



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: 10754/2022P

In the matter between:

BENJAMIN JACOBUS VORSTER N.O

APPLICANT

and

FELIX KHULEKANI BUTHELEZI

1ST RESPONDENT

IPHRAIM MFUNENI ZUNGU

2ND RESPONDENT

NONTOBEKO PRECIOUS ANGELA BUTHELEZI

(first applicant for leave to appeal)

3RD RESPONDENT

NOMUSA ZETHU QUNTA

(second applicant for leave to appeal)

4TH RESPONDENT

MABUTHO MIYA N.O

5TH RESPONDENT

CYNTHIA THEMBA KHUMALO N.O

6TH RESPONDENT

THE MASTER OF THE KWAZULU-NATAL HIGH COURT

7TH RESPONDENT

PIETERMARITZBURG

ORDER

The following order is granted:

The third and fourth respondents' application for leave to appeal is dismissed with costs on the attorney and client scale, such costs to be paid jointly and severally, the one paying the other to be absolved.

JUDGMENT

E Bezuidenhout J

[1] The third and fourth respondents (the respondents) applied for leave to appeal against my judgment delivered on 13 October 2023. The applicant, Mr B J Vorster N.O., opposed the application. Due to me having been on circuit during November 2023 and counsels' unavailability during the December 2023 and January 2024 recess, the application was only heard on 26 January 2024.

[2] The facts of the matter are set out in detail in my judgment and will not be repeated, suffice to say that the applicant sought an order relating to the suspension of the first to fourth respondents as trustees of the Ubunje Be-Afrika Development Trust (the trust), which order was granted.

[3] The grounds of appeal are set out in detail in the notice of appeal and can be summarised as follows:

1. It was stated that the applicant sought final relief against the first to fourth respondents on papers which contained a number of material disputes of fact. Such disputes of fact included:

- 1.1 The nature of the payment of the R10 million made by the Peaker's Trust to the trust.
- 1.2 Which trustees made the decision to disburse the funds received from the Peakers Trust.
- 1.3 When the decision was made and the written resolutions and/or minutes of the decision.
- 1.4 How the amount of each payment to each different trustee or beneficiary was arrived at.
- 1.5 The reason for the payment to each trustee.

It was submitted by the respondents that each of the above facts are critical to a finding that the first to fourth respondents collectively made a decision to pay out monies to the detriment of the beneficiaries. It was also submitted that the disputes are incapable of being resolved on the papers and ought to have been referred to the hearing of oral evidence.

2. In the alternative to the above, it was stated that all disputes of fact should have been resolved by applying the test in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.¹ It was stated that I failed to determine the legal disputes based on those facts as stated by the respondents, together with those facts stated by the applicant that are admitted by the respondents. In particular, in finding that the sole or primary purpose of the trust was to disburse funding to the farming beneficiaries, when the evidence of the respondents was that:

- 2.1 When the trust changed from the Uphaphe Empowerment Trust to the Ubunye BE Afrika Development Trust, it changed from a trust which received grants in aid for disbursement to farmers in Northern KwaZulu-Natal, to a trading trust. The trust was no longer just a charitable trust, but also a business trust – established to promote businesses.
- 2.2 The trust no longer operated exclusively as a distributor of grants in aid like a non-profit organisation. It also supported the non-farming beneficiaries (hereinafter referred to as ‘the business beneficiaries’) to develop business activities to alleviate poverty by creating jobs in profitable businesses.
- 2.3 Clause 13.4 of the trust deed provided for the payment of trust funds to the business beneficiaries.
- 2.4 The business beneficiaries effectively worked for the trust, performing an assortment of tasks and obligations towards the trust, which were set out in the answering affidavit.
- 2.5 The business beneficiaries and trustees worked together to provide administrative and logistical support to the secondary (farming) beneficiaries. This took the form of assisting farmers to prepare business proposals and plans, to corporatize themselves and to apply for funding.
- 2.6 The business beneficiaries also prepared numerous bids for tenders on behalf of

¹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

the trust at their cost and through their labour, details of which were set out in the answering affidavit.

2.7 The trust also provided support and assistance to the businesses of the business beneficiaries in various sectors of the economy.

3. It was also stated that I ought to have held that the trustees were permitted to disburse funds to the business beneficiaries, whose work for the trust was done to support and develop farmers in the designated area. The disbursement of trust funds to these beneficiaries falls squarely within the defined purposes of the trust as set out in clauses 2.2.1; 2.2.2.1; 2.2.2.3; and 2.2.2.4.

