



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

REPORTABLE

Case Number: 17494/2024

In the matter between:

DIE ORFFER LANDGOED (PTY) LTD

Applicant

and

CHRISTIAAN JOHANNES ORFFER N.O.

First Respondent

ELMIEN ORFFER N.O.

Second Respondent

*[in their official capacity as
Trustees for the time being of
The Bloubank Boerdery Trust]*

REGISTRAR OF DEEDS, CAPE TOWN

Third Respondent

JUDGMENT

ANDREWS AJ

Introduction

[1] This is an opposed application for an order to have a Special Power of Attorney ("SPA") declared as an original for purposes of Regulation 65 (1) of the regulations in

terms of the Deeds Registration Act¹("the Deeds Registration Act"). Alternatively, an order directing the First and Second Respondents, and/or the Trust to sign and furnish the Applicant with a duplicate original of the Special Power of Attorney. What initially appeared to be a fairly crisp issue for determination, metamorphosed into distilling a lacuna identified in the law pertaining to the effectiveness of a Trustee's resignation under the Trust Property Control Act ("the TPCA"), due to the arguments presented against the relief sought in both the main and alternative claims. The effectiveness of a Trustee's resignation under the Trust Property Control Act ("the TPCA") arises from the arguments presented against the relief requested in both the main and alternative claims.

[2] The First and Second Respondents sought a declaratory order stating that the Bloubank Boerdery Trust ("the Trust") is not bound by the Special Power of Attorney signed on 14 December 2022. Alternatively, that the Special Power of Attorney has been revoked by the Trust, and Special Power of Attorney is of no force and effect. They also contended that the sale agreement concluded on 28 May 2024, by the Applicant on behalf of the Trust with O2 Fruit (Pty) Ltd ("the sale agreement"), for the sale of Portion 1 of Farm 52, Bloubank Farm, Tulbagh ("the property"), is of no force and effect, alternatively be set aside by the Court. Alternatively, the registration of the property be stayed pending a potential referral to oral evidence or a potential action.

[3] The Third Respondent did not oppose the application. Any reference to "the Respondents" must be understood to mean the First and Second Respondents.

¹ Act No. 47 of 1937.

Historical background

[4] The parties provided the contextual narrative to assist the Court in understanding the historical background giving rise to the respective applications. The property was originally part of a larger farm that was bequeathed to the First Respondent and his brother. As a consequence of what the First Respondent described as “significant personal differences and conflicts” between them, they agreed that the farm would be subdivided leading to the Trust becoming the registered owner of the property. The Applicant conducts its farming enterprise from the Bloubank Farm.

[5] The First Respondent was initially the only shareholder of the Applicant. The business of the Applicant encountered financial challenges that necessitated the involvement of an investor. Cape Five Group (Pty) Ltd (“the Cape Five Group”), a holding company, stepped in to provide a capital injection. As part of the fund raising, they received shares in the Applicant. Almost immediately after entering into the partnership, the Covid-19 pandemic occurred which was followed by a severe hailstorm, both of which impacted the financial success of the farm. As a result, the Applicant encountered further financial difficulty. The First Respondent did not have the financial resources to cover the operations of the farm and the Trust. The Applicant was unable to get out of financial distress. The Applicant had over time provided loans and advanced monies to the Trust. As at the date of signature of the Special Power of Attorney, the Trust was indebted to the Applicant in excess of R17 million.

[6] To ensure the payment of the Trust debt to the Applicant, the Trust consented to provide the Applicant with the necessary authority to sell, amongst other assets, the Bloubank Farm and from the proceeds of the sale to settle the outstanding debt. On

or about 14 December 2022, the Trust concluded the Special Power of Attorney. On 28 May 2024, the property was sold to O2 Fruit. The original Special Power of Attorney was in the Applicant's possession and was misplaced when the Applicant relocated offices.

The Applicant's case

[7] The Applicant has sold the property; however, it cannot transfer it due to non-compliance with the applicable regulations pertaining to land registration. The Applicant astutely remonstrated that in terms of the Special Power of Attorney, it has the right to sell the property, and to effect transfer thereof to the purchaser. Therefore, in order to pass transfer of the property, the Applicant is required to lodge the original Special Power of Attorney and is currently unable to do so as the original has been misplaced. The Applicant is not able to procure another original power of attorney from the Trust as the Trust disputes the Applicant's authority to sell the property on its behalf.

[8] The Applicant contended that the Trust's opposition to this application is *mala fides* as it has raised non-meritorious grounds of opposition and an ill-founded counter-application in an attempt to obfuscate these proceedings and to prevent the inevitable consequences to the First and Second Respondent that will follow from the sale of the property.

Trust's grounds of opposition

[9] The Trust disputed that the Applicant has the right to sell and/or transfer the property pursuant to the Special Power of Attorney, as it principally asserted that:

- a) The SPECIAL POWER OF ATTORNEY is invalid because the First Respondent was not duly authorised by the Trust to grant the SPECIAL POWER OF ATTORNEY in favour of the Applicant;
- b) The SPECIAL POWER OF ATTORNEY was revoked and
- c) They obtained a higher offer.

Principal submissions by the parties

[10] The Respondents contended that the letters of authority in respect of the Trust were never amended by the Master of the High Court. The Trust maintain that Mr Stofberg's resignation has no legal effect until the letters of authority are amended to reflect such a change. The Respondents argued that Mr Stofberg was required to participate in the Trust's decision to sign the Special Power of Attorney. The Applicant, however, asserted that this argument is legally unsound and that it is sufficient for a resigning Trustee to notify his Co-Trustees and the Master of his resignation, after which the resignation becomes effective upon the Master's acknowledgement. The Applicant postulated that Mr Stofberg's resignation became effective as from 12 June 2019, the date of his resignation, and as such, he was no longer a Trustee from that date onwards.

[11] The Respondents' arguments insofar as it relates to the lacuna in the law concerning the effectiveness of a Trustee's resignation in terms of the TPCA becomes apposite to determining when Mr Stofberg's resignation took effect. The Respondents indicated that the authorities appear to hold conflicting views on this

issue. This argument is premised on the seemingly contradictory judgments in ***Soekoe NO v Le Roux***² and ***Meijer NO v FirstRand Bank Limited***³.

[12] The Respondents contended that a distinction must be drawn between the formalities of a resignation and when such resignation becomes effective. They argued that even though a Trust Deed may set out the formalities regarding a Trustee's resignation, this does not detract from the question as to when such a resignation becomes effective. The Applicant proffers as a counter argument asserting that Mr Stofberg's resignation was in compliance with, and pursuant to the provisions of the Trust Deed. They submitted that the argument regarding Mr Stofberg's resignation pursuant to the TPCA, should only be addressed if it is established that Mr Stofberg did not resign in compliance with the provisions of the Trust Deed. They reasoned that if it was required to be in terms of the provisions of Section 21 of the TPCA, Mr Stofberg's resignation was effective from the date the Master acknowledged receipt thereof. Therefore, according to the Applicant, Mr Stofberg's resignation was effective prior to the signature of the SPECIAL POWER OF ATTORNEY in terms of the Trust Deed and/or the TPCA.

[13] The Respondents furthermore contended that the proposition that when a Trustee resigns in compliance with the formalities required in a Trust Deed that he or she simply stops being accountable to the beneficiaries for the assets under their control cannot be tenable. Conversely, the Applicant argued that the Respondents' proposition postulated to the effect that the general position prior to the TPCA being promulgated was that a Trustee did not enjoy the right to resign as a Trustee and that

² [2007] ZAFSHC 135 (29 November 2007).

³ [2013] JOL 30560 (WCC).

a Trustee had no right to resign from such position, is incorrect. In this regard, a Trustee required the leave of the Court to resign only if the Trust Deed did not provide for his resignation.⁴ Therefore, even prior to the promulgation of the TPCA, a Trustee could resign in terms of the provisions outlined in the Trust Deed. The Respondents asserted that this must be interpreted within the context of the conclusion drawn by the authors in *Honorés South African Law of Trusts* (“*Honorés*”) on this aspect. I will deal more comprehensively herewith, later in this judgment.

[14] The Respondents suggested that it is a far more common sense and business-like approach to insist that, regardless of any resignation, the Trustee must continue to act until such time as the Master has amended the letters of authority to replace the Trustee. This, it was argued, would mean that a Trust could never be subject to the whims of a “resigned” Trustee. The Respondents made an analogy of a situation in which a Trust Deed requires that a Trust must always have three Trustees. It reasoned that if one Trustee resigned by giving notice to the other two Trustees and that resignation was effective immediately, then the Trust would be unable to undertake any valid actions until the Master appointed a new Trustee. However, if the resignation is only effective once the letter of authority is issued, then the resigning Trustee would be required to continue to act to ensure that the Trust can take valid decisions.

[15] Likewise, if a Trustee’s resignation was to be effective immediately, such scenario would render a Trust unable to administer the assets held under a Trust. The Respondents argued that it is therefore irrelevant to the question of when a resignation

⁴ *Honorés South African Law of Trust, Cameron et al.* (6th Edition), Section 135, page 262.

is effective, and whether or not, the Trustee complied with the formalities in a Trust Deed when resigning.

[16] The essence of the Applicant's argument therefore hinges on whether the Trust would be in Court if the original SPECIAL POWER OF ATTORNEY had not been lost; particularly since the Respondents have raised the legal argument concerning the validity of the SPECIAL POWER OF ATTORNEY more than 3 years after the signing thereof. This they argued, highlights the *modus operandi* of the First Respondent in an attempt to delay the inevitable.

Common cause facts

[17] The following facts are common cause:

- a) The Trust initially comprised of 3 Trustees, namely the First and Second Respondents, as well as Boshoff Visser Trustdienste (Pty) Ltd, represented by Arnoldus Jacobus Stofberg ("the Third Trustee");
- b) The Trust, at the time of the conclusion of the SPECIAL POWER OF ATTORNEY, and the date of the institution of the application, was and is indebted to the Applicant.
- c) On 14 December 2022, the First and Second Respondents, in their capacities as Trustees for the Trust, signed the resolution⁵ that authorised the Trust to conclude the SPECIAL POWER OF ATTORNEY, and authorised either of them to sign the SPECIAL POWER OF ATTORNEY on behalf of the Trust.
- d) The Third Trustee tendered a written resignation as Trustee on 12 June 2019.

