

SOUTH AFRICA / JUDGMENT

Ngapo v Huma N.O and Another (014208/23) [2025] ZAGPPHC 384 (9 April 2025) [2025] ZAGPPHC 384

COURT

North Gauteng High Court, Pretoria

BEFORE

Flatela Luleka

CASE / FILE NUMBER

014208/23

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE NO: 014208-23

1.

REPORTABLE: NO

2.

OF INTEREST TO OTHER JUDGES: NO

3.

REVISED: NO

DATE:

09 Apr. 25

SIGNATURE

OF JUDGE:

In

the matter between:

TSHIAMO
LAWRENCE NGAPO
APPLICANT
and
MOSHATE
SOLOMON HUMA N.O
1st RESPONDENT
MASEGO
LUCIA MOKWENA N.O
2nd RESPONDENT
ORDER

1.
Relief sought in paragraphs 1,2,3,5 and 6 of the notice of motion is dismissed.
2.
The First and Second Respondents are directed to provide the Applicant with the Trust's Financial records from 2020 to date.
3.
Each party to pay its own costs.

JUDGEMENT

FLATELA J

Introduction

“When two brothers fight to death, a stranger reaps the harvest.”

African Proverb

- [1] The Applicant and the First Respondent are half-brothers sharing the same biological father. The Second Respondent is the First Respondent's wife, the applicant's sister-in-law. The Respondents are the trustees of the Motsepe Family Trust (the Trust Fund), an inter vivos discretionary trust established by the deceased father of the Applicant and the First Respondent. This Trust was created to ensure the maintenance, education, and advancement in the life of the Applicant and his younger sibling, Ms Mpopo Maleka. Both the Applicant and Ms Mpopo Maleka are income and capital beneficiaries of the Trust.
- [2] The Applicant seeks an order compelling the Respondents to pay for his maintenance, education, and general upkeep. He also seeks an order directing the Trustees to reimburse the funds that the Applicant utilised to cover his fees and for the Respondents to provide a comprehensive accounting of the Trust and the costs of the suit on a punitive scale, including the costs of counsel.

[3] The Applicant contends that following his father's death in October 2000, the trustees failed to fulfil their obligations as stated in the trust deed. Specifically, they neglected to provide ongoing maintenance, did not pay his educational fees, and offered no support for his financial needs. The Applicant further contends that although the First Respondent failed to meet his obligations to him, he made regular and consistent payments to the other beneficiary, his younger

sibling, Ms. Maleka, thereby discriminating against him.

[4] The applicant asserts that the Respondents abrogated their responsibilities by ceasing the First Respondent's payments for his maintenance and school fees in April 2022, which has led to the current application. Ms Maleka has not been joined in these proceedings.

Relief Sought

[5] The Applicant is seeking relief in the following terms:

1. The 1st and 2nd Respondent be ordered to pay the maintenance and school fees of the Applicant.
2. That the 1st and 2nd Respondent pay the school fees the Applicant paid personally in 2021, amounting to R22 381.00 (twenty-two thousand three hundred eighty-one).
3. The 1st and 2nd Respondent be ordered to pay retrospectively the amount of R10 000.00 (Ten thousand rand) in monthly maintenance, which they stopped paying in April 2022, calculated from April 2022 to date.
4. The 1st and 2nd Respondents provide the Applicant with the Trust Financial statements from 2020 to date.
5. Directing any party who opposes this application be ordered to pay the cost of this application, jointly and severally with any other opposing parties, the one paying the other to be absorbed., on a scale as between acting and client, including the cost of the counsel
6. The order in para 1 above will operate with immediate effect from the granting hereof;
7. That the Applicant be granted any further alternative relief that this Honourable Court deems appropriate.

[6] The respondents dispute the nature of the relief sought by the Applicant.

Factual

Background

[7] To gain a comprehensive understanding of the issues at hand, it is essential to consider the Applicant's family dynamics. Both the Applicant and the Respondents have drawn my attention to their late father's Will and the Trust Deed, which are included in the pleadings for consideration.

[8] In my introduction, I mentioned that the Applicant and the First Respondent are siblings, specifically half-brothers. In his will, their deceased father recognized two women, whom he identified as his wives, W. Ngapo and C. Maleka. This clarification establishes the relevant familial relationships in the matter at hand.

[9] The Applicant's late father bequeathed his estate as follows:

- a. To each of the following of my children, namely Solomon Huma, Seageng (First Respondent), Lawrence Ngapo Seageng (the Applicant and the beneficiary of a trust) and Mpopo Maleka Seageng (the other beneficiary of the Trust), the fixed property they are currently staying in, together with all furniture and movable assets situated on the fixed property.
- b. All other fixed property, all of my businesses, including all business assets and all shares owned by me, to my trust.
- c. 5% of the cash in my ESTATE to each of my wives.
- d. The balance of the cash in my estate is to be shared equally between Solomon Huma Seageng (First Respondent), Lawrence Ngapo Seageng (the Applicant and the beneficiary of a trust) and Mpopo Maleka Seageng

(the other beneficiary of the Trust), provided they are not addicted to drugs. Should any of them be addicted to drugs, the person's share would be inherited by the other two.

- e. All livestock equally between namely Solomon Huma Seageng (First Respondent), Lawrence Ngapo Seageng (the Applicant and the beneficiary of a trust) and Mpopo Maleka Seageng (the other beneficiary of the Trust),
- f. all other moveable assets to my trust.
- g. Should any of my aforesaid beneficiaries predecease me, they will be presented per stripes. Should any of the said issues be under the age of 18 years at the time of my death, the inheritance of such issue shall be paid or transferred to the parent or guardian to be used for the education benefits of such issue until the issue reaches the age of 18, whereafter. The remaining benefit would be transferred to such issue.

