THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 1158/2019

In the matter between:

HAITAS KONSTANTINOS	**APPELLANT**
and	
FRONEMAN GABRIEL FRANCOIS VAN LINGEN	**FIRST RESPONDENT**
HAITAS MARIA ELPIS	**SECOND RESPONDENT**
FWC ESTATE & RELATED SERVICES (PTY) LTD	**THIRD RESPONDENT**
BRAND KITCHEN HOSPITALITY (PTY) LTD	**FOURTHRESPONDENT**
MEZEPOLI HOLDINGS (PTY) LTD	**FIFTH RESPONDENT**
MEZEPOLI CAMPS BAY (PTY) LTD	**SIXTH RESPONDENT**
MEZEPOLI MELROSE ARCH (PTY) LTD	**SEVENTH RESPONDENT**
MEZEPOLI NICOLWAY (PTY) LTD	**EIGHTH RESPONDENT**
PLAKA HOLDINGS (PTY) LTD	**NINTH RESPONDENT**
PLAKA MENLYN (PTY) LTD	**TENTH RESPONDENT**
PLAKA NORTHCLIFF RESTAURANT (PTY) LTD	**ELEVENTH RESPONDENT**
MERCHANT PROPERTY INVESTMENTS (PTY) LTD	**TWELFTH RESPONDENT**
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	**THIRTEENTH RESPONDENT**
THE MASTER OF THE HIGH COURT OF SOUTH AFRICA, GAUTENG DIVISION, PRETORIA	**FOURTEENTH RESPONDENT**

Neutral citation: *Haitas v Froneman and Others* (1158/2019) [2021] ZASCA 01 (06 January 2021)

Coram: PETSE DP, ZONDI, VAN DER MERWE and NICHOLLS JJA and UNTERHALTER AJA

Heard: 06 November 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 15h00 on 06 January 2021.

Summary: Trust Law - s 20(1) of Trust Property Control Act 57 of 1988 (the Act) - whether the conduct of the trustees justifies their removal in terms of s 20(1) of the Act, alternatively the common law - whether a breakdown of the relationship between a beneficiary and the trustees justifies the removal of the trustees from office.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Matojane J sitting as court of first instance):

The appeal is dismissed with no order as to costs.

JUDGMENT

Nicholls JA (Petse DP, Zondi and van der Merwe JJA and Unterhalter AJA concurring):

[1] When wealthy businessman, Evangelos Haitas (the deceased) died on 21 October 2018, a family feud broke out over the control of the restaurant businesses that he had built up during his lifetime. The appellant, Mr Konstantinos Haitas, is the deceased's son and sole surviving heir. He is also the only income and capital beneficiary of an *inter vivos* trust, the Kam Trust (the Trust), established by his late father in 2007, and the vehicle through which the restaurant businesses are owned. While he was alive the deceased was the fulcrum of the businesses. His two co-trustees played little role, with effective control in the hands of the deceased. His death has resulted in suspicion and hostility between the appellant and the remaining two trustees.

[2] The first and second respondents, respectively Mr Gabriel Froneman and Ms Maria Elpida Haitas, are the surviving trustees appointed by the deceased in December 2013. Mr Froneman is a chartered accountant employed as such at Middel & Partners Incorporated. He is the representative of FWC Estate & Related Services (Pty) Ltd (FWC), the third respondent. Ms Haitas is the deceased's sister, the appellant's aunt, and resides in Greece. The fourth to twelfth respondents are private companies owned by the Trust (the trust companies), and no relief is sought against them. The shares held by the Trust

in the trust companies constitute its principal assets. The Trust owns the majority of the shares or all issued shares in the trust companies. They, in turn, own four restaurants situated in Melrose Arch, Nicolway, Menlyn Park and Eastgate and two franchise operations, under the Plaka and Mezepoli brands, which earn license fees. Merchant Property Investment (Pty) Ltd holds the various properties owned by the Trust. The head office, from which the businesses are managed and operated, is Brand Kitchen Hospitality (Pty) Ltd (Brand Kitchen). It is the fourth respondent. The thirteenth and fourteenth respondents are the Companies and Intellectual Property Commission and Master of the High Court, respectively, who took no part in these proceedings.

