HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED. Yes

10/4/18 .....
DATE

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SIGNATURE

10/4/18

CASE NO: 38168/2016

In the matter between:

M.L. RAATH KLAGSBRUN	**First Applicant**
M.L. RAATH KLAGSBRUN NO	**Second Applicant**

and

M.J. RAATH	**First Respondent**
M.J. RAATH	**Second Respondent**
B. RAATH	**Third Respondent**
B. RAATH NO	**Fourth Respondent**
G.J. SWART	**Fifth Respondent**
G.J. SWART NO	**Sixth Respondent**

M.L. RAATH BOSHOFF	**Seventh Respondent**
M.L. RAATH BOSHOFF NO	**Eighth Respondent**
THE MASTER OF THE HIGH COURT	**Ninth Respondent**

JUDGMENT

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1. This application concerns the control over a family trust, the M.J. Raath Family Trust ("the trust"), established during 1996 by the late Mr M.J. Raath for the benefit of his children, being the first applicant and the first, third, and seventh respondents. The first applicant ("the applicant"), her mother, three siblings and a certain Mr G.J. Swart, an Auditor, were the trustees appointed by the late Mr Raath. The applicant's mother subsequently resigned as a trustee.

2. During a meeting of the trustees on 4 February 2016, the trustees, except for the applicant, decided that the applicant's position as trustee was terminated with immediate effect as envisaged in clause 4.7.5 of the Trust Deed. This resulted in the applicant, during May 2016, launching the present application claiming the following relief. Firstly, that the applicant is, and remains, a trustee of the trust and that the purported invocation by the 1st to the 6th respondents of clause 4.7.5 of the Trust Deed as a basis for the termination of the applicant's office as a trustee of the trust, is invalid and that the court should declare her to be a trustee. Secondly, that the 1st to 6th respondents be ordered to provide the applicant with the information more fully set out in an

annexure to the founding affidavit. Thirdly, that the 1st, 3rd and 5th respondents be removed from their office as trustees of the trust, alternatively, that they be suspended from the office as trustees for a period of six months from the date of this court's order. Fourthly, that an independent trustee be nominated by the chairperson for the time being of the South African Institute of Chartered Accountants be appointed as trustee of the trust. Fifthly, that the applicant may approach the court on the same papers, duly supplemented, to have the 1st to the 6th respondents committed for contempt of court should they fail to comply with the order in the second paragraph to provide her with information. Sixthly, that it be declared that the beneficiaries of the trust and their immediate families (including spouses and children) are permitted access to the farm Rooiberg Wildboerdery. Seventhly, that the 1st, 3rd and 5th respondents in their personal capacities be ordered to pay the costs of this application jointly and severally on the scale as between attorney and client.

3. At the hearing of this application the court was informed that the applicant had been supplied with the documentation referred to in paragraph 2 of the Notice of Motion and that she would consequently not seek the relief claimed in paragraph 2 and 5 of the Notice of Motion.

4. As mentioned above, the respondents, excluding the 9th respondent being the Master of this Court, are the two brothers of the applicant, Martin Raath and Beaufort Raath, her sister, Mercia Raath Boshoff, and Mr Gerhard Swart. For ease of reference I shall also refer to the two brothers and the sister by their

first names or with Mr Swart collectively as "the respondents". Martin, Beaufort, Mercia and Mr Swart were cited both in the personal capacities and their capacities as trustees of the trust.

5. In the voluminous papers constituting the application the parties in detail sketched the background relating to the commercial empire built up by their late father, the management thereof over the years and the activities and management of the remaining companies and enterprises falling under the trust since his death. It is not necessary to refer in this judgement to the detail of the aforesaid and I shall only refer thereto when necessary.

6. Firstly, it is necessary to refer to paragraph 4.7 of the Trust Deed. This paragraph deals with the instances when the office of trustee would be *ipso facto* terminated and become vacant. One such instance is, according to paragraph 4.7.5, when the trustee acts inconsistent with the provisions of the Deed of Trust and not in the interest of the trust. The Afrikaans wording of the trust is "indien hy teenstrydig met die bepalings van hierdie trustakte nie in belang van die Trust optree nie." The essence of the applicant's case is that she did not act contrary to the provisions of the Trust Deed and did not act contrary to the interests of the trust and that, consequently, the termination of her office as a trustee of the trust for such reasons, was invalid

7. Regarding the history, the following may be said in summary. The founder of the trust, Mr Raath, who passed away on 4 December 2007, was a successful businessman and had amassed considerable wealth. Prior to his death, the

first trustees of the trust, being Mr Raath himself, his wife, and Mr Swart, adopted a resolution providing for the appointment of the four children as additional trustees.

8. It seems that an uncomfortable atmosphere arose between the applicant and her two brothers, Martin and Beaufort, during the first half of 2008. The exact reasons for this unfortunate state of affairs are in dispute but it seems to be clear that one of the main reasons resulted from the applicant's persistent requests for information regarding the affairs of the trust and some of the companies of which the trust was a shareholder, as well as Martin's and Beaufort's negative attitude in that regard and sometimes their downright refusal to respond to her requests.

9. Some of the family businesses were the Stone Aggegate Mine, a road surfacing and civil engineering business, the Marlin Lodge, which was a holiday resort, the Meletse Golf Estate and Game Reserve, a house in Keurboomstand, a family beach house in Vilankulos in Mozambique, a holiday lodge on the Benguerra Island off the coast of Mozambique, and a game farm in the Rooiberg area. The siblings contributed at various levels in the running of these enterprises although there is quite a dispute regarding the nature and extent thereof.

10. Every now and then disputes arose between the applicant and her brothers with Mr Swart siding with the brothers. Mercia, who resided in New Zealand, was not much involved. According to the applicant difficulties arose during

2007 when she asked for a list of the companies and their financial statements to enable her to get some background on the complicated structure of inter-company loans and structures both in respect of the South African and Mozambican companies. She was provided some information by Martin but he was reluctant to give her additional and more detailed information and also refused to explain certain issues to her. According to the applicant she was prevented by this negative attitude to act as a trustee and to meaningfully contribute and participate in the administration of the trust's affairs and to make decisions regarding the trust and the various related companies.

