

SOUTH AFRICA / JUDGMENT

Vorster N.O v Buthelezi and Others

(10754/2022P) [2023] ZAKZPHC 109; [2023] 4 All SA 889 (KZP) (13 October 2023)

[2023] ZAKZPHC 109

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

E Bezuidenhout

CASE / FILE NUMBER

10754/2022P

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Policy

IN THE HIGH COURT OF

SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

Case

No: 10754/2022P

In

the matter between:

BENJAMIN
JACOBUS VORSTER N.O
APPLICANT
and
FELIX KHULEKANI
BUTHELEZI
1ST
RESPONDENT
IPHRAIM MFUNENI
ZUNGU
2ND
RESPONDENT
NONTOBKO PRECIOUS
ANGELA BUTHELEZI

3RD RESPONDENT

NOMUSA ZETHU

QUNTA

4TH RESPONDENT

MABUTHO MIYA

N.O

5TH RESPONDENT

CYNTHIA THEMBA KHUMALO

N.O

6TH RESPONDENT

THE MASTER OF THE

KWAZULU-NATAL HIGH COURT 7TH RESPONDENT

PITERMARITZBURG

ORDER

1.

The first, second, third and fourth respondents' powers to act as trustees of the Ubunye Be Afrika Development Trust (I[...]) are suspended;

2.

The first, second, third and fourth respondents are removed as trustees of the Ubunye Be Afrika Development Trust (I[...]) with immediate effect, and are directed to return their letters of authority to the seventh respondent.

3.

The first, second, third and fourth respondents are directed to pay the costs of the application on the attorney and client scale, such costs to be paid jointly and severally, the one paying the other to be absolved.

JUDGMENT

E Bezuidenhout J

Introduction

[1] The applicant, Mr B J Vorster N.O, applies for relief in his capacity as an independent trustee of the Ubunye Be Afrika Development Trust with registration number I[...] (the Ubunye Trust), against the first respondent, Mr Felix Khulekani Buthelezi, the second respondent, Mr Ephraim Mfuneni Zungu, the third respondent, Ms Nontobeko Precious Angela Buthelezi and the fourth respondent, Ms Nomusa Zethu Qunta as follows:

(a) That the first, second, third and fourth respondents' powers to act as trustees of the Ubunye Trust be suspended;

- (b) That the first, second, third and fourth respondents are removed as trustees of the Ubunye Trust, suspended and directed to return their letters of authority to the seventh respondent, the Master of the High Court, Pietermaritzburg; and
 - (c) That the first, second, third and fourth respondents and/or any respondent who opposed the application, are directed to pay the costs of the application on an attorney and client scale. In the event of opposition by any respondent other than the first respondent, such costs are to be paid jointly and severally, the one paying the other to be absolved.
- [2] The first to fourth respondents were cited in their personal capacities (collectively referred to as the respondents).
- [3] The fifth respondent, Mr Mabutho Miya N.O, and the sixth respondent, Ms Cynthia Temba Khumalo N.O, are cited in their capacity as trustees of the Ubunye Trust, and no relief is being sought against them.

Issues

that require determination

- [4] The main issue that requires determination is whether the trustees of the Ubunye Trust were entitled to pay or distribute certain amounts or funds to, amongst others, the first to fourth respondents. It therefore needs to be determined whether the various payments authorised by the trustees fall within the wide discretion afforded to the trustees in terms of the provisions of the trust deed. Ultimately, it must be decided if the first to fourth respondents should be removed as trustees.

Background

- [5] The Ubunye Trust was formed and registered with the Master on 21 October 1999. It was initially known as the Uphaphe Empowerment Trust (the Uphaphe Trust). The name was subsequently changed to the current name, Ubunye Be Afrika Development Trust. The terms of the trust deed were amended on 26 February 2001, 11 September 2013, and again during

2017 when a so-called second amended trust deed replaced the previous trust deed in its entirety. I will deal with the relevant clauses in the trust deeds in due course.

- [6] In terms of the various trust deeds, certain persons were listed as trustees and certain persons or entities as beneficiaries. During 2020, disputes arose between some of the trustees, which culminated in litigation which led to an order being granted by the late Mnguni J on 30 April 2021, in terms of which seven individuals were appointed as trustees for a period of three years from the date of issue of their letters of appointment by the Master. The second, third, fifth and sixth respondents were retained as trustees.

- [7] The applicant was appointed as an independent and impartial trustee in order to assist with a deadlock that existed between some of the trustees. A meeting of trustees was held on 11 June 2021 and the first and fourth respondents were appointed as trustees after being nominated by the so-called 'Direct Beneficiaries' as provided for in the trust deed. The Master subsequently issued letters of appointment on 17 September 2021.
- [8] The applicant was elected as the chairperson of the Ubunye Trust. He alleges that two clear factions exist amongst the other trustees: the Buthelezi faction, consisting of the first, third and fourth respondents and the Zungu faction, consisting of the second, fifth, and sixth respondents.
- [9] The applicant alleges that since his appointment, he uncovered highly concerning conduct on the part of the first, second, third and fourth respondents. Their conduct forms the subject matter of the application for their removal which is sought in terms of section 20(1) of the Trust Property Control Act 57 of 1988 (the Act). The section reads 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.'

[10] The conduct that concerned the applicant can be summarised as follows:

- (a) The first respondent was elected by the board of trustees (the Ubunye Board) to represent the Ubunye Trust at meetings held by its main donor, the Peakers Trust. He received a gratuity payment from the Peakers Trust in the amount of R375 806 but has failed to disclose the payment to the Ubunye Board. As a trustee, he is

duty-bound to declare all interests as soon as it is received.

- (b) During the first respondent's disciplinary hearing, minutes of a meeting of trustees of the Ubunye Trust held on 7 June 2019 disclosed that various payments were made to the trustees, employees

and to the chairman of the Peakers Trust. The payments were referred to as gratuity payments, which included inter alia, a so-called

dividend payment of R100 000 to each of the nine Direct Beneficiaries. It was also resolved that the fifth respondent would

receive a once-off token of appreciation of R100 000. Two administrative staff members would receive R20 000 each. Mention

was also made of a payment of R1 million to the first respondent. He was, however, dissatisfied and it was recorded that an amount of R4 million should be considered.

