

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH**

Case No: 2727/2018

Date heard: 23 May 2019

Date Delivered: 13 June 2019

In the matter between:

RIANA FERREIRA

FIRST APPLICANT

GIDEON JACOBUS VAN DER MERWE

SECOND APPLICANT

and

CHRISTO VAN DER MERWE N.O.

FIRST RESPONDENT

MARICUS CHRISTO VAN DER MERWE N.O.

SECOND RESPONDENT

FRANSCOIS ALWYN SASS N.O.

THIRD RESPONDENT

CHRISTINA ADRIANA JACOBA VAN DER MERWE

FOURTH RESPONDENT

ADRI TROLLIP

FIFTH RESPONDENT

MASTER OF THE HIGH COURT, GRAHAMSTOWN

SIXTH RESPONDENT

JUDGMENT

Mullins AJ

[1] The background facts to this dispute, which are either common cause or not in dispute, may be summarised as follows:

- (a) On 7 February 1984 one Aletta Getruida Janse van Rensburg (“the Founder”) established a trust, the Johannes van der Merwe Trust, TM 794 (“the Trust” or “the Trust Deed”, depending on the context), nominating her son, Johannes Hendrik van der Merwe, as the sole trustee (“the Original Trustee”);
- (b) On 22 March 1984, and apparently in accordance with sec 6 (1) of the Trust Property Control Act, 57 of 1988 (“the Act”), the Master, which official is cited as the Sixth Respondent, authorised the Original Trustee to act as such and issued him with letters of authority to this effect.¹
- (c) The Trust Deed contained the following provisions which are relevant to this application:
 - (i) In the event of the Original Trustee ceasing to be a trustee, for whatever reason, then his wife, Christina van der Merwe, who is cited as the Fourth Respondent, would replace him and, failing her, Volkstrust Ltd;²
 - (ii) On the death of both the Original Trustee and the Fourth Respondent, and provided the youngest of their four children had reached the age of 28, the four children, who are cited as the First and Second Applicants

¹ I will return to this aspect below.

² This entity no longer exists and the parties were *ad idem* that this provision in the Trust Deed should simply be ignored.

and the First and Fifth Respondents respectively, would become the trustees of the Trust;³

- (iii) The income beneficiaries were the Original Trustee, the Fourth Respondent and the four children;
- (iv) The capital beneficiaries were the four children;
- (v) The Original Trustee had the power to deal with the Trust's assets as he saw fit in order to achieve the purpose of the Trust;
- (vi) The Original Trustee was obliged to administer the Trust funds on behalf of the Fourth Respondent and the four children;
- (vii) On the death of the Original Trustee the primary income beneficiary would be the Fourth Respondent;
- (viii) While still alive the Original Trustee and the Fourth Respondent would have the right to distribute the Trust's capital to the four children, with the proviso that on their death the assets would be distributed to the four children in such a way that, having regard to assets already distributed, as far as possible they (the four children) would each receive an equal proportion of the assets;
- (ix) The above provision was subject to a further proviso, namely that when each child reached the age of 28, 25% of the assets were to be distributed to that child and when the youngest child (the Fifth

³ By the time of the events giving rise to this application, the youngest child had long since reached the age of 28.

Respondent) reached 28, the assets were to be distributed in equal proportions;

- (x) The children could elect to leave an asset distributed to him/her in the Trust, to be administered on such terms and conditions as that child may determine;
- (xi) Proper records were to be kept of all transactions and business of the Trust, to be provided to the children on demand;
- (d) As is evident from the above, the Trust Deed contained complicated, vague and contradictory provisions as to the manner in which the Trust assets were to be administered and distributed. Fortunately, for present purposes it is not necessary to make sense of this aspect. Suffice it to state that it would appear that the intention of the Founder was that, ultimately, as far as possible, each of the four children was to receive 25% of the capital assets of the Trust;
- (e) Of paramount importance to this application is that the Trust Deed made no provision for the amendment thereof;⁴
- (f) The Founder died on 13 March 1994;
- (g) Although the reasons differ, it is not in dispute that over time the relationship between the Original Trustee, on the one hand, and the First and Second Applicants, on the other hand, became strained and, particularly in respect of the Second Applicant, acrimonious;

⁴ The Act refers interchangeably to vary/variation and amend/amendment. The parties have throughout used the term "amendment" and I will do the same.

