



**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

**Case No: 8721/23P**

In the matter between:

**SMALL ENTERPRISE DEVELOPMENT  
AGENCY (SEDA)**

**INTERVENING APPLICANT**

and

**LINDANI PERCIVAL DLHOMO N.O.  
WESLEY AERLRED SOUTTER N.O.  
PAUL FRANCIS PHILIP HEEGER N.O.**

**FIRST APPLICANT  
SECOND APPLICANT  
THIRD APPLICANT**

and

**PATRICIA NTOMBIZODWA CHALWA N.O.  
THE MASTER OF THE HIGH COURT,  
PIETERMARITZBURG**

**FIRST RESPONDENT  
SECOND RESPONDENT**

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Coram: Davis AJ

Heard: 16 October 2023

Date of Judgment: 10 November 2023

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**ORDER**

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- 1 The intervening applicant's application to intervene is granted.
- 2 The amended substantive relief sought by the intervening applicant is dismissed.
- 3 The intervening applicant is ordered to pay the costs of the intervention application, such costs to include the costs of two counsel where so employed.
- 4 The first respondent be and is hereby removed forthwith as a trustee of the National Construction Incubator Trust with registration number IT183/2008/N.
- 5 The second respondent is directed to endorse their records accordingly.
- 6 The first respondent is directed to hand over to the applicants all documents including but not limited to banking and administrative instruments relating to the administration of the National Construction Incubator Trust, within 3 days of this order.
- 7 In the event of the first respondent failing to comply with paragraph 3 above, the sheriff be and is hereby authorised to do all things necessary to give effect to paragraph 3 above.
- 8 The first respondent is directed to pay the costs of the application, in her personal capacity (*de bonis propriis*) on an attorney and client scale, including the costs consequent on the employment of two counsel where so employed.

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## JUDGMENT

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**Davis AJ:**

**Introduction**

[1] The applicants, Messrs. L Dlhomo N.O., W Soutter N.O. and P. Heeger N.O., in their personal capacities,<sup>1</sup> instituted an urgent application against the first respondent, Ms. P Chalwa N.O., and applied for the following:

'(1) That the first respondent be removed as a trustee of the National Construction Incubator Trust.

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<sup>1</sup> Where a party appears in his official capacity, the letters NO follow his surname, in this matter as will become apparent in the judgment, the applicants act in their individual capacities as parties with a substantial interest.

- (2) That the first respondent is directed to pay the costs of the application, in her personal capacity *de boniis propriis*.
- (3) Further and/or alternative relief.<sup>2</sup>

[2] Aside from the voluminous nature of the papers, the issues that requires determination are inter alia; whether, SEDA should be joined as an intervening party and that an administrator should be appointed to administer the trust or on the facts stated by the respondent, together with the admitted facts in the applicants' affidavits, justify the order that the applicants have requested, i.e. the removal of the first respondent as a trustee.<sup>3</sup>

[3] In an attempt to render this judgment more easily understood I will refer to the three original applicants, Messrs. Dhlomo, Soutter and Heeger respectively as the applicants unless in context it is necessary to refer to them by their individual citation. I will refer to Ms. Chalwa as the respondent and the second respondent who is the Master of the High Court as the Master, the Master did not participate in these proceedings. I will refer to the Small Enterprise Development Agency who seek to intervene as SEDA.

[4] Lengthy affidavits and evidentiary material have been filed on record by the applicants and the respondent in this matter, SEDA has chosen not to engage with the factual correctness of the facts averred either by the applicants or the respondent, SEDA draws conclusions about the effect of the conflict between the parties.

[5] The respondent has filed detailed averments in her answering affidavits. It is impossible to traverse all the allegations and averments contained in the papers in this judgment. Furthermore counsel appearing on behalf of the intervening applicant, the applicants and the respondent have, to different degrees, filed extensive heads of argument much of which has proved helpful and is appreciated. Not all the points raised will be dealt with but have nonetheless been carefully considered.

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<sup>2</sup> Verbatim the notice of motion.

<sup>3</sup> *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E - 635C, *Wightman t/a JW Construction v Headfour (Pty) Ltd and another* 2008 (3) SA 371 (SCA) para 12, and *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 26.

## Background

[6] Despite the matter proceeding under urgency the first preferential date that could be assigned by the senior civil judge, due to the volume of the papers, was 16 October 2023. The exchange of affidavits and papers being completed by 17 July 2023.

[7] On 29 September SEDA filed its application to intervene.<sup>4</sup>

## Context

[8] In order to understand the relationship between the parties and why SEDA applied to intervene it is necessary to contextualise the relationship between them. The applicants and the respondent were appointed by the Master as trustees of the National Construction Incubator Trust (NCI Trust), which is duly registered and incorporated in terms of the Trust Property Control Act 57 of 1988 (the Act), with registration number IT183/2008. SEDA was the founder of the NCI Trust and the main beneficiary.<sup>5</sup>

[9] The NCI Trust is a public benefit organization mandated to develop and mentor emerging construction companies within Southern Africa. Its focal point are BBBEE initiatives designed to empower emerging construction companies to compete with older and more established companies in the open market. It seeks to assist those companies that historically did not have equal access and opportunity within the industry to compete with other long established construction entities. One of the goals is to allow these emerging companies to compete on an equal footing with those corporations that were the beneficiaries of historical inequality.

[10] The NCI Trust provides technical and business administration assistance, which includes training and upskilling initiatives. Being a public benefit organisation

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<sup>4</sup> The court file was handed to me during the morning of 2 October but immediately removed by the registrar for the file to be updated with the intervening application. This was 9 court days before this hearing. The applicants' description of the application being brought at the 'eleventh hour' is therefore apt.

<sup>5</sup> Indexed papers, vol 1, at 69.

the objects of the trust accord with the constitutional imperatives of economic transformation.<sup>6</sup>

[11] The NCI Trust has numerous sources whereby it generates capital. There is donor funding and the NCI Trust also receives funding from its partners, which include the metropolitan municipalities and other local government authorities. Funding is received from inter alia, the eThekweni Municipality, the City of Ekurhuleni, Nelson Mandela Bay, the City of Tshwane and overseas donor funding. The majority of its funding is sourced from public funds.

[12] SEDA is legally obligated to support the NCI Trust, it is the founder of the trust and is 'possibly the greatest supporter of the Trust.'<sup>7</sup> SEDA is also the main beneficiary of the NCI Trust but is not the only beneficiary. SEDA forms part of the government's Department of Small Business Development initiative.<sup>8</sup>

[13] Over the past three years SEDA has on average provided R10 million rand per year to the NCI Trust. The trust was set up at the instance of SEDA in order to achieve the vision and objectives of SEDA. The trustee's fiduciary duty is to manage the NCI Trust and provide oversight in accordance with the trust deed and to ensure that the donor funding is used to attain the objects and purposes of the trust as set out in the trust deed.

[14] The applicants and the respondent are the only appointed trustees of the NCI Trust.<sup>9</sup> The first applicant was appointed as the Chairman of the NCI Trust at the Annual General Meeting of the trust in 2020,<sup>10</sup> the minutes of that meeting refer to the respondent as a trustee and the Chief Executive Officer (CEO) of the National

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<sup>6</sup> In the preamble to the Broad-Based Black Economic Empowerment Act 53 of 2003 it is stated that one of the objectives with that Act is to 'promote the achievement of the constitutional right to equality'. The right to equality therefore occupies a central place in any constitutional discussion on the broad-based black economic empowerment programme.

<sup>7</sup> Indexed papers, vol 1, at 12.

<sup>8</sup> The Department of Small Business Development (DSBD) was established as a standalone national department in accordance with the reorganisation of some national departments announced by the President in May 2014. The vision being a transformed and inclusive economy driven by sustainable, innovative small medium and micro enterprises and co-operatives.

<sup>9</sup> This is true as to the last letters of authority issued by the Master and supplementary explanation. See the indexed papers, vol 1 at 83-84, annexure H.

<sup>10</sup> Indexed papers, vol 1, at 59-68.

