

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



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

CASE NO: 2023 - 014134

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: YES
SIGNATURE	DATE

In the application by

EXCLUSIVE TRUST SERVICES (PTY) LTD NO

First Applicant

V[...] D[...] S[...], S[...] A[...] NO

Second Applicant

and

V[...] D[...] S[...], L[...] M[...] R[...] NO

First Respondent

RMB PRIVATE BANK

Second Respondent

MASTER OF THE HIGH COURT, PRETORIA

Third Respondent

In the counter application by

V[...] D[...] S[...], L[...] M[...] R[...] NO

First Applicant

V[...] D[...] S[...], L[...] M[...] R[...]

Second Applicant

And

EXCLUSIVE TRUST SERVICES (PTY) LTD NO	First Respondent
V[...] D[...] S[...], S[...] A[...] NO	Second Respondent
MASTER OF THE HIGH COURT, PRETORIA	Third Respondent
V[...] D[...] S[...], S[...] A[...]	Fourth Respondent
EXCLUSIVE TRUST SERVICES (PTY) LTD	Fifth Respondent
LIEBENBERG, THEUNIS	Sixth Respondent

JUDGMENT

MOORCROFT AJ:

Summary

Inherent jurisdiction – joinder of co-respondent in counter-application when co-respondent is not already a party to the application – Court can make such an order

Joinder – direct and substantial interest

Trustee – removal of – section 20 of the Trust Property Control Act 57 of 1988 and common law

Good cause for removal - trustees resolving to remove a fellow trustee required to exercise discretion arbitrio bono viri – implied term of trust deed

Conflict of interest - may be ground for removal of trustee

Order

[1] In this matter I make the following order:

1. *The late delivery of the replying affidavit in the counter-application is condoned;*
2. *The supplementary affidavit dated 11 February 2024 is accepted and allowed into evidence;*
3. *The first respondent's first and second points in limine are dismissed;*
4. *The application to join the applicants, Exclusive Trust Services (Pty) Ltd and S[...] A[...] V[...] D[...] S[...] cited in their capacity as trustees, also in their personal capacities as the fourth and fifth respondents in the counter application is granted;*
5. *The application to join Theunis Liebenberg as the sixth respondent in the counter application is granted;*
6. *The resolution by the trustees of the Ludan Trust [IT007697/1995 (T)] taken on 19 January 2023 to remove the first respondent, L[...] M[...] R[...] V[...] D[...] S[...], as trustee is declared to be null and void;*
7. *The application to remove the first respondent as trustee is dismissed;*
8. *The resolution by the trustees of the Ludan Trust taken on 19 January 2023 to appoint Mr Botha as a third trustee is declared to be null and void;*
9. *The application to set aside resolutions of the Ludan Trust dated 14 April 2021 and 3 February 2023 is dismissed;*
10. *The third respondent, the Master of the High Court is directed to remove the first applicant, Exclusive Trust Services (Pty) Ltd, as trustee of the Ludan Trust and the first applicant is directed to return its letters of authority in respect of the Ludan Trust, to the third respondent in terms of section 20 (3) of the Trust*

Property Control Act 57 of 1988 (“the Act”) within ten business days from the grant of this order;

11. Pending the appointment of a third trustee and the adoption of resolutions dealing with the authority of trustees, the founder trustees (L[...] M[...] R[...] V[...] D[...] S[...] and S[...] A[...] V[...] D[...] S[...]) shall jointly authorise

(1) all acts of the Ludan Trust,

(2) all transactions on the Trust's bank account with the second respondent, the RMB Private Bank, and transactions on all investment accounts;

12. The founder trustees shall nominate a third trustee for appointment by the third respondent by agreement within six weeks, failing which either of the founder trustees shall be entitled to approach the Court on amplified papers for an order for the appointment of a third trustee or the nomination of a third trustee for appointment by the third respondent;

13. The independent trustee so appointed shall be entitled to remuneration in an amount to be agreed with the founder trustees, which shall, in the event of a dispute arising as to the remuneration to be paid to the independent trustee, be fixed by the third respondent pursuant to section 22 of the Act.

14. The order granted on 4 December 2012 under case number 2012/14581 is substituted and replaced with this court order.

15. The costs of the applications, including the costs of the urgent application, the costs of the appearance of 14 March 2024, the counter application, and the joinder application, shall be paid by the trustees, nomine officio, for the time being of the Ludan Trust.

