REPUBLIC OF SOUTH AFRICA

GAUTENG LOCAL DIVISION
JOHANNESBURG

CASE NO. 35494/16

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED.

5 APRIL 2017
DATE

SIGNATURE

In the matter between:

ANDREW GRAHAM VOGEL *N.O.*	Applicant
and	
STEPHEN MELAMED	First Respondent
ANNA MILLER (formerly Salzman)	Second Respondent
RYAN PAUL SALZMAN	Third Respondent
LEONARD MARK SALZMAN	Fourth Respondent
THE MASTER OF THE WESTERN CAPE HIGH COURT, CAPE TOWN	Fifth Respondent

JUDGMENT

BHAM AJ

INTRODUCTION

[1] The Trust Deed of the SAC Salzman Trust ("***the Trust***") was signed by the founder of the Trust and the first trustees thereof on 12 September 2014 ("**the Trust Deed**"). The Trust beneficiaries are Sacha Quillian Miller Salzman ("***Sacha***"),

Ariel Millie Miller Salzman ("***Ariel***") and Calia Magdalene Miller Salzman ("***Calia***"),[1] who are the children of the second and third respondents.

[2] The Trust was formed pursuant to a written agreement concluded between the second and third respondents (during June 2014) which was referred to as the Consent Paper ("***the Consent Paper***"). The Consent Paper (which was stamped by the Office of The Family Advocate on 25 August 2014) was concluded in the context of divorce proceedings between the second and third respondents. They have since been divorced.

[3] The fourth respondent is the founder of the Trust, having donated to the Trust an amount of R100,00 for the benefit of the beneficiaries. The applicant and the first respondent were the first trustees of the Trust, having been nominated as such respectively by the second and third respondents in terms of clause 4.4 of the Consent Paper. The applicant and the first respondent were duly issued with their Letters of Authority in terms of the Trust Property Control Act, 57 of 1988 ("***the Act***") on 30 October 2014.

[4] Prior to the registration of the Trust with the fifth respondent and the issue of the Letters of Authority to the applicant and the first respondent, and as envisaged in terms of clause 5.7 of the Consent Paper, an amount of R6 677 373,73 was transferred into an account of the first respondent's firm of attorneys.[2] The first respondent was required to invest those funds in an interest-bearing trust account. He was, upon the establishment of the Trust, required forthwith to transfer those funds into a bank account of the Trust. The first respondent deposited the funds into a Standard Bank, Killarney

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1 The name of the Trust is derived from the first alphabet letter in each of the beneficiaries' names.

2 The first respondent is a practising attorney, who acted for the third respondent in the divorce proceedings referred to earlier herein.

Branch account with number 61470317 ("the Standard Bank Account"). He was the sole signatory to the Standard Bank Account. Upon establishment of the Trust the first respondent was required to transfer the funds from the Standard Bank Account to an account to be opened in the name of the Trust which would be controlled by the trustees. This did not occur.

[5] On 19 May 2016 the fifth respondent, acting in terms of section 20(2)(e) of the Act, removed the first respondent from his office as co-trustee of the Trust.[3] Thereafter and until 5 August 2016 the applicant was the only trustee of the Trust. Between 5 August 2016 and 12 September 2016, there were two trustees of the Trust, the applicant and Peter Veldhuizen ("***Veldhuizen***"). Since 12 September 2016, the applicant has again been the only trustee of the Trust.

[6] However, and since the registration of the Trust and the original issue of Letters of Authority to the applicant and the first respondent, the funds earmarked for the Trust which were originally transferred into the Standard Bank account, have been retained by the first respondent. The first respondent has received demands from the trustees of the Trust (the applicant and Veldhuizen) and thereafter from the applicant as the only trustee of the Trust demanding that the funds held in the Standard Bank account be transferred so that such funds were in the control of the trustees (when Veldhuizen was a trustee), and into a bank account opened for the Trust at a time when the applicant was the sole trustee of the Trust.

