

SOUTH AFRICA / JUDGMENT

Van As N.O. and Others v Jacobs N.O. and Others (54121/2019) [2024] ZAGPPHC 292 (27 March 2024) [2024] ZAGPPHC 292

COURT

North Gauteng High Court, Pretoria

BEFORE

T P Krüger

CASE / FILE NUMBER

54121/2019

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

REPORTABLE:

YES / NO

OF

INTEREST TO OTHER JUDGES: YES / NO

REVISED:

Date:

27/03/2024

Case

Number: 54121/2019

In

the matter between:

KAREL
JOHANNES VAN AS N.O.
First
Applicant
STAR
STONE CRUSHERS CC
Second
Applicant
KAREL
JOHANNES VAN AS N.O.
Third
Applicant
CHRISTINE
CATHERINE VAN AS N.O.
and
GETRUIDA
SUSANNA JACOBS N.O.
First
Respondent
DAWID
MATTHEE N.O.
Second
Respondent
GETRUIDA
SUSANNA JACOBS N.O.
Third
Respondent
DAWID
MATTHEE N.O.
Fourth
Respondent
DAWID
MATTHEE N.O.
Fifth
Respondent
CYNTHIA
MATTHEE N.O.
Sixth
Respondent
GERTRUIDA
SUSANNA JACOBS
Seventh
Respondent
DAWID
MATTHEE
Eighth
Respondent
THE
MASTER OF THE HIGH COURT, PRETORIA
Ninth
Respondent

MIDCITY
PROPERTY SERVICES (PTY) LTD
Tenth
Respondent
FREDERIK
JOHANNES VAN AS N.O.
Eleventh
Respondent
CHANTELL
VAN AS N.O.
Twelfth
Respondent
FERDINAND
SMARTENRYK DEVENIER N.O.
Thirteenth
Respondent
FREDERIK
JOHANNES VAN AS
Fourteenth
Respondent

JUDGMENT

T P Krüger AJ:

[1] On 14 December 2020 when this matter was first heard, the court at the instance of the first to fourth and seventh and eighth respondents upheld a point in limine and dismissed the application for lack of compliance with Regulation 4(2) of the Regulations governing the Administration of an Oath or Affirmation promulgated in terms of section 10 of the Justices of the Peace and Commissioners of Oath Act 16 of 1963. On 1 December 2022 a Full Bench upheld the appeal against the first order and ordered that the application be reconsidered. This court is thus seized with the reconsideration of the application.

[2] The applicants seek an order –

(i) that the first to fourth and seventh and eighth respondents be held in contempt of court and be dealt with appropriately;

(ii) that the first to fourth respondents be removed as trustees of two trusts and they be replaced by independent trustees appointed by the Master of the High Court;

(iii) that the trust deed of one of the two trusts mentioned in (ii) above be amended.

The first to eighth respondents in their counterapplication seek an order –

(i)

that the determination of the application be postponed pending the adjudication of an action instituted by the eleventh to thirteenth

respondents others under case number 74582/17, alternatively that the application be consolidated with the aforesaid action for simultaneous determination;

(ii)

In the alternative, and if the above relief is refused, that the first applicant be removed as trustee of one of the trust and be replaced by a trustee appointed by the Master.

[3] The first applicant brings the application as a trustee of the Deelkraal Behuisings Trust (hereinafter referred to as the “Deelkraal

trust”) and in his capacity as a trustee of the Pivotal Family Trust, who in turn holds 100% of the membership interest in Star Stone Crushers CC (“Star Stone”). The fourth applicant is the other trustee of the Pivotal trust. For the sake of convenience, I shall refer to the first applicant as “Van As” unless the context requires a different description.

[4] The first respondent (herein “Mrs Jacobs”) is the mother

of the first applicant. She and the second respondent (herein “Matthee”) are the other two trustees of the trust.

Mrs Jacobs and Matthee are also cited herein as the third and fourth respondents in their representative capacities as the trustees of the Sebenza Trust and as the seventh and eighth respondents in the personal capacities.

[5] Matthee and his wife are the fifth and sixth respondents as trustees of the Rucinda Trust.

[6] The ninth respondent is the Master of the High Court. The Master is cited herein with the purpose to give effect to some of the relief sought by the applicants.

[7] The tenth respondent is MidCity Property Services (Pty) Ltd. At the hearing of the application, counsel for the applicants indicated that the applicants did not pursue the relief to appoint MidCity as rental agents of the trust as a court cannot make a contract for the parties. This proposal accords with the principles enunciated in *City of Cape Town (CMC Administration) v Bourbon-Leftley and Another* NNO 2006 (3) SA 488 (SCA) at para 9. MidCity plays no further role in this application.

[8] The eleventh to thirteenth respondents are the trustees of the Frikkie van As Family Trust. The eleventh respondent is cited as the fourteenth respondent in his personal capacity. The applicants did not persist with any relief against the eleventh to fourteenth respondents and they did not participate in the hearing.

