

SOUTH AFRICA / JUDGMENT

Price and Another v Kaplan N.O. and Others (44937/2019) [2022] ZAGPPHC 429 (14 June 2022)

[2022] ZAGPPHC 429

COURT

North Gauteng High Court, Pretoria

BEFORE

Baqwa

CASE / FILE NUMBER

44937/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 44937/2019

REPORTABLE:

YES/ NO

OF

INTEREST TO OTHER JUDGES: YES / NO

REVISED:

YES / NO

14/06/22

In

the matter between:

LESLEY

ANN PRICE

First Applicant

JENNIFER

RUTH

HYTON

Second Applicant

and

MORRIS

KAPLAN

N.O.

First Respondent

HILTON

NORMAN KAPLAN N.O.

Second Respondent
SUSAN
EVE WOOLF
N.O.
Third Respondent
MORRIS
KAPLAN
Fourth Respondent
HILTON
NORMAN KAPLAN
Fifth Respondent
SUSAN
EVE WOOLF
Sixth Respondent
RONALD
WOOLF
Seventh Respondent
NORTH
ATHERSTONE (PROPRIETARY) LIMITED
Eighth Respondent
TWO-K-ADMINISTRATION
CC
Ninth Respondent
THE
MASTER OF THE HIGH COURT,
GAUTENG
DIVISION, PRETORIA
Tenth Respondent

JUDGMENT

BAQWA J

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 on 14 June 2022.

INTRODUCTION

[1] In this application the trustees of the Lesser Family Trust ("the Trust") seek an order declaring the Trust lacking capacity due to the absence of a minimum of three trustees and also declaring that certain actions taken by the first respondent ("Morris")

invalid and of no force and effect due to his lack of authority as a trustee of the Trust.

[2] They also seek the removal of Morris a trustee and the appointment of three new trustees in his stead.

- [3] In the alternative they seek the enforcement of an agreement allegedly concluded between Morris as a trustee and the applicants.
- [4] They also seek an order that Morris render an account to the applicants regarding his administration of Trust affairs.
- [5] Finally, they seek the removal of the seventh respondent (“Ronald”) as a director of the eighth respondent and that Ronald be ordered to render an account to the applicants of his administration of the eighth respondent’s affairs.
- [6] According to the applicants, Morris acted in dereliction of his duties in that he maladministered the assets of the Trust.
- [7] Morris denies the allegations against him and he has filed an answering affidavit detailing his response.

THE

ISSUES

8.1 This court has to determine whether Morris was empowered in the absence of the appointment of two additional trustees to pass the resolution extending the distribution event contemplated in the Trust Deed.

8.2 If he was empowered to pass such a resolution, whether there was “good and sufficient” reason to do so.

8.3 whether upon considering other actions by Morris during the time when the Trust was incapacitated including the passing of the said resolution are invalid and of no force and affect, and if so, whether the first, second and third respondents be removed as trustees of the Trust.

8.4 whether Morris was empowered to appoint Ronald as a director of the eighth respondent (“North Atherstone”).

8.5 to the extent that Morris the second and third respondent are to be removed as trustees, whether Messrs Rose, Cathrall and Kampel be appointed as trustees to the Trust.

8.6 whether or not to award costs on a de bonis propriis basis against Morris and order him to render an account to the applicants.

8.7 as an alternative relief to the above whether to direct the Trust to give effect to what the applicants describe as the “true distribution decision”

PRELIMINARY ISSUE

- [9] At the commencement of these proceedings I requested counsel to address me regarding three preliminary issues. These were the

application for condonation for the late filing of the answering affidavit by Morris and the counter, application by the applicants to the condonation application and the rule 30 application seeking to set aside, the counter application as an irregular step.

[10] It was agreed between the parties that since the matters arising out of the counter application and the Rule 30 application seemed to be overlapping with those raised in the main application, it would be more convenient to address them in the main application.

[11] The only matter left for determination was the condonation application which I granted after due consideration with costs in

that regard to be determined at the end of the hearing.

FACTS

[12] The trust was established in 1982 by Hans Heinz Lesser (“Henry”) who selected his trusted friend and accountant, Morris, as one of the trustees. The other two trustees were Henry and his wife Leah Lesser (“Lilly”).

