

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

(1) REPORTABLE: NO
(2) OF INTREST TO OTHER JUDGES: NO
(3) REVISED: YES
21 OCTOBER 2024
Case no: 083964/2023

In the matter between:

A[...] J[...]	First Applicant
J[...] B[...]	Second Applicant
J[...] M[...] J[...]	Third Applicant
and	
R[...] C[...] F[...] NO	First Respondent
T[...] F[...] NO	Second Respondent
R[...] C[...] F[...]	Third Respondent
T[...] F[...]	Fourth Respondent
A[...] F[...] F[...]	Fifth Respondent
JOHANNES JACOBUS ROSSOUW NO	Sixth Respondent

JUDGMENT

NEUKIRCHER, J

1] On 29 July 1994, A[...] F[...] (the deceased) established and registered a family trust known as the T[...] F[...] Trust (the Trust). The Trust is a family trust. The original Trust Deed was amended on 19 August 2014 by agreement between the deceased, the trustees ¹and the beneficiaries of the Trust. The new Deed of Trust (New Trust Deed) was signed by the deceased on 23 September 2014. The New Trust Deed provided that, upon termination of the Trust, the Trust Property in the possession of the trustees would be distributed in accordance with the deceased's will, with the balance to be distributed to the named beneficiaries. It also contained provisions imposing on the trustees the duty to keep proper accounts and not to manage the trust property for their own benefit.

2] The deceased passed away on 22 February 2015. He was survived by his four children - the three applicants and R[...] - and his spouse T[...]. All five are beneficiaries of the Trust, as is T[...]’s daughter, A[...]. At institution of these proceedings, A[...] was still a minor and represented by T[...] - she has since reached the age of majority, but she has neither sought to be substituted in these proceedings, nor has she filed any affidavits, nor has she appointed a legal representative to make submissions on her behalf.

3] The applicants have launched the application seeking interdictory relief, declaratory relief, and relief in terms of s20(1) of the Trust Property Control Act

¹ The first and second respondents, who will be referred to in this judgment as R[...] and T[...].

57 of 1988 (the Act)² to remove R[...] and T[...] as trustees. The notice of motion, to be precise, seeks the following relief:

- 1.1 "Declaring that the first and second respondents have repudiated the terms of the agreement entered into amongst the parties on 18 August 2015;
- 1.2 Setting aside the resolution of the first and second respondents taken on 15 December 2023 ("*the December resolution*");
- 1.3 Interdicting and restraining the first and second respondents from implementing the December resolution;
- 1.4 Ordering the first and second respondents to provide the applicants' attorneys with all books, records and documents relating to the affairs, operations, business and management of the Trust to date;
- 1.5 Removing the first and second respondents as trustees of the Trust and ordering the fourth respondent to cancel the letters of authority dated 20 October 2014 authorising the first and second respondents to act;
- 1.6 Directing the fourth respondent to provide the applicants and the proposed independent trustee with letters of authority authorising them to act as trustees of the Trust;
- 1.7 Ordering the first, second and third respondents to pay the costs of the application including the costs of two counsel where employed ... "

The Issues

- 4] The issues can be divided into two main themes:
- a) the first revolves around the validity of an agreement reached between the heirs and executor of the Will, as well as the trustees and the beneficiaries of the Trust on 18 August 2015

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

(the August Agreement), which effectively amended the New Trust Deed, and whether a subsequent resolution by the trustees on 15 December 2023 (the December Resolution), which varies the August Agreement, is valid;

- b) the second is whether the trustees have conducted themselves in such a way that their removal is warranted in terms of s20 of the Act: is their removal in the interests of the Trust and the beneficiaries?

