

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 898/2007

In the case between:

W. M. SOEKOE N.O. 1st Applicant

A. J. SOEKOE N.O. 2nd Applicant

Q. HUGO N.O. 3rd Applicant

and

WERNER LE ROUX Respondent

HEARD ON: 31 MAY 2007

JUDGEMENT: RAMPAL, J

DELIVERED ON: 29 NOVEMBER 2007

- [1] The matter became by way of an ordinary application. The motion proceedings were initiated on the 2nd March 2007. The relief sought by the applicants is threefold. Firstly they seek a detailed account of all the money the respondent received and paid out on behalf of Enrique Soekoe Trust during the specified period. Secondly they also seek a debate of such an account. Thirdly they seek the cost from

the respondents. The application is opposed.

[2] The 1st applicant and the 2nd applicant are husband and wife. Their son, Werner Soekoe, was married to Leandra Soekoe. Out of the marriage of the young couple one child was born, namely Enrique Mathew Soekoe, a boy born on the 3rd May 2000. The young couple and their little son were involved in a road accident on the 18th December 2003. Enrique's mother, Leandra, died instantly and his father, Werner, the next day as a result of the fatal bodily injuries they sustained in the road accident. Enrique survived but he was tragically orphaned at a tender of 3.5 years.

[3] At the time of the road accident which claimed the lives of Enrique's parents, his aforesaid paternal grandparents were living in Kimberley in the Northern Cape. The 1st applicant was a police captain and the 2nd applicant a teacher by profession. Subsequent to the death of their

aforesaid children, the 1st applicant and 2nd applicant relocated to Bloemfontein where they are currently living. Their move was chiefly prompted by their common wish to see to the general welfare of their grandchild, Enrique. The parents legally adopted the parentless Enrique on the 2nd June 2006 as their adoptive child.

[4] The 1st applicant and the 2nd applicant consulted the respondent for legal advices in respect of the following matters, among others: third party claim for Enrique; administration of the deceased estate of the late Werner Soekoe; custody care and control of Enrique and financial management pertaining to all these matters. The respondent is an attorney. He practises law under the name and style of Goodrick & Franklin Incorporated here in Bloemfontein.

[5] Following the said consultation, a trust was created and registered through collaboration between the respondent

on the one hand and the 1st applicant and the 2nd applicant on the other. Enrique was the beneficiary. His grand parents together with the respondent were duly appointed by the Master of the High Court on the 13th August 2004 as the trustees of Enrique Soekoe Trust. The trust deed was signed here in Bloemfontein on the 5th August 2004.

[6] The respondent also caused the 1st applicant to be appointed by the Master of the High Court in terms of section 18(3) Administration of Deceased Estate as an executor of the deceased estate of the late Werner Soekoe. The 1st applicant left the administration of this estate in the hands of the respondent. The value of the assets exceeded the minimum threshold of R125 000,00 necessary for the issue of letters of executorships.

[7] With the passage of time the professional relationship between the respondent and the first two applicants gradually deteriorated. By the end of the year 2006 it has completely broken down. On the 14th June 2006 the first two applicants in their capacities as the co-trustees of the Enrique Soekoe Trust addressed a letter to the respondent in his capacity as their fellow trustee informing him that

they no longer required his services as their co-trustee on account of the perceived breach of trust. They also copied, among others, the Master of the High Court. The first and the second applicants then decided to entrust the affairs of Enrique Trust to Messrs Hill McHardy & Herbst attorneys of Bloemfontein. They averred that they did not actively participate in the management of the affairs of Enrique because they had entrusted such management to the respondent. They also alleged that the respondent ran such affairs almost singlehandedly but in a poor manner. However, the respondent denied that he was mismanaging the affairs of Enrique Trust as alleged. He admitted that he ran such affairs alone but averred that it was so because the minor beneficiary's grandparents had abdicated their responsibilities as his co-trustees.

