

REPUBLIC OF SOUTH AFRICA  
IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG

REPORTABLE: Yes  
OF INTEREST TO OTHER JUDGES: No  
DATE: 30/6/2021

Case No.: 2020/11552

In the matter between:

B.R.R

Applicant

and

M.B.J

First Respondent

FERREIRA, GEOFF

Second Respondent

THE MASTER OF THE HIGH COURT, JOHANNESBURG

Third Respondent

JUDGMENT

*This judgment was handed down electronically by circulation to the parties' legal representatives by email and is deemed to be handed down upon such circulation.*

Gilbert AJ:

1. This is a dispute between the trustees of a testamentary trust. The testator, an attorney and a mother of three children, executed a Will on 30 August 2016. The testator passed away on 22 February 2018. Pursuant to the Will, the whole of the deceased estate (other than personal effects) devolved on the trustees of a testamentary trust. The trustees are required to administer the trust in their discretion for the care, upbringing, maintenance, education and benefit of the three minor children. The testator appointed as trustees her father (who is the first respondent), her husband (who is the applicant) and the second respondent, an attorney of Pretoria.

2. With effect from September 2019 the trust has paid R20 000.00 per month to the three minor children as beneficiaries, effectively as maintenance. The applicant as the father of the minor children is dissatisfied with this, and seeks a monthly contribution towards maintenance of R41, 760.00 from the Trust. The first and second respondents as trustees have declined to pay the increased amount, contending that the applicant has not provided them with the necessary documents and information to enable them to responsibly determine an increase.

3. This has pitted the applicant who is a trustee against the first and second respondents, the remaining trustees.

4. The applicant seeks a variety of relief in these application proceedings launched by him during May 2020. The applicant seeks the removal of the first and second respondents as fellow trustees, contending that they have conducted themselves in such a manner that justifies their removal. The applicant seeks that the Master be directed to appoint independent trustees to the trust, after consultation with interested parties. The applicant seeks declaratory relief declaring that the minor children are capital beneficiaries of the trust. The applicant also seeks an order directing the trust to make an interim monthly payment of R43 533.27 to the beneficiaries until the newly appointed trustees are able to assess the monthly amount to be paid.

5. I refer to the first and second respondents as “the respondents”.

6. It is unclear from the applicant's founding affidavit in what capacity he seeks these various forms of relief. During argument, the applicant's counsel clarified that the applicant seeks relief as a trustee as well as in his capacity as the father and legal guardian of the minor children as beneficiaries.

7. The respondents are clearly cited in their personal capacities, which is necessary as the applicant seeks their removal as trustees.<sup>1</sup> Although not entirely clear, I accept that the applicant has also cited the respondents in their official capacities as trustees.

#### THE APPLICANT'S CLAIM FOR AN INTERIM MONTHLY PAYMENT

8. The applicant claims what is effectively interim maintenance on behalf of minor children as beneficiaries of the Trust. The applicant seeks payment of a specific monthly amount, and does not seek declaratory relief as to the obligations of the trust, if any, to make payment.

9. The applicant does not advance a legal basis upon which the trust can be ordered to make payment.

10. Clause 4.1 of the Will provides that:

*"The whole of [the testator's] estate (including immovable property) shall devolve upon the trustees of the Trust hereby created who shall retain and stand possessed thereof to be administered in trust by them in their discretion for the care, upbringing, maintenance, education and benefit of [the minor children] and my further children to be born, in accordance with the terms and stipulations of the Trust". (my emphasis)*

11. Clause 4.3 of the Will provides that:

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<sup>1</sup> *Stander and others v Schwulst and others* 2008 (1) SA 81 (C), para 32 to 34.

*“The Trustees of the Trust shall have all the powers, in their widest sense to provide for the advancement and maintenance of such beneficiary/ies subject to all the provisions of the Trust Property Control Act Number 57 of 1988”.*

12. Such rights as the minor children beneficiaries may have (and which can be asserted by the applicant as their legal guardian) are contingent or discretionary rights. Such payments that are to be made to the beneficiaries are clearly expressed in the Will to be in the discretion of the trustees.

13. In Cameron *Honore’s South African Law of Trusts*<sup>2</sup> the authors describe a trust as discretionary not only if the trustees have the discretion whether to pay income or distribute capital at all but also if the trustees have a discretion *how* much to pay or distribute.<sup>3</sup> In both those instances the beneficiaries will have contingent rather than vested rights. To similar effect, is the description by the authors in Geach & Yeats *Trusts: Law and Practice*<sup>4</sup> that a beneficiary has a discretionary right if the beneficiary will benefit *to the extent* that the discretion has been exercised in their favour.

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

15. A further difficulty is that the applicant, in seeking relief on behalf of the beneficiaries, has not cited himself as a respondent in his capacity as a trustee. A trite principle is that all trustees must be sued jointly when relief is sought against the trust.<sup>5</sup> In *Trustees of Wright v Executors of Wright* (1871-1872) 2 Roscoe 84 the then Supreme Court of Appeal of the Cape of Good Hope held that the plaintiff as

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<sup>2</sup> 5<sup>th</sup> ed. Juta (2002) (*‘Cameron’*) at pp 557, 558.

<sup>3</sup> See also *Burger v Commissioner for Inland Revenue* 1956 (1) SA 534 (W) at 536G.

<sup>4</sup> Juta (2007) (*‘Geach & Yeats’*) at p 120.

<sup>5</sup> *Land and Agricultural Bank of South Africa v Parker and others* 2005 (2) SA 77 (SCA), para 15, and para 39 to 44 where this also applies to litigation.

testamentary trustee was obliged to cite himself as defendant where he was also the executor of the deceased estate, albeit that he would then be both plaintiff and defendant but in different capacities.<sup>6</sup> Whether this is an overly formalistic approach need not be resolved in light of the other reasons why the relief cannot be granted.

16. To the extent that the applicant contends that as a trustee, rather than as the legal guardian of the beneficiaries, he is entitled to insist that the remaining trustees pay the increased amount to the beneficiaries, likewise no legal basis has been made out for such relief against his fellow trustees.

17. Clause 4.4 of the Will provides that “[a]ll decision by the Trustees shall be taken either by consensus or majority vote (if there are three Trustees)”. The applicant as one of three trustees is bound by the majority decision of the respondents.

18. There appears to have been some conflation in the papers between what rights the minor children may have against the trust as beneficiaries of the trust (which is regulated primarily by the law of trusts) and what rights they may have against the trust for maintenance proper based upon a possible duty of support owed by the trust to them. This is apparent from the applicant seeking that the court embark upon an enquiry into what would constitute payment of reasonable maintenance, which belongs in the realm of enforcing a maintenance obligation arising from a duty of support.

19. The parties accept that the purpose of the trust is to maintain the children. The papers and argument appear to be directed at the trust making payment to the minor children as beneficiaries of the trust in achieving that purpose. No attention had been directed in the affidavits or heads of argument to whether payments are to be made to the children arising from any duty of support that the trust may owe to the children, conceivably on the basis that the trust is a substitute or surrogate for the children's deceased mother who had a primary duty of support to her children.

