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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable: YES/NO
Of Interest to other Judges: YES/NO
Circulate to Magistrates: YES/NO

Application number: 201/2023

In the application between:

T[…] T[…] Applicant
(ID No. 4[…], duly represented herein
by M[…]-C[…] C[…]-T[…] by virtue of Power
of Attorney PA 183/2021)
[In his capacity as founder and Trust beneficiary of the
OLIVE TREE TRUST, IT126/2012]

and

D[…] T[…] N.O. 1st Respondent
(ID No. 7[…])
[In her capacity nominee officio as trustee of the OLIVE
TREE TRUST, IT126/2012]

MASTER OF THE HIGH COURT, BLOEMFONTEIN,
FREE STATE PROVINCE 2nd Respondent

D[…] T[…] 3rd Respondent
[On behalf of and in her capacity as guardian of
C[…] T[…], a minor with ID No. 0[…],
a beneficiary of the OLIVE TREE TRUST, IT126/2012]

D[…] T[…] 4th Respondent
[On behalf of and in her capacity as guardian of
I[…] T[…], a minor with ID No. 0[…],
a beneficiary of the OLIVE TREE TRUST, IT126/2012]

T[…] T[…] 5th Respondent
(ID No. 4[….], duly represented herein
by M[…]-C[…] C[…]-T[…] by virtue of Power
of Attorney PA 183/2021)
[In his capacity as a beneficiary of the
OLIVE TREE TRUST, IT126/2012]

D[…] T[…] 6th Respondent
(ID No. 7[…])

SAREL LOUIS AUGUSTYN N.O. 7th Respondent
[In his capacity as nominee officio as trustee of the OLIVE
TREE TRUST, IT126/2012]

FANIE VAN VUUREN N.O. 8th Respondent
[In his capacity nominee officio as trustee of the
FC FIN TRUST]

AND:

Application number: 1916//2023

In the application between:

T[…] T[…] Applicant
(ID No. 4[…], duly represented herein
by M[…]-C[…] C[…]-T[…] by virtue of Power
of Attorney PA 183/2021)
[In his capacity as founder and Trust beneficiary of the
OLIVE TREE TRUST, IT126/2012]

and

D[…] T[…] N.O. 1st Respondent
(ID No. 7[…])
[In her capacity nominee officio as trustee of the OLIVE
TREE TRUST, IT126/2012]

SAREL LOUIS AUGUSTYN N.O. 2nd Respondent
[In his capacity as nominee officio as trustee of the OLIVE
TREE TRUST, IT126/2012]

**MASTER OF THE HIGH COURT, BLOEMFONTEIN,
FREE STATE PROVINCE** 3rd Respondent

D[…] T[…] 4th Respondent

[On behalf of and in her capacity as guardian of
C[…] T[…], a minor with ID No. 0[…],
a beneficiary of the OLIVE TREE TRUST, IT126/2012]

D[…] T[…] 5th Respondent
[On behalf of and in her capacity as guardian of
I[…] T[…], a minor with ID No. 0[…],
a beneficiary of the OLIVE TREE TRUST, IT126/2012]

D[…] T[…] 6th Respondent
(ID No. 7[…])

SAREL LOUIS AUGUSTYN 7th Respondent

FANIE VAN VUUREN N.O. 8th Respondent
[In his capacity nominee officio as trustee of the
FC FIN TRUST]

THE REGISTRAR OF DEEDS, PRETORIA 9th Respondent

CORAM: VAN ZYL, J

HEARD ON: 31 AUGUST 2023

DELIVERED ON: 22; 26 JANUARY 2024

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[1] Two applications serve before me. In the first application, application number 201/2023 ("the main application" or "the removal application"), the applicant is seeking the following relief in terms of his Amended Notice of Motion:

"1. The sixth respondent be removed as trustee of the Olive Tree Trust, IT 126/2012.

2. The sixth respondent shall return her letters of authority to the Master without delay but not later than 5 court days from date of this order.

3. The sixth respondent shall hand over all documents regarding the … Trust …, but not limited to the following:

   3.1 Minutes of meetings of trustees of the … Trust, ….
   3.2 Resolutions taken by the trustees of the … Trust, …
   3.3 Bank cards related to all bank accounts or investments in the name of the … Trust, …. or the first respondent in her capacity as Trustee …
   3.4 Bank statements relating to all the bank accounts and/or investments of the … Trust or in the name of the first respondent in her capacity as trustee of the … Trust, …
   3.5 The assets register of the … Trust, …

4. The sixth respondent must render an account to the applicant regarding her administration of the … Trust's affairs no later than 30 calendar days from date of this order, the first day to be excluded and the last day to be included in calculation of the 30-day period.

5. In the event that the sixth respondent is not removed as trustee of the … Trust, then an order that the sixth respondent must render an account to the applicant regarding her administration of the … Trust's affairs no later than 30 calendar days from date of this order, the first day to be excluded and the last day to be included in calculation of the 30-day period.

6. Declaring that the … Trust lacked capacity from 13 October 2020 until 19 January 2023 due to the absence of a minimum of two trustees.

7. Declaring invalid and of no force and effect due to her lack of authority as a trustee of the … Trust the decision of the sixth respondent to appoint Remax to list the … Trust's immovable property for sale and

the appointment of Remax pursuant to the aforesaid decision and appointment.

9. That M[…]-C[…] C[…]-T[…] … be appointed as trustee of the … Trust.

10. That Deirdré Milton … be appointed as trustee of the …Trust.

11. That the second respondent be directed to issue letters of authority in respect of the said M[…]-C[…] C[…]-T[…] and Deirdré Milton.

12. Declaring the agreement, styled Agreement of Sale – Sectional Title, dated 1 March 2023, with regard to the Trust`s immovable property, better known as Unit 18, L[…] Sectional Title, Sectional Title Scheme number; 193 (situated at W[…] Extension 1 270, Diagram Number; 193/89. 82 K[…] Crescent, Tswane, Gauteng Province [Pretoria Deeds Office], declared [*sic*] void; alternatively, be set aside [*sic*].

13. That the sixth respondent be ordered to pay the costs of this application in her personal capacity on a scale between attorney and client, should she oppose this application. In the event that any other respondent opposed the application, then an order that such respondents opposing the application shall pay the costs jointly and severally, the one paying the other to be absolved, on the scale as between attorney and client and jointly and severally with the sixth respondent in the event that she opposed the application."

[2] The first, third, fourth, sixth and seventh respondents are opposing the main application.

[3] The second application, application number 1916/2023, is the return date of a rule *nisi*, which initial application for the rule *nisi* previously served before me on an urgent basis ("the interdictory

application”). The first, second, fourth, fifth and sixth respondents opposed the application. However, on 2 June 2023, I granted the following order therein:

“1. The applicant`s non-compliance with the Court Rules pertaining to form, service and time periods are condoned and the application is enrolled and heard as an urgent application in terms of the provisions of Rule 6(12).

2. A rule *nisi* is issued, calling upon the respondents to show cause, if any, on 27 July 2023 at 9h30, or as soon thereafter as the applicant`s legal representatives may be heard, why the following orders should not be made final:

2.1 Interdicting and restraining the first and second respondents from passing transfer of the immovable property, better known as Unit 18, L[…] Section Title, Sectional Title Scheme number: 193 (situated at W[…] Extension 1 27), Diagram Deed Number: 193/89, 82 K[…] Crescent, Wapadrand, Tshwane, Gauteng Province [Pretoria Deed’s Office] to the FC Fin Trust, alternatively in the name of the trustee(s) for the time being of the FC Fin Trust or any other nominated purchaser pursuant to the Agreement of Sale, Sectional Title, dated 1 March 2023, pending the finalization of the main application issued in this Court under case number: 201/2023 and the resolution taken with regards to the sale of the aforesaid immovable property at the first meeting of trustees to be held after finalization of the aforesaid main application.

2.2 Interdicting and restraining the first and second respondents from entering into a purchase agreement to sell the immovable property, … and passing transfer thereof to the FC Fin Trust or any other purchaser pending the finalization of the main application issued in this Court under case number: 201/2023 and the resolution taken with regards to the sale of the aforesaid immovable property at the first meeting of trustees to be held after finalization of the aforesaid main application.

2.3 Interdicting and restraining the ninth respondent from registering the transfer of the immovable property, in the name of the trustee(s) for the time being of the FC Fin Trust, alternatively in the name of the FC Fin Trust or any other purchaser pending the finalization of the main application issued in this Court under case number: 201/2023 and the resolution taken with regards to the sale of the aforesaid immovable property at the first meeting of trustees to be held after finalization of the aforesaid main application.

2.4 That the costs of the application stand over for determination by the Court hearing the main application.

3. Paragraphs 2.1, 2.2 and 2.3 above are to operate as interim interdicts with immediate effect pending the finalization of this application.

4. A copy of this order is to be served forthwith by the applicant on the respondents by means of email."

[4] The said respondents are now also opposing the confirmation of the rule *nisi*.

<u>The citation of the parties:</u>

[5] The parties have unfortunately been cited differently and in a different chronological order in the two applications, which can cause confusion. I will therefore, for the sake of efficacy, refer to the parties in both applications as follows, unless I specifically indicate the contrary:

5.1 The applicant in both applications is a male pensioner, residing in Cape Town. The applicant suffers from Vascular Dementia. M[…]-C[…] C[…]-T[…] is the applicant's wife. She is representing the applicant in both applications and deposed to the respective affidavits by virtue of a General Power of Attorney, dated 7 July 2021, and which was registered in the Deeds Office on 16 July 2021. She explained in the founding affidavits filed in both applications that the applicant's medical condition affects his speech and co-ordination, but that he fully understands when he is spoken to. I will refer both to the applicant and Mrs C[…]-T[…] as "the applicant", unless I mean to specifically refer to Mrs C[…]-T[…], in which instances I will refer to her as "the applicant's wife".

