



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 246/20

In the matter between:

GERT ERASMUS BURGER N.O.

First Applicant

ANTON KEET N.O.

Second Applicant

WILLEM JACOBUS CRONJE N.O.

Third Applicant

(in their capacities as joint trustees of the HNP Trust)

and

CHRISTIAN FINDLAY BESTER N.O.

First Respondent

LEGADIMANE ARTHUR MAISELA N.O.

Second Respondent

THOMAS CHRISTOPHER VAN ZYL N.O.

Third Respondent

*(in their capacities as joint trustees of the Insolvent Estate
of Petrus Serdyn Louw and Martha Maria Sophia Louw)*

Neutral citation: *Burger N.O. and Others v Bester N.O. and Others* [2021] ZACC
48

Coram: Madlanga J, Madondo AJ, Majiedt J, Mhlantla J, Pillay AJ,
Rogers AJ, Theron J, Tlaletsi AJ and Tshiqi J

Judgments: Mhlantla J (unanimous)

Heard on: 26 August 2021

Decided on: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Constitutional Court website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 13 December 2021.

Summary: Power of a single trustee to conclude loan agreement on trust's behalf — use of trust to channel funds to company — factual disputes — no arguable point of law — misdirection on the facts — jurisdiction not engaged

Requirements to bind a trust — powers of trustee provided for by trust deed — settled principle of law — jurisdiction not engaged

ORDER

On appeal from the High Court of South Africa, Western Cape Division, Cape Town:

1. Leave to appeal is refused.
2. The applicants must pay the respondents' costs, including the costs of two counsel.

JUDGMENT

MHLANTLA J (Madlanga J, Madondo AJ, Majiedt J, Pillay AJ, Rogers AJ, Theron J, Tlaletsi AJ and Tshiqi J):

Introduction

[1] The fruits of ill-gotten gains often leave a bitter taste in the mouths of those who are swindled by cunning fraudsters. Meanwhile, these fruits line the pockets of these fraudsters and launch them into affluence. This is most unfortunate, as it wreaks havoc

on livelihoods and leaves the victims embroiled in litigation in an attempt to recover these monies. At the heart of this matter is the question: what legal claim, if any, the estate of an alleged “self-confessed fraudster” can have against a trust that he administered to recover funds derived from fraudulent activities.

[2] This application comes before this Court as one for leave to appeal against a judgment and order of the High Court of South Africa, Western Cape Division, Cape Town (High Court),¹ in terms of which a final order of sequestration of the HNP Trust (the Trust) was issued.

Background

[3] Mr Petrus Serdyn Louw was the founding director of Louw & Cronje Incorporated, a registered firm of auditors conducting its business in Porterville, Vredendal, and Strand in the Western Cape. The other director was Mr Willem Jacobus Cronje. The firm provided accounting services to two business ventures known as Pholaco (Pty) Limited and Quintado (Pty) Limited, which were operated by Mr Louw. He operated Quintado with his brother-in-law, Mr Markram Jan Kellerman. Over the years, the firm grew to have a substantial and loyal client base.

[4] Mr Louw, under the guise of providing investment and financial advice, defrauded his clients of approximately R110 million using several methods. First, he convinced his clients that they could secure higher than average returns by depositing funds through him into a special account at First National Bank. His clients gave him the money to invest on their behalf. However, when he received these monies, he appropriated them for his own ends. His second method to fleece his clients of their monies was to persuade them to participate in share-schemes. This would entail Mr Louw undertaking to purchase immovable properties on their behalf and when the

¹ *Burger N.O. v Bester N.O.*, unreported judgment of the High Court of South Africa, Western Cape Division, Cape Town, Case No 3383/2018 (16 August 2019) (High Court judgment). This matter was heard together with the application in *Bester N.O. v Quintado 120 (Pty) Ltd*, unreported judgment of the High Court of South Africa, Western Cape Division, Cape Town, Case No 15274/2019 (18 August 2020) (*Quintado*).

deals fell through, he retained the money. The third one was the withdrawal of money from company entities without any entitlement to do so. Lastly, he convinced his clients to invest in several companies and upon receiving the money, he withheld the funds instead of making the requisite investment in these companies. To conceal his fraudulent actions, he forged share certificates, bank statements, and communications to create the impression that the funds had indeed been invested. Ultimately, the monies were used to fund Mr Louw's private interests.