- (h) It is not necessary to go into the allegations and counter-allegations. The fact of the matter is that there was a fall-out between the Original Trustee and the First and Second Applicants, whereas the relationship between the Original Trustee and the First Respondent appears to have been a very good one. The same can be said for the Original Trustee's relationship with the Fifth Respondent, although she appears to have played a minor role in the events giving rise to this dispute;
- (i) The poor relationship between the Second Applicant and the Original Trustee is evidenced by the fact that during August 2009 the Original Trustee presented the Second Applicant with two documents entitled "*AFSTANDOENING*" and "*BEVESTIGING VAN AFSTANDOENING*",⁵ which he requested the Second Applicant to sign which, had he done so, would have resulted in him renouncing his beneficial interest in the Trust. The Second Applicant refused to sign;
- (j) On 25 September 2004 the Original Trustee presented all the beneficiaries (i.e., the Fourth Respondent and the four children) with a document, entitled "*MEMORANDUM VAN OOREENKOMS*"⁶ which he requested them to sign. This document was, in effect, a partial distribution of the Trust's assets to the First Respondent and to a lesser extent to the Fifth Respondent;
- (k) Despite the apparent favouritism afforded to the First and Fifth Respondents, the First and Second Applicants signed this document;

⁵ Translated into English as "waiver" and "confirmation of waiver".

⁶ Memorandum of Agreement

- (l) On 22 February 2007 the Original Trustee presented the beneficiaries with the same document, subject to one addition thereto, and requested them to sign it which, once again, they did;
- (m) On 3 November 2009 the Original Trustee sent the four children a lengthy letter,⁷ most of the emotional contents of which can be ignored. Of relevance is that to this letter was attached another “*MEMORANDUM VAN OOREENKOMS*”, which they were requested to sign in the event of them being happy with the contents thereof;
- (n) This proposed memorandum was intended as a further distribution of the assets of the Trust;
- (o) On 13 November 2009 the First and Second Applicants and the Fifth Respondent replied that they were not prepared to sign the memorandum and that they would in due course draft a response with their own proposals;
- (p) On 19 November 2009 the Original Trustee sent the four children another emotionally charged letter in which he bemoans the fact that he had not received a positive response to his memorandum;
- (q) On 20 November 2009 the Applicants and the First Respondent again responded to the effect that they would not be signing the memorandum;
- (r) On 18 June 2010 the Original Trustee prepared a document entitled “*LETTER OF WISHES*”, addressed to “*Trustees for the time being of the Johannes van der Merwe Trust (TM794)*” in which he informs the trustees, *inter alia*, that he has executed a deed of trust in which they had been nominated as trustees.

⁷ The letter is supposedly from “Pa and Ma”, although it is not signed.

This can only have been reference to the Amended Trust Deed, which is referred to below;

- (s) On 17 November 2010 the Original Trustee resolved to amend the Trust Deed (“the Amended Trust” or “Amended Trust Deed”, depending on the context) in material respects, namely:
 - (i) The beneficiaries of the Trust were henceforth to be the Original Trustee, the First Respondent, the Fourth Respondent, the Fifth Respondent, the descendants of any of the above and any trust established for the benefit of the above-mentioned beneficiaries;
 - (ii) Provision was made for there to be between two and five trustees;
 - (iii) The requirement that, ultimately, there had to be an equal distribution amongst the capital beneficiaries was discarded, this being left up to the discretion of the trustees;
- (t) The effect of the amendment was, *inter alia*, to exclude the First and Second Applicants as beneficiaries altogether;
- (u) The Amended Trust Deed was lodged with the Master on 25 November 2010⁸;
- (v) Pursuant to the amendment, on 8 November 2011 the Master endorsed the Trust Deed to provide that the First Respondent and one Maurice Lessing (“Lessing”) be authorised to act as trustees together with the Original Trustee;⁹

⁸ Although the Master’s stamp reflects the date as being 2021-11-25!

⁹ Why this occurred only a year later is not explained.

- (w) The Original Trustee died on 30 January 2017 leaving the First Respondent and Lessing as the remaining trustees;
- (x) On 12 June 2017 the Master endorsed the Amended Trust Deed by recording that the Original Trustee (who was deceased) and Lessing (who resigned) were no longer trustees and that the First Respondent, the Second Respondent, who is the First Respondent's son, and the Third Respondent, one Francois Alwyn Sass, were authorized to act as trustees of the Amended Trust;¹⁰
- (y) Although they appear to have been aware of these developments, or some of them at least, since 2013, the Applicants launched this application on 7 August 2018.

