

SOUTH AFRICA / JUDGMENT

## Bouwer NO and Another v Smit NO and Others (59423/2015) [2019] ZAGPPHC 264 (5 June 2019) [2019] ZAGPPHC 264

COURT

North Gauteng High Court, Pretoria

BEFORE

J.J.C. Swanepoel

CASE / FILE NUMBER

59423/2015

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### Source record

IN THE HIGH COURT OF SOUTH  
AFRICA  
(GAUTENG DIVISION, PRETORIA)  
(1)

REPORTABLE:

YES/NO

(2)

OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED

Case number: 59423/2015

Heard on: 28 May 2019

Date

of judgment: 5 June 2019

In the matter between:      WILLEM  
FRANCOIS BOUWER N.O.  
First  
Applicant  
CHRISTOFFEL  
FREDERICK VILJOEN  
Second Applicant  
and  
CATHERINA JOHANNA SMIT  
N.O.  
First Respondent  
JOHANNES ADRIAAN VILJOEN  
N.O.  
Second  
Respondent  
WILLEM CHRISTIAAN VOLJOEN N.O.  
Third Respondent  
ALBERTUS ABRAHAM VILJOEN  
N.O.  
Fourth  
Respondent  
ABRAHAM  
CAREL VILJOEN N.O.  
Fifth Respondent  
PETRUS  
JACOBUS VILJOEN  
Sixth Respondent  
DANIE  
BARNARD N.O.  
Seventh Respondent  
MASTER  
OF THE NORTH GAUTENG  
HIGH COURT, PRETORIA.  
Eighth Respondent  
ABRAHAM  
CAREL VILJOEN  
Ninth Respondent

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## JUDGMENT

SWANEPOEL AJ:

## INTRODUCTION

- [1] This is an application for the removal of the trustees of the Avianco Trust ("the trust"), and the appointment in their stead of two independent trustees. First Applicant is an attorney, acting in this application in his representative capacity as the executor of the estate of the late Abraham Carel Viljoen ("Viljoen") who passed away on 12 November 2011.

- [2] Second Applicant, as well as First, Second, Third, Fourth, Fifth and Sixth Respondents are the children of Viljoen from his marriage to Anna Maria Aletta Viljoen, who was previously the seventh respondent ("Anna Viljoen"). All of the siblings were appointed as trustees of the trust after Viljoen's passing. Anna Viljoen passed away after the application was launched, the executor of her estate, one Danie Barnard, was substituted in her stead, and he is now the Seventh Respondent. By the time that the matter came before Court, the parties had agreed that the passing of Anna Viljoen had resulted in the purpose of the trust being fulfilled and that the trust should be terminated. They also agreed that one, alternatively two independent trustees should be appointed to wind up the affairs of the trust. All of the trustees, save for Fifth Respondent, wish to be removed as trustees. The main issue remaining for decision, is whether Fifth Respondent should also be removed as trustee.

## BACKGROUND

- [3] On or about 19 April 1994 Viljoen signed a deed of trust, creating an inter vivos trust, the Avianco Trust, the trustees at that time being Viljoen, his wife Anna Viljoen, and one Willem Du Tait. At the outset there was a dispute between the parties regarding which trust deed was the correct one, the deed referred to above, or a deed upon which applicants relied that had been signed in 2001, and which purported to create the "Avianco Familie Trust". The parties have now agreed that the deed signed in 1994 (that Fifth Respondent contended was the correct document) is the operative one.
- [4] In the deed Viljoen nominated Anna Viljoen and all the children born from their marriage as beneficiaries of the trust. The deed provided that the trust would endure until Anna's death, or, at the discretion of the trustees, until an earlier or later date. Upon the termination of the trust, the capital then remaining was to be divided between the remaining beneficiaries.
- [5] A beneficiary was entitled to conclude agreements with the trust, with the proviso that the contract should be disclosed in writing in advance to all the trustees.
- [6] The deed provided for the removal of a trustee by a court in the event of:
- 6.1 The trustee becoming permanently mentally incapacitated, if he/she was declared incapable of handling his/her own affairs or was declared to be a prodigal, or if the trustee was placed under curatorship;
- 6.2 The trustee's liabilities exceeding his/her assets, or the trustee committing an act of insolvency;
- 6.3 The trustee failing to execute his duties as trustee properly;
- 6.4 The trustee being sentenced to imprisonment without the option of a fine;
- 6.5 The trustee becoming disqualified to be appointed as a director of a company in accordance with section 218 (1) of the Companies Act, 1973.

