REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case no: **6375/07**

and

12461/07

In the matter between:

ANNEBELLE JEAN STANDER First Applicant

MELISSA JANE STANDER Second Applicant
JUSTIN EDWARDS STANDER Third Applicant
IMOGEN EILEEN MIRAMADI Fourth Applicant
and
DENNIS ARTHUR SCHWULST First Respondent
NICHOLAS NORMAN CAMPBELL LOUW Second Respondent
MICHAEL MALCOLM ANDERSON Third Respondent
THE MASTER OF THE ABOVE COURT Fourth Respondent
KAMRAM MIRAMADI Fifth Respondent
(in his capacity as father and guardian of

LUKE EDWARD MIRAMADI and

JESSICA ANNE MIRAMADI)
DAVID MELUNSKY in his capacity Sixth Respondent
as *curator ad litem*
to possible future beneficiaries and to

existing minor beneficiaries of
THE JILELF EDWARDS TRUST

JUDGMENT DELIVERED ON THIS 21ST DAY OF SEPTEMBER

2007

NC ERASMUS J

An order as set out at the end of this judgment was handed down on

14 September 2007, the reasons follow.

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Introduction:

[1] The applicants are the living adult beneficiaries of the Jilelf Edwards Trust (hereinafter referred to as the Trust). Luke and Jessica Miramadi are the only minor beneficiaries of the trust being the children of the fourth applicant and fifth respondent. The terms of the trust are such that as yet unborn descendants of the applicants could become beneficiaries. Such possible future beneficiaries are represented by the sixth respondent herein.

[2] First to third respondents are the current trustees of the abovementioned trust.

[3] In the main case, launched on 18 May 2007 (hereinafter referred to as the removal application), the applicants seek the removal of the current trustees of the Trust.

[4] No opposing affidavits have as yet been filed in the main case. They were due by 27 July 2007. The applicants granted the trustees an extension to 31 August 2007 and subsequently to 11 September 2007, the date of hearing in this application.

[5] The first to third respondents, on 7 August 2007, brought this application (hereinafter referred to as the costs application) in which the following relief is sought:

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"*1. That the trustees of the Jilelf Edwards Trust, Trust No T166/80 be authorized to withdraw funds from the said Trust in order to fund the defence of an application brought under the aforementioned case no against the trustees in their personal capacities, conditional upon the following:*

1.1 That a proper fee arrangement between the Trustees and the Attorney representing them, be entered into prior to further defending the matter;

1.2 That the funds may only be withdrawn from the Trust for payment of a properly submitted account by the attorneys to the trustees from time to time;

1.3 That all such payments be incorporated in the financial statements of the Trust for the specific fiscal year during which such withdrawals were made.

2. That the filing of opposing affidavits to the application brought on behalf of the aforementioned Applicants, be stayed pending the final order to be made in this application.

3. That the respondents in the main application be ordered to file their opposing affidavits within 60 (sixty) days from date of the final determination of this interlocutory application.

4. Alternative Relief.

5. The costs of this application to be paid by the aforementioned Trust if the application is not defended. If it is defended, then costs to be awarded against the party/parties defending it."

[6] The costs application was set down for hearing on 23 August 2007 and thereafter postponed to 11 September 2007.

[7] On 5 September 2007 the first to third respondents, in their representative capacity as the joint trustees of the trust, brought an application (hereinafter referred to as the intervention application) set down for 11 September 2007 for the following relief:

"*1. That leave be granted to the joint trustees of The Jilelf Edwards Trust (the "Trust") to intervene as Seventh Respondent in the application under Case No 6375/2007 (the "removal application").*

2. That the above Honourable Court make such orders and give such directions as to the further procedure in the removal application as it may seem meet.

3. Alternative relief.

4. That the costs of this application be determined in the removal application."

[8] This Court is therefore seized with the two applications to wit the costs and intervention application, that was heard simultaneously.

[9] The application for removal in the main case is based on a number of grounds. The allegations, which are fully motivated, are serious. They include dishonesty and a want of good faith. Most of the accusations of impropriety are levelled at Schwulst and Anderson (first and second respondent). In the case of Nic Louw (third respondent), it is alleged that he has failed over a protracted period to participate in the important discretionary decisions confronting the trustees, and has thus abdicated his responsibilities. The applicants' allegations can be summarised as follows:

9.1 The trustees are not being guided in their administration of the Trust by any rational or legitimate objective. They are preserving the capital at all costs as an end in itself, without regard to the interests of the beneficiaries.

9.2 The Trust's income, which is the only part of the Trust's assets which has to date been used for the benefit of beneficiaries (and then only after payment of the trustees' remuneration) has declined in real terms since 1991.

9.3 The trustees have closed their minds to a distribution (partial or total) of the Trust's capital (the termination date of the Trust being in their discretion). Their attitude is not motivated by the interests of any beneficiaries. On their approach, the Trust will last in perpetuity, with an ever-growing untouched capital.

9.4 In keeping with this alleged irrational approach, the trustees have adopted a standard which is improper and which is not justified by the language of the trust deed, namely that the resources of the Trust are to be applied for the benefit of the beneficiaries only, as it were, *in extremis*. They have said, for example, that the beneficiaries should only look to the Trust for additional support *"where circumstances make it absolutely necessary for them to do so"*, and that the Trust's resources should not be *"free money"* for the settlors' descendants but that the Trust's capital should be

protected *"for as long as it was possible"* so as to be available to support the settlors' descendants *"in need, at the Trustees' discretion especially if living standards in the future were to deteriorate to the extent that* [the settlors' descendants] *were not able to maintain a reasonable standard of living"*.

9.5 The written letters of wishes of the settlors (the parents of the first applicant and grandparents of the second to fourth applicants) indicated that the Trust should now either have been distributed or partially distributed. While these letters are not binding a distribution of capital to persons the settlors actually knew makes far more sense than the perpetual preservation of capital for the theoretical benefit of distant descendants whom the settlors never knew and whom the trustees themselves cannot conceivably have in mind and will not live long enough to know. Indeed, by the standards adopted by the current trustees it is not certain that any distant descendants will ever have need of the assets of the Trust. In these circumstances, the trustees' obduracy and closed-mindedness is improper. This is particularly so in view of the fact that the trust deed itself declares that the settlors established the Trust *"out of the affection which they bear towards their*

children".

