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

Application number: 1916/2023

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

CIRCULATE TO MAGISTRATES: YES/NO

In the application between:

T[...] T[...]

Applicant

(ID No. 4[...], duly represented herein

by M[...] C[...] by virtue of Power

of Attorney PA 18[...])

[In his capacity as founder and Trust beneficiary of the

OLIVE TREE TRUST, IT1[...]]

and

D1[...] T[...] N.O.

1st Respondent

(ID No. 7[...])

[In her capacity nominee officio as trustee of the OLIVE

TREE TRUST, IT1[...]]

SAREL LOUIS AUGUSTYN N.O.

2nd Respondent

[In his capacity as nominee officio as trustee of the OLIVE

TREE TRUST, IT1[...]]

MASTER OF THE HIGH COURT, BLOEMFONTEIN,

FREE STATE PROVINCE

3rd Respondent

D1[...] T[...]4th Respondent

[On behalf of and in her capacity as guardian of
C[...] T[...], a minor with ID No. 06[...],
a beneficiary of the OLIVE TREE TRUST, IT1[...]]

D1[...] T[...]5th Respondent

[On behalf of and in her capacity as guardian of
I[...] T[...], a minor with ID No. 08[...],
a beneficiary of the OLIVE TREE TRUST, IT126/2012]

D1[...] T[...]6th Respondent

(ID No. 7[...])

SAREL LOUIS AUGUSTYN7th Respondent**FANIE VAN VUUREN N.O.**8th Respondent

[In his capacity nominee officio as trustee of the
FC FIN TRUST]

THE REGISTRAR OF DEEDS, PRETORIA9th Respondent**CORAM:**

VAN ZYL, J

HEARD ON:

28 APRIL 2023

DELIVERED ON:

2 JUNE 2023

[1] This matter served before me as an urgent application in terms whereof the applicant is seeking urgent interim interdictory relief.

- [2] In addition to the usual condonation prayer, the applicant is seeking a rule *nisi*, which rule *nisi* is to operate as an interim interdict with immediate effect, pending the finalization of this application, in the following terms:

“2.1 Interdicting and restraining the first and second respondents from passing transfer of the immovable property, better known as Unit 1[...], L[...] Section Title, Sectional Title Scheme number: 193 (situated at Wapadrand Extension 1 2[...]), Diagram Deed Number: 19[...], 8[...], 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 of Sectional Title dated 1 March 2023, pending the finalization of the application issued in the Free State Division of the High Court of South Africa, Bloemfontein under civil case cover 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 immediately aforesaid application.

2.2 Interdicting and restraining the first and second respondents from entering into a purchase agreement to sell the immovable property, better known as Unit 1[...], L[...] Section Title, ... and passing transfer thereof to the FC Fin Trust or any other purchaser pending the finalization of the application issued in the Free State Division of the High Court of South Africa, Bloemfontein under civil case cover 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 immediately aforesaid application.

2.3 Interdicting and restraining the ninth respondent from registering the transfer of the immovable property, better known as Unit 1[...], L[...] Section Title, ... 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 final determination of the application issued in the Free State Division of the High Court of South Africa, Bloemfontein under civil case cover 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 immediately aforesaid application.”

Background:

- [3] The applicant is a male pensioner, residing in Cape Town. The applicant suffers from Vascular Dementia. M[...] C[...] is the applicant’s wife. She is representing the applicant in the application and deposed to the founding and replying 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 affidavit 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[...] as “the applicant”, unless I mean to specifically refer to Mrs C[...], in which instances I will refer to her as “the applicant’s wife”.

- [4] According to the applicant he is the founder and an income- and capital beneficiary of the Olive Tree Trust (“the Trust”), but the allegation that he is an income- and capital beneficiary of the Trust, is being disputed.

- [5] The first respondent is D1[...] T[...] in her capacity as a co-trustee of the Trust. She is also cited in her personal capacity as the sixth respondent and in her capacity as guardian of her two minor children (“the two minor children”) who are beneficiaries of the Trust, as fourth and fifth respondents. For the sake of efficacy, I will in general refer to her as “the first respondent”, but will specify her capacity if and when necessary when same cannot be deducted from the context.

