
SOUTH AFRICA / JUDGMENT

Shabangu N.O. and others v Malumane N.O. and Others (1980/2020) [2021] ZAMPMBHC 46 (4 October 2021) [2021] ZAMPMBHC 46

COURT

Mbombela High Court, Mpumalanga

BEFORE

Mashile

CASE / FILE NUMBER

1980/2020

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REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

(MPUMALANGA DIVISION,
MBOMBELA)

REPORTABLE: NO

OF INTEREST TO OTHER

JUDGES: YES

REVISED: YES

04/10/2021

CASE

NO: 1980/2020

In

the matter between:

FONIE
SHABANGU
N.O.
First Applicant
JAMES
VADER SHAKOANE
N.O.
Second Applicant
FRANCINA
SOKATI
N.O.
Third Applicant
MONDAY
MAKHABANE
N.O.
Fourth Applicant
and
DECEMBER
JOHN MALUMANE N.O.
First Respondent
SILO
MICHAEL MABUZA
N.O.
Second Respondent
BHANI
PETRUS KHOZA
N.O.
Third Respondent
ENSIE
MASOMO MOKOENA N.O.
Fourth Respondent
MAKARONI
ROBERT SHABANGU N.O.
Fifth Respondent
DUDU
EUNICE MBUYANE
N.O.
Sixth Respondent
BRYAN
BONGA MOKOENA N.O.
Seventh Respondent
WALTER
DAVID MOKOENA N.O.
Eighth Respondent
BUSI
LUSIA MASHEGO
N.O.
Ninth Respondent
SAMSON
DANIEL SHAKOANE N.O.
Tenth Respondent

MASTER
OF THE HIGH COURT: MBOMBELA
Eleventh Respondent
OFFICE
OF REGIONAL LAND CLAIMS

COMMISSIONER: MPUMALANGA
Twelfth Respondent
MEC
FOR RURAL DEVELOPMENT
AND
LAND REFORM: MPUMALANGA
Thirteenth Respondent

JUDGMENT

MASHILE J:

INTRODUCTION

[1] This application concerns the removal of the First to Tenth Respondents as trustees of the Mbayane Community Trust (“the Trust”). These trustees are currently on suspension following an urgent order of this Court per Greyling-Coetzer AJ on 2 October

2020. The essence of the order is that pending the Applicants’ application for the removal of the First to Tenth Respondents as trustees of the Trust, the aforesaid respondent

trustees are suspended and interdicted from acting on behalf of the Trust’s and/or performing any duties and/or exercising any powers as per the Trust Deed. The word, respondents and trustees, will be used interchangeably depending on the context.

[2] The order continues to appoint all of the four Applicants as interim trustees of the Trust and directs them to nominate and appoint an independent trustee within 14 days of the date of the order. The order further lays down that the nominated independent trustee is required to:

2.1 Be suitably qualified to act as trustee and assist the Trust in functioning optimally;

2.2 Have no current or former affiliation and/or association and/or interest in the Trust, Greyling Botha Van Rensburg Attorneys, Desire Koch Attorneys or an attorney’s firm associated with either of aforementioned firms;

2.3 Be regarded as a suitable trustee as provided for in the Trust Property Control Act NO 56 of 1988.

- [3] The order also prescribes that the independent trustee would have the same powers bestowed on trustees as per Clause 6 of the Trust Deed except that in addition, he enjoys a casting vote. The interim trustees would have the same powers as described in the Trust Deed, with the added power given to the independent trustee and subject to

any limitation set out in the order. The interim trustees are specifically deprived of the power to dispose, sell, alienate, exchange, any real right in respect of any immovable property belonging to the Trust. Finally, the Applicants were ordered to launch the application for the removal of the First to Tenth Respondents as trustees of the Trust within 15 days of the date of the order, failing which the interim order would lapse.

