IN THE HIGH COURT OF SOUTH AFRICA

(EAST LONDON CIRCUIT COURT)

CASE NO.: EL139/2020

Heard on: 6 October 2022

Delivered on: 13 December 2022

In the matter between:

M[...] H[...]	**First Applicant**
In her representative capacity as mother and legal guardian of	
H[…]-J[…] W[…]	
A[…] T[…] W[…]	
M[...] H[...]	**Second Applicant**
and	
R[...] W[...] W[...] N.N.O	**First Respondent**
F[...] E[...] W[...] N.N.O	**Second Respondent**
M[...] P[...] N.N.O	**Third Respondent**
THE W[...] FAMILY TRUST	**Fourth Respondent**
THE MASTER OF THE HIGH COURT OF SOUTH AFRICA, EASTERN CAPE	**Fifth Respondent**

CONLON AND ASSOCIATES INCORPORATED
Reg no: 2[…] **Sixth Respondent**

JUDGMENT

MOLONY AJ:

Introduction

[1] The first applicant in this matter has approached this court in her capacity as the mother and legal guardian of the two minor children listed above ('the minor children').

[2] The second applicant in this matter is the first applicant, in her personal capacity. The second applicant's personal interest, according to the founding affidavit, is due to the fact that she is a creditor of the fourth respondent ('the trust'). The second applicant furthermore points out that she is the listed 'donor' of the trust. The applicants will hereafter be referred to collectively as 'H[...]'.

[3] The first respondent ('W[...] ') is cited in his capacity as a trustee of the trust. W[...] and H[…] were married, but divorced on 5 December 2017. The minor children were born of the marriage between W[...] and H[…].

[4] The second respondent is cited in her capacity as a trustee of the trust. The second respondent ('F[...] W[...] ') is W[...] 's mother.

[5] The third respondent is cited in her capacity as a trustee of the trust. The third respondent ('P[...]') is involved in a relationship with W[...] . The aforementioned trustees will, when referring to them collectively, be referred to as 'the trustees'.

[6] The fourth respondent is the trust, duly incorporated in terms of the Trust Property Control Act 57 of 1988 ('the Trust Act'), and registered with the Master of the Eastern Cape High Court, Grahamstown/Makhanda, under IT3[…].

[7] The fifth respondent is the above-mentioned Master of the High Court ('the Master'). No relief is sought against the fifth respondent.

[8] The sixth respondent ('the company') is a company which was involved in the transfer of certain immoveable property which led to the application in this matter.

Relevant background

[9] The trust was established in 2011. The relevant trust deed (with addendums) records the primary object of the trust as being to *'serve as a family trust'.*

[10] H[…], W[...] and the minor children were listed as beneficiaries in the trust deed.

[11] H[...] is recorded as being the 'donor' in the trust deed, having donated an amount of R 100.00 as part of establishing the trust.

[12] The independent trustee, at the time the trust was established, was Birch Bruce Administration Close Corporation ('the CC'), as represented by Eugene Samuel George Birch.

[13] The donor (i.e. H[...]), W[...] , and the above-mentioned CC, are collectively referred to as 'the parties' in the trust deed.

[14] H[...] is the primary care-giver of the two minor children, who reside with her.

[15] H[...] and W[...] , during the course of their marriage, purchased various immoveable properties, game and cattle, and it was agreed that the various properties be placed in a trust, which led to the establishment of the trust.

[16] H[...] and W[...] disagree in regard to the intention behind establishing the trust. H[...] avers that it was established for the benefit of the minor children, and for their expenses to come from or out of the trust.

[17] W[...] avers that the intention was for the trust (which had certain tax benefits, and which would protect the relevant properties from being sold should H[...] or W[...] face insolvency proceedings) to only be used for the minor children's benefit when H[...] and W[...] passed away. W[...] denies that it was intended that the trust be utilized to meet the everyday expenses of the minor children, but was to protect the relevant properties in case he or H[...] were declared insolvent or bankrupt.