[7] The first respondent refused to heed these demands, even though he accepts that since his removal as trustee of the respondent and even at

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3 The first respondent's reaction to this is dealt with below.

present, the decision of the Master to remove him as a trustee of the respondent is operative.[4]

[8] In the present application, the central issue which the first respondent has raised relates not to his entitlement to retain under his sole control funds of the Trust. The issue which the first respondent has raised, as articulated in the heads of argument filed on his behalf in this application, is whether the applicant had the "*authority*" to institute and pursue the present court proceedings, and as articulated in argument during the hearing of this application, whether the applicant has the "*legal capacity*" to have instituted and/or pursued these proceedings. That issue ultimately turns on an interpretation of certain provisions in the Trust Deed as well as the effect of section 10 of the Act.

[9] Although no relief is sought against the third respondent, the third respondent has, together with the first respondent, opposed this application. They are both, in these proceedings, represented by the same legal team.

[10] In order to place the issue which arises in this application into its proper context, a chronology of the relevant events and an analysis thereof leading to the institution of this application would be useful.

THE RELEVANT CHRONOLOGY AND AN ANALYSIS THEREOF

[11] The Consent Paper was concluded during June 2014. It provided, *inter alia*, for maintenance obligations in relation to Sacha, Ariel and Calia (collectively referred to as "***the children***"), the formation of the Trust, the

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[4] This issue arises in the context of the first respondent's application (which has already been brought) to review and set aside the fifth respondent's decision to remove him as a trustee of the Trust – that application remains pending.

nomination of the first trustees, the primary purpose of the Trust and also provided, in clause 5.7, for the following –

> *"The parties and Salzman hereby irrevocably instruct the conveyancing solicitors to transfer the remaining 34% of the net proceeds of the Garden flat into the trust account of the Plaintiff's attorneys of record, Stephen Melamed and Associates. The funds must be invested in an interest bearing trust account. Plaintiff's attorneys shall in turn forthwith pay the entire amount received by them into the bank account of the SAC Salzman Trust, and in favour of the SAC Salzman Trust, once same has been established. Such transfer shall not give rise to a loan account in the SAC Salzman Trust in favour of either Plaintiff or Salzman."*[5]

[12] As contemplated by clause 5.7 of the Consent Paper, an amount of R6 677 373,73 was deposited into the Standard Bank account. The first respondent was the sole signatory to this account.

[13] On 12 September 2014, the Trust Deed was signed. On 30 October 2014, the fifth respondent issued Letters of Authority in respect of the Trust in favour of the applicant and the first respondent. Matters thereafter though did not proceed smoothly. Disputes arose relating to the manner in which these funds held in the Standard Bank account were utilised.[6] Consequently, and after representations made by the applicant, the fifth respondent, on 19 May 2016, removed the first respondent as a trustee of the Trust.

[14] The first respondent was dissatisfied with this decision. On 17 June 2016 he instituted review proceedings in the High Court of South Africa (Western Cape Division, Cape Town) in which he seeks to review and set aside the fifth respondent's decision of 19 May 2016. In keeping with the principles set out in **Oudekraal Estates (Pty) Ltd v City of Cape Town and**

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5 The provisions of clause 5.7 are clear in their terms and require no further explanation.

6 For purposes of this application, those disputes are not only irrelevant but

Others,[7] the first respondent accepts that "... *the review application launched by myself does not stay nor suspend the effect of the Fifth Respondent's decision to remove me as a trustee* ...". In short, since 19 May 2016, the first respondent has not been a trustee of the Trust, a position which will remain unless and until his review succeeds.

[15] Although the first respondent has accepted the legal effect of the fifth respondent's decision to remove him as a trustee, and the implication thereof pending the outcome of the review application, the first respondent criticised the applicant for having failed to annex the founding affidavit in the review application to the papers in the present application and contended that it was "... *incumbent upon the Applicant to annex the founding affidavit in the review application to the founding affidavit in this application so as to apprise the above Honourable Court with all the relevant facts in this matter.*" Not only was the first respondent's criticism of the applicant in this regard ill-conceived, but the first respondent's inclusion of papers in the review application as an annexure to his answering affidavit in this application was unnecessary and unduly burdened the record in this application. The issues in the review application are not relevant to the issue in the present application.