- [4] As directed by the court, the Applicants are now applying to court seeking the removal of the First to Tenth Respondents as trustees. The Applicants allege that the justification for the application is the First to Tenth Respondents' failure to adhere to their fiduciary duties in terms of the Trust Property Control Act, 57 of 1988 ("the Act"), which they deliberately neglected.
- [5] Proper administration of the Trust, aver the Applicants, will not only be hindered by the Respondents continuing to act as trustees but it will be detrimental to the welfare of the members, beneficiaries and households in the Trust. The Trust Deed as it stands now, does not prevent trustees who have been removed by either members or other trustees or a court order from standing for election again. The Applicants Lament this manifest lacuna in the Trust Deed and seek the intervention of this Court in that regard.
- [6] The relief sought by the Applicants in this application is set out in the following terms:

"1. The First to Tenth Respondents are removed as the Trustees of the Mbayane Community Trust with registration number: IT010926/2004(T);

2. That the First to Tenth Respondents surrender their letters of authority to the Eleventh Respondent;
3. That the Eleventh Respondent adjusts and amends their records accordingly, alternatively cancels or terminates the letters of Authority issued to the First to Tenth Respondents on 18 June 2018;
4. That the interim trustees appointed in terms of the court order granted on 2 October 2020 under this case number continue to act as such until the election of the new Trustees as per the election procedure set out in the Trust Deed;
5. That the First to Tenth Respondents are prevented from accepting any nomination to be appointed as a Trustee and/or prevented from being appointed as a Trustee of the Mbayane Community Trust again;

6"

FACTUAL MATRIX

- [7] The Trust is said to have been founded by Sihlahuse Joseph Motaung during 2004. The main objective of its formation was to secure a property that the community had obtained through a process of land claim for development for the benefit of the community. The primary idea was that every household had to receive equal value from the assets of the Trust. As such, the Trust had to be managed by the trustees for the benefit of every household/member or beneficiary.
- [8] Following the registration of the Trust, various immovable properties acquired through the land claim process were transferred into the name of the Trust. The value of the properties transferred to the Trust is significant and they are prime farming properties. The transfer of the properties into the name of the Trust did not necessarily come with advantages for the community nor did they produce any income or benefit for all the beneficiaries or households. The first benefit, allege the Applicants, that the whole community realized was during December 2019.
- [9] During late 2015 to early 2016, negotiations ensued with Mr. Deon Kotzee who wanted to lease the property known as Lahlamali, being Portion 3 of the Farm Legogote 30, Registration Division JU, Province of Mpumalanga. The Applicants have confessed that they are not in possession of a copy of the lease agreement. That said, they claim that they have nonetheless been able to establish some information concerning the lease agreement. That information relates specifically to the income which the lease agreement generates annually.
- [10] The Applicants state that the lease agreement raised an average income of approximately R600 000.00 per annum. The amount is said to have been paid into the account of the Trust by Mr Kotzee since 2016. The aforesaid notwithstanding, no benefit has accrued to the beneficiaries or households of the Trust. The Applicants allege further that a rough estimate of how much should be in the bank account of the Trust amounts in all to R2 400 000.00. It must be noted that this information has not been confirmed by Mr Kotzee.
- [11] The Applicants say that they have persistently been requesting the trustees to furnish explanation why the property for which the community had worked so hard to obtain was not providing any support or income to the beneficiaries. No explanation was forthcoming. To date the position has not changed. In June 2018, the current trustees were appointed. It soon became obvious that these Trustees were not acting in the best interest of the members as they were not complying with their fiduciary duties as trustees of the Trust.
- [12] The maladministration of the Trust endured and became frightening for the members of the Trust. It is common cause that no financial information was ever made available, no information regarding income or expenditure of the Trust was ever tabled and no one knows why funds were not paid to the beneficiaries at all. When the Applicants attempted to obtain bank statements of the Trust, the Bank officials advised them that only the signatories to the account were authorized to have access to them. Subsequent to numerous requests to have insight into the bank accounts of the Trust, the trustees provided them with

a handwritten bank statement at one meeting. This was one indubitable confirmation that serious administration issues prevailed

in the Trust, allege the Applicants.