- [11] The applicant stated that it became clear that the Peakers Trust had donated R10 million to the Ubunye Trust in November 2019. It appeared as if the June 2019 minutes were setting out how the funds would be earmarked for the aforementioned payments.
- [12] From the minutes of a meeting held on 5 July 2019, it appeared that the second respondent, who had apparently already received a payment of R1 million, would receive a further amount of R2 million as soon as funds became available.
- [13] The third respondent received a gratuity payment of R250 000. She was also the chairperson of the board of Direct Beneficiaries and was adamant that the rights of the Direct Beneficiaries be recognised. She allegedly led meetings whereby decisions were taken to claim R17,5 million from the Ubunye Trust, to appoint additional trustees which would result in the Buthelezi faction taking control of the majority vote, and to disregard the applicant's input as an independent trustee. I will deal with the issue of beneficiaries below.
- [14] The fourth respondent was appointed as a replacement trustee after the passing of Mr Freeman, one of the previous trustees. She was appointed as the treasurer and supports the Buthelezi faction. She also received a gratuity of R100 000.
- [15] The third respondent attested to the answering affidavit filed on behalf of the first, second, third and fourth respondents. It appears from her affidavit, in which she refers to herself as the chairperson of the 'Original Beneficiaries', and the interim chairperson of the Ubunye Trust, that the first to fourth respondents' defence against the claims of the applicant is mainly that the payments were lawful and 'intra vires the trust instrument'. The trustees, in their discretion, were entitled during the continuance of the Ubunye Trust to pay or distribute all or part of the trust funds to the beneficiaries.
- [16] The third respondent states that the Uphaphe Trust originally made provision for four original beneficiaries, namely the second respondent, Mr S A Xulu, Mrs H B Yaka, and Mr A T Shange, who subsequently resigned. The remaining three beneficiaries agreed to vary the trust deed in order to permit funds and assets to be used 'only for disadvantaged farmers and groups of farmers operating principally in the northern regions of KwaZulu-Natal'. The Uphaphe Trust was designed as an entity that would receive grants in aid, which it would then disperse to mainly farmers operating in northern KwaZulu-Natal. In 2001, an amended trust deed was drafted to reflect these variations. It was attached to the third respondent's affidavit. The original 1999 trust deed is not available. I will return to provisions of the trust deed in due course, as it becomes significant in understanding the meaning of 'beneficiaries'. After disagreements between the remaining beneficiaries, the Uphaphe Trust became dormant.
- [17] The trust was revived in 2005 when it tendered to become a possible BEE partner to participate in a transaction to purchase shares from Sasol Oil Ltd (Sasol). The Uphaphe Trust was at the time trading as the Ubunye Be Afrika Development Trust, and in association with other entities, purchased 25% of Sasol's shares. The trust was incorporated as a partner in

the Black Empowerment Scheme and was issued with 6 500 shares. It has become common cause that it is actually another entity, Batho Trust, who holds the shares in Sasol. The Uphaphe Trust was one of the beneficiaries of the Batho Trust. The second respondent was the only active remaining beneficiary of the original beneficiaries of the Uphaphe Trust. Over time, more

beneficiaries were added and the name of the trust was changed to the present name.

- [18] The third respondent alleges that the beneficiaries listed in the trust deed performed ‘an assortment of tasks and obligations’ towards the Ubunye Trust and utilized their own funds to ‘operationalize’ it, travelling to meetings in Johannesburg and in KwaZulu-Natal, providing equipment to deal with the administrative requirements of the Ubunye Trust and making payments of ‘fungibles’ and the like to maintain its operations. The original beneficiaries and trustees worked together to provide administrative and logistical support to the secondary beneficiaries. The Ubunye Trust also submitted bids for tenders and the beneficiaries covered the expenses for preparing the bid documents and travelling to Gauteng to submit the bids.
- [19] It appears to be common cause that an amended trust deed was adopted in 2017. The third respondent states that they sought legal advice as to what the original beneficiaries sought to do. The current beneficiaries ‘wanted to and have always used the trust as a trading trust which also has charitable goals’. The third respondent, however, concedes that this was not properly reflected in the trust deed.
- [20] In order to assess the complaints against the respondents, it is necessary to closely examine the relevant trust deeds, firstly the amended trust deed of the Uphaphe Trust (the 2001 trust deed), signed and adopted by the trustees at the time on 26 February 2001, and thereafter the second amended trust deed which refers to the Ubunye Trust (the 2017 trust deed), signed and adopted in 2017. Although the 2001 trust deed was replaced in its entirety, it is in my view useful to consider it simply because it provides the background of how the position of the beneficiaries evolved over time.

The 2001 trust deed

[21] Para ‘D’ of the introduction stated that

‘The remaining Original Beneficiaries have agreed to amend the Original Deed by replacing it in its entirety with this Trust Deed, in order to permit the funds and other assets of the Trust to be used only on behalf of the disadvantaged farmers and groups of farmers contemplated in Clause 3 below (“the Beneficiary Farmers”).’

- [22] Clause 2, with the heading ‘Definitions and Interpretations’ contained a number of significant definitions. In clause 2.1 ‘Beneficiary Farmers’ were inter alia described as those agricultural co-operatives whose members are disadvantaged farmers carrying on farming activities in the designated area, and ‘which are identified or selected by the Trustees in their entire discretion . . . to benefit from the proceeds of the Trust Fund and/or the activities of the Trust’.
- [23] In clause 2.2 the ‘Designated Area’ was described as the ‘rural areas in and adjacent to Dundee, Vryheid and Newcastle in the Province of KwaZulu-Natal, inhabited, farmed and/or owned by historically-disadvantaged persons and communities’.
- [24] Clause 2.3 defined ‘Original Beneficiaries’ as ‘those persons appointed as Trustees in terms of the Original Deed, and nominated also as the only beneficiaries under the Original Deed’. These were: Mr E M Zungu (the second respondent), Mrs H B Yaka and Mr S A Xaba. In terms of clause 2.8, these three persons would also hold

office as trustees.