[2] So much for the background which, as stated above, is either common cause or not in dispute. However, the meaning, and the effect to be given to events, in particular the documents referred to, is very much in dispute.

[3] Before dealing with the merits it is necessary to make reference to one troubling aspect which only came to my attention after the matter had been argued:

- (a) According to the Master's original Letters of Authority, on 22 March 1984 he authorized the Original Trustee to act as a trustee in accordance with sec 6(1) of the Act;
- (b) As the Act was only promulgated on 31 March 1989, some five years later, it was not possible for the Master to have done so;

¹⁰ There was an earlier endorsement in identical terms, save for a typing error.

- (c) Ironically, both sides rely on the document in question and could proffer no explanation as to how and why it came into existence, nor did they show any inclination to do so;
- (d) Fortunately, as both sides are *ad litem* that the Original Trustee was authorized to act as a trustee of the Trust from its inception, nothing turns on this anomaly.

[4] I turn now to the merits.

[5] On 7 August 2018 the Applicants launched this application (“the Main Application”) claiming the following relief:

- “1. An order declaring the amendment of the trust deed of the Johannes van der Trust, TM 794 (E) (“the Trust”) on or about 17 November 2010 and annexed to the founding affidavit marked annexure “RF7” to be invalid and of no force and effect.
2. An order declaring the appointment of the First to Third Respondents as trustees of the Trust on or about 26 of May or 12 June 2017 to be null and void.
3. That the First to Third Respondents, in their capacities as trustees of the Trust, be ordered to pay the costs of this application and, in the event that it is opposed by any other Respondent, jointly and severally by (sic) the First to Third Respondents, in their capacities as trustees of the Trust, and by any other Respondent who opposes this application.
4. Further and/or alternative relief.”

[6] The Main Application is opposed by the First to Third Respondents (who will for convenience sake be referred to as “the Respondents”, unless the context requires otherwise), who are the current trustees of the Amended Trust.

[7] In addition to opposing the Main Application, the Respondents, together with the Fourth Respondent, have brought a conditional counter- application (“the Counter-Application”), in which, in its amended form, the following relief is claimed:

- “1. An order confirming the appointment of Christina Adriana Jacob van der Merwe as Trustee of the Johannes Van Der Merwe Trust TN 944 [E]¹¹ in terms of clause 3 of the original Trust Deed dated 7 February 1984 and annexed to the Founding Affidavit marked “RF1”.*
- 2. An order that the First and Second Applicants pay the costs of the Conditional Counter-Application jointly and severally, the one paying, the other to be absolved.”*

[8] The Applicants oppose the Counter-Application.

[9] As I understand it, the Respondents contend that the Main Application should be dismissed with costs, in which event the Counter-Application would simply fall away (subject to the issue of costs). If I find for the Applicants in respect of prayer 1, but dismiss prayer 2, the same applies. However, in the event of me finding in favour of the Applicants in respect of paragraph 1 and 2 of the notice of motion in the Main Application, then paragraph 1 of the Counter-Application has to be successful (hence the Counter-Application being conditional).

¹¹ The reference number is incorrect. It should read: TM 794.

[10] The first issue to resolve is whether the Trust Deed could be amended when it was and in the manner in which it was. To this end it is relevant that the Founder died on 13 March 1994, the Trust Deed being amended by the Original Trustee on 17 November 2010.

[11] Sec 4(2) of the Act requires that when a trust instrument is amended the trustee(s) shall lodge the amendment or a copy thereof with the Master, so certified. Although it does not appear from the papers, it is not in dispute the amendment was lodged with the Master and certified.

[12] In **Erwee NO v and Another v Erwee and Others NO**¹² it was held that a trustee's appointment arises from the trust instrument itself and his/her authority derives from the terms of the trust deed. See also **Honore's South African Law of Trusts**,¹³ in which the following is stated:

“Despite the statutory formulation, it is clear that a trustee's appointment arises from the trust instrument itself, not from the Master's authorisation, and that the authority of the trustees derives from the terms of the trust deed. This is because the office of trustees is created by the trust instrument and not by the Master or even the court in filling it.”