- [8] The respondent's mandate in respect of the deceased estate was also terminated. As a result of the final breakdown of the relationship between the first applicant as the executor and the respondent as an attorney Mrs. S. M.

van Coppenhagen of Honey Attorneys was appointed to take over the matter and to administer the deceased estate further on behalf of the executor.

- [9] Reacting to the respondent's query, the Master informed the respondent that the Master of the High Court had the powers in terms of section 20 to remove a trustee from office. In the same letter dated the 7th July 2006 the Master of the High Court requested the respondent to submit financial statements pertaining to the trust. On behalf of the 1st and 2nd applicant Messrs. Hill McHardy Herbst Incorporated also addressed a similar request to the respondent via his law firm Messrs Goodrick & Franklik Incorporated. At the instance of the 1st applicant and the 2nd applicant the Master of the High Court removed the respondent from office as a co-trustee on the 8th November 2006. In his place the Master of the High Court appointed the 3rd applicant.

[10] The important documents pertaining to the trust were under the control of the respondent. Among them were bank statements. It is undisputed that the respondent received and expended trust money on behalf of the trust.

[11] It is the case of the applicants that the 1st applicants and the 2nd applicants were entitled to entrust the administrative management of the affairs of the trust to the respondent; that they did not thereby abdicate their ultimate responsibility of control towards the trust; that they are still committed to ensuring that such control obligations were properly carried out; that the respondent was obliged to account to them accurately as his co-trustees; that he was bound to furnish them with a satisfactory and acceptable written financial account and to openly debate such account with them. All this, they say, the respondent has failed to do to their satisfaction. They claim that a substantial deficit exists.

[12] The respondent puts up a defence that strictly speaking he is not legally obliged to account to the applicants, or to provide them with any detailed trust account of his administrative management of the affairs of the trust or for that matter to debate such account with them. He also denies that the first two applicants ever entrusted the management of the affairs of the trust to him. He maintains that notwithstanding his stance that he cannot be lawfully compelled to do all these, he, at any rate, had already delivered a proper account as regards all the trust money he once held in trust on behalf of the trust. He also asserts that whatever obligations he had towards the trust ceased from the day he was released from office as a co-trustee on the 8th November 2006.

[13] In brief that is the dispute I am called upon to adjudicate. An overview of caselaw appears necessary. A trustee who is a lay-person is entitled to place the day-to-day running of the affairs of a trust in the capable and competent hands of a fellow trustee with the necessary expertise – **AFRICAN**

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THROPE 1932 NPD 559. It is a practice not uncommon in the legal sphere of administration of trusts for a trustee to delegate the daily administration of a trust to another – Honorés: S A Law of Trusts, 5th Edition, par 201 by Cammeron *et ali*.

[14] As regards the question of delegation the respondent expressed his stance as follows:

„Ek het as trustee gedien kragtens en uit hoofde van die Trustakte (Sien WMS2). Daarvolgens is die trustees gesamentlik in hulle amp as sodanig, by wyse van vergadering en kworum, verantwoordelik vir die uitoefening van bovermelde bevoegdhede ten opsigte van die trustbates, gelde ingesluit.”

What the respondent is really saying here is that the 1st and 2nd applicants abdicated their obligations as trustees and left him with no choice but to run the affairs of the trust all by himself. He did his best but they did virtually nothing. Now, they blame him for what they neglected to do. They were not entitled to place the administrative burden

exclusively on his shoulders.

[15] The argument is unsound. First, because the deed of trust expressly recognises the trustee's right to delegate and it sanctions delegation in respect of the control and administration of the trust – vide page 40, para 11.1.3. However, such delegation of one trustee's responsibilities to other trustees does not relieve the delegating trustee of his core responsibility towards the trust.

[16] Second, the first two applicants were lay-persons in law. Their averment that they placed the day tot day administration of the trust affairs in the hands of the respondent, whom they regarded as an expert is understandable. He was, and still is, after all, a qualify professional, an attorney. He possessed certain legal expertise none of them possessed, AFRICAN

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THORPE *supra*. The 1st applicant was a police captain, the 2nd applicant a teacher. They contented that they were

entitled to exercise their office through their co-trustee who was an attorney – see **HARRIS v FISHER NO** 1960 (4) SA 855 (AD) at 857 e – f, where second delegate was an accountant.

