

**N and Others v Maluleke
N.O and Others (5983/2021)
[2022] ZAGPPHC 911**



**Presented by: Phia van
der Spuy**

**N and Others v Maluleke N.O and Others (5983/2021)
[2022] ZAGPPHC 911 (25 November 2022)**

North Gauteng High Court, Pretoria

CASE NO: 5983/2021

REPORTABLE: NO

Heard on: 21 November 2022

Delivered: 25 November 2022

MILLAR J

Question:

- ✧ Did applicants have *locus standi* to seek the orders that they did against the Trusts - accounting and freezing of accounts
- ✧ Definition of *locus standi* = **right to bring an action, to be heard in court, or to address the court** on a matter before it

Maluleke facts

✧ 13 Applicants:

✧ 1st and 2nd applicants

✧ Reflected as potential beneficiaries of the Legacy Trust

✧ Previously served as trustees of the Trusts before they were removed by order of court

✧ 3rd to 13th applicants - tenants of properties owned by the Trusts who purport to have an interest in the affairs of the Trusts. No right to any of the orders sought

✧ 9 Respondents:

✧ 6 Trustees

✧ Master of the High Court

✧ Registrar of Deeds

✧ First National Bank

Maluleke - summary

- ✧ Application to **freeze bank accounts** of the Trusts pending **accounting** by trustees
- ✧ Applicants **neither beneficiaries nor trustees** having any **direct legal interest** in the affairs of the respective Trusts
- ✧ Neither the **prior** holding of the office of trustee in a trust nor being within a **class of persons who may be nominated** as a beneficiary confer *locus standi*,
 - ✧ unless holding office as a trustee or until exercise of trustees' discretion and **nomination** as beneficiary
- ✧ No **direct legal interest** in the affairs of the Trusts – application dismissed with costs

Maluleke - Background

- ✧ Nkoanyana Trading Trust (IT1870/10(T)) (“the Trading Trust”) and the TS N[....]2 Legacy Trust (IT002126/2016(T)) (“the Legacy Trust”) (IT002126/2016(T))
- ✧ Both Trusts were established by the late Tsakane Stanley N[....]2. Both Trusts are interlinked with the legacy Trust being the sole beneficiary of the trading Trust.
- ✧ The trust deed was amended to stipulate “*The beneficiary shall mean the TS Nkoana Legacy Trust, IT2126/2016, duly registered on 22 July 2016*”
- ✧ None of the other non-trustee respondents have opposed the application
- ✧ Application **interlocutory** to the main application brought under the present case number and in which was sought inter alia the **removal** of the trustees of both Trusts

Maluleke - Orders sought

- ✧ To **join** the 5th and 6th respondents in their capacity as trustees and also to join the 9th respondent in the main application.
- ✧ To **freeze** the bank account of the Trading Trust
- ✧ To compel an **accounting** and disclosure of financial and management reports for the years 2019 to 2021 for both trusts, to the applicants.
- ✧ The Trusts to give **account of various specific transactions** entered into by them over the period 1 December 2021 up to 17 January 2022.

Maluleke - Orders sought

- ✧ To compel the Master to exercise his powers in terms of **section 16** of the Trust Property Control Act in the event of non-compliance by the respondents with any order compelling them to account in the terms requested
- ✧ *“(1) A trustee shall, at the written request of the Master, **account** to the Master to his **satisfaction** and in accordance with the Master's requirements for his administration and disposal of trust property and shall, at the written request of the Master, deliver to the Master any **book, record, account or document relating to his administration or disposal of the trust property** and shall to the best of his ability answer honestly and truthfully any question put to him by the Master in connection with the administration and disposal of the trust property. (2) The Master **may**, if he deems it necessary, cause an **investigation** to be carried out by some fit and proper person appointed by him into the trustee's administration and disposal of trust property. (3) The Master shall make such order as he deems fit in connection with the cost of an investigation referred to in subsection (2).”*
- ✧ To compel the Master to deliver a report to the court in which it is indicated whether or not there any such **accounting was satisfactory**.

Maluleke - Questions

- ✧ Should joinder of the 5th, 6th and 9th respondents be granted?
- ✧ Should applicants have *locus standi* to seek the orders that they do against the Trusts?
- ✧ A beneficiary of a trust has the right to an accounting in terms of **section 19** of the Trust Property Control Act which provides “*If any trustee fails to comply with a request by the Master in terms of section 16 or to perform any duty imposed upon him by the trust instrument or by law, the Master or any person having an interest in the trust property may apply to the court for an order directing the trustee to comply with such request or to perform such duty.*”
- ✧ Also in terms of the **common law** – see *Mia v Cachalia* [1934 AD 102](#)
 - ✧ Trustees must maintain a proper set of accounts and be in a position to report to beneficiaries when requested to do so
 - ✧ Not mentioned *Doyle v Board of Executors* case of 1999?

