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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: 993/2019

In the matter between:

MALEFANE PATRICK MATSAU

First

Applicant

MODUPE JOHANNES MPHATSOENYANE

Second Applicant

LELOKO JAPHTA

Third Applicant

and

SUPING NEPHTHALI MOKHOBO

Respondent

Coram: OPPERMAN, J

Heard: 12 September 2019

Delivered: 16 September 2019

Summary: Application for confirmation of *rule nisi* – Mismanagement of trust.

ORDER

The *rule nisi* that was issued on 4 March 2019 and as amended on 27 June 2019 is confirmed and the respondent to pay the costs of the suit.

JUDGMENT

Opperman, J

[1] This is an opposed motion for the confirmation of a *rule nisi* that was issued on urgent application. The relief sought is for a final interdict.

[2] The atmosphere and tragedy of this case is shown in the founding affidavit¹ wherein it was pointed out that at a recently convened meeting attended by the 52 beneficiaries of the Boiteko Farming Trust various persons indicated that they are so fed up with the situation surrounding the Trust that they are willing to take matters into their own hands and to resort to physical violence towards the respondent.

[3] Boiteko Farming Trust (the Trust) was established in November 1997. The Department of Land Affairs had granted funds to 124 households for purchase of land. The said 124 households have negotiated the purchase of the farms Catharina, Tempe, Damplaas, Portion 1 of Barseba and Populierhoek/Waterval. Collectively the five farms are referred to as “Catharina”. The heads of the 124 households agreed that a trust should be

¹ Paragraph 40.

established and registered to receive the transfer of Catharina and to hold it for and on behalf of the members.

[4] The main objects of the Trust are incorporated in clause 4 of the Notarial Deed of Trust. The Trust was constituted to:

4.1 Acquire rights in land, hold and develop or improve and manage such land in common, wholly or mainly for agriculture and residential purposes and to actively pursue such objectives for the benefit and on behalf of the members.

4.2 In the furtherance of the achievement of the main objects, the Trust shall:

4.2.1 carry on such activities as are directly connected with the achievement of the main objects of the Trust including the provision of community facilities and the establishment and carrying on of community programmes aimed at the furtherance of agriculture production, community life and the health and welfare of members of the community;

4.2.2 improve the quality of life of its members with reference to their broad social, economic, cultural, educational and recreational need; and,

4.2.3 secure, hold or acquire, develop and manage additional assets and property, provided that no additional Trust Deed or amendments to this Trust Deed shall be required for the Trust to do so.

[5] The Principle of Equality in clause 5 demands the utmost equality in the treatment of the members and decrees against any discrimination or distinction between the members.

[6] The project collapsed completely and the Trust has fallen into disarray. It stands beyond doubt from the papers before the court that the respondent had taken over the assets and is illegally appropriating it for his own benefit. The

litigation in this case stems from this mishandling of what is supposed to be a noble initiative to the indigent community.

[7] The applicants managed to proof that for some time the beneficiaries of the Trust discovered unauthorised transactions involving assets belonging to the trust. Various members of the Trust have attempted to intervene by visiting the Catharina Farm. Very often the respondent would call the police, which would result in people being refused access to the farms. This behaviour indicate that the respondent had seized for himself the assets of the Trust and it involved the selling of cattle and implements and renting of farms.

[8] Added to this is the uncontested facts that the Trust has collapsed and is in shambles. The applicants are among the beneficiaries (members) of the Trust and the respondent has been proven, beyond any doubt, to have been a former trustee and chairperson of the trust who resigned as trustee on 21 February 2012. He has no authority whatsoever to take any action on behalf of the Trust.

[9] Worse is the fact that the Trust Deed requires that a minimum of 18 trustees must serve at all times. The trust has for some time been in a situation of irresolvable deadlock. This is primarily the result of the passing away of at least 8 of the original trustees on the board of trustees, the respondent's failure to call a general meeting to elect a new board of trustees and the respondent's efforts to prevent alternative means of creating a new board of trustees.

