

SOUTH AFRICA / JUDGMENT

Museler N.O v Momberg N.O and Others (617/2022) [2025] ZAECKMKHC 29 (18 March 2025)

[2025] ZAECKMKHC 29

COURT

Eastern Cape High Court, Makhandha

BEFORE

Govindjee

CASE / FILE NUMBER

617/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE

DIVISION, MAKHANDA)

NOT

REPORTABLE

Case

no: 617/2022

In the matter between:

LUCINDA WYNNE MUSELER

N.O.

Applicant

and

SHANNON LEE MOMBERG

N.O.

0020First Respondent

THE MASTER OF THE HIGH

COURT,

MAKHANDA

Second Respondent

MARTIN

MUSELER

Third Respondent

CHYNEE ELIZABETH

MINNIE

Fourth Respondent

CHAD ALEXANDER

MOMBERG

Fifth Respondent
SIOBHAN HELEN
MOMBERG
Sixth Respondent

JUDGMENT

Govindjee J

Background

- [1] The applicant seeks the removal of the first respondent (the respondent) as Trustee from the Wynhelee Trust (the trust) in terms of s 20(1) of the Trust Property Control Act, 1988[1] (the Act). The second respondent (the Master) furnished a report (the Master's report) without participating in the proceedings.
- [2] The Trust was founded in 1997 and the trust property consists solely of a residential property in Kenton-on-Sea (the property). Leaving aside the purported citation of the parties in their representative capacities, a matter to which I will return, the applicant and respondent (the parties) are siblings and serve as trustees, together with an independent trustee (Minnie).[2] The trust instrument (the deed) divides the beneficiaries into two classes. 'Class A' beneficiaries consist of the applicant, her spouse and descendants. 'Class B' beneficiaries comprise the respondent, her spouse and descendants.[3]
- [3] The applicant was in a stronger financial position than the respondent and used her own funds to renovate the property between February and December 2019. During 2019, the respondent occupied the property for a few months when she had no other accommodation available, and the applicant lived in the premises during October that year. The property was let when not in use by the parties, who agreed that the respondent would vacate the property in December 2019 to generate rental income. When the running expenses exceeded the rental income generated, these expenses were mainly carried by the applicant.

May-August 2020

- [4] The relationship between the parties degenerated during this period. Early during 2020, the applicant unsuccessfully approached the respondent with an offer to purchase the respondent's share of the property for R1,6 million. Whether or not this constituted a fair market value for the property is in dispute, as is the value of the applicant's loan account.
- [5] On the accepted facts, the applicant reneged on an agreement to permit the respondent to utilise the property for two weeks and an altercation resulted in the respondent vacating the premises at approximately 22h00 on 4 May 2020, in the presence of members of the police, a neighbourhood watch and security company.[4]

[6] The applicant instructed a service provider to change the locks on the property during May 2020. The respondent placed her own lock on the property when she became aware of this on 24 June 2020. That lock was later removed by the applicant to enable an agent to access the premises. Pam Golding Properties subsequently requested the respondent to sign a resolution granting the applicant

signing power in respect of the trust. The respondent refused to do so because of her insistence that there was a dispute, so that the property could not be leased during December 2020. The respondent considered the dispute to be about the property. She was not interested in selling her share to the applicant and offered only R100 000 when pushed to make an offer herself. That offer was rejected by the applicant, who indicated, during August 2020, that she wanted nothing more to do with the respondent.

[7] When the respondent communicated her refusal to permit the property to be leased over the December 2020 period, the applicant convened a virtual trustees' meeting on 19 August 2020. The applicant and Minnie failed to persuade the respondent, who felt that Minnie was serving only the applicant's interests. He immediately informed the parties of his decision to resign as an independent trustee.[5]

[8] On 21 August 2020 the applicant addressed lengthy correspondence to the respondent. The tone was conciliatory, and various options were suggested to the respondent, none of which appear to have resolved the impasse. The parties now viewed their position as one of a hopeless deadlock, seemingly unable to agree on a replacement independent trustee for Minnie. Thereafter, the applicant's focus turned to the Master and the appointment of a replacement independent trustee.

