THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 695/2023

In the matter between:

TERSIA JOOSTE NO	**FIRST APPELLANT**
JENS LIEVENS NO	**SECOND APPELLANT**
and	
JANA ANNELISE PRETORIUS	**FIRST RESPONDENT**
JANA ANNELISE PRETORIUS NO	**SECOND RESPONDENT**
RHINO PRIDE FOUNDATION	**THIRD RESPONDENT**
MASTER OF THE HIGH COURT JOHANNESBURG	**FOURTH RESPONDENT**

Neutral citation: *Jooste NO and Another v Pretorius and Others* (Case no 695/2023) [2024] ZASCA 130 (1 October 2024)

Coram: SCHIPPERS, NICHOLLS, MOTHLE and UNTERHALTER JJA and BAARTMAN AJA

Heard: 3 September 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The time and date for hand-down is deemed to be 11h00 on 1 October 2024.

Summary: Law of trusts – removal of trustee – provision in trust deed empowering trustees to adopt resolution forcing trustee to resign – subject to Trust Property Control Act 57 of 1988 – destructive conduct by trustee – continued support of trust by donor imperilled – beneficiaries prejudiced – resolution by trustees requiring resignation of trustee valid.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Maumela J, sitting as court of first instance):

1 The appeal succeeds with costs, which shall be paid by the first respondent in her personal capacity.

2 The order of the High Court is set aside and replaced with the following:

'(a) The application is dismissed.

(b) The counter-application succeeds. It is declared that the following resolutions taken at the meeting of the trustees of the Rhino Pride Foundation, Master's reference number IT001464/15 (G) (the Trust), on 3 March 2022, are valid and enforceable:

(i) that the second applicant, Dr Jana Annelise Pretorius NO, is required to resign and vacate the office of trustee, in terms of clause 11.1.5 of the Trust's Deed of Trust; and

(ii) that Ms Marielle Borgström is appointed as a trustee of the Trust in the place of the second applicant.

(c) The second applicant shall tender her resignation and vacate the office of trustee within seven (7) calendar days of the date of this order, failing which the Sheriff of the High Court, Pretoria, is authorised to sign the necessary documents to give effect to that resolution.

(d) The first applicant shall pay the costs of the application and the counter-application, in her personal capacity, including the costs of two counsel where so employed.

(e) The second applicant is directed to sign all documents necessary to grant the first and second respondents full access to all the bank accounts of

the Trust, within seven (7) calendar days of the date of this order, failing which the Sheriff of the High Court, Pretoria, is authorised to sign the necessary documents in her stead.'

JUDGMENT

Schippers JA (Nicholls, Mothle and Unterhalter JJA and Baartman AJA concurring)

[1] This appeal concerns the proper construction of a clause in a trust deed, which, subject to the Trust Property Control Act 57 of 1988 (the Act), provides that the office of a trustee shall be vacated when the remaining trustees unanimously require the resignation of any trustee. The appellants are trustees of the third respondent, Rhino Pride Foundation (the Trust), a public charitable *inter vivos* trust (created during the lifetime of a person) established in terms of the Act, and registered as a non-profit and public benefit organisation.

[2] The first respondent, Dr Jana Annelise Pretorius (the respondent), a specialist wildlife veterinarian, is the founder and a trustee of the Trust. The main objects of the Trust are the creation of a fund to put an end to the poaching of rhinos for their horns; the advancement and protection of rhinos in South Africa; and the provision of medical care and facilities to rhinos, including emergency relief and rescue.

[3] On 3 March 2022, in terms of clause 11 of the Deed of Trust (the trust deed), the appellants adopted a resolution by majority vote, requiring the respondent to resign from her office with immediate effect (the impugned resolution). On 16 March 2022 the respondent, in her personal capacity and as a trustee, applied to the Gauteng Division of the High Court, Pretoria (the High Court), for an interdict

to prevent the appellants from enforcing the impugned resolution, pending the finalisation of an action to be instituted to set aside that resolution (the main application). The appellants filed a counter-application for an order that the impugned resolution be enforced; alternatively, that the respondent be removed from office as a trustee, in terms of s 20(1) of the Act.

[4] The High Court granted the main application and dismissed the counter-application, with costs, including the costs of two counsel. It issued an interdict restraining the appellants from enforcing the impugned resolution, pending finalisation of an action which was subsequently instituted by the respondent for their removal as trustees.