⁵ "Trustees Resolutions", Annexure NWM3, record page 35.

- e) On 14 December 2022, the First Respondent signed the SPECIAL POWER OF ATTORNEY in favour of the Applicant. The salient terms of the SPECIAL POWER OF ATTORNEY included *inter alia*:
- i) the Applicant was authorised to sell Bloubank Farm, with a reserve price of R12 million;
 - ii) The Applicant was authorised to execute any act or deed relating to the alienation and/or transfer of Bloubank Farm in any Deeds Registry;
 - iii) The Applicant was authorised to repay the amount due to it by the Trust from the proceeds of the sale and
 - iv) The SPECIAL POWER OF ATTORNEY will subsist until such time as Bloubank Farm is sold and successfully transferred to the purchase, and the full purchase price is paid and distributed in accordance with the terms of the SPECIAL POWER OF ATTORNEY.
- f) The Applicant concluded a sale agreement with O2 Fruit on 28 May 2024 in terms of the SPECIAL POWER OF ATTORNEY, pursuant to which the Trust transferred the property to O2 Fruit.

Legal position regarding the resignation of a Trustee

[18] It therefore behoves this Court to consider whether the Respondents raised a meritorious challenge to the validity of the SPECIAL POWER OF ATTORNEY, more particularly, in the light of the resignation of the third Trustee. The law lacks clarity regarding the effective date of a Trustee's resignation as the Trust Property Control Act ("TPCA"), is not clear on when a Trustee's resignation becomes effective. Section 21 of the TPCA stipulates as follows:

'Whether or not the Trust instrument provides for the Trustee's resignation, the Trustee may resign by notice in writing to the Master and the ascertained beneficiaries who have

legal capacity, or to the tutors or curators of the beneficiaries of the Trust under tutorship or curatorship'

[19] As a starting point, I find it prudent to consider and reflect on the commentary by the authors of *Honorés* regarding the resignation of a Trustee. Under common law, a Trustee could not resign from their position without good reason and the Court's consent, unless the Trust instrument provided otherwise.⁶ This was due to the assumption that a Trustee cannot relinquish his or her fiduciary duties merely by electing not to perform them^{7,8}. In terms of the TPCA, more particularly Section 21 thereof, the Trustee is entitled to resign regardless of whether the Trust instrument provides for this.

[20] The authors of *Honorés*⁹ recognised that this provision represents a progression beyond the common law, where the Trust instrument would permit a Trustee to resign, however, if it did not, permission of the Court had to be obtained, which would only be granted for good reasons. They further elaborate by stating that:

'The statute now contains a general power of resignation subject to certain formalities. The Trustee who resigns must do so by notice in writing to (a) the Master and (b) the ascertained beneficiaries who have legal capacity or, in the case of beneficiaries under tutorship or curatorship, to the tutors or curators concerned. The entitlement to resign is not subject to the Masters or the Court's permission. But it should be remembered that the Trustee willingly assumed office. Hence, fiduciary obligations mean that he or she cannot resign at any time and regardless of the needs of the Trust and the interests of the beneficiaries. If resignation would prejudice the Trust, the policy of giving effect to validly constituted Trusts must at least temporarily prevail, and until as suitable accessor is available, override considerations of private convenience. Resignation would accordingly be possible only when there remains at least one further Trustee capable of administering the Trust or when the Trustee who

⁶ *Meijer NO v Firstrand Bank Ltd* [2012] ZAWCHC 23 (4 April 2012) at para [7].

⁷ *Van de Merwe NO v Hydraberg Hydraulics CC* 2010 (5) SA 555 (WCC) para [17].

⁸ *Honorés* *ibid* page 262.

⁹ *Honorés* *ibid* page 262.

*resigns arranges for the Master to appoint a substitute capable of administering the Trust. A Trustee who resigns arbitrarily despite possible prejudice to the Trust may in appropriate circumstances be liable for breach of Trust.*¹⁰ [my emphasis]

[21] **Honorés**, states that when the Trust instrument permits resignation, any specified formalities outlined in the Trust instrument must be complied with. Moreover, they opine that the object of the provision in the Trust Property Control Act concerning resignation appears to be to allow a Trustee to resign notwithstanding the provisions of the Trust instrument, not to impose the formality of written notice to the Master and others on all resignations. It is of seminal importance that a Trustee is not prohibited from resigning, as the statutory language is permissive ("may resign").

[22] In **Meijer NO v Firstrand Bank Ltd**¹¹ ("Meijer") the Court notably left open the question whether or not the statutory mode of resignation as contemplated in Section 21 was intended to establish a rule applicable for all resignations, regardless of whether the internal requirements provided for in the Trust instrument have been met.¹²

'[7] The Applicants, in their Founding Affidavits, departed from the premise that as neither of them had been replaced as Trustees by the Master, they have residual legal obligations in terms of their respective positions as Trustees. In his Replying Affidavit the First Applicant referred to the fact that he has since learned that the Master had not been informed of the resignations which had been tendered in 2001 and that the resignations were ostensibly only delivered to the Master on 5 April (sic) The First Applicant then proceeded as follows:

"Even if it should be held that the resignation of the applicant became effective already in 2001, despite the fact that the master did not replace us as Trustees, and this is not conceded, the second respondent could not legally on her own take decisions binding the

¹⁰ Honorés *ibid* pages 262 – 263.

¹¹ [2012] ZAWCHC 23 (4 April 2012).

¹² Honorés *ibid* page 264.

*Trust at the time that she signed the 'certificate in respect of a loan to a Trust' on 22 January 2007'*¹³

[23] **Meijer** references the afore-quoted excerpts from **Honorés** insofar as the trite legal principles at common law and the statutory prescripts of Section 21 of the TPCA are concerned. Dlodlo J, as he then was, goes on to pose the very question that this Court is called upon to answer in *casu* namely:

*'The question which is more vexed, however, is (a) whether the resignation of a Trustee is of any force and effect until such time as the Master has appointed and authorised another Trustee to act in his or her stead and (b), if not, whether or not the statutory mode of resignation (as provided for in Section 21) was meant to lay down the rule for all resignations - regardless of the fact that the internal requirements provided for in the Trust instrument have been met.'*¹⁴

[24] It is trite that when a Trustee authorised by the Master to act, resigns, the statute mandates the prompt return of the written authority to the Master.¹⁵ However, the Act is silent on exactly when the resignation becomes effective. The Court in **Meijer** considered the judgment of **Soekoe NO v Le Roux**¹⁶ ("Soekoe"), where it was held that the resignation only becomes effective once the Trustee who resigned was replaced by his or her successor.¹⁷ The writers of **Honorés** proposed that *'[t]his could be the proper approach if the resigning Trustee is the only (or the only remaining) Trustee in a particular instance. But in Meijer NO v Firstrand Bank Ltd'*¹⁸the

¹³ At para [7].

¹⁴ At para [7].

¹⁵ Section 20(3) of the Trust Property Control Act 57 of 1988 '(3) If a Trustee authorized to act under section 6(1) is removed from his office or resigns, he shall without delay return his written authority to the Master.'

¹⁶ [2007] ZAFSHC 135 (29 November 2007).

¹⁷ At para 8 '...Mr La Grange, inter alia, relied on WM Soekoe and Others v Le Roux (an as yet unreported judgment of the Free State - Case 898/2007 (O)), where Rampai J held as follows: "I have already found that the Respondent's resignation on 10 October 2006 did not legally relieve him of his duties as Trustee. He remained legally accountable to his fellow Trustees for the entire period until the Master of the High Court officially removed him from office as a Trustee. ... The respondent's duties did not fall away when he resigned, but when he was replaced by the third applicant.'

¹⁸ At para 11.

Court suggested an alternative because the approach in *Soekoe* could lead to "hardship".¹⁹

[25] The Court in *Meijer* remarked that *Soekoe* has faced criticism, particularly in academic circles, which I regard as being worthy to restate in order to understand how this vexing question has been dissected with a view to possibly finding an answer to the lacuna in the law in this context. Justice Dlodlo, as he now is, distilled the various interpretations and academic critiques as follows:

'It is true that judgment in Soekoe matter supra has been the subject of criticism particularly in academic circles. See for instance Olivier Strydom & Van den Berg Trust Law and Practice, p 3.17 et seq, where the authors point out that the decision creates practical problems. What is important to note, however, is that the authors also justify their criticism by saying that: "Once a Trustee has, in our opinion, complied with the provisions of Section 21 we find it hard to understand how it could be the intention of the legislature that that Trustee still remain liable until new letters of authority had been issued by the Master of a High Court". Olivier et al, Trust Law and Practice, seem to be more circumspect. At p 3-18 they say the following: "Furthermore if a Trust Deed provides for resignation by a Trustee in a certain manner, compliance with that provision of the Trust Deed should be enough. It might be worthwhile to include a clause in a Trust Deed stating that a Trustee's resignation will be effective from the date upon which the Master of the High Court receives notice of such resignation." With regard to the question posed in (b) supra, Cameron et al, in Honore's South African Law of Trust seem to subscribe to the view that the statutory mode of resignation provided for in Section 21 is not prescriptive in instances where the Trust instrument permits resignation:

"Apart from the requirement of written notice introduced by the Trust Property Control Act, when the Trust instrument permits resignation there are no particular formalities for resigning, apart of course from those the instrument itself may specify. The object of the statutory provision concerning resignation appears to be to allow a Trustee to resign notwithstanding the provisions of the Trust instrument, not to impose a formality of written notice of the Master and others on all resignations. The statutory mode of resignation is additional, and is capable of being exercised alongside other methods permitted by the Trust instrument."

