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

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

Case number: 387/2017

In the matter between:

**H. J. T.**

Applicant

and

**J. M. T.**

First Respondent

**H. F. T. N.O.**

Second Respondent

**J. M. T. N.O.**

Third Respondent

**A. J. D. J. N.O.**

Fourth Respondent

**H. J. T. N.O.**

Fifth Respondent

**THE MASTER OF THE HIGH COURT,**  
**BLOEMFONTEIN**

Sixth Respondent

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**JUDGMENT BY:** SNELLENBURG, AJ

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**HEARD ON:** 15 JUNE 2017

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**DELIVERED ON:** 6 JULY 2017

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- [1] The applicant, H. J. T., one of three siblings born of the marriage between J. M. T. [Mrs T.] and H. F. T. [Mr T. Sr], seeks the removal of his mother from the office as trustee of the Kleinfontein Trust [interchangeably referred to as either the Kleinfontein Trust or the Trust] by way of motion procedure. The marriage relationship between Mrs and Mr T. Sr deteriorated to the stage where Mrs T. instituted divorce proceedings which are currently pending in this court. As will become apparent certain claims in those divorce proceedings gave rise to the present application.
- [2] Before considering the merits of the main application the interlocutory application needs to be disposed of. The applicant in the main application is also the applicant in the interlocutory application. Mrs T., Mr A. J. D. J. N.O. and the Master of the High Court, Bloemfontein are joined as respondents in the interlocutory application. The applicant seeks the following relief in his interlocutory application, to wit: (i) condonation for the late filing of his replying affidavit in the main application; (ii) that Mr A. J. D. J. N.O. [Mr D. J.] be joined in the main application as second respondent; (iii) that the Master of the High Court be joined as third respondent; (iv) that Mrs T. (joined as the only respondent in the main application) become the first respondent; (v) that the dispute between the applicant and first respondent regarding whether (the assets of) Kleinfontein Trust is the property and alter ego of H. F. T. be referred to arbitration in terms of clause 9 of the Trust Deed of the Kleinfontein Trust, alternatively, if the court finds that an arbitrator can indeed adjudicate the removal of a trustee, that the

removal of the first respondent as trustee be referred for arbitration as a further dispute; (vi) that the main application be postponed *sine die* (pending the arbitration); (vii) that the interlocutory application be adjudicated simultaneously with the main application and (viii) that any respondent opposing the application be ordered to pay the costs of opposition.

- [3] The main and interlocutory applications were postponed to be heard simultaneously by agreement between the parties. As result the relief to that effect became moot and no order in that regard needs to be made.

#### Joinder

- [4] Only the first respondent was initially joined in the main application. The interlocutory application was made pursuant to Mrs T.'s objection of the non-joinder of the trustees of the Kleinfontein Trust and the Master of the High Court. It is no longer in dispute that the trustees or the Master should be joined. It is common cause that the most recent letters of authority issued by the Master authorises the applicant, Mrs and Mr T. Sr and Mr D. J. to act as trustees on behalf of the Kleinfontein Trust.
- [5] The only issue regarding the joinder of the trustees of the Trust was that the applicant only applied for the joinder of Mr D. J.. The applicant contended that it was not necessary to join Mr T. Sr in his capacity as trustee as he had resigned as trustee. The applicant also contended that as he and Mrs T. were already parties to the application, it was not necessary to join them again in the

proceedings. As result the applicant only applied for the joinder of Mr D. J. and the Master.

- [6] Mrs T. was joined in the proceedings in her personal capacity, not in her representative capacity as trustee of the Trust.<sup>1</sup> The applicant also acts in his personal capacity, not in his representative capacity as trustee of the Trust. It is therefore not correct to argue that they are before the court in any capacity other than in their personal capacities. They should be joined in the proceedings in their representative capacities. As for Mr T. Sr, he is still authorised as trustee (the Master indicates in his report that he has not received the letter of resignation) and as a trust acts through its authorised trustees it can do no harm to join all the trustees presently authorised to act on its behalf. The applicant only seeks costs from such party opposing the main application and only Mrs T. opposes the relief. A common-sense approach to the joinder point in this matter dictates that the joinder of the trustees of the Trust in these circumstances would not cause any prejudice to them or the existing parties to the application and would allow the matter to be ventilated, rather than cause the parties further exposure to wasted costs if the matter is postponed for the inevitable joinder thereafter.

