THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 149/2015

In the matter between:

JOHANNA DOROTHEA GOWAR	**FIRST APPELLANT**
FRANCOIS PETER GOWAR	**SECOND APPELLANT**

and

REGINALD DAVID GOWAR	**FIRST RESPONDENT**
TERTIUS NICOLAAS VAN DER WALT	**SECOND RESPONDENT**
MASTER OF THE HIGH COURT, GRAHAMSTOWN	**THIRD RESPONDENT**

Neutral citation:	*Gowar v Gowar* (149/2015) [2016] ZASCA 101 (9 June 2016)
Coram:	Maya DP, Majiedt, Petse JJA and Victor and Baartman AJJA
Heard:	19 May 2016
Delivered:	9 June 2016

Summary: Trust and trustee ─ removal from office on grounds of misconduct ─ power of the high court to remove trustee under the common law not abrogated by s 20(1) of the Trust Property Control Act 57 of 1988. Trust ─ termination of ─ power of the court in terms of s 13 of the Trust Property Control Act to terminate a trust circumscribed.

ORDER

On appeal from: Eastern Cape Division of the High Court, Grahamstown (Smith J sitting as court of first instance):

1 The appeal is dismissed with costs including the costs of two counsel.

2 The cross-appeal is dismissed with costs.

JUDGMENT

Petse JA (Maya DP, Majiedt JA and Victor and Baartman AJJA concurring):

Introduction

[1] This appeal and cross-appeal emanate from a long-standing family feud about the control of various family trusts. Both concern the quintessential issue of the circumstances in which a court may remove a trustee from office in terms of either the common law or s 20(1) of the Trust Property Control Act 57 of 1988 (the Act). A related issue is whether the appellants have satisfied the requirements of s 13 of the Act which empowers a court to terminate a trust in certain defined circumstances.

[2] The second appellant, Mr Francois Peter Gowar, and the first respondent, Mr Reginald David Gowar, are brothers. The first appellant, Mrs Johanna Dorothea Gowar, is their mother. They all have an interest either as trustees or beneficiaries (or both) of four family trusts, namely: (a) the David Gowar Trust; (b) the Rietfontein Trust; (c) the Gowar Farm Trust; and (d) the R D Gowar Testamentary Trust. These trusts were established at various times by Mr Reginald Denver Gowar, the father of the second appellant and the first respondent and formerly a farmer of Somerset East, who passed away in July 2007 (the deceased). The first respondent and the second respondent, Mr Tertius Nicolaas van der Walt, are chartered accountants and business partners. The third respondent, the Master of the High Court, Grahamstown (the Master), took no part in the proceedings and I shall therefore refer to the first and second respondents collectively as ‘the respondents’.

[3] The David Gowar Trust owns seven farms. The Rietfontein Trust owns two farms whilst the R D Gowar Testamentary Trust owns one farm, farming equipment and livestock. The Gowar Farm Trust owns farming equipment and livestock.

[4] The second appellant and the first respondent are the trustees of the David Gowar Trust. They, together with their respective spouses and descendants, are the beneficiaries of this trust. The respondents are the trustees of the Rietfontein Trust, the second appellant having been removed as trustee. The beneficiaries of the Rietfontein Trust are the David Gowar Trust, the first respondent and his spouse and descendants.

[5] The second appellant and the respondents are the trustees of the Gowar Farm Trust. The beneficiaries of the Gowar Farm Trust are the appellants, the first respondent and the two brothers' spouses and descendants. The second appellant and the first respondent are, in addition, the trustees of the R D Gowar Testamentary Trust and also its beneficiaries, as are their respective descendants.

[6] The chief protagonists in this bitter and drawn-out dispute are the Gowar brothers. Their conflict largely stemmed from their irreconcilable differences about how the affairs of the various trusts could be best served in the interests of the beneficiaries. Despite concerted endeavours by third parties, including the first appellant, to mediate the dispute remains unresolved.

[7] Ultimately, the dispute culminated in an application brought by the appellants against the respondents in the Eastern Cape Division of the High Court, Grahamstown. In that application the appellants sought an order:

'1. That [the] first respondent be removed as trustee of David Gowar Trust (TM 5553/4) and R D Gowar Testamentary Trust (For Reginald David Gowar and Francois Peter Gowar) (MT 2659/2007).

