

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO THE JUDGES: YES/ NO
(3)	REVISED. <i>CA</i>
Signature Date..... <i>10/06/2022</i>	

CASE NO: 7805/2020

In the matter between:

SEROBI MILTON MAJA

FIRST APPLICANT

CHANCHI HANS LEKOTA

SECOND APPLICANT

PHAUWE FRANS RADEBE

THIRD APPLICANT

LESIBA SHADRACK MALEKA

FOURTH APPLICANT

MATOME GODFREY MASEKWAMENG

FIFTH APPLICANT

KATLEGO SOLOMON LEGODI

SIXTH APPLICANT

and

THE TRUSTEES FOR THE TIME BEING OF THE
REBOILE TRUST (IT2495/2001)

FIRST RESPONDENT

JOEL MOKAKA LEGODI N.O	SECOND RESPONDENT
MATHETHI THOMAS LEGODI N.O	THIRD RESPONDENT
RAESIBE ANNA RIKHOTSO N.O	FOURTH RESPONDENT
MADIMETJA HERMAN LEGODI N.O	FIFTH RESPONDENT
MATSOBANE JOAS LEGODI N.O	SIXTH RESPONDENT
MASHIBA WILLIAM KGANYAGO N.O	SEVENTH RESPONDENT
MICHAEL LEGODI N.O	EIGHTH RESPONDENT
SALPHINA LEGODI N.O	NINTH RESPONDENT
THE MASTER OF THE HIGH COURT, PRETORIA	TENTH RESPONDENT
ANGLO PLATINUM MINE	ELEVENTH RESPONDENT
FIRST NATIONAL BANK, A DIVISION OF FIRSTSTRAND BANK LIMITED	TWELFTH RESPONDENT

JUDGMENT

MAKGOBA JP

[1] The Applicants brought an application against the Respondents for the following relief in Part B of the Notice of Motion:

- 1.1. Removing the Second to the Ninth Respondents as trustees of the Reboile Trust (IT2495/2001);

- 1.2. Directing the Master to appoint and authorise the Applicants to act as the trustees of the Reboile Trust (IT2495/2001);
- 1.3. Directing the Master to endorse its records accordingly and issue the Applicants with letters of authority within 7 (seven) days of the granting of the final order;
- 1.4. Directing the Second to the Ninth Respondents to hand over to the Applicants all documents, banking and administrative instruments relating to the administration of the Reboile Trust (IT2495/2001) within 5 (five) days of the granting of the final order.

[2] The upshot of the relief claimed in the main proceedings (Part B) comprise of the removal of the Second to the Ninth Respondents ("The Trustee Respondents") as Trustees of Reboile Trust (First Respondent); furthermore an order authorising the Master of the High Court to appoint Applicants as trustees as their replacement.

Initially the Applicants approached this Court on an extremely urgent basis in Part A of the Notice of Motion for an interim relief pending the finalisation of the principal proceedings in Part B.

The urgent relief sought was for an order interdicting the First to Ninth Respondents from dealing with, including withdrawing, disbursing funds in a banking account of the Reboile Trust held at First National Bank, Polokwane Branch.

The urgent application in Part A was struck from the roll for lack of urgency.

- [3] The claim for an order authorising the Master to appoint the Applicants as trustees is precipitated upon an election apparently held by the beneficiaries of the Reboile Trust on 15 April 2018, for the election of trustees. The Trustee Respondents oppose the application on a variety of grounds, which separately and/or jointly, militate against the grant of the relief claimed in these proceedings.

The Applicants contend that the Trustee Respondents have resigned but refuse to vacate their office as trustees.

Factual Background

- [4] During the year 1961 the Reboile Community was forcefully removed from certain portions of the Farm Palmiefontein No 24 KS district Pietersburg during the times of apartheid.

On or during 2001 the community successfully reclaimed their land in terms of the Restitution of Land Rights Act 22 of 1994. As part of the settlement of the land claim a notarial deed of trust and donation was registered on 30 March 2001. The land was therefore registered in the name of the Reboile Trust. The initial trustees of the Reboile Trust were:

1. Lesiba Phillip Legodi;
2. Joel Mokaka Legodi;
3. Raisibe Anna Rikhotso;
4. Matheti Thomas Legodi;
5. Sarah Makhaukani Mashele;
6. Madimetja Herman Legodi; and
7. Malesela Isaac Mapeka.

