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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: **18564/2013**

In the application between:

JOHN STEPHEN GORDON MACKENZIE N.O.

First Applicant

(In his capacity as trustee of the MACK TRUST)

BARBARA ANNE MACKENZIE N.O.

Second Applicant

(In her capacity as trustee of the MACK TRUST)

RONALD GEORGE GLASS N.O.

Third Applicant

(In his capacity as the nominee of the Independent Management Trust (Pty) Ltd) which is a trustee of the MACK TRUST)

and

RYNO ENGELBRECHT

Respondent

(In his capacity as the receiver of the CTC Trust)

In re:

In the application between:

JOHN STEPHEN GORDON MACKENZIE N.O.

(In his capacity as trustee of the CTC TRUST)

First Applicant

JOHN STEPHEN GORDON MACKENZIE N.O.

(In his capacity as trustee of the MACK TRUST)

Second Applicant

BARBARA ANNE MACKENZIE N.O.

(In her capacity as trustee of the MACK TRUST)

Third Applicant

RODNEY KOEN N.O.

(In his capacity as the nominee of the Independent Management Trust (Pty) Ltd) which is a trustee of the MACK TRUST)

Fourth Applicant

and

JAN LAMBRINK LAUBSCHER N.O.

(In his capacity as trustee of the CTC TRUST)

First Respondent

ANNETTE LAUBSCHER N.O.

Second Respondent

JAN LAMBRINK LAUBSCHER N.O.

(In his capacity as trustee of the GRACE NUBA Trust)

Third Respondent

ANNETTE LAUBSCHER N.O.

(In her capacity as trustee of the GRACE NUBA Trust)

Fourth Respondent

RODNEY KOEN N.O.

(In his capacity as the nominee of the Independent Management Trust (Pty) Ltd) which is a trustee of the GRACE NUBA TRUST)

Fifth Respondent

Hearing dates: 26 and 30 August 2021

Judgment Delivered: 10 September 2024

JUDGMENT DELIVERED ON 10 SEPTEMBER 2024

GORDON-TURNER AJ

1. The application and counter-application in this matter concern the dissolution of a trust, the duties of the receiver charged with the dissolution and the extent to which the receiver must account to and produce supporting documents for that account to the trust beneficiaries.

Background

2. The CTC Trust was established on 31 January 2011 when Mr John Stephen Gordon MacKenzie (“**MacKenzie**”) and Mr Jan Lambrink Laubscher (“**Laubscher**”) entered into a deed of donation and trust deed to create the CTC Trust with the Mack Trust, represented by MacKenzie, and the Grace Nuba Trust, represented by Laubscher, being equal beneficiaries. MacKenzie and Laubscher were the appointed and authorised trustees.
3. The applicants in the present application are the trustees of the Mack Trust. The trustees of the Grace Nuba Trust are not party to the application but are cited as respondents in the counter-application. They do not oppose.
4. The CTC Trust was to be a trading trust used to conduct, among other things, the business of the buying and selling of antiques, collectables, coins, bank notes, and stamps.
5. Various disputes arose between MacKenzie and Laubscher. Ultimately,

Laubscher resigned as trustee by written notice dated 16 September 2013 with effect from the end of October 2013. Mrs Annette Laubscher ("**Annette**") was apparently nominated as the successor to Laubscher as group representative but she was neither appointed nor authorised to act as trustee of the CTC Trust.

6. On 8 November 2013, acting in his capacity as trustee of the CTC Trust and as a joint trustee of the Mack Trust, MacKenzie launched an application under the above case number for the appointment of an interim receiver to the estate of the CTC Trust, as a result of the disputes between MacKenzie and Laubscher, as well as the breakdown in the relationship of trust between them. This was due, amongst other things, to the alleged misappropriation of funds of the CTC Trust by Laubscher and his allegedly being in unlawful competition with the business of the CTC Trust.
7. The trustees of the Grace Nuba Trust were cited as the respondents in that application, and Laubscher was cited in his capacity as trustee of the CTC Trust. Annette was also joined as a respondent.