¹² [2006] 1 All SA 626 (O)

¹³ The 6th Edition @page 206; para 110

[13] In **Land and Agricultural Bank of SA v Parker and Others**¹⁴ the Supreme Court of Appeal held that:

“Except where statute provides otherwise, a trust is not a legal person. It is 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 a trust can act. Who the trustees are, the number, how they are appointed, and under what circumstances they have the power to bind the trust estate are matters defined in the trust deed, which is the trust’s constitutive charter.” (My underlining).

[14] It is clear that the trustees of a trust are bound by the four corners of the trust deed and have to give effect thereto. If a trust deed does not make provision for something, as a general rule, it cannot be done.

[15] With reference to **Honore’s** work,¹⁵ it is clear that even where a trust deed permits the amendment thereof, the right to do so is not unfettered. Even the founder’s ability to do so may be circumscribed in certain circumstances. Even where a trust deed permits the trustees to amend the terms thereof, if the beneficiaries have a contingent interest in the trust assets and/or have accepted the benefits thereof, if an amendment will adversely affect their rights, their consent is required.

¹⁴ 2005 (2) SA 77 (SCA) @para 10

¹⁵ Chapter 11.

[16] It was argued by Mr *de la Harpe*, who appeared on behalf of the Applicants, that the Trust Deed, not having made provision for the amendment thereof, and particularly as the Founder was deceased at the time the amendment was effected, any attempt to do so would in all cases be a nullity.¹⁶

[17] I did not understand Mr *Ford*, who appeared together with Mr *Nepgen*, on behalf of the Respondents, to argue very vociferously to the contrary, the opposition being aimed primarily at paragraph 2 of the relief claimed by the Applicants in the notice of motion, namely the setting aside of the Master's appointment/authorisation of the Respondents as trustees of the Amended Trust, it being argued that it was an administrative act and the Applicants should have brought an application to review the decision in accordance with sec 23 of the Act. In the alternative it was argued that the Applicants had consented to the amendment and/or waived their rights as beneficiaries.

[18] I am in agreement with Mr *de la Harpe* and find that the amendment of the Trust Deed by the Original Trustee on or about 17 November 2010 was invalid and of no force and effect. In my view the law is clear in this regard.

[19] Even if I am wrong, the Original Trustee's power to amend the Trust Deed were not, as already alluded to, unfettered. Even beneficiaries who have contingent rights have a vested interest in ensuring the proper administration of a trust and are entitled to prevent the maladministration thereof. Mr *de la Harpe* argued that the amendment of the Trust Deed in circumstances where it was not permitted was the maladministration thereof. See

¹⁶ The exception would be an application in terms of sec 13 of the Act, which does not apply in the present matter.

Gross and Others v Pentz.¹⁷ That the Applicants had a contingent right in the Trust assets cannot be gainsaid.

[20] Mr *de la Harpe* argued that the Applicants' case went much further than merely claiming a contingent right, in that there was evidence which established that they had accepted the benefits conferred on them in terms of the Trust Deed.

[21] For the proposition that a trust deed cannot be amended without the beneficiaries' consent once they had accepted the benefits conferred on them, reliance was placed on **Potgieter v Potgieter NO.**¹⁸ After having considered the legal position at some length Brand JA (who delivered the unanimous judgment) stated:

"Succinctly stated it is this: the variation of the trust deed was invalid for lack of consent by the beneficiaries who had previously accepted the benefits bestowed upon them in terms of the trust deed. Hence the original provisions of the trust deed, prior to the purported amendment, must prevail. Prima facie, the appellants were therefore entitled to a declarator confirming that conclusion, which is what they sought." (My underlining).

[22] The allegations relied upon by the Applicants to establish that they had accepted the benefits bestowed on them in terms of the Trust Deed are the following:

- (a) The beneficiaries were required to perform work for no reward for the Trust because they were informed by the Original Trustee that they would ultimately reap the benefits thereof;

¹⁷ 1996 (4) SA 617 (A) @628 I – J

¹⁸ 2012 (1) SA 637 (SCA) @para 37

- (b) The Second Applicant paid an inflated rental for a property owned by the Trust on the basis that he would ultimately reap the benefits thereof;
- (c) The Second Applicant paid all the expenses, including the mortgage bond in respect of another property which was apparently ear-marked as his;
- (d) The Second Applicant refused to sign the waiver (referred to above) abandoning his rights in respect of the Trust;
- (e) The First and Second Applicants signed the two documents (during 2004 and 2007), which effected a partial distribution of the Trust's assets (albeit to the First and Fifth Respondents);
- (f) The First Respondent received the proceeds of the sale of a property owned by the Trust;
- (g) The First and Second Applicant's, as well as the Fifth Respondent, refused to sign the memorandum (referred to above).