[18] In 2013, and in order to give effect to the ruling in the matter of *Potgieter v Potgieter NO and Others,*[1]the trust deed was amended to *inter alia* reflect H[...], W[...] and the two minor children as being beneficiaries who had accepted benefits under the trust, and who were accordingly required to co-sign the amendment.

[19] When H[...] and W[...] divorced on 5 December 2017, the order included that they were to determine the difference in the accrual between their respective estates.

[20] H[...] and W[...] signed a deed of settlement containing agreement in regard to the immoveable properties acquired during the subsistence of the marriage, pursuant to the above-mentioned order, on 29 April 2019.

[21] The deed of settlement confirmed that the parties had acquired three immoveable properties (a house in Cambridge, East London, and two farms) during the course of the marriage.

[22] The deed of settlement set out that the house in Cambridge ('the 8[…] H[…] Street property'), which was registered in the name of both H[...] and W[...] , would be retained by H[...] as her sole and absolute property, and dealt with the practicalities of implementing such agreement.

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[1] 2012 (1) SA 637 (SCA).

[23] The deed of settlement stated, at paragraph 1.6 thereof, that:

'It is recorded that the two farms shall be retained by the Defendant. Farm 1[…], East London is registered in the name of the W[...] Family Trust. The T[…] Farm has been acquired and is also registered in the name of the W[...] Family Trust.'

And at paragraph 1.9:

'On transfer to the Plaintiff of the Defendant's undivided half share in 8[…] H[…] Street, Cambridge, East London, the Plaintiff shall resign as a Trustee of the W[...] Family Trust and shall waive all rights that she might have to the Trust as a beneficiary. The Plaintiff undertakes to sign all documentation necessary to give effect to the provisions of this clause within seven (7) days of the date of being requested to do so. Should the Plaintiff fail to sign the documentation, the parties irrevocably authorize the Sheriff of the High Court, East London to sign all and any documentation necessary to give effect to the provisions of this clause.'

And at paragraph 2.4:

'The Plaintiff warrants to the Defendant that she has remarried, out of community of property, and excluding the provisions of accrual. Should the Plaintiff remarry (in the future) the Plaintiff, and furthermore the Defendant (should he remarry) agree that it is their intention that if any of the properties are sold, the proceeds, or any other property or any other asset which is acquired with the net proceeds will remain the exclusive the (sic) property of the Plaintiff or the Defendant (as the case may be). Both Plaintiff and Defendant intend to provide for their daughters from the proceeds of the sale of the properties on their death.'

[24] Whilst paragraph 2.4 is somewhat confusing in regard to whether or not H[...] has in fact remarried, or if this clause was intended to refer to future marriages only, nothing turns on this.

[25] Paragraph 2.2 of the deed of settlement allowed for either party to approach the High Court for the agreement to be made an order of court. It does not appear, from the papers, that the deed of settlement was ever made an order of court.

[26] H[...] duly resigned as a trustee, as did the independent trustee. The papers do not disclose whether or not H[...] was ever called upon to sign any documentation waiving her rights as a beneficiary.

[27] During 2019 H[...][2] launched an urgent *ex parte* application under case no.: EL1462/2019 ('the first application'), requesting *inter alia* an interdict against W[...] , F[…] W[...] and P[…], in their capacity as trustees of the trust, from selling one of the above-mentioned immoveable properties.

[28] It was also sought that the purchase price (of R 650 000.00) be deposited into H[...]'s attorney's trust account, and that F[…] W[...] be interdicted from withdrawing, utilizing or dissipating the aforementioned amount, in the event that such amount had already been paid into F[...] W[...] 's bank account, pending finalization of the application.

[29] The first application was in two parts, with part A being reflected above, whilst part B requested that the dispute-allegation of breach of trust by the respondents be referred to and dealt with at arbitration (in terms of clause 34 of the Trust Deed).

