REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **38761/2016**

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED ✓

Date: 7/11/17 **WHG VAN DER LINDE**

In the matter between:

De Beer, Chenée — **Applicant**

and

Master of the South Gauteng High Court — **First Respondent**
De Beer, Riaan Eben — **Second Respondent**

SUMMARY

Trust – trustee - removal of – family trust - application by ex-wife for removal of ex-husband as co-trustee in family trust established pursuant to divorce settlement agreement on the ground that ex-husband contends for loan against trust for purchase price of residential property he was obliged to procure for the trust – applicant submitting loan not justified by terms of settlement or in fact.

Second respondent (ex-husband) submitting obligation to procure residential property not legally enforceable as trust did not accept stipulatio alteri upon establishment – second respondent also submitting oral agreement of loan established with applicant.

Held: assuming stipulatio alteri, terms of trust deed consistent only with acceptance by trust of benefits in terms of settlement agreement – in any event, existence of loan agreement rejected in law and on facts.

Held further: considering various factors enumerated and discussed, in the interests of beneficiaries that second respondent be removed as trustee.

Application granted.

JUDGMENT

Van der Linde, J:

Introduction

[1] In this application, brought by a 37 year old ex-wife against her 49 year old ex-husband, the applicant asks that he be removed as trustee, in terms of s.20(1) of the Trust Property Control Act 57 of 1988,[1] of an inter vivos family trust established in terms of their divorce settlement five years ago for the benefit of the applicant herself and the three minor children. The two parents were appointed as the two trustees and so the applicant is both a beneficiary and a trustee.

[2] The reason she wants him removed, is that he insists, even in the present application, that the trust owes him R3,45m on loan account when, according to her, there is no truth in the allegation that such a loan, or any loan, was made by the trust to the respondent (I refer to the second respondent simply as *"the respondent"*). His account is that his previous attorney, now deceased, told him that he was entitled to raise a loan account against the

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[1] S.20(1) provides as follows:
"20 Removal of trustee
(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."

trust in return for the family home that he had to provide for the trust – for the applicant and the children to live in - in terms of the divorce settlement.

[3] I deal in turn with the applicant's case and arguments and then with those of the respondent.

The applicant's case

[4] The contentious clause in the settlement agreement is this:

"Die Eiser (the respondent) sal binne 1 jaar na datum van toestaan van die finale egskeidingsbevel 'n onroerende eiendom ter waarde van 'n maksimum koopprys (insluitende hereregte en transportkostes) belopende R3 500 000.00 aankoop en oordra aan voormelde trust, en welke kooprys na een jaar sal eskaleer gelykstaande aan die jaarlikse verbruikersprysindeks, tot datum van aankoop."

[5] This clause appears in clause 3 which is headed *"Akkommodasie."* The two earlier clauses are respectively headed *"Minderjarige kinders"* (clause 1) and *"Onderhoud vir die verweerderes"* (clause 2). The later clauses are *"Meubelment"* (clause 4), *"Geen verdere eise"* (clause 5), and *"Kostes"* (clause 6).

[6] Clause 1 splits the parental rights and obligations between the applicant and the respondent. The two younger children share living arrangements equally between the parents. The respondent is obliged to pay maintenance in respect of the children.

[7] Clause 2 obliges the respondent to pay rehabilitative maintenance of R20 000 per month to the applicant, for two years. He undertakes also to transfer (*"oordra"*) a Toyota Prado to the applicant, on the basis that it will then become her sole property.

[8] Clause 3 starts with obliging the parties to establish a trust in which both parties would be trustees, and of which the applicant and the three minor children would be the beneficiaries. Clause 3.2 quoted above provides for the fixed property that would be transferred to the trust; and then clause 3.3 says that both parties would *" ... gesamentlik sodanige eiendom identifiseer."*

[9] Clause 3.4 provides that the applicant would acquire a *"... ius habitatio ... vir die lewensduur van die verweerderes"*. Clause 3.5 provides that pending the acquisition of the property (*"hangende die aankoop van die eiendom voormeld"*), but for no longer than 18 months, the respondent would pay to the applicant R20 000 per month *"... ten einde Verweerderes instaat te stel om akkommodasie te huur."*

[10] Clause 3.6 obliges the respondent to pay all rates and taxes (*"huiseienaars heffings"*) in respect of the property, and the applicant undertakes to pay the local authority charges, including water and lights (*"munisipale heffings, water- en ligterekenings"*). Finally, in terms of clause 3.7 the parties agreed that their DSTV antenna would be given to the applicant and the respondent would pay for its installation at the property to be acquired.

