. Toerien, the oldest child, had been living and working in the United States when Elbert Snr requested him to return to South Africa to assist in managing the De Wit Group, which he did. Prior to this, and thereafter, Maryke’s husband, Koos, was involved in assisting Elbert Snr with the businesses and inter alia managed Gasvoorsieners, in which he holds 50% of the shares. He was also a co-director of Gasvoorsieners, Prokdok, Breëvallei and BVW.

RELIEF IN TERMS OF SECTION 13 OF THE ACT

THE APPLICANTS’ CASE

Case made out in the applicants’ papers

36. The applicants’ case is that the wide discretionary powers conferred upon the trustees in terms of clauses 7.3 and 1.8 of the Trust Deed have brought about consequences which Elbert Snr did not contemplate or foresee, namely a serious breakdown in the

relationships in the family, which is hampering the achievement of the objects of the Trust and prejudicing the interests of the

beneficiaries.

37. In essence, the applicants allege that Toerien, with the assistance of Rall, is running the Trust and the whole Group for his own benefit and not in accordance with the Trust objects and to the prejudice of the beneficiaries. It is important to note that, although there are statements in Lenette’s affidavit that might be interpreted as suggesting that Rall has not acted objectively at all times, the applicants’ counsel at the hearing disavowed any suggestions of impropriety by Rall.
38. I summarise only the facts and allegations relied upon by the applicants for their case that I consider to be the most relevant.
39. As regards the “objects of the Trust” which are allegedly hampered, the applicants refer not only to clause 3 of the Trust Deed[8] but also to “the fundamental purpose and object of Elbert Snr” as being “to provide benefits for his family” and that “his family should benefit from the Trust, not that its continued operation should result in a serious breakdown of the relationships

between family members”. I deal with the issue of the objects of the Trust in the discussion later in this judgment.

40. Lenette alleges that Toerien is “intent on taking effective control” of the Trust and has been using DWG (Pty) Ltd “to include some trustees and some beneficiaries of the Trust from the information and operation of the Trust and the companies under the Trust, which “control and exclusion escalated since Elbert Snr’s passing on 26 February 2019”. He has appointed his confidants and sympathisers, Mostert and Beyer, as co-directors in DWG (Pty) Ltd and subsidiaries to ensure that he has control over the majority vote.
41. In summarising the “prejudice to the Trust objects and the beneficiaries” Lenette alleges that, by virtue of his control of the Trust and its assets, Toerien now controls the income stream, contrary to clause 3 of the Trust Deed, to the prejudice of all the other beneficiaries.
42. Although she is not aware of his income as a director and/or employee of the various companies, she believes it to be considerable, which provides him with ample motivation to continue operating the Trust and its assets indefinitely.
43. As regards the beneficiaries, Maryke earns an income through Gasvoorsieners and also lives in a property owned by one of the companies in the De Wit Group. Karmien has received very little benefit. She receives no monthly income, does not live in a property owned by the companies in the De Wit Group and her request for financial assistance has mostly been denied. Elbert Jr has received almost nothing and Lenette herself lives in a property owned by one of the companies in the De Wit Group but does not derive any income from the Trust.
44. Over the period of two years from January 2017 until the passing away of Elbert Snr on 26 February 2019, there were many family meetings and email correspondence relating to the DWG which provide clear indications of Elbert Snr’s wishes as to how the Trust businesses and assets should be dealt with, particularly as regards serving the interests of the beneficiaries.
45. I refer only to those aspects of the discussions and correspondence that I consider to have particular relevance to the matter.
46. On 31 January 2017, after a meeting between Toerien, Elbert Snr and Lenette regarding Elbert Snr’s will and the business of the Trust, Toerien recorded the discussion in an email letter. The most relevant statements therein are that:

“Dad doesn’t want the assets in the Trust split up and distributed. He would like to see the Trust continue. Dad wants us to value the assets in the Trust and assign each child an equal fair value. Toerien then personally takes over the Trust with all its assets and becomes responsible for buying out each child’s value. We have to determine how this will be carried out practically. In principle, however, Toerien will continue to manage the Trust in its current format and he will, over a period of time, as the businesses allow, buy out the other children.”