Background

5] As stated already, the deceased, the trustees and the beneficiaries amended the Trust Deed on 19 August 2014. This was approximately one year after the deceased signed his Last Will and Testament (the Will), in terms of which:

- a) he bequeathed his entire estate to T[...] and A[...] in equal shares;
- b) insofar as the Trust was concerned, it provides:

"4. As far as the assets of the T[...] F[...] Trust is concerned, I direct the balance of the trust assets after payment of all debts and costs, upon termination of the Trust, shall be paid to the beneficiaries in the following manner:

- 4.1 R[...] C[...] F[...] - 25%
- 4.2 A[...] F[...] (J[...])-25%
- 4.3 J[...] M[...] F[...] (J[...]) - 25%
- 4.4 J[...] F[...] - 25%..."

6] It is common cause that on 18 August 2015, after the passing of the deceased, the trustees, heirs, and beneficiaries of the Trust and the executor of the will, entered into the written August Agreement. It is also common cause that the August Agreement records:

- a) a resolution passed by the trustees and an agreement

between them and the beneficiaries; as well as

b) an estate agreement between the executor and the heirs.

7] I emphasize that the August Agreement was signed by all the abovementioned parties. Their signatures are appended to the document at the end of all the agreed terms and on the same date. This is not disputed by any of them. Nor do any of them dispute that it is their respective signature that is recorded on the written instrument. It is also not in dispute that the terms set out were correctly recorded.

8] To be precise, the August Agreement specifically records the following:

"The trustees of the T[...] F[...] Trust, namely R[...] F[...] and T[...] Farly have held a meeting ...with the heirs of the T[...] F[...] estate represented by T[...] Farly (Mother and natural guardian of A[...] F[...]) and have agreed and resolved as follows:

Resolution of the trustees and agreement between trustees and beneficiaries of the T[...] F[...] Trust...

1. That the loan accounts in favor of the late founder Mr. A[...] F[...] (B[...]) AND Mrs. T[...] F[...] (G[...]) be reduced pro-rata to R5 500 000.00 and will be an interest free loan repayable over terms as set out below.

a.

b.

c. T[...] F[...]’s repayment portion will be paid to R[...] C[...] F[...] in lieu of payment towards shares purchased by T[...] F[...] in the RWand RB Property CC for a period of time that would be sufficient to repay the difference owed after the initial payment has been made as highlighted in point 3.b.1

d. The property within the trust will stand as guarantee

against the loan amount.

2. That the wishes of our late founder Mr. A[...] F[...] with regards to Erf 3[...], 4[...] E[...], U[...] street, R[...], B[...] valued at R1 001 000.00 and Erf 1[...], 3[...] L[...], G[...] road, B[...] P[...], B[...] valued at R1 650 000.00 be distributed as follows:

a. Erf 3[...], E[...], U[...] street, R[...], B[...] to R[...] C[...] F[...];

b. Erf 1[...], 3[...] L[...], G[...] road, B[...] Park, Boksburg... TO A[...] M[...] J[...];

c. The condition of the transfers are as follows:

i. That there are no unforeseen restrictions and preventative steps taken by way of the law or other.

ii. It is further understood that the transfer values of each property will be deducted from that beneficiary's dividend at the end of the trust term.

d. Any costs payable for the transfer of the above said property be for the individual beneficiaries account and will not be borne by the Trust.

3. Income distribution agreement: a.

b.

c. Monthly distribution agreement

i. R F[...], acting in his capacity as the T[...] F[...] Trust administrator ... will reduce his distribution portion from 50% to 40% and carry the administration costs of the trust (administration costs limited to legal fees, accounting fees and fees to run the office including petrol, telephone and data as well as his time)

ii. The balance of the income after the loan and administration distribution portion will be equally divided by the remaining beneficiaries as laid out in the Trust Deed namely:

1. T[...] F[...]

2. A[...] F[...]

3. J[...] F[...]

4. A[...] M[...] J[...]

5. J[...] J[...]
4. The trustees have further resolved... that the loan owed to the T[...] F[...] Trust by RW and RB Property CC (R671 621.00 as at 2013 financial statements) be reduced to an interest free loan of R500 000.00 on the following conditions...
5. It is also understood that the T[...] F[...] Trust is a testamentary trust and that the beneficiaries as named in the trust deed are only going to benefit from the trust while the trust is active whereupon the arrival of the termination date in December 2024 the beneficiaries are named in the final will and testament of the founder and their father the late Mr. A[...]F[...] will be the only beneficiaries of the trust namely:
- a. J[...] B[...] 25%
 - b. A[...] M[...] J[...] 25%
 - c. R[...] C[...] F[...] 25%
 - d. J[...] M[...] J[...] 25%

The estate agreement

1. The T[...] F[...] estate (represented by way of any representative), executor and heirs will have no further claim against the T[...] F[...] Trust other than what is highlighted above and in point 2 below.
2. That T[...] F[...] and A[...] F[...] be furnished with a legitimate attorney's agreement covering the terms of the loan as set out above and at the expense of the trust should it be deemed that this resolution is not sufficient.
3. That the beneficiaries of the T[...] F[...] Trust as laid out in the final will and testament have no claim to the estate of their father Mr. A[...] F[...]."

9] Thus, it is clear from the above:

- a) that T[...] represents the heirs in negotiating the terms of the agreement. Given that A[...] was a minor at the time, this is logical;

b) the terms on which the Trust would repay certain loans to the deceased estate, the manner in which rental income would be distributed, the administration costs of the Trust and the explicit arrangements on termination of the Trust including explicit provisions relating to how the assets would be distributed.

10] It is also common cause that, subsequent to the conclusion of the August Agreement, the parties all conducted themselves in accordance with the provisions of

that Agreement:

- a) payments were made towards the amounts owed by T[...] and A[...] to the Trust;
- b) R[...] received some payments from T[...] towards the members interest in the RW and RB Property CC (the CC);
- c) the mentioned immovable properties were transferred to R[...] and A[...];
- d) monthly payments were made to the applicants (although not in the proportions envisaged by the August Agreement).

11] However, according to the applicants, R[...] then made payments to himself in excess of what was agreed upon, and it appears that there was tension and discontent amongst the parties as a result of the way in which he, in particular, conducted himself as trustee.

12] The final straw for the applicants came when R[...] and T[...] passed the December Resolution which, it is common cause, is completely at odds with the terms of the August Agreement. Amongst others, the December resolution:

- a) made it clear that R[...] and T[...] no longer considered themselves bound by the August Agreement;
- b) provides for the distribution of the Trust assets, including the distribution of income, other than that provided for in the August Agreement;

c) distributes Trust assets to R[...]’s three sons who were not heirs in terms of the deceased’s will, nor beneficiaries of the Trust³.

13] The entire defence put up by both R[...] and T[...] is dependent on whether the August Agreement is valid. I say this because, in their answering affidavits, neither R[...] nor T[...] take issue with either the manner in which the terms of the August Agreement are recorded in the written document, nor do they take issue with the fact that they signed the August Agreement as Trustees, heirs and beneficiaries. Nor do they dispute that the signatures that appear on the last page of the August Agreement were appended by, *inter alia*, them.

14] In fact, R[...] goes further: in his answering affidavit, he not only confirms that following the August Agreement the Trustees conducted themselves in accordance with that agreement until November 2021, he also states:

"... I pause to mention that at the time the August Document was concluded, I believe the August Resolutions to have been validly passed."

15] In fact, it appears that R[...]’s rejection of the August Agreement is based on T[...]’s conduct, as he states:

"27. Subsequently, T[...] F[...], both in her capacity as the second and fourth respondent, began to dispute the validity of the August Resolutions, specifically the first Resolution, which saw the reduction of the loan amount due to her..."
and that

"(g)iven that the August Resolution were (sic) considered to be invalid... the second respondent and I, as we are authorised to do in terms of the New Deed, passed a resolution on 15 December 2021."