- [25] In clause 3 the objects of the trust were described. Clause 3.1 stated that

‘The Trust is a charitable institution of a public character, with the Object of providing support and assistance to agricultural

co-operatives whose members are historically-disadvantaged farmers and groups of farmers (“the Beneficiary Farmers”) in the rural areas of and adjacent to Dundee, Vryheid and Newcastle... (“the Designated Area”), for the purpose of helping those Beneficiary Farmers to establish and improve farming and related income-generating activities, with a view to promoting the alleviation of poverty and the creation of sustainable, profitable farming operations in the area.’

- [26] Clause 5 set out the powers of the trustees. In terms of clause 5.1, the trustees were ‘vested with a complete and unfettered discretion as to the manner in which they deal with, use and apply the assets constituting the Trust Fund’. The entire trust fund would be at the disposal of the trustees to be applied as they deemed appropriate ‘for the fulfilment of the Object of the Trust’, subject to certain limitations and constraints.

The 2017 trust deed

- [27] Clause 1, with the heading ‘Definitions and Interpretations’ and in particular clause 1.1.2, states that

‘Beneficiaries means the Beneficiary Farmers, Original Beneficiaries, Co-Operatives, SMMEs, Trusts and any other juristic person registered in terms of the laws of South Africa’.

- [28] In terms of clause 1.1.3, ‘Beneficiary Farmers’ mean South African agricultural co-operatives ‘whose members are historically disadvantaged farmers and/or groups of farmers’ and ‘which are identified or selected by the Trustees in their entire discretion from time to time,

to benefit from the proceeds of the Trust Fund and/or the activities of the Trust. . . . It is specifically recorded in clause 1.1.3.2 that the determination of the agricultural co-operatives that shall be identified as beneficiaries, 'shall be needs based and selected each year on the criteria specified in the award policy as contemplated in terms of Clause 13.1'.

[29] In terms of clause 1.1.7, 'Original Beneficiaries' mean the following persons:

- (a) Mr E M Zungu (the second respondent);
- (b) Ms N P A Buthlezi (the third respondent);
- (c) Mr B S Mpulo;
- (d) Ms L E Khuzwayo;
- (e) Ms N P Zuma;
- (f) Mr A R Freeman;
- (g) Mr J P Gwala;
- (h) Mr B S P Xaba; and
- (i) Ms N L E Buthelezi.

[30] Clause 1.1.14 deals with the trustees. The 'current Trustees' were the following persons:

- (a) Ms N P A Buthelezi (the third respondent);
- (b) Mr A R Freeman;
- (c) Mr F K Buthelezi (the first respondent);
- (d) Mr E M Zungu (the second respondent);
- (e) Mrs N Z Qunta (the fourth respondent); and
- (f) Ms T L B Dinga.

[31] Clause 2 sets out the establishment, objects and legal capacity of the Ubunye Trust. In terms of clause 2.1, the Ubunye Trust has been established as 'a charitable institution of a public nature'.

[32] The objects and business of the Ubunye Trust are set out in clause 2.2 and are wide-ranging in nature. In terms of clause 2.2.1, the Ubunye Trust shall

'provide support and assistance to Beneficiaries in the Territory[1] for the purposes of helping the Beneficiaries to establish and improve their businesses, farming and related income generating activities, with a view to promoting the alleviation of poverty and creation of sustainable profitable businesses and farming operations.'

[33] In terms of clause 2.2.2, the assistance provided by the Ubunye Trust will include, but will not be limited to inter alia providing ‘technical advice and support in relation to businesses, farming and related income-generating activities’,

accessing business opportunities from the public and private sector and accessing business finance and or funding opportunities.

[34] Clause 2.2.3 deals with farming and related income-generating activities undertaken by the beneficiaries which includes inter alia, the farming of maize, wheat and cattle farming, as well as eco-tourism.

[35] Clause 2.2.4 deals with the assistance to be provided to co-operatives and so-called SMMEs ‘currently undertaken or to be undertaken by the Beneficiaries selected by the Trustees’, and includes, inter alia, manufacturing, mining, banking, hospitality, tourism, primary health care and related fields.

[36] It is specifically recorded in clause 2.2.5 that

‘the determination of the Beneficiary Farmers, Co-Operatives and SMMEs to receive benefits shall be entirely on needs based and determined

annually by the Trustees on the criteria specified in the awards policy and no such Beneficiary shall have a right to demand any

benefit.’

I may add that the awards policy did not form part of the papers before me.

[37] Clause 5 deals with the trustees. In terms of clause 5.1, the management of the Ubunye Trust shall be undertaken by its Board. Clause 5.2 states that ‘[t]here shall at all times be a minimum of 6 (six) and no more than 9 (nine) Trustees in office appointed by the Original Beneficiaries in terms of clause 6’.[2]

[38] In terms of clause 5.3, ‘[t]here shall at all times be 3 (three) Trustees who are not Beneficiaries and the remainder of the Trustees shall come from the Original Beneficiaries’. The trustees are to be appointed for a period of three years, and not for more than two terms of office.[3]

[39] In terms of Clause 5.6, the Ubunye Board must elect a chairperson, a treasurer and a secretary. Clause 5.7 stated that at all times, the chairperson ‘must not be a beneficiary’.

[40] Clause 5.15 states as follows:

‘A Trustee shall in the performance of his duties and the exercise of his powers, act with the care, diligence and skill which can be reasonably expected of a person who manages the affairs of another.’

[41] Clause 5.16 is in my view of particular importance. It reads as follows:

‘All reasonable costs, charges, expenses and disbursements reasonably incurred by the Trustees in or arising out of the administration of the Trust, shall be borne by the Trust Fund as a first charge. The Trustees may, from time to time, be remunerated out of the Trust Fund in respect of their normal and reasonable fees for services rendered in the execution of their duties as Trustees, and any Trustee firm shall be entitled to its normal professional fees in respect of any services rendered by it to the Trust. Save as provided for in this Trust Deed, no further remuneration shall be paid to the Trustees.’