5.2 According to the applicant he is the founder and an income- and capital beneficiary of the Olive Tree Trust 162/2012 ("the Trust").

5.3 The first respondent in both applications is D[…] T[…] N.O. in her capacity as a co-trustee of the Trust. She is also cited in her personal capacity as the sixth respondent in both the applications and in her capacity as guardian of her two minor children ("the two minor children") who are beneficiaries of the Trust, as the third and fourth respondents in the main application and the fourth and fifth respondents in the interdictory application. For the sake of clarity, I will in both applications generally refer to her as "the first respondent", but will specify her capacity if and when necessary when same cannot be deducted from the context.

5.4 The seventh respondent in the main application is Sarel Louis Augustyn N.O. in his capacity as a co-trustee of the Trust. He is also cited as such as the second respondent in the interdictory application. He is furthermore cited in his personal capacity as the seventh respondent in the interdictory application, but he has not been cited in his personal capacity in the main application. I will in both applications refer to him in his personal capacity as "Mr Augustyn" and in his representative capacity as "Mr Augustyn N.O.".

5.5 When referring to both the first respondent and Mr Augustyn N.O. in their capacity as joint trustees, I will refer to them as "the trustees" in both the applications.

5.6 The eighth respondent in the main application and the interdictory application is Fanie van Vuuren N.O., who is cited in his capacity as trustee of the FC Fin Trust. I will refer to Mr van Vuuren and the FC Fin Trust by his/its names respectively in both the applications.

Background:

[6] On 20 July 2023 my colleague, Van Rhyn, J granted an interim application of the applicant in the main application, in which she *inter alia,* ordered that "*the notice of motion and all the affidavits*

deposed to by the parties thereto" in the interdictory application *"be incorporated by reference in the main application"***.** The two applications are very intertwined, hence this order. I will consequently also be referring to allegations contained in both applications.

[7] I have fully dealt with the background to the interdictory application and in effect to the main application too, in my judgment delivered in the interdictory application on 2 June 2023. For ease of reference and clarity I consider it apposite to repeat the greater part thereof herein.

[9] The first respondent was married to the applicant's son, D[…] T[…], but they were divorced during 2009. The two minor children were born from their marriage. The first respondent was awarded care and primary residence of the two minor children.

[10] D[…] was never in a position to assist the first respondent to maintain the minor children, which is currently still the position. The applicant has consequently been financially assisting the first respondent, on behalf of this son. The extent of the applicant's financial assistance is in dispute.

[11] The immovable property described in the Notice of Motion is presently still registered in the name of the Trust. I will refer to the said immovable property as "the Trust property".

[12] In the founding affidavit of the interdictory application the applicant's wife made the following allegations:

“9. The trust was erected with the sole purpose to own an immovable property where the children can reside.

10. I was present when the applicant specifically said to the first respondent (in personal capacity) when creating the trust that the immovable property must not be sold. It was never the intention that the Trust’s property be sold, and the proceeds of the sale utilized as the first respondent (and the second respondent) intends to do. The first respondent agreed to this, and the immovable property acquired in the Trust with the express intention to safeguard the property for the benefit of all the trust beneficiaries, including the applicant.

11. The house was purchased and put in Trust to provide a suitable place to live for the children with good living conditions to serve the best interests of the children as envisaged by the Children’s Act, 38 of 2005. The first house was sold when the first respondent moved, and a new property acquired as a result of the intention with which the Trust property was bought. The same transpired when the first respondent moved to Gauteng and the Trust’s property was purchased. In the removal application the acquisition of the Trust property is dealt with fully, namely that the applicant (*sic)* sold the KwaZulu Natal property without informing the applicant or me of the sale. We only learned of the sale after the first respondent had signed an offer to purchase on the Trust’s property. There however was a shortfall on the purchase price that needed to be paid and the first respondent approached the applicant and myself for funding in this regard. An amount was lent to the Trust by Armist Wholesale (Pty) Ltd, a company in which the applicant and myself have equal shares.

12. It obviously benefits the first respondent in personal capacity as she also has a place of residence as guardian of the children for which she need not pay rent.

13. The first respondent's (in personal capacity, thus the sixth respondent) only expense with regards to place of residence is payment of the monthly municipal account in relation to the immovable property. To this end, she receives as part of the maintenance contribution from the applicant, a contribution for the pro-rata share of the children's water and electricity usage.

14. The levy payable on the property also forms part of the maintenance contribution. The applicant also pays the household insurance directly to the insurer monthly."

The main application under case number 201/2023:

[13] On 18 January 2023 the applicant issued the main application under case number 201/2023 in terms whereof the applicant was initially seeking an order that the applicant's attorney of record, Mrs Milton, and the applicant`s wife be appointed as trustees of the Trust in addition to the first respondent, who, at the time, was the only trustee.

[14] On 23 February 2023 the Court granted leave to the applicant to, amongst other matters, amend the Notice of Motion in the main application to include a prayer for the removal of the first respondent as trustee of the Trust and to file a supplementary founding affidavit. The respondents in the interdictory application, with the exclusion of Mr Augustyn, in his personal capacity, Mr van Vuuren, in his capacity as trustee of the FC Fin Trust, and the Registrar of Deeds, Pretoria, are also cited as respondents in the main application. The said respondents are opposing the relief

sought by the applicant in the main application. The aforesaid respondents filed an answering affidavit in the main application which was deposed to by the first respondent. Mr Augustyn N.O. also deposed to a confirmatory affidavit in support of the opposition to the main application. The applicant filed a replying affidavit, which was deposed to by the applicant`s wife.

[16] When the Trust was established on 23 February 2012, three trustees were appointed. They were the first respondent, the applicant and one Anthony de Villiers, representing the Beta Trust Admin CC. The applicant resigned as trustee on 21 June 2012, allegedly since he was advised that he should rather not be the founder, a trustee and beneficiary. The first respondent and the Beta Trust Admin CC were then the appointed trustees. On 13 October 2020, Beta Trust Admin CC, represented by Anthony de Villiers, resigned. Although the Letters of Authority was not revised to reflect only the first respondent as trustee, Beta Trust Admin CC's resignation was, however, accepted by the Master by means of a letter attached to the founding affidavit in the interdictory application as annexure "N".

[17] According to the applicant, the first respondent, notwithstanding demand, failed to appoint an additional trustee in terms of the provisions of the Trust Deed. According to the first respondent, she was initially not aware that the Beta Trust Admin CC had resigned as trustee.

[18] The first respondent later nominated Mr Augustyn to be the second trustee and the Master authorised him to co-represent the Trust on 19 January 2023.

[19] During the preparation of the main application the applicant and his wife were informed by Demetrios that the first respondent had instructed an estate agency to sell the Trust property. It was then ascertained that the Trust property had indeed been placed in the market by Remax Estate Agency and advertised on the Property24 website for R1 450 000.00. A copy of the advertisement is attached to the founding affidavit in the interdictory application as annexure “C”.

[20] On or about 3 March 2023 the applicant’s wife received information that an offer to purchase the Trust property had been made. Thereafter correspondence followed between the applicant`s attorney and Mr Augustyn, in his capacity as the attorney of the first respondent, and only after some time and much effort, the applicant`s attorney eventually received a copy of the document titled “Agreement of Sale – Sectional Title” (“the Deed of Sale”) from Mr Augustyn via e-mail on 22 March 2023. A copy of the Deed of Sale, dated 1 March 2023, is attached to the founding affidavit in the interdictory application as annexure “I”.

[21] The applicant pointed out in the founding affidavit that at the time of the drafting and filing of the supplementary founding affidavit in the main application, the sale had not yet been concluded.

[22] At paragraph 46.7 of the founding affidavit in the interdictory application, the following is consequently stated:

> "The applicant has given notice to the … respondents in the removal application that the applicant intends to amend the amended notice of motion to include as new prayer 11 the following, 'Declaring the agreement, styled Offer to Purchase – Sectional Title, dated 1 April 2023, with regards to the trust's property be declared (*sic)* void, alternatively be set aside', and renumbering the existing paragraph 11 and 12 to prayers 12 and 13 respectively. Fanie van Vuuren N.O. in his capacity as trustee of the FC Fin Trust will be joined to the application as eighth respondent and the Registrar of Deeds, Pretoria will be joined as ninth respondent to the application."

[23] It is the applicant's case that the Trust was erected and the immovable property in the Trust was acquired to provide housing for the minor children. This is why the immovable property in the Trust was replaced by another immovable property when it was sold in the past in keeping with the intention with which the Trust was established.

[24] According to the applicant the first respondent fails to pay the Trust's creditors fully every month, which puts the Trust property at risk for attachment, more specifically by the Municipality who threatened to take legal action due to non-payment of the municipal accounts. The applicant further alleges that the levies were also not paid, which means that Trust funds were not used for the purpose for which it was paid over to the first respondent.

[25] It is further the applicant's case that the first and second respondent's conduct by selling the Trust property is not in the

interest of the Trust nor the Trust beneficiaries. The Trust property was acquired to secure a safe living environment for the minor children. The costs of living in the Trust property are negligible, especially considering that the applicant pays the levies each month.