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<sup>6</sup> This authority is cited as support for the proposition in *Cameron* at p 420 that it would seem that all the trustees holding office at the time should be joined as defendants or respondents, even if this means that the same person appears as plaintiff and defendant in two separate capacities.

Accordingly I make no finding whether the trust owes any duty of support to the children, and which may be enforceable in the usual ways that maintenance obligations are enforced, such as in terms of and/or through the mechanisms in the Maintenance Act, 1998.<sup>7</sup>

20. The testator's clearly expressed intention of the discretionary nature of the trustee must be seen as deliberate. If the relief were granted, and so the trust becomes obligated to pay the increased amount with the consequence that the beneficiaries then have a vested right to that amount each month that may have consequences, such as from a taxation perspective. This is one of the difficulties that may arise without proper consideration having been given by the applicant to the formulation of his relief and to the interplay and potential overlap between a claim for maintenance per se against the trust (assuming that there is a duty of support owed by the trust to the minor children) and a claim for payment on behalf of the minor children *qua* beneficiaries of the trust.

21. The respondents' counsel submission in her heads of argument that this relief claimed by the applicant is inappropriate as *"the applicant basically requests the court to take over the function of the trustees"* and that *"the claim is not based on any sound legal principles"* is correct. Although the respondents' counsel's further submission that *"no high court should be used as maintenance court"* may be pitched somewhat too widely, in the context of the present matter where no legal basis has been advanced by the applicant for the court to engage in an maintenance enquiry, the court cannot engage in that enquiry.

22. In the circumstances, the applicant's claim against the trust for the payment of an increased monthly amount fails.

## THE APPLICANT'S DECLARATORY RELIEF

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<sup>7</sup> Section 2(1) of the Maintenance Act, 1998 provides that the provisions of the Act shall apply in respect of the legal duty of any person to maintain any other person, irrespective of the nature of the relationship between those persons giving rise to that duty.

23. The applicant seeks an order declaring his three minor children as capital beneficiaries of the trust.

24. The dispute as perceived by the applicant on this issue, as appears from his founding affidavit, is that in the administration of the trust for the purposes of the care, upbringing, maintenance, education and benefit of the children, the respondents have adopted the position that the trust is an educational trust and that payments are only to be made out of interest and not from the trust capital while that applicant contends that payments can also be made from the trust capital.

25. It is to address this perceived dispute that the applicant seeks declaratory relief that the three children are capital beneficiaries.

26. As appears from their answering affidavit, the respondents accept that the minor children are capital beneficiaries and that the trust is not an educational trust. Nor have they at any stage asserted otherwise. The applicant disputes this in his replying affidavit, with reference to certain WhatsApp messages from the first respondent. Although the first respondent is particularly concerned with the education of the beneficiaries, as appears from the WhatsApp messages, those messages do not show, in my view, that the respondents insist that the trust is an educational trust or that payment can only be made to the beneficiaries from income.

27. The respondents' position is that the children are both capital and income beneficiaries and that reasonable payments should be paid first from any income, but, if necessary, also from capital. The respondents' position is also that the extent that there is any capital remaining when a child turns twenty-one years of age, then such of the capital as the trustees may decide in their discretion shall be distributed to that beneficiary.

28. Clause 4.2 of the Will provides that:

28.1. *"The Trust hereby created shall continue in respect of any beneficiary until that beneficiary attains the age of 21 (twenty one) in which event the Trust shall in respect of that beneficiary terminate and the trustees shall*

*distribute to such beneficiary so much of the capital of the Trust as they in their discretion may decide without being obligated to apply the principle of equality.*

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

30. The trust assets earn income. Given the stated purpose of the trust, it cannot be seriously doubted that the trustees can use the income to make payments to the beneficiaries. The testator could not have intended that the income earned on the assets be retained in the trust and capitalised, and only paid out to the beneficiaries upon the distribution of the capital when each turn twenty-one. The purpose of the trust, being the care, upbringing, maintenance, education and benefit of the children, would be defeated if they were not income beneficiaries as the need of the testator's minor children to be maintained would be when they are not yet twenty-one years old. That the testator was alive to income being used to pay beneficiaries, appears from the express exclusion in clause 5.4 of the Will of income being subject to any beneficiary's marital proprietary regime. The beneficiaries are clearly income beneficiaries.

31. The beneficiaries are also capital beneficiaries. The testator envisaged that there may be capital remaining when the beneficiaries turn twenty-one as the Will specifically provides in clause 4.2 for a distribution of capital in the discretion of the trustees to each beneficiary when they turn twenty-one.

32. The respondents are accordingly correct that the beneficiaries are both capital and income beneficiaries. The relief sought by the applicant that the beneficiaries are capital beneficiaries, without any reference to them also being income beneficiaries, therefore cannot be granted. Perhaps the applicant intended to seek a declarator that the beneficiaries are both capital and income beneficiaries, but that is not the relief sought (no request was made for amended relief) and in any event, as I have found, the respondents have not disputed that this is so.



33. It appears from the founding affidavit that the issue that the applicant wants addressed is rather whether the trustees are entitled to distribute the capital in fulfilling the purpose of the trust in maintaining the children should the income be insufficient to do so. Apart from this issue not being addressed by the formulated relief sought by the applicant, there is no dispute between the parties that the trust capital can be used if the income is insufficient. Although the applicant perceived there to be such a dispute, I have already found that the respondents accept that payments can be made from both capital and interest. I agree with the respondents that there is no need in these circumstances, where there is no dispute between the parties and where there was not full argument on this aspect, to make an order to this effect.

34. An ancillary issue arose between the parties regarding the distribution of the capital. The applicant contends that the trustees are obliged to distribute the capital (and presumably also the income, although this is not made clear) so that by the time the children turn twenty-one, the trust capital will have been depleted, i.e. that there will be nothing left in the trust to distribute as by then all the capital must have been distributed to their benefit, and particularly towards their maintenance. Actuarial calculations mandated by the applicant calculate what amounts can be paid to the beneficiaries, together with such income as the trust can be expected to generate, in order to achieve this outcome. The respondents disagree, contending that the trust specifically envisages capital remaining for distribution when the children turn twenty-one.

35. The declaratory relief sought by the applicant that the children are capital beneficiaries was motivated at least partially to resolve this issue. But the declaratory relief if granted would not resolve this issue because it does not follow upon a declaration that the minor children are capital beneficiaries that the outcome advanced by the applicant is correct.

36. In any event, I do not interpret the Will as reflecting the testator having intended that the capital of the trust must be depleted by the time her children turn twenty-one years of age. I refer again to clause 4.2 of the Will that specifically

envisages a distribution of capital to the children when they turn twenty-one, which presupposes that there may be capital remaining for distribution.

