

**FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA**

Case No. : 1352/2011

In matter between:

KENOSI McDONALD MOROKA N.O	1st APPLICANT
MBUSELLWA ERIC RENS N.O	2nd APPLICANT
MBUSELLWA ERIC RENS	3rd APPLICANT
JAMES CALVERT	4th APPLICANT
GEORGE CALVERT	5th APPLICANT
PATRICK THEMBA MATLHAPE	6th APPLICANT
MATSHELISO FRANS MAHURA	7th APPLICANT

And

JOHN TSEDISO MAURA N.O.	1st RESPONDENT
MBUSELLWA ERIC RENS N.O.	2nd RESPONDENT
BOITUMELO PHILLIP MAHURA N.O.	3rd RESPONDENT
JOHN TSEDISO MAURA	4th RESPONDENT
BOITUMELO PHILLIP MAHURA	5th RESPONDENT
THOMAS HENDRIK MOLELEKOA	6th RESPONDENT
BONAKELE FLIP ENKELD	7th RESPONDENT
QWETH FLIP ENKELD	8th RESPONDENT
THE MEC: DEPARTMENT OF AGRICULTURE FREE STATE PROVINCE	9th RESPONDENT
LETSEMENG LOCAL MUNICIPALITY	10th RESPONDENT
FIRSTRAND LIMITED t/a FIRST NATIONAL BANK	11th RESPONDENT

HEARD ON: 4 AUGUST 2011

JUDGMENT BY: C.J. MUSI, J

DELIVERED ON: 25 OCTOBER 2011

[1] On 23 March 2011 my brother Hancke, J issued the following rule *nisi*.

“1. The Respondents are called upon to give reasons, if any, on Friday, 15th April 2011 at 09H30, why the following order should not be made:

1.1 The business cheque account of the VUKANI MA-AFRIKA TRUST, IT 704/02, business cheque account no. 62117331900, held at FIRST NATIONAL BANK, KOFFIEFONTEIN, be frozen and that only deposits be accepted into the account, and that no monies be withdrawn out of the said account and no cheques be drawn against the said account, unless with the written authority of the First Applicant;

1.2 The sheriff of the High Court, Koffiefontein, be authorised and ordered to attach all the monies currently

held in the account mentioned in prayer 1.1 *supra*, pending the re-organisation of the trust and the appointment of other trustees and/or beneficiaries;

1.3 The sheriff of the of the High Court, Koffiefontein, be authorised and ordered to attach all the assets of the VUKANI MA-AFRIKA TRUST, pending the re-organisation of the trust and the appointment of other trustees and/or beneficiaries, and to compile an inventory in this regard;

1.4 The decision of the First Applicant, to remove the First and Third Respondents as trustees of the VUKANI MA-AFRIKA TRUST, be confirmed;

1.5 The decision of the First Applicant, to remove the Fourth to Eight Respondents as beneficiaries of the VUKANI MA-AFRICA TRUST, be confirmed;

1.6 The First Respondents are ordered, jointly and severally, the one to pay the other to be absolved, to pay the costs of this application;”

- [2] The applicants now seek confirmation of the rule *nisi*. The application is opposed by the first and the third to the eight respondents only. I will for the sake of convenience refer to them as the respondents. No relief is claimed against the ninth and tenth respondents. They are cited because they may have an interest in the subject matter of this application. The second respondent is cited in his capacity as a trustee of the trust. He is also the second applicant, as trustee, and the third applicant in his personal capacity. The eleventh respondent – First National Bank (the Bank) – is cited because prayers 1.1 and 1.2 of the rule *nisi* relates to it.

- [3] During 1998 the Member of the Executive Council responsible for agriculture in the Free State Province (9th respondent) and the Letsemeng Local Municipality (10th respondent) established the Badira Mogo Project with the aim of enabling previously disadvantaged individuals to acquire and cultivate land in order to become self-sufficient.
- [4] The third to the 7th applicants and the fourth to the eighth respondents were selected, after an interview and screening process, to participate in the project.
- [5] On 18 February 2002 the Vukani Ma-Afrika trust (the trust) was established with the parties mentioned in the preceding paragraph as beneficiaries. The first applicant is the donor and the first, second and third respondents were trustees. The trustees were chosen by the beneficiaries.
- [6] With the assistance of the ninth and tenth respondents the trust acquired assets worth approximately R2 173 000.00. All the beneficiaries, except the fifth applicant secured personal loans of R20 000.00 each from the Land Bank in order to start with the farming operations.
- [7] There were disputes between the parties. The fifth, seventh and eighth respondents decided to run the affairs of the trust. According to the respondents the third to the seventh applicants were no longer actively involved in the activities of the trust. Meetings of the trust were not held regularly.

