REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 30163/2017

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

SIGNATURE ..... DATE 16/02/2018

16/2/18

In the matter between:

GILLIAN VAN ZYL	1st Applicant
(In her capacity as mother and natural guardian of the minor child, Lauren Van Zyl)	
ROCCO GRAHAM VAN ZYL	2nd Applicant
Versus	
EUGEN DE VILLIERS VAN ZYL	1st Respondent
REZANNE-OENIE LOUW	2nd Respondent
JOHANNES JURGENS LOUW	3rd Respondent
THE EUGENE ANDREW DE VILLIERS VAN ZYL	4TH Respondent
THE MASTER OF THE HIGH COURT OF SOUTH AFRICA EASTERN CAPE DIVISION, GRAHAMSTOWN	5th Respondent
THE MASTER OF THE HIGH COURT OF SOUTH AFRICA, GAUTENG DIVISION, PRETORIA	6TH Respondent

JUDGMENT

MPHAHLELE J

[1] This is an application for the removal of the trustees of the J H S van Zyl testamentary trust (Master's reference: MT3127/2013) and the Laurenrocc trust (Master's reference: IT1258/2001).

[2] In terms of prayers 3 and 4 of the notice of motion, the applicants also claim orders for forfeiture of trustee fees and payment of damages. The applicants withdrew the relief sought in respect of prayers 3 and 4 and persist only with the application in respect of the remainder of the relief sought in terms of prayers 1, 2 and 5 of the notice of motion, namely that the first, second and fourth respondents be removed from office as trustees in the JHS van Zyl testamentary trust; that the first, second, third and fourth respondents be removed from office as trustees in the Laurenrocc trust; and an order declaring the first, second, third and fourth respondents paying the costs *de bonis propriis* on an attorney-and-client scale.

[3] Lauren van Zyl, who is duly represented herein by the first applicant, and Rocco Graham van Zyl, the second applicant, are the sole beneficiaries of these trusts and launch this application in such capacities. The first to fourth respondents are the trustees of the Laurenrocc trust. The first, second and fourth respondents are the trustees of the JHS van Zyl testamentary trust. The application is launched against the first to fourth respondents ("the respondents") in their personal capacities.

[4] The two trusts were created by the late Jan Hendrik van Zyl ("the deceased") who passed away on 8 January 2013. The JHS van Zyl testamentary trust was created in terms of the deceased's will, which he executed on 20 June 2012. The Laurenrocc trust is an *inter vivos* trust that was established during 2001.

[5] In life, the deceased was the father of the trust beneficiaries, Lauren and Rocco van Zyl. He was the brother of the second and fourth respondents and the three of them are the children of the first respondent. The third respondent is the husband of the second respondent. The trusts are thus being managed by the van Zyl family. The second respondent was also appointed as the executrix of the deceased estate. To assist in the administration of the estate, the second respondent engaged the services of Barnard Patel Attorneys.

[6] In its answering affidavit served on the applicants on 14 July 2017, the respondents indicated that the third respondent resigned his position as trustee of the Laurenrocc trust prior to the launch of these proceedings. In terms of the provisions of clause 6 of the trust deed the resignation has immediate effect, although the new letter of authority has not yet been issued. The respondent further indicated that the remaining trustees are no longer interested in remaining in their position as trustees after the finalisation of this application. The respondents will resign as trustees upon the final outcome of this application.

[7] The respondents contend that, under the circumstances, the only remaining issue to be determined is the issue of costs. The applicants

contend that they were justified in enrolling this matter for a hearing due to the failure of the trustees to resign as trustees immediately (or at the least consent to their removal as trustees).

APPLICANTS' GROUNDS FOR REMOVAL OF TRUSTEES

Value in Rubyco

[8] The applicant alleges that the deceased was a partner in equal shares with the fourth respondent in a business called Rubyco. An accounting firm, Pretorius & Co. prepared financial statements relating to Rubyco as at the date of the deceased's death, which reflects the deceased's interest in Rubyco at such time to be R1 042 025-00. The fourth respondent's interest was determined to be R 712 177-00.