37. In any event, I envisage various difficulties in administering the trust to achieve the applicant's asserted outcome. For example, the applicant's actuarial calculations have as a key assumption that each child will receive the same monthly amount until age twenty-one. But the assumption is incorrect as the Will does not so provide nor in my view did the testator so intend. The eldest minor child turns twenty-one considerably earlier than the younger twins. The needs of the children are variable, such as for their education. The eldest child, who I understand is in high school, was born in 2005 while his twin sisters were born in 2014. It is understandable that the respondents as trustees may wish to retain funds in the Trust to cater for such contingencies as may arise, and which provides considerable scope for capital remaining when the twins turn twenty-one depending upon what contingencies materialise. This is consistent, in my view, with what the testator intended.

38. For these various reasons, the applicant's claim for declaratory relief fails.

DOES THE RESPONDENTS' CONDUCT IMPERIL THE TRUST'S ASSETS OR ITS PROPER ADMINISTRATION AND SO JUSTIFY THEIR REMOVAL AS TRUSTEES?

39. What remains is the applicant's claim for the removal of the respondents as trustees.

40. It is necessary to go beyond what are legal conclusions asserted by the applicant why the respondents should be removed as trustees and to distil the impugned conduct of which the applicant complains.

41. The applicant contends that the first respondent as the grandfather of the beneficiaries is in effective control of the assets of the trust and uses that control as leverage to advance his own personal agenda. That agenda, the applicant contends, is to coerce the applicant into giving the first respondent contact access to his

grandchildren and to appease the first respondent's insistence that his grandchildren go to private school in circumstances where the applicant contends that private school is unaffordable.

42. Allied to this, the applicant complains that there is a conflict of interests between the second respondent's professional business interests as an attorney and his fiduciary obligations to the trust as a trustee. The applicant contends that the second respondent as an attorney gets most of his legal work from the first respondent or companies allied to the first respondent and that for fear of losing this workstream, the second respondent, to use the words of the applicant, is the 'puppet' of the first respondent. In this manner the applicant contends that the first respondent is in effective control of the trust and its assets.

43. The applicant complains that the respondents deliberately delay considering the information made available by him to them to enable an appropriate payment to be made by the trust to the beneficiaries as maintenance.

44. The applicant also raises as issues justifying the removal of the respondents:

44.1. the respondents' failure to inform the applicant, although he is a trustee, of the transfer of the deceased's half share in an immovable property (which is co-owned by the applicant in his personal capacity) to the trust;

44.2. the respondents' failure to appoint auditors and other investment advisors to the trust; and

44.3. the respondents' failure to obtain the repayment of a deposit paid to a private school.

45. Before examining these complaints, the threshold that must be satisfied before the court will remove a trustee should be emphasised. The Supreme Court of Appeal recently in *Fletcher v McNair* [2020] ZASCA135 (23 October 2020) reaffirmed in paragraph 18 that a court has an inherent power to remove a trustee from office at common law as well as in terms of section 20(1) of the Trust Property Control Act, 1998 ("the Act").

46. Section 20 of the Act provides that:

*“A trustee may, on the application of the Master or any person having an interest in the trust’s 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.”*

47. The Supreme Court of Appeal distilled in paragraph 19 the following principles from a previous examination of the authorities undertaken by Petse JA in *Gowar and another v Gowar and others* 2016 (5) SA 225 (SCA),<sup>8</sup>

*“(a) the court may order the removal of a trustee only if such removal will, as required by section 20 of the Act, be in the interest of the trust and its beneficiaries;*

*(b) the power of the court to remove the trustee must be exercised with circumspection;*

*(c) the sufficiency of the cause for removal is to be tested by a consideration of the interests of the estate;*

*(d) the deliberate wishes of the deceased person to select persons in reliance upon their ability and character to manage the estate, should be respected, and not be likely interfered with;*

*(e) where there is disharmony, the essential test is whether it imperils the Trust estate or its proper administration;*

*(f) mere friction or enmity between the trustee and the beneficiaries will not in itself be an adequate reason for the removal of the trustee from office;*

*(g) mere conflict amongst trustees themselves is not a sufficient reason for the removal of a trustee at the suit of another;*

*(h) neither mala fides nor even misconduct are required for the removal of a trustee;*

*(i) incorrect decisions and non-observance of the strict requirements of the law, do not of themselves, warrant the removal of a trustee;*

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<sup>8</sup> Paragraphs 31 and 32.

(j) *the decisive consideration is the welfare of the beneficiaries and the proper administration of the trust and the trust property.”*

48. Particularly instructive for assessing whether the conduct complained of is sufficient to justify the removal of the respondents, are the following *dicta* from *Volkwyn NO v Clarke and Damant* 1946 WLD 456 at 464:

*“To my mind it is a matter not only of delicacy (as expressed in Letterstedt’s case [Letterstedt v Broers (1884) 9 AC 371 (PC) at 387]) but of seriousness to interfere with the management of the estate of a deceased person by removing from the control thereof persons who, in reliance upon their ability and character, the deceased has deliberately selected to carry out his wishes. Even if the executor or administrator has acted incorrectly in his duties, and has not observed the strict requirements of the law, something more is required before his removal is warranted. Both the statute and the case cited indicates that the sufficiency of the cause for removal is to be tested by a consideration of the interests of the estate. It must therefore appear, I think, that the particular circumstances of the acts complained of are such as to stamp the executor or administrator as a dishonest, grossly inefficient or untrustworthy person, whose future conduct can be expected to be such as to expose the estate to risk of actual loss or of administration in a way not contemplated by the trust instrument”;*

and later at 474:

*“... the essential test is whether such disharmony as exists imperils the trust estate or its proper administration.*

49. The Supreme Court of Appeal in *Gowar* with reference to *Volkwyn* concluded in paragraph 31 that:

*“Thus, the overriding question is always whether or not the conduct of the trustee imperils the trust property or its proper administration. Consequently, a mere friction or enmity between the Trust and the beneficiaries will not in itself*

*be adequate reason for the removal of the trustee from office. (See also in this regard Tijmstra NO v Blunt-MacKenzie NO and others 2002 (1) SA 459 (T) at 473 E-G). Nor, in my view, would mere conflict amongst trustees themselves be a sufficient reason for the removal of a trustee at the suit of another.”*

50. And so what I must determine is whether the conduct complained of by the applicant imperils the trust property or its proper administration.

The complaint that the first respondent is using the assets of the trust as leverage to advance his personal interests

51. The applicant contends that the first respondent has failed to administer the Trust for the sole and exclusive benefit of the beneficiaries and has only taken his, and the second respondent's, personal interests into consideration, and in particular is using the trust's assets to advance his personal interests.

52. The applicant does not seek to make out a case that the first respondent is making use of the trust assets for his own financial gain. Rather, the applicant contends, the personal interests that the first respondent seeks to advance are non-financial, particularly that the applicant restores contact access between the first respondent and his grandchildren (as the applicant has stopped the contact) and to appease his personal insistence that the grandchildren go to private school.