[5] The appeal is with the leave of this Court. Although an interim order is ordinarily not appealable,[1] this case is somewhat unique: the facts in the main application and the counter-application are inextricably linked. Therefore, should it be found that the impugned resolution is valid, the interdict cannot remain in force.

The facts

[6] The facts are largely common ground and can be briefly stated. The respondent founded the Trust in 2014. She met the appellants in 2017, and they became friends through their shared passion for rhino conservation. The first appellant is an attorney who runs a non-profit organisation called Rhino Connect, which raises funds for various rhino protection projects, and she is not a recipient of any funds of the Trust. The second appellant is a Belgian banker who worked in the defence industry, and has experience in rhino anti-poaching technology.

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[1] *Zweni v Minister of Law and Order* [1992] ZASCA 197; [1993] 1 All SA 365 (A); 1993 (1) SA 523 (A) at 536B; *TWK Agricultural Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and Others* [2023] ZASCA 63; 2023 (5) SA 163 para 30.

[7] In May 2019 the second appellant, who sources overseas funding for the Trust, facilitated a substantial donation of some R50 million by a foreign donor who has chosen to remain anonymous (the donor), to expand the then existing sanctuary which was home to 50 rhinos. This donation constitutes about 90% of all the funds received by the Trust through donations, its sole source of income. The donor concluded a memorandum of understanding (MoU) with the Trust, valid until 30 May 2026. In terms of the MoU, the donor agreed to fund the establishment of a rhino sanctuary in a maximum amount of USD 5 540 000 over five years. The MoU contains stringent reporting requirements by the Trust to the donor, and states that the donor can terminate the MoU without any reason.

[8] At the respondent's request, the first appellant was appointed as a trustee in 2019 and the second appellant, in 2020. The Trust bought a farm in Bela-Bela, Limpopo (the farm), in July 2019, using the funds provided by the donor. A rhino sanctuary was established on the farm, which was improved by the construction of a veterinary hospital, animal enclosures, staff accommodation and a guardhouse.

[9] The operating costs of the Trust – about R675 000 per month – which include staff salaries and extensive security costs to protect the rhinos, are funded by the foreign donation. Without this funding the Trust cannot protect, treat and rehabilitate rhinos on the farm.

[10] The respondent provides veterinary services to the Trust at a fee of R75 000 per month. Initially she was not going to live on the farm and concluded an agreement to purchase her own property in Bela-Bela, but this did not materialise. Subsequently the trustees agreed that she could live in a house on the farm.

[11] The parties had a good relationship until late 2021, when the appellants became concerned about the respondent's administration of the Trust and management of the farm. She failed to adhere to the budget for improvements on

the farm, which created difficulties in reporting to the donor. Without the appellants' knowledge, the respondent's fiancé became involved in the activities of the Trust and its operations on the farm. She appointed her fiancé's companies as service providers to the Trust. Numerous staff members lodged grievances with the appellants about the abusive behaviour of the respondent and her fiancé, and what they claimed were inhumane working conditions (they were denied access to kitchen and ablution facilities). As to the administration of the Trust, the appellants did not have any access to its bank accounts at the time.

[12] These concerns were discussed at a meeting of the trustees on 18 January 2022. At the outset, the appellants made it clear that they were not there to attack the respondent, but to work with her in addressing their concerns. The transcribed minutes of that meeting state the following: that in the past few months the respondent had acted as a sole trustee; that the appellants could not communicate with her; that they had taken a decision that the respondent should take a leave of absence for at least a month, during which they would manage operations on the farm; and that her fiancé should leave the farm immediately. The meeting ended with the respondent agreeing to go on leave and saying that the appellants should tell her when they wanted her back. She recorded that she was being forced to do so and that things could have been done differently. Two resolutions were taken at the meeting. These were essentially that the respondent's fiancé would leave the farm immediately; and that the appellants would be granted access and added as signatories to the Trust's bank accounts, and all transactions in excess of R15 000 would be authorised by two trustees.

[13] The appellants then made the necessary arrangements with the Trust's employees and service providers for the continued operation of the farm. They ensured that the rhinos were cared for; that the security was adequate; and that the employees had access to the necessary facilities. The rhinos (which do not require constant attention of a veterinarian) were cared for mainly by the veterinary nurses

and staff who live on the farm. It was agreed that the respondent would be available to provide medical care to the rhinos, and arrangements were made with Warmbad Dierekliniek (animal clinic) for any *ad hoc* emergency assistance.

