

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2023-130579

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

SIGNATURE

.....
...04/01/2024....
DATE

In the matter between:

LOUISE ANN DE LUCA

FIRST APPLICANT

PETER JOHN DE LUCA

SECOND APPLICANT

LINDA MARGARET DE LUCA

THIRD APPLICANT

and

BRAZILIE FARMS (PTY) LTD

FIRST RESPONDENT

PAUL ALDO DE LUCA N.O.

SECOND RESPONDENT

ANDREW ALDO DE LUCA N.O.

THIRD RESPONDENT

LINDA MARGARET DE LUCA N.O.

FOURTH RESPONDENT

PAUL ALDO DE LUCA

FIFTH RESPONDENT

ANDREW ALDO DE LUCA

SIXTH RESPONDENT

MONDZO CAMPS & CONSERVATION (PTY) LTD SEVENTH RESPONDENT

JUDGMENT

MANOIM J:

“All happy families are alike: each unhappy family is unhappy in its own way”

Leo Tolstoy, “Anna Karenina”

[1] This application concerns an unhappy family. They are all descendants of the late Aldo de Luca who in the 1960’s bought a game farm known as the Brazilie Farm that is adjacent to the Kruger National Park. In 2005, as part of his estate planning, he transferred the shares in the farm, which was then owned by the first respondent (“the company”), to a family trust he had set up. The Trust now owns 100% of the company, which in turn owns 100% of the farm.

[2] The three applicants are all children of the late Aldo and are all beneficiaries of the trust. Given that de Luca is the common surname of most of the litigants in this matter, I will from now on refer to them by their first names. The first two applicants, Louise, and Peter are siblings and beneficiaries of the Trust. The third applicant is their sister Linda, who is also a beneficiary of the Trust but unlike them also a trustee of the Trust. Hence, she has also been cited in this capacity as the fourth respondent.¹ The second respondent, Paul, is another sibling of the applicants, from whom they have become estranged. He is both

¹ The founding affidavit refers to her as the fourth applicant, but this is an obvious error.

a beneficiary and trustee of the Trust. The third respondent is Paul's son Andrew, who is also a trustee of the Trust and is presently the only member of the family who lives on the farm and apparently runs it. Paul and Andrew are cited in both their personal capacities and those as trustees.

- [3] In addition to being trustees Paul and Andrew are the sole directors of the first respondent which is the company that owns the farm.
- [4] The division of the family between applicants and respondents relates to an ongoing feud control over the Trust that has found its way into the courts on several occasions. There is even a dispute over whether some of this litigation has been settled. But it is common cause that at least one case is still pending which relates to the validity of Andrew's appointment and the right of Peter to be appointed or to nominate a descendant as a trustee. This case has now been set down for trial and is due to commence in the Gauteng High Court in August 2024. ("the August trial"). It is of indirect to the current matter because if the applicants prevail in the August trial, they or their nominees may constitute a majority of the trustees of the Trust.
- [5] What has triggered this application is a decision by Andrew and Paul, in their capacity as directors of the company, to enter into a fifteen-year notarial lease agreement with the seventh respondent, Mondzo Camps & Conservation (Pty) Ltd, to establish a camp on the farm with certain rights of access for their visitors. The lease was negotiated in March 2023 and the lease was notarised on 8 May 2023. The applicants did not know about this lease at the time.

[6] It came to their attention indirectly. As a result of one of the previous court applications the Master had appointed an attorney, Charl Du Plessis, in October 2023, to investigate the Trust. During his investigation, Du Plessis asked the applicants if they were aware of the lease agreement. The applicants claim they had no knowledge of it until then. This triggered the present application.

[7] The relief sought is that:

“That the first, fifth and sixth respondents are interdicted from allowing the seventh respondent occupation of Portion 1 of Farm Brazilie No 48 Bushbuckridge pending the outcome of the trial under case number 2015/42031 [“the August trial”].

[8] The lease was initially meant to commence on 1 January 2024. Hence the original urgency of this application. The applicants argue that once the lease commences it will be difficult to subsequently evict Mondzo and there is likely to be considerable damage to the property due to the erection of the contemplated camp. Hence the need to have the interim relief decided before the lease commences. Subsequently, Paul and Andrew then reached an agreement with Mondzo to postpone the commencement date to March 2024. Hence Paul and Andrew (from now on the “opposing respondents”) contend the application is no longer urgent and should be struck on that basis.

[9] However, I am sympathetic to the applicants’ argument that even if commencement date is only 1 March 2024, it is unlikely this matter would be heard on the ordinary opposed roll before then, and so the applicants would not

succeed in obtaining substantial relief in due course as the lease would have commenced.²

[10] The opposing respondents also take a point on jurisdiction. They argue that none of the respondents, nor the farm, are within the jurisdiction of this court and hence it does not have effective jurisdiction. However, I consider this court does on the basis that the interim interdict sought in this matter is pending the August case, a case to be heard in this court's jurisdiction. This court thus has effective jurisdiction in relation to the nature of the relief sought.