[13] At its inception, the Trust was governed by the provisions of the Trust Moneys Protection Act 34 of 1934 (“the 1934 Act”),

that is, prior to the Trust Property Control Act 57 of 1988 (“the Act”).

[14] In terms of the 1934 Act a trustee was not required to obtain the “written authority” of the Master. It only required the trustee to furnish or be exempt from the furnishing of security.

[15] Registration of the Trust was confirmed by the Master and security dispensed with on 09 June 1982. Henry, Lilly and Morris were appointed effectively from 9 June 1982.

[16] The trust assets consist of 100% of the issued share capital in a company trading under the name and style of North Atherstone which owns a block of flats in Illovo, consisting of 26 units. North Atherstone was operated by Henry as its sole director until his death in 2004’

[17] The block of flats having been constructed in early 1960’s needed refurbishment and in 2012 the process of refurbishment was beginning, Lilly was still alive and she was the sole director.

[18] Morris and his brother (“Hilton”) practising as Kaplan and Kaplan were appointed as auditors of both the Trust ant North Atherstone. Henry passed away on 26 October 2004 and that is the date on which Lilly assumed the directorship of North Atherstone. Morris and Lilly who remained as trustees did not see the need to appoint another trustee despite the requirement in terms of the Trust Deed to do so.

[19] After Henry’s death Lilly was maintained through dividends declared to the Trust from North Atherstone together with a salary. No dividends were paid to her after 2010 but she continued to receive a salary and occupy one of the flats rent free.

- [20] Even though Lilly was the sole director of North Atherstone, she delegated her authority and responsibilities regarding the management of the company to Ronald through a General Power of Attorney.
- [21] Lilly passed away on 5 May 2017 and on that same day Morris appointed Ronald as a director of North Atherstone for which he was remunerated.
- [22] On 24 October 2017 a resolution was adopted by Morris approving the appointment of Hilton and Suzan as trustees of the Trust. Both Hilton and Suzan were signatories thereto, until this application was launched. No new letters of authority had been issued by the Masters office conferring the said appointments.
- [23] It is the applicants' contention that after their mother's death, they were not kept informed of the affairs of the Trust and North Atherstone whilst Morris holds a view to the contrary.

THE DISTRIBUTION EVENT

- [24] The distribution event ought to have occurred six months after Lilly's death in terms of the Trust Deed. According to Morris, this was because there was no agreement between the beneficiaries as to whether the block of flats had to be retained until it had been refurbished or put on the market in order to establish its value.
- [25] A valuation was obtained from Van Wyk and Tugman (Pty) Ltd in September 2017 valuing the block of flats at R 19 200 000 together with a recommendation that the refurbishment be completed to increase the value of the property.
- [26] To facilitate handing over the flats to Suzan and Ronald and the Applicants receiving their distribution of the Trust capital Morris and Ronald and the applicants accepted that the company would purchase a portion of its own shares from the Trust. The proceeds would then be used to pay the Trust capital in the sum of \$366 690 each, net of tax, upon receipt of which, the applicants would renounce their rights as beneficiaries and only Suzan would remain as a beneficiary.
- [27] On the 12 February 2018, Morris on behalf of the Trust concluded a sale of shares agreement with Ronald representing the company ("the sale agreement") which provided for the company to purchase two thirds of its own share capital from the Trust at a market price to facilitate the payment of the applicants their agreed share upon which they would renounce their benefits under the Trust.
- [28] The company would raise funds to purchase its own shares by registering a bond over the block of flats.

[29] The sale agreement was subject to suspensive conditions which had to be fulfilled by the 28 February 2018. The conditions also included obtaining exchange control consent for the payment and security a mortgage loan from a South African financial institution. On the 13 February 2018 Ronald sent an email to the applicants stating that they had secured the financing of the transaction and complied with all the legal requirements except for a bond which was to be registered on the block of flats in approximately eight weeks.

[30] On the 5 July 2018 he further confirmed by email that the Trust had agreed to cover all taxes relating to the transactions save taxes caused by the applicants being non-residents and stating that the Trust was committed to the US Dollar value of the distribution even though the rand value had depreciated.

[31] On the 6 July 2018 the renunciation agreement was signed by the applicants. The agreement recorded that the beneficiaries would

irrevocably waive their benefits in the Trust in exchange for payment of the distribution amount in the sum of US \$733 380 which would be \$366 690 to each applicant.