- [6] The second respondent is Sarel Louis Augustyn in his capacity as a co-trustee of the Trust. He is also cited in his personal capacity as the seventh

respondent. I will in general refer to him as “the second respondent”, but will specify his capacity if and when necessary.

- [7] When referring to both the first and second respondents in their capacity as joint trustees, I will refer to them as “the trustees”.

- [8] The eighth respondent is Fanie van Vuuren, 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.

- [9] The first respondent was married to the applicant’s son, D2[...] 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] D2[...] 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 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 application under case number 201/2023:

- [13] On 18 January 2023 the applicant issued an application under case number 201/2023 (“the main application”) 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 those proceedings 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 casu*, 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, were 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. The second respondent herein 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.
- [15] A lever arch file containing the papers which have been filed to date in the main application, was also placed before me during the hearing of the application *in casu*.
- [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 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 not aware that the Beta Trust Admin CC had resigned as trustee.
- [18] According to the applicant, on the day that the main application was issued the applicant nominated the second respondent and the Master authorised him to represent the Trust on 19 January 2023. The applicant he was not aware of this fact and it only came to his knowledge when the Master filed his report in the main application.

The sale of the Trust property:

- [19] During the preparation of the main application the applicant and his wife were informed by D2[...] 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 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 the second 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 the second respondent via

e-mail on 22 March 2023. A copy of the Deed of Sale, dated 1 March 2023, is attached to the founding affidavit as annexure "I".

[21] The applicant points 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 present 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."

The removal of the first respondent as trustee and/or the appointment of additional trustees and the validity of the Deed of Sale:

[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 present founding affidavit:

"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 Dimitri 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 go 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 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 is further the applicant's case 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 alleges 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] According to the applicant the first and second respondents intend to force the sale and the registration of passing of ownership are concerned 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.

[31] The applicant is consequently seeking an interim interdict with immediate effect pending the finalization of the main application and the first meeting of trustees to be held subsequent thereto.

Opposition of the application:

[32] The first, second, fourth, fifth and sixth respondents are opposing the application (“the respondents”). On 24 April 2023 a Notice in terms of Rule 6(5)(d)(iii) was filed on behalf of the aforesaid respondents in which it was indicated that the respondents would raise certain questions of law in respect of the relief applied for by the applicant. The relevant questions of law were set out and dealt with in the Rule 6(5)(d)(iii) Notice. On the same date the respondents also filed an answering affidavit in opposition to the application. The questions of law which were set out in the Rule 6(5)(d)(iii) Notice, were also dealt with in the answering affidavit. It is not clear why the respondents deemed it necessary to file both the Notice and an answering affidavit. Be that as it may, although it may turn out to become an issue in relation to unnecessary costs, I will take cognisance of the contents of both the documents for purposes of the adjudication of this application.

Urgency:

[33] In the Rule 6(5)(d)(iii) Notice the respondents refer to the provisions of Rule 6(12)(b) and state that in terms of the last-mentioned Rule, the following aspects should have been addressed in the applicant’s founding affidavit, which the applicant, according to the respondents, failed to do:

1. the circumstances which the applicant avers render the matter urgent;
and
2. The reasons why the applicant claims that he cannot be afforded substantial redress at a hearing in due course.

- [34] In the said Notice the respondents refer to and rely on the well-known judgment of **East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd** 2011JDR 1832 (GSJ), para [7] thereof:

“[7] It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his cases in that regard.”

- [35] As stated earlier, it is the applicant's case that selling the Trust property is neither in the interest of the Trust nor the Trust beneficiaries. The applicant pertinently states that the Trust property should consequently not be sold before the main application is finalised, otherwise, should the main application ultimately be successful, *“any additional trustees will be faced with a fait accompli”*.
- [36] The applicant further explained the existence of the real risk of the Trust property being sold and registered in the name of the FC Fin Trust prior to the finalisation of the main application if the matter is not to be dealt with on an urgent basis. In this regard it was stated that the second respondent informed the applicant's attorney on 29 March 2023 that the purchase price of the Trust property has been paid into trust and that they were only awaiting clearance certificates, where after they would be lodging the necessary documents with the Registrar of Deeds for registration of the transfer of ownership.
- [37] Mr Grobler, who appeared on behalf of the respondents, dealt in his argument with the dates of the correspondence and other communications between the applicant's attorney and the second respondent, based upon which he submitted that in so far as it may be found that urgency is present, such urgency was self-created and can therefore not be relied upon by the applicant. In this regard Mr Grobler relied on the well-known judgment of

Schweizer-Reneke Vleis Mkpy (Edms) Bpk v Minister van Landbou 1971

(1) PH F11 (T).

