THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 635/09

In the matter between:

MARGARETHA ALETTA RAS NO	**First Appellant**
MARGARETHA ALETTA VISSER (BORN RAS) NO	**Second Appellant**
PIETER VISSER NO	**Third Appellant**
v	
NICOLINE VAN DER MEULEN	**First Respondent**
MASTER OF THE HIGH COURT, PRETORIA	**Second Respondent**

Neutral citation: *Ras v Van der Meulen* (635/2009) [2010] ZASCA 163 (1 December 2010).

Coram: Lewis, Shongwe and Leach JJA, Ebrahim and K Pillay AJJA

Heard: **9 November 2010**

Delivered: **1 December 2010**

Summary: Trust – first respondent not entitled to seek removal of trustees unless a beneficiary – issue whether she is a beneficiary not decided by high court – matter remitted to high court to determine the issue.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Ledwaba J sitting as court of first instance).

The following order is made:

1. The applicants are granted leave to appeal to this court.
2. The appeal is upheld to the extent that the order made by the court a quo on 14 January 2009 is set aside and replaced with the following:
   ‘(a) The application is referred for the hearing of oral evidence on a date to be arranged with the Registrar, on the questions whether or not the applicant, Nicoline Van Der Meulen, is a beneficiary of the Bokfontein Trust or whether she has been validly removed as a beneficiary of such trust.
   (b) The evidence shall be that of any witness whom the parties or either of them may elect to call, subject, however to what is provided in para (c) hereof;
   (c) Save for witnesses whose evidence is already on affidavit in this application, neither party shall be entitled to call any witness unless:
      (i) It has served on the other party at least 15 (fifteen) days before the date appointed for the hearing (in the case of a witness to be called by the applicant), and at least 10 days before such date (in the case of a witness to be called by the respondent), a statement wherein the evidence to be given in chief by such person is set out; or

(ii) The court, at the hearing, permits such person to be called despite the fact that no such statement has been so served in respect of his evidence;

(d) Either party may subpoena any person to give evidence at the hearing whether such person has consented to furnish a statement or not;

(e) The fact that a party has served a statement in terms of (c) above, or has subpoenaed a witness, shall not oblige such party to call the witness concerned;

(f) Within 30 (thirty) days from the date of this order, each of the parties shall make discovery on oath of all documents relating to the issues referred to in para (a) hereof, which are or have at any time been in the possession or under the control of such party. Such discovery shall be made in accordance with Rules of Court 35(1) and 35(8) and the provisions of Rule 35 with regard to the inspection and production of documents discovered shall be operative;

(g) The incidence of costs incurred up to date shall be determined after the hearing of oral evidence.'

3. The costs occasioned by the application for leave to appeal and the appeal shall be costs in the cause.

JUDGMENT

LEACH JA (Lewis and Shongwe JJA, Ebrahim and K Pillay AJJA concurring):

[1] This is an application under s 21 of the Supreme Court Act 59 of 1959 which was set down for argument in this court. The applicants seek leave to

appeal against a judgment of the North Gauteng High Court, holding that the first respondent has sufficient interest in the subject of the proceedings to entitle her to seek relief, the high court having refused leave to appeal.

[2] The applicants proceed in their capacities as trustees of the 'Bokfontein Trust' ('the trust'). Established inter vivos by the first respondent's late father, its principal asset is the farm Bokfontein in the district of Brits. The applicants are, respectively, the first respondent's mother (the first applicant), her sister (the second applicant) and her sister's husband (the third applicant). The Master, who is cited as second respondent, has played no part in these proceedings and for convenience I intend to refer to the first respondent as 'the respondent' and to the applicants, who were the respondents in the court a quo, as 'the trustees'.

[3] In October 2008, the respondent launched motion proceedings in the high court in which she alleged that she was a capital beneficiary of the trust and applied for an order removing the trustees, contending they had acted in bad faith in the performance of their duties She also sought an order obliging the Master to carry out an investigation into the trustees' administration of the trust under s 16 of the Trust Property Control Act 57 of 1988 (the Act) and to report the findings of such investigation both to her and the court.

[4] The trustees opposed this relief, denying any improper conduct on their part. For present purposes it is unnecessary to detail the merits of the dispute in regard to their alleged mal-administration of the trust. Importantly, the trustees specifically denied that the respondent was a trust beneficiary and contended that she was thus not entitled to seek the relief she did. In regard to this issue they relied upon a trustees' resolution adopted on 25 March 1999 which purported to amend the terms of the trust deed by removing the respondent as a capital beneficiary.

[5] For completeness I should also mention that, on 24 December 2004, the trust's founder and the trustees passed another resolution in which they again purported to vary the trust deed, this time by adding the name of the second applicant (the respondent's sister) as a beneficiary *after* the name of the first respondent. The trustees have attempted to explain this by stating that all concerned had forgotten about the March 1999 resolution. Furthermore, on 4 November 2008, after the institution of proceedings in the court below, the trustees passed another resolution in which they purported to withdraw the amendment of December 2004. This was clearly an ex post facto attempt to ensure that there was no resolution inconsistent with that of 25 March 1999, and I did not understand counsel for the applicants to place any reliance upon it.