[5] On or during 2005 new trustees of the Trust were appointed and received their letters of authority from the Master of the High Court, Pretoria.

The following persons were authorised by the Master to act as trustees of the Reboile Trust (the First Respondent):

1. Serobi Milton Maja;
2. Michael Lati Mashego;
3. Matsobane Joes Legodi;
4. Mashiba William Kganyago;
5. Michael Legodi; and
6. Salphina Legodi.

[6] On or during July 2005 the High Court, Pretoria granted an order in terms of which Mr. Dinga Rammy Nkwashu and Mr. Johannes Frederik Moolman were appointed as trustees of the First Respondent. Pursuant to the said court order the Master issued letters of authority and authorised the following persons to act as trustees:

1. Serobi Milton Maja;
2. Joel Mokaka Legodi;
3. Lesiba Phillip Legodi;
4. Raisibe Anna Rikhotso;
5. Matheti Thomas Legodi;
6. Madimetja Herman Legodi;
7. Sarah Makhaukani Mashele;
8. Michael Lati Mashego;
9. Matsobane Joas Legodi;
10. Mashiba William Kganyago;
11. Michael Legodi;
12. Salphina Legodi;
13. Dinga Rammy Nkwashu; and
14. Johannes Frederik Moolman.

- [7] The Sixth Respondent, Matsobane Joas Legodi tendered his resignation as a trustee of the First Respondent on 31 July 2015.
- [8] At the annual general meeting of the trustees and beneficiaries held on 15 April 2018 the following persons tendered their resignation as the trustees of the First Respondent:
1. Serobi Milton Maja;
 2. Salphina Legodi;
 3. Michael Legodi;
 4. Michael Lati Mashego;
 5. Malesela Isaac Mapeka;
 6. Sarah Makhaukani Mashele;
 7. Mashiba William Kganyago; and
 8. Johannes Frederik Moolman.
- [9] At the same annual general meeting of the 15 April 2018 the beneficiaries resolved that the First to Sixth Applicants and one Moshothi David Legodi be appointed as the new trustees of the First Respondent (the Trust).

[10] On or about 12 April 2019 Dinga Rammy Nkwashu tendered his resignation as a trustee. On the 4th of December 2019 Moshothi David Legodi renounced his appointment as a trustee.

[11] On or during August 2019 the Applicants appointed their erstwhile attorneys, Mapulana Maponya Incorporated, to assist with the process of obtaining letters of authority on their behalf.

It is noted that since their election as trustees at the meeting of 15 April 2018, the Applicants had not been issued with letters of authority by the Master.

Their erstwhile attorneys engaged in several correspondence with the Master of the Court, Pretoria requesting the Master to issue the Applicants with letters of authority. It is common cause that the Master never issued the Applicant with letters of authority as requested.

[12] On or about 11 September 2019 the Master addressed a letter to the former attorneys of the Applicants requesting a number of documents, amongst others the original written resignations of the trustees and original resolution signed by all the parties nominating the new trustees.

Of importance, the Master demanded to know of the whereabouts of the following trustees:

1. Lesiba Phillip Legodi;
2. Raisibe Anna Rikhotso;
3. Matheti Thomas Legodi;
4. Madimetja Herman Legodi; and
5. Michael Lati Mashego.

The Master further indicated that if the abovementioned trustees were still alive and did not resign, they were empowered to appoint additional trustees and also convene a meeting for the purpose of confirming the appointment of new trustees. The Master referred to clauses 6.1 and 6.2 of the Deed of Trust.

I shall revert to the provisions of clauses 6.1 and 6.2 later in my judgment.

Whether the Applicants were duly elected or appointed as Trustees

[13] It is common cause that an election of trustees was held by the beneficiaries at their meeting of the 15 April 2018 and that the Applicants were so elected as new trustees of the First Respondent.

It is furthermore common cause that the Applicants were not issued with letters of authority by the Master pursuant to their election as trustees by the beneficiaries on 15 April 2018.

The issue before me is whether the beneficiaries are empowered in terms of the Deed of Trust of the First Respondent to elect or appoint trustees.

[14] Clauses 6.1 and 6.2 of the Deed of Trust provide as follows:

“6. Cessation of office of trustees and appointment of new trustees

6.1. The trustees may appoint additional Trustees.

6.2. In the event of a resignation, permanent incapacity or death of anyone of the Trustees, then the remaining Trustees may appoint another Trustee in place of such Trustee who has resigned, become permanently incapacitated or died, in his place or stead subject to confirmation of not less than 75% (Seventy Five Percent) of the Beneficiaries present at a meeting called for by the remaining Trustees for purposes of confirmation of the appointment of such Trustees.”