¹⁹ *Honorés ibid* page 265.

Discussion

[26] It is undisputed that Mr Stofberg resigned as the third Trustee on 12 June 2019, by giving written notice. On 29 March 2021, the Master of the Western Cape High Court, noted Mr Stofberg's resignation. The SPECIAL POWER OF ATTORNEY was signed on 14 December 2022.

[27] It is my view, that there cannot be a proverbial one size fits all approach, as it is manifest that Section 21 is not prescriptive in instances where the Trust instrument permits resignation. To my mind, if a Trust Deed makes provision for the resignation of a Trustee in a particular manner, such provision of the Trust Deed ought to be honoured and implemented accordingly. The grey area arises when the Trust Deed does not specify the effective date of a Trustee's resignation. This may lead to a number of permutations which might include *inter alia*:

- a) The actual date of the resignation;
- b) The date when the written notice was sent to the Master and ascertained beneficiaries;
- c) The date when the Master receives the notice of the resignation;
- d) The date when the Master notes the resignation (acknowledges receipt thereof)
or
- e) The date when the Master officially removes the Trustee from office and issues amended letter of authority.

[28] To reiterate, in terms of the TPCA, regardless of whether the Trust instrument provides for the Trustee's resignation, the Trustee may resign by written

notice to the Master and the ascertainable beneficiaries who have legal capacity. This, notwithstanding the provisions of the Trust instrument. Therefore, even if the Trust Deed makes provision for resignation, a Trustee may invoke the statutory provision for resignation which appears to be an additional option available to a Trustee. The writers of *Honorés* proposes that if a Trustee resigns in terms of Section 21 of the TPCA, the resignation should take effect not only upon it being shown that the written notice was sent to the Master and ascertained beneficiaries, but also upon the Master acknowledging receipt of that notice.²⁰ This reasoning fails to account for safeguards in situations where for instance, the Trustee's resignation was arbitrarily motivated, possibly to the detriment of the Trust beneficiaries. It is important to note that if the Trust instrument stipulates additional requirements concerning resignation, a Trustee's resignation will be effective only once these requirements have been fulfilled.

[29] This Court must carefully scrutinise the provisions of the Trust Deed with a view to establishing whether there were any additional and further prerequisites pertaining to the resignation of a Trustee. In *casu*, the salient clause in the Trust Deed stipulates that²¹:

'5.5. 'n Trustee hou op om as 'n Trustee van die Trust op te tree:
5.5.1. as hy as Trustee bedank, wat hy geregtig is om te doen deur skriftelike kennisgewing aan sy mede-Trustee(s) te dien effekte;²²

[30] The Trust Deed specifically states that the Trustee ceases to act in that capacity if he resigns as a Trustee, which he is permitted to do by simply giving written

²⁰ *Honorés* *ibid* page 265.

²¹ Trustakte, Record Page 222.

²² Applicant's Note in Rebuttal, para 8, page 3: 'A loose translation of this provision is as follows:

"5.5. A Trustee will no longer act as a Trustee for the Trust:

5.5.1. If he resigns as a Trustee, which he is allowed to do by giving written notice to his co-Trustee;"

notice to his co-Trustee. On a strict interpretation of Section 21 of the TPCA, that resignation should be considered effective when it is shown that the written notice was sent to the Master and ascertained beneficiaries, but also upon acknowledgment by the Master of the receipt thereof. In *casu*, the Trust instrument did not stipulate other requirements with regards to resignation, except that he was to give written notice to his Co-Trustees. To my mind, the common sense and business-like approach proposed by the Respondents would essentially curtail a Trustee from relinquishing their fiduciary obligation until such time as the Master has amended the letters of authority to appoint a new Trustee.

[31] Mr Stofberg's resignation is dated 12 June 2019 and reads as follows:

*'Aanvaar hiermee my bedanking as Trustee van Bloubank Boerdery Trust...
Ek hoop en vertrou u vind bogenoemde in orde so.'*

[32] It is evident that the Trustee provides no reasons for resigning. There is no requirement in the Trust Deed that the resigning Trustee needs to provide reasons for resignation. It seems that Mr Stofberg has fulfilled the requirements as set out in the Trust Deed. Nothing more was required of Mr Stofberg on an ordinary grammatical reading of the Trust Deed. It is however, noteworthy that the Trust Deed does not address the resigning Trustee's residual legal obligations. In terms of the TPCA, it is sufficient for the resigning Trustee to notify his Co-Trustees and the Master of his resignation and once the Master acknowledges the resignation, it becomes effective.

[33] In reply to a letter dated 30 November 2020, the Master directed a letter to BVSA Worcester (Pty) Ltd, bearing date stamp 29 March 2021, as follows:

'...

I hereby confirm that the resignation as Trustee by Boshoff Visser Trustdienste (Pty) Ltd has been noted and placed on record.

*In order for a new Letter of Authority to be issued please provide the following:
Original Letter of Authority dated 13 July 2015 or a sworn affidavit by the Trustee if it cannot be located*

*Acknowledge by the remaining Trustees that they are aware of the resignation
Advise whether or not this is a "family business Trust", if so then provide the necessary documentation to appoint an independent Trustee OR written motivation to waive same'*

[34] The Master has essentially acknowledged the resignation. The context of the Master's response is to be considered. I will deal with this aspect in greater detail later in this judgment. However, I deem it necessary to reiterate that it is not about the resigning Trustee obtaining the Master's permission to resign, which is not a requirement, it goes to the heart of clearly defining the procedure for resignation insofar as:

- a) When it is deemed to be effective; and
- b) Whether interim measures ought to be put in place to ensure that the business of the Trust continues to function; and
- c) Curtailment of arbitrary resignations.

[35] I interpolate to state that I am ever mindful that Section 21 of the TPCA is a progression beyond the common law, however, it appears that a Trustee has the liberty to resign without providing justification for relinquishing its fiduciary obligations. There appears to be no safeguards to prevent arbitrary resignations of Trustees. In my view, it is not competent for a Trustee to simply give up his or her fiduciary duty by simply electing not to fulfil them. As I see it, fiduciary obligations must override private

convenience in circumstances where no cogent reasons have been advanced by a resigning Trustee.

[36] In a letter penned by Mr Stofberg dated 13 May 2024, addressed “to whom it may concern”, he writes that as at that date, no new letters of authority were received and essentially indemnifies BVSA Worcester (Pty) Ltd from any consequential financial loss or damages that may flow.

‘Hiermee bevestig ons as rekenmeesters van bogenoemde Trust dat Mnr AJ Stofberg reeds as Trustee bedank het on 12 Junie 2019. Daar is nog nie ‘n nuwe magtingingsbrief om te bevestig nie.

BVS Worcester (Edms) Bpk en sy direkteure aanvaar geen aanspreeklikheid ten opsigte van enige finansiële verliese of skade wat enige party mag lei as gevolg van die vertroue wat hulle op hierdie skrywe geplaas het nie.’²³

[37] Mr Stofberg considered it essential to indemnify BVSA Worcester (Pty) Ltd from any consequential financial loss or damages. This suggest to me that he was uncertain about his status as a resigning Trustee and, for good measure, believed that it was important to direct this communication to the Master. Of further significance, it was emphasised that no amended letter of authority was issued. There was clearly a concern that the status of Mr Stofberg as Trustee could be deemed as extant notwithstanding the “noted” letter of resignation.

[38] In **Soekoe** (*supra*), it was unequivocally established that a resigning Trustee remained legally accountable to his fellow Trustees until the Master formally removed him from office as a Trustee. Furthermore, his duties did not cease upon resignation, but instead he was succeeded by a new Trustee.

²³ Annexure “AA16”, Record page 193.

[39] It however behoves this Court to consider the matter of *Investec Bank Ltd v Adriaanse* ²⁴ (“Adriaanse”), which the Applicant referred to as being directly relevant to the matter in *casu*. In *Adriaanse*, Investec Bank instituted action against the Defendants, in their capacity as Trustees of the Kudu Trust, based on a suretyship executed by the Kudu Trust in favour of Investec for the indebtedness of Scarlet Ibis Investments (Pty) Ltd, having been liquidated, to Investec. Scarlet Ibis, represented by the Second Defendant, Mr Adriaanse, applied for a loan from Investec. Investec granted the loan against certain measures being put in place to secure the loan which included a suretyship entered into by Adriaanse in his personal capacity, along with a suretyship by the Kudu Trust. The Defendants’ opposition based on the premise that the Trust lacked competence to execute such surety as it was not to the advantage of the beneficiaries and therefore, exceeded the Trustee’s authority. It argued that Investec had an obligation to interrogate the transaction with increased diligence, ensuring that it would be sustainable for the benefit of the Trust and beneficiaries. The Defendants further submitted that, even if it is found that it did fall within the Trust’s powers, it was not executed with the consent of all Trustees, based on the fact that the third Trustee, Mr Kleingeld, had not signed the resolution to enter into such suretyship. The Court was called upon to determine *inter alia*:

- a) whether the execution of the suretyship was to the advantage of the Trust and the beneficiaries, as was required by the Trust Deed; and
- b) if so, whether all of the Trustees consented to said suretyship; and
- c) whether they were empowered to do so in terms of the Trust Deed.

²⁴ 2014 (1) SA 84 (GNP) [23].

[40] The Court held it to be trite that *"Trustees have the primary responsibility to act in accordance with the dictates of the Trust Deed, and one should guard against the unintended consequence of developing a quantitatively higher standard of diligence and care on the part of the outsider dealing with a Trust, than on the part of the Trustees themselves."* The defendants maintained that Investec needed to ensure there was a benefit to the Trust and its beneficiaries, thereby relieving the Trust of responsibility for its assessment of profitability and placing the onus on Investec for not doing their due diligence and examining the Trusts projections. The Court determined that this approach to go *"against simple logic and the dictates of business efficiency, which should characterise the dealings between a Trust and the outside world."* The Court deemed this defence to be unsustainable and rejected it. In determining whether there was sufficient consent to conclude the suretyship, the Court accepted that the third Trustee had resigned from holding such office and, therefore, at the time of conclusion of the suretyship agreement in question, the Kudu Trust only had two Trustees, namely the First and Second Defendant, both of whom had duly signed the authorising resolution and had consented thereto. In determining whether the Trustees were empowered to conclude the suretyship, the Court held that aside from the fact that the Trust Deed required there to be three Trustees at all times, it had regard to the plain language construction and found there to be no limitation on the remaining Trustees' powers in respect of executing the deed of suretyship. The Court eventually determined that the remaining Trustees were empowered, according to the Trust Deed, to do so.