9.6 The only explanation for the trustees' attitude is that they are intent on preserving and growing the Trust's capital so that they (Schwulst in particular) can earn remuneration therefrom. The trustees' fees are based on the capital value of the Trust from time to time. Trustees' remuneration in fact exceeds the amount paid to any single beneficiary.

9.7 The trustees have prevaricated concerning the settlors' letters of wishes, at first justifying their conduct with reference to those letters and later claiming that they were being guided by yet other unrecorded wishes to which only Schwulst apparently was privy.

9.8 The trustees have used bullying tactics and improper threats to discourage the beneficiaries from pursuing their rights.

9.9 There has for many years been a complete breakdown in the relationship between the applicants and the trustees. The adult beneficiaries find the trustees' behaviour so patronising, insulting and mean that they

prefer to have nothing to do with them.

9.10 This dislike has been engendered not only by the trustees' improper and insufferable conduct but *inter alia* by Schwulst's behaviour in relation to Annabelle's (first applicant) brother, Robin, who committed suicide in February 1995. The applicants allege that Schwulst co-opted Annabelle's elderly mother (one of the settlors) into a litigious strategy which involved Robin's potential committal for contempt. This drove Robin, who was known by Schwulst to be psychiatrically troubled and very close to his mother, to suicide. Schwulst's reaction to Robin's death was cold and unfeeling.

9.11 The trustees have not only been obdurate in relation to the Trust's capital, they have also been parsimonious and grudging in their approach to income. This has been exhibited in many ways, each incident perhaps being relatively minor in itself but nevertheless demonstrating unacceptable pettiness by the trustees. For example, Imogen (Fourth Applicant) was told that if she wanted to engage an electrician who required a deposit before undertaking necessary work at a property belonging to the Trust, the deposit would have to come out of her own pocket. They refused to fund Justin's (third

applicant) proposed one-year hotel management course. They would only assist Melissa (second applicant) to buy a modest car on the basis of a loan repayable out of her further income awards. Schwulst made Melissa wait two years for a refund of R15 000 she had disbursed in respect of Trust property. Imogen asked for additional financial help with medical expenses at a time when she was expecting twins, but it was not forthcoming.

9.12 Schwulst procured the appointment of Anderson, his business associate, as a trustee in the stead of the elderly Mrs Edwards without consulting with any of the beneficiaries. They only learnt of Anderson's appointment more than a year later. He was completely unknown to them.

9.13 The trustees initially refused, despite demand made by the applicants through their attorneys, to supply any form of accounting, taking the attitude that as contingent discretionary beneficiaries the applicants had no rights. It was only after considerable legal correspondence and an opinion obtained by the applicants from senior counsel that the trustees relented. They then reimbursed themselves out of the

Trust's income for their own legal expenses in wrongly refusing to furnish accounts while making it clear that they would countenance no claim by the beneficiaries for payment of their legal expenses.

9.14 Schwulst (and Annabelle's mother) acted as trustees for two and a half years without authority from the Master. Schwulst claims to have been appointed with effect from 2 March 1989. He only applied for letters of authority on 22 May 1992. Schwulst has subsequently admitted that the purported trustees' resolution of 2 March 1989 was falsely backdated and that it was only executed on 22 September 1989.

9.15 In terms of the purported resolution of 2 March 1989, Brian Arenson was removed as a trustee. However, he was never notified of a meeting and was told only after the late Mr Edwards' death of his supposed removal. It also appears that Nic Louw, was unaware of Brian Arenson's supposed removal and Schwulst's appointment. It thus appears that to Schwulst's knowledge there could never have been a duly constituted meeting at which Arenson was removed or he (Schwulst) appointed.

9.16 There is considerable doubt about the authenticity of the late Mr Edwards' signature on the purported resolution of 2 March 1989 and on the power of attorney of 20 September 1989. The former document, it seems, was backdated and could not have been signed earlier than 20 September 1989. By the dates on which the two documents were supposedly signed Mr Edwards could neither speak nor write on account of a brain tumour. Annabelle does not believe her father signed either document.

9.17 At best for Schwulst, he backdated documents and then belatedly sought approval from the Master to act as a trustee, being prompted by requests from Annabelle's attorneys for documentary proof of the legitimacy of his appointment.

9.18 Schwulst, purporting to act for the Trust (at a time when his appointment had not yet been authorised by the Master), procured the cancellation of a Sanlam policy belonging to Annabelle, and the substitution therefore of policies in favour of Robin and Annabelle's sister Rosemary (who later also committed suicide), without

Annabelle's knowledge, and then – when questioned about it – dishonestly claimed that he had nothing to do with the substitution and that the substitution had been effected by the late Mr Edwards before Schwulst's appointment as trustee.

[10] First to third Respondents contended that they should not have been cited in their personal capacity but rather in their representative capacity as joint Trustees of the Trust.

[11] They claim that they are not, in this representative capacities party to either of the applications and that the relief claimed in the removal and cost applications cannot be granted without joining them in their representative capacities.

[12] Mr Olivier, on behalf of the Trustees, argued further that there is a long history of complaints against the trustees. It can never be expected of trustees to expend vast amounts of money out of their personal pockets in defending the exercise by them of their duties and discretion. Respondents would have no alternative but to resign, should they not be able to rely on the Trust to fund the opposition.

[13] He submitted that there is a difference between being sued in

a personal and representative capacity. Respondents are before Court in the main case in their personal capacities only and cannot as such in law say anything in defence of the Trust. They are not called upon to defend the Trust, but to defend themselves in their private capacities. A clear distinction has to be drawn between the position of a trustee, cited in his personal capacity, and a trustee, cited in his official capacity.[1] Legal standing is in a sense a procedural matter, but it is also a matter of substance.[2]

[14] Mr Olivier further submitted that the question in regard to the funding of the application by respondents in their personal capacity, only arises as a result of the fact that the proceedings were instituted against them in that capacity.