- [38] Mr Snellenburg, however, who appeared on behalf of the applicant, referred to the following *dictum* in the **East Rock Trading**-judgment, *supra*, at para [8]:

“[8] In my view the delay in instituting proceedings is not, on its own a ground, for refusing to regard the matter as urgent. A court is obliged to consider the circumstances of the case and the explanation given. The important issue is whether, despite the delay, the applicant can or cannot be afforded substantial redress at a hearing in due course. A delay might be an indication that the matter is not as urgent as the applicant would want the Court to believe. On the other hand, a delay may have been caused by the fact that the Applicant was attempting to settle the matter or collect more facts with regard thereto.”

Mr Snellenburg referred to the explanations pertaining to the delay as set out in the founding affidavit and submitted that the applicant could not have launched the application without first having obtained a copy of the Deed of Sale, in order to ascertain the identity of the proposed buyer. Despite an earlier request thereto, the second respondent only provided the applicant’s attorney of record with a copy thereof on 22 March 2023. Thereafter, on 29 March 2023, as stated earlier, the second respondent advised the applicant’s attorney that they were only awaiting clearance certificates where after the necessary documents would be submitted with the Registrar of Deeds for registration of the passing of ownership.

- [39] Mr Snellenburg further submitted that the delay between 29 March 2023 and 18 April 2023, when the application was issued, has also been duly explained in the founding affidavit.

- [40] I agree with Mr Snellenburg's contentions. In my view, the delays were reasonable in the circumstances and considering the explanations advanced by the applicant.
- [41] The fact remains that the applicant will not be afforded substantial redress at a hearing in due course should the application not be dealt with on an urgent basis. It is clear that on 29 March 2023 the registration of the transfer of the Trust property was imminent, which necessitated the drafting of the application on an urgent basis and approaching Court accordingly. In this regard it is trite law that in terms of the abstract system of passing of ownership, even if it is ultimately found in the main application that the obligatory agreement (the Deed of Sale) is void, the real agreement (the transfer of ownership) will, in the absence of any defect thereto, remain valid. Therefore, if transfer of ownership is to be validly registered prior to the finalisation of the main application, the applicant will not be able to have same be invalidated and will therefore not be afforded substantial redress in due course.
- [42] The applicant has therefore, in my view, made out a proper case for urgency and the necessary condonation is subsequently to be granted to the applicant.

Locus standi:

- [43] It is being alleged in the founding affidavit that the applicant is the founder and an income- and capital beneficiary of the Trust. In paragraph 18 of the founding affidavit, it is pertinently averred that "*the applicant makes this application in his capacity as income and capital beneficiary of the Trust*".
- [44] In the respondents' Rule 6(5)(d)(iii) Notice they state that on a proper interpretation and analysis of the Trust Deed, it is evident that the applicant is not an income beneficiary or a capital beneficiary of the Trust. He is only the founder of the Trust. The respondents therefore contend that the

applicant is non-suited since he has no direct or indirect interest in the Trust's sole asset, being the Trust property.

- [45] In his argument Mr Grobler firstly referred to the preamble of the Trust Deed in which the following is stated:

"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. ..."

He submitted that considering the legal nature of a "*donation*", a donor is not entitled to receive any benefit in exchange for the donation. Mr Grobler submitted that one can therefore not be a donor/founder and a beneficiary.

- [46] I cannot agree with the aforesaid contention of Mr Grobler. In **Trust Law and Practice**, Dr PA Olivier *et al*, updated April 2023 – SI 8, chapter 2, the following is stated at para 2.2.1:

"A trust is created through an action of the founder (also known as the donor) who has the express intention of creating a trust. Obviously, the founder's intention to create a trust relates to property which is awarded or conveyed to a trustee in order for him to hold and administer it for the benefit of beneficiaries."