Construction Incubator public benefit organisation, also referred to as a business incubator (the Incubator).<sup>11</sup> The respondent is the person charged with the day-to-day operation of the Incubator on behalf of the NCI Trust. The first respondent as the CEO of the Incubator is required to report and act in accordance with the instructions of the board of trustees.

### **Chronology of the dispute**

[15] On 6 March 2023 the first and second applicants arranged for an informal meeting with the respondent in order to obtain explanations from her in connection with allegations of serious misconduct. A preliminary investigation into the respondent's conduct as CEO implicated her to have committed acts of maladministration, misappropriation of funds and irregular transactions constituting serious misconduct. The respondent left before any meaningful engagement occurred at the meeting.

[16] On 30 March 2023 the respondent locked out the applicants from the premises of the Incubator including their access to the IT infrastructure.

[17] The respondent was served with a notice of suspension on 31 March 2023. The suspension notice was signed by the first applicant as chairman of the NCI Trust. The respondent ignored the notice of suspension. The trustees in terms of the trust deed are mandated to provide an oversight over the functioning of the Incubator, including decisions of the board and the management of the Incubator. SEDA removed the suspension shortly thereafter.<sup>12</sup>

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<sup>11</sup> A useful description of what a 'business incubator' generally does is as follows:

'Although the detailed definition of small business incubator is contested there is a general consensus among scholars that a business incubator provides various targeted business support and technical support services aimed at growing emerging and small start-up business enterprises into financially and operationally independent enterprises.' (references omitted)

M Masutha & CM Rogerson 'Small business incubators: An emerging phenomenon in South Africa's SMME economy' (2014) 25 *Urbani izziv/Urban Challenge Journal* S47 at S48, and M Masutha & CM Rogerson 'Small enterprise development in South Africa: The role of business incubators' (2014) 26 *Bulletin of Geography. Socio-Economic Series* 141 at 143.

<sup>12</sup> The removal of a suspension notice taken by the trustees of a trust entity without the approval of the trustees by resolution is clearly unlawful.

[18] On 5 April 2023 the respondent enrolled an urgent application to be heard in this division sitting in Durban the next day.<sup>13</sup> The respondent sought an interdict preventing the applicants from attending on the premises of the NCI Trust and associated relief.<sup>14</sup> The respondent deposed to the founding affidavit substantiating the relief sought and her apparent authority to bring such an application. The application was opposed on the basis that the respondent was not authorised to bring such application. It was struck from the roll with no order as to costs.<sup>15</sup>

[19] The first applicant notified the management of the Incubator and the other trustees of the conduct of the respondent on 11 April 2023. The applicant placed the respondent on terms that should she not adhere to the suspension and restore to the applicants as trustees their full access to the Incubator then they would launch an urgent application for appropriate relief.

[20] The respondent without further reference to the applicants, on 13 April 2023 'procured' the removal of the applicants as the trustees of the NCI Trust. The Master of the High Court issued new letters of authority appointing Branton Abrahams and Masthideso Ndlovu as trustees.

[21] A meeting of the board of trustees and management of the incubator, including the 'new' trustees was convened electronically. The applicants immediately in writing advised the board of the Incubator and the 'new' trustees that the meeting was unlawful. Notwithstanding this the respondent applied to First National Bank to open a bank account in the name of the NCI Trust.

[22] Another application was then brought before the high court sitting at Durban on 26 April 2023 citing the newly appointed trustees of the NCI Trust as applicants duly authorised to represent the trust. The application was directed against the first applicant and others related parties. The application sought to unfreeze the funds on the NCI Trusts Absa Bank account with immediate effect. The matter came before

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<sup>13</sup> *Chalwa v Dlomo and two others* (KZD) case no. 3590/23D, heard on 6 April 2023 where the matter was struck from the roll with costs.

<sup>14</sup> The indexed papers, vol 1, at 72-75.

<sup>15</sup> The respondents, the three trustees did not seek costs as those costs would be paid by the NCI Trust.

Mossop J, where it was postponed without the relief sought by the respondent being granted.

[23] The applicants opposed the application, maintaining that the appointment of the new trustees was unlawful and their removal as existing trustees fraudulently obtained. The applicants later alleging that documentation produced was indicative of instances of fraud and forgery.

[24] Notwithstanding the pending litigation and the refusal by Mossop J to grant the relief sought, the respondent on 8 May 2023, requested the Nelson Mandela Bay Metropolitan Municipality to deposit donor funds into a new bank account that she alleged had been verified by National Treasury and the Master. This was done notwithstanding the ongoing impasse concerning dispute over the appointment of the trustees.

[25] This request was denied by the Nelson Mandela Bay Metropolitan Municipality on the basis of the ongoing legal dispute, undeterred the respondent's attorneys, purporting to represent the NCI Trust sent a request to the municipality requesting payment be made into 'the updated account' on 12 May 2023.

[26] The Master on 16 May withdrew the letters of authority that it had authorised in respect of the 'new trustees' citing that the respondent had not informed the Master of the pending litigation that was ongoing in both seats of this division.<sup>16</sup>

[27] The Master withdrew the letters of appointment for the new trustees and confirmed that the applicant in this matter and the respondent, and no-one else, were in fact the trustees of the NCI Trust. This is in accordance with the original letters of authority dated 10 December 2020.

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<sup>16</sup> *National Construction Incubator v Lindani Dlomo* (KZD) case no. D3590/2023, heard on 6 April 2023 where the matter was struck from the roll with costs and *Chalwa N.O. and three others v Dlomo and three others* (KZP) case no. 6117/2023P, 17 May 2023 where the matter was postponed with directions.



[28] The next day, 17 May 2023, the applicants in this application enrolled an urgent application<sup>17</sup> ostensibly seeking an order to prevent:

- (a) The respondent from operating other bank accounts in the name of the NCI Trust, and
- (b) From encouraging donors to pay into any account without the consent of the applicants, and;
- (c) Not to encourage any donor to pay into any account other than the original ABSA account of the NCI Trust.

[29] Bedderson J made an interim order on 17 May 2023, which was later confirmed,<sup>18</sup> the following are the paraphrased terms of that order:

- (a) That the respondent is interdicted from opening any bank account in the name of the NCI Trust without the consent of the applicants.
- (b) Interdicting the respondent from encouraging any donor or potential donor to make payments into any bank account other than the original bank account of the NCI Trust.
- (c) The respondent is to restore full access to the premises and IT system of the trust to the applicants.
- (d) Supply on oath a full list of bank accounts and transactions opened by her.
- (e) The funds from these accounts are to be transferred respondent to the bona fide account of the NCI Trust.
- (f) No payments to be made from the trust without the written consent of the applicants.

[30] The next day, the respondent signed off on a payment schedule despite the order of Bedderson J. On 19 May 2023 the applicants requested the respondent to comply with the court order. On 24 May the respondent notified the employees of the Incubator that 'we have made the decision to place our operations on temporary hold until the outcome of the litigation process'.<sup>19</sup> There was no meeting of the trustees when this notification was made.

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<sup>17</sup> *Chalwa N.O. and three others v Dlomo and three others* (KwaZulu-Natal Division of the High Court, Pietermaritzburg) case no. 6117/2023P was postponed *sine die*, see also the indexed papers, vol 1, at 78.

<sup>18</sup> Per Mossop J on 28 June 2023.

<sup>19</sup> The indexed papers, vol 2, at 126.

[31] On 31 May 2023, despite the interim order of Bedderson J being effective, the respondent's attorney mailed the applicants purporting to represent the NCI Trust despite not being authorised to do so by the four trustees.<sup>20</sup>

[32] On 26 June 2023 an attorney representing Abrahams sent an email<sup>21</sup> to the applicants confirming that Abrahams did not sign the resolution of the NCI Trust dated 24 April 2023 conferring authority, nor did he sign the power of attorney dated 18 April 2023, these were subsequently used in the court applications.

[33] Attorneys for Dr Ndlovu sent an email to the applicants indicating that Dr. Ndlovu did not sign the power of attorney or the confirmatory affidavit supposedly deposited to on her behalf.<sup>22</sup> These documents were used in the applications instituted by the respondent.