[23] The Applicants maintain that, objectively viewed, their actions clearly establish the acceptance of the benefits bestowed upon them.

[24] The Respondents' response to the above allegations is at best lukewarm. They either rely on bold denials, profess to have no knowledge of, or do not seriously challenge, them. In the circumstances, in the event that I am wrong in finding that when he did so the Original Trustee was not permitted under any circumstances to vary the Trust Deed, I find that the Applicants not only had a vested interest in the proper administration of the Trust, but that they had also accepted the benefits afforded to them in terms of the Trust Deed

and that, if the Trust Deed could be amended, which I find it could not, at the very least their consent was required in order to do so.

[25] Finally, it was argued on behalf of the Respondents that the Applicants had waived the benefits bestowed upon them in terms of the Trust Deed. This submission is based on the minutes of a meeting of the Original Trustee held on 17 November 2010, in which he resolved to amend the Trust Deed. Under the heading “*DISCUSSED*” the following is recorded:

“2. *Discussed*

2.1. *The Trustee of the Trust wishes to distribute the trust assets amongst the beneficiaries of the Trust.*

2.2. *The Trustee has written letters to his four (4) children, who are beneficiaries of the Trust, enquiring whether any of them are interested in taking over any of the properties held by the Trust and, if so, that they accept responsibility for the bond payments and for the maintenance of the properties.*

2.3. *Only Christo van der Merwe (to a greater extent) and Adri van der Merwe (to a lesser extent) have expressed any interest in owning any of the properties.”*

[26] The letter referred to (in 2.2) is the one referred to above as the “*LETTER OF WISHES*” and it is dated 18 June 2010.

[27] It was submitted that the failure of the Applicants to respond to the Original Trustee’s invitation constituted a waiver.

[28] It is trite that waiver is not easily inferred. See generally: **Contract: General Principles; Van der Merwe et al.**¹⁹

[29] All the above-quoted passage says is that if the children were interested in taking over any of the Trust assets they could do so provided they assumed financial responsibility therefor. It does not spell out the consequences of failing to take up the opportunity and the Applicants' silence is equally consistent with a decision to wait until the Trust assets were finally distributed, at which time they were to receive 25% thereof (in accordance with the original Trust Deed prior to its amendment).

[30] In any event, even if I am wrong in this regard, the Applicants deny ever having received the "*LETTER OF WISHES*", their first sight thereof being on receipt of the answering affidavits. In the absence of any evidence to the contrary, their version must prevail and I must accept their denial. I accordingly find that the Applicants did not waive and/or abandon the benefits conferred on them in accordance with the Trust Deed.

[31] One final observation must be made as to the Original Trustee's actions. It is trite law that a trustee must act in the best interests of the trust and the beneficiaries.²⁰ It is abundantly clear that the Original Trustee completely confused his role as a father to his children and as a trustee of the Trust, in respect of which trust those children were beneficiaries. He treated the trust assets as his own, to be distributed as he, in his sole discretion and without reference to the wishes of the Founder, decreed. His cavalier approach to the fiduciary duties expected of a trustee is to be deprecated.

¹⁹ Pp. 452 – 456; para 13.3

²⁰ See generally: Honoré; Chapter 6

[32] In the circumstances I am satisfied that the Applicants have made out a case for the relief claimed in paragraph 1 of the notice of motion.

[33] I turn now to the second leg of the Applicants' case, as set out in paragraph 2 of the notice of motion.

[34] The relief sought in paragraph 2 of the notice of motion is framed as a declarator. It is the Applicants' case, as it evolved, that, if I grant paragraph 1 of the notice of motion, paragraph 2 follows as a matter of course. It was argued by Mr *de la Harpe* that despite having stated that he had acted in accordance with section 7(2) of the Act, the Master could not have done so, the authorization of the Respondents as trustees having taken place in accordance with sec 6(1) of the Act.

[35] Not so, submitted the Respondents, it being argued that the Respondents had been authorized in accordance with sec 7(2) of the Act, which was patently an administrative act on the part of the Master and, in the absence of an application to review his decision in accordance with sec 23 of the Act, the relief sought in paragraph 2 must fail.