2. That [the] first and second respondents be removed as trustees of:

2.1 Gowar Farm Trust (IT 1231/1997);

2.2 Rietfontein Trust (TM 5692);

3. That [the Master of the High Court] be directed to appoint Jacobus Marthinus Abraham Louw[1] and David Keith Reed as trustees of:
3.1 David Gowar Trust (TM 5553/4);
3.2 Gowar Farm Trust (IT 1231/1997);
3.3 Rietfontein Trust (TM 5692);
3.4 R D Gowar Testamentary Trust (For Reginald David Gowar and Francois Peter Gowar) (MT 2659/2007).
4. That Jacobus Marthinus Abraham Louw[1] [Stephen Kenneth Gough] and David Keith Reed in their capacities as trustees of the above trusts, be entitled to act in conjunction with the remaining trustees of each such trust and to administer the affairs of the trusts, including the passing of a resolution terminating each such trust and distributing the trust capital and income to the beneficiaries of the various trusts in accordance with the provisions of such trusts.
5. That Jacobus Marthinus Abraham Louw [Stephen Kenneth Gough] and David Keith Reed in their capacities as trustee of the above trusts be exempt from filing security with the Master of the High Court in terms of the Trust Property Control Act 57 of 1988.
6. That first and second respondents be ordered to pay the cost of this application jointly and severally, the one paying the other to be absolved. . . .'

[8] In addition to opposing the application, the respondents also brought a counter-application. In it, they sought the following relief:
'1. That second applicant be removed as a Trustee of the David Gowar Trust (TM5553), the Gowar Farm Trust (IT 1231/97) and the R D Gowar Testamentary Trust (MT2659/2007);
2. That second applicant be ordered to pay the costs of first and second respondent's counter motion.'

[9] Both the main and the counter applications came before Smith J who dismissed both with costs, concluding that:
'[45] Under these circumstances I am not satisfied that the applicants have been able to prove misconduct, lack of capacity, breach of fiduciary duties, or any other grounds to justify the removal of the respondents as trustees. But neither have the respondents been able to establish similar grounds for [the second appellant's] removal as trustee. For the reasons which I have stated earlier, I am also not convinced that his removal as trustee will be in the interests of the beneficiaries.'
The court a quo went on to hold, from the facts outlined in its judgment, that:

[1] Following objection from the respondents, Mr Louw was substituted with a Mr Stephen Kenneth Gough.

'[46] It must have been abundantly clear from [the] summary of the allegations in the main and counter applications that there are extensive and fundamental disputes of fact.'

[10] It continued:

'[47] Mr Ford has belatedly applied for the matter to be referred for trial. He conceded that the factual disputes are so numerous and interrelated that it would be impossible to refer only certain discrete issues for oral evidence. It is in my view unavoidable that the ensuing trial would be protracted, and will incur substantial expenses for the parties and the trusts. In addition, I am of the view that it is extremely unlikely that the balance of probabilities in both the main and counter applications will be disturbed by the hearing of viva voce evidence. The answers to the allegations of misconduct in both the main and counter applications have been comprehensive and reasonable, and those allegations relating to lack of capacity and breaches of fiduciary duties have also been soundly refuted. There can also be little doubt that the applicants must have anticipated the extensive disputes of fact, but nevertheless decided to institute motion proceedings. I am accordingly loath to exercise my discretion to refer the matter for trial under these circumstances.'

[11] Aggrieved by the outcome of their respective applications, both parties sought and were granted leave by the court a quo to appeal and cross-appeal against its judgment.

Factual background

[12] It is necessary to set out some factual background. The trusts in issue were established from 1994 to 2008. The various trust deeds state that the primary objects of the trusts shall inter alia be the acquisition by purchase or otherwise of immovable property or other property and the maintenance, development and improvement of land. The founder was the deceased, a successful farmer during his farming career. He was advised by the first respondent that it would be prudent, for estate planning purposes, for him to conduct his farming operations and to pursue the acquisition of additional farms under the auspices of a trust. Although the deceased was initially not receptive to the proposal, he later agreed subject to the second appellant being made a beneficiary of the David Gowar Trust. In addition, a certain Mr Phillip Gerber, a chartered accountant and the deceased's confidant was, upon the deceased's insistence, appointed as one of the trustees. The deceased subsequently transferred two of his farms into this trust.