[3] The appeal has its genesis in an urgent application in the Gauteng Division of the High Court, Johannesburg (the high court) launched by the appellant on 16 April 2019 when he was 19 years old. The main relief sought was the removal of Mr Froneman and Ms Haitas as trustees, and for the Master to urgently appoint two more trustees, one of whom should be an independent trustee. This Court was urged, in the alternative, to appoint two additional independent trustees to break any deadlock that might arise in the running of the Trust. The appellant also sought to declare the appointment of Mr Froneman and Ms Haitas as directors of the trust companies void ab initio. Further, ancillary relief was sought that the trustees produce the financial statements of the Trust and all the trust companies; that they meet urgently with the appellant regarding trust matters and that he be permitted to have legal representation at such meeting. Finally, the appellant seeks an order that Mr Froneman and Ms Haitas pay the costs of the application in their personal capacities.

[4] The high court (Matojane J) dismissed the application and made no order as to costs. It held that although the trustees did not function optimally in all respects, there was no necessity to remove them and no reason to believe that they would be guilty of any future misconduct or would endanger the assets of the Trust. Leave to appeal was granted to this Court by the high court.

[5] To understand the family dynamics, it is necessary to set out the *dramatis personae*. First and foremost is the appellant himself. As the sole heir and beneficiary, he is apparently keen to maintain a certain lifestyle. The obstacle he faces is that the trust property vests in him only when he turns 23 years old. In addition, in terms of the deceased's Will any inheritance will be retained in a testamentary trust and only accrue to him once he turns 25 years old, if he is in possession of a university degree. If not, then a third will accrue to him at the age of 25 and the balance when he reaches 30 years of age[1]. The Will makes provision for the appellant to succeed the deceased as a trustee of the Kam Trust on reaching the age of majority.[2]

[6] At the time of his father's death the appellant had commenced his studies at the University of Amsterdam in the Netherlands. These were abandoned soon after the death, ostensibly to attend to trust matters and to his father's estate. His expenses while abroad were shared equally by his mother and father. His current complaint is that he is receiving no maintenance from the Trust. The trustees have only paid him € 878.82 when he was still in Amsterdam; a further R2 000 on his return; and an amount of R5 645.00 in repayment of monies paid by his stepfather for medical expenses.

[7] A central character, and according to the trustees the driving force behind the appellant's actions, is his mother and the former wife of the deceased, Ms Margarita Tsangaris-Scherf. During the subsistence of the marriage she was integrally involved with growing and running the businesses. The marriage ended in an acrimonious divorce. She was one of the original trustees and a capital beneficiary. Her resignation as a trustee was one of the terms of the divorce settlement. She has since remarried Mr Sandro Scherf who evidently also plays a supportive role in the appellant's life.

[8] Ms Sofia Lorena Lanuza Batista is a Panamanian national and had been the deceased's romantic partner since 2013. She is the target of much of the appellant's anger and resentment. Ms Batista is a businesswoman in her own right who, on the urging

[1] Clause 5.2 of the Will.
[2] Clause 5.3 of the Will.

of the deceased, left her employment at Bidvest to become a consultant to the trust companies. She co-habited with the deceased and was sharing a house with him at the time of his death. The appellant accuses the trustees of making various unauthorised and unlawful payments on behalf of Ms Batista into a Panamanian bank account which he alleges contravened exchange control regulations, and amounts to money laundering. She is not a beneficiary of the Trust or an heir to the deceased's Will. Nor is she a party to these proceedings.

[9] Mr Mohsen Abdullah, also known as Manal, is a 10% shareholder in Brand Kitchen, which manages and operates the businesses. Mr Abdullah worked for the deceased for 12 years prior to his death and was the operations manager of the businesses at the time of the death. He has experience in the restaurant industry and has expressed concern for the future of the businesses. Mr Abdullah was aggrieved when the trustees overlooked him for the position as general manager and, instead, appointed Ms Batista. He has a close relationship with the owners of one of the Plaka franchisees, trading as Mastika Tree. They, with the support of Mr Abdullah, sought substantially to reduce their royalties after the deceased's death. No royalties at all have been paid since November 2018 and as a result the trustees accuse Mr Abdullah of acting against the interests of the trust. He has made common cause with the appellant and his mother in trying to remove the trustees from office and brought to light what he perceived to be irregular payments made to Ms Batista. Mr Abdullah described the deceased as being the 'heart and soul' of the business whose personal relationships with franchisees, landlords, staff and supplier was an integral part of the businesses' success.