It is clear from the provisions of clause 6 of the First Respondent's Deed of Trust that the beneficiaries have no powers to elect or appoint trustees.

The Trustees in office have such powers to appoint additional trustees.

The Deed of Trust upon which the Applicants rely does not entitle nor authorise an election of trustees by a community or beneficiaries as seemingly contended by the Applicants.

[15] As to the lawful appointment of a trustee, it must at the outset be noted that the office of trustee is created by a trust instrument and is to be filled as specified in the trust instrument, or by the Master, or by the Court.

In ***Metequity Ltd & Another v NWN Properties Ltd & Others***¹ it was said:

“A trustee is defined as any person who acts as trustee by virtue of an authorisation under section 6. That section envisages in section 6(1) that the Master’s authorisation to act as trustee is granted to persons appointed as trustees in a trust instrument, by the Master or by the Court. The office of trustee is therefore created by the trust instrument and filled thereby or by the Master or the Court. The Trust Property Control Act, however, as a regulatory and control measure, provides in section 6 that such existing trustee shall not act without authorisation by the Master.”

[16] In the present case the Applicants were elected or appointed by the beneficiaries contrary to the provisions of the Deed of Trust. It follows inexorably that the Applicants could not have been validly elected in accordance with the trust deed.

¹ 1998 (2) SA 554 (T) at 557 G – H.

[17] The Supreme Court of Appeal judgment in ***Fesi v Ndabeni Communal Property Trust***² is appropriate in the present case. The SCA had to deal with a question whether persons elected as trustees of a trust established to administer and develop property received as a result of a land restitution claim (like in the Reboile Trust) were properly appointed in terms of the trust deed and further whether the Master was correct in refusing to issue letters of authority.

Navsa JA said the following at paragraph 69:

“To sum up, the election of the respondents was for the reasons set out above, not in accordance with the trust deed. That alone disentitle the respondents to the relief sought and granted. It was dispositive of the dispute in the Court below and is of this appeal. This was a case in which there were bright flashing lights and sirens wailing against the grant of letters of authority, which the Master rightly heeded. For all of the reasons set out above, the Master’s refusal to issue letters of authority was clearly justified.”

² ***Fesi v Ndabeni Communal Property Trust*** (411/2017 & 412/2017) [2018] ZASCA 33 (27 March 2018).

Whether the Applicants are entitled to seek removal of Trustees

[18] The Applicants' request for the removal of the Trustee Respondents as trustees of the First Respondent must be based on whether they have any interest in the Trust as beneficiaries. Short of being beneficiaries, the Applicants have no interest in the Trust which justify their being entitled to seek the relief claimed. It is only if the Applicants are beneficiaries that they would be entitled to seek the removal of the trustees. The issue of the Applicants' status as beneficiaries would therefore be determinative of their rights to seek the relief claimed.³

[19] This actually brings to the fore the issue as to whether all the Applicants before this Court have the necessary *locus standi* to initiate the present proceedings against the Respondents.

The Trust Deed alludes to, and identifies its beneficiaries, as persons whose names appear in the list attached thereto and entitled "Reboile Trust, List of Beneficiaries". The list attached to the Applicants' founding affidavit is incomplete as it only comprises of 5 of the 12 pages. The names of the Applicants do not appear on the incomplete list of beneficiaries furnished by them.

In their answering affidavit the Trustee Respondents attached as Annexure "RAS2" a complete list of beneficiaries comprising of the whole 12 pages.

³ *Ras & Others NNO v Van Der Meulen and Another* 2011 (4) SA 17 (SCA) at paragraph 9.

[20] The Applicants do not appear on the list of beneficiaries of the Reboile Trust that is attached to the founding affidavit as well as the complete list of beneficiaries furnished by the Trustee Respondents in Annexure RAS2.

The First Applicant states in his replying affidavit that some Applicants became beneficiaries by virtue of being heirs of the beneficiaries listed in Annexure "RAS2". Justifying his own status as a beneficiary the First Applicant explained himself as a nephew of Phillip Legodi, the latter being a beneficiary and listed as number 88 on the list of beneficiaries appearing on Annexure "RAS2".