[16] I pause to mention at this stage that subsequent to the registration of the Trust and the issuing of Letters of Authority to the applicant and the first respondent as the first trustees of the Trust, and having regard not only to the provisions of clause 5.7 of the Consent Paper, but also section 10 of the Act and clauses 18.3 and 18.4 of the Trust Deed, the applicant and the first

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also require no further comment.

7 2004 (6) SA 222 (SCA) at para [26].

respondent ought to have taken steps to open a bank account in the name of the Trust and ought to have caused transfer of monies belonging to the Trust which were held under the control of the first respondent to be transferred into that account.[8]

[17] Subsequent to the first respondent's removal as trustee of the Trust, and on 26 July 2016, the applicant addressed a letter to the first respondent requesting certain payments to be made from monies belonging to the Trust (which were under the control of the first respondent). In the answering affidavit, this letter is relied upon by the first respondent to contend that subsequent to his removal, the applicant seemed content to permit the status quo regarding control over the monies which belonged to the Trust to remain, i.e. in the Standard Bank account. The applicant's response to this suggestion though seems more plausible. The applicant states that after the removal of the first respondent as a trustee, and having regard to the requirement set out in the Trust Deed that there be a minimum of two trustees, he had difficulty opening a bank account until a new second trustee was appointed by the fifth respondent. In any event, whatever the applicant's attitude may have been during the period after the first respondent's removal as trustee of the Trust, the first respondent ought to have known (if he did not actually know) that the money belonging to the Trust in the Standard Bank account had to be transferred into a bank account of the Trust. In short, once circumstances permitted this to occur, there was no justification for him to continue retaining control over those monies.

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[8] Why this was not done at that stage is not clear from the papers. Had it been done timeously, this application would have been avoided.

[18] On 5 August 2016, the Master issued Letters of Authority certifying that the applicant and Veldhuizen were authorised to act as trustees of the Trust. This situation regarding the minimum number of trustees was thus regularised. On 25 August 2016, the applicant and Veldhuizen, as trustees of the Trust, passed resolutions, *inter alia* -

18.1. to open a bank account in the name of the Trust at Investec Bank;

18.2. to instruct the first respondent to transfer the funds of the Trust under his control to the trust account of certain attorneys nominated by then as trustees, pending the opening of a bank account in the name of the Trust; and

18.3. to make application to the High Court for an order compelling the first respondent to transfer the funds of the Trust to the bank account of the Trust in the event of him failing to do as directed.

[19] Shortly thereafter, on 31 August 2016, Veldhuizen (as trustee of the Trust) addressed a letter to the first respondent in which he dealt with various matters relating to the use of the Trust funds for the children's school fees,[9] and also then advised the first respondent that he (Veldhuizen) and the applicant as registered trustees "... *are to have control over the funds of the Trust*". In that context, he made the request for the balance of the funds of the Trust to be transferred to his law firm's trust account. At this stage, one would have thought that the simple response from the first respondent would have been to give effect to the request made of him by the trustees of the Trust relating to control of the funds of the Trust.

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[9] This issue was the subject matter of significant dispute, but that dispute is not relevant to the issues in this application.

[20] Instead, the first respondent obfuscated the issue. In his response dated 2 September 2016, he made reference to the review application, suggested that the relevant funds would not be dissipated, that he would "... *continue to administer same pending the outcome of the [review] application*", that the third and fourth respondents had instructed him that the funds "... *are not to be released to Mr Veldhuizen" and that "no prejudice can be suffered as a consequence of the funds being held in the writer's trust account pending the outcome of the [review] application.*" The stance adopted by the first respondent in this regard was legally untenable. Yet there was no real attempt made by the first respondent, in his the answering affidavit in this application, to explain his stance. It goes without saying that had the first respondent transferred the funds of the Trust to the control of the applicant and Veldhuizen (in their capacity as trustees of the Trust) at that stage, the present proceedings would not have eventuated.