[13] As already mentioned, the David Gowar, the Rietfontein and the R D Gowar Testamentary Trusts own several farms in the Somerset East and Alexandria districts. The Gowar Farm Trust farmed, from 2000 until 2010, on all of the farms owned by the other trusts and on Glen Cumming farm owned by the first appellant. The second appellant was in charge of the farming operations conducted by the Gowar Farm Trust, initially with the deceased and in later years on his own. The first respondent was responsible for the bookkeeping and preparation of the financial records of all the trusts and related matters. Some of the farms were purchased and paid for by the first respondent whilst the others were purchased on behalf of the David Gowar Trust. From the income generated through its farming operations, the Gowar Farm Trust inter alia paid its own operating expenses, the deceased's and first appellant's expenses and the second appellant's living expenses.

[14] Additional farms were acquired and paid for with loans obtained from certain banks. The monthly bond instalments ─ or at least a portion thereof ─ were paid from income generated from the farming operations of the Gowar Farm Trust. Occasionally, the first respondent would pay any shortfall in the monthly bond payments. Initially, the farming operations continued reasonably well and additional livestock was purchased. Other farming ventures, albeit short-lived, were also undertaken. But later, the first respondent expressed dissatisfaction about the manner in which the second appellant conducted the farming operations. He was, inter alia, critical of the following: (i) the farming operations that were allegedly running at a loss and thus could not repay the loans and meet other farming expenses; (ii) the dilapidated state of the farm properties and buildings; (iii) the second appellant's alleged preoccupation with advancing his personal interests at the expense of the other beneficiaries of the various trusts in breach of his fiduciary duties as a trustee; (iv) the alleged neglect and state of disrepair of the farms' irrigation systems; (v) the second appellant's alleged failure to provide accurate stock numbers for accounting purposes; and (vi) the fact that there was insufficient income generated from the farming operations to pay rental to the trusts that owned the farms.

[15] Following the deceased's death and during 2008 in the build-up to the escalation of their irreconcilable differences, the second appellant and the first respondent

discussed the prospect of a division of the assets of the trusts. But as they could not agree on how the division was to be implemented, it did not materialise. When this happened, the second appellant and the first respondent apparently agreed that the second appellant should farm for his own account from July 2009. A close corporation named Peter Gowar Farms CC, to be used by the second appellant to conduct farming operations for his own account, was registered. It appears that this arrangement was shortlived for their differences persisted.

[16] Matters came to a head when, in June 2010, a meeting of the trustees of the Rietfontein Trust was convened by the first respondent to which the second appellant was allegedly invited. At that meeting, a resolution was taken in terms of which the second appellant's trusteeship was terminated. Following the removal of the second appellant as trustee, the respondents — being the remaining trustees — took a resolution to withdraw all the farms from the management of the second appellant through the Gowar Farm Trust and to let them to third parties at market-related rentals.

[17] The second appellant was aggrieved by this turn of events and asserted that the respondents' action undermined the farming operations of the Gowar Farm Trust to his financial prejudice as a trust beneficiary. This exacerbated the conflict between the appellants and the respondents. And as the previous attempts by the second appellant and the first respondent to agree on a division of the trust properties had come to naught, the second appellant accused the first respondent — in the latter's capacity as the trustee of the various trusts — of dishonesty and serious breaches of his fiduciary duties towards the trusts' beneficiaries.

[18] On their part, the respondents asserted that the second appellant was guilty of: (i) putting his personal interests above those of the beneficiaries of the trusts; (ii) appropriating trust assets and income for his personal use; (iii) treating trust assets as though they are his personal property; and (iv) refusing to account for his management of the farming operations conducted by the Gowar Farm Trust. These accusations by the second appellant and the first respondent levelled against each other were at the heart of the dispute in the court a quo.

Locus standi

[19] Although the appellants' locus standi was disputed by the respondents in the court a quo, it was no longer a live issue before us and thus no more need be said about it.

