IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 14625/2021

In the matter between:

KARMIEN KRUTH	Applicant
and	
PHILIP RALL N.O.	First Respondent
LENETTE JANSE DE WIT N.O.	Second Respondent
TOERIEN DE WIT N.O. [in their capacities as the trustees for the time being of the **ELBERT DE WIT FAMILIE TRUST**, number **T813/94**]	Third Respondent
LENETTE JANSE DE WIT	Fourth Respondent
MARYKE SMIT	Fifth Respondent
TOERIEN DE WIT	Sixth Respondent
ELBERT DE WIT	Seventh Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 18 JULY 2023

MANGCU-LOCKWOOD, J

A. INTRODUCTION

[1] The applicant, a capital and income beneficiary of the Elbert De Wit Family Trust (*"the Trust"*) seeks an order directing the first to third respondents (*"the trustees"*) to prepare the Trust's financial statements and to provide her with certain specified documents of the Trust.

[2] All the capital and income beneficiaries of the Trust are family members and are cited as respondents. The fourth respondent, who is also cited as second respondent in her capacity as a trustee, is the applicant's mother, Lenette. The sixth respondent, who is also cited as third respondent in his capacity as a trustee, is the applicant's older brother, Toerien. The fifth and seventh respondents are the applicant's sister (Maryke) and younger brother (Elbert Jr), respectively. It is convenient to refer to all of them by their first names. The only party who is not a family member is the first respondent, who has been a trustee from the inception of the Trust, and is a retired attorney.

[3] The application was initially opposed by all three trustees. However, well after the launch of these proceedings, Lenette delivered an affidavit in which she effectively dissociated herself from the trustees' opposition. I permitted the admission of the affidavit, and permitted all parties to deliver supplementary affidavits in response to her affidavit. Clause 4.10 of the Trust Deed of the Trust provides that *"[i]n the event of any dispute between the Trustees at any time, the decision of the majority shall apply and shall have the same effect and consequences as if it were the unanimous decision of the Trustees"*. And clause 5.22 grants the trustees the power and authority to defend any lawsuit in the name of the Trust. Thus, the majority of the trustees, consisting in this case of Toerien and the first respondent, suffices. For convenience's sake, I continue to refer to the trustees opposing the matter as *"the trustees"*.

[4] There have otherwise been numerous supplementary papers (as well as supplementary heads of argument) exchanged in these proceedings from both sides, in part, due to the fact that the matter was initially launched on what was referred to as a semi-urgent basis. All those papers and pleadings have been considered for purposes of this judgment.

B. THE RELIEF SOUGHT

[5] There have also been two amendments to the relief sought in the notice of motion. At the launch of these proceedings in August 2021 the applicant sought a list of specified financial information and documents of the Trust and of its associated companies. In December 2021 the notice of motion was amended to include a prayer for provision of trust financial statements as from 2017 to 2021 (now prayer 2.2) instead of *"financial statements for only the last three years"*.

[6] In March 2022 the amended notice of motion was further amended to include an order directing the trustees to comply with clause 8.2 of the Trust Deed by preparing financial statements for the years 2017 to 2021 (prayer 1) and to provide the 2017 to 2021 Trust financial statements (prayer 2.1).

[7] Then, after some *'without prejudice'* discussions were held between the parties in April and May 2022 the applicant received a number of documents, including the Trust financial statements from 2017 to 2021 - the subject of prayers 1, 2.1, 2.2, 2.4 and 2.5 of the latest notice of motion dated 15 March 2022. The applicant now only seeks costs in relation to that relief.

[8] The applicant has also been supplied with financial information relating to Route 62 Investments (Pty) Ltd, one of the Trust-owned entities of which she is a director, for the years 2017 to 2022. That information forms the subject of paragraph 2.5.6 of the further amended notice of motion. She persists with the remainder relief sought in the further amended notice of motion, which is the following:

> Prayer 2.3: All valuations of the Trust capital as at February 2017.
>
> Prayer 2.5: Financial statements, in either draft or final form, or end of year trial balances for Caresso Properties (Pty) Ltd, Zero E (Pty) Ltd and Connected Property Investment (Pty) Ltd.
>
> Prayer 2.6: The loan agreements in respect of mortgage bonds registered over trust owned properties.

Prayer 2.7: Copies of loan account printouts for loans between each company in the group and advances to any trusts or companies which a director or trustee has an interest.

Prayer 2.8: An explanation as to the origin and function of De Wit Group (Pty) Ltd and any financial information pertaining to it.

Prayer 2.9: A copy of the assets for any share swap agreement/s concerning the trust or entities it owns.

Prayer 2.10: Copies of the last income tax returns submitted in respect of each of the companies in the group and of the trust for the 2018 to 2020 tax years.

Prayer 2.11: Details of Trust properties bonded in 2020, all amounts received therefrom and details of how these funds were applied, to which these entities were advanced and for what purpose, and all trustees' resolutions taken in this regard.

C. RELEVANT FACTS

[9] The Trust was founded by the late Elbert De Wit Snr who passed away on 26 February 2019 and left his entire personal estate to it, and confirmed in his will that his wife and four children are the named capital beneficiaries in equal shares.