- [9] The beneficiaries of the Deelkraal trust are the Sebenza Trust, the Rucinda Trust and Star Stone which respectively hold 45%, 10% and 45% of the beneficial interest in the trust. Mrs Jacobs, Matthee and Van As hold office as trustees of the Deelkraal trust, in their respective capacities as representatives of the Sebenza Trust and the Rucinda Trust and the Pivotal Family Trust,.
- [10] The Deelkraal trust was created in 2008. Mrs Jacobs was the founder of the Deelkraal trust. She and Matthee, together with Frik van As, were the original trustees. The Deelkraal trust owns the immovable properties known as the remaining extent of Portion 10 (a portion of Portion 3), Portion 11 (a portion of Portion 10) and portion 22 (a portion of Portion 10) of the Farm Deelkraal 142, Registration Division IQ, Northwest Province. These immovable properties were registered in the name of the trust round about April 2009 whereafter the Deelkraal trust commenced with the renovation of the approximately 400 houses situated on these properties, which are jointly known as the Deelkraal Estate (the “Estate”). These houses are leased to the public, and it is from the rental collected that the Deelkraal trust derives its sole income.
- [11] From the rental income the Deelkraal trust pays its creditors, its employees, maintain the properties owned by it, and make distributions to its beneficiaries as and if, its cash flow permits. It is the distribution of the income that is the bone of contention between the parties.
- [12] Mrs Jacobs resides in one of the houses situated in the Estate. Van As also occasionally resides in one of the houses. The trust’s office, its principal place of business, is also situated in the Estate. The trust’s office is also the address where the various tenants of the trust are supposed to pay the monthly rental and other charges (such as water and electricity).
- [13] In terms of clause 10 of the trust deed, decisions by the trustees must be supported by trustees representing beneficiaries holding at least 60% of the beneficial interest in the trust. In practical terms this means that all the decisions taken by the trustees must be unanimous.
- [14] On 5 September 2011 the trustees resolved to proportionally, pro rata to each beneficiary’s beneficial interest in the Deelkraal trust, divide the township into three portions. These portions are referred to this as “Deelkraal Noord 1”, Deelkraal Noord 2” and “Deelkraal Suid”. This resolution was also minuted in the trust register. It is evident from this resolution that the trustees accepted the benefit division whilst agreeing that each beneficiary/beneficiary group would from 1 October 2011 (the effective date) manage and administer its allocated “portion” and also become entitled to all profits and be liable for all losses. It is evident that from 1 October 2011 the allocated and awarded benefits vested in the respective beneficiaries. This is also the factual position the first applicant found when he was

appointed as trustee.

- [15] Van As was not originally a trustee of the Deelkraal trust. He became a trustee of the trust on 28 August 2017 when the Pivotal Family Trust obtained the shareholding in Star Stone from the spouse of the fourteenth respondent.
- [16] On 5 September 2017 the trustees of the trust resolved that the Deelkraal trust would recover control over all its assets on the three immovable properties that formed the Estate and administer it for the benefit of the trust and that a company would be incorporated to administer all services and levies owed to the Deelkraal trust. This resolution intended to and indeed revoked the resolution of 5 September 2011 referred to above.
- [17] After the trustees had taken their decision, Van As took control of the finances and administration of the trust and the Estate, much to the chagrin of Mrs Jacobs and Matthee. Ignoring the September 2017 resolution, they continued to collect the rental income in accordance with the September 2011 resolution for the benefit of the Sebenza and Rucinda trusts and not for the benefit of the Deelkraal trust.
- [18] This clearly led to tension between the parties involved, including Mr Frik van As, who held the view that Van As had unlawfully acquired the shareholding in the second applicant. For this reason the trustees of the Frik van As Family Trust in October 2017 issued summons against the Pivotal trust to set aside the agreement of sale entered into with Frik van As' spouse. In an effort to calm the emotions, and at the suggestion of Matthee, the trustees of Deelkraal trust held a meeting at the offices of Savage Jooste & Adams Attorneys (hereinafter "SJA") in Pretoria on 23 May 2018 where they resolved as follows:

(1)

That the Trustees, acting personally and on behalf of the beneficiaries that they represent, immediately cease and desist from collecting any rental or other income in respect of the immovable properties owned by the Deelkraal Trust for their own benefit and/or the benefit of the beneficiaries that they represent and/or any third parties.

(2)

That the Trustees shall ensure that all funds received by them personally and/or any of the beneficiaries that they represent and/or any third entities in which they have an interest which constitute the rental or other income pertaining to the immovable properties owned by the Deelkraal Trust will immediately be paid into the bank account of the Deelkraal Trust, the bank account details of which are as follows:

....

or be dropped in the Deelkraal Trust's drop safe (as the case may be).

(3)

That the Trustees continue to collect all rental and other income in respect of the immovable properties owned by the Deelkraal Trust, and ensure that all lease agreements in respect of such immovable properties are signed in the name of the Deelkraal Trust, which reflect the Deelkraal Trust as the Landlord and the Deelkraal Trust's bank account details.

(4)

That all lease agreements to be signed by at least 2 (two) of the above-mentioned Trustees, and that any amendments to any lease agreements of the Deelkraal Trust be authorised by all 3 (three) above-mentioned Trustees in writing from time to time.

(5)

That none of the Trustees are authorised to enter into any other agreements on behalf of the Deelkraal Trust, unless same is authorised by all 3 (three) Trustees, provided that in the event that the Trustees cannot agree on whether to enter into an agreement on behalf of the Deelkraal Trust:

(5.1) An aggrieved Trustee ('the aggrieved Trustee'), shall within 5 (five) days of the other Trustees ('the disputing Trustees') refusing to enter into any such agreement ('the disputed agreement'), refer the disputed agreement to Mr Arnold Rademeyer, and in his absence and/or unavailability to Mr Brandon Topham and Mr Wilhem Prinsloo ('the expert'), provided that in the event that there is a deadlock between Mr Brandon Topham and Mr Wilhelm Prinsloo, Mr Arnold Rademeyer shall make a final decision. In the event that the aggrieved Trustee fails to refer the disputed agreement to the experts within the aforementioned time period, the disputed agreement will automatically be deemed not to be approved.

(5.2) The experts shall determine whether the disputed agreement is in actual fact in the best interest of the Deelkraal Trust and all of its beneficiaries, with due consideration to any written representations made by the Trustees do the experts within 5 (five) days of the referral of the disputed agreement to the experts, and the experts determination shall be final and binding on the Trustees.