[41] Since the promulgation of the TPCA, neither the founder nor the other Trustees may refuse a Trustee's resignation. This is also applicable to the Master of the High Court. The principle essentially embraces the notion that a Trustee cannot

be forced to remain in office against his or her free will. In terms of **Adriaanse**, the Court held that while outsiders have an interest in self-protection, the primary responsibility for compliance with the Trust Deed rests with the Trustees.

[42] The Court in **Adriaanse** did not address the question of when a Trustee's resignation became effective. However, and appositely so, the Court determined that there was no limitation on the remaining Trustees' powers in respect of execution of the deed of suretyship. This perspective, in my view, is instructive on the Courts approach. It is indeed the Trustees' primary obligation to act in accordance with the dictates of the Trust Deed. However, each matter is to be determined on its own merits, bearing in mind that there may be practical constraints. In *casu*, Mr Stofberg had already resigned in 2019 and by 2024, no new letters of authority were issued.

[43] Therefore, in an attempt to demystify the identified lacuna, the Chief Master's Directive may be informative and could provide valuable insights into the relationship between Trust instruments and the TPCA. In this regard, The Chief Master's Directive 2 of 2017, dealing with various Trust matters stipulated as follows regarding the resignation of a Trustee:

'Procedures for the resignation of a Trustee may be contained in the Trust instrument in which instance such procedures should be adhered to. Section 21 of the Trust Property Control Act does not exclude or override the provisions of a Trust instrument which allow a Trustee to resign. For more information on this aspect, refer to Meyerowitz D, *The Law and practice of Administration of Estates and their Taxation*, 2010 edition, par. 23.26 and Cameron E, De Waal M, Wunsh B, Solomon P & Kahn E, *Honoré's South African law of Trusts*, 5th edition, 9228-229.²⁵

²⁵ Meyerowitz D et al *'The Law and practice of Administration of Estates and their Taxation'* (Juta) 2023 Ed, 24.23, p 454. 'What if the Trust instrument provides that a Trustee may resign by, say, giving notice to his co-

Where the Trust instrument fails to make provision for the resignation of a Trustee the provisions of section 21 of the Trust Property Control Act, 1988 will apply.

In terms of section 21 of the Trust Property Control Act, 1988 a Trustee must give notice of his or her resignation in writing to the Master and to the ascertained beneficiaries. The Courts have not, on the date of this directive, had the opportunity to decide what ascertained beneficiaries in the context of section 21 of the Act means, Masters must therefore give the words their normal meaning, namely beneficiaries with vested rights that are known to the Trustees.

The Trust Property Control Act, 1988 does not contain any provision authorising the Master to refuse to accept the resignation of the Trustee. Masters must note that upon his or her resignation a Trustee is not absolved from any liability incurred while he or she was a Trustee.²⁶

[44] The learned authors of ***Wills and Trusts***²⁷ is similarly insightful on this point, where they appositely opined as follows:

'It appears that the more flexible approach in the said Meijer case with regard to notice of resignation in terms of section 21 can form a good and practical base for determining when a resignation of a Trustee actually takes effect, even in the case of alternative methods of resignation as prescribed by a specific Trust Deed. For instance, if the deeds prescribe notice of resignation to be given to the co-Trustees, it is submitted that it can only take effect not only upon it being shown that the written notice was sent to the co-Trustees and the Master, but upon acknowledgement by the Master of the receipt thereof (as per the Meijer case). It is suggested that this is also a case, whether it be a notice to the ascertained beneficiary as required by, for instance, a particular Trust Deed. It is further suggested that this is required for the sake of legal certainty and because of the indispensable role of the Master in the authorising and removal of Trustees. Thus, the Master's acknowledgement of receipt of the notice of resignation should perhaps in all instances be the trigger moment or moment to cause the resignation to take effect, and not the removal of the name of the Trustee from the letter of authority. This could be conducive of more fairness as well as legal certainty because in respect of the

Trustees? It is submitted that such resignation would be effective; s 21 does not exclude or override the provisions of a Trust instrument which allow a Trustee to resign.'

²⁶ Circular 13 of 2017, Head Office File 12/4/2 & 5/9/3/2), dated 6 March 2017, para 3.9.

²⁷ Van der Westhuizen & Pace *'Wills and Trusts'* (LexisNexis), 6.2.4.1 – Resignation by Trustee.

acknowledgment by the Master of receipt of a notice of resignation, the resigning Trustee is more directly involved in the process by, for instance delivering a notice to the Master's office and getting a date stamp on a copy of the letter of resignation than when due to possible delays in the Master's office which may occur between the delivery to his office and the removal of the Trustee's name from the letter of authority, a resigning Trustee could be unfairly prejudiced.' [my emphasis]

[45] Dlodlo J, in **Meijer** recognised the importance that there be legal certainty and remarked as follows:

'I am of the view that this is exactly why Rampai J in Soekoe matter supra decided that matter in the manner already referred to in this Judgment. To ameliorate any possible hardship that may result from the above finding made by Rampai J, it is suggested that proof of the fact that resignation had been sent to the Master in writing coupled with an acknowledgement of receipt by the Master's office should suffice. In my view, in the latter scenario, the Trustee should be deemed as having resigned. In other words, the resignation should take effect not only upon it being shown that the written notice was sent to the Master and the ascertained beneficiaries, but upon an acknowledgement by the Master of the receipt thereof. Merely because the papers in the instant matter do not prove that the Master was notified in writing of the two Applicants' resignation, I hold that they remained Trustees.'

[46] The Court ultimately determined that the moment the Master acknowledged receipt of the Trustee's resignation, would be when the resignation was deemed to take effect. The reasoning behind Justice Dlodlo's view was to ameliorate hardship to the resigning Trustee. The Respondents in *casu* however, submitted that it can hardly be said to be hardship to have to continue to act as a Trustee until letters of authority are amended. They contended that the consideration of hardship is to be viewed in relation to the potential hardship that beneficiaries of a Trust may suffer in light of the fiduciary responsibilities that such appointment holds.

[47] The golden thread that runs throughout the authorities relied upon by the parties are pellucid, in that a Trustee is permitted to resign if a Trust instrument makes provision in this regard. It is furthermore manifest that Section 21 of the Act does not supersede the provisions contained in a Trust instrument. A Trustee cannot reasonably be expected to remain in office against their will. Therefore, there was no prohibition on Mr Stofberg's resignation which by and large complied with the provisions of the Trust Deed.

[48] The only issue remaining is the determination of the precise moment when Mr Stofberg effectively resigned. In this regard, the academic opinion from **Wills and Trusts** grappled with the issue when the resignation of a Trustee actually takes effect, namely whether it can be the date of resignation, or the date on which the resignation is received by the Master or another date entirely. They opined that *'for the sake of legal certainty but not necessarily of fairness. It is submitted that the resignation can take effect (and the authority granted is terminated) only after the Master has removed the name of the Trustee from the letter of authority.'* They then proceed to acknowledged the confirmed position taken in the **Soekoe** matter.

[49] To reiterate, if the timeline were to be taken into account in this matter *in casu*, it is evident that although Mr Stofberg resigned in 2019, by May 2024, the Master had yet to issue new letters of authority. Given the circumstances, it would, in my view be unreasonable to expect a Trustee to continue to hold office for such an inordinate duration.

[50] The next question to wrestle with is whether the approaches postulated in **Soekoe and Meijer** would amount to compromising fairness over legal certainty.

Maintaining a balance, in my view, requires an approach that avoids the necessity of making these challenging decisions. It cannot be the case that, on one hand, a Trustee is forced to remain in office while, on the other hand, the beneficiaries of the Trust stand to be adversely affected if the process lacks clarity. In this case, the TPCA is silent on when the resignation of a Trustee actually takes effect.

[51] For instance, in matters where a child's interests need to be safeguarded, as seen in the *Soekoe*, where a Trust was established to assist a minor child whose parent had been killed in a motor vehicle accident. The reasoning postulated by the Applicant in *casu* would result in the Trust being administered by the remaining Trustees without a professional Trustee to look after the funds in the Trust. In circumstances such as these, it is my view that the scales must tip in favour of ensuring that the Trust operates for the benefit of the beneficiary, being the minor child.

[52] It therefore behoves this Court to consider the matter in *casu* through the lens of its unique factual matrix as the Trust in question. The matter of *Soekoe*, although, unreported, provides valuable insight into the Court's approach pertaining to the resigning Trustee's accountability to his fellow Trustees until the Master formally removed him from office as a Trustee. It highlights that the resigning Trustees responsibilities do not cease upon resignation, but rather continue until such Trustee is replaced with a new Trustee. Whilst the Applicant argued that the reasoning in *Meijer* is on point, thorough and unassailable, the Respondents postulated that the Court in *Meijer* made mere *obiter* comments on the issue. They contended that a firm

finding on the issue was made in **Soekoe**; which was not overturned in either **Meijer** or **Sidwell NO v Du Buisson NO** ²⁸(*Sidwell*).

[53] The Respondents advanced an argument that the “unassailable” reasoning was based on academic criticism of the **Soekoe** judgment. The Respondents argued that this “unassailable” reasoning is ultimately just a conclusion by the authors of **Trust Law and Practice**, in terms of which they concluded that they *‘find it hard to understand how it could be the intention of the legislature that a Trustee will remain liable until new letters of authority had been issued by the Master of the High Court.’*²⁹ The Respondents’ critique of the writers conclusion is founded on the fact that they did not provide any reasoning as to why they find it hard to believe that this should be the intention.

