

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED

Case No: 2017/76334

12/9/2019

In the matter between:

ESKOM HOLDINGS SOC LIMITED

Applicant

and

JACOBUS JOHANNES PIETERS BOTHA N.O.

First Respondent

(ID No: [...]): Cited in his capacity as the
Trustee of Rhenosterfontein Wild Life Conservation)

MARYKE AMANDE BOTHA N.O.

Second Respondent

Id No: [...]: Cited in her capacity as the
Trustee of Rhenosterfontein Wild Life Conservation)

ADRIAAN JACOBUS BOTHA N.O.

Third Respondent

ID No: 4010265101084: Cited in his capacity as the
Trustee of Rhenosterfontein Wild Life Conservation)

WYNE COLE N.O.

Fourth Respondent

ID No: [...]: Cited in his capacity as the
Trustee of Rhenosterfontein Wild Life Conservation)

JUDGMENT

FRANCIS J

Introduction

1. The applicant, Eskom Holdings Soc Limited, is an organ of State as contemplated in section 139 of the Constitution, and a major entity as contemplated in Schedule 2 of the Public Management Act 1 of 1999 (the PFMA), having its main source of business as the generation, transmission and distribution of electricity in bulk within the Republic of South Africa and neighbouring countries. It brought an urgent application for an order *inter alia* that the respondent be directed to take the necessary steps to sign and make available to the applicant all documents that are necessary for purposes of the registration of a servitude in favour of the applicant over the property described as Ptn 23 Van Klein Zonderhout 519 JR (portion 23) within five (5) days of the granting of the order.
2. Jacob Johannes Pieterse Botha N.O. in his capacity as a trustee for time being of Rhenosterfontein Wildlife Conservation Trust, IT 1521/2001 (the Trust) was initially cited as the respondent in this application. He had opposed the application and had filed an answering affidavit where he raised several preliminary issues including the applicant's failure to have joined all the trustees of the Trust as interested parties. The applicant thereafter filed a replying affidavit.
3. On 6 December 2017 the application came before court. It was stayed and the applicant was given leave to supplement its papers. It was also ordered to pay the costs of the application not a punitive scale. The issue of urgency was not decided by that court.
4. On 24 February 2018 the applicant brought an application to join the second to fourth respondents as trustees of the Trust which application was granted on 24 April 2018 with no order as to costs. Thereafter the respondent became the first respondent. The second to fourth respondents namely Marycke Amanda Botha, Adriaan Jacobus Botha and Wyne Cole were all joined in their capacity as trustees.

5. After a full exchange of pleadings this³ matter was enrolled for a hearing as a special motion on 27 and 28 August 2019.

Background facts

6. The applicant is in the business of *inter alia* generating and supplying electricity within the borders of South Africa and to certain neighbouring African countries. For purposes of transmitting electricity that is generated from power stations that are owned by the applicant, it needs to construct power lines that are used to transmit electricity to various points of distribution. In the course of constructing the power lines, the plans occasionally cause them to run over private property.
7. In the event of the planned transmission lines having to run over private property, the applicant would conclude options to acquire servitudes with the owners of the affected properties, for the purpose of registration of servitudes at the appropriate time in order to allow such construction, alternatively erection to take place.
8. When, by necessity a need arises for the applicant to build a power line that will run over a private property, a process has to be undertaken in order to acquire an option and later, to register a servitude over privately owned property that would be affected by the erection of such power line. It is not necessary for purposes of this application to set out what process needs to be undertaken.
9. Once the route plan of the power lines relating to the project had been finalised and it became apparent that the property belonging to the Trust of which the first respondent is a trustee, he was personally contacted with a view to entering into negotiations with him to reach some agreement with regard to the power lines traversing over the immovable property. He was made an offer about how much the applicant would pay him as compensation for allowing the applicant to erect the power lines of the proposed route plan over the immovable property.
10. On 8 June 2011, and at Pretoria, the applicant, at the time being represented by Annemarie Botha, its duly authorised representative, and

the Trust, at the time being represented¹² by the first respondent in his capacity as the trustee of the Trust, entered into an option to acquire the servitude over the immovable property of the Trust for the erection of the Kusile Lulamisa 400kV Transmission . line (hereinafter referred to as the option). The first respondent, having considered the compensation offered to him by the applicant entered into an option with the applicant.

11. The option was registered over the property which is registered in the Trust' s name and the Trust is the registered owner of the property.
12. On 5 July 2011, the option was approved by the applicant' s Land and Rights tender Committee.
13. The applicant exercised the option on 21 September 2011 which option according to the applicant was valid at the time.
14. Certain developments took place post 21 September 2011 which culminated in the applicant launching this application on 8 November 2017 against the first respondent who was initially cited as the respondent.
15. A dispute arose whether the option was valid and binding.