(5.3) In the event that the experts determine that the disputed agreement is indeed in the best interest of the Deelkraal Trust and all of its beneficiaries, the disputing Trustee shall immediately sign the disputed agreement, failing which the disputing Trustee appoint the experts in rem saum (sic) to sign the disputed agreement on his/her behalf.

(6)

That the Trustees immediately implement the following process of joint accountability in the Deelkraal Trust, and communicate same to all of the relevant staff members responsible for the collection and banking of the rental and other income pertaining to the immovable properties of the Deelkraal Trust:

(6.1) All cash, cheques and other forms of payment received at Deelkraal Trust's offices pertaining to the immovable properties owned by the paste that must be accepted by 2 (two) Deelkraal Trust employees ('the accountable employees').

(6.2) The accountable employees must jointly count any cash received, record the amount of cash, cheques or other form of payment received by issuing a written receipt to the payee (in a Deelkraal Trust receipt book which is sequentially numbered), and jointly signed receipt as the accountable employees.

(6.3) Only one paste that receipt book must be in use at any given time by all accountable employees to ensure proper bookkeeping. All new, unused Deelkraal Trust receipt books will accordingly be held by auditors, and will be issued to the accountable employees on return of a duly completed Deelkraal Trust receipt book.

(6.4) After issuing the receipts, the accountable employees shall jointly place all cash, cheques and other forms of payment in Deelkraal Trust's drop safe. The drop safe shall be locked with (2) two keys, of which 1 (one) will be kept by Mr Karel van As or, and the other (1) one by Ms Gertie Jacobs. Once a week, Karel van As and Ms Gerty Jacobs will empty the safe, reconcile the cash, cheques and other payments received, and prepare the funds for collection and banking by a security company appointed by the Trustees from time to time, alternatively will personally attend to the banking thereof.

(6.5) In the event that cash is required for the operations of Deelkraal Trust for wages and/or petty cash, same will only be released by Mr Karel van As and Ms Gerty Jacobs on completion of a cash requisition form signed by both of them.

(6.6) No employees will be allowed to deviate from the above process on the instructions of any of the Trustees of the Deelkraal Trust, unless such instructions are in writing and signed by all 3 (three) Trustees of the Deelkraal Trust from time to time.

(7)

That all 3 (three) Trustees attend at FNB at 11:00 on Friday, 25 May 2018 and ensure that they are appointed as joint signatories on Deelkraal Trust's bank account, which will have the following effect:

(7.1) All Trustees will have access to view the bank account of the Deelkraal Trust from time to time; and

(7.2) All payments made from the Deelkraal Trust's bank account will require approval from Mr Karel van As and Ms Gerty Jacobs, with either Ms Gerty Jacobs or Mr Karel van As loading the payment, and the other one releasing same.

(8)

In the event that Ms Gerty Jacobs or Mr Karel van As load a payment to which he/she deems due and payable by the Deelkraal Trust ('the aggrieved Trustee'), and the other person [Ms Gerty Jacobs or Mr Karel van As (as the case may be)] refuses to release such payment ('the disputing Trustee'):

(8.1) The aggrieved Trustee shall within 5 (five) days of the disputing Trustee refusing to authorise the payment ('the disputed payment'), refer the disputed payment to Mr Arnold Rademeyer, and in his absence and/or unavailability to Mr Brandon Topham and Mr Wilhem Prinsloo ('the expert'), provided that in the event that there is a deadlock between Mr Brandon Topham

and Mr Wilhelm Prinsloo, Mr Arnold Rademeyer shall make a final decision. In the event that the aggrieved Trustee fails to refer the disputed payment to the experts within the aforesaid time period, the disputed payment will automatically be deemed not to be due and payable by the Deelkraal Trust.

(8.2) The experts shall determine whether the disputed payment is in actual fact due and payable by the Deelkraal Trust, with due consideration to any written representations made by the Trustees to the experts within 5 (five) days of the referral of the disputed payment to the experts, and the expert's determination shall be final and binding on the Trustees.

(8.3) In the event that the experts determine that the disputed payment is indeed due and payable, the disputing Trustee shall immediately authorise the payment, failing which the disputing Trustee hereby appoints the experts in rem saum (sic) to authorise the payment on his/her behalf.

(9)

That Ms Gerty Jacobs and/or Mr Karel van As circulate any proposed distributions to the beneficiaries of the Deelkraal Trust ('the proposed distribution') to the Trustees on the 20th day of each and every month, with due consideration to the cash flow, solvency and liquidity of the Deelkraal Trust, and that the Trustees respond in writing with their consent/objection (together with reasons for such objections) in respect of such proposed distribution within 48 (forty eight) hours, provided that:

(9.1) Any failure on the part of a Trust deed to time is the consent/subject to the proposed distribution with the aforesaid 48 (forty eight) hours, will be deemed to be an acceptance of the proposed distribution.

(9.2) In the event that a proposed distribution is approved by Ms Gerty Jacobs and Mr Karel van As ('the approving Trustees'), the proposed distribution will be deemed to be approved, and the approving Trustees may proceed to load and release the proposed distribution (in accordance with what is set out in 7.2 above).

(10) In the event that a proposed distribution is disputed by any of the Trustees ('the disputing Trustee'), then:

(10.1) Any of the Trustees shall within 3 (three) days of raising/receiving the objections to the proposed distribution ('the disputed distribution'), refer the disputed distribution to Mr Arnold Rademeyer, and in his absence and/or unavailability to Mr Brandon Topham and Mr Wilhem Prinsloo ('the expert'), provided that in the event that there is a deadlock between Mr Brandon Topham and Mr Wilhelm Prinsloo, Mr Arnold Rademeyer shall make a final decision. In the event that any of the Trustees failed to refer the disputed distribution to the expert within the aforementioned time period, the disputed distribution will automatically be deemed not to be due and payable by the Deelkraal Trust, and none of the beneficiaries shall be entitled to a distribution for that particular month.

