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

REPORTABLE
CASE NO: 20736/2021

In the matter between:

MARGO MEIER	First Applicant
MARNÉ MEIER	Second Applicant
MORNÉ MEIER	Third Applicant

and

JOHANNES STEPHANUS GERHARDUS DU TOIT N.O. (in his purported capacity as a Trustee of the Meier Family Trust)	First Respondent
JOHAN HURTER VAN ZYL N.O. (in his purported capacity as a Trustee of the Meier Family Trust)	Second Respondent
MARI HAYWOOD N.O. (in her capacity as one of two duly appointed Provisional Trustees in the insolvent estate of Cornelius Waldo Meier)	Third Respondent
RETHA STOCKHOFF N.O. (in her capacity as one of two duly appointed Provisional Trustees in the insolvent estate of Cornelius Waldo Meier)	Fourth Respondent
STELLENBOSCH FIDUCIARY SERVICES (PTY) LTD	Fifth Respondent

THE MASTER OF THE WESTERN CAPE HIGH COURT Sixth Respondent

Bench: P.A.L. Gamble, J.

Heard: 21 November 2022

Delivered: 27 February 2023

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on Monday, 27 February 2023

JUDGMENT

GAMBLE, J:

INTRODUCTION

1. Who should be in control of the Meier Family Trust? That is the question that falls for determination in this family dispute.

2. The saga begins on 19 March 2007 when the Meier Family Trust ("the Trust") was formed by Cornelius Waldo Meier ("Meier Snr"). It is a bog-standard family trust intended for the benefit of family members, with Meier Snr as the donor and initial trustee, and the first applicant (his erstwhile wife, Ms. Margo Meier) and Mr. Andre du Plessis (as the representative of LDP Trust Company (Pty) Ltd – "LDP Trust") as fellow trustees. For the sake of convenience, I shall refer to these persons as "the First Trustees." The Trust was registered by the sixth respondent ("The Master") in terms of the Trust Property Control Act, 57 of 1988 ("the Act") under reference number IT16232/2007, and the First Trustees were duly authorized to assume office. At the time, Meier Snr conducted an architectural practice in Pretoria through TJ Architects Holdings (Pty) Ltd, certain of the shareholding whereof was evidently held in the Trust.

3. On 4 July 2008 the First Trustees effected an amendment to the trust deed by altering the beneficiaries named in the original trust deed. Henceforth, the capital beneficiaries of the Trust were to be the applicant and her children by Meier Snr ("the Meier children") who, at that stage, were the second and third applicants ("Marné" and "Morné" respectively, who are majors) and Ane and Conrad Meier (who are still minors). The amended trust deed provided that any further children born of the marriage between the applicant and Meier Snr would also become capital beneficiaries, as would any descendants of the Meier children. The trust deed as amended also reserved to the First Trustees the absolute discretion in regard to the declaration and allocation of any benefits to the named beneficiaries.

4. The amendment to the trust deed also provided that the beneficiaries were to include the intestate heirs of Meier Snr as well as Meier Snr himself, the latter nomination being conditional upon Meier Snr irrevocably renouncing all powers granted to him under the trust deed. The amended trust deed also reserved to the First Trustees the absolute discretion to declare and allocate benefits to the named capital beneficiaries. Lastly, the amended trust deed made provision for the addition of two income beneficiaries – Ms. Marguerite Pretorius and Ms. Anna van der Plas. Judging by their identity numbers, it would appear that these beneficiaries were two women in their senior years.

5. The administrative work relating to these amendments was handled, initially, by LDP Trust and later by the fifth respondent, Stellenbosch Fiduciary Services (Pty) Ltd ("SFS"), after LDP Trust underwent a name change.

DIVORCE AND INSOLVENCY

6. The marriage between the applicant and Meier Snr broke down and in March 2015 the applicant issued summons for divorce. In her particulars of claim the applicant alleged that the Trust was conducted by Meier Snr as his *alter ego.* The applicant says that she and Meier Snr were subsequently divorced in the Pretoria High Court on 23 May 2018 and as part of their divorce order they agreed to go to arbitration to resolve the patrimonial consequences of the marriage. In that process, says the applicant, Meier Snr admitted later in 2018 that the Trust was indeed his *alter ego*. In these proceedings, however, he appears to dispute the allegation.