[30] On 13 December 2019, Toni AJ granted a rule *nisi* in the first application, calling upon the respondents to show cause by 7 January 2020 as to why the relief sought in part A should not be made final.

[31] On 18 December 2019 the respondents filed opposing papers, and anticipated the return date.

[32] The matter was then heard by Pakati J on 19 December 2019, with judgment being delivered on 28 January 2020. The rule *nisi* was confirmed, with F[...] W[...]

[2] She launched the above-mentioned application in her representative capacity as mother and legal guardian of the two minor children.

being interdicted from withdrawing, utilizing or dissipating the aforementioned amount, as it appeared the amount in question had already been paid into her account.

[33] The judgment of Pakati J was later taken on appeal and overturned, by a full bench of this division, on 10 August 2021.[3] A reading of the judgment (written by Mbenenge JP, with Brooks J and Gqamana J concurring) demonstrates that the judgment of Pakati J was set aside primarily due to the fact that the relevant order was granted under the following circumstances:[4]

(a) A rule *nisi* (returnable on a particular day) was sought on an *ex parte* basis.

(b) The rule *nisi* (which was part A of the application), along with interim relief, was requested pending the outcome of part B. At the time the application was launched there was no part B in the notice of motion. An 'extended notice of motion' had been filed shortly thereafter.

(c) Pakati J, in reaching the final decision, accepted the 'extended notice of motion'. In this regard, it was held, Pakati J erred, as no appropriate application for leave to amend the notice of motion had been launched, and the opposing parties were unduly prejudiced.

[34] In addition to the above, and in the context of determining an appropriate order of costs, the full bench was of the view that H[...], in not disclosing the contents of the settlement agreement in the divorce proceedings, had failed in her duty to disclose all material facts in pursuit of her *ex parte* application. The aforementioned failure was considered lamentable, and was part of the reason why a punitive costs order was granted against H[...].

[35] On 3 February 2020 H[...] launched the current application ('the second application') in two parts. Part A, which was *inter alia* to interdict and restrain the

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[3] See *Russel Wayne Webber N.O. and Others v Megan Hein (as representative of Hannah and Ashely Webber)* Appeal Case No.: CA221/2020, Eastern Cape Division, Grahamstown, delivered on 10 August 2021.

[4] *Supra* at paras 1 – 17; paras 21 – 22 and paras 26 – 36.

payment of the proceeds of the sale of Farm 1[…], K[…] B[…] ('the K[…] B[…] property') pending the outcome of a dispute to be referred to arbitration to remove W[...] , F[...] W[...] and P[...] as trustees of the trust, alternatively the dissolution of the trust and the distribution of the trust proceeds and assets by payments to H[...].

[36] Part B of the second application simply seeks an order that H[...], along with W[...] , F[...] W[...] and P[...], attend and/or refer the dispute regarding the management of the trust to arbitration in terms of clause 34 of the Trust Deed and that the arbitration award be made an order of court, in order to enforce compliance therewith.

[37] Costs are sought against W[...] , F[...] W[...] and P[...] in regard to part A and part B of the application on an attorney and client scale, with such costs to include the costs of counsel.

[38] The relief sought in part A was ultimately granted by Mjali J.[5] Leave to appeal was sought, and refused. It appears that prior to the matter being argued, an agreement was struck that the proceeds of the sale would remain in the company's trust account pending the outcome of the second application.

[39] This judgment is accordingly only concerned with part B of the second application.

Part B of the second application

[40] H[...] maintains that, as in case number, EL1462/2019, W[...] , F[...] W[...] and P[...] have acted in a manner which is inconsistent with the provisions of the trust deed as well as the governing provisions of the Trust Act.

[41] H[...] notes, *inter alia*, that the deed of alienation of property in regard to the K[...] B[...] property, was concluded on 24 October 2019. It is not in dispute that the

[5] See judgment of Mjali J in this matter (heard on 20 February 2020 – the copy of the judgment provided in the court file is undated).

relevant endorsement from the Master, authorizing F[...] W[...] and P[...] to act as trustees of the trust, was only issued on 9 December 2019.

