

SOUTH AFRICA / JUDGMENT

Dladla N.O and Others v Lamula N.O and Others (27440/21) [2022] ZAGPPHC 868 (18 November 2022)

[2022] ZAGPPHC 868

COURT

North Gauteng High Court, Pretoria

BEFORE

Kooverjie

CASE / FILE NUMBER

27440/21

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 27440/21

DATE:

18 NOVEMBER
2022

REPORTABLE:

YES / NO

OF

INTEREST TO OTHER JUDGES: YES / NO

REVISED

In

the matter between:-

SIBUSISO

JOHN DLADLA N.O.

First

Applicant

MZAMOSI

FLORAH NGOMANE N.O.

Second

Applicant

ZUKA

SIDEON NDLOVU N.O.

Third

Applicant

THANDIWE

FABASE THEMBA N.O.
Fourth
Applicant
VS
HAPPY
LAMULA N.O.
First
Respondent
JOHN
CHIPA NKALANGA N.O.
Second
Respondent
NANASHI
MARGARET MASHALE N.O.
Third
Respondent
NTOMBIZODWA
DORAH SIBIYA N.O. Fourth
Respondent
DUDU
SLIVA NKENTJANE N.O.
Fifth
Respondent
JABULILE
MUMCY MUBE N.O.
Sixth
Respondent
TAKALANI
MATODZI N.O.
Seventh
Respondent
MASTER
OF THE HIGH COURT, PRETORIA Eighth
Respondent
DEPARTMENT
OF RURAL DEVELOPMENT
AND
LAND AFFAIRS, MPUMALANGA Ninth
Respondent

DIRECTOR-GENERAL: DEPARTMENT OF RURAL
DEVELOPMENT
AND LAND AFFAIRS Tenth
Respondent
MINISTER
OF RURAL DEVELOPMENT AND
LAND
REFORM
Eleventh
Respondent
PETRUS
ZEELIE N.O.
Provisional
Administrator

JUDGMENT

KOOVERJIE J

- [1] The first applicant seeks amended relief in terms of Part B. Part A has already been dispensed with. The relief sought in Part B is, inter alia, to remove the trustees of the Siphumelele Tenbosch Trust (“the Trust”) and further that the Administrator, Mr Zeelie, be appointed as the sole trustee of the Trust for the time being, tasking him to bring the administration of the Trust in good order.
- [2] The appointment of Mr Zeelie serves as an interim measure until the verification of the beneficiaries is finalised and the trustees are appointed in terms of the Trust Deed at a properly constituted meeting of beneficiaries.
- [3] For the purposes of this hearing, only the first applicant was represented and will be referred to as “the applicant”. The first to sixth respondents are the other appointed as trustees with effect from 22 August 2019.[1] The first applicant and the seventh respondent were, in addition to being appointed as trustees, appointed as accountants of the Trust for a period of 24 months. The second to fourth applicants have withdrawn from the proceedings. The eight new trustees were appointed by virtue of the letters of authority issued by the Master of the High Court, Pretoria (“the Master”).

ISSUE FOR DETERMINATION

- [4] Essentially this is a Section 20(1) application of the Trust Property Control Act 57 of 1988 (“the Act”) whereby this court is required to exercise its discretion as to whether it is satisfied that the trustees’ removal is in the interests of the Trust and the beneficiaries.