[17] Third, there is no averment or even a mere suggestion in the respondent's answering affidavit that he ever complained to the 1st applicant or to the 2nd applicant that he was unable to run the day to day affairs of the trust alone without their participation. The respondent cannot now be heard to say the 1st applicant and the 2nd applicant had neglected the affairs of the trust and that therefore they cannot look up to him for their neglect to carry out their obligations in collaboration with him.

[18] In my view the 1st and the 2nd applicants were entitled, through delegation, to entrust the daily running of the trust affairs to the respondent by virtue of his expertise. I find that they did and that through him they participated in the

administrative management of the trust. They did not abdicate their ultimate responsibility as the respondent claims they did. The respondent's contention must therefore fail.

- [19] As regards the duty to account, the legal position of a trustee was set out as follows in **MIA v CACHALIA** 1934 AD 102 on page 107 per Beyers AJ:

„Dit was sonder twyfel die plig van die administrateurs om 'n juiste rekening van die bate aan hulle toevertrou, te hou en sodanige rekening aan respondent, desversoek, te lewer. Verder om aan hom op versoek die nodige informasie te verskaf omtrent die wyse waarop die toevertroude bate, of sy aandeel daarin, beleg, of andersins mee gehandel is, en waar die bate is en om hom volledige rekeninge daaromtrent te oorhandig.”

- [20] At common law a trustee must maintain a correct account of the fund he or she administers. In an appropriate case a co-trustee is entitled to demand from a trustee information about the state of the investment of the trust or other dealings pertaining to it - Honoré – paragraph 206:

¶206. At common law a trustee must maintain a correct account of the fund administered. Though at common law a creditor – apart from special relationships such as principal and agent – has no right to an account from a debtor, both a trust beneficiary and, in an appropriate case, a co-trustee, are entitled to demand from a trustee information about the state of investment of and other dealings with the trust property and in particular information regarding the claimant's share of it.

It is usual, subject to specific provisions in the trust instrument, for accounts to be rendered annually. Provided this is done in a satisfactory manner, a beneficiary is not entitled to demand further or intermediate accounts.

The account rendered should give an accurate picture both of income and expenditure during the period covered and of the state of investment of the trust fund during and at the end of the period. Entries should be precise and detailed and dates should be given. Unless this is done, the trustee may be ordered to furnish a proper account and to pay the costs of the relevant application out of his or her own pocket.

[21] Primarily the trust beneficiary is the person with the strongest entitlement, if not the right, to demand an account from a trustee. Honoré: paragraph 207:

¶A fellow trustee is also entitled to demand accounts, because he or she has the duty of supervising the administration of the trust as a

whole and is jointly and severally liable for the other trustee's defaults."

In **SPIROS v SPIROS** 1932 WLD 207 on 210 De Wet J stressed the principle as follows:

"I think it requires no authority that his co-administrator is entitled to receive from him a proper account of his administration. It is true that the co-administrator would be responsible to third parties, but he is entitled to look to his co-administrator for proper accounts."

[22] The applicants contend on the one hand that they are entitled to demand an account from the respondent. But the respondent contends on the other hand that they are not entitled to demand an account from him but from an outsider, a third party who is not a trustee.

[23] The entire edifice of the respondent's stance is embodied in the following passage:

"Ek wys verder daarop dat die Applikante die huidige trustee is en ek 'n voormalige trustee wat op 10 Oktober 2006 as trustee bedank het. Ten einde aanspraak te kan maak vir debatering

van rekening, moet die Applikante 'n gepaste vertrouensverhouding, onderling daartoe of 'n statutêre verpligting bewys. Ek het as trustee gedien kragtens en uit hoofde van die Trustakte (Sien WMS 2). Daarvolgens is die trustees gesamentlik in hulle amp as sodanig, by wyse van vergadering en kworum, verantwoordelik vir die uitoefening van bovermelde bevoegdhede ten opsigte van die trustbates, gelde ingesluit. Daarin word nêrens die bevoegdheid geskep vir een trustee om debatering van rekening van 'n ander te eis, of vir die trust om daarop teenoor huidige of vorige trustee aanspraak te maak nie.”