³ Either in terms of the original Trust Deed or the New Trust Deed

16] R[...] seeks then to base the alleged invalidity of the August Agreement not just on T[...]’s rejection of its terms, but also on an email received from the A[...] on 2 April 2021 which he alleges evidences that applicants also consider the August Agreement to be invalid. But an analysis of this letter clearly demonstrates that this allegation is incorrect. That email requests that an independent Trustee be appointed to the Trust to "look after the interest of all the beneficiaries" given "the dispute between the Trustees with an ongoing court matter."

17] The letter also details that the dispute is the following:

"The beneficiaries dispute [is] with (R[...] C[...] F[...]) and his monthly Distributions. We are in dispute as his monthly income exceeds the loan repayments and we would prefer to have the loan accounts repaid quicker. As per this dispute between the beneficiaries and R[...] (Trustee and Administrator) we request that with immediate effect all Distributions payments to him are ceased until this matter can be resolved. Loan accounts must be continued to T[...] F[...] (Trustee)..."

18] In essence, the dispute revolves around the fact that, despite the fact that R[...] undertook to reduce his payments in the August Agreement, he reneged on that and ended up taking more than the lion's share of agreed distribution funds.

19] But all this goes to show is the immense mistrust between the parties and the origin of the allegations that the trustees abused their powers. Whether R[...] did or did not abide by the terms of the August Agreement or did or did not receive more than he was entitled to has no bearing on the validity of the August Agreement - at best it has a bearing on whether he should be removed as a trustee.

20] R[...] also attempts to clothe the August agreement with invalidity by

using the phrase "in my mind" when describing the purpose and content of the August agreement. For example he states:

a)"19. In my mind, the August Document served two purposes ... ";
and

b)"20. In my mind, paragraphs 1 to 5 of the August Documents set out the August Resolution passed by the Trustees while the paragraphs numbered 1 to 3 under the heading "The Estate Agreement" naturally comprised the Estate Agreement."

21] But what was in his mind is entirely irrelevant - R[...]'s subjective intention is not relevant in the interpretation of what is a very clear and unambiguous document. It is also clear that, in creating the August Agreement, everyone acted in concert - this is clear from the wording and their signatures. In fact, the affidavits before court confirm this too.⁴

22] The high watermark of T[...]'s case is to be found in three main paragraphs in her answering affidavit. These are the following:

a) "29.1... I have from the beginning disputed the contents of the "so-called August agreement" and the way it was presented to me for signature and its execution ... "

b) "33.2 I have to further indicate that a number of the provisions of the so-called August resolution did not represent the agreement between the parties as the provisions therein was not what second respondent had agreed on."

c) "37.1... I have already dealt with the issues around the so-called August resolution and have no intention of repeating the same here ... "

⁴ *Cecil Nurse (Pty) Ltd v Nkola* 2008 (2) SA 441 (SCA) para 15 "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms." Per *Smith v Hughes* (1871) LR 6 QB 597 at 607 [also reported at (1861 - 73] All ER Rep 632

23] Whilst there are several other references to the August Agreement littered throughout T[...]’s affidavit, they are always in the same context ie that it is null and void. But conspicuous by their absence are any allegations as to why she makes this denial, when she took issue with the signed August Agreement, why she did so or the terms she alleges are at variance with the actual recorded agreed terms.

24] In argument, Mr Maphelela⁵ made several important concessions:

- a) that there are no documents to indicate the date on which the alleged dispute commenced - his submission was that I can "take judicial note" of the dispute date. No basis was laid for this submission nor was I referred to any authority in support of this confounding submission;
- b) that all the relevant parties had in fact, signed the August agreement;
- c) that although he argued that immediately after the August Agreement was signed, T[...] realized that "it did not align with her intentions", there were no documents supporting any of these contentions. Once again I was told that "because of the facts", I can "take judicial notice" of all of this.

25] Mr Maphelela also submitted that the August Agreement is invalid as:

- a) A[...]’s share of the estate and Trust was reduced and this without the consent of the Master of the High Court;
- b) A[...] was a minor when the August Agreement was signed - therefore it cannot bind her and is invalid.

