FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Reportable:	**Yes**
Of Interest to other Judges:	**Yes**
Circulate to Magistrates:	**No**

Case No. : 836/2018

In the matter between:-

NEIL DU PLESSIS N .O.	First Applicant
JAN LUBBE N.O.	Second applicant
CHARLES GEORGE FRIEDRICH KROHN N.O.	Third Applicant

and

ILZE FOURIE VAN NIEKERK	First Respondent
LIZA TASHLEY SCHEEPERS	Second Respondent
MASTER OF THE FREE STATE HIGH COURT BLOEMFONTEIN	Third Respondent

CORAM: DAFFUE, J

HEARD: 24 MAY 2018

JUDGMENT BY J P DAFFUE

DELIVERED: 26 JUNE 2018

I INTRODUCTION

[1] A novel, interesting and important question has been raised in the dispute between trustees of a trust which owns valuable immovable property in the Knysna district.

[2] A major female, who was only eleven years old when the trust was created in 1999, is the sole income and capital beneficiary of the trust and for obvious reasons she finds herself in one of the opposing camps.

[3] The crisp point to be decided is whether the decision of the majority of trustees, consisting of three professional persons, *i.e.* two auditors and a lawyer, to request the fourth trustee and mother of the aforesaid beneficiary to resign as provided for in the trust deed was sufficient for her to lose her office as trustee, or put otherwise, caused her to vacate her office.

[4] The Master of the High Court decided not to take sides and abides by the court's decision.

II THE PARTIES

[5] The applicants are Messrs, N Du Plessis, J Lubbe and C G F Krohn, two auditors and an attorney respectively, in their official capacities as trustees of the Ritom Trust IT 1138/99 ("the trust"). Adv P J J Zietsman appeared for the applicants.

[6] Ms I F van Niekerk, the first respondent, is the mother of the second respondent. First respondent and Mr Krohn were the first trustees of the trust. Her position as trustee of the trust is the focal point of the proceedings before me.

[7] Ms L T Scheepers, a thirty year old female, cited as second respondent herein, is the sole income and capital beneficiary of the trust. First and second respondents oppose the application and they were represented by Adv G P van Rhyn.

[8] The Master of the High Court, Bloemfontein, ("the Master") cited as third respondent, does not oppose the application and has given notice to abide by the court's decision. An insignificant report was filed.

III THE RELIEF SOUGHT

[9] The following relief is sought in the notice of motion:

"1. That the First Respondent has **lost** her office as trustee of the Ritom Trust, IT 1138/99, on 1 February 2018.

2. That the Third Respondent is **ordered** to amend his records so as to reflect that the First Respondent has lost her office as trustee of the Ritom Trust, IT 1138/99, on 1 February 2018.

3. That the First Respondent pays the cost of the application.

4. That the Second and/or Third Respondent in the event that they oppose the application, jointly and severally with the First Respondent pay the cost of the application." (emphasis added)

IV THE TRUST DEED AND CLAUSE 5.7 IN PARTICULAR

[10] The trust deed was entered into on 18 June 1999 between a certain Marthinus Johannes Bam as founder/donor and first respondent and third applicant as the only trustees. The sole income and capital beneficiary is second respondent who was at the time still a minor. The donation paid to establish the trust was R100.00. The trust was duly registered by the Master whereupon letters of authority were issued to the two trustees. On 20 October 2016 the Master issued letters of authority to the present four trustees, to wit the three applicants and first respondent. As is evident Mr Scheepers, the father of the beneficiary and husband of first respondent at the time, did not create the trust and was also not appointed as trustee. However and bearing in mind the history sketched by first respondent in the answering affidavit, logic dictates that he played a vital role in the creation of the trust, duly advised by his legal representative(s). In fact, he has been conducting farming activities on the trust's immovable property all along by making use of a company and close corporation.

[11] Clause 5.7 of the trust deed deals with the vacation of a trustee from his/her office as trustee. I quote the clause *verbatim*:

"5.7 The office of a TRUSTEE **shall be vacated** if –

5.7.1 he becomes disqualified in terms of clause 5.7;

5.7.2 he files an application for the surrender of his estate or an application for an administration order or if he commits an act of insolvency as defined in the Insolvency law for the time being in force or if the (sic) makes any arrangement or composition with his creditors generally.

5.7.3 he resigns his office by not less that (sic) 60 days (or such shorter period as the remaining TRUSTEES or TRUSTEE may agree to) written notice to the remaining TRUSTEE or TRUSTEES;

57.4 the **majority** of TRUSTEES **request** a TRUSTEE **to resign**." (emphasis added)

V WHAT TRIGGERED THE APPLICATION?