[42] Clause 10 deals with the duties of trustees. Clause 10.1.4 states that trustees shall ‘receive and hold the Trust Fund for the benefit of the Beneficiaries’. In terms of clause 10.1.6, the trustees shall also ‘ensure that proper books and records are kept for the affairs of the Trust. . .’.

[43] Clause 10.1.8 is also important. It states that trustees shall

‘refrain from holding or disposing of any assets of the Trust Fund for their personal benefit, or for the benefit of their estates, and generally to act in a prudent and responsible manner as would be expected from persons who are in charge of the affairs of another person.’

[44] Clause 13 addresses the distribution of the trust fund. A number of clauses are relevant to the issues to be decided. In terms of clause 13.1, ‘[t]he Trustees shall pass an award policy for purposes of distribution to the Beneficiary Farmers and SMMEs which will outline the procedure to be followed in identifying Beneficiary Farmers and SMMEs’. As mentioned above, no such award policy formed part of the papers and it is not stated when or if such a policy was passed.

[45] Clause 13.4 states that ‘[d]uring the continuance of the Trust, the Trustees, entirely in their discretion, shall pay or distribute, from time to time, all or part of the Trust Fund (net income or capital) to the Beneficiary’. In terms of clause 13.5, ‘[t]he Trustees shall have the right to retain income or capital . . . and no income or capital of the Trust shall vest in the Beneficiaries until the said income or capital has been allocated by the Trustees to the Beneficiaries in the books of the Trust. . .’.

[46] In terms of clause 13.8,

‘The trustees shall have the right, in their discretion, to effect any distribution in cash or in specie and shall also have the right to withhold any distribution of capital or income in their sole and unfettered discretion; provided always that in the event of the Beneficiary resolving that a distribution of capital or income already allocated shall be made, then such distribution shall be made.’

Clause 13.10 states that

‘Prior to the termination of the Trust, the Beneficiaries shall not have any vested right to any of the capital of the Trust nor shall the Beneficiaries have any vested right in the income of the Trust which has not been allocated to the Beneficiaries and properly recorded in the books of the Trust by the Trustees.’

[47] In terms of clause 16, the trustees are obliged to keep proper books of account which, together with the Ubunye Trust’s financial statements, must be audited and certified by an independent practising chartered accountant.

The complaints from Peakers Trust

[48] The applicant attached a letter to his founding affidavit which he received from the financial trustee of the Peakers Trust’s board of trustees, in which an explanation is requested in respect of a number of matters, which were apparently raised at its board meeting. The applicant stated that this letter was the genesis of the current application. It was noted that a special distribution was paid by the Peakers Trust to the Ubunye Trust ‘to be used . . . in line with its trust objectives’. Reference was made to clause 2 of the 2017 trust deed, which contained the objectives of the Ubunye Trust. The Peakers Trust expected the R10 million distribution to be used in accordance with these objectives.

[49] The letter contained a table, setting out how the distribution of R10 million had been allocated. It reflected 11 items, a description of the person or entity, the nature of and the amount paid, and the percentage of the total distribution such amount represented. Under section ‘A’, it is reflected that the second respondent received an ‘outstanding gratuity’ of R1 million and also a distribution as a so-called direct beneficiary of R250 000 which amounted to 12,5% of the total distribution. The first respondent received an outstanding gratuity of R3 million, amounting to 30% of the total distribution. The late trustee, T Freeman, received an outstanding gratuity of R500 000, amounting to 5% of the total distribution. The third respondent received an outstanding gratuity of R500 000 and also a distribution as a direct beneficiary in the amount of R250 000, amounting to 7,2% of the total distribution.

[50] The other seven direct beneficiaries also each received a distribution of R250 000 each, equating to 17,5% of the total distribution.

[51] The table also reflected the payment of a gratuity of R500 000 to the CEO, amounting to 5% of the total distribution. A payment of R500 000 was made as a gratuity to the Peakers Trust’s chairperson, amounting to 5% of the total distribution. Three payments of R100 000 were made to the so-called three independent trustees, being inter alia the fourth respondent, Khulekani Buthelezi and Thina Dinga. The last entry under section ‘A’ referred to ‘funded other administration expenses’ in the amount of R200 000. The total administration expenses were reflected as R8 750 000, amounting to 87,5% of the total distribution.

[52] Under section ‘B’, with the heading ‘Project Funded’, reference was made to only one project, namely ZBQ Consulting (Logistics Project) in respect of which R1 million was paid, amounting to 10% of the distribution amount.

- [53] Finally, under section 'C', reference was made to 'Taxation Paid'. A payment of R250 000 to SARS was reflected.
- [54] The applicant was requested to provide the resolutions and minutes of the Ubunye Board where the decisions to pay the aforementioned parties were taken, and to highlight the relevant objectives used to justify each payment. The applicant was also requested to provide answers to a number of questions posed by the Peakers Trust, which included inter alia:
- (a) It was noted that 87,5% of the R10 million appeared to have been utilised to fund administration costs which is above 15%. An explanation regarding the rationale behind spending 85,5% on gratuities for trustees instead of funding beneficiaries' projects was requested.
 - (b) An explanation was requested for the payment of R500 000 to the Peakers Trust's chairperson and how such payment aligned with the Ubunye Trust's trust deed.
 - (c) The Ubunye Board was asked to explain how it came to the decision to declare benefits to themselves and the direct beneficiaries, instead of funding projects based on broad-based black economic empowerment.
- [55] The applicant was also asked to provide information on certain projects which the Peakers Trust had previously funded and in respect of which no updates had been given. A report was requested detailing what had happened to the funds given to the listed beneficiaries and businesses. Mention was made of the Nyawane Projects, which the Peakers Trust funded with R1 million. Although several reports were filed, investigations by the Peakers Trust revealed that the project does not exist. A similar problem was discovered with the Zunco Greenhouse. Despite providing funding of R1 million, it was discovered that the project did not exist.
- [56] The applicant requested the Ubunye Board to provide a detailed statement of all payments made from the R10 million donation received from the Peakers Trust, which was done. It was attached to the founding affidavit as annexure 'P'. It makes for disturbing reading. It reflects various payments made between March 2018 and February 2020. It should maybe be mentioned that the Ubunye Trust in 2019 also received a so-called dividend from Sasol through the Batho Trust in the amount of R4,7 million. At the time of the meeting held by the Ubunye Board on 5 July 2019, the Ubunye Trust had an amount of R6,7 million in its bank account, as reflected in the minutes of that meeting, under the heading 'Treasurers Report'.
- [57] According to annexure 'P', the first respondent received R3,1 million in December 2019 as a gratuity, and R1 million in June 2018 in respect of a project for the Emthunzi Trust, which was apparently his own company.