7. On 6 July 2021 Meier Snr was provisionally sequestrated in the Pretoria High Court at the behest of the applicant, which order was made final on 8 October 2021. The papers herein do not reflect what the basis of Meier Snr's indebtedness to his former wife was. Be that as it may, the third and fourth respondents (respectively, "Haywood" and "Stockhoff") were appointed by the Master as provisional trustees in the insolvent estate of Meier Snr on 15 July 2021.

CHANGE OF TRUSTEES

8. Unbeknown to the applicant, control of the Trust had been altered, firstly, early in August 2017. It was resolved at a meeting on 4 August 2017, which the applicant did not attend because she had not been given notice, and in terms of a resolution which she neither approved nor signed, that the resignation of SFS as trustee be accepted and the appointment of Meier's brother-in-law (the second respondent herein – "Van Zyl") as trustee be accepted. That change of trusteeship was confirmed by the Master when revised Letters of Authority in respect of the Trust were issued on 14 August 2017: the trustees were then Meier Snr, van Zyl and the applicant.

9. Control of the Trust was further changed on 30 January 2019, also in the absence of the applicant. At a meeting allegedly held at Cape Town on that day, Meier Snr and van Zyl purported to remove the applicant as a trustee of the Trust. This was confirmed on 5 April 2019 when the Master issued further Letters of Executorship reflecting the trustees as only Meier Snr and van Zyl.

10. Meier Snr resigned as trustee of the Trust on 6 July 2021, the day on which he was provisionally sequestrated. The papers do not reflect whether he resigned before or after the provisional was granted but, given that cl 4.5.4 provides for the immediate termination of office in the event that a trustee becomes insolvent, it is fair to assume that his resignation preceded Meier Snr's declaration of insolvency. In any event, on the same day, Van Zyl purported to appoint Meier Snr's other brother-in-law (the first respondent herein – "Du Toit") as a trustee of the Trustee. On 28 July 2021, the Master duly issued fresh Letters of Authority reflecting the trustees as Du Toit and Van Zyl, who are presently the only trustees of the Trust.

THE PRESENT APPLICATION

11. Dissatisfied with the incremental change of trustees and her exclusion from trusteeship of the Trust, the applicant launched this application on 6 December 2021 in which she seeks the following declaratory relief:

> "1. That it be declared that respectively the First and Second Respondents' appointment as trustee (sic) of the Meier Family Trust… was and is unlawful and invalid;
>
> 2. That the Sixth Respondent is authorized and directed to remove respectively the First and Second Respondents as trustees of the Meier Family Trust…;
>
> 3. That it be declared that the removal of the First Applicant as a trustee of the Meier Family Trust… was and is unlawful and invalid;
>
> 4. That the Sixth Respondent be authorized and directed to correct its records to show that the First Applicant has been a trustee of the Meier Family Trust… throughout and since its registration;
>
> 5. That the Sixth Respondent be authorized and directed to appoint respectively the Third and Fourth Respondents as trustees of the Meier Family Trust…;
>
> 6. That those Respondents that oppose the application, be ordered to pay the cost thereof, jointly and severally, the one paying the other to be absolved;
>
> 7… Alternative relief…"

12. Accompanying the founding affidavit deposed to by the applicant, were confirmatory affidavits by Marné and Morné supporting the relief sought. In addition, Haywood and Stockhoff indicated acceptance of their respective nominations as proposed new trustees. The Master has not entered the fray and so this application is opposed only by Du Toit and Van Zyl ("the respondents").

13. At the hearing of the matter, the applicants were represented by Mr. M. Daling of the Cape Bar, the heads of argument having been drafted by Mr. G.F. Heyns SC of

the Pretoria Bar, while the Respondents were represented by Mr. F.S.G. Sievers SC of the Cape Bar. The Court is indebted to the parties for the helpful heads of argument.

14. In the answering affidavit, the respondents take only two points. Firstly, they attack the applicants' *locus standi.* Secondly, they contend that the removal of the applicant as a trustee and the appointment of Du Toit and van Zyl was validly effected in terms of clause 4.3 of the trust deed. However, in argument Mr. Sievers accepted that the applicant had the necessary *locus standi* and so the sole issue for determination is the validity of the applicant's removal as a trustee and the appointment of Du Toit and Van Zyl as such.

THE RELEVANT FACTS

15. The thrust of the applicant's case is that she was unlawfully removed as a trustee, in her absence and without notice of the relevant meeting or her intended removal having been given to her. Once her removal had been effected, the applicant was clearly not privy to the further changes in control of the Trust. It is thus necessary to look at just what happened.