[11] Clause 4 provides for a split of the furniture, and the respondent undertakes to pay for the transport costs in respect of the furniture allocated to the applicant, even if it meant that she would have to move twice. This referred presumably to her having to move once out of the previous common home into a rental property; and then again from the rental property into the trust home.

[12] Clause 6 provides that the respondent would pay the applicant's legal costs; and clause 5 provides that the parties would have no further claims against each other; that each party would otherwise retain the assets in their possession as their sole property; and that no amendment to the settlement agreement would be of any force unless reduced to writing and signed by the parties.

[13] The trust was established by deed dated 11 October 2012. The respondent is the settlor, donating the usual nominal R100 to the trust; the applicant and the respondent are the two trustees; and the applicant and the three children the beneficiaries in equal shares. These four individuals are both income and capital beneficiaries, and their position as such is entrenched.[2]

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[2] P53, clause 16.

[14]There are required to be at least two trustees at all times. They must meet to discuss and arrive at decisions concerning trust matters, provided that a written resolution signed by all the trustees would have the same effect as a resolution passed at a meeting.[3] Trustee decisions are taken by majority vote, provided that the respondent will be part of that majority.[4] It follows that all decisions of the trust must carry the respondent's approval except when, as now, there are only two trustees and they deadlock.

[15]There is provision for reference to a senior attorney for final resolution in the event of a trustee deadlock.[5] The trust deed expressly identifies the applicant's life usufruct accorded her over the trust property in terms of the settlement agreement and the concomitant court order, and specifically empowers the trustees to avail the use of the property to her in terms of that court order.[6]

[16]Termination of the trust and consequent vesting of the trust property in the beneficiaries occur when the trustees acting unanimously so decide, or if the applicant were to abandon her life usufruct over the trust property. Upon termination, the trust fund (which includes the trust property) is divided in four equal shares among the applicant and the three children as capital beneficiaries.[7]

[17]In terms of a written agreement dated 24 October 2012 the trust purchased a house for R3 449 051 and it was registered in the name of the trust. The respondent paid for it. The applicant says this was in discharge of his divorce settlement obligation.

[18]Thus far the relevant instruments. The applicant says the first time she heard of the contention that the parties had agreed a loan – which would have had to have been between her as trustee and the respondent – was when the respondent presented to her the draft annual financials for the February 2014 year. Those reflected a loan for the

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[3] P56, clause 23.1, 23.2.
[4] P48, clause 8.2.
[5] P48, clause 8.3.
[6] See p45, clause 1.2(b) of the definition of *"Vestigingsdatum"*; and see p51, clause 11.2.19.
[7] P52, clause 13.1.2.

purchase price that was *"interest-free, unsecured and has no fixed terms of repayment, although by intent of a long term nature."*

[19]She says there never was a loan, and her attorneys so wrote to the respondent's attorneys. Despite some seven letters in all to them during the period 17 March 2015 to 19 July 2016, they never responded meaningfully, or provided an explanation for why the respondent was contending for the loan owed by the trust to him.

[20]Her case is that the respondent has sought to denude the trust; has breached his fiduciary duties; has sought self-enrichment at the trust's expense; regards himself as being in sole control of the trust; has placed himself in a position of conflict with the trust; and should thus be removed.

[21]Her counsel submitted that the respondent's obligation to purchase the property was no loan, and no donation, but simply the discharge of an obligation derived from the settlement agreement. It was submitted that no evidence was put up to support the assertion of a loan. Relying on Honore's South African Law of Trusts[8] and Sackville West v Nourse and Another[9] counsel contended that the main guide in deciding whether or not to remove the respondent as a trustee was the well-fare of the beneficiaries.

[22]He submitted that the respondent's attitude, as evidenced in the answering affidavit,[10] reflected his mala fides; he stressed what he called the respondent's stubborn and recalcitrant attitude, submitting that this attitude results in a deadlock between the trustees.

The respondent's case

[23] The respondent says that the applicant's application is a repudiation of the settlement agreement, entitling him to elect to terminate it. Clause 3.2 of the settlement agreement

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[8] 5th ed, para 223; 233.
[9] 1925 AD 516.
[10] Particularly at p115/21.4; p115/21.5; and p119/27.4.

was a stipulatio alteri, and the trust was required to have accepted it before it could be binding on the respondent. Although not said expressly, the implication is that the trust did not accept the stipulation, because he says the house was purchased by the trust and not by him.