11. One of the disputes which arose related to the signing of a deed of suretyship which required the signature of the trustees. The applicant wanted information to understand what was required but Martin and Beaufort regarded her requests as being obstructive. Another dispute related to the request that the trustees appoint Martin with the authority to sign on behalf of the trust and to deal with matters of the trust and the companies in which the trust was a shareholder in his own discretion.

12. By excluding her from information which she regarded as vital, and by, according to the applicant, considering himself as exclusive caretaker and controller of the trust, the applicant formed the view that Martin wanted to avoid sharing information at all costs regarding the affairs of the trust and was also not prepared to disclose any information relating to the companies in which the trust had an interest. During 2008 and 2009 the applicant appointed

attorneys to represent her. Some of the tension was diffused but during the end of 2010 emotions again flared up regarding the business of the Marlin holiday lodge. This resulted in the applicant and Mercia resigning their positions in Marlin. According to the applicant Martin became officially in control of all the businesses, the bank accounts, cash flows and various assets from April 2011 onwards and she was still unable to obtain detailed financial information of the trust and the various underlying businesses.

13. At the end of 2013 a division of many of the assets of the trust was made between the trustees and shares in a number of operational companies were transferred to Martin and Beaufort. The shares which remained vested in the trust related to Rooiberg Wildboerdery Pty Ltd ("Rooiberg"), Keurbou Investments Pty Ltd ("Keurbou") and Marlin Lodge Holidays Pty Ltd ("Marlin Lodge").

14. Rooiberg was the family farm where the late Mr Raath was also buried. The exotic game breeding business and other farm interests of Rooiberg were managed by Martin and Beaufort to the advantage of the beneficiaries of the trust. The other trustees and their families had unrestricted use of the farm and its facilities.

15. Keurbou owned a holiday property at Keurboom Strand in the Eastern Cape. The applicant's mother controlled and managed this property. All the children and their families had unrestricted access to this property. Marlin Lodge was put up to be sold.

16. After a period of relative peace between the siblings, disputes flared up again during 2015. The main dispute related to the family game farm Rooiberg. Martin and Beaufort are the only two directors of Rooiberg and the trust is the shareholder thereof. Rooiberg, which comprises approximately 2,000 hectares, forms part of the Elandsberg Nature Reserve ("ENR") comprising of different farms over an area of approximately 12,000 hectares. The members of the ENR have traversing rights for game viewing purposes over the whole of the area of the ENR. Each member of the ENR owns A-class shares in accordance with the size of his or her farm and also owns B-class shares which are associated with the game on the farm and are valuable tradable assets between the members of the ENR. Each landowner in the ENR can appoint one director to the board of the ENR. Martin is Rooiberg's appointed director on the ENR board.

17. According to the applicant it is impossible for her to assess the potential of their breeding stock which also comprises exotic game, for the reason that Martin and Beaufort refused to furnish her with information regarding the game breeding operation, breeding stock details, strategies or a business plan and anything regarding their interests in the ENR which also owns a substantial variety of game. Many disputes relating to these issues arose between the applicant and her brothers with them taking the view that Rooiberg is a company of which they are the directors and that the applicant has no more rights to information than an ordinary shareholders in a company would have

in terms of the provisions of the Companies Act. As a result of this state of affairs a measure of distrust developed on the part of the applicant towards Martin and Beaufort in their handling of Rooiberg, which she regards as essentially an asset of the trust.

18. During the end of 2015 Martin and Beaufort wanted to dissolve the trust. The applicant and Mercia were against this notion. This led to acrimonious exchanges between the siblings which it is not necessary to traverse in this judgement.

19. Of more importance is that at this time a more ominous dispute was on the rise which related to the applicant's husband later on obtaining an interest in one of the farms which was part of the ENR. The applicant's husband, Chris, was not well liked by Martin and Beaufort. In fact, their animosity towards him eventually ran so high that they wanted nothing to do with him whatsoever and refused to be in his presence. This caused a tremendous amount of strain to be added to the already flailing relationship between the applicant and Martin and Beaufort.

20. It seems that Martin's and Beaufort's negative feelings towards Chris grew when they established that he would have an interest in a farm in the ENR. The parties don't exactly agree on the facts relating to this issue but it seems that one of the owners of the farm in the ENR, Mrs Kok, had for quite some time expressed her wish to sell her farm. She made this known to Chris who at some point informed his friend, Mr Nagle, which had shown a prior interest in

such a property, of the opportunity. Eventually Mrs Kok negotiated with Mr Nagle and concluded a sale agreement with him or a company to be formed by him, in respect of her farm. The applicant had no part in the affairs and businesses of her husband nor of Mr Nagle.

21. On 24 September 2015 the applicant informed Beaufort during a telephone conversation that Mr Nagle, who was a friend of her husband, was talking to Mrs Kok with a view to purchasing her farm which was in the ENR. Beaufort's response was that he was under the impression that the farm had already been sold to a veterinary surgeon, Dr McKernan. He added that he did not regard it as a good investment. The applicant also informed Beaufort that her husband was considering participating in the transaction with Mr Nagle if it hadn't been sold yet.

22. On 15 October 2015, during a telephone conversation with Martin, the applicant informed him that since her telephone conversation with Beaufort, Chris and Mr Nagle had established that Dr McKernan had not purchased the farm and that Chris would be joining Mr Nagle in the purchase transaction. According to her Martin did not raise any objection and only made a sarcastic remark aimed at Chris.

23. A few days after these events, on 22 October 2015, and according to the family custom, the applicant sent a telephone message to the family group, which included her brothers, indicating that she and her family wanted to visit the farm as they have been doing each festive season since their father passed

away. A few days later, on 29 October 2015, Martin responded by cell phone message saying that the applicant and her children were allowed to visit the farm but that Chris was no longer welcome there. On the same day the applicant received a letter on the letterhead of Rooiberg signed by both Martin and Beaufort with the heading "Board Decision: Access to Property". This letter informed the addressees that the Board had decided that until further notice Chris would not be permitted on the farm.