- [58] The second respondent received gratuities in the amount of R1 million in June 2019 and R1 million in December 2019. He also received dividends of R100 000 in May 2019 and R250 000 in December
2019. He received R1 million for a project referred to as 'Zunco' in July 2018. It is not clear if this is the same non-existent project referred to by the Peakers Trust as Zunco Greenhouse.
- [59] The third respondent received a gratuity of R500 000 in December
2019. She also received dividends of R100 000 in May 2019 and R250 000 in December 2019. She received R1 million for a project in October 2018, referred to as Edu Block Pmb, which apparently was her own company.
- [60] The fourth respondent received a gratuity of R100 000 in December 2019 and also R1 million for a project, ZBC Consulting, which was apparently her own company.
- [61] It was clear from annexure 'P' that a number of the original beneficiaries also received payments. I will only mention a few. Ms N P Zuma received dividends of R100 000 in May 2019 and R250 000 in December 2019. She received R1 million for a project in respect of a company registered in her daughter's name.
- [62] Mrs N Buthelezi, the wife of the first respondent, received dividends of R100 000 in May 2019 and R250 000 in December 2019. She received R980 000 in July 2018 for a project in respect of her own company.
- [63] Mr J Gwala, who is the first respondent's brother-in-law, received dividends of R100 000 in June 2019 and R250 000 in December 2019. Mr B Xobo received dividends of R100 000 in May 2019 and R250 000 in December 2019. He received R500 000 in March 2018 towards a project in respect of a family company and a further R500 00 in December 2018 in respect of a project for his own company.
- [64] Mr B Mpulo received dividends of R100 000 in June 2019 and R250 000 in December 2019. He also received R1 million in December 2019 for a project in respect of a company apparently in his wife's name. Ms L Khuzwayo received dividends of R100 000 in May 2019 and R250 000 in December 2019. She also received R500 000 in June 2018 for a project in respect of her own company.
- [65] Annexure 'P' also reflected the gratuity of R500 000 paid to the chairperson of the Peakers Trust, which, as mentioned above, was questioned by the Peakers Trust.
- [66] The applicant stated that he also received a letter from ENGIE Southern Africa (Pty) Ltd, one of the shareholders of the Peakers Trust, which was addressed to the Peakers Trust. In it, issues were raised about possible breaches of the Peakers Trust's trust deed by the beneficiaries of the Peakers Trust. Reference was made to the misuse of funds by the beneficiaries and their close family members. The Peakers Trust was requested to select and appoint an independent auditor to perform an audit into inter alia the process implemented by the beneficiaries to identify and select projects and the use of funds granted to the

Peakers Trust. The trustees of the Peakers Trust were instructed to refrain from making any further distributions to its beneficiaries. In terms of the deed of trust of the Peakers Trust, which was attached by the third respondent to a supplementary affidavit, the Ubunye Trust was one of its three beneficiaries.

The third respondent's answer

- [67] I have already briefly referred to the respondents' defence to the application and will accordingly merely highlight a number of allegations made in the answering affidavit.
- [68] The third respondent stated that the Peakers Trust's board of trustees allocated a special distribution to each of its beneficiaries after apparently receiving a commissioning fuel payment from SARS. This special distribution was not paid in lieu of an application by the Ubunye Trust for an award. The third respondent alleged that it was up to the trustees to 'exercise their discretion and to distribute the special distribution to the beneficiaries'. She added that this was a 'first return' from all the investments which the original beneficiaries made over the years. She did not say what these investments were. It was presumably a reference to the time and effort put in over the years. No mention was made of any monetary or capital investments and no details were provided.
- [69] As far as the payment to the first respondent by the Peakers Trust is concerned, the third respondent alleged that the Ubunye Trust had no control over payments made by the Peakers Trust. She also alleged that the payment was not an interest, and presumably implies that there was no duty on the first respondent to disclose it to the Ubunye Board.
- [70] The third respondent also alleged that the original beneficiaries are at the core of the Ubunye Trust and are entitled to receive distributions from time to time in terms of clause 13.4. It was also stated that there is nothing wrong with describing payments or distributions as gratuities. The third respondent reiterated that the beneficiaries invested time, effort, energy and money, and that the special distribution made by the Peakers Trust and the Sasol dividends were not meant to be passed on to third parties. The payment was not made by the Peakers Trust in consequences of any applications for awards. The original beneficiaries also 'clearly' rank above the 'secondary beneficiaries'. Reference was also made to an incentive policy.
- [71] The third respondent stated that Sasol only paid the dividend for the benefit of the Ubunye Trust after a verification process. It is important to note though that the previous trust deed provided to Sasol, described the Ubunye Trust as a charitable public trust, which is still retained in the amended trust deed. The third respondent appears to be unhappy about this description in that it does not accord with what the original beneficiaries want, namely a trading trust.
- [72] In further defence of the first respondent's receipt of the gratuity of R3 million, the third respondent related the first respondent's involvement in a transaction which ultimately lead to the Ubunye Trust's shareholding in Sasol (via the Batho Trust). Mention was made of a

loan allegedly raised to fund a consortium in the sum of R1,5 billion. According to the third respondent, the asset which has since accrued to the trust is worth over R100 million. She clearly does not realise at what cost this “asset” came. The applicant in reply stated that no assets other than cash are reflected in the Ubunye Trust’s asset register. It is therefore unclear what this asset is.