- [7] A decision of trustees required a majority of votes. Any trustee was entitled to call a meeting of trustees on 14 days' written notice to the other trustees. The deed required that there should be a minimum of three trustees at all times.
- [8] Viljoen executed a will on 28 March 2001, in terms of which he bequeathed his entire estate to the trust subject to certain conditions, of which the relevant ones are:
- 8.1 That Anna Viljoen would have lifelong usufruct of the income of the trust;
- 8.2 That all seven children would be trustees of the trust, together with Anna Viljoen;
- 8.3 That five votes would be required to pass a resolution.
- [9] The will also provided that after Anna Viljoen's death, the usufruct would devolve upon the children for a period of one year, and should a beneficiary pass away during the currency of the usufruct, his/her children would step into the shoes of that beneficiary.
- [10] After Viljoen passed away, all seven of the children were appointed as trustees of the trust, together with Anna Viljoen. Sixth Respondent was subsequently sequestered, and consequently he was removed as a trustee of the trust. Sixth Respondent was also the executor of Viljoen's estate. Some of the trustees had concerns that Sixth Respondent had not executed his duties as executor with diligence and care, and that he had delayed the finalisation of the estate. As a result, the trust resolved on 11 July 2012 to apply for the removal of Sixth Respondent as executor. An order to that effect was granted by default on 3 February 2014.
- [11] Fifth Respondent was implacably opposed to the removal of Sixth Respondent as executor. Fifth and Sixth Respondents applied jointly for the rescission of the order, but later decided to withdraw the application. In the meantime First Applicant had been appointed as executor of Viljoen's estate in Sixth Respondent's place.
- [12] For some years there has been friction between the Viljoen siblings. It is fair to say that the decision to remove Sixth Respondent as executor of his father's estate, and the appointment of 1st Applicant in his stead, fuelled the fires of enmity. By September 2012, when the annual trustees' meeting was held, the differences between the siblings had become overwhelming, with Fifth and Sixth Respondents in one camp, and the rest of the siblings in the opposing camp. Whether he was correct or not, Fifth Respondent's perception was that 1st Applicant was exacerbating the disagreements between the siblings. Fifth Respondent was very vocal in his belief that First Applicant had been improperly substituted in Sixth Respondent's stead as executor, and that First Applicant was doing nothing to finalise the estate. He clearly felt that First Applicant was interfering in family affairs that were none of his business.
- [13] The parties seemed to have reached a stalemate by 2015, and during July 2015 this application was launched. First Applicant, in his capacity as executor of the Viljoen estate, and Second Applicant, in his personal capacity as well as in his capacity as trustee, sought

the removal of Second Applicant, and First, Second, Third, Fourth, Fifth and Seventh Respondents as trustees of the trust. The also sought the appointment of two independent persons as trustees. The application was only opposed by Fifth Respondent, and essentially the other respondents supported the application. Neither Second Applicant, nor the respondents (save for Fifth Respondent) wished to remain on as trustees.

[14] The grounds for the removal of the trustees were dealt with in very vague and generalised terms in the founding affidavit. To a large extent, 1st Applicant (who deposed to the founding affidavit) felt aggrieved by Sixth Respondent's alleged lack of cooperation in resolving the deceased estate, and his apparent refusal to provide relevant documents and information.