“Dad wants dividends to be distributed this year on a higher basis than last year and that dividends are paid out annually.”

47. On 23 February 2017, Toerien sent an email to Elbert Snr and Koos, proposing how the Trust assets would be distributed between the Trust beneficiaries. The proposal is too extensive to set out herein in detail and it suffices to say that provision was made for transferring shares in Gasvoorsieners to Koos and 25% in Breëvallei to Toerien. Further, as regards distribution of the assets of the Trust, it was recorded that the valuation of all the assets had not been done and noted that some assets generate income and others not, and that the valuation of the assets must be done at an agreed time in order to determine the “asset value” of each of the beneficiaries. Toerien noted further that income generating capacity of assets would be crucial in order to calculate a fair division, in respect of which agreement would have to be reached.
48. At a meeting of all concerned on 26 February 2017, Elbert Snr once again made it clear that he did not want all the Trust assets to be sold for the benefit of the beneficiaries and that the Trust must continue to exist and that Toerien must pay to each beneficiary an equal sum to purchase their interest.
49. On 23 December 2017 Toerien sent a valuation of the Trust to Elbert Snr which valued the Trust assets at approximately R119 000 000.
50. On 17 December 2017 another family meeting was held, where Elbert Snr again confirmed his wish that the Trust assets not be sold but that the Trust should continue and that the businesses that he had built should continue to exist and be managed well. His wish was that Toerien be appointed to manage the De Wit Group and further that the value of the Trust assets must be split equally between the beneficiaries. Assets may be allocated to a specific beneficiary who had a specific interest in the asset and Toerien would purchase the interest of the beneficiaries or the balance of their interests where an asset was allocated.
51. Lenette indicated that she did not want a distribution and each of the other beneficiaries indicated an interest in specific assets, other than Karmien who indicated that she preferred cash.
52. It was understood that it would take some time to be able to “buy out” each of the beneficiaries but the express purpose was to do that as soon as possible and to adjust the beneficiaries’ remaining interests annually according to inflation. Toerien confirmed that he would have to work hard to grow the businesses in order to be able to pay out the other beneficiaries but that there may be a risk that he is unable to do so, in which case it may be that the Trust assets would have to be sold to do so.
53. On 4 February 2019, Toerien sent an email to Rall referring to a conversation in respect of the restructuring of the Trust and enquired about progress in respect of Rall’s research on asset swaps and a follow up meeting to implement their plan. According to Lenette, this email indicates that the parties were implementing a plan to distribute the assets which Toerien accepted as a decision that had been made.

54. On 21 February 2019, Toerien confirmed in an email to Rall, Elbert Snr, Koos and Mostert that what was sought to be achieved, in broad terms, was certain asset distributions to be made to Maryke and cash distributions to Karmien and Elbert Jr while Toerien would retain the remaining trust assets. He would then be the sole beneficiary of the Trust and would be obliged to pay Elbert Jr and Karmien their portion in cash over time.
55. After Elbert Snr's death, the disagreements between all the stakeholders intensified which, according to Lenette, has a direct

effect on the administration of the Trust and the ability of the trustees to give effect to the Trust's objectives. According to her, Toerien and Rall are not willing to give effect to the objectives of the Trust Deed, in particular by failing to take steps

to advance the distribution of the trust assets as envisaged by Elbert Snr and all the stakeholders previously.

