THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 334/18

In the matter between:

JOAN CYNTHIA GRIESSEL NO	**FIRST APPLICANT**
SHIRLEY ANN VAN WYK NO	**SECOND APPLICANT**
CARYN SCHUTZ NO	**THIRD APPLICANT**
JOAN CYNTHIA GRIESSEL	**FOURTH APPLICANT**
SHIRLEY ANN VAN WYK	**FIFTH APPLICANT**
DE VILEBOIS ETIENNE DE KOCK	**SIXTH APPLICANT**
CELESTE MARIE DE KOCK	**SEVENTH APPLICANT**
MANYELETI (PTY) LTD	**EIGHTH APPLICANT**
and	
HAROLD LEE DE KOCK	**FIRST RESPONDENT**
THE MASTER OF THE HIGH COURT OF SOUTH AFRICA PRETORIA	**SECOND RESPONDENT**

Neutral citation: *Joan Cynthia Griessel NO & others v De Kock* (334/18) [2019] ZASCA 95 (6 June 2019)

Coram: Navsa ADP and Leach, Majiedt and Molemela JJA and Davis AJA

Heard: 23 May 2019

Delivered: 6 June 2019

Summary: Discretionary trust – trustees having power to select beneficiaries from listed potential beneficiaries - whether potential beneficiary acquired rights capable of protection.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Bam AJ sitting as court of first instance).

1 The application for leave to appeal is granted.

2 The appeal succeeds only to the limited extent, reflected in para 3 of this order.

3 The order of the court a quo is set aside and replaced with the following:

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

3.2 The first, second, third and ninth respondents are ordered to pay the costs of the application, including the costs occasioned by the employment of two counsel, jointly and severally, the one paying, the others to be absolved.'

4 Each party is to pay its own costs of the appeal.

JUDGMENT

Molemela JA (Navsa ADP and Leach and Majiedt JJA and Davis AJA concurring)

Introduction

[1] This is an application for leave to appeal, referred for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013. The parties were directed to be prepared, if called upon to do so, to present oral argument in relation to the merits. We heard submissions both on the application for the leave to appeal and the merits. The background is set out hereunder.

Background facts

[2] In 1999, two sisters created an *inter vivos* trust known as the Arathusa Family Trust (the trust). The only assets of the trust are all the shares in the eighth applicant, a company called Manyeleti (Pty) Ltd (the company), which owns a farm that is part of a game reserve. The three trustees appointed in terms of the trust deed were the two sisters (first and second applicant) and the third applicant, a chartered accountant who is an independent trustee. The trust deed gave the trustees the power to, within their discretion, select beneficiaries from time to time from amongst those described as 'potential beneficiaries'. All the potential beneficiaries had been afforded the right to visit the farm with their families on vacation on a rotational basis.

[3] A difference of opinion over the development of the farm for commercial use resulted in acrimony between the first respondent and the rest of the family. The trustees then resolved to amend the trust deed. The effect of the amendment was that the first respondent was removed as a beneficiary in the trust. Aggrieved by his purported exclusion as a beneficiary, the first respondent approached the high court claiming re-instatement of his rights as a beneficiary. That litigation was settled on the basis that the purported amendment of the trust was to be regarded as 'of no force and effect and invalid'. The settlement agreement was made an order of court on 17 February 2016.

[4] Pursuant to the settlement of that dispute, the first respondent, through his attorneys, required the applicants to confirm that his right to visit the farm with his family on a rotational basis would be restored. What followed was an unpleasant exchange of correspondence by their legal representatives. The parties could not

reach agreement on the effect of their settlement agreement and of the first respondent's rights as a beneficiary in terms of the trust deed. With a view to resolving the impasse, the first respondent instituted fresh litigation in the Gauteng Division of the High Court, Pretoria (Bam AJ) (the court a quo). In the intervening period, the first applicant resigned both as a trustee of the trust and as a director of the company. The first respondent's siblings, the sixth and seventh applicants, were named as the first applicant's successors both as trustees of the trust and directors of the company. As at the time of the litigation instituted before the court a quo, the Master had not yet issued the sixth and seventh applicants with letters of authority, resulting in the first applicant still being cited as a party in her capacity as a trustee. The three trustees were cited as the first, second and third respondents. The two sisters were further cited in their personal capacities as the fourth and fifth respondents. The designated directors of the company were cited as the sixth and seventh respondents. The Master was cited as the eighth respondent and the company as the ninth respondent. All except the Master opposed the application.

