

**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 64416/2009

**REPORTABLE: NO.
OF INTEREST TO OTHER JUDGES: NO
REVISED.**

DATE: 25 NOVEMBR 2022

In the matter between:

E[....] B[....] L[....]

Applicant

and

N[....] E[....]2 K[....]

Respondent

ADVOCATE M W DLAMINI SC

Curator ad Litem

Summary: Minor – minor permanently seriously disabled – parents estranged – creation of a trust to protect and manage proceeds of a damages claim – principles set out in *The Master of the High Court Pretoria v Pretoria Society of Advocates and Others* [2022] ZAGPPHC 396 (20/5/2022) applied and powers of trustees limited.

ORDER

1. The balance of the damages paid by the defendants in Case No 664416/2009 (being the total settlement amount less the nett attorney and client fees in relation to the action payable to the parties' attorneys of record therein and the amounts paid by the attorneys in whose trust account the moneys had been paid pursuant to interim orders of this court and less the costs referred to in paragraph 4 hereunder) (the "nett damages") shall be paid over to a Trust to be created in accordance with the draft Trust Deed annexed hereto marked "A".
2. The Trust shall have, as its objective, the management and administration of the nett damages and any income derived thereon for the benefit of T[...] L[...] as sole capital and income beneficiary.
3. The Trustee shall be obliged to furnish security to the satisfaction of the Master for the discharge of his duties and for due compliance of all his obligations towards the Trust.
4. The applicant's attorneys are entitled to recover the costs of this application, save those occasioned by the opposition thereto, from the damages amount referred to in paragraph 1 hereof, before payment of the nett damages to the Trust.
5. The respondent is ordered to pay the applicant's costs occasioned by his opposition to the application on a party and party scale (including all previously reserved costs).
6. The respondent is ordered to pay those costs of the *curator ad litem* not already included in previous costs orders, on the scale as between attorney and client.
7. Until the creation of the Trust and the payment of the nett damages thereto, paragraphs 3.1, 3.2 and 3.3 of the order of this court dated 22 July 2021 shall remain operative.

J U D G M E N T

DAVIS, J

Introduction

[1] This is an “implementation application” dealing with how the nett proceeds of a damages claim in favour of a minor should be managed, in order to have the funds protected and administered for and on behalf of the minor.

[2] The applicant in the application is a single parent. She is a nurse and the mother of a boy child T[....] L[....], born on 27 October 2006 (“the minor”). The respondent is the biological father of the minor. The applicant and the respondent were never married and are completely estranged from one another. The minor is in the care of the applicant and resides with her.

[3] As a result of birth complications, the minor is blind, deaf and severely brain-damaged. An action for the recovery of damages based on medical negligence had been instituted against a private hospital and a healthcare practitioner. After extensive and drawn-out litigation, the action was eventually settled in an amount of some R10, 8 million. The net proceeds of this amount is still in a trust account under the control of the applicant’s attorneys. This application is about the future protection, administration and management of those funds and the current dispute finally distilled to arguments about trusteeship and contents of a trust to be created.

Litigation history

[4] In order to appreciate the reasons why the implementation of an order for protection of the funds resulted in further extended litigation, the litigation history of the matter needs to be explained. It is, in summary, the following:

- 1 February 2009 - The action for damages is instituted.
- 10 June 2019 - The defendants make an order of settlement.
- 14 June 2019 - The offer of settlement is accepted.
- 14 June 2019 – 12 July 2019 - Extensive correspondence is exchanged between the applicant and the respondent regarding the future protection and management of the funds.
- 29 September 2020 - The applicant's application for the appointment of a *curator ad litem* for the minor is served on the respondent.
- 7 October 2020 - The respondent delivers a notice of intention to oppose.
- 11 February 2021 - The applicant invites the respondent to withdraw his opposition and to allow the appointment of a curator to proceed on an unopposed basis.
- 18 May 2021 - The respondent belatedly delivers an answering affidavit.
- 19 May 2021 - The respondent delivers a condonation application for his late answering affidavit.
- 21 May 2021 - The matter is referred from the unopposed roll to Van der Schyff J for judicial case management.
- 14 June 2021 - Condonation is granted for the late answering affidavit and further case directives are issued.
- 22 July 2021 - The matter proceeds as an opposed application before Van der Schyff J despite the respondent's failure to timeously deliver heads of argument. A *curator ad litem* is appointed.

5 August 2021 - The respondent delivers an application for leave to appeal against the appointment of the *curator ad litem*.

1 September 2021 - The application for leave to appeal is dismissed.

7 September 2021 - The respondent launches an application for an interdict to prevent the applicant and the curator “from executing” the order of 22 July 2021.

15 September 2021 - The curator delivers his report, recommending the creation of a trust.

1 October 2021 - The respondent belatedly applies to the Supreme Court of Appeal for leave to appeal the appointment of the *curator ad litem*.

7 October 2021 - The answering affidavit to the interdict application is delivered.

15 November 2021 - The respondent belatedly delivered his replying affidavit in the interdict application.

11 February 2022 - Leave to appeal is refused by the SCA, rendering the interdict application moot.

9 March 2022 - The applicant’s attorney delivers a supplementary affidavit in the interdict application, appraising the court of the SCA decision and correspondence that followed thereupon.

22 March 2022 - The interdict application is withdrawn. The respondent refuses to tender the costs thereof.

27 May 2022 - The interdict application is heard in respect of the issue of costs.

15 June 2022 - Judgment is rendered in respect of the interdict application and its costs and the costs of the curator.

13 August 2022 - After further case management the “implementation application” is finally heard. The applicant and the curator proposed a draft trust deed.