Common cause facts

[10] The Motsepe Family Trust was established in 2015 by the applicant's late father, Mr Joseph Kgathale Motsepe, to benefit the applicant and Ms Florence Mpopo Maleka. The primary purpose of the Trust is to provide maintenance, education, and overall advancement for the beneficiaries.

[11] The applicant's father and the first respondent were the original trustees of the Trust Fund, with the applicant's father serving as the founder and donor. The Trust Fund is a discretionary trust.

[12] The applicant's father passed away on 15 October 2020, resulting in the First Respondent becoming the sole trustee of the estate. The trust deed granted the remaining trustee wide discretion to appoint an additional trustee upon the death of a trustee. Subsequently, the First Respondent appointed his spouse, the Second Respondent, as the new trustee.

[13] In terms of his will, Applicant's father bequeathed all other fixed property, along with his businesses, including the business assets and all shares owned by him, to the trust. The Applicant and Ms. Mpopo Maleka Seageng are the only beneficiaries of the trust.

[14] On 5 June 2022, the Applicant received R 1 098 207.16 from his father's will.

The Applicant's pleaded case

[15] The essence of the Applicant's case is summarised in paragraph 4 of his founding affidavit as follows:

"The purpose of this application is to get an order from Court compelling the trustees of H Motsepe Family Trust to fulfil their obligations under the trust of maintaining, education and taking care of my needs as per the intention of my late father"

[16] In the founding affidavit, the applicant pleaded his case, which I consider appropriate to reiterate as follows:

4.1.1 Clear Right

I confirm that I have a clear right to request the relief sought because I am a beneficiary of the said trust

4.1.2 An injury reasonably apprehended.

There is an imminent threat of harm or actual harm suffered by me; currently suffering financial harm as I'm being deprived of the funds needed for my education, maintenance and advancement contrary to my father's wishes

4.1.3 No alternative remedy.

There is no alternative remedy available to me except to obtain an interdict against the first and second respondents, compelling them to give him much-needed relief

5.2 In terms of clause 5 of the Family Trust agreement, the trustees of the trust have to ensure that the net income of the trust is utilised for beneficiaries, maintenance, education and advancement in life

5.3 Upon my father's passing, the first respondent failed to fulfil his mandate as per the requirements of the trust memorandum, failed to pay continual maintenance to me, failed to pay my school fees in full, and also failed to advance my interest financially in any way.

5.4 Even though he breached his mandate pertaining to me, he continued to make regular and consistent payments to my other sibling, who is the beneficiary of the trust

5.5 The First respondent made the following payments to me upon my father's death.

5.5.1 paid R10 000.00 (ten thousand rand) into my mother's account towards his maintenance from 2021 but stopped in April 2022.

5.5.2 Paid R14 500.00 (fourteen thousand five hundred rand) towards my school fees at the Boston Arcadia campus but did not cover the remaining balance of R22 381.00 (twenty two thousand three hundred and eighty one)

5.5.3 In 2023, no payment was made towards his education, maintenance and advancement.

5.6 It should be noted that in 2020, I had to drop out of school because I did not have the finances to pay for my school fees. This was communicated to the executor of the estate and the first respondent but to no avail. I attach herein the statement from Damelin as annexure T7.

5.7 At some point, I wrote a letter to the Master complaining about the trustees, and during that time, my half-brother was still the sole trustee of the trust account. I attached herein the letter to the Master as annexure T8.

Conclusion

6.1 From the above-mentioned, it is evident that we have a valid reason to approach the court, and we have great prospects of obtaining an interdict comparing the 1st and 2nd respondents to comply with their order and execute their mandate as per the Trust fund agreement and the will of his late father.

6.2 The relief herein should be granted. If not the Applicant would be prejudiced.

6.3 Finally, it is evident that we have illustrated that an interdict would be in our interests and in the interest of justice, and the requirements of such an interdict have been complied with”

The Respondent's submissions

[17] The Respondents oppose the application on the grounds that the Applicant has not met the requirements for a final interdict.

[18] The Respondents contend that the Trust Fund is a discretionary trust; thus, the trustees possess wide discretion in managing and distributing the trust's assets and income to the two designated beneficiaries. The Respondents assert that they have not exercised their discretion to allocate either capital or income to the applicant, and no determination has been made regarding the distribution of benefits. The respondents contend that the applicant has failed to demonstrate any entitlement to receive payments from the trust's capital or income. The Respondents further contend that the Applicant has failed to demonstrate a clear right to the payments in question.

[19] The Respondents dispute the claim that the Trust previously paid the Applicant's maintenance and education only to cease funding without explanation. Instead, they assert that it was the First Respondent, acting in his individual capacity, who provided the

applicant's mother with a monthly gratuity allowance of R10,000.00 (ten thousand rand) while their father's estate was still under the administration of the executor. The First Respondent states that this financial support was discontinued once the applicant and his mother received their cash inheritance from the estate.

- [20] Regarding irreparable harm, the Respondent denies that the Applicant will suffer such harm due to a lack of funds to cover his fees. The Respondents assert that the Applicant received an inheritance of R 1 098 207.16 from his father's estate in June 2022. The Respondents contend that it has no legal or moral obligation to provide for the Applicant's maintenance from the Trust. The Respondents refute the claim that they are paying the other beneficiary.