[5] The relief sought in the court a quo was framed as follows in the Notice of Motion:

'1.1 That the Applicant's vested rights, as a beneficiary, under the Arathusa Family Trust be reinstated. Without derogation from the generality of the aforegoing, that the Applicant's rights of access to the property known as the farm Arathusa 241, Registration Division KU, district Pilgrims Rest, Mpumalanga, be fully restored, as it existed and were exercised until 14 January 2013;

1.2 That the First, Second and Third respondents be removed as Trustees of the Arathusa Family Trust and that the [Master] be requested to appoint Independent and impartial Trustees for the Arathusa Family Trust;

1.3 Costs of suit; and

1.4 Further and/or alternative relief.'

[6] An *in limine* issue that was raised in the court a quo was the failure of the first respondent (applicant in those proceedings) to cite the third respondent in her

personal capacity. It was submitted before that court that since the first respondent, inter alia, sought to have all trustees removed, they should all have been cited in their personal capacities, over and above being cited in their representative capacities. Only the first and second applicants had been cited in a dual capacity. It was argued that failure to cite the third respondent in her personal capacity constituted a material non-joinder which, on its own, should result in the dismissal of the application. The court a quo concluded that there was non-joinder and granted an order in terms of which the third applicant was, in her personal capacity, joined as the tenth respondent in the proceedings.

[7] In the court a quo, the basis of the trustees' opposition of the matter was that the first respondent was only a 'potential beneficiary' in the trust, had no vested right in the trust property and, accordingly, had no rights that he could protect. The court a quo found that the trustees had unlawfully discriminated against the first respondent. It reasoned that the law did not allow the trustees to withhold the benefit enjoyed by the other potential beneficiaries from the first respondent simply because the rest of the family had issues with him. It then decided in favour of the first respondent and granted the following order:

'1. The third respondent is joined in this action in her personal capacity as Tenth Respondent.

2. The first, second, third and ninth respondents are ordered to forthwith reinstate the applicant's rights as a beneficiary under the Arathusa Trust IT 4883/99, in particular, equal access to and enjoyment of the farm Arathusa 241 KU, Pilgrims Rest in Mpumalanga as was the practice before 14 January 2013.

3. The eighth Respondent is ordered to appoint an independent co-trustee in consultation with the respondents and other interested parties such that at any given time there are two independent trustees of the Arathusa Family Trust.

4. The first, second, third and ninth respondents are ordered to pay the costs of this application on a scale as between attorney and client, including the costs of two counsel jointly and severally, the one paying, the others to be absolved.'

[8] The issues for determination before this court are: (i) whether leave to appeal should be granted and, in the event that leave is granted; (ii) whether the first respondent, as a beneficiary of a discretionary trust, acquired rights as against the trust which were capable of protection; (iii) and if so, whether the court a quo was correct in granting an order reinstating the first respondent's access to the farm, directing the Master to appoint an additional trustee, and issuing a punitive costs order.

[9] Although the applicants' locus standi was initially disputed by the first respondent, it was no longer a live issue before us. Consequently, nothing more needs to be said about it. Rather, the focus shifted to the nature of the rights, if any, the first respondent had acquired in relation to the trust property.

[10] The salient provisions of the Trust Deed are as follows:

'3. DEFINITIONS

In this deed, unless the context otherwise requires, words importing the singular shall include the plural and words importing the masculine gender shall include females, and vice versa; the following expressions used in this deed shall have the meaning hereinafter assigned to them unless the context shall clearly otherwise require, namely:

3.1 "beneficiary" shall mean that person or those 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 or both under this trust, from amongst the following potential beneficiaries:

3.1.1 Shirley Ann de Kock

3.1.2 Joan Cynthia Griessel

3.1.3 Harold Lee de Kock

3.1.4 De Villebois Etienne de Kock

3.1.5 Celeste Marie de Kock

3.1.6 any trust established for the benefit of any of the aforementioned.

. . .

5.2 The Trustees shall have the power, in their entire discretion from time to time and at any time to pay to, or to apply the whole of any part of the income of the trust fund for the general advantage or anyone or more of the beneficiaries as the Trustees may decide, and

in such proportions and from such source as the Trustees may determine, and any income so paid or applied shall accrue to the beneficiary.

. . .

9. VESTING

The right of any beneficiary to payment of any income or capital under this trust shall, unless the Trustees otherwise determine, vest in such beneficiary only on the date of such payment or transfer. “Payment” and “transfer” shall include all forms of transfer of possession or ownership of trust assets, but shall not include the crediting of a loan account in the name of the trust or a loan account which a beneficiary has with the trust.

. . .