23 September 2022 - The parties make further submissions regarding the contents of a proposed trust deed.

The relevant principles

[5] The issue of protection and administration of the proceeds of damages claims in personal injury matters for the benefit of those who are incapable of managing those proceeds themselves, including minors, featured in a recent judgment by a full court of this division in *The Master of High Court v The Pretoria Society of Advocates and Others*.¹

[6] In *The Master* the full court acknowledged that the creation of trusts often provides more flexibility than has customarily been the position where a curator had been appointed. Each matter will, however, still depend on its own facts. In the event that a trust is created, the powers of a trustee, must be properly prescribed in the proposed trust deed, as well as the trustee’s remuneration. Other aspects which must be catered for are the termination of the trust and the identity of the trustees themselves.

[7] Regarding the identity of the trustees, in *Dube NO v Road Accident Fund*² this court held that in respect of trusts established for minors “*unless it is undesirable, a guardian should participate as a co-trustee*”.

[8] In instances where *curators ad litem* have been appointed, they should have regard to the various aspects listed in para 161 (j) in *The Master* when reporting to the court. It is not necessary to list all the aspects mentioned there. For purposes of the present matter, the most relevant are that the curator must investigate and report on the form of protection of the damages award proposed and whether the parents of the minor should be appointed as co-trustees.

¹ [2022] ZAGPPHC 396 (20/5/2022) as yet unreported (*The Master*)

² 2014 (1) SA 577 (GSJ) at para [26] (*Dube*).

The reports of the *curator ad litem*

[9] In the order of 22 July 2021 by Van der Schyff J, she ordered the curator ad litem to report on the following:

1.1 *Whether the applicant and respondent respectively are suitable and able to be appointed as either sole trustee or as joint trustees to and of the inter vivos trust (created or to be created for the sole benefit of T[....]) (“the trust”) to be appointed to receive, manage and administer the balance of the damages paid (and/or to be paid) by the defendants in case number 64416/2019 (being the total settlement amount less the attorneys of record therein and deducted from the total settlement amount) (“the net damage”) in respect of the actin instituted against such defendants by them on behalf of T[....];*

1.2 *Which conditions are subject to which safeguard they should be so appointed;*

1.3 *Who would be a suitable independent and able candidate to be appointed as a trustee of the trust;*

1.4 *The appropriate terms of the trust”.*

[10] In his first report, the *curator ad litem*, Adv Dlamini SC, indicated that he had attempted to conduct interviews with both the applicant and the respondent, but only the applicant responded to his invitations. He identified the core dispute between the parties being the identity of the trustees. The applicant was of the view that the trust should be administered by “*an independent, professional, sole trustee*” while the respondent was of the view that he and the applicant should be joint trustees.

[11] From an interview with the applicant, the curator established that the minor is currently residing with the applicant and is in her care. The applicant also told the curator that the respondent initially supported the minor but that things “*had changed when the minor turned three years old*”. At the time when the applicant was still

attending the S.G Lourens Nursing College, the minor was temporarily cared for by her parents. This was in 2007, even before the damages action had been instituted. Since 2009 when the parties' relationship finally terminated, the respondent stopped voluntarily supporting the minor. He also had never paid damages as required by customary law.

[12] After completion of her studies, the applicant enrolled the minor in a school for the mentally handicapped. The respondent refused to pay the school fees, prompting the applicant to obtain an order in the maintenance court. The respondent has no bond with the minor child and last saw him during a visit in 2018. Despite his neurocognitive defects, the minor is still able to develop a relationship and a sense of affection. He recognizes the voices of those close to him and is capable of establishing a bond with those who cares for him.

[13] The applicant had indicated that she is not familiar with the administration of trusts and that, apart from her not having the necessary skills, the disagreements between her and the respondent regarding the needs of the minor and how to best cater for them would make it impossible for them to function as co-trustees. She experienced the respondent to be a "difficult" person and inconsiderate of the needs of the minor.

[14] Despite the respondent's refusal to be interviewed by the curator, the curator invited suggestions from the parties regarding the appointment of an independent trustee. Again, only the applicant, through her attorneys, responded. The directors of the law firm proposed, being Wilsnach Pretorius Inc, whose directors are often appointed as trustees of protective trusts by this court, were suggested as trustees in this matter. The curator was satisfied that the alternate directors proposed as trustees have the necessary skills and experience to act as trustees for a trust such as the one contemplated.

[15] The curator also made necessary enquiries as to the trustees' fees and had regard to the contents of a judgment by Victor J in this court in *N Radebe obo NS Radebe v The MEC for Health, Gauteng*, Case No 2014/23231 on 27 May 2019 dealing with this issue. He found the fees to be reasonable. The curator referred to

the law regarding trusts and recommended that a trust be established for the administration of the funds in question and that the trustee furnish the requisite security to the Master.

[16] On 15 June 2022, during one of the case management meetings, I requested the curator to prepare a supplementary report addressing the concerns raised by the respondent in his answering affidavit in the implementation application which had been delivered subsequent to the filing of the curator's abovementioned report.

[17] The curator obliged and favoured the court with a supplementary report. In this report, the curator dealt with the views of the respondent that the funds in question be deposited in the Guardians Fund alternatively be placed under his control as sole trustee of a trust. The curator undertook an extensive comparison between the fees/costs and advantages/disadvantages between the administration of funds by the Guardians Fund and by a trustee of a trust. The curator also again had regard to *The Master* and the comparative exercises conducted in that judgment and concluded that a properly administered trust would, in the circumstances of this case, be in the best interests of the minor.

[18] The *curator ad litem* is thanked for his services and the assistance rendered to the minor and to this court.

The creation of a trust

[19] For purposes of determining the appropriate relief to be granted in the implementation application, the parties have submitted Heads of Argument (the respondent's heads were, in similar fashion as many previously delivered documents, again delivered late). For purposes of argument, I again urged the parties to address the issues raised in *The Master*.

[20] At the hearing of the matter the applicant had submitted a trust deed, providing for the independent sole trustee recommended by the curator. The draft deed did not, in my view, set out the fees and costs with sufficient detail and I had some concerns regarding the extent of the trustee's powers.