[13] The Applicants state that the First to Tenth Respondents carried on to avoid their requests for information. The frustration experienced by the Applicants and the beneficiaries of the Trust deepened in 2018 when the latter decided to take action against the appointed Trustees by seeking advice from their Attorney of Record. On 8 December 2018 at a meeting of the members of the Trust, it was resolved to appoint the Applicants, as the Safety, Security and Disciplinary Committee,

to take over the running of the Trust because of the discontent with the current administration of the Trust by the trustees.

[14] Additionally, the meeting decided to have the First to Tenth Respondents removed as Trustees because of their failure to observe their fiduciary duties. On 11 December 2018, all the trustees were served with Letters of Demand relating to the financial statements of the Trust. The demand also informed them of the resolution that they be removed as trustees. The members had doubts regarding the Trust especially its running. From the beginning, the community has not received any financial reward or monthly income from the management of the immovable properties of the Trust.

[15] The first financial aid or distribution to households was received during December 2019. Each household received an amount of R6 000.00 distributed from the rental income of the Trust received from Mr Kotzee. The Applicants instructed their Attorney to proceed with an Application for the removal of the trustees. They subsequently managed to obtain a copy of Mr Kotzee's payment history for the period of six months preceding the appointment of the Applicants' attorney in 2018.

[16] It is evident from the statement that during the period 2 August 2018 to 28 September 2018, Mr Kotzee paid an amount of approximately R370 000.00 into the bank account of the Trust. The Applicants allege that to date they have no knowledge of the fate of the money whatsoever. None of the trustees who are also the Respondents in this application, can give a satisfactory explanation of where the money had disappeared.

[17] A bank statement was ultimately produced in January 2019 for the period of 1 August 2018 until 31 December 2018 after a considerable pressure was brought to bear on the trustees. From these bank statements, it is discernable that all of the funds that were paid to the Trust's account were withdrawn as cash. This fact was confirmed by Ms M Surajpersad in a letter dated 28 March 2019 addressed to the Thirteenth Respondent. There has been neither explanation for the withdrawals nor is there supporting documentation or anything to show that this money was used for the benefit of the beneficiaries of the Trust.

- [18] The Applicants and the beneficiaries, in general, have taken a more active role in the affairs and management of the Trust. Some of them have even expressed their wish to develop the immovable properties for the benefit of the larger community. Towards the end of August 2020, the majority of the members of the Trust accepted a proposal to sell some of the portions of the immovable property of the Trust to develop the remaining portions. They believe that such development could yield tangible benefits.
- [19] It is not contested or seriously denied that shortly after taking the decision to develop the immovable properties of the Trust, the First to Tenth Respondents made several attempts to terminate the mandate of the Attorneys of the Applicants. When the attempt failed, threats of intimidations surfaced culminating in the Tenth Respondent threatening the Second Applicant, his brother, if he did not sign a resolution supporting the Respondents. These threats ended up being interdicted by the order of this Court dated 2 October 2020.
- [20] The Applicant allege that it seems that the Respondents admit that there has been mismanagement of the funds of the Trust. The admission notwithstanding, it is strenuously argued that only some of the trustees were responsible for the act. As such, it is unlawful to visit the remaining trustees with the indiscretions of the others who, it is claimed, have since been suspended.

POINTS IN LIMINE

- [21] The Respondents have raised certain preliminary points which require adjudication before determination of the main issues. These are the following:
- 21.1 Disputes of fact;
 - 21.2 Misjoinder of the Fourth Applicant;
 - 21.3 The Deponent's lack of locus standi; and
 - 21.4 The lack of jurisdiction of this court.

DISPUTES OF FACT

- [22] Here the Respondents' claim is that the acceptance of a proposal to sell portions of the property of the Trust has created a material dispute of fact. It is trite that a court has a wide-ranging discretion whether to refer an application to oral evidence. A court cannot refer a matter for oral evidence on the mere say-so of one of the parties to a dispute. Prior to doing so, it ought to examine the dispute of fact to determine whether such dispute of fact is real or genuine.
- [23] The manner in which disputes of fact can arise was described in the matter of Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T). Some of these are:

23.1 When the respondent denies all the material allegations made by the various deponents on the applicant's behalf, and produces or will produce, positive evidence by deponents or witnesses to the contrary. He may have witnesses who are not presently available or who, though adverse to making an affidavit, would give evidence viva voce if subpoenaed;

23.2 When the respondent admits the applicant's affidavit evidence but alleges other facts which the applicant disputes;

23.3 When the respondent concedes that he has no knowledge of the main facts stated by the applicant, but denies them, putting the applicant to the proof and himself gives or proposes to give evidence to show that the applicants and his deponents are biased and untruthful or otherwise unreliable, and that certain facts upon which the applicant relies to prove the main facts are untrue.