COURT PROCEEDINGS

- [5] This matter was initially instituted on an urgent ex parte basis where Collis J granted an interim order on 9 June 2021. By virtue of this order, the Trust was placed under administration, the trustees were suspended and Petrus Zeelie was appointed as the Administrator of the Trust. His duties and responsibilities was set out in an annexure forming part of the order. The interim order further made provision that the hearing of Part B be postponed until the Administrator file his report and both parties file the answering and replying papers.
- [6] An application for reconsideration was instituted by the respondents, challenging Collis J's order. Sardiwalla J varied Collis J's order wherein he, inter alia, ordered the Master of the High Court to exercise his discretion in terms of Section 16 of the Trust Property Control Act No. 57 of 1988 ("the Act") and file a report by 8 October 2021. He further ordered that the suspended trustees remain the trustees pending the report from the Master of the High Court. In addition he ordered that all litigation, including the litigation in the Mpumalanga Division of the High Court, be suspended pending the report from the Master of the High Court.
- [7] The applicant initially appealed the Sardiwalla order, but subsequently withdrew his leave to appeal. Part B will therefore proceed on the basis of Sardiwalla J's order.
- [8] In this time, the respondent trustees also instituted an urgent application under case number 62887/21, demanding access to the Trust's bank account in order to pay the beneficiaries. This led to Mbongwe J's order granted on 28 December 2021.
- [9] In a subsequent order, dated 21 January 2022, of Millar J, also under case no.62887/21, ordered, inter alia, that: the trustees of the Trust were required to furnish the Administrator with the beneficiary list and details, allowing the Administrator to reconcile the beneficiaries together with the amounts distributed and furnish a report to that effect.
- [10] At this stage of the proceedings it should be noted that as per the respective orders, both the trustees as well as the Administrator

remained responsible for the administration of the Trust. As alluded to above, the core issue for determination is whether the trustees should be removed and whether Mr Zeelie's appointment as the interim trustee is appropriate.[2]

POINTS IN LIMINE

- [11] The respondents raised the contention that the applicant did not seek relief from this court to file his supplementary affidavit. During the hearing, the respondents, however, abandoned this point. I however deem it necessary to clarify this point. The supplementary affidavits were filed as per the directives issued by the Deputy Judge President. It was not only the applicant but the respondents as well as the Administrator who were ordered to file their respective supplementary affidavits within certain specific time frames.

- [12] The respondents raised a further issue, namely that the applicants failed to disclose that there are other pending court applications on the subject matter in issue. This the respondent concluded constituted a material non-disclosure.
- [13] The first matter is under case number 4456/19 in the Mpumalanga High Court. It was pointed out that the applicants failed to disclose at the time as well as in this application that they also received payments from the Trust. The applicant was paid R341,000.00 for services rendered by him. Hence when the trustees received their honoraria, there was nothing irregular.
- [14] The applicant, however, clarified this point. He explained that this contention has no merit as he was paid for services rendered as an accountant. Mr Matodzi, the other independent trustee, was also paid for services rendered as an accountant.
- [15] In the second matter, under case number 898/2020, also in the Mpumalanga High Court, the respondents sought to, inter alia, to interdict Mr Spoor and others from interfering with the management of the Trust. The applicant explained that, in essence, the fight was between the respondents, Mr Spoor and the beneficiaries. These proceedings was opposed only by Mr Spoor and his firm.
- [16] In a third matter, under case number 1082/2021, in the Mpumalanga High Court as well, the respondents sought to remove the second to fourth applicants as well as the other trustees. [3] The applicant once again explained that he was not a party. It was the second, third and fourth applicants who were cited as parties.
- [17] On my perusal of the limited information placed before me, there is no doubt that the Mpumalanga court matters have a bearing on the matters in issue. They all concern the Trust's affairs and administration. These applications are demonstrative of the fact that there has been irreconcilable differences amongst the trustees causing them to neglect their fiduciary duties to the extent that it has prejudiced the Trust and the beneficiaries. The relief sought as far back in 2019 (in matter 4456/2019) was for the removal of the trustees as well.
- [18] I am of the view that the pending litigation had to be disclosed for the benefit of this court's understanding and perspective. No doubt there has been misappropriation of funds prior to and after the appointment of the current trustees.
- [19] What is, however, clear is that the Trust remains dysfunctional. It is incumbent on this court to acknowledge that the constitutional objectives of land restitution and the interest of the beneficiaries are paramount.[4] Under the circumstances as per the direction of Sardiwalla J's court order, Part B, in my view, is ripe for hearing.