53. The applicant's contention is that the first respondent, with the second respondent as his puppet, holds the purse strings and he is able to control the flow of funds from the trust to the beneficiaries, and that unless the first respondent gets his way, he will exercise that control contrary to the purpose of the trust, which is to maintain the minor children. This explains why, the applicant continues, the respondents have failed to make a monthly payment towards maintenance any greater than R20, 000.

54. It is common cause that the applicant terminated contact between the beneficiaries and the first respondent as their grandfather during August or

September 2019. The first respondent in his personal capacity has launched proceedings for restoration of that contact, which is still to be decided.

55. It is also clear from the affidavits that the first respondent is eager that his grandchildren attend private school. The first respondent contends that such private schooling was an express wish of his daughter, the testator, so much so that he has personally offered and paid for private schooling for the children.

56. The applicant contends that these personal interests of the first respondent relating to his grandchildren conflict with his fiduciary duty as trustee to act in the best interests of the children as beneficiaries of the Trust. The applicant argues that the first respondent must be entirely impartial.

57. The applicant contends that as the first respondent as the grandfather has permitted his personal interests in relation to his grandchildren to intermingle with the exercise of his discretion as a trustee as to the maintenance to be paid by the trust to the children, he is not impartial and so unfit to be a trustee.

58. The applicant further contends that second respondent, who is a senior practising attorney, as well as the second respondent's attorneys firm VFV Attorneys of which the second respondent is a partner, are puppets of the first respondent. This, the applicant argues, is demonstrated by way of an analysis of the evidence.

59. The applicant referred to a series of WhatsApp messages and emails sent by the first respondent dealing with issues relating to his grandchildren. This includes his eldest grandchild's school fees and how he has personally contributed towards those school fees. The applicant also refers to an offer by the respondents as trustees for the applicant and the children to stay in the property which is half-owned by the trust (the applicant being the other half owner) free of charge as an interim solution until the property was sold. This, the applicant argues, is a conflation by the first respondent of his personal interests and those of the Trust.

60. This is further evident, the applicant argues, from the correspondence that emanates from the offices of VFV Attorneys, of which the second respondent is a

partner. VFV Attorneys acts for the first respondent personally in his application seeking restoration of access to his grandchildren. The applicant argues that this correspondence is problematic in that the second respondent is meant to be an independent trustee acting in the best interests of the trust beneficiaries and so cannot be acting for the first respondent in his personal capacity.

61. The letters that are attached to the papers demonstrate that VFV Attorneys represent the first respondent in his personal capacity. The applicant refers, for example, to a letter addressed by VFV Attorneys to the applicant's attorneys on 21 October 2019 which, on the one hand, deals with issues that relate to the first respondent's personal relationship with his grandchildren, such as various problematic Facebook posts of pictures of the grandchildren, contact between the minor children and their grandparents and issues relating to school, and on the other hand, with issues relating to the trust, such as the payment of maintenance.

62. As appears above, the overriding question is whether the respondents' conduct as trustees imperil the trust property or its proper administration.

63. In my view, the first respondent's understandable concerns to maintain contact with his grandchildren and their schooling does not imperil the trust property or its proper administration. There are no incidents described in the affidavits in which the first respondent states that unless he gets his wishes, he will use his powers as a trustee to stifle the flow of any payments to the beneficiaries. The beneficiaries are his grandchildren, and it is common cause that the grandfather has spent hundreds of thousands of rands from his own funds on their private schooling.

64. These are motion proceedings. As the applicant seeks final relief on motion, the usual *Plascon-Evans* approach applies in relation to any factual disputes that may arise, where the respondents' version is effectively to be preferred over that of the applicant<sup>9</sup> unless the respondents' version can be rejected as far-fetched and fanciful.<sup>10</sup>

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<sup>9</sup> Final relief can only be granted on motion if the facts as stated by the respondents, together with the admitted facts in the applicant's affidavits, justify the granting of the relief: *Plascon-Evans Paints*



65. In the circumstances, I cannot draw the conclusion on the papers that the first respondent has used or will use his position as trustee as leverage to advance his own personal agenda.

66. Total impartiality is not required. That there are circumstances that have the potential for a trustee to be partial does not automatically disqualify him or her from being a trustee. It is unrealistic to expect trustees to be totally impartial at all times. While it may be that professional trustees who are appointed as independent trustees can perhaps be expected to be impartial, in many trusts, including testamentary trusts, the majority if not all the trustees may be family members or other persons who have a close connection to the beneficiaries. Although it is desirable for there to be what has been termed an independent trustee or even to have a majority of independent trustees, it does not follow that every trustee must be so detached from the beneficiaries that they are totally impartial.

67. In the present instance, the testator, who herself was an experienced attorney, deliberately chose to appoint the three trustees. Two of those trustees were close family members, being her father, the first respondent and her husband, the applicant. These two trustees were no doubt chosen by the testator because of their close relationship with the grandchildren and so to expect of these close family members to the grandchildren to be totally impartial is unrealistic and detached from the testator's intention. It is inherent in the appointment of a trustee that is a close family member or friend that there may be a conflation of personal interests and what may be in the best interests of the beneficiaries. The challenge is to manage that tension, such as by the appointment of independent trustees.

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*Limited v Van Riebeeck Paints (Pty) Limited* 1984 (3) SA 623 (A) at 634 E-G, as reaffirmed in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 290 D-G. Effectively, any factual disputes ought to be resolved by accepting the respondents' version, save where such version is "so far-fetched or clearly untenable that the court is justified in rejecting (it) merely on the papers": *Botha v Law Society, Northern Provinces* 2009 (1) SA 277 (SCA) at para 4, with reference to *Plascon-Evans Paints*.

<sup>10</sup> Once the respondents' version is rejected as far-fetched and fanciful, there would only be one version before the court, namely that of the applicant and therefore the *Plascon-Evans* approach would not come into play as there would no longer be conflicting factual versions.

68. The Supreme Court of Appeal in *Parker* above in considering the nature of a family trust emphasised the desirability for independent trustees, particularly in ensuring that there is an adequate separation of control by the trustees from enjoyment by the beneficiaries. This is particularly necessary where the trustees and beneficiaries are the same. In the present instance, the first respondent is not a beneficiary, even indirectly and therefore this tension does not exist. This can be contrasted to the position of the applicant who as the father and legal guardian of the children does have an indirect financial interest in the trust's affairs as the payments made to the children as beneficiaries of the trust are used by him as their legal guardian to maintain them. The greater the monthly payment by the trust, then less the contribution required from the applicant as the father of the children. It is clear from the papers that there is a tension between that which he must financially contribute as the children's father to support them and the contribution he requires of the trust, of which he is a trustee, to contribute to their maintenance.

69. The suggestion by the Supreme Court of Appeal in *Parker* above at paragraphs 35 and 36 that there be an appointment of an independent outsider as a trustee to every trust in which the other trustees may lack a sufficiently independent interest in the observance of substantive and procedural requirements arising from the trust deed presupposes that those other trustees may be lacking in independence. It does not follow that those trustees are to be removed because of their relationship with the beneficiaries, and more so where the trustees enjoy no direct or indirect financial benefit as a beneficiary.