[15] With reference to the Courts' attitude in *McNamee & Others v Executors Estate McNamee* 1913 NDP 428 at 432, that an action for removal of trustees was personal to the trustees as individuals, he contends that the judgment is clearly wrong, illogical and no authority was stated for such finding. I shall return to this argument in due course.

[16] He argued further that as a trustee, who is removed, may be ordered to pay costs, such discretion can only succeed if the

1 *The Master v Deedat & Others* 2000 (3) SA 1076(N) at 1091D-E
2 *Land & Agricultural Bank of SA v Parker & Others* 2005 (2) SA 77 (SCA) at 92F

proceedings are instituted against the trustees in their representative capacities. This leaves the door open that the costs can be recovered from a party who was not party to the proceedings. This he argues is improper and not legally sound.

[17] With reference to the trust deed that reads:
"*For and on behalf of the Trust to commence and prosecute or defend any action, suit, compulsory sequestration, liquidation or other proceedings before any Court or any other competent body or persons.*"

And:

"*Generally, it is the intention of the Settlors that the Trustees are in fact to have the same absolute control over and unfettered powers of investment and reinvestment of the Trust Assets as if they had been absolutely and beneficially entitled to the Trust Fund and they are specially indemnified against any claim arising from the loss of income or capital as a result of the bona fide exercise of the discretions hereby granted to them.*"

Mr Olivier contends that should the trustees not be entitled to recover the costs in regard to the removal application, this right would be reduced to a mere token. They always acted in their representative capacities and therefore must be cited as such, have the protection as trustees and because of the

Trust's interest in the matter it should be joined.[3]

[18] Mr Olivier relies on the dictum in *Enrlich v Rand Cold Storage and Supply Co. Ltd* 1911 TPD 170 at 182-183, for the distinction between the legal practice in South Africa and that of England.

"*But it seems to me, according to the practice in South Africa, that we have all along recognised the representative character of trustees, or assignees in assigned estates, and that they have a persona standi in judicio. This was so in Watkin's Assignee vs Kromm (9 C.T.R 632), Quirk's Trustees vs Assignees of Liddle & Co. (3 S.C. 322), Natal Bank vs. Scott and Others (6 N.L.R. 266), and other cases. I am not aware that this point has ever been argued before any court of law: but it is in keeping with our Roman-Dutch law; and if we remember that our statute law recognises trustees in insolvency as having a personal standee in judicio, it seems to me that it is in consonance with the principles of our Roman-Dutch law that the trustees in an assigned estate may be sued in their representative capacity. That is the difference between our law and the English law, as was pointed out during the course of the argument. The English law makes the trustee personally liable, the trustee having his indemnity against the cestui que trust. According to our law, all the*

3 *SACCAWU v Letlapa NO & another (Mostert intervening)* 2005 (6) SA 354 WLD 359E-G

authorities-with the exception of the case of Standard Bank vs. Jacobson (16 S.C. 352), with which I shall presently deal-agree that the trustee or executor who acts in a representative capacity is prima facie liable in his representative capacity. In Potgieter's case ([1908)] T.S. 982) it was laid down that costs cannot be obtained against a trustee personally, unless he acts either mala fide, negligently, or unreasonably. As I said, the only case to the contrary is Standard Bank vs. Jacobson, where the CHIEF JUSTICE of the Cape Colony said that, when judgment is given against him, the trustee is prima facie liable in his private capacity. Whether the CHIEF JUSTICE was correctly reported or not, I do not know; but the dictum is opposed to the decisions in Potgieter's Case and Vermaak's case ([1909] T.S. 679), and I think, to the general principles of our law."

He further argues that in our law the trustees are *prima facie* not liable in their personal capacity.

[19] This dictum does however not take the debate in the instant matter any further. This will apply when the trustees act in their representative capacities and even then, the liability is only *prima facie* subject to the finding of the Court at the end of the case.

[20] Mr Owen Rogers SC with John Rogers who appeared on behalf of the Applicants was *ad idem* with counsel for first to third

respondents that the cost relief sought by the trustees is unprecedented in this country or in the commonwealth case law.

[21] They submitted that the citation of the trustees in the main case (the removal application) in their personal capacities was correct and in accordance with authority. However, the debate is sterile, since it does not answer the question whether the trustees are entitled to be indemnified out of the estate for their opposition or whether the court should at this stage make any such order.

[22] The fact that a trustee is sued for removal in his personal capacity is not dispositive of the question whether he is entitled as a trustee to reimbursement. If a trustee is sued in his personal capacity for breach of trust (whether the claim is for damages or for removal or both) and he is vindicated at the end of the case, the fact that he was sued (albeit it personally) would be regarded as a consequence or incident of his having agreed to act as a trustee. If his conduct giving rise to the claim and his defence of the proceedings were proper, he would be entitled to recoup any loss suffered by him from the trust estate. This would be the difference between his full reasonable expenditure in defending himself on the one hand, and any amounts recouped from the

unsuccessful complainant on the other.

[23] The *curator ad litem,* Adv Melunsky filed a comprehensive report on behalf of the existing minor and possible future beneficiaries of the Trust.

[24] He argues that the removal application is to be distinguished from those instances where, but for its lack of legal personality, it would be the trust which sues or is sued. In such cases trustees act in their representative capacities on behalf of the trust, *nominee officii*. In so acting they give effect to their duty to protect or preserve the trust estate for the benefit of the beneficiaries. That is not the position here.

[25] It follows that an order against the trustees for their removal would be an order against them in their personal, rather than their official, capacities.

[26] Not only would it be competent for an order removing the Trustees to be accompanied by an order that they pay the costs from their own pockets such an order would be consistent with the general principle that costs follow the event.