[36] Sec 6(1) of the Act provides as follows:

"6(1) Any person whose appointment as trustee in terms of a trust instrument, section 7 or court order comes into force after the commencement of this Act, shall act in that capacity only if authorised thereto in writing by the Master."

[37] Sec 7(2) of the Act provides as follows:

“7(2) When the Master considers it desirable, he may, notwithstanding the provisions of the trust instrument, appoint as co-trustee of any serving trustee any person whom he deems fit.”

[38] The chain of events giving rise to the Master's authorisation of the Respondents as trustees of the Amended Trust may be summarised as follows:

- (a) On 25 November 2010 the Original Trustee amended the Trust Deed and lodged it with the Master, who certified the amendment;
- (b) On 8 November 2011 the Master certified that the First Respondent and Lessing were authorised to act as trustees together with the Original Trustee;
- (c) On 21 June 2017 the Master certified that the Original Trustee and Lessing were no longer trustees and that the Respondents were henceforth authorised to act as trustees of the Trust.

[39] Clause 9 of the Amended Trust Deed provides as follows:

“9. Replacement of Trustees

In the event of any Trustee ceasing to hold office for whatsoever reason, such Trustee shall be replaced by a person nominated by the remaining Trustee(s).” (My underlining).

[40] Mr *de la Harpe* argued that on the death of the Original Trustee and the resignation of Lessing, that is precisely what happened: the remaining trustee, the First Respondent,

nominated the Second and Third Respondents, whom the Master certified were authorised in accordance with sec 6(1) of the Act.

[41] Countering this argument Mr *Ford* referred me to the Master's first report, dated 29 August 2018, paragraphs 4 and 5 of which read:

“4. Under cover of a letter dated 17 November 2010 the trustee, Johannes van der Merwe,²¹ lodged a resolution dated 17 November 2010 together with an annexure thereto, both signed by him, in terms of which certain changes were made to the trust deed. This office acknowledged receipt thereof on 2 December 2010 in terms of **Section 4 (2) of the Trust Property Control Act No. 57 of 1988.**

5. The current trustees of the trust in terms of an Endorsement issued by this office on 21 June 2017 are:

- (a) Christo van der Merwe
- (b) Maricus Christo van der Merwe
- (c) Franscois Sass.

After due consideration of the decision made in **Land and Agricultural Bank of South Africa v Parker 2005 2 SA77**, the fact that one of the prosed (sic) trustees was an independent trustee and that there was only one trustee in office, the Master made these discretionary appointments in terms of **Section 7 (2) of the Trust Property Control Act No. 57 of 1988.**” (Master's emphasis).

²¹ The First Respondent.

[42] The Master explicitly states that he acted in accordance with sec 7(2) of the Act and, according to Mr *Ford*, if I were to find otherwise I would have to find that the Master is misleading the Court.

[43] Mr *de la Harpe* dealt with this argument by referring to the documents discovered by the Master in accordance with Rules 35(12) and (14) of the Uniform Rules of Court. These documents are:

- (a) A resolution of the then Trustees, dated 10 April 2017, in terms of which it is recorded that:
 - (i) The Original Trustee was removed as a trustee due to his death;
 - (ii) Lessing resigned as a trustee;
 - (iii) The Second and Third Respondents were appointed as trustees in their stead (together with the First Respondent);
- (b) Two forms, headed “*ACCEPTANCE OF TRUSTEESHIP BY TRUSTEE (INTER-VIVOS TRUST)*”,²² in terms of which the Second and Third Respondents:

“Hereby apply for authority in terms of section 6 (1) of the Trust Property Control Act, 1988 (Act 57 of 1988) to act as a trustee of the Trust known as JOHANNES VAN DER MERWE TRUST (TM 794)...”

²² Form J417

- (c) A “*TRUST REGISTRATION AMENDMENT FORM*”²³, the relevant amendment to the Amended Trust Deed being recorded as “*Trustee Amendments*”.

[44] From the foregoing it is evident that the authorization of the Second and Third Respondents was anything but a discretionary appointment by the Master in terms of sec 7(2) of the Act. The authorization was as a result of a resolution of the remaining trustee, the First Respondent, which resolution was endorsed by the Master. He merely rubber-stamped the trustee’s actions, which actions were taken in accordance with the terms of the Amended Trust Deed.