BACKGROUND

[20] The Trust in issue is a land restitution trust, which was registered in 2004 and established due to a settlement of a land claim in favour of the “Ngomane of Siboshwa Traditional Community” (“the community”). This community was forcibly removed in terms of past racially discriminatory laws from certain farms in the Komatipoort district

and were resettled in other areas. The beneficiaries are the households of such community. As at April 2020, at least 1468 beneficiary households were registered.[5]

[21] Serious allegations of financial and administrative mismanagement have been levelled against the current trustees. Through the reports of the Administrator it was demonstrated that the Trust assets were not only mismanaged but abused to the extent that the Trust found itself in an insolvent position.

[22] The Trust owns 38 farms, valued at around R1 billion. The farms are leased to commercial farmers. The Trust accrues an estimated annual income of R25 million.

[23] The applicant alleged that following his appointment in November 2019, he noted that sound administration of the Trust was lacking and attempted to address this with the other trustees. However, his concerns fell to deaf ears and necessitated this application.[6]

[24] The detailed findings are contained in the respective reports of the Administrator. A total of 6 reports from April 2021 to October 2022 were prepared and form part of these papers. The findings are summarized below.

MASTER’S REPORT

[25] The Master’s Report (“the Report”) was indeed filed upon the directive of the Court order, albeit late. The Report read:

“1.

I am an assistant Master at the High Court of South Africa, Gauteng Division, Pretoria, who is appointed by the Minister of Justice and Constitutional Development in terms of Section 2(1)(a) (iii) of the Administration of Estates Act 66 of 1965 (as amended) and by virtue of my appointment I am the eighth respondent (the Master) in this application.

2,

This report is filed in terms of an order by the honourable Justice Sardiwalla on 8 July 2022 wherein it is ordered that the Master must file a report in terms of Section 16 of the Trust Property Control Act No. 57 of 1988 on or before 8 October 2021.

3.

The Master does not have the resources to conduct his own investigation.

4.

The Master therefore abides by the ruling of the High Court having considered the reports dated 26 April 2022, filed by Mr P Zeelie in his capacity as interim administrator of the Trust appointed by the honourable court, case no. 2744/202.

5.

Please accept my apologies for the late filing of this report and the Master was never aware of the order until after the lapse of the submission date set out in paragraph 2 there above.”

[26] The applicant argued that the Report filed constitutes a valid Master’s Report and the Master is functus officio. The Master was ordered to file a report in accordance with Section 16 of the Trust Property Control Act.

[27] Section 16 stipulates:

“(1) The trustees shall, at the written request of the Master, account to the Master to his satisfaction and in accordance with the Master’s requirements for his administration and disposal of trust property and shall, at the written request of the Master, deliver to the Master any book, record, account or document relating to its administration or disposal of the trust property and shall to the best of his ability answer honestly and truthfully any question put to him by the Master in connection with the administration and disposal of the trust property.

- (2) The Master may, if he deems it necessary, cause an investigation to be carried out by some fit and proper person appointed by him into the trustees administration and disposal of the trust property.
- (3) The Master shall make an order as he deems fit in connection with the cost of the investigations referred to in subsection (ii).”

[28] From the reading of the Report, it is common cause that the Master did not cause an investigation to be conducted nor did he request information or documentation from the trustees regarding their administration of the Trust. The Master advised that he would abide by the decision of this court, after having considered the report of the Administrator dated 26 April 2022.

[29] The respondents argued that the Report is defective on several grounds, namely:

- (i) the Master failed to file his Report in accordance with Section 16 of the Trust Property Control Act;
- (ii) secondly, the Report was filed by the Assistant Master who does not stipulate that he was authorized to file the report;
- (iii) thirdly, the Report does not address the nature and extent of the lack of resources, namely whether they are capacity or financial shortcomings;
- (iv) fourthly, the purported report had been filed out of time and no condonation has been sought.