Maluleke - Beneficiary clause - Legacy Trust

Clause 1.1.2 of the Legacy Trust defines “the beneficiaries” as follows:

“1.1.2 the beneficiaries” means that person or other persons who may from time to time be selected by the Trustees in their entire and absolute discretion to be a beneficiary in respect of the income or capital profits or capital gains or capital or either under the Trust, from amongst the members of the classes consisting of:-

1.1.2.1 Tsakane Stanley N[...]² (Id no: [...]);

1.1.2.2 Mpho Lucy N[...]² (Id no: [...]);

1.1.2.3 Selina Mmazhapelo N[...]² (Id no: [...]);

1.1.2.4 Khutso N[...]² (Id: [...]);

1.1.2.5 K[...]² N[...]² N[...]² (Id no: [...]);

1.1.2.6 P[...]² N[...]² (Id no: [...]);

1.1.2.7 K[...]² O[...]² N[...]² (Id no: [...]);

1.1.2.8 T[...]² N[...]² (Id no: [...])

1.1.2.9 Halamalani Nelfy N[...]² (Id no: [...]);

1.1.2.10 The biological descendants of the beneficiaries set out in 1.1.2.1 to 1.1.2.8;

1.1.2.11 Any Trust established for the benefit of any of the aforementioned;

1.1.2.12 Failing the existence of any members of the classes set out in the sub-classes supra, only in the event, only in that event, the nearest blood relatives of the Founder;

Maluleke - When were beneficiaries selected?

- ✧ 14 February 2022 trustees exercised the discretion conferred upon them in the Trust Deed to select beneficiaries from amongst the list of potential beneficiaries. The Trust Deed provides that:
 - ✧ *“21.1 The Trustees shall use, pay, distribute or apply the whole or portions of the Trust income, in such proportions and at such time/s as they in their sole, absolute and unfettered discretion determine, for the benefit of or to all or any one or more of the beneficiaries”*
 - ✧ *“28. The discretionary powers vested in the Trustees in terms of this deed shall be complete, exclusive and absolute and any decision made by them pursuant to any such discretionary powers shall be binding and unchangeable by any beneficiary affected thereby or by any other person”.*
- ✧ When the beneficiaries were **selected** by the trustees, these did not include either the 1st or 2nd applicants or any of their biological descendants.

Maluleke - Applicants argued that:

- ✧ 1st and 2nd applicants had a “**vested**” or “**contingent**” interest in the affairs of the Trusts
- ✧ They are named as **potential** beneficiaries of the Legacy Trust
- ✧ Their interest in the Trading Trust was based on “vested” or “contingent” interest in the Legacy Trust as **sole beneficiary** of the Trading Trust
- ✧ Given the formulation of clause 1.1.2 of the Legacy Trust, that they and their minor children, by virtue of their falling within a “**class**” of beneficiary, had an **interest** in the Trusts and on that basis the trustees owed them a **fiduciary duty** (Griessel N O & Others v De Kock & Another 2019 (5) SA 396 (SCA) at paragraph 19)

Maluleke - Applicants argued that:

- ✧ “Even if an applicant did **not have an interest** in the trust property, he could still have *locus standi* by virtue of the **common law** if he had a **sufficiently direct interest** in the subject matter of the litigation” (Bouwer NO v Smit - 2019)
- ✧ Resolution of 14 February 2022 constituted an attempt to **amend** the trust and that, since they were potential beneficiaries, such amendment was impeachable.
- ✧ Where there was any **right**, whether **vested or contingent**, an attempt to amend the trust deed would necessarily affect the interests of the holder of that right and that this may constitute an ‘**interest**’ (Potgieter v Potgieter and Another)

Maluleke - Respondents argued that:

- ✧ Besides the fact that the trustees had not **appointed** any beneficiaries until the resolution of 14 February 2022, the mere fact that the 1st and 2nd applicants had themselves been **trustees** did **not confer upon them the status of beneficiaries** who had **accepted a benefit** and now had a **legal interest**.
- ✧ Any **acceptance** would have had to have been predicated upon a **nomination** in terms of clause 1.1.2 to have been made first.

Maluleke - Held

- ✧ Inasmuch as they are listed as **potential beneficiaries**, the Trust specifically provides that the **actual beneficiaries** would only be those, selected from the list in trust deed, who the trustees **in their “entire and absolute discretion”** selected.
- ✧ In absence of a **selection** by the trustees (Braun v Blann and Botha NNO and Another [1984] ZASCA 19; 1984 (2) SA 850 (A) at 867A-B), none of the persons referred to in clause 1.1.2 of the Trust Deed **can claim any right to any benefit** from the Legacy Trust and it must follow, that if they have **no right**, they have **no interest** (Whether to claim insight into the affairs of the Trust, accounting or removal of a trustee – see Ras and Others NNO v Van Der Meulen and Another 2011 (4) SA 17 (SCA) at 20C-D)

Maluleke - Held (cont.)

- ✧ Any **acceptance** would have had to have been predicated upon a nomination in terms of clause 1.1.2 to have been made **first**
- ✧ Cameron Wunsch and de Waal, Honore's Law of Trusts, Fifth Edition, p499 in which it is stated "*No form is prescribed for acceptance, but it is advisable for a beneficiary with sufficient understanding to write to the trustee accepting the benefits under the trust. A mere mental attitude of approbation does not amount to acceptance. An unequivocal expression of intention to accept is needed.*"

Maluleke - Held (cont.)