[45] It is also relevant that it is not in dispute that the Second Respondent is the First Respondent’s son and the Third Respondent is the First and Fourth Respondents’ “broker”. It is highly improbable that the Master would make discretionary appointments of people he could have had no knowledge of.

[46] Accordingly, I am unable to agree with Mr *Ford*’s submission that in order to find that the Master did not act in terms of sec 7(2) of the Act I must find that he is intentionally trying to mislead the Court. No reason was advanced why this official should want to do so. A perfectly reasonable explanation is that the Master is wrong in law, and I find this indeed to be so.

[47] In conclusion on this point (paragraph 2 of the notice of motion) I find that the authorisation of the Respondents as trustees of the Trust was not an administrative action

²³ Form J401

on the part of the Master and that it was not necessary for the Applicant's to review the "decision" in accordance with section 23 of the Act.

[48] The amendment of the Trust Deed having been declared a nullity, I am of the view that paragraph 2 of the notice of motion follows as a matter of course.

[49] Support for this conclusion may be found, ironically, in administrative law. In **Seale v Van Rooyen NO & Others; Provincial Government, North West Province v Van Rooyen NO & Others**,²⁴ where it was held that where the initial invalid administrative act is set aside, subsequent acts were also invalid. Seale was cited with approval in **Corruption Watch NPC & Others v President of the Republic of South Africa and Others**.²⁵

[50] I turn now to the Counter-Application.

[51] It is the Respondents' case, the Fourth Respondent joining as a party to the Counter-Application, that in the event of me setting aside the authorisation of the Respondents to act as trustees of the Amended Trust, then the provisions of the original Trust Deed must automatically apply. In accordance with clause 3 of the Trust Deed, on the Original Trustee ceasing to be a trustee, the Fourth Respondent would act as trustee and the relief sought is that her appointment be confirmed.

[52] The Applicants deal with this as follows:

- (a) There is no need to seek the appointment of a new trustee, in that sec 7(1) of the Act provides that if the office of trustee becomes vacant and the trust

²⁴ 2008 (4) SA 43 (SCA) @ para. [13]

²⁵ Constitutional Court: [2018] ZACC 23 @ paras 32 – 35; pp. 19 - 21

instrument makes no provision for the replacement thereof, the Master shall, after consultation with interested parties as he deems necessary, appoint a trustee(s);

- (b) The Master has no power at common law to appoint (or remove) trustees, whereas the Court does have this power;
- (c) The order the Respondents seek is not competent in that the Court cannot order the Master to appoint the Fourth Respondent, as this would be tantamount to delegating its (the Court's) common law powers of appointment to the Master;²⁶
- (d) Given the unfortunate circumstances, it would not be appropriate for the Fourth Respondent to assume the appointment, in that she is biased and is physically and mentally incapable of fulfilling the functions of trustee.

[53] In answer to the first ground of opposition, there no suggestion that the office of trustee cannot be filled and it is common cause that the original Trust Deed makes provision for what is to happen in the event of the Original Trustee ceasing to be a trustee – the Fourth Respondent steps into his shoes. Having succeeded with the relief in paragraph 2 of the notice of motion in the main application the Applicants can hardly argue that the provisions of the original Trust Deed are not applicable.

[54] In answer to the second ground, I do not understand the Respondents to be seeking an appointment in terms of the common law, or statute, for that matter. They seek the implementation of the terms of clause 3 of the original Trust Deed.

²⁶ In fairness to the Applicants, their answering affidavits were filed before the Respondents amended the notice of motion, which previously prayed for an order that the Court direct the Master to appoint the Fourth Respondent.

[55] Due to the amendment to the notice of motion the third objection largely falls away. The Respondents no longer seek an order that the Court direct the Master to appoint the Fourth Respondent, but merely that her appointment be confirmed. The amendment does not entirely do away with the Respondents' problems, in that the Court does not confirm appointments. The Master does. However, it is clear what is intended and refusing the relief on this basis would be putting form before substance.

[56] It was argued that at the age of 76 the Fourth Respondent's poor health and mental capacity were such that she was incapable of meeting the requirements of a trustee. The Fourth disputes the Applicants' allegation in an affidavit in which she states that, *inter alia*, she is quite willing and able to act as a trustee of the Trust and sets out in detail why this is so. In the absence of specific evidence to contrary, as opposed to generalized allegations, I am not prepared to go behind the Fourth Respondent's detailed assertion that she is quite capable of, and willing to, perform the functions of a trustee.