[24] The disputes of fact complained of ought to be about the one that is for adjudication before the court seized of the matter. Accordingly, it is appropriate to ask oneself what the dispute is in this matter. The controversy before this Court for decision concerns the removal of the trustees and barring them for nomination for appointment as trustees ever again.

[25] Given the nature of the dispute before this Court, it is difficult to establish a connection between the acceptance of a proposal to sell portions of the land of the Trust and the removal of trustees. Moreover, and assuming that the proposal to sell was relevant, the order of this Court per Greyling-Coetzer AJ dated 2 October 2020 specifically prohibits the interim trustees to alienate any property of the Trust. That on its own would have rendered the complaint relating to disputes of fact completely extraneous to the dispute before court. In the circumstances, the disputes of fact contention are dismissed as devoid of any merit whatsoever.

MISJOINDER OF THE FOURTH APPLICANT

[26] The allegation that the Fourth Applicant was unaware of this application and that he is not part of it is outrageous especially because he is cited as such in these papers. Furthermore, the Respondents state that, as confirmation of their allegation, an affidavit of the Fourth Applicant is attached to their answering affidavit BUT on inspection of their PAPERS, no such confirmatory affidavit could be found. In fact, the Applicants have annexed a confirmatory affidavit of the Fourth Applicant as proof that he is aware of the matter and that he is part of it. In the circumstances, this point in limine too stands to be dismissed as bereft of any merit.

THE DEPONENT'S LACK OF LOCUS STANDI

[27] I agree with the Applicants that while the Respondents may not have dealt with this point as a point in limine, allegations of lack of locus standi are generally characterised as preliminary points. As such, it ought to be dealt with at this juncture. Perhaps it will be appropriate to preface any discussion here with the provisions of Clause 23 of the Trust Deed. The Clause empowers any member, class of members or any person having a material

interest therein to approach the court for appropriate relief in the event of any refusal or failure on the part of the Trustees.

- [28] This point in limine is nonsensical in view of the admission by the Respondents that all the parties are members and beneficiaries of the Trust. It follows that the Deponent, as a member and beneficiary of the Trust, has a material interest to approach this Court where the trustees have failed or refused to do so. The Deponent was part of the urgent application wherein the court directed that he, together with the other applicants, ought to launch this application within 14 days of the date of the order failing which the interim order would lapse. The admission as outlined above cannot co-exist with the lack of locus standi argument. As such it is rejected and dismissed.

LACK OF JURISDICTION OF THIS COURT

- [29] The Respondents have filed a supplementary affidavit wherein they deal with the clause pertaining to arbitration in the Trust Deed. It is settled that a party must seek leave of the court to file further affidavits. The Respondents' explanation for their failure to have dealt with the issue of arbitration in their answering affidavit is that the Applicants filed the Trust Deed with missing pages. As a matter of fact, the Respondents specifically state in their answering affidavit that a supplementary affidavit might become necessary later once they have established precisely what the missing pages of the Trust Deed are all about. This is what they have done. In the absence of opposition, I have no difficulty to grant leave for the filing of

the supplementary affidavit.