[54] The approach adopted in **Sidwell**, where the Court suggested that despite formalities stipulated in a Trust instrument itself, the provision of section 21 of the TPCA, must in any event be complied with, appears to be premised on an approach to overcome the lacuna earlier identified. This is, because section 21 of the Act only deals with circumstances under which a Trustee may resign, stipulating certain formalities that must be complied with. It does not stipulate the event at which the Trustee will no longer be regarded as a Trustee of the Trust.

[55] In *casu*, Mr Stofberg occupied the position of Trustee as an independent Trustee. On 29 March 2021, the Master enquired whether the resignation of Mr Stofberg was acknowledged by the remaining Trustees and whether they are aware

²⁸ [2015] ZAFSHC 177 (18 August 2015).

²⁹ *Meijer ibid* para 8.

of it. The Master subsequently enquired about the nature of the Trust, specifically whether or not it was a family business Trust and if so, then the necessary documentation had to be provided to appoint an independent Trustee, or a written motivation had to be submitted to waive same. The response from the Master appears to be in keeping with the Chief Masters Directive 2 of 2017 as earlier referred to in this judgment. It appears evident that the Master in conducting the said enquiry required the necessary documentation to initiate the process for the appointment of another independent Trustee. The Master was clearly astute to ensure that the provisions of Section 21 of the TPCA was complied with in relation to whether the written notice of Mr Stofberg's resignation was also provided to the ascertained beneficiaries. In terms of these Directives, the notice must be given to beneficiaries with vested rights and interest that are known to the Trustees.

[56] The Respondents argued that there has been a lack of compliance with Section 21, as it remains unclear whether the beneficiary, Charlotte Orffer was notified of his resignation. It was emphasised by the Applicant that because the Trust is a discretionary Trust, Charlotte Orffer is an income beneficiary of the Trust. As such, Charlotte Orffer only acquires a vested right and becomes a beneficiary for the purposes of Section 21 of the TPCA, after the Trustees have made the decision to distribute income to the beneficiary. There is no evidence before this Court that Charlotte Orffer is a beneficiary with a vested interest and that she required notice of Mr Stofberg's resignation in terms of Section 21 of the TPCA. The Applicant contended that because the Respondents allege that Mr Stofberg's resignation is invalid, it was for them to prove that the resignation was invalid.

[57] The Applicant further submitted that as Co-Trustees and family members of the beneficiary, it was within their knowledge necessary to determine whether the beneficiaries had vested rights and whether they were informed of Mr Stofberg's resignation. The Applicant contended that it is both opportunistic and disingenuous for the Respondents, who are aware, or should reasonably be aware whether the beneficiaries have vested rights and have been informed, to argue that there is no evidence that they have been notified. The Applicant therefore submitted that Mr Stofberg's resignation complies with section 21 of the Act and that the SPECIAL POWER OF ATTORNEY is valid and binding.

[58] To reiterate, the TPCA does not contain any provision authorising the Master to refuse to accept the resignation of the Trustee. However, in terms of the Chief Master's directive, it is incumbent upon the Master to consider that upon the resignation of a Trustee, the said Trustee is not absolved from any liability incurred during his or her tenure as a Trustee. Therefore, if regard is had to the relevant literature and authorities on point, it cannot be that a beneficiary can be imperilled by the resignation of a professional Trustee being immediate. The fiduciary responsibility of a Trustee cannot be overemphasised.

[59] A Trustee fulfils a fiduciary role, bearing a duty of utmost good faith towards the Trust and its beneficiaries. Therefore, it cannot simply be a matter of metaphorically abandoning the ship proverbially speaking once a resignation is tendered or the Master notes a resignation. This, because a Trustee's fiduciary responsibility is the legal obligation to act in the best interests of the Trust and its beneficiaries. Therefore, those individuals who accept such position must understand the seriousness of the position. Binding a resigning Trustee to their duties during this

period until such time the Master formally removes him or her from office through the issuance of new letters of authority, as per the Court's approach in **Soekoe** would be tantamount to overriding the provisions of the Trust instrument. Inasmuch as the Master has no power to refuse resignations, the Master, as the overseeing authority must, in my view, ensure that Trusts continue to operate from the time that the resignation is noted until new letters of authority is issued. Administrative delays in adopting the approach in **Soekoe** would effectively mean that Mr Stofberg would not have been released from his fiduciary obligations until some years later.

[60] Although Mr Stofberg has tendered his written resignation in 2019, the Master was still enquiring as to whether formalities were complied with in 2021, and as at May 2024, the Master had not issued new letters of authority. Given these circumstances, it would appear unreasonable to expect a Trustee to continue to hold office for such an undue period of time. The Master emphatically stated that in order for a new letter of authority to be issued, the original letter of authority dated 13 July 2015 was necessary. Additional queries were also raised. Consequently, any delay in issuing new letters of authority cannot imperil the resigning Trustee as it has been demonstrated in *casu* that this process could take an inordinate time.

[61] As previously stated, Justice Dlodlo in **Meijer** acknowledged that there was no legal certainty and already postulated the view that "*It is important that there be legal certainty in this regard*", which view I echo. It is furthermore worthy to mention that **Meijer** is distinguishable from the matter in *casu* in that the Master was not informed about the resignations. The legal debate on point provides no conclusive approach. In my view, unless and until the legislation addressing the lacuna is changed, or until binding authority on point has been established, divergent legal

decisions and academic literature will continue to saturate the jurisprudence with divergent perspectives in this regard.

[62] To maintain a balance, it is essential to adopt an approach that addresses both fairness and legal certainty regarding the effective date of the resignation of a Trustee. I propose that Section 21 of the TPCA be read in conjunction with Section 20(3) of the TPCA which makes it peremptory for the written letter of authority to be returned to the Master without delay.³⁰ To my mind, once the written letter of authority has been returned by the resigning Trustee's, his or her fiduciary obligation ceases.

[63] However, for the purposes of these proceedings in considering the aforementioned cumulative factors along with the unique facts of this matter, I determine that Mr Stofberg's resignation became effective when the Master noted the resignation "*as Trustee by Boshoff Visser Trustdienste (Pty) Ltd*". This determination is furthermore premised on the fact that Section 21 of the TPCA does not override the provisions in the Trust instrument in terms of which there was compliance.

[64] Having considered the lacuna identified in the law regarding the effective date of a Trustee's resignation in terms of the TPCA, I conclude that the First and Second Respondents were empowered to sign the resolution and SPECIAL POWER OF ATTORNEY on 14 December 2022. On this basis alone, the Respondents' counter-application requesting that the Court confirms that it is not bound by the SPECIAL POWER OF ATTORNEY falls to be dismissed. Should I be wrong in

³⁰ See fn16.

reaching this conclusion, I deem it necessary to consider the alternative relief sought by the Respondents in the counterclaim.

The alternative relief sought in the counterclaim

[65] The Trust in the alternative seeks an order for the revocation of the Special Power of Attorney, thereby declaring SPECIAL POWER OF ATTORNEY the sale agreement with the third party be declared of no force or effect or be set aside. alternatively, the Trust applies for an order that registration of transfer in terms of the disputed sale agreement be stayed, pending the finalisation of action proceedings which the Trust intends to institute, asserting that the disputed sale agreement is of no force and effect, alternatively should be set aside by the Court.

[66] The Applicant argued that the Trust's alternative relief sought in paragraph 3 of its counter application is lacking in competence. The relief, in paragraph 3 of the counter application is in the alternative to paragraph 2, and accordingly only arises for determination if the relief in paragraph 2 is dismissed. If the relief in paragraph 2 is dismissed, the validity of the sale agreement has been determined and is accordingly *res judicata*. Therefore, it was asserted that the Trust is impermissibly seeking a re-determination of issues which have already been determined.

Revocation of the SPECIAL POWER OF ATTORNEY

[67] This Court, having determined that the SPECIAL POWER OF ATTORNEY was properly executed by the Trust, is now required to consider whether the Respondents' contention that it is not bound by the SPECIAL POWER OF ATTORNEY because the SPECIAL POWER OF ATTORNEY was revoked on 24 April

2023 and/or 23 July 2024 is meritorious. In this regard, the Trust averred that its indebtedness to the Applicant ceased to exist when the Witzenberg farm was transferred from the Witzenberg Trust to Cape Five Properties (Pty) Ltd in 2018. This contention in and of itself cannot, in my view, be sustainable, as this event pre-dated the resignation of Mr Stofberg and the signing of the SPECIAL POWER OF ATTORNEY. The resolution was officially signed on 14 December 2022. Of significance is the fact that 2 agreements were entered into, but the Trust only applies to set 1 of the agreements aside. Therefore, it manifests that the Trust specifically mandated the Applicant to pay First National Bank and then pay themselves what is owed. This contradicts the assertion that the Trust's indebtedness fell away.

[68] In the alternative, the Trust averred that the debt ceased to exist on 17 May 2024, when an improved sale transaction for the farm for R17 million was proposed by the Trust but was purposefully delayed due to a lack of co-operation from the Applicant. Furthermore, the Trust submitted that from such date(s), the SPECIAL POWER OF ATTORNEY became revocable, and the Trust validly revoked the SPECIAL POWER OF ATTORNEY on 24 April 2023, alternatively on 23 July 2024.

[69] The Applicant raised 4 grounds opposing the Respondents contentions in this regard. Firstly, they asserted that the Trusts own argument is non-sensical as a mandate cannot be revoked twice. They submitted that the assumed revocations are not alleged in the alternative to each other. The Applicant suggested that this demonstrates *mala fides* of the Respondents and that throughout the history of this matter, they have repeatedly approbated and reprobated the validity of the SPECIAL POWER OF ATTORNEY. In fortification of this contention, the Applicant contended that it is only when it suits the Respondents that the SPECIAL POWER OF

ATTORNEY is alleged to be revoked and at all other times, they act in accordance with the provisions of the SPECIAL POWER OF ATTORNEY. By way of example, they demonstrated that the Respondents have in the eviction application, relied on its validity as a defence.

