



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 37198/2021

(1) Reportable: No
(2) Of interest to other
Judges: Yes
(3) Revised: No

Date: 26/11/2025

In the matter between

OTTO FRIEDRICH ALBERT KRAUSE WYPKEMA N.O

First Applicant

OTTO FRIEDRICH ALBERT KRAUSE WYPKEMA

Second Applicant

and

EMMA MARY WYPKEMA N.O

First Respondent

AGATHA JANE SMITH N.O

Second Respondent

WYPKE WYPKEMA (JUNIOR) N.O

Third Respondent

EMMA MARY WYPKEMA

Fourth Respondent

AGATHA JANE SMITH

Fifth Respondent

WYPKE WYPKEMA (JUNIOR)

Sixth Respondent

J U D G M E N T

MAIER-FRAWLEY J:

Introductory background

1. The first applicant and the first to third respondents are siblings. They are the appointed trustees of the *W Wypkema Trust* with trust registration number T1943/84 (the 'Trust') as well as the primary beneficiaries of the Trust.¹ They are cited in both their representative and personal capacities in these proceedings.
2. I will refer to the siblings individually by their first names, in keeping with how they were mentioned in the papers, namely 'Otto' (first and second applicant), 'Emma' (first and fourth respondent), 'Agatha' (second and fifth respondent, and 'Wypke Jr' (third and sixth respondent). Where I refer to Otto, Emma, Agatha and Wypke Jr collectively, I will either refer to them as 'the trustees' or 'the primary beneficiaries', or 'the siblings', depending on the context. Where I refer to the respondents collectively, namely Emma, Agatha and Wypke Jr, I will refer to them either as the 'respondent trustees' or the 'respondent siblings'.
3. Oral argument was presented at the hearing of the matter by Adv S. Symon SC and Adv J. Blaau SC on behalf of Otto. For Emma, Mr A. Franklin SC presented oral argument. For Agatha, Mr F. Snyckers presented oral argument. Wypke Jr was unrepresented and chose not to present oral argument, although heads of argument were filed of record on his behalf by his erstwhile legal representatives.
4. The Trust was founded by the siblings' father, Wypke Wypkema (Snr) ('the founder') in 1984. The Trust is currently regulated by an amended trust

¹ Other beneficiaries include the children and grandchildren of the primary beneficiaries, as well as the founder. In terms of clause 16 read with clause 1.2.2.2 of the trust deed, *inter alia*, the descendants (children/grandchildren) of the primary beneficiaries would only be entitled to their parents' share of the trust fund, upon distribution of the fund on the vesting date, if such parent were to die before the date of vesting.

deed ('the trust deed') which was executed by the founder and signed by the trustees on 1 March 1989. The Trust was established as a family or *inter vivos* trust in terms of which the trust assets were to be managed and controlled by family members, as trustees, for their benefit, as beneficiaries.

5. The founder resigned as a trustee of the Trust on 2 July 2014. He remained a limited income beneficiary of the Trust until his death on 19 December 2020. Prior to his resignation as trustee, the founder together with the siblings were the named trustees. Prior to the founder's death, the beneficiaries included the founder, the siblings and their descendants.
6. It is common cause that the trust's assets are worth somewhere between R1.5 billion and R1.7 billion. Since all four primary beneficiaries are still alive, they each stand to benefit from any distribution that occurs upon vesting, to the tune of hundreds of millions of rands.
7. Trust assets include, *inter alia*, shareholding in various entities through which three private hospitals established by the founder, are operated.² Approximately 80% of the net value of the Trust's assets is contained in the Arwyp Group of companies, one of which is AMC. There is no controversy about the fact that AMC is by far the most valuable company in the Arwyp Group in which the Trust holds an indirect majority shareholding.³

² The hospitals include the Mayo Clinic of South Africa in Roodepoort ("**the Mayo Clinic**"), the Flora Clinic in Florida ("**the Flora Clinic**"), and the Arwyp Medical Centre ("**AMC**") in Kempton Park.

³ Otto refers to AMC as the operating company of the Arwyp Group of companies in his papers. Emma confirms in her answering affidavit that the majority of the Trust's assets lie in the Arwyp Group of Companies and, in turn, a substantial portion of the Arwyp Group's assets are housed in AMC. Wypke Jr states in his answering affidavit that "It is common ground that the trust is an indirect majority shareholder of AMC. Arwyp Holdings (Pty) Ltd (Arwyp Holdings) holds 78.6% of the issued shares in AMC. The trust holds all of the issued shares in Arwyp Holdings." Agatha's Arwyp organogram, attached as annexure 'AS8' to her answering affidavit, illustrates the position clearly.

8. Otto was a director of Arwyp Holdings and AMC prior to the founder's death. On 5 May 2021, the siblings were appointed as directors of all the companies in which the trust is a shareholder. These include AMC, Arwyp Properties, Arwyp Holdings, and Arwyp Training Institute. Thereafter, *inter alia*, various alleged corporate governance failures were uncovered through investigations conducted by independent third parties into the affairs of AMC. There is a pending action against Otto (and other defendants), which was instituted by AMC pursuant to such investigations and findings.⁴
9. According to Otto, on 20 April 2023 his siblings had him removed as a director of Arwyp Holdings and on 17 May 2023 his siblings had him removed as a director of AMC. In June 2023, the AMC action was instituted against Otto, which he is defending and in which proceedings he denies all allegations of misconduct levelled against him.
10. After the founder's death, a dispute arose between the trustees as regards the vesting date and the validity and enforceability of certain written 'riglyne' (also referred to as letters of wishes ['Lows'] or 'guidelines' in the papers).⁵ Otto contended that the date of vesting was the date of the founder's death - in consequence of which vesting has occurred - and that

⁴ According to Emma, a report was obtained from Comello Forensic Group. She states that "*That report paints a disturbing picture of potential misappropriation of hundreds of millions of rand and poor financial, operational and corporate governance at the instance of Otto. The report raised several preliminary concerns relating to potential corporate malfeasance, the potential misappropriation of hundreds of millions in company funds, the apparent use of related and interrelated entities as conduits to facilitate the misappropriation of company assets and other unlawful transactions. These are reflected in reports which are compiled by third parties.*"

⁵ Four different riglyne were executed - they are referred to in the papers as the 2014 Low/riglyne; the 2018 Low/riglyne; the 2019 Low/riglyne and the 2020 Low/riglyne. At the time that the dispute arose, Otto contended that the 2020 riglyne were to be enforced.

the founder's 2020 riglyne (representing the founder's wishes and made in terms of clauses 14 and 16 of the trust deed) are valid, binding and enforceable vis-à-vis the trustees and the trust. Emma and Agatha held the opposite view – that the date of vesting had not arrived (and is yet to be determined by the trustees in conformance with the trust deed) and that the riglyne are not valid, binding or enforceable against the trustees and the Trust in law.

11. Leaving aside questions of validity or enforceability, in terms of the 2020 riglyne, Otto and Emma stand to receive the lion's share of the trust assets that will be distributable on vesting. In terms of the 2014 and 2018 riglyne, Otto and Emma will also receive more than Agatha and Wypke Jr on vesting. In terms of the 2019 riglyne, the siblings will share equally in the trust assets on vesting.
12. As the dispute remained unresolved, on 3 August 2021, Otto instituted an action in his capacity as trustee against the Trust, citing the trustees in their representative capacity, *nomine officio*, qua Trust. At that stage, he sought the following relief:
 - "1. An order declaring the 3 December 2019 guidelines⁶ to be valid, binding, and enforceable vis-a-vis the trustees and the Trust; and
 2. That the costs of suit be borne by the Trust, unless any defence to the suit that might arise, is found to be vexatious or mala fide, in which event the costs of suit are to be ordered *de bonis propriis* against any Defendant found to be defending the action vexatiously or being mala fide, jointly and severally, the one vexatious defending party paying, the other to be absolved."

⁶ It is common cause that the riglyne of 3 December 2019 is in fact what the parties refer to as the 2020 Low/riglyne. The action was initially instituted by Otto to declare only the 2020 riglyne as valid and binding and enforceable. Pursuant to an amendment to the particulars of claim, Otto relies on the 2020 riglyne and in the alternative, on the 2019 riglyne, alternatively, the 2018 riglyne, further alternatively, the 2014 riglyne

13. The action was defended by the trustees (Emma, Agatha and Wypke Jr) and is pending adjudication. Emma and Agatha and Wypke Jr are each represented by their own attorneys in the action although Wypke Jr's attorneys withdrew shortly before the hearing of this matter. Wypke Jr nonetheless attended the hearing in person but placed on record that he aligned himself with the relief sought by the respondents in their affidavits (the dismissal of the application with costs) and that he would abide by the arguments presented on Emma and Agatha's behalf at the hearing.
14. In December 2023 and January 2024, Agatha and Emma each delivered a separation application. Issues identified for separate and prior determination were: (i) Otto's *locus standi* to represent the Trust in the main action (a defence pleaded by Emma only); (ii) whether the 2020 LOW is valid, constitutes written guidelines as envisaged in clauses 14 and 16 of the trust deed, is binding, and is to be given effect to by the trustees in accordance with clause 16 of the trust deed; and (iii) whether the 2020 LOW determined the vesting date as the date of Wypke Senior's death. Otto has opposed these applications.
15. Pursuant to the delivery of the separation applications, Otto gave notice that he intended to amend his particulars of claim. In September 2024, Otto obtained an order by consent to join the beneficiaries named in the trust deed, being the primary beneficiaries and their descendants, to the action. The particulars of claim were ultimately substantially amended by:
 - (i) Citing all the beneficiaries of the Trust in the proceedings;
 - (ii) Introducing alternative claims within the main claim (claim A) for declaratory relief as to the vesting date of the trust and as to the force and effect of the riglyne, aimed at effecting distribution of

trust assets to the primary beneficiaries in terms of the 2020 riglyne and in the alternative, in terms of the 2019 or the 2018 or the 2104 riglyne;