16. The papers show that the applicant, her children, Meier Snr and Van Zyl resided in Gauteng, while Du Toit resided in KwaZulu Natal. However, the minutes of the various meetings of the trustees convened from time to time reflect that such meetings were held in either Cape Town or Stellenbosch. Further, all the relevant minutes and documentation forwarded to the Master were attended to by SFS, in Stellenbosch. The aforesaid meetings were apparently held on a round-robin basis, with SFS taking the lead before circulating the minutes to the others for signature. Save as it set forth hereunder, the applicant does not challenge the validity of the meetings on account of the way in which they were convened. She points out that clauses 5.1 to 5.3, which are contained in the section of the trust deed setting out its administrative procedures, sanction a meeting of trustees, for instance, by way of a round-robin procedure.

"**5. ADMINISTRATIVE PROCEDURES**

5.1 The trustees may meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit. Any trustee shall at any time be entitled to summon a meeting of the trustees subject to a written notice with proposed agenda, delivered to all trustees with 24 hours prior notice. A quorum necessary for this trust shall be the majority of the trustees in office for the time being, provided that **CORNELIS WALDO MEIER** during his term of office or his or her successor-in-rights during their terms of office as the case may be, shall form part of such majority, provided further that in the event of there being only one trustee in office at a particular point in time, such trustee shall not be entitled to act as a trustee of this trust other than to appoint one or more additional trustee(-s) in terms of paragraph 4.4.1.

5.2 All significant decisions must be in writing.

5.3 Subject to them giving effect to the terms and conditions of this trust deed, the trustees shall in administering the trust, adopt such procedures and take such administrative steps as they shall from time to time deem necessary and advisable, provided that such decisions shall be reduced to writing.

5.4…

5.5 In the event of any disagreement between the trustees at any time, the decision of the majority of them shall prevail, provided that **CORNELIS WALDO MEIER** during his term of office or his or her successor-in-rights during their terms of office as the case may be, shall form part of such majority and it will be of the same force and effect as if it were an unanimous decision of the trustees. Any minute signed by the majority of trustees in office shall have the same force and effect as a decision of the majority of trustees taken at a properly constituted meeting of trustees."

17. The applicant refers the Court to Annexure MM9 to the founding affidavit which are the minutes of the meeting of the trustees purportedly held at Stellenbosch on 4 August 2017. She says that she received "absolutely no notice" of this meeting which was evidently held by way of a round-robin procedure. Significantly, the minutes of that meeting were not signed by the applicant although there is a space allocated on the document for her signature.

18. In the answering affidavit purportedly made on behalf of the Trust, Van Zyl says the following regarding the meeting of 4 August 2017.

"9. The first applicant alleges in her founding affidavit that the business of the trust which took place on or about 4 August 2017 should be set aside as unlawful and invalid as clause 5.1 of the trust deed was allegedly not complied with in that she did not receive a written notice of the purported meeting.

10. It is extremely difficult to try and ascertain exactly what took place during August 2017 as more than 4 years has passed. It is thus uncertain if the first applicant did receive notice. However, I respectfully submit that whether or not the first applicant has received notice is irrelevant in light of the fact that Mr. Meier requested that I be appointed as trustee. The document which purports to be the minutes of the meeting held on 4 August 2017, and annexed to the first applicant's affidavit as "MM9", constitutes a written instrument as is required by clause 4.3 of the trust deed. Johann Hurter Van Zyl was accordingly validly appointed in terms of clause 4.3.1 and Stellenbosch Fiduciary Services (Pty) Ltd was validly removed as a trustee in terms of clause 4.3.2."

19. In my view, this response by Van Zyl does not raise a real or genuine dispute of fact[1] and it follows that the applicant's allegation that she received no notice of the meeting must stand. Consequently, I find that the convening of the meeting did not comply with the express provisions of cl 5.1 of the trust deed

20. The applicant goes on to point out that her exclusion from the meeting was no sheer coincidence: she claims that she was intentionally excluded at a time when she and her husband were in the throes of an acrimonious divorce. The applicant points out further that she only recently acquired full knowledge of the facts which are relevant to this application and concludes therefrom as follows.