[11] I will also assume for the benefit of the applicants' that I can pierce the corporate veil, to conclude that as directors who are also trustees of the Trust, the directors' decisions must be made in the best interests of the beneficiaries.³

[12] But even if the applicants can overcome these hurdles the question is whether they have made out a case for an interim interdict. The opposing respondents contend that they have not, and they fail at the first requirement of establishing a *prima facie* right.

[13] This is how the applicants have framed this issue in the founding affidavit.

"The applicants have a prima facie right to the use and enjoyment of the whole farm free from commercial activity and free from occupation by a third party whose lease prohibits the applicants

² See *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* (11/33767) [2011] ZAGPJHC 196 (23 September 2011 paragraph 9).

³ See *De Kock v Griessel NO and Others* (50776/16) [2017] ZAGPPHC 1163 (23 October 2017)) paragraphs 24-26.

from entering that part of the farm that the seventh respondent is using.” (“Emphasis provided”).

- [14] Since this right derives from their status as beneficiaries of the Trust it is important to consider what the Trust deed says. In the Trust deed, the main purpose is described as follows:

“The main Purpose of the Trust is the acquisition of the farm BRAZILIE and any additional land for the purposes of nature conservation and for the utilization thereof by the descendants of Aldo Giovanni De Luca and their extended families.”

- [15] From this statement it is clear that the Trust has two objectives in respect of the farm: (i) the purpose of nature conservation and (ii) the utilisation for the benefit of the descendants of Aldo.

- [16] The applicants are all descendants of Aldo – this is common cause. They have for sometime, been denied access to the farm, although this is disputed. The tension between them and the opposing respondents is that the latter are concerned with the upkeep of the farm which has ongoing expenses. Because the farm is a game farm and has an open fence arrangement with the Kruger National Park, it is obliged to perform certain nature conservation obligations. These obligations are ongoing and expensive. The opposing respondents contend that the applicants have failed to contribute to these expenses and hence denying them access is justified until they do so. But that is not part of this dispute. The real question is whether the lease agreement was in violation of the beneficiaries’ rights to use and enjoyment of the whole of the farm. What

the opposing respondents contend is that the lease with Mondzo was necessary to pay for the upkeep of the farm given that it had to meet these expenses. Moreover, on their version the lease will only result in minimal use of the farm property.

[17] They state the following:

“The camp's area is approximately 0.46% of the farm's space. Relatively speaking its footprint will be minimal. From a conservation perspective this is ideal;”

[18] And they also state that this usage will be minimal:

“The camp is almost entirely movable and portable. It will be largely made up of fully portable tents that have a limited impact on the surrounding bushveld. We have been advised that even the pool area will be movable;”

[19] Thus, applying *Plascon-Evans* I must accept this version. The opposing respondents have established that the lease will be minimally invasive of the applicants' right to the use and enjoyment of the farm. If the proposed camp's physical structure can easily be dismantled and constitutes such a minimal proportion of the property (less than 1%) it is hard to see how the applicants' rights are violated, unless, as they contend, they have a right which extends over the whole of the property. But there is nothing in the Trust deed that suggests that this right of enjoyment, to this extent, exists at all, let alone to the exclusion of any other right which trustees may exercise to enter into

commercial arrangements to provide for the upkeep of the property which indirectly contributes to the farm's contribution to nature conservation. The lease to a conservation company for tourism is not inconsistent with the objectives of the Trust deed. Moreover, the trustees are given explicit powers to enter into leases, so the mere conclusion of a lease with a conservation company is not inconsistent with their powers or with the objects of the Trust.

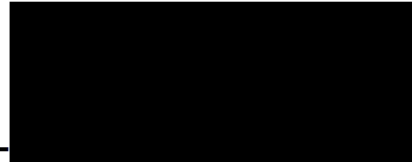
[20] The applicants may well be unhappy with the manner in which Paul and Andrew are running the Trust without ever consulting them, but that is not the subject matter of the present application. The notarial lease is. The applicants have not established that their right to use and enjoyment of the farm extends to the whole farm. Hence, they have not established a *prima facie* right on the present papers and their application fails.

[21] The opposing respondents are entitled to their costs. They sought attorney client costs and the costs of two counsel. However, I do not consider they are entitled to any more than party and party costs and the costs of one counsel. Their conduct in the running the Trust without consultation with the beneficiaries and in a manner that is not transparent, whilst I cannot say with any certainty may have obviated this litigation, has at least partially contributed to its length and urgency.

ORDER:-

[22] In the result the following order is made:

1. The application is dismissed.
2. The second and third respondents are entitled to their costs on a party and party basis, confined to the costs of one counsel.



N. MANOIM

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

JOHANNESBURG

Date of hearing: 20 December 2023

Date of Judgment: 04 January 2024

Appearances:

Counsel for the Applicant:

R Stevenson

Instructed by:

Boon Schreiber-Maritz Attorneys

Counsel for the Respondent:

S. Aucamp and

CJ Smith

Instructed by:

Paterson Attorneys

Type