- (iii) Introducing claim B, which is a claim for a statement and debatement of account and repayment to the Trust of 'the Fees and the Other Fees as may be found to be due to the Trust', together with interest thereon. The claim is ostensibly for the siblings to personally repay all legal fees they allegedly unlawfully caused the Trust to pay on their behalf in defending the action; and
 - (iv) Introducing claim C, being a claim for the removal of the siblings as trustees of the trust;
 - (v) In respect of each of the three claims, a cost order is sought against each party who opposed the relief (i.e., the respondent trustees in their representative and personal capacities) personally, payable jointly and severally on the attorney and client scale.
16. In respect of claims B and C, Otto has alleged that the use by the siblings of trust funds to pay their legal fees in defending the action is wrongful and in breach of the fiduciary duties owed by them as trustees in that they are not acting in the best interests of the Trust but in our own interests, and that their personal interests as beneficiaries are in conflict with the interests and duties they owe to the Trust as trustees.
17. Otto's amendments took effect on 11 October 2024,⁷ being a period of three years after the institution of the action in August 2021. In respect of

⁷ Proof of electronic service of the amended summons and Particulars of claim on 11 October 2024 is found at 02-130 of the papers. Filing thereof took place on even date (at 02-3). There is some mention in the papers that the amendments to introduce claims A,B & C were effected in May 2024, however, I could not locate proof thereof in the electronic file.

the primary relief sought, being claim A, the main issues essentially remained the same, namely (1) whether the riglyne are valid, constitute written guidelines as envisaged in clauses 14 and 16 of the trust deed, are binding, and are to be given effect to by the trustees in accordance with clause 16 of the trust deed, and if so, which one of the four riglyne should be enforced and (2) whether the trustees have determined the vesting date as the date of the founder's death.

18. The present application was launched on 22 March 2024. In these proceedings, Otto seeks the following relief:

"1. The first to sixth respondents are hereby interdicted and restrained from, directly or indirectly procuring that the funds of the W Wypkema Trust with trust registration number T1943/84 ("the Trust"), are used to pay for any further legal fees or other costs incurred by all or any of them for or in connection with the defence against the action instituted by the first applicant and/or second applicant against them out of in this Court under case number 37198/2021 ("the Action"), and until such time as the Action (including any appeals) has been finally determined.

2. That those respondents who oppose this application, be ordered to pay the costs of this application, jointly and severally, the one paying the others to be absolved, and on the attorney and own client scale inclusive of the costs of two counsel. "

19. The issues arising for consideration in these proceedings, include the following:

(i) As regards the nature of the application, whether this matter should be decided on ordinary and established principles applicable to interdicts and if so, whether Otto has made out a case for interdictory relief; or

- (ii) whether the relief sought in the matter should be viewed *not* as a 'true' or 'classic' interdict, but as a type of *sui generis* procedure or case that invokes this court's supervisory power to control the alleged unreasonable incurrence by the respondent siblings of triplicated, uncontained and unrestrained legal costs, at the Trust's expense, in order to prevent the improper use of trust funds;
- (iii) The proper categorization of the capacity in which the siblings are 'truly' acting in advancing their opposition to the action, i.e., whether they are acting in their capacity as trustees or whether they are acting, 'in truth and in substance' in their capacity as beneficiaries, in procuring payment of their legal fees by the Trust;
- (iv) Whether the respondent siblings are entitled and authorized to use trust funds to defend the action.

Otto's pleaded case in the founding affidavit

- 20. Otto alleges as follows. In defending the action, the siblings are pursuing their personal interests as beneficiaries and not the interests of the trust estate. They are therefore not entitled to the indemnity usually afforded to trustees who litigate on behalf of a Trust.
- 21. The siblings are also not acting jointly as trustees in defending the action. They are not represented by the same legal teams, nor have they delivered a single cohesive plea on behalf of and in the interests of the Trust in the action. The power afforded to trustees to institute or defend litigation in clause 4.2.16 of the trust deed is an authorisation for the trustees (plural) to act jointly and does not confer authority on each of the trustees to appoint their own attorneys to defend their interests as

beneficiaries and to advance separate defences and to procure that the Trust pay their personal legal fees.

22. The 10 July 2024 resolution, purportedly authorizing the payment of individual fees under the guise of defending the Trust, is invalid. It was passed in breach of the fiduciary duties which the sibling trustees owe to the Trust in that they are using the Trust as their personal piggy bank to fund, what is in truth and substance their personal litigation, on a luxurious and triplicated scale, whilst acting in their personal interests, not those of the Trust, and in conflict with Trust interests.
23. As beneficiaries, his siblings personally stand to gain if the action fails, not the Trust.
24. Regarding a *prima facie* right to interdict and restrain the siblings from using trust funds in the litigation going forward, Otto alleges that such a right arises arise by virtue of the fiduciary duties he owes to the Trust as a trustee (which fiduciary duties include the obligation trustees have to act in the trust's best interest and not their own, and not to use trust funds to pay for their personal legal fees) and from his right to protect the trust assets to which he has a claim as a beneficiary of the Trust.
25. As to the requirement of a well-grounded apprehension of irreparable harm, Otto alleges that "It is obvious that my siblings are the majority of the trustees and will not act to protect the Trust against their own inappropriate use of Trust funds to pay their attorneys to protect their interests." He states that the siblings have managed to spend approximately R3.2 million⁸ so far on legal

⁸ In table A of his heads, Otto states that the siblings legal expenditure has increased to approximately R6.48 million

fees. Although the Trust is asset rich, its liquidity is not boundless, and at the rate of spending by the siblings, the continuing depletion of the Trust's liquid reserves in paying their litigation costs is prejudicial. If the action succeeds, he alleges that he is unsure whether his siblings possess the financial ability to satisfy a costs order made in his favour or to repay legal fees unlawfully paid from trust funds in terms of claim B.

26. As regards the balance of convenience, he alleges that he has been forced to fund the action from his own resources. In circumstances, where the siblings "have obdurately insisted on having their own legal teams and have boldly entered defences on entirely different grounds to each other (at least insofar as the erstwhile Agatha and Wypke faction, versus the Emma faction), the balance of convenience falls against them."
27. As to the absence of an alternate satisfactory remedy, he alleges that the only way in which to protect the trust from "the unauthorized use of its funds" and his rights as a beneficiary, is to impose an interim interdict restraining his siblings from paying their separate legal fees in the action using trust funds.
28. To avoid undue prolixity, I do not intend to summarize the pleaded cases of the respondent siblings. Suffice it to say, that the arguments contained in the heads filed on their behalf and advanced at the hearing, align with the factual allegations contained in their affidavits.
29. I am unable to do justice to all the detailed legal arguments presented on behalf of the parties in this judgment. I have, however, considered them carefully together with the authorities cited.

Discussion

Nature of the application

30. Otto relied on the remedy of an interdict, as it is known in our law, to prevent the alleged improper and unauthorized use of trust funds by the respondent siblings in the litigation going forward. He dealt with the requirements of an interim interdict in both his founding affidavit and his heads of argument.⁹
31. It was during oral argument advanced on his behalf at the hearing that he relied, for the first time, on a different basis, being the court's supervisory powers, for an entitlement to the relief sought. This basis was neither pleaded nor dealt with in his heads of argument. It was simply invoked in the course of oral argument.
32. Even if I were to accept that the court has supervisory powers to prevent the abuse or improper use of trust funds to pay legal fees,¹⁰ I am not convinced that this case provides the opportunity for considering its application for several reasons.

⁹ The requirements of an interim interdict are trite: the applicant is required to establish (i) a *prima facie* right though open to some doubt; (ii) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is granted; (iii) a balance of convenience in favour of the grant of interim relief; and (iv) the absence of any other satisfactory remedy. See: *Setlego v Setlego* 1914 AD.

¹⁰ See *Genesis Medical Aid Scheme v Registrar, Medical Schemes and Another* 2017 (6) SA 1 (CC) at par 30 where the following was said: "Once established, a trust creates a legal relation of fiduciary obligation on the part of the trustee towards the beneficiary. That relation is distinct from a purely contractual or commercial relationship. This is because a trustee occupies a fiduciary office that is subject to supervision and regulation by the courts. Even in a consensual trust, the trustee is not simply a contracting party, but assumes an office subject to court supervision and public control, as no contractant does." See too *Land and Agricultural Bank of South Africa v Parker* [2004] ZASCA 56; 2005 (2) SA 77 (SCA) (*Parker*) at paras 23, 34 & 37." (emphasis added)

33. Firstly, because such *causa* is sought to be relied on belatedly without the requirements for its invocation having been addressed or canvassed in the papers or heads.¹¹ Secondly, aside from its late introduction as a *causa* for the relief Otto seeks, without notice to opposing counsel, it appears to me to be a last minute change of tack to in order to overcome a fundamental difficulty Otto faces in this case, namely, to create a basis for the relief he seeks, which at its core amounts to a pre-emptive *de bonis propriis* costs order in his favour, in advance of the trial, on the very issues the trial court is yet to determine. Thirdly, the question of improper use of trust funds is an issue that ought properly to be determined by the trial court after all evidence has been led, tested and evaluated, and not on paper. Fourthly, Mr Blaau argued that the court in this case is not dealing with an ordinary or classic interdict involving ordinary contracting parties, but with a *sui generis* procedure that ought to apply because the parties have an interest in the trust assets and the Trust must be closely monitored in dealing with third parties and in its dealings between parties who are interested in trust assets. This, however, begs the question: if the *sui generis* procedure now sought to be relied on (with a disavowal of reliance on common law principles that govern interdicts) why was interdictory relief sought based on requirements that govern ordinary interdicts in notice of motion and founding affidavit? The notice of motion has never been amended to provide for any *sui generis* supervision, which is designed to prevent abuses of the trust form by persons occupying a fiduciary position.¹² It is

¹¹ The general rule that a litigant must make out its case in the founding affidavit, is subject to the following exception, which was set out in *My Vote Counts NPC v Speaker of the National Assembly* 2016 (1) SA 132 (CC) at para 177. There the Constitutional Court said: "a point that has not been raised in the affidavits may only be argued or determined by a court if it is legal in nature, foreshadowed in the pleaded case and does not cause prejudice to the other party." The invocation of the court's supervisory power is not only legal in nature, it is also fact dependant.