[10] Ms Otilia De Sousa is an attorney who represented the deceased in his divorce proceedings against Ms Tsangaris-Scherf. She has been appointed executrix of the deceased's estate. She, too, is accused of attempting to sideline the appellant and deprive him of vital information.

[11] According to Mr Froneman and Ms De Sousa the deceased, while he was ill, warned them that his son was immature and would be unduly influenced by his mother.

This was a situation he wanted them to guard against at all costs. The undertaking they made to the deceased in this regard has inevitably informed most of their actions and has in turn infuriated the appellant and his mother. Their attempts to prevent Ms Tsangaris-Scherf from playing a role in the businesses has undoubtedly contributed to a pervasive mistrust between the trustees and Ms De Sousa on the one hand and the appellant and his mother on the other.

[12] The day after the death of the deceased, a meeting was convened at the joint residence by Ms Batista. Staff salaries and rentals had to be paid in a few days at the end of the month. At the meeting, it was decided that Mr Froneman should be appointed as a director of the trust companies. The meeting was attended by the companies' banker and lawyer who advised that this was the quickest way to gain access to the bank accounts for the purposes of paying necessary expenses. Mr Froneman was duly appointed on 23 October 2018.

[13] On 1 November 2018, Ms Haitas was appointed as a director of the trust companies, the day before the deceased's funeral was held in Greece. The day after the funeral, she read the Will to the appellant and his mother, and provided them with a copy of the Trust Deed. It turned out that this was an outdated Trust Deed which led to further suspicion.

[14] On 9 November 2018, the appellant received a copy of the acceptance of trusteeship form to be completed in order to accept his appointment as a trustee of the Kam Trust. The appellant also wrote to Mr Froneman demanding access to financial information about the trust companies; the deceased's life insurance policies and confirmation that the Trust would continue to cover half his living expenses in Amsterdam. He stated: "most importantly, I would like to inform all concerned that my mom will be involved in all matters, on my behalf, she has my power of attorney, signing power and is my most trusted advisor. . . " It appears that from then on relations deteriorated rapidly.

[15] Ms Tsangaris-Scherf started sending emails to Mr Froneman, as did the appellant's current attorneys, all demanding documents and financial information. The appellant requested to meet with the trustees and Ms De Sousa but insisted that this be in the presence of his advisors, his attorney or his stepfather. The trustees indicated that any meeting would only take place directly with the appellant. A stalemate was reached. In November 2018, the question of whether the trust was quorate was raised, an issue which will be dealt with later.

[16] On 27 November 2018, the appellant returned from the Netherlands. On his return, he wanted to visit the house his father lived in, and shared with Ms Batista, because he wanted to spend some time in his father's room. He also requested the use of his father's Pajero motor vehicle and the keys to a property on the Vaal River owned by one of the trust companies. The request was denied by his aunt, Ms Haitas, who also refused access to the house, saying that this was a matter that should be taken up with Ms Batista as the house was also her home. This further strained relations.

[17] On 16 April 2019, the appellant launched the present application for the trustees' removal. The appellant received his letters of executorship on 19 May 2019. No meeting of the trustees could be held as Mr Froneman and Ms Haitas insisted that the appellant could not have his advisors present. However, on 20 May 2018, he was given access to various financial documentation relating to payments made by the trust companies, including those to Ms Baptista. The financial statements provided to the appellant were the un-audited financial statements for the trust companies from 2009 to 28 February 2017. The financial statements for 2010 were missing.

[18] Before dealing with the appellant's complaints against the trustees, two preliminary points must be referenced. The first was that the amended Trust Deed is 'suspicious' and possibly fraudulent. It differed from the original Trust Deed in various respects, including that the appellant had to wait until the age of 23 before he would become a capital beneficiary of the trust property. The sole reason for the suspicion was that the Trust Deed was signed on 23 May 2018 at Melrose Arch when in fact the deceased was in

Greece at the time. It was not signed by all the trustees on the same day and before all the witnesses. However, there is no dispute that the amended Trust Deed was signed by all the trustees, including the deceased. Ms Tsangaris-Scherf's attempt to cast doubt on the Trust Deed was not pursued before this Court and requires no further consideration.