[42] In W[...] , F[...] W[...] and P[...]'s view, this is immaterial as transfer of the property has yet to take place. Annexure 'K' to the founding affidavit is an extract from a minute of a meeting (no date is disclosed) between W[...] , F[...] W[...] and P[...], in their capacity as trustees, in which they *inter alia* resolve that the K[...] B[...] property may be sold in accordance with the relevant sale agreement, and that the trust ratifies and adopts as valid any documentation already signed and acts performed by any of the trustees in connection with the sale of the aforementioned property.

[43] W[...] avers that the proceeds of the sale of the K[...] B[...] property have not been paid out to him in his personal capacity. It appears that W[...] was, due to the settlement agreement in the divorce between H[...] and W[...] , under the impression that he was lawfully permitted to utilize the monies generated by the sale of the relevant trust properties, for private use.

[44] It appears that the original intention (as reflected in annexure 'RA2' to H[...]'s first replying affidavit) was for the balance of the proceeds of the sale to be paid into F[...] W[...] 's personal bank account.[6] Annexure 'RA2' is a document titled 'Authority by Seller', and is dated 10 December 2019.

[45] W[...] avers that the monies in question can still be transferred to the trust, whereafter the trustees could resolve to allow W[...] to utilize the proceeds. W[...] denies any contravention of the provisions of the trust deed or the Trust Act.

[46] W[...] denies that the minor children are prejudiced as he has been paying the necessary maintenance, and both he and H[...] have been caring for the minor children.

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[6] Section 10 of the Trust Property Control Act requires that whenever a person receives money in his capacity as trustee, it shall be deposited in a separate trust account at a banking institution or building society.

[47] In a supplementary answering affidavit, W[...] further alleged that the trust account of the trust (which was ostensibly with Nedbank) was not in fact a trust account, but a savings account, registered by 'Birch Trust t/a Birch Bruce Fin Serv', which was also the only signatory to the relevant account.

[48] H[...] denied any impropriety in regard to the above and, in reply (as annexure 'RA3' to her first replying affidavit), provided a statement from the Nedbank account (which is a 'corporate saver' account) for the period 1 March 2013 to 28 February 2014, and which appears to show various deposits being placed into the account by W[...] , along with various payments being made in regard to the minor children.

[49] Various arguments were advanced in regard to the import of the above, and various allegations of dishonesty on the part of H[...] as well as the relevant respondents were made.

[50] In my view, the central issue in this matter is whether or not H[...] has the right to refer the dispute with the trustees to arbitration in terms of clause 34 of the trust deed, or if she is required instead to exercise whatever alternative remedies are available (for example via the Trust Act).[7]

Analysis

[51] Clause 34 has the heading 'Informal Arbitration', and the relevant sub-paragraphs (34.1 and 34.2) state as follows:

'34.1 Any difference or dispute between the parties in connection with the interpretation or application of the provisions of this trust deed or its termination shall be referred to and be determined by informal arbitration in terms of this clause.

34.2 Any party to this trust deed may demand that a dispute be determined in terms of this clause by written notice given to the other party (ies).'

[7] See sections 19, 20 and 23 of the Trust Property Control Act.

[52] H[...], in essence, seeks to have the issue of whether or not the trustees have breached their fiduciary duties determined by way of arbitration.

[53] Mr Cole, who appeared for W[...] , F[...] W[...] and P[...], invited me to conclude that, given the decision of the full bench in the first application, H[...] has not approached this court with clean hands, as she did not specifically disclose the settlement agreement in the founding affidavit.

[54] Mr Bothma, who appeared for H[...], submitted that the first application was a different matter, which, unlike the second application, involved relief sought *ex parte*. He submitted that the founding affidavit in the second application was signed prior to the full bench judgment in the first application being delivered.