[9] The applicants contend that, as executrix of the deceased estate, the second respondent sold the deceased interest in Rubyco to the fourth respondent for the substantially lower purchase price of only R245 745-00. The first, second and fourth respondents as trustees of the JHS van Zyl testamentary trust did not object to this transaction.

[10] The respondents deny that the sum of R1 042 025-00 represents the value of the deceased's interests in Rubyco, contending that it merely records the capital invested by and profit allocated to the deceased for the relevant period. The respondents further contend that the deceased interest in Rubyco was valued by a chartered accountant who determined it to be R235 745-00.

[11] The respondents are alleged to have caused a further valuation to be done of the deceased interest in the Rubyco partnership, by a certain Ben Jones, and that such valuation was established to be R168 735-00.

[12] The applicants attacked the respondents' valuations and indicated that the first valuation was not confirmed under oath by the valuer. It contains no reference to the valuer's knowledge or experience, the investigations undertaken or the methods used – instead, it simply refers to the aforesaid financial statements dated 8 January 2013 as the basis upon which the alleged valuation is based. Those financials contained no reference to the net asset value alleged in the purported valuation. In fact, the term 'net asset value' connotes the value of an entity's assets minus the value of its liabilities, which in the present matter is reflected in the financials as having been the partners combined equity of R1 754 202-00.

[13] The applicants further indicated that the second purported valuation is also not confirmed under oath. It further declares not to be a formal audit of Rubyco's financials - instead, the report was prepared more than four years after the deceased passed away, in retrospect and from documents and information received from the respondents. Notably such valuation appears to be nothing more than a balance sheet of Rubyco. Yet and although having been prepared from information received from the respondents, it differs materially from the balance sheet prepared by Pretorius & co. which was also prepared from information received from the respondents.

[14] The complaint is that the Rubyco partnership was undervalued by the second respondent, in her capacity as executrix. The respondents contend that this ground does not concern the conduct of the trustees of the Laurenrocc trust and the trustees of the JHS van Zyl testamentary trust, it concerns the conduct of the executrix in the deceased estate.

[15] The respondents submit that the sale / division agreement was concluded at an amount equal to the 5 May 2014 valuation. The first applicant lodged a formal objection against the valuation of the partnership interest. On 21 September 2016 the sixth respondent dismissed the objection and invited the first applicant to exercise her right to approach the High court for an order to aside the Master's ruling. The first applicant never availed herself of the remedy.

[16] The respondents submit that the applicants do not make out a case that any procedural requirement was not complied with when the sixth respondent made the decision to accept the valuation of the Rubyco partnership. In the absence of any challenge to the validity of the decision of the sixth respondent to accept the Rubyco valuation, the decision stands and I cannot, therefore, find any merit in this ground.

[17] The respondents further submit that in a letter dated 03 October 2016 addressed to the second respondent, the applicant stated the following: *"I am mailing you this letter, as you are the executor of the estate and separate from the trust and trustees. The estate details that*

I wanted to discuss with you over the weekend, was that after the meeting with Aletta last week, I asked that she inform Barnard and Patel that we will accept the offer made by Eugene for Rubyco and would very much like to wind up the matter and put it to rest."

[18] The applicants contend that whether or not the first applicant accepted the offer (and, indeed whether or not the Master approved the sale) it is irrelevant to the question of whether or not the respondents, in exercising their powers as trustees, acted with the care, diligence and skill which can reasonably be expected of individuals who manage the affairs of another. The "person" or party with *locus standi* to object or accept the valuation is the respondents as the trustees of the trusts and not the first applicant. Even if I was to accept that the valuation of Rubyco was not perfect, that valuation was approved by the Master, and the first applicant failed to challenge it in court despite being made aware that she could do so. In the circumstances, the valuation as approved by the Master stands, and the applicants cannot rely on this ground for the removal of the trustees.

Rubyco sale constituting a conflict of interest

[19] The applicants contend that the sale of the deceased's interest in the Rubyco partnership to the fourth respondent constituted a conflict of the second and fourth respondents' interest, as they should have been primarily concerned with receiving the maximum inheritance from the deceased estate as opposed to securing the fourth respondent's personal business interest. The applicants state that, because of such conflict of interest, the first, second and fourth respondents, as trustees of the said trust, did not object to the transaction despite the negligible

respondent on 21 October 2016 and the applicants never challenged the decision that was taken by the sixth respondent to accept the valuation. It follows that there is no merit in this ground.