[10] The Trust is the sole shareholder of a group of entities referred to in these proceedings as the De Wit Group, whose director and chief executive officer is Toerien. It also holds 100% of the shares in Route 62 Investments (Pty) Ltd and 50% of shares in Gasvoorsieners Boland (Pty) Ltd. It owns no fixed property or assets, save for shares in three legal entities. It also does not have a bank account.

[11] Before and soon after the death of Elbert Snr, the family was engaged in discussions regarding possible distributions to be made to the beneficiaries for consideration by the trustees, but no agreement was reached. The first significant family meeting in that regard was held on 17 December 2017 whilst Elbert Snr was still alive, where the Trust assets were valued, and possible distribution was discussed. It was there that the beneficiaries expressed their preferences for specified assets, and the applicant recorded a preference for only cash instead of assets as a form of distribution.

[12] There was also an email circulated whilst Elbert Snr was alive, dated 21 February 2019, containing what the parties agree were the collective intentions of the beneficiaries and of Elbert Snr. It is common ground that this email was not sent pursuant to a resolution of the trustees, and in any event, that no final agreement was reached regarding distributions to be made.

[13] By 24 March 2021, no agreement had been reached regarding distributions and mediation attempts were unsuccessful. From 8 April 2021, a chain of correspondence ensued, resulting in a proposal emanating from Maryke's attorney (Cloete Marais), apparently on behalf of both Maryke and Lenette.

[14] Sometime in early May 2021 the applicant, Elbert Jr and Toerien, with the assistance of an attorney (Ms Venter), agreed on terms of a distribution proposal which was to be forwarded as a counter-proposal to Maryke's attorneys (*"the beneficiaries' proposal"*). It is common cause that before the beneficiaries' proposal was forwarded, Toerien, at the applicant's request, drafted a schedule indicating how the applicant and Elbert Jr would be affected by the beneficiaries' proposal. There is a dispute between the parties regarding whether this schedule, which was forwarded by email to the applicant and Elbert Jr on 16 May 2021, emanated from the trustees or from Toerien in his individual capacity, an issue to which I return. What is common cause is that the beneficiaries' proposal appeared to be significantly skewed in favour of Maryke, and that the applicant rescinded from it as a result, and obtained the services of a forensic accountant, Mr Hilton Greenbaum.

[15] With the assistance of Greenbaum, the applicant requested the latest audited financial statements of the Trust and related entities, and was supplied with some financial documents for 2019. It is in dispute whether these were audited financial statements or management accounts.

[16] In addition to seeking the advice of a forensic auditor the applicant also engaged the services of an attorney, Mr. Gootkin, who exchanged correspondence with the trustees between 21 June 2021 and 22 July 2021. He requested financial information

and documents, some of which continues to be sought in these proceedings, and similar to these proceedings, the trustees' refrain was that no resolution had yet been made regarding distributions to be made to the beneficiaries, and accordingly, no vesting of rights has yet occurred entitling the applicant to the information she sought.

[17] In August 2021 these proceedings were launched on a semi-urgent basis, on the basis that Toerien is using Trust assets to advance his own commercial and business interests by bonding trust property.

D. THE PARTIES' ARGUMENTS

[18] In summary, the applicant relies on the following bases for the relief she seeks:

a. The applicant has previously received distributions and/or benefits from the Trust.
b. In common law a trust beneficiary is entitled to demand information about the state of investment of, and other dealings with the trust property and, in particular information regarding the claimant's share of it.
c. The trustees have a duty to disclose to a beneficiary information needed to enable the beneficiary to form a judgment as to whether the proposed course of action for which their consent is required or sought is in their interest. On this score, the applicant states that one of the reasons she rejected the May 2021 distribution proposal was because she required further information as to the value of the Trust's assets.
d. The applicant invokes section 19 of the Trust Property Control Act 57 of 1988 as a person having an interest in the Trust's property.

[19] Regarding the latest amendment to the notice of motion - prayers 1 and 2.1 - the applicant relies on an e-mail dated 6 December 2021 from Lenette in which the latter requested financials for the Trust and related companies for the last five years. The applicant states that this shows that no financial statements had been prepared for that period, contrary to the requirement in clause 8.2 of the Trust Deed.

[20] In a supplementary set of heads of argument, an additional basis for the relief sought by the applicant is added. An argument is made that the applicant has been subjected to differential treatment amounting to unfair discrimination, in the manner that she has been afforded access to the Trust's information and documents when compared to Toerien who is both a beneficiary and a trustee and has access to all the information concerning the Trust's finances and interests. As a result, it is argued that she ought to be granted access to all the information she requests to remedy the differential treatment, unfair discrimination and breach of the trustees' fiduciary duties inflicted upon her by the trustees.

[21] The mainstay of the opposition to the relief sought by the applicant is that a contingent trust beneficiary with no vested interest in the trust assets (being shares in three companies in this case) is not entitled to receive the detailed financial information about trust assets and assets of other legal entities set out in prayers 2.12 to 2.11 of the further amended notice of motion.

[22] Since the Trust is a discretionary trust, the applicant has no right to the income or capital of the Trust until the trustees have exercised their discretion, which they have not so exercised. In particular, the trustees have made no decision regarding distribution of benefits. As a result, the applicant's rights as a trust beneficiary have not yet vested. The consequence, say the trustees, is that the applicant has no right to the information she seeks in these proceedings. To the extent that she has received any cash payments, they were all loans, pursuant to informal arrangements and family discussions, from companies owned directly or indirectly by the Trust.