[26] With reference to the main application, the applicant also makes the following averments in the founding affidavit in the interdictory application:

"58. … the first respondent contends, in summary, in her affidavit in the removal application that she is the children's mother and she alone must decide what is and is not in their best interest. Once more, if I understand her version correctly, as set out in her answering affidavit to the removal application, then the first respondent states that D[…] does not support her or the children and she denies, as stated, the extent of the appellant's financial support. Her denial of the applicant's financial support is palpably untrue and will be properly dealt within those proceedings. She however goes further to state that the applicant cannot force her to stay in the Trust's property and says that she and the children no longer want to reside there. She contends that the children only has (*sic*) the Trust to look at for maintenance."

59. Her intention is however to sell the Trust property and to use the proceeds to pay all the maintenance needs of the children. She in fact goes so far as to state that the fact that she is living above her means and her income is irrelevant. She says this after saying that the removal application in fact revolves around the children's maintenance. The first respondent claims that she and the second respondent will only use the proceeds of the sale to pay for expenses of the daughters. The first respondent indicated that they (the trustees) intend to pay the proceeds of sale into a bank account.

60. It appears that the first respondent has decided that since the children has almost reached the age of majority, she will sell the Trust's only asset and see to it that the money is used up.

61. The first and second respondents' conduct, by selling the Trust property is not in the interest of the Trust or trust beneficiaries. The reasons advanced for the decision simply does not pass muster.

62. …
63. …

64. The first respondent will not be able to rent a property in a safe neighbourhood for the amount of the municipal account, which is what she is liable to pay towards the current housing. In the result she will have to rent a property and she will use the Trust's funds to pay the rent. If she could not even pay her pro-rata portion of the municipal account, which was the only expense she had to pay out of her own pocket to stay in the Trust property, she will most definitely not be able to pay a pro-rata portion of rental. She will still be liable to pay a municipal account if she rents, but she could not even pay the municipal account for the Trust`s property on her version.

65. As stated above, it has also come to my knowledge that the applicant *(sic)* [moved] out of the Pretoria property and receives occupational rent for the property. She did not disclose this fact to us.

66. The sale of the property is not in the interest of the beneficiaries and this issue is fully dealt with in the main application. Suffice it to say, the applicant's interests for instance have not been considered by the trustees. They intend to sell the property and then pay rental, obviously this will be put down as maintenance obligation for the children whilst they do not have such an obligation. The applicant has appropriated trust funds for herself in the past, as dealt with in the main application

> and even requested the applicant to consent to the registration of a bond over the Trust's property to enable her to buy a car for herself when she had to sell her Fortuner vehicle due to financial constraints. The Court is referred to the allegations in the main application where this is dealt with in detail."

[27] The first respondent first qualified herself as an attorney and she later decided to qualify herself as an advocate and she joined the Pretoria Society of Advocates after she moved to Pretoria. The applicant points out that the second respondent is the first respondent's attorney and he condones her conduct as trustee. According to the applicant the second respondent has not been taking issue with any conduct on her part in her capacity as trustee.

[28] It was further the applicant's case in the interdictory application that the Deed of Sale does not comply with the peremptory requirements of section 2(1) of the Alienation of Land Act, 68 of 1981.

[29] Furthermore, with regard to the first respondent's decision to sell the Trust property and the mandate which was given to the estate agent in this regard, the applicant was the sole trustee at the time. The applicant alleges in the interdictory application that the second respondent informed the applicant's attorney that he ratified the sale after the second respondent became authorised to act on the Trust's behalf on 19 January 2023. According to the applicant the Deed of Sale is, also on this basis, void.

[30] In the interdictory application the applicant averred that the first and second respondents intended to force the sale and the registration of passing of ownership so that regardless of the first respondent's possible removal as a trustee and/or the appointment of any additional trustees, such trustees will be faced with a *fait accompli* as far as the sale of the Trust property is concerned.

MERITS OF THE APPLICATIONS:

[31] It is recorded that at the time when the adjudication of the interdictory application served before me, all the papers in both the applications had already been filed and the lever arch file which contains the main application was also placed before me at that stage. No subsequent affidavits on the merits of the two applications followed the issuing of the rule *nisi* in the interdictory application.

The appointment of the estate agent and the validity of the Agreement of Sale:

[32] Mr Snellenburg, who appears on behalf of the applicant in both the applications, and Mr Reinders, who presently appears on behalf of the relevant respondents who are opposing the two applications, indicated in their respective heads of argument that the Agreement of Sale pertaining to the Trust property has since been cancelled by Mr Van Vuuren on behalf of the FC Fin Trust. Mr Snellenburg consequently indicated that the declaratory order regarding the validity of the appointment of the estate agent and

the subsequent Agreement of Sale, need not be adjudicated anymore. Mr Snellenburg confirmed same at the commencement of the hearing of oral arguments.

[34] For the sake of clarity I record that Mr Grobler previously appeared on behalf of the relevant opposing respondents during the hearing of the interdictory application on 28 April 2023.

The *locus standi* of the applicant:

[35] I have already dealt with the alleged lack of *locus standi* of the applicant in the interdictory application. I consequently request that my findings in this regard contained in paragraphs [43] to [51] of my judgment dated, 2 June 2023, be read herein as though *mutatis mutandis* set forth in this judgment.

[36] When dealing with this issue in relation to the main application, I wish to pertinently repeat the contents of paragraph [52] of my said judgment herein:

> "[52] In addition, the aforesaid interpretation is supported by the available evidence pertaining to the surrounding circumstances which led to the formation of the Trust. In this regard the evidence of the founder of the Trust, being the applicant, is clear that it was the intention that he be appointed as an income- and capital beneficiary, as indeed stated and recorded in the Trust Deed. In this regard I find it very significant that in the main application the respondents are not disputing the applicant's allegation that he is an income- and capital beneficiary, and, consequently, his *locus standi*. In this regard the following allegations

and responses thereto are evident from the papers filed in the main application:

1. In paragraph 2 of the founding affidavit the following allegations are made:

   '2.1.2 The applicant is the founder and an income and capital beneficiary of the Olive Tree Trust …

   2.1.3 The applicant is also cited herein as the fifth respondent, as he is also a beneficiary of the abovementioned Trust.'

   In response to the aforesaid allegations, the respondents state as follows in paragraph 5.5 of the answering affidavit:

   '5.5 I admit the allegations herein contained, insofar as it accords with the content of the Deed of Trust….'

2. In paragraph 10.1 of the founding affidavit the following allegations are made:

   '10.1 The founder of the Trust is my husband in my second marriage. He is also an interest and capital beneficiary in the said Olive Tree Trust …'

   The response to the aforesaid allegations is contained in paragraph 5.17 of the answering affidavit, which (unconditionally) reads as follows:

   '5.17 I admit the allegations herein contained.'"

[37] Consequently, based on the information contained in the interdictory application, read with the contents of the main application, I again find/persist with my finding that the applicant is an income- and capital beneficiary in terms of the Trust Deed. In his capacity as such he has the right to approach the Court if a trustee is delinquent. The right vests in all trust beneficiaries, including contingent trust beneficiaries. See **Gross v Pentz** 1996 (4) SA 617 (A)

[38] The applicant consequently has *locus standi* for purposes of both the interdictory application and the main application.

[39] For the sake of completeness I need to mention that Mr Reinders, during his oral argument, expressed his doubt as to whether the General Power of Attorney, attached to the founding affidavit as Annexure "CCT1", on which the applicant`s wife relies for her authority to have deposed to the respective affidavits on behalf of the applicant, is worded wide enough to provide her with such authority. However, as correctly submitted by Mr Snellenburg, this point has not been raised in either the interdictory application or the main application and will grossly prejudice the applicant should I allow the point to be raised at this late stage of the proceedings. In any event, I have to remark, even though *obiter,* that in my view the said Power of Attorney is indeed worded wide enough for her to rely upon it for present purposes.

Approach to the factual allegations contained in the affidavits:

[40] The approach to be followed when an applicant seeks final relief on motion has been determined in **Wightman t/a JW Construction v Headfour (Pty) Ltd and Another** 2008 (3) SA 371 (SCA) at para [12] to be the following:

> "[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E - 635C. See also the analysis by Davis J in *Ripoll-Dausa v Middleton NO and Others* 2005 (3) SA 141 (C) at 151A - 153C* with which I respectfully agree."

See also **Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs** 2019 (3) SA 251 (SCA).

[41] I must however state that in this matter most of the findings are actually based on common cause facts.

[42] Because of the voluminous nature of the two applications (2 lever arch files, consisting of a total of 815 pages, excluding the four sets of heads of argument), it goes without saying that I cannot deal with each and every allegation. I have, however, worked through all the papers more than once and will be addressing the most pertinent issues and averments.

<u>Request for removal of the sixth respondent (first respondent N.O.) as trustee:</u>

<u>1. General Principles:</u>

[43] The nature of a trust is described as follows in **<u>Griessel N.O. v De Kock</u>** 2019 (5) SA 396 (SCA) at para [11]:

> "[11] It is trite that a trust is not a legal person. An inter vivos trust is governed by the terms of a trust deed as well as the provisions of the Trust Property Control Act 57 of 1988. In its strictly technical sense, a trust is a legal institution sui generis. In *Lupacchini v Minister of Safety and Security* Nugent JA observed:
>
>> 'A trust that is established by a trust deed is not a legal person — it is a legal relationship of a special kind that is described by the authors of *Honoré's South African Law of Trusts* as 'a legal institution in which a person, the trustee, subject to public supervision, holds or <u>administers property separately from his or her own, for the benefit of another person or persons</u> or for the furtherance of a charitable or other purpose . . .''" (My emphasis)

[44] It is the duty of a trustee(s) to administer a trust for the benefit of the beneficiaries. In **<u>Trust Law and Practice</u>**, Dr PA Olivier *et al,* updated April 2023 – SI 8, Chapter, at para 3.4.2 this principle is stated in the following terms:

> "The object of the powers given to a trustee is to enable him to do justice to the fiduciary duties which attach to his office. It is self-evident that there is a duty to exercise all powers in such a manner that the beneficiaries reap the benefits. Although the trustee's duties can be listed under a number of

headings, the dominant consideration inherent in all the duties is the benefit of the beneficiaries."