Furthermore, chapter 5, *supra*, at para 5.5.3.6.4:

"Before a valid trust can be established, the trust assets must be legally removed from the control of the previous owner. Although the previous owner of the estate may still exercise a measure of control over the assets as co-trustee, care must be taken to ensure that the control exercised in terms of the office of trustee is primarily focused on the best interests of the beneficiaries. Because the law separates the trustee in his official capacity from the individual holding the office, in his private capacity he can be both the founder and a beneficiary."

- [47] The respondents are, secondly, relying on the provisions of clause 23 of the Trust Deed for purposes of their aforesaid contention, which provisions they aver are decisive and compelling:

“23. LIMITATIONS RELATING TO THE FOUNDER.

Notwithstanding anything to the contrary herein expressed or implied, no discretion or power conferred upon the trustees or any other person by this Trust Deed, shall be so exercised and nothing in this Trust Deed shall have the effect so as to cause or permit that any part of the capital and/or assets and/or liabilities and/or income and/or expenses of the Trust to be or become payable to or applicable directly or indirectly for the benefit or disadvantage of the founder or his estate.” (My emphasis).

- [48] Both Mr Snellenburg and Mr Grobler referred to the judgment of **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA), in which judgment the approach to interpretation was authoritatively stated at para [18] to be the following:

“[18] ... The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible

or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document." (My emphasis)

[49] Mr Snellenburg pointed out that the applicant was at three different instances specifically identified and nominated in the Trust Deed as one of the income- and/or capital beneficiaries, namely:

1. In the preamble of the Trust Deed, p. 2 thereof, at paragraph III; and
2. In the Trust Deed itself, p. 4 thereof, at paragraph (a); and
3. In the Trust Deed itself, p. 4 thereof, at paragraph (b).

[50] Mr Snellenburg submitted that if the founder of the Trust (the applicant) had not been expressly identified and nominated as a beneficiary in the Trust Deed, then clause 23 of the Trust Deed would protect the beneficiaries against the founder operating the Trust or manipulating the administration of the Trust in any manner that would benefit him personally instead of the beneficiaries. Where, however, the Trust Deed specifically identifies and nominates the founder as both an income and capital beneficiary, the only businesslike and sensible interpretation of the Trust Deed is that the applicant is indeed an income- and capital beneficiary and should benefit as such. Clause 23 does therefore not apply in the present circumstances.

[51] When clause 23 of the Trust Deed is considered in the context of the totality of the said Deed, and a businesslike approach pertaining to the interpretation of the contents thereof is followed, I have to agree with the interpretation thereof as submitted by Mr Snellenburg. To interpret clause 23 differently would be nonsensical since it would result in the relevant clauses being directly contradictory, in the sense that the founder, on the one hand,

be expressly identified and nominated as beneficiary, but thereafter be excluded from receiving any benefit from the Trust.

[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.”

[53] Consequently, based on the information contained in the present application, read with the contents of the main application, I find that the applicant is an income- and capital beneficiary in terms of the Trust Deed and that he consequently has *locus standi* for purposes of the present application.

THE MERITS OF THE APPLICATION:

The requirements for an interim interdict:

[54] The applicant is seeking an interim interdict pending the finalisation of the main application and, more particularly, pending the finalisation of 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 main application.

[55] The requirements for an interim interdict are trite:

- “(a) A *prima facie* right;
- (b) A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;
- (c) That the balance of convenience favours the granting of an interim interdict; and
- (d) That the applicant has no other satisfactory remedy.”

See **LAWSA**, Vol. 11, 2nd Edition, at para 403.

Prima facie right even though open to some doubt:

- [56] The first requirement for an interim interdict is a prima facie right, namely prima facie proof of facts that establish the existence of a right in terms of substantive law. In **National Gambling Board v Premier of KwaZulu-Natal** 2002 (2) BCLR 156 (CC) at para [41] it was confirmed that an applicant for an interim interdict must show a *prima facie* right to the main relief pending which the interim interdict is sought. The test for such a *prima facie* right was set out in **Simon N.O. v Air Operations of Europe AB** 1999 (1) SA 217 (SCA) at 228G – H to be the following:

“Insofar as the appellant also sought an interim interdict *pendente lite* it was incumbent upon him to establish, as one of the requirements for the relief sought, a *prima facie* right, even though open to some doubt (*Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189). The accepted test for a *prima facie* right in the context of an interim interdict is to take the facts averred by the applicant, together with such facts set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the case of the applicant, he cannot succeed. (*Gool v Minister of Justice and Another* 1955 (2) SA 682 (C) at 688B-F and the numerous cases that have followed it.)”