The Master

[9] The Master's report dated 4 March 2022 confirmed receipt of notification of Minnie's resignation during January 2021. On 1 February 2021, the Master wrote to the applicant to seek clarification as to whether all beneficiaries had been informed of the resignation, as well as the identity of a replacement independent trustee. That correspondence seemingly went unanswered for several months. During October 2021, the applicant indicated that the matter was urgent, that the parties' relationship had broken down and that the Master was requested to appoint an independent trustee. On 24 February 2022, in response to a query from the Master regarding the possible appointment of the applicant's Makhanda corresponding attorney as trustee, her attorneys advised as follows:

'Mr McCallum indicated to us that he is not prepared to be appointed as Trustee in the mentioned Trust. We obtained instructions from our client to propose a possible appointment but was instructed not to make any proposals due to the impasse between herself and the other trustee, Mrs S L Momberg. Our client is of the opinion that any proposal made by her will be countered by the other trustee. Having regard to the above, our instructions is therefore to again request your office to make such an appointment ... We further wish to advise that we, following our client's instructions, drafted an application for the High Court...'. (Sic).

The basis for removal

[10] The crux of the applicant's argument is explained in the conclusion to the founding affidavit, based on the respondent's alleged failure to make decisions to generate sufficient income for the trust, to resolve conflicts for the benefit of the trust in compliance with the trust deed, to regard trust property as belonging to another and to ensure that the trust's tax compliancy:

'My contention is that the 1st Respondent's actions are not to the benefit of the trust nor is she acting in the best interest thereof. On numerous occasions did she demonstrate an inability to keep her personal affairs separate from the trust and views the Trust Property as partly her own to do therewith as she pleases, with the obvious detriment to me. I further contend that despite the inaction of the 2nd Respondent, which may have contributed to the current state of lockdown, a meaningful alternative could have been reached had the

1st Respondent "acted with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another" as provided for in terms of Section 9(1) of the Act.'

[11] As a result of the respondent's refusal to permit the property to be rented, the parties had to pay for monthly municipal rates and taxes themselves from November 2020. They did so based on their respective beneficiary percentages, as provided for in the trust deed. By February 2021, however, the respondent could not cover her portion of the monthly costs. As a result, she signed a resolution, on 4 April 2021, permitting the applicant to appoint an agent, and the property was rented from June

2021. The applicant accepts, in reply, that '[the dispute regarding] her refusal to have the property rented out had been resolved with the resolution passed on 4 April 2021'.

[12] In explaining her failure to sign the financial statements, the respondent disputes the financial position of the trust after 2019. On 2 October 2021, the respondent signed the 2019 Financial Statement, which reflected an amount of only R122 000 in the applicant's loan account. The 2021 financial statements reflected the applicant's loan account to be an amount of almost R430 000 and the respondent submits that the applicant failed, despite numerous requests, to provide proof of expenditure in respect of renovations to the property. The respondent was unable to verify the significant increase in the applicant's loan account absent evidentiary proof. The respondent also relied on an email from the applicant dated 15 November 2020. The contents indicate that the applicant was, at this stage, reconstructing financial records for 2017 and 2018 but had not kept receipts of expenditure in cash. In reply, the applicant attached an affidavit deposed to by the trust's accountant, as well as a spreadsheet depicting a summary of receipts, to support the position reflected in the 2021 financial statements.

[13] The applicant's view is that it would be in the best interest of the trust to sell the property so that both loan accounts may be repaid.[6] The respondent prefers a referral to arbitration, alternatively an order compelling the Master to replace Minnie with another independent trustee. On 19 August 2021, all three trustees signed a resolution at Middelburg noting that Minnie had submitted his resignation in terms of the deed and adding the following:[7]

'Presently the composition of the unit of trustees does not comply with the above [paragraph 5.1 of the deed] and as the two remaining trustees are at an impasse, it is respectfully submitted that in these circumstances an independent third trustee ought to be appointed by the Master.'

[14] Both parties seek a punitive costs order against the other.

Analysis

Standing

[15] An application for the removal of a trustee is properly brought as a claim against a trustee in their personal capacity.[8] Similarly, it is the applicant in her personal capacity that appears to enjoy standing to bring the present application in terms of s 20(1) of the Act. This on the basis that she, as a co-trustee and beneficiary, has an interest in the property.[9] Neither the applicant nor the respondent appears to have been alive to the authorities on the point, so that the parties were cited in the manner indicated, above.

