

REPUBLIC OF NAMIBIA

HIGH COURT OF
WINDHOEK



NAMIBIA, MAIN DIVISION,

JUDGMENT

CASE NO: HC-MD-CIV-MOT-GEN-2018/00169

In the matter between:

ASCAN SCHUTTE

APPLICANT

and

HANS-WILHELM SCHUTTE

FIRST RESPONDENT

DOROTHEA JOHANNA ELISABETH SCHUTTE

SECOND RESPONDENT

HERBERT MAIER

THIRD RESPONDENT

Neutral Citation: *Schutte v Schutte* (HC-MD-CIV-MOT-GEN-2018/00169) [2019]
NAHCMD 178 (31 May 2018)

CORAM: CLAASEN, AJ

Heard: 8 April 2019

Delivered: 31 May 2019

Reasons delivered: 7 June 2019

ORDER

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1. The application to order the respondents in their capacities as trustees to reinstate the applicant as trustee of the Schutte Trust is hereby granted.
 2. The respondents are ordered to pay the cost of the application jointly and severally, the one paying the other to be absolved.
 3. The matter is removed from the roll and is regarded as finalised.
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JUDGMENT

CLAASEN A J:

Introduction

[1] This matter involves a family trust, the Schutte Trust and revolves around the question whether a resolution by the majority of trustees removing another trustee from office is valid.

[2] The applicant is Mr. Ascan Schutte, one of the biological children of the late Florenz Dietrich Schutte and his surviving spouse Dorothea Johanna Elisabeth Schutte. Mr. Ascan Schutte is currently residing in Hamburg, Germany.

[3] All the respondents are cited in their respective capacities as trustees of the Schutte Trust and they reside in Windhoek, Namibia. The first respondent is Mr. Hans Wilhelm Schutte, a trustee and brother to the applicant. The second respondent is the mother of the applicant and first respondent. The third respondent is Mr. Herbert Maier.

[4] The deed of trust founding the Schutte Trust was signed by the applicant and the respondents on 03 September 2001. The patriarch in the family, the late Florenz Dietrich Schutte was the founder and first donor of the trust. The trust was created as

an investment holding trust with the vesting date upon the beneficiaries, being the death of the parents. The beneficiaries were the six children as well as the descendants of the beneficiaries per stirpes.

[5] At the time that the Trust Deed was entered into the applicant and the respondents were donors in addition to being nominated as first trustees with the late Florenz Schutte. On the 17th of October 2014 Florenz Schutte passed away, which left the applicant and the three respondents remaining as trustees.

[6] According to the averments in the founding papers, the applicant learnt that he was no longer a trustee when he requested annual reports of the Trust, which request he made during August 2017. There was no reply and the applicant wrote another letter to the first respondent on 9 December 2017. In response to the applicant's request for annual reports of the Trust the first responded forwarded an amended trust certificate to the applicant on 2 January 2018. The said document was dated 12 September 2017 and did not reflect the applicant as a trustee of the Schutte Trust.

[7] The applicant, on 19 January 2018 requested the reasons for his removal. The replying letter from the trustees on behalf of the Trust indicated that the removal was effected in terms of clause 4.4.6. of the Trust Deed.

[8] Mr. Vaatz, on the instructions of the applicant addressed a letter to the first respondent in which he contended that the respondents are not entitled to unilaterally remove the applicant as trustee and that it was upon the applicant to decide whether he will comply with their request or refuse to resign. The trustees initially responded that they will forward Mr. Vaatz's letter to the Trust. On 2 March 2018 the trustees addressed another letter to Mr. Vaatz in which they stated that the applicant's removal as a trustee took place as per a letter dated 18 June 2017 and that it was in accordance with clause 4.4.6 of the Trust Deed.

[9] Aggrieved by his removal as trustee of the Schutte Trust, the applicant during July 2018 initiated proceedings by notice of motion in which he seeks an order reinstating him as fourth trustee of the Schutte Trust and the cost of the application.

The basis on which the applicant seeks the order of reinstatement and the basis on which the respondents oppose the application

[10] The applicant contends that the provisions in the Trust Deed, including clause 4.4.6 of the Deed of Trust do not empower the respondents to, without affording audi alteram partem, remove him as a trustee of the Schutte Trust.