"4.6 With hindsight, it is clear that the purported round-robin trustee meeting, of which I did not receive any notice, was a pre-meditated strategic move to get rid of the only supposed independent trustee i.e. the Fifth Respondent, and to appoint one of my

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[1] Ripoll-Dausa v Middleton NO and others 2005 (3) SA 141 (C) at 151H-J

former husband's brothers-in-law as a trustee, so that the trust can effectively be managed by my former husband and his allies, to my exclusion, and with the ultimate aim to remove me as a trustee."

In the result, the applicant attacks the validity of the meeting at which SFS's resignation was accepted and the decision was made to appoint Van Zyl as a trustee.

21. The applicant then deals with the meeting of the trustees of the Trust which followed upon her divorce from Meier Snr. She says that Annexure MM11 to her founding affidavit contains the minutes of a meeting purportedly held at Cape Town on 30 January 2019 at which Meier Snr and Van Zyl were present. Although she was still a trustee, the applicant says that she did not receive notice of this meeting either - an allegation that is similarly not challenged in the answering affidavit.

22. The material part of Annexure MM11 is to the following effect.

"**PRESENT: CORNELIS WALDO MEIER**

JOHANNES HURTER VAN ZYL

Resolution 1;

The Donor and majority of the Trustees being present at this meeting hereby remove **MARGO MEIER** … as trustee of the trust. The aforementioned Trustee will be notified by way of registered post and proof of which will be attached to the resolution as required."

The minute is signed by Meier Snr as "DONOR AND TRUSTEE" and by Van Zyl as "TRUSTEE".

23. The applicant avers that this meeting too was not validly constituted as she was not given notice thereof as contemplated in cl 5.1. Further, she says, she received no notification after the meeting of her purported removal as trustee. The applicant complains that her removal as aforesaid was arbitrary and that she was not afforded the opportunity to address the others present at the meeting.

24. Moving on to the appointment of Du Toit as trustee, the applicant points out that on 6 July 2021, Meier Snr was sequestrated and was accordingly automatically disqualified from holding office as a trustee. But, as noted above, he elected to resign as a trustee on that day. The minutes of the meeting of the Trust which allegedly took place at Stellenbosch on that day are attached to the founding affidavit as Annexure MM14. The relevant portion thereof reads as follows.

"**PRESENT: CORNELIS WALDO MEYER**

JOHANN HURTER VAN ZYL

Resolution 1;

Johannes Stephanus Gerhardus Du Toit….is hereby appointed as Trustee of the Trust, which appointment is hereby accepted with immediate effect.

Resolution 2:

The following trustee has resigned as such: Cornelis Waldo Meier…

Resolution 3:

Stellenbosch Fiduciary Services (Pty) Ltd is requested to affect (sic) the necessary changes with the Master of the High Court and to update the register accordingly."
These minutes were signed by Meier Snr and van Zyl, both in their capacity as "Trustee".

25. As a matter of fact, Meier Snr could only have resigned if he was still a trustee which suggests that the resignation must have occurred before the Gauteng High Court granted the provisional order of sequestration against him that day. And, once he had resigned, Meier Snr could play no further part in the management of the trust *qua* trustee. The timing of the various steps taken on 6 July 2021 is thus critical, yet neither Meier Snr nor Van Zyl offer the Court any assistance in this regard. Further, given that this minute follows the usual format, it is not unreasonable to assume that

the steps in relation to the business of the round-robin meeting were initiated by SFS and then forwarded on to the others for signature. This assumption is made on the basis that the document was in fact not back-dated. However, in view of the fact that the applicant was excluded from the meeting, the true state of affairs is not known to the Court.

26. Nevertheless, these facts show unequivocally that there were two meetings of the trustees (4 August 2017 and 30 January 2019) which were improperly convened, at which the applicant was entitled to be present and from which she was intentionally excluded. They also show that there was a third meeting (6 July 2021) held in the applicant's absence but at which she may have been entitled to be present if the earlier meetings are held to be invalid and she is confirmed to have retained her trusteeship throughout.

THE RESPONDENTS' APPROACH

27. The respondents cannot deny that the first two meetings at which the applicant was entitled to be present, were not convened in accordance with cl 5.1 of the trust deed, nor do they seek to do so. Their argument, rather, is based on the provisions of cl 4 of the trust deed which deals with the "Office of Trustee". After reciting who the First Trustees were intended to be, the trust deed continues as follows.

"4.2 The trustees hereof shall consist of not less than 2 (TWO) individuals and any vacancy in trusteeship hereof shall be filled as soon as possible, subject however to the specific instruction by the Donor to the remaining trustee (-s) that at least one member of the body of trustees shall be suitably qualified to deal with financial matters.