[19] The second issue was that the Trust was inquorate after the deceased's death when Mr Froneman and Ms Haitas were trustees. Clause 5.2 of the Trust Deed states that at all times there shall be a minimum of 3 and a maximum of 5 trustees. It goes on to deal with the situation where a trustee resigns or dies in the following manner:

'Provided that if there is only one trustee . . . the remaining trustee will be authorised to exercise all the powers of trustees for the maintenance and administration of the trust fund until such time as another trustee has been appointed, which appointment the trustee so in office shall make within NINETY (90) days of the resignation or death of his co-trustee.'

[20] The thrust of the argument was that as there were two trustees, and not only one trustee, remaining after the death of the deceased, the provisions of clause 5.2 would not be applicable. Any other interpretation, so it was contended, would render the requirement of a minimum number of trustees entirely obsolete and counter to this Court's decision in *Land and Agricultural Bank of South Africa v Parker and others*[3]. In that case the difficulty was that there was a sub-minimum number of trustees. It was held that a provision requiring a minimum number of trustees to hold office is a capacity-defining condition, unless the Trust Deed provides otherwise. If fewer than the required number of trustees hold office, a trust does not have the capacity to take any action. These facts are distinguishable from the current matter where the contention is that there are too many trustees for the relevant clause to have application. In my view clause 5.2 cannot have the meaning contended for by the appellant. It cannot be seriously suggested that after the death or resignation of a fellow trustee, one trustee can exercise all the powers to administer the Trust but not two – that would be a manifest absurdity.[4] Interpreted

[3] *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA).

[4] *Natal Joint Municipal Pension Fund v Emdumeni* Municipality [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA); 2012 4 SA 593 (SCA) and the later cases of this Court enjoin courts to interpret contracts in a commercially sensible and business-like manner, having regard to their language, context and purpose in what is a unitary exercise.

sensibly, the proviso in Clause 5.2 means that provided there is at least one trustee, the remaining trustee or trustees will be authorised to exercise all the powers of the trustees. So understood, Clause 5.2 regulates the position when there remain either one or two trustees.

[21] Aligned to the above is the contention that the appointment of Mr Froneman and Ms Haitas as directors of the trust companies was void ab initio. Relying again on *Land and Agricultural Bank* it is argued that that when the minimum number of trustees do not hold office the remaining trustees have a duty to appoint a further trustee. Because of the delay in appointing the appellant as the third trustee, the two trustees did not have the requisite capacity to appoint themselves as the directors without the appellant's authorisation. In the absence of this, Mr Froneman and Ms Haitas could not exercise the rights attached to the shares in the trust companies to appoint themselves as directors. They did not act jointly as trustees and therefore their appointment is void ab initio.

[22] Having found that clause 5.2 of the Trust Deed, properly interpreted, must mean that two trustees were within their rights and competent to attend to the administration of the Trust, it follows that this argument is equally unmeritorious and must suffer the same fate. It was contended that even if it is accepted that clause 5.2 is capable of being interpreted as applying to two trustees, their authority would be limited to the most essential aspects for maintaining the Trust, and not to usurp the powers to control the trust companies. This is precisely why the appointment of a director of the trust companies was urgently required - for 'the maintenance and administration of the trust fund'. It would have been detrimental to the trust companies to have delayed the payment of staff salaries and rentals until the appellant had received his letters of authority.

[23] I revert now to the crux of the appeal. Essentially, there are three broad categories of complaints that the appellant contends justify the removal of the trustees. These are the lack of disclosure and transparency in regard to the financial documents of the Trust and the trust companies; the trustees' refusal to maintain the appellant; and the payments made to Ms Batista;

[24] The appellant argues that instead of openness and transparency, Mr Froneman and Ms Haitas have shown a reluctance to disclose the financial records of the Trust and trust companies. Clause 15.1 of the Trust Deed expressly provides that the trustees shall keep a proper set of books recording the financial affairs of the Trust. In addition, 'financial statements will be prepared and will be subject to annual audit. Every beneficiary of the trust shall on request be entitled to a copy of the financial audited statements of the trust.' On 20 May 2019 the trustees furnished the appellant with the audited statements from 2009 – 2016 with the exception of the 2010 financial statements. That, in this regard, they were remiss in their duties as trustees is common ground.