[21] The respondent had, apart from voicing criticism, not produced an alternate draft trust deed and in fact, apart from being obstructive, the respondent's position was unclear. Ms Mbanjwa who appeared for the respondent, denied that the respondent was obstructive but argued that his opposition had been adopted "as a matter of strategy". This was apparently based on the respondent's restated view that the curator was "tainted". Finally, Ms Mbanjwa argued that the respondent was not "opposed" to the creation of a trust, despite his opposition to the implementation application and his lack of making proposals regarding the terms of such a trust.

[22] The applicant undertook to deliver a revised trust deed pursuant to the concerns raised by the court and I allowed the parties the opportunity to deliver written submissions on the terms of such a proposed trust by 23 September 2022, which they did.

[23] In the final draft trust deed proposed by the applicant, the objective of the trust, being the proper administration of the funds, the accounting thereof, the fees of the trustee, the termination of the trust upon the death of the minor or by way of a court order, the proper care and maintenance of the minor, the furnishing of security and all ancillary matters were properly catered for.

[24] I did, however, effect some amendments to the trust deed as a court is empowered to do in its oversight role and as upper guardian of minors. For example, I deleted the powers proposed that the trustee may borrow money and encumber assets of the trust and that the trust may lend money "to any person". If the mother of the minor needs funds to care for the minor or to ensure that he has as proper roof over his head all the other amenities of life, then funds needed for that purpose should be made available by the trustee "for and on behalf" of the minor. There is no need to lend money to the mother (the applicant) "or to any person". Similarly, the trustee (and the trust) is there to look after the existing proceeds of a damages claim, to keep it safe and to properly administer it. There should be no need to borrow any more money from any other source, let alone encumber assets of the trust for this purpose. This court often encounters terms of this kind in trust deeds proposed for the sole purpose of safeguarding existing funds. The only interference is that the drafters of trust deeds proposed to a court merely "cut and

paste” terms which generally feature in other inter vivos trusts. This practice is inappropriate requires that each proposed trust deed must now meticulously be scrutinized.

[25] I also deleted provisions which cater for the trustee to be a contracting party with the trust. While this may be permissible subject to prior disclosure of interest and subject to the approval by the Master in an inter vivos trust, I can find no justification for it in “protective” trusts. The contracting of professionals to assist the trustee in the administration of the trust or services otherwise rendered in his professional capacity is elsewhere covered in the trust deed and there is no need for further contracting rights to be provided for the trustee.

[26] I am of the view that the parties should not be co-trustees, having regard to the acrimony between them and the applicant’s concerns against being forced to being part of the administration of the trust, both in general and in particular in conjunction with the respondent. Having regard to the respondent’s limited role in the life of the minor and his scant display of concern for the day-to-day needs of the minor, I also do not find that, should the applicant not be a trustee, that the respondent should be one. I find this to be an appropriate case where the trust should be in the hands of an independent, professional trustee, to the exclusion of the guardians of the minor. I have however, inserted provisions in the draft trust deed to the effect that the parties be furnished with copies of the audited trust statements and reports on the income generated by the trust assets (particularly in light of the fact that the respondent had boasted that he could generate much more investment profits than any trustee ever could).

[27] Needless to say, the draft trust deed finally submitted by the respondent, catering for the appointment of both himself and the applicant as “Category B” trustees is unacceptable. As “Category A” trustees, the respondent proposes individuals without naming them, or corporate institutions, which is contrary to the Trust Property Control Act 57 of 1988. The respondent’s proposed trust deed also proposes an “emergency fund” consisting of six times the monthly average distribution to the beneficiary and long-term investments “based on a clear investment strategy” generated by any of seven listed banks or insurance

companies. The trust deed then also caps the price of a residential property to be purchased (at R600 000-00) and the price of a sedan vehicle (at R200 000-00). These restrictions are imposed without any investigation of the current needs of the minor or, for example, of whether a sedan vehicle is at all practical. The respondent further proposes that the applicant “*who is the custodial parent, will provide her own furniture and electrical appliances*” and that this would be “*fair exchange for [her] right as the custodial parent to occupy the residential property which will be acquired by the Trust for the Beneficiary*”. The respondent also proposed that rights of parents as provided for in section 18 of the Childrens Act 38 of 2005 extensively form part of the terms of the trust, inter alia dealing with his rights to consent to the application for a passport for the minor or alienation of immovable property. Regarding termination of the Trust, the draft proposed by the respondent provides that, upon the death of the minor, the trustees should be “*empowered to prolong the life of the trust ... to ensure beneficial transfer ... to the Category B trustees*”.

[28] The terms of the trust deed proposed by the respondent are objectionable for a number of reasons additional to those already stated. The proposed investment terms are too restrictive in their formulation, the terms regarding the residence and the terms of how the mother of the minor is to be treated are objectionable and offensive and have no foundation, either in fact or morality. They reflect a complete lack of understanding of or empathy with the position of a single parent caring for a disabled child on a day-to-day basis without support, monetary or otherwise, from the father of the child. The inclusion of provisions of rights provided for in the Childrens Act into a trust deed are wholly inappropriate, including the provision for alteration or amendments of those rights without the intervention of a court. The prolonging of the life of the trust without following the course of law, not only offends against the findings made in *The Master* regarding the termination of trusts of this kind, but smacks of self-interest. It follows that this proposed trust deed should be rejected in its entirety.

Relief and costs

[29] From what has already been stated, it follows that the implementation application should succeed and that the creation of a trust as proposed by the applicant, with the terms as amended by the court, should be sanctioned.

[30] The costs incurred by approaching a court to ensure the sanctioning of the mode of protection of damages awarded to and for the care of the minor should be part of the costs of administering those funds. This means that the applicant's costs should be paid from the proceeds of the damages claim. This can be done prior even to the creation of the trust. If this cannot take place it should thereafter be paid by the trustee.