[32] Morris and Ronald were working jointly to get Nedbank to obtain clearance from the South African Reserve Bank ("SARB")

for the payment in dollars.

[33] On 6 September 2018 Ronald responded to a completed application by Nedbank pointing out that the amount written by Nedbank was incorrect as it reflected "ZAR" and not "US \$". Instead of explaining that "ZAR" should be altered to "US \$", he instructed that the amount be changed to ZAR 9 357 928. This was a total about turn given the assurance he had given earlier to the applicants.

[34] Even though it seemed all was on track for the applicants to receive their distribution, there is conflicting evidence between the applicants and Morris as to whether SARB approved the transaction and payment to the applicants. The applicants allege that SARB did approve such payment on 7 September 2018.

[35] Be that as it may, there was a sudden change of events, after a consultation between Ronald and Morris's attorney, Allschwang,

the latter sent a letter to the trustees advising that the sale agreement was void ab initio because of non-fulfilment of suspensive conditions and advising the trustees to conclude a new agreement, where the amount to be paid would be reflected in ZAR and not in US \$.

EXTENSION OF THE DISTRIBUTION EVENT

[36] A further development was that during or about October 2018 Morris and Ronald informed the applicants that Morris had purportedly

decided to extend the distribution event for 20 years.

- [37] The extension decision by Morris was perceived by the applicants as an attempt to deprive them of their inheritance and lock them into the extended life of the Trust for 20 years contrary to the distribution agreement.
- [38] According to the applicants, the extension would only benefit Morris, Suzan and Ronald in that Morris would continue to benefit from audit and secretarial fees with the extended life of the trust whilst Suzan and Ronald would benefit as they were treating the block of flats controlled by Ronald as their personal fiefdoms.

THE INCAPACITY OF THE TRUST

- [39] Clause 5.1 of the Trust provides:

39.1 There shall at all times be no less than three and not more than five trustees;

39.2 If at any time the number of trustees falls below three, the remaining trustee or trustees shall, as soon as practicable, assume some other person or persons to act with him or them so as to bring the number up to three.

39.3 If they fail to do so within 60 days, the auditors of the trust shall make the necessary appointment or appointments;

39.4 Save as aforesaid, until any such assumption is made, the remaining trustees shall be entitled to continue to act in all matters affecting the Trust.

- [41] In clause 6.2 the Trust Deed provides that a decision of the majority of trustees shall be deemed to be the decision of them all.

- [42] A majority of trustees as provided in clause 5 must be a minimum of two out of three trustees. A quorum would require at least 2 trustees. The Trust Deed therefore envisages decisions being taken by a majority of the three trustees at all times which implies that a decision which is not taken by a quorum of trustees is not a valid decision binding on the Trust.

APPLICABLE LAW

- [43] Section 20(1) of the Trust Property Control Act 57 of 1988 provides that a trustee may, on the application of any person having an interest in the trust property at any time be removed from his office by the court if the court is satisfied that such removal will be in the interests of the Trust and its beneficiaries.

- [44] Three principles govern a trustee's administration of a Trust and these are discussed by Cameron et al in Honore's South African Law of Trust[1].

44.1 Firstly the trustees must give effect to the trust instrument properly interpreted.

44.2 Secondly, a trustee must exercise proper care and skill. Section 9 of the Act provides that a trustee must act with care, skill and diligence which can reasonably be expected of a person who manages the affairs of another. This standard has been described as “scrupulous care” which is-

“Higher than that which an ordinary person might generally observe in the management of his or her own affairs. Such a person was free to do what he liked with his property and not infrequently selected investments which were of a speculative nature, particularly when the potential profits were high.”

A person in a fiduciary position such as a trustee, on the other hand, was obliged to adopt the standard of the prudent and careful person, that is to say the standard of the *bonus et diligens paterfamilias* of Roman Law, and was accordingly, obliged, in dealing with and investing the money of the beneficiary, to observe due care and diligence, and not to expose it in any way to any business risks. The need to avoid risks was emphasised.