[23] In any event, the trustees state that, since the launch of these proceedings the applicant has now received even more information than what she is entitled to. Rather, what the applicant seeks to do is to force the issue of an early distribution of trust assets and achieve a transfer to herself.

[24] The trustees also state that clause 8.2 of the Trust Deed does not require audited financial statements but requires only financial statements, which the Trustees may decide to have audited in terms of clause 8.3.

E. RELEVANT LAW

[25] In *Doyle v Board of Executors*[1] the court was dealing with a contingent beneficiary where the trustees had a discretion, not merely regarding the mode of applying the terms of the trust, but whether or not to distribute to a particular beneficiary.[2] The court stated[3] that despite the contractual nature of a trust, it is ". . . *unquestionable that the trustee occupies a fiduciary office. By virtue of that alone he owes the interest good faith towards all beneficiaries, whether actual or potential."* Therefore, even contingent beneficiaries of a trust have vested interests in the proper administration of the trust.[4]

[26] It has also been held[5] that the role of a trustee in administering a trust calls for the exercise of a fiduciary duty owed to all the beneficiaries of a trust, irrespective of whether they have vested rights or are contingent beneficiaries whose rights to the trust income or capital will only vest on the happening of some uncertain future event.

[27] It has also been held[6] that a trustee has a duty to disclose to the beneficiaries all the information needed for them to form a judgment as to whether a proposed course of action for which their consent is required or asked is in their interest.

---

[1] *Doyle v Board of Executors* (1999 (2) SA 805 (C).
[2] As in *Braun v Blann and Botha NNO and Another* 1984 (2) SA 850 (A). See generally Cameron *et al* **Honore's South African Law** of Trust 5th ed at page 557 to 558 and Joubert (ed) **The Law of South Africa (LAWSA)** 2nd edition vol 31 at para 547. See also *Gross and Others v Pentz* (1996 (4) SA 617 (A).
[3] At 213B.

[4] *Doyle* at at 628J. See also *Griessel NO and Others v De Kock and Another* (334/18) [2019] ZASCA 95; 2019 (5) SA 396 (SCA) (6 June 2019) where it was held that even contingent beneficiaries are entitled to protection.

[5] *Griessel NO and Others v De Kock and Another* (334/18) [2019] ZASCA 95; 2019 (5) SA 396 (SCA) (6 June 2019) para 16 -17.

[6] *Weyer v Estate Weyer* 1939 AD 126 at 145-146.

[28] Section 19 of the Trust Property Control Act 57 of 1988 provides as follows:

> "If any trustee fails to comply with a request by the Master in terms of section 16 or to perform any duty imposed upon him by the trust instrument or by law, the Master or any person having an interest in the trust property may apply to the court for an order directing the trustee to comply with such request or to perform such duty."

F. DISCUSSION

[29] Because of its centrality to these proceedings, it is most convenient to begin by addressing a dispute which I have already referred to regarding whether the email and schedule sent by Toerien on 16 May 2021 emanated from him as a beneficiary or as a trustee. In my view, there are several indications in favour of the respondents in this regard.

[30] For one, it is common cause that the applicant had requested Toerien to draft a proposal of how her distribution would look like before she could agree to the beneficiaries' proposal. That is the most probable purpose of the email and schedule - to comply with her request. I have not been referred to any other document in the record which would have met her request. And this purpose is supported by the clear terms of the e-mail, the opening line of which makes mention of numbers that were sent *"on Thursday evening, but with very limited notes"*, and thereafter sets out the intention of the e-mail namely *"to outline the reasoning and assumptions used in support of the numbers"*. According to the evidence in these proceedings, the previous numbers could only be a reference to the beneficiaries' proposal. And the contents of the schedule support the version of the trustees, namely that it was an annuity calculation explaining distribution payments that were to be received over time.

[31] Another indication in favour of the respondents is that the e-mail of 16 May 2021 was only addressed to the applicant and Elbert Jr, not the other beneficiaries. This was clearly a follow-up to their discussions in early May 2021, which had been held with their attorney Ms Venter.

[32] Further, no trustees were copied in on the email, to indicate that they were in support of a proposal being made at that point. This is significant because, the clear terms of the beneficiaries' proposal make it clear that it was subject to the trustees' approval at a meeting to be convened on a future date. Clause 2.7 of the final draft of the beneficiaries' proposal states as follows: *"This agreement will be presented to the three (3) trustees of the Trust as a proposal, and a request, to exercise their unfettered absolute discretion to implement the terms of this agreement, at a trustees meeting convened within 21 days from 14 May 2021"*.

[33] It is also clear from the papers that at the point when the email was sent, the applicant was aware that the distribution to her sister Maryke and her mother had not been finalized. That, after all, was the point of drafting the beneficiaries' proposal in early May 2021, which awaited her signature and agreement, for forwarding to Maryke's attorneys as a proposal. Given what was happening at that point, namely engaging the different beneficiaries and their legal representatives for the purpose of soliciting their distribution proposals, it would make no sense for the trustees to make a proposal to her at that stage.