[15] In an attempt to resolve his difficulties, First Applicant "initiated" a meeting of trustees. The meeting, in First Applicant's own words, erupted into chaos, with tempers flaring and accusations and insults cast about between the two camps.

[16] The result is that First Applicant became convinced that Fifth and Sixth Respondents were being obstructive. Sixth Respondent was primarily his cause of complaint, as he had particular knowledge of the affairs of the estate, and First Applicant wanted to know what he had done with all the assets in the estate. First Applicant also wanted information relating to an overseas investment that belonged to the trust, but was being held in the names of the Second and Sixth Respondents.

[17] On 23 June 2015 First Applicant wrote to all the trustees seeking certain information and documents. He demanded:

17.1 Information regarding certain assets that had already been dealt with by Sixth Respondent, and which were in the hands of the trust;

17.2 Copies of all bank statements of the trust;

17.3 A comprehensive list of all the bank accounts opened by the trust;

17.4 Details of the trust's offshore accounts;

17.5 Information relating to the trust's books and accounts;

17.6 A list of all documents under the control of the trust, including invoices, receipts, minutes of meetings of trustees, minutes of meetings of beneficiaries, agendas, minute books, resolutions etc.

[18] Fourth Respondent replied to the letter suggesting that First Applicant should liaise with Sixth Respondent, the previous executor, and with the agent appointed by him to administer the estate, one Hein Bezuidenhout, as well as with Fifth Respondent and with the trust auditors, Messrs. Griessel Nel. Fifth Respondent also replied to the request for information. He recorded that First Applicant had had the liquidation and distribution account in his possession for some time, and he invited him to familiarise himself with the document. Fifth Respondent also tendered to make himself available to discuss specific issues with First

Applicant. In

a later email, Sixth Respondent pointed out again that First Applicant had the liquidation and distribution account in his possession, that he was in possession of the details of the trust auditors, and that he knew where to find Sixth Respondent. He suggested that First Applicant was not being truthful when he said that he did not have the information that he needed to finalise the estate. First Applicant was apparently frustrated by the aforesaid responses, and it clearly reinforced his view that Fifth and Sixth Respondents were being obstructive.

[19] Based on the aforesaid facts, First Applicant launched this application and in the founding affidavit he raised the following grounds for the removal of the trustees:

19.1 He believed that it was in the trust's interests that independent persons be appointed as trustees;

19.2 He alleged that there was continued conflict at trustee meetings, that it was thus impossible to hold trustee meetings, and trustees were incapable of agreeing on anything. Conversely, First Applicant alleged that no trustee meetings were being held;

19.3 The Seventh Respondent had a usufruct over the assets of the trust, and the trust was allegedly "failing in achieving this object and purpose";

19.4 No resolutions were being adopted and none were implemented;

19.5 The trustees were required to keep minutes of meetings, to meet regularly, to keep proper books of account and to account for their conduct as trustees, which they were not doing.

[20] First Applicant made the specific allegation that it was principally Fifth and Sixth Respondents who were making it impossible for the trust to function. There was allegedly complete chaos as far as financial accounting was concerned. He also alleged that the trust had not submitted tax returns to the South African Revenue Services and that there were no proper books for the trust. There were no apparently no financial statements being prepared and not even basic books of account were being maintained.

[21] The picture that First Applicant painted was that of a completely dysfunctional trust that was clearly unable to achieve the goal

envisaged by its creator. The aforesaid is the case that Fifth Respondent was asked to meet in his answering affidavit.

#### LOCUS STANDI

[22] At the outset Fifth Respondent's contended that First Respondent did not have the required locus standi to bring the application. Fifth Respondent took the point that First Applicant did not have any interest in the trust, specifically not in the removal of its trustees.