44.3 Thirdly, a trustee must always exercise an independent discretion, a sub-minimum of trustees cannot bind the trust.

[45] The principles governing the capacity of a trust where the requested number has fallen below the number prescribed in the Trust Deed are set out in *Land Agricultural Bank of South Africa v JL Parker and two others*[2] as follows:

“[10] The first principle accounts for the fact that the trust could not be bound while there were fewer than three trustees. 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. Who the trustees are, their number how they are appointed, and under what circumstances they have power to bind the Trust estate are matters defined in the trust deed, which is the trust constitutive charter. Outside its provisions the trust estate cannot be bound.”

[11] It follows that a provision requiring that a specific minimum number of trustees must hold office is a capacity defining condition. It lays down a prerequisite that must be fulfilled before the trust estate can be bound. When fewer trustees than the number specified are in office, the trust suffers from an incapacity that precludes action on its behalf.

[12] This is not to say that the trust ceased to exist, nor is it to say that the trust obligations falls away. Counsel for the bank cited passages from *Honore* establishing that a trust will not be allowed to fail for want of a trustee, and that the administration of a trust proceeds even when not all the trustees can be appointed in the precise manner envisaged in the Trust Deed. This is to confuse the existence of the rights and obligations that constitute the trust estate with the question whether and in what manner the trust estate can be bound. It is axiomatic that the trust obligation exists even when there is no trustee to carry it out. The Court or the Master will where necessary appoint a trustee to perform the trust, but it does not follow that a sub-minimum of trustees can bind a trust.

- [13] In the present case, the Parkers alone were not “the trustees” as defined in the trust deed, Nor, while fewer than three trustees were in office, were there “trustees” on whose behalf the Parkers could act, or from whom they could receive authority to bind the Trust estate. The fact that they acted jointly in signing the contracts does not change this, because the trust’s incapacity during this period does not arise from the joint action requirement, but from the trust’s incapacity while a sub-minimum of trustees held office.
- [14] The Parkers in other words could not bind the trust because no one could. This does not mean that their duties as trustees ceased. On the contrary their obligation to fulfil the trust objects and to observe the provisions of the trust deed continued. These required that they appoint a third trustee when a vacancy occurred- a duty they signally failed to fulfil. But until they did so the trustee body envisaged in the trust deed was not in existence, and the trust estate was not capable of being bound. For the Parkers to purport to bind the trust estate during this period was an act of usurpation that simply compounded the breach of trust they committed by failing to appoint a third trustee, such conduct may, as I indicate later (para 37.3), provide the basis for impugning the very existence of the trust, but that was not the bank’s case.”

ANALYSIS

- [46] The contents of the Trust Deed and the law set out clearly that the obligations of a trustee includes strict compliance with the provision of the Trust Deed. The record shows that Morris failed to do so from the time of Henry’s death in 2004. He and Lilly were the only trustees left to conduct the business of the trust. The trust deed granted them authority to assume a third trustee but they failed to do so.
- [47] Lilly passed away in 2017 and Morris was left as the only trustee with the authority to assume two more trustees within sixty days from the time of Lilly’s death but again, he failed to do so. Morris acted in breach of his most basic duty in terms of the Trust Deed from the time of Henry’s death and continued to do so even after Lily’s death for a period spanning about 14 years.
- [48] As stated in Parker (supra), the provision requiring that a specified minimum number of trustees hold office is a capacity-defining condition. It sets a prerequisite that must be fulfilled before a trust can be bound. The Trust Deed required a minimum of three and when fewer trustees than the number specified are in office, the trust suffers from an incapacity that precludes any valid legal or administrative action on its behalf.
- [49] Morris purported to appoint Ronald as director of North Atherstone on the day of Lilly’s passing. This purported administrative act by Morris acting in his capacity as a trustee could not have any legal validity.