Regarding the Second to Sixth Applicants, none of them filed any replying affidavit or confirmatory affidavit thereto to explain their status.

I accordingly make a finding that the Second to Sixth Respondents failed to show that they are the beneficiaries of the Reboile Trust.

Resignation of the Trustees

[21] I have already dealt with provisions of clauses 6.1 and 6.2 of the Deed of Trust regarding the appointment of additional trustees in the event of the resignation of trustees.⁴

Clause 6.4 of the Deed of Trust provides that any Trustee shall, without an Order of Court, be entitled, in writing to resign from his office.

⁴ See paragraph [14] hereof above.

It is common cause that the Sixth Respondent tendered his resignation as a trustee on 31 July 2015 and the Seventh, Eighth and Ninth Respondents together with the First Applicant tendered their resignation on 15 April 2018. Needless to say that the First to Fifth Respondents never resigned.

[22] Clause 6.5 of the Deed of Trust provides that:

“6.5. There shall at all times be at least 5 (five) Trustees in Office for the purpose of the valid exercise of the powers and discharge of the duties of the Trustees in terms hereof, provided that pending the appointment of a successor or successors in this clause, provided the Trustees remaining in office shall be empowered to act in the preservation of and necessary formal administration of the Trust Assets.”

It is therefore axiomatic that after the “mass resignations” of the Trustees on 15 April 2018 the remaining Trustees could exercise their powers in terms of clause 6 of the Deed of Trust to appoint additional trustees. There is no provision in the Deed of Trust that prohibits a trustee who resigned from being re-appointed. In any event the First Applicant was purportedly re-elected as a trustee on 15 April 2018 shortly after his resignation.

[23] Accordingly, in the present case and in accordance with the Trust Deed of the Reboile Trust 5 (five) trustees are sufficient for the trust to take decisions and thus appoint additional trustees.⁵

[24] Section 21 of the Trust Property Control Act 57 of 1988 provides that whether or not the trust instrument provides for the trustee's resignation, the trustee may resign by notice in writing to the Master and ascertained beneficiaries who have legal capacity or to the tutors or curators of the beneficiaries of the trust under tutorship or curatorship.

Thus a trustee who wishes to resign must comply with the formalities set out in the Deed of Trust, if any and section 21 of the Act.

Appointment of the Trustee Respondents as Trustees

[25] There are letters of authority dated 03 December 2020 which bear the names of the Second to Ninth Respondents (i.e. the Trustee Respondents) as the current trustees of the First Respondent, the Reboile Trust.

These letters of authority were duly issued by the Master.

The Applicants seem to question why such letters of authority were issued to the Trustee Respondents when, according to them, the Second to Ninth Respondents had resigned.

⁵ See *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA).

[26] The answer to this query is provided hereunder.

[27] The Second Respondent, JOEL MOKAKA LEGODI states the following in the answering affidavit:

"50. The Applicants' efforts came to a naught as I, together with the other trustees who refused to resign, resolved to approach the other trustees to reconsider their decisions prior to the resignations been accepted by the remaining board of trustees. In this regard I refer the Honourable Court to the confirmatory affidavits attached hereto and marked "RAS4".

51. We were greatly successful in this regard and persuaded the trustees who had resigned to reconsider, and we did not approach the First Applicant to reconsider his resignation because his resignation was greatly welcomed.

52. The Master ultimately approved the request of the trustees and presented us with new letters of appointment, and we actioned the removal of the First Applicant from the banking profile of the Trust."

The Second Respondent has attached to the answering affidavit the confirmatory affidavits of the Third to Ninth Respondents who confirm the deponent's version about the procedure they had followed to obtain their letters of authority.

It is significant to note that the Second Respondent is one of those trustees who remained when the others resigned on 15 April 2018.

- [28] It is important to note the contents of paragraph 51.14 of the First Applicant's founding affidavit where he states the following:

"In 2018, verifications of the beneficiaries were conducted in the regions and before the mass meeting was held on 15 April 2018. For some reasons best known by Mr. Matsobane Joas Legodi, he refuses to relinquish his position even though his resignation letter is on record including those of his associates.

Out of 14 (fourteen) Trustees, 9 (nine) including himself resigned in order to allow the beneficiaries to elect new trustees and I was re-elected."

- [29] The contents of the First Applicant's affidavit clearly shows that after the "mass resignation" of the trustees on 15 April 2018, the remaining trustees continued to function until they appointed additional trustees as stated by the Second Respondent in his answering affidavit referred to in paragraph [27] hereinabove.