[16] That principled issue aside, the parties rightly accept that Minnie's purported resignation as trustee was ineffective and that he legally continued to serve in that capacity.[10] He and the applicant, if not the respondent, also considered this to be the position in practical terms. The reason for this is that the deed contained specific provisions for termination of trusteeship. In particular, 'a trustee's resignation becomes effective as soon as the Master issues an amended letter of authority'. No such letter has been issued by the Master. In addition, the Master's query asking for proof of compliance with s 21 of the Act (to determine whether ascertained beneficiaries with legal capacity had been informed of the resignation) had seemingly not been addressed despite correspondence to the applicant on 1 February 2021. There is therefore no need, for present purposes, to enter the debate as to whether a trustee who resigns must comply with s 21 and / or the requirements prescribed in the deed:[11] in the present circumstances the resignation was ineffective in terms of both the Act and the deed and Minnie rightly considered himself to remain an independent trustee notwithstanding the respondent's protestations and threats.

[17] Minnie deposed to a confirmatory affidavit in support of the application. And yet, it must be emphasised, the present application is restricted to the potential removal of the respondent in terms of s 20(1) of the Act, at the instance of the applicant alone.[12] Paragraph 6.3 of the deed, in terms of which 'a trustee stops to be a trustee should he be requested by the majority of all

trustees to resign', was not invoked. It is accepted that the respondent threatened to report Minnie and seek his removal from his position as a magistrate during this time.

The test for removal

[18] Turning to the crux of the matter, where more than one trustee is specified in the trust deed, they share a common fiduciary obligation towards the fulfilment of the objects of the trust and must act jointly.[13] Section 9(1) of the Act provides that 'a trustee shall in the performance of their duties and the exercise of their powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another'. This standard is higher than that which an ordinary person might generally observe in the management of their own affairs.[14]

[19] A trustee may be removed from office by the court, in the exercise of its inherent power, on the application of a person having an interest in the trust property.[15] The question is whether the court 'is satisfied that such removal will be in the interests of the trust and its beneficiaries'.[16] The general principle is that a trustee will be removed from office when continuance in office will prevent the trust being properly

administered or will be detrimental to the welfare of the beneficiaries.[17] Although neither bad faith nor misconduct is considered a pre-requisite for removal, it is settled that the power of the court to remove a trustee 'must be exercised with circumspection'.[18] The court will give weight to the fact that the founder selected the trustee as a proper person to carry on the administration, without this consideration being conclusive.[19] The position has been explained, by analogy, as follows:[20]

'(I)t is a matter not only of delicacy ... but of seriousness to interfere with the management of the estate of a deceased person by removing from the control thereof persons who, in reliance upon their ability and character, the deceased has deliberately selected to carry out his wishes. Even if the ... administrator has acted incorrectly in his duties, and has not observed the strict

requirements of the law, something more is required before his removal is warranted. Both the statute and the case cited indicate

that the sufficiency of the cause for removal is to be tested by a consideration of the interests of the estate...'

[20] The essential test is 'whether such disharmony as exists imperils the trust estate or its proper administration':[21]

'[31]...Thus, the overriding question is always whether or not the conduct of the trustee imperils the trust property or its proper administration. Consequently, mere friction or enmity between the trustee and the beneficiaries will not in itself be adequate reason for the removal of the trustee from office...Nor, in my view, would mere conflict amongst trustees themselves be a sufficient reason for the removal of a trustee at the suit of another.