[14] On 20 January 2022, two days after the trustees' meeting, the respondent approached the High Court urgently – without any notice to the appellants – for a spoliation order and an interim interdict. The High Court (Millar J) issued an order restoring the possession and use of the farm to the respondent; and granted an interdict restraining the appellants from terminating her trusteeship, and interfering with her right to occupy the house on the farm and her management of the Trust, pending the outcome of proceedings to be instituted by the respondent for the removal of the appellants as trustees (the *ex parte* order).

[15] After obtaining the *ex parte* order, the respondent excluded the appellants from all aspects of the Trust. She denied them access to its bank accounts, email server, accounting software, and to all documents relating to the Trust. She prevented the Trust's accountants from accessing its accounting software. She removed the appellants from all of the Trust's WhatsApp groups (which include its employees and business associates), posted a notice of the *ex parte* order on WhatsApp and informed the recipients that the appellants were no longer trustees. And she sent a copy of the order to the donor.

[16] The donor became extremely concerned about the administration of the Trust, enquired whether the remainder of the donation could be withdrawn and stated that any future donations would not be made. The donor's representatives requested certain information from the respondent. She apparently did not respond to this request.

[17] On 26 January 2022 the appellants launched an urgent application to the High Court for an order that they be reinstated as trustees. Prior to the hearing of

that application, the respondent relented and the appellants' trusteeship was restored. The respondent also did not pursue her application for contempt of court, which she had brought in the High Court in the interim.

[18] The parties and their legal teams met thereafter. The appellants proposed that the litigation be resolved as follows. The respondent would return to the farm, but not her fiancé. The appellants would be granted access to the computer platforms and bank accounts of the Trust. The concerns raised by the appellants would be resolved by mediation. The respondent however rejected this proposal.

[19] Meanwhile, the donor became increasingly concerned about the status of the Trust. On 1 February 2022 the donor's representatives sent an email to the trustees, in which they expressed their dissatisfaction with the situation. They stated that all investments should be postponed; that a short-term solution should be implemented; and that spending should be avoided.

[20] The appellants then applied to the High Court for the reconsideration of the *ex parte* order. The application came before Janse Van Nieuwenhuizen J on 4 February 2022, who set aside that order, with costs. The court found that the respondent 'failed dismally in observing the utmost good faith when the *ex parte* order was obtained'; that certain allegations in her affidavit were 'blatantly untrue'; that she had not been 'unlawfully deprived of her undisturbed possession of the farm'; and that the facts did not sustain the order excluding the appellants from fulfilling their duties as trustees.

[21] The judgment in the reconsideration application was sent to the donor, whose representatives responded by email on 21 February 2022, as follows:

'The Donor has asked us to express their concern in respect of the recent developments regarding the court cases between the trustees.

We have considered the judgement and are disappointed with the way Jana has handled the situation. It is clear from the judgement that she acted dishonestly, and the donor has indicated that their trust in Jana is lost.
The donor informed us that unless order is restored at the sanctuary, the donor considers no longer to support the Rhino Pride Foundation. Therefore, we ask that Jana resign and/or to be removed as Trustee.
In the meantime, all investments and/or expenses must be put on hold unless absolutely critical for the safety and welfare of the rhinos.'

[22] The answering affidavit states that a loss of future donations from the donor would be the death knell of the Trust, since other donations make up only some 10% of its income, which would not meet the Trust's monthly expenses, even for a few months. Consequently, there was a real possibility that the Trust would no longer be able to continue its work without the financial assistance of the donor.

[23] The respondent's reply to this is startling. She denied that 'the Trust would not be able to continue its work without the donations from this specific donor'. She said that 'there are many other donors available to the Trust, and there are other sources of income that could still be explored'.

[24] A meeting of the trustees was convened for 3 March 2022. One of the items on the agenda for that meeting, prepared by the appellants, was that the respondent should vacate the office of trustee in terms of clause 11 of the trust deed, and be replaced by Ms Marielle Borgström, the donor's representative.

[25] The main reasons for the proposed resolution that the respondent vacate her office of trustee, were the following:

(a) The respondent had deposed to the affidavit in the *ex parte* application against the appellants, containing false statements. This irreparably harmed the relationship between her and the appellants, imperilled the

administration of the Trust, and jeopardised the financial support by the donor.