- [8] On 29 July 2004 all the beneficiaries signed a beneficiaries' constitution drafted and presented to them by representatives of the ninth respondent. They elected a management committee, in terms of the said constitution, consisting of the eighth respondent (chairperson), the second respondent (vice-president), the seventh applicant (treasurer), the third respondent (secretary), the fourth applicant (deputy secretary), the first respondent (co-ordinator) and the third applicant (co-ordinator)
- [9] On 29 March 2010 the Acting Director: Legal Services of the ninth respondent, Mr Makoko, wrote to the Bank informing it that the trust held a meeting on 24 February 2010 whereat a committee of the trust was elected. The members of the committee were as follows:
1. **Frans Mahura: Chairperson (7th applicant)**
 2. **Themba Matlhape: Deputy Chairperson (6th applicant)**
 3. **Phillip Mahura: Secretary (5th respondent)**
 4. **Rabie Rens: Deputy Secretary (8th respondent)**
 5. **James Calvert: Treasurer (4th applicant)**
 6. **Eric Rens: Co coordinator (3rd applicant)**
 7. **George Calvert: Co coordinator (5th applicant)**
- [10] He also requested that the signatories to the trust's bank account should be changed.
- [11] I hasten to mention that the drafting and signing of the beneficiaries' constitution and the election of committee members in terms thereof, to run the affairs of the trust, were irregular and in conflict with the trust deed. This served to

deepen the tension and disputes between the parties. Some of the beneficiaries were of the view that the trust was being mismanaged and its funds misused. On the other hand there was an allegation that only five of the beneficiaries were actively participating in the activities of the trust.

- [12] On 7 September 2010 a meeting was held between the trustees, beneficiaries, representatives of the Free State Department of Agriculture and the donor at the donor's offices. During this meeting there was a complaint that the signatories to the trust's bank account do not want to relinquish their signing powers. The trustees and beneficiaries decided, as an interim measure, to appoint new signatories viz Phillip Mahura (5th respondent), Frans Mahura (7th applicant) and MK Motlhabane, who is neither a trustee nor a beneficiary. It was also resolved that the trust deed be amended so that the 7th applicant and a neutral person, Lenka Mholo, be appointed as trustees. This resolution was not implemented.
- [13] On 12 January 2011 Mr Makoko wrote to the Bank requesting it to freeze the trust's bank account. On 13 January 2011 the Bank placed a temporary hold on the account.
- [14] On 4 February 2011 the first and third respondents, as two of the three trustees of the trust, purportedly held a meeting of the trust and resolved to give the third respondent full power to sign any documents, agreements, bank documentation

including signing of cheques on behalf of the trust and that the trust should enter into a lease agreement with Pieter Ferreira Trust and Linsal Boerdery.

[15] On 1 March 2011 the Bank confirmed that only the 4th, 7th and 8th respondents have signing authority on the trust's bank account.

[16] On 16 March 2011 the first applicant, in his capacity as donor, removed the 1st and 3rd respondents as trustees. He also removed the 4th to the 8th respondents as beneficiaries of the trust. He purportedly acted in terms of clauses 5.5 and 6 of the trust deed which reads as follows:

“5.5 The Donor also reserves the right to appoint additional Trustees including the right to remove any of the existing Trustees as and when a need arises and it is in the best interest of the trust...

6. The Donor reserves the right to appoint Beneficiaries including the right to remove any of the existing beneficiaries as and when a need arises and if, it is in the interest of the Trust.”

[17] The first applicant informed the Bank about his decision to remove the respondents as beneficiaries and/or trustees. He wanted to amend the signatories to the trust's bank account. The Bank refused and intimated that the removal of the respondents as trustees and or beneficiaries does not have any effect on the signing powers afforded to them. He then approached this Court.

[18] Mr Reinders, on behalf of the respondents, during argument,

consistent with their papers, indicated that the respondents do not oppose the relief sought in paragraphs 1.1 to 1.3 of the rule *nisi*. They are only opposing the relief sought in paragraphs 1.4 to 1.6 thereof.