[23] The test whether a party has locus standi was set out in *Jacobs en 'n ander v Waks* [1991] ZASCA 152; 1992 (1) SA 521 (AA) at 533 J to 534 (B):

"In die algemeen beteken die vereiste van locus standi dat iemand wat aanspraak maak op regshulp 'n voldoende belang moet he by die onderwerp van die geding om die hof te laat oordeel dat sy eis in behandeling geneem behoort te word. Dit is nie 'n tegniese begrip met vas omleinde grense nie. Die gebruiklikste manier waarop die vereiste beskryf word is om te se dat 'n eiser of applicant 'n direkte belang by die aangevraagde regshulp moet he (dit moet nie te ver verwyder wees nie); andersinds word daar ook gesê, na gelang van die samehang van die feite, dat daar 'n werklike belang moet wees (nie abstrak of akademies nie), of dat dit 'n teenswoordige belang moet wees (nie hipoteties .me)....."

[24] It is clear from Jacobs (supra) that a party's interest in the relief sought does not have to be financial in nature. Section 20 (1) of the Trust Property Control Act, Act 57 of 1988 seems, however, to limit the class of persons who may apply for the removal of a trustee even further:

"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".

[25] Mr Lamey, acting for Fifth Respondent pointed my attention to the matter of *Ras NNO v Van der Meulen* 2011 (4) SA 17 (SCA) where Leach JA found (at 20 C):

"The court clearly erred in finding that short of being a beneficiary, the respondent had an interest in the trust which justified her being entitled to seek the relief claimed. It is only if she is a beneficiary that she would be entitled to seek the removal of the trustees .... ."

[26] In *Kidbrooke Place Management Association v Walton NNO* 2015 (4) SA 112 (WCC) at 118 I Binns-Ward J suggested 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, even if he did not have an interest in the trust property. Itself. This dictum seems, on the face of it, to conflict with the *Ras* judgment (supra). However nothing turns on it in this matter, and I do not have to decide this issue as, in my view, First Applicant has no interest whatsoever in the subject matter of the litigation. He has no interest in the trust property, nor does he have any interest in the trust, nor in its administration, nor in the removal of its trustees.

[27] First Applicant's sole purpose is to administer the deceased estate, and to ensure that the assets of the deceased estate are placed in possession of the trust. I fail to see how the administration of the trust impacts on First Respondent's duties as executor. It is therefore my view that First Applicant does not have locus standi to bring the application to remove the trustees.

MERITS

[28] That however, is not the end of the matter. Second Applicant is a beneficiary of the trust, and as such he is entitled to bring the application. Second Applicant supported First Applicant's version and it is therefore necessary to consider the merits of the application.

[29] Before I deal with the Fifth Respondent's answer to the allegations, I must point out that the papers are replete with factual disputes. I therefore have to be mindful of the dictum in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (AD) at 634 (H):

" It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order."

[30] In answer to applicants' averments Fifth Respondent put up a comprehensive answer. Fifth Respondent alleges that he was appointed as the chairperson of the trust with the consent of his co-trustees. He states that the other trustees are either not interested in dealing with the affairs of the trust, or they are incapable of handling its affairs. He alleges that some of the trustees are resident elsewhere, and cannot attend meetings of the trustees. For that reason Fifth Respondent, regarding himself as an experienced businessman, has taken the burden of the trust affairs on his own shoulders.

[31] Fifth Respondent denies that the trust is not functional. He alleges that under his auspices, the affairs of the trust have been properly administered, and assets have been properly accounted for. Fifth Respondent makes two points, in my view correctly so, firstly, that there are no allegations of impropriety against him, and secondly, that most of the allegations relate to the conduct of Sixth Respondent in dealing with the affairs of the deceased estate, and he has not been a trustee for some years.