[45] In the preamble of the Trust Deed it is also specifically stipulated that the Trust Fund is for the benefit of the income- and capital beneficiaries:

"Whereas the Founder wishes to create a Trust by way of a donation to the Trustees, with the purpose of establishing a Trust Fund for the benefit of the income- and capital beneficiaries (herein later jointly referred to as the 'beneficiaries') …"

[46] The Trust Deed furthermore contains the following provisions in this regard:

"9. <u>POWERS OF THE TRUSTEES:</u>

9.1 The powers of the Trustees defined in this Trust document, are *ex officio* powers relating to that of the office of Trustees, to enable them to administer the Trust Fund, <u>on behalf of the beneficiaries, and not for the personal benefit of the Trustees</u>. The extent of the powers vested in the Trustees, must always be interpreted so that <u>the main objective of the Trust is, namely, to benefit the beneficiaries, and not to do harm</u>." (My emphasis)

"13. <u>DUTIES OF TRUSTEES:</u>

Apart from the common law duties which attach to the office of Trustee, the Trustees shall be subject to all the duties of a Trustee as enunciated in the Trust Property Control Act No. 57 of 1988, namely to:

13.1 …

…

13.7 <u>To not dispose of any assets of the Trust, for their own benefit or for the benefit of their estates</u>, and to continuously act in a prudent and diligent manner as can be reasonably expected from a person who is in charge of the affairs of another person." (My emphasis)

[47] In terms of section 20(1) of the Trust Property Control Act, 57 of 1988 ("the Act") a trustee may, on the application of any person having an interest in the trust property, at any time be removed from his/her office by the court if the court is satisfied that such removal will be in the interests of the Trust and its beneficiaries.

[48] An application for the removal of a trustee is to be made against the relevant trustee in his/her personal capacity, hence the sixth respondent *in casu*, Ms Theodorellis Debbie. In **<u>Stander v Schwulst and Others</u>** 2008 (1) SA 81 (C) the following is stated in this regard at paras [32] – [34.5]:

"<u>The legal position</u>

[32] An application for the removal of a trustee is a claim against the trustee in his personal capacity, in much the same way as is a beneficiary's claim against a trustee for damages for breach of trust. The trustees accepted this in their founding affidavit and it is borne out by authority.<u>5</u>

[33] The contention by Mr *Olivier* that they should have been sued in the main case in their representative capacities would not affect the costs issue now under consideration and their contention is, incorrect in law. It is contrary to the cases cited in n5 above and to the views of the learned authors mentioned there.

[34] It is also not correct to describe this state of affairs as illogical. On the contrary, it is sound:

[34.1] A claim should be brought against a trustee in his representative capacity where he is alleged to be liable in that capacity, eg on a contract concluded on behalf of the trust or a delict committed by the trust or to effect payment due under the Trust deed to a beneficiary.

[34.2] In such cases, where there is more than one trustee, the trustees in their representative capacities must act together and any claim in such cases must cite all the trustees in their representative capacities. One of several trustees cannot be cited as a representative of the trust. Accordingly, in proceedings of the kind envisaged in 34.1 above, all the trustees in their representative capacities would have to be sued. That is the hallmark of a claim brought against trustees in their representative capacities.

[34.3] Where a trustee is sued for breach of trust (whether for removal or damages), the claim is obviously against him personally. The claim arises because the trustee assumed the office of trustee, but the complaint is that he violated the trust or the office. The whole point in such proceedings is that the trust (as represented by its trustees in their representative capacities) is not liable. If it were otherwise, beneficiaries would always be the ultimate losers where trustees act in breach of trust.

[34.4] Particularly in the case of removal, the claim is personal. A trustee as a representative of the trust (as distinct from his personal capacity) cannot be removed. The correct metaphor is that of an office (cf s 20 of the Trust Property Control Act 57 of 1988; cf Honoré (op cit) in para 8 at 22). The office is unaffected by the removal. It is the individual who is removed from the office.

[34.5] That claims for removal are personal is clear from the fact that a removal application can properly be brought against only one of several trustees. The claim arises from conduct personal to the particular trustee and not from conduct which binds the trust."

See also **Price and Another v Kaplan N.O. and Others** (44937) [2022] ZAGPPHC 429 (14 June 2022) at para [66].

[49] Section 20(3) of the Act determines that if a trustee authorized to act under section 6(1) is removed from his office or resigns, he/she shall without delay return his/her written authority to the Master.

[50] In **LAWSA,** Volume 43(3ed), at para 216, the following approach to an application for the removal of a trustee and the circumstances in which such an application may be successful, are set out as follows:

"A trustee may be removed even if his or her conduct was *bona fide*, since neither *mala fides* nor even misconduct are necessary requirements for removal. When a court exercises its power to remove a trustee it must do so with circumspection. Whenever trust assets are endangered, a trustee should be removed. Some circumstances which justify the removal of a trustee by the court are:

(a) where the trustee, without explanation, removes trust funds from an apparently safe investment with a financial institution and transfers them to his or her personal account, for the courts have often laid down <u>that any person in a position of trust has no business to mix his or her own funds with trust funds – it is a very improper procedure for such a person to pay trust funds into his or her personal account;</u>

(b) where the trust deed requires that, if a decision is to be taken (especially the sale of immovable property) notice must be given to all the trustees so that they can make a decision in this regard, and the trustee deliberately refrains from informing one of his or her trustees of the intended decision;

(c) <u>where the trustee does not ascertain from the trust deed what the rights and obligations of the office of trustee entail;</u>

(d) <u>where the trustee treats the trust and its assets as his or her own, for example by selling the trust assets without the proper approval of the other trustees as required by the trust deed</u>;

(e) where a trustee, without objection allows grave misconduct on the part of a co-trustee in the administration of trust property and thereby exercises no control at all over the trust property; and

(f) <u>when continuance of the trustee in office prevents the trust being properly administered or will be detrimental to the welfare of the beneficiaries.</u>" (My emphasis)

[51] The following applicable *dicta* are contained in the judgment of <u>**Kidbrooke Place Management Association and Another v Walton and Others NNO**</u> 2015 (4) SA 112 (WCC) at paras [47] – [49] thereof:

[47] The conflict-of-interest situation in which the first respondent and Badenhorst placed themselves as trustees in respect of the transactions involving HMS and Codé was stark. This was in manifest breach of their duties to the Trust and the rights-holders as beneficiaries.

[48] Not only was their conduct in conflict with the duties of a trustee at common law, it was also in breach of express provisions of the trust deed that reiterated the common-law duties of trustees. …

[49] As stated in Cameron et al op cit supra para 223, '(a) trustee, even though innocent, whose position involves a conflict of interest and duty may be removed from office by the court'. …"

2. The required number of trustees:

[52] The relevant provisions of the Trust Deed with regard to the required number of trustees and their decision-making processes, are the following:

"5.2 There shall be at least TWO (2) but preferably THREE (3) and at most SIX (6) trustees in office, with the understanding that in case only TWO trustees remain as a result of the resignation of or death of co-trustees, the remaining Trustees will be authorized to exercise sole powers as Trustees for the maintenance and administration of the Trust, until such time as a further Trustee is appointed.

5.3 Should there be only **ONE trustee** in office, **such Trustee is obliged to appoint further Trustees within 90 (NINETY) days of the retirement/resignation** or death **of the co-trustees**. While there is only one Trustee in office, such Trustee will, whilst he/she acts alone, not be entitled to pass a valid resolution, regarding the distribution of income, capital or amendment of the Trust Deed." (My emphasis)

"8.2 Resolutions made by the Trustees, occur:

8.2.1 Where there are more than two Trustees, by way of an ordinary majority of votes;

8.2.2 Where there are only two Trustees, by way of a unanimous decision from both of them."

[53] The first respondent and Beta Trust Admin CC, represented by Anthony de Villiers, used to be the two trustees of the Trust. The last-mentioned trustee resigned on 13 October 2020, as evident from his letter of resignation. On the applicant`s version the first respondent told her about the trustee`s resignation shortly after he had resigned. According to the first respondent she only became aware of his resignation on 15 April 2021 when she contacted Meditax in Bloemfontein to request a copy of the Trust Deed, since her copy had a few pages missing. Helena at Meditax then emailed her the letter of resignation and the Master`s letter confirming same. I will approach these facts based on the first respondent`s own version.

[54] In her answering affidavit in the main application the applicant admitted that she did not immediately appoint another trustee at the time "*because it took time to find a fit and proper person to act as a trustee …and not everyone wanted to accept the appointment to act as trustee."* She further stated that fortunately her attorney, Mr Augustyn (the seventh respondent)*, "whom I have worked with previously in other matters, was satisfied to accept the appointment as trustee …*"

[55] It is common cause that on 31 January 2022 the applicant`s attorney of record, Mrs D Milton, emailed a letter to the first respondent in which letter Mrs Milton, *inter alia,* pointed out to the

first respondent that she, the first respondent, was the only trustee at the time and that she had failed to appoint additional trustees as determined by the Trust Deed. She was placed on terms to comply with the Trust Deed in relation to the appointment of further trustees on or 28 February 2022. Mrs Milton also advised the first respondent that whilst she is the only trustee she may not make any resolutions or decisions in relation to the trust and should she do so, same will be void.