Legal framework

[20] I propose dealing first with the law relating to the nature of a trust, the duties of trustees, their removal from office and the statutory power of a court to vary any provision of a trust or to terminate a trust. It is trite that a trust is not a legal person. 'In its strictly technical sense the trust is a legal institution *siu generis* . . . The trustee is the owner of the trust property for purposes of administration of the trust but *qua* trustee he has no beneficial interests therein.' (See in this regard: *Braun v Blann and Botha NNO & another* 1984 (2) SA 850 (A) at 859D-H; *Commissioner for Inland Revenue v Friedman & others NNO* [1992] ZASCA 190; 1993 (1) SA 353 (A) at 370D-H.)

[21] In *Land and Agricultural Bank of South Africa v Parker and others* [2004] ZASCA 56; 2005 (2) SA 77 (SCA) Cameron JA elaborated (para 10):

'. . . . [A trust] is an accumulation of assets and liabilities. These constitute the trust estate, which is a separate entity. But though separate, the accumulation of rights and obligations comprising the trust estate does not have legal personality. It vests in the trustees, and must be administered by them ─ and it is only through the trustees, specified as in the trust instrument, that the trust can act . . . .'

[22] In *Lupacchini NO & another v Minister of Safety and Security* [2010] ZASCA 108; 2010 (6) SA 457 (SCA) Nugent JA took this theme further and observed that (para 1):

'. . . . A trust that is established by a trust deed is not a legal person ─ it is a legal relationship of a special kind that is described by the authors of *Honoré's South African Law of Trusts* as "a legal institution in which a person, the trustee, subject to public supervision, holds or administers property separately from his or her own, for the benefit of another person or persons or for the furtherance of a charitable or other purpose."'

[23] Where more than one trustee have been specified in the trust deed they share a common fiduciary obligation towards the fulfilment of the objects of the trust and must

act jointly. (Compare: *Hoosen & others v Deedat & others* [1999] ZASCA 49; 1999 (4) SA 425 (SCA) paras 23, 24 and 26.)

[24] It is apposite at this juncture to make reference to s 9(1) of the Act. It reads:

'**9. Care, diligence and skill required of trustee ─**

(1) A trustee shall in the performance of his duties and the exercise of his powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another.'

[25] In *Sackville West v Nourse & another* 1925 AD 516, Kotze JA whose judgment was supported by the other members of the bench, succinctly stated the position relating to the fiduciary duties of trustees as follows (at 534):

'The effect of this authority is that a tutor must invest the property of his ward with diligence and safety. It is also said that a tutor must observe greater care in dealing with his ward's money than he does with his own, for, while a man may act as he pleases with his own property, he is not at liberty to do so with that of his ward. The standard of care to be observed is accordingly not that which an ordinary man generally observes in the management of his own affairs, but that of the prudent and careful man; or, to use the technical expression of the Roman law, that of the *bonus et diligens paterfamilias* . . .'

The learned judge of appeal continued (at 535):

'We may accordingly conclude that the rule of our law is that a person in a fiduciary position, like a trustee, is obliged, in dealing with . . . the money of the beneficiary, to observe due care and diligence, and not to expose it in any way to any business risks.'

[26] This principle was elaborated upon by this court in *Administrators, Estate Richards v Nichol & another* [1998] ZASCA 82; 1999 (1) SA 551 (SCA) where the following was stated (at 557D-F):

'. . . [T]he standard was higher than that which an ordinary person might generally observe in the management of his or her own affairs. Such a person, it was pointed out, was free to do what he liked with his property and not infrequently selected investments which were of a speculative nature, particularly when the potential profits were high. A person in a fiduciary position such as a trustee, on the other hand, was obliged to adopt the standard of the prudent and careful person, that is to say the standard of the *bonus et diligens paterfamilias* of Roman law, and was accordingly, as Kotze JA concluded at 535, "obliged, in dealing with and investing the money of the beneficiary, to observe due care and diligence, and not to expose it in any way

to any business risks". The need to avoid risks was emphasised in the judgments of both Solomon ACJ and Kotze JA.'

Removal from office of trustee

[27] It is now trite that the court has inherent power to remove a trustee from office at common law. This power also derives from s 20(1) of the Act which provides as follows:

'**20. Removal of trustee ─**

(1) A trustee may, on the application of the Master or any person having 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 interests of the trust and its beneficiaries.'