4. It was further stated that I erred in finding that the disbursement of these funds to the business beneficiaries was detrimental to all of the beneficiaries, when the work of the business beneficiaries was in pursuance of the goals of the trust, being the support and development of farming in the regions.

5. It was also stated that I erred in finding that the payments made to the business beneficiaries did not promote the objects of the trust, which included the alleviation of poverty and creation of sustainable businesses, when the evidence by the respondents was that all the work of the (non-farming) beneficiaries and for which the funds were disbursed, were directed at these objects.

6. In relation to the payment by the Peakers Trust of R10 million it was stated that:

6.1 No affidavit was placed before the court on behalf of the Peakers Trust. All of the evidence about the nature and purpose of the payment of the R10 million was hearsay.

6.2 The impetus and the terms of the payment by the Peakers Trust was a key consideration in reviewing the decision by the trustees to disburse it in the manner in which they did.

6.3 I erred in failing to refer this dispute for the hearing of oral evidence, alternatively in failing to accept the evidence about this payment put forward by the respondents.

6.4 The evidence by the respondents was that applications for funding made to the Peakers Trust were a comprehensive process. Examples of applications by the trust for funding for R17 million is referred to in the Peakers Board Minutes dated 29 April 2022.

6.5 By contrast, the payment by the Peakers Trust of the special distribution of R10 million did not arise from any such application and was simply to be ‘managed in compliance with the beneficiary trust deeds objectives’.

6.6 The Trustees were free to use this amount to *inter alia* fund the work of the beneficiaries which was being undertaken on an ongoing basis to further the goals of the trust.

7. It was further stated that I erred in finding that the payments made to the third and/or fourth respondents justified their removal from office. The third respondent had worked for the trust as a trustee and a beneficiary since 2005. She was paid an amount of R250 000 as a beneficiary and R500 000 for her work as a trustee. The third respondent attested that all the monies paid to her were for work which she dedicated to the trust for 14 years. Such work included sourcing opportunities for the trust over the years and building up the assets of the trust fund, which was then available for disbursement to all the beneficiaries. The payment of R500 000 was not restricted by clause 5.18, which pertained only to costs, charges and expenses reasonably incurred and arising out of the administration of the trust. The work for which the third respondent was being paid, was for work done for the trust itself, which developed and grew the trust in pursuit of its farming goals. The fourth respondent had served as a trustee for three years and was paid R100 000 – the equivalent of R30 000 per year. This amount is more than reasonable given the extent of the meetings attended by her.

8. It was also stated that I erred in making a blanket finding against all four respondents without considering their individual circumstances. This is all the more problematic given the failure to establish who made the decision to disburse the funds. I allegedly further erred in applying the same penalty to the third and fourth respondents, as I did to the first and second respondents, who received R1 million and R3 million respectively.

[4] Before I deal with the merits of the application, it is perhaps appropriate to say something about the test to be applied in applications of this nature. In terms of section 17(1)(a)(i) of the Superior Courts Act 10 of 2013, leave to appeal may only be given where the judge is of the opinion that ‘the appeal would have a reasonable prospect of

success', or in terms of section 17(1)(a)(ii), if there is 'some other compelling reason why the appeal should be heard'.

[5] In *The Mont Chevaux Trust v Goosen and others*,² Bertelsmann J (in an obiter dictum) held that:

'It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see *Van Heerden v Cronwright & Others* 1985 (2) SA 342 (T) at 343H. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.'

[6] The test was also considered in *S v Smith*³ where the court held:

'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.' (Footnotes omitted.)

[7] In *Four Wheel Drive v Rattan NO*,⁴ Schippers JA, with reference to *S v Smith supra*, referred to the principle that leave to appeal should only be granted where 'a sound, rational basis [exists] for the conclusion that there are prospects of success on appeal'. The court is required to test the grounds on which leave to appeal is sought against the facts of the case and the applicable legal principles. The court a quo was also criticised for granting leave to appeal when there were no reasonable prospects of success, which resulted in the parties being put through the inconvenience and expense of an appeal without any merit.

² *The Mont Chevaux Trust v Goosen and others* [2014] ZALCC 20; 2014 JDR 2325 (LCC) para 6.

³ *S v Smith* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 7.

⁴ *Four Wheel Drive Accessory Distributors CC v Rattan NO* [2018] ZASCA 124, 2019 (3) SA 451 (SCA) para 34.