[31] It is, however, to be questioned whether the recovery of costs from the damages amount should include the costs occasioned by or incurred as a result of the respondent's opposition. While it is accepted that the respondent may have exercised his rights to address the court on the terms of a proposed trust and as to whether he should be appointed as a co-trustee or not, that could have been done by co-operation with the court-appointed curator or by delivering affidavits in this regard in the initial application upon the receipt of the curator's report or by even addressing the court at the hearing where that report was to be considered. That would all have been a reasonable exercise of the respondent's rights.

[32] But that is not what the respondent as an absent father did. In her reasoned written judgment whereby the curator was appointed, Van der Schyff J cautioned the parties to "*put their differences behind them*" and not to "*fuel the flames of discord*". She then ordered the parties to each pay their own costs on the basis that their respective positions were informed by what they then thought to be in the best interests of the minor.

[33] The respondent did not heed this caution. He sought to frustrate the work of the curator appointed to assist the minor and the court and attempted to appeal an unappealable order. In her written judgment dismissing the application for leave to appeal, Van der Schyff J found as follows: "*I have afforded the respondent the benefit of the doubt in the main application and accepted that his initial opposition to the relief sought was rooted in his concern for his child's best interest. The grounds*

of appeal raised, dispelled this view. The respondent is concerned with his own interests. In these circumstances, there is no reason to deviate from the principle that costs follow success". Costs were then awarded against the respondent.

[34] Undeterred, the respondent launched the interdict application to prevent "the execution" of the curator's appointment. The curator, mindful of the time limits imposed on him by Van der Schyff J, (rightly) considered himself bound to the court order and not the respondent's notice of motion. He then completed his task and delivered his report on 14 September 2021, explaining in his report why he had done so. Despite the "execution" which the respondent sought to prevent thereby having been carried into effect, the respondent did not withdraw his interdict application. Instead, he out of time launched a new application for leave to appeal, to the SCA. When the applicant answered to the interdict application, the respondent again took more than a month to deliver his replying affidavit.

[35] When the respondent's application to the SCA for leave to appeal was refused, rendering the interdict application moot, the respondent took more than another month to withdraw that application and when he did so, he refused to pay costs. The issue of costs was then dealt with by way of yet another opposed hearing. For reasons set out in the judgment in the interdict application, costs were awarded against the respondent on an attorney and client scale. These included the costs of the *curator ad litem*.

[36] In the judgment in the interdict application this court has already found that this "implementation application" was largely unnecessary and the sentiments expressed in paragraph 31 above were then already made. Despite this, as already indicated above, the implementation application was opposed without constructive alternatives put forward as to what would otherwise be in the best interests of the minor rather than the creation of a trust as proposed by the curator. Instead, the respondent launched a scurrilous attack on the curator without a shred of evidence, calling him "tainted" and accusing him of bias. Such conduct should attract the censure of this court by way of a punitive costs order. There is also no reason why the funds which form the subject matter of these proceedings should be depleted as a result of the litigation conduct of the respondent.

[37] In conclusion and, in the exercise of this court's discretion regarding costs, I find that from the funds held in trust (the balance of which is to be paid to the Trust) the applicant's costs should be paid but that the costs occasioned by the respondent's opposition to this application, including those costs of the curator not previously catered for, should be paid by the respondent. The costs order regarding the costs of the curator shall be on the scale as between attorney and client.

[38] During previous proceedings and the case management of this matter, I have directed that payments may be made for the interim care and maintenance of the minor as previously provided for in paragraphs 3.1 to 3.3 of the order of Van der Schyff J of 22 July 2021. These payments should continue until the Trust is finally created, in the interests of the minor.

[39] Order

1. The balance of the damages paid by the defendants in Case No 664416/2009 (being the total settlement amount less the nett attorney and client fees in relation to the action payable to the parties' attorneys of record therein and the amounts paid by the attorneys in whose trust account the moneys had been paid pursuant to interim orders of this court and less the costs referred to in paragraph 4 hereunder) (the "nett damages") shall be paid over to a Trust to be created in accordance with the draft Trust Deed annexed hereto marked "A".

2. The Trust shall have, as its objective, the management and administration of the nett damages and any income derived thereon for the benefit of T[....] L[....] as sole capital and income beneficiary.

3. The Trustee shall be obliged to furnish security to the satisfaction of the Master for the discharge of his duties and for due compliance of all his obligations towards the Trust.

4. The applicant's attorneys are entitled to recover the costs of this application, save those occasioned by the opposition thereto, from the

damages amount referred to in paragraph 1 hereof, before payment of the nett damages to the Trust.

5. The respondent is ordered to pay the applicant's costs occasioned by his opposition to the application on a party and party scale (including all previously reserved costs).

6. The respondent is ordered to pay those costs of the *curator ad litem* not already included in previous costs orders, on the scale as between attorney and client.

7. Until the creation of the Trust and the payment of the net damages thereto, paragraphs 3.1, 3.2 and 33 of the order of this court dated 22 July 2021 shall remain operative.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of hearing: 31 August 2022 (with further submission on 23 September 2022)

Judgment delivered: 25 November 2022

APPEARANCES:

For the Applicant:	Adv R Bowles
Attorney for the Applicant:	Adams & Adams Attorneys, Pretoria
For the First Respondent:	Ms L Mbanjwa
Attorneys for the First Respondent:	L Mbanjwa Incorporated Attorneys, Pretoria

Curator ad Litem:

Adv M W Dlamini SC

Attorneys for the Curator ad Litem:

Ngegebule Attorneys, Johannesburg

DEED OF TRUST

In pursuance of a Court Order of the High Court of South Africa (Pretoria High Court, Gauteng Division) dated 25 November 2022 in case no 64416/2009 in the matter between **T[....] L[....]** and **MEDI-CLINIC LIMITED - DR SFN KASIRYE**

entered into by and between

ADV MPIOLO W DLAMINI SC

Advocate representing the Plaintiff in the abovementioned matter (hereinafter referred to as the "**Donor**")