[28] Although the Act does not spell out the grounds for the removal of a trustee, the authors of *Honoré's South African Law of Trusts*[2] assert that the general principle which has crystallised over time in the court's exercise of its common law jurisdiction ─ and is now echoed in s 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.[3]

[29] In *Fey NO and Whiteford NO v Serfontein & another* [1993] ZASCA 8; 1993 (2) SA 605 (A) this court remarked that there was nothing in s 60 of the Insolvency Act 24 of 1936 there under consideration that expressly or by necessary implication indicates that the court's inherent common law power of removal from office of a trustee has been displaced. It said the following (at 610A-E):

'Thereafter the learned Judge reasoned by analogy. It appears to me, with respect, that his reasoning is instructive and sound. He said:

"It would seem to me that the position of a trustee in insolvency is analogous to that of a trustee, administrator or executor in a deceased's estate. He occupies a position of trust. Under the insolvency laws it is his function to liquidate the insolvent estate and account to creditors and the insolvent for his administration. In this respect his fiduciary position differs little from that of an executor or administrator of the estate property. In my view the Court has at common law the same power to remove a trustee in an insolvent estate as it has in respect of a trustee, or guardian or administrator in a deceased's estate."

On the second issue before him Thirion J stated his conclusion in the following words:

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

[3] See for example: *Sackville West* above at 527.

"In my view the grounds for removal of a trustee as set forth in s 60 of the Insolvency Act 24 of 1936 as originally enacted were not intended to be in substitution of the Court's common law powers but were intended to be additional thereto. *Madrassa Anjuman Islamia v Johannesburg Municipality* 1917 AD 718 at 723 and 727.

The substitution of s 60 of the Act by s 18 of Act 99 of 1965, therefore, did not in any way affect the Court's common-law powers to remove a trustee from office. This conclusion is in accordance with the well recognised rule in the interpretation of statutes that, in order to oust the jurisdiction of a court of law, it must be clear that such was the intention of the Legislature *(De Wet v Deetlefs* 1928 AD 286 at 290), and in accordance with the rule that statutory provisions which limit or do away with an aggrieved person's right to seek the assistance of the Court have to be strictly interpreted. *Benning v Union Government (Minister of Finance)* 1914 AD 180 at 185."'

Although those remarks were made in a different but analogous context they, by parity of reasoning, apply with equal force in the context of s 20(1) of the Act.

[30] For present purposes, two principles must be emphasised. First, the power of the court to remove a trustee must be exercised with circumspection. Second, neither *mala fides* nor even misconduct are required for the removal of a trustee. As to the former, Murray J explained this in *Volkwyn N.O. v Clarke and Damant* 1946 WLD 456 as follows (at 464):

'. . . [I]t is a matter not only of delicacy (as expressed in *Letterstedt's* case [*Letterstedt's v Broers* (1884) 9 AC 371 (PC) at 387]) but of seriousness to interfere with the management of the estate of a deceased person by removing from the control thereof persons who, in reliance upon their ability and character, the deceased has deliberately selected to carry out his wishes. Even if the . . . administrator has acted incorrectly in his duties, and has not observed the strict requirements of the law, something more is required before his removal is warranted. Both the statute and the case cited indicates that the sufficiency of the cause for removal is to be tested by a consideration of the interests of the estate. . .'

[31] As to the latter, Murray J said the following at 471:

'. . . . It is of course true that proof of dishonesty or *mala fides* is not essential for a case for the removal of executors or administrators. . .'

The learned judge continued (at 474):

'. . . [T]he essential test is whether such disharmony as exists imperils the trust estate or its proper administration. . .'

Thus, 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 the beneficiaries will not in itself be adequate reason for the removal of the trustee from office. (See also in this regard: *Tijmstra NO v Blunt-Mackenzie NO & others* 2002 (1) SA 459 (T) at 473E-G.) Nor, in my view, would mere conflict amongst trustees themselves be a sufficient reason for the removal of a trustee at the suit of another.

[32] Moreover, 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. And, sight must not be lost of the crucial fact that the court may order the removal of a trustee only if such removal will, as required by s 20(1) of the Act, be '*in the interests of the trust and its beneficiaries*'. (My emphasis.)

