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**IN THE COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

CASE NO: 27605/2015

DATE: 5/6/2015

In the matter between:

**D E M. obo K. O M.**

Plaintiff

and

**MEMBER OF THE EXECUTIVE COUNCIL OF THE**

**DEPARTMENT OF HEALTH, NORTH WEST PROVINCE**

Defendant

**JUDGMENT**

**A.C. BASSON. J**

[1] On a previous occasion the respondent - the Member of the Executive Council of the Department of Health, North West Province- accepted liability to the plaintiff (Ms M.) in her representative capacity for such damages as the plaintiff may prove were sustained by K. O. M. ("K.") on [.....] 2003.

Brief exposition of the facts

[2] K. was injured at birth on [.....] 2003. On 2 September 2014 this court ordered the defendant to make an interim payment in the amount of R 1,500,000.00 which amount was duly paid. This amount therefore falls to be deducted from any award made by this court in

these proceedings. The plaintiff, K.'s mother, claims for future hospital and medical expenses, loss of earnings and general damages.

[3] It is common cause that K. suffered a fracture of the left humerus and nerve damage which has resulted in Erb's paralysis (also known as brachial plexus injury). He has as a result of the injury effectively no hand function of his right arm.

[4] The only issue that was disputed in these proceedings was whether K. had also suffered a diffuse brain injury due to hypoxia.

[5] In order to prove that K. did indeed suffer a diffuse brain injury, various experts were called to testify to this effect. The report of Prof Odendaal - a Professor of Obstetrics and Gynaecology - was admitted when liability was conceded. His conclusion was that "... *oxygen deprivation is manifest and consistent with brain injury*". He also regarded the brain injury as "*probable*".

[6] Dr Jaques du Plessis - a Neurosurgeon - records in his report that the Apgar score of K. after birth was low and was 2/10 at one minute and 7/10 after 10 minutes. All the experts were *ad idem* that this is a very low score and a cause of concern. The hospital records also record that K. was "*very limpy and cyanosed*" one minute after birth. Dr du Plessis states in his report that it is not certain whether K. has also suffered mild hypoxic brain damage but deferred to the opinions of a paediatric neurologist, neuropsychiatrist and educational psychologists to express an opinion in this regard.

[8] In a lengthy and detailed report, Ms Eleanor Bubb - a Clinical and Educational Psychologists with many years' of experience- explains in meticulous detail how she had arrived at the conclusion that K. had in fact suffered a diffuse brain injury following a hypoxic episode. She confirmed in her evidence that she had conducted tests and assessments on K. and that she had concluded that the ability of K. lies in the low

average range. She explained that K. experiences problems with simple tracking and attention, that his working memory and quality of information processing are affected and that he experiences problems with the fine motor control on his left hand. K. also experiences problems with visuo-spatial reasoning and non-verbal concept formulation and with short term auditory memory for logical material. He also experiences difficulties with comprehension and instructions, arithmetical skills, verbal fluency, cognitive flexibility and productivity, to name but a few. She concluded that present information suggests that pre-injury K. probably was of average to high average ability and that he probably would have obtained a Grade 12 and would have studied further at a University of Technology. Post-injury his ability is low average to average with particular deficits in visuo-spatial/perceptual memory. She explained in detail that these difficulties are going to become more evident in his schooling achievement when he enters high school and when greater demands on higher-order cognitive skills are made with which he will not cope. She also explained that as K. enters into adolescence - when further significant maturity occurs within the brain - these areas will not develop at optimum and that the full extent of the probable brain injury sustained during birth will come into play and that further problems can be expected. According to her, K. will probably only obtain a Grade 9. She recommended that K. be placed in a remedial school.

[9] Dr Louise Olivier - a Clinical- and Neuropsychologists - with years of experience also submitted an extensive and detailed report. In brief she concluded that K. has lasting cognitive-, emotional-, and behavioural and personality problems due to the trauma experience at birth and the ramifications of him having to be forced out of the birth canal and suffering a cerebral hypoxic episode at birth. In her report Dr Olivier identifies numerous cognitive deficits. She also notes that there are clear indications of brain injury in his profile

on the Bender Visual Motor Gestalt Test. She also identifies indications of clinical depression with an organic underlay. Dr Olivier also notes that there are clear indications of especially good cognitive abilities and poor cognitive abilities which would be consistent with brain injury. She concludes that it would be highly unlikely for K. to pass Grade 12 with university exemption and that he will have to focus on the more practical subjects which will makes it difficult for him to enter the world of work because of his physical disability. Dr Olivier also recommended that any monies awarded to K. need to be protected in a trust.