56. At a family meeting on 4 August 2019, further discussions were held regarding distribution of the Trust assets. Toerien presented the other family members with a document with calculations of the value of the assets which amounted to R85 500 000 (after tax), which meant that each beneficiary stood to receive approximately R21 400 000. The farms had however not been formally valued but could be applied as security for loans. This proposed distribution was however not implemented.
57. During October 2020, the board of DWG took steps to remove Koos as a director of DWG. This gave rise to litigation between him and various respondents under WCHC Case No 16973/22. According to Toerien, that application is still pending, but Toerien has acknowledged, after receiving legal advice, that the process to remove Koos was flawed and undertakings have been given not to remove him as a director.
58. During June and July 2021 Karmien's requests for access to the Trust's financial information were refused, which gave rise to an application launched by her in August 2021 for access to such information under WCHC Case No 14625/2021. The Trust subsequently made information available but according to Karmien not all of the information was made available and some was insufficient.
59. Judgment dismissing Karmien's application was handed down by Mangcu-Lockwood J on 18 July 2023. Toerien invokes that judgment in favour of the respondents, in particular the findings that there was no evidence of a decision having been made by the trustees to make capital distributions to the beneficiaries, that there was no evidence that the trustees had as yet determined or indicated a vesting date, that Karmien failed to show that any of the trustees acted beyond the scope of the Trust Deed in their dealings with Trust property and assets, that there was insufficient evidence to establish that Karmien had been unfairly treated and/or discriminated against, and that she had failed to make out a case that the trustees had failed to comply with their obligations in terms of clause 8.2 of the Trust Deed, namely the preparation of financial statements.

60. In the papers in Karmien's application, and in subsequent correspondence, Toerien again put forward distribution proposals,

which entailed inter alia that the Trust be valued as at 28 February 2017 and that the established quantum be divided into four and distribution made to the beneficiaries over a period of time.

61. The further disputes between the parties are many and varied and it is not feasible to deal with each in this judgment.

62. Lenette's complaints were set out in a letter from her attorneys to Toerien and Rall dated 14 November 2022 in response to certain proposed Trust resolutions, the correspondence of recent years, settlement negotiations, the purpose of the Trust, the wishes of Elbert Snr and the decisions and his instructions before his death. Summarised, the following points were made in the letter:

62.1 She maintained that a distribution decision was taken in 2018 but that the exact manner and most cost effective way of implementing this was still unclear. She points out that Toerien with his financial education and background was and is responsible for the financial record keeping of the Trust which, according to her, was neglected for six years. Rall had to advise on the Trust construction and asset swaps pursuant to the 2018 distribution decision but has not done that.

62.2 She complained of the fact that in a letter as well as in a Notice of Opposition in Case No 16973/2022 (the application launched by Koos), attorneys Marais Muller Hendricks purported to act on behalf of the Trust and also specifically herself, for which she gave no consent.

62.3 Reference was again made to what she considered to have been a distribution decision made in 2018 and it was stated that it appears that Toerien would do everything in his power to fully take control of the Trust, Gasvoorsieners, DWG (Pty) Ltd and all the other companies, particularly by:

62.3.1 denying the 2018 distribution decision;

62.3.2 removing Koos and Maryke as directors and seeking to have them declared as delinquent directors;

62.3.3 removing auditors and charging them with unprofessional conduct;

62.3.4 appointing multiple directors of his choice in all companies in any manner possible (possibly even fraudulently) to secure a special resolution in respect of the Companies Act;

62.3.5 appointing himself as chairperson of the Trust so secure a casting vote;

62.3.6 attempting to remove her as trustee.

63. It was further stated that Elbert Snr would never have envisaged or foreseen that the Trust "would be managed in such a way that it would be detrimental to the interests of the beneficiaries and that the aims and instructions of him as founder would be impeded".

64. Lastly, postponement was requested of a meeting of trustees that had been set for 15 November 2022 until 28 December 2023 for “consideration of proposals regarding the favouritism or not of nominated beneficiaries of the Trust”.

65. Lenette’s attorneys addressed a follow up letter to Toerien and Rall dated 6 December 2022 in which, inter alia, the following was stated:

65.1 That the differences between the trustees and the beneficiaries, the beneficiaries themselves, and between the directors and shareholders

of the companies, are untenable and that the way these differences are being handled is not in the best interests of everyone and that such “unforeseen and untenable situation must now be finally addressed”.

