IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case number: 26288/2020

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

..... 2022-06-15
SIGNATURE DATE

In the matter between:

HAROLD LEE DE KOCK	**APPLICANT**
And	
DE VILLEBOIS ETIENNE DE KOCK N.O	**FIRST RESPONDENT**
SHIRLEY ANN VAN WYK N.O	**SECOND RESPONDENT**
CELESTE MARIE DAVEY N.O	**THIRD RESPONDENT**
FREDERICK FRANS VAN NIEKERK N.O	**FOURTH RESPONDENT**
JOHANNES JURGENS POTGIETER N.O	**FIFTH RESPONDENT**
DE VILLEBOIS ETIENNE DE KOCK	**SIXTH RESPONDENT**

SHIRLEY ANN VAN WYK	**SEVENTH RESPONDENT**
CELESTE MARIE DAVEY	**EIGHTH RESPONDENT**
FREDERICK FRANS VAN NIEKERK	**NINTH RESPONDENT**
JOHANNES JURGENS POTGIETER	**TENTH RESPONDENT**
THE MASTER OF THE HIGH COURT	**ELEVEN RESPONDENT**
MANYELETI PROPRIETARYLIMKITED	**TWELFTH RESPONDENT**

JUDGMENT

PHAHLAMOHLAKA A.J.

INTRODUCTION

[1] The Applicant seeks an order against the respondent in the following terms:

1.1 That the First, Second, Third, Fourth and Fifth Respondents (or any other person so nominated by the First, Second, Third, Fourth and Fifth Respondents to act as trustees of the Arathusa Trust) be removed as trustees of the Arathusa Family Trust.

1.2 That the Eleventh Respondent be directed to appoint independent trustees for the Arathusa Family Trust.

1.3 Cumulative and/or in the alternative to the relief in paragraph 1.1 and 1.2 above, that the First, Second, Third, Fourth and Fifth Respondents are in contempt of the court order granted by the Supreme Court of Appeal on 06th of June 2019 under case number 334/2018.

1.4 Cumulative and/or in the alternative to the relief in paragraph 1.1 and 1.2 above, that the First, Second, Third, Fourth and Fifth Respondents, jointly and severally, the one to pay the other to be absolved, be ordered to pay a fine equal to such an amount which the Honourable Court deems fit and just in the circumstances due to their contempt of the order of the Supreme Court of Appeal.

1.5 In the alternative to the relief set out in paragraph 1.1, 1.2, 1.3 and 1.4 above, an order interdicting the First, Second, Third, Fourth and Fifth

Respondents (as well as the trustees from time to time of the Arathuisa Trust) not to frustrate and/or stop the Applicant from gaining equal access to and enjoyment of the farm Arathusa 241 K.I., Pilgrims Rest, Mpumalanga, as was the practice before 14 January 2013.

1.6 An order that in accordance with the provision of clause 13.6 of the Trust Deed, an arbitrator be appointed in order to make a decision and to implement the arrangement whereby the beneficiaries of the Arthusa Family Trust are given equal proportionate access to the property known as Farm Arathusa, District Pilgrims Rest, Mpumalanga. Without derogating from the generally of the aforegoing, that the following arrangement be implemented, in order to regularise and implement the access to the said farm by the various beneficiaries:

1.6.1 As from the granting of this order the trustees of the trust shall no longer be empowered to determine whether by virtue of a roster or otherwise, which beneficiary will be visiting the farm on which date and for how long and under what circumstances.

1.6.2 The authority to grant access to the farm to beneficiaries is in terms of clauses 13.66 vested in the arbitrator referred to below, which is determined by virtue of a roster or otherwise and after procuring submissions form the beneficiaries, which beneficiaries shall visit the farm at which date, for how long and under what circumstances.

1.6.3 The arbitrator so appointed shall be a senior advocate practising in Pretoria of not less than 5 years standing which will follow an informal procedure in order to determine swiftly and cost effectively the right of access of beneficiaries to the farm.