70. To similar effect is *Hoppen and others v Shub and others* 1987 (3) SA 201 (C) at 217F where there too it was inherent in the identity of certain of the trustees that they had a close relationship with the beneficiaries. What is required of a trustee is not total impartiality or no connection to the beneficiaries, but rather that he or she is capable of bringing the necessary independent mind to bear on the business of the trust and of deciding what is in the interests of the trust and its beneficiaries.

71. Although a situation can or does arise where the personal interests of a trustee conflict with those of the trust, that is insufficient in and of itself to justify the

removal of the trustee. What is required is that the trustee must have acted or is at risk of acting in a manner that imperils the trust's assets or its proper administration.

72. In my view, the applicant has failed to demonstrate this in relation to this complaint by him.

The complaint that the second respondent is conflicted in respect of his professional financial interests and his fiduciary duties as a trustee

73. The parties refer to the second respondent, as a practising attorney, as an independent trustee. But what that entails is in dispute.

74. The Supreme Court of Appeal had this to say in *Parker* in paragraph 36:

*“The independent outsider does not have to be a professional person, such as an attorney or accountant, but someone who, with proper realisation of the responsibilities of trusteeship, accepts office in order to ensure that the trust functions properly, that the provisions of the trust deed are observed, and that the conduct of trustees who lack a sufficiently independent interest in the observance of substantial and procedural requirements arising from the trust deed can be scrutinised and checked. Such an outsider will not accept office without being aware that failure to observe these duties may risk action for breach of trust.”*

75. Geach & Yeats<sup>11</sup> have this to say in relation to the appointment of independent trustees:

*“Exactly what would be an independent trustee is neither defined nor prescribed, but it is submitted that common sense should prevail and that it is usually fairly obvious for a person who is truly independent of another. ... What often happens in practice is that a planner appoints existing professional advisors as trustees. So for example, a planner may be the shareholder in the*

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<sup>11</sup> At p 41.

*company to which business is conducted, and may appoint the auditor of that company and a person who gives legal advice to the company as trustees of the planner's family trust. In reality, these persons may not be 'independent' in the sense required, because they are likely to accede to the wishes and demands of the planner without objectively taking into account all beneficial interests and all circumstances before arriving at a decision. The risk of losing lucrative audit and consulting fees must simply be too great if these trustees oppose the views or wishes of the planner, and hence they may not act in the manner that should legitimately be expected of a trustee."*

76. The applicant asserts that the second respondent, a senior attorney and partner of VFV Attorneys suffers from a conflict of interests in that he obtains most of his legal work from the first respondent or companies associated with the first respondent. The applicant argues that because of this valuable workstream, the second respondent is unlikely to jeopardise that workstream by not doing that which is required of him by the first respondent in relation to the affairs of the trust and that therefore he is not only conflicted but, to use the words of the applicant, is the first respondent's "puppet".

77. This is a serious assertion to make, particularly of a senior practising attorney. It is a serious matter for the court to remove someone from a position of trust, as appears from *Volkwyn* above, and especially a professional trustee such as a senior attorney. Sound evidence would be necessary for a court to remove a trustee, which is not a particularly easy task when that relief is sought in motion proceedings.

78. The applicant says the following in his founding affidavit:

*"... the second respondent obtained the majority of his business in his capacity as an attorney from the First Respondent ... This is to the extent that, in the administration of the Trust, the Second Respondent acts as a 'puppet' for the First Respondent, as should he act independently, he would stand to then lose business from the First Respondent."*

79. The first and second respondents each deny these allegations.

80. There is no cogent evidence to support the applicant's bold averment that the second respondent does the first respondent's bidding because of fear of the second respondent or the firm of which he is a partner losing the custom of the first respondent or any companies associated to him, or that he does not bring an independent mind to bear on the affairs of the trust.

81. The first respondent confirms a professional relationship exists between the second respondent and himself, and also between his employer company and its various affiliates, and the second respondent. These averments are confirmed under oath by the second respondent.

82. The testator nominated the second respondent, knowing of the existing professional relationship between the second respondent and her father, the first respondent. The professional relationship was inherent in the testator's choice of the trustees. The testator's choice of trustees is to be respected. That this professional relationship may render the second respondent not fully independent does not, in my view and in the context of the prevailing facts, justify his removal.

83. The applicant complains that a conflict of interests on the part of the second respondent arises because the second respondent acts for the first respondent personally in the first respondent's legal disputes with the applicant in relation to the grandchildren, such as in relation to restoration of contact, while at the same time being a trustee that owes a fiduciary duty to the trust.

84. The respondents point out that the second respondent does not represent the first respondent in his personal disputes with the applicant but rather another attorney from VFV Attorneys, Hein Beukes. The respondents point out that the correspondence that emanates from VFV Attorneys in relation to the first respondent's personal litigation is from Beukes, in contrast to the emails that emanate from the second respondent relating to the affairs of the Trust. The respondents argue that it cannot be said that the second respondent is acting for the first respondent in his personal capacity.

85. The applicant's retort is that just as the second respondent is the puppet of the first respondent, so too is Beukes a puppet as he is from the same attorneys firm. Again, no evidence is adduced of this serious assertion. The applicant points to the letters addressed by Beukes which, the applicant argues, conflate the first respondent's personal interests relating *inter alia* to the restoration of contact with his grandchildren and their school fees with issues relating to the trust, such as maintenance and that this demonstrates the control that the first respondent exercises over the second respondent, and so the argument goes, over Beukes. I have already dealt with this correspondence and have difficulties with the logic of this argument. It is not clear to me why attorneys' correspondence that may deal with both the first respondent's personal issues and those of the trust is demonstrative of the first respondent controlling the second respondent, and his firm.

86. It is not necessary to determine whether the second respondent is entirely independent. The second respondent and his firm VFV Attorneys do have a professional relationship with the first respondent and, with regard to the caution sounded by Geach & Yeats, to this extent cannot be said to be truly independent. But then, as set out above, the testator was aware of this when appointing the second respondent. The first respondent was an attorney at a large law firm in Johannesburg and would have had access to any number of professionals to appoint as trustees but instead elected to appoint the second respondent. This deliberate choice of trustees by the testator is to be respected, together with the testator's knowledge of the professional relationship between the first and second respondents. Although as a general proposition a trustee must so far as possible avoid a position where private interests conflict with his or her duty as a trustee, as stated in Cameron at page 315, the practical reality is to be appreciated, such as in *Jowell v Bramwell-Jones and others* 2000 (3) SA 274 (SCA) at para 16, that a conflict may be inherent in or created by the will itself, and that such a conflict itself does not necessarily justify a removal of the conflicted trustee. While in a perfect world it may be preferable that the second respondent had no relationship at all with the first respondent and that the firm did not represent the first respondent in any litigation, the reality is that this is idealistic.