- [19] They opposed the granting of paragraph 1.4 and 1.5 on the basis that clauses 5.5 and 6 of the trust deed do not reflect the common intention of the parties. According to them the parties did not agree to include clauses 5.5 and 6 in the trust deed. They requested that the trust deed be rectified by expunging clauses 5.5 and 6. Their alternative argument was that clauses 5.5 and 6 are contrary to public policy. Allied thereto they argued that the applicants did not show that it was in the interest of the trust to remove them as trustees and or beneficiaries of the trust.
- [20] Mr Danzfuss SC on the other hand argued that the parties agreed to all the terms of the trust deed and should be held thereto. He further argued that the donor is entitled to appoint and remove trustees and beneficiaries as per the trust deed.
- [21] The issues that must be considered are firstly whether the trust deed should be rectified, if the answer thereto is in the negative, whether clauses 5.5 and 6 are contrary to public policy and whether the decision of the first applicant was in the (best) interest of the trust.
- [22] This trust is beset by difficulties and challenges. Although

some of the beneficiaries and the trustees had a hand in the problems that befell the trust; their actions were facilitated by the vehicle that was created to achieve a noble goal.

[23] The ninth respondent with the assistance of the first applicant (an attorney of this Court) designed a vehicle to travel on urban tarred roads, without potholes, while the terrain where it was going to be used, probably unforeseen at the time of design, turned out to be very ragged. The problems of the trust were compounded by the fact that the driver of the vehicle (ninth respondent) and the navigators (the first applicant, the trustees and the beneficiaries) had an idea of where the destination is but they could not agree on which road to take. Unfortunately in the confusion the destination became a pipe dream.

[24] The respondents alleged that there was never an agreement that the first applicant would be entitled to remove them as trustees and/or beneficiaries. According to them the ninth respondent intended to create an entity in terms of the Communal Property Association Act 28 of 1996. They allege that all disputes were to be resolved in terms of that Act. They further alleged that the trust deed does not reflect their oral agreement. They contended that the first applicant wrongly included the impugned clauses because of a *bona fide* mistake alternatively that he deliberately added those clauses and omitted to direct their attention thereto and thereby misled them into signing the trust deed containing those clauses.

[25] The first applicant who was instructed by the ninth respondent, on the other hand explained in detail, in his replying affidavit, that he explained the difference between a trust, close corporation and a company to the prospective participants. They decided on a trust. The first applicant drafted the trust deed and explained the contents thereof to all the role players. All the trustees and beneficiaries signed the trust deed. He specifically refers to clause 21 of the trust deed which reads as follows:

“21. ACCEPTANCE OF THE TRUST

21.1 The trustees hereby accepts and undertakes to carry out the terms and conditions and stipulations contained in this deed.

21.2 The beneficiaries hereby accept the benefits conferred upon them on the terms, conditions and stipulations contained in this deed.”

[26] A trust deed can be rectified. See **Meyer v Merchants Trust Ltd** 1942 A.D. 244; **Van Der Bilj, N.O v Barclays Bank (D.C. & O) N.O.** 1953 (2) SA 141 (T.P.D). In **Kathmer Investments Ltd v Woolworths (Pty) Ltd** 1970 (2) SA 498 at 503 B – C Rumpff JA said the following about rectification:

“The doctrine as to rectification of a written contract generally presupposes, of course, the existence of a term of the real agreement, antecedent to the written contract, which has not been properly recorded.”

[27] Our courts rigorously insist upon the party relying on rectification pleading all the essentials thereof and proving

them on a substantial balance of probabilities. See **Von Ziegler and Another v Superior Furniture Manufacturer (Pty) Ltd** 1962 (3) SA 399 (T) at 409 H-410 A.

[28] For a successful reliance on rectification the respondents will have to show on a substantial balance of probabilities that:

- 28.1 There was a oral agreement.
- 28.2 The oral agreement was reduced to writing.
- 28.3 The written agreement does not reflect the common intention of the parties correctly.
- 28.4 The parties intended reducing what was orally agreed upon to writing.
- 28.5 The common intention was not captured in the written agreement due to a *bona fide* common mistake or due to the intentional act of one of parties.

[29] There is no evidence of a real (oral) agreement antecedent to the trust deed. The respondents did not plead any of the terms of the oral agreement. The respondents do not state why they did not object when they realised that the impunged clauses are part of the trust deed. The first applicant expressly states that he read the contents of the trust deed to all the trustees and beneficiaries. There is no evidence to the contrary. The respondents also declared that they accepted the benefits conferred upon them on the terms, conditions and stipulations contained in the trust deed.

[30] The respondents do not say why they did not object to the

trust deed if the intention was to form a Communal Property Association.