65.2 That the vesting date as per paragraph 1.8 of the Trust Deed had to be fixed. Lennete’s view was that it had in fact already been set as 15 November 2018 when all the stakeholders met to discuss a proposed division of assets at the time. Toerien and Rall were requested to now decide to fix the Vesting Date as 15 November 2018 so that the second step may follow, namely the decision on how the Trust’s assets are to be divided. In the alternative, Toerien and Rall are requested to suggest an alternative Vesting Date.

65.3 According to Lenette, Elbert Snr already realised in 2017 that his objectives as set out in the Trust Deed would be hampered and that the interests of beneficiaries would be prejudiced and this was the reason for discussions regarding the distribution of the assets and the eventual meeting of 15 November 2018.

65.4 It was stated further that, if the Vesting Date is not fixed as proposed and the current differences not resolved with negotiations, a court application in terms of section 13 of the Act would be her only option.

65.5 Lastly, a meeting of trustees was called for her to be held on 13 December 2022 in order to adopt a resolution fixing the Vesting Date at 15 November 2018.

The applicants’ submissions

66. The applicants’ submissions in argument may be summarised as follows:

66.1 It is clear that, before his death, Elbert Snr and the other family members contemplated that there would be a valuation of the trust assets as of 2017, that each child should be given an equal share, that Toerien would take over the Trust and eventually buy out each child. Elbert Snr had realised that this would be necessary in order to achieve his basic objective of providing benefits to his family members and furthermore that the Trust could and should not continue to operate indefinitely, conducting its affairs in the same way and holding the same assets.

66.2 Since Elbert Snr’s passing away, significant disagreements have arisen between the trustees themselves and between the Trust and beneficiaries. The trustees have failed to take steps to effect a distribution of the trust assets as described above.

66.3 All the while, Toerien has earned a significant income as a director and/or employee of the various companies in the De Wit Group whereas the Lenette and the other beneficiaries received no income or capital distributions and there is no indication as to when this might take place in the future, which is not what was envisaged by Elbert Snr and all concerned prior to his death.

66.4 The continued operation of the Trust by Toerien and Rall has resulted in far-ranging disputes between the parties, causing acrimony and the breakdown of family relationships, none of which was or could have been foreseen by Elbert Snr when the Trust was established in 1995.

66.5 In response to Toerien's averments that he has no objection to implementing an agreement that might be reached but that this has proved impossible, the point is made that it is not a requirement that there should be agreement and that the distribution of assets falls within the discretion of the trustees, which they (Toerien and Rall) are deliberately refraining from exercising.

66.6 In all of these circumstances, the continued operation of the Trust on an indefinite basis by Toerien and Rall, relying on clauses 1.8 and 7.3 of the Trust Deed has seriously negative consequences for the De Wit family, namely the breakdown of the relationships between them, which was not contemplated or foreseen by Elbert Snr and would have left him appalled and distressed.

66.7 Having regard to all of the circumstances, these consequences are hampering the achievement of the fundamental aims and purposes of Elbert Snr and are prejudicing the interests of the beneficiaries.

THE RESPONDENTS' OPPOSITION

67. The respondents vigorously deny any efforts on the part of Toerien to control the Trust assets for his own benefit, and any impropriety in general. Various factual disputes are raised which however in my view do not require specific reference.

68. The opposition to the application can conveniently be considered with reference to the four main grounds identified by the respondents in both written and oral argument, namely:

68.1 First, that the relief sought is antithetical to the purpose of the Trust as expressed in the Trust Deed;

68.2 Second, that the applicants have failed to set out a basis for the relief sought in terms of section 13 of the Act specifically by failing to identify the specific provisions thereof which brings about the unforeseen consequences that the Founder did not foresee. With regard to the issue of the conduct and decisions of the majority of trustees, it is pointed out that conflict between trustees was contemplated and the Trust Deed contains mechanisms for resolution of such conflicts;

68.3 Third, that mere enmity or friction between trustees and the beneficiaries does not justify the removal of a trustee from office;

68.4 Fourth, that the applicants and Karmien have not acquired vested rights to capital or income distribution or to demand immediate distribution, and by seeking the termination of the Trust, alternatively the removal of Toerien and Rall, they are impermissibly attempting to secure immediate distribution of the Trust assets contrary to the express provisions of the Trust Deed and wishes of the founder.