24. On the next day the applicant also received a letter on the letterhead of Keurbou, signed by Martin, in which it was announced that in future anyone who use the house would have to pay R 7000,00 per night if this occurred while their mother was not in residence. According to the applicant this was aimed at preventing her from visiting the beach house during the December holidays.

25. These letters got Mercia to respond. Her view was that it was not proper to prevent Chris from visiting the farm and asked the reasons for the decision. She remarked that the farm was, after all, for the use by the trustees and their families and that to exclude a spouse would cause unnecessary conflict.

26. On 11 November 2015 Martin addressed a letter to Chris and Mr Nagle, *inter alia*, requesting particulars of the proposed purchase agreement and contending that the board of the ENR had the right of pre-emption in respect of the property in question. Both Mr Nagle and Chris responded to this letter. In his letter Chris, *inter alia*, confirmed that he and Mr Nagle had purchased the

farm and that the transaction had been concluded in early October 2015. He stated that rumours that they wished to fence out the farm from the ENR were untrue and that to join the ENR was in fact one of the main motivating reasons for purchasing the farm. He added that Mr Nagle and his family have regularly visited the ENR for over 10 years as a guest of the late Mr Raath and have spent many hours traversing the reserve and enjoying the natural surrounds. Chris also detailed his interest which went back almost 15 years and the fact that he had worked closely with the late Mr Raath and others in helping to draft the original Reserve Constitution and ultimately sharing in the joy of seeing the fences being removed after the signing ceremony a few years earlier. He also expressed the intention to plough back into the area and to do upgrades on the farm. He also expressed their willingness to serve on the Board of the ENR and stated that they would have a farm of no less than 500 hectares. He also expressed their intention to buy all of the seller's B shares. He indicated their willingness to share the appropriate information which may reasonably be required by the ENR to give effect to them joining up.

27. In this letter, which appears to have been addressed to other members of the ENR as well, Chris wrote to the following paragraph near the end of the letter:

"As a side, and to the extent that it has been the cause for any negativity towards myself (and possibly Mark, which I doubt?), I'd like to acknowledge that the relationship between myself (and my wife) and the two Raath sons is not very good and besides there being other internal family pressures which they are facing, I do not believe that these personal issues should interfere in this transaction. I would

therefore urge anybody who wishes to clear up any misconceptions about our intention for the Reserve, that they please contact me directly."

28. Also important is the following paragraphs where Chris stated as follows:

"Lastly, with regard to the recent letter suggesting that the Reserve has a first option to buy Magdaleens farm, the information we have is that it does not apply to our transaction and it will only have real legal effect once the exact wording of the first right is finalised with the Attorneys and the final version voted in and unanimously approved by all the owners at a duly constituted meeting.

We will accordingly appreciate to receive a draft version of the changes for us to also review and understand its impact and limitations for future transferability of the farm, before we sign off on any documents from our side."

29. The aforesaid two paragraphs were written because, as stated therein, there was no right of pre-emption in favour of the ENR or any member thereof and in respect of the possible intention to introduce a right of pre-emption, such would only be valid once a change in the relevant documents of the ENR had been validly brought about. This response followed on an earlier letter by Martin to Mr Nagle and Chris dated 11 November 2015 in which he requested certain information and then had added at the end of his letter the following:

"Upon receipt of the requested information the board will have 30 (thirty) days in which to consider same.

Please note that the board can within the above thirty days effect certain rights of pre-emption."

30. On 19 November 2015 Beaufort responded to the aforesaid letter of Chris in a very aggressive and belligerent manner.

31. The applicant requested the trustees to reconsider the banning of her husband from the farm and proposed that the trustees convene a meeting in February 2016 at which the matter could be further discussed. She found it inconceivable that their physical use of the farm which had been undisturbed for more than eight years, could suddenly be a risk to the farm or the trust. Mercia also indicated she had no difficulty if the applicant and her family, including her husband, used the farm.

32. The applicant also indicated that she intended to focus on her responsibilities as a trustee and for that reason requested detailed information regarding the activities on the Rooiberg farm, matters relating to the ENR, and detailed information relating to the game breeding activities and also a copy of the minute book in which decisions of the trustees had been minuted.

33. On 27 November 2015, Beaufort responded in an email stating that as a director of Rooiberg, his decision to ban Chris from the farm would stand until the trust gave contrary instructions. He also stated that the applicant had disseminated information and had taken steps which had a detrimental effect on the assets of the trust and that she was only acting in her own interests and did not hesitate to prejudice the farming operation.

34. On the same day Beaufort sent a further email to the trustees stating that the applicant's support for her husband constituted proof that she was acting in conflict with the trust and that she was abusing her position as trustee for her own personal benefit.

35. Also on the same day the applicant received a letter signed by Martin on the Rooiberg letterhead stating, *inter alia*, that he and Beaufort had been appointed as the directors of Rooiberg and that they are of the opinion that Chris was busy in an unacceptable manner with negotiations which would affect the value of the company (Rooiberg) and its assets detrimentally. Also that confidential family matters had been disclosed to members of ENR. He then proposed that the ban on Chris be maintained and furthermore that the applicant's request for information not be granted until she can explain to the trustees what her and her husband's reasons are and what their motivation is for obtaining the information. He then added that the information is in any event contained in the financial statements which the applicant has and can obtain.

36. Apart from her own correspondence the applicant's attorney wrote to Martin and Beaufort on 10 December 2015, *inter alia*, recording that the ban on the applicant's husband to visit the farm, was unjustified and motivated by personal animosity towards him. Furthermore that the information sought earlier had not yet been received and that it was again requested. The independence of Mr Swart as a trustee was also questioned.

37. On 14 January 2015 the respondents' attorney responded in a letter on behalf of the trust, Martin, Beaufort and Mr Swart and also on behalf of Rooiberg. In the letter it was indicated that a decision would be taken at a meeting on 4 February 2016 regarding what information would be made available to the

applicant and also for what purpose. He also stated that most of the information sought had been available at a previous trustees' meeting. This last-mentioned statement was denied by the applicant.

