IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, BHISHO)

CASE NO. 580/2014

Reportable	**Yes**

In the matter between:

RATASI GLADYS NKOTOBE	**1st Applicant**
VUYISWA NTOZINI	**2nd Applicant**
NELISWA REGINA QUZA	**3rd Applicant**
XOLANI WELLINGTON BANKU	**4th Applicant**
MZWANDILE WITNESS BAKO	**5th Applicant**
ASANDA BENSTHUMANI	**6th Applicant**
SIPHO ALEX HANISE	**7th Applicant**
and	
MFANELO WRIGHT BENGU	**1st Respondent**
THULISWA MOREEN DYANI	**2nd Respondent**
NTOMBOTHANDO KILA	**3rd Respondent**
MPHUMZI RUMSELL XONXA	**4th Respondent**
THE MASTER OF THE HIGH COURT	**5th Respondent**
MABHONGO PHILLIP BUWA	**6th Respondent**

Trust *– Removal of trustees in terms of section 20(1) of the Trust Property Control Act 57 of 1988 – locus standi of applicants - appointment of beneficiaries of the trust left to the discretion of the trustees – persons who have a right to apply to the trustees to be appointed as beneficiaries lack the necessary locus standi in proceedings in terms of section 20(1).*

Removal of trustees a drastic remedy – not to be ordered lightly – order refused where an alternative and less drastic remedy exists.

JUDGMENT

D VAN ZYL ADJP:

[1] The applicants want the first to fourth respondents **(the respondents)** removed as trustees of the Mhala Development Trust **(the Trust)**. The application is in terms of section 20(1) of the Trust Property Control Act 57 of 1988 **(the Act)**. It provides that a trustee may, **". . . on 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."**

[2] In argument the issues were confined to the following: The first is whether the applicants have the necessary legal standing (*locus standi in iudicio)* to

ask for the removal of the trustees, and if so, whether the applicants have satisfied the court that the removal of the respondents would be in the interests of the trust and its beneficiaries.

[3] The Trust is an *inter vivos* trust. It was created in 2003 by Mxolisi Hamilton, a traditional chief in the Peddie area, and Ntombomzi Vinolia Makinana. The objective of the Trust according to the trust deed is **". . . to administer the assets and / or monies as may be settled on the trust and to conduct all business pertaining thereto in the best interests of the beneficiaries."** (Clause 3) Clause 3.2 further provides that the **". . . main purpose and the object for which the Trust has been constituted is to maximize the benefit to, and interest of, the persons falling under the jurisdiction of Chief Mxolisi Hamilton Makinana . . . by means of such specific aims and objectives as the trustees may determine in their sole discretion from time to time save as for any other provisions as contained in this Trust Deed . . ."**

[4] The founders of the Trust entrusted to the trustees the power to appoint the beneficiaries of the Trust. Clause 1.1.4 of the Trust Deed determines that a beneficiary is **". . . any person who falls under or subjects himself/herself to the jurisdiction of Chief MXOLISI HAMILTON MAKINANA and is selected by**

Trustees after application by him or her and accordingly requires to benefit in any manner in terms of this Trust Deed. Said selection/approval by the Trustees will be evidenced by a certificate to be issued by the Trustees and shall be a final decision."

[5] From a reading of clause 1.1.4 it is evident that while the trust was created to benefit the subjects of Chief Makinana, the mere fact that a person falls with that class of persons does not make him or her automatically a beneficiary. The use of the conjunctive **"and"** in clause 1.1.4 militates against such a construction. To become a beneficiary a person must not only: (a) be a subject of Chief Makinana; but must also be willing to become a beneficiary by (b) applying to become a beneficiary; and (c) must have been selected by the trustees in their discretion. It is common cause that the applicants are subjects of Chief Makinana, and that they have neither made application, nor have they been selected to become beneficiaries. They refer to themselves as **"potential beneficiaries"** of the Mhala Trust and say that they **"are desirous of applying to the Trustees for the purpose of being selected by the Trustees"**, but that as a consequence of the Trustees' failure to convene meetings, they have been unable to do so.