[24]The respondent says the R3 500 000 stipulated in clause 3.2 of the settlement agreement was the maximum amount he was prepared to disburse *"in order to secure accommodation for the benefit of the applicant and the minor children"*. In the same paragraph he goes on to say that *"but by agreement between the applicant and me ... the house was purchased by the trust and the purchase price, transfer duties and transfer costs were advanced by me"*.

[25]He denies there was ever an agreement of donation in respect of the house, making this a common cause issue. But he says: *"At the time of negotiation of the settlement agreement I was advised by my attorney (who is since deceased) that the amount disbursed by me in terms of clause 3.2 would constitute a loan by me to the trust, and in disbursing the aggregate amount of R3 449 051 I intended to lend and advance that amount to the trust, and not to donate it."*

[26]He says it was *"always my intention and understanding that the amount disbursed by me in respect of the acquisition of the property would constitute a loan by me to the trust, repayable on the sale of the property or on the applicant's death, whichever might occur first, having regard to the right of habitatio in favour of the applicant, as contemplated in clause 3.4 of the settlement agreement."*

[27]The respondent nonetheless denies that the applicant has legally acquired a life usufruct over the property.[11] He explains too that he terminated the employment of the first accountants and auditors of the trust, being Uys & Zaayman Auditors, and appointed others

[11] Answering affidavit, p111, paras 11.2, 11.3.

instead. He says the applicant was aware that he had done so, did not object, and *"thus informally agreed."*[12]

[28]He argues that he could not have acquired any binding obligation to procure the house for the trust under clause 3.2 of the settlement agreement, because the trust was then not in existence. He denies that he is in a position of conflict; and he says:

"It is ludicrous, and devoid of factual or legal merit, to contend that a trustee who lends and advances money to a trust to enable the trust to acquire assets, thereby breaches his fiduciary duty of care towards the trust or establishes a claim adverse to the trust. Absent the loan, the trust would have had no funds with which to purchase the property, and would have remained an empty shell."

[29]At one stage he says that his removal as trustee is not necessary for the dispute as to whether there was a loan to be resolved, because clause 8.3 of the trust could be invoked – although he says he would not *"necessarily"* vote against such a resolution. However, he concludes his affidavit, in relation to the issue whether or not the purchase price was a loan: *"... such dispute could only be determined in separate legal proceedings."*

[30] Counsel for the respondent's main submission was that on these papers it cannot be found that the respondent is mala fide. He submitted that there is a bona fide dispute between the parties which does not endanger the trust property. The respondent has illustrated his willingness to have it resolved through the appropriate channel, which – as proposed by the respondent's attorney in the correspondence - is clause 8.3 of the trust deed. That being so, a case for the removal of the respondent as trustee cannot succeed.

[31]In support of the proposition that it cannot be found that the respondent is not bona fide, counsel referred amongst others to the following. First, on the respondent's version he will only receive repayment of the interest free loan on the sale of the trust property or the

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[12] Answering affidavit, p112, para 15.2. The applicant denies that she was aware of this, or had agreed informally to it; replying affidavit pp143, 144; paras 30.2, 30.3. There is thus a factual dispute on this issue which, on Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) must be resolved in the respondent's favour unless it can be rejected out of hand. Assuming in the respondent's favour that it cannot, it still seems uncontested that the respondent "had done so" unilaterally, and then inferred from the applicant's subsequent non-objection that she had "informally" agreed to it.

death of the applicant, whichever occurred first. Since the property is likely to have increased in value in the meantime, the loan would have been to the benefit of the trust.

[32]Second, in terms of s.7C of the Income Tax act 58 of 1962 the respondent is deemed to have donated the interest that would ordinarily have been paid by the trust on the loan, to the trust, and he is thus exposed to donations tax on that interest.[13] Third, the respondent, contrary to the applicant's submission, does in fact assert a loan in his answering affidavit. Fourth, the annual financial statements containing the loan assertion were only drafts, and thus open for discussion.

[33]In the alternative, counsel submitted that in any event, on a proper construction of the settlement agreement, a loan by the respondent to the trust was envisaged in the divorce settlement agreement. Counsel submitted first that since interpretation of written instruments was now a unitary endeavour, it was important to consider the subsequent conduct of the parties. He referred here to the fact that the respondent did not actually purchase the house and then transfer it to the trust, but that the trust purchased the house direct, and the respondent advanced the money.