12. POWER OF TRUSTEES

The Trustees shall administer the trust fund, and for this purpose shall have unrestricted powers of dealing with the trust fund as if they were beneficially entitled thereto; without limiting the generality of their authority, it is recorded that they shall have power:

12.1 to retain or to realise, invest and re-invest the trust fund in such manner and to such property, movable or immovable, whatsoever and where ever, in any part of the world, as they deem fit, regardless of limitations or restrictions imposed by statute or otherwise as to the character of investments to be made by Trustees, and whether income producing or speculative or not and subject to such conditions as they may deem fit;

12.2 to acquire by loan, purchase or otherwise, any assets whatsoever on such terms as to payment as they may deem fit but without the authority to pledge any of the trust assets for such purposes as the Trustees may deem fit;

12.3 to buy, sell, lease, let insure, alter, maintain, improve, turn to account, amortise, exchange or alienate any property, movable or immovable;

12.4 to lend money or other assets, whether upon security or not to any beneficiary upon such terms and conditions as may seem expedient to the Trustees;

12.5 to allow any beneficiary free use and enjoyment of any property controlled by them or forming part of the trust fund, whether movable or immovable, upon such conditions, if any, as to maintenance, insurance, rates and taxes and other expenses as they may deem fit. . . .

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In addition, a general power was granted to the trustees in the following terms:

‘Generally, it is the intention of the Settlors that the Trustees are in fact to have the same absolute control over and unfettered powers of investment and re-investments of the trust assets as if, they had been absolutely and beneficially entitled to the trust capital [except] in so far as the trust deed specifies otherwise and they are specially indemnified against any

claim arising from the loss of income or capital as a result of the bona fide exercise of the discretion hereby granted to them.'

[11] It is trite that a trust is not a legal person. An *inter vivos* trust is governed by the terms of a trust deed as well as the provisions of the Trust Property Control Act 57 of 1988. In its strictly technical sense, a trust is a legal institution *sui generis*.[1] In *Lupacchini NO & another v Minister of Safety and Security,*[2] Nugent JA observed that

'A trust that is established by a trust deed is not a legal person – it is a legal relationship of a special kind that is described by the authors of *Honoré's South African Law of Trusts* as "a legal institution in which a person, the trustee, subject to public supervision, holds or administers property separately from his or her own, for the benefit of another person of persons or for the furtherance of a charitable or other purpose . . . ."'

[12] A significant amount of effort was dedicated by the parties, both in the affidavits that served before the court a quo and the arguments raised in the court a quo and before us, on the question whether or not the right of access to the farm which was previously afforded to the first respondent was a vested right. The first respondent contended that his visits to the farm amounted to the free use and enjoyment of a property controlled by the trustees as contemplated in clause 12.5 of the trust deed. Relying on the provisions of clause 9 of the Trust Deed, he contended that his visits to the farm constituted possession of a trust asset, which, in turn, resulted in a vesting of rights, thus entitling him to approach the court a quo to protect those rights. He argued that his description as a potential beneficiary in the trust deed was therefore immaterial.

[13] Relying on clause 3.1 of the trust deed, which grants the trustees the discretion to select beneficiaries from a list of potential beneficiaries, the trustees were at pains to point out that they had not yet selected beneficiaries. Since the

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[1] See in this regard: *Braun v Blann and Botha NNO & another* 1984 (2) SA 850 (A) at 859D-H; *Commissioner for Inland Revenue v Friedman & others NNO* [1992] ZASCA 190; 1993 (1) SA 353 (A) at 370D-H.

[2] *Lupacchini NO & another v Minister of Safety and Security* [2010] ZASCA 108; 2010 (6) SA 457 (SCA) para 1.

beneficiaries had not yet been selected, so the argument went, the first respondent remained a potential beneficiary who merely had contingent rights and had no vested rights worthy of protection. They argued that, notwithstanding the fact that the first respondent and other potential beneficiaries had previously been allowed to occasionally occupy the farm, no vesting of rights was consequent upon that occupation, as the farm in question was owned by a separate entity, namely the company. The company and not the trust, so the argument went, had exclusive right to allow persons access to the farm.

Discussion

[14] It is convenient to start with the last argument. It is common cause that the trust is the sole shareholder of the company, which is a registered private company. Given that scenario, the trust, *qua* shareholder, has voting rights in the company. It is trite that a trustee is the owner of the trust property for purposes of the administration of the trust.[3] Equally trite is that where more than one trustee have been specified in the trust deed, they must act jointly in the fulfilment of the objects of a trust.[4] Given all these well-established principles, it cannot be gainsaid that the first, second and third applicants, as trustees, jointly exercise the voting rights in the company, which have been conferred by the shares owned by the trust.[5] They therefore make decisions pertaining to the farm, including granting access rights. The upshot of this finding is that there was no need for the court a quo to pierce the corporate veil as it purported to do.