[56] Despite the aforesaid, on the first respondent`s own version, she only signed a resolution on 16 November 2022 for the nomination of Mr Augustyn as second trustee of the trust.

[57] On her own version it therefore took the first respondent from 15 April 2021 until 16 November 2022 to have taken a resolution regarding the nomination of a second trustee, despite having even been placed on terms by Mrs Milton to do so by 28 February 2022. In addition, the said resolution and other relevant documents were only received by the Master on 18 January 2023 (which version is supported by the fact that Mr Augustyn was only appointed as co-trustee by the Master on 19 January 2023).

[58] The first respondent`s version that she took from 15 April 2021 until 16 November 2022 to have found a fit and proper and willing trustee, is so untenable that it can outright be rejected. The first respondent further failed to provide any explanation for the delay between the date of the resolution and the date when the Master received same.

[59] It is consequently evident that the first respondent failed to comply with the provisions of the Trust Deed in this regard.

[60] Mr Snellenburg relied on the **Price**-judgment, *supra,* wherein it was held that a trustee who failed to comply with the terms of the Trust Deed, and specifically the obligation to see to the appointment of a trustee where the number of trustees fell below the required minimum necessary for the trust to have capacity, constitutes a dereliction of his/her duty as trustee and amounted to grossly inefficient administration of the estate rendering the trustee unfit to hold the office of trustee.

[61] Furthermore, if it took the first respondent months to find out that her co-trustee had resigned, it begs the question how much, if any, co-operation existed between them as co-trustees or did the first respondent proverbially "run the show" on her own.

3. Ascertaining from the trust deed what the trustees` rights and obligations entail:

[62] As already indicated earlier, the first respondent stated that she contacted Helena at Meditax on 15 April 2021 to request a copy of the Trust Deed because *"my copy of the Trust Deed had a few pages missing".* An email from the said Helena is attached to the answering affidavit in the main application as annexure "DT14" from which it is evident that she (the first respondent indeed requested a copy of the Trust Deed.

[63] What the first respondent did not explain is for how long period of time she has been without a complete copy thereof and/or how it happened that she lost or misplaced some of the pages thereof. She has been holding the office as trustee of the trust since 23 February 2012. Theoretically, and without an explanation by the first respondent, it may have been a number of years during which she did not have a complete copy of the Trust Deed.

[64] The further ramification is that even after the first respondent obtained a complete copy of the Trust Deed, she still failed to comply with the time period within which she had to nominate a new co-trustee.

[65] As indicated earlier in the judgment, one of the obligations of a trustee is to ascertain from the Trust Deed what his/her rights and obligations as the trustee entail, which the first respondent could not have done "properly during the (unknown) time period when she was not in possession of a complete copy of the Title Deed.

4. Conflict of interest and/or where the trustee treats the trust and its assets as his/her own:

[66] The aforesaid heading actually constitutes two different grounds upon which a trustee can be removed from office. However, due to the facts and circumstances in the present matter, I deem it apposite deal with these two grounds under one heading.

[67] I have already referred to the general principle that a trustee should keep trust assets and money at all times separate from

his/her own and that there should be no conflict of interest between the personal capacity and the repetitive capacity of a trustee.

[68] In terms of the Trust Deed the duties of the trustees, *inter alia,* entail the following:

> "13.3 Immediately open a Trust account with a bank or building society in the name of the Trust, in which all money received by the Trust, shall be deposited.
>
> 13.4 …
>
> 13.5 To keep proper books or allow proper bookkeeping to be kept of the affairs of the Trust;
>
> 13.6 To continuously keep all trust property separate or to register it so can be identified as Trust property.
>
> 13.7 To not dispose of any assets, for their own benefit or for the benefit of their estates, and to continuously act in a prudent and diligent manner as can reasonably be expected from a person who is in charge of the affairs of another person."

[69] At the outset I need to record that the first respondent, nor Mr Augustyn N.O., presented any evidence of the existence of such separate bank account in the name of the trust, nor of any bookkeeping in relation to the affairs of the trust.

[70] To a certain extent the two applications developed as though they entail a maintenance dispute, which they definitely do not. I do

however comprehend why this development occurred in the circumstances. However, I wish to accentuate the fact that these two applications do not constitute maintenance disputes and I will consequently attempt to restrict myself to what I consider to be the real issues for purposes of the nature of the two applications.

[71] The first respondent and Demetrios got divorced in 2010. The applicant offered and undertook to pay maintenance in support of the two minor children in lieu of their father, the applicant`s son, Demetrios, who was and is not financially able to do so.

[72] It is common cause that after the first respondent`s and Demetrios divorce in 2010, she resided in Bloemfontein with the two minor children in a house which belonged to the applicant. When the first respondent relocated to KZN in July 2012, the applicant sold the said house and bought a house in Pietermaritzburg, which was subsequently registered in the name of the trust during or about October 2012. When the first respondent and the minor children thereafter relocated to Pretoria, the property in KZN was sold and the Trust property was acquired and registered in the name of the trust on 28 February 2014. The first respondent and the minor children took occupation of the property in Pretoria on 1 March 2014. The first respondent became a member of the Pretoria Society of Advocates during 2016 and she has since been practising as an advocate, after she previously qualified herself as an attorney. It is. However, it is not clear whether she still holds chambers at the bar.

[73] Already in the founding affidavit filed in the main application, paragraph, 10.9.7 thereof, the applicant referred to a time period when the first respondent moved into a different townhouse and the payments which he made in respect of the said townhouse in favour of her personally, in spite of rental which she was receiving at the time for the Trust property. In the answering affidavit filed in the main application, the first respondent admitted the aforesaid averments. At the same time the first respondent, more than once in her answering affidavit in the main application, averred how she struggled financially during the Covid-pandemic in 2020. I accept unconditionally that the pandemic had a huge negative impact on the first respondent`s practice. However, when the aforesaid averments are read in conjunction with the replying affidavit, it is evident that it was during the very same year, 2020, that the first respondent moved out of the Trust property in January 2020 to live with a third party with whom she had a relationship. The relationship did not work out and during March 2020 she had to move out and find alternative accommodation because she had rented out the Trust property. During that stage the applicant paid a deposit of R17 000.00 for a furnished flat of the first respondent`s choice where they went to live temporarily, called L'Breeze. Thereafter the applicant also paid the rental for L' Breeze for the next 10 months in the amount of R17 000.00 per month. Not only did the applicant and the minor children lived free of charge, but the applicant also continued to pay her a monthly amount of R16 286.00 for maintenance, as well as the insurance for her vehicle and household assets. Whilst the applicant was paying these amounts, the first respondent also received an amount of R15 000.00 per month for 11 months for the rental of

the Trust property. The said rental money which she received for the Trust property obviously belonged to the Trust, but instead of paying it into an account in the name of the Trust or paying the creditors of the trust, she kept the rental amounts for herself and used same for her personal needs. She made no distinction between the money of the Trust and her personal money. I need to also mention that the first respondent did not pay the R17 000.00 which the applicant paid in her favour as a deposit for L'Breeze, back to him when she moved back to the Trust property. She used it like it was her own money.

[74] It is common cause that during 2021 the first respondent divulged to Ms T[…] that she was experiencing financial difficulties, despite the applicant`s monthly contributions. She was in arrears with the levies and the Municipal accounts of the Trust property. Ms T[…] herself checked the arrears at the time with the respective authorities. On 6 December 2021 the monthly rates were R3 286.00 and the outstanding amount was R30 166.49. The monthly levy was R1 500.00 and the levies outstanding were R25 496.79. From two invoices, dated July 2021, which the first respondent attached to her answering affidavit in the main application, it is evident that the rates were in arrears in the amount of R37 048.55 and that the monthly rates were R1 066.79 at the time. The levies were in arrears in the amount of R22 876.98 and the monthly levy at the time was R3 257.00. According to a letter from Ms Milton addressed to the first respondent, dated 31 January 2022, as at 6 December 2021 the monthly rates were still R1 066.79 with a total amount of R30 166.49 outstanding. At the time the Municipality handed the

account over to its lawyers. The said lawyers contacted Mrs T[…] and informed her that they will issue summons, take judgment and attach the Trust property if the account is not brought up to date.

[75] In a follow-up letter from Mrs Milton, dated 24 March 2022, addressed to the first respondent`s attorney of record, Mr Augustyn, Mrs Milton, *inter alia,* recorded the following:

"4.1 Mr T[…] and your client had an oral agreement that he would over and above the maintenance payable for his two granddaughters also pay the monthly levies of the said property, which he has been doing since the property was purchased.

4.2 Included in the maintenance of the children, provision was made for their pro-rata share of the water and lights, which enabled Mrs D[…] T[…] to pay the two accounts monthly, and should not have been in arrears, arrears which our client also had to from time to time pay on behalf of your client. We are sure that your client will be able to verify these payments.

4.3 Monthly our client therefore pays over to Mrs T[…] the following:

4.3.1 The levies in the amount of **R3 286.00**

4.3.2 Household insurance in the amount of **R2 040.00**

4.3.3 Maintenance for the two granddaughters **R13 000.00**
(Maintenance R6 500.00 for each child)

Total amount of: **R18 326.00** per month."