Pursuant to the aforesaid appointment the Master duly issued letters of authority in favour of the Trustee Respondents on 03 December 2020.

Accordingly, this Court finds that the appointment of the Second to Ninth Respondents (the Trustee Respondents) as the present trustees of the Reboile Trust was lawfully made.

Removal from Office of Trustee

[30] The Applicants seek an order for the removal of the Trustee Respondents from the latter's office as trustees of the Reboile Trust. In their papers the Applicants based their case on the ground that the Trustee Respondents have resigned and were never reappointed at the beneficiaries meeting of the 15 April 2018. The question is whether the Applicants have, on that basis, made out a case for the removal of the Trustee Respondents from office.

[31] It is trite that the Court has inherent power to remove a trustee from office at common law.

This power also derives from section 20 (1) of the Trust Property Control Act 57 of 1988.

Section 20 (1) of the Act provides that a trustee may, on the application of the Master or any person who has 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 interest of the trust and its beneficiaries.

[32] Although the Act does not spell out the grounds for the removal of a trustee, the authors of *Honore's South African Law of Trusts*⁶ assert that the general principle which has crystallised over time in the Court's exercise of its common law jurisdiction (and now echoed in section 20 (1) of the Act) is that a trustee will be removed from office when continuance in office will prevent the trust being properly administered or will be detrimental to the welfare of the beneficiaries.

[33] The overriding question is always whether or not the conduct of the trustee imperils the trust property or its proper administration.

Consequently, mere friction or enmity between the trustee and beneficiaries will not in itself be adequate reason for the removal of the trustee from office – see in this regard *Tijmstra NO v Blunt – Mackenzie NO & Others*⁷.

In my view even mere conflict amongst trustees themselves (like in the present case) will not be a sufficient reason for the removal of a trustee at the suit of another.

[34] It must be emphasised that whilst a trustee is in law required to act with care and diligence, the decisive consideration is the welfare of the beneficiaries and the proper administration of the trust and the trust property. The crucial fact is that the Court may order the removal of a trustee only if such removal will, as

⁶ Cameron, De Waal, Wunch, Solomon & Khan, *Honore's South African Law of Trusts 5ed* (2002) at 223.

⁷ 2002 (1) SA 459 (T) at 473 E –G.

required by section 20 (1) of the Act, be in the interest of the trust and its beneficiaries.

See ***Gowar v Gowar* (149/2015) [2016] ZASCA 101 (9 June 2016)**.

[35] Accordingly, to succeed in the relief that the Applicants seek against the Trustee Respondents namely, their removal as trustees, they must prove that the respondents' conduct of which they complain imperils the trust property or its administration or that the removal will otherwise be in the interests of the trust and its beneficiaries.

[36] In the present case the Applicants have failed to establish any ground for the removal of the Trustee Respondents save to rely on their resignation and not having been re-elected by the beneficiaries at the meeting of 15 April 2018 when the Applicants were apparently elected.

The Applicants' prayer for an order removing the Trustee Respondents from office is doomed to fail.

Conclusion

[37] The Applicants have failed to make out a case for the relief claimed. With regard to costs, there is no basis to deviate from the general rule that costs follow the result. The Trustee Respondents asked that the application be dismissed with

costs on the scale as between attorney and client. The Respondents argued that the Applicants persisted with litigation, at a costly consideration of the Reboile Trust and ultimately the beneficiaries.

[38] The issue of costs is in the discretion of the Court. In my view the Respondents have not made out a case for a punitive costs order in the circumstances of this case. However, the Reboile Trust should be fully indemnified against the expenses of these proceedings. The beneficiaries of the Trust should not be disadvantaged by payment of the legal costs out of the Trust funds. Accordingly, the Applicants should bear the legal costs in their personal capacities.

[39] For all the reasons set out above, the following order is granted:

1. The application is dismissed.
2. The Applicants are to pay the costs of the application jointly and severally, the one paying the other to be absolved.



E M MAKGOBA
JUDGE PRESIDENT OF THE HIGH
COURT, LIMPOPO DIVISION

APPEARANCES

Heard on : 27 May 2022

Judgment delivered on : 10 June 2022

For the Applicants : Adv F J Nalane SC

Instructed by : Fisha Attorneys
c/o DDKK Inc

For the Respondents : Adv M E Manala

Instructed by : Legodi Attorneys