(b) After obtaining the *ex parte* order, the respondent, through her attorneys, addressed correspondence to the other trustees demanding that they cease any contact or engagement with any known associates of the Trust, including its sponsors, contractors, agents, suppliers and any other affiliate of the Trust. This was unlawful and contrary to the trust deed.

(c) The respondent unlawfully removed the appellants from all computer platforms necessary to administer the Trust, and agreed to reinstate their access to those platforms, only after they launched an urgent application to the High Court.

(d) The respondent falsely informed the trust's employees, affiliates, service providers and business associates, that the appellants were no longer trustees, thereby damaging the Trust's reputation.

(e) Certain employees of the Trust were seeking redress of their grievances against the respondent, before the Commission for Conciliation, Mediation and Arbitration (CCMA).

(f) The respondent's continuance in office as trustee would prevent the Trust from being properly administered, and was detrimental to the welfare of the beneficiaries.

[26] In the answering affidavit, the first appellant states that the impugned resolution was not taken lightly, but in the interests of the Trust and its beneficiaries, which could only be served if the Trust were properly administered. These allegations were met with a bald denial in reply, and an assertion that 'no evidence was led' to prove the allegations against the respondent; and that her constitutional rights in s 34 of the Constitution had been violated.

[27] As stated, on 16 March 2022 the respondent launched the main application. On 14 September 2022 the High Court granted the interdict and dismissed the counter-application.

The High Court's judgment

[28] The High Court found that in seeking the relief which they did, there were allegations and counter-allegations by the parties, which gave rise to disputes of fact that could not be resolved without recourse to oral evidence. On this basis, the court said, it would be premature to prevent a trustee from participation in the affairs of the Trust 'based on reasons that have not been substantiated'.

[29] The court held that the respondent was not given a fair hearing and that the impugned decision 'clearly amounts to an infringement of the constitutionally enshrined rights of the Founding Trustee'. Then it said that it was common cause that rhinos are an endangered species worldwide; that they require security; and that a 'unilateral removal' of the respondent in circumstances 'where there is no oversight at all', undermined the basis for the formation of the Trust.

[30] The High Court reasoned that to remove a trustee, the appellants had to comply with the requirements and procedure set out in the common law or s 20(1) of the Act. It said, 'the removal of a trustee cannot just be subject to the whims of fellow members of the Trust'; the appellants had failed to show that the respondent's removal was 'for the benefit of the Trust Property and the animals on it'; and the court was loath to endorse the impugned resolution without the application of the rules of natural justice. The court stated that that the impugned decision was 'arrived at on a unilateral basis', which was 'contrary to s 34 of the Constitution'.[2]

[2] Section 34 of the Constitution provides:
'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

[31] The High Court concluded that the action instituted by the respondent should run its course, to determine whether the impugned resolution was correctly taken. The parties could then 'substantiate fully' the orders they were seeking.

Disputes of fact requiring oral evidence?

[32] It is convenient to deal first with the counter-application. The appellants sought a final order, essentially that the impugned resolution is valid and enforceable.

[33] In *Zuma*[3] Harms JA said:

'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's . . . affidavits, which have been admitted by the respondent . . . , together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.'

[34] The basic facts in the counter-application are common cause. The High Court's finding that there were disputes of fact that could not be resolved on the papers is erroneous. So too, its conclusion that the reasons for the impugned resolution are unsubstantiated.

[3] *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA); 2009 (1) SACR 361 (SCA); 2009 (4) BCLR 393 (SCA); [2009] 2 All SA 243 (SCA) para 26, affirmed by the Constitutional Court in *Commercial Stevedoring Agricultural and Allied Workers' Union and Others v Oak Valley Estates (Pty) Ltd and Another* [2022] ZACC 7; [2022] 6 BLLR 487 (CC); 2022 (7) BCLR 787 (CC); 2022 (5) SA 18 (CC) para 46.

[35] The common cause facts are these. At the meeting of 18 January 2022, the respondent agreed to take a leave of absence for a month on account of the appellants' concerns about her management of the farm. The appellants made arrangements to take over operations on the farm and protect the rhinos. At no stage was there going to be 'no oversight at all', as the High Court opined. Neither were the rhinos left unprotected.