38. After receiving the agenda for the upcoming trustees meeting Beaufort sent an email dated 19 January 2016 requesting that a further point be added to the agenda namely that a resolution be taken that the trusteeship of the applicant should *ipso facto* be terminated in terms of clause 4.7.5 of the Trust Deed. In response the applicant requested a further point on the agenda referring to the removal of Martin and Beaufort as trustees of the trust.

39. On 1 February 2015 the applicant's attorney responded to the respondents' attorney's letter of 14 January 2016 stating, *inter alia*, that the respondents' attorney's instructions that most of the information sought had been available, was wrong and that the applicant had a clear right to the information sought, both in her capacity as trustee and as beneficiary of the trust.

40. And so the scene was set for the trustees' meeting of 4 February 2016 which led to the decision that the applicant was no longer a trustee of the trust and to the rejection of her motion that Martin and Beaufort be removed as trustees.

41. A transcript of the meeting of 4 February 2016 of almost 220 pages was attached to the applicant's founding affidavit. I do not propose to summarise the contents of the meeting and shall merely refer to certain salient features and summarise my impressions of the actions and attitudes of the different

parties. The meeting was attended by the applicant, Martin, Beaufort, Mercia and Mr Swart. The siblings' mother, Mrs Raath, was not present and her resignation was accepted at the commencement of the meeting.

42. The parties discussed the decision to rent out the Keurbooms holiday home. It is not necessary to refer further to this issue. The main issue at the meeting, and the one leading to the termination of the applicant's position as trustee, related to the purchase of the farm of Mrs Kok by Chris and Mr Nagel. Martin and Beaufort were the main spokespersons with Mr Swart fully supporting them. Their version at the meeting was that Dr McKernan, the veterinary surgeon, had purchased Mrs Kok's farm and that Dr McKernan's wife had shown Martin a deed of sale in August 2015. According to him it would have been a great asset to Rooiberg and the ENR in general if Dr McKernan would buy Mrs Kok's farm since he specialised in exotic game and had taken care of the game in the ENR. According to Martin and Beaufort he had plans to establish an animal hospital on the property.

43. Firstly, it is noteworthy that none of the trustees, except Martin and Beaufort, apparently had any specific knowledge regarding Dr McKernan's desire to purchase Mrs Kok's farm. Even Mr Swart appeared to have been unaware thereof.

44. More importantly, however, is the version of Mrs Kok herself as set out in her affidavit which was attached to the papers of the applicant and to which I shall now briefly refer. Mrs Kok was part of the group of founding owners who

created the ENR. She stated that during 2012 she decided to sell her farm and had notified the other ENR owners, including Martin, thereof. Nobody expressed any desire to purchase the farm nor was there any objection to her selling the farm on the open market as she was entitled to do. She received sporadic informal enquiries but no concrete offers. During May 2015 she received an interest from Dr McKernan. Negotiations dragged on for several months but eventually he could not make an acceptable offer. As a last attempt she decided to contact Chris, who was an old friend of hers, to see whether he would be interested to buy the farm. Eventually Chris informed her that a friend of his, Mr Nagel, might be interested and would contact her. Mr Nagel and Mrs Kok eventually met and agreed on the purchase price. She also offered to sell her B shares to him.

45. On 1 October 2015 Mrs Kok sent a draft agreement to Mr Nagel. Mrs Kok enquired from Martin regarding the whereabouts of her A and B share certificates and spoke to him about the farm owners' rights to sell their ENR shares to buyers of their properties. Martin responded in respect of the share certificates and also stated that she could deal with the sale of shares in the ENR, being the B shares, as her attorney may advise her. Mrs Kok informed Mr Nagel of the aforesaid and on 13 October 2015 the sale agreement was signed by Mr Nagel in the name of a company or its nominee. On 14 October 2015 Mrs Kok countersigned the sale agreement. Oceanside Trading 644 Pty Ltd (Oceanside Trading) was later nominated as the nominee.

46. Mrs Kok stated that on 25 October 2015 Chris called her to advise her that Mrs McKernan had contacted Mr Nagel requesting that Mr Nagel and Chris withdraw from the sale as they wanted to buy the farm. Mrs Kok stated that she explained to Chris that her negotiations with Dr McKernan had dragged on for over four months and that the price he eventually offered was too low. She confirmed that no agreement had ever been signed with Dr McKernan nor was there ever any notification given to the ENR that he was purchasing her farm or any of her shares in the ENR, nor was there ever a discussion or approval by the Board of the ENR for Dr McKernan to buy her farm or to become a member of the reserve. She also confirmed that there were no other pending offers received from any of the other owners of the ENR or from anybody else in the open market to buy her farm. The transaction with Oceanside Trading was quick and uncomplicated and she just wanted to move on with her life. Mrs Kok further stated that on 2 November 2015 she received an email from Martin requesting the names and contact numbers of the purchasers and that he also insisted to be given the full details and conditions of the sale. She responded to Martin saying that he should contact Chris and Mr Nagel if he wanted information.

47. Mrs Kok also referred to the email of Martin of 11 November 2015 wherein, according to her, he incorrectly claimed that the reserve had a 30 day first right of refusal to buy her farm and shares in the ENR. She also referred to the email on 18 November 2015 by Chris to the ENR owners confirming the

purchase of her farm and his intention to stay in the reserve. Also that Chris corrected Martin by pointing out that in terms of the Reserve Constitution, the ENR, or Martin, had no right of first refusal to purchase her farm or her shares.

48. Mrs Kok also referred to the fact that on 19 November 2016 one of the original reserve founders congratulated and welcomed Chris and Mr Nagel in buying her farm and expressed his support for them to join the reserve. She attached the relevant letter.

49. Mrs Kok then referred to an email by Martin to her dated 20 November 2015 in which he required her to choose whether she opted for the "old" Constitution or the "new" Constitution of the ENR. Martin added that if she chose the new Constitution then he could assist her to exit from the sale with Chris and Mr Nagel. Martin subsequently called her to discuss the options set out in the email and made it clear to her that his objective was not so much to block the sale of her farm but rather to avoid that it be sold to Chris.