Fourth respondent's unrecovered indebtedness to the trusts

[24] The applicants submit that, in fact, the respondent was permitted to settle the purchase price of the Rubyco sale by way of deferred payments, without any interest being charged and without having to provide any security. Even when the fourth respondent signed an acknowledgement of debt in this regard more than three years later, on 15 April 2016, the second respondent failed to negotiate better terms.

[25] Very importantly, the respondents have already been appointed as trustees of the trust by the time of the acknowledgement of debt being entered into. In fact, payment in terms of the acknowledgement of debt was ostensibly to be made into the bank account of the Laurenrocc trust. The interest of the deceased estate in the Rubyco sale was furthermore ceded to the trustees of the JHS van Zyl testamentary trust on the same day, being 15 April 2016. Yet, despite clearly having been part of negotiating the acknowledgement of debt, the respondents did not object to the terms of repayment or to have made any attempt to negotiate better terms, particularly relating to interest and security. Furthermore, despite the acknowledgement of debt containing an acceleration clause, the respondents made no attempts to recover the purchase price from the fourth respondent.

[26] The second respondent is alleged to have sold the Rubyco interest to the fourth respondent on such unfavourable, if not non-existing, terms because he was unable to pay the purchase price immediately and in full. This does, however, not explain why they did not agree on interest being charged on any outstanding or arrear balance; why better terms were not negotiated four years later, when concluding the acknowledgement of debt; why the fourth respondent was at no stage required to put up security in the form of (a) the interests in an immovable property which he inherited from the deceased and/or (b) his own immovable property; or why steps have not been taken to recover the outstanding balance from the fourth respondent.

[27] The applicants contend that the second respondent seeks to justify the sale further by boldly claiming that, had it not been for the sale to the fourth respondent, the interests in Rubyco would devolve to the heirs without any market value. Furthermore, the suggestion that such alternative scenario would prejudice the heirs more than selling to a non-paying purchaser without security or interest, is completely misguided.

[28] The applicants contend that the respondents' absolute inability to protect the trusts' interests, particularly when it came to one of their own, the fourth respondent, did not stop the respondents from loaning a sum of approximately R101 000-00 to the fourth respondent for payment of legal fees and then failing to recover payment thereof. In this regard, the respondents simply allege that the fourth respondent has made payment of the R35 000-00 and that they expect payment of the balance together with interest soon.

[29] The applicants contend further that the Rubyco sale took place in circumstances where the fourth respondent was already indebted to the deceased estate for payment in the sum of R 150 000-00, being monies lent and advanced to him by the Rubyco partnership on 27 September 2012.

[30] The respondents contend that such debt was already settled in December 2012, when the deceased instructed the fourth respondent to pay such money to their mother, from whom the deceased later on refused to accept repayment.

[31] The respondents further submit that this ground does not concern the conduct of the trustees of the Laurenrocc trust but that of the executrix in the deceased estate up to and inclusive of the date of cession on 16 April 2016. After 15 April 2016 it concerns only the conduct of the trustees of the JHS van Zyl testamentary trust.

[32] The alleged conduct of the trustees must be assessed against the background that the trustees have a discretion in the manner they conduct the trust business. Where the trustees exercise such discretion in a manner they deem appropriate in the circumstances, it cannot be a basis for their removal unless such conduct, objectively viewed, is reckless and *mala fide*. The applicants have failed to establish the basis for the removal of the trustees on this ground.

The Rubyco sale contravened the Administration of Estates Act 66 of 1965

[33] The applicants contend that the second respondent conceded to having acted in contravention of section 47 of Act 66 of 1965. Section 47, *inter* alia, provides that, unless it is contrary to the will of the deceased, an executor shall sell property in the manner and subject to the conditions, which the heirs who have an interest therein approve in writing, or if the said heirs fail to agree, he shall sell the property subject to conditions approved by the Master. It was further contended that the respondents, as trustees of the testamentary trust do not claim to have been unaware of the unlawfulness of the transaction, to have objected thereto or to have taken any steps to rectify the unlawfulness.

