IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

Case no: 10832/2020

In the matter between:

CHARLES GORDON DU PREEZ **APPLICANT**

and

ANNETTE DU PREEZ N.O. **FIRST RESPONDENT**

CHARLES GORDON DU PREEZ N.O. **SECOND RESPONDENT**

JEAN PIERRE DU PREEZ N.O. **THIRD RESPONDENT**

(In their capacities as Trustees for the time being of the Du Preez Familie Trust IT 384/05)

Coram: Norton AJ

Heard: 13 August 2020

Order: 14 August 2020

Reasons: 21 August 2020

REASONS FOR ORDER

Norton AJ

[1] In an urgent application heard on Thursday 13 August 2020, the applicant sought an order interdicting the respondents from proceeding with a meeting of the trustees of the Du Preez Family Trust, Trust No. IT 384/05 (the Trust) scheduled to be held on Friday 14 August 2020.

[2] On Friday 14 August 2020 I made an order dismissing the application and directing the applicant to pay the costs of the application, and advised that my reasons would follow. These are my reasons.

[3] The Trust is an inter vivos family trust established by Johannes Hermanus Du Preez (the founder) on 18 January 2005. The first trustees of the Trust were the founder himself and his eldest son Hendrik Du Preez. Following the death of Hendrik Du Preez, an amended trust deed, which is the trust deed pertinent to this application, was executed on 3 March 2008.

[4] Clause 5.1 of the trust deed provided that the trustees of the Trust would be (a) the founder; (b) the founder's wife Annet Du Preez (who is cited in her official capacity as the first respondent in this application); (c) the founder's son Charles Gordon Du Preez (the applicant, who is also cited in his official capacity as the second respondent in this application); and (d) the founder's son Jean Pierre Du Preez (who is cited in his official capacity as the third respondent in this application).

[5] The applicant, the founder, Annet Du Preez and Jean Pierre Du Preez (the first trustees) were granted letters of authority to act as trustees of the Trust on 16 May 2008.

[6] Since the death of the founder on 9 March 2018, the applicant, Annet Du Preez and Jean Pierre Du Preez have served as the trustees of the Trust. In clause 4.1 of his will executed on 18 June 2007, the founder directed that on his death, his children (with the exception of those who were already serving trustees) would automatically be appointed trustees of the Trust. No further children of the founder have to date been appointed trustees of the Trust.

[7] Arising from a breakdown of the relationship between the applicant and the other trustees (which is common cause on the papers and which the other trustees say has made the effective administration of the Trust impossible), the applicant was notified on 7 July 2020 that the other trustees intended to remove him as a trustee in terms of the power granted to the trustees to remove a trustee by majority vote under clause 5.5 of the trust deed.

[8] The reasons furnished for the proposed removal of the applicant were that the applicant fails to provide feedback on essential aspects of the effective management of the Trust and repeats unsubstantiated allegations against the other trustees.

[9] On 4 August 2020 the applicant was given notice of a trustees' meeting to be held on 14 August 2020, at which his removal in terms of clause 5.5 of the trust deed would be sought.

[10] In correspondence which followed, the applicant's attorney recorded the applicant's view that the other trustees were not entitled to remove him as a trustee by majority vote in terms of clause 5.5.5 of the trust deed, and on 12 August 2020 the other trustees' attorney advised that they intended to proceed with the meeting on 14 August 2020 and to seek the applicant's removal at that meeting.

[11] The applicant approached this court urgently seeking an order (a) interdicting the respondents from proceeding with the trustees' meeting scheduled for Friday 14 August 2020; (b) that a rule nisi be issued calling for the respondents to show cause why an order should not be made (i) declaring that the respondents are not empowered in terms of clause 5.5.5 of the trust deed to remove the applicant by way of majority vote; and (ii) directing the first and third respondents to pay the costs of the application in their personal capacities; and (c) declaring that pending the return day of the rule nisi the applicant is entitled to act as a trustee of the Trust.

[12] I am satisfied that the applicant has made out a case for urgency.