[31] I accept the first applicant's version that the provisions of the trust deed were read and explained to the trustees and or beneficiaries. The respondents' denial is totally untenable.

[32] In my view the trust deed correctly reflects the intention of the parties thereto. Are clauses 5.5 and 6 contrary to public policy?

[33] In **Barkhuizen v Napier** 2007 (5) SA 323 (CC) at paragraph 28 and 29 Ngcobo J, as he then was, said the following:

“Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values that underlie it. Indeed, the founding provisions of our Constitution make it plain: our constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and rule of the law. And the Bill of Rights, as the Constitution proclaims, ‘is a cornerstone’ of that democracy; it enshrines the rights of all people in our country and affirms the democratic [founding] values of human dignity, equality and freedom.

[29] What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given

expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable.”

- [34] The respondents do not indicate why they say that the provisions of clauses 5.5 and 6 are contrary to public policy safe to point out that the powers given to the first applicant, regard being had to the history of the trust, are too drastic and draconian.
- [35] Mr Danzfuss on the other hand argued that the impugned clauses are unassailable because a donor is entitled to appoint and remove trustees and beneficiaries in terms of the trust deed.
- [36] I am in agreement with Mr Danzfuss. A donor may reserve the right to remove trustees and beneficiaries. See **Honore’s South African Law of Trusts – Cameron et al**, 5th ed at 89-90. All the beneficiaries are contingent or potential beneficiaries who will only acquire a right to claim payment of the trust benefits upon the occurrence of an uncertain future event. They however have vested interest in the proper administration of the trust by the trustees. See **F du Toit: The fiduciary office of trustees and the protection of contingent trust beneficiaries 2007 Stell LR 469 AT 477 – 478.**
- [37] Clauses 5.5 and 6 of this trust deed also enjoin the donor to

look at other factors before deciding to remove a trustee and/or beneficiary. There must firstly be a need and it must secondly be in the best interest of the trust to remove trustees and in the interest of the trust to remove beneficiaries. I can not say that clauses 5.5 and 6 of the trust deed are contrary to public policy because that is not their clear effect. **See Sasfin (Pty) Ltd v Beukes** 1989 (1) SA 1 (A).

[38] The next question to consider is whether the provisions of clauses 5.5 and 6 are capable and where indeed implemented in a manner that is against public policy.

[39] In **Juglal N.O. v Shoprite Checkers t/a OK Franchise Division** 2004 (5) SA 248 (SCA) at paragraphs 12 and 13 the following was said:

“[12] Because the courts will conclude that contractual provisions are contrary to public policy only when that is their clear effect (see authorities cited in *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 8C-9G) it follows that the tendency of a proposed transaction towards such a conflict (*Eastwood v Shepstone* 1902 TS 294 at 302) can only found to exist if there is a probability that unconscionable, immoral or illegal conduct will result from the implementation of the provisions according to their tenor. (It may be that the cumulative effect of implementation of provisions not individually objectionable may disclose such a tendency.) If, however, a contractual provision is capable of implementation in a manner that is against public policy but the tenor of the provision is neutral then the offending tendency is absent. In such event the creditor who implements the contract in a manner which is unconscionable, illegal or

immoral will find that a court refuses to give effect to his conduct but the contract itself will stand. Much of the appellant's reliance before us on considerations of public policy suffered between the contract and its implementation and the unjustified assumption that, because its term were open to oppressive abuse by the creditor, they must, as a necessary consequence, be against public policy.

[13] An attempt to identify the tendency of contractual provisions may require consideration of the purpose of the contract, discernible from its terms and from the objective circumstances of this conclusion. The present is such a case."

[40] The power to declare a contract or terms thereof contrary to public policy should be exercised sparingly and only in the clearest of cases. See **Sasfin (Pty) Ltd v Beukes** *supra* at 9 B-E.

[41] This might be a case where the contractual terms were implemented contrary to public policy. Clauses 5.5 and 6 contain factors that have to be present before they are invoked, i.e. whether there is a need to remove and whether it is in the (best) interest of the trust to remove. These factors are for the advantage of the trustees and beneficiaries. They were obviously included to protect them against arbitrary conduct by the donor in order to prevent their willy nilly removal. Best interest or in the interest of the trust suggests an objective method of decision making. The donor must therefore consider objectively what is in the best interest of the trust before deciding to remove a trustee or trustees. The best interest can not be based on the subjective view of the

donor. The donor must objectively consider all the relevant facts, circumstances and available options before taking the decision to remove. The decision to remove trustees must be the best course of action under the circumstances. The ultimate decision should also be less restrictive of the trustees' and the beneficiaries' rights to dignity, equality and freedom. The question or test therefore is whether a notional reasonable person in the position of the donor would conclude that there is a need to remove the trustees and beneficiaries and whether it is in the (best) interest of the trust to do so. I propose to deal with this matter with reference to those factors. The conclusion that I reach by following this route renders it unnecessary for me to find whether the implementation of the clauses was contrary to public policy.