Consequently the matter cannot proceed until a Report in terms of the court order is filed.

[30] It was argued that the Master's non-compliance with Sardiwalla J's order constitutes contempt of court. The Master should have sought condonation for the late filing of his report and, secondly, provided evidence of his inability to comply with his statutory obligations in terms of Section 16 of the Trust Property Control Act.[7]

[31] In addressing the respondent's argument, one must be mindful that the Master may only remove a trustee on application to this court. This entails that trustees may only be removed upon the court being satisfied that a case has been made and an order to such effect is issued. Furthermore the trustees can be removed without the discretion of the Master. The court has the final say. In this instance, the Master has left the discretion in the court's hands.

[32] The fact that he failed to apply his mind in terms of Section 16, in my view, does not make the Report defective. In fact, the Report is valid. Given the Master's discretion, no person or court can force the Master to exercise their discretion to act in a certain way.[8] In the matter of Ras, the Supreme Court of Appeal held:

"The Master has a wide discretion to carry out to call the trustees to account in terms of Section 16(1). Section 16(2) further provides that: The Master may, if he deems it necessary, cause an investigation to be carried out ... into the trustees' administration or disposal of the trust property. The discretion to call for such an investigation rests solely in the Master..."

[33] On the point of condonation I find that there is no merit. By virtue of the Sardiwalla order, the Master was required to file his report by 8 October 2021, but only did so on 9 June 2022, almost 8 months later. The Master had requested indulgence for the late filing of his report and his explanation was:

"The Master was never aware of the order until after the lapse of the submission set date in paragraph 2 thereof."

Although the delay has been extensive, the Master nevertheless sought indulgence from this court. I find that it is in the interest of justice that the Master's Report be allowed. There is further no merit in the contention that the Assistant Master has no authority to file the Report. The Assistant Master would not have compiled the Report if he was not authorized.

TRUST DEED

[34] The Trust Deed recorded that the Trust was created to receive and transfer farms, hold it for and on behalf of the beneficiaries and to generally facilitate the development of the farms in the interest of the beneficiaries.[9]

[35] Inherent to the trustees' fiduciary responsibilities, the Trust Deed made provision that:

- (i) the minutes of the meetings and resolutions be minuted;

- (ii) the beneficiaries be paid their equitable dividends derived from the profits realised from leasing the property;
- (iii) the trustees are not entitled to any remuneration in respect of the rendering of their services to the Trust (clause 17.3);
- (iv) the financial statements of the Trust be audited by appointed auditors and proper books of account of the Trust had to be kept (Clause 14.5).

THE ADMINISTRATOR'S REPORTS

- [36] Mr Zeelie was appointed by virtue of a court order on 9 June 2021. He has to date not been removed. His powers, duties and responsibilities were specified in the said order. Mr Zeelie duly filed ongoing reports in accordance with his mandate as per the court order and on specific direction from the court. At the time of these proceedings several reports were filed.
- [37] As per the direction of Millar J on 2 January 2022, Mr Zeelie was requested to specifically investigate, consult with the trustees and file a report concerning the beneficiaries list and their dividend payments. The said court order gave rise to Mr Zeelie's report of 28 April 2022.
- [38] The respective reports revealed that the trustees neglected their fiduciary responsibilities and failed to adhere to their obligations set out in the Trust Deed. The detailed findings relating to, inter alia, financial maladministration remain uncontested.
- [39] The respondents, in their supplementary affidavit, questioned Mr Zeelie's impartiality.

It was alleged that he was appointed on the recommendation of the applicants' attorney, Mr Spoor. This allegation lacks credence

and, in my view, is unassailable. There is no substantive evidence to support same.