[27] While a trust may sometimes have to bear the costs of the party who successfully applies for the removal of a trustee (because the trustee cannot pay[4], it would be contrary to principle (because the trustee is not acting in a representative capacity) to expect a trust to bear the legal costs of such a

4 *Tijmstra NO v Blunt-Mackenzie NO and Others* 2002 (1) SA 459 at 477C-H

trustee. Generally speaking it would also be unfair to oblige a trust to pay the legal costs of the person whose maladministration was the cause of the removal application.

[28] The order which the trustees seek in their interlocutory application should be seen in this light. It is unprecedented (at least, no authority has been cited in favour of it) and it runs counter to principle. Furthermore, if granted, it would have the effect of pre-empting any future decision on the costs of the removal application. Specifically, it would preclude the court seized with the matter from ordering the trustees to bear their own costs thereby depriving the court hearing the removal application of a significant part of its discretion, specifically as regards costs.

[29] It is submitted by Mr Melunsky that, rather than this interlocutory application which serves only to increase costs, the appropriate course of action for the trustees, if they wish to oppose the removal application, would be to file answering affidavits and to include a prayer that their costs be borne by the Trust. Should it be found in due course that the removal application was not justified or that the trustees had acted in good faith, they may receive an indemnity from the Trust. However, it is submitted that it is premature for that issue to be decided at this stage.

[30] If the removal application succeeds and some or all of the applicant's allegations are proven, it would be unfair for the Trust to be saddled with the trustees' costs on the basis of this interlocutory application. The court removing the trustees – if that is the ultimate outcome – ought to have the discretion to order that the Trust not bear the trustees' costs. The order sought by the trustees could result in the (otherwise avoidable) depletion of the Trust's estate.

[31] It is further submitted that there is no warrant for interfering with the usual rule that the question of costs be decided at the end of the matter. To order that the trustees be indemnified for their legal costs at the outset of the litigation and even before the issue of their fitness for office has been assessed could result in prejudice

to the Trust.

Accordingly, the *"joinder"* of the trustees in the main case in their representative capacities is irrelevant to the current issue. It is also contrived. All three trustees are before the court in the main case, and they can say whatever they believe needs be said in defence of the Trust.

The legal position:

[32] An application for the removal of a trustee is a claim against the trustee in his personal capacity, in much the same way as is a beneficiary's claim against a trustee for damages for breach of trust. The trustees accepted this in their founding affidavit and it is borne out by authority[5].

[33] The contention by Mr Olivier that they should have been sued in the main case in their representative capacities would not affect the costs issue now under consideration and their contention is, incorrect in law. It is contrary to the cases cited in footnote 5 above and to the views of the learned authors mentioned there.

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5 Cameron et al *Honore's South African Law of Trusts* 5th Ed para141 at p 141 and para 256 at p 420; *LAWSA* vol 31 para 427; *Meyerowitz on Administratin of Estates and Estate Duty* 2004 para 23.24; *McNamee and Others v Executors Estate McNamee* 1913 NPD 428 at 432; *Mooljee v Mooljee* 1958 (4) SA 192 (D) at 194C-D; *Rampersadh v Pillay* 1963 (3) SA 320 (D) at 321A-D; cf *Chetty v Tamil Protective Association* 1951 (3) SA 34 (N) at 39D. This proposition was not doubted by Diemont J in *Katz, NO v Segal and Others* 1977 (2) SA 1038 (C) at 1040H-1041B – the learned judge merely decided that the court of the place of the administration of the estate still had jurisdiction.

[34] It is also not correct to describe this state of affairs as illogical. On the contrary, it is sound:

34.1 A claim should be brought against a trustee in his representative capacity where he is alleged to be liable in that capacity, e.g. on a contract concluded on behalf of the trust or a delict committed by the trust or to effect payment due under the trust deed to a beneficiary.

34.2 In such cases, where there is more than one trustee, the trustees in their representative capacities must act together[6] and any claim in such cases must cite all the trustees in their representative capacities[7]. One of several trustees cannot be cited as a representative of the trust. Accordingly, in proceedings of the kind envisaged in 34.1 above, all the trustees in their representative capacities would have to be sued. That is the hallmark of a claim brought against trustees in their representative capacities.

34.3 Where a trustee is sued for breach of trust (whether

6 *Honore op cit* para 198 p 324
7 *Honore op cit* para 256 and cases cited in footnote 21 thereof

for removal or damages), the claim is obviously against him personally. The claim arises because the trustee assumed the office of trustee, but the complaint is that he violated the trust or the office. The whole point in such proceedings is that the trust (as represented by its trustees in their representative capacities) is not liable. If it were otherwise, beneficiaries would always be the ultimate losers where trustees act in breach of trust.

34.4 Particularly in the case of removal, the claim is personal. A trustee as a representative of the trust (as distinct from his personal capacity) cannot be removed. The correct metaphor is that of an office (cf s20 of the Trust Property Control Act 57 of 1988; cf *Honore op cit* para 8 p 22). The office is unaffected by the removal. It is the individual who is removed from the office.

34.5 That claims for removal are personal is clear from the fact that a removal application can properly be brought against only one of several trustees. The claim arises from conduct personal to the particular trustee and not from conduct which binds the trust.

[35] The answer to the costs aspect of the current application is the same whether the trustees are regarded as being parties to the main case in their personal capacities or in their representative capacities. Accordingly, the proposed *"intervention"* by the trustees in their representative capacity in the main case does not alter the position.