[15] I turn now to determine whether there was a right that the first respondent was entitled to protect. The first respondent's reliance on clause 9 as support for his proposition that rights became vested by virtue of him having been granted possession of the trust asset (the farm) is misplaced. Clause 9 must be read in the context of the other provisions of the trust deed and in relation to its purpose. It does not, on its own, confer a vested right on any beneficiary. It is trite that contingent

[3] Ibid.
[4] *Hoosen NO & others v Deedat & others* [1999] ZASCA 49; 1999 (4) SA 425 (SCA) paras 23, 24 and 26.
[5] *See Jowell v Bramwell-Jones & others* [2000] ZASCA 16; 2000 (3) SA 274 (SCA) para 14.

rights are generally not subject to tax.[6] However, when a trustee exercises the discretion by paying the beneficiary either income or capital, the beneficiary thereby acquires a vested right in the money paid over, which becomes taxable.[7] Clause 9 was therefore intended to distinguish between a loan and other income that is distributed to beneficiaries in an attempt to ensure that a beneficiary is not saddled with a tax liability when a loan was advanced to him or her.

[16] It is undisputed that the trust that was created falls in the category of discretionary trusts, since the trustees have been given the right, within their discretion, to select beneficiaries from a list of potential beneficiaries. It follows that none of the potential beneficiaries can claim rights in perpetuity, as their rights are merely contingent.[8] The question is whether the first respondent, as a potential beneficiary in a discretionary trust, has rights that he could ask the court a quo to protect. The judgment of this court in *Potgieter & another v Potgieter NO & others*[9] is instructive, particularly at para 28, where it is stated that:

'I do not think it can be gainsaid that at the time of the variation agreement on 21 February 2006, the appellants enjoyed no vested rights to either the income or the capital of the trust. They were clearly contingent beneficiaries only. But that does not render their acceptance of these contingent benefits irrelevant. The respondents referred to no authority that supports any proposition to that effect and I cannot think of a reason why that would be so. The import of acceptance by the beneficiary is that it creates a right for the beneficiary pursuant to the trust deed, while no such right existed before. The reason why, after that acceptance, the trust deed cannot be varied without the beneficiary's consent, is that the law seeks to protect the right thus created for the first time. In this light, the question whether the right thus created is enforceable, conditional or contingent should make no difference. The only relevant consideration is whether the right is worthy of protection, and I have no doubt that it is. Hence, for example, our law affords the contingent beneficiary the right to protect his or her interest against mal- administration by the trustee . . . .'[10]

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[6] *Estate Munro v CIR* 1925 TPD at 693; *Hilda Holt Will Trust v CIR* 1992 (4) SA 661 (A).
[7] *Estate Munro v CIR* ibid at 702; *De Beer v CIR* 1932 CPD 443 at 448; *Hilda Holt Will Trust v CIR* ibid.
[8] *CIR v Sive's Estate* 1955 (1) SA 249 (A).
[9] *Potgieter & another v Potgieter NO & others* [2011] ZASCA 181; 2012 (1) SA 637 (SCA).
[10] Ibid para 28.

[17] During an exchange with the bench, counsel for the first respondent was referred to the afore-mentioned *dictum* and asked whether, given the common cause fact that all the potential beneficiaries, including the first respondent, had previously been permitted to have a vacation at the farm, it was necessary to decide whether the first respondent had vested rights or not. Counsel ultimately conceded that such a determination was not necessary. That concession was correctly made. It is evident from the *dictum* in *Potgieter* that even beneficiaries who have contingent rights are entitled to protection. Trustees have an obligation to treat all the beneficiaries even-handedly. As a beneficiary, the first respondent had a right to be protected against arbitrary and discriminatory treatment.

[18] In this matter, the privilege of having a vacation on a farm situated in a game reserve was taken away from the first respondent while the other potential beneficiaries continued to enjoy the same rights. That constituted differential treatment without a justifiable basis. This was evidently prompted by the attitude of the first respondent towards the development of the farm for commercial purposes, which, over the years, increased to the point that the first respondent considered the second applicant, his own mother, to be openly hostile towards him.