[34]Next, counsel submitted that the settlement agreement already provided for maintenance in clause 2.1, and so clause 3.2 is not to be regarded as part of discharge of the respondent's maintenance obligations: that would go further than would have been required by law. Third, counsel submitted that in terms of the trust deed, on the vesting date the remainder of the trust corpus is divided amongst the capital beneficiaries. That conveys that the parties to the trust deed must have intended that beyond the loan capital, net asset value would be available for distribution.

[35]Fourth, if the property was a donation, the trust deed would not have referred only to the R100 donated by the respondent as settlor. Fifth, clause 3.2 of the settlement agreement was a stipulatio alteri which was never accepted. Sixth, the parties decided to vary clause 3.2

[13] See s.7C(3) of the Income Tax Act.

by means of their conduct in agreeing to a direct purchase by the trust. The resultant event could be constructed either as a loan or as a donation. However, since not even the applicant relies on a donation, the more plausible construction is a loan.

Discussion

[36]Two central issues arise for determination in this application. The first is the proper interpretation of the settlement agreement and the proper construct of its subsequent implementation, and the second is whether a case for the removal of the respondent as trustee of this family trust has been made out. If the respondent's counsel's alternative argument, that pertaining to the interpretation of the settlement agreement and its implementation is correct, namely that a loan was in fact concluded, then self-evidently no question of the removal of the respondent as trustee arises. It is appropriate then to commence with the interpretation endeavour.

Interpretation of the written settlement agreement

[37]The method of interpretation is well-known. Written instruments are interpreted in a unitary walk-through of text, context and purpose.[14] Relevant side-rules include that where parties intended the written contract to be the sole memorial of their consensus, no extraneous or parol evidence is permitted to assist in the interpretation function.

[38]Starting then with the settlement agreement: the parties said that it was intended to settle all claims between them. Amendments were not permitted otherwise than in writing and

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[14] Compare Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at [18]; Amcu and Others v Chamber of Mines of South Africa and Others 2017 (3) SA 242 (CC) at footnote 28 per Cameron, J: *"All interpretations of law are themselves in a sense 'factual': certain textual and other sources (for example, statutes, common and customary law) are excavated and marked out as factually 'law', in contradiction to non-law. But this process itself involves a contextual analysis of those sources. See in this regard Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) ([2012] 2 All SA 262; [2012] ZASCA 13) para 18. Indeed, interpretation and application are simultaneous and intricated. The most imaginative exponent of this insight is Ronald Dworkin. See Dworkin Law's Empire (Harvard University Press 1986) at vii: 'Legal reasoning is an exercise in constructive interpretation' in which we advance 'the best justification of our legal practices as a whole'."*

under their signature. And in this case, although there was one formal amendment duly executed,[15] no enforceable amendments to the settlement agreement are contended for. The settlement agreement is then complete and encompassing in its terms, and one turns next to consider it, and particularly whether clause 3.2 was intended to be a loan, in the context of its express terms.

[39]The various clauses of the settlement agreement have been referred to above. Clause 3.1, requiring that a trust be established, identifies as the future beneficiaries the applicant and the children. Already this signifies that the trust was intended to benefit them, and not the respondent. Clause 3.2 mentions no loan, and simply obliges the respondent to transfer a fixed property to the trust. It is clear that this was for the beneficiaries to live in it, including especially the applicant, as is evidenced by the life usufruct to be conferred in terms of clause 3.4 on the applicant; and as is borne out by the applicant's equal say in the selection of the home in terms of clause 3.3. Indeed, the respondent himself expressly says that he was prepared to secure accommodation for the applicant and the children.[16]

[40]No-one suggests that this life usufruct was a donation; since it could not have been a loan, it could only have been intended as the discharge by the respondent of an obligation seriously undertaken in terms of the settlement agreement. The origin of such an obligation is likely the respondent's maintenance obligation, already introduced in clauses 1 and 2 of the settlement agreement. And tellingly, this clause 3.4 recorded an obligation towards the applicant that had to be discharged with reference to the specific fixed property that the respondent undertook to transfer to the trust in terms of clause 3.2.

[41]Clause 3.5 also underscores that in terms of the settlement agreement the respondent was, amongst other things, discharging maintenance obligations. That payment of R20 000 for 18 months – not to be confused with the rehabilitative maintenance of R20 000 per month for 24 months - was expressed to be pending the purchase of the property. That too casts its

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[15] P41.