AND

HERCULES ALEXANDER SANDENBERGH

Or

CONSTANT WILSNACH

(hereinafter referred to as the "**Trustee**")

In terms of which the Donor donates to the **Trustee**, the sum of R100.00, which amount is to be held by the **Trustee** in the trust and be administered by him in terms of the conditions and terms of this Deed of Trust as in herein set out:

1. NOW, THEREFORE, IT IS CONFIRMED THAT

Once the Deed has been registered with the Master of the High Court and Letters of Authority have been issued to the **Trustee**, the nett proceeds ("**the proceeds**") of the settlement of the matter for compensation for injuries

sustained by the **Beneficiary** shall, pursuant to the direction/ order of the said Honourable Court be paid to the **Trustee** in trust on the terms and conditions hereinafter set out, which proceeds shall thereupon vest in the **Trustee** and which proceeds the **Trustee** by his signature to this Deed undertakes to accept for and on behalf of the **Beneficiary** upon the terms and conditions set out herein.

2. **NAME OF TRUST**

The trust shall be known as the **T[....] L[....] TRUST**.

3. **TRUSTEE**

3.1. The **Trustee** of this Trust will be the person described as **Trustee** in this Trust Deed. This office will be held by him for an indefinite period until his resignation or incapacity or the termination of the Trust;

3.2. The **Trustee** is required to furnish security to the Master of the High Court of South Africa for the assets of the Trust as may be required in terms of the provisions contained in the Trust Property Control Act as amended from time to time.

4. **BENEFICIARY**

The beneficiary of this Trust will be **T[....] L[....]**, a person suffering from a mental illness as described in section 1 of the Mental Health Care Act, 17 of 2002 or a serious bodily impairment which prevents such person from generating sufficient income for his own maintenance or managing his own affairs, with regards to the income derived from the Trust assets and the capital shall also be used to the benefit of **T[....] L[....]** in such a way as the **Trustee** may deem appropriate but subject to the terms of this Deed of Trust. Should **T[....] L[....]** pass away, the Trust's assets will be transferred to the intestate heirs of **T[....] L[....]** in accordance with the provisions of the Intestate Succession Act as amended from time to time.

5. **INTERPRETATION**

In this Deed, unless the context otherwise requires, words importing the singular shall include the plural, and *vice versa*, and words importing the masculine gender shall include the feminine gender, and *vice versa*. The following expressions used in the Deed shall have the meaning hereinafter assigned to them unless the context otherwise requires.

5.1 **"Beneficiary"** shall mean T[....] L[....] or any other person as set out in paragraph 4 above. The **Beneficiary** shall be entitled to receive the income and capital of the Trust upon the terms and conditions set out in the Deed and shall be entitled to the capital of the Trust upon its termination.

5.2 **"Trust Fund"** shall mean the sums to be settled in the Trust in terms of the said settlement agreement, in particular the award referred to in paragraph 1 hereof together with any additions or accruals thereto; all assets which shall from time to time be acquired by the **Trustee** for the purposes of this Deed including, without being limited thereto, capital assets and all income thereon whether capitalised or not.

5.3 The phrase **"maintenance, education and advancement of life"** shall be interpreted in the widest sense wherever it appears in this Deed of Trust so as to include, for example, attendance at schools, specialised needs schools anywhere in the world; remedial teaching of any nature whatsoever, specialised tutoring, occupational therapy of any nature whatsoever, training in craft, hobby or trade, music, art, dancing, sports, as well as sciences, travel, both national and international, accommodation lodgings, food, clothing and medical expenses and general well-being of the **Beneficiary**.

6. **OBJECTIVES**

6.1. The objectives of this Deed of Trust are the following:-

6.1.1. To maintain and support the said T[....] L[....] physically

and mentally for the remaining part of his life;

6.1.2. To protect the said **T[....]** **L[....]** from the vulnerability to interpersonal influence/exploitation, and to protect him from his mental incapacity;

6.1.3. The protection afforded by a Trust would benefit the Beneficiary by ensuring that the award is sustainable and that its lifespan is maximised;

6.1.4. The **Trustee** will as far as possible endeavour to utilise the funds of the Trust to comply with the medical needs of the mentioned **T[....]** **L[....]**. In this respect the **Trustee** will in his discretion, and if he deems it necessary, be authorised to make use of medical advice in overseas countries and if necessary, send the mentioned **T[....]** **L[....]** to the foreign country if the **Trustee** in his discretion deems it to the benefit of **T[....]** **L[....]** and if there are sufficient grounds and funds for such advice and medical treatment;

6.1.5. To provide accommodation to the beneficiary and one other person who will act as the beneficiary's caretaker/nurse if necessary and affordable. In this respect the **Trustee** will also be entitled in his discretion to employ people and to remunerate them for services rendered to **T[....]** **L[....]** where and if necessary and affordable;

6.1.6. To do anything that the **Trustee** in his discretion deems necessary for the general wellbeing of the mentioned **T[....]** **L[....]** and the **Trustee** will be entitled to incur such reasonable costs as he deems necessary in this regard in his absolute discretion;

6.1.7. To invest the Trust's assets and to act therewith in such a manner so as to attempt to increase same and if possible to cause capital growth in order for the funds paid over in trust to be administered for as long as possible, to the benefit of **T[....]** **L[....]**.