Variation or termination of trust

[33] The variation of the provisions of a trust deed or its termination may be achieved in various ways. For present purposes it is only the variation or termination in terms of s 13 of the Act that is of relevance. Section 13 reads:

'**13. Power of court to vary trust provisions ─**

If a trust instrument contains any provision which brings about consequences which in the opinion of the court the founder of a trust did not contemplate or foresee and which ─

(a) hampers the achievement of the objects of the founder; or

(b) prejudices the interests of beneficiaries; or

(c) is in conflict with the public interest,

the court may, on application of the trustee or any person who in the opinion of the court has a sufficient interest in the trust property, delete or vary any such provision or make in respect thereof any order which such court deems just, including an order whereby particular trust property is substituted for particular other property, or an order terminating the trust.'

[34] Thus, s 13 of the Act is to the effect that the court may on application of the trustee or any person who, amongst others, has sufficient interest in the trust property delete or vary any such provision, in a trust deed which brings about the result specified

in the section or to grant 'an order terminating the trust.' Cameron et al[4] state that the provisions have both subjective and objective criteria. The former relate to the founder's lack of foresight or contemplation and the latter relate to prejudice to the trust object, beneficiaries or the public interest. These criteria must be satisfied before the court can intervene. Accordingly, as I see it, for the purposes of s 13 of the Act the appellants had to establish on a balance of probabilities that any provision of the trust deed has brought about any one of the consequences mentioned in s 13*(a)*, *(b)* and *(c)* of the Act and that the founder of the trust did not, at the time the trust was established, contemplate or foresee such a result.

[35] In *Potgieter & another v Potgieter NO & others* [2011] ZASCA 181; 2012 (1) SA 637 (SCA) Brand JA who wrote the unanimous judgment of this court said (para 30):

'I do not agree that s 13 supports the authority assumed by the court a quo. I say this for two reasons. First, I find no provision in the original trust deed which brings about any consequence that could not be foreseen by the founder. The consequences which the court a quo found untenable were brought about by an application of common-law principles, not by any provision of the trust deed. . . .'

Consequently, absent the jurisdictional criteria required in terms of s 13 of the Act, it would not be competent for the court to exercise the statutory power conferred on it by s 13. (See, for example: *Curators, Emma Smith Educational Fund v the University of KwaZulu-Natal & others* [2010] ZASCA 136; 2010 (6) SA 518 (SCA) para 48.)

Discussion

[36] That there is a break-down of relationship between the chief protagonists is apparent from the record. As appears above, the record is replete with disputed accusations and counter-accusations which, it was asserted, are a manifestation of a conflict of interests, misconduct, dishonesty and breaches of fiduciary duties made by the one against the other. At the hearing before us, counsel were agreed that there are material disputes of fact on the papers. Thus, applying the principles set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A),[5] the averments set out in the respondents' affidavits should be accepted in relation to the main

[4] Cameron, De Waal, Wunch Solomon & Khan, *Honoré's South African Law of Trusts* 5 ed (2002) at 517.

[5] At 634E-635C; see also: *PMG Motors Kyalami (Pty) Ltd & another v Firstrand Bank Ltd, Wesbank Division* [2014] ZASCA 228; 2015 (2) SA 634 (SCA) para 23.

application unless farfetched or clearly untenable. And, by the same token, the averments contained in the appellants' affidavits must be accepted in respect of the counter-application.

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

[38] The appellants contended that the removal of the first respondent from the trusteeship is necessary, inter alia, because he: (a) cajoled the second appellant into agreeing to the appointment of the second respondent as a stratagem to gain control of the Gowar Farm Trust; (b) required the second appellant to farm for his own account at the height of a drought and when the drought broke, advised Cape Merino and Wool not to accept any livestock or produce from the second appellant, but that if it did, to make payment therefor to the Gowar Farm Trust which he controlled, so as to financially ruin the second appellant; (c) deprived the second appellant of the use of the farms owned by the Rietfontein Trust by letting them to third parties with devastating consequences for the livestock; (d) unilaterally passed a resolution amending the beneficiaries of the Rietfontein Trust to the prejudice of the David Gowar Trust; (e) appropriated income derived from the letting of certain farms for himself; and (f) misappropriated the second appellant's shares in GBG Estates Trust (Pty) Ltd. In all of this, so the appellants contended, the first respondent acted in concert with the second respondent without regard for the appellants' financial wellbeing.