[34] The applicants believing there was no full and substantial compliance with the order and an unwillingness on the part of the respondent to work as a part of the NCI Trust in accordance with her fiduciary duty to the trust approached this division for an order removing the respondent as a trustee of the NCI Trust

[35] The application was enrolled in motion court on 23 June 2023 and was opposed by the respondent. A consent order postponing the matter *sine die* was granted and the applicants were given leave to approach the senior civil judge for a preference date, with costs reserved.<sup>23</sup> Due to the voluminous papers filed the first available date on the special opposed motion roll was 16 October 2023

### **The intervening application**

[36] On 29 September 2023 the SEDA filed on notice of motion an urgent application for leave to intervene in these proceedings and that SEDA be granted the

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<sup>20</sup> The indexed papers, vol 2, at 132-133.

<sup>21</sup> The indexed papers, vol 5, at 448.

<sup>22</sup> The indexed papers, vol 5, at 450.

<sup>23</sup> Judge Sibiyi in paragraph 6 of her order also issued directives by which dates heads of arguments and practice notes had to be filed, at the time I started to read the papers to prepare on 5 October nothing had been filed in this regard by the first defendant. Defendant's heads of argument and practice note were handed up to the court on the date of the hearing.

right to present written submissions in advance of the hearing and oral argument at the hearing.

[37] SEDA also sought substantive relief which included a prayer for the removal of the applicants and respondent as trustees of the NCI Trust, replacing them with the appointment of an administrator and costs to be awarded should the application be opposed.

[38] All parties were given to 12 October 2023 to oppose the application and to file an affidavit setting out the grounds of opposition. On 11 October 2023 SEDA filed amended papers and served them on the litigants.

[39] The substantive relief now sought by SEDA included, inter alia:

- (a) An order appointing one Mr. L Matshidiso as the administrator of the NCI Trust alternatively;
- (b) To allow SEDA to appoint, within five days, an interim board of trustees to take over the daily administration of the NCI Trust;
- (c) That the Master be directed to either issue a letter of authority to the administrator or in the alternative appoint an interim board of trustees pending an investigation into the financial affairs of the NCI Trust and the conduct of the of the current trustees who are the applicants and respondent in the original application.
- (d) An order was sought directing the administrator or trustees appointed by the Master to complete the investigation into the conduct of the existing trustees within 120 days of being appointed, and/or
- (e) The four trustees, are to surrender their letters of authority issued by the Master immediately on the date of this order; or
- (f) In the alternative the Master to be directed to withdraw the letters of authority forthwith, and
- (g) In addition that the applicants' motion be dismissed, alternatively stayed pending the investigation report of the administrator or the interim board of trustees.
- (h) An order as to costs should the application be opposed.

[40] The founding affidavit of Mr Nkhosikona Mbatha was used in support of their application to intervene. The affidavit confirms that SEDA is an agency of the

Department of Small Business which provides non-financial support to small medium and micro enterprises (SMME's) and cooperatives throughout the Republic of South Africa. SEDA's main objectives coincide with the NCI Trust, it founded the trust and is fully funded by the Department of Small Business Development.

[41] In order for SEDA to fulfil its functions the NCI Trust was established in 2018. SEDA is the co-founder, main funder and the beneficiary of the NCI Trust. SEDA maintains that it should have been joined to this application as it has a direct and substantial interest in the application. The affidavit is, surprisingly silent, on why it did not seek to intervene in the other recent applications brought in this division as it was fully aware of the issues between the trustees from the outset.

[42] The founding affidavit of SEDA does not deal with the averments that pertain to the cause of the impasse between the applicants and the respondent, it does not illuminate any issues as to the conduct of the applicants and respondent. Instead, the affidavit focuses on the results of the conduct complained of in the papers. There is no attempt to interrogate the averments of either the applicant or respondent, to ascertain if there are real disputes of fact as to the cause of the issues that now confront the trust. SEDA instead maintains that the result of the conflict between the applicants and respondent is characterized by serious infighting that warrants the appointing of an administrator to administer the NCI Trust and simultaneously to investigate the cause of the conflict.

[43] SEDA justifies seeking the relief they do on the basis that donor money is currently being withheld because of issues at the NCI Trust, this resulted in employees and service providers not being paid and this opens the NCI Trust to legal challenges which directly impact upon SEDA and its ability to perform in terms of its mandate.

[44] The NCI Trust cannot fund the litigation of the trustees as that directly and negatively impacts upon their ability to properly mentor and assist its beneficiaries. SEDA in its founding affidavit asserted that the conduct of both the applicants and the respondent allows the court to exercise its inherent jurisdiction to remove them as trustees or appoint an administrator.

[45] The applicants filed a notice to oppose the substantive relief sought by SEDA but would abide by the decision of the court with regard to the prayer to be allowed to intervene. Somewhat ambiguously in its replying affidavits much was said indicating why intervention should not be allowed.

[46] Despite this ambivalence senior counsel for the applicants informed the court at the hearing that indeed the applicants had no objection to the intervening applicant been admitted to these proceedings, they merely opposed the substantive relief sought by SEDA.

[47] In respect of the application to intervene the respondent filed no papers and abides by the decision of the court. SEDA has indicated that it is no longer pursues the removal of the trustees but the key relief prayed for is now an order appointing an administrator. In respect of the substantive relief prayed for by SEDA it is now limited to the following:

- (a) The appointment of Mr Leeto Matshadiso as the administrator of the NCI Trust.
- (b) The Master to issue letters of authority to the administrator allowing the administrator to take over the daily administration of the trust.
- (c) The administrator is to conduct an investigation into the financial affairs of the NCI Trust and the conduct of the current trustees.
- (d) The administrator be directed to complete its investigation within 120 days.
- (e) The administrator may apply to the Master of an extension of time should investigation be incomplete but for not longer than 90 days.
- (f) All four trustees are temporarily suspended pending the outcome of the investigation conducted by the administrator.
- (g) The Master to withdraw letters of authority to give effect to the suspension.
- (h) The staying of all litigation between the parties pending the investigative report of the administrator.

### **Intervening application analysis**

[48] SEDA, in my view wisely does not pursue its prayer for the removal of the trustees at this time, it now seeks only to have this court appoint an administrator. I say wisely, as its own founding affidavit read with the affidavits filed on record do not support the removal of the trustees either in fact or in law.

[49] The response of the applicants in their replying affidavit was that even if this enmity impacts upon beneficiaries, it is not, in law, a ground to remove the trustees, especially in the face of what they refer to as 'indisputable evidence of the Respondent's maladministration, malfeasance and breach of fiduciary duty this relief is not countenanced by our law.'

[50] Mere friction or enmity between the trustees and beneficiaries will not in itself be adequate reason for the removal of the trustees. Nor would mere conflict amongst trustees be a sufficient reason. Ultimately the question is whether the removal will, as required by s 20(1) of the Act, be 'in the interest of the trust and its beneficiaries'.<sup>24</sup>

[51] The applicants acknowledge the importance of their relationship with SEDA, the existence of the NCI Trust is founded on the aims and objectives of SEDA and their appointments as trustees is to support and provide leadership and oversight in the attainment of these objectives.

[52] However, their appointment as trustees demands that they maintain their independence and uphold their fiduciary positions and integrity and this demands that they act in the best interests of the NCI Trust, which is a public benefit organization. This has to be done without fear or favour, noting that the NCI Trust and SEDA have a joint responsibility to the public, this court, and their funders to be transparent about this matter.

[53] On a scrutiny of the papers there is no evidence on the common cause facts of the applicants acting directly to undermine the NCI Trust, the evidence discloses

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<sup>24</sup> *Gowar and another v Gowar and others* [2016] ZASCA 101; 2016 (5) SA 225 (SCA); [2016] 3 All SA 382 (SCA), *Tugh NO and another v Rajbansi and others* [2018] ZAKZDHC 12 para 8.

that the applicants merely seek to exercise their fiduciary duty towards the beneficiaries of the NCI Trust in accordance with the trust deed and objects of the trust.

[54] The applicants' response to SEDA applying to the court appoint on an interim basis an administrator is flawed in law as it would usurp the function of the Master, it would be from the outset a nullity, void *ab initio* and ultra-vires the provisions of section 16(2) of the Act.<sup>25</sup> The power to appoint an administrator is the statutory preserve of the Master and no one else.