See also **Spur Steak Ranches Ltd v Saddles Steak Ranch, Claremont** 1996 (3) SA 706 (CPD) at 714G – H.

- [57] The nature of a trust is described as follows in **Griessel N.O. v De Kock** 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 administers property separately from his or her own, for the benefit of another person or persons or for the furtherance of a charitable or other purpose'

- [58] It is trite that it is the duty of a trustee(s) to administer a trust for the benefit of the beneficiaries. In **Trust Law and Practice**, *supra*, 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.”

- [59] Also in the preamble of the Trust Deed it is 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’) ...”

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

“9. **POWERS OF THE TRUSTEES:**

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, on behalf of the beneficiaries, and not for the personal benefit of the Trustees. The extent of the powers vested in the Trustees, must always be interpreted so that the main objective of the Trust is, namely, to benefit the beneficiaries, and not to do harm." (My emphasis)

"13. DUTIES OF TRUSTEES:

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 To not dispose of any assets of the Trust, for their own benefit or for the benefit of their estates, 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)

[61] I am not called upon at this stage to make definitive findings with regard to the conduct of the first and second trustees in their administration of the Trust and whether they, especially the first respondent, is exercising her fiduciary duty owed to all the beneficiaries, in a proper manner and to the benefit of the beneficiaries. However, when applying the test pertaining to a *prima facie* right in the context of an interim interdict, as enunciated in **Simon N.O. v Air Operations of Europe AB**, *supra*, I am satisfied that in view of the totality of the factual allegations made by the applicant, considered with the factual allegations as set up by the respondents, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. When I then consider the facts set up in contradiction by the respondents, there is, in my view, no serious doubt

thrown upon the case of the applicant. 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. It is not necessary for me to determine at this stage of the proceedings what the interest income would be on the proposed investment of the proceeds of the sale, since that will be fully dealt with during the hearing of the main application. 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.

- [62] In addition to the aforesaid there are a number of allegations made by the applicant in respect of the first respondent’s failure in the past to have properly complied with the provisions of the Trust Deed and/or with her fiduciary duties as a Trustee. One of these alleged transgressions is the fact that the applicant was the only trustee for a period of approximately 2 years and two months, which is in direct contravention of clauses 5.2 and 5.3 of the Trust Deed. Although the first respondent responded to those allegations (or to most of them), the responses did not, in my view, cast serious doubt on the applicant’s case in this regard.

[63] The proposed selling of the Trust property forms part and parcel of the merits of the issue whether the first respondent is to be removed as trustee and/or that further trustees be appointed. The Court hearing the main application will have to determine whether the proposed sale is in the interest of the Trust beneficiaries and if not, whether the Court can interfere with the exercise of the Trustees' discretion in this regard.

[64] In addition to the aforesaid basis of seeking an order that the proposed sale of the Trust property be set aside, the applicant is also relying on two additional grounds. In terms of the Amended Notice of Motion the applicant is also seeking an order in the following terms:

"7. Declaring invalid and of no force and effect due to her lack of authority as a trustee of the Olive Tree Trust the decision of the sixth respondent to appoint Remax to list the Olive Tree Trust's immovable property for sale and the appointment of Remax pursuant to the aforesaid decision as well as all steps consequently taken as a result of the aforesaid decision and appointment."

The request for the aforesaid relief is based on the fact that the first respondent was, at the time, the only trustee of the Trust in direct contravention of clause 5.3 of the Trust Deed and that she consequently could not have validly bound the Trust by means of the said decision. The applicant further alleges 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.

[65] As indicated earlier in the judgment, the applicant also intends seeking an order "*Declaring the agreement, styled Offer to Purchase – Sectional Title, dated 1 April 2023, with regards to the trust's property ... void, alternatively [that it] be set aside*". (The date appears to be an error, since the Deed of

Sale is dated 1 March 2023, but that is neither here nor there.) In this regard it is the applicant's case 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.