[24] Still at the same paragraph he elaborates his stance further. He states:

“Inteendeel ooreenkomstig klousule 8.4 van die Trust Akte is PKF Accountants and Business Advisors as rekenmeesters aangestel. Ooreenkomstig daardie klousule sal die rekenmeesters jaarliks 'n finansiële staat van die administrasie van die trust opstel, en uiteensit alle inkomste en uitgawes onderskeidelik ontvang en aangegaan. Die trust is gevolglik regtens nie op hierdie regshulp teenoor my geregtig nie. Insovere die Applikante 'n verslag benodig van die hantering van die Trust se finansiële aangeleenthede is die trust op sy rekenmeesters aangewese. Die blote feit dat die Eerste en

Tweede Applikante hulle pligte en verantwoordelikhede versuim het en nou beweer hulle dit betyds op my afgeskuif het (par. 5.1 van die Funderende verklaring het betrekking) maak die Applikante regtens nie geregtig op gemeenregtelike debatering van rekening ten aansien van hulle versuimde verantwoordelikhede met my nie.”

- [25] The foregoing standpoint is legally untenable. In terms of clause 8.4 of the trust instrument, the appointment of external accountant was a matter which required the collective decisions of all the three trustees, namely the 1st applicant, 2nd applicant and the respondent. It reads:

“Die TRUSTEES mag, indien hulle so besluit, van tyd tot tyd ‘n Rekenmeester aanstel om as die Rekenmeester van die Trust op te tree en om die funksies wat hierna in hierdie paragraaf omskryf is, uit te voer..”

- [26] The respondent’s averment in connection with PKF Accountants and Business Advisors are somewhat vague. For instance, he does not say where, when and at what

meeting of the trustees such decision was taken. On the contrary the 1st applicant specifically states that he and the 2nd applicant knew nothing about the appointment of such accountants; that they met those accountants for the first time at meeting held at their attorney's offices in Bloemfontein on the 17th October 2006 and that the appointment of those accountants was a unilateral decision of the respondent. I am of the opinion that the version of the applicants is more satisfactory than that of the respondents. Therefore I find that the appointment of PKF Accountants and Business Advisors was the unilateral decision of the respondent. Such a decision violated clause 8.4. It follows therefore that the respondent cannot pass the bug to the accountants whose appointment was not properly validated by the requisite joint decision of the trustees.

[27] Seeing that the accountant was appointed by the respondent alone, it stands to reason that the accounting statements he prepared in the name of the trust could only have been prepared on the strength of the particulars and details the respondent

himself had provided. Such accounting statement would in a way constitute hearsay in respect of what the respondent alone conveyed to the accountant in the absence of his co-trustees and without their prior knowledge.

[28] It is crystally clear from the authorities already cited that all the stakeholders such as the trust beneficiary, the former co-trustees, the 3rd applicant as well as the substitute new trustee and of course, the Master are entitled to demand an account directly from the respondent and not from the thirds. The respondent's contention to the contrary is, on the facts, not a sound proposition in law. His responsibility to account did not evaporate when he resigned but when he was removed from office. His contention to the contrary is also untenable.

[29] The respondent's main ground of resistance to this application has been that he is not legally bound to account to the current trustees. But in what resembles an alternative ground of defence, the respondent contends that, at any rate, he volunteered to account to the applicants in respect of the trust funds and that he has, in fact, done so. The respondent relies on a written document

which he sent to the attorney for the applicants on the 18th April 2005. Such a document appears on page 208 – 212 of the record. It is described as “geskrewe uiteensetting” and it marked annexure wms 34(a).