[12] A trustees' meeting was held on 18 January 2018. The three applicants were in Bloemfontein and they communicated with first respondent via telephone whilst she attended her attorney's offices in Johannesburg. A transcript of the telephonic conversation was made and attached to the answering affidavit. The parties discussed several issues, but the removal of first respondent as trustee was neither a point on the agenda, nor discussed. Second applicant merely mentioned towards the end of the conversation: "Baie dankie ek vermoed ons gaan Ilze **verwyder** as trustee." (Thank you, I presume we are going to remove Ilze (first respondent) as trustee.) I added the emphasis. Mr Scheepers' loan account against the trust was discussed and applicants raised the issue of payment of interest on the loan account, rentals payable to the trust as well as the approval of the trust's financial statements.

Applicants insisted that interest should be paid in respect of the loan account, but first respondent responded that interest was never agreed upon and therefore interest should not be allowed to be charged retrospectively. No agreement could be reached with first respondent. Eventually, and what must have been a huge surprise for first respondent and her attorney, second applicant referred to a written offer to purchase the trust's immovable property. After a while tempers flared up and the conversation was terminated by applicants, notwithstanding protest by first respondent's attorney.

[13] Following upon this meeting applicants informed first respondent in a letter dated 18 January 2018 that she was removed ("dat u verwyder word as trustee") as trustee in accordance with clause 5.7.4 of the trust deed. I added the emphasis. Three reasons were advanced for this step, *i.e.* that 1) all items discussed were either rejected or opposed; 2) she made false allegations against the applicants and 3) she admitted that she did not have sufficient knowledge to fulfil her duties as trustee. No minutes were sent to either first respondent or her attorney at that stage. It was only done on 31 January 2018. It is apparent that applicants misread clause 5.7 and believed that they could remove first respondent as trustee.

[14] On the same day applicants informed the Master of their resolution to remove first respondent as trustee and attached minutes of the meeting signed by all three. These minutes are not a correct version of the meeting as recorded and

transcribed and as testified to by first respondent. It was never recorded whilst first respondent was in telephonic communication with them that the majority resolved to remove her as trustee and that a decision was taken not to appoint any further trustee. Furthermore, it is incorrect that the removal of first respondent as trustee was on any agenda circulated to her in particular. No mention is made of an agenda *ex facie* the transcript. First respondent challenged applicants' version in this regard and even accused them of misrepresenting the facts to the Master. Her version was not refuted in clear and concise terms and with reference to any objective evidence and it must be accepted as correct.

[15] The Master pointed out to applicants that they could not resolve to remove first respondent as trustee, but could only request her to resign. Consequently a further letter dated 1 February 2018 containing the request to resign was written to first respondent. Thereupon first respondent requested the Master an opportunity to make representations in this regard. The Master was not prepared to issue new letters of authority to exclude first respondent as trustee as requested, (or more aptly put, instructed by applicants) and furthermore allowed her to make representations which she did. A copy of the written representations is attached to the answering affidavit. The Master did not adhere to applicants' instructions and in a report filed with the registrar abided with the court's decision. I deliberately used the word "instructions" as it is applicants' attitude that the Master had no option than to issue new letters of authority. It must be reiterated that applicants failed to

respond to many allegations made by first respondent in her answering affidavit and representations to the Master which she incorporated into her affidavit. They did this on the basis that the court would be requested to strike out all alleged irrelevant material from the record. No such application was brought and Mr Zietsman did not argue or move such application during his argument.

VI THE PARTIES' CONTENTIONS

[16] Applicants' case as changed and set out eventually in this application is plain and simple. According to their counsel clause 5.7 is clear and unambiguous; the majority of trustees may resolve to request a trustee to vacate his/her office and such trustee does not have any option than to vacate his/her office. No reasons have to be given. This is what occurred in essence according to them, although the correspondence indicates otherwise. They decided to remove first respondent from office, not during a trustees' meeting, but behind her back. According to applicants first respondent had no option than to resign and the Master had no option than to issue new letters of authority in favour of applicants only. Although not stated in so many words, it is apparent that applicants believe that even the court has no say in the matter, except to confirm their decision. Therefore applicants did not even attempt to respond to most of the issues raised in the answering affidavit and Mr Zietsman urged the court not to consider these reasons and/or submissions. According to him any reasons given are totally irrelevant. He relied on a few passages in Cameron *et al,*

Honoré's South African Law of Trusts, 5th ed p 225 and further and in particular paragraph (iv) under the heading "Vacation in accordance with the terms of the trust."

[17] Applicants somersaulted as mentioned. Initially they insisted that they could validly remove first respondent as trustee. When their incorrect procedure was pointed out by the Master, they changed tack and informed first respondent that they had decided to request her to resign. On their version she had no option than to resign, which is totally irreconcilable with a mere request which may always be accepted or refused, but for obvious reasons they rely on the peremptory wording in clause 5.7 that the office of trustee "shall be vacated" if a request is made.