[36] On first principles, one would expect costs in a removal application to follow the result. If the trustee is removed for improper conduct or breach of trust, he should pay the costs of the other side personally. Conversely, if the complaining beneficiary's claim is found to be unfounded, the trustee's costs should be paid by the unsuccessful applicant personally. This is again borne out by case law: where a trustee is removed, he is invariably ordered to pay the applicant's costs personally, though it is often stated (for the successful applicant's protection) that if the trustee fails to pay such costs they can be recovered from the trust estate[8]. In the *Sackville West* case (cited in the footnote) Solomon ACJ emphasised that this is not confined to cases where the trustee has been guilty of misconduct but extends to proceedings made necessary by his negligence or

8 See, e.g., *Sackville West v Nourse and Another* 1925 AD 516 at 529-533; *Spiros v Spiros* 1932 WLD 207 at 212; *Ex Parte Hiddingh* 1935 OPD 92 at 96-97; *Ex Parte Suleman* 1950 (2) SA 373 (C) at 377; *Die Meester v Meyer en Andere* 1975 (2) SA 1 (T) at 19E-H; *Boyce NO v Bloem and Others* 1960 (3) SA 855 (T) at 875A-B; *The Master v Deedat and Others* 2000 (3) SA 1076 (N) at 1091B-E; *Tijmstra NO v Blunt-MacKenzie NO and Others* 2002 (1) SA 459 (T) at 477C-H; *Gory v Kolver NO and Others* 2006 (5) SA 145 (T) para 30 and clauses 11 and 12 of the order.

unreasonable behaviour.

[37] As regards the payment of the trustee's own costs in such cases, if he is removed for improper conduct or breach of trust it would obviously be unjust for the trust estate to have to bear the expense of his unsuccessful defence. Since the claim is against the trustee in his personal capacity, his defence is not in his capacity as a trustee and one would thus not in principle expect him to be entitled to have recourse to the trust estate, particularly where he is removed for misconduct.

[38] The question can be viewed from the perspective of the more general question as to a trustee's right of reimbursement for trust expenditure, particularly insofar as it relates to legal expenditure. The general rule is that a trustee is entitled to an indemnity in respect of expenses properly incurred, and this applies *inter alia* in respect of legal expenses incurred by the trustee when sued in his representative capacity[9]. Accordingly, if a trustee sues or is sued in his representative capacity, and the bringing or defending of the proceedings is proper, he will be entitled to a full indemnity regardless of the outcome. This would apply both to his own costs and those he becomes liable (if unsuccessful) to pay to the other side.

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9 *Honore op cit* para 217 at p 345 and para 265 at p 428.

[39] However, and even where the trustee is properly a party to legal proceedings in his representative capacity the trustee will be held personally liable for the costs if he acted *mala fide* or unreasonably or improperly in bringing or defending the proceedings[10].

[40] A revealing illustration of this principle is found in the judgment of Diemont J (as he then was) in *Jakins v Burton* 1971 (3) SA 735 (C). The applicant, a beneficiary, applied for an increase of her allowance from a trust fund. The respondent trustee, despite a favourable report from the curator *ad litem*, opposed. Although the trustee was not found to have been guilty of *mala fides* or mismanagement of the trust estate, he had unreasonably opposed the increase of the applicant's allowance. He was criticised by the applicant's counsel for displaying *"vicarious parsimony"* (739D), and the court said he had placed too much emphasis on capital preservation and not enough on the welfare of the beneficiaries (738G-H). He made unreasonable demands for substantiation of the requested increase. Based on the test laid down in *Re Estate Potgieter* (see footnote 10), Diemont J ordered that the trustee should bear personally the costs incurred by him subsequent to the filing of the curator's report, his opposition having been unreasonable (740C-H).

10 See *Re Estate Potgieter* 1908 TS 982 at 1000-1002 and 1007-1009; *Grobbelaar v Grobbelaar* 1959 (4) SA 719 (A) at 725B-C.

[41] Another example is the judgment of a full bench in this division in *Port Elizabeth Assurance Agency & Trust Co Ltd v Estate Richardson* 1965 (2) SA 936 (C). There were originally five trustees. Two died. Of the remaining three, two wished to co-opt a further trustee. The other trustee (the appellant, a professional trust company) was against this. The two trustees brought proceedings for the appointment of the further trustee and the appellant opposed. The appellant lost in the lower court and again on appeal. This court held that the appellant's opposition had been unreasonable. In reaching this conclusion the court took into account that the appellant had a personal interest in the outcome, since the trust's capital was substantial and if a further trustee were appointed the remuneration would have to be divided among more trustees. The appellant was ordered to pay the other trustees' costs *de bonis propriis* and was held not to be entitled to recover its own costs from the trust estate.

[42] The case of *Cooper NO v First National Bank of SA Ltd* 2001 (3) SA 705 (SCA), is another illustration of this principle. The statutory trustee of an insolvent, who was correctly sued in his representative capacity, was found to have behaved properly although in the event he lost the case. He was thus not ordered to pay the costs personally.

[43] Since this is the position where a trustee is sued in his representative capacity, a trustee sued in his personal capacity for breach of trust can hardly be in a better position. If he is removed for misconduct or other improper or unreasonable behaviour, his opposition to the application for his removal would inevitably be found to have been unreasonable, and he could not only be ordered to pay the other side's costs personally but would have no entitlement to an indemnity from the trust in respect of his own costs.

[44] The argument of respondent's counsel in paragraph 16 above is based on paragraph 141 in *Honore,* (supra) which he refers to in support of the proposition that a trustee who is removed may be ordered to pay costs from his own pocket, and argues that such a discretion could exist only if proceedings were against the trustee in his representative capacity. Since the cited proposition follows immediately after the sentence in which the learned authors state that an application for removal should be brought against the trustee in his personal capacity, they could hardly have intended to support the suggested argument. Moreover, it is clear from the two cases cited by the learned authors[11] that they were referring to the successful applicant's costs, not reimbursement of the

11 See footnote 5 above

unsuccessful trustee's costs. In both cases the court ordered that the trustee pay the applicant's costs personally but that failing such payment the applicant's costs could be recovered from the trust estate. Such an order in favour of the successful beneficiary in no way indicates that the claim was not against the trustee in his personal capacity.

[45] Schwulst refers in his affidavit to clause 9.3 of the trust deed, in terms whereof the trustees are to be indemnified out of the trust fund *"against all claims and demands of whatsoever nature that may be made upon them arising out of the exercise of any of the powers conferred upon them by this Trust Deed"*. This clause refers to a claim or demand made against the trustees in their capacity as such. An application for their removal is not a *"claim"* or *"demand"* made upon trustees arising out of the exercise of their powers under the trust deed. In any event, a clause such as this will always be construed as covering only expenses properly incurred. Since the trust deed does not empower the trustees to act improperly, the misconduct which would form the basis of their removal would not constitute the exercise by them of powers conferred by the trust deed. Similarly, unreasonable or improper opposition to their removal would not involve an exercise by them of powers conferred by the trust deed. This approach to the interpretation of indemnity clauses is trite, as

will appear from commonwealth decisions to be referred to hereunder[12].