[16] Answering affidavit, p107, para 10.4.

shadow back into clause 3.2, and underscores that it was no less part of the respondent discharging a maintenance obligation.

[42]It is necessary to deal with the respondent' submission that clause 3.2 is a stipulation in favour of a third party yet to come into existence and, when in fact it did come into existence, did not accept the stipulation. Leaving aside nice questions such as whether such a stipulation for the benefit of a non-existent principal is valid, and assuming in favour of the respondent that the legal construction for which he contends is correct, it seems plain to me that in any event the trust deed was entered into on the if not express then at least tacit acceptance of the benefits of the clause 3.2 obligation charged to the respondent.

[43]This is evident especially from clause 11.2.19 to which I have referred above. In terms of that clause, the trustees were expressly empowered to avail the use and enjoyment of the property to the applicant in terms of the court order embodying the settlement agreement. The settlor (the respondent) and the trustees (the applicant and the respondent) could not have reached this agreement if they did not thereby intend that the trust, established on 11 October 2012 before the subsequent purchase of the property on 24 October 2012, was thereby accepting that the property would be transferred to it.

[44]The real value for the respondent of being able to contend that the trust did not accept the stipulation, is then to submit that clause 3.2 falls to the ground, leaving it open to contend that the subsequent direct purchase created the scope for the existence of a loan agreement between the trust and the respondent.

[45]I have concluded however that the settlement agreement generally and clause 3.2 in particular leave no legal scope for the existence of a loan agreement; and further, that even if clause 3.2 was a stipulation for the benefit of a third person, it was accepted by that third person. A subsequent loan agreement would in any event have required a written, signed amendment to the settlement agreement, and this did not occur.

[46]But there is in any event, on the facts, also no scope for a loan agreement. The high-water mark of the respondent's version that a loan was created, are the two paragraphs[17] in which he says it was his (unilateral) intention that the moneys that he advanced for the purchase of the property would be a loan.[18] Self-evidently, that is no evidence of a consensual juridical act involving both the applicant and the respondent.

[47]That brings me to the question concerning the parties' change in method of implementation of clause 3.2. In my view, what the parties did when they agreed to the direct purchase by the trust of the property, and not the circuitous route of the respondent first purchasing the property and then transferring it to the trust, was to save the respondent one set of transfer duty and fees. And there is nothing objectionable in law for parties to agree that discharge of obligations would occur in a manner different from that agreed upon, without thereby amending the original instrument creating the obligation.[19]

[48]To sum up then[20] on this part of the application: the respondent was obliged to procure for the trust a fixed property in which the applicant and the children would live. He was obliged

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[17] P107, para 10.5; p108, para 10.7.

[18] In oral argument the respondent relied on p107, para 10.4. But that is not what that lone sentence says; it was addressing the parties' short-cut method of performing the property purchase obligation: *"I did not purchase a house and transfer it to the trust, as contemplated by clause 3.2, but by agreement between the applicant and me, acting in our personal capacities as trustees, the house was purchased directly by the trust and the purchase price, transfer duties and transfer costs were advanced by me."*

[19] Compare Van der Walt v Minaar 1954 (3) SA 932 (O), referred to in Telcordia Technologies Inc v Telkom SA Ltd 2007 (3) SA 266 (SCA) (2007 (5) BCLR 503; [2007] 2 All SA 243) by Harms, JA in the context of upholding an arbitrator's award:

"[13] To this the arbitrator added:

'My own provisional view, expressed with all due diffidence, would be that the position may be very different in a case where the evidence shows that A and B have orally agreed on a mode of performance by B of his contractual obligation to A different from that originally specified in the contract, where that different mode of performance was agreed upon for the mutual benefit of both parties, and where B has, to the knowledge and with the acquiescence of A, done the work and/or laid out the necessary resources in pursuance of that different mode of performance. In such a case it would be, to say the least, most surprising if the law was that A, when presented with the results of B's substituted performance, could simply refuse to accept it on the ground that the agreement to such substituted performance was not concluded in writing or otherwise memorialised in accordance with the requirements of a No Oral Variation Clause. I was shown a number of authorities which strongly suggest that such is, indeed, not the law.'

He relied in this regard on the judgment in Van der Walt v Minnaar which, it would appear to me, provides some support for his view. The effect of Van der Walt v Minnaar is, quite sensibly, that the acceptance of substituted performance does not amount to a variation of the contract."