[18] Applicants have obviously borrowed the language of Honoré when they prepared their affidavits. The replying affidavit in particular deals with legal argument instead of a response to the facts alleged by first respondent. In paragraphs 7.7 and 8 of the founding affidavit it is stated by applicants that first respondent "… has <u>already lost her office</u> and that the <u>Master must</u> accordingly <u>amend</u> his records …" and "… the Master does not have any jurisdiction to hear any representations …" (emphasis added)

[19] Mr Van Rhyn submitted that applicants have provided reasons and therefore nailed their colours to the mast. They have to live with those reasons and the court should consider whether these are at all relevant.

[20] Mr Van Rhyn dealt with the disputes between the parties and submitted that it is evident that the applicants do not act in the interests of the only beneficiary, the second respondent. He relied on first respondent's version that the trust had been "captured" by Mr Scheepers who is conducting farming on the trust's immovable property by making use of two separate vehicles, to wit a company and a close corporation. He also submitted that applicants are under Mr Scheepers' influence. I must reiterate that this is vehemently denied in the replying affidavit and it is not necessary to make any finding in this regard.

[21] Mr Van Rhyn submitted that the authorities are clear, *i.e.* the removal of trustees shall be done with circumspection. If the wording of clause 5.7 is accepted as it stands, the majority of trustees may cause a trustee to vacate his/her office for frivolous reasons or for no reasons at all, or worse, for *mala fide* reasons. Therefore, so he submitted, the court should find that an implied term must be read into the relevant clause so that the request to resign may only be made on good cause.

[22] Mr Van Rhyn also submitted that the issue of vacation of office was not on the agenda of the meeting of 18 January 2018 and that, in any event, first respondent never received notice, not to speak of reasonable notice as provided for in clause 6.2.1 of the intention to remove her as trustee.

VII EVALUATION OF THE SUBMISSIONS WITH REFERENCE TO LEGISLATION AND AUTHORITIES

[23] It appears from the transcript of the meeting of 18 January 2018 that applicants insisted on agreement by the trustees that Mr Scheepers should be entitled to interest on his loan account (the amount which is in dispute) notwithstanding the fact that there was never an agreement on the payment of interest. First respondent was not amenable thereto. Second respondent has never received any income from the trust, apparently as Mr Scheepers and/or his entities did not pay any rental. There may be valid reasons for this, *e.g.* improvements were undertaken increasing the value of the trust's property. The full facts have not been placed before the court. However, I have no reason to doubt that first respondent has only the interests of the trust and its sole beneficiary at heart, whilst applicants have a more objective view which may not be in the interests of the trust beneficiary. It is not necessary to make any finding in this regard, save to say that first respondent's *bona fides* are above board.

[24] I quoted the relevant clause of the trust deed, clause 5.7, in full *supra*. I shall deal with the clause again in a moment. It is perhaps apposite to state that another clause in the trust deed, and to which neither counsel referred, also deals with the incapacity of a person to act as trustee. I refer to clause 5.6. The persons disqualified to act as trustee in terms thereof are 1) those disqualified from acting as a director of company in terms of s 218 of the 1973 Companies' Act, 2) unrehabilitated insolvent persons, 3) lunatics or persons declared incapable of managing their own affairs, 4) convicted criminals involving

dishonesty and sentenced to imprisonment without the option of a fine or a fine exceeding R500.00 and 5) companies which have been liquidated or placed under judicial management.

[25] Clause 5.7 provides for four instances in terms whereof the office of a trustee shall be vacated as set out *supra.* The first instance is really nonsensical as it merely encapsulates the other three instances. The second instance relates to sequestration and like matters also mentioned to an extent in s 20(2)(c) of the Trust Property Control Act, 57 of 1988, ("the Trust Act") which provides a reason for the Master to remove a trustee from office. The third instance is when the trustee resigns (it is presumed freely and voluntarily) and lastly when the majority requests the trustee to resign. A study of clauses 5.6 and 5.7 reveals that the two clauses contain a mixed bag of the events stipulated in s 20 of the Trust Act.