[73] The third respondent attached to her affidavit the decision schedule of the Peakers Trust, in respect of a meeting held on 14 November 2019, which deals with the R10 million special distribution referred to above. It was specifically resolved by the Peakers Trust that the distribution would be paid to the beneficiaries (no qualification) and that the funds ‘would be managed in compliance with the Beneficiary Trust Deeds objectives’.

[74] The third respondent also attached the Ubunye Trust’s financial statements for the year ending 31 March 2020. The objects of the Ubunye Trust are stated on page 1 as follows:

‘The trust has been established to be a charitable institution of a public nature. The objects and business of the trust shall be to provide support and assistance to beneficiaries in the territory for the purpose of helping to establish and improve their businesses, farming and related income generating activities, with a view to promoting the alleviation of poverty and creation of sustainable profitable business and farming operations in KwaZulu- Natal.’

The nature of the business was stated as being a ‘public benefit organisation whose main business is to uplift or develop small business’.

[75] The financial statements showed that in addition to payments of the dividends and gratuities to the trustees and beneficiaries, as mentioned above, the trustees and beneficiaries also received remuneration, described as meeting fees and other expenses. The CEO, Mr Mabutho Miya, received remuneration of R1 189 415 in 2020, in addition to his gratuity payments totalling R850 000.

The applicant’s reply

[76] The applicant in his replying affidavit inter alia attached the Ubunye Trust’s financial statements for the years ending March 2019 and March 2018, which reflected payments to the trustees in respect of remuneration, travelling and accommodation.

[77] The applicant, with reference to the letter from the Peakers Trust demanding an explanation, stated that the respondents in essence admitted that they paid the various amounts to themselves. It was submitted that the trustees disregarded the fact that once funds are donated to a trust, it becomes a trust asset which must be distributed in terms of the provisions of the trust deed.

[78] The applicant pointed out that any amounts contributed by the respondents to the Ubunye Trust in respect of its workings, would be reflected as loans to be repaid by the Ubunye Trust. There were no such loans or any personal investments made by the trustees or the beneficiaries recorded in the financial statements.

- [79] The applicant stated that the respondents did not dispute that the first respondent received R375 000 from the Peakers Trust and that he failed to disclose receipt thereof. It has in the meantime come to light that the Peakers Trust has realised that a mistake was made and that arrangements have been made for the repayment of the money by the first respondent.
- [80] The applicant agreed that the trustees were entitled to distribute trust assets in accordance with clauses 13.4 and 13.8 of the trust deed but pointed out that only the second and third respondents are beneficiaries of the Ubunye Trust. Any payments made by the trustees need to be made bearing in mind the objectives of the Ubunye Trust and that it is a community trust. The respondents, in essence, paid amounts to themselves as a return on the investment of their time and effort (of which no record or proof is provided) spent in the execution of their duties as trustees. It was stated that these payments were to the detriment of all the other beneficiaries and that the respondents conflate their rights of income to that of a capital trust, which the Ubunye Trust is not. It is a charitable trust and not a trading trust.
- [81] The applicant dealt with the so-called incentive policy, used inter alia as justification for the payments received, and stated that although it appears to have been discussed and accepted, it does not accord with clauses 10.1.3, 10.1.7, and 10.8 of the trust deed. The policy was furthermore agreed to by the respondents long after the events described by the third respondent occurred. No details are furthermore provided of the transactions which the first respondent had facilitated to entitle him to the substantial amount he is claiming with reference to this policy.

Legal principles

Removal of a trustee

- [82] Counsel appearing on behalf of both the applicant and the respondents filed extensive heads of argument which proved helpful and which is appreciated. Not all the points raised will be dealt with but have nonetheless been carefully considered by me.
- [83] As mentioned above, the applicant seeks the removal of the first to fourth respondents in terms of section 20(1) of the Act. The basis for him doing so is set out in detail above but in essence revolves around the handling of the R10 million donation received by the Ubunye Trust from the Peakers Trust, and whether the trustees were entitled to distribute the donated funds to themselves and the original beneficiaries.
- [84] It was submitted on behalf of the applicant that, in addition to the provisions of section 20(1) and (2) of the Act, the court also has in terms of common law the inherent power to remove a trustee from office. In Honoré's South African Law of Trusts[4] the following is stated:
- 'The general principle developed in the exercise of the court's common-law jurisdiction is that the trustee will be removed when continuance in office will prevent the trust being properly administered or will be detrimental to the welfare of the beneficiaries.'(Footnote omitted.)

- [85] A court's common law power to remove a trustee has been confirmed by the majority in *Fey NO* and *Whiteford NO v Serfontein* and another[5] and is now considered trite as per Petse JA in *Gowar and another v Gowar and others*. [6]
- [86] Section 20(1) of the Act does not specify any grounds for removal, other than that the court should be satisfied that the removal will be in the interests of the trust and its beneficiaries. I was referred to *Tijmstra NO v Blunt-Mackenzie NO* and others[7] where it was inter alia held that '[w]henver trust assets are endangered a trustee should be removed'.

Duties of trustees

- [87] Section 9(1) of the Act states that '[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'.
- [88] In *Honoré*, [8] reference is made to *Sackville West v Nourse* and another[9] where Kotzé JA held that a trustee must observe greater care in dealing with and handling trust property than he might in dealing with his own property. It was further stated that[10]
- '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 and investing 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[11] where the principle was elaborated on by adding inter alia that a trustee must 'adopt the standard of the prudent and careful

person'.