[36] Despite agreeing to take a temporary leave of absence, in a remarkable *volte-face*, the respondent obtained the *ex parte* order. She stated under oath that she had been unlawfully removed from the farm; that the appellants had prevented her from practising as a veterinarian and attending to rhinos under her care; that they had unilaterally and for no reason, summarily terminated the security measures to protect employees living on the farm, and the endangered rhinos; and that pursuant to the appellants' threats to remove the respondent as trustee, they had contacted the Trust's private banker to revoke her access to its bank accounts.

[37] All of these statements were false, as Janse Van Niewenhuizen J indeed found. Consequently, the *ex parte* order was set aside. There is thus no factual dispute about the respondent's procurement of that order on the basis of false statements, and its consequences – a complete breakdown of the relationship between her and the appellants; the donor's support being placed at risk; and the sustenance of the beneficiaries being endangered. And the respondent's statements that the Trust could continue its work without the support of the donor, and that there are many other donors available to the Trust, could safely have been rejected on the papers: they are far-fetched.[4]

[38] Then there are the common cause facts relating to the respondent's conduct in removing the appellants from all computer platforms necessary to administer the

[4] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-635C, affirmed in *Mamadi and Another v Premier of Limpopo Province and Others* [2022] ZACC 26; 2023 (6) BCLR 733 (CC); 2024 (1) SA 1 (CC) paras 22, 43-45.

Trust; falsely informing the Trust's employees, service providers and business associates, that the appellants were no longer trustees; and causing the Trust to become involved in a labour dispute at the CCMA. And she refused mediation to settle the differences between the parties.

[39] Not a scintilla of evidence can change the truth about any of the events described above. And the common cause facts apply equally to the main application. This is because the respondent was required to establish the requisites for the grant of an interim interdict, more specifically, a prima facie right, though open to some doubt.[5] However, it is clear from the judgment that the High Court did not address the issue as to whether the respondent had met the requirements for an interim interdict. I revert to this aspect below.

Is the impugned decision valid?

[40] The first question that arises is whether the appellants were required to apply the rules of natural justice in taking the impugned decision. These rules have their origin in Administrative Law and are generally expressed in two maxims: *audi alteram partem* (hear the other side, or the *audi* principle) and *nemo iudex in propria causa* (no one may judge in his own cause).[6] Procedural fairness in the form of the *audi* principle is concerned with giving people an opportunity to participate in the decisions likely to affect them, and to influence the outcome of those decisions.[7]

[41] The impugned decision, however, does not constitute administrative action as defined in the Promotion of Administrative Justice Act 3 of 2000.[8]

[5] The requirements of an interim interdict are a prima facie right; a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is granted; a balance of convenience in favour of the grant of interim relief; and the absence of any other satisfactory remedy (11 *Lawsa* 2 ed para 403).
[6] L Baxter *Administrative Law* (1984) at 536.
[7] C Hoexter and G Penfold *Administrative Law in South Africa* 3 ed (2021) at 502.
[8] The Promotion of Administration Justice Act defines 'administrative action' essentially as:

Consequently, procedural fairness in the context of administrative action, does not arise, since a trust is a legal institution *sui generis* (of its own kind).[9] Clause 11 of the trust deed – the constitutive charter of the Trust to which all trustees are bound[10] – sets out the circumstances in which the office of trustee shall be vacated. The appellants took the impugned decision in terms of clause 11.1.5 of the trust deed, which empowers trustees to unanimously call for the resignation of a trustee.

[42] That said, the removal of a trustee is a decision of considerable importance for the governance of a trust. A trustee will ordinarily have no claim of right to hold the office of trusteeship. But there is good reason to hear from a trustee before a decision is taken to remove them. This is so because a decision to remove a trustee must be well-informed and taken in the best interests of the trust and the fulfilment of its objects. What the trustee has to say enhances good decision-making.

[43] Clause 11.1.5 may also not be invoked arbitrarily; nor on the basis of the unreasoned exercise of majoritarian power; nor to settle good faith disagreements; nor on the ground of minor irregular conduct by a trustee[11] that does not affect the administration of the Trust, its assets or the beneficiaries. What matters is the proper administration of the Trust, to secure and carry out its objects, in the best interests of the Trust and the beneficiaries. But where, as here, a breakdown in relations makes the task of trustees difficult or impossible, [12] coupled with a real risk to the financial survival of the Trust and the welfare of the beneficiaries, replacement of a trustee may be the only option.