50. According to Mrs Kok she informed Martin that she chose the "old" Constitution to apply to her sale. She saw no reason why all of a sudden new rules had to apply to the transaction with Chris and Mr Nagel and she reiterated to Martin that Chris and Mr Nagel wished to join the ENR. Mrs Kok added that Martin emailed a letter of demand to her indicating that he refused to believe that the purchaser intended to join the reserve. He further demanded that no further negotiations proceed between her and the purchasers and she was given a two day deadline to respond, failing which Martin would approach the court to

stop the sale. Mrs Kok decided to obtain legal advice from attorney Pierre Marais who had been familiar with the Reserve Constitution. On 2 December 2015 attorney Marais addressed a letter to the ENR responding to Martin's letter of demand and setting out the legal position and making it clear that a legal willing seller and willing buyer sale had taken place between Mrs Kok and Oceanside Trading and that the transfer would proceed in due course. He also requested clarity around the amount of shares registered in the name of Mrs Kok so that she could finalise the transaction with Oceanside Trading to join the Reserve. He also demanded that Martin, in his capacity as a director of ENR, furnish certain documents to him failing which Martin would be guilty of certain contraventions of the Companies Act. On 3 December 2015 attorney Marais received a letter from Martin indicating that he would not take further steps under the letter of demand. Martin also avoided any further suggestion that he would interfere with the sale to Oceanside Trading or that the reserve or any other owner had a first right of refusal to purchase her farm or her ENR shares.

51. Mrs Kok further stated that on 14 January 2016 attorney Marais met with, *inter alia*, Martin and the auditor of the ENR during which he obtained clarity and set out the legal position with regard to her shares in the ENR. He undertook to obtain the necessary documents in order for her shares to be transferred to Oceanside Trading. According to her no further objection was raised regarding Oceanside Trading purchasing her farm.

52. According to Mrs Kok the negotiations with Chris and Mr Nagel was neither rushed nor confidential and that everything happened in a streamlined and professional manner. No pressure was put on her, and her own attorney in Klerksdorp drafted the sale agreement.

53. I shall now return to the meeting of trustees on 4 February 2016. The version put forward by Martin and Chris to the other trustees being the applicant, Mercia and Mr Swart, was, however, quite different. They held out that the transaction relating to the purchase of Mrs Kok's farm was irregular in that it could only have occurred with the approval of the Board of the ENR. The applicant tried to tell them that their view was wrong but she was simply talked down by Martin and Beaufort. In fact, she was accused of being conflicted between the interests of her husband and that of the trust. She was told that the members of the ENR, or the ENR itself, had a right of pre-emption in respect of the property as well as the B shares. According to them she had been under an obligation to convince her husband not to proceed with the sale, or not to assist Mr Nagel in the sale. I shall again refer to this aspect below in order to show that no such right of pre-emption existed. The applicant was also accused of not informing the trustees of the intention of Mr Nagel and Chris to purchase the farm. Her attempts to remind them of the fact that she had in fact informed Martin and Beaufort thereof at an early stage, as mentioned above, were simply blown away by Martin and Beaufort and met with further accusations.

54. Martin and Beaufort's conduct towards the applicant during the meeting was intimidating, oppressing and harassing in the extreme. They expressed the facts and especially the legal position according to them as being beyond doubt and on the basis thereof vilified the applicant. They accused her of damaging the name of the trust and even of causing the trust financial harm. She was also accused on leaking internal trust information. Beaufort went so far as to state, on numerous occasions, that he has written proof that the applicant had leaked confidential information of the trust. Despite requests of the applicant during the meeting for him to reveal such information and despite being invited to present such information in the answering affidavit to this application, Beaufort had failed to do so. The applicant was simply talked over when she tried to defend herself.

55. As mentioned, the applicant was openly accused of acting in her own interest, acting in breach of her fiduciary duties and acting against the interest of the trust by defending the sale transaction of Mrs Kok's farm. Beaufort and Martin indicated that they wanted to exercise the right of pre-emption and that they would fight the sale transaction of Mrs Kok's farm. This stance by Martin and Beaufort is quite the opposite from the one which Martin expressed during his dealings with attorney Marais referred to above. Furthermore, the attempts by the applicant to say that the legal position, as expressed by Martin and Beaufort, was not correct according to her knowledge, were met by ridicule and accusations of dishonesty, having a private agenda and acting against the

interests of the trust. This went on and on throughout practically the whole meeting.

56. The fact of the matter is that the applicant was completely correct. Martin and Beaufort had invoked a non-existent right of pre-emption as a pretext for finding that the applicant had acted contrary to her fiduciary duties by not somehow stopping Chris from being involved in the purchase of Mrs Kok's farm. Martin and Beaufort relied on the Memorandum of Incorporation (MOI) of the ENR and the Shareholders Agreement of the ENR in support of their allegation that a right of pre-emption applied to the sale of this property. However, during the meeting Martin and Beaufort did not disclose the full and correct facts to the trustees. Even in the answering affidavit to this application they only annexed certain extracts which may create the impression that the sale of Mrs Kok's property was subject to some right of pre-emption.

57. In the replying affidavit the applicant annexed the whole of the shareholders agreement of the ENR which she obtained from the respondents in terms of Uniform Rule of Court 35 (12). It was submitted that a number of clauses were mischievously not annexed to Martin's affidavit and that if all the relevant clauses are read together, it is clear that no right of pre-emption came into play.

58. Firstly, there existed no right of pre-emption in respect of the farm itself or of the A shares. The shareholders agreement is quite specific in the subparagraphs of paragraph 6.8 that where a shareholder's property exceeds

500 hectares in extent, as was the case in respect of Mrs Kok's farm, the sale of the entire property to a third party, *i.e.*, a person who is not an existing shareholder, shall not require any consent. The only provision is that the relevant transferee would be required to be bound in writing to the provisions of the shareholders agreement.

59. Secondly, there existed no right of pre-emption in respect of B shares if the purchaser purchases the B shares of the seller, as was the case in respect of Mrs Kok's contract. It is only in the case where the acquiring shareholder, or purchaser, does not accept the offer in respect of the B shares, that the other shareholders of the ENR shall be entitled to acquire the disposing shareholder's B shares.