[55] Counsel for the intervening applicant relies on *Dladla N.O v Lamula N.O*<sup>26</sup> to refer to an example where the court had made an order in the terms sought by SEDA. It is important to note that in *Dladla N.O.* there was no challenge to the legality of that decision.

[56] It is not the only time a high court has made the order sought by SEDA, in *Van der Meulen v Ras N.O.*<sup>27</sup> Ledwaba J, in a matter where there was enmity between a purported beneficiary and the trustees stated:

'As it is clear in the papers that there are disputes of facts in respect of certain issues and there is an allegation that the trustees did not act in good faith . . . It will not be proper, in my view, to replace the trustees unless a proper investigation has been conducted by the [Master].'

[57] Ledwaba J ordered the Master in *Van der Meulen v Ras* to 'carry out an investigation in terms of Section 16 of the Trust Property Control Act 57 of 1988 a copy of the report to be served on the applicant and respondent's attorneys of record'.<sup>28</sup>

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<sup>25</sup> Applicant's heads of argument at 2-3, paras 2-5.

<sup>26</sup> *Dladla N.O and others v Lamula N.O and others* [2022] ZAGPPHC 868.

<sup>27</sup> *Van der Meulen v Ras N.O. and others* [2009] ZAGPPHC 313 para 32.

<sup>28</sup> *Van der Meulen v Ras N.O. and others* [2009] ZAGPPHC 313 para 35, see para 1 of the order.

[58] Ledwaba J's judgment subsequently went on appeal to the Supreme Court of Appeal (the SCA). I align myself with the dicta of Leach JA *Ras NO v Van der Meulen*<sup>29</sup> where he said:

'The court a quo also erred in ordering the Master to carry out an investigation. Under s 16(1) of the Act, the Master has a wide discretion to call upon trustees at any time to account to him. Section 16(2) further provides that the Master may, "if he deems it necessary, cause an investigation to be carried out . . . into the trustee's administration or disposal of trust property". *The discretion to call for such an investigation vests solely in the Master. It is not alleged that the Master had in anyway acted improperly in the exercise of that discretion, and it was therefore not competent for the court a quo to direct him to carry out an investigation.*' (my emphasis, footnote omitted)

[59] Similarly in *Master of the High Court NGP v Motala NO*<sup>30</sup> in which the court was dealing with a statutory provision reserving to the Master the power to appoint a judicial manager in insolvency proceedings Ponnann JA said:

'Any doubt as may have existed as to the power of the high court to appoint judicial managers — and to my mind there ought to have been none — has now been laid to rest by the judgment of Bertelsmann J in *Ex parte The Master of the High Court South Africa (North Gauteng)* 2011 (5) SA 311 (GNP). In that matter the Master saw fit to approach the high court for declaratory relief. What motivated the application appears from the reported judgment (paras 2-4), which reads:

"The application has been necessitated by a practice that has developed over the past years that attorneys who apply for the sequestration of individuals or the liquidation of companies (or, for that matter, close corporations), or for judicial management of a company in terms of the Companies Act 61 of 1973 (see now Act 71 of 2008), include a prayer in the notice of motion and draft order for the appointment of a specific individual as trustee or provisional trustee, as liquidator or as provisional liquidator or judicial manager or provisional judicial manager.

Advocates who are instructed to appear in these applications, usually in the unopposed motion court, move for orders in these terms, and, as is apparent from a number of orders granted by judges of this court, do so successfully.

The Master contends that such orders are in conflict with the clear provisions of the relevant statutory provisions, and that officers of the court should not apply for, and

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<sup>29</sup> *Ras and others NNO v Van der Meulen and another* 2011 (4) SA 17 (SCA) para 10.

<sup>30</sup> *Master of the High Court Northern Gauteng High Court, Pretoria v Motala NO and others* [2011] ZASCA 238; 2012 (3) SA 325 (SCA) para 7.



this court should not grant, orders that interfere with the exercise of the applicant's functions.”

Ponnan JA went on to quote the order issued by Bertelsmann J in *Ex parte The Master of the High Court*,<sup>31</sup> where Bertelsmann J declared that the Master ‘is the only person authorised to appoint’ trustees and provisional trustees where an estate is sequestrated, liquidators or provisional liquidators in the provisional or final liquidation of a company or close corporation, judicial managers or provisional judicial managers where a company is placed under final or provisional judicial management. The last part of the order reads that ‘no judge of the High Court of South Africa has authority or jurisdiction to effect any appointment of any person to any of the positions referred to in paragraph 1.’

[60] These decisions of the SCA are binding precedent and are dispositive of the substantive relief sought by SEDA. The application to have an interim administrator appointed must fail, this court has no jurisdiction in these circumstances to make such an order.

[61] In respect of the other grounds of objection to the substantive relief it suffices at this point to note that the manner in which SEDA engaged with the papers filed by both sides would have struggled to sustain a finding that the applicants’ conduct in the matter as opposed to that of the respondent justified such an order. I decline, in light of my findings herein, to deal with the applicants’ other arguments on why the relief should be refused. SEDA’s application for substantive relief fails.

### **Application to remove the respondent as trustee**

[62] Section 20(1) of the Act provides that:

‘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.’

[63] Koen J in *Tugh N.O. v Rajbansi*<sup>32</sup> in a concise exposition of the law in this regard wrote,

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<sup>31</sup> *Ex parte the Master of the High Court South Africa (North Gauteng)* 2011 (5) SA 311 (GNP) para 44.

<sup>32</sup> *Tugh NO and another v Rajbansi and others* [2018] ZAKZDHC 12 para 8.

'Proof of misconduct, dishonesty or mala fides is not essential for the removal of executors or administrators. In *Volkwyn N.O. v Clarke and Damant Murray J* held:

"the essential test is whether such disharmony as exists imperils the Trust estate or its proper administration".' (footnotes omitted)

[64] In a recent judgment of this division, E Bezuidenhout J held that:<sup>33</sup>

'Section 20(1) of the Act does not specify any grounds for removal, other than that the court should be satisfied that the removal will be in the interests of the trust and its beneficiaries. I was referred to *Tijmstra NO v Blunt-Mackenzie NO and others* where it was inter alia held that "[w]henver trust assets are endangered a trustee should be removed".'

[65] Conflict or dislike between trustees or between a trustee and the beneficiaries are not in themselves suitable reasons for the removal of a trustee: '[ultimately] the question is whether the removal will, as required by s 20(1) of the Act, be "in the interest of the trust and its beneficiaries".'<sup>34</sup>

### **Duties of trustees**

[66] In *Doyle v Board of Executors*<sup>35</sup> it was said that despite the contractual nature of a trust, it is 'unquestionable that a trustee occupies a fiduciary office. By virtue of that alone he owes the utmost good faith towards all beneficiaries, whether actual or potential.'

[67] Koen J in *Tugh NO*<sup>36</sup> provided the following helpful summary of the law applicable to trustees:

- '(a) A trustee must administer a trust estate with the utmost good faith and in the best interest of the trust beneficiaries;
- (b) A trustee must act with impartiality, which implies the avoidance of a conflict between the trustee's personal interest and those of the beneficiaries;
- (c) A trustee is obliged to conserve trust property;
- (d) A conflict between interest and duty, whether arising from an act of the Trustee, such as a claim made against the Trust estate, or from independent causes, is a ground for removal;

<sup>33</sup> *Vorster N.O v Buthelezi and others* [2023] ZAKZPHC 109 para 86.

<sup>34</sup> *Tugh NO and another v Rajbansi and others* [2018] ZAKZDHC 12 para 8.

<sup>35</sup> *Doyle v Board of Executors* 1999 (2) SA 805 (C) at 831A-B. See also *Harvey NO and others v Crawford NO and others* [2018] ZASCA 147; 2019 (2) SA 153 (SCA) para 45.

<sup>36</sup> *Tugh NO and another v Rajbansi and others* [2018] ZAKZDHC 12 para 5.