[34] The respondents submit that this ground concerns only the conduct of the executrix in the performance of her duties in the administration of the deceased estate and it bears no relation to the conduct of the trustees of the Laurenrocc trust and the trustees of the JHS van Zyl testamentary trust.

[35] The respondents further submit that, notwithstanding that the transaction was labelled as a sale, it is effectively nothing other than an application of the *actio communi dividundo,* by agreement. The non-compliance with the statutory provisions, if any, did not result in any harm to the heirs. To the contrary; in the absence of the agreement on the *communi dividundo,* the heirs would not have received any benefit at all from the value of the deceased's interest in the Rubyco partnership.

[36] In my view, for the applicants to succeed in removing the trustees on the ground of contravention of section 47 of the Administration of Estates Act, the applicants must at least establish that the respondents were aware of the unlawfulness of the conduct and condoned and condoned it, or reasonably ought to have known about the unlawfulness of the conduct. The second respondent appears to be the only trustee who should have been aware of the provisions of section 47 and ought to have acted in accordance therewith, but negligently failed to do so. In the circumstances of this matter, such negligence does not justify the removal of the trustees from office.

Sale of Volkswagen motor vehicle

[37] The applicants contend that the second respondent also sold the deceased's Volkswagen Polo motor vehicle to the fourth respondent, and that such sale was contrary to the provisions of Act 66 of 1965, and that the proceeds of the sale was never accounted for.

[38] The respondents contend that the motor vehicle was not the property of the deceased and was further not sold to the fourth respondent. The applicants contend that, although this explanation is purportedly supported by documentary evidence, the respondents do not explain the contradiction with their own annexures to their answering affidavit, which they allege are recordals of an oral agreement between the parties and in terms of which the deceased is stated to be the owner of the Volkswagen motor vehicle.

[39] The respondents submit that this ground concerns only the

conduct of the executrix in the administration of the deceased estate and it does not concern conduct of the trustees of the Laurenrocc trust or the trustees of the JHS van Zyl testamentary trust.

[40] The respondents further submit that objective evidence indicates that the motor-vehicle was the property of Wesbank, a division of First Rand Bank and was purchased by Caritas Verpleegsorg cc. The monthly instalments were also paid by Caritas Verpleegsorg cc. The motor-vehicle was simply made available for use by the deceased for a period of time, during which he paid the monthly instalments to Caritas Verpleegsorg cc as compensation for the use of the motor-vehicle. After the demise of the deceased, the fourth respondent used the motor-vehicle for a period. The motor-vehicle was ultimately sold to a Mr Ian Fletcher.

[41] The respondents contend that a *bona fide* dispute of fact presented itself on the papers and that the Plascon Evens rule finds application. The applicant seeks adjudication of the issue on motion proceedings and the version of the respondent is accordingly to be accepted.

[42] In my view, the dispute of fact that arises with regard to the removal of the trustees in respect of the sale of the motor vehicle in contravention of the Administration of Estates Act is that the court is unable to determine the factual position on the papers and come to an appropriate decision. The decision can only be taken after hearing evidence on this aspect at the trial. Accordingly, I find that there is no basis for the removal of the trustees at this stage.

Irregular expenses

[43] The applicants contend that the respondents paid themselves trustee fees in circumstances where those fees were unreasonable, the first respondent was unable to properly perform the duties of a trustee and the fourth respondent was a non-paying debtor of the trust.

[44] The respondents contend that the payments made were reasonable, especially considering what was required of them. As for the specific amounts queried by the applicants, the respondents respond as follows:

[45] As for the sum of R12 695-38 paid to the second respondent, the respondents concede that the second respondent was not entitled thereto and provided proof that such amount has been repaid to the trust subsequent to this application being launched. Notably the second respondent paid no interest on the amount, which she only repaid years after it was advanced to her.

[46] The respondents submit that the second respondent rendered professional services as auditor to the Laurenrocc trust and the account she rendered to the trust unfortunately also contained items in respect of which she rendered services in the administration of the deceased estate. The respondents contend that the second respondent's error in this regard is understandable in view of the intertwined nature of the services that were rendered.