[20] I believe I have in the process dealt with the essence of the respondent's submissions, if not expressly then at least by implication.

to do so at his cost, and was not entitled to arrange that a loan account be established in the books of the trust in his favour for an amount equal to the cost of the acquisition.

Should the respondent be removed as trustee?

[49]Both parties referred to the judgment of the Supreme Court of Appeal in Gowar v Gowar[21] in which Petse, JA discussed the law on this point. The learned judge of appeal begins[22] by stating that it is part of the common law inherent power of a court to remove a trustee, and recording that the power is now also captured in s.20 (1) of the Act, quoted above.

[50]After discussing the authorities, the learned judge of appeal stresses, I suggest, four points: first, that the power must be exercised with circumspection; second, that neither mala fides nor even misconduct is required to be shown;[23] third, that the overriding question is always whether or not the conduct of the trustee imperils the trust property or its proper administration;[24] and four, the decisive consideration is the welfare of the beneficiaries.[25]

[51]In assessing the conduct of the respondent in this matter, it seems to me that the following features require consideration: first, the particular trust deed and the respondent' position in it, in the context of the divorce settlement; second, the respondent's conduct in relation to the accounts of the trust and the manner in which the alleged loan was created; third, the respondent's conduct in the present proceedings, including his language in the affidavits; and fourth, whether the best interests of the beneficiaries of the trust are potentially endangered by the respondent's disposition.

The trust deed and the respondent's position in it

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[21] 2016 (5) SA 225 (SCA).
[22] At [27] ff.
[23] At [30].
[24] At [31].
[25] At }32].

[52] It is as well that one begins by reminding oneself of the legal nature of an inter vivos trust in our law. The discussion in Gowar[26] and the cases there mentioned remind us that a trust is not a juristic person,[27] although some statutes may have defined it as such.[28] For purposes of our common law it is best described as *"... merely an accumulation of assets and liabilities which, in aggregate, constitute the 'trust estate' which is a separate entity, though it is not a persona."*[29]

[53]Although it is established by contract, it certainly is not a contract in the accepted sense of the notion, if only because a court has the power, as we have seen, to remove trustees; but also to change the terms of the "contract."[30] Importantly, it also imposes statutory obligations on trustees.[31]

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[26] At [20] ff. We are also reminded by the earlier Appeal Court cases that its origin in our law is neither Roman nor Roman-Dutch, but likely English, although certainly English Trust Law was not received holus bolus into our law. A local variety has been developing, and is still developing. For instance, we know that generally the trustees must all join as actors in litigation, although the jury is still out on whether all the trustees need necessarily be joined as defendants: Pistorius, NO and Others v The Competition Commission of South Africa, 148/CAC/Nov16, at [20] ff.

[27] Commissioner for Inland Revenue v MacNeillie's Estate, 1961 (3) SA 833 (A); Commissioner for Inland Revenue v Jacobson's Estate, 1961 (3) SA 841 (A); Commissioner for Inland Revenue v Friedman, 1993 (1) SA 353 (A); Kohlberg v Burnett NO 1986 (3) SA 12 (A). See too generally, Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk 2004 (3) SA 486 (SCA); Land and Agricultural Bank of South Africa v Parker and Others 2005 (2) SA 77 (SCA).

[28] For example *"juristic person"* in s.1 of The Consumer Protection Act, 68 of 2008; *"person"* in s.1 of the Income Tax Act 58 of 1962.

[29] LAWSA, First Reissue, vol 31, para 531.

[30] S.13 of the Act:

"13 Power of court to vary trust provisions

If a trust instrument contains any provision which brings about consequences which in the opinion of the court the founder of a trust did not contemplate or foresee and which-

(a) hampers the achievement of the objects of the founder; or

(b) prejudices the interests of beneficiaries; or

(c) is in conflict with the public interest,

the court may, on application of the trustee or any person who in the opinion of the court has a sufficient interest in the trust property, delete or vary any such provision or make in respect thereof any order which such court deems just, including an order whereby particular trust property is substituted for particular other property, or an order terminating the trust."

[31] *"9 Care, diligence and skill required of trustee*

(1) A trustee shall in the performance of his duties and the exercise of his powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another.

(2) Any provision contained in a trust instrument shall be void in so far as it would have the effect of exempting a trustee from or indemnifying him against liability for breach of trust where he fails to show the degree of care, diligence and skill as required in subsection (1)."