60. In paragraph 6.9 of the shareholders agreement it is repeated that a shareholder shall not be obliged to afford the other shareholders any pre-emptive right with respect to the property which the shareholder intends to dispose of, and the same principle shall apply with regard to the disposal of the whole or any portion of the equity in a property owning entity which is a shareholder. Furthermore it is provided that whilst there is no obligation on any shareholder to afford any other shareholder a pre-emptive right, it is required that the Board be informed in writing promptly after the conclusion of a transaction in order to afford the Board a reasonable opportunity to monitor compliance with the relevant provisions of the shareholders agreement.

61. It cannot be doubted that Oceanside Trading, by means of Mr Nagel, expressed a clear intention to purchase the B shares of Mrs Kok and to remain part of the ENR. That much is clear from the correspondence referred to above. Consequently, neither Rooiberg nor any of the other property owners in the ENR, had any right of pre-emption in respect of this particular farm or the shares relating thereto. It appears that during the trustees' meeting Martin and Beaufort only referred to and relied upon a situation where a shareholder contemplates disposing of his B shares only, which was not the case with Mrs Kok's transaction.

62. It is inexplicable that Martin and Beaufort, who had earlier been informed by, *inter alia,* Chris as well as attorney Marais that no right of pre-emption existed, and despite the wording of the shareholders agreement of the ENR of which they must have had knowledge of, nevertheless persisted during the meeting of 4 February 2016 in attacking the applicant and falsely accusing her of breaching her fiduciary duties to the trust by in some way or another prejudicing Rooiberg's right of pre-emption which they wanted to exercise and in some or other way causing financial harm to the trust. This was in fact the main reason used by them in convincing the other two trustees, Mercia and Mr Swart, to vote with them in expelling the applicant as a trustee in terms of clause 4.7.5 of the Trust Deed.

63. As mentioned before, the applicant was also blamed for causing harm to the good name and reputation of the trust and to cause it financial prejudice. Since

there existed no right of pre-emption, the trust could not suffer financial harm as a result of the sale of Mrs Kok's farm. The sale of her farm did not come about as a result of anything the applicant did or did not do and to blame her for it was simply wrong. Dr McKernan could not meet the required purchase price and that was the reason why he did not purchase the farm. It might have been very convenient for Rooiberg to have a veterinary surgeon close by, but the applicant is hardly to blame for that not happening. In any event, there is no indication, except the say-so of Martin and Beaufort, that any of the other members of the ENR thought any less of them or of the trust as a result of the sale of Mrs Kok's farm. There is similarly not an iota of proof that any financial loss occurred or would have occurred to the trust, and in any event to have blamed the applicant for causing such a perceived loss, was without any foundation. The same can be said in respect of the bald and unsubstantiated accusations that the applicant imparted confidential information to anyone.

64. At one point during the meeting the applicant was blamed that the "process" was not followed and Mr Swart joined by saying to her that she should stop defending it. Martin added that she couldn't defend it. Shortly thereafter Mr Swart asked Martin and Beaufort whether the information which they had put before the meeting had been correct and both responded that it was factually correct. Mr Swart then stated that in that event further proof is not necessary because "al die inligting wat hier gegee is, is betroubaar, want hierdie is betroubare manne. Trustees wat ten bate van die trust optree wat gesê het die

inligting wat vir ons gegee is, is waar, juis en korrek. En op grond daarvan sê ek amen daarvoor dat dit reg is. Ons kan 'n besluit neem om te kan sê ons gee die mandaat, sorteer hierdie gemors uit." Unfortunately, for the reasons already mentioned, this reliance was totally misplaced. Mr Swart failed, as the independent trustee he was supposed to be, to verify the facts and the true state of affairs before deciding such important matters as the existence of a right of pre-emption and the expulsion of one of the trustees. He should also have realised that Mercia, who lives in New Zealand and would have found it difficult to establish the true facts and the correct provisions of the shareholders agreement and the contents of the correspondence, and that she would have relied heavily on him as an independent person.

65. A further aspect for which Martin and Beaufort blamed the applicant was their statement that the ENR had to be informed in writing of the proposed sale agreement with Mrs Kok. I have already referred to the fact that the applicant had in fact informed both Martin and Beaufort of the proposed interest of Mr Nagel. But furthermore, as mentioned above, the shareholders agreement of the ENR only requires that the Board of the ENR be informed in writing after the conclusion of a transaction. They thus, again, misrepresented the true position to the applicant and Mercia and Mr Swart regarding this aspect and relentlessly attacked the applicant and wrongly accused her of serving her own interests instead of that of the trust.

66. The applicant was also blamed for her numerous requests for information. As mentioned above, this court was informed that the information requested by the applicant in this application had been afforded to her and that the relief claimed in the Notice of Motion was not persisted with. It would thus seem that in the end the information requested by the applicant had been given to her. However, it is equally clear that both Martin and Beaufort were irritated by the applicant's requests for information, not realising that as a trustee, she requires relevant information in order to comply with her duties as trustee. This court was not called upon to decide whether the requests of the applicant for information were valid request but what is clear from a reading of the transcript of the meeting of 4 February 2016, is that every effort was made by Martin and Beaufort to frustrate her efforts to obtain information. During the meeting Beaufort went so far as to inform her that she was entitled to the information but that it couldn't be given to her because she had a conflict of interest. This view of Beaufort, which was obviously shared by Martin as well, was clearly wrong and devoid of any substance. The applicant did not have a conflict of interest and she did not in any way breach her duty as trustee or act in any way contrary to the interests of the trust. Martin and Beaufort, clearly through their overbearing manner, unfortunately succeeded in convincing Mercia and Mr Swart that the applicant's efforts, which appear to have been legitimate, were further proof of why she should be expelled as a trustee. Furthermore, Martin's attempt to show that the applicant had in fact been in possession of

information which she had requested, was not borne out by the correspondence by his attorney.