[34] It is correct that the e-mail of 16 May 2021 makes mention of a trustees' decision regarding the valuation of the Trust. However, given the factual matrix I have referred to above, that is not enough to conclude that the e-mail was sent on behalf of the trustees. I am alive to the fact that Toerien holds multiple roles – as beneficiary, trustee and CEO of the De Wit Group. This is why it is evermore so important to properly examine the purpose, context and the clear wording of the documents relied upon. After all, he was already a beneficiary when he was invited by his father - the founder of the Trust - to become the CEO of the De Wit Group and to become a trustee. In other words, the multiple roles were not an impediment in the eyes of Elbert Snr, the founder of the Trust.

[35] What is more, the version of Toerien regarding the context and purpose of the e-mail of 16 May 2021 is confirmed by Elbert Jnr, who has deposed to a confirmatory affidavit and was part of the relevant correspondence and discussions on this aspect.

Even Lenette, who is both a trustee and beneficiary - similar to Toerien - and has now broken ranks with the trustees, has not gone as far as to suggest that the trustees made such an offer to the applicant at that point.

[36] For all these reasons, I conclude that the e-mail of 16 May 2021 did not emanate from the trustees, and was sent by Toerien in his individual capacity to assist his siblings, Elbert Jnr and the applicant.

[37] The e-mail and schedule of 16 May 2021 have taken great significance in these proceedings and is referred to by the applicant as the May 2021 proposal which emanated from the trustees. It is stated that the applicant requires the information she seeks in these proceedings in order to form judgement as to whether the proposed course of action by the trustees for which her consent is required or asked is in her interest. In other words, for the purpose of deciding whether the May 2021 proposal is in her interest and to enable her to make a counter-proposal. Given my findings immediately above, to the extent that the applicant relies on the email and schedule of 16 May 2021 as a basis for the relief she seeks, it cannot avail her.

[38] In support of a case that she previously received distributions or benefits from the Trust and that she therefore has vested rights, the applicant has set out a variety of payments that she received, which may be summarised as follows:

a. On 26 February 2017 she received a payment of R55,000, which she claims is a dividend payment. The trustees dispute that this was a dividend payment, and state that it was a loan payment from the De Wit Group.

b. Between March 2021 and May 2021, the applicant received three monthly payments of R86,000, which she claims were agreed interest payments on capital to be paid to her, as an interim arrangement. The trustees dispute the applicant’s characterization of these payments and state that they were loan payments which were recorded in the financial records of the company

(Bester & Van Der Westhuizen (Pty) Ltd) as loans. The trustees also state that there were no meetings or resolutions where these payments were discussed, or where it was agreed to make distributions to the applicant. Whilst the applicant bears no knowledge of whether a trustees' resolution was taken in this regard, she has attached watsapp communication from Toerien dated 28 February 2021, in which he committed to make monthly payments which he also referred to globally as an 'interest amount'. The applicant has also attached watsapp communication dated 7 June 2021, in which reference is made to the fact that Toerien had apparently failed to pay 'interest payments' as previously agreed between them.

c. From 13 November 2018 to March 2021, the applicant states that she received monthly payments of R15,000 from one of the companies, Prokdok (Pty) Ltd. The trustees state that there was only one such payment from Prokdok, and it was a loan which was paid on 3 December 2018. At the same time, they state that she received two further loan payments of R15,000, from BRV Worcester (Pty) Ltd, and a further six such payments from the De Wit Group between February 2019 and July 2019. In reply, the applicant refers to an email from Henk Mostert the financial director of the De Wit Group, dated November 2016 regarding the first payment of R15 000 made to her on 30 November 2018, in which Toerien refers to the payment as income distribution. She also refers to Henk Mostert's email dated 26 May 2021 in which payments made to the beneficiaries are referred to as dividends.

d. In 2019 the applicant states that she received an amount of R1 632 965 as proceeds of the sale of property which was previously owned by the Trust in Strand. The trustees state that the applicant received a loan in the amount of R1,000,000 from the De Wit Group. They dispute that the sale of the immovable property in Strand was linked to this loan. In reply, the applicant states that on 4 August 2019 she received a payment of R1 million, after the transfer of property the property was registered on 30 July 2019, and states

that the timing of the payment is too coincidental for it not to be considered as proceeds of a sale.

e. A payment which gained traction as the supplementary papers progressed is in regard to sale of a Porsche motor vehicle which previously belonged to Elbert Snr. On 24 April 2020 the applicant received an amount of R253 333, which she states was the proceeds of the sale of a Porsche motor vehicle. The applicant refers to clause 5.1.1 of Elbert Snr's will in which he bequeathed all his assets, including motor vehicles, to the Trust, and that accordingly the Porsche was a Trust asset. Then, she refers to a wish expressed by her mother Lenette, at a meeting of 4 August 2019, for the Porsche to be sold and its proceeds to be divided into three parts, between the applicant, Maryke and Elbert Jr. The applicant states that this wish was implemented, supported by the fact that two trustees were present at the meeting, namely her mother and Toerien. The trustees admit that the payment of R253 333 was made to the applicant, but state that it was a loan payment.