[21] The stance adopted by the first respondent frustrated Veldhuizen. He sought directions from the fifth respondent regarding how the trustees of the Trust should attend to the two issues which had arisen. The first issue, relating to the children's school fees is not presently relevant. The second issue was the first respondent's refusal to remit the funds of the Trust to the control of the applicant and Veldhuizen in their capacity as trustees of the Trust. Veldhuizen indicated that in the absence of receiving the fifth respondent's urgent directions, he would have no alternative but to resign as an independent trustee of the Trust. This situation did not resolve itself (in that the first respondent did not transfer the funds of the Trust to the control of the applicant and Veldhuizen) and consequently, on 12 September 2016, Veldhuizen resigned as a trustee of the Trust. At that stage, the present

application had not been instituted. Veldhuizen's resignation left the Trust with only the applicant as a trustee. The number of trustees thus fell below the minimum stipulated in the Trust Deed.

[22] On 16 September 2016, Investec bank confirmed that a bank account in the name of the Trust had been opened with account number 10011887899 ("***the Investec bank account***"). On the same day, the applicant, as the only trustee of the Trust at the time, addressed a letter to the first respondent advising the first respondent of the Investec bank account, requesting that the first respondent immediately transfer all the funds of the Trust to the Investec bank account and further advising that the trustees of the Trust had resolved at the meeting of 25 August 2016 to make application to Court for appropriate relief in the event of the first respondent refusing to transfer the funds of the Trust as instructed.

[23] Finally, on 23 September 2016, and following a written request made to him by Veldhuizen on 1 September 2016, advocate Louis Buikman SC furnished his consent to the Trust instituting legal proceedings against the first respondent to gain control over the funds of the Trust.[10] Advocate Buikman SC's consent was sought at a time when there was two trustees of the Trust. His consent was granted when the applicant was the only trustee of the Trust. The present application was issued on 10 October 2016.

[24] Against this background, I now turn to consider the issue in this application.

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[10] In terms of the Trust Deed, the consent of advocate Buikman SC is a requirement for the Trust to, *inter alia*, institute legal proceedings.

THE ISSUE IN THIS APPLICATION

[25] The applicant seeks an order for the funds of the Trust, presently held in the Standard Bank account, to be transferred into the Investec bank account (so that they are under his control). He also seeks an accounting relating to transactions in the Standard Bank account.

[26] In heads of argument submitted on behalf of the first and third respondents it was submitted that, "... *the applicant had no authority and/or entitlement to launch this application* ...". At the hearing of the application, counsel for the first and third respondents made a slightly more nuanced submission. He submitted that, having regard to the provisions of the Trust Deed and in particular clauses 7.2, 7.3 and 7.4 thereof, the applicant did not have the "*legal capacity*" either to institute the present application or to continue with these proceedings.

[27] These submissions made on behalf of the first and third respondents were essentially founded upon the requirement in clause 7.2 of the Trust Deed that there shall at all times be not less than two trustees. In addition, reliance was placed on the provisions of clause 7.3 which gave the applicant the power, in the event of the number of trustees being less than two, to appoint an additional trustee within a reasonable period.

[28] The submission on behalf of the first and third respondents was essentially that because the applicant is the only trustee of the Trust (which has been the position since Veldhuizen's resignation as a trustee) he has no legal capacity to institute and continue with legal proceedings in the name of the Trust. Counsel for the first and third respondents submitted that in terms of clause 7.3 of the Trust Deed the applicant had it in his power to regularise the present state of affairs by appointing a second trustee, that he has had

more than a reasonable time to do so, that he has not done so and consequently is himself to blame for his lack of "*legal capacity*" in relation to the present application.