[2] The reasons for the order follow below.

Introduction

[3] I refer to -

- 3.1 the applicants in the main application collectively as *'the applicants'*;
- 3.2 the respondents in the main application collectively as *'the respondents'*;
- 3.3 the parties by the names set out below:

L[...] M[...] R[...] V[...] D[...] S[...]	Mr D[...] S[...]
S[...] A[...] V[...] D[...] S[...]	Mrs D[...] S[...]
RMB Private Bank	RMB
Exclusive Trust Services (Pty) Ltd	Exclusive Trust
Master of the High Court, Pretoria	The Master
Theunis Liebenberg	Mr Liebenberg

[4] The Master and RMB abide the decision of the Court.

[5] Mr and Mrs D[...] S[...] were previously married. During the subsistence of the marriage they became trustees of the then newly established Ludan Trust and they have been trustees ever since. The D[...] S[...]s divorced in 2015. There have been a number of independent trustees since 2014 all reportedly finding it impossible to fulfil their function as trustee because of the acrimonious relationship between the couple.

Exclusive Trust is the third successive independent trustee and was appointed in 2021.

[6] Three years before the divorce, on 4 December 2012, the Court made an order relating to the management of the trust accounts. The orders now sought are intended

to vary or supersede the 2012 order.

[7] It is common cause that in the recent past the trustees and the beneficiaries of the Trust entered into discussions to decide on the future of the Trust but these discussions broke down when consensus could not be reached. The parties are not in agreement on the reasons for the breakdown.

[8] The applicants' application for the removal of Mr D[...] S[...] as trustee elicited a counter-application by the first respondent. The parties now seek orders relating to and flowing from the removal of opposing parties as trustees.

The order in the Urgent Court

[9] Both the application and the counter-application came before Randera AJ in the Urgent Court on 14 March 2023 and an order was made by agreement. The applications were postponed *sine die* and the costs were reserved.

Pending the outcome of the application it was declared that the two applicants together with Mr D[...] S[...] were the trustees of the Trust. This was an order declaring the applicants in their personal capacity to be trustees as any order pertaining to their status can only be made in respect of the trustees in their personal capacity¹ and not in their capacity as trustees. Both Exclusive Trust and Mrs D[...] S[...] were now also before the Court in their personal capacity and this happened by agreement.

It was also ordered that all decisions would have to be taken unanimously by all three trustees and that in the event of disagreement the matter would be referred to a mediator who, despite being referred to as a mediator rather than a referee or arbitrator, shall be authorised to take a final and binding decision. It was also confirmed in the order that the order would prevail over the earlier order of 4 December 2012 in the event of any conflict.

Section 20 of the Trust Property Control Act 57 of 1988

[10] In terms of section 20 (1) of the Trust Property Act any person with an interest in the trust property may apply for the removal of a trustee and at common law any person with a sufficiently direct interest in the subject of litigation would also have standing to apply.² Section 20(1) and (3) of the Act reads as follows:

¹ See *Ntombela v Shibe* 1949 (3) SA 586 (N) 587.

² *Kidbrooke Place Management Association and Another v Walton and Others* NNO 2015 (4) SA 112 (WCC) paras 15 to 18. See *Fletcher v McNair* 2021 JDR 2331 (SCA) para 18 and De Waal & others 'Wills and Succession, Administration of Deceased Estates and Trusts' *Law of South Africa* vol 31 (2001 1st reissue) para 514 with reference to the jurisdiction of the Court at common law.

“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.

....

(3) If a trustee authorized to act under section 6 (1) is removed from his office or resigns, he shall without delay return his written authority to the Master.”

The identification and *locus standi* of the parties before the Court

[11] The applicants approached the Court in their representative capacities as trustees. They cited Mr D[...] S[...] in his personal capacity and sought an order that he be removed as trustee. In the counter-application Mr D[...] S[...] approached the Court in his personal capacity and also as trustee, and sought orders against the applicants in their personal capacity. These orders include, as indicated above, an order that they be removed as trustees.

[12] The order made by agreement in the urgent Court was and is binding also on the applicants in their personal capacity. They therefore agreed to be bound to the interlocutory order in their personal capacity and this occurred before the joinder application, referred to below, was instituted.