The Applicant's reply

- [21] At the time of the hearing, the Applicant's legal representative had not filed the replying affidavit. In his practice note, which was filed on 17 October 2024, the Counsel for the Respondent brought relevant facts pertaining to the Applicant's replying affidavit to the attention of the court. He stated that:
- a. This matter served before Retief J on an opposed roll on 4 June 2024.
 - b. The Respondent had raised a point in limine in their heads of argument dated 28 February 2024 concerning the applicant's replying affidavit. The applicant's replying affidavit was signed by an individual identified as the Applicant's Legal Representative, while the deponent's details were those of the Applicant.
 - c. The matter was postponed at the request of the Applicant's counsel to allow them to address the issue. The Applicant's legal representative was ordered to pay costs de bonis propriis.
 - d. The Respondent's counsel indicated that the issue had not yet been resolved.
 - b. There was no joint practice filed, but the Respondent stated that the practice was served upon the Applicant's counsel.
- [22] Neither the order from Retief J nor the replying affidavit was uploaded to CaseLines. I would not have known these facts had I not been alerted by the Respondent's counsel. It later emerged that the matter was not postponed but removed from the roll, and the counsel was ordered to pay the wasted costs de bonis propriis.
- [23] Before the hearing commenced, I inquired with the Applicant's counsel whether the Applicant's replying affidavit had been rectified and uploaded on CaseLines. The Applicant's counsel responded that he believed the matter had been resolved some time ago; however, he requested an adjournment to review CaseLines and to upload the replying affidavit if it had not yet been uploaded. The Respondent's counsel objected to the Applicant filing a replying affidavit, as the Respondent's heads of argument had been submitted without the opportunity to consider the reply. The applicant's counsel argued further that there was no prejudice in uploading the replying affidavit, as all parties were present in court and ready to proceed. He argued further that the respondent did not want the matter to proceed as

they had no case to argue. I refused the request for an adjournment for this purpose; the Applicant had three months to rectify and upload all pleadings; in fact, the Applicant had set this matter down on the basis that it was ready for hearing.

[24] A document titled "Applicant's Reply," dated 12 July 2024, was uploaded to CaseLines on 17 October 2024. After reviewing the replying affidavit, I noted that the deponent failed to append his signature, but the Commissioner of Oaths signed the purported replying affidavit. It is essential to note that there was no designated space for the deponent's signature in the reply. It raises questions as to how the Commissioner of Oaths could sign the affidavit in the absence of the deponent's signature.

[25] It is common cause that an affidavit is a statement in writing sworn to before a commissioner of Oath.[1] The deponent is required to sign the statement in the presence of the commissioner of Oath, and if unable to write it, he must affix his mark in the presence of the commissioner of Oath. A court must be satisfied that a document has been sworn or attested to and signed in the presence of a commissioner of Oath.

[26] In *Absa Bank v Botha NO and Others*, a matter dealing with the requirements of verifying affidavits in Summary Judgement Kathree -Setiloane J held as follows:

"[6] The verifying affidavit must satisfy the general requirements for affidavits as contained in the Regulations[2] ("The Regulations") promulgated in terms of the Justices of the Peace and Commissioners of Oaths Act, 16 of 1963 ("Justices of the Peace and Commissioners of Oaths Act"). In terms of the Regulations, the oath or affirmation is administered by a

commissioner of oaths.[3] Before a commissioner of oaths administers the prescribed oath or affirmation, the commissioner of oaths is required to ask the deponent:

- (a) Whether he knows and understands the contents of the declaration;
- (b) Whether he has any objection to taking the prescribed oath; and
- (c) Whether he considers the prescribed oath to be binding on his conscience[4].

[7] If the deponent answers these questions in the affirmative, the commissioner of oaths must administer the oath[5]. The deponent is required to sign the statement in the presence of the commissioner of oaths, and if unable to write, he or she must affix his mark in the presence of the commissioner of oaths at the foot of the statement.[6] In terms of Regulation 4 (1), the commissioner of oaths is required to certify that the deponent has acknowledged that he or she knows and understands the contents of the declaration. Regulation 4(1) reads as follows:

"Below the deponent's signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he is required to state the manner, place and date of taking the declaration."

The commissioner of oaths is, thereafter, required to sign the declaration, print his full name and business address below his signature, and state his designation and the area for which he holds his appointment or his office if he has been appointed ex officio.

- [27] Although the Absa Bank matter concerns verifying affidavits, the general requirements outlined in the Regulations apply to every affidavit.
- [28] The present matter was removed from the opposed motion roll on 4 June 2024, and leave was granted to the applicant's counsel to rectify an earlier mistake made when he signed on behalf of the deponent. However, he subsequently filed an affidavit that did not comply with the regulations. Once again, the deponent failed to sign the affidavit.
- [29] The Applicant's reply is not admitted into evidence for non-compliance with Regulation 4 of the Regulations governing the Administration of an Oath or Affirmation promulgated in terms of section 10 of the Justices of the Peace and Commissioners of Oath Act 16 of 1963. Only the Applicant's founding affidavit and the answering affidavit were considered in this matter.

Consideration

- [30] The primary complaint appears to be that the Respondents have not fulfilled their fiduciary duties as Trustees by neglecting their obligations to the Applicant while continuing to make regular payments to other beneficiary of the Trust.
- [31] The Respondent's main ground for opposition is that the Trust is a discretionary Trust with wide discretion regarding the distribution of income and capital to the two appointed beneficiaries. The Respondent contends that the Trustees have not exercised their discretionary power to make payments of either capital or income to the Applicant; therefore, it is disputed that the Applicant has demonstrated any right, clear or otherwise, to payment from the capital or income of the Trust at this time.
- [32] I deem it prudent to address the legal framework first before proceeding with the discussion.