DISCUSSION

69. The grounds of opposition as stated are to an extent interrelated and it is convenient to deal with the second ground as a starting point.

Have the applicants established the jurisdictional requirements for intervention by the Court in terms of section 13 of the Act?

70. The respondents submit as follows in relation to this question:

70.1 That clauses 1.8 and 7.3 did not bring about unforeseen consequences which hamper the achievement of the objects of the founder or prejudice the interests of the beneficiaries, as required by section 13;

70.2 That it is clear from the provisions of the Trust Deed as a whole that Elbert Snr did intend that the Trust should be capable of being conducted indefinitely in the discretion of the trustees with a view to preserving and increasing the Trust capital assets and that while the breakdown in interpersonal relationships is unfortunate, that is not something that was brought about by the impugned provisions but rather by external circumstances such as human nature and conflicting interests of the beneficiaries;

70.3 That, while the happiness of the family would have been something that the founder would have wished, that was not stated as a specific object in the Trust Deed and in any event, that provision is made for conflicts in the form of providing for a minimum of three trustees as well as for a “tie-breaker” vote.

71. In terms of the Harvey NO formulation of section 13 of the Act, the first question is whether the offending provisions brought about consequences which in the opinion of the Court the founder did not contemplate or foresee. This entails a subjective enquiry.

72. I accept the applicants’ contention that Elbert Snr did not contemplate or foresee such a serious breakdown in the relationships

between his family members that his wife and two daughters would now be engaged in such bitter acrimony and litigation against his eldest son in particular. The respondents contend that the fact that there are an uneven number of trustees creates a deadlock-breaking

mechanism, but that can at best be relied on for an argument that he foresaw that there would not always be consensus between all the trustees. That is not the same as contemplating or foreseeing such an absolute breakdown in the relationships between the various family members as has occurred.

73. Further, in my opinion, the facts show that it is indeed the discretionary powers created by clauses 1.8 and 7.3 specifically that have caused the breakdown in the family relationships. The applicants have been attempting to persuade Toerien and Rall to fix the vesting date and effect a distribution of assets, as opposed to continuing the Trust in the same manner indefinitely. The fact that this has not been done is precisely the cause of the breakdown in the relationships. Put differently, if, for example, the vesting date had been fixed in the Trust Deed, or not been subject to such a wide discretion, the complete breakdown of the family relationships would most probably not have eventuated.
74. In my view, the breakdown in the family relationships cannot simply ascribed to human nature, as the respondents contend. The dissatisfaction of the respondents must also be seen against the backdrop of the discussions that took place during family meetings prior to the passing away of Elbert Snr. His wish was that the other beneficiaries would be “bought out” by Toerien from income generated from the businesses and, whilst that was probably never capable of being achieved in the short term, they were justified in expecting, as an alternative, the vesting date to be fixed and a distribution of capital to occur once it became clear that the option of buying out their shares from income generated from the businesses is unlikely to be achieved even in the mid-term.
75. In this regard I refer, in particular, to the family meeting held on 17 December 2017 and Toerien’s own reference to a risk that he might be unable to generate sufficient income from the businesses to “buy out” the other beneficiaries, in which case it may be that Trust assets would have to be sold to do so.
76. The cause of the applicants’ dissatisfaction, and the breakdown of family relationships, is that the trustees have not given effect to Elbert Snr’s wishes, even if it means doing so in the alternative manner, namely selling Trust assets and, instead, have simply continued to manage and operate the Trust in terms of their discretionary powers which allow them to do so indefinitely.
77. I accordingly find that the first jurisdictional requirement for intervention by the Court in terms of section 13 of the Act has been satisfied.
78. The second jurisdictional requirement in terms of the Harvey NO formulation is whether the offending provisions and the unforeseen consequences to which they gave rise, hamper the achievement of the objects of Elbert Snr or prejudice the interests of the beneficiaries.
79. As has been set out above, the Trust Deed stipulates two objectives, namely:
- 79.1 The expansion of the Trust benefits (assets) and the creation of sources of income for the beneficiaries; and
- 79.2 To pay such funds from income of the Trust to the various beneficiaries as may be reasonable and desirable in the opinion of the trustees and in accordance with the guidelines set out in clauses 6 and 7.