- [50] Morris belatedly tried to rectify the incapacity of the Trust by purporting to make Suzan and Hilton trustees. He claims that these appointments were delayed by the Master's office which failed to issue letters of authority. He, however fails to address a letter attached to the founding affidavit from the Master's office requesting the necessary documentation in order to issue them with letters of authority. He produces no evidence of compliance with the Master's request.
- [51] It has been submitted on behalf of Morris that it is not correct that the Trust automatically and simultaneously suffered from an incapacity when the number of trustees fell below three. Reliance is sought in support of this submission on *Natal Joint Pension Fund v Endumeni Municipality*[3] where it was stated that, a Trust Deed, like any other document must be interpreted in a business-like manner, having regard to the text, context and purpose of its provisions. This submission is not sustainable in light of the Parker decision in which the number of trustees is defined as a capacity-defining condition. The submission arises from a confusion between the Trust estate which remains in existence and the capacity to act by the Trust which, absent the quorum of 3 trustees, does not exist.
- [52] It is contended on behalf of Morris that he continued to operate the Trust as a sole trustee. It is contended that the applicants did not raise the issue of incapacitation of the Trust when they negotiated with Morris and concluded an agreement between the applicants and the Trust which anticipated a distribution event in the form of a payment to the applicants in dollars which was preceded by a renunciation agreement signed by the applicants.
- [53] The agreement in terms of which the applicants were to be paid as part of a distribution event is common cause. What is also common cause being that the said agreement assuming it was valid, lapsed due to a failure to comply with certain pre-conditions. More importantly, whatever impression the applicants and Morris may have laboured under regarding the capacity of the Trust would not have endowed the Trust with legal capacity to act despite an undisputed non-compliance with the capacity defining provisions of the Trust Deed. The conduct of the parties cannot capacitate a Trust. The fact of the matter is that neither Morris acting together with Lilly during the latter's lifetime nor Morris acting alone after Lilly's passing were trustees as defined in the Trust Deed. For as long as there were fewer than three trustees, there were no trustees who had authority to bind the trust estate.
- [54] It is submitted on behalf of Morris that he still has authority. Reliance is sought in this regard from *Haitas v Froneman*[4] but in that matter there is a proviso that reads as follows;
- “provided that if there is only one trustee, the remaining trustee will be authorised to exercise all the powers of trustees for the maintenance and administration of the trust fund until such time as another trustee has been appointed, which appointment the trustee so in office shall make within ninety (90) days of the registration or death of his co-trustee”.*

[55] The fallacy of seeking support in *Haitas* (supra) is that it seeks to import a proviso which does not exist in the Trust Deed in the present case. The decision in *Haitas* was based on that provision in that specific case and there lies the distinction between the two cases. It would therefore be irrational to try and interpret the trust deed in the present case on the basis of a provision in another case which may bear a vague resemblance to the present case. Morris is not assisted by the *Haitas* decision and the fact that the Trust has been incapacitated since Henry died in 2004 remains valid.

[56] It also does not assist Morris to seek refuge in clause 5.1 which provides: “until such assumption is made, the remaining

trustees shall be entitled to continue to act in all matters affecting the Trust”. Firstly, the Trust Deed provides a 60-day

window period within which the remaining trustee or trustees have such authority and thereafter the auditors assume the authority to appoint. Secondly, whilst Morris could still wear the hat of a trustee, his actions as a sole trustee had no binding authority on an incapacitated Trust. If Morris has no authority to bind the Trust it follows that his actions, from the time he purported to appoint Ronald as a director of North Atherstone to the time he purported to extend the Trust for a period of twenty years, he had no legally binding authority. Whether the applicants had consented to any or all purported agreements does not alter the legal position.

[57] In my view Morris had committed a dereliction of duty in failing to act as directed in the Trust Deed. One would have expected him to conduct himself in a more appropriate manner in relation to the Trust given the fact that he and his brother were auditors of the Trust. The applicants argue for the removal of Morris from office for all or any of the following reasons;

57.1 Morris (in his capacity as trustee) did not assume additional trustees within 60 days of the deaths of Henry and Lily, and Morris (in his capacity as an auditor) did not appoint any additional trustees to make the Trust quorate;

57.2 Morris did not open a bank account for the Trust;

57.3 Morris reached an agreement with the applicants to pay them out for their trust interest and then reneged on the agreement;

57.4 Morris extended the distribution event for a period of 20 years;

57.5 Morris failed to respond to the applicant’s request for reasons for the extension of the distribution date;

57.6 Morris had maladministered the trust property;

57.7 There is a conflict of interest in his position as both a trustee and an auditor of the trust.

[58] In light of the legal position of Morris and the Trust Deed referred to above, it does not serve a purpose to try and delve into the various explanations which Morris prefers to try and justify his actions because he conceded his non-compliance with the Trust Deed. An

objective assessment of all the facts can only lead to one conclusion, namely that Morris's administration of the Trust was not only lackadaisical but grossly inefficient. It is not surprising therefore that the trust between Morris as a trustee and the applicants would appear to be in tatters. This would require not only the removal of Morris as a trustee but also the appointment of new trustees. A logical duty that arises from these events is for Morris and Ronald to account to the new trustees.