- [32] Moreover, it must be emphasised that whilst a trustee is in law required to act with care and diligence, the decisive consideration is the welfare of the beneficiaries and the proper administration of the trust and the trust property. And, sight must not be lost of the crucial fact that the court may order the removal of a trustee only if such removal will, as required by s 20(1) of the Act, be “in the interests of the trust and its beneficiaries” (my emphasis).’
- [21] It may be emphasised that minor irregularities have been held to be insufficient to justify removal.[22] While the most usual basis for the removal of a trustee is a breach of trust, not even every breach of trust justifies removal.[23] In *Sackville West v Nourse*, for example, the beneficiary succeeded in a claim for damages for negligence against a trustee who had made an unwise investment. But since no fraud or positive misconduct was present it was held that there was no reason to think that the interests of beneficiaries

would be prejudiced by leaving the trustees to continue to manage the trust fund.[24] In *Tjimstra NO v Blunt-Mackenzie NO*, the court enumerated a number of specific grounds for a court’s removal of a trustee in terms of s 20(1) of the Act, all indicative of the gravity required before a court will accede to an application of this nature.[25]

Will the respondent’s removal be in the interests of the trust and its beneficiaries?

- [22] The parties, their spouses and descendants are the beneficiaries of the trust, which was created for their benefit in the ratio specified in the deed. Leaving aside the suggestion that Minnie could not act independently, it appears from the papers that the trust functioned without incident for several years. The property was not utilised purely for purposes of income generation although, courtesy of an informal arrangement, the property was leased when not in use by the parties. As an aside, there is little to suggest that Minnie played an active role in the administration of the trust during the time that the parties were able to reach agreement on the use of the property.
- [23] Between May and August 2020, however, the relationship between the parties soured to the point that the applicant decided to institute the present litigation, and the impasse has remained unresolved for more than four years. That said, the parties appear to have managed to move on from the respondent’s refusal to permit the property to be leased during December 2020, at least to some extent. Absent income, both parties took responsibility to settle the monthly municipal rates and taxes from November 2020 and used their respective beneficiary percentages to calculate the amounts due. By February 2021 the respondent could no longer cover

her portion of the costs. The trustees then all signed a resolution on 4 April 2021, permitting the applicant to appoint a long-term

letting agent for the property.

[24] Further commonality followed.[26] On 19 August 2021, a year to the day after the virtual trustees' meeting, all three trustees signed a resolution drawing attention to Minnie's resignation as well as paragraph 5.1 of the deed and the stand-off between the parties. The resolution specifically drew attention to the need for the Master to intervene by appointing a replacement independent trustee.[27]

[25] The correspondence from the applicant's attorneys to the Master reiterated that plea on 24 February 2022. That letter also reflects that the applicant had now decided not to make any proposals to the respondent regarding a possible suitable replacement for Minnie, being of the opinion 'that any proposal made by her will be countered by the other trustee'. By now the

applicant had resolved to proceed with the present application and the Master was informed of this. The Master's non-interventionist stance persisted. It must be added that the Master's report fails to acknowledge the e-mail correspondence from the applicant, during October 2021, requesting intervention. There is also nothing on record to suggest that the Master has even been in direct contact with the respondent.

[26] This summation reveals that the trust's difficulties, and indeed the applicant's frustration to the point of litigation, is largely due to the inability to reach consensus on a replacement independent trustee for Minnie, coupled with the position adopted by the Master. The groundwork for what occurred may well be traced all the way back to Minnie's appointment. Having been previously married to the applicant, and the father of one of the trust's beneficiaries, he was in a compromised position, even though it must be accepted that he was selected as an 'independent trustee' by both parties given his legal expertise. Once the parties locked horns, however, and the respondent perceived him to be biased in favour of the applicant, his hands were effectively tied, and it is unsurprising that he made the decision to resign. Instead of pursuing an alternative dispute resolution solution pathway to identify a replacement, and without any attempt to compel the Master to intervene, the applicant has chosen to launch the present application.

[27] This is lamentable given that either course would likely have obviated the present proceedings. That notwithstanding, the applicant and Minnie were alive to the reality that the resignation was, in terms of the deed, ineffective, absent receipt of an amended letter of authority from the Master.[28] Assuming that to be the position, for present purposes, and given the parties' breakdown in relationship, the applicant would have been unable to obtain a majority vote in respect of any disputed matter, such as whether the prepared financial statements accurately reflected the trust's financial position. That being the case, there appears to be no justification for the applicant not to have triggered the referral of such a matter for arbitration to an independent party in terms of paragraph 9.2 of the deed.[29] The applicant's protestations, in reply, that pursuing this route would have been futile are unpersuasive and based mainly on speculation. That the respondent did not herself trigger the arbitration clause takes matters no further.