1.6.4 The aforementioned arbitrator shall be remunerated by the trust and the trustee]s of the trust shall *pro rata* be obliged to ensure that the arbitrator is properly remunerated, alternatively the arbitrator shall be remunerated by virtue of equal contributions which the beneficiaries will be obliged to make, failing which the attorney or record for the Applicant shall be entitled to institute on behalf of the trust recovery proceedings against any beneficiary and/or trustee who fail to make the required contribution in order to pay the expenses of the arbitrator, to discharge in effect a function which the trustees are apparently incapable to perform themselves.

1.7 In the alternative to the appointment of the arbitrator as envisaged above, that this Honourable Court grants relief to the effect that the access rights of the beneficiaries of the trust, to the farm Arathusa, shall be in accordance

with a roster to be compiled by either the newly appointed trustees or a roster which the above Honourable Court deems fit.

1.8 Further and/or alternative relief which the Honourable Court deems fit and proper under the circumstances in terms of the factual matrix of this application, read with the Deed of Trust of the Arathusa Trust, as well as the Trust Property Control Act, 57 of 1988.

1.9 Costs of suit on attorney and client scale.

FACTS AND BACKGROUND

[2] On or about 09 May 1999, the Arathusa Family Trust (IT4883/99) ("the Trust") was established for the security, maintenance, education and welfare of the beneficiaries of the trust.

Through its exclusive shareholding in the Twelfth Respondent, the trust provides a form of leisure to its beneficiaries – access, on a rotational basis, to a large private game farm known as the Sabi Sands Game Reserve.

- The Applicant's brother and sister (De Villabois Etienne de Kock and Celeste Marie de Kock) had been appointed with their mother, Shirley Ann van Wyk as trustees of the trust.

- The Applicant, together with his aunt, Joan Cynthia Griessel, his mother brother and sister, are the beneficiaries of the trust.

- Manyelethi (Pty) Ltd, the Twelfth Respondent ("the Company"), is a property holding entity in which the trust is the only shareholder. The trust is the holder of all shares in the company who in turn is the registered owner of the farm known as Arathusa in the district of Pilgrims Rest, Mpumalanga ("the farm").

- The farm forms part of a larger game reserve. Although the farm is registered in the name of the company, the company does not trade and is directly under control of the trust, its only shareholder.

- On or about 14 January 2013, the trustees resolved to amend the Trust Deed.

- According to the applicant the amendment of the Trust Deed had the effect that the Applicant was removed as a beneficiary of the trust.

- The Applicant instituted action under case number 44989/2014 against the trustees for his reinstatement as a beneficiary of the trust. Initially the action

was defended, however the trustees later made a settlement proposal to the Applicant which was accepted.

- A settlement agreement was entered into in terms of which the amendment of the Trust Deed and the Applicant's removal as a beneficiary of the trust were declared of no force and effect and invalid.

- On 26 January 2016 the settlement agreement was made an order of the court.

THE APPLICANT'S COMPLAINTS

[3] The applicant contends that intention of the settlement agreement was to reinstate the Applicant as a beneficiary of the trust with all the rights and interest he had previously enjoyed prior to his removal as a beneficiary thereof. However, despite the settlement agreement being reached and same being made an order of court on 26 January 2019, contents the applicant, the trustees continued to deny him enjoyment of such rights which the trust\ holds for the benefit of its beneficiaries, in particular with regard to access rights to the farm which is part of the larger Sabi Sands Game Reserve.

[4] The applicant argues that it is clear that the trustees settled the matter with him, but by doing so, acted in bad faith as they had no intention of reinstating the rights he had enjoyed prior to his removal as a beneficiary of the trust.

[5] On 23 October 2017, the trustees were ordered by the Supreme Court of Appeal to forthwith reinstate the Applicants rights as a beneficiary of the trust to enjoy equal access to the farm as was the practice prior to 14 January 2013 when the Applicant was unlawfully removed as a beneficiary of the trust.