[70] Secondly, in reference to ***Smit and Others v Origize 166 Strand Real Estate (Pty) Ltd and Others***³¹, it was argued that the SPECIAL POWER OF ATTORNEY expressly provides that it shall remain in effect until the property has been sold and transferred, and the proceeds from the sale has been distributed in accordance with the provisions of the SPECIAL POWER OF ATTORNEY.

[71] Thirdly, they contended that as a matter of law, the SPECIAL POWER OF ATTORNEY cannot be revoked since it provided security for a debt. The Applicant reiterated that it is common cause that at the time when the SPECIAL POWER OF ATTORNEY was concluded the Trust was indebted to the Applicant which indebtedness remains unrefuted. They argued that in these circumstances and as authoritatively held in ***Smit and Others v Origize 166 Strand Real Estate (Pty) Ltd and Others*** (*supra*), the SPECIAL POWER OF ATTORNEY is irrevocable for the duration that the debt to the Applicant remains unpaid. Fourthly, they submitted that the Trust is estopped from alleging that the SPECIAL POWER OF ATTORNEY has been revoked.

[72] As mentioned earlier, the Respondents counterclaim must however be viewed against the backdrop of the earlier conclusion reached. Having determined

³¹ [2020] JOL 48745 (SCA).

that the remaining Trustees were empowered to pass a resolution, it follows that the SPECIAL POWER OF ATTORNEY was properly executed by the Trust.

[73] In considering the manner in which the Respondents articulated their plea for revocation, it is self-evident that a mandate cannot be revoked on two separate occasions. It is furthermore, telling that the Respondents have approbated and reprobated as to the validity of the SPECIAL POWER OF ATTORNEY and relied on its validity as a defence in the eviction application.

[74] The Applicant submitted that the Trust has through its representations, communications and conduct, throughout the interactions between the parties, and during the recent settlement of the eviction application, represented to the Applicant that it is still mandated by the Trust to sell the Property in terms of the SPECIAL POWER OF ATTORNEY. They predicate this contention on the following:

- a) The various communications between the parties, in which the Trust throughout does not persist with its revocation of the SPECIAL POWER OF ATTORNEY, but rather enquired about the progress made with the various sale agreements;
- b) After the first revocation of the SPECIAL POWER OF ATTORNEY on 23 April 2023, the Trust was invited to take the necessary legal steps in order to prevent the Applicant from further attempting to sell the property in terms of the SPECIAL POWER OF ATTORNEY. They assert that the Trust never took any such steps, nor did they attempt to set aside any of the previous sale agreements. The Trust in fact followed up on the progress of the sales.
- c) First and Second Respondents in the Heads of Argument filed on their behalf in the eviction proceedings submitted that the SPECIAL POWER OF ATTORNEY was still valid.

- d) The order granted in the eviction application, in which the parties recorded that there is at the date of the order no sale agreement, and the parties agree that the Applicant's Attorney of record, will keep the First and Second Respondents updated on any progress with the sale of the property.

[75] The Applicant contended that it was pursuant to these representations, that the Applicant acted and concluded the sale agreement. It is trite that one cannot both approve (approbate) and reject (reprobate) the same thing.³² This in my view, demonstrates that the Respondents, although now raising the lacuna in the TPCA as to when the resignation of a Trustee becomes effective, never challenged the validity of the SPECIAL POWER OF ATTORNEY in the eviction application. These legal principles highlight the importance of consistency and fairness in legal transactions.

Existing mandate

[76] In reference to *Smit and Others v Origize 166 Strand Real Estate (Pty) Ltd and Others*³³ it was argued that the SPECIAL POWER OF ATTORNEY expressly provides that it shall remain in effect until the property has been sold and transferred, and the proceeds from the sale has been distributed in accordance with the provisions of the SPECIAL POWER OF ATTORNEY. This argument, in my view, ties in with whether or not the SPECIAL POWER OF ATTORNEY is valid. It is noteworthy that the Respondents regarded the SPECIAL POWER OF ATTORNEY as valid for the purposes of the eviction. Yet, the Trust harbours the belief that it is not bound by the SPECIAL POWER OF ATTORNEY because the SPECIAL POWER OF

³² See *Union Government v. Smook's Trustee* 1924 AD 281; *Standard Bank of South Africa Ltd. v. Ocean Commodities Inc.* 1983 (1) SA 276 (A).

³³ [2020] JOL 48745 (SCA).

ATTORNEY was revoked on 24 April 2023 and/or 23 July 2024. It is evident that the Trust has approbated and reprobated, which is akin to flapping in the wind, proverbially speaking in its attempt to stop the impending sale of the property. This ties in with the doctrine of estoppel, as the Applicant argued that the Trust is estopped from alleging that it has revoked the SPECIAL POWER OF ATTORNEY.

Estoppel

[77] The doctrine of estoppel serves as an essential principle in both English and South African law, operating as a mechanism to prevent parties from conducting themselves inconsistently to the detriment of others who relied on their representations. The doctrine of estoppel is a fundamental legal principle that prevents an individual from claiming something contrary to what is implied by their previous actions, allegations, or conduct. In essence, estoppel requires consistency in one's words and actions. It also requires a clear representation by one party to another. The party relying on the representation must have acted to their detriment in reliance on it. This doctrine serves to promote fairness and prevent injustice by requiring parties to adhere to their representations when others have relied on them to their detriment.³⁴

[78] There are significant and notable authorities on the doctrine of estoppel in English law that are frequently referred to. These include ***Franklin v. Neate***³⁵ which explored detrimental reliance in equity; ***Hughes v. Metropolitan Railway Co.***³⁶, which established that representations can arise from conduct or implied promises; ***Central***

³⁴ Spencer Bower, K.R. *Handley, Res Judicata* (LexisNexis, 2021); G Spencer Bower, *The Law Relating to Estoppel by Representation* (4th ed, Butterworths, 2004).

³⁵ *Franklin v. Neate* (1844) 13 M & W 481.

³⁶ *Hughes v. Metropolitan Railway Co.* (1877) 2 App. Cas. 439 which also discussed the equitable underpinnings of estoppel in English law.

London Property Trust Ltd. v. High Trees House Ltd. ³⁷, a landmark case introducing promissory estoppel as a defence in contract law; and **Combe v. Combe**³⁸, which clarified that reliance must be detrimental and not merely reliance on a promise.

[79] These cases illustrate the application of estoppel in various contexts and have collectively shaped the modern doctrine of estoppel, particularly in establishing its scope and limitations. The principle of estoppel, as denoted in the aforementioned cases, prevents a party from denying or asserting anything that is inconsistent with their earlier actions, statements, or representations.³⁹

[80] An overview is necessary to address the jurisprudential significance, practical application, and doctrinal coherence of estoppel in relation to the previously mentioned authorities.

Representation

[81] Estoppel is founded on representation, whether, explicit or implicit. The cases of **Hughes v. Metropolitan Railway Co.** and **Central London Property Trust Ltd. v. High Trees House Ltd.** ("**High Trees**") underscore the potential for representations arising from both verbal and non-verbal conduct. Nevertheless, the doctrine's application can be contentious when attempting to ascertain the clarity and intent behind such representations. Although the **High Trees** case offers a compelling illustration of promissory estoppel within a contractual framework, the judgement fails

³⁷ *Central London Property Trust Ltd v. High Trees House Ltd* [1947] KB 130.

³⁸ *Combe v. Combe* [1951] 2 KB 215.

³⁹ Amplers' Precedents of Pleadings (LexisNexis, 10th edition), page 187.

to provide explicit guidance on the distinction between enforceable representations and mere assurances, which is a common critique of its broader consequences.

Detrimental Reliance

[82] Estoppel is not invoked frivolously as a result of the detrimental reliance requirement. The cases of ***Franklin v. Neate*** and ***Combe v. Combe*** emphasise the importance of substantive and demonstrable reliance. Nevertheless, the precise degree of detriment that is required continues to remain a subject of debate. The Court's focus on induced detriment in South African jurisprudence, as evidenced in ***MTO Forestry (Pty) Ltd v Swart NO and Others***⁴⁰, is consistent with the principle's equitable origins. However, it is subject to scrutiny due to the subjective nature of detriment assessment.

Consistency and Injustice

[83] The objective of the principle of consistency is to preserve the integrity of legal interactions. Authorities such as ***Blair Atholl Home Owners Association v City of Tshwane Metropolitan Municipality***⁴¹ demonstrate how estoppel promotes predictability in legal relationships. More particularly, it demonstrated the role of estoppel in ensuring consistency in administrative actions.

[84] However, the doctrine's perceived rigidity in restricting defences, as demonstrated in ***Moodley v Minister of Police***⁴², highlighted the limitations of procedural defences constrained by estoppel which has been perceived as a potential

⁴⁰ *MTO Forestry (Pty) Ltd v. Swart NO and Others* (2004) 6 SA 620 (SCA).

⁴¹ *Blair Atholl Home Owners Association v. City of Tshwane Metropolitan Municipality* (2014) 5 SA 511 (SCA).

⁴² *Moodley v. Minister of Police* (2020) ZACC 34.

drawback. In this case, the Respondent's capacity to contest procedural irregularities was arguably constrained by the doctrine.

Typologies of Estoppel

[85] Estoppel is effectively categorised into its fundamental forms, representation, conduct, and deed. This classification facilitates comprehension of its multiple applications. Nevertheless, the critique is rooted in the exclusion of promissory and proprietary estoppel, which have distinct jurisprudential underpinnings and practical relevance, particularly in English law. For example, proprietary estoppel, which was established in cases such as ***Thorner v. Major***⁴³, which defined proprietary estoppel and its applicability in property disputes. It addresses equitable considerations in property disputes, a dimension that remains inadequately examined in the current analysis.