[76] At the time of the attestation of the founding affidavit in the main application, 17 January 2023, the applicant`s wife stated as follows at paragraph 12.5 thereof:

> "The first respondent is not paying the Trust`s creditors fully every month and the levies and municipal accounts is presently R3 539.09 and R42 392.61 respectively. It would seem that the first respondent has neglected to address the municipal accounts for some time, but has brought the levies up to date after she made an arrangement with the Trustees of the Governing Board of the Sectional Title Scheme."

[77] In the first respondent`s answering affidavit filed in the main application, dated 9 March 2023, she explains that there is a municipal account for the electricity in the name of the trust and a municipal account for the property rates in the name of the trust.

[78] In the said answering affidavit, the first respondent also stated that the current levies amount to R3 257.00 per month and conceded that she and the applicant agreed that she will pay the levies from the money he paid to her in support of the children. She further stated that at the time there was no outstanding levies. She also conceded that they agreed that she will pay the electricity account in her personal capacity and stated that at the said date of the answering affidavit, 9 March 2023, there were no outstanding amounts in respect of the electricity account of the Trust. She has in the meantime also settled the levy account. According to the first respondent, at the time when she deposed to the answering affidavit in the main application, she has in the meantime also settled the levy account *in toto*, but that the rates

account has not been settled yet. She avers that there was no agreement that she will pay the property rates each month.

[79] Where the money came from to have paid the arrears in relation to the levies and the electricity, has not been explained by the first respondent. I, however, agree with the contention of Mr Snellenburg that it was probably paid up as a result of the two applications.

[80] Be that as it may, the fact remains that the money which the first respondent entrusted to the first respondent to pay the relevant creditors of the Trust, which was to be considered to be Trust funds and earmarked to be utilized in favour of the Trust, was not utilized for that purpose or in any other way in favour of the Trust. In the absence of any explanation, the only reasonable inference is that the first respondent used it for her own personal expenses/purposes, to the detriment of the Trust, putting the Trust property at risk for attachment.

[81] The very disturbing part about the aforesaid figures, is the fact that at the time the applicant was actually paying the money for the monthly levies over to the first respondent in order for her to pay the monthly account. She clearly failed to do so and therefore utilized money which was meant for the Trust, for her own personal purposes. The applicant at the time paid R18 326.00 per month to the first respondent, which was calculated as follows:

1. Monthly Levy R3 286.00
2. Household and Vehicle insurance R2 040.00
3. Maintenance for the two minor children

(Maintenance R6 500 for each child) R13 000.00

The maintenance includes their pro-rata share of the municipal electricity account.

[82] At one stage the first respondent wanted the applicant to consent that a bond be registered over the Trust property to enable her to buy a new car for herself and to pay her personal debt – to the detriment of the Trust. The applicant obviously declined her request.

[83] In the answering affidavit in the main application the first respondent constantly bemoans her alleged financial constraints. At paragraph 2.8 of the answering affidavit in the main application, the applicant states as follows:

"The Applicant is by no means committed to contribute meaningfully to my minor children`s maintenance, as he only contributes an amount of R8 000.00 in total for the maintenance of both my minor children. The aforementioned contribution is wholly insufficient to maintain my minor children and I, as my minor children`s primary caregiver and guardian, am duty bound to attend to their best interests, hence the decision to sell the property and to safeguard the nett proceeds derived therefrom for my minor children's benefit, as more fully alluded to and described herein *infra".*

[84] In subsequent paragraphs of the first respondent`s answering affidavit in the main application, the first respondent herself partly explains why the applicant reduced his direct monthly payments to her:

"5.32.5. Over and above the monthly maintenance amount, the Applicant pays the premium of the short-term insurance in respect of household contents and all risk items directly to the service provider. The current premium is approximately R2 000.00 per month.

5.32.6. Until the end of October 2022, the Applicant paid maintenance towards both children in the amount of R16 286.00 per month, which amount was split into two payments:

(a) on the 29th day of the month R8 286.00

(b) on the 4th day of the month R8000.00

5.32.7. From the maintenance amount of R16 286.00 supra, I had to pay the levies of the property in the amount of R3 257.00 per month.

5.32.8. After deduction of the levies of the property, the remainder of the maintenance for both children amounts to R13 029.00, being R6 514.50 per month per child.

5.32.9. From the balance of the maintenance of R13 029.00 supra, I have to pay the children's school fees, medical aid, transport, personal care, toiletries, clothes, shoes, electricity, cell phones, airtime/data, wifi, school lunches, pocket money, groceries, and so the list goes on.

5.32.10. The school fees for both children amounts to R8 980.00 per month, which amount excludes the children's extramural activities, extra classes, 8th subject fees, school uniform, sport clothes and sport gear. I annex hereto a copy of the account of Die Hoërskool Menlopark confirming the school fees, marked as Annexure "DT7". I also annex a copy of the account of Die

Hoërskool Menlopark, confirming the extramural and extra subjects, marked as Annexure "DT8".

5.32.11. The property's rates and taxes amounts to R1 175.00 per month which is currently in arrears in the amount of R43 620.03.

5.32.12. As from November 2022, the Applicant unilaterally decided to reduce the maintenance amount of R16 286.00 to R8 000.00 per month for both children, leaving a shortfall of R8 286.00.

5.32.13. With the R8 000.00 maintenance for both children, the Applicant expects me to pay the expenses of the trust property, being the levies of R3 257.00 and the property rates (current and arrears) together with all the other expenses of the children as mentioned supra.

5.32.14. When I noticed at the end of November 2022 that the Applicant made a short payment of R8 286.00, I sent text messages to Celeste and to Dimitri. Celeste never responded. Dimitri phoned me later to inform me that the Applicant are withholding R8 286.00 in order to pay directly to the school as from the end of November 2022.

5.32.15. Conveniently and interesting to note that no payments are reflecting on the school account for the months of November and December 2022 for the amount of R8 286.00 per month. The Applicant only made a payment of R4 650.00 on 18 January 2023 and of R4 650.00 on 25 February 2023.

5.33. AD PARAGRAPH 10.9.2 THEREOF:

5.33.1. I admit that the levy amount was included in the maintenance amount of R8 286.00 until the end of October 2022, the remainder of this paragraph is noted.

5.33.2. Save as aforesaid, I deny the remainder of the allegations herein contained as if specifically traversed.

5.33.3. I informed Celeste that I was in arrears.

5.33.4. The amount for the property rates and taxes was never included by the Applicant in the maintenance amount for my minor children.

5.33.5. The Applicant and C[…] was fully aware of my financial position at the time and they knew about the arrear levies, rates and taxes, however, they decided not to assist me by paying the arrear levies, rates and taxes in respect of the property."

[85] Although I do not want to unnecessarily burden the judgment, I deem it essential to also quote the response of the applicant in the replying affidavit in the main application regarding the payment of maintenance and more specifically also the payment of the school fees:

"11.3 As at October 2022 the applicant was paying the amount of R16 286.00 monthly to the first respondent.

11.4 The payment included the following:

11.4.1 The monthly levy regarding the Trust's property payable to the body corporate. This portion was earmarked for the Trust's obligation and was entrusted to the first respondent to use for that purpose only. The Court will appreciate that the levy was less in the preceding years and is determined by the Body Corporate annually.

11.4.2 A maintenance contribution towards the minor children which, includes:

11.4.2.1 The pro-rata share of the children regarding the municipal account;

11.4.2.2 R8000.00 earmarked for payment by the first respondent towards the school fees of the children.

11.5 The monthly premium payable for the first respondent's household insurance (which also included her Fortuner vehicle before she sold it) was (and is still) paid directly per debit order to the insurer monthly in addition to the aforesaid payment.

11.4 [*sic*] An amount was included in the contribution annually for payment of the school fees based on what the first respondent' represented to the applicant the school fees cost per month. The amount of R8000.00 rand earmarked for payment towards the children's school fees was based on what the first respondent told the applicant Dimitri's pro-rata contribution was for the 2022 school year.

11.5 During November 2022 the applicant no longer included the amount of R8000.00, (which had been earmarked for the school fees) as part of the amount that was paid to the first respondent monthly. The reason why the amount earmarked for payment towards the children's school fees was no longer included in the amount paid to the first respondent was twofold. Firstly, the first respondent had not paid the contribution of R8000.00 per month to the school towards the school fees and the applicant subsequently learned that the applicant had successfully applied for exemption of the liability to pay school fees.

11.6 The amount of R8000.00 was earmarked for Dimitri's portion of the school fees, thus entrusted for the specific purpose; was received by the first respondent but not used for the purpose it was paid to her. The first respondent thus received amount of R8000.00 per month which was earmarked for a specific purpose, but she did not use the money for that purpose and later got exemption. The first respondent never disclosed the I fact that she was not paying the school fees, nor the fact that she intended to or did apply for exemption, nor did the first respondent disclose the fact that her application for exemption was successful.

11.7 In light thereof the first respondent applied for exemption and in any event did not make payment towards the school fees, the reason for payment of payment of the additional amount of R8,000.00 earmarked for payment of school fees was not necessary for November and December as it would not be used for that purpose. The first respondent also had the monthly contribution for school fees that was paid during the year.

11.8 The balance without the R8,000.00 was paid from November 2022. I realised during preparation of this replying affidavit that there was a short payment of R286.00 per month since November 2022. I paid the shortfall, in the amount of R1716.00 to the first respondent on 5 April 2023.

11.9 Secondly, the applicant's own financial position has changed. The challenges with his health have brought about more medical expenses. The first respondent is well aware of the applicant's health issues. The applicant has his own obligations that he must comply with and also have other children and grandchildren. He has and is contributing within his means.