Legal Framework

- [33] The Trust Control Property Act 57 of 1998 ("The Act")

What is trust?

Definitions

- [34] A "trust" means the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed –

- (a) To another person, the trustee, in whole or in part, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument; or
- (b) To the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administered or disposed of according to the provisions of the trust instrument or for the achievement of the objective stated in the trust instrument.

[35] “Trust property” or “property” means movable or immovable property and includes contingent interests in property, which in accordance with the provisions of the trust instrument are to be administered or disposed of by a trustee.

[36]

3. Jurisdiction of Master

(1)(a) In respect of trust property which is to be administered or disposed of in terms of a testamentary writing, jurisdiction shall lie with the Master in whose office the testamentary writing or copy thereof is registered and accepted, and in any other case, which the master in whose area of appointment in terms of the administration of Estate Act, (Act 66 of 1965), the greater or greatest portion of the trust property is situated: Provided that a Master who has exercised jurisdiction shall continue to have jurisdiction notwithstanding any change in situation of greater or greatest portion in the trust of the trust property.

- (b) Notwithstanding the provisions of paragraph(a), a Master who would otherwise have no jurisdiction in respect of trust property may, on written application by any person having an interest in that trust property, and with the consent of the Master who has jurisdiction, assume jurisdiction of that trust property.

[37] Section 9 of the Act: Care, diligence and skill required of a trustee

- (1) A trustee shall in the performance of his duties and the exercise of his powers act with care, diligence, and skill which can be reasonably be expected of a person who manages the affairs of another.
- (2) Any provision contained in a trust instrument shall be void in so far as it would have the effect of exempting a trustee from or indemnifying him against liability for breach of trust where he fails to show the degree of care, diligence and skill as required in subsection (1).

[38] Section 12 of the Act provides as follows:

Separate position of trust property. Trust property shall not form part of the personal estate of the trustee except in so far as he is the trust beneficiary entitled to the trust property.

[39] Section 16 provides as follows :

“(1) The trustees shall, at the written request of the Master, account to the Master to his satisfaction and in accordance with the Master’s requirements for his administration and disposal of trust property and shall, at the written request of the Master, deliver to the Master any book, record, account or document relating to its administration or disposal of the trust property and shall to the best of his ability answer honestly and truthfully any question put to him by the Master in connection with the administration and disposal of the trust property.”

[40] Section 19 of the Trust Property Control Act 57 of 1988 provides as follows:

“If any trustee fails to comply with a request by the Master in terms of section 16 or to perform any duty imposed upon him by the trust instrument or by law, the Master or any person having an interest in the trust property may apply to the court for an order directing the trustee to comply with such request or to perform such duty.”

The Legal Status of a Trust

[41] Our courts had on numerous occasions, addressed the legal status of the Trust. Cameron JA in *Land and Agricultural Development Bank of SA v Parker and Others*[7] answered the question of what a trust is with these words:

‘Except where statute provides otherwise, a trust is not a legal person. It is an accumulation of assets and liabilities. These constitute the trust estate, which is a separate entity. But though separate, the accumulation of rights and obligations comprising the trust estate does not have legal personality. It vests in the trustees and must be administered by them – and it is only through the trustees, specified as in the trust instrument, that the trust can act.’ (footnotes omitted).

[42] Nugent JA in *Lupacchini NO and Another v Minister of Safety and Security*[8] held that:

‘A trust that is established by a trust deed is not a legal person – it is a legal relationship of a special kind that is described by the authors of Honoré’s South African Law of Trusts as “a legal institution in which a person, the trustee, subject to public supervision, holds or administers property separately from his or her own, for the benefit of another person or persons or for the furtherance of a charitable or other purpose”[9]

[43] Based on the case law discussed, a trust is *sui generis*. The administration of the trust’s assets is entrusted to the trustees, who are responsible for safeguarding the welfare and interests of the beneficiaries.

[44] The issue to be determined in this matter is whether the applicant has made out a case for a final interdict. The question that this court must answer is whether the facts presented by the applicant entitle them to the relief sought.

Discussion

[45] The applicant's pleadings were not a model of clarity. For the Applicant to succeed in this application, he must fulfil the requisite for the right to claim a final interdict, which is as follows:

- i. A clear right,
- ii. An injury actually committed or reasonable apprehended; or a refusal to act in fulfilment of such right,
- iii. The absence of any satisfactory remedy.

[46] The party seeking a final relief must first establish the existence of a clear or definite right. Whether an applicant has a clear right is a matter of substantive law.[10] Whether that right is clear is a matter of evidence. To establish a clear right, the applicant must prove, on a balance of probability,

facts that, in terms of substantive law, establish the right relied on.[11]

[47] The applicant asserts that, as a beneficiary, he has a clear right to maintenance and to have his school fees paid to him and that these expenses should be paid retrospectively.

[48] The respondents argue that the applicant currently has no clear right to income and that such a right will not arise until a resolution to that effect has been passed by the trustees, which will determine both the amount and timing of the payment. The respondents argue that in the absence of a resolution to make payments to a beneficiary, the applicant lacks a clear right. The right is merely contingent.