[28] The Master's inaction is similarly perplexing and disconcerting. Section 7 of the Act provides:

'(1) If the office of trustee cannot be filled or becomes vacant, the Master shall, in the absence of any provision in the trust

instrument, after consultation with so many interested parties as he may deem necessary, appoint any person as trustee.

(2) When the Master considers it desirable, he may, notwithstanding the provisions of the trust instrument, appoint as co-trustee of any serving trustee any person whom he deems fit.'

[29] The Master, without proper explanation, failed to exercise either of these powers and maintained a hands-off approach. What is perturbing

is the Master's failure, in the Master's report, to acknowledge the correspondence which appears to have been sent by e-mail to the Estate Controller and Deputy Master during October 2021, noting the breakdown in the relationship between the parties and desperately requesting intervention. In addition, and seemingly contrary to the applicable Chief Master's directive (the directive),[30] the Estate Controller in the Master's office only appears to have communicated with the applicant as to the possible identity of an independent trustee. This appears to fall short of the directive's prescripts: the Master ought to have consulted the existing trustees and beneficiaries with a vested right in the trust assets, in order 'to obtain nominations for an independent trustee'.[31]

[30] Absent alternative dispute resolution or the Master's intervention, this court is seized with the matter and must consider whether the applicant has made a case for the respondent's removal as trustee in terms of s 20(1) of the Act, or perhaps the common law. Considering the relief sought by the applicant, this court is obliged to apply the Plascon-Evans rule in resolving disputes of fact evident on the papers.

[31] But even on the applicant's own version of events there is little to justify the removal of the respondent as trustee in the interests of the trust and its beneficiaries. The trust property is currently generating income courtesy of a long-term rental. On the accepted facts, the respondent contributed to the running and upkeep of the property by marketing and advertising the property, management of the property, performing renovations, arranging cleaning of the property between rentals and general upkeep. While sibling disharmony in relation to the property appears to have festered since 2020, it cannot be said that the respondent's conduct has endangered either the property or the proper administration of the trust. Rather, the applicant takes umbrage based largely on isolated historical incidents, particularly in relation to the respondent's conduct that resulted to loss of rental for December 2020. That approach loses sight of both the context in which the respondent's refusal arose, including the events of May 2020, as well as the subsequent events that resulted in the financial position of the trust being stabilised, via the parties' agreement. While I agree that the respondent acted incorrectly in believing that she had the 'right' to

refuse rental for December 2020, and that this expression of enmity fell short of due exercise of power with the level of care prescribed, something more was required to justify removal in the interests of the trust. As for the issue of tax compliance, the respondent was entitled to receive a satisfactory explanation, including supporting documentation, for the financial position evinced in the statements after 2019. The papers reflect that this was only forthcoming as part of the applicant's reply in the present proceedings. In my view there is no basis for concluding that the respondent utilised the property as if it belonged to another and the parties are equally responsible for failing to utilise the mechanisms contained in the deed to resolve their quarrels.

[32] Importantly, the parties, and indeed Minnie, jointly resolved, as recently as August 2021, to request the Master's assistance in replacing Minnie for the administration of the trust to move forward. It appears to have been the nature of the Master's responses, rather than any breach of trust, misconduct or the like on the part of the respondent, that necessitated the present application. Considering the replying papers, however, the applicant approbates and reprobates, persistently requesting the Master's intervention on the one hand yet claiming that the appointment of a replacement independent trustee would make no difference to the impasse. Give the manner in which the deed regulates the decisions of trustees, and bearing in mind the circumstances that placed Minnie in a compromised position, the latter approach is unjustified.

[33] On my assessment, the papers reveal nothing more than minor instances of questionable conduct on the part of the respondent, wholly

insufficient to justify removal.[32] This conclusion finds support when considering that the court is enjoined to be circumspect prior to granting an application of this nature, and bearing in mind the likely reason for the respondent's appointment as trustee as well as the respondent's position in relation to the 'Class B' beneficiaries. While sale of the property may well be desirable for the applicant and the 'Class A' beneficiaries, the test for removal requires proper consideration of the interests of the trust and all its beneficiaries.