The joinder application

[13] In response to the point of non-joinder raised in the applicants’ replying affidavit

Mr D[...] S[...] brought an interlocutory application in April 2023 seeking *inter alia* an order joining Exclusive Trust, Mrs D[...] S[...], and Mr Liebenberg as respondents in the counter application in their personal capacity. Exclusive Trust and Mrs D[...] S[...] were already cited in their representative capacity.

Mr Liebenberg was not a party to the application prior to the joinder application of April 2023 but he was the nominee of Exclusive Trust on the basis set out elsewhere in this judgement. Mr D[...] S[...] seeks to join Mr Liebenberg to the application in order to ask for a cost order against him.

[14] Mr Liebenberg deposed to the answering affidavit in the interlocutory application. In response to the application for joinder he states that there is no reason for the joinder application and that no case was made out. The applicants and Mr Liebenberg argue that these being application proceedings, rule 24 (2) is not applicable: Unlike rule 10, rule 24 (2) was not made applicable to application proceedings in terms of rule 6 (14).³

[15] It is correct to that rule 6 (14) does not refer to rule 24 (2) and that a respondent may in terms of the rule bring a counter – application only against parties who or that are already parties to the application. Rule 6 (7) (a) provides:

“6 (7)(a) Any party to any application proceedings may bring a counter-application or may join any party to the same extent as would be competent if the party wishing to bring such counter-application or join such party were a defendant in an action and the other parties to the application were parties to such action. In the latter event the provisions of rule 10 will apply.” [emphasis added]

[16] This does not mean that a counter-applicant may not seek to join a party not cited in the main application as a party in the counter-application. The High Court possesses inherent jurisdiction to grant relief where the rules of court make no provision for the relief sought. In *Neal v Neal*⁴ Henochsberg J said:

“in my view moreover such inherent jurisdiction goes even further

³ The question is not pertinently dealt with in Van Loggerenberg *Erasmus Superior Court Practice* 3rd ed (2023) and Dendy & Loots *Herbstein and Van Winsen: The Civil Practice of the Superior Courts of South Africa* 6th ed (2022).

⁴ *Neal v Neal* 1959 (1) SA 828 (N) 833A.

than the mere power to grant relief where insistence upon exact compliance with a Rule of Court would result in substantial injustice to one of the parties. I think such jurisdiction includes a power to grant relief where the rules of court make no provision therefor."

[17] Similarly in *Ncoweni v Bezuidenhout*⁵ Gardiner JP said the following:

"The rules of procedure of this Court are devised for the purpose of administering justice and not of hampering it, and where the rules are deficient I shall go as far as I can in granting orders which would help to further the administration of justice. Of course if one is absolutely prohibited by the rule one is bound to follow that rule, but if there is a construction which can assist the administration of justice I shall be disposed to adopt that construction."

[18] The concept of joinder predates the introduction of rules of court and the uniform rules of 1965 by many years. The practice was founded on grounds of convenience and equity or in order to save costs and also to avoid oppression or multiplicity of actions or on other similar grounds.⁶ In the *Marais* case Wessels J referred to the judgement by De Villiers JA in the *Morgan* case and said that once a party is shown to have a direct and substantial interest in the issues raised in the proceedings the court will proceed to determine the question of joinder in accordance with the requirements of convenience and common sense.

A plaintiff has a wider right than a defendant in regard to the joinder of defendants and may join a third party as a defendant notwithstanding the fact that a plea of nonjoinder could not have been successful if the plaintiff had elected not to join the third party in the action.

Mr Liebenberg's interest arises only from the fact that a cost order is sought against him as the nominee of Exclusive Trust on a *de bonis proprius* basis and in my view on a

⁵ *Ncoweni v Bezuidenhout* 1927 CPD 130.

⁶ *Morgan and Another v Salisbury Municipality* 1935 A.D. 167 at 171; *Marais and Others v Pongola Sugar Milling Co Ltd and Others* 1961 (2) SA 698 (N) 702. See also Daniels *Beck's Theory and Principles of Pleading in Civil Actions* 6th ed. (2002) 21.

reading of the papers a direct and substantial interest is shown: It is important on the facts of this case that he be heard in such an application.

[19] I am satisfied⁷ that the High Court does have the jurisdiction to join a respondent to a counter application even when the respondent is not a party to the main application and the applicants in the main application are cited as respondents in the counter application. A proper case must however be made out for joinder.

[20] The joinder application is granted and Exclusive Trust, Mrs D[...] S[...] and Mr Liebenberg are joined as respondents in the counter- application in their personal capacity.