[32] In reply, First Applicant filed a fifty eight page affidavit in which he made a number of new allegations against Fifth Respondent. The material new allegations are the following:

32.1 That he has an autocratic style and does not accept the decision of the majority of trustees;

32.2 That he simply appoints his own auditors to do his bidding in respect of the trust affairs;

32.3 That Fifth Respondent made a loan to the trust which he wants to recover, that the loan is in dispute, and that Fifth Respondent therefore has a conflict of interest that would disqualify him from continuing as a trustee;

32.4 That there are numerous assets of the deceased estate that were not accounted for in the inventory;

32.5 There is a complete breakdown of trust between the Fifth Respondent and the beneficiaries;

32.6 That the books of the trust have been manipulated.

[33] First Applicant makes the following inexplicable and unsubstantiated allegation:

" I deny the unsubstantiated statement by the Fifth Respondent that he has seen to it that the trust assets are properly administered and accounted for. I have already referred to the missing assets of the trust as far as the deceased estate is concerned. Furthermore, I have well founded reasons to suspect serious maladministration in the deceased estate by the Sixth Respondent."

[34] I emphasize that I am bound to accept the Fifth Respondent's version where it contradicts applicant's version, unless the Fifth. Respondent's averment is so obviously false that it can be rejected. In this matter the consideration of facts is made even simpler by the comprehensive version put up by Fifth Respondent. There are simply no facts to support the contention that either the estate assets or the trust assets are missing, or that there has been maladministration of the trust or the estate. What is meant by the statement that there are "missing assets of the trust as far as the deceased estate is concerned", I do not

know. Subsequent to the reply being filed, Fifth Respondent, quite correctly so, deemed it necessary to file an affidavit in answer to the new allegations that only arose in reply. In that affidavit he deals with each of the First Applicant's allegations.

[35] I will deal with each allegation separately:

35.1 Absence of meetings and resolutions: The allegation that there were no meetings of trustees being held is palpably false. Fifth Respondent attached the minutes of an annual meeting held on 28 July 2015, the same date upon which the application was issued. According to the return of service the

application was served on Third, Fifth and Sixth Respondents on 28 July 2015 at the offices of the trust auditors, where the annual

meeting was being conducted. The contention that no meetings were being held was, to First Applicant's knowledge, false. The allegation

that resolutions were not adopted is equally untrue.

35.2 Fifth Respondent also attached to the answering affidavit the minutes of the meeting of 7 March 2014, being the previous annual general meeting of trustees. First Applicant himself attached the minutes of a trustees' meeting held on 11 July 2012 to his replying affidavit. That meeting was held at First Applicant's offices. At that meeting a resolution was taken to apply for the removal of Sixth Respondent as executor of the estate. There is simply no truth to the allegation that there were no meetings of trustees. They may have been held annually, but nothing prevented any one of the other trustees from calling for a meeting, as they did in July 2012.

35.3 Absence of basic books of account and financial statements: This allegation is even more egregious than the allegation that meetings were not held. In his answering affidavit, Fifth Respondent

attached financial statements for the financial years 2013, 2014 and

2015. He also attached the SARS tax returns for 2013, 2014 and 2015. In reply Applicants' case morphed from the allegation that there were no financial records (not even basic books of account), to a denial that the financial statements were properly audited. He provided no factual basis for this allegation save to state that none of the other trustees had signed the statements. There is no allegation, however, that the statements do not correctly reflect the financial affairs of the trust. There is also no factual basis to the allegation that the books of account have been "manipulated". What I find inexplicable, is that First Applicant could by a mere enquiry to the auditors have determined that there were proper books of account, and that financial statements had been prepared. There is no explanation why he did not take that opportunity.

35.4 Conflict of interest in respect of loan: Fifth Respondent is alleged to have lent the sum of R 114 411.00 to the trust at a stage when its account was frozen, in order to pay income tax and to avoid penalties for late payment. First Applicant now alleges that the loan is disputed, notwithstanding the fact that at the annual general meeting of 7 March 2014 the loan was discussed and it was resolved to repay the monies to Fifth Respondent. I have serious doubts whether there is actually a dispute regarding the loan. In any event, the order that I intend to make will resolve any potential conflict of interest.