22 November 2013 order granted by Davis J ("the Davis order")

8. On 22 November 2013, an order was granted by agreement between the parties to that application in terms whereof Mr Ryno Engelbrecht of Planet Administrators was appointed as receiver in respect of the estate of the CTC Trust ("**the receiver**").
9. The receiver was authorised and directed to take over the control of the business of the trust including but not limited to all assets, sales and finances of the trust with immediate effect. Laubscher and Annette were directed to provide the receiver with access to all of the bank accounts held by the CTC Trust. Laubscher was also required to provide the receiver with access to his personal bank account used to receive funds from PayPal relating to sales generated by the CTC Trust, and to provide the receiver with access to the PayPal account and Bid or Buy accounts held by the CTC Trust. All the respondents to that application were directed to provide the receiver with passwords that fell within

their knowledge with regard to websites or virtual platforms used by the trust to conduct its business and the respondents were prohibited from changing the passwords without the consent of the receiver.

10. The receiver was authorised and directed to preserve all the assets of the trust, to receive all income due to it, to demand from the parties to the application a true and correct account of any portion of the trust assets which either of them may have taken possession of or which they may have dealt with, to demand from the parties the payment or delivery of any portion of the trust assets in his/her possession, and to demand from the parties that they assist the receiver to the best of their ability in collecting, taking charge of, acting with and realising any property belonging to the trust.
11. The Davis order did not extinguish the obligations of the trustees of the CTC Trust (limited by then to MacKenzie), particularly the obligation in terms of Section 9(1) of the Trust Property Control Act, 57 of 1988 (**"the Act"**), which provides that:

"A trustee shall in the performance of his duties and the exercise of his powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another."

12. MacKenzie remains under a similar obligation in regard to the Mack Trust, of which he is a trustee.
13. The Davis order further provided at paragraphs 1.8 and 1.9 that:

"1.8 The Receiver shall keep records of all transactions attended to by him in relation to the Trust which shall remain open for the reasonable inspection by the parties and/or their legal representatives."

1.9 Save to the extent that the parties may agree otherwise in writing, the parties or the receiver shall be entitled to approach the above

Honourable Court for such further directions in regard to the receivership of the Trust as may be necessary.”

14. The receiver has invoked the latter provision in his counter-application currently before the Court, in which he has cited as respondents the trustees of the CTC Trust, the trustees of the Mack Trust, and the trustees of the Grace Nuba Trust.
15. The Davis order further provided that the parties to the 2013 application were directed to take all steps as may be necessary to provide the receiver with the particulars of all income which the CTC Trust earned since its inception, the accounting records for the trust from inception, and full particulars of all income earned by the trust and the manner in which the parties had dealt with it.
16. In terms of paragraph 2 of the Davis order, the receiver would ultimately dissolve and/or terminate the trust on or before 28 February 2014, and in doing so would have all the necessary powers in this regard, including but not limited to the power to liquidate and/or divide the trust assets between the trust beneficiaries with the *proviso* that in terminating the trust, any sale of trust assets would be a last resort and this course would only be followed if the parties could not agree to a division of the trust assets between the trust beneficiaries.
17. The Davis order provided in paragraph 3 that “*the Receiver will account fully to the parties regarding the termination of the Trust and the distribution of the Trust assets*”.
18. This provision is apposite to both the application and counter-application as is the provision at paragraph 1.8 of the Davis order, quoted above.
19. Despite the wide powers afforded in the Davis order to the receiver, his position differs from that of a liquidator upon their appointment. The receiver did not and does not, for example, represent the CTC Trust.¹ He was not empowered to run the business of the CTC Trust. The provisions of the Insolvency Act, 24 of 1986,

¹ *De Villiers and Others N.N.O. v Electronic Media Network (Pty) Ltd* 1991 (2) SA 160 (W) at 184H to 185A.

were not engaged by his appointment. This bears upon the submission by the receiver's counsel, when comparing the accounting by the receiver to that required of a liquidator of a company or trustee of an estate under sequestration: that which the receiver had provided, so counsel submitted, was more than what a liquidator or trustee of an insolvent estate would be required to do. This submission does not avail the receiver: the Master can call upon the trustee to furnish him with bank statements² and has the right to examine all vouchers relating to the estate bank account.