Respondents' first point *in limine*: The status of Exclusive Trust

[21] The respondents argue that Exclusive Trust is precluded from acting as trustee because the name of its purported nominee does not appear in the letters of authority. Section 6 (4) of the Trust Property Control Act 57 of 1988 provides as follows:

“6 Authorization of trustee and security

...

(4) If any authorization is given in terms of this section to a trustee which is a corporation, such authorization shall, subject to the provisions of the trust instrument, be given in the name of a nominee of the corporation for whose actions as trustee the corporation is legally liable, and any substitution for such nominee of some other person shall be endorsed on the said authorization.”

[22] The legislation provides for the appointment of a corporation as a trustee but the

⁷ See also Van Loggerenberg *Erasmus: Superior Court Practice* 3rd ed. (2023) B-41 and D-171, read with Item 2 of Schedule 1 of the Constitution of 1996 and with section 171 of the Constitution.

authorisation must be given in the name of a nominee for whose actions the corporate entity is legally liable. The nominee does not become the trustee; the trustee is the corporation.⁸ There must be an individual rather than a faceless corporation as the interface with the Trust. Mr Liebenberg is such an individual but his name does not appear on the letters of authority issued by the Master. His identity number does however appear and he is identified, albeit in a roundabout and unsatisfactory fashion.

There is no evidence in the affidavits as to why Mr Liebenberg's name does not appear and he is identified only by his identity number, but it is very probably due to an error when the letters of authority were issued.

[23] I am satisfied that Exclusive Trust is the trustee appointed in terms of the legislation and that the failure to identify Mr Liebenberg by his first name is of no moment. It is common cause between the parties and admitted by Mr Liebenberg that he is the person nominated by Exclusive Trust and in the past Mr D[...] S[...] did not dispute the status of Exclusive Trust as a trustee or that of Mr Liebenberg as its nominee.. It is not disputed that Mr Liebenberg is a person "*for whose actions as trustee the corporation is legally liable.*"

[24] The first point *in limine* is dismissed.

Respondents' second point *in limine*: The authority of Tli Inc Attorneys to represent Exclusive Trust and Mrs D[...] S[...]

[25] Mr D[...] S[...] disputes the authority of the firm of attorneys representing the two applicants. It is common cause that he disputed the authority some thirteen days after becoming aware of the identity of the attorneys, and that he first raised the dispute in the answering affidavit. There is textbook authority⁹ for the proposition that such a dispute be raised in the answering affidavit.

[26] Rule 7 (1) reads as follows:

⁸ *Metequity Ltd and Another v NWN Properties Ltd and Others* 1998 (2) SA 554 (T).

⁹ *Liebenberg Erasmus: Superior Court Practice* 2nd ed. (2023) D1 Rule 7-1.

“7 Power of attorney

(1) Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.”

[27] Rule 7(1) as first enacted in 1987 abolished the requirement that a power of attorney be filed in action proceedings. It was never a requirement in application proceedings because the authority of a party to bring or defend application proceedings appeared from the affidavits by the parties or by individuals whose authority appeared from the papers. The purpose of the rule is to prevent a litigant from denying that process was initiated in its name.

In this way the rule seeks to protect a party from having to incur legal costs under circumstances where the other party is actually not litigating and the first party would be unable to recover its costs from the other party because that party was never really a party to the application. The attorney who acts for a party is therefore required to confirm that he is indeed acting for that party,¹⁰

[28] Should it later become apparent that the attorney acting for a party was in fact not authorised to do so, the opposing party would probably be in a position to justify a *de bonis proprius* cost order.

[29] Both applicants deposed to affidavits the application and there can be no doubt that they authorised a firm of attorneys to act for them. They are the parties before the Court.

¹⁰ See *Eskom v Soweto City Council* 1992 (2) SA 730 (W).

[30] The allegation that the firm of attorneys is liquidation is disputed and this averment should not detain the Court at this stage of these proceedings. There is also some confusion surrounding the exact name of the firm of attorneys. These are matters for the Legal Practice Council to address, if necessary. Mr Liebenberg is a partner and a director of the firm and also of the firm Mashabane Liebenberg Sebola Inc. He states that the firm was previously known as Theunis Liebenberg Inc but that the Legal Practice Council has not yet registered the name change.