Jurisprudential Comparisons

English Law

[86] The evolution of estoppel in English law has been primarily shaped by legal precedent, which demonstrates a pragmatic approach. Nevertheless, critics contend that this *ad hoc* evolution lacks a cohesive theoretical framework. While cases such as ***Hughes*** and ***High Trees*** exhibit judicial creativity, they also underscore the complexities associated with reconciling the equitable origins of estoppel with its contractual implications.

⁴³ *Thorner v. Major* [2009] UKHL 18.

South African Law

[87] The South African Courts have skilfully incorporated estoppel into a hybrid legal system, blending civil law traditions with common law principles. It is therefore manifest that there is no universal approach. The doctrine of estoppel has been applied in different contexts as illustrated in the more recent matter of ***MTO Forestry (Pty) Ltd v Swart NO and Others***⁴⁴, which addressed the doctrine of estoppel within the context of a contractual dispute. The Court held that estoppel can only be invoked where a party has been induced to act to their detriment by the other party's representation.

[88] ***Mthembu v Nkosi***⁴⁵ serves as an example of estoppel in property disputes, where the Court examined the application of estoppel in a dispute over a parcel of land. The Court determined that the respondent's actions had estopped him from disputing the appellant's rights to the land.

[89] The matter of ***City of Tshwane Metropolitan Municipality v Blair Atholl Home Owners Association (Pty) Ltd***⁴⁶, involved a dispute between a municipality and a homeowner's association. The Supreme Court of Appeal applied the doctrine of estoppel to bar the municipality from denying the association's rights, which had been established through a prior agreement.

⁴⁴ (2017) ZASCA 131.

⁴⁵ *Mthembu v Nkosi* (2021) 1 SA 35 (SCA).

⁴⁶ (2020) ZASCA 105.

[90] In *Moodley v Minister of Police*⁴⁷, the Court considered the application of estoppel in a dispute over a police officer's employment. The Court found that the minister's actions had estopped him from denying the officer's right to a hearing.

[91] The application of estoppel in unique socio-legal contexts, including land disputes, is illustrated by the cases referenced. However, the critique is rooted in the sporadic inconsistency in its application, which may be attributed to varying judicial interpretations of equity.

Practical Implications

[92] The consequences of estoppel, as described, underscore its transformative potential in legal disputes. However, the practical challenges cannot be overlooked which includes:

- a) Preventing a party from denying a representation; that is, a party may be prevented from denying a representation they made, even if it was incorrect or incomplete;
- b) Creating a binding obligation. In this regard, estoppel can create a binding obligation on a party, even if there is no formal contract or agreement and
- c) Limiting a party's defences and/or counter-claim(s).⁴⁸

⁴⁷ (2020) ZAKZPHC 34.

⁴⁸ Freedom of Contract and Estoppel: Treitel, G.H. *The Law of Contract* (Sweet & Maxwell, 2022); Atiyah, P.S. *Essays on Contract* (Clarendon Press, 1986).

(a) Preventing Denial of Representation

[93] Although estoppel's capacity to prevent a party from denying prior representations serves to promote justice, it is susceptible to being overextended. For example, failure to consider incomplete or ambiguous representations, as emphasised in **Combe**, may result in obligations that are not intended by the parties.

(b) Creating Binding Obligations

[94] The doctrine's ability to impose obligations in the absence of formal agreements, as demonstrated in **High Trees**, raises concerns regarding its intersection with the principle of freedom of contract. This tension is especially evident in commercial settings, where formal agreements and predictability are of the utmost importance.

(c) Limiting Defences

[95] The effectiveness of Estoppel in minimising defences, as demonstrated in **Moodley**, is emphasised, along with its potential for harshness. The Courts continue to face significant challenges in balancing procedural fairness and equity.

Conclusion and Recommendations

[96] The doctrine of estoppel plays a critical role in guaranteeing fair outcomes in a variety of legal contexts. The theoretical and practical dimensions of the subject are illuminated by the cases and principles that were examined.⁴⁹ The cases

⁴⁹ Judicial Guidelines and Theoretical Coherence: Burrows, A. *A Restatement of the English Law of Contract* (Oxford University Press, 2016); Neels, J. & Perling, J. "The Doctrinal Development of Estoppel in South African Law" (2020) *SA Law Journal* 137.

that were examined confirm its enduring relevance, while the critiques emphasise the necessity of continuous improvement to grapple with modern legal questions. It therefore behoves this Court to consider whether the reliance by the Applicant on the doctrine of estoppel finds application to the facts of the matter in *casu*.

[97] I interpose to state that Courts ought to seek consistency while accommodating the unique socio-legal contexts in which estoppel operates. The diverse applications in property, contractual, and employment disputes, highlight the need for nuanced judicial approaches. To my mind, a unified theoretical framework for estoppel, would strengthen its doctrinal robustness and predictability. Lastly, clear judicial guidelines for assessing detriment and reliance would mitigate the subjective variability in estoppel's application.

[98] These references clearly provide the legal context and authoritative support for the principles, cases, and critiques presented in the foregoing discussions. Consequently, having regard to the jurisprudence regarding the doctrine of estoppel and the key elements elucidated, I am satisfied that the doctrine of estoppel finds application to the facts of the matter in *casu*. In my view, the Trust has failed to persuade this Court that it has in fact revoked the SPECIAL POWER OF ATTORNEY in circumstances where the Respondents have placed reliance thereon for the purposes of the eviction. The doctrine of estoppel continues to serve as a testament to the legal system's ability to maintain a balance between certainty and equity. The conduct and representations of the Trust is therefore inconsistent with their later assertions and as such they are prevented from denying their previous conduct.

Consequently, the Trust is estopped from alleging that it has revoked the SPECIAL POWER OF ATTORNEY. To reinforce this conclusion, I have also considered the Applicant's contention that as a matter of law, the SPECIAL POWER OF ATTORNEY cannot be revoked as it was provided as security for a debt. In this regard, the Applicant reiterated that it is common cause that at the time the SPECIAL POWER OF ATTORNEY concluded, the Trust was indebted to the Applicant, and this indebtedness remains unrefuted.

Extant debt

[99] In the alternative, the Trust averred that the debt was eliminated on 17 May 2024, when the Trust proposed an improved sale transaction for the farm for R17 million. However, the Applicant's lack of cooperation resulted in a deliberate delay.

[100] In my opinion, this proposition is untenable and legally flawed, as its indebtedness can only be discharged when the debt is actually settled, rather than relying on an alleged improved sale transaction. The Applicant's reference to *Smit and Others v Origize 166 Strand Real Estate (Pty) Ltd and Others* clearly elucidated that the SPECIAL POWER OF ATTORNEY is irrevocable for as long as the debt to the Applicant remains unpaid. Therefore, I find that that SPECIAL POWER OF ATTORNEY remains in effect has not been revoked by the Trust.

The sale agreement with the third party be declared of no force or effect

[101] The Respondents submitted that the sale agreement does not comply with Section 2(1) of the Alienation of Land Act⁵⁰ due to the inadequacy of the "written

⁵⁰ Act No. 68 of 1981.

authority" of the Trust's signatory to such agreement. Section 2(1) of the Alienation of Land Act 68 of 1981 (South Africa) states:

'(1) No land as defined in section 1 of this Act shall be alienated, except by means of a written deed of alienation, signed by the parties thereto or by their agents acting on their written authority.'

[102] This section requires that any transfer of land ownership must be executed in writing, through a deed of alienation, and signed by the parties involved or their authorized representatives. In the landmark decision of ***Thorpe and Others v Trittenwein and Another***⁵¹ ("*Thorpe*"), the Supreme Court of Appeal ("SCA") issued a significant ruling regarding the declaration of a sale agreement as void. This ruling provides clarity on the circumstances under which a sale agreement can be declared void and highlights the importance of ensuring that sale agreements are properly drafted and executed to avoid disputes. The SCA held that a sale agreement can only be declared void in circumstances where:

- a) The agreement is invalid *ab initio* meaning it was never valid due to some inherent flaw or defect and
- b) The parties have not yet performed in terms of the agreement, where for instance, the buyer has not paid the purchase price, and the seller has not transferred ownership.

[103] The SCA emphasised that a sale agreement cannot be declared void retrospectively, more particularly after the parties have already performed in terms of the agreement. The implications of this ruling are significant for the following reasons

⁵¹ 2007 (2) SA 172 (SCA).

- a) if a sale agreement is declared void, any payments made or transfers of ownership that have taken place will be considered invalid;
- b) However, if the parties have already performed, the agreement cannot be declared void, and the parties will be bound by its terms.

[104] In accordance with the guidelines enunciated in **Thorpe**, the sale agreement, which was concluded on 28 May 2024, demonstrates that the Respondents have failed to make out a case on the papers that the sale agreement is invalid *ab initio*. They aver non-compliance due to lack of “written authority” from the Trust’s signatory to such agreement. The Court having found that the SPECIAL POWER OF ATTORNEY is valid, renders this ground of opposition unsustainable. It is apparent that the Applicant seeks an order to have the SPECIAL POWER OF ATTORNEY declared an original for the purposes of Regulation 65 of the Deeds Registries Act, which is necessary for the transfer of the property. In terms of the SPECIAL POWER OF ATTORNEY, the Applicant has the right to sell the property and to effect transfer thereof to the purchaser. I am not persuaded that the Respondents have made out a case that the sale agreement is of no force and effect.

Setting aside of the sale agreement

[105] The Trust also sought an order setting aside the sale agreement for the following reasons:

- a) The Applicant as the Trust’s agent did not act in good faith in signing the sale agreement on the Trust’s behalf and has an interest in the signing of the sale agreement which conflicts with its fiduciary duty under the SPECIAL POWER OF ATTORNEY; and

- b) The Trust has obtained a purchaser on more favourable terms than the sale agreement negotiated by the Applicant.

[106] The Applicant argued that the Trust's counter-application for the setting aside of the sale agreement is premised on the same grounds for its opposition to the application, save that it alleges a further ground namely that it has obtained a better offer, without stating who the purchaser is or providing the purported offer. There is accordingly no basis in law, they argued, that would allow a seller to unilaterally rescind from a sale agreement because it has obtained an offer for a higher purchase price and on this basis, they contend, that the counter application falls to be dismissed.