[29] In support of this submission, counsel for the first and third respondents referred to two judgments. The first judgment referred to was the Full Bench judgment in **Hyde Construction CC v the Deucher Family Trust and Another**,[11] where at para [40], the Full Bench of the Cape High Court dealt with "... *an incapacity to transact or to institute proceedings because of the absence of the specified minimum number of trustees*". The Court referred to the judgment in **Lupacchini N.O. & Another v Minister of Safety and Security**,[12] to the effect that such a transaction "... *or the institution of the proceedings is a nullity and cannot be ratified.*"

[30] The Court in **Hyde Construction** also made reference to the SCA judgment in **Land and Agricultural Bank of South Africa Ltd v Parker and Others**.[13] In **Parker**, the SCA in dealing with the question of a sub-minimum of trustees held the following –

30.1. Firstly, a trust cannot be bound while there are fewer than the requisite number of trustees.[14]

30.2. The Trust instrument though defines who the trustees are, their number, how they are to be appointed and under what circumstances they have power to bind the Trust.

30.3. Outside of the provisions of the Trust Deed, the Trust estate cannot be bound.[15]

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11 High Court of South Africa, Western Cape Division, appeal case no. A460/2013.

12 2010 (6) SA 457 (SCA).

13 2005 (2) SA 77 (SCA).

30.4. A provision requiring that a specified minimum number of trustees must hold office is a capacity-defining condition. It lays down a pre-requisite that must be fulfilled before the Trust can be bound where there are fewer trustees than the number specified, the Trust suffers from an incapacity that precludes action on its behalf.[16]

30.5. However, even if the number of trustees is less than the number stipulated in the Trust Deed, the Trust does not cease to exist and the administration of a trust proceeds even when not all the trustees can be appointed in the precise manner envisaged in the Trust Deed.[17]

30.6. Whilst the Trustees in that case, who were less in number than was required in terms of the Trust Deed, could not bind the Trust this did not mean "... *that their duties as trustees ceased. On the contrary, their obligations to fulfil the trust objects and to observe the provisions of the Trust Deed continued.*"[18] Thus, the Court in that case found that the remaining trustees were required to appoint a third trustee when the vacancy occurred, which was a duty they failed to fulfil.

[31] What though does arise from **Parker** is that whilst a sub-minimum number of trustees cannot bind a trust, they remain duty bound to observe the provisions of the Trust Deed. And if one of these provisions is for the sub-minimum number of trustees to appoint a trustee to meet the minimum

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14 Para [10].
15 Para [10].
16 The word "*action*" was used in the context of acts rather than legal proceedings – para [11].
17 Para [12].
18 Para [14].

number of trustees required, they are duty bound to do so. But, it is the Trust Deed which sets out the duties and power of a sub-minimum number of trustees to undertake any act whilst there are fewer trustees than are required. Consequently, in any given case, the specific provisions of a Trust Deed are to be considered.

[32] The Trust Deed in the present case –

32.1. provides that there shall be not less than three trustees. The clause containing this stipulation though has a proviso that,

> *"... if the number of acting trustees is less than the prescribed number, the remaining trustee or trustees, as the case may be, shall be entitled to exercise the powers of the other trustees for the maintenance and administration of the trust fund until another trustee has been appointed.* (emphasis provided)

32.2. In terms of clause 7.3 of the Trust Deed, the remaining trustee is also required to appoint the additional trustee to ensure that the minimum number of trustees is met. However, the failure of the remaining trustee to act in terms of clause 7.3 does not excuse him from acting in terms of the wording of clause 7.2, which in clear terms entitles him to exercise the powers of the other trustees for the maintenance and administration of the trust fund.

[33] Amongst the powers given to the other trustees, in clause 13.2.3.1 is to collect, receive and claim on behalf of the Trust and for the account of the Trust, in a competent court of law, any amount which his due or payable to the Trust or which belongs to the Trust.[19]

[34] If one were to read clause 7.2 on its own terms and even in the context of the Trust Deed as a whole and also have regard, by way of

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[19] Court proceedings are subject to 13.2.4.1 of the Trust Deed which required advocate Buikman SC's consent.

context, to the Consent Paper (and in particular clause 7.5 thereof), then it seems to me clear that the remaining trustee (the applicant in this instance) whatever his failings may have been or continue to be in relation to clause 7.3 of the Trust Deed, is entitled to exercise such powers as the trustees had "*for the maintenance and administration of the trust fund*" until another trustee has been appointed. But, one may, rhetorically, ask how the applicant (as the remaining trustee) is able to exercise any such powers for the maintenance and administration of the Trust funds whilst he is the only trustee unless he is placed in possession and control of the Trust, which are presently held under the control of the first respondent?