- ✧ “Classes” were intended to comprise a list of those in respect of whom the trustees were to exercise their discretion in deciding who the beneficiaries of the Trust **would be** – only potential beneficiaries , not actual beneficiaries
- ✧ Resolution of 14 February 2022
 - ✧ The preamble to the resolution reads “That by virtue of clause 1.1.2 of the trust deed, the trustees hereby **appoint** the below beneficiaries, as income and capital profits beneficiaries, capital gains or capital beneficiaries, under the trust:”
 - ✧ Not amended trust deed; distinguishable from Potgieter case

Maluleke - Held (cont.)

- ✧ The **failure** of the trustees (which included the 1st and 2nd applicants while they were trustees) to **exercise their discretion** and nominate beneficiaries does **not** transmute the persons named within the category of those who could be selected as **beneficiaries**, into beneficiaries.
- ✧ The office of trustee is a **fiduciary** one which is **separate** and distinct from being a beneficiary and the **holding of such office** similarly does **not** transmute the trustee into becoming a **beneficiary**.

Maluleke - Held (cont.)

- ✧ Since they are **not beneficiaries**, they have **no legal interest** in the affairs of the Trust and have **none of the rights (contingent or vested or otherwise)** conferred upon either beneficiaries or trustees in terms of section 19 of the Trust Property Control Act to demand an accounting.
- ✧ Concluded - present application **cannot succeed**
- ✧ As regard the first issue - absent locus to bring the present application, the application for the **joinder** of the 5th, 6th and 9th respondents must also **fail** as must the order for the **freezing** of the bank account

Maluleke - Ordered

- ✧ The application is **dismissed**.
- ✧ The **1st to 13th applicants** are ordered to pay the respondents costs jointly and severally, the one paying the others to be absolved.
- ✧ The costs are to be paid on the scale as between **party and party** and are to include the costs consequent upon the employment of **senior counsel**.

What is a discretionary/contingent beneficiary?

- ✧ A beneficiary of a *discretionary trust* (which is an *ownership trust* since the trustees remain the *non-beneficial owners* of the trust assets) only has a *discretionary or contingent right* (a hope to receive something) until the trustees have **exercised their discretion** in terms of the trust instrument in favour of such beneficiary.
- ✧ This case referred to “**vested**”/”**contingent**” interest – not the same

What about Doyle v BOE case?

- ✧ Doyle v Board of Executors [1999] 1 All SA 309 (C)
- ✧ Confirming the contingent beneficiary's **right** to an accounting
- ✧ Contingent beneficiary - right to trust income and capital will only vest on the happening of some **uncertain future event** (Griessel v de Kock case of 2019)

What about Doyle v BOE case? (cont.)

The trust was created in 1949 with Mrs D as the income beneficiary. Her son was to become the capital beneficiary only on her death. Mrs D died in 1994, whereupon the son demanded full and complete accounting from the date that BoE was appointed as trustee – which was in 1951. BoE argued that it was only the income beneficiary – Mrs D – who had been entitled to this accounting, as the son only became entitled to the accounting as at the date of Mrs D's death – the date he became the capital beneficiary. The Court disagreed and held that the trustees have a *duty* to provide *full trust administration reports and accounting records* to trust beneficiaries and even to *contingent beneficiaries born later*, dating back to the time the discretionary trust was *established*. The judge found that a beneficiary is entitled to request and receive from the trustees full, true, and proper accounting records of the trust, *supported by vouchers*. The judge further found that beneficiaries are entitled to have access to the books of account of the trust, even though they only have a *contingent right*.

What about Griessel de Kock case?

Griessel NO and Others v De Kock and Another (334/18) [2019] ZASCA 95; 2019 (5) SA 396 (SCA) (6 June 2019)

It “is undisputed that the trust that was created falls in the category of discretionary trusts, since the trustees have been given the right, within their discretion, to select beneficiaries from a list of potential beneficiaries. It follows that none of the potential beneficiaries can claim rights in perpetuity, as their rights are merely contingent. The question is whether the first respondent, as a potential beneficiary in a discretionary trust, has rights that he could ask the court a quo to protect”.

The judge was of the view that the Potgieter case is “*instructive*”. The judge concluded that “*even beneficiaries who have contingent rights are entitled to protection*” although in this case “*all the potential beneficiaries, including the first respondent, had previously been permitted to have a vacation at the farm*”, which created a *vested right*, which is stronger than a contingent right.

What about Griessel v de Kock case? (cont.)

- ✧ Court held that a **contingent beneficiary** in a trust does have rights worthy of protection by the Court.
- ✧ Our law, therefore, also affords the contingent beneficiary the right to protect their interests from **maladministration** by trustees (Gross v Pentz case of 1996)
- ✧ Role of a trustee in administering a trust calls for the exercise of a **fiduciary duty** owed to **all the beneficiaries** of a trust, **irrespective** of whether they have **vested rights** or are **contingent beneficiaries** whose rights to the trust income or capital will only vest on the happening of some **uncertain future event**.

Thank you!

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phia@trusteeze.co.za