The Trust Deed

[49] The Trust Deed defines the Trust Fund as “the capital from time to time to be administered by the trustees, consisting in the first place of the donation made in terms of Clause 2 hereof and thereafter of all investments made by the trustees, any income derived therefrom and, in any additions, hereafter made to the trust fund”

2. Donation

“The donor hereby donates to the trustees as and by way of donation inter vivos the sum of R100 and in the donor hereby on behalf of himself and his executor, forever releases the trustees, the done and each beneficiary hereinunder from, and hereby indemnifies each of them against any claim by his executor for refund of estate duty in respect of his donation in terms of the Estate Duty Act 1955 or of any a similar duty payable in terms of in the statute for the time being, replacing, substituting, extending, modifying or amending the said Act”

3. Vesting

“The donation made in terms of Clause 2 hereof shall immediately vest in the trustees but will be subject to the terms of this trust deed”

4. Powers of the Trustees

In regard to any assets at any time comprising the whole or any portion of the Trust Fund, Trustees shall have the following powers,

privileges and discretions, namely;

4.1. "They shall be entitled from time to time to deal with the said assets as they, in their sole and absolute discretion, may deem in the best interest of the Trust Fund and shall have all powers relative thereto as if they were absolute owners of the same"

Application of net income.

5."All costs and expenses lawfully incurred by the trustees in connection with the administration of the Trust Fund (including the trustees remuneration and any taxation that may become payable by them in their represented capacity in respect of the income thereof) shall be paid by the trustees out of the income of the Trust fund. The net income shall not become payable to the Beneficiaries but shall instead be retained by the trustees on behalf of the beneficiaries and shall be applied by them for the benefit of the beneficiaries in the following manner:

5.1. Utilizing for the beneficiary's maintenance, education and advancement in life and paying to the beneficiary after all the beneficiaries have become 40 years of age, the whole or such portion of the net income as they, in their sole and absolute discretion, may think fit.

5.2. In accumulating and/or investing for the beneficiary's sole and exclusive benefits, all unexpended balances of net income together with any other income that may be derived there from any such accumulations of income, whether invested or not, shall remain the sole property of the trust, and shall during the continuance of the trust, be capable of being paid to the beneficiary as at such time and in such amounts as the trustees, in their sole and absolute discretion may decide, any accumulated income not so paid to the beneficiary during the continuance of the trust shall be paid to the beneficiary on the termination thereof or beneficiary's executor in the event of the beneficiary's prior death"

[50] Clause 6 provides inter alia as follows:

6.1. "Subject to the provisions of 6.4. the capital of the trust fund, so far as it has already been paid out. Shall be paid to the beneficiaries at the decision of the trustees

6.2...

6.3...

6.4 A part of the capital of the beneficiary, became entitled in terms of clauses 6.1, 6.2, 6.3 shall be paid to such beneficiary when such beneficiary has reached the age of 40 years, always provided that the trustee shall be entitled in their absolute discretion to pay the whole or any part of such capital to or for the benefit of such beneficiary at any time or any time prior to such beneficiary attaining the age and to postponed pending payment of the whole or any part of such capital after such beneficiary has attained that age for such period or period as may in the

absolute discretion decide”

[51] When Trust was established in 2015, the founder donated a mere R100 (One Hundred Rand), which immediately vested in the Trustees. In his will, the founder bequeathed his businesses, business assets, shares, and both immovable and movable assets to the Trust Fund.

[52] It is common cause that the Applicant is entitled to both income and capital of the trust, and he has both vested and contingent rights. In Griessel NO and Others[12]; Molemela P dealing with whether the contingent beneficiaries have any right it may call the court protect answered this question as follows:

“It is undisputed that the trust that was created falls in the category of discretionary trusts, since the trustees have been given the right, within their discretion, to select beneficiaries from a list of potential beneficiaries. It follows that none of the potential beneficiaries can claim rights in perpetuity, as their rights are merely contingent.[13] The question is whether the first respondent, as a potential beneficiary in a discretionary trust, has rights that he could ask the court a quo to protect. The judgment of this court in Potgieter & another v Potgieter NO & others[14] is instructive, particularly at para 28, where it is stated that:

I do not think it can be gainsaid that at the time of the variation agreement on 21 February 2006, the appellants enjoyed no vested rights to either the income or the capital of the trust. They were clearly contingent beneficiaries only. But that does not render their acceptance of these contingent benefits irrelevant. The respondents referred to no authority that supports any proposition to that effect and I cannot think of a reason why that would be so. The import of acceptance by the beneficiary is that it creates a right for the beneficiary pursuant to the trust deed, while no such right existed before. The reason why, after that acceptance, the trust deed cannot be varied without the beneficiary’s consent, is that the law seeks to protect the right thus created for the first time. In this light, the question whether the right thus created is enforceable, conditional or contingent should make no difference. The only relevant consideration is whether the right is worthy of protection, and I have no doubt that it is. Hence, for example, our law affords the contingent beneficiary the right to protect his or her interest against mal-administration by the trustee (see *Gross v Pentz* [1996] ZASCA 78; 1996 (4) SA 617 (A) at 628I-J)’

[53] Similarly, I am of the considered view that the Applicant has a right worthy of protection.

The Applicant’s claim for payment of maintenance and school fees is directed to him.

[54] The Applicant is seeking mandatory relief regarding the trust’s obligation to pay maintenance and his fees. The Applicant states that this is what his father established the trust for.

[55] As mentioned earlier, Clause 4 deals with the powers of the trustees. It provides as follows:

“Powers of the Trustees

In regard to any assets at any time comprising the whole or any portion of the Trust Fund, Trustees shall have the following powers, privileges and discretions, namely;

4.1. They shall be entitled from time to time to deal with the said assets as they, in their sole and absolute discretion, may deem in the best interest of the Trust Fund and shall have all powers relative thereto as if they were absolute owners of the same.