7. **ASSETS**

The assets of the Trust will include:-

7.1. The assets donated to the Trustee in terms of this Deed as well as any additions and accruals thereto;

7.2. All donations and inheritances donated or bequeathed to the Trust in supplementation of the Trust's assets;

7.3. All assets that the Trust may purchase with its own funds or borrowed funds or that may be acquired by any other juristic act;

7.4. Any assets that may be allocated to the Trust in terms of an Order of Court.

8. **APPOINTMENT OF TRUSTEE**

HERCULES ALEXANDER SANDENBERGH or CONSTANT WILSNACH attorneys and directors in the firm of Pretorius & Wilsnach Incorporated, are hereby nominated first administrative and sole **Trustee** and in the event that it is not possible for him to take the appointment or to continue with his duties for whatever reason, his successor in practice or, failing him, a director or employee nominated by the managing partner of Pretorius & Wilsnach Incorporated or, failing this, a person nominated by the Master of the High Court, for the purpose of this Deed. **HERCULES ALEXANDER SANDENBERGH or CONSTANT WILSNACH** or any other **Trustee** shall be authorised to sign all documents relating to the administration and investment of the Trust Fund and shall be entitled to charge such fees and to recover from the Trust such remuneration as he would have received if they had been administrators administering a testamentary trust. The said **HERCULES ALEXANDER SANDENBERGH or CONSTANT WILSNACH** by his signature to this Deed accepts office as such and undertakes to carry out all the duties and obligations encumbered upon them hereunder.

9. **INCOME**

The **Trustee** shall collect the income accruing from the investment of the Trust Fund and after making provision for payment of all necessary expenses, interest due, taxation, premium of the bond of security and **Trustee's** fees, the nett income shall be accrued to and invested as part of the Trust Fund, for the benefit of the **Beneficiary**: Provided that the **Trustee** may in his entire discretion pay the whole of such nett income or any portion of the Trust Fund as may be necessary to the **Beneficiary** and/or apply the same for maintenance, education and advancement in life of the **Beneficiary** and may at their discretion (whilst any **Beneficiary** is still a minor) make payment to such **Beneficiary's** parent or guardian on his/her behalf, in such manner and upon such conditions and in such proportions and at such times as the **Trustee** may in his absolute discretion decide.

The **Trustee** may, in his entire discretion, allow the **Beneficiary** hereunder free use and enjoyment of assets owned by the Trust and may decide whether the Trust or the **Beneficiary** concerned should be responsible for the maintenance of such assets and also for the payment of any rates, insurance premium and other similar charges.

10. **TERMINATION OF TRUST**

The Trust will be terminated when the mentioned **T[....]** **L[....]** passes away or when a competent Court orders it so, whichever event may happen first.

With termination of the Trust as a result of the death of **T[....]** **L[....]**, the Trust will be liquidated and the capital will after all the administrative costs and debts as well as claims against the Trust have been paid, if the mentioned **T[....]** **L[....]** dies intestate, the nett assets of the Trust will be divided equally between his intestate heirs in accordance with the relevant Intestate Succession Act that is applicable in the Republic of South Africa. If the Trust is terminated by Order of competent Court of South Africa, the funds will be paid out in accordance with the stipulations of such order.

11. **POWER OF TRUSTEE**

11.1 To enable the **Trustee** to comply with all obligations in terms of the Deed of Trust, the **Trustee** will be entitled:-

11.1.1 To perform any act in general, whatsoever, that is according to his opinion, beneficial for the preservation and growth of the assets of the Trust, or in the interest of the Beneficiary. The powers entrusted to him according to the paragraphs hereinafter do not limit the generality of this sub-paragraph;

11.1.2 To use any part of the assets or income of the Trust for payment of any costs reasonably incurred by him in relation to his duties and obligations as **Trustee**;

11.1.3 To invest the assets or income of the Trust or any part thereof, with a registered bank or investment company (which should be a registered licensed financial service provider) or insurance company, such investment to be of the nature and on such terms as the **Trustee** may deem fit. The **trustee** will not be entitled to invest the trust capital in shares of public or private companies or in any other companies or businesses. All investments by the **Trustee** will be in line with the interest and personal circumstances of the beneficiary. The trustee may invest in fixed property or any such assets as he may deem beneficial to the Trust and its beneficiary which will also include moveable assets if deemed reasonably to the benefit of the beneficiary. Such moveable assets may be used or consumed by the **Trustee** if, in his discretion, it is deemed to be reasonably in the interest of the beneficiary. He will furthermore be entitled to call up any investments, to make any investments solvent, to convert, amend, realise and to re-invest such investments in any manner reasonably deemed appropriate;

11.1.4 If the **Trustee** practises a profession and in such capacity performs any other act or service on behalf of the Trust, in such capacity, the **Trustee** will be remunerated for his professional services rendered without

limiting or reducing his right to remuneration as stipulated hereinafter;

11.1.5 To institute legal and arbitration proceedings and to oppose same in any competent court with regard to any matter forthcoming from the Trust and to pay the costs incurred in relation thereto from the assets or income of the Trust;

11.1.6 To purchase, sell, let, hire or to hire-purchase any assets;

11.1.7 To reasonably acquire or renounce, in any manner whatsoever, rights on behalf of the Trust where such actions are in the best interest of the Trust;

11.1.8 To perform all acts on behalf of the Trust which may be necessary to effect transfer of any assets of the Trust;

11.1.9 To grant extensions for the complying with any duty towards the Trust, to reach compromises and oppose claims against the Trust, to recognise, and settle same and to handle any claims in favour of the Trust in the same manner;

11.1.10 To employ people to perform any act and to remunerate them from the assets or income of the Trust. The possibility that the **Trustee** would have been able to perform such act himself does not detract from the aforementioned entitlement;

11.1.11 To utilise the assets and income of the Trust in such a manner as the **Trustee** may deem proper for the conservation, maintenance or replacement of any assets of the Trust and to demolish any buildings if deemed appropriate by the **Trustee** to erect new buildings on the fixed property of the Trust;

11.1.12 To exercise his voting right as deemed appropriate, with regard to any shares which belong to the Trust and are held in any company or society. The exercise of his discretion and authority hereunder is not reduced where he directly or indirectly has an interest in such company or society neither will such **Trustee** due to his confidential relationship with the

Trust be obliged to give account of any benefit, which accrues to him due to such interest either directly or indirectly, nor is any act, agreement or deed of the **Trustee** void or voidable on the ground that he received such benefit. The object of this clause is to avoid that the consequences of voidability or voidness due to the confidential office of the **Trustee** will supervene and insofar as it may affect agreements and relationships with companies and societies in which the **Trustee** has a personal interest;