[54]The first concerning aspect of the trust in its present form in this application is the position of the respondent in it. I have pointed out that he is both settlor and one of two trustees: but a trustee with special powers, because his approval is required for every resolution of trustees. While there are only two trustees, if unanimity lacks they have to refer to a senior attorney under clause 8.3. If the trustee number increases to three or more, the respondent must be part of the majority otherwise the decision does not carry.

[55]This type of arrangement elicited the following description by Appeal Court Judge van den Heever, more than sixty years before (emphasis supplied):[32]

"The settlor is still alive. If the provisions in the deed to which I have referred are valid according to their tenour, the settlor holds the key to the management of the corpus. If a co-trustee proves obdurate or obstinate, he can promptly discharge him and appoint another who promises to be more tractable. Shorn of verbiage the trust deed amounts to no more than this: it is a contract between the settlor on the one side and himself and his by no means independent nominee on the other, pursuant to which he takes his money from one pocket, places it in the other and proceeds to dictate laws unto himself as to what the fate of that money shall be."

[56]That case concerned the revocation and amendment of a settlement on a trust. Here that issue does not arise because, after all, the applicant was one of two trustees that accepted the settlor's initial donation. There is therefore sufficient separation between settlor and the settlement (R100) to constitute a trust. But the relevance for present purposes of this entrenched strong position of the respondent in the trust is, as I see it – and I return to this below - that the respondent has a concomitantly increased responsibility to act fairly and even-handedly in the interests of the beneficiaries.

[57]Here the context of this trust must be borne in mind. It is a small, intimate, family trust, not a public trust. There are only two adults charged with its administration, two adults who were in an intimate personal relationship, the parents of the minor beneficiaries; and they have fallen out. Yet the ability of the trustees to get along is paramount.

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[32] Crookes NO and Another v Watson and Others 1956 (1) SA 277 (A) at 297E – F.

[58]Add to this the fact that the respondent's unique position in the trust is not matched by the terms of the settlement agreement. The position of the applicant and the respondent relative to the children is treated on par in that instrument. Parental rights are shared equally, and so too visitation rights. The trust would be established by both, not only one. Self-evidently, as the settlement agreement goes on to provide, the respondent is obliged as part of his maintenance obligations to procure a home for the applicant and the children; presumably he retains the erstwhile family home.

[59]But there does not appear to be any foundation for the respondent's strong position in the trust, given that the trust will, or at least need only, exist simply for purposes of owning the house in which the beneficiaries will live. Since the house will have been paid, all that would engage the trustees is its maintenance.

[60]For that the applicant does not need the respondent's input as co-trustee. If he is to fund any part of the maintenance as part of his maintenance obligation, he will simply pay for it in his personal capacity; not as trustee. He is not required, in the interests of the beneficiaries, personally to supervise any part of it.

[61]The point is, the respondent's presence as trustee is not a sine qua non for the trust's efficient and successful existence. He is not making an essential contribution to the welfare of the beneficiaries, and so his presence as trustee is not essential. Nor does his answering affidavit offer that his presence as trustee is essential for the benefit of the trust beneficiaries.

[62]To sum up on this aspect: the respondent is in a uniquely strong constitutional position in the trust deed. It is a position not expressly founded in the settlement agreement, nor in the specific interests of the beneficiaries. This position raises the bar for the respondent's conduct and the need for him to act even-handedly and fairly.

The creation of the so-called loan

[63]I have found that the loan never existed. But the way in which the respondent went about in attempting to create it, calls for comment. The respondent did not disclose in his evidence precisely when the so-called loan was first created in the accounts. On the evidence this must have been around February 2015, when the applicant was presented with the draft accounts. One does know from the evidence that the respondent, acting on his own, terminated the trust auditors and, again acting on his own, appointed new auditors.[33] One knows too that, acting on his own yet again, the respondent instructed them on the drawing of the accounts, and so he must have instructed them on the so-called loan as well.

[64]The size of this so-called loan relative to the trust assets has been referred to. The difficulty is this: if the respondent is prepared to go to these lengths in unilaterally creating an unlawful liability for the trust, what does the future hold? Since the liability does not serve the beneficiaries but only the respondent personally – not even as trustee – this conduct predicts poorly for future situations of conflict of interest between the respondent and the interests of the beneficiaries.

[65]The respondent has not addressed this concern in this application. He has not put up in his papers any evidence that this was a unique event, and not his pattern in business or commercial life. He has not explained to the court what his prudential record is otherwise, and one has no material to which one may point to ameliorate or justify his otherwise objectionable conduct.