[42] Having decided that the donor is entitled to reserve the right to remove a trustee or trustees and or beneficiaries the question is whether this donor acted in accordance with the provisions of clauses 5.5 and 6.

[43] The donor requested this Court to confirm his acts. It is incumbent on him to show on a balance of probabilities that he acted in terms of the trust deed, i.e. that he reasonably considered all the facts and circumstances and took the best course of action because there was a need to remove the trustees in the best interest of the trust. He must also show that there was a need to remove the beneficiaries in the interest of the trust. If I am satisfied that the answers to the

two questions, *viz* whether there was a need and whether it was in the best interest or interest of the trust to remove, are in the affirmative then the decision to remove ought to be confirmed. If the answer to any one of the questions is in the negative then the removal ought not to be confirmed. This is so because both factors must be present. A refusal to confirm will, practically, have no effect because the act of removal has already been done. There is no counter-application to declare it unlawful. The only effect would be the absence of a court order giving judicial imprimatur to the decision of the donor. The applicants argued that it is in the interest of all concerned that the removal of the trustees and the beneficiaries be judicially sanctioned. A confirmatory order, so they argued, would give certainty and enable the donor to continue with the restructuring process. I agree. It is indeed desirable that this Court pronounce on this issue. It is practical and cost effective that certainty is created so that the restructuring, if there is still a need to do so, should proceed uninhibited by the prospect of further litigation whereas this issue can be pronounced upon in these proceedings together with the issues in paragraphs 1.1 and 1.2 of the rule *nisi*. There is also the danger that other persons may be appointed as trustees and or beneficiaries and acquire certain rights. Uncertainty will also not be in their interest. This judgment might also assist the parties in charting the way forward because nothing prohibits the donor to reappoint the same trustees and or beneficiaries.

[44] It is a strange truism that a group of like-minded individuals

working towards the same goal may harbour deep rooted differences. In this case, individuals from different backgrounds were selected to work together without any rules of engagement or conflict management skills. All that they had to work on was the provisions of the trust deed. Other than that Rafferty's rules applied. This was fertile ground for conflict.

[45] When the conflict escalated the ninth respondent responded by drafting the beneficiaries' constitution which was embraced by all the beneficiaries. They signed it on 29 July 2004. This document, although at odds with the trust deed, contains an elaborate dispute resolution mechanism. It *inter alia* provides for all disputes to be referred to a mediation committee. If the dispute is still unresolved within 21 days it may be referred to arbitration by any party. It was clearly an attempt by the ninth respondent to resolve some of the disputes between the beneficiaries.

[46] The first applicant states that on 14 April 2008 the third applicant, supported by the fourth to seventh applicants, requested him in a letter to appoint additional trustees. As proof thereof he appends a copy of a letter dated 14 April 2008 and signed by the third to the seventh applicants.

[47] This letter was purportedly written on 14 April 2008. Under the heading "reasons that led to this decision" the following *inter alia* appears:

47.1 A meeting was held between all the beneficiaries and the

donor at the latter's offices on 16 September 2008. At this meeting it was resolved that the beneficiaries and trustees "will hold both Trustees' and Executive meetings to solve most of our challenges."

- 47.2. On 11 November 2008 the beneficiaries met with representatives of the ninth respondent and took resolutions similar to those taken at the meeting of 16 September 2008.
- 47.3. On 19 November 2008 a meeting was held with a legal team that was appointed as mediators.
- 47.4. The 5th, 7th and 8th respondents who were former executive committee members refused to relinquish power and their signing authority to the trust's bank account. These respondents ran the affairs of the trust for the entire 2009.
- 47.5. The mediators held meetings with them during January 2010 and February 2010. The mediators or legal team declared that all ten original beneficiaries are still beneficiaries and that "the Trust Deed and the Beneficiary Constitution must both be used in are (sic) best interest and that there two documents don't conflict on (sic) each other."
- 47.6. On 24 February 2010 elections were held and a new Executive Committee appointed.
- 47.7. On 5 March 2010 the newly elected executive committee held its first meeting.
- 47.8. The signatories to the letter mandated the third applicant to request that the 7th applicant and the 4th applicant be added as trustees.