[8] It is in my view also important to keep in mind what was held in *R v Dhlumayo and another*⁵ by Davis AJA , namely that

‘No judgment can ever be perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered.’

[9] In returning to the present application, it is perhaps important to note that the respondents were now being represented by new attorneys and new counsel, Ms Nicholson, who drafted the application for leave to appeal, despite not having argued the matter before me initially. A new broom always wants to sweep clean. The issue of a referral to oral evidence of the alleged material disputes of fact is raised now for the first time. At the hearing of the matter before me, none of the parties raised it, neither in argument nor in their heads of argument. One of the issues to be addressed in the practice note, which has to accompany a party’s heads of argument,⁶ is whether there are material disputes of fact. None were raised by the applicant. The respondents further failed to file a practice note.

[10] Counsel for the respondents conceded that it was not initially raised before me but submitted that should I grant leave to appeal, as the court of appeal may well refer the matter back for the hearing of oral evidence. I was not referred to any authority for this submission. This submission of course pre-supposes that there are material disputes of fact, which, counsel for the applicant submitted, there were not.

[11] In *Santino Publishers CC v Waylite Marketing CC*⁷ it was held that, in principle, an application for an order referring a matter for the hearing of oral evidence can be entertained by an appeal court, bearing in mind the wide powers given to an appeal court under section 22 of the now repealed Supreme Court Act 59 of 1959. The court had to consider whether it was competent for it to order a referral where it was neither applied for nor considered in the court below. The court, however, declined to make the

⁵ *R v Dhlumayo and another* 1948 (2) SA 677 (A) at 706 (numbered para 12).

⁶ KZN Practice Directive 9.4.

⁷ *Santino Publishers CC v Waylite Marketing CC* 2010 (2) SA 53 (GSJ) para 7.

order due to other difficulties that the appellant faced, resulting in the application becoming academic.

[12] In *Ras and others NNO v Van der Meulen and another*⁸ the court referred the matter back for the hearing of oral evidence to deal with an issue only raised in argument in the court below which had not been dealt with in the papers. Leach JA held at para 17 that ‘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’.

[13] In *Tshangela v Nombembe and others*⁹ the issue of a referral to oral evidence was also raised for the first time during the hearing for leave to appeal. The court held as follows:¹⁰

‘Generally, an application for a referral to oral evidence must be made at the outset of a hearing (before argument on the merits) by an applicant faced with irresolvable disputes of fact on the papers. Courts should be circumspect in referring matters to oral evidence *mero motu* because there may be strategic reasons why the litigants may have elected not to pursue this course.’ (Footnotes omitted.)

The court *inter alia* relied on *Absa Bank Ltd v Molotsi*¹¹ and the authorities cited therein. The application for leave to appeal was dismissed.

[14] Counsel for the applicant submitted that the material disputes of fact listed by the respondents were not actually disputes and were certainly not material. I agree with this submission. The nature of the payment by the Peakers Trust was not in dispute. The letter written by the Peakers Trust, referred to by the applicant, described the payment as a ‘special distribution...intended to be used by each beneficiary trust in line with its trust objectives’. The third respondent, in her answering affidavit, referred to the payment as a special distribution to be distributed to the beneficiaries. There is clearly no dispute about the nature of the payment.

⁸ *Ras and others NNO v Van der Meulen and another* 2011 (4) SA 17 (SCA).

⁹ *Tshangela v Nombembe and others* [2023] ZAGPJHC 1223.

¹⁰ *Ibid* para 18.

¹¹ *Absa Bank Ltd v Molotsi* [2016] ZAGPJHC 36 paras 25-27

[15] The remainder of the issues listed as material disputes of fact relate to the minutes and resolutions and how the amount of each payment was arrived at. These disputes were never raised or addressed by the third respondent. The respondents supplied the information to the applicant of how the R10 million was distributed, as contained in annexure 'P'. The reasons for the payments were set out in very basic terms by the third respondent, which it was conceded, lacked detail and particularity. There is in my view accordingly no dispute as there are no conflicting versions. The respondents' counsel submitted that if the matter is referred for oral evidence, these 'issues' can be ventilated after proper discovery has taken place and the respondents have been placed in possession of the relevant minutes and resolutions. I was reminded by the applicant's counsel that the respondents filed a rule 35(3) notice, wherein the respondents requested the trust's bank statements and minutes of meetings. It was, however, not pursued by way of an application for an appropriate court directive. Any further documents could have been requested but were not. The applicant attached a number of minutes of meetings to his affidavit, to which I have referred in my judgment.