[6] When the matter came before Ledwaba J in the court below, the trustees requested him to determine whether the respondent was a trust beneficiary, arguing that, if she was not, the application had to be dismissed. On the other hand, the respondent argued that she is a beneficiary and that, before the merits of the application be decided, the Master should be ordered to investigate the affairs of the trust and report to the court.

[7] Faced with these conflicting arguments, the learned judge appears to have attempted to steer a middle course. On 14 January 2009, he ruled that even if the respondent is not a trust beneficiary, in respect of which he specifically recorded he had made no finding, she has 'sufficient interest in the matter warranting that she can file this application and can request the Master to carry on an investigation'. He then ordered the Master to carry out an investigation in terms of s 16 of the Act and to report thereon, and postponed the application sine die to be later enrolled once such report was available. It is not necessary to discuss the terms of further interim relief granted in regard to the administration of the trust.

[8] The trustees applied unsuccessfully for leave to appeal against this order. The judge concluded that his order was neither definitive of the rights of the parties nor disposed of a substantial portion of the relief sought in the main application, and was therefore not appealable. The trustees then applied to this court for its leave to appeal.

[9] In opposing leave to appeal, the respondent argued that the order was not appealable and it is necessary to deal with this issue at the outset. The court clearly erred in finding that, short of being a beneficiary, the respondent had an interest in the trust which justified her being entitled to seek the relief claimed. It is only if she is a beneficiary that she would be entitled to seek the removal of the trustees, and the respondent correctly did not seek to support the high court's contrary conclusion. If the trustees are correct and the respondent is not a beneficiary, her application would fall to be dismissed. The issue of the respondent's status as beneficiary would therefore be determinative of the parties' rights, rendering the order granted in respect of those rights appealable.

[10] The court a quo also erred in ordering the Master to carry out an investigation. Under s 16(1) of the Act, the Master has a wide discretion to call upon trustees at any time to account to him.[1] Section 16(2) further provides that the Master may, 'if he deems it necessary, cause an investigation to be carried out . . . into the trustee's administration or disposal of trust property'. The discretion to call for such an investigation vests solely in the Master. It is not alleged that the Master had in any way acted improperly in the exercise of that discretion, and it was therefore not competent for the court a quo to direct him to carry out an investigation.

[11] Accordingly, the appeal against the order must be allowed. It remains to decide how the dispute should be resolved.

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[1] *Administrators, Estate Richards v Nichol & another* 1999 (1) SA 551 (SCA) at 561B.

[12] Counsel for the respondent submitted that the matter should be referred back to the high court for it to hear evidence to determine whether the respondent was a beneficiary. The trustees contended otherwise. Alleging that it was common cause that the respondent had not accepted her nomination as beneficiary before the 1999 resolution was taken, they relied upon well-known authorities[2] to submit that the trust founder and the trustees had been free to amend the trust deed in March 1999 and replace the respondent as beneficiary. They therefore argued that as the respondent had not been a beneficiary of the trust after the resolution of March 1999, the appeal should be upheld and the application dismissed.

[13] In advancing their argument, the trustees relied on an allegation they had made in applying to this court for leave to appeal where they averred that it had been common cause at the hearing in the high court that the respondent had not accepted the benefits under the trust before the resolution of 25 March 1999. Although that allegation was not disputed by the respondent in her answering affidavit, it is not to be viewed in isolation but in the context of the averments in the main application. There the respondent alleged that she was a beneficiary of the trust and, in response, the trustees alleged that although she had been a beneficiary at the outset (‘aanvanklik ‘n begunstigde van die Bokfontein Trust was’), she had been removed as she had indicated that she did not want to farm Bokfontein. It was never suggested either that the respondent had never been a beneficiary or that she had been removed before accepting any benefit under the trust. The issue in the high court was never that on which the trustees now seek to found their case; rather it was whether the respondent had been lawfully removed as a beneficiary.

[14] It was only when counsel for the trustees filed his heads of argument in the high court that it was first contended that the respondent had not accepted the benefits under the trust before the March 1999 resolution and that the

[2] In particular *Crookes NO & another v Watson & others* 1956 (1) SA 277 (A) 285E-G and *Hofer & others v Kevitt NO & others* [1997] 4 All SA 620 (A) at 623-624.

founder and the trustees had therefore been fully entitled to amend the trust deed by removing her as a beneficiary. In supplementary heads of argument, counsel for the respondent conceded that the founder and trustees of a trust 'are entitled to cancel or amend the contract concluded between them at any time prior to the third party accepting the benefits in terms of the trust deed'. Presumably it was this concession that gave rise to the allegation in the application for leave to appeal in this court that it was common cause that the respondent had not accepted the benefit of the trust. But the matter was then argued not on the basis that the amendment of the trust deed had taken place before the respondent had accepted the benefits under the trust but, rather, in regard to the validity of the resolution of 25 March 1999 in the light of further provisions of the trust deed (an argument raised in this court as well). It is clear from this that the respondent's alleged failure to accept the benefits under the trust before the crucial date of 25 March 1999 was neither a live issue on the papers nor the subject of the debate in regard to whether she is a beneficiary. There was certainly no formal admission made by the respondent in that regard, and the bald allegation made in the trustees' founding affidavit in the application for leave to appeal in this court that the issue was common cause, albeit not denied, cannot amount to a final determination of the issue.