80. As I have mentioned, the applicants, in their papers, stated the “fundamental purpose and object” of Elbert Snr as being

to provide benefits for his family. That statement however does not fully accord with the objectives of the Trust as expressly stated in clause 3 of the Trust Deed. It is well-established that the Trust objects must be sufficiently certain^[9] and the matter must in my view be determined on the basis of the objects of the founder as set out in clause 3 of the Trust Deed.

81. The breakdown in the relationships between the family members does not in my view hamper the first of the two objects of the Trust set out in clause 3 of the Trust Deed. Indeed, to an extent it is precisely Toerien’s insistence on pursuing the objective of expanding the Trust benefits and creating sources of income as a priority, that has caused the dissatisfaction of the applicants.

82. As regards the second of the stated Trust objects, the applicants’ case, as I understand it, is firstly that Toerien’s attitude and approach, namely that the income of the companies in the De Wit Group should be utilised by him in order to buy out the interests of the other beneficiaries, is not what was contemplated in the Trust Deed regarding income. On the contrary, so the argument goes, the Trust Deed contemplates that income would be distributed to the beneficiaries, not used for the purpose of acquiring their interests.

83. The difficulty that I have with this is that, if it is indeed Toerien’s purpose to use income to buy out the interests of the other beneficiaries as opposed to making payments to them, that aim is rather in accordance with, and as a result of, the express wishes of Elbert Snr, as opposed to having been caused by the acrimony between the stakeholders.

84. The only averments in the applicants’ papers that relate to this specific enquiry are those contained in the letters addressed to Toerien and Rall by the applicants’ attorney dated 14 November 2022 and 6 December 2022.

85. In neither of those letters does one find a clear articulation of the applicants’ case, specifically, of how the breakdown in relationships has caused hampering of the objects of the Trust. In the letter of 14 November 2022 one finds a number of accusations, referred to in paragraph 62 above, but no reference to the breakdown in the relationships as being the cause of non-achievement of the second of the stated Trust objects relating to payment of income to beneficiaries.

86. In the letter of 6 December 2022, there is a statement to the effect that the differences between the parties are untenable and that the manner in which those differences are being handled, namely through exchange of letters, litigation and meetings with a concerted effort to find a solution, is not in the best interests of everyone. However this is vague and does not explain how the achievement of the second Trust object is being hampered.