[39] In argument, the appellants' counsel nailed his colours to the mast and relied solely on three bases in support of the appellants' case which he contended fell outside the realm of the factual disputes. He advanced three contentions. First, that the surreptitious removal of the second appellant as the trustee of the Rietfontein Trust leads to only one conclusion that it was intended to advance the first respondent's interests. Second, the addition of the first respondent's wife and children as beneficiaries of the Rietfontein Trust constituted a variation of the trust deed which was impermissible. Third, the fact that 50 per cent of the shares in GBG Estates (Pty) Ltd, a company in which the second appellant allegedly held a 25 per cent shareholding, were

transferred to the Dago Trust of which the first respondent and his family were beneficiaries without reference to him and by amending the balance sheet of the David Gowar Trust to delete the reference to the Trust's shareholding in GBG Estates (Pty) Ltd, the first respondent acted to the prejudice of the trust's beneficiaries in breach of his fiduciary duties.

[40] I deal with these grounds in the reverse order. Apropos the affairs of GBG Estates (Pty) Ltd, it was contended that the first respondent's activities reveal an extraordinary state of affairs which called for an explanation from the respondents as to how the transfer of the shares came about. Yet, it was argued, the respondents studiously avoided providing answers, choosing to take refuge in subterfuge by contending that the dispute relating to those shares was *res judicata*. In my view, this submission is unavailing. It overlooks the simple fact, highlighted by the respondents' counsel, that whatever may have happened with the shares of GBG Estates (Pty) Ltd had no bearing on the affairs of the trusts. Simply put, it was not a trust issue and can therefore found no basis for the removal of the respondents from trusteeship.

[41] As to the removal of the second appellant as the trustee of the Rietfontein Trust, the appellants' contention was that the second appellant was removed merely because he had prior thereto been required to resign but had refused to do so. The appellants then took an inferential quantum leap, relying on this fact, to contend that the second appellant's removal was calculated to advance the first respondent's interests and those of the beneficiaries benefiting through him to the exclusion of all the other beneficiaries.

[42] The respondents, whilst admitting that the second appellant was indeed removed as a trustee, nevertheless contended that his removal was permitted by clause 2.3 of the trust deed which empowers the majority of the trustees to take a resolution removing one of their number, as happened in their case. And that as the second appellant's removal from trusteeship was accepted by the Master it remained effective for as long as it was still extant. In my view, there is merit in respondents' submissions. This must be so for the second appellant does not impugn his removal from trusteeship but only seeks the removal of the respondents as trustees of the affected trusts.

[43] I deal next with the last contention advanced by the appellants in support of their case that the respondents are guilty of misconduct warranting their removal as trustees. It was contended on their behalf that the addition of the first respondent's wife and children as beneficiaries of the Rietfontein Trust amounted to a variation of the Rietfontein Trust deed. Consequently, as the sole beneficiary before variation was the David Gowar Trust, its consent qua beneficiary was necessary and without it the purported variation was ineffectual. In support of this contention the appellants placed much store in *Crookes NO & another v Watson & others* 1956 (1) SA 277 (AD). There, Centlivres CJ, in the course of examining old authorities and reference to the judgment of this court in *Commissioner for Inland Revenue v Estate Crewe & another* 1943 AD 656, reiterated the principle that once a beneficiary accepts the benefit under the trust he acquires rights and the trust deed can thus not be varied without his consent.[6]

[44] Counsel for the respondents submitted that the appellants presented no evidence to establish that the David Gowar Trust had accepted the benefit bestowed upon it in the Rietfontein Trust deed. Consequently, the respondents contended that in the absence of such evidence the appellants' reliance on the decisions in *Crookes NO* and *Potgieter NO* does not avail them. I agree. In the present case, in order to successfully invoke *Crookes NO* and *Potgieter NO*,[7] the appellants bore the onus of proving that the David Gowar Trust had, in one way or other,[8] accepted the benefit bestowed on it. They have not discharged that onus.

Termination of the trust

[45] Before considering this part of the appellants' case it is necessary to have regard to the terms of the trust deed. The relevant provision is clause 28. It reads as follows:

'28 Termination[9]

This trust shall terminate upon whichever of the following events shall happen the earlier;

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[6] See also: *Potgieter* above, para 28; Cameron, De Waal, Wunch Solomon & Khan, ***Honoré's South African Law of Trusts*** 5ed (2002) at 195.

[7] *Potgieter & another v Potgieter & others* [2011] ZASCA 181; 2012 (1) SA 637 (SCA).