- [7] At the commencement of the matter I indicated to the applicant's counsel, Mr Heymans, as well as the first respondent's counsel, Mr Tsangarakis, that I intended to join the trustees and Master to the proceedings as necessary parties and then immediately thereafter

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<sup>1</sup> It is trite that where an application or action is made for the removal of trustee from office the claim against the trustee is in personal capacity. See **Stander and Others v Schwulst and Others 2008 (1) SA 81 (C)**.

hear arguments on the remaining issues in the interlocutory application as well as the main application, barring either or both of them persuading me that it would be prejudicial to the trustees or their respective clients. I requested Mr Heymans to take an instruction whether Mr T. Sr who appeared to be receiving counsel from the same attorney that represented the applicant in these proceedings, would have any objection to his joinder and whether it would be necessary to postpone the main application for filing of further affidavits once he and the other trustees were joined. I made a similar request to Mr Tsangarakis. I was assured by Mr Heymans that there was no objection to the joinder and he gave me the assurance that there would be no need to postpone the matter. Mr Tsangarakis gave a similar assurance on behalf of Mrs T..

[8] I therefore made an order that the trustees be joined as second to fifth respondents respectively and the Master of the High Court as the sixth respondent. Mrs T. became the first respondent. The Master's joinder in the proceedings at that stage was a matter of formality. The Master filed a report prior to the hearing and indicated that he would abide by the court's order. In light of the relief I am of the view that the Master should have been joined in the main application from the outset. In light of the facts of this matter there can be no prejudice if he is joined.

[9] As the joinder was finalised before I heard further arguments and reserved the judgment, I will henceforth refer to the parties as they are after the joinder and as reflected in the heading above. Mrs T. is the first respondent and also in her representative capacity as trustee of the Trust the third respondent. Mr HF T. is the second

respondent in his representative capacity as trustee of the Trust, but for sake of convenience I will refer to him as Mr T. Sr. Mr D. J. is the fourth respondent in his representative capacity as trustee of the Trust. Mr HJ T. is the applicant and in his representative capacity as trustee of the Trust the fifth respondent. The Master is the sixth respondent but will still be referred to as the Master.

### Condonation

- [10] The applicant seeks condonation for the late filing of his replying affidavit in the main application. The application is opposed by the first respondent on the basis that the applicant has failed to show good cause for the indulgence and does not tender costs.
- [11] The principles for condonation in terms of Rule 27 are well settled. The principles were aptly summarised in **Standard General Insurance Co Ltd v Eversafe (Pty) Ltd and Others** 2000 (3) SA 87 (W) at para 12:

“It is well-established that an applicant for any relief in terms of Rule 27 has the burden of actually proving, as opposed to merely alleging, the good cause that is stated in Rule 27(1) as a jurisdictional prerequisite to the exercise of the Court's discretion. *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352G. The applicant for any such relief must, at least, furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about and to assess his conduct and motives (*Silber v Ozen Wholesalers* (supra at 353A)). Where there has been a long delay, the Court should require the party in default to satisfy the Court that the relief sought should be granted. *Gool v Policansky* 1939 CPD 386 at 390. This is, in my view, particularly so when the applicant for the relief is the dominus litis plaintiff.”

This passage also encapsulates the essence of the first respondent's opposition to the applicant's application for condonation.

- [12] The first respondent's opposition to the grant of condonation was more than reasonable. The first respondent's counsel however conceded that in as much as there was a lot of force in the arguments that the applicant's explanation for his default was subject to criticism, there would not be any material prejudice if the late filing of the replying affidavit were condoned and an appropriate order regarding costs were made. This concession was fairly made.
- [13] In light of the facts of the matter and in order to adjudicate the matter on fully ventilated facts I am of the view that the replying affidavit should be allowed.
- [14] I therefore allow the replying affidavit. I will deal with the issue of costs below.