[5] On 7 May 2001, Mr Louw established a family trust called the HNP Trust. The trustees were Mr Louw, his wife, Mrs Martha Maria Sophia Louw, and Mr Cronje. The Trust held 90% of the shares in Pholaco and 50% of the shares in Quintado. The remaining shares in Quintado were held by Mr Kellerman's family trust. In terms of the Trust Deed, the three trustees had to act together when administering the Trust and, if there were fewer than three trustees due to either death or resignation, the remaining trustees had limited power to act on behalf of the Trust.

[6] During 2018, it became evident that Mr Louw was operating a massive fraudulent scheme, the proceeds of which he used to fund Pholaco. On occasion, these monies flowed to Pholaco through the bank accounts of the Trust and Quintado. This elaborate scheme was exposed through a series of events triggered by the publication of a newspaper article. The article provided the details of liquidation proceedings against Louw & Cronje instituted by Kloovenburg Plase (Pty) Limited for the firm's failure to make good on its undertakings. This caused most of Mr Louw's clients at the firm to enquire about the status of their investments.

[7] Mr Louw later confessed that all the investment opportunities presented to his clients were fraudulent and he had misappropriated approximately R110 million. Of this amount, about R70 million had been advanced to Pholaco. He had transferred the money to the Trust, and the Trust had then transferred the funds to Pholaco. After his confession, he resigned as a director of Louw & Cronje. Thereafter, Pholaco was placed under liquidation, followed by the sequestration of the estate of Mr Louw and his wife.

[8] Upon the sequestration of the estate of Mr and Mrs Louw, the insolvency practitioners – Messrs Christian Bester, Legadimane Maisela and Thomas Van Zyl – were appointed as joint trustees of the insolvent estate. They are the respondents in this Court. They then brought an application in the High Court for an order authorising them to sell the property of the Louw insolvent estate and to bring or defend any legal proceedings as well as other powers incidental thereto. This was granted. In a bid to recover the monies allegedly advanced by Mr Louw to the Trust, the respondents launched an application in the High Court for the sequestration of the Trust. Mr and Mrs Louw were, as a result of their sequestration, disqualified to act as trustees for the Trust. Therefore, Mr Cronje was the only remaining trustee.

Litigation history

High Court

[9] On 21 December 2018, the respondents launched an application for the sequestration of the Trust on the basis that the Trust was indebted to the Louw insolvent estate for at least R70 million.²

[10] The High Court held that Mr and Mrs Louw were, as a result of their sequestration, disqualified from acting as trustees in the sequestration application of the Trust. Due to the disqualification of the Louws, the remaining trustee had limited powers in terms of the Trust Deed and could not act on behalf of the Trust. Therefore, the application remained unopposed. On 10 January 2019, a provisional order of sequestration was granted on an unopposed basis. A rule nisi was issued calling on interested parties to show cause why the order should not be made final on 21 February 2019. This rule nisi was further extended to 8 August 2019. Messrs Gert Erasmus Burger and Anton Keet were appointed as joint trustees of the Trust, thus, joining Mr Cronje. They are the applicants in the application before us.

² This application was opposed by Mr Cronje, the only remaining trustee of the HNP Trust at that stage. Subsequently, two more trustees were appointed in Mr and Mrs Louw's stead who had been disqualified.