The parties contentions

16. The applicant contended that a valid option was concluded with the first respondent in his capacity as a representative of the Trust. When the option was concluded the third and fourth respondents were not trustees, alternatively, were not issued with letters of authority, at the relevant time, could not have had any role to play when the transaction was concluded in June 2011. The option came about as a result of a decision taken jointly by the two trustees at the time it was made. As the options bear the signatures of the two trustees who acted at the time, it was submitted that the trustees acted jointly and the option is valid and enforceable. The applicant contended that at all material times when the offer was made the Trust had only two trustees, namely the first and second respondents and the option to acquire the servitude of the Trust property was signed by both the first and second respondents, the second respondent confirming that the first respondent who signed the documents as an authorised

agent of the Trust, did so in the presence¹³, as she witnessed the signature.

17. The respondents contended that no valid and enforceable agreement came into existence between the applicant and the trustees. The first respondent signed the option in his capacity of the Trust not only under threat, but further, that the option was subject to approval by the other trustees, which approval was never given by the other trustees in respect of the route that formed the subject-matter of the option.

Issues for determination

18. The first issue that arises for determination is whether notwithstanding the time lapse since the institution of the application the matter was still urgent.
19. The second issue is whether the option entered into between the applicant and the first respondent was invalid and unenforceable in law , due to the first respondent having signed the option without the other trustees.
20. The third issue is whether at the time of the conclusion of the option the first respondent had the requisite authority to enter into the option with the applicant for purposes of registering a servitude over the property of the Trust in favour of the applicant.

Analysis of the evidence and arguments raised

21. It is clear from the pleadings that the main issue that arises in this application is whether the first respondent had the necessary authority to have bound the Trust when entering into the option relating to portion 23. He denied that he had the necessary authority to have done so. It follows that if he did not have the necessary authority to have concluded such an option on behalf of the Trust that the option is invalid and unenforceable. That would be the end of the matter bearing in mind that the relief that the applicant is seeking is limited to portion 23.
22. Our courts have in the past warned about some of the legal dangers facing people who transact with trusts. These dangers relate mainly to the capacity of the trust to conclude the transaction and the authority of a

trustee to bind the trust. In this regard¹² see *Nieuwoudt NO and Another v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 SCA.

23. The following guidelines can be gleaned from case law about what should happen or what elementary precautions should be taken when parties conclude agreements with a trust. A party should before committing themselves to the deal, insist of seeing the Letters of Authority from the Master authorising the trustees to act as such, insist on seeing the trust deed itself, to make sure that the board of trustees is properly constituted and has the capacity to enter into the type of agreement in question and check whether all the internal formal or procedural requirements have been met particularly with regard to the granting of the authority to a particular trustee to enter into and sign the agreement on behalf of the trust. Trustees who conclude agreements on behalf of trusts should ensure not only that they have the necessary authority to do so, but also that there is strict compliance with all the provisions of the trust deed.
24. It is common cause that the Trust was formed on 27 February 2001 and that the first respondent was its sole trustee. The trust deed was amended on 14 December 2005 and the new trustees were the first and second respondents. This much is clear from annexure AAAI at page 106 to 114 which is the amended trust deed. The Trust had purchased portions 20, 23 and 36 which were transferred to the Trust in terms of the deed of transfer on 27 September 2007. There are also Letters of Authority appearing at page 115 which bears the Master's court date stamp being 30 May 2010. It reflects that there are 3 trustees namely the first to third respondents. Page 116 is another Letter of Authority dated 28 January 2015 where all four respondents are reflected as being the trustees.
25. In terms of the trust deed:
 - 25.1 The trustees assumed the obligation to control and manage the trust assets to the benefit of the beneficiaries (clauses 6.1 and 7);
 - 25.2 The Trust assets vest in the name of the trustees in their capacity as trustees or a nominee of the trustees (clauses 6.7 and 7.4);
 - 25.3 The trustees are entitled to purchase, sell, barter or deal in any way

whatsoever with the Trust assets¹² (clause 7.5);

25.4 The trustees are obliged to meet to discuss and to decide on trust affairs at least once a year within six months after the trust's financial year-end (clause 9.3);

25.6 Resolutions are taken by majority vote (clause 9.3).

26. It is clear from the trust deed that the assent by a single trustee to a contract will not bind the trust.

27. It is common cause that on 8 June 2011 the applicant and first respondent entered into an option to acquire a servitude over the immovable property of the Trust which option appears at pages 27 to 33. It was signed by the registered owner and two witnesses one of whom was a representative of the applicant. The property in question is portion 23 for a consideration of R1 11 510.00. The first respondent in paragraph 1 of the option is described as "JJP Botha (Jacobus), in my capacity as Trustee of Rhenosterfontein Wild Life Conservation Trust, being duly authorised thereto".