[39] Having surveyed all the evidence in the papers regarding these payments, it is clear that there are disputes of fact on this issue. This much is admitted in one of the set of heads delivered on behalf of the applicant. As I have intimated, some of these alleged payments mentioned above gained traction as the supplementary papers progressed, with allegations and counter-allegations being supplemented in supplementary affidavits. This is undesirable, and, if anything, demonstrates why motion proceedings are not designed to resolve disputes of fact.[7] In my judgment, the issue regarding these disputed payments is not appropriate for resolution based on probabilities, and there is nothing exceptional about this matter which requires a departure from that well-established principle.[8] As a result, I am not satisfied that the applicant has demonstrated that distributions have been made to her by the Trust.

[7] *National Director of Public Prosecutors v Zuma* 2009 (2) SA 277 (SCA) paras [26] – [27].
[8] Harmse *Civil Procedure in the Supreme Court*, B6.45.

[40] Even Lenette, who claims that the Porsche payment was a distribution from the Trust, bases this on her wishes which were expressed at a beneficiaries' meeting. Given the context of where this wish was expressed - a beneficiaries' meeting - I would have expected some evidence of a later decision by the trustees (including first respondent) in support of this wish. The same applies in respect of the alleged payment received from the sale of the Strand property.

[41] The existence of disputes of fact was pointed out to the applicant in the answering affidavit and was denied in the replying affidavit. In the supplementary heads of argument delivered on her behalf it is stated that it is not necessary for this Court to decide any of the disputes of facts on the papers. I am constrained to point out that a court faced with disputes of fact in motion proceedings is entitled to adopt a robust approach by dismissing the matter, especially where the applicant should have realised when launching the application that a serious dispute of fact was bound to develop.[9]

[42] From the papers before this Court, there is no evidence of a decision made by the trustees to make capital distributions from the Trust to the beneficiaries. Instead, what appears are negotiations that were held amongst different groupings of the beneficiaries, so that a proposal may be made to the trustees, as demonstrated by the discussions and correspondence of May 2021 already discussed above. This is further supported by the contents of the replying affidavit in which the applicant relies on correspondence dated 7 June 2021 from the trustees, recording that they intended discussing the desirability of making capital and income distributions and requested an indication of her stance. As the supplementary papers indicate, similar engagements continued between the beneficiaries and the trustees well into 2022. It is also not disputed that one reason for the various payments made to the applicant was that she was in a strained financial position after a divorce.

[43] The significance of the finding that the applicant did not receive distributions or benefits from the Trust, lies in clause 1.8 of the Trust Deed, which provides that the

---

[9] *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 *(T) at 1162; Conradie v Kleingeld* 1950 (2) SA 594 *(O) at 597.*

'vesting date' is *"the date which the Trustee[s] may determine as vesting date, which shall indicate the time at which beneficiaries shall acquire vested rights with respect to the net trust assets"*. No evidence has been established that the trustees have as yet determined or indicated a 'vesting date' within the contemplation of this clause.

[44] Rather, the terms of the Trust Deed indicate that beneficiaries may receive some payments before they receive any part of the capital assets. Clause 6.6 provides:

> *"Subject to the foregoing provisions, the Trustees shall be entitled to pay to any of the Income Beneficiaries, in their sole discretion,* ***before payment to any such beneficiaries of any part of the capital assets****, such amounts from the income as the Trustees in their sole discretion may deem reasonable and desirable;* ***provided that the provisions of clauses 7.7 and 7.8 below shall apply mutatis mutandis to the disbursement of Trust income****"*. (my emphasis)

[45] The relevant part of clause 7.7 provides that *"no rights or benefits from the Trust shall vest in any beneficiary before actual transfer or handover of an asset to such beneficiary…"*.[10] The result is that the beneficiaries' rights to receive income or capital from the Trust have not vested.

[46] Still, it has been held that even a contingent beneficiary has a vested interest in the proper administration of the trust - as against, for example, maladministration by a trustee.[11] I have already mentioned that, it was on the basis of alleged maladministration and abuse of the Trust assets by Toerien that the applicant approached this Court on a semi-urgent basis.

[47] The applicant alleged in the founding affidavit that Toerien is using Trust assets to advance his own commercial interests, and had caused a mortgage bond to be registered over immovable property owned by the Trust. There was otherwise very scant detail provided regarding these serious allegations, a point which was raised in the answering affidavit. It was in the replying affidavit, after the trustees complained about

---

[10] Clause 7.8, which deals with a disqualified beneficiary, is not relevant to these proceedings.

[11] See *Griessel NO and Others v De Kock and Another* paras 16 -17, referring to *Potgieter & another v Potgieter NO & others* [2011] ZASCA 181; 2012 (1) SA 637 (SCA) para 28.

the scant details, that the applicant gave more information with regard to these claims, including an allegation that soft loans may have been made to Toerien. This aspect continues to contain only vague allegations which no specificity to allow the respondents to respond. They are in any event disputed. It needs hardly stating that the manner in which these allegations were raised, which were the basis for bringing the matter on the semi urgency, is far from ideal. Making out a case in reply is inappropriate. In any event, this is manifestly an issue which remains in dispute.

[48] Besides, clauses 5.1 to 5.8 of the Trust Deed grant trustees wide discretion to deal with trust property and assets. In terms of clause 5 *"[t]he control and management of the Trust and Trust assets shall rest with the Trustees who shall be entitled to administer the Trust in accordance with their own discretion and to effect all actions in respect of the Trust as if the Trustees were an adult individual who has full and free right to deal with his own property"*. It has not been shown that any of the trustees acted beyond the scope of the trust deed in their dealings with trust property and assets.