11.1.13 To enter into insurance contracts and to pay the premiums from the assets of the Trust;

11.1.14 To pay the debts of the Trust;

11.1.15 To accept or refuse donations and inheritances to the Trust;

11.1.16 To open a bank account and to borrow money from a bank on the overdraft facility or otherwise;

11.2 Notwithstanding the stipulations of paragraph 6.1 or any other paragraph in this Deed, the **Trustee** will not be entitled to dispose of any assets or income of the Trust for his own benefit or the benefit of his or any other person's estate. Without detracting from the generality of the aforementioned he will specifically not be entitled or authorised to appropriate or to dispose of any of the assets or income of the Trust as his own, as he deems fit, if he by doing so will benefit himself or his estate directly or indirectly. The **Trustee** will furthermore not be authorised to use or consume any of the assets of the Trust directly or indirectly, for his own benefit unless so authorised by the Master of the High Court of South Africa;

11.3 If the Trust shows drastic growth and if the administration thereof requires it, the **Trustee** will be entitled to employ a person or persons, full time or part time, to assist with the administration of the Trust and in this respect he will be entitled to pay a reasonable salary or remuneration, which he in his discretion deems appropriate, to such a person or persons. Control and care over the Trust's assets shall always be the responsibility of the **Trustee** including fixed property or a

bond with regards to any place in the Republic of South Africa. In this regard the only limitation is that investments may only be made within the borders of the Republic of South Africa unless ordered otherwise by the Court.

12. **LIABILITY**

The **Trustee** shall -

12.1 perform his duties and exercise his powers with the care, diligence and skill, which can reasonably be expected of a person who manages the affairs of another and shall be liable for breach of trust where he fails to show the degree of care, diligence and skill required;

12.2 be liable for losses as may arise from or be occasioned by his own dishonesty, wilful misconduct or gross negligence or that of his employees;

12.3 the **Trustee** holding office shall be required to furnish either individually or collectively to the Master of the High Court, security for the administration of the Trust hereby created, as the Master may deem fit.

13. **NOMINEE REGISTRATIONS**

All investments or other assets acquired by the Trust may be registered in the name of the Trust without specifically naming the Trust, or in the name of the nominee company, or in such manner as the **Trustee** may deem expedient from time to time.

14. **EXCLUSION FROM MARITAL PROPERTY REGIMES**

All the benefits that **T[....]** **L[....]** is entitled to in terms of this Deed of Trust are for all purposes excluded from any community of property or any community of profit and loss. The accrual system in terms of the Matrimonial Property Act 88 of 1984 is not applicable to any benefit hereunder. It may not be seized for the debts or liabilities of any spouse of **T[....]** **L[....]** and may not form part of any insolvent

estate of such a spouse or vest in the curator of such insolvent estate.

15. **INDEMNITY- INCOME TAX**

In the event of the **Beneficiary** hereunder becoming legally liable in any statutory year to tax upon the whole or any portion of the income arising from the Trust Fund to which he has not received the benefit by reason of any provision in any law hereafter in force, in terms of which the aforesaid person is rendered liable for tax on such income, then, in such circumstances, it shall be competent for the **Trustee** to pay out of the income or capital of the Trust, the amount of the additional tax which the **Beneficiary** is obliged to pay as aforesaid. For the purposes of this clause the expression "tax" shall be deemed to include all Income Tax, Imports and other duties levied by the State or other competent authority.

16. **ACCOUNTING**

16.1 The **Trustee** shall cause proper records, which may be wholly or partially computerised, to be kept of all affairs and dealings of the Trust. The records of the Trust shall be submitted to auditors to be audited and vouched for at the end of each financial year, which shall be regarded as being the last day of February, of any other day which may be selected by the **Trustee** and shall be submitted within six months of each financial year-end.

16.2 The **Trustee** shall keep a complete set of accounting records with regard to the affairs of the Trust;

16.3 The **Trustee** will ensure that the accounting records of the Trust are audited by a chartered accountant and that such accountant will have free access to the books, documentation and assets of the Trust.

16.4 The Trustee will provide the parents of T[....] L[....] with copies of the audited annual financial statements, upon receipt thereof by the Trustee.

17. **PAYMENT AND DELIVERY**

In the paying out of any amount of capital or income of the Trust to or for the benefit of a **Beneficiary**, the **Trustee** shall be empowered to make the said payments in whole or in part by delivery of an asset or assets or share in an asset or assets having a value equivalent, in the opinion of the **Trustee**, to the payment effected by such delivery.

18. **APPLICATION OF INCOME**

The **Trustee** will use the income of the Trust to pay the administration costs for the administration of the Trust and to realise the objectives of the Trust.

19. **DUTIES OF THE TRUSTEE**

19.1. The **Trustee** shall:-

19.1.1. As far as possible endeavour to realise the objectives of the Trust;

19.1.2. To open a current account with a registered commercial bank of his choice, which account will be used for the receipt of all cash which is paid to the Trust;

19.1.3. To see to it that proper minutes of all decisions made by him, are kept in a safe place;

19.1.4. To see to it that the financial statements of the Trust for each year are kept in safe custody for the period of the existence of the Trust;

19.1.5. To see to it that all contracts are fulfilled;

19.1.6. To make all payments that may be payable on the income of the Trust;

19.1.7. To see to it that the set of books that he shall open and keep will immediately become operational and at the same time appoint a firm of auditors for the Trust as soon as the Master of the High Court has registered this Deed;

19.1.8. To see to it that the firm of auditors that is appointed for the Trust will at all times have free access to the books and accounts and vouchers of the Trust and he further undertakes to obtain such information as the auditors may require and to make same available to the firm of auditors and if explanations are required, to provide same.