[13] The determination of the interdictory relief sought by the applicant turns on the question whether the other trustees have the power, in terms of clause 5.5.5 of the trust deed, to remove the applicant as a trustee by way of majority vote. This is a matter of interpretation of clause 5.5.5 read with clause 5.3 of the trust deed.

The proper interpretation of clause 5.5.5 read with clause 5.3

[14] A trust deed must be construed in accordance with the established rules governing the interpretation of written contracts (*Harvey NO and Others v Crawford NO and Others* 2019 (2) SA 153 (SCA) para 45; *Sea Plant Products Ltd v Watt* 2000 (4) SA 711 (C) 720-2).

[15] Those rules were elucidated in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18, as follows:

> 'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results

> or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

[16] I am required to interpret the relevant clauses of the trust deed on the papers before me, which do not disclose any pertinent facts regarding the circumstances in which the trust deed was executed or any subsequent conduct.

[17] Clause 5.5.5 of the trust deed provides that a trustee will cease acting as a trustee if the majority of the trustees in office decide to remove that trustee, save that the power to remove a trustee by majority vote may not be exercised in respect of the founder or any trustee nominated by the founder in terms of clause 5.3 of the trust deed. The precise wording of the clause, which is in Afrikaans, is as follows:

'5.5 'n Trustee hou op om as trustee te ageer:

…

5.5.5 as die meerderheid van die trustees in amp besluit om hom as trustee af te dank welke magte nie sal geld ten opsigte van

JOHANNES HERMANUS DU PREEZ of enige trustee deur hom benoem in terme van 5.3 hierbo.'

[18] On its ordinary meaning, clause 5.5.5 provides for a protected category of trustees who may not be removed by a majority vote of the serving trustees, being the founder himself and any trustee nominated by him in terms of clause 5.3 of the trust deed.

[19] Clause 5.3 provides that the trustees are entitled to nominate and appoint additional trustees of their choice, subject to qualifications which include the following: (a) the founder, during his lifetime, has the sole right to nominate trustees of his choice, to serve as a co-trustee or to replace him as a trustee; and (b) the founder has the right to nominate succeeding trustees in his will. The precise wording of the clause and the relevant sub-clauses, which are in Afrikaans, is as follows:

'5.3 Die trustees is geregtig om bykomstige trustees van hulle keuse te benoem en aan te stel, onderhewig aan die volgende beperkende bepalings:

…

5.3.2 Gedurende sy lewe, het JOHANNES HERMANUS DU PREEZ die alleenreg om trustees van sy keuse te benoem, om of as mede-trustee op te tree of om hom te vervang as trustee;

5.3.3 JOHANNES HERMANUS DU PREEZ het die reg om opvolgende trustees by wyse van sy Testament te benoem.'

[20] On its ordinary meaning, clause 5.3 provides that (a) during the lifetime of the founder, he is the only trustee who has the power to nominate and appoint additional trustees, either as co-trustees or to replace him as trustee; (b) after the death of the founder, additional trustees may be nominated and appointed by the other trustees; and (c) succeeding trustees may be nominated by the founder in his will.

[21] Read together, clauses 5.5.5 and 5.3 on their ordinary meaning protect from removal by majority vote (a) the founder; (b) any additional trustee nominated by the founder during his lifetime as a co-trustee or to replace him as a trustee; and (c) any succeeding trustee appointed as a result of being nominated by the founder in his will. With the exception of the founder, the first trustees recorded in clause 5.1 of the Trust deed are excluded from the protected category of trustees.

[22] The power granted to trustees to remove a trustee by majority vote has as its apparent purpose the provision of an efficient mechanism for the removal of a trustee.

[23] Clause 11.1 of the trust deed states that the powers granted to the trustees are powers with which the trustees are vested in order to put them in a position to manage the trust fund for the benefit of the beneficiaries, and that the generality of the powers vested in the trustees must always be so interpreted that the purpose of the Trust is to benefit the trust beneficiaries.

[24] The benefit of the beneficiaries is plainly served by a clause empowering the trustees to remove a trustee who is an obstacle to the

effective management of the Trust, without having to do so through the more cumbersome provisions of the Trust Property Control Act 57 of 1998.

[25] The apparent purpose of the 'protected category' of trustees is to ensure that neither the founder nor trustees nominated by the founder may be removed by the mechanism of a majority vote.