- [30] The following aspects of the respondent’s written account were seriously attacked and criticized by counsel for the appellants. As regards paragraph 1 on page 208 it does not appear to which financial institution the banking account of the trust was held from the 19th April 2005 until the 8th November 2006 when the respondent was released from office.

The respondent’s account indicates that the trust bank account held at the First National Bank earned interest in the sum of R727,17. The precise period over which the trust bank account earned such interest is not reflected. Similarly, the rate of interest is also not indicated. The respondent’s written account is silent as to further investment details of the interest, assuming such interest

was earned before the 19th April 2005.

- [31] As regards paragraph 3, page 208 the respondent's written account shows that only two amounts were received in favour of the trust in the amount of R722 353,00 from Wetgewer Provident Fund plus R28 000 from an undisclosed source. The total credits is shown as R750 353,00. However, the affidavit of Ms. Van Copenhagen of Messrs Honey Attorneys suggests that there should be yet another credit entry besides the two. The omitted credit entry should be and amount of R205 000,00 which money had originated from the deceased estate of "The Late Werner Soekoe" which funds were also initially entrusted to the respondent as the first executor. The funds are nowhere accounted for in the respondent's written account. The money was deducted from the deceased estate account to repay a loan which the 1st applicant and the 2nd applicant owed to the trust.

[32] On the debit side of the respondent's written account a number of entries appear. The identities of the payees are regrettably not shown - let alone the purpose for which such funds were expended. Against one payment (R13 878,19) the letters "G & F" appear. The payment was made on 8th November 2004. It baffles one to figure out what these letters really symbolise. But the most disturbing debit is one of 30 November 2004 in the amount of R28 000,00 against which the word "Fout" is written. This would mean that the debit entry was an error. The problem is compounded by the absence of any subsequent entry whereby the erroneous debit entry was reversed. If the money was inadvertently paid out it should be added back to increase the credit balance. Such an amount does appear under the receipts. But the problem is that it was shifted around without any sensible explanation.

[33] The respondent's written account suggests that there existed another account at the First National Bank in the name of the trust. It appears that such an account was

closed on 18 April 2004 (R453 411,15) and the funds transferred to a certain money market investment merely described as “Geldmarkbelegging” account number 620801191564. Precisely at which bank such an investment was held does not appear. No essential details of such an investment are spelt out. It is unclear for instance, at what rate of interest the funds were invested and what the maturity date of the investment was.

[34] The trust appears to have had another current account at Absa Bank. The respondent’s notes pertaining to such a current account are so cryptic that they make incomprehensible reading – Vide paragraph 1, page 209. The total sum of the three receipts was R276 364,41.

[35] Certain funds were placed per internet. The reason for such internet dealings is obscure – vide paragraph 2, page 209.

Certain amounts of money were indicated as money received in favour of the trust. But two essential details are

lacking. In the first place the respondent did not specify the purpose for which the receipts were made. In the second place he neglected to specify the trust account which he credited with such funds – vide paragraph 4, page 209.

Again there were funds paid out and the trust account debited. But there were no explanatory notes made indicating the underlying purpose for the payments so made.

[36] Apparently the trust account had a credit balance of R188 857,54 at the time it was closed. The amount of R159 500,00 was apparently transferred to a money market account at Nedbank Limited but there are huge discrepancies in respect of both bank accounts. Sadly no further details of the closed account are indicated. The explanatory notes relating to a number of entries of the “afrekeningstaat” are difficult to understand. In addition to all this, the accounting statement in question contains explanatory notes of bank charges, interests and debit entries. All of these are not sufficient explained – vide page 210. Worse still the respondent’s accounting statement is not verified by any supporting vouchers – vide page 211 - page 212.