20. The receiver's position differs in some measure from that of an interim curator, a curator or an executor, who are subject to the provisions of the Administration of Estates Act, 66 of 1965, in terms whereof the Master appoints them, they remain under the supervision of the Master, security must be provided for the proper performance of their functions, and they must account to the Master for the property in respect of which they have been appointed in such manner as the Master may direct.³
21. As a creature of contract whose terms of reference are to be found there, a receiver is not ordinarily accountable to the Master.⁴
22. That, however, does not afford the receiver in the present matter free reign.
23. Counsel for both parties agreed that the receiver is under a fiduciary duty to the beneficiaries of the CTC Trust. Those submissions were correctly made. The Davis order, in effect, engendered scope for the exercise of some discretion or power (by the receiver), the ability to use that power or discretion unilaterally so as to affect the beneficiary's legal or practical interests, and a peculiar vulnerability to the exercise of that discretion or power, which factors give rise to a fiduciary duty.⁵ It follows that the duties of the receiver to the beneficiaries of the CTC Trust included the promotion of their interests and the disclosure to them of such information as came to his knowledge which might reasonably be thought

² Insolvency Act 24 of 1936, s70(2) and s70(5)

³ *Ellis v Saga Wine Farms (Pty) Ltd* 2014 JDR 0764 (WCC).

⁴ *Ex parte Trakman N.O.: in re Dumba Motel (Pty) Ltd* 1978 (1) SA 1082 (N) at 1084G.

⁵ *Phillips v Fieldstone Africa (Pty) Ltd and Another* 2004 (3) SA 465 (SCA) at 482C-E.

to have a bearing on their interests.⁶

24. Moreover, it cannot be gainsaid that as he was entrusted with the assets of the CTC Trust, the receiver attracted the obligations ordinarily imposed upon a trustee by the Act. The receiver is an officer of the Court, does not represent either party and has the functions of a curator,⁷ charged with administering the affairs of another,⁸ with the concomitant obligations and duties.

Events following upon the grant of the Davis order

25. The receiver has explained in his papers that the manner wherein he was to dispose of assets was not spelt out in the Davis order, and he was uncertain whether he was authorised and/or had the power to dispose of assets by means of closed tenders, as he was of a mind to do. He sought and was granted an order on 21 February 2014 by Baartman J (**“the Baartman order”**) that authorised him to instruct Michael James Organisation (**“MJO”**) to sell the assets of the trust by means of a private, closed tender addressed to the beneficiaries of the trust, and extended the date by which the CTC Trust was to be dissolved. Should the tender not result in a valid sale, the assets of the trust were to be sold by public auction, with all costs associated with the realisation of the assets to be paid out by the assets of the trust.
26. Pursuant to the Baartman order, MJO invited the beneficiaries to tender in a private, closed tender. The only tender received was from the Grace Nuba Trust and/or Laubscher’s interests. MacKenzie and the Mack Trust did not participate in the process. As a result, Laubscher and/or entities in which he had an interest were the successful bidder and bought all the auctioned assets of CTC Trust.
27. It is common cause that the proceeds of the sale of the assets by way of the closed tender, plus interest accrued thereon thereafter, comprises the trust fund. The trust fund has been both augmented by interest earnings and partially

⁶ *Ibid* at 483B.

⁷ *Ex parte de Wet N.O.* 1952 (4) SA 122 (O) at 125 D;
Gillingham v Gillingham 1904 TS 609 at 613, per Innes CJ.

⁸ *Clarkson v Gelb and Others* 1981 (1) SA 288 (W) at 293D to 294C.

consumed over time by payment of administration fees, the receiver's charges, bank charges, BC's fees, and legal costs (including fees due to senior counsel for his advice referred to below), and the costs of the applications to court made by the receiver.

28. The receiver's affidavits filed in the application and counter-application recount that from the outset there was disagreement between the parties to the Davis order, as well as a lack of cooperation with the receiver so as to enable him to fulfil his duties and obligations without delay and the incurrence of unnecessary costs. There were material disputes between the trustees of the CTC Trust in regard to the extent and validity of various loan account entries and claims. There were allegations that trust funds may have been misappropriated or not fully accounted for.
29. The receiver had formed the view that he would not be able to render a proper and full account and to finalise the receivership without the appointment of a forensic auditor to investigate the alleged misappropriation, alleged non-disclosure of income and disputed loan account entries and claims. Accordingly, he applied for and was granted an order as part of the Baartman order that he be authorised to engage the services of a forensic auditor. The receiver appointed Barnard Consulting ("**BC**") to prepare a financial report in regard to the affairs of the CTC Trust.
30. BC interviewed MacKenzie and Laubscher and afforded them an opportunity to raise queries and to provide information and documentation. BC prepared a first report. It was sent to the beneficiaries to enable them to comment thereon. In its conclusion, BC recommended that the loan accounts be amended pursuant to its forensic findings.
31. The Grace Nuba Trust registered some objections. The receiver then approached the Master on 2 October 2014 to cause an investigation to be carried out pursuant to Section 16(2) of the Act.
32. The Master declined the receiver's request to launch an investigation, and