4.3 The Donor or his successors-in-rights shall have the right and power to:

> 4.3.1 In his will or during his lifetime or the lifetimes of their successors-in-rights as the case may be, under written instrument to (sic) appoint a new trustee or trustees hereof, and such powers shall extend to the appointment of a new trustee or trustees in the place of any trustee or trustees dying or vacating office in terms of paragraph 4.5; and

4.3.2 During his lifetime or the lifetimes of his successors-in-rights as the case may be, under written instrument to remove any trustee and appoint another in his stead, provided that he will not be able to remove **CORNELIS WALDO MEIER** as trustee of the trust.

4.3.3 In his will or during his lifetime or the lifetimes of his successors-in-rights as the case may be, by written instrument to appoint any other persons (including a person who may be or may be, or may become one of the beneficiaries) to exercise the rights conferred upon him in terms of paragraphs 4.3.1 and 4.3.2, and of this paragraph.

4.4 Subject to the right of appointment of trustees by the Donor their (sic) successors-in-rights:

4.4.1 The trustee or trustees for the time being shall be entitled (notwithstanding that they may be less than 2 (TWO) trustees in office) under a written instrument to appoint a new trustee or trustees hereof, and such power shall extend to the appointment of a new trustee or trustees in the place of any trustee or trustees dying or vacating office in terms of paragraph 4.5 and also, to the appointment of one or more additional trustee or trustees;

4.4.2 The beneficiaries in existence (assisted by their guardians where applicable) shall be entitled to appoint trustees in the absence of any powers of appointment being exercised in terms of paragraphs 4.3 and 441.

4.5 The office of a trustee shall immediately be terminated and vacated…

4.5.4 if he becomes insolvent or assigns his estate for the benefit of or compounds with his creditors…

28. The respondents say that the removal of LDP Trust and appointment of Van Zyl at the meeting of 4 August 2017, in the planned absence of the applicant, is in accordance with the trust deed. The contention advanced by them in support of that argument is that the applicant was validly removed from office by the donor,

exercising his powers under cl 4.3.2. They go on to say that the minutes of the meeting of 30 January 2019 (Annexure MM11 referred to above) constitute the "written instrument" contemplated under cl 4.3.2 for the applicant's removal from office and that nothing else was required to get rid of her.

THE APPROACH TO TRUSTEESHIP GENERALLY

29. In Land and Agricultural Bank[2] Cameron JA restated certain of the fundamental principles applicable in a matter such as this. Firstly, the learned Judge of Appeal dealt with the nature of a trust.

"[10]… Except where statute provides otherwise, a trust is not a legal person. It is an accumulation of assets and liabilities. These constitute the trust estate, which is a separate entity. But though separate, the accumulation of rights and obligations comprising the trust estate does not have legal personality. It vests in the trustees, and must be administered by them - and it is only through the trustees, specified as in the trust instrument, that the trust can act. Who the trustees are, their number, how they are appointed, and under what circumstances they have power to bind the trust are matters defined in the trust deed, which is the trust's constitutive charter. Outside its provisions the trust estate can not be bound."

30. Then the learned Judge of Appeal stressed the importance of trustees acting jointly.

"[15]… It is a fundamental rule of trust law, which this Court recently restated in *Nieuwoudt and another NNO v Vrystaat Mielies (Edms) Bpk,*[3] that in the absence of contrary provision in the trust deed the trustees must act jointly if the trust estate is to be bound by the acts. The rule derives from the nature of the trustees' joint ownership of the trust property. Since co-owners must act jointly, trustees must also act jointly…(T)he joint action requirement... has…formed the basis of trust law in this country for well over a century and a half."

[2] Land and Agricultural Bank of SA v Parker and others 2005 (2) SA 77 (SCA)
[3] 2004 (3) SA 486 (SCA) at [16]

31. Further, at common law, a trustee is duty bound to act in good faith, observe proper diligence and bring an independent mind to bear when dealing with the affairs of the trust.[4]

32. In this matter, as pointed out above, cl 4.2 of the trust deed requires that a minimum of two trustees must be in place at any given time and in the event that there is a vacancy in trusteeship, it shall be filled as soon as possible. Further, it is then the duty of the donor to ensure that at least one of the trustees is a person suitably qualified in matters financial.