#### Removal of trustee from office by means of arbitration

- [15] Only the High Court and in certain prescribed circumstances the Master have the power to remove a trustee from office.
- [16] The Supreme Court of Appeal decisively dealt with the High Court's power to remove a trustee in **Gowar and Another v Gowar and Others** 2016 (5) SA 225 (SCA) para 27 where Petse, JA on behalf of the unanimous Court held:

“It is now trite that the court has inherent power to remove a trustee from office at common law. This power also derives from s 20(1) of the Act.<sup>2</sup>”

The High Court’s power to remove a trustee from office stems from its residual common law jurisdiction which was not displaced by the **Trust Property Control Act 57 of 1988** [the Act] and also s 20 of the Act.<sup>3</sup> The Master’s powers to remove a trustee from office is contained in s 20 of the Act.

[17] Since its commencement on 31 March 1989 the Act regulates the control of trust property and provides for matters connected therewith of all trusts save those exempted in terms of s 25 of the Act. It is common cause that the Kleinfontein Trust is subject to the provisions of the Act.

[18] Section 20 of the Act which deals with the removal of a trustee provides as follows:

“20 Removal of trustee

- (1) A trustee may, on the application of the Master or any person having an interest in the trust property, at any time be removed from his office by the court if the court is satisfied that such removal will be in the interests of the trust and its beneficiaries.
- (2) A trustee may at any time be removed from his office by the Master-
  - (a) if he has been convicted in the Republic or elsewhere of any offence of which dishonesty is an element or of any other offence for which he has been sentenced to imprisonment without the option of a fine; or

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<sup>2</sup> **Trust Property Control Act 57 of 1988.**

<sup>3</sup> **Fey NO and Whiteford NO v Serfontein and Another 1993 (2) SA 605 (A).**



- (b) if he fails to give security or additional security, as the case may be, to the satisfaction of the Master within two months after having been requested thereto or within such further period as is allowed by the Master; or
  - (c) if his estate is sequestrated or liquidated or placed under judicial management; or
  - (d) if he has been declared by a competent court to be mentally ill or incapable of managing his own affairs or if he is by virtue of the Mental Health Act, 1973 (Act 18 of 1973), detained as a patient in an institution or as a State patient; or
  - (e) if he fails to perform satisfactorily any duty imposed upon him by or under this Act or to comply with any lawful request of the Master.
- (3) If a trustee authorized to act under section 6 (1) is removed from his office or resigns, he shall without delay return his written authority to the Master.”

[19] A ‘court’ is described in section 1 of the Act as provincial or local division of the Supreme Court of South Africa [High Court] having jurisdiction.

[20] In conclusion, as stated at the outset, only the Court and the Master have the power to remove a trustee from office.

[21] It follows that the relief for referral to arbitration of the ‘dispute’ pertaining to the removal of the first respondent from the office of trustee and the relief pertaining to the *sine die* postponement of the main application pending the finalisation of the envisaged arbitration, cannot succeed.

Referral of dispute regarding whether (assets of) the Kleinfontein Trust is the property and alter ego of Mr T. Sr

- [22] The relief is premised on clause 9 of the Trust Deed which provides for compulsory arbitration in the event of an irreconcilable dispute between (a) trustees mutually or vis-à-vis each other, or (b) where there is deadlock in votes regarding the same matter on consecutive occasions; or (c) where there is deadlock in votes in between parties to the Trust; erstwhile parties to the Trust; trustees; the trustees and trust beneficiaries; trust beneficiaries amongst themselves; forbears of trust beneficiaries; forbears and their descendants (in any grouping vis-à-vis the other) or descendants mutually pertaining to any matter arising from the Trust Deed.
- [23] In my view the first respondent's claim in the divorce proceedings that Mr T. Sr hedged the comprehensive estate he had been able to accumulate, during the existence of their marriage due to her direct and/or indirect contributions, in numerous trusts, does not fall in the class of dispute envisaged by clause 9 of the Trust Deed.
- [24] It follows that the referral and the relief pertaining to the *sine die* postponement of the main application pending the finalisation of the envisaged arbitration, cannot be granted.