[26] Before I deal with the interpretation of clause 5.7 I need to show what the Trust Act stipulates pertaining to removal of trustees from office and some authorities will be quoted as well. I do this notwithstanding Mr Zietsman's submission that the circumstances in terms whereof a trustee can be removed from office by the court and/or the Master are irrelevant and therefore also the authorities dealing with these matters. I do not agree with such submission. In terms of s 20(1) a court may remove a trustee from office on application of the Master or an interested person. This will only be done if the court is satisfied that removal will be in the interests of the trust (and in my view in particular) the beneficiaries. Section 20(2)

stipulates that the Master may remove a trustee in five instances, to wit 1) conviction of dishonesty and if the trustee is sentenced to imprisonment without the option of a fine, 2) the failure to give security to the satisfaction of the Master, 3) in the event of sequestration, liquidation or judicial management, 4) if declared mentally ill or incapable to handle his own affairs and 5) the failure to perform his statutory functions satisfactorily or to comply with any lawful request by the Master.

[27] In *Gowar and another v Gowar and others* 2016 (5) SA 225 (SCA) the court was confronted with a main and counter-application in terms whereof the trustees of several family trusts *inter alia* sought orders against the others for their removal as trustees. The High Court found that neither party had established the requirements to remove the other. This was confirmed on appeal when both the appeal and cross-appeal were dismissed. The court dealt with the common law and Trust Act requirements for removal and found at paragraph [31] that mere conflict between trustees and beneficiaries or amongst trustees was insufficient for removal of any of the trustees.

[28] The SCA in *Gowar supra* relied on a passage in *Honoré* and a *dictum* in *Sackville West v Nourse and another* 1925 AD 516 at 527 and emphasised in paragraph [28] that removal will be ordered if the trustee's "continuance in office will prevent the trust being properly administered or will be detrimental to the welfare of the beneficiaries." The court warned at paragraph [30] that the court's power "… to remove a trustee must be exercised with

circumspection." Hereafter it stated at paragraph [31] that "the overriding question is always whether or not the conduct of the trustee imperils the trust property or its proper administration." The following *dictum* in *Sackville West supra* at 519 is apposite:

"And one of the circumstances to be considered by a trustee is that he is dealing not with his own money, but with that of the trust. Greater care and caution are required of him in the latter case than in the former."

[29] I shall now consider the comments in *Honoré* vehemently relied upon by Mr Zietsman. The authors distinguish the three modes in terms whereof a trustee may lose his/her office. I quote from 225:

"'Vacation of office' refers to those modes by which a trustee loses office with neither consent nor the need for cause to be shown why office should be lost. 'Resignation' is a mode by which a trustee loses office by his or her own expressed volition. 'Removal' refers to those modes by which a trustee loses office without consent on good cause shown for removal."

[30] The last two modes quoted *supra* speak for themselves. A trustee may resign freely and voluntarily. The court and the Master may remove a trustee in circumstances alluded to *supra.* The term "vacation of office" may be regarded as more problematic, but in my view it is not. The authors in *Honoré* deal from 225 and further with five eventualities. The death of a trustee is an obvious eventuality, as are the vacation of office by a trustee appointed *ex officio,* the revocation of a constitution under which the trustee was appointed and the termination of the trust. The one eventuality of relevance is vacation of office in accordance with the terms of the trust. In

this regard the authors submit that "(i)t is self-evident that the terms of the trust may prescribe that the trustee vacate office in a certain event." (emphasis added). The authors rely for their submission on *Osman v Jhavari* 1939 AD 351 at 359. The *Osman* example does not support applicants' case. In that matter the rules of the voluntary association provided for nine trustees and stipulated that if five trustees resigned or retired the remainder should vacate office. The court found that when five trustees had resigned, the other four could not exercise any powers as trustees. Clearly, the resignation of the majority - the five trustees - was "an event" as mentioned by the authors.

[31] Mr Zietsman submitted that the resolution of the majority – the three applicants – was "an event" as identified by *Honoré* and provided for in the trust deed. I do not agree for the reasons that follow in the next paragraphs. At this stage I need to point out that *Honoré* again refers to "an event" when termination of a trust is dealt with. According to the authors, with reliance on *Pietermaritzburg Women's Christian Temperance Union v Charlesworth & Appleby & Perks Tea Room* 1949(1) PH F10 (N), the trustee's office comes to an end when "the event on which it is to terminate occurs." In my view "an event" can never be a majority decision by trustees to terminate a trust contrary to the terms of the trust deed or the interests of the beneficiaries or to cause the vacation from office by a trustee against his/her will and/or without good cause, whether by way of a request to resign or otherwise.