[11] In opposing the granting of the final order of sequestration, the trustees of the Trust presented a transcript of a meeting held on 13 December 2018. This revealed that Mr Louw did not make any admissions relating to any fraudulent activities, but rather that the Trust was not indebted to the Louw insolvent estate and what was recorded in the accounting records was erroneous. The Trust's bank statements were attached to the answering affidavit filed in the High Court, which showed that no money had been transferred into the Trust's bank account. They contended that there were factual disputes regarding the solvency of the Trust and its involvement in Mr Louw's fraudulent activities.³ In support of their opposition, a transcript of the evidence that was led at the section 152 enquiry was presented. In addition, the trustees of the Trust applied for the rescission of the provisional order of sequestration of the HNP Trust, and of the order that granted an extension of their powers under section 18(3) of the Insolvency Act. The application was later withdrawn to the extent that the parties agreed that the trustees of the Trust would desist from exercising their extended powers.

[12] Mr Cronje, in his capacity as the remaining trustee of the Trust and as the person who had intimate knowledge of the activities of the Trust, deposed to an affidavit on behalf of the Trust. He submitted that the Trust was able to pay the R150 000 owed to the Louw insolvent estate which had been transferred to the Trust from Mrs Louw's bank account. This was the only debt that was admitted by Mr Cronje. However, due to the provisional sequestration order, payment could not be processed. Mr Kellerman had also transferred an amount of R17 680 000 to the Trust in December 2018, allegedly at the request of Mr Louw to "put things right with his creditors". The Trust agreed to assume liability for this amount, and Mr Kellerman obtained, as security, the 50% share in Quintado that the Trust held. After the Trust's 50% share in Quintado was transferred to Mr Kellerman, he owned 100% of Quintado's shares. According to the respondents, this was a fraudulent transaction.

³ The procedure in terms of section 152 of the Insolvency Act, effectively provides for an enquiry into the affairs of the insolvent estate and vests powers in the Master of the High Court to call for any person or trustee to furnish her with documentation relating to such estate. This can be done at any time after the sequestration of the estate of the debtor and before their rehabilitation if the Master deems it desirable.

[13] The trustees of the Louw insolvent estate subsequently filed a supplementary affidavit in which they stated that the misappropriation of funds to Pholaco through the Trust had been admitted at a meeting on 30 October 2018, and not the meeting of 13 December 2018.

[14] On the extended return day of the rule nisi, the High Court considered the requirements for the granting of a final order of sequestration in terms of sections 9(1) and 12 of the Insolvency Act⁴ as well as an application for intervention by Mr Kellerman. Insofar as the intervention application was concerned, the High Court held that Mr Kellerman had a direct and substantial interest in the outcome of the proceedings and granted him leave to intervene.

[15] Regarding the sequestration application, the High Court held that the evidence was consistent with the version presented by Mr Louw. That is, the Trust was used as a vehicle to disguise the flow of misappropriated funds from his clients to himself or entities he controlled. The High Court acknowledged that this could be seen from the

⁴ 24 of 1936. Section 9(1) provides—

“(1) A creditor (or his agent) who has a liquidated claim for not less than fifty pounds, or two or more creditors (or their agent) who in the aggregate have liquidated claims for not less than one hundred pounds against a debtor who has committed an act of insolvency, or is insolvent, may petition the court for the sequestration of the estate of the debtor.”

And section 12 provides:

“Final sequestration or dismissal of petition for sequestration—

- (1) If at the hearing pursuant to the aforesaid rule *nisi* the court is satisfied that—
 - (a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section nine; and
 - (b) the debtor has committed an act of insolvency or is insolvent; and
 - (c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated, it may sequester the estate of the debtor.
- (2) If at such hearing the court is not so satisfied, it shall dismiss the petition for the sequestration of the estate of the debtor and set aside the order of provisional sequestration or require further proof of the matters set forth in the petition and postpone the hearing for any reasonable period but not *sine die*.”

lack of records relating to the indebtedness of the Trust to the insolvent estate. The High Court noted that the transfer of funds was made from Mr Louw's bank account to Pholaco, and the amount would be recorded as a loan from the Trust to Pholaco. The High Court was, thus, satisfied that it did not have to consider the evidence led at the section 152 enquiry because the applicants had on the facts set out in the affidavit discharged the onus on them to establish their standing.⁵

[16] The High Court held that it was manifestly clear that the Trust was insolvent, and that it would be to the advantage of the creditors for it to be finally sequestrated. In the result, the estate of the HNP Trust was placed under final sequestration.⁶

[17] Aggrieved by the outcome, the Trust sought leave to appeal against the order; however, that application was dismissed.

