

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES:

~~YES~~/NO

(3) REVISED **NO**

DATE:.....**25 November 2022**

SIGNATURE:.....

CASE NO: 5983/2021

In the matter between:

SELINA MMAZHAPELO NKOANA

FIRST APPLICANT

MPHO LUCY NKOANA

SECOND APPLICANT

M C LEDIGWANE

THIRD APPLICANT

N THABETHE

FOURTH APPLICANT

I MUDZWIRI

FIFTH APPLICANT

M MASINA

SIXTH APPLICANT

DR M POANE

SEVENTH APPLICANT

P PHIRI

EIGHTH APPLICANT

B NDLOVU

NINTH APPLICANT

R RESENGA

TENTH APPLICANT

J SESHOKA

ELEVENTH APPLICANT

T KEHITLHITLE

TWELFTH APPLICANT

T MATHEBULA

THIRTEENTH APPLICANT

AND

C V MALULEKE NO

FIRST RESPONDENT

C P NKOANA NO

SECOND RESPONDENT

T OLIVIER NO

THIRD RESPONDENT

E VAN SCHALKWYK NO

FOURTH RESPONDENT

J SNYMAN NO

FIFTH RESPONDENT

C SCHALK NO

SIXTH RESPONDENT

THE MASTER OF THE HIGH COURT

SEVENTH RESPONDENT

THE REGISTRAR OF DEEDS

EIGHTH RESPONDENT

FIRST NATIONAL BANK

NINTH RESPONDENT

Coram: Millar J

Heard on: 21 November 2022

Delivered: 25 November 2022 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 25 November 2022.

Summary: Application to freeze bank accounts of the Trusts pending accounting by trustees – applicants neither beneficiaries nor trustees having any direct legal interest in the affairs of the respective Trusts – neither the prior holding of the office of trustee in a trust nor being within a class of persons who may be nominated as a beneficiary confer *locus standi* – unless holding office as a trustee or until exercise of trustees discretion and nomination as beneficiary, no direct legal interest in the affairs of the Trusts – application dismissed with costs.

ORDER

It is Ordered:

1. The application is dismissed.
2. The 1st to 13th applicants are ordered to pay the respondents costs jointly and severally, the one paying the others to be absolved.
3. The costs are to be paid on the scale as between party and party and are to include the costs consequent upon the employment of senior counsel.

JUDGMENT

MILLAR J

1. This is an application in which the applicants seek various orders against the 1st to 6th respondents who are the trustees for the time being of the Nkoanyana Trading Trust¹ (“the Trading Trust”) and the TS Nkoana Legacy Trust² (“the Legacy Trust”). None of the other respondents have opposed the application.³ The present application is interlocutory to the main application brought under the present case number and in which is sought inter alia the removal of the trustees of both Trusts.
2. The orders sought in the present application are to join the 5th and 6th respondents in their capacity as trustees and also to join the 9th respondent in the main application. Besides the joinders, the applicants also seek an order

¹ IT1870/10(T).

² IT002126/2016(T)

³ The 3rd, 4th, 7th, 8th and 9th respondents did not oppose the application.

freezing the bank account of the Trading Trust and orders to compel an accounting and disclosure of financial and management reports for the years 2019 to 2021 for both trusts, to the applicants.

3. The applicants have also specifically sought an order that the Trusts give account of various specific transactions entered into by them over the period 1 December 2021 up to 17 January 2022. In addition they also sought an order compelling the Master to exercise his powers in terms of section 16⁴ of the Trust Property Control Act⁵ in the event of non-compliance by the respondents with any order compelling them to account in the terms requested and in addition, that the Master deliver a report to the court in which it is indicated whether or not there any such accounting was satisfactory.
4. This application turns on 2 issues – firstly whether the joinder of the 5th, 6th and 9th respondents should be granted and secondly, whether the applicants have *locus standi*⁶ to seek the orders that they do against the Trusts.
5. For convenience I propose dealing with the second issue first. Both Trusts were established by the late Tsakane Stanley Nkoana. Both Trusts are inter linked with the legacy Trust being the sole beneficiary of the trading Trust⁷.
6. Clause 1.1.2 of the Legacy Trust defines “the beneficiaries” as follows:

⁴ The section provides: “(1) A trustee shall, at the written request of the Master, account to the Master to his satisfaction and in accordance with the Master's requirements for his administration and disposal of trust property and shall, at the written request of the Master, deliver to the Master any book, record, account or document relating to his administration or disposal of the trust property and shall to the best of his ability answer honestly and truthfully any question put to him by the Master in connection with the administration and disposal of the trust property. (2) The Master may, if he deems it necessary, cause an investigation to be carried out by some fit and proper person appointed by him into the trustee's administration and disposal of trust property. (3) The Master shall make such order as he deems fit in connection with the cost of an investigation referred to in subsection (2).”