Removal of the first respondent as trustee of the Kleinfontein Trust from office

- [25] During or about July 2005 the Kleinfontein Trust was created by virtue of a written agreement titled "NOTARIËLE (*sic* NOTARIËLE) TRUST– EN SKENKINGSAKTE". The founder of the Kleinfontein Trust was Mr T. Sr. The first trustees of the Trust were the second,

third and fifth respondents. Both the first and second respondent (in personal capacity) as well as the applicant and certain classes of the applicant's descendants and their blood relatives are income beneficiaries. The applicant and certain classes of his descendants and their blood relatives are the capital beneficiaries. It is not necessary to deal with the intricacies of which class of beneficiary will benefit in what circumstances.

- [26] These being motion proceedings, the famous Plascon-Evans<sup>4</sup> rule applies. Wallis, JA recently restated the application of the rule in the matter of **Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd** 2017 (2) SA 1 (SCA) para 36 where he succinctly explained it as follows:

“Media 24 chose not to pursue this case by way of trial. Nor did it ask for the matter to be referred to oral evidence. In asking for it to be decided on the affidavits alone, it therefore bound itself to the long-established approach described in Plascon-Evans. That meant that the case could not be determined simply on a weighing of the probabilities as they emerged from the affidavits. The facts deposed to by OUP's witnesses had to be accepted, unless they constituted bald or uncreditworthy denials or were palpably implausible, far-fetched or so clearly untenable that they could safely be rejected on the papers. A finding to that effect occurs infrequently because courts are always alive to the potential for evidence and cross-examination to alter its view of the facts and the plausibility of evidence.”<sup>5</sup>

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<sup>4</sup> **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) at 634H – I.

<sup>5</sup> Also see **National Scrap Metal (Cape Town) (Pty) Ltd and Another v Murray & Roberts Ltd and Others** 2012 (5) SA 300 (SCA).

The applicant did not request a referral for oral evidence. The Plascon-Evans rule applies to final relief in motion proceedings where disputes of facts arise:

“where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.”<sup>6</sup>

Lastly the affidavits in motion proceedings constitute both the pleading and the evidence, in other words both *facta probanda* and *facta probantia*.<sup>7</sup>

- [27] To contextualise the applicant's case his contentions are relevant. I will record which allegations are denied.
- [28] According to the applicant when the Kleinfontein Trust was erected two further trusts were also created. The Trust Deeds of these other trusts were not produced in these proceedings by the applicant. The applicant contends that the three trusts were created by agreement between his mother, father, Mr D. J., the applicant, his brother and sister to “secure our separate futures”. The “our” refers to the three siblings. The applicant's general contention is that a trust was erected for each child. Farms “belonging to my father would be sold at an acceptable value to the different trusts.” No details save for the allegation were provided. The applicant alleges that there was

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<sup>6</sup> Plascon-Evans at 634H – I.

<sup>7</sup> Transnet Ltd v Rubenstein 2006 (1) SA 591 (SCA) para 28; Kham and Others v Electoral Commission and Another 2016 (2) SA 338 (CC) para 40.

nothing sinister or unacceptable about “it”. The first respondent states that trusts were erected by Mr T. Sr on advice of the Mr D. J., a chartered accountant (the fourth respondent in his representative capacity). She also states she was merely informed by Mr T. Sr of his intention to do so and was never part of any decision-making process. She denies the remainder of allegations insofar as it is contrary to her version.

[29] The applicant also alleges that a close corporation and other trusts form part of the farming enterprise.

[30] The applicant also contends that shortly before the first respondent sued his father for divorce “it was decided that the joint farming enterprise would be split up and that each of the children would then continue under their own Trusts”. This is also denied by the first respondent.

[31] The gravamen of the applicant’s case is the first respondent’s allegation in paragraph 7.3 of her particulars of claim. Paragraph 7.3 must be read in context. Paragraph 7 in relevant parts reads:

“Gedurende die bestaan van die huwelik tussen die partye het Eiseres direk of indirek bygedra tot die groei en instandhouding van die Verweerder se Boedel deur die lewering van dienste en/of besparing van uitgawes wat andersins aangegaan sou moes word en is dit in die omstandighede reg en billik dat 50% van die Verweerder se netto bates of sodanige gedeelte daarvan as wat die Agbare Hof reg en billik mag ag, aan Eiseres oorgedra word deurdad Eiseres:

7.1 te alle tye die kinders en die Verweerder versorg het;

7.2 te alle tye die gesamentlike huishouding versorg het;

7.3 aan die Verweerder 'n geleentheid gebied het om 'n omvangryke boedel op te gebou het, welke boedel die Verweerder verskans in verskeie trusts waarvan die finansiële besonderhede aan Eiseres onbekend is en behou Eiseres haar reg voor om mettertyd die trustees van hierdie onderskeie trusts te voeg as partye tot hierdie aksie;

7.4 die Verweerder bygestaan het in sy boerdery aktiwiteite.”