67. In summary, it is clear that none of the reasons put forward by Martin and Beaufort for invoking clause 4.7.5 of the Trust Deed had any merit whatsoever. Clause 4.7.5 of the Trust Deed provides for termination *ipso facto* if a trustee acts contrary to the provisions of the Trust Deed and not in the interest of the trust. The question whether the facts which trigger an *ipso facto* termination are present, must be determined objectively and the subjective views of the individual trustees in this regard are irrelevant. Having regard to my findings above it is clear that the decision by the trustees to invoke this clause was unjustified and invalid and has to be set aside.

68. I now turn to the application by the applicant that Martin, Beaufort and Mr Swart be removed from their office as trustees of the trust, alternatively, that they be suspended from such office for a period of six months.

69. In support of this relief the applicant relied on the fact that these trustees rode roughshod over her rights by, *inter alia*, misconstruing the concept of fiduciary duties, by invoking a non-existent right of pre-emption as a pretext for finding that the applicant had acted contrary to her fiduciary duties, by forcing the applicant to absent herself from the meeting in circumstances where she was entitled to be present, by falsely and without justification accusing her of causing harm to the trust, and by refusing, for a considerable period of time, to provide her with information to which she was entitled. More specifically as far

as Mr Swart is concerned, that he failed to remain independent, that he uncritically supported the allegations put forward by Martin and Beaufort and that he failed to verify the correct facts before siding with Martin and Beaufort to expel her as a trustee.

70. I was referred by counsel to authorities relating to the removal from office of trustees. It is clear that the court has an inherent power to remove a trustee from office at common law. This power also derives from section 20(1) of the Trust Property Control Act, Act 57 of 1988 ("the Act"). This section provides as follows:

"20. Removal of trustee -

(1) A trustee may, on the application of the Master or any person having an interest in the trust property, at any time be removed from his office by the court if the court is satisfied that such removal will be in the interests of the trust and its beneficiaries."

71. In Gowar v Gowar 2016 (5) SA 25 (SCA) at page 232 paragraph [28] the court supported the assertion of Honore's South African Law of Trusts (Cameron, De Waal, Wunch, Solomon & Khan, 5 ed (2002)) on p 223 that the general principle which has crystallised over time in the court's exercise of its common law jurisdiction, and which is now echoed in the aforesaid section 20 (1) of the Act, "is that a trustee will be removed from office when continuance in office will prevent the trust being properly administered or will be detrimental to the welfare of the beneficiaries."

72. In Gowar (supra), in paragraph [30] to [32], the court expressed itself as follows:

[30] "For present purposes, two principles must be emphasised. First, the power of the court to remove a trustee must be exercised with circumspection. Second, neither mala fides nor even misconduct is required for the removal of a trustee. As to the former, Murray J explained this in Volkwyn NO v Clarke and Damant 1946 WLD 456 as follows (at 464):

'(I)t is a matter not only of delicacy (as expressed in Letterstedt's case [Letterstedt v Broers (1884) 9 AC 371 (PC) at 387]) but of seriousness to interfere with the management of the estate of a deceased person by removing from the control thereof persons who, in reliance upon their ability and character, the deceased has deliberately selected to carry out his wishes. Even if the ... administrator has acted incorrectly in his duties, and has not observed the strict requirements of the law, something more is required before his removal is warranted. Both the statute and the case cited indicated that the sufficiency of the cause for removal is to be tested by a consideration of the interests of the estate...'

[31] As to the latter, Murray J said the following at 471:

'It is of course true that proof of dishonesty or *mala fides* is not essential for a case for the removal of executors or administrators...'

The learner judge continued (act 474):

'(T)he essential test is whether that disharmony as it exists imperils the trust estate or its proper administration...'

Thus, the overriding question is always whether or not the conduct of the trustee imperils the trust property or its proper administration. Consequently, mere friction or enmity between the trustee and beneficiaries will not in itself be adequate reason for the removal of the trustee from office. (See also in this regard Tijmstra NO v Blunt-MacKenzie NO and Others 2002 (1) SA 459 (T) at 473E-G.) Nor, in my view, would

mere conflict amongst trustees themselves be a sufficient reason for the removal of a trustee at the suit of another.

[32] Moreover, it must be emphasised that whilst a trustee is in law required to act with care and diligence, the decisive consideration is the welfare of the beneficiaries and the proper administration of the trust and the trust property. And, sight must not be lost of the crucial fact that the court may order the removal of a trustee only if such removal will, as required by section 20 (1) of the Act, be '*in the interests of the trust and its beneficiaries*'."

73. There is certainly great friction and enmity between the applicant, on the one hand, and Martin and Beaufort, on the other hand. There may be many reasons for this state of affairs. There is a distinct impression that Martin and Beaufort were over estimating their own role or their own importance and regarded themselves as being in a superior position viz-a-viz the other trustees, as far as the trust is concerned. They are undoubtedly playing a major role in the management of Rooiberg and there is nothing in the papers before this court to suggest that they are not doing a good job in managing and maintaining this company as a valuable asset. The same goes for the other assets of which the trust is a share holder.

74. This does not mean, however, that they cannot be removed as trustees of the trust, but the link between the trust and the entities in which it holds shares, is a factor to consider, at least for the present, in deciding whether retaining Martin and Beaufort as trustees would or would not be detrimental to the welfare of the beneficiaries. In my view their intimate knowledge of the affairs of these assets, and the manner in which they have managed these assets,

would allow this court to be that more judicious in deciding whether to remove them as trustees.

75. There are other considerations as well. The trustees, barring Mr Swart, are siblings who have gone through an extremely unpleasant time due to the present dispute which I am sure all of them would at some point have regretted. I am not convinced that the disharmony which existed would continue to exist to the extent that it would imperil the trust estate and its proper administration. All of them would realise the importance of obtaining proper legal advice and to follow such advice and, of course, to maintain a civil relationship.

76. I have also mentioned above that Martin and Beaufort apparently failed to appreciate the entitlement of the other trustees to information. The resistance to the applicant's attempts to obtain information increased the level of stress and frustration on all sides. As mentioned, it was not required of this court to decide the applicant's and the other trustees' entitlement to the information requested as all the requested information was eventually given to the applicant. However, one can only hope that the siblings would in future be able to find a good working relationship in the interest of the trust and of them all. They would all probably realise by now that personal feelings against other family members should not be allowed to cloud and hinder the smooth running of the affairs of the trust.