Application of net income.

5. All costs and expenses lawfully incurred by the trustees in connection with the administration of the Trust Fund (including the trustees remuneration and any taxation that may become payable by them in their represented capacity in respect of the income thereof) shall be paid by the trustees out of the income of the Trust fund. The net income shall not become payable to the Beneficiaries but shall instead be retained by the trustees on behalf of the beneficiaries and shall be applied by them for the benefit of the beneficiaries in the following manner:

5.1. Utilizing for the beneficiary's maintenance, education and advancement in life and paying to the beneficiary after all the beneficiaries have become 40 years of age, the whole or such portion of the net income as they, in their sole and absolute discretion, may think fit. (my underlining)

[56] In Cameron Honore's South African Law of Trusts[15]; the authors contend that when the trustees are directed to pay the income to the beneficiary but have a discretion to withhold it, unless the capital is also vested in the beneficiary, the latter's vested right to the income will, on exercise of the discretion to withhold, become merely contingent.

[57] In B.R.R v M.B.J and Others[16], Gilbert AJ dealt with a claim on behalf of the capital and income beneficiaries of the Trust, where the father of the minor children

sought an increase in the maintenance amount paid by the Trust towards the minor children, held as follows:

"In Cameron Honore's South African Law of Trusts[17] the authors describe a trust as discretionary not only if the trustees have the discretion whether to pay income or distribute capital at all but also if the trustees have a discretion how much to pay or distribute.[18] In both those instances the beneficiaries will have contingent rather than vested rights. To similar effect, is the description by the authors in Geach & Yeats Trusts: Law and Practice[19] that a beneficiary has a discretionary right if the beneficiary will benefit to the extent that the discretion has been exercised in their favour.

The minor children's rights as beneficiaries to payment from the trust is contingent upon the trustees exercising a discretion in their favour to pay them. The trustees have not exercised their discretion to pay the beneficiaries the amount claimed on their behalf by the applicant, and so the minor children qua beneficiaries have no right to payment of that amount"

[58] In paragraph 28, the learned judge held that:

A discretionary capital beneficiary is entitled upon the exercise of a discretion in his or her favour to a distribution of capital. A discretionary income beneficiary is entitled upon the exercise of a discretion in his or her favour to payment of income of the trust.

[59] The Respondent asserted that the trust had not made any decisions regarding the payment of income to the Applicant. Therefore, the Applicant has no right to the payment. I agree.

The Applicant's claim to be paid monthly maintenance and for the payment of maintenance retrospectively

[60] In support of the relief sought for an order of payment and reimbursement of funds for maintenance and education, the applicant contends that the First Respondent deposited R10,000.00 (ten thousand rand) into his mother's account for his maintenance from 2021 but ceased payments in April 2022 without any explanation. The applicant also claims that the First Respondent contributed R14,500.00 (fourteen thousand five hundred rand) towards his school fees at the Boston Arcadia campus but neglected to pay the remaining balance of R22,381.00 (twenty-two thousand three hundred and eighty-one rand).

[61] The Applicant also seeks an order directing the First and Second Respondents to pay retrospectively the amount of R10,000.00 (ten thousand rand) in monthly maintenance, which they ceased paying in April 2022, from April 2022 to the present date.

[62] In support of the relief sought, the Applicant attached a bank statement and indicated that R10,000 (ten thousand rand) had been paid into his mother's bank account from 2021 to April 2022. The transaction records show that the sum originated from Motsepe Funerals. For fees, the Applicant has attached Annexure T6, which is a statement from his school, proof of registration, and a letter of demand from attorneys acting on behalf of the school dated 1 September 2021.

[63] The First Respondent disputes the assertion that the trustees provided any funds for the Applicant's maintenance. The First Respondent claims to have given the Applicant's mother a sum of R10,000 in his individual capacity as a gratuity for their support during the executor's administration of their father's estate. According to the First Respondent, these payments ceased once the executor had distributed the cash inheritances.

[64] The Applicant also claims that the Respondents, despite breaching their obligations towards him, continued to make regular and consistent payments to Ms Mpopo, his younger sibling and a beneficiary of the trust. No factual basis was laid in the founding affidavit to support this allegation.

[65] The Respondents argue that they have not made any decision concerning the payment of funds to any beneficiary. They assert that the Trust does not generate income; it only holds fixed assets.

[66] There is clearly a dispute of facts arising from the pleadings. It is trite that a final interdict can only be granted in motion proceedings based on common cause facts. In *National Director of Prosecutions v Zuma*[20] the court held that 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.’

[67] This being the motion proceedings, the disputes must be resolved in accordance to the Plascon-Evans principle laid in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty)*. [21] In terms of the Plascon-Evans principle, an applicant who seeks final relief in motion proceedings must, in the event of a dispute of fact, accept the version set up by his or her opponent unless they are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.[22]

[68] In support of this application, the Applicant attached historical documents dating back to 2020, which do not assist the Applicant. It is common cause that the executor of the late estate concluded the estate's administration in 2022. Prior to that, the Applicant's father donated a mere R100, which vested upon the Trustees. Upon careful examination of the evidence concerning these payments, I am not satisfied that the First Respondent deposited the funds into the Applicant's mother's account in his capacity as Trustee. Furthermore, there is no information regarding whether the Respondent conducts any income-generating business under the Trust

[69] Applying the Plascon-Evans principle, the respondent's assertion that the Trust has not paid any maintenance or school fees to the beneficiaries is accepted. Therefore, the relief sought in paragraphs 1,2,3,5, and 6 of the notice of motion falls to be dismissed.