THE MEETING OF 4 AUGUST 2017

33. As already noted above, the provisions of cl 5.1 of the trust deed were not complied with in relation to the convening of the meeting. While the meeting was quorate (with a minimum of 2 trustees – Meier Snr and the representative of SFS – being present) the absence of notice to the third trustee, in my view rendered the meeting invalidly constituted, all the more so where the intention was that the applicant should expressly be excluded for ulterior reasons. This violated the principal that trustees were at all times obliged to act jointly and in the interests of the Trust and its beneficiaries. In short, the meeting of 4 August 2017 was not a meeting at which the business of the Trust could be conducted, given the absence of proper notice thereof to the applicant and her subsequent absence from the meeting.

34. It appears from the answering affidavit that SFS had indicated to Meier Snr that its representative was precluded from continuing to act as a trustee because the company was rendering administrative services to the Trust. In the circumstances, there can be no quibble with its decision that its representative should resign with immediate effect. However, the prospect of such resignation was clearly a step of which the applicant was entitled to be informed in order that she could participate in a meeting at which a new trustee was to be proposed for appointment in terms of cl 4.4.1 of the trust deed.

35. In that regard, it must be noted that the minutes of the meeting of 4 August 2017 do not suggest that Meier Snr exercised his prerogative under cl 4.3.1 to appoint Van Zyl as a trustee. Rather, the minute was clearly formulated in advance by SFS

[4] Cameron et al Honore's South African Law of Trusts, 5th ed. at p262 para 160

(as the entity providing administrative support to the Trust) for circulation in advance to the prospective attendees who could then resolve to appoint Van Zyl as the third trustee. Given the requirement in cl 4.2 that one of the trustees "*shall be suitably qualified to deal with financial affairs*", the applicant was entitled to be satisfied that this criteria was adhered to. This is all the more reason why she was entitled to full compliance with the terms of the trust deed.

36. The appointment of Van Zyl was thus manifestly not a joint decision of the trustees. In the result, I conclude that his appointment as trustee was not in compliance with the express terms of the trust deed and that the applicant has made out a case for the applicable relief sought in prayer 1 in the Notice of Motion.

THE MEETING OF 30 JANUARY 2019

37. When the meeting of 30 January 2019 was allegedly held, the applicant was still a trustee and similarly entitled to notice thereof in accordance with cl 5.1 of the trust deed. It is common cause that the applicant did not receive such notice. All that was purportedly sent to the applicant was a letter allegedly sent by registered mail on 29 March 2019 informing her that her removal had been effected. Moreover, the answering affidavit reflects that the letter never reached the applicant. For the reasons already advanced in relation to the meeting of 4 August 2017, the applicant's exclusion from the meeting of 30 January 2019 also rendered the meeting in conflict with the express provisions of the trust deed.

38. The removal of the applicant as a trustee at that meeting is recorded in the minutes as a resolution taken by the trustees there present. In my view, her removal was invalid for a number of reasons. Firstly, the trust deed does not permit the removal of a trustee by fellow trustees in the manner recorded in the resolution of 30 January 2019. I stress again that *ex facie* the minutes, Meier Snr did not purport to exercise any right available to him under cl 4.3.2 of the trust deed.

39. Secondly, the resolution was adopted by Meier Snr and Van Zyl. For the reasons already advanced, Van Zyl's appointment in August 2017 as a trustee was irregular and invalid. Consequently, he could not participate in the affairs of the Trust at all *qua* trustee thereafter.

40. Thirdly, the applicant was entitled to notice of the meeting of 30 January 2019 and to be informed of the intention to remove her as a trustee. It must be remembered that this was a family trust set up, primarily, for the benefit of the Meier children and that for this reason alone her presence at the meeting was necessary in order that she could properly discharge her functions in relarion to the Trust. Furthermore, in the absence of notice to the applicant that her removal as trustee was being contemplated, she was deprived of the opportunity to be heard before such a step was taken against her. Lastly, in the absence of any reasons advanced to the applicant for her intended removal, it can safely be concluded that the decision to remove her as trustee was arbitrary.

REASONS ADVANCED EX POST FACTO

41. In an affidavit dated 2 February 2022, Meier Snr seeks to explain his actions. While this affidavit is not annexed to the answering affidavit deposed to by Van Zyl, the latter does reference Meier Snr's affidavit which he says is to be filed contemporaneously with the answering affidavit in order that the facts known to Meier Snr can be placed before the Court.