The applicant's contentions on interpretation

[26] The applicant's contention that he cannot be removed by a majority vote of the trustees is based on two alternative grounds.

[27] The first is that the applicant falls within the protected category delineated in clause 5.3 by virtue of having been (a) nominated by the founder as one of the first trustees; and (b) nominated as a trustee in the founder's last will and testament.

[28] This contention is at odds with the language of clause 5.3 and the scheme of the trust deed overall.

[29] The trust deed (in clauses 5.3 and 6 in particular) expressly distinguishes between the following classes of trustees: (a) the first trustees ('eerste trustees') recorded in clause 5.1 of the Trust deed; (b) additional trustees ('bykomstige trustees') nominated by trustees in terms of clause 5.3; and (c) succeeding trustees ('opvolgende trustees') nominated by the founder in his will in terms of clause 5.3.3.

[30] In the definition of 'trustees', a distinction is drawn between the first trustees and 'later trustees'.

[31] Clause 5.3 plainly deals with the nomination of trustees additional to the first trustees, and trustees who will succeed trustees. It takes as a given that the first trustees are in place and provides for the necessary powers to supplement or replace them.

[32] The founder had no power in terms of clause 5.3 to nominate as an additional trustee a person who was already a trustee of the Trust. Nor could the applicant become a succeeding trustee by virtue of his nomination under clause 4.1 of the founder's will, in circumstances in which that clause expressly excluded from its application persons who were serving trustees.

[33] To find that the applicant is, simultaneously, one of the first trustees, an additional trustee and a succeeding trustee, would be to disregard the express language and scheme of the trust deed.

[34] The second ground relied on by the applicant, is that the exclusion of the first trustees (other than the founder) from the protected category, which means that the family members who are the first trustees may be removed more easily than trustees nominated subsequently, does not make sense.

[35] The applicant relies in this regard on the statement in *Endumeni* that '[a] sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document'.

[36] Neither the trust deed nor the papers disclose any apparent reason why the trust deed provides for greater protection for the later trustees than the first trustees. What is however clear, from the language and the context of

the relevant provisions, is the purpose of distinguishing (in respect of removal) between, on the one hand, the founder and trustees nominated by the founder after the trust deed was executed, and on the other hand, the first trustees other than the founder, and trustees nominated by those trustees after the trust deed was executed.

[37] It is also apparent that if it was not intended that the first trustees should be subject to removal by a majority vote in terms of clause 5.5.5 of the trust deed, there would have been no reason for the founder to be expressly exempted from such removal in the same clause.

[38] I must also take into consideration that the instrument which I am called upon to interpret is not a commercial contract but the deed of an inter vivos family trust in which the will of the founder, as the donor, looms large and should not lightly be disregarded on the ground that it does not appear to be sensible or reasonable.

[39] In *Harvey NO and Others v Crawford NO and Others* 2019 (2) SA 153 (SCA) the Supreme Court of Appeal rejected an interpretation of a private trust deed which would involve disregarding the donor's manifest intention on the grounds that that intention did not accord with public policy. The Court recognised that the donor in respect of a trust enjoys a similar freedom to that of a testator in determining how to dispose of his or her property (paras 56 and 64) and expressly distinguished the position in respect of a private trust from the principles which would apply in interpreting a public charitable trust (paras 60 to 62).

[40] I am of the view that the plain purpose of the removal scheme – to provide for removal by majority vote for all trustees other than the founder and trustees nominated by him after the execution of the trust deed – should not be frustrated by a construction which is at odds with the language of the relevant clauses in their context, based on what the applicant or the court might regard as a more sensible scheme.

Conclusion

[41] The applicant has failed to establish a right (clear or prima facie) upon which final or interim interdictory relief may be granted preventing the other trustees from removing him in terms of their powers under clause 5.5.5 of the trust deed. The application must accordingly fail.

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Michelle Norton
Acting Judge of the High Court
Western Cape Division

APPEARANCES:

For the applicant:	P Bothma Instructed by Steyn Attorneys Inc. Cape Town
For the first and	

third respondents: V Manser
Instructed by
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