Supreme Court of Appeal

[18] The trustees of the HNP Trust sought leave to appeal from the Supreme Court of Appeal. Leave was refused on the ground that there were no reasonable prospects of success on appeal. The trustees, thereafter, applied for the reconsideration of that order. That application was also dismissed.

[19] The trustees of the HNP Trust have now approached this Court for leave to appeal against the order of the Supreme Court of Appeal and the judgment and order of the High Court.

Before this Court

Submissions by the applicants

[20] The applicants did not contend that any constitutional issue was raised. To establish jurisdiction, they submitted that there were arguable points of law of general

⁵ High Court judgment above n 1 at para 20.

⁶ Id at paras 20-1.

public importance that ought to be considered by this Court and these were: (a) on the evidence, the respondents did not demonstrate that the Louw insolvent estate had a claim against the Trust and sequestration proceedings are not intended to be abused simply because of allegations of fraud; (b) the modus operandi of the actions of trusts, and in particular the question relating to authority to bind a trust, must be clarified; and (c) the provisional sequestration order was granted on admittedly incorrect facts.

[21] On the merits, the applicants submit that the cause of action relied upon by the respondents for the provisional sequestration order was based on the allegedly false statements made by the respondents about what Mr Louw had said during the meeting of 13 December 2018. As there was no other cause of action for the respondents to have established standing, the sequestration order should not have been granted. Furthermore, the applicants submit that Mr Louw did not have the necessary authority to transact on behalf of the Trust, as it is trite that delegated authority in a trust is merely administrative where the decision still has to be taken jointly by the trustees. Therefore, if a loan had been advanced to the Trust from Mr Louw for the benefit of Pholaco, Mr Louw did not have the necessary authority to conclude the loan agreement.

[22] As no money passed through the bank account of the Trust (as evidenced by the bank statements), if the money was loaned to Pholaco, it must have come directly from Mr Louw and the Trust was not used as a vehicle. Furthermore, the Trust did not pass a resolution for the movement of funds. Lastly, the applicants submit that the creation of the loan account in favour of the Trust against Pholaco was a scheme created by Mr Louw to hide the true origin of the money.

Submissions by the respondents

[23] The respondents submit that this Court's jurisdiction is not engaged in that the applicants have raised points of fact rather than of law. They submit that the applicants have not shown that the law is not clear on the issues in this matter, but rather just challenge the High Court's application of the law.

[24] On the merits, the respondents submit that Mr Louw was indeed authorised by the trustees to bind the Trust in obtaining the required monies to fund Pholaco. It is argued that although the loans to Pholaco did not go through the Trust's bank account, the Trust was still used as a vehicle for fraudulent activities.

[25] Regarding the issue of standing, the respondents submit that the R150 000 paid into the bank account of the Trust from Mrs Louw's bank account was sufficient to establish standing, as an alternative if the loan agreement ground fails. Furthermore, the respondents relied on an act of insolvency by the Trust in terms of section 8(c) of the Insolvency Act⁷ to establish standing. This related to the agreement that led to the transfer of Quintado shares between Mr Kellerman and the Trust. They submit that one creditor, Mr Kellerman, was being preferred above the other creditors. The respondents also state that Mr Louw sent out an email to some of his creditors confessing his fraudulent activities.

[26] Regarding the authority to oppose the sequestration application, the respondents submit that Mr Cronje would have had the necessary authority to oppose the provisional sequestration application. This was evident from Mr Cronje's conduct when he instructed his attorneys to oppose the final application, and from a common sense reading of clause 5.2 of the Trust Deed. This clause provides for the quorum requirement for the taking of decisions. Mr Cronje was also cited as a party in the proceedings.