[10] The proven conduct of the respondent and collapse of the project and trust as described is the sole cause and the reason for an order granted on urgent application on 4 March 2019:

1. The Uniform Rules of Court relating to service and process be dispensed with in order that this application be heard as one of urgency in terms of Rule 6(12).
2. A *rule nisi* be issued calling on the respondent on 30 May 2019 at 9h30 or so soon thereafter as the matter may be heard to show cause why the following should not be ordered:
 - a. The respondent be interdicted from disposing or otherwise dealing in any manner whatsoever with any assets of the Boiteko Farming Trust;
 - b. The respondent be ordered to pay any and all funds belonging to the Boiteko Farming Trust into the following bank account:
FNB: Account number:[...]; and
 - c. The respondent be ordered to pay the costs of this application.
3. Paragraphs 2(a) and 2(b) above serve as an interim interdict with immediate effect pending the final determination of the application.
4. This application and order be served on the respondent and the Master of the High Court in terms of the rules of the court.

[11] The Master of the High Court apparently caused the Trust's bank account referred to above to be frozen in 2015 but for income.

[12] On 27 June 2019 after some postponements the following clause was added to the *rule nisi*:

“7. All funds that are received by respondent from Mr JF Odendaal shall be paid into the Boiteko Farming Trust account: FNB, account [....].”

[13] The applicant's *locus standi* is vested in their capacity as beneficiaries that are also in clause 3.6 of the Trust Deed defined as members. Their *locus standi* is cemented in the fact that the respondent admits that the second and

third applicants are beneficiaries of the Trust. In terms of the Trust Deed the Trust is to be administered for the benefit of its beneficiaries. They have a real and clear right to prevent the unlawful alienation of Trust assets by way of a direct action. The application is brought by the trust beneficiaries in their own right and not on behalf of the trust. In *Gross & others v Pentz* 1996 (4) SA 617 (A) at 632B-D it was held that:

“The question of locus standi is in a sense a procedural matter, but it is also a matter of substance. It concerns the sufficiency and directness of interest in the litigation in order to be accepted as litigating party (*Wessels en Andere v Siziodale Kerkkantoor Kommissie van die Nederduitse Gereformeerde Kerk*, OVS 1978 (3) 5A 716 (A) 725H; *Cabinet of the Transitional Government for the (Territory of South West Africa v Eins* 1988 (3) SA 369 (A) 388B-E). The sufficiency of interest is "altyd afhanklik van die besondere feite van elke afsonderlike geval, en geen vaste of algemeen geldende reëls kan neergele word vir die beantwoording van die vraag nie ..."(*Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 (A) 534D). The general rule is "that it is for the party instituting proceedings to allege and prove [my underlining] that he has locus standi, the onus of establishing that issue rests upon the applicant.”

[14] The three requirements for the granting of a final interdict are that the applicant must show a clear right, there must exist an actual injury or reasonably apprehended injury and there must not be any prospect or existing other satisfactory relief. The facts of the case proven meet the principles.

[15] A concern of the court is clause 2(b) of the March 2019-order. It reads that: “The respondent be ordered to pay any and all funds belonging to the Boiteko Farming Trust into the following bank account: FNB: Account number: [...]” Counsel for the applicants indicated that it is clearly understood that ownership of “any and all funds belonging to the Boiteko Farming Trust” will have to be verified in law before the order can be executed.

ORDER

[16] In result the *rule nisi* that was issued on 4 March 2019 and as expanded on 27 June 2019 is confirmed and the respondent to pay the costs of the suit.

[17] A copy of this judgement to be served on the Master of the High Court in terms of the Rules of Court by the applicants.

M. OPPERMAN, J**Appearances**

For applicant: Advocate HJ van der Merwe
Chambers, Bloemfontein

Instructed by: Symington de Kok
Bloemfontein

For respondent: Mr. L Mokhele
LM Mokhele Attorneys
Bloemfontein