35.5 Assets of the estate have not been accounted for: This allegation has nothing to do with the trust. If it were true, then First Applicant has the authority to pursue those assets and recover them from wherever they may be found. In any event, what is more concerning is that First Applicant has been aware throughout that Hein Bezuidenhout was appointed as Sixth Respondent's agent to administer the affairs of the trust, and despite invitations to do so, First Applicant has made no attempt to engage with Bezuidenhout regarding his concerns. In my view Fifth Respondent has in any event provided a proper explanation for each of the allegedly missing assets.

[36] Finally I have to deal with the allegation that Fifth Respondent has an autocratic style, and does as he pleases with the trust and its affairs. The breakdown of the relationship between a trustee and his co-trustees and beneficiaries is, in my view, not per se a basis to remove a trustee from his position. A trustee is not lightly removed, and there have to be substantive reasons why the trustee cannot, or should not be allowed to continue in his position.

[37] The principles to be applied in deciding whether to remove a trustee have been restated a number of times over the years. In *Sackville West v Nourse* and another 1925 AD 516, Solomon ACJ considered an application to remove a trustee based on the contention that he had acted imprudently with trust monies in investing in a hotel property. The learned judge referred to the matter of *Ledderstedt v Broers* (9 AC 371), an appeal to the privy Council against a judgment of the Cape Supreme Court. In his judgment Lord Blackburn quoted a passage from Story's *Equitable Jurisprudence* (at paragraph 1289) with approval:

"But in cases of positive misconduct Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust: it is not indeed every mistake or neglect of duty or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to show a want of honesty or a want of proper capacity to execute the duties, or a want of reasonable fidelity."

[38] Solomon ACJ further quoted Lord Blackburn (in *Ledderstedt* supra at 527) where he laid down the general principle that a Court would remove a trustee "if satisfied that the continuance of the trustee would prevent the trust being properly executed." Solomon ACJ also approved of the passage in which Lord Blackburn set out the broad approach to be applied in these matters:

"In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated that their main guide must be the welfare of the beneficiaries."

[39] What is clear from the *Sackville* matter, is that it is not necessary to find fraud or "positive misconduct" on the part of a trustee, before he or she could be removed from office. One of the grounds for removal argued for in *Sackville* (supra at

528) was the friction and hostility between trustees and the beneficiary. Solomon ACJ considered the nature of the functions that the trustee was required to discharge, and came to the view that notwithstanding the hostility which emanated mainly from the side of the beneficiary, the trust could nevertheless be properly executed, and that there were therefore insufficient grounds to remove the trustee.

[40] In *Spiros v Spiros* 1932 WLD 207 at 211, the Court held that even though it could not be found that there was any misconduct on the part of a trustee:

"...it seems to me to be a case of obstinacy on the part of the respondent and of the two parties not being able to agree, but whatever the cause the fact remains that the trust property has really been endangered, and if the Court has to regard as the main guide the welfare of the beneficiaries, which in this case include a minor, the daughter of the applicant, I think the Court can only come to one conclusion and that is that the administration cannot be carried on in the way in which it has been carried on in the past."

[41] In the matter of *Volkwyn, N.O. v Clarke & Damant* 1946 W.P.A. 456 (at 464) Murray J made the following comment:

"Both the statute and the case cited (*Letterstedt v Broers*) indicate that the sufficiency of the cause for removal is to be tested by a consideration of the interests of the estate. It must therefore appear, I think, that the particular circumstances of the acts complained of are such as to stamp the executor or administrator as a dishonest, grossly inefficient or untrustworthy person, whose future conduct can be expected to be such as to expose the estate to risk of actual loss or of administration in a way not contemplated by the trust instrument."