advised that its office could not override the Baartman order, so the objections raised by Laubscher (in his capacity as trustee of the Grace Nuba Trust) together with proof should be submitted to the forensic auditor for consideration. This was done. The parties were given a further opportunity to raise concerns and objections, and to place relevant information before BC for consideration and report. BC then presented its second report.

33. The trustees and beneficiaries of the CTC Trust were unable to agree on a division of the trust assets, despite meetings held between the trustees and receiver, and the exchange of correspondence.
34. By agreement with Laubscher and the Grace Nuba Trust, and without opposition from MacKenzie and the Mack Trust, the receiver applied for and was granted an Order by Salie J again extending the date by which the CTC Trust was to be dissolved (**"the Salie order"**).
35. The trustees of the two beneficiary trusts agreed that advice be sought as to whether or not the receiver should pay the free residue out and terminate the trust, or whether the receiver is under an obligation to further investigate the affairs of the trust and institute proceedings for the recovery of damages or assets should such further investigations reveal recoverable claims.
36. During May 2018, senior counsel was instructed to provide such advice. He was briefed with the two BC reports and with correspondence and documents compiled by the receiver. He met with MacKenzie and his attorneys, who thereafter set out on affidavit his objections and contentions. MacKenzie's affidavit was sent to Lauscher, who provided an answer.
37. In senior counsel's opinion, the CTC Trust may in form be a trust but in substance it is not. He deliberated whether or not there was a partnership between MacKenzie and Laubscher and their respective family trusts. He advised that the receiver was, however, not appointed to effect a dissolution of a partnership and the existence of a partnership (as opposed to a trust) cannot simply be imposed on the parties. He advised that the receiver should approach

the court for directions in regard to the payment of the funds held by him.

38. Pursuant thereto, the receiver approached the Court for directions on the distribution of the trust funds and the dissolution of the trust. MacKenzie and the Mack Trust did not oppose that application. Laubscher filed an affidavit setting out his disagreement with the view of senior counsel that the CTC Trust was not in substance a trust. However, he and the Grace Nuba Trust abided the court's decision.
39. On 12 February 2021, Bozalek J granted an order ("**the Bozalek order**") directing that the date to dissolve and/or terminate the CTC Trust as provided in the Salie order be extended to 12 May 2021. The Bozalek order further provided:
 - 39.1 that the CTC Trust shall be dissolved and terminated by the receiver by paying the Mack Trust 97,52% and the Grace Nuba Trust 2,48% of the trust funds after all expenses had been paid and deducted therefrom;
 - 39.2 that the receiver account fully to the Mack Trust and the Grace Nuba Trust regarding the termination of the trust and the distribution of the trust funds;
 - 39.3 that after paying the amounts due to the Mack Trust and the Grace Nuba Trust, the receiver shall have the trust deregistered by the Master of the High Court; and
 - 39.4 that the costs of that application be paid out of the trust funds of the CTC Trust.
40. The receiver thereafter presented his final liquidation and distribution account ("**L&D account**") on 12 May 2021, stating what amount each trustee (on behalf of each of the respective beneficiary trusts) would receive in terms of the Bozalek order (styled as their 'dividend'). The applicants raised queries, particularly in regard to interest earned after 14 August 2018 for which bank statements were requested. On 14 March 2022, the receiver provided the applicants' attorneys

with a file containing vouchers proving each payment he had made on behalf of the CTC Trust including those to attorneys, counsel and auditors, and annexures setting out the interest earned monthly by the trust and bank charges paid, as well as the ledgers.