[15] We do not know what information would have been forthcoming had the issue been properly raised, and it is not without relevance that the respondent alleged that she conducted part-time farming operations on Bokfontein and paid certain farming expenses at a time after the trust had been created. At the very least, these facts are consistent with her having accepted the benefits of the trust, but one is left to speculate on what further information she could have relied upon had the issue been properly raised.

[16] Blame for the failure to raise the issue is not something which can be placed at the door of the respondent. She made the positive averment that she was a beneficiary, to which the trustees replied that although she had been a

beneficiary, she had been removed. If the trustees wished to dispute that the respondent was a beneficiary, it was for them to have raised the allegation that she had been removed before she accepted her nomination. As they now seek to build a case on a foundation not previously laid, they should be precluded from doing so.[3] Although it may be open to a party to raise a point of law which involves no unfairness to the other party and raises new factual issues, a point raised for the first time on appeal on factual considerations not fully explored in a court below should not be allowed.[4]

[17] In the light of these considerations, this court should not now dispose of the appeal by having regard to a point not raised in the court below and in respect of which the relevant facts have not been properly explored in the papers.

[18] Moreover, disposing of the matter on the basis that the respondent had not accepted her benefit, would preclude her from relying on her contention that no matter what the effect of the March 1999 resolution may be, she was nominated as a beneficiary by way of the resolution of 7 December 2004.

[19] In these circumstances, it seems to me to be appropriate to remit the issue whether the respondent is indeed a beneficiary of the trust to the high court for the hearing of evidence. That would enable the parties to place before court whatever evidence they consider is relevant to the issue. Although the respondent suggested a referral should only be made in respect of certain specified issues, in the light of the uncertainty as to the factual matrix under which this issue will be decided, it is probably best to grant an order in broad terms.

[20] In the result, the following order is made:

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[3] *Administrator, Transvaal & others v Theletsane & others* 1991 (2) SA 192 (A) at 195F-196E and 200G.
[4] *Naude & another v Fraser* 1998 (4) SA 539 (SCA) at 558A-E.

1. The applicants are granted leave to appeal to this court.

2. The appeal is upheld to the extent that the order made by the court a quo on 14 January 2009 is set aside and replaced with the following:

‘(a) The application is referred for the hearing of oral evidence on a date to be arranged with the Registrar, on the questions whether or not the applicant, Nicoline Van Der Meulen, is a beneficiary of the Bokfontein Trust or whether she has been validly removed as a beneficiary of such trust.

(b) The evidence shall be that of any witness whom the parties or either of them may elect to call, subject, however to what is provided in para (c) hereof;

(c) Save for witnesses whose evidence is already on affidavit in this application, neither party shall be entitled to call any witness unless:

(i) It has served on the other party at least 15 (fifteen) days before the date appointed for the hearing (in the case of a witness to be called by the applicant), and at least 10 days before such date (in the case of a witness to be called by the respondent), a statement wherein the evidence to be given in chief by such person is set out; or

(ii) The court, at the hearing, permits such person to be called despite the fact that no such statement has been so served in respect of his evidence;

(d) Either party may subpoena any person to give evidence at the hearing whether such person has consented to furnish a statement or not;

(e) The fact that a party has served a statement in terms of (c) above, or has subpoenaed a witness, shall not oblige such party to call the witness concerned;

(f) Within 30 (thirty) days from the date of this order, each of the parties shall make discovery on oath of all documents relating to

the issues referred to in para (a) hereof, which are or have at any time been in the possession or under the control of such party. Such discovery shall be made in accordance with Rules of Court 35(1) and 35(8) and the provisions of Rule 35 with regard to the inspection and production of documents discovered shall be operative;

(g) The incidence of costs incurred up to date shall be determined after the hearing of oral evidence.'

3. The costs occasioned by the application for leave to appeal and the appeal shall be costs in the cause.

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L E LEACH

JUDGE OF APPEAL

APPEARANCES

APPELLANTS:	J W Louw SC (with him J J Botha) Instructed by Van der Merwe Attorneys, Pretoria Naudes Attorneys, Bloemfontein
RESPONDENT:	M Helberg SC Instructed by Louis Benn Attorneys, Pretoria Lovius Block, Bloemfontein