(10.2) The expert shall determine whether the disputed distribution is in actual fact due and payable by the trustee that, with due consideration to any written representations made by the Trustees to the expert within 5 (five) days of the referral of the disputed distribution to the expert, and the expert's determination shall be final and binding on the Trustees.

(10.3) In the event that the expert determines that the disputed distribution is indeed due and payable, Ms Gerty Jacobs and Mr Karel van As shall immediately authorise payment of the proposed distribution, failing which the disputing Trustee hereby appoints the expert in rem saum (sic) to authorise the payment of the distribution on their behalf.

(11) That any costs of the experts in determining any disputed payments and/or disputed distributions shall be paid by the Deelkraal Trust.

[19] The object of this resolution clearly was to normalise the affairs of the Deelkraal trust and to ensure that the trust received all the rental income from its properties. Mrs Jacobs and Matthee however did not abide the terms of the aforementioned resolution, compelling Van As to approach the court on an urgent basis to obtain an interdict ensuring compliance. Mrs Jacobs and Matthee opposed the application. In their joint answering affidavit to the urgent application, Mrs Jacobs stated that -

"..., the second respondent and I do not, at this stage, dispute the validity of the resolution dated 23 May 2018 ('the resolution'). To the contrary, the resolution was adopted at our insistence following the applicant's conduct of assuming control of the Trust as his own personal fiefdom. Until revoked, amended or set aside the resolution stands as valid and all of the Trustees are duty bound to give effect to, as we also are under legal obligation to (i) give effect to all of the standing resolutions taken by the Trustees as well to (ii) at here in strict terms to our fiduciary obligations in managing the affairs of the Trust for the

benefit of the beneficiaries. The application for obtaining of introductory relief is brought on an urgent basis without any sustainable legal foundation and it simply lacks a factual basis to support the relief sought. I shall return to dealing with the fact at the appropriate juncture."

[20] The urgent court hearing the application, seemingly found that this statement amounted to an undertaking to comply with the resolution passed by the trustees and struck the matter from the roll for lack of urgency.

[21] Van As then set the application down on the opposed roll and on 6 May 2019 Retief AJ made an order in the following terms:

‘The 1st and 2nd respondents are interdicted and restrained from contravening the written resolutions passed by the Trustees of the Deelkraal Behuisings Trust (IT: 4808/08) on 23 May 2018 until such time that the Trustees of the Deelkraal Behuisings Trust duly amend and/or revoke same in terms of clause 10 of the Deelkraal Behuisings Trust’s Trust deed.’

[22] Mrs Jacobs and Matthee did not oppose the application on 6 May 2019 despite the fact that their attorneys were in court when the order was granted.

[23] In consequence of the court order, Van As dispatched letters to the tenants and employees of the trust to inform them of the court order of 6 May 2019. Notwithstanding the court order, the Sebenza Trust continued to collect rental and other income in respect of the immovable properties, refused to permit the employees of the trust to resume their duties, to return the movable assets belong to the trust, to pay all funds collected by Mrs Jacobs and the Sebenza Trust in respect of trust properties into the trust bank account and refused to sign lease agreements reflecting the trust as landlord and including its bank account. In her answering affidavit, Mrs Jacobs fails to address these direct accusations. She does however attempt to justify her conduct inter alia by saying that she was entitled to withhold the rental income of some 80 houses by virtue of an agreement entered into between a close corporation owned by Mrs Jacobs and the trust on 5 March 2009. In the replying affidavit, Van As pointed out several shortcomings in respect of this argument. The principal problem with the aforesaid agreement is that it was not authorised by all the trustees of the trust. The resolution of the trust attached to the agreement was signed by only two trustees, namely Mrs Jacobs and Frik van As. In addition, the resolution states that the third trustee, Matthee, was not present at the meeting but had only been informed of the decision. The resolution relied on by Mrs Jacobs offended against the provisions of clause 10 of the trust deed and was accordingly void.

[24] After obtaining the court order, Van As instructed his attorneys, SJA (the continued reference to “SJA” hereafter means no disrespect to Ms Magdel van Biljon who was the author of the correspondence dealt with below), to write a letter to Bernard van der Hoven Attorneys, the attorneys of Mrs Jacobs and Matthee to demand compliance with the court order. The parties then, at the suggestion of Mr Van der Hoven, held a round table conference to discuss a solution but this proved futile.

[25] Two days before the round table conference took place, Mrs Jacobs wrote letters to the tenants of the houses on the Estate and informed them that they should continue to pay their rental “where [their] contracts are at Deelkraal Estate” and that they were “under no obligation to sign any letters delivered to [them]”.

In doing so Mrs Jacobs elected to expressly ignore the strict terms of the court order. Mrs Jacobs' conduct elicited another letter to her attorneys demanding her and Matthee's due and proper compliance with the court order. A few days later, on 24 May 2019, Mr Van der Hoven wrote to SJA and confirmed that she would "refrain from not complying with the court order dated 6 May 2019 read with the resolution adopted by the trustees of the trust on 23 May 2018". SJA on the same date wrote back and acknowledged receipt of the undertaking but enquired whether Matthee would give the same undertaking. The attorneys also warned that since Mrs Jacobs and Matthee had previously reneged on undertakings given under oath, Van As would not hesitate to launch contempt proceedings if they once more ignored the court order.