[37] Mr. Van Rooyen, counsel council for the applicants, argued

that the respondent's written account was inadequate and defective in many respects as outlined herein. Therefore he submitted that it could not at all be contended, as the respondent contended, that the respondent had delivered a proper account of his management which was sufficiently supported by appropriated vouchers. In my opinion the submission has substance. The respondent's written account contains several entries, debits as well as credits – which were not explained in a reasonably adequate and satisfactory manner. In the circumstances I find that the respondent has indeed failed to render a proper account to the applicants.

[38] The learned authors of Honore's *supra* at paragraph 206 outline the basic requirements of a trustee's account as follows:

°The account rendered should give an accurate picture both of income and expenditure during the period covered and of the state of investment of the trust fund during and at the end of the period. Entries should be precise and detailed and dates should be given.

Unless this is done, the trustee may be ordered to furnish a proper account and to pay the costs of the relevant application out of his or her own pocket.”

I cannot agree more. See in general also an instructive article – **Authorisation of Trustees in terms of The Trust Property Control Act** – by M J de Waal: 2000 THRHR 472.

[39] In **MIA v CACHALIA** *supra* on page 107, Beyer JA after analysing a document purportedly delivered as an accounting statement said:

“Dit is onnodig om te beslis of “A” wel ‘n rekening is, of nie. Dis genoeg om te sê dat *ex facie* dit total onvoldoende en onbevredigend is, en geensind ‘n juiste en behoorlike rekening, en die rekening waartoe respondent onder die omstanighede geregtig is, is nie.

Die administrateurs moes aan respondent rekening en verantwoording oor die periode van Junie 1923, tot datum van rekenskap, doen. “A” gee voor tot 26 Maart 1932, te wees, maar daar is geen enkele datum vir enige pos nie, en dit nogal

oor poste en transaksies wat tot 26 Maart, 1932, 'n tydperk wat byna nege jaar beslaan het, loop.

Nagenoeg al die poste is vaag, duister en onduidelik en tasbaar vereis byna almal aanvulling en uitlegging. So te sê geeneen is enigsins redelik gespesifiseer nie. Blykbaar word geen inkomste van bate aangetoon nie, alleen uitgawe; en dit word ook nie aangetoon uit watter bron die uitgawe gedek is....”

- [40] The respondent contented that he has made the bank statements relating to the trust available to the attorneys of the applicants. The allegation is denied by the applicants through their attorney. He, attorney Herbst averred that the bank statements which he received from the respondents were in fact copies of the current account of the deceased estate: The Late Werner Soekoe and not Enrique Soekoe's Trust. This averment is persuasive. If it is accepted as true, and I think it should, then it necessarily follows that the respondent has in his possession the original bank statements relating to the trust. Notwithstanding demand the respondent has so far failed to place the applicant's in possession thereof. He is obliged to hand such bank

statements over to the attorneys of the applicants, Hill McHardy Herbst Incorporated.

[41] In his answering affidavit (vide page 122: 2.9) the respondent referred to “annexure l” and “annexure m” which were attached thereto. The two annexures were financial statements prepared by Messrs PKF Accountants and Business Advisors. These statements appear on page 172 – 187. On behalf of the respondent Mr. Benade submitted that, through such financial reports, the respondent had rendered a proper trustee’s account to the applicants. He made the submission without conceding that the respondent was legally obliged to account to the applicants.

[42] Mr. Van Rooyen differed. He submitted that the respondent’s answering affidavit together with its aforesaid two annexures were not all satisfactory and that it did not comply with the respondent’s responsibility towards the trust.

The critique revolved around the following aspects:
 Administrative costs were paid; advances were made to the beneficiaries and funds were loaned to the Soekoe couple – vide page 177 in respect of costs, page 187 and 185 in respect of the advances and page 178 and 186 in respect of loans. It is uncertain why such costs, advances and loans were paid. The financial statements relied upon were not validated by any supporting vouchers. It was indicated that the loans were unsecured and interest free. But no usual conditions of repayment were spelt out.

[43] The two financial statements by the accountants only covered the period 28 February 2005 to 28 Februarie 2006.