[48] It is clear from the contents of the letter that it could not have been written on 14 April 2008. Accepting that the date is wrong, it is clear from it that all the beneficiaries were told by

the legal team or mediators that the beneficiaries' constitution and the trust deed are not in conflict with each other. They requested the first applicant to appoint two additional trustees. He did not. No reason is given as to why he did not adhere to this request. It is also clear that the first applicant was aware that the beneficiaries' constitution was being used to govern the affairs of the trust. There is no evidence whatsoever as to what he did to remedy the situation by for example pointing out, as he now loudly proclaims, that the beneficiaries' constitution is illegal and in conflict with the trust deed.

[49] In fact there is sufficient evidence pointing to him being complicit in creating the chaos he now wants to blame the respondents and the ninth respondent for. In his founding affidavit he states that:

“On 7 September 2010 a further meeting was held by the trustees of the trust and the beneficiaries in the presence of the representatives of the Department of Agriculture. At this meeting the presentees appointed new signatories for the bank account of the trust including seventh applicant and Mr M.K Motlhabane. Neither of them are trustees and Mr Motlhabane is not even a beneficiary.

At the same meeting it was resolved that the trust deed be amended to include the following people... as the trust committee. They were the present three trustees as appears from annexure “A” as well as seventh applicant and a certain Ms Cecilia Mholo who is not a trustee and neither a beneficiary. I append hereto as annexure “K” a copy of the minutes of this meeting.”

[50] Annexure A referred to above is the letter of authority issued by the Master authorizing the three trustees to act on behalf of the trust.

[51] The minutes (annexure K) however reveal that the meeting of 7 September 2009 was held “between the trustees and the beneficiaries of Vukani Ma–Africa, the Department of Agriculture and the donor.” My underlining.

[52] The minutes further reads as follows:

“The donor Mr Moroka introduced himself and mentioned the powers vested in him as a (sic) donor.”

[53] After each beneficiary was asked what he thinks should happen the following interim resolutions were taken:

“Interim resolution

As an interim matter (sic) the trustees and the beneficiaries appointed new signatories there (sic) are as follows;

Phillip Mahura

Frans Mahura

M.K. Motlhabane

Asset creditors and debtors committee was also appointed it included from the 1st group Phillip Mahura and Rabie Rens, 2nd group Frans Mahura and Eric Rens. The registration of the bakkie in the name of the Trust must be done.

Amending of the Trust Deed and having the following people as the trust committee

Phillip Mahura

John Mahura

Eric Rens
Frans Mahura
Cecila Mholo as a neutral person.”

[54] It is clear from these minutes that the first applicant was an active participant and condoned the interim resolution that the 7th applicant who is not a trustee should be made a signatory to its bank account and that M K Motlhabane who is neither a trustee nor a beneficiary should also have signing powers on the trust’s bank account.

[55] The interim resolution interestingly contains a solution, that is, that additional trustees be appointed. This solution is the same as the one that was proffered in the letter dated 14 April 2008. Significantly, when all the beneficiaries were asked what their respective views were they either indicated that they want out of the project and that the assets should be shared or that they want to remain on the farm as part of the project. None of them suggested that any of the trustees and or beneficiaries should be removed.

[56] The first applicant gives the following reasons for his decision to remove the relevant beneficiaries and trustees;

56.1. The only duly elected trustees of the trust are the first and the second respondents but several other persons take part in the running of the affairs of the trust in conflict with the trust deed.

56.2. The signatories on the cheque account have been irregularly authorised and in any case not at a meeting of the trustees and include at least two individuals who are

not trustees at all.

56. 3. The trust is supposed to receive rental income from the Government of the Republic of South Africa and tenants of six residential units. He could not trace any record that any of those amounts have been deposited into the trust's account.

56.4. There were allegations that the affairs of the trust are run for personal gain "by those responsible and that the income find their (sic) way to the pockets of those individuals and not to the bank account of the trust. Those were also the reasons for the attempt by the ninth respondent to freeze the bank account."