77. I cannot find that, at this point, it would be in the interest of the trust or its proper administration, to terminate the trusteeships of Martin and Beaufort. As far as the position of Mr Swart is concerned I have already mentioned what I regard as a failure from his side during this whole unfortunate affair. But this failure, which relates only to the dispute which gave rise to the present application, is in my view not sufficient to cause his removal. He was chosen by the late Mr Raath as an independent trustee and to assist Mr Raath's children. There is not sufficient evidence that he would not be willing and able to do so in the future.

78. For, *inter alia*, the aforesaid reasons, the first, third and fifth respondents should not be removed from their office as trustees of the trust and neither should they be suspended from such office. I have considered the applicant's prayer that an independent trustee be appointed but having regard to the facts of this case and the sentiments expressed by me above, I am of the view that such an appointment should, at least at this stage, not be made.

79. In paragraph 6 of the Notice of Motion the applicant applied for an order that it be declared that the beneficiaries of the trust and their immediate families, including spouses and children, are permitted access to the farm Rooiberg. It was submitted on behalf of the applicant that this decision was taken by Martin and Beaufort because of their dislike of the applicant's husband but mostly because of their anger at the applicant's husband for causing them to lose their

alleged right of pre-emption. They blamed the applicant's husband for acting against the trust and against the interests of the trust.

80. Mercia was initially not in favour of the banning of the applicant's husband from the farm for obvious reasons. However, at the meeting of trustees on 4 February 2016, Martin and Beaufort stated that it was for the trustees to decide this issue and proceeded to convince Mercia, and probably Mr Swart as well, that the applicant and her husband had acted against the interests of the trust by causing them to lose their alleged right of pre-emption and that for that reason the applicant's husband should be banned from the farm. Martin even mentioned that had it not been for this fact, *i.e.*, them losing their right of pre-emption as a result of the applicant and her husband's actions regarding the purchase of Mrs Kok's farm, the applicant's husband would not have been banned from the farm.

81. I have already referred to the fact that the applicant had nothing to do with the purchase of Mrs Kok's farm, that she informed Martin and Beaufort of that fact when she got to know about it and that she did not act against the interests of the trust. I have also referred to the fact that no right of pre-emption existed for Rooiberg or any of the other members of the ENR and that the statements of Martin and Beaufort during the meeting were wrong. Consequently, if the wrong facts had not been presented to the meeting, the decision to ban the applicant's husband from the farm, would not have been taken. In fact, there can conceivably be no prejudice to the administration of the trust or to the

beneficiaries of the trust if the applicant's husband were to be allowed to visit the farm with his family.

82. However, having regard to the circumstances of the case, it is my view that this court should not take a decision regarding this issue. The decision as to who could visit the farm and who not, should be left to the five trustees of the trust.

83. That leaves the issue of costs. The applicant moved for costs to be paid by Martin, Beaufort and Mr Swart in their personal capacities and that such costs should be on the scale as between attorney and client. The respondents moved for costs to be paid by the applicant.

84. The applicant was substantially successful in her application. The fact that she did not succeed in having Martin, Beaufort and Mr Swart removed as trustees does not detract from this fact. Almost all of the application was directed at achieving the result of having the termination of the applicant's office as a trustee to be turned around and, as I have mentioned, her removal as a trustee in reality gave rise to most of the other relief prayed for by her. The application to have Martin, Beaufort and Mr Swart removed as trustees was little more than a spin-off of the main thrust of the application and very little of the affidavits and the argument in court was spent on this issue. The applicant should accordingly be awarded her costs.

85. There is no doubt that Martin and Beaufort were equally responsible for the removal of the applicant as a trustee and that their actions necessitated this

application. They should consequently be ordered to pay the costs of this application and the order should be against them in their personal capacities. Mr Swart placed his trust, albeit a misplaced trust, in the assurances of Martin and Beaufort and supported the removal of the applicant. I have remarked that Mr Swart should in the circumstances have done his own investigations but having regard to all the circumstances I am of the view that he should not be ordered to pay the costs of this application. No order for costs was asked against Mercia.

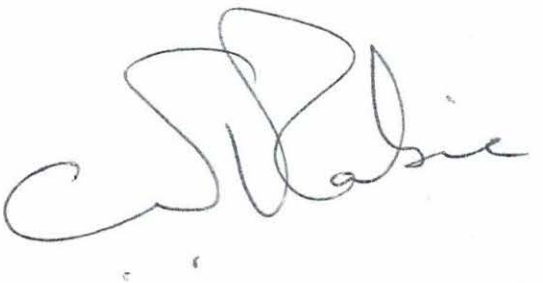
86. That leaves the issue as to the scale upon which the cost should be paid. There is certainly something to be said for the submission on behalf of the applicant that due to the conduct of Martin and Beaufort a punitive order for costs would be appropriate. However, having regard to the history of the matter, all the circumstances of the case, the measure of success of the applicant, the relationship between the parties and also the future relationship between them, I am of the view that such an order should not be made and that costs should be awarded on the party and party scale. I am also of the view that such costs should include the costs of senior counsel.

87. In the result the following order is made:

1. The purported invocation by the first to the eighth respondents of clause 4.7.5 of the Trust Deed of the M.J. Raath Family Trust ("the Trust") as a basis for the termination of the applicants' office as a trustee of the Trust, was invalid and the first applicant is declared to be still a trustee of the Trust.

2. The applicants' application for the removal of the first, third and fifth respondents from their respective offices as trustees of the Trust as well as the application for the appointment of an independent trustee for the Trust, as well as the application that it be declared that the beneficiaries of the Trust and their immediate families, including spouses and children, are permitted access to the farm Rooiberg, are dismissed.

3. The first and third respondents, in their personal capacities, are ordered, jointly and severally, the one to pay the other to be absolved, to pay the costs of this application and such costs shall include the costs of senior counsel.



C.P. RABIE

JUDGE OF THE HIGH COURT