⁵ On behalf of T[...]

26] But what these submissions ignore is:

- a) firstly, none of these issues were raised on the papers. The applicants have therefore not been given an opportunity to respond to them and they (even if there were merit in them, which there is not) are simply no more than "trial by ambush". Counsel's conduct in raising them in answering argument is to be deprecated;
 - b) secondly T[...] has acted as guardian of A[...] at all times and her actions bind her daughter;
 - c) A[...] is now a major at no stage has she sought to impugn any decision taken by her mother at any stage whilst she was a minor.
- Therefore these arguments are dismissed.

27] Had T[...]’s denouncing of the August agreement as invalid been made because of a want of consensus⁶ or a misrepresentation⁷ I would, at the very least have expected some from particularity as to when T[...] realized the August Agreement was at variance with her understanding of its terms;

- why she maintains this position;
- what the actual terms were;
- why she signed the August Agreement;
- why she allowed the terms to be recorded as they appear.

28] But even more importantly, it remains undisputed that several of the August Agreement terms were implemented eg. the property transfer to R[...] and A[...] - the question is why she allowed this? It also begs the question as

⁶ Which appears to be her argument

⁷ *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A) at 2391 - 240B

to why the August Agreement was implemented between August to December 2021.

29] "If by a mere denial in general terms a respondent can defeat or delay an applicant who comes to Court on motion, then motion proceedings are worthless, for a respondent can always defeat or delay a petitioner by such a device. It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits."⁸

30] The respondents have attempted to argue that there is a material dispute of fact on the papers and that, as a result, the *Plascon-Evans*⁹ test must be applied in their favour. It is trite that relief should be granted only if the facts as stated by respondent together with the admitted facts in the applicant's affidavits, justify the grant of the order. But:

a) in certain instances the denial by the respondent of a fact alleged by applicant may not be such as to raise a real, genuine or bona fide dispute of fact¹⁰; and

b) where the allegations or denials by respondent are so far-fetched or clearly untenable, the court is justified in rejecting them merely on the papers¹¹.

31] In my view, the complete lack of particularity of T[...]s version is such that her version does not raise a real, genuine or bone fide dispute; and given the paucity of particularity regarding that, her version is so untenable that it

⁸ *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154F – H

⁹ *Plascon-Evans Paints (TVL) Ltd. v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 635B - C

¹⁰ *Plascon-Evans* at 634 I-J

¹¹ *Plascon-Evans* at 635 B-C

falls to be rejected merely on the papers. This is especially important given the facts that in motion proceedings, the affidavits constitute the pleadings and the allegations must be proven by adducing admissible evidence. T[...] has failed to adduce any evidence, never mind any admissible evidence.

32] R[...]’s version fares no better regarding the August Agreement - he bases his rejection on T[...]’s "lack of consensus". He gives absolutely no cogent version why the August Agreement should be found invalid beyond what T[...] avers and, as such, he too fails to raise a real, genuine or bona fide dispute. His version too is so lacking in substance that it falls to be rejected on the papers. In my view, their denial of the August Agreement amounts to little more than obfuscation.

33] Thus, given the terms of the August Agreement and the fact that all the parties accepted those terms in writing, the Trustees were not at liberty to vary the August Agreement without the consent of the heirs and beneficiaries and contrary to the terms of the Will. Thus, by passing the resolution of 15 December 2021, the R[...] and T[...] have exhibited conduct that amounts to little more than a deliberate and unequivocal intention not to be bound by the August Agreement and, in doing so, they have breached the August Agreement. In any event, R[...] and T[...] unequivocally stated in their respective affidavits that they do not consider themselves bound by the August Agreement.¹² But the applicants have elected to uphold the August Agreement and thus the relief sought in Prayer 1 of the Notice of Motion is competent.