- In the litigation envisaged in 3.14 above, the Applicant requested the removal of the then existing trustees. The Respondents in the application opposed the application on rather trivial and technical grounds. It was argued by the Respondents that it is in fact the company that can decide who enters upon its land and who will not.

- The Applicant demonstrated with reference to the facts that this is an artificial distinction, but the Respondent contended that the Applicant was trying to "pierce the corporate veil". Be that as it may, none of the trivial and technical defences were upheld.

- Regarding the Applicant's request for a removal of the trustees, the Respondents pertinently argued that there is already an independent trustee in

office, namely Caryn Schultz N.O and that it is therefore not competent to ask for the removal of the trustees.

- My sister Justice Bam AJ, granted an order directing the Master to appoint additional independent trustees so that there would be a majority of independent trustees.

- The trustees of the trust and the directors of the company (who are essentially the same natural persons), lodged an application for leave to appeal the judgment of Bam AJ. The application for leave to appeal was dismissed. The trustees then filed an application to the Supreme Court of Appeal for leave to appeal. The SCA granted leave.

- The Supreme Court of Appeal granted an order in the following terms;

  " 3.1 The first, second and third respondents are ordered to forthwith reinstate the applicant's rights a beneficiary under **Arathusa Trust IT 4883/99**, in particular, equal access to and enjoyment of the farm **Arathusa 241 ku, Pilgrims Rest** in Mapumalanga the practice before 14 January 2013."

- appeal by the trustees therefore failed against what can be regarded as the main relied and that is namely to achieve a restoration of the Applicant's rights and a full recognition of the Applicant as a beneficiary, but the appeal succeeded against the order whereby the court *a quo* directed the Master to appoint additional trustees.

- In the Supreme Court of Appeal, very soon after the hearing started, and when senior counsel on behalf of the trust and the trustees addressed the court on behalf of the Appellants, the learned Presiding Justice of Appeal, his Lordship Mr Justice Navsa JA, interjected and posed the following to counsel for the Appellants:

  - The learned judge intimated that the court wants there and then for counsel to obtain an instruction from the trust and the trustees and to then state in open court whether the trust and the trustees are prepared to recognise fully Applicants rights and privileges. The court continued to explain that if counsel returns and court will regard that as an indication that the trustees can manage this trust and act independently, but if such an instruction cannot be achieved and given to the court there and then, then such a failure will be regarded by the court as an indication that the then existing trustees in fact

needed the independent guidance of additional independent trustees.

- Counsel then obviously requested a short adjournment. The court then adjourned and counsel could be seen making telephonic enquiries to his instructing attorney who did not himself attend the proceedings, namely Mr Henk Strydom. After a few minutes the hearing resumed and senior counsel for the Appellants ("the trustees") then said in open court that he procured instructions to make the concession on record and gave an undertaking that the Applicant's rights would be fully restored and that the Applicants would be treated equally just like any other beneficiary, and without any discrimination against him.

- That concession then dramatically shortened the address on behalf of the Appellants.

- It was clearly on the strength of this undertaking given in open court o the Supreme Court of Appeal that the Supreme Court of Appeal interfered with the order granted by the court *a quo*, namely to direct the Master to appoint a majority number of independent trustees.

- It is that unequivocal undertaking given to the Supreme Court of Appeal which moved the Supreme Court of Appeal to allow the appeal to succeed in part, namely against only the order directing the Master to appoint the additional trustees and the consequent cost order.

  Unfortunately, the subsequent conduct of the trustees is not conforming with the undertaking which they have given in open court to the Supreme Court of Appeal. The trustees' act and their words are not the same.

- The undertaking given to the Supreme Court of Appeal was false and merely an attempt to save in part the day for the trust at the hearing in the Supreme Court of Appeal.