[57] I now deal with each of these reasons. The first, second and third respondents were trustees of the trust. The trustees were faced with an unenviable dilemma. Do they follow the terms of the trust deed and receive no financial support or do they follow the beneficiaries' constitution as presented to them by the ninth respondent's representative and receive financial support? In order to comply with the prescripts of the trust deed on the one hand and with the beneficiaries' constitution on the other they had to become ditheist. Unfortunately, as we know, it is very difficult to serve two gods. In the end everyone, the trustee, donor and beneficiaries, understandably decided to dance to the ninth respondent's tune. After all he paid the piper. The donor only donated R50.00 to the trust.

[58] In terms of section 9 (1) of the Trust Property Act No 57 of 1988 (the Act) all the trustees were supposed to perform

their duties and exercise their powers with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another. The trustees have a duty not to expose trust property to business risks. See **Sackville West v Nourse and Another** 1925 AD 516 at 535. The standard of care required of a trustee is higher than that which an ordinary person might generally observe in the management of his or her own affairs. A trustee must adopt the standard of the *bonus et diligens paterfamilias* of Roman Law. See **Administrators, Estate Richards v Nichol and Another** 1999 (1) SA 551 (SCA) at 557 C-F. **Tijmstra N.O v Blunt – Mackenzie N.O and Others** 2002 (1) SA 459 (TPD) at 472 – 473. Trustees can be held jointly and severally liable. See **Ex parte Blaikie Trusts 1952 (3) SA 200 (N)**; **The Master v Deedat and Others 2000 (3) SA 1076 (N)** at 1086.

- [59] At all the relevant meetings the second respondent, who is also the second and third applicant, was present. He also actively allowed other persons to take part in the running of the trust's affair. In his letter dated 14 April 2008 he states the following:

“This ex-self impose (sic) three ex-executives and Trust fund (sic) signatories namely Mr Rabie Rens, Phillip Mahura and Fillip Enkeld refuse to hand power over to the newly elected executive members and started to isolate (sic) the other five beneficiaries again by claiming they are not part of the Trust...”

He further states that:

“On the 5th of March 2010, the first meeting were (sic) held by the newly elected executives. On that meeting six of the

executives were present except Rabie Rens who haven't even sent an apology. At that meeting decisions were taken of which one of them was that the previous bank signatories must hand over the signing rights to the newly elected committee. When they were requested to avail themselves at the bank on the appointed date, they refuse (sic) to hand over the signing rights."

Clause 5.7.4 of the trust deed stipulates that:

"The office of trustee shall be vacated if, amongst others, he plays no meaningful part in the development of the trust or is found to be acting in conflict with the interest of the trust"

[60] The insistence by the second respondent that the executive committee should be in charge of the trust property is in conflict with the interest of the trust. It is clear that the second respondent like the first and third respondents abdicated his duties as a trustee. He was not removed as trustee or beneficiary. No reason is given why he was not removed. There is also no reason why the first applicant treated him differently. All the *dramatis personae*, except the first applicant, were *ad idem* that the best solution to solve the problems is to appoint additional trustees. Not a single beneficiary requested that the respondents be removed as either trustees and or beneficiaries. The first applicant does not give any reason why he did not implement the suggestion of the other applicants and the unanimous interim resolution to appoint additional trustees. The appointment of additional trustees might have solved the problem.

[61] The first applicant states that the signatories to the bank

account were irregularly authorised. That is so. The current signatories were not authorised by the trustees at a duly convened meeting of the trustees. This points to the ineptitude of all the trustees, including the second respondent. What is very disconcerting is the fact that the first applicant complains about this and gives it as a reason for the removal of the trustees and beneficiaries while he condoned the irregular actions of the trustees and beneficiaries. It was at a meeting at his offices, in his presence, where it was resolved, without any objection by him, that persons should be appointed as signatories to the trust's bank account. This was not a trustees' meeting. He knew that the meeting could not legally take those decisions, yet he did nothing.

- [62] The respondents clearly showed, by way of bank statements, that the rental income earned was deposited directly into the bank account of the trust. The allegation that the rental money due from the State is not deposited into the trust's account is simply not true. In respect of the residential units the respondents state that those units are rarely occupied but when they are then that money is utilised to cover overhead costs. They don't deny that they did not pay the money into the trust's bank account. This is a clear transgression of section 10 of the Act, which reads:

“When a person receives money in his capacity as trustee, he shall deposit such money in a separate trust account at a banking institution...”

[63] The allegations that the affairs of the trust are run for personal gain are hearsay. This accusation is also vague. It is not clear which of the respondents ran the affairs of the trust for personal gain. No confirmatory affidavit by a representative of the ninth respondent is attached.