19.1.9. To disclose to T[....] L[....] and to his parent upon request any benefit gained by him arising from any investment of the cash assets of the Trust other than his remuneration on income as provided for herein.

20. **APPOINTMENT OF THE TRUSTEES**

20.1. The following people will be disqualified to act as **Trustee** of this Trust:-

20.1.1. Any person who is disqualified to act as a director of a company in terms of the stipulations of the relevant Company Laws of the Republic of South Africa;

20.1.2. Any person who is an unrehabilitated insolvent;

20.1.3. Any person who has previously been removed as a **Trustee** from a trust due to his/her misadministration of the said Trust;

20.1.4. Any person who has previously been found guilty, in the Republic of South Africa or elsewhere, of theft, fraud, forgery, perjury, corruption or any misconduct or offence where dishonesty was an element of and resulted in that person being found guilty;

20.1.5. Any person who has been declared mentally ill or incapable of managing his/her own affairs.

21. **EXEMPTIONS**

21.1. With regard to the aforementioned the following exemptions will be applicable:-

21.1.2. Any **Trustee**, who is a member of or a partner in a firm of professional practitioners, may be employed by the Trust or render services for the Trust and in such instance the **Trustee** will be entitled to a fee in his/her professional capacity;

21.1.3. The **Trustee** shall bear the responsibility and liability for his acts or omissions where he fails to show the degree of care, diligence and skill as required as determined in the Trust Property Control Act, 57 of 1988.

21.1.4. No **Trustee** will be liable for any dishonesty or wrongful act committed by any of the other **Trustee** unless such a **Trustee** had knowledge thereof and allowed such dishonest acts or acted as an accessory, or could have prevented such act but negligently failed to do so;

21.1.5. The **Trustee** shall be indemnified out of the assets of the Trust with regards to any claims that may be instituted against him/her personally and which result from the reasonable acts of the TRUSTEE and the exercise of any of his/her competencies which he/she is entitled to exercise in terms of this Deed.

22. REMUNERATION AND TRUST ADMINISTRATION FEES AND COSTS

22.1. The administration fees for the Trust shall be calculated as follows

22.1.1. A once-off drafting fee for documents necessary for the formation of the Trust, in the sum of R7 565-00 (Seven thousand five hundred and sixty-five Rand),

22.1.2. A once-off 1% (One per cent) fee to establish and register the Trust Deed, and for the acceptance of the appointment as a Trustee, calculated on the Trust Fund,

22.1.3. An annual management fee calculated at 0.75% (Zero point seventy-five per cent) of the capital under administration, with a minimum fee of R6 000-00 (Six thousand Rand) per annum to be debited once a year or monthly in

twelve equal instalments.

22.1.4. An annual fee of 0.5% (Zero point five per cent) calculated on any current/saving account and short-term investments held under the Trust's name.

22.1.5. The administration costs and disbursements shall be calculated, and include the following:

22.1.6. Value Added Tax on the administration fees, at the prevailing rate.

22.1.7. Administration software at R850 (eight hundred rand) per annum subject to increases in charges by the relevant service provider.

22.1.8. Bank charges, in the sum of R240-00 (Two hundred and forty Rand) per annum, subject to increases in charges by the relevant Banking institution.

22.1.9. Storage fees for legal process under Case number: 64416/2009 and any additional documentation generated in the course of administering the Trust, in the sum of R600- 00 (Six hundred Rand) per annum, subject to increases in charges by the relevant Storage facility.

22.1.10. Accounting and Auditing costs in relating audited financial statements, in the sum of R8 000-00 (Eight thousand Rand) per annum, subject to increases in charges by the relevant Accountant/Auditor.

22.1.11. The annual costs of the Bond of Security, calculated at 0.69% (Zero point sixty-nine per cents) on the Trust Fund.

22.2. A once-off termination fee of 1% (One per cent) of the residual capital under administration on termination of the Trust.

24. **AMENDMENTS**

24.1. The Trust Deed can only be amended by the trustee in writing:

24.1.1. With the consent of the Master of the High Court,

24.1.2. Failing such consent from the Master of the High Court, with the leave of this Court,

24.2. No amendment which is in conflict with the provisions of the Court Order under case number 19775/2019 may be effected without the prior leave of the Court having been granted thereto.

25. **ACCEPTANCE**

The **Trustee** hereby accepts the donation made to him according to this Deed subject to the conditions of this Deed and further undertakes to realise the objectives of this Trust Deed

26. **GENERAL**

26.1 The interest of the **Beneficiary** in terms of this Trust shall not be capable of being ceded, assigned, transferred, pledged and hypothecated or in any way alienated without the prior written consent of the **Trustee** and the Master of the High Court or by order of Court.

26.2 The rights, benefits or interests conferred on the **Beneficiary** under this Deed shall not be capable of being exercised or claimed in any way by anyone other than such **Beneficiary** or being attached at the instance of any creditor or vesting in any other person whomsoever in any capacity.

26.3 Until any benefit or reward is actually paid over to the **Beneficiary** nothing herein contained nor any resolution, deed or act of the **Trustee** shall create or confer upon any person any claim or right enforceable at law to any benefit or award hereunder.

26.4 Wherever the assets may be held or registered they shall be held on and for the account of the Trust and at no time shall the **Trustee** be deemed to acquire for himself or his personal account any vested right or interest in the Trust Fund.

The aforesaid **HERCULES ALEXANDER SANDENBERGH or CONSTANT WILSNACH** has declared to accept office as **Trustee** and promised to undertake diligently to perform the duties hereinbefore imposed upon him.

THUS DONE AND SIGNED at PRETORIA this day of 2022.

AS WITNESSES:

2

ADV MPIOLO W DLAMINI SC DONOR

2

THUS DONE AND SIGNED at Pretoria this day of 2022.

AS WITNESSES:

1.

HERCULES A SANDENBERGH TRUSTEE

2.

AS WITNESSES:

1.

CONSTANT WILSNACH
TRUSTEE