87. Ultimately, I am unable to find that such relationship as exists between the first and second respondents amounts to the second respondent being a puppet of the first respondent or that the relationship imperils the trust's assets or its proper administration.

Have the respondent trustees deliberately delayed paying maintenance to the beneficiaries?

88. The applicant contends that the respondents as trustees have deliberately frustrated the calculation and payment of maintenance in an appropriate amount. The applicant initially sought maintenance, in April 2019, in an amount of R60 000.00 per month. In July 2019 the applicant, after queries by the respondents together with requests for documents and information, reduced the request for maintenance to R41 760.00. The respondents sought still further documents and information. In December 2019 the trust began paying maintenance of R20 000.00 per month, backdated to September 2019. These monthly payments have since been made more or less regularly.

89. The applicant contends that these payments are too little and that the respondents are deliberately as trustees not doing what is necessary to properly calculate the reasonable maintenance requirements of the beneficiaries and to make payment of an increased amount.

90. The respondents contend that they have sought documentation from the applicant to enable them to undertake this calculation, including details of the beneficiaries' reasonable maintenance needs, details of the applicant's income as it is common cause that he is to contribute to the maintenance of his children proportionate to his income as well as details of the contributions made by the applicant's wife (as the applicant has since married) to the household necessities of the family unit consisting of the applicant, his wife and the three minor children.

91. The applicant contends that much of this information as is reasonably required has been provided while the respondents contend not. For example, in a series of supplementary affidavits filed in the months before the hearing of this

application, the respondents state that they have requested the applicant to furnish proof of his new income as he had since changed jobs but that this has not been forthcoming.

92. Bearing in mind that these are motion proceedings and that the respondents' version is to be accepted over that of the applicant unless the first and second respondents' version can be rejected as far-fetched and fanciful (which I cannot), I am unable to resolve these factual disputes.

93. I am unable to conclude that the respondents in seeking this information from the applicant before calculating an increased monthly payment necessarily imperils the trust's assets or its proper administration. Self-evidently as the applicant complains that the trust is paying too little rather than too much, the trust in making the payments that it does cannot imperil the assets. Presumably what the applicant seeks to assert is that the respondents' failure to properly calculate the monthly maintenance and to make payment thereof to the beneficiaries imperils the proper administration of the trust given that the purpose of the trust is the care, upbringing, maintenance, education and benefit of the minor children as the beneficiaries. I am unable to find that the respondents have conducted themselves in a manner that is contrary to what is required of them as trustees. Added to this is the difficulty discussed earlier in this judgment of the discretionary nature of the payments to be made by the trust and the applicant's conflation of this with what appears to be a perception on his part that the trust is obliged to pay maintenance in the usual sense arising from a legal duty of support.

94. That the respondent trustees, as a recognised majority in terms of the Will, exercise their discretion in a particular manner as to what monthly payments are to be made to the beneficiaries cannot constitute conduct justifying their removal because the applicant, even in his capacity as trustee, may disagree.

95. Much of the applicant's affidavit is from the perspective of the surviving parent looking for assistance to discharge his financial obligation to support his children rather than from the perspective of a trustee acting in the best interests of the trust. But it must not be overlooked that the applicant is one of the three trustees, with



powers and duties of a trustee. As a trustee, he is able to call upon the respondents as fellow trustees to attend trustees' meetings and formally engage with them on the issue of maintenance. These trustees' meetings would provide a forum at which documents and information can be exchanged and debated in seeking to agree on an appropriate amount to be paid to the children as beneficiaries, based upon their reasonable needs and what the trust can afford. This would be preferable to a letter-writing campaign between the parties' respective attorneys.

96. The applicant has not sought to call a trustees' meeting other than a singular request on 5 December 2019. The applicant's explanation for not calling for trustees' meetings is that it would be pointless as the respondents have set themselves against him and as the second respondent is the puppet of the first respondent.

97. After the launch of these proceedings, during January 2021 the respondents requested the applicant to attend a trustees' meeting to be held on 29 January 2021. The applicant explains in a supplementary affidavit that upon legal advice and taking into account the pending litigation, he declined to attend the meeting on the basis that:

97.1. the respondents continuously request financial information which he has already provided to them but to no avail;

97.2. the respondents had refused to step down as trustees and were not acting independently in the best interests of the children;

97.3. the second respondent is a puppet of the first respondent based upon their business relationship and that he did not foresee any change in that relationship.

98. I cannot find, on these papers in motion proceedings, that the reasons advanced by the applicant for not attending a trustees' meeting are factually sound. And even if there is some factual foundation to what the applicant asserts, it is incumbent upon the applicant to engage with his fellow trustees at trustees' meeting and to formally place these issues on the record. The applicant as a trustee cannot decide not to attend trustees' meetings but still complain that the Trust is not being conducted properly by the other trustees, especially when he has been invited to

engage with them at a meeting. Similarly, that the applicant has launched legal proceedings against the respondents in their personal capacities seeking their removal does not in my view absolve the applicant from attending trustees' meetings to see whether the contentious issues can be addressed, such as the calculation and payment of an increased amount as maintenance.

99. In the circumstances, I am unable to find that the respondents have deliberately conducted themselves in a dilatory or obfuscatory manner to frustrate the purpose of the trust.

#### The applicant's further grounds of complaint

100. The applicant and the testator, his wife, co-owned the immovable property that served as their home. When the testator died, her half-share formed part of her deceased estate and which devolved in terms of the Will to the trust, with the applicant remaining a co-owner.

101. The applicant's complaint is that he was not told of the formal transfer of the deceased estate's half-share to the trust and that this shows that the respondents are side-lining him. The respondents maintain that this was an oversight but that had the applicant engaged with them as a trustee such as at the trustees' meetings, he would have learnt of this. In any event, it would have been plain from the liquidation and distribution account of the deceased estate that this was to take place and the applicant could not have been surprised at the half-share being formally transferred from the deceased estate to the trust. Further, as incorrect decisions and non-observance of the strict requirements of the law, do not of themselves, warrant the removal of a trustee, as found in *Volkwyn* at 464 and affirmed in *Gowar* at para 30 and *Fletcher* at para 19, then so too an oversight of this nature. In any event, I fail to see how the trust assets or its proper administration is imperilled by this conduct.

102. What is problematic in relation to the immovable property now co-owned by the trust and the applicant personally, and as raised by the respondents, is that the applicant without the consent and knowledge of his fellow trustees concluded a lease agreement to rent the property to a third person. The applicant is the co-owner of the

property with the trust and was obliged to act jointly with the respondents as trustees in renting the property. But he did not do so. The applicant explains that he entered into the lease agreement in his personal capacity as he is a co-owner, but this is not a satisfactory explanation as the trust is a co-owner of the property. Neither has the applicant accounted for the rental that he has collected. Co-owners are entitled to the fruits of the co-owned property, including rent, in undivided shares.<sup>12</sup> The applicant contends that because he has paid the expenses relating to the property and the trust has not contributed to those expenses, he is entitled to take these into account in justifying his retention of the rental. But at the very least the applicant is to account to the trust. There is no evidence that the applicant has done any accounting or is likely to do so.