THE APPOINTMENT OF NEW TRUSTEES

[59] Part of the relief sought by the applicants is the appointment of Messrs David Rose, Dave Cathrall and Paul Kampel as trustees of the Trust.

[60] Section 6(1) of the Trust Property Control Act (supra) suggests the manner and procedure to be followed when making such appointments as follows;

"Any person where appointed as a trustee in terms of a Trust instrument, section 7 (the Master) or a court order, comes into force after commencement of this Act, shall Act in that capacity only if authorised in writing thereto by the Master".

[61] In *Metequity v NWM Properties*[5], the court held that:

"From this has to be a distinguished the appointment of the nominee in terms of section 6 (4) of the Trust Property Control Act of

1988. A trustee is defined as any person who acts as trustee by virtue of an authorisation under section 6. That section envisages in section 6

(1) that the Master's authorisation to act as trustee is granted to persons appointed as trustees in a trust instrument, by the master or by the Court. The office of trustee is therefore created by the trust instrument and filled thereby or by the Master or the Court. The Trust Property Control Act, however, as regulatory and control measure, provides in s 6 that such existing trustee shall not act without authorisation by the Master".

[62] The proposed appointees are all in professional practice, two being chartered accountants and an attorney, each with over 30 years' experience. They have an outstanding record of professional service and are all entirely independent of the Trust and the disputes that have arisen during the tenure of Morris as trustee. They have indicated their willingness to be appointed.

It is common cause that Suzan and Hilton are currently not trustees as they have no letters of authority as discussed above. The resolution appointing them had no legal validity. Their previous involvement in matters of the trust which was not in accordance with the directives contained in the Trust Deed, would render them as neither independent nor impartial.

[63] In the circumstances I would deem the proposed appointment of new trustees to be necessary and appropriate.

ENFORCING THE DISTRIBUTION DECISION

[64] I have already alluded to the fact that the Trust was not capacitated due to Morris not being authorised by the Trust Deed to represent it as a sole trustee. In those circumstances, the distribution decision is legally not enforceable and the prayer for relief in that regard cannot be sustained. This is despite the fact that the parties entered into agreements and appeared at some stage to be intent on implementing the distribution decision.

COSTS

[65] The applicants seek an order compelling Morris to pay the costs of the application and the costs for his opposition to the application in his personal capacity.

[66] The applicants rely on the well-established principle that in applications where the removal of a trustee is sought on the basis of improper conduct, the trustee must bear the costs of the proceedings in his personal capacity. Reliance for this proposition is based on the case of *Stander and Others v Schwulst and Others*.^[6]

In the *Stander* matter the beneficiaries of a trust (the applicants) sought the removal of the current trustees of the trust on grounds

which included dishonesty and lack of good faith. The application was brought against the trustees in their personal capacities. The trustees contended that they should have been cited in their representative capacities and brought an application seeking that

their defence of the removal application be funded by the trust estate. The court held that where a trustee was sued for breach of trust (for removal or damages), the claim was against the trustee in her personal capacity. It was also held that even where the trustee was properly joined as a party to legal proceedings in her representative capacity, she would be held personally liable for the costs if she acted *mala fide* or unreasonably or improperly in bringing or defending the proceedings.

[67] It was further held in *Stander* that if a trustee were removed for misconduct or other improper or unreasonable behaviour, her

opposition to the application for her removal would inevitably be found to be unreasonable and she could not only be ordered to pay the other side's costs personally but would have no entitlement to an indemnity from the Trust in respect of her own costs. Opposition would be improper where removal was sought, *inter alia* on grounds of unreasonable conduct, negligence or breach of trust.