[10] It is clear from the evidence of Dr Olivier and of Ms Bubb that it is generally accepted that a brain lesion does not necessarily show up on a MR scan and that this was the reason why Dr Du Plessis deferred to the expertise of a Neuropsychologist (Dr Olivier) and an Educational Psychologists (Ms Bubb).

[11] I have already referred to the fact that both Dr Olivier and Ms Bubb were adamant that K. has a brain injury that probably stems from hypoxia at birth. In this regard Ms Bubb specifically referred to the hospital records that show that K. was cyanotic after birth and that he had a very low Apgar score in circumstances where it was common cause that the saturation of oxygen was very low. The hospital records also show that K. was taken to the High Care Unit after resuscitation.

[12] Ms Bubb also referred to the fact that K. did not obtain the developmental milestones he ought to have obtained and that this indicates brain injury. Dr Du Plessis also notes in his report that these developmental milestones could not be explained on the basis of the brachial plexus injury. Both Dr Olivier and Ms Bubb are of the view that it is clear that the reason for the delay in reaching developmental milestones is probably due to cerebral hypoxia. Both experts were also adamant that the cognitive and emotional deficits were due to a brain injury.

[13] Even though the clinical psychologists retained by the defendant did not testify it is clear that she also confirms some of the deficits, significantly the slowness, identified by Dr Olivier and Ms Babb. The defence closed its case without leading any evidence.

### Evaluation

[15] I am persuaded on the evidence that was placed before the court that K.'s brain deficits were caused at birth. The evidence of both Dr Olivier and Ms Bubb were compelling and points to the conclusion that K. had suffered a brain injury at birth. In this regard I had regard to the recent decision of the Supreme Court of Appeals in *Goliath v MEG for Health, Eastern Cape* [\[1\]](#) where reference was made to the well-known case of *AA Onverlingse Assuransie-Associasie* in respect of what must be proven by a plaintiff in a civil case:

"[19] Thus at the close of Ms Goliath's case, after both she and Dr Muller had testified, there was sufficient evidence which gave rise to an inference of negligence on the part of one or more of the medical staff in the employ of the MEC who attended to her. In that regard it is important to bear in mind that in a civil case it is not necessary for a plaintiff to prove that the inference that she asks the court to draw is the only reasonable inference; it suffices for her to convince the court that the inference that she advocates is the most readily apparent and acceptable inference from a number of possible inferences (*AA Onderlinge Assuransie-Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A); see also *Cooper and Another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA))."

### Loss of earnings

[16] It was not in dispute that K. would have matriculated and would have obtained a

three-year University/Technicon degree/diploma had it not been for the injury at birth. In this regard the Actuary has calculated that this would have yielded earnings for him of R4, 999, 00.00. For ease of calculation this figure is rounded off to R5 million.

[17] It must be taken into account that, because K. had suffered the injuries at birth, many years had to lapse and that many uncertainties exists. In light of this fact, it was conceded on behalf of the plaintiff that a 20% contingency should be deducted in respect of general contingencies. Taking this into account the uninjured earnings amounts to R4 million.

[18] I have also taken into account the fact that Prof Schreuder - an Industrial Psychologist - has given evidence to the effect that K. would not do much better than a practical Grade 12 or academic Grade 9 qualification.

[19] According to Prof Schreuder, K. is functionally unemployable in the open market and may at best obtain sympathetic employment. Prof Schreuder, however, accepted that there is a residual earning capacity of 10%. If this residual earning capacity is taken into account this would leave the claim for loss of earnings at R4 million less 10%. The amount awarded for loss of earnings is therefore R3.6 million.

#### Future medical expenses

[20] As in the case of the loss of earnings, the parties did not seem to be in dispute that an amount of R847274.00 would be fair in the circumstances. In this regard Ms Bubb has given evidence about what expenses would be fair and reasonable in respect of future medical expenses as calculated by the Actuary. In addition to this amount it would be necessary for K. to receive occupational therapy. Dr Rony Birrel - an orthopaedic surgeon - has also recommended a possible amputation and some conservative treatment.