[25] One of the appellant's greatest grievance is the trustees' unwillingness to allow him to benefit from any trust monies. In February 2019, in response to a request from the appellant, Mr Froneman sent an email expressing his regret that the appellant had terminated his studies in Amsterdam as a good education was his father's greatest wish for him. Mr Froneman pointed out that the deceased's personal bank accounts were frozen and until the appellant turned 23 years old he was not entitled to a distribution from the Trust. Their fiduciary duties as trustees, stated Mr Froneman, was to ensure 'that capital and income is preserved.' The latter statement was not strictly correct, as the Trust Deed afforded the trustees a wide discretion as to the allocation and distribution of trust income.[5] Nonetheless, the trustees remained trenchant in their refusal to make payment of any trust monies to the appellant. They persisted with the view that should he require maintenance he should make an application to the Trust which they would consider.

[5] Clause 11 of the Trust Deed provides that:
'Employment of Income
The trust is a discretionary trust as far as the employment, allocation and distribution of trust income is concerned, and the trustees may in their absolute discretion, by way of a proper resolution passed by them, allocate income to any beneficiary who may qualify as an income beneficiary, and in particular they are entitled to:
11.1 pay all costs incurred by the trustees in connection with the administration of the trust;
11.2 pay such amounts to any beneficiary as the trustees may deem reasonable and desirable for the maintenance, education and general welfare of such beneficiary'.

[26] While refusing to give the appellant any monies, the trustees made payments in the approximate sum of R600 000 to Ms Batista, which the appellant considered unduly generous and favoured Ms Batista over the appellant. In addition, the trustees approved payments of foreign exchange to Ms Batista which, it is contended, were unlawful. Two invoices in the ZAR amount of R61 528.52 and R61 350.75 were issued by Elango Implex Inc, based in Panama, for 'consulting fees' and 'market research in the Region' on behalf of Ms Batista. Mezepoli Holdings and Plaka Holdings made the application for the foreign exchange payments in January 2019 and, a few days later, on 25 January 2019 Mr Froneman authorised the payments.

[27] Mr Froneman's justification was that it was legal and permissible for Ms Baptista to have her consulting fees paid through this entity. Because of the administration involved, he later advised her to invoice her services through a local company in future. This she did through Tailor Webs (Pty) Ltd (Tailor Webs). Mr Froneman, on behalf of Brand Kitchens, signed an agreement in terms of which Tailor Webs would get paid R80 000 per month for consultancy fees and a further R15 000 for property management. It is not disputed that Ms Batista did the work, although the appellant queries whether she should have been paid this much. The appellant's complaint is that because Ms Batista did not invoice the trust companies in her personal capacity, this resulted in a loss of R12 000 in respect of value added tax which would not otherwise have been payable and that the illegal foreign exchange payments imperilled the Trust. Further, that the conflict over Ms Baptista's payments was a stark illustration of the conflict that arose from Mr Froneman and Ms Haitas having appointed themselves as directors of the trust companies.

[28] It is common cause that when Ms Batista entered into an intimate relationship with the deceased, he persuaded her to leave her job with Bidvest and work as a consultant for the trust companies. On the appellant's own version she was responsible 'for overseeing work done by three outsourced personnel, being a social media or public relations assistant, a marketing consultant and an artwork designer.' When the deceased became too ill to work, from March to October 2018, Ms Batista took over most of his

workload, as well as her own. Mr Froneman says that before he died, the deceased had instructed him to pay her half her normal commission which had accumulated over 4 months and her annual bonus into a foreign entity. He denied that the offshore payments were irregular, asserting that they were legitimate and recorded in the companies' books. As an accountant he was satisfied that the payments were reasonable for the work that had been done by Ms Batista.

[29] The primary issue for determination is whether the conduct of the two trustees justifies their removal in terms of s 20(1) of the Trust Property Control Act 57 of 1988 (the Act), alternatively the common law. Section 20(1) provides that:

'A trustee, may, on application of the Master or any person having an interest in the trust property, at any time be removed from his office by the court if the court is satisfied that such removal will be in the interests of the trust and its beneficiaries.'