[46] Schwulst says, in his founding affidavit in the costs application, that if the court does not come to the trustees' aid they will simply have to accede to their removal. In Schwulst's replying affidavit he states: *"At this point in time, I also wish to state categorically that should this Honourable Court not be prepared to grant an order as prayed in the Notice of Motion that I and my co-Trustees will withdraw our defence... and the Applicants will then be able to have their way on an unopposed basis"*. This stance is quite unjustified:

46.1 The trustees do not say that they cannot, between the three of them, afford to fund a defence of the main application pending a final determination thereof.

46.2 If a final determination were in their favour, they would in all probability obtain a costs order against the applicants. They do not say that the applicants could not afford to pay such costs, and in any event the court could at that stage rule that if the applicants fail to pay the trustees' costs the latter can recover same from the

12 See particularly *Holdings and Management Ltd v Property Holding and Investment Trust plc and others* [1990] 1 All ER 938 (CA) at 943a-h*; Gomba Holdings UK Ltd and others v Minories Finance Ltd and others (No 2)* [1992] 4 All ER 588 (CA) at 599c-f; *Sons of Gwalia Ltd v Margaretic* [2006] FCAFC 92 para 3; *Pope v Pope and others* [2001] SASC 26 paras 27 and 33.

trust estate.

46.3 If a final determination were against the trustees, their opposition would have been unreasonable and they could not complain about having to bear their costs personally.

46.4 The trustees know what the facts are. If the trustees believe the applicants do not have a just claim, they could personally fund their opposition, confident in the knowledge that they will in due course be able to recoup their costs.

46.5 What they cannot be permitted to do is to litigate at no personal risk, which is what in essence they seek to do. Says Schwulst: *"Neither I nor my Co-trustees are inclined to run the risk of being liable for such exorbitant amounts in respect of costs"* and *"... I am not prepared to spend any amount of money whatsoever from my personal funds in defending my actions and the exercising of my discretion whilst acting on behalf of the Trust, other than defending any criminal acts of impropriety..."*.

[47] In his replying affidavit Schwulst says that the trustees would be willing to indemnify the Trust by guarantee in respect of costs incurred in their defence of the application, if it should at the end of the case transpire that the trustees were guilty of criminal conduct.

47.1 This shows a misapprehension as to the circumstances in which a trustee is and is not entitled to an indemnity out of the trust estate. The indemnity is lost not only where there has been criminal conduct. If opposition to removal is not proper in all the circumstances, there will be no indemnity. The grounds for removal might include unreasonable conduct, negligence or breach of trust. Opposition to removal on those grounds, if such grounds are established, would be improper.

47.2 The suggested guarantee would thus be hopelessly deficient. In any event, Schwulst has said nothing as to the terms of the guarantee or the identity of the guarantor.

47.3 Moreover, if the trustees have the financial standing to obtain a suitable guarantee, there is no reason why they should not personally fund their opposition *pro tem*.

Commonwealth law

[48] Since the development of our trust law has been substantially influenced by English law[13], it may be useful to make reference to some English and commonwealth decisions.

[49] In English law it is common practice for trustees, when proposing to sue in that capacity or when sued in that capacity, to approach the court for directions as to whether they would be acting properly by bringing or defending the proceedings. Such an application is known as a *"Beddoe"* application, after the leading case on this procedure, *Re Beddoe, Downes v Cottam* [1893] 1 Ch 547 (CA). The trustees are expected to make a full disclosure to the court of the strengths and weaknesses of their case. If the court sanctions the proceedings, the trustees will enjoy an indemnity from the trust estate, regardless of the outcome. The court's directions would typically not be given once for all but would sanction certain steps, whereafter an application for further judicial advice would be necessary.

[50] A *Beddoe* application may thus involve in effect what is known as a pre-emptive costs order. This procedure, insofar as it deals pre-emptively with costs, has been extended in certain instances to beneficiaries, in that they may apply at the outset

13 Cf *Honore op cit* para 8

for an order that litigation relating to the trust to be funded from the trust estate. The leading case on this extension is *Re Buckton, Buckton v Buckton* [1907] 2 Ch 406.

[51] In this and subsequent decisions the English courts have distinguished between the various types of trust litigation in which trustees, beneficiaries and third parties may become embroiled. In *Alsop Wilkinson (a firm) v Neary and others* [1995] 1 All ER 431 (Ch) the court dealt at some length with the principles applicable to pre-emptive cost orders in *"hostile litigation"* between beneficiaries and trustees (as opposed, for example, to cases where trustees or beneficiaries seek a ruling from the court on a disputed point of interpretation for the benefit of the estate). The making of pre-emptive costs orders in such cases is exceptional, and requires a consideration of four matters, namely (a) the strength of the party's case (b) the likely order as to costs at the trial (c) the justice of the application and (d) any special circumstances (at 437b-d)[14]. As regards consideration (b), it must appear to the judge at the interlocutory stage that the trial court could properly exercise its discretion only by ordering the applicant's costs to be paid out of the trust estate.