[32] It is mentioned at 232 in *Honoré* that the founder of a trust may reserve the right to remove a trustee if so stipulated in the trust deed. He may also confer such a right on some other person and presumably also the majority of trustees. *Honoré's* discussion and the examples provided do not support applicants' case at all. The contrary is true. "An event" must have its origin in some external occurrence which can be established objectively. If one considers the common law as well as statutory powers of the court to remove a trustee, it is hard to believe that a trustee can be validly removed by the founder or a person nominated by him in circumstances where the interests of the beneficiaries are not even considered. I accept that such procedure may be a cheaper procedure than litigation and might be provided for in a trust deed based on the common law principles or s 20 of the Trust Act, but the court or the Master's power of removal shall always be retained. The effect of my approach is that even if the trustees were given a mandate to remove a fellow trustee, which is not the situation *in casu*, it would only be possible in circumstances analogous to that set out in the common law or s 20 of the Trust Act. Furthermore, the affected trustee should always have the right to challenge the decision in a court. Such right is afforded to a trustee that is removed by the Master and if a court removes a trustee he/she will have the right to apply for leave to appeal the decision. It must certainly also apply to removal by the founder or a person nominated by him. *In casu* applicants' argument is straightforward: no procedural rights are afforded to first respondent and *cadit quaestio.* This argument is unsound.

[33] Bearing in mind the background and circumstances known to the parties at the time when the deed of trust was entered into and notwithstanding the fact that the wording of clause 5.7 may be regarded as unambiguous, which it is not, it now becomes relevant how to deal with the parties' submissions insofar as interpretation thereof is concerned. Mr Zietsman's argument is simple: don't concern yourself with authorities dealing with circumstances in which either the Master or the court is entitled to remove a trustee from office, because, *in casu,* the parties to the deed of trust decided to contract on a different basis. The majority rules and their resolution must be acceded to, whether or not the Master or the court would not dare removing a trustee if no sufficient reason exists. I shall try to explain why this could not be the law.

[34] In an oft-quoted judgment Wallis JA summarised the current state of our law regarding the interpretation of documents, including contracts, as follows in *Natal Joint Municipal and Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18]:

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is

directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document." (emphasis added)

Thus, the matter must be approached holistically and context and language must be considered together with neither predominating over the other. The warning at 603F - 604D should be adhered to. Judges must be alerted to and guard against the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. See also *Bothma-Batho Transport (Edms) Bpk v S Bothma en Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at paras [10] - [12].

[35] In *BP Southern Africa (Pty) Ltd v Mahmood Investments (Pty) Ltd* [2010] 2 All SA 295 (SCA) Lewis JA stated the following in a unanimous judgment at para [11]:

"It is settled law that the contractual provision must be interpreted in its context, having regard to the relevant circumstances known to the parties at the time of entering into the contract …. It is also clear that the position must be given a commercially sensible meaning …" (emphasis added)

[36] In *Novartis v Maphil* [2015] ZASCA 111, 3 September 2015, Lewis JA stated the following at para [28]:

> "[28] The passage cited from the judgment of Wallis JA in *Endumeni* summarizes the state of the law as it was in 2012. This court did not change the law, and it certainly did not introduce an objective approach in the sense argued by Novartis, which was to have regard only to the words on the paper. That much was made clear in a subsequent judgment of Wallis JA in *Bothma-Botha Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA), paras 10 to 12 and in *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76; 2013 (5) SA 1 (SCA) paras 24 and 25. A court must examine all the facts - the context - in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing." (emphasis added)

[37] At first glance clause 5.7 may appear unambiguous. This is not the case at all. The word "shall" indicating a peremptory meaning is used, but the word "request" is irreconcilable with peremptoriness. "Request" is defined in the New Shorter Oxford English Dictionary as follows: "Asked to be favoured with or given (a thing); ask for; express a wish or desire that, to do; asked to be allowed to do; ask (a person) to do something."

A request is clearly what it has meant all along: a person who is requested to do something has a choice, either to agree or to reject the request. Applicants' belief must be considered to be "wishful thinking". Their desire can never be akin to first respondent's removal from office. A court can direct a person to do something or to refrain from doing something and in the event of non-compliance a sanction may await the person. In similar vein, an officer in the armed forces may order, direct or

instruct a trooper to do something or to refrain from doing it. Non-compliance will have consequences. Having said this, clause 5.7 is clearly ambiguous.

[38] The above quoted judgments emphasise that context is important and that all relevant facts must be examined by the court interpreting a particular contract in order to establish the intention of the parties and this must be done even where the words used are unambiguous. *In casu* Mr Krohn, an attorney, and first respondent, the mother of the minor trust beneficiary, were appointed the only trustees in 1999. Obviously, clause 5.7.4 could not play a role at that stage and thereafter. I accept that it was anticipated that further trustees might be appointed and this happened indeed, apparently only in 2016. Could it ever be said that the parties to the trust deed intended a situation where the mother of the minor beneficiary might be requested to vacate the office of trustee and a stranger be appointed in her place or nobody else appointed at all, without any valid reason, or for no reason or even out of malice and *mala fide?* Surely not. Such interpretation would make a mockery of the principles of trust law. It might (or would) lead to an insensible result and undermine the whole purpose of the trust deed, *i.e* to ensure that the interests of the only beneficiary is properly taken care of.