[26] On 28 May 2019 SJA complained to Mrs Jacobs' attorney that she was not complying with her undertakings given in the letter of 24 May

2019. This was followed on 29 May 2019 by a stern letter enquiring whether Mrs Jacobs understood the consequences of her conduct in refusing to comply with the court order. A day later, in a letter dated 30 May 2019 Mr Van der Hoven repeated Mrs Jacobs' unequivocal undertaking to comply with the court order and confirmed that she subscribed to the principle that all income in respect of the immovable property owned by the trust would be

collected for the credit of the trust. According to the letter, Matthee denied that he had ever violated the 23 May 2018 resolution or that he was in a position to do so, since he was not involved in the day-to-day management of the trust or the collection of any rental. Matthee declared himself bound to the provisions of the May 2018 resolution and requested particulars of any default on his side.

[27] On 4 June 2019 a spat arose about the payment of the salaries of the trust's employees. According to Van As, all but two of the trust's employees had taken up employment with the Sebenza Trust and had failed to render service to the Deelkraal trust from March to May 2019. Notwithstanding Van As' view, Mr Van

der Hoven addressed two letters to SJA noting the refusal by the trust to pay the salaries of the employees. SJA responded

on 5 June 2019 and set out Van As' position on the rendering of service and other related issues. When Mr Van der Hoven did not immediately reply to this letter, SJA had two telephonic discussions with him, inter alia about the appointment of managing agents to collect the rental from tenants. On 13 June 2019 Mr Van der Hoven addressed correspondence to SJA and therein addressed his clients' position in respect of various issues in contention between the parties, including the appointment of managing agents, the payment of salaries and the alleged indebtedness of the trust to the close corporation run by Mrs Jacobs referred to above. It was also acknowledged that Frik van As was unlawfully appropriating income due to the trust, perhaps because Frik van As believed that the September 2011 resolution referred to above remained in place. On 14 June 2019 SJA responded and set out his position and made various proposals and counter-proposals to the content of the letter of 13 June 2019. In this letter Van As once more threatened to bring an application for contempt against Mrs Jacobs and Matthee.

- [28] On 26 June 2019 a representative of Mrs Jacobs, Matthee and Van As held a meeting where Van As once more proposed that the trust institute proceedings against Frik van As to interdict him from collecting rental and other income from immovable properties owned by the trust. This was not acceptable to Mrs Jacobs' representative or to Matthee. On 27 June 2019 SJA again threatened to launch contempt proceedings. In reply, on the following day, Mrs Jacobs' attorneys requested that he refrain from embarking on unnecessary applications in order not to burden the parties with unnecessary costs.
- [29] On 2 July 2019 in a letter addressed to SJA, Mr Van der Hoven suggested that the collection of rental and other income by Mrs Jacobs, Frik van As and the Frik van As Trust was justified by the indebtedness of the Deelkraal Trust to Mrs Jacobs' close corporation. He also wrote that the second applicant was not the lawful beneficiary of Deelkraal Trust.
- [30] At this point in time it became clear to Van As that the parties would not be able to resolve the numerous disputes between them and decided to launch an application to hold Mrs Jacobs and Matthee in contempt of court, to remove the current Trustees of the Deelkraal Behuisings Trust in terms of section 20(1) of the Trust Property Control Act, No. 57 of 1998 and to amend the Trust deed of the in terms of section 13 of the Trust Property Control Act, No. 57 of 1998 to give effect to the removal of the trustees.

Contempt of Court

- [31] The applicants apply for a declaratory order that Mrs Jacobs and Matthee are in contempt of the court order of 6 May 2019. They move that Mrs Jacobs and Matthee be ordered to purge their contempt within 10 (ten) days of the declarator failing which certain consequences would ensue, alternatively that they be incarcerated for 30 (thirty) days further alternatively a just and equitable order for the contempt.
- [32] It is by now trite, as set out by the Supreme Court of Appeal in *Fakie N.O. v CCII Systems (Pty) Ltd* 2006
- (4) SA 326 (SCA), and approved by the Constitutional Court in *Pheko v Ekurhuleni City* 2015
- (5) SA 600 (CC), that an applicant who alleges contempt of court must establish that
- (a) an order was granted against the alleged contemnor; (b) the alleged contemnor was served with the order or had knowledge of it; and (c) the alleged contemnor failed to comply with the order. Once these elements are established, wilfulness and mala fides are presumed, and the respondent bears an evidentiary burden to establish a reasonable doubt. Should the respondent fail to discharge this burden, contempt will have been established.
- [33] The May 2019 court order was granted against Mrs Jacobs and Matthee in their

representative capacities as trustees of the Deelkraal trust. A contempt order can only be sought against them in that capacity and not in any other capacity, neither as as trustees of the Sebenza trust or in their personal capacities. Insofar as relief is sought in them in any other capacity than as trustees of the Deelkraal trust, such relief will be incompetent.

[34] In *Meadow Glen Home Owners Association and Others v City of Tshwane Metropolitan Municipality and Another* 2015 (2) SA 413 (SCA) at paragraph [16] the SCA held that although some punitive element is involved, the main objectives of contempt proceedings are to vindicate the authority of court and coerce litigants into complying with court

orders.

[35] Courts issue orders for a variety of reasons, not least of all to ensure that there exists legal certainty amongst the participants involved in any dispute. Legal certainty ensures harmony and stability, and creates social order. Once social order is achieved, peaceful co-existence is but a short step away. If on the other hand, one or more of the participants wilfully ignores an order of court, the dove of peace turns into the crow of chaos, and society becomes ungovernable.

[36] There is no doubt that Mrs Jacobs elected to disregard the resolution of 23 May 2018 to which she had penned her signature and wilfully ignored the terms of the court order that sought to enforce the resolution.

[37] In his heads of argument, counsel for Mrs Jacobs and Matthee conceded that it is common cause that they were aware of the content of the court order, that Mrs Jacobs failed to comply with the order and that the second respondent was alerted to the order. He argued that Mrs Jacobs in view of the history of the matter was justified in her conduct. I disagree. Mrs Jacobs in my opinion acted in wilful disobedience of a court order.