[31] The decision to bring the application and to instruct attorneys was one taken by the applicants. In terms of clause 15.5 of the trust deed the trustees or any firm of which they or any of them are members or partners may be employed to act in any matter relating to the administration of the Trust, but only by unanimous decision. It was perhaps inadvisable of the trustees to appoint a firm of attorneys of which Mr Liebenberg was a member or partner but Exclusive Trust rather than Mr Liebenberg is the trustee and the situation is not prohibited by clause 15.5.

[32] Mr D[...] S[...] seeks condonation for non-compliance with the time limit of ten days in the rule. Under the circumstances no case is made out for condonation and the point *in limine* is dismissed.

The merits of the application:

The removal of Mr D[...] S[...] as trustee

[33] The applicants seek an order directing the Master to remove Mr D[...] S[...] as a trustee pursuant to a decision purporting to be a resolution adopted by them on 19 January 2023. The applicants argue that clauses 6.3 and 7.3 of the trust deed confers a right on the applicants to remove a trustee by a majority vote on written notice with no reasons required for such removal. They in any event also argue that while they did not require reasons to remove him as trustee there were indeed reasons that justified his removal.

[34] The questions that arise are whether the trust deed requires good cause to be shown for the removal of a trustee and if so whether good cause existed at the time. Mr D[...] S[...] submits that the trust deed contains a tacit or implied term requiring good

cause to be shown for the removal of the trustee at the time of deciding to remove him, that the trust deed properly interpreted requires written notice of the intended resolution to remove the trustee, that his version of the facts must be accepted¹¹ for the purposes of final relief as sought by the applicants, and that he was in fact not provided with proper notice of the intended resolution in terms of clause 10 of the trust deed.

He then reaches the conclusion that the applicants did not exercise their discretion *arbitrio bono viri* in that they decided to remove him summarily without providing any reasons for the decision at the time of his removal and therefore without good cause. He goes further and submits that the decision was *mala fide*.

[35] It is settled law that the 'Endumeni¹² principles' apply to the interpretation¹³ of all documents and therefore also to the interpretation of a trust deed. Words must be understood not in isolation but in the context of the document itself and of the other words used. In daily life people use and understand words in their context all the time.

[36] The Ludan Trust was established in 1995. Mr D[...] S[...] was the donor and Mr and Mrs D[...] S[...] were appointed as the founder trustees of the *inter vivos* trust. The two founder trustees and their three children were nominated as beneficiaries. In the event of either of the founder trustees passing away before the termination of the Trust two new trustees, namely Mr D[...] S[...]’s brother and his attorney, were nominated to take the place of the deceased trustee and in the event of the nominated person not accepting appointment the surviving trustee would assume full power of assumption.¹⁴ The nomination of Mr D[...] S[...]’s brother would only be relevant in the event of his passing and not in the event of his resignation or removal as trustee.

[37] Clause 6.3 provided that subject to the provisions of clause 5,¹⁵ the trustees may¹⁶ remove a trustee from office by written notice to that effect. There is no express

¹¹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634E *et seq.*

¹² *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) paras 17 to 26.

¹³ See also *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* 2008 (5) SA 1 (SCA) paras 16 to 19, *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA), [2009] 2 All SA 523 (SCA) para 39, and *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) para 28.

¹⁴ Clause 6.2.

¹⁵ Clause 5 required that there shall at all times be at least two and not more than three trustees.

¹⁶ By majority vote – clause 7.3.

provision that good cause must exist for the removal or that the trustee sought to be removed must be given proper notice and an opportunity to present evidence or argument to show why he or she should not be removed. It is indeed strange that the trust deed provides that a trustee, even a founder trustee, may be removed from office by a simple majority vote supported by the remaining two trustees without it being necessary to give proper notice of the intention to do so together with reasons so that the affected trustee can present his or her case.

[38] Documents must be interpreted so that they have meaning, sense and efficacy but at the same time the Court must guard against making a contract for the parties because of what the Court regards as reasonable and sensible. The fact that the parties to the deed of trust perhaps ought to have entrenched the position of the founders does not mean that the Court is at liberty to read terms into the deed of trust that are simply not there because it would make sense to have such terms. I find therefore that the terms argued for by Mr D[...] S[...] are not tacit terms on the basis of the evidence presented.

Entrenching the position of a donor and founder trustee especially one whose children are beneficiaries would be a very sensible thing to do but the parties chose not to do so.