## General damages

[21] The parties had different views in respect of the amount that should be awarded in respect of General Damages. What is however clear from the facts is that K. will from birth until his dying day never have the use of his dominant right arm: It will always be a useless appendage and he may at some stage opt to amputate his arm. However, apart from the fact that K. suffers disfigurement, he will undoubtedly also suffer psychiatric and psychological trauma. K. is also particularly vulnerable as a result of the brain injury and will experience considerable difficulty in dealing with his disfigurement.

[22] I have also already referred to the fact that not only did K. suffer from a brachial plexus injury; he has also suffered a brain injury that has resulted in cognitive deficits and emotional problems. All of these injuries have effectively wrecked K.'s employability and will compromise the rest of his life.

[23] None of the parties could refer the court to a matter similar to this one. Both parties have however referred me to cases where the plaintiff had undergone an amputation of an arm. See in this regard *Rens v MEG for Health: Northern Cape Provincial Department of Health* [\[2\]](#) and *Shadrachk v Road Accident Fund* [\[3\]](#) In the latter case the court awarded R1.1 million in respect of General Damages. The defendant also referred the court to cases where the courts have awarded less in respect of General Damages where a person's arm was amputated.

[24] I have considered the case law dealing with amputations. Although these cases are not exactly similar, they do offer some assistance to the court in arriving at a conclusion in respect of General Damages. I am of the view that an amount of R1.2 million would be fair in the circumstances taking into account the fact that K. had suffered a brachial plexus injury as well as a mild brain injury.

[25] I have provided in my order attached hereto as Annexure "A" for the creation of a Trust. The Deed of Trust is also attached to the order. From the amount awarded to K., an amount of R 1.5 million must be deducted as having already been paid over to the plaintiff.

[26] The total amount awarded to K. is R 5 647 274.00. From this amount certain amounts must be deducted as provided for in the attached order.

[28] The order marked "Annexure A" is made an order of Court.

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A.C. BASSON

JUDGE OF THE HIGH COURT

NORTH GAUTENG HIGH COURT

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION PRETORIA**

CASE NO : 70876/ 2010

**ON \_\_\_\_\_ JUNE 2015**

**BEFORE HER LA DYSHIP MADAM JUSTICE BASSON**

In the matter between:

**D. E. M.**

**Obo K. O. M.**

Plaintiff

AND

**M E M B E R O F T H E E X E C U T I V E C O U N C I L O F**

**T H E D E P A R T M E N T O F H E A L T H ,**

**N O R T H W E S T P R O V I N C E**

Defendant

### **ORDER**

Having heard counsel and the evidence tendered by the parties, the following order is made :

1. 1.1 The defendant is ordered to pay plaintiff, for the benefit of K. O. M. ( born [...] 2003) R5647274.00 (five million six hundred forty seven thousand two hundred seventy four; rand);

1.2 The amount in paragraph 1.1 takes into account the interim payment of R1,500,000.00 (One Million Five Hundred Thousand Rand).

2. The defendant is ordered to pay the plaintiff's costs of suit, up to and including 2 June 2015, such costs to include :

2.1 the costs of two counsel (up to 25 May 2015) and thereafter the costs of senior counsel;

2.2 the reasonable taxable fees for consultation and preparation for trial, qualifying fees (if any and on proof thereof) of the following experts :

2.2.1 Dr Louise Olivier;

2.2.2 Eleanor Bubb;

2.2.3 Dr Dries Schreuder;

#### 2.2.4 Wilma van der Walt;

2.3 it is noted that the defendant was ordered on 2 September 2014, to inter alia, pay the reports of Drs Birrell, du Plessis, Schreuder, Gladys Maluleke, Eleanor Bubb and Wilma van der Walt. The defendant is ordered further to pay the report of Dr Olivier and the costs of relevant experts for compiling joint minutes and that of further actuarial reports;

2.4 the cost of establishing the K. O. M. Trust;

2.5 the costs of the trustee as if he/she were appointed as curator *bonis* under the Administration of Estates Act;

2.6 the costs of the trial enrolled for quantum on 25 May 2015 and 1 and 2 June 2015.