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14 These principles were derived *inter alia* from *Re Biddencare Ltd* [1994] 2 BCLC 160 and *McDonald v Horn* [1995] 1 All ER 961 (CA)

[52] In the *Alsop Wilkinson* case the application for a pre-emptive costs order failed on all four grounds. As to the second ground, Lightman J said that the usual order in hostile litigation is that the parties, if they lose, have to pay their own costs and those of the successful party.[15]

[53] The learned authors of *Lewin*[16] do not cite, and neither counsel nor my research assistants have been able to find, any English case in which a trustee, faced with an application for removal, has sought a pre-emptive costs order by way of a *Beddoe* application. The learned authors state[17] that where removal is sought as relief in a breach of trust application, the position as to costs will be governed by the general principles applicable to breach of trust actions. The following passage setting out these general principles shows why pre-emptive costs orders would not be encountered in removal cases:

"*Sometimes trustees who are sued for breach of trust seek to protect their position by making a Beddoe application for directions as to whether or not they should defend. Apart from exceptional_circumstances, this is inappropriate. For, in contrast to the position concerning third party proceedings, a trustee who loses a breach of trust action is not entitled to*

15 See also *Lewin on Trusts* 17th Ed at paragraphs 21-45; 21-56; 21-67; 21.60; 21.85-88; 21.93; 21-46; 21.76; 21.104-109 and 21.70
16 See footnote 15 above
17 *Lewin* paragraph 21-93

indemnity, and so cannot expect the court to indemnify him at a time when it is not known whether or not the charge of breach of trust is well founded. There may perhaps be exceptional circumstances where a Beddoe application might be justified, for example where a disaffected beneficiary seeking to bring pressure on the trustee charges him with a breach of trust which even if established would demonstrably not have involved any loss to the trust fund, and might have yielded a profit, and where it would be of benefit to the trust for the defendant trustee to have access to the trust fund for the purpose of enabling the trustee to obtain legal representation so as bring the action to a speedy and effective conclusion[18]*."*

[54] In the next paragraph (21-89) the learned authors state that a trustee who successfully wards off a breach of trust claim may only recoup his costs out of the trust fund once the action against him has been dismissed or discontinued and perhaps only when it has become clear that his costs are irrecoverable from the claimant.

[55] These principles have been adopted and applied in other commonwealth jurisdictions:

18 *Lewin* paragraph 21-88

Canada

55.1 In *Turner v Andrews* 2001 BCCA 76, the Court of Appeal for British Columbia at para 17, in refusing a pre-emptive costs order in hostile litigation, noted that the usual rule as to costs had as one of its purposes to encourage the reasonable conduct of litigation. The court obviously had in mind that if either side had an advance indemnity in respect of costs, the ordinary considerations which temper extravagant litigation and force parties to make a realistic assessment of the strengths and weaknesses of their cases would be absent[19].

55.2 The English principles were also applied by the Supreme Court of British Columbia in *Kordyban v Kordyban* 2003 BCSC 1302. The court found that it was impossible to weigh the strengths of each side's case but that it could not be said that the only order which could properly be made at the trial was for an indemnity out of the trust estate. As to the justice of the application for pre-emptive costs, the court remarked that there was no evidence that the applicant would be unable to advance her case without a prospective costs order, and that she would be able to recoup her costs from the other side if

19 *Turner* was followed in a similar case by the Queen's Bench of Alberta: See *Lloyd v Imperial Oil Ltd* 2001 ABQB 407.

successful.

55.3 A similar conclusion was reached in *Bank of Nova Scotia Trust Co v Powlick* 2003 BCSC 1382. The application for pre-emptive costs was made by the trust company appointed as executor under a disputed will. The trust company (like the trustees in the present matter) said that it was unwilling to take the risk that it would be out of pocket for legal fees and that unless it got pre-emptive costs it would have to abandon its advocacy of the disputed will, to the possible prejudice of the deceased's wishes. The court described the trust company's attitude as untenable. The trust company was sufficiently solvent to fund the litigation *pro tem*: *"The relief the BNS seeks is so unusual, so extraordinary, so out of the realm of the usual that the court should grant it only in the most narrow and deserving of circumstances"*.

Australia

55.4 In general on the costs where a trustee is removed, the High Court of Australia (per Latham CJ) said the following in *Miller v Cameron* [1936] HCA 13, a case where a trustee was removed in consequence of his bankruptcy despite the absence of any evidence of

misconduct:

> "*In this case the trustee was asked to resign his office by every person interested in the execution of the trust. In my opinion his refusal to resign in all the circumstances of the case has resulted in legal proceedings which ought to have been avoided. The defendant would have acted wisely and properly in resigning as soon as he was asked. In defending this action and in prosecuting this appeal the defendant has been representing and supporting his own interests and not those of the trust estate. He has failed to show that his interests coincide with the interests of the trust estate. In such a case I consider it quite proper that he should pay the plaintiffs' costs of the action and of the appeal to this Court*".[20]

55.5 The principles in the English cases culminating in *Alsop Wilkinson v Neary and others* were applied by the Supreme Court of Victoria in *RMBL Investments Pty Ltd v Salvus Quen Nominees Pty Ltd & others* [1999] VSC 44, where a trustee sought a pre-emptive costs order. The court was satisfied that in respect of a past phase of the litigation (culminating in an interim distribution

20 This passage was quoted and applied in the more recent judgment of the Full Court of the Supreme Court of Australia in *Pope v Pope and others* [2001] SASC 26 (paras 31-33)

order) the only order which could be made at trial was in favour of the trustee and thus granted the pre-emptive order in respect of those costs. However, in respect of the rest of the pending proceedings the court declined to make a pre-emptive order as it could not be totally satisfied that this would accord with the only order which could be made at the end of a trial.

55.6 There is a general discussion of the matter in the judgment of Finkelstein J in *Sons of Gwalia Ltd v Margaretic* [2006] FCAFC 92 (the other two judges in the Federal Court found it unnecessary to enter into the question of the trustee's costs). What is relevant for present purposes is the judge's comment on clause 5.7 (b) of the relevant trust deed, which stated that the trustees were to be reimbursed in respect of all costs, fees and expenses incurred in connection with the performance of their duties under the deed. Finkelstein J said: *"It goes without saying that these provisions only entitle the administrators to recover properly incurred costs and properly claimed remuneration in relation to work that has been undertaken by them"* .[21]

21 That was also the view expressed in the *Pope* case supra with reference to the indemnity clause in the trust deed there under consideration (see para 27 read with para 33)

55.7 A similar point was made by the Court of Appeal of the Supreme Court of Victoria in *Dimos v Skaftouros & Others* [2004] VSCA 141, where it was said that a trustee's indemnity is confined to costs properly incurred and that a trustee who unsuccessfully opposed proceedings for his removal was not entitled to an indemnity.