[39] The question that then arises is whether the term contended for by Mr D[...] S[...] is a term implied by law. In *Du Plessis NO and Others v Van Niekerk and Others*¹⁷ the Court was dealing with a rather awkwardly worded trust deed that provided that the office of a trustee *shall* be vacated if the majority of the trustees *requested* a trustee to resign.¹⁸ Dafue J confirmed that the power to remove a trustee granted in a trust deed may be exercised but must be exercised in conformance with the common law and section 20 of the Trust Property Control Act. The trustee so removed would always have the right to challenge the removal in Court.¹⁹ The power remove a trustee by majority decision is a discretionary power arising from contract and unless the power is unfettered it must be exercised *arbitrio bono viri*.²⁰ The discretion must be exercised on reasonable grounds.²¹ The learned Judge summarised the law as follows:

¹⁷ *Du Plessis NO and Others v Van Niekerk and Others* 2018 (6) SA 131 (FB).

¹⁸ Clause 5.7.4 of the trust deed before the Court in that matter.

¹⁹ Para 20.

²⁰ See also *NBS Boland Bank Ltd v One Berg River Drive CC and Others; Deeb and Another v Absa Bank Ltd; Friedman v Standard Bank of SA Ltd* 1999 (4) SA 928 (SCA), [1999] 4 All SA 183 (SCA) paras 25 to 28 and *Juglal NO and Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division* 2004 (5) SA 248 (SCA), [2004] 2 All SA 268(SCA) 261D.

²¹ Paras 25 to 28, 43 and 47.

"I repeat: if the applicants are entitled to unilaterally cause the first respondent's vacation from the office of trustee in circumstances where they do not have to produce reasons, or even for mala fide reasons, it would be against public policy and the principles of ubuntu, reasonableness and fairness. I am of the view that the introduction of an implied term as suggested and amplified by me below is good law in general for the reasons advanced earlier herein. There is no valid reason why it should not be applicable to all deeds of trust similarly worded."

[40] This trust deed is indeed similarly worded. In the *Du Plessis* case the trust deed provided that the trustee was obliged to resign when requested to do so and the request was no more than a courtesy because it could not be refused. In the present matter no "request" is provided for but the majority may remove the third trustee and then inform him or her accordingly. There is no difference in substance - the difference is a semantic one.

[41] Good cause must therefore be shown for the removal of a trustee and the remaining trustees must exercise their discretion *arbitrio bono viri*. In my view a Court should be hesitant to remove a trustee who is not only a founding trustee of a family trust but also the only or a major donor of trust assets, and the parent of beneficiaries.

[42] The applicants adopted the view in the founding affidavit that they were entitled to remove Mr D[...] S[...] and that no reasons are required. I find that this Cannot be correct and that such arbitrary conduct Cannot be condoned. It is also simply not acceptable to merely remove a trustee and then when confronted to tabulate reasons for so doing. By that point in time the trustees have already committed to a course of action on the understanding that they need not have or provide reasons, and any reasons then identified to justify their earlier decision will and must be questioned.

[43] In the founding affidavit the applicants adopted the view that even though they are not obliged to have reasons to remove Mr D[...] S[...] as trustee they were nevertheless justified in doing so because he makes unwarranted personal and defamatory remarks about Mrs D[...] S[...], he disrespects the other trustees, and for reasons set out in an email message by Mr Liebenberg dated 26 January 2023.²² The allegations made by Mr Liebenberg are serious but lacking in detail. They summarise conclusions reached by the applicants but do not furnish the evidence in support of these conclusions.

In application proceedings the affidavits comprise pleadings and evidence, and the evidence presented by the applicants in support of the allegation that Mr D[...] S[...] ought to be removed as a trustee is contained in eight typewritten lines in the founding affidavit together with thirty-seven lines in the email message. The only elaboration given is with regard to the withdrawal of funds from the bank account and I deal with this aspect below.

[44] Exclusive Trust informed RMB, the Trust's banker, of the removal of Mr D[...] S[...] on the day that the resolution was taken, namely 19 January 2023. On 20 January 2023 transactions on the account triggered a fraud alert when Mr D[...] S[...] withdrew R1,673,006.43. In terms of resolutions taken on 14 April 2021 and again on 19 January 2023 withdrawals from the bank accounts must be signed by at least two trustees. The transactions were therefore unauthorised irrespective of whether Mr S[...] was recognised as a trustee or not.