[32] The applicant alleges that he has been advised that the effect of the allegation in paragraph 7.3 is that the first respondent claims 50% of the value of the properties of all the trusts. He further contends that apart from the properties there is also a substantial amount of cattle in the close corporation. The applicant states that the conduct of the first respondent by making these allegations threatens his own and his children's future; creates uncertainty and that the first respondent has an 'unsurmountable conflict of interests'. The applicant contends that in terms of the law the first respondent must act in the best interest of the beneficiaries; that she has a fiduciary duty towards the beneficiaries and her claims in the particulars of claim are in breach of these duties. The applicant also relies on the fact that the first respondent refuses to make any decision regarding the affairs of the Trust without first seeking advice from her attorney.

[33] During argument the applicant's counsel submitted that the application also had a further purpose, namely to challenge the first respondent to 'put her money where her mouth is' as the saying goes. She is challenged to say whether she truly believes that she is entitled to the relief she seeks and several other matters and make an election, either serve as trustee or pursue the claim, which

the applicant contends has no merit, and that she should be removed as trustee. To this end the correspondence shows that the first respondent was put on terms to resign as trustee of the Trust and she has refused. The applicant also relies on an agreement which has allegedly been reached before the divorce action whereby the first respondent would resign. The applicant contends that he would have been appointed as trustee in the first respondent's place and that she reneges on that agreement. This agreement is denied by the first respondent. Lastly the applicant states that his brother has been allowed to remove sheep from the close corporation with which he is farming on his own, therefore not as part of the farming enterprise. This the applicant contends shows that the first respondent is not really against the dissolution of the larger farming enterprise. The first respondent denies any discussion or agreement regarding the dissolution of the farming enterprise and laments the lack of details regarding these alleged discussions.

[34] As far as the agreement in terms whereof the first respondent would resign as trustee of the Trust goes, the first respondent's version is not farfetched or clearly untenable warranting that it can be rejected merely on the papers. On these premises, as far as the alleged agreement goes, the first respondent's version must prevail. The same goes for the agreement or discussions about the larger farming enterprise being dissolved.

[35] The real issue in question is whether the applicant has satisfied the requirements to warrant the removal of the first respondent from the office as trustee of the Trust. The applicant's case to this extent rests

*essentially* on two grounds, namely the allegation (claim) in para 7 of the first respondent's particulars of claim in the divorce proceedings and the fact that she currently enlists legal advice before making any decision regarding the Trust.

[36] The Mr D. J. deposed to a supporting affidavit in support of the applicant. It is evident from his affidavit that the friction between the trustees of the Trust is according to him limited to first respondent and Mr T. Sr pursuant to the divorce. Mr T. Sr has resigned as trustee. In my view, nothing turns on this evidence, but even if I am wrong that issue is no longer relevant in light of Mr T. Sr's resignation as trustee. The alleged disharmony does not imperil the trust estate or its proper administration, at least no evidence to prove this has been advanced. In **Gowar and Another v Gowar and Others** *supra* the Supreme Court of Appeal referred with approval to **Volkwyn NO v Clarke and Damant** 1946 WLD 456 and held that:

"It is well established that mere friction or enmity between the trustee and the beneficiaries will not in itself be adequate reason for the removal of the trustee from office. (See also in this regard *Tijmstra NO v Blunt-MacKenzie NO and Others* 2002 (1) SA 459 (T) at 473E – G.) Nor, in my view, would mere conflict amongst trustees themselves be a sufficient reason for the removal of a trustee at the suit of another."