[44] The decision to replace the respondent, the evidence shows, was not taken arbitrarily. There were compelling reasons for her removal, and she was treated

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'any decision taken, or any failure to take a decision, by . . . an organ of state, when . . . exercising a public power or performing a public function in terms of any legislation . . . which adversely affects the right of any person and which has a direct, external legal effect . . .'

[9] *Braun v Blann and Botha NNO and Another* 1984 (2) SA 850 (A) at 859E.

[10] *Land and Agricultural Development Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA) para 10.

[11] *Volkwyn NO v Clark & Damant* 1946 WLD 456 at 467-9.

[12] *McNair v Crossman and Another* [2019] ZAGPJHC 298; 2020 (1) SA 192 (GJ) paras 35 and 36.

fairly. She had scheduled a meeting of the trustees for 24 February 2022. She agreed that the meeting be postponed to 3 March 2022, for the appellants to prepare a list of agenda items, which included a proposed resolution that the respondent vacate the office of trustee, and that Ms Borgström be appointed to that position. The list of agenda items was given to the respondent on 21 February 2022.

[45] The proposed resolution was discussed and debated at the meeting on 3 March 2022, after which the impugned resolution was adopted. A resolution appointing Ms Borgström in place of the respondent was also taken. The answering affidavit states that Ms Borgström's appointment as trustee ensures both that the donor's rights in the operations of the Trust are protected, and that the substantial funds donated are utilised in accordance with the MoU, in the interests of the beneficiaries.

[46] What is more, in terms of the MoU, the Trust agreed 'to collaborate with the Donor in accordance with the Donor's desires relating to participation in the sanctuary activities and operations'. This unquestionably, renders Ms Borgström's appointment appropriate. The respondent's assertion that this appointment is not in the Trust's best interests, or that it creates a conflict of interest, is unsustainable on the evidence.

[47] What all of this shows, is that the respondent's s 34 constitutional right to have a dispute that can be resolved by the application of law decided by a court, was not infringed. The High Court's conclusion to the contrary, is incorrect. In fact, the respondent's approach to the court for an interdict, constitutes the exercise by a dissenting minority to refer a decision by the majority to an appropriate forum for determination, as envisaged in the trust deed.

[48] This brings me to the proper construction of clause 11 of the trust deed. It provides:

‘**11. TRUSTEES – DISQUALIFICATION AND VACATION OF OFFICE**

11.1 Subject to the Trust [Property] Control Act, the office of a Trustee shall be vacated if:

11.1.1 he or she resigns his or her office by notice in writing to his or her co-Trustees;

11.1.2 as a natural person, he or she becomes insolvent or is convicted of any offence involving dishonesty;

11.1.3 he or she shall become of unsound mind and mentally incapable of managing his or her own affairs;

11.1.4 he or she shall become disqualified in terms of the Companies Act 71 of 2008 or its predecessor or successor in force from time to time, to act as a director of a company, or

11.1.5 the remaining Trustees shall unanimously agree in writing that any Trustee(s) be required to resign.’

[49] The disqualifying criteria in clauses 11.1.2 and 11.1.3, also constitute grounds upon which the Master of the High Court may remove a trustee from office under the Act.[13] For present purposes, the relevant provisions of the Act are ss 9(1) and 20, which read:

‘**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.’

‘**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.’

[50] The proper approach to the interpretation of the above provisions is settled: ‘It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation . . . [T]he triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concept expressed by those words and the place of the contested

[13] Section 20(2)*(a)*, *(c)* and *(d)* of the Act.

provision within the scheme of the agreement (or instrument) as a whole that constitute the enterprise by recourse to which a coherent and salient interpretation is determined.'[14]

[51] The inevitable starting point is the language of the statutory provisions and clause 11 of the trust deed.[15] Section 20(1) of the Act empowers a court to remove a trustee from office, if it is in the interests of the Trust and the beneficiaries. Section 20(1) does not state that this power is exclusive to the court. Nor is there any reason to read such limitation into s 20(1). Thus, s 20(1) does not detract from the principle that a founder may reserve the right to remove a trustee, or may confer it on some other person, if that right is stipulated in the trust instrument.[16] The principle is illustrated by this very case: clause 10.7 of the trust deed provides, inter alia, that the founder, with the support of at least a 66% majority of trustees, is entitled to remove a trustee.