34] The purpose of the December resolution is clear: it evinces the intention to transfer two of the major trust assets to parties who are neither heirs nor beneficiaries of the Trust: the one property, known colloquially as Monte Carlo would be sold to the RW and RB Property CC "in full settlement

¹² *Schlinkmann v Van der Walt* 1947 (2) SA 900 (E) at 919; *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (A)

of the loans". The other property, colloquially known as Las Vegas, would be "awarded" to R[...] (14,29%), JO- A[...] J[...] F[...] (28,57%); L[...] A[...] F[...] (28,57%) and L[...] F[...] F[...] (28,57%). The latter three are R[...]’s sons and they are neither heirs nor Trust beneficiaries.

35] But what the "set off"¹³ to the RW and RB Property CC¹⁴ completely fails to set out is either the value of those loans or the value of the immovable properties. There is thus no explanation of the monies owed by the Trust and the value of the properties used to set off the debt. Thus the rationale behind this decision is completely lacking. The transfer also appears to benefit the RW and RB Property CC, which is also not a beneficiary of the Trust. There is thus no rationale behind the transfer other than what appears to be an undue benefit to persons and parties not entitled to that benefit. Thus it appears that the only parties who ultimately benefit from this are R[...] and T[...] and R[...]’s sons.

36] The December Resolution furthermore changes the payment of administration costs of the Trust that was agreed upon in the August Agreement. This solely benefits R[...].

37] Insofar as the applicants seek final interdictory relief, they are required to prove the following:

- a) that they have a clear right;
- b) that there is an injury committed or reasonably apprehended;
and
- c) that they have no other satisfactory available remedy.¹⁵

38] The clear right in my view rests on the August Agreement, which is valid. The harm lies in the fact that the implementation of the December Resolution will see two immovable properties transferred to parties who

¹³ I use the term loosely

¹⁴ Of which R[...] and T[...] are the directors

¹⁵ Setlogelo v Setlogelo 1914 AD 441; Plason-Evans (supra) at

are neither heirs nor Trust beneficiaries, and this to the detriment of the existing heirs and Trust beneficiaries and in contravention of the August Agreement. As the trustees have been released from the obligation to provide security, the beneficiaries are put at risk. There is also no suitable alternative remedy available to the applicants: they have attempted to submit the dispute to mediation, but to no avail; they have also sought the intervention of the Master of the High Court but without success. They have therefore no suitable alternative remedy available to them other than these proceedings.

39] "A trustee may be removed even if his conduct complained of was *bona fide*. *Mala tides* or even misconduct are not necessary requirements for his removal. Whenever trust assets are endangered a trustee should be removed. Some circumstances which justify the removal of a trustee by a Court in terms of s 20(1) of the Trust Property Control Act 57 of 1988 are the following:

1. Where the trustee, without furnishing any explanation for his conduct, removes trust funds from an apparently safe investment with a financial institution and transfers them to his personal account. The Courts have often laid down that any person in a position of trust has no business to mix his own funds with trust funds. It is a very improper procedure for such a person to pay trust funds into his private account.
2. Where the trust deed requires that, if a decision is to be taken, especially the sale of immovable property, notice must be given to all the trustees so that they may decide thereon, and the trustee deliberately refrains from informing one of his co- trustees of the intended decision. Such conduct may very well amount to *ma/a tides*.
3. Where the trustee does not ascertain from the trust deed what the rights and obligations of the office of trustee entails.
4. Where the trustee treats the trust and its assets as his own, for example by selling the trust assets without the proper approval of the other trustees as required by the trust deed.
5. Where the trustee expresses no independent views about matters affecting the trust, but relies entirely upon a dominant co-trustee and

approves of his (wrongful)
conduct.