¹² See *Parker*, above n 10, at paras 37 where the court referred to appropriate cases in which the court's supervisory powers may be invoked.

common cause that all the trustees are the primary beneficiaries in this case. It is thus inevitable that they will be interested parties.¹³ The trust deed itself envisages this. The fact that trustees are interested parties does not in and of itself constitute abuse.

34. Furthermore, the court's supervisory powers are employed in relation to the conduct of persons occupying fiduciary positions, such as trustees. That in itself undermines Otto's argument that the case is one in which the respondent siblings are, in truth and in substance, only acting in their personal capacity, as beneficiaries, and are advancing beneficiary positions rather than trustee positions, their purpose being to secure a fair and equal distribution, as Mr Symon and Mr Blaau vociferously argued. It becomes a self-defeating argument where Otto seeks to invoke the court's supervisory powers over trustee conduct but at the same time arguing that the respondents are not acting as trustees. And, ironically, a *personal* cost order is sought against the respondent siblings, both in their representative and personal capacities, in the action. As against the respondent trustees who act in their representative capacity, such an order amounts to a *de bonis propriis* order.¹⁴
35. I will therefore determine the matter based on ordinary principles relating to interdicts in our law.

¹³ See *Rademeyer v Jesseman and Others* [2021] JOL 50848 (GJ) at paras 66-70.

¹⁴ See *Cawood N.O and Another v Claassen and Others* (1191/2022) [2022] ZAFSHC 119 (18 May 2022) at paras 32-33; Cilliers *et al*, *Herbstein & van Winsen, The Civil Practice of the High Courts of South Africa*, vol 2, 982 – 987 where, *inter alia*, the following is stated: “An award of costs *de bonis propriis* may be made only when a person acts or litigates in a representative capacity. It is unusual to order a litigant in a fiduciary position to pay costs *de bonis propriis*, and good reason for such a course should be shown, such as want of *bona fides*, negligent or unreasonable action, or improper conduct by a trustee or executor.” (emphasis added)

36. Having heard argument by Mr Blaau in relation to foreign law principles, which he submitted may assist the court in its assessment, and having the foreign judgments to which I was referred, I am not convinced that the cases were helpful, precisely because none of them dealt with the same type of relief as is sought in these proceedings. Peculiar if not extraordinary relief is sought in this matter is effectively for an anticipatory *de bonis propriis* cost order by way of an interdict aimed at stopping the use of trust funds by trustees in litigation brought against the Trust and defended by the trustees qua Trust. Mr Snyckers is correct when he argued that the making of a *de bonis propriis* cost order against the respondent trustees right now - in respect of all future litigation in this matter including any appeals – “is something no-one has ever seen before, not in the sphere of trusts or estates or in any other type of litigation - and for which no precedent has been cited, whether in terms of our law or foreign law.” I pause to mention that the foreign law cases were not addressed in the heads of argument prepared on behalf of Otto, and once again, opposing counsel were not given notice prior to the hearing that foreign law cases would be relied on.
37. There was some dissensus between Mr Symon and Mr Blaau in oral argument. Mr Snyman suggested that the common law may need to be developed ¹⁵to cater for this type of relief, on the basis that “this matter involves itself with what the law should be now with constitutional guidance and with regard to the position of the court in supervising costs”, whereas Mr Blaau argued that there is no such need for development,

¹⁵ Development of the common law only occurs where there is a need for such development. The requirements for development of the common law, as set out in *Oliver NO v MEC for Health: Western Cape Provincial Department of Health* 2025 (5) SA 384 (SCA) at paras 21-22, have in any event not been met in the present case.

given that the court in *Stander*¹⁶ endorsed the notion of pre-emptive cost applications and it thus forms part of our law.

38. *Stander* set out what the English law provides in respect of a pre-emptive application known as a *Beddoe* application, in which trustees come to court to seek directions when they either sue or defend proceedings in their representative capacity. In such an application, the trustees are expected to make a full disclosure to the court of the strengths and weaknesses of their case. If the court sanctions the proceedings, the trustees will enjoy an indemnity from the trust estate, regardless of the outcome. The court's directions would typically not be given once for all but would sanction certain steps, where after an application for further judicial advice would be necessary.¹⁷ A *Beddoe* application may thus involve in effect what is known as a pre-emptive costs order.¹⁸
39. As will be apparent from the foregoing, *Beddoe* applications are concerned with litigation by or against trustees who sue or are sued *nomine officio*. The argument that a *Beddoe* type application was available to the trustees in this matter, who ought to have obtained permission from the court, in advance, to use trust funds to pay for their litigation costs, rather than to arrogate to themselves the right to do so, is, with respect, paradoxical. The main thrust of the argument presented by both counsel representing Otto is that the litigation itself is not about trust business, rather, it is a beneficiary dispute, because vesting has occurred and all that is left is for a distribution of trust assets to be made to the beneficiaries. The litigation expenses have been improperly incurred by the respondent siblings, so the argument went, because they are really

¹⁶ *Stander v Schultz* 2008 (1) SA 81 (C)

¹⁷ *Id* par 49.

¹⁸ *Id* par 50.

acting and defending the main action in their personal capacities irrespective of how they have been cited.

40. *Stander* was concerned with an application by the trustees for permission to use trust funds to fund their defence in a pending main application in which the beneficiaries sought their removal from office. In the main application, they had been sued only in their personal capacities and not in their representative capacities. The court held that an application for the removal of a trustee is a claim against the trustee personally.¹⁹ If the trustee who is sued in his personal capacity is removed for misconduct or other improper or unreasonable behaviour, his opposition to the application for his removal would inevitably be found to have been unreasonable, and he could not only be ordered to pay the other side's costs personally but would have no entitlement to an indemnity from the trust in respect of his own costs.²⁰ If the trustee is vindicated at the end of the case, he would be entitled to recoup any loss suffered by him from the trust estate. This would be the difference between his full reasonable expenditure in defending himself on the one hand, and any amounts recouped from the unsuccessful complainant on the other.²¹

41. Whilst *Stander* concerned a *Beddoe* type application,²² far from endorsing *Beddoe* type applications or importing them into our law, the court in *Stander* held that:

"It is clear that on the approach reflected in the commonwealth cases the current application would have to fail,²³ and that this conclusion accords with the principles

¹⁹ *Id*, par 34.4

²⁰ *Id* par 42.

²¹ *Id*, par 22

²² *Stander* was not dealing with an interdict to stop the trust from paying the costs of the litigation. It concerned trustees requesting the court to allow them to have their costs paid like one encounters in *Beddoe* applications.

²³ I.e., even in a world where *Beddoe* applies, this type of application would fail.

of our own law discussed earlier...As a matter of basic principle, therefore, an application of the kind now made by the trustees is fundamentally misconceived. They ask in advance for an order that their defence of the application for their removal be funded by the trust estate. Since they would only be entitled to such an indemnity if their opposition were justified, the court could not make such an order without deciding the main case. In effect, the trustees ask the court to rule that regardless of whether or not they are acting reasonably in opposing the main application, they are entitled to an indemnity. The making of such an order is contrary to all authority, which is to the effect that trustees enjoy an indemnity only if they oppose proceedings properly and reasonably. The trustees' demand also offends basic notions of justice and commonsense."²⁴ (emphasis added; own n 23 included))

42. At par 22 of the judgment, the court set out the default position where a trustee is sued personally – the trustee cannot have his costs paid out of the trust fund unless his opposition is found to be reasonable, in which event, he would be entitled to be reimbursed for those costs. This is, as was held in par 31 of the judgment, is to be decided at the end of the case, because if it were to be decided upfront, it would pre-empt the trial court's decision.²⁵

²⁴ *Stander*, above n 16, at par 58.

²⁵ In paras 28, 30 and 31 of *Stander*, the following was said:

"[28] the order which the trustees seek in their interlocutory application ... is unprecedented (at least, no authority has been cited in favour of it) and it runs counter to principle. Furthermore, if granted, it would have the effect of pre-empting any future decision on the costs of the removal application. Specifically, it would preclude the court seized with the matter from ordering the trustees to bear their own costs thereby depriving the court hearing the removal application of a significant part of its discretion, specifically as regards costs.

[30] If the removal application succeeds and some or all of the applicant's allegations are proven, it would be unfair for the Trust to be saddled with the trustees' costs on the basis of this interlocutory application. The court removing the trustees – if that is the ultimate outcome – ought to have the discretion to order that the Trust not bear the trustees' costs. The order sought by the trustees could result in the (otherwise avoidable) depletion of the Trust's estate.

[31] It is further submitted that there is no warrant for interfering with the usual rule that the question of costs be decided at the end of the matter. To order that the trustees be indemnified for their legal costs at the outset of the litigation and even before the issue of their fitness for office has been assessed could result in prejudice to the Trust." (emphasis added)

43. The default position in terms of the common law is the opposite where trustees are sued in their representative capacities. In that scenario, the trustees are entitled to be indemnified out of the estate for their opposition subject to the finding of the Court at the end of the case that they acted *mala fide* or unreasonably or negligently or improperly.²⁶
44. In *Re Estate Potgieter*,²⁷ the appeal court held that a trustee cannot approach a court for directions as to whether he is entitled to defend proceedings against him in his representative capacity, or to ask for

²⁶ *Stander*, above n 16, at paras 19 & 29.

²⁷ *Re Estate Potgieter* 1908 TS 982, a decision of a Full bench, which is binding on me. The case involved an appeal against a *de bonis propriis* order that had been made against the trustee. Dispute had arisen about whether or not a trustee in insolvency was favouring certain creditors in defending proceedings. There was a finding up front ordering *de bonis propriis* costs against the trustee which led to an appeal against that order.