3. The amount in paragraph 1 and the costs, once taxed or agreed, are to be paid into the trust account of Messrs Marais Basson as follows :

Bank : Standard Bank

Account holder : Marais Basson Incorporated

Account number :

Branch code : 052750

4. After deduction of agreed/attorney and client fees due to the plaintiff's attorneys of record and their correspondent, and after payment of disbursements and an advance of R250,000.00 (Two Hundred and Fifty Thousand Rand) to the plaintiff, the net proceeds of the claim are to be paid to the K. O. M. TRUST. A copy of the draft Trust Deed is attached hereto, with the consent of the proposed trustee.

5. It is noted that the Plaintiff has agreed to furnish the Defendant with at least 14 (FOURTEEN) days written notice of taxation.

6. The plaintiff's attorney is entitled to charge contingency fees in terms of the Contingency Fees Act on the basis of the contingency fee agreement dated 8 May 2013.

**BY ORDER**

**REGISTRAR**

### **DEED OF TRUST**

entered into by and between

**STEFANUS PETRUS SASSON**

(hereinafter referred to as the "DONOR")

And

**JACO BUS FREDERIK DE BEER**

(hereinafter referred to as the "TRUSTEE")

In terms of which the DONOR donates to the TRUSTEE, the sum of R100.00, which amount is to be held by the TRUSTEE in trust and be administered by him in terms of the conditions and terms of this Deed of Trust as is herein set out:-

#### **1. DONATION**

The DONOR hereby donates to the TRUSTEE the sum of R100.00, which amount will be paid to the TRUSTEE and will be received by him with the registration of this Deed.

## **2. NAME OF TRUST**

The Trust will be known as the K. O. M. TRUST.

## **3. TRUSTEE**

3.1 There will at all stages be one trustee who must be an admitted attorney or a registered chartered accountant;

3.2 The TRUSTEE of this Trust will be the person described as TRUSTEE in the preamble to this Trust Deed. This office will be held by him for an indefinite period until his resignation or incapacity or the termination of the Trust;

3.3 3 The TRUSTEE must furnish security to the satisfaction of the Master of the High Court of South Africa for the assets of the Trust and for the due compliance of all his obligations towards the Trust.

## **4. BENEFICIARIES**

The beneficiary of this Trust will be K. O. M. with regards to the income derived from the Trust assets and the capital shall also be used to the benefit of K. O. M. in such a way as the TRUSTEE may deem appropriate. At the death of the mentioned K. O. M. the Trust's assets will be transferred to the heirs of K. O. M. as set out in the Will of K. O. M. or should K. O. M. not leave behind any will, the assets will be transferred to the intestate heirs of K. O. M. in accordance with the provisions of the Intestate Succession Act.

## **5. OBJECTIVES**

The objectives of this Deed of Trust are the following :-

5.1 To maintain and support the said K. O. M. physically and mentally for the remaining part of his life;

5.2 The TRUSTEE will as far as possible endeavour to utilize the funds of the Trust to comply with the medical needs of the mentioned K. O. M.. In this respect the TRUSTEE will in his discretion, and if he deems it necessary, be authorised to make use of medical advice in overseas countries and if necessary, send the mentioned

K. O. M. to the foreign country if the TRUSTEE in his discretion deem it to the benefit of K. O. M. and if there are sufficient grounds and funds for such advice and medical treatment;

5.3 To provide accommodation to the beneficiaries and one other person who will act as the beneficiary's caretaker/nurse if necessary and affordable.

In this respect the TRUSTEE will also be entitled in his discretion to employ people and to remunerate them for services rendered to K. O. M. where and if necessary and affordable;

5.4 To do anything that the TRUSTEE in his discretion deem necessary for the general well-being of the mentioned K. O. M. and the TRUSTEE will be entitled to incur such reasonable costs as he deems necessary in this regard in his absolute discretion;

5.5 To invest the Trust's assets and to act therewith in such a manner so as to attempt to increase same and if possible to cause capital growth in order for the funds paid over in trust to be administered for as long as possible, to the benefit of K. O. M..