[11] The respondents on the other hand contend that clause 4.4.6 of the Trust Deed simply requires the majority of the trustees to demand the resignation of a trustee and once that is done the trustee by that very fact vacates his or her office. The respondents concede that they did not invite the applicant to the meeting where the resolution to remove the applicant as a trustee of the Schutte Trust was taken. In their view it was not necessary, as clause 4.4.6 does not require any action by the applicant at all.

The issue for determination

[12] The parties agreed in the case management report that the issue before the court is the interpretation of the trust deed with respect to the removal of the fourth trustee from office, and more specifically clause 4.4.6 of the Trust Deed.

Discussion

[13] I now move on to the source of the disagreement. The provision in dispute is contained in clause 4.4.6 of the Trust Deed, which reads as follows:

‘4.4. The office of a Trustee shall be ipso facto vacated if:

4.4.1. ...

4.4.6. if the majority of the Trustees shall in writing require him to resign.’

[14] Mr. Vaatz who appeared for the applicant in summary, argued that the applicant was unlawfully removed as the procedural formalities required by the Trust Deed were not followed and his interpretation of clause 4.4.6 was that the affected trustee cannot be removed by the other trustees without furthermore. He contended that the affected trustee must be afforded an opportunity to decide on the request for him or her to resign as a trustee, he must in essence be afforded audi alteram partem.

[15] Mr. Töttemeyer who appeared for the respondents argued that clause 4.4.6 of the trust deed constitutes a contractual notice. According to him the respondents complied with the requirements namely the majority of trustees gave written notice and thus the applicant is ipso facto vacated from office. If the applicant is afforded a choice, it will defeat the purpose of 'ipso facto,' and nothing else was required as this was not an Article 18 contract, so he argued.

[16] In turning to interpretation of contracts, the Supreme Court in *Egerer v Executrust (Pty) Ltd*¹ prescribed the unitary approach that encompass both the text of the words as well as the broader context and purpose of the document. The Supreme Court para 35 stated that:

'Context is considered by reading the particular provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. 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 lights of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible and unbusinesslike results or one that undermines the apparent purpose of the document. The court must avoid the temptation to substitute what it regards as reasonable, sensible or unbusinesslike for the words actually used.'

¹ (SA 42-2016) [2018] NASC 6 February 2018.

[17] Following the guidance by the Supreme Court I considered the language used in the light of the ordinary rules of grammar and syntax; and the context in which clause 4.4.6 of the Trust Deed appears. In my view the most sensible and reasonable interpretation of clause 4.4.6 of the Deed of Trust is that where the majority of the trustees want a trustee to vacate the office of a trustee they must request that trustee to resign his office.

[18] In this matter the facts are that; the applicant was not invited to the meeting where the decision to remove him as a trustee was taken, the majority of the trustees did not take a resolution requiring the applicant to resign as a trustee. They simply took a resolution, removing the applicant as a trustee. Clause 6.3 of the Trust Deed requires all the decisions of the trustees to, if possible, be taken by a unanimous decision. The failure to invite the applicant to a meeting is thus not within the spirit of the Trust Deed and the resolution to remove of the applicant as trustee is not in accordance with the terms of the Deed of Trust and is therefore invalid.

[19] There is another reason why the resolution taken by the majority of the trustees cannot be allowed to stand. I am of the view that a person cannot be condemned unheard, as it offends the spirit and tenor of the Namibian Constitution, which permeates all areas of the law. In a constitutional dispensation it is not sound that the majority of the trustees can remove the applicant from office without furnishing him with reasons for his removal or at the least giving him an opportunity to persuade them why he must not be removed.

[19] In these premises I find in favour of the applicant.

Order

1. The application to order the respondents in their capacities as trustees to reinstate the applicant as trustee of the Schutte Trust is hereby granted.

2. The respondents are ordered to pay the cost of the application jointly and severally, the one paying the other to be absolved.
3. The matter is removed from the roll and is regarded as finalised.

C CLAASEN
ACTING JUDGE

APPEARANCES:

APPLICANT: A Vaatz
of Andreas Vaatz & Partners, Windhoek

RESPONDENT: R Totemeyer SC
on instructions of Ellis Shilengudwa Inc, Windhoek