- Alternatively and if the undertaking was genuine and *bona fide*, the practical reality of the matter is that the hard and irrefutable facts show convincingly that they are still in fact discriminating against the Applicant; that they, the trustees, are still not recognising the Applicant's right fully and that the undertaking given to the Supreme Court of Appeal was a hollow one, which was not given *bona fide* by the trustees of the trust.

- In a similar fashion the trustees reneged upon the settlement agreement which they entered into with the Applicant which was made an order of court.

- Despite all of this, the Applicant's right are still not fully restored and the Applicant is still not treated equally, just like any other beneficiary, without any discrimination against him.

- After the Judgment by the Supreme Court of Appeal in June 2019, the Applicant via his attorney of record, requested the attorney of the trustees of the trust to comply with the order of the Supreme Court of Appeal. In order to have done so, the trustees had to implement the following:

    - A new roster had to be issued by the trustees of the trust to entitle the Applicant to gain access to the farm; and

    - A vehicle entry disc whish registered the Applicant's vehicle for the access to the Sabi Sands Games Reserve, needed to be issued in the name of the applicant.

[6] In his founding affidavit the applicant raises, among others, the following complaints;[1]"

"Since the order, the Trustees have frustrated, delayed and manipulated the ruling of the SCA. The Trustees of the Trust at all costs want to frustrate, delay, manipulate and stop me from gaining access to the farm.

I am however of the opinion that even if such newly appointed trustees of the trust, which have been nominated by the current Trustees of the Trust, are to be appointed by the Master of the High Court once a new letter of authority is issued, such newly appointed trustees will merely carry on and continue to implement the mandate (of the current Trustees of the Trust) to frustrate and stop me from gaining access to the farm. I do not speculate if I make this allegation because there is currently supposed to be at least one "independent" trustee and that is the current Third Respondent.'

I bring this application in circumstances where I have exhausted all non-litigious means in order to achieve a resolution. I therefore have no other option but to lodge this application, which I regard as unfortunate and necessary.

After the settlement agreement was made an order of court on 26th of January 2016, the trustees continued to deny me enjoyment of such rights

[1] Founding Affidavit paragraph 2.6

which the Trust holds for the benefit of its beneficiaries, in particular, with regard to access rights to farm, which is part of the larger Sabi Sands dame reserve.

Although I have been reinstated as a beneficiary of the trust, I was effectively barred by the trustees from visiting the farm. The Trustees were blandly discriminately against me in favour of the other trustees by not allowing me or any family to visit the farm."

Respondent did not dispute that a roster existed.

RESPONDENT'S CASE

[7] The Respondents say that a practising Attorney and an Advocate were nominated as trustees. The Applicant contends that "The Trustees nominated other Trustees (who would also be under their guidance and control) to manage the affairs of the Trust, however no letter of Authority has been issued by the Master of the High Court to this end.

[8] The respondents argue that the SCA judgment does not give any other rights on the applicant and certainly did not elevate him to the position of trustee or gave him *locus standi to* prescribe to the trustees of the trust or the twelfth respondent how to manage the farm. That prior to 14 January 2013, the applicant did not visit the farm Arathusa 241 FU, Pilgrims Rest, Mpumalanga, regularly.

[9] That the applicant in his replying affidavit filed under case number 50776/2016 signed and dated 11 August 2016, stated that for the period 2002 to 2012 he and his family only visited the farm twice.

[10] The respondents argued that a roster was made and it included the applicant. However, the respondents argue further that the roster is developed at the beginning of the year and therefore it is difficult to ament as dates have already been allocated.

[11] The respondents contend that they are not the ones issuing the car permits and therefore cannot be held liable if the applicant is unable to obtain a permit.