[27] Although no money passed through the bank account of the Trust, the respondents argue that the Trust was still used as a vehicle for fraudulent activities as the applicants ignore the fact that a borrower can conclude a loan agreement with a

⁷ Section 8(c) provides as follows:

“A debtor commits an act of insolvency—

...

(c) if he makes or attempts to make any disposition of any or his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another.”

lender on the basis that the money be paid to a designated third party – in this instance Pholaco was the designated third party.

[28] Lastly, the respondents request that in the event the appeal is upheld, the matter should be remitted to the High Court for the admission of oral evidence which surfaced during the section 152⁸ hearing of the Louw insolvent estate and the Trust.

Issues

[29] The issues for determination are the following:

- (a) Does this matter engage this Court’s jurisdiction?
- (b) Is it in the interests of justice to grant leave to appeal?
- (c) If the above two questions are answered in the affirmative, the merits of the appeal will have to be considered and, in particular, these issues must be determined:
 - (i) Does the Louw insolvent estate have a claim against the Trust?
 - (ii) Did Mr Louw have the authority to bind the Trust?
 - (iii) Should a final order of sequestration have been granted based on “admittedly false allegations”?
 - (iv) What is an appropriate remedy?
 - (v) Should the matter be remitted to the High Court for oral evidence and supplementary evidence on new facts?

Jurisdiction

[30] For an applicant to be granted leave to appeal, she must show that this Court has jurisdiction to entertain the matter in terms of section 167(3)(b)(ii)⁹ of the Constitution

⁸ As provided for by the Insolvency Act.

⁹ Section 167(3)(b) of the Constitution provides, in relevant part:

“(3) The Constitutional Court—
 (b) may decide—
 (i) constitutional matters; and

and that it is in the interests of justice for leave to appeal to be granted.¹⁰ The jurisdiction of the Court will be established if there is a constitutional issue or there is an arguable point of law of general public importance. The approach to determining jurisdiction was set out in *Gcaba*, as follows: “jurisdiction is determined on the basis of the pleadings . . . and not the substantive merits”.¹¹

[31] In this matter, the applicants did not contend that any constitutional issue was raised. In an effort to show that this Court has jurisdiction, the applicants submitted that there were arguable points of law of general public importance that ought to be considered by this Court. As I see it, the applicants have failed to show that this Court’s jurisdiction is engaged. In this case, there are two factual disputes, namely, (a) whether the Louw insolvent estate loaned various monies to the Trust and whether the Trust, in turn, advanced those monies to Pholaco; and (b) if so, whether Mr Louw was authorised to conclude the alleged loan agreements on behalf of the Trust. The applicants ask this Court to answer issues that are riddled with factual disputes.

[32] In *Makate*,¹² the applicant had sought the payment of compensation for the use of his idea in developing a digital product that later allegedly made billions in revenue for the respondent, a telecommunications company. This Court, in emphasising the importance of deference by appellate courts to the factual findings of courts of first instance, had this to say:

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- (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court.”

¹⁰ *Freedom of Religion South Africa v Minister of Justice and Constitutional Development* [2019] ZACC 34; 2020 (1) SA 1 (CC); 2019 (11) BCLR 1321 (CC) at para 21. *Phillips v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC) at para 30. See also *Radio Pretoria v Chairperson of Independent Authority of South Africa* [2004] ZACC 24; 2005 (4) SA 319 (CC); 2005 (3) BCLR 231 (CC) at para 19.

¹¹ *Gcaba v Minister for Safety and Security* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) at para 75.

¹² *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC).