(e) A trustee can be removed from office by the court if continuance in office would prevent the proper administration of a Trust or be detrimental to the welfare of the trust beneficiaries and the Trust Estate.’ (footnotes omitted)

[68] Koen J further pointed out that<sup>37</sup>

Although this court has the power in terms of s 20 of the Trust Property Control Act 57 of 1988 or using its inherent power to remove a trustee where continuous occupation of the office of the trustee will prevent the Trust from being properly administered or be to the detriment of the beneficiaries, such power must be exercised with circumspection and only where the removal of the Trustee will be in the interest of the Trust and its beneficiaries. The First Respondent in this regard relied on the decision in *Gowar and another v Gowar and others* (‘*Gowar*’).

[69] Koen J further in *Tugh NO*,<sup>38</sup> with reference to *Gowar v Gowar*<sup>39</sup> stated as follows:

‘In *Gowar* attention was *inter alia* drawn to the following:

(a) In *Land and Agriculture Bank of South Africa v Parker and others* Cameron JA held that:

“[A Trust] an accumulation of assets and liabilities. These constitute the trust estate, which is a separate entity. But though separate, the accumulation of rights and obligations comprising the trust estate does not have legal personality. It vests in the trustees, and must be administered by them – and it is only through the trustees, specified as in the trust instrument, that the trust can act”;

(b) Where more than one trustee has been specified in the Trust Deed they share a common fiduciary obligation towards the fulfilment of the objects of the Trust and must act jointly;

(c) In terms of s 9(1) of the Trust Property Control Act:

“(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”;

(d) Kotze JA in *Sackville West* said that:

“a tutor must observe greater care in dealing with his ward's money than he does with his own, for, while a man may act as he pleases with his own property, he is not at liberty to do so with that of his ward. The standard of care to be observed is

<sup>37</sup> *Tugh NO and another v Rajbansi and others* [2018] ZAKZDHC 12 para 5(f), referring to *Gowar and another v Gowar and others* [2016] ZASCA 101; 2016 (5) SA 225 (SCA); [2016] 3 All SA 382 (SCA) paras 27 and 30.

<sup>38</sup> *Tugh NO and another v Rajbansi and others* [2018] ZAKZDHC 12 para 6.

<sup>39</sup> *Gowar and another v Gowar and others* [2016] ZASCA 101; 2016 (5) SA 225 (SCA); [2016] 3 All SA 382 (SCA).

accordingly not that which an ordinary man generally observes in the management of his own affairs, but that of the prudent and careful man; or, to use the technical expression of the Roman law, that of the *bonus et diligens paterfamilias*.”

(e) This was reaffirmed in the context of trusts in *Administrators Estate Richards vs Nichol and another*.’ (footnotes omitted)

### **The trust deed**

[70] The deed of trust regulates and defines how the NCI Trust operates and the duties of the trustees to ensure compliance with the directives of the deed.<sup>40</sup> is the trust deed recorded that the

‘3.1 SEDA Technology Programme. (STP) is a programme of SEDA aimed at increasing economic growth and employment creation through the enhancement of technological innovation, improvement in productivity and accelerated international competitiveness of South Africa’s SMME’s.

3.2 STP wishes to establish a centre of excellence and development support for small enterprises in the construction sector in KZN which will foster growth and lead to the establishment of sustainable businesses.’

[71] The primary objectives of the trust as stated in the deed inter alia are:

‘4.2.1 To receive capital construction

4.2.2 Set up a business framework for incubation.<sup>41</sup>

...

4.2.4 Use the Capital Contributions for purposes of Incubation.

...

4.2.7 Enter into any agreement as may be necessary to implement any of the above objects.

4.2.8 Carry out all such further activities provided for in the Trust Deed and/or any other activities necessary for or which will further the objects set out above.’

### **Meetings and decisions of the trustees**

<sup>40</sup> Indexed pages vol 1, at 85-102

<sup>41</sup> Incubation is defined in para 2.1.0 of the trust deed as meaning ‘the process of nurturing SMME’s in the South African Construction Industry and assisting them to grow and achieve Target Construction Sector Grading, which process shall involve among other things mentorship, technical and business support, marketing and facilitation of networking opportunities.’

[72] With regard to attending to the business of the trust, the trust deed requires that:

- (a) At least four (4) meetings a year are required,<sup>42</sup>
- (b) These meetings may be convened by the chairperson or any trustee, at each meeting of the trustees shall have one vote<sup>43</sup> with the chairperson holding the casting vote.
- (c) Representatives of the beneficiary and other role-players may be invited to attend meetings of the trustees but may not vote at any meeting.<sup>44</sup>
- (d) A written resolution signed by all trustees is also deemed to be valid in terms of 7.7 of the trust deed.<sup>45</sup>

[73] The powers of the trustees according to the trust deed include inter alia: -

- (a) The Trustees shall do all things necessary to give effect to the objectives of the Trust as envisaged 4.2 of the Deed.<sup>46</sup>
- (b) Trustees shall not engage in any activity nor enter into any agreement or transaction which compromises or is not contemplated in the objectives of the Trust.<sup>47</sup>
- (c) The trustees may incur any liabilities on behalf of the Trust other than pursuant to the fulfilment of the objectives of the Trust.<sup>48</sup>
- (d) The Trustees have the power to make use of the services of professional advisors, management consultants and/or employees to carry out the aims and objectives of the Trust and to pay for those services.<sup>49</sup>
- (e) The trustees may accept donations or bequests on behalf of the trust from anybody subject to the terms and conditions of the trust deed and subject to the terms and conditions of such donations.<sup>50</sup>
- (f) The trustees can apply to do fund-raising for the trust if deemed necessary.<sup>51</sup>

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<sup>42</sup> Trust deed; 7.2 page 94. of volume 1 of the indexed papers

<sup>43</sup> Ibid 7.4

<sup>44</sup> Ibid 7.9

<sup>45</sup> Ibid 7.7

<sup>46</sup> 8.2.1 of the trust deed at page 96-97 of the indexed papers volume 1.

<sup>47</sup> Ibid 8.2.2

<sup>48</sup> Ibid 8.2.3

<sup>49</sup> Ibid 8.2.7.8

<sup>50</sup> Ibid 8.2.7.10

<sup>51</sup> Ibid 8.2.7.11

[74] The remuneration of the trustees is regulated by the trust deed, which states as follows:

'10.1. The Trustees shall be entitled to a fee or an amendment to the fee in an amount to be agreed between the beneficiary and the Trustees from time to time and to be reimbursed by the Trust for any reasonable administrative expenses which may be incurred in their capacities as Trustees as agreed between the Beneficiaries and the Trustees.

10.1.2 Contribution to the trust are required to be used for purposes of incubation.'

[75] The respondent is not just the CEO of the NCI Trust she is one of four trustees. The core function of the trustee is to ensure that the trust's aims and objectives as provided in the trust deed are achieved. Although she is the CEO, she is a trustee and bound by the duties that attach to being a trustee. She bears the fiduciary duties of a trustee even if she is in charge of the management of the trust on a daily basis.

[76] Even where the respondent took decisions as the CEO after consulting with her management team at the Incubator the respondent was required to ensure that where those decisions impacted upon the NCI Trust that she would obtain the necessary ratification of all the trustees. This requirement is illustrated in the recent decision of *Shepstone and Wylie Attorneys v De Witt NO*<sup>52</sup> where the SCA said:

'Equally trite, is the principle that trustees must act jointly in taking decisions and resolutions for the benefit of the Trust and beneficiaries thereof, unless a specific majority clause provides otherwise. Trustees are legally bound to comply with the terms of the trust deed. In line with their fiduciary duties, trustees must be legally authorised to act through competent resolutions.'

[77] Instructive with regards to the issues in this matter, is the following, where Mbatha JA, quoting from *Thorpe v Trittenwein*,<sup>53</sup> said:<sup>54</sup>

'In *Thorpe and Others v Trittenwein and Another* 2007 (2) SA 172 (SCA); [2006] 4 All SA 129 (SCA), this Court endorsed the principle that unless the trust deed provides otherwise the trustees must act jointly if the Trust is to be bound by their acts. At paragraph 14, this Court expressed itself as follows:

<sup>52</sup> *Shepstone and Wylie Attorneys v De Witt NO and others* [2023] ZASCA 74 para 20.