103. The applicant therefore appears to be making use of the trust's assets in the form of its half-share of the immovable property for his own benefit, but without a proper accounting.

104. Although the respondents belatedly in supplementary affidavits filed in the month preceding the court hearing indicated that they would seek the removal of the applicant as a trustee, at the outset of the hearing their counsel indicated that they would not be doing so, presumably, and understandably, because of the lateness in asking for such relief. The conduct of the applicant nonetheless remains relevant, as will appear below, to whether it would be in the interests of the beneficiaries to remove the respondents as trustees, leaving the applicant as a trustee.

105. The applicant complains that the respondents have not appointed auditors or other investment advisors for the trust. Again, this is an issue that should have been taken up by the applicant at a trustees' meeting. There is no requirement in the Will or the Act that an auditor, or any other advisor, be appointed. On the evidence in the affidavits, it does not appear that the non-appointment of an auditor investment advisor has imperilled the assets of the trust or its proper administration.

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<sup>12</sup> C G van der Merwe with Ann Pope in Du Bois ed. *Wille's Principles of South African Law*, 9<sup>th</sup> edition (2007) Juta at p 559.

106. Allied to this is the applicant's complaint that it is only he who has engaged the services of an actuary, who has compiled two actuarial reports as to what the trust can afford, while the respondents have not appointed an actuary. I have briefly commented on these actuarial reports procured by the applicant and why in my view the reasoning that underlies those calculations does not accord with the purpose of the trust. I cannot on the evidence before me fault the respondents, at least not to the extent that they should be removed, for having adopted the view that the applicant needs to engage with them in seeking to reach agreement on the reasonable needs of the children as the starting point to the calculation of appropriate payments to be made by the trust to them, before engaging in actuarial exercises.

107. The applicant complains that the respondents have not taken steps to recover a deposit paid to a particular private school and/or to arrange for that deposit to be transferred to another school which the beneficiaries may be attending. Having considered what evidence there is, I cannot quite see what the complaint is in this regard and certainly not to the extent that justifies the removal of the respondents as trustees.

108. In any event, it is not every failure by a trustee that will result in a trustee being removed from office. Ultimately, the removal will only be ordered in the event that the removal will be in the interests of the trust and its beneficiaries.

Why it would not be in the interests of the trust and the beneficiaries to remove the respondents as trustees

109. As to the overriding question whether the conduct of the respondents imperils the trust property or its proper administration, I find that the respondents have not so conducted themselves.

110. To the extent that there can be said to be any deficiency in their conduct or that it might (but not necessarily) be desirable that the second respondent or his firm does not act for the first respondent in his personal litigation, I am not of the view that it would be, to use the phraseology from section 20(1) of the Act, "*in the interests of*

*the trust and its beneficiaries*” to remove the respondents. Should leave be granted in the form sought by the applicant in his notice of motion seeking the removal of the respondents coupled with an order directing the Master to appoint independent trustees to the Trust after consultation with interested parties, the applicant would be the only trustee in office pending the appointment by the Master of those further trustees. This presents various difficulties and fortifies why a removal of the respondents would not be in the interest of the trust and its beneficiaries.

111. The Will in clause 2 provides that there shall at all times be not less than two nor more than three trustees of the trust and, if the number falls below two, the remaining trustees shall forthwith assume another or others to act with them. If the relief sought by the applicant is granted, the trust will be incapacitated as there will be less than two trustees in office.<sup>13</sup>

112. Should the applicant as the remaining trustee exercise the power of assumption, it will be left to him to decide who the remaining trustees would be who are to be so assumed. Effectively, control of the trust will end up with the applicant, which is an undesirable state of affairs.

113. As set out above, the applicant’s conduct in leasing the property of which the trust is a half-owner and his failure to account for the revenue generated by the property is concerning. Further, the applicant has an indirect financial interest in payments to the beneficiaries given that as the father of the beneficiaries with a duty of support, he is financially interested in any contribution to the support of the children that the trust may make. The greater the trust’s monthly contribution, the lesser his financial outlay to support his children. If the applicant is in effective control of the trust, there would be no checks and balances in place to address any conflict between the applicant’s personal financial interests and his interests to act in the best interests of the trust.

114. That this is a real concern appears from an email attached by the applicant to his founding affidavit. On 4 December 2018 the second respondent in his capacity as

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<sup>13</sup> *Parker* at para 11.

a trustee addressed an email to the applicant as well as to the first respondent. This appears to be correspondence between the trustees. In this email the second respondent raises what he describes as the primary issue being the maintenance of the children and the monthly contribution that is expected from each of the trust and the applicant, with the best interests of the children as beneficiaries being the primary consideration. In this email the second respondent recorded that there is a joint duty between the applicant and the trust to contribute towards the reasonable needs of the children and that this must be apportioned according to the means of the parties based upon the joint disposable income of the respective parties. This, the second respondent records, requires a consideration of the applicant's monthly earnings. The second respondent then proffers his view as to what are unnecessary expenses in relation to the children.

115. The applicant's wife, who he married after the death of the testator, commented on these issues raised by the second respondent in his capacity as a trustee in the form of making comments within the body of the second respondent's email and then forwarding those comments to the applicant's attorneys. Effectively the email attached by the applicant to his founding affidavit contains the response by his wife to the second respondent's concerns, and which may have been intended for the benefit of the applicant's attorney. It is strange that the applicant chose to attach to his founding affidavit what may have been a privileged communication between attorney and client, but he has nonetheless done so, waiving any privilege. In any event, the applicant during argument raised no objection to the email being considered.

116. What is instructive from these comments by the applicant's wife is that there is a clear tension between the applicant's personal financial interests in seeking to obtain a greater proportion of the maintenance contribution from the trust as that would alleviate his proportionate contribution and his fiduciary interests as a trustee to advance the interests of the trust that he as the surviving parent contributes his fair and proportionate share. For example, the following comment from the applicant's wife is found in the body of the email in response to the concern by the second respondent that certain expenses including for entertainment are too high, and that savings must be achieved:

*“Again it is R[...] [the applicant] that must cut out his FULL entertainment costs (sorry, no dinners out or any form of lifestyle for you R[...]).”*

117. The relevance of these comments is that it would undesirable for the applicant to be in effective control of the trust, even for an interim period the Master goes about appointing independent trustees given the clear tension that exists between appeasing his personal financial interests as expressed by his wife (from which the applicant does not distance himself) and those of his appropriate contribution to the costs of maintaining his children. There is also merit in the respondents’ concern that the applicant’s wife may be exerting undue influence over the applicant. Although the applicant challenges the respondents as having adopted an irrelevant emotional approach at the applicant having remarried and that this is apparent from their affidavits in these proceedings, their concern cannot be rejected particularly where the applicant himself has adduced email correspondence demonstrating the close involvement of his wife in the affairs of applicant and potentially of the trust through the applicant. I do not make any positive findings in this regard, other than to find that a state of affairs exists that would not be in the interests of the trust and its beneficiaries to grant the relief sought by the applicant.