[39] The telephonic discussion of 18 January 2018 referred to *supra* is indicative of the applicants' attitude. I am not prepared to find that Mr Scheepers "has captured" the trust or

that applicants are under his influence, but I find it disturbing that they insist on interest being paid to Mr Scheepers in the absence of an agreement in this regard. First respondent's version appears to be in the interests of the trust, but I cannot say that in respect of applicants' insistence. Instead of blaming first respondent for being obstinate, she should be commended for taking a stance in the interests of the trust beneficiary. It is not the trustees' duty and obligation to further the interests of Mr Scheepers who might or might not be a creditor of the trust and to negotiate interest on his behalf which was never agreed upon when the loans (the amount which is in dispute) were allegedly advanced. They should act in the interests of the trust and the beneficiary.

[40] In Potgieter v Potgieter NO 2012 (1) SA 637 (SCA) the orders granted by the High Court were set aside on appeal by the SCA. The central issue on appeal was whether the purported variation of a trust deed pursuant to an agreement between the founder and trustees, which excluded the beneficiaries, was legally binding. Bertelsmann J found as such, but then varied the provisions of the trust deed. The learned judge believed that he was entitled to act accordingly in order to give effect to what he believed to be the real intent of the deceased. Reliance was placed on s 13 of the Trust Act granting powers to the court to vary trust provisions and the values of the Constitution as applied to law of contract. He relied on *Barkhuizen v Napier* 2007 (5) SA 323 (CC) as the second basis for his authority. The facts in Potgieter are distinguishable from the matter i*n casu*. There, the High

Court, after finding that the agreement between the founder and trustees was invalid, proceeded to award two fifths of the trust property to the two appellants, whilst the other potential beneficiaries of the discretionary trust retained their rights in terms of an amended trust deed. Here, the power of the majority of trustees to act in a manner that may be in direct conflict with the common law or s 20 of the Trust Act as well as constitutional values (if the relevant clause is to be interpreted as submitted by Mr Zietsman) is the focal point.

[41] I accept that the court cannot make a contract for the parties. However, it is deemed necessary to consider *ubuntu.* In *Everfresh Market Virginia v Shoprite Checkers* 2012 (1) SA 256 (CC) at paras [70] and [71] Moseneke DCJ, writing for the majority, said the following about the duty to negotiate in good faith, which I accept is not directly applicable *in casu*:

> "[70] If that were so, then the parties' bargain was that they would try to agree, and the age-old contractual doctrine that agreements solemnly made should be honoured and enforced (*pacta sunt servanda)* would bolster Everfresh's case that the law should be developed to make an agreement of this kind enforceable.
>
> [71] Had the case been properly pleaded, a number of interlinking constitutional values would inform a development of the common law. Indeed, it is highly desirable and in fact necessary to infuse the law of contract with constitutional values, including values of ubuntu, which inspire much of our constitutional compact. On a number of occasions in the past this court has had regard to the meaning and content of the

> concept of ubuntu. It emphasises the communal nature of society and 'carries in it the ideas of humaneness, social justice and fairness' and envelopes 'the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collectives unity.'
>
> [72] Were a court to entertain Everfresh's argument, the underlying notion of good faith in contract law, the maxim of contractual doctrine that agreements seriously entered into should be enforced, and the value of ubuntu, which inspires much of our constitutional compact, may tilt the argument in its favour. Contracting parties certainly need to relate to each other in good faith. Where there is a contractual obligation to negotiate, it would be hardly imaginable that our constitutional values would not require that the negotiation must be done reasonably, with a view to reaching an agreement and in good faith."

[42] Section 39(2) of the Constitution stipulates that when developing the common law every court shall promote the spirit, purport and objects of the Bill of Rights. In terms of s 10 of the Constitution everyone, including a trustee such as first respondent, has the right to have their dignity respected and protected. In my view this means that she cannot merely be "dumped" as trustee by "outsiders" where it is her clear intention and purpose to take care of the interests of her daughter, the sole trust beneficiary. On the view taken by applicants they are above the law in that their resolution to remove first respondent as trustee (which was later changed to a request to vacate office) is not subject to any challenge by anyone: not the Master and not the court and no reasons have to be advanced for their unilateral decision. This is contrary to s 34 of the Constitution which provides everyone

the right to have any dispute that can be resolved by the application of the law to be decided in a fair public hearing before a court.