<sup>53</sup> *Thorpe and others v Trittenwein and another* 2007 (2) SA 172 (SCA), [2006] 4 All SA 129 (SCA).

<sup>54</sup> *Shepstone and Wylie Attorneys v De Witt NO and others* [2023] ZASCA 74 para 21.

“The answer, I think, is that even if one regards the decision of the co-trustees to enter into the agreement of sale as no more than a matter of internal trust administration, the point remains that in the absence of a joint decision of the co-trustee (or the majority if that is all the trust deed requires), the assent of a single trustee will not bind the trust.”

Most importantly, the court stated the following:

“A trustee who was not a party to the decision making process and who therefore has not authorized the contract would be free to contest the validity of the transaction.”

[78] Mbatha JA further stated that:<sup>55</sup>

‘In *Steyn and Others N N O v Blockpave (Pty) Ltd* 2011 (3) SA 528 (FB) (*Blockpave*), the court succinctly drew the distinction between internal and external business with outsiders. The court held that although trustees may disagree internally on a matter, they are prohibited from disagreeing externally. Internal matters may be debated and put to a vote, thereafter the voice of the majority will prevail. However, in so far as the Trust is required to deal with external business all trustees are required to participate in the decision-making.’

[79] The common cause facts as disclosed by the affidavits filed on record reveal that the respondent as CEO of the Incubator made unilateral decisions pertaining to the running of the NCI Trust, that directly impacted upon the NCI Trust’s ability to optimally perform its functions in accordance with the demands imposed upon it by the trust deed, without involving the other trustees at all.

[80] Decisions were made by the CEO that bypassed the trustees, these were objectively undermining the proper functioning of the NCI Trust and when concerns were raised by the applicants, quite properly as trustees, the respondent reacted in a manner that has culminated in this hearing.

[81] It is necessary to remind oneself that the NCI Trust is a public benefit organisation mandated to develop and mentor emerging construction companies in South Africa. To this purpose the Trust Deed regulates the conduct of the Trustees in the manner in which they achieve this purpose. The Trustees carry a fiduciary duty to act in the furtherance of the objectives of the Trust within the parameters set in the Deed of Trust. The NCI Trust is an entity that is managed in terms of the Trust Deed

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<sup>55</sup> *Shepstone and Wylie Attorneys v De Witt NO and others* [2023] ZASCA 74 para 22.

not outside of the Trust Deed. Compliance with the Trust is the responsibility of all the trustees, it cannot be delegated to another body or individual. The Incubator itself has to act in accordance with the trust deed. Merely the stating of the duty imposed by law on a set of trustees is an indication of the problematic actions of the respondent.

### **Application for removal of trustee**

[82] Counsel for the applicant, Mr Ramdhani SC, and Mr Mhlabathi for the respondent, made lengthy submissions before me. Heads of argument had been filed and the papers are voluminous.

[83] Due to the content of the heads of argument filed on record, especially those of the respondent, before being addressed, I requested the legal representatives to address me with specific reference to the aims and objects of the NCI Trust as provided in the trust deed. I invited them to address me on how the conduct of the respondent addressed the aims of the NCI Trust.

[84] It concerned me that the arguments particularly, about the conduct of the respondent, made very little reference to the trust deed, i.e. what her responsibilities were in terms of the obligations imposed upon her by the position she held and in particular her fiduciary duty owed to the NCI Trust. None of the issues raised by the respondent's legal representative dealt with these duties, instead the respondent attacked the bona fides of the applicants and that, as CEO, she was making decisions in the best interests of the Incubator.

[85] Bearing in mind the issues to be decided, it is perhaps more expedient to first highlight and discuss the submissions made on behalf of the respondent.

### **Points *in limine***

[86] In her heads of argument, the respondent has raised some *in limine* challenges to the application. One of these included the non-joinder of SEDA to the application,<sup>56</sup> somewhat surprisingly Mr Mhlabathi persisted with this argument

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<sup>56</sup> The respondent's heads of argument at 4 para 4.



notwithstanding the fact that SEDA were allowed to intervene by consent. They were a party to the proceedings so it makes the issue of their non-joinder moot.

[87] In respect of the submission that the applicants do not have the authority to remove trustees as the trust deed states that the beneficiary is the person who may remove beneficiary appointed trustees. The law is settled, those that have a substantial interest in the matter may apply to a competent court for the removal of a trustee. The trustees in this matter as per the trust deed are independent appointees and the beneficiary cannot remove them unless by a court application.<sup>57</sup>

[88] He argues that the same or similar allegations, including one as to who the rightful trustees are, these are pending in other courts and that they should be finalized first. The SCA has repeated what is required in order to find a claim of *lis alibi pendens*.<sup>58</sup>

‘Fundamental to the plea of *lis alibi pendens* is the requirement that the same plaintiff has instituted action against the same defendant for the same thing arising out of the same cause.’

[89] No action has previously been instituted for the removal of any trustee, the Master has filed an affidavit stipulating who the trustees of the NCI Trust is. The issue of the removal of the respondent is not before any other court.

### **Authority to bring the action**

[90] The applicants and respondent are cited as nominee officio, however in their Uniform rule 7(1) notices they correctly allege that they bring the application in their personal capacities. As trustees they have sufficient interest in the matter to find locus standi.

[91] The applicants have cited the respondents in her official capacity. This is not in line with the authorities. E Bezuidenhout J, in *Vorster NO v Buthelezi*<sup>59</sup> stated ‘an application for the removal of a trustee should be brought against the trustee in his or her private, and not representative, capacities.’

<sup>57</sup> Section 20(1) Trust Property Act 57 of 1988.

<sup>58</sup> *Hassan and another v Berrange NO* 2012 (6) SA 329 (SCA) para 19.

<sup>59</sup> *Vorster N.O v Buthelezi and others* [2023] ZAKZPHC 109 para 112.

Despite the application referring to the applicants and respondent in their official capacities in terms of the rule 7(1) notice the issue is resolved.

### **Merits**

[92] The applicants allege that an investigation revealed highly concerning conduct on the part of the respondent. The applicant's founding affidavit, as deposed to by the first applicant, lists the following as the grounds on which the applicants assert that the respondent should be removed as a trustee:<sup>60</sup>

- (a) The misappropriation of NCI Trust funds; and
- (b) Introducing a financial scheme inconsistent with the NCI Trust deed.
- (c) Introducing a financial scheme inconsistent with the objects of the NCI Trust deed.
- (d) Refusing to accept the withdrawal of the letters of authority of the Master.
- (e) Locking out the appointed trustees from the Incubator and all of its infrastructure.
- (f) The respondent opened a bank account and directed payments into the new account controlled despite the court order of Mossop J.
- (g) She failed to comply with the court order of Bedderson J, i.e. to restore the applicants' access to the information technology (IT) infrastructure.
- (h) She purported to act on behalf of a newly appointed trustees on two occasions without the requisite authority to litigate on their behalf.
- (i) Without the necessary authority of the trustees, following the order of Bedderson J, the respondent shut down the business of the NCI Trust and sent employees home.
  - (i) The respondent claimed legal fees from the NCI Trust despite never having secured authority to litigate in the trust's name.
  - (ii) She unilaterally granted salary increases as much as 25 percent to herself.
  - (iii) The respondent used the NCI Trust for personal gain and did not advance the interests of the NCI Trust as a public benefit organisation.
  - (iv) She received a commission payment or finder's fee of R125 000 for a donation from public funds.

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<sup>60</sup> Indexed papers, vol 1, at 17. This is also contained in the chronology.

[93] I am mindful of the factual disputes that are present in the affidavits filed by the applicants and the respondents. The correct approach is where<sup>61</sup>

‘in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact.’

[94] In this particular matter the manner in which the respondent on the facts contained in the affidavits before me, even when considered as favourably as possible in her favour leave the result inevitable. In this judgment I set out the duties of the trustees to administer the trust as a collective and that duty has been completely disregarded by the respondent. The chronology reflects examples of where the respondent failed in her duty to act in accordance with the trust deed when she unilaterally without the rest of the trustees’ approval embarked on litigation and authorised payment structures that flew in the face of her fiduciary duty.