[45] The question whether the withdrawals were legitimate is however complicated by the fact that in terms of the order of Court granted on 4 December 2012 Mr and Mrs D[...] S[...] had sole access to the RMB current account and could transact on the account. It is argued in other words that the Court order of 2012 overrides the subsequent resolutions and authorised Mr D[...] S[...] to operate on the account. While a Court should be critical of his conduct in withdrawing such a large amount merely for the purpose of keeping it separate from trust assets and to keep it safe from what he perceived to be an attempt to "capture" the Trust, it is so that he was always the person who took responsibility for payment of trust debts and the amount withdrawn was subsequently repaid once he had received legal advice.

²² "TL18" to founding affidavit.

[46] The applicants immediately demanded repayment of the amount and threatened criminal charges. On 23 January 2023 the payment was again demanded from Mr D[...] S[...]. The next day Mr D[...] S[...]’s attorneys gave an irrevocable and unconditional undertaking on behalf of their client’s to refund the full amount and the undertaking was reiterated on 30 January 2023.

[47] The amount of R1,173,006.43 was repaid and Mr D[...] S[...] continued to transact on the trust bank account by withdrawing an amount of R6,673.16. This was also alleged to be an unauthorised withdrawal. The applicants then proceeded to launch the urgent application seeking repayment of the R500,000 and other relief.

[48] Mr D[...] S[...] opposed the urgent application and launched a counter application. The amount of R500,000 was repaid but only after the urgent application had already been launched.

[49] In his answering affidavit Mr the S[...] alleges that Mrs D[...] S[...] had also made authorised withdrawals of trust funds and admitted these withdrawals under in two Court applications. These withdrawals total R1,222,490.00 and were made in the period 2012 to 2014. He also states that he had paid R1,200,000 to the trust between 2014 and 2016 to avoid legal action against the Trust and to allow it to pay its debts. He states that he withdrew the amount of R1,673,006.43 in order to protect the Trust and the beneficiaries against the “*applicants capturing the Trust.*” When he realised that the funds were protected by an order of Court (namely the Court order of 2012) he proceeded to repay the amount as soon as he was able to. These payments were made between 2 and 16 February 2023. He says that during the period the applicants attempted to gain access to the investment accounts and to exclude him from the accounts under circumstances where no new letters of authority had been issued.

[50] Mr D[...] S[...] also admits payment of R6,673.16 from the RMB account but states that the payment was due to the City of Johannesburg in respect of one of the Trust properties. Mr D[...] S[...] says that he has been paying the Trust’s debts from the trust bank account for the past ten years and the applicants never objected to him doing so.

[51] Mr D[...] S[...] also admits the use of abusive language in a letter to Mrs D[...] S[...] for which he apologises. He is correct in doing so as such conduct is not acceptable of a trustee. It is so however that perfection is not required or to be expected and that because of the acrimonious nature of a marriage relationship spouses often behave in ways they later regret and apologise for.

[52] I found that there are no grounds for the removal of Mr D[...] S[...] as trustee.

The removal of Mrs D[...] S[...] as trustee

[53] The comments made above with reference to the removal of a founder trustee of a family trust who is also a parent of beneficiaries are equally applicable to Mrs D[...] S[...] except for the fact that she is not a donor.

[54] The acrimonious relationship between Mr and Mrs D[...] S[...] lies at the heart of the problems experienced by the Trust. The best interests of the Trust and the beneficiaries will not be served by removing them as trustees. The existing problems will only be overcome by Mr and Mrs D[...] S[...] pertinently but calmly addressing the problems they have experienced within the Trust rather than by removing one or both of them.

[55] The application to remove Mrs D[...] S[...] is therefore dismissed.

The removal of Exclusive Trust as trustee

[56] Exclusive Trust and Mr Liebenberg have placed themselves in the unenviable position whereby Exclusive Trust represented by Mr Liebenberg is a trustee but Mr Liebenberg's firm of attorneys also represented by him act as the firm of attorneys of the Trust. The Trust pays legal fees to the firm of attorneys and trustee fees to Exclusive Trust. The legal fees must be approved by the trustees and this places Mr Liebenberg who is beholden to both the firm of attorneys and to Exclusive Trust in a very difficult position especially when, as here, fee disputes arise.

[57] A trustee owes a fiduciary duty to beneficiaries of the Trust and must not place himself or herself in a situation where his or her private interests conflict with duties to the Trust. The existence of a conflict of interest (however innocently it may have arisen) may be a ground for the removal of a trustee.²³

²³ See *Grobbelaar v Grobbelaar* 1959 (4) SA 719 (A); *Hoppen and Others v Shub and Others* 1987 (3) SA 201 (C) 210A, referring to Honoré *The South African Law of Trusts* 3rd ed. 246; and *Kidbrooke Place Management Association and Another v Walton and Others* NNO 2015 (4) SA 112 (WCC).