[57] It was also argued that the Fourth Respondent had acted improperly in the past in siding with the Original Trustee and had also demonstrated bias in favour of the First and Fifth Respondents. This is not my impression. The rambling, emotional, letters written to the four children, some of them by "*Ma en Pa*", are clearly the views of the Original Trustee. When dealing with the family feud the Applicants themselves concentrate on their poor relationship with the Original Trustee, their father, not the Fourth Respondent. In addition, in her affidavit in support of her capability to fulfil the role of trustee the Fourth Respondent at no stage resorts to mud-slinging, as it were.

[58] It must be borne in mind that with the re-installment of the Original Trust Deed ALL the provisions thereof are re-instated and the Fourth Respondent, as trustee, is bound to comply therewith. She cannot do as she pleases (as the Original Trustee clearly believed he was entitled to do) and will have to implement the provisions of the original Trust Deed. If she does not do so I have no doubt that the Applicants, and hopefully also the Master, will hold her to account.

[59] Whether the Master deems it appropriate to appoint additional trustees in accordance with section 7(2) of the Act, is for that official to decide.

[60] Finally, it was submitted that, in allowing the Original Trustee to amend the Trust by appointing others as trustees the Fourth Respondent had “declined” the appointment. The Fourth Respondent denies this and states that the issue was never raised nor discussed with her. Without more, I cannot go behind her denial. In addition, my comments above in respect of waiver are apposite to this argument. Her ignorance of what the Original Trustee was doing is also support for the contention that she was not an active party to the acrimonious disputes that arose between the Original Trustee and the Applicants (although she must have been aware thereof).

[61] Mr *de la Harpe* urged me to exercise the Court's inherent discretion and appoint independent trustees. From my understanding of the authorities, the Court will only exercise its discretion on rare occasions and should not decide a case on the basis of what it believes is reasonable and fair.²⁷ In ***Ex parte Leandy and Another, NNO***²⁸ the issue was considered at length and the Court came to the conclusion that it would not be done lightly.

²⁷ Potgieter, *supra*; para 34

²⁸ 1973 (4) SA 363 (N)

[62] In any event, without a specific care having been made out, properly motivated, identifying the person(s) to be appointed, and why, the Court cannot exercise its discretion and *mero motu* take it upon itself to appoint trustee(s). The Applicants should have prayed for this relief in their notice of motion.

[63] I am accordingly of the view that the Respondents (together with the Fourth Respondent) are entitled to the relief sought in paragraph 1 of the amended notice of motion in the Counter-Application.

[64] That leaves the issue of costs. Both sides have been successful and in the normal course costs should follow the result. However, Mr *de la Harpe* argued that the conditional Counter-Application was unnecessary in that, if the Main Application was successful, the relief sought in the conditional Counter-Application must, of necessity, follow. That begs the question: why did the Applicants oppose the conditional Counter-Application so vigorously? They did so because they did not want the Fourth Respondent to be authorized as trustee of the Trust. It was thus a wise precaution on the part of the Respondents to bring the conditional Counter-Application.

[65] Although the Counter-Application consists of fewer pages and took up less time in argument, the two applications are inextricably inter-linked with many of the issues overlapping. While both sides have tasted success, they have also tasted defeat. In the circumstances, in the exercise of my discretion, I intend to make no order as to costs.

[66] In conclusion I make the following order:

MAIN APPLICATION

1. It is declared that the amendment of the trust deed of Johannes van der Merwe Trust, TM794(E) ("the Trust") on or about the 17th of November 2010 and annexed to the founding affidavit marked annexure "RF7" to be invalid and of not force and effect;
2. It is declared that the appointment of the First, Second and Third Respondents as trustees of the Trust on or about the 26th of May or the 12th of June 2017 to be null and void;

COUNTER APPLICATION

3. The appointment of Christina Adriana Jacobs van der Merwe as trustee of the Johannes van der Merwe Trust (TM794(E)) in terms of clause 3 of the original Trust Deed dated 7 February 1984, annexed to the founding affidavit marked "RF1" is hereby confirmed.

COSTS

4. There will be no order as to costs.

N.J. MULLINS

ACTING JUDGE OF THE HIGH COURT

Obo the Applicants:

Instructed by:

Adv D de la Harpe

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Obo the Respondents:

**Adv EAS Ford SC and J
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