[49] In any event, as the trustees point out, it is not disputed that the Trust itself owns no immovable property, and would accordingly not have bonded property. In that context, if the applicant wished to make allegations in regard to some of the companies associated with the Trust, it is incumbent upon her to be specific with her allegations to make out her case in her pleadings, in line with established legal authorities. The applicant has simply failed to satisfy the Court regarding these allegations. As a result, to the extent that she relies on alleged maladministration or abuse of Trust assets for a right to the relief she claims, this cannot assist her. In this regard, the sentiments expressed by the Supreme Court of Appeal (SCA) in *Clutchco (Pty)Ltd v Davis*[12] are apposite, that although a shareholder in a company has the right to receive copies of the company's annual financial statements and to obtain copies of minutes of its general meetings, she does not have an automatic right to the company's accounting records *"on a whiff of impropriety or on the ground that relatively minor errors or irregularities*

[12] See *Clutchco (Pty)Ltd v Davis* 2005 (3) SA 486 (SCA) at para 17.

have occurred". Although these sentiments were expressed in the context of a company shareholder, they are applicable in the circumstances of this case.

[50] As for the case based on alleged unfair treatment and discrimination, this legal argument surfaced for the first time in the applicant's supplementary heads of argument. Faced with this challenge, it was argued in reply that the factual averments which formed the basis for this legal argument are contained in the papers. The Court was referred in this regard to averments in the applicant's replying affidavit in which it is alleged that, in making the proposal of 16 May 2021 which the applicant characterizes as a distribution proposal from the trustees, Toerien had all the information as to the financial position of the Trust, *"while the rest of us are kept in the dark"*. These factual averments are denied in the papers. However, as I have stated, the case of unfair treatment amounting to discrimination is not squarely raised in the papers in order to afford the respondents and opportunity to deal with it. This is important because, in order for the applicant to be successful on this score, the Court would at the very least need comprehensive evidence relating to the access to information granted to the remainder of the beneficiaries, whom I assume are *"the rest of us"* that are being kept in the dark. It is not sufficient to merely allege that the applicant is disadvantaged as compared Toerien, who is both a beneficiary and a trustee. In order to reach the conclusion sought by the applicant, the Court would need to compare 'like with like', and compare the circumstances of each particular beneficiary, and assess whether their treatment by the trustees was justified by their circumstances.[13] The Court does not have sufficient information in order to reach such a conclusion.

[13] E Cameron *et al Honore's South African Law of Trusts* 5 ed (2002) Thirteenth Impression 2016 at 316.

G. PRAYER 1

[51] I now turn to deal with paragraph 1, the amended order directing the trustees to comply with clause 8.2 of the Trust Deed. The applicant explains that it came to her attention after delivery of the replying affidavit, that the trustees were acting in breach paragraph 8.2 of the Trust Deed by failing to comply with their duty to prepare annual financial statements of the Trust. She made this discovery after having sight of an e-mail of Lenette dated 6 December 2021, in which the latter requested from her co-trustees copies of financial statements for the Trust and the companies under it for the previous five years. On the basis of this e-mail, the applicant avers that the inference is inescapable that no financial statements had been prepared for the previous five years.

[52] The trustees dispute the alleged non-compliance with clause 8.2 of the Trust Deed. They have attached to their supplementary affidavit (deposed on 15 February 2023) correspondence dated 7 and 9 December 2021 which was sent in response to Lenette's e-mail of 6 December 2021, and in which Lenette was invited to view all the financial information she requested, with the assistance of the Trust's auditors if required. The e-mail stated that the financial statements had not been disseminated given certain undisclosed sensitivities.

[53] The affidavit of Lenette, which was deposed on 20 February 2023 (after Toerien's allegations in this regard), makes no reference to Toerien's allegations regarding the invitation that was allegedly extended to her on 9 December 2021 to view the financial statements which were available on that date.

[54] Instead, Lenette has attached a letter addressed by her attorneys to the Trust on 15 March 2022, in which it is alleged that the Trust had failed to have financial statements compiled for the previous six years, and that they were belatedly compiled - it is not stated when - and Lenette was expected to 'rubber stamp' them upon a mere two days' notice. It is also stated that Lenette requested that a meeting scheduled for 16 March 2022 be postponed until she had been provided with the annual financial statements for the previous three years. In response to these allegations, the trustees

have clarified that the meeting of 16 March 2022 was not in respect of all the financial statements of the Trust which had long been prepared before then, but was in respect of rectified financials following the discovery of irregularities in Gasvoorsieners Boland (Pty) Ltd.

[55] The trustees have explained the history of the preparation of the financial statements. They point to a decision made in 2020 for the financial statements to be prepared, and an e-mail sent by the Trust's accountants on 6 May 2021 which attached annual financial statements for the years 2016 to 2020. After compilation and delivery of the financial statements in May 2021, the trustees state that they were updated in December 2021. They state that, save in respect of Gasvoorsieners Boland, proper accounting records have always been kept and maintained by the Trust in respect of each company in which it holds shares directly or indirectly. The affidavit has also set out allegations relating to improprieties at Gasvoorsieners Boland which resulted in the financial information of that company not being kept up to date, and this is the reason they state that this information needed amending in March 2022.