[55] W[...] , F[...] W[...] and P[...] allege that H[...] does not have *locus standi* to launch the second application, as, in accordance with the settlement agreement, she is no longer a trustee and has waived all rights she may have had as a beneficiary. The minor children, it was submitted, remain as possible future beneficiaries, to be selected at the whim of the current trustees, who have a wide and unfettered discretion. The minor children have no real rights in the trust property, and have no part of the trust property vested in them. The existing trustees ratified the sale of the K[...] B[...] property.

[56] Mr Bothma relied on three authorities in countering the above, those being *Gross and Others v Pentz*,[8] *Potgieter and Another v Potgieter NO and Others*,[9] and *Griessel NO and Others v De Kock and Another*.[10]

[57] He submitted, relying on the *Potgieter* matter, that the minor children (represented by their parents, who were the donor as well as two of the trustees) had (similar to the circumstances in the *Potgieter* matter) accepted benefits and accordingly become parties to the contract that was the trust deed.

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[8] 1996 (4) SA 617 (A).
[9] 2012 (1) SA 637 (SCA).
[10] 2019 (5) SA 396 (SCA).

[58] In the *Potgieter* matter, the following is stated:[11]

'As I see it, the legal principles that find application are well settled and I did not understand any of the parties to contend otherwise. I believe these principles can be formulated thus: a trust deed executed by a founder and trustees of a trust for the benefit of others is akin to a contract for the benefit of a third party, also known as a stipulatio alteri. In consequence, the founder and trustee can vary or even cancel the agreement between them before the third party has accepted the benefits conferred on him or her by the trust deed. But once the beneficiary has accepted those benefits, the trust deed can only be varied with his or her consent. The reason is that, as in the case of a stipulatio alteri, it is only upon acceptance that the beneficiaries acquire rights under the trust (see, for example, Crookes NO and Another v Watson and Others 1956 (1) SA 277 (A) at 285F; Ex parte Hulton 1954 (1) SA 460 (C) at 466A – D; Hofer and Others v Kevitt NO and Others 1998 (1) SA382 (SCA) ([1997] 4 All SA 620) at 386G – 387E; Cameron, De Waal, Kahn, Solomon & Wunsh Honoré: South African Law of Trusts 5 ed (2002) para 304).'

And further:[12]

'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

[11] *Supra* at para 18.
[12] *Supra* at para 28.

his or her interest against maladministration by the trustee (see *Gross and Others v Pentz* 1996 (4) SA 617 (A) ([1996] 4 All SA 63) at 628I – J).'

[59] The above is reflected in the fact that the minor children were required to sign the amendment to the trust deed that catered for the decision in the *Potgieter* matter, as well as any future amendments.

[60] Mr Bothma submitted further that the minor children (represented by their mother), as contingent beneficiaries, had the necessary rights in this matter.

[61] He referred to the *Gross* matter, in which the following is conveniently summarized in the headnote:

'In its decision as to whether a contingent beneficiary of a trust (viz one who had merely a contingent interest in both the future income and the capital thereof) had locus standi to institute action against a co-trustee for maladministration amounting to breach of trust and resulting in pecuniary loss to the trust estate, the Court made, inter alia, the following observations: The general rule of our law was that the proper person to act in legal proceedings on behalf of a deceased estate was the executor thereof: a beneficiary normally had no standing to do so, and the same principle applied to a trustee appointed in terms of a testamentary trust. (At 625A/B-E, paraphrased.) A distinction had to be drawn, however, between actions brought on behalf of the trust, for instance, to recover trust assets or nullify transactions entered into by the trust (representative actions) and actions brought by beneficiaries in their own right against a trustee for maladministration or for failing to pay or transfer to beneficiaries what is due to them under the trust (direct actions). The general rule could clearly apply only to representative actions. (At 625E-H.) Because a delinquent trustee could not be expected to sue himself, the general rule did not apply in such cases. Consequently, beneficiaries had locus standi to claim restoration to the trust of loss caused by the negligence of the trustees. (The rule in Beningfield v Baxter (1886) 12 AC 167.) (At 627H/I-I and 628G.) Contingent beneficiaries (viz those who have no vested interest in the future income or the corpus of the trust) did have a vested interest in the proper administration of the

trust and should also be able to avail themselves of a representative action in terms of the Beningfield exception. (At 628I-J.)'