[70] While this concludes the matter, I must add that, for completeness, I am not satisfied that the Applicant has demonstrated that there was an imminent threat of harm or irreparable harm. The Applicant contends that he is currently suffering financial harm because he is deprived of the funds needed for his education, maintenance and advancement, contrary to my father's wishes. The Applicant only attached the historical documents from 2020 to 2022; beyond those years, the Applicant is silent regarding his current position and the steps he has taken to assert his rights. The Applicant has not demonstrated in these pleadings whether a request for payment for maintenance and education was made to the trustees, nor is there any information regarding the trustees' response to such a request.

[71] Furthermore, the Applicant has an alternative remedy in the office of the Master of the High Court. Clause 3 (1)(a) provides that respect of trust property which is to be administered or disposed of in terms of a testamentary writing, jurisdiction shall lie with the Master in whose office the testamentary writing or copy their office registered and accepted, and in any other case, which the master in whose area of appointment in terms of the administration of Estate Ac,(Act 66 1965), the greater or greatest portion of the trust property is situated. Except for the letter that the Applicant addressed to the Master and the Executor in 2020, there is no indication that the Applicant had addressed the issues he is complaining about in this application with the office of the Master.

Access to the financial accounting records of the trust from 2020 to date.

[72] The Applicant is also seeking relief that the First and Second Respondents provide the Applicant with the Trust Financial statements from 2020 to date. In his heads of argument, the applicant relied on the decision in *Doyle v Board of Executors*[23] where Slomowitz AJ held as follows:

“....The right to an account is at once two distinct concepts. It is both substantive and procedural. It is a right as well as a remedy. The duties of good faith, which are owed by an agent to his principal, are no different in kind to those which fall on a trustee. They are set out in De Villiers and Macintosh Agency 3rd ed at 322 ff..

Inextricably bound up with this by no means exhaustive compendium of obligations is the agent's duty to give an accounting to his principal of all that he knows and has done in the execution of his mandate and with his principal's property.

I have chosen to emphasise the obligation to give an accounting because I in no way read the authorities to contain this duty within generally accepted bookkeeping principles. That is the least of it. What is owed is, as I have already said, a substantive legal duty. The agent must explain himself. He must justify his actions and conduct. If this, by circumstance, falls to be done in Court, then, to put it in evidential terms, he bears the onus of demonstrating the proper discharge of his office. That, in turn, expresses the remedy as opposed to the right.

It follows that one of the substantive duties falling on an agent is, in Silke's words (at 331),

'to maintain accounts, i.e. he must at all times be ready with correct accounts of all his dealings and transactions carried on during the currency of the mandate.

It is not enough for him to say: "Here are my books and vouchers - you are free to use them to make up your own accounts." In addition, he is obliged to allow inspection by the principal of all relevant vouchers and entries in the agent's books, this duty being in no way affected by an action pending between the principal and the agent and by the fact that the principal could obtain similar rights under the Rules of Court.”

[73] In the following paragraphs, the learned judge continues to expound on the duty to account. He said :

“At this stage of the case I am concerned only with the first prayer. It involves the delivery of an appropriate account. The proper practice, with remedies of this kind, was adverted to in detail by the highest Court in Doyle and Another v Fleet Motors PE (Pty) Ltd 1971 (3) SA 760 (A). Holmes JA pointed out (at 763) that, if it appears that the plaintiff has already received an account, which he avers is insufficient, the Court may enquire into and determine the issue of sufficiency, so to decide whether to direct an account which is in fact sufficient. In addition, the learned Judge drew attention to the possibility of supererogation in this aspect of the matter and the element of debate. Where they are correlated, a court might, in an appropriate case, find it convenient to undertake both enquiries in one hearing. There is no hard and fast rule. I enjoy a discretion to deal with this matter with such flexibility as practical justice requires. Instances in which accounts rendered were held to be insufficient are to be found in the various judgments given in Krige v Van Dijk's Executors (supra), as well as that of the same Court in Mia v Cachalia (supra). In the present case no proper account has been delivered. What has been given instead is discovery. If an account is due at all, then that is wholly inadequate.”

[74] The principle in Doyle has been applied in numerous court judgements. Recently, the Supreme Court of Appeal in Snyman v De Kooker N O and Others[24], held as follows :

“Accounting

[26] In our law, a plaintiff is not entitled to an account unless he or she can show that the defendant stands in a fiduciary relationship to them, or that some statute or contract imposes a duty to render the account.[25] As explained in Doyle v Board of Executors,[26] a trustee owes a duty of good faith akin to that owed by an agent. He or she must keep regular accounts of all his or her transactions on behalf of the beneficiary, not only of disbursements but also the receipts, and to render such accounts to the beneficiary at all reasonable times ‘without any suppression, concealment, or overcharge; keep accounts up to date and allow for the inspection of his or her books.’[27]

[27] In the present case, there is no dispute that the trustees stand in a fiduciary relationship to the appellant as both an income and capital beneficiary. The appellant averred that the trustees’ accounting to her was inadequate for her to have a full understanding of the trust’s financial position. In Doyle v Fleet Motors[28] it was held that if it appeared from the pleadings that a plaintiff who is entitled to an account had already received an account which he averred was insufficient, he or she is entitled to press his or her claim for a due and proper account. Therefore, this Court is entitled to enquire into and determine the issue of sufficiency, to decide whether to order the rendering of a proper account.