[6] The respondents contend that until such time as the applicants have applied to become beneficiaries, and they have been selected as such by the Trustees, they are not beneficiaries. That they may potentially become beneficiaries of the Trust is insufficient to give them the necessary legal standing to claim the relief they are seeking. The respondents are supported in this argument by an unreported decision of the Supreme Court of Appeal in *Ras & Others v Van der Meulen & Another* (Case No. 635/2009 [1 December 2010] ZASCA 163) where it was held that a person can apply for the removal of a trustee of a trust only if he or she is a beneficiary of that trust. Short of being a beneficiary, a person would have no interest in the trust justifying him or her seeking the removal of a trustee. (at para [9]. See also Pace and Van der Westhuizen **Wills and Trusts (Lexis Nexis)** at page B6.2.4 and B6.3.1.)

[7] The applicants' argument in turn is that the main purpose for which the Trust was created was to benefit persons who fall under the jurisdiction of Chief Makinana. As persons for whose benefit the conditions in the trust deed were provided, they are potential beneficiaries and have a sufficient legal interest in the proper administration of the Trust. In support of this submission the applicants placed reliance on the decision in *Doyle v Board*

of Executors (1999 (2) SA 805 (C)) where it was said at 213B that despite the contractual nature of a trust, it is ". . . **unquestionable that the trustee occupies a fiduciary office. By virtue of that alone he owes the interest good faith towards all beneficiaries, <u>whether actual or potential.</u>"** (My emphasis)

[8] The reference to potential beneficiaries in the *Doyle* judgment must be seen in the context of fact that the court was there dealing with the proposition in *Hofer and Others v Kevitt NO and Others* (1996 (2) SA 402 (C)) that the office occupied by a trustee could not in itself serve as a source of a fiduciary duty, to what was referred to as a **"potential beneficiary."** In both the *Doyle* and *Hofer* decisions the issues dealt with therein arose in the context of what is referred to as a contingent beneficiary, and the terms **"contingent"** and **"potential"** beneficiary are used interchangeably.

[9] A contingent beneficiary is a beneficiary whose rights to the enjoyment of the benefits of the trust property are conditional upon the occurrence of an event such as the death of another (as in the *Hofer* case), the passage of a particular period of time (as in the *Doyle* case), or where the trustee has a discretion, not merely regarding the mode of applying the terms of the trust,

but whether or not to distribute to a particular beneficiary. (As in *Braun v Blann and Botha NNO and Another* 1984 (2) SA 850 (A). See generally Cameron *et al* **Honore's South African Law** of Trust 5th ed at page 557 to 558 and Joubert (ed) **The Law of South Africa (LAWSA)** 2nd edition vol 31 at para 547.)

[10] That the court in the *Doyle* case was dealing with contingent beneficiaries is also evident from its reference to the decision in *Gross and Others v Pentz* (1996 (4) SA 617 (A)). In *Gross* the rights of the appointed beneficiaries to both the income and capital of the trust were subject to the discretion of the trustees and the death of one of the beneficiaries. In that context Corbett CJ proceeded to say that **"While the rights of such beneficiaries are contingent, they do . . . have vested interests in the proper administration of the trust."** (at 628J) The reference to **"potential"** beneficiaries in *Doyle* was therefore clearly intended to refer to those beneficiaries whose rights to the benefits of the trust are contingent as opposed to being vested, and it was tasked to consider the position of contingent beneficiaries in relation to the duty of a Trustee to account to the beneficiaries.

[11] The *Doyle* case therefore dealt with the interest in the administration of the trust of beneficiaries who have a contingent right in the trust property. It cannot serve as authority for the proposition that a person whose expectation is limited to be appointed a beneficiary at the discretion of the trustees, has a sufficient interest in the trust property to ask for the removal of a trustee as envisaged in section 20(1) of the Act. The applicants are not without rights though. In terms of clause 1.1.4, as subjects of Chief Makinana, and the intended beneficiaries of the Trust, the applicants have the right to apply to become beneficiaries of the Trust, and the trustees, whose power of appointment is coupled with a duty, have a concomitant duty to consider their applications. Does this give the applicants *locus standi* to seek the removal of the trustees?

[12] The general principle is that a person who has a direct and substantial interest in the right which is the subject matter of the litigation has the necessary legal standing. (*United Watch & Diamond Company v Disa Hotels* 1972 (4) SA 409 (C); *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A) and *Jacobs en 'n ander v Waks en andere* 1992 (1) SA 521 (A).) In the context of section 20(1) of the Act the subject matter is the right to seek the

intervention of the court in the administration of the Trust property and the obligations of the trustees in relation thereto. The question is whether this right forms part of the applicants' interest in the Trust.