- [68] Just to recapitulate, in the present case, the record shows that Morris had acted unreasonably, negligently or in a manner manifestly lacking in good faith in a number of respects. For a period of about fourteen years he had acted in utter disregard of the very clear directives contained in the Trust Deed with regard to assuming or appointment of additional trustees in order to capacitate the Trust. His very belated effort to make amends by trying to appoint Hilton and Suzan yielded no results.
- [69] Even when Morris purportedly entered into agreements with a view to fulfilling the distribution event (belatedly), he acted in breach of his undertaking to the applicants by reneging from those agreements. What singularly demonstrated his lack of good faith was his attempt to extend the trust for 20 years in total disregard of the advanced age of the applicants and which held the potential of permanently dispossessing them of whatever benefits they were entitled in terms of the Trust Deed. His attempts to explain his patently unreasonable actions by stating that he did not mean to extend the trust for 20 years could only be described as irrational. Evidently, Morris's actions had resulted in the breaking of trust between himself and the applicants.
- [70] In light of the broken trust and the total failure to comply with the Trust Deed provisions, I find that it was unreasonable for Morris to oppose this application, thereby justifying a *de bonis propriis* cost order.
- [71] I do not intend to award costs for the counter application to the application for condonation due to the agreement that the matters addressed therein would be subsumed in the main application. I indicated to the parties at the commencement of the proceedings that the counterapplication seemed to be an irregular process but the issue was not argued before me because of the said agreement.

The counterclaim seems to deal with payments made by Morris to a certain attorney Allschwang. I take the view that those are matters to be taken up or addressed by the new trustees and that they ought not to be canvassed in an application for the removal of Morris as a trustee.

- [72] Regarding the application for condonation for the late filing of the answering affidavit, condonation is granted on the basis that it was filed two days late and that there could not have been any prejudice to the applicants occasioned by such late filing. Opposition thereto was not justified and each party ought to bear its own costs in that regard.

CONCLUSION

- [73] In light of the above, I make an order:

1. Declaring that the first respondent had no capacity to effect

resolutions or to otherwise bind the Lesser Family Trust ("Trust") in the absence of the minimum of three trustees specified in the Trust Deed.

2. Declaring that the purported resolution signed by the first

respondent, “FA2” to the founding affidavit, is invalid and of no force and effect.

3. Declaring that the purported resolution, dated 24 October 2017 (“FA1” to the Founding Affidavit), in which the second respondent and third respondent purportedly participated in their own appointment as trustees is invalid and of no force or effect.
4. Declaring that the first, second and third respondents had no lawful authority to act as trustees in the absence of letters of authority issued by the Master of the High Court.
5. Declaring that the first, second and third respondents are removed as trustees of the Trust.
6. Declaring that Messrs David Rose, Dave Cathrall and Paul Kampel are appointed as trustees of the Trust, alternatively directing the Master to give consideration to their appointment as trustees and to make the necessary appointments.
7. Directing the first respondent to render an account to the applicants

and/or the trustees to be appointed in terms of paragraph 6 in respect of the administration of the Trust's affairs for each year,

from inception to date, within 30 calendar days of this order, including annual statements of the Trust's assets, liabilities,

income and expenditure, with all supporting documentation and vouchers, including books and records, bank statements (if any);

annual financial statements of the Trust (audited, or prepared by or at the instance of the trustees); minutes of trustees meetings and resolutions passed by trustees.

8. Directing the seventh respondent to render an account to the applicants, alternatively to the trustees appointed or to be appointed pursuant to paragraph 6 above, in respect of the administration of the eighth respondent's affairs for each of its financial years, from 2017 to date, within 30 calendar days of this order, including annual statements of the eighth respondent's assets, liabilities, income and expenditure, with all supporting documentation and vouchers, including books and records, bank statements; annual financial statements of the eighth respondent (audited, or prepared by or at the instance of the seventh and/or eighth respondent); minutes and resolutions.
9. The first respondent is directed to pay the costs of the main application de bonis propriis and in his personal capacity as fourth respondent, including the costs of junior and senior counsel, jointly and severally and on the attorney client scale when employed.
10. Directing that the costs of the condonation application brought by the first respondent for the late filing of the answering affidavit and the counter-application thereto and the Rule 30 application in respect thereof be borne by each party.

11. Directing that the costs of the application for security for costs be reserved and set down for separate hearing on the opposed roll by any party thereto requiring such costs to be determined by the court.

SELBY BAQWA

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Date of hearing: 24 February 2022

Date of judgment: 14 June 2022

Appearance

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[1] Cameron South African Law of Trust 6th Edition p306.

[2] 2004 ZASCA 56 at para 10-14.

[3] 2012

(4) SA 593 SCA at para 18.

[4] 2021 JDR 001 (SCA).

[5] 1988

(2) SA (T) at 557 G-11.

[6] 2008

(1) SA 81.

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