55.8 In the aforesaid case the court upheld the decision of the lower court in *Skaftouros & Others v Dimos* [2002] VSC 198. In the latter case Mandie J said that in proceedings for a trustees' removal a trustee cannot take the costs of defending the application from the trust estate *pendente lite* – it was for the court at the end of the hearing to decide whether the trustee had acted reasonably in opposing his removal.

New Zealand

55.9 In *Hargreaves v Telford and Haining* [2006] NZHC 1476 the court emphasised that a trustee is only entitled to an indemnity out of the estate where legal costs have been properly incurred. Where the indemnity applies it

is in effect the beneficiaries who bear the costs, so it is critical for there to be a check on those expenses. A trustee is not entitled to the indemnity where the expenses he incurs arise out of his own misconduct.

Hong Kong

55.10 The case of *In Re Estate Leung Shuet Fun* HCMP 148/2005, a case directly in point, a trustee facing an application for removal, has applied for a pre-emptive costs order.

The court, in refusing the application, referred to *Alsop Wilkinson* and *Lewin on Trusts* and found that exceptional circumstances were not present. The court could not make a meaningful assessment of the merits of the main case and there was no evidence that the applicant trustees were impecunious.

[56] In applying the four factors set out in *Alsop Wilkinson* the following is apparent:

56.1 As regards the merits of the main case, *prima facie* the applicants' case for removal is strong. The trustees, having chosen to hold back their answering

affidavits, has not proffered a defence to be taken into account.

56.2 As regards the likely costs order of the main case, it is plain that if the applicants succeed the trustees will not enjoy an indemnity out of the estate. The charges against them are numerous and serious. One thus cannot say, at this stage, that an indemnity order is the only one which the trial court could reasonably make.

56.3 As regards the justice of the case, there is no reason why each side should not have to *"put their money where their mouth is"*. The trustees do not claim in their personal capacities, to be impecunious. They will recoup their personal expenditure in due course if successful.

56.4 There are no special circumstances to which the trustees have pointed.

[57] As regards the approach adopted in the Hong Kong case of *Re Estate of Lehung Shuet Fun*:

57.1 The general principle there laid down is that a pre-emptive costs order in a removal case is inappropriate save *"perhaps"* in *"exceptional circumstances"*. The reasons stated accord entirely with our law.

57.2 As regards the possible exceptional circumstance mentioned by *Lewin*, this is plainly not a case where the breaches of trust, even if established, would be found to be insignificant.

57.3 Nor is this a case of impecuniosity on the part of the applicants. In any event, such a danger can adequately be met by an order at the end of the main case. At that stage, if the trustees are successful, the court could order that to the extent that the applicants are unable to pay the trustees' costs, such costs may be recouped from the Trust estate. That, after all, is the order which the applicants themselves will have to be satisfied with if they are successful in the main case and if the trustees in their personal capacities should prove to be unable to pay the applicants' costs. As noted earlier, this is usually the way in which costs orders in such matters are framed by our courts.

[58] It is clear that on the approach reflected in the commonwealth cases the current application would have to fail, and that this conclusion accords with the principles of our own law discussed earlier thus submitting that prayer 1 of the notice of motion should be dismissed. As a matter of basic principle, therefore,

an application of the kind now made by the trustees is fundamentally misconceived. They ask in advance for an order that their defence of the application for their removal be funded by the trust estate. Since they would only be entitled to such an indemnity if their opposition were justified, the court could not make such an order without deciding the main case. In effect, the trustees ask the court to rule that regardless of whether or not they are acting reasonably in opposing the main application, they are entitled to an indemnity. The making of such an order is contrary to all authority, which is to the effect that trustees enjoy an indemnity only if they oppose proceedings properly and reasonably. The trustees' demand also offends basic notions of justice and commonsense.

EXTENSION OF TIME

[59] Prayers 2 and 3 of the notice of motion seek a stay of the filing of the trustees' answering papers in the main case until 60 days after a final determination of the costs application.

[60] The procedural chronology of the matter is set out in paragraph 3 to 7 above. The trustees have had since 10 May 2007 to consider the merits of the main case. They delayed their notice of opposition until the last possible day, 6 July 2007. They then waited until 7 August 2007 to launch the current application

which was heard on 11 September 2007, a period of more than 4 months have elapsed.

[61] There is no justification for the trustees not to have at least filed answering papers pending the determination of the costs application. In terms of rule 27(1) this court can grant an extension of time only *"on good cause shown"*[22]. The trustees have deliberately not complied with the rules regarding the filing of their answering papers. They do not have acceptable grounds for having adopted this position, and they also failed to bring their extension application at the earliest opportunity when they foresaw the need for it. They relied on the outcome of this application for the filing of papers.

[62] I am of the view, even having found as stated in para 61 above, that the prejudice that the first and third respondents might suffer as a result of the potential court orders in the main application that they be granted an opportunity to file papers, if they so wish.

Conclusion:
I am indebted to counsel for the thorough preparation and heads of argument filed in this matter, from which I richly harvested in preparation of this judgment. The Research assistants Mr Thembe and Ms Sirkhotti are thanked for their diligent and thorough

22 See generally on this requirement *Du Plooy v Answes Motors (Edms) Bpk* 1983 (4) SA 213 (O)

research, without which I would not have been able to deliver the judgment in this short time.

Order:

1. The costs and intervention applications are dismissed.

2. The first and second respondents are jointly and severally to pay applicants as well as Sixth Respondent's costs including those attendant on the employment of two counsel, which costs to include the wasted costs for the appearance on 23 August 2007.

3. The first to third respondent is not entitled to recover the costs from the Trust.

4. First to third respondents are ordered to file their opposing affidavits in the removal application, if any, within 15 days of this order failing which the applicants may set the matter down for hearing on the unopposed roll.

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NC Erasmus J