REMOVAL OF THE TRUSTEES

- [40] In their defence, the respondents alleged that the trustees had not breached their fiduciary duties. In particular:
 - (i) the trustees did not have a sufficient and reasonable opportunity to manage the affairs of the Trust due to the interference of the applicant's attorney, Mr Spoor;
 - (ii) the trustees engaged with experts to regularize the affairs of the Trust to the extent that they sought assistance from attorneys to ensure that the affairs of the Trust are in order[10];
 - (iii) they specifically co-operated with Mr Zeelie and furnished him with the requested documents and information.

In fact, the respondents argue that the blame should be laid at the door of the independent trustees, namely the applicants.

- [41] Their defences, however, remain questionable if one has regard to their conduct post their appointment. Mr Zeelie, in his fourth report raised the trustees' unwillingness to timeously not only furnish the requested documents. It was alleged that to date certain information remains outstanding. The trustees were required to furnish the requested information to Mr Zeelie within a specific time period. They failed to timeously do so.
- [42] It was pointed out that material information concerning the beneficiaries has, to date, not been furnished. As a result, the beneficiary list remains incomplete and there are no proof of payments with regard to the beneficiaries who have been paid.
- [43] In these papers, the respondents' contentions against financial maladministration in the hands of the trustees are not substantiated. In fact, the detailed financial maladministration findings remain unchallenged.
- [44] The findings reveal, inter alia, that:
- (i) funds were withdrawn without due process and proper record keeping;
 - (ii) payments were made to persons who did not appear on the beneficiary list;
 - (iii) no reconciliations were performed to ensure that actual beneficiaries were paid;
 - (iv) there was a lack of accounting records and no formal accounting method was evident;
 - (v) substantial funds were paid into the trust account of an attorney, Gerhard Lourens Incorporated but there is no explanation as to this arrangement. The Trust deed specifically stipulated that all funds must be paid into the accounts of the Trust[11];
 - (vi) Lourens Agri, one of the lessees, paid funds directly to the said attorney's account instead of the Trust account. Between the period June 2019 and December 2020 an amount of R5,754,558.43 was paid by Lourens Agri. However, such deposits could not be accounted for in the accounting records or the bank statements of the Trust;
 - (vii) Lourens Agri further made payments directly to the trustees amounting to close to R2 million in 2020 and 2021. This was once again in contravention of the Trust Deed where the trustees were not to receive any remuneration[12];
 - (viii) non-compliance with clause 14.5 of the Trust Deed which required that the financial statements be audited by duly appointed auditors;
 - (ix) the Trust's tax debt remains unsettled. At February 2020, it was established that the Trust owed around R118 million;
 - (x) the Trust failed to file tax returns. This caused SARS to issue assessments for the 2012 to 2020 financial years. The VAT debt was estimated for the 2021 year to be R3.1 million. Moreover no income tax returns were submitted for the 2017 to 2021 financial periods and the income tax liability together with interest was estimated to be R91.6 million[13];

(xii) in terms of the report of April 2022, the Administrator confirmed that the Trust continued to make unauthorized payments;

(xiii) to date there are no explanations or supporting documents pertaining to the withdrawal of funds and payments to the trustees;

(xiv) several farms of the Trust were not properly managed. Various lease agreements were entered into with various tenants. There is no evidence that invoices were issued for the rental amounts or that such rental amounts were paid into the Trust. For instance, with regard to the property, Savannah Farm, the lessee paid a rental of R100,000.00 but did so into the attorneys' trust account. He further paid R45,000.00 to trustees and a further R120,000.00 to Ms Nkentshane;

(xv) in the case of Mr Engels, another lessee on the Savannah property[14], it was established that the rental amounts were not deposited into the Trust account.

[45] On the subject of the beneficiaries, the Report of the Administrator outlines that more than 50% of the beneficiaries' bank account details remain outstanding. The veracity of the beneficiary list remains questionable. The last update of the beneficiary list was in 2019.[15] The list of beneficiaries differ substantially from the list available in 2019. Furthermore, the trustees were unable to confirm whether the persons were in fact those nominated by the respective beneficiary households. It cannot be ruled out that the Trust funds were paid to non-beneficiaries. Furthermore the list was not ventilated at a properly constituted trustees meeting. Although there were only 1464 listed beneficiaries, it was found that over 2000 beneficiaries were paid. These findings clearly illustrate that Trust funds were placed at risk.