[47] As for the amount of R34 200-00 paid to the third respondent, the respondents contend that the amount actually paid to him was R31 500-00 and that the remaining R3 000-00 was paid to the erstwhile trustee of the Laurenrocc trust, a certain Joubert. The applicants contend that, irrespective of the amount so paid, the third respondent was not a duly appointed trustee during the period with respect to which such payment was made. He was therefore not entitled to payment of trustee fees.

[48] The respondents contend that although the third respondent did not fully accede to the office of the trustee in that he lacked the written authorisation by the Master, he was duly appointed as trustee in terms of clause 5 of the trust deed and his appointment derived from the trust instrument itself and not from the Master's authorisation. I must point out that section 6 (1) of the Trust Property Control Act 57 of 1988 provides that a trustee appointed after the commencement of the Act, shall act as trustee only if authorised thereto in writing by the Master.

[49] The respondents submit that the amount of R31 500-00 represent the trustee remuneration calculated at R3 500-00 per month for the period June 2013 to February 2014 (9 months). The respondents further submit that the payment to the third respondent of the negligible remuneration took place in circumstances that the uncontroverted evidence is that he rendered continued assistance to the trustees of the Laurenrocc trust throughout this period. The respondents maintain that if the third respondent was not remunerated as trustee (which he technically could not have been) he would have had a claim for services rendered. It is hard to fathom that the claim would have been less than R3 500-00 per month for the said period.

[50] The respondents stated that the sum of R64 800-00 paid to the fourth respondent constituted a repayment of two loans which the fourth respondent made the trust. The applicants note that the respondents do not provide any proof of such loans ever being advanced. The applicants further noted that it is baffling that the respondents would settle the trust's indebtedness to the fourth respondent regardless of the fourth respondent's indebtedness to the trust.

[51] The respondents submit that this payment was made as long ago as July 2013 and this was before the application of the sale agreement and it was before the payment of the legal expenses in respect of the obtaining of the interdict.

[52] The respondents submit further that the amount constitutes repayment of monies that were, at the time, advanced by the fourth respondent to the Laurenrocc trust in the following the circumstances: before the receipt of the proceeds of the insurance policy, neither the Laurenrocc trust, nor the deceased estate had the requisite liquidity to pay for the maintenance of the beneficiaries; the first respondent advanced the amount of R60 000-00 to the Laurenrocc trust to enable the trust to make payment to the first applicant in respect of maintenance of the beneficiaries; this took place in March 2013 and June 2013; the fourth respondent advanced the trustee remuneration that was payable to Joubert (R4 800-00) to the Laurenrocc trust. The respondents state that the repayment of the amounts in July 2013 can certainly not serve as justification to remove the trustees of the Laurenrocc trust as it took place long before the appointment of the second and fourth respondents as trustees of the Laurenrocc trust.

[53] The applicants contend further that the respondents, as trustees of the Laurenrocc trust, made payments contrary to the object of such trust, as follows: Legal fees in the aggregate sum of R 218 653-87. The respondents contend that such expenses were incurred in the prosecution of legal proceedings with respect to the Rubyco partnership. The applicants submit that the respondents mean that the incurrence of those expenses were reasonable when considered against the circumstances prevailing at the time and with the intention of securing the deceased's interests in Rubyco. Yet, an important factor to have consider at the time, which the respondents apparently failed to do, was what the quantum would be of such expenses that would be necessary to secure the deceased's interest, which they purportedly valued at R245 735-00. The applicants maintain that there can in any event be no justification for the Laurenco trust to have paid legal costs incurred with respect to proceedings in which it was not a party.

[54] The applicants also object to a loan in the sum of R101 859-00 that was made to the fourth respondent. The respondents contend that such loan was made with respect to the fourth respondent's portion of the aforesaid legal costs incurred with respect to the Rubyco proceedings, and with the understanding that the fourth respondent would repay such sum after recovery of the costs in those proceedings. The applicants note that the costs in such proceedings were ostensibly recovered as the fourth respondent is alleged to have paid back R15 000-00. The applicants submit that the respondents are, however, like the other instances of the fourth respondent's indebtedness, conspicuously silent on why such ridiculous payment terms were agreed to, why the balance has not yet been repaid and what they, as trustees, have done to recover payment of the outstanding balance.