APPLICABLE LAW

[12] Section 20 of the Trust Property Control Act 57 of 1988 provides as follows:

(i) *A trustee may, in the application of the Master or any person having 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 interest of the trust and its beneficiaries.*

(ii) *A trustee may at any time be removed from office by the Master of the High Court:-*

(a) If he has been convicted in the Republic or elsewhere of any offense of which dishonesty is an element or of any other offense for which he has been sentenced to imprisonment without the option of a fine; or

(b) If he fails to give security or additional security, as the case may be, to the satisfaction of the Master of the High Court within two months after having been requested thereto or with such further period as is allowed by the Master of the High Court; or

(c) If his estate is sequestrated or liquidated or placed under judicial management; or

(d) If he has been mentally ill or incapable of managing his own affairs or if he is virtue of the Mental Health Act, 1973 (Act 18 of 1973), detained as a patient in an institution or as a State Patient; or

(e) *If he fails to perform satisfactorily any duty imposed upon him by under this Act or to comply with any lawful request of the Master of the High Court.*

[13] the most recent authority on the removal of trustees is the judgment of the Supreme Court of Appeal, **Fletcher v McNair.**[2] In paragraph 19 of the Fletcher judgment Makgoka JA lists the requirements for the removal of trustee as follows"

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

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

[2] (1350/2019) [2020] ZASCA 135 (23 October 2020)

(d) The deliberate wishes of the deceased person to select persons in reliance upon their ability and character to manage the estate, should be respected, and not be lightly interfered with;

(e) Where there is disharmony, the essential test is whether it imperils the Trust estate or its proper administration;

(f) Mere friction or enmity between the trustee and the beneficiaries will not in itself be an adequate reason for the removal of the trustee from the office;

(g) Mere conflict amongst trustees themselves is not a sufficient reason for the *removal of a trustee at the suit of another;*

(h) Neither mala fides nor even misconduct are required for the removal of a trustee;

(i) Incorrect decisions and non-observance of the strict requirements of the law, do not of themselves, warrant the removal of a trustee;

(j) The decisive consideration is the welfare of the beneficiaries and the proper administration of the Trust and the Trust Property."

REMOVAL OF TRUSTEES

[14] The court also has common law jurisdiction to remove a trustee. The general principle is that the court will exercise its common law jurisdiction to remove a trustee if the continuing offence of the trustee will be detrimental to the beneficiary or will prevent the trust from being properly administrated.

[15] Counsel for the applicant referred me to **Gowar & Another v Gowar & Others**[3]. It was argued by the applicant that the facts of this case justify the removal of the trustees. It is clear that the trustees by their conduct, not only are in contempt of the order by the Supreme Court of Appeal, but their continuance in office is detrimental to the Applicant, a beneficiary. It will therefore be correct that the trustees be removed and that the Master be ordered to appoint independent trustees for the trust. The trustees frustrate, delay and manipulate the order by the Supreme Court of Appeal. They have one goal which they want to achieve and that is to prevent the Applicant gaining access to the farm. Even after the Supreme Court of Appeal's order, there was yet again a further attempt to deny that the Applicant is a beneficiary of the trust. The relief sought will also have the effect that the trustees will not be in a position to nominate other individuals to take over their responsibilities, duties and rights, *vis a vis* the trust and its beneficiaries. This will prevent the situation where newly appointed trustees will merely carry on and frustrate the Applicant. If the master is ordered to appoint new independent trustees, then hopefully the matter will be resolved as there will be no underlying relationship between the current and old trustees and trustees nominated by them.

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[3] [2016] ZASCA 101; 2016 All SA 382; 2016(5) SA 225 (SCA)

[16] It is apparent that that the high water mark of the applicant's case for the removal of the independent trustees is that they will do what the existing trustees dictate. This is in my view speculation that is not supported by ay facts. Two independent trustees who are members of the legal profession have been appointed and I am of the view that as lawyers they are aware of their fiduciary duties.

[17] I am not satisfied that the applicant has made out a case for the removal of the trustees and therefore the relief sought in this regard should fail.