[75] The Applicant's founding affidavit lacks specific allegations supporting the requested relief; however, it remains undisputed that the trustees have a fiduciary duty to the Applicant, who is both income and capital beneficiary status. In the heads of argument, the Applicant asserts that "the Trustees are effectively managing the Trust as if it were their personal property, failing to report on its financial activities or support the Applicant, thereby breaching their fiduciary obligations."

[76] It is trite that the Applicant is entitled to a financial account from the Trustees. The trustees have not disputed the allegation that they have not accounted to the beneficiaries since assuming their roles as trustees. Additionally, the Trustees have not confirmed the availability of the financial accounts, nor have they provided any commitment to disclose this information. I have the discretion to address this matter. The applicant is entitled to Trust financial records.

Order

[77] In the circumstances, the following order is made:

1. Relief sought in paragraphs 1,2,3,5 and 6 of the notice of motion is dismissed.

FLATELA LULEKA

JUDGE OF THE HIGH COURT

This Judgment was handed down electronically by circulation to the parties' and or parties representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on 09 April 2025.

Appearances

Counsel for the Applicant: Adv C.N Mosala – Advocate with possession of Fidelity Fund Certificate

Counsel Respondent: Adv J Möller

Instructed by:

Van Rensburg Attorneys

c/o Moller Pienaar Attorneys

Date of the Hearing: 16 October 2024

Date of the Judgement: 09 April 2025

[1] Goodwood Municipality v Rabie 1954(2) SA 404(C)

[2] Promulgated in Government Gazette 3619, Government Notice R1258 of 21 July 1972 as amended by Government Notice R1648 of 19 August 1977, Government Notice R1428 of 11 July 1980 and Government Notice R774 of 23 April 1983

[3] Regulations 1(1) and 1(2)

[4] Regulation 2(1)

[5] If the deponent merely confirms the contents of his or her declaration, but objects to taking the oath or does not consider the

oath to be binding on his or her conscience, the commissioner of oaths administers the affirmation.

- [6] This is subject to the proviso that, should the commissioner of oaths have any doubts as to the deponent's inability to write, he should require that such inability be certified at the foot of the declaration by some other trustworthy person.
- [7] Land and Agricultural Development Bank of SA v Parker and Others (186/2003) [2004] ZASCA 56,
- [8] Nugent JA in Lupacchini NO and Another v Minister of Safety and Security 2010 (6) SA 457 (SCA); [2011] 2 All SA 138 (SCA),
- [9] Ibid, para 1
- [10] Minister of Law & Order, Bophuthatswana v Committee of the Church Summit of Bophuthatswana and Others 1994 3 SA 89 (BG) at 97-98.
- [11] LAWSA Vol. 11, 2nd Ed. 397.
- [12] Griessel NO and Others v De Kock and Another (334/18)
- [2019] ZASCA 95; 2019 (5) SA 396 (SCA) (6 June 2019) para 16-17.
- [13] CIR v Sive's Estate 1955
- (1) SA 549 (A).
- [14] Potgieter & Another v Potgieter NO & others [2011] ZASCA 181; 2012 (1) SA 637 (SCA).
- [15] 5th ed. Juta (2002) ('Cameron') at pp 557. 558.
- [16] 2020/11552) 2021ZAGPJHC 396
- [17] 5th ed. Juta (2002) ('Cameron') at pp 557,558.
- [18] See also Burger v Commissioner for Inland Revenue 1956
- (1) SA 534 (W) at 536G.
- [19] Juta (2007) ('Geach & Yeats') at p 120.
- [20] 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) para46.
- [21] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634H-635C. Also see Wightman t/a JW Construction v Headfour (Pty) Ltd & another [2008] ZASCA 6; 2008 (3) SA 371 (SCA), paras 11-13 where Heher JA, in discussing the principle said: 'The first task is accordingly to identify the facts of the alleged spoliation on the basis of

which the legal disputes are to be decided. If one is to take the respondent's answering affidavit at face value, the truth about the preceding events lies concealed behind insoluble disputes. On that basis the appellant's application was bound to fail. Bozalek J thought that the court was justified in subjecting the apparent disputes to closer scrutiny. When he did so he concluded that many of the disputes were not real, genuine, or bona fide. For the reasons which follow I respectfully agree with the learned judge. "Recognizing that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the even of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers...' A real, genuine, and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rest his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say "generally" because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to borne in mind when arriving at a decision. A litigant may not necessarily recognize or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.'

[21] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634H-635C. Also see Wightman t/a JW Construction v Headfour (Pty) Ltd & another [2008] ZASCA 6; 2008 (3) SA 371 (SCA), paras 11-13 where Heher JA, in discussing the principle said:

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[22] Wightman t/a JW Construction v Headfour and Another [2008] ZASCA 6; 2008 (3) SA 371 (SCA); [2008] 2 All SA 512 (SCA) para 12.

[23] 1999 (2) SA 805 (C).

[24] Snyman v De Kooker N O and Others 2d (400/2023)

[2024] ZASCA 119 (2 August 2024)

[25] Video Parktown (North) Pty) Ltd v Paramount Pictures Corporation; Video Parktown North (Pty) Ltd v Shelburne Associates and Others; Video Parktown North (Pty) Ltd v Century Associates and Others 1986

(2) SA 623 (T) at 640E.

[26] Doyle v Board of Executors 1999

(2) SA 805 (C).

[27] Ibid at 814C-G.

[28] Doyle and Another v Fleet Motors PE (Pty) Ltd 1971

(3) SA 760 (A) at 762E-763D.

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