[43] Even if it accepted that the majority of trustees has the right to request a trustee to vacate his/her office (in the peremptory sense as understood by applicants), their discretion to make such a request must be based on reasonableness. In *NBS Boland Bank Ltd v One Berg River Drive CC and others* 1999 (4) SA 928 (SCA) at paras [25] – [28] the SCA dealt with the old Roman adage that a discretion, unless unfettered, must be exercised *arbitrio bono viri.* Van Heerden DCJ, writing for the full bench, stated the following at para [25]:

"It is, I think, a rule of our common law that unless a contractual discretionary power was clearly intended to be completely unfettered, an exercise of such a discretion must be made *arbitrio bono viri*." This entails that the decision of a good man is required; put differently, the majority is "obliged to act reasonably and to exercise reasonable judgment (*arbitrio bono viri*)." See: *Juglal NO Shoprite Checkers t/a OK Franchise Division* 2004 (5) SA 248 (SCA) at 261D. Mr Zietsman's submission effectively boils down to a conclusion that the majority has an unfettered discretion to do as they wish as if the interests of trust beneficiaries are irrelevant. I do not agree for the reasons stated in this judgment.

[44] In *ex parte Minister of justice: in re Nedbank Ltd v Abstein Distributors (Pty) Ltd and others and Donelly v Barclays Bank Ltd 1995(3) SA 1 (A) at 21D -22D so-called* "conclusive proof"

clauses in deeds of suretyship were found to be against public policy and void in that parties to such contracts did not have the right to challenge the correctness of certificates of indebtedness relied upon by creditors.

[45] It has been repeatedly stated by the SCA that "although abstract values such as good faith, reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that courts can employ to intervene in contractual relationships." See: *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) at para [27] with reference to *Brisley v Drotsky* and *Afrox Healthcare Bpk v Strydom. See also: Bredenkamp v Standard Bank* 2010 (4) SA 468 (SCA) para [53]. Cognisance should be taken of Brand JA's statement in the same paragraph of *Forestry*:

> "Acceptance of the notion that judges can refuse to enforce a contractual provision merely because it offends their personal sense of fairness and equity will give rise to legal and commercial uncertainty……. – constitutional values such as dignity, equality and freedom require that courts approach their task of striking down or declining to enforce contracts that parties have freely concluded, with perceptive restraint." The learned judge of appeal repeated his words of caution in *Potgieter supra* at paras [31] to [37] and [34] in particular where he said:
>
> "Reasonable people, including judges, may often differ on what is equitable and fair. The outcome in any particular case will thus depend on the personal idiosyncrasies of the individual judge. Or, as Van den Heever JA put it in *Preller and others v Jordaan* 1956 (1) SA 483 (A) at 500, if judges are allowed to decide cases on the

> basis of what they regard as reasonable and fair, the criterion will no longer be the law but the judge."

[46] Mr Van Rhyn submitted that an implied qualification of "good cause" should be imported into clause 5.7.4 and that this should be "considered to be good law in general", thereby borrowing from Brand JA in *Forestry supra* at 339J. It has been widely recognised that implied terms may be imported into contracts by law. In doing so, the courts have considered requirements such as justice, reasonableness, fairness and good faith. I refer to the judgments mentioned by Brand JA in *Forestry supra* at para [28]. The learned judge of appeal emphasised later in the same paragraph that it should be kept in mind that once an implied has been recognised, it is incorporated into all contracts if it is of general application, and if not, then into contracts of a specific class. Mr Zietsman cautioned me not to introduce an implied term as suggested by Mr Van Rhyn because the effect would be that it will apply to all deeds of trust with a similar wording as *in casu.*

[47] I have seriously considered the *Forestry* judgment and the *dicta* of Brand JA in paragraphs [26] and further. In my view the matter is clearly distinguishable. *In casu* we are confronted with a totally different issue, *i.e.* the interests of beneficiaries and the constitutional rights of first respondent and in particular her right to access to a court and a fair hearing in terms of s 34 of the Constitution. I repeat: if applicants are entitled to unilaterally cause first respondent's vacation from the office of trustee in circumstances where they do not have to produce reasons, or even for *mala fide* reasons, it would be against

public policy and the principles of *ubuntu*, reasonableness and fairness. I am of the view that the introduction of an implied term as suggested and amplified by me *infra* is good law in general for the reasons advanced earlier herein. There is no valid reason why it should not be applicable to all deeds of trust similarly worded.

VIII CONCLUSION

[48] The accepted facts favour first respondent's version. I do not intend to mention these in the light of applicants' approach to the litigation. Suffice to say that first respondent's version must be accepted insofar as final relief is sought in opposed motion procedure. See: *Plascon-Evans Paints.* The overwhelming conclusion to be reached from a reading of the papers, and the undisputed facts in particular, is that first respondent has the interests of her daughter, the sole beneficiary of the trust, at heart as is expected of trustees, whilst the applicants are apparently more interested to get into the boxing ring and fight the trust creditor's fight for him.