[30] The general principle is that a court will exercise its common law jurisdiction to remove a trustee if the continuance in office of the trustee will be detrimental to the beneficiary or will prevent the trust from being properly administered.[6] A trustee has a fiduciary duty to act with due care and diligence in administering property on behalf of another. However, courts have taken a pragmatic approach as to what misconduct should be construed as imperilling trust assets. As early as 1946 the court in *Volkwyn NO v Clarke and Damant*[7] cautioned that this was a delicate matter and the power to remove a trustee was one that should be used with circumspection. Irrespective of whether the common law or s 20(1) is utilised, the courts have emphasised that when a deceased person has deliberately selected certain persons to carry out their wishes because they believe they are best placed to do so, a court should be loathe to interfere[8].

[31] The early authorities, and the circumspection required before a court exercises its power of removal, were cited with approval by this Court in *Gowar*[9]. It was held that

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[6] *Sackville West v Nourse* and Another 1925 AD 516 at 526; Gowar and Another v Gowar and Others [2016] ZASCA 101; [2016] 3 All SA 382 (SCA); 2016 (5) SA 225 (SCA).
[7] *Volkwyn NO v Clarke and Damant* 1946 WLS 456.
[8] *Volkwyn NO v Clarke and Damant* 1946 WLS 456 at 464.
[9] Above fn 6 paras 30 & 31.

neither mala fides nor misconduct necessarily warrant the removal of a trustee. Disharmony in the administration of a Trust is only to be considered if this imperils the trust assets and removal will only be necessary if it is in the interests of the Trust and its beneficiaries.

[32] In certain circumstances it is not necessary that there be a finding of dishonesty, gross inefficiency or untrustworthiness on the part of the trustee and a conflict of interest may be sufficient justification for the removal of a trustee. The appellant argued that even an innocent trustee can be removed for conflict of interest. For this, reliance was placed on *Kidbrooke Place Management Association and Another v Walton and Others*[10]*.* That case concerned a Trust whose object was to donate land to develop a housing scheme for retired persons who obtained life rights to their unit. The trustees sold properties to companies in which they had a direct or indirect proprietary interest, which they then on-sold at a R50 000 profit for every erf. In addition, one of the trustees and his wife were the sole members of a close corporation which earned commission on the sale of life rights. The court held that the trustees were in breach of their fiduciary duties in that they had profited from their actions, which they had failed to disclose, and had acted in direct conflict with the express provisions of the Trust Deed. Their actions were motivated by personal gain and an order was granted removing the remaining trustee from office, the other trustee having resigned.

[33] I do not understand *Kidbrooke* to be authority for the proposition that conduct by the trustees which does not find favour with the beneficiary justifies their removal. In fact this Court has found that enmity between the beneficiary and the trustees is not of and in itself an adequate reason for their removal.[11] Rather, the court in *Kidbrooke* found that, although playing a valuable role in the administration of the trust, the trustees misconstrued the nature of their role and responsibilities. In *Kidbrooke* the removal

[10] *Kidbrooke Place Management Association and Another v Walton and Others NNO* 2015 (4) SA 112(WCC).
[11] Above fn 6 para 31.

application was a precursor to further legal action by the life rights holders for a proper accounting and disgorgement of profits.

[34] Insofar as it may be contended that *Letterstedt v Broers*[12] which was cited with approval in *Kidbrooke*, provides support for the appellant's contention this, too, is misplaced. In both *Kidbrooke* and *Letterstedt* the trustees breached their fiduciary duties by profiting at the expense of the Trust, with the trustees overcharging the trust estate in the latter. Lord Blackburn observed:

'It is quite true that friction or hostility between trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of the trustees. But where the hostility is grounded on the mode in which the trust has been administered, where it has been caused wholly or partially by substantial overcharges against the trust estate, it is certainly not to be disregarded.'[13]

[35] What the above authorities have emphasised is that the conduct of trustees must be detrimental to the trust assets and it is only then that their conduct may warrant removal. It not necessary that their conduct be unimpeachable but generally where there is no impropriety and no financial gain on the part of trustees, courts will not interfere. In this matter there is nothing to suggest any impropriety in the conduct of Mr Froneman and Ms Haitas. There is no evidence of any personal gain or of overcharging. The criticism to be levelled against them is that they have been over-zealous in carrying out what they believed to be the deceased's wishes. What is clear is that since early November 2018 all meaningful communication between the trustees and the appellant had broken down. That there is disharmony cannot be disputed. But, in my view, it is not sufficient to warrant the removal of Mr Froneman and Ms Haitas as trustees and I see no reason to interfere with the high court's reasoning in this regard.