87. I accordingly find that, as regards the second jurisdictional requirement, the applicants have not shown on a balance of probabilities that the achievement of the Trust objects have been hampered by the breakdown in the family relationships.
88. What is left for the applicants to succeed with a case based on section 13 of the Act, is reliance on section 13(b), namely the (broader) requirement that the identified provisions and the unforeseen consequences to which they gave rise, prejudice the interests of the beneficiaries.
89. The interests of the beneficiaries that are said to be prejudiced, as I understand the applicants' case, is the fact that they are receiving neither income nor capital. It is to be noted that such interests of a beneficiary in a discretionary trust are only contingent interests but are susceptible to, and worthy of, protection by courts in general and in terms of section 13 of the Act.[10]
90. Can it be said that it is the breakdown of the relationship between the family members that has resulted in the beneficiaries not receiving income or a distribution of assets?
91. The applicants say that the trustees have not facilitated the conclusion of an agreed distribution and, in any event, that agreement is not required for them to exercise their discretion to fix the vesting date and distribute the assets. They say that the trustees are deliberately refraining from doing so despite the wishes of Elbert Snr and the severely negative consequences for the Trust and the beneficiaries. I understand their case to be that this stance is motivated by the fact that the family relationships have broken down to such a serious extent.
92. In particular, the applicants refer to distribution proposals that were submitted and considered towards the end of 2018 and beginning of 2019 before the passing away of Elbert Snr, as well as during a meeting of family members in August 2019, after Elbert Snr's death. Their case is that a decision had in fact already been made that there would be a distribution of assets and that it was only a question of giving effect to that decision, irrespective of whether the beneficiaries themselves can come to an agreement as to the division.
93. Toerien denies that any decision was made by the trustees and that the proposal ever amounted to more than discussions of options that may be considered by the trustees and remained adamant that "As the trustees are obliged to effect parity in distribution of capital in due course and, at the same time, to obtain the objects of the Trust, it can only be by a process of full agreement amongst all the beneficiaries that an unequal or potentially unequal distribution could take place". He states further that "In the meantime, the Trust must be governed in accordance with the principles of the Trust Deed and that is what I am in the process of doing. This I do in conjunction with my co-trustees and in accordance with the provisions of the Trust Deed".

94. The difficulty is that Elbert Snr's idea that the beneficiaries be "bought out" from income earned through the running of the Trust businesses, was in reality not feasible. That possibility was contemplated and it was acknowledged by Toerien, during the family discussion on 17 December 2017, that there may be a risk that this goal could not be achieved, in which case it may be that the Trust assets would have to be sold.
95. My assessment of Toerien's conduct and stance is that he has been attempting to give effect to the Trust objects as stipulated in the Trust Deed as well as the wishes expressed by Elbert Snr before his death but that he and Rall are willing to effect a distribution of assets if it is feasible and is agreed to by all.
96. Even if the applicants were correct in all other respects, the question that remains problematic for them is whether or not they have shown on a balance of probabilities that it is the unforeseen consequence, namely the breakdown of the relationships between all concerned, that has caused Toerien and Rall to refuse or fail to fix the vesting date and effect a distribution. In my view, they have not, for the reasons already mentioned.
97. I am accordingly unable to find that the applicants have made out a case in terms of section 13 of the Act.
98. Since it may have a bearing on the manner in which the Trust is managed in future, it is worth noting that, in my view, should the beneficiaries agree to a specific distribution, which Toerien and Rall refuse to give effect to, such circumstances may possibly justify intervention by a court in terms of section 13 of the Act. I base this view on the fact that Toerien himself has expressed a desire to give effect to Elbert Snr's wishes that the beneficiaries share in the capital assets of the Trust. He has acknowledged that this cannot be achieved by buying out their shares from income generated but that a distribution of assets can be done if agreed to by the beneficiaries. Should a distribution agreement agreed to by all the other beneficiaries be rejected, unless for other valid reasons, that would in my view lend some credence to the applicants' accusation that Toerien is interested only in continuing the Trust indefinitely to his own benefit. Naturally, this is not a finding that it is intended to, or could possibly have, any bearing on any future litigation.
99. In any event, even if I am wrong in finding that a case has not been made out for intervention in terms of section 13 of the Act, I am of the view that termination of the Trust would not be appropriate relief.
100. Termination of a trust in terms of section 13 of the Act is an extraordinary remedy, only to be resorted to as a last resort.[11] As the respondents argue, this would be antithetical to the wishes of Elbert Snr expressed in the Trust Deed as well as in the meetings held prior to his death, that Toerien should run the Trust and the businesses indefinitely.
101. The applicants have not in their papers indicated any alternative to termination of the Trust as a remedy in terms of section 13 of the Act (the issue of removal of the trustees in terms of section 20(1) of the Act is dealt with below) and have made it clear, in their written

submissions, that termination of the Trust is the only appropriate remedy in terms of section 13 of the Act. It is indicated in their written submissions that the respondents have not suggested any other remedy in terms of section 13, which approach was also adopted by counsel at the hearing of the matter. The applicants pointedly refrained from requesting an alternative to termination of the Trust.