The principle set out in *Potgieter* was the following: “...*That is an exceptional order to make in a case where a trustee of an insolvent estate, or any other person in a similar fiduciary position, is an unsuccessful litigant. The usual order in such a case is to give costs against him in his representative capacity, that is, in the capacity in which he is sued; and when an order is made that a trustee should pay the costs, it is understood that he is to pay them out of the estate. When it is desired that a trustee should pay costs personally, the order is made in the form in which it was made in this case --- that he pay the costs de bonis propriis. But that, as I have said, is an exceptional order, and it usually indicates that there is in the mind of the court soiree (sic) disapproval of the trustee's conduct in connection with the matter in dispute; and I think that before making an order of that kind against a trustee there should be some good ground shown for departing from the usual rule in such cases.*”. (at 1000-1001).(emphasis added)

At 1002, the **general rule** was expressed thus: “*So that I think as the result of the authorities we may lay down as a general rule in these cases that a trustee should not be ordered to pay the costs of unsuccessful litigation de bonis propriis, whether he is a plaintiff or defendant, unless it appears that there was a want of bona fides on his part or that he acted negligently or unreasonably.*” (emphasis added).

These principles have since been endorsed by higher court in *Grobelaar and Grobelaar* 1959 (4) SA 719 (A) at 725 B-C; and *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2015 (5) SA 600 (CC) at par 51.

These principles were also endorsed in *Stander* (above n 16) at paras 38 & 39.

directions from the court or seek the court's sanction with regard to his defence, as he must "take the responsibility upon himself."²⁸

The proper categorization of the capacity in which the respondent siblings are 'truly' acting in advancing their opposition in the action (and this application)

45. The question is whether the trustees are acting in their capacity as trustees in opposing the litigation or whether they are, in truth and in substance, acting in their personal capacities as beneficiaries in furtherance of their personal financial interests, as beneficiaries, as Otto contends.
46. On Otto's version, vesting has already occurred. Therefore, in terms of clause 16 of the deed, the trust assets fall to be distributed. Otto contends that assets must be distributed in accordance with the founder's wishes as expressed in the 2020 riglyne (with reliance on the other riglyne in the alternative). The respondent trustees contend for an equal distribution amongst the primary beneficiaries in accordance with the founder's wishes. Whether the date of vesting has been determined by the trustees, is in dispute, and falls for determination at trial. How any distribution is to be effected is also an issue that arises for determination at trial, because the validity, enforceability and binding nature of the riglyne, including what the founder's wishes were, are in dispute. These issues implicate a proper interpretation of the provisions of the trust deed.
47. The action instituted by Otto against the Trust in 2021 was for relief against the Trust. The trustees were cited qua Trust and the action was defended by the trustees, acting *nomine officio*. Otto sought, at that

²⁸ Id, at 1004 (per Soloman J) & 1008

juncture, that the Trust be ordered to pay the costs of the Trustees. It was only three years later that the trustees were joined to the action in their capacity as beneficiaries, and that claims for their removal as trustees and for the repayment of legal fees expended on their behalf to the Trust were introduced.

48. As pointed out by Mr Franklin, the relief which Otto seeks in the action goes to the very heart of the trust objects and its existence; and how or in which manner the trust assets are to be distributed, to whom, in what proportions and when. With this submission I am in agreement.
49. Otto submits that the respondent siblings are in in pursuance of their own personal interests as beneficiaries in defending the action, the premise being that the vesting date has already arrived and so it is just a question of distribution of trust assets to the beneficiaries. On Otto's version, the Trust is effectively at an end because vesting already occurred on the date of the founder's death. The argument overlooks that, whether or not the vesting date was determined by the trustees in terms of the provisions of the trust deed, and has arrived, is in dispute. That the founder's wishes are as set out in the 2020 riglyne is also in dispute. And the validity and enforceability of the riglyne is also in dispute.
50. Otto's argument rests on the assumption that his version is the correct one, which is certainly not a forgone conclusion. It is an issue which the trial court is yet to decide. Be that as it may, assuming for purposes of argument, without finding, that Otto's version is correct, it is indisputable that the termination of a trust would result in the loss of office for the trustees²⁹ and thus implicates them directly. Otto's declaratory relief fundamentally

²⁹ *Snyman v De Kooker NO and Others* 2024 (6) SA 136 (SCA) at [21]

impacts the continued existence of the Trust and goes to the heart of the trust objectives which is to protect and preserve the Trust and its assets for the benefit of all the beneficiaries.³⁰

51. Moreover, the basis on which the distribution is to be effected – whether in accordance with the riglyne, or not - and when - based on whether or not vesting has occurred, are quintessentially issues that implicate trustees in the performance of their duties, one of which, in relation to trust property, is to effect the distribution of net trust assets to the appropriate beneficiaries at the time(s) stipulated in the trust deed. The argument that this is really just a fight amongst beneficiaries and that the respondent siblings do not act as trustees in any genuine sense, cannot therefore be sustained on the facts of this case.
52. It would be inappropriate for me to make any findings on the merits of the matter and thereby-pre-empt the trial court’s findings. Otto’s approach in assuming the correctness of his stance and then mounting his arguments based thereon is fundamentally flawed. It amounts to faulty reasoning in the construction of an argument.
53. Let me elaborate. Otto alleges that payment of the respondent sibling’s legal fees, using trust funds, is wrongful and their conduct in doing so constitutes a breach of the fiduciary duties owed by them to the Trust. As Mr Franklin puts it: Otto uses the very issues in dispute and which are yet to be determined by the trial court as a basis for contending that the

³⁰ In *Jooste NO and Another v Pretorius and Others* 2025 (3) SA 95 (SCA) at par 42, the Supreme Court of Appeal stated that the removal of a trustee is a decision of considerable importance for the governance of a trust because a trustee will have no claim of right to hold the office of trusteeship. In par 60 of the judgment, the court held that “Trustees must act honestly and reasonably. They have a duty to protect the assets of the trust for the benefit of the beneficiaries. For these reasons, as a general rule a trustee should not be ordered to pay costs *de bonis propriis* (out of own pocket), whether as an applicant or respondent, unless she has acted in bad faith, negligently or unreasonably.”

payment of fees by using trust funds is wrongful and in breach of the respondent trustees' fiduciary duties, which conduct must be stopped now to avert ongoing prejudice by depletion of the trust fund to the Trust and himself as beneficiary. Whether their use of trust funds amounts to a breach of their fiduciary duties or whether they were conflicted in doing so, are issues yet to be determined at trial. The only basis on which Otto can contend, in these proceedings, that his siblings are *not* acting in discharge of their duties is by assuming that his version is correct. The logic of this contention is irrefutable.

54. Mr Franklin pointed out in oral argument that the implementation of the 2020 riglyne would result in the following distribution to the primary beneficiaries:
 - (i) Otto and Emma would each receive approximately R680 million worth of trust assets; and
 - (ii) Agatha and Wypke Jr would each receive approximately R170 million worth of trust assets.³¹

55. From Emma's perspective, the action seeks to impose upon the Trust the enforcement of the disputed 2020 riglyne, which would fundamentally alter the structure and purpose of the Trust and result in: (i) the dissolution of the Trust; and (ii) a grossly disproportionate distribution of the Trust assets with Emma and Otto gaining 80% of the value of the Trust assets to the exclusion of the remaining beneficiaries; and (iii) Otto gaining a significant stake in the ownership and control of AMC. This would also diminish both the value and the strategic direction of the trust estate in that it would place a principal revenue generator for the Trust outside of

³¹ As I understood matters, there was not contention about these figures.

the Trust's control. Opposing the action is essential to prevent the erosion of the founder's legacy, to preserve the trust assets for the benefit of all its beneficiaries, and to safeguard the interests of all beneficiaries, by ensuring an eventual fair and equitable distribution of Trust assets. And that is why she is opposing the relief sought in the action in her capacity as trustee.

56. As pointed out by Mr Snyckers, it is artificial for Otto to contend that this is a dispute amongst siblings in their personal capacities. If there is a conflict between the trustees in their capacity as trustees and beneficiaries, it is a conflict that is created and which is inherent in the trust deed itself. It is not a conflict that would disqualify them from acting in both capacities. These submissions appear to me to be correct, having regard to the provisions of clause 4.2.24 of the trust deed,³² taken at face value.
57. Mr Snyckers further submits that the interpretation of the trust deed and how it must be applied, irrespective of the consequences of who gets what or who gets more or who gets less, are issues that arise in the action and are for the trial court to determine. There can be no qualm with that contention. What is at issue at trial are two questions: (i) must the trustees follow the dictates of law by way of letters of wishes? In other words, are the letters of wishes (riglyne) enforceable in law? and (ii) if they are enforceable, does it mean that the vesting date has occurred and has the

³² Clause 4.2.24 reads; ““Any trustee may exercise, and consent to the exercise, of all powers and discretions granted to them under this deed or by law, notwithstanding that the trustee has a direct or other personal interest in the manner or outcome of the exercise of such power or discretion. However, any trustee may, notwithstanding this, but without any obligation, choose to refrain from acting other than as a formal party in any matter in which they have such a personal interest and may allow their co- trustees to act alone in exercising the aforementioned powers and discretions in relation to such matter. Each trustee who has such an interest in the action affecting trust funds will, however, be obliged to disclose the nature and extent of their interest to the co-trustees in advance.”

trust come to an end? ³³ Both involve interpretation and administration issues, irrespective of the consequence that some will get less and others will get more. If, on the other hand, the riglyne are *not* enforceable, then it will be for the siblings, as trustees, to decide on what is best for the siblings, as beneficiaries, and what is fair and . I agree.