[56] In response to these allegations, the applicant delivered a notice in terms of Rule 35, demanding delivery of the financial statements for the years 2016 to 2020 which were allegedly attached to the email of 6 May 2021, and they were provided to her. The applicant states that the financial statements she received in response to her Rule 35 request are different to the ones she was provided with in or about May 2022 during the 'without prejudice' discussions between the parties. She opines that the financial statements she received in response to her Rule 35 request were in draft form, and that the statements she received in May 2022 were an advanced draft. In either event, she now complains that the financial statements she has received were not signed by the trustees.

[57] From a reading of the applicant's further supplementary replying affidavit dated 28 March 2023, it is does not appear to be in dispute any longer that financial statements had indeed been prepared by the time she amended her relief to include what is now contained in prayer 1. At best, the applicant is cynical of these allegations, which

admittedly, were made late in the papers in one of the supplementary affidavits. However, the applicant is not in a position to dispute that the financial statements existed and had been prepared by 6 May 2021, because, after all she received them in response to her Rule 35 request. The fact of their existence is supported by the e-mails of 7 and 9 December 2021 from Toerien to Lenette, in which the latter was invited to attend at the business premises to view the financial statements, with the assistance of the auditors of the Trust if she so required. The significance of the offer of the assistance by the auditors lies in the fact that the e-mail of 6 May 2021, which attached the financial statements was from the same auditors.

[58] As I have already mentioned, Lenette's affidavit is silent regarding the invitation extended to her to view the financial statements in December 2021. Instead, she continues to complain about the meeting scheduled for March 2022, which she and the applicant claim demonstrate that no financial statements had been prepared by then. What is significant about Lenette's complaints is that she repeatedly states that she was not provided with the financial statements. Clause 8.4 of the Trust Deed requires that the *"financial statements and books of the Trust [be] accessible to all Trustees on a reasonable basis at all times"*. The invitation extended for her to view the financial statements in December 2021 meets this requirement. As Toerien explained in that invitation, the information was considered too sensitive to disseminate. The basis provided for not disseminating the statements was not challenged by Lenette at the time. There remains no explanation for why she did not take up the offer to view the statements as proposes in Toerien's email. As for clause 8.2, it merely requires preparation of the financial statements. There is no requirement for the financial statements to be <u>provided</u> to Lenette as demanded in the correspondence attached to her affidavit.

[59] Thus the basis on which the notice of motion was amended - Lenette's email of 6 December 2021 and subsequent events of March 2022, do not assist the applicant. The application of the *Plascon Evans* rule supports the version of the trustees.

[60] What the applicant now complains about is that the financial statements were not signed and that no trustees' meeting was called to approve them. She adds that the financial statements she eventually received in May 2022 were not signed by either the auditors or the trustees, and are not dated. This, she says, is an indication that they were not prepared annually within a reasonable time of the last day of the financial year in compliance with clause 8.2 of the Trust Deed, and had plainly not been prepared prior to the launch of these proceedings, but were prepared in response to the further amendment to the notice of motion.

[61] Clause 8.2 provides as follows:

> "The Trustees shall annually, within a reasonable time after the last day of the financial year, prepare or cause to be prepared financial statements of the Trust, which shall include at least a balance sheet and income statement."

[62] Clause 8.2 creates an obligation for the trustees to annually and within a reasonable time after the last day of the financial year, prepare or cause to be prepared financial statements of the Trust, which shall include at least a balance sheet and income statement. The clause is not prescriptive about the form that the financial statements should take, save to set a minimum requirement of a balance sheet and income statement. It is a low threshold. There is no requirement for a meeting to be held or for signatures from trustees. I am accordingly not satisfied that the only plausible inference to be drawn from the facts is that no financial statements had been drawn for the period in issue.[14]

[63] As a result, I am not satisfied that the applicant has made out a case that the trustees failed to comply with their obligations in terms of clause 8.2 of the Trust Deed, and that she should obtain an order directing them to comply therewith. I have also already made a finding that as at 9 December 2021 the financial statements had been prepared. As a result, the applicant has not made out a case for the relief sought in paragraph one of the further amended notice of motion.

---

[14] *S A Post Office v Delacy and Another* 2009 (5) SA 255 (SCA) at para 35. *R v Blom* 1939 AD 188 at 202-203.

[64] In the same vein, I am not satisfied that a case has been made out for relief in terms of section 19 of the Trust Property Control Act 57 of 1988. For successful reliance on that provision, the applicant was required to establish that the trustees failed to perform a duty imposed upon them by the Trust Deed.[15]

H. PRAYERS 2.1 – 2.11

[65] Regarding the relief sought at prayers 2.3 to 2.11, in respect of which the applicant persists with her application, the conclusions and discussions already outlined above apply. In particular, when she brought these proceedings, the applicant claimed that she needed this information in order to assess the proposal made to her in May 2021, which she characterized as a trustees' proposal. I have already found that the May 2021 proposal did not emanate from the trustees. Thus, the overall basis for seeking this information has not been established.