[16] There is in my view no merit in this ground of appeal. In addition, it was never raised by or on behalf of the respondents in the papers or at the hearing of the matter.

[17] It was stated in the alternative to the above that I failed to determine the legal issues based on the facts stated by the respondents together with the admitted facts stated by the applicant. The facts stated by the third respondent were lacking in particularity, and I arrived at the conclusions I did based on her version, which demonstrated that the payments made by the trust were not made in accordance with the objectives of the trust deed. It is now stated that the so-called 'business beneficiaries' worked for the trust and provided administrative support to the trust. Once again, the third respondent is hamstrung by the limited facts set out in her affidavit. It was conceded that her affidavit was vague and unsupported by evidence, such as time sheets, and setting out the work done. The evidence of the third respondent had to be judged in accordance with what the trust deed stipulated and whether the payments fell within the discretion of the trustees, and ultimately whether such payments were to the

benefit of the trust and all the beneficiaries. Although I did not express my findings in terms of accepting or rejecting the respondents' version as referred to in *Plascon-Evans*, I clearly found that the trustees did not act in the interests of the trust based on their version and explanations provided. There were furthermore insufficient facts provided by the respondents on which to make a finding that the trustees were permitted to disburse funds to the business beneficiaries (themselves in other words) whose work for the trust was allegedly done to support and develop farmers in the designated areas. In my view, there is no merit in these grounds of appeal.

[18] As far as the letter from the Peakers Trust constituting hearsay is concerned, it is important to note that the third respondent never raised this issue in her answering affidavit. When she responded to the specific paragraph of the applicant's affidavit dealing with and attaching the letter, she stated that 'The terms of the special distribution from Peaker Trust in November 2019 and the objectives of the Trust were met in its distribution'. She further stated that she was an original beneficiary and also ran a SMME and on that basis, would be entitled to support and assistance. She even attached the decision schedule of the Peakers Trust to her affidavit, which deals with the special distribution. This issue, and the impetus and terms of the payment by the Peakers Trust should apparently also have been referred for oral evidence. I cannot find any merit in these grounds of appeal.

[19] The grounds relating to the payments made to the various respondents and the reasonableness of the payments deserve some mention. It was stated that the fourth respondent had served as a trustee for three years and was paid R100 000 - the equivalent of R30 000 per year, which is more than reasonable given the numerous meetings attended by her. It is, however, clear from the minutes put up, that the trustees were being paid R3 000 for each meeting they attended. The fourth respondent also received R1 million for a company owned by her, despite not being an original beneficiary of the trust. As far as the work done on behalf of the trust is concerned, I have already dealt with the vague allegations in this regard.

[20] I was criticised for making a blanket finding against all four respondents without considering their individual circumstances and applying the same penalty to all four respondents, despite the discrepancy in the amounts received. Only the third respondent attested to a substantial affidavit whilst the other respondents merely attested to confirmatory affidavits. She certainly did not set out the respondents' individual personal circumstances. At the hearing of the application for leave to appeal, it was submitted that I failed to consider the practical effect of my order on the respondents. Apparently, both the third and fourth respondents have subsequently been removed as directors of all the companies on whose boards they serve. They have also been removed as trustees from the other trusts they were involved in. It was further submitted that I should have considered that they were not legally trained and therefore did not understand the workings and limitations of a trust. It, however, emerged at the hearing that both respondents held doctorate degrees, albeit in philosophy and theology. In my view, these submissions fortified my view that the respondents should no longer act as trustees of the trust for the reasons set out in my judgment. I was reminded by the applicant's counsel that the respondents were provided with a legal opinion which they choose to ignore. There is in my view likewise no merit in these last grounds of appeal.

[21] I am firmly of the view, having considered the grounds of appeal as well as the submissions made, that there is no sound, rational basis to conclude that there are reasonable prospects of success on appeal. There are in my view furthermore clearly no compelling reasons, which would justify granting leave to appeal in this particular matter.

[22] As far as costs are concerned I see no reason why I should not make a cost order on the same basis as before. The applicant and by implication the trust, should not be out of pocket in respect of the respondents' failed application.

[22] I therefore make the following order:

1. The third and fourth respondents' application for leave to appeal is dismissed with costs on the attorney and client scale, such costs to be paid jointly and severally, the one paying the other to be absolved.

E BEZUIDENHOUT J

Date of hearing: 26 January 2024

Date of judgment: 16 February 2024

Appearances:

For the 3rd and 4th respondents:

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