58. It is *not* insignificant that the present application - to prevent the use of trust funds for payment of legal fees - was launched by Otto at a time when he was in fact still seeking an order in the main action that the Trust pay the legal fees incurred by trustees in the action. This was consistent with the general common law principle that legal fees incurred by trustees in the course of litigation instituted or defended by them in their official capacity are payable by the Trust, unless their conduct is found to be *mala fide*, unreasonable or negligent.³⁴ The fact that claim C for the removal of the trustees was introduced by later amendment, did not alter the fact

³³ Vesting has two components. As was recognised in *Wilkinson and Another v Crawford N.O. and Others* 2021 (4) SA 323 (CC) at par 62 (albeit in the context of a deceased estate), vesting comprises of “two sub-moments, namely *dies cedit*, the time when a beneficiary obtains a vested right to claim delivery of the bequeathed benefit unconditionally, and *dies venit*, the time at which the beneficiary’s right to claim delivery of the benefit becomes enforceable.

In fn 76 of the judgment, the court referred to *De Leef Family Trust v Commissioner for Inland Revenue* 1993 (3) SA 345 (A) at 356 where it was stated that *dies cedit* was described as the moment the right is due and owing; *dies venit* on the other hand is when ‘the time for enjoyment has arrived and delivery or transfer of its subject matter may be claimed’, in other words: when the right becomes enforceable.

The trust deed in the present matter empowers the Trustees to determine the vesting date. In terms of clause 1.2.3 ““The Vesting Date” shall be the date determined at any time by the trustees as the vesting date, and shall indicate the point in time at which beneficiaries shall acquire vested rights in respect of the net trust assets in terms of sub-paragraph 16, or sub-paragraph 11.3 in relation to that beneficiary or group of beneficiaries for whom the Vesting Date has been so determined earlier.”

³⁴ The right to indemnification for a trustee acting in their representative capacity, is an ongoing right. A trustee is thus entitled to rely on that right from the outset, and may use the trust funds on an ongoing basis to pay for the legal costs incurred in the opposition of proceedings. By way of example, a trustee cannot be compelled to pay a debt of the trust estate in the first instance from personal funds. See *Ehrlich v Rand Cold Storage & Supply Co Ltd* 1911 TPD 170; *Burnett NO v Kohlberg* 1984 (2) SA 137 (E) 141D–G. When acting properly in the course of trust administration, a trustee renders only the trust estate liable to others. Trust funds may therefore be used to settle the liability in the first instance in which case no question of indemnity will arise. A trustee who chooses to pay out of personal funds can claim to be indemnified from the trust fund.

that the main claim A was against the Trust. For approximately three years before he launched this application, Otto was satisfied that the Trust was liable for the fees incurred by the trustees. It was only three months after the institution of this application that the amendments to Otto's particulars of claim were effected to include a removal claim and the beneficiaries who had been joined to the action. Thus, when the application was launched, a cause of action necessary to sustain the relief was missing.³⁵

59. A court will only allow an amendment to pleadings to introduce a new cause of action that did not exist at the time of the institution of the proceedings in exceptional circumstances.³⁶ No such exceptional circumstances have been demonstrated in this matter.
60. It is also *not* insignificant that initially, the action was instituted against the respondents as trustees. The action was defended by the respondent trustees, given that they contested Otto's contentions regarding vesting and the validity of the 2020 riglyne. They incurred legal expenses using trust monies. Three years later, Otto alleged that by using trust monies, his siblings were not acting in the interests of the trust, but personally, which constitutes grounds for their removal. The tacking on of removal relief, given the timing of its introduction, supports an inference that it was used to bring the case in line with the *Stander* principle (referred to in par 22 of *Stander*).³⁷

³⁵ In *Evins v Shield Insurance Co Ltd* 1980 2 All SA 40 (A) the court defined "cause of action" as every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the Court. It does not compromise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. At p 57, the court stated that a cause of action does not materialise unless and until the occurrence of the last fact that constitutes a cause of action.

³⁶ Erasmus *Superior Court Practice* Part D1 Rule 28-10 and the authorities in footnote 54

³⁷ *Stander* affirmed the principle that a trustee who defends the trust estate ordinarily enjoys the right to funding from the estate to pay for that defence; withholding that funding is the exception, not the

61. The main import of the action instituted in 2021 was to establish the date of vesting and validity of the 2020 riglyne. That main relief was subsumed in claim A of the amended particulars of claim and did not change the capacity in which the trustees were acting in relation thereto. I agree with Mr Franklin and Mr Snyckers that claim C (removal relief) is ancillary to the main claim, now claim A. The tacking on of the removal claim, although it is a claim against the trustees personally, did not transform the entire action into one in which the trustees are acting in their personal capacities. It also did not alter the fact that the main claim lies against the Trust, represented by the trustees. Claim B is also for relief against the trustees and is directed at reimbursement to the Trust of any fees improperly incurred by the trustees, for example, because the respondent trustees' opposition in the litigation was unreasonably or unjustifiable or *malea fide*. As the Constitutional Court affirmed in *Pheko*,³⁸ whether conduct warrants a *de bonis propriis* order, is fact bound, and is decided on all the basis of all the circumstances.

rule, and this occurs when the merits of the main proceedings are heard and decided (see paras 38 & 39 of *Stander*).

Stander also underscored that a court will not pre-emptively rule [*ie decide in advance*] on trustees' litigation costs where they are sued in their personal capacities; the trial court must first decide—on the merits—whether their defence was *bona fide* and reasonable. The same logic defeats Otto's present application. Otto seeks that this Court should compel the respondent siblings to fund the defence personally on the premise that their conduct is vexatious, yet that allegation is precisely what the trial court must in due course determine after hearing all the evidence at trial. It follows, as a matter of pure logic, that until the merits have been adjudicated, no court can (or should) pronounce upon the trustees' entitlement to an indemnity. Whether there is a proper basis for the removal is also an issue that is to be determined by the trial court

³⁸ *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2015 (5) SA 600 (CC) at par 51, where the following was said: "Costs *de bonis propriis* are costs which a representative is ordered to pay out of his or her own pocket as a penalty for some improper conduct, for example, if he or she acted negligently or unreasonably. Whether a person acted negligently or unreasonably must be decided in the light of the particular circumstances of each and every case." (emphasis added; footnotes excluded)

62. The costs of Emma, Agatha and Wypke Jr's opposition to claim A (the main claim) which they oppose in their representative capacity, are inextricably linked to the costs incurred in opposing claims B and C. If Otto fails to obtain personal costs orders against the trustees in relation to claim A, then claim B falls away (personal reimbursement by trustees to the Trust of all legal fees improperly paid using trust funds) and the main ground for the removal of the trustees in claim C (wrongful use of trust funds to fund litigation costs) falls away. Even if the trial court grants personal costs orders against the trustees in relation to claim A, then it would not necessarily follow that the trustees are to be removed from office.³⁹
63. Otto relies on the fact that his siblings are each represented by separate attorneys and have in some instances pleaded additional but disparate defences, in support of the contention that they are 'in truth and in substance' acting in their personal capacities.
64. It is trite that the respondents owe fiduciary duties to all of the beneficiaries of the Trust, and are required to act with utmost good faith and in the interests of all beneficiaries of the Trust. This includes, *inter alia*, the duty to: (i) preserve the Trust assets and uphold the Trust Deed; (ii) exercise all powers in such a manner that the beneficiaries reap the benefits; (iii) treat beneficiaries impartially; and (iv) act independently when discharging their duties.
65. The fact that the respondent trustees have engaged their own attorneys and have pleaded certain additional or different points does not in and of

³⁹ The requirements for removal are discussed in, *inter alia*, *Sackville West v Nourse and Another* 1925 AD 516; *Volkuyin NO v Clarke and Damant* 1946 WLD 456; *Dihomo and Others v Chalwa NO and Another* 2024 (4) SA 161 (KZP); and *Hoppen and Others v Shub and Others* 1987 (3) SA 201 (C); *Mirchandani v Unica Iron & Steel (Pty) Ltd and Unica Iron & Steel (Pty) Ltd v Mirchandani* (802/2020 & 813/2020) [2022] ZASCA 58

itself mean that they are thereby pursuing their personal interests. They are, as I have indicated earlier, defending qua Trust on fundamental issues, namely, vesting and the validity of the riglyne, and the interpretation of the trust deed, all of which affect the Trust and impact their duties as trustees.⁴⁰ The presence of separate defences does not detract from this. The common thread that runs through all the defences is to ensure that the Trust is protected and that the Trust's assets are properly distributed in accordance with the trust deed and in terms of the law.

66. In terms of clause 4.1 of the trust deed, the trustees "shall be entitled to perform any act whatsoever that is necessary and/or conducive to the preservation or growth of the assets of the trust and in the interest of the beneficiaries." In terms of clause 4.2.16, the trustees are empowered to institute or defend legal proceedings and to sign all deeds, powers of attorney or documents that may be necessary for this purpose. In terms of clause 7.4, the trustees "shall be indemnified out of and from the trust fund against all claims and demands of whatsoever nature that may be brought against them arising from the powers granted to them under this trust deed." In terms of clause 8.4, the trustees are, *inter alia*, entitled to appoint attorneys "to carry out all or any matters of whatsoever nature that are required to be done under this trust deed."
67. It is for the trial court to determine whether, in engaging three sets of attorneys, the trustees acted improperly or reasonably and whether each

⁴⁰ In *Parker*, above n 10 at par 10, the following was said: "Except where statute provides otherwise, a trust is not a legal person. It is an accumulation of assets and liabilities. These constitute the trust estate, which is a separate entity. But though separate, the accumulation of rights and obligations comprising the trust estate does not have legal personality. It vests in the trustees, and must be administered by them – and it is only through the trustees, specified as in the trust instrument, that the trust can act. Who the trustees are, their number, how they are appointed, and under what circumstances they have power to bind the trust estate are matters defined in the trust deed, which is the trust's constitutive charter. Outside its provisions the trust estate cannot be bound."

trustee's opposition was justified. The court could not make such a determination without deciding the main case. That is in accordance with the general rule that costs are decided at the end of the matter. As *Stander* made plain, and it is not for this court to pre-empt that decision.