[66] I am of the view that the applicant is accordingly not entitled to the documents and information requested in these prayers. As the trustees point out, the requests for information are extensive and unreasonably wide-ranging. Most importantly, no legal right has been established for this information, as already discussed above. In addition to all that is discussed in this judgment, I also make the observations that follow.

a. In respect of prayer 2.3, the applicant seeks valuations of the Trust capital as at February 2017. The basis for this relief is said to be the May 2021 proposal, which she says emanated from the trustees. I have already made a finding to the contrary.

[15] Section 19 of the Trust Property Control Act 57 of 1988 provides as follows:

> "If any trustee fails to comply with a request by the Master in terms of section 16 or to perform any duty imposed upon him by the trust instrument or by law, the Master or any person having an interest in the trust property may apply to the court for an order directing the trustee to comply with such request or to perform such duty."

b. In prayer 2.5 the applicant states that she requires this information because these are entities or businesses in which the Trust owns shares or has invested monies. I have already indicated that I am not satisfied that the applicant received distributions or benefits from the Trust, and accordingly it has not been established that the applicant is entitled to this information.

c. As regards prayers 2.6 and 2.11, in terms of which the applicant seeks information relating to how trust assets are bonded or not, it has not been established why the applicant requires this information. From what is contained in the papers this demand relates to the allegations that Toerien abuses assets of the Trust for his own benefit, a case which is made in reply. There is otherwise no indication from the papers for why the applicant requires this information. I have already made a finding in this regard, that the abuse alleged has not been established. In any event, it appears that the was provided with some of this information in May 2022.

d. In prayer 2.7 the applicant requests loan account printouts for loans between each company in the Group. She states that she requires this information as it is relevant to the state of investment of and other dealings with the trust property and in particular information regarding her share of it. Given that, on the papers, I am not satisfied that the applicant received distributions or benefits from the Trust, it has not been established that the applicant is entitled to this information. The same goes for prayer 2.10 in terms of which the applicant seeks income tax returns submitted in respect of each of the companies in the Group and of the Trust on the same basis.

e. As for prayer 2.8 in which the applicant seeks an explanation as to the origin and function of the De Wit Group (Pty)Ltd as well as financial information pertaining to it, the applicant confirms that the financial information has been provided to her, and that what is outstanding is the explanation as to the origin and function of the entity. Amongst the documents provided to the applicant following the good faith discussions in May 2022, was an organogram

explaining the structure of private companies owned, directly or indirectly, by the Trust. The trustees state these documents and financial documents provided to the applicant should assist in explaining the function and origin of the De Wit Group. In the latest heads of argument of the applicant, it is stated that *"if it is simply a holding company then the trustees need only say so, but they have not"*. Accordingly save for this question, it seems that the prayer in paragraph 2.8 has been satisfied.

f. In prayer 2.9 the applicant requests information regarding swap agreements which were in place, for purposes of evaluating the schedule provided to her by Toerien on 16 May 2021. Toerien has explained that the schedule was an annuity calculation which showed Elbert Jr and the applicant how they could expect to receive distribution payments over time. I have, in any event, already found that the schedule did not emanate from the trustees and cannot be read as a course of action to be adopted by them and which required her consent.

[67] For all the reasons discussed in this judgment, I am not satisfied that the applicant has made out a case for the relief she seeks.

COSTS

[68] From the launch of these proceedings, the applicant has sought an order that the costs of this application should be paid from the Trust funds, unless the matter was opposed, in which event the respondents should pay the costs jointly and severally.

[69] The trustees have set out the extent of information that has been provided to the applicant since the launch of these proceedings, including as a result of the May 2022 discussions, which is common cause. In argument before me it was argued that, to the extent that the applicant has persisted with these proceedings beyond that date, she should bear the costs in her personal capacity.

[70] Given my findings on the merits of the matter, that would have been the ordinary course to adopt. However, as I have already indicated, the trustees only clarified in affidavits dated February and March 2023 that the financial statements had been prepared as at 6 May 2021. This was a complete answer to the amended prayer 1 in the further amended notice of motion, and was inexplicably not given from the time of the amendment in February or March 2022, until February or March 2023.

[71] There is also the belated participation of Lenette in these proceedings, who states that, as a mother, trustee and beneficiary she felt increasingly uncomfortable with the ongoing litigation and sought to contribute towards the adjudication of the matter. The filing of her affidavit at the 11th hour resulted in a postponement of the matter which was supposed to have been heard on 21 February 2023, and the trustees decry the conduct of their co-trustee in this regard which was not at all foreshadowed. Although I did not find that, in the main the averments made in her affidavits assisted with the adjudication of the matter, I do not find it appropriate to grant a costs order against her in the individual capacity in which she has sought to intervene.

I. ORDER

[72] In the circumstances, the following order is made:

a. The applicant's case is dismissed;
b. The costs of this application shall be paid from the Elbert De Wit Family Trust funds.

_____

N. MANGCU-LOCKWOOD
Judge of the High Court

APPEARANCES

For the applicant	**:**	**Adv B. Gassner SC** **Adv R Fitzgerald**
Instructed by	**:**	**R. Gootkin** **Werksmans Attorneys**
For the first to third respondents'	**:**	**Adv C Maree**
Instructed by	**:**	**C Venter** **Venter Attorneys & Conveyancers**