⁵ 57 of 1988

⁶ A beneficiary of a trust has the right to an accounting in terms of both section 19 of the Trust Property Control Act which provides “If any trustee fails to comply with a request by the Master in terms of section 16 or to perform any duty imposed upon him by the trust instrument or by law, the Master or any person having an interest in the trust property may apply to the court for an order directing the trustee to comply with such request or to perform such duty.” and also in terms of the common law – see *Mia v Cachalia* 1934 AD 102 .

⁷ The trust deed was amended to stipulate “The beneficiary shall mean the TS Nkoana Legacy Trust, IT2126/2016, duly registered on 22 July 2016”

“1.1.2 the beneficiaries” means that person or other persons who may from time to time be selected by the Trustees in their entire and absolute discretion to be a beneficiary in respect of the income or capital profits or capital gains or capital or either under the Trust, from amongst the members of the classes consisting of:-

1.1.2.1 Tsakane Stanley Nkoana (Id no: [...]);

1.1.2.2 Mpho Lucy Nkoana (Id no: [...]);

1.1.2.3 Selina Mmazhapelo Nkoana (Id no: [...]);

1.1.2.4 Khutso Nkoana (Id: [...]);

1.1.2.5 Keatlegile Nelly Nkoana (Id no: [...]);

1.1.2.6 Paballo Nkoana (Id no: [...]);

1.1.2.7 Koano Onalerona Nkoana (Id no: [...]);

1.1.2.8 Tumisho Nkoana (Id no: [...])

1.1.2.9 Halamalani Nelfy Nkoana (Id no: [...]);

1.1.2.10 The biological descendants of the beneficiaries set out in 1.1.2.1 to 1.1.2.8;

1.1.2.11 Any Trust established for the benefit of any of the aforementioned;

1.1.2.12 Failing the existence of any members of the classes set out in the sub-classes supra, only in the event, only in that event, the nearest blood relatives of the Founder;.

7. From what is set out in paragraph 6 above, the 1st and 2nd applicants are reflected as potential beneficiaries of the Legacy Trust. In respect of the 3rd to 13th applicants, these are all tenants of properties owned by the Trusts who purport to have an interest in the affairs of the Trusts. Self-evidently, their tenancy and matters related to it do not confer upon them any right to any of the orders sought in this application⁸.

8. When the application was argued, counsel for the applicants asserted that the 1st and 2nd applicants had a “vested” or “contingent” interest in the affairs of the Trusts by virtue of the fact that they were named as potential beneficiaries of the Legacy Trust. Their interest in the Trading Trust was predicated upon this “vested” or “contingent” interest in the Legacy Trust *qua* sole beneficiary of the Trading Trust.

9. It was common cause:
 - 9.1 that the trustees of the Legacy Trust did not until 14 February 2022 exercise the discretion⁹ conferred upon them in the Trust Deed to select from amongst the list of potential beneficiaries, the beneficiaries of the Legacy Trust.

 - 9.2 that when the beneficiaries were selected by the trustees, these did not include either the 1st or 2nd applicants or any of their biological descendants.

⁸ See *Maitland Cattle Dealers v Lyons* 1943 WLD 1 at page 19; and *Moodley v Moodley* 1953 (3) SA 860 (N) at 862C-D

⁹ The Trust Deed provides that: “21.1 *The Trustees shall use, pay, distribute or apply the whole or portions of the Trust income, in such proportions and at such time/s as they in their sole, absolute and unfettered discretion determine, for the benefit of or to all or any one or more of the beneficiaries*” and “28. *The discretionary powers vested in the Trustees in terms of this deed shall be complete, exclusive and absolute and any decision made by them pursuant to any such discretionary powers shall be binding and unchangeable by any beneficiary affected thereby or by any other person*”.

10. It was argued for the 1st and 2nd applicants that given the formulation of clause 1.1.2 of the Legacy Trust¹⁰, that they and their minor children, by virtue of their falling within a “class” of beneficiary, had an interest in the Trusts and on that basis the trustees owed them a fiduciary duty.¹¹
11. The 1st and 2nd applicants previously served as trustees of the Trusts before they were removed by order of court. They and their minor children find themselves listed amongst the potential beneficiaries of the Legacy Trust. However, inasmuch as they are listed as potential beneficiaries, the Trust specifically provides that the actual beneficiaries would only be those, selected from the list referred to in paragraph 6 above, who the trustees in their “entire and absolute discretion” selected. Absent a selection by the trustees¹², none of the persons referred to in clause 1.1.2 of the Trust Deed can claim any right to any benefit from the Legacy Trust and it must follow, that if they have no right, they have no interest¹³.
12. I was referred to *Bouwer NO v Smit*¹⁴ in which it was held:
- “Even if an applicant did not have an interest in the trust property, he could still have locus standi by virtue of the common law if he had a sufficiently direct interest in the subject matter of the litigation”*
13. The 1st and 2nd applicants argued that the resolution of 14 February 2022 constituted an attempt to amend the trust and that since they were potential beneficiaries, such amendment was impeachable. I was referred to *Potgieter v Potgieter and Another*¹⁵ in which it was found that where there was any right, whether vested or contingent, an attempt to amend the trust deed would