[52] Clause 11 states that its provisions are subject to the Act. The purpose of the phrase 'subject to', in the field of legislation,

'is to establish what is dominant and what subordinate or subservient; that to which a provision is "subject", is dominant – in case of conflict it prevails over that which is subject to it.'[17]

[53] The meaning and effect of this phrase in relation to clause 11.1.5 of the trust deed is no different, having regard to the plain wording, context and purpose of that provision. Clause 11.1.5 is subordinate to both s 20(1) and s 9(1) of the Act. Section 20(1) authorises the removal of a trustee if it is in the interests of the trust and the beneficiaries; and where a trustee fails to fulfil her duties in accordance

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[14] *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) para 25, with reference to *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18; *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13; 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (CC).

[15] *Natal Joint Municipal Pension Fund* fn 14 para 18.

[16] E Cameron, M de Waal and P Solomon *Honoré's South African Law of Trusts* 6 ed (2018) at 268; *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA) para 10; *Raath v Nel* 2012 (5) SA 273 (SCA) para 12.

[17] *S v Marwane* 1982 (3) SA 717 (A) at 747H-748A, affirmed in *Zantsi v Council of State, Ciskei, and Others* 1995 (4) SA 615 (CC) para 27.

with the standard set out in s 9(1), that trustee may be required to vacate her office in terms of clause 11.1.5.

[54] In other words, and in the particular circumstances of this case, the power in clause 11.1.5 must be exercised for a reason sanctioned by the Act. That is why it may not, without more, be invoked by a simple majority. It follows that clause 11.1.5, for the reasons set out above, may also not be invoked arbitrarily, irrationally, or capriciously, for example, based on the will, preference or convenience of the majority of trustees; or where there is no evidence that the interests of the trust and its beneficiaries would be prejudiced.

[55] This construction is buttressed by the context of clause 11 in the scheme of the trust deed, in relation to the powers of trustees and the objects of the Trust, and the purpose of clause 11 within that scheme. Thus, clause 12.1 provides:

'The powers of the Trustees as set out in this Deed of Trust are powers which are conferred upon them as Trustees of the Trust and to enable them to administer the Trust Fund for the benefit of Rhinos in South Africa in accordance with the Trust Objects, and not for their personal benefit. The extent of the powers vested in the Trustees must be construed in accordance with and subject to the Trust Objects.'

[56] The main objects of the Trust include the creation of a fund to combat rhino poaching, the protection of the lives of rhinos in South Africa; the establishment of a rhino protection zone; the provision of funding for the acquisition of land to establish that zone for the safekeeping of rhinos; and support of sanctuaries and rehabilitation projects relating to rhinos. Where these objects are subverted or threatened by the conduct of a trustee, or where a trustee exercises her powers contrary to clause 12.1, the remaining Trustees are empowered to call for the resignation of that trustee in accordance with clause 11.1.5, without the need to approach a court for the removal of a trustee, in terms of s 20(1) of the Act. This plainly, was the intention of the founder – the respondent, no less. Otherwise construed, clause 11.1.5 is rendered meaningless.

[57] Clause 11.1.5 thus provides an expeditious method for the removal of a trustee, in the interest of the Trust and its beneficiaries. It obviates the lengthy delays, exorbitant costs and uncertainties associated with litigation. It is supplementary to the disqualification criteria in clauses 11.1.2 to 11.1.4 of the trust deed. And it does not oust the right of trustees to apply to court for the removal of a trustee in terms of s 20(1) of the Act, or under the common law, which permits the removal of a trustee when continuance in office would prevent the proper administration of a trust, or be detrimental to the welfare of beneficiaries.[18] In *Gowar*[19] this Court stated that the common law principle is endorsed in s 20(1) of the Act.

[58] Returning to the present case, on the common cause facts outlined above, the appellants have established that the resolutions that the respondent vacate the office of trustee, and that Ms Borgström be appointed to that position, are valid and enforceable. The removal of the respondent as trustee is plainly in the interests of the Trust and its beneficiaries. The papers are confined to these resolutions, and it is therefore inappropriate to confirm all the resolutions taken at the meeting of 3 March 2022, as sought by the appellants.