[66] 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.”

“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.”

[67] It is by now trite that where there is more than one trustee they must act jointly, unless the trust instrument provides otherwise. See **Lupacchini NO and Another v Minister of Safety and Security** 2010 (6) SA 457 (SCA) at para [2].

[68] In Land and Agricultural Bank of South Africa v Parker and Others 2005 (2) SA 77 (SCA) at para [15] the aforesaid principle was confirmed as follows:

“[15] ... It is a fundamental rule of trust law, which this Court recently restated in *Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk*, that in the absence of a contrary provision in the trust deed the trustees must act jointly if the trust estate is to be bound by their acts. The rule derives from the nature of the trustees' joint ownership of the trust property. Since co-owners must act jointly, trustees must also act jointly. Professor Tony Honoré's authoritative historical exposition has shown that the joint action requirement was already being enforced as early as 1848. It has thus formed the basis of trust law in this country for well over a century and half.”

[69] When the applicant's attorney received the Deed of Sale from the second respondent via e-mail on 22 March 2022 as indicated earlier in the judgment, it was evident that only the second respondent in his capacity as trustee of the Trust signed the Deed of Sale on behalf of the Trust. No resolution was attached to it. The applicant points out in the founding affidavit that although the answering affidavit filed in the main application was deposed to on 9 March 2023 and although the first respondent, as confirmed by the second respondent, states therein that the trustees concluded the Deed of Sale, relying on the fact that they as trustees are authorised by the Trust Deed to sell the property, the first and second respondents failed to attach a copy of the Trust Deed to the said answering affidavit. No mention was made by any resolution in this regard either. It was only after the applicant attached a copy of the Deed of Sale, as received from the second respondent, to the founding affidavit in the present application, relying on the allegation that the Deed of Sale does not comply with the peremptory requirements of section 2(1) of the Alienation of Land Act, that the first respondent attached a resolution accompanied by the Deed of Sale to the answering affidavit filed in the present application. In this regard the applicant states as follows in the replying affidavit:

“41. There is now a resolution, purportedly taken on 1 March 2023 for the sale. That is something different from ratifying the decision to sell.”

[70] Section 2(1) of the Alienation of Land Act determines as follows:

“No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.”

[71] The aforesaid resolution, on face value thereof dated 1 March 2023, and signed by both the first and second respondents in their capacity as trustees of the Trust, reads as follows:

“RESOLUTION:

IT IS RECORDED THAT

1. C[...] and I[...] T[...] whom reside at Unit 1 [...], SS L[...] (the ‘Trust Property’) as beneficiaries of the Trust together with their mother, D[...] T[...], desires alternative accommodation/residence closer to their school.
2. The children’s needs have changed, and will in future require financial assistance from the Trust such as *inter alia* the provision of tertiary education etc.
3. The Property does not produce income and only provides for a benefit to the beneficiaries who reside there.
4. The question arose whether such investment contributes to a long term benefit of all the beneficiaries.

5. The trustees have certain options to generate income in respect of the Trust Property and compared the letting out of the Trust Property as opposed to liquidating the asset and investing the proceeds from the sale in an interest earning fixed investment.
6. The trustees are of the opinion that an interest earning fixed investment would outperform the nett income achievable from letting of the Trust Property especially taking into account that the levies and rates and taxes alone amount to approximately R5 000.00 per month in respect of the Trust Property.
7. The trustees further considered the risk associated with the returns on a fixed investment which guarantees income upon maturity, as opposed to non-payment of rental and the costs and time eviction proceedings may entail.
8. Had the Trust owned more than one property, the risk associated with non-payment of rental and eviction proceedings could be hedged with other rental income. This is however not the case.

IT IS RESOLVED THAT:

1. The Trust sells the following property owned by the Trust:

A unit consisting of

- (a) Section No. 1[...] ... L[...] ...
- (b) An undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan.

HELD BY Deed of Transfer Number ST1[...]
to FC FIN Trust, Registration Number IT3[...]

on similar terms and conditions therein as stated in Annexure “A” hereto which is initialled for identification purposes.