[55] A further bone of contention is the sum of R58 908-00 advanced to the deceased estate. The respondents explain that such sum was received by the Laurenrocc trust on behalf of the deceased estate. The respondents state that the payment was made by Barnard & Patel attorneys into the Laurenrocc trust's bank account during June 2013, a date well before the accession of the office of trustee by the second and fourth respondents.

[56] The respondents submit that this ground concerns only the conduct of the trustees of the Laurenrocc trust and it does not concern the conduct of the trustees of the JHS van Zyl testamentary trust.

[57] I am not able make a considered finding on the issues raised under this ground without resorting to trial proceedings. I am therefore unable to order the removal of the trustees on this ground based on the disputed evidence of the parties.

Unlawful donations

[58] The respondents made donations with the funds of the Laurenrocc trust, in the respective sums of R5 000-00 and R10 208-00. Such sums were repaid subsequent to the launching of this application, without interest. The applicants submit that, what is of importance, is the respondent's concession in their answering affidavit that "*it is evident from a mere reading of the provisions of the trust deed*", that it does not permit of such donation.

[59] The respondents submit that this ground concerns the conduct of the the trustees of the Laurenrocc trust and it does not concern conduct of the trustees of the JHS van Zyl testamentary trust.

[60] The respondents contend that they made both donations to charity with the knowledge and consent and agreement of the applicants and that upon receipt of advice that the payments were not authorised by the trust deed, the trustees of the Laurenrocc trust repaid both amounts from personal funds. The fact that the trustees made the donations with the applicant's full knowledge suggest that the trustees and the beneficiaries believed that the donations were permissible. Whilst the trustees were negligent, they appear not to have acted in bad faith. The trustees have already repaid the money to the trust. The trustees' mistake in this regard cannot serve as a ground for the removal of the trustees of the Laurenrocc trust. The removal of the trustees on this ground fails.

Penalty interest to SARS

[61] The applicants point out that the Laurenrocc trust paid penalty interest of approximately R140 000-00 to the South African Revenue Service as a result of the respondents failing to pay estate duties on time. The respondents lay the blame for having failed to pay such estate duty timeously at the door of Barnard & Patel attorneys, being the attorneys who assisted the second respondent, as executrix, in the administration of the deceased estate. The applicants submit that it is unclear on what basis the respondents allege that Barnard & Patel attorneys had a duty to the Laurenrocc trust, considering that they acted on a mandate from the executrix of the deceased estate.

[62] The respondents submit that this ground concerns the conduct of the trustees of the Laurenrocc trust and conduct of the executrix in the administration of the deceased estate and it does not concern the conduct of the trustees of the JHS van Zyl testamentary trust.

[63] The respondents contend that the aforesaid provisions are technical in nature and not within the knowledge of the reasonable average lay-person. The second respondent (the executrix) fully relied on Patel & Barnard attorneys to assist her in the administration of the deceased estate. Neither the executrix nor the trustees of the Laurenrocc trust had been advised that estate duty was payable by the Laurenrocc trust within twelve months from the date of the deceased demise. They were also not advised by Barnard & Patel attorneys that an extension could be sought before expiry of the period of twelve months. Therefore, the respondents maintain that the omission to have paid the estate duty timeously was not caused by an omission or the neglect of the part of the trustees' duties, or the failure to act in accordance with that which is expected of the *bonus et diligens paterfamilias.*

[64] The trustees took reasonable steps to obtain professional advice in this regard. I am of the view penalty interest payable to SARS cannot be attributed to the conduct of the trustees, and accordingly, the trustees cannot be removed on this ground.

Improper investment

[65] The applicants also object to the high risk investment of the

Laurenrocc trust funds, which resulted in a loss of R390 000-00. The respondents stated that the trust funds were invested conservatively, on advice of experts, that the reduction of trust funds can be attributed to payments made to the trust beneficiaries, and the poor performance of the local economy. The applicants contended that the funds should have been invested in in a standard money market account, which is not affected by the poor performance of the local economy. The applicants stated that one would expect a person faced with a poor performing investment to review such investment, especially when the investment relates to another person's funds.