## **6. ASSETS**

The assets of the Trust will include:-

- 6.1 The assets donated to the TRUSTEE in terms of this Deed as well as any additions and accruals thereto;
- 6.2 All donations and inheritances donated or bequeathed to the Trust in supplementation of the Trust's assets;
- 6.3 All assets that the Trust may purchase with its own funds or borrowed funds or that may be acquired by any other juristic act;
- 6.4 Any assets that may be allocated to the Trust in terms of an Order of Court or settlement of the action.

## **7. INCOME FROM THE TRUST**

The income of the Trust will be all income earned by means of the Trust's assets.

## **8. POWERS OF THE TRUSTEE**

- 8.1 To enable the TRUSTEE to comply with all obligations in terms of the Deed of Trust, the TRUSTEE will be entitled: -

- 8.1.1 To perform any act in general, whatsoever, that is according to his opinion, beneficial for the preservation and growth of the assets of the Trust, or in the interest of the Beneficiary. The powers entrusted to him according to the paragraphs hereinafter do not limit the generality of this sub-paragraph;
  - 8.1.2 To use any part of the assets or income of the Trust for payment of any costs reasonably incurred by him in relation to his duties and

obligations as TRUSTEE;

8.1.3 To invest the assets or income of the Trust or any part thereof, in such a manner as he may deem proper in his discretion. Without detracting from the generality of the aforementioned clause, he will be entitled to invest in shares in public companies, building societies, loans with security, investments in state and municipal shares, investments in fixed property or any such assets as he may deem beneficial to the Trust and its beneficiaries which will also include moveable assets of whatsoever nature if deemed reasonably to the benefit of the beneficiaries. Such moveable assets may be used or consumed by the TRUSTEE if, in his discretion, it is deemed to be reasonably in the interest of the beneficiary. He will furthermore be entitled to call up any investments, to make any investments solvent, to convert, amend, realise and to re invest such investments in any manner reasonably deemed appropriate;

8.1.4 If the TRUSTEE practices a profession and in such capacity performs any other act or service on behalf of the Trust, in such capacity, the TRUSTEE will be remunerated for his professional services rendered without limiting or reducing his right to remuneration as stipulated hereinafter;

8.1.5 To institute legal and arbitration proceedings and to oppose same in any competent court with regard to any matter forthcoming from the Trust and to pay the costs incurred in relation thereto from the assets or income of the Trust;

8.1.6 To purchase, sell, let, hire or to hire-purchase any assets;

8.1.7 To acquire or renounce, in any manner whatsoever, rights on

behalf of the Trust;

8.1.8 To acquire money through a loan or expend money by way of a loan on any conditions and against proper security being furnished where money is expended by way of a loan;

8.1.9 To encumber any assets of the Trust by way of a bond, pledge, hypothec or session as security;

8.1.10 To perform all acts on behalf of the Trust which may be necessary to effect transfer of any assets of the Trust;

8.1.11 To grant extensions for the complying with any duty towards the Trust, to reach compromises and oppose claims against the Trust, to recognise, and settle same and to handle any claims in favour of the Trust in the same manner;

8.1.12 To employ people to perform any act and to remunerate them from the assets or income of the Trust. The possibility that the TRUSTEE would have been able to perform such act himself does not detract from the aforementioned entitlement;

8.1.13 To utilize the assets and income of the Trust in such a manner as the TRUSTEE may deem proper for the conservation, maintenance or replacement of any assets of the Trust and to demolish any buildings if deemed appropriate by the TRUSTEE to erect new buildings on the fixed property of the Trust;

8.1.14 To exercise his voting right as deemed appropriate, with regard to any shares which belong to the Trust and are held in any company or

society. The exercise of his discretion and authority hereunder is not reduced where they directly or indirectly have an interest in such company or society, neither will the TRUSTEE, due to his confidential relationship with the Trust, be obliged to give account of any benefit, which accrues to them due to such interest either directly or indirectly, nor is any act, agreement or deed of the TRUSTEE void or voidable on the ground that they received such benefit. The object of this clause is to avoid that the consequences of voidability or voidness due to the confidential office of the TRUSTEE will supervene and insofar as it may affect agreements and relationships with companies and societies in which the TRUSTEE has a personal interest;

8.1.15 To lend money to any person or legal entity on such conditions as he in his absolute discretion may stipulate on the condition that proper security is provided by the lender;