[34] In my view, the conduct of the respondent cannot be said to imperil the property. On the probabilities, allowing the respondent to continue in office neither prevents the trust from being properly administered, nor is it detrimental to the welfare of the beneficiaries. Applying the test, the application must be dismissed. I consider it appropriate, in the circumstances, to also order reconsideration of the Master's approach to the possible appointment of a trustee in terms of s 7 of the Act on an expedited basis. The Master is directed specifically to paragraphs 28, 29 and 34 of this judgment.

Costs

[35] The respondent's conduct and the breakdown in the relationship between the parties has been held to be insufficient to justify the respondent's removal as trustee. Ordinarily, this would have entitled the respondent to her costs.[33] On my assessment, the parties have both, at times, failed to act with the care, diligence and skill reasonably expected of persons

in their position. A punitive costs order is unwarranted in the circumstances. There is also no basis for saddling the trust with any of the costs associated with this litigation, which could result in depletion of the trust's estate. Bearing in mind, in particular, the threats levelled against Minnie and the loss of trust income caused by the respondent's refusal to permit the property to be leased during December 2020 and for a few months thereafter, it is appropriate to limit the respondent to recovery of 50 per cent of her costs as a mark of disapproval. These costs are to be paid by the applicant in her personal capacity.[34]

Order

[36] The following order is issued:

1. The application is dismissed.
2. The applicant shall, in her personal capacity, pay 50% of the first respondent's costs of the application on a party and party scale.
3. The applicant is directed to serve a copy of this judgment on the second respondent, highlighting paragraphs 28, 29 and 34.
4. The second respondent is directed to reconsider the exercise of power in terms of section 7 of the Trust Property Control Act, 1988, and to do so on within 14 (fourteen) days of receipt of this judgment.

A GOVINDJEE

JUDGE OF THE HIGH COURT

Heard:

13 February 2025

Delivered:

18 March 2025

Appearances:

For the Applicant:

Adv S Sephton

Instructed by:

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For the Respondent:

Adv S Cole

Instructed by:

De Jager Lordan

2 Allen Street

[1] Act 57 of 1988.

[2] Paragraph 5.5 of the Trust Deed provides that a beneficiary may also be a trustee. Minnie was married to the applicant until the marriage was dissolved by divorce in 1999. He was appointed as trustee by the applicant and respondent and assumed this position on 7 November 2012.

[3] The deed provides as follows: ‘Class entitlement to benefits The trustees shall allocate a percentage of not less than 62.5% of all trust benefits to the Class A Beneficiaries and not less than 37.5% of all trust benefits to the Class B Beneficiaries...’

[3] The deed provides as follows:

‘Class entitlement to benefits

The trustees shall allocate a percentage of not less than 62.5% of all trust benefits to the Class A Beneficiaries and not less than 37.5% of all trust benefits to the Class B Beneficiaries...’

[4] On the approach to considering factual disputes on the papers, see *Plascon-Evans Paints v Van Riebeeck Paints (Pty) Ltd*

[1984] ZASCA 51; [1984] 2 All SA 366 (A) 367–368 [1984] ZASCA 51; ; 1984 (3) SA 623 (A) 634E–635D.

[5] Minnie did so in writing on 25 August 2020.

[6] The applicant also sought an order terminating the trust in terms of s 13 of the Act. That relief was abandoned during argument.

[7] The emphasis was included in the resolution.

[8] *Stander and Others v Schwulst and Others* 2008

(1) SA 81 (C) (Stander) paras 32–34.

[9] See *Kidbrooke Place Management Association v Walton* 2015 (4) SA 112 (WCC) para 18; *Cameron et al Honoré’s South African Law of Trusts* (6th Ed) (2018) at ch 4-270.

[10] Paragraph 5.1 of the deed provides that, ‘At all times there have to be at least two trustees in office, of whom at least one will not be a beneficiary of the trust.’