[49] I am satisfied that my conclusions and eventual orders can be justified on four bases. The first basis is the interpretation of the trust deed. Clause 5.7 is ambiguous as mentioned *supra*. The context and all relevant circumstances must be considered together with the language used to interpret the clause. In my view the parties to the trust deed, that is the founder, Mr Bam, and the two original trustees, Mr Krohn and first respondent, could never have intended that either one of

the trustees, and the mother of the only beneficiary especially, could one day be requested to resign and vacate office without any good reason. The effect of such "request", (whether for good reason or not) as applicants want me to accept, is nothing but a unilateral removal from office as first respondent had apparently no option than to resign and vacate her office. This is a *contradictio in terminis*. In order to give practical, sensible and businesslike meaning to the words used, the clause must be interpreted to read that there must be good cause for such a request and that the trustee shall vacate his/her office only in the event of an acceptance of the request.

[50] Secondly and even if I am wrong about my interpretation, I am satisfied that, notwithstanding the firm *dicta* expressed by learned judges of appeal alluded to, I find that an implied term should be read into clause 5.7.4 to the effect that good cause must be present for a resolution to be taken by the majority of trustees to get rid of a trustee on the basis that he/she be "requested" to resign and that he/she shall only vacate office once the request is accepted. The Master cannot be directed to issue amended letters of authority in a case as *in casu* as if he has no option at all to consider why the trustee should vacate his/her office.

[51] The third ground is the following. The reasons initially advanced by applicants do not justify first respondent's removal as trustee, but these reasons are clearly disputed. In any event applicants have abandoned their right to rely on

these reasons. Applicants have not proven that their action is justified. They cannot be heard to say that they did not have to give reasons, or much worse, that they could take a decision without any reason or even for a *mala fide* reason. In my view the applicants could only rely on clause 5.7.4 on the basis of a discretion exercised *arbitrio bono viri, i.e.* based on the discretion of a good person acting reasonably. This they failed to do.

[52] There is a fourth ground on which the dispute may be adjudicated against applicants. Even if it could be found that I am wrong (1) in my interpretation of clause 5.7, (2) in the second finding that an implied term should be read into the clause and (3) in finding that the majority has to act *arbitrio bono viri*, there is another obstacle in applicants' path which, in my opinion, they can never surpass based on the facts presented to me. Applicants' resolution should have been taken on a properly constituted trustees' meeting and upon proper notice of their intention. They failed to act accordingly, but elected to take a decision behind first respondent's back. When the Master pointed out their mistake, they took another decision, again secretly and without notifying first respondent in advance, in the hope of rectifying their mistake. They failed to give proper notice in compliance with the provisions of the Trust Act.

[53] Finally, there is no question of a deadlock between the trustees for which eventuality clause 6.1 of the trust deed sufficiently caters. Decisions in the interests of the trust and trust

beneficiary can be taken by the majority of trustees during a properly convened meeting on condition that sufficient notice of all matters to be considered is given. It is not necessary to remove the first respondent in order to conduct the business of the trust in a lawful manner. Applicants' criticism of first respondent's obstinate attitude and the allegation that she accused them of discrimination has not been proven. She raised valid concerns in the interests of the trust and trust beneficiary. Animosity and difference of opinion are not sufficient to have a trustee removed from office and/or for the majority of trustees to unilaterally force another to vacate his/her office through a so-called request to resign, which as I have indicated is a *contradictio in terminis*. See also: *Gowar supra.*

IX <u>COSTS</u>

[54] If a normal costs order is made against the applicants as trustees in their capacities as such, the costs will have to be paid from the trust estate. Therefore, I seriously considered granting a costs order against them *de bonis propriis* in order to avoid prejudice to the sole trust beneficiary. This is what the respondents seek in the answering affidavit and what Mr Van Rhyn submitted in his argument. Mr Zietsman argued that in the event of the applicant being unsuccessful, the parties should be ordered to pay their own costs. This will be unfair as first and second respondents will have to pay their own costs, whilst applicants, acting in their official capacities

as trustees, will be entitled to claim from the trust funds. Eventually I decided not to make a punitive costs order, bearing in mind the novelty of the dispute and the applicants' reliance on advice from senior counsel. I am also not amenable to make an order suggested by Mr Zietsman. The costs should be borne by the trust estate.

X ORDERS

[55] The following orders are issued:

1) The application is dismissed.

2) The costs of the parties, taxed on a party and party scale, shall be paid out of the estate of the Ritom Trust, IT 1138/99.

J. P. DAFFUE, J

On behalf of applicant: Adv P J J Zietsman
Instructed by:
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On behalf of the 1st & 2nd respondents: Adv G P Van Rhyn
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