- [89] One of the duties of a trustee which is discussed in *Honoré*, relates to impartiality which in turn includes the avoiding of a conflict of interest and the duty to treat beneficiaries impartially.[12] The authors, in dealing with the conflict issue, state that where a trustee is also a beneficiary, and acts in a way so as to benefit him or herself at the expense of the other beneficiaries, the trustee's conduct will be narrowly scrutinized.[13] Reliance was placed on *Colonial Banking and Trust Co v Estate Hughes*, [14] which approach was followed in *Harris v Fisher NO*. [15]
- [90] Counsel for the applicant also referred me to *Grobbelaar v Grobbelaar* [16] and *Die Meester v Meyer* [17] where it was held that a conflict between interest and duty is a ground for removal.
- [91] In *Numsa obo Nganezi v Dunlop Mixing And Technical Services (Pty) Ltd* and others[18] it was held that fiduciary duties must be exercised for the sole purpose of promoting the beneficiaries' interests and that it is one of the core duties 'to avoid all potential conflict-of-interest situations'.

The trustees' remuneration

[92] Section 22 of the Act states that '[a] trustee shall in respect of the execution of his official duties be entitled to such remuneration as provided for in the trust instrument or, where no such provision is made, to a reasonable remuneration. . . '.

[93] Honoré states that the general principle is that a trustee is entitled to be indemnified out of trust property for expenses incurred during the course of administration and to remuneration for services, as provided for in the trust instrument. A trustee is not entitled to make a profit from the administration of the trust and must account to the trust for any such profit. A trustee is also entitled to be indemnified in respect of travelling expenses incurred in attending meetings or when conducting trust business. Loss of remuneration

resulting from time properly spent on trust affairs can also be claimed.[19]

Discussion and analysis

[94] Counsel for the applicant, Mrs Ploos van Amstel, and counsel for the respondents, Mr Nxusani SC, made lengthy submissions before me. Bearing in mind the issues to be decided, it is perhaps more expedient to first highlight and discuss the submissions made on behalf of the respondents.

[95] It was submitted by Mr Nxusani that, over the years and through the amendments to the original trust deed, the definition of beneficiaries evolved to what it is at present. It was submitted that the so-called original beneficiaries enjoy a preference over the other beneficiaries because they are entitled in terms of the trust deed to appoint trustees. It was also submitted that they rank above all the other beneficiaries because those beneficiaries, being the beneficiary farmers, co-operatives and SMMEs, are only entitled to access funds by way of a written application submitted in terms of the award policy. Reference was made to clauses 1.1.3.1.2 and 1.1.3.2 of the 2017 trust deed and it was submitted that such beneficiary farmers have to apply for funding from the Ubunye Trust. In terms of clause 1.1.3.1.2, only those beneficiaries identified or selected in the entire discretion of the trustees shall benefit from the trust fund.

[96] As mentioned above, the award policy is not before me and it is uncertain if such a policy has indeed been passed. I will for the sake of argument accept that such a policy exists and that it applies to beneficiary farmers and SMMEs. The argument on behalf of the respondents is that the beneficiary farmers and SMMEs would only become eligible to an award by the trustees if they had applied for an award for funds. If I understand the argument correctly, the respondents are saying that if the Ubunye Trust has R10 million in its trust fund but no application has been made on behalf of any beneficiary farmer or SMME for funds, the trustees will make no awards to any beneficiary farmer or SMME. The trustees are, however, free to make distributions to the original beneficiaries from time to time in their discretion and, by implication, also to themselves as trustees. More so because the special distribution of R10 million was not meant to be shared.

- [97] Reliance was also placed on clause 13.4 and it was submitted that it entitles the trustees to pay or distribute part of the trust fund to beneficiaries 'entirely in their discretion', which justifies the payments made.
- [98] The difficulty with clause 13.4 is the use of the word 'beneficiary'. The respondents clearly want the reference to 'beneficiary' to only mean the original beneficiaries and not to include the other beneficiaries, which are so clearly spelt out in the definition of 'beneficiaries' in clause 1.1.2 of the 2017 trust deed. It was submitted that the difference in approach as to beneficiary farmers and SMMs in clause 13.1 and the approach in clause 13.4, is indicative that clause 13.4 relates to the original beneficiaries only and not to all beneficiaries.
- [99] It was also submitted that clause 13.4 permitted the distributions made by the trustees and it does not matter whether it was in respect of gratuities or paid in recognition for past efforts. It was further submitted that the original beneficiaries had a contingent right to receive distributions from time to time in their capacities as such, although one might hold a dim view of how it is done. It has to be accepted that it is permitted in terms of clause 13.4 and that it is in line with the intention as reflected in the trust deed.
- [100] It was submitted by Mr Nxusani, in his written heads of argument, that the trustees and original beneficiaries had agreed that the payments were to be made and that there was therefore no conflict or breach of trust between them. Reference was made to *Hoppen and others v Shub and others*[20] and it was submitted that it is trite that where trustees conclude a transaction for value with the full knowledge and consent of the co-trustees and the beneficiaries, but which is not prejudicial to the trust, then in those circumstances, the court will not remove the trustees.
- [101] In my view the issue of prejudice to the Ubunye Trust has largely been ignored by the respondents. It is so that the payments of gratuities and disbursements to the original beneficiaries can be justified on a reading of the wide powers granted to the trustees. It is unfortunately a hallmark of most trust deeds. This however does not include the payments the trustees made to themselves. But ultimately, I must decide whether in doing so, the trustees administered the trust properly and not in a manner that is detrimental to the beneficiaries, being all the beneficiaries.
- [102] The payments made by the trustees and the way it has been motivated for by the relevant parties does not do anything to promote the objects of the Ubunye Trust which include inter alia the alleviation of poverty and creating sustainable businesses.
- [103] The respondents seem to think that because the original beneficiaries became involved in certain projects, towards which millions of rands appear to have been channelled, that would satisfy the objects of the Ubunye Trust. However, almost without fail, these projects and the companies or businesses registered to do these projects, belong to or are linked to the original beneficiaries themselves or their spouses or relatives, which leads to the inescapable conclusion that the funds paid for these projects are simply for the benefit of

those original beneficiaries and their relatives.