“[D]eciding factual disputes is ordinarily not the role of apex courts. Ordinarily, an apex court declares the law that must be followed and applied by other courts. Factual disputes must be determined by the lower courts and when cases come on appeal, they are adjudicated on the facts as found by the lower courts.”¹³

[33] In *Jiba*,¹⁴ this Court had to consider whether the claim brought by the applicant – the General Council of the Bar – against the respondents who were advocates and senior officials in the National Prosecuting Authority, was a constitutional issue. The applicant sought to have the respondents’ names removed from the roll of advocates on the basis that they were no longer fit and proper persons and ought not to continue to practise as advocates. It became clear that the matter concerned an application of an established test to the evaluation of the facts. In determining whether the matter engaged this Court’s jurisdiction, it stated:

“The apparently incorrect determination of facts by the majority in the Supreme Court of Appeal and the erroneous application of the three-stage test to those facts also do not raise a constitutional issue. This is because the standard is well established and the determination of facts, whether right or wrong, does not amount to a constitutional issue.

...

It is now axiomatic that if what is at issue in a particular case is the determination of facts, the jurisdiction of this Court is not engaged.”¹⁵

The same principle applies in the present case as it involves the determination of a factual dispute.

[34] In this matter, there were factual disputes before the High Court. In order to resolve this, the High Court was required to apply the *Plascon-Evans* rule.¹⁶ The

¹³ Id at para 39.

¹⁴ *General Council of the Bar of South Africa v Jiba* [2019] ZACC 23; 2019 (8) BCLR 919 (CC) (*Jiba*).

¹⁵ Id at paras 49-50.

¹⁶ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A). In that matter, the court laid down the seminal principle for the correct approach to dealing with disputes of fact in motion proceedings. In essence, where a factual dispute arises, the relief sought by an applicant may be granted only where the accepted facts justify such an order. The accepted facts will be determined by an assessment whether the respondent’s

allegation that it failed or misapplied the rule in the course of making factual findings does not assist the applicants. That question does not concern the content of the *Plascon-Evans* rule but its application to particular facts and the question cannot be answered without reference to the specific facts in this case. Therefore, a failure to apply the rule or a misapplication of the rule does not engage this Court's jurisdiction.¹⁷ Similarly, factual disputes do not ordinarily engage this Court's jurisdiction.¹⁸ Therefore, where the determination of a matter turns solely on the determination of factual disputes, this Court will not have jurisdiction to entertain the application. In any event, a misdirection on the facts by the High Court is not an arguable point of law of general public importance.

[35] Be that as it may, there may be instances in which this Court will have jurisdiction despite the presence of a factual dispute. This will be where the dispute is connected to a constitutional matter to be decided by the Court. In *Rail Commuters*, this Court said:

“This reasoning does not imply that disputes of fact may not be resolved by this Court. It states merely that where the only issue in a criminal appeal is dissatisfaction with the factual findings made by the Supreme Court of Appeal, and no other constitutional issue is raised, no constitutional right is engaged by such a challenge. Where, however, a separate constitutional issue is raised in respect of which there are disputes of fact, those disputes of fact will constitute ‘issues connected with decisions on constitutional matters’ as contemplated by section 167(3)(b) of the Constitution. On many occasions, therefore, this Court has had to determine on appeal the facts of a matter in order to determine the constitutional claim before it. Were it to be otherwise, this Court's ability

denial of the facts alleged by the applicant is insufficient to raise a real or genuine dispute of fact. If they are indeed insufficient, they fall to be rejected on the papers. In such a case, where the court is satisfied as to the credibility of the version of the applicant, the court may then decide the dispute in the applicant's favour without hearing oral evidence.

¹⁷ *Booyesen v Minister of Safety and Security* [2018] ZACC 18; 2018 (6) SA 1 (CC); 2018 (9) BCLR 1029 (CC) at para 50. See also *Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3; 2011 (3) SA 237 (CC); 2011 (5) BCLR 453 (CC) at para 12.

¹⁸ *Mbatha v University of Zululand* [2013] ZACC 43; (2014) 35 ILJ 349 (CC); 2014 (2) BCLR 123 (CC) at para 222. In that matter, this Court expressed the principle that “a factual issue may [not] somehow morph into a constitutional issue through the simple facility of clothing it in constitutional garb”. This principle remains uncontradicted.

to fulfil its constitutional task of determining constitutional matters would be frustrated.”¹⁹

[36] The argument relating to the alleged “arguable points of law” also does not assist the applicants. The points raised by the applicants are points of fact. In *Paulsen*, this Court emphasised that an arguable point of law of general public importance must be just that – a legal question that is open for determination.²⁰ This excludes a determination wholly based on a factual dispute. In this case, the applicants have failed to overcome this hurdle. Accordingly, this Court’s jurisdiction is not engaged.