[95] She has instead embarked upon a journey as the CEO to run the NCI Trust as an independent entity enriching herself at the expense of the aims and objectives stated in the trust deed to the detriment of the beneficiaries. The respondent made decisions without reverting to her fellow trustees and without a resolution of the trustees to act.

[96] It was submitted by the applicants that the respondent ‘disregarded the fact that once funds are donated to a trust, it becomes a trust asset which must be distributed in terms of the provisions of the trust deed’.<sup>62</sup> It is the fiduciary duty of the trustees collectively to ensure that this is done. The functions of the trustees are to meet, to pass resolutions to ensure that the aims of the trust are met. It is clear to me, as sure as night follows day, that the respondent embarked upon a journey as

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<sup>61</sup> *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E - 635C, *Wightman t/a JW Construction v Headfour (Pty) Ltd and another* 2008 (3) SA 371 (SCA) para 12, and *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 26.

<sup>62</sup> *Vorster N.O v Buthelezi and others* [2023] ZAKZPHC 109 para 77.

the CEO of the Incubator to make decisions impacting upon the goals of the trust without attempting to comply with the NCI Trust's rules and requirements. It is abundantly clear that she regarded the management board as being the proper forum by which decisions were made and ignored her fellow trustees' fiduciary duty to practice oversight over these decisions.

[96] Once it became apparent that the investigation ordered into her misconduct had exposed serious cases of maladministration and malfeasance she embarked on a mission to protect herself by rendering the trustees ineffective.

[98] Instead of dealing with the notice of suspension and her position in conjunction with the other trustees within the parameters of the trust deed the respondent approached the founding beneficiary and the management of the operational work of the NCI Incubator to assist her in removing the suspension. She directly and deliberately conducted herself contrary to her fiduciary duty to the NCI Trust.

[99] The preliminary investigations into the conduct of the respondent revealed numerous cases of payments not properly authorised, some with apparently serious deficiencies. In light of the view I take I will not do into any great detail in respect of these, it suffices to notes that the manner in which some of these factual complaints have been responded to in the answering affidavits of the respondent have not disclosed a bona-fide dispute of fact with the factual averments of the applicant.

[100] The most disturbing aspect is the manner in which the respondent has been remunerated. She is the CEO of the Incubator, as a trustee holding such a senior position in the day to day management of the NCI Trust and Incubator her fiduciary duty to the trust to ensure the proper management of the NCI Trust's funds should be paramount in her mind. In particular, her remuneration as the CEO, outside of mere expenses that she is entitled to as a trustee, could only be ratified by a resolution at a meeting of the trustees.

[101] The trustees, in accordance with the trust deed, are the only people entitled to vote on this issue. To glibly say the board approved it by a vote when there was no

vote of the trustees and no duly authorised resolution of the trustees reveals a flagrant and devastating breach of her duty to act in the utmost good faith to the NCI Trust and its beneficiaries. The management board of the Incubator had no right to vote on either her remuneration as the CEO or any bonus commission scheme that she might be entitled to.

[102] It is the examination of the salary increase of 25% and the 10% finder's fee that underscore the unfitness of the respondent to be a trustee. I deal firstly with the finder's fee through which the respondent received a finder's fee payment of R125 000 from a donation to the NCI Trust by SEDA.<sup>63</sup> The majority of the funds sourced by the NCI Trust are donations from municipalities and government entities, this renders the finder's fee hugely problematic. When looked at it in the light of the fact that SEDA as the founder of the NCI Trust, is legally obligated to fund the trust, it is the NCI Trust's primary donor and beneficiary. The decision to pay to the CEO a finder's fee in such circumstances is incomprehensible, especially in light of a trustee's duty to the trust.

[103] SEDA over a period of 3 years has donated R10 million per annum to the NCI Trust. It is legally obligated to do so as the trust is one of the main vehicles used to achieve the goals of SEDA. Without its contributions the NCI Trust would face serious challenges, indeed it probably could not operate. Simply stated the respondent in terms of this scheme would be enriched in the amount of approximately R1 million rand per annum. This enrichment through this scheme would be as a result of her doing absolutely nothing and in direct contravention of the stipulation in the trust deed that all funding be used for incubation.

[104] Those who work and are remunerated on the basis of a finder's fee protocol can benefit without necessarily being actively involved in the sourcing of the donor funding. Many entities operate on that basis, that is easily accepted. If the prescripts of the finder's fee agreement allowed it, then it would be due and payable.

[105] What is completely unacceptable is the following:

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<sup>63</sup> Indexed pages, vol 2, at 104.

- (a) Where an employee takes a finder's fee, from the legally obligated primary donor, who donates money from the public fiscus to the Incubator and that donation is in aid of the work of the Incubator, i.e. to assist SMMEs to gain a footing in the construction industry, this behaviour defies comprehension.
- (b) There is no sourcing of, or the need to find, an income stream, SEDA has to donate money.
- (c) The taking of the finder's fee, in light of the above, is exacerbated when the employee is in fact a trustee, who is charged with ensuring that donated funds are used to achieve the aims and objectives of the NCI Trust.
- (d) The deed requires that all funding is to be used for incubation, it cannot be used to pay a finder's fee or commission.
- (e) There is no resolution by the trustees of the NCI Trust authorising the paying of a finder's fee, noting that the trust could not have, in the proper exercise of their fiduciary duty, authorised this fee.
- (f) This is a gross abuse of the respondent's position within the trust and placed herself in direct conflict with the purpose of the trust.

[106] The respondent's conduct on this aspect falls well short of complying with her duty to the NCI Trust as a trustee. The respondent's actions are the opposite to promoting the objects of the 'Incubator Trust,' which include the promoting and upliftment of emerging construction companies and thereby creating sustainable businesses. All she did was deplete the funds available to the trust that should be used for the purposes of incubation. It is another illustration of the respondent acting outside of her duties towards the NCI Trust and failing to protect the income of the trust. It is a clear example of maladministration.

[107] Paragraph 4.2.4 of the trust deed specifically states; that 'the funds donated and all capital contributions had to be used for purposes of Incubation'. The respondent was thus prevented by the trust deed from using these contributions other than for incubation.

[108] The duty of a trustee in respect of the trust with regard to the finances of the trust was set out earlier per Koen J in *Tugh NO*.<sup>64</sup> The respondent was required to

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<sup>64</sup> *Tugh NO and another v Rajbansi and others* [2018] ZAKZDHC 12 para 6(d).

act with 'great care' when dealing with the NCI Trust money, the standard quoted was that of the *bonus et diligens paterfamilias*. Her behaviour is in stark contrast with this requirement.

[109] In the founding affidavit of the applicants the respondent is described as believing '*that she is the be all and end all of the trust*'.<sup>65</sup> That may in large part be correct but the better description, in my view is that, she simply ignored her duties as a trustee to the NCI Trust.

[110] This is aptly shown when the respondent took a 25% salary increase, which meant that instead of earning R1 630 804,00 per annum, she now earned R2 049 755.00 per annum. When this increase was agreed there was no meeting of the trustees, there was no resolution authorising the large increase, merely the submission in her papers that her management board at the Incubator had approved the increase.

[111] This increase could only have been approved by the trustees at a meeting with only the trustees voting on the issue. Taking into account the cost to the entity this would be a decision that needed to be responsibly taken considering the fiduciary duty of all the trustees. She simply circumvented the NCI Trust by having her increase ratified by her management board at the Incubator whereas only the trustees should have voted on a salary increase for the CEO.

[112] In returning to the issues that had to be decided, I am of the view that the respondent was not entitled to pay or distribute the funds in the way she did and that these payments were made contrary to the objects of the NCI Trust and accordingly directly prejudicial to the trust property and the beneficiaries of the trust.

[113] The exposure of her financial maladministration triggered a set of events and litigation in this division by the respondent whereby she tried to remove the applicants from the NCI Trust. The respondent denied the applicants access to the premises and the IT infrastructure without the authorisation of a majority of the trustees. This was in direct conflict with her fiduciary duty as a trustee.

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<sup>65</sup> The indexed papers, vol 1, at 23, para 50.