¹⁰ Paragraph 6 supra

¹¹ *Greissel N O & Others v De Kok & Another* 2019 (5) SA 396 (SCA) at paragraph 19

¹² *Braun v Blann and Botha NNO and Another* 1984 (2) SA 850 (A) at 867A-B

¹³ Whether to claim insight into the affairs of the Trust, an accounting or for that matter the removal of a trustee – see *Ras and Others NNO v Van Der Meulen and Another* 2011 (4) SA 17 (SCA) at 20C-D

¹⁴ 2019 JDR 1166 (GP) at paragraph 26

¹⁵ 2012 (1) SA 637 (SCA) at 649D-E

necessarily affect the interests of the holder of that right and that this may constitute an 'interest'.

14. This argument is without merit. On a plain reading of clause 1.1.2 of the Trust Deed, it is readily apparent that the persons referred to in that clause, referred to as "classes" were intended to comprise a list of those in respect of whom the trustees were to exercise their discretion in deciding who the beneficiaries of the Trust would be. Furthermore, the resolution of 14 February 2022, is in its terms¹⁶, an exercise of the discretion conferred upon the trustees to select beneficiaries and does not evince an intention to amend the Trust Deed. For this reason the decision in Potgieter is clearly distinguishable.
15. It was argued for the respondents that, besides the fact that the trustees had not appointed any beneficiaries until the resolution of 14 February 2022, the mere fact that the 1st and 2nd applicants had themselves been trustees did not confer upon them the status of beneficiaries who had accepted a benefit and now had a legal interest that was cast in stone in consequence. Any acceptance would have had to have been predicated upon a nomination in terms of clause 1.1.2 to have been made first¹⁷.
16. The entirety of the case of the 1st and 2nd applicants hangs upon the peg of their having been named amongst the classes of persons from whom the beneficiaries of the Legacy Trust would be selected, together with their having previously acted as trustees of that Trust.
17. Having regard to the plain meaning of clause 1.1.2, the failure of the trustees (which included the 1st and 2nd applicants while they were trustees) to exercise

¹⁶ The preamble to the resolution reads *"That by virtue of clause 1.1.2 of the trust deed, the trustees hereby appoint the below beneficiaries, as income and capital profits beneficiaries, capital gains or capital beneficiaries, under the trust:"*

¹⁷ Cameron Wunsch and de Waal, *Honore's Law of Trusts*, Fifth Edition, p499 in which it is stated "No form is prescribed for acceptance, but it is advisable for a beneficiary with sufficient understanding to write to the trustee accepting the benefits under the trust. A mere mental attitude of approbation does not amount to acceptance. An unequivocal expression of intention to accept is needed."

their discretion and nominate beneficiaries does not transmute the persons named within the category of those who could be selected as beneficiaries, into beneficiaries. Furthermore, the office of trustee is a fiduciary one which is separate and distinct from being a beneficiary and the holding of such office similarly does not transmute the trustee into becoming a beneficiary.

18. For the reasons set out above, I find that neither the 1st nor the 2nd applicant, properly considered, can be regarded as beneficiaries of the Legacy Trust. Since they are not beneficiaries, they have no legal interest in the affairs of the Trust and have none of the rights (contingent or vested or otherwise) conferred upon either beneficiaries or trustees in terms of section 19 of the Trust Property Control Act to demand an accounting.
19. It follows that the present application cannot succeed. Furthermore, and as regard the first issue - absent locus to bring the present application, the application for the joinder of the 5th, 6th and 9th respondents must also fail as must the order for the freezing of the bank account.
20. In regard to the question of costs, this is a discretionary matter. I see no reason to depart from the usual principle that the costs must follow the result. I would mention that although the 3rd to 13th applicants have played no role in the determination of the present application and for the reasons set out above, themselves had no locus standi, they have associated themselves with the case for the 1st and 2nd applicants and ought to bear the costs equally with them.
21. In the circumstances, it is ordered:
 - 21.1 The application is dismissed.
 - 21.2 The 1st to 13th applicants are ordered to pay the respondents costs jointly and severally, the one paying the others to be absolved.

21.3 The costs are to be paid on the scale as between party and party and are to include the costs consequent upon the employment of senior counsel.

**A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

HEARD ON: 21 NOVEMBER 2022

JUDGMENT DELIVERED ON: 25 NOVEMBER 2022

COUNSEL FOR THE APPLICANTS: ADV. PA VENTER

INSTRUCTED BY: VZLR ATTORNEYS.

REFERENCE: MR. T FARI

COUNSEL FOR THE 1ST, 2ND, 5TH & 6TH RESPONDENTS: ADV. PG CILLIERS SC

INSTRUCTED BY: ALBERT HIBBERT ATTORNEYS

REFERENCE: MR. A HIBBERT

No Appearance for the 3rd, 4th, 7th – 9th Respondents