6. Where the trustee, without objection, allows grave misconduct on the part of a co- trustee in the administration of trust property, and thus exercises no control at all over the trust property."¹⁶

40] Section 20 provides that a court may remove a trustee if it is in the interest of the beneficiaries to do so. In my view, R[...] and T[...] have conducted themselves in a less than stellar manner and certainly not in a manner befitting that of a trustee. That much is clear from their conduct which is highly prejudicial to the beneficiaries of the Trust. Furthermore, it is also clear that their conduct has evidenced a propensity for putting their own personal interests above those of the beneficiaries. This goes against the entire ethos and purpose of the Trust Property Control Act and the Trust in general. Given that they are incapable of acting in their interests, in my view they should be removed.

41] A further quiver to this bow is the undisputed fact that the applicants were not given the financial statements of the Trust until such time as they were formally demanded. Both R[...] and T[...] excused this conduct because they say that the dispute that arose prevented the financial statements from being finalized. Even were one to assume that this excuse passes muster, they fail to explain why the financial statements for 2021 could not have been finalized - after all, the dispute arose after the cut-off date for those. And the fact that the financial statements had to be formally demanded also does not avail their cause.

42] It is clear that R[...] and T[...] pay scant regard to the terms of the Will and have scant regard for the fact that the beneficiaries have already accepted the benefits bestowed on them¹⁷. They also have scant regard for the

¹⁶ Tjimstra No V Blunt-Mackenzie No and Others 2002 (1) SA 459 (T); Gowar and Another v Gowar and Others 2016 (5) SA 225 (SCA)

¹⁷ Gowar and Another v Gowar and Others 2016 (5) SA 225 (SCA) para 43

agreement reached, in writing, between all the relevant parties on 18 August 2021¹⁸. Their conduct is to be frowned on.

43] I am therefore of the view that, all of the above considered, their removal is well founded and necessary.

44] Mr. Miltz¹⁹ has asked for an amendment of the costs order sought in the Notice of Motion he asks that R[...] and T[...] be ordered to pay the costs *de bonii propriis*. I am of the view that, given my findings this is the appropriate order - the Trustees were not acting in the interests of the heirs and Trust beneficiaries - they were acting in their own self-interests. There is therefore no reason that the Trust should have to stand in for these costs²⁰. Given the complexity of the matter and the issues raised costs on scale C are warranted.

THE ORDER

45] Therefore the order is:

1. It is declared that the first and second respondents have repudiated the terms of the agreement entered into amongst the parties on 18 August 2015.
2. The resolution of the first and second respondents taken on 15 December 2023 ("the December Resolution") is set aside.
3. The first and second respondents are interdicted and restrained from implementing the December Resolution.
4. The first and second respondents are ordered to provide the applicants' attorneys with all books, records and documents relating to

¹⁸ Bearing in mind that once a beneficiary accepts a benefit under the trust he acquires rights and the trust deed cannot be varied without his consent: *Potgieter and Another v Potgieter NO and Others* 2012 (1) SA 637 (SCA) para 28

¹⁹ For Applicants. Thank you guys they keep you can keep up with the pink and blue

²⁰ *Stander and Others v Schwulst and Others* 2008 (1) SA 81 (C) para 36-37

the affairs, operations, business and management of the Trust to date.

5. The first and second respondents are removed as trustees of the Trust and the fourth respondent is ordered to cancel the letters of authority dated 20 October 2014 authorising the first and second respondents to act.

6. The fourth respondent is directed to provide the applicants and the proposed independent trustee with letters of authority authorising them to act as trustees of the Trust.

7. The third and fourth respondents are ordered to pay the costs de bonis propriis to be taxed in accordance with Scale C.

NEUKIRCHER J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 21 October 2024

Instructed by:

For the first, second and

third Applicants : Adv I Miltz SC, with him Adv D Whittington

Instructed by: Du Preez & Associates

For the first and third

Respondents: Adv M Phalane

Instructed by: Cliffe Dekker Hofmeyr Inc

For the second, fourth and fifth

Respondent: Adv TC Maphelela Advocate

Instructed by: TN Nkuna (Trust)

Matter heard on 8 May 2024

Judgment date 21 October 2024