[62] In reaching the above conclusions, it was stated in the *Gross* matter[13] that:

'In my view, the Beningfield exception should be recognised and the general rule modified to this extent. Clearly a defaulting or delinquent trustee cannot be expected to sue himself. The only alternative to allowing the Beningfield exception would be to require the aggrieved beneficiaries to sue for the removal of the trustee and the appointment of a new trustee as a precursor to possible action being taken by the new trustee for the recovery of the estate assets or other relief for the recoupment of the loss sustained by the estate. This, in my opinion, would impose too cumbersome a process upon the aggrieved beneficiaries.'

[63] Mr Bothma also referred to H[...]'s status as a party to the trust deed due to her being the 'donor' as recorded in the trust deed.

[64] He submitted that a trustee's discretion is never entirely unfettered, as trustees are still required to comply with their fiduciary duties.

[65] He submitted that (similar to the *Griesel* matter) H[...] is alleging that there has been a breach of the trustees' fiduciary duty, in that they apparently exercised their power and sold the K[...] B[...] property, with the intention to of giving all of the proceeds to W[...] , to the exclusion and prejudice of his daughters. Whether or not this had in fact occurred and how the settlement agreement in the divorce (given that it was a private agreement between two individuals[14]) affected the situation were issues to be determined at arbitration. H[...] had approached the court to enforce contractual rights to refer the matter to arbitration.

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[13] *Supra* at p. 628.

[14] Whilst it was noted in the full bench judgment (at para 30 thereof) in the first application that the parties to the settlement agreement appeared to intend one another to retain the respective properties as their personal property, and that their daughters accepted that to have been the position, it was not readily apparent in the papers before me that the minor children had accepted the aforementioned position.

[66] In addition to the above, the proper interpretation of the wording of clause 34 of the trust deed was in dispute.

[67] Mr Bothma submitted that on a proper (commercially practical) interpretation of clause 34.1, it included disputes relating to administration of the trust.

[68] Clause 34.1, in contrast, catered for further disputes which would not fall under clause 34.1. If it did not, then clause 34.2 would essentially be redundant.

[69] This was demonstrated, he submitted, *inter alia* by the fact that clause 34.1 made it obligatory (the word 'shall' is utilized) to refer a dispute falling under that clause to be referred to arbitration, whilst clause 34.2 (which used the word 'may') allowed for a discretion in regard to other types of disputes, which did not fall under clause 34.1.

[70] Mr Cole disagreed with the above, submitting that clause 34.2 was simply the manner in which the proceedings contemplated in clause 34.1 would be implemented. He submitted that nowhere in the founding affidavit was any case made out regarding what was in dispute, as no dispute was raised in regard to an interpretation of the trust deed, or regarding the application of the provisions of the trust, or regarding the termination of the trust. Issues in regard to the management of the trust (when there was no disagreement between the trustees themselves) did not fall under clause 34.1. He submitted that the settlement agreement necessarily implied that the trustees were expected to resolve to pay the proceeds of the sale of the relevant farm to W[...] .

[71] Mr Cole submitted further that the second application was futile, as the existing trustees could, in any event, resolve to terminate the trust and distribute the benefits to W[...] .

[72] In my view H[...], in her representative capacity as mother and legal guardian of the minor children has the necessary *locus standi* to uphold their best interests, which in this instance involves *inter alia* their rights as beneficiaries, and relates to a dispute as to whether or not W[...] , F[...] W[...] and P[...] are managing the affairs of

the trust in accordance with the provisions of the trust deed, in accordance with their fiduciary duties, as well as in accordance with the Trust Act.