[114] She litigated without the authorisation of the majority of the trustees, and purported to represent the NCI Trust, she engineered the removal of the trustees by the Master through deceit and encumbered the trust with the costs of the litigation. With respect to the argument of Mr Mhlabathi that it has not been proved who forged the signatures on the powers of attorney of the 'replacement trustees' does not assist the respondent. She drove the replacement of the current trustees with the new trustees, she was in the unique position of knowing the process that was followed and how the documents were signed. Her failure to explain how the documents were signed in the circumstances is fatal to her denial that documents used to initiate litigation were fraudulent.

[115] There is no bona fide dispute that documents used in the earlier legal proceedings, in particular, the power of attorneys, were not signed by those persons named on the power of attorney document. The applicants laid sufficient basis for that conclusion, the respondent is in the best position to set the record straight. She chose not to do so when it would have been simple for her to do so. Whilst her attorney was proceeding with the application, between them they must have known where the source of those signatures were. In such a case her averments in her affidavit do not create any bona-fide dispute of fact on this aspect..

[116] The manner in which she litigated before the high court, how she unilaterally purported to represent the NCI Trust in the application before Chetty J in Durban is unacceptable for a trustee. The subsequent failure to comply with the order of Bedderson J and directly and through her attorney requesting donors to pay money into a bank account contrary to the directives of that court order that specifically prohibited this conduct, is contemptuous and indicative of someone who is not acting in any accordance with a fiduciary duty.

[117] The close proximity in time between the surfacing of the preliminary report implicating the respondent in possible maladministration and financial irregularities and the respondent's actions designed to get rid of the current trustees is telling. In direct conflict with her duties as a trustee the respondent embarked on a path of self-preservation at the expense of the NCI Trust. The respondent was no longer acting



on behalf of the trust but to protect her misconduct from exposure by the other trustees.

[118] The precedent referred to earlier makes it clear that trustees will be removed when their continuance in office will be detrimental to the trust property and the beneficiaries. I must be satisfied that that the removal will be in the interest of the trust and the beneficiaries.

[119] SEDA's unwillingness to deal with the facts of what occurred within the trust that fundamentally undermined the aims of SEDA is disappointing, especially when the information was readily available to them. They instead chose not to engage with the factual issues. If they had done so the conclusion they had to come to would have been that the reality is, on the undisputed facts in this application, it is in the NCI Trust's interest, SEDA's interest and all the beneficiaries' interest, that the respondent be removed.

[120] I am unable to cover all the material contained in the papers for this ruling, the record is vast, I have carefully considered the papers filed, the heads of argument filed along with the practice notes, and after a consideration of all the material believe that the application must inevitably succeed. The respondent's conduct is the antithesis of what the fiduciary duties of a trustee demand.

[121] I have not said much about the submissions made on behalf of the applicant. I agree with applicants' counsel that the applicants were justified in bringing the application and that the respondent breached her fiduciary duties in respect of the NCI Trust in the manner described above. On a reading of the papers and listening to the submissions of counsel, for which I am grateful, I conclude that the respondent has conducted herself in a manner completely unbecoming a trustee.

[122] I also agree that the respondent's continuance in office would indeed be detrimental and prejudicial to the welfare of the NCI Trust and all its beneficiaries. I therefore have no hesitation to conclude that the first respondent should be removed as a trustee of the NCI Trust. In respect of the amended substantive relief sought by SEDA in their intervention application, I reiterate that their application is dismissed.

## Costs

[123] In *Vorster*<sup>66</sup> E Bezuidenhout J quoting with approval from *Honore*<sup>67</sup> states 'A trustee who is removed may be ordered to pay the costs out of his or her own pocket (*de bonis propriis*) . . . failing which the court may order the costs to be borne by the estate.'

The facts and circumstances of this particular matter demand that these costs be recovered from the respondent. The respondent's conduct is egregious. The applicants have prayed for an order that the respondent pays the costs on the attorney and client scale. I agree. The deplorable conduct of the respondent in connection with the litigation in this matter and the abuse of donor funds from public sources would also be a justification for an order against her *de bonis propriis*. The applicants, in the original application to remove the respondent as a trustee, have been substantially successful in resisting the intervention application brought by SEDA and should be awarded costs, such costs to include the costs of two counsel where so employed.

[124] In my view this would be appropriate bearing in mind that the applicants have acted in accordance with their duties as trustees of the NCI Trust and any costs not recovered from the respondents would by implication come out of the trust, which in my view would be unwarranted. Counsel for the applicant has sought costs of two counsel where so employed and I believe that to be appropriate.

## Order

[125] After having read the papers, heard counsel for the applicant, the intervening applicant and the legal representative of the first respondent, the following order is granted:

- 1 The intervening applicant's application to intervene is granted.
- 2 The amended substantive relief sought by the intervening applicant is dismissed.

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<sup>66</sup> *Vorster N.O v Buthelezi and others* [2023] ZAKZPHC 109 para 112.

<sup>67</sup> E Cameron *et al Honoré's South African Law of Trusts* 6ed (2018) at 275, see also at 482. See also *Stander and others v Schwulst and others* 2008 (1) SA 81 (C), and *Kidbrooke Place Management Association and another v Walton and others* NNO 2015 (4) SA 112 (WCC).

- 3 The intervening applicant is ordered to pay the costs of the intervention application, such costs to include the costs of two counsel where so employed.
- 4 The first respondent be and is hereby removed forthwith as a trustee of the National Construction Incubator Trust with registration number IT183/2008/N.
- 5 The second respondent is directed to endorse their records accordingly.
- 6 The first respondent is directed to hand over to the applicants all documents including but not limited to banking and administrative instruments relating to the administration of the National Construction Incubator Trust, within 3 days of this order.
- 7 In the event of the first respondent failing to comply with paragraph 3 above, the sheriff be and is hereby authorised to do all things necessary to give effect to paragraph 3 above.
- 8 The first respondent is directed to pay the costs of the application, in her personal capacity (*de bonis propriis*) on an attorney and client scale, including the costs consequent on the employment of two counsel where so employed.

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**DAVIS AJ**

### APPEARANCES

For the applicants:

Instructed by

Mr. D.Ramdhani SC

Mcgregor Erasmus Attorneys

1<sup>st</sup> Floor Bond Square

12 Browns Road

The Point, Durban

Tel: 031 2018955

Email: [sandra@meattorneys.co.za](mailto:sandra@meattorneys.co.za)

[justin@meattorneys.co.za](mailto:justin@meattorneys.co.za)

[glen@meattorneys.co.za](mailto:glen@meattorneys.co.za)

Ref: JM KLINGBIEL/sv/NAT33/0004

Care of: Botha and Olivier INC.  
239 Chapel Street  
Pietermaritzburg  
3201  
KwaZulu-Natal

For the intervening applicants:  
Instructed by

Mr. F Baloyi  
Maenetja Attorneys  
65 Rigel Avenue  
Waterkloof Ridge  
Pretoria  
Tel: 012 3274480  
Email: [kaizer@maenetjaattorneys.co.za](mailto:kaizer@maenetjaattorneys.co.za)  
[maenetjai@gmail.com](mailto:maenetjai@gmail.com)  
Ref: TIM/MCN/SEDA/02-2023  
c/o Govindsamy, Ndzinga & Govender  
Incorporated  
211 Burger Street  
Pietermaritzburg, 3201  
P.O. Box 8518  
Cumberwood, 3235  
Docex: Pmb 29  
Tel: 033 345 3427/9  
Ref: YG/dg/M1500/104  
Email: [yugusan@gngattorneys.co.za](mailto:yugusan@gngattorneys.co.za)  
[litigation@gngattorneys.co.za](mailto:litigation@gngattorneys.co.za)

For the first respondent  
Instructed by

Mr L M Nhlabathi  
L M NHLABATHI INC.  
Mpumuza Location  
Off Caluza Road

Emasimini Stand 18842  
P.O. Box 12225  
Dorpspruit  
3206  
Tel: 033 8800108  
Email: [info@lmnlaw.co.za](mailto:info@lmnlaw.co.za)

Date of hearing: 16 October 2023

Date of Judgment: 9 November 2023