- [30] I now turn to arbitration as another point in limine raised by the Respondents. The clause dealing with arbitration in the Trust Deed is 24 and it is headed: "Disputes". The Respondents have referred to the relevant sub-clauses of Clause 24, which I proceed to cite in full below:

"24.1 In order to facilitate the resolution of disputes and avoid unnecessary litigation, in the case of disputes which for any reason

are unable to be referred to the MASTER, it is further provided that the Board of TRUSTEES, or any three (3) of their number, or a General Meeting of MEMBERS or any four (4) of their number, shall be entitled to require, in the event of any difference or dispute which the parties are unable amicably to resolve, whether in regard to the meaning or effect of any term of this TRUST DEED, or the rights and obligations of any party interested or acting thereunder, or any other matter arising therefrom or incidental thereto, that such difference or dispute shall be referred to arbitration in accordance with the following provisions:

24.4. The Arbitrator shall permit each party to adduce such evidence and argument as the Arbitrator may consider to be relevant to the matter in dispute.

24.8 The decision of the Arbitrator shall be final and binding upon all parties and capable of being made an Order of Court on application by any of them.”

- [31] The Respondents are unwavering in their assertion that these extracts from Clause 24 of the Trust Deed represent proof that the Arbitrator has jurisdiction to adjudicate disputes and not this Court. Perhaps the first remark that I should make is one appropriately observed by the Applicants – the arbitration clause is concerned with reference of controversies to the arbitrator for determination. The ground upon which the removal of the trustees is sought being common cause, it is hard to fathom where the dispute lie. The Respondents admit that there has been misappropriation of funds by some among themselves. If that is so, where is the dispute for referral?
- [32] I need to emphasise that once the Respondents do not contest the allegation that there have been mal-administration and misappropriation of funds in the Trust, which is the ground upon which their removal as trustees is sought, their case has been dealt a fatal blow and they cannot rely on arbitration as a point in limine. The clause of arbitration as cited by the Respondents is correct but it hardly finds application here because there is no controversy for referral to the arbitrator.
- [33] Besides and assuming that arbitration was properly raised, this Court would not have entertained it anyway in the absence of an application to stay the proceedings while they refer it for arbitration. Dismissal of the application is totally improper in these circumstances. The correct position is as described above. I say an application to stay the proceedings pending referral would have sufficed because I read the Trust Deed to be an agreement among the trustees on how they will run and operate the Trust for the benefit of the larger body of beneficiaries.
- [34] In any event, arbitration is inappropriate for another reason as pointed out by the Applicants. An arbitrator cannot grant an order authorizing the Master of the High Court to remove the trustees of the Trust. That remains the preserve of this Court. So, this point would not have succeeded for that reason as well. Against that background the point in limine is dismissed.

ISSUES

- [35] Now that I have disposed of the points in limine, it is proper to turn to the actual issues that should be addressed in this judgment. From the facts above I am required to determine whether or not it is appropriate to remove the Respondents as trustees on the ground of breach of their fiduciary duties with the Trust. Furthermore, I am also expected to make a pronouncement on whether or not this Court can, in the absence of any provision in the Trust Deed, proscribe the trustees from nomination to ever stand for elections as trustees of the Trust again.

LEGAL FRAMEWORK

[36] This application for the removal of the Respondents as trustees is founded on the Act. As such, it is proper to outline the Sections of the Act pertinent to the issue. Section 9 provides that:

“9 Care, diligence and skill required of trustee

- (1) A trustee shall in the performance of his duties and the exercise of his powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another.
- (2) Any provision contained in a trust instrument shall be void in so far as it would have the effect of exempting a trustee from or indemnifying him against liability for breach of trust where he fails to show the degree of care, diligence and skill as required in subsection (1).”

[37] Dealing with removal of trustees for their failure contemplated in Sub-Section 2 of Section 9, Section 20 is headed: Removal of trustee and it stipulates:

“(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.

- (2) A trustee may at any time be removed from his office by the Master
 - (a) if he has been convicted in the Republic or elsewhere of any offence of which dishonesty is an element or of any other offence for which he has been sentenced to imprisonment without the option of a fine; or
 - (b) if he fails to give security or additional security, as the case may be, to the satisfaction of the Master within two months after having been requested thereto or within such further period as is allowed by the Master; or
 - (c) if his estate is sequestrated or liquidated or placed under judicial management; or
 - (d) if he has been declared by a competent court to be mentally ill or incapable of managing his own affairs or if he is by virtue of the Mental Health Act, 1973 (Act 18 of 1973), detained as a patient in an institution or as a State patient; or
 - (e) if he fails to perform satisfactorily any duty imposed upon him by or under this Act or to comply with any lawful request of the Master.
- (3) If a trustee authorized to act under section 6 (1) is removed from his office or resigns, he shall without delay return his written authority to the Master.”