- [11] See *Soekoe N.O. v Le Roux* [2007] ZAFSHC 135; *Meijer N.O. v FirstRand Bank Limited* [2013] JOL 30560 (WCC); *Sidwell N.O. v Du Buisson N.O. and Others*
- [2016] ZAFSHC 82 para 17; *Die Orffer Landgoed (Pty) Ltd v Orffer N.O. and Others* [2025] ZAWCHC 14; *Van der Merwe N.O. and Others v Hydraberg Hydraulics CC and Others*, *Van der Merwe N.O. and Others v Bosman and Others*
- [2010] ZAWCHC 129; 2010 (5) SA 555 (WCC) para 18; *Cameron et al above n 9* ch 4-264.
- [12] Paragraph 6.3 of the deed, in terms of which ‘a trustee stops to be a trustee should he be requested by the majority of all trustees to resign’, was not invoked.
- [13] *Gowar v Gowar* 2016
- (5) SA 225 (SCA) (*Gowar*) para 23.
- [14] *Administrators, Estate Richards v Nichol and Another*
- [1998] ZASCA 82; 1999
- (1) SA 551 (SCA) at 557D–F. In the context of investment of the money of beneficiaries, for example, emphasis has been placed on the need not to expose funds in any way to any business risks: *Sackville West v Nourse and Another* 1925 AD 516 at 534–535.
- [15] Section 20(1) of the Act; *Gowar above n 13* para 27.
- [16] Section 20(1) of the Act.
- [17] *Cameron et al above n 9* at ch4-271, cited with approval in *Gowar above n 13* para 28.
- [18] *Gowar above n 13* para 30.
- [19] *Die Meester v Meyer* 1975
- (2) SA 1 (T), as cited in *Cameron et al above n 9* at 4-274.
- [20] *Volkwyn NO v Clarke and Damant* 1946 WLD 456, cited with approval in *Gowar above n 13* para 30.
- [21] *Gowar above n 13* paras 31, 32.
- [22] *Cameron et al above n 9* at 4-271.
- [23] *Cameron et al above n 9* at 4-273.
- [24] *Sackville West v Nourse above n 14* at 536.
- [25] *Tijmstra NO v Blunt-Mackenzie NO* 2002

- (1) SA 459 (T) at 473E–F. The possible grounds were paraphrased in the headnote to the reported judgment as follows: (a) where a trustee without explanation transfers trust funds from a safe investment into his or her personal account; (b) where a trustee deliberately refrains from advising a co-trustee of a decision to be taken on behalf of the trust; (c) where a trustee fails to ascertain what rights and obligations the office entails;
- (d) where a trustee treats trust property as their own; (e) where a trustee relies entirely upon a dominant co-trustee and approves of their wrongful conduct; or (f) where a trustee allows grave misconduct by a co-trustee in the administration of trust property.

[26] Cf *McNair v Crossman* 2020 (1) SA 192 (GJ) para 34.

[27] A month later, the respondent also signed a resolution providing the applicant with the power to act as the main trustee with regards to SARS trust registration and correspondence.

[28] Had the position been different, so that the number of trustees had in fact fallen below the minimum number, paragraph 5.2 of the deed provided that ‘the remaining trustee(s) will be authorized to exercise all the powers of trustees for the maintenance and administration of the trust fund until such time as another trustee(s) has been appointed, which appointment shall be made

within 90 (NINETY) days after the resignation or demise of the other trustee. Should the remaining trustee(s) neglect to do so or if no trustee is alive, then the appointed accounting officer of the trust may either acts self as succeeding trustee or appoint a succeeding trustee of his own choice.’ (sic) There is nothing on the papers to suggest that this paragraph was ever invoked.

[29] Paragraph 9.2 of the deed provides: ‘When a majority vote, or a unanimous decision cannot be obtained concerning a matter, the matter has to be referred for arbitration to an independent party. Failing consensus of an independent party, the matter has to be referred to senior counsel or a retired Appeal Court Judge, chosen by the trustees. Failing unanimity in this regard, to a senior counsel assigned by the chairman of the applicable Bar Council. The arbitrator, who has to decide the matter, determines the procedures to be followed and this decision is final and binding on all the trustees.’

[30] See *Cameron et al* above n 9 at ch4–229.

[31] The Master would not have been bound by any nomination received and was even at liberty, in exceptional circumstances, to appoint a suitable person other than those nominated.

[32] Cf *McNair v Crossman and Another* 2020 (1) SA 192 (GJ) para 29 and following.

[33] *Stander* above n 8 para 26, 36.

[34] *Stander* above n 8 para 27, 30 and following.

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