It must be borne in mind that the respondent continued to function as a trustee until the 8th November 2006. The period between 28 February 2006 and 9 November 2006 was ignored by the said accountants. Therefore there is no account for a period of 8 months, 1 week, 1 day. Herein lies a serious defect in the financial statements the respondent equates to a proper trustee's account. It cannot be.

[44] I turn now to the issue of debating the trustee's account.

There is no need to dwell on this issue anymore. The authorities are in favour of the contention of the applicants

that one trustee is entitled to call upon a fellow trustee to have a trustee account debated – vide Honore's *supra* at 207 and the authorities there cited.

[45] It was contended on behalf of the applicants that even if the financial statements prepared by the said accountants were regarded as adequate account which showed income and expenses, the respondent had not acceded to the request of the applicants to have such an account debated. Indeed the applicants are entitled to know why every entry was made and if they are not satisfied with the answers given during the course of the debate or at any other time they are also entitled to make further enquiries in connection with the entry concerned. Moreover, the applicants are also entitled to debate the supporting vouchers to verify any income or expense.

[46] In the replying affidavit the 1st applicant demonstrated, by means of a simple calculation made on the strength of the information provided by the respondent, that there appears

to be a shortfall of R147 475,53 which the respondent cannot explain.

[47] In the circumstances I find that the applicants have made out a case for the relief sought. They are entitled to demand a trustee account from the respondent; the respondent is obliged to render such a trustee account to the applicants; the respondent has failed to render such an account notwithstanding the request of the applicants; the respondent refuses to have the required account debated and that there is no good cause shown why the respondent should not be directed to pay the costs of this applicants.

[48] The respondent was allowed to duplicate and the applicant to triplicate. The respondent's formal application to duplicate was filed under case number 2227/07. The real purpose of such an application appears to be twofold. I deal with the two aspects below.

[49] In the first instance the respondent attempted to show that

he was not accountable for the entire period from the date he was appointed a trustee on 13 August 2004 until the date he was removed from such office on 8 November 2006. He avers the following in paragraph 6 of his duplicating affidavit:

“Ten opsigte van die tydperk **10 Oktober 2006 tot 8 November 2006** is Eerste en Tweede Applikante in die aansoek self verantwoordelik as enigste Trustees en kan ek nie vir rekenskap van versoek word nie.”

[50] I deem it unnecessary to comment any further on this contention. I have already found that the respondent's resignation on 10 October 2006 did not legally relieve him of his duties as a trustee. He remained legally accountable to his fellow trustees for the entire period until the Master of the High Court officially removed him from the office as a trustee. The Master has the power to call upon a trustee to account – section 16(1). The respondent's duties did not fall away when he resigned, but when he was replaced with the third applicant.

[51] Implicit in the averments the respondent makes in par. 6 of his duplicating affidavit, is a tacit admission that he did not render a proper and adequate account at least in respect of the period dating from 29 June 2006 until 8 November 2006 both dates inclusive. A trust reconciliation marked annexure “n” together with the vouchers marked annexures “p”, “r”, “t”, “s” were attached to the duplicating affidavit. The most glaring shortcomings of the respondent’s alleged final account are that:

- The respondent does not explain why the account together with the additional annexures was not rendered before his answering affidavit was filed;
- The respondent does not explain why the account did not form part and parcel of his answering affidavit;
- The respondent does not explain why only now he renders the account by way of a duplicating affidavit.

[52] To the extent that the respondent’s final account, annexure “n”, does not take into account the period between 10

October 2006 until 8 November 2006, it remains incomplete and accordingly cannot be regarded as a final account as the respondent would have it – **MIA v CACHALIA**, *supra* on p. 107.

[53] In the second instance, the respondent contrives, through this process of duplication, to make a new case. He now contends that the applicants wrongly followed the civil litigation process whereas clause 9 of the deed of trust requires disputes to be resolved by way of a private arbitration process.