[58] Mr D[...] S[...] alleges that Mr Liebenberg when charging fees on behalf of the firm of attorneys do so at attorneys' rates even when according to his own notes he was acting as trustee, and that the existence of fee disputes between the Trust and Exclusive Trust as a trustee, and also between the Trust and the firm of attorneys make it impossible for Exclusive Trust to continue as trustee.

[59] Mrs D[...] S[...] complained about a possible conflict of interest in an email in May 2021 when the release of payments to Mr Liebenberg's law firm were debated. In 2023 when a dispute arose between Mr D[...] S[...] and Mr Liebenberg regarding the payment of fees due to Exclusive Trust Mr Liebenberg threatened in writing that he would refuse to approve any resolutions or to approve the settlement agreement then being negotiated unless the fees were paid. He also stated that unless the matter was dealt with to his satisfaction "*there will be no settlement and he [Mr D[...] S[...]] will be replaced as a trustee.*" This event took place a week before Mr D[...] S[...] was ostensible removal as trustee. This correspondence implied that Mr Liebenberg refused to approve the settlement agreement being negotiated not on the basis of the merits of the proposed agreement placed before the trustees but on the question whether 'his' fees had been paid. His duties to the Trust were now clearly in conflict with his desire to recover fees due to the entities he represented.

[60] Two days before the meeting at which Mr D[...] S[...] was removed as trustee Mr Liebenberg said that his choices were to resign as trustee and to sue the Trust for payment, to propose a resolution to remove either of the two founder trustees and to then appoint two independent trustees in order to administer the Trust, or to sequester the Trust on the ground that the trustees can no longer work together. These options were clearly identified by him not in the interest of the Trust and its beneficiaries but again in pursuance of the fee claims.

[61] Responding to a request by Mr D[...] S[...]’s attorney Mr Liebenberg expressed the view in March 2023 that he was not conflicted by his dual role as attorney and trustee and that he would not resign as trustee. A few days later however he informed Mr D[...] S[...] that he "*would like to resign as trustee and*" that he believed "*that it may be in the best interest for all concerned.*" He made an offer that Exclusive Trust would resign as trustee and the firm of attorneys would withdraw as the attorneys of the Trust in other litigation provided all fees owed to both entities (totalling R662,555.62) were paid and the Trust waived all claims against Exclusive Trust and the attorneys.

[62] It is clear that Exclusive Trust is no longer in a position to continue as trustee and this is so independently of the question whether the fees are indeed payable in full or not. The entitlement to the fees claimed is not something that can be dealt with in this application.

[63] It is appropriate therefore that Exclusive Trust be removed as trustee.

The appointment of Mr Botha as trustee

[64] The applicants seek an order directing the Master to appoint a Mr Botha as a trustee pursuant to a resolution adopted by the applicants on 19 January 2023. Mr Botha is not a party to the application.

[65] The appointment is clearly premised on the removal of Mr D[...] S[...] as trustee and must suffer the same fate as the removal. Mr Botha would also be a second independent trustee and the Trust would then become liable for the professional costs of two independent trustees. This may not be financially sustainable. The trust deed also does not contemplate the appointment of two independent trustees in addition to Mr and Mrs D[...] S[...].

[66] The application for an order that the Master be directed to appoint Mr Botha is dismissed.

Costs

[67] The dispute before the Court is a dispute between the two founders trustees of the Trust and arises from the acrimonious nature of their personal relationship. The costs should therefore be paid out of trust funds. There is in my view no justification for holding any party personally liable for costs.

Conclusion

[68] For all the reasons as set out above I make the order in paragraph 1.

J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting 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 of the judgment is deemed to be **22 MARCH 2024**

COUNSEL FOR THE APPLICANT:	P VAN DEN BERG SC
INSTRUCTED BY:	TLi INC ATTORNEYS
COUNSEL FOR THE RESPONDENT:	P STRATHERN SC L M NIGRINI
INSTRUCTED BY:	AMANDA MARTIN ATTORNEYS
DATE OF ARGUMENT:	23 FEBRUARY 2024
DATE OF JUDGMENT:	22 MARCH 2024