[46] On the issue of the irregular payments, the Administrator, by having regard to the bank statements, was able to determine that:

(i) trustees received payments totaling to R890,000.00. Such payments are not in accordance with the Trust Deed as they were not entitled to any remuneration;

(ii) approximately R900,000.00 was paid to the respondents' attorney. There is no justification for the payment being made into the instructing attorney's bank account;

(iii) more than R100,000.00 of cash withdrawals was made by the trustees who were the signatories to the bank account.

[47] Section 20(1) of the Act gives the court an inherent power to remove the trustee from office if it is satisfied that such removal will be in the interest of the Trust and its beneficiaries. A trustee will be removed from office when continuance in office will prevent the Trust from being properly administered or will be detrimental to the welfare of the beneficiaries.

[48] In Gowar[16] the Supreme Court of Appeal cautioned that the power of the court to remove a trustee must be exercised with circumspection. The overriding question is always whether or not the conduct of the trustee imperils the Trust property or its proper administration.

- [49] It was explained that the mere friction or enmity between a trustee and the beneficiaries will not be adequate reason for the removal of a trustee from office, nor will the mere conflict among trustees themselves be a sufficient reason for the removal of a trustee. Acts of misconduct or mala fides on their own are insufficient grounds for a trustee's removal.
- [50] At all relevant times a trustee is in law required to act with care and diligence. The decisive consideration is the welfare of the beneficiaries and the proper administration of the Trust property.
- [51] Section 9(1) of the Act requires a trustee to conduct his or her duties with care, diligence and the necessary skills required of that of a trustee. It reads:

"(1) A trustee shall in the performance of its duties and exercise of its powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another."

- [52] It is the respondents' case that their removal would not be in the interest of the beneficiaries since the trustees have always ensured that the beneficiaries received their dividends which remains the main objective of the Trust. Furthermore it was submitted that the trustees have done everything they possibly could to properly manage the affairs of the Trust. They had even gone to the extent of appointing independent trustees and attorneys to deal with the historical problems of the Trust, for instance, the SARS debt.
- [53] I find it apt to refer to *Sackville West v Nourse and Another* 1925 AD at 535 where the court defined fiduciary duty. In essence, it was set out that:

"A person in a fiduciary position, like a trustee, is obliged in dealing with ... the money of the beneficiary, to observe due care and diligence, and not to expose it in any way to any business risks."

The standard is therefore higher than that which an ordinary person might generally observe in the management of his or her own affairs. [17]

- [54] The ultimate test is, in fact, whether the conduct of the trustees compromised the Trust property and its proper administration. Based on the findings in the respective reports of the Administrator, I find that the Trust property and the administration of the Trust was severely compromised and was to the detriment of the Trust and the beneficiaries. The trustees failed in their fiduciary duties to ensure that they, at all relevant times, acted in the interest of the beneficiaries and the Trust.
- [55] The current trustees appointed in 2019 were expected to resume their duties. In their term of office, the mismanagement of the Trust continued.
- [56] There has been no contrary evidence gainsaying the Administrator's findings. It was incumbent on the trustees to ensure that the identified beneficiaries were paid their dividends and that the Trust funds were managed, accounted for and protected. In this instance, there was not an aorta of evidence placed before me that this was done.

- [57] The trustees had an obligation and a constitutional duty to ensure that the objectives of the Trust were met and that the importance of land restitution and its benefits for formerly displaced communities were taken into account. The impasse amongst the trustees and lack of proper administration of the Trust persists.[18] Most notable, the trustees are unable to properly account for the beneficiary payments.
- [58] Furthermore it is in the interest of the Trust that all the trustees be removed. There is clearly a discord amongst the current trustees. The trustees are unable to work together in the interest of the Trust and the beneficiaries.