Whether the respondents are entitled and have authority to defend and to use trust funds

68. In terms of the common law, the general rule is that a trustee is entitled to an indemnity in respect of expenses properly incurred, and this applies *inter alia* in respect of legal expenses incurred by the trustee when sued in his representative capacity. However the trustee will be held personally liable for the costs if he acted *mala fide* or unreasonably or improperly in bringing or defending the proceedings.
69. Otto disputes that there is a legal basis for using trust funds to finance his siblings' opposition to the action on the basis that neither the trust deed, properly interpreted, nor any of the resolutions passed by the trustees provide any entitlement or authority for their "unchecked" use of trust funds to pay for their legal fees and therefore his siblings' conduct remains "patently unauthorised, illegitimate and unlawful." He submits in his heads that his siblings "cannot enable and authorise themselves to use Trust funds for an improper purpose," to sanction their "prolific use of Trust funds, and their election to separately oppose the Action, in circumstances in which they should have done so jointly, and in which they are plainly not acting in good faith and in the Trust's interest but in their own interest, and particularly in their interest as beneficiaries."
70. In support of these contentions, Otto relies on certain provisions of the trust deed:

- (i) **Clause 2.10** (which provides that in the event of a dispute between the trustees at any time, the decision of the majority would be binding, with the proviso that the founder had to be one of the majority trustees), Otto's contention being that once the founder resigned as a trustee, the trustees no longer had the right to overrule each other by way of a majority vote in the event of a dispute between them and that they could then only make decisions unanimously; and
- (ii) **Clause 4.2.16** (which provides that the *trustees* (plural) "shall have the power to institute or defend legal proceedings and to sign all deeds, powers of attorney or documents that may be necessary for this purpose"), Otto's contention being that the clause implies that *all* of the trustees would have to be in favour of instituting or defending proceedings and act jointly in doing so;

71. Otto disputes that certain clauses relied on by Agatha (albeit not by Otto) assist his siblings, namely:

- **Clause 4.2.24** (which provides that trustees may execute all powers and discretions granted to them in spite of the fact that they have a direct or other personal interest in the way or result of the execution of such power, and that if they so choose, they can instead recuse themselves and allow their fellow trustees to act alone), Otto's contention being that all his siblings are conflicted in opposing the action (and this application) and that the ambit of this clause was not intended to cover funding by the Trust of their individual personal defences. The expenditure of Trust funds for this purpose is against the interests of the Trust, and only serves their individual interests;

- **Clause 7.4** (which provides that trustees are exempted by and out of the Trust funds from all claims and claims for payment of whatever nature that might be instigated against them as a result of the powers granted to them by the Trust), Otto's contention being that his siblings' opposition to the action does not, and cannot, arise from any valid exercise of the powers granted to them by the trust deed. The siblings cannot expect to be indemnified when they use trust funds against the trust's interests and for the illegitimate purposes of serving their own interests, as beneficiaries.
- **Clause 8.3** (which provides that the trustees shall be authorised to settle and pay from the Trust, and from any income of the fund, all expenses incurred by them in respect of executing the Trust and the powers granted to them), Otto's contention being that the clause does not confer authority upon his siblings to act as they have, in that, for the same reasons given in respect of clause 7.4;.
- **Clause 10.1** (which provides, *inter alia*, that "All costs and expenses lawfully incurred by the trustees in connection with the administration of the trust (including trustees' remuneration and any income tax payable by them in their representative capacity in respect of the income thereof) shall be paid by the trustees from the income of the trust fund..."), Otto's contention being that his siblings "have not acted "*wettiglik*" in acting as they have" in incurring legal costs which "are not in respect of compensation or income tax, or any other analogous expenditure. Rather, the expenditure is in the siblings' own interest and not in the interest of the Trust."

- **Clause 10.5** (which provides that subject to the terms of clause 10.6 of the Amended Trust Deed (which provides for the investment of the Trust's net income), the trustees may at any time up to and including the vesting date, pay the net income of the Trust or use the net income of the Trust to the benefit of all or such one or more of the beneficiaries in such a way and subject to such conditions and limitations that the trustees may from time to time determine at their sole discretion, and that the net income on which beneficiaries receive vested rights by way of an income distribution may be specifically credited by the trustees on loan account without any obligation to pay out such income), Otto's contention being that Agatha's reliance on clause 10.5 of the Amended Trust Deed "unequivocally proves" that his siblings are using their office as trustees not in furtherance of the fiduciary duties which they owe to the Trust but for their own personal benefit. He also contends that his siblings have simply had the Trust pay their legal fees without conferring any benefit on themselves as beneficiaries.
- **Clause 14** (which provides that the discretion granted to trustees in paragraphs 10 to 12 of the trust deed shall be an absolute and unencumbered discretion and that the trustees shall not be expected to provide any beneficiary any reason for the manner in which such discretion has been utilised and except in so far as relevant guidelines have been laid down by the founder in a will or other document), Otto's contention being that "the fact that the exercise of discretions afforded to the trustees are said to be absolute and unencumbered does not permit the siblings to act in bad faith, or to utilise trust funds for an improper purpose – the trustees are accountable to the Court, the Master and to the

beneficiaries for the administration of the Trust's assets. Unauthorised expenditure of the Trust assets by the trustees, in their own interests and not those of the Trust, are impermissible."

72. I will focus on those clauses which Otto relies on for his submission that the respondent trustees are not empowered by the trust deed to act as they have. His opposition to the clauses relied on by Agatha is based on the assumption that his version is correct.
73. In *Harvey NO*,⁴¹ the Supreme Court of Appeal confirmed that a trust deed must be construed in accordance with the well-known and time honoured rules regarding the interpretation of written contracts. As with the interpretation of a written contract, the point of departure in interpreting a trust deed is the grammatical or ordinary meaning of the words used, read within the context of the trust deed as a whole.
74. Clause 2.10 provides for decision making at a properly constituted meeting of trustees by way of majority vote in the event of a dispute between trustees, subject to the founder being one of the majority. A decision taken by majority vote shall have the same force and effect as if it were the unanimous decision of the trustees. On Otto's construction,

⁴¹ *Harvey NO and Others v Crawford NO And Others* 2019 (2) SA 153 (SCA) at par 45.

In *Natal Joint Municipal Pension Fund v Endumeni* 2012 (4) SA 593(SCA) (*Endumeni*) at par 18, the court set out what the process entails:

"Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so ... in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

after the founder resigned as trustee, trustees lost the right to overrule each other with the consequence that they could only make decisions unanimously. What then if a deadlock were to arise between the trustees precisely because they held different views and could therefore all agree on an issue, bearing in mind that each trustee is duty bound to apply an independent mind⁴² to the affairs of the Trust? Otto does not say. This case itself illustrates the fact that trustees cannot always agree on trust matters.

75. I am in agreement with the submissions made by Mr Franklin and Mr Snyckers that Otto's interpretation of clause 2.10 cannot be sustained, since it would not only render the Trust incapable of functioning without the founder if trustees are not all in agreement (something the clause specifically envisages) but it would frustrate the proper administration and functioning of the Trust, surely an absurd and unworkable result! Whilst the founder remained in office during his lifetime, the provision that he be one of the majority would obviously apply. The founder formally resigned in 2014 and passed away in December 2020. His resignation meant that he was no longer in office and could therefore not participate in trustee meetings, meaning that provision could and would no longer apply. Otto does not say in his papers that all decisions taken by trustees pursuant to the founder's resignation were unanimous.
76. The clause expressly enshrines the principle of majority vote and must be considered in the light of other clauses. The issue of majoritarianism is enshrined in clauses 2.7 - in relation to a quorum, being a majority of trustees; and 2.10 - in relation to the requisite number of votes for a

⁴² See: *Wiid and Others v Wiid and Others* (1571 / 2006) [2012] ZANCHC 62 (13 January 2012); See too *Parker*, above n 10 at par 22, where the court held that "Independence of judgment on the part of a trustee is an indispensable requisite of office [*Honoré* pages 89-91 (§ 52), 264 (§ 160)."

resolution to be carried. If there was to be a requirement of unanimity, it would have been expressed in the trust deed. It was not.

77. As regards clause 4.2.16, Otto's interpretation, namely that *all* of the trustees would have to be in favour of instituting or defending proceedings (i.e., all would have to agree), and must act jointly in doing so, is, with respect, self-defeating. If this interpretation is correct, then one wonders on what basis Otto instituted the action?
78. Mr Franklin submits that the clause identifies the persons who have the power to make decisions in relation to legal proceedings, i.e., the trustees. When the clause is read together with clauses 2.8 and 2.10 (which enshrine the majority principle); a requirement of unanimity simply cannot be inferred. I agree.
79. Clause 4.2 of the trust deed sets out specific powers that the trustees as a collective organ have. Clause 4.2.4 of the trust deed provides that "In general, the trustees shall have such powers and authority in the administration of the trust as is usually vested in the Board of Directors of a company." Mr Franklin submits that the plural term "*the trustees*" is a functional reference to the Board of the trustees in the context of describing what the Board of Trustees is allowed to do. It cannot be interpreted as also dealing with the manner of decision-making within the Board. Clause 4.2 is not concerned with the manner; only the description of powers. That must be correct. The office of trustees is held collectively, decisions are taken by the body of trustees acting as a single legal organ and that legal will is expressed through resolutions taken at validly constituted meetings.