[8] See for example: *Ex parte Orchison* 1952 (3) SA 66 (T) at 78H where the following is stated:
'. . . . But by agreeing to become vested with the *dominicum* of property and to administer it in terms of the trust the trustees seem to me to have performed quite a different juristic act. They contracted for the benefit of third parties who might or might not accept the benefits of the contract at some future date . . . but they did not accept benefits under the contract for those third parties.'

[9] This is common to all four trust deeds.

28.1 the passing of unanimous resolution by the Trustees that in their sole and absolute discretion, there is a good and sufficient reason for such termination and they resolve accordingly; or
28.2 The entire Trust Capital has been distributed.'

[46] The appellants seek the termination of the trust on the ground that the relationship between the second appellant and the first respondent has broken down. For this reason, the second appellant contends that he 'no longer trusts the first respondent and [is] not prepared to be associated with him in any manner whatsoever'. Hence he is seeking the appointment of independent trustees 'who may then administer the affairs of the various trusts in the interests of all beneficiaries and . . . terminate such trusts and distribute the capital and income to the beneficiaries. . . .'

[47] Counsel for the respondents submitted that the appellants have made out no case for variation or termination of the various trusts. It was contended that absent the jurisdictional requirements specified in s 13 of the Act the court is not vested with any power under that section to vary or terminate the trusts.

[48] For the appellants it was argued that in substance what they seek is the appointment of additional independent trustees who would administer the affairs of the trusts in conjunction with the existing trustees. Those trustees would then, if they considered there to be a good and sufficient reason to do so, terminate the trusts in accordance with the provisions regulating their termination.

[49] This submission cannot prevail for the reasons explained in paras 34 and 35 above. Moreover, in their notice of motion the appellants sought an order for the appointment of two independent trustees in order for them (in conjunction with the remaining trustees) to, inter alia, pass a resolution terminating the various trusts and distributing the trust capital and income. Having failed to bring their case within the purview of s 13 of the Act, the relief sought in that regard was manifestly doomed to fail. Nor have the appellants brought their case within the terms of clause 28 of the trust deed.

Cross-appeal

[50] I deal next with the cross-appeal. It was in essence premised on the contention that the court a quo erred in finding that 'the removal of the second appellant as a trustee was not in the interests of the beneficiaries of the affected trusts'. And that the court a quo should have found that an overwhelming case of misconduct against the second appellant had been established.

[51] Earlier, I alluded to the fact that the fate of both the appeal and the cross-appeal hinged entirely on the question whether the allegations and counter-allegations of misconduct fall outside the realm of the factual disputes on the papers. Mindful of this fact, counsel for the respondents, in pressing for relief against the second appellant, contended that the second appellant: (a) preferred his personal interests above those of the trusts and all other beneficiaries; (b) banked farming income from the Gowar Farm Trust farming operations into accounts controlled by him; (c) utilised trust assets for his personal benefit without accounting therefor; and (d) failed to account for livestock losses in excess of R1 million. It was argued that the factual account in support of these accusations was beyond question and that the second appellant's denials were far-fetched and clearly untenable to warrant their rejection on the papers.

[52] Unsurprisingly, counsel for the appellants submitted that all of the allegations against the second appellant were disputed. And that the second appellant's denials were in fact not so far-fetched or clearly untenable that the court would be justified in rejecting them merely on the papers. In my view, it is unnecessary to go into a detailed discussion of this aspect. It suffices to say that the issues that counsel for the respondents submitted were discrete and far removed from the factual conflict are in truth inextricably intertwined with the factual matrix contested by the appellants. This conclusion necessarily means that the cross-appeal too cannot succeed.

[53] It must follow, therefore, that the conclusion reached by the court a quo cannot be faulted. Consequently, both the appeal and the cross-appeal fall to be dismissed.

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

1 The appeal is dismissed with costs including the costs of two counsel.

2 The cross-appeal is dismissed with costs.

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JUDGE OF APPEAL

APPEARANCES:

For Appellants:	E A S Ford SC Instructed by: Pagdens Attorneys, Port Elizabeth Claude Reid Inc, Bloemfontein
For First and Second Respondents:	A R Sholto-Douglas SC (with D H De La Harpe) Instructed by: Coetzee & Venter Inc, Port Elizabeth Cooper Majiedt Inc, Bloemfontein