[37] It is trite that the power of the court to remove a trustee must be exercised with circumspection. I do not intend to undertake an extensive review of the duties and obligations of a trustee. It well documented and I accept for purposes hereof the duties and obligations contended for by the applicant. The question in this matter is simply whether the applicant has shown that the first



respondent's claim in the particulars of claim (as well as her intention to pursue the claim in the divorce proceedings)<sup>8</sup>, creates an unsurmountable conflict of interests for the first respondent between her personal interests and her duty as trustee of the Trust. The applicant perceived the relief to also include that the first respondent claims that the assets of the Trust is the property of Mr T..

[38] It is clear that but for the first respondent's claim in para 7.3 of the particulars of claim in the divorce proceedings, the applicant would not have sought the first respondent's removal from the office of trustee of the Trust.

[39] In **MM and Others v JM** 2014 (4) SA 384 (KZP) Ploos van Amstel, J was called upon to consider an exception against the plaintiff's particulars of claim where the main issue was whether the assets in a family trust can be taken into account in the determination of the accrual of the husband's estate. The court accepted for purposes of determination of the exception that the allegations would be that, but for the trust, ownership of the trust's assets would have vested in the defendant and that the trust is his alter ego. Although the facts in that matter is distinguishable from the facts in this matter, the court was also called upon to consider the same issue that arises from this application, namely whether a trustee making (and pursuing) a claim as first respondent makes in the divorce proceedings constitutes a breach of her fiduciary duties. To put it

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<sup>8</sup> The claim being that Mr T. Sr hedged the extensive estate, which he was at liberty to accumulate during their marriage due to her direct or indirect contributions, in numerous trusts, (of which I accept the Trust to be one such trust).

differently, whether 'an unsurmountable conflict of interests' justifying the removal as trustee is inherent in such a claim by a plaintiff who is also a trustee of the trust.

[40] In para 21 Ploos van Amstel, J held as follows:

"The first ground was that JM cannot plead on the one hand that the trust is a validly constituted one, that she is a trustee and a beneficiary, and at the same time allege that the trust in truth is merely her husband's alter ego and that the assets of the trust therefore effectively belong to him and should form part of his accrual calculation. There is not necessarily an inconsistency. Her contention is not that the trust is invalid. She contends that her husband has operated the trust in a manner which shows that it is his alter ego. She does not allege that the assets of the trust effectively belong to her husband, but seeks an order that they be deemed to form part of his estate and that they should form part of his accrual calculation. I have already found that this is not a valid claim. If she had averred that the trust assets in truth belonged to her husband, without challenging the validity of the trust, I do not consider that such a claim would have been excipiable. The second ground is that she is not entitled, as trustee, to make a claim against trust assets, for in doing so she would be breaching her fiduciary duties. The answer to this point is that she is not making a claim against trust assets. Her claim relates to her husband's estate. In any event, I do not see how a trustee who makes a claim against trust assets thereby breaches her fiduciary duties, provided of course that her claim is a valid one. The third ground of the exception is that evidence to contradict the terms of the trust deed would breach the parol evidence rule. I do not consider that JM's claim seeks to contradict the terms of the trust deed. As I have said, she does not aver that the trust is a sham. Her claim is based on the manner in which her husband operated and controlled the trust, which may in a particular case justify a finding that assets which had been 'placed' in the trust in truth belonged to the person controlling the trust."

[41] The mere fact that a trustee makes a claim that a trust is the alter ego of her husband, or for that matter in the context of this matter makes a claim that assets were hedged in a trust, or makes a claim against trust assets in these circumstances cannot *per se* lead to the conclusion that she is acting in breach of her fiduciary duties as trustee. In **MM and Others v JM** *supra* the court qualified its conclusion by adding that the claim should be a valid one. Insofar as the use of the word 'valid' in this context was meant to convey its ordinary meaning, namely that the claim should have a sound basis in logic and reason, or put differently be defensible or justifiable, I agree fully with the learned Judge.

[42] The first respondent does not allege that the Trust is a sham or that the Trust is invalid. Apart from the above finding the applicant has apart from relying on the claim and the intention of the first respondent to pursue the same during the divorce proceedings, placed no tangible proof before the court in this matter that underlies the allegation of the insurmountable conflict of interest that the applicant complains of. Save for the fact that she enlists legal advice before making decisions, no other conduct has been alleged or proven that would justify her removal from the office as trustee. It matters not whether the trustee makes a claim against the assets of the trust or avers that the trust is the alter ego as in this matter. The applicant's *ipse dixit* that there are no merits in the claim by the first respondent is denied by the first respondent. This contention has certainly not been proved as far as motion proceedings go.