[19] The role of a trustee in administering a trust calls for the exercise of a fiduciary duty owed to all the beneficiaries of a trust, irrespective of whether they have vested rights or are contingent beneficiaries whose rights to the trust income or capital will only vest on the happening of some uncertain future event.[11] While discrimination on the basis of need may, under certain circumstances, be justified by the needs of a particular beneficiary,[12] the trustees did not advance 'need' as the reason for treating the first respondent less favourably. It is clear from the averments made in the affidavits and the tenor of the attorneys' correspondence that he was regarded as obstructive and contrarian. That may be so, but that does not suffice as justification for treating him less favourably. This therefore means that the trustees unfairly discriminated against him. It follows that the court a quo was correct in re-instating his right to visit the farm on a rotational basis.

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[11] *Doyle v Board of Executors* 1999 (2) SA 805 (C).
[12] E Cameron *et al Honore's South African Law of Trusts* 5 ed (2002) Thirteenth Impression 2016 at 316.

[20] I turn now to the ancillary orders granted by the court a quo. As regards the issue of joinder, the applicants contended that the granting of joinder of the third applicant in her personal capacity was irregular, as it was not properly applied for but was only sought informally in argument before the court a quo. It is common cause that the court a quo ultimately did not make any order against the third applicant in her personal capacity. Nothing, therefore, turns on this aspect.

[21] With regards to the order directing the Master to appoint an additional trustee, I find the following remarks apposite. '. . . [I]t is a matter not only of delicacy (as expressed in *Letterstedt's* case [*Letterstedt's 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 indicates that the sufficiency of the cause for removal is to be tested by a consideration of the interests of the estate. . . .'[13]

[22] Although these remarks were made in the context of a removal of a trustee from office, they are, by parity of reasoning, apposite in relation to a court's decision to *mero motu* direct the Master to appoint an additional trustee. It is clear that there was a dispute of fact pertaining to the first respondent's allegation that the trustees did not properly attend to the affairs of the trust to the point where a letter of demand was issued against the trust. The court a quo merely stated that the appointment of another independent trustee might quell acrimony between the parties and restore the role of the trustees to what it should be. The third respondent is a chartered accountant by profession and is therefore qualified to properly understand the responsibilities of trusteeship.[14] In the absence of facts conclusively showing that the

[13] *Volkwyn NO v Clarke and Damant* 1946 WLD 456 at 464.
[14] *Land and Agricultural Development Bank of SA v Parker & others* [2004] ZASCA 56; [2004] 4 All SA 261 (SCA) para 36.

third respondent would not be able to play that role, there is simply no legal basis for an order directing the Master to appoint an additional trustee. The need for the appointment of an additional independent trustee was simply not established in this matter. In any event, in terms of the trust deed decisions must be arrived at consensually. That would mean that the family and all the potential beneficiaries have to reach agreement, which obviates any need for the appointment of a further trustee.

[23] It was argued on behalf of the company that a costs order was granted against it despite the fact that no relief was sought against it. It is evident from the papers that this is a misstatement of the facts. The correct position is that the company was cited as a respondent in the court a quo. In his founding affidavit, the first respondent stated that he would not be asking for relief against certain parties unless they opposed the relief without success. These were the company as well as the sixth and seventh applicants. All these applicants made common cause with the trustees in opposing the first respondent's application and were unsuccessful. Since there is a general rule that costs follow the cause, there is nothing untoward in mulcting them with costs. The question remaining is whether a punitive costs order was necessary.

[24] It is trite that the determination of an award of costs is discretionary. That discretion, however, must be exercised judicially. The first respondent did not at any stage pray for a punitive costs order. The court a quo has not advanced any reason for mulcting the applicants with a costs order on a punitive scale. In the absence of any reasons justifying the granting of such an order, the ineluctable inference is that the court a quo did not exercise its discretion judicially in that regard. A failure to exercise a discretion amounts to a material misdirection entitling an appellate court to interfere.[15] As there are no facts justifying the granting of a punitive costs order falls to be set aside.

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[15] *Trencon Construction Limited v Industrial Development Corporation of South Africa Limited & another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC).

[25] In relation to the costs of appeal, cognisance has been taken of the fact that the first respondent sought to defend the unsustainable punitive costs orders made by the court a quo. Given the finding that such orders are to be set aside, it follows that the applicants have had a measure of success in the appeal. Thus, the appropriate order is for each party to pay own costs.

[26] For all the above reasons, I make the following order:

1 The application for leave to appeal is granted.

2 The appeal succeeds only to the limited extent, reflected in para 3 of this order.

3 The order of the court a quo is set aside and replaced with the following:

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

3.2 The first, second, third and ninth respondents are ordered to pay the costs of the application, including the costs occasioned by the employment of two counsel, jointly and severally, the one paying, the others to be absolved.'

4 Each party is to pay its own costs of the appeal.

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M B Molemela
Judge of Appeal

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