41. The applicants were not satisfied, and demanded explanations for various payments that had been made, an accounting for the interest earned on the trust fund and bank charges paid from it, copies of all invoices for payments made by the receiver, and copies of bank statements from 14 August 2018.
42. The receiver addressed all these demands, apparently to the satisfaction of the applicants, save that he declined to provide bank statements.

The issues for determination

43. The decision that the Court is called upon to make is whether the accounting by the receiver was adequate (as he contends) or not (as the applicants contends); the answer to that question determines the fate of both the application and the counter-application.
44. In the application, disclosure is claimed of bank statements dating back to 14 August 2018. In his counter-application, the receiver seeks an extension of the date by which the CTC Trust is to be dissolved and terminated. He further seeks directions as to how the trust funds held by him are to be distributed. In his prayers 3 and 4, he seeks orders that the Court approve his L&D account and directing the trustees of the Mack Trust to accept the dividend calculated in terms thereof.
45. The receiver contends that he has kept records and made sufficient information available to the beneficiaries by furnishing the L&D account, together with supporting vouchers and ledgers. The applicants contend that they also require inspection of bank statements.

46. Both counsel referred to the decision in *Doyle v Board of Executors*⁹ in support of their competing positions. In that case, it was also common cause that the defendant trustee acted in a fiduciary capacity. The defendant made discovery of supporting documents but did not render an account. He was ordered to furnish the plaintiff beneficiary with a full and proper accounting duly supported by vouchers pertaining to management of the trust's capital assets.¹⁰
47. The receiver sought to distinguish the facts of the present matter from the *Doyle* judgment on the basis that he had indeed provided an accounting to the beneficiaries by way of his L&D account and supporting ledgers and vouchers furnished on 12 May 2021 and 14 March 2022 respectively.
48. The applicants contend that the *Doyle* judgment supports their demand for full disclosure including the bank statements which had repeatedly been requested of the receiver, and which requests had either been ignored or refused, and were still being resisted by the receiver's opposition to the present application.
49. Slomowitz AJ held on this issue as follows:¹¹

"At this stage of the case I am concerned only with the first prayer. It involves the delivery of an appropriate account. The proper practice, with remedies of this kind, was adverted to in detail by the highest Court in Doyle and Another v Fleet Motors PE (Pty) Ltd 1971 (3) SA 760 (A). Holmes JA pointed out (at 763) that, if it appears that the plaintiff has already received an account, which he avers is insufficient, the Court may enquire into and determine the issue of sufficiency, so to decide whether to direct an account which is in fact sufficient. In addition, the learned Judge drew attention to the possibility of supererogation in this aspect of the matter and the element of debate. Where they are correlated, a court might, in an appropriate case, find it convenient to undertake both

⁹ 1999 (2) SA 805 (C).

¹⁰ *Ibid* at 816G-H.

¹¹ At 814H-J.

Slomowitz AJ's judgment has been approved and applied in several judgments, most recently by a full bench in *Mohle N.O. and others v RLN and another* (A43/2023) [2024] ZAMPMBHC (9 January 2024).

*enquiries in one hearing. There is no hard and fast rule. I enjoy a discretion to deal with this matter with such flexibility as practical justice requires. Instances in which accounts rendered were held to be insufficient are to be found in the various judgments given in *Krige v Van Dijk's Executors* (supra), as well as that of the same Court in *Mia v Cachalia* (supra). In the present case no proper account has been delivered. What has been given instead is discovery. If an account is due at all, then that is wholly inadequate.” (my underlining)*

50. The receiver contends that he has performed all of his duties, save the ultimate dissolution of the CTC Trust, division of its assets and finally accounting to the parties to the Davis order on the termination of the trust and the distribution of the trust assets. He contends that the disputes raised by the first and second applicants have prevented, over many years, the termination and dissolution of the CTC Trust. These disputes permeated through interactions with the receiver, with BC (in its two reports) and the advice secured from senior counsel. He contended that the bank statements would provide no useful information in addition to that already disclosed and would not assist them because, for example, the bank statements do not provide a narrative describing the details of each payment, but simply show the amount paid and the running balance. He further argues that if further expenses were uncovered by the bank statements, this would reduce the amount available for distribution to the beneficiaries, which was contrary to their interests. Disclosure of the bank statements would not, so it was submitted, place the applicants in a better position to object or to accept the L&D account. This justification for withholding information appears self-serving and, for the reasons that follow below, is rejected.
51. Counsel for the applicants, Mr De Wet, was unable to provide a clear example of subject matter that may appear on a bank statement which would not have been recorded in the ledgers and supporting vouchers provided by the receiver. A generalised submission was advanced that the applicants required the bank statements to satisfy themselves that the dividend to be paid to the Mack Trust was in its interests. MacKenzie correctly contends that, as trustee of the Mack Trust he has a fiduciary duty to the beneficiaries of that trust to so satisfy himself.