APPOINTMENT OF MR ZEELIE

- [59] The relief sought that the Administrator be appointed as a trustee in the meantime, is, in my view, in the interest of the Trust and its beneficiaries under these circumstances. The Administrator has been involved in the administration of the Trust since 2021 and has duly filed several reports. The first report is dated 1 July 2021 and the last report 5 October 2022. He had, by virtue of his mandate, consistently analyzed the lack of the financial administration and beneficiary status of the Trust. He is further equipped with the necessary accounting skills and having gleaned his curriculum vitae he possesses the accounting experience to continue with his mandate.[19] He is entitled to fees which should be reasonable and agreed upon with the community he is representing.
- [60] It is further noted that the core dispute between the community and the trustees are the beneficiary payments. With the progressive reports, it is noted that the Administrator made viable proposals going forward in order to attain proper administration of the Trust.
- [61] Mr Zeelie has also made positive attempts to settle the tax debt. However, he explained that he is unable to execute his mandate freely with the current trustees on board.
- [62] Apart from raising an unfounded bias issue, there is no reason why Mr Zeelie should not continue managing the Trust administration in the meantime. I am further of the view that since he has been involved in administering the Trust, short of two years, a truncated period to bring the Trust affairs in order, would be appropriate. In my view, 12 months is more than sufficient for Mr Zeelie to convene a general meeting and set the process in place for the appointment of new trustees.
- [63] On the issue of the fees, I deem it appropriate that Mr Zeelie reach an agreement with the beneficiaries regarding his fees as well as ancillary assistance costs that is proposed.

COSTS

- [64] Insofar as costs are concerned, I am not inclined to grant a punitive costs order. No basis has been laid for such an order. An order directing the Trust and the trustee respondents to be jointly and severally liable is, in my view, justified.

ORDER

[65] In the premises, I make the following order:

1. The current trustees for the time being of the Sephumelele Tenbosch Trust Registration Number IT 6336/04 (T), (“the Trust”) are removed as trustees, with immediate effect.
2. Petrus Zeelie is appointed as the sole trustee of the Trust (trustee).
3. The eighth respondent is directed forthwith to issue new letters of authority confirming the appointment of Petrus Zeelie as the sole trustee of the Trust.
4. The trustee shall have all the powers and duties as provided for in the Trust Deed, to administer the affairs of the Trust in the best interests of the beneficiaries.
5. The trustee shall have the power to lease the fixed properties of the Trust or to renew existing leases in the ordinary course of the business of the Trust.
6. The trustee is directed specifically:

6.1 to update the register of beneficiaries and to verify the information recorded therein, including the beneficiaries’ banking details, and to maintain such register;

6.2 to take under its control the Trust’s property, books, papers and financial records, wherever they may be located and, to the extent required, to compel the delivery of such property, books, papers and financial records to the Trust;

6.3 to compile and maintain an inventory of all Trust assets;

6.4 to reconstruct the financial records of the Trust, as required and prepare comprehensive financial statements and to have same audited;

6.5 to identify and recover all moneys owed to the Trust;

6.6 to prepare and submit to SARS all outstanding tax declarations and returns;

6.7 to enter into discussions and/or negotiations with SARS, regarding the tax liabilities of the Trust, and to conclude an agreement and/or arrangement for the settlement of liabilities, as accrues to the best interest of the Trust;

6.8 subject to the agreement of SARS, to make such distributions to the beneficiaries, as is financially prudent, having regard to the pressing social and economic circumstances of the beneficiaries.