42. Meier Snr claims that it was his intention to appoint Van Zyl in terms of cl 4.3 of the trust deed. Similarly, he says that he intended to remove the applicant as a trustee on 30 January 2022 (not 2019) and to appoint Du Toit as a trustee on 6 July 2021, both in terms of cl 4.3. Meier Snr says that the minutes of the three meetings (Annexures MM9, MM11 and MM14 to the founding affidavit) are "*intended to serve the purpose of a written instrument as is required by clause 4.3 of the trust deed*."

43. Meier Snr explains what motivated his desire to remove the applicant as a trustee.

> "4.5.1 The first applicant was not acting (and continues to not act) in the best interest of the Trust and its beneficiaries as she was attempting to include the Trust and its assets in the divorce proceedings. She alleged in this regard that the Trust was my alter ego - an allegation which I deny as my intention was as Donor of the trust (sic), and remains to date hereof, that the Trust should be to (sic) the benefit of my children, being beneficiaries of the Trust.

4.5.2 The first applicant has not given her cooperation as a trustee prior to her removal as such. I refer the Honourable Court to paragraph 19 of the opposing affidavit in this regard."

44. I pause to point out that in the said para 19 of the answering affidavit, Van Zyl claims that the applicant would not have taken the steps she alleges in para's 5.4 to 5.7 of the founding affidavit (i.e. object at meetings of trustees to the change of trustees) because she had in the past shown very little interest in the affairs of the Trust. Further, he says, the applicant's indifference is demonstrated by the fact that she had not responded in the past to a request from Meier's attorneys that she should sign certain FICA documents required by the Trust's bankers. The allegations really amount to the invocation of the so-called "no difference rule".

45. There is no room for such a speculative response. Tension or enmity between trustees is not necessarily a basis for removal of a trustee from office. In Gowar[5] the court *a quo* had been asked by a co-trustee to apply s20(1) of the Act[6] and remove a brother (and fellow trustee of a family trust) because of the warring relationship between them. The court *a quo* refused to do so and on appeal the Supreme Court of Appeal likewise declined to interfere, making the following observations in the process.

"[31]…(T)he overriding question is always whether or not the conduct of the trustee imperils the trust property or its proper administration. Consequently, mere fiction or enmity between the trustee and the beneficiaries will not in itself be adequate reason for the removal of the trustee from office… Nor, in my view, would mere conflict amongst trustees themselves be a sufficient reason for the removal of the trustee at the suit of another."

46. In my view, the respondents have not demonstrated that the removal of the applicant was warranted on this basis. There is nothing to show that she did not have the interests of the beneficiaries at heart and so the removal is demonstrably arbitrary.

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[5] Gowar and another v Gowar and another 2016 (5) SA 225 (SCA)

[6] The sub-section reads as follows:
"*A trustee may on application of the Master or any person having an interest in the trust property, at any time be removed from his office by the court if the court is satisfied that his removal will be in the interests of the trust and its beneficiaries."*

47. On the question of arbitrariness, I agree with the *dictum* in Du Plessis[7] that an implied term should be read into the power granted to the donor under cl 4.3.2 of the trust deed that good cause should exist for the removal of a trustee. So too, for any decision by the trustees to remove one of their own.

48. In conclusion, I consider that the allegations by Meier Snr in his affidavit of 2 February 2022 are essentially self-serving but they do reveal quite clearly that he did not prepare a written instrument as contemplated in cl 4.3.1 and 4.3.2 of the trust deed – "by" or "under" his hand – to give effect to his rights vis-à-vis trustees under the trust deed. Rather, the mechanism employed was a round-robin meeting of trustees (to the exclusion of the applicant) at which resolutions were adopted and later reduced to writing. This procedure manifestly did not only fail to comply with cl 5.1 of the trust deed but it was in breach of cl 4.3.1.1 and 4.3.2 as well and hence Meier Snr's reliance on those clauses is misplaced.

EXCURSUS

49. An issue which was not dealt with in the papers or argument relates to the residual powers of Meier Snr under the trust deed, notwithstanding his sequestration. These powers include the right, *qua* donor, to appoint further trustees. However, that right might be constrained by cl 1.2.2.5 of the amendment to the trust deed on 4 July 2008 in the event that Meier Snr has taken capital benefits under the Trust.