2. That the nett proceeds from the sale of the property be invested in an interest earning fixed investment, the interest received to be for the benefit of all beneficiaries of the Trust.

AND THAT

3. Sarel Louis Augustyn, identity number 73[...] in his capacity as trustee of the Trust be and is hereby authorized in his sole and absolute discretion to give effect to the aforesaid resolutions.”

[72] I have to point out that I noticed that the two Deeds of Sale, one attached to the founding affidavit and one attached to the answering affidavit, differ, without any explanation provided by the first and second respondents, despite the fact that both the copies originate from them. The Deed of Sale attached to the founding affidavit, contains two initials next to every amendment and was indeed signed by the second respondent. However, the one which the first and second respondents are relying upon, attached to the answering affidavit, together with the resolution, has not been signed by the second respondent and also only contains one initial. This is despite the fact that the resolution refers to “*Annexure “A” hereto which is initialled for identification purposes.*”

[73] Like I have already indicated, I am only to determine at this stage whether the applicant has shown a *prima facie* right even open to some doubt pertaining to the relief sought in the main application, in this regard more specifically with regard to the validity of the first respondent’s decision to sell the property and to appoint Remax as the estate agent for purposes thereof and alleged invalidity of the Deed of Sale. These are mostly a legal questions and not factual ones as is the situation with regard to the relief pertaining to the removal of the first respondent as trustee and/or the appointment of further trustees. Since the Court hearing the main application

is still to finally adjudicate upon these legal issues, I am weary to detail the reasons for my conclusion in this regard. It will be improper for the Court adjudicating the main application to be bound by my reasoning pertaining to the legal questions.

[74] I have, however, duly considered the aforesaid legal issues. In my consideration I considered the case law pertaining the authority of trustees already referred to above. In addition, I also considered the following case law and article:

1. **Northview Shopping Centre (Pty) Ltd v Revelas Properties Johannesburg CC** 2010 (3) SA 630 (SCA)
2. **Van Der Merwe NO v Hydraberg Hydraulics CC** 2010 (5) SA 555 (WCC)
3. **Thorpe v Trittenwein** 2007 (2) SA 172 (SCA)
4. **Section 2(1) of the Alienation of Land Act, Trusts, Trustees and Agency** (Thorpe v Trittenwein [2006] SCA 30 (RSA), DJ Lötze et CJ Nagel, 2006 (69) THRHR, at p. 698 - 704

[75] In my view the applicant has made out a proper case with regard to the requirement of showing a *prima facie* right (even though open to some doubt) to the main relief pertaining to the selling of the property.

Further requirements for an interim interdict:

[76] With regard to the further requirements for an interim interdict, namely a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted, that the balance of convenience favours the granting of an interim interdict and that the applicant has no other satisfactory remedy, I am satisfied that the applicant has also made out a proper case in respect of all three requirements.

[77] If the property is not to be preserved pending the finalization of the main application and the applicant is to be successful with the main application in one or more respects, he will clearly suffer irreparable harm. Therefore, the balance of convenience also favours the applicant.

[78] The applicant clearly has no other satisfactory remedy.

Costs:

[79] In my view the appropriate order is that the costs of the application are to stand over for determination by the Court who is to hear the main application.

Order:

[80] The following order is made:

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 1[...], L[...] Section Title, Sectional Title Scheme number: 1[...] (situated at Wapadrand Extension 1 2[...]), Diagram Deed Number: 19[...], 8[...] 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, better known as Unit 1[...], L[...] Section Title, Sectional Title Scheme number: 1[...] (situated at Wapadrand Extension 1 2[...]), Diagram Deed Number: 19[...], 8[...] K[...] Crescent, Wapadrand, Tshwane, Gauteng Province [Pretoria Deed's Office] 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, better known as Unit 1[...], L[...] Section Title, Sectional Title Scheme number: 1[...] (situated at Wapadrand Extension 1 2[...]), Diagram Deed Number: 19[...], 8[...] K[...] Crescent, Wapadrand, Tshwane, Gauteng Province [Pretoria Deed's Office] 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.

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, 2nd, 4th, 5th
 and 6th respondents: Adv S. Grobler SC
Instructed by:
 Phatshoane Henney Inc/Ref I Strydom
 BLOEMFONTEIN