80. In *Parker*,⁴³ the court held that “It is a fundamental rule of trust law, which this Court recently restated in *Nieuwoudt NO v Vrystaat Mielies (Edms) Bpk*, that **in the absence of contrary provision in the trust deed** the trustees must act jointly if the trust estate is to be bound by their acts.” (footnotes excluded; emphasis added).
81. In the present case, the trust deed empowered the majority of the trustees to meet and to make decisions that bind the Trust. To this extent the joint action requirement was abrogated. The principle that trustees must act jointly will be satisfied if they act by way of majority if the deed allows them to.
82. As regards clause 4.2.24, it will be recalled that Otto contends that all his siblings are conflicted in opposing the action (and this application) and that they are pursuing their personal interests as beneficiaries and are not defending as trustees and that this clause does not permit the use of trust funds to pay for personal costs. I agree with Mr Snyckers that Clause 4.2.24 contains a broad recognition of the fact that the trustees are also the beneficiaries in terms of the trust deed and that they cannot be disqualified from acting as trustees on the basis that they are also beneficiaries. In effect, the clause envisages a conflict of interest and precludes reliance on that fact as a basis to disqualify the trustee from acting in such circumstances.
83. On the face of it, clauses 4.2.16; 2.10; 7.4; 8.3; 10.1; 10.5 and 14, read together, contemplate that the trustees would have the power to defend any proceedings brought against the Trust and to use trust funds to do so. Clause 14 gives the trustees absolute and unfettered discretion in the exercise of their powers. Clause 7.4 affords them a full indemnification out

⁴³ Above n 10 at par 15.

of the trust fund. This is supported by the common law rule that trustees who are sued in their representative capacity are indemnified from personal payment of legal expenses unless the court decides at the end of the trial that they ought to be personally liable

84. In addition, the trustees passed two resolutions to the effect that the Trust is to fund the opposition to Otto's claim. I deal only with the July 2024 resolution given that an interdict is forward looking.
85. On the face of it, the July 2024 resolution⁴⁴ authorized the trustees, acting in such capacity (including Otto), to have the Trust pay for their legal fees in the action. The resolution contains a clawback provision which is consistent with the common law, namely, that if the court makes a *de bonis propriis* cost order against any trustee, then such costs as have already been paid by the Trust must be reimbursed to the Trust by that trustee, by setting off the costs against any capital distribution that may be made to that trustee. In other words, the clawback provision allows for reimbursement to be effected by set-off, given that on vesting, the net assets will be distributed to the beneficiaries. It will of course be open to the trial court, when ordering costs, to decide how reimbursement should be made.

⁴⁴ The resolution reads as follows:

"1. The Trustees are entitled to have their legal expenses in relation to the legal proceedings under case number: 2021/37198 paid by the Trust subject to any costs orders that are made against a trustee *de bonis propriis*.

2. The legal expenses payable by the Trust shall include the fees and disbursements payable to each trustee's attorneys of record, counsels' fees and the fees payable to expert witnesses.

3. In the event that the court in the legal proceedings under case number 2021/37198 makes a cost order against a trustee *de bonis propriis*, then such costs as have already been paid by the Trust shall be reimbursed to the Trust by that trustee by setting off the costs against any capital distribution that may be made to that trustee."

86. The resolution was passed at a duly constituted trustees' meeting in accordance with clauses 2.7 and 2.8 read with 2.10 of the Trust Deed in circumstances where all the trustees were present and voted. It was passed by majority vote. Otto has not sought to have the resolution set aside nor has he brought proceedings declare it invalid. On the face of it, the resolution is operative and valid.
87. Otto contends that the resolutions are invalid based on his argument in relation to clauses 2.10 and 4.2.16, which I have already dealt with, and further based on his version that in giving effect to the resolution, his siblings are acting in breach of their fiduciary duties and in breach of clause 15 of the trust deed.
88. At common law, trustees who are also beneficiaries are not disqualified from acting as trustees, even where their personal interests are implicated. In *Jowell*,⁴⁵ Scott JA held as follows:
- "A trustee must generally speaking avoid as far as possible a conflict between her personal interests and those of the beneficiaries (see *Honoré's South African Law of Trusts* 4 ed 260). But in the present case such a conflict was created by the will itself. Mrs Jowell is both income beneficiary and trustee for the capital beneficiaries. The mere fact that a particular transaction may appear to favour her rather than the capital beneficiaries does not necessarily mean there was a breach of trust. But such a transaction will be "narrowly scrutinized" "
89. Mr Snyckers submitted that the need for narrow scrutiny does not arise in the present case because the July 2024 resolution does not favour any one

⁴⁵ *Jowell v Bramwell-Jones and others* 2000(3)SA 274 (SCA) at par 16. See too: Cameron et al *Honoré's South African law of Trusts*, 6th ed at 369-370, where the following is stated:

"A trustee must as far as possible avoid a position where his or her private interest conflicts with his or her duty as trustee. In other words, the trustee should avoid a position where his or her private interests conflict with those of trust beneficiaries. This cannot of course apply where the trust instrument itself creates a conflict, as by appointing the trustee for the capital beneficiary and income beneficiary, even though in such situations if the trustee is also a beneficiary and acts in such a way as to benefit him or herself at the expense of the other beneficiaries, the trustee's acts will be narrowly scrutinized."

of the trustees any more than any other trustees. It confers exactly the same benefit to all trustees, Otto included. That appears to me to be correct.

90. Otto alleges that clause 15 of the Amended Trust Deed prohibits distributions after the vesting date of the Trust and in the event that the Trust has not vested, prevents beneficiaries from purporting to deal with distributions that they may become entitled to prior to actually being paid those distributions. Otto's reliance on clause 15 of the trust deed is misplaced. Clause 15, properly interpreted, means that until a beneficiary has received payment of an income or capital distribution that beneficiary may not cede, assign or pledge the payment that the beneficiary is due to receive. Otto's case is in any event, incongruous. On his version, vesting has occurred, ie., precluding the passing of resolutions. Yet reliance is placed on the passing of a resolution which is alleged to be in breach of clause 15.

91. Aside from the common law, the provisions of the trust deed *prima facie* empower the trustees to defend the action and to use trust funds doing so. Likewise, the July 2024 resolution passed in accordance with the provisions of the trust deed, expressly authorizes the use of trust funds to pay the legal fees of each of the trustees individually.

Requirements for an interdict

92. Mr Franklin argued that, despite how the notice of motion is cast, the relief sought is, in substance, final in effect. The interdict against using trust funds applies the instant it is granted and endures for the duration of the action until all appeals are finalised. If the interdict is granted, the trustees' ability to defend the Trust at its own expense is irretrievably lost;

the legal costs will not be incurred by the Trust and there is nothing for the trial court to revisit or modify in relation thereto. It would also render nugatory the July 2024 resolution. That immutability is the hallmark of finality. Further, Mr Franklin submits that the order Otto seeks would conclusively declare at the time it is given that the respondents possess no right to use the Trust funds to defend the action, and that any reliance on such a right was unlawful *ab initio*. This is not the preservation of the *status quo*; it is a distinct, self-contained, and a final determination of substantive rights.

93. Although the above submissions are persuasive, I am prepared to decide the matter on the basis of principles applicable to interim interdicts, for if Otto cannot satisfy the less onerous requirements of an interim interdict, he would not have satisfied the requirements of a final interdict.⁴⁶
94. The requirements of an interim interdict are trite. An applicant must establish:
 - (i) a *prima facie* right which requires protection in the interim period. As the Constitutional Court put it,⁴⁷ "It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made... the

⁴⁶ The requirement for obtaining a final interdict were discussed In *Equistock Properties 8 (Pty) Ltd and Another v Oosthuizen and Others* (738/2023 and 739/2023) [2025] ZASCA 06 (29 January 2025) at par 17, where the following was said: "...the requirements for obtaining a final interdict are trite. The following must be shown: (a) a clear right on the part of the applicant; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy. As for a clear right, it is established that an applicant must prove the right it seeks to protect on a balance of probabilities. Whether an applicant has such a right is a substantive law question, but whether it has been established is an evidential question. Where the point is genuinely in dispute in opposed application proceedings, the applicant can only succeed if the facts averred by the respondent, together with the facts in the applicant's affidavits, which the respondent admits, establishes that right." (footnote excluded)

⁴⁷ *National Treasury and Others vs Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC), para [50].

applicant must demonstrate a prima facie right that is threatened by an impending or imminent irreparable harm." (emphasis added

- (ii) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted
 - (iii) that the balance of convenience favours the granting of an interim interdict; and
 - (iv) that the applicant has no other satisfactory remedy.
95. The harm that is protectable by an interdict must be irreparable in the sense that it cannot be reversed.⁴⁸ In my view, Otto has failed to establish a right which is threatened by impending irreparable harm, nor has he established the remaining requirements so as to entitle him to relief.
96. It is irrefutable that the Trust has a substantial income generating asset base. That is evident from the organogram referred to earlier in the judgment. Otto's right to pursue the action remains fully intact if the interdict is not granted. The clawback provision in the July 2024 resolution provides a mechanism for repayment to the Trust of legal fees wrongfully expended in the event that a trustee is ordered to pay costs *de bonis propriis*. There are also other methods for protecting the trust. Aside from the *Stander* rule, which allows the trial court to revisit the use of trust funds for litigation, the very relief which Otto seeks in claim B is aimed at allowing the Trust to recoup trust monies found to have been improperly spent by the respondent trustees.
97. The trial court has the widest discretion as to costs. Otto has not been able to establish *prima facie* (or clearly) what the court is going to be ordering at the end of the trial in relation to costs, for the simple reason

⁴⁸ *City of Tshwane Metropolitan Municipality v Afriforum and Another* 2016 (6) SA 279 (CC) para [59].

that he cannot pre-empt the trial court's decision. He unquestionably cannot establish with any certainty that the trustees will *not* get the costs out of the trust fund, precisely because the trial court is yet to determine, based on all the circumstances, whether the respondents were unreasonable, *mala fide* or negligent in defending. Even if it were to be found that the trustees were acting in a personal capacity, if they were *bona fide*, reasonable and not negligent in defending, they will still be allowed to have their legal costs paid out of the trust fund. The court in *Stander* pointed out, in par 5, that letters of wishes are not binding – *prima facie*, therefore, it cannot be said at this juncture that the respondents are opposing unreasonably or negligently.