- [104] The respondents want to blame the applicant for failing to understand how the Ubunye Trust conducts its business and accused him of siding with one or the other faction but he clearly had reason to be concerned about the conduct of business by the trustees. He was not the only one concerned. The letter from Peakers Trust confirms in my view that there were serious, justifiable concerns about how the donation of R10 million was utilised by the trustees. Peakers Trust was concerned that the objectives of the Ubunye trust as set out in the 2017 trust deed were being disregarded when the decision was made on how to distribute the donation, and quite rightly so. The payment to the chairman of Peakers Trust comes to mind as no justification for it will be found in the 2017 trust deed.
- [105] The respondents clearly regarded the donation of R10 million as some sort of bonus, for want of a better word, that could be distributed amongst themselves and the original beneficiaries with no regard to the objectives of the Ubunye trust and to the obvious exclusion of the other beneficiaries. R10 million could have gone a long way to alleviate poverty.
- [106] The trust deed makes provision for the remuneration of the trustees and bearing in mind the authorities referred to above, that is all the trustees are entitled to, more so in the absence of any detailed and specific descriptions as to what expenses were in fact incurred to justify the payments made.
- [107] I find it difficult to agree with the submissions made on behalf of the respondents that the original beneficiaries enjoy a preference over the other beneficiaries. If this was the intention, the 2017 trust deed clearly would have reflected such a preference, which it does not do, even on the most liberal interpretation of the relevant clauses.
- [108] It was also submitted that the focus on the complaints by Peaker Trust is unwarranted and that the resolutions taken to distribute the funds were made long before receipt of the Peakers Trust donation. This is not borne out by the papers. The decisions and discussions regarding the various payments were reflected in the July 2019 minutes. At the time only an amount of R 6,7 million was available but the payments discussed and decided upon were in excess of that amount, which is a clear indication that the R10 million was expected and therefore taken into account.
- [109] It was also submitted on behalf of the respondents that not every breach of a trust deed justifies a removal. The authorities referred to above makes it clear that trustees will be removed when their continuance in office will be detrimental to the trust property and the beneficiaries. In terms of the Act, I must be satisfied that that the removal will be in the interest of the trust and the beneficiaries. That clearly means all the beneficiaries, not just the select few.

[110] I have not said much about the submissions made on behalf of the applicant. I agree with applicant's counsel that the applicant was justified in bringing the application and that the respondents breached their fiduciary duties in respect of the Ubunye trust by depleting the trust fund in the way they did. I also agree that the respondents' continuance in office would indeed be detrimental and prejudicial to the welfare of the Ubunye trust and all its beneficiaries.

[111] In returning to the issues that had to be decided, I am of the view that the trustees were not entitled to pay or distribute the funds in the way they did and that these payments were made contrary to the objects of the Ubunye trust and accordingly prejudicial to the trust property and the beneficiaries. I therefore have no hesitation to conclude that the first to fourth respondents should be removed as trustees of the Ubunye trust.

Costs

[112] The applicant has cited the first to fourth respondents in their personal capacities. This is in line with the authorities. In *Honore*, at page 235, it is stated that an application for the removal of a trustee should be brought against the trustee in his or her private, and not representative, capacities. A trustee who is removed may be ordered to pay the costs out of his or her own pocket (*de bonis propriis*) failing which the court may order the costs to be borne by the estate. Bearing in mind the facts and circumstances of this particular matter, I can find no reason to order that the costs should rather be recovered from the trust fund, instead of the respondents. The applicant has prayed for an order that the respondents pay the costs on the attorney and client scale. In my view this would be appropriate bearing in mind that the application is brought by the applicant in his representative capacity and any costs not recovered from the respondents would by implication come out of the trust fund which in my view should not be permitted.

Order

[113] The following order is granted:

E BEZUIDENHOUT J

Date of hearing: 14 April 2023

Date of judgment: 13 October 2023

Appearances:

For the applicant: Mrs J Ploos Van Amstel Instructed by: Jacques Roos Attorneys Shop 23, Tiffany shopping Centre Old Main Road Salt Rock Tel: 032 525 4552 c/o Viv Greene Attorneys 132 Roberts Road Clarendon Pietermaritzburg For the first, Second, Third and Fourth respondent: Mr J Nxusani SC Instructed by: Diedricks Attorneys 78 Taunton Road Wembley Pietermaritzburg Tel: 033 342 9808 Email: admin@fiedricksattorneys.co.za

[1] Defined as the province of KwaZulu-Natal.

- [2] Clause 6 provides that '[t]he Original Beneficiaries shall appoint the Trustees in a meeting of Original Beneficiaries solely constituted for the appointment of trustees'.
- [3] Clause 5.4.
- [4] E Cameron et al Honoré's South African Law of Trusts 6 ed (2018) at 271 (Honoré).
- [5] Fey NO and Whiteford NO v Serfontein and another 1993 (2) SA 605 (A) at 614.
- [6] Gowar and another v Gowar and others
- [2016] ZASCA 101; 2016 (5) SA 225 (SCA) para 27.
- [7] Tijmstra NO v Blunt-Mackenzie NO and others 2002
- (1) SA 459 (T) at 473E-F.
- [8] Honoré at 306.
- [9] Sackville West v Nourse and another 1925 AD 516 at 534.
- [10] Ibid at 535.
- [11] Administrators, Estate Richards v Nichol and Another
- [1998] ZASCA 82; 1999 (1) SA 551 (SCA) at 557D-F.
- [12] Honoré at 370.
- [13] Ibid.
- [14] Colonial Banking and Trust Co Ltd v Estate Hughes and others 1932 AD 1 at 16.
- [15] Harris v Fisher, NO 1960 (4) SA 855 (A) at 862C.
- [16] Grobbelaar v Grobbelaar 1959 (4) SA 719 (A).
- [17] Die Meester v Meyer en andere 1975 (2) SA 1 (T).
- [18] Numsa obo Nganezi v Dunlop Mixing And Technical Services (Pty) Ltd and others [2019] ZACC 25; 2019 (5) SA 354 (CC) para 55.
- [19] Honoré at 409-410.
- [20] Hoppen and others v Shub and others 1987
- (3) SA 201 (C).

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