[35] In my view, and on a proper construction of clause 7.2, whether read on its own in the context of the Trust Deed as a whole or having regard to the context provided by clause 5.7 of the Consent Paper, if the applicant's demand on the first respondent for the funds of the Trust constitute part of his duty for the "*maintenance and administration of the trust fund*", then he has the power to collect, receive and claim on behalf of the Trust in a competent court of law the money held under the control of the first respondent which belongs to the Trust. And in order to maintain and administer the Trust fund, the applicant must be in possession of funds of the Trust or have those funds under his control. That is what he seeks to achieve through this application. It would be absurd, in my view, to suggest that the applicant, at present, is entitled (and therefore has the power) to maintain and administer the funds of the Trust, but that if any party wrongfully is in possession of those funds and refuses to hand them over to the applicant as trustee of the fund or transfer them into the Trust's bank

account, then the applicant would be impotent to act to institute court proceedings in order to claim those funds.[20]

[36] There is another way to state the proposition. It would seem to me absurd to suggest that if a party who is not entitled to be in possession of funds of the Trust but is in possession of the funds of the Trust (such as is the case with the first respondent), and upon a request made by the remaining trustee of the Trust to transfer those funds into a bank account of the Trust refuses to do so, the remaining trustee even if he is in default of the obligation to appoint an additional trustee is left impotent in taking steps to obtain possession of the funds of the Trust. This would not only be in conflict with the provisions of clause 7.2 of the Trust Deed, but would also undermine the obligations placed on trustees in terms of clauses 18.3 and 18.4 of the Trust Deed and section 10 of the Act.[21]

[37] Consequently, in my view, the applicant does not lack the capacity to have brought and prosecuted the present application, having regard to the relief which he seeks. He is not seeking to bind the Trust in any manner. He is merely seeking to give effect to his obligation to maintain and administer

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20 In this regard, the principles relevant to the interpretation of written documents which require that effect be given to the words of those documents, read in the context of the document itself and any admissible contextual evidence, and in a manner which will avoid an absurdity has been set out in a series of judgments, including – **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA) para [18]; **Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk** 2014 (2) SA 494 (SCA) paras [10]-[12]; **Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd** 2016 (1) SA 518 (SCA) para [24]-[31].

21 In this regard, clause 18.3 of the Trust Deed requires the trustees to open a bank account in the name of the Trust and deposit all monies received by the Trust into such account and clause 18.4 requires the trustees to take possession of and hold all the assets. This would form part of their administration of the trust fund, and clause 7.2 entitles the remaining trustee (i.e. the applicant) to exercise the powers of the trustees for the maintenance and administration of the trust fund

the funds of the Trust by seeking a transfer of those funds into the Investec bank account.

[38] For that reason, in my view, the applicant is entitled to the relief sought in prayer (b) of the notice of motion. As regards prayer (c), counsel for the applicant conceded at the hearing of the application that the prayer was framed too widely and that it should be restricted to all documents in the first respondent's possession which relate to the Trust. Counsel for the applicant also conceded that there is no basis for the relief sought in prayer (d) of the notice of motion.

[39] Having regard to the approach I have adopted above, it is unnecessary for me to deal with the strike-out application. Counsel for the parties were in agreement with my approach in this regard.

[40] There remains a consideration of the question of costs.

COSTS

[41] The applicant seeks an order against the first respondent on an attorney-client scale. I might add only that whatever costs order is made against the first respondent, there would seem to me to be no reason why a similar costs order should not be made against the third respondent, who with full knowledge of the facts, joined the first respondent in opposing this application.

[42] A punitive costs order in the form of attorney-client costs is not usually made by a court. However, there are circumstances in which the conduct of a litigant justifies such an order.