98. If Otto succeeds at trial, then the trust fund would have vested in the primary beneficiaries on the date of the founder's death and each one of the beneficiaries would already have acquired vested rights in a substantial portion of the trust fund. In these circumstances, there can be no legitimate apprehension that the trustee respondents would be unable to satisfy a *de bonis propriis* cost order. There is therefore no prospect at all that, if the litigation is funded out of the Trust, but a reckoning is ordered at the end of the trial (i.e. if Otto is correct that legal fees ought not to have been funded by the Trust), any prejudice would be suffered by Otto or by the Trust in its administration. If Otto does not succeed at trial, then the opposition would have been justified in any event.
99. I agree with Mr Franklin submission that the high value of the Trust's assets provides a significant financial buffer. Even with the legal fees incurred, the Trust's overall financial stability remains, and will continue to remain robust, and any depletion of liquid reserves does not pose a threat to the Trust's financial health.

100. I therefore find that Otto has failed to establish a right that is threatened by irreparable and imminent harm.
101. Otto contends that there are no alternative remedies given that his siblings will not stop using trust funds unless this application is brought, and the interdict is granted. The enquiry is not whether an interdict is the only way to stop payments now; rather, it is whether adequate, effective alternative remedies exist to vindicate the underlying right. Claim B provides a satisfactory remedy in the event that the respondents are ordered to personally repay amounts spent by the Trust in respect of their legal fees. In addition, Otto is also seeking personal costs orders against the respondents in the action. The July 2024 resolution fortifies this remedy. It recognises in its terms that the trial court has an overriding discretion to make such costs orders as the court deems appropriate at the end of the trial. These remedies are both adequate - they ensure complete restitution, and the remedies are also effective - they are already before the trial court and do not depend on future proceedings.
102. The balance of convenience also favours the Trust paying the legal fees incurred by Emma, Agatha and Wypke Jr in the main Action, pending the final determination of the main action. All the respondent trustees have said that they would, in effect, be stymied in continuing with the Trust's defence if not funded by the Trust. Otto has not established that he (or the Trust) will suffer any prejudice if the Trust continues to pay the legal fees. If he succeeds at trial, the Trust would be able to recoup fees that are found to have been improperly spent as the distribution that the beneficiaries will receive run into hundreds of millions of rands. If he does

not succeed at trial then it is axiomatic that the fees would not have been improperly incurred on behalf of and for the benefit of the Trust.

103. Otto adopts mutually inconsistent positions: He argues that future costs orders *de bonis propriis* would not be sufficient (he speculates that the respondents do not have the funds for this), and that the costs incurred by the respondents would be "*irrecoverable by the Trust*". On the other hand, he insists the respondents should finance the entire defence from their own pockets now, given that they each previously received a R1 million donation from the Trust. His assumption – that the respondent trustees do not personally have funds - if correct, only serves to underscore the fact that the balance of convenience lies in favour of the refusal of an interdict.

104. In all the circumstances, I am unable to find that Otto has met the requirements for the grant of an interdict.

Costs

105. In the notice of motion, Otto seeks an order that the respondents pay the costs of the application jointly and severally, on the attorney and own client scale, inclusive of the costs of two counsel.

106. Emma seeks the dismissal of the application with costs on Scale C inclusive of the costs of two counsel, in her answering affidavit.

107. Agatha seeks the dismissal of the application with costs on the attorney and client scale inclusive of the costs of two counsel, in her answering affidavit.

108. Wypke Jr seeks the dismissal of the application with costs on the attorney and client scale in his answering affidavit. In his heads, a punitive costs order was not pursued.
109. Mr Snyckers submits that the application is vexatious and an abuse of the process for reasons detailed below and that this court should mark its disapproval with the manner in which Otto has prosecuted this application by awarding attorney and client costs against him in his personal capacity.
110. First, Otto originally sued the trustees only in their representative capacity and sought that the legal costs of action (including his own costs) be paid by the Trust. He knew for a period of three years before instituting the Costs Application that the Trust was paying Emma, Agatha and Wypke Junior's legal fees, that they had raised different defences and that they were separately represented. Otto's sudden about-turn when he launched this application, together with the amendments to his pleadings, were clearly part of a stratagem to prevent his fellow-trustees from having access to funds to properly oppose the action.⁴⁹
111. Second, Otto has used the removal claim (claim C) as a basis to contend that from 2 May 2024, the trustees are precluded from using trust funds in opposing the action, in circumstances where claim C did not even exist at the time the application was launched.

⁴⁹ Mr Franklin too argues that **true aim** of this costs application is to paralyse the Trust's ability to defend itself against Otto's claims in the action. The introduction of removal relief by way of amendment was an orchestrated and a contrived attempt to create a basis for contending that the respondent trustees are acting personally, in conflict with their fiduciary duties, by using trust funds to finance their litigation. Mr Franklin therefore submits that to the extent that there is such conflict (which is denied) then "Otto has deliberately engineered the conflict by the belated inclusion of the removal relief, over 2 years after the 28 April Resolution was passed. That relief is plainly entirely ancillary to the purpose of the action and is inextricably linked to the merits of the action and whether the action fell to be defended by the Trust in the first place." I find this submission persuasive.

112. Third, the July 2024 resolution adopted by majority vote provides for the Trust to pay all the trustees' legal expenses, including Otto's. His refusal to avail himself of this option is not only unreasonable but calls into doubt his *bona fides* in launching and persisting with this application. He certainly cannot contend that he will be worse off if the costs are paid by the Trust.
113. Fourth, Otto accuses his siblings of litigating on a luxurious scale that is excessive and wasteful, whereas it is Otto that litigates on a scale that is excessive, wasteful, unreasonable and unnecessary, as further demonstrated in heads of argument filed on behalf of Agatha. *Inter alia*, Otto referred to irrelevant and extraneous matters in his affidavits, which served only to embarrass his siblings; and produced 171 pages of duplicated documents in his replies to the answering affidavit, repeating the same contents in the first 23 pages of each replying affidavit.
114. In *Plastic Converters*,⁵⁰ the court cautioned that the scale of attorney and client is one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible matter. The term 'vexatious' was considered in the context of a punitive costs award in *Johannesburg City Council*,⁵¹ where the court expressed the view that proceedings may be regarded as vexatious when a litigant puts the other side to unnecessary trouble and expense which it ought not to bear. The Constitutional Court affirmed this approach in *Public Protector v SARB*,⁵² stating that a punitive costs order is appropriate 'in

⁵⁰ *Plastic Converters Association of South Africa on behalf of Members v National Union of Metalworkers of SA* [2016] ZALAC 39; [2016] 37 ILJ 2815 (LAC) at para 46.

⁵¹ *Johannesburg City Council v Television & Electrical Distributors (pty) Ltd and Another* 1997 (1) SA 157 (A) at 177D-E.

⁵² *Public Protector v SARB* [2019] ZACC 29; 2019 (9) BCLR 1113 (CC) at para 144.

circumstances where it would be unfair to expect a party to bear any of the costs occasioned by the litigation'⁵³ and is designed 'to mark the court's displeasure at a litigant's conduct, which includes vexatious conduct and conduct that amounts to an abuse of the process of court'.⁵⁴

115. Without repeating what has been stated, I am persuaded that Mr Snycker's submissions have merit and that a special costs order is warranted in respect of Agatha's opposition. The timing of Otto's amendments (*inter alia* to introduce the removal claim) and the launch of this application tends to support an inference that this application was brought as a stratagem to stifle the respondent trustees' ability to defend the action on behalf of the trust. In effect, it amounts to an attempt at paralysing the Trust's ability to defend itself against Otto's claims in the action, in that a trustee cannot be compelled to pay a debt of the trust estate in the first instance from personal funds. In these circumstances, the application cannot be said to be *bona fide*. Otto sought an interim interdict, based on ordinary common law principles relating to interdicts in this application, only to change course at the hearing of the matter, without notice to opposing counsel, to rely on what was termed a *sui generis* procedure in the quest to find some other legally cognizable basis to put a stop to the use of trust funds in the litigation. Had this not been an afterthought, he would have included this relief in his papers. He must have anticipated that he could not satisfy the requirements of an interdict. Moreover, he launched this application prematurely at a time when a cause of action did not yet exist.

⁵³ *Public Protector v SARB*, para 221.

⁵⁴ *Public Protector v SARB*, para 223.

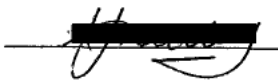
of the trust estate in the first instance from personal funds. In these circumstances, the application cannot be said to be *bona fide*. Otto sought an interim interdict, based on ordinary common law principles relating to interdicts in this application, only to change course at the hearing of the matter, without notice to opposing counsel, to rely on what was termed a *sui generis* procedure in the quest to find some other legally cognizable basis to put a stop to the use of trust funds in the litigation. Had this not been an afterthought, he would have included this relief in his papers. He must have anticipated that he could not satisfy the requirements of an interdict. Moreover, he launched this application prematurely at a time when a cause of action did not yet exist.

116. The general rule is that costs follow the result. I see no reason to depart therefrom.

117. Accordingly, the following order is granted:

ORDER

1. The application is dismissed.
2. The applicant is to pay the respondents' costs as follows:
 - a. In relation to the first and fourth respondents, costs are payable on Scale C inclusive of the costs of two counsel.
 - b. In relation to the second and fifth respondents, costs are payable on the attorney and client scale, inclusive of the costs of two counsel.
 - c. In relation to the costs of the third and sixth respondent, costs are payable on Scale C, to excluding the dates of hearing on 5th and 6th June 2024.



AVRILLE MAIER-FRAWLEY

JUDGE OF THE HIGH COURT,

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing: 5-6/6/2025
 Judgment delivered 26/11/2025

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 26 November 2025.

APPEARANCES:

Applicants' Counsel	S. Symon SC assisted by J. Blaau SC, together with F. McAdam
Instructed by	Cuthbertson & Palmeira Attorneys Inc
1 st & 4 th Respondents' counsel	A. Franklin SC together with B. Manentsa
Instructed by:	Webber Wentzel Attorneys
2 nd & fifth respondents' counsel:	F. Snyckers SC together with T Prinsloo
Instructed by:	Pinsent Masons South Africa Inc.
For the 3 rd & 6 th respondents:	Mr Wypke Jr in person