- [41] In *Die Meester v Meyer* 1975 (2) SA 1 (TPA), Margo J, in discussing the principle laid down by Murray J in *Volkwyn*, remarked that circumstances of any nature, which left the trustee in an untenable situation vis a vis the trust, would be prima facie grounds for his/her removal (at 17 D). The determining factor was the interests of the trust and its beneficiaries. For instance, should the executor in the Meyer matter (who is as against the estate in the same position as a trustee is in respect of a trust) not be impartial in considering claims against the estate, that would be prima facie grounds for his removal. (See also: *Webster v Webster* 1968 (3) SA 386 (T) at 388 C to D)
- [42] It was argued on behalf of applicants that the dictatorial conduct of the Fifth Respondent, and the hostility between the different factions of siblings engendered thereby, rendered the execution of the trust impossible. In *Tijmstra NO v Blunt Mackenzie NO and others* 2002 (1) SA 459 (TPD), the hostility shown by a trustee towards co-trustees, was one of the factors that led to the removal of the trustee. Normally, simple

hostility between trustees or trustees and beneficiaries would not be sufficient reason to remove a trustee from his position. However, the general principle remains, that should the conduct of the trustee generate such hostility between parties that the trust cannot be executed properly, a trustee may be removed from office.

- [43] In analysing the various allegations, I have no doubt that Fifth Respondent did not endear himself towards the other trustees. He took a very dim view of the fact that First Applicant had been appointed as executor of his late father's estate, and he believed that First Applicant was interfering in family affairs that had nothing to do with him. I must say that I have some sympathy with Fifth Respondent's views. First Applicant "initiated" a trustee's meeting when he had no right to do so. Applicants' attorney, Mr Danie Barnard attempted to attend the annual general meeting in 2015, without the necessary consent in writing and in advance of all the trustees. When he was asked to leave, he refused. Then followed the demand for information and documents that fell outside of the purview of First Applicant's duties. It is not surprising that Fifth Respondent was unhappy with Barnard's conduct, and that of First Applicant.
- [44] The question that I have to consider is whether Fifth Respondent's conduct was such that it would likely prevent the further execution of the trust. There have been vague allegations made of assets that have disappeared from the estate. Those allegations were denied, and, in my view, comprehensively shown to be untrue. The allegations regarding the estate relate to the manner in which Sixth Respondent allegedly administered the estate, and have no bearing on the business of the trust. There are no substantive allegations that the assets of the trust have been administered improperly or have disappeared. The allegations of financial mismanagement by failing to keep books of account have been conclusively rebutted.

- [45] I doubt that the relationship between the siblings will be restored in the near future, and they will in all likelihood remain hostile to one another. However, given the order that I intend to make, I do not believe that such hostility will prevent (what is essentially) the winding up of the trust. I also have serious doubts that the loan to which reference was made would constitute a substantial conflict of interest. The loan has been reflected in the books of the trust for a number of years, and at the 2014 annual meeting the trustees already resolved to reimburse Fifth Respondent. In any event, the two independent trustees will be able to deal with any conflicts, should they arise.
- [46] The trust requires three trustees at any one time. I therefore propose to direct the Master of the High Court to appoint two independent persons to wind up the affairs of the trust, together with Fifth Respondent. In the event of a disagreement, a majority of votes would prevail. In summary therefore, I am of the view that there are no grounds for the removal of Fifth Respondent as trustee. The result is that the application should be dismissed, and the counter- application should succeed, albeit in amended form.