118. The applicant attached to his replying affidavit a “without prejudice” settlement proposal dated 4 September 2020, which is after the launch of these proceedings, and which the applicant asserts was a reasonable settlement offer. The applicant having decided to place this offer before the court, and so waive any legal privilege that may have attached to the proposal, enables the court to consider the offer in context.

119. Nearly a year earlier in October 2019 the first respondent had suggested that both he and the applicant resign, that the second respondent remain a trustee and that two other independent trustees (who are named) be appointed and that in the interim that maintenance of R20 000.00 per month be paid by the Trust. The response by the applicant’s attorney on 25 October 2019 is that the applicant agrees in the interim to payment of a monthly amount of R20 000.00 (backdated to September 2019) on a without prejudice basis, and that the applicant agrees to

resigning as a trustee and is agreeable to the respondents' proposal that second respondent remain a trustee (without any complaint that the second respondent is 'a puppet' for the first respondent) and the two named persons be appointed as independent trustees.

120. Pursuant to this exchange of correspondence, the trust subsequently commenced the monthly payments backdated to September 2019. According to the respondents, they then began implementing the agreement that the applicant and the first respondent resign as trustees and that the independent trustees be appointed.

121. The respondents contend that the applicant then reneged on the agreement in precipitously launching these proceedings. The respondents record that that it was with surprise that they were served with this application during May 2020. There was no preceding demand or forewarning by the applicant for the six months from December 2019 to May 2020 that proceedings would be launched to *inter alia* seek their removal as trustees. The first time that any challenge is made in relation to the second respondent's continued trusteeship is in the founding affidavit.

122. The respondents explain in their answering affidavit that after the application was launched in May 2020, they nevertheless sought to engage with the applicant's legal representatives to reach an amicable settlement and they proposed that the previous agreement be implemented that the applicant and first respondent resign as trustees and certain identified persons as independent trustees be appointed. The first and second respondents state that the applicant was no longer willing to execute the previous agreement, that he no longer considered himself bound to that agreement and that such counter-proposals as were made by the applicant were "*wholly unrealistic*" and were not accepted.

123. The applicant's response is that having subsequently reconsidered his position, he decided it was not in the best interest of the trust that he proceed with agreement.



124. It is in this context that the applicant's settlement proposal of 4 September 2020 that he chose to attach to in his replying affidavit is to be considered. The applicant's proposal was that he resign as a trustee, that the first respondent be removed as a trustee, that two independent trustees chosen by him be appointed, that the trust reimburse the applicant R1, 447, 038.76 and that the trust pay interim monthly maintenance for the children at R43, 533.27.

125. The applicant, referring to this proposal, explains in his replying affidavit:

*"71. In the settlement negotiations I was prepared to step down on the basis that three independent trustees be appointed, whom I could elect.<sup>14</sup>*

*72. The reason for requesting same is based on the conduct of the Second Respondent and my concern regarding him working as a puppet as he had been doing, for the First Respondent.*

*73. This then, without the appointment of the two independent trustees elected by myself will not be of any favour and/or resolve the issue before the Court.*

*74. The Respondents refused this offer and further refused to accept our proposed settlement agreement. This once again demonstrated the fact that the First and Second Respondents are afraid to lose the financial control of the Trust in order to dictate to the Trust what they deem to be appropriate, which has not been exercised in terms of their fiduciary duty.*

126. The difficulties that emanate from the position adopted by the applicant are readily apparent. The applicant insists that it be him who elects who the trustees are to be that are to be appointed. This stance resonates with his approach in the present proceedings where should he be granted the relief that he seeks he will remain the sole trustee of the trust and with the powers of assumption will be able to assume trustees of his choosing. The relief that the applicant presently seeks goes one step further in that now the applicant will remain as a trustee, in contrast to his previous proposal where he would step down but would choose two independent trustees to be appointed.

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<sup>14</sup> This is somewhat inconsistent with the proposal.

127. The proposal made by the applicant is that the trust reimburse him (in his personal capacity) an amount of R1 447 048.76 and that the trust pay increased maintenance on a monthly basis of R43 533.27. The conflicts of the applicant's personal interests and those of a trustee are manifest. The respondents argue, with justification, that the applicant's unreasonableness is apparent from this proposal.

128. I have already raised concern at the applicant's failure as trustee to invoke his powers and discharge his duties as a trustee such as convening trustees' meetings and attending trustees' meeting when called upon to do so by his fellow trustees.

129. In the prevailing circumstances, it will not be in the best interests of the trust and its beneficiaries to grant the relief sought by the applicant which effectively places the applicant in control of the trust, even if on an interim basis. The applicant's counsel realising these difficulties during the course of argument suggested various reformulated relief that the court could consider granting in the form of further and/or alternative relief as prayed for in the notice of motion. Without the applicant having formulated such relief and having made out a case for that relief and having afforded the respondents an opportunity to deal with such reformulated relief, it will not be appropriate to do so.

130. While it is not an entirely satisfactory state of affairs that the *status quo* remains given the discord between the trustees, the Supreme Court of Appeal has recently in *Fletcher*, in overturning the decision of the Full Bench in *McNair v Crossman* 2020 (1) SA 192 (GJ), made it clear in paragraph 36 that a lack of trust, respect or compatibility among trustees is not a basis for the removal of trustees unless the trust property is imperilled or the proper administration of the trust is placed at risk.

131. The Supreme Court of Appeal also made the observation in paragraph 32 that if both sets of trustees were responsible for the state of enmity, lack of trust and respect, it is inexplicable why the one set of trustees is to be removed but not the other, particularly in motion proceedings where a final order cannot be granted where there is a real, genuine and *bona fide* dispute of fact.

132. In the present instance the applicant is at the very least also responsible for such discord that may exist between the trustees. It is therefore not open to me to remove the respondents but not him.

133. I am not satisfied that the conduct of the respondents imperils the trust or its proper administration or that their removal would otherwise be in the interest of the trust and its beneficiaries.

134. The removal of the respondents as trustees, with related relief, is not granted.

135. The applicant has not succeeded in any of the relief sought. No submissions were made as to why costs should not follow the result or why if the applicant failed that the costs should not be paid by him personally. Given the nature of the relief sought by the applicant, it is appropriate that he pay the costs.

136. The first and second respondents did not seek an order that in the event that they succeeded that they be indemnified by the trust in respect of such costs as they incurred in opposing the litigation.<sup>15</sup>

137. The following order is made:

137.1. The application is dismissed;

137.2. The applicant to pay the first and second respondents' costs.

Gilbert AJ

Date of hearing: 2 June 2021

Date of judgment: 30 June 2021

Counsel for the applicant:

Ms K Howard

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<sup>15</sup> Contrast *Stander* above, para 58.

Instructed by:

Jennifer Scholtz Attorney

Counsel for the

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Ms I Vermaak-Hay

Instructed by:

VFV Attorneys