[38] IN Land and Agricultural Bank of South Africa v Parker and Others 2005

- (2) SA 77 (SCA) at paragraph 10, it was stated that: “In its strictly technical sense the trust is a legal institution sui generis... The trustee is the owner of the trust property for purposes of administration of the trust but qua trustee he has no beneficial interest therein.” In the same vein, in *Lupacchini NO and Another v Minister of Safety and Security* 2010 (6) SA 457 (SCA) at paragraph 1 the court said the following:

“...is an accumulation of assets and liabilities. These constitute the trust estate, which is a separate entity. But though separate, the accumulation of rights and obligations comprising the trust estate does not have legal personality. It vests in the trustees, and must be administered by them – and it is only through the trustees, specified as in the trust instrument, that the trust can act...”

- [39] It is trite that where a trust has more than one trustee, they share a common fiduciary obligation towards the fulfilment of the objects of the trust and must act jointly. See *Gowar and Another v Gowar and Others* 2016 (5) SA 225 (SCA). As early as 1925, the Appellate Division, as it then was, stated the following in *Sackville West v Norse and Another* 1925 AD 516 on the fiduciary duties of trustees:

“The effect of this authority is that a tutor must invest the property of his ward with diligence and safety. It is also said that a tutor must observe greater care in dealing with his ward's money than he does with his own, for, while a man may act as he pleases with his own property, he is not at liberty to do so with that of his ward. The standard of care to be observed is accordingly not that which an ordinary man generally observes in the management of his own affairs, but that of the prudent and careful man; or, to use the technical expression of the Roman law, that of the bonus et diligens paterfamilias. . . . We may accordingly conclude that the rule of our law is 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.”

See also, *Administrators, Estate Richards v Nichol and Another* [1998] ZASCA 82; 1999

- (1) SA 551 (SCA).

- [40] The general rule regarding the removal of trustees is that a trustee will be removed from office when continuance in office will imperil the property of a trust and prevent the trust itself being properly administered to the welfare of the beneficiaries. The power to remove a trustee must be exercised guardedly but neither mala fides nor even misconduct is required for the removal of a trustee. See the *Gowar* case supra at paragraphs 30 – 31. Courts have over and over again stressed that the removal of trustees must be done in line with the provisions

of Section 20(1) of the Act - when it is in the interests of the trust and its beneficiaries.

- [41] To the extent that the Applicants require this Court to vary the provisions of the Trust Deed, Section 13 of the Act becomes pertinent. The Section provides:

“Power of court to vary trust provisions —

If a trust instrument 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 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 particular trust property is substituted for particular other property, or an order terminating the trust.”

ANALYSIS

[42] The questions for this Court are, have the trustees failed in their discharge of their fiduciary duty towards the Trust, if so, in what manner have they contravened their fiduciary duty towards the Trust and is it in the interest of the Trust and its beneficiaries that they be removed as trustees? I proceed to address these issues below.

HAVE THE TRUSTEES FAILED TO ACT IN ACCORDANCE WITH THEIR FIDUCIARY AND IF SO, IN WHAT MANNER

[43] The Applicants have submitted that the manner in which the trustees have conducted themselves, which they do not contest anywhere in their papers, puts the proper administration of the trust and the trust property at risk. The trustees have no financial information, explanation and/or record keeping of any kind. They have kept no records of any decisions that they have taken, no minutes of meetings from the time they were appointed. No proof exists that records were made available to any of the beneficiaries and/or members and/or households.

[44] The trustees cannot explain the large cash withdrawals contained in the bank statement on which the Applicants were able to lay their hands. There is no financial and/or administrative reporting of any kind. This is confirmed by the registration of ownership and title of a property belonging to the Trust into the name of an unknown individual without any explanation or record of a decision in connection therewith.