[38] Mrs Jacobs' wilful disobedience translates into contempt of an order of court. Her attempts to justify her conduct are not persuasive.

(i) Already in May 2018 she, as a trustee of the Deelkraal Trust, agreed to immediately cease and desist from collecting any rental or other income in respect of the immovable properties owned by the Deelkraal Trust for her own benefit and/or the benefit of the beneficiaries that they represent and/or any third parties and that she would ensure that all funds received by her personally and/or any of the beneficiaries that she represents and/or any third entities in which she has an interest which constitute the rental or other income pertaining to the immovable properties owned by the Deelkraal Trust would immediately be paid into the bank account of the Deelkraal Trust or be dropped in the Deelkraal Trust's drop safe (as the case may be). She, as one of the trustees, undertook to continue to collect all rental and other income in respect of the immovable properties owned by the Deelkraal Trust, and ensure that all lease agreements in respect of such immovable properties are signed in the name of the Deelkraal Trust, which reflect the Deelkraal Trust as the landlord and the Deelkraal Trust's

bank account details. This resolution replaced and nullified the 2011 resolution which allowed each beneficiary to collect for its own benefit the rental from tenants.

(ii) When the matter came before the urgent court, she regarded the May 2018 resolution as binding on Matthee and herself.

(iii) She did not object to the order being granted on 6 May 2019, even though her attorney was present in court.

(iv) SJA on several occasions wrote to her legal representative, Mr Van der Hoven, to call her attention to the fact that she was deemed to be in contempt. The tenor of Mr Van der Hoven's correspondence addressed to SJA indicate that he had taken extensive instructions from Mrs Jacobs and he would have informed her of the demands from SJA to abide the terms of the May 2018 resolution and the court order.

[39] I accordingly find that Mrs Jacobs has not discharged the evidentiary burden that rested on her in her representative capacity to establish reasonable doubt that her conduct was excusable.

[40] A trust is not a legal persona but a legal institution sui generis. Its assets and liabilities vest in the trustees. In *Doyle v Board of Executors* 1999 (2) SA 805 (C) it was confirmed that the trustee's duty of utmost good faith (fiduciary duty)

derived from his or her office. The trustee is often also a co-beneficiary and burdened with inside knowledge regarding the intentions of the founder, or the broader family involved in the trust. Persons who stand in relation to another in a position of confidence involving a duty to protect the interests of that other person are not allowed to place themselves in such a position that their interests conflict with their fiduciary duty. On the contrary, as was stated in *Sackville West v Nourse* and another 1925 AD 516 at 534, dealing with the obligations of a tutor towards his ward's property, which equally applies to a trustee dealing with trust property:

"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;" [my underlining]

[41] In *Twentieth Century Fox Film Corporation and Others v Playboy films (Pty) Ltd and Others* 1978 (3) SA 202 (W) at 203C-D, King AJ, as he then was, reached the conclusion that:

'A director of a company who, with knowledge of an order of Court against the company, causes the company to disobey the order is himself guilty of contempt of Court. By his act or omission such a director aids and abets the company to be in breach of the order of Court against the company. If it were not so a Court would have difficulty in ensuring that an order ad factum praestandum against a company is enforced by a punitive order.'

[42] Public officials and even ministers of state may be held in contempt of court as was held in *Mjeni v Minister of Health and Welfare, Eastern Cape 2000*

(4) SA 446 (TkH). If that is the case, I can see no reason why a trustee of a trust against whom an order has been granted in his or

her representative capacity cannot be held in contempt. I accordingly hold that Mrs Jacobs is in contempt of the order of court of 6 May 2019.

[43] The next question that arises is whether Matthee is also in contempt of the court order. The court granted an order against him in his representative capacity as trustee of the Deelkraal trust and he had knowledge thereof. Matthee, as trustee of the Deelkraal trust, took no positive steps to prevent either the Sebenza trust or the Rucinda trust (both of which he was at the time a trustee – he has since been replaced as trustee of the Sebenza trust) from collecting rental from tenants after the May 2018 resolution or the May 2019 court order. When called upon to support an application to interdict Frik van As from collecting rental, he refused to do so.

[44] The Appellate Division in *Minister van Polisie v Ewels 1975*

(3) SA 590 (A) laid down the principle that a failure to act or an omission is to be regarded as unlawful conduct when the circumstances of the case are of such a nature not only that the omission incites moral indignation, but also that the legal convictions of the community demand that it be regarded as unlawful and that the damage suffered be made good by the person who neglected to perform a positive act. In order to make a determination as to whether or not there is unlawfulness, therefore, the question is not whether there was the usual "negligence" of the bonus paterfamilias; the question is whether, regard being had to all the facts, there was a duty in law to act reasonably. There is no doubt that such a duty rested on Matthee.

[45] Matthee did not file an affidavit in answer to the application and the allegations against him. His only version is recorded in the letter dated 30 May 2019 written by Mr Van der Hoven wherein he stated that

(a) Matthee denied that he had ever reneged on any undertaking, more so any undertaking given under oath, (b) Matthee denied that he ever violated the May 2018 resolution or that he was in a position to do so. Matthee was not involved in the day to day management of the business of the Deelkraal trust or the collection of any rental. "His 10% interest" in any event did not allow him to dictate proceedings.

[46] The fact that Matthee denied active participation in the management of the

Deelkraal trust does not excuse him. In *Höltz v Douglas and Associates (OFS) CC en Andere 1991*

(2) SA 797 (O) at 801D-802E, it was held that a person who contributes to the offence of contempt of a court order, can, without being a principal offender, be punishable as an accomplice.