The conduct in the litigation

[66]The respondent's conduct in the litigation is concerning. I have pointed to his vexatious and offensive language, devoid of humility.[34] He even argues in his answering affidavit that the applicant in fact does not have a life usufruct:[35] but he knew full well that in fact the trustees

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[33] Answering affidavit, p111, para 15.2.
[34] Answering affidavit, para 27.3.
[35] Answering affidavit, p109, para 11.2; 11.3.

were expressly empowered in the trust deed to avail to the applicant the life usufruct referred to in the settlement agreement.[36]

[67]There is the issue of his instructing his legal representatives to submit that this court is not the appropriate forum for resolving whether his contention of a so-called loan is sound, but that the matter should instead be referred to a senior attorney in terms of clause 8.3 of the trust deed. This contention is unmeritorious, for two reasons. First, the obligation to procure the property founds in the earlier settlement agreement, not the subsequent trust deed. It does not concern the administration of the trust but its very constitution.

[68]Second, and in any event, the non-variation clause in the settlement agreement precludes any resolution – even if determined by a senior attorney – that would purport to amend the settlement agreement by creating a loan from having any legal efficacy.

[69]More importantly for present purposes, this strategy of creating a loan to the trust must be viewed against the milieu that in truth, to the respondent's knowledge, there was never such loan.[37]

[70]Finally, although this is not a major issue, there is the condescending response that he instructed in the first paragraph of his attorney's letter of 5 June 2015[38] to a genuine attempt on the part of the applicant's attorneys to resolve the issue, mimicking the language of the letter being responded to.[39] It speaks, I suggest, of an attitude dismissive of an attempt to deal openly and fairly with legitimate concerns.

[71]The respondent is of course entitled to conduct his litigation in the high court in a manner that he sees fit. But the way he has done it here has not even purported to suggest to the court that there is every reason to accept that at all times he had only the best interests of the beneficiaries at heart in creating the loan; on the contrary.

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[36] Trust deed, p51, clause 11.1.19; definition of *"Vestigingsdatum"* p45, clause 1.2(a).
[37] The story about the advice of a deceased attorney whose name is not disclosed can be rejected on the papers for lack of detail; see answering affidavit p 107, para 105.
[38] P84.
[39] See applicant's attorney's letter dated 24 April 2015, p82, at para 7, p83.

The best interests of the beneficiaries

[72]Regrettably one does not have the full history of the break-up between the parties. It is not impossible that there remains remorse, and that this informs the vindictive language and attitude of the respondent towards the applicant. Whatever the cause, it seems to me that the best a court can do at this stage, is to arrive at a judgement on the presently available material. Neither party has asked that the matter be referred to evidence.

[73]The future may bring changes in attitude but currently it is in my view, for the reasons set out above, not in the interests of the beneficiaries of the trust that the respondent occupies the entrenched position of trustee which the trust deed in this trust has uniquely provided for him. The respondent's conduct in creating the so-called loan, and in the litigation, does not meet the high standard that the entrenched position in the trust exacts of him. And the respondent has not suggested any amendment to the trust deed that would reduce his power in the trust so that it was on par with that of the applicant.

[74]It seems to me that their interests will therefore best be served by the respondent being removed as trustee, and that two trustees are appointed to replace the respondent: the applicant's father,[40] and the trust's initially agreed auditor.

[75]As to costs, counsel for the applicant has asked for a special costs order. But the notice of motion does not ask for it, nor the replying affidavit. My attention was not drawn to any notice to the respondent before the heads of argument were filed. The respondent's conduct in the litigation has been contentious, but absent proper notice a special order is not competent.

Conclusion

[76]In the result I make the following order:

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[40] I have noted the respondent's objection to his ex-father-in-law being appointed as trustee. But the grounds go to his relationship with him, and not to the interests of the trust beneficiaries.

(a) The second respondent is removed as trustee of the GOUELOKKIES EN DIE DRIE BEERTJIES FAMILIE TRUST ("the trust").

(b) Subject to the approval of the first respondent, WILHELM HERCULES ENGELBRECHT is appointed as trustee of the trust.

(c) Subject to the approval of the first respondent, a registered chartered accountant nominated by Uys & Zimmerman Auditors, Benoni is appointed as trustee of the trust.

(d) The second respondent is directed to pay the costs of this application.

WHG van der Linde
Judge, High Court
Johannesburg

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Date hearing: 24 October, 2017
Date judgment: 7 November , 2017