[43] In my view, an attorney-client costs order in this application is warranted for the following reasons –

43.1. The first respondent is a practising attorney. He could have been under no illusion, upon his removal as a trustee of the Trust, that he had no entitlement to retain control over the funds of the Trust. And, the fact that there was only one trustee prior to the appointment of Veldhuizen as a trustee did not change that fact. The first respondent ought, immediately upon his removal as a trustee of the Trust (and in circumstances where on his papers he accepts the effect of the **Oudekraal** principle) to have tendered transfer of the funds of the Trust so that they were under the control of the remaining trustee. He did not do so.

43.2. Thereafter, and upon becoming aware of the appointment of Veldhuizen as a trustee, and when requested to do so, the first respondent ought to have transferred the funds of the Trust under his control as requested by Veldhuizen. Instead, he obfuscated the issue in the manner which has been set out earlier herein.

43.3. The first respondent has not set out any real justification for not having voluntarily handed over control of the funds to the trustees of the Trust (when Veldhuizen was a trustee) or to the trustee of the Trust when the only trustee was the applicant. There is no suggestion by the first respondent that he could ever have thought that had he offered to transfer control of the funds to the trustee of the Trust (at a time when there was just a single trustee), that trustee would not have had the "*capacity*" to receive such funds.

43.4. Having failed to transfer the funds of the Trust to the control of the trustees and after having been notified of the Investec bank account into the Investec bank account, the respondent then opposed the present application on the basis that the trustee lacked the "*capacity*" to bring the application.

For reasons set out above, I am of the view that the first respondent's opposition in this regard was misplaced. However, even if the first respondent believed that the applicant did not have the "*capacity*" to litigate in order to secure transfer of the funds of the Trust into the Investec bank account, there still remains no good reason for the first respondent not to have nonetheless tendered transfer of the funds of the Trust into the Investec bank account. He does not explain why he has not done so. Had he done so, this litigation would have become academic.

43.5. In a nutshell, the first respondent has held onto funds of the Trust when, to his knowledge, he has no entitlement to do so. And, if he has no entitlement to retain control of those funds, he could have been under no illusion that the only person who has such entitlement is the applicant (*qua* trustee of the Trust), whether or not the applicant has been remiss in his own duty to appoint a second trustee.

[44] As regard the third respondent, no relief was sought against him. However, he chose to join the first respondent in the first respondent's opposition to this application. There is then no reason for him to escape the cost consequences of his conduct in this regard. And, he could have been under no illusion, having been party to the circumstances which resulted in the formation of the Trust for the benefit of his own children, that property of the Trust cannot be held by anyone but the trustee of the Trust, even at a time when there is only a single trustee.

[45] In my view, the circumstances leading to the application having been instituted indicate that if the first respondent had conducted himself as he ought to have, then the application would not have been necessary in the first place. And, once the application was brought, there was no justification

for the first and third respondents to oppose the application, nor was there any justification for the first respondent not to have, in any event, tendered transfer of the funds of the Trust into the Investec bank account.

[46] In these circumstances, an attorney-client costs order against the first and third respondents is warranted.

[47] Accordingly, I make an order in the following terms:

47.1. The first respondent is ordered to, forthwith, transfer all funds currently held in Standard Bank account number 61470317 in the name of SAC Salzman at the Killarney branch of Standard Bank into the Investec Bank current account number 10011887899 in the name of the SAC Salzman Trust held at the Port Elizabeth branch of Investec Bank, branch code 580105.

47.2. The first respondent is ordered, within five court days from the date of this court order, to deliver to the applicant all documents of whatsoever nature which relate to the aforesaid Standard Bank account number and to the affairs of the SAC Salzman Trust and which are in the first respondent's possession or under his control.

47.3. The first and third respondents are ordered, jointly and severally, to pay the costs of this application on an attorney-and-client scale.

BHAM AJ

Heard: 26 April 2017
Judgment delivered: 5 May 2017

Appearances:

For Applicant – Advocate S C Rorke SC, instructed by Mervyn Taback Incorporated.

For First and Third Respondents: Advocate S Pincus SC, instructed by Stephen Melamed & Associates Inc.