7. The trustee is further directed within 12 months of date of this order to:

7.1 convene a general meeting of the Trust for the purposes of presenting the financial reports of the Trust and for the holding of an election of new trustees of the Trust, provided that the trustee may make application to the High Court, on good cause shown and on notice to the beneficiaries and to the Master, for an extension of the 12 month period;

7.2 to consider appropriate amendments to the Trust Deed, as may be requisite to ensure the continued good governance of the Trust after their term of office has lapsed, and to the extent that they deem it in the best interests of the Trust and its beneficiaries, to make application to the High Court, on notice to the beneficiaries and to the Master, to effect such amendments;

7.3 to prepare and submit a first written report to the Master on their administration of the Trust within 90 days of this order, and further reports every 90 days thereafter.

8. The trustee shall be entitled:

8.1 to receive and be reimbursed from the Trust's funds a reasonable remuneration for work done and time spent on the administration of the Trust and the exercise of their powers and the fulfilment of his duties at a reasonable agreed fee, which fees are payable from the Trust's funds;

8.2 to employ the services of an assistant forensic practitioner for the purpose of investigating the affairs of the Trust, administration of the trust and the exercise of their powers in the fulfilment of their duties at a reasonable agreed rate, which fees are payable from the Trust's funds;

8.3 to employ the services of an accounting and/or bookkeeping clerk in respect of their financial administration of the Trust at a reasonable agreed rate, which fees are payable from the Trust funds.

9. For the avoidance of doubt, the trustee will perform his duties in his professional capacity as a Member of the South African Institute of Chartered Accountants ("SAICA") and shall always be bound by the SAICA Code of Professional Conduct and be subject to that body's discipline.

10. The Trust and the trustee respondents who opposed this application are jointly and severally liable, the one paying the other to be absolved, to pay the applicants' costs in these proceedings.

11. Such costs are to be taxed and awarded in the discretion of the Taxing Master.

H KOOVERJIE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the first applicant: Adv

T Strydom SC Adv JP Slabbert

Instructed by:

Richard Spoor Inc. Attorneys

c/o Brazington & McConnel Attorneys

Counsel for the first to seventh respondents: Adv T Ngwenya

Instructed by: JF

Shabangu Attorneys

Counsel for the provisional administrator: Adv D van den Bogert

Instructed by: Murphy

Kwape Maritz Attorneys

Date heard: 8

November 2022

Date of Judgment: 18 November 2022

- [1] Page 4-4 to 4-6
- [2] Pages 21-8 to 21-9 read with Annexures ‘SA3’, ‘SA4’, ‘SA5’, ‘SA6’
- [3] Page 10-12 to 10-13 of the answering affidavit
- [4] Fesi and Another v Trustees Elect of the Ndabeni Communal Property Trust (IT1056/98 [2018] JOL 29823 (SCA) at par 60
- [5] Page 4-10 of the founding affidavit
- [6] Page 4-14 of the founding affidavit
- [7] Page 22-10 of the respondent’s supplementary affidavit
- [8] Ras NO & Others v Van der Meulen and Another 2011 (4) SA 17 SCA at par 10
- [9] see clauses 3.4.1, 4.2 and 4.3 of the Trust Deed
- [10] Page 22-10 and 22-11 (supplementary answering affidavit)
- [11] See clause 14.6
- [12] Clause 17.3 of the Trust Deed states that: “Trustees shall not receive any remuneration in respect of their services for the Trust.”
- [12] Clause 17.3 of the Trust Deed states that:
“Trustees shall not receive any remuneration in respect of their services for the Trust.”
- [13] Page 21-50 to 21-52 of the supplementary affidavit of the applicant
- [14] Page 21-72 of the applicant’s supplementary affidavit
- [15] Page 21-63 of the applicant’s supplementary affidavit
- [16] Gowar and Another v Gowar and Others [2016] 3 All SA 382 (SCA)
- [17] Administrators, Estate Richards v Nichol and Another 1999 (1) SA 551 (SCA)

[18] Page 21-20 of the supplementary affidavit

[19] Page 4-30 to 431 read with Annexure 'SD17**

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