8.1.16 To enter into insurance contracts and to pay the premiums from the assets of the Trust;

8.1.17 To pay the debts of the Trust;

8.1.18 To accept or refuse donations and inheritances to the Trust;

8.1.19 To open a bank account and to borrow money from a bank on the overdraft facility or otherwise;

8.2 Notwithstanding the stipulations of paragraph 5.1 or any other paragraph in this Deed, the TRUSTEE will not be entitled to dispose of any assets or income of the Trust for his own benefit or the benefit of his estate. Without detracting from the generality of the aforementioned he will specifically not be entitled or authorised to

appropriate or to dispose of any of the assets or income of the Trust as his own, as he deems fit, if he by doing so will benefit himself or his estate. The TRUSTEE will furthermore not be authorised to use or consume any of the assets of the Trust, for his own benefit unless so authorised by the Master of the High Court of South Africa ;

8.3 3 If the Trust shows drastic growth and if the administration thereof requires it, the TRUSTEE will be entitled to employ a person or persons, full time or part time, to assist with the administration of the Trust and in this respect he will be entitled to pay a reasonable salary or remuneration, which he in his discretion deem appropriate, to such a person or persons. Control and care over the Trusts assets will however always be the responsibility of the TRUSTEE including fixed property or a bond with regards to any place in the Republic of South Africa. In this regard the only limitation is that investments may only be made within the borders of the Republic of South Africa.

## **9. BOOKKEEPING**

9.1 The TRUSTEE must keep a complete set of accounting records with regard to the affairs of the Trust;

9.2 The TRUSTEE will ensure that the accounting records of the Trust are audited by a chartered accountant and that such accountant will have free access to the books, documentation and assets of the Trust.

## **10. APPLICATION OF INCOME**

The TRUSTEE will use the income of the Trust to pay the administration costs for the administration of the Trust and to realise the objectives of the Trust.

## **11. DUTIES OF THE TRUSTEE**

The TRUSTEE will:-

- 11.1 As far as possible endeavour to realise the objectives of the Trust;
- 11.2 Open a current account with a registered commercial bank of his choice, which account will be used for the receipt of all cash which is paid to the Trust;
- 11.3 Invest and reinvest the funds of the Trust in such a manner as he may deem fit in shares, securities or any assets of whatsoever nature including fixed property or on bond in any place in the Republic of South Africa and in this respect the only limitation is that investments may only be made within the borders of the Republic of South Africa ;
- 11.4 Amend, regroup or reinvest the investments in such a manner and on such conditions and for such objectives as the TRUSTEE in his sole discretion may deem appropriate;
- 11.5 See to it that proper minutes of all decisions made by him, are kept in a safe place;
- 11.6 See to it that the financial statements of the Trust for each year are kept in safe custody for the period of the existence of the Trust;
- 11.7 See to it that all contracts are fulfilled;
- 11.8 Make all payments that may be payable on the income of the Trust;
- 11.9 If he deems it necessary to effect any amendments to the Trust Deed, he will be entitled to make the said amendments on condition that such amendments are approved by the DONOR during his lifetime. After the death of the DONOR he will

be entitled to make such amendments as he may deem appropriate on condition that such amendments will not amend the objective of the Trust;

11.10 See to it that the set of books that he must open and keep will immediately become operational and at the same time appoint a firm of auditors for the Trust as soon as the Master of the High Court has registered this Deed;

11.11 See to it that the firm of auditors that is appointed for the Trust will at all times have free access to the books and accounts and vouchers of the Trust and he further undertakes to obtain such information as the auditors may require and to make same available to the firm of auditors and if explanations are required, to provide same;

11.12 To report and file statements of account to the Master of the High Court, Pretoria, as at 28 February of every year.

## **12 POWERS OF THE TRUSTEE**

The following people will be incompetent to act as TRUSTEE of this Trust:-

12.1 Any person who is incompetent to act as a director of a company in terms of the stipulations of the relevant Company Laws of the Republic of South Africa;

12.2 Any person who is an unrehabilitated insolvent;

12.3 Any person who has previously been removed as a TRUSTEE from a trust due to his/her misadministration of the said Trust;

12.4 Any person who has previously been found guilty, in the Republic of South Africa or elsewhere, of theft, fraud, forgery, perjury, corruption or any misconduct or offence where dishonesty was an element of and resulted in that

person being found guilty;

12.5 Any person who has been declared mentally ill or incapable of managing his/her own affairs.

### **13. TERMINATION OF THE TRUST**

The Trust will terminate at the death of the mentioned K. O. M.. It requires an application to the High Court in Pretoria, to terminate or dissolve the Trust prior to the death of K. O. M..