[43] It is perfectly understandable that the first respondent will seek advice from her attorney in the present circumstances. Her conduct

must be evaluated in context of the circumstances that exist presently. Save that a trustee may at any time elect to enlist expert advice before making an informed decision, the first respondent cannot be criticized for enlisting legal counsel in the current circumstances. The applicant repeatedly stated in his affidavit that he means the first respondent no ill will and that he is actually acting in her best interest. The converse however appears to the case if the correspondence is considered. The applicant's conduct towards her as trustee has done little to substantiate his statements. One example will suffice. The Trust persistently refuses to avail the information the first respondent requested. Regardless of when the applicant became a trustee he is fully aware of her requests for information. The applicant argues that he is protecting the first respondent against herself because her legal costs will be astronomical if her attorney peruses the various documents as it consists of numerous boxes of documents. The first respondent is a grown woman presently in the midst of a divorce. She is more than capable of making her own decisions. Furthermore, in my view the trustees are obligated to supply the requested information to the first respondent, yet they persistently refused to do so. They would rather force the first respondent to make an application to court to obtain the information. To this end the applicant's attorney (who ostensibly acts on behalf of the Trust – it is not clear whether the Trust took such a decision but it matters not for purposes hereof) refers the first respondent's attorneys to the accountant (fourth respondent) who in turn refers them to the applicant's attorney. The alternative argument that the Trust is not compelled to supply the information to the first respondent's attorneys is artificial, because it has neither been made available to the first respondent whilst the

requests were made on her behalf *inter alia* in her capacity as trustee. It is understandable that the first respondent would seek legal counsel in these circumstances. It does not take much effort to imagine the circumstances she probably faces when a meeting of trustees is convened. In saying this I have sympathy for all the affected parties, including the applicant, but that does not change the facts.

[44] As stated, no other grounds have been proven that could conceivably justify the removal of the first respondent from the office of trustee of the Kleinfontein Trust.

[45] I do not agree with the applicant's counsel that it is proper to make an application of this nature with the purpose to challenge the first respondent to make the election or in counsel's words to challenge her to put her money where her mouth is. In my view the application in fact went much further than that and at times even creates the impression that it was also intended to elicit responses that would aid Mr T. Sr in the conduct of the divorce proceedings. I expressly refrain from further commenting on this aspect or from making a finding in this regard.

[46] It follows that the application stands to be dismissed.

[47] The applicant sought an indulgence regarding condonation for the late filing of the replying affidavit. I already held that the opposition to the condonation application was reasonable and raised considerations which were relevant to the adjudication of the matter. As matters stand the condonation was granted on the basis that any

prejudice would be remedied by an appropriate cost order. The joinder was necessitated as result of the non-joinder of necessary parties by the applicant. The relief claimed did not provide for all the trustees. The first respondent was fully justified to oppose the joinder in the manner she did, notwithstanding the eventual order. The relief that the interlocutory application be heard simultaneously with the main application became moot as result of the agreement between the parties.

[48] The relief that remained relevant regarding the interlocutory application were prayers 1, 3, 4.1 and the costs of the interlocutory application as a whole. The applicant only succeeds with the relief in prayer 1. The proper order regarding the costs of the interlocutory application is that the applicant should pay the first respondent's costs on an opposed basis.

[49] The applicant is equally unsuccessful with the relief he seeks in the main application. No reason exists why the costs should not follow the result. The costs order is obviously on an opposed basis.

[50] Accordingly, **IT IS ORDERED THAT:**

1. Condonation is granted to the applicant for the late filing of the replying affidavit in the main application;
2. The applicant is ordered to pay the first respondent's costs on opposed basis pertaining to her opposition to the interlocutory application as a whole;

3. The main application is dismissed with costs.

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**N. SNELLENBURG, AJ**

**APPEARANCES:**

On behalf of the applicant:

Adv P Heymans  
Instructed by:  
YDE Attorneys  
BLOEMFONTEIN

On behalf of the first respondent:

Adv S Tsangarakis  
Instructed by:  
Honey Attorneys  
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