[59] The common cause facts also show that the respondent did not establish a prima facie right for the grant of the interim interdict: in essence, she failed to show that she has good prospects of success in the action in which she asks for an order that the appellants be removed as trustees.[20] Had the High Court applied the test for a prima facie right, it ought to have concluded that in light of the inherent probabilities, the respondent is unlikely to succeed in her action. Consequently, the main application should have been dismissed.

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[18] *Sackville West v Nourse and Another* 1925 AD 516 at 527; *Honoré's op cit* fn 16 at 271.
[19] *Gowar and Another v Gowar and Others* [2016] ZASCA 101; [2016] 3 All SA 382 (SCA); 2016 (5) SA 225 (SCA) para 28.
[20] *Economic Freedom Fighters v Gordhan and Others* [2020] ZACC 10; 2020 (6) SA 325 (CC); 2020 (8) BCLR 916 para 42.

Costs

[60] Trustees must act honestly and reasonably. They have a duty to protect the assets of the trust for the benefit of the beneficiaries. For these reasons, as a general rule a trustee should not be ordered to pay costs *de bonis propriis* (out of own pocket), whether as an applicant or respondent, unless she has acted in bad faith, negligently or unreasonably.[21]

[61] This is such a case. The *ex parte* order, based on falsehoods, was obtained in bad faith. In that application the respondent sought an order that the appellants who opposed it, should pay costs on an attorney and client scale. The respondent then prevented the appellants from fulfilling their duties as trustees. Consequently, they were compelled to apply for a reconsideration of the *ex parte* order, which was set aside on the basis that it had no foundation, in fact or in law. The respondent was ordered to pay the costs of the *ex parte* application.

[62] The respondent restored the appellants' administration of the Trust, only after they launched a separate urgent application on 26 January 2022 for her to do so. In the meantime, the respondent had brought an application for contempt of court by the appellants, which she subsequently withdrew. She then launched the main application which, on the common cause facts, was doomed to failure from the outset. In that application, she also sought an order that the appellants pay the costs of her contemplated action for their removal, on an attorney and client scale. Throughout, the respondent paid scant regard to Trust's continued existence and the welfare of the beneficiaries, regardless of their utter dependence on the donor.

[63] In these circumstances, the only appropriate order is that the respondent should pay the costs of these proceedings in her personal capacity. She acted in bad faith and recklessly.

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[21] *Grobbelaar v Grobbelaar* 1959 (4) SA 719 at 725B; *Honoré's op cit* fn 16 at 476-477; See 3 *Lawsa* 2 ed para 377 and the authorities there collected. See also *Pheko and Others v Ekurhuleni Metropolitan Municipality* [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) para 51.

Conclusion

[64] In the result, the following order is issued:

1 The appeal succeeds with costs, which shall be paid by the first respondent in her personal capacity.

2 The order of the High Court is set aside and replaced with the following:

‘(a) The application is dismissed.

(b) The counter-application succeeds. It is declared that the following resolutions taken at the meeting of the trustees of the Rhino Pride Foundation, Master’s reference number IT001464/15 (G) (the Trust), on 3 March 2022, are valid and enforceable:

(i) that the second applicant, Dr Jana Annelise Pretorius NO, is required to resign and vacate the office of trustee, in terms of clause 11.1.5 of the Trust’s Deed of Trust, and

(ii) that Ms Marielle Borgström is appointed as a trustee of the Trust in the place of the second applicant.

(c) The second applicant shall tender her resignation and vacate the office of trustee within seven (7) calendar days of the date of this order, failing which the Sheriff of the High Court, Pretoria, is authorised to sign the necessary documents to give effect to that resolution.

(d) The first applicant shall pay the costs of the application and the counter-application, in her personal capacity, including the costs of two counsel where so employed.

(e) The second applicant is directed to sign all documents necessary to grant the first and second respondents full access to all the bank accounts of the Trust, within seven (7) calendar days of the date of this order, failing which the Sheriff of the High Court, Pretoria, is authorised to sign the necessary documents in her stead.’

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A SCHIPPERS

JUDGE OF APPEAL

Appearances:

For appellants:	N Marshall
Instructed by:	Visser Inc Attorneys, Pretoria
	Honey Attorneys, Bloemfontein
For first and second respondents:	A van der Walt
Instructed by:	Krige Attorneys Inc, Pretoria
	Phatshoane Henney Attorneys, Bloemfontein