[45] The title deed indicates that the property was donated but no one knows under what circumstances the donation was made as there is no resolution through which one can determine why it was made. Even assuming that the information on the title deed is incorrect and that the land was in fact sold, there is no proof of a large amount that can be associated with the sale of the property being deposited into the account of the Trust.

[46] Oblivious of the principle in the Gowar case *supra*, that trustees share a common fiduciary obligation towards the fulfilment of the objects of the trust and must act jointly. One set of trustees accuse another of being delinquents blaming them of mismanaging the finances of

the Trust, displaying unbecoming behaviour and refusing to furnish them with the financial report. One thing stands out and that is that despite this knowledge that the other set of trustees were a problem, the other claiming to be innocent did nothing to determine the extent of the mismanagement such that to date no one knows how much money has been embezzled.

- [47] Because trustees act jointly as a unit, the one set cannot attempt to extricate itself from the other set for its failure of observance of its fiduciary duties, they are all in it together with the others and the responsibility is therefore to be shouldered by all of them. In short, the failure is attributed to the whole unit of trustees and not to individual trustees especially in circumstances where those who claim to be innocent have done nothing to acquit themselves of the misdeed.

POWER TO VARY THE TRUST DEED

- [48] Prior to this Court entertaining variation of the Trust Deed, it must be satisfied that the founder of the Trust has, at the time of the creation of the Trust, failed to contemplate or foresee that there could be a need to make a provision that would limit the eligibility of trustees to stand for nomination for re-election as trustees especially those who have been removed in circumstances where they have contravened their fiduciary duties with the Trust. This is contrary to the fiduciary relationship between trustees and beneficiaries, members and/or households.
- [49] It is not demanding to realise that had the founder thoroughly thought of the repercussions of the lack of a provision limiting the nomination of a trustee especially one removed under circumstances where he has transgressed his fiduciary duties, he would have sought the inclusion of a clause limiting re-election as a matter of course. Failure to limit nomination to stand for re-election under circumstances described above would fetter or hinder the objectives the founder meant to accomplish by the creation of the Trust. This will prejudice the interest of the beneficiaries and equally imperil the property of the Trust. The Trust Deed must accordingly be amended to reflect the proper intentions of the founder.

FINDINGS

- [50] The Respondents have as a unit of trustees for the Trust failed to observe their fiduciary duties. The fact that not all of them were involved in the misappropriation of the funds belonging to the Trust is of no moment as they act jointly. This Court has the power in terms of Section 13 of the Act to vary the Trust Deed to include or remove a provision that the founder could not have contemplated or foreseen at the time of the creation of the Trust.

CONCLUSION

- [51] In the result, the application succeeds and I make the following order:

1. The First to Tenth Respondents are removed as the Trustees of the Mbayane Community Trust with registration number: IT010926/2004(T);
2. The First to Tenth Respondents are directed to surrender their letters of authority to the Eleventh Respondent;
3. The Eleventh Respondent is directed to adjust and amend their records accordingly, alternatively, cancel or terminate the letters of Authority issued to the First to Tenth Respondents on 18 June 2018;
4. The interim trustees appointed in terms of the court order granted on 2 October 2020 under this case number are ordered to continue to act as such until the election of the new Trustees as per the election procedure set out in the Trust Deed;
5. The First to Tenth Respondents are prevented from accepting any nomination to be appointed as Trustees of the Trust again;
6. The Trust Deed must be amended to read that trustees who have previously been removed as trustees, especially as a result of contravention of their fiduciary duties with the Trust, are excluded from accepting nomination to stand for elections as trustees again;
7. The First to Tenth Respondents are ordered to pay the costs of this application on an attorney and client scale.

B A MASHILE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 04 October 2021 at 10:00.

APPEARANCES:

Counsel for the Applicant:

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Instructed by:

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C/O Desire Koch Attorneys

Counsel for the Respondents: No appearance

Instructed by:

Sphiwe Milazi Attorneys Inc

C/O SN Mkhathswa Attorneys

Date of Judgment:

04 October 2021

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