- [47] In the premises, Matthee in my judgment is also in contempt of the May 2019 court order. His failure to take active steps to ensure the trust's compliance with the court order does not pardon him – rather it convicts him. As a trustee he had the duty to ensure that the trust complied with the court order.
- [48] A finding of contempt of a court order can lead to either a coercive or a punitive sanction, as Khampepe ADCJ explained in *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* 2021 (5) SA 327 (CC):
- [47] I should start by explaining how the purposes of contempt of court proceedings should be understood. As helpfully set out by the minority in *Fakie*, there is a distinction between coercive and punitive orders, which differences are “marked and important”. A coercive order gives the respondent the opportunity to avoid imprisonment by complying with the original order and desisting from
- the offensive conduct. Such an order is made primarily to ensure the effectiveness of the original order by bringing about
- compliance. A final characteristic is that it only incidentally vindicates the authority of the court that has been disobeyed.
- Conversely, the following are the characteristics of a punitive order: a sentence of imprisonment cannot be avoided by any action on the part of the respondent to comply with the original order; the sentence is unsuspended; it is related both to the seriousness of the default and the contumacy of the respondent; and the order is influenced by the need to assert the authority and dignity of the court, to set an example for others.
- [49] If the applicants had not sought the removal of the first and second respondents as trustees of the Deelkraal trust, a coercive order would have been appropriate. Since I intend to grant an order removing Mrs Jacobs and Matthee as trustees, the only remaining option is a punitive order.
- [50] The following factors play a role in determining an appropriate order:
- (i) The history of the matter, in particular that Mrs Jacobs and Matthee in accordance with the 2011 resolution for several years collected for their own beneficiaries the rental income from the Deelkraal Estate;
 - (ii) The familial relationship between the parties to this application, more so that Van As chose to bring contempt proceedings against his own mother, who is an octogenarian;
 - (iii) Van As only became a trustee of the Deelkraal trust in 2017;
 - (iv) After the Pivotal Family trust had obtained control over Star Stone,

Frik van As personally or through the Frik van As trust continued to collect for his own account the rental income as he had done since 2011 to the frustration of Van As;

(v) The disrespect that both Mrs Jacobs and Matthee showed to the order of court despite several warnings to abide the order;

(vi) There is no indication that Mrs Jacobs and Matthee had terminated the collection of rental income, even after Van As had commenced with the contempt application;

(vii) Van As is not a knight in shining armour. Although he is the driving force behind the contempt application, his motivation is not purely the benefit of the trust and the protection of the trust property. He has the same avaricious goals as the other trustees.

[51] I assume that the trustees appointed to replace the current trustees will recover from them the monies they had appropriated for themselves after the May 2018 resolution. A fine is therefore not appropriate. Only a custodial sentence remains. I am of the view that three (3) months imprisonment, suspended for a period of five (5) years on the condition that Mrs Jacobs and Matthee are not found guilty of contempt of court in that period, is an appropriate sentence.

Removal of the trustees of the Deelkraal trust

[52] Section 20(1) of the Trust Property Control Act, No. 57 of 1998 provides as follows:

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.

[53] The applicants have a beneficial interest in the trust property. They therefore have the necessary locus standi in terms of sec 20(1) of the Trust Property Control Act to apply for the removal of the current trustees.

[54] The SCA recently, in *Fletcher v McNair* (1350/2019) [2020] ZASCA 135 (23 October 2020) restated the requirements for the removal of a trustee.

[19] Our jurisprudence on the removal of trustees is neatly collated in *Gowar* at paras 31-32. There, Petse JA undertook a useful examination of authorities, from which the following principles can be distilled:

- (a) the court may order the removal of a trustee only if such removal will, as required by s 20(1) of the Act, be in the interests of the trust and its beneficiaries;
- (b) the power of the court to remove a trustee must be exercised with circumspection;
- (c) the sufficiency of the cause for removal is to be tested by a consideration of the interests of the estate;

- (d) the deliberate wishes of the deceased person to select persons in reliance upon their ability and character to manage the estate, should be respected, and not be lightly interfered with;
- (e) where there is disharmony, the essential test is whether it imperils the trust estate or its proper administration;
- (f) mere friction or enmity between the trustee and the beneficiaries will not in itself be an adequate reason for the removal of the trustee from office;
- (g) mere conflict amongst trustees themselves is not a sufficient reason for the removal of a trustee at the suit of another;
- (h) neither mala fides nor even misconduct are required for the removal of a trustee;
- (i) incorrect decisions and non-observance of the strict requirements of the law, do not of themselves, warrant the removal of a trustee;
- (j) the decisive consideration is the welfare of the beneficiaries and the proper administration of the trust and the trust property.

[55] I am mindful of the fact that mere conflict between the trustees is not a ground for removal of trustees. The acrimony between the trustees in this matter is however of such a nature that it will be in the best interest of the beneficiaries if all the trustees are removed. The conduct of both Mrs Jacobs and Matthee described hereinabove was improper and not aimed at the proper administration of the Deelkraal trust and the trust property. The trustees have not been able to separate their own affairs and property from the affairs and property of the Deelkraal trust. They lack the ability to act impartially to the benefit of the trust. There is no indication that the current trustees will in the near future be able to cooperate with one another to make unanimous decisions. Summons has already been issued against the trust for payment of R9 million and there is no indication that any of the current trustees has done anything to compromise that debt. Instead of acting in good faith to the trust and its beneficiaries, they want to do is to fleece their own pockets.

[56] Both Van As and Mrs Jacobs have indicated that they are prepared to resign as trustees, if the other were to leave office. Both the main application and the counterapplication seek the removal of the present trustees. It is necessary to regularise the affairs of the Deelkraal trust. The appointment of independent trustees by the Master of the High Court should achieve that.