[66] The respondents submit that the trustees at the time acted with extreme diligence, in a prudent manner and consonant with the conduct to be expected from a tutor taking care of his ward, in particular in this regard: a reputable financial institution was approached to render advice; the financial advisors concerned were both reputable and duly qualified; the investment instrument was carefully selected and the trust fund was conservatively invested.

[67] I was not able to find anything in the evidence submitted by the applicant to suggest that the loss resulting from the investment was a result of gross and deliberate action on the part of the trustees. In the circumstances, I find that the applicants have not established a case for the removal of the trustees on this ground.

WITHDRAWAL OF PRAYERS 3 AND 4

[68] The applicants, on 28 August 2017 advised through their lawyers

that they had resolved not to pursue the relief sought in prayers 3 and 4 of their notice of motion, which the applicants would pursue in subsequent action proceedings.

[69] The respondents submit that the notification constitutes a withdrawal by the applicants of the relief sought in terms of prayers 3 and 4 of the notice of motion. As a consequence, the respondents apply, in terms of rule 41(1)(c), that the applicants be ordered to pay the respondent's costs occasioned by the applicant's application for the relief claimed on the attorney and client scale. The respondents contend that the greater part of the applicants' application deals with the withdrawn claims. However, it is clear from the disputes arising in respect of prayers 3 and 4 that these issues can be suitably be dealt with in action proceedings.

TRUSTEES' STATUS

[70] Section 20 (1) of the Act provides: '*a trustee may, on the application of the master or any person having an interest in the trust property, at at any time be removed from his office by the court if the court is satisfied that such removal will be in the interest of the trust and its beneficiaries*'.

[71] The established principle upon which a trustee may be removed from office is when continuance of the trustee in office will prevent the trust being properly administered or will be detrimental to the welfare of the beneficiaries. The overriding question is always whether or not the conduct of the trustee imperils the trust property or its proper administration. [See Gowar v Gowar 2016(5) SA 225 (SCA)].

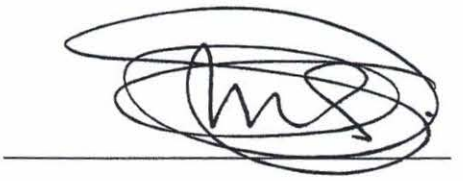
[72] There are matters that require further adjudication in order to determine whether the trustees should remain in office or not. These matters can only be properly determined at a trial. Nevertheless, I am cognisant of the fact that the beneficiaries have expressed a deep loss of trust in the ability of the trustees to the act in the best interest of

the trust and the beneficiaries. The trustees have indicated thet they will resign as trustees on conclusion of these proceeding. I am of the view it would be in the best interst of the trust and beneficiaries that the trustees be granted their wish to vacate their office.

COST

[73] Generally cost follow the cause although the court has a discretion in the award of cost. I have not made any order in favour of the applicants. However, I am of the view that the manner in which the respondent dealt with trust issues, even if it could be found to have been in good faith,created so much uncertainty and apprehension on the part of the beneficiaries to justify this application. Most of the issues in dispute were clarified during the court proceedings, and many issues remain obscure. In the circumstances, it would be just and equitable that the respondents not be awarded the cost of the application, and each party to pay its own cost.

[74] Accordingly, an order is made in terms of draft order marked 'X'



S S MPHAHLELE

JUDGE OF THE HIGH COURT,

PRETORIA

FOR THE APPLICANT: Adv EJJ Nel

INSTRUCTED BY: WF Bouwer Attorneys

FOR THE 1st TO 4th RESPONDENTS: Adv JG Bergentoin SC

INSTRUCTED BY: VDT Attorneys

3.2 The attorneys of the parties, or any representative affiliated to their firms, should not be appointed as Trustees;

3.3 The objective Trustees to be appointed should not have any interest, directly, or indirectly, in any of the two Trusts, the beneficiaries, or the parties to the above application.

4. Each party to pay its own costs ~~First and Second Applicants are ordered to pay the costs of the application.~~

BY ORDER

REGISTRAR