#### COSTS

- [47] Costs generally follow the result. Fifth Respondent has argued that I should grant an order against the applicants, and against the respondents who supported the application, in their personal capacities. As far as the applicants are concerned, they act in their representative capacities, whilst Second Applicant also brought the application in his personal capacity. I see no reason why the estate of the late Mr. Viljoen should be burdened with the costs of the application, which to my mind was ill-conceived. I also see no reason why the trust should be out of pocket for the costs of the Second Applicant.
- [48] As far as a costs order against the First, Second, Third and Fourth Respondents is concerned, they were not represented herein, and although they supported applicants' version, they did not actively pursue the matter. I do not believe that, in the absence of having heard them on costs, it would be appropriate to make such an order. My view is therefore that applicants should pay the costs, jointly and severally, the one paying the other to be absolved, in their personal capacities.
- [49] One issue remains, which is the costs of the previous postponement of the matter on 19 March 2018. The following facts seem to be common cause:
- 49.1 During December 2017 the matter was set down for hearing on 19 March 2018. At that stage applicants had filed their replying affidavit. It must, from the outset, have been clear that the replying affidavit contained much new material that would likely have to be dealt with, either by an application to strike, or by a further affidavit.
- 49.2 More than three months passed before Fifth Respondent delivered a counter-application, and, on the day of the hearing Fifth Respondent filed a duplicating affidavit.

49.3 When the matter was called it was pointed out to counsel that the file was empty. The matter was thus postponed and costs were reserved.

[50] There is no explanation why the file was empty, but one can safely assume that the matter would not have continued in any event due to the late filing of the counter-application and the duplicating affidavit, even if the file had been complete. Although applicants contend that their attorney had prepared the file properly, and that the contents of the file had disappeared thereafter, it is still applicants' responsibility to see to it that a complete file is before the presiding judge. Therefore, both parties seem to have had a hand in the postponement, and in my view, there should be no order as to costs for the postponement of 19 March 2018.

[51] In the premises I make the following order:

51.1 Second Applicant and First to Fourth Respondents are removed as trustees of the Avianco Trust, IT no. 1912/1994.

51.2 In terms of the provisions of clause 10.1 of the trust deed dated 19 April 1994, and in terms of section 13 of the Trust Property Control Act, Act 57 of 1988 ("the Act") the trust is to be dissolved and the assets of the trust are to be distributed and transferred to the beneficiaries of the trust.

51.3 The Master of the High Court is directed to appoint two professional persons as independent trustees in terms of section 7 of the Act, and such persons shall not be from within the ranks of any of the parties to the present litigation, their representatives or of the previous trustees or beneficiaries.

51.4 The trustees shall, in order to give effect to the foregoing:

51.4.1 Take control of all assets, funds, monies, and accounts of the trust;

51.4.2 Determine whether there are assets of the trust that have not been transferred to the trust, and take all necessary steps to obtain possession and transfer of such assets to the trust before final distribution to the beneficiaries and the termination of the trust. The trustees may make interim distributions of funds or assets to the beneficiaries.

51.4.3 At their discretion, liquidate any assets, movable or immovable, of the trust;

51.4.4 For all intents and purposes act as administrator for the purposes of winding up the trust, and for the distribution of the net assets of the trust to the beneficiaries;

51.4.5 Ensure that all liabilities of the trust are settled before final distribution of assets to the beneficiaries;

51.4.6 Account to all of the beneficiaries, and to the Master of the High Court for the payment of liabilities and the distribution of the assets of the trust to the beneficiaries;

51.4.7 Be entitled to such reasonable remuneration as the Master may approve;

51.4.8 Be entitled to conduct a forensic audit into the affairs of the trust and to appoint a forensic auditor to conduct an investigation into its affairs;

51.4.9 Be entitled to approach this Court if necessary, on papers duly supplemented, to extend their powers in order to give effect to this order.

51.5 Upon fulfilment of the obligations of the trustees as set out above, the trust shall terminate.

51.6 Applicants shall pay the costs of the application and the counter-application, jointly and severally, the one paying the other to be absolved, in their personal capacities.

51.7 In respect of the wasted costs of 19 March 2018, each party shall pay its own costs.

J.J. C. Swanepoel

Acting Judge of the High Court,

Gauteng Division, Pretoria

Heard on:

28 May 2019

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Attorneys for respondents: DAWIE BEYERS ATTORNEYS INC

Date of judgment:

5 June 2019

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