[64] On the applicant's own version there is a need to appoint additional trustees. In my view it is also clear that all the trustees breached their fiduciary duties. However, not every breach of trust justifies removal. See **Honorè** supra at page 234. On the other hand the appointment of additional trustees might have obviated the need to remove the two trustees. See **Bonsma N.O v Meaker, N.O. and Others 1973 SA (4) 526 (R.,A.D.)**. The first applicant does not state whether he considered this option and if he did why he did not implement it. It can however not be said that it is in the best interest of the trust to remove only two of the trustees while all three fulfilled their duties as trustees in a manner that is inconsistent with the trust deed and their fiduciary duties. I am not satisfied that the donor could reasonably have concluded that the removal of the trustees is the best course of action to take. His decision to remove them was therefore not in the best interest of the trust. The arbitrary and discriminatory manner in which the first applicant decided to remove the first and third respondents should not be confirmed. It is clear that they were removed as a punitive measure.

[65] It is clear that there were two groups or factions of

beneficiaries. The first applicant clearly aligned himself with the group led by the third applicant. He must have decided that if he gets rid of the one group there would be peace amongst the remaining beneficiaries. He does not state what measures, if any, he took to resolve the disputes. Other than the meetings held at his offices he states that the ninth respondent endeavoured to no avail to resolve the disputes. He did not attach a confirmatory affidavit by the ninth respondent. Getting rid of some beneficiaries in the manner that the first applicant did might just be a recipe for strife and animosity which is something that none of the parties want. All the beneficiaries contributed not only their physical labour but also by making personal loans in order to start the farming operations.

[66] Although the fruits of their labour and loans became trust property it can not be in the interest of the trust to remove them arbitrarily as beneficiaries whereas the trust deed clearly states that there must be a need and it must be in the interest of the trust to do so. It is also clear that they were removed as beneficiaries as a punitive measure and not in the interest of the trust.

[67] In any event the applicants failed to show that there was a need or that it was in the interest of the trust to remove the beneficiaries. It is clear that the conflict and differences were not of such a nature that removal was a good, let alone best, solution under the circumstances. Nothing, at all, is said about the sixth respondent's conduct but he too was

removed as a beneficiary. No reason is given why he is treated differently from the third to the seventh applicants. I am not satisfied that the donor could reasonably have concluded that there is a need to remove the beneficiaries or that their removal was in the interest of the trust. The removal of the beneficiaries should also not be confirmed.

[68] This matter was postponed on 26 May 2011 because the applicants failed to file their replying affidavit, as ordered, on or before 19 May 2011. The costs occasioned by the postponement stood over for later adjudication. Mr Danzfuss made no submission in this regard. Mr Reinders requested that the applicants be ordered to pay the respondent's costs occasioned by the postponement. I agree.

[69] The respondents, from the beginning, indicated that they do not oppose the relief sought in paragraphs 1.1 to 1.3 of the rule *nisi*. They opposed the granting of paragraphs 1.4 and 1.5 (the confirmation of their removal) thereof. They were successful in their opposition.

[70] In my view the trust should not be ordered to pay the costs of this application. The applicants should pay the costs. Although the first applicant is cited as Kenosi McDonald Moroka N.O. he holds no office. It is the trustees who hold office and not the donor.

[71] Mr Reinders requested me to order the applicants to pay the costs occasioned by the employ of two counsel. The

applicants did not object. They also employed two counsel. The employment of two counsel in this matter was justified.

[71] I accordingly make the following order:

- a) Paragraphs 1.1 to 1.3 of the rule *nisi* are confirmed.
- b) Paragraphs 1.4 and 1.5 of the rule *nisi* are discharged.
- c) The first and the third to seventh applicants are ordered to pay the costs occasioned by the postponement on 26 May 2011 jointly and severally the one paying the other to be absolved.
- d) The first and third to seventh applicants are ordered to pay the costs of this application, jointly and severally the one paying the other to be absolved, which costs are to include the costs consequent upon the employment of two counsel.

C.J. MUSI, J

On behalf of the Plaintiff:
Assisted by:

Adv F.W.A. DANSFUSS SC
Adv P.DU P.GREYLING

Instructed by: MOROKA ATTORNEYS
74-80 PRESIDENT REITZ STREET
SUITE 19 REITZ PARK
WESTDENE
BLOEMFONTEIN

On behalf of the Defendant: Adv S.J. REINDERS
Assisted by: Adv J.C.COETZER
Instructed by: HONEY ATTORNEYS
NORTHRIDGE MALL
EEUFEEESROAD
BLOEMFONTEIN