[57] It follows that all the trustees stand to be removed and the Master be directed to appoint new trustees.

Amendment of the trust deed

[58] The applicants in the third place seek an order in terms of section 13 of the Trust Property Control Act, 57 of 1988 for the amendment of the trust deed. The section reads as follows:

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 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 the court deems just, including an order whereby particular trust property is substituted for particular other property, or an order terminating the trust.

[59] There is no doubt that the founder and trustee of a trust can vary the trust deed without the interference of the court. In *Potgieter v Potgieter NO and Others* 2012 (1) SA 637 (SCA) the court in respect of the amendment of a trust instrument held that –

[18] ... I believe these principles can be formulated thus: a trust deed executed by a founder and trustees of a trust for the benefit of others is akin to a contract for the benefit of a third party, also known as a *stipulatio alteri*. In consequence, the founder and trustee can vary or even cancel the agreement between them before the third party has accepted the benefits conferred on him or her by the trust deed. But once the beneficiary has accepted those benefits, the trust deed can only be varied with his or her consent. The reason is that, as in the case of a *stipulatio alteri*, it is only upon acceptance that the beneficiaries acquire rights under the trust (see eg *Crookes NO v Watson* 1956

(1) SA 277 (A) at 285F; *Ex parte Hulton* 1954

(1) SA 460 (C) at 466A-D; *Hofer v Kevitt NO* [1997] ZASCA 79; 1998

(1) SA 382 (SCA) at 386G-387E; *Cameron, De Waal & Wunsh Honoré's South African Law of Trusts* 5 ed (2002) para 304).

[60] Since I propose to remove the founder qua trustee and since the beneficiaries have already accepted and have at least since 2011 received the benefits in terms of the trust deed, it is no longer open to the founder and trustees to amend the trust deed.

[61] Section 13 quoted above is an obvious (albeit limited) exception to the rule that a court will not make a contract for parties. In order for a court to amend a trust deed in terms of section 13, an applicant must show the following:

(a) the trust instrument contains a provision that brings about consequences which in the opinion of the court the founder did not contemplate or foresee;

(b) the provision(s) in the trust deed either:

- (i) hampers the achievements of the objects of the founder; or
- (ii) prejudices the interests of beneficiaries; or
- (iii) is in conflict with public interest.

[62] If the trust deed does not contain a provision that brings about consequences that the founder had not foreseen and either hampers the achievements of the objects of the founder or prejudices the interests of the beneficiaries or is in conflict with the public interest, section 13 does not find application, as was held in *Gowar and Another v Gowar and Others* 2016 (5) SA 225 (SCA)

[63] Counsel for the applicants in his heads of argument suggests that an application under section 13 of the Trust Property Control Act may be used when no power is given to the trustees to vary or change the terms of the trust deed. The fact that clause 28 of the Deelkraal trust deed expressly stipulates that it can be amended by unanimous agreement between the trustees puts pay to this first suggestion. Counsel also suggests that application may be made in terms of section 13 where the right given to trustees to amend a trust deed has been given but the power to exercise such a right is disputed by a beneficiary or by some other person. I disagree. Section 13 does not contain such a limitation. He lastly proposes that in order to achieve the objective to remove the current trustees, the trust deed needs to be amended. He says that if the court were to find that the trustees should to be removed, the amendment of the trust deed should follow as a matter of course. He states that independent trustees will not be able to function effectively if the trust deed is not amended in the terms proposed by the applicants. I also disagree with this proposal.

[64] Like the court in *Potgieter*, supra, I find no provision in the original trust deed which brings about any consequence that could not be foreseen by the founder. The proposed amendment to the heading of clause 5 and the deletion of the words “belanghebbende personeel” and “groepe” in clause 5.1 is purely cosmetic and can be dealt with by the newly appointed trustees. The deletion of clauses 1.5, 5.2 to 5.4.1, 7.2 & 12.3 and the proposed amendment of clause 5.4.2 & 7.5 to 7.8 & 11.1, 11.2, 12.5, 19.1, 19.2, 22.4 & 23 fall in the same category. The applicants’ attempted amendment of clause 10 of the trust deed to replace the requisite 60% voting power with a mere majority falls foul of the first requirement contained in section

13. It was indeed the position of the founder that a decision of the trustees should be supported by 60% of the trustees.

That provision at the moment equates to a practical difficulty in the management of the trust, does not mean that it is competent for the court to exercise the statutory power conferred by section 13.

[65] The application to amend the trust deed therefore fails.

Costs

[66] What remains are matters of costs. The applicants, on the one hand, were substantially successful in their application, particularly in respect of the contempt application but only in the representative capacity as

trustees of the Deelkraal trust. The opposition by the respondents to the contempt application in their personal capacities

was not unfair. All the trustees of the trust stand to be removed. In the result, I believe that all costs should be borne by the trust.

In the result I make the following order:

1. It is declared that the first respondent and the second respondent in their representative capacity as trustees of the Deelkraal Behuisings Trust (IT 4808 / 08) are in contempt of the court order issued by Retief AJ on 6 May 2019;
2. The first and second respondents are sentenced to three (3) months imprisonment, suspended for a period of five (5) years on the condition that they are not found guilty of contempt of court in that period;
3. The first applicant and the first and second respondents are removed as trustees of the Deelkraal Behuisings Trust (IT 4808 / 08);
4. The Master of the High Court is directed to nominate and appoint three independent trustees for the Deelkraal Behuisings Trust (IT 4808 / 08) in the stead of the first applicant and the first and second respondents;
5. The costs of the application shall be borne on the scale as between attorney and client by the Deelkraal Behuisings Trust (IT 4808 / 08).

T P KRÜGER

Acting Judge of the High Court

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JUDGMENT

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