11.10 The first respondent also has a maintenance obligation, but she expects the applicant to pay for everything which the applicant is not bound to do nor is it reasonable.

11.11 The applicant sold his own property after the divorce and bought the house which was registered in the Trust's name to provide housing for the children. He had made substantial contributions over the years which are not said to be ‘very limited’.”

[86] On the first respondent`s own version she would have applied for exemption before the end of February 2022. For the year 2022 she received an 83% exemption and the applicant was supposed to only pay the balance that was left after the exemption. However, she did not tell the applicant about the exemption and he continued for the year until October 2022 to pay R8 000.00 over to the first respondent which was earmarked for school fees, but which she used for other purposes. That is why the account for school fees which the first respondent referred to earlier, annexure “DT9” attached to the answering affidavit, showed that the school fees outstanding at 3 March 2023 were R31 664.00

[87] A further incident which is indicative of the pattern the first respondent follows, is the following. As a result of the (unlawful) decision which the first respondent took as single trustee to put the Trust property in the market to sell it and the consequent sale thereof (which sale has since been cancelled by the buyer), resulted in her receiving rental from the purchaser. The rental was supposed to have been deposited into the Trust`s bank account or, considering that she knew that the sale is being contested, in an interest bearing account in the name of the Trust in case the

money had to be refunded. This was not done. According to the first respondent it is not clear what happened to the said rental money –money which belongs to the Trust.

5. <u>Selling of the Trust property/best interest of the Trust:</u>

[88] One of the golden threads that run throughout the two answering affidavits of the first respondent filed in the two applications, is the first respondent lamenting her financial constraints, her struggling to make ends meet and her blaming of the applicant for allegedly not maintaining the minor children properly. A second golden thread is the complete absence of **any** indication by her of her average monthly income, her lack of insight that she also has a primary duty and obligation to maintain the minor children and her general lack of taking responsibility for anything.

[89] Although the papers are riddled of examples of the aforesaid, I wish to point to certain examples:

1. Answering affidavit, paragraph 2.6, the proceeds from the sale of the Trust property are to pay everything:

   "The Seventh Respondent and I undertake to deposit the nett proceeds derived from the alienation of the property into the Trust`s designated bank account, which funds will be earmarked for the benefit of the trust beneficiaries. … <u>My minor children are entirely dependent on the Trust</u>, as the proceeds from the sale of the property are earmarked to maintain my minor children and to assist them in pursuing their tertiary studies and further education" (My emphasis)

2. Answering affidavit, paragraph 5.32.9, all monies for the children`s maintenance and expenses have to come from the applicant, no contribution from her side:

   "From the balance of the maintenance of R13 029.00 supra, I have to pay the children's school fees, medical aid, transport, personal care, toiletries, clothes, shoes, electricity, cell phones, airtime/data, wifi, school lunches, pocket money, groceries, and so the list goes on."

3. Replying affidavit, paragraph 11.12, the applicant is experiencing the same conduct from her:

   "The children are entitled to reasonable maintenance. The applicant has stood in, bona fide, without any duty, for D[…]. But the first respondent, whilst pleading poverty, has lived an extravagant lifestyle, above her means, creating the situation that whilst the contributions should be more than enough if the first respondent also contributes, she fails to pay creditors and put the trust`s property in jeopardy."

[90] On the first respondent`s own version, on the second page of her answering affidavit in the main application, she stated that the Trust is a "classical property holding trust and owns only one immoveable property". Previously when the Trust property was sold, a replacement property was bought and that was and is the intention of the Trust founder, the applicant, in the best interest of the minor children. I repeat paragraphs 9 – 11 of the founding affidavit:

"9. The trust was erected with the sole purpose to own an immovable property where the children can reside.

10. I was present when the applicant specifically said to the first respondent (in personal capacity) when creating the trust that the

immovable property must not be sold. It was never the intention that the Trust's property be sold, and the proceeds of the sale utilized as the first respondent (and the second respondent) intends to do. The first respondent agreed to this, and the immovable property acquired in the Trust with the express intention to safeguard the property for the benefit of all the trust beneficiaries, including the applicant.

11. The house was purchased and put in Trust to provide a suitable place to live for the children with good living conditions to serve the best interests of the children as envisaged by the Children's Act, 38 of 2005. The first house was sold when the first respondent moved, and a new property acquired as a result of the intention with which the Trust property was bought."

[91] I repeat and persist with following findings I made in my previous judgment of 2 June 2023 at paragraph [61]:

"In fact, there are a number of crucial issues which seriously begs the question whether the first and second respondents, and especially the first respondent, are complying with their fiduciary duty owed to all the beneficiaries, or whether the first respondent is using and/or is attempting to use the Trust/Trust funds/Trust property as a "maintenance-provider" for the two minor children for the payment of all their expenses. Although the respondents correctly pointed out in the answering affidavit that the Trust Deed, *inter alia,* determines that the Trustees are empowered to pay such amounts to any beneficiary as the Trustees may deem reasonable and desirable for maintenance, the first and second respondents still have the duty to exercise this power for the benefit of all the beneficiaries. Even if only the interest of the two minor children is considered, it can hardly be to their benefit if the Trust property is to be sold in order for the proceeds thereof (then Trust funds) to be used to pay expenses which are in actual fact part of the maintenance obligation of the first respondent in her personal capacity towards the two minor children. … However, if such interest is utilized to make payments which are in actual fact part of the first respondent`s maintenance obligation (in her personal capacity), it will probably result in the necessity to also utilize the capital to the point that it will become, to the detriment of the Trust beneficiaries, completely depleted."

[92] The first respondent and the minor children are currently living in a proper house at minimal cost. The first respondent, on her version, does not make ends meet. If a house is to be rented, the first respondent will not be able to afford the rent. That means that already the rent of a new house will have to be paid from the interest on the proceeds or, more likely, from the capital itself, since I cannot foresee that the interest will be enough to fund the first respondent`s lifestyle of living above her means.

[93] With the current facts and circumstances in this matter, I cannot find that it will be in the best interest of the minor children and the applicant, as a co-beneficiary, that the Trust property be sold.

[94] Since paragraphs 2.1, 2.2 and 2.3 of the rule *nisi* issued on 2 June 2023 in the interdictory application make provision for "*any other purchaser*", I deem it appropriate that the rule *nisi* be confirmed. It is also to include the present reference to FC Fin Trust, since in the absence thereof, the said Trust will theoretically be entitled to conclude a new sale agreement with the trustees.

<u>6. Incapacity of the trust:</u>

[95] The principles governing the capacity of a trust where the number of trustees has fallen below the number prescribed in the Trust Deed are set out in **Land Agricultural Bank of SA v Parker and Others** 2005 (2) SA 77 (SCA) at paras [10] – [14]:

> "[10] The first principle accounts for the fact that the trust could not be bound while there were fewer than three trustees. 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 the trust can act. Who the trustees are, their number how they are appointed, and under what circumstances they have power to bind the Trust estate are matters defined in the trust deed, which is the trust constitutive charter. Outside its provisions the trust estate cannot be bound.
>
> [11] It follows that a provision requiring that a specific minimum number of trustees must hold office is a capacity defining condition. It lays down a prerequisite that must be fulfilled before the trust estate can be bound. When fewer trustees than the number specified are in office, the trust suffers from an incapacity that precludes action on its behalf.
>
> [12] … but it does not follow that a sub-minimum of trustees can bind a trust.
>
> [13] In the present case, the Parkers alone were not 'the trustees' as defined in the trust deed, Nor, while fewer than three trustees were in office, were there 'trustees' on whose behalf the Parkers could act, or from whom they could receive authority to bind the Trust estate. The fact that they acted jointly in signing the contracts does not change this,

because the trust's incapacity during this period does not arise from the joint action requirement, but from the trust's incapacity while a sub-minimum of trustees held office.

[14] The Parkers in other words could not bind the trust because no one could. This does not mean that their duties as trustees ceased. On the contrary their obligation to fulfil the trust objects and to observe the provisions of the trust deed continued. These required that they appoint a third trustee when a vacancy occurred - a duty they signally failed to fulfil. But until they did so the trustee body envisaged in the trust deed was not in existence, and the trust estate was not capable of being bound. For the Parkers to purport to bind the trust estate during this period was an act of usurpation that simply compounded the breach of trust they committed by failing to appoint a third trustee, such conduct may, as I indicate later (para 37.3), provide the basis for impugning the very existence of the trust, but that was not the bank's case."

[96] The applicant is consequently entitled to an order regarding the incapacity of the trust as set out in prayer 6 of the Amended Notice of Motion in the main application.

7. Conclusion regarding removal of sixth respondent as trustee:

[97] I will from here on refer to the sixth respondent instead of the first respondent, hence, in her personal capacity.

[98] In addition to the case law and principles which I have already referred, I wish to also refer to the following authorities.

[99] In the **<u>Price-</u>** judgment, *supra,* at para [44] the principles governing a trustee`s administration of a Trust is set out with reference Honore`s South African Law of Trust:

[44] Three principles govern a trustee's administration of a Trust and these are discussed by Cameron et al in Honore's South African Law of Trust.