[13] The answer in my view is that it does not. While the applicants have the right to apply to become beneficiaries of the Trust, until such time as they have actually applied, and they have been selected by the trustees in their discretion to benefit from the trust, the applicants have nothing more than an expectation to be appointed beneficiaries, as opposed to a beneficiary who has an expectation to receive a benefit from the Trust property after some future event.

[14] Put differently, the applicants' interest lies in the enforcement of their right acquired in terms of the trust deed to be considered for appointment as beneficiaries, and not in the exercise by the Trustees of their fiduciary and other duties in relation the Trust property which are associated with the public nature of that office, and the supervising function of the court in regard thereto. Their legal interest therefore simply lies in being appointed

beneficiaries, as opposed to an interest in the administration of the Trust property by the trustees as envisaged in section 20(1) of the Act.

[15] I accordingly find that the applicants' do not have a sufficient legal interest in the Trust property to clothe them with *locus standi* in proceedings for the removal of the Trustees.

[16] While this spells the end of the matter, I may add that I am equally not satisfied on the facts as determined by applying the ordinary rules of procedure applicable to motion proceedings, that the applicants have shown that the removal of the trustees will be in the interests of the Trust and its beneficiaries, and that it is the appropriate relief to grant in all the circumstances. (*Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)) Counsel for the respondents acknowledged that on a practical level the activities of the Trust centers around tourism and the use of two properties, what has been described as a tourism and information centre, for that purpose. The respondents do not deny the failure to convene meetings of the trustees. The reason they say is that they are at present engaged in a dispute with one of the co-founders of the Trust,

namely Chief Makinana, over the two properties and the other moveable assets of the Trust. To that end the trustees have instituted proceedings in the High Court wherein they seek to interdict Chief Makinana from *inter alia* interfering with the Trust's use of the properties, and from interfering with the activities of the Trust. These proceedings have not been finalised.

[17] That the failure of the trustees to perform their functions is as a result of this dispute, rather than a failure to act with the care, diligence and skill as envisaged in section 19(1) of the Act, is strengthened by the fact that the trustees, according to the applicants, in the past met regularly at least twice a month, that they diligently performed their functions, and that the two centres were constructed in the discharge of the trustees mandate in terms of the trust deed. Moreover, the applicants have a far less drastic remedy available to them. It is apparent from clause 1.1.4 and 3 of the Trust deed that the founders of the trust must have considerable faith in the trustees by having entrusted them with wide discretionary powers. In *Volkwyn N.O. v Clark en Damant* 1946 TPD 456 at page 464 Murray J said the following: **". . .it is a matter not only of delicacy . . . 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." This equally applies to the office of trustee.

[18] As stated in paragraph [11] above, as the objects of the Trust, the applicants have the right to apply to become beneficiaries thereof. This right, and the power of the trustees to appoint the beneficiaries of the trust, in turn places a duty on the Trustees to consider and decide the application. Should they fail to do so, the court may enforce the terms of the trust deed and compel them to do it. As trustees they are bound to the terms of the trust deed and obligated to give effect thereto. (*Crookes NO and Another v Waston and Others* 1956 (1) SA 277 (A) at 305 C – D and Cameron *op cit* at page 262.) A failure to consider and decide the applicants' application, or for that matter, the creation by the trustees of a situation that makes it impossible for the applicants to make application as envisaged in clause 1.1.4, would give the applicants a right of action, and consequently entitle them to approach the court for appropriate relief.

[19] For these reasons the application falls to be dismissed with costs.

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D VAN ZYL

ACTING DEPUTY JUDGE PRESIDENT

Counsel for the Applicants;	Adv S Nzuzo
Instructed by:	Dandala Attorneys 18 Eales Street KING WILLIAMS TOWN (Ref: SD/xr/MDT/CIV 13)
Counsel for the Respondents:	Adv M Mphahlwa (1st to 4th Respondents)
Instructed by:	Jikwana Nginda & Associates c/o Messrs Losi & Co. 40 Eales Street KING WILLIAMS TOWN (Ref: HC/CIV/754)

Date Heard: 07 May 2015

Judgment Delivered: 15 May 2015