[36] That the trustees have, in some respects, been lax in maintaining proper accounting records of the Trust cannot be denied. The problem pre-dates the death of the deceased who did not require audited financial statements and ran the businesses

[12] *Letterstedt v Broers* (1884) 9 AC 371 (PC).
[13] *Letterstedt v Broers* (1884) 9 AC 371 (PC) 386 - 387.

single-handed. Although access to some of the information is now only of historical value, once the appellant was appointed as a trustee, he still believed documents were being withheld from him and required unfettered access to all financial information to ensure that the trustees were complying with their duties. This underscores the depth of mistrust between the appellant and the trustees. Certainly, it was negligent of the trustees to give the deceased free rein during his lifetime, and subsequent to his death they have not been forthcoming with financial information. The information that is available was provided to the appellant once he became a trustee. It was not necessary to apply for the trustees' removal to obtain financial disclosures. This could have been obtained by far less drastic remedial action. In prayer 6 of the notice of motion it is exactly this that is sought.[14]

[37] Similarly, the foreign exchange payments made to Ms Batista were at the instance and upon the instruction of the deceased and, while perhaps ill-advised, have not resulted in any negative repercussions to the trust companies because a proper case is made out that the payments were for services rendered.

[38] The appellant is entitled to an income from the Trust for his education and general well-being. This, Mr Froneman has stated under oath that he and Ms Haitas will consider once they receive an application. While this approach is unnecessarily formalistic, it neither imperils the trust, nor subverts the interests of the appellant as the beneficiary of the trust. The trustees would be well-advised to properly consider the appellant's needs in order to avoid further litigation.

[39] The only issue is whether the trustees' conduct has imperilled the trust companies, and therefore the trust assets. The appellant claims, as advised by Mr Abdullah, that this

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[14] Prayer 6 of the notice of motion provides:
'6 An order that the first and second respondents forthwith, but in any event in no less than 5 days from the date of this order furnish to the applicant: -
6.1 the latest audited financial statements of the KAM Trust; and
6.2 the latest audited financial; statements (*or if they have not been audited, the latest draft financial statements)* accounting and financial records *(which includes all audited financial statements)* from inception of the Trust Companies.'

is indeed the case. This is denied by the trustees who point out that Mr Abdullah has an axe to grind, as he was not elevated to the position that he thought he deserved. He has also actively encouraged Mastika Tree to stop paying license fees. There is no doubt that the restaurants have suffered a decline in turnover. With the deceased having played such a pivotal role in the businesses, it is only to be expected that his death would cause an upheaval, as well as a loss of confidence and morale amongst staff and management.

[40] As regards the proposal that other independent trustees be appointed to break the deadlock, the issue is whether there is a deadlock to break. The appellant and his mother disapprove of the manner in which the Trust is being run but this does not mean that it is rendered dysfunctional. We were informed that the appellant would have peace of mind that he was being treated fairly if independent trustees were appointed. But even if one were to accept that this Court has the power to appoint further trustees, there is insufficient reason to do so. The appellant has elected not to attend meetings of trustees presumably because of the enmity with his co-trustees. The other trustees are his aunt and his father's trusted financial advisor who, whatever their shortcomings, have the Trust's interests at heart. The appellant would be well advised to attend these meetings, and take legal advice thereafter, if he so wishes. Until he participates in the governance of the Trust it is premature to claim that there is a deadlock requiring the appointment of an independent trustee. In any event the appellant is at liberty to approach the Master under s 7(2) of the Act to appoint further trustees, if warranted.

[41] In conclusion, my view is that the conduct of the trustees, although leaving much to be desired in the way they handled certain matters, does not justify the primary relief sought against them - their removal. The appeal falls to be dismissed.

[42] The high court made no order as to costs. In this court there was no argument on costs and no suggestion that any other order would be more appropriate. I find no reason to differ from the high court.

[43] In the result I make the following order:

The appeal is dismissed with no order as to costs.

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CH NICHOLLS

JUDGE OF APPEAL

APPEARANCES:

For appellant:	A C Botha SC (with him M F B Clark)
Instructed by:	Brian Kahn Inc., Johannesburg
	Claude Reid Inc., Bloemfontein
For first to twelfth respondent:	M Smith
Instructed by:	Nance-Kivell Attorneys, Germiston
	Israel & Sackstein Attorneys, Bloemfontein