### **14. DISSOLUTION OF THE TRUST**

With termination of the Trust as a result of the death of K. O. M. the Trust will be liquidated and the capital will after all the administrative costs and debts as well as claims against the Trust have been paid, be allocated according to the stipulations of the will of the mentioned K. O. M. and if the mentioned K. O. M. dies intestate, the net assets of the Trust will be divided equally between his intestate heirs in accordance with the relevant Intestate Succession Act that is applicable in the Republic of South Africa. If the Trust is terminated by Order of the Master of the High Court of South Africa, the funds will be paid out in accordance with the stipulations of such order.

### **15. EXEMPTIONS**

With regard to the aforementioned the following exemptions will be applicable:-

15.1 No TRUSTEE will be incapable due to his office as TRUSTEE of this Trust, to enter into a contract with the Trust or any company in which the Trust has an interest. Furthermore any contract entered into between the Trust and such company will not be void due to the Trustee's interest in the company. The only requirement with regard hereto, is that the TRUSTEE must before any negotiations

are entered into, disclose his interest in the contract or entity, to the Master of the High Court of South Africa before such negotiations take place;

152 Any TRUSTEE, who is a member of or a partner in a firm of professional practitioners, may be employed by the Trust or render services for the Trust and in such instance the TRUSTEE will be entitled to a fee in his professional capacity;

153 No TRUSTEE will be requested to make good any damages that the Trust may have suffered, regardless of how such damage was caused, with the exception of such damage that was caused by the dishonesty of a TRUSTEE or as a result of his negligence;

154 No TRUSTEE will be liable for any dishonesty or wrongful act committed by any other TRUSTEE unless such a TRUSTEE had knowledge thereof and allowed such dishonest acts or acted as an accessory;

155 The TRUSTEE shall be indemnified out of the assets of the Trust with regards to any claims that may be instituted against him personally and which result from the reasonable acts of the TRUSTEE and the exercise of any of his competencies which he/she is entitled to exercise in terms of this Deed.

## **16 REMUNERATION**

If the TRUSTEE is a professional person, he will be entitled to his reasonable professional fees for any professional work done for the Trust. Such fees will include any fees that are reasonably payable to his partners and he will further be entitled to make use of the services of other similar professional people as also auditors, medical doctors, attorneys and advocates. With regard to services rendered by the TRUSTEE for the

general administration of the Trust and arrangements which he will make with regard to the care of the mentioned K. O. M., the TRUSTEE will be entitled to a yearly fee as stipulated in the relevant legislation of the Republic of South Africa.

#### **17. ACCE PTANCE**

The TRUSTEE hereby accepts the donation made to him according to this Deed subject to the conditions of this Deed and further undertakes to realise the objectives of this Trust Deed.

SIGNED at PRETORIA on this the \_\_\_\_\_ day of MAY 2015.

#### **AS WITNESSES:**

1. \_\_\_\_\_

\_\_\_\_\_

DONOR

2. \_\_\_\_\_

SIGNED at PRETORIA on this the \_\_\_\_\_ day OF MAY 2015,

#### **AS WITNESSES:**

1. \_\_\_\_\_

\_\_\_\_\_

TRUSTEE

2, \_\_\_\_\_

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

CASE NO : 70876/2010

In the *ex parte* application of:

**D. E. M.**

Plaintiff

(IN RE :

THE APPOINTMENT OF A TRUST FOR K. O. MALAD

(born [.....] 2003)

I, the undersigned

**JACOBUS FREDERIK DE BEER**

confirm that :

1. I am practising as an attorney at the firm, Gildenhuis Malatji, Pretoria.
2. I am not related to the patient and he is not known to me.

3. I agree to act as trustee for K. O. M..

**JACOBUS FREDERIK DE BEER**

[\[1\]](#) 2015 (2) SA 97 (SCA).

[\[2\]](#) Case number 799/2006.

[\[3\]](#) Case number 64897/2010.