CONTEMPT OF COURT:

[18] For the applicant to succeed in a contempt of court claim the applicant must prove that the respondents had the necessary intention to disobey the order of the Supreme Court of Appeal. I agree with the respondent's contention that the applicant has not advanced independent and separate facts to support his claim that the first to third respondents be found guilty on contempt of court. I am not satisfied therefore that the applicant has made out a case for me to find that the respondents were in contempt.

[19] Counsel for the applicant referred me to ***Fakie N.O v CCII System (Pty) Ltd, 2006 (4) SA 326 (SCA), Matjabeng Local Municipality v Eskom Holdings (Pty) Ltd, 2018 (1) SA 1 (CC)***, where the Constitutional Court at 27A to C, held the position to be as follows:

> *"Summing up, on a reading of Faki, Pheko and Burchell, I am of the view that the standard of proof must be applied in accordance with the purpose sought to be achieved or differently put, the consequences of the various remedies. As I understand it, the maintenance of a distinction does have a practical significance: the civil contempt remedies of committal or a fine have material consequences on an individual's freedom and security of the person. However, it is necessary in some instances because disregard of a court order not only deprives the other party of the benefit of the order, but also impairs the effective administration of justice. There the criminal standard of proof – beyond reasonable doubt – applies. A fitting example of this is Fakie. On the other, there are civil contempt remedies – for example – declaratory relief, mandamus or a structural interdict that do not have the consequences of depriving an individual of their right to freedom and security of the person. A fitting example of this is Burchell. Here, and I stress, the civil standard of proof – a balance of probabilities – applies."*

[20] I am of the view that the two judgments referred to are distinguishable to this matter and therefore do not take the applicant's case any further.

INTERDICT

[21] The applicant contents that to force compliance with not only the Supreme Court of Appeal's order, but with the rights that the Applicant has as a beneficiary of the trust, the Applicant also seeks interdictory relief to the effect that the trustees be interdicted from frustrating and/or stopping the Applicant gaining access and enjoyment to the farm as was the practice before 14 January 2013. The SCA judgment by NAFSA JA addresses the issues the applicant is raising and therefore it is my view that the applicant has not made out a case for the relief sought in this regard.

ARBITRATION

[22] The trust Deed in clause 13.6 makes provision that an arbitrator be appointed. The applicant avers that the respondents deliberately frustrates him with a roster that does not favour him. As a beneficiary I am of the view that the applicant should enjoy the same as other beneficiaries. The applicant has failed to demonstrate that the existing roster and procedure does not give him equal access to the property.

[23] The respondents have demonstrated how the roster works and according to them the applicant is included and they say it has been a practice that the roster cannot be amended at the wink of an eye. Nothing came forth to contradict this and therefore I agree that the respondent's version falls to be accepted in terms of the Plascon-Evans rule.

[24] I am not satisfied that the applicant has made out a case for the relief sought in this regard.

COSTS

[25] The applicant cotends that I should award punitive costs in his favour should I find against the respondent. There is no justification for me to ward costs on a punitive scale against either of the parties.

CONCLUSION AND ORDER

[26] In the premises I am of the view that the applicant's application has no merit and it should fail

[27] Consequently I make the following order:

The application is dismissed with costs.

KGANKI PHAHLAMOHLAKA
ACTING JUDGE OF THE HIGH COURT

Delivered: this judgment was prepared and authored by the judge whose name is reflected and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of his matter on Caselines. The date for handing down is deemed to be 15 June 2022.

JUDGMENT RESERVED ON	**: 02 February 2022**
FOR THE PLAINTIFF	**: ADV M P VAN DER MERWE SC**
INSTRUCTED BY	**: JARVIS JACOBS RAUBENHEIMER INC.**
FOR THE RESPONDENT	**: ADV T.A.L.L. POTGIETER SC**
INSTRUCTED BY	**: GELDENHYS MALATJI INC.**
DATE OF JUDGMENT	**: 15 June2022**