28. The applicant had stated that the option was signed by the second respondent as a witness which was disputed by the first respondent. The first respondent stated in his answering affidavit that he was approached for the very first time by the applicant duly represented by Anne-Marie Botha and engaged him to discuss the possibility to erect a new power line next to the said two power lines on the servitude area and the registration of a proposed new servitude. He said that on 8 June 2011 and after being threatened by Botha that the applicant would expropriate portion 23 if he did not sign the option, he signed the option in his capacity as a trustee of the trust without having consulted the other trustees, and thus subject thereto that the other trustees (or the majority of the) agree thereto. It is telling that the applicant did not deem it necessary to file a confirmatory affidavit by Anne-Marie Botha. There is simply no explanation given why no such an affidavit was filed. The first respondent's version insofar as it relates to his dealings with Anne-Marie Botha remains uncontested and there is no evidence placed before me that the second respondent had

signed the option as a witness and¹² or by the other trustees. The first respondent's version that the option was signed by him in the presence of Botha and other representatives of the applicant is uncontested.

29. It is clear that at the time when the option was entered into that there were three trustees of the Trust namely the first to third respondents. The option was signed by the first respondent in his capacity as trustee of the Trust 'being duly authorised thereto'. There is a document at page 34 which was drafted by the applicant which is a resolution of the Board of Trustees of the Rhenosterfontein Wild Life Conservation Trust where it was resolved that the Trust agreed to register a servitude in favour of the applicant over portion 23. It is undated and not signed by any of the trustees of the Trust but has October 2011 on it. Clause 2 of the unsigned resolution that JJJ P Botha in his capacity as a trustee of the trust, be and is hereby authorised to sign all and any documents required in order to give effect to the above, as he in his sole and absolute discretion deem necessary.
30. There is simply no evidence placed before this court that the board of trustees had authorised the first respondent to enter into the option and that the majority of the trustees of the Trust resolved to grant the option to the applicant. Since the resolution is undated and unsigned it is clear therefore that the first respondent was not authorised by the Trust to sign all and any document to give effect to the option. He was not authorised to represent the other trustees or the Trust in signing the option. The majority of the trustees of the trust did not resolve to agree to the registration of the proposed servitude over portion 23
31. Mr Sibeko who appeared for the applicant conceded that there is no signed resolution or the board of trustees. This concession was well made which must mean that there was no valid and binding option that binds the Trust. Since the relief that the applicant is seeking relates to portion 23 and not portion 20 it becomes unnecessary for this court to deal with the issues relating to portion 20.
33. It follows that the option is invalid and unenforceable. There was no valid and enforceable agreement between the parties.
34. The application stands to be dismissed.

35. The respondents contended that the¹³ application should be dismissed with costs on a punitive scale. I do not agree that this is a matter that warrants a punitive costs order. I have taken into account that the parties do have an ongoing relationship and are in the process of further negotiations. I have also taken into account the role that was played by the first respondent in this matter. The first respondent did not bring it to the attention of the applicant what the true position of the trust was. However I find it somewhat strange that the applicant had proceeded with this application in the beginning without having ascertained what the true nature of the Trust was in terms of how many trustees there were when the option was concluded etc. It should not have proceeded with the application when it became clear that the first respondent could not bind the trust. No steps were taken with the Master to have ascertained how many trustees there were. Despite all of this I am not convinced that a proper case has been made out for a punitive cost order.
36. This matter was enrolled for a hearing on 6 December 2017 as an urgent application. It was stayed and a cost order was granted against the applicant. This court is no longer sitting as an urgent court so urgency or the lack thereof is no longer an issue and the matter is no longer urgent. In any event an order for costs was granted when the matter was stayed.
37. In the circumstances I make the following order:
- 37.1 The application is dismissed with costs.

FRANCIS J

JUDGE OF THE HIGH COURT

**FOR APPLICANT : L T SIBEKO SC WITH J S MAISELA
INSTRUCTED BY KOIKANYANG INC**

**FOR 1ST RESPONDENT : D B DU PREEZ SC INSTRUCTED BY
COMBRINK & JAMNECK ATTORNEYS**

**FOR 2 - 4 RESPONDENTS : U LOTTERING INSTRUCTED BY HANNES
BENADIE INC**

DATE OF HEARING : 27 & 28 AUGUST 2019

DATE OF JUDGMENT : 16 SEPTEMBER 2019