The applicants' position was that they were unable to assert what the bank statements might reveal, but that they were entitled to inspect them as of right.

52. The applicants were aware that the CTC trust fund, comprised of the proceeds of sale of its assets, had been invested by the receiver in an interest bearing account, because the CTC Trust's current account earned no interest.
53. The applicants learned for the first time upon receipt of the receiver's replying affidavit on 12 August 2024 that, on or about 14 August 2018, the receiver had moved the CTC trust fund and deposited it into the receiver's trust account, being an interest bearing account with FNB bank, and that the CTC trust fund has been so held to date together with other amounts entrusted to him. The receiver had done so instead of holding the CTC trust fund in a separate account in the name of the CTC trust as required by section 10(1) of the Act.¹²
54. As a result of this arrangement, which the receiver had not previously disclosed, the interest earned on the CTC trust fund had to be calculated by the receiver's staff on a month to month basis: the running balance held in the FNB investment account had to be apportioned between the CTC trust fund (less any expenses paid on its behalf in that month), on the one hand, and the remainder of the funds entrusted by third parties to the receiver and held in the same FNB account, on the other hand; that ratio was then applied to the interest accrued on the FNB account during that month to arrive at the interest due to the CTC Trust.
55. Counsel for the receiver, Mr Grobbelaar, justified this methodology on the grounds that a reconciliation statement, being a schedule of the interest earned by the CTC Trust, was among the substantiating documents that had been provided to the applicants. Those documents included a ledger for transactions on the receiver's FNB account running from 3 March 2014 to 28 February 2022. It was submitted that these documents sufficed in place of bank statements.

¹² The section provides:

"10. Trust account

Whenever a person receives money in his capacity as trustee, he shall deposit such money in a separate trust account at a banking institution or building society."

Similarly, an agent bears the duty to keep the principal's property separate.

56. The receiver repeatedly contended, and his counsel also so submitted, that no matter what information had been provided to the applicants, and despite the assistance provide by his office, by BC and the advice of senior counsel, the applicants had continued to cavil about every detail on the accounting provided to them, and were likely to continue doing so even if bank statements for the receiver's FNB investment account were provided to them to verify the interest as calculated by the receiver's staff and 'posted' to the accounting records kept by the receiver for the CTC Trust. This was causing undue delay in finalising the L&D account and fulfilling his court ordered mandate to dissolve the CTC Trust.

57. The receiver's expressions of frustration are understandable, but are misplaced.

57.1 Once he accepts that he is under a fiduciary duty, then he must accept that his actions in managing the CTC trust fund cannot be opaque. His previously undisclosed decision to invest the CTC trust fund into his business' investment trust account with FNB did operate to the advantage of the CTC trust by earning it interest. Counsel for the receiver submitted that the receiver was not obliged to invest the CTC trust fund to earn interest. I disagree. He was obliged to protect the CTC Trust's beneficiaries' interests, which necessarily requires ensuring that interest income was earned.

57.2 It is common cause that, given the quantum of funds under investment, the same interest rate would have been earned in a similar separate investment account held at FNB only in the name of the CTC Trust. The receiver's decision to meld the CTC trust fund with other monies afforded no commercial advantage to the applicants.

57.3 Moreover, as stated above, he thereby breached the imperative in Section 10(1) of the Act. His decision to so invest the CTC trust find was the exemplification of his "*ability to use that power or discretion*

*unilaterally so as to affect the beneficiary's legal or practical interests".*¹³

It immediately engaged his obligation to account fully to the beneficiaries on the effect of that decision, even if the effect was neutral in financial terms when comparing interest that could potentially have been earned in a separate bank account.