102. Even if I had been persuaded that the two jurisdictional requirements for intervention by the Court in terms of section 13 had been satisfied, I would, at best for the applicants, have considered effecting an amendment to the relevant clauses to fix the vesting date to occur on a date that I deem to be appropriate in the circumstances of the case. However, the Court does not have the power to *mero motu* grant relief not specifically requested in terms of section 13 of the Act, a point that was also made in the recently reported judgment in the case of *Estate Hafiz and Others v Hafiz and Others* 2024 (2) SA 374 (SCA) at paragraph 30.

RELIEF IN TERMS OF SECTION 20 OF THE ACT

103. I am of the view that for largely the same reasons and considerations dealt with above, the applicants have not shown, on a balance of probabilities, that the Trust property or its proper administration is imperilled by the conduct of Toerien and Rall.
104. In my view, they have done no more than to seek to give effect to the relevant terms of the Trust Deed, including clauses 1.8, 3 and 7.3, whilst at the same time showing a willingness to entertain an agreed asset distribution proposal, as an alternative to Elbert Snr's (essentially unachievable) wishes that the beneficiaries be "bought out" from income generated from the Trust assets.
105. As I understand the applicants' case, they are of the view that different trustees would exercise their discretion to fix a vesting date immediately or within a reasonable time, followed by a distribution of the capital assets. As I have mentioned, Toerien and Rall have indicated a willingness to do so but require a feasible, agreed proposal to be submitted to them. This does not appear to me to be an unreasonable stance since such a course of action would strictly speaking be neither in accordance with the Trust provisions nor the wishes expressed by Elbert Snr during his lifetime.
106. Moreover, as Toerien points out, it was Elbert Snr's wish that he, specifically, should continue to conduct the business of the De Wit Group and he has been to intricately involved in doing so that it is, in reality, not feasible to remove him as a trustee.
107. There is in my view certainly no case for the removal of Rall as a trustee. The applicants' counsel has, fairly, disavowed the notion that Rall has conducted himself in any untoward manner and there is no reason for anticipating, for example, that he would not support a fair proposal that might be placed before the trustees for a decision. As a third trustee, appointed by Elbert Snr, he serves as a deadlock breaking mechanism should that be necessary, and there is in my view no need to interfere with Elbert's Snr's wishes as regards the appointment of trustees.

108. In the premises I find that the applicants have not made out a case for relief in terms of section 13 or section 20 of the Act and the application must fail.
109. There is no reason for costs not to follow the result. To the extent that it may be necessary to do so, I find that the engagement of senior counsel was warranted.
110. Accordingly, I make the following order:
- 110.1 The application is dismissed with costs, including the costs of senior counsel.

DC JOUBERT AJ

Applicants' counsel: Adv J Newdigate SC; Adv M Van Staden

Applicants' attorneys: Mostert & Bosman Attorneys

Respondents' counsel: Adv P Van Eeden SC; Adv P Gabriel

Respondents' attorneys: Marais Muller Hendricks Inc

[1] At para 34

[2] At para 72

[3] At para 32

[4] Gowar (supra) at para 34

[5] Potgieter v Potgieter NO and Others 2012

(1) SA 637 (SCA) at para 30

[6] Gowar v Gowar (supra) at paras 30 – 32. See also Fletcher v McNair (1350/2019) [2020] ZASCA 135 (23 October 2020)

[7] The Trust Deed was executed in Afrikaans and this translation provided by the applicants is not entirely correct. The Afrikaans word is “trustbates” which more correctly translates to trust assets.

[8] Quoted in para 24 above

[9] Cameron et al: Honorés South African Law of Trusts, 6th Ed. p 168

[10] Potgieter v Potgieter NO (supra) at para 28

[11] Nair NO v Nair NO (supra) at para 30

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Prepared on 9 October 2026 · Esheria