[73] In terms of the trust deed itself, H[...], in her capacity as donor, is a party to the trust deed.

[74] The fact that W[...] sold the relevant property, ostensibly for his own benefit, at a time when he was the sole appointed trustee, does, *prima facie* appear to be *ultra vires*.[15] The fact that he did so apparently pursuant to the terms of a settlement agreement in a divorce, when there was no accompanying resolution from the relevant trustees at the time, similarly *prima facie* appears to be *ultra vires* (this view was shared by Mjali J when deciding part A of this application).*[16]* In my view these are issues which should be determined at arbitration.

[75] Clause 34.1 states that a difference or dispute between the parties, *inter alia* relating to the application of the provisions of the trust deed, shall be referred to and be determined by informal arbitration. A sensible interpretation[17]of the

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[15] See, for example, *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA) at paras 10 – 14 and *Thorpe and Others v Trittenwein and Another* 2007 (2) SA 172 (SCA) at paras 9 - 16. See further clause 5.2 of the trust deed (which states that there shall always be not less than two trustees); and the amended clause 36 of the trust deed (contained in annexure 'B' to the founding affidavit), which states as follows:
'Notwithstanding anything to the contrary in this deed, no trustee shall at any time qualify as a capital or income beneficiary of this trust or receive any benefits as such for so long as he is solely competent to dispose of trust property for his own benefit or for the benefit of his estate as contemplated in Section 3(3)(d) of the Estate Duty Act No. 45 of 1955, as amended.'

[16] See para 29 of the judgment of Mjali J.

[17] See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18:
'The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to preparation and production of the document.'

aforementioned would clearly include a dispute relating to the management of the trust as such management would involve the trustees engaging in their duties which would require them to apply the provisions of the trust deed.

[76] It is notable that the word ‘party’ is used in clause 34.1 (as opposed to ‘trustee’) which, as defined in the trust deed, includes the donor (that being H[...]).

[77] Clause 34.2, in my view, sets out how the relevant party may invoke clause 34.1.

[78] Clause 34.1 also refers to disputes relating to termination of the trust and so, to the extent that the trustees may attempt to terminate the trust in order to thwart any arbitration process, such dispute may be dealt with at arbitration.

[79] Clause 34.10 of the trust deed makes provision for the decision of the arbitrator to be made an order of court by any party at the cost of such party, and so, depending on the outcome of such arbitration, such remedy is already available to the parties.

Costs

[80] In regard to the issue of costs, the relevant parties, in their papers, requested a punitive costs order, alleging various instances of wrongdoing.

[81] Whilst the views of the full bench in the first application were not favourable in regard to H[...]’s conduct, I cannot overlook that the context in that matter involved an *ex parte* application. The papers in that matter are not before me.

[82] This matter (the second application) was not launched on an *ex parte* basis, and the relevant parties had opportunity to ventilate the relevant issues. H[...] annexed the judgment of Pakati J (which refers to the settlement agreement in the divorce) to the founding papers, but made it clear that she does not view the

background relating to the ongoing maintenance and other legal issues between W[...] and herself as being relevant to this application. It therefore cannot be, in my view, said that H[...] attempted to mislead this court in this regard in the second application.

[83] W[...] , F[...] W[...] and P[...], in keeping with their stance that they have not contravened any provisions of the trust deed or the Trust Act, and that H[...] did not have the *locus standi* to approach this court, were entitled to oppose this application.

[84] Given the above there is no reason, in my view, why the costs in this matter should not follow the result.

Order

In the result the following order is made:

(a) The applicants and the first, second and third respondents are to attend and/or refer the dispute regarding the management of the trust to arbitration in terms of clause 34 of the trust deed.

(b) The first, second and third respondents are to pay the costs of part B of this application.

N MOLONY
ACTING JUDGE OF THE HIGH COURT

On behalf of the applicants:	**Mr Bothma**
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