[37] The second issue on which the applicants rely to establish jurisdiction, relates to the authority of a trustee, which is a legal question. However, the law relating to the operation of a trust is well-settled. The powers of a trustee to act on behalf of the trust are located within the four corners of the trust deed. They provide for the circumstances in which the actions of trustees may bind a trust. Thus, a trustee acting outside the parameters of the powers conferred on her will be found not to have acted on behalf of the trust. In *Hoosen N.O.*, a trust deed was silent on the delegation of powers, rights, and duties to a single trustee, but conspicuously made provision for collective action by the trustees.²¹ That Court rejected the notion that a single trustee could act for a trust on her own initiative without her co-trustees’ authorisation. This principle has not changed.²² In *Land Bank*,²³ the same principle was reiterated by the Supreme Court of Appeal. The broad context in that matter concerned a dispute over a family trust. The family trust was alleged to owe over R16 million to the Land Bank which sought the payment of these monies. The question at the forefront of the enquiry was which

¹⁹ *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at para 52 (*Rail Commuters*). See also *Tjiroze v Appeal Board of the Financial Services Board* [2020] ZACC 18; 2021 (1) BCLR 59 (CC) at paras 15-6.

²⁰ *Paulsen v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at paras 21-2.

²¹ *Hoosen N.O. v Deedat* [1999] ZASCA 49; 1999 4 SA. 425 (SCA).

²² *Id* at para 23.

²³ *Land and Agricultural Development Bank of SA v Parker* [2004] ZASCA 56; 2005 (2) SA 77 SCA (*Land Bank*).

circumstances had bound the trust through the dealings of its trustees. The Supreme Court of Appeal said:

“[A] provision [in a trust deed] requiring that a specified 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.”²⁴

[38] In my view, nothing more needs to be said about the requirements to bind a trust. The requisite number of trustees must be in office before the trust can be said to have acted. The law is settled on this point and the argument does not assist the applicants.

[39] As I see it, what the applicants appear to take issue with is that the High Court held that the two other trustees, Mr Cronje and Mrs Louw, acquiesced in Mr Louw’s use of the Trust as a conduit for illicit flows of the ill-gotten monies.²⁵ This again is a challenge to a finding of fact made by the High Court.²⁶ Alternatively, if they say that this is not so, this would at best be a complaint that the High Court misapplied an established principle.²⁷ Neither engages this Court’s jurisdiction.

[40] The applicants also sought condonation for the late filing of this application. However, having concluded that this Court lacks jurisdiction to entertain the matter, the application for condonation does not arise for consideration.

Conclusion

[41] This matter does not engage this Court’s jurisdiction in terms of section 167(3)(b)(ii). It is therefore not necessary to consider the second leg of the

²⁴ Id at para 11.

²⁵ High Court judgment above n 1 at para 12.

²⁶ *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 at para 15. In that matter this Court definitively stated that a challenge to a finding of fact does not in of itself amount to a constitutional issue.

²⁷ *Booyesen* above n 14 para 50.

enquiry, that is, whether it is in the interests of justice to grant leave. It follows that the application for leave to appeal falls to be dismissed.

Costs

[42] In relation to costs, I see no reason why costs should not follow the result.

Order

[43] The following order is made:

1. Leave to appeal is refused.
2. The applicants must pay the respondents' costs, including the costs of two counsel.

For the Applicants:

P A Van Eeden SC and D Baguley
instructed by Assheton-Smith Ginsberg
Incorporated

For the Respondents:

J A Van der Merwe SC, J P White and
M Adhikari instructed by Mostert and
Bosman Attorneys