[54] The respondent is belated. This is a perfectly valid point he should have raised by way of a special plea at the first available opportunity he had to resist the application by the fellow trustees. He did not. There was no reference to arbitration in his answering affidavit. He cannot now raise it by way of duplication. It is impermissible to do so now because duplication is allowed with the leave of the court only to answer new matters emerging from the replying

affidavit. There was no mention of the word arbitration in the replying affidavit filed on behalf of the applicants. The respondents must fall or stand by the averments contained in his answering affidavit. He cannot plead a new defence in his duplicating affidavit since the door has already been closed.

- [55] It follows from the above that where, as in the instant case, a respondent does not properly object to motion procedure and well in an answering affidavit, it can be readily accepted that such respondent does not insist on arbitration procedure and that respondent is quite happy to follow the dispute resolution procedure chosen by his or her opponent as if there existed no option of arbitration procedure. The point was illustrated by way of an analogy in the case of **PAREKH v SHAH JEHAN CINEMAS (PTY) LTD AND OTHERS** 1980 (1) SA 301 (D) at 304 e – g per Didcott J.

- [56] In the instant case, there is really no arbitration dispute in terms of the trust instrument. On his own version as now

embodied in the duplicating affidavit, the respondent clearly shows that he did not render the required account to the applicants. See Butler & Finsen, **Arbitration in South Africa – Law and Practice**, 1st edition at par. 4.1.1. In my view, the respondent's belated request to stay the motion proceedings so that the applicants can initiate arbitration proceedings *de novo* will not be compatible with the exercise of a true judicial discretion. There exists a reasonable and probable cause to fear that the trust will suffer untold harm if the respondent's request is granted.

[57] In the light of the reasons given herein the court application proceedings initiated by the applicants cannot be brought to a sudden standstill now. It is too late to halt the process. I cannot fairly send the parties to the drawing board at this juncture. The respondent willingly walked down this avenue of dispute resolution. Now there is no turning back. This is the last mile of the journey.

[58] In the notice of motion the applicants prayed that the debate

relating to the trustees' account be held at the offices of their attorneys. I consider it unfair to the respondent to direct him to attend the debate at such a proposed venue. The playing field must be seen to be level. Levelling the playing field, demands that the trustees' account be debated at a neutral venue. Certainly the office of the applicants' attorney does not qualify as a conducive and neutral arena for the proposed debate of the account. I am certain that Ms Molapo, the registrar of this court, will be able to accommodate the parties to hold such debate, if not in the advocates' dressing room, then in one of the court halls.

[59] In the circumstances the following order:

59.1 The respondent must render to the applicant a detailed and specified account of all the funds he received or expended on behalf of Enrique Soekoe Trust No. IT1326/04 for the period commencing on the 13th August 2004 and ending on the 8th November 2006, which account must be properly and

adequately vouched by means of supporting documentary invoices as far as it may be necessary and possible, and well within 28 days of this order.

59.2 The respondent must thereafter make himself available with all his records, accounts, personnel and *precarii* to debate the account of his trust administrative management together with all the annexures thereto as well as the supporting vouchers rendered in terms of paragraph 60.1 *supra* with the applicant, their advisors and *precarii* at the advocates dressing room of the Free State High Court in Bloemfontein on a suitable date to be arranged and agreed upon between the attorney in collaboration with the registrar of the applicants and the respondent's attorney which date of debate must be agreed upon within 30 days after the rendering of the trustee's account in terms of paragraph 60.1 *supra*.

59.3 The costs of this application as incurred by the

applicants shall be borne and paid by the respondent on the scale as between party and party. Such costs shall include the costs pertaining to the application filed under case number 2227/2007.

59.4 The applicants are hereby authorised, should it become necessary in the future, to approach this court on the same papers duly amplified for further relief in case the respondent fails to comply with this court order.

M. H. RAMPAL, J

On behalf of the applicants:

Adv. P. C. F. Jordaan SC
Instructed by:
Hill, McHardy & Herbst
BLOEMFONTEIN

On behalf of the respondents:

Adv. H. J. Benade
Instructed by:
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