50. The claim that Meier Snr has abused then Trust as his *alter ego* is capable of interpretation that he may indeed have taken such benefits. However, as the issue was not ventilated in the papers, I refrain from commenting further thereon. This is an issue which the sixth respondent may be requested to look into when she gives effect to the order made below.

CONCLUSION

51. In the light of the foregoing, I am satisfied that the applicant has made out a case for the relief sought in the notice of motion. Her removal as a trustee was not in accordance with the provisions of the trust deed and is thus unlawful and must be set aside. Similarly, the appointments of, first, Van Zyl and later Du Toit were not in accordance with the trust deed and both fall to be set aside.

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[7] Du Plessis and others v Van Niekerk and others 2018 (6) SA 131 (FB) at [50]

52. The question that remains is what to do about the appointment of a new trustee(s) to replace those removed? The applicant will be reinstated and will continue to function as the sole trustee. As I have said, the provisions of cl 4.2 require a minimum of 2 trustees at any given time and the appointment of a second (or further) trustee is required "*as soon as possible.*" Further, one member of the board of trustees must be "*suitably qualified to deal with financial matters.*" Prima facie, as a practising physiotherapist, the applicant does not meet that requirement. In the emotionally charged circumstances of this matter, I do not consider it appropriate that the applicant be directed to exercise the pregogative of appointing one or more trustee under cl 4.4.1 of the trust deed.

53. The applicant has proposed that Haywood and Stockhoff be appointed as co-trustees with the applicant. I have reservations with this suggestion. These two respondents are charged with the winding up of Meier Snr's insolvent estate and it is possible that in the discharge of these duties they might find themselves conflicted with the interests of the Trust. Further, the applicant was the petitioning creditor in the sequestration and the insolvency trustees might have to look to her for funding and instructions in the discharge of their duties. In reply, Mr. Daling readily accepted that the appointment of these persons was problematic and he did not press for the relief sought in prayer 5 of the notice of motion. I accordingly decline to appoint Haywood and Stockhoff as trustees to the Trust.

54. In the light of the history of this matter, I am of the view that the appointment of further trustees should be left up to the Master. Further, having regard to the applicant's allegations regarding the fact that the trust is Meier Snr's *alter ego*, the Master will have to consider the papers filed of record together with this judgment and decide whether the Trust is a sham or not. If the Master is then of the view that the Trust is not a sham and that it is necessary to appoint a further trustee (or trustees), she will be required to appoint same with due regard to the terms of cl 4.2 of the trust deed.

55. Finally, as regards the issue of costs, the litigation was brought by the applicant in the interests of protecting the integrity of the Trust on behalf of the beneficiaries. The respondents have acted similarly believing their appointment was

proper. As trustees they consider that they were duty bound to resist the application. In the circumstances, I consider that it will probably be just and equitable that the Trust (through the trustees for the time being of the Trust) be held liable for the costs incurred by both sides in this litigation. However, I have not heard the parties fully on this point and I consider that they should be afforded an opportunity to file a short affidavit each (if so advised) and make further written submissions to this Court on an appropriate costs order, due regard being had to this judgment.

ORDER OF COURT

In the circumstances the following order is made

A. It is declared that the first and second respondents' respective appointments as trustees of the Meier Family Trust, with registration number IT 1623/2007, ("the Trust") was unlawful and is invalid and of no force and effect.

B. The sixth respondent is hereby authorized and directed to remove respectively the first and second respondents as trustees of the Trust.

C. It is declared that the removal of the first applicant as a trustee of the Trust was unlawful, invalid and of no force and effect.

D. The sixth respondent is hereby authorized and directed to correct its records to reflect that the first applicant has been a trustee of the Trust throughout and since its registration.

E. The sixth respondent, in the event that she is satisfied that such a step is warranted and in such event, having due regard to the terms of the trust deed, is hereby authorized and directed to appoint one or more persons as trustees of the Trust as soon as is practically possible.

F. The parties are to address the Court on an appropriate costs order in this matter by delivering a short affidavit and/or supplementary heads of argument within 2 weeks of delivery of this judgment.

GAMBLE, J

Appearances

For the applicants: Mr. M. Daling
Instructed by Seymore Du Toit & Basson Inc.
Mbombela
c/o JMB Gillan
Cape Town

For the first and second respondents: Mr. F.S.G. Sievers SC
Instructed by Miller Bosman Le roux Inc.
Somerset West
c/o
De Klerk and Van Gend Attorneys
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