44.1 Firstly the trustees must give effect to the trust instrument properly interpreted.

44.2 Secondly, a trustee must exercise proper care and skill. Section 9 of the Act provides that a trustee must act with care, skill and diligence which can reasonably be expected of a person who manages the affairs of another. This standard has been described as "scrupulous care" which is-

> ‘Higher than that which an ordinary person might generally observe in the management of his or her own affairs. Such a person was free to do what he liked with his property and not infrequently selected investments which were of a speculative nature, particularly when the potential profits were high.
>
> A person in a fiduciary position such as a trustee, on the other hand, was obliged to adopt the standard of the prudent and careful person, that is to say the standard of the *bonus et diligents paterfamilias* of Roman Law, and was accordingly, obliged, in dealing with and investing the money of the beneficiary, to observe due care and diligence, and not to expose it in any way to any business risks. The need to avoid risks was emphasised.

44.3 Thirdly, a trustee must always exercise an independent discretion, a sub-minimum of trustees cannot bind the trust."

[100] In **<u>Sackville West v Nourse</u>** and Another 1925 AD 516 it was stated at 534 – 535 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 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*. The investment of the ward's property must accordingly be made with safety and security, and is not to be placed in anything involving the element of uncertainty and risk."

> "We may accordingly conclude that the rule of our law is that a person in a fiduciary position, like a trustee, is obliged, in dealing with and investing the money of the beneficiary, to observe due care and diligence, and not to expose it in any way to any business risks … It is the duty of a trustee to avoid all investments which a man of prudence would regard as attended with hazard."

[101] In the judgment of **<u>Jowell v Bramwell-Jones</u>** 2000 (3) SA 274 (SCA) the court stated that the trustee has a duty to avoid any conflict between trustee's personal interests and those of beneficiaries. Allegations capable of supporting evidence of a conflict of interests, establishes a breach of trustee's fiduciary duty.

[102] In **<u>Doyle v Board of Executors</u>** 1999 (2) SA 805 (C) it was explained that the duty which fell upon those who occupied a fiduciary position to keep <u>proper accounts</u> was often said to be *sui generis*. By virtue of that alone it owed the <u>utmost good faith</u>

towards all beneficiaries, whether actual or potential, in all things done. It imposes a duty to account to trust beneficiaries. (My emphasis)

[103] The first respondent showed a wilful, or at best for her, a grossly negligent and reckless attitude towards her failure to have acted in terms of the Trust Deed and to have complied with the very basic principle of appointing a trustee where the number of trustees fell below the required number. As evident from the case law, that, in itself, constitute sufficient grounds for her removal. In my view the facts and circumstances in the present matter make it even more serious, considering not only the long period of time that lapsed before she complied, but also the fact that she was forewarned about the situation by Mrs Milton, which warning she blatantly ignored.

[104] Further, it is evident that on her own version, the first respondent blatantly and wilfully approbated funds which were earmarked for the Trust and entrusted to her for that purpose. The disturbing factor is that despite the fact that the sixth respondent is legally trained as both an attorney and an attorney, she is showing no insight into or comprehension of the seriousness of her conduct as trustee. She also fails to distinguish between her personal interest and that of the Trust and the beneficiaries.

[105] The sixth respondent does not exercise her powers and obligations as trustee with the required care, diligence and skill as determined as determined in section 9(1) of the Act. As submitted

by Mr Snellenburg she made her guilty of breach of trust and maladministration of the Trust.

[106] The sixth respondent is abusing her fiduciary position as trustee to her own benefit. Her conduct does not comply with the required standard of *bonus et diligens paterfamilias.* Mr Reinders did his utmost best to convince me to the contrary, especially since the sixth respondent is also the mother of two of the Trust beneficiaries and he submitted that she would not do anything which will not be in the minor children`s best interest. I cannot agree – her conduct shows the opposite.

[107] The appointment of the seventh respondent did also not cure the problem. It is clear that he, in his capacity as her attorney of record, and in his capacity as co-trustee of the Trust, associates with her and was not taking any steps from preventing her from continuing on her unacceptable path.

[108] In my view it is evident that her conduct in more than one way constituted a dereliction of her duties sand obligations as trustee rendering her unfit to hold office.

Appointment of new trustees:

[109] The applicant is requesting that his wife and Ms Milton be appointed as trustees of the Trust in addition to Mr Augustyn. Mr Snellenburg submitted that it would be best for three trustees to hold office since it will ensure an uneven number of votes for purposes of resolutions which are to be taken in future.

[110] The applicant`s wife explained in the founding affidavit that the applicant is desirous that she be appointed since she has been doing all the negotiations with and payments to the sixth respondent since the Trust property was acquired. She is also the one who deals with the maintenance payments for the minor children.

[111] The applicant is also desirous that Mrs Milton be appointed as trustee. She is their family attorney. Because of her qualifications and experience of trusts she will be able to see to the proper administration of the Trust. Mrs Milton is also willing to accept the appointment.

[112] In my view both the applicant`s wife and Mrs Milton are fit and proper to hold the office of trustee.

[113] The two trustees to be and Mr Augustyn are to hold a meeting of trustees as soon as possible, *inter alia,* in order to decide the issue of the selling of the house. With the new trustees to be appointed, together with Mr Augustyn, there may be new facts and considerations in deciding whether to sell the Trust property or not.

Costs of the two applications:

[114] In application number 196/2023, the interdictory application, I ordered on 2 June 2023 that the costs of the application are to

stand over for determination by the Court who is to hear the main application.

[115] On 27 July 2023 Reinders, J extended the rule *nisi* to 31 August 2023 in order to be heard simultaneously with the main application. Those costs stood over for later adjudication. In my view the said costs are to be costs in the cause in the interdictory application.

[116] In application number 201/2023, the main application, I am of the view that the same order as to costs is to be made than in the interdictory application. The two applications are completely intertwined and overlap to the extent that they are actually to be considered as one.

[117] On 20 July 2023 van Rhyn, J granted the interlocutory application in the main application which, *inter alia,* dealt with the amendment of the applicant`s Notice of Motion. The costs were ordered to be costs in the cause.

[118] With regard to the costs of the interdictory application and of the main application, I gave serious consideration to an order that the first respondent and/or the first respondent and Mr Augustyn be ordered to pay the costs of the two applications in their personal capacities, which type of costs order is often granted in removal applications. However, due to the fact that Mr Snellenburg indicated during his oral argument that he no longer holds instructions to ask for such an order ánd because of the specific facts and circumstances in these applications which involve two

minor children and their mother, I, in exercising my discretion, decided that the Trust is to pay the costs of both applications.

[119] With regard to the costs of the application for condonation for the late filing of the applicant`s replying affidavit in the main application, I deem it appropriate that the said costs are to be paid by the applicant, since he sought an indulgence and there was no opposition thereto.

[120] In respect of the costs of the application for condonation for the late filing of the first, third, fourth, sixth and seventh respondents' heads of argument, I deem it appropriate that the sixth respondent, Ms D[…] T[…] in her personal capacity, is to be ordered to pay the costs thereof, including the costs of the opposition thereto. The reasons for the delay were ill-founded and the application contained inadmissible averments regarding settlement negotiations between the parties. The necessity for the applicant to have opposed it, is therefore obvious and *bona fide.*

The Orders:

[80] The following orders are made:

Application number 196/2023:

1. Paragraphs 2.1, 2.2 and 2.3 of the rule *nisi*, dated 2 June 2023, are confirmed.

2. The Olive Tree Trust, IT 126/2012 is ordered to pay the costs of the application, including the costs of 27 July 2023.

<u>Application number 201/2023:</u>

1. The sixth respondent is hereby removed as trustee of the Olive Tree Trust, IT 126/2012 ("the Trust").

2. The sixth respondent shall return her letters of authority to the Master without delay, but no later than 10 court days from date of this order.

3. The sixth respondent shall hand over to the applicant all documents regarding the Trust, including, but not limited to the following:

   3.1 Minutes of meetings of trustees of the Trust.
   3.2 Resolutions taken by the trustees of the Trust.
   3.3 Bank cards relating to all bank accounts and/or investments in the name of the Trust and/or the first respondent in her capacity as trustee of the Trust.
   3.4 Bank statements relating to all bank accounts and/or investments in the name of the Trust and/or in the name of the first respondent in her capacity as trustee of the Trust.
   3.5 The assets register of the Trust.

4. The sixth respondent must render an account to the applicant regarding her administration of the Trust’s affairs within 1 (one) month from date of this order.

5. It is declared that the Trust lacked capacity from 13 October 2020 until 19 January 2023 due to the absence of a minimum of two trustees.

6 Mrs M[…]-C[…] C[…]-T[…], ID number 5[…], is appointed as trustee of the Trust.

7. Mrs Deirdré Milton, ID number 5[…] is appointed as trustee of the Trust.

8. The Master of the High Court, Bloemfontein, is directed to issue amended Letters of Authority in respect of the said Mrs M[…]-C[…] C[…]-T[…] and Mrs Deirdré Milton.

9. The Olive Tree Trust, IT 126/2012, is ordered to pay the costs of the application, which costs are to include:

   9.1 The costs of the interlocutory application which served before Van Rhyn, J on 20 July 2023, which costs were ordered to be costs in the cause.

10. The costs of the application for condonation for the late filing of the applicant`s replying affidavit, is to be paid by the applicant.

11. The sixth respondent, Ms D[…] T[…] in her personal capacity, is ordered to pay the costs of the application for condonation for the late filing of the first, third, fourth, sixth and seventh respondents' heads of argument, which costs are to include the costs of the opposition thereto.

C. VAN ZYL, J

On behalf of the applicant:	Adv N. Snellenburg SC Instructed by: Bezuidenhouts Inc/Ref Mrs D Milton BLOEMFONTEIN
On behalf of the 1st, 3rd, 4th, 6th and 7th respondents:	Adv S. J. Reinders Instructed by: Phatshoane Henney Inc/Ref I Strydom BLOEMFONTEIN