58. Counsel for the receiver persisted that the receiver's decision made no difference as the interest had been accounted for in the schedule previously provided. He then advised me from the Bar that he had been instructed that an Excel spreadsheet could be provided to the applicants to illustrate how the receiver's staff had performed the calculation of interest attributable to the CTC Trust and recorded on that schedule.
59. Exercising the discretion postulated by Slomowitz J in the *Doyle* judgment as underlined in the quoted passage above, I stood the hearing down to afford the parties an opportunity to consider that document, together with those furnished by the receiver previously, and to advise whether it was agreed that the interest calculation was correct, and failing agreement, to file supplementary affidavits setting out their differing positions. Had agreement been reached, then it would be possible for the trust to be dissolved as contemplated in the succession of preceding orders in this matter, and in particular, as regulated by the Bozalek order. Only the costs of this application and counter-application would remain to be determined.
60. The parties were unable to agree, and each filed supplementary affidavits. and supplementary written submissions. Oral argument then resumed.
61. As it turns out, the provision of the additional spreadsheet gave rise to more questions than answers. In short, it could not be fully reconciled with the contents of the documents previously provided by the receiver. A number of discrepancies were exposed. Although they were not all of a significant order of magnitude, they aroused the applicants' concern, and thwarted the expected approval of the L&D

¹³ *Phillips v Fieldstone Africa (Pty) Ltd and Another supra* at 482C.

account. Plainly, the bank statements are essential to successfully reconcile the figures, or to make any necessary changes to the L&D account.

62. During argument, Mr De Wet moved an amendment to prayer 2 in the notice of motion to the effect that the request for bank statements was to be dated from 1 March 2014 instead of 14 August 2018. The amendment was not opposed and was granted.
63. Taking account of the fiduciary duty of a person in a position such as the receiver to ensure full transparency and accountability in his dealings with the affairs of another, and with due regard to the clear wording in paragraphs 1.8 and 3 of the (agreed) Davis Order in its full context, including the circumstances which gave rise to it, I hold that the receiver was obliged and remains obliged to disclose to the applicants every document that was used in the calculations which were ultimately recorded in his L&D account. Accordingly I intend to order disclosure of the bank statements as prayed for in the original notice of motion.
64. Given the lengthy history of this matter and the judicial resources that have been devoted to determining the fate of an ever diminishing trust fund consumed by the costs of litigation, careful consideration was given to crafting an order that would obviate any further approaches to the Court being required¹⁴. However, it is not possible to do so without causing an injustice to one or other of the parties.
65. Although Mr De Wet argued for a dismissal of the counter-application, he conceded that the receiver's prayer for an extension of the period by which the CTC Trust is to be dissolved and terminated should be granted. The prayer requesting directions from the Court as to how the trust fund is to be distributed is redundant as the Court has already so determined in the Bozalek order. I agree that the Court is not presently in a position to determine the relief claimed in prayers 3 and 4 of the counter-application. That relief and the costs of the counter-application must stand over for later determination.

¹⁴ *Krige v Van Dijk's Executors* 1918 AD 110 at 116

66. The applicants have succeeded in their application and the costs must follow that result. It is possible that, after perusal of the bank statements by the applicants, the receiver may be vindicated in regard to his calculation of the dividend for distribution reflected in his L&D account. On this basis, his counsel urged me to reserve the costs of the application. I decline to do so because the disclosure by the receiver is being ordered on a matter of principle, and not in relation to the accuracy or otherwise of his calculations or due to the applicants' misgivings (however misplaced they may turn out to be). The receiver was not entitled to withhold documents which he unilaterally decided to be unnecessary. He could have avoided this application by candidly reporting to the applicants in August 2018 when he moved the CTC Trust fund into his firm's FNB trust account. He ought to have been transparent in his management of the CTC Trust fund, and he ought to have provided the particulars of the interest calculations at a far earlier time – at the very latest by March 2022.
67. Accordingly, I hold that the receiver must bear the applicants' costs and his own costs in the application.
68. The parties' respective costs in regard to the counter-application shall stand over for later determination. In reserving those costs, I bear in mind that it is common cause that the date for dissolution of the trust must be extended as prayed by the receiver, that the Davis order authorised the receiver to approach the Court, and that the relief he has sought must necessarily stand over.
69. Counsel for both parties agreed that a curtailed timetable should be directed by the Court to facilitate the finalisation of this matter, which has been protracted over eleven years.
70. **It is accordingly ordered that:**
- 70.1 The date stipulated in the order of 12 February 2021 by which the CTC Trust is to be dissolved and terminated is extended to **28 February 2025**.