[107] In augmentation of this contention, the Court was referred to ***Kaya FM (Pty) Ltd v Gats Tour Operators (Pty) Ltd***⁵² ("Kaya") where the Court held that:

'A mandatory must carry out his mandate and not exceed the terms of his mandate. He must act in good faith and with reasonable care and the mandator is entitled to be informed as to the progress of the mandatory and can from time to time call upon him to furnish the relevant information.'

[108] The Court in *Kaya* clarified the function of an agent in a contractual agreement. According to the *Kaya* judgment, an agent creates a legal relationship not for their own benefit, but on behalf of another party. This means that an agent acts on behalf of the principal, and their actions have a direct impact on the principal's rights and obligations. In this context, the Court highlighted that a contract of mandate may consist of an undertaking to perform a task for another party in exchange for compensation. The agent or mandatory is expected to carry out the task without being

⁵² 2015 JDR 2457 (GP) at para 22.

subject to the directions of the mandator as to the time, place, or manner of fulfilling the mandate. However, the agent remains obligated to adhere to the directives provided by the mandator at the time the contract is concluded. The Court also emphasises that an agent must act in good faith and reasonable care, and the principal is entitled to be informed about the progress of the task. Accordingly, the agent has a fiduciary duty to act in the best interests of the principal and to provide regular updates regarding their actions.

[109] The Court was also referred to the matter of *Transvaal Cold Storage v Palmer*⁵³ in which it was clearly established that an agent's interest must not conflict with his duty. This principle is a core element of the law of agency, emphasising the fiduciary nature of the agent-principal relationship. The Court emphasised that an agent has a duty to act in the best interests of the principal, without any conflict of interest. An agent must not place their own interests above those of the principal or partake in actions that could jeopardise their loyalty to the principal. An agent must not place their own interests above those of the principal or partake in actions that could jeopardise their loyalty to the principal. An agent must not place their own interests above those of the principal or partake in actions that could jeopardise their loyalty to the principal.

[110] This principle has been consistently upheld in South African law, emphasising the importance of agents conducting themselves with integrity, transparency, and accountability in their interactions with principals. This trite legal principle has been reaffirmed in *Investec Bank Limited v Investec Private Bank*

⁵³ 1904 (3) TS 4 (3 November 1904), page 16.

Limited⁵⁴ where the Court emphasised the importance of agents avoiding conflicts of interest and prioritising the interests of their principals. **Absa Bank Limited v National Commissioner, South African Revenue Service**⁵⁵ highlighted the fiduciary duties of agents, including the duty to avoid conflicts of interest and to act in good faith. These cases demonstrate that the principle remains a cornerstone of the law of agency in South Africa.

[111] It bears mentioning that the Applicant contended that it is unclear whether the Trust relies on a common law fiduciary duty or a fiduciary duty imposed by the contractual agreement. This, they argued, is a significant distinction since the available remedies are determined by the alleged breached duty. They referenced the matter of **National Union of Metalworkers of South Africa obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited**⁵⁶ in this regard, where the Constitutional Court emphasised the importance of contractual good faith obligations over fiduciary obligations.

[112] The Applicant contended that it remains to be determined what the scope and ambit of the Applicant's duties were, and whether there was a breach and violation of those duties. In this regard, it was submitted that the Applicant's obligation was encapsulated in the SPECIAL POWER OF ATTORNEY, namely that it had to the best of its ability sell the property for no less than R12 million. The reserved price was determined by the Trust, and the Trust granted the Applicant a mandate to sell the property for R12 million. The Applicant asserted that it fulfilled such mandate. Therefore, the notion of an alleged conflict of interest as suggested by the

⁵⁴ 2011 (3) SA 531 (GSJ).

⁵⁵ 2015 (6) SA 287 (SCA).

⁵⁶ [2019] 9 BLLR 865 (CC).

Respondents is misguided according to the Applicant. The Trust, premises this argument that the Applicant had a conflict of interests because the first sale agreement provided for a fruit export agreement between O2 Fruit and Cape Five. The Applicant argued that this was not a term of the third and extant sale agreement. In addition, it was submitted that the Trust does not allege nor prove that the conclusion of the fruit export agreement is in conflict with the Applicant's obligation to sell the Property for R12 million. Therefore, according to the Applicant, there is no conflict of interest.

[113] The Applicant also refuted the claim that it frustrated its attempts to sell the property. This, they argued is devoid of merit. In support of its opposition hereto, it was submitted that there is no obligation on the Applicant to assist the Trust on its own, to sell the property. The Applicant was mandated to sell the property on behalf of the Trust and not to help the Trust to sell the property itself. This, notwithstanding the facts alleged by the Trust in this regard, does not evince a breach of any fiduciary duty or any frustration. The Applicant furthermore remonstrated that the Trust and the First Respondent possessed all the requisite information and knowledge regarding the property in order to conclude a sale agreement. They go on to state the Trust misapprehends that the agricultural operation which is conducted on the property by the Applicant pursuant to the lease agreement does not form part of the property.

[114] The SPECIAL POWER OF ATTORNEY encapsulates the scope and duties of the Applicant. The Applicant averred that it fulfilled such mandate. To the extent that a conflict of interest is alleged, the Trust in my view, has failed to allege or prove that the conclusion of the fruit export agreement is in conflict with the Applicant's duty in selling the Property for R12 million. I am therefore not persuaded that there is a conflict of interest as asserted by the Respondents. Consequently, I am in

agreement with the Applicant's contentions that there exists no legal basis that would allow a seller to unilaterally resile from a sale agreement because it has obtained an offer for a higher purchase price. Furthermore, there was no obligation on the Applicant to assist the Trust in the sale of the property. On this basis alone, the counter application for an order setting aside the sale agreement falls to be dismissed.

Joinder of further parties

[115] The Applicant in its Replying Affidavit, raises the issue that the Trust has failed to include O2 in its counter-application and that the counter-application should be dismissed on the basis of "misjoinder".⁵⁷ The Respondent correctly, in my view, noted that the Applicant in all likelihood meant to refer to the non-joinder of O2. Needless to say, this is merely a matter of semantics, as the argument raised by the Applicant in this regard is unambiguous. They submitted that O2 Fruit has a direct and substantial interest in these proceedings. The Applicant contended that the counter-application cannot be considered or determined without O2 Fruit, as O2 Fruit has not been joined.

[116] The Trust maintains that the joinder of O2 Fruit is not necessary in respect of the Trust's opposition to the relief sought by the Applicant on the basis that it is not bound by the SPECIAL POWER OF ATTORNEY alternatively that the SPECIAL POWER OF ATTORNEY has been revoked. In addition, they propound the view that O2 Fruit is not a party to the SPECIAL POWER OF ATTORNEY and that O2 Fruit not being before the Court as a party should not influence the Court's

⁵⁷ Replying Affidavit, record page 442, para 58.

consideration of the relief sought by the Applicant and the Trust's grounds of opposition thereto.

[117] In light of the conclusion to which I have come, I do not deem it necessary to consider whether O2 Fruit should have been joined as a party to the Counterclaim. I agree that O2 Fruit not being before the Court as a party should not influence the Court's consideration of the relief sought by the Applicant and the Trust's grounds of opposition thereto.

[118] The Respondents postulates that insofar as it pertains to the lacuna in the law concerning the effectiveness of a Trustee's resignation, and in light of the differing legal positions in the case law, it is probable that the Master should be given the opportunity to make submissions on the issue. Moreover, the Third Trustee has an interest if the resignation is deemed to not have taken effect yet. In light of the conclusion to which I have come to, I do not believe it necessary that the Master be given an opportunity to make submissions on the issue, as the Court extensively considered the relevant authorities, the legislature and the Chief Master's Directives.

Conclusion

[119] Finally, I am not persuaded that the Respondents have made out a case in its counter claim that the registration of the property be stayed pending a potential referral to oral evidence or a potential action. In my view, the Trust would be unjustifiably seeking a re-ventilation of issues which have already been determined. In any event, there is no factual dispute to refer to oral evidence.

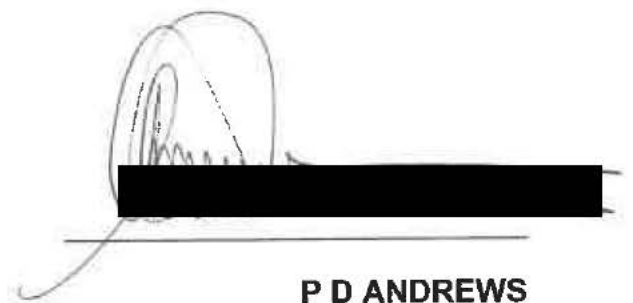
Costs

[120] It is trite that costs ordinarily follow the result. After carefully considering the complexity of the matter, its value and importance to the parties, in the exercise of my discretion, I am of the view that costs on Scale B are justified.

Order

[121] Having heard Counsel for the Applicant and Counsel for Respondents, and having read the papers filed of record, the following order is made:

1. The Special Power of Attorney dated 14 December 2022 is hereby declared an original for the purposes of Regulation 65 of the regulations in terms of the Deeds Registries Act, 47 of 1937;
2. The First and Second Respondents are liable to pay the costs of the application which costs are to include the reasonable costs of counsel on scale "B";
3. The Respondents counterclaim is dismissed with costs.



P D ANDREWS

Acting Judge of the High Court of South Africa
Western Cape Division, Cape Town

Case No: 17494/2024

APPEARANCES:

Counsel for the Applicant:

Advocate Marnes de Wet

Instructed by:

STBB Attorneys

Counsel for the 1st and 2nd Respondent:

Advocate David van der Linde

Instructed by:

Muller Terblanche & Beyers Inc.

Hearing date:

30 October 2024

Judgment Delivered:

23 January 2025

This judgment was handed down electronically by circulation to the parties' representatives by email.