70.2 The matter is postponed for determination of the relief sought in prayers 3 and 4 of the notice of counter-application and costs of the counter-application, at a hearing on the first available date in fourth division, alternatively, to such earlier preferential hearing date as the Acting Judge President may authorise, provided that the hearing date shall be no earlier than 31 October 2024.

70.3 By no later than **23 September 2024**, the respondent, Mr Engelbrecht, in his capacity as the receiver of the CTC Trust (*“the receiver”*) shall make the following documents available to the trustees of the Mack Trust (*“the applicants”*):

70.3.1 A full run of the bank statements for the trust bank account number 6[...] at First National Bank (**“FNB”**) in the name of Planet Administrators cc for the period 14 August 2018 to date (**“the FNB bank statements”**); and

70.3.2 The ledgers, schedules, spreadsheets and any other documents pertaining to the calculations of the monthly interest earned by the CTC Trust since 14 August 2018 performed by the receiver or his staff.

70.4 Prior to providing the FNB bank statements to the applicants, the receiver may redact them so as to remove particulars of any clients of Planet Administration cc or persons on whose behalf the receiver and/or Planet Administration cc hold funds, provided that no running balances on the FNB bank statements may be redacted.

70.5 Within 10 court days of receiving the documents contemplated in above, the applicants may deliver written objections to the receiver in relation to the L&D account he has most recently submitted to them, which objections must stipulate:

70.5.1 All transactions which are queried by the applicants, with

reference to the dates and nature thereof;

70.5.2 The reasons why a query is raised;

70.5.3 The difference the queried transaction makes to the balance available for distribution;

70.5.4 The quantum which the applicants contend to be available for distribution, and how this is calculated.

70.6 Within 10 court days of receipt of the objections, the receiver shall present an amended L&D account to the applicants, accompanied by a detailed response to their objections, with reference to substantiating documents and further accompanied by separate schedules setting out:

70.6.1 the costs incurred by the receiver in opposing the application;

70.6.2 the costs incurred by the receiver in the counter-application;
and

70.6.3 all reasonably anticipated costs to be incurred and interest to be earned on the CTC Trust's funds in the period between delivery of the amended L&D account and the resumed hearing date.

70.7 The parties may deliver supplementary affidavits by no later than **25 October 2024** on the subject matter of this order and their compliance therewith.

70.8 The parties shall prepare a joint practice note, to be filed no less than five (5) court days before the hearing, in which they shall, in addition to addressing the subject matter required by the practices of this Court:

70.8.1 Succinctly describe the differences, if any, in their view of the

quantum available for distribution to the beneficiaries of the CTC Trust;

70.8.2 Stipulate what further directions, if any, are required from the Court to facilitate the dissolution and termination of the CTC Trust;

70.8.3 Briefly motivate the costs orders that they seek in respect of the counter-application;

70.8.4 Direct the Court to which specific pages of the record (including the supplementary affidavits filed in the course of the hearing during the week of 26 to 29 August 2024) must be read, and which may be omitted from reading.

70.9 In the event that the parties reach agreement on all outstanding issues as set out in this order, then the receiver may deliver a notice of removal of the matter from the fourth division roll and, on notice to the applicants, enrol the matter for hearing in the third division, in which event the practice note contemplated above shall be accompanied by a draft order for consideration by the Court.

70.10 The respondent shall bear his own costs in the application and shall bear the applicants' costs in the application, which shall be recovered from the fee payable to the receiver on dissolution of the trust.

70.11 The costs of the respondent's counter-application stand over for later determination.

GORDON-TURNER AJ
MS ACTING JUSTICE OF THE HIGH COURT

Appearances

Counsel for the Applicants

Adv Rudi de Wet

Instructed by Attorney

Mr Callie Albertyn

De Klerk & Van Gend

Counsel for the Respondents

Adv Eben Grobbelaar

Instructed by Attorney

Ms Jesse Barrington-Smith

De Waal Boshoff Inc.